

## ESG in Corporate Transactions

It's time to buzz the tower

**November 17, 2022**





## Agenda

What is ESG?

What are the drivers for ESG?

ESG Regulation

How does ESG impact corporate value?

Approach on transactions

Drafting in detail



# What is ESG?



**E**nvironmental



**S**ocial



**G**overnance



# What is ESG?

## Environmental



Focusses on company's environmental disclosure, environmental impact both ways, and any efforts to reduce pollution or carbon emissions

- Climate change
- Greenhouse gas emissions
- Resource depletion, including water
- Waste and pollution
- Deforestation





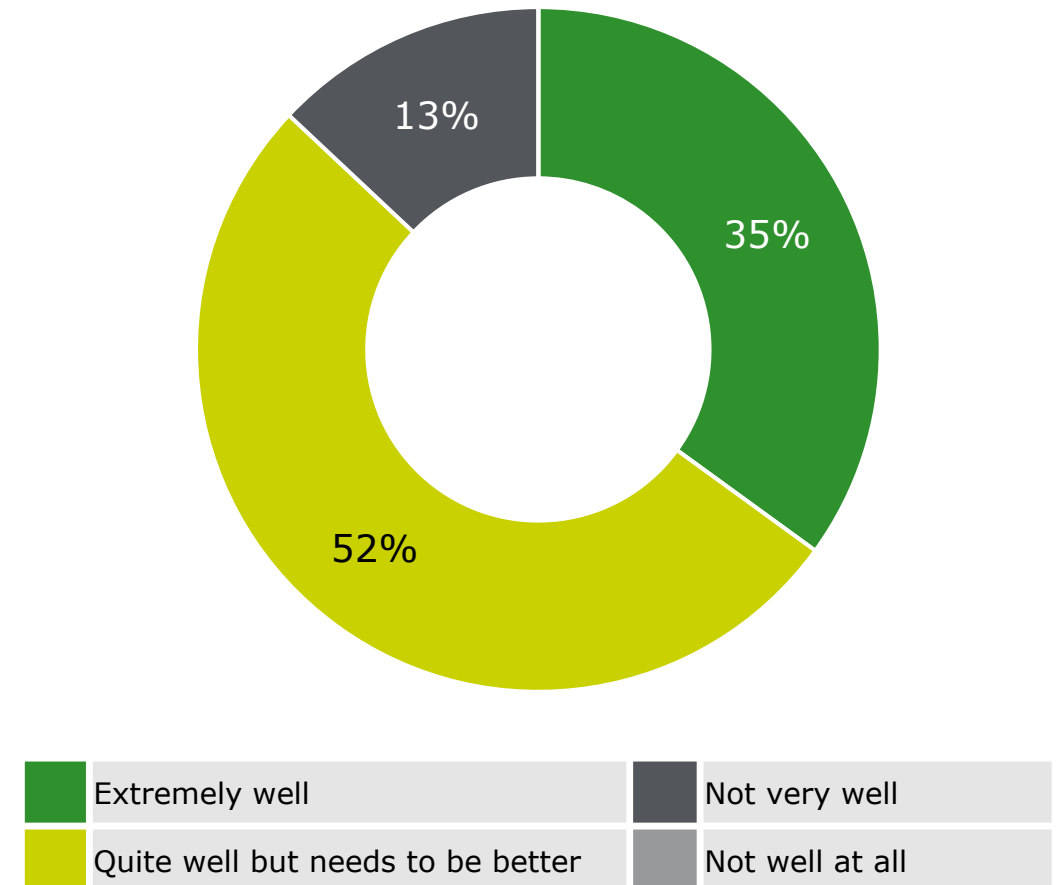
# Most executives currently believe they understand the climate-related risks their companies face



Climate risks fall into two broad categories:

- Physical risk, such as extreme weather events caused by changes in the physical environment that present a threat to a business's physical assets, operational resilience, and supply chains; and
- Transitional risk, caused by those who engage with a company and who are key for its continued success deciding to disengage, such as investors, lenders, regulators, business partners, customers, and employees

## Global results



# What is ESG?

## Social



Refers to the workplace mentality (e.g. diversity, management, human rights) as well as any relationships surrounding the community (e.g. corporate citizenship and philanthropy)

