THE REVIEW OF
SECURITIES & COMMODITIES REGULATION
AN ANALYSIS OF CURRENT LAWS AND REGULATIONS AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 55 No. 16 September 28, 2022

ESG LITIGATION: SEC ENFORCEMENT AND PRIVATE ACTIONS

Environmental, Social, and Governance ("ESG") disclosures continue to be an important focus for the SEC, institutional investors, and private litigants. In this article, the authors highlight some recent SEC enforcement activity and private litigation arising from ESG disclosures, and offer key takeaways that companies should consider in connection with this evolving trend.

By Jina Choi and Christin Hill *

Rules and regulations concerning Environmental, Social, and Governance ("ESG") disclosures are expanding rapidly. ESG disclosure remains at the top of the SEC's rulemaking agenda. The SEC already requires "human capital" disclosures, prompting disclosure around the "social" element of ESG.[1] Earlier this year, the SEC also proposed mandatory climate risk disclosures, including provisions that would require disclosure around carbon emissions in an issuer's Form 10-K.[2] State legislatures have also attempted to pass, or are considering, legislation around ESG issues. Most notably, several states have attempted laws aimed at increasing board diversity, or disclosure around board diversity.[3] Similarly, new NASDAQ listing rules require enhanced transparency around board diversity.[4]

Separate from the new rules and regulations, proxy advisory firms and institutional investors are also demanding increased ESG disclosures. For example, Institutional Shareholder Services ("ISS") now provides quality scores on ESG matters, including summaries of key disclosure omissions. Similarly, BlackRock, one of the world's largest asset managers with $10 trillion in assets under management, has pushed for more ESG disclosures, asking companies to embrace "better sustainability disclosures" and that "disclosures on talent strategy fully reflect . . . long-term plans to improve diversity, equity, and inclusion."[5]

All of this puts significant pressure on companies to provide enhanced ESG disclosures. In response,

[1] 17 C.F.R. § 229.101(c)(2)(ii).

[2] Securities and Exchange Commission, *The Enhancement and Standardization of Climate-Related Disclosures for Investors* (2022) ("SEC Proposed Rule"), https://www.sec.gov/rules/proposed/2022/33-11042.pdf.

[3] For example, California and Washington both enacted legislation that require a certain number of board seats to be held by women or members of certain underrepresented groups. *See* Cal. Corp. Code § 301.3; Cal. Corp. Code § 301.4; Wash. Rev. Code § 23B.08.120. Notably, California's diversity mandates have been struck down as violating the California constitution. *See Crest v. Padilla*, No. 19-STCV-27561 (Cal.

footnote continued from previous column…

Super. Ct. L.A. Cnty. May 13, 2022); *Crest v. Padilla*, No. 20-STCV-37513 (Cal. Super. Ct. L.A. Cnty. Apr. 1, 2022).

[4] The NASDAQ Stock Market LLC Rules, Sections 5605(f), 5606.

[5] *Larry Fink's 2021 Letter to CEOs*, Blackrock.com, https://www.blackrock.com/us/individual/2021-larry-fink-ceo-letter.

* *JINA CHOI and CHRISTIN HILL are partners at Morrison & Foerster LLP. Their e-mail addresses are jchoi@mofo.com and chill@mofo.com.*

RSCR Publications LLC Published 22 times a year by RSCR Publications LLC. Executive and Editorial Offices, 2628 Broadway, Suite 29A, New York, NY 10025-5055. Subscription rates: $1,197 per year in U.S., Canada, and Mexico; $1,262 elsewhere (air mail delivered). A 15% discount is available for qualified academic libraries and full-time teachers. For subscription information and customer service call 609-683-4450; fax 609-683-7291; write Subscriber Services, RSCR Publications, PO Box 585, Kingston NJ 08528; e-mail cri.customer.service@comcast.net; or visit our website at www.rscrpubs.com. General Editor: Michael O. Finkelstein; tel. 212-876-1715; e-mail mofinkelstein@gmail.com. Associate Editor: Sarah Strauss Himmelfarb; tel. 301-294-6233; e-mail sarah.s.himmelfarb@gmail.com. To submit a manuscript for publication contact Ms. Himmelfarb. Copyright © 2022 by RSCR Publications LLC. ISSN: 0884-2426. All rights reserved. Reproduction in whole or in part prohibited except by permission. For permission, contact Copyright Clearance Center at www.copyright.com. *The Review of Securities & Commodities Regulation* does not guarantee the accuracy, adequacy, or completeness of any information and is not responsible for any errors or omissions, or for the results obtained from the use of such information.

