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# 2023 GCs and ESG

## Practices, Priorities and Perspectives

*Annual Benchmark Study*

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Second annual survey reveals a dramatic shift, as 78% of corporate counsel report above-average focus by their boards and leaders on ESG's environmental pillar.

By **Mary Smith Judd**

# Introduction

Corporate environmental, social and governance (ESG) actions are not new. Companies have focused on matters that are related to environmental and social factors for more than three decades. Their reasons are not solely financial.

In the United States, many companies and investors have initiated ESG activities well ahead of regulation, while observing accelerated regulation elsewhere, including the European Union. The risks associated with ESG are central to overall corporate value. Stakeholders, including investors, increasingly view material ESG factors as critical drivers of a company's ability to grow sustainably in the long term. Investors understandably demand assurance that leadership teams and boards understand ESG.

Beyond investor pressure, impacting a company's access to capital, ESG is increasingly a compliance and operational risk concern.

*Corporate Counsel* in 2022 partnered with international law firm Morrison & Foerster, launching a benchmark survey of U.S.-based in-house counsel to study the extent to which ESG policy and compliance development, implementation and reporting falls to corporate legal departments. That collaboration was renewed in the spring of 2023, when *Corporate Counsel* launched an updated 27-question survey of senior in-house counsel that queried organizational, individual and departmental attitudes and approaches to ESG. The annual benchmark survey now compares year-over-year practical and cultural shifts.

Responses were collected by invitation online and via telephone interviews. The survey was open from April 5, 2023 to April 23, 2023.

Respondents' titles included general counsel, chief legal officers, vice presidents of legal, chief compliance officers and the like. The size of the respondents' legal departments ranged from a single lawyer to exceeding 60 lawyers.

## The 2023 survey explores

- An overview of the survey respondents, including title(s), most recent annual revenue (new), entity type (new), number of lawyers in their legal departments and their companies' Sustainability Accounting Standards Board sectors.
- Personal and departmental leadership roles of organizational ESG initiatives.
- Company and/or board leadership's practices and priorities including depth of focus on individual ESG components (environmental, social, governance and human capital); whether and how companies altered their approach to environmental action in the year; factors motivating the adoption of environmental goals; status of environmental performance goals; and ESG metrics (key performance indicators, or KPIs) tied to executive compensation, types of incentives, and impact or observance of anti-ESG sentiment (new).
- Legal department practices and priorities, including involvement in ESG strategy, involvement in ESG compliance, departmental priorities, consideration of vendors' environmental records and policies, materiality assessments (new), ESG disclosures, and merger and acquisition (M&A) factors (new).

- Personal opinions and observations, including respondents' confidence that their organization has a comprehensive ESG program in place; challenges to ESG implementation; stakeholders' understanding of ESG relative to company culture; and perceived risks associated with a publicly touted ESG strategy.

Most questions were worded identically to the prior survey. However, the following were added for additional context and depth:

- What was your company's most recent (FY 2020-21 or 2021-22) annual revenue?
- Which best describes your company or organization (i.e., publicly held, privately held, closely held, nonprofit or governmental)?
- If your company is engaging in M&A, how are you considering ESG factors in M&A?

Current events and other factors inspired the following additions:

- How has anti-ESG backlash affected your organization's approach to ESG?
- Has your company conducted a materiality assessment?
- With increased regulation scrutiny and the rise of greenwashing litigation, do you view touting a public ESG strategy as a risk? What types of incentives does your company tie to executive compensation based on ESG performance?
- What focus areas or KPIs are tied to incentives or mandates for ESG performance for your company's executive compensation?

Some questions likewise were updated or modified to quantify prior data. For example, in 2022, 90% of respondents answered "yes" to the question, "Does your legal department lead a material portion of ESG initiatives in your organization?" One year later, the question was updated to quantify legal departments' involvement in leading strategy.

Many data points were cross-tabbed to contrast differences year-over-year, by entity type, annual revenue, legal department size and other factors. Some of those variations, whether modest or notable, are included in this report.

## Key Findings

- ESG's compliance has come into sharper focus as regulation of corporate action and disclosure, especially as it relates to climate, increases globally and C-suite executives, board members, and in-house legal teams adapt.
- 2023 may well be a bellwether, as boards increasingly focus on ESG's "E" (environmental) and "S" (social), expending fewer resources on "G" (governance) than the prior year.
- Chief compliance officers have quickly overtaken the role of leading ESG compliance from in-house counsel. In 2023, 55% report ESG compliance is led by chief compliance officers. Just one year earlier, 54% of 2022 respondents reported that ESG compliance was led by legal departments. In 2023, 71% combined C-suite and chief compliance personnel-led ESG compliance, compared with 2022's 63% combined general counsel equivalents and legal departments.

Additionally, this report includes insights, observations and comments derived from interviews with the following general counsel who also are ESG legal thought leaders:

- Linda Weber, senior program manager—global sustainability engagement at Jabil, an international manufacturing company, headquartered in St. Petersburg, Florida; and

- Ling-Ling Nie, deputy general counsel, chief compliance officer and chief ESG officer at Aura, an information identity security start-up, based in Boston.

The report also includes insights, observations and comments made during a panel discussion on ESG at *Corporate Counsel's* General Counsel Conference Midwest by:

- Seth Gastwirth, deputy general counsel and assistant corporate secretary at JLL (Jones Lang LaSalle), a global commercial real estate services company, based in Chicago; and

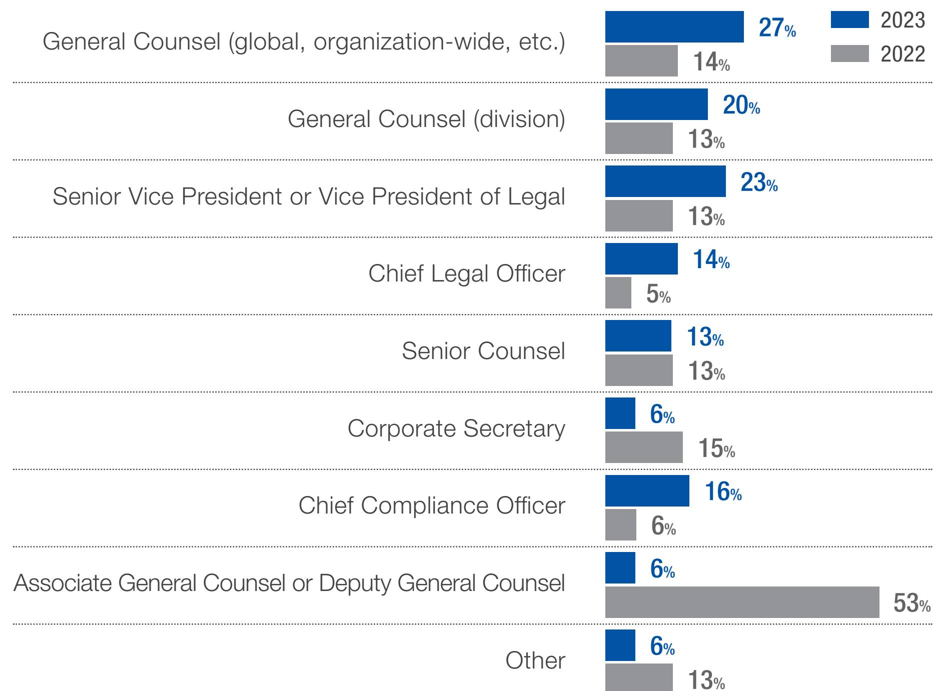
- Kathleen Sweitzer, senior vice president, general counsel and corporate secretary at Trustmark, a benefits services provider, based in Forest Park, Illinois.

# Survey Results

## Overview of respondents

It is not uncommon for in-house legal leaders' titles to include multiple roles. The majority (84%) of 2023 respondents' titles reflected at least one presumable senior-most descriptor, such as general counsel, vice president of legal or chief legal officer. By comparison, in 2022, deputy GC equivalents made up 53% of the respondents. The 2023 pool likewise includes more chief compliance officer titles—16% compared with 6% in 2022.

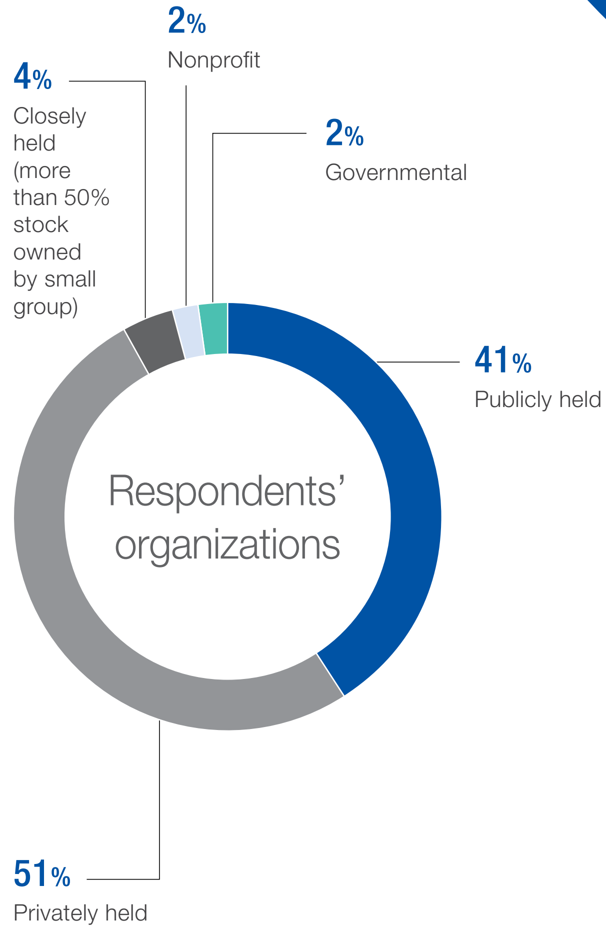
Which of the following best reflects your current role/title?



## Entity types

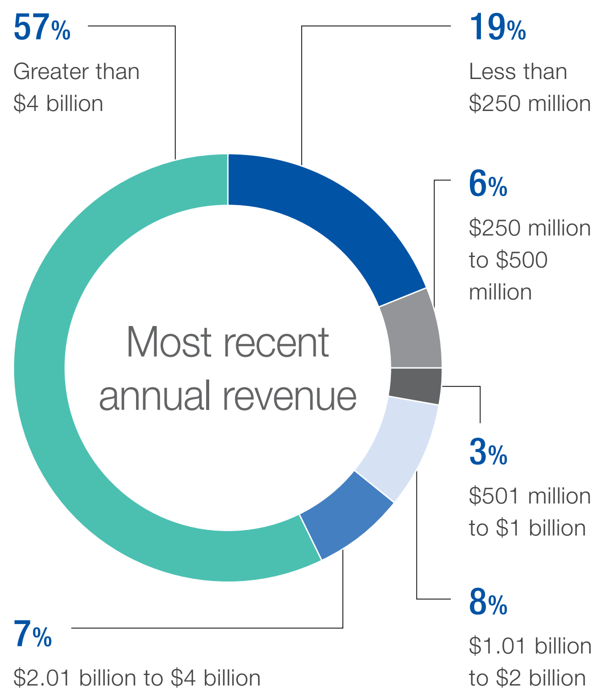
Given five options, respondents were asked what best describes their company or organization. This question was new to the survey. More than half (51%) of respondents work in privately held companies, while 41% work for publicly held companies. Another 4% work in closely held companies, defined as having more than 50% of their stock owned by a small group. Governmental and nonprofit organizations each employ just 2% of the respondents.

In this report, several questions are calculated to measure differences between and commonalities among respondents from privately or publicly held companies. Because of their smaller representations, the latter three entity types are excluded from subsequent breakouts. Private/public breakout columns may not average total columns as a result of their removal.




## Revenue

Also new to the survey, respondents were asked their organizations' most recent annual revenue. Recognizing *Fortune* magazine's $2.01 billion revenue threshold for fiscal year 2022, nearly two-thirds of respondents represent *Fortune* 1000 companies.



