# Second Panel Discussion - Symposium: Who Makes ESG? Understanding Stakeholders in the ESG Debate

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## PANEL TWO†

DIANNA LAM: The second panel will discuss Stakeholders as the driving force of ESG. Again, the last 10 minutes are reserved for the audience. Please type your questions in the chat box. I will now turn it over to the committee members who will engage in this dialogue with our panelists Carmen Lu, Lisa Fairfax, and David Webber.

AJ HARRIS: Welcome, everyone. To get started on today's panel, can we talk about some of the ways to quantifiably measure and communicate the impact of an organization's ESG efforts on its stakeholder satisfaction and retention?

MS. LU: AJ, I think there are many ways to measure, quantify and communicate an organization's ESG efforts. One of the most common methods that is currently done is to engage in ESG reporting through stand-alone ESG reports. There are a number of major frameworks, for example, SASB;[1] GRI, the Global Reporting Initiative;[2] and TCFD,[3] which focuses on climate-related impacts. These frameworks all provide various metrics that allow companies to demonstrate how they are performing on ESG.

Another pathway for communicating ESG efforts, and which many companies are adopting, is providing disclosure on their website. On a growing number of company websites, you will see information on the company's ESG goals, such as goals relating to employees or relating to the treatment of suppliers and engagement with local communities. In addition, we are also seeing active engagement between companies and their key investors discussing critical ESG issues such as diversity and inclusion, adaptation to climate change risks, and so forth.

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† Panel 2 was moderated by symposium editor Dianna Lam and symposium committee members AJ Harris, Nicole Mecca, Avery Golombek, Taylor Wells, and Marie Bogenez.

1. SUSTAINABILITY ACCT. STANDARDS BD., https://www.sasb.org [https://perma.cc/F899-XQWV] (last visited Apr. 21, 2021).

2. GLOB. REPORTING INITIATIVE, https://www.globalreporting.org [https://perma.cc/B7QN-C5ZE] (last visited Apr. 21, 2021).

3. TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, https://www.fsb-tcfd.org [https://perma.cc/JFG7-W323] (last visited Apr. 21, 2021).

MS. FAIRFAX: I will just weigh in, Carmen. First, I want to say thank you so much for having me here today. It has been a very engaging conversation so far, and I am so happy to be a part of this discourse.

As Carmen suggests, there are all kinds of ways in which companies communicate their efforts. I think the last statistic I saw said something like 85% or 86% of S&P 500 companies have some type of sustainability report, and I think that statistic was from two years ago—they do it voluntarily, often on their website and in other forums.[4] I do think that one of the interesting trends that is a positive one is the effort to try to push that communication into the proxy statement. I think that one of the concerns about the voluntary reporting and the reporting in different locations is there is not as much board oversight with respect to what is going in those documents. Maybe that could have an impact on whether and to what extent boards prioritize the goals and the targets that are there. So, I do think that in terms of thinking about effective communication, one piece of it is trying to push that information into the proxy statement, especially when it is in the proxy statement that there is an overt recognition that investors also want to be communicated with about that type of information. It is not just something going out to other stakeholders.

I will also say that Carmen is right. There is so much information. One of the concerns is that it is too much, and that we are not being thoughtful enough about the nature of the information that is being produced and making sure that it is useful because, at times, it is overinclusive, and at other times, it is underinclusive. Certainly, there have been a lot of complaints about the lack of uniformity.

We know there are all kinds of ways in which we saw this on the first panel, what people mean by the "E," the "S," and the "G." How are they measuring it? What does it mean for their company? Sometimes that is difficult to discern at a particular company because the lack of uniformity makes it difficult to make comparisons across companies and across industries. When we think about effective communication, it is also about trying to have some type of understanding about the

4. GOVERNANCE & ACCOUNTABILITY INST., FLASH REPORT: 86% OF S&P 500 INDEX COMPANIES PUBLISH SUSTAINABILITY/RESPONSIBILITY REPORTS IN 2018 (May 16, 2019), https://www.ga-institute.com/press-releases/article/flash-report-86-of-sp-500-indexR-companies-publish-sustainability-responsibility-reports-in-20.html [https://perma.cc/VB34-7VF7].

appropriate information and how we can at least find some uniformity with regard to that information.

This is my plug for saying that while the market has been a good source of driving information, in order to get really effective disclosure, it is probably going to require something more, so that the disclosure can be useful across companies and industries.

MR. WEBBER: I agree. Standardization is obviously critically important to developments like SASB,[5] and others are moving things in that direction. But of course, it is always the classic problem of making the apples to apples comparisons and needing to be able to do that. The only other point I would emphasize—and I do not have much to add to what Carmen and Lisa just said—but picking up on Carmen's point about the shareholder engagement piece: look at what BlackRock and State Street have done in terms of announcing policies like gender diversity targeting, increased gender diversity in corporate boards, voting along those lines, engaging with corporate managers on those subjects. Obviously, they are big voices and they wield significant market carrots and sticks, and certain investors do indeed have a significant role to play in driving these changes inside companies. I think many other institutions follow along or take their cues from that. It will be interesting to see what new issues those institutions pick up in the coming years, and how particular issues get onto their agendas or not, because that in and of itself has a significant role in the future development of ESG in the marketplace.

MS. LU: On Lisa and David's point about the lack of standardization, it has definitely been a key source of concern for investors and various other stakeholders. The often-asked question is: How do you measure companies' performances using metrics that are not directly comparable? As a result, we have seen efforts to reach agreed-upon disclosure metrics and standards, notably from the World Economic Forum, whose recently released reporting framework aims to standardize the ESG reporting process and draws from existing frameworks, such as GRI and SASB.

It will be interesting to see what happens in the next couple of months or so, and whether companies and investors coalesce around one uniform framework. It will also be interesting to see how the disclosures are used by investors, stakeholders, various third-party ratings agencies, and proxy advisory services. How disclosures are used will in turn

5. SUSTAINABILITY ACCT. STANDARDS BD., *supra* note 1.

impact how companies choose to report their ESG performance in the long term.

MS. FAIRFAX: This question about shareholders and how they are engaging around ESG is really interesting, because they are helping to fill in the bubble as to what counts as "E," what counts as "S," and what counts as "G." So there is a push around diversity, for example, that obviously has been something that has been on many stakeholders' radars and companies' radars, but then you start seeing larger shareholders pushing forward. All of a sudden, the bubble gets filled in a little darker as we think about normalizing the notion that is part of the ESG framework. It is very interesting to think about how those issues get shaped.

MR. WEBBER: Absolutely, if you look at the lifecycle on environmental issues and environmental shareholder proposals. In the beginning, they were brought by sort of smallish, some would say fringe, ESG investors when ESG was still considered a quixotic thing, a tiny market niche. Then you had other institutions, some of the big public pension funds and others started to pick up on it and that raised the profile of it. It also raised the kind of vote totals and shareholder proposals. We then hit 2017, and for the first time we started to see some of the biggest players in the markets vote in favor of those proposals; notably, proposals that they did not bring themselves, but they did start to vote in favor of them a little bit. We have seen a little bit more of that since and so that is one kind of interesting life cycle of how you watch an issue like this move from the periphery into the core and how it gets there. That is one pattern of how this stuff evolves, and standardization has a role to play, too, but keep an eye on that particular channel through which these issues become central.