companies are issuing and considering more ESG disclosures than ever before. With new disclosures, comes a heightened risk of regulatory enforcement and private litigation based on these disclosures, or lack thereof.

This article highlights some recent SEC enforcement activities and private litigation arising from ESG disclosures, and offers key takeaways that companies should consider in connection with this evolving trend.

SEC IDENTIFIES ESG AS A PRIORITY

The SEC has taken many steps in recent years to focus its efforts on ESG-related issues. On March 4, 2021, the SEC announced the creation of the Climate and ESG Task Force within the Division of Enforcement.[6] The task force aims to develop initiatives to identify ESG-related misconduct to respond to increased investor reliance on climate and ESG-related disclosure and investments.[7] On March 30, 2022, the SEC's Division of Examinations ("EXAMS") published its 2022 examination priorities, which also showcased ESG investing by registered investment advisers and registered funds as a significant focus area for EXAMS staff.[8] In particular, EXAMS stated that they would focus on whether advisers and funds are (1) accurately disclosing their ESG investing approaches and have adopted and implemented policies and procedures designed to prevent violation of the federal securities law in connection with ESG investing; (2) voting client securities in accordance with proxy voting policies and whether votes align with their ESG-related disclosures and mandates; and (3) overstating or misrepresenting the ESG factors considered or incorporated into portfolio selection (e.g., greenwashing).[9] And in May 2022, the SEC proposed amendments to rules and reporting forms to establish disclosure requirements for funds and advisers that market themselves as being ESG-focused.[10] In supporting this proposal, SEC Chairman Gensler highlighted the need for clearer guidance for ESG-related disclosures to protect the growing investor interests in ESG.[11]

Although new rules related to climate risks and greenwashing have been proposed, they have not yet been adopted or implemented. So, for now, the SEC's enforcement toolbox has not changed. Nonetheless, the SEC has identified several enforcement actions that reflect its announced focus on ESG-related issues, seemingly paving the way for future enforcement activities. We analyze some of these cases below.

SEC ENFORCEMENT ACTIONS RELATED TO ESG

Fiat Chrysler. On September 28, 2020, the SEC charged Fiat Chrysler Automobiles N.V. ("FCA") for making materially misleading disclosures with respect to its diesel cars in violation of Section 13(a) of the Securities Exchange Act of 1934.[12] The matter arose from public statements FCA made following the Volkswagen "Dieselgate" scandal, in which the U.S. Environmental Protection Agency ("EPA") found in September 2015 that Volkswagen installed emissions software that allowed it to cheat on diesel-emissions tests.[13] In response to the scandal, FCA began its own internal audit to determine whether any of its vehicles had similar software. In February 2016, FCA issued a press release and an annual report, both of which stated that FCA's internal audit confirmed that its vehicles complied with environmental regulations concerning emissions.

---

[6] Press Release, *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues* (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

[7] *Id.*

[8] Press Release, *SEC Division of Examinations Announces 2022 Examination Priorities* (Mar. 30, 2022), https://www.sec.gov/news/press-release/2022-57.

[9] *Id.*

[10] Gary Gensler, *Statement on ESG Disclosures Proposal* (May 25, 2022), https://www.sec.gov/news/statement/gensler-statement-esg-disclosures-proposal-052522.