Even though the majority of respondents work in *Fortune* 1000 companies, almost one-fourth (23%) of those from private organizations report revenue of less than $250 million.

| Revenue | All | Public | Private |
|---|---|---|---|
| Greater than $4 billion | 57% | 80% | 48% |
| $2.01 billion to $4 billion | 7% | 6% | 9% |
| $1.01 billion to $2 billion | 8% | 6% | 11% |
| $501 million to $1 billion | 3% | 3% | 5% |
| $250 million to $500 million | 6% | 6% | 5% |
| Less than $250 million | 19% | 0% | 23% |

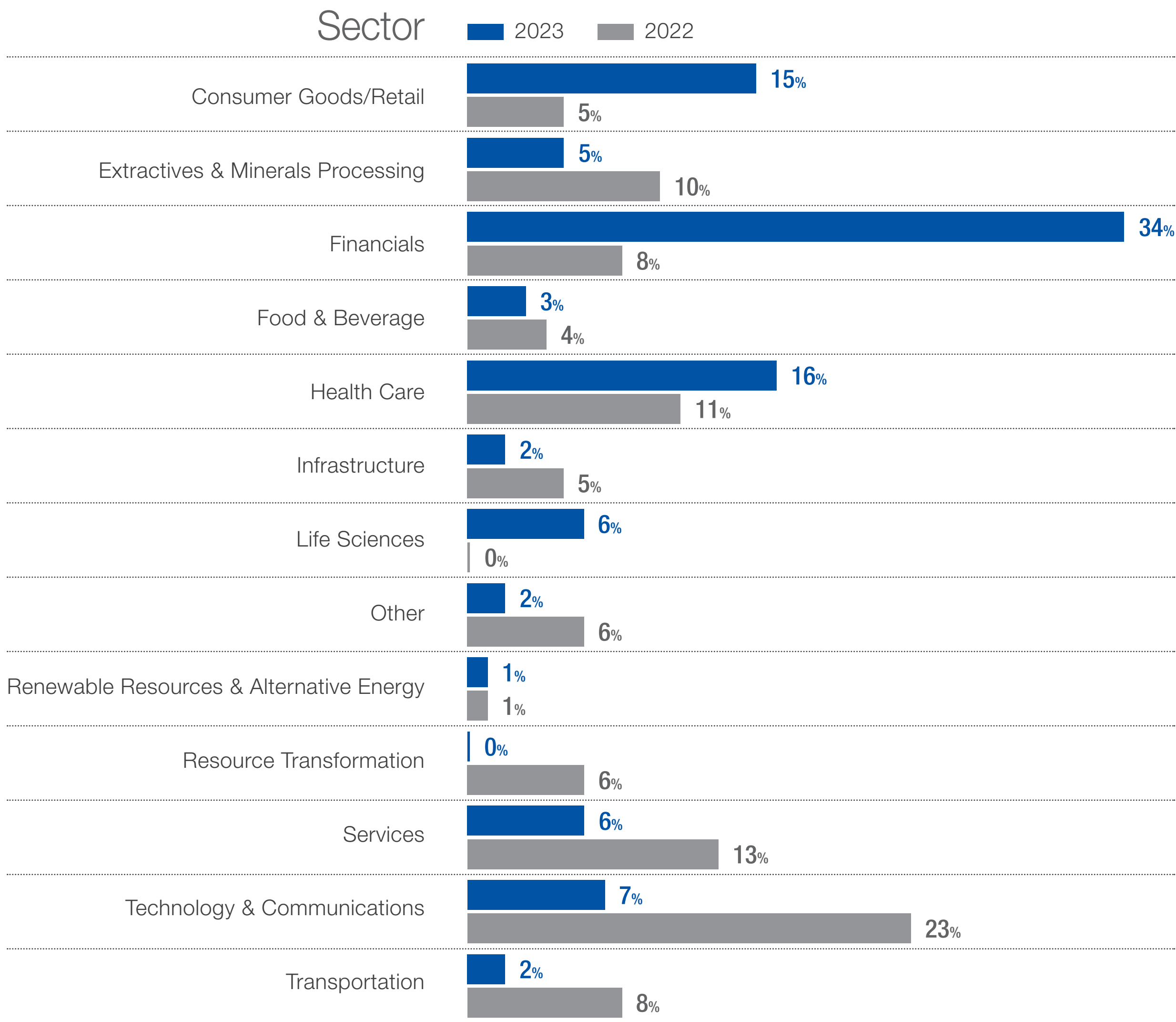
## Legal department size

This year's pool also includes a greater percentage of lawyers from large legal departments. More than half (53%) represent legal departments with at least 20 lawyers. Among them, 66% work for publicly held companies, while 45% represent privately held companies.

| Lawyers in Department | 2023 | 2022 | Public | Private |
|---|---|---|---|---|
| Just me | 7% | 5% | 0% | 7% |
| <10 | 20% | 30% | 14% | 23% |
| 11 to 20 | 21% | 42% | 20% | 25% |
| 21 to 40 | 28% | 15% | 46% | 18% |
| 41 to 60 | 12% | 1% | 3% | 20% |
| >61 | 13% | 6% | 17% | 7% |

## Industries

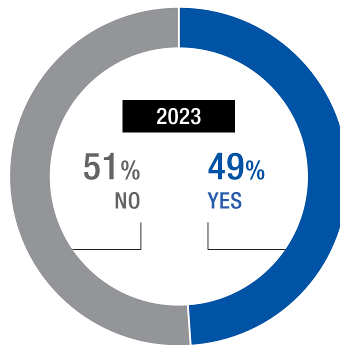
Respondents again represent a diverse array of sectors; however, one-third (34%) report financials as the Sustainability Accounting Standards Board classification that best describes their organization. The increase in financial-sector representation might be attributed to the greater representation of companies with revenue exceeding $4 billion.

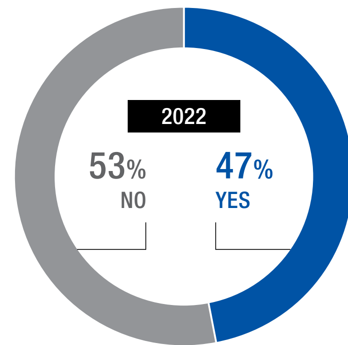


# Personal and Legal Department Roles in ESG

The nearly even split between respondents who personally lead a material portion of ESG initiatives in their organization was up only slightly from last year.

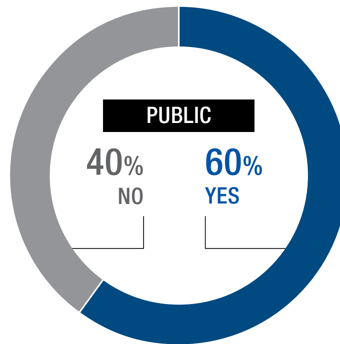
Leads material portion of ESG initiatives

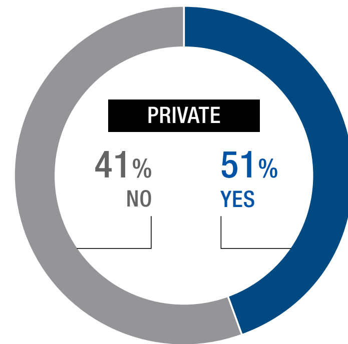



Three-fifths of respondents from publicly held companies, however, report personal roles, compared with two-fifths in privately held.

Leads material portion of ESG initiatives




## Legal departments and ESG leadership

In 2022, 90% of respondents reported their *legal departments* led a material portion of ESG initiatives in their organizations.

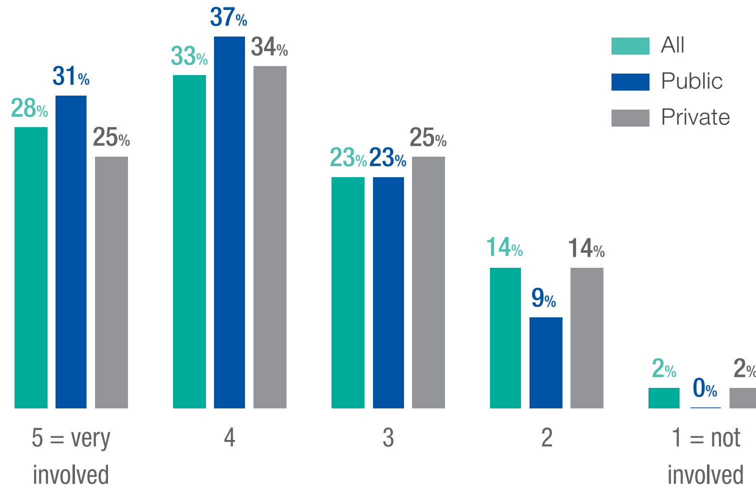
Differences were observed at the time between strategy and compliance leadership. Respondents reported higher engagement leading ESG strategy than compliance. Consider that 54% of respondents gave their legal departments the highest (5 = extremely involved) rating for involvement in leading ESG strategy. Comparatively, only 18% gave the highest rating for their legal departments' involvement leading ESG compliance.

In 2023, legal departments and general counsel remain involved; however, they appear to have ceded their roles leading ESG in both categories to the C-suite and compliance leaders.

## ESG Strategy Leadership

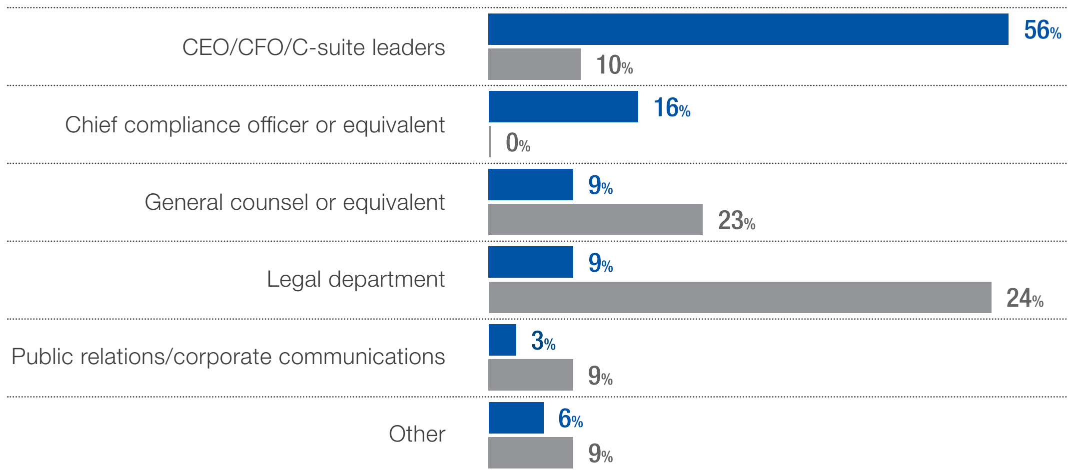
In 2023, 61% of respondents reported their legal departments have higher-than-average involvement leading ESG strategy. Above-average involvement (those rating their legal departments' involvement at 4 or 5) is greater among public companies (68%) than private (59%).

Legal departments' involvement in leading ESG strategy




Yet, when asked to identify the business unit or position that/who leads their organizations' ESG *strategy*, a seismic shift emerges. Last year, GCs and legal departments, combined, overwhelmingly (77%) led ESG strategy. C-suite leaders accounted for only 10% and chief compliance officers for 0%.

In 2023, the C-suite and chief compliance officers dramatically flip the dynamic.




The drastic increase in ESG strategy leadership by CEOs and CFOs may be a reaction to the SEC signaling its desire to see greater board involvement in ESG, particularly in the areas of climate, cybersecurity and human capital management, says Ling-Ling Nie,

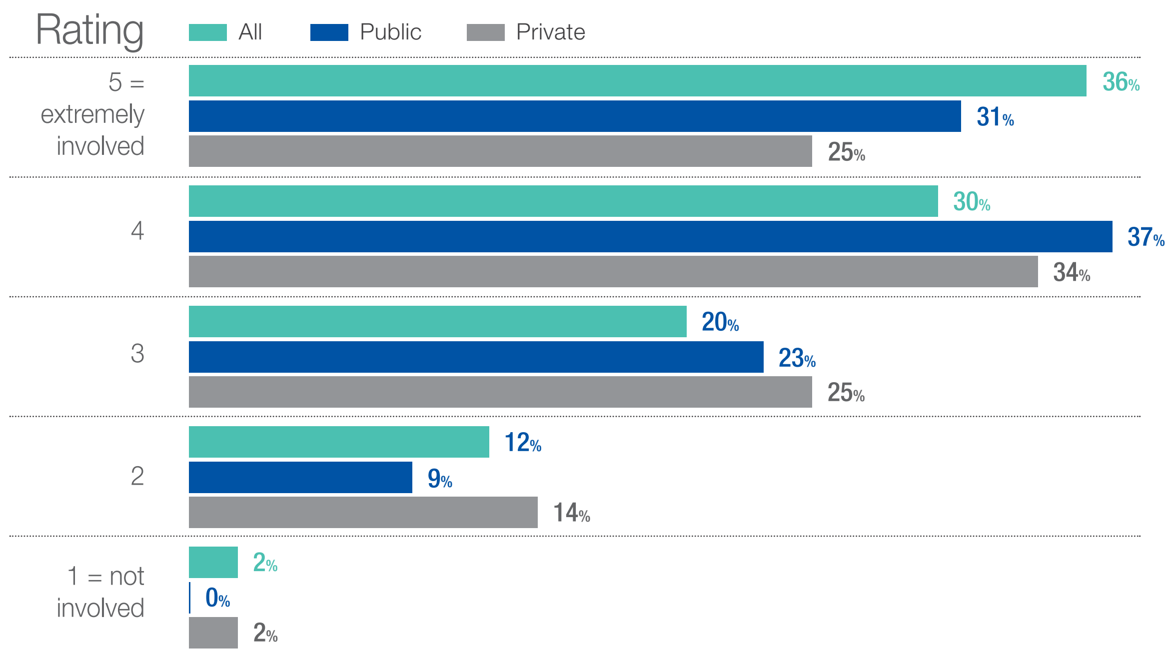
Aura's deputy general counsel, chief compliance officer and chief ESG officer. "And as we all know, company CEOs are going to pay attention to what their board deems to be important. I know many public board members who do feel they need to have a greater hand in driving the company's ESG strategy, rather than merely exercising oversight over it."

