

ESG & ANTI-BLACK RACISM

Alicia E. Plerhoples*

INTRODUCTION	910
I. ESG RACIAL EQUITY GOALS.....	912
II. THE ACTORS SETTING ESG RACIAL EQUITY STANDARDS	916
A. Federal Regulation.....	916
1. Equal Employment Opportunity Commission: EEO-1	916
2. The Securities Exchange Commission’s Diversity Assessment Report.....	917
3. The Office of Federal Contract Compliance Programs	918
B. Private ESG Efforts.....	919
1. Stock Exchanges & Indices	920
2. Proxy Advisory Firms & Asset Managers	922
3. Allbirds’ Sustainability Principles and Objectives Framework	923
III. RACIAL EQUITY AUDITS	924
A. Shareholder Proposals in Response to America’s Reckoning with Race.....	924
B. Federal Legislation on Racial Equity Audits	926
C. The SEC’s Future: E.U.’s Corporate Sustainability Reporting Directive	927
D. Caution: Standardization and Independent Audits of ESG Metrics.....	929
IV. CONCLUSION.....	931

* Alicia E. Plerhoples, Professor of Law, Georgetown University Law Center. Thank you to my research assistants Lauren Nilles, Taylor Tengwall, and Hayley Roth for their work on this essay and to the participants of the University of Pennsylvania Journal of Business Law’s 2022 symposium for helping me shape my reflections on environmental, social, and governance standards as they pertain to racial equity.

INTRODUCTION

In the wake of George Floyd's murder at the hands of a Minneapolis police officer and worldwide protests calling for policing reform, American companies like Amazon, Nike, and Walmart made statements in support of the Black Lives Matter movement and called for racial equity. Some companies donated funds to legal aid and other nonprofit organizations that work towards criminal justice reform. Minnesota-based Target provided ten thousand hours of pro bono consulting services to Black-owned businesses.¹ While environmental, social, and governance (ESG) tools and metrics have tended to focus on a firm's external and internal impacts on the environment, human rights, and labor standards, in recent years, firms have targeted ESG efforts at racial equity primarily through internal diversity, equity, and inclusion (DEI) initiatives and customer-facing corporate philanthropy.

Just how far are companies going to eradicate anti-Black racism? Many would find this question laughable. Is it foolish to look to the private sector to contribute solutions? As former Delaware Court of Chancery Chancellor Leo Strine writes, "American corporate law makes corporate managers accountable to only one constituency—stockholders."² According to Strine, believing that firms can regulate themselves and internalize externalities (such as racial inequities) that cause economic and social harm is rather naïve, even delusional.³

I tend to agree. Corporate self-regulation is insufficient to solve the problem at hand. Companies continue to engage in virtue-signaling initiatives to garner the goodwill of consumers or satisfy inadequate anti-discrimination regulation that cannot, by itself, level the playing field. Eradicating anti-Black racism requires more; such efforts do not start or end with the private sector.

Stronger regulation is key. Strine writes:

The public interest, in the end, depends on protection by the public's elected representatives in the form of law. The well-intentioned efforts of many entrepreneurs and company managers,

1. *Target Commits \$10 Million and Ongoing Resources for Rebuilding Efforts and Advancing Social Justice*, TARGET (June 5, 2020), <https://corporate.target.com/article/2020/06/commitments-rebuilding-and-social-justice> [<https://perma.cc/VC2X-YSLK>]; see also *Amazon Donates \$10 Million to Organizations Supporting Justice and Equity*, AMAZON, <https://www.aboutamazon.com/news/policy-news-views/amazon-donates-10-million-to-organizations-supporting-justice-and-equity> (last updated July 14, 2020) [<https://perma.cc/FG4E-JVUS>] (describing Amazon's contributions to organizations promoting equity).

2. Leo E. Strine, Jr., *Making It Easier For Directors To "Do The Right Thing"?*, 4 HARV. BUS. L. REV. 235, 241–42 (2014).

3. Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 135–36 (2012).

who have a duty to their investors to deliver a profit, to be responsible employers and corporate citizens is undoubtedly socially valuable. But it is no adequate substitute for a sound legally determined baseline.⁴

Firms cannot be left to regulate themselves on ESG matters, including on eradicating anti-Black racism. They are beholden to stockholders. The race to the bottom for monetary profit has no floor without regulation.

And yet, the outsized power and excessive protections that companies have consolidated in the American political and legal systems and the economy cannot be ignored. As economic power is increasingly consolidated in fewer American firms, companies like Google, Apple, Amazon, United Health Group, AT&T, General Motors, and Walmart have an outsized ability to improve and reshape American lives, particularly Black lives.⁵ Racial equity demands not just criminal justice reform and an end to police violence, but also economic justice for Black Americans. Transformative laws could reduce the racial wealth gap, build up the Black middle class, and reduce income inequality in America.⁶ But can any of this realistically be done without the private sector? The complexity and largeness of the task at hand as well as the political and legal power of American companies requires engaging the private sector to help eradicate anti-Black racism. The current trends towards ESG provides such an opportunity.

This essay catalogs contemporary federal, financial intermediary, and company efforts to navigate racial inequality, placing those efforts in the context of ESG—environmental, social, and governance—initiatives. The bulk of this discussion focuses on an emerging and important ESG tool: the racial equity audit. “Race audits” were first proposed in 2011 in the context

4. *Id.* at 155.

5. See Barry C. Lynn, *America's Monopolies are Holding Back the Economy*, THE ATLANTIC (Feb. 22, 2017), <https://www.theatlantic.com/business/archive/2017/02/antimonopoly-big-business/514358/> [<https://perma.cc/J3WQ-4V4R>] (describing how monopolies are hurting the American economy).

6. See Heather Long & Andrew Van Dam, *The Black-White Economic Divide Is as Wide as It Was in 1968*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/business/2020/06/04/economic-divide-black-households/> [<https://perma.cc/MN5K-BPW8>] (illustrating how the wealth gap between Black and White people is still prevalent); see also Lucas Hubbard, *Middle Class Not a Level Playing Field for Blacks, New Duke Research Finds*, DUKE TODAY (May 12, 2020), <https://today.duke.edu/2020/05/middle-class-not-level-playing-field-blacks-new-duke-research-finds> [<https://perma.cc/2DGF-M5LQ>] (explaining that there is a very small Black middle class); see also Joseph Zeballos-Roig, *The Economic Prospects of Black Americans Have Stayed Largely Unchanged for Decades. Here are 12 Charts Demonstrating Alarming Rates of Inequality*, BUS. INSIDER (June 10, 2020, 10:16 AM), <https://www.businessinsider.com/charts-black-americans-gaping-economic-inequality-white-unemployment-earnings-financial-2020-6> [<https://perma.cc/4Q8B-8UPL>] (illustrating the economic inequality between Black and White people).

of municipalities seeking to “map the specific impacts of racial disadvantage within a jurisdiction.”⁷ The focus of the audit is not to seek out intentional wrongdoers but to track laws, policies, and procedures that contribute to racial disparities within the municipality.⁸ Racial equity audits have since been used in public education and, during the 2021 proxy season, were the topic of numerous shareholder proposals for companies to adopt.⁹ While no racial equity audit shareholder proposals were successful in 2021, they—and the entire ESG movement—continue to be bolstered by institutional investors eager to fight systemic racism and reluctant corporate managers facing embarrassing and newsworthy racially-charged incidents in their offices and storefronts.¹⁰ This essay concludes with my own recommendation to improve ESG efforts to combat racial inequality: the U.S. Securities Exchange Commission (SEC) should step into the role of regulator of ESG accounting and auditing firms to oversee and regulate the quality, ethics, integrity, and independence of ESG audits, including racial equity audits.

