Greenwashing Claims on the Rise: Avoiding Dirty Laundry

"Green marketing"—where businesses advertise products and businesses as environmentally safe or eco-friendly—has been on the rise and is likely only to increase with the increasing legal and policy focus on climate change. Examples of green marketing are everywhere: H&M, one of the largest fashion retailers in the world, vaunts its "Conscious" clothing line, which uses "sustainable materials" such as organic cotton and recycled polyester. One of the most important trends in the cosmetics industry is "clean beauty" products, as advertised by industry giants such as Estée Lauder and L'Oréal. And according to data from Morningstar Inc., the flow of capital into funds that claim to focus on environmental, social, and governance ("ESG") issues jumped in 2020, driving assets under management up 29% in the fourth quarter to nearly $1.7 trillion.[i] A recent Bank of America survey found that 40% of investable assets are now touted to be ESG friendly or compliant. But although green marketing may make good business sense, governments, competitors, and consumers alike have become increasingly savvy at detecting, exposing, and suing for "greenwashing."

What Is Greenwashing?

"Greenwashing" is when a business creates the impression through branding or marketing that its products and practices are environmentally friendly when they are not, or not to the extent implied. Greenwashing may be intentional or simply the result of imprecise wording. For example, a company may claim that its product is "made of recycled material." But is the *entire* product or only a component made of recycled material? It may be news to some businesses that Section 260.13 of the Federal Trade Commission's ("FTC") Green Guidelines—"designed to help marketers avoid making environmental claims that mislead consumers"—warns against making unqualified claims of recycled content unless the entire product or package, excluding minor incidental components, is made from recycled components.

Greenwashing Claims on the Rise

The last several years has seen a significant increase in greenwashing claims. In 2020, the National Advertising Division ("NAD") of the BBB National Programs—the advertising industry's self-regulatory forum—saw a substantial increase in the scope and number of greenwashing claims. From claims of biodegradibility, to questionable third-party certifications, to purportedly non-toxic products, the NAD addressed a wide breadth of environmental marketing claims in the last year. In the financial sector, on March 4, 2021, the Securities and Exchange Commission ("SEC") announced the creation of a Climate and ESG Task Force in the Division of Enforcement. The Task Force "will develop initiatives to proactively identify ESG-related misconduct," including analyzing disclosures "relating to investment advisers' and funds' ESG strategies."[ii] And on March 16, 2021, three environmental groups filed the first ever complaint with the FTC against an energy company for alleged greenwashing.[iii]

Given the exponential rise in green marketing, the capital flowing into "green" funds, and the increasing focus of governments and consumers on detecting greenwashing, we are likely to see even more government enforcement efforts and civil suits directed at greenwashing.

Federal and state consumer protection: Perhaps the most infamous case of greenwashing is the Volkswagen emissions scandal. Volkswagen admitted to cheating government emissions tests with "defeat devices," while simultaneously promoting the low-emissions features

of its vehicles. It ultimately agreed to pay $***14.7 billion*** to settle with the Department of Justice, the State of California, and the FTC.[iv] And although Volkswagen may be the highest profile case, it is certainly not the only one. The FTC has investigated and found at least 90 cases of businesses misleading consumers with greenwashing and has imposed civil penalties.[v]

These kinds of enforcement efforts are only likely to increase during the Biden Administration. Signaling this belief is shared by environmental groups, on March 16, 2021, Earthworks, Global Witness, and Greenpeace USA jointly filed an FTC complaint against Chevron for allegedly engaging in deceptive advertising that "overstates investment in renewable energy and its commitment to reducing fossil fuel pollution."[vi] The complaint claims that Chevron has violated the Green Guides "by consistently misrepresenting its image to appear climate-friendly, while its business operations overwhelming rely on climate-polluting fossil fuels."[vii] The groups point out that FTC action on this complaint would be the first use of the Green Guides against any fossil fuel company based on alleged greenwashing. And should the FTC take up the complaint, more of them will likely follow.

