ESG and airports: The benefits and risks of ESG reporting for US airports

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Abstract

The subject of ESG — environmental, social and governance — disclosure and how airports are responding to the issues presented by these factors has become of great interest in the last few years. This paper will help familiarise airport managers and others with the concepts behind ESG and what these factors mean at an airport; discuss the reasons why an airport might want to provide ESG guidance to a wider audience; and review the potential risks and liabilities associated with ESG reporting, including a review of the application of US securities laws to disclosure regarding ESG, either formally through an official statement in connection with an issuance of bonds or less formally through an ESG report or by other means. ESG reporting has been driven, in large part, by the growth of funds and other investors who are seeking to invest primarily in securities issued to finance sustainable infrastructure and/or in entities that are working to achieve socially driven goals. It provides a very different scope of review of an airport's operations, focusing primarily on the external impacts of those operations on the environment, on affected communities and on how the entity operates within its regulated environment.

Keywords

ESG, environmental, social, governance, airports, airport management

INTRODUCTION

In the last few years, several large US airports have prepared environmental, social and governance (ESG) reports. For many of these airports, the genesis of the ESG report was a desire to provide relevant data to a segment of the investment markets. For others, it was a desire to provide a clear statement regarding the airport's efforts in these spheres. And for

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most airports, it is another valuable management tool for critically examining issues relating to the impacts of operating an airport on the wider community. The subject of ESG and how airports are responding to the issues presented by these factors has become of great interest in the last few years, with an increasing number of airports providing disclosure regarding ESG factors in either standalone reports or as a portion of their bond disclosure, known as an 'official statement'.

ESG reporting provides a very different scope of review of an entity's operations, focusing primarily on the external impacts of those operations on the environment, on affected communities and on how the entity operates within its regulated environment. This form of reporting has been driven, in large part, by the growth of funds and other investors who are seeking to invest primarily in securities issued to finance sustainable infrastructure and/or in entities that are working to achieve socially driven goals. US sustainable funds now hold approximately US$296bn assets, a tremendous increase in the last five years,[1] and European investors have led the world in socially conscious investing. Further, most of the securities rating agencies now require airports issuing bonds to provide information regarding their ESG policies and results, both as an indicator of the airport's governance and as a means of addressing forms of risk not otherwise fully addressed by other forms of reporting.

The purpose of this paper is to help familiarise airport managers and others with the concepts behind ESG, and what these factors mean at an airport; discuss the reasons why an airport might want to provide ESG guidance to a wider audience; and review the potential risks and liabilities associated with ESG reporting, including a review of the application of US securities laws to disclosure regarding ESG.

This paper begins by reviewing the essential terms 'environmental', 'social' and 'governance' in the context of airport reporting. Next it examines the potential benefits that may accrue to an airport that provides this information. Following that, this paper examines other risks and liabilities associated with ESG reporting, including ESG reporting in the context of US federal securities laws and political and policy disputes regarding the value of ESG efforts. The bottom line? Especially for airports, ESG analysis means far more than participating in a public relations campaign; airports should understand the potential legal and financial liabilities and be mindful that state and local politics could increase or reduce those risks.

ESG REPORTING IN THE CONTEXT OF AN AIRPORT

The first question that must be addressed when discussing ESG is how these three factors are defined, especially in the context of an airport. ESG reporting in the municipal bond market is a relatively new phenomenon and is evolving rapidly. There is not a single recognised definition or framework for an ESG report, although there are a number of competing approaches and organisations that are providing guidance internationally. Thus, there is currently little agreement regarding the specific ESG factors that must be tracked and reported. As has been said in a variety of contexts, entities manage what they measure. Thus, developing more widely recognised standards for the data that should be gathered and reported and the areas of scrutiny for ESG reports will undoubtedly be helpful.