AJ HARRIS: If I can pick up on something that David mentioned: board diversity. Lisa, you have been writing about this for over 10 years now. Could we get your thoughts on what you are seeing in today's environment, and how it relates to the work that you have done?

MS. FAIRFAX: Yes, I have written in this area. It is a kind of glass half-empty, glass half-full situation happening. I will wear my "glass half-full optimism hat" first. There is a lot of momentum. There is a push by some of these major players. The big three—Vanguard, State Street, and BlackRock—have all kind of made diversity one of the chief considerations that they are engaging around and that they will vote around, and that has really increased the momentum, particularly with regard to gender diversity. Last year, for the first time in history, every single company in the S&P 500 had at least one woman on its board.[6] Last year we have seen record numbers of new directors who are women and more than any other group of people who are new directors. So, there has just been this huge momentum behind diversity efforts. But I have got to say, even with the glass half-full, I am much more pessimistic about Blacks and people of color than I am about women.

My work over 10 years has suggested that there has not really been much progress in that area, and even though it is the case that diverse directors are making up some ground with larger percentages of new directors, it is also the case that 2019 studies show that Black directors account for only 1% of the total board seats at S&P 500 companies.[7] A full 37% of those companies had no Black directors on their board at all, and that is concerning, especially because throughout the time that I have been writing about this, there have been professions that really think this is important. Most studies say that social movements really have not moved the needle that much, so I think there is cause for concern there.

I will say two things about why I think there is real cause for concern. One is that there continues to be this pattern where Black directors and directors of color are "overboarded," or at least holding multiple board seats in ways that white directors do not. Even when you think about the numbers in percentages, it is overcounting because they reflect a small subset of people. I saw one CNN article about a Black person who had held 14 board seats through his lifetime,[8] and that is reflective of the insular nature of the board search process. The vast majority of people get on boards based on the people that they know. Increasing Black representation poses challenges that adding white

6. Jeanne Sahadi, *For the First Time, There's a Woman on Every S&P 500 Board. But They're Still in the Minority*, CNN BUS. (Dec. 17, 2020, 3:40 PM), https://www.cnn.com/2020/12/16/success/women-sp-500-board-directors/index.html [https://perma.cc/5C9U-M8NK].

7. DAVID F. LARCKER & BRIAN TAYAN, DIVERSITY IN THE C-SUITE: THE DISMAL STATE OF DIVERSITY AMONG FORTUNE 100 SENIOR EXECUTIVES, ROCK CTR. FOR CORP. GOVERNANCE AT STAN. U. No. CGRP-82 (2020), https://ssrn.com/abstract=3587498 [https://perma.cc/QW77-Q4RL].

8. Sara Ashley O'Brien, *He's Served on 14 Boards. Now He Wants Companies to Find Other Black Candidates*, CNN BUS. (July 24, 2020, 9:35 AM), https://www.cnn.com/2020/07/24/tech/barry-lawson-williams-black-board-representation/index.html [https://perma.cc/XKD4-YRLF].

women may not.[9] Most of the women elected to the boards are white and selected because they had professional connections with the white men who still dominate boardrooms.[10]

Similar networks between white corporate leaders and potential Black directors are less well-developed. In an interview, a prominent board member mentioned that in white America, she does not know that everyone even knows a Black person. What does that mean for this process that relies so heavily on social and informal networks? It means that we are in this loop of doing the same thing over and over again and expecting different results. Somebody told me this was insanity, but I do not think it is.

MS. LU: Just picking up on Lisa's comment regarding "overboarding" of individual Black directors, one of the big issues that companies and investors have started to realize must be tackled is the pipeline problem. One contributing factor to having overboarded women directors or overboarded Black directors is the absence of a large number of Black, of color, and female candidates moving through the ranks into senior management that prepares individuals to have the right skill set and experiences that make them ideal director candidates. As a result, you have certain individuals who are qualified, but find themselves being asked to serve on multiple boards and then finding themselves stretched thin as a result. This problem is going to continue to compound as investors and stakeholders continue to call for greater gender diversity and racial diversity on boards unless greater attention is being paid to the need to develop a credible pathway for diverse individuals to rise through the corporate ranks. I think one of the issues that investors and other stakeholders are realizing is that it is not simply enough to have board diversity. It is also important that there is workforce diversity, and that diversity also occurs in middle management and throughout the entire company. Whereas in the past, a lot of diversity and inclusion initiatives were siloed in one particular part of the corporate structure, people are now realizing that perhaps it is important to combine these efforts with the HR function in order to help create diverse boards in an organic manner over the long term.

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9. Jeff Green, *After Adding More Women to Boards, Companies Pivot to Race*, BLOOMBERG QUINT (Aug. 19, 2020, 5:01 PM), https://www.bloombergquint.com/onweb/companies-seek-more-black-directors-after-adding-women [https://perma.cc/2B2J-3R3X].

10. *Id.*

MR. WEBBER: So, if this issue is going to move from glass half-empty to glass half-full, I think that what we have to keep an eye out for is: Can the question of racial diversity and corporate boards follow the same path that was followed with environmental issues, and more recently with gender diversity issues?

Some investors are raising it and pushing it into the center of the agenda. It is not going to get there on its own, just like it did not get there on its own with the two issues that I just mentioned. Is there a cause for optimism? I do not know, but I would just point to a couple things. First, last week the Business Roundtable issued a statement and a set of objectives, specifically focusing on issues of race and inequality in the United States.[11] It did not get as much attention as last year's departure from shareholder privacy, but it is out there.

A number of companies are indeed facing a lot of controversy regarding the way they handle these issues. Companies that have a workforce that is less than 5% Black have now committed to much higher hiring targets.[12] The Black Lives Matter marches this summer pursued high-profile ways of raising this issue on social media and targeted companies for doing virtue signaling, but not actually taking any action on these issues. Many companies have announced increased hiring targets by race, so there is so much yet to be done and I am not asserting that this is going to happen tomorrow. I would like to believe that it is not just rhetoric here and that some real numbers have been targeted, but it remains to be seen. California recently adopted some targets for corporate boards along not just gender diversity, but also taking into account race and ethnicity and other criteria.[13]

11. *Business Roundtable Chairman Doug McMillon Establishes Special Committee to Advance Racial Equity and Justice*, BUS. ROUNDTABLE (June 5, 2020), https://www.businessroundtable.org/business-roundtable-chairman-doug-mcmillon-establishes-special-committee-to-advance-racial-equity-and-justice [https://perma.cc/8AMC-73WH].

12. *See, e.g.*, Julie Creswell & Kevin Draper, *Adidas Pledges to Increase Diversity. Some Employees Want More*, N.Y. TIMES (Aug. 14, 2020), https://www.nytimes.com/2020/06/10/business/adidas-black-employees-discrimination.html [https://perma.cc/Y629-CS4T].

13. Anne Steele, *California Lawmakers Back Mandate for Racial Diversity on Corporate Boards*, WALL ST. J. (Aug. 31, 2020), https://www.wsj.com/articles/california-lawmakers-mandate-racial-diversity-on-corporate-boards-11598915372 [https://perma.cc/WX77-D43R].

NICOLE MECCA: I agree, and I think this is a great time to shift to a discussion of the workplace. What might signal that a company is simply virtue signaling on an ethical issue like D&I, as opposed to generating and maintaining organizational and cultural change?

