THE GROWING RISK OF ESG-RELATED LIABILITIES

ESG and the Sustainable Economy Handbook

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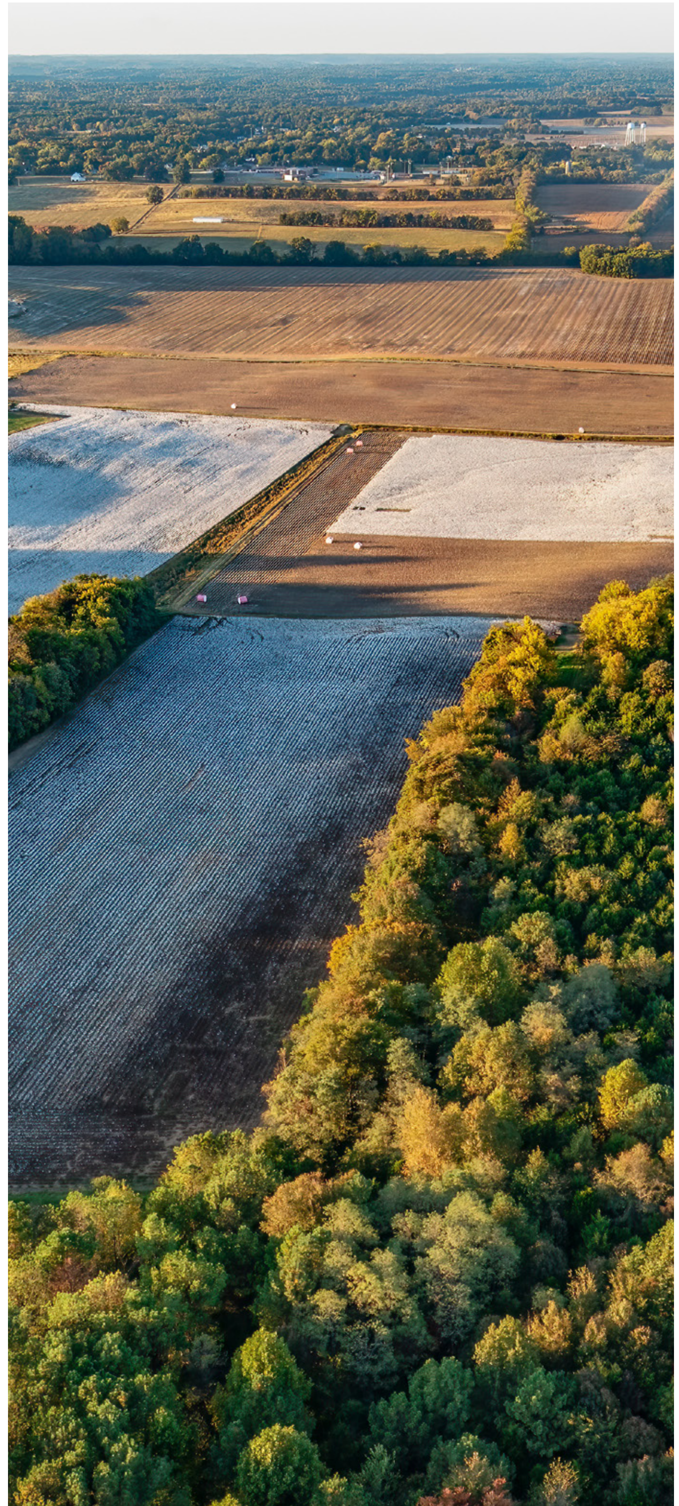
INTRODUCTION

As we have discussed in previous chapters of our ESG Handbook, companies are under increasing pressure to improve the sufficiency and transparency of their ESG disclosures. The universe of stakeholders seeking to hold companies accountable with respect to the implementation and progress of their ESG policies is broad and includes, among others, investors, consumers, regulators, and employees.

In their efforts to demonstrate to these stakeholders their commitment to sustainability and ethical labor practices, it is important that companies consider the risks inherent in incorporating ESG initiatives into their strategic and operational plans and give careful consideration to how to manage those risks.

In this chapter, we will review the principal types of claims presented by ESG factors and provide strategic advice for mitigating those risks. The chapter concludes with a discussion of the types of insurance coverage that may be available to policyholders for certain ESG-related risks.



SHAREHOLDER/ INVESTOR CLAIMS

The heightened level of scrutiny placed on ESG-related subjects in recent years has given rise to a corresponding increase in shareholder litigation risk under the federal securities laws and common law. This section provides an overview of the types of ESG-related shareholder claims filed over the past several years, both directly and derivatively, and presents a number of suggested best practices for public companies and their boards and officers.

ESG CLAIMS BROUGHT BY SHAREHOLDERS

Federal and state securities laws establish causes of action in favor of shareholders and prohibit false or misleading statements of material fact or omissions of material fact in connection with the purchase or sale of securities. These claims have most commonly been brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (Exchange Act), Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission (SEC), 17 C.F.R. § 240.10b-5, and Sections 11 and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l (Securities Act). Liability for ESG-related misstatements or omissions under these securities laws may extend beyond the issuer of the securities to the individual directors and officers who:

- Disseminated or approved false statements which they knew to be misleading (or recklessly disregarded their misleading nature);
- Failed to disclose the material facts necessary to avoid misleading statements; or
- Exercised control over the issuer of the securities.

In addition to direct actions under the federal securities laws,[1] shareholders also can and have initiated putative derivative actions against corporate directors and officers alleging that the corporation itself has been harmed by its own allegedly false or misleading ESG disclosures under Sections 10(b), 14(a), and 20(a) of the Exchange Act. These claims often are paired with common law breach of fiduciary duty claims brought against individual directors and

officers, alleging that these individuals breached their duties of care and loyalty to the company.

Although ESG disclosures have drawn increasing interest from the plaintiffs' bar in recent years, the underlying legal standards governing the claims are well established. ESG-related shareholder claims are subject to the same pleading standards applicable to other shareholder claims. Claims alleging fraud are subject to the stringent pleading standard imposed by Fed. R. Civ. P. 9(b), and putative class action claims alleging securities fraud are subject to the even more demanding pleading standard imposed by the Private Securities Litigation Reform Act of 1995.

Claims based upon disclosures or other statements that are nonactionable "puffery,"[2] expressions of opinion, or forward looking and accompanied by meaningful cautionary language are susceptible to attack by motion whether or not the statements are ESG-related. Similarly, courts have dismissed some ESG-related shareholder claims based on statements that courts found to be aspirational or overly general and, thus, not actionable. *See, e.g., Fogel v. Vega*, 759 F. App'x 18, 23 (2d Cir. 2018) (holding "general statements about honesty and integrity, including those about general compliance with the law, are not sufficient to state a claim"); *Ocegueda v. Zuckerberg*, 526 F. Supp. 3d 637 (N.D. Cal. 2021) (dismissing Section 14(a) claim because statement in proxy that Facebook was "committed" to diversity was aspirational and not actionable); *City of Pontiac Gen. Emps.' Ret. Sys. v. Bush*, 2022 WL 1467773 (N.D. Cal. Mar. 1, 2022) (dismissing Section 14(a) claim because statements in proxy that Cisco "embraces diversity" and "believes it is important to consider diversity of race . . . in evaluating board candidates" were merely aspirational); *Reiner v. Teladoc Health, Inc.,* 2021 WL 4451407, *13 (S.D.N.Y. Sept. 8, 2021) *report and recommendation adopted by* 2021 WL 4461101 (S.D.N.Y. Sept. 29, 2021) (statement that

all directors, officers, and employees "are expected to comply with all provisions of this Code [of ethics]" deemed "aspirational and hortatory").

As discussed below, ESG-related shareholder litigation can stem from allegedly false or misleading public disclosures issued by a company about its ESG-related policies or practices, or from a company's alleged mishandling of ESG-related events.

Environmental issues:

Climate change, sustainability, greenwashing, and environmental disasters

Although only recently labeled as "ESG-related," claims based upon alleged false or misleading environmental-related statements are not a new phenomenon.

For example, in the aftermath of the Deepwater Horizon oil spill, dozens of individual investors brought claims based on both English common law and federal securities laws that ultimately were consolidated in a multi-district litigation in the Southern District of Texas as *In re BP P.L.C. Securities Litigation*. The shareholders alleged that the company made numerous material misrepresentations in public statements about the impact of the spill, including statements regarding the flow rate of the oil spill, BP's emphasis on and commitment to process safety, and BP's ability to respond to an oil spill. On a motion to dismiss several related complaints,[3] the court dismissed many of these statements as not actionable because they reflected opinion, were future-looking, or were not false, or because the plaintiffs failed to adequately plead scienter.

In other suits, shareholders have alleged material misrepresentations in public statements concerning the risks of climate change or the impact of climate-related governmental policies.[4] Public statements about a company's products have also been the target of ESG-related suits, where shareholders have targeted purported misrepresentations about a product being safe, eco-friendly, biodegradable, or recyclable.[5]

Social issues:

Diversity and inclusion, sexual harassment and misconduct, discrimination, and workplace culture

Shareholders have filed putative derivative actions based upon allegedly false or misleading allegations about a company's commitment to diversity on the board or among executives.

In *Ocegueda v. Zuckerberg*, 526 F. Supp. 3d 637 (N.D. Cal. 2021), for example, a shareholder brought a derivative action related to Facebook's alleged lack of diversity on its board, among senior management, and in its workplace, as well as Facebook's alleged discriminatory advertising practices and failure to curb hate speech on its platform. The plaintiff claimed that Facebook's directors breached their fiduciary duties through these actions. Additionally, specifically with respect to the alleged lack of diversity, the plaintiff asserted a claim under Section 14(a) of the Exchange Act, alleging that statements made in 2019 and 2020 proxy statements were materially false because they indicated that Facebook was committed to diversity, which the plaintiff purported to contrast with statistics about the demographics of directors, officers, and employees of Facebook.[6] (The court dismissed the complaint because the complaint alleged "conclusions," "not facts" concerning the board's commitment to diversity.)

