



Covering All Aspects of ESG

October 20, 2021
12:00 – 1:00 PM

ESG Defined

E = Environmental
S = Social
G = Governance
(Corporate)





Legislative Developments and Innovative Reporting

Mike Nasi
Jackson Walker LLP

LEGISLATIVE UPDATE: TX Passes SB 13

“THE ENERGY BAN BAN”



**PURCHASING POWER
AGAINST BOYCOTTING**

=

**Texas State Pensions:
~\$300 billion**

+

**Texas Bank Accounts:
>\$100 billion**

+

**Texas Contracts:
Tens of Billions Per Year**

+

Other States?

TEXAS: “You Ban Us & We’ll Ban You”

- SB 13 prohibits state contracts & investments with companies that boycott fossil fuels.
- The rationale: Tax dollars should not fund agendas that actively work against the state’s economic interests.
- Texas is the first state to pass this legislation, modeled after existing anti-BDS laws regarding companies that boycott Israel. Similar legislation is likely in other states.
- \$300 billion under management in 5 statewide pension plans with billions also in state accounts & contracts.
- Legislation carefully crafted to fit within constitutional constraints, but still issues:
 - Anti-fossil fuel/pro-other = Political speech?
 - Unconstitutional Conditions?
 - Pensions & Bank Accounts vs. Contracts

The “Energy Ban” Ban - SB 13 (Birdwell)



Texas State Pensions:
~\$300 billion

+

Texas Bank Accounts:
>\$100 billion

+

Texas Contracts:
Tens of Billions /yr

=

**MAJOR Purchasing
Power Leverage**

How the “Energy Ban” Ban Legislation Works:

1. State Comptroller evaluates public filings (and information submittals) to identify companies that trigger the “boycott” definition.
2. State gives notice to companies of their status as a listed companies (subject to divestment by state) due to their anti-fossil fuel stance.
3. Offers the company the opportunity to clarify/change its activities.
4. Company must cease boycotting activity to avoid state divestment.

Liberty Oilfield Services ESG Report

- The most urgent challenge with energy today is that fully one-third of humanity still lacks access to basic modern energy, including over 80% of Africans and half of Indians.
- Nearly one billion people have no access to electricity. Another billion have only intermittent – four hours per day – access to modest amounts of electricity.
- Women in energy poverty spend more than an hour per day gathering fuel wood for cooking.



<https://www.libertyfrac.com/wp-content/uploads/2021/06/Liberty-ESG-2020-Bettering-Human-Lives.pdf>

LIBERTY'S FOCUS: U.S. Energy Leads the World in Reducing Pollution & Energy Poverty



