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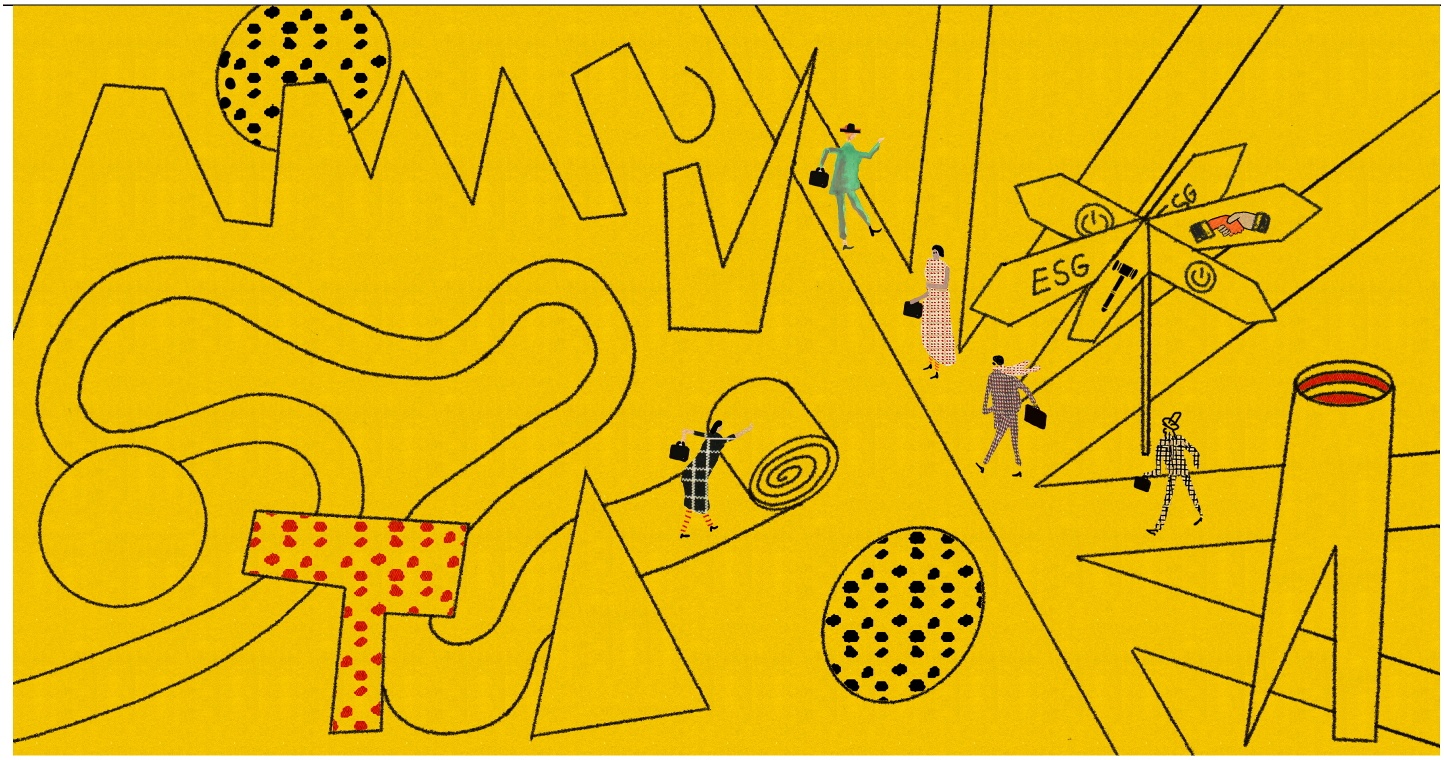
The Mainstreaming of ESG in Business: The Role & Opportunities for In-house Counsel

Corporate, Securities, and Governance



Original artwork by [Ryan Peltier]().