As a result, Nie says, boards are becoming better educated on these issues, asking for more-than-periodic updates. "I'm also seeing companies looking for competency and expertise in ESG matters when identifying new board members," she adds.

To gain clarity around how respondents define leadership, the research team suggests in subsequent studies following the word "lead" with "developing, modifying or updating."

## ESG Compliance Leadership

When asked to rate—on a scale of 1 to 5, where 5 is extremely involved and 1 is not involved at all—how involved their legal departments are in leading ESG *compliance*, two-thirds (66%) of respondents offered an above-average rating. There were small differences between public and private.




Mirroring their involvement leading ESG strategy, chief compliance officers and C-suite leaders also have overtaken ESG compliance leadership as respondents report a combined 71% in 2023, compared with legal departments' and GCs' combined 63% a year earlier.

| ESG compliance led by | 2022 | 2023 | Public | Private |
|---|---|---|---|---|
| CEO/CFO/C-suite leaders | 5% | 16% | 11% | 18% |
| Chief compliance officer or equivalent | 22% | 55% | 63% | 55% |
| General counsel or equivalent | 9% | 12% | 6% | 14% |
| Legal department | 54% | 8% | 11% | 5% |
| Other | 6% | 5% | 0% | 7% |
| Public relations/corporate communications | 4% | 5% | 9% | 2% |

GCs still need to be in the center of all of this, though, due to the increasing regulation of ESG, Nie says. "I would caution C-suite executives not to underestimate the importance of the legal aspects. Even if you have a chief ESG officer in the C-suite, there are regulatory and governance components that a GC should be managing as part of their role."

ESG involves both risk and strategy, Nie says. "Great GCs are paying attention to things like whether their board is appropriately structured and has the capacity to meet the SEC's expectations of them."

# Company and/or board leadership's practices and priorities

Another dramatic year-over-year finding is seen in the increased focus companies' leadership and boards place on ESG's "E" (environmental) pillar. More than half (52%) now give their companies'/leaderships'/boards' focus the highest (5) rating. Board focus on social and human capital remains high. Conversely, governance, which received the greatest attention in 2022, has slipped significantly in just one year. Just over half (53%) of those surveyed report above-average governance focus, compared with 84% last year.

| Company/ leadership/ board focus | Environmental | | Social | | Governance | | Human Capital (includes diversity) | |
|---|---|---|---|---|---|---|---|---|
| | 2023 | 2022 | 2023 | 2022 | 2023 | 2022 | 2023 | 2022 |
| 5 = very focused | 52% | 29% | 23% | 24% | 15% | 38% | 17% | 23% |
| 4 | 26% | 34% | 50% | 54% | 38% | 46% | 57% | 54% |
| 3 | 10% | 27% | 17% | 16% | 40% | 14% | 19% | 22% |
| 2 | 6% | 9% | 5% | 4% | 6% | 3% | 5% | 1% |
| 1 = not at all focused | 6% | 1% | 5% | 1% | 1% | 0% | 2% | 0% |

Examined by entity type, 83% public and 77% private report an above-average focus on environmental; 83% and 71% report an above-average focus on social (and tangentially, 77% and 72% on human capital); yet only 51% and 50% on governance.

| Company/ leadership/ board focus | Environmental | | Social | | Governance | | Human Capital (includes diversity) | |
|---|---|---|---|---|---|---|---|---|
| | Public | Private | Public | Private | Public | Private | Public | Private |
| 5 = very focused | 57% | 50% | 17% | 30% | 14% | 11% | 26% | 11% |
| 4 | 26% | 27% | 66% | 41% | 37% | 39% | 51% | 61% |
| 3 | 14% | 9% | 14% | 18% | 46% | 41% | 20% | 18% |
| 2 | 3% | 11% | 3% | 5% | 3% | 7% | 3% | 5% |
| 1 = not focused | 0% | 2% | 0% | 7% | 0% | 2% | 0% | 5% |
| Average rating | 4.34 | 4.11 | 3.97 | 3.82 | 3.63 | 3.5 | 4 | 3.7 |

When analyzing average ratings by revenue, sharp contrasts emerge, suggesting the role a resource divide may play in prioritizing ESG focus. Governance receives the highest average rating among companies with less than $1 billion revenue. Companies with revenue of more than $1 billion have average ratings exceeding 4 for all but governance.

## Average rating: ESG focus (by revenue)

| Revenue | Environmental | Social | Governance | Human Capital |
|---|---|---|---|---|
| <$1 billion | 3.13 | 3 | 3.63 | 3.25 |
| $1.01 billion to $4 billion | 4.46 | 4.23 | 3.54 | 4.15 |
| >$4 billion | 4.53 | 4.12 | 3.61 | 4.02 |

Similarly, legal department size confirms the correlation between resources and ESG focus.

## Average rating: ESG focus (by department size)

| Lawyers in Legal Dept. | Environmental | Social | Governance | Human Capital |
|---|---|---|---|---|
| 10 or fewer | 3 | 3.09 | 3.61 | 3.3 |
| 11 to 20 | 4.56 | 4.17 | 3.89 | 4.11 |
| 21 to 40 | 4.71 | 4.3 | 3.46 | 3.96 |
| >61 | 4.33 | 3.81 | 3.95 | 4 |

"In recent years, the primary driving forces behind the heightened emphasis on environmental sustainability have been the demands of customers and other key stakeholders who possess a vested interest in this topic," explains Linda Weber, Jabil's senior program manager—global sustainability engagement. During this period, companies have largely undertaken voluntary initiatives, determining their own scope of action based on stakeholder demands and their own philosophies.

However, she says, the landscape is evolving. "There is a growing presence of emerging regulations that establish standardized reporting expectations and third-party validation. Noncompliance with these regulations now carries significant legal, financial, and reputational risks. As a result, [corporate counsel] anticipate a heightened focus on environmental sustainability and an increased involvement of company legal compliance teams in ensuring adherence to these regulations."

*Report continues on Page 16*

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# Strategy and Operational Alignment are Interdependent Variables for Successful Compliance and ESG Performance

By Suz Mac Cormac

The results from our annual benchmarking survey are in. As we learned from the survey last year, it is heartening that in-house legal departments are increasingly becoming integral to—and often leading—corporate ESG initiatives. Our 2023 survey confirms that this trend has continued and is accelerating. However, I find it surprising that many lawyers, in-house and external counsel alike, do not understand the history of ESG. Understanding the genesis of ESG and how it has evolved is critical to the development of an ESG legal program that goes beyond compliance to see around corners and advance compliance, operational, and strategic goals.

## A Little History

ESG is not "new" and has never been disconnected from the financial value of corporations. As a term, ESG was first used in 2004 in the United Nation's Global Compact Initiative's Who Cares Wins Report. Such report represented the culmination of efforts by major financial institutions and the International Finance Corporation's inquiry into the efficacy of certain environmental, social, and governance considerations in investments, which considerations were not reflected in a corporation's financial statements. The report, endorsed by 18 financial institutions from 9 countries with over $6 trillion in assets under management concluded that companies that perform better on certain ESG metrics could increase shareholder value and deliver better risk-adjusted financial returns by managing risks, anticipating regulatory action, or accessing new markets, while contributing to sustainable development of the societies in which they operate. The report highlighted ESG factors that could impact valuation, including climate change and related risks, human rights practices, executive compensation, and monitoring of corruption and bribery issues. Following this report, corporations accelerated the adoption of ESG policies, often blending them into existing corporate social responsibility (CSR) initiatives, thereby expanding ESG to include issues relevant to both stockholders and stakeholders following the Global Reporting Initiative (GRI) framework that had been introduced a few years earlier.

So, what does this mean for in-house counsel? It explains why ESG has a strong compliance component; there has been a sea of new government regulation adopted over the past two decades related to anti-corruption and bribery, privacy, sanctions, cybersecurity, and human rights, to name a few. And more regulation is expected, particularly in the areas of human rights, cybersecurity, and climate. However, it also means that there are many ESG factors that are not tied to compliance but instead touch on critical areas of focus for corporate strategy, operations, enterprise risk management, supply chain management, financial controls, and reporting.

Finally, because in many cases ESG was blended with CSR, there are also elements of ESG that may be "nice to have" but are actually not material to the financial performance or operations of a corporation. Typically, addressing this component of ESG goes a long way to mitigating some of the anti-ESG sentiment that exists in many jurisdictions in which corporations are operating in the United States

## Trends and Developments

Back to the report. ESG is clearly now on the radar of every in-house legal department. Much of this is because of the rise in regulation of corporate action and disclosure. Compliance is increasingly shifting to cover overall operations with regulations driving accountability and disclosure on operational matters such as anti-slavery (e.g., the UK's Modern Slavery Act and the U.S. Uyghur Forced Labor Prevention Act, among others). ESG is also being driven by broad ESG reporting requirements that are moving from voluntary (following the Sustainability Accounting Standards Board now part of International Sustainability Standards Board) to mandatory. Even ahead of rules that are (eventually) expected to be published by the Securities and Exchange Commission, the European Union's Corporate Sustainability Reporting Directive (CSRD) will require measurement, benchmarking, and reporting (together with greater governance and internal controls) by most U.S. companies—companies meeting a particular revenue threshold, subsidiaries of covered U.S. companies, and, ultimately, companies not specifically covered by regulation that are counterparties of covered companies. The debate over whether or not to require reporting on Scope 3 in the United States is essentially moot.

Some of the increased focus of legal departments is driven by management teams that see the strategic value in establishing a leadership role around ESG—and the need to mitigate risks to operations (like climate risk) that were not as clear decades ago. Some of the attention is also the result of increasing scrutiny from stockholders and stakeholders, including consumers and regulators, forcing companies to pay closer attention to their actions and communications to mitigate risks from marketing and other strategies that embody greenwashing, greenrinsing,[1] greencrowding,[2] greenshifting,[3] and greenlighting,[4] to mention a few.

## Room for Growth

As corporations navigate this economically significant year full of market gyrations, legal departments are encouraged to collaborate with all other departments and leadership across their organizations to ensure that ESG compliance and alignment are integrated into strategic decision-making as companies navigate risk management, compliance, and internal ESG innovations. ESG, if well pursued as a framework, should form part of a company's anatomy; blending overall strategy with material ESG considerations will deliver cost-effective and resilient results as posited by the group of institutional investors 20 years ago in the United Nations report.

We also hope to see more private companies and even start-ups rethink what ESG means for their organizations. Given the survey results, smaller companies and private companies (especially private companies looking to go public) are encouraged to consider what ESG factors are material to their operations to enable them to attract investors, achieve greater valuations and profitability as they grow, scale, and possibly contribute to a better world as a result.

**_Click here_ to view MoFo's additional ESG resources.**

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[1] Changing ESG targets before they are achieved.

[2] Greencrowding involves moving at a slow speed and hiding in a crowd to avoid discovery by relying on safety in numbers, for example, hiding in the crowd to adopt sustainability strategies slowly (e.g., hiding in industry groups without taking quick and meaningful actions).

[3] Shifting blames and implying that consumers, not the company, are responsible for ESG actions.

[4] Spotlighting a miniature green activity to draw attention away from environmentally damaging activities being conducted elsewhere.