[11] *Id.*

[12] Press Release, *Fiat Chrysler Agrees to Pay $9.5 Million Penalty for Disclosure Violations* (Sept. 28, 2020) https://www.sec.gov/news/press-release/2020-230.

[13] *In re Fiat Chrysler Automobiles N.V.*, No. 3-20092 (S.E.C. Sept. 28, 2020) ("FCA Order") at 1-2.

The SEC alleged that FCA's disclosure of the audit results contained materially false and misleading statements because FCA did not disclose that the internal audit had a limited scope (it only focused on finding a specific type of defeat device) and did not cover or address some of the issues the EPA had been raising with respect to FCA.[14] In fact, the EPA and other regulatory organizations had been raising concerns with some of FCA's vehicles for some time. These concerns culminated in 2017, when the EPA issued a notice of violation to FCA, and the U.S. Department of Justice filed a complaint against FCA and certain of its subsidiaries for violations of the Clean Air Act.[15] In 2019, the State of California also filed a complaint against FCA alleging similar misconduct.[16] All parties entered into a consent decree shortly thereafter in which FCA agreed to implement a recall program, offer an extended warranty on repaired vehicles, and pay a civil penalty of $305 million.[17]

The SEC found that FCA's disclosure touting the positive results of its own internal audit without acknowledging the limited scope of the audit, while the EPA was simultaneously raising concerns, constituted a securities law violation. To settle the charges by the SEC, FCA agreed to a cease-and-desist order and to pay a penalty of $9.5 million.[18] The case did not allege violations of the anti-fraud provisions of the federal securities law and no individual defendants were charged.

Vale S.A. On April 28, 2022, the SEC filed a complaint against Vale S.A. ("Vale"), a Brazilian mining company, alleging that the company made false and misleading statements about dam safety in its sustainability reports and other public filings in violation of the anti-fraud provisions of the federal securities laws.[19] The SEC's complaint alleged that the company acted with scienter but did not charge any individuals. The case is currently pending in the EDNY.

The complaint follows the January 2019 collapse of the Brumadinho dam in Brazil, a mining disaster that released 12 million cubic tons of mining waste and killed 270 people.[20] Three years before the collapse of the Brumadinho dam, in 2016, another dam co-owned by Vale failed as a result of liquefaction, which prompted the state government to pass more stringent regulations regarding dam safety and to require the filing of special audits.[21] The SEC alleges that from 2016 to 2019, Vale manipulated multiple dam safety audits, obtained fraudulent stability certificates, and regularly misled local governments, communities, and investors about the dam's stability through its ESG disclosures, despite knowing the Brumadinho dam did not meet internationally recognized safety standards.[22] For example, Vale stated in its sustainability reports and SEC filings that it adhered to the best international practices for dam safety, complied with regulatory requirements, and that 100% of the audited structures were certified to be in stable condition.[23] The SEC alleged that these statements were misleading because Vale failed to disclose that it provided unreliable data to Vale's dam safety auditors, which made their certifications false.[24] The SEC further claimed that various analyses hidden from the dam safety auditors showed that the Brumadinho dam fell below the minimum safety standards and that it was not safe.[25]

The SEC's press release announcing the enforcement action against Vale referred to formation of the Climate and ESG Task Force and specifically called out 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."[26]

BNY Mellon. On May 23, 2022, the SEC charged BNY Mellon Investment Advisor, Inc. ("BNYMIA") for misstatements and omissions about ESG considerations in making investment decisions for certain funds it managed.[27] The SEC found that between July 2018 and

[14] *Id.*

[15] *Id.* at 3-5.

[16] *Id.* at 5.

[17] *Id.*

[18] *Id.*

[19] Press Release, *SEC Charges Brazilian Mining Company with Misleading Investors about Safety Prior to Deadly Dam Collapse* (Apr. 28, 2022), https://www.sec.gov/news/press-release/2022-72 ("Vale Press Release").

