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## **Extending Your Reach: New Approaches to Values-Based Compliance and Contracting**

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*The authors explain that building a social values-driven business has evolved from a niche marketing strategy into a core business strategy over the past decade. Today, they add, consumers and investors, alike, have begun to demand that the companies with which they engage both share their values and take real steps to achieve them. The authors conclude that the good news is that there are steps that promote justice and improve communities.*

**I**n recent years, many companies have taken strong public stances on pro-diversity, equity and inclusion (DEI) initiatives and spoken out against discrimination and injustice. At the most basic level, all companies are prohibited by law from discrimination based on certain protected characteristics, including race and sex. Many companies, though, are going beyond the basics – extending both the efficacy of their own policies and the reach of their corporate values in new ways.

This article provides an overview of one of these tactics, and explores its roots in and alignment with a greater global movement towards ESG and CSR principles.<sup>1</sup>

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## **THE CORPORATE SOCIAL RESPONSIBILITY LANDSCAPE AND ESG EVOLUTION**

Corporate Social Responsibility (CSR) “refers to the concept that businesses are not only responsible for creating value for shareholders, but should also seek to benefit the broader community.”<sup>2</sup> CSR is often viewed as a subset of a rising Environmental, Social, and Governance (ESG) movement within corporate America.

Some companies began incorporating these practices into their business models in the early 2000s. In the past decade, the CSR/ESG movement has accelerated. Companies have responded to consumer, employee, and investor pressure by introducing a wide range of programs to address issues such as climate change, racial and gender inequality, income inequality, and many other forms of hate and discrimination.

For example, as recently as January 2022, approximately 98 percent of the S&P 500 had at least one racially or ethnically diverse board member; this compares to 88 percent in 2021.<sup>3</sup> And, as of 2019, more than 90 percent of S&P 500 companies have published an ESG report,<sup>4</sup> and many more companies around the globe address ESG principles as part of their general business and marketing materials. The increase in such reports represented a 70-percent increase as measured from 2011.<sup>5</sup> Because of this changing landscape, ESG initiatives are now considered by many companies as necessary on multiple fronts, including to acquire and retain employees and customers, and to attract investors.<sup>6</sup>

These initiatives can take many forms, and frequently include external actions such as financial support to key organizations and causes, as well as internal measures.

For instance, several companies have conducted “Civil Rights Audits.” These examinations identify possible sources of direct and indirect discrimination and introduce countermeasures to combat such inequities.

Companies have also furthered ESG goals through social issue advertising,<sup>7</sup> such as marketing initiatives often paired with corporate support statements.

For example, one major clothing manufacturer made a public statement in support of the “Black Lives Matter” movement while integrating racial justice awareness into its own advertising campaigns.<sup>8</sup> Several entities have also increasingly adopted programs targeting diversity and inclusion within its employee base.<sup>9</sup>

Given the wide variety of ESG options, organizations have the opportunity to shape social initiatives to their unique goals and business strategies.

### ***Public Response to Values-Driven Approaches***

Affirmative values-driven contracting is not just a noble social objective. Evidence has demonstrated that consumers respond positively to

brands taking such steps. Airbnb, Uber, and Lyft have received substantial public praise for its antidiscrimination contracting activities. For example, the public widely celebrated Airbnb enforcing its antidiscrimination terms when it cancelled bookings for customers attending a white nationalist rally.<sup>10</sup> Perhaps most apparent is the fact that values-driven initiatives, like antidiscrimination contracting, can serve as an attainable and concrete means of implementing a company's social and brand goals.

### ***Shareholder and Regulator Responses to Values-Driven Initiatives***

Investors and regulators have responded to consumer demand for a conscientious and transparent approach in several ways, revealing several macro trends.

First, shareholders are actively using formal proposals to convince companies to enact ESG initiatives more than ever. While many of these focus narrowly on environmental factors, they can be seen as a bellwether of a market that increasingly expects companies to do more than make a product or produce a service. Proxy advisory firm ISS, expected a record-high number of proposals related to political, social, environmental, and ethical issues in 2021.<sup>11</sup> While these proposals have enjoyed mixed success, their increased use indicates many investors are actively considering factors beyond the most recent financials when making investments.

