



# ESG Survey:

## Environmental Performance and the Stakes for Your Business

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- ➔ Supply Chains Going Green
- ➔ What Companies Are Measuring—and May Be Missing
- ➔ Greenwashing and the Reporting Revolution



# Key Findings

## How Companies Are Performing on Environmental Matters

### New goals, a greener future.

78%

Say their organization has identified environmental performance goals beyond required regulatory compliance.

### Leadership on board.

82%

Feel their board of directors is adequately focused on the environment.

### Consumers drive change.



Half say that brand image and reputation among customers are among the most significant factors driving their company to adopt environmental goals.

### Companies are talking.



From advertisements to PR, companies are sharing environmental performance data beyond required disclosures, but in-house legal departments may not always be aware.

### Measurement lags.



Less than half say their companies are measuring in key areas, like product recycling, water use, and electronic waste.

### Impact on racial minorities unmeasured.

13%

Are actively measuring their environmental impact on ethnically and racially diverse communities.

### Most companies do not assess their carbon footprint.

56%

Say their company does not measure its carbon footprint. Of those that do, less than half measure Scope 3 emissions, which are indirect and often emerge from suppliers.

### Supply chain as the critical link in environmental performance.



Nearly 6 in 10 respondents say their organization is setting supply chain goals, while 33% consider the environmental policies and record of a supplier's host country government in their decisions.

### Washington driving change... and budget.

45%

Say the change in the U.S. presidency in 2021 has driven strategic business decisions, with 40% saying it has impacted their compliance budget—even before significant policy changes.

### In-house counsel less bullish.

49%

Say their organization has identified and adopted environmental performance goals beyond required compliance, compared to nearly 90% of ESG and sustainability professionals.

## Contents

Letter from the Editors	1
Executive Summary	2
Section 1: How Companies Think They're Doing—and What's Driving Them to Act	4
Section 2: What Companies Are Doing—What They're Measuring and What They're Missing	8
Section 3: How Companies Are Communicating—and Advertising—Their Efforts	11
Section 4: Greening the Supply Chain—What's Next and What's Holding Companies Back	13
Methodology	16

## Letter from the Editors

# ESG: The Business Climate Is Shifting

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Dear Clients and Friends of the Firm,

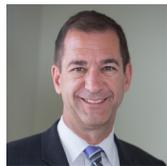
As we look ahead to 2022, the question of how to navigate rapidly changing environment, social, and governance (ESG) issues sits high on Crowell & Moring's list of top legal and regulatory issues to watch, regardless of industry.

Recent headlines tell the story—from unprecedented citizen activism, to impact investment firms making their way onto boards of directors, to the U.S. Securities and Exchange Commission announcing the creation of a Climate and ESG Task Force and moving closer to a new mandatory climate risk disclosure proposal. Businesses are under increasing pressure to measure, improve, and disclose their ESG performance to investors, to consumers, and to regulators. And their efforts are reaching into every area of their operations, as are the risks and opportunities that follow.

In our first-ever survey that looks at how businesses are navigating ESG issues, we focus on the critical issue of environmental performance and take the pulse of where companies are today through the eyes of the leaders spearheading these efforts—primarily in-house counsel, sustainability professionals, and compliance professionals who are finding their roles increasingly interconnected, much like ESG itself. We ask several questions that touch upon the governance, risk, and compliance issues that these professionals and their companies are facing. Throughout this report, we pair our survey findings with key takeaways intended to help your team prepare for the road ahead.

We hope you find this report helpful, and we look forward to the conversation ahead.

Co-editors



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## Executive Summary

### Environmental Performance Is Reaching into Every Aspect of Business. But Can Companies Go from General Awareness and Planning to Specific Actions and Execution?



Reported measuring carbon footprint.

“

We believe environmental disclosures for public companies will become mandatory.”

— ESG professional (respondent)



Reported measuring their environmental impact on ethnically and racially diverse communities on an ongoing basis.

Nearly 4 out of 5 decision-makers Crowell & Moring surveyed in July and August said their organization has identified and adopted environmental performance goals, including many targets that go beyond what regulations require. They are motivated by a range of factors, from improving their company’s brand image among customers to increasing pressure from federal regulators.

Our survey also finds that many of these respondents—who include compliance, sustainability, and ESG professionals, as well as in-house lawyers—represent organizations that are not yet fully measuring performance against those goals, and in some cases are grappling with implementation.

The potential gap between setting environmental performance goals and measuring progress against those goals may not only hinder a company’s efforts, but can expose a company to increased risks from a rising tide of regulatory enforcement and litigation from advocacy groups, consumers, and investors. And given the intensifying competitive pressure to advance effective ESG programs, such a gap may also cause companies to fall behind their industry peers.

Given that pressure to improve ESG performance could soon reach a fever pitch, a handful of our findings are particularly noteworthy. Forty-four percent of respondents say their organizations are measuring their carbon footprint, while 13% are measuring their environmental impact on ethnically and racially diverse communities on an ongoing basis. Yet both are likely to be key areas of focus of the current U.S. administration’s regulatory and enforcement activities. Serious questions also center on the issue of how organizations track their supply chains’ sustainability and how they assess and share their goals and metrics publicly. In-house lawyers—whose role in these matters will only grow as environmental and sustainability efforts become increasingly regulated and challenged—were much less bullish about the status of their organizations’ efforts compared to other executives.

The move toward improved environmental performance offers significant business opportunities while also posing significant challenges, all while affecting every area of an organization, from procurement and energy supply, to waste disposal and other end-of-product-life issues, to investor relations. We offer these findings to help organizations fully grasp the state of the broader environmental landscape and move from planning to execution of their ESG goals.

Respondents seem to understand both the stakes and the opportunities, noting increased net-zero goals, transitions to renewables, and the looming possibility of more government mandates.

“We believe environmental disclosures for public companies will become mandatory,” one ESG professional said. And one in-house lawyer noted that their organization is reportedly “moving from planning to execution. Setting goals and measuring material metrics. Increased publication of the same.”

Another in-house lawyer noted their company’s broad organizational embrace of sustainability and succinctly explained their thinking: “I expect dramatic changes,” the respondent said.



Reported measuring supply chain sustainability.

## Supply Chains Add Further Complication

Companies recognize they cannot simply limit their perspective to their own operations; they must address their often-sprawling global supply chains. While nearly 6 in 10 respondents reported that their organization is setting goals in this area, one-third said they're measuring supply chain sustainability. Nearly the same percentage consider the environmental policies and record of a supplier's host country government in their decision-making. The finding that two-thirds of respondents apparently aren't considering such policies and records in their decision-making likely speaks to the difficulties inherent in navigating a multitude of far-flung regulatory regimes.

Further, even among the 44% of companies that measure their carbon footprint, less than half measure their Scope 3 emissions—for instance, the emissions associated with purchased goods and services, business travel and commuting, waste disposal, and transportation and distribution. Because these emissions are generally indirect, assessing them isn't easy. But companies may increasingly find themselves at the receiving end of demands to do just that, and to view their supply chains, and indeed their whole operation, through an environmental lens.

