[18]*Nuveen Fund Advisors, LLC, et al.*, Inv. Co. Act Rel. Nos. 34,243 (Apr. 8, 2021) (notice) and 34,265 (May 4, 2021) (order).

[19]*Blue Tractor ETF Tr. and Blue Tractor Group, LLC*, Inv. Co. Act Rel. Nos. 33,682 (Nov. 14, 2019) (notice) and 33,710 (Dec. 10, 2019) (order). Blue Tractor amended its initial exemptive application 11 times and obtained its exemptive order in under four years.

[20]*Spinnaker ETF Series, et al.*, Inv. Co. Act Rel. Nos. 33,929 (Jul. 17, 2020) (notice) and 33,969 (Aug. 12, 2020) (order).

[21]*Alps ETF Tr., et al.*, Inv. Co. Act Rel. Nos. 34,149 (Dec. 22, 2020) (notice) and 34,181 (Jan. 21, 2021) (order).

[22]*The RBB Fund, Inc., et al.*, Inv. Co. Act Rel. Nos. 34,189 (Feb. 5, 2021) (notice) and 34,215 (Feb. 26, 2021) (order).

[23]*Fidelity Beach St. Tr., et al.*, Inv. Co. Act Rel. Nos. 33,683 (Nov. 14, 2019) (notice) and 33,712 (Dec. 10, 2019) (order). Fidelity amended its initial exemptive application nine times (likely in response to several rounds of Staff comments) and obtained its exemptive order in just over five years.

[24]Rheaa Rao, *Hartford Funds Licenses Fidelity's ETF Structure*, Ignites (May 26, 2021) (https://www.ignites.com/c/3189044/402994/hartford_funds_licenses_fidelity_structure). *See also Putnam ETF Tr., et al.*, Inv. Co. Act Rel. Nos. 34,245 (Apr. 15, 2021) (notice) and 34,266 (May 10, 2021) (order).

[25]*Putnam ETF Tr.*

[26]*Invesco Capital Mgmt. LLC, et al.*, Inv. Co. Act Rel. No. 34,087 (notice).

[27]*Invesco Capital Mgmt. LLC, et al.*, Inv. Co. Act Rel. Nos. 34,170 (Jan. 12, 2021) (notice) and 34,193 (Feb. 9, 2021) (order).

[28]*Blue Tractor ETF Tr. and Blue Tractor Group, LLC*, Inv. Co. Act Rel. Nos. 34,194 (Feb. 10, 2021) (notice) and 34,221 (Mar. 9, 2021) (order).

[29]*Precidian ETFs Tr.*, Application for an Order to Amend a Prior Order (Nov. 24, 2020).

[30]*T. Rowe Price Assocs., Inc., et al.*, Inv. Co. Act Rel. No. 34,248 (Apr. 22, 2021) (notice).

[31]Conceivably, there could also be amendments to Rule 6c-11 under the 1940 Act one day, which would remove the need for semi-transparent ETF structures to obtain an exemptive application at all. The SEC has already amended the Rule to bring leveraged and inverse ETFs into the Rule, despite initially carving them out.

[32]*See* Greg Saitz, *Boards Tapped to Respond if Nontransparent ETFs Stumble*, BoardIQ (May 18, 2021) (citing FactSet data as of April 22, 2021).

[33]*See* Carmen Germaine, *Non-transparent ETFs pass their first test-spreads are tight*, Financial Times (Sep. 11, 2020).

[34]Todd Rosenbluth, *Possible Changes in Tax Policy Could Further Drive ETF Use: CRFA*, ETF Trends (Apr. 26, 2021).

INSTITUTIONAL INVESTORS AS VANGUARDS OF CHANGE?

Morrow Sodali recently published its sixth annual Institutional Investor Survey, which canvassed the opinions of 42 global institutional investors, managing about $29 trillion in assets under management. (You can read it here: https://morrowsodali.com/insights/institutional-investor-survey-2021.)

Among the findings: Environmental, Social and Governance (ESG) issues "have been propelled to the forefront of investors' minds as they assess the management of risks and opportunities, operational resilience, and shareholder value creation through a period of unprecedented market uncertainty and turbulence." A vast majority of respondents said they were giving more focus to ESG topics when engaging and making investment decisions (98% and 96% respectively).