In *City of Pontiac General Employees' Retirement System v. Bush*, 2022 WL 1467773 (N.D. Cal. Mar. 1, 2022), the plaintiff brought a derivative action asserting claims under Section 14(a) of the Exchange Act based upon Cisco's statements that it "embraces diversity across the spectrum at every level," that "[d]iversity, inclusion, collaboration, and technology are fundamental to who we are," and that the Cisco "Board believes it is important

to consider diversity of race . . . in evaluating board candidates in order to provide practical insights and diverse perspectives." The court held that these statements were nonactionable because "they were neither misleading nor material to investors."

Additionally, the #MeToo movement has led to suits related to sexual harassment or misconduct by directors or senior executives,[7] along with claims related to an allegedly "toxic" workplace environment.[8]

Governance issues:

Internal controls, mismanagement, data breaches, and executive compensation

Shareholders have long scrutinized board governance and have asserted claims based upon alleged failure to implement internal controls to address product safety issues,[9] properly manage and protect customer data,[10] or adequately control executive compensation and perks.[11] For example, in *In re Marriott International, Inc. Customer Data Security Breach Litigation*, 2021 WL 2401641 (D. Md. June 11, 2021), *aff'd*, 31 F.4th 898 (4th Cir. 2022), a shareholder brought a derivative action asserting claims under Sections 10(b), 14(a), and 20(a) of the Exchange Act, as well as Rules 10b-5 and 14a-9, in addition to state common-law claims including a claim for mismanagement of the company, related to the breach of the guest reservation data of Starwood Hotels and Resorts Worldwide after Marriott acquired Starwood. Under Sections 10(b) and 20(a), the plaintiffs alleged material misrepresentations regarding the importance to the company of protecting customer privacy, privacy statements on Marriott's website, and cybersecurity risk disclosures. The court dismissed these claims because the plaintiff failed to adequately plead materiality, scienter, or loss causation. The court also dismissed the Section 14(a) claim because the alleged misrepresentations pertained to the officers' and directors' compliance with a code of ethics, which included safeguarding customer data. The court reasoned that this was essentially a claim that the defendants violated the code of ethics because they "did not disclose their own mismanagement," and that Section 14(a) does not "impose a freestanding disclosure requirement, particularly regarding unadjudicated allegations." *Id.* at *14.

In another data breach case, shareholders in *In re Facebook, Inc. Securities Litigation*, 405 F. Supp. 3d 809 (N.D. Cal. 2019), brought claims under Sections 10(b) and 20(a) of the Exchange Act, and Rule 10b-5, alleging that Facebook directors and officers made materially false or misleading public statements regarding Facebook's response to data misuse and privacy violations, including the Cambridge Analytica breach; failed to disclose the existence and magnitude of the risk created by Facebook's failures to protect user privacy; and misled investors by assuring them that Facebook was compliant with European privacy laws. The court dismissed plaintiffs' claims because the statements were forward-looking or "puffery," were not sufficiently alleged to be false, or relied on documents on which a reasonable investor would not consult when making purchasing decisions, such as Facebook's privacy policy.

Shareholders also have asserted derivative claims against directors claiming their oversight failures led to illegal activity. For example, in *In re Telefonaktiebolaget LM Ericsson Securities Litigation*, Case No. 1:22-cv-01167 (E.D.N.Y.), shareholders brought a derivative action under Sections 10(b) and 20(a) of the Exchange Act alleging that the defendants materially misled investors and failed to disclose that the company, which had already been fined more than $500 million on two occasions for bribery, allegedly had bribed ISIS in order to continue operations in Iraq. Specifically, the plaintiff alleged material misrepresentations in statements related to the company's internal controls and anti-bribery program, compliance with the company's code of ethics, and the company's zero tolerance for corruption. The defendants, as of this writing, have not responded to the complaint, and it remains to be seen whether these alleged misrepresentations will fare better than similar statements in other cases.

THE RISE OF OVERSIGHT CLAIMS AND IMPACT OF BOOKS-AND-RECORDS DEMANDS

Though a number of ESG-related cases have failed to survive the pleading stage,[12] plaintiffs have found some recent success in cases asserting claims based upon alleged board failure to adequately perform its oversight duties.

Such oversight claims, also known as *Caremark*[13] claims, have historically been regarded as among the most difficult for plaintiffs to prove. *Caremark* claims require plaintiffs to show that the directors either completely failed to implement reporting systems or controls or, if the controls are in place, consciously failed to monitor or oversee the controls such that they kept themselves uninformed of risks or problems.[14] In *Marchand* and *Boeing*,[15] however, both of which involved claims related to safety issues, the plaintiffs succeeded in pursuing *Caremark* claims in large part because, before they filed their respective derivative claims, they utilized books-and-records demands under Section 220 of the Delaware General Corporation Law (Section 220).

Section 220 allows stockholders to access the corporation's books and records for a "proper purpose." 8 *Del. C.* § 220(b). Historically, courts gave corporations latitude to object to Section 220[16] demands where it appeared stockholders were merely fishing for evidence of misconduct with no meaningful prospect for success. In recent years, however, courts and commentators have been increasingly skeptical of corporations' efforts to refuse demands under Section 220 and have begun to expand the boundaries of shareholder rights under the Section.[17] This broader interpretation of Section 220 has led to a dramatic increase in the number of ESG-related Section 220 demands and related litigation.

An example of a recent ESG-related Section 220 demand is *Sjune AP-Fonden v. Activision Blizzard, Inc.*, C.A. 2022-0281-KSJM (Del. Ch. 2022). In that case, a stockholder of Activision Blizzard, Inc. (Activision) pursued a Section 220 demand related to Activision's alleged culture of sexual harassment and discrimination. The demand sought, among other documents, board materials regarding Activision's planned sale to Microsoft and the compensation and employment of Activision's chief executive officer (CEO), Robert Kotick. After Activision refused the Section 220 demand, the stockholder filed a complaint in the Delaware Court of Chancery for the inspection of books and records.

The complaint alleges that Activision's planned sale to Microsoft was put into place to take advantage of the company's depressed stock price, which was the result of the ongoing scandals at the company. The complaint further alleges that the planned sale to Microsoft was an improper attempt to protect Mr. Kotick from calls for his termination because the planned sale would keep him as CEO during the sale and allow him to cash out his stock options. As of this writing, the Chancery Court granted a joint stipulation of the parties to stay the Section 220 action while the parties attempt to resolve the demand privately.

The *Activision* case is just one example of an increase in Section 220 demands related to ESG claims—a practice that the plaintiffs in *Marchand* and *Boeing* employed with success. In both *Marchand* and *Boeing*, the plaintiffs were able to base their claims on what the books and records did *not* show: (1) the lack of a board committee charged with addressing safety issues; (2) no protocol requiring management to report on safety issues; and (3) no discussion identified in board minutes related to safety issues. In Boeing, after the company made changes, such as the establishment of a board committee to oversee and ensure safety and a mandatory safety reporting program, the parties engaged in mediation to discuss the actions Boeing had already taken, as well as additional governance proposals from the plaintiffs. Ultimately, the parties reached a settlement agreement that incorporated governance changes (such as, in addition to steps Boeing had already taken, the election of an additional board member with engineering or product safety oversight experience), as well as a landmark monetary settlement of $237.5 million. This trend, therefore, underscores the importance for directors to identify critical ESG and oversight issues and build and maintain a proper record of these issues, to reflect their efforts and avoid distracting and expensive challenges to their oversight activities.

BEST PRACTICES

Officers and directors should ensure that the company's public disclosures are accurate and that the company has developed robust policies and procedures governing the evaluation of the ESG-related issues to mitigate risk. Management should consider the following:

- Retain good documentation that is available and accessible in the event that a shareholder makes a demand to minimize disruption and cost;
- Understand the breadth of statements upon which you are held to account. Litigation risk can arise not only from securities filings but also from statements made in other settings;
- Appreciate the difference between puffery, aspirational statements, company goals, and representations of current facts, and avoid the use of language which blurs the distinction between the foregoing categories of statements;
- Evaluate carefully the accuracy of any statements that can be objectively verified;
- Assess the flow of internal communication regarding ESG-related issues, and appreciate the protection that attorney-client privilege affords for full and candid discussions;
- Get started—it may appear overwhelming, but companies have had to address and litigate issues stemming from public representations since their formation. While ESG-related litigation is broader and perhaps more nuanced, it is manageable.

CLAIMS ASSERTED BY CONSUMERS AND COMPETITORS

ESG-related statements and representations increasingly are becoming the target of consumer class actions and private party claims asserted by competitors.

