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# Regulatory and Litigation Updates on Greenwashing and ESG Claims

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# Regulatory and Litigation Updates on Greenwashing and ESG Claims

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CELESQ WEBINAR

MAY 9, 2023

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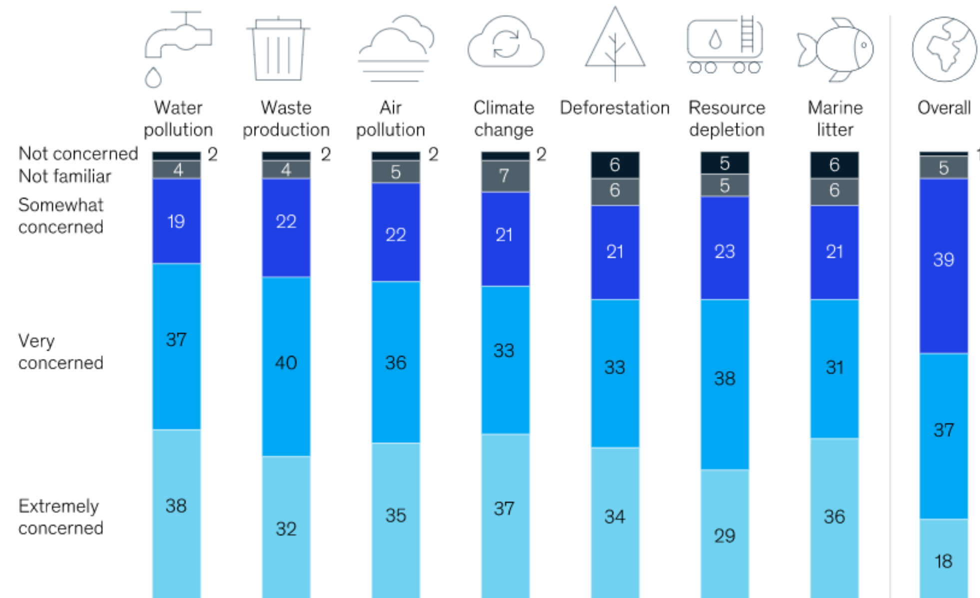
# Agenda

- Background and Overview of Greenwashing and ESG Claims
- Regulatory Updates on Greenwashing and ESG Claims
- Litigation Updates on Greenwashing and ESG Claims
- Evolution of ESG Investment and Reporting

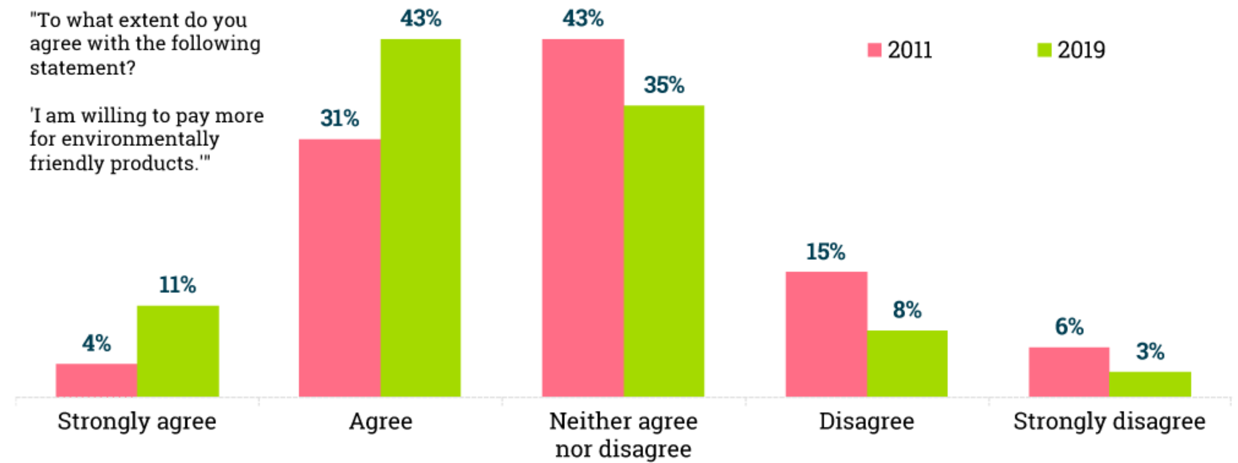
# Background and Overview and Regulatory Updates on Greenwashing and ESG Claims

ALICE DOUGLAS, ESQ.

