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Jessica Corley (jpcorley@kslaw.com) leads the Business Disputes and Securities Litigation Specialty team and is a partner in the Atlanta, Georgia, USA, office of King & Spalding.

Lisa Bugni (lbugni@kslaw.com) is a partner in King & Spalding's Securities and Shareholder Litigation practice, based in San Francisco and Los Angeles, California, USA.

Brandon Keel (bkeel@kslaw.com) is a partner in King & Spalding's Trial and Global Disputes practice, based in Atlanta, Georgia, USA.

Matt Rosenthal (mrosenthal@kslaw.com) is an associate in King & Spalding's Trial and Global Disputes practice, based in Atlanta, Georgia, USA.

ESG and securities litigation: An increased focus on allegations of "greenwashing"

By Jessica Corley, Lisa Bugni, Brandon Keel, and Matt Rosenthal

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 U.S. Securities and Exchange Commission (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 every day. 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, including litigation or even regulatory actions that seem to challenge those statements as false or misleading—whether in consumer actions concerning the products or practices at issue, or in shareholder actions asserting claims for alleged violations of federal securities laws.

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

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

Background and SEC proposed disclosure requirements

One need not look far to see the increasing market focus on ESG-related matters, which has rapidly grown in recent years and seems certain to continue. Indeed, a recent study by Dow Jones indicates that ESG investments

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are projected to more than double in the next three years and that such investment is expected to account for 15% of all investments by 2025.[1]

This growing market interest also has drawn the attention of regulators—at state and federal levels. As an example, last year, the SEC made headlines when it proposed rule changes that would require registrants to include certain ESG-related disclosures in their registration statements and periodic reports.[2] If those rules were made final (which has yet to occur), they would require registrants to disclose, among other things, information about their greenhouse gas emissions and "climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics."[3] If implemented, those rules could have wide-ranging implications for a number of public companies, including the substantial cost that would likely be associated with ensuring their compliance with these rules.

The SEC has not stopped there. It also has proposed new rules for investment advisers and investment companies to promote "consistent, comparable, and reliable information for investors concerning funds and advisers' incorporation of environmental, social, and governance (ESG) factors."[4] Those rules appear to be targeted mainly at investment advisers that represent commitments to ESG investing as part of their strategies.

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