[20] Complaint, *SEC v. Vale S.A.*, No. 22-cv-2405 (E.D.N.Y. Apr. 28, 2022), at 2, https://www.sec.gov/litigation/complaints/2022/comp-pr2022-72.pdf.

[21] *Id.* at 3-4.

[22] *Id.* at 2.

[23] *Id.* at 4-5, 10.

[24] *Id.* at 58.

[25] *Id.* at 57.

[26] Vale Press Release.

[27] *In re BNY Mellon Investment Advisor, Inc.*, No. 3-20867 (S.E.C. May 23, 2022) ("BNY Order"), https://www.sec.gov/litigation/admin/2022/ia-6032.pdf.

September 2021, BNYMIA inaccurately represented to investors that all investments in certain ESG-focused mutual funds had undergone an ESG quality review at the time of their investments. The SEC alleged that BNYMIA did not always perform the ESG quality review that it said it was using as part of the investment selection process for certain mutual funds it advised.[28] The SEC found that BNYMIA's representations in mutual fund prospectuses, statements to the funds' boards, and responses to requests for proposals ("RFPs") from investment firms considering investing in the ESG-funds were therefore false and misleading.

The SEC also set forth that because BNYMIA lacked written policies and procedures reasonably designed to prevent inaccurate or materially incomplete statements in prospectuses and in responses to RFPs, compliance personnel were unaware that ESG quality reviews were not prepared for all of the fund's investments.[29] To settle these claims, BNYMIA agreed to a cease-and-desist order, a censure, and a civil penalty of $1.5 million.[30] None of the claims BNYMIA agreed to settle were based on scienter, and the order recognized remedial acts and cooperation by BNYMIA that were taken into account in determining the SEC's remedies.

PRIVATE LITIGATION

Not to be left out, private shareholders are also scrutinizing ESG disclosures, and are contributing to the rise in ESG litigation. So far, suits brought by investor plaintiffs have been concentrated in two main areas: (1) securities class actions alleging that companies misrepresented their environmental practices or commitments and (2) shareholder derivative suits alleging that the board of directors breached their fiduciary duties by misrepresenting their commitment to racial diversity. The former category of suits has met mixed results. The latter category of suits, on the other hand, has fallen completely flat.

SHAREHOLDER CLASS ACTIONS CHALLENGING ENVIRONMENTAL DISCLOSURES

Ramirez v. Exxon Mobil Corp. The first climate-based securities class action was filed against Exxon Mobil in 2016 in the Northern District of Texas.[31] The shareholders alleged that Exxon misled investors by failing to disclose the risks posed to its business by climate change.[32] Specifically, the shareholders claimed that Exxon "ha[d] long understood the negative effects of climate change and global [warming]" on its business and should have adjusted its accounting of oil reserves based on this knowledge.[33] Exxon moved to dismiss on the grounds that it had fully disclosed its risks from climate change. In August 2018, the court denied Exxon's motion, finding that the plaintiffs had sufficiently pleaded claims that Exxon made material misrepresentations.[34] The case subsequently settled.[35]

Wildfire Securities Litigation. Exxon proved to be a roadmap for climate-related securities class actions, and utility companies have been a particular target. At least two securities class actions have been filed against utility companies, PG&E and Edison, wherein investors allege they were misled about the impact of climate change and catastrophic wildfires. The PG&E securities class action alleges that the utility company made misleading statements about the impact of climate change and wildfire resilience.[36] Specifically, the complaint alleges that PG&E's risk factors "included warnings that droughts, climate change, wildfires and other events ***could*** cause a material impact on PG&E's financial results," when in fact, there was "already existing negative impact on PG&E as a result of PG&E's subpar safety practices that caused wildfires resulting in death, destruction, and liability."[37] Defendants moved to dismiss. The case is currently stayed pending the PG&E bankruptcy proceedings.

---

[28] *Id.* at 4-5.

[29] *Id.* at 6.

[30] *Id.* at 7.

[31] *Pedro Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-03111 (N.D. Tex. Nov. 7, 2016).