Cheat Sheet

- **CSR.** There have always been examples of irresponsible conduct by corporations, but what started as the corporate social responsibility agenda in the 1970s has transformed into the environmental, social, and governance (ESG) and sustainability movements today.
- **Action.** Calls for universal efforts to act on climate change and other ESG issues from consumers and governments are increasing and should be addressed.
- **Officers.** There is an emergence of roles designed to keep companies accountable on their ESG commitments like sustainability or responsibility officers or ESG directors.
- **In-house.** Legal counsel will be called alongside the sustainability officers to undertake ESG integration work by advising the business on compliance and integration of ESG objectives and to advise management on mitigating the risks and sanctions of not doing so.

Move over Risk and make space in the C-Suite.

There is a new CRO in town: the Chief Responsibility Officer. And seated at their right hand will be the general counsel.

It would be hard not to notice the recent uptick in job titles and teams containing words like sustainability, ESG, D&I, and others related to responsible business conduct. More and more organizations are forming dedicated sustainability and environmental, social, and governance (ESG) teams while simultaneously embedding policies focused on climate change risk, responsible AI and data, and enhanced social justice, particularly with employee related diversity and inclusion (D&I) commitments.

Many top tier international law firms and professional consultancies have recently announced dedicated ESG practice groups, and, in the last few years, there has been an emergence of boutique and specialist ESG consultancies appointed on mandates with financial institutions, governments, and multinational corporations.

A popular webinar topic conducted by law firms and other professional groups revolves around responsible business conduct themes such as sustainable finance, ESG related laws and regulations, climate change litigation risk, and human rights and business trends.

In order to navigate, make sense of, and integrate the fast pace of ESG related changes and expectations, organizations are appointing a chief responsibility officer (CRO) or chief sustainability officer (CSO). This role is what a recent joint report from Deloitte and the Institute of International Finance referred to as a "sense-maker in chief" — someone to help an organization navigate the ESG environment, strategize, and operationalize its purpose-led goals and commitments.

There were naysayers who dismissed sustainability and the wider ESG agenda only a few years ago as just another passing fad, but it has become clear that this portfolio is here to stay. It is likely to take more prominence on the board agenda, and in-house counsels will be expected to both lead and support these initiatives.

Looking back

Historically, business conduct had various checks and balances both internal to an organization (e.g., lawyers, compliance officers, audit, tax, and risk functions) and external to the company management (e.g., laws/regulations, government watchdogs, media and public oversight, and customers). Notwithstanding, there have been, and continue to be, examples of irresponsible conduct due to neglect, oversight, or intentional fraud, with no sector or country exempt. The persistence of "bad behavior" shows the need for vigilance and enhancement of responsibility frameworks.

The advent of the corporate social responsibility (CSR) agenda that took place initially in the United States during the 1970s further entrenched corporate accountability by creating professionals, teams, resource allocation, and reporting towards responsible business conduct objectives. While CSR initiatives have been effective in widening the range of stakeholders whom businesses consider, it has also been critiqued as sometimes serving as public relations or being marginal to the organization's day-to-day policies, practices, and output.

In the last twenty years there has been increasing attention given to legal, compliance, and risk professionals to address matters related to risk and responsibility in doing business and accordingly in professional consultancies, advisories, and law firms. The enhancement of these roles and workstreams has come in waves and usually in response to issues such as anti-bribery and corruption, anti-money laundering and counter-terrorist financing, sanctions, data privacy and a general increase in government scrutiny and regulatory oversight.

The last decade has seen greater awareness of the adverse impacts of climate change, how the negative effects of globalization have created vast economic disparities, and that still at this progressive time there exist deep racial and social injustices within societies and across geographies. This heightened awareness has led to a broad acceptance that business as usual is no longer acceptable. Things need to change; the new norm cannot mirror the old norms.