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## A Critical Juncture

Finally, we asked respondents whether the new administration in the United States has altered their company's approach to environmental action. Forty-five percent said the change had already driven strategic business decisions. This might seem low until we remind ourselves that companies are seeing that other priorities have occupied the Biden-Harris administration in its first year and that enhanced regulation is sure to come soon.

As 2021 draws to a close, companies should recognize the crossroads before them. Consumer and investor sentiments are changing fast. Although new environmental regulations have yet to take shape, no one should be under any illusions that they won't soon arrive. And U.S. and EU government pressure on suppliers to be green could up the ante even more.

In their efforts to advance performance, companies are exploring innovative solutions and strategies. In some cases, they are collaborating with competitors to achieve environmental efficiencies, and they are working together via trade associations to create voluntary standards. Those associations are creating new frameworks and templates as industry works to get ahead of the curve. But as our report shows, companies believe there's quite a bit of work ahead. We hope the findings serve as a guidepost in an uncertain—but important—moment.



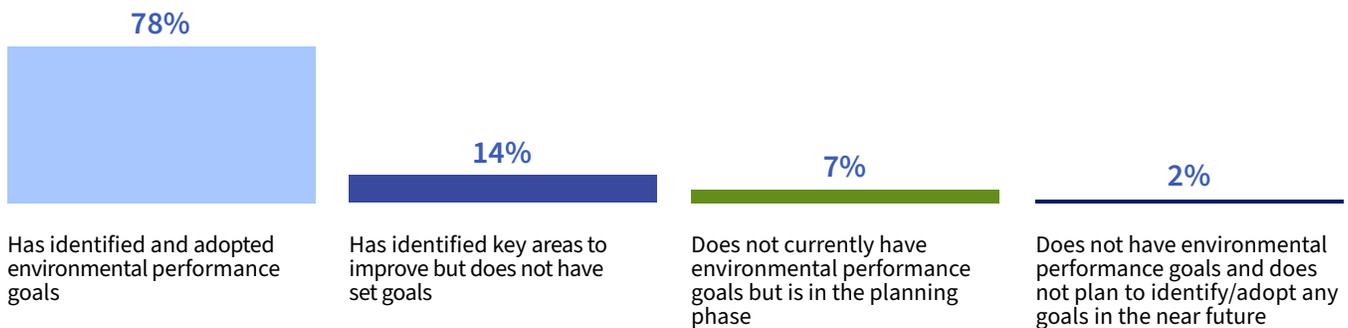
Said the new U.S. administration had already driven changes in strategic business decisions.

## Section 1:

# How Companies Think They're Doing— and What's Driving Them to Act

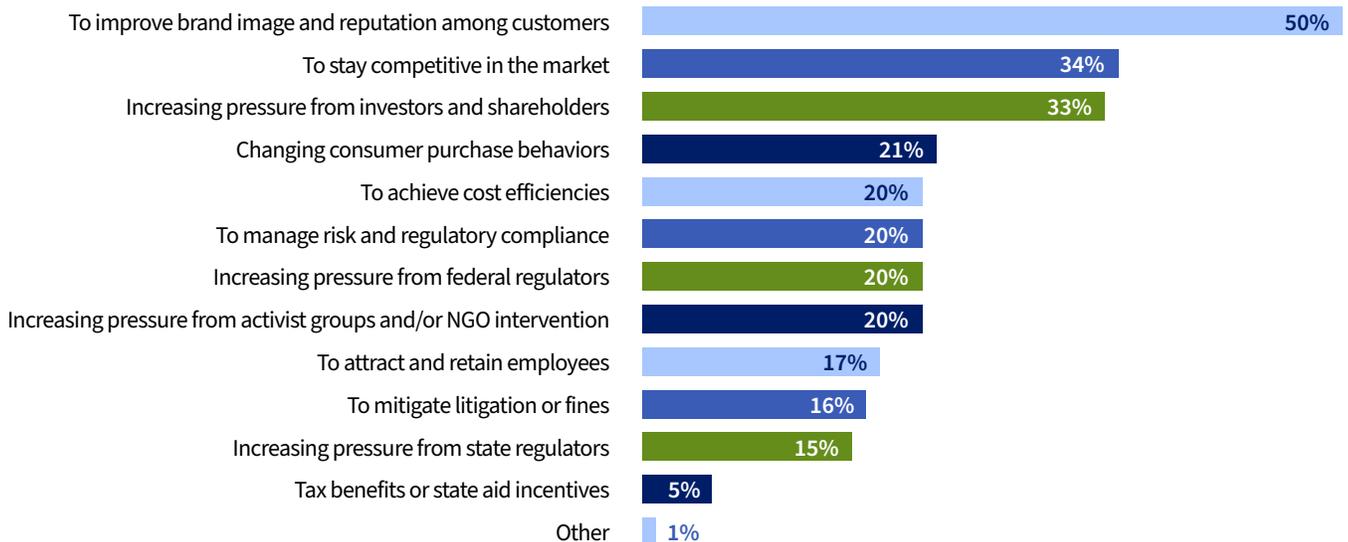
### Companies' Current Environmental Status

Which of the following statements best describes the current status of your organization's environmental performance goals, beyond required compliance with environmental laws? (Select one option.)



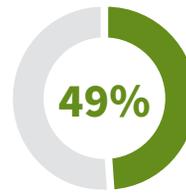
### What's Motivating Them to Act

Which of the following factors are motivating your organization to adopt environmental goals, beyond required compliance with environmental laws?



That 78% of respondents say their company has identified and adopted environmental performance goals is a sign of the times. Improving brand image and reputation among customers topped the list as far as what's specifically motivating respondents, followed by staying competitive in the market, increasing pressure from investors and shareholders, and changing consumer purchasing behaviors.

Given what’s at stake, organizations should know they could soon be pressed to explain whether and how they’re meeting their goals—lest they hear internal and external complaints of greenwashing, i.e., leading the market to think that a company is greener than it actually is. Indeed, it’s possible those kinds of concerns are leading the in-house lawyers surveyed to be far more reserved in their assessments of their companies’ efforts, with less than half (49%) saying their organization has identified and adopted environmental performance goals. This may signal that organizations might be moving ahead with less involvement of their in-house lawyers. That could be problematic, as a legal perspective can help identify risks before they turn into problems—especially before companies end up in the crosshairs of shareholders, activists, and regulators.



Of in-house counsel said their organization has identified and adopted environmental performance goals beyond required compliance, compared to 78% of respondents overall.

Organizational motivations as perceived by in-house lawyers were also strikingly different when compared with other respondent groups. They were more likely to pick managing risk and regulatory compliance, which is understandable given the Federal Trade Commission’s watchful eye and broad interpretations when it comes to greenwashing. But they were especially focused on mounting pressure from investors and shareholders—a group that is more likely to spot exaggerated claims than consumers, particularly in the context of SEC rules and regulations.

