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Disclosure, Greenwashing, and the Future of ESG Litigation

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Disclosure, Greenwashing, and the Future of ESG Litigation

Barbara Ballan & Jason J. Czarnezki*

Abstract

The Environmental, Social, and Governance ("ESG") disclosure movement is expanding both voluntarily, as businesses choose to disclose this information, and mandatorily, as government agencies impose disclosure requirements. As ESG disclosure expands, so do the litigation risks. "Greenwashing" refers to presenting false or misleading environmental or sustainability (i.e., "green") qualities of products, services, or practices. Businesses may greenwash consumers as well as investors with false and misleading ESG disclosures in advertising, securities filings, or other public statements activating greenwashing litigation from investors and consumers. This Article addresses (1) the laws and regulations that cover consumer and securities greenwashing litigation, (2) how these forms of greenwashing litigation are evolving, and (3) the synergistic relationships that do, and should, exist between these forms of litigation.

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INTRODUCTION

The Coca-Cola Company advertises its plastic bottles as 100 percent recyclable,[1] while ranking as the top plastic polluter company in the world.[2] Large corporations, such as Danone, label their products as "carbon neutral,"[3] while most U.S. consumers do not even know what this term means.[4] Chevron and Shell commit to a low-carbon future[5] while dedicating 1

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1. *See* Swartz v. Coca-Cola Co., No. 21-cv-04643, 2022 WL 17881771, at *1–2 (N.D. Cal. Nov. 18, 2022) (dismissing the plaintiffs' complaint for false advertising based on the plaintiffs' misunderstanding of "100% recyclable"); *see also Endlessly Refreshing: Coca-Cola North America Rolls Out Bottles Made from 100% Recycled PET Plastic*, COCA-COLA CO. (Feb. 10, 2021), https://perma.cc/TUN3-XJ5J ("The new 13.2-oz. bottle—the first-ever Coca-Cola package made from 100% rPET in the United States—offers a convenient, sippable portion size.").

2. *See World's Biggest Plastic Polluters*, AQUABLU, https://perma.cc/N66W-C9LW (last visited Jan. 11, 2024) (listing Coca-Cola as number one for "[c]ompanies responsible for the most plastic pollution world-wide for 2022").

3. *See Climate Impact*, EVIAN, https://perma.cc/9MCQ-DVEH (last visited Jan. 11, 2024) ("Since 2008, we reduced our energy consumption by 25% and since 2017, Carbon Trust has certified evian's products in the United States and Canada, as well as certifying the evian bottling site in France as carbon neutral.").

4. *See* Eliza Carter, *Most U.S. Consumers Don't Know What 'Carbon Neutral' Means*, MORNING CONSULT (Aug. 2, 2022), https://perma.cc/4JDG-HK82 (finding in a survey that 59 percent of adults either incorrectly "identified the definition of carbon neutrality" or did not know what it meant).

5. *See Chevron Sets Net Zero Aspiration and New GHG Intensity Target*, CHEVRON, https://perma.cc/CRS8-EQ67 (last visited Jan. 11, 2024) ("Chevron adopted a 2050 net zero aspiration for equity upstream Scope 1 and 2 emissions."); *Our Climate Target*, SHELL, https://perma.cc/BKL6-8UP3 (last visited Jan 11, 2024) ("That is why we have set a target to become a net-zero emissions energy business by 2050.").

percent or less of their long-term investments to sources of low-carbon energy.[6] Global banks commit to net-zero pledges,[7] while doubling their financing to fossil fuel companies.[8] Meanwhile, 51 percent of global greenhouse gas ("GHG") emissions are attributable to fossil fuel producers[9] who are being accused of misleading shareholders with false statements concerning the risks caused by climate change[10] and for misleading consumers on climate action.[11]

Such claims, whether for advertising purposes or as part of a deeper corporate mission, are now part of the Environmental, Social, and Governance ("ESG") movement in which

6. *See Greenwashing Files: Shell*, CLIENTEARTH, https://perma.cc/9WS8-8D23 (last visited Jan. 11, 2024) ("Between 2010 and 2018, Shell was reported to have dedicated just 1% of its long-term investments to sources of low-carbon energy like wind and solar."); *Greenwashing Files: Chevron*, CLIMATEEARTH, https://perma.cc/ELV4-9NND (last visited Jan. 11, 2024) ("Between 2010 and 2018, Chevron is analysed to have dedicated only 0.2% of its long-term investments to sources of low-carbon energy like wind and solar.").

7. *See* Fiona Harvey, *Banks Still Investing Heavily in Fossil Fuels Despite Net Zero Pledges—Study*, GUARDIAN (Jan. 17, 2023), https://perma.cc/4PLD-J75M ("Banks and finance institutions that have signed up to net zero pledges are still investing heavily in fossil fuels, research has shown, leading to accusations they are acting as 'climate arsonists.'").

8. *See* BANKING ON CLIMATE CHAOS, FOSSIL FUEL FINANCE REPORT 2022, at 3 (2022), https://perma.cc/8HD2-NG7A (PDF) ("[I]n a year where net-zero commitments were all the rage, the financial sector continued its business-as-usual driving of climate chaos.").

9. *See New Report Shows Just 100 Companies are Source of Over 70% of Emissions*, CDP (July 10, 2017), https://perma.cc/7DGH-L4ZV.

10. *See, e.g.*, *In re* Exxon Mobil Corp. Derivative Litig., No. 19-CV-16380, 2020 WL 5525537, at *1 (D.N.J Sept. 15, 2020) ("Saratoga asserts that Exxon misrepresented the estimated costs of greenhouse gas regulations it was using in its business decisions and did not appropriately project future costs of carbon and greenhouse gas."); Ramirez v. Exxon Mobil Corp., No. 16-cv-03111, 2023 WL 5415315, at *5 (N.D. Tex. Aug. 21, 2023) ("Plaintiff alleges that Defendants misled investors by not adhering to their public statements about using a proxy cost of carbon—a figure representing the projected effects of various climate-related policies on the future global energy demand—in their investment and valuation procedures.").

11. *See, e.g.*, *Accountability Groups File First of Its Kind FTC Complaint Against Chevron for Misleading Consumers on Climate Action*, EARTHWORKS (Mar. 16, 2021), https://perma.cc/XNZ8-TN9S ("The complaint claims that Chevron is consistently misrepresenting its image to appear climate-friendly and racial justice-oriented, while its business operations overwhelmingly rely on climate-polluting fossil fuels, which disproportionately harm communities of color.").

corporations disclose a diverse array of approaches to achieve sustainability.[12] ESG is a broad term that addresses "a broad range of environmental, social, and governance factors which seek to provide investors with objective, quantifiable performance indicators."[13] Also, ESG qualities attract consumers that are worried about the planet, and consumers are more likely to buy the brand if they perceive the company as "green."[14] Thus, ESG involves environmental marketing, and these claims attract consumers, activate consumer preferences, and serve to identify consumer trends.[15] However, ESG disclosure can also exacerbate greenwashing concerns because there may be inconsistency between a company's ESG claims and their actual practices.[16]

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12. *See generally* Elizabeth Pollman, *The Making and Meaning of ESG* (U. Penn., Inst. for L. & Econ., Working Paper No. 659/2022, 2022), https://perma.cc/T2P3-H5VA (PDF). Our Article focuses on the "E" in ESG disclosure in relation to environmental greenwashing claims, which are mostly linked to carbon pledges and sustainability claims. Nevertheless, ESG encompasses social and governance components that may also give rise to greenwashing claims. *See, e.g.*, Lee v. Fisher, 70 F.4th 1129, 1135 (9th Cir. 2023) (describing plaintiff's claim against a company for false and misleading statements about diversity in the boardroom as a social component of ESG).

13. Ron C. Llewellyn & Ashley C. Walter, *ESG and the Supply Chain*, THOMSON REUTERS: PRAC. L. (Feb. 1, 2023), https://perma.cc/2X22-PWAJ. In this Article, "shareholders" and "investors" are terms used interchangeably to refer to investors as participants in securities markets and are defined as "individuals who own securities directly or indirectly, and institutional investors that own securities on behalf of others." ALAN R. PALMITER, EXAMPLES & EXPLANATIONS: SECURITIES REGULATION 5 (7th ed. 2017) [hereinafter PALMITER, SECURITIES REGULATION].