U.S. RESPONSIBLE FOR VIRTUALLY ALL GLOBAL LPG EXPORT GROWTH

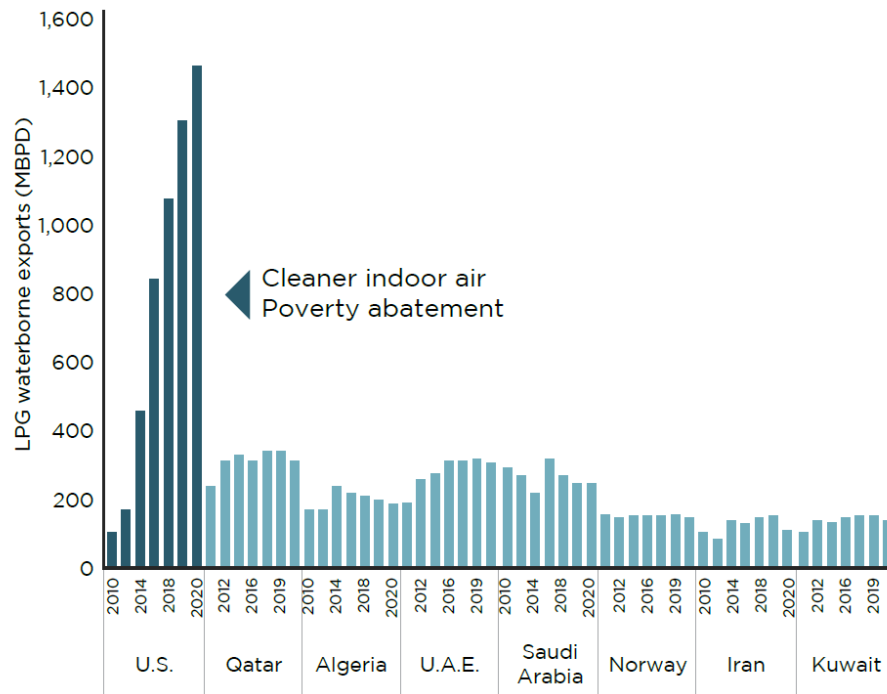


Figure 1.6 Source: IEA and IHS Waterborne

Liberty Oilfield Services ESG Report

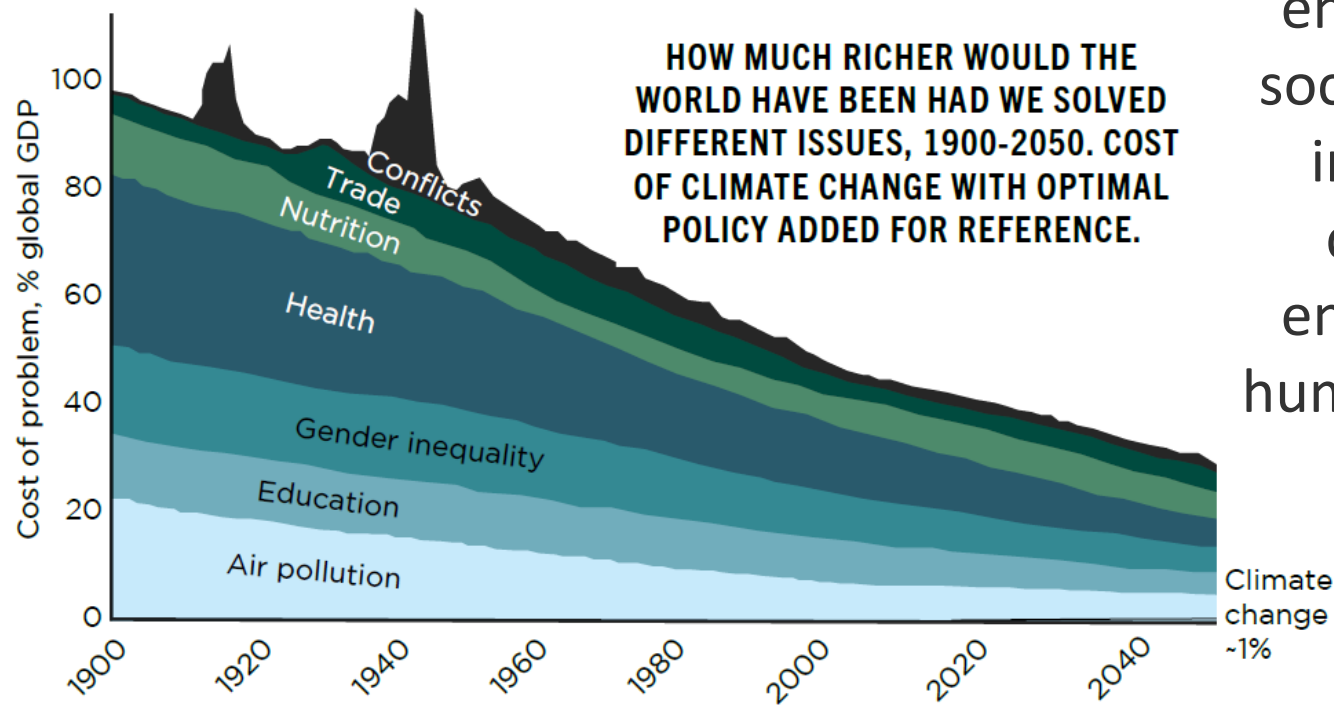
- Together PM2.5, malnutrition, preventable disease, and lack of access to drinking water and basic education collectively are responsible for over 10 million premature deaths per year. Bringing affordable, reliable energy to the world's poor will be essential to eradicating these scourges.
- Energy access is increasing globally as hundreds of millions of people have made the transition from traditional cooking and heating fuels to modern fuels – most commonly to liquid petroleum gas (LPG) – over the last 15 years.

LIBERTY PUTS GLOBAL ISSUES IN CONTEXT: Energy Access & Benefits Thereof Dwarf Others



Liberty ESG Report

“It is simply not possible to discuss the environmental and social impacts of our industry without considering the environmental and human impacts of the absence of our industry.”



