LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
THURSDAY, JUNE 4, 2020

PERSPECTIVE

ESG disclosure issues during and after the COVID-19 pandemic

By Peter I. Altman, Stacey H. Mitchell, Bryan C. Williamson and Joshua D. Tate

Chairman Jay Clayton and Director of the Division of Corporation Finance William Hinman of the U.S. Securities and Exchange Commission requested that public reporting companies respond to the COVID-19 crisis by providing "as much information as is practicable regarding their current financial and operating status, as well as their future operational and financial planning." While the level of disclosure to follow is sure to vary widely, with accommodations for "work from home" now turning to preparations for "return to work," many companies will need to focus more than ever on disclosure regarding material risks associated with workplace safety in unprecedented ways. In this regard, so-called "environmental, social and governance," or ESG, disclosures may soon become a topic for an increasing number of company management teams and boards of directors as they plan for periodic and annual reporting on a go-forward basis.

Background on ESG Disclosures

ESG disclosures first started appearing in coalitions of companies across industries consisting of environmental non-governmental organizations, religious investors, and a small handful of large asset owners. In 2010, the SEC offered guidance indicating that companies must report climate-related risks, if material. Some states, such as California, Washington and New York, followed suit by requiring some form of environmental- related disclosure from insurance companies. ESG reporting has become more mainstream, with 80% of the world's largest corporations reporting in 2018 pursuant to standards set by the Global Reporting Initiative. Then, in January 2020, BlackRock CEO Larry Fink catapulted ESG disclosures into the mainstream for larger companies through his announcement that BlackRock, the world's largest investment management firm, would "vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices and plans underlying them." With a growing number of companies in most industries reporting on ESG issues, the benefits of doing so are clear, particularly in the midst of a global pandemic: Morningstar recently reported that "sustainable equity funds" lost less than their less sustainable peer firms during the first quarter of 2020, and nearly every ESG-titled index fund outperformed its conventional counterpart.

> Well-prepared companies will internalize the lessons from this pandemic and adjust their risk assessments across the panoply of ESG topics to include the real consequences we can expect to see from climate change, future pandemics, terrorist and cyber attacks, and supply chain disruptions.

Redefining Material Risk Assessment during (and following) the Pandemic

From contingency planning in January to transitioning workforces and shuttering facilities in March, the quickly evolving nature of the COVID-19 crisis has forced companies to adapt to unique, developing risks. While some disruptions have been minor, others have been severe. Public companies are now faced with assessing the materiality of risks on a near-daily basis, with one eye analyzing data revealing the impacts of the crisis and another looking at future threats. Risk assessments will not only inform disclosures, but will also form the basis for internal assessments of a company's response to the crisis and to potential future disruptions. During this time, as always, the focus should be on material issues. To address these risks and reduce uncertainty, companies can rely on the traditional earmarks of an effective ESG program — such as target setting, road-map implementation, data collection and reporting — with a critical eye toward the unique and financially material issues this pandemic presents.

In the near future, this may mean disclosing timelines for safely transitioning remote workforces back to facilities or offices or releasing information (subject to privacy filters) on employee and/or customer health and safety outcomes. In the intermediate term, companies could look to disclose plans to chart a course toward financial security and sustainability while reporting on the documented impacts of the crisis on companywide and business- unit-specific ESG goals. For many companies, these assessments will inform disclosures on a range of issues, including workforce and customer safety, and could tie into existing or new environmental and sustainability initiatives.

Disclosing Efforts taken to Respond to COVID-19 Crisis

Most companies responded to the COVID-19 crisis by shifting to remote or limited workforces, and those with public-facing operations have had to take measures to protect their customers and business partners. Consistent with SEC guidance, disclosures could describe efforts taken to support the workforce and protect employees, customers, and partners. For example, companies may choose to disclose the steps taken to ensure that agile workplace policies are administered in a consistent, nondiscriminatory manner during remote work transitions, and could further disclose the steps taken to meet obligations to provide employees and customers with safe and healthy working and shopping environments. Such steps might include compensating employees and monitoring their communications in accordance with established policies and applicable law, and recording instances of work-related injuries and illnesses and reporting this data to the U.S. Occupational Safety and Health Administration and applicable state agencies.

Although regulators have provided some relief for companies struggling to comply with environmental obligations, it may be important to disclose significant or overarching efforts taken to maintain compliance with environmental laws and voluntary sustainability initiatives. ESG-active companies have procedures in place to maintain a firm grasp of all applicable obligations (whether mandated or voluntary) and access to pertinent records. These companies should consider disclosure of noteworthy efforts to ensure compliance in the midst of the pandemic, such as continued reporting pursuant to permits or voluntary reporting initiatives (e.g., reporting on greenhouse gas emissions, water management, and biodiversity impacts) and updated plans to ensure that facilities are operating responsibly with reduced on-site personnel. Conversely, companies falling short of compliance may need to document and disclose any material shortcomings, explaining the link between notable instances of noncompliance and the COVID-19 crisis.

Also worth consideration for disclosure are creative solutions used to respond to the crisis, such as repurposing facilities to support the nation's crisis response (e.g., manufacturing protective equipment, converting spaces into temporary hospitals), expanding leave policies, dedicating funds to support employees and business partners in distress, donating excess food and supplies to community organizations or health care facilities, or developing virtual systems to measure and report environmental compliance.

Early Lessons to Learn

Ultimately, materiality assessments should not just be limited to the near term, nor should they be limited to COVID-19. Well-prepared companies will internalize the lessons from this pandemic and adjust their risk assessments across the panoply of ESG topics to include the real consequences we can expect to see from climate change, future pandemics, terrorist and cyber attacks, and supply chain disruptions. While the coronavirus' economic impacts are still unfolding, we now have a greater understanding of how other foreseeable — yet apparently distant — risks can wreak economic havoc. Forward- thinking firms in every industry need to account for these impacts in their materiality assessments, both now and for the indeterminate future. These assessments should rely on data-driven insights to produce specific, detailed disclosures rather than broad acknowledgments of risk or ambiguous speculation. ■

Peter I. Altman *is a partner at Akin Gump Strauss Hauer & Feld, advising clients on white collar and other enforcement and regulatory matters, securities class action litigation and internal investigations. He is a former senior counsel in the SEC's Division of Enforcement in Los Angeles, as well as a member of the division's selective Market Abuse Unit.*

Stacey H. Mitchell *is a partner at Akin Gump Strauss Hauer & Feld, where she provides strategic advice to companies and handles complex criminal and civil litigation. As a former deputy general counsel at the Environmental Protection Agency and chief of the Department of Justice's Environment Crimes Section, she is a leader in Akin Gump's ESG and crisis management work.*

Bryan C. Williamson *is an associate at Akin Gump Strauss Hauer & Feld, advising on a range of environmental regulatory, transactional and litigation matters. He is a member of the firm's ESG practice, working with clients on the business and legal risks associated with ESG and sustainability initiatives.*

Joshua D. Tate *is an associate at Akin Gump Strauss Hauer & Feld. He works with clients on complex commercial disputes and litigation.*

Reprinted with permission from the *Daily Journal*. ©2020 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.