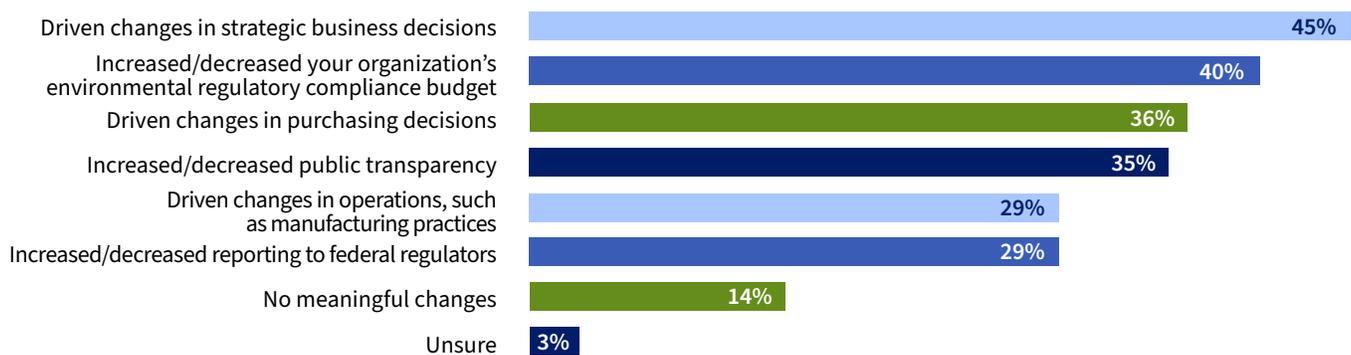
Notably, government subsidy opportunities and tax benefits were a small factor in driving environmental performance goals in this largely U.S.-based respondent pool. But for companies operating in Europe, the case may be different.

Two years ago, when the European Commission launched the [European Green Deal](#), it set in motion a domino effect of new regulations and policies and new state-funded opportunities to help the EU switch to a greener economy. And while the change has meant stiffer penalties and regulatory concerns for companies operating in the EU, it has also opened the door to new opportunities not always available in the U.S. The EU is moving toward both incentives and disincentives tied to member-state subsidies for new projects, with the goal of discouraging EU member states from funding projects that would harm the environment or increase their carbon footprint.

The new rules, for example, will discourage aid for projects in oil and coal. But the EU also wants to adjust competition policy to create a market environment that is friendlier to companies working together to achieve environmental efficiencies. That might involve such things as joint standards to improve the environmental footprint of certain products, joint research and development to speed up innovation, and even collaboration on logistics and supply chains.

## Effect of New Administration

Has the 2021 change in the U.S. administration resulted in any changes in your organization’s environmental approach? (Select all that apply.)



Of course, companies are spurred to act on environmental issues not only because of changing consumer and investor sentiment. Political and regulatory changes are (rightly) very much on respondents' minds.

We specifically asked whether the transition to the Biden-Harris administration changed their environmental approach. Nearly half said it had, which is notable considering that the regulatory process under Biden had just begun when the survey was fielded. In other words, respondents' actions are to a large extent anticipating new regulations or in response to statements of enforcement priority, instead of actual new rules. Respondents are clearly watching Washington closely, with one respondent saying their approach to environmental issues over the next three years "depends on the legislative/regulatory environment, and that depends on the 2022 midterm elections."

Based upon our survey participants, the industry that has moved the most since Biden's election is financial services, with 63% of respondents in that sector already noting changes in strategic business decisions. The only other sector that came close was technology, telecom, and software, with 52% of the respondents noting change.

More changes are sure to be on the horizon as the Biden-Harris administration works to achieve net-zero greenhouse gas emissions economy-wide by 2050. In September 2020, a subcommittee of the U.S. Commodity Futures Trading Commission declared that climate change is a major risk to the financial system of the United States. The new administration has taken this statement to heart.

Among the developments, the SEC has created a Climate and ESG Task Force to focus resources on identifying potential misconduct in the disclosure of climate risks and compliance concerns relating to ESG strategies of investment advisors and funds. And in May 2021, President Biden issued an "Executive Order on Climate-Related Financial Risk," which ordered federal agencies—including many outside those historically linked with the environment and finance—to evaluate and incorporate climate-related financial risk into the government's purchasing, lending, and financial sector oversight activities.

While many new policies are still taking shape, what is clear is that Washington's view on climate is expanding—not only as an environmental issue but as a financial one. Watch for heightened disclosure requirements from government agencies for public *and* private entities and requirements for substantive changes in both government suppliers' businesses and projects that benefit from federal procurement, lending, and insurance programs. In particular, the efforts reflect the administration's twin themes of economic and environmental justice for communities of color and other disadvantaged communities and acknowledge that climate impacts may fall disproportionately on these groups.

Publicly traded companies can expect that new disclosure requirement proposals are on their way from the SEC, likely in the first quarter of 2022. Companies may be expected to make more disclosures regarding the extent to which they are accounting for their impact on the climate, and also the risk that climate poses to them. Companies that do not have robust environment and sustainability functions in place may find themselves less prepared for a future that requires more disclosure. While it is too soon to know precisely what will be required, there are key steps that companies can take now to prepare for the road ahead.

Respondents who said the change in the U.S. administration has driven changes in strategic business decisions.



Of financial services

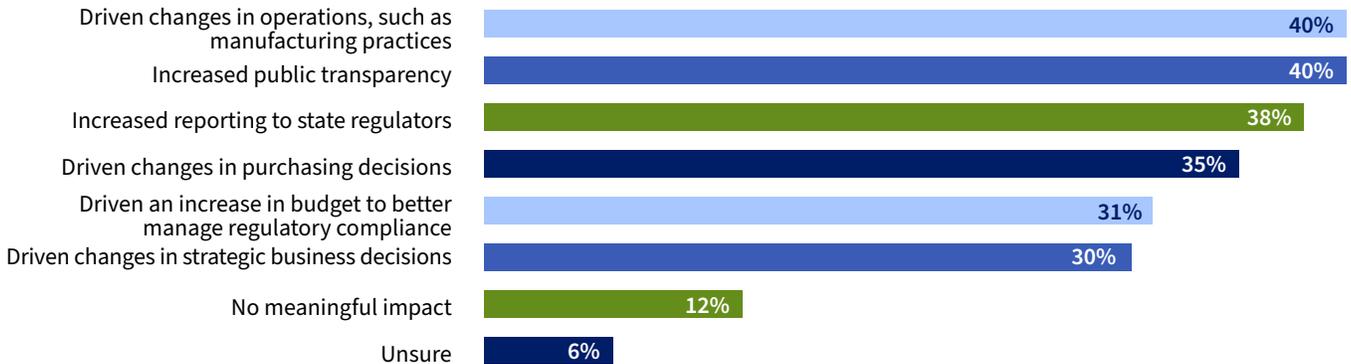


Of telecom, technology, and software

## State Regulatory Impact

State environmental regulators are also driving change, with 40% of respondents at U.S. companies saying that their efforts have driven their company to increase public transparency and make changes in operations, such as manufacturing practices.