- Working conditions, including slavery and child labour
- Local communities, including indigenous communities
- Conflict regions
- Health and safety
- Employee relations and diversity





# What is ESG?

## Governance



Accounts for compensation, shareholder rights, and the relationship between shareholders and management

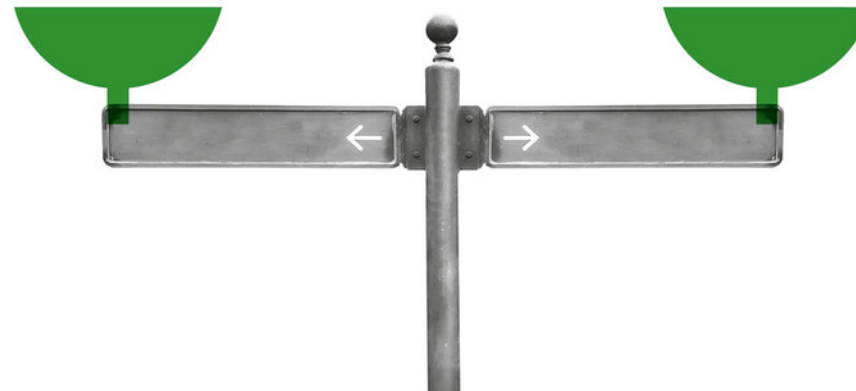
Board diversity  
and structure

Bribery and  
corruption

Political lobbying  
and donations

Executive pay

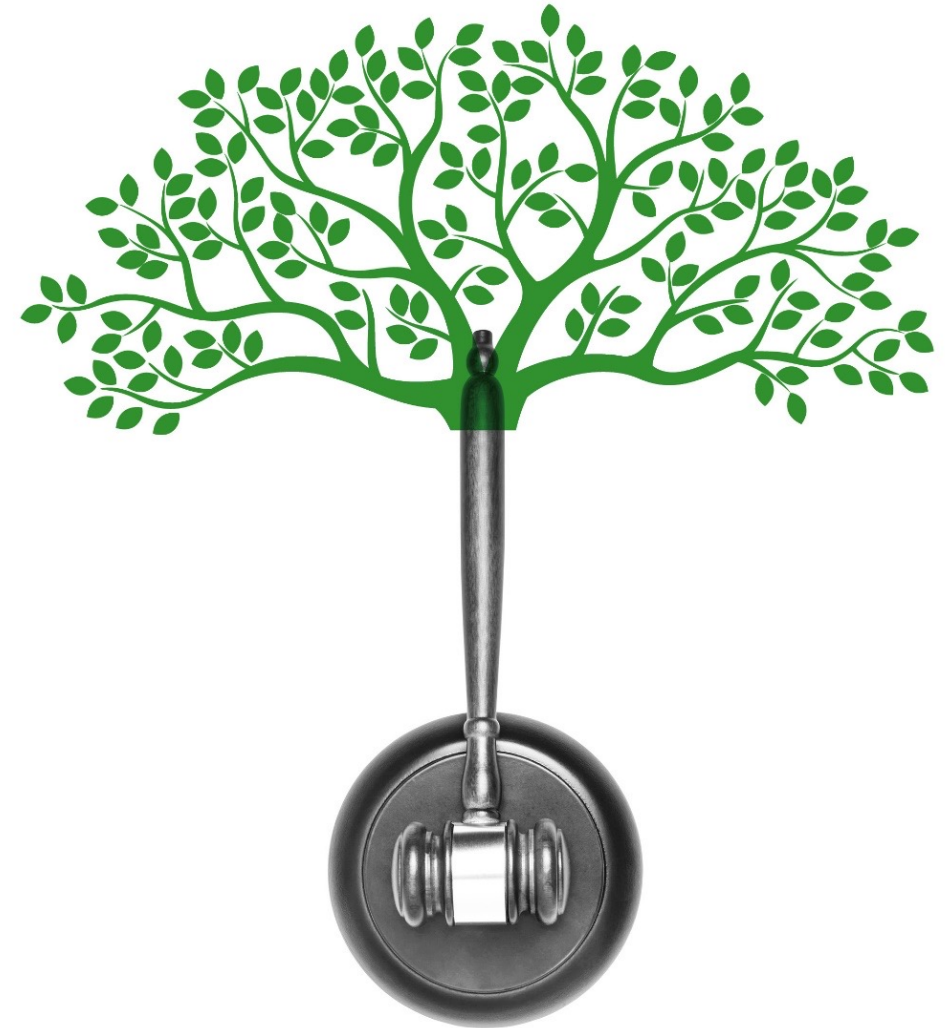
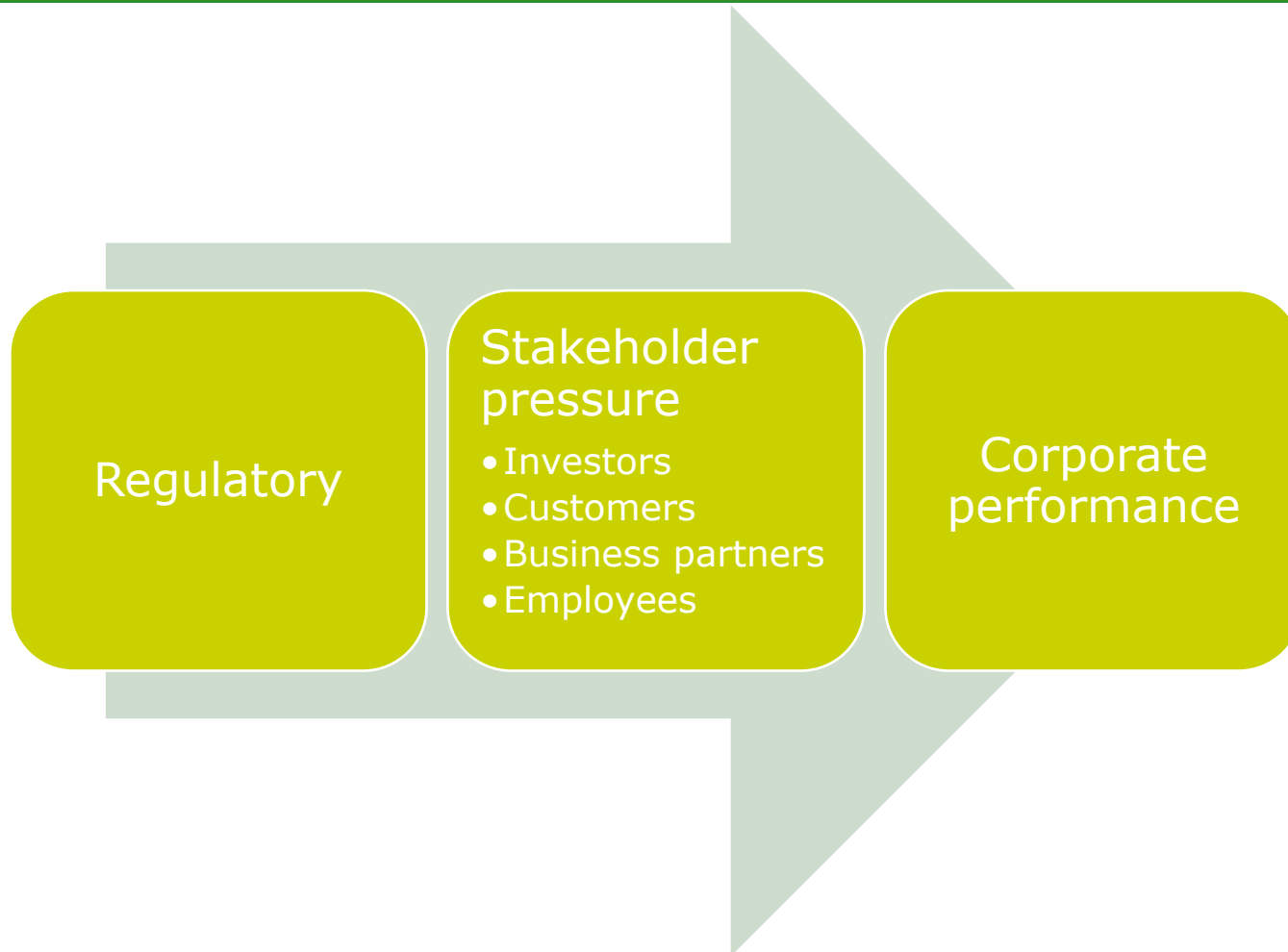
Tax strategy





