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The International Comparative Legal Guide to: **Corporate Governance 2019**

12th Edition

A practical cross-border insight into corporate governance

Published by Global Legal Group, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Stephens & George
Print Group
July 2019

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ISBN 978-1-912509-87-4

ISSN 1756-1035

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EDITORIAL

Welcome to the twelfth edition of The International Comparative Legal Guide to: Corporate Governance.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of corporate governance.

It is divided into two main sections:

Seven general chapters. These are designed to provide an overview of key issues affecting corporate governance law, particularly from a multi-jurisdictional perspective.

The guide is divided into country question and answer chapters. These provide a broad overview of common issues in corporate governance laws and regulations in 33 jurisdictions.

All chapters are written by leading corporate governance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Sabastian V. Niles & Adam O. Emmerich of Wachtell, Lipton, Rosen & Katz for their invaluable assistance.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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ESG in the US: Current State of Play and Key Considerations for Issuers

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Introduction

ESG, or environmental, social and governance, is a topic of growing importance to public companies and their investors. Arguably, the rise of index or passive investing has led large institutional investors, which together hold a significant percentage of the U.S. public company equity register, to focus on ESG matters insofar as they may be relevant to ensuring or creating long-term sustainable value for their clients. In particular, these institutional investors review company ESG risks and related disclosure in deciding whether to engage with them and how to vote on relevant shareholder proposals.

While U.S. public companies are subject to mandatory disclosure regimes, to support their investment decisions, certain investors have pushed for more “voluntary” disclosure from companies in the form of corporate social responsibility, sustainability or similar reports or website information to supplement disclosures mandated by the U.S. Securities and Exchange Commission. Though it varies depending on industry, it has become somewhat expected for many companies to provide some ESG disclosure above and beyond what is required by law. There is a dizzying array of ESG disclosure regimes from which a company can choose to use as a framework for this additional disclosure. This memorandum provides a high-level summary of some prominent ESG disclosure regimes and their key attributes.

The rise in index or passive investing has also fueled the growth and prominence of so-called ESG third-party raters. These ESG raters analyse data relating to companies and provide reports summarising ESG risks and opportunities, benchmarking these companies against their peers. Many investors, including the largest asset managers, use the products of ESG raters in managing their investments and assessing the ESG risk of the numerous companies that are reflected in their various indices. The actual ratings are based in large part on the subject company’s disclosure – voluntary and mandatory – as well as how they compare to their peers’ disclosure. If peers are disclosing voluntary information, a company that is not (or is disclosing less than its peers) may receive a lower rating.

Looking ahead, analysts predict that over the next two to three decades millennials could place between \$15 trillion to \$20 trillion in U.S. domiciled ESG investments, which would double the size of the entire U.S. equity market.¹ To support the creation of sustainable index funds, it is possible that company disclosure will become even more important in determining if a company ought to be included or excluded from a particular index.

This chapter describes the rise of passive investing, what top asset managers’ views are on ESG, ESG disclosure regimes, ESG raters and ESG ETF offerings by the top three asset managers and the expected growth of that area due in part to demand by millennials.

Passive Investing and ESG

An index fund is an investment fund constructed to follow a specific industry or index such as the S&P 500. An index fund may also be designed based on rules that screen social and sustainable criteria. The so-called Big Three asset managers – BlackRock, State Street Global Advisors (SSGA) and Vanguard – together manage through index funds over \$5 trillion in U.S. corporate equities and vote approximately 20% of the shares in S&P 500 companies.² They and other index fund managers are essentially fiduciaries managing, engaging and voting on behalf of their clients, the beneficial owners.³

Vanguard’s founder, Jack Bogle, once said that index funds are the best hope for corporate governance.⁴ Indeed, the Big Three asset managers stress the importance of responsible investing for two main reasons: (i) their long-term commitment to companies in which they invest, which due to the index structure, provides effectively no exit from an individual company; and (ii) they hold relatively large stakes and therefore have tremendous influence in encouraging underlying companies to create long-term value.⁵

Asset managers may not be perfectly incentivised to push companies to improve their ESG performance insofar as improving performance of the index would also unhelpfully benefit their competitors, which track the same index.⁶

However, asset managers appear to be operating as much as they can within their fiduciary duties to their clients to account for ESG issues in the long-term health of their investments. Larger asset managers appear to engage with companies on ESG matters year-round and vote their proxies accordingly. The below chart details some of such activities by the Big Three.