How have state environmental regulators changed your organization's environmental efforts? (Select all that apply.)



## Thoughts for In-House Counsel: Preparing for Potential SEC Disclosure Requirements



Understand that your disclosure will be evaluated by SEC officials and shareholders in the 21st century, where issues of environmental performance and risk are evolving quickly. The securities laws that govern disclosure are remarkably flexible because they use a materiality standard that reflects the context of today's environment and take into consideration the policies, procedures, and protections that concern consumers, investors, and regulators. Your impact on the environment may be material.



Start looking around the corner now. Do not wait for the regulation to bring rigor to the evaluation of the statements you are making and the fulsomeness of your ESG-related disclosures. Ensure you have in place the right sensitivities and processes for evaluating the materiality of ESG impact. The legal risk that comes with overstating what you're doing to improve environmental performance can be just as great a risk as understating your impact. From formal SEC filings to CEO tweets, everything your company says about environmental performance matters because it's all going to be evaluated in the context of SEC materiality.



Evaluate voluntary disclosure frameworks and what they require of your industry for a sense of what may be in store and to discern whether you may need to begin gathering new data or synthesizing your data in a new way. SEC staff have already been directed to draw lessons from extant voluntary disclosure frameworks, such as the Task Force on Climate-Related Financial Disclosures, and to consider whether disclosure requirements should be industry-specific.



Review responses to the SEC's request for input on climate change disclosures and trade association activities for an indication of what your industry colleagues, competitors, other stakeholders, and the interested public deem important. Consider using this information to benchmark your company's readiness for more meaningful disclosures.



Ensure you have aligned internal channels of reporting so that all teams that intersect with your environmental, ESG, and sustainability initiatives have a clear method of reporting information. Legal departments should understand what their ESG teams are doing, assessing, and reporting, and those teams should understand when to notify in-house counsel and why.



Watch for how environmental assessments and their related disclosures can impact other areas of your operations, such as insurance. Map your organization's climate-related risks across your organization, with an eye on where the data is pointing as opposed to what precedent requires.

## Section 2:

# What Companies Are Doing— What They're Measuring and What They May Be Missing

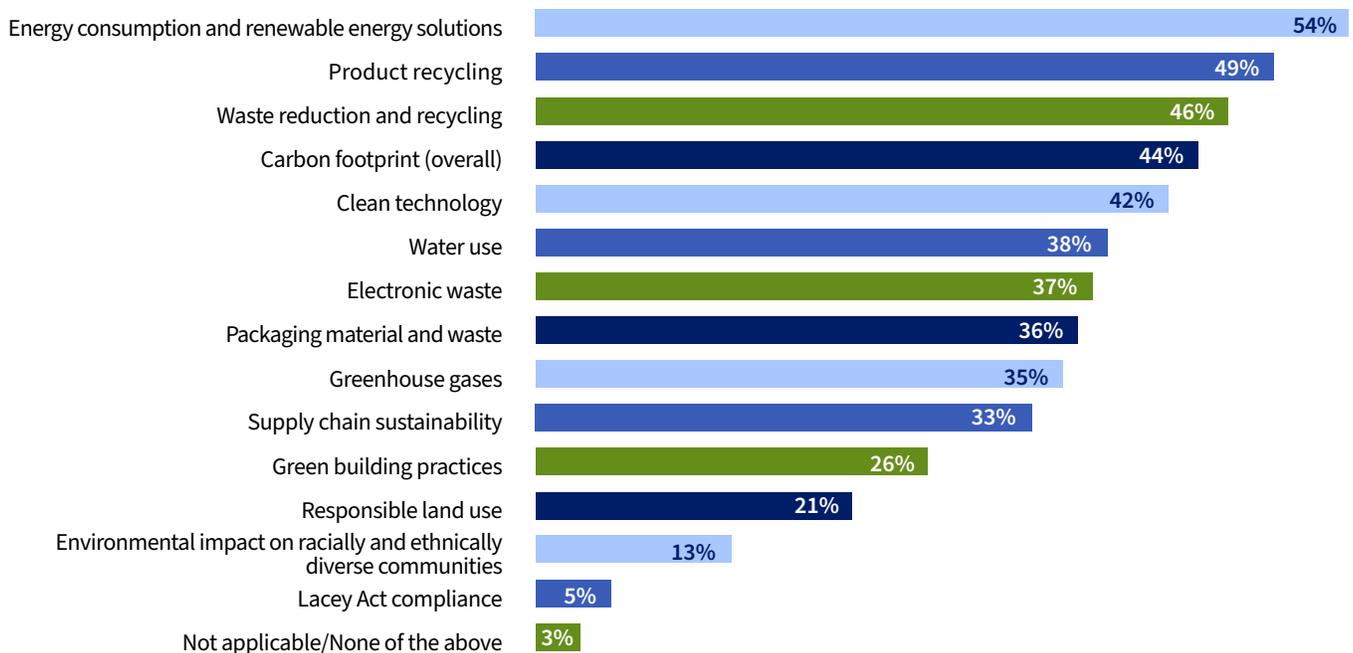
### Assessing Their Own Efforts

To what extent do you agree with the following statements? (Select one option for each statement.)



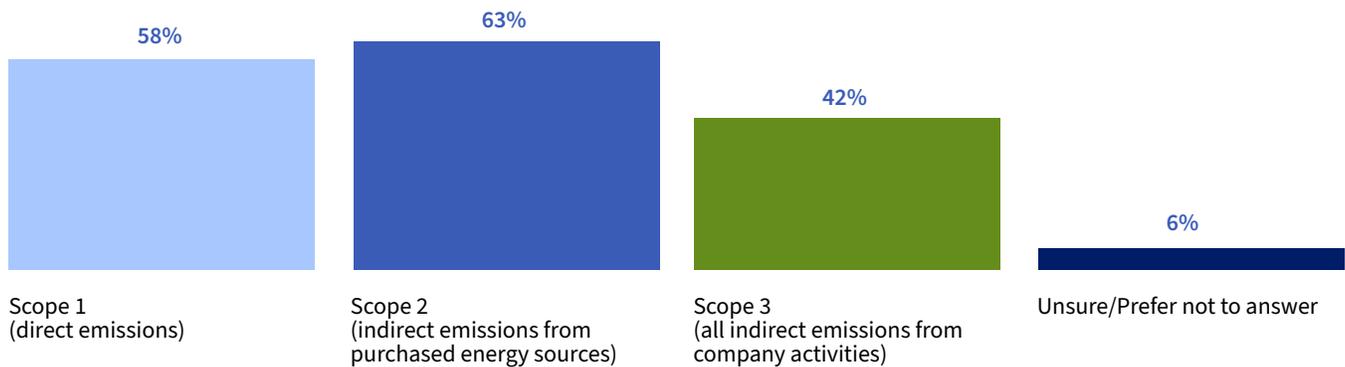
### What Companies Are Measuring

Which of the following environmental factors is your organization currently measuring? (Select all that apply.)



