

ESG as a Shield: How Corporate Greenwashing Leads to Climate Change Litigation

Overview

“Right now, the planet cannot afford delays, excuses, or more greenwashing.”¹ In 2022, former Canadian Minister and chairperson of the United Nation’s High-Level Expert Group, Catherine McKenna, explained the need to take active measures to curb greenhouse gases and reduce the negative impact that climate change is having on the environment. Ms. McKenna went on to explain further that many actors are employing empty slogans and failing to enact meaningful measures to combat climate change. Furthermore, not only are companies failing to act, but are actively engaging in conduct that is doubly worse: greenwashing. Greenwashing is particularly harmful because it actively shields companies from scrutiny and making meaningful changes to their policies and actions while also potentially deceiving consumers into thinking that a company’s policies are aligned with their values. This article will examine the current trends, regulatory updates, and notable litigation that highlights the extent to which the issues are being addressed in the United States.

Current Trends in Climate Change Litigation

A. Greenwashing

The ESG Glossary defines greenwashing as “a

method of conveying a company’s environmental benefits in a false or misleading manner.”² Greenwashing occurs when a company issues statements or uses terms in its marketing materials that either leads a consumer to believe that that company’s product or service is more environmentally friendly or less damaging than it is. Greenwashing comes up in various ways and in different contexts (e.g., SEC filings, ESG or sustainability reports). In the U.S., depending on the nature of the representations made, statements deemed to be greenwashing may be scrutinized under the regulatory authority of either the Securities and Exchange Commission (“**SEC**”) or the Federal Trade Commission (“**FTC**”).

As recently as 2019, greenwashing related litigation was relatively rare. Since then, however, cases involving greenwashing have risen dramatically. While there were six such cases in 2019 and nine in 2020, that number increased to 27 in 2021. According to ESG data firm RepRisk, there were 86 recorded cases from banking and financial services industry in 2022 and 148 as of September 2023 for the following twelve months.³ Greenwashing cases fall broadly into three categories: (i) Corporate Commitments, (ii) Product Attributes, and (iii) Disclosures related to Climate Change & Regulations.

¹COP27: ‘Zero tolerance for greenwashing’, Guterres says as new report cracks down on empty net-zero pledges, *United Nations* (2022).

²<https://www.bloomberglaw.com/product/blpg/document/X19G3GOS000000>

³Banks behind 70% jump in greenwashing incidents in 2023 –report, *Reuters* (2023)

I. Corporate Commitments

Cases revolved around corporate commitments focus on challenging corporations' lofty promises or stated goals of achieving net zero greenhouse gas emissions. According to a 2022 Accenture survey, more than 33% of the world's largest companies issued a public target of net zero emissions; however, there are questions challenging the credibility of those publicly stated goals.⁴

In 2023, the SEC initiated cease-and-desist proceedings against Deutsche Bank's subsidiary, DWS Investment Management Americas, Inc. ("**DIMA**") after finding that it had failed to adopt and implement the policies and procedures that it had touted.⁵ While DIMA held itself as an industry leader and publicly stated that, ESG is "top of mind throughout [the] organization," and that each "DWS investment team uses [ESG policies] to make investment decisions for their portfolio," DIMA failed to monitor whether such efforts were being taken throughout its research and compliance protocols. For example, while DIMA publicly stated in its policy that "Supervisors shall monitor compliance with this policy by monitoring [...] ESG comments in Research Notes," the SEC found that there was no specificity for how these should be carried out. Additionally, while DIMA assembled an ESG Integration Team, senior members of the team lamented that there was a lack of resources, clarity, and understanding of each person's role and responsibility. Despite voicing these concerns internally as early as 2020, DIMA failed to update any of their public facing

statements nor follow up to implement solutions to these issues.

As a result, the SEC censured DIMA and fined DIMA \$19,000,000 for willfully violating Section 206(2) and 206(4) of the Investment Advisers Act and Rules 206(4)-7 and 206(4)-8 thereunder. DIMA agreed to pay that fine as well as \$6,000,000 penalty in the SEC's AML action related thereto. There is reason to think that more cases with fact patterns like this may be on the horizon.

