

Ballard Spahr

Environmental, Social, and Governance (ESG)

ESG is becoming an essential metric for business leaders, investors, regulators, and other key constituencies.

Increasingly, shareholders and other stakeholders evaluate a company's performance on certain non-financial metrics, including sustainability, workforce composition and labor standards, board and management diversity, pay equity, and political/non-profit giving.

These environmental, social, and governance (ESG) metrics are a growing area of focus for companies of all sizes, investors and investment firms, lenders, governmental agencies and legislatures, stock exchanges and other self-regulatory bodies, activist shareholders, and other advocacy groups.

Our ESG Working Group applies the experience of lawyers from across the firm to address the unique ESG issues and goals of our clients. This cross-disciplinary approach allows us to help our clients navigate a fast-changing ESG landscape, including:

- Enhanced disclosure requirements by regulators, proxy advisors, and trading platforms on certain ESG metrics;
- Increased litigation and reputational risk to business operations caused by corporate statements, spending, and policy;
- Divestment and investment trends in projects and entities based on their environmental and social impact;
- The evolution of fiduciary duties of directors, investment advisors, and lenders arising from ESG initiatives; and
- Creating and assessing diversity, equity, and inclusion goals in the workplace.

Securities and Corporate Governance

Companies are increasingly applying ESG factors to identify material risks and growth opportunities for their businesses. Companies also face growing internal and external pressure to be more transparent about their ESG initiatives, including in the areas of board composition and diversity, compensation governance and pay equity, response to COVID-19 and worker safety, stewardship of the environment and environmental impact, community relations, and charitable or political donations.

Increasingly, companies, their boards and management, are being asked to take public positions on a variety of ESG issues of importance to investors, shareholders, employees, customers, and the public at large. For public companies, some of this transparency is being mandated by SEC rules, by stock exchange listing standards, and by ISS, Glass Lewis, and other proxy advisory firms. Our lawyers assist companies and their directors and officers with the scope of their disclosure and fiduciary duties related to ESG, help them monitor and understand the changing landscape of ESG-related risks and best practices, and defend them in litigation, if necessary.

Investment Management

In the investment world, ESG analysis has become an increasingly important part of the investment process and we are seeing the beginning of mainstreaming of ESG investing. We also are seeing a rise in ESG focused private equity, hedge, real estate and other pooled investment vehicles.

Our investment management practice encompasses organizing, registering, and structuring money-management firms and public and private investment companies. We also represent investors—including pension funds, family offices, and other private and institutional investors. We help these clients achieve their ESG goals by developing sound ESG investment policies and practices and vetting their investments from a legal perspective.

The Environment, Energy, and Sustainability

A company's energy use, waste disposal procedures, water stress levels, carbon footprint, treatment of animals, and impact on climate change will be closely scrutinized by employees, consumers, and investors. Our ESG audits consider any environmental risks a client might face and how to best manage those risks.

We help clients assess their ESG standing, evaluate the environmental factors at play during transactions, and take steps to reduce their impact on the planet in pursuit of their ESG goals. We also provide wide-ranging legal counsel in the power, utilities,

and renewable energy industry for whom ESG initiatives are a business imperative.

Finance

Our lawyers advise clients with the varied ESG considerations in finance and development, including matters associated with the “greening” of infrastructure and other capital assets, asset monetization, supply chain, procurement, and adaptation strategies to mitigate current and future impacts of climate change. We regularly advise clients on methods to achieve their ESG objectives, whether as lender or borrower. We advise direct lenders, fixed-income purchasers, investors, fund sponsors and managers, issuers, borrowers and developers in connection with ESG-focused debt and equity transactions and programmatic lending and investment programs.

Our nationally recognized public finance lawyers represent these clients in a wide range of ESG-driven financings across the nation. We finance green infrastructure to economically safeguard our rivers and other water resources; the installation of energy efficient capital improvements to aging multifamily housing stock and commercial, nonprofit and governmental facilities; social impact investments; and modernization of our electric grid, street light, and transportation networks. We are national leaders in the financing of bioenergy and recycling facilities – including the scaling of nascent technology to commercial scale – to reduce our nation’s dependence of coal, oil and landfills. We assist our nonprofit clients to achieve their carbon-neutrality and sustainability goals through investment in renewable energy sources and campus energy efficiencies. Our finance lawyers regularly advise clients on securities disclosure issues in municipal securities offerings and secondary market filings concerning climate change adaptation, green bond qualification and reporting on the efficacy of their ESG investments. As thought leaders acting in concert with environmental advocates, we have co-hosted our annual Green Infrastructure conferences for clients and other interested parties.