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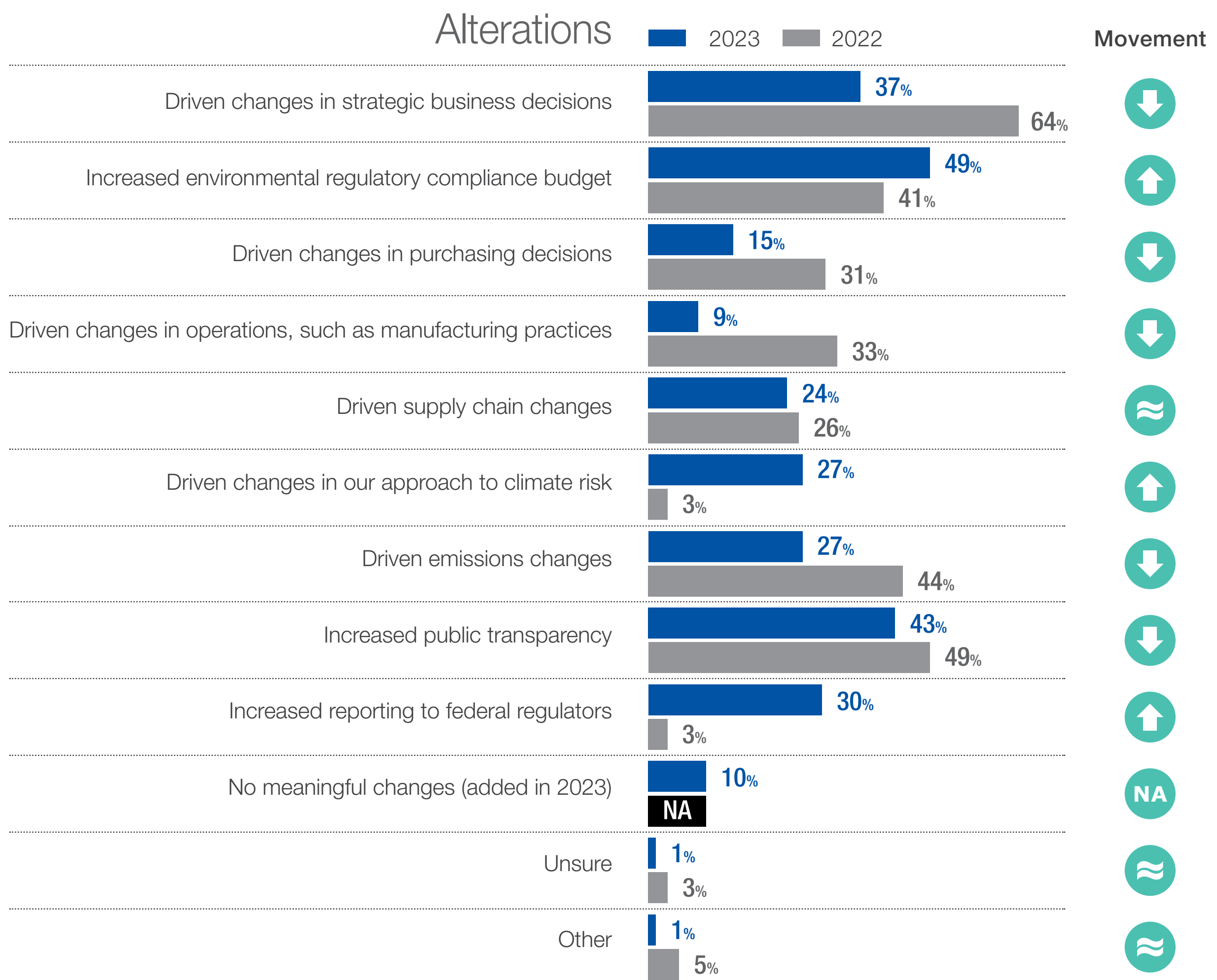
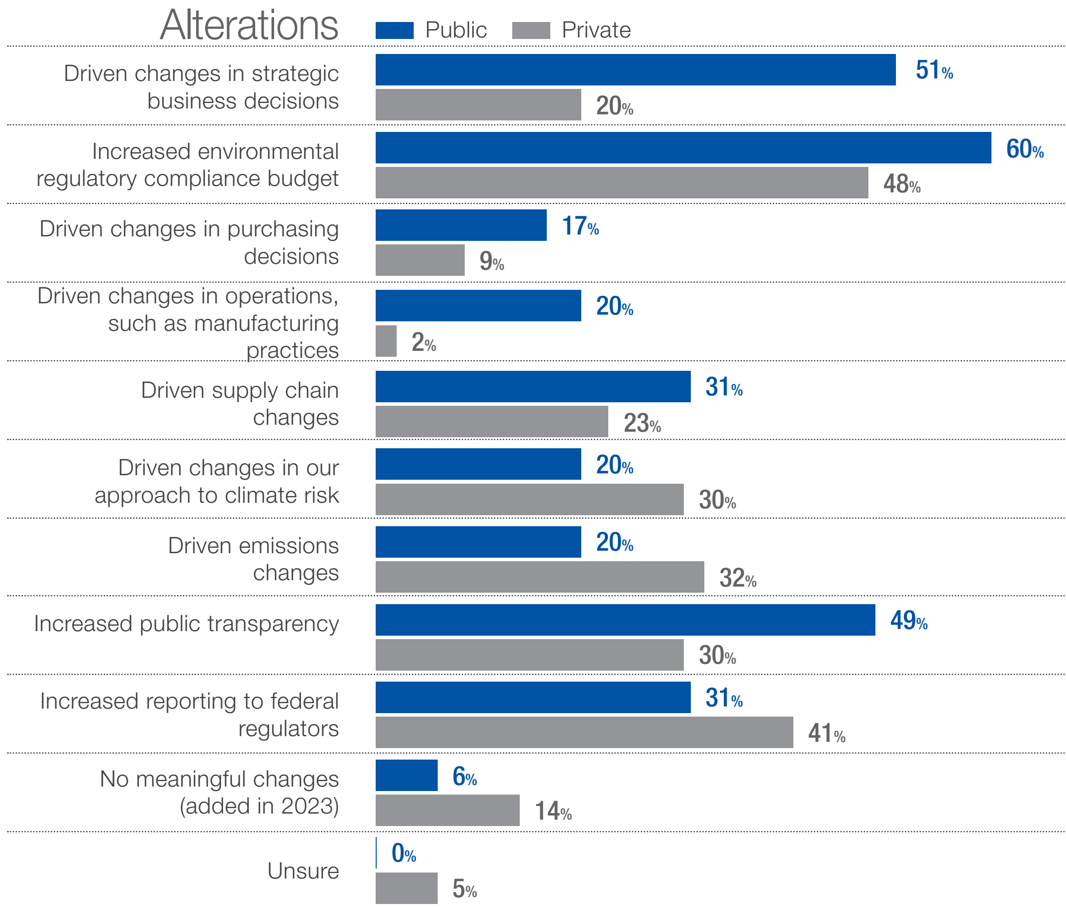
## Altered approaches

In 2022, we asked, “Has your company altered its approach to environmental action in the last 12 months?” Half (49%) answered “yes.” Those answering “yes” were asked, “In what ways has your company altered its approach?”

In 2023, offering the same selected choices, we instead asked all respondents, “In what ways has your company altered its approach to ensure ESG alignment?” Ten percent reported “no meaningful changes” (added to the selected choices). The results demonstrate increased adoption of climate risk approaches, environmental compliance budgets reporting to federal regulators and public transparency.




Public or private, those budget, reporting and transparency boosts are consistent. More public companies report altering internal operations compared with private companies. With new and pending legislation, this may be attributed to an anti-ESG movement and legislation being enacted. As a result, some companies are refraining from pursuing climate goals, while others pursue climate goals without publicizing their strategy or internal considerations. The latter tactic is known as “greenhushing.”




Once again, smaller companies are the exception.

| Alterations | >$4.01 billion | $1.01 to $4 billion | <$1 billion |
|---|---|---|---|
| Driven changes in strategic business decisions | 41% | 23% | 29% |
| Increased environmental regulatory compliance budget | 65% | 62% | 4% |
| Driven changes in purchasing decisions | 14% | 15% | 17% |
| Driven changes in operations, such as manufacturing practices | 8% | 8% | 8% |
| Driven supply chain changes | 24% | 62% | 4% |
| Driven changes in our approach to climate risk | 31% | 31% | 13% |
| Driven emissions changes | 32% | 62% | 13% |
| Increased public transparency | 53% | 46% | 21% |
| Increased reporting to federal regulators | 41% | 0% | 17% |
| No meaningful changes (added in 2023) | 0% | 0% | 38% |
| Unsure | 0% | 0% | 8% |
| Other | 0% | 0% | 0% |

## ESG Motivation

When asked to identify factors motivating their organizations to adopt environmental goals, beyond required compliance with environmental laws, the most dramatic year-over-year change is seen in managing risk and regulatory compliance. The only other area of increase, albeit slighter, was "increasing pressure from federal regulators." Every other factor saw a decrease.

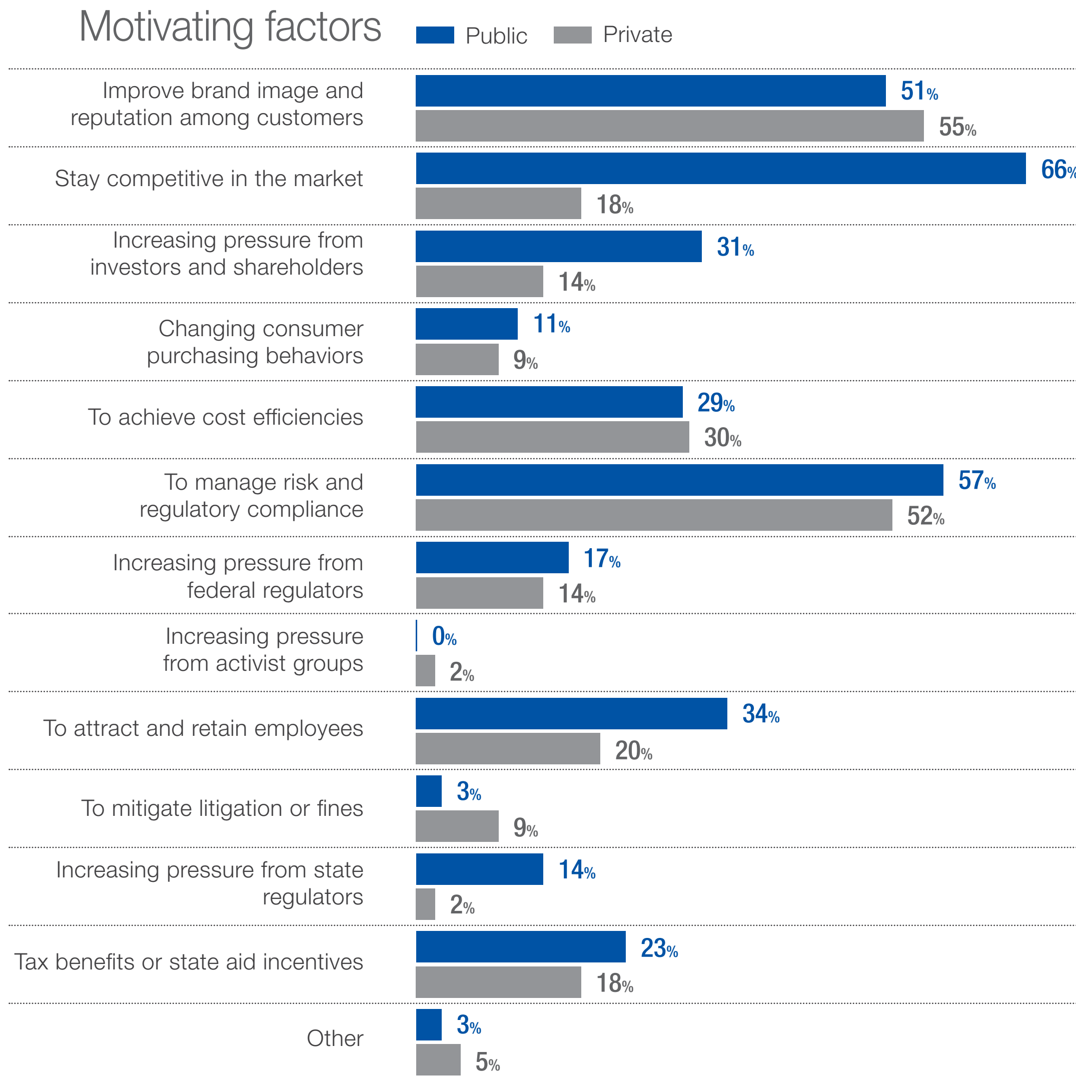
"The consequences of noncompliance with legal requirements in the environmental realm extend beyond financial and reputational risks; they can result in fines and even criminal charges in more severe cases," Weber explains.