In a 2022 survey with 1,491 executives at global companies across 16 countries for The Harris Poll for Google Cloud, while 86% reported that they believed that their companies' efforts were making a positive difference, only 36% of respondents admitted that their companies have measurement tools to help track and quantify their efforts.⁶ Moreover, only 17% stated that they use those measurement tools to optimize their results. Given these percentages, there is reason to believe that courts and various federal agencies will continue to scrutinize empty promises regarding environmental protection or ESG policies.

II. Product Attributes

The second type of cases relate to false or misleading claims about the extent or nature of harm caused by a company's product or service. Examples range from companies' statements that their products were "climate neutral" leaving consumers with the false impression that the process by which the product was created or

⁴ Destination Net-Zero, Accenture.

⁵ DWS Hit with \$19 Million Fine for ESG Misstatements, NAPA (2023).

⁶ Report: What it will take for CEOs to fund a sustainable transformation, Google Cloud (2022).

distributed occurred without greenhouse gas (“GHG”) emissions, while these companies were donating or offsetting their negative carbon footprint, rather than ensuring that their actions were not directly leading to GHG emissions. For instance, investors filed a lawsuit in 2021 against KLM Royal Dutch Airlines for relying on carbon offset purchases to fulfill their net zero commitments.⁷ Others include mislabeling products to mislead consumers to think that their products are less harmful to the environment than they actually are. Some notable examples include the FTC’s enforcement against Kohl’s and Walmart levying fines of \$2.5m and \$3m respectively in 2022 for their sales of rayon products derived *from* bamboo but labeled as “bamboo.” The companies marketed these products as being “free of harmful chemicals, using clean, non-toxic materials,” but the FTC alleged that the companies knew that their claims were deceptive and misleading and were ordered to cease making these unsubstantiated claims.⁸

By contrast, in 2023, a federal judge in the Eastern District of Missouri dismissed a proposed class action lawsuit filed against H&M for its “Conscious Choice” line of products alleging that these products misled consumers. In this case, H&M did not use term “environmentally friendly,” but rather emphasized the words “conscious” and “sustainable”, which sufficiently distinguished this case from others that were deemed to be materially misleading and/or deceptive.⁹ The

court highlighted public statements that H&M had made and found not misleading or deceptive.

The contrast between these cases suggests that the focus is not on using or avoiding any given particular term or phrase, but rather to note that the FTC will take a holistic approach to determining and evaluating whether any given label or claim could lead a consumer to reasonably believe that a product or service is “greener” than it is.

III. Disclosures Related to Climate Change & Regulations

The third category of greenwashing focuses on financial risks related to greenwashing and how various financial regulators examine official statements. On March 21, 2022, the SEC issued a proposed rule related to standardizing mandatory climate-related disclosures for investors. The SEC formally adopted its Climate Disclosure Rules (“Rules”) on March 6, 2024, requiring further disclosures related to the financial risks connected with climate-related risks in a registrant’s operations when submitting registration statements. First, the Rules update Regulation S-K requiring a company to disclose material climate-related risks that it faces along with that company’s processes regarding governance, compliance, and disclosures surrounding the updates. Second, the Rules require larger registrants, especially large accelerated filers and accelerated filers to disclose Scope 1 (direct emissions) and Scope 2 (indirect emissions related to energy purchases)

⁷ *FossielVrij NL v. KLM*, Climate Case Chart.

⁸ *FTC Uses Penalty Offense Authority to Seek Largest-Ever Civil Penalty for Bogus Bamboo Marketing from Kohl’s and Walmart*, FTC (2022).