Second, certain shareholders have even gone so far as to sue boards that they perceive as not having followed through on stated social objectives. Within the past two years, investors have sued boards claiming lack of ESG implementation.<sup>12</sup> In addition, literature increasingly supports the premise that firms who engage in values-driven activities lower their risk of shareholder litigation *ex ante* and lower the financial consequences *ex post*.<sup>13</sup>

## **THE POWER OF CONTRACTING**

One recent initiative that has generated significant interest among corporate America in recent years is the idea of leveraging corporate bargaining power to support values-driven goals through negotiated contract terms, including specific terms addressing discriminatory behavior.<sup>14</sup> Companies can accomplish these objectives effectively by including in their own terms of use custom language designed to combat unscrupulous behavior of those with whom they do business. Put differently, by aligning contract requirements with company values, organizations can directly avoid doing business with counterparties that violate their objectives, and consequently, potentially deter such corporate behavior.

The practice is trend-setting. Through it, companies are fundamentally changing the way that they address harmful behavior and use their economic power to actually identify and potentially prevent discrimination (or at least not support counterparties that are facilitating it).

Antidiscrimination clauses in contracts are still relatively rare as a practice among Fortune 500 companies.<sup>15</sup> The Digital Sharing Economy (DSE) – in which Airbnb, Lyft, and Uber are market leaders<sup>16</sup> – has been at the forefront of values-based contracting. But, there remains significant room for further implementation.<sup>17</sup>

In a study of 108 DSE apps, researchers found that twenty-nine companies employ some variation of antidiscrimination language in their terms of use.<sup>18</sup> Of those twenty-nine companies, only fifteen included specific consequences, such as termination of the contract, for their counterparties engaging in discriminatory behavior.<sup>19</sup> This study shows that antidiscrimination terms are rare, even among the most progressive companies. Although there is no blueprint for writing antidiscrimination provisions,<sup>20</sup> companies plainly have the ability to implement them and take the lead in enforcing these provisions.<sup>21</sup>

Such contracting allows companies to efficiently pursue strategies within existing commercial frameworks. For example, Airbnb has grown its business even while implementing comprehensive antidiscrimination terms of use in 2016, as the company has facilitated nearly three-quarters of a billion in booking transactions since making this change.<sup>22</sup>

These terms apply to most of the company's transactions, and in each such transaction, Airbnb has: (1) discouraged discrimination, (2) publicly stated its position on discrimination, and (3) provided a contractual consequence for individuals who may discriminate in using Airbnb's platform (i.e., they cannot do so and continue to use the platform). In other words, these terms are not merely decorative. The practice has prompted the removal of 1.4 million users from the Airbnb platform for failing to agree to or violating its antidiscrimination terms.<sup>23</sup> Airbnb's terms of use also ensure that the platform is not being used to further discriminatory missions.<sup>24</sup> This type of prevention and response volume is quite difficult (or impossible) utilizing ESG methods, but corporate contracting power, employed effectively, can generate tangible results.

The discussion above demonstrates that values-focused contracting as a market phenomenon is still in its nascent stages. But it is a concept still very much top of mind for organizations, employees, and consumers. Taking the learnings of the marketplace to date, we set forth below several starting points through which a company can implement values-based contracting concepts. In doing so, there are several drafting considerations. Moreover, beyond terms of use, the antidiscrimination approach and the considerations we discuss in these examples can expand to other contract areas, such as representations and warranties and covenants, and can cover both direct users and other corporate counterparties.<sup>25</sup>

## ***Terms of Use***

As noted, DSE companies have begun adding antidiscrimination clauses to their terms of use, theoretically holding users to a standard that lessens incidences of discrimination against other users.

To revisit Airbnb as an example, its organizational terms state: “Hosts may not: decline a booking, . . . [i]mpose any different terms or conditions, . . . [or] [p]ost any listing or make any statement that discloses or indicates a preference for or against any guest on account of race, ethnicity, national origin, religion, sexual orientation, gender identity, or marital status.”<sup>26</sup> Airbnb also explicitly states that it “commit[s] to do more than comply with the minimum requirements established by law.”<sup>27</sup>

Similarly, Lyft’s policy states that “[r]eports of discrimination based on any of the following can result in account deactivation: race, color, national origin, religion, gender, gender identity or expression, physical or mental disability, medical condition, marital status, age, [or] sexual orientation.”<sup>28</sup> Uber’s policy is nearly the same, but states that “[a]ny user found to have violated this prohibition will lose access to the Uber platform.”<sup>29</sup> Although these provisions are worded somewhat differently, the relevant criteria and enforcement mechanisms are similar.

As to the foregoing, while these provisions share certain core similarities, variations in the individuals they cover, length of examples, reporting mechanics, and enforcement methods provide companies with several options in implementing their own anti-discrimination objectives and policies. With this in mind, we set forth below some suggested language that can be implemented in applicable terms of use to accomplish an organization’s overall ESG objectives.

