

Greenwashing and the SEC: the 2022 ESG Target

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A recent wave of [greenwashing lawsuits](#) against the cosmetics industry drew the attention of many in the corporate, financial and insurance sectors. Attacks on corporate marketing and language used to allegedly deceive consumers will take on a much bigger life in 2022, not only due to our prediction that such lawsuits will increase, but also from Securities & Exchange Commission (SEC) investigations and penalties related to greenwashing. 2022 is sure to see an intense uptick in activity focused on greenwashing and the SEC is going to be the agency to lead that charge. Companies of all types that are advertising, marketing, drafting ESG statements, or disclosing information as required to the SEC must pay extremely close attention to the language used in all of these types of documents, or else run the risk of SEC scrutiny.

SEC and ESG

In March 2021, the SEC formed the Climate and Environmental, Social and Governance Task Force ([ESG Task Force](#)) within its Division of Enforcement. Hand in hand with the legal world's attention on greenwashing in 2021, the SEC's ESG Task Force was created for the sole purpose of investigating ESG-related violations. The SEC's actions were well-timed, as 2021 saw an enormous increase in investor demand for ESG-related and ESG-driven portfolios. There is considerable market demand for ESG portfolios, and whether this demand is driven by institute influencers or simple environmental and social consciousness among consumers is of little importance to the SEC – it simply wants to ensure that ESG activity is being done properly, transparently and accurately.

Greenwashing and the SEC

The SEC has stated that in 2022, it will be taking direct aim at greenwashing issues on many different levels in the investment world. As corporations and investment funds alike increasingly put forth ESG-friendly statements pertaining to their actions or portfolio content, the law has thus far failed to keep pace with the increasing ESG statement activity. It is into this gap that the SEC sees itself fitting and attempting to ensure that the public is not subject to greenwashing. In order to tackle this objective, expect the SEC to focus on the wording used to describe investments or portfolios, what issuers say in filings, and the statements made by investment houses and advisors related to ESG.

From this stem several topics that the SEC's ESG Task Force will scrutinize, such as: whether “ESG investments” are truly comprised of companies that have accurate and forthright ESG plans; the level

of due diligence conducted by investment houses in determining whether an investment or portfolio is “ESG friendly”; how investment world internal statements differ from external public-facing statements related to the level of ESG considerations taken into account in an investment or portfolio; selling “ESG friendly” investments with no set method for ensuring that the investment continues to uphold those principles; and many others.

2022, the SEC, and ESG

Given the SEC’s specific targeting of ESG-related issues beginning in 2021, we predict that 2022 will see a great degree of SEC enforcement action seeking to curb over zealous marketing language or statements that it sees as greenwashing. Whether these efforts will intertwine with the potential for increased Department of Justice criminal investigation and prosecution of egregious violators over greenwashing remains to be seen, but it is nevertheless something that issuers and investment firms alike must closely consider.

While there are numerous avenues to examine to ensure that ESG principles are being upheld and accurately conveyed to the public, the underlying compliance program for minimizing greenwashing allegation risks is absolutely critical for all players putting forth ESG-related statements. These compliance checks should not merely be one-time pre-issuance programs; rather, they should be ongoing and constant to ensure that with ever-evolving corporate practices, a focused interest by the SEC on ESG, and increasing attention by the legal world on greenwashing claims, all statement put forth are truly “ESG friendly” and not misleading in any way.

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