Airports Council International (ACI) has provided the first meaningful guidance specifically intended as a reference for airports seeking to engage in best practices relating to ESG.[2] Rather than trying to narrowly define each of the factors relating to ESG, the ACI ESG Best Practice provides examples of the types of topics that may be addressed within each of these wide ranging areas of inquiry.[3] The ACI North America Environmental Affairs Committee Sustainability Working Group has recently published an article on airports and ESG that endeavours to provide clearer guidance to airports seeking to undertake ESG reporting.[4] ESG will look different for airports than for for-profit corporations, especially with respect to governance, where the vast majority of US commercial service airports are governmentally owned.[5]

As of the date of this paper, 19 of the 30 largest US airports have published either an ESG or a sustainability report or maintain a sustainability webpage or website. Those airports and their various reports are set out in Table 1, with details of the cited documents given in the references. The varying approaches taken, and lack of annual updates in many cases, by these large hub airports demonstrates both the lack of clear consensus on the method of reporting ESG issues and the importance of such reporting. In addition, there continues to be a tendency to conflate ESG and sustainability reporting, further muddying the disclosure waters.

Environmental

The first factor, 'environmental', is familiar to many airports. Both within the US and internationally, airports have been providing reporting concerning their environmental mitigation, sustainability and related efforts for some time. However, the scope of reporting on environmental factors in an ESG context is intended to include more than simply mitigation of the impacts of airport operations on the environment or the actions the airport is taking to achieve sustainability. In the corporate context, one commentator has defined the environmental elements of an ESG report as reflecting 'energy efficiencies, carbon footprints, greenhouse gas emissions, deforestation, biodiversity, climate change and pollution mitigation, waste management and water usage'.[6] The ACI ESG Best Practice includes a similar list of factors, including 'energy efficiency and management, water efficiency and recycling, electrification and decarbonisation, GHG/criteria air pollutant measurement and management, materials management, green purchasing and embodied carbon and sequestration'.[7]

Like private corporations, airport sponsors are subject to many of the environmental considerations that rating agencies consider with respect to ESG. In 2019, just prior to the COVID-19 pandemic, the US had the highest overall level of CO_2 emissions — 175 metric tons — resulting from passenger air travel of any country.[8] US airports also face localised environmental challenges, including runoff and other forms of pollution, as well as factors that are affected by global warming, such as sea rise, flooding and more intense storms. In fact, many large US airports are located in coastal areas only a few feet above sea level. Projected increases in sea levels over the coming years could have existential impacts on some of these airports if efforts are not undertaken to address this issue. In another example, the US Environmental Protection Agency's (EPA) intent to

Table 1 US large hub ESG or sustainability reports and websites

Airport	*Code*	*Summary*
Atlanta	ATL	In 2022, issued a detailed, 30-page 'ESG + Prosperity' report for 2021.[9]
Austin	AUS	Issued a 2019 Aviation Sustainability Report.[10]
Baltimore	BWI	Maryland DOT's Maryland Aviation Administration, which sponsors BWI and Martin State Airport, issued a Green Promotion and Reporting Program report.[11]
Boston	BOS	Massport issued a 2019 Annual Sustainability and Resiliency Report.[12]
Charlotte	CLT	In 2020, the City of Charlotte Aviation Department issued a Comprehensive Sustainability Plan.[13]
Chicago	MDW, ORD	In 2020, the Chicago Department of Aviation issued 'Version 4.0' of its Sustainable Airport Manual, a 545-page document providing sustainability guidelines for the development and construction and for 'green airport management'.[14]
Dallas-Fort Worth	DFW	DFW has released an ESG report for 2021.[15]
Denver	DEN	Denver has released an Annual Environmental Performance Report for 2021.[16]
Detroit	DTW	In 2017, the Wayne County Airports Authority issued a Sustainability Accomplishments Report.[17]
Fort Lauderdale	FLL	In 2016, FLL (the Broward County Aviation Department) issued a Sustainable Operations and Green Practices Guidance Manual.[18]
Houston	IAH	In 2018, the Houston Airport System issued a Sustainable Management Plan, which has both forward-looking statements about its sustainability strategy and facts about current operations.[19]
Las Vegas	LAS	LAS maintains a sustainability website.[20]
Los Angeles	LAX, VNY	Los Angeles World Airports recently issued its 2021 Sustainability Report, covering both LAX and Van Nuys (VNY).[21]
Miami	MIA	MIA maintains a website, 'Fly Green at MIA', that discusses various sustainability and environmental initiatives.[22]
Minneapolis	MSP	MSP's website includes a section, titled 'Environmental Sustainability', that features links to graphs showing its progress toward reaching goals for reduction of emissions, solid waste and water usage and for achieving 'employee sustainability engagement'.[23]
Nashville	BNA	BNA maintains a website that focuses on BNA's forward-looking initiatives, including a webpage on sustainability, with a heavy focus on LEED certification.[24]
New York	JFK, LGA, EWR	The Port Authority of New York & New Jersey issued a 2015 Airport Sustainability Report for all of its airports (JFK, LGA, EWR, SWF and TEB).[25]
Orlando	MCO	In 2013, the Greater Orlando Aviation Authority (GOAA) published a Sustainability Management Plan.[26] In 2017, GOAA issued its 2017 Annual Sustainability Performance Report Card.[27]
Philadelphia	PHL	PHL recently issued its 2021 Sustainability Annual Report.[28]
Phoenix	PHX	In 2022, the City of Phoenix Aviation Department issued a Sustainability Management Plan Update Report.[29]
Salt Lake City	SLC	In 2021, SLC issued an Environmental, Social and Governance Report.[30]
San Diego	SAN	SAN issued a 2019–20 Sustainability Report.[31]
San Francisco	SFO	In 2022, SFO released its Climate Action Plan for Fiscal Year 2021.[32] In 2021, SFO also released an Interim Strategic Plan with a heavy emphasis on ESG measures, including social matters.[33] Previously, SFO issued a Sustainability and Social Equity Plan.[34] SFO also maintains a webpage, Action Plans & Reports, featuring various environmental reports, including the Climate Action Plan.[35]
Seattle	SEA	In 2018, SEA issued its 2017 Environmental Progress Report.[36]
Tampa	TPA	In 2014, TPA issued a Sustainable Management Plan.[37]
Washington	DCA, IAD	The Metropolitan Washington Airports Authority has issued a Corporate Social Responsibility Report for 2021.[38]

