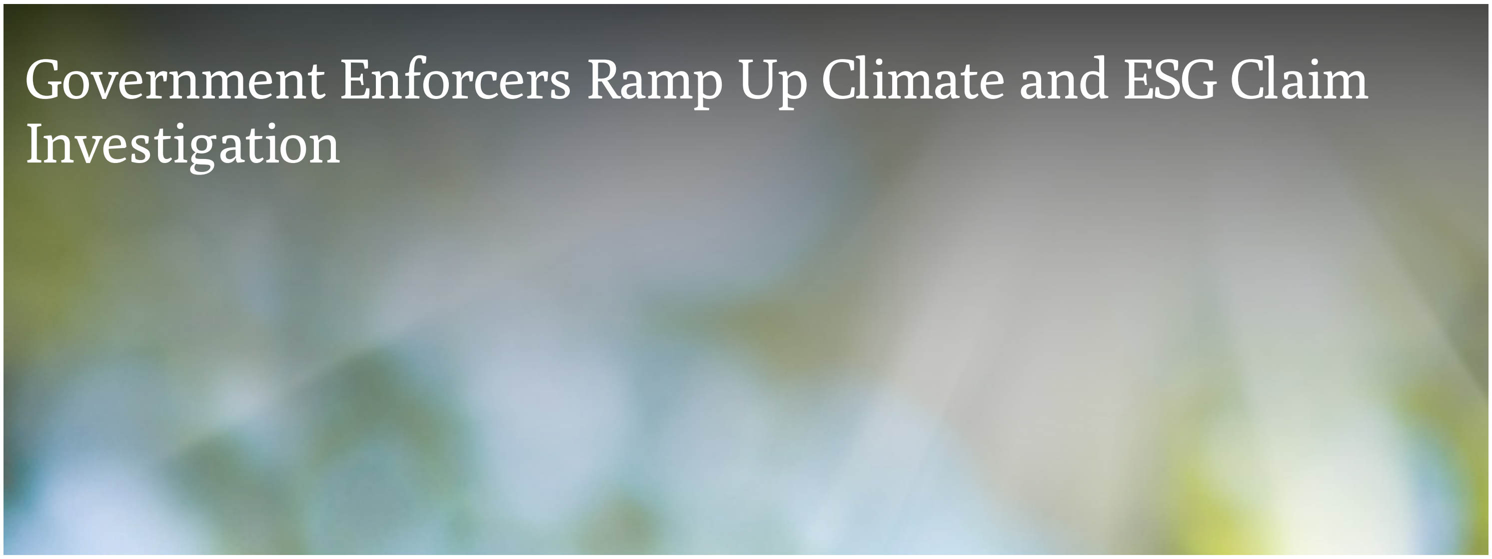
BLOG

Government Enforcers Ramp Up Climate and ESG Claim Investigation



SEPTEMBER 7, 2021

Government regulators around the world are increasing scrutiny of climate-related and other environmental, social, and governance (ESG) claims. Many companies are issuing “sustainability” reports, and voluntarily making ESG claims about social issues such as environmental justice in response to investor demands. But regulators are raising questions about their accuracy and support. We look at recent actions by United States and international regulators.

Background

On May 20, 2021, President Biden signed Executive Order No. 14030. This calls for “a comprehensive, [g]overnment-wide strategy” on climate-related financial risk. As detailed in a prior alert,[1] the order expanded upon climate-related initiatives by individual federal regulators, including the Securities and Exchange Commission (SEC), Federal Trade Commission (FTC), Commodity Futures Trading Commission, Consumer Financial Protection Bureau, and Federal Reserve. For example, the SEC is moving in the direction of mandatory disclosures of climate-related financial and other ESG information.[2]

In the European Union, the EU’s Sustainable Finance Disclosure Regulations (SFDR) went into effect on March 10, 2021. These rules cover EU financial-market participants and advisers. They require the classification of funds and that such funds start collecting and reporting certain ESG and sustainability information.[3] In the United Kingdom, a taskforce similarly developed a regulatory roadmap for the next five years. It aims to increase disclosure of climate-related risks and opportunities across the UK economy.[4] The Australian Securities and Investment Commission has also enacted climate-related disclosure regulations.[5]