### **Example**

Company does not tolerate discrimination against users, customers, subcontractors, or employees on the basis of race, color, national origin, disability, medical condition, religion, sex, sexual orientation, marital status, gender identity, gender expression, age, or any other characteristic protected under applicable federal or state law (hereinafter “Protected Characteristics”).

Such discrimination includes, but is not limited to: (i) communicating the intention to select or to avoid or actually selecting or avoiding users, customers, subcontractors, or employees based on any of the Protected Characteristics and (ii) holding any person to a different standard or to different terms based on any of the Protected Characteristics in any decisions related to the contractual duties.

Any party found by Company to have violated this policy is subject to consequences such as a formal warning, temporary account suspension, or permanent loss of access to Company's services and platform. Company will determine the penalty based on factors such as the severity of the violation and party's previous record of rule violations.

Discrimination may be reported to Company here ([hyperlink](#)).

### Drafting Considerations

#### *Persons Covered by the Policy*

Antidiscrimination policies are generally written to cover all users. For example, Uber and Lyft's policies covers both riders and drivers.<sup>30</sup> Further, GrubHub's policy (which is included in its harassment policy) covers all people who use the platform and "applies to delivery partners and any third party using the platform, including diners, restaurant employees, or anyone else who a delivery partner may come into contact with on their deliveries or while providing services."<sup>31</sup> Airbnb's terms of use even specify that hosts, guests, and all Airbnb employees must read and agree with the policy.<sup>32</sup> Policies should be drafted with caution so that they do not capture only one half of the users of any platform by using specific and limiting language such as "customer shall not" or "provider shall not."

#### *Examples of Permitted or Prohibited Actions*

Some antidiscrimination policies included in a terms of use clause are relatively simple. For example, Uber's policy states that it "does not tolerate discrimination" based on a series of characteristics. Refusing to provide or accept services based on the characteristic is one prohibited action.<sup>33</sup> In contrast, Airbnb not only lists a variety of characteristics, but also details acceptable considerations in making a decision.<sup>34</sup> While language that broadly bans discrimination may theoretically cover more instances of problematic behavior, greater clarity as to unpermitted actions may help limit instances of discrimination by making it easier to punish individuals participating in the activity. TaskRabbit takes a slightly different approach, stating that "examples of discrimination include, but are not limited to" five actions, the last of which is a catch-all provision.<sup>35</sup>

Those companies looking to give concrete examples of prohibited behavior can start with a rule that bans discriminatory choices made by individuals interacting with other platform users. For example, Uber does not let its drivers avoid certain passengers and Airbnb does not allow advertising against certain traits or refusing to rent to certain people. By

banning the ability to hold people to different standards, a company can broaden its antidiscrimination protections as needed. Overall, the drafting decision requires one to analyze whether the company desires to carve out specific boundaries to protect other interests, or ban discriminatory practices more generally.

### Reporting Discrimination

Companies looking to minimize discrimination through terms of use must be able to monitor and fix reported issues. Airbnb offers an automated chat function to report abuse to those who “witness or experience behavior that goes against [their] policies.”<sup>36</sup> Uber allows users to document discrimination through submitting pages entitled “I was discriminated against”<sup>37</sup> and “I want to report a trip denial due to discrimination.”<sup>38</sup> While not all DSE companies offer these reporting procedures, most have a general “contact us” page that is accessible when viewing the anti-discrimination policy.<sup>39</sup>

In addition, the ability to contact the company regarding violations of its terms of use seems critical to all companies, but there are differences in who can report the discrimination. Some companies specifically call for those who have experienced discrimination to report such conduct. Others, like Airbnb, take a broader approach and encourage anyone who witnesses discrimination to report such conduct. This expansive approach is especially attractive for companies who provide a service that involves postings or advertisements but offer less direct contact between users.

### Enforcement

Importantly, CSR terms of use must carry consequences for their violation.<sup>40</sup> Companies must enforce their anti-discrimination policies for maximum benefit. Organizations that have included antidiscrimination clauses in their terms of use generally do not reveal the process for determining whether discrimination has occurred. Other than focusing on placing individual behaviors in context, attempting to describe the method of adjudication following reports of discrimination may pin companies to a method that they later want to change. On the other hand, a vague oversight procedure matched with an initial vague policy may not fully deter abuse. Entities should consider an internal system for evaluating reports of discrimination so that there is some standard of uniformity in enforcement.