MS. FAIRFAX: I think it is really important when we talk about the diversity issue. Just to address the pipeline thing that Carmen has raised—I love the way that she talked about it because she talked about the changes that needed to occur in the workforce. I actually would go a step farther and say that the so-called "pipeline problem" is a problem created by the corporations themselves, who are not doing enough to effectively hire, promote, and retain people of color in diverse workforces.

Every study, including the most recent one by the Harvard Business Review, basically says what we all know.[14] There continues to be discrimination in hiring, promotion in the workforce, etc. It is problematic for companies to suggest that there is a problem and not to acknowledge that they are the problem, that they are the ones clogging the pipeline, if you will, in this area. I also think it is super important to keep in mind that the pipeline becomes self-fulfilling because too often companies do not look beyond title and do not focus enough on skill sets, despite the fact that empirical evidence suggests that boards that rely too much on CEOs actually do not perform well.[15] That is not a good proxy for good board performance—and yet to suggest that this is the reason why we cannot find qualified people or why we cannot find enough does not delve deeply enough into who gets deemed qualified for these purposes. For the most part, boards can appoint anybody they want to their board. There is no corporate law or securities law, other than if you need a financial expert, that says who has to be on your board. That is why there are some boards that have family members, insiders, friends of friends, etc. So, I think we need to be mindful of how people define the problem. I also think it is important to interrogate that explanation or rather what I call "that excuse" to determine what it really means, and how it may be getting in the way of real progress.

14. *See, e.g.*, Lincoln Quillian et al., *Hiring Discrimination Against Black Americans Hasn't Declined in 25 Years*, HARV. BUS. REV. (Oct. 11, 2017), https://hbr.org/2017/10/hiring-discrimination-against-black-americans-hasnt-declined-in-25-years [https://perma.cc/6V5P-64T8].

15. Jeffery Sonnenfeld et al., *What CEOs Really Think of Their Boards*, HARV. BUS. REV. (Apr. 2013), https://hbr.org/2013/04/what-ceos-really-think-of-their-boards [https://perma.cc/X82G-LPM2].

NICOLE MECCA: We can also shift to how employees can hold their employers accountable to providing fair employment practices such as fair benefits compensation and quality management.

MS. LU: Thanks, Nicole. Just circling quickly back to your first question about how you can tell when companies are virtue signaling as opposed to ensuring real change is happening in their workforce—I think this is where disclosure comes into play. A lot of the information that would be useful for holding companies accountable is not currently required to be made public, but would be disclosed under the ESG disclosure frameworks. Examples of such information include information on gender diversity, employee retention rate, and how employees are being promoted through the ranks. All this data is going to be very helpful, especially when collected over the long term, for identifying which companies are truly concerned about creating real change and promoting D&I in their workforce. I think, in the long term, what disclosure also allows is for employees, as well as other stakeholders, to actively engage with companies to ensure their accountability.

We have already started to see the first examples of investor push for fairly aggressive disclosures. For example, over the summer, the New York City Comptroller and a couple of pension funds asked companies to disclose actual EEO-1 data.[16] We also have ISS asking for information from company boards about their gender and ethnicity makeup.[17] So as long as investors continue to push for this data to become public, I think we are going to see greater strides. At least we will be better equipped to identify those companies who are paying lip service to diversity and those who are outperformers.

MR. WEBBER: I will just add that first of all, the New York City pension funds have been at the forefront of these issues for decades, engaging the "G" really seriously about five or six years ago, and

16. SCOTT M. STRINGER, NEW YORK CITY COMPTROLLER, *Comptroller Stringer, NYC Funds Escalate Campaign Calling on Major Companies to Publicly Disclose Workforce Demographics* (Dec. 10, 2020), https://comptroller.nyc.gov/newsroom/comptroller-stringer-nyc-funds-escalate-campaign-calling-on-major-companies-to-publicly-disclose-workforce-demographics [https://perma.cc/FEF2-LY5W].

17. *ISS Policy Changes for 2021: Increased Expectations for Diversity and Accountability*, FENWICK & WEST LLP (2020), https://www.fenwick.com/insights/publications/iss-policy-changes-for-2021-increased-expectations-for-diversity-and-accountability [https://perma.cc/CG3A-GBP2].

pushing for proxy access after it was struck down by the D.C. Circuit Court of Appeals, pushing environmental issues.[18]

Carmen just made the point on D&I issues, and I think this also just leads into the discussion about human capital management and the SEC's recent action there.[19] I would have liked to see them go further, but it was a step, I think, in the right direction. I think it raises a really important point that Lisa touched on very briefly earlier, but it is really part of the problem—the classic cliché, "you manage what you measure." There has been so much historical emphasis on the C-suite, on executive compensation, on executive performance, on the backgrounds of executives and board members, and so on and so forth.

The securities laws emphasize disclosure of that kind of performance and compensation. Lisa suggested earlier, in some ways, the problem with that particular kind of emphasis is it reinforces a misleading narrative for investors, and a misleading political narrative—perhaps that is what really matters. "It is the five people at the top. We will tell you everything you need to know about corporate performance." And that is just badly misleading. I think it is an artifact of the sort of ideology of the CEO as superstar that we had back from the '80s and '90s, the Jack Welch's and the "Chainsaw Al" Dunlaps, people like that, before we really had this sharper move towards shareholder activism.

I think that the human capital management idea is going to allow investors to peer much more deeply into corporate practices along all of these dimensions. For example: D&I, but also everything that you mentioned in your question too about benefits—compensation, training, how you build effective workforces that do a good job, are committed to the work, and are also rewarded for that work. So, I think there is a growing realization and some movement in the right direction. We need to be able to look more deeply. It is one thing to target board diversity along a number of dimensions, but absolutely if we are going to make these kinds of needed changes, we have to be able to peer more deeply into the organization.

MS. FAIRFAX: There is almost nothing that I can add. You have both said it right. This is what we mean by human capital management

18. *See generally* Bus. Roundtable v. S.E.C., 647 F.3d 1144 (D.C. Cir. 2011).

19. *See* Press Release, SEC. & EXCH. COMM'N, SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K (Aug. 26, 2020), [hereinafter *Regulation S-K amendments*], https://www.sec.gov/news/press-release/2020-192 [https://perma.cc/3FZM-VUSZ].

and why it is so important. You have all these studies talking about the importance of intangible assets and their growth as a percentage of a company's market value.[20] There is growing concern that we do not know enough about how companies pay attention to these issues. What are they doing about their D&I practices? What are they doing about their labor pool and how stable it is? What does worker turnover look like? How are they training their employees? We do not know enough about how they are developing people for promotion, and as it turns out, that is important information for us to understand. We cannot keep thinking about employees as this financial outlay; they are a critical asset that needs to be appropriately managed around all of these issues, including the diversity issue, as we think about the demographic shifts in the population. We must consider what that means for a company that is not appropriately managing its labor pool so that they can take advantage of those shifts in multiple different ways.

I agree absolutely that you cannot solve the concerns associated with the workforce by getting information about the CEO's salary, but I think the disclosure around it was intended to respond to a different concern. So it is not as if that information is not important. It is that it is not going to really drive and help this other human capital management piece, and we do need more information on that piece in order to really understand how companies are doing in this area, an area that is critically important.

