



## Fox Rothschild Podcast

### ESG Essentials: What You Need to Know Now

#### Episode 17: The Evolution of ESG Enforcement Under the SEC

*Featuring David Colvin and Karen Davis of Fox Rothschild*

**Colvin:** Hey, everybody. Welcome back to another episode of "ESG Essentials: What You Need to Know Now," a podcast brought to you by your friends at Fox Rothschild. I'm your host, David Colvin, Co-Chair of Fox's ESG Practice Group. And as many of our listeners know, Fox's ESG podcast covers core ESG concepts and explores important issues for businesses, both public and private, that are concerned with developing and deploying an ESG profile, or responding to increased scrutiny from regulators, investors and consumers, regarding their perceived environmental and social impact. And of course, minimizing the reputational risk that can arise and often be associated with ESG.

In today's episode, which comes after our summer hiatus, we will be talking about recent developments at the SEC regarding its focus on all things ESG. And for that conversation, I'm very pleased to welcome back to the podcast my partner and Co-Chair of the firm's ESG practice group, Karen Davis. How are you doing, Karen?

**Davis:** I'm well, David, how are you?

**Colvin:** I'm doing well. I'm doing well. So, normally on these podcasts I would be asking questions of a guest and facilitating the discussion around these important topics. Karen and I decided that perhaps it's time for me to do a little bit of the heavy lifting. And I will be responding to questions from Karen.

So Karen, the floor is yours to ask me whatever you'd like about the recent updates and developments at the SEC.

**Davis:** Great. It certainly has been an interesting time in the ESG world. It's been reported that the SEC has abandoned its Climate and ESG Enforcement Task Force. What do you think that says about the SEC's focus on ESG enforcement initiatives?

**Colvin:** I saw, I saw those reports as well. And I think before I talk a little bit about what it says about the SEC's current view and intentions with respect to ESG, I think it's important maybe to take a step back and look at where we came from and how we got here.

Just by way of background, in March of 2021, the SEC announced, with much fanfare, the creation of what it called the Climate and ESG Task Force that sat within the SEC's Division of Enforcement. The task force at that time was contemplated to be made up of 22 members from across the SEC's

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various divisions. And as it put it in its own press release, announcing the creation of the task force, the ostensible purpose of the task force was to proactively identify ESG-related misconduct.

And so back at that time in 2021, the task force really initially focused on two objectives. First was identifying material gaps and misstatements in public disclosures regarding a company's climate risks. So it was very climate-focused. And then also analyzing disclosure and compliance issues relating to investment advisors and funds that professed to have a focus on ESG strategies.

And as you see how the task force evolved and started taking action, the actions really fell into those two buckets. Beginning in March of 2023, two years after it's created, the SEC announced its first major victory. And that had to do with a settlement with a company named Vale, which is a Brazilian mining company. And that settlement was reached based upon allegations by the SEC that Vale had misrepresented the safety of its Brumadinho dam to investors. And that's a dam that people may recall collapsed in 2019 and killed almost 300 people. The SEC focused on the fact that the alleged false statements by Vale were made in its sustainability reports and other public disclosures related to ESG, and so that's important to keep in mind because I don't think there's a publicly traded company, and in fact, most privately owned companies are now publishing sustainability reports to keep up with the Joneses. And so the fact that the SEC focused on those reports, I think is important to note. And ultimately, in connection with the settlement Vale agreed to pay nearly \$56 million to settle the charges from the ESG task force.

In another enforcement matter, the SEC charged a subsidiary of Deutsche Bank regarding alleged misstatements regarding that company's ESG investment practices. In its action, the SEC alleged that the company had represented that it adhered to various sound policies for integrating ESG considerations into the investments that it made on behalf of its investor clients. And according to the SEC, that simply wasn't true. And as a result of that action, the company agreed to pay \$19 million dollars to the U.S. government.

And then just very recently, recent as in September 2024, the SEC announced that it had settled with a publicly traded company regarding an enforcement action pertaining to the issuer's representations in its public disclosures that its products are effectively recyclable. The SEC took issue with that representation as a result of the fact that there is, and has been, some dispute around whether those products are in fact 100% recyclable or not, and whether the company's recycling partners can effectively recycle those products. And as a result of that action, again, just last month, the company agreed to pay a fine of 1.5 million to the SEC.

So, I say all that to get us to where we are today in that the SEC has been active. It's been active through the task force in maintaining actions against companies that the SEC perceives is not making truthful statements and disclosures regarding their climate risks on the one hand, or their ESG investment-related policies on the other.

And so one would think that the ESG task force would continue to move into the future and continue to file these actions against the companies that the SEC believes is not, are not following the law. But that's not the case. We don't know when we just know it was a quote couple of months ago, as it's



being reported by *Bloomberg* and others, that the SEC decided to shutter the ESG Task Force with no fanfare. And in fact, ESG is not even noted among the SECs examination policies for 2024.