# More and more consumers are seeking “green” or “environmentally friendly” products and services




| | Water pollution | Waste production | Air pollution | Climate change | Deforestation | Resource depletion | Marine litter | Overall |
|---|---|---|---|---|---|---|---|---|
| Not concerned | 2 | 2 | 2 | 2 | 6 | 5 | 6 | 1 |
| Not familiar | 4 | 4 | 5 | 7 | 6 | 5 | 6 | 5 |
| Somewhat concerned | 19 | 22 | 22 | 21 | 21 | 23 | 21 | 39 |
| Very concerned | 37 | 40 | 36 | 33 | 33 | 38 | 31 | 37 |
| Extremely concerned | 38 | 32 | 35 | 37 | 34 | 29 | 36 | 18 |



# Companies have picked up on these preferences and have adjusted their marketing strategies

# Enter Greenwashing…

# Greenwashing Origins

# FTC Green Guides

In response to growing public concern regarding greenwashing, in 1992, the Federal Trade Commission (FTC) published an administrative guidance document entitled the Guides for the Use of Environmental Marketing Claims (the Green Guides or Guides) to help companies avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45.

In developing the Guides, the FTC relied upon consumer surveys to explain how reasonable consumers are likely to interpret various environmental claims and offered non-binding guidance on how to substantiate environmental claims to avoid deceiving consumers.

# Potential Updates to the Green Guides

- Following revisions in 1996, 1998, and 2012, the FTC published notice in the Federal Register on December 20, 2022, that it is now undertaking a decennial review of the Green Guides and is seeking public comment on potential updates to the Guides.
- The FTC is seeking feedback on the efficiency, costs, benefits, and regulatory impact of the Guides to determine whether to retain, modify, or rescind them.
- The public comment period closed on April 24, 2023, and additional regulatory guidance is expected in 2023.
- Moreover, the FTC is hosting a free, public workshop on May 23, 2023, to examine "recyclable" advertising claims, including current practices, consumer perception, and any necessary updates to the Green Guides on recyclable claims.
- The FTC is welcoming public comment on that topic until June 13, 2023.

# The FTC has received comments on the following:

- ✓Retaining the Guides
- ✓Making the Guides mandatory
- ✓Modifying the Guides to address technological advancements and economic changes
- ✓Increasing clarity of the Guide's requirements and consistency with other regulatory frameworks, including the EU's proposals and rules
- ✓Updating the Guide's language on recycled content, climate change, and carbon offsets claims

# EU Proposal for a Directive on Green Claims

On March 22, 2023, the EU proposed a Directive on Green Claims to address greenwashing

Much like the Green Guides, the Directive would address:

- ✓Methods of proving environmental claims with reliable data
- ✓Standardized criteria to support various environmental claims
- ✓Responsible use of third-party certifications, including an analysis of their methodologies
- ✓Measuring and reducing the environmental impact of products and services

# What is ESG?
# (Environmental, Social, and Governance)

**Environmental:**

- Climate change
- Greenhouse gas emissions
- Biodiversity, air and water quality, deforestation, waste management
- Supply chain and resources

**Social:**

- Workplace culture
- Diversity, equity and inclusion
- Community involvement
- Human rights and labor standards

**Governance:**

- Anti-corruption
- Internal controls
- Leadership, board composition, executive compensation, audit committee structure, shareholder rights, bribery, lobbying, political contributions, and whistleblower programs

# SEC Climate and ESG Task Force

- In 2021, the Securities and Exchange Commission (SEC) announced the creation of a Climate and ESG task force.
- As investors increase their focus and reliance on climate and ESG-related disclosures and investments, the Climate and ESG Task Force will work to identify ESG related misconduct, including through sophisticated data analysis to mine and assess information across registrants, to identify potential violations.
- The Task Force will also evaluate and pursue tips, referrals, and whistleblower complaints on ESG-related issues.

