

Small Business Notes

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Senators Ask Federal Trade Commission (FTC) for Expanded Consumer Privacy Protection

On September 20, 2021, nine U.S. Senators (including Senator Amy Klobuchar of Minnesota) directed a letter to the Chair of the FTC encouraging that agency to initiate new rulemaking with expanded safeguards on the collection and use of consumers' personal information in transactions in the digital economy.

The letter noted that recent high-profile privacy violations have shown the limits of the FTC's current general prohibitions on unfair and deceptive practices in protecting personal information with the result that "Americans' identities have become the currency in an unregulated, hidden economy of data brokers that buy and sell sensitive information about their families, religious beliefs, healthcare needs, and every movement to shadowy interests, often without their awareness and consent."

The letter urged the FTC to initiate a rulemaking process with strong protection for the data of members of marginalized communities, prohibitions on practices like exploitative targeting of children and teens, opt-in consent rules for collection and use of data, and global opt-out standards.

Such an FTC rulemaking, the letter noted, would contribute to congressional efforts to develop federal privacy legislation through the research, public comment, and dialogue among interested and affected parties required in rulemaking under the federal Administrative Procedure Act.

DEED and the law firm of Lathrop GPM have published [A Legal Guide to Privacy and Data Security 2022](#) which provides substantial background on the privacy issue. The Guide is available to view online or to download.

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Does ESG Have a Place with Privately Held Small Businesses?

ESG refers to a set (most often different for each business) of environmental, social, and governance issues that can affect the current or future success of an individual business and, in the aggregate, affect business sectors, financial markets, and the macro economy.

Environmental issues can include all aspects of a business' effects to be a good steward of the natural order and to minimize the adverse effects and negative externalities of its business activities on the physical environment.

Social issues reflect the ways in which a business relates to, and interacts with, its employees, investors, vendors, distributors, customers, and the broader range of stakeholders and communities.

Governance issues include business leadership, board and management behavior, pay and compensation issues, and shareholder rights.

Together these drive business efforts in areas like sustainability, diversity and inclusion, and regulatory responses.

Historically, ESG has been applied in the context of large, publicly traded businesses through the required disclosures and reporting requirements of the U.S. Securities and Exchange Commission (SEC), and other agencies, which consider such disclosures and reporting as containing information "material" to decisions by investors. There is, however, considerable growth in voluntary reporting using standards developed by private standard setting organizations in response to pressure for more -and often more substantial - ESG disclosure applied by consumers, investors, banks, and other financial institutions.⁽¹⁾

But there is also the new recognition that ESG can will become an issue for small, privately held businesses. In a June, 2021, speech SEC Commissioner Allison Herren Lee noted that "...the perceived barrier between social value and market value is breaking down. This change is driven by investors, lenders, asset managers, and ultimately consumers, making it an essential consideration for every business, whether or not under SEC regulation."⁽²⁾

⁽¹⁾ "Mandatory disclosure of ESG matters remains grounded in materiality consideration and specific line item disclosure requirements, and the SEC has not mandated a uniform framework...in effect conceding this territory to a growing set of voluntary standard setters".

Holly J. Gregory, "Oversight of EESG Disclosures," *Transactions and Business*, Aug-Sept. 2021, p. 53.

⁽²⁾ Allison Herren Lee, "You Cannot Direct the Wind, But You Can Adjust Your Sails," June 28, 2021.

Available at <https://www.sec.gov/>

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The purpose, timing, and content of disclosures by a privately held company may be different than those made by a publicly traded business under mandatory disclosure regulation—if only because such privately held disclosures may not have as its main purpose the release of material information for investor awareness. (That said, information released in documents like private placement memoranda of financing statements and loan/credit applications will have to meet the standards of materiality.)

Instead, such disclosure may be for purposes like:

- Obtaining first mover reputation effects among consumers, lenders, and others as an organization committed to ESG goals.
- Incorporating ESG efforts into product branding and marketing.
- Identifying potential, complimentary products, markets, and strategies.
- Developing new areas of talent within the business.

Whatever the purposes of a privately held small business' disclosures and discussion of ESG, the following points should be kept in mind:

- ESG disclosures and discussions for a small business are a supplement to, not a replacement of, a business plan addressing business structure, operations, financing, competition and the like.
- ESG disclosures and discussions will vary in size, scope, and detail for each business.
- ESG disclosures and discussions should be accurate as to current situations and effects. Where aspiration goals are present, or efforts with future effect, the timing for implementation should be made clear.
- ESG disclosures and discussions should be vetted by the business' legal and financial team.
- There are models of the principles and metrics of ESG that can be looked at as food-for-thought keeping in mind that have been developed for mandatory or voluntary disclosures by publicly traded companies. For example, the Global Reporting Initiative has on its website examples of standards and resources (<https://globalreporting.org/standards>) and the SEC has in September released a sample ESG letter on climate change (<https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures>).

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U.S. Equal Employment Opportunity Commission (EEOC) Files First Lawsuit Under the Americans With Disabilities Act Over Employer's Denial of Remote Work During Pandemic

On September 7, 2021, the EEOC filed its first lawsuit under the Americans with Disabilities Act against an employer for allegedly denying an employee a reasonable accommodation under the Act, working part time from home and taking frequent breaks on the employer's site, that the employee had requested because her existing medical condition put her at high risk for contracting COVID-19. The case is *Equal Employment Opportunity Commission v. ISS Facility Services*, U.S. District Court for the Northern District of Georgia, Atlanta Division.

Ranisha Moncrief worked for ISS as a Health Safety and Environmental Quality Manager. On or about March 1, 2020, Moncrief became sick at work, experiencing fever, sweats, and an uncontrollable cough as well as shortness of breath and chest discomfort. She informed her supervisor and the facility manager and took two days off from work to seek medical attention.

On or about March 4, 2020, Moncrief was diagnosed with obstructive lung disease. Her physician recommended she work from home and take frequent breaks when working. The physician also completed the employer's ADA Reasonable Accommodation Request Medical Certification Form on which he wrote that Moncrief had limitations affecting her job performance, including coughing and shortness of breath.

Shortly thereafter ISS placed all its employees on a rotational schedule, because of the pandemic, which resulted in Moncrief working from home four days per week which did help Moncrief in managing her condition.

On or about June 1, 2020, ISS required all to staff to return to work at the facility five days a week. At that time Moncrief sought an ADA accommodation to allow her to work from home two days per week with frequent breaks while working on site at the facility.

Moncrief's request was denied around July 20th, 2020. Other managers were allowed to work from home.

Moncrief was terminated on or about September 11, 2020, for performance issues. The EEOC suit notes that Moncrief had not been informed of any deficiencies in her job performance and, rather, in the months leading up to her termination she helped increase employee training by more than 15 percent.

The suit asks that Moncrief be awarded back pay and punitive damages in amounts to be determined at trial.

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Past issues of Small Business Notes are available on the Department of Employment and Economic Development website at [Small Business Notes](#)

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