

ESG, EXAMS, AND ENFORCEMENT – PRACTICAL TIPS FOR MANAGERS

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Morgan Lewis

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Overview

- **Practical tips to:**
 - Stay off the SEC Enforcement radar
 - Be prepared for an SEC examination or investigation
 - Successfully navigate an SEC examination/enforcement investigation
- **Focus on ESG activities:**
 - SEC attention on ESG/sustainable investing
 - Proposed rules and potential implications
 - Developing best practices regarding ESG investing

Agenda

1. Insights on SEC Divisions of Examinations and Enforcement
2. Being Prepared for an SEC Call
3. Navigating, and Successfully Surviving, an Exam and/or Enforcement Investigation
4. On the Horizon: IM, Exams, Enforcement, ESG

Chapter 1: SEC Examinations and Enforcement

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Introduction to Examinations and Enforcement



- How are the divisions structured?
- Examinations vs. Enforcement
- Enforcement investigations: What are they and should I be worried?
- What do they look for?
- Data, data, data!
- Life cycle of a matter

SEC Focus on ESG Matters

- SEC focus on ESG:
 - Examination priorities and risk alert, warning against “greenwashing” and misstating sustainability practices
 - Division of Enforcement’s Climate and ESG Task Force
 - Recent Examinations
 - Recent Enforcement cases

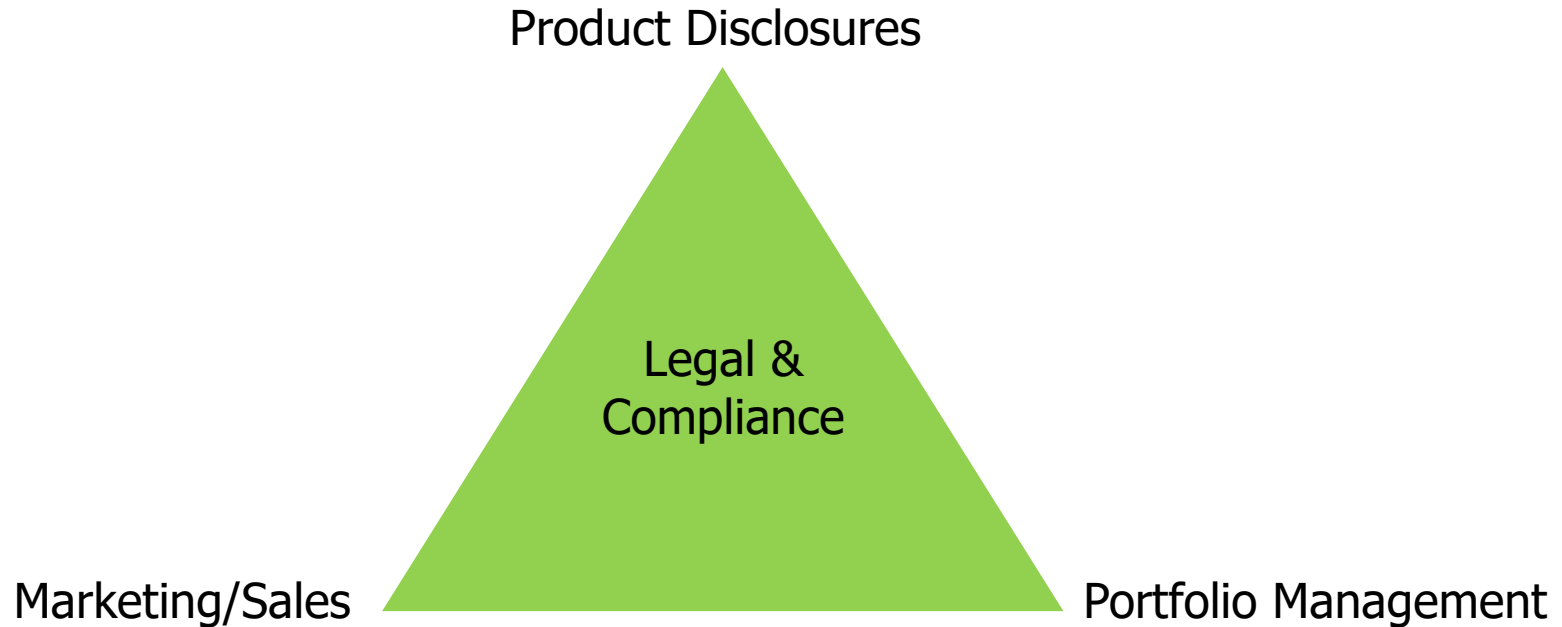
Chapter 2: Being Ready

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General Best Practices

- Understand firm's products
 - Do disclosures reflect what investment management is actually doing?
- Review marketing and offering disclosures
 - Consistency is key
- Policies and procedures
 - The best policies are often high-level documents noting intent to comply with requirements
 - The best procedures usually list the specific (auditable) steps that the business will take to ensure compliance with the firm's policies
- Watch for SEC staff statements, guidance, proposals, Enforcement pronouncements or settlements, etc.

