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Insights

ESG & Sustainability Practice

Misleading Public Company ESG Disclosure Results in SEC Enforcement Action – and $55.9 Million Settlement

May 18, 2023

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On March 28, 2023, the U.S. Securities and Exchange Commission (SEC) reached a $55.9 million settlement with Vale S.A., a NYSE-traded mining company, to resolve allegations that Vale committed securities fraud by presenting intentionally misleading information in its annual Sustainability Reports and investor presentations. The SEC's enforcement action against Vale was brought by the agency's Climate and ESG Task Force, which was created to "proactively identify ESG-related misconduct consistent with increased investor reliance on climate and ESG-related disclosure and investment." For companies seeking to highlight ESG and sustainability goals and progress, this case serves as an important reminder of the need to ensure the accuracy of these public statements, lest they too end up in the crosshairs of government regulators.

According to the SEC's complaint, in 2016 Vale conducted required safety investigations and found that its Brumadinho dam was dangerously unstable, but Vale intentionally withheld the information from auditors tasked with assessing the safety of the dam. As a result, several misleading reports asserting that the Brumadinho dam was safe were filed with Brazilian regulators. In 2019, the Brumadinho dam collapsed, resulting in a death toll of 270 and one of the worst mining disasters in history, according to the SEC.

Against this backdrop, the SEC found that several public statements made by Vale in its ESG and sustainability reporting and other investor communications between 2016 and 2018 were materially false and misleading. The SEC cited various statements made by Vale's CEO during investor presentations and at an ESG webinar – that Vale's dams were in a state of "impressive" quality; that the state of the dams was "impeccable"; and that all of its iron ore dams were safe and operating within normal parameters. In addition, in its annual sustainability reports, Vale stated that its dams had been audited and that 100 percent were certified to be in stable condition, without disclosing that the audit findings were based on data that Vale knew was incorrect. The SEC concluded that these public statements, among others, were materially false and misleading; that Vale's deceit misled investors regarding several material issues concerning the stability of the dams and Vale's safety practices; and that, through its false statements and material omissions, Vale violated the antifraud provisions of federal securities laws. The SEC held the company to account for false and misleading statements, material omissions and deceptive practices in connection with ESG disclosures, which Vale executives had reviewed and approved, even when the disclosures were not included in regulatory filings (though the filings sometimes referred to the sustainability reports).

Vale's case, though extreme, is only one of several cases that have been brought recently by the SEC's Climate and ESG Task Force—and we expect the SEC's scrutiny in this space to increase. As more companies prepare ESG reports and announce commitments to sustainability, it is important to remember that these statements, made in almost any context, may later become subject to scrutiny by the SEC, other governmental agencies, or investors. And while there is an understandable desire to highlight bold ESG-related plans and accomplishments, care must be taken to ensure that any public disclosure is complete and accurate.

Should you have any questions concerning your company's ESG-related programs, policies, or disclosures, please reach out to any member of our ESG & Sustainability Team, an accomplished group of transactional, regulatory and litigation attorneys with extensive experience navigating ESG considerations at the complex intersection of law, profitability, accountability, sustainability, and ethics.

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Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any member of our ESG & Sustainability Group.