ESG in the Workplace

In addition to ESG compliance counseling, we advise employers on the development, enhancement, implementation, and achievement of their ESG goals, including diversity and inclusion programs. We perform diversity audits and analysis, prepare action plans, conduct employee and executive training, and advise on supplier and vendor ESG-related issues.

Salary, bonus, and severance packages given to top management have become points of scrutiny by shareholders, investors, proxy advisory firms, and the public, as well as other employees. We regularly advise clients and their boards on executive hiring, termination, and compensation structures, with specific attention to compensation governance, internal equity concerns, and the client’s ESG goals. We also advise on the preparation of human capital, executive compensation, and other related public disclosures.

Privacy and Data Security

How companies handle personal information continues to make headlines. In the European Union and increasingly in the United States, data privacy issues are human rights issues, which fall under the “S” of ESG. Additionally, among ESG-minded investors and ESG ratings agencies, privacy and data security is gaining a rising profile due to its potential impact on customers, users, and society at large.

Socially responsible companies have a plan for the collection and use of sensitive data. We offer cybersecurity counseling, asset inventories, and risk assessments. Our work includes drafting disclosures on information risks and developing risk management practices and incident response plans that ensure that information is being properly managed.

Banking and Financial Services

We help investors and lenders ensure that their assets—and their participation in transactions—fall within the boundaries of their own ESG standards, as well as the achievement of their borrower’s financed ESG objectives. We counsel clients on ESG considerations during financings, mergers, acquisitions, divestitures, and vendor selection. We advise on regulatory compliance, including securities disclosure issues, and evaluate potential ESG risks. ESG investors and conscious consumers want assurances that the financial institutions with whom they do business are ethical. Our Anti-Money Laundering team advises on customer identification, suspicious activity report requirements, and due diligence for lending and acquisitions.

In addition, many institutional and non-traditional investors have aggressive investment strategies to achieve their own ESG goals, particularly in fixed-income investments. We have a robust finance practice in the bioenergy project finance and green infrastructure finance sectors and significant experience with the issuance and disclosure of green bonds.

Real Estate

Our development and transactions attorneys—many of whom are LEED certified—advise on how to build ESG values into real estate projects, including the acquisition of environmental permits and siting approval and evaluating the viability of projects through environmental due diligence. On the financing side, we counsel clients on the ESG considerations in investments of real property, REITs, distressed assets, and real estate portfolios. We represent clients in litigation to challenge unacceptable permit terms and defend third-party challenges to project approvals.

Nonprofit Organizations

Education, health care, and cultural non-profits have some of the most well-formed and aggressive ESG goals in the marketplace. Many of our nonprofit institutional clients have pressing capital needs to achieve those goals within the next 10 to 15 years. We have worked with nonprofits to finance energy efficient capital improvements and sustainability programs.

Government

Our Government Relations and Public Policy team is active in the ESG field, monitoring developments and issues as they arise and advising clients of potential new matters on the horizon. As a result, we are able to proactively address many issues and develop ESG positions well before they come to the attention of the constituencies impacted by ESG decisions. We also advise private clients on new legislation and local building codes that aim to incentivize energy efficiency capital investment in the public and private sectors.

