ESG & Impact Investing 2022

LEXOLOGY Getting The Deal Through

United States

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LEGAL AND POLICY FRAMEWORK

Legislation

1 Has your jurisdiction enacted any primary or secondary legislation addressing environmental, social and governance (ESG) factors in banking, finance and corporate law, or legislation addressing the pursuit of other non-financial objectives by companies and investors?

Generally, federal and state legislation is not specifically focused on ESG matters, but various federal and state laws focus on substantive areas usually captured within the ESG umbrella and create fiduciary or other similar duties that obligate fiduciaries to act in certain ways or consider certain issues beneficial to the interests of securityholders or other stakeholders. Examples include environmental laws, such as the federal Clean Air Act; labour laws, such as the federal Fair Labor Standards Act; anti-discrimination laws, such as Title VII of the federal Civil Rights Act; marketplace regulations laws, such as the federal Gun Control Act; and fairness in lending laws, such as the federal Equal Credit Opportunity Act. Many of these laws have state-level corollaries, and state corporation laws impose fiduciary duties on boards of directors.

Corporate governance of businesses is mostly governed by state laws that pertain to 'internal affairs' of business organisations. Certain states have adopted legislation to advance specific ESG-related concepts in corporate governance. For example, California requires that boards of California-based corporations meet quotas for female and minority representation. State laws regarding limited liability companies and limited partnerships are generally less prescriptive than corporation laws with regard to governance.

Additional disclosure laws and regulations pertain to publicly traded companies and investment managers and advisers. The federal Securities Act of 1933 (the Securities Act) and the federal Securities Exchange Act of 1934 (the Exchange Act), and rules adopted by the US Securities and Exchange Commission (SEC) govern disclosures related to, among other things, securities, proxy solicitations, company operations, characteristics of investment managers, and ordinary course operations. Disclosure on social and environmental topics may be required to the extent they fall under the principles-based and prescriptive disclosure requirements imposed by these statutes. As an example, SEC regulation requires companies that use certain 'conflict minerals' to disclose publicly information about such minerals. State laws may require additional disclosures. For example, California-based companies must disclose efforts to eliminate human trafficking in their supply chains. These laws and rules must be addressed by companies and institutional investors that promote ESG factors as a reason for investment, doing business with the entity or delivering a proxy.

The New York Stock Exchange (NYSE), NYSE American and the Nasdaq Stock Market (Nasdaq) require listed companies to abide by corporate governance rules of the exchange. The NYSE has declared its support for ESG disclosures and Nasdaq has produced a voluntary ESG reporting guide for companies, but, to date, neither exchange requires ESG-guided reporting or operational standards for listed companies.

Three additional federal statutes apply to investment advisers and institutional investors, although the federal government, and particularly the SEC, has not yet issued formal guidance to asset managers with respect to ESG. The Advisers Act of 1940 (Advisers Act) imposes varying levels of regulation on investment advisers depending on whether the adviser is registered with the SEC and is a domestic or foreign adviser. The Investment Company Act of 1940 (Company Act) imposes a broad and detailed scheme of regulation upon investment companies and their advisers. The Employee Retirement Income Security Act of 1974 regulates private pension plans and is administered by the US Department of Labor. These laws and the regulations thereunder impose antifraud rules and fiduciary duties on institutional investors, which impact those that feature ESG in their investment thesis and promotional and reporting materials. Investment advisers may also be subject to other regulatory requirements at the state level. In addition, the Uniform Prudent Investor Act (UPIA), model legislation issued by the American Law Institute and adopted by 44 states, sets out guidelines for trustees, and the Uniform Prudent Management of Institutional Funds Act, adopted in 49 states, provides guidance on investment decisions and endowment expenditures for non-profit and charitable organisations. Insofar as institutional investors are business entities established pursuant to state law, they are also subject to the fiduciary duties and antifraud rules under state law to the extent not lawfully waived in their organisational documents.

Efforts to develop ESG-related legislation and regulation at the federal level have intensified with the election of President Joe Biden, who committed to taking a 'whole of government' approach to advancing sustainability in business. In 2021, the SEC established a Climate and ESG Task Force that is expected to require new levels of ESG disclosure from public companies; the SEC is also reviewing registered investment adviser compliance programmes with a focus on 'the accuracy and adequacy of disclosures' related to strategies focused on sustainable and responsible investing. The US Secretary of the Treasury announced that the Financial Stability Oversight Council will also work towards improving ESG disclosures of companies. The Commodity Futures Trading Commission established a Climate Risk Unit to focus on the role of derivatives in understanding and pricing climate-related risk and transitioning to a low-carbon economy. The US Department of Energy appointed a prominent impact investor to lead its Loans Program Office, which is expected to channel capital to clean energy technologies. In 2021, the US House of Representatives passed a bill to promote climate-related disclosures for public companies.