While organizations are not particularly clear on how they analyze reports of discrimination, some are direct and specific when describing the consequences of such violations. Uber has a “zero tolerance policy” in which any driver who refuses service to a rider based on a protected



characteristic loses access to his or her account.<sup>41</sup> Other companies use a range of consequences from the user having to take down discriminatory postings and reaffirm their understanding of the non-discrimination policy, to full removal from the platform.<sup>42</sup>

### ***Representations and Warranties***

Other than terms of use, standard representations and warranties used in other transactions may be an additional tool to guarantee the status of the *other* party's nondiscriminatory practices at the time of entering an agreement. These clauses can prevent a contracting party from endorsing or supporting organizations that have been deemed by credited sources – such as the Federal Bureau of Investigation, the Anti-Defamation League, or the Southern Poverty Law Center – to be “Hate Groups,” i.e., groups embracing ideologies of hate, discrimination, and/or violence toward ethnic, religious, or other protected classes of people.<sup>43</sup>

Widespread use of these clauses may be helpful in ensuring that parties looking to contract constantly keep an eye on discrimination in their own business instead of merely responding to requirements during the term of a specific contract. However, representations and warranties should be combined with covenants to cover discrimination both before and after a contract is signed.

### **Example**

- i) Party and its affiliates (including beneficial owners and management) do not have and do not plan to implement any practices that discriminate based on race, color, national origin, disability, medical condition, religion, sex, sexual orientation, marital status, gender identity, age, or any other characteristic protected under applicable federal or state law (hereinafter “Protected Characteristics”). Such practices include, but are not limited to: (i) communicating the intention to select or to avoid or actually selecting or avoiding users, customers, subcontractors, or employees based on any of the Protected Characteristics, (ii) holding any person to a different standard or terms based on any of the Protected Characteristics in any decisions related to the contractual duties, and (iii) targeting advertisements based on any of the Protected Characteristics.
  
- ii) Party has and enforces a policy against individuals’ Active Affiliation with Hate Groups.



1. A Hate Group is one that espouses and encourages hate against another person or group based on race, nationality, ethnicity, sex, gender, class or another similar characteristic.<sup>44</sup>
2. Active Affiliation involves attending a meeting, rally, or other assembly, enrolling in membership of, or lending monetary support to a group.
3. Party's policy includes the following rules:
  - a. Each director shall sign a statement that they do not Actively Affiliate with any hate groups. Directors found to Actively Affiliate with a hate group shall be removed from their positions and lose all voting power.
  - b. Each new employee shall sign a statement that they do not actively affiliate with any hate groups. Employees found to actively affiliate with a hate group shall be terminated.
  - c. The corporate bylaws have been amended to reflect that any shareholder found to be actively affiliated with a hate group will lose all voting power in subsequent elections.

### ***Covenants***

Covenants can be used to bind a party to a certain course of action. While representations and warranties cover the period concurrent with contract formation (or at a specific future date when representations are made again), a nondiscrimination covenant would bind a party to limiting discrimination for the duration of the contract. Thus, ideally the two would be used in tandem to cover the entire contract term. As discussed in the terms of use section, these clauses should be broad enough to cover a variety of behaviors, but they must also avoid being so vague that they are unenforceable. Being able to verify that a company is fulfilling its nondiscrimination obligations is a key part of nondiscrimination clauses, so companies are encouraged to use at least some examples.

### **Example**

Under this Agreement, Party and its affiliates (including without limitation, its beneficial owners and managers) shall not discriminate against any person on the basis of race, color, national origin,

disability, medical condition, religion, sex, sexual orientation, marital status, gender identity, gender expression, age, or any other characteristic protected under applicable federal or state law (hereinafter “Protected Characteristics”).

Such discrimination expressly includes, but is not limited to: (i) communicating the intention to select or to avoid or actually selecting or avoiding users, customers, subcontractors, or employees based on any of the Protected Characteristics; (ii) holding any person to a different standard or to different terms based on any of the Protected Characteristics in any decisions related to the contractual duties; (iii) targeting advertisements based on any of the Protected Characteristics; or (iv) without limitation engaging in any transaction under the Agreement with any entity, group, organization, or business which (a) is deemed or designated as a “Hate Group;” (b) engages in practices which would violate the discrimination provisions set forth in this covenants; or (c) otherwise expressly espouses ideologies or policies of hate or discrimination based on Protected Characteristics.

Party will continue to use and enforce a policy against individuals’ Active Affiliation with hate groups. Any amendments to this policy must be communicated to the Company.