The landscape, she notes, is rapidly evolving, with the emergence of new regulations and disclosure requirements globally. "As these regulatory frameworks continue to take shape, we anticipate a significant increase in focus on environmental sustainability. Consequently, company legal compliance teams are becoming increasingly engaged in ensuring adherence to these evolving mandates," Weber adds.

Here are the motivating factors by public/private.

| Motivating factors | 2023 | 2022 | Percentage point difference |
| --- | --- | --- | --- |
| Improve brand image and reputation among customers | 57% | 85% | -28 |
| Stay competitive in the market | 51% | 73% | -22 |
| Increasing pressure from investors and shareholders | 20% | 54% | -34 |
| Changing consumer purchasing behaviors | 12% | 20% | -8 |
| To achieve cost efficiencies | 28% | 42% | -14 |
| To manage risk and regulatory compliance | 56% | 8% | 48 |
| Increasing pressure from federal regulators | 15% | 10% | 5 |
| Increasing pressure from activist groups | 1% | 16% | -15 |
| To attract and retain employees | 28% | 47% | -19 |
| To mitigate litigation or fines | 6% | 19% | -13 |
| Increasing pressure from state regulators | 8% | 15% | -7 |
| Tax benefits or state aid incentives | 22% | 25% | -3 |
| Other | 5% | 6% | -1 |

Does the data suggests that investor heat is taking a backseat to regulatory anxiety? Not necessarily, says Weber.



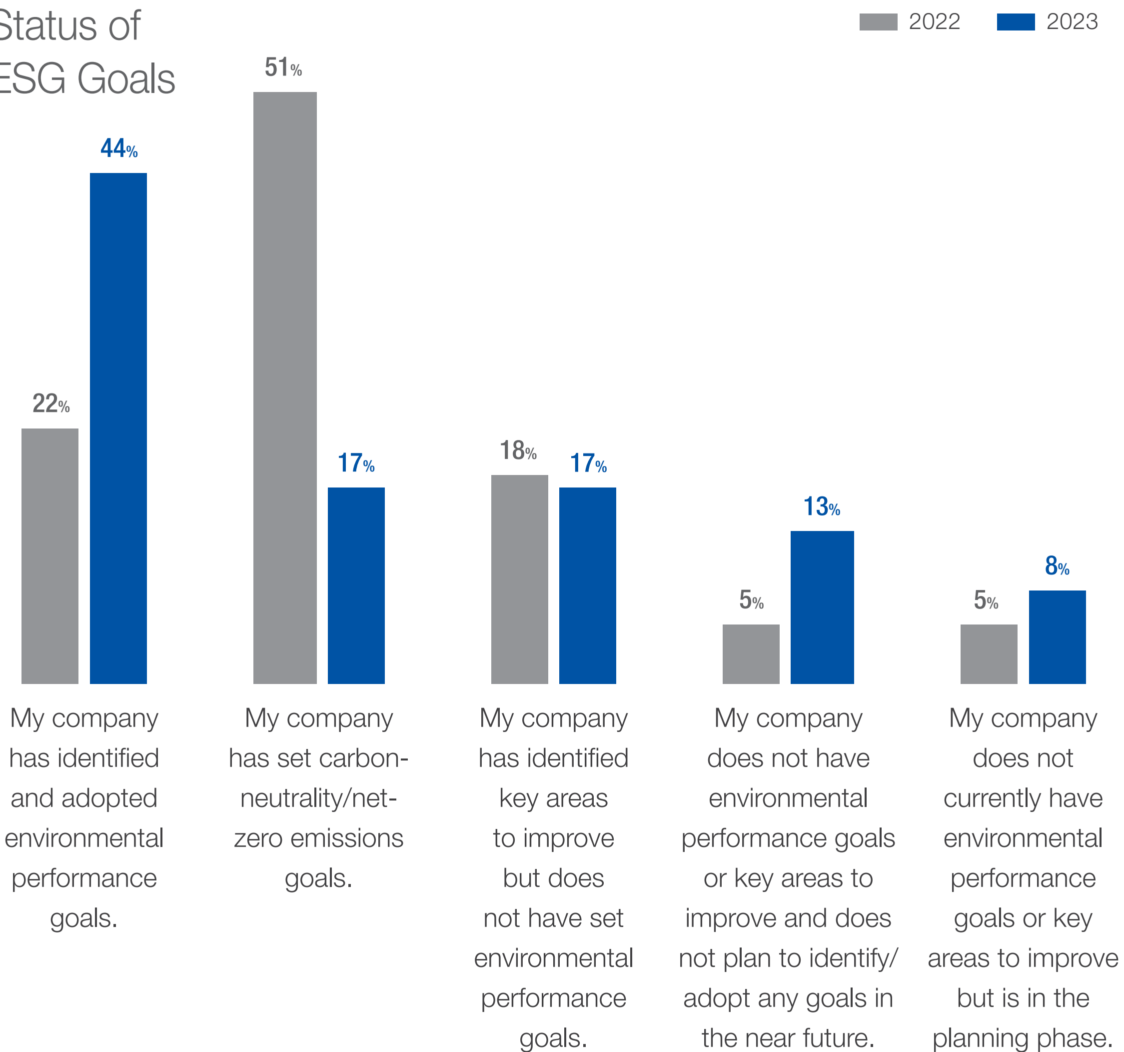

"This is purely conjecture, but as regulators become more involved and begin to mandate activities that were once discretionary, coupled with the increased standardization of ESG reporting protocols, it may seem like the necessity for external stakeholders to apply pressure in this area is reducing," Weber says.

"However, this change might not necessarily imply that shareholders are less involved. Instead, it may suggest that the global ESG regulatory environment has matured enough to enable companies to operate in a more autonomous yet accountable manner," she adds.

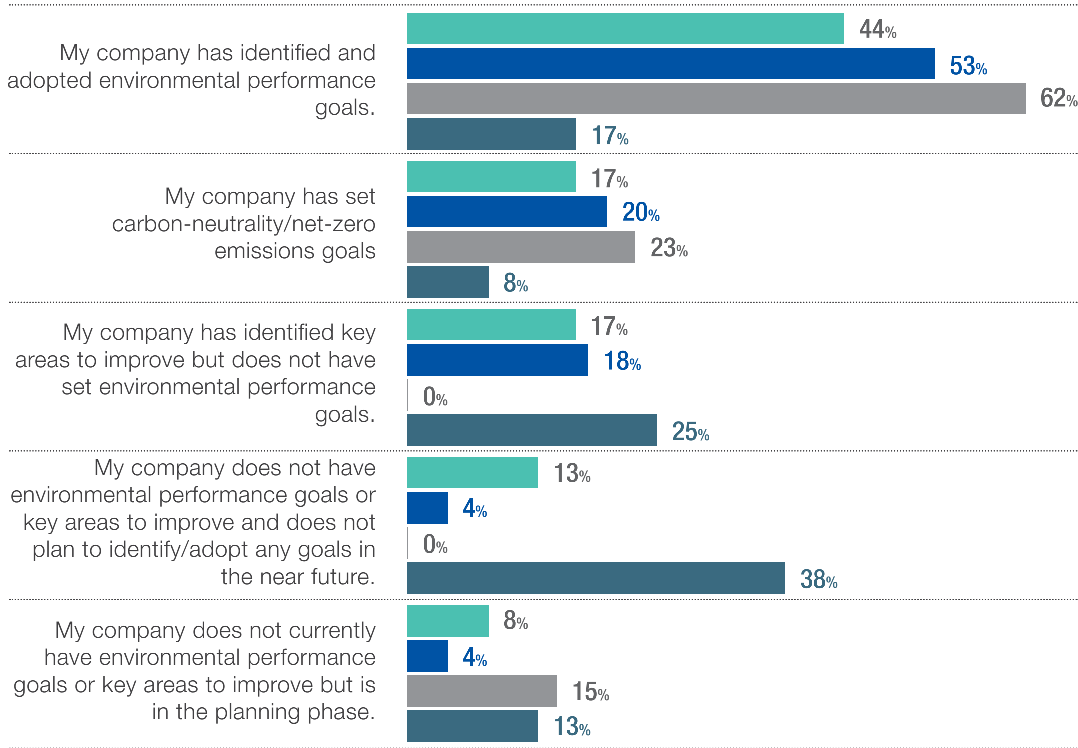
## Environmental performance goals

When asked which of five statements—beyond required compliance with environmental laws—best describes the status of their organizations' environmental performance goals, only 17% of all respondents state that their companies have set carbon-neutrality/net-zero emissions goals. In 2022, by comparison, 51% made that claim.

The dip may be the result of better definitions around what carbon neutrality and net zero mean, clarifications about the timing of those expectations and the potential consequences of not meeting aspired thresholds.



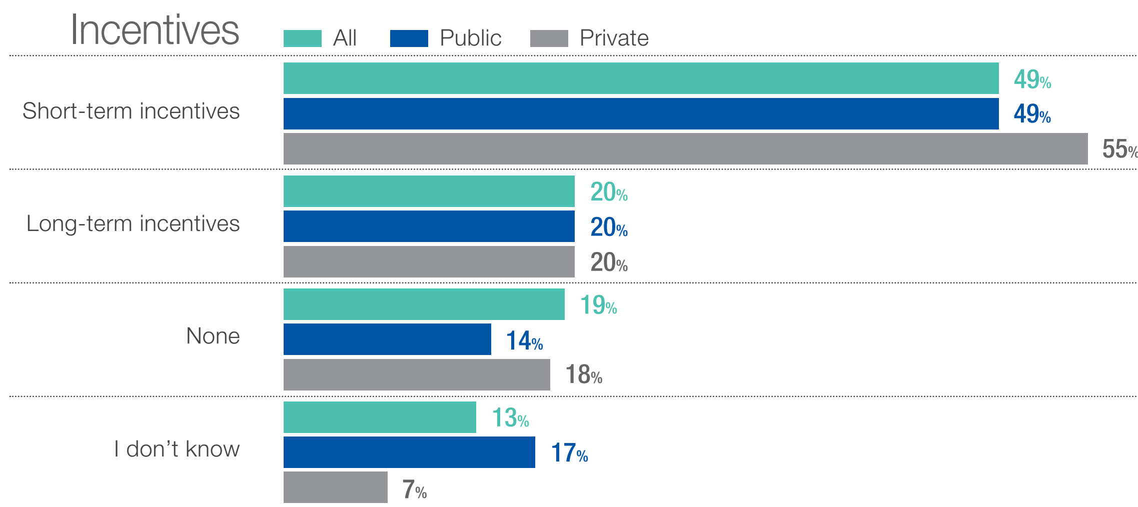

Highlighting the resource divide, a combined 51% of companies with revenue below $1 billion report no environmental performance goals.


Status
All
>$4 billion
$1.01 billion to $4 billion
<$1 billion
My company has identified and adopted environmental performance goals.
44%
53%
62%
17%
My company has set carbon-neutrality/net-zero emissions goals
17%
20%
23%
8%
My company has identified key areas to improve but does not have set environmental performance goals.
17%
18%
0%
25%
My company does not have environmental performance goals or key areas to improve and does not plan to identify/adopt any goals in the near future.
13%
4%
0%
38%
My company does not currently have environmental performance goals or key areas to improve but is in the planning phase.
8%
4%
15%
13%

## Executive compensation incentives

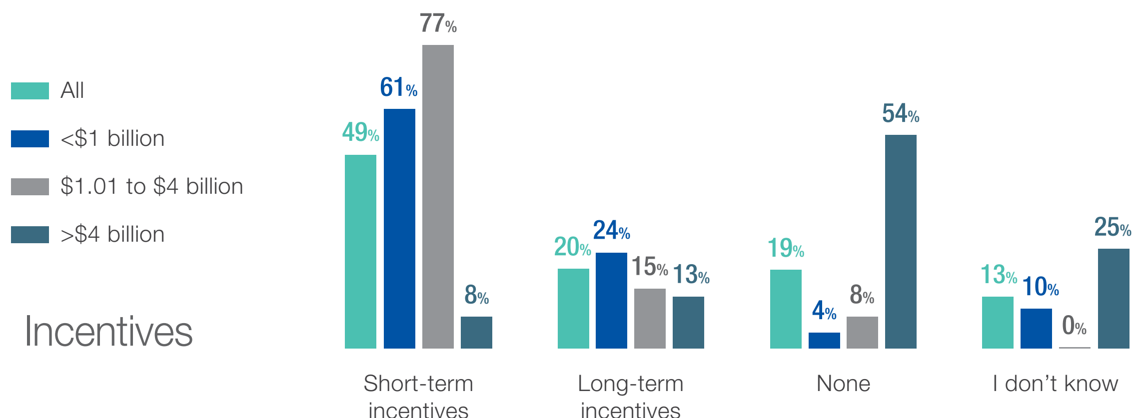
Last year, when we asked, “Does your company’s executive compensation include incentives or mandates for ESG metrics?” 55% said “yes,” 39% said “no,” and 6% did not know. This year, we modified the question to determine what types of incentives companies tie to executive compensation based on ESG performance. We define short-term incentives as including formula-driven awards that are provided over a period of a year. Long-term incentives include cash plans, equity plans or share plans.