I. ESG RACIAL EQUITY GOALS

What should ESG efforts focused on racial equity strive to achieve? Defining goals before methods is crucial. The antithesis of anti-Black racism is racial equity. Racial equity is “the condition that would be achieved if one’s racial identity no longer predicted, in a statistical sense, how one fares.”¹¹ Where racial equality would treat all Americans the same,

7. R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1534 (2011).

8. *Id.* at 1534.

9. See generally Terrance L. Green, *Community-Based Equity Audits: A Practical Approach for Educational Leaders to Support Equitable Community-School Improvements*, 53 EDUC. ADMIN. Q. 3 (2017) (describing how community-based equity audits can assist education professionals in creating more equitable schools); Linda Skrla et al., *Equity Audits: A Practical Leadership Tool for Developing Equitable and Excellent Schools*, 40 EDUC. ADMIN. Q. 133 (2004) (illustrating how equity audits can change inequities in schools); Ron S. Berenblat et. al, *Racial Equity Audits: A New ESG Initiative*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 30, 2021), <https://corpgov.law.harvard.edu/2021/10/30/racial-equity-audits-a-new-esg-initiative/> [<https://perma.cc/A6XR-7AX6>] (portraying that racial equity audits are required by shareholders to reveal a company’s policies to combat racism or discrimination).

10. See Monica Avila et. al, *\$16.7 Million To Save One Reputation: How Starbucks Responded Amidst a Racial Sensitivity Crisis*, 7 PEPP. J. COMMC’N RSCH. 24, 24–36 (2019) (describing how Starbucks reacted to a racist incident in their store).

11. *Racial Equity*, CTR. FOR ASSESSMENT POL’Y DEV., <https://www.racialequitytools.org/resources/fundamentals/core-concepts/racial-equity> [<https://perma.cc/D62K-J3QD>]; see also POLICYLINK, FSG & JUST CAPITAL, *THE 2021 CEO BLUEPRINT FOR RACIAL EQUITY*, at ii (June 2021), <https://www.policylink.org/resources/2021-CEO-blueprint-for-racial-equity>

regardless of need, racial equity recognizes that people have different needs to thrive in a racially unjust and unfair society.

For me, an African-American cisgender woman, such a world is simultaneously easy and difficult to imagine. I live, with my family, in a wealthy suburb of Washington, D.C., where the high school's graduation rate is 98% and the median *household* income is \$207,184.¹² My town is not just a majority-white enclave, it is 74% white and 2% Black.¹³ I try to imagine my neighborhood if racial equity were achieved. In *White Space, Black Hood: Opportunity Hoarding and Segregation in the Age of Inequality*, Sheryll Cashin writes about the American residential caste system that “overinvest[s] in affluent white space[s] and divest[s] and plunder[s] elsewhere.”¹⁴ I witness this caste system play out daily on my drive by multi-million-dollar homes almost entirely occupied by white Americans into Washington, D.C., whose homeless population is almost entirely Black.¹⁵

Cynicism, apathy, and white supremacy's hold on America make it difficult to imagine a reality in which one's racial identity no longer statistically predicts how one fares: a reality in which white families do not have eight times the wealth as Black families, there are more than five Black CEOs in the Fortune 500, and more than 10% of U.S. businesses are owned by Black people.¹⁶

How to Be an Antiracist author Ibram X. Kendi urges individuals to undertake difficult steps towards racial equality and to employ anti-racist

[<https://perma.cc/XY6F-4HMN>] (defining racial equity as “just and fair inclusion into a society in which all can participate, prosper, and reach their full potential”).

12. *QuickFacts: McLean CDP, Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/mcleandcpvirginia> [<https://perma.cc/QSH9-VNBF>].

13. *Id.*

14. SHERYLL CASHIN, *WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY* 4 (2021).

15. CMTY. P'SHIP FOR THE PREVENTION OF HOMELESSNESS, *2020 POINT-IN-TIME COUNT OF PERSONS EXPERIENCING HOMELESSNESS IN THE DISTRICT OF COLUMBIA* (Jan. 20, 2020), <https://community-partnership.org/wp-content/uploads/2020/07/2020PITCountFactSheet.pdf> [<https://perma.cc/7GC2-NYKV>].

16. See Neil Bhutta et. al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [<https://perma.cc/DR9C-SJB9>]; Phil Wahba, *The Number of Black CEOs in the Fortune 500 Remains Very Low*, *FORTUNE* (June 1, 2020), <https://fortune.com/2020/06/01/black-ceos-fortune-500-2020-african-american-business-leaders/> [<https://perma.cc/HCX4-AJQK>]; Press Release, U.S. Census Bureau, *Census Bureau Releases New Data on Minority-Owned, Veteran-Owned and Women-Owned Businesses* (Oct. 28, 2021), <https://www.census.gov/newsroom/press-releases/2021/characteristics-of-employer-businesses.html> [<https://perma.cc/V77D-6RZQ>] (reporting that in 2019, 134,567 businesses in the United States were owned by Black or African American owners).

thought and behavior.¹⁷ In Professor Kendi’s view, racism is not a spectator sport.¹⁸ One can either recognize his or her participation in racist concepts and institutions and work to dismantle racism, or participate in racist concepts and institutions to perpetuate them. As Professor Kendi explains in *Stamped from the Beginning*, the 582-page academic version of his popular press book, a person can hold both racist and anti-racist views at the same time, under an assimilationist race theory.¹⁹ Notions that a person is either purely racist or purely not-racist are inventions that distract from dismantling structural racism.²⁰ Racial inequity is a problem of power, not morality.²¹

Slavery’s Capitalism authors Sven Beckert and Seth Rockman identify slavery as the key driving force in the development of the American economy, including American businesses, before the Civil War.²² “Slavery, as the foundational American institution, organiz[ed] the nation’s politics, legal structures, and cultural practices with remarkable power to determine the life chances of those moving through society.”²³ Black bodies were used as both capital and labor to build the American economy. Companies, not just individuals, benefit from a racially inequitable sociopolitical and legal framework, including, for example, the racial wealth gap, which affects everything from who the company’s founders and investors are to who its employees, customers, and suppliers are. “Business-as-usual can never be neutral in an economy founded on systemic racism.”²⁴

As Strine puts it, companies are not people imbued with moral principles.²⁵ Fortunately, changing morality or mindsets is not the goal of

17. See IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* (2019).

18. See *id.* at 22-23 (“The question for each of us is: What side of history will we stand on? A racist is someone who is supporting a racist policy by their actions or inaction or expressing a racist idea. An antiracist is someone who is supporting an antiracist policy by their actions or expressing an antiracist idea.”).

19. See IBRAM X. KENDI, *STAMPED FROM THE BEGINNING* (2016).

20. See *id.*

21. KENDI, *supra* note 17, at 208.

22. See SVEN BECKERT & SETH ROCKMAN, *SLAVERY’S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT* (2016).

23. *Id.* at 1.

