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Three ESG Trends to Follow Into 2023

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The ESG universe is ever-expanding. The past year has proven as much with several noteworthy developments, including increased politicization of ESG issues, sweeping international disclosure and due diligence directives, trillions of dollars added in ESG assets under management, and the ESG debt market projected to triple (or more) by 2025. With all that has already transpired, ESG risk and opportunities show no signs of slowing in 2023. As governments and businesses scramble to implement lofty climate- and biodiversity-related goals, the “E” factor will continue to generate substantial amounts of activity and discussion. However, social and governance factors are gaining momentum and cannot be ignored despite behemoth environmental concerns. This means that evaluating individual factors will become more complex, as will analyzing the intersectionality and impact between each factor. As 2022 draws to a close, here are three important ESG trends to follow closely into 2023:

Evaluating Potential Intersection Between ESG and Antitrust

Lawmakers and officials at the federal and state level have placed companies and law firms on notice of an emerging nuance potentially pitting ESG efforts against antitrust prohibitions. With the vast range of ESG strategies, products and services in motion, recent theories that certain ESG activity could violate antitrust rules have yet to be vigorously tested. Regardless, the implications of ESG goals and activities for compliance with applicable antitrust laws will depend on the type of business(es) and activity involved. Increased scrutiny of ESG “scorers,” ratings providers and investment managers offering ESG investment strategies or products will likely continue. It is also likely that those supporting antitrust as a “check and balance” on ESG will focus acutely on climate-related activities and whether net-zero or renewable energy initiatives could be vehicles for intentional or unintended anti-competitive maneuvers (e.g., using ESG as a pretext to weaken fossil fuel businesses).

The potential — and still developing — antitrust / ESG risks in the United States are notably less mature compared to the emerging landscape in the United Kingdom (U.K.) or the European Union (EU). While neither the U.K. nor the EU have fully defined the boundaries between legitimate ESG activity versus illegal collusion, in March 2022, U.K. and EU authorities published guidance and insight regarding the impact of competition law as a means of furthering ESG goals. The European Commission's and the U.K. Competition & Markets Authority's (CMA) insight can be found here:

1. EU: Public Consultation on the Draft Revised Horizontal Block Exemption Regulations and Horizontal Guidelines
2. U.K.: Environmental Sustainability and the U.K. Competition and Consumer Regimes: CMA Advice to the Government

That said, international (multi-jurisdictional) businesses would do well to develop a sufficiently nuanced strategy for navigating between potentially inconsistent approaches to managing antitrust compliance and ESG activities across the United States, U.K., and EU.

Advancing Cybersecurity Through Good Governance

Although environmental considerations have largely dominated ESG headlines, 2023 will likely see increased activity around "the other two factors" – social and governance. From a governance perspective, multiple stakeholders are highlighting the importance of cybersecurity as a key element of a mature ESG strategy. In addition to the Security Exchange Commission's (SEC) proposed rules for cybersecurity risk management, strategy, governance, and incident disclosure, which would impose more expansive disclosure requirements on public companies, the Cybersecurity and Infrastructure Security Agency (CISA) is pushing for heightened monitoring and tracking to improve cyber governance programs. To that end, CISA released voluntary cybersecurity performance goals (CPGs) as one mechanism to help evaluate and address critical cybersecurity vulnerabilities, especially for companies with limited resources. Whether utilizing CPGs or other data, these developments signal that companies will likely face additional stakeholder demands for more robust monitoring, tracking, verification and disclosure of cyber-related KPIs.

Additionally, cybersecurity has become an increasingly important factor in ESG frameworks as cybersecurity as a risk (and opportunity) is evolving quickly to require more than technological considerations. Consistent with this trend, a Bloomberg report assesses corporate cybersecurity spending to exceed $200 billion annually by 2024.

As part of their cybersecurity governance measures, businesses will likely continue seeking (and be required to disclose) resources to manage and mitigate cyber-related risks. Frameworks like the Uniform Domain-Name Dispute Resolution Policy (UDRP) are poised to serve as practical tools in companies' struggle to manage cyber-related risks.

Shedding Light on Social Factors

With several leading analysts ringing recession alarm bells amidst workforces' ambivalence to "post-pandemic" return-to-office policies, companies may find that 2023 poses even greater challenges to human capital management, workplace culture, and diversity, equity and inclusion (DEI) objectives. For example, in past downturns, it has not been unusual to see culture and diversity take a backseat to cost efficiency. Similar to evaluating resilience to climate-related risk, businesses should consider pressure-testing the resilience of their culture to converging dynamics, including increased politicization of social issues, work-from-home preferences and performance expectations.

Additionally, companies should continue examining the intersectionality between "environmental" and "governance" factors with an eye toward the social implications of ESG strategies. Environmental justice is an important example and will continue to gain visibility as enterprises grapple with assessing the impact of their operations on the health and wellbeing of surrounding communities. Keen focus is warranted to identify and proactively engage with groups that are otherwise unable to access the channels of power needed to facilitate robust participation in discussing, challenging or benefiting from environmental laws and policies.

That said, companies will continue to face increased scrutiny from and activism by shareholders, including targeted shareholder proposals seeking substantiation of environmental stewardship efforts as a means of gauging environmentally related societal impacts. As noted above, proactive and transparent engagement improves companies' posture for managing shareholder proposals. Possible activities to anticipate and address shareholder concerns include robust, enterprise-wide environmental justice audits to evaluate a host of relevant factors, including management/remediation of legacy cleanup sites, the operational footprint's impact on the environment and surrounding communities, internal practices, and community perception.

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