

UPDATES

## Key Takeaways: *People Places Planet: The Enforcement Angle* Podcast Featuring SEC's Kelly Gibson

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Together with the Environmental Law Institute, Sidley brings you the “[People Places Planet](#)” podcast series “The Enforcement Angle.” Justin Savage, partner and global co-leader of Sidley’s Environmental practice, hosts the series, which features insights of senior environmental enforcement officials and thought leaders on state and federal enforcement of environmental laws and regulations.

This episode’s guests were Kelly Gibson, director of the Philadelphia Regional Office for the Securities and Exchange Commission (SEC) and leader of the Climate and environmental, social, and governance (ESG) Task Force within the SEC Division of Enforcement, and Sidley partner Ranah Esmaili, who recently joined the firm’s global Securities Enforcement and Regulatory practice. Esmaili previously worked at the SEC Asset Management Unit within the Division of Enforcement.

### Interview With Kelly Gibson and Ranah Esmaili

Gibson and Esmaili shared firsthand perspective on the roles of advisers, investors, and regulatory bodies, such as the SEC, regarding the increased interest in ESG investments. They also discussed ESG areas of focus for the SEC and the Climate and ESG Task Force; potential rulemaking related to climate and ESG disclosures; the overlap between ESG and special purpose acquisition companies (SPACs) in certain SEC enforcement matters; and the SEC’s response to President Biden’s all-of-government approach to ESG.

### SEC’s Focus on Climate and ESG Investing

- The SEC is not trying to dissuade investors from ESG endeavors or play the role of “environmental police”; Gibson said the SEC is focused on ensuring that investors disclose the

most accurate information possible in a timely manner. The SEC is looking closely at what issuers say in their filings and what investment advisers state in terms of their stated investment strategies to ensure that advisers are doing what they say they'll do.

- The SEC is seeing instances of fraudsters taking advantage of investors' personal and often deeply held values. The SEC has seen this play out across a wide variety of cases that range from offering frauds to pump-and-dumps, financial frauds, disclosure frauds, and even in EB-5 matters. These matters involve a variety of entities and ESG-related false statements.
- Advisers should consider the criteria used regarding ESG and how regulators and investors will weigh it. Gibson said that any market participant that exaggerates its commitment to, or achievement of, climate and ESG-related issues — such as by engaging in questionable ESG labeling or greenwashing — risks incurring a significant negative effect on investors.
- The SEC continues to focus on longstanding disclosure principles for public issuers and longstanding principles regarding fiduciary duties for investment advisers. The agency is also focused on ensuring that registered investment advisers and funds have effective compliance programs in place around their ESG investing. As Gibson said, "For issuers and advisers, doing what you say you're going to do — it really should be the baseline. Unfortunately, that's just not the case."
- President Biden has made clear that climate and ESG issues are a key priority for his administration. As such, the SEC is taking a comprehensive "whole of government" approach, engaging the entire agency — rulemaking, policy development, examinations, enforcement, operations — to take on these important issues.

### **Climate and ESG Task Force**

- At this point, Gibson gave her perspectives on the SEC's Climate and ESG Task Force. It was formed in March 2021 to allocate resources and expertise on ESG-related issues, products, and disclosures as a result of increased interest in this area from investors and other market participants. The Task Force comprises more than two dozen lawyers and accountants from across the SEC's offices and specialized units.
- The role of the Task Force is to develop initiatives and serve as a resource for the entire division, leverage existing and new data sources while coordinating with other regulators and criminal authorities.
- The Task Force is continuing to expand the SEC's focus on ESG-related matters and assess a broad range of potential misconduct. The initial focus is on issuers' climate and ESG-related disclosures and investment advisers' ESG funds and strategies.
- Fact patterns that could be of interest to the Task Force include these:
  - A company falsely states that it has met an ESG-related target — for example, by claiming to have reduced methane by a certain amount — but in reality methane emissions increased.
  - An issuer omits disclosure of material events related to ESG issues — for example, there is a supply chain issue resulting from a natural disaster and causing the

increased cost of goods sold — but the issuer does not disclose the driver of the increase in cost.

- An investment adviser is selling a product or service now without considering how the adviser will provide the product or service — for example, has the adviser thought about what criteria it will use or how heavily ESG considerations will be weighed in its investment decisions? Does the adviser have current capabilities to do what it's promising
- Investment advisers fail to follow through with what they tell investors they will do or fail to follow its policies and procedures.
- Considerations for investment advisers include these:
  - Have policies and procedures in place to ensure you are complying with what you say you are doing, both initially and on an ongoing basis, and consider monitoring compliance after the initial screening.
  - Vote issuer proxy votes consistent with the adviser's fiduciary duty and the client's ESG mandate and restrictions.

### **Upcoming Potential SEC Rulemaking**

- The SEC is contemplating potential rulemaking for public companies and investment advisers and funds. Esmaili pointed out that the two rulemaking streams are intertwined, as greater consistency and comparability in public company disclosures feeds into investment managers' ability to assess and evaluate ESG investments and to provide disclosure of their ESG practices.
- Esmaili indicated that the SEC is contemplating making certain changes to the “names rule” for registered funds, which prohibits registered funds from adopting materially deceptive or misleading names in the fund product. The rule, as currently drafted, applies only to investment types and not to investment strategy.
- In October 2021, the Department of Labor proposed a new rule that would make it easier for employers to offer investments in workplace retirement plans, such as 401k and 403(b) plans that take ESG factors into account.
- Esmaili noted that SEC rulemaking takes time, and, meanwhile, there is in place a disclosure and antifraud framework under existing statutes and rules.

### **ESG and SPACs**

- There has been a surge in both ESG- and SPAC-related matters. SPACs are managed by a sponsor and are often an alternative strategy to initial public offerings.
- ESG and SPACs are both hot topics in the marketplace, and the Task Force has seen them overlap in certain matters. The SEC is paying close attention to the SPAC space and will continue to be alert for fraud and bad actors.

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