Disclosure Process Triangle



Emerging Best Practices: ESG

- Disclosure = Marketing = Investment Processes
 - Define terms internally before including in investor-facing materials
 - Do not assume that a statement is immaterial
- Disclosure must not overstate ESG considerations
 - Assume disclosure will be read as applying to **every** investment
 - Watch out for overly permissive disclosure
- ESG Policy?
- Learnings from Proposed SEC Rules
 - ESG Rule proposal
 - Names Rule amendments proposal

Chapter 3: Navigating, and Successfully Surviving, an Exam and/or Enforcement Investigation

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SEC Examinations/Investigations

- Recent trends in examination process:
 - Increased breadth
 - Increased depth
 - More sweep examinations
- Recent trends in enforcement investigations:
 - Sweep investigations (open directly), often coming from asset management unit

Surviving Exams/Investigations

- Organization and responsiveness matters
 - Response organization/Bates stamps
- Cooperation starts early and often – important both for exams and investigations
- Interview preparation is important
- FOIA/confidentiality/privilege considerations
- Patience...
- Examination closings:
 - Exit-interview process
 - Consider your audience when responding to an exam deficiency letter. Tone matters!
- Investigations:
 - Seek to proceed interactively, and in parallel with internal review and assessment
 - Strategic focus – manage toward desired conclusion; adjust as information is learned internally and from Staff

SEC ESG Examinations/Investigations

- Areas of focus:
 - Procedures to ensure that disclosures match the investment processes
 - RFP/RFI/DDQ response content and processes
 - Evidence that the investment process is operating as described
 - Exclusionary screens/processes
 - Proxy voting/engagement are happening as described
 - Changes to products are implemented promptly
 - Board interaction

Chapter 4: Looking Ahead

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Looking Ahead

- Expect to see continued ESG-focused examinations and additional Enforcement actions arising from SEC's use of data analytics
- Staff deploying what they have learned through examinations in guidance and additional examination focus
- ESG rulemaking momentum

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With more than a decade of experience as senior in-house counsel with global investment managers, **Lance** has a deep understanding of mutual fund law and operation and is fluent in the myriad regulations applicable to investment managers. He is well versed in the creation of investment products and environmental, social and governance (ESG) and sustainability matters. Lance works extensively on regulatory policy matters engaging with various financial services regulators, including the US Securities and Exchange Commission, US Department of Labor, Internal Revenue Service, and US Department of Treasury.

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Kelly is the co-leader of the firm's securities enforcement practice. She previously held numerous national and regional leadership roles at the US Securities and Exchange Commission (SEC), including serving as the acting deputy director of the Division of Enforcement, as leader of the Enforcement Division's nationwide Climate and Environmental, Social, and Governance (ESG) Task Force, and as director of the SEC's Philadelphia Regional Office. Kelly advises and defends public companies, financial services clients, and their executives in SEC, self-regulatory organization (SRO), and state enforcement matters, and in internal investigations. She is admitted in Pennsylvania and New Jersey only, and her practice is supervised by NY Bar members.

Leveraging her government and private practice experience, Kelly works in collaboration with the firm's corporate and business transactions, investment management, white collar defense, and labor and employment practices to advise clients on regulatory and litigation matters.

She also uses her broad ESG enforcement and policy experience to counsel public companies and registrants as they develop proactive ESG strategies, create investment products, consider disclosure requirements, and identify investment opportunities.

