KILPATRICK TOWNSEND

3 KEY TAKEAWAYS

What Companies Can Do Now to Develop and Strengthen Their ESG Programs

In a recent seminar on "Environmental, Social & Governance (ESG) Elements and Legal Considerations" for the Charlotte Chapter of the Association for Corporate Counsel, Kilpatrick Townsend's Scott Marrah, Adria Perez, and Todd Roessler addressed essential strategies to help companies understand and navigate the myriad of ESG legal considerations.

Many U.S. companies anticipate that the U.S. Securities and Exchange Commission (SEC) will promulgate and implement mandatory non-financial or ESG-related disclosures in the near future. Even absent new rules, the SEC has increased its focus on climate change and ESG disclosures. In September 2021, the SEC published a sample comment letter forecasting comments that the SEC may issue to companies because of the absence of climate-related disclosures or if more information is needed based on the 2010 Climate Change Guidance. The sample letter can be found here. This sample letter, however, is not hypothetical; companies have started to receive information requests from the SEC related to climate change disclosures.

As companies await more certainty with regard to U.S.-mandated ESG disclosures, Scott, Adria, and Todd offer the following key points on how companies can use this time to develop and strengthen their ESG programs:

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Constructing & Enhancing ESG Program

- Begin forming the interdisciplinary team that is needed to guide the company's ESG journey, which should include both legal and compliance department personnel;
- Focus on material ESG risks and opportunities; not every ESG risk is material;
- Map out data sources that the company will rely on for ESG-related disclosures;
- Begin measuring ESG successes and monitor the company's progress over time using available benchmarks; and,
- Identify gaps in information or expertise and begin seeking those who can help.

Create Awareness & Strengthen Skill Sets

- Develop training and awareness for the Board of Directors and Executive Management on key ESG risks and potential legal exposure;
- Start engaging or building the skill sets of key departments on critical ESG risk topics for your company, including those in the internal audit, sustainability, human resources, communications and risk management departments; and,
- Understand from your external auditors what they plan to focus on with regard to ESG.

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Disclosures

- Legal counsel and compliance personnel should get involved early to vet both mandatory and voluntary disclosures (such as voluntary sustainability and CSR-related reports) and be aware that anything published by your company (including

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mandatory and voluntary disclosures (such as voluntary sustainability and CSR-related reports) and be aware that anything published by your company (including representations and statements by senior executives) can be scrutinized by third parties and create liability; and,

- Clearly state in the disclosures that certain statements are “aspirational” and not strictly factual.

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