We compared all responses with public/private, where there was no noticeable difference.



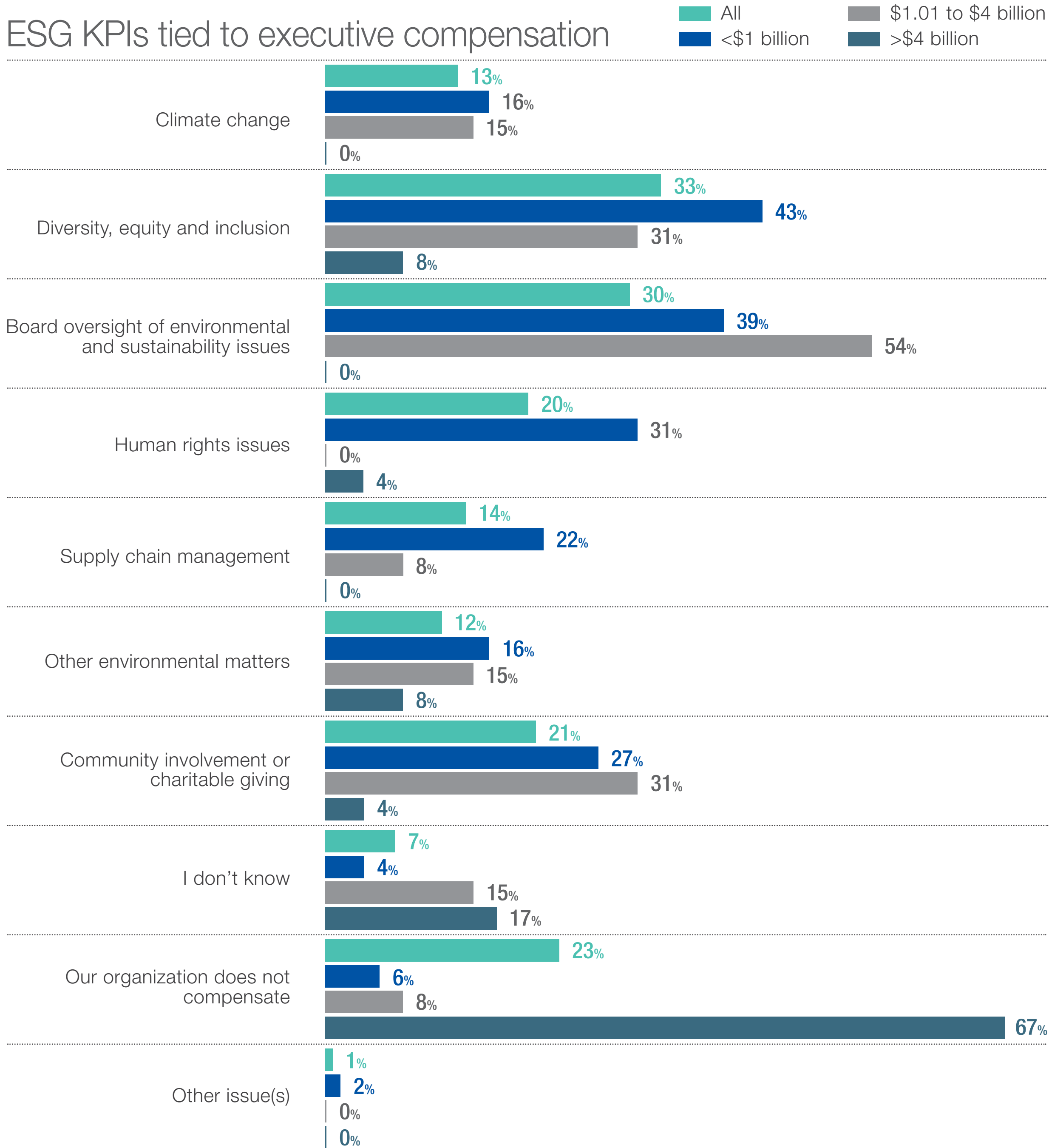

When responses were broken down by revenue, however, differences emerge. Short-term incentives are offered by three-fourths of respondents’ companies with revenue of $1 billion to $4 billion, and three-fifths of the companies with revenue exceeding $4 billion. Only 8% of the smaller companies offer short-term incentives.

Long-term incentives are less common across the board although one in four larger companies offers them.



## Measuring ESG performance

In a new survey question, we asked what focus areas or KPIs are tied to incentives or mandates for ESG performance for the purposes of executive compensation. Data shows that diversity, equity and inclusion (DEI) and board oversight are most heavily tracked among companies with more than $1 billion revenue. Two-thirds of the smaller companies do not measure KPIs tied to compensation.



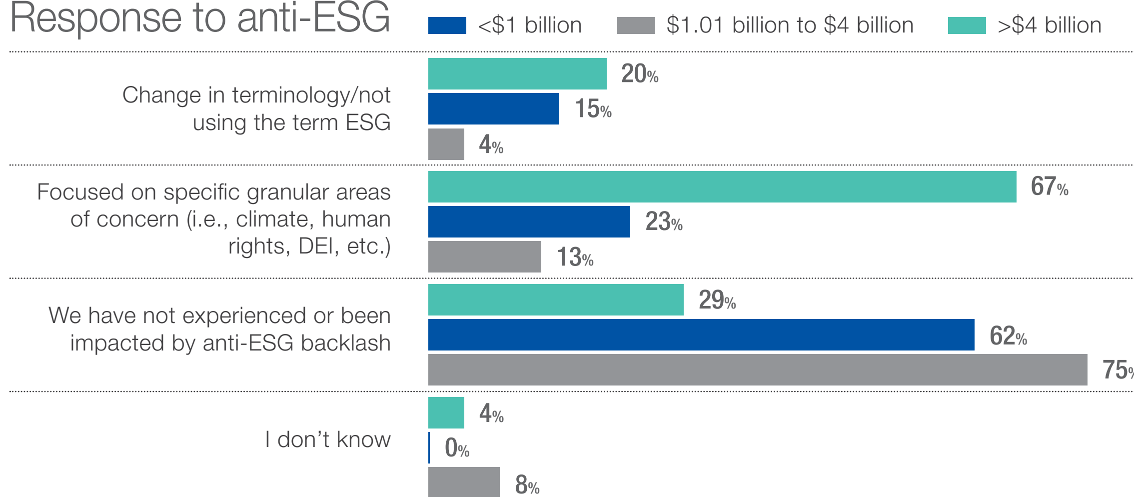
## Anti-ESG impact

Whether in response to uncertainty around reporting, fear of litigation or the so-called culture wars, anti-ESG sentiment is gaining momentum. When asked how anti-ESG backlash has affected their organizations' approach to ESG, nearly half (47%) of the respondents have neither experienced it nor been impacted by it. Another 47% report that they have responded by focusing on specific, granular areas of concern, such as climate matters or DEI.

Public/private results are consistent with one exception: 20% of the publicly held companies represented are not using the term ESG, compared with only 7% of the private companies.

| Response to anti-ESG | All | Public | Private |
| --- | --- | --- | --- |
| Change in terminology/not using the term ESG | 15% | 20% | 7% |
| Focused on specific granular areas of concern (i.e., climate, human rights, DEI, etc.) | 47% | 49% | 45% |
| We have not experienced or been impacted by anti-ESG backlash | 47% | 46% | 45% |
| Other | 5% | 3% | 5% |

Larger companies are strongly focused on specific areas of concern, while smaller companies report less impact. This may explain why more publicly held companies are not using the term ESG as 80% of the public company respondents work for companies with revenue in excess of $4 billion.



# Confidence

Respondents were asked to rate their confidence that their organizations have comprehensive ESG programs in place. Not surprisingly, larger, often public companies are most comfortable with their programs.

| ESG program confidence rating | All | >$4 billion | $1.01 billion to $4 billion | <$1 billion | Public | Private |
|---|---|---|---|---|---|---|
| 5 = extremely confident | 24% | 39% | 23% | 4% | 31% | 23% |
| 4 | 45% | 64% | 62% | 13% | 46% | 50% |
| 3 | 16% | 7% | 15% | 38% | 14% | 11% |
| 2 | 8% | 0% | 0% | 29% | 6% | 11% |
| 1 = not confident | 6% | 0% | 0% | 17% | 3% | 5% |

A personal stake in a material portion, however, does not seem to increase confidence. Here's a breakdown based on how respondents answered the earlier question "Do you personally lead a material portion of ESG?"

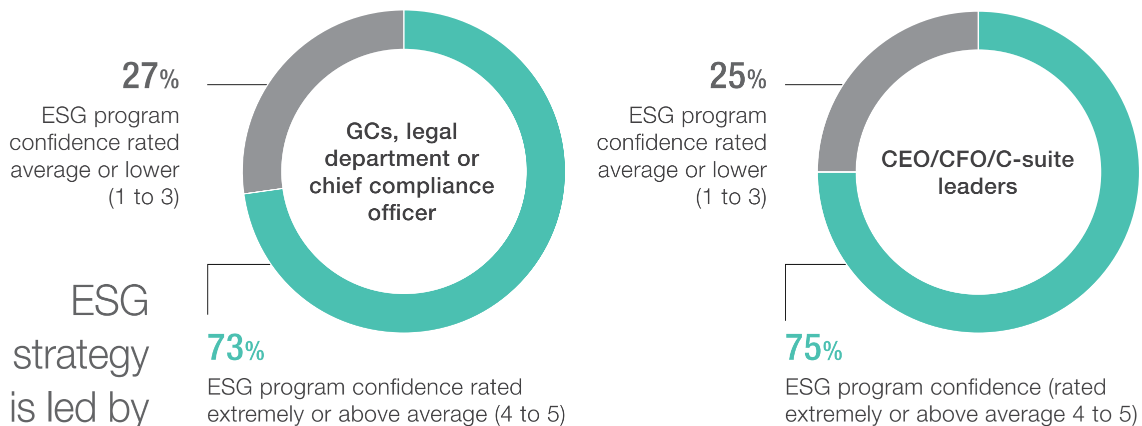
| ESG program confidence rating | All | No (does not personally lead a material portion of ESG) | Yes (personally leads a material portion of ESG) |
|---|---|---|---|
| 5 = very confident | 28% | 24% | 22% |
| 4 | 33% | 42% | 49% |
| 3 | 23% | 20% | 12% |
| 2 | 14% | 4% | 12% |
| 1 = not confident | 2% | 7% | 5% |

Demonstrating faith in their in-house team, the legal department's involvement in developing ESG strategy does seem to boost respondents' confidence in the comprehensiveness of their ESG programs. Here's a breakdown, grouped by how respondents rated their legal departments' involvement in leading ESG strategy. (See page 9 of this report.)

| ESG program confidence rating | All | Extremely involved/above average (4 to 5) legal department involvement in leading ESG strategy | Average or lower (1 to 3) legal department involvement in leading ESG strategy |
|---|---|---|---|
| 5 = very confident | 24% | 33% | 12% |
| 4 | 45% | 52% | 35% |
| 3 | 16% | 8% | 29% |
| 2 | 8% | 6% | 12% |
| 1 = not confident | 6% | 2% | 12% |

And while the legal department's involvement in strategy boosts confidence in their overall ESG program, respondents' confidence is not dependent on who is leading ESG strategy. Asked to identify the business unit or position in their organizations leading ESG strategy, there is little difference between the (combined) 34% who identified GC, legal department or chief compliance officer and the 56% who stated CEO/CFO/C-suite leaders.