14. *See* ECONOMIST INTEL. UNIT, AN ECO-WAKENING: MEASURING GLOBAL AWARENESS, ENGAGEMENT, AND ACTION FOR NATURE 22 (2021), https://perma.cc/9V4A-UT3S (PDF) ("The popularity of Google searches for sustainable goods increased by 71% between 2016 and 2020.").

15. *See* InfoPro Cmty. Manager, *Greenwashing and ESG. Why It Matters*, LEXISNEXIS (Sept. 14, 2022), https://perma.cc/Z5LQ-NUHH ("Consumer demands for sustainable goods and services are higher than ever and a top priority for companies around the globe. As companies market their goods and services around this topic, there is a high risk of 'greenwashing' in their marketing.").

16. *See* Kelly Anne Smith, *Greenwashing and ESG: What You Need to Know*, FORBES ADVISOR (Aug. 25, 2022), https://perma.cc/X587-9CAH ("Studies have shown that more and more ESG funds include companies that are far from being paragons of social and environmental responsibility."); Jennifer Hijazi, *Shell Greenwashing Challenge Highlights Risk of ESG Claims*, BLOOMBERG L. (Feb. 16, 2023), https://perma.cc/P4PJ-23VM (discussing a

Greenwashing occurs when a company concurrently engages in both negative environmental practices and positive communication about their environmental performance.[17] Companies may use ESG metrics as a way to appear socially or environmentally responsible to investors and consumers, while their actions do not align with their stated ESG goals.[18] Administrative agencies are rushing to fill the gaps[19] left by the private, voluntary pledges of corporations by enacting public policies, such as guidelines and mandatory disclosures, that may also influence litigation trends.[20]

This Article explores the potential liability of businesses that claim to be "green" while not fulfilling their pledges, describes and analyzes the potential trends in greenwashing litigation, and confronts the new regulatory landscape of

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"growing trend of greenwashing accusations from environmental groups and investors").

17. *See* Magali A. Delmas & Vanessa Curel Burbano, *The Drivers of Greenwashing*, 54 CAL. MGMT. REV. 64, 66 (2011) (defining greenwashing as "misleading consumers about firm environmental performance or the environmental benefits of a product or service").

18. *See supra* notes 7–11 and accompanying text.

19. *See generally* Michael P. Vandenbergh et al., *The Gap-Filling Role of Private Environmental Governance*, 38 VA. ENV'T L.J. 1 (2020).

20. *See, e.g.*, The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249); Investment Company Names, 88 Fed. Reg. 70,436 (Dec. 11, 2023) (to be codified at 17 C.F.R. pts. 230, 232, 239, 270, 274); Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36,654 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, 279); Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822 (Dec. 1, 2022) (to be codified at 29 C.F.R. pt. 2550). California has passed two laws that require companies to disclose their direct and indirect GHG emissions and climate-related financial risks. *See* Climate Corporate Data Accountability Act, S.B. 253, 2023–2024 Leg., Reg. Sess., 2023 Cal. Stat. 382; Greenhouse Gases: Climate-Related Financial Risk, S.B. 261 2023–2024 Leg., Reg. Sess., 2023 Cal. Stats. 383. The European Union has been at the forefront of climate legislation, influencing U.S. legislation and litigation trends. *See, e.g.*, 2022 J.O. (L 322) (recognized as the "Corporate Sustainability Reporting Directive"). In March 2024, the European Parliament adopted its position on the Green Claims Directive to establish a verification and pre-approval system for environmental marketing claims to protect citizens from misleading ads. *See Parliament Wants to Improve Consumer Protection Against Misleading Claims*, EUR. PARLIAMENT (Mar. 12, 2024), https://perma.cc/S8NU-HDUS.

securities regulation. Importantly, while there are many forms of ESG litigation, this Article focuses on specific types of greenwashing litigation arising from ESG disclosure.[21]

In doing so, this Article focuses on two specific litigation paths: (1) greenwashing claims arising from environmental marketing claims that potentially run afoul of federal and state consumer protection laws, and (2) greenwashing securities litigation arising from potentially deceptive climate change and sustainability claims in violation of federal securities law.

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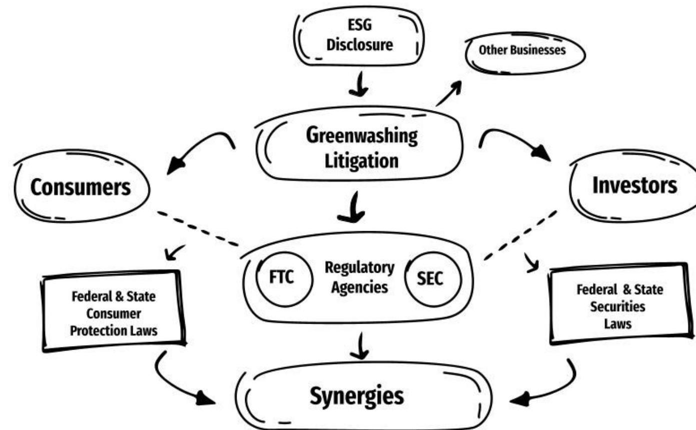
21. For instance, complaints can also refer to ESG litigation arising from retirement fund beneficiaries suing fund providers for divesting, or *not* divesting, funds in fossil fuel companies. *See, e.g.*, Complaint at para. 1*,* Wong v. N.Y.C. Emps.' Ret. Sys., No. 652297/2023 (N.Y. Sup. Ct. May 11, 2023) ("Defendants have breached their fiduciary duties and abused their control over plan assets by divesting the Plans of approximately four billion dollars of holdings in companies involved in the extraction of fossil fuels, in a misguided and ineffectual gesture to address climate change."); Complaint at para. 25, Lynn v. Peabody Energy Corp., 250 F. Supp. 3d 372 (E.D. Mo. 2017) (No. 15-CV-00916) (alleging breach of fiduciary duty in the context of pension plans). Complaints may also allege breach of corporate directors' and officers' fiduciary duties when losses can be attributed to their failure to disclose or to consider ESG-related information. However, courts typically defer to the actions of directors and officers made in good faith and in the best interests of the company under the business judgement rule. Nevertheless, the growing impacts of climate risks have led to an increase in climate change litigation against directors and officers who may be perceived as neglecting their fiduciary obligations. *See, e.g.*, Ramirez v. Exxon Mobil Corp.*,* 334 F. Supp. 3d 832, 840 (N.D. Tex. 2018) ("Pension Fund alleges these representations were materially misleading because ExxonMobil knew it could not survive the historic drop in oil and gas prices without writing down assets."); *see also* Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties*, 2020 UTAH L. REV. 313, 348–72 (discussing fiduciary duties in the context of climate risks as new risks and responsibilities for corporate actors).

Figure 1



As shown in Figure 1, consumer litigation involves claims made by consumers under federal and state law, whereas securities litigation involves claims made by investors based on federal and state securities laws. Additionally, regulatory agencies from both realms—the Federal Trade Commission ("FTC") in the consumer realm and the Securities and Exchange Commission ("SEC") in the investor realm—may also initiate litigation and establish regulations and guidelines pertaining to greenwashing in ESG disclosure.[22] Greenwashing litigation from a consumer and investor perspective should be considered by businesses in tandem and before engaging in greenwashing practices to avoid litigation risks. Furthermore, this Article addresses the potential collision between seemingly unrelated regulatory landscapes of consumer and securities law.

Recognizing the importance for businesses and regulators to consider the risks of greenwashing litigation from both consumer and investor perspectives, this Article proposes a collaborative and integrated approach to overseeing and implementing sustainability claims, thereby advancing ESG goals. Part I of this Article defines ESG, "greenwashing," and the different types of claims that a plaintiff can bring, such as: (1) product-level greenwashing, (2) firm-level greenwashing, and (3) claims of "climate-washing." Part II discusses the Green

22. *See infra* Parts II–III.