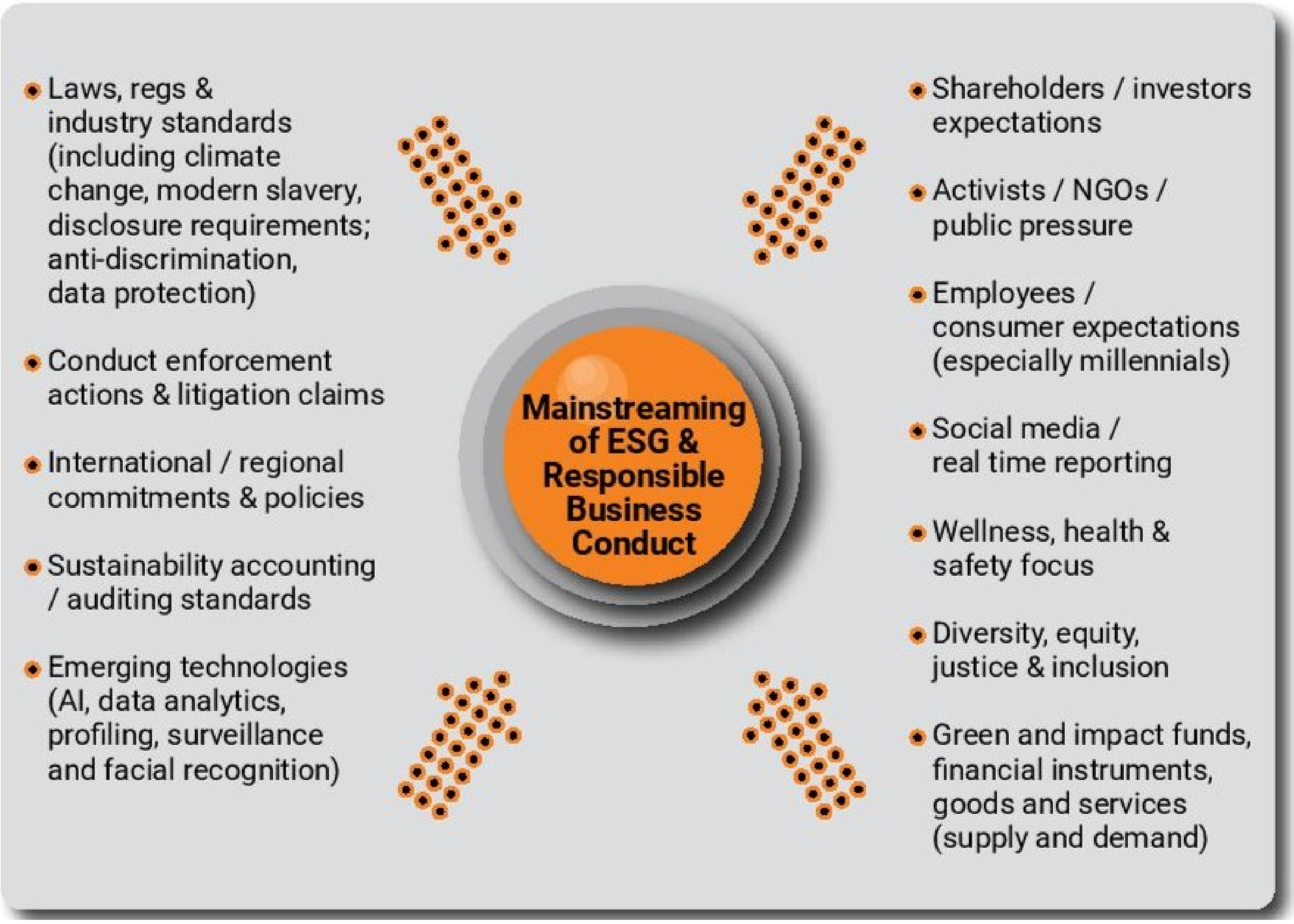
However, we are further challenged by emerging technologies and increasing digitization. The use of big data analytics, artificial intelligence, profiling and facial recognition, and surveillance have heightened the inadequacy and unpreparedness of traditional accountability mechanisms.

