SUSTAINABLE CAPITALISM AND ESG ONLINE

Course Syllabus

Presented by

Berkeley Law
Executive Education

Berkeley Law
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Table of contents

Course Description
Learning Outcomes
Format of Class
Instructor Office Hours And Communication
Sustainable Capitalism & ESG Course Plan Overview
Course Design

**Module One:** Articulating & Enacting Corporate Purpose

**Module Two:** Redefining the Roles of Government and Business to Address Social and Environmental Challenges

**Module Three:** Debating the Board's Fiduciary Duties Under the Traditional and New Corporate Forms

**Module Four:** Communicating with Investors on Environmental and Social Risks and Priorities

**Module Five:** Governing ESG Risks and Opportunities

**Module Six:** Measuring and Disclosing Environmental and Social Risks and Priorities

**Module Seven:** Valuing Employees and the Workforce

**Module Eight:** Prioritizing Diversity, Equity, and Inclusion

**Module Nine:** Respecting Human Rights and Building Resilience Against Supply Chain Risks

**Module Ten:** Building Resilience Against Environmental Risks
Course Description
The predictions that companies and investors would retreat from ESG in the bear market are proving wrong. The global pandemic, racial injustice, rising income inequality, and climate change have only heightened the demands for capitalism to take account of its stakeholders. These demands are coming from investors, regulators, employees, and the public, who are increasingly asking companies to manage their environmental and social impact. Precisely how to meet this growing demand remains unclear.

Through a combination of theory and practice, this course will explore and address that challenge.

Learning Outcomes
In this course we will:
● Compare the theoretical frameworks that have defined the purpose of the corporation in the United States;
● Debate where to draw the line between the rights and obligations of business versus government;
● Analyze the seminal US Supreme Court and Delaware cases regarding corporate purpose;
● Debate whether the new corporate forms, which offer a more expansive view of a company’s obligations to society, are helpful or counterproductive;
● Explain the shifting role of investors, in particular institutional investors, with respect to embracing environmental and social issues, and what is driving that shift;
● Describe how ESG operates as a process for mitigating environmental and social risks in practice;
● Detail best practices for measuring and disclosing environmental and social risks in both voluntary and mandatory disclosures; and
● Analyze case studies of companies addressing climate change, human capital management, supply chain, and data privacy.

Thank you for taking this course at such an important time.
Class Format

This class combines lectures, readings, interviews with ESG experts ('The ESG Beat'), written reflections, and in-person discussions — delivered online. It is largely asynchronous, which means that you are not required to participate at the same time and place as other students in the class. Students are encouraged to complete the online tasks according to the suggested weekly schedule. You choose what time of day you are “in class.” We recommend setting a daily “class/study time” that fits your schedule and adhering to it during the course. Students should set aside around 3-4 hours each week for this course.

During the first eight weeks of the course, we have scheduled weekly office hours with instructors to provide opportunities for “live” discussion with them and your classmates that occur at scheduled times. These will vary, but most are typically held on Thursdays at 9:00 AM Pacific Time.

Instructor Office Hours And Communication

Four office hours will be held during the course access period on Thursdays at 9:00 AM Pacific Time, via Zoom. Exact dates and the Zoom link will be provided on the Canvas course platform, as well as under “Key Dates” in the next section.

The office hours are designed to be similar to the experience you would have if you were a student on campus. You can attend and ask questions you may have about the course, the materials, or the lectures; however, to be respectful of our instructors’ time, we will send a weekly reminder of office hours and request students who will be attending to respond by 6 pm the evening prior to the scheduled office hour.

The class will be notified if the office hours are rescheduled. Communication with the entire class about important course updates and notifications will be done using announcements within the Canvas course platform. All course-related announcements and communication will be conducted via this platform, so please make sure you have checked your Canvas notification/email settings. Click on "Account" on the left sidebar menu and then "Notifications". We recommend that you set Announcements to email you immediately once they are posted to the Canvas platform.
Sustainable Capitalism & ESG Course Plan Overview

COURSE DESIGN

Each module will include lectures, readings, podcast interviews with ESG experts (“The ESG Beat”), and written reflections.