24. *Racial Equity in the Board Room: Voting Guide*, MAJORITY ACTION: SERV. EMPLOYEES INT’L UNION, <https://www.racialjustice.majorityaction.us/home> [<https://perma.cc/A433-RHYZ>].

25. See Strine, *supra* note 3, at 135–36 (“More importantly, the continued failure of our societies to be clear-eyed about the role of the for-profit corporation endangers the public interest. Instead of recognizing that for-profit corporations will seek profit for their stockholders *using all legal means available*, we imbue these corporations with a personality and assume they are moral beings capable of being ‘better’ in the long-run than the lowest common denominator. We act as if entities in which only capital has a vote will somehow be

anti-racists; changing racist policies and impacts is.²⁶ If regulation is unavailable, whether because of the lack of political willpower, political dysfunction, racist legislators, or other reasons, what impetus do companies have to work towards racial equity? Profit. “The whole design of corporate law in the United States is built around the relationship between corporate managers and stockholders, not relationships with other constituencies.”²⁷ Corporate law ensures that profit drives corporate managers to act, including on political and moral issues. Markets also drive corporate managers to focus on short-term profit over long-term profit.²⁸

The economic impact of reducing the racial wealth gap provides the financial case for corporate pursuit of racial equity. A 2019 McKinsey study forecasted two economic scenarios to measure the impact on GDP from closing the racial wealth gap over a nine-year period.²⁹ The McKinsey study found that closing the racial wealth gap would add between \$1 and \$1.5 trillion to the economy over the nine-year period.³⁰ With U.S. GDP at approximately \$20 trillion since 2018, expanding the economy by \$110 to \$160 billion every year is no small feat.³¹ Likewise, a 2018 W.K. Kellogg Foundation report on the business case for racial equity has found that the U.S. could add \$8 trillion to its GDP by 2050 by closing the racial wealth gap.³² The cynical yet realistic view is that for corporate boards and managers to make substantial strides towards racial equity they must see profit in doing so—profit in the form of Black Americans’ increased equity

able to deny the stockholders their desires, when a choice has to be made between profit for those who control the board’s reelection prospects and positive outcomes for the employees and communities who do not.”) (emphasis added).

26. KENDI, *supra* note 17, at 208 (“Moral and educational suasion breathes the assumption that racist minds must be changed before racist policy, ignoring history that says otherwise To fight for mental and moral changes *after* policy is changed means fighting alongside growing benefits and the dissipation of fears, making it possible for antiracist power to succeed. To fight for mental and moral change as a prerequisite for policy change is to fight against growing fears and apathy, making it almost impossible for antiracist power to succeed.”).

27. Strine, *supra* note 3, at 153.

28. Strine, *supra* note 3, at 138.

29. See Nick Noel et. al, *The Economic Impact of Closing the Racial Wealth Gap*, MCKINSEY & CO. (Aug. 13, 2019) <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap> [<https://perma.cc/9QXW-9YCJ>].

30. *Id.* at 7.

31. *Gross Domestic Product*, U.S. DEP’T OF COMMERCE: BUREAU OF ECON. ANALYSIS, <https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey> (last updated Dec. 22, 2021) [<https://perma.cc/52E4-V4NK>].

32. Ani Turner, *Business Case for Racial Equity*, W.K. KELLOGG FOUND. (2018), <https://www.wkcf.org/resource-directory/resources/2018/07/business-case-for-racial-equity> [<https://perma.cc/BCS8-JJF8>].

capital, savings, credit, and income.

Undoubtedly, there are significant barriers to getting corporate managers to focus on profit left on the table by racial inequality. If racial equity were profit-maximizing in the short-term, we would have achieved our racial equity goal and there would be no need for further handwringing, prompting, or discussion. There is significant friction in corporate action on racial equity. With government regulation lacking, racial equity standards are being set by other power brokers, namely stock exchanges, indices, and institutional investors.

II. THE ACTORS SETTING ESG RACIAL EQUITY STANDARDS

A. Federal Regulation

Federal regulation of companies around race tends to focus on preventative measures, e.g., prohibiting employers from racial discrimination in hiring and pay,³³ or voluntary disclosure measures (although companies that do business with the federal government must also comply with affirmative action requirements).³⁴ For example, some federal agencies request or require disclosures of companies' workforce demographics. These disclosure regimes are intended to help guide managers to mitigate racial inequality within a company's workforce. Without more, these measures are wholly inadequate to achieve the goal of racial equity, but they are currently the dominant form of federal regulation and private sector ESG tools.

1. Equal Employment Opportunity Commission: EEO-1

The Equal Employment Opportunity Commission (EEOC) collects demographic workforce data from companies with more than one hundred employees who are required to provide such information by law through the Employment Information Report Component 1 (EEO-1).³⁵ Workforce demographic data requested includes the sex, race, ethnicity, and job categories of all employees; and a count of full versus part-time employees during a pay period selected by the employer.³⁶ The EEOC also may share data with other authorized federal agencies, like the Office of Federal

33. Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000e (West).

34. OFCCP, *About Us*, <https://www.dol.gov/agencies/ofccp/about> [<https://perma.cc/2K6G-N4ZK>].

35. 42 U.S.C.A. § 2000e-8(c) (Westlaw through PL 117-39); *EEO-1 Data Collection*, <https://www.eeoc.gov/employers/eo-1-data-collection> [<https://perma.cc/PX5N-7NKV>].

36. *Id.*

Contract Compliance Programs (OFCCP), to select companies to audit for compliance with their rules and regulations.³⁷ Nonetheless, neither the public nor shareholders can access individual company EEO-1 responses, only aggregate-level data on employment patterns, unless a company releases such data.³⁸

2. The Securities Exchange Commission's Diversity Assessment Report

Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") requires financial regulators to create diversity standards for the entities they regulate, including provisions for the collection of data on diversity in management, employment, and business activities.³⁹ Federal financial agencies were required to create an Office of Minority and Women Inclusion to oversee these efforts. In 2015, five federal financial agencies and the Securities Exchange Commission (SEC) established Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies.⁴⁰ The SEC created a voluntary diversity and inclusion disclosure form called the Diversity Assessment Report, which is a self-assessment and asks for responses to questions relating to the diversity policies, practices, and profile of the respondent.⁴¹ The first section of the report asks respondents to mark "yes" or leave blank boxes next to a series of statements like "the firm has a written diversity and inclusion policy" and "the firm engages in outreach to minority and women organizations" and leaves room for the respondent to provide commentary.⁴² The second section asks respondents to provide (a) percentage data related to gender, race, and ethnicity of their workforce across varying levels and (b) information related to supplier diversity by percentage of contracting

37. *Id.*

38. Alle Smith, *How Do the EEOC and OFCCP Use EEO-1 Reports?*, SHRM, <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeoc-ofccp-use-eeo-1-reports.aspx> (Sept. 17, 2019) [<https://perma.cc/2T3L-YLU5>].

39. *Id.*

40. Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed. Reg. 33016 (June 10, 2015). Financial regulators that would receive the new diversity information include the Consumer Financial Protection Bureau (CFPB), Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC), the Federal Reserve, and the Securities and Exchange Commission (SEC).

41. SEC, DIVERSITY ASSESSMENT REPORT FOR ENTITIES REGULATED BY THE SEC, <https://www.sec.gov/files/OMWI-DAR-FORM.pdf> [<https://perma.cc/Y6FH-S2JK>].