Guides and provides examples of how the FTC has brought enforcement actions based on them and other statutory schemes it administers. Part III explores the relevant existing and proposed SEC regulations and the SEC's efforts to enforce those regulations. Part IV focuses on greenwashing litigation related to ESG disclosure by private plaintiffs, whether individually or as a lead plaintiff in a class action. It examines the private rights of action available to them and the remedies they can seek, specifically under the Lanham Act,[23] federal securities laws, and state consumer protection laws.[24] Part V analyzes the existing synergies between securities and consumer litigation, and the new litigation landscape surrounding SEC climate disclosure rules. This Article concludes by identifying the ESG litigation trends in consumer protection and securities class actions. There are possible intersections between the FTC's authority to regulate green-marketing claims and the SEC securities litigation landscape, indicating a potential merger between "the investor and consumer realms."[25] The boundaries between consumer and investor protection may become increasingly blurred in the context of ESG-related litigation when addressing consumer protection laws and securities laws related to greenwashing. There may be a convergence of legal issues and risks faced by both investors and consumers regarding ESG practices. This Article argues that this merger between the two realms highlights the need for companies to consider the risks and consequences of greenwashing practices from both perspectives before making sustainability and climate-related statements.

23. Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.).

24. *See infra* Part IV.

25. John Cooper, *A Case for Unified Control of ESG and Sustainability Claims for Advertising and Investor Communications*, VEEVA, https://perma.cc/FH48-L3X2 (last visited Jan. 11, 2024).

I. ESG DISCLOSURE AND THE DIFFERENT TYPES OF GREENWASHING

"ESG" has become the new "sustainability" paradigm for businesses.[26] The lack of clarity, broad interpretation, and flexibility in ESG's definition allow businesses to convey a "big tent approach" that converges environmental, social, and governance factors under the ESG acronym.[27] It is a versatile term that can adapt in diverse contexts, change over time, and appeal to a wide range of investors and stakeholders.[28] This "big tent approach" facilitates greenwashing, leads to misleading claims and unfair practices, and may cause one to question the credibility of ESG-related statements, which all expand potential paths to litigation.[29]

While using ESG as a metric-based mechanism[30] can offer effective new solutions to address the public environmental governance vacuum, it can also give rise to new gaps as an alternative governance mechanism. Many environmental claims are based on "self-created" or "first-party" standards

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26. Large corporations are linking ESG and sustainability on their websites. *See, e.g.*, *Governance*: *Getting Results the Right Way*, CHEVRON, https://perma.cc/KM4E-SG3E (last visited Jan. 11, 2024) ("The ESG team regularly briefs the Global Issues Committee on its efforts and supports the briefing of the Public Policy & Sustainability Committee."); *Sustainability*, COCA-COLA CO., https://perma.cc/Y5UR-DYK3 (last visited Jan. 11, 2024) ("As a foundational step in how we conduct business and develop our corporate strategy, our company focuses on the highest-priority sustainability and environmental, social, and governance (ESG) issues."); *ESG Information Hub*, SHELL, https://perma.cc/53WQ-27GP (last visited Jan. 11, 2024) ("The environmental, social and governance (ESG) information hub brings together our key reports, policies and commitments, our sustainability data and performance, and mapping to reporting standards and frameworks."); *Sustainability & Governance*, TARGET, https://perma.cc/XZ7R-ZRMV (last visited Jan. 11, 2024).

27. *See* Pollman, *supra* note 12, at 30.

28. *See id.* at 29 ("The combination of E, S, and G into one acronym has provided a highly flexible term that can vary widely by context, evolve over time, and collectively appeal to a broad range of investors and stakeholders.").

29. *See id.* at 40 ("A slew of claims and ESG-related litigation are on the horizon as corporate statements and pledges about environmental and social issues have seen 'exponential growth.'").

30. *See* Colin Myers & Jason J. Czarnezki, *Sustainable Business Law? The Key Role of Corporate Governance and Finance*, 51 ENV'T L. 991, 997 (2021) ("ESG has emerged as a metrics-based approach intended to increase corporate accountability.").

whereby businesses claim to be environmentally friendly without the support of independent third-party certification.[31] At the same time, the lack of standardization for third-party certification allows companies to assess their environmental impact independently, meaning that they can decide which data to collect and how that data will be processed in the first place.[32] For example, when businesses pledge to be carbon-neutral, they choose their preferred methodology for estimating their carbon footprint, and, in turn, can omit important environmental data.[33] These business practices expose the disadvantages of unregulated and non-standardized ESG metrics.

Greenwashing has been defined as "the act of misleading consumers [and investors] regarding the environmental practices of a company (firm-level greenwashing) or the environmental benefits of a product or service (product-level greenwashing)."[34] Furthermore, another category introduced in the context of climate change pertains to "climate-washing." This specific type of greenwashing refers to misleading or overstating claims related to carbon-neutral or net-zero pledges.[35] The "green" advertising movement has exploded at

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31. *See* Jason J. Czarnezki et al., *Greenwashing and Self-Declared Seafood Ecolabels*, 28 TUL. ENV'T L.J. 37, 39 (2014) [hereinafter Czarnezki et al., *Greenwashing and Self-Declared Seafood Ecolabels*] ("A self-declaration environmental claim is an environmental claim that is made, without independent third-party certification, by manufacturers, importers, distributors, retailers, or anyone else likely to benefit from such a claim." (quoting Atsuko Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, 11 GEO. INT'L ENV'T L. REV. 599, 608 (1999))); Jason Czarnezki et al., *Eco-Labeling*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ENVIRONMENTAL LAW 996, 1004 (Emma Lees & Jorge E. Viñuales eds., 2019).

32. *See* John W. White et al., *Practical Steps for Board and Management Supervision of ESG Data Gathering and Disclosure*, *in* INTERNATIONAL COMPARATIVE LEGAL GUIDES: ENVIRONMENTAL, SOCIAL & GOVERNANCE LAW 42, 43 (David M. Silk & Carmen X. W. Lu eds., 3d ed. 2023) (detailing the challenges faced by companies in the collection of ESG data).

33. *See, e.g.*, Complaint at paras. 12–16, Dwyer v. Allbirds, Inc., 598 F. Supp. 3d 137 (S.D.N.Y 2022) (No. 21-cv-05238) [hereinafter *Allbirds* Complaint] (alleging that the business tool Allbirds used to estimate its product's carbon footprint omits important environmental impact data).

34. Delmas & Burbano, *supra* note 17, at 66.

35. *See* AKRITI BHARGAVA ET AL., CLIMATE SOC. SCI. NETWORK, CLIMATE-WASHING LITIGATION: LEGAL LIABILITY FOR MISLEADING CLIMATE COMMUNICATIONS 4 (2022), https://perma.cc/3Y6A-8SGR (PDF) ("This type of climate-related green washing maybe referred to as 'climate-washing,' and

the same time as the development of sustainable business law.[36] In the last few years, the rapid ascension of consumer and capital markets for green products has expanded the scope of consumer, investor, and business protection against greenwashing claims.[37]

The evolution of greenwashing litigation is heavily influenced by the development of regulations and guidelines put forth by governmental agencies—in the consumer realm by the FTC's Green Guides, which may serve as a reference for state litigation and laws,[38] and, in the investor realm, by existing guidance, rules, and regulations of ESG and climate-related disclosures by the SEC.[39]

As companies engaging in greenwashing can face potential lawsuits from consumers, shareholders, and regulatory bodies, it is important to analyze the types of greenwashing claims that might emerge. Recent litigation trends related to ESG-disclosure-greenwashing claims can be categorized into three types: (1) product-level greenwashing, (2) firm-level greenwashing, and (3) claims of "climate-washing." This Part focuses on the types of greenwashing claims that may arise considering the aforementioned taxonomy, and how it applies to the investor and consumer realms.[40]

A. *Product-Level Greenwashing*

Product-level greenwashing refers to the act of misleading consumers and shareholders about the environmental benefits

litigation brought against it highlights the gap between state and non-state actors' words and actions regarding climate change.").

36. *See* Myers & Czarnezki, *supra* note 30, at 992 ("Lawyers, law schools, and corporate entities have shown an increased interest in sustainable business strategies.").

37. *See* Delmas & Burbano, *supra* note 17, at 65.

38. FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. pt. 260 (2024). See *infra* Part II.A for a description of the FTC's authority and the Green Guides, and Part IV.C for a description of state consumer protection laws and its relation to the Green Guides.

39. See *infra* Part III.B for a description of the SEC authority, and existing and proposed climate-related and ESG disclosure regulations.

