CORPORATECOUNSEL
The Business Magazine for In-House Counsel
corpcounsel.com | April 13, 2021

How CLOs Can Help Boards Prioritize the 'S' in ESG

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By Michael W. Peregrine

As corporate boards seek a governance response to burgeoning social responsibility pressures, their chief legal officer can serve as an important resource towards a solution.

The recent controversy on corporate support for voting rights protection is the latest in a growing number of social impact issues that have been raised as part of broader "ESG" focus. These are issues—the "S" in "ESG"—to which boards, attentive to the interests of a broad range of stakeholders, must give close consideration. Yet the sheer number of these issues, the magnitude of their potential impact and the form of a proper corporate response, threaten to overwhelm the board's ability to process and prioritize the concerns. The CLO, in her role as both technical legal expert and corporate counselor, is well suited to guide the board in its related efforts.

As with other core ESG concerns, these apply in most interests across industry sectors and to private and nonprofit corporations as well as public companies.

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In the earliest stages of the corporate purposes/ESG movement, frequently identified examples of social impact included those associated with recognized elements of public welfare. These include, but are not limited to matters of (1) individual financial stability; (2) community economic development and opportunity; (3) job training and skills enhancement; (4) resilience from natural disaster; (5) diversity and equitable labor relations; (6) personal wellness; and (7) increased access to the basic needs of life (e.g., food, shelter, transportation).

More recently, however, these have been joined by elements of social impact more closely aligned with economic equality and social justice causes. These include (1) gender equity (e.g., "glass cliffs" and "glass ceilings"); (2) income equality/living wage; (3) workplace safety/employee health; and (4) the interests of underrepresented communities.

With the recent presidential election, transition and inauguration have come social causes more directly associated with corporate citizenship, preservation of democratic principles and the peaceful transition of presidential power.

And now comes the matter of voting rights for underrepresented communities, with the laudable effort of leading Black executives to publicly oppose voting rights legislation that would restrict the rights of Black voters, and to use their reputations, financial resources and lobbying capabilities consistent with that opposition. Advocates were contrasting the willingness of corporations to make public statements of support for the racial justice protests of 2020, and for gender and bathroom access, with their alleged initial unwillingness to confront critical voting rights issues.

All meritorious causes, no doubt. All supportive of the public good. All consistent with the goals and objectives of corporate social responsibility. But perhaps a bit overwhelming to the board in terms of the sheer number of elements, their compatibility with the company, and the commitment required for their implementation. How should their merits be analyzed? How to prioritize their consideration? How to balance them with operational concerns? How much effort is sufficient for the goals intended? When is an issue too controversial? What, ultimately, is the board's role here?

The CLO, in her role as both technical legal advisor and "wise counselor" to the corporation and its board, is uniquely well situated to offer governance solutions, consistent with the principles of ESG and the themes of emerging regulation, by which the board can identify social issues most appropriate for corporate consideration. These qualifications are buttressed by the CLO's ability under the Professional Rules of conduct to incorporate "moral/social" perspectives within the context of her legal advice to the client.

The most obvious governance solution would be to form an ESG-specific board committee or subcommittee, in order to support the board in discharging its oversight duties for the entirety of social responsibility initiatives that are relevant to the organization. The primary activity of the committee/subcommittee would be to provide guidance to the board on these issues and to monitor the development of the company's policies on social responsibility. A growing number of companies have followed this approach, most recently **Tenet Healthcare Corporation**.

Such a committee/subcommittee would likely advise the board on such issues as (1) the scope of its commitment to broader corporate purposes/the linkage between profit and purpose; (2) the a company-wide definition of ESG; (3) an intake mechanism on emerging social responsibility issues; (4) evaluation of which social responsibility risks and initiatives offer strategic benefit to the company; (5) coordination of social responsibility initiatives with the broader business strategy of the company; (6) internal and external messaging and disclosure; (7) emerging state and federal disclosure and other legal obligations; and (8) effective board level monitoring of individual social responsibility programs initiated by the company.

For boards that choose not to form a new committee or subcommittee, the CLO can recommend a variety of governance options to achieve the same core goal of board engagement with social impact issues. These might include adding these tasks within the charter of an existing committee, repurposing of an existing but less utilized committee, or identifying existing committees whose charter is considered sufficient for including ESG related tasks, and then coordinating their respective efforts for purposes of ultimate reporting to the board.

The CLO's advice could also extend to the Governance Committee with respect to the nomination of board and committee members with particular affinity for ESG matters and the development and implementation of a related, coordinated corporate strategy. In addition, the CLO is positioned to advise the Board and key committees with respect to the establishment of ESG related policies and procedures, as well as overarching board commitments to the principles of social responsibility. The CLO would also be expected to periodically update the Board on legal, regulatory and related developments.

Matters of social impact are a critical part of an organization's ESG strategy. Examples of significant social impact causes and issues are arising on a regular basis. They are in many cases increasingly impactful and controversial, requiring careful organizational deliberation before commitment to their support. The corporate board has a very clear role in monitoring the actions of executive leadership in pursuing social impact initiatives as part of broader ESG strategies. The chief legal officer can play a key role advising the board in the exercise of this responsibility.

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