[32] Complaint ¶ 3, *Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-03111 (N.D. Tex. Nov. 7, 2016).

[33] *Id.* ¶ 29.

[34] *Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832 (N.D. Tex. 2018).

[35] The securities class action was just one of several suits that Exxon has faced over its climate disclosures. Most notably, the NY Attorney General sued Exxon for alleged misrepresentations concerning the company's climate change risk. Exxon ultimately prevailed in the NY AG action at trial. *People of the State of New York v. Exxon Mobile Corp.*, Index No. 452044/2018 (N.Y. Super. Ct.).

[36] *In Re PG&E Corp. Sec. Litig.*, No. 5:18-cv-03509-EJD (N.D. Cal. June 12, 2018).

[37] Third Amended Consolidated Class Action Complaint ¶ 633, *In Re PG&E Corp. Sec. Litig.*, No. 5:18-cv-03509-EJD (N.D. Cal. May 28, 2019).

Edison successfully defeated a similar securities class action alleging that Edison and its senior executives made false and misleading statements about Edison's mitigation measures related to climate change and the heightened risk of wildfires in California.[38] Specifically, the complaint alleged that Edison misled investors when it attributed increased wildfire risk to climate change rather than its own failure to adequately maintain infrastructure.[39] In dismissing the suit, the court found that Edison's "general statements related to prioritization of safety would not mislead a reasonable investor."[40] Plaintiffs appealed the order, and the Ninth Circuit affirmed, agreeing that Edison's statements were "mere corporate puffery."[41]

Greenwashing Litigation. More recently, shareholder plaintiffs have brought securities class actions based on alleged greenwashing in a company's disclosures. In July 2021, shareholders sued oatmilk manufacturer, Oatly, in the United States District Court for the Southern District of New York, alleging that Oatly, a Swedish-based company whose securities are listed on Nasdaq, misled investors about the environmental benefits of oat milk production in comparison to cow milk production.[42] The shareholders allege that Oatly touted its sustainability practices, when in reality, Oatly's impact on water consumption was worse than dairy milk and its shipping practices created significant environmental impact. The shareholders allege, in addition, that Oatly contributed to deforestation and endangerment of species in Africa. The case is still in the earliest stages, so it is yet to be determined whether it survives a motion to dismiss.

Finally, shareholders recently filed a securities class action against Georgia-based bioplastics company, Danimer Scientific, and its top executives, alleging the company misrepresented its product as being 100 percent biodegradable.[43] The suit came after the *Wall Street Journal* published an article entitled "Plastic Straws That Quickly Biodegrade in the Ocean, Not Quite, Scientists Say" addressing, among other things, Danimer's claims that Nodax, the company's signature plant-based plastic, breaks down far more quickly than fossil-fuel plastics. The article alleged that according to several experts on biodegradable plastics, "many claims about Nodax are exaggerated and misleading." The motion to dismiss is currently pending.

DIVERSITY DERIVATIVE SUITS

The other hot area in ESG litigation is derivative litigation premised on an alleged lack of diversity. In the summer of 2020, in the wake of a nationwide racial justice movement following the murder of George Floyd, the racial composition of corporate boards became a focal point of derivative litigation. Since July 2020, there have been at least 12 derivative suits filed in federal district courts against the boards of public companies alleging that directors of each of these companies: (1) breached their fiduciary duties by failing to include African-American directors on their boards and/or (2) violated federal securities laws by misrepresenting their commitment to diversity.[44]

None of the cases survived a motion to dismiss. For the most part, these were cookie-cutter complaints with generic, but serious, allegations. The complaints included thumbnail pictures of the board of directors and alleged that the lack of African-American directors on the board rendered statements in the companies' proxies

[38] Amended Order re Motion to Dismiss, *Barnes v. Edison Int'l*, No. 2:18-cv-09690-CBM-FFM (C.D. Cal. Apr. 27, 2021), ECF No. 177.

