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SEC Receives Complaint of Alleged Greenwashing by International Energy Company

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On February 1, 2023, Global Witness – an international non-governmental organization – **filed** what it called a "groundbreaking greenwashing complaint" with the Securities and Exchange Commission (SEC)'s Climate and ESG Task Force asking the that it investigate Shell plc for possible violations of the federal securities laws.

Global Witness claims that Shell may be misleading investors by overstating its financial investments in energy sources under Shell's "Renewables and Energy Solutions" (RES) reporting segment. RES **includes** Shell's production and marketing of hydrogen, nature and environmental solutions and integrated power activities.

According to Global Witness's complaint, Shell has "mislabeled" the RES segment because it includes investments in fossil fuel-related activities that are not renewable or energy solutions. For example, Global Witness alleges that a "significant portion" of Shell's spending on RES is directed toward marketing and trading "natural gas" and gas-generated power. Citing international and domestic authorities, Global Witness claims that gas is not renewable or an energy solution.

Global Witness identifies two possible securities violations with Shell's RES segment. First, Global Witness alleges that lumping renewable and gas-related activities in the RES segment may not comply with International Financial Reporting Standards, which have specific criteria for what qualifies as a "reporting segment" and what can be aggregated under that reporting segment.

Second, Global Witness claims that the RES segment disclosure may either omit material facts that would give Shell's investors a clear understanding of the company's transition to renewable energy sources, or the representation that there is a segment that may qualify as a materially misleading statement because the segment includes a significant portion of spending on non-renewable and non-energy solutions. Global Witness suggests that, while Shell reported 12%

capital expenditures on RES in 2021, the company spent only 1.5% total capital expenditure on developing renewable sources of energy such as wind and solar. These misstatements, according to Global Witness, "would have the effect of exaggerating the extent to which Shell is reducing its dependence upon fossil fuels and investing instead in renewable energy sources." Global Witness also claims that the RES segment may "obscure" for investors the "large and growing role that gas plays in Shell's portfolio."

According to **press reports**, Shell categorically denies misleading investors, stating that it is "confident" its "financial disclosures are fully compliant with all SEC and other reporting requirements."

Taking the Temperature: Global Witness's complaint is just the most recent example of the heightened scrutiny companies are facing regarding claims of greenwashing – both from stakeholders and regulators around the world. As we previously reported, European regulators are seeking feedback from the EU financial sector on potential greenwashing practices. The Australian Securities and Investments Commission (ASIC) has also already imposed two greenwashing-related fines. More generally, we have commented on the increase in the number and varieties of climate-related litigation, including those commenced by NGOs like Global Witness. A different NGO recently commenced litigation in France against Danone under France's Corporate Duty of Vigilance Law on the basis that the company does not have an adequate plan to reduce its plastic footprint. We expect the trend of robust litigation and enforcement climate-related activity to continue. With respect to the Global Witness's complaint, the SEC started the ESG Task Force within the Division of Enforcement "to develop initiatives to proactively identify ESG-related misconduct consistent with increased investor reliance on climate and ESG-related disclosure and investment." The agency, however, is not required to open an investigation based on a complaint, which is not evidence of wrongdoing. As for Shell and other energy producers, we observe that they confront the challenge of both continuing to supply approximately 80% of the world's energy, including energy necessary to manufacture equipment required for renewable energy production, while at the same time navigating their own organization's climate transition, including the tasks of governance, data collection/assessment and disclosure. They should be held to the same standards as companies in other industries attempting to navigate a complex and dynamic environment where consensus around issues like data integrity and disclosure continues to emerge.