NICOLE MECCA: Thank you. To continue the conversation around the term human capital management, the SEC has waded into this topic with its recent amendment to Regulation S-K.[21] In particular, what can we expect from the SEC's latest rule?

MS. FAIRFAX: I have to fully disclose here that I was on the investor advisory committee when we recommended that the SEC focus on this issue. Certainly, the new rule falls very short of what we were hoping would happen around this.

It is a step in the right direction, but the problem is there is no real guidance and no specific disclosure requirements. There is sometimes merit to a principle-based approach, I think, but in this case, we do not really have the kind of detailed disclosure guidelines we were just

20. *See, e.g.*, AON, 2019 INTANGIBLE ASSETS FINANCIAL STATEMENT IMPACT COMPARISON REPORT (Apr. 2019), https://www.aon.com/getmedia/60fbb49a-c7a5-4027-ba98-0553b29dc89f/Ponemon-Report-V24.aspx [https://perma.cc/DW3G-C8AR].

21. *See Regulation S-K amendments*, *supra* note 19.

talking about. There is also no direction about what kind of information is salient or important. By way of example, it would have been a good way to start in terms of thinking about what kind of information we need to know to have a really good understanding of what companies are doing in this area. While I think on the one hand, it acknowledges that human capital management is important and that we need to see information on it—in terms of doing something beyond that, I will take a wait-and-see approach.

MS. LU: Speaking generally on the SEC and its approach to ESG, I think the general approach and view taken by the SEC has been that of regulatory caution. It has very much stood by its principle of "you should disclose what is material to investors," but the SEC has not gone so far as recommending or requiring any specific ESG-style disclosures, which is something that you actually do see across the Atlantic. EU regulators have been a lot more forthright about mandating ESG-specific disclosures and that is something that the SEC has so far declined to do. In terms of where we are going to get this information, a lot of the pressure and momentum is going to come from the private sector, namely initiatives from investors, and companies that really want to demonstrate their leadership. So we will see a lot of development coming out of the private sector in the United States rather than seeing the SEC really taking the lead on these issues for now.

AVERY GOLOMBEK: With respect to ESG in the lifecycle of a pension fund investment, could you speak to the types of conflicts that arise in ESG-related negotiations between pension funds and general partners?

MR. WEBBER: Sure, there are a lot of different ways to look at that particular question. We were just talking about the New York City Comptroller. Why don't I touch on some interesting stuff that they have done?

Recently, New York City adopted a responsible contractor policy which applies to investments in infrastructure and in real estate. The purpose of the responsible contractor policy is that when we make such investments, we expect that responsible contractors are hired to do the work; responsible contractors are those who deploy and pay prevailing wages and benefits to workers and have strong safety records. They do not have lots of litigation against them. Part of their assessment in adopting that policy was investment-driven in the sense that work sites that are run by union labor may have fewer accidents, less litigation, better training, better compensation, and so forth.

So what do you get from policies like that? The funny thing is, all this sounds very new. But the reality is ingrained in the history of the AFL-CIO housing investment trusts, the AFL-CIO Building Investment Trust, and another entity called ULLICO—the Union Labor Life Insurance Company—it was actually founded by Samuel Gompers, who also founded the AFL-CIO. Initially, it was created to write life insurance policies for workers for industrial accidents when no one else would write such policies—it is still around. It has been around for many decades and they have always had investment practices where they invest in projects where those projects hire union labor.

Right now, ULLICO is investing alongside Carlyle in building Terminal One at JFK Airport.[22] These investments are going on across the country, and they are going on through and with private equity funds that are investing in these projects with them. This is part of the deal between New York City and other pension funds and P.E. firms engaged in these types of projects. I think that this is one way forward for labor and pension funds on the "S" part of ESG.

I would like to spin an optimistic scenario for a second, if we are still allowed to have any optimism. There is widespread recognition that there are serious infrastructure deficiencies in the United States, and potentially trillions of dollars of investment in that space.[23] One can tell a story in which worker pension funds can play a role of investing in those types of projects while creating union jobs, and importantly bringing new workers and new contributors into these pension funds.

I will not dwell on it, but this is where there is often a breakdown between shareholder returns over in one corner, and on environmental or social benefits being something totally different. The reality is that these things *can be* self-fulfilling and self-reinforcing, so pension funds can get there without just operating on returns. There are three legs to the stool: returns, worker contributions, and employer contributions. So those are really big issues for multi-employer pensions, for labor

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22. *See* Press Release, THE CARLYLE GRP., The New Terminal One at JFK Continues Progress with Approval of Proposed Lease by The Port Authority of New York and New Jersey's Board (Nov. 21, 2019), https://www.carlyle.com/media-room/news-release-archive/new-terminal-one-jfk-continues-progress-approval-proposed-lease [https://perma.cc/92A2-CJMX].

23. *See* Jim Tankersley, *Biden Details $2 Trillion Plan to Rebuild Infrastructure and Reshape the Economy*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/03/31/business/economy/biden-infrastructure-plan.html [https://perma.cc/4DUU-ALUE].

union funds, and for public pension funds. This is one potential way to look at the model between pension fund investors and private equity funds—the point was made in the earlier panel today.

In the private equity space, these pension funds are estimated—public pension funds in particular—to constitute somewhere between a third and up to 50% of total assets under management by private equity.[24] That is an opportunity for these funds to exercise a lot of say over how that money is invested, how it is deployed, and importantly, how it should not be deployed. I think we are going to see more of that going forward.

MS. FAIRFAX: I want to add that I have done a lot of work around shareholder activism and engagement.[25] What that work has surfaced is that there are a lot of areas in which PE and pension funds are aligning where you would not classically expect. One of the reasons why the governance pushes were so successful was not just because of activist shareholders, but because of the alliances that those shareholders were able to build amongst other shareholders and the shareholder base. While it is true that shareholders may have competing and different interests, there are some ways in which they have found common ground. They have been able to work together in interesting ways and we are going to see that play out.

What these mini-cycles of financial stress have demonstrated is that everything is interconnected. It is not that what David is talking about in terms of pension fund investment is different—it means that when you name a particular shareholder, underneath that shareholder is probably other types of shareholders, who may have the ability to find some common ground around things that they are concerned about.

MS. LU: We all talk about major institutional investors—BlackRock, State Street, the major pension funds—really being at the forefront of pushing for ESG, but sometimes we forget the reason why: because, as Lisa mentioned, they are investing on behalf of ordinary people. As millennials and the generations below them enter the

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24. *See* OECD, ANNUAL SURVEY OF LARGE PENSION FUNDS AND PUBLIC PENSION RESERVE FUNDS 6 (2019), http://www.oecd.org/finance/survey-large-pension-funds.htm [https://perma.cc/9YCV-EB5U].

25. *See generally* Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301 (2019); Lisa M. Fairfax, *Social Activism Through Shareholder Activism*, 76 WASH. & LEE L. REV. 1129 (2019); Lisa M. Fairfax, *Shareholder Democracy on Trial: International Perspective on the Effectiveness of Increased Shareholder Power*, 3 VA. L. & BUS. REV. 1 (2008).

workforce, their priorities on how their money should be invested differ from previous generations.[26]

Institutional shareholders must align their investment strategies with the demands and concerns of their clients, and there is a major grassroots push that is driving the current wave of focus on ESG. I think we will see the trend continue to accelerate in parallel with demographic changes where millennials, women, and minorities continue to accrue greater wealth.