[39] Consolidated Second Amended Complaint ¶¶ 379, 382, 384-385, 395-98, 431-32, *Barnes v. Edison Int'l*, No. 2:18-cv-09690-CBM-FFM (C.D. Cal. Apr. 27, 2021), ECF No. 151.

[40] *Id*. at 20.

[41] *Barnes v. Edison Int'l*, No. 21-55589 (9th Cir. Mar. 18, 2022).

[42] *In re Oatly Group AB Sec. Litig.*, No. 1:21-cv-06360-AKH (S.D.N.Y. July 26, 2021).

[43] *In re Danimer Sci., Inc. Sec. Litig.*, No. 1:21-cv-02708 (E.D.N.Y. May 14, 2021).

[44] *Klein v. Ellison*, No. 20-cv-4439 (N.D. Cal. July 2, 2020) (involving Oracle); *Ocegueda v. Zuckerberg*, No. 20-cv-04444 (N.D. Cal. July 2, 2020) (involving Facebook); *Kiger v. Mollenkopf*, No. 20-cv-01355-LAB-MDD (S.D. Cal. July 17, 2020) (involving Qualcomm); *Esa v. NortonLifeLock Inc.*, No. 20-cv-05410 (N.D. Cal. Aug. 5, 2020) (involving NortonLifeLock); *Lee v. Fisher*, No. 20-cv-06163 (N.D. Cal. Sept. 1, 2020) (involving Gap Inc.); *In re Danaher Corp. S'holder Derivative Litig*., No. 20-cv-02445 (D.D.C. Sept. 1, 2020) (involving Danaher); *Falat v. Sacks*, No. 20-cv-01782 (C.D. Cal. Sept. 18, 2020) (involving Monster Beverage Corp.); *City of Pontiac Gen. Emps.' Ret. Sys. v. Bush*, No. 5:20-cv-06651 (N.D. Cal. Sept. 23, 2020) (involving Cisco); *City of Pontiac Police & Fire Ret. Sys. v. Caldwell*, No. 20-cv-6794 (Sept. 29, 2020) (involving Advanced Micro Devices); *City of Pontiac Police & Fire Ret. Sys. v. Jamison*, No. 20-cv-00874 (M.D. Tenn. Oct. 9, 2020) (involving Tractor Supply Co.); *Foote v. Micron Tech. Inc*., No. 21-cv-00169 (D. Del. Feb. 9, 2021) (involving Micron); *Lee v. Frost*, No. 21-cv-20885 (S.D. Fla. Mar. 5, 2021) (involving OPKO Health, Inc.).

that the board is "committed to diversity" false and misleading.

The complaints universally failed to credit women on the boards, or even other racial minorities, instead insisting that "diversity" has only one definition: a specific number of African-Americans on the board. Unsurprisingly, the lawsuits failed to identify any legal authority that endorsed this narrow view of "diversity." The complaints were dismissed for various reasons, including several courts finding that the statements about a "commitment to diversity" were aspirational statements, exempt from liability.[45]

Despite consistent dismissal, these suits carry reputational risk. All of the companies faced with these suits were subject to headlines accusing the board of racial discrimination. One headline from *The Mercury News* regarding the Oracle suit read, "'Blacks Need Not Apply' Sign Would Fit Oracle HQ, Suit claims."[46] Further, it appears that the plaintiffs' bar is not quite ready to abandon this theory of liability. Even recent lawsuits have raised diversity concerns.[47]