⁹ *Guidance for ‘sustainable’ claims after dismissal of H&M ‘greenwashing’ class action*, Reuters (2023).

emissions when those emissions are material. Notably, companies will not need to disclose their Scope 3 emissions—emissions that are generated throughout a company’s supply chain and the indirect emissions resulting from consumers using their products. Third, these Scope 1 and Scope 2 disclosures must be accompanied by attestation reports, which SEC Chairman Gensler stated, “will improve accuracy and reliability of those metrics as well as the key assumptions, methodologies, and data sources.”¹⁰

Some requirements include the registrant’s need to disclose information such as the following:

- ❖ Climate-related risks that have had or are reasonably likely to have a material impact on the business strategy, operational results, or financial condition;
- ❖ Actual and potential material impacts of any climate-related risks to the registrant’s strategy, business model, or future outlook;
- ❖ Descriptions of actions (if any) that a registrant has taken to mitigate or adapt to any material climate-related risk, including both quantitative descriptions, along with expenditures incurred to implement those actions, any material impacts those actions have or will have on its financial estimates;
- ❖ Descriptions of its scenario analysis (if it uses one) if said scenario analysis

determines that a climate-related risk is reasonably likely to have material impact on its business, operations, or financial conditions;

- ❖ Disclosures regarding internal carbon price (if this is material to that registrant’s evaluation of and management of a material climate-related risk.

Many of these disclosure requirements center around whether the underlying information is “material.” Under federal securities laws, information is deemed material “if there is a substantial likelihood that a reasonable investor would consider [disclosure] important when determining whether to buy or sell securities or how to vote or such a reasonable investor would view omission of the disclosure as having significantly altered the mix of information made available.”¹¹

B. Future Outlook

On April 4, 2024, the SEC stayed implementing these rules after multiple lawsuits in the Circuit Courts challenging the validity of the Rules. Currently, these cases have been consolidated into one case in the 8th Circuit: *Iowa v. Securities and Exchange Commission*. While this case is pending, the SEC has issued a statement that it will “continue vigorously defending” the Rules and described the Rules as “consistent with applicable law and within the Commission’s long-standing authority.”¹²

All eyes will be on this case as Iowa along with 18 other Republican led states’ attorneys general

¹⁰ [Statement on Final Rules Regarding Mandatory Climate Risk Disclosures](#), U.S. Securities and Exchange Commission (2024).

¹¹ *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976)

¹² [See *In re Enhancement and Standardization of Climate-Related Disclosures for Investors*](#), Rel. Nos. 33-11280, 34-99908 (Apr. 4, 2024) (announcing voluntary stay).

have filed suits challenging the Rules. Their challenges fall under four broad categories:

1. Major Questions Doctrine: This argument claims that the Rules requires congressional action.
2. Ultra Vires: This argument claims that this expands the SEC’s statutory rulemaking authority.
3. First Amendment violation: This argument centers on claims that the Rules impermissibly compels speech.
4. APA (Administrative Procedure Act) Challenge: This argument claims that the Rules are unnecessary because they’re arbitrary, capricious, and not supported by substantial evidence.

to “make decisions of vast ‘economic and political significance’” since it could not pinpoint to “clear congressional authorization.”¹³ However, as SEC Commissioner Carolien Crenshaw reiterated, “well-established authority has been consistently relied upon, and affirmed and reaffirmed across dozens of disclosure rulemakings over multiple decades.”¹⁴ In her view, the latest Rules that the SEC has issued would be no different. Ultimately, whether these Rules are struck down, upheld entirely, or modified further, litigation related to climate change and greenwashing, in particular, will continue to remain as investors focus on how companies’ actions contribute to the deleterious effects of climate change.

Historically, there have been longstanding and well-established understandings recognizing the validity of the SEC’s rulemaking powers. And it remains to be seen which, if any, of these legal arguments will prove successful. Nonetheless, it is becoming clearer that these updated regulatory frameworks and at least some of these enhanced disclosure requirements are here to stay.

Opponents may cite arguments ranging from the Major Questions Doctrine as the U.S. Supreme Court did in the 2022 landmark case *West Virginia v. EPA*, which limited the extent to which the EPA can regulate GHG emissions from coal-fired power plants. In that case, the Supreme Court held that Congress had not empowered the EPA

¹³ See *West Virginia v. Env’t Prot. Agency*, 597 U.S. 697, 732 (2022).

¹⁴ SEC Climate Disclosure Rule faces Legal Gauntlet, EENews (2024).

Investor Alert

Labaton Keller Sucharow's lawyers are available to address any questions you may have regarding these developments. Please contact the Labaton Keller Sucharow lawyer with whom you usually work or the contacts below.



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