GOVERNANCE INSIGHTS 2023

Charting a (Safe) Path Through the ESG Wilderness

Introduction

Casey Stengel is said to have remarked that we should 'never make predictions, especially about the future.' While Stengel likely had baseball in mind, this remark also rings true in considering the rise in prominence of environmental, social and governance (ESG) factors in the fields of corporate governance, asset management and institutional investing. As we have detailed in past issues of *Davies Governance Insights*, public companies, investors, asset managers, regulators and the broader stakeholder community have all demonstrated a growing acceptance of the importance of ESG factors in the context of strategic decision making and corporate reporting.

The markets were quick to respond to this new focus on ESG – for example, a 2020 analysis conducted by the Global Sustainable Investment Alliance found that

- global sustainable investment at the beginning of 2020 had reached $35.2 trillion, representing a 15% increase over the previous two years;
- Canada experienced a 48% increase in sustainable investment between 2018 and 2020, the largest absolute increase identified in the analysis; and
- Canada had the largest proportion – 62% – of sustainable investment assets.

In light of such trends, some may be surprised by the recent anti-ESG backlash that prompted Robert Eccles, a leading commentator on ESG, to suggest that a change in terminology may be needed to avoid the negative associations surrounding the term. This suggestion may have resonated with BlackRock Chairman and Chief Executive Officer Larry Fink, who avoided using the term "ESG" altogether in his March 2023 annual letter to investors.

As discussed further below, during 2022, the ESG movement was subject to sustained, and in some cases significant and even politically motivated, criticism on multiple grounds. Some even questioned the very integrity of efforts made to advance sustainability and ESG goals.

Given the tremendous amount of capital that has been mobilized under the banner of ESG investing, it is safe to conclude that, whatever doubts commentators raise, investors see value in the incorporation of ESG factors into corporate and investment decision-making. Furthermore, if investor and stakeholder demand is the carrot driving further movement down the ESG path, the ever-tightening focus regulators place on ESG disclosure and ESG investment funds is the corresponding stick, intended to guard against the pitfalls of "greenwashing", whose conceptual boundaries continue to grow.

Board members, asset managers and individual investors must attend to both the ESG carrots and the ESG sticks while planning for a future that will most certainly require an ongoing commitment to ESG.

The Anti-ESG Political Push: "Everything is Politics"

Starting with what is surely the most vocal branch of the recent anti-ESG backlash – namely, the proliferation of anti-ESG legislation and regulatory guidance in the United States – it is easy to see the truth behind the saying that "everything is politics." Indeed, while most such anti-ESG measures are framed in terms of fiduciary duty, they are generally understood to be largely motivated by the desire to protect local industries that may not fare well when viewed through the ESG lens (e.g., coal) or for political reasons.

Motivation aside, the legal argument on which anti-ESG measures are primarily based is that considering ESG factors when making investment decisions or establishing investment strategies runs contrary to fiduciary duties – a notion borne out of the long-standing dogma that the sole purpose of a corporation is to maximize profit for shareholders and that non-financial considerations are therefore irrelevant (or immaterial) for the purpose of corporate decision-making.

Notable examples of such anti-ESG measures:

- **Florida.** In May 2023, Florida's governor enacted legislation that prevents state and local governments from using ESG factors as a basis for investment or procurement decisions and prohibits state and local governments from using ESG factors in bond issuances.
- **Arkansas.** In March 2023, Arkansas enacted a law that requires the state to divest all direct or indirect holdings with a financial services provider which discriminates against energy, fossil fuel, firearms or ammunition companies on the basis of ESG factors.
- **West Virginia.** In July 2022, West Virginia's state treasurer issued a press release identifying BlackRock Inc., Goldman Sachs Group Inc., JPMorgan Chase & Co., Morgan Stanley and Wells Fargo & Co. as financial institutions that are ineligible for state banking contracts on the grounds that these institutions boycott fossil fuel companies, contrary to a newly enacted Senate bill.
- **Texas.** In August 2022, the Texas comptroller published a list of 10 financial companies that boycott energy companies and that would therefore be subject to state anti-boycotting legislation that, among other things, prohibits state government entities from investing in those listed financial companies.
- **Louisiana.** In August 2022, Louisiana's attorney general issued legal guidance to state retirement boards asserting that BlackRock, Vanguard and State Street had violated their fiduciary duties, contrary to state law, by placing their interest in "the ESG agenda above the interest of their investor-clients."
- **Indiana.** In September 2022, Indiana's attorney general issued an advisory opinion confirming, among other things, that state law prohibits the Indiana Public Retirement System's board from making investments or selecting investment strategies on the basis of ESG considerations and from retaining investment advisors that make such investments, adopt such investment strategies, engage with portfolio companies or exercise voting rights according to ESG considerations.

Motivation aside, the legal argument on which anti-ESG measures are primarily based is that considering ESG factors when making investment decisions or establishing investment strategies runs contrary to fiduciary duties.

Our Take: ESG Risks are (Long-Term) Financial Risks

The debate in the United States that continues to rage over whether fiduciary duties require or prohibit the consideration of ESG factors is beginning to bear fruit, as evidenced by Vanguard's decision in December 2022 to pull out of the Net Zero Asset Managers initiative targeted by anti-ESG U.S. lawmakers. However, a similar debate has not yet been replicated in Canada, with good reason. In Canada, the scope of fiduciary duties has been more carefully delineated in both statute and case law. More specifically, the *Canada Business Corporations Act* (CBCA) explicitly acknowledges that directors and officers of a corporation may, when acting with a view to the best interest of a corporation, take into consideration a range of factors significantly broader than shareholder interests. While the CBCA makes no reference to ESG per se, it does specify that consideration of the best interests of a corporation may include consideration of the environment and the corporation's long-term interests. As discussed in *Davies Governance Insights 2019*, this statutory explanation of fiduciary duties was intended to codify the key elements of the Supreme Court of Canada's 2008 decision in *BCE Inc. v 1976 Debentureholders*, which confirmed that satisfaction of the fiduciary duty may require a consideration of a class of interests broader than those of shareholders alone.

Given that in Canada, fiduciary duties may require consideration of ESG factors in certain circumstances, and that there is a conceptual overlap between the notion of sustainability and that of long-term (financial) interest, public issuers, asset managers and financial service providers would be well advised to determine whether, and to what extent, they face any material ESG risks. They might then begin working toward the disclosure of such risks in accordance with the International Sustainability Standards Board's (ISSB) recently released draft *IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information* (ISSB Draft), which will likely serve as the new global baseline standard for the disclosure of sustainability-related risks and opportunities, once finalized.

Materiality and the Direction of ESG Analysis

A second argument that has been levelled against the use of ESG considerations in corporate decision-making and asset management is grounded in the notion that there is a fundamental inconsistency between the concept of materiality generally used in ESG risk analysis and the concept of sustainability, broadly understood to refer to practices that satisfy present needs without compromising the ability of future generations to satisfy their own needs.

According to this line of argument, the concept of materiality used in ESG risk analysis, disclosure and ratings is not suitably connected to ESG's goals. Following the approach taken to continuous disclosure obligations under securities legislation, ESG standards have typically framed the analysis to be undertaken in terms of identifying (and disclosing) material ESG information, risks (and opportunities), whereby material information is understood to mean information that, if omitted, misstated or obscured, could reasonably be expected to influence the decisions of the users of such disclosure. In other words, material information is information about the company, its operations, and the risks and opportunities the company may face in light of current and anticipated circumstances.

This understanding of materiality – often referred to as single materiality (or financial materiality) – has been contrasted with the alternative concept of double materiality, which adds a second direction to the analysis by inquiring not only into financial materiality but also into the social and environmental risks posed or caused by the company (sometimes referred to as "impact materiality"). How these risks should be accounted for in corporate reports is subject to significant debate.