Enter the responsible business conduct professional.

What and why?

ESG issues and risks gained increasing prominence within business particularly from 2015 when all UN Member States adopted the 17 Sustainable Development Goals (SDGs) as a universal call to action to end poverty, protect the planet, and ensure that all people enjoy peace and prosperity by 2030.

In order to reach these ambitious targets, concerted and integrated efforts are required by both public and private sectors across all industries. The variety of push and pull factors (which predate 2015 and go beyond the UN SDGs) are listed below:



The international initiatives are many and continue to be rolled out including the SDGs, the Paris Agreement on Climate Change, UN Global Compact, OECD Guidelines on Responsible Business Conduct, the UN Guiding Principles on Business and Human Rights, the World Economic Forum's Circular Economy Guidelines, sustainable finance taxonomies (notably by the governments of EU, Hong Kong, Singapore, and China). There is a steady stream of regulations and laws such as the Task Force on Climate-Related Financial Disclosures, the UK Modern Slavery Act, or the EU Mandatory Human Rights Due Diligence regulations, in addition to sector specific standards. These and more have all set out clearer frameworks on what, who, and how to address current ESG challenges.

Although European countries have often been cited as taking the lead with laws and regulations, they are by no means alone. Governments and regulators from Singapore, Hong Kong, the United Arab Emirates, and South Africa have announced "green" plans, sustainable finance taxonomies and guidelines, climate change risk initiatives, and human rights authorities.

2020 was welcomed as the "decade for action" to deliver on the UN SDGs and climate change commitments, but that was quickly thrown off the rails with the COVID-19 pandemic, natural disasters, and renewed focus on systematic racial/social inequalities. This trifecta of crises has further drawn out the imperative of acting on the S and G in ESG commitments in tandem with the environmental focus.

Influential voices in the business community such as Larry Fink of Blackrock and other prominent institutional investors are not only widening investment criteria to include ESG factors but are also increasingly using their investment power to influence the business community to embed ESG and climate change risks in corporate strategies.

Former Bank of England Governor Mike Carney recently took up a position at a prominent global investment firm with the specific mandate of expanding their environmental and social investing. Despite the economic challenges of the COVID-19 global pandemic, debt and capital markets reported a sharp rise in sustainability linked products, continuing trends from past years and encouraging conformity to industry standards set by groups like the Loan Market Association and the International Capital Market Association.

Another factor in companies' decisions to embed ESG considerations in corporate strategies is the rise of employee activism. In 2019, employees of Google, Microsoft, and Amazon walked out to support the Global Climate Strike, and Amazon announced further commitments of its climate change policies in the face of public scrutiny instigated by their Employees for Climate Justice Group. In 2020, some of the world's top retail chains were implicated in supply chain integrity lapses for sourcing of textiles from Chinese factories with alleged forced labor of Uyghur minorities. This prompted calls for boycotts, supply chain due diligence, re-sourcing of raw materials, and pressure on the UK government to impose bans.

Considering the fast pace at which government guidelines turn into hard obligations, together with the shift in investor expectations and public opinion, more organizations are appointing sustainability and responsible business conduct professionals. There are primarily two types of roles these professionals will fill: new roles like the responsible AI officer and refashioned roles like legal counsel or compliance officers focusing on ESG issues like climate change risk, data privacy, supply chain human rights risks. Companies will also rely more on external advisors to assist with understanding, tracking, and complying with ESG related commitments.

Looking ahead

Responsibility officers and in-house counsel will be required to align an organization's business model and operations with its ESG strategies and commitments, to advise management, and to catalyze change within the organization beyond what is required.

Often doing what is required today will not be enough tomorrow given the fast output in laws, regulations, industry standards, public expectations, and the legal accountability of both governments and corporations in relation to climate change and human rights concerns.

