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Strategic Perspectives | The ESG Ready Lawyer

K&L Gates' Sean Jones and Julie Rizzo help diverse clientele navigate the ESG chaos

By Brad Rosen

In this fourth installment of *The ESG Ready Lawyer*, I sat down with K&L Gates partners Sean Jones and Julie Rizzo for an engaging discussion of ESG issues in today's highly politicized environment and the host of challenges they create for companies and stakeholders of all stripes.

K&L Gates is a fully integrated global law firm with approximately 2,000 lawyers located across 48 offices worldwide. Sean, based in the firm's Charlotte, North Carolina office, is the head of the U.S. Capital Markets practice group, and focuses his practice on securities and corporate governance matters. Julie is based in the firm's Raleigh, North Carolina office where her practice focuses on SEC reporting and disclosure issues. Prior to joining the firm, Julie worked as an in-house attorney at an NYSE-listed company where she served as the company's in-house securities lawyer, and prior to that, she served as an attorney-advisor in the SEC's Division of Corporation Finance. The interview has been edited for clarity and brevity.

Can you describe your background, practice, and ESG journey, and how that informs your approach to providing counsel on ESG issues?

Sean Jones: My practice is focused on public companies, SEC disclosures, and advising boards. I'm the U.S. head of the firm's Capital Markets practice and work with a variety of large and small public companies. I also enjoy working with nonprofits and considering ESG issues from many different perspectives. My practice primarily involves governance and disclosure issues, and I have found that ESG is a broad and dynamic area and that it can be a little difficult to get your arms around.

As for my own ESG journey, I find ESG-related issues very interesting. Corporations are powerful forces in our economy and society, and I find the debate over the role, purpose, and responsibility of corporations to be fascinating. Discussions about whether executives should manage a corporation solely for the benefit of stockholders or for a broader set of stakeholders is incredibly interesting, particularly when you consider the issue against the backdrop of our day-to-day counseling of boards and management teams. ESG ties into this debate and has drawn me to this area of practice.

Julie Rizzo: My personal ESG journey has been informed by three different perspectives. First, from having spent time at the SEC, then from having spent time in-house, and now advising companies on their own ESG journeys.

For example, a question we have all heard many times is whether the SEC should be involved in this area. When I think about this question, I go back to the fundamental premise that if disclosures are material to investors, those disclosures should be in a public company's SEC filings. I believe that is the lens through which the SEC views ESG disclosures, and it informs the way I think about ESG matters. Additionally, I think the fact that I have been in-house and in the shoes of our clients helps me advise them as they undertake their ESG journeys.

Please describe how the ESG practice at K&L Gates is organized, as well as its focus and capabilities.

Sean Jones: I don't think any lawyer is smart enough to master every aspect of ESG, as the topic is just too broad. Our firm has a multi-disciplinary ESG practice group, and we try to approach ESG from the perspectives of our clients and present our advice in a way that synthesizes and harmonizes complex issues with often conflicting considerations.

ESG has become politically charged and a little chaotic recently. Our goal is to bring order to this chaos for our clients. We try to enable our clients to see broader trends and dynamics – and avoid getting lost in the details that seem to be changing almost minute by minute.

Our client base is incredibly broad. We represent multi-billion dollar NYSE companies, smaller NASDAQ-listed companies, private companies, asset managers, large institutional investors, and non-U.S. companies. So, when we consider ESG, we try to view the issues from multiple perspectives.

Julie Rizzo: We also want to meet our clients where they are. Every client is in a different place in its ESG journey. We want companies that are just beginning, or companies that don't know where to begin, to feel comfortable continuing, or just starting, on their journeys. We also help companies that are much further along on their ESG paths. We advise companies regardless of where they are and how they want our help along the way.

If we can dive into some of the chaos that Sean refers to. We are all eagerly awaiting the SEC's final climate disclosure rules. What is K&L Gates' approach to providing counsel to clients in advance of the rules' issuance?

Julie Rizzo: As you know, we only have proposed rules at this point. When advising clients on these proposed rules, we underscore that they are only the initial framework that the SEC prepared for climate change disclosures, and it gives an insight into what the SEC considers to be potential material disclosures. However, it's not the final rule and, until we have the final rule, we have no idea how significantly it will deviate from the proposed rule.

There is a great deal of discussion as to whether the Scope 3 emissions disclosures will stay in the final rule. Even if Scope 3 emissions disclosures do not end up in the final rule, companies should still keep in mind that this disclosure was something that the SEC believes to be an important aspect of ESG-related disclosures.

Beyond the proposed climate disclosure rule, the SEC has taken other ESG-related actions that companies should be aware of. For example, the Division of Enforcement established a task force to bring ESG-related enforcement actions. The Division of Corporation Finance has issued a sample letter to companies regarding ESG-related disclosures that companies should review when preparing their SEC filings and sustainability or corporate social responsibility report. Additionally, SEC officials have given speeches and they've talked about ESG-related issues. Companies need to be aware of and stay informed of all of the SEC's ESG-related actions, statements, and guidance and not solely focus on the proposed climate disclosure rule.

