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SEC “Greenwashing” Enforcement Case Against Public Company

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Last week, the SEC publicly announced a settled enforcement case against Keurig Dr. Pepper. The case focused on the company’s disclosure in its annual reports on Form 10-K on whether its K-Cup pods could (or would) be recycled. The SEC action focused on allegedly incomplete disclosure: In testing the reliability of recycling K-Cup pods, the SEC alleged that the company had received negative feedback from two significant recycling companies on the commercial viability of such recycling, but its 10-K disclosure did not reflect that uncertainty. The SEC noted in its allegations that some portion of the company’s customers viewed the environmental impact as a factor in their purchasing decisions.

In bringing prior “greenwashing” cases, the SEC enforcement staff has been primarily focused on the funds industry. The Keurig case is significant because it may indicate that, when it comes to ESG disclosure, the SEC’s enforcement staff is turning its attention to public companies as the courts weigh its new disclosure rules for public companies on climate change, notwithstanding recent reports that the SEC’s Enforcement Division has disbanded its ESG enforcement task force.

Although companies should exercise care in preparing public disclosure, both filed with the SEC and non-filed, they should pay special attention to their disclosure about climate change and other ESG subjects. The SEC’s action highlights the importance of ensuring disclosures are materially complete, and of carefully considering whether the disclosure, although accurate, could be viewed as materially misleading in light of other, undisclosed information. The interpretation or characterization of public disclosure can be subjective. Like some other recent agency enforcement actions, the Commission’s view of the case and of the company’s disclosure was not unanimous. In her dissent, SEC Commissioner Peirce stated that Keurig’s disclosure that the pods “could” be recycled should not have been read as an implicit assertion that the pods “would” be recycled.

With respect to filed reports, the SEC has been focused on the strength of public companies' required "disclosure controls and procedures," which are internal controls designed to ensure that disclosure is timely, accurate, and complete. Even if the SEC does not ultimately agree with a company's disclosure decisions, companies are no doubt in a stronger position vis-à-vis regulators if they can demonstrate adequate disclosure controls and procedures on whether certain statements are materially complete.

The SEC likewise has been reviewing companies' sustainability reports and other non-filed disclosure for light that it might shed on filed reports, and instances where the non-filed information differs from disclosure included in reports filed with the SEC. The SEC's new climate change rules have been stayed pending the resolution of several lawsuits consolidated in the 8th Circuit U.S. Court of Appeals. While the rules as adopted are due to take effect for some companies for their 2025 fiscal years (See previous posts The SEC Adopts Extensive Climate Change Disclosure Rules and Court Temporarily Stays New SEC Climate Change Disclosure Rules Amidst Widening Legal Challenges), it seems likely that the SEC will delay their effectiveness for at least one year in light of the litigation and stay.

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