ESG: Key Trends in 2020 and Expectations for 2021 (Part III of III)

by Marc S. Gerber, Scott C. Hopkins, Simon Toms, Helena J. Derbyshire, Louise Batty, Adam M. Howard, Greg P. Norman, Damian R. Babic, Zoe Q. Cooper Sutton, Kathryn Gamble, Sym Hunt, Caroline S. Kim, Abigail B. Reeves, Patrick Tsitsaros, and Eleanor F. Williams

This is Part III of a three-part post. For Part I, looking back at important trends and topics in 2020, please click here. For Part II, discussing the first 5 of 10 key trends expected in 2021, please click here.

Below are the final 5 of 10 key environmental, social and governance (ESG) trends and topics that we expect to be prominent in 2021, some of which are continuing trends from 2020, while others may emerge in response to the events of 2020.

6. Incoming legislative changes[1]

The Sustainable Finance Disclosure Regulation (SFDR) will apply starting 10 March 2021, in European Economic Area (EEA) member states. Following Brexit, the SFDR will not be implemented in the U.K.; however, financial market participants in the U.K. that conduct marketing or have other operations in the EEA may have to comply with the SFDR in relation to such marketing or operations. In the meantime, the U.K. government is continuing to work towards its own ESG regulatory framework. The chancellor has made clear a desire to make London the "green finance capital of the world" and we expect to see greater regulatory action to achieve this goal over the course of 2021. While the form of the U.K. legislation remains unclear, many U.K. firms will hope for some alignment with the EU regulations in order to avoid additional compliance complications.

7. COP26 and the private sector's response[2]

The 2021 United Nations Climate Change Conference (COP26) will be held in Glasgow after having been delayed due to COVID-19. Although the public is demanding fast and effective action from governments, the UN climate change conferences so far have generated promises that are not being followed by action to cut emissions in order to meet the Paris Agreement climate goals. After the events of 2020, the public has expressed a hope that COP26 will see a shift in approach from world leaders and that governments will seize the opportunity to implement decisive change.

It is not only the public sector that will be closely watching the summit; companies and businesses will also be paying close attention. We may see a “bottom-up” shift, with the private sector driving action to combat climate change. We have already seen the banking sector in particular pledging to take greater action to protect climate stability in 2021. British banks have announced that they will launch a range of climate-related products in 2021 and that they intend to raise their lending standards in response to criticism that they have been slow to act on ESG policies. Deutsche Bank plans to take further action and, starting in 2021, intends to link its top executives’ pay to the lender’s achievement of its sustainability goals, which will be determined by measuring the volume of sustainable financing and investment that complies with ESG criteria and how the bank is ranked by rating agencies. Deutsche Bank has set up a sustainability committee and is aiming to reach €200 billion in standard sustainable investment by 2025.

Despite such strides, a cohesive public-private initiative is necessary, with the banks underscoring that both the U.K. and Europe require the correct infrastructure and environment to enable companies to take the steps necessary to meet their climate goals. How this relationship plays out through 2021 will determine the success and speed with which countries will meet their ESG goals.

8. Demand for harmonization of ESG standards[3]

A growing desire for clearer ESG standards and a harmonization into a single consistent framework can be seen across a range of sectors and industries.

- The mission to create a cohesive global ESG accounting standard against which to measure performance is still ongoing, with different initiatives led by the Sustainability Accounting Standards Board and the International Financial Reporting Standards foundation. Projected timelines indicate that an overarching standard will be released (or, at the very least, close to agreement) in 2021.
- The International Organization of Securities Commissions is working to identify “commonalities” among the vast range of sustainability disclosure standards from across the world in order to make it easier to compare information. The organisation aims to complete its initial work and seek industry input by October 2021.
- In the U.K., an investigation by the Competition and Markets Authority (CMA) into the meaning of “eco-friendly” is underway due to the flexible use of the term in marketing materials. Although the CMA has said it will focus on U.K. marketing practices, the agency also made clear that it would take a leading role in researching green claims in a global context. This could have the knock-on effect where companies found to be “greenwashing” may become open to class actions under the U.K.’s collective actions regime. The U.K. Supreme Court’s judgement in Merricks v. Mastercard in December 2020 breathed life into this regime, setting a low bar

for obtaining certification (a prerequisite to the class action proceeding to a full trial).[4] Companies suspected to be violating green protocols may therefore be exposed both to regulatory scrutiny from the CMA and claims for damages from disgruntled customers.

9. ESG activism[5]

The rise of ESG activism over recent years promises to continue in 2021, with the added pressure of investors ready to scrutinize the behaviour of companies throughout the pandemic. The European small-cap and mid-cap markets are thought to be full of companies whose value can be significantly increased with further attention to ESG factors, offering a wealth of opportunity for activists in the coming months.