42. *Id.*

dollars spent.⁴³

The Diversity Assessment Report is designed to guide a respondent company's self-assessment of diversity policies and practices and is offered to regulated entities, which include brokers and dealers, investment companies, self-regulated organizations, and nationally recognized statistical rating organizations among other entities considered "regulated entities" under Section 342 of the Dodd-Frank Act.⁴⁴ Notably, publicly traded companies are not "regulated entities" under Section 342 of the Dodd-Frank Act; the Diversity Assessment Report targets financial firms.⁴⁵ Regulated entities do not have to use the SEC's form to conduct their self-assessments. The SEC recommends that regulated entities conduct their self-assessments annually, but the SEC does not request information about a regulated entity's diversity practices and policies more than biennially.⁴⁶ The voluntary and self-regulating nature of the Diversity Assessment Report detracts from accountability and transparency in meeting diversity goals. Most entities have declined to participate in annual diversity self-assessment requests.⁴⁷ Efforts to reform Section 342 of the Dodd-Frank Act were taken up in Congress in 2021 and are discussed in Part III.

3. The Office of Federal Contract Compliance Programs

The federal government has more influence on the diversity practices and policies of companies that do business with the federal government. The Office of Federal Contract Compliance Programs (OFCCP) is responsible for ensuring that companies that do business with the federal government comply with statutory anti-discrimination and affirmative action requirements.⁴⁸ Many government contractors are publicly traded companies and thus the OFCCP's rulemaking power potentially influences market behavior beyond companies that contract directly with the federal

43. *Id.*

44. *Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the SEC - Frequently Asked Questions*, SEC, <https://www.sec.gov/files/OMWI-DAR-FAQ.pdf> [<https://perma.cc/DK54-KZGM>].

45. *Id.*

46. *Id.* at 4

47. SEC, DIVERSITY ASSESSMENT REPORT FOR ENTITIES REGULATED BY THE SEC: SUMMARY OF YEAR ONE RESULTS, https://www.sec.gov/files/SEC_Diversity_Assessment_Report_Year_One_Summary%20Report.pdf [<https://perma.cc/D2TK-JNW2>]. Only 5% of regulated entities responded to the SEC's biennial request to submit information requested on the Diversity Assessment Report.

48. *OFCCP About Us*, DOL, <https://www.dol.gov/agencies/ofccp/about> [<https://perma.cc/8369-EVKN>].

government.⁴⁹ The OFCCP requires companies to:

1. Not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity or national origin;⁵⁰

2. Take affirmative action to ensure that applicants are employed and are treated without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin during employment;⁵¹

3. Maintain gender, race, and ethnicity records of employees and, where possible, job applicants;⁵²

4. Develop and maintain a written affirmative action program if the company is (i) a non-construction contractor and (ii) has more than fifty employees.⁵³

The OFCCP conducts compliance evaluations to determine whether a particular contracting company complies with its rules and may make referrals to the Solicitor of Labor or Department of Justice for administrative or judicial enforcement, respectively.⁵⁴ The OFCCP has also put forward “best practices” for companies seeking to improve their workplace diversity efforts.⁵⁵ These best practices are comprised of actions federal contractors can take rather than suggesting more reporting metrics.⁵⁶

B. Private ESG Efforts

Although too numerous to fully document in this essay, stock exchanges, indices, proxy advisory firms, institutional investors, ESG reporting agencies, advocacy groups, and global working groups have all influenced or set standards for ESG metrics to combat racial inequality.⁵⁷

49. For example, Microsoft is subject to OFCCP rules. Dev Stahlkopf, *Responding to the OFCCP on Our June Diversity Commitments*, MICROSOFT ON THE ISSUES (Oct. 6, 2020), <https://blogs.microsoft.com/on-the-issues/2020/10/06/ofccp-diversity-employment-laws/> [<https://perma.cc/LF3K-8EH6>].

50. 41 C.F.R. § 60-1.4 (2021).

51. *Id.*

52. *Id.* § 60-1.12.

53. *Id.* § 60-1.40.

54. *Id.* §§ 60-1.20, 60-1.26.

55. See, e.g., *Best Practices for Fostering Diversity & Inclusion*, OFF. OF FED. CONT. COMPLIANCE PROGRAMS, <https://www.dol.gov/agencies/ofccp/compliance-assistance/outreach/hbcu-initiative/best-practices> [<https://perma.cc/KS2T-XX7G>] (detailing some of these best practices and how to implement them).

56. *Id.*

57. For example, the Refinitiv Diversity & Inclusion Index analyzes over eleven thousand publicly listed companies based on twenty-four metrics across four key pillars related to D&I performance to identify the top one hundred publicly traded companies with

Wachtell, Lipton, Rosen & Katz partners reflected on the various racial equity tools that they have seen firms use during the past year.⁵⁸ These tools include: (1) hiring and expanding Diversity, Equity, and Inclusion (DEI) roles; (2) anti-bias training; (3) inclusive hiring practices; (4) audits of DEI progress and effectiveness; (5) public disclosure of DEI goals and targets, including EEO-1 workforce data reports; (6) executive compensation tied to DEI performance; (7) supporting and increasing supplier diversity; and (8) increasing board and management diversity. This section focuses primarily on the racial equity standards set by stock exchanges and proxy advisory firms, and the Sustainability Principles and Objectives Framework established for companies going public.⁵⁹

1. Stock Exchanges & Indices

The Nasdaq Stock Market (“Nasdaq”) imposed a first of its kind mandatory board diversity rule for companies listed on the Nasdaq. Under the Board Diversity Rule, a company’s board must: (1) have a self-identified (i) woman director and (ii) an underrepresented minority or LGBTQ+ director; or (2) (i) state that the Board Diversity Rule applies to them and (ii) explain the reasons why they have not met this obligation in advance of the company’s next annual meeting either through a proxy statement or on their website posted concurrently with a proxy statement filing and submission to the Nasdaq listing center.⁶⁰

The Rule provides exceptions for small boards, as well as transition

respect to diversity and inclusion. *Diversity and Inclusion Indices*, REFINITIV, <https://www.refinitiv.com/en/financial-data/indices/diversity-and-inclusion-index> [<https://perma.cc/7WWA-H9QK>]. As another example, the Sustainability Accounting Standards Board (SASB) Reporting Standards address five sustainability dimensions, one of which is Human Capital. SASB standards are published by industry and, of the seventy-seven industry standards, SASB applies diversity and inclusion metrics to thirteen industries. Kelli Okuji Wilson, *Exploring Diversity & Inclusion in the SASB Standards*, VALUE REPORTING FOUND.: SASB STANDARDS (Sept. 28, 2020) <https://www.sasb.org/blog/exploring-diversity-inclusion-in-the-sasb-standards/> [<https://perma.cc/F73U-GQAV>]. The U.S. Chamber of Commerce began the Equality of Opportunity Initiative in June 2020 to develop solutions to close race-based opportunity gaps in education, employment, and entrepreneurship. The Initiative supports progress in the private sector by promoting diversity in corporate leadership and increasing workforce diversity. *Equality of Opportunity Agenda*, U.S. CHAMBER OF COM. 1–5 (July 6, 2020), <https://www.uschamber.com/equality-of-opportunity-agenda> [<https://perma.cc/2AXE-Z8DJ>].

58. Adam Emmerich et al., *Using ESG Tools to Help Combat Racial Inequity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 7, 2021), <https://corpgov.law.harvard.edu/2021/07/21/using-esg-tools-to-help-combat-racial-inequity/> [<https://perma.cc/A7QE-YM3D>].