By way of illustration, an analysis using the concept of single materiality may flag a company's greenhouse gas (GHG) emissions as material on the grounds that the company operates in jurisdictions that have instituted carbon pricing regimes and that the legislated carbon price in those jurisdictions is expected to increase to levels that may compromise the company's profitability. An analysis of that same company's GHG emissions using the concept of double materiality may also find these emissions to be material, but that finding would be based not only on the potential financial impact to the company associated with the emissions but also on the potential harm that such emissions can be expected to cause or contribute to.

While the foregoing example helps to illustrate the meaning of the two concepts of materiality, the tension between the two is better illustrated by an example in which the company in question does *not* operate in any jurisdictions that have instituted a carbon pricing regime, with the result that the company's GHG emissions would be deemed not to be material in accordance with a single materiality standard, but would still be material under the double materiality lens.

Given this potential disconnect between the goals of sustainability and the financial impact assessment at the heart of an ESG analysis that uses a single materiality standard, the argument is that the use of a single materiality standard in the context of making ESG disclosure or promotional representations is misleading at best and intentional misrepresentation at worst, both of which regulators may view as greenwashing.

Our Take: Double Materiality – The Road Less Travelled, for Now

While stakeholder support for the use of a double materiality standard in ESG analysis, disclosure and ratings is growing, adherence to the traditional, single materiality standard continues. For example, although the concept of double materiality has been incorporated into the European Union's (EU's) *Sustainable Finance Disclosure Regulation* and *Corporate Sustainability Reporting Directive*, the ISSB opted to use a single materiality standard in the ISSB Draft. The single materiality standard also continues to be used in the context of climate disclosure – for example, the single materiality threshold is still used in the framework of the Taskforce on Climate-related Financial Disclosures and was incorporated into the draft climate disclosure rules released by the Canadian Securities Administrators (CSA), the U.S. Securities and Exchange Commission (SEC) and the ISSB.

Despite the current commitment to the single materiality standard, it is reasonable to expect a gradual shift away from that standard for the simple reason that it is difficult to deny that an analysis undertaken through a single materiality lens does not meaningfully inform environmental or social impacts, or sustainability. Increasingly vocal demands by stakeholders, investors and regulators for corporate accountability for such impacts may, in time, erode the commitment to a strictly financial concept of materiality. Furthermore, industry players that are leading the ESG pack by, for example, implementing measures to cut GHG emissions or promote diversity and respect for human rights, may realize that a double materiality analysis is an effective means of distinguishing themselves from their peers who may have less to say about the tangible efforts they are making to advance the goals of sustainability.

Whether a double materiality standard for ESG or climate disclosure could be incorporated into securities legislation is, however, another matter. In the U.S. context, for instance, such a shift away from purely financial considerations would likely invite a jurisdictional challenge along the lines of the recent decision of the U.S. Supreme Court in *West Virginia v Environmental Protection Agency*.

Lost in the Woods: Is It All Greenwashing?

The final branch of the anti-ESG push challenges the notion that there is a discrete and well-defined subject matter being tracked by ESG ratings providers. According to this line of argument, there is a disconnect between, on the one hand, stakeholder expectations regarding the purpose of collecting, analyzing and disclosing ESG information, and, on the other hand, the nature and scope of the services offered by ESG ratings providers. This disconnect is so significant that nearly any representation or disclosure of ESG ratings could be considered a form of greenwashing. This argument is more compelling when we consider the fact that regulators may pursue greenwashing that goes beyond intentionally misleading claims and representations, and extends to unintentionally misleading claims (e.g., claims that are simply vague) or those that are clear but unsupported.