Policy guidance and development

2 How would you describe the general level of policy guidance and development regarding ESG, impact investing and purpose-driven companies in your jurisdiction?

A substantial portion of guidance and development regarding ESG-oriented investing is through market-driven 'private ordering'. Market participants – such as institutional investors, companies, shareholders and industry organisations – and market observers – such as non-governmental organisations, accounting firms, consulting firms, and financial media – are extensively publishing recommendations and advocating and implementing best practices. Private-sector companies and investors and non-governmental organisations are also driving innovations in impact investing and purpose-driven company models. The evolution of the benefit corporation form, for instance, was influenced by a non-governmental organisation that drafted model legislation and promoted its adoption by state legislature. The role of government in setting policy guidance and development related to ESG is expected to increase under President Joe Biden. In 2021, the US Department of Energy appointed a prominent impact investor to lead its Loans Program Office, which is expected to channel capital to clean energy technologies. The Biden Administration also reestablished the White House Office of Faith-Based and Neighborhood Partnerships, to 'promote partnerships with religious and secular organizations to better serve people in need.' This office is a facilitator of pay for success investing models such as social impact bonds.

INVESTMENT

Regulatory and fiduciary duties

3 Are institutional investors and financial intermediaries legally required to consider ESG factors when making investment decisions? Must any additional non-financial principles and objectives be considered?

Federal and state law do not affirmatively require the integration of ESG-related considerations into the management of investments, except to the extent that applicable fiduciary duties would require a fiduciary to consider such matters in the interest of an entity and its owners, shareholders or other beneficiaries. For example, the Advisers Act, the Company Act and The Employee Retirement Income Security Act of 1974 (ERISA) impose additional, federal-level fiduciary duties on investment advisers and benefit plan fiduciaries. The Securities and Exchange Commission (SEC), which administers the Advisers Act, has explained that an investment adviser has a duty to 'adopt the principal's goals, objectives, or ends' and to make full and fair disclosure of all facts related to the advisory relationship. These responsibilities are implicated when an investment adviser or its client wishes to integrate ESG considerations into an investment strategy. In the case of retirement plans regulated under ERISA, the US Supreme Court has held that best interests of beneficiaries must be understood to refer to 'financial' rather than 'nonpecuniary' benefits. (*Fifth Third Bancorp v Dudenhoeffer*, 573 U.S. 409 (2014)) The US Department of Labor, which administers ERISA, has accordingly taken a similar position, providing in guidance issued in 2018 that '[f]iduciaries must not too readily treat ESG factors as economically relevant to the particular investment choices at issue . . . rather, ERISA fiduciaries must always put first the economic interests of the plan . . . .'

Insofar as an institutional investor or financial intermediary is a business organisation formed pursuant to state law, fiduciaries of the organisation may owe fiduciary duties (usually duties of care and loyalty) to the entity and its equity holders and are not required to consider ESG factors when making investment decisions, except to the extent that applicable fiduciary duties would require a fiduciary to consider such matters.

For managers of trusts, ESG factors are not favoured by the UPIA in the jurisdictions where it has been adopted. Specifically, the UPIA places certain constraints on impact investing, in that the official comments provide that '[n]o form of . . . 'social investing' is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries – for example, by accepting below-market returns.'

Considerations of principles and objectives developed by non-governmental and supranational organisations, such as the United Nations Principles for Responsible Investment (UNPRI) and the United Nations Sustainable Development Goals (SDGs), are not required as a matter of law.

Voluntary standards and best practices

4 What voluntary standards and best practices are commonly followed in your jurisdiction with regard to integrating ESG factors and other non-financial principles into investment decisions?

Investors pursuing ESG integration and impact investing strategies have adopted and promoted a wide variety of investment practices and are establishing investment vehicles designed to pursue their strategies. Common themes regarding strategy pertain to establishing general goals, marketing approaches, fund documentation, screening principles, due diligence, management and oversight of the investment (in the private side especially), engagement (on the public side especially), reporting to investors, and best practices for exiting and divestment. Investors focused on public company investment have encouraged public companies to increase their ESG-related disclosures and to follow disclosure standards set forth by nongovernmental standard setters — for instance, the Sustainability Accounting Standards Board, and GRI – and proxy advisory firms, specifically Institutional Shareholder Services (ISS) and Glass Lewis. Also influential are ESG indices, raters and rankers; while the primary function of these firms is to rate and sort companies on the basis of existing conduct, they influence ESG-related investment strategies by identifying best practices.

These developments are taking place against a backdrop of increasing recognition of contributions of nongovernmental and intergovernmental institutions that have advanced ideas about standards and best practices in ESG investing, particularly the UNPRI and related initiatives, such as the SDGs and the UN Impact Standards for Private Equity Funds.