1. A Hate Group is one that spouses and encourages hate against another person or group based on race, nationality, ethnicity, sex, gender, class or another similar characteristic.<sup>45</sup>
2. Active Affiliation involves attending a meeting, rally, or other assembly, enrolling in membership of, or lending monetary support to a group.
3. Party’s policy includes the following rules:
  - a. Each director shall sign a statement that they do not Actively Affiliate with any hate groups. Directors found to Actively Affiliate with a hate group shall be removed from their positions and lose all voting power.
  - b. Each new employee shall sign a statement that they do not actively affiliate with any hate groups. Employees found to actively affiliate with a hate group shall be terminated.
  - c. The corporate bylaws have been amended to reflect that any shareholder found to be actively affiliated with a hate group will lose all voting power in subsequent elections.

In the event Party breaches this covenant, Company has the right to terminate the Agreement for cause.

### ***Other Options for Organizations***

Companies (including in the DSE space) have been making progress by incorporating nondiscrimination clauses in their terms of use, but the full potential of ESG contracting initiatives may be under realized. Entities looking to use a nondiscrimination clause in their terms of use have many options to consider in writing their policies, but if they want to hold partners or subcontractors of a significant size responsible, incorporating nondiscrimination clauses into representations and warranties and covenants may be particularly useful. By utilizing both representations and warranties and covenants, a company can promote other parties to have their own nondiscrimination policies and practices in place while also ensuring that those promises are actually followed during the term of the contract.

## **LEGAL AND PRACTICAL CHALLENGES IN IMPLEMENTING CSR CONTRACTING TERMS**

As with any other organizational policy, legal and practical hurdles must be evaluated. There are several arguments that could be brought against a company that has adopted values-influenced provisions like the ones suggested above. While there certainly are risks associated with adopting the approaches, each organization should weigh those risks against broader objectives it wishes to employ as a means of achieving its social and business objectives. These include, but are not limited to, practical considerations, First Amendment challenges, contract enforceability disputes, and claims of fiduciary duty breaches by shareholders. While a deeper discussions of these risks is beyond the scope of this article, we briefly raise them below.

### ***Practical Challenges***

Basic issues that could prevent the successful implementation of values-driven contracting terms include that the contracting counterparty could lie and/or does not have knowledge to make the representation. These issues apply in other contracting terms as well. When a party deliberately conceals relevant information, the contract can be considered void due to misrepresentation. In such cases, the contract is illegitimate and unenforceable, as if it never existed in the first place.

### ***First Amendment Challenges***

Some have argued that companies violate the First Amendment by censoring speech of any kind on their platforms, including discriminatory speech. Additionally, an organization's policy punishing active association with a particular group could be viewed as violating one's freedom of association. These arguments could be applied to organizations who seek to employ values-based contracting, particularly to the extent that contract provisions focus on speech that is racist, hateful, or otherwise objectionable. However, these claims generally run into the long-standing "state-action" doctrine, establishing that the First Amendment applies only to state action, not private action, like companies pursuing values-based objectives in their contracting activities.<sup>46</sup>

### ***State Law Contracting Principles & Enforceability of Contract Terms***

Companies should also ensure that their terms of use are enforceable before enacting innovative contracting terms. Because state law broadly governs contract law, it will dictate both whether the contract is enforceable and what general defenses could be brought against a company seeking to enforce particular contract terms.<sup>47</sup> This analysis can be especially difficult for electronic transactions.<sup>48</sup>

Additionally, consumers sometimes argue that companies use unlawful "adhesion contracts," or contracts where the terms are "dictated by one contracting party."<sup>49</sup> However, adhesion contracts are enforceable, unless the "non-sticking" party can show that the terms are unfair.<sup>50</sup> Thus, companies using adhesion contracts to promulgate values-focused initiatives must evaluate their contracts for fairness in order to ensure their enforceability.

Given the possibility that organizations currently have unenforceable terms of use under these frameworks, entities implementing antidiscrimination terms of use should endeavor to do so in a manner that complies with the relevant case law of each jurisdiction.

### ***Fiduciary Duties***

Finally, some legal scholars argue that by engaging in ESG activities, directors and officers may violate their fiduciary duties by not maximizing shareholder wealth.<sup>51</sup> Such arguments stem from the "shareholder primacy" governance philosophy in which a corporation cannot consider employees, suppliers, communities, or the environment in making business decisions. But this philosophy does not take into account the controlling, and deferential, business judgment standard for evaluating the conduct of directors and officers which applies equally to decisions to

institute ESG programs, so long as the decisions are made absent fraud, illegality, or conflict of interest.<sup>52</sup>

Increasingly, states are enacting laws that provide even more protection than the business judgment rule afforded. The majority of states, but not Delaware, has instituted some form of an “Other Constituency” statute, allowing the board to take into consideration the interests of non-stockholders when making decisions, including the interests of employees, creditors, economies, and communities. In fact, the Business Roundtable recently adopted this view in its 2020 “Statement on the Purpose of a Corporation,” emphasizing that entities owe a “fundamental commitment to *all* stakeholders,” not just stockholders.<sup>53</sup>

## CONCLUSION

Building a social values-driven business has evolved from a niche marketing strategy into a core business strategy over the past decade. Today, consumers and investors, alike, have begun to demand that the companies with which they engage both share their values and take real steps to achieve them. The good news is that there are steps that promote justice and improve communities. And the better news: in many cases doing those steps can also advance a company’s position in the competitive landscape.