Asset Manager E&S Engagement and Proxy Voting

Manager	Source	General	Factors Considered in Shareholder Voting
BlackRock	Proxy Voting Guidelines for U.S. Securities (January 2019)	<ul style="list-style-type: none"> ■ Will gauge the relevance of the proxy voting in light of the nature of its engagement with the company on the issue over time. ■ Engagement will generally focus on its clients’ long-term economic interests as shareholders and not “social, ethical or political judgments”. ■ Expects company to identify and report on material business, as well environmental and social, aspects and it suggests that companies should also disclose key performance indicators, which allows for peer group benchmarking. ■ States that TCFD and SASB provide useful guidance to companies on identifying, managing and reporting on climate change risks and opportunities. 	<ul style="list-style-type: none"> ■ For E&S Proposals, it will consider if: (i) the company took steps to address the concern; (ii) the company is implementing a response; and (iii) there is a clear and material economic disadvantage to the company in the near term if the issue is not addressed in the manner of the proposal. ■ May vote against directors where the company may not be dealing with E&S factors appropriately. ■ Climate change – will vote based on the robustness of the company’s existing disclosure and understanding of its management of issues learned via engagement with company and board over time. ■ Political activities – will generally defer to companies as it is the board’s duty to determine appropriate level of disclosure; will not generally support proposals that are overly prescriptive in nature.
State Street Global Advisors	SSGA Proxy Voting and Engagement Guidelines North America (United States and Canada) March 18, 2019	<ul style="list-style-type: none"> ■ Notes that the primary responsibility of the board is to preserve and enhance shareholder value and protect shareholder interests and long-term economic value. ■ Conducts E&S engagement in a manner consistent with maximising shareholder value, but also states that it is committed to sustainable investing. ■ Uses proprietary in-house sustainability screens to identify companies for engagement. ■ Its Asset Stewardship Program has a prioritisation process that allows it to proactively identify companies for engagement and voting to mitigate sustainability risks in its portfolio. 	<ul style="list-style-type: none"> ■ Will look to materiality of the issue. ■ Will consider if implementing the proposal would promote long-term shareholder value in the context of the company’s existing practices and disclosures, as well as existing market practice.
Vanguard	Vanguard’s Proxy Voting Guidelines	<ul style="list-style-type: none"> ■ Investor Stewardship team, which consists of certain of its senior officers, executes day-to-day operations of the fund’s proxy voting process. ■ Voting objective is to maximise fund investment value over the long-term. 	<ul style="list-style-type: none"> ■ Will consider ISS and Glass Lewis recommendations of proxy advisory firms, but will give “substantial weight” to board recommendations absent “guidelines or other specific facts that will support a vote against management”. ■ Will support proposals that evidence “logical demonstrable link between proposal and long-term shareholder value”. ■ In determining its vote it will look to: <ul style="list-style-type: none"> ■ the materiality of the issue; ■ quality of current disclosures; and ■ company progress toward relevant best practices/industry norms.

ESG Voluntary Disclosure

A company’s ESG disclosure is key to asset manager engagement as well as in potentially avoiding majority votes on any such shareholder proposals. For instance, BlackRock has stated that “one of the priorities of BlackRock’s stewardship program is ESG disclosure” and that “the quality of information which underpins both investors’ and businesses’ pursuits of greater sustainability is uneven and presents a barrier for further progress in sustainable finance”.^{7,8} The current alphabet soup of competing voluntary ESG disclosure standards and initiatives, however, can be daunting and discourage companies from selecting any one. See [Appendix A](#) for a table that compares some of the leading standards. The table shows that some standards are more appropriate for certain industries, or for companies in the U.S. versus Europe.

