



June 2022

Government ESG-Related Enforcement Actions Are on the Rise

The federal government and various state and local governments are targeting companies that publish ESG¹-related misrepresentations or omit certain information in their ESG disclosures. Vega Economics has significant experience with ESG issues and can provide expertise for those facing enforcement actions.

The SEC Climate and ESG Task Force

On March 4, 2021, the Securities and Exchange Commission announced the formation of its Climate and ESG Task Force in its Division of Enforcement.² As investor reliance on ESG-related disclosures rises, the Task Force is focusing on ESG-related misconduct and potential violations such as an issuer's misstatements or gaps in statements in climate risk disclosures or disclosures relating to ESG strategies.³

On May 23, 2022, the SEC announced it had entered into a consent order with BNY Mellon Investment Adviser, Inc. (BNYMIA).⁴ The agency had charged BNYMIA for certain misstatements and omissions it made regarding its incorporation of ESG considerations into its investment decisions for various mutual funds under its management. BNYMIA had stated or implied, in public statements, that all of its investments for these funds had gone through an ESG quality review. But the agency found that many investments in the company's funds lacked an ESG quality review score at the time the fund invested in them.⁵

BNYMIA and the SEC reached an accord and the consent order includes findings that the company violated Sections 206(2) and 206(4) of the Investment Advisers Act of 1940 and Rules 206(4)-7 and 206(4)-8 and Section 34(b) of the Investment Company Act. In the order, BNYMIA neither admits

¹ Environmental, Social and Governance (ESG) principles have rapidly spread throughout economies worldwide. Many consumers and investors take a corporation's ESG practices into account in making their purchasing and investment decisions.

² "SEC Announces Enforcement Task Force Focused on Climate and ESG Issues." *U.S. Securities and Exchange Commission* (March 4, 2021). <<https://www.sec.gov/news/press-release/2021-42>> (accessed June 4, 2022).

³ *Id.*

⁴ "SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations." *U.S. Securities and Exchange Commission* (May 23, 2022). <<https://www.sec.gov/news/press-release/2022-86>> (accessed June 2, 2022).

⁵ *Id.*

nor denies these findings.⁶ The order also includes a \$1.5 million penalty BNYMIA agreed to pay as well as a cease-and-desist order and a censure. The order further recognizes that BNYMIA cooperated with the SEC during the investigation and implemented remedial acts promptly.⁷

The BNYMIA matter represents the largest penalty the SEC has imposed, to date, for ESG misrepresentations or omissions. But it is not the only matter the agency has prosecuted.

Another recent SEC case involved Vale S.A., a Brazilian iron-ore mining company. Vale had built the Brumadinho dam to protect surrounding areas from certain toxic mining byproducts. But the dam collapsed, killing 270 people and causing significant environmental damage. The company lost more than \$4 billion in market capitalization as a result.⁸

Following an investigation, the SEC filed charges claiming that Vale hid dangerous practices, manipulated safety audits, obtained fraudulent stability certificates, and routinely misled investors and others, in its ESG disclosures, regarding the dam's safety. The agency claimed that Vale knew, for years, that the dam failed to meet internationally-accepted standards but, instead of improving the dam, the company repeatedly assured investors that it followed the "strictest international practices" regarding dam safety and that "100 percent of its dams were certified to be in stable condition."⁹

During the period in question, Vale had raised \$1 billion in U.S. debt markets and continued to trade on the New York Stock Exchange. The SEC complaint, filed in the U.S. District Court for the Eastern District of New York, charges Vale with violations of federal securities law antifraud and reporting provisions and seeks injunctive relief, civil penalties, and an order forcing Vale to disgorge certain gains and pay prejudgment interest. Since its filing, the Court has granted the lead plaintiff's motion for an order granting class certification and, further, has certified a class of investors who can participate in the litigation.¹⁰

The SEC intends to pursue aggressively corporate ESG misrepresentations and omissions that affect investors in the United States.¹¹ International companies are not immune from prosecution if they have an appropriate nexus with the United States.¹² This trend is expected to continue,

⁶ *Id.*

⁷ *Id.*

⁸ "SEC Charges Brazilian Mining Company with Misleading Investors about Safety Prior to Deadly Dam Collapse." *U.S. Securities and Exchange Commission* (April 28, 2022). <<https://www.sec.gov/news/press-release/2022-72>> (accessed June 2, 2022).

⁹ *Id.*

¹⁰ *In re Vale S.A. SEC Litig.*, No. 19-CV-526-RJD-SJB (E.D.N.Y. March 31, 2022) (Order granting motion by lead plaintiff, Colleges of Applied Arts and Technology Pension Plan, for class certification and order certifying the class). <<https://casetext.com/case/in-re-vale-sa-sec-litig-4>> (accessed June 2, 2022).