*In late May, **Wall Street Lawyer** spoke to Morrow Sodali's Chairman Emeritus John Wilcox, who is also a member of WSL's editorial board, for his thoughts on some of the survey's findings.*

***Wall Street Lawyer**: It's striking how dominant ESG issues are in this year's survey. As you note, this is something that's only come to the forefront in the last two or so years.*

Wilcox: If you look at the survey answers, it's pretty clear that these are topics that really matter to the institutions now. It's not as if we're asking questions about a fringe issue. These ESG issues, especially climate—which is the top concern at this point in the ESG area—are issues that the institutions are bringing to the table in dealings with their portfolio companies.

One of the more interesting topics in this survey is in the area of materiality. The U.S. has a much more rules-based approach to all these topics and disclosure rules are quite detailed. The responses from institutions to our survey show that even if you apply that traditional U.S. legal definition of materiality, what matters to investors is that ESG is right in there. ESG is clearly "material" in that sense. What I think is interesting is that the European regulatory agenda is a little bit different. They're taking a principles-based approach—a so called "double-materiality" approach, which is written into the new European Commission regulations that haven't taken effect yet. The sustainability reporting directive addresses that specifically.

But one thing about the survey, from the perspective of corporations, is that it tells them absolutely clearly that these issues are material to shareholders. So there needs to be disclosure.

In addition to the top U.S. institutions, the survey also includes European institutions, asset managers, and sovereign investment funds. All of their obligations are going to be felt by U.S. companies. You can see some of that push: looking for a somewhat broader approach. It's going to be interesting to see how global regulators work together. There's some pressure on auditors to expand the concept of assurance, making it more detailed, making it apply to these ESG issues. It's a fascinating time. There are some very fundamental changes going on right now.

WSL: *One of the survey's findings was "that investors are increasingly interested in how integrating ESG into long-term strategy leads to improved financial performance. The key drivers selected by investors were the link to financial performance (49%), followed by legislative changes (44%) and then client focus (41%)."*

Wilcox: There are two ways of looking at that. One is from the investor's perspective, because they want their portfolio companies to perform financially and they understand that ESG /nonfinancial sustainability issues will have a direct impact on financial performance, both long- and short-term, but primarily long-term. The big indexers whose perspective is long-term have initiated this push. These investors see these issues as being very closely related to risk and to opportunities, both of which have an impact on a company's financial performance.

At the same time, companies have come to recognize that their financial performance is be affected by ESG issues. If you want to look at something aside from climate, which is probably the best-developed in terms of standard metrics, take human capital management, which has fairly recently moved to the top of the list of priorities. This is because of COVID but also BLM and MeToo and diversity—all these social issues and trends are being highlighted in the media and spilling over into politics. There's pressure on companies to consider whether political activity should be examined, from the perspective of the health of their business and the well-being of their stakeholder audiences. All of this is far different, in terms of how things used to be as recently as five years ago, when companies were operating more or less under the Milton Friedman doctrine of shareholder primacy.

When you look at the 30-year evolution of governance, it used to be a really top/down approach, where the rules and the standards and best practices were being imposed on companies from outside. But while these newer issues, like climate and human capital, are also being externally imposed, there's a much stronger element of inside/out or bottom/up, in which the corporations are taking a look at their own businesses, who their stakeholders are, what their employee policies are, what their state of incorporation is, what's going on in their local communities. So there's a tremendous amount of bottom/up thinking that is necessary for companies to determine what is material to them and what their particular audience of stakeholders need.

I think we're going to be moving to a much more individualized approach to looking at companies' individual circumstances, and determining what is material for their business. The challenge going to be to figure out how to do this in such a customized way while also achieving some degree of standardization that investors need in order to compare companies in the marketplace, and that regulators feel is necessary for an efficient market.

***WSL**: In terms of COVID's effects, the survey notes that "the appropriateness of dividend payments when faced with liquidity problems, big layoffs, taking government subsidies and dilution of share capital were ranked as concerns relatively equally."*

Wilcox: We've seen a number of large institutions, particularly indexed ones, go fairly easy on corporations in terms of not wanting to second-guess compensation decisions, because the amount of money paid to the CEO and top five, and how it's paid, isn't really material in terms of the company's financial results. It's traditionally been seen as being too much like micro-management to be fiddling around with compensation. The institutions would say, correctly, that they're not in the business of designing compensation plans for individual companies.

