

Influence

Promote policy frameworks that strengthen the relationship between commercial success and the achievement of a just and sustainable world.



COMPANY LAW AND REGULATION

Support for regulatory frameworks and rules for due diligence and disclosure that drive sustainable business.



ADVOCATING FOR SUSTAINABLE BUSINESS

Speaking out in favor of policies that enable a just and sustainable world and promoting the interests of sustainable business, especially during times of political uncertainty, economic nationalism, and protectionism.

Company Law and Regulation

We believe that companies can be bolder in developing a point of view on the company law and regulatory frameworks that are needed to achieve sustainability and be more proactive in advocating for that point of view.



STOP

Misalignment between business strategy, sustainability, and government affairs agendas

Business from focusing policy engagement on traditional issues of tax, trade, and regulation

INNOVATE

Reach a point of view on the legal instruments that will support sustainable business in the long term

Influence future legal frameworks through leadership by example

This report so far has focused on actions companies can take to improve their strategy, governance, and performance. However, it is unlikely that this will achieve its potential without legal frameworks that create incentives for all companies to take the steps we have outlined here. Without reforms on items such as due diligence and disclosure requirements, there are limits on how far companies can go in creating a just and sustainable world.

In this chapter, we set out a BSR point of view on what these company law frameworks should be. This chapter is focused primarily on legal frameworks as they relate to the governance of sustainability inside companies—such as sustainability reporting and supply chain management—and not legal frameworks on performance regarding specific issues, such as climate change, environmental resources, or human rights. These are covered in the next chapter.

There is one supremely important item of context that is relevant for both chapters. Many of the world's most significant sustainability challenges are global (such as climate change) or cross-border (such as the sourcing of raw materials). However, the world's most powerful governance systems are often national or regional, and as a result often ill-suited to addressing major sustainability challenges. It is beyond the scope of this paper to address this contradiction, and we acknowledge up front that much of what follows suffers from this inherent limitation. That said, we are heartened by the progress that we believe can be made by adopting the proposals that follow.

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Company Law Today

At the time of writing, we are seeing conflicting trends on company law as it relates to sustainable business, with wildly different approaches across regions and even within countries at city, state, and national levels.

In some jurisdictions, new legal requirements are being introduced. The U.K. Modern Slavery Act,¹⁵ the EU Non-Financial Disclosure Directive,¹⁶ and the French Duty of Vigilance Law¹⁷ all increase the sustainability management expectations of business. The “Carrots and Sticks” database found almost 400 sustainability reporting instruments in 64 countries in 2016, up from 180 instruments in 44 countries in 2013, with the growth of reporting instruments in Europe, Asia-Pacific, and Latin America being particularly strong.¹⁸ Recently introduced environmental reporting instruments include efforts to improve company disclosure of greenhouse gas emissions in Spain, Mexico, and the U.K., while in France, listed companies are required to disclose risks related to the effects of climate change.

In other jurisdictions, most notably the United States, the opposite trend is currently in play.

Moves to repeal all or parts of the Dodd-Frank Act would eliminate requirements to disclose payments to host governments by extractives companies listed with the U.S. Securities and Exchange Commission (SEC), as well as obligations to report on conflict minerals due diligence. Avenues to improve the quality of company transparency on sustainability issues—such as the SEC’s consultation in 2016 on enhanced sustainability disclosures in Form 10-K reports—are almost certainly closed off for the time being.

In this context, we believe that companies would be well served by reaching a stronger point of view on the types of laws, regulations, and other legal instruments that are most likely to support effective due diligence and disclosure regarding sustainability issues, and integrate this point of view into public policy plans and strategies. This point of view should cover soft law (instruments without binding legal force), hard law (binding legal instruments), and international law (relations between states and nations, which may become hard or soft law).

