

# **Student Comment on An Introduction to Anti-ESG**

## **Legislation**

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My name is Erika Holmes, and I am a 3L here at the College of Law. When I received Professor Padfield's Article, I had heard ESG floating around, but as a law student with too little time and too much to learn I hadn't really dug into the concept and actually considered what is at play with ESG. It seems like everybody's talking about it, but I can never get a solid answer about what it means. Professor Padfield's Article provides this different angle for me to step back and try and consider what factors are at play here. In stepping back, I think it was important that I also took a step back from my emotions as well because we are thinking about corporate governance when considering ESG factors. I'm going into corporate transaction work following graduation, so understanding this space is important as I do have to consider what's going to be best for my client.

In considering the context of anti-ESG legislation, I'm also considering if ESG factors even deserve a role in corporate America. As Professor Aarons was alluding to, are corporations actually saying what they're doing or is it just a farce? I think sometimes the classic example is

corporation ABC goes along, June hits and it is ABC, but with rainbows.<sup>1</sup> I'm just wondering, do these corporations actually back what they're saying?

In considering what ESG means for our corporate clients, at the end of the day, we must also take a step back from our own morality and social stances and think about anti-ESG legislation implications. In thinking about that, I need to consider who and what my client's market is. Is the market coal miners in West Virginia? If so, if a corporation is trying to maximize profits, that's going to be something that needs to be considered in moving forward and in advising a board. I think the important thing comes down to really documenting how corporations are making these decisions to ensure that there are no personal beliefs imported into these decisions. So, taking a step back, operating with this duty of care and making sure corporations are fully informed in decision-making with these market factors. I think with two sides of the coin and a political conversation, that it can get difficult to know the correct corporate action.

I also just had some general questions when we think about ESG. One question is how are we actually measuring ESG, and how is it

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<sup>1</sup> See Lisa Desjardins, et al., *Rainbow Capitalism Raises Questions About Corporate Commitments and Pride Month's Purpose*, PBS NEWS HOUR (June 30, 2021, 6:10 PM), <https://www.pbs.org/newshour/show/rainbow-capitalism-raises-questions-about-corporate-commitments-and-pride-months-purpose> (discussing "rainbow capitalism" and corporations marketing efforts during Pride Month).

reflected back when corporations make decisions? Is the measurement really sound? Because I see these scoring systems,<sup>2</sup> and I'm wondering what levels are being balanced in the scoring system and how are corporations actually backing those up with corporate actions? Or is this just something corporations are putting on? As Nike demonstrated when they supported Kaepernick, ESG efforts can drive profits,<sup>3</sup> so that's another consideration. Also, do our clients actually have a clear understanding of what an ESG score means and how we are backing our decisions? Is there enough transparency in the field? I don't know that that is necessarily so.

Before Professor Padfield's article, I wasn't even thinking about the flip side of the coin—ESG bans—and how these bans are then going to impact clients depending on if there are operating in different states. In the future, businesses are not just going to have to be aware of ESG factors, they're also going to have to be aware of ESG legislation at play and on the horizon, while also taking into account these new SEC

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<sup>2</sup> See, e.g., Noah Miller, *ESG Score*, CORP. FIN. INST., [https://corporatefinanceinstitute.com/resources/esg/esg-score/#:~:text=by%20Kyle%20Peterdy-,What%20is%20an%20ESG%20Score%3F,and%20Governance%20\(ESG\)%20issues](https://corporatefinanceinstitute.com/resources/esg/esg-score/#:~:text=by%20Kyle%20Peterdy-,What%20is%20an%20ESG%20Score%3F,and%20Governance%20(ESG)%20issues) (Dec. 14, 2022) (explaining ESG scoring).

<sup>3</sup> Gina Martinez, *Despite Outrage, Nike Sales Increased 31% After Kaepernick Ad*, TIME, <https://time.com/5390884/nike-sales-go-up-kaepernick-ad/> (Sept. 10, 2018, 12:47 PM).

proposals on disclosure regulations.<sup>4</sup> I think when you tie those into the space, we are now in an area that is super murky and not super clear for boards of directors to proceed and unclear how they should correctly act on behalf of shareholders. I may be a little cynical, but at the end of the day, I really do think corporations are just trying to maximize profits. As much as we can see some things as being political, I think there's a big profit-driven nature to ESG initiatives more than anything else.

In short, I do think it's important to consider the legislation in the context of overall corporate governance. Is there going to be a need for corporations to at some point be in the political space because legislation is actually hurting profit initiatives and goals? Thank you again. It was a great article to spur the thought process about what ESG is aiming to accomplish and the implications even more because a lot of times ESG is just talked about as what is happening and what the ESG factors are that everybody's thinking of, but not necessarily the flip side of the coin with ESG pushback.

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<sup>4</sup> See Press Release, SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices, <https://www.sec.gov/news/press-release/2022-92> (May 25, 2022) (discussing new proposals for disclosure requirements).