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Increased Scrutiny on Greenwashing

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Greenwashing is under increased scrutiny at the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC). Greenwashing is clearly damaging to consumers and investors as it imbues purchasing decisions with disinformation. It "harms innovation, since it makes it more difficult for legitimate, environmentally friendly products to compete with sellers who engage in deception."[1]As investors and consumers become increasingly sophisticated in environmental issues, it is easier for them to detect greenwash and discount companies that make misleading environmental claims, thereby undermining that company's public integrity.[2]

In light of increasing investor interest and reliance on Environmental, Social, and Governance (ESG) related disclosures the SEC is pursuing multiple ESG efforts. For example, the SEC created the Climate and ESG Task Force in its Division of Enforcement.[3] The Climate and ESG Task Force was created to "develop initiatives to proactively identify ESG-related misconduct."[4] The SEC's Division of Examinations published a Risk Alert on ESG offerings, which states that "rapid growth in [ESG] demand, increasing number of ESG products and services, and lack of standardized and precise ESG definitions present certain risks."[5] Additionally, the SEC invited public comments on climate change disclosures.

Separately, the FTC has written the Green Guides, an industry guide that attempts to help entities avoid making deceptive claims about environmental benefits of products and services. As such, they are an important corporate compliance resource. While the Green Guides are not new, they have ongoing relevance for companies in the environmental and sustainability space. This is particularly true now because a complaint is pending at the FTC that seeks to use the Green Guides against an energy company for allegedly misleading environmental benefit claims.[6]

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[1] Federal Trade Commission, Statement of Commissioner Rohit Chopra, Regarding the FTC Energy Guide Rule at p. 5, Commission File No. R611004 (Dec. 22, 2020) (encouraging the FTC to "use[] all of its legal authorities to combat practices that harm consumers, distort competition, and undermine national goals on energy independence and climate change").

[2] Deceptive environmental benefit claims are commonly referred to as "greenwash" or "greenwashing," which is generally defined as "disinformation disseminated by an organization so as to present an environmentally responsible public image." *Greenwash*, Oxford Languages (last accessed Oct. 2021).

[3] SEC Press Release, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021) *available at* https://www.sec.gov/news/press-release/2021-42

[4] *Id.*

[5] SEC Risk Alert, The Division of Examinations' Review of ESG Investing (Apr. 9, 2021) (hereinafter "SEC Risk Alert") (stating that the term ESG is used "in the broadest sense to encompass terms such as 'socially responsible investing,' 'sustainable,' 'green,' 'ethical,' 'impact,' or 'good governance' to the extent they describe environmental, social, and/or governance factors that may be considered when making an investment decision.") *available at* https://www.sec.gov/files/esg-risk-alert.pdf

[6] Greenpeace Press Release, Greenpeace Jointly Files FTC Complaint Against Chevron (Mar. 16, 2021) (hereinafter "Greenpeace Press Release") *available at* https://www.greenpeace.org/usa/news/greenpeace-jointly-files-ftc-complaint-against-chevron/

SEC Developments: Climate and ESG Task Force, Risk Alert, Public Comment

The SEC's new Climate and ESG Task Force is initially focusing on "identify[ing] material gaps or misstatements in issuers' disclosure of climate risks under existing rules."[7] It will also "analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies" and "evaluate and pursue tips, referrals, and whistleblower complaints on ESG-related issues[.]"[8] The SEC emphasized that the Climate and ESG Task Force will work with other SEC Divisions and Offices to "bolster the efforts of the Commission as a whole" on the "vital" issues of climate risks and sustainability.[9] Since establishing the Climate and ESG Task Force, the SEC is investigating Deutsche Bank's asset-management arm, DWS Group, for alleged overstatements about its sustainable investment efforts.[10] Additionally, the SEC sent letters to dozens of public companies requesting additional information for investors about how climate change may affect their earnings or operations.[11]

The SEC's Division of Examinations issued a Risk Alert that identifies deficiencies and internal control weaknesses in firms regarding ESG investing and recommends effective practices for compliance.[12] Risks include investor confusion in the absence of clear and consistent ESG definitions and term usage.[13] SEC staff is examining firms to determine whether they accurately disclose their ESG investing approaches, and whether they have implemented policies, procedures, and practices in accord with their ESG-related disclosures.[14] SEC staff examinations focus on portfolio management, performance advertising and marketing, and compliance programs.[15]

The Risk Alert identified the following compliance issues:

- "Portfolio management practices were inconsistent with disclosures about ESG approaches."
- "Controls were inadequate to maintain, monitor, and update clients' ESG-related investing guidelines, mandates, and restrictions."

