THE AMERICAN LAWYER | THE AM LAW DAILY
An ALM Publication

'We Have Big Problems': As Businesses Use ESG to Help, Corporate Law Is Changing

Investor interest in companies' environmental attributes is opening up work for corporate lawyers, but more education is needed.

By Jessie Yount
November 3, 2021

ESG is coming to the forefront of corporate law.

Allbirds Inc., a sustainable sneaker maker, went public at a $3.3 billion valuation Wednesday. Ahead of its listing, the company committed to a new set of ESG criteria called the Sustainability Principles Objectives (SPO) Framework, which seeks to help companies demonstrate their environmental, social and governance credentials to investors and stakeholders.

And that is just one example of how ESG matters are being interwoven with corporate law, according to Susan "Suz" Mac Cormac, a corporate partner and chair of the energy and social enterprise and impact investing practice at Morrison & Foerster in San Francisco. Mac Cormac was also the only law firm attorney to advise on the council, hosted by San Francisco-based sustainable business organization BSR, that created the SPO Framework.

Mac Cormac spoke with Law.com about the SPO Framework, the increasing reality that investors view environmental attributes as having monetary value, and the changes ESG is bringing to the world of corporate law.

JY: How did the SPO Framework come about?

SM: To take a step back, ESG is incredibly broad. It's like saying you're buying a car, but think about all of the different varieties of cars. It's the same thing with ESG. It's very broad and it encompasses many factors. All of those factors are good for companies, and some of them, depending on the company, are more tied to operations or profitability. So a good ESG program for a company takes those factors and weights them.


Courtesy photo

Suz Mac Cormac of Morrison & Foerster.

But one of the issues, and how the SPO Framework came about, is right now there is an incredible amount of green-washing because almost every company can say "we're doing good" and there is not a lot of rigor behind verification and not a lot of consistency in standards. Our group identified there was a gap for late-stage private companies and early-stage public companies in the reporting framework. The group pulled together to say "what would be criteria that could be verified, that could be applicable to companies at this stage of business?" We didn't try to set a new standard. We said "there are all these standards, and this is how companies should be thinking about standards related to DEI, climate, etc."

For example, the criteria for climate requires reporting on [Task Force on Climate-Related Financial Disclosures] recommendations related to climate risk. What that means from an operational perspective is you can't report unless you are evaluating climate risk. Let's say you buy component parts for manufacturing and you're entering a 20-year supply contract. Part of the evaluation of climate risk is seeing if the manufacturing site will be underwater in 10 years because of water rise or flooding. You may face greater worker shortages because there is a direct correlation between loss of land and civil unrest. That would impact the ability of the company to perform based on its supply contract.

JY: How has this renewed attention around ESG matters altered your own role as a corporate lawyer?

SM: When I first started focusing on sustainability and what became ESG, almost all of my work was pro bono. Now, people understand we have big problems, and philanthropic capital is less than one half of a percent, so things will get worse and worse unless we get businesses involved. So a lot the work we do is figuring out how we blend capital: take philanthropic capital and unlock mainstream capital.

Another key difference is that when I started practicing, people thought this was 30 or 40 years out—so outside of the investment time frame. That has changed fundamentally and it's accelerating. Companies need to mitigate some of this risk, and there are great opportunities as well. A year ago, there was one public Delaware benefit corporation. Now there are 13. And the most profitable IPO of 2020 was Lemonade—a public Delaware benefit corporation. That has been a complete sea change.

JY: Can you provide a few examples of your recent work that weaves ESG through a transaction?

SM: One example would be a performance-linked bond where a company issues a debt or equity security that has a lower return or lower interest rate paid to lender if they meet certain metrics, like carbon emission reductions. So a business could be building dams, and have a lower interest rate on the whole profit of the structure if it is more climate resilient or emissions-neutral.

There's also a lot of investment going into public housing because of homelessness in this country. Public housing tends to be built in places that are climate-insecure, so they are more subject to floods, fires and sea level rise. And they don't have good programs for energy efficiency and solar because there's only so much money to build. So an investment can be made alongside those buildings in climate resiliency … simple things like putting in trees for shielding so it stays cooler.

JY: What are some steps corporate lawyers can take to navigate the intersection of ESG and the practice of law?

SM: There is still a lot of green-washing because at most law firms, ESG is handled by environmental or compliance lawyers, and that type of work is much more check-the-box. Firms need to understand that ESG integrates through the corporate form. It's just like cybersecurity. If you checked the box 10 years ago, you thought you'd be in great shape, but you weren't prepared for what has happened in the last 10 years.

And lawyers have got to get educated. I teach at UC Berkeley, and some leaders at other law firms have been my students. That said, there are really good places with continuing education classes. As for younger lawyers, interest is huge. I get emails from associates at my firm and from other firms every day who want to work in this area, not just on compliance work, but on structuring transactions. This type of work is really meaningful.