Wednesday, March 16, 2022

On March 21, 2022, the Securities and Exchange Commission (SEC) will vote on a proposed rule for climate-relate disclosure statements for all SEC-registered companies. This will mark the first action by the SEC since it announced in 2021 that it intended to provide rules for ESG-related disclosures for publicly traded companies. It goes without saying that companies of all types that are advertising, marketing, drafting ESG statements, or disclosing information, as required to the SEC, will pay extremely close attention to the results of the SEC ESG decision and vote next week given the scrutiny that companies will face for non-compliance.

**SEC ESG Decision**

In March 2021, the SEC formed the Climate and Environmental, Social and Governance Task Force (ESG Task Force) within its Division of Enforcement. Hand in hand with the legal world’s attention on greenwashing in 2021, the SEC’s ESG Task Force was created for the sole purpose of investigating ESG-related violations. At
the same time, the SEC also announced that it intended to create rules for company disclosures related to ESG factors, including climate disclosures. The goal of the SEC ESG decision is to create standardized, comprehensive disclosure requirements, making it easier for investors to compare between companies.

The SEC’s actions were well-timed, as 2021 saw an enormous increase in investor demand for ESG-related and ESG-driven portfolios. There is considerable market demand for ESG portfolios, and whether this demand is driven by institute influencers or simple environmental and social consciousness among consumers is of little importance to the SEC – it simply wants to ensure that ESG activity is being done properly, transparently and accurately.

**2022, the SEC, and ESG**

We previously predicted that 2022 will see a great degree of SEC enforcement action seeking to curb overzealous marketing language or statements that it sees as greenwashing, as well as formal rules with respect to ESG-related factors. Whether these efforts will intertwine with the potential for increased Department of Justice criminal investigation and prosecution of egregious violators remains to be seen, but it is nevertheless something that issuers and investment firms alike must closely consider.

While there are numerous avenues to examine to ensure that ESG principles are being upheld and accurately conveyed to the public, the underlying compliance program for minimizing SEC violation or greenwashing allegation risks is absolutely critical for all players putting forth ESG-related statements. These compliance checks should not merely be one-time pre-issuance programs; rather, they should be ongoing and constant to ensure that with ever-evolving corporate practices, a focused interest by the SEC on ESG, and increasing attention by the legal world on greenwashing claims, all statement put forth are truly “ESG friendly” and not misleading in any way.

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