

Managing U.S. Enforcement and Civil Risks Relating to ESG Issues: Greenwashing

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Companies face new pressures relating to the potential environmental impact of their products and services. In recent years, ESG has become a focal point about how companies conduct their business and there has been an increase in pledges to reduce greenhouse gas emissions, marketing of environmentally friendly products and reporting on environmental, social and corporate governance/ESG metrics. As with any other statements that companies make, it is important that such statements are substantiated and accurate.

More and more authorities and private litigants are targeting alleged greenwashing, which includes misstating the use of environmental considerations, overstating the environmental benefits, and underplaying the environmental risks relating to products. In the United States, the Securities and Exchange Commission (SEC) and private investors have pursued claims of false or misleading disclosures or omissions relating to ESG considerations and the environmental impact of products under the securities laws. The Federal Trade Commission (FTC), State Attorneys General and consumers have litigated claims about the environmental attributes of products under consumer protection statutes. The Commodity Futures Trading Commission (CFTC) has recently indicated that it will investigate and take enforcement actions relating to greenwashing under the Commodity Exchange Act (the “CEA”).

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On June 29, the CFTC announced the formation of an Environmental Fraud Task Force to address fraud and other misconduct in regulated derivatives markets, as well as “in relevant spot markets (such as voluntary carbon credit markets), relating to purported efforts to address climate change and other environmental risks.”¹ The announcement of the task force followed the CFTC’s publication of a whistleblower alert encouraging reports of potential violations of the CEA connected to fraud or manipulation in the carbon markets.² Below, we outline legal theories that U.S. authorities and private litigants have pursued relating to greenwashing, best practices in making environmental claims, disclosure and climate commitments, and potential defenses against allegations of greenwashing.

I. Securities Laws

a. Advisers Act and Investment Company Act

Section 206 of the Investment Advisers Act of 1940, as amended (the “Advisers Act”), bars misstatements, misleading omissions of material facts, and any fraudulent, deceptive or manipulative acts or practices by investment advisers.³ The SEC has been found to have the power to bring a Section 206 enforcement action even in the absence of actual injury to the client.⁴ The Advisers Act does not provide a private right of action based on violations of Section 206.⁵ Rule 206(4)-7 under the Advisers Act requires that advisers create and maintain compliance programs and review such programs at least annually.⁶ Under Rule 206(4)-8, advisers are barred from making false or misleading statements to, or otherwise defrauding, investors or prospective investors in pooled investment

vehicles.⁷ Section 34(b) of the Investment Company Act of 1940, as amended (the “Investment Company Act”), bars material misstatements or omissions in a fund’s registration statement or required records.⁸ The SEC has brought enforcement actions for violations of Sections 206(2) and 206(4) of the Advisers Act, Rules 206(4)-7 and 206(4)-8 thereunder, and/or Section 34(b) of the Investment Company Act based on alleged representations by investment advisers about the use of ESG reviews in selecting investments for funds and alleged deficiencies in related policies and procedures.

b. Exchange Act and Securities Act

In general, to prevail on a claim under Section 10(b) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), and Rule 10b-5 thereunder, a plaintiff must show (1) a material misrepresentation or omission by the defendant; (2) with scienter; (3) in connection with the purchase or sale of a security; (4) reliance by the plaintiff on the misrepresentation or omission; and (5) economic loss to the plaintiff; (6) caused by the misrepresentation or omission.⁹ A claim under Section 11 of the Securities Act of 1933, as amended (the “Securities Act”), requires a material misstatement or omission in a registration statement, while a Section 12(a)(2) claim under the Securities Act requires a material misstatement or omission in a prospectus or oral communication.¹⁰

Case Study: Putative Securities Class Action Against Oatly

In 2021, investors in Swedish oat milk producer Oatly filed putative class action complaints in

¹ Press Release, Commodity Futures Trading Commission, CFTC Division of Enforcement Creates Two New Task Forces (June 29, 2023), <https://www.cftc.gov/PressRoom/PressReleases/8736-23>.