In what are often referred to as "greenwashing" suits, a plaintiff accuses a company of making false statements about its sustainability or ESG practices in an effort to appeal to consumer interests. For example, manufacturers and retailers face the risk of greenwashing claims based on representations that their packaging or products are made from 100% recycled materials. Food and beverage companies may face consumer class actions alleging that a product should not be labeled as "all natural" or "organic" if it contains per- and polyfluoroalkyl substances (PFAS) chemicals.[18] Similarly, packaging manufacturers may also bring suit against their competitors for making false or misleading statements about the sustainable materials used in products to appeal to consumers. The sources of consumer- and competitor-driven ESG litigation vary as widely as the potential causes of action. Since the early 1990s, the Federal Trade Commission (FTC) has published the Green Guides, which are designed to guide manufacturers, retailers, utilities, and a wide range of other businesses when they advertise being eco-friendly or carbon-free, or when they assert their products are recyclable or biodegradable. When companies stray from the guidance provided by the Green Guides, they not only run the risk of an FTC enforcement action under the FTC Act, but they also face the risk that a consumer or competitor could challenge their public statements through state and federal claims of unfair and deceptive trade practices, fraud, and false advertising. Manufacturers, retailers, food and beverage companies, and the energy and utility industry face the prospect of suits brought under the consumer protection laws on the books in all 50 states. Several states also have adopted specific statutes that bar misleading environmental claims. For example, California has a statute that makes it "unlawful for any person to make any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied."[19]

TYPES OF GREENWASHING CLAIMS

Low-Carbon Energy Sourcing

One way that companies have been choosing to address sustainability is by reducing their carbon footprint through low-carbon or carbon-free electricity procurement. These goals are implemented through a variety of methods: some companies have constructed on-site wind and solar generating facilities, while others have entered into power-purchase agreements (both direct and virtual) with independent power suppliers for electricity sourced from renewable or carbon-free generation. Companies often promote these efforts by making public statements about their carbon footprint, using terms like "low-carbon," "carbon-free," and "carbon neutral" to describe their operations.

In 2012, the FTC released its most recent set of "Green Guides," which includes a section regarding representations about energy and electricity sourcing. The Green Guides observe that it is deceptive to make unqualified representations that a product or service is made with renewable energy unless virtually all significant manufacturing processes are powered by renewable energy or the marketer has purchased an equivalent output of renewable energy certificates.

While the FTC has not yet taken any enforcement actions against companies for unsupported claims on these grounds, other plaintiffs, including consumers and advocacy groups, have. Advocacy groups recently brought two cases against oil companies, targeting the companies' clean energy representations in advertisements. In March 2021, nonprofit Beyond Pesticides challenged Exxon Mobil's marketing of its clean energy activities as misleading and a significant exaggeration of the oil company's overall investment activity.[20] In 2022, a group of environmental advocacy groups, citing the Green Guides, filed an FTC complaint against Chevron for misrepresenting its business as significantly invested in clean energy.[21] Both cases point to the express and implied environmental benefits claimed by the oil companies, the lack of evidence to support those claims, and the reasonable consumer who is misled by those claims. Neither case, however, has yet been evaluated on its merits.

Environmental Benefits

Other companies have faced pushback from consumers challenging representations that their sustainable operations provide environmental benefits. For example, in 2021, nonprofit Earth Island Institute sued BlueTriton, a water distribution company, on behalf of consumers in the Superior Court of the District of Columbia's Civil Division over BlueTriton's statements that its use of recycled plastic in its bottles represents proactive efforts by BlueTriton to reduce overall plastic pollution.[22] Earth Island brought its action under D.C.'s Consumer Protection Procedures Act, arguing that BlueTriton's representations about its sustainability practices misled and deceived D.C. consumers. These representations include statements made by BlueTriton that its operations "will continue to support [BlueTriton's] commitment to being at the forefront of sustainable water management, advancing recycling and waste reduction" and will continue "a longstanding commitment to environmental leadership." The proceeding remains ongoing, with the D.C. Superior Court denying BlueTriton's motion to dismiss in June 2022.

Sustainable Manufacturing

Companies also face litigation risk from consumers and competitors when they make public statements about the sustainable manufacturing of their products. Such lawsuits may rely on third-party reports or investigations that question the data underlying the sustainability claims. For instance, consumers brought a class action lawsuit in July 2022 against clothing manufacturer H&M in New York federal court, alleging that "H&M's labeling, marketing, and advertising . . . is

designed to mislead consumers about its products' environmental attributes" through the use of sustainability-oriented marketing and environmental scorecards called sustainability profiles for its individual products.[23] The complaint alleges, for example, that an independent investigation revealed a dress that H&M claimed was made with 20% less water on average was actually made with 20% more water. In the lawsuit, the consumers plaintiffs argued that H&M's alleged misrepresentations about the sustainability of its products "takes advantage of consumers' interest in products that are sustainable and that do not harm the environment" and are unjustly enriched by premium pricing for allegedly sustainable clothing products.

In a similar claim, three plastic bag manufacturers sued a competitor ChicoEco in federal court for making claims that ChicoEco's shopping bags are "environmentally superior to competing products," including the bags sold by plaintiffs.[24] The plaintiffs claimed that ChicoEco was unfairly appealing to customers by erroneously claiming that using ChicoEco products would lessen a consumer's environmental impact and that using a reusable bag eleven times would have a lower environmental impact than using eleven disposable bags. Plaintiffs argued that these and other similar claims made by ChicoEco could not be substantiated, and therefore ChicoEco was willfully engaged in a continuous and systematic campaign of false advertising and unfair competition in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and the South Carolina Unfair Trade Practices Act, South Carolina Code Annotated § 39-5-10 *et seq.* ChicoEco ultimately settled with the plaintiffs, agreeing to various restrictions on its advertising materials and consumer communications.

TRENDS IN GREENWASHING LITIGATION

Courts have differed on how they treat these greenwashing suits. In some cases, courts dismiss greenwashing claims outright if the alleged greenwashing statements would not mislead or confuse a reasonable consumer. For instance, in *Dwyer v. Allbirds, Inc.*,[25] a consumer brought a class action lawsuit against the wool shoe company, Allbirds, under the New York General Business Law (GBL), among other claims. The consumer alleged Allbirds products were misleadingly labeled to have a low carbon footprint. The methodology used by a third party to certify Allbirds as low carbon did not account for the impacts of wool production, including water, eutrophication, methane emissions, or land occupation. The court, however, granted Allbirds' motion for summary judgment, holding that the plaintiff could not show that a reasonable consumer would expect a different methodology. It found that Allbirds illustrates this methodology on its website, and a reasonable consumer would not expect non-atmospheric inputs from the production of raw materials to be included.

The consumer also alleged Allbirds made misleading animal welfare claims, challenging Allbirds' statements that the sheep providing the company's wool for its shoes "live the good life" because the wool is sourced from ZQ Merino certified farms. The court similarly found no reasonable consumer would expect farm animals to receive individual care or expect that the ZQ Merino certification process would require a particular methodology approved by the People for Ethical Treatment of Animals, and granted Allbirds' motion to dismiss.

In other cases, courts have found that a company's third-party certification could mislead a reasonable consumer. In *Walker v. Nestle USA, Inc.*, the court refused to dismiss a complaint because it found

Nestlé's UTZ Certification, in combination with other marketing statements, could mislead a reasonable consumer into believing Nestlé sustainably sourced its chocolate.[26] The court held the UTZ Certification "enhance[d] the advertising statements by suggesting that they are true because they were approved by a third-party."

In *Locklin v. StriVectin Operating Co., Inc.*, the court denied defendant StriVectin's motion to dismiss because it found that StriVectin's sunscreen products, which are labeled "REEF SAFE* SUNCREEN," could mislead consumers in violation of California's consumer protection laws.[27] The back of StriVectin's sunscreen features an asterisk and fine print stating that that the sunscreen does not contain two ingredients widely thought to harm coral reefs, but the court found that the consumer complaint plausibly alleged that the sunscreen contained four other chemicals known to harm coral reefs. While StriVectin argued that the statement on the label is true and does not amount to false advertising because the fine print narrowly defined "reef safe" to mean two particular chemicals known to harm coral reefs were not included in the product, the court rejected this argument as "absurd" and akin to labeling a product as "VEGAN*" with fine print explaining that it actually contained meat.

Similarly, courts can find that alleged greenwashing statements constitute puffery. "Mere puffing" is not actionable under state laws like New York's GBL or the federal Lanham Act because they are subjective claims that cannot be proven true or false, nor are they factual claims upon which a reasonable consumer would rely. Examples of nonactionable puffery include: "Better lives for hens mean better eggs for you,"[28] "Raised right tastes right"[29] and "The Good Life."[30] On the other hand, courts have found that the term "free-range" or statements regarding hens' living situations ("Our hens can peck, perch, and play on plenty of green grass") were not mere puffery.[31]

HOW COMPANIES CAN PROTECT THEMSELVES

To mitigate the risk of litigation challenging marketing statements as misleading and false advertising, companies should ensure that such statements can be supported and would not be misleading to a reasonable consumer (e.g., no asterisks or fine print caveating a statement about a product). Puffing is permissible, but companies should ensure that such statements are subjective statements, not factual claims that a reasonable consumer would rely on (e.g., "The happiest beef in the world!" versus "Happy beef from our humanely-treated and pasture grazing cows").

With respect specifically to avoiding litigation targeting companies' carbon neutral and renewable energy representations, businesses should continue to follow guidance in the current and forthcoming update to the FTC's Green Guides. With assistance of counsel, businesses should analyze public statements against this guidance and evolving case law to ensure their representations are based on evidence sufficient to support their claims, even if certified by an independent third-party certifier.

Additionally, to mitigate risks regarding litigation on third-party certifications, with assistance of counsel, businesses should analyze public statements against evolving case law to avoid overstating what a third-party certification means. Businesses should maintain independent evidence that substantiates their certifications and vet the processes used by third-party certifiers to ensure they match consumer expectations.

CLAIMS ASSERTED BY GOVERNMENTAL REGULATORS

As investors have demanded more sustainability data in recent years, governmental agencies have begun to take a more central role, including by proposing new ESG-related reporting requirements and updating existing regulations to address ESG issues. For example, the SEC and the Department of Labor each have proposed ESG-related rules, and the FTC is set to update its existing regulations, which may include additional ESG components. These new or updated regulations, although still in preliminary stages, project to have a significant impact, especially if they are adopted in their proposed forms. Noncompliance with these regulations could expose corporations and/or their directors and officers to civil or criminal penalties, as well as private lawsuits by shareholders. Corporations will need to become familiar, and take steps necessary to comply with, any new requirements or restrictions established by the regulations, particularly the SEC's new disclosure requirements.

