What does the ‘S’ stand for?: Understanding the social pillar of ESG

16 juin 2023

Perhaps not as widely reported on as the “E” (environmental) or “G” (governance) factors that dominate ESG headlines, the “S” (social) pillar remains a critical consideration to the success of a company and particularly, its workforce. The social pillar of ESG focuses on a company’s relationships with its stakeholders, including employees, customers and community. This includes the way in which a company engages and reacts to the sociopolitical environment within which it operates. Accordingly, companies are understandably looking to enhance their public image in this area to drive shareholder value and improve employee retention. However, what are proposed and rolled out as ESG programs or initiatives in response to such issues ought to be carefully considered. Without meaningful consideration and follow-through, organizations, companies and investors run the risk of yielding unintended legal and commercial consequences such as alienating impact-oriented investors, legal liability risk, reputational risk and decreases in revenue.

Engagement with the social pillar of ESG must be thoughtful

The broad nature of the social pillar requires companies to develop holistic initiatives that are achievable and within their means. When considering addressing social issues that matter to their stakeholders, companies may want to ask themselves whether they:

i. have full buy-in from their board and executives;
ii. have accurate objectives and tracking mechanisms for what they want to accomplish;
iii. have direct involvement from suppliers and key business partners;
iv. are improving their customers’ experience; and
v. are respecting employees throughout the process.

By asking such questions, companies can ensure that the social initiatives and policies they are considering are embedded into their strategy and daily operations. Addressing social issues must be a thoughtful endeavour and not seen as a publicity exercise. If a social initiative is approached with hubris or carelessness, a company may risk its reputation, financial performance and create unintended legal consequences.

Consumers, shareholders and the broader community value coherence in a company's approach to social issues; however, as demonstrated by the recent examples cited below respecting companies' engagement of the social pillar of ESG, no social issue is simple to address and complexity in this area necessarily arises where companies are operating cross-jurisdictionally where laws and regulations may vary.

A standard approach to a given issue within a given country is difficult enough. This becomes increasingly difficult where, for example, a U.S. ESG initiative is rolled out in multiple foreign jurisdictions. By way of example, the FTC in the U.S. recently proposed banning non-competes in the U.S. save and except for very specific situations. This type of roll-out internationally may negatively impact shareholder value and the company. In this case, other than the province of Ontario, no other province within Canada has similar legislation. Some provinces still apply non-compete clauses and the courts will apply these clauses provided the clauses respect other contractual terms and conditions. Additionally, a very recently proposed amendment in the U.K. seeks to limit the duration of non-competes to three (3) months, as opposed to a complete ban. Therefore, a U.S. company that has substantial operations in both Canada and the U.K. would be wise to consider applying the existing laws in those jurisdictions. As a result, companies must carefully consider the effect of any ESG initiative and the interplay between different jurisdictions on its international operations. Once announced, back tracking from an ESG initiative may adversely affect any company.

In addition, the same considerations would apply to a company's decision to offer its employees the right to unionize without an employer's interference under applicable labour laws or to the implementation of uniform DEI approaches across different jurisdictions. This latter concept is often driven by applicable local human rights legislation and obligations. Therefore, a uniform approach to DEI may fall short in some jurisdictions of a company's existing legal obligations or may even exceed obligations that exist in these jurisdictions.

In the end, companies would be well advised to carefully review the impact of any ESG initiative and how it may impact operations outside of the country in which these ESG initiatives were developed.

Pitfalls to avoid when addressing the 'S' in ESG

Akin to greenwashing, there is **social washing** , which can occur when there is a perceived or actual disconnect between a company's stated commitment to social issues and their actions towards those issues. The risks of social washing may be even more pronounced than greenwashing as social initiatives can appear more relevant to a wider audience and spread quickly through social media. Any misstep in addressing social issues can expose a company to unwanted risk and liability. For example, Australian eyewear chain Oscar Wylee was fined A$3.5 million for falsely advertising that for every pair of glasses sold, the company would donate a pair to charity. The company admitted in court that out of 328,010 pairs of glasses sold, it only donated 3,181 frames without lenses to charity. Oscar Wylee's attempt at targeting socially conscious consumers without adequate follow-through resulted in legal repercussions, financial loss and a tarnished reputation. So, before addressing or engaging with a social issue, a company must ensure their actions, both externally and internally, are consistent and can speak for themselves.

Takeaways

A sustained focus on the social pillar of ESG is expected to continue as consumers, investors and communities remain socially conscious and require more than just share value from companies and investments. Developing meaningful and verifiable ESG policies that align with your company's strategy and operations is critical to avoiding social washing and other unintended legal or commercial consequences of poor engagement with the social pillar of ESG. More importantly, an understanding of how these policies align and fit within current market practices and applicable laws can further help prevent unintended consequences.

If you would like assistance with developing ESG policies, analyzing market practices and laws or other ESG-related issues, please contact the authors of this article.

Par

Jennifer Archer, Danny J. Kaufer, Neil Ezra Hazan, Sunny Garcha, Eliot Escalona

Services

Droit des sociétés et droit commercial, Travail et emploi

BLG | Vos avocats au Canada

Borden Ladner Gervais S.E.N.C.R.L., S.R.L. (BLG) est le plus grand cabinet d'avocats canadien véritablement multiservices. À ce titre, il offre des conseils juridiques pratiques à des clients d'ici et d'ailleurs dans plus de domaines et de secteurs que tout autre cabinet canadien. Comptant plus de 725 avocats, agents de propriété intellectuelle et autres professionnels, BLG répond aux besoins juridiques d'entreprises et d'institutions au pays comme à l'étranger pour ce qui touche les fusions et acquisitions, les marchés financiers, les différends et le financement ou encore l'enregistrement de brevets et de marques de commerce.

blg.com

Bureaux BLG

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000, rue De La Gauchetière Ouest
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749