40. See *infra* Part V for an explanation of consumers' and investors' private right of action in greenwashing litigation related to ESG disclosure.

of a product or service by businesses.[41] This tactic is often employed by labelling products with false or misleading information regarding their composition or capabilities, and usually the terms used by businesses are not defined by federal or state law.[42]

In the consumer realm, product-level greenwashing claims arise when consumers purchase products based on misleading environmental claims.[43] Consumers who believe they are making an eco-friendly choice are misled and harmed by the false advertising.[44] For example, a company might market a product as "recyclable," although most consumers do not have the ability to recycle that product.[45]

In the context of securities litigation, product-level greenwashing claims arise when companies overstate the environmental benefits of specific products to investors.[46] This typically occurs when a company makes claims about a product's sustainability attributes that are later investigated and found to be false or exaggerated.[47] Investors are misled into believing

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41. *See* Delmas & Burbano, *supra* note 17, at 6.

42. Regarding the use of the term "recyclable" in labelling as a form of product-level greenwashing see, for example, Swartz v. Coca-Cola Co., No. 21-cv-04643, 2022 WL 17881771, at *2 (N.D. Cal. Nov. 18, 2022) (using the term "100% recyclable"); Complaint at 3, Peterson v. Glad Prods. Co., No. 23-cv-00491, 2023 WL 4600404 (N.D. Cal. July 17, 2023) [hereinafter *Peterson* Complaint] ("[O]n the Product's front label: 'Recycling' is stated in all capital letters . . . . Immediately below, in all caps, the label declares 'Designed for Municipal Use' misleading consumers to reasonably, but incorrectly, believe the Products are recyclable and will be accepted by their municipal recycling programs."). *See also* Delmas & Burbano, *supra* note 17, at 69 (explaining how regulation on greenwashing in the United States is limited).

43. *See, e.g.*, *Swartz*, 2022 WL 17881771, at *2.

44. *See* Delmas & Burbano, *supra* note 17, at 64 ("The skyrocketing incidence of greenwashing can have profound negative effects on consumer confidence in green products, eroding the consumer market for green products and services.").

45. See *infra* Part IV.C for a discussion about the use of the term "recyclable" in consumer greenwashing litigation and the development of the Green Guides. *See also, e.g.*, *Swartz*, 2022 WL 17881771, at *2; *Peterson* Complaint, *supra* note 42, at 3.

46. *See supra* note 10 and accompanying text.

47. *See* Delmas & Burbano, *supra* note 17, at 66 ("Energy Star, a government-backed third party eco-label indicating that a product meets a set of energy efficiency guidelines, certified many of LG Electronics' refrigerator models. It was discovered, however, that ten of the certified LG refrigerator

that the product has a more positive environmental impact than it actually does, leading to fluctuations in the company's stock price and potential shareholder losses.[48] For instance, in a recent securities class action filed against a bioplastic manufacturer, investors allege that the company's sustainability statement, which claimed its plastic was 100 percent biodegradable, renewable, and sustainable, was overstated, particularly given its presence in oceans and landfills.[49] This case serves as an example of the potential securities risks associated with product-level greenwashing claims.

Product-level greenwashing lawsuits highlight the importance of laws and regulations to clearly define the terms used by businesses when labelling products. Consumers and investors rely on this information to make informed decisions, and any misrepresentation or overstatement can have significant repercussions on the company's reputation and financial standing. As the trend of ESG investing continues to grow,[50] companies must exercise caution and adhere to accurate disclosure practices to avoid potential consumer and securities litigation related to product-level greenwashing claims.

B. *Firm-Level Greenwashing*

Firm-level greenwashing arises when a company makes false or misleading claims about its overall environmental practices, policies, or performance, rather than just its individual products.[51] It involves creating a false image of the

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models did not actually meet the efficiency standards required to earn the certification.").

48. *See* BHARGAVA ET AL., *supra* note 35, at 11 ("[S]ome jurisdictions are recommending or requiring that high emitting companies disclose the risks of climate change to their businesses to investors and the public, particularly where their future profitability may be jeopardised by continued capital investments in fossil fuel-based assets, infrastructure and reserves.").

49. *See, e.g.*, Complaint at 3–4, *In re* Danimer Sci., Inc. Sec. Litig., No. 21-CV-02708, 2023 WL 6385642 (E.D.N.Y. 2023) [hereinafter *Danimer* Complaint].

50. *See* CAP. GRP., ESG GLOBAL STUDY 2023, at 3 (2023), https://perma.cc/TTH4-HGQV (PDF) (finding that the percentage of investment professionals using ESG has reached 90 percent).

51. *See* Delmas & Burbano, *supra* note 17, at 67.

company as environmentally responsible, even though its actual practices may be environmentally harmful or unsustainable.[52] This form of greenwashing can be particularly damaging as it misleads consumers and investors into thinking that the entire company is environmentally friendly, when in fact only a small portion of its practices may be achieving the stated sustainability goals.[53]

In the recent years, the cause of action in consumer greenwashing litigation for false and misleading statements has been extended to the business practices undertaken throughout the supply chain.[54] Consumers are scrutinizing advertisements and claims by evaluating the product's environmental, sustainability, and ethical practices at every stage of its life

52. *See id.* ("A greenwashing firm engages in two behaviors simultaneously: poor environmental performance and positive communication about its environmental performance.").

53. *See id.* at 69.

54. *See* Jaikaran Singh & Charles W. Niemann, *Hot Topics in Consumer Product False Advertising Class Actions: An Increased Focus on Ethics, Sustainability, and Safety Claims*, NAT'L L. REV. (July 8, 2022), https://perma.cc/VM5B-U5JY (explaining that as details of supply chains using unethical practices have emerged, "putative class action plaintiffs have been quick to challenge the manufacturer's marketing claims about environmentally friendly actions, the sustainability of their products, and 'cruelty-free' or ethical manufacturing processes").

cycle.[55] For instance, a company might claim to be committed to sustainable farming while engaging in deforestation.[56]

In the securities realm, firm-level greenwashing claims may involve investors challenging a company's public statements regarding its overall environmental performance.[57] For example, investors may bring securities class actions against a company that falsely presents itself as environmentally responsible in its sustainability reports and press releases, leading to inflated stock values.[58] Such claims can have a significant impact on the company's reputation and investor confidence.

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55. *See, e.g.*, Complaint at 24, Marshall v. Red Lobster Mgmt. LLC, No. 21-cv-04786, 2023 WL 9111611 (C.D. Cal. Dec. 18, 2023) [hereinafter *Red Lobster* Complaint] (alleging that Red Lobster misleads and falsely advertises to consumers in California by promising "that its Sustainability Representations are 'more than just words on our menu,' and instead a 'promise' on which consumers can rely 'that all of the seafood we serve is sourced to the highest standards'"); Walker v. Nestlé USA, Inc., 19-cv-00723, 2022 WL 901553, at *1 (S.D. Cal. Mar. 28, 2022) ("Plaintiff claims the statements on product labels are deceptive because they falsely lead consumers to believe that the products were produced in accordance with environmentally and socially responsible standards."); Class Action Complaint at 1, Commodore v. H&M Hennes & Mauritz LP, No. 22-cv-06247 (S.D.N.Y. July 22, 2022) [hereinafter *H&M* Complaint] ("This case is about H&M's labeling, marketing, and advertising that is designed to mislead consumers about its products' environmental attributes, through the use of false and misleading 'environmental scorecards' for its products called 'Sustainability Profiles.'").

56. *See, e.g.*, *Walker*, 2022 WL 901553, at *1 (discussing plaintiff's allegations that cocoa sourced by Nestle contributes to deforestation, going against the social and environmental benefits displayed on the packaging).

57. *See, e.g.*, Class Action Complaint at 22–23, Fagen v. Enviva Inc., No. 22-2844, 2023 WL 1415628 (D. Md. Jan. 31, 2023) [hereinafter *Fagen* Complaint] (alleging that the company misled investors by claiming to be an environmentally sustainable producer of wood pellets, while actually engaging in clear-cutting); *In re* Volkswagen AG Sec. Litig., 661 F. Supp. 3d 494, 508–09 (E.D. Va. 2023) (alleging that Volkswagen misled investors by stating that the company would be changing its name from "Volkswagen" to "Voltswagen" to reflect a shift in emphasis to electric vehicles).

