Legal Developments and Disclosure Frameworks

Akin Gump
STRAUSS HAUER & FELD LLP

Energy Briefing: Environmental, Social and Corporate Governance (ESG) Considerations for the Energy Industry

January 28, 2021

This handout highlights some of the key legal developments impacting the ESG landscape in the United States and the prominent disclosure frameworks that ESG leaders use to inform their disclosures.

1. Key Legal Developments Impacting the ESG Landscape in the United States

a. Biden Administration Actions

i. On January 20, 2021, President Biden signed an executive order, entitled Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, which "directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of federal regulations and other actions during the last four years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis"

- Additional Reading

ii. The Biden Administration will pursue stricter climate regulations, as evidenced by the United States rejoining the Paris Agreement

- Additional Reading

iii. The Administration also is expected to strive to reduce carbon emissions from natural gas and power plants while simultaneously focusing on bolstering the use of alternative energy sources and technologies, such as electric vehicles

- Additional Reading

b. U.S. Securities and Exchange Commission (SEC)

i. Nomination of Gary Gensler as SEC Chair

- Gensler, a former chairman of the U.S. Commodity Futures Trading Commission with a reputation for pursuing progressive policy goals, is expected to join Commissioner Lee to lead the SEC's efforts to require rules-based ESG-related financial disclosures, with a particular focus on climate

Presenter Contact Information

Cynthia Mabry
Partner
cmabry@akingump.com
Houston
+1 713.220.8130

Stacey Mitchell
Partner
shmitchell@akingump.com
Washington, D.C.
+1 202.887.4338

Brian Patterson
Partner
bpatterson@akingump.com
Houston
+1 713.250.2214

- A Gensler-led SEC also may consider—or reconsider—rules related to fiduciary obligations for broker-dealers, cryptocurrencies, financial technology, and the use of Special Purpose Acquisition Companies
    - Additional reading

ii. December 2020 Section 13(q) Rulemaking

- Effective March 16, 2021 (unless delayed pursuant to the White House Chief of Staff's "Regulatory Freeze Pending Review" memorandum), new rule requires resource extraction issuers to disclose payments made to government entities for the purpose of developing oil, natural gas, or minerals
    - Additional reading

iii. Asset Management Advisory Committee, ESG Subcommittee

- September 2020 evaluation of a number of potential regulations related to ESG performance measurement, proxy voting, rating systems, and disclosure
    - Additional reading

- December 2020 recommendations regarding issuer disclosure of ESG risks and ESG investment product disclosure, including a recommendation to require the disclosure of material ESG risks using third-party frameworks
    - Additional reading

iv. 2020 Amendments to Regulation S-K

- August 2020 revisions do not require or specify ESG-related disclosures, prompting objection from Commissioner Lee to the revisions' "unsustainable silence"
    - Additional reading (rule)
    - Additional reading (statement from Commissioner Lee)

- November 2020 revisions do not require climate-related disclosures, prompting objection from Commissioners Lee and Crenshaw and a recommendation for an internal task force and ESG Advisory Committee to use recommendations from standard-setting organizations to "define a clear path to address sustainable investing"
    - Additional reading (rule)
    - Additional reading (statement from Commissioners Lee and Crenshaw)

v. Investor Advisory Committee, Investor-as-Owner Subcommittee

- May 2020 recommendation that the SEC update reporting requirements of issuers to include material, decision-useful ESG factors
    - Additional reading

vi. Statement by Commissioner Lee

- November 2020 speech expresses support for a standard ESG disclosure framework and rules regarding investment advisor ESG policies and transparency in credit ratings
    - Additional reading

c. U.S. Department of Labor

i. Under Biden, the Department of Labor has signaled that it will review the rule codified on January 12, 2021, regarding prohibitions on retirement plan fiduciaries' ability to make investment decisions based solely on ESG considerations.