Company Law as It Should Be

In this section, we address a few key questions relating to company law on due diligence and disclosure as we think it should be:

- **What is the “right” framework for company law on due diligence and disclosure?**
- **What legal frameworks for sustainable business are sound, scalable, and conceptually robust?**
- **What norms, behaviors, and principles could usefully be built into legal frameworks?**
- **What is the right balance between soft law, hard law, and international law?**
- **What policy positions on due diligence and disclosure should business be advocating for?**

15 <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>

16 https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en

17 <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte>

18 See www.carrotsandsticks.net/. In this survey “instruments” can mean mandatory or voluntary regulations, guidance, and codes of conduct issued by a government, stock exchange, or financial market regulator.

We propose four underlying principles for “the law as it should be.” Our intention is that these underlying principles can be used by companies to shape their own public policy positions, generate alignment between business strategy, sustainability, and government affairs agendas and shape engagement with public officials.

These principles can also be used by industry associations, trade bodies, and multistakeholder organizations to form their advocacy positions. Indeed, misalignment between business strategy, sustainability, and government affairs agendas is most acute—often jarringly so—when trade associations intervene with policy makers on these issues.

Finally, we believe these principles can be used by regulators, policy makers, and governments as they seek to make better policy.

The principles we outline here are based on our experience working with companies to implement sustainability management in practice, including lessons learned achieving compliance with today’s laws and regulations.

Consistent with international norms: Over the past two decades, several multilateral organizations have undertaken extensive processes to create

norms for responsible business conduct, such as the OECD Guidelines for Multinational Enterprises, the G20/OECD Principles of Corporate Governance, and the UN Guiding Principles on Business and Human Rights. These norms are credible, robust, and have extensive backing across the business, civil society, and labor constituencies. Laws and regulations on these topics should be based upon the key concepts contained in these codes and guidelines, such as the role played by due diligence and disclosure in defining company action and accountability, and should certainly not run counter to them. While not all the concepts in these norms lend themselves to hard law (such as the cause, contribute, and linked framework in the UNGPs), these norms provide essential conceptual underpinning for company law on sustainable business.

Causes, not symptoms: Laws and regulations should be attentive to the broad desired outcomes they are seeking to achieve. For example, by focusing on the Democratic Republic of Congo and surrounding countries, and just the four metals of tin, tantalum, tungsten, and gold, the SEC conflict minerals rule has skewed responsible raw materials sourcing efforts toward a sub-set of a broader problem. One of the most frequent unintended consequences of regulation is that companies tend to focus on meeting

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What policy positions on due diligence and disclosure should business be advocating for?

Know

DUE DILIGENCE

- Identify, mitigate, prevent, and account for potential impacts
- Seek and obtain all information necessary for making decisions
- Cover all potentially relevant sustainability issues, not only those included in today's legal frameworks
- Include issues that are material to society, not only those that are material to stakeholders

Show

DISCLOSURE AND ADVOCACY

- Consider the information needs of “the reasonable citizen,” not just “the reasonable investor”
- Be more assertive in promoting the development of fresh public policy frameworks that are more supportive of sustainable business, are capable of harnessing cross-party support, and enable the long-term investments required for sustainable business success
- Combine individual business action with coordinated policy advocacy coalitions with like-minded companies and external stakeholders with overlapping priorities
- Encourage policy innovation in individual jurisdictions, including at the subnational, regional, national, and international levels

specific requirements rather than addressing the broad issue or principles. Laws and regulations should be drafted in ways that mitigate this tendency.

Material: Laws and regulations should be focused toward those companies and industries that can make a material difference to the sustainability challenge at hand. Importantly, this does not mean restricting attention to only those companies for whom the sustainability issue has a material impact on the company; it also means focusing on those companies having a material impact on the sustainability issue. The recent recommendations of the Task Force on Climate Related Finance Disclosures set good direction by making a clear distinction between what all companies should report on and deeper guidance for industries with more material climate risks. As we set out in the reporting chapter above, this is an example of a transparency requirement that will have a positive impact on performance.¹⁹

Comprehensive: The extensive progress made on sustainability issues by global companies over the past two decades is such that many new legal requirements simply confirm the existing practice of many companies. This is not necessarily a bad thing, because company-led innovation to address societal expectations before they become law can identify effective strategies and increase the effectiveness of law once they are introduced. However, not all companies innovate in this way, so laws and regulations on sustainable business can play an important role in bringing laggard companies up to a higher level by ensuring that laws apply to all companies having a material impact on sustainability issues, thereby creating a level playing field. The EU Non-Financial Disclosure Directive is a good example of this in practice; leading companies are already in compliance, but laggard companies need to up their games.