58. *See Fagen* Complaint, *supra* note 57, at 29 ("Such scheme was intended to, and throughout the Class Period did . . . artificially inflate and maintain the market price of Enviva securities . . . [and] cause Plaintiff and other members of the Class to purchase or otherwise acquire Enviva securities and options at artificially inflated prices."); *In re Volkswagen*, 661 F. Supp. 3d at 509 ("Defendants' conduct was allegedly motivated by their desire to promote the ID.4 'without having to incur the costs and risks associated with rebranding' in its competition with Tesla for North American market share.").

C. *Climate-Washing Claims*

Lastly, an important trend in ESG disclosure greenwashing litigation class actions comes in the form of cases alleging "climate-washing."[59] Generally, climate-washing allegations are related to carbon pledges or claims that are interchangeably referred to as "carbon neutral," "climate neutral," "net-zero," and "zero-carbon."[60] Climate-washing has grown in the last few years due to the great pressure on corporations to step up to the challenges posed by climate change.[61]

Analyzing climate-washing class actions from a consumer and investor perspective is important for drawing parallels between the different provisions encountered in securities and consumer regulatory landscapes, and to uncover potential litigation trends and synergies between both paths.[62] While the legal landscape surrounding climate-washing litigation is still evolving, it can provide valuable insights for both investors and consumers.

In the consumer realm, climate-washing claims may arise when companies make carbon-neutral or net-zero claims without transparently disclosing their progress toward those goals.[63] As a result of climate-washing expansion, consumers

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59. *See, e.g.*, Complaint at 2, Dorris v. Danone Waters of Am., No. 22 Civ. 08717, 2024 WL 112843 (S.D.N.Y. Jan. 10, 2024) [hereinafter *Danone Waters* Complaint] ("On the labels and/or packaging of all versions of the Product, Defendant represents that the Product is 'carbon neutral' . . . . However, Defendant's representation that the Product is carbon neutral is false: Defendant's manufacturing of the Product still causes carbon dioxide ('CO_2') to be released into the atmosphere."); *Allbirds* Complaint*, supra* note 33, at 1–3 (accusing businesses of making false and misleading claims regarding carbon pledges, which can be seen as a form of greenwashing in the context of climate change).

60. *See* Ken Markowitz et al., *Modernizing the Green Guides in the Age of Carbon Neutrality*, WESTLAW TODAY (Sept. 2, 2021), https://perma.cc/89Q6-TLU5 (PDF)**.**

61. At least twenty climate-washing cases have been filed before courts in the United States, Australia, France, and the Netherlands since 2016. *See* BHARGAVA ET AL., *supra* note 35, at 5; *see also* JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2022 SNAPSHOT 39–40 (2022), https://perma.cc/BYB4-RSXQ (PDF) (describing the rise of climate-washing litigation).

62. *See infra* Part V.A.

63. *See* BHARGAVA ET AL., *supra* note 35, at 4.

that feel misled by such claims are reacting through litigation.[64] Consumers who support these companies based on their climate commitments may be deceived if the company's actions do not align with its promises.[65] For instance, Danone has been accused of making false claims about its "Carbon Neutral" plastic water bottle, illustrating the consumer risks associated with climate-washing claims.[66]

In the securities realm, climate-washing claims involve investors challenging a company's climate-related disclosures.[67] Investors may bring securities class actions against companies that fail to deliver on their climate pledges or provide insufficient evidence to support their commitments.[68] Such claims can impact the company's stock value and reputation among investors.[69] For instance, Exxon has been accused by shareholders of failing to disclose its climate change reports.[70]

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64. *See id.* at 4–6 (stating that climate-washing litigation has emerged as a trend in consumer protection, with consumers filing lawsuits against corporations for misleading claims about addressing climate change).

65. *See* cases cited *supra* note 59

66. *See Danone Waters* Complaint, *supra* note 59, at 2–3.

67. *See, e.g.*, Ramirez v. Exxon Mobil Corp., No. 16-cv-03111, 2023 WL 5415315, at *15 (N.D. Tex. Aug. 21, 2023) (explaining plaintiff's allegations that investors were misled by Exxon Mobil when addressing the "risks to its business from climate change").

68. *See, e.g.*, *id.* at *1.

69. *See id.* at *12 (explaining the expert reports on whether "Defendants' alleged misrepresentations caused Exxon Mobil's stock to maintain an inflated price").

70. *See, e.g.*, Complaint for Violations of the Federal Securities Laws at 1–2, Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d 832 (N.D. Tex. 2018) (No. 16-cv-031111) [hereinafter *Ramirez* Complaint]. Plaintiffs allege that after the price of oil and gas declined in 2014, (1) Exxon made false and misleading statements by failing to disclose in its reports the environmental risks associated with climate change; (2) Exxon's inability to extract claimed hydrocarbon reserves due to climate change risks, resulting in stranded reserves that should have been devalued; and (3) the use of an inaccurate "price of carbon" to artificially inflate the value. *Id.* In 2023, the United States District Court for the Northern District of Texas denied the lead plaintiff's motion to certify a class for alleged misstatements on carbon proxy, citing the defendants' successful rebuttal of the reliance presumption using an expert's analysis. *See Ramirez*, 2023 WL 5415315, at *15. However, the court did certify a class for the remaining claims regarding alleged failures in disclosing losses linked to specific operations in Canada and the Rocky Mountains. *See id.* at *22–23.

Consumer protection laws and securities laws have different regulations related to product-washing, firm-washing, and climate-washing claims. For instance, in the case of climate-washing, businesses that disclose certain statements related to carbon offsets may be violating consumer protection laws but not securities laws.[71] The analysis of these cases and their application in litigation is further explored in Part V to show the existing synergies between consumer and securities protection laws and uncover potential trends that could impact greenwashing litigation in the future.

To conclude, consumer and investor greenwashing encompasses three distinct types of claims, each presenting its own opportunities and challenges: product-level greenwashing, firm-level greenwashing, and claims of "climate-washing." Exploring the different types of greenwashing claims highlights the significant impact and potential liability that companies engaging in greenwashing may face. Additionally, the FTC's authority and the development of the Green Guides, which are analyzed next in Part II, play a crucial role in defining product terms and influencing the interpretation of sustainability statements, thereby shaping the landscape for potential consumer greenwashing litigation. Similarly, the SEC's authority and the relevant existing and proposed regulations also determine the future of ESG-disclosure-securities-greenwashing litigation.[72] As both voluntary and mandatory ESG initiatives continue to expand, consumer protection and securities regulations, enforcement actions, and greenwashing litigation are also developing. The analysis of both consumer and shareholder's greenwashing litigation is important for the development of considerations that benefit businesses, regulators, and potential plaintiffs in managing ESG disclosures and associated litigation risks.

II. GREENWASHING, THE FTC, AND THE GREEN GUIDES

This Part describes the Federal Trade Commission's authority to create and enforce regulations that prevent

71. See *infra* Part V.A.3 for a comparison of consumer and securities regulations regarding carbon offsets.

72. See *infra* Part III for a description of the SEC's authority and existing and proposed regulations related to ESG and climate-related disclosures.

consumer misinformation by businesses. Subpart A describes the FTC's authority and the Green Guides. Subpart B provides examples on how the FTC has brought enforcement actions to protect consumers against greenwashing.

A. *FTC and the Green Guides*

The Federal Trade Commission is the United States agency in charge of preventing fraudulent, deceptive and unfair business practices, and providing information to help consumers avoid scams and fraud.[73] The FTC is authorized to initiate federal district court proceedings to enjoin violations of the Federal Trade Commission Act[74] ("FTCA") and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies.[75] In any enforcement action, the Commission must prove the conduct in question constitutes "unfair or deceptive acts or practices in or affecting commerce" in violation of § 5 of the FTCA.[76] To determine the deceptiveness of the label or advertising term on the product, the FTC uses a "reasonable consumer standard."[77] For the application of this standard, the FTC must put itself in the shoes of a reasonable consumer to unravel their explicit and implicit beliefs about the label or term used in advertising.[78]

The FTC published the Guides for the Use of Environmental Marketing Claims[79] ("Green Guides"), which provide general principles and specific guidance, intending to

73. *See Federal Trade Commission (FTC)*, USAGOV, https://perma.cc/4HK5-5W6D (last visited Mar. 3, 2024).

74. 15 U.S.C. §§ 41–58.

75. *See id.* §§ 53(b), 45(*l*).

76. *See id.* § 45(a)(1); 16 C.F.R. § 260.1(a) (2024).