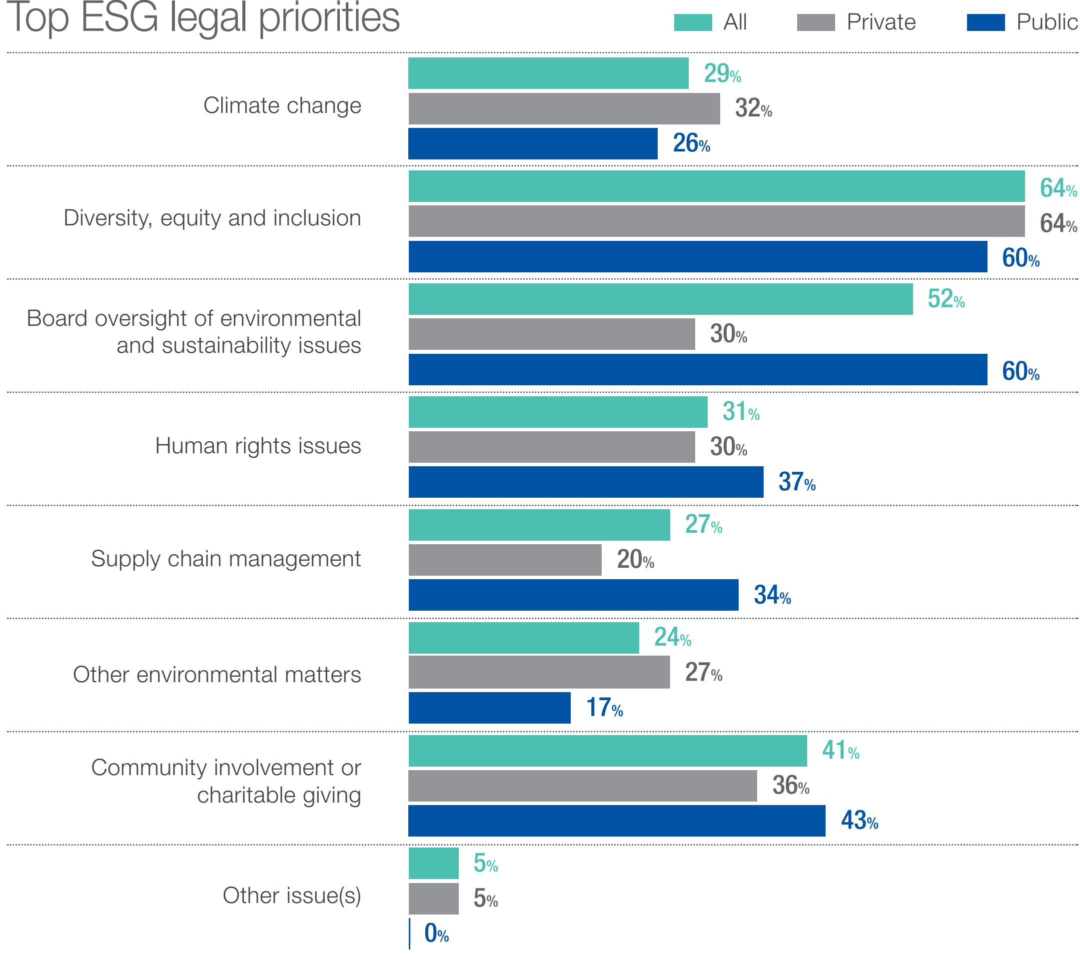
Confidence may be rooted in a combination of strategy cogence, clarity of goals/objectives and leadership.



# Legal department practices and priorities

## Top ESG-related legal priorities

When asked their legal departments' top legal priorities related to ESG, nearly two-thirds of respondents, regardless of entity type, prioritize DEI. Community involvement/ charitable giving and board oversight of environmental and sustainability issues likewise ranked high, although not surprisingly, board oversight is a priority for publicly held companies to a much higher degree.



A dramatic year-over-year jump is seen in community involvement or charitable giving.

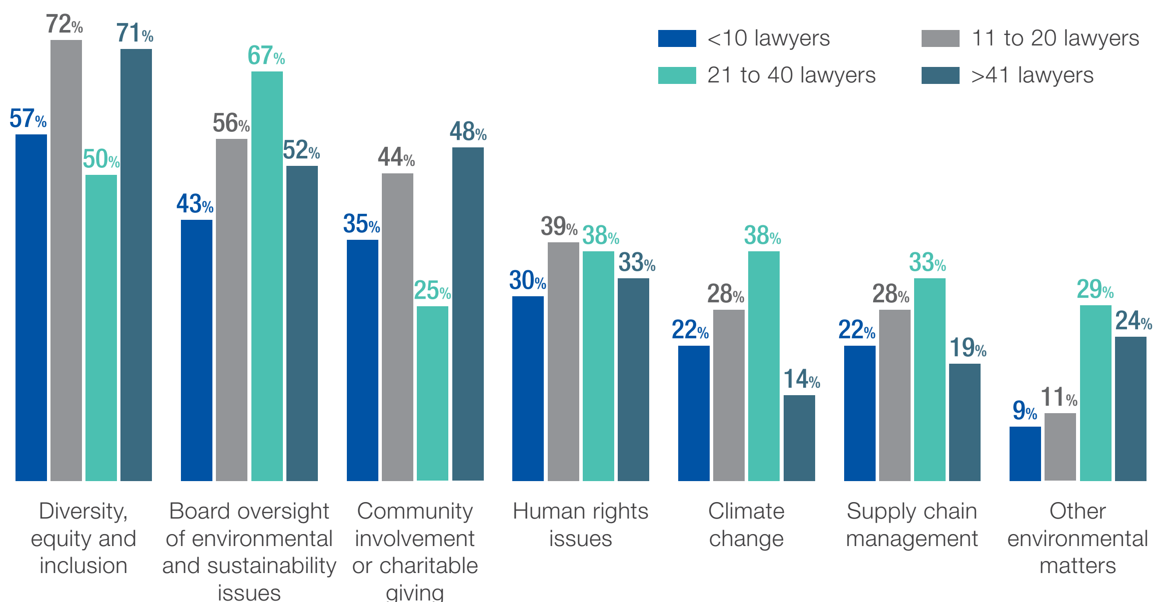
## Top ESG legal priorities

| Top ESG legal priorities | 2023 | 2022 |
| --- | --- | --- |
| Diversity, equity and inclusion | 64% | 72% |
| Board oversight of environmental and sustainability issues | 52% | 52% |
| Community involvement or charitable giving | 41% | 16% |
| Human rights issues | 31% | 42% |
| Climate change | 29% | 61% |
| Supply chain management | 27% | 28% |
| Other environmental matters | 24% | 18% |
| Other issue(s) | 5% | 1% |

*This information was updated in August 2023.*

ESG-related legal issues surrounding community involvement/charitable giving are likewise a top-three priority among respondents from the largest departments.

Although they are grouped together in the survey, note that community involvement differs from charitable giving. Community involvement growth may be a result of stakeholders' expectations that companies consider the impact of their operations on their ecosystems and



immediate communities. Charitable giving uses tools such as corporate foundations to donate money or resources to meet an identified need.

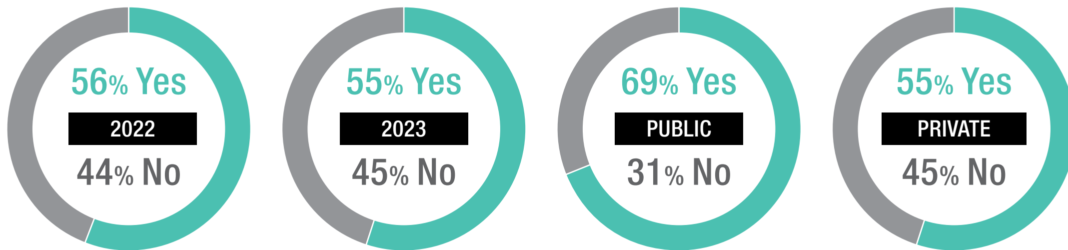
In the coming years, we will examine how companies design structure and strategy around giving, and their efficiency and impact.

## Vendors' environmental policies

Just more than half of respondents (55%) report that their companies consider vendors' environmental policies and records, almost identical to last years' results.

As regulation, risk management and innovation increase around ESG, it will be interesting to see how vendor environmental policies evolve as priorities for companies.

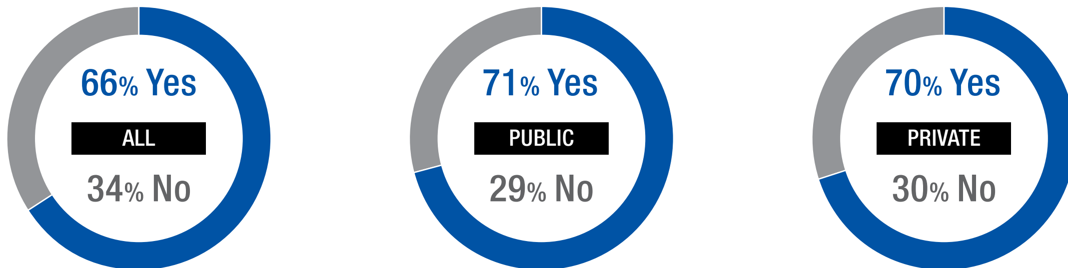
### Vendors' environmental policies considered




## Materiality assessments

Two-thirds of respondents report that their companies have conducted a materiality assessment. There was little difference between public and private. This was a new question.

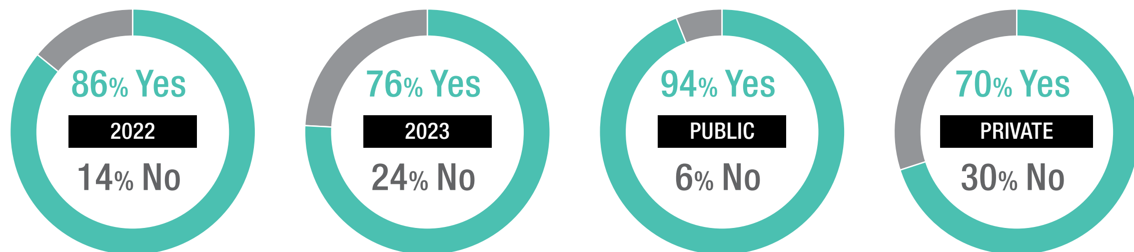
### Conducted materiality assessments



## ESG disclosures

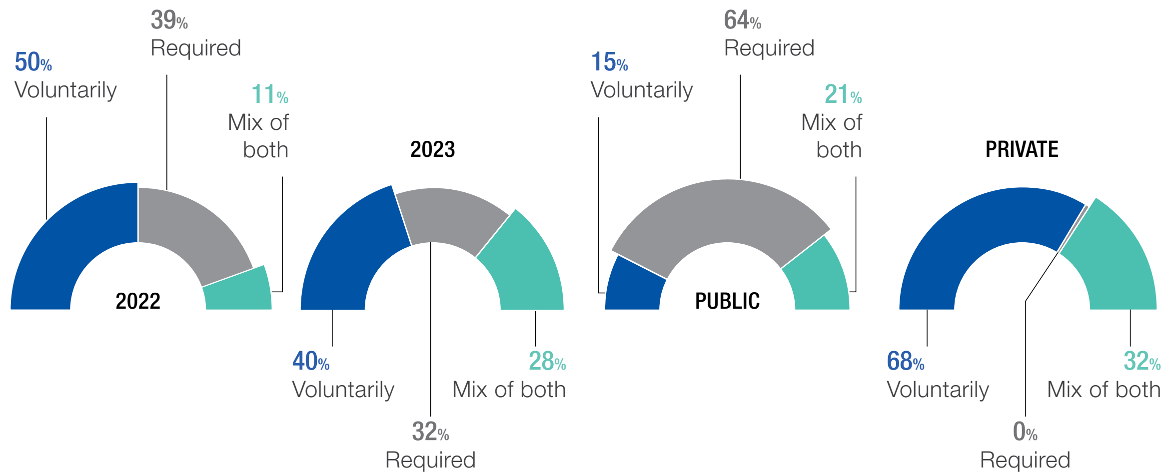
Three-fourth of respondents provide ESG disclosures, a slight drop from 2022. Among public companies, 94% report that they provide ESG disclosures.