59. *Id.*

60. Self-Regulatory Organizations, Exchange Act Release No. 34-92590, SR-NASDAQ-2020-081 (Aug. 6, 2021) [hereinafter Exchange Act Release No. 34-92590].

periods for companies to come into compliance with this new rule.⁶¹ Once the transition period ends, companies who fail to comply will be notified by Nasdaq's Listing Qualifications Department and given until the later of (1) the next annual shareholder meeting, or (2) one hundred and eighty days to cure the deficiency to avoid potential de-listing.⁶²

Nasdaq also requires listed companies to disclose board-level diversity statistics annually using a standardized template (the "Board Diversity Matrix") or a similar format.⁶³ To support company board diversification efforts, Nasdaq-listed companies are offered free board recruiting services through partnerships with Equilar, Athena Alliance, and the Boardlist.⁶⁴ The SEC approved Nasdaq's board diversity rules in August 2021, determining that the rules were not anti-competitive, contributed to the maintenance of fair and orderly markets, and were sufficiently related to the purposes of the Act and administration of the exchange.⁶⁵

The SEC's treatment of Nasdaq's board diversity rules creates room for other stock exchanges to propose and adopt similar rules. Nonetheless, the New York Stock Exchange (NYSE) has not indicated that it will adopt a comparable set of board diversity rules. NYSE President Stacey Cunningham stated that NYSE would refrain from enacting such rules because companies will act on their own in reaction to investors that are demanding board diversity.⁶⁶ Cunningham does not believe that NYSE should be "defining the investable universe".⁶⁷ In 2019, NYSE introduced the NYSE Board Advisory Council which provides voluntary services connecting diverse candidates with companies seeking new board directors.⁶⁸ NYSE has also put forth ESG guidance in the form of Best Practices for Sustainability Reporting, which are voluntary and point those

61. *Nasdaq's Board Diversity Rule: What Nasdaq-Listed Companies Should Know*, NASDAQ (Aug. 6, 2021), <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf> [<https://perma.cc/3CHD-UQWD>].

62. Exchange Act Release No. 34-92590, *supra* note 60.

63. *Board Diversity Matrix Disclosure Requirements and Examples*, NASDAQ (Feb. 23, 2022), https://listingcenter.nasdaq.com/assets/Board%20Matrix%20Examples_Website.pdf [<https://perma.cc/59D5-B59X>].

64. See Exchange Act Release No. 34-92590, *supra* note 60 (listing rules related to board diversity and offering board recruiting services to companies).

65. *Id.*

66. *NYSE President on IPOs, Diversity, Chinese Company Listings*, BLOOMBERG (Dec. 9, 2020), <https://www.bloomberg.com/news/videos/2020-12-09/nyse-president-on-ipo-diversity-chinese-company-listings-video> [<https://perma.cc/JB99-2EVS>].

67. *Id.*

68. Betty Liu, *The Secret to Making Boards More Diverse: Networking*, BARRON'S (Feb. 5, 2020), <https://www.barrons.com/articles/diverse-boards-make-better-companies-so-the-nyse-is-taking-action-51580927401> [<https://perma.cc/MF24-GG7Z>]; *NYSE Initiative to Advance Board Diversity*, NYSE, <https://www.nyse.com/boardadvisory/about-the-council> [<https://perma.cc/CCM4-FRKZ>].

interested towards existing standards, including diversity standards, like those forth by the Global Reporting Initiative (GRI) and the Sustainability Accounting Standards Board (SASB).⁶⁹

2. Proxy Advisory Firms & Asset Managers

Proxy advisory firms such as Institutional Shareholder Services (ISS) provide guidelines related to how it will vote its proxy shares related to diversity and inclusion.⁷⁰ Firms like ISS have recently moved towards favoring diversity and inclusion policies, though in a limited manner. ISS encourages companies to be “sufficiently diverse to ensure consideration of a wide range of perspectives.”⁷¹ To that end, as of February 1, 2022, ISS votes against or withholds the vote from chairs of nominating committees where the board has no racially or ethnically diverse members.⁷² ISS will also vote for shareholder proposals for a company to disclose diversity policies, initiatives, or proposals (including EEO-1 data).⁷³ However, ISS holds out an important exemption to this guideline: ISS will not vote for disclosure data if the company (i) already publicly discloses such policies; (ii) already publicly discloses workforce data; and (iii) has no recent EEOC-related violations.⁷⁴ ISS will vote on a case-by-case basis on requests for reports on racial pay gaps.⁷⁵

In its 2022 proxy voting guidelines, BlackRock, the world’s largest asset management firm, encourages companies to have at least one member from an underrepresented group which includes racial and ethnic minorities but also people who are disabled, veterans, or identify as LGBTQ+. ⁷⁶ BlackRock takes a case-by-case approach to voting for or against company nominating committees who fail to achieve adequate board diversity.⁷⁷ Similar to ISS, BlackRock “expect[s] companies to disclose the steps they are taking to advance diversity, equity, and inclusion” and their responses on

69. *ESG Guidance: Best Practices for Sustainability Reporting*, NYSE, <https://www.nyse.com/esg-guidance> [<https://perma.cc/EX6Z-85EV>].

70. ISS GOVERNANCE, UNITED STATES PROXY VOTING GUIDELINES: BENCHMARK POLICY RECOMMENDATIONS 11–12 (2021), <https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf> [<https://perma.cc/4N4J-KMNF>].

71. *Id.* at 8.

72. *Id.* at 12.

73. *Id.* at 64.

74. *Id.*

75. *Id.* at 65.

76. BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP PROXY VOTING GUIDELINES FOR U.S. SECURITIES 7 (2022), <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf> [<https://perma.cc/NDF6-6ARW>].

77. *Id.* at 7.

their EEO-1 Report.⁷⁸ Additionally, BlackRock recommends that companies use and disclose ESG metrics based on the Sustainability Accounting Standards Board or similar reporting standards;⁷⁹ this would presumably include ESG metrics around advancing racial equity.

3. Allbirds' Sustainability Principles and Objectives Framework

In 2021, ESG thought-leaders from companies, rating agencies, academia, and investment firms came together to create the Sustainability Principles and Objectives (SPO) Framework for late-stage private companies preparing to go public and wanting to “demonstrate their environmental, social, and governance (‘ESG’) credentials” and commitments.⁸⁰ The SPO Framework contains several board-level governance criteria directly related to pursuing racial justice, including: (1) tying executive compensation to the company’s performance on ESG metrics, which includes diversity and inclusion metrics; (2) aligning the company’s policy advocacy, political contributions, and trade association engagement with its ESG criteria; (3) achieving and maintaining board diversity; and (4) making ESG criteria, including diversity and inclusion metrics, a board-level matter with oversight imbued in a Board committee.⁸¹ A company using the SPO Framework commits to reporting annually on each of these ESG criteria such that meeting these criteria is an ongoing and transparent commitment.

The SPO Framework also contains ESG criteria at the employee level. A company using the SPO Framework must (1) commit to achieve and maintain employee diversity, report on progress towards that goal, and conduct diversity training for employees, management, and directors; and (2) commit to report on its progress towards the company’s goals related to the median and mean pay gap for minority groups.⁸² Although not couched in terms of race, the SPO Framework also implicates impact on Black employees and communities by requiring companies to establish a living wage and adopt a human rights policy.⁸³

Sustainable footwear company Allbirds, a Delaware public benefit corporation, was the first to file its initial public offering using the SPO Framework. Allbirds chose ISS to independently assess and verify Allbirds’

78. *Id.* at 18.

