Sustainability as the New Business Imperative:
How Legal, Market, and Workforce Forces Are Shaping Corporate Priorities

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Over the past decade, there has been a seismic shift by corporate clients now prioritizing sustainability. Some of this is driven by increased legal requirements, both domestically and abroad, but more of this focus appears to be motivated by business opportunities, to grow market share, attract investors, and improve employee satisfaction.

Sustainability Defined

The U.S. Environmental Protection Agency defines sustainability as: "Sustainability is based on a simple principle: Everything that we need for our survival and well-being depends, either directly or indirectly, on our natural environment. To pursue sustainability is to create and maintain the conditions under which humans and nature can exist in productive harmony to support present and future generations."[1]

Legal Requirements

Depending on where companies are based and do business, they may face legal requirements that drive disclosure and investment obligations in the areas of environmental, social,

[1] Learn About Sustainability | US EPA (accessed December 2, 2024).

and governance (ESG), which are metrics used to evaluate an organization's impact and sustainability practices.

In the United States, for example, ESG regulations originate primarily from three sources: (a) the U.S. Securities and Exchange Commission (SEC), (b) the U.S. Department of Labor (DOL), and (c) state legislatures and agencies. Specifically, the SEC monitors company disclosures, not only in required filings but also in marketing materials, on websites, and in investor documents. On March 6, 2024, the SEC issued a final rule that requires registrants to provide climate-related disclosures in their annual reports and registration statements.[2] The prior year, the SEC imposed a $19 million penalty on an investment advisor accused of making materially misleading statements about its ESG investment process.[3]

The DOL, which oversees the Employee Retirement Income Security Act (ERISA), has been active in regulating whether fiduciaries can consider ESG in investment decisionmaking for private retirement plans. In 2020, the agency introduced a rule viewed by some as "anti-ESG"[4] and then shifted course under the Biden administration, deeming ESG an acceptable factor in investing decisions.[5] That action has been challenged in court, and DOL may reverse course again in the second Trump Administration.

Forty-one states have proposed or enacted ESG-investing laws.[6] While some states have enacted "pro-ESG" laws that allow ESG factors to be considered in investment decisions, most

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[2] Final rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors, SEC (March 6, 2024).
[3] SEC Order (September 25, 2023).
[4] 85 Fed. Reg. 72846.
[5] US Department of Labor announces final rule to remove barriers to considering environmental, social, governance factors in plan investments | U.S. Department of Labor (November 22, 2022).
[6] ESG Investing: The US Regulatory Perspective – Publications, Morgan Lewis (March 12, 2024).

states have done the opposite, disincentivizing or prohibiting the consideration of ESG factors in investment decisions.[7]

While the second Trump Administration in the United States may alter, and will likely narrow, the regulatory focus on ESG at the federal agency level, many companies will continue to focus on ESG disclosures and investment decisions because of regulations in certain states and other countries where they do business. But the legal requirements companies face are not the sole drivers of their focus on sustainability.

Customer Growth and Premium Prices

Sustainability is, at its core, an effort to produce products as efficiently as possible, with as little impact as possible, while returning the highest value the market will support. Certain branded products that promote their sustainability may even cost more to produce but can command higher prices in the marketplace. For example, Unilever's Sustainable Living Brands, such as Seventh Generation, Dove, and Ben & Jerry's, are priced above competitors but are growing 69% faster than the rest of the business and delivering 75% of the company's growth.[8] Customers are enthusiastic about the growth of sustainable product availability in the market. According to a study published in the *Harvard Business Review*, customers who prefer sustainable products may be more loyal than other customers, serving as "super promoters" who recommend products to 10 or more people.[9]

[7] Navigating State Regulation of ESG | Ropes & Gray LLP (November 4, 2024).
[8] Unilever's purpose-led brands outperform | Unilever, Unilever Press Release (June 22, 2019).
[9] How Brands Can Sell to Environmentally Conscious Nonconsumers, Harvard Business Review (June 5, 2023).

Employee Activism

Companies know the value of a strong talent pool. Making sustainability a priority can expand an employer's talent advantage. A 2023 Deloitte survey found that 69% of employed adults want their companies to invest in sustainability efforts, such as reducing carbon, using renewable energy, and reducing waste.[10] The workforce is also being more selective about companies' sustainability positions in deciding whether to accept jobs: 27% will consider a potential employer's position on sustainability before taking a job.[11] It is thus unsurprising that employee activism is motivating corporate leaders. Fifty-nine percent of corporate leaders say that employee activism has driven their sustainability efforts.[12]

Investor Demands

More than 95% of S&P companies issue a sustainability report.[13] Investors are using ESG factors—particularly those related to governance and climate change—to reduce risks associated with investments.[14] Likewise, investors believe that strong ESG practices can lead to higher returns, an opinion that is growing. According to a Morgan Stanley report, 77% of investors say they are interested in investing in companies and funds that consider positive social and/or

[10] Engaged employees are asking their leaders to take climate action | Deloitte Insights, Deloitte Center for Integrated Research (November 9, 2023).
[11] *Id.*
[12] *Id.*
[13] Linking ESG initiatives to financial performance | McKinsey, McKinsey & Company (September 15, 2023).
[14] Big Investors Say They Use ESG to Reduce Risk (But Mostly Focus on the E and G) | Stanford Graduate School of Business, Insights by Stanford Business (May 2, 2024).

environmental impact; 57% say that their interest has increased over the last two years; and 54% plan to grow allocations in sustainable investments in the coming year.[15]

Regardless of whether laws mandate a focus on sustainability, customers, employees, and investors appear to be strong forces in setting sustainability as a high priority for companies.

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[15] Sustainable Investment Interest on the Rise in 2024 | Morgan Stanley, Institute for Sustainable Investing (January 26, 2024).