Similar to the distinction discussed above between the concepts of single and double materiality, commentators have documented two distinct views regarding exactly what ESG ratings are intended to measure. For example, a recent article, aptly titled "ESG Ratings: A Compass Without a Direction" (Compass Article), notes there is a widespread, and for the most part false, belief among investors that the "ESG quality" being measured by ESG ratings relates to the impact of a company on "the welfare of its stakeholders, such as employees, suppliers, customers, local community, and the environment," whereas what most ESG ratings aim to measure is the opposite – the financial impact that "societal and environmental factors have on the company."

In light of this misconception surrounding the purpose of ESG ratings, their use of such ratings in corporate financial disclosure marketing materials, or to promote ESG investment funds, could be, and has been, construed as a form of greenwashing because it conveys (whether intentionally or not) the impression that companies with high ESG scores have less impact from an environmental/societal point of view than companies with low ESG scores. Indeed, this is precisely the complaint made by Elon Musk when he dismissed ESG as a scam in response to Tesla's removal from the S&P 500 ESG Index, a list that has Exxon Mobil scoring in the top 10. The explanation for this is not that Exxon Mobil has less environmental or social impact than Tesla, but rather that Exxon Mobil scores higher than its industry peers, earning it a high ESG score; by contrast, Tesla's ESG score dropped in comparison with its industry peers.

As reported in the Compass Article, studies have confirmed that the Tesla/Exxon Mobil example is not unique and that there may be a weak association between ESG ratings and environmental and social outcomes. For example, one study found that companies in ESG portfolios have a poorer track record regarding compliance with environmental and labour legislation compared with companies in non-ESG portfolios. Another study, however, found that U.S. firms that commit to incorporating ESG factors into their decision-making by signing on to the Principles for Responsible Investment (PRI) received lower ESG scores than U.S. firms that did not join the PRI.

Empirical studies have also called into question the notion that ESG ratings are tracking the financial impacts that ESG factors may have on a company. For example, a 2019 study found that funds with low sustainability ratings performed better than funds with high sustainability ratings. A 2021 review that analyzed 1,100 peer-reviewed papers and 27 meta-analyses relating to ESG and sustainable investing concluded that the financial performance of ESG investing was "indistinguishable from conventional investing."

On the basis of the foregoing, a case could be made that the disclosure or promotional use of ESG ratings are not serving either the purpose most investors (mistakenly) believe the ratings are intended to serve or the purpose that the ratings are actually intended to serve.

Our Take: There Are No Shortcuts

The strength of the challenges levelled against the current approach to ESG ratings and their use cannot be denied. However, it would be hasty to conclude that such arguments have undermined the value of considering ESG factors. Indeed, there is little doubt that placing insufficient value on ESG factors can have significant consequences not only for the environment or the bottom line, but also for board members. For example, in April 2023, British Columbia Investment Management Corp. voted against re-electing two Imperial Oil executives, citing their lack of oversight and community engagement that resulted in the mishandling of a tailings leak at Imperial Oil's Kearl oil sands site.

The better view is that these arguments have shown:

- the ESG ratings industry is still in the early stages of development;
- ESG ratings cannot (currently) reliably serve as a substitute for a review of company-level ESG disclosure; and
- the threat of allegations of greenwashing (whether intentional or not) is more likely greater than headlines would suggest.

The good news is that the "wild west" of ESG disclosure and ESG investing may soon be coming to an end because regulators have taken aim at greenwashing through a combination of new guidance and increased enforcement activities.

ESG Investing: CSA Guidance

Although Canada has yet to issue its own set of ESG disclosure rules, in January 2022 the Canadian Securities Administrators (CSA) issued *Staff Notice 81-334, ESG-Related Investment Fund Disclosure* (ESG Fund Guidance), aimed at providing guidance in relation to:

- the types of investment funds that may market themselves as being focused on ESG; and
- the ESG disclosure practices of investment funds, including funds whose investment objectives specifically reference ESG factors and funds that use ESG strategies.