## How Companies Are Measuring Carbon

Which of the following carbon emissions is your organization currently measuring? (Select all that apply.)



*This chart reflects responses from individuals who said their organization measures its carbon footprint.*

We asked whether respondents' organizations had clearly defined environmental policies and practices and if they understood many of the key issues involved. In each instance, more than 80% agreed or strongly agreed they had. Consistent with many of our findings, in-house lawyers were less optimistic than the others surveyed, with 67% of them saying they were up to speed on environmental issues and understand their impact on the future of their company's business.

This broad perspective is difficult to square, however, with what organizations are actually measuring. For instance, 73% of respondents either agreed or strongly agreed that their organizations had a meaningful understanding of how their environmental performance impacts minority communities, and 44% said they have assessed their impact on racially and ethnically diverse communities. But 13% said it is something their company is currently measuring.

Seventy-three percent of respondents said their organizations had a meaningful understanding of how their environmental performance impacts ethnically and racially diverse communities. Thirteen percent said it is something their companies are currently measuring.



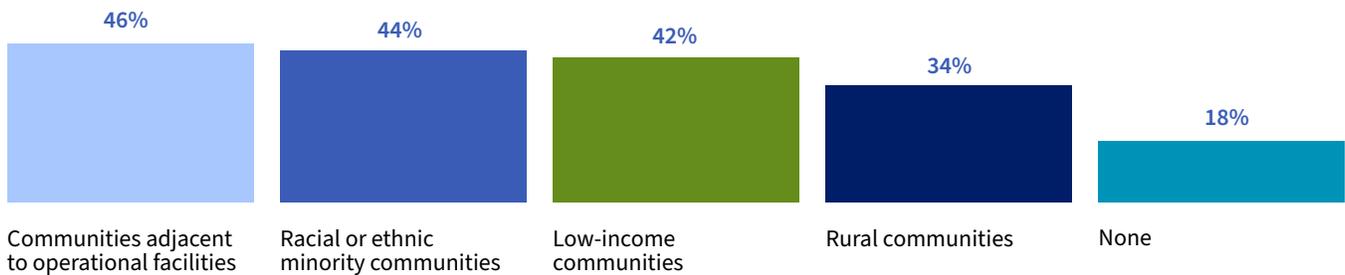
This difference between a company's understanding and what it measures may speak to the challenges companies have with identifying appropriate metrics and means of tracking them; taking specific, targeted actions to deal with these challenges; and preparing to fend off litigation and other risks down the line. For instance, respondents' top goals—energy consumption and renewable energy solutions—are generally easy to measure and affect companies' bottom lines. Other areas are understandably difficult to measure, even if the issues surrounding them are generally understood. But organizations would be wise to at least begin data gathering, particularly given the Department of Justice and the Environmental Protection Agency's current focus on environmental justice. It's critical for companies to conduct self-audits in such areas as their impact on racially and ethnically diverse communities—and to do so under the direction of counsel.

Meanwhile, one-third of respondents said they measure their supply chains' sustainability, a finding that we'll discuss later in relation to how tricky it is to tackle environmental issues when it comes to far-flung suppliers around the globe. Companies seem to have the best handle on Scope 2 emissions, which makes sense: It's fairly easy for companies to measure where they're getting their energy and how providers produce it. That's not the case with Scope 3 emissions, i.e., indirect emissions from company activities. These were the least likely type to be measured by the 44% of respondents who said their company measures carbon emissions at all.

This might have significant consequences, as Scope 3 emissions represent a sizable percentage of many companies' carbon impact. That means addressing carbon and achieving near net-zero goals will have to involve measuring Scope 3 emissions, and some experts have their doubts about whether that's currently possible. But customers, investors, and regulators alike are increasingly focused on Scope 3 emissions, and reporting is sure to follow.

## How Companies Assess Their Environmental Impact

My organization has assessed the environmental impact of its operations on \_\_\_\_\_. (Select all that apply.)



We also asked how organizations are assessing the effects of their operations on specific communities. Nearly 1 in 5 said they weren't assessing them at all—led by the 42% of in-house lawyers who answered that way—and less than half said they were assessing any of the choices we presented. In part, companies haven't been focused on these kinds of assessments until recently. But that is changing, as citizens groups are feeling increasingly emboldened to hold the EPA accountable for its recent elevation of environmental justice as an agency priority—and by extension, the companies the EPA regulates.

Financial services conducted more assessments than other industries, though respondents in that category might have a leg up if they're thinking about their own investments, which can be clearly intended to focus on underserved communities.

## Thoughts for In-House Counsel: Mitigating Risk



Help ensure your board's ambitions do not get ahead of reality, particularly when it comes to net-zero pledges. Is the board really aware of the extent of your company's Scope 1, 2, and 3 emissions (and maybe even beyond)? Might it be more realistic to identify a percentage reduction target or a specific area of your operations that can reach net-zero? Be prepared to talk about steps needed to improve performance so the board can effectively assess progress.



Select carefully which external benchmarks or recognized ESG frameworks your company will use to measure its performance, if any. In the absence of mandatory reporting requirements to the SEC or any other regulator or stakeholder, much of the ESG discussion is about voluntary public statements. These can create potential liabilities or claims of responsibility when stated publicly, such as false advertising lawsuits that allege your company misrepresented its performance by not meeting all of the framework's standards.



Consider coordinating the review of all environmental efforts—and public statements about them—throughout the organization so that the left hand knows what the right is doing. An internal audit is often a useful first step. Carbon offsets are a particular area of auditing concern, should your company decide to include them in its emissions strategy. External review and scrutiny are critical, given the failure of some offsetting organizations to perform as advertised.



Consider carefully, when undertaking an audit, making an inquiry, or preparing documentation, whether it should be done under the direction of counsel. That decision can have consequences.



Ensure everything you say to the public about your environmental performance matches what you're saying to regulators. If, for instance, you have a history of compliance issues with your regulator, but you're telling the public how green you are, regulators will see it and may come calling.



Mitigate litigation risk by ensuring public statements are backed up by guidance, like the FTC's Green Guides (more on those below) or internal reports. When in doubt, state performance in terms of goals rather than achievements unless you can document them.



