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ESG and Securities Litigation

Recent Trends Show Increased Focus on Allegations of "Greenwashing"

Over the past few years, regulators, businesses, and the market in general have become increasingly focused on environmental, social, and governance ("ESG") issues. From the SEC proposing new disclosure requirements for climate-related matters, to increasing state regulations, to litigation accusing public companies of failing to follow through on their commitments to diversity, ESG is seemingly in the headlines on a daily basis. This ever-increasing focus has created a climate where companies, understandably, want to make public statements promoting their own positive commitments to ESG issues. But those statements come with a risk: litigation, or even regulatory actions, challenging those statements as false or misleading. Not only in consumer actions concerning the products or practices at issue, but also from shareholders asserting claims for alleged violations of the federal securities laws.

As discussed in the examples below, the SEC and securities plaintiffs have brought a number of such actions recently against public companies indicating an increased scrutiny over company ESG statements, particularly those promoting a company's positive impact on environmental issues. These claims have been mainly focused on allegations of "greenwashing," *i.e.*, making false or misleading statements that make a company's business, products, policies, or practices appear to be more environmentally friendly or sustainable than they truly are.

Given this trend, companies must carefully assess the risks that they or their officers or directors face when making public statements or disclosures regarding ESG-related practices.

Regulatory Actions

The increased interest by investors and companies on ESG-related issues has attracted the attention of regulators—both state and federal. In addition to new rules proposed by the SEC in 2022 relating to ESG disclosures,¹ which have yet to become final, the SEC has brought enforcement actions



against companies accusing them of greenwashing or otherwise making false or misleading statements regarding ESG issues.

Vale S.A.

One example is an SEC enforcement action against Vale S.A., a publicly traded Brazilian mining company.² In 2019, Vale's Brumadinho dam collapsed, killing 270 people and causing significant environmental harm through the release of toxic mining waste into a local water supply. The mine collapse allegedly caused a loss of more than \$4 billion in Vale's market capitalization.

In April 2022, the SEC announced that it had charged Vale with making false and misleading statements regarding the safety of its dams. Specifically, the SEC alleged that Vale falsely stated that it evaluated the safety of its dams by employing a rigorous audit process, when in reality, it manipulated this audit process and was aware that the Brumadinho dam faced an unreasonable risk of collapse.

This action is still ongoing. Vale has moved to dismiss the action, and that motion is currently pending. In a press release announcing these charges, the SEC underscored its focus on ESG disclosures, noting that "[m]any investors rely on ESG disclosures like those contained in Vale's annual Sustainability Reports and other public filings to make informed investment decisions."

BNY Mellon

Another recent example involves BNY Mellon.³ In May 2022, the SEC announced that a BNY Mellon Investment Adviser had agreed to pay \$1.5 million to resolve charges alleging that it had issued false and misleading statements regarding ESG investment policies for certain mutual funds under its management.

Specifically, certain investment funds managed by BNY Mellon were allegedly represented as having undergone "ESG quality review" when, according to the SEC, that was not always the case.

BNY Mellon, without admitting or denying the allegations, agreed to pay a \$1.5 million penalty and take remedial measures in order to resolve this action.

In its press release regarding this settlement, the SEC reiterated its focus on ESG-related investing, stating that "the Commission will hold investment advisers accountable when they do not accurately describe their incorporation of ESG factors into their investment selection process."⁴

Securities Class Actions

In addition to regulator attention, the plaintiffs' bar has been focusing on ESG disclosures by public companies. Most of this litigation is still in the early stages, meaning that it is unclear what success these shareholder plaintiffs will ultimately achieve. It does, however, suggest that these actions are likely to continue—at least in the near term.

Enviva

One example is a lawsuit filed against Enviva Inc., a company that develops, constructs, acquires, and owns and operates fully contracted wood pellet production plants.⁵ Enviva touted itself as a "growth-oriented" ESG company with a platform "to generate stable and growing cash flows." Among other public statements, Enviva represented that "[s]ustainability is the foundation of our business and is increasingly an area of focus for our investors, who place a great deal of value on having Enviva as an ESG investment in their portfolio" and that the company's displacement of 64 million tons of coal was an "amazing statement about sustainability."

In October 2022, a short-seller published a report regarding Enviva, alleging that the company was "flagrantly greenwashing its wood procurement" and characterizing its claims of being a "pure play ESG Company" as



“nonsense on all accounts.” Following the issuance of this report, Enviva’s stock price declined, and litigation ensued.

The plaintiff, an Enviva investor, filed this putative class action in the U.S. District Court for the District of Maryland. The investor asserts claims under Sections 10(b) and 20(a) of the Securities Exchange Act, alleging that Enviva and certain of its officers and directors made false and misleading statements regarding the environmental sustainability of Enviva’s wood pellet production and procurement.

Danimer Scientific

Another recent example involves Danimer Scientific, Inc., a biodegradable plastics company that became publicly traded through a merger with a special purpose acquisition company.⁶ The company claimed that its proprietary product, a biodegradable plastic substitute, was 100% biodegradable, renewable, and sustainable.

However, the *Wall Street Journal* published an article raising questions regarding the biodegradability of this plastic substitute product. Shortly thereafter, an investor filed a putative securities class action lawsuit against Danimer in the U.S. District Court for the Eastern District of New York, asserting claims under Sections 10(b) and 20(a) against the company, its CEO and CFO, and seven members of the company’s board of directors. Among other things, the complaint alleges that statements touting the company’s biodegradable plastic product as a revolutionary product were, in reality, merely greenwashing.

The defendants recently moved to dismiss the amended complaint, asserting that this lawsuit was the result of baseless allegations raised by short sellers. That motion is still pending.

Conclusion

Given the market focus on ESG issues, companies will inevitably continue to make public statements about their own ESG initiatives and practices. But companies and their officers should be aware of the increasing scrutiny on these statements from regulators and litigants when deciding to what extent, and how, such statements are made. Companies would also benefit from staying informed of developments in these types of securities actions, as they are part of a recent trend, and it is too soon to tell how these matters will ultimately be resolved.



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¹ <https://www.sec.gov/news/press-release/2022-92>

² *SEC v. Vale, S.A.*, Case No. 1:22-cv-02405-LDH-SJB (E.D.N.Y.)

³ *In the Matter of BNY Mellon Investment Adviser, Inc.*, SEC Administrative Proceeding File No. 3-20867 (May 23, 2022)

⁴ <https://www.sec.gov/news/press-release/2022-86>

⁵ *Fagen v. Enviva Inc., et al.*, Case No. 8:22-cv-02844-DKC (D. Md.)

⁶ *In re Danimer Scientific, Inc. Securities Litigation*, Case No. 1:21-cv-02708-HG-RLM (E.D.N.Y.)