ESG Ratings – Institutional Investor Use

Many U.S. public companies are being evaluated and rated on their ESG performance by various third-party providers of reports and ratings. Institutional investors, asset managers, financial institutions and other stakeholders are increasingly relying on these reports and ratings to assess and measure company ESG performance over time and as compared to peers. This assessment and measurement often forms the basis for informal and shareholder proposal-related investor engagement with companies on ESG matters. Report and ratings methodology, scope and coverage, however, vary greatly among providers. Many providers encourage input from their subject companies to improve or sometimes correct data. There are currently numerous ESG data providers, a summary of each of which is beyond the scope of this article, but some well-known third-party ESG report and ratings providers are summarised in [Appendix B](#).

Asset Manager ESG Investing Activity

Manager	Certain ESG Funds	Comments/Other Related Activity
<i>Blackrock</i>	<ul style="list-style-type: none"> ■ iShares MSCI EAFE ESG Select ETF and MSCI EM ESG Select ETF, using ESG ratings and data provided by MSCI. ■ iShares ETF, including iShares Global Green Bond ETF. ■ BSF Sustainable Euro Bond Fund, BSF Impact World Equity Fund and BGF New Energy Fund. 	<ul style="list-style-type: none"> ■ ETFs have been a key driver in the big growth of BlackRock among other asset managers. ■ BlackRock manages \$1.75 trillion in ETFs (only \$7B are sustainable). ■ In 2018, BlackRock took a stake in Acorns, an app that invests spare change, with the idea of gaining insight into the investing habits of young investors.
<i>State Street Global Advisors</i>	<ul style="list-style-type: none"> ■ SSGA has been managing ESG portfolios for 30 years and in 2014 announced the SPDR MSCI ACWI Low Carbon Target ETF, as a way of accessing long-term growth opportunities of carbon-efficient companies. ■ Also offers SPDR SSGA Gender Diversity Index ETF. 	<ul style="list-style-type: none"> ■ In March 2019, SSGA announced a new partnership with a professor at Harvard Business School to advance its research in ESG investing.¹⁴
<i>Vanguard</i>	<ul style="list-style-type: none"> ■ Vanguard ESG US Stock ETF ESGV. ■ Vanguard ESG International Stock ETF. ■ Vanguard FTSE Social Index Fund. 	<ul style="list-style-type: none"> ■ In March 2019, Vanguard filed a registration statement with the SEC for the proposed launch of Vanguard Global ESG Select Stock Fund.

Millennials and Sustainable ETFs

Millennials are the demographic cohort born between 1980 and 1996, or roughly those individuals aged 23 to 39. Millennials, who constitute approximately 23% of all millionaires, are believed to be entering their prime earning years.⁹ In addition, over the next several years, the baby boomer generation is expected to transfer approximately \$30 trillion to its millennial children. Studies have shown that millennials are focused on ESG issues. In particular, 67% of millennials believe that investments “are a way to express social, political and environmental value” versus only 36% of baby boomers.¹⁰ In 2018, ETFs were found to be the investment vehicle of choice for approximately 91% of millennial investors.¹¹ According to this 2018 study, millennials say that 42% of their portfolios are currently in ETFs and that nearly 80% of millennials see ETFs as their primary investment vehicle in the future. A 2016 FactSet study of high net worth investors says that 90% of millennials want to direct their allocations to responsible investments in the next five years.¹²

ESG investing is generally defined as the consideration of ESG factors alongside performance factors in the investment decision-making process. Sustainable ETFs are roughly defined as those with positive social or environmental impact with positive financial results.¹³ Investments in ETFs with a sustainability focus are expected to rise from approximately \$25 billion currently to approximately \$400 billion by 2028. Asset managers are starting to provide their own sustainability offerings. The above table summarises some of the activity in this area by the Big Three asset managers.

