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ENVIRONMENTAL LAW

Corporate Compliance in the Age of Environmental Justice

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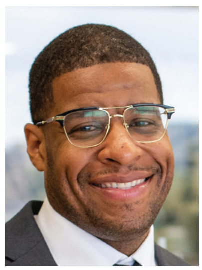
Special to the Legal

Since the early 2000s, climate change and other environmental concerns have been crawling to the forefront of the nation's political and social agendas. With a focus on some of the country's largest corporations, corporate sustainability efforts came firmly into view with voluntary efforts to reduce climate impacts and enhance conservation of natural resources. Federal and state rulemaking efforts also began to address greenhouse gas emissions. At the same time, the federal government and others placed a greater emphasis on combating corporate fraud and misconduct. In fall 2015, then-Deputy Attorney General Sally Yates issued guidance in the form of a memorandum to Department of Justice prosecutors emphasizing the department's focus on fighting corporate misconduct and enforcing corporate accountability. Later that year, the United States became one of 196 countries to join the Paris Climate Agreement—a legally binding international treaty aimed at eliminating global warming by peaking greenhouse gas emissions. Despite this two-pronged focus on corporate accountability, the Trump administration was widely thought to have de-emphasized a prosecutorial response to corporate misconduct and environmental enforcement. Likewise, with its efforts to reduce regulatory burdens on development projects, the United States' withdrawal from



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the Paris Climate Agreement was an action that signaled a less aggressive approach toward climate action.

The events of 2020 and 2021, including the COVID-19 pandemic, the murder of George Floyd in Minneapolis, the most contentious presidential election in modern history, and the Jan. 6, 2021, Capitol riot all contributed to a renewed focus on environmental, social, and governmental justice (ESG). ESG is a general term representing a wide range of factors and risks that are used to evaluate corporate behavior and give investors an indication of a corporation's future performance. It includes ethical and corporate governance issues such as creating a diverse workforce and managing carbon footprint, which are aimed at ensuring long-term sustainability.

Initially, the growing focus on ESG spurred a voluntary market-driven response with many corporations and other organizations announcing new diversity and environmentally friendly initiatives. But the trend has pivoted toward government action supporting ESG principles, including

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justice centered environmental policies and regulation. In 2021, the Biden administration wasted little time acting on the public demand for environmental justice. On his first day in office, President Joe Biden brought the United States back into the Paris Climate Agreement and issued Executive Order 13985: On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. A week later, Biden issued Executive Order 14008: Tackling the Climate Crisis at Home and Abroad, and in May he issued Executive Order 14030: Climate-Related Financial Risks. All three orders direct the federal government to advance environmental justice goals.

In October 2021, the deputy attorney general announced that the DOJ would renew its focus on combating corporate misconduct, holding corporate wrongdoers accountable and enforcing compliance by restoring its guidance originally issued in the 2015 Yates Memo. Finally, in November 2021, Congress passed, and Biden signed into law, the Infrastructure Investment and Jobs Act, which allocates $1.2 trillion for the development of roads, railways, bridges, broadband, the power grid and environmental initiatives. Environmental justice is a core objective of the act as it is the largest investment in addressing legacy pollution in American history, and it directs $21 billion for Superfund and Brownfield site cleanups, which are disproportionately located in low-income and minority communities.

U.S. administrative agencies, including the Securities and Exchange Commission (SEC), Department of Labor (DOL), and the Environmental Protection Agency (EPA), began to follow Biden's directives and shift focus and resources toward environmental justice regulation and enforcement. The SEC, for example, announced the creation of a Climate and ESG Task Force in the Division of Enforcement. This task force will develop proactive initiatives to identify ESG related misconduct, including identifying any material gaps or misstatements in issuers' disclosure of climate risks under existing rules. The SEC is devoting significant resources to the Climate Change and ESG task force—22 members drawn from the SEC's headquarters, regional offices, and enforcement specialized units.

Similarly, the DOL proposed a new rule, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, which would remove barriers to plan fiduciaries' ability to consider climate change and other ESG factors when selecting investments and exercising shareholder rights. According to the assistant secretary for Employee Benefits Security Administration, the proposed rule will "bolster the resilience of workers' retirement savings and pensions by removing any artificial impediments—and chilling effect on ESG investment."

EPA's Office of Enforcement and Compliance Assurance responded to Biden's charges to advance racial equity and support for underserved communities, and to strengthen enforcement to help advance the protection of overburdened communities disproportionately impacted by pollution by issuing four memoranda directing enforcement staff to strengthen environmental justice considerations in the civil regulatory, criminal, and cleanup enforcement programs, and to use all available resources to do so. Over the next year, and beyond, the EPA is expected to take a proactive role in regulation and enforcement of ESG issues—increasing inspections, early clean-up and expedited negotiations with responsible parties, community engagement through more efficient environmental justice screening, and a more active role in permitting—particularly in communities with environmental justice concerns.

The federal government's dual focus on environmental justice and corporate accountability raises critical issues about the future of environmental compliance and highlights the need for corporations to evaluate their impacts and risks. One way that organizations can ensure compliance is through the implementation of a corporate compliance program. More than ensuring compliance, implementation of a corporate compliance program can also mitigate the severity of any penalty or punishment when an agency is investigating, determining whether to bring charges, or negotiating plea and other agreements with an organization for misconduct, including noncompliance with any environmental rules and regulation. Federal prosecutors are required to consider whether an organization has a compliance program, and importantly, to evaluate the design, adequacy and effectiveness of the program.

A comprehensive compliance program, designed to maximize effectiveness in preventing corporate misconduct, must include provisions for compliance with environmental regulations, and must, in this age of environmental justice, track and monitor proposed regulations and various agency ESG initiatives. Additionally, an organization's compliance program should allocate adequate resources—manpower and finances, relative to the size and footprint of the organization—to ensure environmental compliance. Organizations should enforce their program in a way that incorporates environmental compliance into the its culture. This means that employees should be well informed about the program and made aware that misconduct with respect to environmental compliance will not be tolerated.

Some suggestions for organizations to avoid or mitigate the risk of environmental liabilities in a time of increased scrutiny: conduct self-prompted internal investigations, be proactive in identifying releases of hazardous substances and get ahead of any clean-up efforts, carefully review any required disclosures to ensure accuracy and truthfulness, and engage the community by being transparent with respect to environmental issues, especially in communities that have suffered disproportionately from pollution. Although the contours of ESG-related regulatory and legal requirements continue to take shape, it is clear that environmental justice is a priority that is shared by the Biden administration, many states, shareholders and communities. Organizations must be able to adapt quickly to avoid violating environmental rules and to proactively engage with communities. •