SECURITIES AND EXCHANGE COMMISSION

In the first half of 2022, the SEC issued three proposed rules that directly address ESG-related issues. The first proposed rule establishes a broad set of new disclosure requirements related to climate change. The second and third proposed rules are not as wide-ranging and focus more on ESG investment funds. Although the rules are not yet in final form, they clearly signal the SEC's intent to take a direct line to regulating the ESG space. In fact, on March 4, 2021, the SEC announced the creation of a climate and ESG task force within its Division of Enforcement,[32] which was designed to identify any material gaps or misstatements in disclosures of climate risks and to analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies. The adoption of the SEC's new rules would expand the scope of disclosures available for the task force's review. With this new, focused enforcement effort, the SEC will enhance its power to impose civil penalties for ESG matters, such as climate change disclosures, or even seek criminal enforcement of federal securities laws through the U.S. Department of Justice (DOJ). The proposed new disclosure rules may also create fertile ground for shareholders pursuing claims under federal securities laws.

The most sweeping of the SEC's recently proposed rules was issued[33] in March 2022, and would require a broad set of new disclosures related to climate change in annual and, in some circumstances, quarterly reports, as well as IPO, spin-off, and merger registration statements. After a public notice-and-comment period that elicited responses from Fortune 500 CEOs and more than 14,000 public comments, the SEC anticipates publishing its final, adopted rule in November or December of 2022, with full compliance required, in most cases, about one year after publication.[34] Although the rule is not yet in final form, given the breadth of the proposed new disclosures, as outlined below, corporations subject to SEC regulations will need to fully incorporate climate change considerations into their regular operations and carefully document any initiatives, expenses, or risks associated with climate change.

The new disclosures required by the proposed rule fall into four broad categories, each covering different aspects of climate change contributions: (1) financial statement footnote disclosures, (2) greenhouse gas (GHG) emissions disclosures, (3) qualitative disclosures, and (4) governance disclosures.

Financial Statement Footnote Disclosures: The proposed rule would require corporations to describe, in their financial statement footnote disclosures, how climate change-related factors affected the company's income, assets, debts, and expenses. This includes the financial impact, including mitigation expenses, of severe weather events and other natural conditions (e.g., impairment charges, increased loss reserves), as well as transition activities (e.g., changes in salvage values or useful lives of assets), so long as the impact exceeds 1% of the financial line item. Additionally, corporations would need to disclose how these impacts affected the estimates and assumptions reflected in the financial statements. In light of these disclosure requirements, corporations should consider whether to modify how they allocate funds to account for climate change effects or mitigation.

GHG Emissions Disclosures: Under the proposed rule, corporations must also provide a comprehensive accounting of any and all emissions involved in their operations. This would include emissions produced directly from operations the corporations own or control, as well as emissions produced by electricity, steam, heat, or cooling that corporations purchase, and emissions from indirect upstream or downstream operations. Given the highly technical and expansive nature of these disclosures, it remains to be seen whether the SEC can practically enforce this requirement. In any

event, the proposed rule would account for the full life cycle of a company and its broad interactions with various outside entities. While some companies may already be making efforts to account for their respective carbon footprints, the SEC's proposed rule would, in most cases, go beyond these initiatives.

Qualitative Disclosures for Climate-Related Risks: The proposed rule also would require companies to disclose any climate-related risks that are reasonably likely to have a material impact on their business or consolidated financial statements. The proposed rule defines climate-related risks broadly and includes both physical risks, like flooding or extreme heat, and risks related to a potential transition to a lower-carbon economy, including technological, market, liability, reputational, or other risks. Further, these risks include not only those directly felt by a corporation, but also those impacting a corporation's supply chain.

Governance Disclosures: Finally, the proposed rule also would require disclosures related to the board of director's oversight of climate-related risks and management's role in assessing and managing climate-related risks. This includes, for example, whether any board member has expertise in climate-related risks, how the board considers climate-related risk as part of its business strategy, whether certain management positions or committees are responsible for assessing and managing climate-related risks, and the processes by which such positions or committees are informed about and monitor climate-related risks. With the number of shareholder claims related to directors' oversight duties already on the rise, this disclosure requirement further enhances the critical importance that corporations carefully document climate-related issues, the existence of board or management committees, and any efforts the corporation is taking in relation to climate change.

In addition to the above climate-change rule, the SEC also has proposed two additional rules[35] that pertain to ESG funds, seeking to specifically enhance and standardize disclosures related to ESG factors considered by funds and advisors, and to also expand the regulation of the naming of funds with a focus on ESG. While these proposed amendments are not as wide-reaching as the SEC's proposed climate change rule, nearly all U.S. fund advisers will be affected by the proposed amendments, and will need to consider how to approach these new requirements.[36]

DEPARTMENT OF LABOR

Similarly, the Department of Labor has proposed a rule to clarify that sponsors of employee retirement plans should consider ESG factors, like climate risks,[37] following President Biden's directive that the federal government treat climate change as a threat to workers' retirement savings.[38] If finalized, the rule would be enforceable by the Employee Benefits Security Administration, which can, for example, assess civil penalties for failing to operate the plan prudently and for the exclusive benefit of participants. The proposed rule, issued on October 14, 2021, amends the Investment Duties regulation under Title I of the Employee Retirement Income Security Act to explain that sponsors of employee retirement plans may consider climate risks and other ESG factors as part of their fiduciary duties of prudence and loyalty. Notably, the proposed rule does not necessarily create new duties for sponsors of employee retirement plans. However, if the rule is finalized in substantially similar form, then in addition to potential civil penalties, sponsors of employee retirement plans might also face private actions by plan participants claiming that the sponsors did not sufficiently consider ESG factors as part of their fiduciary role.

FEDERAL TRADE COMMISSION

The FTC's Green Guides[39] have been in effect since 1992, with an update scheduled for 2022, and provide a set of industry guidelines for environmental marketing claims to help inform industries about how the FTC will construe whether a marketing claim is false or deceptive.[40] The Green Guides are not binding and do not create any obligations or rights. However, they signal the FTC's thinking on environmental marketing, and violating a principle outlined in the Green Guides could serve as a basis for the FTC to initiate a civil enforcement action under Section 5 of the FTC Act, 15 U.S.C. § 45, for deceptive or unfair trade practices.[41] Because the Green Guides are not binding, however, the FTC would still need to prove that a violation of the Green Guides constitutes an unfair trade practice under Section 5. Nevertheless, Section 5 authorizes the FTC to seek civil penalties of up to $10,000 per violation.[42]

Additionally, corporations should be mindful of the potential impact of ESG matters on proposed mergers, particularly because a rejected merger resulting from ESG concerns may provide an additional ground for shareholder actions. Recently, the FTC has begun to review proposed mergers with a broader view of various market realities,[43] including questioning the relevant companies regarding the impact of the merger on ESG issues.[44] Although ESG factors are not yet formalized in the FTC's merger guidelines, in January 2022, the FTC, in conjunction with the Antitrust Division of the DOJ, issued a request for information, seeking public comment on the joint FTC/DOJ merger guidelines.[45] This may signal an intent to formally incorporate ESG factors in merger enforcement. Corporations should be careful to include ESG concerns when performing due diligence for any merger, acquisition, or consolidation they may be considering.

OTHER AGENCIES

While the DOJ has not issued formal guidance or policies related to ESG, DOJ recently stated that it is taking a holistic approach to its investigations, reviewing all criminal, civil, and regulatory records.[46] This means that administrative enforcement by the Environmental Protection Agency (EPA), for example, may be considered relevant to non-environmental investigations by DOJ. Additionally, DOJ's Environment & Natural Resources Division remains committed to identifying and prosecuting environmental crimes for all individuals involved in wrongdoing. The EPA, too, remains empowered to seek civil penalties or criminal sanctions for violations of its environmental regulations. Therefore, as companies assess the role ESG plays within their organizations, overall compliance with environmental laws must be a top priority.

CLAIMS ASSERTED BY EMPLOYEES

Organizations are increasingly recognizing that they must be responsible social actors, seeking to enhance equal opportunity in their treatment of employees and stakeholders and avoid discrimination at all costs. Where this may have been a focus almost exclusively of human resource departments in the past, equitable and socially conscious action is now clearly a board-of-directors focus and is being closely watched by stakeholders and shareholders.

The "S" or "social" factor in ESG relates to how a company interacts with its employees, customers, and the surrounding community, and whether it does so in a way that includes historically underrepresented or marginalized groups, and treats employees and customers/clients equitably based on protected class status. There is both tremendous opportunity and tremendous risk in this area. And, both courts and regulators are paying attention.

In terms of potential liability, which is extensive, the main areas to consider are pay equity and pay discrimination; Diversity, Equity, Inclusion, and Accessibility (DEIA)-related liability; systemic hiring discrimination; and systemic promotion discrimination. This section will discuss the types of claims employers may face on these issues and provide advice on minimizing the risks of these claims.

PAY EQUITY

Pay equity is a critical issue. Pay gaps exist for women, minorities, LGBTQ+ individuals, and individuals with disabilities, with intersectional pay gaps, such as for women of color, being the largest. Even when controlling for job title and other factors used to set pay, pay disparities exist more frequently and more persistently than most organizations realize.

Pay equity means the fair and comparable compensation of all employees doing the same work or similar duties, regardless of protected class status, with a particular focus historically on race, ethnicity, and gender, but now with a greater focus on LGBTQ+ and disability status as well. However, nondiscriminatory business reasons such as education or certification level, experience, job performance, and tenure can be considered when determining compensation, leading to legitimate differences in pay that do not undermine pay equity.