The course is designed so that you can complete each module in approximately 3-4 hours. You can choose to follow the recommended ten-week schedule and complete one module each week. You do not need to follow this weekly schedule—you can complete the course according to your own schedule. No extensions will be granted.

CERTIFICATE ELIGIBILITY

The program is designed to be completed in 12 weeks but you will have access to the course platform for 5 months to complete all of the certificate requirements. Once you have finished the course, you must complete the post-program survey in order to receive your certificate. Certificates will be awarded on a rolling weekly basis. In order to qualify for the certificate, students must:

1. Complete all mandatory lectures for ten modules
2. Complete all mandatory readings + ESG beats for ten modules
3. Submit a written reflection (200-250 words each) in two different discussion boards
4. Submit a written response (100-150 words each) in two different discussion boards
5. Complete the post-program survey.

MCLE CREDIT

This program has been authorized by the California State Bar to offer up to 19.75 credit hours of MCLE. Attorneys from other states will need to contact their local bar to verify their own certification requirements.
Module One: Articulating & Enacting Corporate Purpose

Module Overview

For the past few decades, the belief that a corporation's purpose was primarily to generate profits for shareholders was rarely questioned. Today, the role that companies ought to serve in society is being vigorously debated by regulators, investors, corporate executives, employees, academics, and the general public. We are beginning with corporate purpose because the outcome of this debate will dictate the future of capitalism.

In this module, we will examine this renewed debate on the purpose of the corporation from both a theoretical and practical perspective. We will address and debate the following questions:

- How have legal norms, business norms, and culture shaped our understanding of corporate purpose throughout history, and how are those norms shifting today?
- Why is the articulation of corporate purpose so important?
- What impact does purpose have on corporate governance and the inner working of companies?
- What are the differences between shareholder primacy and short-term profit maximization, and have those two things been conflated?
- Why are investors, CEOs, and regulators currently advocating for “stakeholder governance,” and what are the benefits and risks of making companies accountable to “all stakeholders”? Is stakeholder governance even possible, particularly in bear markets, which force companies to make tradeoffs between stakeholders to survive?
- How can companies effectively communicate their corporate purpose to shareholders and other stakeholders?
- What corporate governance reforms would communicate a commitment to purpose?
Module Two: Redefining the Roles of Government and Business to Address Social and Environmental Challenges

Module Overview

Traditionally companies focused on generating profits, and governments addressed harms to society or the environment through regulation. Today, key stakeholders are not only asking companies to address their harms or externalities, as we discussed in Module 1, but also to step into the role of government to address issues such as education, gender and racial justice, infrastructure, and income inequality. Many corporate leaders are embracing this new narrative, and even aligning their brands and business strategies with social and environmental priorities. This recent blurring of the line between government and the social sphere, on the one hand, and business and the private sphere, on the other, raise new business, legal, ethical, and practical challenges.

In this module, we will discuss and debate the following questions:

- How have recent US Supreme Court decisions on the constitutional rights of corporations impacted how we view the corporation’s obligations to society?
- How should companies respond to the growing body of data showing that employees, consumers, and investors are expecting companies to address social and environmental issues?
- What are the advantages and harms of this broader articulation of the role of companies?
- Is “brand activism” fundamentally at odds with social and environmental justice given that it has a profit motive, or do we want alignment between profit and social values?
- What challenges does this raise given the fact that companies are not democratic institutions?
- How has brand activism played out in the Black Lives Matter movement? How is this different from other types of brand activism, including the LGBTQ rights movement or the #MeToo movement?
- How can companies draw the line between social and environmental issues that they are willing to engage on and those that are best addressed through regulation?
- What if regulation is not possible due to political deadlock?
- What if stakeholders are asking companies to engage on issues that have no nexus to a company’s business purpose or strategy?
We will begin the module with a historical overview of the Supreme Court cases which have blurred the lines between natural persons and corporate persons. We will then spend the rest of the module on brand activism, or the increasing ways in which companies are advocating for and against social and environmental causes.
Module Three: Debating the Board’s Fiduciary Duties Under the Traditional and New Corporate Forms

Module Overview

Many states have adopted legislation for new corporate forms that explicitly require boards to take stakeholders into account. Some caution that these new forms are not necessary because the fiduciary duties of directors under Delaware law already permit or even require boards to take the interests of stakeholders into account. Others, including prominent Delaware justices, argue that while the long-term interests of shareholders and stakeholders often converge in the long-term, it is important to be “clear-eyed” about the limits of traditional corporate forms.