A ‘Know and Show’ Framework for Company Law

The UN Guiding Principles on Business and

Human Rights state that businesses “need to know and show that they respect human rights,”²⁰ where “know” means due diligence, and “show” means external communication that demonstrates performance. While originally written for human rights, we believe that this “know and show” model provides an excellent conceptual foundation for legal and regulatory frameworks for other due diligence and disclosures on sustainability. However, a “know and show” model should exist alongside performance standards on a range of subjects, not instead of them.

“Know” – due diligence: The concept of due diligence features highly in existing international codes and guidelines. The UN Guiding Principles on Business and Human Rights state that companies should undertake due diligence to identify, prevent, mitigate, and account for how they address their adverse human rights impacts, and they base a significant portion of the guidance on the implementation of due diligence. The revised OECD Guidelines for Multinational Enterprises contain a new and comprehensive approach to due diligence, including as it relates to responsible supply chain management. Importantly, the concept of “duty of care” is one of the three pillars of state corporate law in the United States, and means that corporate directors have a responsibility to undertake due diligence by seeking and obtaining all information necessary for making decisions for which it is responsible. This all points to the conclusion that company laws and regulations that seek to require or incentivize due diligence—such as the new French Duty of Vigilance Law—are working with the grain of existing company sustainability management efforts.

“Show” – disclosure: Disclosure requirements have long played an important role in efforts to advance sustainable business, and the discipline of public disclosure is known to incentivize improved sustainability performance. And like due diligence, the concept of transparency features highly in existing international codes and guidelines, as a necessary minimum for companies to demonstrate what they are doing. For example, the UN Guiding Principles on Business and Human Rights state that companies should communicate how they

19 www.fsb-tcfd.org/

20 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

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address human rights issues externally, while the OECD Guidelines for Multinational Enterprises state that companies “should be transparent in their operations and responsive to the public’s increasingly sophisticated demands for information.” Both the G20/OECD Principles of Corporate Governance and the OECD Guidelines emphasize the foundational role that transparency plays in ensuring a well-functioning corporate governance system and responsible business conduct. This all points to the conclusion that laws and regulations that seek to require or incentivize company transparency on sustainability topics—such as the EU Non-Financial Disclosure Directive—also work with the grain of existing sustainability management efforts.

There are many examples today that have deployed the due diligence and disclosure concepts. However, it is instructive to compare these to our four underlying principles above to identify where improvements in legal frameworks can be made. We believe there are three main areas where legal frameworks for sustainable business need to alter course.

Highly fragmented due diligence requirements: While due diligence features

highly in today’s legal frameworks, it is often limited to a specific topic or issue area. As noted in the introduction to this section, this can be due to multiple jurisdictions acting on individual issues. In the United States, the focus has been on anti-corruption, money laundering, and conflict minerals due diligence. The French Duty of Vigilance Law only covers human rights issues in the supply chain. The U.K. Modern Slavery Act and the California Transparency in Supply Chains Act focus on the important issues of slavery and human trafficking, but not other human rights violations that we know take place in global supply chains.

Each of these initiatives is valuable in its own right, but taken together we are missing the most important point of all about company due diligence—that due diligence should surface all information necessary for making decisions. This issue-by-issue approach to lawmaking risks making progress on some issues at the expense of others, and over time may result in an ever-growing list of rules, rather than a more strategic approach. Instead of specifying particular areas for due diligence, company law should require due diligence across all potentially relevant sustainability issues. Among other things, this more holistic approach can be framed as guiding companies away from siloed efforts where different departments (such as procurement, compliance, and sustainability) work separately, and toward efforts where company-wide and whole value chain approaches are taken. It is important to note that issue-by-issue guidance can certainly sit alongside this more holistic approach.