# What are the Drivers for ESG?









# ESG Regulation





- Sustainable reporting obligations and director duties
- Sustainability-related disclosure obligations
- Environmental compliance and liability
- Climate change litigation and regulatory action
- Tax compliance
- Health and safety at work





# ESG Regulation - US

- The SEC has issued interpretive guidance regarding climate change disclosures.
- The SEC has proposed to require public companies to disclose a broad array of climate related disclosures, including:
  - climate-related risks;
  - climate-related effects on strategy, business model, and outlook;
  - greenhouse gas (“GHG”) emissions; and
  - climate targets and goals.
- The Department of Labor has proposed to permit ERISA fiduciaries to make available investment alternatives, including Qualified Default Investment Alternative (QDIAs), which take collateral ESG factors into consideration.
- The National Association of Insurance Commissioners (NAIC) has revised its annual Climate Risk Disclosure Survey to require reporting based on the Task Force on Climate-related Financial Disclosure (TCFD) framework. Fifteen states have committed to use the NAIC survey in 2022 for insurance companies licensed in their jurisdictions, representing nearly 80% of the US insurance market.



An aerial photograph of a dense, lush green forest. A river or stream flows through the center of the image, reflecting the sky and surrounding trees. The forest is composed of various types of trees, including tall evergreens and shorter deciduous trees. The overall scene is vibrant and natural.

## How does ESG impact corporate value? Focus on climate risk





## Climate Risk

- physical impacts of climate change
- transitional risk of decarbonization failure
- greater transparency
- regulators/investors hot on greenwashing

## Impacts

- balance sheet impairment
- share price
- stranded asset risk

## Mitigators

- strategic decarbonization plan
- verifiable reporting against stated milestones
- TCFD becomes a toolkit
- Decarbonization and climate risk mitigation delivered



# Tools for value maintenance and enhancement







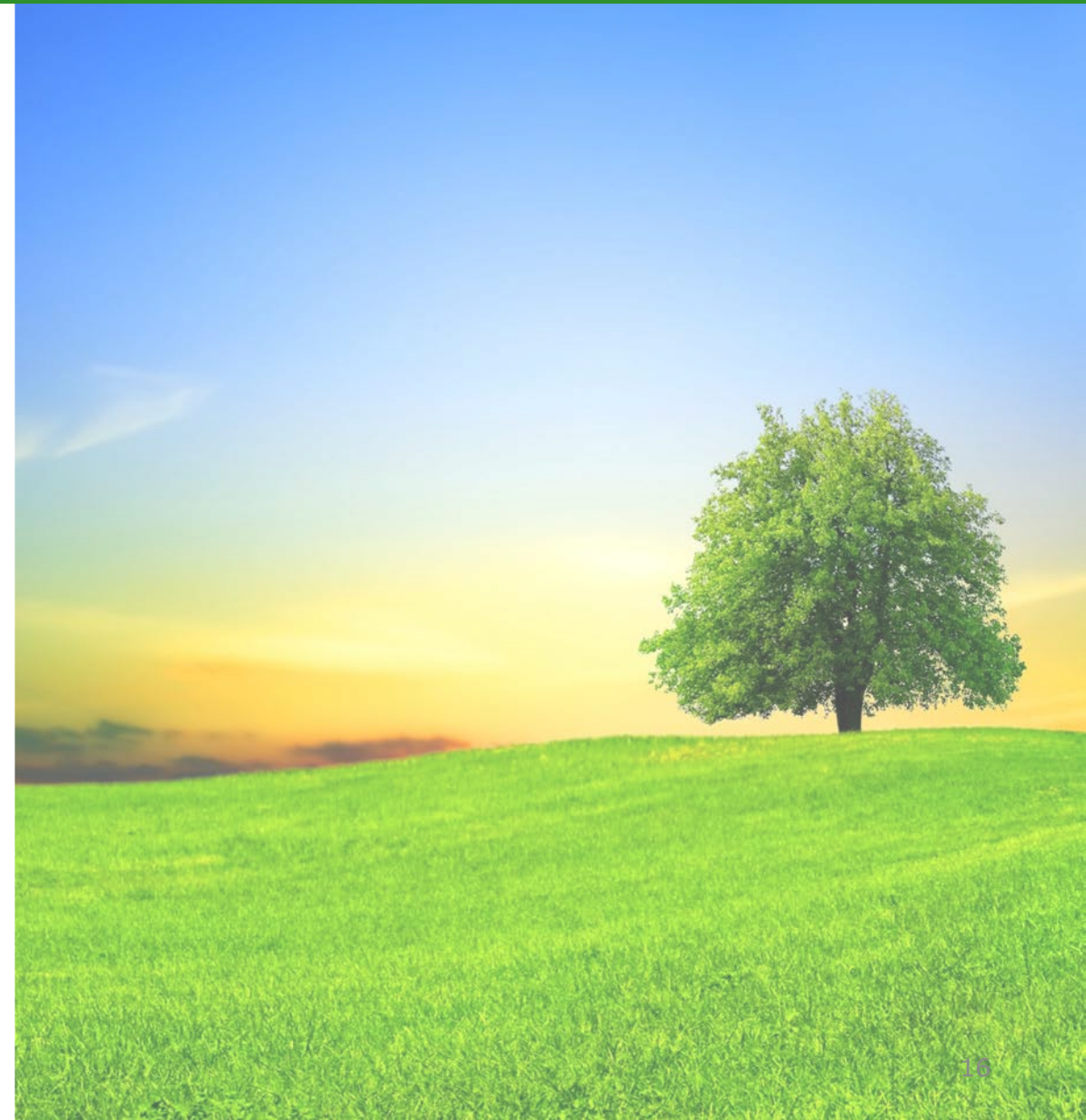
Essentially businesses now have to be:



ESG fit for purpose



ESG future proofed





# Approach on transactions



# Approach on transactions



## ESG objective in corporate transactions

- Full visibility in risk areas
- Ability to evaluate these
- Assess the impact if any on transaction structure, terms and pricing



# Approach on transactions



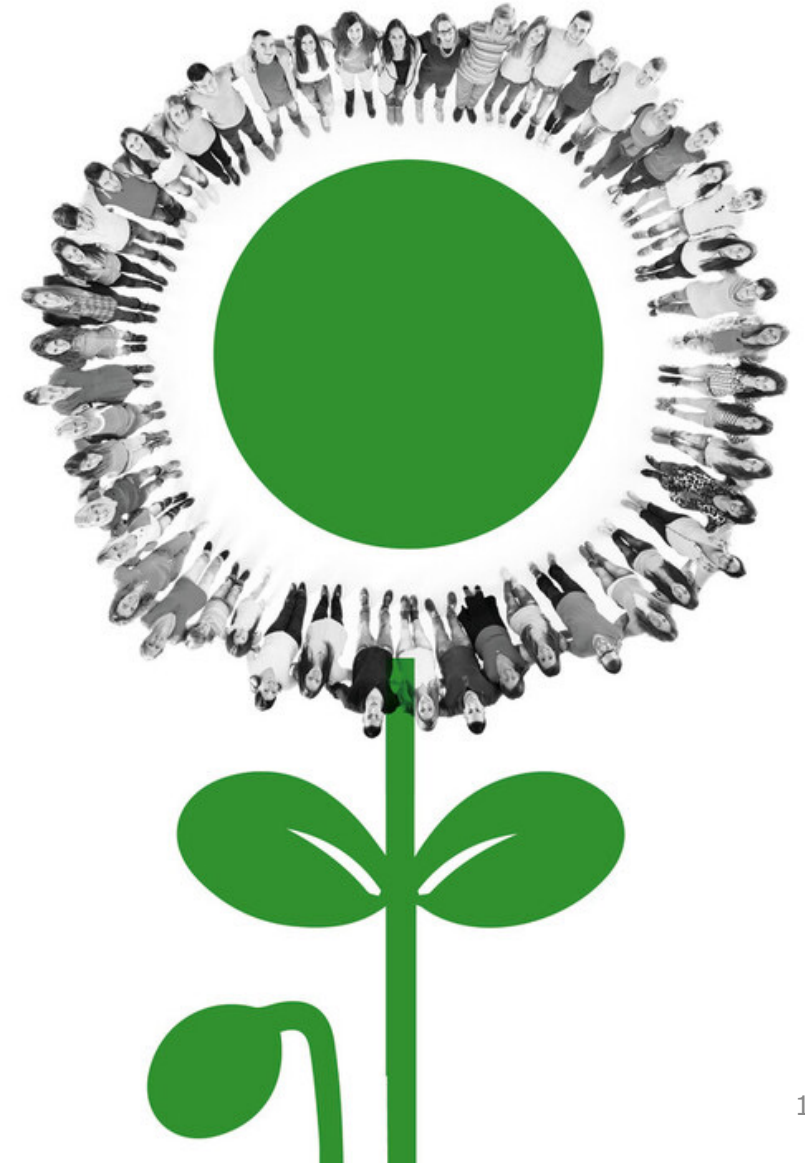
ESG has the potential to create value enhancement which may not have been captured at the time of the transaction.



