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Sustainability as Superlaw: Reinventing Your Playbooks

By Dave Curran and Brad Karp

Demands on in-house legal teams have never been greater. In addition to anticipating and handling companies' legal obligations, general counsel must now also manage the significant legal and reputational risks that arise from public commitments companies make in response to stakeholder demands that the private sector address the most pressing environmental, social and governance (ESG) issues of the day.

We often refer to this vast, overarching set of mandates as "superlaw." These commitments — generally self-imposed and without the weight of law — are more akin to decrees than written statutes. Examples of "superlaw" include instances where companies publicly promise to reduce water usage, cut carbon emissions, pay a "living wage" or diversify their board and workforce.

Even if there is no legal mandate involved, companies can still face serious consequences if they miss a stated target. Accountability could come in the form of shareholder activism, government investigations, reputational damage or even litigation. Or, as we have seen recently, employees, consumers and investors could revolt.

So, how can a savvy general counsel attuned to ESG issues adapt to this new age of superlaw? An important first step is for in-house legal teams to reinvent their traditional playbooks. Playbooks are the rituals, patterns and tactics you use every day, whether you realize it or not, to go about your business. Whether it's defending a company against a lawsuit, conducting an internal investigation, or conducting a board meeting, playbooks guide day-to-day processes and the cadence of activities internally.

Here are some six practical ways in-house counsel can reinvent their playbook to embrace the new world order:

1. Establish cross-functional engagement

ESG issues often span multiple businesses and functions across the organization. Legal teams must be involved with HR, investor relations, purchasing, finance, and business units likely to encounter these issues. At what point in the workflow does legal get called in? For example, a traditional playbook would have legal sign off on sustainability reporting documents at the end of the approval process. But to effectively manage these issues, it is imperative for legal to be involved from the start by regularly engaging with the relevant functions and businesses.

Cross-functional collaboration ensures that ESG receives genuine and continuous support within the company. Legal teams can help break down any silos within the organization by bringing people together to resolve mission-critical ESG issues. Designate a single point of contact for each function and business to minimize conflict and streamline communication.

2. Coordinate legal, compliance, risk and sustainability functions

The sands are shifting on who owns the pen and who is leading the

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meetings when it comes to setting and tracking ESG goals. Current playbooks may look to procurement or elsewhere in the company to play an important function. But lawyers can add just as much value – if not more – by not waiting on the sidelines.

Legal teams are in an ideal position to coordinate disparate parts of an organization and fill important gaps.

3. Revisit your crisis response process

To whom are issues escalated in a crisis and what is the formal response process? Typically, crises are handled by marketing and communications, but legal is often involved as well, along with the CEO and CFO.

Revisiting the crisis playbook is an essential part of ensuring that everyone involved in ESG issues is included at the company-level and possibly even the board level. The best companies are not waiting for a crisis to happen. They're convening the group frequently to stay one step ahead and be prepared to manage risk well before disaster strikes.

4. Engage internal and external stakeholders

As part of the crisis playbook, make sure the company has developed relationships with media, large institutional investors, activist groups, regulators, government officials, plaintiffs' lawyers and employee groups. While the old playbook might have enabled companies to suppress or cauterize dissenting opinions, the superlaw playbook requires companies to acknowledge and attempt to address stakeholder complaints. Legal teams must ask themselves and their organizations: Do you know who the primary points of contact are for each stakeholder group, and is there a known process for engaging with each group so you can contact them quickly if needed? And, by all means, maintain ongoing communication with each of these constituencies in good times, so that you will have chits in the bank to spend in times of crisis.

5. Track, measure, monitor and report on your progress

Most companies already have systems and technology in place to measure sustainability and ESG compliance. But legal departments are uniquely positioned to leverage their cross-functional teams to gain visibility across the organization and spot and remediate any gaps.

Legal teams are also well-equipped to help their organizations navigate the many third-party disclosure frameworks and standards that have proliferated as the prominence of ESG has grown and demand for accountability has increased. These include the United Nations-supported Principles of Responsible Investment (PRI), the UN Sustainable Development Goals (SDGs) and the Global Reporting Initiative (GRI).

Finally, lawyers can ensure that the company's disclosures are consistent across reporting mechanisms such as 10-K's, glossy ESG and sustainability reports and earnings calls. Transparent communication will go a long way towards building trust with stakeholders. Consistent and regular reporting will demonstrate how your company is matching aspiration to action in its day-to-day operations.

6. Cross-check your program for risk resilience

The in-house legal team may need external advice on how to address any superlaw issues. Internally pressure-testing an existing ESG program is a best practice that can help flag inconsistencies or potential liability. But just like an auditor provides assurance about bookkeeping, outside counsel can help boost confidence in your ESG program. Outside advisers can also help benchmark your program against industry leaders and cross-check it against the law in other jurisdictions.

Overall, lawyers are perfectly suited to reinvent their organization's playbook and lead the charge when it comes to ESG. Spotting and mitigating risks within complex scenarios and workflows is essential to driving the positive change leaders want – and it's what lawyers know how to do best. And with aggressive regulators and plaintiffs' counsel and activist investors prepared to pounce on any misstep, lawyers can provide much-needed protection in this increasingly important, dangerous and pervasive area.