

SEC FILES CHARGES AGAINST A NON-US MINING COMPANY IN RESPECT OF ESG DISCLOSURES

Last week, the Securities and Exchange Commission (“SEC”) [announced](#) that it had filed charges against a Brazilian mining company that is one of the world’s largest iron ore producers, alleging violations of the antifraud and reporting provisions of the U.S. federal securities laws. The charges brought by the SEC follow the January 2019 collapse of the company’s Brumadinho dam, which was built to contain potentially toxic byproducts from mining operations. The collapse, believed to be one of world’s worst mining disasters, resulted in significant loss of life and significant environmental and social harm. The company’s ADSs are traded on the NYSE; following the collapse of the dam, the ADSs lost more than 25% of their value.

The SEC [complaint](#) alleges that the company, over a three-year period immediately prior to the dam’s collapse, made false and misleading disclosures/omissions relating to safety and risks associated with the dam. Certain statements were made after the dam’s collapse. The false and misleading statements arose as a result of the actions allegedly taken by the company to conceal the actual condition of the dam. Among other things, the SEC alleges that the company improperly obtained dam stability declarations by knowingly using unreliable and flawed laboratory data, concealed material facts from its dam safety auditors, removed auditors and others that threatened the company’s ability to obtain dam stability declarations, disregarded accepted best practices and minimum safety standards, and misled local governmental bodies and investors about the safety of the dam through its ESG disclosures. The SEC’s complaint singles out allegedly false or misleading ESG disclosures/omissions:

- made by the company in two annual sustainability reports (available on the company’s website and referenced in its SEC filings);
- made by the company in its periodic reports (Form 20-F annual reports and reports filed under cover of Form 6-K);
- made by the company in an investor presentation;
- made by the company’s President and CEO during an investor meeting; and
- made by the company as part of an ESG webinar (published on its website).

The charges are noteworthy as they appear to represent the first enforcement action involving material misstatements and omissions in ESG sustainability reports and ESG-related statements in periodic reports (with claims under Section 10(b) and Rule 10b-5 under the 1934 Act and Section 17(a) of the 1933 Act (by reason of bond offerings), among others) since the [announcement](#) in March 2021 of the formation by the SEC of a Climate and ESG Task Force within its Division of Enforcement. The initial mandate of the Task Force is “to identify any material gaps or misstatements in issuers’ disclosure of climate risks under existing rules.” It is also noteworthy that the Director of the Enforcement Division, in a statement quoted in the announcement of the filing of the charges, focused on reliance by investors on ESG disclosures and characterized the company’s alleged misstatements and omissions as undermining investors’ ability to assess the risks of investments in the company.

The charges are also an important reminder that the Enforcement Division continues to bring enforcement actions against foreign entities and individuals, and that ESG-related disclosure claims will be treated just as any other alleged material misstatements or omissions from an enforcement standpoint. In recent months, the SEC has filed charges against non-US citizens/residents for [insider trading](#), in various penny stock schemes (see [April 2022 release](#), [March 2022 release](#) and [December 2021 release](#)), allegedly fraudulent digital assets [offerings](#), a hacking and fraudulent trading [scheme](#), and allegedly fraudulent [offerings](#) of microcap securities. The SEC also has brought charges against foreign companies for violations of the FCPA (see [SEC release](#)), against a non-US brokerage firm for violating the broker-dealer registration requirements (see [SEC release](#)) and against non-US traders for stock manipulation (see [SEC release](#)). Announcements for many of these actions recognize the assistance of non-US securities regulators and law enforcement.

Concluding Thoughts

The mandate of the SEC's Climate and ESG Task Force was to focus on securities law violations based on existing standards of disclosure. While the public disclosure ecosystem is rightfully focused on the recently proposed mandatory climate-related disclosure rules (see my prior briefing note, available [here](#)), reporting companies should not lose sight of their longstanding obligations under the U.S. federal securities laws. While the instant case has been styled as an ESG disclosure case, the elements in fact are very much the bedrock of traditional disclosure actions (allegedly false or misleading material statements/omissions; knowingly or recklessly engaged in deceptive conduct).

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