There are several federal laws in place that make compensation discrimination illegal. The Equal Pay Act (EP Act), enacted in 1963, made pay discrimination on the basis of gender illegal by requiring that men and women in the same workplace be given equal pay for equal work.[47] Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, passed in 1964, 1967, and 1990, respectively, collectively prohibit compensation discrimination on the basis of race, color, religion, gender, LGBTQ+ status, national origin, age, or disability.[48]

Despite these federal laws, compensation discrimination still exists. On average, women working full time are paid 83 cents for every dollar earned by White men.[49] This gap widens when you take other identities such as race, ethnicity, LGBTQ+ status, and disability status into consideration. As an example, Black and Hispanic women, respectively, are paid 65 cents and 59 cents for every dollar earned by White men.[50]

Pay Equity is an area of increasing interest for regulatory agencies and state officials. Forty-two states have enacted their own equal pay laws, acts, or statutes that compliment or are broader than the Equal Pay Act. The state-level protections have expanded fair pay requirements beyond gender to include race and other protected characteristics.

Pay Equity considerations also apply to federal contractors. On March 15, 2022, President Biden issued an Executive Order on Promoting Pay Equity and Transparency in Federal Contracting.[51] This Executive Order limits and restricts federal contractors from requesting and considering information about job candidates' and employees' current or past compensation in the context of hiring and other employment decisions.

On August 18, 2022, the Office of Federal Contract Compliance Programs (OFCCP) issued "Advancing Pay Equity Through Compensation Analysis," a revision to Directive 2022-01, Pay Equity Audits, which also confirms OFCCP's approach to conducting compensation reviews found in Directive 2018-05. This revised Directive stresses the importance of compliance evaluations, annual compensation reviews, and pay equity audits. Despite the increase in the number of laws and regulations enacted, compensation discrimination remains an area where there are many lawsuits and enforcement actions. In 2021, the top EP Act and Title VII charges filed were wage-related.[52]

There have been several large pay equity suits in recent years. A noteworthy case is the U.S. Women's National Soccer Team's (USWNT) equal

pay lawsuit. After filing an Equal Employment Opportunity Commission (EEOC) complaint in 2016, the players brought a lawsuit in 2019 alleging gender discrimination and demanding equal pay. In August 2022, the U.S. Soccer Federation reached a settlement with the USWNT on the lawsuit, which was just preliminarily approved by a federal judge in the amount of $24 million, with the judge stating the settlement was “fair, adequate, and reasonable.”[53]

A large, global technology company recently settled a class-action pay equity lawsuit for $118 million. In that case, the plaintiffs alleged that the women at the defendant corporation were locked into a fixed pay gap, creating a deficit of $17,000 from equally situated men. In 2021, this same technology giant settled a lawsuit alleging it unfairly paid its female engineers and failed to hire numerous Asian applicants.

Smaller businesses and organizations have also faced EEOC complaints regarding pay discrimination and have been ordered to pay large sums as part of the settlement process. Not only are these lawsuits costly and time-consuming for the companies, but they also often tarnish the reputation of those involved, even if a settlement or resolution eventually is reached.

There are several things companies can do to address pay equity issues in their ESG policies while minimizing risk. First, companies should develop compensation policies and standards that determine starting pay, merit increases, promotions, one-off increases, and incentives. Having these policies and standards in place is beneficial in limiting the possibility of disparities developing in the first place, and then helping to explain unintended disparities that might occur as a matter of chance in the workplace. Companies should also document any legitimate business reasons for these disparities since pay equity claims are often not alleged for years.

Second, do not make false claims about your company’s status regarding equal pay. Not only can these false claims open the door to litigation for enterprising plaintiffs’ lawyers who are seeking the next big class action suit, but they can also catch the eyes of regulators. Falsely claiming that your company has “100% pay equity” causes potential regulatory concern and can create potential liability that may need to be disclosed to SEC and other regulators. Additionally, federal agencies are coordinating with one another to aggressively investigate pay equity compliance and enforce pay equity laws.

Finally, companies should proactively conduct pay equity self-audits with the help of their legal counsel under attorney-client privilege to arm themselves with the information necessary to identify and address pay equity discrepancies before claims arise. This proactive audit also allows employers to determine if the discrepancies in their employment wages can be explained through legitimate, nondiscriminatory reasons.

DEIA-RELATED LIABILITY

DEIA is an increasingly popular movement that aims to build a culture of belonging, ensure fair treatment, and design and construct accessible programs for employees of all protected classes, with a particular focus on ensuring inclusion of historically underrepresented and marginalized groups.

In the workplace, this means that companies should ensure equal employment opportunities while recognizing differences in background, cultures, skillsets, and perspectives. This new human-centric way of thinking and operating is not only a social movement. On June 25, 2021, President Biden signed the Executive Order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce to further advance equity within the federal government.[54]

When constructing ESG policies to address DEIA-related liabilities, companies should keep several things in mind to mitigate their risks. First, DEIA programs are generally a best practice for eliminating discrimination and promoting equity. These programs can help companies set and meet goals related to the inclusion and retention of diverse candidates.

However, if the DEIA program engages in preferences or quotas, or otherwise targets particular groups based on protected class status, this can cause significant liability. There has been an uptick in the number of discrimination lawsuits alleging that preferences or quotas led to an adverse action against employees.

These employees have brought high-profile cases against their employers claiming unfavorable treatment. Employers should keep in mind that all employees, including White employees, are protected by federal and state civil rights laws. A large health care corporation was just ordered to pay $10 million to a former executive in a discrimination lawsuit. The executive, a White man, alleged that he and other White male leaders were dismissed without warning and replaced by women and or minorities. Plaintiff alleged that these terminations stemmed from the company's commitment to reshaping its workforce and addressing health care inequities.

In crafting DEIA programs, employers should ensure that they are not favoring one group over another just to meet their program goals. At the same time, it must be remembered that most discrimination cases continue to involve discrimination against minorities and women, so there continues to be substantial risk of liability for not having a DEIA program or for not seeking to increase equal opportunity for groups historically discriminated against. It is key to involve counsel in creating DEIA programs to make sure that they increase diversity, equity, inclusion, and accessibility while not using preferences or quotas. This will allow DEIA programs ultimately to decrease risk of liability.

Second, employers should remember that DEIA programs that do not include disability as a focus causes risk as well, as disability is typically the most frequent EEOC complaint other than retaliation. In the last decade, the total number of disability complaints filed has steadily grown and are consistently the second most frequently filed charge.[55] A recent Harvard Business Review article indicated only about 4% of DEIA program/initiatives include disability, so there is much work to be done here.[56]

SYSTEMIC HIRING AND PROMOTION DISCRIMINATION

Systemic hiring and promotion discrimination are significant areas of concern that companies should address through their ESG policies. These two forms of discrimination can be forms of institutionalized discrimination. Institutionalized discrimination is a type of discrimination that occurs regularly in a workplace—through interactions and processes, creating disadvantages for people with a common set of characteristics over an extended period.

In the hiring process, systemic hiring discrimination can appear in several ways. Company policies or preferences listed in job advertisements, which turn out to have a disparate impact or include stereotypes, are ways systemic discrimination can occur in the hiring process. Companies must avoid steering and de facto occupational segregation based on race, ethnicity, and gender.

If the hiring process is inherently discriminatory, then employers should establish policies to correct this discrimination in the promotion process. Otherwise, it will lead to underrepresentation among its executives. Underrepresentation among executives based on race, ethnicity, gender, LGBTQ+ status, disability status, and other intersectional identities remains an area of potential liability for employers.

A recent lawsuit filed against a global electric car manufacturer alleges that the company discriminated against Black workers by segregating them to the lowest levels of the workforce, along with severe underrepresentation in the ranks of executives, senior officials, and managers. Companies can address some of these issues by setting hiring and promotion standards through their ESG policies. To reduce the risk of liability, companies can proactively conduct either affirmative action programs (mandatory for federal contractors/subcontractors that meet the OFCCP threshold) and can proactively analyze racial, ethnic, and gender representation in their workforce by job group and job title, comparing this to availability, to see if there is underrepresentation. Federal contractors/subcontractors that meet OFCCP thresholds have to take similar actions for individuals with disabilities and protected veterans, and there is growing advocacy for doing the same proactive workforce assessment for LGBTQ+ individuals as well.

Ultimately, there is no short cut to doing this kind of workforce assessment to determine if underrepresentation is present. In particular, employers should not set arbitrary numbers and deadlines for themselves related to diverse hiring and retention. By setting these arbitrary goals, employers can potentially run afoul of discrimination laws if they are being preferential to one group over another. Instead, employers should work to create policies and standards that are inclusive during the hiring and promotion process.

CONCLUSION

As the current social landscape continues to evolve and ESG issues become increasingly important, companies must adapt and enact new policies to keep up with the changing social landscape. Companies must be proactive and enact policies that allow them to address and promote racial and social equity internally and externally. However, implementing these policies can open the door to potential liability if done improperly. It is imperative for companies to engage with counsel to mitigate the potential liabilities and risks that could occur and to ensure that they remain within the bounds of the law.

POLICYHOLDER CLAIMS

Insurance is an important consideration as companies assess the risks presented by potential ESG claims. Coverage may be available for both the costs of defending against ESG claims and to pay for settlements or judgments in connection with ESG claims.

Companies confronting ESG claims will usually look to one or a combination of their existing lines of coverage to respond to ESG-related matters. In the event of a claim, the availability of coverage may depend on a variety factors, including the nature of the ESG-related allegations and terms and provisions of relevant insurance policies. Therefore, companies and their directors and officers may find substantial value in being aware of relevant policy types for ESG claims, devoting attention to policy renewals and replacements, and being mindful how to preserve and pursue their claims for insurance coverage.

