

INSIGHTS

Will Generic ESG Statements Lead to a Wave of Securities Litigation?

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These days, it is commonplace for companies to commit to general concepts like “sustainability” or a “diverse workforce” in public statements and SEC disclosures. But when stock prices drop as a result of specific environmental, social and governance (“ESG”) issues, these seemingly unobjectionable statements may become actionable. A spate of recent cases suggests a rise in ESG lawsuits resulting from incomplete or inaccurate ESG disclosures, and the SEC’s creation of a Climate and ESG Task Force last month is only the splashiest example of the new administration’s increased focus on ESG issues. These two trends—combined with a case recently argued before the U.S. Supreme Court—may be a harbinger of a wave of litigation in coming years.

The Rise of ESG Litigation

In recent years, companies have come under increasing pressure from investors and the public to make a commitment to ESG issues. To keep up with these demands, many companies have expressed their support for environmentally-friendly policies, for example, with aspirational statements such as “we are committed to sustainability” or “achieving net-zero carbon emissions is our top priority.” Likewise, many companies routinely issue well-intentioned, broad public statements about their commitment to workplace diversity and inclusion, racial justice, prohibiting workplace harassment, and other social and corporate governance issues.

As the tempo of public statements on ESG increases, companies must be careful not to undercut their public statements with contradictory actions. A few companies have already been the target of lawsuits claiming the companies failed to live up to their aspirational statements. These cases, often referred to as “stock-drop” suits, follow a similar pattern: when a negative event causes a drop in a company’s share price, shareholders bring a class action lawsuit, arguing that the negative event renders a prior statement issued by the company false or misleading. A well-known early example arose out of the Deepwater Horizon oil spill in 2010. Following that highly-publicized event, BP shareholders brought a securities-fraud class action lawsuit, alleging that vague statements issued by BP concerning its commitment to safety—such as “BP America is in the midst of a comprehensive effort to improve its safety culture” and “Safety remains our number one priority and we can see clear progress”—were false and misleading.¹

More recently, following a deadly accident in 2019 at a mine owned by Brazilian company Vale, S.A., the Eastern District of New York certified a class action brought by Vale’s investors alleging that prior statements issued by Vale in “sustainability reports,” which touted the company’s

commitment to safety and environmentally-friendly policies, were rendered false or misleading in light of the later accident.²

In the same vein, in 2018, investors in Equifax brought a securities-fraud class action in a Georgia federal court following Equifax's well-publicized data breach. The court allowed that class action to move forward, on the basis of allegations that Equifax had misled investors with generic statements like "[s]afeguarding the privacy and security of information . . . is a top priority for Equifax."³

These cases, along with others,⁴ suggest that the plaintiffs' bar is becoming increasingly willing to challenge generic statements via securities-fraud class actions.

Will the Supreme Court Wade In?

On March 29, 2021, the U.S. Supreme Court heard argument in [*Goldman Sachs Group v. Arkansas Teacher Retirement System*](#), a case that could have significant implications for the future of ESG-related litigation, and class actions in particular.⁵ While the case presents a variety of legal issues, the primary question is to what extent companies can be held liable for making "generic" public statements, when those statements are later alleged to be false. The plaintiffs in *Goldman Sachs Group*—a class of Goldman Sachs shareholders, led by the Arkansas Teacher Retirement System—alleged that they were misled by public statements from Goldman Sachs, such as: "Our clients' interests always come first"; "Integrity and honesty are at the heart of our business"; and "We are dedicated to complying fully with the letter and spirit of the laws, rules, and ethical principles that govern us." The Second Circuit permitted the case to proceed as a class action on the basis of these generic disclosures.

The stakes in the *Goldman Sachs Group* case are high. If the Supreme Court affirms the Second Circuit, companies that issue generalized disclosures concerning ESG issues could be vulnerable to the risk of expensive shareholder-driven litigation.

While the ultimate outcome of the case is unknown, the argument before the Supreme Court points to a potential future for ESG-related litigation based on generic statements. Apparently assuming that generic statements can form the basis of a class action lawsuit, the argument instead focused on how much weight the generic nature of a statement should receive. Justice Kavanaugh, for example, sought to understand: "how are you defining 'generic' or, stated otherwise, what kinds of statements are not generic?" Counsel for Goldman Sachs suggested that courts should weigh the impact of a company's public statements on a "sliding scale," based on how generic the statements are.

Regardless of the Supreme Court's decision, it appears likely that companies' generic statements regarding ESG or other aspirational statements will remain a target for shareholder litigation in the foreseeable future. But the *Goldman Sachs Group* case may shape how likely such litigation is to succeed, and an affirmance of the Second Circuit's class certification may embolden the plaintiffs' bar to scour generic ESG-related disclosures for potentially actionable content.

Conclusion

While the future of ESG-related litigation remains uncertain, the combination of intensifying SEC enforcement activity, an increasingly active plaintiffs' bar, and the Supreme Court's possible expansion of liability for generic statements may result in a wave of ESG disclosure-

related litigation.

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.

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1. *In re BP p.l.c. Securities Litigation*, No. 4:10-md-2185 (S.D. Tex. Feb. 13, 2012).
 2. *In re Vale S.A. Sec. Litig.*, 2020 WL 2610979, at *9 (E.D.N.Y. May 20, 2020); *see also In re Massey Energy Sec. Litig.*, 883 F. Supp. 2d 597 (S.D. W. Va. 2012) (following a 2010 explosion at a West Virginia coal mine owned by Massey Energy, a class of investors brought suit alleging that Massey's earlier disclosures, including statements that safety was its "first priority every day," violated federal securities laws).
 3. *In re Equifax Inc. Sec. Litig.*, No. 17-03463 (N.D. Ga. Apr. 23, 2018).
 4. For example, a flurry of shareholder derivative and securities-fraud actions were filed in California federal courts last year, alleging that board members made false statements concerning their companies' commitment to achieving workplace diversity, and breached fiduciary duties by failing to live up to those commitments. *See, e.g., Klein v. Ellison*, Civ. No. 20-04439 (N.D. Cal. July 2, 2020); *Kiger v. Mollenkopf*, Civ. No. 20-1355 (N.D. Cal. July 17, 2020); *Esa v. NortonLifeLock Inc.*, No. 20-cv-05410, Dkt. No. 1, at 6–12 (N.D. Cal. Aug. 5, 2020); *Lee v. Fisher*, No. 20-cv-06163 (N.D. Cal. Sept. 1, 2020); *Falat v. Sacks*, No. 20-cv-01782 (C.D. Cal. Sept. 18, 2020); *City of Pontiac Gen. Emps.' Ret. Sys. v. Bush*, No. 20-cv-06651 (N.D. Cal. Sept. 23, 2020); *but see Ocegueda v. Zuckerberg*, Ca. No. 3:20-cv-04444-LB (N.D. Cal. Mar. 19, 2021) (granting motion to dismiss similar claims).
 5. *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, No. 20-222 (U.S. Aug. 21, 2020).