If the above estimates relating to millennials bear out, we should expect a significant increased demand for ESG-linked ETFs, which would likely make company ESG disclosure even more important than it is today.

Regulation of ESG ETFs

In March 2019, the European Parliament, subject to certain further EU approvals, approved legislation that would set standards for low-carbon benchmarks in the EU. In financial markets, a benchmark is essentially an index, or a standard or measure pegged to the value of a “basket” of underlying equities, bonds or other assets or prices, that is used for a variety of investment purposes, such as evaluating the performance of a security, mutual fund, or other investment. Many in the investing community rely on low-carbon benchmarks to create

investment products, to measure the performance of investments and for asset allocation strategies. By establishing clear criteria that companies must meet to be included in a low-carbon benchmark, the proposed legislation aims to provide certainty and transparency to sustainable investing and reduce “greenwashing”, or the making of unsubstantiated or misleading claims about the environmental attributes of a benchmark.

The legislation proposes the creation of two new categories of low-carbon benchmarks: (a) “Paris-aligned” benchmarks, for companies in line with the Paris Agreement goal of limiting global temperature rise to 2.0° Celsius above pre-industrial levels; and (b) “climate-transition” benchmarks, for companies on a trajectory to lower their carbon footprint but not yet on track to achieve Paris-level carbon reductions. As proposed, the legislation is designed to allow current unofficial benchmarks and indexes touting ESG or sustainable characteristics to continue to operate alongside the new EU-sanctioned benchmarks as long as they do not co-opt the labels established by the legislation.

The legislation also proposes that all benchmark providers, with some exceptions, disclose whether and how their benchmarks pursue ESG objectives and to what extent the benchmarks align with the goal of reducing carbon emissions or achieving Paris-level carbon reductions.

The benchmarks legislation was part of a package of sustainable finance bills proposed by the European Commission in May 2018. The two other proposals include: (1) one that improves disclosure requirements related to sustainability risks and opportunities; and (2) one that establishes a unified EU classification system (taxonomy) for sustainable economic activities. The first of these two proposals, thus far approved by the European Parliament in March 2019,¹⁵ proposes that pension funds, insurers, credit institutions and others must disclose information on their integration of sustainability risks, consideration of adverse sustainability impacts, and sustainable investment goals to end-investors. The taxonomy proposal of the package is currently being negotiated and legislators expect to reach consensus by June 2019.

To date, no similar legislation has been proposed in the U.S.

Conclusion

While some companies, regulators and investors view the topic of ESG as political or as a niche interest of a select few, the trends in passive investing, millennial investing and the related rise in ESG voluntary disclosure indicate that ESG is a business consideration that is not going away.