# SEC Regulatory Updates

- Early last year, the SEC also published notice of two proposed rulemakings which would impose specific ESG disclosure requirements on SEC registrants, investment advisers, and business developers, including:
  - Disclosure of greenhouse gas emissions associated with portfolio investments
  - Description of specific impacts and progress of ESG related funds
  - Explanation of protocols for proxy voting on ESG related matters
  - Existence of ESG engagement meetings
- The public comment periods for both rulemakings are closed, and additional regulatory developments related to ESG are expected in 2023.

# Third-Party Certifications in the Greenwashing Space

Many third-party, nongovernmental organizations have stepped in to provide independent review of companies' performance on a variety of ESG criteria, including greenhouse gas emissions, labor relations, and animal welfare initiatives.

While these certifications can be helpful to both marketers and consumers to convey ESG benefits, they have also been the subject of greenwashing complaints.

# Third-Party Certifications in the ESG Space

With increased attention to companies' ESG policies and procedures, third-party certifiers are also stepping in to help evaluate and report these metrics out to regulators and potential investors.

The methodologies and scoring criteria can vary widely, but with increased regulatory guidance, they may become more uniform.

Again, it is important to think through which certifier and level of reporting would be appropriate for each company.

# Suggested Best Practices

- While we await continued greenwashing and ESG regulatory changes, here are some suggested best practices to keep in mind:
  - Ensure that all ESG claims are substantiated with reliable data
  - Retain records of all data that supports various ESG claims
  - Consult with counsel prior to making ESG claims
  - Refer to the FTC Green Guides, SEC regulations, and other requirements when making ESG claims
  - Set “reminders” for greenwashing and ESG regulatory updates, case law, articles, etc.
  - When discussing future targets/goals, opt for clearly aspirational language
  - Vet third-party certifiers, including their methodology and their likely effect on consumers
  - Attend conferences, continuing legal education sessions, and other ESG events

# Litigation Updates on Greenwashing and ESG Claims

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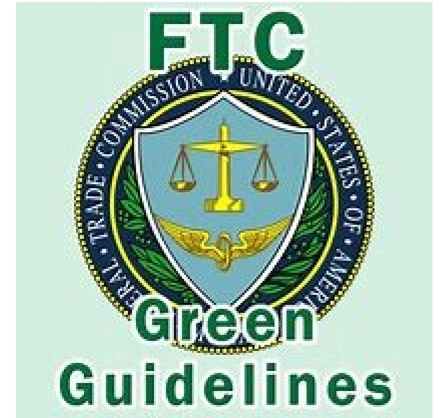



# Rise of Greenwashing Litigation

# What is an Environmental Benefit Claim?

Typically tied to the Advertising/Promotion of a Product or Service:

- No environmental impact
- Positive environmental impact
- Current product is less damaging to the environment than prior versions of the same product
- Product is less damaging to the environment than competitor’s product

# Common Forms of Greenwashing

- Misleading Symbols
- Questionable Certifications and Labels
- Vagueness
- Empty Claims and Policies
- Selective Disclosure
- Jargon
- Lack of Proof
- Lies

# First Of Its Kind Greenwashing Suit!

- *Client Earth v. Washington Gas Light Co*., No. 2022-CA-00323, Superior Court of the District of Columbia
  - Pending 12(b)(1) and 12(b)(6) Motions to Dismiss
- Ruling could have ramifications in California, Oregon, Colorado, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, and Texas – states with similar marketing practices.
- Implications for “clean” fossil fuel movement.