77. Jason Czarnezki et al., *Creating Order Amidst Food Eco-Label Chaos*, 25 DUKE ENV'T L. & POL'Y F. 281, 301 (2015) [hereinafter Czarnezki et al., *Creating Order*].

78. *See* Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to John D. Dingell, Chairman, Comm. on Energy & Com., FTC Policy Statement on Deception (Oct. 14, 1983), https://perma.cc/6MRF-DUC3 (PDF) ("When representations or sales practices are targeted to a specific audience, such as children, the elderly, or the terminally ill, the Commission determines the effect of the practice on a reasonable member of that group."); *see also* Czarnezki et al., *Creating Order*, *supra* note 77, at 301.

79. 16 C.F.R. pt. 260 (2024).

prevent companies from making missteps with respect to environmental claims.[80] The Green Guides address "green" claims by (1) explaining how reasonable consumers likely interpret such claims; (2) describing the basic elements necessary to substantiate a valid claim; and (3) presenting options to avoid deceptive practices.[81] The Green Guides provide general principles that can be applied to all environmental marketing claims.[82] They can be used as advertising principles for greenwashing claims that can be introduced as evidence in court proceedings involving false advertising litigation.[83] For each claim covered, the Green Guides explain how reasonable consumers likely interpret it, describe the basic elements necessary to substantiate it, and present options for qualifications to avoid deception.[84]

Although compliance with the Green Guides is voluntary, if a business chooses to make an environmental claim that is inconsistent with the Green Guides, the FTC can act against the deceptive claim by pursuing an enforcement action for violation of § 5 of the FTCA.[85] Thus, the Green Guides are voluntary principles, not enforceable by themselves, and "following these guidelines falls in the middle space between legally mandatory and truly voluntary."[86]

The Green Guides were issued and introduced by the FTC in 1992 and are reviewed periodically, with the last update in 2012.[87] On December 2022, FTC sought public comment to

80. *See* David Hackett et al., *Growing ESG Risks: The Rise of Litigation*, 50 ENV'T L. REP. 10849, 10853 (2020).

81. 16 C.F.R. § 260.1.

82. *See id.* § 260.3.

83. *See* Czarnezki et al., *Creating Order*, *supra* note 77, at 301–03.

84. *See* 16 C.F.R. §§ 260.4–.17.

85. *See id.* § 260.1(a) ("[These guides] do not confer any rights on any person and do not operate to bind the FTC or the public. The Commission, however, can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the guides.").

86. Czarnezki et al., *Greenwashing and Self-Declared Seafood Ecolabels*, *supra* note 31, at 43; *see also infra* Part II.

87. *See FTC Seeks Public Comment on Potential Updates to Its 'Green Guides' for the Use of Environmental Marketing Claims*, FED. TRADE COMM'N (Dec. 14, 2022) [hereinafter *FTC Seeks Public Comment*], https://perma.cc/SED8-9JQJ.

update the Green Guides.[88] On January 31, 2023, the Commission extended the public comment period for sixty days, until April 24, 2023, at the request of several interested parties.[89]

The Green Guides can also influence state consumer protection law; for example, California, where they are broadly referenced, and New York, where they are referenced in specific terms.[90] A consumer class has a cause of action for false and misleading advertising under consumer protection and unfair competition states laws, and the Green Guides are cited in state litigation.[91] This means that consumer greenwashing litigation

88. *See id.* ("The FTC is requesting general comments on the continuing need for the guides, their economic impact, their effect on the accuracy of various environmental claims, and their interaction with other environmental marketing regulations.").

89. *See* Press Release, Fed. Trade Comm'n, Federal Trade Commission Extends Public Comment Period on Potential Updates to Its Green Guides for the Use of Environmental Marketing Claims (Jan. 31, 2023), https://perma.cc/GD89-HYA9.

90. California has included the Green Guides as standards for any environmental marketing claim. *See* CAL. BUS. & PROF. CODE § 17580.5 (West 2024)

> (a) It is unlawful for a person to make an untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied. For the purpose of this section, "environmental marketing claim" shall include any claim contained in the "Guides for the Use of Environmental Marketing Claims" published by the Federal Trade Commission.
> (b)(1) It shall be a defense to any suit or complaint brought under this section that the person's environmental marketing claims conform to the standards or are consistent with the examples contained in the "Guides for the Use of Environmental Marketing Claims" published by the Federal Trade Commission.

New York has included the Green Guides as a labeling standard for the terms "recyclable," "recycled," and "reusable." *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 368-1.3(a)–(c) (2024).

91. *See*, *e.g.*, MINN. STAT. § 325E.41 (2023) ("Environmental marketing claims . . . must conform to the standards or be consistent with the examples contained in Code of Federal Regulations, title 16, part 260, 'Guides for the Use of Environmental Marketing Claims' . . . ."); CAL. BUS. & PROF. CODE § 17580.5; Earth Island Inst. v. Coca-Cola Co., No 2021 CA 001846 B, 2022 WL 18492133, at *1 (D.C. Super. Ct. Nov. 10, 2022) ("Plaintiff asserts that Defendant's statements constitute false and deceptive marketing by representing the company as sustainable and environmentally friendly in violation of the District of Columbia Consumer Protection Procedures Act

can arise from federal law, the FTC's authority as an enforcer, and from consumers utilizing consumer protection state law that may be based upon federal law. Subpart B focuses on how the FTC initiates greenwashing litigation.

B. *FTC Enforcement Actions Against Greenwashing*

"The current liability for advertisers and marketers who violate the Green Guides is fairly limited."[92] As previously stated, the cause of action for the FTC to activate greenwashing claims is by enforcing § 5 of the FTCA.[93] If the FTC finds that an advertiser violated § 5, then it will typically issue a cease-and-desist order to the violator.[94] If the greenwashing practice continues, the FTC may issue a fine or up to one year in prison to the violator.[95] The FTCA establishes criminal liability if the violation is committed with the intent to defraud or mislead.[96] During 2022, the FTC increased the number of enforcement actions brought against businesses for their deceptive environmental claims.[97]

Nevertheless, the FTC has been criticized for not effectively protecting the consumer from greenwashing and for the lack of

(CPPA)."). See also *infra* Part IV.C for an analysis of consumer class actions under state consumer protection statutes.

92. David Gibson, *Awash in Green: A Critical Perspective on Environmental Advertising*, 22 TUL. ENV'T L.J. 423, 431 (2009).

93. *See supra* note 76 and accompanying text.

94. *See* 15 U.S.C. § 45(b); Czarnezki et al., *Creating Order*, *supra* note 77, at 301.

95. *See* 15 U.S.C. § 54(a) ("[I]f the conviction is for a violation committed after a first conviction . . . punishment shall be by a fine of not more than $10,000 or by imprisonment for not more than one year, or by both such fine and imprisonment . . . .").

96. *See id.* ("Any person, partnership, or corporation who violates any provision of section 52(a) of this title shall, . . . if such violation is with intent to defraud or mislead, be guilty of a misdemeanor . . . .").

97. The FTC renewed its enforcement efforts in prosecuting deceptive environmental claims in 2022. During 2020 and 2021, no cases or proceedings tagged with environmental marketing were enforced by the FTC. *See Green Guides*, FED. TRADE COMM'N, https://perma.cc/2CQ6-G26W (last visited Apr. 28, 2024). The initiation of enforcement actions in 2022 may indicate the FTC's revived commitment to addressing deceptive environmental practices. *See id.* However, no cases were brought in 2023, and, as of the writing of this Article, no cases have been initiated during 2024. *See id.*

effectiveness in their enforcement actions.[98] Recent enforcement actions by the FTC, including *United States v. Kohl's Inc.*[99] and *FTC v. Truly Organic*,[100] represent the FTC's renewed engagement strategy in prosecuting deceptive environmental claims.

In *Kohl's Inc.*, the FTC used its penalty offense authority to seek the largest ever civil penalty for bogus bamboo marketing from Kohl's and Walmart.[101] The retailers falsely marketed rayon textile products as being made from bamboo.[102] Both companies made deceptive environmental claims, asserting that the textiles were produced using eco-friendly processes, when in reality, the production process involved converting bamboo into rayon using toxic chemicals, resulting in the emission of hazardous pollutants.[103] The case highlights the FTC's efforts to combat greenwashing and deceptive environmental claims. By seeking such a high penalty, the FTC's enforcement actions against greenwashing can serve as a deterrent, sending a clear message to other businesses discouraging them from engaging in similar greenwashing practices.

