Westlaw Journal

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Litigation News and Analysis • Legislation • Regulation • Expert Commentary

VOLUME 38, ISSUE 13 / DECEMBER 26, 2018

WHAT'S INSIDE

SPECIAL REPORT

Westlaw Journals is pleased to provide subscribers with a year-end special report offering a comprehensive look at trends, updates and strategies for the ever-changing legal industry.

This special report includes insights from legal thought leaders and spotlights current issues and challenges facing attorneys in areas ranging from technology to legal procedures to business practices.

Included are pieces on diversity in the legal profession, compliance technology's influence on e-discovery, law firm recruitment, a discovery pilot project, opioid addiction in the legal community, and updates and guidance on cybersecurity and privacy law.

The report also includes analysis of legal marketing and social media; the #MeToo movement's effect on governments, law firms and other employers; and a Q&A with the director of the Private Environmental Governance Initiative at the Environmental Law Institute.

We trust readers will find this collection of expert articles helpful in keeping up with a continuously evolving profession. We plan to bring you a special Supreme Court report in summer 2019.

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Westlaw Journal Automotive

Published since November 1981

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Westlaw Journal Automotive
(ISSN 2155-7012) is published biweekly by Thomson Reuters.

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TABLE OF CONTENTS

Managing ESG disclosures: Q&A with Cassie Phillips of the Environmental Law Institute

Nearly 15 years ago Kofi Annan, then secretary-general of the United Nations, invited the CEOs of 55 leading financial institutions to discuss how to integrate environmental, social and governance factors into investment decisions.

The initiative's culminating report, "Who Cares Wins," recommended using ESG information to actively manage risks and opportunities related to emerging environmental and social trends and increasing public expectations for corporate governance and accountability.

While institutional investors initially resisted broadening their fiduciary duty beyond the maximization of shareholder value, they have embraced the use of ESG information as evidence has proven the financial implications of such issues, Forbes reported July 11.

Thus, the conversation around ESG disclosures — company information serving the dual goals of transparency and corporate social responsibility — has transitioned from one focusing on whether to disclose to one focusing on how to disclose.

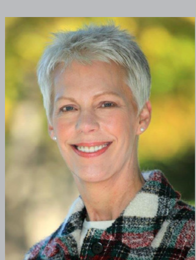
A coalition of investors, academics and organizations on Oct. 1 petitioned the U.S. Securities and Exchange Commission to undertake notice and comment rulemaking to develop a comprehensive framework that will ensure the relevance, reliability and usefulness of ESG disclosures.

Thomson Reuters recently spoke with Cassie Phillips, director of the Private Environmental Governance Initiative at the Environmental Law Institute, about a less prominent, but equally important, aspect of ESG disclosures: legal risk.

Thomson Reuters: What is driving ESG disclosures?

Cassie Phillips: Companies are responding to a demand for information from customers, investors, employees and others about how they manage the risks around ESG issues.

ESG-related disclosures used to be simple: They were either mandatory — such as submitting toxics release inventory data to the Environmental Protection Agency or posting recordable incident data under Occupational Safety and Health Administration requirements — or truly voluntary — such as reporting on corporate philanthropy or social responsibility programs.



Cassie Phillips is a visiting scholar serving as the director of the **Environmental Law Institute's Private Environmental Governance Initiative**, which focuses on the legal and policy aspects of voluntary standards and ecolabels. Prior to joining ELI, she was vice president of sustainable forestry at Weyerhaeuser Co. and was responsible for strategies to address global environmental and regulatory issues. Phillips has a J.D. from the University of Washington and can be reached at phillips@eli.org.

Today, there's a huge increase in ESG disclosures falling somewhere in between: not legally required, but also not avoidable, at least for major companies.

TR: What are some of the trends in ESG disclosures?

CP: The biggest trend in ESG issues in general is the emergence of what we at ELI call "private environmental governance," that is, companies taking on regulator-like roles.

The private governance trend comes out of the growth in global supply chains. The best-known example comes from the apparel sector as Nike and other companies, beginning in the 1990s, grappled with the risk of poor labor standards in developing countries.

The companies couldn't point to government regulation in these countries as their "proof point" for good practices. And labor and human rights activists wouldn't settle for petitioning an unresponsive government to address their concerns. So, the issues came back to the companies to address through their supply chains.

"The biggest trend in ESG issues in general is the emergence of 'private environmental governance,' that is, companies taking on regulator-like roles."