# Greenwashing & Diversity, Equity, & Inclusion Litigation

- DEI Pledges post George Floyd – in SEC filings, press releases, news articles, shareholder communications, and posts on websites
- Allegations of sham interviewing, price of stock drops once “scandals” become public, regulators place an asset cap on growth due to failure to adhere to proper management and compliance standards
- Board of Directors took no action to address DEI problems
- Cause of Actions – Breach of Fiduciary Duty, Corporate Waste, Unjust Enrichment, Violation of Federal Securities Laws
- In the past three years, there have been over 40 lawsuits alleging greenwashing of DEI initiatives or reverse discrimination

# Examples of Successful Motions to Dismiss

## *EARTH ISLAND INSTIT. V. COCA-COLA CO.,* 1:21-CV-01926-PLF (D.C. SUPERIOR COURT)

- Injunctive and declaratory relief sought for violations of the DC Consumer Protection Procedures Act. Plaintiffs alleged that the Coca-Cola was falsely and deceptively marketing itself as committed to sustainability and reducing plastic pollution.
- Coca-Cola's attempt at removal to federal court failed under 28 U.S.C. § 1332(a).
- Coca-Cola filed a 12(b)(6) motion to dismiss the complaint:
  - Court found the following statements general, aspirational corporate ethos and not misleading.
    - "Our planet matters. We act in ways to create a more sustainable and better shared future. To make a difference in people's lives, communities and our planet by doing business the right way."
    - "Scaling sustainability solutions and partnering with others is a focus of ours."
- Currently pending appeal in D.C. Court of Appeals.

# Examples of Successful Motions to Dismiss

## SWARTZ V. COCA-COLA CO., 21-CV-04643-JD (NORTHERN DISTRICT OF CALIFORNIA)

- Several plaintiffs sued Coca-Cola, Blue Triton Brands and Niagara Bottling alleging that the "100% recyclable" labels on their single-use plastic bottles were false and misleading.
- Claims were brought under the California Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law. Other claims included fraud, deceit, misrepresentation, and negligent misrepresentation.
- Defendants filed a 12(b)(6) motion to dismiss; Court granted motion:
  - Reasonable consumer would not understand "100% recyclable" to mean that the entire product would always be recycled or that the product is "part of a circular plastics economy in which all bottles are recycled into new bottles to be used again."

# Future Greenwashing Litigation?

## ENVIRONMENTAL JUSTICE

- Advertising Targeted to Specific Communities
- Tension between country's energy development and the needs of vulnerable communities

## FORCED LABOR

- Child Labor
- Unethical Sourcing

# Mitigation/Litigation Tips

## OFFENSIVE STRATEGIES

- Think beyond consumer products and services.
- Review environmental benefit claims on an ongoing basis and incorporate review into existing corporate compliance programs.
- Review recycling programs in jurisdictions where your product is sold.
- Appropriately allocate risks among vendors and in supply chain.
- Speak the truth, and the full truth.

## DEFENSIVE STRATEGIES

- Think about crisis communication strategy.
- File notice of removal to federal court on legal theory that the amount in controversy requirement is met by costs of remedying the alleged wrongs.
- Consider filing a 12(b)(1) and 12(b)(6) motion.
- Seek to argue for the plain meaning of terms.
- Challenge plaintiffs’ standing – injury in fact.
- Hold plaintiff to burden of proof, particularly if data requiring substantiation is inconclusive.

# Evolution of ESG Investment and Reporting

JONATHAN NWAGBARAOCHA, ESQ.

# Evolution of ESG Investment and Reporting

- Socially responsible investing in the U.S. manifesting in different ways over the years
  - 18th century religious institutions resisting investments in companies manufacturing liquor or tobacco products or promoting gambling
  - 1960's Vietnam War protestors demanded that university endowment funds no longer invest in defense contractors
  - 1980's investors excluded stocks or entire industries from their portfolios based on business activities such as involvement in the South African apartheid regime
- ESG first mentioned in the 2006 United Nation's Principles for Responsible Investment consisting of the Freshfield Report and "Who Cares Wins."
  - Bank and other investment stakeholders summarized key ESG issues
  - The report provided several recommendations for integrating ESG issues in analysis, asset management and securities brokerages.
  - The group proposed that greater inclusion of ESG factors in investment decisions will contribute to more stable and predictable markets.