Measurement, reporting and disclosure

5 What voluntary and statutory measurement, reporting and disclosure frameworks are followed in your jurisdiction with regard to ESG and other non-financial factors?

Federal securities laws and regulations govern disclosures by investment managers and public companies, and disclosure on social and environmental topics under these laws may be required to the extent they fall under principles-based and prescriptive disclosure requirements and are material to the organisation. State laws may require additional, specific disclosures concerning specific ESG-related concepts.

Beyond these frameworks, companies, including investment firms, are increasingly issuing additional disclosures, on a voluntary basis, under frameworks and standards published by nongovernmental and intergovernmental organisations. According to research by the Government & Accountability Institute, 90 per cent of S&P 500 index companies published sustainability reports in 2019. Of these, 36 per cent referenced one or more of the UN Sustainable Development Goals (SDGs), 51 per cent referenced the Global Reporting Initiative's (GRI) guidelines for ESG reporting; 25 per cent referenced standards of the SASB; and 16 per cent referenced recommendations of the TCFD.

Private companies also reference these and other voluntary disclosure frameworks. The IRIS+ System, a framework for reporting on social and environmental performance, is used by impact investors to measure impact.

The two leading proxy advisory firms in the US, Institutional Shareholder Services (ISS) and Glass Lewis, play a unique but influential role in shaping corporate disclosures. These firms specialise in providing proxy voting recommendations to institutional investors and also rate companies' on their governance, social and environmental disclosures. Since these regimes influence the proxy voting policies of institutional investors, their policies influence companies' policies and disclosures.

Ratings, indices and guidelines

6 What ratings, indices and guidelines are used to benchmark adherence to ESG principles and other non-financial factors in your jurisdiction?

Raters for public companies include the MSCI ESG Ratings, S&P Dow Jones Indices ESG Scores, Refinitiv ESG Scores, Sustainalytics, Bloomberg ESG data service, R-Factor, the FTSE Russell ESG ratings. ISS QualityScore and ISS Environmental & Social Disclosure QualityScore also issue scores pertaining to ESG performance and disclosure. In the private investments space, the Global Impact Investing Rating System (GIIRS) and the IMP+ACT Classification System are used to assess the social and environmental impact of companies and funds. Indices for public companies include MSCI ESG Select Index, MSCI KLD 400 Social Index, Dow Jones Sustainability World Index, the S&P 500 Environmental & Socially Responsible Index, Thomson Reuters Global ESG Equal Weighted Index and FTSE4Good indexes. The proxy voting policies of ISS and Glass Lewis, and the scoring methodologies of ISS QualityScore and ISS Environmental & Social Disclosure Quality Score, are among the bases used to benchmark ESG performance and disclosure.

Incentives, benefits and financial support

7 Are any fiscal incentives or other benefits available in your jurisdiction to encourage institutional investors and financial intermediaries to integrate ESG and other non-financial factors into their investment decision-making?

The tax-exempt status under the Internal Revenue Code (IRC) of program-related investments (PRIs) and mission-related investments (MRIs) is an example of direct tax incentives for private foundations that incorporate non-financial factors into their investment decision-making. Qualifying PRIs are not subject to jeopardising investment rules and are treated as taxable expenditures or subject to the excess business holding rules (so that a foundation will not be assessed an excise tax on the investment's value). MRIs, investments with the dual purpose of generating income and furthering a foundation's purpose, do not provide as many benefits as PRIs but may be exempt from jeopardising investment rules. IRS guidance provides that foundation managers may make investments that further a private foundation's charitable purpose, even if the investment provides a lower return, as long as the managers exercise ordinary business care and prudence in making the investment decision.

Other fiscal incentives for purpose-driven companies provide indirect incentives to institutional investors. For example, regulations under the US Tax Cuts and Jobs Act provide tax incentives for investments in economically distressed communities. These incentives permit taxpayers to defer and reduce any capital gain they recognise provided that the amount of gain recognised is timely invested in certain funds that in turn invest in such communities and also exempt from tax all appreciation in the value of the taxpayer's interests in such funds if they are held for at least 10 years.

Business organisation laws of states also create incentives through corporate forms, such as benefit corporations (allowed in 37 states), social purpose corporations (allowed in three states), low-profit limited liability companies (allowed in eight states), and benefit limited liability companies (allowed in five states).

Impact investing

8 In addition to ESG factors, what considerations and practices are commonly integrated into impact investment strategies?

