

Environment & Energy

# Top ESG, Environmental Issues for Business in 2022

By Thomas Lorenzen and Elizabeth Dawson

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The ESG landscape will become more complex in 2022, and in-house counsel and compliance professionals should be aware of five emerging trends, say Crowell & Moring's Thomas A. Lorenzen and Elizabeth B. Dawson. Findings of a recent Crowell survey shows that only about two-thirds of in-house counsel said they were up to speed on environmental issues and understand their impact on the future of their business.

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In the world of environmental law and policy, 2021 brought about many notable developments, from the Biden administration's policy shifts at the beginning of the year to COP26's deliberations and diplomacy regarding climate change toward the end. At the same time, environmental, social, and governance issues (ESG) have been elevated in the popular discourse as never before.

And let's not forget the continuation of the Covid-19 pandemic, which adds a layer of complication to everything. As we approach 2022, taking stock of what happened in 2021 helps shape expectations for the new year.

In addition to executive, legislative, and judicial news in the U.S. and abroad, informing our analysis are the results of a recent Crowell & Moring survey polling in-house counsel, sustainability professionals, compliance professionals, and others on how their companies are navigating ESG and environmental performance.

Interestingly, only about two-thirds of in-house counsel said they were up to speed on environmental issues and understand their impact on the future of their company's business.

In the fast-changing landscape of ESG, the only certainty is that things will become more complex. The following five developments—encompassing litigation, regulation, policy, disclosures, and supply chain—are by no means the sum total of the myriad environmental issues that demand attention, but they capture several important, emerging themes.

**Litigation: Beware the Greenwashing Monster**

More than half of the survey respondents reported that their companies publicly share information such as environmental issues on which they're focused, metrics identified by a recognized ESG framework, environmental performance data, and forward-looking environmental targets and goals.

At the same time, false advertising claims are increasing, with the plaintiffs' bar bringing a never-ending stream of lawsuits claiming companies are engaging in "greenwashing"—over-promising and under-performing regarding their environmental efforts.

Emboldened by new and sophisticated testing methods, these cases are challenging past assumptions and environmental performance standards as no longer sufficient. With the Federal Trade Commission poised to review its "Green Guides" in 2022—for the first time in a decade—we expect continued pressure on companies to be able to substantiate what they put out for public consumption.

### **Regulation: Can Governments 'Keep 1.5° Alive'?**

COP26 was a disappointment to many who viewed it as the last best chance to achieve firm, accountable emission-reduction commitments that would limit global warming to 1.5 °C. But it was no surprise to those who have watched countries struggle for decades to reconcile the need to rein in greenhouse gas emissions with the moral imperative of economic development in the Global South.

And with the U.S. Supreme Court considering the extent of the Environmental Protection Agency's ability to regulate carbon dioxide emissions under the Clean Air Act this spring, the ability of the U.S. to make good on all of its goals is up in the air.

Nevertheless, meaningful change is on the horizon, as the Biden administration sets its sights on reductions in methane and HFCs—greenhouse gases with higher global warming potential than carbon dioxide. Fewer than half of companies reportedly track greenhouse gas emissions, according to the survey results. Events in the coming year may force a reassessment of this approach.

### **Policy: Environmental Justice Influences Regulatory Agenda**

The Biden administration has been more intentional than perhaps any administration before it in recognizing the outsized impact environmental stressors have on traditionally under-served communities. As such, the administration has vowed to integrate social justice and economic opportunity considerations with environmental permitting and enforcement.

Many companies indicated in the survey that they are aware of their impacts on minority communities, but far fewer are actually measuring that impact. In the coming year, companies may find themselves needing to gather additional data in anticipation of increased interest in the local impacts of their operations, particularly where they operate in an area of more concentrated commercial activity.

### **ESG Disclosures Are Here—Are Businesses Ready?**

Voluntary disclosure regimes under which companies can opt to disclose ESG metrics—and of late, particularly climate-related financial risks—are not new. But ESG and climate disclosures are increasingly moving from voluntary to mandatory, with both the European Union and the U.K. having taken significant steps in the past two years to require companies to disclose decision-useful information.

The U.S. is currently playing catch-up, but many expect to see a proposed rule out of the Securities and Exchange Commission in early 2022 to require climate disclosures. The U.S. is also leveraging its purchasing power to impose requirements on companies regardless of public-reporting status.

A majority of survey respondents indicated they already disclose more than current law requires, but it remains to be seen whether the type and quantity of data disclosed will align with what may soon be required.

### **Supply Chain Sustainability: Monitoring and Measuring**

Recent events, not least the Covid-19 pandemic, have lodged supply-chain issues firmly in the public consciousness, with the increased scrutiny that inevitably brings. A majority of survey respondents identified environmental goals for their supply chains; at the same time, many are experiencing challenges in implementing those goals, whether due to cost, difficulty tracking, or reluctant suppliers, among other reasons.

Companies with international suppliers and operations may find these issues particularly thorny, and may be looking to new tools such as AI-powered management software for help. And, with the aforementioned disclosure requirements coming into force, these tools will be more vital than ever.

As a new Covid-19 variant of concern emerges yet again, predictions about 2022 may be premature. But no matter what the new year brings, these five environmental issues will be top of mind as businesses navigate and adapt to these changing times.

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