

## 6 KEY TAKEAWAYS

### ESG Hot Topics

[Kilpatrick Townsend](#) attorneys, consultants, and corporate representatives recently provided insight on ESG topics and takeaways ranging from climate change, broker/dealer and corporate board considerations, potential legal exposure and ways for companies to successfully start and maintain their ESG journey. Kilpatrick Townsend Government Enforcement and Investigation Team Partners, [Scott Marrah](#) and [Adria Perez](#) offer key takeaways from their presentations, including:

**1**

Companies are disclosing more information—both voluntarily and in response to requirements—on environmental, social and governance topics given stakeholder demand. The potential legal risks for not accurately disclosing your ESG efforts, whether voluntarily or not, can include government enforcement, shareholder actions, consumer actions and commercial litigation. What you say must be accurate!

**2**

There are several trends that may create ESG risk, including the recent Delaware Court of Chancery's denial of The Boeing Company's Board of Directors' motion to dismiss a shareholder derivative action against the directors arising from the fatal 737 MAX airplane crashes (*In re The Boeing Company Deriv. Litig.*, 2021 WL 4059934, at \*1 (Del. Ch. 2021)). The court based its decision on the alleged failure of the board to establish a board-level reporting system for "mission-critical" airplane safety issues and for "turn[ing] a blind eye to a red flag representing airplane safety problems." This decision may lead to more derivative actions into ESG topics that shareholders believe require board oversight. For more information on the court decision, please see <https://www.jdsupra.com/legalnews/recent-boeing-decision-highlights-focus-4840478/>.

**3**

Also, research companies, like Hindenburg Research LLC (which is also a short seller) will review corporate voluntary and mandatory disclosures to understand whether the information is accurate and complete. Hindenburg Research's reports have triggered several DOJ and SEC investigations, including into:

- Lordstown Motor Corporation's alleged misrepresentations of its preorder numbers and production readiness;
- Nikola Corporation and its founder's alleged misleading of investors over its technology capabilities; and
- Clover Health for failing to disclose a DOJ probe.

**4**

Whistleblowers will be interested in ESG topics. The DOJ and SEC are reported to have initiated investigations into DWS Group after the former Sustainability Chief's allegations concerning how the company's 2020 annual report painted a "rosier-than-reality picture" to the public of DWS' ESG efforts. According to the allegations, DWS did not have a clear ESG strategy; it lacked certain policies and ESG personnel were not part of any decision-making. BaFin, a German regulator, reportedly also opened an investigation.

**5**

Given the risks, compliance departments have an increasing ESG role because they have data, metrics, insight on the laws and regulations as well as best practices. Legal departments will be asked to continue to help identify and mitigate these risks.

**6**

What is voluntary regarding ESG reporting may soon become mandatory and non-financial reporting could expand and demand more rigor from companies. The SEC has indicated new rulemaking will take place soon. The SEC's recent template letter regarding climate disclosures (see <https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures>) appears to be a preview of coming requirements.

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