¹¹ For information on other ESG-related cases the SEC has brought, see "Spotlight on Enforcement Task Force Focused on Climate and ESG Issues." *U.S. Securities and Exchange Commission* (Modified May 26, 2022). <<https://www.sec.gov/spotlight/enforcement-task-force-focused-climate-esg-issues>> (accessed June 2, 2022).

¹² In its press release regarding the Vale case, Melissa Hodgman, Associate Director of the Commission's Division of Enforcement, stated, "Today's filing shows that we will aggressively protect our markets from

particularly as more investors rely on ESG disclosures and other statements as part of their investment decision making.

State Action for ESG Misstatements

In 2019, the Commonwealth of Massachusetts brought an enforcement action against Exxon, alleging that the company engaged in unfair and deceptive practices in that it systematically misled consumers and investors when it made factual misstatements and failed to disclose information regarding its products' impact on the climate. The case, filed in 2019, is one of several cases various states have filed against Exxon and other oil and gas companies for climate change misrepresentations.

Exxon filed a special motion to dismiss the action, citing anti-SLAPP protection from the litigation, claiming the case was filed because of the company's 'petitioning' activities. A SLAPP (Strategic Lawsuit Against Public Participation) is a lawsuit filed to harass or inflict litigation costs on another with the goal of restricting that person's protected speech. Anti-SLAPP laws discourage such suits and range from curtailing retaliatory actions against those who petition the government to protecting speech concerning public issues of the day. These laws seek to streamline the litigation and appellate processes, limit the litigation costs these defendants might incur, and even provide for recovering costs from those who file the lawsuits.¹³

The trial court denied the motion and the Massachusetts Supreme Judicial Court has just affirmed that denial, holding that the Massachusetts anti-SLAPP law does not apply to government civil enforcement actions brought by the Attorney General.¹⁴ The decision was based on factors including the statutory language, legislative history, intent of the law, and applicable rules of construction.¹⁵ Similar suits have been filed in other jurisdictions¹⁶ and more are expected to be filed under state laws.

wrongdoers, no matter where they are in the world." "SEC Charges Brazilian Mining Company with Misleading Investors about Safety Prior to Deadly Dam Collapse." *U.S. Securities and Exchange Commission* (April 28, 2022). <<https://www.sec.gov/news/press-release/2022-72>> (accessed June 2, 2022).

¹³ See Vining, Austin and Matthews, Sarah. "Overview of Anti-SLAPP Laws." *Reporters Committee for Freedom of the Press* <<https://www.rcfp.org/introduction-anti-slapp-guide/>> (accessed June 2, 2022).

¹⁴ *Commonwealth v. Exxon Mobil Corp.*, No. SJC-13211 (Mass. Filed May 24, 2022) at 7.

¹⁵ *Id.* at 7-15.

¹⁶ See, e.g., *Mayor and City Council of Baltimore v. BPP.L.C., et al.*, 952 F.3d 452 (4th Cir. 2020) (affirming lower court order to remand action); *City of Hoboken v. Exxon Mobil Corp., et al.*, C.A. No. 20-cv-14243 (D.N.J. 2021) (granting motion to remand); *Board of County Comm'rs Of Boulder County v. Suncor Energy (U.S.A.) Inc., et al.*, C.A. No. 18-cv-01672-WJM-SKC (D. Colo. 2019) (granting plaintiff's motion to remand). See also, *State of Delaware v. BP America Inc., et al.*, C.A. No. 20-1429-LPS (D. Del.); *State of Minnesota v. American Petroleum Inst., et al.*, Civil No. 20-1636 (JRT/HB) (D. Minn.).

As ESG issues assume greater importance worldwide, state enforcement actions against companies that make ESG representations will increase in number. Many companies will be reaching their target dates for emissions reductions and, for those that miss their targets, government entities will likely get involved.

Vega Economics Offers Expertise in ESG Litigation

Vega Economics is an economic consulting firm specializing in expert testimony and data analysis. With our extensive network of experts, we can deliver exceptional quantitative solutions and meticulous expert reports on ESG claims. Vega offers analysis and expert testimony on company operations, including the environmental impact of same. Vega also has experience in the area of corporate reporting and disclosures. As corporations respond to the growing demand for ESG initiatives, we anticipate a wave of legal challenges when their disclosures and statements are alleged to be inaccurate.

Vega has experience and is ready to provide outstanding expert support in the following areas:

- Deceptive and Unfair Business Practices including Misrepresentation and Fraud
- Human Rights Violations in the Supply Chain
- Negligence Claims Regarding Supplier Activities
- Climate Change Litigation
- Shareholder Claims Against Companies for Misstatements and Omissions
- Investor Claims of Material Misstatements Made in Connection with Securities Offerings

For additional inquiries, please contact info@vegaeconomics.com.