Corporate transactional models need to be capable of identifying this and capturing it for future value enhancement.



Avoid missed opportunities





## Approach on transactions

In simple terms ensure that when it comes to ESG in corporate transactions:



### Certainty

- You can rely on the ESG data and have captured all ESG risk and opportunity



### Clarity

- You are clear that the modelling, structure and provisions relating to ESG are correct, understood and have been properly implemented



### Comfort

- From knowing that this transaction is aligned with your ESG strategy and will enable your business to continue to grow





ESG should now be a part of any due diligence, verification or disclosure process. The challenge is knowing what to look for. Understanding which ESG factors have the potential to impact risk or value in the target business is key.

- Assessing ESG compliance
- Assessing other ESG risk impacts
- Understanding which tools and risk mitigation strategies are being utilised
- Understanding current and past stakeholder impact and future strategies for continued engagement
- Reviewing third party specialist ESG diligence reports
- Supplementing existing DD approach to specifically access ESG data



While existing standard warranties will no doubt cover many areas of ESG concern, in our view the better approach is to be specific and to consider going beyond a focus on compliance. This is because:

- a company's ESG position has the potential to impact a company's value notwithstanding ESG compliance
- key stakeholder engagement will likely be linked to a strong ESG position
- ESG is not just about risk. ESG can create value enhancing opportunities and these need to be understood



# Approach to transactions

## Live provisions



ESG is a continuing obligation and risk



Needs to be incorporated into joint ventures and consortium arrangements



Utilize highest standards (as was done for bribery and corruption compliance)







Taking it one step further – ESG as a means to enhance value

Consider ESG as growth opportunity

Build this into due diligence

Is it a transaction/value driver?



## Drafting in detail





# Definitions relating to ESG



To go beyond the base definition of ESG Law, to include regulation and recommended ESG practice