Government Enforcers Scrutinize Climate and ESG Claims

In a speech in late July, SEC Chairman Gary Gensler observed that many companies are already making climate-related, sustainability, and other ESG claims. One report says that nearly two-thirds of companies in the Russell 1000 Index, and 90% of the 500 largest companies in that index, published sustainability reports in 2019, using various third-party standards.[6] Yet while many companies are already making such claims voluntarily, growing numbers of incidents are reported of companies failing to live up to their lofty ideals—or at least allegedly failing to keep up with their marketing and investor claims. This means that, even without SEC regulations mandating climate and ESG disclosures, many entities already have current risk.

- After the EU's SFDR rules took effect, the European market for sustainable investments is reported to have *contracted* by $2 trillion between 2018 and 2020. Observers attribute this contraction to fewer entities now *claiming* such status consistent with new EU requirements—not that there is less investor interest in such funds.
- In the United Kingdom, the Financial Conduct Authority (FCA) wrote a letter to financial-fund-management chairs. According to an examination of submissions received, the FCA claimed that managers are issuing "poorly drafted" pitches for investment funds meant to combat climate change, with claims that "do not bear scrutiny."[7]
- In July 2020, the U.S. FTC issued a final report on its settlement with Volkswagen. The FTC reported that Volkswagen and Porsche repaid a total of more than $9.5 billion to car buyers from the companies' deceptive "clean diesel" advertising.
- The U.S. SEC is similarly pursing companies for misrepresenting environmental compliance in annual reports and other SEC-regulated disclosures and statements. Last fall, the SEC entered into a cease-and-desist order with an automotive company, imposing a civil penalty of $9,500,000 and other injunctive relief.[8]
- In March of this year, the SEC announced a Climate and ESG Task Force in the Division of Enforcement.[9] It then issued an "Alert" in April observing "instances of potentially misleading statements regarding ESG investing processes and representations regarding the adherence to global ESG frameworks."[10] The alert stressed that if market participants chose to voluntarily make ESG statements, the SEC will examine them to insure firms are "accurately disclosing their ESG investing approaches and have adopted and implemented policies, procedures, and practices that accord."[11]
- In late August, it was revealed that SEC and DOJ prosecutors are investigating the sustainability claims of a major European bank's asset-management arm.[12] A former employee claimed that the bank was overstating how much it uses sustainable investing criteria to manage its assets.[13] The SEC has other such matters under inquiry.
- The Australian Securities and Investment Commission (ASIC) sent letters to numerous fossil-fuel energy firms as well as leading international auditing firms that service them in June. The ASIC warned that its operating reviews and directors' reports failed to disclose business risks from climate change.[14]

Government regulators around the world are not the only parties beginning to take action. Private parties are filing suits against companies making climate-related, sustainability, and other ESG claims. Two securities class actions recently filed in the Federal District Court for the Southern District of New York alleged that an innovative food company engaged in "improper accounting practices and greenwashing," including in the registration statement filed with the SEC.[15]

KEY TAKEAWAYS

- Government regulators around the world are ramping up review of climate-related, sustainability, and other ESG statements for compliance with *current* law.
- Indications are that certain companies may not have subjected such claims to the same diligence, substantiation, and ongoing compliance review as previously regulated claims.
- Risk-management and compliance personnel should review procedures for making and substantiating such claims and for ensuring ongoing legal compliance.
- Private plaintiffs are similarly examining the climate, sustainability, and ESG statements of companies and bringing challenges to such claims.

For further information or questions on climate-related financial, sustainability, and ESG disclosures and their implications, contact **Jonathan D. Brightbill*** (Partner, White Collar, Regulatory Defense & Investigations, Environmental Litigation), or **Jennie Porter (**Associate, White Collar, Regulatory Defense & Investigations).

** Jonathan D. Brightbill served as Acting Assistant Attorney General at the U.S. Department of Justice, litigating cases and issues relating to climate change, from 2017 to 2021. Government orders on the federal, state, and local levels are changing every day, and the information contained herein is accurate only as of the date above.*

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[1] Jonathan Brightbill and Suzanne Jaffe Bloom, *Compliance and Risk Considerations – Executive Order on Climate-Related Financial Risks*, Winston's Environmental Law Update (June 1, 2021), https://www.winston.com/en/winston-and-the-legal-environment/compliance-and-risk-considerations-executive-order-on-climate-related-financial-risks.html.