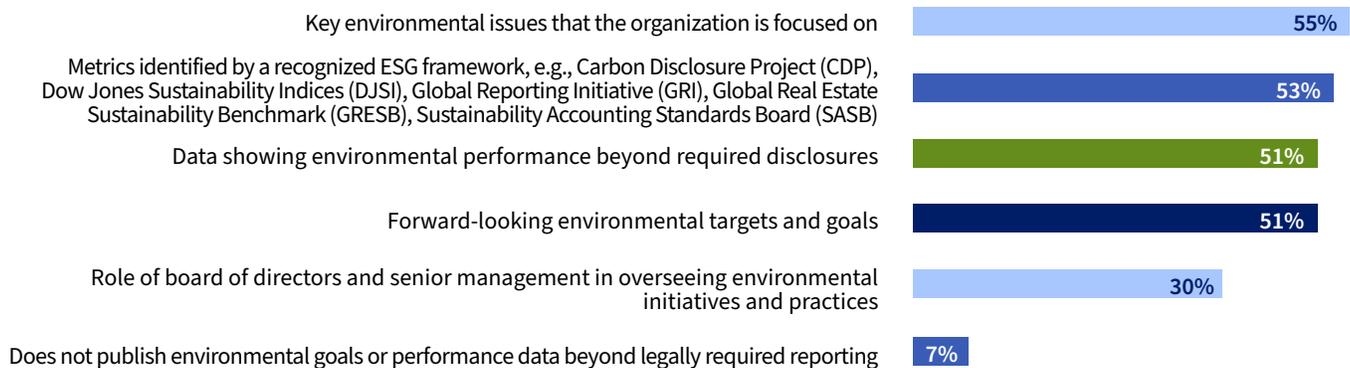
Consider revisiting your engagement with environmental groups. Meaningful efforts to go green—from setting new goals, to expanding monitoring, to addressing environmental concerns of the communities surrounding your facilities—can provide tools for new conversations.

## Section 3:

# How Companies Are Communicating— and Advertising—Their Efforts

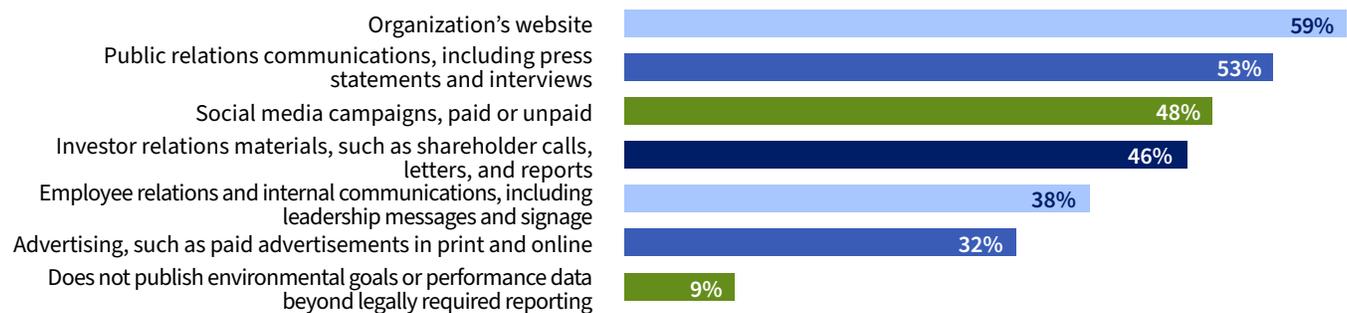
### What Companies Are Sharing Publicly

Which of the following does your organization share publicly beyond legally required disclosures? (Select all that apply.)



### How Companies Share Publicly

Where is your organization sharing its environmental goals and/or performance data (beyond required reporting)? (Select all that apply.)



Within these findings, it seems that public companies are much more likely to actively share environmental information, tech companies are most likely to share data, and manufacturing and financial services lead the way when it comes to using recognized ESG frameworks.

Companies are also emphasizing consumer and public relations efforts over materials intended to inform investors and shareholders. Interestingly, ESG professionals themselves—who would presumably be closer to communications about their own work than other respondents surveyed—believed their companies shared less about their environmental efforts than other respondents.

There is also a possible disconnect in the critical area of paid advertising. Overall, 32% of respondents said their organizations were sharing environmental goals and/or performance data, beyond required reporting, in print and online advertising. However, that percentage fell to 17% of in-house lawyers and 14% of ESG professionals. Sustainability professionals (47%) perceive much more ESG advertising is happening.

Sustainability professionals are often tasked with reviewing and supplying information for ad campaigns—and our findings indicate that the information they’re sharing, or the draft ad copy they review, may not always be getting reviewed by the legal department. Such a disconnect regarding advertising could give rise to false advertising litigation and investigations—especially in an environment with increasing risk, where such claims are being scrutinized and challenged frequently.

Given these findings, organizations need to ensure they’re properly calibrating their public ESG statements to reap the benefits of their environmental work while reducing risk. But reaching the right balance can be a challenge. Many in-house lawyers who review marketing claims are familiar with the FTC’s Green Guides, which cover principles that apply to environmental marketing claims. But those guides won’t help determine whether the analyses are incorporating relevant metrics or whether they can count on statements from suppliers.

Recycling is a great example. A company may say its product is recyclable if it meets FTC Green Guides standards, which requires it to confirm that a certain percentage of communities have the facilities to accept these materials. But now, even meeting the Green Guides (which are 10 years old) is merely the minimum requirement, as states and plaintiffs are demanding even greater care around such claims in light of the inability of many municipalities to fulfill recycling goals.

There has also been an uptick in false advertising claims against companies for alleged greenwashing, along with a near-constant influx of new theories, new enforcement matters, and new ways of measuring impact—both social and environmental. As the plaintiffs’ bar brings new lawsuits every day, the cases are not just asking whether marketing claims are supported under previously acceptable standards. They are looking beneath the surface to challenge long-held assumptions and using sophisticated testing methods to support their investigations.

Corporate lawyers, sustainability professionals, and marketers will need to be much more engaged with one another as they navigate the familiar push and pull between selling products, promoting the brand, and protecting the company from undue risk. Greater attention and support may be required than teams had previously deemed acceptable. The alternative is to say less publicly about ESG progress and aims.

### Thoughts for In-House Counsel: Navigating Public Statements



Review all public statements. Ensure your review includes marketing and PR materials, the company website, messaging for investor calls, and other investor relations materials. Even small editorial changes can have big impacts on liability risks. Lawyers are trained to look for these things; sustainability professionals are not.



Constantly scan for changing ESG reporting and monitoring standards. Be sure to monitor the legal news for reports on new litigation and investigations on ESG issues. The FTC Green Guides may no longer be enough.



Train your people. Partner with your marketing and sustainability teams to sensitize them to the legal issues and risks. We have found that some legal training helps marketers appreciate the risk environment and encourages them to communicate more proactively with legal.



