

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.