Investors are increasingly enthusiastic about seeking impact and profit as complimentary objectives. Many are utilising traditional profit-seeking methods as a means to drive impact, for instance, by investing into proven and scalable business models. Impact strategies are focusing on integrating ESG-oriented practices into every stage of the investment cycle, from the original conception of a fund to forming and training a fund management team, obtaining appropriate outside advisors, innovative financing (for instance, blended finance), screening and due diligence, drafting terms in fund and investment agreements, incentivising employees of the portfolio company to optimise impact, monitoring and measuring impact performance at the portfolio level, and best practices for exiting investments.

On the public investment side, investment managers implement negative screening criteria (for instance, not investing in certain industries) or proactively invest in companies and funds with ESG-oriented themes. To monitor investments, institutional investors are pressuring publicly traded companies to enhance their environmental and social disclosures so that investors can rate, rank, and select investment opportunities using increasingly granular data. To steer companies toward ESG-minded policies to presumptively unlock value and create social and environmental benefit, institutional investors use direct engagement and shareholder proposals to influence operations.

PURPOSE-DRIVEN COMPANIES

Legal recognition and certification

9 What legal forms or statuses are used in your jurisdiction to establish purpose-driven companies?

Purpose-driven companies can be formed under state law like any other corporations, limited liability companies or limited partnerships. Founders of such entities may then establish any lawful purpose for their entities, and they may form them as for-profit or non-profit entities, in the latter case to take advantage of tax exemptions. Various hybrid structures are also used, such as a charitable organisation as a parent with a for-profit subsidiary. Additionally, benefit corporations, allowed in 37 states, social purpose corporations, allowed in four states, low-profit limited liability companies, allowed in eight states, and benefit limited liability companies, allowed in five states, specifically permit directors and managers to focus on social and environmental objectives, and the interests of stakeholders beyond investors, when fulfilling their fiduciary duties. Purpose-driven companies can also be formed as ordinary limited liability companies that have waived certain fiduciary duties.

A business can also show that it is focused on environmental and social goals by obtaining third-party certifications. For instance, non-profit organisation B Lab will offer a 'Certified B Corp' certification to any business, regardless of its form or state of incorporation, provided that the company achieves a minimum score on B Lab's Impact Assessment process.

Purpose and mission

10 What rules and standard practices govern the establishment of companies' social or environmental purposes and mission?

Under state laws, directors and managers of corporations, limited liability companies and partnerships are required to act in the best interests of the organisation and its shareholders, members, and limited partners, as applicable. State corporation statutes provide limited circumstances under which such duties of directors may be waived; limited liability and limited partnership statutes provide more flexibility. As reflected in a 2019 statement of the Business Roundtable, a coalition of CEOs of US companies, fulfilment of such duties to a corporation and its shareholders may include consideration for the interests of a broader range of stakeholders beyond shareholders, including customers, employees, suppliers and communities. The World Economic Forum echoed this theme in its 2020 Davos Manifesto, which states that the purpose of a company is to 'engage all its stakeholders [defined as employees, customers, suppliers, local communities and society at large] in shared and sustained value creation.' State laws do not prohibit company fiduciaries from considering economic, social and other community-related ramifications of their decisions so long as these considerations are also related to advancing the interests of investors. Additionally, 35 states have adopted 'constituency statutes' that specifically permit directors of corporations to consider the interests of other stakeholders beyond investors.

Against this legal background, state laws defer to founders and owners to establish the purposes of their entities. State laws require entities to state their purpose in formation documents, but these statements can be generic, including to the effect that a company has been formed 'to pursue any lawful purpose.' This holds true even if a company has been formed to pursue a specific social or environmental mission. Benefit corporations, social purpose corporations, low-profit limited liability companies and benefit limited liability companies, by contrast, must provide a more focused statement of purpose in their formation documents.

Purpose-driven companies can be formed on a non-profit basis to obtain tax exempt status under federal and state law. A company can lose its tax-exempt status if it ceases to conduct operations consistently with its purpose as set forth in its formation documents.

Profit distribution, winding up and remuneration

11 What rules and restrictions govern profit distributions for purpose-driven companies in your jurisdiction?

State laws grant corporations, limited liability companies and partnerships latitude to establish the distribution structures that suit their goals, subject to outside limitations imposed by statutes and fiduciary duties. Delaware corporation law, for example, permits the board to declare dividends out of surplus, or if there is no surplus, out of net profits for the fiscal year in which the dividend is declared or the preceding fiscal year. Otherwise, state laws do not impose additional rules or limits on companies that pursue ESG-oriented purposes. These principles also apply to special corporate forms, specifically benefit corporations and low-profit limited liability companies. For non-profit purpose-driven companies, dividend limitations under state law are generally not implicated because under federal law a tax-exempt company cannot benefit private interests through distributions.

