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The 3 Biggest Unanswered Questions About ESG

By **Juan Carlos Rodriguez**

Law360 (March 10, 2022, 9:37 PM EST) -- Clients' continued clamoring for clear guidance on how best to face the dizzying array of possible environmental, social and governance exposures has forced law firms and attorneys to navigate uncharted waters to deliver timely, salient advice.

The volume and complexity of ESG work continues to escalate as law firms face questions about how best to develop interdisciplinary practice areas, where and how new regulations and policies are taking shape, the proper role for outside consultants and, of course, where the greatest risks lie for clients.

"It's not just one area, and we all need to work together in this evolving space," said Betty Huber of Latham & Watkins LLP, who co-chairs the firm's ESG practice.

Here, Law360 breaks down three of the biggest unanswered questions about ESG.

How Should Law Firms Structure and Increase ESG Practices?

Law firms have taken different approaches to building ESG proficiency, such as designating certain partners as leaders and ensuring there are knowledgeable professionals in practice groups across the firm. Huber said the matter is complicated by the fact that different clients have different values and want different things.

"It's about assembling the right team and giving them the white-glove service that fits their strategy and mission best," she said.

Sarah Fortt, another Latham & Watkins partner and the other co-chair of the ESG group, said key differences distinguish lawyers who make ESG a core part of their practice from those in more established areas of law. While the second group may handle developments in their areas a couple of times a year, there are nearly daily developments in the ESG realm, Fortt said.

"Being an ESG lawyer is effectively like having a little piece of every practice area at the firm and trying to manage that across a playing field where there are all different types of rules and standards, from actual regulation to soft law to current trends."

Law firms must find the right way to expand into the ESG arena when there isn't yet a "right" way to do so, Huber and Fortt said, so looking to clients for guidance to help navigate the unknown is key.

Fortt added that while many people are focused on the climate aspects of ESG — the current hot topic — firms must also be aware of the growing number of other aspects.

"There's a growing appreciation for the complexity of ESG and the fact that we're not just trying to solve for climate change, which would be difficult enough to tackle, but we're trying to do that in a just and equitable way, and what does that look like from a global perspective and who needs to have a seat at the table?" she said.

Where Are the Biggest Enforcement and Litigation Risks?

One of the biggest areas of uncertainty for everyone paying attention to ESG is how the regulatory landscape will develop — what kinds of rules will be imposed and how will they reflect the input of interested parties.

People are rightly focused on the U.S. Securities and Exchange Commission, which is working on a proposed climate disclosure rule, but there are many other regulators and entities attorneys should have their eyes on, said Kimberly Jaimez, a partner at Pillsbury Winthrop Shaw Pittman LLP.

For example, the California State Legislature is currently considering the Climate Corporate Accountability Act, which would require U.S.-based companies that do business in California and generate over $1 billion in gross annual revenue to disclose all of their greenhouse gas emissions to the California Secretary of State's Office. That bill has passed the state Senate and is being debated in the Assembly.

And there are many other fronts to be aware of, Jaimez said. In New York, the state Legislature is considering the Fashion Sustainability and Social Accountability Act, which requires fashion retailers and manufacturers to disclose environmental and social due diligence policies. Abroad, laws and regulations may differ or even contradict U.S. rules and present issues for international companies, she added.

And then there are independent standard-setting organizations, such as the Climate Disclosure Standards Board and the Value Reporting Foundation, Jaimez said.

Clients are already rightly worried about enforcement, even without clear SEC guidance or laws having been passed, said Kevin B. Muhlendorf, a partner at Wiley Rein LLP. There are still ways for regulators to get at ESG issues through enforcement efforts or litigation, such as pursuing "greenwashing" claims, in which companies are accused of misrepresenting their environmental efforts, which can take a multitude of forms depending on the business.

"My concern is that enforcement is not going to wait" for the SEC rule, Muhlendorf said. "They've created an enforcement task force for ESG issues. They're going to bring cases, and I think it'll be really interesting to see if the SEC does a little bit of its own greenwashing. And by that I mean, bring an action against some penny stock company and claim that that's an ESG case when really it's just a fraud case."

What's the Proper Role for Data and Consultants?

Another gray area is how much law firms and their clients should depend on the growing number of ESG consulting firms, a crop of businesses often focused on ESG data to help provide accurate information to ensure compliance.

With the availability of consultants who can help businesses collect their data, existing and prospective clients might wonder if they need a law firm's help at all with ESG matters — so it's crucial for law firms to establish their value in the process early, Jaimez said.

"The purpose is the privilege," Jaimez said. "To the extent that a business wants to do a deep dive into ESG assessments, let's say ahead of a big merger or a big transaction, and they want to assess the target's profile, they are going to want to be able to have a law firm involved to help bring in the privilege. If you just have a consulting company, that's not going to help."

She said the same is true if a company wants to do a supply chain audit, a civil rights assessment or a racial equity audit — all of which fall under the ESG umbrella.

One possible solution is for consultancies and law firms to team up, Jaimez said. Some are already doing that, pitching clients together on what their combined services can provide, with lawyers doing the deep analysis of how the data fits into reporting and other regulatory requirements, presenting the findings to the board or whoever's engaged and providing recommendations.

"We're seeing consultancy firms and law firms pitch clients together and help them understand, here are the consultancy capabilities to really do the data analytics and analyze that, and then here are the attorneys to bring in the privilege so that some of this analysis can come under the privilege, right, or whatever amount that you decide," she said.

--Additional reporting by Tom Zanki. Editing by Karin Roberts.
