

Morgan Lewis

ESG-What In-House Counsel Need To Know And Do In 2021

KEY TAKEAWAYS

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Why Care About ESG?

- Shareholders, shareholder advisory firms and other stakeholders (e.g. customers and employees) are increasingly holding Boards and companies accountable for addressing ESG issues
- Increase in ESG-related shareholder proposals for inclusion in proxies and ESG activist campaigns
- Buyers and investors are increasingly conducting ESG due diligence
- Increase in SEC regulation of ESG issues with the new human capital resources disclosure requirement and potential for further rulemaking in Biden administration
- Increase in federal and state legislation on ESG issues; perhaps more to come in 2021
- Keeping up with market/peer company practice

Where to Start?

- Assess stakeholder feedback
- Benchmark peer company practice
- Develop a strategy
- Get internal buy-in

Where to Disclose ESG?

- Company Website and Press Releases
 - Typical channels for companies to highlight their ESG achievements and commitment to their stakeholders, as well as to host ESG-related content, such as sustainability reports
- SEC Filings (Forms 10-K, proxy statements)
 - Be aware of the legal liability associated with information disclosed in an SEC filing
 - Many public companies highlight their ESG oversight frameworks or recent ESG achievements in their proxy statements, including ESG expertise represented on the board or executive team
- Social Media and Advertising
 - While both social media and advertising can be powerful tools to send an ESG message, care needs to be exercised to avoid misunderstandings and potential backlash

ESG Risk Areas

- Lack of measurability and reporting standards
- Litigation/activist campaigns from shareholders (alleged breach of fiduciary duties for failing to maximize profits); litigation over allegedly false or misleading statements concerning ESG commitments; activist campaigns from other stakeholders (e.g. consumers/advocacy groups)

- Increased SEC regulation (e.g., human capital)
- Increased federal and state legislation limiting board discretion or creating private rights of action

What's on the Horizon

- Increased push to a unified, global standard of ESG reporting
- Legislative and regulatory action based on President Biden's campaign promises (i.e., climate change) and recent leadership changes at the SEC
- Continued focus on diversity and inclusion
- Impact of COVID-19 on human capital management, economic fairness, and internal pay equity

Advising Boards on ESG

- Delaware law and focus on shareholders' best interest
- Consult with management and external advisors as needed, so that each director is prepared to reach an informed decision
- Document decision-making process in a way that protects the Board against claims that directors improperly allocated corporate resources to advance individual altruistic goals at the expense of shareholder value

Best Practices for Implementing an ESG Program

- Define ESG goals, KPIs and rating systems/metrics
- Engage with C-Suite/Board on ESG goals
- Prioritize the time and resources needed to support ESG goals
- Engage with other internal stakeholders, along with third-parties, advisors, shareholders and other stakeholders, on achieving ESG goals
- Communicate strategic importance of ESG goals with disclosure team
- Develop disclosure and reporting policies and procedures
- Consider forming ESG reporting and disclosure committee

For more information please visit:

[The GC Role in ESG? Leader. By Jeff Levinson](#)

[The Regulatory Overlay on ESG Investing](#)

Contacts

If you have any questions or would like more information on the issues discussed in this program, please contact any of the following:

[Carl Valenstein](#), Partner, Morgan Lewis, carl.valenstein@morganlewis.com

[Celia Soehner](#), Partner, Morgan Lewis, celia.soehner@morganlewis.com

[Jason Frank](#), Partner, Morgan Lewis, jason.frank@morganlewis.com

[Jeff Levinson](#), Vice President, General Counsel, and Secretary, NetScout Systems, Inc., jeff.levinson@netscout.com

Connect with us:   

www.morganlewis.com