SANGRA MOLLER LLP
Barristers & Solicitors

LEGAL CURRENCY
A Client Communication

Deutsche Bank: Allegations of Greenwashing and Potential Enforcement

On May 31, 2022, German federal agents raided Deutsche Bank's headquarters over greenwashing allegations against DWS (Die Wertpapier Spezialisten), its asset management unit. The Frankfurt public prosecutor said that it started its investigation in January 2022, triggered by claims made by the former head of sustainability at DWS. The CEO of DWS resigned a day after the bank was raided.

The DWS case is interesting given enhanced investor and regulatory scrutiny of environmental, social and governance ("ESG") disclosure and is an early example of enforcement activities by regulators.

I. Background

DWS has been under scrutiny since its former head of sustainability alleged last year that it misleadingly characterized €459 billion of assets as "ESG integrated". Since then, the prosecutor alleged that DWS committed prospectus fraud under German laws and that there is sufficient evidence that suggests that contrary to the statements made in the sales prospectuses of DWS funds, ESG factors were not taken into account in a large number of investments.

According to news sources, DWS's former CEO fired the former head of sustainability last year, informing staff that her unit had not made sufficient progress. DWS was thereafter unsuccessfully sued for unfair dismissal. In an interview with *Der Spiegel*, the former head of sustainability stated that she had warned that the bank had made misleading statements in its 2020 annual report that had disclosed that over half of the unit's assets were invested under the ESG criteria. She also called for an audit report into ESG investments to be made public.

II. Other Greenwashing Examples

Deutsche Bank is not alone in facing greenwashing allegations. FIFA and World Cup host nation, Qatar, asserted that the 2022 World Cup tournament will be carbon-neutral. However, a new report by Carbon Market Watch attributed that claim to be "creative accounting". The carbon footprint of Qatar's six newly built stadiums was calculated by dividing the number of days in the tournament over the entire estimated life of the stadium. According to Carbon Market Watch, this calculation is problematic as the stadiums are purpose-built for the World Cup, and as such will not be utilized in the years to follow. It was estimated that the true emissions are being understated by a multiple of eight.

Further, on May 31, 2022, the Business of Fashion released its second annual survey of sustainability efforts for the fashion industry's top 30 biggest publicly traded companies and found that no company scored more than 49 out of 100 on a series of metrics related to emissions, waste, materials, chemicals and transparency.

III. What is Greenwashing?

Commentators refer to "greenwashing" as selective disclosure of positive information about a company's ESG performance, without full disclosure of negative information, in an attempt to present an overly positive corporate image.

Commentators have alleged that the measurement of ESG is fraught with greenwashing and that market participants adopt an ESG index due to its appeal to investors. The issue is made more complex with different industries having differing standards of what is considered "green". Further, different industries often have differing views on what may be characterized as a pollutant.

Due to the variations in ESG interpretation, companies are at risk of being labeled one way or another.

IV. Liability and Enforcement

Regulators and policymakers have recently shown an interest in the potential of exaggerated claims about corporate ESG efforts. While enforcement action has been minimal so far, there is a greater scrutiny on ESG claims in general. For example, the U.S. Securities and Exchange Commission recently announced that BNY Mellon Investment Advisor had paid $1.5 million to resolve charges that it misstated ESG investment policies for particular mutual funds.

That being said, although they regularly open inquiries, the bar for public prosecutors to successfully prosecute corporate wrongdoing tends to be high.

However, from a securities law standpoint, as the demand for ESG disclosures has increased, public companies should be mindful of the potential for civil liabilities and litigation risks associated therewith.

Potential liability may arise form ESG-related disclosures that are materially false or misleading. Under U.S. securities laws, claims may be brought for material misstatements in securities offering documents for misstatements and omissions under Section 11 of the Securities Exchange Act of 1934 or under the general "anti-fraud" provisions under Rule 10b-5. The latter applies to both formal securities filings and less formal communications such as sustainability reports, press releases and website disclosures. Similarly, under Canadian securities laws, ESG disclosures may be subject to liabilities associated with "misrepresentations" by reporting issuers. Accordingly, while to date, ESG litigation has been generally unsuccessful, public companies should be aware of the potential risk as this area of law further develops.

To assist in mitigating this risk, companies should effect a careful review of ESG-related disclosures and include appropriate disclaimers in ESG reports and similar disclosures. Such disclaimers are based upon similar principles as "forward-looking statement" disclaimers with additional tailoring for ESG specific facts and topics.

Suite 1000 Cathedral Place, 925 West Georgia Street, Vancouver, B.C. V6C 3L2
Telephone: (604) 662-8808 • Facsimile: (604) 669-8803