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Session 802

ESG CROSSOVER ISSUES FOR ALL LAWYERS IN THE LEGAL DEPARTMENT



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EXECUTIVE SUMMARY



ESG Crossover Issues for All Lawyers in the Legal Department

MODERATOR:

Dorothy Capers, *EVP, and Global General Counsel*, National Express Group

PANELISTS:

- **Jill Louis**, *Office Managing Partner*, Perkins Coie, LLP
- **Petrina McDaniel**, *Partner*, Squire Patton Boggs (US) LLP
- **Kahlil Williams**, *Partner*, Ballard Spahr LLP

OVERVIEW

Environmental, Social, and Governance factors (“ESG”) are non-economic criteria used to evaluate corporate social responsibility and environmental sustainability at public companies. Public pressure and investor influence have already advanced the ESG agenda, and now governments are also prepared to get involved.

A panel of attorneys with ESG expertise shared their thoughts on these issues that affect the future of corporate ESG activity. The discussion included a preview of possible regulations, as well as advice on aligning policy and reporting practices with potential requirements.

KEY TAKEAWAYS

Market forces are accelerating the adoption of corporate ESG values and metrics.

A combination of social pressure and fiscal realities is moving corporations away from the sole priority of shareholders toward a worldview considering broader stakeholders. This new dynamic looks beyond revenue to measure ESG values that include climate responsibility, representative diversity, and the fair treatment of human capital.

Institutional investors are now prioritizing non-financial ESG benchmarks along with bottom lines when constructing portfolios. Favoring businesses with progressive ESG credentials is good public

BIG IDEAS

- As companies move from a shareholder to a stakeholder perspective, ESG is becoming increasingly important.
- Internationally, ESG policies and metrics may become mandated by regulation.
- Companies must prepare to set measurable ESG goals and communicate performance, which will involve multiple functions, especially legal.

policy and a solid investment strategy. Companies that take this approach are better positioned for sustainable success.

BlackRock CEO Larry Fink sets market trends via his public letters and enforces them with the backing of \$9 trillion in managed assets. A recent communication stressed climate measures and racial inclusion as business and investment imperatives, creating a ripple effect.

“Capital will increasingly be allocated to companies with the most sustainable business models.”

— *Petrina McDaniel, Squire Patton Boggs (US) LLP*

Consumer expectations exert a similar influence. Recent social movements have drawn greater attention to systemic racism and environmental sustainability, forcing consumers to assess the policies of their preferred brands. The next generation is buying with social consciousness in mind.



“After the murder of George Floyd, consumers started to think more about spending their dollars on companies that are trying to do the right thing.”

— *Kahlil Williams, Ballard Spahr LLP*

As a result of this pressure, good corporate citizenship has evolved from a talking point to a legitimate business position. In addition to expanding investment and consumer appeal, assuming responsibility for a broader spectrum of stakeholders expands fiduciary duty. Corporate lawyers should be aware of this development and the obligations involved.

The international regulatory outlook suggests that ESG policies may soon be a requirement rather than a choice for companies and their boards.

ESG values that entered the business arena as public relation concessions have gained momentum to shape market rules and increasingly affect regulations. NASDAQ recently required listed companies to publicly disclose boardroom diversity and appoint at least two diverse directors—or explain their non-compliance. The SEC approved this NASDAQ provision, and in March 2021 set up a Climate and ESG Task Force, formally establishing social measures as a priority agenda item.

The EU considers climate concerns more urgent than social issues. That focus produced the Sustainable Finance Disclosure Regulation (SFDR), which imposes climate-related disclosure requirements on asset managers. Separately, the international Task Force on Climate-related Financial Disclosures (TCFD) has established similar reporting guidelines for companies. In 2021, the UK made climate disclosures mandatory, while encouraging emission reductions by offering companies preferential consideration for government contracts. (This combined a stick and carrot approach.) This approach might appeal to American lawmakers.

Having led the way on data privacy concerns, the EU may similarly be at the forefront of ESG requirements, offering a possible model for the United States. In fact, US companies with European operations will be forced to establish ESG reporting mechanisms that could be put into effect in US operations as well.

Ideally, businesses would do the right thing without the need for rules, but laws can supply the motivation to make changes. Regulation can serve as “permission” to establish preferred policies without sacrificing a competitive edge.

“Just as with Upton Sinclair’s *The Jungle*, public forces and laws can level the playing field and compel businesses to make social improvements.”

— *Jill Louis, Perkins Coie, LLP*

Companies must prepare their teams to set measurable goals and communicate the advantages of corporate ESG actions.

