

# ESG Litigation:

Can I call my company “climate friendly”? Should it be doing more?



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# ESG: Environmental, Social and Governance

Investors are increasingly focusing on a range of risks and opportunities under the broad rubric of environmental, social and governance (“ESG”) that represent **non-financial matters that may be financially material over the long term** and expectations for **Board oversight of key ESG issues**.



# ESG's Massive Impact

- U.S. investment in sustainable funds:
  - » \$5 billion in 2018
  - » \$70 billion in 2021
- 2022: Global ESG fund assets reached \$2.5 trillion
- 90% of S&P 500 companies now publish ESG reports
- Much of the sector's growth driven by the "E"

# Can I call my company climate friendly?

- Know the environmental impacts of business:
  - Permitting (emissions, discharges)
  - Siting
  - Water use
  - Natural resources
  - Biodiversity
  - Supply chain impacts
  - *Emerging issues:*
    - » Environmental Justice
    - » Climate Justice
    - » Human Rights



Source: Supply Chains Quarterly

# Can I call my company climate friendly?

- Company has taken steps to be more sustainable, and wants people to know...
  - Marketing/promotional materials
  - Statements by company representatives
  - SEC Filings
- What's the Risk: *Greenwashing*
  - Dishonestly or inaccurately characterizing a business practice as more sustainable or environmentally-friendly than it really is.
- Who can bring a greenwashing action?

# Government Greenwashing Claims

- Federal Trade Commission
  - Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits unfair and deceptive acts or practices in or affecting commerce
- FTC’s “Green Guides”
  - first issued about 30 years ago (updates in the works)
  - Provide guidance on how companies can make environmental marketing claims that comply with the FTC Act.
  - Non-binding, but often referenced by courts
- Recent Cases: Bamboo shirts are not eco-friendly
  - *United States v. Kohl’s, Inc.*, No. 22-cv-00964 (Dist. D.C. 2022)
  - *United States v. Walmart, Inc.*, No. 22-cv-00965 (Dist. D.C. 2022)

# Government Greenwashing Claims

- Securities and Exchange Commission
  - SEC Climate-Related Disclosure Rule
  - “Names Rule”
- SEC Enforcement Actions – *ESG funds misled investors*
  - *In the Matter of Goldman Sachs Asset Mgmt.*, SEC Admin. Proceeding No. 3-20867 (May 23, 2022) (alleged GSAM did not adopt written procedures to evaluate ESG factors for ESG fund)
  - *In the Matter of BNY Mellon Investment Adviser*, SEC Admin. Proceeding No. 3-20867 (May 23, 2022) (alleging BNY Mellon investment funds were represented as having undergone “ESG quality review” when, according to the SEC, that was not always the case)



# Citizen Greenwashing Litigation

- Shareholder derivative suits (Sec. 10 of Securities Exchange Act)
  - ***Fagen v. Enviva Inc., No. 8:22-cv-02844-DKC (D. Md.)*** (wood pellet producer allegedly greenwashing wood procurement process and status as a sustainable coal alternative)
  - ***Rosencrants v. Danimer Scientific, Inc., No. 1:21-cv-02708 (E.D.N.Y)*** (producer of plastic alternative allegedly overstating the product's biodegradability in oceans and landfills)
- Fraud or State Deceptive Practice Law (State Law)
  - ***Curtis v. 7-Eleven, No. 21-cv-6079, 2022 WL 4182384, at \* 1 (N.D. Ill. Sept. 13, 2022)*** (holding that 711 did not mislead consumers by claiming foam plates it sold were recyclable where economic infeasibility made recycling unlikely to happen)
  - ***Swartz. v. The Coca-Cola Co., No. 3:21-cv-04643 (N.D. Cal., Dec. 2022)*** (dismissing claims against Coca-Cola, Niagara Bottling, and Nestlé for “100% recyclable” claim on beverages because plaintiffs failed to plausibly allege that label would deceive a reasonable consumer into believing that each bottle would actually be recycled or converted into reusable material)



# Avoiding Greenwashing

- **Avoid overstating or making misleading statements** about your company's/products pro-environmental commitments and impacts.
- **Carefully define your claims;** words like “sustainable,” “carbon neutral,” and “recyclable”--and even “green” or eco-friendly--have concrete meanings; their use can be challenged.
- **Understand your company's full environmental impact** before you tout isolated events.
- **Avoid using generalized “green” messaging** that is a mismatch with a product or service.
- **Remember:** Greenwashing is a problem even where a court does not find a deceptive practice: it can create bad press, hurt your reputation with customers, and create litigation costs, etc.

# Should my company be doing more?

- No longer an “easy” answer
  - Cumulative flow of investments into U.S. ESG funds flat since the first quarter of 2022.
  - Economic conditions impacting ESG investments
- ESG is becoming politicized

# Considerations

- Before making environmental claims, consider:
  - Is management and corporate compliance aligned with your marketing team, EHS team, and facility operators?
  - What are the company's core business goals? Are they naturally aligned with ESG goals?
  - How do company's environmental positions currently drive its policy? Are they realistic or aspirational?
  - Are more ambitious environmental goals likely to benefit your customers? Your investors?

# Questions