Some sectors are impacted more than others and some regions are moving ahead of others, but this trend is noticeable across most sectors both private and public. For example, financial institutions are under great scrutiny due to the introduction of rules and regulations by market authorities to ensure banks protect investor deposits against climate change risks, take further responsibility for their financing impacts and play a proactive role in mobilizing resources to finance the SDG commitments.

However, banks are not the only sector with ESG responsibilities; oil and gas, aviation, retail and fashion, agriculture and food production, and tech giants all face similar challenges and scrutiny around carbon emissions, waste management, supply chain integrity, the treatment/payment of workers, data privacy protection, ethical use of emerging technology, and diversity and inclusiveness practices.

Role and opportunities for in-house lawyers

Lawyers have historically been the torch bearers for responsible conduct in business. Considering the aforementioned factors, there is arguably an enhanced and slightly different role and responsibility for in-house lawyers to shoulder. It would be remiss of in-house counsel to carry on business as usual or for management to consider legal advisors as back office support when it comes to mainstreaming ESG issues.

Increasingly, in-house lawyers will be called to advise directly on ESG matters or at least ensure consideration of ESG factors and risks in providing routine advice. They should therefore become aware of and maintain current knowledge on a range of issues including:

- Climate change risks and related regulations;
- Governance standards and best practice;
- Sustainable finance;
- Supply chain integrity;
- Business human rights standards and conduct;
- Sector specific standards for responsible business conduct, due diligence and reporting; and
- Consequences of non-adoption or non-compliance with ESG issues and risks and how to mitigate (e.g., litigation claims, fines/breaches, adverse reputational/brand, activism by external or internal stakeholders).

In-house lawyers can consider their role of mainstreaming ESG in business through a multifaceted lens, taking a wider view of their role in advising their client to remain compliant with laws and policies. They can and should be part of setting the ESG strategy and subsequent steps to operationalize responsible business conduct.

