

SEC Brings First Major ESG Enforcement Action

Update

May 09, 2022 | 3 minute read

More than a year after creating its Climate and ESG Task Force in March 2021, the Securities and Exchange Commission's ESG-related enforcement goals are finally being realized. The SEC recently brought a fraud action against Vale S.A., a publicly traded Brazilian iron ore producer, for making false and misleading statements about safety before the 2019 collapse of its Brumadinho dam. Importantly, Vale's allegedly fraudulent statements were contained not only in SEC filings and investor presentations, but also in voluntary sustainability reports and an ESG webinar posted on Vale's website. Given the SEC's focus on ESG enforcement, combined with the Commission's recently released proposed rules on climate-related disclosures, the Vale case is likely to become the first of many new enforcement actions arising out of ESG matters. As this action demonstrates, companies should take steps, if they have not already, to ensure their compliance and reporting regimes are sufficiently robust to minimize enforcement and litigation risks.

The SEC's complaint, alleging violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, as well as Section 17(a) of the Securities Act, reflects the SEC's environmental, social, and governance (ESG) enforcement priorities. The complaint, filed in the United States District Court for the Eastern District of New York, alleges that Vale deceived investors about the safety and stability of the dams it built to hold waste, or tailings, from its mining operations.¹

More specifically, after a November 2015 collapse of another Vale dam that killed 19 people in Mariana, Brazil, Vale came under intense regulatory scrutiny and, according to the complaint, made a series of statements to reassure the market, including that "it adhered to the 'strictest' and best international practices for dam safety and 'rigorously' complied with regulatory requirements." According to the SEC, these statements "were intended to leave no doubt that [Vale] had learned from the Mariana dam disaster and had

Related People

Rachel B. Goldman

Partner

NEW YORK

+1.212.508.6135

rachel.goldman@bracewell.com

David A. Shargel

Partner

NEW YORK

+1.212.508.6154

david.shargel@bracewell.com

Thomas F. Kokalas

Partner

NEW YORK

+1.212.508.6136

thomas.kokalas@bracewell.com

Related Practices

Corporate & Securities

Environmental, Social &

Governance (ESG)

Environment, Lands and

Resources

Government Enforcement &

Investigations

Litigation

mitigated the future risk of failure at its other tailings dams.” The SEC’s complaint alleges that these and other statements were false and misleading, and that Vale was, in fact, aware of dangerous conditions at the Brumadinho dam. The dam collapsed on January 25, 2019, killing 270 people and leaving behind a toxic sludge that caused an environmental disaster at the Paraopeba River.

Significantly, the statements upon which the SEC based its enforcement action were included, among other places, in the company’s annual sustainability reports and a 2018 ESG webinar posted on Vale’s website, touting the company’s commitment to dam safety. For example, according to the complaint, the webinar claimed that “[a]ll of Vale’s iron ore dams are safe and operating within normal limits,” and that external auditors had certified the dams’ stability.

When the SEC announced the action, the Director of the SEC’s Division of Enforcement emphasized that “[m]any investors rely on ESG disclosures like those contained in Vale’s annual Sustainability Reports and other public filings to make informed investment decisions.” As noted in prior alerts, all public facing materials can readily provide a source for enforcement action and litigation.

The allegations against Vale also highlight the litigation risk that can result from a company’s ESG failures. For example, before the SEC complaint, Vale had been sued by U.S. investors in a securities class action arising out of the 2015 dam collapse. That case settled in 2020 for \$25 million. A new class action was filed against Vale in 2019 after the Brumadinho collapse, and on March 31, 2022, the court granted class certification, paving the way for what is likely to become another costly settlement for Vale.

In sum, the Vale mining disasters are a roadmap for the various risks that may emerge from ESG-related statements, including enforcement actions by regulators and shareholder litigation. While the circumstances of the Vale case may be unique, they illustrate the importance of ensuring compliance with ESG policies and procedures. The case also underscores the need to make sure that ESG disclosures, whether mandatory or voluntary, are accurate and not misleading.

Bracewell has a multi-disciplinary team focused on ESG issues. We advise and support our clients drawing on our expertise in environmental strategies, securities matters, regulatory issues, government enforcement, labor and employment, commercial litigation, and crisis management, and we are at the forefront of the transition to sustainable energy. Please contact your Bracewell team member for more information.

1. Although Vale is a Brazilian stock corporation, its American Depositary Shares and notes trade on the New York Stock Exchange.

