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## SEC ROASTS KEURIG FOR CLAIMS REGARDING RECYCLING OF K-CUP PODS

COMMISSIONER STRONGLY DISSENTS

Sep 17, 2024

### WHAT HAPPENED

On September 10, 2024, the SEC announced that it had charged Keurig Dr. Pepper for making incomplete, and therefore inaccurate, statements regarding the recyclability of its popular K-cup pods. Specifically, Keurig made statements in two Form 10-Ks that indicated that its pods could be “effectively recycled,” without revealing that two of the largest commercial recyclers had told Keurig that the recycling of the pods at such time was not commercially feasible, and therefore, the companies did not intend to accept pods at their respective facilities. To settle the SEC’s charges, Keurig agreed to pay a \$1.5 million civil penalty and entry of a cease and desist order.

### TAKEAWAYS

Companies should review their disclosures to ensure that they are not making statements that may be technically accurate, but that may not present the full picture. As noted by the dissent of Commissioner Peirce, as discussed below, the SEC may challenge product statements, even when the materiality of the statements may be subject to question. This may be particularly applicable to disclosure regarding environmental matters, given the SEC and public’s focus on greenwashing.

### DEEPER DIVE

The SEC order discussed the background of the charges, including the establishment of a company goal to achieve recyclability of pods, and testing by the company to demonstrate recyclability, including RF tagging of pods during the recycling process.

#### Potential significance of recyclability

According to the SEC order, consumer research conducted by Keurig in 2016 indicated that environmental concerns, among others, were a significant factor for certain customers when deciding whether to purchase a Keurig brewing system. The importance of environmental concerns

was also suggested by Keurig's Form 10-Ks. In its FY 2018 10-K, Keurig disclosed its goal that all of its pods be recyclable by 2020. Additionally, in each of its FY 2019 and 2020 10-Ks, Keurig included a consumer preference risk factor which stated in part:

*Consumers are also increasingly focused on sustainability, with particular attention to the recyclability of product packaging, reducing consumption of single-use plastics and non-recyclable materials, and the environmental impact of manufacturing operations. If we do not meet consumer demands by providing recyclable packaging options and focusing on sustainability throughout our manufacturing operations, our sales could suffer.*

The SEC order further stated that sales of pods comprised a significant percentage of net sales of Keurig's coffee system business segment in 2019. This disclosure might also be interpreted to indicate the potential importance of the pods' recyclability to the company's business.

### **Testing and Disclosure**

According to the SEC order, in connection with its 2016 consumer research, Keurig reviewed options to change its pods to make them recyclable. Keurig determined that pods made of polypropylene number 5 plastic, sold in packaging with appropriate instructions, would achieve this goal. However, Keurig was aware of recycling industry concerns that small items like the pods could not be processed and recycled at recycling facilities. In part to address these concerns, Keurig performed tests at various recycling facilities in the United States and Canada beginning in 2016 utilizing RF identification readers at various points in the recycling process to follow the movement of pods tagged with a tracking chip. These tests enabled Keurig to track the flow of pods through the facility, including the ultimate destination of pods, and assess whether pods were processed and sorted correctly. Keurig's tests reflected that pods typically could be successfully sorted from other materials during the recycling process.

According to the SEC, after Keurig's testing, two recycling companies that were involved in the testing provided negative feedback regarding commercial feasibility of curbside recycling of pods at that time and indicated that they did not intend to accept pods at their own recycling facilities at such time. The two companies were among the largest, operating more than one-third of U.S. recycling facilities.

### **SEC Order**

Based upon Keurig's 2019 and 2020 fiscal year Form 10-Ks, the SEC order indicated that Keurig violated Section 13(a) and Rule 13a-1 under the Exchange Act that require accurate and complete 10-K filings. Keurig, without admitting or denying the findings in the order, agreed to pay a \$1.5 million civil penalty and consented to a cease-and desist order from committing or causing any violations and future violations.

### **Commission Peirce's Dissent**

Commissioner Hester Peirce released a [statement](#) dissenting from the order. She indicated that Keurig's statements regarding the pods' ability to be "effectively recycled" remain accurate even if a third-party recycler elects not to do so. She asserted that the SEC misread Keurig's statement that the pods *could* be recycled as an assertion that the pods *would* be recycled. Commissioner Peirce believes the statement remains accurate, irrespective of whether decisions by a third party meant that the pods would likely not be recycled. For example, she asks whether Keurig's statements would be any less accurate if recycling companies accepted the pods, but most consumers simply threw them in the trash because it was easier.

Commissioner Peirce also emphasized that the SEC order does not indicate that the statements at issue were material. In her view, the closest the SEC comes in this regard is the statement that the sales "comprised a significant percentage of net sales of Keurig's coffee systems business segment" in 2019. She also believes that the fact that certain *consumers* identified environmental concerns as a factor, among others, when deciding whether to purchase a Keurig brewing system in 2016 does not mean that the recyclability of pods was material to *investors* in 2016 or 2019.

Commissioner Peirce also noted that the absence of any charges against Keurig on the basis of the antifraud rules (Exchange Act Section 10(b) and Rule 10b-5, Securities Act Section 17(a) or Exchange Act Rule 12b-20) is telling of the weakness of the SEC's case.

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