² Whistleblower’s Office, *CFTC Whistleblower Alert: Blow the Whistle on Fraud or Market Manipulation in the Carbon Markets*, Commodity Futures Trading Commission (June 20, 2023), <https://www.whistleblower.gov/sites/whistleblower/files/2023-06/06.20.23%20Carbon%20Markets%20WBO%20Alert.pdf>.

³ 15 U.S.C. § 80b-6.

⁴ *S.E.C. v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

⁵ *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979).

⁶ 17 CFR § 275.206(4)-7 (2023).

⁷ 17 CFR § 275.206(4)-8 (2023).

⁸ 15 U.S.C. § 80a-33(b).

⁹ *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 157 (2008).

¹⁰ 15 U.S.C. § 77k(a); 15 U.S.C. § 77l(a)(2).

the U.S. District Court for the Southern District of New York against the company and certain of its directors and officers including claims under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Sections 11 and 12(a)(2) of the Securities Act. The operative complaint included allegations that the registration statement and prospectus documents for Oatly’s initial public offering “overstated Oatly’s sustainability practices and impact” because documents obtained through a Freedom of Information Act request “showed ‘very high concentrations’ of certain wastewater byproducts from Oatly’s manufacturing facility in New Jersey, which were of significant concern to local regulators and required the installation of a new wastewater treatment facility.” The complaint cited an activist investor’s accusations of greenwashing by the company and regulatory action by an agency in the United Kingdom banning certain of the company’s ads for making misleading environmental claims.

In April 2022, defendants filed a motion to dismiss the case, pointing out that plaintiffs had failed to plead particularized facts disproving Oatly’s general statements about its commitment to environmental sustainability and had drawn unwarranted inferences about Oatly’s environmental sustainability practices and impact based on an isolated incident at one facility. In August 2022, plaintiffs filed an amended complaint that did not challenge Oatly’s statements about its environmental

sustainability practices or impact.¹¹ The court recently granted defendants’ motion to dismiss the latest complaint.

II. Consumer Protection Statutes

a. FTC Act

Section 5(a) of the Federal Trade Commission Act (the “FTC Act”) prohibits unfair or deceptive acts or practices in or affecting commerce.¹² The FTC Act authorizes the FTC to bring administrative proceedings for cease and desist orders, as well as civil actions in federal district courts to recover civil penalties for knowing violations of rules and cease and desist orders in respect of unfair or deceptive acts or practices.¹³ Section 5 does not provide a private right of action.¹⁴ By statute, the FTC cannot declare that an act or practice is “unfair” unless it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”¹⁵

The FTC issues Guides for the Use of Environmental Marketing Claims (the “Green Guides”) that are intended to help marketers avoid making environmental claims that are unfair or deceptive.¹⁶ The Guides are not binding.¹⁷ The FTC still must prove in any enforcement action that any challenged conduct is unfair or deceptive under Section 5(a).¹⁸

¹¹ See Consolidated Amended Complaint ¶¶ 9, 61, 82, 83, *In re Oatly Group AB Securities Litigation*, No. 1:21-cv-06360-AKH (S.D.N.Y. Mar. 4, 2022), ECF No. 64; Memorandum of Law in Support of Defendants’ Motion to Dismiss at 12-13, *In re Oatly Group AB Securities Litigation*, No. 1:21-cv-06360-AKH (S.D.N.Y. Apr. 8, 2022), ECF No. 70; Second Consolidated Complaint ¶¶ 71-117, 168-173, *In re Oatly Group AB Securities Litigation*, No. 1:21-cv-06360-AKH (S.D.N.Y. Aug. 17, 2022), ECF No. 76.

¹² 15 U.S.C. § 45(a)(1).

¹³ 15 U.S.C. §§ 45(b), (m).

¹⁴ *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 987 (D.C. Cir. 1973).

¹⁵ 15 U.S.C. § 45(n).

¹⁶ FTC Guides for the Use of Environmental Marketing Claims, § 260.1(a) (Oct. 1, 2012), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf>.