Since that time, leading companies across multiple sectors have welcomed the idea of establishing reasonable global norms for good behavior — as long as their competitors have to meet them, too. That understandable desire for collective action brings antitrust law to bear and leads to voluntary standards developed through formal processes.

The antitrust risks can come as a surprise to someone used to thinking about ESG issues only in the context of government regulation. That's because petitioning the government over the passage or enforcement of laws is immune from antitrust liability under the *Noerr-Pennington* doctrine, no matter how brutal the outcome's effect on competition.

So the subject may never come up. But once a business, organization or sector turns away from government and decides to regulate itself, the immunity is lost, and the issues and processes must be managed carefully to comply with antitrust law.

This isn't as scary as it sounds: The law favors voluntary standards, which have a long history, especially in technical areas. But the competition risks must be managed, starting with process: Ideally, a proponent engages an independent, accredited standards development organization, which in turn uses balanced (preferably multi-stakeholder), inclusive processes to develop a voluntary consensus standard.

Turning to substance, several different strategies for ESG standards have emerged, one of which is to focus on disclosures. A disclosure-based standard raises fewer competition issues because it presumably avoids any specific agreement to constrain behavior and instead makes consistent information available to customers, investors, regulators, etc., ideally enhancing competition rather than restricting it.

TR: How have ESG disclosures affected businesses?

CP: Businesses face an ever-increasing demand to disclose ESG information and increasing scrutiny of that information. Some is mandatory, of course: Public companies in the U.S. must meet SEC requirements to disclose material information, ESG or otherwise.

Some is from the explosive growth in voluntary ESG standards and ecolabels, including voluntary consensus standards, proprietary standards and government standards, many of which are disclosure-based.

> "Leading companies across multiple sectors have welcomed the idea of establishing reasonable global norms for good behavior — as long as their competitors have to meet them, too."

In addition, 93 percent of the world's 250 largest companies, according to KPMG, voluntarily publish annual sustainability reports. Plus, companies receive private requests for ESG information from customers, investors, nongovernmental organizations, local communities and others.

Companies should also recognize advertising and marketing claims as a form of ESG disclosure, if they relate ESG information to products or use it for overall corporate branding.

It takes a lot of work for businesses to respond well to these demands for information, and one of the virtues of an annual sustainability report is it provides one set of consistent information.

It also provides a framework for the internal governance processes needed to collect consistent data across businesses and manufacturing sites, exercise quality control, normalize the data, roll it up and present it.

Some standardization is occurring: Most companies use the Global Reporting Initiative's voluntary standards for sustainability reporting and many of the reports are verified by third parties. Several other reporting frameworks are relatively well known, including that of the Sustainable Accounting Standards Board and the Carbon Disclosure Project.

TR: How should in-house legal departments be involved in managing ESG disclosures?

CP: It's essential that companies manage the risks around ESG disclosures, with accountability starting with the board and senior executives, including the general counsel.

93% of the world's largest 250 companies publish annual sustainability reports

Data source: The KPMG Survey of Corporate Responsibility Reporting 2017

One of the biggest challenges for the general counsel, though, is that the issues cross legal disciplines and the client's need for advice will cross organizational lines, including both business and staff groups. The issues can easily fall through the organizational cracks.

For example, many of the processes I've touched on call for expertise in business law: antitrust for employees sitting at standards tables; consumer or advertising law for those developing marketing claims; securities law for those doing SEC filings and responding to investor requests; contract law for those responding to customer questionnaires.

But the expertise on the substantive issues underlying a call for disclosure will probably lie elsewhere, with environmental, labor and other lawyers who focus on greenhouse gas emissions, energy efficiency, chemical use, labor, human rights standards, etc. How does the law department ensure an integrated review?

A more practical question is whether ESG disclosure issues find their way to the law department to begin with. A business client will recognize certain triggers for legal advice: a rulemaking announced, a permit needed, a company report due.

But a company can make ESG disclosures in myriad ways, far beyond its formal reporting: A plant manager fills out a customer questionnaire; a public relations professional responds to a Facebook comment; a scientist publishes a research paper; a manager responds to an auditor's request for documentation; a marketing manager tweaks a product brochure.

It isn't practical (and wouldn't be welcome) to expect a law department review in advance of all ESG disclosures. But the law department should be closely involved in designing the alternative internal governance processes to ensure that the company's ESG disclosures are deliberate, precise and accurate, will stand up to scrutiny, and will reflect well on the company's reputation. WJ