In this module, we will address and debate the following questions:

- Under Delaware corporate law, are directors permitted or even required to consider stakeholders beyond shareholders?
- What are the key differences between the most common types of benefit corporations, including the Delaware Public Benefit Corporation, the California Benefit Corporation, and the California Flexible Purpose Corporation?
- Are the new corporate forms necessary, or even counter-productive, given the evolving interpretations of the board’s fiduciary duties to consider stakeholder interests?
- Should corporate governance be legislated at the national level to address the externalities of companies on our society and the planet?
- What are the limits of regulation and should the investor, and business community articulate new business norms to provide guardrails on corporate conduct?
Module Overview

ESG investing has become mainstream, but how it works in practice remains opaque. In this module, we will hear from leaders in the investment community to explore why investors now embrace ESG, how ESG plays into their investment strategy, and how they communicate their ESG priorities to companies.

In this module, we will address and debate the following questions:

- What are the origins of the sustainable investment movement, and how is that different from ESG investing today?
- Why has ESG investing become mainstream?
- How do investors communicate their ESG priorities to companies, and how can companies effectively respond?
- What are the mechanics of the engagement process?
- How do investors’ fiduciary duties impact their ability to advocate for environmental and social issues?
**Module Overview**

ESG is not a discrete set of issue areas but rather a robust and cross-functional process for seeking continual input from internal and external stakeholders. By encouraging communication, the ESG process allows companies to mitigate risk and seize business opportunities. Unlike compliance, which is often narrowly focused on legal risk, the ESG process casts the net wide and allows companies to address emerging and unknown risks. In light of the growing number of crises, investors are recognizing that a robust ESG function is essential for sound risk oversight.

In this module, we will address and debate the following questions:

- What are the different steps of the ESG process?
- How does each step operate in practice to elicit information from key stakeholders in order to flag emerging and unknown risks and identify new business opportunities?
- Why is ESG a better risk monitor than compliance?
- How does ESG interact with traditional enterprise risk management?
- How have companies leveraged their ESG processes, and in particular communicated with stakeholders, to be more resilient to the Covid-19 crisis?
Module Six: Measuring and Disclosing Environmental and Social Risks and Priorities

Module Overview

The lack of standardized metrics to hold companies accountable for their environmental and social commitments has impeded the ESG movement. To the frustration of investors and corporate executives, there are numerous standard setters, rating agencies, and data providers. After several years of investor demand, the SEC has recently proposed rules governing the “Enhancement and Standardization of Climate-Related Disclosures for Investors.

In this module, we will address and debate the following questions:

● What are the key ESG standard-setters, and which standards should companies report to?
● What are the differences between standards, frameworks, rating agencies, and data providers?
● How can companies leverage each other to communicate their ESG priorities to investors and stakeholders?
● What is the current state of play with respect to mandatory reporting of human capital management and climate risk?
● What are the investors’ expectations for disclosure of ESG, and how do those differ from the expectations of other stakeholders?
● What are specific examples of companies that are effectively communicating their ESG risks and priorities with investors and stakeholders?
Module Seven: Valuing Employees and the Workforce

Module Overview

Today, intangible assets which include a company’s workforce account for the overwhelming majority of its value. Despite this, the Covid-19 pandemic revealed just how vulnerable many workers today are. As a result, investors are engaging more than ever on how companies are treating their workforce and overseeing corporate culture.