To meet the demand for ESG awareness and prepare for impending regulations, corporations are advised to put mechanisms in place to efficiently implement policies and meet reporting requirements. Steps include:

- **Designate a quarterback.** Select a point of contact to own the internal ESG functions and lead the teams. This leader should pull relevant information together for senior management reports to ensure that issues are flagged, measured, and prioritized.
- **Perform ESG audits.** Corporations should conduct internal reviews assessing their current ESG policies, deficiencies, and priorities. These evaluations can determine which ESG aspects are most relevant to the company (it might be “E” for an energy company and “S” for a media entity) and the right metrics for recording and reporting progress.
- **Establish a wide view.** Risk assessment must go beyond internal operations. Comprehensive awareness requires surveying all supply chain elements, vendors, and business partners to uncover pitfalls at the enterprise level.

“The formal risk assessment or auditing has to go beyond just internal operations and look down into the company’s business partners to rate the risk and understand how they interrelate at the enterprise level.”

— *Petrina McDaniel, Squire Patton Boggs (US) LLP*

- **Put your money where your values are.** A demanding consumer environment reinforced by inevitable SEC scrutiny calls for ESG policies that are real and effective. The time for meaningless “glossy” presentations is over—it is critical to involve the C-suite and motivate the entire workforce by tying evaluations, bonuses, and promotions to ESG and DE&I success.



“Structure may matter less than commitment.”

— *Kahlil Williams, Ballard Spahr LLP*

Achieving and reporting ESG gains will be essential to controlling the narrative. Demonstrating the positive financial and social impacts of these policies can reassure the public and investors and appease regulators.

“Tone at the top is important. You need ESG expertise woven into the C-suite level and the CEO banging the drum. There has to be a clear vision of how management and leadership are integrating ESG considerations into the business strategy, and how these activities are measured.”

— *Petrina McDaniel, Squire Patton Boggs (US) LLP*

Public companies face heightened litigation risks for promising too much ESG activity or delivering too little.

Without well-defined ESG regulations, companies stay safe from harsh enforcement actions, but legal exposure is rapidly expanding on two fronts: shareholder actions for untrue ESG statements, and prosecution for the failure to disclose known ESG risk factors.

The height of the Black Lives Matter movement put a spotlight on equity issues that forced companies to defend their records on diversity. This attention produced a host of shareholder derivative actions for misrepresentations related to diversity and inclusion efforts. The suits were undone by glaring legal deficiencies, but the plaintiffs did not file to win. Instead, they sought to nudge (or shame) companies and start a shareholder conversation about corporate diversity while drawing attention to those businesses whose ESG actions were noticeably absent despite their proclamations.

“Activist shareholder lawsuits aren’t meant to be won; they’re meant to shame companies into doing better. Bad press and reputational harm force companies to evaluate their record on diversity and make positive changes.”

— *Petrina McDaniel, Squire Patton Boggs (US) LLP*

In the meantime, the SEC is stepping up investigations into companies that do not fully announce known ESG risks. Especially when it comes to human capital management, the SEC is showing little tolerance for annual reports that claim positive workplace practices while the facts suggest otherwise. The SEC is signaling that intentional omissions or misrepresentations of such ESG matters will constitute material misstatements. Companies need to carefully align their messaging and facts on ESG issues. Overstating achievements or underreporting risks creates legal exposure.

“Disclosures need to be more fulsome. They cannot be puffery. They cannot be sort of broad or aspirational, but what concretely is being done.”

— *Jill Louis, Perkins Coie, LLP*

An evolving ESG landscape makes legal responsibilities uncertain but adhering to core principles will best serve clients.

The rise of ESG awareness is an opportunity to improve business practices. Rather than avoiding accountability, the most ethical and effective path is to implement ESG practices and make positive changes. Diversity improves the bottom line while sustainability saves the planet. The strongest defenses to potential litigation are sincere efforts and honest statements.

Boards should be diverse and include directors supportive of ESG practices. Messaging should accurately reflect achievements, and disclosures should honestly describe policies. Metrics and data should document and communicate successes. The best way to keep shareholders and regulators at bay is to keep them happy—even better when those practices serve the workforce and customers.

At the same time, attorneys must continue to protect clients in the courtroom and public arena. Internal due diligence is critical for finding all ESG issues and discrepancies that could lead to liability down the road. Plaintiffs doing their own research, and shareholders demanding access to books, will ultimately uncover all dirt. Clients should assume it will be aired publicly.



“As legal departments, you are called to protect the brand. In protecting the brand you want to make sure that you have not left your company vulnerable to be called out.”

— Dorothy Capers, National Express Group

Legal departments should examine material such as company books, records, board minutes, social media feeds, political contributions, and supply chain affiliations to be aware of any issues that might arise and preemptively manage disclosures and statements accordingly.

Meaningful ESG progress and honesty are ultimately the best policies for companies and legal teams. Coordinating this message across the boardroom, compliance, public relations, litigation team, employees, and the public is sound advice legally, morally, and fiscally.