# Evolution of ESG Investment and Reporting (cont’d)

- Over time companies responded to variety of regulatory and shareholder pressure by providing information related to ESG
- Form 10-K Environment Risk Disclosures
  - Historically describing significant environmental risks related to the business such as liability under the Comprehensive Environmental Response, Compensation and Liability Act, or "CERCLA," also known as the "Superfund Act”.
  - Shareholder proposal put pressure on companies including BP, Exxon Mobil, Occidental Petroleum, and PPL Corporation to disclose climate change risks.
- Conflict Minerals –Section 1502 of the Dodd-Frank Act amending the Securities and Exchange Act of 1934
  - Companies are required to disclose annually to the Security & Exchange Commission (SEC):
    1. its due diligence to determine the source and chain of custody of gold, tin, tungsten, and tantalum (“conflict minerals") that are necessary for the functionality or production of their products; and
    2. whether any such “conflict minerals” originate from the Democratic Republic of the Congo (DRC) or adjoining countries and whether trading in those minerals benefitted armed groups.

# ESG and SEC Enforcement

Overview: Vale S.A., a publicly traded Brazilian mining company and one of the largest iron ore producers in the world, agreed to pay $55.9 million to settle charges brought last April stemming from the company's allegedly false and misleading disclosures about the safety of its dams prior to the January 2019 collapse of the Brumadinho dam that killed 270 people.

Key Facts:

- SEC's complaint alleged that, for years, the dam did not meet internationally-recognized safety standards even as Vale's public sustainability reports assured investors that all of its dams were certified as stable
- Demonstrates the interplay between the company's sustainability reports and its obligations under the federal securities laws

# Evolution of ESG Investment and Reporting
(cont'd)

- Variability in How and What Information is Disclosed
  - No universal standard exists
  - ESG reporting does exist in the form of regional reporting frameworks, voluntary standards, and national legislation that vary significantly.
    - Global Reporting Initiative (GRI) (1997)
    - Carbon Disclosure Project (CDP) (2000)
    - Sustainability Accounting Standards Board (SASB) (2011)
    - Taskforce on Climate-related Financial Disclosures (2015) (TCFD)
    - Workforce Disclosure Initiative (WDI) (2016)
- Recent proposed ESG disclosures in the United States and European Union focused on establishing a framework

# U.S. Securities and Exchange Commission (SEC) Proposed Rules

- In March 2022, the SEC proposed rules that would mandate enhanced climate-related disclosures by all public companies in the 10-K. *See* Securities and Exchange Commission, The Enhancement and Standardization of Climate-Related Disclosures for Investors (2022).
- Several new disclosures would be required including:
  - Oversight and governance of climate-related risks by board and management;
  - Company's processes for identifying, assessing, and managing climate risks and how those processes fit into overall risk management;
  - The impact of climate-related events (e.g., severe weather) and transition activities (e.g., policy changes) on the line items of the company's consolidated financial statements and on its financial estimates and assumptions used in the financial statements;
  - Scope 1 and 2 emissions metrics both by disaggregated constituent greenhouse gases and in the aggregate, reported in absolute and intensity terms; and
  - Scope 3 emissions and intensity if material, or if the company has set an emissions target that includes Scope 3 emissions, with some exceptions.

# U.S. Securities and Exchange Commission Proposed Rules (cont'd)

- The SEC's public comment period on the proposed rules closed on June 17th, extended from May 20th
- The comment period was reopened again from October 7th-November 1st due to a "technological error" that impacted certain comments submitted via internet form
- The SEC received over 15,000 comments:
  - Comments in favor focused on the benefits to investors and the broader economy
  - Comments in opposition focused on the legal authority of the SEC and compliance costs
- The final rules are rumored to be forthcoming, but there is uncertainty about the timeline of the final rule and how the final rule will address:
  - scope 3 emissions; and
  - the bright-line test that if climate-related costs and risks affect more than 1 percent of a line item in a financial report, those costs and risks must be disclosed

# European Union Corporate Sustainability Reporting Directive (CSRD)

- EU CSRD adopted by EU Parliament on November 28, 2022
- Requires "large companies" in the EU to disclose data on the impact of their activities on people and the planet and any sustainability risks they are exposed to. The directive defines a large company as an entity that meets two of the following three criteria:
  - (a) a net turnover of more than €40 million;
  - (b) balance sheet total assets greater than €20 million; and/or
  - (c) more than 250 employees;
- The CSRD provides the framework for companies to report environmental, social, and governance (ESG) data