In this module, we will address and debate the following questions:

- Why are investors and other stakeholders focused on the workforce?
- What are the tradeoffs between the interests of employees and those of other stakeholders, and how are companies navigating those tradeoffs?
- What is the board’s role in ensuring that corporate executives are fostering a strong corporate culture and meeting the needs of employees, contractors, and workers?
- What are ways that companies can ensure that input from employees is incorporated into corporate decision-making?
- Should there be employee representation on the board? If not, what are some corporate governance structures that would allow for employees to have more influence?
- What are best practices of companies that are demonstrating their commitment to their workforce?
Module Eight: Prioritizing Diversity, Equity, and Inclusion

Module Overview
While the pandemic has continued to accelerate systemic inequalities and exacerbate political turmoil in the U.S., corporate political activity and workplace diversity including board oversight of diversity, are at top of mind for investors and stakeholders. What’s more, stakeholders and shareholders are increasingly viewing DEI issues at the nexus of the climate crisis; specifically, how corporate DEI is related to complex and interlinked issues such as economic, environmental, and racial justice, a just climate transition, decent work, and corporate transparency. In response, an increasing number of businesses have made public commitments to support diversity, equity, and inclusion. Yet, many of these businesses have faced investor and stakeholder scrutiny for failing to align their business strategies and operations with these commitments. This gap between public statements and business practices has led to legal, reputational, and business risk for companies.

In this module, we will address and debate the following questions:

- What are best practices for prioritizing diversity, equity, and inclusion?
- How can companies measure and report their progress on diversity, equity, and inclusion?
- What is the board’s role in ensuring that it is fostering a culture that values diversity, equity, and inclusion?
- Why are regulators increasingly focused on diversity, equity, and inclusion?
- Should DEI extend to how corporations treat their consumers and the communities in which they have an impact?
Module Nine: Respecting Human Rights and Building Resilience Against Supply Chain Risks

Module Overview

Despite the sustained progress on supply chain management, many companies have multi-tiered supply chains that remain opaque. As a result, forced labor and child labor remains common in supply chains throughout sectors. A number of jurisdictions around the world have passed legislation to increase legal liability for companies that fail to oversee their supply chains. As these abuses are becoming more transparent through social media, companies are also facing mounting reputational risks. And these practices run afoul of the commitments that companies themselves have made to abide by human rights standards and norms. More recently, COVID-19 has heightened investor focus on supply chain management because weak supply chain oversight is disrupting business continuity.

In this module, we will discuss and debate the following questions:

- What are the increased legal and regulatory risks of failing to oversee supply chain risks, and how is that risk intensifying due to the Covid-19 pandemic?
- What are specific examples of companies that invested in mapping their supply chains and communicating with their suppliers before the pandemic and how is that helping them navigate business disruption?
- How are investors engaging with companies on their supply chain vulnerabilities, and what do investors expect companies to do?
- What are the emerging technologies and approaches to address supply chain risks, and do these pose other risks such as data privacy?
- What are examples of companies that are effectively overseeing their supply chains?
Module Ten: Building Resilience Against Environmental Risks

Module Overview

The largest investors and asset managers in the world are sounding the alarm bells—climate change is now an investment risk. Consumers and employees are also demanding that companies manage their impacts on the environment. As the pressure for companies to react with specific actions is mounting, they are responding in a variety of novel ways. These strategies include reformulating business practices and products, recruiting climate competent directors, and tying executive compensation to climate change goals.

In this module, we will address the following questions:

- Have consumer expectations changed with respect to a company’s environmental practices, and does this represent any tangible business risk to companies?
- How have employees’ expectations changed, and are companies risking losing talent? Is this less of a concern in today’s market, with high unemployment numbers?
- How are investors leveraging their influence over companies who are failing to oversee climate risk?
- What is the basis for the increased number of shareholder proposals on climate risk, and have those been successful?
- Is there more legal risk to corporate executives and directors for failing to oversee or disclose the risk of climate change? What actions are companies taking to address environmental risks, and which ones are addressing stakeholder concerns?
- What is the role of the board in overseeing climate change risk?