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The SEC's Climate and ESG Task Force: What it Means for Public Companies

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On March 4, 2021, the Securities and Exchange Commission (SEC) announced the creation of their Climate and Environmental, Social, and Governance Task Force (Task Force). This Alert addresses the purpose of the task force, discusses recent enforcement actions and rule promulgation, and highlights certain areas of Environmental, Social, and Governance (ESG) enforcement moving forward.

Purpose of the Task Force

The Task Force is part of the SEC's Division of Enforcement and was established to, among other things, address ESG-related misconduct. Specifically, the Task Force was established to ensure clarity and develop initiatives to support reliable ESG-related disclosure and investment.

While the Task Force's initial focus was to identify material gaps or misstatements in the climate risks that issuers must disclose, the Task Force is also seeking to identify gaps and issues relating to the strategies that investment advisers and funds use to comply with ESG requirements generally. Ultimately, the Task Force's goal is to support investor reliance and build trust by proactively addressing any misconduct related to the new ESG rules requirements, including analyzing disclosure and compliance issues relating to investment advisers' and funds' ESG strategies.

To implement its purpose, the SEC has already taken several enforcement actions and promulgated new rules.

Recent ESG Enforcement Actions

- On May 23, 2022, the SEC announced its first enforcement action, which was against BNY Mellon Investment Advisors.

  - The SEC charged BNY Mellon with falsely representing or implying in various statements that all of its investment funds had received ESG quality reviews, when that was not always the case.
  - BNY Mellon agreed to pay a $1.5 million penalty for failing to have adequate policies and procedures to prevent potentially misleading disclosures.
  - The deputy director of the SEC's Division of Enforcement stated that "investment advisers and funds are increasingly offering and evaluating investments that employ ESG strategies or incorporate certain ESG criteria," and BNY Mellon failed to "perform the ESG quality review that it disclosed using as part of its investment selection process for certain mutual funds it advised."
- On April 28, 2022, the SEC charged Vale S.A., a Brazilian mining company, in the United States District Court for the Eastern District of New York.

  - The SEC alleged that Vale made false and misleading claims about the safety of a dam before the dam collapsed, killing 270 people and causing more than a $40 billion loss in Vale's market capitalization.
  - The SEC alleges that Vale knew for years that the dam did not meet internationally recognized safety standards to contain toxic mining by-product, but manipulated dam safety audits, obtained false safety certificates, and misled all levels of stakeholders through the company's ESG disclosures.

- The complaint seeks an order permanently enjoining Vale from violating the federal securities laws alleged in the complaint, requiring Vale to disgorge all ill-gotten gains, and requiring Vale to pay civil monetary penalties.
- Melissa Hodgman, associate director of the SEC's Division of Enforcement, announced that the filing of this case shows that the SEC "will aggressively protect our markets from wrongdoers, no matter where they are in the world."

For more details on these and other enforcement actions, see the SEC's Spotlight on Enforcement Task Force Focused on Climate and ESG Issues here.

SEC Proposes New Rules

The SEC also recently announced two sets of proposed rules: first, proposed mandatory climate risk disclosures by all public companies, and second, enhanced disclosures by certain investment advisers and companies about their ESG investment practices. The first set of proposed rules, announced on March 21, 2022, would require all public companies to include extensive climate-related information in their SEC filings. More detailed information regarding the proposed rules can be found here.

The second set of proposed rules, announced on May 25, 2022, aims to curb the practice of "greenwashing" (i.e., making unfounded claims about one's ESG efforts) and would add proposed amendments to rules and reporting forms that apply to registered investment companies and advisers, advisers exempt from registration, and business development companies. According to the SEC, the amendments would serve to "promote consistent, comparable, and reliable information for investors concerning funds' and advisers' incorporation of [ESG] factors."

Of course, the SEC's authority to promulgate these rules may be challenged, considering the Supreme Court's recent decision in *West Virginia v. EPA*, 20-1530. You can read our alert on that case and its ESG implications here.

ESG Enforcement and Awareness Moving Forward

The SEC's recent enforcement actions and proposed rules are consistent with the SEC proactively implementing its ESG initiatives through the Task Force. As the world's ESG-related issues continue to grow and change, so too will the ESG issues competing for investors' attention. Boardrooms and high-level stakeholders must diligently familiarize themselves with the new rules and pay close attention to any proposed amendments the SEC may release.

To prepare and avoid enforcement actions, companies must devote time and resources to ensure compliance with ESG-related requirements. As stricter and more comprehensive disclosure requirements arise, internal communication channels and transparency between business areas will be crucial. Going forward, boards of directors and management can expect their ESG-related disclosures to be reviewed under the same lens as their financial disclosures, as well as regular updates from the SEC regarding new rules or amendments to existing rules. Ultimately, as the ESG-related landscape continues to change and the Task Force brings additional investigations and charges, there will be an increasing need for legal support and advice.

If you have questions about this topic or need ESG-related assistance, contact Tom Barnard or Annie Kenville.

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