In *Truly Organic*, the FTC brought charges against both the company and its CEO, Maxx Appelman, for promoting their product's organic qualities through misleading and unsupported claims.[104] The FTC alleged that Truly Organic falsely labeled their bath and beauty products as "100% organic" or "certified organic" when they did not meet USDA standards.[105] Many of their products contained nonorganic ingredients, some of which were prohibited by USDA guidelines.[106] The court's ruling

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98. *See* Delmas & Burbano, *supra* note 17, at 69 ("The FTC has indeed investigated and charged companies for environmental claims under Section 5 of the FTC Act, but these charges have been few and far between.").

99. No. 22-cv-964 (D.D.C. May 4, 2022).

100. No. 19-cv-23832 (S.D. Fla. Sept. 18, 2019).

101. Press Release, Fed. Trade Comm'n, FTC Uses Penalty Offense Authority to Seek Largest-Ever Civil Penalty for Bogus Bamboo Marketing from Kohl's and Walmart (Apr. 28, 2022), https://perma.cc/F8HJ-HRMU.

102. *See id.*

103. *See id.*

104. *See* Complaint for Permanent Injunction & Other Equitable Relief at 3–4, FTC v. Truly Organic Inc., No. 19-cv-23832 (S.D. Fla. Sept. 18, 2019).

105. *See id.* at 4.

106. *Id.*

mandated that Appelman and his associates refrain from making any claims about the environmental or health benefits of their products unless backed by credible scientific evidence.[107] This decision emphasizes the FTC's commitment to cracking down on false advertising and promoting greater transparency in the marketplace.[108]

It is important to note that the FTC Green Guides were created to prevent deception and not to set environmental policy.[109] This means that the FTC is not concerned with the "merit" of the environmental benefit claim, but rather with ensuring that the information provided to consumers is clear and reliable. The emphasis lies on the appropriateness of the procedures followed, guaranteeing that the available information is accurate and relevant to the environmental claim.[110]

Overall, the FTC plays a vital role in combating greenwashing by enforcing § 5 of the FTC Act. Recent enforcement actions demonstrate the agency's commitment to addressing deceptive environmental claims and promoting transparency in marketing. However, the Green Guides' voluntary nature prevents automatic enforceability, and the FTC must rely on the "reasonable consumer standard" to prove deceptive ESG disclosure practices.

III. THE SEC AND SCOPE OF ESG DISCLOSURE

Part III analyzes the development of securities law in the context of climate change and ESG disclosure. Subpart A sets the stage by describing the overlay of securities law related to

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107. *See Truly Organic*, No. 19-cv-23832, slip op. at 3 (S.D. Fla. Sept. 18, 2019).

108. *See* Sheila A. Millar, *Truly Organic? Not Really, Says FTC*, NAT'L L. REV. (Oct. 2, 2019), https://perma.cc/6WY7-GD9Y ("As we have previously noted, the Federal Trade Commission has a low tolerance for greenwashing or unsupported claims interpreted to be beneficial to health.").

109. *See* Kelley Drye Ad Law Access Podcast, *Green Marketing 101*, APPLE PODCASTS, at 02:50 (May 20, 2020), https://perma.cc/9BRW-2PE2.

110. *See* Jason W. Gray-Lee et al., *Review of Legal Standards for Environmental Marketing Claims*, 13 J. PUB. POL'Y & MKTG. 155, 158 (1994) ("The FTC is less concerned with the actual amount of environmental benefit claimed and more interested in making sure consumers have access to accurate and relevant information about what the claim means.").

ESG, including the SEC's current approach to materiality, non-financial metrics, and the use of ESG ratings. Subpart B focuses on securities law and its relation to climate disclosure, including the SEC's involvement as a regulator. Subpart C analyzes the involvement of the SEC in greenwashing securities litigation as an enforcer. Overall, Part III aims to provide a comprehensive overview of the current regulatory landscape surrounding ESG and climate-related disclosures in the securities law field and their impact on businesses and investors.

The past decade has witnessed SEC interventions on climate change and ESG risks which can be attributed to the increasing public awareness of climate change and its potential impact on businesses.[111] Previously, the SEC did not exercise regulatory authority in relation to disclosures related to climate change or ESG matters. Thus, the focus was on addressing issues of materiality and misleading statements that have a clear impact on financial performance in accordance with existing statutes.[112] Traditionally, climate change and ESG factors were not seen as directly material to financial performance, and disclosure requirements related to these issues were not explicitly mandated.[113] Additionally, determining materiality in the context of climate change and

111. *See Commission Guidance Regarding Disclosure Related to Climate Change*, 75 Fed. Reg. 6290, 6290 (Feb. 8, 2010) ("Climate change has become a topic of intense public discussion in recent years. . . . This release outlines our views with respect to our existing disclosure requirements as they apply to climate change matters."); *see also* Allison Herren Lee, *Playing the Long Game: The Intersection of Climate Change Risk and Financial Regulation*, U.S. SEC. & EXCH. COMM'N (Nov. 5, 2020), https://perma.cc/2Z37-YMA9 (discussing the need for public concern to shift towards coming up with solutions for climate change before the "point of no return" comes in 2035 for achieving the Paris Accord's two degrees Celsius goal by 2100, causing substantial environmental risks).

112. *See* Sonia G. Barros et al., *Public Company Mandatory Reporting on ESG Matters*, *in* ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS 137, 137 (Katayun I. Jaffari & Stephen A. Pike eds., 2022).

113. *See* Hester M. Peirce, *We Are Not the Securities and Environment Commission—At Least Not Yet*, U.S. SEC. & EXCH. COMM'N (Mar. 21, 2022), https://perma.cc/UPT8-S674 (explaining the traditional SEC position in considering climate change and ESG factors).

ESG was seen as challenging due to the complexity and long-term nature of these issues.[114]

However, institutional investors and other stakeholders, since as early as 2003, started to take a proactive role and publicly request climate-related information and ESG disclosures.[115] Shareholders began to demand a regulatory approach that would offer further security and close the gap between ESG and public policy—"[t]he bottom line is that businesses now actively compete for capital based on ESG performance, and that competition needs to be open, fair, and transparent."[116] The increased public awareness of climate change and ESG risks in recent years has led to a growing demand for transparency and disclosure from businesses.[117] Institutional investors and other stakeholders have played a critical role in pushing the SEC to take a more proactive approach in regulating and enforcing climate-related and ESG disclosure requirements.[118] As the business landscape continues to evolve, it is likely that these issues will continue to be at the forefront of public discussion and regulatory action.

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114. *See* Jay Clayton, *Statement on Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure*, U.S. SEC. & EXCH. COMM'N (Jan. 30, 2020), https://perma.cc/NF36-PVQA (explaining how the complexity and long-term nature of climate change and ESG issues posed a challenge for materiality considerations).

115. *See* Shira Cohen et al., *Institutional Investors, Climate Disclosure, and Carbon Emissions*, J. ACCT. & ECON., Aug. 26, 2023, at 4 ("The CDP is a global nonprofit organization founded . . . to help companies . . . disclose their environmental impact. [It] began sending out requests for climate-related information in 2003 . . . and as such became the first platform attempting to link firm environmental performance with investor fiduciary duty.").

116. Herren Lee, *supra* note 111.

117. *See More than 680 Financial Institutions with US$130+ Trillion in Assets Call on Nearly 10,400 Companies to Disclose Environmental Data Through CDP*, CDP (Mar. 14, 2022), https://perma.cc/JN9Y-LEYN (informing companies that the nonprofit organization CDP will be issuing letters and asking companies to disclose on numerous environmental issues).

118. *See* Cohen et al., *supra* note 115, at 1 (discussing the ongoing debate over what role institutional shareholders should assume in the current climate change reform efforts to achieve net-zero emissions by 2050).