Liberty Oilfield Services 2020 ESG Report: Bettering Human Lives, <https://www.libertyfrac.com/wp-content/uploads/2021/06/Liberty-ESG-2020-Bettering-Human-Lives.pdf>

Sustainability Disclosure Topics & Accounting Metrics



TOPIC	ACCOUNTING METRIC	RESPONSE	CODE
Emissions Reduction Services and Fuels Management	Total fuel consumed, percentage renewable, percentage used in: (1) on-road equipment and vehicles and (2) off-road equipment	Off-Road 8,340,600.28 GJ On-Road 339,531.97 GJ	EM-SV-110a.1
	Discussion of strategy or plans to address air emissions-related risks, opportunities, and impacts	Improving Environmental Performance (pg. 48-49) and Frac Engines (pg. 52-53)	EM-SV-110a.2
	Percentage of engines in service that meet Tier 4 compliance for non-road diesel engine emissions	25.7%	EM-SV-110a.3
Water Management Services	(1) Total volume of fresh water handled in operations, (2) percentage recycled	Water (pgs. 58-59)	EM-SV-140a.1
	Discussion of strategy or plans to address water consumption and disposal-related risks, opportunities, and impacts	Water (pgs. 58-59)	EM-SV-140a.2
Chemicals Management	Volume of hydraulic fracturing fluid used, percentage hazardous	41,078,829 m3 of frac fluid slurry (includes sand volumes); 0.072% hazardous chemicals	EM-SV-150a.1
	Discussion of strategy or plans to address chemical-related risks, opportunities, and impacts	Frac Fluid Chemistry (pgs. 56-57)	EM-SV-150a.2
Ecological Impact Management	Average disturbed acreage per (1) oil and (2) gas well site	See footnote 1	EM-SV-160a.1
	Discussion of strategy or plan to address risks and opportunities related to ecological impacts from core activities	Ecological Impact (pgs. 60-61)	EM-SV-160a.2



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ESG & Corporate Governance

Key Takeaways for Corporate Managers and Directors

Pat Knapp
Jackson Walker LLP

Blackrock CEO Larry Fink, Jan. 2021, Letter to CEOs:

*Given how central the energy transition will be to every company's growth prospects, we are asking companies to **disclose a plan for how their business model will be compatible with a net zero economy** – that is, one where global warming is limited to well below 2°C, consistent with a global aspiration of net zero greenhouse gas emissions by 2050. We are asking you to disclose how this plan is incorporated into your long-term strategy and reviewed by your board of directors.*

Acting SEC Chair Allison Lee, Mar. 15, 2021 speech at the Center for American Progress:

There is really no historical precedent for the magnitude of the shift in investor focus that we've witnessed over the last decade toward the analysis and use of climate and other ESG risks and impacts in investment decision-making.

- Majority of the Fortune 100 now include at least some ESG disclosures in their SEC filings
 - Increased board involvement in EHS management and oversight
 - Corporate culture and HR practices
 - Considerations surrounding community impact and sustainability
- Advent of the “ESG Fund”

New ERISA Guidelines



- DoL recently proposed new regulations relating to ESG factors in ERISA decision-making
- *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 29 CFR Part 2550, 86 Fed. Reg. 57272 (Oct. 14, 2021)
- In general:
 - Clarifies when and how ESG factors may be considered, particularly for QDIAs
 - Drops some tiebreaker guidelines for ESG-related collateral benefits
 - Eliminates certain safe harbors that defend against shareholder litigation

Recent SEC Statements & Activity



- **Mar. 2, 2021**—U.S. Securities Exchange Commission, *2021 Examination Priorities*
- **Mar. 4, 2021**—Press Release, U.S. Securities Exchange Commission, *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues*
- **Mar. 15, 2021**—Acting Chair Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosures*
- **Apr. 9, 2021**—U.S. Securities Exchange Commission, Risk Alert, *The Division of Examinations' Review of ESG Investing*
- **Apr. 12, 2021**—Commissioner Hester M. Peirce, *Statement on the Staff ESG Risk Alert*
- **May 21, 2021**—Executive Order on Climate-Related Financial Risk
- **Jun. 11, 2021**—Press Release, U.S. Securities Exchange Commission, *SEC Announces Annual Regulatory Agenda*
- **Jun. 20, 2021**—Press Release, U.S. Securities Exchange Commission, *SEC Engages with Students for Their Perspectives on Emerging Issues*
- **Jul. 16, 2021**—Press Release, U.S. Securities Exchange Commission, *Chair Gensler Announces Composition of Policy Team* (announcing hiring of Mika Morse as lead policy advisor on climate-risk finance issues).
- **Jul. 28, 2021**—U.S. Securities Exchange Commission, *Office Hours with Gary Gensler: The SEC & Climate Risk Disclosure*, <https://www.youtube.com/watch?v=xjSk7wWJG6o>.