12 What rules and restrictions govern the winding up of purpose-driven companies?

Business organisation laws of states establish default rules for winding up companies but do not impose additional rules or restrictions on for-profit companies that pursue ESG-oriented purposes. Statutes require discharging a company's debts, obligations, and other liabilities, settling and closing a company's activities and affairs, and distributing remaining assets to shareholders or members. An entity's organisational documents can provide that remaining assets be distributed to persons or entities other than the owners. These principles also apply to special corporate forms such as benefit corporations and low-profit limited liability companies.

For tax-exempt non-profits pursuant to section 501(c)(3) of the Internal Revenue Code (IRC), after all liabilities are settled the remaining assets must be distributed to another 501(c)(3) organisation or to a government entity and cannot benefit a private individual or the non-profit's directors employees, donors, volunteers or beneficiaries.

13 What rules and restrictions govern the remuneration of directors, officers, employees and third parties?

State law grants directors and managers of companies latitude to establish policies for remunerating directors, officers and employees, subject to the requirement to avoid corporate waste and to act in the best interests of the organisation and its members or shareholders, consistent with their fiduciary duties and to the extent such duties have not been lawfully waived or modified in the company's organisational documents. Within this framework, directors and managers can tie compensation to metrics of their choosing, which can include ESG performance metrics. These principles also apply to special corporate forms such as benefit corporations and low-profit limited liability companies. Public companies are additionally subject to a practical limitation in that institutional investors and proxy advisors rigorously monitor required disclosures of compensation practices against peer practices and other benchmarks.

For non-profit companies, the IRC permits tax-exempt organisations to pay executives, officers and staff 'reasonable' compensation. The Internal Revenue Service, which administers the IRC, presumes that compensation is reasonable if an organisation follows a set of standard, recommended procedures in setting compensation. Non-profits generally do not compensate directors for service on the board except to reimburse direct expenses.

Measurement, benchmarking and reporting

14 Are purpose-driven companies legally required to measure, benchmark and report the social and environmental impact of their business?

Purpose-driven companies established as ordinary corporations or limited liability companies are not legally required to report on or benchmark the social and environmental impact of their business, except, in the case of public companies, to the extent reporting might be required under federal or state disclosure rules that apply to all public companies. By contrast, most state benefit corporation statutes, based on model legislation developed by the non-profit B Lab Company, provide that such corporations must publish an annual report providing, among other things, an assessment of the social and environmental performance of the corporation reported against a third-party standard. While the model legislation provides criteria for applicable third-party standards, it does not specify a standard. Delaware's benefit corporation law, not based on the model legislation, requires the benefit report to be provided to shareholders at least biennially and does not require an assessment of performance against a third-party standard, but allows that the certificate of incorporation or by-laws can require this. B Corporations certified by B Lab also report routinely to B Lab and their impacts are assessed in accordance with the B Impact Assessment model.

15 | What statutory and voluntary standards, guidelines and best practices are followed by purpose-driven companies in your jurisdiction with regard to the measurement and reporting of ESG and other non-financial factors?

Purpose-driven companies seeking to measure impact performance against third-party standards can use, for example:

- B Impact Assessment;
- GIIRS;
- GRI;
- SASB;
- ISO 26000;
- IMP+ACT Classification System;
- Green Seal Business Certification;
- Green America Business Network;
- MultiCapital Scorecard;
- Ceres Roadmap to Sustainability;
- Food Alliance Certified;
- Good Guide Company Ratings;
- People4Earth Business Framework;
- Sustainability Quotient; and
- Sustainable Farm Certification.

Director liability and private enforcement

16 | What rules govern the liability of directors of purpose-driven companies for compliance with social and environmental standards and principles? In addition to shareholders, are stakeholders entitled to hold directors accountable through private enforcement action?

Purpose-driven companies are commonly organised as ordinary corporations and limited liability companies, and state laws provide shareholders and members of such companies the ability to hold directors and managers accountable for fulfilling purposes and other obligations. Shareholders and members can bring such suits on their own behalf or on behalf of the company (a derivative suit), depending on the allegation and subject to procedural requirements. As a result, shareholders and members can bring such suits under theories that could apply to directors and managers of companies established for any purposes, such as fraud or breach of fiduciary duties or contract (for instance, a purpose stated in a corporate charter).

Directors of corporations will not be held liable for their decisions, even if such decisions harm the corporation or its shareholders, if the decisions fall within the judicially created safe harbour known as the 'business judgement rule,' extensively developed in Delaware case law. The rule provides a judicial presumption that disinterested and independent directors make business decisions on an informed basis and with the good faith belief that the decisions will serve the best interests of the corporation. Comparable standards may be employed by a court in reviewing the decisions of managers of limited liability agreements, subject to terms of the formation documents of the company in question.

If an entity has issued securities or is an institutional investor, its directors and managers could be liable to shareholders for violations of state- or federal-level antifraud rules or fiduciary duties.

These principles also apply for special corporate forms such as benefit corporations.

