



“Environmental, Social, and Governance (ESG) Fundamentals”

ACC SoCal Presentation
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Presenters:

Rick McNeil, Partner, Crowell & Moring LLP

Ellie Dawson, Counsel, Crowell & Moring LLP



Agenda

- **ESG Overview**
- **ESG In-House**
- **Intersection with Prop. 65**
- **“Safe Harbors”**
- **Enforcement Process**

ESG Overview

(It's not just “sustainability” anymore)

- Ephemeral-sounding, but real-world implications to business operations:
 - Environmental and social impacts of a company's supply chain and procurement activities (E/S);
 - The success of a company's efforts (or lack thereof) to transition to renewable energy or otherwise reduce its carbon footprint (E/G); and
 - A company's board ethics, compensation structures, and labor practices (S/G).
- Opportunity: demonstrate leadership in an industry
- Risk: spotlight existing financial, compliance, and reputational risks
- Challenge: quantifying companies' ESG assets and liabilities

ESG in the Biden Administration

All-of-government approach (to everything)

- Executive Office of the President
 - E.O. 14008 – Tackling the Climate Crisis at Home and Abroad
 - E.O. on Climate-Related Financial Risk: “(b) The Secretary of the Treasury shall: (i) direct the Federal Insurance Office to assess climate-related issues or gaps in the supervision and regulation of insurers, including as part of the FSOC’s analysis of financial stability, and to further assess, in consultation with States, the potential for major disruptions of private insurance coverage in regions of the country particularly vulnerable to climate change ...”
- SEC: ESG task force, enforcement review, disclosure rule evaluation
- Labor: won’t enforce anti-ESG investing rule for employee benefit plans
- FEMA: flood standard
- Congress: infrastructure legislation

ESG and In-House Counsel

Where to Start and Where to Go

- Where to Start – Risk Assessment
 - Operational Audit – Compliance, Policies, Media Strategy, Value Proposition
 - Supply Chain Audit
 - Downstream Audit
 - Climate Audit
- Where to Go – Compliance and Beyond
 - Measurable Goals, Unified Strategy, Value-Based Movement, Innovation
 - Dedicated Teams/Business Units (C-level, HR, Finance)
 - Board Policies
 - Voluntary Reporting, Disclosure Requirements
 - Budget



ESG and Prop. 65

- Some preliminaries, then the important question tying back to ESG
 - Hint: it is the last bullet point on the next slide ☺
- Proposition 65 (Very) Basics
 - 1986 Voter Initiative (written by plaintiff’s lawyers)
 - “Oversight” by OEHHA (within Cal-EPA) – and also courts
 - **Only** implicates listed chemicals (but about 1,000) designated by authoritative bodies
 - Requires warnings for exposure above “threshold”
 - Precious few defenses: *e.g.*, <10 employees, preemption, no exposure, 1st amendment
- Enforcement:
 - Public Prosecutors (Modest) and “Bounty Hunters” (Overwhelmingly Prolific)
- Periodic Amendments

ESG and Prop. 65

- Risk assessment determines if warning is required
 - For Cancer
 - “No significant risk level” (“NSRL”) assuming lifetime exposure at the level in question (1 in 100,000 excess)
 - For Reprotox
 - “Maximum allowable dose level” (“MADL”) assuming exposure at 1,000 below NOEL
- Ready for the Question?

“Safe Harbors”

Current	New
“This product contains . . .”	“This product can expose you to . . .”
No need to specify the chemical.	Must specify at least one chemical for which the warning is provided. If warning for both cancer and <u>reprotox</u> , must specify at least one of each.
No requirement for pictogram.	 or 

Sequence Of, And Offramps To, Enforcement

- 60-Day Notice
- Certificate of Merit
- Evaluation and Negotiation
 - Toxicity
 - Units sold
- Suit filed, discovery conducted
- Expert analysis of exposures and effects
- ***Burden of proof shifts from plaintiff to defendant***
 - Plaintiff need not prove injury
 - Defendant must prove absence of risk or exposure below “safe” levels – many such levels have not been established by OEHHA
- Settlement or Trial/Appeal

Monetary Components and Scenarios

- Civil Penalties
 - Up to \$2,500 Per Day (x Persons Exposed?) x (Number of Articles?) = ???
- Costs of Reformulation and/or Warning
 - Potentially Meddlesome Sticking Point
- Feasibility/Impact of Reformulation and/or Warning
- Blanket Warning The Panacea? (Not So Fast ...)
- Attorneys Fees and Costs
 - One Way, Not Two Way, Street
- Three Pre-Trial Resolution Scenarios (Principally, Payment to Plaintiff/Plaintiff's Attorneys)
 - No Payment (Infrequent)
 - Six Figures (Not Infrequent – but often there are harbingers)
 - Higher (Less Frequent)

Thank you!
We look forward to
***your* thoughts!**