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SEC Enforcement Warms Up: Commission Creates Climate and ESG Task Force

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In line with increased investor demand for Environmental, Social, and Governance (ESG) and climate-related disclosures, on March 4, 2021, the Securities and Exchange Commission announced the creation of a Climate and ESG Task Force within the Division of Enforcement. The ESG Task Force's goal is to "develop initiatives to proactively identify ESG-related misconduct." Its initial focus will be on "material gaps and misstatements in issuers' disclosures of climate risks under existing rules," as well as "disclosure and compliance issues relating to investment advisers' and funds' ESG strategies." Working with other components of the SEC like the Office of the Whistleblower, the ESG Task Force will receive and evaluate tips, referrals, and whistleblower complaints, and will be an agency-advisor on ESG-related matters. The 22-member ESG Task Force will be headed by current Acting Deputy Director of Enforcement Kelly L. Gibson.

The development of the ESG Task Force follows recent efforts by the SEC to increase its focus on issues related to climate and ESG. On February 1, 2021, the Commission named Satyam Khanna Senior Policy Advisor for Climate and ESG. Mr. Khanna, who worked on the Biden-Harris Presidential Transition Team, "will advise the agency on environmental, social, and governance matters and advance related new initiatives across its offices and divisions." Acting Chair of the Commission, Allison Herren Lee, has also stated that "climate risks and sustainability are critical issues for the investing public and our capital markets." That may be an understatement, as recent reporting by the Wall Street Journal revealed that $51.1 billion of new money was invested in funds with an ESG focus in 2020 alone. On February 24, 2021, Acting Chair Lee also directed the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings by working to update its 2010 guidance on disclosure requirements as they apply to climate change matters. SEC staff is reviewing public companies' response to the 2010 guidance and compliance with disclosure obligations under federal securities laws.

The SEC's efforts will likely be supported by Gary Gensler, the Biden administration's nominee for Chairman of the Commission. During his confirmation hearing this week before the Senate Committee on Banking, Housing and Urban Affairs, Gensler pledged to enforce disclosure of climate-related risks, stating that "in 2021, there's tens of trillions of dollars of invested assets that are looking for more information about climate risk, and I think then the SEC has a role to play to help bring some consistency and comparability to those guidelines." Nonetheless, the SEC's focus will face at least some internal pushback, as its two Republican commissioners issued a joint statement questioning the ESG initiatives.

To avoid unwanted SEC scrutiny, companies should bear the SEC's new priorities in mind. Companies should also exercise additional care when preparing climate and ESG portions of their disclosures.

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