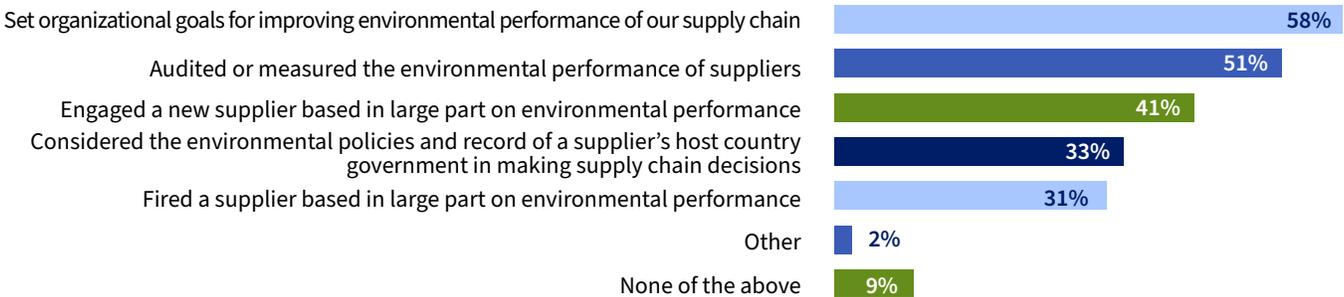
Partner with outside experts. Third-party certifiers and consultants can help determine support for claims, and this may help by providing expert validation down the line.

## Section 4:

# Greening the Supply Chain—What’s Next and What’s Holding Companies Back

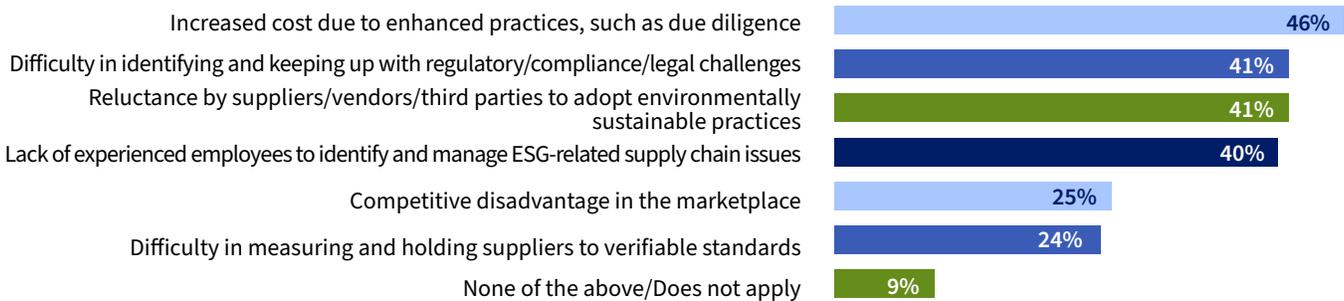
### Steps to Improve Supply Chain Performance

What steps has your organization taken to improve environmental performance within its supply chain? (Select all that apply.)



### Supply Chain Challenges

Which of the following supply chain challenges is your organization facing as it seeks to improve environmental performance? (Select all that apply.)



Nearly 6 in 10 respondents said their organization is setting goals for improving its supply chain’s environmental performance. However, as mentioned earlier, 33% said their organization is measuring supply chain sustainability. This shows how difficult it is to assess supply chains that can sprawl around the world, and that the goals being set probably aren’t measurable or don’t incorporate specific metrics. In fact, the goal-setting process for many organizations, at this stage, might mostly be exercises in optimism or aspiration—and some respondents could be conflating “Buy American” efforts stemming from the pandemic with environmental ones.



Are measuring supply chain sustainability.

Nearly a third of respondents said their company has considered the environmental policies and record of a supplier's host country government in their decision-making, while 14% of in-house lawyers and 16% of ESG professionals answered that way. It's worth digging deeper into these two groups' views. In-house lawyers were less bullish on how their organization is improving its supply chain's environmental performance. ESG professionals, meanwhile, weren't that pessimistic, but 27% said their organization has audited its suppliers' environmental performance.

Their perspective is likely shaded by proximity, and perhaps caution, whereas other groups surveyed might think more is going on than actually is. With increased pressure from consumers and investors—and, of course, the possibility of more regulations—these results should spur many organizations' action plans.

At the same time, 31% of respondents said they have fired a supplier based in large part on environmental performance. This is a significant step given the challenges in finding a similarly priced alternative with a better environmental record. Particularly in areas like technology, where suppliers are likely to be very strategically selected and good alternatives aren't plentiful, most companies would seek to secure changes in supplier behavior before cutting ties. Additionally, moving on most often happens if a supplier has done something that goes against initial agreements, although environmental factors are being built into more agreements and renewals of existing agreements. This is particularly true as companies look at potential reputational and other risks associated with actions within their supply chains.

Of course, it can be quite difficult to improve a supplier's environmental performance—as reflected in the fact that respondents were fairly split when it comes to the challenges in doing so. Increased cost topped the list, followed by difficulty in identifying and keeping up with regulatory/compliance/legal challenges, something that is likely to only get harder given looming regulations and the difficulty of operating in multiple jurisdictions.

Survey respondents weren't as focused on competitive advantage being a driving force at improving their supply chains' environmental performance. That's not surprising considering that organizations tend to be focused on what's right in front of them. But there should be no doubt that environmental matters will increasingly become competitive issues in the years to come.

Percentage of respondents that said their organization has considered the environmental policies and record of a supplier's host country government in making supply chain decisions.



Of total respondents



Of in-house counsel



Said their organization has fired a supplier based in large part on environmental performance.



Said their organization has engaged a new supplier based in large part on environmental performance.

## Thoughts for In-House Counsel: Creating and Maintaining Green Supply Chains



Start at the top. Without a clear plan from leadership, it will be difficult to signal commitment to your diverse supply chain that environmental performance is a core driver for your company. Clear direction for personnel, production, and contracting practices is essential.



Leverage design. Redesigning products for longer use, reuse, and recyclability can reduce environmental impact. While redesigns can be difficult and costly, 80% of a product's environmental impact is determined during the design stage, making redesigns a key opportunity for sustainability and long-term profitability.



Know your markets. Countries with lax environmental policies may provide a sense of complacency for suppliers whose own environmental practices are lacking. There are exceptions to every rule, and the existence of effective domestic regulations and effective enforcement in-country are critical backstops to your organization's obligations. Consider assessing in-country and on-the-ground practices of your suppliers abroad and compare those against benchmark assessments.



Review supply chains. Evaluate for specific criteria and obligations linked to environmental performance. Issue RFPs for new or renewed contracts with measurable criteria and reporting metrics linked to environmental performance. If feasible, link specific renewal, price, or financial components to performance, and ensure your contracts include termination provisions for violations of key environmental standards.



Monitor, measure, and move. Effective measures to monitor environmental performance must be instituted early, as environmental issues are not often seen with the end product. Problems are most likely to surface long after a product is launched. Not only does this risk reputational and financial damage, but it also presents long-term potential risk due to uncertain liability, changing enforcement regimes, or alleged harms to communities that may present persistent challenges. Consider combined and alternative transport means, as well as utilizing novel technological monitoring techniques.



