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QuickCounsel

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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

SUSTAINABILITY: WHAT DOES IT MEAN FOR YOU?

Overview

Sustainability has gone mainstream. Hardly a day goes by without a media report that another company has adopted "sustainable" practices. But what is sustainability, and what does it mean for your company and your role as corporate counsel?

Sustainability is often used to refer to an expanded measure of accounting that measures not only the economic aspects of a business, but also its social and environmental impacts. One popular shorthand for sustainability is the three "P's": people, planet and profit. In other words, sustainability does not ignore traditional economic considerations. Instead, it seeks to account for a company's economic, environmental, and social performance and impacts to provide a more holist picture of the company. And many companies have also recognized that the incorporation of this broader perspective may help them identify new opportunities to enhance their business. This QuickCounsel provides an overview of opportunities in sustainability, the lawyer's role, and planning/reporting issues.

Opportunities and the Lawyers Role

The adoption of a sustainability program can create a significant number of benefits for your company. Indeed, the primary reason many corporations pursue sustainability is that it makes good business sense—it is a business strategy to enhance value, lower costs and strengthen its competitive position. In perhaps the most famous example, Walmart adopted procurement practices to account for the environmental impacts of the products it sells, including a goal to eliminate 20 million metric tons of greenhouse gas emissions from its global supply chain by 2015. The company also adopted practices to reduce energy consumption and waste from its operations, including fuel efficiency gains for its truck fleet. The adoption of these types of goals not only helps a company's bottom line—through energy costs savings, for example—but also creates consumer goodwill and enhances the value of the brand.

Compliance

In light of the varied attributes of each company's sustainability initiatives, however, it is important to understand at the outset why and how your company is advancing its sustainability program in order to allow in-house and outside counsel to best manage any associated legal issues and risks. Indeed, many companies implement sustainability initiatives in order to reduce business and legal risks. Counsel for public companies, for example, should be aware of the Securities and Exchange Commission's guidance on the disclosure of material climate-change-related information. Similarly, although the Environmental Protection Agency continues to refine the program, some companies may be subject to greenhouse gas reporting requirements under the Clean Air Act.

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Voluntary and Local Sustainability

Beyond the federal government, a number of states and local jurisdictions have adopted regulations that may affect your company's sustainability efforts. For example, a number of companies currently participate in voluntary benchmarking and disclosure programs related to the energy efficiency of their buildings, such as the Environmental Protection Agency's Energy Star program. Several states, including California and Washington, as well as a number of major cities, such as New York, San Francisco, Seattle, the District of Columbia and Austin, have adopted laws that require building owners to monitor and disclose energy use on a periodic basis or during real estate transactions. Under San Francisco's program, for example, owners of commercial buildings of 10,000 square feet or more must determine how much energy their building consumes on an annual basis and make this information publicly available. In addition, building owners in San Francisco will be required to conduct an energy audit of these commercial properties every five years.

LEED Certification

Other sustainability initiatives may also require the involvement of in-house and outside counsel, even if they are not directly subject to governmental regulation. Many companies, for example, have participated in voluntary "green building" initiatives, such as certification of their buildings under the U.S. Green Building Council's Leadership in Energy and Environmental Designed ("LEED") certification system. The LEED certification process, however, may require the involvement of counsel with respect to a variety of issues, ranging from an appeal of an unfavorable decision by the Green Building Certification Institute, which administers the LEED program, to contract issues involving the design, construction or retrofit of a building intended for LEED certification.

Renewable Energy Credits

The production, hosting, and sale and purchase of renewal energy is also a significant part of many companies sustainability programs. The market for renewable energy has been driven in part by the value of renewable energy certificates ("RECs") used by utility companies to satisfy renewable portfolio standards adopted by many states. If your company becomes involved in any aspect of a renewable energy transaction, counsel will need to be involved in the deal. Indeed, renewable energy transactions raise a host of legal issues, from the negotiation of power purchase agreements to govern the purchase and sale of electricity generated from a project, to regulatory issues involving federal tax credits and grants as well as zoning and siting approvals for the project.

Marketing Issues

Finally, sharing your company's sustainability initiatives with the public may create new legal risks—and because sustainability is new, project personnel may not be aware of or recognize these risks. Indeed, marketing materials related to sustainability may expose a business to allegations that it "green washes" its products through dissemination of misleading or exaggerated claims. The Federal Trade Commission Act, for example, gives the FTC authority to investigate and seek an injunction and civil penalties against deceptive marketing practices. In 2010, the FTC proposed revisions to its "Green Guides," which address deceptive advertising and marketing claims about the environmental qualities of products and services. The proposed revisions to the Green Guides reflect both the increasing use of environmental marketing claims by companies and the FTC's growing concern that such claims may be deceptive, especially when companies lack adequate technical or scientific information to substantiate their claims. Individuals responsible for marketing and sustainability, therefore, must work closely with counsel to assure a consistent, substantiated message.