Material to sustainability, not just material to shareholders: The resilient business strategies we advocate for in part one of this paper will be much more effective if they are accompanied by disclosure of sustainability issues of importance to all relevant stakeholders, not just investors.

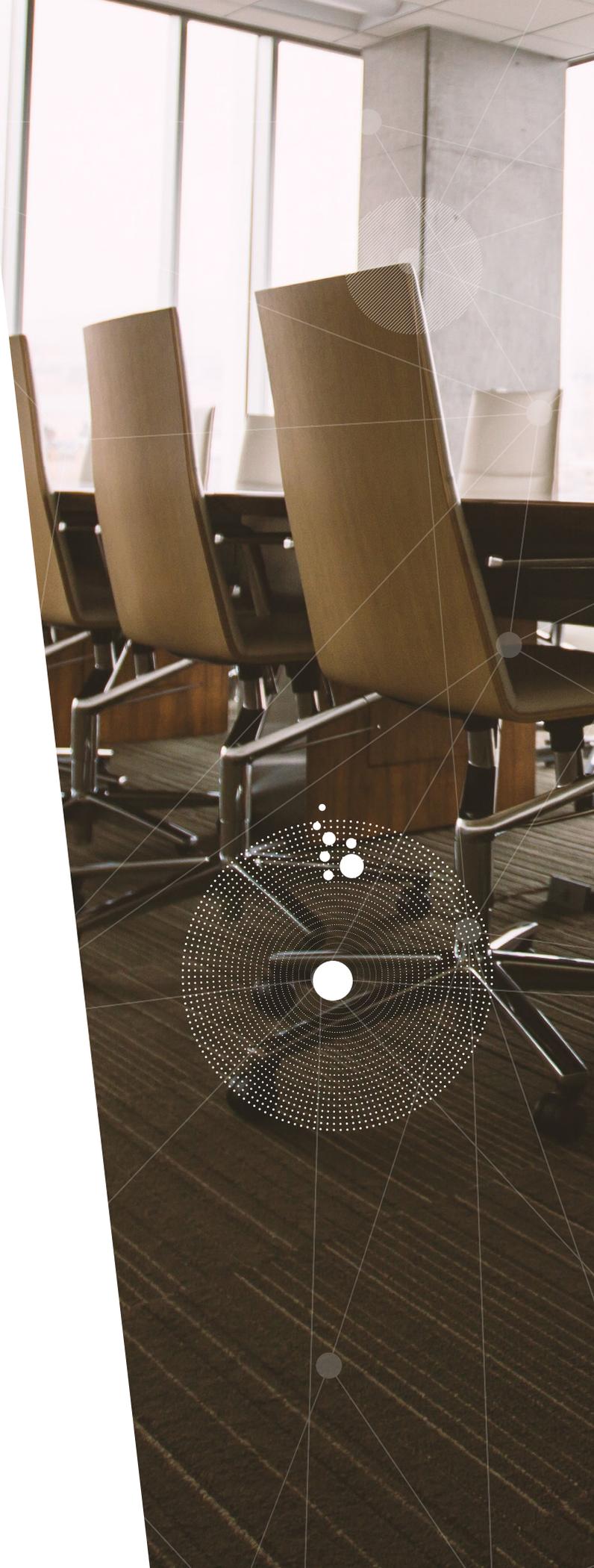
Many legal frameworks today focus on the information needs of investors and operate on the assumption that investors require improved sustainability disclosures to make informed investment decisions. Indeed, as SASB rightly highlights, it is already a legal requirement for companies to disclose their approach to sustainability issues of material significance to investors.

Many issues may be material to the creation of a just and sustainable world, but may not be material to shareholders today or in the foreseeable future. We believe that the pursuit of sustainability is important regardless of its significance to investors, and that introducing a legal requirement for companies to disclose their management of sustainability issues they identify as being of material significance to society seems reasonable. The EU Non-Financial Disclosure Directive gets close to this, though it is ambiguous on “material to whom” when stating that companies should disclose their management of material issues.

