

Top Ten Practice Points

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TOP TEN PRACTICE POINTS FOR DEVELOPING A SUSTAINABILITY PROGRAM

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Companies are increasingly developing, adopting and reporting sustainability initiatives in an effort to improve their triple bottom line. The participation of in-house and outside counsel is crucial at all stages of the development of a corporate sustainability program. Sustainability programs should be used as tools to identify and manage the evolving legal and business risks and opportunities associated with the current public and regulatory focus on “green” business. The following list includes best practices that will allow counsel to help guide a successful sustainability program.

1. Participate in the development of your company’s sustainability program from the outset

Although almost all companies can reasonably expect to benefit from the development and implementation of sustainability program, each company will have unique reasons for doing so. Counsel should therefore be involved from the outset of the development of a program in order to help identify regulatory, litigation and business risks facing the company, and to help manage those risks in light of the business’s operations and goals. For example, counsel should help determine whether new and evolving regulatory requirements are applicable to a company, such as the EPA’s mandatory greenhouse gas (“GHG”) reporting rule or the Securities and Exchange Commission’s (“SEC”) guidance on reporting material climate-change related information. Similarly, counsel can help guide a company’s response to evolving market conditions, such as the demands for “greener” products from other businesses in your company’s supply chain (think Wal-Mart and IBM) or consumers.

2. Select an appropriate sustainability framework

Once a company has identified any pertinent risks and opportunities, counsel should also assist in the selection or design of an appropriate process for addressing sustainability issues. Although generally thought of as a tool to develop public sustainability reports, the Global Reporting Initiative (“GRI”) G3 Guidelines also provide a commonly used process to guide the development of a sustainability program. Alternatively, many businesses will design a unique sustainability process to meet their specific needs. Regardless of the specific mechanism used, counsel should assess the strategic implications of adopting the chosen framework, and should also help develop the policies and procedures to guide the sustainability program.

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3. Engage internal and external stakeholders

Counsel can also serve a valuable role by identifying, prioritizing and developing a strategy to engage stakeholders. For example, counsel can help identify issues important to various corporate constituencies, such as shareholders, employees, regulators and consumers, and relate the concerns of those groups to the risks and opportunities identified previously. This process will not only serve as an important tool to gather additional information about the risks and opportunities facing your business, but may also help build support and momentum for your sustainability program.

4. Define the organizational boundaries of your business

An initial step in creating a sustainability program is the establishment of the “organizational boundary,” i.e., the businesses and operations that will be considered the “company” for purposes of the program. Under the G3 Guidelines, a company’s boundary should be defined to include the entities over which the company exercises control or significant influence. Accordingly, counsel should help determine whether a sustainability program or report will address not only your company’s own operations, but also those of other businesses up- or down-stream in your supply chain in light of your financial and operational relationship with those businesses.

5. Identify the material sustainability-related aspects of your company’s business

A sustainability program need not, and as a practical matter should not, attempt to address every sustainability-related issue facing your business at once. Similarly, sustainability reports, whether developed for internal use or public dissemination, should be tailored to address the issues and risks that are material to your intended audience. For example, the G3 Guidelines define materiality as the topics “that reflect the organization’s significant economic, environmental, and social impacts, or that would substantively influence the assessments and decisions of stakeholders.” Counsel should therefore help assess and define the material risks facing your company.

6. Determine whether a greenhouse gas inventory is right for your company

Companies are increasingly conducting greenhouse gas (“GHG”) inventories as an integral part of their sustainability programs. Currently, there are a number of GHG reporting frameworks available to companies that choose to inventory and report their GHG emissions, each with somewhat different requirements and potential benefits associated with participation. Additionally, last fall EPA finalized its mandatory GHG reporting rule, which requires certain stationary sources to monitor and report annual GHG emissions to EPA pursuant to specified guidelines. Indeed, the landscape of GHG control is an evolving mix of federal, state and local legislation, regulation and litigation, and also involves changing commercial practices that attempt to hedge against these climate change risks and capitalize on new opportunities. Counsel should therefore play an integral role in the selection of the appropriate reporting framework.

7. Guide the selection and use of an appropriate reporting protocol

Although most companies should consult the available sustainability reporting frameworks, such as the G3 Guidelines, in the development of their sustainability plan, not every company will immediately decide to issue a public report. Indeed, many businesses begin by creating targeted sustainability reports for internal stakeholders only. If your company decides to issue a public report, counsel should assess the requirements of the various publicly-available protocols to help determine whether your company should adopt some or all of their components. Counsel can also help determine whether external verification of a report is appropriate.

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8. Identify business opportunities resulting from your sustainability program

Sustainability programs can be used as tools to enhance business reputation and brand, identify operational inefficiencies and cost savings, attract and retain customers, employees and other stakeholders, and encourage innovation. For example, consumers are increasingly taking sustainability issues into account in their purchasing decisions. An appropriately publicized sustainability program can help enhance corporate reputation and brand, and strengthen a business's relationship with its customers. Conversely, ignoring "green" issues may place your company at a competitive disadvantage in the marketplace if other businesses in your industry get ahead on these issues.

9. Ensure that sustainability-related claims are well-supported

The flip-side of these new business opportunities are new legal and regulatory risks. For example, marketing materials related to sustainability may expose a business to allegations that it "green washes" its products through dissemination of misleading or exaggerated claims. For public companies, SEC disclosure rules may also create the risk of legal liability for misleading representations related to sustainability initiatives. Counsel should be involved in the review of sustainability-related marketing efforts to minimize your company's exposure to legal risk, and may also want to consider employing outside counsel or other consultants to provide external verification of any publicly-available sustainability reports.

10. Avoid overwhelming yourself

Trying to manage a corporate-wide sustainability program is overwhelming, especially when the responsibility is added to everything else in-house counsel is expected to do in these belt-tightened days. So start small. For example, identify the low-hanging fruit in your organization, such as retrofitting lighting fixtures, to demonstrate the benefits of sustainability initiatives to management and other internal stakeholders. Moreover, a company should identify and select a cross-disciplinary team, including operational, marketing and legal departments, to develop and implement its sustainability program. Beginning with manageable projects, and developing a stable, inclusive and committed group of individuals to implement them, will help you create a "sustainable" sustainability program for your company.