Read Kelly's extended profile here: <https://www.morganlewis.com/bios/kellygibson>

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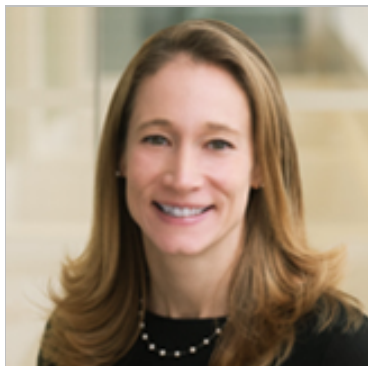
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Peter focuses his practice on securities regulatory matters, litigation and arbitration, and internal investigations. Peter represents broker-dealers, financial services firms, and individuals in civil litigation matters and arbitration proceedings relating to securities issues, and in connection with investigations, examinations, and enforcement proceedings brought by the SEC, FINRA, or state regulators. He conducts internal investigations on behalf of management or independent directors or trustees. He also counsels clients on a wide variety of regulatory, compliance, and corporate governance issues.

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Amy advises registered funds, including mutual funds and ETFs, and their investment advisers in a number of areas, such as SEC filings, regulatory and compliance issues, corporate matters, and Board governance. Amy also helps clients with advocacy efforts surrounding SEC rulemakings and advising on subsequent implementation and compliance questions. Amy is an active member of the firm's ESG and sustainability working group, and frequently advises clients on ESG investing, disclosure, and compliance questions. In addition to supporting clients in drafting fund documents, including registration statements, proxy materials, and exemptive applications, Amy has experience in a broad range of legal, regulatory, and transactional matters.

Read Amy's extended profile here:

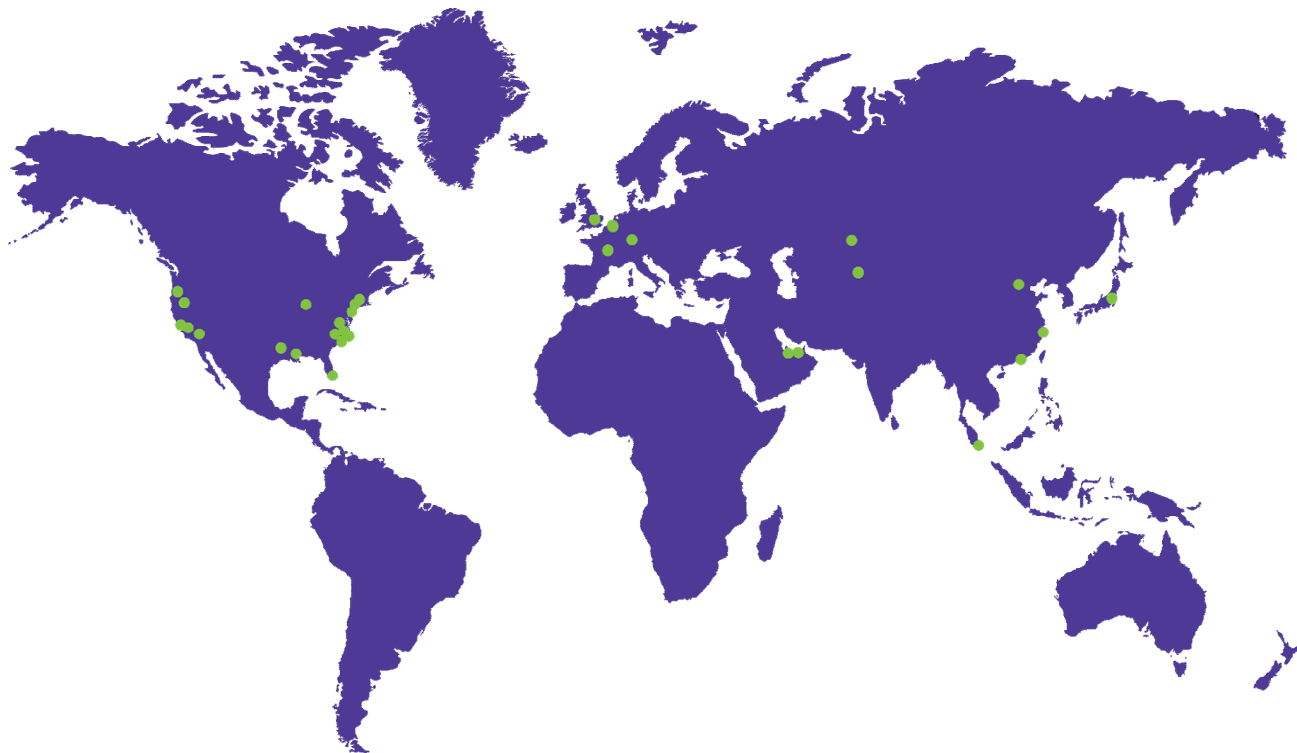
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