MR. WEBBER: I will make just one more point here about pensions, private equity, and ESG to kind of illustrate how chasing returns to the exclusion of everything else can have very perverse effects. One of the things that I looked at in some earlier work was public pension fund investments in privatization.[27] You had public pension funds that were investing through private equity in the privatization of prisons, privatization of schools, privatization of public school services, privatization of firefighting, privatization of police and security, all the way down the line.

I interviewed someone who worked as a custodian at a school in Massachusetts. He had been making $20 an hour, worked there for many years, had good benefits.[28] His public pension was invested in a private equity pool that turned around and bought Aramark, which then came into that town and underbid the union for the school's contract. This guy, who had been making $20 an hour, was offered his old job back for $8.50 an hour. This was financed with his own retirement funds.

This was not an isolated case—this was a problem with public pension funds investing in private equity. You may say, "What if there were good returns on the investment?" But a lot of these workers lost their jobs. That is a loss of payments into the funds by both the workers and the employers themselves. So it is not so easy to just tease out. That is an example where even good return on investment could undermine

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26. *See* LPL FINANCIAL, *How Different Generations Invest*, WEBSTER NEWS (July 8, 2020), https://public.websteronline.com/articles/investments-insights/how-different-generations-invest [https://perma.cc/HM8B-2QGN].

27. *See* David H. Webber, Opinion, *Protecting Public Pension Investments*, WASH. POST (Nov. 20, 2014), https://www.washingtonpost.com/opinions/david-h-webber-protecting-public-pension-investments/2014/11/20/85748ee6-66cb-11e4-836c-83bc4f26eb67_story.html [https://perma.cc/VZA2-6KXS].

28. *Id.*

the fund itself, which we think of as not being possible, but it is possible.

We increasingly see this kind of pattern emerging in other parts of ESG, in particular in the "E" space. There is increasingly a kind of collapse between returns and other forms of benefits to these funds that are making these investments.

MS. FAIRFAX: It shows that the issue is extremely complicated.

MR. WEBBER: I agree.

AVERY GOLOMBEK: One of the fiercest critics of ESG and stakeholder capitalism has been Lucian Bebchuk, who has argued that stakeholder capitalism and the tenets of ESG would reduce management and board accountability.[29] How should boards and management parse through different stakeholder interests and manage potential conflicts?

MS. FAIRFAX: I think that the concern that Bebchuk raises is one that often gets raised in this conversation: For whom should the board and the corporation govern? Is the obligation strictly to shareholders and their profit maximization concerns? That is a single-choice proposition, whereas obligations to groups of stakeholders involves the possibility that the board and management can play groups off of one another.

Accountable to everyone essentially means accountable to no one; that is the argument. While you can understand that concept, I think his argument ignores the reality that boards and managers are already doing this. This is actually what we expect them to do. We expect them to balance the interest of different stakeholders. If you imagine this moment right now, where corporations are struggling to decide what to do during the pandemic, they have on the one hand employees whose health and safety concerns they have to think about. On the other hand, they have consumers, but this is what they are in the business of doing. They have to be in the business of what they are doing in order to manage and oversee a large corporation, so I think the reality is that they are already doing this.

The reason why I suggest it is not a concern is that they are already doing it. What I think is important about naming the fact that they are doing it is so that we are able to spotlight it and really be able to figure out who is doing it *well*. Shedding light on best practices is the whole

29. *See, e.g.*, Lucian Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, HARV. L. SCH. FORUM CORP. GOVERNANCE (Mar. 2, 2020) https://corpgov.law.harvard.edu/2020/03/02/the-illusory-promise-of-stakeholder-governance [https://perma.cc/U3PQ-ZYG6].

point. The business endeavor is about people making decisions, some of them that may work and others that may fall flat.

We have got to try to figure out which ones work and which ones do not. How to make tradeoffs is the whole point of this endeavor. By allowing people to engage in potentially risky tradeoffs where there is no particular right answer, you are just trying to kind of do the best by the institution. So to the extent that is concerning, of course it is, but that is business. That is my view.

MR. WEBBER: I think that the Bebchuk concern is real, but I think it is also overstated and may not even be that real—I am not so sure. Lisa already stated the premise of that critique, which is if we all know there is only one score and one metric that matters, we can hold everybody accountable to share price and that is it. If you loosen it up at all and say, we care about the environment or we did this for workers, then there goes the accountability. Realistically speaking, we tend to evaluate companies in light of their competitors, in light of other entities of the industry. If one entity's share price is getting pummeled, and they claim that they are only getting pummeled because they are doing all this great stuff for workers and for the environment—I think it is going to be looked at skeptically. It is a question of being able to balance these things to let whole industries move in particular directions.

Secondly, I think that there is more to life than just managerial accountability. The reality is it does not tell us enough about whether this is the right direction to move. There might well be a little bit less managerial accountability because they are taking other things into consideration. What we really want to know is, maybe so, but we can still benefit overall from managers being able to take other things into consideration along these other dimensions. The single-minded focus on just the issue of managerial accountability is not good enough.

There is also this artificiality to the argument that I think continues to break down, because many shareholders want this stuff. Many shareholders want more environmental accountability, more labor friendliness, labor protection, economic equality, diversity—they are concerned about these issues too. So shareholder primacy is not exactly the same thing as maximized returns.

There are so many different pieces moving here, but ultimately, I think we need to know much more even if we can see that there is a little bit less managerial accountability, which I am skeptical of anyway. If it advances these other metrics, then I think we might benefit from it.

Finally, the last point here really is there is so much inside the system as it currently exists to keep shareholder interests on the table. The quarterly reporting, the leak tables and performance and so forth, the idea that shareholder interests go out the window and managers can do whatever they want. Again, I just think it is possibly a real concern, but I think it is overstated.

MS. LU: Adding to what Lisa and David mentioned, the importance of stakeholder capitalism is also about empowering the board to act in the long term interests of the company and about creating a company that is primed for sustainable long term growth, as opposed to being focused on short term growth and high stock prices in the short term, which may serve the interests of a select number of shareholders but may not actually serve the larger company, especially in the long run. For example, if a company could easily continue to do well in the short term without taking into account the risks relating to climate change; or takes seriously its human capital policies but fails to invest in research, development, and innovation; or fails to invest in the workforce, it will not be sustainable over the long term.

If you are not capturing all the ESG risks and considering the concerns of your community, your suppliers, and your customers, you are not able to build a sustainable business. That is where stakeholder governance comes in, because it allows the board to take into account these issues and take a stance against short-termist thinking without risking punishment. That is what is really important here. I would counter the Bebchuk argument about less accountability. You would have less accountability by solely focusing on share prices because that does not account for how a company is going to perform over the medium to long run, which is what most people who are invested in companies care about. Most people are not flipping stocks, they are investing their life savings with a 10, 20, or 30-year horizon.

TAYLOR WELLS: Shifting the conversation a little bit to millennial involvement in ESG, I want to ask the classic question: Today’s fight for ESG appears to pit young versus old, for example, millennials fighting to address climate change facing off against the large shareholder base of pension and retirement funds. How should the timeless problem of young versus old—here, stakeholders versus shareholders—be approached today?

MR. WEBBER: First of all, I should just say that those types of conflicts are, I think, overstated. In my opinion, it is not really true that baby boomers are saying to themselves, “Let the planet burn, I don’t have much time left anyway.” I do not think that this is really the baby boomer attitude, and in any case, those types of conflicts have always existed within every single pension fund and every single investment fund.