TAKEAWAYS

- Demands for ESG disclosures are here to stay.
- The SEC will rely on traditional enforcement tools in bringing ESG-related cases while new rules are pending.[48] These tools include the anti-fraud provisions of the federal securities laws (Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Section 206(1), (2) and (4) of the Investment Advisers Act of 1940 (the "Advisers Act"), as well as laws and regulations prohibiting material misstatements. Registered investment advisers have the additional obligation of ensuring that they adopt and implement written policies and procures reasonably designed to prevent violations of the Advisers Act.
- The SEC considers statements in public companies' sustainability reports, ESG reports, press releases, and media interviews to be statements made to investors that will be scrutinized under the federal securities laws. Statements made in such reports should go through a thorough vetting process to ensure they are accurate and not misleading.
- Public companies should ensure robust disclosure controls and procedures, especially in the context of regulatory inquiries (federal, state, and local) to ensure that statements regarding potential litigation — often in the context of inquiries from agencies overseeing environmental and workplace violations – are accurate and not misleading.
- The private plaintiffs' bar is also scrutinizing ESG disclosures, and has not hesitated to bring suit.
- Many of the initial lawsuits have been concentrated in securities class actions around climate disclosures and derivative litigation around board diversity.
- Securities class actions arising from climate disclosures have met with relative success, with several surviving motions to dismiss. These results are likely to embolden the plaintiffs' bar. Accordingly, companies making climate disclosures should choose their words wisely, and with the eyes of a plaintiff's attorney.
- While the initial wave of diversity-related derivative suits has been unsuccessful, the suits carry reputational risk, and the SEC's, institutional investors' and state legislature's continued interested in diversity issues may encourage the plaintiffs' bar to keep trying. For future suits to survive a motion

[45] *See, e.g.*, *Klein v. Ellison*, No. 20-cv-04439-JSC, 2021 WL 2075591, at *7 (N.D. Cal. May 24, 2021); *Ocegueda v. Zuckerberg*, No. 20-cv-04444-LB, 2021 WL 1056611, at *9 (N.D. Cal. Mar. 19, 2021); *Kiger v. Mollenkopf*, No. 21-409-RGA, 2021 WL 5299581, at *3 (D. Del. Nov. 15, 2021); *Esa v. Nortonlifelock Inc.*, No. 20-cv-05410-RS, 2021 WL 3861434, at *5 (N.D. Cal. Aug. 30, 2021); *City of Pontiac Police & Fire Ret. Sys. v. Jamison*, No. 3:20-cv-00874, 2022 WL 884618, at *16 (M.D. Tenn. Mar. 24, 2022).

[46] Ethan Baron, *'Blacks Need Not Apply' sign would be appropriate for Oracle HQ, lawsuit claims* (July 7, 2020), https://www.mercurynews.com/2020/07/06/blacks-need-not-apply-sign-would-be-appropriate-for-oracle-hq-lawsuit-claims/.

[47] *See, e.g.*, *Ardalan v. Wells Fargo & Co.*, No. 22-cv-03811 (N.D. Cal. June 28, 2022) (a securities class action alleging misstatements and omissions in connection with Wells Fargo's implementation of a recruitment policy aimed at increasing diversity).

[48] Director of Division of Enforcement, Gurbir Grewal, has recently stated that no matter how novel the industry or corporate strategy may be, the SEC would be sticking to the

footnote continued from previous column…

"long-standing principle" that companies must make disclosures that are not materially false or misleading. Grewal Keynote Address.

to dismiss they would need to be less generic and more specific about how a lack of diversity equates to a breach of fiduciary duty.

CONCLUSION

Enforcement cases surveyed here show that while the SEC seems poised to cast a wide net to bring more ESG-related enforcement actions, it will likely continue to rely on traditional enforcement mechanisms to do so in the near future. Even if the tools and statutes remain the same, however, it does not mean that there will be a lack of creativity in the breadth of cases and investigations the SEC would pursue under the new initiative.

On the private litigation side, plaintiffs have been eager to bring ESG-related litigation as well but were met with mixed results. The cases that have survived the motion to dismiss stage so far are cases involving climate risk disclosures. Cases involving generic diversity disclosures, on the other hand, have been dismissed. With the new SEC rules that seek to require more specific disclosures, one could expect that more precise disclosures may give rise to an increase in future litigation. This makes it even more imperative for companies to pay special attention to their disclosure language as it relates to ESG. ■