Directors and managers can also be found liable – variously to investors, other stakeholders or the public – for violating state and federal laws pertaining to operations, such as anti-discrimination, labour and environmental protection laws. Such laws typically provide their own bases for liability, providing rights of action variously to the government and private individuals.

State supervision

17 | Is there any form of state supervision of purpose-driven companies in relation to their social and environmental purposes?

State governments provide limited to no oversight to ensure that a business is carrying out its purpose, leaving shareholders to hold directors and managers accountable through engagement with management and legal action. This principle also applies to special corporate forms such as benefit corporations and low-profit limited liability companies. Public companies and investment advisors, being subject to federal securities laws, may be subject to proactive supervision of agencies, such as the Securities and Exchange Commission (SEC) and Department of Labor (in the case of the Employee Retirement Income Security Act of 1974 fiduciaries). It is possible for a federal agency to bring an enforcement action against a public company or institutional investor to fulfil its mission as stated to investors. The IRS, state tax departments and state attorneys general also provide a type of supervision for purpose-driven organisations insofar as they proactively monitor the qualification and practices – such as the remuneration policies – of tax-exempt organisations. A company can lose its tax-exempt status if it receives substantial unrelated business income that does not have a clear connection to the organisation's purpose.

Incentives and benefits

18 | Are any fiscal incentives or other benefits available for purpose-driven companies in your jurisdiction? What is the scope of these benefits and what requirements apply?

The IRC provides tax-exempt status to organisations that conduct educational, scientific and other qualifying work with a public purpose, and charitable corporations can solicit tax-deductible contributions. The TJCA provides fiscal benefits to investments in economically distressed communities. Other provisions in the IRC promote ESG-related investment concepts, particularly in renewable energy. For instance, section 48 provides an investment tax credit to businesses that invest in renewable energy projects.

The Small Business Innovation Research and Small Business Technology grant programme, sponsored by the US Department of Energy, provides grants to small businesses for the development of energy-saving transportation. The Program for Investors in Microentrepreneurs of the US Small Business Administration (SBA) provides grants to entrepreneurs from disadvantaged backgrounds. The SBA's Historically Underutilized Business Zone Program helps small businesses in economically distressed communities obtain federal contracts by affording preferential treatment in bidding rounds. The SBA's Women-Owned Small Business Federal Contract Program authorises contracting officers in the federal government to set aside certain contracts for women-owned small businesses. The Biden Administration has announced an intent to catalyse private sector investment into the advancement of clean energy, buildings, vehicles and products.

Public procurement

19 | Do the public procurement rules and policies in your jurisdiction confer any advantages on companies for pursuing social or environmental purposes? If so, what conditions apply?

The Federal Acquisition Regulations require government agencies to 'maximize the utilization of environmentally preferable products and services' but does not mandate procurement advantages for suppliers, contractors and service providers providing such products and services. Presidential executive orders have encouraged the consideration of sustainability in federal agencies' procurement and planning, but those orders also have not provided specific incentives for procurement from companies for pursuing social or environmental purposes. Certain other federal laws promote ESG-related values in procurement: The Historically Underutilized Business Zone Program helps small businesses in economically distressed communities obtain federal contracts. The Women-Owned Small Business (WOSB) Federal Contract Program authorises contracting officers to set aside certain contracts for WOSBs and 'economically disadvantaged' WOSBs. Various US government agencies have implemented policies to promote procurement from minority- and veteran-owned companies. Agencies of several states have similarly issued orders and adopted policies to encourage and assist state agencies in awarding contracts to businesses owned by minorities, women, veterans, LGBT community members and disabled persons. Public procurement policies are expected to be more influenced by ESG-related considerations under the Biden Administration. An executive order has directed the Federal Acquisition Regulatory Council to ensure that major federal agency procurements minimise the risk of climate change, including requiring the social cost of greenhouse gas emissions to be considered in procurement decisions and, where feasible, give preference to proposals from suppliers with a lower social cost of greenhouse gas emissions.

Economic sustainability and market competition

20 How would you describe the level of economic sustainability and market competition of purpose-driven companies?

The infinite range of ESG-oriented management strategies and concepts of purpose make it challenging to generalise about the sustainability and competitiveness of purpose-driven companies. A handful of high-profile public companies in the technology sector, having a combined value of several trillions of dollars, claim to be purpose-driven companies. On the other hand, the term 'purpose-driven' is commonly associated with small, private businesses pursuing local impact. Researchers have nevertheless published studies showing that a purpose-driven approach may enhance a firm's returns, economic sustainability and competitiveness. McKinsey & Company found that investment in globally sustainable firms has increased tenfold since 2004 and that such firms have performed well compared to traditional peers. Bank of America research in 2019 found that purpose-driven companies that rank well on ESG metrics have outperformed the market by up to 3 per cent per year over the past five years.