If you look at every pension fund, if it makes an investment that pays off in 10 years, or two years, or 20 years, it is going to benefit some workers at the expense of others. There is this so-called duty of impartiality that is implied. I am talking about on the investment side, not necessarily the corporate side. This duty of impartiality really is not that muscular because of precisely the concerns just identified, unless you truly are favoring one set of beneficiaries over another. You are not really running afoul of the duty of impartiality.

I will plug a paper that I have forthcoming with Michal Barzuza and Quinn Curtis, both of the University of Virginia.[30] We talk about the rise of the millennials, in particular, to state the theory or hypothesis of the paper: why ESG? Why is it suddenly becoming so important now? Why has it moved from something that was once marginal, into something that is core? In particular, we focus on the big three index funds in that paper.[31] We ask, why have they suddenly become more active voting in favor of environmental proposals and voting? Why have they started targeting board diversity and issues like that?

Our hypothesis is that it really is about the fight to manage millennial money. It is about the fight to manage millennial investment dollars.[32] These entities do not compete on what they invest in. The index funds all buy exactly the same thing. Their costs have essentially been whittled down to zero. What do they compete on? What is left to compete over assets under management?

Carmen alluded to this earlier, but there is a lot of social science research that shows that the millennials have very different attitudes from baby boomers and Gen X along two dimensions. One is their actual political views and political attitudes. Millennials' view on the environment and social issues are just different in many respects from Gen X and the baby boomers. The second, and I think even more consequential attitudinal difference, is that millennials say again and again—and there is a lot of anecdotal evidence to support that they mean

30. *See generally* Michal Barzuza et. al., *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020).

31. *See id.* at 1253.

32. *See id.* at 1303, 1320.

it—that they are much more comfortable living their politics, not just in the voting booth, but at the office, in the way they shop, and in the investment choices that they make. I think we are seeing that. I think that we are seeing in terms of them saying that it is important to them to work at a company that they believe is doing sustainable, socially useful work. It is important to them to buy products like that, and it is important to them to invest accordingly.

Part of our theory is that part of the reason that these investment managers are talking the ESG talk, and to some extent walking that walk as well, is over the efforts to appeal to millennials who now are predicted to be three quarters of the workforce by 2030, and who are now really making investment choices that tend to be kind of sticky.[33] If you invest in that 401(k) with one entity in your 20s, there is a decent chance that you will still be with them for years and years, whereas the boomers are already in, the Gen X people are already in. So I think that is what is driving a lot of why ESG is taking center stage now.

MS. FAIRFAX: David is absolutely right. All the evidence is showing us a lot about this generation. How are they willing to spend their money? What they are willing to spend their money on? The fact that they are willing to put their dollars in businesses and in products if they think it reflects their values; how reputation matters.

I too am resisting, as is David, this notion of us versus them. Rather, this is the evolution of a changing world and a changing economy. A changing understanding of what the long term means has got to happen when you have a generation that grew up with expectations that other generations did not have. This is a generation that grew up with expectations around concern for the environment. This is a generation that grew up with expectations about diversity, real or imagined, signaling or not. The truth is this generation has an expectation of what their workforce is supposed to look like, has an expectation about what those practices are supposed to reflect, and a generation that has proven that they will put their dollars where those expectations are. That is the key.

They have said in their consumer spending patterns, in their investment patterns, even in their kind of choice of work patterns that it matters so much to us that this is where we are going to put our resources, and you have to be cognizant of that as you think about the

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33. *See, e.g.*, Clemens Sialm, Laura T. Starks & Hanjiang Zhang, *Defined Contribution Pension Plans: Sticky or Discerning Money?*, 70 J. FIN. 805, 806–07 (2015).

long term and what it means for that generation to have control of significant assets and resources for the next 30 or 40 years.

MS. LU: If we also look at the demographics of millennials today, it is really different from previous generations. Millennials today are one of the most educated generations, so they are incredibly sophisticated and understand the investment propositions that have been put in front of them. They realize that it is a financial imperative, not just a moral imperative, to think about climate change or questions about diversity and inclusion, because all these things, ultimately, will likely have a real bottom line impact on the value of investments over a long horizon.

Millennials today are also incredibly diverse, far more diverse than prior generations. Women hold much more wealth than prior generations, so that is where diversity and inclusion becomes a real issue, because the millennials entering the workforce are realizing that the issues of the past remain today. They are asking questions about what can be done to change institutions, and many of them are using their investments to push for change. I think we are at the initial phase of a wave of change because the generation behind the Millennials is just starting to enter the workforce and they are even more educated and even more diverse.

MS. FAIRFAX: I would also add that this understanding of the impact of ESG targets on investments and on returns is something we have to unpack. I think one of the latest studies I saw was a meta-analysis of many studies, going back over a decade, from the Department of Labor (DOL).[34] It found that most people believe that if they invest with an ESG focus, they are going to have to sacrifice some profits.[35] The empirical evidence does not bear that out: most of the empirical evidence supports the proposition that investing with those types of goals and targets will have you, at the very least, on the same level as conventional investing, if not better.

I think the first panel said this—we have got to pull the ESG out. This is investing with these types of things in mind, and in fact, the evidence points to the fact that it is an investment that will give you

34. *See generally* DEP'T OF LAB., ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INVESTMENT TOOLS: A REVIEW OF THE CURRENT FIELD 14 (Dec. 2017), https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/ESG-Investment-Tools-Review-of-the-Current-Field.pdf [https://perma.cc/53PY-W84K].

35. *Id.*

a good return. So that is something that people need to be mindful of as well.

MS. LU: ESG funds have actually performed quite well during the pandemic, and have in many instances outperformed the market.[36] The fact that ESG funds have proven themselves to be able to withstand severe market shocks is further evidence that taking this approach to investing is going to serve investors well, or at the very least, put them in the same position in most cases.

MR. WEBBER: You can also look at it in the negative, as not only in terms of affirmative investments in growing sustainable industries, but also avoiding industries that do not fit those criteria. Following the logic of the millennial argument here, we can look at companies that were badly hit when they handled these kinds of issues in a bad way. Whether it is Starbucks coming out and banning its employees from wearing Black Lives Matter pins, then turning around and not only reversing itself after an outcry, but buying 250,000 Black Lives Matter T-shirts, and distributing them to their workers;[37] or that episode at Papa John's[38]—this conduct had a serious negative impact on each company. Sometimes ESG is depicted as painting a rosy picture of investing in the right stuff, but it is also about avoiding the harm that is caused when you really alienate your employees, your customers, or your shareholders. If you alienate your employees or your customers, it can have effects on your share price.

Again, it just underscores the point that the siloed way of looking at these things is inadequate—particularly when you have a rising generation that does not silo its politics into the voting booth alone—and decisionmakers have to take the ESG side into account here alongside the legal side and the corporate side of these issues, too.

36. Esther Whieldon & Robert Clark, *ESG Funds Beat Out S&P 500 in 1st Year of COVID-19; How 1 Fund Shot to the Top*, S&P GLOB. MKT. INTEL. (Apr. 6, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/esg-funds-beat-out-s-p-500-in-1st-year-of-covid-19-how-1-fund-shot-to-the-top-63224550 [https://perma.cc/5WB7-Y6TX].