Deep green	Published ESG or sustainability report in 2018 or later
Light green	Published ESG or sustainability report prior to 2018
Yellow	Maintains sustainability website

designate PFAS,[39] a US Federal Aviation Administration (FAA)-mandated element of airfield fire-fighting foam, as a toxic substance, and the potential for widespread litigation,[40] is another environmental burden and risk for airports.

Numerous US policymakers and airports are considering environmental impacts of airports, especially with respect to climate. Last year, FAA issued the 'United States 2021 Aviation Climate Action Plan', which states that 'airports are playing an important role in addressing climate change' and includes a section on 'Airport Initiatives'.[41] As noted above, several major US airports have released 'sustainability' reports and other analyses of their environmental impacts and efforts, providing ongoing environmental disclosure of varying degrees.[42] Thus, although most airports have not been preparing environmental reporting as deep or broad as recommended for ESG reports, the topic is one with which airports are familiar and for which they are likely to be already gathering relevant data.

The wider range of issues, as well as the greater scope of risks addressed by ESG reporting, may help airports develop a more holistic approach to environmental issues, including not only sustainability and impact mitigation, but also an integrated approach to their environmental initiatives.

Social

Reporting on social factors is generally a less familiar subject for many airports and includes, according to ACI, 'diversity and gender equity, human rights and trafficking, living wage and worker rights, indigenous and community partnerships, worker health and safety and union relationships'.[43] These are very similar to the factors to be incorporated in corporate ESG reports according to a knowledgeable source, which include 'labor standards, wages and benefits, workplace and board diversity, racial justice, pay equity, human rights, talent management, community relations, privacy and data protection, health and safety, supply-chain management and other human capital and social justice issues'.[44]

Although many social elements of ESG that private corporations must address are similarly pertinent to airports, US airports, as government-owned entities, bear the additional burden of confronting their impacts on surrounding communities. The communities immediately surrounding US airports are often lower-income or comprised of historically marginalised groups — and evidence suggests that the presence of a large airport *increases* the share of the surrounding community that fits such a description.[45] In addition, US airports collectively host a sizeable share of the American workforce, with 1.2m people working in US airports.[46] A large airport can have up to 60,000 — or more — onsite workers.[47] As such, airports may have more ability and responsibility — as well as political pressure — than many comparably sized private organisations to act in ways that benefit their surrounding communities. This puts much of the onus on the airport to balance immediate financial or operational interests against social ones, a question that is exceptionally relevant to ESG.