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[7] SEC Press Release, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021) *available at* https://www.sec.gov/news/press-release/2021-42
[8] *Id.*
[9] *Id.*
[10] The Wall Street Journal, U.S. Authorities Probing Duetsche Bank's DWS Over Sustainability Claims (Aug. 25, 2021) *available at* https://www.wsj.com/articles/u-s-authorities-probing-deutsche-banks-dws-over-sustainability-claims-11629923018
[11] The Wall Street Journal, SEC Asks Dozens of Companies for More Climate Disclosures (Sept. 22, 2021) *available at* https://www.wsj.com/articles/regulators-ask-dozens-of-companies-for-more-climate-disclosures-11632341672
[12] SEC Risk Alert (stating that the term ESG is used "in the broadest sense to encompass terms such as 'socially responsible investing,' 'sustainable,' 'green,' 'ethical,' 'impact,' or 'good governance' to the extent they describe environmental, social, and/or governance factors that may be considered when making an investment decision.") *available at* https://www.sec.gov/files/esg-risk-alert.pdf
[13] Refer to Statement on the Staff ESG Risk Alert (Apr. 12, 2021) *available at* https://www.sec.gov/news/public-statement/peirce-statement-staff-esg-risk-alert
[14] SEC Risk Alert at 2.
[15] *Id.* at 2-3.

- "Proxy voting may have been inconsistent with advisors' stated approaches."
- "Unsubstantiated or otherwise potentially misleading claims regarding ESG approaches."
- "Inadequate controls to ensure that ESG-related disclosures and marketing are consistent with the firm's practices."
- "Compliance programs did not adequately address relevant ESG issues."
- ESG compliance personnel had limited knowledge of relevant ESG-investment analysis or oversight over ESG-related disclosures and marketing decisions.

By contrast, the Risk Alert also identified the following effective practices:

- "Disclosures that were clear, precise and tailored to firms' specific approaches to ESG investing, and which aligned with the firms' actual practices." Specifically: "[s]imple and clear disclosures regarding the firms approaches to ESG investing", "ESG factors that could be considered alongside many other factors", and "explanations regarding how investments were evaluated using goals established under global ESG frameworks."
- "Policies and procedures that addressed ESG investing and covered key aspects of the firms' relevant practices."
- "Compliance personnel that are knowledgeable about the firms' specific ESG-related practices." Notably, this reduced the likelihood of materially misleading claims in ESG marketing materials and investor-facing materials.

The SEC invited public comments on climate change disclosures given that current disclosures may not be adequate to "inform investors about known and material risks, uncertainties, impacts, and opportunities[.]"[16] SEC staff is evaluating the SEC's disclosure rules "with an eye toward facilitating the disclosure of consistent, comparable, and reliable information on climate change."[17] The SEC identified fifteen groups of questions for commenters to consider addressing.[18] The SEC Chair has since expressed an intention to propose new disclosure requirements for climate change and human capital by the end of this year.[19]

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[16] Public Statement, Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021) *available at* https://www.sec.gov/news/public-statement/lee-climate-change-disclosures

[17] *Id.*

[18] *Id.*

[19] Speech, Can the SEC Make ESG Rules that are Sustainable? (June 22, 2021) *available at* https://www.sec.gov/news/speech/can-the-sec-make-esg-rules-that-are-sustainable#_ftnref1 (citing Annual (Spring 2021) Regulatory Agenda for the Securities and Exchange Commission (June 11, 2021), available at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=7CE97CC2D49C9B6B70868F7B2752E582C86F1945A4A46F34426C18AF1ABE101E611318F64B67159C3A36E7556BD0FB872C8F; Chair Gary Gensler, "Testimony Before the Subcommittee on Financial Services and General Government, U.S. House Appropriations Committee" (May 26, 2021), *available at* https://www.sec.gov/news/testimony/gensler-2021-05-26).