37. *See* Lauren Aratani, *Starbucks Reverses Stance and Allows Staff to Wear Black Lives Matter Clothing*, GUARDIAN (June 12, 2020), https://www.theguardian.com/business/2020/jun/12/starbucks-black-lives-matter-clothing [https://perma.cc/DC8P-6LM4].

38. Noah Kirsch, *Papa John's Founder Used N-Word on Conference Call*, FORBES (July 11, 2018), https://www.forbes.com/sites/noahkirsch/2018/07/11/papa-johns-founder-john-schnatter-allegedly-used-n-word-on-conference-call/?sh=7b537c214cfc [https://perma.cc/8CGF-SV9D].

TAYLOR WELLS: Regarding millennials' investment and ESG, research has shown the millennials are the first generation that are projected to be generally less wealthy than their predecessors. How will this affect millennials' ability to implement long-lasting ESG values in mainstream corporate culture?

MR. WEBBER: I think not that much, because even if that is true, per capita, that is not true in terms of the overall size of this generation. It is a much bigger generation than my own gen, Gen X, as Larry Fink recently pointed out.[39] The millennials are on the threshold of inheriting somewhere from $12 trillion to as much as $30 trillion.[40] It is the largest intergenerational asset transfer in the history of the world, and collectively, that generation is going to be massively powerful.[41] As I said, 75% of the workforce by 2030,[42] with huge inheritances and wielding lots of market power, lots of consumer power.

So I am not sure. I am always a little bit skeptical about those types of projections, but I think even if it is true, on a per capita level, it is not true in the aggregate. I think that they are not going to be thwarted for that reason. There may be other reasons, but not that one.

MS. LU: Going off what David mentioned, I think we will hear in the press and the news about the struggles of millennials in terms of their ability to acquire wealth. I think, in many ways, the experience has also made millennials perhaps more aware and more concerned about ESG issues. Millennials have experienced significant challenges, such as mounting student debt challenges, two major recessions, and the

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39. *See* Richard Fry, *Millenials Overtake Baby Boomers as America's Largest Generation*, PEW RSCH. (Apr. 28, 2020), https://www.pewresearch.org/fact-tank/2020/04/28/millennials-overtake-baby-boomers-as-americas-largest-generation [https://perma.cc/5UN6-Y6WH]; Julia Horowitz, *BlackRock Is Getting Ready for Millennial Investors*, CNN (Dec. 4, 2018), https://www.cnn.com/2018/12/04/investing/blackrock-millennial-push [https://perma.cc/V5GL-UHHC].

40. *See* Ben Eisen & Anne Tergesen, *Older Americans Stockpiled a Record $35 Trillion. The Time Has Come to Give It Away*, WALL ST. J. (July 2, 2021, 10:00 AM), https://www.wsj.com/articles/older-americans-35-trillion-wealth-giving-away-heirs-philanthropy-11625234216 [https://perma.cc/2L86-TZ3G].

41. *See* Liz Skinner, *The Great Wealth Transfer is Coming, Putting Advisers at Risk*, INVESTMENTNEWS (Aug. 7, 2015), https://www.investmentnews.com/the-great-wealth-transfer-is-coming-putting-advisers-at-risk-63303 [https://perma.cc/MU6R-TYQM].

42. DELOITTE, THE DELOITTE MILLENNIAL SURVEY 2 (2014), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-dttl-2014-millennial-survey-report.pdf [https://perma.cc/LTW2-5MR7].

accompanying career setbacks. All these experiences do fold into how they make investment decisions. As David mentioned, it is probably going to impact the overall trend and push towards ESG in the longer run.

MARIE BOGENEZ: I want to discuss the most recent proposed rule from the Department of Labor.[43] It seems from the rule that it would discourage managers of ERISA covered pension plans from actually considering ESG issues when making their investments. What do you think will be the long term impact of that rule, if it were to be implemented?

MR. WEBBER: It depends how long-term we are talking about here. My own view is that it will not. If it is implemented it will not linger for very long. It may not be implemented or may not even be implemented for very long, depending on the outcome of the election in a couple weeks.

In my own view and those of my co-authors on that piece—because we think that this is so important to millennials, we think that market pressures in favor of ESG will continue to be enormous, and we think that ultimately the DOL's ability to really constrain this kind of activity is going to be limited. It would be limited even if the current administration stays in business for another four years. If it does not, it will be more than just limited, it may just be eliminated and may never fully be implemented.

It is interesting to note, if you look at the many comment letters objecting to this new ESG standard, that the objections do not come from the Bernie Sanders crowd. They are coming from very, very mainstream investment managers who are opposed to this. DOL has started essentially trying to harass some investment managers by demanding all sorts of documentation in wanting to see why they made certain decisions along ESG lines and so forth, and that is a real cost and also a little bit alarming to folks who have been targeted by it.[44]

I suppose we should tell the political backstory, which is that the energy industry went to the Trump White House and complained about all this ESG stuff, shareholder proposals and so forth. The White House issued an executive order to the DOL to look into this fiduciary stuff, and that is why we got a flurry of this action from DOL over the summer. There are a lot of other investors out there other than those

43. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846, 72846–87 (Nov. 13, 2020).

44. *See id.* at 72879.

governed by ERISA, including all the public pension plans. So given the market pressures in this direction, given the demand from customers, employees, investors, and millennials, I do not expect this to be the death knell of ESG that I think some of the folks who implemented this guidance hope it will be, but time will tell.

MS. FAIRFAX: It is particularly concerning because it is based on a false premise that we have all been highlighting, which is the assumption that considerations around ESG do not align with or advance financial goals. The reason that you are getting at, David, suggests that these traditional funds and fund managers are pushing against a restriction like this is because it absolutely has an impact on financial goals. So, it is concerning to say these funds could not take that into account, recognizing that market pressure translates into money, into finances, into performance. The DOL's own study just three years ago said when you look at the meta-analysis of all of the studies around ESG investing, they show that type of investing either performs as well as or outperforms conventional investments.[45] So what are they doing right now?

It is good of David to tell the political story behind the story, but certainly the question of what type of impact we expect it to have—if it remains in the long term, I think it could have a concerning impact. I do recognize that, in fact, there is some financial hit that you will take if you are not allowed to engage around these issues.

As Carmen was suggesting, at this moment we are seeing these funds outperform the market, and researchers and analysts are saying it is because funds that invest and consider in this way are a proxy for resiliency. Sustainability is a proxy for resilience, it is a proxy for being able to weather the storm because you have taken into account some really important risk factors that other companies may have blind spots around. I think that whatever happens in November, the market will speak for itself around whether or not this makes sense. I think, ultimately, the market will demand the ability to continue to invest in the way that is most beneficial and the evidence suggests an inclusion of these types of factors.

MS. LU: Quickly adding to what Lisa and David just said, I think there are still folks out there who do not believe that ESG has a positive impact, or at least a neutral impact on investment outcomes. I think that

45. *See* SUMMIT CONSULTING, ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INVESTMENT TOOLS: A REVIEW OF THE CURRENT FIELD 14 (2017).

group is getting smaller and smaller over time, and if we look at the trends right now, the influx of money into ESG funds is far greater than investments into regular funds. As long as this trend continues to persist, as Lisa mentioned, the market will speak for itself. There will ultimately be market demand for access to ESG-managed funds, and so I think it is really a question of time. As long as ESG continues to outperform and do well, then I think that the data itself will become irrefutable.