Experience

Securities

- Counseling Essential Utilities (formerly Aqua America Inc.) on ESG disclosures made in its ESG report, proxy statement, and Form 10-K. Essential Utilities eventually earned a favorable mention in a Donnelley Financial report on ESG matters.
- Advising, for more than 20 years, several denominational pension plans on their ESG investment policies and practices and closely monitoring related fiduciary duty regulations
- Advising the investment fiduciaries of several pension, 401(k), and 403(b) plans on new ERISA regulations for fiduciary duties related to investing plan assets in ESG fund
- Counseling the boards of both public and private companies, investment managers, and investment funds in ESG matters and related fiduciary duty issues.
- Drafting charters for boards of directors' ESG committees, counseling companies on ESG committee agenda items, and coordinating with other board committees
- Evaluating ESG mutual funds to determine if they were appropriate for our clients
- Advising public companies on ESG/board diversity initiatives and requirements of institutional investors and proxy advisory firms
- Counseling public company boards and governance committees on ESG matters related to board and executive recruiting, investor relations, shareholder activists, and setting the “tone at the top”
- Drafting SEC required disclosures on ESG topics such as conflict minerals reporting, human capital management, board policies for diversity, nomination and governance processes, and environmental and other ESG related litigation
- Advising public companies on ESG-related proxy statement disclosures, shareholder proposals, and proxy advisory firm voting guidelines
- Helping fund managers design voting policies for proxies; form investment funds that target ESG-related matters; and implement family “mission” planning
- Advising trustees and families in establishing ESG policies and determining whether trusts can or should be modified to permit ESG investing

Environmental

- Assisted a client in evaluating a development project's adherence to the Equator Principles prior to the client's tax equity investment
- Drafting policy and legal white papers for industry-sector investors on the impact of implementing or cancelling environmental regulatory initiatives
- Helping clients navigate the environmental justice landscape during the siting and development of major infrastructure, institutional, and private development projects
- Advising clients in best practices for "greening-up" their energy, construction, and operational arms
- Reviewing client sustainability reporting to ensure alignment with operations and governmental, regulatory, and public policy initiatives
- Evaluating environmental claims in advertising and other public-facing statements
- Developing strategies for implementing climate change action across diversified utility operations
- Evaluating emission offset programs and buying/selling emission offsets

Energy

- Assisted a Fortune 500 company in the negotiation of renewable energy/environmental attribute purchase agreements for approximately 1,500 megawatts of new renewable energy facilities being installed throughout the county, and these purchase arrangements result in the company being among the largest purchasers of green energy in the USA, and are a key component of its sustainable development goals
- Assisted various public and private educational institutions in structuring renewable energy and credit purchase arrangements that help these institutions achieve their goals for environmental sustainability
- Represented the underwriters in the financing of the development of a biofuels production facility in Oregon that converts woody biomass from timber harvest residuals and forest thinning activities into jet, diesel, and gasoline blendstock fuels
- Represented the underwriter in connection with the limited offering of multiple bond issues from 2017-2020 for Fulcrum Sierra Biofuels, LLC for the development of biorefinery facilities in Nevada and related infrastructure improvements that will convert municipal solid waste to diesel fuel
- Represented the underwriters in connection with the limited offering of bonds in 2018 for an affiliate of Equilibrium Capital Group to finance the second phase of an organic waste to RNG production facility that included the construction of two 3.3 million-gallon digesters and additional gas conditioning equipment that is to source local dairy cow manure and industrial food waste from the Phoenix area dairies
- Represented the underwriters on a 2019 project to finance the development of a plastics recovery and recycling facility that will convert mixed polymer waste into gasoline blendstock and wax in Indiana

Bioenergy and Project Finance

- Represented approximately 20 institutional investors in the limited offering and sale of nearly \$220 million of senior lien, tax-exempt revenue bonds issued in 2020 by the Southern Ohio Port Authority to finance the world's first commercial-scale, virgin-grade polypropylene recycling facility
- Served as bond counsel in connection with the 2020 limited offering and sale, on a current and forward delivery basis, of approximately \$125 million of tax-exempt and taxable bonds to finance the development of a new digester in suburban Philadelphia to convert supermarket food waste into pet and animal feedstocks

Labor and Employment

- Conducted diversity and inclusion training, including training regarding implicit bias, and drafted leave donation policies for the workplace
- Assist clients with developing programs under the Equal Credit Opportunity Act, presenting these programs to regulators and obtaining approval
- Advised a Fortune 500 company on diversity, equity and inclusion practices
- Advised a utility-scale energy storage developer in connection with the development and implementation of diversity, equity, and inclusion plan and associated practices

- Drafted Codes of Conduct and Business Ethics for publicly traded companies
 - Advised clients across industries with respect to pay equity issues and conducting training for HR and hiring professionals on best practices
 - Advised clients on compliance and investigation best practices
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