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WisdomTree Wells Notice could center on ESG representations



SEC staff have concluded an investigation involving several now-liquidated ETFs.

August 8, 2024 *By Emile Haller*



WisdomTree is facing a likely SEC enforcement action related to three ESG-themed ETFs that the company liquidated earlier this year.

The company disclosed in a regulatory filing Tuesday that it had received a Wells Notice a day earlier from the Securities and Exchange Commission, which indicates that the regulator has concluded an investigation and that its staff have recommended an enforcement action.

It's unclear what sections of federal securities law WisdomTree Asset Management allegedly violated, as the firm did not specify that in the regulatory filing. However, the company opted to say that the Wells Notice pertained to three ETFs with ESG-focused investment strategies that once represented a total of \$119 million in average assets and have since been liquidated.

"We maintain that WTAM's actions have been in compliance with all applicable laws and regulations and intend to pursue the Wells Notice process, which will include the opportunity to respond to the SEC staff's position," a company spokesperson said in an email. "We have cooperated at every step of this process, and we will continue to do so."

The SEC staff's recommendation could include "a civil injunctive action or other action allowed by law, and may seek remedies that include injunctions, disgorgement, pre-judgement interest, civil money penalties, and such other relief as may be available," the company said in the regulatory filing.

A Wells Notice "is the first step in the enforcement process, so it's always very serious," said David Chase, a former senior counsel at the SEC who now defends clients in SEC actions as well as whistleblowers.

It is generally up to Wells Notice recipients to determine whether to disclose that they are facing enforcement actions, though they may be compelled to do so when those are material to a company and its operations, he noted.

In WisdomTree's case, the company's wording of the disclosure could be intended to downplay the significance of the notice, as it noted the small size of the three ETFs and the fact that they have since been liquidated, he said.

"What they didn't include, which they could have ... [are] the particular provisions of the federal securities laws that the staff is intending to recommend as charges," he said. "Absent some egregious conduct ... my guess would be it's going to concern the representations and disclosures made about the nature of these ESG-focused investment strategies."

Last year, the SEC approved changes to its fund names rule, including provisions about **ESG naming**. While that rule went into effect at the end of 2023, most funds do not have to comply with it until mid-2027.

Still, ESG representation has been an enforcement focus. **Last September**, for example, the SEC fined Deutsche Bank subsidiary DWS Investment Management

Americas **\$19 million** for allegedly making misleading statements about the incorporation of ESG factors for some of its actively managed mutual funds and separately managed accounts.

A Wells Notice is not a guarantee that the SEC will follow through with enforcement actions, and companies can respond to the notices to potentially convince the regulator to not further pursue them, Chase said. "But that's very difficult," he noted.

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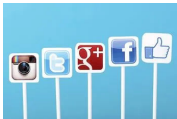
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