Certain Voluntary ESG Disclosure Reporting Frameworks

Appendix A

ESG Disclosure Framework	Date	Mandatory or Voluntary	Target/Market Cap Coverage	Methodology	Key Takeaways
1. Global Reporting Initiative (GRI) Standards	Established in 1997 and updated periodically.	Voluntary.	Businesses and organisations around the world.	GRI Standards are modular and interrelated – there are three universal Standards (GRI 101, GRI 102 and GRI 103) as well as topic specific standards (economic, environmental and social). The Standards are linked to the United Nations Sustainable Development Goals. GRI Community is a network designed to offer peer-to-peer learning and collaboration as well as access to GRI experts. ¹⁶	GRI is an independent international sustainability reporting organisation, with the Global Sustainability Standards Board (GSSB) governing standard-setting activities and the Board of Directors governing all other activities. GRI is also a Collaborating Centre of the United Nations Environment Programme.
2. Principles for Responsible Investment (PRI)	PRI was formed in April 2006.	Voluntary. Signatories are required to report by March 31 of each year to PRI, though PRI generally grants a one-year grace period for new signatories.	Institutional investors and private equity. ¹⁷	PRI signatories commit to six principles for incorporating ESG issues into investment practices. PRI implemented three minimum requirements in 2016, which, if not met within a two-year period, will lead to a private, then public delisting from PRI. PRI published an ESG private equity disclosure guidance trilogy – the first part in 2015, the second part in 2017 and the third part in 2018.	PRI is an independent organisation formed in April 2006 as the result of an invitation by UN Secretary General Kofi Annan to the then largest institutional investors to develop sustainable investment principles. ¹⁸ PRI provides confidential grades to signatories each year based on their reporting.
3. Sustainability Accounting Standards Board (SASB) Foundation	Founded in 2011.	Voluntary.	Initially U.S. public companies and foreign private issuers, but now corporations worldwide.	SASB has 77 industry standards, which identify the financially material sustainability topics and their associated metrics. Sustainability topics are organised under five sustainability dimensions: (1) environment; (2) social capital; (3) human capital; (4) business model and innovation; and (5) leadership and governance. To develop standards, SASB identified sustainability topics from a set of 26 sustainability issues, organised under the five dimensions.	SASB focuses only on financially material sustainability issues. Three former SEC commissioners and/or division heads serve on SASB's Board of Directors. Private equity firms are increasingly using SASB standards to set ESG key performance indicators (or KPIs) for their portfolio companies, in part to support their PRI reporting obligations.

ESG Disclosure Framework	Date	Mandatory or Voluntary	Target/Market Cap Coverage	Methodology	Key Takeaways
4. Task Force on Climate-Related Financial Disclosures (TCFD)	Established in December 2015 by the Financial Stability Board (FSB). TCFD released its final Recommendations on June 29, 2017. TCFD released its first Status Report on current disclosure practices on September 26, 2018.	Voluntary.	Recommendations apply to the financial sector, including banks, insurance companies, asset managers and asset owners, as well as other companies. Investors petitioned the U.S. Securities and Exchange Commission (SEC) in October 2018 for the SEC to consider TCFD standards or a starting point for an SEC ESG disclosure standard. The Climate Risk Disclosure Act, a bill introduced by Senator Elizabeth Warren in September 2018 would require every public company to disclose climate change risks similar to those outlined in the TCFD standard.	TCFD has published recommendations on climate-related financial disclosures. It recommends inclusion of such disclosures in mainstream financial filings. The core thematic areas of the recommendations are (1) governance, (2) strategy, (3) risk management and (4) metrics and targets.	Membership of the TCFD is global. TCFD also provides information on how to implement the recommendations. TCFD website includes a list of its supporters, which includes major financial institutions, corporations, central banks and governments. More than 580 organisations worldwide currently support TCFD.
5. UN Global Compact (UNGC)	UNGC was launched in 2000.	Voluntary. Companies can either become participants (a more rigorous commitment) or signatories of the UNGC.	Corporations worldwide.	Members must produce and publish an annual Communications on Progress (COP) report or face delisting. The UNGC has Ten Principles spanning four areas of the UN goals that members pledge to integrate into their business operations. Signatories and participants make annual contributions based on annual gross sales or revenue. Companies can distinguish themselves by conforming their reports to the “Advanced” classification or by choosing to be a part of the UN Global Compact 100 stock index. Certain rating agencies, including RepRisk, assess companies on factors that map onto the Ten Principles of the UNGC. ¹⁹	Resources are available to signatories and participants. To become either a participant or signatory, companies must prepare a Letter of Commitment signed by the highest executive officer.
6. UN Sustainable Development Goals (SDGs)	Set by the UN in 2015.	Voluntary. The SDGs are nonbinding on both national governments and corporations.	All public and private institutions, including governments, NGOs and private companies.	The SDGs lay out a plan of action with 17 goals grouped into five areas. The goals include 169 specific targets to be achieved by 2030. Certain rating ESG ratings map to the SDGs.	The SDGs aim to create a “world free of poverty, hunger, disease and want, where all life can thrive”. The SDGs are the successors to the UN’s 2000 Millennium Development Goals.