Disclosure for “the reasonable citizen”:

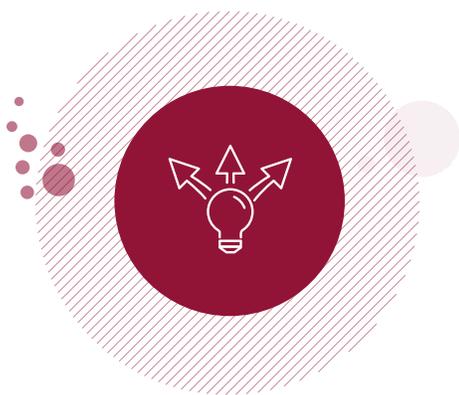
There has been significant progress in recent years on requirements for companies to disclose sustainability information. Many of these developments have focused on the mix of information that “the reasonable investor” would require to make decisions and have relied upon the enlightened shareholder model—the idea that enlightened shareholders recognize the importance of various sustainability issues for long-term financial success—to require increased disclosure.

However, we believe that sustainability is too important to link solely to the information needs of “the reasonable investor,” and we propose the use of additional sustainability reporting requirements based on the information needs of “the reasonable citizen.” We believe it is wise to require companies to disclose information of material interest to society (“the reasonable citizen”), even if that information is not of material interest to investors. However, this also implies that using investor-oriented bodies (such as the SEC in the United States) to achieve these outcomes may not be the right approach, and that alternative channels (such as departments of trade or commerce) may be more appropriate.



Advocating for Sustainable Business

The essence of sustainable business is ensuring positive outcomes for society, and the business voice in critical debates is an important tool that companies have at their disposal.



STOP

Letting the sustainable business agenda be set by others

Inconsistency between lobbying and stated sustainability commitments

Over-reliance on trade associations to represent the business view on key issues

INNOVATE

Use the business voice to advocate for policy frameworks that support resilient business

Align business strategy, sustainability commitments, and policy engagement

Demonstrate the potential for sustainability to generate economic benefit for all

The sustainable business movement has focused much of its attention on ensuring that environmental, social, and governance issues have been integrated into business strategies and operations. This makes good sense, as we believe that it is the core of business that presents the greatest opportunity to mitigate sustainability risks and maximize the positive impact of business.

At the same time, companies have an important role to play in the public debate as well. This can include debates on policy, but also business practices that can support sustainable development.

We live in an age of major public debates of huge significance to sustainable business, such as the future of privacy in the age of big data, the future of work in the age of automation, and a changing energy system needed to tackle climate change. Business leaders have informed perspectives on these debates, and it is essential that these viewpoints become much more widely known. And as we noted in the last section, the mismatch between global issues and approaches focused on national jurisdictions means that reliance on nation-states might not deliver needed action.

Over the past year, many U.S. companies and individual business leaders have spoken out in favor of policies on climate change, diversity, and immigration, as well as values and principles they consider important for business. We hope that this is not a case-specific response, but rather reflective of a new way of thinking that recognizes the business and public benefit from business advocacy on relevant matters.

We believe there are two primary and interrelated venues for business advocacy on sustainability—with policy makers and with the public. While the nature of company engagement in these venues is often quite different, the common thread is being more assertive in developing a point of view on the importance of sustainable business models and more confident in communicating that perspective in external forums.

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Influencing Policy Makers

We believe that companies can be more assertive in shaping effective public policy frameworks that promote key sustainability objectives that are also central to the long-term success of businesses and economies.

By directly connecting sustainability to business and economic success, business leaders have an opportunity to bridge political divides that often oversimplify the role of the private sector as either needing more regulation or being freed from it. As one interviewee said, “I’m tired of sustainability regulations being part of the left-right divide, and exhausted by the debate that there is either too much regulation or not enough regulation. We don’t need more regulation or less regulation, we need better regulation that politicians on all sides have reason to support.”