The CSA explained the need for such guidance by noting that in Q1 2021, the value of sustainable funds in Canada hit $18 billion at the end of the first quarter, representing a 160% increase over their value in 2020. In tandem with the increasing popularity of ESG investing, the CSA has seen a corresponding increase in the risk of greenwashing by investment funds, which the CSA described as disclosure or marketing that "intentionally or inadvertently misleads investors about the ESG-related aspects of the fund."

The CSA takes a broad view of the types of investment funds to which the ESG Fund Guidance is directed (ESG-Related Funds), explaining that these are funds that consider ESG factors in their investment decision-making process, with those factors understood to include biodiversity, climate change, diversity, human rights, Indigenous inclusion and reconciliation, executive compensation and political contributions.

Although a detailed discussion of the ESG Fund Guidance is beyond the scope of this article, several elements of that guidance provide useful illustrations of the practices that could lead to allegations of greenwashing. First, with regard to naming conventions, the CSA has advised that the name and investment objectives of a fund must accurately reflect the degree to which the fund is focused on ESG factors. For example, the ESG Fund Guidance explains that an investment fund whose name mentions ESG (or associated terms such as "sustainability" or "green") should reference the relevant ESG factors in its fundamental investment objectives. Conversely, investment funds that do not reference ESG factors in their fundamental investment objectives should not use those terms in the fund's name.

Second, the CSA suggests that all ESG-Related Funds should consider and disclose any risk factors that apply as a result of such funds' ESG-related investment objectives or use of ESG strategies. Such ESG risk factors may include concentration risk, risk of underperformance due to the fund's focus on ESG and risks associated with reliance

In Q1 2021, the value of sustainable funds in Canada hit $18 billion at the end of the first quarter, representing a 160% increase over their value in 2020. In tandem with the increasing popularity of ESG investing, the CSA has seen a corresponding increase in the risk of greenwashing by investment funds.

on third-party ESG ratings regarding assessments of the ESG performance of the fund's underlying holdings.

Third, the "sales communications" of an ESG-Related Fund, which includes information posted to a fund's website, must not contain any statement that is inconsistent with the information included in the fund's regulatory offering documents and, more generally, must not be untrue or misleading. On the latter point, the CSA explains that an ESG-Related Fund's sales communications may be misleading if such communications:

- contain a statement that lacks explanations, qualifications or limitations;
- contain statements that are vague or exaggerated or that cannot be verified;
- suggest that the fund is focused on ESG factors that are not referenced in the fund's investment objectives; or
- contain more information about the fund's ESG strategies than has been included in the fund's prospectus.

ESG Investing: International Developments

Given the global demand for ESG investment opportunities, the CSA is not alone in issuing guidance that aims to prevent greenwashing in this growing field. For example, in April 2022, the EU published its final *Regulatory Technical Standards*, which supplement its *Sustainable Finance Disclosure Regulations* (SFDR) and *Taxonomy Regulation* (TR) by further detailing the ESG-related disclosure required under the SFDR and TR. Furthermore, on October 25, 2022, the U.K.'s Financial Conduct Authority issued the draft *Sustainability Disclosure Requirements and investment labels* for public consultation. This draft targets the naming conventions, disclosure practices and marketing of sustainability-related investment products.

Closer to home, in May 2022, the SEC published two sets of rules for public consultation (SEC Proposals), covering much of the same ground as the ESG Fund Guidance. More specifically, the SEC Proposals include rules aimed at preventing the "materially deceptive and misleading" use of ESG terminology in investment fund names and rules intended to enhance the ESG disclosure of certain investment advisors, investment companies and business development companies.

With regard to naming, under the SEC Proposals, an investment fund's name is considered to be materially deceptive and misleading if the name includes terms suggesting the fund's investment decisions incorporate one or more ESG factors when the reality is that such ESG factors are generally no more significant than non-ESG factors that are also used in making investment decisions. More generally, the SEC Proposals would extend the SEC's existing "80% rule" to ESG funds, meaning that an investment fund that incorporates ESG factors in its name would be required to adopt a policy of investing at least 80% of the value of its assets in the type of investments associated with ESG factors.