**“Climate Risk”**

**“Decarbonization Strategy”**

**“ESG Data”**

**“Environment, Social and Governance” or “ESG”**

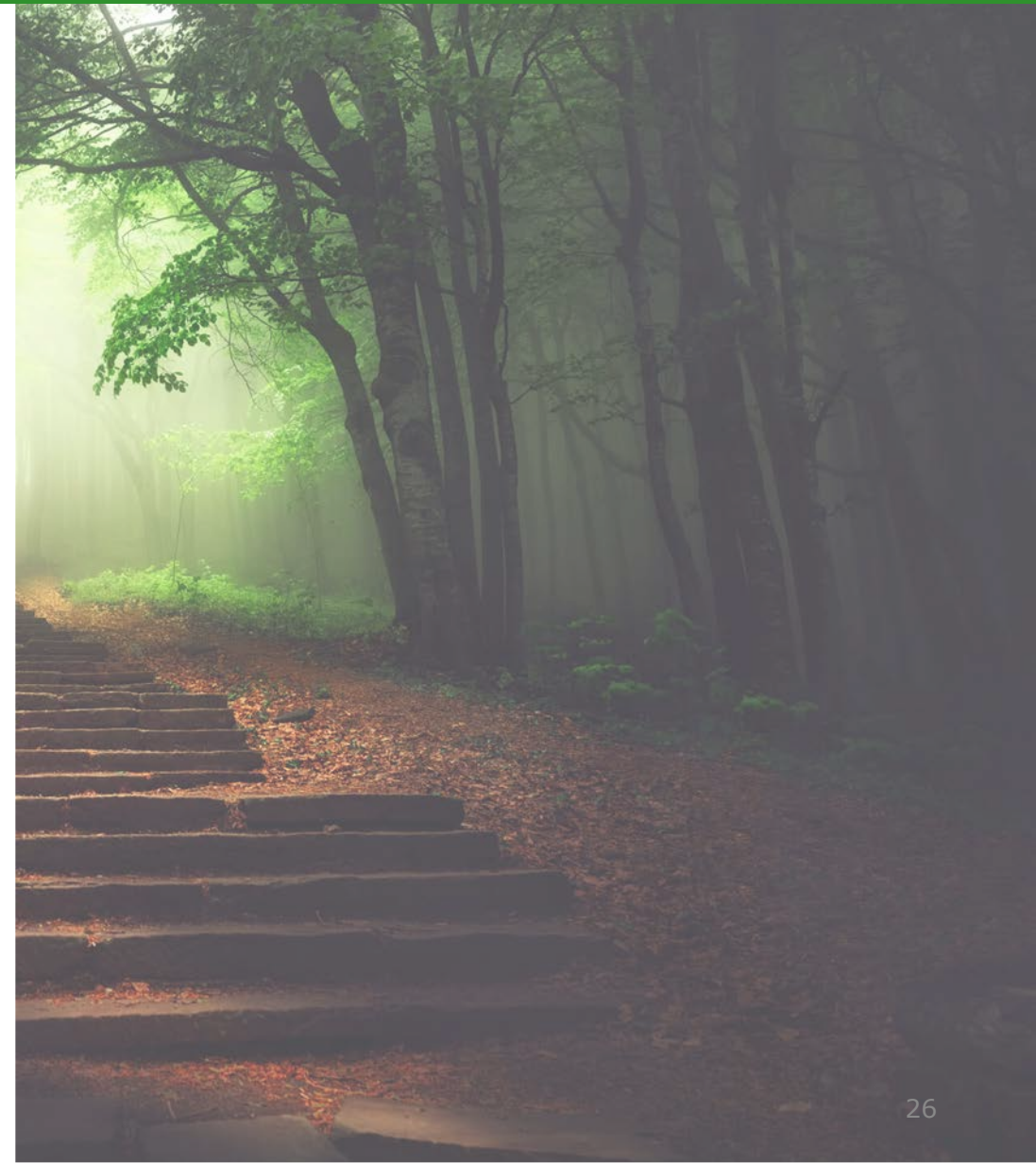
**“ESG Best Practice”**

**“ES Governance”**

**“ESG Law”**

**“ESG Policy”**

**“Key ESG Stakeholders”**





Exclusions under R&W / W&I insurance



Specialist insurance policies





# Integration provisions



Alignment of the target's ESG policies and procedures



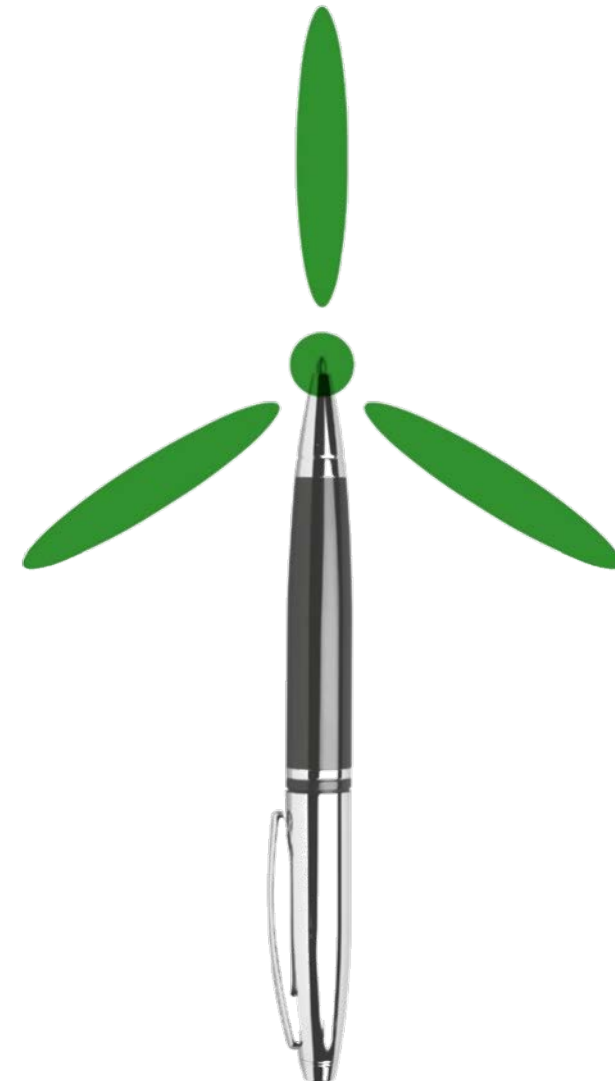
Post-completion ESG compliance audit



Addressing and managing ongoing ESG risks



Preparation for enhanced ESG disclosures





- Similar warranties to the SPAs
- Ongoing obligations
  - in relation to existing and ongoing compliance with ESG law and ESG Regulation (similar to Bribery Act) by the JVCo and by the JV parties
  - to disclose any circumstances that could impact the ESG position of the JV
  - to protect against ESG driven value deterioration and to focus on ESG driven value enhancement on an ongoing basis
  - to establish appropriate access to ESG Data and establish appropriate due diligence, monitoring and disclosure protocols
  - to share ESG best practices across the JV parties and JVCo
- Think about the consequences of breach of the ESG obligations, given the reputational risks of breach by a JV or its JV parties:



**Remedy**



**Pay to remedy**



**Termination  
(with all the consequential  
issues around this)**



# General warranties



The Company complies with all [ESG Law/ESG Regulation, Applicable Law relating to ESG]

The Company does not carry out any activity that has led or is likely to lead to a breach of [ESG Law/ESG Regulation, Applicable Law relating to ESG]

The Company has in place a documented process for ESG Governance and compliance with such ESG Governance policies and procedures subject to a monitoring process by [the Board]

All ESG Governance policies and reports relating to the Company have been Disclosed

The Company has a system in place for collecting, processing and storing data in relation to its ESG Governance and that of its suppliers – link to existing regulatory wording

The Company has in place a system for monitoring ESG Data which is itself where necessary compliant with, and in addition is sufficient to enable compliance with, ESG Law and ESG Regulation and further all appropriate actions which need to be taken as a result of such ESG Data have been taken [eg dealing with this appropriately eg compliance, taking action under agreements to protect the value of the Business] and this set out in the Data Room