### Provides ESG disclosures



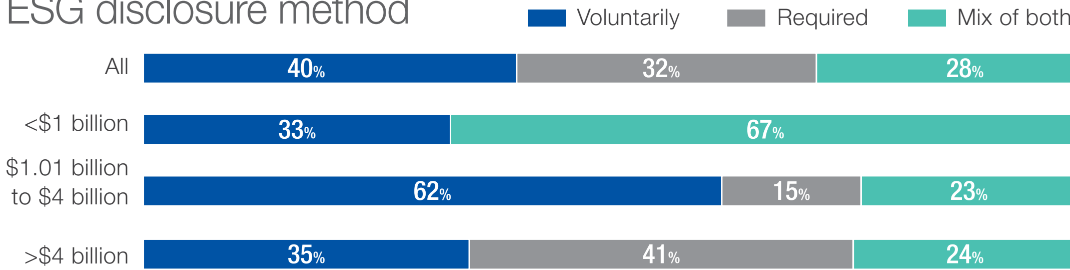

Among those who do provide disclosures, 40% say they are provided voluntarily. Not surprisingly, more than two-thirds (68%) of those from the private sector report theirs are voluntarily disclosed. Conversely, nearly two-thirds (64%) of those from public companies say their ESG disclosures are required.

### ESG disclosure method



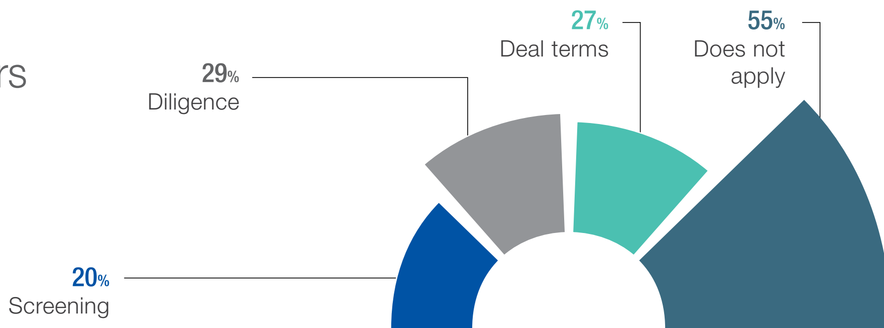

The Biden administration's proposed climate disclosures for federal contractors is likely a significant change, especially for privately held companies that previously were unaccustomed to making certain disclosures, Kathleen Sweitzer, senior vice president, general counsel and corporate secretary at Trustmark, recently told attendees of a panel discussion at *Corporate Counsel*'s General Counsel Conference Midwest.

Two-fifths (41%) of respondents from companies with revenue exceeding $4 billion report ESG disclosures are required.



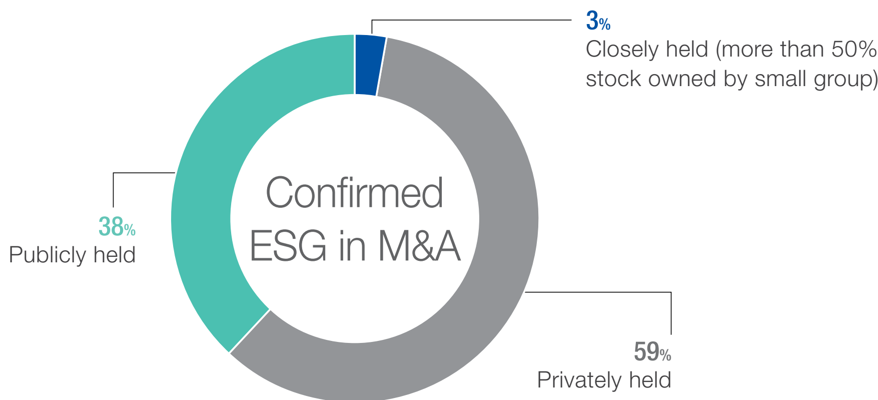

## ESG in M&A

New to the 2023 survey, was the question, "If your company is engaging in M&A, how are you considering ESG factors in M&A?" The majority selected "does not apply."

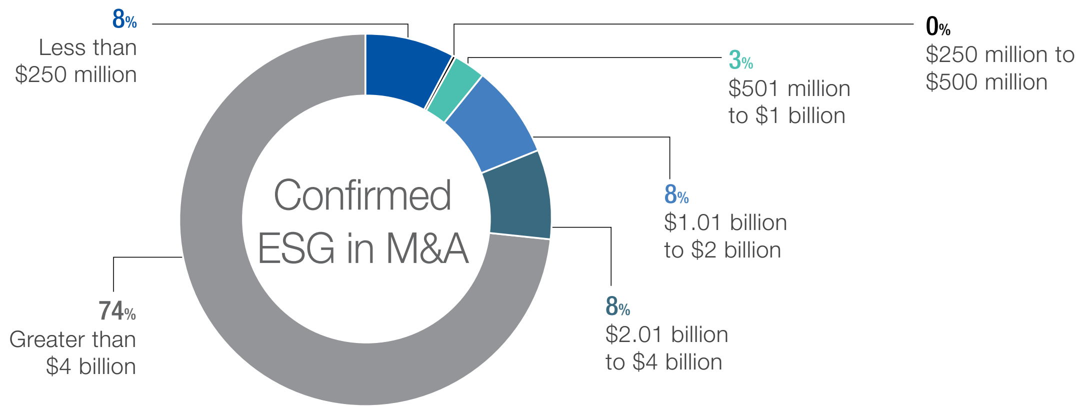



For the purposes of this study, researchers consider this confirmation that their companies are not engaged in M&A activity.

Here's a breakdown by entity type of the 45% who confirmed that their companies are engaged in M&A activity and take ESG factors into account.




A breakdown by revenue indicates that three-fourths of that same confirmed group (74%) are at companies with annual revenue exceeding $4 billion.

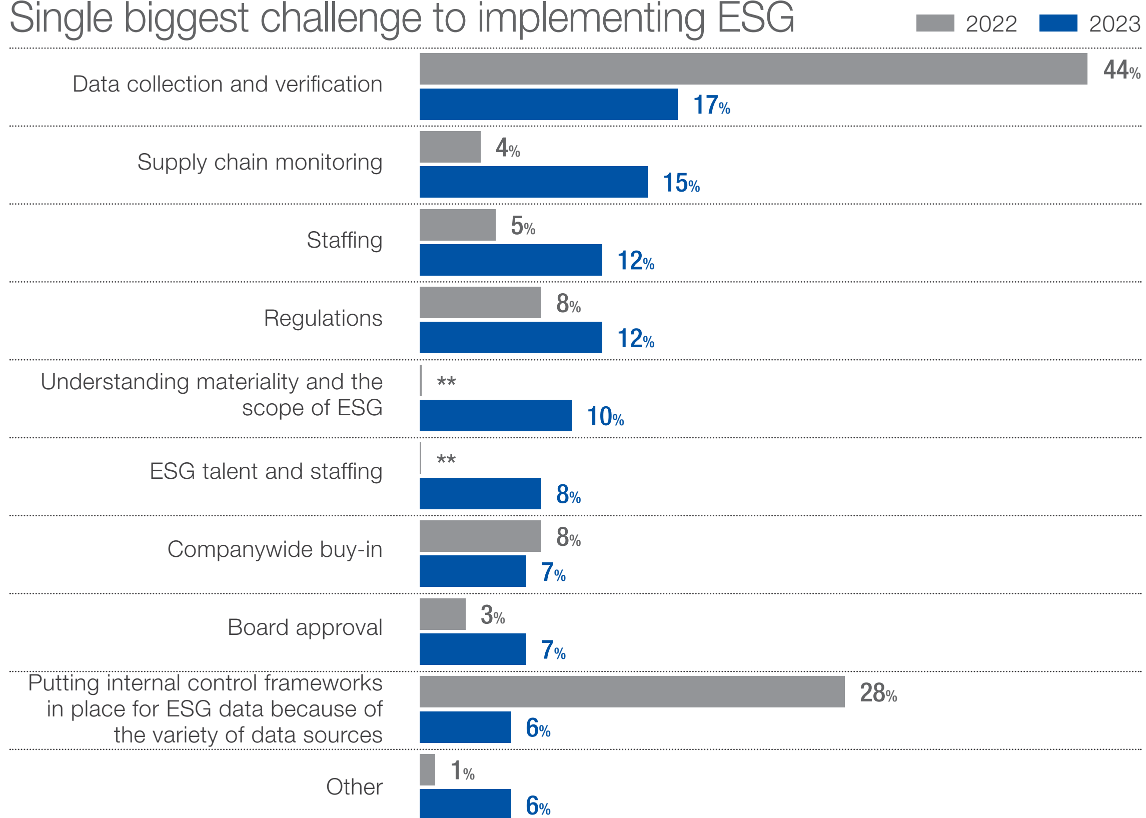



To improve clarity in future studies, researchers suggest replacing "Does not apply" with "My company does not engage in M&A" and adding "ESG factors are not considered in M&A at this time" and "Other (please specify)" to the selected choices.

In future studies, we also will explore respondents' posture and thoughts on ESG as a critical consideration in M&A.

## Greatest ESG challenge

Although data collection and verification remains the single biggest challenge to implementing ESG in their organizations, respondents shed a considerable amount of angst surrounding that in the past year. Consider that 44% identified it as their number one challenge last year.



This year, their collective data-related anxiety dropped to 17%. Concerns around putting internal control frameworks in place for ESG data because of the variety of data sources also dropped from 28% to 6%.

Challenges around supply chain monitoring, staffing and regulations gained modest ground. It's worth noting, however, that in 2023, we added two new selection options to the question: "Understanding materiality and the scope of ESG" and "ESG talent and staffing." Their combined 18% likely diluted some year-over-year comparisons.

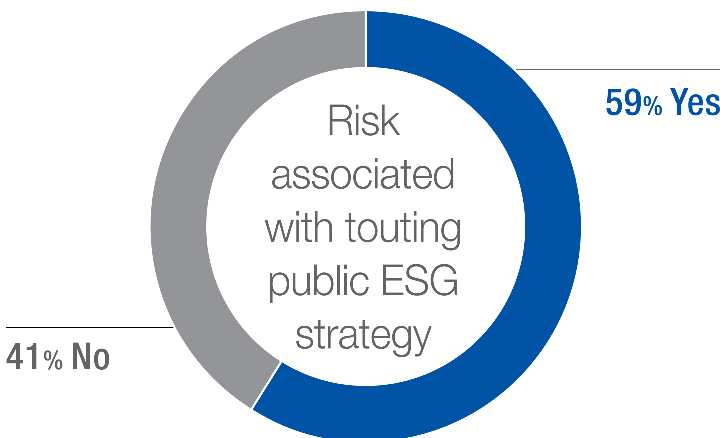
## Owning ESG

Internal stakeholders increasingly "get it," as 8% more respondents report that their internal stakeholders understand how to effectively own ESG as part of their company culture.

### Stakeholder understanding

## Public ESG strategies

Nearly three-fifths (59%) of respondents report the view touting a public ESG strategy as a risk resulting from increased regulation scrutiny and the rise of greenwashing litigation.



# Conclusion

In the continued absence of consistent, reliable reporting guidelines—including defined potential liabilities for misreporting or noncompliance—in-house legal counsel understandably remain anxious. As this report goes to press, the U.S. Securities and Exchange Commission (SEC) still has not released its final ruling on the proposed and hotly debated climate-related disclosure rules it issued in March 2022. New potential reporting risks include whether a company's ESG report is consistent with ESG disclosures in its 10-K.

"This is an area that's ripe for the plaintiff's bar," Seth Gastwirth, deputy GC and assistant corporate secretary at JLL, said during *Corporate Counsel*'s General Counsel Conference Midwest.

The multiple and increased resources detailed in this report demonstrate that corporate counsel anticipate and are preparing for increased enforcement. As in-house counsel await the SEC's climate proposal, individual states such as California consider enacting their own ESG disclosures. Gastwirth agrees with the proactive approach, suggesting that companies can prepare by collecting data from their supply chains and reviewing their regulatory disclosures and marketing materials for consistency.

Meanwhile, many in-house legal departments—especially those at companies with international operations and/or a significant nexus (through supply or customer contracts) with companies in the European Union—have begun navigating alignment with the EU's Corporate Sustainability Reporting Directive (CSRD). The CSRD is revenue based and its effects are expected beyond the EU. The results of this survey suggest the fundamental role that global thinking, cohesive strategy and innovation continue to play as companies navigate and fine-tune their ESG strategy, goals and objectives.

**Mary Smith Judd** *is an Atlanta-based researcher, writer and former ALM editor. She has covered the legal industry since 1995.*

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