The SEC's proposed rules regarding ESG-related investment disclosure, more broadly construed, are explicitly aimed at responding to consumer demand for "consistent, comparable and reliable information" relating to both investment advisors and products that claim to take ESG factors into consideration. The proposed ESG disclosure requires:

- Funds engaging in ESG investing must include information about the implementation of ESG factors in the fund's principal investment strategies, with the extent of such disclosure turning on the extent to which a fund incorporates/considers ESG factors in its investment process.
- ESG funds must disclose in their prospectus the manner in which the fund focuses on ESG factors in its investment process.

- ESG funds may also be required to disclose the aggregated GHG emissions of the portfolio in their annual financial report or disclose the fund's progress (both in qualitative and quantitative terms) in achieving its targeted ESG impact.

Ramp-Up of Greenwashing Enforcement Activities

In addition to publishing ESG disclosure and marketing standards, regulators have responded by way of targeted enforcement activities to (i) the increasing demand and public appetite for ESG-related investment products and ESG disclosure, and (ii) the proliferation of ESG-related marketing. For example, in March 2021 the SEC announced the creation of a Climate and ESG Task Force (ESG Taskforce) in the SEC's Division of Enforcement, aimed at developing initiatives that would, among other things, proactively identify ESG-related misconduct and analyze any disclosure or compliance issues arising out of the ESG strategies of investment advisers or investment funds.

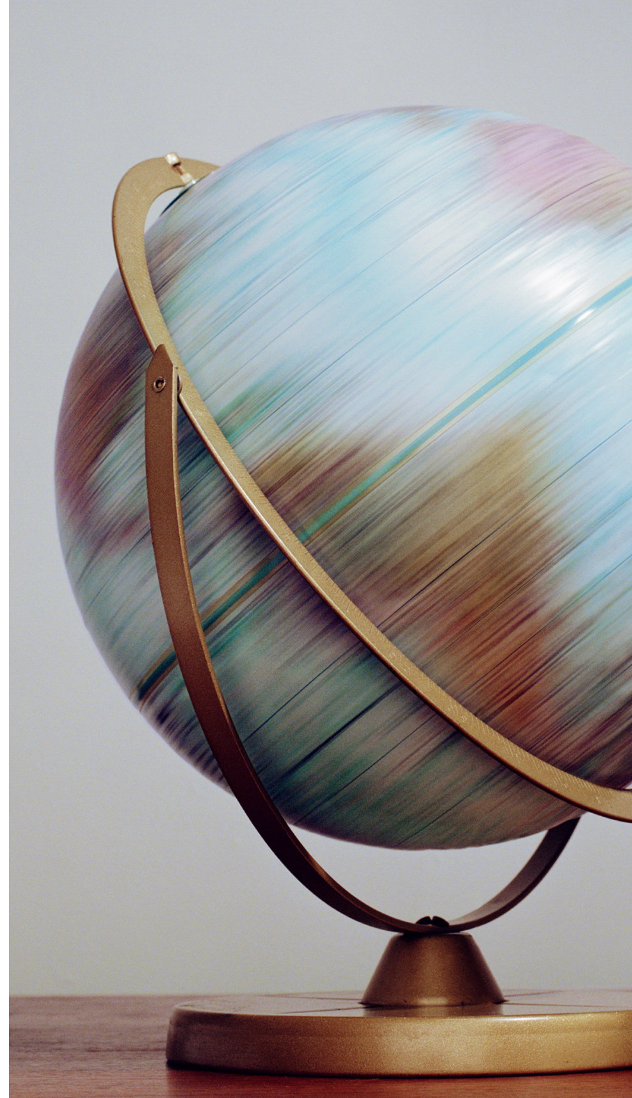
The SEC maintains an online list of the ESG Taskforce's enforcement actions, with the following notable examples:

- Fraudulent statements made by the former CEO of a truck manufacturer relating to the production of alternative fuel and low/zero emission trucks. The charges were settled and the manufacturer has agreed to pay a penalty of $125 million.
- False and misleading statements made by a mining company in its ESG disclosures regarding the safety of its dam, which collapsed in 2019. The charges against the company were settled and the company agreed to pay a penalty of US$55.9 million.
- Omissions and misstatements made by an investment advisor regarding ESG considerations used in making investment decisions. The charges against the advisor were settled and the advisor agreed to pay a penalty of US$1.5 million.
- The failure of an asset management firm to establish and follow procedures governing how ESG factors will be evaluated in the investment process for certain mutual funds marketed as ESG investments. The charges against the firm were settled and the firm has agreed to pay a penalty of US$4 million.

In Canada, at a 2022 summit focused on the intersection between competition law and sustainability, the Commissioner of Competition confirmed that the Competition Bureau believes that its mandate includes maintaining consumer confidence in the "green economy." Investigating the alleged environmental attributes of products and services is a long-standing focus of the Bureau, whose investigation into the use of Energy Star claims by several hot tub retailers culminated in several negotiated resolutions between 2009 and 2010. The Commissioner has specifically highlighted the rise in greenwashing – which he described as the practice of making false or misleading eco-claims – as falling within the Bureau's purview and enforcement priorities.

The Bureau's authority to take enforcement action to combat greenwashing is grounded in the general prohibitions in the *Competition Act* against making representations to promote any business interest, or the supply or use of a product, if such representations are materially false or misleading in a material respect.

The *Competition Act* authorizes the Bureau to bring proceedings before the Competition Tribunal or a court, seeking, among other things, an order to an entity to stop making certain representations, as well as administrative monetary penalties of up to the greater of $10 million and three times the value of the benefit derived from the deceptive conduct. In practice, the Bureau may first try to resolve the matter through a negotiated resolution or consent agreement, which has the force of a court order,



or by seeking temporary orders to stop the allegedly misleading representations.

In addition to the foregoing enforcement risks, private parties may rely on provisions of the *Competition Act* to initiate class actions and/or seek injunctions related to alleged false or misleading representations, which may result in potentially significant monetary costs and reputational damage.

In 2021, the Bureau formally archived its prior 2008 guidance relating to environmental claims on the basis that the guidance no longer reflected the Bureau's views. This move left Canadian businesses with a dearth of official guidance while the Bureau continues to pursue active investigations and enforcement.

The Bureau has already demonstrated that it will actively pursue enforcement relating to environmental claims:

- **January 2022.** A Bureau investigation into claims regarding the recyclability of single-use coffee pods resulted in a settlement involving the payment of a \$3-million penalty.
- **October 2022.** The Bureau confirmed that it had opened an investigation after receiving a complaint that a financial institution had made false or misleading representations with respect to its actions to fight climate change. More specifically, the complaint alleges that the financing provided by the financial institution regarding the oil and gas industry is inconsistent with its statements relating to its commitment to the principles of the Paris Agreement and to achieving net-zero GHG emissions by 2050.
- **November 2022.** The Bureau confirmed that it had opened an investigation into representations made regarding the environmental attributes of natural gas. The complaint alleges that representations characterizing natural gas as "natural" and "clean" are false and misleading, primarily because methane – the largest component of natural gas – has a global warming potential up to 80 times higher than carbon dioxide.
- **February 2023.** The Bureau confirmed that it had opened an investigation after receiving a complaint pertaining to allegedly false and misleading representations regarding the sustainability of certain forest management practices.

The fact that the Bureau has initiated an investigation does not necessarily mean enforcement action will follow. Nevertheless, the number of complaints recently filed with the Bureau underscores the risks associated with environmental claims.

