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5 Best Practices For Attys Helping To Craft ESG Policies

By **Juan Carlos Rodriguez**

Law360 (August 20, 2021, 4:38 PM EDT) -- Law firms are handling more questions than ever about clients' environmental, social and governance policies, driven by mounting interest from investors and competitors as well as uncertainty about what the Biden administration may require of companies.

While ESG, as it's known, isn't a new concern for businesses or law firms, it has expanded in the past few years and become an increasingly important metric for investors, regulators and companies to track certain environmental and ethical aspects of industry.

As the topic increases in complexity and importance, attorneys must be ready to handle rapidly evolving client needs, Carl Valenstein, a partner at Morgan Lewis & Bockius LLP, said.

"What's changing is that, as we see a generational shift in terms of managing money — millennials are more interested in this; women, by and large, are more interested in this — we're seeing boards begin to shift from older, retired, white CEOs who are not really interested in anything other than bottom-line returns for stockholders [to those] showing more of an interest [in ESG issues]," he said.

And some mature public companies that have had their eye on this for some time are now stepping up their attention due to the shifts in both business and government spaces, Morgan Lewis partner Celia Soehner said. And companies that for various reasons have not spent a lot of time on ESG questions are now coming to firms with their own inquiries, she said.

"More so than at any time I've been practicing, we are getting a lot of questions from clients," she said.

The questions run the gamut from the basics: "What do we do with this? How do we start?'" to the nuanced: "'OK, we've been thinking about this for a long time, but what are some things that maybe we're not thinking about that are real risks to us?' or 'How do we think the playing field is going to further change and evolve? And how can we kind of best prepare for that?'" Soehner said.

Here, Law360 breaks down five best ESG practices attorneys should follow as they're helping clients.

Don't Get Ahead of Yourself

Some U.S. Securities and Exchange Commission rules that are currently in effect for ESG issues, like those requiring more detailed disclosure of workforce information, are vague and leave a lot of room for interpretation about what exactly to file, Soehner said. As a result, companies and firms advising them have to consider a variety of factors in determining what to disclose.

With rules regarding climate disclosures coming soon, it will remain important to keep an eye on the competition and be careful what makes it into a report, she said.

"From a risk management perspective, in year one, exactly how much information do we want to disclose? Do we want to get out of the gate and kind of be a first mover in terms of disclosure? Do we want to take a more middle of the road approach? Or do we want to just get a passing grade and see what everybody else did and re-evaluate the following year?" Soehner said. "It's about holding their hand, making sure that they're being thoughtful and deliberative about the process."

And as clients move from having aspirational goals to actually implementing commitments, the data has proven to be complex, Sarah Fitts, a partner at Schiff Hardin LLP, said. She adds that it's better to be cautious and safe than risk misinterpreting information and making statements that might not hold up under scrutiny.

"It's one thing to say that a board has approved a goal of reducing carbon emissions by 50% by 2030, and then actually proving that," Fitts said.

Public Statements Must Be Vetted

In addition to navigating disclosures to the government, companies must be careful about what statements they make to the public to avoid accusations of "greenwashing," Thomas Lorenzen, a partner at Crowell & Moring LLP, said.

Greenwashing refers to the practice of exaggerating the environmental benefits of a company's practice or product, and plaintiffs can sue over some misrepresentations. The Coca-Cola Co., for example, is facing claims it falsely markets itself as environmentally "sustainable" despite being the largest generator of plastic waste in the world.

Regulators, investors and others have become more savvy about greenwashing practices and are pressing companies to change through lawsuits, public relations campaigns or government actions, such as the Federal Trade Commission's Green Guides, Lorenzen said.

The Green Guides cover general principles that apply to all environmental marketing claims, how consumers are likely to interpret particular claims, how marketers can substantiate these claims and how they can qualify claims to avoid "deceiving consumers," the FTC said.

"You need to make sure that if you are making statements about your environmental attributes, that you can, in fact, back those up and that you follow the Green Guides appropriately," Lorenzen said.