Achieving such a policy consensus is clearly an enormous practical challenge. However, the increasing prominence of the business voice on issues such as climate change, human rights, and

diversity suggests a path forward. Business participation in initiatives such as the “We Are Still In” network declaring continued action on climate change despite the U.S. withdrawal from the Paris Agreement; the “America’s Pledge” effort to tally the climate actions of states, cities, colleges, and businesses across the United States; and the “Climate Leadership Council” effort to promote a carbon tax and dividends framework shows that policy consensus on sustainable business issues is achievable, and may increase over time. The UNHCR has launched a global initiative to drive business support for refugees, including public policy advocacy. At the time of writing, the Financial Reporting Council in the U.K. is planning to open consultation on changes to the U.K. Corporate Governance Code, including the need for companies to link corporate governance to purpose, engage with a broader group of stakeholders, and consider how business benefits wider society.²¹

Approaches that combine individual business action with coordinated policy advocacy efforts can be undertaken in spheres where change is accelerating, including energy and climate change, environmental protection, employment, privacy, corporate transparency, and human rights, among others. Given the reality that policy lags significantly behind social change, the business need for engagement is more

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urgent than ever. A critical precondition of this approach is alignment around resilient business strategies that embrace sustainability, rather than a rehashing of the very real, but ultimately unproductive, “battle” between sustainability and government affairs teams. It will require a commitment to prioritizing what is right for sustainable business in the long term, rather than being tempted by narrow or short-term commercial gains.

This approach also needs to clearly convey the idea that sustainability enhances long-term competitiveness—that the connections between sustainability, business success, and economic growth are strengthening, and that all modern economies require investment in sustainable business models, technologies, and products. Sustainable business leaders have a unique opportunity to help bridge political divides with a vision for shared economic prosperity.

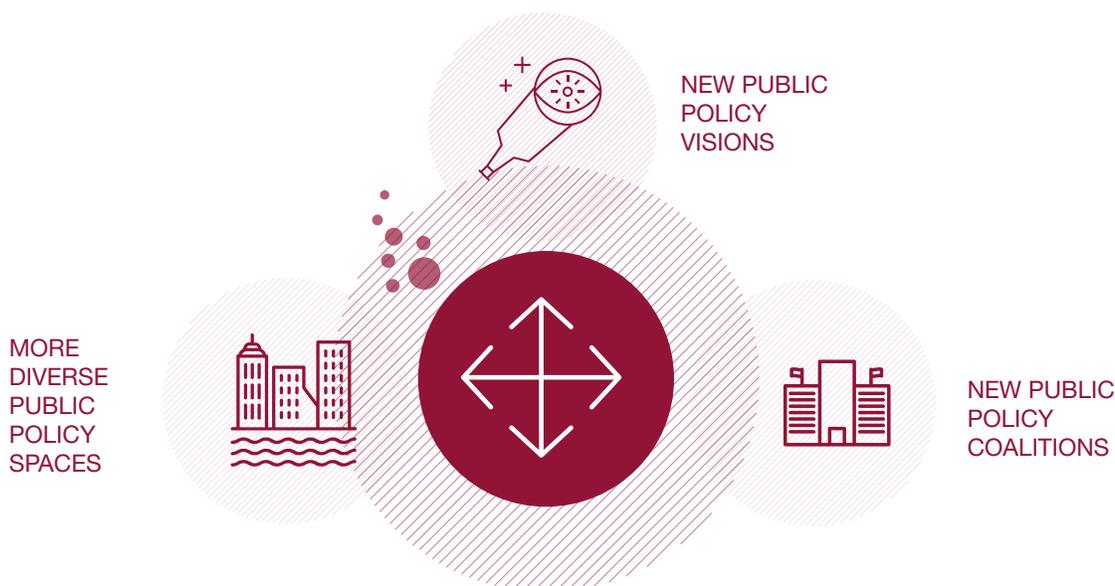
We believe there are three opportunities for action.

New public policy visions: Companies can promote the development of fresh public policy frameworks that are more supportive of sustainable business, are capable of harnessing cross-party support, and enable the long-term investments required for sustainable business success. Today’s global political uncertainty creates an opportunity to envision new public policy approaches that incorporate lessons

learned from previous failures, reduce policy volatility and uncertainty, and are more robust when placed under challenge. Important priorities for these public policy visions relevant to sustainable business include climate change, human rights, rule of law, women’s empowerment, freedom of expression, and support for civil society.