Regulators on other continents are also increasing scrutiny of green marketing claims. In January 2021, the European Commission released the results of a study that screened green online claims from various business sectors, such as garments, cosmetics and household equipment. This was the first time the E.U.'s annual "sweep" of corporate websites had focused on greenwashing. The study determined that "in 42% of cases the claims were exaggerated, false or deceptive and could potentially qualify as unfair commercial practices under E.U. rules."[viii] And with the EU Sustainable Finance Disclosure Regulation ("SFDR") having gone into effect on March 10, 2021, we can expect to see European regulators devote more attention to the accuracy of green marketing in the financial sector over the coming years. As part of the European Commission's Sustainable Finance Action Plan, the SFDR imposes obligations on fund managers, financial advisors and certain other firms in the E.U. to disclose information on various ESG considerations to potential investors and on their websites.

Private consumer actions: Greenwashing suits are often brought by consumer organizations or as consumer class actions. A flurry of such suits have been filed against traditional energy companies in recent years. For example, in May 2020, a non-profit sued ExxonMobil, claiming it is "greatly overstating the level in which it engages in cleaner forms of energy… thereby deceiving consumers," in violation of the District of Columbia's Consumer Protection Procedures Act.[ix] In reality, the complaint alleges, only a very small part of Exxon's overall business is devoted to clean energy, and it is continuing to invest heavily in fossil fuels. The plaintiff seeks to enjoin Exxon from continuing to engage in green marketing.

Energy companies, however, are not the only targets of greenwashing claims. In a suit that lasted at least *eight years*, consumers of Wesson cooking oil brought a putative class action, alleging the manufacturer had "deceptively and misleadingly marketed its cooking oils" as "100% Natural" when in reality they were made from GMOs (genetically-modified organisms). The suit eventually settled, with the manufacturer agreeing not to label, advertise, or market Wesson Oils as "natural" and paying compensation.[x] In July 2019, two consumer advocacy nonprofits sued Tyson Foods Inc. in Washington, D.C., Superior Court for misleading consumers by proclaiming its commitment to sustainable practices, despite allegedly being the "second largest polluter" in the U.S. and routinely allowing the "horrific abuse" of its chickens. Given the allegedly "tremendous toll on the environment" exerted by the poisonous byproducts of Tyson's plants and the "disease-ridden and inhumane conditions, from hatching through slaughter" that its chickens endure, the nonprofits argue Tyson's claims that it is an environmentally friendly company amount to outright lies. The case is ongoing.[xi]

Federal and state securities law enforcement: On March 3, 2021, the SEC's Division of Examinations announced that one of its annual examination priorities will be to review ESG funds' "advertising for false and misleading statements, and review [their] proxy voting policies and procedures and votes to assess whether they align with their strategies."[xii] The next day, the SEC announced the creation of a Climate and ESG Task Force that, among other things, will analyze issuer ESG disclosures. These announcements presage that the SEC under President Biden will be taking a much more aggressive posture against issuers and advisers that make false or misleading statements concerning the environmental goals and attributes of their financial products.

State governments have also targeted investor disclosures for greenwashing. The most high profile securities case to date is the New York Attorney General's 2018 suit against ExxonMobil. New York alleged that Exxon had misrepresented to its investors the cost of future climate change regulations by applying a lower proxy cost for carbon internally than it had publicly disclosed. After a two-week bench trial, the New York Supreme Court found for Exxon, concluding that Exxon's disclosures could not reasonably have misled investors.[xiii] But Exxon's win is not likely to spell the end of these suits. Indeed, the Massachusetts Attorney General's case against Exxon is ongoing. Like New York, Massachusetts alleges that Exxon deceived investors by failing to disclose climate change risks and by misrepresenting its business practices related to use of proxy costs of carbon.[xiv] Should the case survive Exxon's motion to dismiss, it is likely that more states will consider bringing such suits against a potentially wider range of defendants.

