



Environmental, Social and Corporate
Governance (ESG)

ESG Defined

E = Environmental

S = Social

G = Governance
(Corporate)





ESG – Corporate Governance and Compliance Even Stronger

Leonardo Barém Leite

What Does ESG Mean?

Companies Don't Operate in a Vacuum

- Abbreviation for “Environmental, Social and Corporate Governance”;
- Lawyers, business people, executives and investors make daily use of it;
- It has impact over products, projects, services, installations, means of contracting, documents, internal politics, contracts, partnerships etc; and
- ESG structures and conducts business in a way it has to integrate the company as a whole.



Impact of Companies on Social and Environmental Challenges

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Impact of Social and Environmental Trends on Companies and Investments

Environmental

Every company affects, and is affected by, the environment.



Social

Every company operates within a broader, diverse society.



Governance

Every company, which is itself a legal creation, requires governance.

ESG Links to Cash Flow in Ten Important Ways

1. Top-line growth;
2. Cost reduction;
3. Regulatory and legal interventions;
4. Employee productivity uplift;
5. Investment and asset optimization;
6. Improving the company's image among the market;
7. Growth of consumer's support;
8. Attraction of investments and professionals;
9. Reduction of litigation; and
10. Better debt rates.

Significant Correlation Between Resource Efficiency and Financial

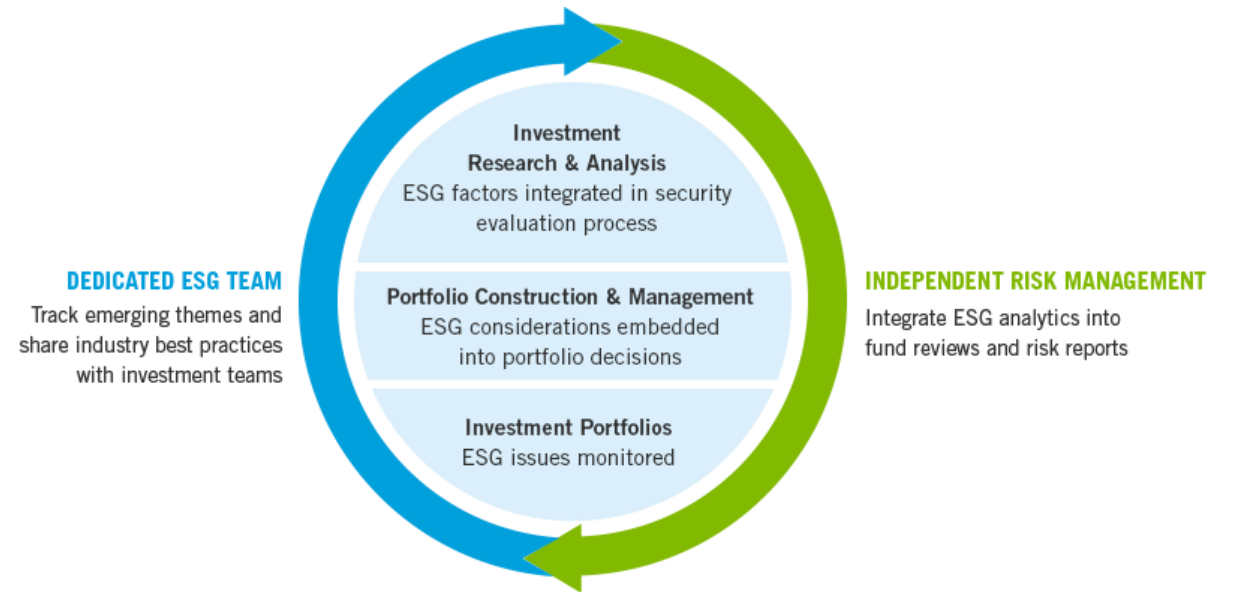


Environmental and Social Issues Impact in Companies From a Total Stakeholder Perspective

- ESG considers the interests of all stakeholders and shareholders: both of them do not compete in a zero-sum game;
- Lower risks; and
- Higher firm performance.

- Global capital markets and large investment firms are proving it;
- Companies need to have earnings and results, which have to be effectively sustainable;
- The trust between the company and both its stakeholders and investors built through investments in social capital, pays off when the overall level of trust in corporations and markets suffers a negative shock; and
- There are already investment funds that only invest in companies that are dedicated to ESG.

ESG is the Path for a Company Higher Performance



What is Catalytic Capital?

It Accepts Disproportionate Risk and/or Concessionary Return to Generate Positive Impact and Enable Third-Party Investments that Otherwise Would Not Be Possible



It Accepts Brazil Needs to Reactivate Its Economy and Strengthen Its Companies



- For this, it is necessary to work in the structuring of projects that attract long term investments.
- The best projects, that attract the principal markets, are the ones concerned with sustainability, the correct way of conducting business.
- These projects strengthen compliance and good corporate governance practices.