FTC: Green Guides Background & Pending Complaint

The Green Guides reflect the FTC's interpretation of Section 5 of the FTC Act as it relates to "unfair or deceptive"[20] environmental marketing claims, or "green marketing." If an entity desires to make a public claim about the environmental benefits or its organization or products, the Green Guides provide recommendations for disclosures and conditions related to those claims. The Green Guides address numerous categories of claims, in varying degrees of detail, such as: (1) general environmental benefit; (2) carbon offsets; (3) certifications and seals of approval; (4) compostable; (5) degradable; (6) free-of; (7) non-toxic; (8) ozone-safe and ozone-friendly; (9) recyclable; (10) recycled content; (11) refillable; (12) renewable energy; (13) renewable materials; and (14) source reduction. For some types of benefit claims, the Green Guides reference existing regulations, which provide more specificity. For example, for "non-toxic" and "free-of" claims the Green Guides state that companies should "always follow the strictest labeling law or regulation applicable to their products", such as EPA labeling requirements.[21]

In other instances, the Green Guides provide a general recommendation. As to claims involving carbon offsets, the Green Guides do not provide extensive guidance, but state that entities who use Renewable Energy Credits (RECs) to substantiate a carbon offset claim "should be cautious that they possess competent and reliable scientific evidence to substantiate their claims and ensure that emission reductions are not double-counted."[22] Claims that a product is made with recycled content should only be made if materials were recovered or diverted from the waste stream during the manufacturing process or after consumer use. Thus, it is important that companies consult the Green Guides if they make environmental benefit claims.

The Green Guides do not have the force and effect of law. However, the FTC can bring an enforcement action under the Section 5 of the FTC Act "if a marketer makes an environmental claim that is inconsistent with the [Green] Guides."[23] Any enforcement action must be based on a case-specific investigation conducted by FTC.[24] Currently, there is a complaint pending before the FTC alleging that a major oil company is using unlawfully deceptive environmental advertising. Specifically, the complaint argues that the company is misleading consumers with false environmental claims that overstate its investment in renewable energy and its purported commitment to reduce fossil fuel pollution.[25] Complainants allege that the oil company "is the most polluting company in the world" and has "no plan to reduce its overall emissions", while

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[20] 15 U.S.C. § 45.
[21] Green Guides at 21, 138, 148.
[22] *Id.* at 74-75.
[23] *Id.* at 1, 264-68; 15 U.S.C. § 45.
[24] Green Guides at 123. Refer to Husch Blackwell Blog, Supreme Court Curbs Consumer Relief: Enforcement Implications of *AMG Capital v. FTC* (May 2021) *available at* https://www.huschblackwell.com/newsandinsights/supreme-court-curbs-consumer-relief-enforcement-implications-of-amg-capital-v-ftc
[25] Greenpeace Press Release.

spending "only 0.2 percent of its capital expenditures . . . on low-carbon energy sources."[26] Should the FTC conduct an investigation and eventually adjudicate this case, any action will illuminate if and how the FTC will use the Green Guides and its authority under the FTC Act to reign in this type of greenwashing.[27]

The FTC is currently unable to seek monetary relief on behalf of consumers, but legislation to grant it such authority is pending in Congress.[28] As to potential overlap with the SEC's extensive ESG developments identified above, the Green Guides generally state that the FTC "seeks to avoid providing guidance that duplicates or is inconsistent with other agencies' guidance." The Green Guides note that the FTC has discretion to not prosecute a company if it makes a claim that is inconsistent with the Green Guides in order to comply with federal law. Therefore, we would not expect to see the FTC base a complaint on any disclosures made through SEC filings.

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[26] *Id.*

[27] More information, including FTC action on the pending complaint, is available here.

[28] Husch Blackwell Blog, Supreme Court Curbs Consumer Relief: Enforcement Implications of *AMG Capital v. FTC* (May 2021) *available at* https://www.huschblackwell.com/newsandinsights/supreme-court-curbs-consumer-relief-enforcement-implications-of-amg-capital-v-ftc

[28] Greenpeace Press Release.