Our Take: Walking the Narrow (But Far From Straight) ESG Path

The potential liability associated with greenwashing, by way of regulatory enforcement and civil claims, should be top of mind both for those who are simply making ESG disclosure and for those taking larger strides into the ESG waters, whether in the ESG investment sector or as a way of promoting more traditional products and services. While not intended to serve as a road map through the greenwashing minefield, the CSA's November 2022 Staff Notice 51-364 – *Continuous Disclosure Review Program Activities for the fiscal years ended March 31, 2022 and March 31, 2021* (Staff Notice) nevertheless provides useful guidance on this topic.

The Staff Notice – a report on the results of the CSA's review of continuous disclosure made between March 31, 2021 and March 31, 2022 – describes areas where such disclosure has fallen short of the CSA's expectations, offers examples of such substandard disclosure and suggests means of improvement. The CSA confirms in the Staff Notice that there has been a significant increase in ESG disclosure made by issuers, but that there has been a corresponding increase of greenwashing in such disclosure.

The CSA's view is that disclosure tends to cross the line into greenwashing when it is overly promotional and not sufficiently factual and balanced. The

following two examples of statements that the CSA views as greenwashing illustrate just how low the regulatory bar for greenwashing has become:

- “The Company plans to be carbon neutral by 2023.”

- “Strategic relationship with high-quality partners attentive to environmental stewardship and performance enhance our long-term value. Our key partner exemplifies this by setting aggressive emissions reduction targets and investing in multiple environmental/economic-enhancing technologies.”

The CSA regards the first example as greenwashing on the grounds that, without any further disclosure on which to base this claim – that is, a description of the issuer’s activities that will allow it to meet the target – disclosure of this short-term carbon-neutral target constitutes greenwashing.

We would add to this by noting that in order to mitigate the potential risks of greenwashing, the disclosure relating to this carbon-neutral target should also include a discussion of (i) the carbon neutrality standard the company makes use of: (ii) the scope of the company’s carbon neutrality claim (i.e., whether it applies only to the company’s direct operations or also to the company’s supply chain); and (iii) any plans the company has to verify or certify its carbon neutrality claim.

The second example is flagged by the CSA as greenwashing due to the use of vague, and potentially misleading, language – “high-quality partners” and “aggressive emissions reduction targets.”

The Staff Notice is only the most recent sign that the standards for ESG disclosure, and by extension ESG claims in marketing materials, are becoming increasingly stringent and that potential liability associated with greenwashing – whether intentional or not – is a serious risk that cannot be ignored.

Key Contacts

If you would like to discuss any of the issues raised in this report or receive more information, please contact any of the individuals listed below or visit our website at www.dwpv.com.

Toronto

Patricia L. Olasker

416.863.5551
polasker@dwpv.com

Aaron J. Atkinson

416.367.6907
aatkinson@dwpv.com

Brett Seifred

416.863.5531
bseifred@dwpv.com

Montréal

Franziska Ruf

514.841.6480
fruf@dwpv.com

New York

Jeffrey Nadler

212.588.5505
jnadler@dwpv.com

Contributors

Researching and writing this report is a project undertaken by Davies Ward Phillips & Vineberg LLP and not on behalf of any client or other person. The information contained in this report should not be relied upon as legal advice.

Sarah Powell (ESG)

Brett Seifred (Diversity)

Matthew Sherman (Diversity)

Zachary Silver (ESG)

About Davies

Davies is a law firm focused on high-stakes matters. Committed to achieving superior outcomes for our clients, we are consistently at the heart of their largest and most complex deals and cases. With offices in Toronto, Montréal and New York, our capabilities extend seamlessly to every continent. Contact any of our lawyers to talk with us about your situation.

Visit us at dwpv.com

DAVIES

TORONTO

155 Wellington Street West
Toronto ON Canada
M5V 3J7

416.863.0900

MONTRÉAL

1501 McGill College Avenue
Montréal QC Canada
H3A 3N9

514.841.6400

NEW YORK

900 Third Avenue
New York NY U.S.A. 10022

212.588.5500

DAVIES WARD PHILLIPS & VINEBERG LLP