BIOGRAPHIES



MODERATOR

Dorothy Capers

*EVP, and Global General Counsel,
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Dorothy G. Capers is Executive Vice President and Global General Counsel of National Express Group. Dorothy oversees a diverse legal team across North America, Europe and the Middle East in the areas of contracts, corporate governance, employment, labor, litigation, compliance, environmental and real estate. Prior to joining National Express, Dorothy was Associate General Counsel for US Foods, Inc. There she was Chief Litigation counsel and led the Litigation and Bankruptcy teams. Before joining US Foods, Dorothy served as a litigator in the state, county and local government, as counsel at Metra Railroad and in a private law firm. Her government experience includes her leadership as Deputy Corporation Counsel with the City of Chicago and a prosecutor for the Cook County State’s Attorneys Office. Dorothy earned her J.D. from Howard University and her B.A from the University of Illinois. She sits as Board Secretary of the Chicago State University Foundation, Board Secretary to Illinois Equal Justice Foundation and a Board Affairs Committee member for Children’s Home and Aid. Dorothy is committed to philanthropic efforts to aid families in low income communities. Dorothy is married to Steven Capers and the proud mother to Mariah and Mackenzie.



Jill Louis

Office Managing Partner, Perkins Coie, LLP

Jill Louis advises companies with growth-oriented, liquidity-creating, and transformational strategies. Her experience includes leading strategic transactions for entrepreneurs, private equity sponsors, and portfolio companies, as well as members of the Fortune 50® with a particular emphasis on the intersection of technology and infrastructure, multi-location retail, transportation, manufacturing, and industrial sector matters. Additionally, Jill served as general counsel for a large private equity portfolio company with over \$1 billion in annual revenue, operating heavy duty parts distribution and service locations in 45 states. She also served as general counsel for a multinational shared workspace company with \$600 million in revenue and operating both owned and franchised locations in all 50 U.S. states, Australia, Brazil, Canada, England, France, and Mexico. For over a decade, she led the transactions group for the retail operating company of a global courier delivery service, managing commercial and technology transactions in North America and Asia and launching the same-day transportation delivery service. Active in both her professional and personal communities, Jill is a member of the board of trustees of Howard University. She also serves on the executive committees of the AT&T Performing Arts Center and North Texas Public Broadcasting, Inc. (KERA/KXT).

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Petrina McDaniel

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Petrina McDaniel is a Partner in Squire Patton Boggs’ Litigation & Data Privacy departments, and co-leads the Firm’s TCPA Class Action team. As a high-stakes litigator and Certified Information Privacy Professional (CIPP/US), Petrina leverages creative advocacy and strategic focus to tackle her clients’ thorniest problems and competitive risks to resolve company-critical litigation that affects her clients’ short and long-term business objectives. She has successfully defended complex cases and class actions with potential billions in exposure in state and federal courts across the country, including consumer privacy class actions, fraud cases, contract disputes, and regulatory investigations. Petrina has built a nationally recognized litigation practice under the Telephone Consumer Protection Act (TCPA), and has served as lead counsel in scores of individual and class actions across the country. Petrina’s record of accomplishment of securing dismissal of individual and class claims and negotiating favorable settlements has earned her recognition as a seven-time Super Lawyers’ “Rising Star” in Business Litigation and Class Action Defense, America’s Top 100 High Stakes Litigators, American City Business Journal’s “BizWoman Headliner, and a Best Lawyers in America designation, among other honors. In an issue of first impression in the Eleventh Circuit, Petrina recently secured a first-in-nation ruling, creating precedent-setting law.

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Kahlil Williams

Partner, Ballard Spahr LLP

Kahlil Williams is a partner in the Litigation Department at Ballard Spahr LLP, where he represents clients in government and internal investigations, securities and corporate governance litigation, and complex commercial litigation. Kahlil leads the Firm's Black Lawyers Group at Ballard Spahr, and is the co-leader of the Firm's ESG Working Group and its Racial Justice and Equality Initiative. Kahlil concentrates his pro bono efforts on voting rights and elections, serving as co-counsel with the NAACP Legal Defense & Educational fund on litigation to end prison-based gerrymandering in Pennsylvania, and working with the Lawyers' Committee for Civil Rights, Fair Fight, and the Brennan Center for Justice on voting rights issues. Kahlil received his J.D. from Columbia Law School in 2011, where he was a Harlan Fiske Stone Scholar and a senior editor of the Columbia Law Review. He received his M.A. in Political Science from the University of Pennsylvania in 2004, and his B.A. in Political Science from Penn State in 2001. Prior to joining Ballard Spahr in 2018, Kahlil was a litigation associate at Davis Polk & Wardwell in New York City. Kahlil lives in Philadelphia with his wife, Ashley Bryant, and his two daughters, Riley and Ellison.

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