Train and reinforce. Your environmental performance objectives and metrics will change over time as new information, requirements, and expectations are forthcoming and as you learn from industry successes and shortcomings. When conveying changed expectations, equip employees and suppliers with the information, training, and tools to meet rigorous expectations. Green training has been found to be successful in helping firms reach environmental targets sooner and increases profits. Whether it's with in-house resources, industry organizations, or toolkits benchmarked against expert-developed performance measures, effective training must be regularly reinforced.

## Methodology

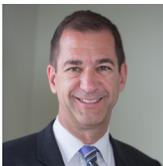
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In July and August 2021, Crowell & Moring surveyed in-house counsel and professionals involved in compliance, ESG, and sustainability matters, as well as other business professionals, on environmental, social and governance (ESG) topics. The 225 respondents represent a variety of industries, mainly financial services/banking, healthcare, technology/telecom/software, manufacturing, transportation/distribution/logistics, government contractors/defense, as well as the nonprofit sector. Thirty-eight percent represent publicly traded companies, 37% were from companies owned by private equity entities, and 25% were from privately held companies. Sixty-two percent of respondents reported being a primary decision-maker in setting environmental goals, reporting, and benchmarking in their organization; 32% support decision-making; and 6% reported not having a role in these specific activities.

Total percentages might exceed 100% for results stemming from questions where respondents were allowed to select more than one answer option. Other total percentages may exceed 100% due to rounding.

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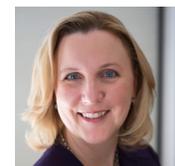
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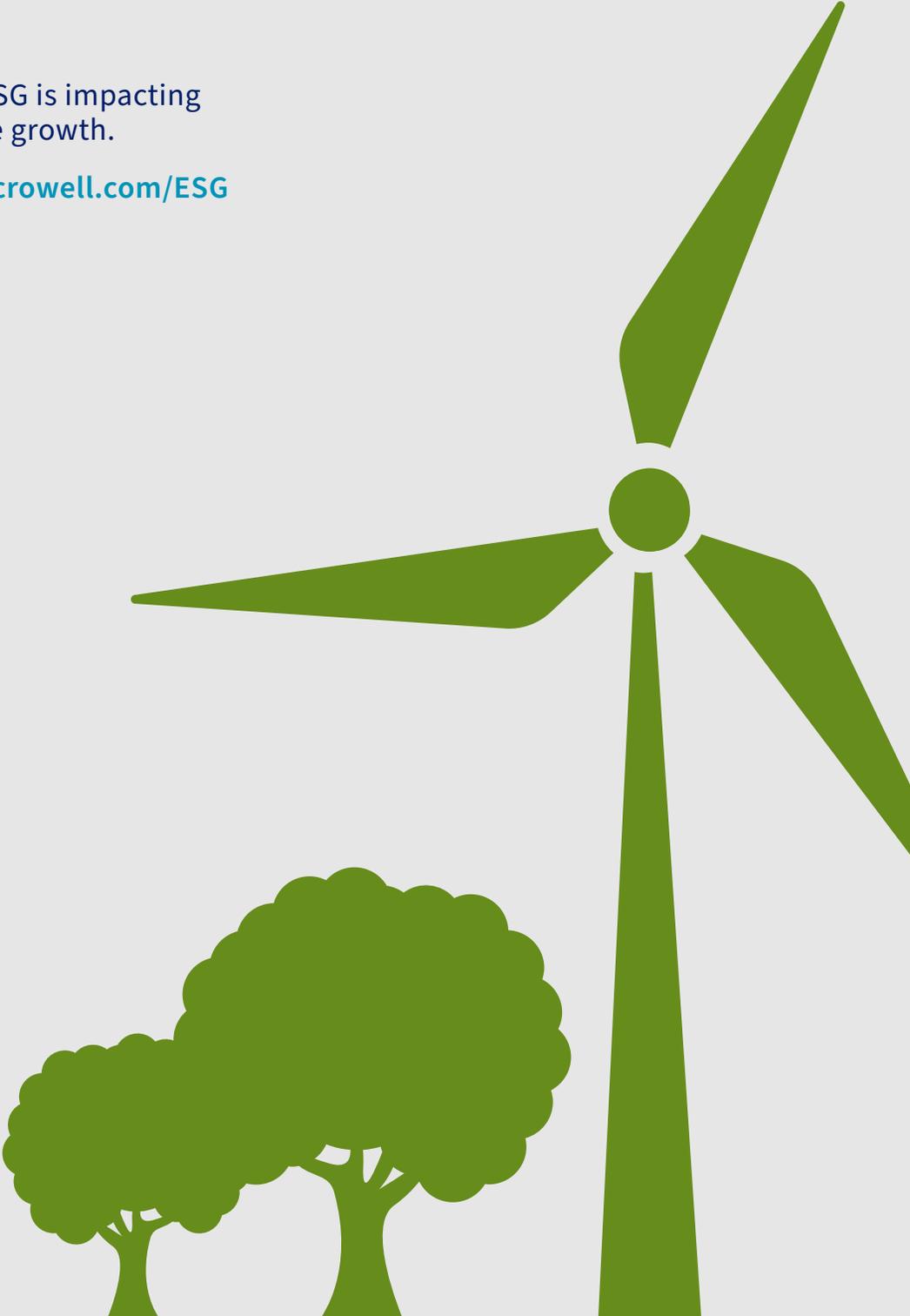
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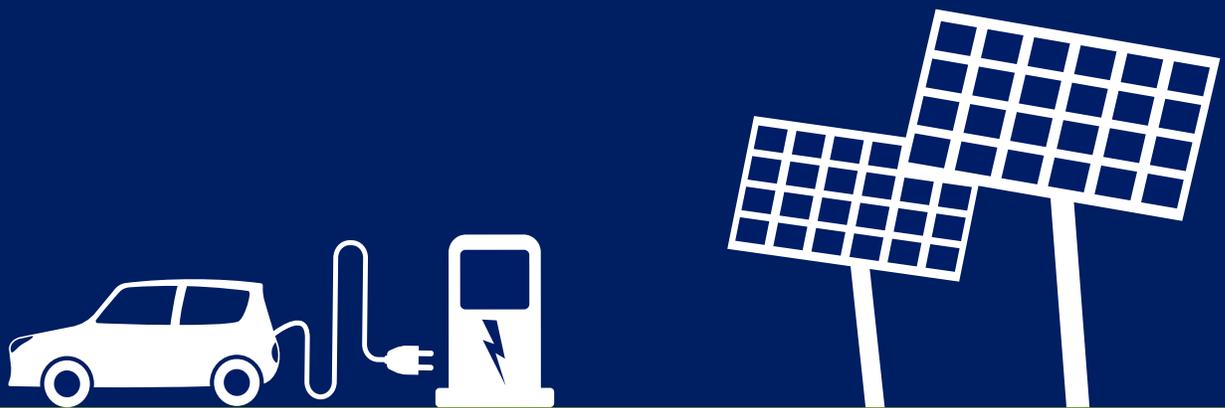


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