New public policy coalitions: Sustainable business efforts do not exist in isolation, but are closely connected with other entities and sectors—such as civil society organizations, customers, investors, academics, and communities—that also have a deep interest in sustainable business success. Collaboration across sectors is essential, and this opens opportunities for new public policy coalitions with like-minded companies and external stakeholders with overlapping priorities. The success of the We Mean Business coalition on climate change or the B Team’s coalition on tax transparency could be replicated in other spheres.

More diverse public policy spaces: As we noted earlier, policy on global sustainability challenges happens at multiple venues—not only nationally, but also at subnational, regional, and international levels. Cities, for example, have led the way on climate action and resilience and are often able to move more quickly and nimbly than national governments.



Three Opportunities for Action



While the business voice matters greatly, it is also crucial to acknowledge that business does not always possess the legitimacy to exert influence on sustainability issues.

While policy consistency across jurisdictions is appealing and ultimately ideal, policy innovation in individual jurisdictions offers opportunities for both new approaches and more rapid action. While the business voice matters greatly, it is also crucial to acknowledge that business does not always possess the legitimacy to exert influence on sustainability issues. The two primary reasons for this are a disconnect between company statements on, and commitments to, sustainability and their lobbying efforts, as well as inconsistency between what companies say and what the trade associations they rely upon say and do. In our view, these disconnects are a hindrance to business and should be sharply curtailed. Without that, the business voice on key issues will not be heard and trust in business will continue to languish.

Influencing the Public

Public dialogue and expectations on sustainability issues have undergone a transformation in recent years. The growing middle class, particularly in the Global South, is increasingly focused on individual empowerment and access to health, education, and opportunity. Issues such as environmental protection and human rights have long been a focus of public concern, but activism is increasing in new areas, such as corruption, privacy, automation, climate justice, and access to healthcare. These debates have been sharpened and made more pressing by a transformation in

the transparency environment, and companies are struggling to adapt to a new world where corporate confidentiality is no longer assured and management of legal risk is not a reliable proxy for reputational exposure. Activists driven by ethical, human rights, and transparency goals are increasingly coordinated, empowered, and focused on business as a driver of change.

Abdicating from debates in the interest of political or policy neutrality is increasingly difficult. Companies need to make rapid decisions on which social and environmental issues to engage on, and how.

In this context, it is essential that business leaders become more effective at connecting sustainability challenges with priorities that resonate with the public—such as employment, competitiveness, and fairness—and demonstrate the relevance and benefits of sustainable business. It is also important for business to stand up for key concepts—such as science, trade, and innovation—that are essential for both business success and long-term global prosperity. As business increasingly becomes the primary source of expertise on key areas of innovation—such as climate research, artificial intelligence, and data analytics—and academia is facing increasing pressure to commercialize its activities, there is a need for more transparency and engagement to drive innovation for the greater good. Early examples include Elon Musk's decision to make

Tesla's patents publicly available for the greater good, and collaboration between scientists and healthcare companies on innovative research. We hope these are early examples of a longer-term trend.

We believe there are several opportunities for companies to engage.

Communicating about company mission, vision, and values: This can include examples of how these are being applied throughout the business, such as in the areas of equal treatment of employees, investment in quality jobs, or maintenance of sustainability commitments. Key international agreements, such as the SDGs, Women's Empowerment Principles, and UN Guiding Principles on Business and Human Rights, provide key touchstones.

Identifying opportunities for CEO and senior executive statements and/or speeches to reinforce sustainability publicly: A recent survey of nearly 1,300 U.S. employees of Fortune 1000 companies by Povaddo LLC found strong support for employer environmental and social action across age, gender, region, employment level, ethnicity, income, and company size, with little real difference across the left-right political spectrum.

Examining opportunities for social investment capital to be deployed in ways that meet current needs in communities: This can include partnerships with civil society organizations, especially those focused on the needs of underserved communities in need of economic regeneration, or those increasing economic opportunities for vulnerable populations.

It is essential that business leaders become more effective at connecting sustainability challenges with priorities that resonate with the public.
