

THE ALL-IMPORTANT “G” IN ESG AND ITS RELATIONSHIP TO GOOD GOVERNANCE AND CORPORATE ITS

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INTRODUCTION

In recent years, ESG (Environmental, Social, and Governance) has become a regulatory and business focus, in response to increased societal pressures for businesses to become more accountable for their impact on the environment and take a more socially responsible stance vis-à-vis not only their workers but more broadly in relation to their supply chains, surrounding communities, and even more broadly in relation to human rights, data security, privacy, and public welfare.

On the regulatory side, with respect to environmental issues, Europe has led the way with the Green Deal, supply chain due diligence measures, and other initiatives.¹ The United Kingdom has played a leadership role on a number of social and human rights issues, as exemplified by its adoption of the Modern Slavery Act.² The United States has been slower to develop

Prevention Act came into effect in the United States.⁴ The U.S. Department of Homeland Security has emphasized the importance of effective supply chain tracing by companies.⁵

While the “E” and “S” elements of ESG tend to dominate attention, this article focuses on the “G” as the key element not only of successful ESG efforts but for good corporate practices more generally. In particular, it will examine how the “G” in the context of “ESG” may intersect with good governance and compliance standards in other regulatory compliance contexts, and particularly in the anti-corruption/transparency context.

This article will argue that for multinational businesses, the “G”—i.e., good governance, including strong internal controls and corporate compliance measures—is the key to effective ESG, just as it is the key to effective anti-corruption compliance. It will also argue that the “G” in

many parts of the Principles also have relevance to privately held enterprises as well.

The 2022 Recommendation succinctly frames the topic as follows:

“Corporate governance involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.”¹⁰

In terms of the Principles’ relationship to other areas, the 2022 Recommendation states that:

“The Principles recognise the interests of employees and other stakeholders and their important role in contributing to the long-term success and performance of the company. Other factors relevant to a

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throughout the investment chain and provide for stock markets to function in a way that contributes to good corporate governance.

4. **The Role of Stakeholders in Corporate Governance:** The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.

5. **Disclosure and Transparency:** The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

6. **The Responsibilities of the Board:** The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.¹²

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Although considered to be a high standard for liability to be established, in the years that followed, *Caremark* had a profound effect on boards of directors in the United States in terms of their focus on compliance programs in a variety of areas.¹⁷ Although not all companies are organized in Delaware, many are, and Delaware is considered a leading jurisdiction for corporate law decisions. The impact of such a decision is therefore not limited to Delaware companies.

Moreover, for public companies, the incentives created by the *Caremark* decision were expanded and reinforced first, by the Sarbanes-Oxley legislation, passed in the wake of the Enron scandal, in 2002, and later, in 2010, the Dodd-Frank legislation. These statutes established, among other things, a periodic disclosure regime within public companies to ensure that material information is reported up to management and ultimately, the Board, and to encourage and protect whistleblowing activity.¹⁸

In the enforcement context, the United States Sentencing Guidelines for Business Organizations¹⁹ have also operated as an incentive for companies to adopt and maintain compliance programs designed to prevent, detect, and remediate conduct that would implicate criminal laws. The United States, unlike many countries, has corporate criminal liability. However, prosecutors have discretion as to whether to prosecute individuals or companies for misconduct, and even if a company is prosecuted, penalties may be mitigated by such programs. The U.S. Attorney's Manual, now called the Justice Manual, also instructs prosecutors to take such programs into account.²⁰

17. For a good discussion of the *Caremark* decision and subsequent cases, see E. Norman Veasey & Randy J. Holland, *Caremark at the Quarter-Century Watershed: Modern-Day Compliance Realities Frame Corporate Directors' Duty of Good Faith Oversight, Providing New Dynamics for Respecting Chancellor Allen's 1996 Caremark Landmark*, 76 BUS. L. 1, 2 (2020).

18. Sarbanes-Oxley, § 302, 15 U.S.C. § 7241 (2002) (responsibility of corporate officers for the accuracy and validity of corporate financial reports); Sarbanes-Oxley, § 404(a), 15 U.S.C. § 7262(a) (2002) (reporting on the state of a company's internal controls over financial reporting); Sarbanes-Oxley, § 806, 18 U.S.C. § 1514A(c) (2002); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (codified at 15 U.S.C. § 78u-6).