# General warranties (continued)



All third party contracts contain provisions that enable the Company to access appropriate data regarding that third party's compliance with ESG and to enable the Company to make an informed statement of the impact of such third party activity on its own ESG compliance position

The Disclosure Letter sets out details of the Company's suppliers and supply chain contracts and the consequences of a breach by a supplier of its ESG Obligations to the Company

The Business is not impacted by Climate Risk – to be defined as the physical impacts of climate change

The Business is not likely to lose any of its Key ESG Stakeholders as a result of its Decarbonization Strategy or its failure to deliver the same

[Include employment warranties too as employment practices are relevant too including around new EU regulation for due diligence, monitoring and disclosure around employment and environment]

Due regard has been had in relation to the impact on the wider community and society of the way that the Company operates its Business

[Further E, S and G warranties to be included]



# Specific areas of concern



Specific areas of concern may need additional bolstering for example (but there may be others):



**Anti-Corruption**



**Anti-Slavery**



Questions?







**Baird D. Fogel**  
*Partner, USA*

**T:** +1 415 528 2605  
**M:** +1 415 205 2605  
[bairdfogel@eversheds-sutherland.com](mailto:bairdfogel@eversheds-sutherland.com)



**Marc Rawls**  
*Partner, USA*

**T:** +1 404 853 8058  
**M:** +1 678 613 2318  
[marcrawls@eversheds-sutherland.com](mailto:marcrawls@eversheds-sutherland.com)



**Antony Walsh**  
*Partner, UK*

**T:** +44 207 919 4848  
**M:** +44 782 446 0430  
[antonywalsh@eversheds-sutherland.com](mailto:antonywalsh@eversheds-sutherland.com)



**Samantha Villanueva-Meyer**  
*Former Chief Compliance Officer,  
Enjoy Technology, Inc.*

**[eversheds-sutherland.com](https://eversheds-sutherland.com)**

This information pack is intended as a guide only. Whilst the information it contains is believed to be correct, it is not a substitute for appropriate legal advice. Eversheds Sutherland (International) LLP can take no responsibility for actions taken based on the information contained in this pack.

© Eversheds Sutherland 2022. All rights reserved.