# European Sustainability Reporting Standards (ESRS) Update

- ESRS adopted by the European Financial Reporting Advisory Group (EFRAG) in November 2022
- The ESRS outlines requirements for detailed corporate reporting on a broad range of environmental, social, and governance (ESG) issues across four areas:
  - Cross-cutting:(ESRS 1) General requirements; (ESRS 2) General disclosures.
  - Environment:(ESRS E1) Climate change; (ESRS E2) Pollution; (ESRS E3) Water and marine resources; (ESRS E4) Biodiversity and ecosystems; (ESRS E5) Resource use and circular economy.
  - Social:(ESRS S1) Own workforce; (ESRS S2) Workers in the value chain; (ESRS S3) Affected communities; (ESRS S4) Consumers and end-users.
  - Governance:(ESRS G1) Business conduct.
- There are 84 disclosures required in the ESRS including:
  - material impacts, risks and opportunities related to biodiversity and ecosystems;
  - the percentage gap in pay between women and men and the ratio between the compensation of its highest paid individual and the median compensation for its employees; and
  - standard contractual payment terms for contractors.
- EU Commission expected to adopt ESRS by June 30, 2023.
- Sector–Specific standard expected later

# Who Owns ESG?

## Environment

- EHSS – Products
- EHSS – Facilities and Operations
- Product Development
- Product Delivery
- Reuse and Takeback

## Social

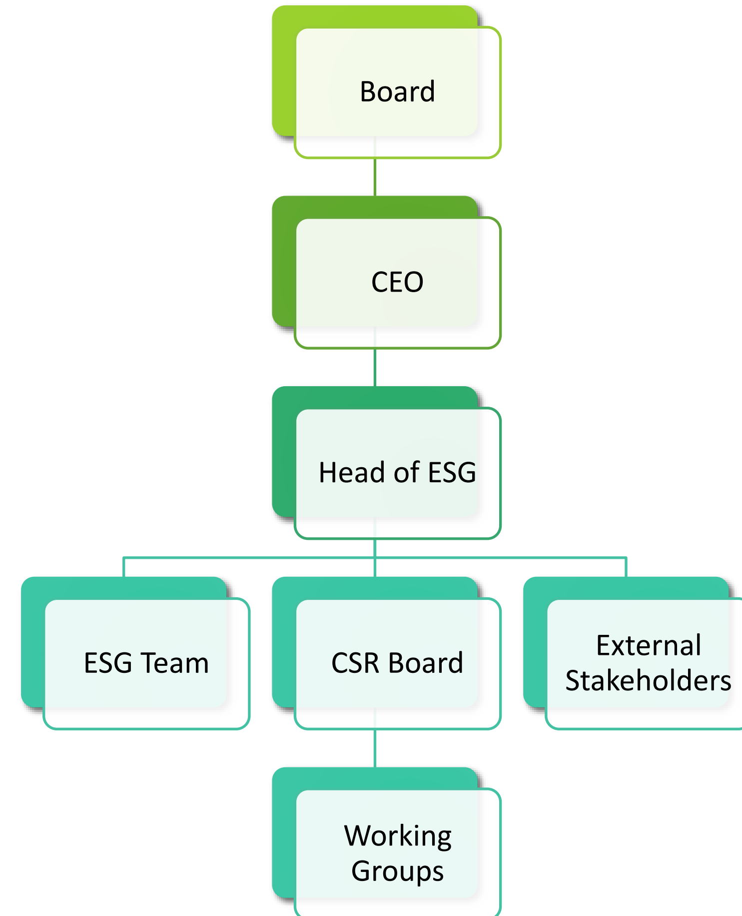
- Human Resources
- Procurement
- Supply Chain
- Volunteer/Public Engagement