But with COVID, you saw an issue that had very much to do with the culture of the company, the recognition that one of the most important stakeholder audiences of any company is its employees: the people who do the day-to-day work, who may be at the bottom of the compensation ladder. COVID was a social wake-up call. From that perspective, it can be unseemly for a company that has fired employees or cut back on wages—but still relied on them to keep the lights on—to be rewarding executives at the top while demanding sacrifices at the bottom.

***WSL**: Another survey finding was that 86% of surveyed investors believe that companies should disclose their "Corporate Purpose," which in your words "defines both the 'why' and 'how' a company exists and interacts with its stakeholders and broader community—creating a sense of purpose across a wide range of ESG matters."*

Wilcox: Corporate purpose is another of these inside/out, bottom/up type of topics that a company needs to pay attention to. Companies need to have a very clear, well-defined corporate purpose, but it doesn't need to be a written statement. It can more be a demonstration of culture and values and purpose that's implicit in the company's strategic and policy decisions. A few years ago, I looked at Travelers Corp., which had a brilliantly-written integrated report in which they talked about the value drivers of the company and how all the pieces fit together. It was crystal clear what that company's character was all about, what its culture was. So there are many ways in which corporate purpose can be communicated and felt, within and outside the company. Shareholders don't just want a formal statement pasted on the wall. They really want the corporate purpose to drive strategy, to drive value, policy decisions, culture: all of it.

***WSL**: Did anything else from survey strike you as unusual this year?*

Wilcox: In the section where we talk about looking forward, I think these are very useful pieces of advice for companies. One thing I sometimes see is that the role of the board of directors is still often not given center stage to the degree that it should. The board has a really important job. More so than at the start of my career. One thing we've learned from the governance movement is that the board of directors embodies the soul of a corporation. These non-financial issues—ESG, sustainability, corporate purpose—are the responsibility of the board of directors, full stop. The board needs to establish ESG policies. The policies are implemented by the CEO obviously, but the board should ensure there are internal controls and mechanisms in place that enable them to fulfill their monitoring responsibilities.

One survey question revealed that many shareholders are willing to withhold votes from directors if they weren't happy with what a company is doing. I think that's a recognition on the part of shareholders as to how important directors are. Shareholders view directors as their elected representatives. As this survey shows, shareholders are looking first and foremost to directors to ensure the interests of all shareholders are looked after.

So the board has a big job. One question we should be asking: "Do we have the right approach to the board now?" The board is a part-time group of seasoned executives. They aren't paid as much as managers. Is this traditional board concept workable for the long term? That's a question I see arising out of the trends that we've found in recent years in our surveys.

THE DOJ AND THE CFTC ARE FOCUSED ON COMMODITIES FRAUD ENFORCEMENT: ARE YOU?

By Brian C. Rabbitt and Joshua B. Sterling

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The DOJ and the CFTC in recent years have worked closely together to target companies and individuals for violations of the Commodity Exchange Act ("CEA") and other laws. Between 2017 and 2020, for example, they brought 46 cases in parallel, racking up record penalties for commodities fraud[1] and breaking new ground by charging violations of the CEA together with other laws, such as the Foreign Corrupt Practices Act ("FCPA") and Bank Secrecy Act ("BSA"), on the same sets of facts.

As former senior officials[2] at the DOJ and the CFTC, we expect the agencies to double down on this joint initiative in the years ahead, continuing to pursue commodities fraud cases with even greater focus and intensity. Accordingly, companies active in the commodities and derivatives markets should understand how these agencies work together and their enforcement priorities. Below, we address these issues and then offer practical tips for companies to take stock of their compliance programs. Armed with this information, companies can ensure that they are prepared to deal with the potential for robust civil and criminal commodities fraud enforcement by the DOJ and the CFTC in the years ahead.

How the DOJ and the CFTC Investigate Companies Together

In recent years, the DOJ and the CFTC have built a strong, collaborative, and enduring partnership for pursuing parallel commodities-related investigations and enforcement actions. At the DOJ, the Criminal Division's Market Integrity and Major Frauds Unit ("MIMF"), which has seen a surge in resources in recent years, remains closely focused on commodities fraud. Leadership of MIMF and the CFTC's Division of Enforcement meet regularly to review ongoing inquiries and investigations, to assess case status, and to coordinate resolutions. This partnership has led to a notable string of individual prosecu-