TYPES OF POLICIES

The insurance industry is aware of the increasing threat of ESG-related claims and the potential for claims being tendered to insurers. Some underwriters now ask policyholders for information related to ESG exposures in connection with policy applications and renewals. To date, the insurance markets have not responded with any widely available specialty ESG insurance policies purporting to cover all types of ESG claims. Rather policyholders typically must consider their potential coverage for ESG matters holistically, across a variety of potentially implicated policies.

In the event of an ESG claim, it is possible that insurers will resist acknowledging coverage. Any attempts by insurers to disclaim responsibility for ESG matters should be carefully scrutinized. As explained below, common types of insurance may cover a wide variety of ESG claims, and the specifics of the allegations and the wording of the insurance policies should be fully considered. This brief overview outlines some of the coverages that are likely to be top of mind when a company faces a serious ESG matter.

D&O Insurance

Directors and officers (D&O) liability insurance may be a valuable asset for companies in responding to a broad range of ESG claims. For example, a securities class action alleging that a publicly traded company failed to properly disclose an ESG-related issue to investors may constitute a securities claim for which both the company and its officers would be entitled to coverage for both defense costs and indemnity (settlements or judgments). It is therefore worthwhile, as part of an assessment of ESG risks, to consider the company's D&O insurance.

D&O insurance policies typically provide direct coverage to directors and officers for claims asserted against them (Side A coverage). In addition, most D&O policies cover the company for amounts it pays to indemnify directors and officers (Side B coverage) and for certain claims asserted directly against the company (Side C coverage). Many entities purchase a tower of Side A-B-C coverage, and some businesses also purchase additional Side A-only coverage as further protection for the assets of D&O.

Many D&O policies require a claim that alleges a wrongful act by an insured. The term wrongful act usually is defined broadly to include, for example, "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted" by an insured. Thus, although ESG claims may implicate a wide range of alleged activities by the company and its leaders, in most instances, they will allege some wrongful act to at least potentially bring the claim within D&O coverage.

Unsurprisingly, insurers might attempt to rely on exclusions to avoid coverage for ESG claims. Policyholders should be aware of the exclusions in their policies, including whether the wording of exclusions can be improved in order to reduce the risk that exclusions will be construed more broadly than the parties intended. For example, D&O policies often contain exclusions of claims for bodily injury and property damage, but policyholders may still have strong arguments in favor of coverage for ESG claims that involve bodily injury or property damage in some way. For example, if a securities class action is filed on the heels of bodily injury claims allegedly resulting from a company's decision to use a toxic ingredient in its weed killer, a policyholder could argue that the securities class action is not a claim for bodily injury but rather is a claim for alleged wrongful acts in governance. Some insurers offer bodily injury and property damage exclusions that contain favorable wording that expressly preserves coverage for securities claims that arise from bodily injury or property damage (such as event-driven securities litigation arising from highly publicized casualty loss). For example, when an incident results in bodily injury or death, the company's liability to the injured person may be excluded from D&O coverage; however, a bodily injury exclusion with the preferred wording would nonetheless make it abundantly clear that a shareholder class action arising from the same event would not be barred from coverage.

Insurers also might attempt to rely on conduct exclusions to avoid covering an ESG claim. These exclusions may purport to exclude claims based on, for example, "deliberate fraud, any deliberate criminal act, or any knowing and willful violation of any United States law . . . established by a final, non-appealable adjudication in the underlying action or proceeding." However, under such wording (which is typical of modern D&O policies, such that policyholders should be wary of broader formulations of the exclusion), insurers should face significant hurdles in establishing that the conduct at issue rises to the level of deliberate fraud or crime, and in any event the exclusion could relieve the insurer of coverage only in the rare instance of a final, non-appealable adjudication of such deliberate conduct.

While ESG claims are sometimes the subject to civil litigation, in other instances companies have incurred substantial defense costs outside of civil litigation in response to scrutiny about ESG issues from government regulators. Policyholders may wish

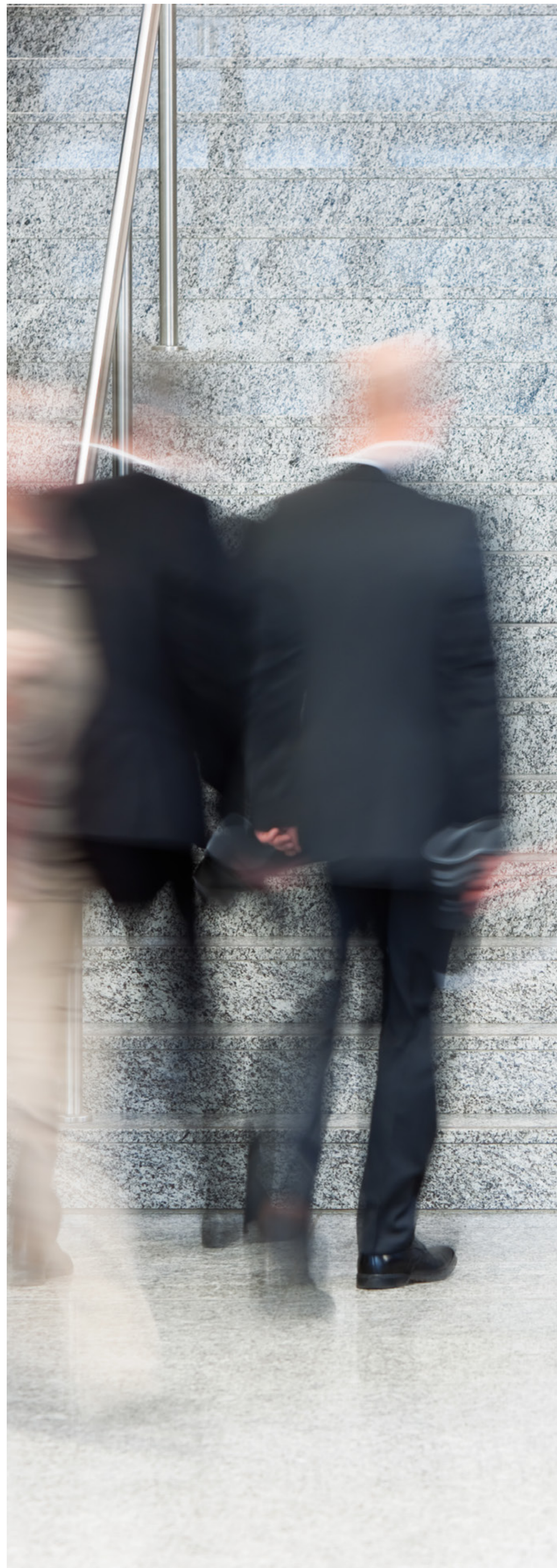
to pursue coverage from their D&O insurers for costs incurred in responding to government investigations or subpoenas. Here, again, a focus on the policy wording as applied to ESG-related investigations is warranted.

For instance, D&O policies often define the term claim to include not only lawsuits but also any "written demand for monetary or non-monetary relief." Depending on the jurisdiction and the circumstances at hand, policyholders may have strong arguments that a government order, subpoena, or other process constitutes a claim for a wrongful act that may trigger valuable coverage for defense costs. Moreover, even where an insurer resists treating a government investigation as a covered claim, a D&O policy may provide express coverage for certain costs, such as the costs incurred by an individual director or officer to respond to pre-claim or inquiry expenses. In view of the increasing government attention to ESG matters and the potentially significant magnitude of response costs, policyholders may find substantial benefit from carefully reviewing their D&O insurance for potential coverage of such costs.

CGL Insurance

Companies commonly purchase comprehensive general liability (CGL) insurance. CGL policies often provide various lines of liability coverage that may apply to ESG claims, including bodily injury, property damage, and personal and advertising Injury.

In addition to indemnity coverage, CGL policies often include a separate duty to defend, which is typically broader than the duty to indemnify. Even if an ESG lawsuit is not entirely within one of the following coverages, specific allegations in a complaint may be sufficient to trigger CGL coverage. Depending upon the language of the policy, such an allegation may require an insurer to provide a defense for the entire claim, even with respect to allegations not covered by the CGL policy. As a result, policyholders may find it valuable to review an ESG claim for any "hooks" to CGL coverage.



Most CGL policies provide coverage for personal and advertising injury, which is typically defined to include injury arising out of a variety of conduct, including false arrest and malicious prosecution. Of significance to ESG claims, personal and advertising injury usually includes the following:

- Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services; and
- Oral or written publication, in any manner, of material that violates a person's right of privacy.

This wording may be relevant, for example, to an ESG lawsuit by consumers or competitors alleging that a company falsely advertised by claiming that its product was the only product of its kind that met certain ethical standards. Such allegations might rise to the level of disparaging a competitor's products (by suggesting the competitor's products did not meet those standards).

Likewise, some courts have found that the right of privacy language provides coverage for certain lawsuits alleging employment discrimination. For example, claims of discrimination, humiliation, intentional infliction of emotional distress, negligent discharge, abuse of right, and interference with privacy rights brought by an employee or former employee may trigger the personal and advertising injury provision. Other alleged violations of another's right to privacy may also be covered by this insurance. For example, claims relating to privacy on the internet—including with respect to social media use—may give rise to personal and advertising injury coverage. Policyholders facing an ESG claim should assess whether the claim, explicitly or implicitly, relates to the violation of another's right to privacy, which may trigger this coverage.

Personal and advertising injury coverage is typically subject to several exclusions, including exclusions for knowing violations of the rights of another, material published with knowledge of falsity, criminal acts, and breach of contract. Any attempts by insurers to rely on such exclusions to avoid coverage for ESG claims should be carefully considered in view of the policy wording and the allegations at issue.

