SEC Creates Enforcement Task Force to Assess ESG-Related Disclosure

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The Division of Enforcement's new Climate and ESG Task Force will use data analysis to mine and evaluate registrant information for possible violations.

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On March 4, 2021, the US Securities and Exchange Commission (SEC) announced the creation of a Climate and ESG Task Force in the Division of Enforcement. According to the SEC, the Task Force will develop initiatives to proactively identify ESG-related misconduct in the form of gaps or misstatements of issuer disclosure by means of the Division's resources, including the collection of tips and whistleblower complaints and the use of data mining and analysis.

Background

The creation of the Task Force follows a February 24, 2021 directive from Acting Chair Allison Herren Lee to the Division of Corporate Finance to enhance the focus on climate-related disclosure in public company filings. The directive instructs SEC staff to take the following actions:

1. Review the extent to which public companies address the topics identified in the SEC's 2010 guidance relating to climate change disclosures by public companies
2. Assess compliance with disclosure obligations under the federal securities laws
3. Engage with public companies on these issues
4. Absorb critical lessons on how the market is currently managing climate-related risks

In addition, the Division of Examinations announced on March 3, 2021 its 2021 examination priorities, which include an "enhanced focus" on climate and ESG-related risks. This announcement came one day after the Senate confirmation hearing for Gary Gensler, President Biden's nominee for SEC Chair, who also touched upon climate risks in company disclosures during the hearing.

Enforcement Objectives

"Climate risks and sustainability are critical issues for the investing public and our capital markets," said Acting Chair Lee, who specified that the Task Force "will play an important role in enhancing and coordinating the efforts of the Division of Enforcement, the Office of the Whistleblower, and other parts of the agency to bolster the efforts of the Commission as a whole on these vital matters."

Consistent with this messaging, the primary actions for the Task Force are to:

1. Identify material gaps or misstatements in issuers' disclosures of climate risks under the existing rules
2. Analyze disclosure and compliance issues relating to investment advisors' and funds' strategies
3. Evaluate and pursue tips, referrals, and whistleblower complaints on ESG-related issues
4. Provide expertise to teams working on ESG-related matters across the Division of Enforcement
5. Connect the efforts of the Division of Enforcement with other initiatives at the SEC, including the recently appointed Senior Policy Advisor for Climate and ESG, Satyam Khanna; additionally, the Task Force is to work closely with the Divisions of Corporate Finance, Examinations, and Investment Management

The Task Force, led by Acting Deputy Director of Enforcement Kelly L. Gibson, views emerging disclosure gaps as a threat to investors and the market. To conduct a proactive assessment, the Task Force intends to use sophisticated data analysis to mine and evaluate registrant information for possible violations in addition to accepting tips and whistleblower complaints.

The announcement of the Task Force is another sign of the SEC's intention to further the climate agenda set forth by President Biden. For now, SEC disclosure obligations remain principles-based with the recent announcements introducing no new line-item disclosure requirements. However, over the past several weeks the SEC has signaled more climate-specific attention than it has in the 11 years since the 2010 guidance was first published. Global developments over the past decade surrounding climate regulation and legislation, the increased frequency of severe weather events and other physical climate impacts, and market trends on ESG in general put the 2010 guidance in a new light. Combined, the new initiatives from the SEC promise to review, examine, and investigate instances in which issuers may have fallen short in disclosing known direct or indirect trends or uncertainties that pose material threats to their business as a result of climate change.

In addition to these increasing spheres of liability exposures that are taking shape, ESG-related risks are gaining ground in the form of ESG litigation and activist exposure. Interested parties such as plaintiffs and investors are increasingly able to utilize sophisticated data analysis to mine and evaluate ESG information, and this data is likely to continue to play a key role going forward. Now is a good time for issuers to conduct a thorough assessment of not just the ESG disclosure that is in existence, but also the gaps or omissions regarding what is not disclosed and perhaps should be.

Latham & Watkins will continue to monitor developments in this area.