¹⁷ *Id.*

¹⁸ *Id.*

Case Study: FTC Enforcement Action against Kohl's

In April 2022, the FTC filed a complaint against Kohl's in the U.S. District Court for the District of Columbia including claims for violations of Section 5(a) of the FTC Act. The FTC alleged that the company marketed certain towels, bedding and clothing as made from bamboo and being eco-friendly, sustainable and renewable when in fact they were made of rayon. Kohl's settled with the FTC by agreeing to pay a \$2.5 million penalty and to stop making statements that certain products are made of bamboo and have environmental benefits unless the statements are not misleading and are substantiated.¹⁹

b. State Consumer Protection Statutes

California law specifically addresses environmental marketing claims.²⁰ Several states, such as Minnesota and Rhode Island, have adopted the standards in the FTC's Green Guides as enforceable state law.²¹ Compliance with the Green Guides is a safe harbor against unfair or deceptive acts or practices claims in certain states, including California and New York.²²

Case Study: Putative Consumer Class Action Against Delta

In May 2023, a plaintiff filed a putative class action complaint against Delta Airlines in the U.S. District Court for the Central District of

California including claims under California's false advertising and consumer protection laws. According to the complaint, Delta states that its investments in the voluntary carbon offset market have entirely offset carbon dioxide emissions from its airline operations. Plaintiff alleges that Delta's offsets are based on misleading and unverifiable accounting of the carbon impact of the offsets; the carbon reductions would have occurred in the absence of a market for offset credits; and Delta misrepresented its offsets as immediate but the offsets project future carbon reduction. Delta's response to the complaint is due on July 28.²³

III. Best Practices and Potential Defenses

It is important, in making environmental claims in advertisements or other marketing materials, to confirm that statements are accurate, substantiated and permit appropriate comparisons. Issues to consider in making environmental disclosures include how the disclosure compares with applicable regulatory frameworks, whether claims are substantiated, and whether the methodology and underlying data are also disclosed. Climate commitments should be supported by concrete plans, based on reliable data, and consistent with policies and practices.

Potential defenses are available to companies facing enforcement actions or litigation alleging greenwashing. For example, companies have successfully defended against:

- Alleged misleading statements based on a defendant's use of certain methodology to

¹⁹ See Complaint ¶¶ 11, 12, 30-33, *United States v. Kohl's Inc.*, No. 1:22-cv-00964-JDB (D.D.C. Apr. 8, 2022), ECF No. 1; Stipulated Order and Judgment at 4-5, 9, *United States v. Kohl's Inc.*, No. 1:22-cv-00964-JDB (D.D.C. May 4, 2022), ECF No. 3.

²⁰ Cal. Bus. Prof. Code § 17580.5 (2019) (prohibiting "any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied").

²¹ See, e.g., Minn. Stat. Ann. § 325E.41 (2022) (environmental marketing claims by a manufacturer, packager, wholesaler or retailer for a product sold or offered

in the state must conform to the standards or be consistent with the examples in the Green Guides); RI Gen. Laws § 6-13.3-1 (2016) (adopting the standards for environmental marketing claims in the Green Guides).

²² See, e.g., N.Y. Gen. Bus. Law § 349(d) (2023); Cal. Bus. Prof. Code § 17580.5 (2019).

²³ See Complaint ¶¶ 5-6, 49, 56, *Berrin v. Delta Air Lines, Inc.*, No. 2:23-cv-04150 (C.D. Cal. May 30, 2023), ECF No. 1; Stipulation to Extend Time to Respond to Initial Complaint, *Berrin v. Delta Air Lines, Inc.*, No. 2:23-cv-04150 (C.D. Cal. June 21, 2023), ECF No. 11.

calculate its product’s carbon footprint, where the complaint did not allege that the defendant’s calculations were wrong or that the defendant falsely described how it undertook those calculations, the defendant made clear what was included in the carbon footprint calculation and did not falsely suggest that the calculation included other factors, and the defendant did not alone possess allegedly omitted information that the plaintiff cited;²⁴