What do you think clients should be doing in this interim period pending the release of the final rules?

Sean Jones: It depends on the client, but the advice can't be "we don't know what's going to happen, so just sit on your hands." That's not a good idea. Perhaps it's one type of advice for large, publicly traded companies in the United States that are well on their way in their ESG efforts. These companies may want to pay particular attention to the voluntary reporting they are doing in their sustainability reports. Most of the companies I'm talking with that are already providing robust climate disclosures in sustainability reports are not pulling back on their reporting while we wait for the final climate disclosure rules to be issued. Instead, they are on their own journey, and they are mindful of the status of the proposed rules and where things may go – but they certainly are not sticking their heads in the sand.

The final climate disclosure rules are going to be much harder for smaller companies. These companies are often much earlier in their ESG journeys, and they may simply be focused on surviving or bringing products to market. To state the obvious, a public company with $50-$100 million a year in revenues is in a very different situation compared to a multi-billion dollar public company, and in some ways these smaller companies may not have the luxury of focusing on ESG and climate disclosures.

I think the SEC's final climate disclosure rules need to be tempered for companies of all sizes given that what's right for a $50 billion fossil fuel energy producer is not necessarily right for a $50 million technology company. The SEC should consider a scaled approach, as there is just no one-size-fits-all solution that is workable across all industries and company sizes.

Do you have any thoughts on some of the anti-ESG headwinds coming from certain quarters, including the U.S. Supreme Court and a number of the states? How might clients navigate these murky waters?

Julie Rizzo: First and foremost, information is power here. You need to stay on top of what's out there. You need to stay on top of the legislation. That's important not only for companies with respect to their ESG practices, but also for lawyers advising companies in this area.

And once companies have information, they need to speak with one voice and to really understand what their overall ESG message is. That takes a lot of work. A company has to understand its various stakeholders and the different locations in which the business operates. Companies may have to make disclosures in the European Union that they aren't expecting to make in the United States. It's important to make sure our clients are educated and informed.

Our job is to provide our clients with legal advice while thinking about it from their perspective. The in-house lawyer takes the legal advice we provide to inform the business of the risks and opportunities to help determine how to move forward. That means being informed and educated as an organization insofar as how it wants to handle these conflicting ESG headwinds.

Sean Jones: I will add that in bringing order to the chaos for our clients, we sometimes have to distinguish between adopted and proposed legislation, as proposed legislation at times can be nothing more than a political effort to grab a headline in tomorrow's newspaper. Another complication is that many of our clients have to navigate the ESG-related legislation of all 50 states, federal legislation, and legislation in the EU and other jurisdictions. It is probably impossible to fully thread the needle with respect to all of the varying regulatory regimes, but we need to help our clients bring order to the chaos.

As a practical matter, with the 2024 election cycle, the rhetoric will likely intensify and the landscape may get even more confused in the short term. That's unfortunately where we are. As for the SEC climate disclosure rules, it will be interesting to see how much litigation the final rules generate, including claims that the SEC exceeded the scope of its rulemaking authority.

What are you seeing with respect to the role that ESG issues are playing in M&A (Merger and Acquisition) transactions these days?

Sean Jones: We're primarily seeing ESG come up in the due diligence process. To the extent a target is positioning itself as doing X,Y, or Z with respect to ESG, buyers want to make sure the claims are accurate and there are no greenwashing risks. Beyond that, we haven't seen as much focus on ESG in M&A as some people initially thought, and maybe it's because the M&A markets are down recently.

Are there any concluding thoughts you wish to share?

Julie Rizzo: I'm interested to see the final SEC climate disclosure rules, the reactions to them, and what disclosure requirements in the proposed rules make it into the final rules. The areas I'm particularly curious about include Scope 3 emissions and the financial statement requirements. I'm interested to see how much time companies are given to comply with the final rules and if there are any changes to the attestation requirements in the final rules.

Sean Jones: I have been practicing for more than 30 years, and in some ways, ESG has been the most interesting, challenging, and dynamic topic that I have seen. From a client and counseling perspective, our clients really do need clarity. I personally hope the political rhetoric gets toned down and we move forward in a way that works for corporations of all sizes and all of their stakeholders.

Learn more about K&L Gates' ESG practice here. The firm also publishes the *ESG And The Sustainable Economy Handbook*, which examines how investors evaluate companies based on ESG and sustainability criteria, and the way companies incorporate these standards into their operating principles.

You can also read about how ESG accelerates demand on legal departments and law firms, which is excerpted from the Wolters Kluwer 2022 Future Ready Lawyer Survey.