US airports are also subject to federal regulations requiring consideration of environmental justice impacts of airport actions.[48] The FAA recently has released guidance regarding compliance with federal anti-discrimination requirements that will require airports to develop a Title VI compliance plan that includes consideration

of the demographics of its many stakeholders, including the people using the airport, the persons employed at the airport, the communities surrounding the airport and the various governing bodies that oversee the airport. Many large, urban US airports are undergoing labour unionisation efforts, and labour issues are likely to continue to be an evolving area at these airports. Lastly, the recent focus on diversity, equity and inclusion in the management and operation of airports is another factor likely to be the subject of the social section of an airport's ESG report.

The wide range of social issues that are to be addressed in an ESG report should give readers as well as airport management a much deeper insight into both the impacts of the airport on its constituencies as well as the means and methods available to it to address those impacts. As such, an ESG report can be a valuable management tool that helps identify additional risks and vulnerabilities and helps airport management to mitigate them.

Governance

Governance is the ESG prong that may apply to airports most differently from how it applies to many private corporations. Although the areas of disclosure cited by ACI are similar to those cited in a corporate context, almost all US commercial service airports are governmentally owned and operated, leading to very different forms of governance from those of corporate bodies. ACI states that governance factors to be addressed in an ESG report include 'executive board structure and oversight, financial disclosures and statements, codes of business conduct, risk and crisis management, accountability and transparency policies, core values, and cyber risks and systems'.[49] This is similar to the aspects noted for corporate boards but contains some important differences. According to one definition, 'governance' incorporates 'corporate board composition and structure, strategic sustainability oversight and compliance, executive compensation, political contributions and lobbying, and bribery and corruption'.[50] S&P Global, one of the major rating agencies, describes the 'G' as a reference to 'governance factors of decision-making', ranging from such topics as policymaking to 'the distribution of rights and responsibilities among different participants' in a corporation.[51]

Publicly held corporations are typically governed by a single board of directors, nominated by the board itself and elected by shareholders or a parent corporation, to whom senior corporate officers report.[52] By contrast, an airport's decision-making body may be a corporate-style board (as in the case of an airport authority), a board directly appointed by a single municipality, a city council or county board of supervisors or a department within state government.[53] Furthermore, the public bodies responsible for airport decision-making are often assisted by advisory boards of varying influence, and may be overseen by elected city councils or executive branch state transportation agencies.[54]

This difference is perhaps most evident when considering the composition of the membership of the body or bodies governing an airport. While a corporate board may have greater control in identifying and proposing a slate of diverse individuals for board membership, an airport board may consist of the elected members of a municipal or state body or members appointed solely by an elected official. Nonetheless, the view that the governing body of any entity focuses more on issues with which it is familiar is likely to apply just as much to an

airport board as to a corporate board. Thus, the FAA's mandate to consider the demographics of any airport's governing body or bodies noted above, as well as the other elements identified regarding governance by ACI and others, are relevant to how the airport's governance impacts its community and its environment. These elements can also identify other risks — both operational and reputational — that might not otherwise be brought to management's attention.

Breadth of ESG reporting

ESG reporting goes far beyond, and differs from, 'sustainability' or environmental reporting — ESG encompasses a broader scope of topics. As noted above, multiple major US airports have published sustainability or environmental reports in recent years. However, fewer have focused on ESG holistically. And fewer still have discussed social or governance matters to the same extent as they analyse environmental issues. An airport's ESG report — especially one produced for the purposes of investors (or a rating agency) — will need to go beyond a sustainability report. As discussed below, rating agencies look at ESG holistically, and airport information that only concerns the first prong will be deemed to be incomplete.

Critically, ESG reporting generally also involves more analysis of corporate practices and policies, not just outcomes. These reports are often targeted at a wider range of constituencies, including investors, rating agencies, governing bodies, tenants, the local community and other stakeholders, whereas sustainability reporting may be targeted towards advocacy groups or the public more generally. ESG reporting can, and should, serve as a management tool for assessing matters that often fall beyond traditional metrics and other indicators. Thus, ESG reporting can serve as a valuable tool for airport management, as well as those monitoring it.

