

# Legal Developments and Disclosure Frameworks

**Akin Gump**  
STRAUSS HAUER & FELD LLP

## ACC Houston Integrating ESG in Corporate Practices: The Role of Counsel

January 12, 2021

This handout highlights some of the key legal developments impacting the ESG landscape in the United States and the prominent disclosure frameworks that ESG leaders use to inform their disclosures.

### 1. Key Legal Developments Impacting the ESG Landscape in the United States

- a. U.S. Securities and Exchange Commission (SEC)
  - i. Asset Management Advisory Committee, ESG Subcommittee
    - September 2020 evaluation of a number of potential regulations related to ESG performance measurement, proxy voting, rating systems, and disclosure
      - [Additional reading](#)
    - December 2020 recommendations regarding issuer disclosure of ESG risks and ESG investment product disclosure, including a recommendation to require the disclosure of material ESG risks using third-party frameworks
      - [Additional reading](#)
  - ii. 2020 Amendments to Regulation S-K
    - August 2020 revisions do not require or specify ESG-related disclosures, prompting objection from Commissioner Lee to the revisions' "unsustainable silence"
      - [Additional reading](#) (rule)
      - [Additional reading](#) (statement from Commissioner Lee)
    - November 2020 revisions do not require climate-related disclosures, prompting objection from Commissioners Lee and Crenshaw and a recommendation for an internal task force and ESG Advisory Committee to use recommendations from standard-setting organizations to "define a clear path to address sustainable investing"
      - [Additional reading](#) (rule)
      - [Additional reading](#) (statement from Commissioners Lee and Crenshaw)
  - iii. Investor Advisory Committee, Investor-as-Owner Subcommittee

### Presenter Contact Information

**Cynthia Mabry**  
Partner  
[cmabry@akingump.com](mailto:cmabry@akingump.com)  
Houston  
+1 713.220.8130

**Stacey Mitchell**  
Partner  
[shmittell@akingump.com](mailto:shmittell@akingump.com)  
Washington, D.C.  
+1 202.887.4338

**Brian Patterson**  
Partner  
[bpatterson@akingump.com](mailto:bpatterson@akingump.com)  
Houston  
+1 713.250.2214

**Monica Karuturi**  
Senior Vice President & General Counsel – CenterPoint Energy  
[monica.karuturi@centerpointenergy.com](mailto:monica.karuturi@centerpointenergy.com)  
Houston  
+1 713.207.7789

- May 2020 recommendation that the SEC update reporting requirements of issuers to include material, decision-useful ESG factors
  - [Additional reading](#)
- iv. Statement by former Chairman Clayton
  - January 2020 statement reaffirms the SEC’s position that ESG-related disclosure requirements are not necessary in light of existing materiality standard
    - [Additional reading](#)
- v. Statement by Commissioner Lee
  - November 2020 speech expresses support for a standard ESG disclosure framework and rules regarding investment advisor ESG policies and transparency in credit ratings
    - [Additional reading](#)
- b. U.S. Department of Labor
  - i. Effective January 12, 2021, new rule codifies prohibition on retirement plan fiduciaries’ ability to make investment decisions based solely on ESG considerations
    - [Additional reading](#)
- c. U.S. Federal Reserve
  - i. Chairman Powell’s November 2020 statement identifies climate risk as a material risk to the economy and one that the Federal Reserve is considering incorporating into its regulatory framework
    - [Additional reading](#)
  - ii. November 2020 Financial Stability Report addresses the impact of climate risk on financial stability, concluding that climate change is “likely to increase financial shocks and financial system vulnerabilities”
    - [Additional reading](#)
  - iii. In December 2020, the Federal Reserve becomes a member of the Network of Central Banks and Supervisors for Greening the Financial System to share ideas, research, and best practices on the development of environment and climate risk management for the financial sector
    - [Additional reading](#)
- d. Litigation
  - i. Securities Cases
    - Section 11 of the Securities Act of 1933 (cases involving alleged ESG-related misstatements and omissions in securities offering documents)
      - *In re Equifax Sec. Litig.*, 357 F. Supp. 3d 1189, 1224 (N.D. Ga. 2019) (cybersecurity)
      - *Ludlow v. BP, PLC*, No. 14-20420 (5th Cir. September 8, 2015) (oil and gas safety)
      - *In re Massey Energy Sec. Litig.*, 883 F. Supp. 2d 597 (S.D. W. Va. 2012) (coal safety and compliance)
      - *City of Brockton Retirement System v. Avon Products, Inc.*, No. 11-CIV-4665, 2014 WL 4832321 (S.D.N.Y. Sept. 29, 2014) (corporate governance)

- Section 10(b) of the Securities Exchange Act of 1934 and the SEC’s Rule 10b-5 (cases involving ESG-related anti-fraud allegations)
  - *In re Banco Bradesco A. Securities Litigation*, 277 F. Supp. 3d 600, 659–660 (S.D.N.Y. 2017) (allegedly false or misleading statements related to criminal corruption charges and bribery schemes)
  - *In re Signet Jewelers Ltd. Sec. Litig.*, No. 16-cv-6728, 2018 WL 6167889 (S.D.N.Y. Nov. 26, 2018) (allegedly false or misleading statements related to risky underwriting practices and sexual harassment)
- ii. Consumer Protection Laws
  - *Hall v. SeaWorld Entm’t, Inc.*, 747 F. App’x 449 (9th Cir. 2018) (allegation that marine park failed to disclose mistreatment of orcas)
  - *Sud Costco Wholesale Corp.*, 731 F. App’x 719, 720 (9th Cir. 2018) (allegation that retailer failed to disclose forced labor in prawn supply chain)
  - *Hughes v. Big Heart Pet Brands*, 740 Fed. App’x.876 (9th Cir, 2018) (allegation that marketer/distributor failed to disclose forced labor in fish and shrimp supply chain)
  - *Dana v. Hershey Co.*, 730 F. App’x 460 (9th Cir. 2018) (allegations that producer/distributor failed to disclose child and forced labor in chocolate supply chain)
  - *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 863 (9th Cir. 2018) (allegations that producer/distributor failed to disclose child and forced labor in chocolate supply chain)

## 2. Prominent ESG Disclosure Frameworks/Standards

- a. [Task Force on Climate-related Financial Disclosure \(TCFD\)](#)
- b. [Sustainability Accounting Standards Board \(SASB\)](#)
- c. [Global Reporting Initiative \(GRI\)](#)
- d. [CDP \(formerly the Carbon Disclosure Project\)](#)
- e. [International Integrated Reporting Council \(IIRC\)](#)
- f. [United Nations Global Compact](#)
- g. [World Economic Forum](#)
- h. Select industry-specific disclosure frameworks:
  - i. [Electric Utilities](#) – Edison Electric Institute – [ESG/Sustainability Template \(Version 2\)](#) & the [Quantitative ESG Template](#)
  - ii. [Natural Gas Utilities](#) – American Gas Association – [ESG/Sustainability Template \(Version 2\)](#) & the [Quantitative ESG Template](#)
  - iii. [Exploration & Production](#) – API, IPIECA and International Association of Oil and Gas Producers – [Sustainability Reporting Guidance for the Oil and Gas Industry](#)
  - iv. [Midstream](#) – Energy Infrastructure Council and GPA Midstream Association – [EIC/GPA Midstream ESG Reporting Template](#)

## 3. Additional ESG Considerations for Financial Institutions

- a. [Principles for Responsible Investing \(PRI\)](#)
- b. Applicability of Section 13(g) of the Securities Exchange Act of 1934 to ESG Engagement with Company Boards
  - i. [Additional reading](#)