The Corporate World Has Never Been So United Regarding the Business Concept

- Need for lawyers to guide their clients in modeling the transactions of their business to a more sustainable one, that assists in identifying opportunities, maximizing processes and reducing risks;
- There are many challenges to companies that come due to changes in the world, by which attorneys must be ready to help their corporate clients adapt to those;
- These challenges must be taken into consideration in all topics related to the corporation, including M&A and capital market; and
- The challenges, among others, are: **(i)** Intensification of demand for food; **(ii)** Population growth; **(iii)** Increased demand for energy; **(iv)** Change in production pattern; and **(v)** Aging of the population.

Compliance, Corporate Governance and Contracts with Clauses that Guarantee that ESG Will Be Respected and Valued Shall Be Points of Effective Attention for Companies and Corporate Lawyers

- Corporate Law *per se* is endeavoring to understand better the legal details that need to be implemented in companies, aiming to harmonize its practice areas with ESG.
- The law practice areas will combine efforts in a permanent and coordinated way so that the integrity of stakeholders are complied to consider the following topics, among others:

- ✓ Diversity;
- ✓ The environment;
- ✓ Respect for Human Rights;
- ✓ Effective inclusion; and
- ✓ Fight against corruption.

Better Contracts, Compliance Programs and Respect for Corporate Governance

- The private initiative will need to fill the gap and cooperate not only to attend even the society in general, but also to consider the environment, sustainable management of rivers and forests, production chains, sustainability, reducing carbon emissions, using recyclable and biodegradable products/packaging, reducing waste and water use;
- The concept of legal guarantee is being expanded to consider the compliance to ESG, which shall soon be required in courts; and
- Only corporate lawyers that are well prepared and educated will be able to assist companies in earning more – with more care and responsibility, less risk and in a more sustainable way.

Leonardo Barém Leite

+55 11 2714-6900

lleite@almeidalaw.com.br



CANADIAN PERSPECTIVES ON ESG

Me Antoine Tremblay

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CANADIAN PERSPECTIVES ON ESG

- ❑ Introduction
- ❑ The evolution of Canadian society over the last few decades
- ❑ The impact of two Supreme Court of Canada (« SCC ») decisions in the (i) Peoples and (ii) BCE cases
- ❑ Changes integrated into the *Canada Business Corporations Act* in 2019 in respect of directors' duties

CANADIAN PERSPECTIVES ON ESG

- ❑ **The TSX Guidelines on ESG**
- ❑ **The application of ESG to non-publicly traded corporations by financial institutions**
- ❑ **The new « Guidelines for directors » published by Dey and Kaplan (January 2021)**

CANADIAN PERSPECTIVES ON ESG

□ Future Perspectives

- ❖ Intensification of natural disasters
- ❖ Social and economic impacts of such disasters
- ❖ The relations with Indigenous Peoples and other minority groups
- ❖ Impact of assets transfers from baby boomers to « Next Gen »
- ❖ Impact of recent SCC decision upholding the constitutionality of the *Greenhouse Gas Pollution Pricing Act*
- ❖ Evolution of behaviours and mindsets
- ❖ Growing interests of investors for ESG

CANADIAN PERSPECTIVES ON ESG

□ Future Perspectives

❖ Business opportunities and hope

- ❖ The new Biden administration
- ❖ Technological developments
- ❖ Social developments
- ❖ Few lessons learned from the COVID-19 crisis

QUESTIONS?



Me Antoine Tremblay

atremblay@morencyavocats.com

500, Place d'Armes
25ième floor
Montréal (Québec) H2Y 2W2

☎ 514.845.3533

📠 514.845.9522





Evolution of ESG in the United States

Kenneth M. Silverman
Olshan Frome Wolosky LLP

ESG Concepts Are Not New

- 1990s – “Corporate Social Responsibility” (CSR) and Nike products manufactured by Asian sweatshops
- 2001 – Enron accounting scandal and employees’ pension losses
- 2002 – Sarbanes-Oxley (SOX) Act – enhanced governance, disclosure obligations
- 2010 – BP Deepwater Horizon oil spill (false safety claims laid bare)
- 2012 – Dodd-Frank Act – conflict minerals disclosure
- 2013 – Delaware adopts public benefit corporation
- 2018 – California gender diversity law for publicly held corporations
- 2019 – Business Roundtable letter regarding stakeholder
- 2019+ – Blackrock CEO Letters (Larry Fink) – climate change, social issues

2020 Watershed Moment

Enhanced focus on societal factors:

- COVID-19 and economic/workforce effects
- George Floyd murder
- SEC – Regulation S-K revisions – principles-based disclosure and enhanced human capital management disclosure
- California racial diversity law for publicly held corporations
- Nasdaq proposed rule – would require additional board diversity disclosure

SEC Activity in 2021

- Feb. 1 – Appointment of Senior Policy Advisor for Climate and ESG announced
- Feb. 24 – Acting Chair Lee announces SEC to enhance focus on climate-related disclosure in public company filings
- Feb. 26 – Posting of Investor Bulletin on ESG
- Mar. 4 – Press Release, *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues*
- Mar. 11 – Acting Director of Division of Corporation Finance Coates advocates for effective ESG disclosure system that is “adaptive and innovative”
- Mar. 15 – Acting Chair Lee, *Public Input Welcomed on Climate Change Disclosures*
- Mar. 22 – Launch of new website page to host information on various agency actions relating to climate and ESG investing
- Apr. 9 – Risk Alert, *The Division of Examinations’ Review of ESG Investing*
- Apr. 12 – Commissioner Peirce, *Statement on the Staff ESG Risk Alert*
- May 21 – Executive Order on Climate-Related Financial Risk
- June 11 – Press Release, *SEC Announces Annual Regulatory Agenda* – climate risk, human capital (workforce/board diversity), ESG funds

July 2021 – So Where Are We?

- The investment market is rapidly evolving as is a regulatory framework
- Proactive and Deliberate vs. Reactive and Resistant
- Regulatory leaders have made clear a longer-term goal of a comprehensive ESG disclosure framework
- Will ESG ratings parallel bond ratings?
- How should ESG initiatives be measured and by whom?
- Organizations without ESG plans may face significant risks
 - Can we obtain capital?
 - Can we obtain/retain customers?
 - Will we meet regulatory disclosure requirements?
 - Can we avoid ESG-related litigation?
 - Can we document our progress toward our own internal goals?

Disclosures

- Litigation risk for misrepresentations and greenwashing
- Accurate, clear, and concise
- Avoid generalities, buzzwords, and conclusory statements
- ESG reports vs. SEC filings – inconsistencies? Aspirational statements?



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THE INTERNATIONAL LAW GROUP

Kenneth M. Silverman
Olshan Frome Wolosky LLP
Partner, New York, NY
ksilverman@olshanlaw.com



U.S. Political Polarization on ESG Issues

Adam L. Plumbley
Jackson Walker LLP

Political Perspectives Differ on ESG Issues

- Administration v. Administration
- Liberal v. Conservative
- Federal v. State
- State v. State

Trump Administration v. Biden Administration

TRUMP – EO 13868

- Promote Private Investment in Energy Infrastructure
- Review of Water Quality Standards
- Transport of LNG by rail tank car
- Materiality of ESG Investment (ERISA)

BIDEN – EO 13990

- Biden's 1st Day in Office
- Revokes EO 13868
- Agency review of all Trump-era policies
- Agency heads can suggest propose new regs on O&G
- Accounting of Social Costs – monetize adverse effects on climate

Trump Policy v. Biden Policy

TRUMP POLICY

- ERISA - Financial Factors in Selecting Plan Investments rule
- Evaluate investment solely on “pecuniary” factors

The purpose of this action is to set forth a regulatory structure to assist ERISA fiduciaries in navigating these ESG investment trends and to separate the legitimate use of risk-return factors from inappropriate investments that sacrifice investment return, increase costs, or assume additional investment □ risk to promote non-pecuniary benefits or objectives. The Department believes that addressing these issues in the form of a notice and comment regulation will help safeguard the interests of participants and beneficiaries in the plan benefits.

BIDEN POLICY

- DOL not enforcing Trump-Era rule
- EO 14030 – SOL to publish rule to replace Trump-Era rule by Sept. 2021
- HR 3387 & S 1762 – bills to replace Trump-Era rule
- ESG in investment decisions

State v. State

MAINE

- Enacted Law requiring divestment of fossil-fuel companies
- Roughly \$17 billion Public Employee Retirement System
- No longer invest
- Divest of current investments by 1/1/2026

TEXAS

- Enacted law requiring public divestment from companies that boycott O&G industry
- \$300 billion in pension plan funds
- >\$100 billion in TX bank accounts
- Will not contract with such companies

Why do we care?

- Simple Answer: Money
- Trillions of dollars tied up in public investments
- Investors are increasingly promulgating a variety of ESG criteria for companies to follow
- Multiple banks commit \$1 trillion or more to ESG Investing, including BofA and JP Morgan
- Investment Tax Credits





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THE INTERNATIONAL LAW GROUP

Adam L. Plumbley
Jackson Walker LLP
Partner, Fort Worth, TX
aplumbley@jw.com