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Sustainability Planning and Reporting

Beyond any specific practices and initiatives that your company may adopt as part of its sustainability program, your company may consider creating planning and reporting processes to track your sustainability efforts. Thousands of companies now issue annual sustainability reports. And even if your business has yet to decide to issue a sustainability report, it should consider the available reporting frameworks in order to guide the development of its sustainability program.

The Global Reporting Initiative (GRI) G3.1 Guidelines have become the de facto standard for sustainability planning and reporting (and even companies that do not adopt all of the GRI Guidelines often refer to and incorporate specific aspects of the GRI Guidelines as appropriate to their business). The GRI Guidelines provide more than guidance for the issuance of a public report, but also include processes for defining objectives, linking goals and sustainability impacts, engaging with stakeholders, and measuring and monitoring impacts. Another framework used by some companies is the AccountAbility AA1000 Series. The AA1000 Series includes a framework for verification of publicly available sustainability information that in-house counsel can use in conjunction with other sustainability frameworks.

Taking the time up front to plan a sustainability program, including an assessment of reporting frameworks, business risks and opportunities, and evolving regulatory requirements, allows a company to tailor its program to its business goals. One important issue commonly faced by companies at the outset of this process is the identification of the individual(s) responsible to create and implement the program, and this issue may best be resolved at the outset. The point person for sustainability varies across companies, ranging from marketing personnel to facilities managers to in-house counsel. Companies often begin their sustainability endeavors with small projects or projects with a quick return-on-investment (such as lighting retrofits) to demonstrate benefits and build managerial support, and then grow the sustainability program over time.

If your company decides to issue a sustainability report, the existing reporting guidelines offer a helpful starting point, even if you ultimately decide not to issue a report in strict compliance with any of the available guidelines. As noted above, the GRI Guidelines are the most commonly used framework and were used by more than 1,500 companies in 2010. The GRI Guidelines provide guidance on how to report, including the content, quality and boundaries of the report. The GRI Guidelines also provide guidance on what to report and provide that a report should incorporate specified standard disclosures, including a company profile, management approach and performance indicators reflecting an organization's material economic, environmental and social impacts. GRI has also developed "Sector Supplements" to provide further guidance for specific industries. These guidelines may raise significant legal questions, such as whether information is material or whether related entities may constitute a single organization for purposes of a sustainability report.

Conclusion

Sustainability is becoming a larger part of corporate life. What originally began as a consumer demand is rapidly becoming part of the legal landscape. In-house counsel should be aware of these issues and how they can engage them constructively. This QuickCounsel provides in-house counsel with an overview of sustainability issues and how in-house counsel can plan accordingly.

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Additional Resources

ACC Resources

- ACC Green-House Counsel (2011): Will Energy Performance Disclosure Laws for Buildings Become the Norm?
- ACC Green-House Counsel (2011): Brightening Up Environmentally Impaired Properties with Solar
- ACC Top Ten (2011): Top Ten Questions to Answer in Considering Renewable Energy at a Contaminated Site
- ACC Top Ten (2010): Top Ten Practice Points for Developing a Sustainability Program
- ACC QuickCounsel (2009): Green Advertising: The FTC Green Guides

Web Resources

- Class Action Lawsuit Filed Against US Green Building Council Assailing LEED Certification Process (Manko, Gold, Katcher, Fox LLP 2010)
- FTC Proposes Revised Guidelines for "Green" Claims (Manko, Gold, Katcher, Fox LLP 2010)
- EPA Issues Final GHG Emission Rules for Large Stationary Sources (Manko, Gold, Katcher, Fox LLP 2010)
- SEC Issue Guidance on Climate Change Disclosure (Manko, Gold, Katcher, Fox LLP 2010)
- As Climate Change Legislation Cools, "Climate-Friendly" Legislation Heats Up (Manko, Gold, Katcher, Fox LLP 2010)
- MGKF Presentation on Corporate Sustainability Reporting (Manko, Gold, Katcher, Fox LLP 2010)
- Commission Guidance Regarding Disclosure Related to Climate Change (SEC 2010)
- Mandatory Reporting of Greenhouse Gases (EPA 2009)