CGL coverage for property damage may apply to ESG claims involving alleged environmental damage, which could include climate change litigation. Going back to the mid-1980s, nearly all CGL policies include the so-called "absolute pollution exclusion," which may make recovery for an environmental claim challenging. However, depending upon the breadth of the environmental allegations, a policyholder may be able to secure coverage under historical insurance policies issued decades ago to the company or its predecessors. For example, if an ESG claim alleges that a company's operations throughout its history have caused environmental damage, and those operations go back to the 1970s, the company may have coverage for that claim under CGL policies issued in the 1970s and early 1980s. Corporate records—often found in risk management, insurance department, or accounting files—may contain copies or evidence of old policies. Insurance archaeologists may also assist in finding old policies.

The CGL coverage for bodily injury may also warrant consideration, for ESG claims with a connection to actual or potential bodily injury, including product labeling litigation. While insurers may contend that such claims are beyond what was contemplated historically in traditional CGL bodily injury coverage, policyholders may have strong arguments that the coverage must be construed broadly, with any ambiguities favoring coverage.

EPL Insurance

Employment Practices Liability (EPL) insurance provides coverage for employment-related claims, including discrimination, harassment, and wrongful discharge. These same types of claims, especially those relating to gender and racial discrimination, are increasingly the subject of ESG litigation.

EPL insurance is offered by numerous insurers, each of which uses its own form policy language. These insurers' EPL insurance policies typically purport to provide indemnification or defense for employees' claims of wrongful discrimination, harassment, wrongful termination, and wrongful failure to hire. Additionally, certain forms provide coverage for violation of employment laws and/or various workplace torts such as wrongful treatment, common law violations (e.g., misrepresentation), failure to enforce corporate policies and/or adverse changes in terms or conditions of employment. Such broadly worded coverage grants may respond to a wide range of allegedly wrongful employment-related conduct. EPL insurance policies may incorporate exclusions for, among others, intentional violations of law, liabilities that arise out of bodily injury or property damage, and claims based on wrongful denials of employment benefits to employees.

Because the scope of EPL coverage has been largely untested in reported decisions by the courts, and because policy language differs markedly from carrier to carrier, policyholders should take care to assess whether such coverage may be available when ESG claims—including those relating to gender and racial discrimination—are made.

Other Policies

D&O, CGL, and EPL are just a few of the insurance policy types that might be implicated by ESG claims. A complete picture of a company's potential insurance for ESG matters should be informed by the company's ESG risk profile and the types of insurance it carries. For example, companies that carry specialty pollution legal liability insurance might seek coverage under that coverage in the event of climate-change or other environmental insurance. A company that learns it has inherited an ESG issue as a result of a corporate acquisition might consider whether any representations and warranties insurance might be available to cover such liabilities. Conferring with coverage counsel regarding relevant ESG risks and insurance policy types may prove valuable.

POLICY PLACEMENT

Proactive policyholders may take several steps to improve prospects for coverage of ESG claims. For example, companies may benefit from taking care in connection with renewals to carefully review any changes to policy wording (including exclusions) related to ESG and negotiating for enhanced wording. Some underwriters (particularly for D&O insurance) have invited policyholders to participate in voluntary ESG programs, offering the possibility of enhanced limits and retention provisions in exchange for providing information regarding potential ESG exposures. Such programs may prove beneficial. At the same time, policyholders should be aware that insurers, including D&O insurers, may attempt to rely on misstatements or omissions in the underwriting process (including in applications) based on misrepresentation defenses to coverage. Insurance recovery counsel can assist companies in reviewing policy wording and preparing insurance applications and other underwriting submissions.

MAKING A CLAIM

When an ESG claim is asserted, prompt consideration of insurance and action items will often be warranted. The insurance claim process typically is commenced by providing notice to relevant insurers. Policyholders should be familiar with specific provisions regarding notice that appear in their insurance policies. Insurers may contend that delays in providing notice of an ESG claim give rise to a defense to coverage. Policies that provide coverage on a claims made basis—including many D&O and EPL policies—often contain specific provisions as to when notice must be provided to insurers, which some courts construe as requiring strict compliance to preserve coverage. Questions may arise as to precisely when notice must be given. For instance, policyholders may wonder whether pre-lawsuit activities (e.g., a letter from a shareholder demanding the company take action on an ESG issue) rises to the level of a claim that triggers a notice obligation. Coverage counsel can assist in analyzing appropriate notice to insurers.

Beyond sending initial notice, other matters also may warrant close consideration very early in the life of an ESG matter. For example, some policies purport to give insurers the right to choose defense counsel (or may provide financial incentives for the insured to select counsel from the insurer's panel). Also, many policies expressly require the insured to cooperate with insurers in the defense of claims, including by providing information about the claim. Balancing such considerations in the context of ESG claims—which may involve sensitive, high-profile matters of special concern to the company—may present challenges. Engaging with coverage counsel early in an ESG matter, even before a dispute with an insurer has arisen, may help the company to navigate these challenges and lay the groundwork for a successful claim for coverage.

ENDNOTES

[1] Shareholders can also bring claims under state securities laws. For example, in Smith v. Firexo Grp. Ltd., 3:21-cv-2266 (N.D. Ohio), the plaintiff brought claims under both federal and Ohio securities laws, as well as a common law fraudulent misrepresentation claim, alleging that the defendant, a manufacturer of fire extinguishers, induced plaintiff's investment by misrepresenting that its fire extinguisher was eco-friendly and had attained a European safety certification. As of this writing, the defendant has filed an answer to the plaintiff's second amended complaint, but no further action has occurred in the case.

[2] See, e.g., Singh v. Cigna Corp., 918 F.3d 57, 64 (2d Cir. 2019) (statements which "suggest[] a company actively working to improve its compliance efforts, rather than one expressing confidence in their complete (or even substantial effectiveness" deemed to be "a textbook example of puffery")); UA Local 13 Pension Fund v. Sealed Air Corp., 2021 WL 2209921, *4 (S.D.N.Y. June 1, 2021) (deeming to be puffery as "too generic" and lacking in "enforceable standards" statements which "described Sealed Air's and its employees' responsibility to conduct business ethically").

[3] In re BP P.L.C. Sec. Litig., 2017 WL 7037706 (S.D. Tex. June 30, 2017); see also In re BP P.L.C. Sec. Litig., 2013 WL 6383968 (S.D. Tex. Dec. 5, 2013).

[4] See, e.g., Ramirez v. ExxonMobil Corp., 334 F. Supp. 3d 832 (N.D. Tex. 2018) (with the exception of one claim dismissed for failure to sufficiently plead scienter, investors adequately pleaded securities fraud claims that Exxon and Exxon officials made material misstatements concerning the company's use of proxy costs for carbon in business and investment decisions). The Ramirez case is still pending and, as recently as June 2022, the parties are litigating the plaintiff's motion for class certification.

[5] Smith v. Firexo Grp. Ltd., supra n.1; In re Danimer Sci. Inc. Sec. Litig., Master File No. 1:21-cv-02708 (E.D.N.Y.) (asserting claims under Sections 10(b), 14(a), and 20(a) of the Securities Exchange Act, and related regulations, as well as Sections 11, 12(A)(2), and 15 of the Securities Act, alleging material misrepresentations in connection with the acquisition of Danimer regarding the development of a 100% fully biodegradable plastic alternative).

[6] See also Elliemaria Toronto ESA v. NortonLifelock Inc., 2021 WL 3861434 (N.D. Cal. Aug. 30, 2021) (alleging a claim under Section 14(a), as well as common law claims, including breach of fiduciary duty, related to statements in proxies indicating that the company was committed to diversity).

[7] Constr. Laborers Pension Tr. for S. Cal. v. CBS Corp., 433 F. Supp. 3d 515 (S.D.N.Y. 2020) (asserting claims under Sections 10(b) and 20(a) of the Exchange Act based on misrepresentations and failure to disclose the risk that the head of CBS, Les Moonves, would be exposed for his alleged sexual misconduct); Ferris v. Wynn Resorts Ltd., 462 F. Supp. 3d 1101 (D. Nev. 2020) (asserting claims under Sections 10(b) and 20(a) alleging misrepresentations and failure to disclose risks related to alleged sexual misconduct of the CEO, Stephen Wynn); In re Liberty Tax, Inc. Sec. Litig., 435 F. Supp. 3d 457 (E.D.N.Y. 2020) (asserting claims under Sections 10(b), 14(a), and 20(a) of the Exchange Act related to misrepresentations and failure to disclose risks related to alleged sexual misconduct of the CEO).

[8] Chau v. Musk, Case No. 1:22-cv-00592 (W.D. Tex.) (derivative claim alleging breach of fiduciary duty in directors' failure to perform oversight duties and allowing an allegedly toxic workplace culture to persist at Tesla, Inc.); see also Section V, infra.

[9] Marchand v. Barnhill, 212 A.3d 805 (Del. 2019) (holding that, in derivative action, plaintiff sufficiently alleged that directors failed to implement reporting and monitoring protocol to address safety issues, resulting in a listeria outbreak in the company's ice cream factories); In re Boeing Co. Derivative Litig., 2021 WL 4059934 (Del. Ch. Sept. 7, 2021) (holding that, in derivative action, plaintiff sufficiently alleged that directors failed to implement reporting and monitoring protocol to address safety issues, resulting in two crashes of the company's 737 MAX airplane); In re Yum! Brands, Inc. Sec. Litig., 73 F. Supp. 3d 846 (W.D. Ky. 2014) (asserting claims under Sections 10(b) and 20(a) alleging failure to disclose suppliers' unfavorable food safety test results).

[10] Nelson v. Bezos, Case No. 2:22-cv-00559 (W.D. Wash.) (derivative action alleging breach of fiduciary duty for Amazon's alleged failure to properly manage and protect biometric data in violation of Illinois state law).