GOVERNMENT, NGO AND SUPRANATIONAL SUPPORT

Government support

21 Are there any governmental actors in your jurisdiction that are specifically dedicated to promoting and supporting socially and environmentally responsible investment practices, as well as purpose-driven companies? What purposes do they pursue and how do they do so?

The Responsible Business Conduct team at the US Department of State promotes responsible business practices by engaging with the private sector and labour groups. The Department of State also contributed to the development of the international Voluntary Principles on Security and Human Rights to provide guidance to oil and mining companies. The US International Development Finance Corporation partners with the private sector to finance solutions involving investments in energy, healthcare and infrastructure and financing for small businesses and women entrepreneurs. The Securities and Exchange Commission (SEC) is a caretaker of responsible investment as a regulator of securities and investments; as one example, the Office of Risk and Strategy seeks to identify through research emerging risks that may be appropriate for future SEC regulation. Other government actors that promote ESG factors include the US Small Business Administration; the US Department of Energy's Energy Star program that promotes the use of energy efficient products and practices for companies; the US Department of Agriculture's Rural Development programs that facilitate grant funding and loan financing for community facilities and renewable energy; the Climate Registry, which assists organisations in reducing carbon omissions; and the Regional Greenhouse Gas Initiative, a cooperative effort among certain US states and Canadian provinces reduce carbon dioxide emissions from the power sector. The role of government in promoting and supporting socially and environmentally responsible investment practices is expected to increase under President Joe Biden. Under the Biden Administration, the US Department of Energy appointed a prominent impact investor to lead its Loans Program Office, which is expected to channel capital to clean energy technologies. The Federal Energy Regulatory Commission created a senior position to facilitate environmental justice and has undertaken efforts to incorporate climate change considerations into the agency's decision-making process. The Biden Administration also reestablished the White House Office of Faith-Based and Neighborhood Partnerships, a facilitator of 'pay for success' investing models such as social impact bonds.

NGO support

22 Are there any non-governmental organisations (NGOs) operating in your jurisdiction that are specifically dedicated to promoting and supporting socially and environmentally responsible investment practices, as well as purpose-driven companies? What purposes do they pursue and how do they do so?

Green America promotes shareholder action to advance sustainability goals and rates mutual funds based on sustainability criteria. The Forum for Sustainable and Responsible Investment is an investor coalition that promotes sustainable investment in public and private companies. Ceres provides investors and companies with empirical research to understand sustainability risks and opportunities, with particular focus on public companies. The Interfaith Center on Corporate Responsibility represents institutional investors in engaging corporate management teams of public companies to help mitigate social and environmental risks. As You Sow promotes environmental and social corporate responsibility through shareholder advocacy at public companies. Social Funds provides retail investors with information and resources regarding socially responsible investing in public companies. The Sustainable Investments Institute disseminates research on social and environmental investing. Invest with Values provides free educational resources to investment professionals regarding impact and socially responsible investing.

Supranational support

23 Are there any supranational actors operating in your jurisdiction that are specifically dedicated to promoting and supporting socially and environmentally responsible investment practices, as well as purpose-driven companies? What purposes do they pursue and how do they do so?

The United Nations Principles of Responsible Investment provides information and strategy reports to assist investors in achieving sustainable investing goals. The UNEP Finance Initiative promotes sustainable investment and growth through the dissemination of publications on sustainable investment. The United Nations Global Compact encourages businesses worldwide to adopt sustainable policies and be stewards of the United Nations Sustainable Development Goals. Global Impact

Investing Network promotes impact investing by facilitating research and promoting innovative investment approaches. Climate Bonds Initiative promotes investments through the bond market to further climate change solutions.

FINANCIAL TOOLS

Equity funds and loans

24 Does your jurisdiction regulate equity funds or other financial tools such as loans designed to scale up companies with social or environmental objectives? Even if not expressly regulated, are there venture funds specifically focused on investing in purpose-driven companies?

The US has seen a growth in launches of, and investments in, funds focused on investing in ESG-conscious and purpose-driven companies, both exchange-traded and private (including venture funds). These funds are not subject to express, ESG-focused regulation, and a fund manager's fiduciary duties do not affirmatively require it to consider ESG-related investment principles. Apart from any fiduciary duties to its client, the securities and investment funds industries are highly regulated in the US under state and federal laws, and funds and other financial intermediaries are particularly subject to federal and state law pertaining to their disclosure responsibilities and antifraud rules. The focus of federal securities laws on disclosures gives investors and the public tools to ensure that investment funds and financial intermediaries with social or environmental objectives faithfully pursue those objectives.

Outcomes funds

25 Does your jurisdiction regulate 'pay for success' investing models such as outcomes funds? Apart from specific regulation, are any of these mechanisms in force or in progress in your jurisdiction?