So what does that say about, the SEC's commitment to the task force itself? Obviously, the SEC believes the task force is no longer needed. And I believe in a public statement that I read, the SEC stated that they feel confident that they can address what the task force would otherwise address through its existing divisions including the Division of Enforcement.

**Davis:** So what do you think it all means, David? Do you think that Chairman Gensler, who had a number of ESG initiatives, do you think those are unlikely to become final during the Biden administration?

**Colvin:** I don't know, but I don't think so. And I think what we're seeing, you know, by way of example, this decision by the SEC to shut down the ESG task force, is really a reaction to the significant backlash that we have seen over, I'd say, the last 12 to 18 months -- some would say it stretches back further. But certainly over the last 12 to 18 months -- with respect to ESG. You know, you have for example, Larry Fink, the CEO of BlackRock, the largest money manager in the world and a huge proponent of ESG and ESG-related policies, you know, telling the world that he's no longer going to use the acronym ESG because it's too politically charged. And then instead, I think he'll just use sustainability to refer to all things ESG. We've also seen a significant number of state legislatures putting legislation in place that prohibits the state from investing in funds that are ESG-focused or that have significant ESG components to them.

Those are now sort of rolling around the courts in various state courts across the country in challenges to that legislation. What you're seeing, and what we've seen -- and Karen, you and I have talked about this in the past -- the backlash is real, you know. I think we often wondered, is it real or is it just a sort of a political movement? I think this decision by the SEC really answers that question. I think the backlash is real. And I think the fact that we're no longer going to have an SEC ESG-focused task force within the Division of Enforcement tells you what the SEC thinks in terms of whether or not the backlash is real.

**Davis:** And while we're on the topic of backlash--

**Colvin:** Yeah.

**Davis:** Can you tell us a little bit about the status of the SEC Climate Risk Disclosure Rules?

**Colvin:** Sure. The SEC under Chairman Gensler, you know, proposed these Climate Risk Disclosure Rules that were initially proposed and commented upon and then scaled back. And we thought we would have final rules that I'm sure the SEC thought would be more palatable and acceptable to the business community and to those who disagree with whether or not the SEC should really be regulating environmental disclosures, for example, or other related disclosures.



And now we have the SEC agreeing to stay the implementation of that rule pending legal challenges that have now been consolidated. They were filed across the country. They were consolidated in the 8th Circuit Court of Appeals.

And for those who just wonder sort of where in the country is the 8th Circuit and for what states does it operate? The 8th Circuit has jurisdiction over trial courts, federal trial courts in the states of Missouri, Minnesota, Iowa, Arkansas, Nebraska and the Dakotas. So it covers a pretty large swath of the middle of the country. And so, briefing right now on the appeals and challenges to the SEC's rule, briefing has been completed. I have not seen any reports of argument in front of the court. And so, we await, you know, that process to continue to proceed and then ultimately to conclude one way or the other.

**Davis:** And so with the backlash and the different things that have happened, where do you see the future of ESG regulation by the SEC?

**Colvin:** So, if I had a crystal ball which I don't, I'd probably use it for something other than answering that question. But, but I think if I had a crystal ball, I would tell you that I really don't think we're going to see much change in the way the SEC looks at ESG-related issues.

To be more direct, I think the SEC is going to continue to focus on disclosures related to climate and whether those disclosures are truthful and accurate. Because the SEC feels like that type of information is the type of information that a reasonable investor wants to know. And that if disclosures are made, and should be made, as it relates to the risks facing a particular company or issuer, obviously, those disclosures, including climate-related disclosures need to be made truthfully.

So I don't expect the SEC will change course and effectively ignore climate-related disclosures or ignore enforcement against ESG-focused funds that say they're ESG-focused, or that say they have a certain set of criteria for funds that they invest in when in fact they don't. I just think there isn't going to be this entity or this body that can serve as a target for opponents of ESG to rail against, which is effectively what the task force became. And so I think the SEC will continue to do its work, ESG-related and enforcement-related. It just won't come with the fanfare of a task force named the Climate and ESG Enforcement Task Force.

I think they'll just do their work perhaps a little bit more quietly. And perhaps taking that target away from opponents will help diminish backlash. Maybe it won't, maybe I'm wrong, but I think that's, I think that's what my crystal ball says.

**Davis:** I guess, like many things, time will tell. And we will be sure to report any future significant updates on these podcasts.

**Colvin:** Absolutely. And I just want to thank you for taking the time and let our listeners know that, should you have any questions ESG-related whether it's disclosures for your company or whether you're an investor and you have questions with respect to disclosures that you're considering, you can always reach out to Karen or to me directly. Or to our colleagues at Fox in our ESG Practice



Group. And we look forward to more episodes to follow this fall. Now that, as I said, our hiatus for the summer has concluded. Thanks, Karen.

**Davis:** Thanks, David.

**Colvin:** Talk to you soon.

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