Preliminary Recommendations for Brighton Tractor Supply Company's ESG Programs

Attorney Team

Dave Meyers
Partner
804.697.1239
david.meyers@troutman.com

Shelli Willis
Partner
404.885.3388
shelli.willis@troutman.com

Andrea Wortzel
Partner
804.697.1406
andrea.wortzel@troutman.com

Brighton Tractor Supply Company (BTSC) asked us for three recommendations to help the company prioritize its environmental, social and/or governance (ESG) issues. This request was prompted by questions from investors and customers about the company's sustainability record. Sustainability is a topic that many companies have incorporated into their corporate policies over the past several years. Historically, few regulatory reporting standards have applied for sustainability, making it a low-risk proposition. In recent years, a rapidly changing ESG regulatory landscape has emerged that must be considered in the implementation of any sustainability program. There are also changing Federal Trade Commission (FTC) standards that apply to corporate and product communications regarding sustainability. With this in mind, we recommend the following three first steps:

1. Internal Materiality Assessment Under Privilege

At the outset, BTSC must assess its current ESG performance and record, and measure against those ESG factors that are most critical to its key stakeholders. In order to do so, a materiality assessment should be undertaken. Doing so under privilege allows both BTSC and its employees to candidly assess where they stand, whether any disclosures have been triggered, and how to move forward. This will also enable BTSC to develop goals and metrics for making improvements tailored to the company. Development of the tools necessary to capture such information, both to enable shared efforts across the company in gathering that data as well as to ensure such data is sufficiently auditable to withstand scrutiny, is another aspect of this initial evaluation. Tracking utility usage and ESG efforts and improvements is vital when implementing an ESG program in order to show continued progress. This materiality assessment will be informed by the other two recommended steps, communicating with investors and stakeholders, and internal company education about ESG requirements and implications.

2. External Communication Strategy

Given that the questions about BTSC's sustainability record have come from investors and customers, BTSC should develop an external communication strategy. This should include gathering insights from the stakeholder group formed to conduct the materiality assessment into the issues about which its customers and investors are concerned and engaging a public relations consultant. Additionally, BTSC could build out a community engagement initiative at its facilities to better understand the impact of its operations on the surrounding community and any associated concerns. This will aid BTSC not only in building out its ESG program, but also in assessing whether there are any environmental justice concerns to consider in future environmental permitting, and in potential expansion of any of its facilities. Developing such a communication strategy will aid in meeting the "Social" component of an ESG program and in completing the materiality assessment described above.

Additionally, as part of the communication strategy, BTSC should familiarize itself with the green guides that have been issued by the FTC and claims that have been brought against companies relating to how they characterize their environmental and sustainability records. It will be important for BTSC to accurately inform all stakeholders about its current sustainability record, and how BTSC is working to improve on that record.

3. Education of BTSC Executives/Board on ESG Requirements and Considerations and Selection of Chief Sustainability Officer

Given the rapidly evolving requirements associated with ESG, the BTSC must be educated on the regulatory requirements and implications of developing its sustainability program. For this reason, the selection of a chief sustainability officer (CSO) is crucial. Such a position is becoming a tablestakes requirement for most companies, so BTSC is on the right track in identifying this need. An important consideration is whether co-designating an existing vice president serving another role is the right choice for CSO. Given the shared and sometimes slim resources available for ESG matters and its cross-functional nature, a CSO must be collaborative and persuasive, in addition to having deep subject matter expertise. Based on the interest expressed by shareholders, the individual filling this role will be closely watched and must be able to demonstrate the requisite skill set to lead BTSC in this area. This includes consideration of ESG risk factors that can determine corporate performance outside of direct short-term financial performance. BTSC will likely be better served by recruiting a subject matter expert CSO to fill the day-to-day job of building the ESG program, directly reporting to an executive leader, with Board oversight.

Board oversight is a critical component of an effective ESG program, and thus educating the Board on ESG is an important step. As a publicly traded company, the federal securities laws impose certain public disclosure requirements on BTSC related to ESG issues. Currently, those disclosures likely apply to BTSC's hazardous waste legal issues. Additionally, BTSC's Annual Report must include disclosures related to human capital management, including descriptions of human capital measures or objectives to the extent such disclosures would be material to an understanding of BTSC's business taken as a whole.

Recently, the Securities and Exchange Commission (SEC) has stated that it intends to increase its focus on ESG-related disclosures and has created a task force to address violations of ESG-related disclosure requirements. Further, the SEC has solicited comments from the public on developing a framework for climate change disclosures "in light of demand for climate change information and questions about whether current disclosures accurately inform investors." In light of all of these developments, BTSC must not only consider the adequacy of its ESG disclosures under applicable law but must also track ESG regulatory developments. BTSC's board of directors and management should consider what other non-mandated disclosures it desires to make in order to signal to its various stakeholders that it takes ESG matters seriously. BTSC must ensure, however, that any inclusion of ESG-related disclosures from voluntary reports into its SEC filings is done only with thoughtful coordination among the legal department, BTSC's sustainability team and its outside securities law counsel given the heightened legal risks involved with disclosures in SEC periodic reports.