Pay for success (PFS) investing models are not specifically regulated in the US, however the federal government has encouraged participation in PFS investments. The Office of Social Innovation and the White House Office of Faith-Based and Neighborhood Partnerships have promoted PFS investing. Social impact bonds are a prominent example of such a programme. The Social Innovation Foundation, administered by an independent federal agency, has facilitated feasibility and technical assistance for social impact bonds. In 2015, Congress passed the Every Student Succeeds Act, which included specific provisions to enable the use of social impact bond initiatives to advance solutions for at-risk students; the US Department of Education is now working on several pay for success projects. In 2018, the US Congress passed the Social Impact Partnerships to Pay for Results Act (SIPPRA) to appropriate funds to facilitate the federal government's payment for outcomes in PFS projects.

Social and development impact bonds

26 Does your jurisdiction regulate 'pay for success' investing models such as social impact bonds and development impact bonds? Apart from specific regulation, are any of these mechanisms in force or in progress in your jurisdiction?

PFS investing models are not specifically regulated. Social impact bonds have, however, been established involving federal and state agencies and private investors. Examples have included the Veterans Coordinated Approach to Recovery and Employment, an initiative to support veterans with post-traumatic stress disorder, and the Massachusetts Pathways to Economic Advancement Project, an initiative providing professional development services to immigrants and refugees.

Crowdfunding

27 Does your jurisdiction regulate crowdfunding initiatives aimed at scaling up companies with social or environmental objectives?

Regulation Crowdfunding, adopted by the Securities and Exchange Commission (SEC) in 2015, enables eligible companies to offer and sell securities through crowdfunding without registering the securities under the Securities Act. These regulations require all transactions to take place online through an SEC-registered intermediary broker-dealer or funding portal and require disclosure of certain to investors. Initiatives aimed at scaling up companies with social or environmental objectives would fall within the broader regulation of crowdfunding generally. In 2021, new Regulation Crowdfunding rules took effect that, among other things, increased the offering limit for issuers from US$1.07 million to US$5 million and eliminated a yearly investing cap for accredited investors.

UPDATE AND TRENDS

Update and trends

28 What are the key recent developments, hot topics and future trends in your jurisdiction relating to social finance, purpose-driven companies and the impact economy in general? Are there any recent studies and initiatives to identify or quantify these market sectors? Are there any new or proposed regulations or taxonomies in this regard?

Sustainable and impact investing increased in the US in 2020. According to Morningstar, as of March 2021, assets in US sustainable funds totaled nearly US$266 billion, representing a 123 per cent annual increase. At the end of 2020, also according to Morningstar the group of sustainable open-end funds and exchange-traded funds available to US investors numbered 392, up 30 per cent from 2019 and representing a nearly four-fold increase over 10 years. On the private side, investment firms with substantial market presence have continued to raise new ESG-oriented funds and appointed chairs to steward impact investing. A 2020 survey by the Global Impact Investing Network valued the maturing worldwide impact investing market at US$715 billion, with 30 per cent of this total now being invested in the US and Canada.

Trends in legislation and regulation are focusing on the public markets. Members of the US Congress and various market participants are urging the Securities and Exchange Commission (SEC) to expand and standardise disclosure requirements regarding environmental and social factors in company operations and investment strategies. Congressional bills introduced in 2019 and 2020 would require public companies to disclose the racial, ethnic and gender makeup of their boards of directors and executive officers, and the US House of Representatives in 2021 passed a bill to promote climate-related disclosures for public companies. The SEC also created a Climate and ESG Task Force that is expected to require new levels of ESG disclosure from public companies. The SEC is also reviewing registered investment adviser compliance programmes with a focus on 'the accuracy and adequacy of disclosures' related to strategies focused on sustainable and responsible investing. In 2021, the US Department of Labor announced that, until it issues additional guidance, it would not enforce Trump administration rules that sought to constrain pension plan fiduciaries from investing in ESG-focused vehicles if doing so would subordinate financial return.

Recommendations

29 Do you have any recommendations for legal models, fiscal treatment and public procurement in your jurisdiction in relation to social finance and purpose-driven companies? Do you see a need for regulatory intervention or is the market capable of self-regulation in these sectors?

The US market is still testing the viability of innovative programmes such as social impact bonds and fiscal incentives for investment in distressed communities; time and outcomes will tell if governments and private investors will continue to invest in these structures. In the meantime, in the area of private investment, state law for business organisations facilitates ingenuity and impact capital flow by providing founders and owners with flexibility in structuring their operations and governance and by providing baseline fiduciary duties that can often be modified for non-corporate organisations, according to the preferences of founders and investors. This flexibility should continue to be a positive factor for sustainable and impact investing.

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