## NOTES

1. “ESG” and “CSR” are defined in the analysis below.
2. Tom Stobierski, 15 Eye-Opening Corporate Social Responsibility Statistics, HARVARD BUSINESS SCHOOL ONLINE (Jun. 15, 2021) <https://online.hbs.edu/blog/post/corporate-social-responsibility-statistics>.
3. Robert Kalb, 2022 Proxy Season Review, United States – Governance & Compensation, ISS (Mar. 22, 2022)
4. Stobierski, *supra* note 2.
5. *Id.*
6. *Id.* (“Seventy-seven percent of customers are motivated to purchase from companies committed to making the world a better place, while seventy-three percent of investors state that efforts to improve the environment and society contribute to their investment decisions.”).
7. Simon Mainwaring, Purpose At Work: How Big Brands Are Showing Their Support For Social Justice, FORBES (Jun. 9, 2020) <https://www.forbes.com/sites/simonmainwaring/2020/06/09/purpose-at-work-how-big-brands-must-show-their-support-for-social-justice/?sh=50a1a3e869de>.
8. NIKE, INC. <https://news.nike.com/news/nike-commitment-to-black-community> (last visited Nov. 23, 2021).

9. David Pedulla, Diversity and Inclusion Efforts That Really Work, *HARVARD BUSINESS REVIEW* (May 12, 2020) <https://hbr.org/2020/05/diversity-and-inclusion-efforts-that-really-work>.
10. Naomi Nix, Shining a Light on Racial Inequality, *BLOOMBERG* (Aug. 6, 2021) (“Today some of Airbnb’s biggest critics have turned into the company’s cheerleaders as it pursues more anti-discrimination projects.”).
11. Kathy Belyeu, Enver Fitch, 2022 Proxy Season Preview, United States – Environmental and Social Issues, *ISS* (March 30, 2022).
12. See, e.g., *In Re Danaher Corp. S’holder Deriv. Litig.*, No. 1:20-cv-02445-TNM (D. D.C. Jun 28, 2021) (plaintiffs claimed that the board failed to follow through on its commitment to board diversity.).
13. See Steven Freund, Nam H. Hguyen, Hieu V. Phan, Shareholder Litigation and Corporate Social Responsibility (June 10, 2021). *JOURNAL OF FINANCIAL AND QUANTITATIVE ANALYSIS* (forthcoming) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3889645](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3889645).
14. Regulators have weighed in on these issues as well. See Davies, Green, & Bee, European Commission Proposes New Supply Chain Due Diligence Rules for Large Companies (Feb. 22, 2022) <https://www.globalelr.com/2022/02/european-commission-proposes-new-supply-chain-due-diligence-rules-for-large-companies/>.
15. In analysis of 65 contracts found within the SEC’s system over the past three years mentioning antidiscrimination, 26% of the agreements were lease agreements, while 15% were employment agreements. Antidiscrimination terms are commonly found in employment and lease agreements because they are required by the Civil Rights Act of 1964 and the Fair Housing Act of 1968. Civil Rights Act of 1964, P.L. 88-353, 78 Stat. 241 (1964); Fair Housing Act of 1968 P.2. 284, 82 Stat. 73 (1968).
16. “The Digital Sharing Economy (DSE) refers to a sustainable form of online business exchange that is built around sharing assets and resources rather than transferring their ownership.” Miroslav Tushev, Fahimeh Ebrahimi, and Anas Mohoud, Analysis of Non-Discrimination Policies in the Sharing Economy, (unpublished) (on file with the Division of Computer Science and Engineering, Louisiana State University). [https://miroslavtushev.github.io/papers/ndp\\_policies.pdf](https://miroslavtushev.github.io/papers/ndp_policies.pdf). Examples include Uber, TaskRabbit, and Airbnb. Id.
17. Id.
18. Id.
19. Id.
20. Id. (noting that only three of these contracts referenced legislation in their criteria). This means that there is great latitude in how companies choose their discrimination criteria.
21. Of course, in doing so, companies should always ensure the retention of competent counsel with experience in the ESG space.
22. David Curry, Airbnb Revenue and Usage Statistics, *THE BUSINESS OF APPS* (May 6, 2021) <https://www.businessofapps.com/data/airbnb-statistics/>.
23. Airbnb, Inc. Form S-1 Registration Statement (Nov. 16, 2020). See e.g., Jonah Bromwich, Airbnb Cancels Accounts Linked to White Nationalist Rally, *THE NEW YORK TIMES* (Aug. 9, 2017) <https://www.nytimes.com/2017/08/09/us/airbnb-white-nationalists-supremacists.html>.