79. *Id.* at 16.

80. *Sustainability Principles and Objectives (SPO) Framework*, BSR, <https://spo.bsr.org/#background> [<https://perma.cc/URG2-YAV7>].

81. *Id.*

82. *Id.*

83. *Id.*

performance against the SPO Framework.⁸⁴

The SPO Framework is an improvement over company self-regulation because a third party conducts the assessment. Nonetheless, it stops short of a holistic company-wide assessment. The SPO Framework incorporates particular sustainability standards set by well-known ESG reporting agencies such as the GRI, SASB, IRIS+, and B Lab.⁸⁵ The metrics are pre-defined. Racial equity audits, as discussed below, are holistic and ask the open-ended question: is the company doing intended or unintended racial harm either internally or externally?⁸⁶

III. RACIAL EQUITY AUDITS

A. Shareholder Proposals in Response to America's Reckoning with Race

Similar to many companies in the wake of Mr. Floyd's death in 2020, Amazon tweeted: “[t]he inequitable and brutal treatment of Black people in our country must stop. Together we stand in solidarity with the Black community—our employees, customers, and partners—in the fight against systematic racism and injustice.”⁸⁷ On June 10, 2020, Amazon put its words into action by placing a one-year global moratorium on the police use of Amazon's facial recognition software.⁸⁸ An MIT algorithmic study had found Amazon's facial recognition software to have a 22.71% higher error rate for identifying dark-skinned subjects than light-skinned.⁸⁹ Amazon subsequently extended the moratorium indefinitely.⁹⁰

84. INSTITUTIONAL SHAREHOLDER SERVICES, EXTERNAL REVIEW OF ALLBIRDS', INC. (Oct. 2021), <https://www.isscorporatesolutions.com/file/documents/spo/spo-20211004-Allbirds.pdf> [<https://perma.cc/Y7MZ-54PF>].

85. The first criteria that a company must satisfy to meet the SPO Framework is an ESG assessment “from a widely recognized third-party ESG reviewer.” *SPO Framework*, *supra* note 80.

86. POLICYLINK, *supra* note 11.

87. @Amazon, TWITTER (May 31, 2020, 1:05 PM), <https://twitter.com/amazon/status/1267140211861073927> [<https://perma.cc/55HZ-6CPW>].

88. *We Are Implementing a One-Year Moratorium on Police Use of Rekognition*, ABOUT AMAZON (June 10, 2020), <https://www.aboutamazon.com/news/policy-news-views/we-are-implementing-a-one-year-moratorium-on-police-use-of-rekognition> [<https://perma.cc/NNY4-7CG9>].

89. Natasha Singer, *Amazon Is Pushing Facial Technology That a Study Says Could Be Biased*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/technology/amazon-facial-technology-study.html> [<https://perma.cc/V876-FYZW>].

90. Jeffrey Dastin, *Amazon Extends Moratorium on Police Use of Facial Recognition Software*, REUTERS (May 18, 2021) <https://www.reuters.com/technology/exclusive-amazon-extends-moratorium-police-use-facial-recognition-software-2021-05-18/> [<https://perma.cc/657E-58L2>].

Less than a year later, Amazon petitioned the SEC to exclude from its 2021 Proxy Statement a 14a-8 shareholder proposal for Amazon to conduct an independent, third-party racial equity audit. The SEC denied the petition and the proposal was included on Amazon's Proxy Statement. Amazon's Board of Directors recommended that Amazon shareholders vote "no" on the proposal, claiming "we are already doing the work."⁹¹ The proposal was rejected by the shareholders, but Amazon's racial equity audit won 44.1% of the vote.⁹²

A racial equity audit is "an independent, objective and holistic analysis of a company's policies, practices, products, services and efforts to combat systemic racism in order to end discrimination within or exhibited by the company with respect to its customers, suppliers or other stakeholders."⁹³ Racial equity audits go further than ESG reporting standards by seeking to determine what "changes to existing programs or new measures or initiatives would help a company become more equitable and inclusive."⁹⁴ In line with some current anti-racist approaches, the purpose of a racial equity audit is to achieve results in the form of policy and practice changes that reduce anti-racism and promote racial justice. The racial equity audit informs investors and managers about risks related to racial bias caused by or occurring within their company so that they may eliminate or limit such risks. Racial equity audits include examination of internal workplace racial dynamics and demographics but also strive to examine external impacts a company makes that either contribute to or lessen racial inequality.

During the 2021 proxy season, there were eight shareholder proposals that were voted on asking firms to implement a racial equity audit. The proposals received support from, on average, 33% of shareholders, but ultimately none of the shareholder proposals were successful.⁹⁵ As some practitioners have pointed out "ESG initiatives, including Racial Equity Audits, are likely to continue to gain momentum during the coming proxy seasons."⁹⁶

91. Amazon.com, Inc., Proxy Statement (Schedule 14A) 43–49 (May 26, 2021), https://www.sec.gov/Archives/edgar/data/1018724/000110465921050333/tm2035374-1_def14a.htm [<https://perma.cc/9UMS-QFLW>].

92. Amazon.com, Inc., Current Report (Form 8-K) 4 (May 26, 2021), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/404c1c5d-f9b0-4007-9cf5-d98c9980bbdc.pdf> [<https://perma.cc/2SBE-8J7L>].

93. Berenblat et al., *supra* note 9.

94. *Id.*

95. Shirley Westcott, *2021 Proxy Season Review*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 5, 2021), <https://corpgov.law.harvard.edu/2021/08/05/2021-proxy-season-review/> [<https://perma.cc/AQ7C-M266>].

96. Berenblat et al., *supra* note 9.

B. Federal Legislation on Racial Equity Audits

There is a current attempt in Congress to legislate a less rigorous racial equity audit requirement for regulated entities who have at least one hundred employees and are regulated by a financial agency as specified in the Dodd-Frank Act. The Diversity and Inclusion Data Accountability and Transparency Act (the “Diversity and Inclusion DATA Act”) was introduced by Congresswoman Joyce Beatty, chair of the Congressional Black Caucus, in March 2021.⁹⁷ The Act would amend Section 342 of the Dodd-Frank Act to mandate the disclosure of diversity-related data by financial entities.⁹⁸ Most entities have declined to participate in annual diversity self-assessment requests.⁹⁹ The Act would mandate the disclosure of such data. Audits would be conducted every two years by independent third parties to determine the covered companies’ “policies and practices pertaining to civil rights, equity, diversity, and inclusion.”¹⁰⁰ Financial regulators that would receive the new diversity information include the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Federal Reserve, and the SEC.¹⁰¹ The Diversity and Inclusion DATA Act is less rigorous than shareholder proposals for racial equity audits. Although it legislates audited DEI reporting, the proposed Act does not appear to require a tailored, holistic analysis of a company’s policies and programs and how they contribute to or perpetuate racial inequality.