POTENTIAL BENEFITS OF ESG REPORTING FOR AIRPORTS

There has been a meteoric rise in the amount of money invested worldwide, and in the US, in socially responsible funds. Globally, investors purchased about US$120bn of ESG-focused exchange-traded funds (ETFs) in 2021, more than double the level of such investments the year before.[55] These ESG-focused funds are obligated to invest in securities that are intended to have specific, identified results.

Thus, one of the primary reasons that airports have begun to report ESG metrics is to attract a wider range of investors.[56] While some people may perceive ESG as a public-relations endeavour, major investors increasingly regard ESG metrics as important indicators of corporate value.[57] As one corporate-governance commentator has explained:

> There was a time when a public stance on ESG issues was a public relations tactic. However, in today's rapidly changing business climate, attention to ESG issues is becoming critical to long-term competitive success. Major institutional investors recognize this and are making it clear that they expect the companies they hold to take a proactive approach to ESG policies and messaging.[58]

In 2018, Blackrock CEO Larry Fink wrote in an open letter to CEOs that 'a company's ability to manage environmental, social, and governance matters demonstrates the leadership and good governance that is so essential to sustainable growth, which is why we are

increasingly integrating these issues into our investment process'.[59] ESG reporting has been especially important for attracting investors in Europe, where the EU has mandated ESG reporting[60] and announced plans for a European Green Bond Standard.[61]

Most larger US airports issue municipal bonds to finance large capital improvements. These bonds are generally backed by the general revenues of the airport. The potential to tap into ESG-focused investors is a powerful motivator for US airport sponsors to conduct ESG reporting, and this has been especially true for US airports seeking to access European capital. One example of the latter is Dallas/Fort Worth International (DFW) Airport, which has led the US airport market in seeking to access European and other foreign investors.[62] DFW issued the first ESG report by a US airport. European airports have also been pursuing the ESG/sustainability bond market for several years.[63]

In response to investor interest, both the major US rating agencies and new, sustainability-ESG rating agencies have developed metrics for assessing securities offerors' ESG practices, further incentivising — and pressuring — airport sponsors to report on ESG.[64] By broadening the range of potential purchasers of airport revenue bonds, airports are seeking to attract the lowest cost of capital by expanding the market for their debt. Among the financial motivations for conducting ESG reporting and pursuing a strong ESG rating is the desire to attract investment from ESG-minded state investment funds, such as public employee investment funds. Several states and major public-employee investment funds prioritise or even require consideration of ESG factors when selecting investments or fund managers.[65] As ESG investing has become yet another politically divisive issue, however, other state investment funds ignore ESG factors in making investments.[66] Nevertheless, the opportunity to broaden the market for their bonds and to achieve highly competitive interest rates has motivated a number of US airports to provide ESG disclosure — either through a stand-alone ESG report or through the so-called 'official statement' which serves as a prospectus for their bonds.

Partially as a response to investor interest and partially as a part of their review of governance factors, most of the US rating agencies have added a review of airport ESG activities to their list of important factors.[67] This area of inquiry indicates the importance of these issues on a wider policy range, both to investors and to the rating agencies' evaluation.

In addition, there are various incentives other than access to capital that motivate organisations to conduct ESG reporting. These include public relations, reputation and hiring and public perception. While ESG may provide offerors, including airports, *bona fide* financial advantages, it also gives reporting organisations an opportunity to improve their public image.[68] Such public-relations concerns may prove especially important to airport sponsors, given that they are typically subject, directly or indirectly, to oversight by elected officials who themselves may wish to demonstrate social and/or environmental responsibility. In addition, organisations with strong ESG performance may have greater success attracting ESG-minded employees, particularly from younger generations, whose views on the role of an employer may differ from those of their parents.[69] A strong ESG reputation may also prove advantageous for regulatory purposes by

increasing regulators' and policymakers' trust in the organisation and improving the organisation's image with the legislature.[70]

POTENTIAL RISKS AND LIABILITIES OF ESG REPORTING FOR AIRPORTS

While there are numerous advantages to ESG reporting by airports, there can also be substantial drawbacks. These include potential securities law claims for inaccurate or incomplete reporting, policy-based arguments against ESG reporting and conflict with state or local policies, including politically motivated prohibitions.