- Additional reading

d. U.S. Federal Reserve

i. Chairman Powell's November 2020 statement identifies climate risk as a material risk to the economy and one that the Federal Reserve is considering incorporating into its regulatory framework
   - Additional reading

ii. November 2020 Financial Stability Report addresses the impact of climate risk on financial stability, concluding that climate change is "likely to increase financial shocks and financial system vulnerabilities"
   - Additional reading

iii. In December 2020, the Federal Reserve becomes a member of the Network of Central Banks and Supervisors for Greening the Financial System to share ideas, research, and best practices on the development of environment and climate risk management for the financial sector
   - Additional reading

e. Litigation

i. Securities Cases
   - Section 11 of the Securities Act of 1933 (cases involving alleged ESG-related misstatements and omissions in securities offering documents)
      - *In re Equifax Sec. Litig*., 357 F. Supp. 3d 1189, 1224 (N.D. Ga. 2019) (cybersecurity)
      - *Ludlow v. BP, PLC*, No. 14-20420 (5th Cir. September 8, 2015) (oil and gas safety)
      - *In re Massey Energy Sec. Litig*., 883 F. Supp. 2d 597 (S.D. W. Va. 2012) (coal safety and compliance)
      - *City of Brockton Retirement System v. Avon Products, Inc*, No. 11-CIV-4665, 2014 WL 4832321 (S.D.N.Y. Sept. 29, 2014) (corporate governance)

   - Section 10(b) of the Securities Exchange Act of 1934 and the SEC's Rule 10b-5 (cases involving ESG-related anti-fraud allegations)
      - *In re Banco Bradesco A. Securities Litigation*, 277 F. Supp. 3d 600, 659–660 (S.D.N.Y. 2017) (allegedly false or misleading statements related to criminal corruption charges and bribery schemes)
      - *In re Signet Jewelers Ltd. Sec. Litig*., No. 16-cv-6728, 2018 WL 6167889 (S.D.N.Y. Nov. 26, 2018) (allegedly false or misleading statements related to risky underwriting practices and sexual harassment)

ii. Consumer Protection Laws
   - *Hall v. SeaWorld Entm't, Inc.*, 747 F. App'x 449 (9th Cir. 2018) (allegation that marine park failed to disclose mistreatment of orcas)
   - *Sud Costco Wholesale Corp.*, 731 F. App'x 719, 720 (9th Cir. 2018) (allegation that retailer failed to disclose forced labor in prawn supply chain)
   - *Hughes v. Big Heart Pet Brands*, 740 Fed. App'x.876 (9th Cir, 2018) (allegation that marketer/distributor failed to disclose forced labor in fish and shrimp supply chain)
   - *Dana v. Hershey Co.*, 730 F. App'x 460 (9th Cir. 2018) (allegations that producer/distributor failed to disclose child and forced labor in chocolate supply chain)

- *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 863 (9th Cir. 2018) (allegations that producer/distributor failed to disclose child and forced labor in chocolate supply chain)

2. Prominent ESG Disclosure Frameworks/Standards

a. Task Force on Climate-related Financial Disclosure (TCFD)

b. Sustainability Accounting Standards Board (SASB)

c. Global Reporting Initiative (GRI)

d. CDP (formerly the Carbon Disclosure Project)

e. International Integrated Reporting Council (IIRC)

f. United Nations Global Compact

g. World Economic Forum

h. Select industry-specific disclosure frameworks:
   i. *Electric Utilities* – Edison Electric Institute – ESG/Sustainability Template (Version 2) & the Quantitative ESG Template
   ii. *Natural Gas Utilities* – American Gas Association – ESG/Sustainability Template (Version 2) & the Quantitative ESG Template
   iii. *Exploration & Production* – API, IPIECA and International Association of Oil and Gas Producers – Sustainability Reporting Guidance for the Oil and Gas Industry
   iv. *Midstream* – Energy Infrastructure Council and GPA Midstream Association – EIC/GPA Midstream ESG Reporting Template

3. Additional ESG Considerations for Financial Institutions

a. Principles for Responsible Investing (PRI)

b. Applicability of Section 13(g) of the Securities Exchange Act of 1934 to ESG Engagement with Company Boards
   i. Additional reading