Liability and ESG Disclosure
Moderator: David Hackett, Partner, Baker McKenzie

Diane Strauss, YISF, discussed corporate sustainability disclosures in American case law. The key findings of her paper included that knowingly false statements are likely to trigger liability, most sustainability statements are aspirational, rather than material, and there is unclear criteria distinguishing “aspirational” from “actionable” sustainability disclosure. The main legal sources of liability are Securities Fraud (Sect. 10(b)) and Consumer Fraud/Protection (state law). She addressed what investors can do about green washing and cherry picking in light of cases against BP, Exxon, and Nestlé. ESG data is increasingly moving towards measurable risks, impacts, and commitments, but most of the future commitments don’t trigger liability. Companies are more likely to be sued if they release misleading information based on tangible, rather than intangible, assets.

Jean Rogers, founder of SASB, discussed the long history of puffery in securities law. Puffery defense spans a broad range of issues (not just sustainability), and courts have most often sided with corporations. The only protection against puffery claims are standards. There is a very high bar in securities law in the US for what is considered material. In the United States, financial reports are divided from sustainability reports. In Europe, an integrated financial and sustainability report is common practice, and what should be adopted in the US as well.

Q and A: David Hackett, Partner, Baker McKenzie, asked the panel about materiality of sustainability issues disclosed in sustainability reports. Jean responded, claiming that we are starting to see an understanding that sustainability topics can be financially material even under the high bar of US securities law. Diane noted that there is a clear divide between the US and Europe, with Europe being far ahead by integrating sustainability into financial reports. David asked about the significant increase in lawsuits over claims about companies’ products, most of which are business to business. Diane noted the issue of measurability in these claims. Courts have elaborated legal standards for words such as “natural,” which may trigger liability. Jean noted that safe harbor doesn’t protect a company after a risk has materialized. Jean’s advice for companies is to develop a process of defining materiality and elevating it to management and board, evaluating shareholder proposals for materiality, and monitoring industry developments on ESG factors. They discussed the dramatic change in high level management becoming more engaged in CSR, and General Counsels becoming increasingly aware that if a company says something in a CSR report or 10K that is not true, it faces material liability. They also discussed the increased concern about how companies are classified by rating agencies.

Audience Q&A asked about laws changing with materiality standards as values change. Diane will be writing about this in another paper. Jean noted that courts have overstepped bounds in accepting puffery defense, and have made biased decisions.