Application of US federal securities laws to ESG reporting

The municipal securities market in the US is subject to limited direct regulation by the federal Securities and Exchange Commission (SEC). The so-called 'Tower Amendment' prohibits the SEC from directly regulating disclosure by issuers of municipal securities.[71] This prohibition, however, is mitigated by allowing the SEC to require that securities brokers and dealers provide information with respect to the issuer and by SEC Rule 15c2-12, which requires such brokers and dealers to obtain and review an official statement from the issuer and provide it to purchasers.[72] In practice, however, there is no specifically required regulatory format for the contents of an official statement, unlike in the highly regulated corporate securities market.

Nonetheless, the disclosure offered by municipal issuers must meet the anti-fraud standards of federal law set forth in the Securities Act of 1933 and Rule 10b-5 promulgated thereunder, which require that the disclosure provided by any issuer of securities not state 'any untrue statement of a material fact or [omit] to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading'.[73] The definition of what is 'material' to an investor can change over time as new information and factors affect decisions to invest in certain securities[74] and the municipal market often follows the corporate market's lead in issue disclosure, albeit often with a lag in time and in a manner related to the distinct characteristics of the municipal market.

Unlike in European law, neither federal statute nor SEC regulation specifically requires public companies to report ESG metrics. However, the SEC has recently proposed rules that would require public corporations to make disclosure that incorporates elements of ESG reporting, including reporting on efforts to mitigate climate change, and efforts to promote diversity, equity and inclusion (DEI) and other social-equity efforts.[75] Similarly, a growing group of investors in the municipal debt markets is seeking information regarding municipal issuers' ESG efforts.

In related efforts, on 25th May, 2022, the SEC issued proposed guidance for funds that include ESG investing in their mission.[76] The first proposed rule would require funds to provide specific disclosures regarding purported ESG investments. Under this proposed rule, funds that consider ESG factors in their investments must provide additional disclosures in their registration statements and annual reports regarding how they factor ESG into their decision making.[77] The proposal establishes three categories of ESG funds: (1) integration funds, which consider ESG factors but do not weigh them more highly than non-ESG

factors; (2) ESG-focused funds, for which ESG factors are a major or primary consideration; and (3) impact funds, which are established to pursue a specific ESG purpose.[78] The second proposed rule would amend SEC Rule 35d-1 (known as the 'Names Rule') to impose requirements on funds whose names suggest a focus on ESG.[79] With respect to ESG specifically, the proposed rule would require that, if a fund has ESG terminology in its name, it must be an ESG-focused fund.[80] Integration funds could not use ESG terminology in their names.[81] In short, while many of these proposed SEC requirements may not specifically govern airports, if adopted, they will apply to funds that purport to focus on ESG matters. Therefore, such funds are likely to demand a degree of comprehensive, verifiable ESG reporting from airport sponsors as a condition of investment.

As another result of the SEC's proposed rulemaking, disclosure regarding ESG is likely to be determined to be material, at least to ESG funds. In 1976, the Supreme Court articulated the 'materiality standard' still employed by the SEC.[82] Under that standard, 'an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote'.[83] 'Put another way', the Court stated, 'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available'.[84] The SEC has framed the standard comparably with respect to financial reporting:

> The omission or misstatement of an item in a financial report is material if, in the light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item.[85]

The SEC has advised that 'the anti-fraud provisions apply to any statement of a municipal issuer that is reasonably expected to reach investors and the trading markets'.[86] Thus, the official statement published in connection with the public offering of municipal bonds is almost certain to be considered to be 'speaking to the market'. However, other materials that are published by a municipal issuer may also be subject to the anti-fraud provisions of Rule 10b-5. An ESG report that is made publicly available, for example, would be likely to be considered material information to an ESG-focused fund. SEC Bulletin 21 lists several examples of statements that the anti-fraud provisions cover, including: (1) statements on issuers' websites, including 'historical information' that a reasonable person may nonetheless not realise is obsolete; (2) public reports that a municipal issuer submits to other governmental or institutional bodies, such as reports from a municipality to a state, that would reasonably be expected to reach investors; and (3) statements made by the municipality's officials, such as through speeches, announcements, interviews or social media, that are reasonably expected to reach investors.[87] Thus, it is important that airports that are appealing to the ESG investor community and preparing ESG materials, whether or not they are included in an official statement, take steps to ensure that their ESG disclosures comply with federal anti-fraud requirements.