19. See U.S. SENT'G GUIDELINES MANUAL §8B2.1 cmt. background (U.S. SENT'G COMM'N 2021) (requiring that "The organization's governing authority [generally the Board of Directors] shall be knowledgeable about the content and operation of the compliance and ethics program and

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TNB laws began with the enactment in 1977 of the U.S. Foreign Corrupt Practices Act (FCPA),³⁷ which stood alone for about twenty-five years. From the outset, as a statute with both civil and criminal dimensions,

management and other operational functions, resources, access to relevant sources of data, experience, qualification, and authority;

5. Ethics and compliance programmes or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, inter alia, the following areas:

- i. gifts;
- ii. hospitality, entertainment and expenses;
- iii. travel, including customer travel;
- iv. political contributions;
- v. charitable donations and sponsorships;
- vi. facilitation payments;
- vii. solicitation and extortion;
- viii. conflicts of interest;
- ix. hiring processes;
- x. risks associated with the use of intermediaries, especially those interacting with foreign public officials; and
- xi. processes to respond to public calls for tender, where relevant.

6. Ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "business partners"), including, inter alia, the following essential elements:

- i. properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular continued oversight of business partners throughout the business relationship;
- ii. informing business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance programme or measures for preventing and detecting such bribery;
- iii. seeking a reciprocal commitment from business partners;
- iv. implementing mechanisms to ensure that the contract terms, where appropriate, specifically describe the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered;

- v. where appropriate, ensuring the company's audit rights to analyse the books and records of business partners and exercising those rights as appropriate;
- vi. providing for adequate mechanisms to address incidents of foreign bribery by business partners, including for example contractual termination rights.

7. A system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery;

8. The use of internal control systems to identify patterns indicative of foreign bribery, including as appropriate by applying innovative technologies;

9. Measures designed to ensure effective periodic communication and documented training for all levels of the company, on the company's ethics and compliance programme or measures regarding foreign bribery, as well as, where appropriate, for business partners;

10. Appropriate measures to encourage and provide positive support and incentives for the observance of ethics and compliance programmes or measures against foreign bribery at all levels of the company including by integrating ethics and compliance in human resources processes, with a view to implementing a culture of compliance;

11. Measures to address cases of suspected foreign bribery, which may include:

- i. processes for identifying, investigating, and reporting the misconduct and genuinely and proactively engaging with law enforcement authorities;
- ii. remediation, including, inter alia, analysing the root causes of the misconduct and addressing identified weaknesses in the company's compliance programme or measures;
- iii. appropriate and consistent disciplinary measures and procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance programme or measures regarding foreign bribery; and

iv. appropriate communication to ensure awareness of these measures and consistent application of disciplinary procedures across the company.

12. Effective measures for providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance programme or measures, including when they need urgent advice on difficult situations in foreign jurisdictions, as well as measures to ensure there is no retaliation against any person within the company who is instructed or pressured, including from hierarchical superiors, to engage in foreign bribery and chooses not to do so;

13. A strong and effective protected reporting framework, including: i. internal, confidential, and where appropriate, anonymous, reporting by, and protection against any form of retaliation for, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for reporting persons willing to report breaches of the law or professional standards or ethics occurring within the company on reasonable grounds; ii. clearly defined procedures and visible, accessible, and diversified channels for all reporting persons to report breaches of the law or professional standards or ethics occurring within the company.

14. Periodic reviews and testing of the internal controls, ethics and compliance programmes or measures, including training, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, both on a regular basis and upon specific developments, taking into account the company's evolving risk profile, such as:

16. External communication of the company's commitment to effective internal controls and ethics and compliance programmes.

The DOJ and SEC provide a very similar list in their *Resource Guide to the Foreign Corrupt Practices Act*.⁴⁷

Other international standards—notably, all soft law instruments—include Transparency International's Business Principles on Countering Bribery,⁴⁸ the World Economic Forum's Partnership Against Corruption Initiative,⁴⁹ and others, contain similar formulations.

At the national level, both soft and hard law standards exist. In the United States, the DOJ and SEC have included a section on compliance in the *Resource Guide to the Foreign Corrupt Practices Act* that details their expectations.⁵⁰ In addition, deferred prosecution agreements (a form of non-trial resolution of criminal charges that typically defer prosecution of a company on those char (a)9.2 ()TJ037d ()TJ037d (s)10e(-)Tj0.033 Tw 1.826 0 21.826 0 21.82

IV. TOWARDS A MORE HOLISTIC APPROACH TO GOVERNANCE AND COMPLIANCE FOR INTERNATIONAL BUSINESSES

The foregoing review has shown that regardless of the specific area of focus, good corporate governance and compliance builds on a common foundation: a board of directors that is focused on providing the guidance and oversight expected by international and domestic standards; management that sets the “tone at the top,” implements the board’s guidance, and ensures that specific controls systems are developed and implemented to manage the risks, legal and otherwise, faced by the ghe fEhe

particularly reconsidered? Especially for companies engaged in international business, given that standards for responsible business conduct are not limited to “E” and “S,” but include at least “C,” should the charter be broadened consistent with the scope of those expectations?

Anti-corruption controls have direct relevance to environmental activities such as