Because companies are vulnerable to litigation over governmental and public disclosures, Valenstein said it's important to make litigators part of an ESG team. Trial attorneys can provide a crucial piece of the puzzle when it comes to helping clients avoid litigation traps as they craft public statements about their ESG practices, he said.

"While a lot of the cases that have been brought, citing whether it's materials in a sustainability report or something in the proxy, haven't survived motions to dismiss, the plaintiffs' bar is going to use this stuff," he said. "And so people need to be very careful, particularly if it's filed with the SEC ... that they're not making claims that they can't back up."

ESG Is a Team Effort

As clients demand more help on ESG issues, it's important that firms know what it takes to deliver good advice, Fitts said. A well-rounded group of attorneys who work in different areas and who have good communication with each other is key, she said.

"It's hard to deliver good ESG advice when firms don't have a well-rounded practice, because ESG is really a 360-degree review — it might be environmental, it might be employment, it might be supply chain," Fitts said. "So you really need to have a group of lawyers who can look at the problem from all directions."

And Lorenzen said it's important for attorneys who are seeing ESG questions coming their way to "be humble" about what they know and what they don't know about the issues, since by its nature ESG is a multidisciplinary endeavor.

"You need to know the limits of your knowledge and know when to seek the involvement of another attorney who may specialize in something completely different, such as advertising or media or labor and employment practices," he said. "ESG requires a recognition of where you need to seek help from others almost more than anything else I can think of."

Success Will Come From Investment

Despite the high demand from clients for ESG advice, the area isn't yet a solid moneymaker for firms. To establish a lasting foothold in the space, firms need to be willing to invest time and energy on ESG issues, Valenstein said.

Some clients may need education to realize the work they need to do in the space, and some clients might not have the legal budget for ESG expenses, he said.

"As lawyers, we like to be thought leaders, but we make our money from billing hours. And there's a ton of non-billable work and educating clients in this space," Valenstein said. "Clients are trying to figure out what they're going to want to do, and it doesn't necessarily result in an engagement. And that's the challenge for firms."

It's fairly widely accepted that ESG is a worthy investment because it's important work and is most likely here to stay, but firms may need to negotiate some sort of alternative billing arrangement while it remains a novel issue, he added.

"I think ESG work may ramp up gradually because a lot of this turns on just how vigorous enforcement is," Valenstein said. "A lot of legal spend is in direct correlation to enforcement."

Lorenzen adds that when lawyers started working in the ESG area, there was some head-scratching about whether there were legal issues even involved, and whether firms ought to be involved in the space.

"I think the answer is only now emerging, and it's yes, absolutely," he said.

Focus on Client Practices

As attorneys are counseling clients on ESG, there are some important questions to ask that may help companies improve both their data-gathering and reporting processes, Lillian Tsu, a partner at Hogan Lovells LLP, said.

She said in-house legal and finance teams are often focused on financial reporting but that they, just like law firms, need to expand the scope of people working on ESG matters.

"We tell them, 'Here are the various people within your organization who probably are gathering this data,' and then they find that they have a lot more ESG data than they were aware of," Tsu said.

"And so it really is kind of broadening the idea of who will be funneling information into the public filings and then putting processes in place so that that ESG information is vetted and validated in a way that is similar to the financial metrics that legal and finance teams are used to reporting every quarter," she added.

For example, Tsu said companies often perform annual risk management assessments, and things like environmental risk, social risk and governance risk can be flagged within those, although they may not be categorized as ESG specifically.

So it's a good idea for companies to develop an idea of what they believe to be material facts and circumstances and round them up to discuss in the context of reporting or making a public statement, she added.

But again, companies must keep in mind what they can back up.

"If you're setting goals, do you have a strategy and plan in place to achieve those goals before you start disclosing them?" Tsu said. "You need to make sure there are procedures in place for when people start asking how you intend to meet those goals."

--Additional reporting by Al Barbarino, Clarice Silber and Dave Simpson. Editing by Philip Shea.