ESG Disclosure Framework	Date	Mandatory or Voluntary	Target/Market Cap Coverage	Methodology	Key Takeaways
7. Walker Guidelines	November 2007.	Mandatory (and voluntary). ²⁰	All private equity firms that are members of the British Private Equity & Venture Capital Association (BVCA). ²¹ Any company that fits within the definition of a “portfolio company”. ²²	The Guidelines require additional disclosure by private equity funds and their portfolio companies, if those companies meet the criteria set out in the Guidelines. In implementing the Guidelines, firms are required to “comply or explain”.	BVCA set up a group called GMG, which has the power to terminate a private equity firm’s membership in the BVCA. GMG publishes a report annually, naming firms that have been found to be noncompliant.

Certain ESG Raters

Appendix B

ESG Rater	Date	Target/Market Cap Coverage	Rating Scale	Methodology	Key Takeaways
1. Bloomberg ESG Data	Launched in 2009.	Mid Cap (>\$2B) to Large Cap (>\$10B).	Out of 100. Provides scores from third-party rating agencies (RobecoSAM, Sustainalytics, ISS QualityScore and CDP Climate Disclosure Score).	Looks at 120 ESG indicators and the rating will penalise companies for “missing data”. Scores rate companies annually based on their public disclosure of quantitative and policy-related ESG data.	Collects ESG data for over 10,000 publicly listed companies globally. Its ESG data is integrated into Bloomberg Equities and Intelligence Services.
2. Corporate Knights Global 100	Founded in 2002.	Companies that have a market cap >\$2B.	Out of 100. Ranked against other companies in their industry group.	14 key performance indicators. Companies only scored on relevant performance indicators for specific industry. Ranking is based on publicly disclosed data.	Annually publishes an index of the global 100 most sustainable corporations in the Corporate Knights magazine.
3. DowJones Sustainability Index	Launched in 1999 as the first global index to track sustainability-driven public companies based on RobecoSAM’s ESG analysis.	Corporations worldwide. Small Cap (<\$2B) to Large Cap (>\$10B).	Out of 100. Ranked against other companies in their industry group.	Industry-specific questionnaire, covering relevant economic, environmental and social factors. Updated annually.	Broken down into DJSI World (the top 10% of the largest 25,000 companies across 60 industries in S&P Global BMI), DJSI Regions (North America, Europe and Asia Pacific) and DJSI Country (United States).
4. Global Real Estate Sustainability Benchmark (GRESB)	Founded in 2009.	Real estate and infrastructure portfolios and assets worldwide. GRESB Investor Members represent over 18 trillion in institutional capital.	GRESB Score is 1–100 and is further broken down by ESG factor (also scored 1–100). Rankings against peers are also provided.	GRESB assesses and benchmarks the ESG performance based on three pillars: (1) assessment; (2) technology; and (3) stakeholders. GRESB has assessments catered to real estate and infrastructure, both of which have a resilience module and evaluation of public disclosure. Based on assessment, GRESB provides an overall GRESB Score for each participant as well as peer group comparisons that take into account country, regional, sectoral and investment-type variations.	GRESB assessments are aligned with GRI and PRI.

