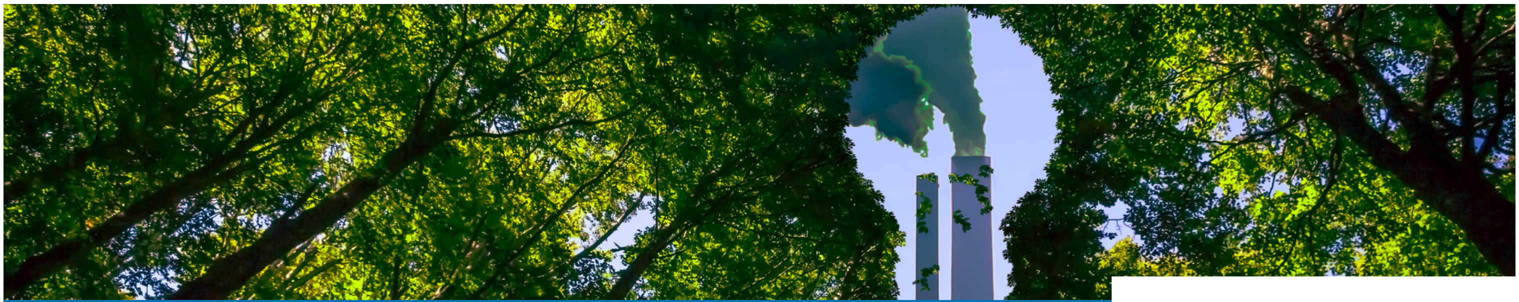

Greenwashing: The Emerging Liability Landscape

General counsel face a looming ESG challenge: managing sustainability claims that could become potential litigation triggers.

Proactive Risk Management is a Strategic Imperative

The threat of greenwashing (either exaggerated or untrue sustainability claims) is larger than ever, and the consequences have never been more severe. Companies are no longer judged merely on their sustainability intentions, but on the precision and verifiability of their environmental narratives. This risk of misleading claims, whether intentional or not, demands a fundamental reimagining of how organizations approach sustainability communications and their associated controls.

Threats Continue to Evolve

Greenwashing accusations have become a multifaceted threat, emerging from diverse and increasingly coordinated sources. Regulatory bodies, once passive observers, now actively investigate corporate sustainability claims and data. Consumer protection agencies, environmental NGOs and shareholder activists are also increasingly questioning and evaluating corporate claims. In addition, we are observing short sellers challenging sustainability claims in an attempt to influence a company's value, as well as industry competitors leveraging such challenges to enhance their standing in consumer perception. Other greenwashing disputes have originated from self-regulatory bodies, such as the National Advertising Division ("NAD") in the United States and the United Kingdom's Advertising Standards Authority ("ASA") — all in an effort to add integrity to the advertising industry.

These entities are using increasingly sophisticated mechanisms to identify claims and validate underlying information and are then using their findings to challenge corporate environmental and social representations. This is why litigation risk is rising — there are more eyes on these issues than ever before.

Greenwashing legal risks manifest through multiple vectors. For example, class action lawsuits have targeted major consumer brands like Coca-Cola for misleading environmental claims about their products. Financial regulators around the world have also taken dramatic steps, such as the German regulatory raids on Deutsche Bank's asset management arm over misleading the public about the company's ESG investment diligence processes, or the SEC's recent $17.5 million fine imposed on Invesco for misrepresenting ESG investment strategies.

Greenwashing risks undeniably include reputational damage and market value erosion, in addition to any fines and fees associated with litigation and enforcement. This is why we are seeing short sellers and industry competitors taking their shot at greenwashing accusations.

Complexities of Carbon Offsets

A case in point, carbon offset strategies, long considered a relatively straightforward path to environmental credentials, now represent a particularly nuanced legal terrain. Investigations, including The Guardian's 2023 analysis of Verra's carbon credit certification, have exposed significant credibility challenges. With estimates suggesting that more than 90% of rainforest carbon offsets may not represent genuine carbon reductions, companies face substantial greenwashing risks in relying on these mechanisms. Additionally, in the United States, the Commodity Futures Trading Commission ("CFTC") has begun examining the integrity of voluntary carbon markets. The reputational evolution of carbon offsets means that any companies relying heavily on them for net-zero claims will likely face increased risk of greenwashing accusations.

Recent cases have also highlighted the risks of nontransparent carbon offset usage. In 2022, Delta Air Lines faced a class action lawsuit over its carbon neutrality claims, which heavily relied on carbon offsets. The Australian Competition and Consumer Commission ("ACCC") has also taken action against several companies for misleading carbon-neutral claims based on offset purchases, and the Netherlands' Advertising Code Committee has ruled against Shell for similar deceptive marketing strategies.

Consequently, general counsel must look at their company's use of offsets to ensure sufficient diligence has been performed and that the offsets represent quality carbon removal solutions.

A Cultural Shift is Necessary

Driving a comprehensive, proactive approach to controls around sustainability communications should be a mandatory part of enterprise risk management. Legal departments need to establish robust governance and oversight mechanisms to ensure that all forms of communication — such as compliance reports, voluntary disclosures and informal corporate messaging — accurately represent the organization's authentic practices. Rigorous internal review processes should define clear, cross-functional roles and responsibilities tasked with critically evaluating environmental claims and public commitments. Collaboration with sustainability experts, communications teams, external counsel and auditors is essential to develop a comprehensive and reliable verification framework.

We recommend much more than a procedural checklist. Greenwashing risk management demands a cultural shift where every environmental and social claim is treated as a potential legal exposure point. Companies must develop robust documentation practices that can withstand intense external scrutiny, including maintaining comprehensive evidence trails for all sustainability assertions.

There are Upsides

This is not all about downside protection, as there are reputational benefits to transparency. Beyond risk mitigation, effective sustainability communication represents a significant competitive advantage. Organizations that can articulate genuine, verifiable sustainability commitments will protect their reputation, build stakeholder trust and differentiate themselves in an increasingly discerning market.

RECOMMENDED ACTIONS

The message is unequivocal: In the current corporate environment, sustainability is not just an opportunity for value creation — it's a complex legal and strategic challenge that demands sophisticated, nuanced management. Sustainability communications must be approached with the same rigor, precision and strategic thinking applied to any critical business function.

Legal departments should take the lead in driving alignment between sustainability statements and verifiable actions, as well as in building cultures that support ongoing alignment. Our recommended course of action is to:

1. Conduct a comprehensive audit of all existing sustainability claims.
2. Develop cross-functional verification mechanisms and strong communications controls.
3. Invest in robust documentation and reporting systems.

The era of sustainability for show is over. ESG data is inexorably moving to the same level of scrutiny and importance as financial data. Companies can no longer responsibly make statements or announce goals without consulting their legal departments due to the potential severe risks to value or reputation. The opportunity, then, for legal and risk professionals, is to manage any potential triggers before they become material liabilities.

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