THE WALL STREET JOURNAL.

MARKETS | FINANCIAL REGULATION

SEC Wants More Climate Disclosures. Businesses Are Preparing for a Fight

Asset managers push for more information; energy, transportation companies say climate-change risks aren't easily measured

By [Dave Michaels](#)

Updated June 21, 2021 12:26 pm ET

WASHINGTON—The Securities and Exchange Commission is preparing to require public companies to disclose more information about how they respond to threats linked to climate change—and businesses are gearing up for a fight.

The SEC's new chairman, Biden administration appointee Gary Gensler, has said climate-related disclosure is a top priority, and President Biden plans to meet Monday with top financial regulators to discuss the issue. The SEC has already sought industry input, much of which arrived last week, for a rule proposal that could be issued by October.

The 21st Century SEC



Search



Office Hours with Gary Gensler: The SEC & Climate Risk Disclosure

2,762 views • Jul 28, 2021

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In the first episode of Office Hours with Gary, SEC Chair Gary Gensler talks about climate risk disclosure.

SEC published guidance refers to “ESG strategies” as:

“Products and services that are referred to by a variety of terms such as sustainable, socially responsible, impact, and ESG conscious.”¹

- ESG Task Force leader Kelly L. Gibson:

*Proactively **addressing emerging disclosure gaps** that threaten investors and the market has always been core to the SEC's mission.²*

- Acting Chair Lee:

*The task force announced today will play an important role in **enhancing** and **coordinating** the efforts of the Division of Enforcement, the Office of the Whistleblower, and other parts of the agency to bolster the efforts of the Commission as a whole on these vital matters.³*

Existing ESG-related Frameworks



- Misrepresentations:
 - *Nat. Consumers League v. Wal-Mart Stores, Inc.*, 2016 WL 4080541 (D.C. Super. July 22, 2016): the court found Walmart’s “aspirational statements” about labor performance by suppliers were not actionable, although claims related to Walmart’s alleged misleading statements regarding audit parameters were allowed to proceed.
- Deceptive Labeling:
 - *Gardner v. Starkist Co.*, 418 F.Supp.3d 443 (N.D. Cal. 2019): Class action alleging Starkist’s false claims that its canned tuna products are “100% dolphin safe” and “sustainably sourced.” Case is on-going.
 - *Smith v. Keurig Green Mountain, Inc.*, 393 F.Supp.3d 837 (N.D. Cal. 2019). Class action alleging Keurig’s coffee pods are mislabeled as “recyclable.” Case survived defendant’s motion to dismiss and is on-going.
- Securities fraud:
 - **About climate risk:** *Ramirez v. Exxon Mobil Corporation*, 334 F.Supp.3d 832 (N.D. Tex. 2018).
 - **About ESH practices:** *In re BP P.L.C. Securities Litigation*, No. 4:12-CV-1256, 2013 WL 6383968 (S.D. Tex. Dec. 5, 2013).

Proposed ESG Disclosures in the EU



- Formally the “**Corporate Sustainability Reporting Directive**”
- Who?—all (a) banks and insurance companies, (b) companies with securities listed on EU-regulated exchanges, and (c) companies with >500 employees
- What?, Part I—bifurcated Financial and Non-Financial reporting obligations for different parties
 - Public Interest Entities (banks and insurance companies, large public companies) generally subject to more Non-Financial disclosures
- What?, Part II—general disclosure content:
 - Strategy, governance and sustainability
 - Determining materiality of topics for disclosure
 - Environmental protection and impact
 - Treatment of employees
 - Respect for human rights
 - Diversity in board/management ranks
- Assurance—not mandatory in most countries, but proposal includes mandatory Limited Third-Party Assurance