ESG Rater	Date	Target/Market Cap Coverage	Rating Scale	Methodology	Key Takeaways
5. <i>ISS</i>	ISS launched its ESG ratings in 2018.	Organisations viewed as being exposed to E&S risks. Covers more than 5,000 companies worldwide.	ISS E&S QualityScore: 1–10. Climetrics Score: 1–5 green leaves. Bond Rating: A+ to D-.	ISS offers research, data and rating services for companies, countries and green bonds broken down into three product-lines: 1. ISS-oekom: Provides corporate and country ESG research and ratings. ■ Ratings include – Carbon Risk Rating, Corporate Rating and Country Rating. 2. ISS-climate: Provides analytics, ratings and advisory services on climate-related risks. 3. ISS-ethix: Provides research, screening and analysis on SRI topics. 4. ISS provides a Governance QualityScore as well as an E&S Disclosure Quality Score, which use a numeric, decile-based score (1-best, 10-worst) based on company disclosures against industry peers. The scores measure the depth and extent of disclosure, including risk understanding, preparedness, and risk mitigation.	Provides a suite of ESG solutions for institutional investors. Ratings place a sector-specific focus on the materiality of non-financial information. E&S Disclosure QualityScore methodology focuses on material aspects of disclosure practices, including GRI, SASB and TCFD. ISS notes that its E&S Disclosure QualityScore assists investors in aligning business models with the UN SDGS.
6. <i>MSCI ESG</i>	Launched in 2010.	Corporations as well as equity and fixed income securities globally. Small Cap (<\$2B) to Large Cap (>\$10B).	AAA to CCC.	Looks at 37 key ESG issues. Data collected from publicly available sources. Companies monitored on an ongoing basis. Annual in-depth review.	One of the largest independent providers of ESG ratings.
7. <i>RepRisk</i>	Founded in 1998.	Businesses and organisations worldwide. Small Cap (<\$2B) to Large Cap (>\$10B).	AAA to D.	Looks at 28 ESG issues, which map onto the Ten Principles of the UN Global Compact. Also looks into “Hot Topics”. Updated daily.	Provides ESG reports for private and public companies, NGOs, governmental bodies and projects.
8. <i>Sustainalytics Company ESG Scores</i>	2008.	Corporations worldwide. Small Cap (<\$2B) to Large Cap (>\$10B).	Out of 100.	Looks at industry-specific ESG indicators, covers at least 70 indicators in each industry. Also looks at systems to manage ESG risks and disclosure of ESG issues and performance.	Assessment focuses on ESG issues presenting the most material risks to company performance.