24. See e.g., Kyle Swenson, Airbnb boots white nationalists head to 'Unite the Right' rally in Charlottesville, *THE WASHINGTON POST* (Aug. 8, 2017) <https://www.washingtonpost.com/news/morning-mix/wp/2017/08/08/airbnb-boots-white-nationalists-headed-to-unite-the-right-rally-in-charlottesville/>.

25. Of course, each individual suggestion should be evaluated and implemented with the assistance of counsel. Our discussion is not meant to displace complete and thoughtful consideration of legal risks, organizational objectives, and implementation costs, among other things. Rather, this article presents a starting point for companies wishing to implement versions of ESG contracting.

26. Airbnb, Nondiscrimination Policy (Oct. 30, 2020) <https://www.airbnb.com/help/article/2867/nondiscrimination-policy>.

27. *Id.*

28. Lyft, Anti-Discrimination Policy <https://help.lyft.com/hc/e/articles/115012923767-Anti-Discrimination-Policies>.

29. Uber, Anti-Discrimination Policy <https://www.uber.com/legal/en/document/?country=united-states&lang=en&name=non-discrimination-policy>.

30. Uber Non-Discrimination Policy, Uber (November 23, 2021) <https://www.uber.com/legal/en/document/?country=united-states&lang=en&name=non-discrimination-policy>; *Anti-Discrimination Policies, Lyft (November 23, 2021)* <https://help.lyft.com/hc/e/articles/115012923767-Anti-Discrimination-Policies>.

31. Policy Against Discrimination, Sexual and Other Forms of Harassment, Grubhub (November 23, 2021) [https://driver-support.grubhub.com/hc/en-us/articles/360053463531-Policy-Against-Discrimination-Sexual-and-Other-Forms-of-Harassment?\\_\\_cf\\_chl\\_captcha\\_tk\\_\\_=Wkk7JCHWmTKhRwV7HTHl64bcWHRms9zFkpqk3\\_UnAA-1637727682-0-gaNycGzNDP0](https://driver-support.grubhub.com/hc/en-us/articles/360053463531-Policy-Against-Discrimination-Sexual-and-Other-Forms-of-Harassment?__cf_chl_captcha_tk__=Wkk7JCHWmTKhRwV7HTHl64bcWHRms9zFkpqk3_UnAA-1637727682-0-gaNycGzNDP0).

32. Nondiscrimination Policy, Airbnb (November 23, 2021) <https://www.airbnb.com/help/article/2867/nondiscrimination-policy>.

33. Non-Discrimination Policy, Uber (November 23, 2021) <https://help.uber.com/riders/article/non-discrimination-policy?nodeId=a6c8ff85-677d-47e3-912f-895161d0828e>.

34. Airbnb, *supra* (In regards to gender identity, hosts may not decline a booking, impose any different terms or conditions, or post any listing or make any statement that discourages or indicated a preference for or against any guest on account of gender unless the host shares living spaces with the guest. But Hosts may make a unit available to guests of the host's gender and not the other where the host shares living spaces with the guest.)

35. TaskRabbit Antidiscrimination and Harassment Policy, TaskRabbit (November 23, 2021) [https://support.taskrabbit.com/hc/en-gb/articles/360051287051-TaskRabbit-Anti-Discrimination-and-Harassment-Policy?utm\\_source=pd\\_search&utm\\_medium=ggl&utm\\_campaign=Google\\_Search\\_US\\_MultiCity\\_AllWebpages\\_DSA&utm\\_campaignID=15021763592&utm\\_content=129509438875&utm\\_term=&utm\\_creative=554793200837&utm\\_extensionid=&utm\\_target=dsa-19959388920&utm\\_network=g&utm\\_locationid=9030985&gclid=EAIaIQobChMIs-aMlo-w9AIVy3xvBB0ZngcAEEAYASAAEgKM9fD\\_BwE](https://support.taskrabbit.com/hc/en-gb/articles/360051287051-TaskRabbit-Anti-Discrimination-and-Harassment-Policy?utm_source=pd_search&utm_medium=ggl&utm_campaign=Google_Search_US_MultiCity_AllWebpages_DSA&utm_campaignID=15021763592&utm_content=129509438875&utm_term=&utm_creative=554793200837&utm_extensionid=&utm_target=dsa-19959388920&utm_network=g&utm_locationid=9030985&gclid=EAIaIQobChMIs-aMlo-w9AIVy3xvBB0ZngcAEEAYASAAEgKM9fD_BwE).