- Allegations that the defendant misled consumers about its products being “more sustainable”, where the defendant did not represent that its products were “sustainable” or even “more sustainable” than its competitors’ (and instead correctly represented that a particular product line contained “more sustainable materials” and included “its most sustainable products”), the plaintiff did not allege the falsity of the defendant’s claim that its product was made from “59% recycled” fabric, and the defendant’s website disclosed all of the information the plaintiff needed to determine the source, composition and relevant comparison of the “more sustainable materials” the defendant used in the product line;²⁵
- Allegations challenging the defendant’s statements such as “[w]e act in ways to create a more sustainable and better shared future,” “[s]caling sustainability solutions and partnering with others is a focus of ours” and

“[w]e’re using our leadership to achieve positive change in the world and build a more sustainable future,” which the court concluded were “general, aspirational corporate ethos” that lacked promises or measurable datapoints that would make them true or false, and “[p]art of our sustainability plan is to help collect and recycle a bottle or can for every one we sell globally by 2030,” which the court determined was a future aspirational goal that had not been found to be inaccurate or misleading.²⁶

Conclusion

In the United States, greenwashing is in the crosshairs of several agencies, not to mention the plaintiffs’ bar. Environmental marketing, reporting on environmental impact, and climate pledges have drawn even more attention from public authorities outside the United States. In Europe, for example, antitrust authorities, as well as competitors to companies, have targeted alleged greenwashing.²⁷ More recently, EU regulators have been focused on greenwashing of financial products. In addition, the European Commission is in the process of finalizing new rules on corporate sustainability reporting that companies will have to apply starting next year.²⁸ And in March of this year, the Commission adopted a proposal for a new Green Claims Directive aimed at environmental claims, which will need to be independently verified and proven with scientific evidence, including identification of the environmental impacts that are

²⁴ Opinion & Order at 10-14, *Dwyer v. Allbirds, Inc.*, No. 7:21-cv-05238-CS (S.D.N.Y. Apr. 18, 2022), ECF No. 22 (dismissing New York consumer protection claims based on defendant’s statements about environmental impact because plaintiff failed to plausibly allege that statements were materially misleading).

²⁵ Memorandum and Order at 14-17, *Lizama v. H&M Hennes & Mauritz LP*, No. 4:22-cv-1170-RWS (E.D. Mo. May 12, 2023), ECF No. 24 (dismissing Missouri consumer fraud claims based on defendant’s statements about product line).

²⁶ Order Granting Motion to Dismiss at 3-6, *Earth Island Institute v. Coca-Cola Company*, No. 2021 CA 001846 B (D.C. Super. Ct. Nov. 10, 2022) (dismissing District of Columbia consumer protection claims).

²⁷ See, e.g., Joanne Faulkner, Grad Gown Giant Accused of Squashing Rivals as Trial Opens, LAW360 (Jan. 24, 2022, 4:57 PM GMT), <https://www.law360.com/articles/1457876/grad-gown-giant-accused-of-squashing-rivals-as-trial-opens>; Ed Garsten, Alcantara Wins Major Court Battle Against Greenwashing, FORBES (Dec. 8, 2021, 11:41am EST), <https://www.forbes.com/sites/edgarsten/2021/12/08/alcantara-wins-major-court-battle-against-greenwashing/?sh=3ac0bcc61cb3>.

²⁸ *Corporate Sustainability Reporting*, European Commission (2023), https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en.

relevant to the product and any possible trade-offs.²⁹ In the UK, the Advertising Standards Authority has been particularly active in regulating environmental claims. While environmental claims will continue to carry regulatory, litigation and reputational risk across different jurisdictions, those risks can be mitigated through proactive steps and careful consideration of ESG-related disclosures.

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²⁹ *Consumer Protection: Enabling Sustainable Choices and Ending Greenwashing*, European Commission (Mar. 22, 2023),

https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1692.