When the Act was heard by the House Financial Services Subcommittee on Diversity and Inclusion, discussions included adding (1) penalties for non-compliance to the bill, including fines of up to \$20,000 a day for failure to engage in the required audit, and (2) requirements that the covered companies investigate what ties they may have to slavery and disclose steps to reconcile any profits they may have received from slavery.¹⁰² On July 9, 2021, the Congressional Budget Office released a Cost

97. Diversity and Inclusion Data Accountability and Transparency Act, H.R. 2123, 117th Cong. (2021).

98. Press Release, Joyce Beatty, House of Representatives, Congressional Duo Demands Diversity Data Disclosure (Mar. 25, 2021), <https://beatty.house.gov/media-center/press-releases/congressional-duo-demands-diversity-data-disclosure> [<https://perma.cc/8Z7E-D7BK>].

99. *Id.*

100. Berenblat et al., *supra* note 9.

101. CONG. BUDGET OFF., COST ESTIMATE, H.R. 2123, DIVERSITY AND INCLUSION DATA ACCOUNTABILITY AND TRANSPARENCY ACT OF 2021 (2021), <https://www.cbo.gov/publication/57351> [<https://perma.cc/WN6C-JUG6>].

102. Abigail Goldber-Zelizer, *Lawmakers Debate Bill Mandating Racial Equity Audits at Firms*, THE HILL (June 30, 2021), <https://thehill.com/policy/finance/561026-lawmakers-debate-bill-mandating-racial-equity-audits-at-firms/> [<https://perma.cc/HCN3-LQHU>].

Estimate for the Act.¹⁰³ No further action has been taken to date. With insufficient political support to regulate private companies, it is unlikely that Congress will mandate corporate racial equity audits. One must look to the rulemaking power of federal agencies like the SEC and Department of Labor to advance ESG metrics and tools to further racial equity.

C. The SEC's Future: E.U.'s Corporate Sustainability Reporting Directive

The SEC is poised to require public companies to report climate-related disclosures in their public filings.¹⁰⁴ Mandatory ESG disclosures, including those concerning diversity, equity, and inclusion, could follow. One can look to the European Union (EU) for what U.S. mandatory ESG reporting might look like, including metrics that advance racial equity. In 2014, the EU approved the Non-Financial Reporting Directive (NFRD) to improve EU companies' disclosure of ESG information, requiring covered companies¹⁰⁵ to begin reporting non-financial ESG information in 2018.¹⁰⁶ The NFRD requires covered companies to disclose material information related to four non-financial matters: (1) Environmental Protection, (2) Social Responsibility and Treatment of Employees, (3) Respect for Human Rights, and (4) Anti-bribery and Corruption.¹⁰⁷ The NFRD uses a "double materiality" standard in which materially impactful information that must be reported means both how ESG matters impact a company ("outside-in") and how a company impacts ESG matters ("inside-out").¹⁰⁸ The NFRD did not establish or require the use of a particular reporting framework or standard; a company could choose its own ESG framework and the NFRD did not

103. CONG. BUDGET OFF., *supra* note 101 (predicting, assuming enactment late in FY 2021, that the Act would increase net direct spending by \$13 million, decrease revenues by \$6 million, and thus increase the federal deficit by \$19 million over the 2021–2031 period).

104. Statement by Allison Herren Lee, Acting Chair, SEC, Public Input Welcomed on Climate Change Disclosures, (Mar. 15, 2021) <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures> [<https://perma.cc/6JVJ-M2D4>]

105. The NFRD applies to large banks, large insurance companies, or large EU companies with more than five hundred employees that have securities listed on regulated EU markets. *Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as Regards Corporate Sustainability Reporting*, SWD (2021) 150 final (Apr. 21, 2021) [hereinafter *Commission Staff Working Document*], <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021SC0150> [<https://perma.cc/HXU8-MDWM>].

106. Directive 2014/95/EU Of the European Parliament and of the Council of 22 October 2014, 2014 O.J. (L 330) 1, 9; *Commission Staff Working Document*, *supra* note 105.

107. *Commission Staff Working Document*, *supra* note 105.

108. *Id.*

require an audit of the content of the reporting company's statements.¹⁰⁹

In 2021, the European Commission (the "Commission") adopted the Corporate Sustainability Reporting Directive (CSRD) to amend the NFRD as part of a finance package intended to direct money towards sustainable investing activities across the EU.¹¹⁰ The Commission committed to proposing a revision of the NFRD in 2020 as part of European Green Deal, and the revisions set forth in the CSRD are intended to enhance the NFRD's existing environmental and social impact reporting framework.¹¹¹

Most notably, the CSRD tasks European Financial Reporting Advisory Group (EFRAG) to develop and draft a set of EU sustainable reporting standards by October 2022.¹¹² Companies regulated by the NFRD must follow these EU standards and cannot use other ESG standards, like those promulgated by SASB, GRI, or B Lab.¹¹³ This standardization of ESG metrics will help solve the "apples-to-oranges" problem caused by the variability of ESG metrics, namely the difficulty in comparing companies' material, non-financial ESG information where companies are relying on different reporting standards.¹¹⁴ The Commission expects EFRAG's drafts to be tailored to existing EU policies and requirements, while also building on and contributing to existing international reporting initiatives, like those developed by SASB and IRIS+.¹¹⁵

Additionally, the CSRD introduces new audit standards for ESG information.¹¹⁶ CSRD-compliant reports must be audited by an independent

109. *Id.*

110. *Sustainable Finance Package*, EUROPEAN COMM'N (June 4, 2021), https://ec.europa.eu/info/publications/210421-sustainable-finance-communication_en [<https://perma.cc/UM6M-NYN3>]; EUROPEAN COMM'N, *EU SUSTAINABLE FINANCE: APRIL PACKAGE* (2021), https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/sustainable-finance-communication-factsheet_en.pdf [<https://perma.cc/SDS5-PF3P>].

111. *Commission Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as Regards Corporate Sustainability Reporting*, COM (2021) 189 final (Apr. 21, 2021) [hereinafter *Commission Proposal*], <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0189> [<https://perma.cc/CP5R-D2T3>].

112. *Corporate Sustainability Reporting*, EUROPEAN COMM'N, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en [<https://perma.cc/V7QL-SNPJ>]; Patricia Taylor and Nessa Joyce, *European Union: FAQ: Corporate Sustainability Reporting Directive (CSRD)*, MONDAQ (Feb. 22, 2022), <https://www.mondaq.com/ireland/fund-management-reits/1164296/faq-corporate-sustainability-reporting-directive-csrd> [<https://perma.cc/UQ2S-6ZG2>].

113. *Sustainable Finance Package*, *supra* note 110.

114. *Commission Proposal*, *supra* note 111.

115. *Questions and Answers: Corporate Sustainability Reporting Directive Proposal*, EUROPEAN COMM'N (Apr. 21, 2021), https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_1806 [<https://perma.cc/6B6L-TBSP>].

116. *Id.*

auditor that must provide a mandatory limited level of assurance about the ESG information reported.¹¹⁷ Auditors will be held to the same high standards that auditors of financial statements are subject to currently.¹¹⁸ Company audit committees will also be required to monitor internal quality controls, monitor assurances made in sustainability reports, inform the company's supervisory body of the outcome of auditing, and review and monitor the independence of auditors.¹¹⁹

D. Caution: Standardization and Independent Audits of ESG Metrics

The EU's approach is tempting, as is the SPO Framework which also requires independent auditing. Presumably, standardizing ESG metrics would simplify agencies and investors' analysis of companies and allow them to compare apples to oranges. Standardization brings transparency; independent audits bring accountability. As it is now, many U.S. companies simply report their prospective commitments around DEI issues and nothing about the impact of their policies and actions. JUST Capital provides data for the one hundred largest U.S. employers around their racial equity initiatives. JUST Capital's Corporate Racial Equity Tracker "reveals that the nation's 100 largest employers are more likely to disclose baseline DEI commitments, but less likely to disclose actions that show accountability toward progress."¹²⁰ As expressed at the outset of this essay, anti-racism requires more than prospective commitments; anti-racism requires the eradication of racist policies, actions, and impacts.