[2] Jonathan Brightbill and Jennie Porter, *An Early Look at What Stage AGs Want From ESG Disclosures,* Law360 (July 8, 2021), https://www.law360.com/articles/1401457; Jonathan Brightbill and Jennie Porter, *Evaluating Challenges To SEC's ESG Disclosure Proposal,* Law360 (Aug. 23, 2021), https://www.law360.com/articles/1414167/evaluating-challenges-to-sec-s-esg-disclosure-proposal.

[3] European Comm'n, *Sustainability-related disclosure in the financial services sector*, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/sustainability-related-disclosure-financial-services-sector_en.

[4] Patricia Kowsmann & Ken Brown, *Fired Executive Says Deutsche Bank's DWS Overstated Sustainable-Investing Efforts*, Wall St. J. (Aug. 1, 2021), https://www.wsj.com/articles/fired-executive-says-deutsche-banks-dws-overstated-sustainable-investing-efforts-11627810380; HM Treasury, *A Roadmap towards mandatory climate-related disclosures* (Nov. 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933783/FINAL_TCFD_ROADMAP.pdf.

[5] Michael Roddan, *Directors liable for 'greenwashing' disclosures*, Fin. Rev. (Apr. 26, 2021, 12:00 AM), https://www.afr.com/companies/financial-services/directors-liable-for-greenwashing-disclosures-20210423-p57lse.

[6] Gary Gensler, *Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar* (July 28, 2021), https://www.sec.gov/news/speech/gensler-pri-2021-07-28.

[7] Silla Brush, *U.K. Financial Regulator Slams 'Poorly Drafted' ESG Fund Filing*, Bloomberg Green (July 19, 2021, 6:27 AM EDT), https://www.bloomberg.com/news/articles/2021-07-19/u-k-financial-regulator-slams-poorly-drafted-esg-fund-filings.

[8] *In the Matter of Fiat Chrysler Automobiles N.V.*, File No. 3-20092 (order dated Sept. 28, 2020).

[9] SEC 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.

[10] Securities and Exchange Commission – Division of Examinations, *The Division of Examinations' Review of ESG Investing* (Apr. 9, 2021), https://www.sec.gov/files/esg-risk-alert.pdf.

[11] *Id.*

[12] Patricia Kowsmann et al., *U.S. Authorities Probing Deutsche Bank's DWS Over Sustainability Claims*, Wall St. J. (Aug. 25, 2021), https://www.wsj.com/articles/u-s-authorities-probing-deutsche-banks-dws-over-sustainability-claims-11629923018.

[13] *Id.*

[14] Michael Roddan, *ASIC targets fossil fuel companies over climate change*, Fin. Rev. (June 1, 2021, 4:45 PM), https://www.afr.com/companies/financial-services/asic-targets-fossil-fuel-companies-over-climate-change-20210531-p57wq4.

[15] *Bentley v. Oatly Group AB*, No. 1:21-cv-06485 (S.D.N.Y., filed July 30, 2021); *Jochims v. Oatly Group AB*, No. 1:21-cv-06360 (S.D.N.Y., filed July 26, 2021).

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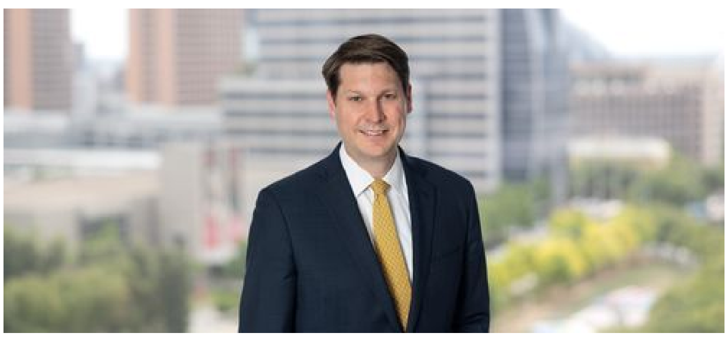

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