Outline of an ESG Plan

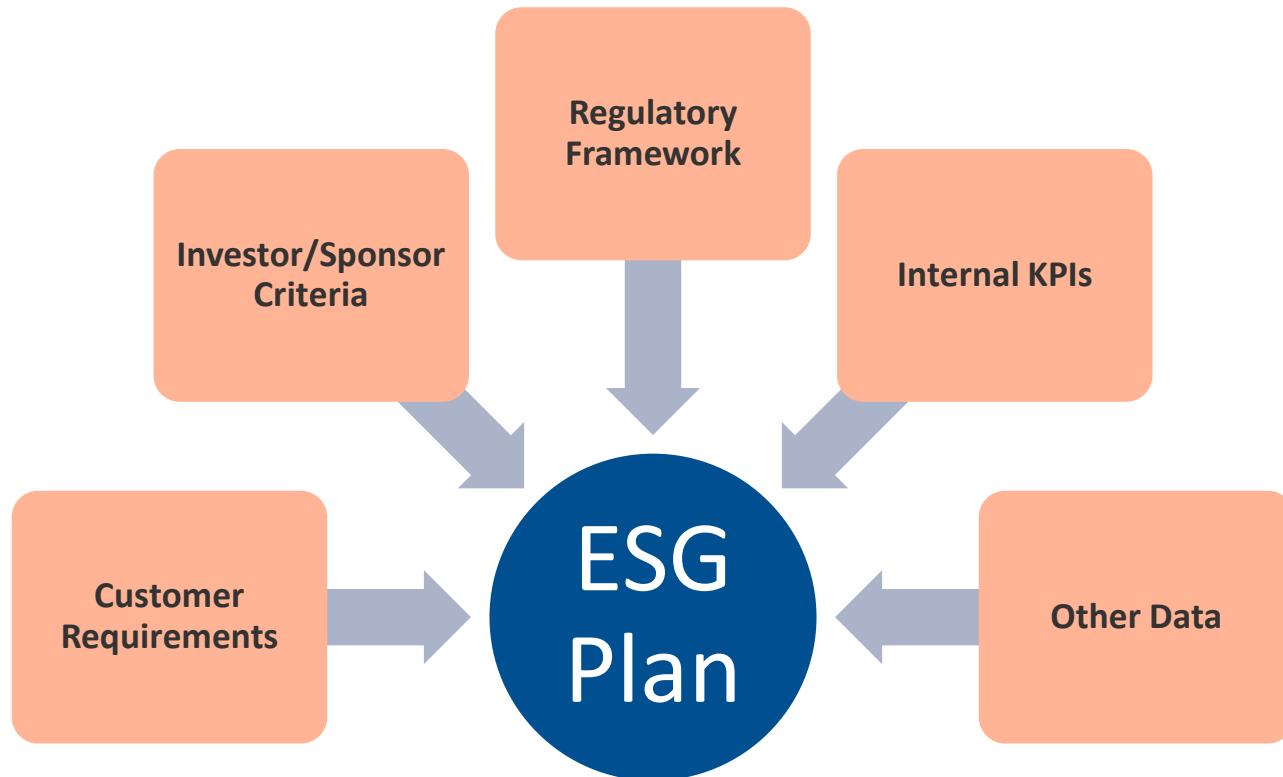


ESG Disclosure Planning



- U.S. disclosures dominated by the marketplace criteria, not regulatory agencies—for now
- Thoughtful and deliberate reporting by the proper entities in your corporate family
- Research ESG disclosure and business practice requirements propagated by relevant stakeholders
 - Gap analysis
 - Materiality of KPIs for disclosure
 - Existing written plans and policies
 - Internal controls
- Annual reviews and updates
 - Substantive v. performative

Sources for ESG Disclosure Planning



Timing and Materiality



- Consistency and timing with pre-existing regulatory disclosures, for example:
- Internal controls
 - Obvious focus for potential future assurance requirements
 - Accuracy, consistency and oversight
- Management Oversight
 - BOD ESG committee
 - Management-level roles and responsibilities

Disclosure Recipients





**“I help people with
problems.”**

James Bond, *License to Kill* (1989)

Footnotes & Citations



- 1—U.S. Securities and Exchange Commission, Division of Examinations, *2021 Examination Priorities* at 28.
- 2—U.S. Securities and Exchange Commission, Press Release No. 2021-42, *SEC Announces Enforcement Task Focused on Climate and ESG Issues* (Mar. 4, 2021).