36. Airbnb, *supra*.

37. I was discriminated against, Uber (November 23, 2021) <https://help.uber.com/driving-and-delivering/article/i-was-discriminated-against?nodeId=00005044-afdb-43e0-bf7f-41fa2faba83b>.



38. I want to report a trip denial due to discrimination, Uber (November 23, 2021) <https://help.uber.com/riders/article/i-want-to-report-a-trip-denial-due-to-discrimination?nodeId=565e854e-b90b-45c2-b74b-e2abe8d99b80>.

39. See Lyft, *supra*.

40. In a study of 73 US-based Hate Groups and 54 online funding platforms, researchers found that although 62% of the websites studied explicitly prohibited Hate Groups from using their services, Hate Groups still effectively fundraised on 83% of those websites. Bankrolling Bigotry: An Overview of the Online Fundraising Strategies of American Hate Groups, Institute for Strategic Dialogue, <https://www.isdglobal.org/wp-content/uploads/2020/10/bankrolling-bigotry-3.pdf>.

41. I want to report a trip denial due to discrimination, Uber (November 23, 2021) <https://help.uber.com/riders/article/i-want-to-report-a-trip-denial-due-to-discrimination?nodeId=565e854e-b90b-45c2-b74b-e2abe8d99b80>.

42. Airbnb *supra*.

43. E.g., Does the FBI investigate hate groups in the United States? FBI, available at <https://www.fbi.gov/about/faqs/does-the-fbi-investigate-hate-groups-in-the-united-states> (“The FBI investigates domestic hate groups within guidelines established by the attorney general. Investigations are conducted only when a threat or advocacy of force is made; when the group has the apparent ability to carry out the proclaimed act; and when the act would constitute a potential violation of federal law.”).

44. See Frequently asked questions about hate groups, Southern Poverty Law Center (March 18, 2020) <https://www.splcenter.org/20200318/frequently-asked-questions-about-hate-groups>.

45. See Frequently asked questions about hate groups, Southern Poverty Law Center (March 18, 2020) <https://www.splcenter.org/20200318/frequently-asked-questions-about-hate-groups>.

46. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922,936 (1982) (explaining that “[a]s a matter of substantive constitutional law, the state-action requirements reflects the judicial recognition of the fact that most rights secured by the Constitution are protected only against infringement by governments.”).

A more detailed analysis of how the state-action doctrine applies in similar circumstances is beyond the scope of this article, but is an issue that is at the forefront of the ESG debate.

47. Legal Information Institute, <https://www.law.cornell.edu/wex/contract> (last visited Nov. 22, 2021).

48. *Kaunders v. Uber Technologies, Inc.*, 486 Mass. 577 (2021) (explaining that “[s]etting out these general fundamental contract principles is not, however, the difficult part of the analysis. The trick here is to know how much to apply these general principles to newer forms of contracting over the internet.” (internal citations and quotations omitted)).

49. 1 Corbin on Contracts § 1.4 (2021); *id.* (explaining “the contract of adhesion is part of the fabric of our society.”).

50. 1 Corbin on Contracts § 24.47 (2021).

51. Jon L. Pritchett & Ed Tiryakian, When CEOs Play Politics, Shareholders Can Take Them to Court, *THE WALL STREET JOURNAL* (Aug. 17, 2017) <https://www.wsj.com/articles/when-ceos-play-politics-shareholders-can-take-them-to-court-1503011944>. This argument was initially established by Milton Friedman and is often referred to as the “Friedman doctrine.”

## Extending Your Reach

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Martin Lipton, Milton Friedman's Essay and the True purpose of the Business Corporation, THE CLS BLUE SKY BLOG (2020) <https://clsbluesky.law.columbia.edu/2020/09/18/milton-friedmans-essay-and-the-true-purpose-of-the-business-corporation/>.

52. Shelensky v. Wrigley, 95 Ill. App. 2d 173, 181 (1968).

53. Business Roundtable, Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans' (Aug. 19, 2019) <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

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