## Governance

- Ethics/Compliance
- Internal Audit
- Corporate Secretary
- Corporate Board

# ESG Management

- **Board** – Oversight
- **CEO** - Commitment and leadership
- **Head of ESG** - Ensure focus on advancing sustainability strategy and the company’s program
- **Cross-Functional ESG Council** – Engage leadership across business units, regions and functions (Chair and Executive Chair)
- **ESG Team** - Coordinate daily activities & implement initiatives
- **ESG Working Groups** - Assist in integration of strategy and goals
- **External Stakeholders –** Refine program and process to collect data and engage stakeholders



# Lessons Learned/Best Practice

- SEC filed vs. furnished and liability
  - Section 18 of the Exchange Act imposes liability for material misstatements or omissions contained in reports and other information filed with the SEC unless it can be established that the entity acted in good faith and had no knowledge that the statement in question was false or misleading.
    - “Filed” reports are liable under Section 18
    - “Furnished” reports and other information do not attract liability under Section 18.
  - Conflict Minerals Report is considered a “Filed Report”
  - Proposed SEC Climate Change Disclosure Rules would be considered “Filed Report”
- Develop engagement strategy for Senior Leadership, including Board of Directors
- Critical to define roles and responsibilities
- Participate in building data collection and processing systems

# Questions?

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Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting

Talking Trash at the FTC: Recyclable Claims and the Green Guides | Federal Trade Commission

Dozens of lawsuits filed after companies fail to fulfill diversity promises, per a new report (www.thegrio.com)

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ENVIRONMENTAL LAW

# Developments in Greenwashing and ESG Regulation and Litigation Expected in 2023

BY SHOSHANA SCHILLER, ALICE DOUGLAS AND BRENDA GOTANDA
*Special to the Legal*

In 2022, there was increasing attention paid to companies' public promotion of their environmental and sustainability programs. That trend is likely to continue in 2023, with further developments in regulation and litigation pertaining to "greenwashing"—a marketing practice that involves unsubstantiated or exaggerated claims about the environmentally friendly or socially responsible attributes of an organization's products or services.

The term greenwashing was first used by environmentalist Jay Westerveld in a 1986 essay in which he suggested that the "save-a-towel" campaigns promoted by hotel chains were primarily motived by cost-savings, rather than environmental considerations, despite hotel marketing materials suggesting otherwise. In response to growing public concern regarding greenwashing, in 1992, the Federal Trade Commission (FTC) published an administrative guidance document titled the Guides for the Use of Environmental Marketing Claims to help companies avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. Section 45. In developing the guides, the FTC relied upon consumer surveys to explain how reasonable consumers are likely to interpret various environmental claims, and offered nonbinding guidance on how to substantiate environmental claims so as to avoid deceiving consumers. Following revisions in 1996, 1998, and 2012, the FTC published notice in the Federal Register on Dec. 20, 2022, that it is now undertaking a decennial review of the guides and is seeking public comment on potential updates to the guides. There is a public comment period until April 24, 2023. The FTC is seeking feedback on the efficiency, costs, benefits, and regulatory impact of the guides to determine whether to retain, modify, or rescind them. It is also inviting comment on specific types of environmental benefit claims that have received increased attention in the past several years.

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Separately, but relatedly, the Securities and Exchange Commission (SEC) announced the creation of a Climate and Environmental Social and Governance (ESG) Task Force on March 4, 2021. The current understanding of the acronym ESG (referencing environmental, social, and corporate governance) seems to have originated from a 2005 United Nations study, which urged companies to develop and report on their policies addressing climate change and human rights issues, among others, to inform their financial analyses and investors' strategies. Early last year, the SEC published notice of two proposed rulemakings which would impose specific ESG disclosure requirements on SEC registrants, investment advisers, and business developers. The public comment periods for both rulemakings are closed, and additional regulatory developments related to ESG are expected in 2023.

From a litigation standpoint, a number of greenwashing class action lawsuits, many of which rely upon alleged divergences from the Green Guides and companies' ESG statements, will continue to make their way through the courts in 2023, with potentially significant decisions on class certification and the merits of these claims expected in the coming year.