The issue of a material omission is one that may be especially important in airport ESG reporting, because many

ESG initiatives are designed to develop information regarding the impacts of operations. That information is probably material to an investor, but just as important, in many instances, will be the consequences that flow from such data. For example, if the data developed as a result of an airport's ESG work shows that the airport is having a specific, identifiable impact on a nearby community, then the consequences of that inquiry may be that the airport may elect — or be required — to mitigate those impacts. Those mitigation efforts could have a wide range of material effects on the airport, including potentially significant costs, legal issues regarding the airport's ability to undertake such efforts (such as the permissible use of airport revenues or the scope of the airport's authority), and questions regarding the means of recovering the costs expended, as well as potential reputational harm. Thus, understanding and accurately and completely reporting the information developed is a critical part of the scope of ESG reporting.

Other risks of ESG reporting

In addition to potential actions for securities fraud, litigants are bringing claims under state consumer protection laws against corporations for their ESG statements. For example, the Commonwealth of Massachusetts has sued Exxon Mobil, alleging that its communications regarding the environmental impacts of its products and the company's 'greenwashing' campaigns constituted unfair and deceptive practices under state law.[88] Further, the DC Superior Court held that statements by Tyson Foods regarding its farming practices, such as the statement that the company was committed to 'environmental leadership', were not puffery but rather actionable statements under the DC Consumer Protection Procedures Act.[89] Accordingly, one legal commentator observes that, while '"green" boasts [. . .] ordinarily will not meet the materiality requirement' under the puffery doctrine, that doctrine may not apply if an organisation makes 'specific statements that emphasize its reputation for integrity or ethical conduct as central to its financial condition or that are clearly designed to distinguish the company from other specified companies in the same industry'.[90]

As noted above, airports that disclose less-than-optimal ESG data, especially with respect to environmental or community impacts, may face pressure to remediate those deficiencies, imposing substantial costs or operational challenges on the airport and thus rendering the ESG reporting a public-relations *harm*. For example, while airports are focusing on reducing their own carbon footprints,[91] they may have little ability to curb the majority of carbon emissions that emanate from the airport, as most result from their tenant aircraft operators. According to one source, airports account for only 2 per cent of aviation's global carbon emissions.[92] Even if ESG reporting requires airports to disclose only CO_2 emissions emanating from the airport's property, most such emissions are likely to be out of the airport's direct control.

Detractors of ESG reporting have often raised several common criticisms of the practice, including, for example, that ESG is outside the proper role of a corporation;[93] ESG is little more than 'greenwashing' (or even, to quote one commentator, 'woke-washing');[94] ESG is not practical to measure; and ESG does not discernibly translate into positive financial performance.[95]

Airport sponsors and others who report ESG metrics could also run afoul

of state or local investment policies in jurisdictions that disfavour or prohibit ESG reporting.[96] Numerous states have adopted policies either prohibiting ESG reporting or, more often, requiring state investment funds to divest from funds that 'boycott' certain types of energy production.[97] Although the preparation of an ESG report and gathering of related data would not necessarily constitute a violation of these policies, they can be a cause for concern if state officials find that such actions are inconsistent with state policy. And, as certain Florida-based corporations are painfully aware, taking actions directly in opposition to a state government's policies can have unfortunate consequences. Thus, airports in states where ESG reporting is contrary to state policy may find themselves facing a dilemma: the agencies rating their debt are likely to seek information on the airport's ESG practices and impacts, while the state's policies may be in direct conflict with the preparation and dissemination of such data. In such cases, limiting the use of such information to providing it to the rating agencies and, perhaps, for management's guidance, may be prudent.

CONCLUSION

ESG reporting can provide several benefits to airports, notably access to an additional sector of the investor market, as well as an additional source of actionable data for management decision making, but it can also come with certain risks and costs. As part of undertaking ESG reporting, airports should understand the range of risks and take steps to mitigate them, especially to ensure that ESG reports, in whatever form, are accurate and complete when made public.

AUTHOR'S NOTE

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