In particular, investors are likely to be interested in social factors, including the treatment of employees during the pandemic and supply chain transparency. We have already witnessed pressure on organisations that paid out generous dividends and bonuses to repay any money received through job retention schemes, and boards should expect greater scrutiny of whether their appointments of new directors and executives better reflects the societies within which their companies operate.

Also, investors expect increased accountability from companies. This trend was already emerging in 2020, with, for example, the French oil and gas major Total facing a resolution demanding that the company set emission reduction targets. Although the proposal was defeated, 17% of shareholders voted in favour of the resolution, which reflects shareholders' growing interest in voting on climate transition action plans. This interest has been the focus of the Say on Climate initiative, established by the Children's Investment Fund Foundation. Mark Carney, the UN's climate envoy and the former governor of the Bank of England, has backed the initiative and in November 2020 encouraged investors to force companies to submit their climate change strategies to annual shareholder votes. He argued that this could improve oversight of pledges to slash greenhouse gas emissions. In December, Unilever announced that it intends to offer shareholders a regular vote on its plans to tackle climate change, becoming the world's largest company to do so and the first FTSE 100 company to offer shareholders a recurrent say on its efforts to address such challenges. If this new approach yields performance gains for the company in 2021, others may be inspired to follow its lead. Additionally, in December 2020, Moody's Corporation announced its affirmation of the principles contained in the Say on Climate campaign, as well as a shareholder vote on its climate change effects, at its 2021 annual meeting.

10. Biden administration ESG policies

The Biden administration represents a significant shift in viewpoints from the previous administration with respect to climate change and DEI matters, as reflected in some of the executive orders signed by President Joe Biden during his first days in office. Still, the process for any new rulemaking by the U.S. Securities and Exchange Commission mandating ESG disclosures easily could extend into late 2021 or later, with new rules becoming effective in 2022. The change in tone sets the stage for continued private sector efforts, led by investors and asset managers, to call on U.S. public companies to (i) expand and enhance their ESG disclosures until such time as mandatory disclosures arise and (ii) continue their efforts to address climate change and DEI challenges. Also, the change in administration should remove any cloud over whether pension funds and other investors can consider ESG matters as part of their investment strategy and take these matters into consideration in their annual meeting voting decisions. These votes, in many cases in the second quarter of 2021, may spur additional corporate action over the second half of the year.

For Part I of this post, please click here. For Part II, please click here.

Footnotes

[1] *Financial Times*, "Pitfalls, opportunities and people to watch in 2021" (3 January 2021).

[2] *Financial Times*, "UK banks to launch wave of green products" (2 January 2021); *Financial Times*, "How to stay ahead of the ESG curve in 2021" (30 December 2020); *Financial Times*, "Climate efforts have entered a tricky new phase" (30 December 2020); Bloomberg, "Deutsche Bank to Link Executive Pay to Sustainability Goal" (6 December 2020).

[3] *Financial Times*, "How to stay ahead of the ESG curve in 2021" (30 December 2020); Gov.uk — "CMA to examine if 'eco-friendly' claims are misleading" (2 November 2020).

[4] Skadden client alert "*Merricks v. Mastercard* — UK Supreme Court Clarifies Low Bar for Class Action Certification" (7 January 2021).

[5] *Corporate Counsel*, "Investors are watching ESG — in 2021, they look to measure it" (4 January 2021); *Financial Times*, "How to stay ahead of the ESG curve in 2021" (30 December 2020); Activist Insight, "In depth: The future of activism feels like ESG" (16 December 2020); *Financial Times*, "Unilever to put its plans to fight climate change to shareholder votes" (14 December 2020).

Marc S. Gerber, Scott C. Hopkins, and **Simon Toms** are partners, **Helena J. Derbyshire** is of counsel, **Louise Batty, Adam M. Howard,** and **Greg P. Norman** are counsel, **Damian R. Babic, Zoe Q. Cooper Sutton, Sym Hunt, Caroline S. Kim, Abigail B. Reeves, Patrick Tsitsaros,** and

Eleanor F. Williams are associates, and **Kathryn Gamble** is a trainee solicitor, at Skadden, Arps, Slate, Meagher, and Flom LLP.

Disclaimer

This entry was posted in Corporate Governance, ESG, Financial Institutions and tagged Abigail B. Reeves, Adam M. Howard, Caroline S. Kim, Damian R. Babic, Eleanor F. Williams, Greg P. Norman, Helena J. Derbyshire, Kathryn Gamble, Louise Batty, Marc S. Gerber, Patrick Tsitsaros, Scott C. Hopkins, Simon Toms, Sym Hunt, Zoe Q. Cooper Sutton on February 16, 2021 [https://wp.nyu.edu/compliance_enforcement/2021/02/16/esg-key-trends-in-2020-and-expectations-for-2021-part-iii-of-iii/] by Jason Kelly.