Endnotes

1. Bank of America Corporation, *2016 Environmental, Social & Governance Report*.
2. Lucian A. Bebchuk and Scott Hirst, Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy (June 1, 2018). European Corporate Governance Institute (ECGI) – Law Working Paper No. 433/2018; Forthcoming, *Columbia Law Review*, Vol. 119 (2019); European Corporate Governance Institute (ECGI) – Law Working Paper No. 433/2018; Harvard Law School John M. Olin Center Discussion Paper No. 986.
3. This article focuses on the Big Three, as BlackRock, SSGA and Vanguard heavily dominate the index fund sector. For example, see BlackRock, *BlackRock Global ETP Landscape* (December 2016), which reports that as of December 2016, BlackRock had 36.9% of the exchange-traded products market, Vanguard had 18.5% and SSGA had 15.4%. Additionally each of the Big Three fund families consists predominantly of index funds – as of June 2017, the proportion of assets invested in index funds was 79% for SSGA, 73% for Vanguard and 66% for BlackRock (see: Hortense Bioy, Alex Bryan, Jackie Choy, Jose Garciz-Zarate & Ben Johnson, “Passive Fund Providers Take an Active Approach to Investment Stewardship” (December 2017)).
4. John C. Bogle, “Bogle Sounds a Warning on Index Funds”, *The Wall Street Journal* (November 29, 2018).
5. This article focuses on the Big Three asset managers’ views on E&S given their views on governance are fairly well-established.
6. Lucian A. Bebchuk and Scott Hirst, “Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy” *Harvard Law School Forum on Corporate Governance and Financial Regulation* (November 28, 2018).
7. Barbara Novick, Vice Chariman, “Building Sustainable Markets: What Is Needed For A Transformation to A Sustainable Market Place”, Remarks at the World Economic Forum, September 24, 2018.
8. Nearly all S&P 500 companies provide some sustainability reporting, according to the Sustainable Investment Institute’s “State of Integrated and Sustainability Reporting 2018”. For more information, see Davis Polk’s blog: <https://www.briefinggovernance.com/2018/12/nearly-all-sp-500-companies-provide-sustainability-reporting/>.
9. Shullman Research Center, “Millionaires Have Their Own Generation Gap” (2014).
10. Comments made by MSCI ESG Research Executive Director Michael Salvatico during a webinar on September 5, 2018 title “Making Financial Sense with ESG Investing”.
11. 2018 ETF Investor Study by Charles Schwab (June 2018). This 2018 study is an annual online survey of 1,500 individual investors between the ages of 25–75 with at least \$25,000 in investable assets who have purchased ETFs in the past two years of the study. Technology may also be a factor in fueling ETF growth – with automated investing platforms or portfolio-building tools designed for self-directs investors to select ETFs.
12. Greg King, “Four Merging HNWI Expectations Wealth Managers Must Meet”, *FactSet* (July 19, 2016).
13. An ETF is an investment fund operating on the stock exchange holding assets such as stocks, bonds or commodities which track a specific index; in other words, it is like a managed fund, but trades on an exchange like a share. They are examples of simple passive index-tracking investments with low fees. They are largely similar in nature and both are classified under the heading of indexing as they both involve making an investment in an underlying benchmark index.
14. Professor George Serafeim of Harvard University is widely published and was recently recognised in Barron’s June 2018 article “The 20 Most Influential People in ESG Investing”.
15. The European Parliament approval is one of several steps before the proposal becomes law. The timing of these steps is currently unknown.
16. There are currently 438 GRI Community members. Access the most up to date list of members on <https://www.globalreporting.org/Pages/Community-Members.aspx>.
17. A list of all PRI signatories can be found on <https://www.unpri.org/signatories/signatory-directory>.
18. PRI has the support of the UN, but is not a UN organisation and is not associated with any government, and therefore has no governmental or quasi-governmental authority or coercive power. However, PRI works in partnership with the UN Global Compact and the UN Environment Programme Finance Initiative. The UN Global Compact is a voluntary policy initiative pursuant to which companies, cities, NGOs and academic institutions pledge to implement sustainability principles and to take steps to advance the UN’s goals in areas of human rights, labor, environment and anti-corruption. The UN Environment Programme Finance Initiative is an initiative in which financial institutions adhere to a statement of commitment recognising the role of the financial services sector to a sustainable economy. The different memberships of these three organisations complement one another, and together approach the issue of a sustainable economy from different angles based on the roles their respective members play in the global economy.
19. Sustainalytics assesses participation in the UN Global Compact 100 on a yearly basis.
20. Some firms not required to comply with the Guidelines have nonetheless decided to voluntarily adopt them.
21. For the purposes of the Guidelines, private equity firms are defined as: “a firm authorized by the FCA that is managing or advising funds that either own or control one or more UK companies or have a designated capability to engage in such investment activity in the future where the company or companies are covered by the enhanced reporting guidelines for portfolio companies”.
22. For the purposes of the Guidelines, portfolio firms are defined as: “a UK Company either a) acquired by one or more private equity firms in a public to private transaction where the market capitalization together with the premium for acquisition of control was in excess of £210 million and more than 50% of revenues were generated in the UK or UK employees totaled in excess of 1,000 full-time equivalents or b) acquired by one or more private equity firms in a secondary or other non-market transaction where enterprise value at the time of the transaction is in excess of £350 million and more than 50% of revenues were generated in the UK or UK employees totaled in excess of 1,000 full-time equivalents”.

Acknowledgment

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Between 2003 and 2005 he served at the U.S. Securities and Exchange Commission, ultimately as Managing Executive for Policy under Chairman William H. Donaldson, where he assisted in directing the Commission's policy-making and enforcement activities.

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