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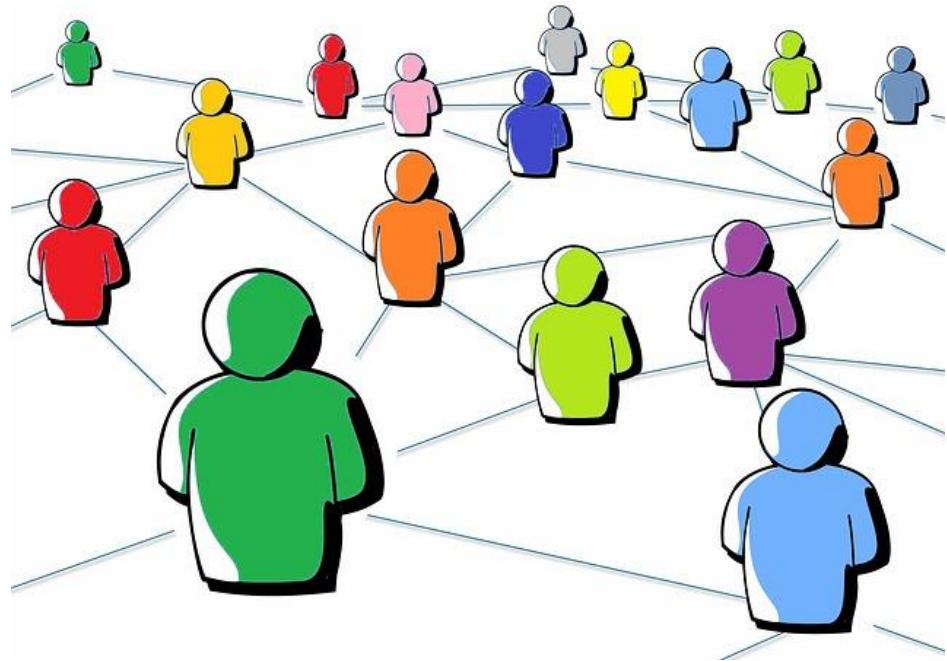
ESG: Managing Corporate Social Risks

Jamila M. Brinson
Jackson Walker LLP

The “S” in ESG



- Corporate Social Risks
- Addresses how companies respond to issues like:
 - Data Protection & Privacy
 - Diversity, Equity & Inclusion
 - Health & Safety
 - Human Capital Management
 - Pay Equity
 - Social Justice/Human Rights



New Rules & Disclosures



- SEC Approved Nasdaq Rules on Board Diversity
 - Approved August 2021
 - Require most Nasdaq-listed companies to have, or explain why they do not have, at least (2) diverse directors, and
 - Publicly disclose certain diversity statistics about their boards annually
- Challenged Legally but undoubtedly more like this to come



Bigger Role of the “S”



- Many Investors Now Require Disclosures, such as:
 - Racial, ethnic, gender makeup of employees
 - Measures to improve DEI
 - Long-term plans to improve DEI
- Current Administration is Focused on Social Issues & Related Reporting
 - Recognition of significant benefits provided for businesses & shareholders



Apollo's Reiss on Board Diversity and ESG Investing

Bloomberg

NOW PLAYING
Apollo's Reiss on Board
Diversity and ESG
Investing

▶ 07:03
Bridgewater
Sustainability Co-CIO on
the ESG Revolution

▶ 06:58
Aviva CEO Seeks
International Standards to
Define ESG

▶ 05:22
Carlyle Benefiting From
High Valuations, Head of
Credit Says

▶ 01:49:23
The Close Full Show
(10/19/2021)

▶ 06:11

Joanna Reiss

■ APOLLO GLOBAL MANAGEMENT
CO-LEAD OF IMPACT INVESTING

Milken Institute
Global Conference
1:59 / 4:43

HOW PE FIRMS CAN HAVE A POSITIVE IMPACT

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Bloomberg Markets European Close

Apollo's Reiss on Board Diversity and ESG Investing

Bloomberg Markets: The Close

October 19th, 2021, 3:00 PM CDT

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H.R.1187 - Corporate Governance Improvement and Investor Protection Act

117th Congress (2021-2022) | [Get alerts](#)

BILL Hide Overview ✕

Sponsor: [Rep. Vargas, Juan \[D-CA-51\]](#) (Introduced 02/18/2021)

Committees: House - Financial Services | Senate - Banking, Housing, and Urban Affairs

Committee Reports: [H. Rept. 117-54](#)

Latest Action: Senate - 06/17/2021 Received in the Senate and Read twice and referred to the Committee on Banking, Housing, and Urban Affairs. ([All Actions](#))

Roll Call Votes: There have been [6 roll call votes](#)

Tracker:

Introduced **Passed House** Passed Senate To President Became Law

More on This Bill

[Constitutional Authority Statement](#)
[CBO Cost Estimates \[1\]](#)

Subject — Policy Area:

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Actions (50)

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Related Bills (12)

Text: H.R.1187 — 117th Congress (2021-2022)

[All Information](#) (Except Text)

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What Companies Can Do



- Conduct Due Diligence
- Address Compliance Issues
- Create & Implement Long-Term Strategy
- Tailored Training





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Questions?



Q&A

CLE course #174137979



Thank You For Joining Us!