Private securities suits: Many of the types of green marketing that may give rise to consumer actions can also raise the specter of securities litigation if investors claim they purchased securities in reliance on the marketing and it was false. Under Section 10(b) and Rule 10b5 of the Securities Exchange Act of 1934—which governs both public and private purchases and sales of securities—if a company includes an affirmative statement in its disclosures, it has a duty to ensure that the statement is accurate and complete.[xv] And because the anti-fraud rules apply not only to formal SEC filings, but also to less formal statements, such as press releases, investor calls and websites, a company may face investor litigation for alleged "greenwashing" even if it avoids including such representations in its official disclosures.

In 2019, for example, shareholders in 3M filed a securities class action against 3M for allegedly "issuing false and misleading statements to conceal the truth about the Company's exposure to legal liability" for manufacturing products containing per- and polyfluoroalkyl substances ("PFAS").[xvi] The plaintiffs claim, among other things, that 3M concealed and misrepresented evidence that the chemicals are toxic, and its "omissions and misrepresentations" caused 3M's stock price to trade at "artificially inflated prices."[xvii] The suit is ongoing.

More money pouring into "socially conscious" funds will result in an increase in litigation around whether the funds actually are adhering to their stated ESG-related principles and meeting their goals; at least one such case has arisen in Australia and, although it has since settled, there is every reason to believe more will come as more companies publicly commit to ESG goals.[xviii]

Common Traps to Avoid

The consequences of greenwashing can be detrimental at best and business-ending at worst, resulting in civil or criminal liability, as well as negative publicity. Below are some common traps to avoid.

1. Avoid making unqualified environmental claims. Many countries have laws and guidelines about greenwashing, which center on the types of statements businesses can and cannot make about their products or services. The FTC's Green Guide warns, for example, that making broad, unqualified general environmental benefit claims, such as calling a product "ecofriendly" without saying why it is ecofriendly, is considered deceptive. Although the Guides are not binding on courts or state authorities, adherence to them will provide powerful arguments that genuine attempts were made not to mislead. Likewise, Australia, the E.U., the U.K., Norway, and Canada each have regulations or guidelines designed to help businesses avoid greenwashing.

2. Avoid suggesting or implying (even visually) independent certification or endorsement without adequate basis. Although it is wise for businesses to consider obtaining an unbiased, reliable third-party assessment, label, and/or certificate to demonstrate how their products or services are ecologically sound, they must be careful in doing so. Companies have found themselves in trouble for suggesting a label or certificate was independently awarded when it actually was created by the business itself. For example, a mattress company called Moonlight Slumber was charged by the FTC for claiming that its products had been certified with the "Green Safety Shield," while conveniently omitting that the awarded seal was its own creation.[xix]

3. Avoid focusing solely on the end-product or service. Many businesses run into legal or reputational trouble by focusing solely on the consumer-facing product or service. A fashion company may be quick to launch its "sustainable" line of clothing using some recycled fabrics, but neglect to acknowledge they are manufactured in factories powered by coal. Similarly, a company may espouse environmental concerns in one area, while ignoring or downplaying its less-than-sustainable environmental practices in another. Ben and Jerry's, for example, came under fire for this in 2018 when the Organic Consumers Association ("OCA") accused it of conducting a misleading marketing campaign called "Caring Dairy." The campaign touted the business's commitment to animal welfare standards, but the OCA claimed this was misleading because the company sourced ingredients from operations that contributed to water pollution, thereby creating a false image of its environmental standards. The District of Columbia Superior Court denied Ben & Jerry's motion to dismiss, finding a reasonable consumer "could plausibly interpret Ben & Jerry's labeling and marketing as affirmatively (and inaccurately) communicating that the company's ice cream products are sourced exclusively from Caring Dairies and/or other humane sources."[xx] The parties mediated for two years before the case was ultimately dismissed.

Although offering environmentally friendly products and services may both be noble and make good business sense, businesses must exercise caution by not overstating their green marketing claims. Statements and commitments must be backed up by specific, clear, factual evidence, not just puffery about "green" efforts. With a renewed focus on the environment, companies investing more on the front end to avoid claims of greenwashing could save multiples in potential penalties, damages, attorneys' fees, and reputational fallout down the road.

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If you have any questions about the issues addressed in this Client Alert, or if you would like a copy of any of the materials we reference, please do not hesitate to contact us:

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