Can standardization and independent audits pave the way? I remain skeptical. While standardization and independent audits of ESG metrics presumably precludes companies from hiding behind distorted data, standardization implies that companies' racial inequities are homogenous and can be simplified to standard metrics. It is unlikely that standardized metrics can capture the myriad ways in which companies perpetuate anti-Black racism and inflict harm on Black employees and Black communities. At one extreme, there is Johnson & Johnson which injected Black inmates with asbestos to determine if its talc was as harmful.¹²¹ Then there is Tesla,

117. *Sustainable Finance Package*, *supra* note 110.

118. Peter Wollmert & Andrew Hobbs, *How the EU's New Sustainability Directive Will Be a Game Changer*, EY (July 28, 2021), https://www.ey.com/en_no/assurance/how-the-eu-s-new-sustainability-directive-will-be-a-game-changer [<https://perma.cc/WS9W-AVJA>].

119. *Id.*

120. *The Corporate Racial Equity Tracker*, JUST CAPITAL, <https://justcapital.com/reports/corporate-racial-equity-tracker/> [<https://perma.cc/6JVJ-M2D4>].

121. Jef Feely, *J&J's Controversial Prison Testing with a Penn Doctor Resurfaces in Baby Powder Lawsuits*, PHILA. INQUIRER (Mar. 8, 2022) <https://www.inquirer.com/business>

which the California Department of Fair Employment and Housing claims has harassed and discriminated against its Black employees at its Fremont plant, relegating them to the lowest possible positions there and subjecting them to frequent racially derogatory language.¹²² Other forms of anti-Black racism that are not as obvious but pernicious and enduring include (1) a company's political and lobbying efforts to prop up elected officials who promote government policies that further white supremacy, and (2) microaggressions in the workplace that demoralize Black employees, making it difficult for them to succeed within a particular company. While many companies inflict the same racist harm on Black employees and Black communities, quite unfortunately, their implementation can be unique. I remain skeptical of a one-size-fits all approach because of the blind spots that it may create in advancing an anti-racist agenda that does not fit neatly into an ESG metrics box. Additionally, standardized approaches often require setting standards at the lowest common denominator so that most companies can satisfy the standard. Nominal standards will not eradicate anti-Black racism. One can also imagine the industry input and lobbying efforts that will occur if the SEC moves to standardize ESG metrics. Divergent views on what constitutes anti-Black racism and how companies perpetuate it would likely result in the SEC adopting the viewpoints of those in power rather than those of the Black communities and individuals adversely affected.

Instead, the holistic approach of the racial equity audit should be adopted and strengthened. The strength of the racial equity audit is in its individualization and holistic approach. While independent auditors would be free to use some standard metrics, a robust racial equity audit would allow the auditor to adopt additional metrics to assess a company's efforts to advance racial equity. Under this strengthened racial equity audit, an independent auditor would take a wide view of the company and also collect its own data about the company to assess how the company's operations and policies are complicit in furthering anti-Black racism. "Practitioners . . . stress the importance of auditors using the right methodology, including both quantitative and qualitative methods, and for such auditors to review not only information provided by the company but to gather its own information."¹²³ Efforts at independent assessment fall short where firms provide auditors with company data.

/health/jj-talc-powder-skin-penn-testsprison-20220308.html [https://perma.cc/W6T5-FBGQ].

122. Deepa Shivaram, *California Sues Tesla Over Alleged Rampant Discrimination Against Black Employees*, NPR (Feb. 11, 2022), <https://www.npr.org/2022/02/11/1080073061/california-sues-tesla-racism-fremont> [https://perma.cc/64YD-MXYK].

123. Berenblat et al., *supra* note 9.

Rather than standardize ESG metrics around racial equity, which is likely to lead to blind spots in assessing racial equity goals given the uniqueness of companies and divergent views on how pernicious racism is, the SEC should replicate the EU's efforts in overseeing accounting and auditing standard-setters just as it oversees private financial auditors through the Public Company Accounting Oversight Board (PCAOB). Companies would remain free to contract with private ESG accounting firms which use various ESG frameworks to assess a companies' operations and policies. The SEC, however, could move to ensure that the private ESG accounting firms act with integrity and are truly independent. The SEC could establish a board like the PCAOB to (1) set standards around independence, attestation, ethics, and quality control; (2) establish best practices for audit procedures and reporting; and (3) establish training guidelines and professional standards for auditors. To date, standards for sustainability accounting firms and auditors have not been set. If ESG metrics, including around racial equity, are to be worthwhile to investors, the SEC must fill the role of overseeing ESG sustainability accounting firms and standard-setters.

IV. CONCLUSION

This essay has catalogued contemporary ESG efforts by federal regulators and private firms around race, from anti-bias training and inclusive hiring practices to powerful DEI officer roles and the racial equity audit. If a corporation's leadership adopted each of these racial equity tools, could it successfully claim to be an anti-racist corporation? Actions speak louder than words. Adopting a label is not the antiracist goal. Policy changes and racial equity results are. Rather than focus on achieving an "anti-racist" label, the better question to pose is whether the company's actions result in policy and procedure changes that advance racial equity. Companies must move from platitudes to action and accountability. Companies cannot be left to self-assess or self-regulate their own performances and impact with respect to antiracism. The business case for diversity can only take us so far. As Larry Fink wrote in his 2022 annual letter, embracing ESG is not "woke" capitalism, "[i]t is capitalism."¹²⁴ Laura Morgan Roberts and Anthony J. Mayo remind us that compelling business cases for capitalistic endeavors have most often been the basis of atrocities, not social justice triumphs.¹²⁵

124. Larry Fink, *2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> [<https://perma.cc/HQX4-XR3N>].

125. Laura Morgan Roberts & Anthony J. Mayo, *Toward a Racially Just Workplace*, HARV. BUS. REV. (Nov. 14, 2019), <https://hbr.org/2019/11/toward-a-racially-just-workplace>

Given this, the SEC has an important role to play in regulating company's ESG reporting, including around racial equity. However, the SEC should not attempt to standardize ESG reporting around racial equity; such standards are likely to insufficiently capture the multitude of ways in which companies perpetuate anti-Black racism. Rather, the SEC should regulate and hold accountable the ESG standard-setters and auditors who vouch for a company's anti-racism efforts.

[<https://perma.cc/ZS3C-5R33>] (“We also can’t forget that a compelling business case can be—and has been—made for all the atrocities listed above. Indeed, when invoked absent humanistic and ethical principles, a ‘business case’ has legitimated exploitative actions throughout history. White landowners argued that the economic welfare of the colonies and the health of a young country depended on keeping black people in chains. And white executives have long benefited because people of color with less access to high-quality education and high-wage employment were forced into low-paying commercial and household jobs, from coal mining and call center work to cleaning, cooking, and caregiving”).