AJ HARRIS: Over these last fifteen minutes, we would like to address some questions posed by the audience. The first question is: Are employee resource groups effective for promoting D&I, and if not, what can be done to make them more effective outlets within these firms?

MS. FAIRFAX: Certainly, all of the studies around the D&I work at companies suggest that it is a top to bottom, bottom to top endeavor, and that you need to have buy-in from everybody and intentionality around all of the things that you do to both kind of recognize the places where there may be inequities as a result of race and to counteract those inequities. So I think it depends. I will end with what I started with: it depends.

What is the makeup of the group? What is their charge? What we sometimes see with the groups that are tasked with D&I efforts is that companies tend to put the least powerful of the employees, with the vaguest of charges and the least amount of resources, and tell them to try to fix the problem that permeates the entire institution. Turns out, that is not going to work. But if you have a group of people who are dedicated to getting something done, who have the power and the resources to get it done, and who are willing to have difficult conversations to make difficult decisions, then yes, it could matter.

AJ HARRIS: Another question is whether an increased emphasis on diversity is potentially a way of maximizing the value for shareholders because diversity reduces support for taxes and social spending and may make it more difficult for workers to organize.

MR. WEBBER: There is a long chain of reasoning in that question that I am not sure I embrace, so I am not quite sure how to answer that. I mean, what do you mean by worker organizing—is it investors, or do you mean unions?

AJ HARRIS: I think what the audience member is asking, in the bigger picture, is: If the efforts to increase diversity at a firm are successful, you have less political pressure on other firms to make these changes, and as a result, you may face less political pressure for taxes. If you have greater diversity efforts, you have a happier workforce, and with a happier workforce, you face less push back for, let us say, union effort.

MR. WEBBER: I see. There is a familiar argument that gets made in this space all the time, which is if you take your environmental issues, you take diversity. If you take any of these issues into the marketplace, into the corporation, does this incentivize making the changes in Washington or legislatively? Is there a sort of zero sum game? No. If you are directing your resources into one space, that does not mean you are not directing it somewhere else. It is related to a book I wrote.[46] I am not sure it focused so much on the diversity piece, but rather on how many resources a union, for example, should put into shareholder activism, versus into recruiting new unionized workers, versus into electoral politics. Institutions have to make these choices with scarce resources from my own perspective.

I think that in the world that we are living in, in the 21st century, nobody can get away. No matter what issue you care about, you just cannot ignore what is going on in the marketplace. It is just not enough. There is too much power and influence in the private sector to ignore. Some of it is a story about gridlock in Washington. Some of it is just a story of capacity. It is just not enough anymore, in my view, to focus on legislative strategies alone, or on litigation strategies alone, or on regulatory strategies alone. Particularly in a world where markets operate globally and government regulation is still local—it is a serious asymmetry. And given the fact that markets operate globally as well, investors can also operate globally in a way that the sort of traditional tools of legislation or regulation do not. So I just do not see how you can ignore this space.

If you care about the facts on the ground and almost anything happening in the real world, you cannot ignore this space. Whether and to what extent your efforts in one space may undermine or detract from your efforts is a complicated question. It is a fair question, but I think, no matter how you come out on that one, you cannot ignore the space, you just cannot.

MS. FAIRFAX: I would just add one follow-up on that, to the extent I understand the question. There is a reason why the Black Lives Matter movement turned from a movement that was about protesting and people in the streets, that focused on the criminal justice system,

46. *See generally* DAVID H. WEBBER, THE RISE OF THE WORKING CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON (Harv. Univ. Press 2018).

towards pressuring the corporation and issues like that. There is a connectedness there. So David is right, these things intersect and people are sophisticated enough to understand the intersection. It cannot be viewed as a zero sum game. It is not an "either-or"; it is a "both-and."

MS. LU: Going off briefly from what David and Lisa just said, I think if you look at the most recent Business Roundtable statement, what was interesting was that when they were talking about promoting racial equity and reducing justice, they also mentioned that aside from the private sector initiatives, they also talked about lobbying the government and proposing public policy proposals. I think that is interesting because it is an implicit recognition by the private sector that they have tremendous political influence. I think change in the private sector is particularly important, and I think any political changes will likely require cooperation from the private sector.

AJ HARRIS: I would close by asking for your future projections for the space in the next five years or so. What are some reasonable goals, and what are the realistic odds of their success in the foreseeable future?

MS. LU: I think the biggest challenge right now is creating an effective disclosure system for corporations so that there is a baseline from which people can understand how ESG is being dealt with, how risks and opportunities are being managed, and how to differentiate companies. I think we will see a lot of movement in the next couple of months because we are seeing a lot of push in the private sector for a coherent disclosure framework, and that in turn will likely trigger, hopefully, more effective disclosures from companies.

Also, to recognize companies that are outperforming their peers. I think that will be one of those critical goals. I think looking further afield, it is hard to predict where this is going to go, but if we look at recent trends in terms of investing and the scope and scale and investment in ESG, it has grown exponentially. It has not just been a steady increase, it has really dramatically exploded in the last couple months. I think if this trend continues, all the debate and old debate and skepticism may slowly erode, and what you will really see is a greater focus on how we deal with these issues. How do we calibrate risks and opportunities? How do we determine the best governance practices? Companies are looking to address this, both on the board level and also throughout management, because addressing ESG is not simply about what is happening at the top. It is also about how that gets filtered down all through the bottom, and this is particularly the case with issues such as D&I.

MR. WEBBER: I will focus quickly just on the "S." I hope we are going to see it—it has been talked about forever. I hope we are going to do more for workers in this country and I hope we are going to see some serious infrastructure spending that could potentially put millions of people back to work or secure their current jobs, resulting also in payments into retirement funds and having all sorts of salutary effects. I think that if such an infrastructure investment plan does come down, it is not going to be just in the form of a big check from the government; hopefully, there will be a significant check from the government, but a lot of it is going to come from the private sector and from tax incentives that might be created in such a plan to make such investments.

One very positive way we might see some of the "S" in action would be for pension funds and investment funds to use their power and make these infrastructure investments to ensure that workers are getting a good, fair bargain with respect to prevailing wages and benefits when they work on such projects. That has been shown to be profitable. It has been shown to create returns, and I also think it would be good for a lot of people in this country who need it.

MS. FAIRFAX: I agree with both of those comments, in particular the focus on the workers, because I think human capital management is a very important and live issue. I am hopeful that we will make some headway on that. I think it is likely to be in fits and starts. I think disclosure is the same way, not only better and more meaningful disclosure, but some standardization. That is going to be the most helpful piece of the disclosure, and I expect fits and starts there too.

We will get to a place after finding some convergence around what people feel are best practices that the SEC will pick up from. I imagine, there will be regulation in this space, but probably not until there is some significant agreement around best practices.

The last thing I will say is the goal with regard to ESG target metrics is to obtain credible commitments. You have to move from the rhetoric to the credible commitment. If you do not measure it, it does not matter. So we need to be thinking about what credible commitments look like in this space. Is it tied to executive compensation? Is it realistic targets and goals? What is it? This is the second wave of that push. How do we hold feet to the fire and make companies have credible commitments in this space? I suspect that too will be in fits and starts.