In *Woolard v. Reynolds Consumer Products*, No. 22-CV-1684 (S.D. Cal. Oct. 18, 2022), a putative nationwide class action case, suit was brought against the manufacturer of Hefty trash bags for allegedly misrepresenting that its "recycling"

trash bags are recyclable. According to the complaint, Hefty "recycling" trash bags are made from low-density polyethylene and are not in fact recyclable. Instead, the complaint alleges, "the bags and all of the otherwise recyclable items within them are not delivered to a recycling facility but are treated as regular solid waste materials," finding their way to landfills or incinerators.

Similarly, in *Curtis v. 7-Eleven*, No. 21-cv-6079 (N.D. Ill. Sept. 13, 2022), the U.S. District Court for the Northern District of Illinois reviewed 7-Eleven's motion to dismiss a putative class action alleging that the company falsely and deceptively marketed its party cups, freezer bags, and foam plates and cups as "recyclable" despite knowing that very few recycling facilities accept these products and that some of these products lacked markings, known as RIC numbers, which recycling facilities use to sort products by plastic type. Significantly, the court found that the putative class representative was entitled "to sue on behalf of class members with substantially similar injuries from similar products" after recognizing that there was a federal district court split on this issue. The court went on to find that 7-Eleven could only be held responsible on the putative class representative's first claim regarding the lack of RIC numbers, which make those products intrinsically incapable of being recycled, while 7-Eleven could not be held responsible for extrinsic economic and social factors that make it unlikely that their products will ever be recycled.

The U.S. District for the Northern District of California came to the same conclusion in *Swartz v. The Coca-Cola Co.,* No. 21-cv-04643 (N.D. Cal. Nov. 18, 2022), in which the court granted the defendants' motion to dismiss the plaintiffs' claims that the "100% recyclable" labels on single-use plastic bottles were false and misleading because most plastic bottles are not recycled and instead end up in landfills or incinerators due to a lack of recycling capacity and a lack of demand for recycled plastics. Like in *Curtis*, the court in *Swartz* found that the term "recyclable" denotes only that the material itself is capable of being recycled, not that it actually will be recycled, and dismissed the plaintiffs' claims that relied on that theory.

The Superior Court for the District of Columbia dealt with similar "puffing" statements made on Coca-Cola's website and social media accounts in *Earth Island Institute v. The Coca-Cola Co.,* No. 2021 CA 001846 B (D.C. Super. Ct. Nov. 10, 2022). The court found that neither the company's general statements about sustainability, nor its more specific statements espousing its recycling goals, were sufficient to support a valid consumer fraud claim because the statements at issue were "aspirational, limited and vague," and nothing in the law "prohibits an entity from cultivating an image" or branding itself.

Conversely, in *Henriquez v. ALDI,* No. 2:22-cv-06060 (C.D. Cal. Feb. 7, 2023), the court found that state consumer fraud claims relating to statements made on ALDI's packaging, website, and social media accounts that its canned tuna is "dolphin safe" and "sustainable" were sufficiently plead to survive ALDI's motion to dismiss. In that case, the plaintiff pointed to several allegedly fraudulent statements which could mislead a reasonable consumer as to the fishing methods used to obtain the tuna, including ALDI's use of a unique "wild caught" logo on its tuna cans, and emphasis on its website that it participates in a number of independent partnerships that promote ethical and sustainable fishing.

Although the analysis can at times be nuanced, there is likely a meaningful distinction between the aspirational, forward-looking statements that were challenged in *Earth Island Institute* and measurable, verifiable statements that promote a product's past or present benefits that were challenged in *Henriquez.* For the time being, state and federal courts alike seem inclined to dismiss complaints based on the former for failure to state a claim while permitting the latter to go forward for further proceedings. While many greenwashing actions thus far have dealt with claims related to a product's recyclability, the universe of greenwashing claims seems to be expanding to include general sustainability and animal welfare claims, among others. As we embark on a new year, it is a good time for companies of any size to take a hard look at whether they can substantiate the environmental or ESG benefit claims made in their marketing materials on their websites, and even on social media, so as to minimize risk of exposure to greenwashing claims. •

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