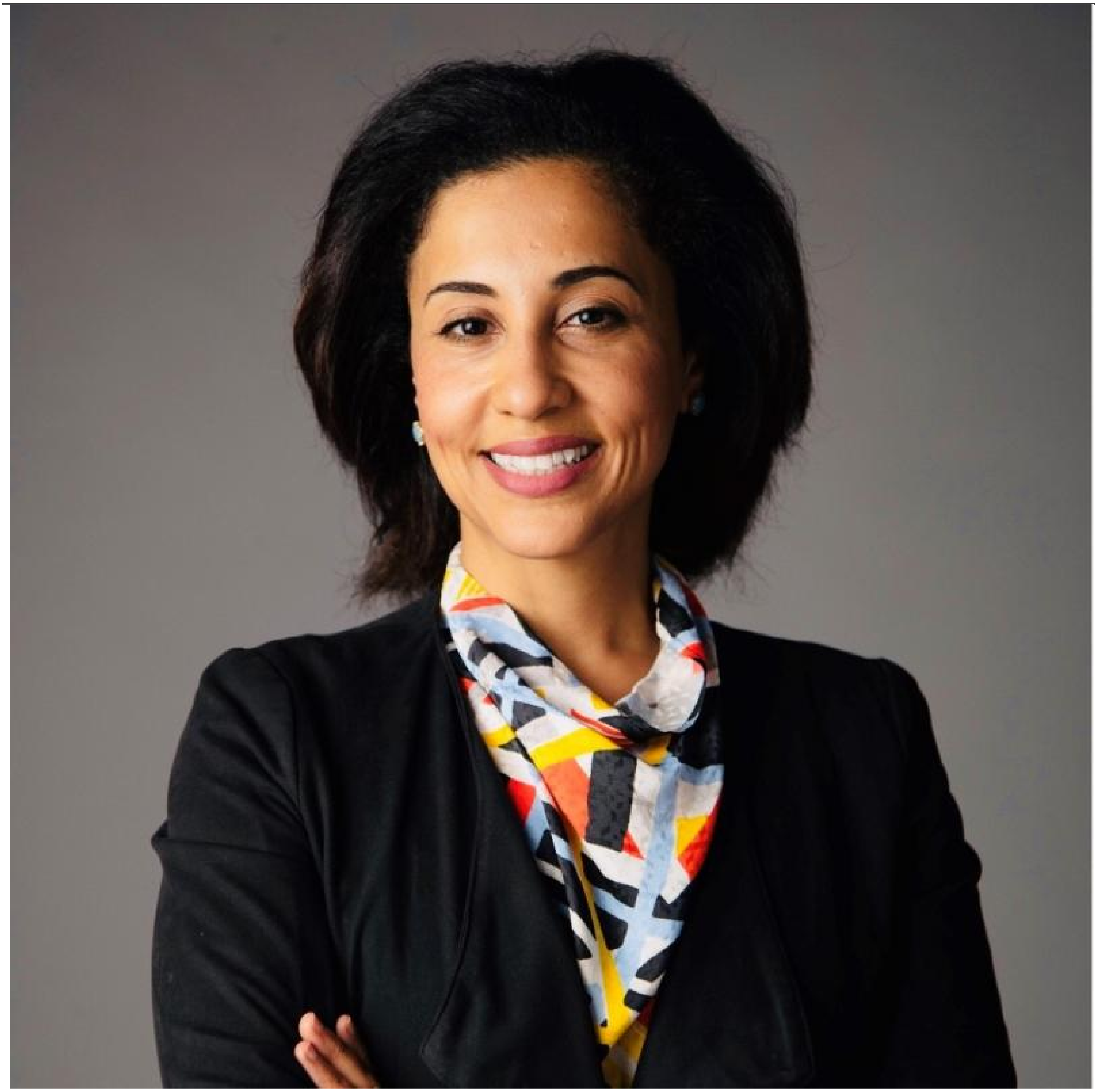
Below are some suggestions to consider for the mainstreaming of ESG and collaboration with the Chief Sustainability/Responsibility Officer (or their equivalent):

- Act as advisors for compliance and risk mitigation both pre-emptive and reactive on matters relating to environmental impacts, supply chain integrity, employment, and D&I practices given the legal department's insights on transactions and day-to-day organizational dealings.
- Understand current and horizon risks for changes in laws and regulations holding companies more accountable on ESG criteria.
- Create or amend legal contracts and general documentation to embed ESG compliance.
- Advise on current and horizon risks and changes in litigation that are increasingly shifting to allocate responsibility to governments for non-action on climate change impacts, to parent companies for adverse subsidiary actions, and to corporations for not meeting ESG commitments mentioned in public position statements.
- Create and/or participate on internal working groups relating to sustainability including issues relating to diversity, equity, and inclusion.
- Act as thought leaders to future proof the business and not simply help clients to catch up with emerging standards, laws, and regulations to meet today's minimum standards.
- Participate in industry bodies and government/regulatory consultations around ESG compliance, opportunities, and challenges specific to their sector (e.g., to share best practice and create common standards and taxonomies).
- Proactively advise management and business around responsible innovation and responsible use of personal data given emerging technologies like artificial intelligence/machine learning used for profiling in decision making, surveillance/tracking.

The chief responsibility officer and general counsel roles may overlap or at least will align to deliver shared objectives. Sustainability and equity are the crises of our generation and there is a moral imperative for lawyers as guardians of the rule of law and justice in further mainstreaming ESG in both public and private institutions. This should not conflict with profits or growth. In fact, such steps should enable companies to maintain and grow their profits sustainably, because without the well-being of the planet and people there would be no profits to be had or enjoyed.

Views expressed in the article are personal to the author and do not represent Standard Chartered in any official capacity.

Layla El-Wafi



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