[11] In re Willis Towers Watson Plc Proxy Litig., 937 F.3d 297 (4th Cir. 2019) (reversing district court's dismissal of complaint alleging material omissions in proxy statements related to conflict of interest in merger and negotiation of executive compensation agreement in violation of Sections 14(a) and 20(a) of the Exchange Act).

[12] See, e.g., Ocegueda v. Zuckerberg, 526 F. Supp. 3d 637 (N.D. Cal. 2021); Falat v. Sacks, 2021 WL 1558940 (C.D. Cal. Apr. 8, 2021); Kiger v. Mollenkopf, 2021 WL 5299581 (D. Del. Nov. 15, 2021); In re Yum! Brands, Inc. Sec. Litig., supra n.9.

[13] In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

[14] Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[15] See Yum! Brands, Inc., supra n.9.

[16] In Pettry v. Gilead Scis., Inc., 2020 WL 6870461, at *2 (Del. Ch. Nov. 24, 2020), the Court of Chancery lamented that the defendant corporation "exemplified the trend of overly aggressive litigation strategies by blocking legitimate discovery, misrepresenting the record, and taking positions for no apparent purpose other than obstructing the exercise of Plaintiffs' statutory rights." The Court further noted that fee-shifting may be appropriate in such circumstances. See also In re Facebook, Inc. Section 220 Litig., 2019 WL 2320842 (Del. Ch. May 30, 2019) (rejecting Facebook's opposition to plaintiff's Section 220 demand, noting that Facebook's "implicit suggestion" that the court must consider the merits of a Caremark claim before allowing an inspection demand is improper and that the "credible basis" standard for a Section 220

demand "imposes the lowest burden of proof known in our law"); James D. Cox et al., The Paradox of Delaware's "Tools at Hand" Doctrine: An Empirical Investigation, 75 Bus. Law. 2123, 2151 (2020) ("Delaware should give serious consideration to awarding plaintiffs their attorneys' fees in cases where the defendants make untoward efforts to delay the resolution of these summary cases."); Randall Thomas, Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information, 38 Ariz. L. Rev. 331, 335 (1996) (arguing that for Section 220 to facilitate effective stockholder monitoring, it must be significantly streamlined, including shifting attorneys' fees to deter frivolous refusals to produce information).

[17] See, e.g., Lebanon Cnty. Emp. Ret. Fund v. AmerisourceBergen Corp., 2020 WL 132752 (Del. Ch. Jan. 13, 2020), aff'd, 243 A.3d 417 (Del. 2020) (holding that a stockholder is not required to state the objectives of his investigation, nor is he required to show that the alleged wrongdoing was actionable); Employees' Ret. Sys. of Rhode Island v. Facebook, Inc., 2021 WL 529439, at *8 (Del. Ch. Feb. 10, 2021) (holding that plaintiffs are entitled to materials beyond just formal board materials).

[18] PFAS are per- and polyfluoroalkyl substances used for their flame-retardant and water-resistant properties. They are used in clothing, cosmetics, and food packaging.

[19] CA Bus & Prof Code § 17580.5 (2020).

[20] Beyond Pesticides v. ExxonMobil Corp., No. CV 20-1815 (TJK), 2021 WL 1092167 (D.D.C. Mar. 22, 2021).

[21] Earthworks v. Chevron Corp., No. 7:21-cv-05238, 2022 WL 1136799 (S.D.N.Y. 2022).

[22] Earth Island Inst. v. BlueTriton Brands, No. 2021 CA 003027B (D.C. Sup. Ct. Jun. 7, 2022).

[23] Commodore v. H&M Hennes & Mauritz LP, No. 7:22-cv-06247 (S.D.N.Y. Jul. 22, 2022).

[24] Hilex Poly Co. v. ChicoEco, Inc., No. 3:11-cv-00116-JFA (D.S.C. Jan. 14, 2011).

[25] Dwyer v. Allbirds, Inc., No. 7:21-cv-05238, 2022 WL 1136799 (S.D.N.Y. Apr. 18, 2022).

[26] Walker v. Nestle USA, Inc., No. 3:19-CV-723-L-DEB, 2022 WL 901553 (S.D. Cal. Mar. 28, 2022).

[27] Locklin v. StriVectin Operating Co., Inc., No. 21-cv-7967, 2022 WL 867248 (N.D. Ca. March 23, 2022).

[28] Lugones v. Pete & Gerry's Organic, LLC, 440 F. Supp. 3d 226, 241 (S.D.N.Y. 2020).

[29] People for the Ethical Treatment of Animals v. Whole Foods Mkt. Cal., Inc., No. 15-cv-04301, 2016 WL 1642577, at *3 (N.D. Cal. Apr. 26, 2016).

[30] Dwyer, at *8.

[31] See Mogull v. Pete and Gerry's Organics, LLC, No. 21-cv-3521, 2022 WL 602971, at *4 (S.D.N.Y. Feb. 28, 2022); see also Lugones, 440 F. Supp. 3d at 242.

[32] https://www.sec.gov/news/press-release/2021-42.

[33] The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33-11042; 34-94478 (Mar. 21, 2022), https://www.sec.gov/rules/proposed/2022/33-11042.pdf.

[34] https://dart.deloitte.com/USDART/home/publications/deloitte/heads-up/2022/sec-proposed-rule-climate-disclosure.

[35] https://www.sec.gov/rules/proposed/2022/ia-6034.pdf.

[36] https://www.klgates.com/SEC-Takes-First-Step-Toward-Standardized-ESG-Disclosures-for-Funds-and-Investment-Advisers-5-27-2022.

[37] https://www.federalregister.gov/documents/2021/10/14/2021-22263/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights.

[38] See EO 13990 ("Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis").

[39] 16 C.F.R. pt. 260.

[40] For example, a product marketed as containing "50% more recycled material than before," but which only increased its recycled material composition from 2% to 3% would be considered deceptive under the Green Guides, even while technically a true statement. 16 C.F.R. § 260.3(c), example 1.

[41] 16 C.F.R. § 260.1(a).

[42] 15 U.S.C. § 45(m).

[43] See https://www.ftc.gov/enforcement/competition-matters/2021/09/making-second-request-process-both-more-streamlined-more-rigorous-during-unprecedented-merger-wave.

[44] https://www.ftc.gov/system/files/ftc_gov/pdf/CWilsonUpdateMergerEnforcement.pdf.

[45] https://www.ftc.gov/policy/studies/submit-comment-merger-enforcement-request-information.

[46] https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

[47] Equal Pay/Compensation Discrimination. https://www.eeoc.gov/equal-paycompensation-discrimination#:~:text=Title%20VII%2C%20the%20ADEA%2C%20and,origin%2C%20age%2C%20or%20disability.

[48] For federal contractors and subcontractors, Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 all provide for affirmative action and nondiscrimination (including pay equity) based on race, color, sex, sexual orientation, gender identity, national origin, religion, disability, and protected veteran status.

[49] Women are still paid 83 cents for every dollar men earn. Here's why. https://www.cnbc.com/2022/05/19/women-are-still-paid-83-cents-for-every-dollar-men-earn-heres-why.html.

[50] Indeed, the pay gap may be even larger for Hispanic women (49 cents), Native American women (50 cents) and Black women (58 cents), with significant pay gaps for White women (73 cents) and Asian American, Native Hawaiian, and Pacific Islander women as well (75 cents), according to a 2022 report from the National Partnership for Women & Families (which also found an overall pay gap of women at 73 cents), available here: quantifying-americas-gender-wage-gap.pdf (nationalpartnership.org).

[51] Executive Order on Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency. https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/15/executive-order-on-advancing-economy-efficiency-and-effectiveness-in-federal-contracting-by-promoting-pay-equity-and-transparency/.

[52] The Continuing Impact of Pay Discrimination in the United States. https://www.eeoc.gov/continuing-impact-pay-discrimination-united-states.

[53] $24 million settlement in USWNT's equal pay lawsuit gets preliminary approval by federal judge. https://www.usatoday.com/story/sports/soccer/2022/08/11/uswnts-decades-long-fight-equal-pay-nearing-end/10305852002/.

[54] Executive Order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce.

(b) The term "diversity" means the practice of including the many communities, identities, races, ethnicities, backgrounds, abilities, cultures, and beliefs of the American people, including underserved communities.

(c) The term "equity" means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment.

(d) The term "inclusion" means the recognition, appreciation, and use of the talents and skills of employees of all backgrounds.

(e) The term "accessibility" means the design, construction, development, and maintenance of facilities, information and communication technology, programs, and services so that all people, including people with disabilities, can fully and independently use them. Accessibility includes the provision of accommodations and modifications to ensure equal access to employment and participation in activities for people with disabilities, the reduction or elimination of physical and attitudinal barriers to equitable opportunities, a commitment to ensuring that people with disabilities can independently access every outward-facing and internal activity or electronic space, and the pursuit of best practices such as universal design.

https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/

[55] *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 202*1. Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021 | U.S. Equal Employment Opportunity Commission

[56] *Do Your D&I Efforts Include People with Disabilities?* https://hbr.org/2020/03/do-your-di-efforts-include-people-with-disabilities

GLOSSARY

Acronym	Description
CEO	Chief Executive Officer
CGL	Comprehensive General Liability
DEIA	Diversity, Equity, Inclusion, and Accessibility
D&O	Directors and Officers
DOJ	Department of Justice
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
EPL	Employment Practices Liability
EP	Act Equal Pay Act
ESG	Environmental, Social, and Governance
FTC	Federal Trade Commission
GBL	New York General Business Law
GHG	Greenhouse Gas
OFCCP	Office of Federal Contract Compliance Programs
PFAS	Per- and Polyfluoroalkyl Substances
SEC	Securities Exchange Act
USWNT	U.S. Women's National Soccer Team's

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