A. *Overlay of the Securities Law*

The unifying principle for U.S. federal securities law is that issuers of securities,[119] as well as securities investment advisers and broker-dealers, are prohibited from misleading investors.[120] It is a disclosure-based system, requiring companies to disclose information to promote integrity and transparency for the support of a fair market.[121] Moreover, issuers of securities must provide complete and accurate disclosure in all respects that are material to investors' decisions to buy or sell securities, vote, or exercise other rights and privileges.[122]

The Securities Exchange Act of 1934[123] ("Exchange Act") supplemented the Securities Act of 1933,[124] and established the Securities and Exchange Commission as the agency in charge of regulating aspects of the securities industry, and gave it the power to enact regulations for the fulfilment of legislative objectives directed by Congress.[125] The Exchange Act contains formal requirements for public businesses to inform investors

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119. The term "security" is broadly defined in the Securities Act of 1933, 15 U.S.C. §§ 77a–77mm. *See* 15 U.S.C. § 77b(a)(1). The statutory phrase "investment contract" is generically used as a synonym. *See, e.g.*, *id.*; *see also* THOMAS LEE HAZEN, FEDERAL SECURITIES LAW 13–17 (Kris Markarian ed., 4th ed. 2022) [hereinafter HAZEN, FEDERAL SECURITIES LAW]. The landmark case on the definition of an investment contract defines it as "a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." SEC v. W.J. Howey Co., 328 U.S. 293, 298–99 (1946).

120. *See* 15 U.S.C. § 78j(b) (prohibiting fraud or manipulation when buying or selling securities).

121. ALEXANDRA POE ET AL., HUGHES HUBBARD & REED, HOW TO ESG: A RESOURCE GUIDE FOR ESTABLISHING AN ESG PROGRAM FOR YOUR COMPANY 29–31, https://perma.cc/AZ65-QU7B (last visited Mar. 5, 2023); *see also* *Mission*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/7NBJ-ZK9D (last visited June 29, 2023) ("The federal securities laws we oversee are based on a simple and straightforward concept: everyone should be treated fairly and have access to certain facts about investments and those who sell them.").

122. *See* 15 U.S.C. §§ 78m, 78n(a)–(c) (establishing disclosure requirements to reporting companies in annual and quarterly reports, disclosure on certain important events, and disclosure during proxy contests).

123. *Id.* §§ 78a–78rr.

124. *Id.* §§ 77a–77mm.

125. *See id.* § 78d; *see also The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/Q3BG-QVVN (last visited Jan. 14, 2024) [hereinafter *The Laws That Govern*].

about a company's current financial state, major financial risks, and business outlook.[126]

The Exchange Act contains antifraud provisions, as well as other specific trading provisions, that protect investors and maintain the stability of market forces.[127] In securities fraud, an investor is induced to make purchase or sale decisions about a security based on false and misleading information.[128] Antifraud provisions aim to prohibit securities fraud in the form of "any manipulative or deceptive tactic in the purchase or sale of a security, whether or not the security is registered for sale on a public exchange."[129] Federal securities fraud claims related to ESG disclosure greenwashing claims generally involve two sets of provisions: (1) Exchange Act § 10(b) and (2) SEC Rule 10b-5 promulgated thereunder.[130]

Section 10(b) of the Exchange Act establishes the prohibition of manipulative and deceptive devices.[131] Furthermore, the SEC issued Rule 10b-5 which extends liability to sales of securities and fraudulent purchases of securities.[132]

Although § 10(b) and Rule 10b-5 do not explicitly provide for a private right of action, such a right has been recognized by the courts since the mid-1940s.[133] This has allowed private litigants, such as investors, to seek remedies for securities fraud under the provisions of the statute.[134] It is important to

126. *See* 15 U.S.C. §§ 78m, 78n(a)–(c).

127. *See id.* §§ 78j, 78i, 78t.

128. *See* 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5 (2024) (SEC rule promulgated under 15 U.S.C. § 78j).

129. Practical Law Litigation, *Exchange Act: Section 10(b) Defense Toolkit*, THOMSON REUTERS: PRAC. L., https://perma.cc/QU8H-N3NY (last visited Mar. 26, 2023).

130. For an overview of the other provisions that prohibit fraud and manipulation under the Securities Exchange Act of 1934, see generally 3 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION §§ 12:2–12:12 (2023) [hereinafter 3 HAZEN TREATISE].

131. *See* 15 U.S.C. § 78j.

132. *See* 17 C.F.R. § 240.10b-5.

133. *See* Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946) (constituting the first case where a lower federal court implied the existence of a private right of action with the rationale that such private remedies strengthen the federal statutory obligations).

134. There is no statutory guidance regarding standing to bring 10b-5 claims since this is an implied remedy. In order to pursue a 10b-5 claim, a plaintiff must demonstrate that there is a security involved in the transaction

understand that both the SEC and investors, acting as private plaintiffs, may pursue securities greenwashing litigation under these provisions.[135] The role of investors as private plaintiffs pursuing securities greenwashing litigation is analyzed in Part IV.B. On the other hand, Part III.C analyzes the role of the SEC to pursue securities greenwashing litigation as an enforcer.

In greenwashing litigation, where companies are accused of making misleading or false statements regarding their ESG efforts, plaintiffs must meet the same requirements as in any other securities fraud case under § 10(b) of the Exchange Act.[136] To establish a claim under § 10(b) of the Exchange Act, there are five elements that plaintiffs must show: "(1) fraud or deceit (2) by any person (3) in connection with (4) the purchase or sale (5) of any security."[137] Moreover, claims under Rule 10b-5 also require plaintiffs to prove fraud or deceit along with the elements of common law fraud—materiality, reliance, causation, and damages.[138] An alleged misrepresentation is material for purposes of § 10(b) of the Exchange Act and SEC Rule 10b-5 if there is a substantial likelihood that a reasonable person would consider it important whether to buy or sell shares of stock.[139]

The concept of "materiality" is the main theme that surrounds ESG-securities-disclosure litigation.[140] A stated or

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in question, that they have sold or purchased such security, and the existence of fraud in connection with the purchase or sale of the security. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 752–53 (1975). For a fuller discussion of the nuances of the law, see 3 HAZEN TREATISE, *supra* note 130, § 12:31.

135. *See* 15 U.S.C. § 78d; *Kardon*, 69 F. Supp. at 514.

136. *See* 15 U.S.C. § 78j.

137. 3 HAZEN TREATISE, *supra* note 130, § 12:19; *see also* PALMITER, SECURITIES REGULATION, *supra* note 13, at 397–457 (providing a general overview of Rule 10b-5).

138. *See infra* Part III.C; *see, e.g.*, Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005). The difference between SEC enforcement actions and shareholder class actions under Rule 10b-5 is that the SEC is not required to prove reliance, causation, or damages (economic loss or loss causation).

139. *See* 3 HAZEN TREATISE, *supra* note 130, § 12:19; *see also* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b).

140. *See infra* Part IV; *see also* Caitlin M. Ajax & Diane Strauss, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?*, 45 ECOLOGY L.Q. 703, 706 (2018) ("Courts in sustainability disclosure cases seem to take a broader, more plaintiff-friendly view of

omitted fact made by a company is "material" when there is a substantial likelihood that a "reasonable investor" would be influenced by the business claim in his decision to buy or sell the security.[141] Thus, the concept of materiality is related to the financial impact the sustainability disclosure has on investors.[142] ESG and climate-related disclosures can have various financial implications from different perspectives. On the one hand, they can represent a company's image and consumer attractiveness, which can create value for the company.[143] On the other hand, these disclosures enable investors to assess the long-term viability of the company's business model, which in turn generates capital over time.[144]

To conclude, U.S. federal securities law centers on the obligation of securities issuers, investment advisers, and broker-dealers to avoid misleading investors. This framework, focused on disclosure, aims to ensure transparency and a level playing field. The Securities Exchange Act of 1934, complementing the Securities Act of 1933, established the Securities and Exchange Commission as the regulatory authority for the securities industry. The Act encompasses antifraud provisions and specific trading regulations, safeguarding both investors and market stability. In the scope of ESG disclosure greenwashing claims, the bedrock antifraud

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'materiality' and 'reliance' when sustainability disclosures are concrete, repetitive, and fact based, but a more restrictive view when similar disclosures contain 'vague' and 'aspirational' language.").

141. *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (stating that, in order for an omitted fact to be material, there must be "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available").

142. *See* NNEKA CHIKE-OBI & MARINA PETROLEKA, SUSTAINABLE FITCH, ESG LITIGATION RISK: CLIMATE LAWSUITS DOMINATE, BUT SCOPE IS WIDENING 2 (2022), https://perma.cc/RKH5-J2JK (PDF) ("A potential liability occurs when sustainability disclosures are false, misleading, or cannot be substantiated, causing financial harm to an investor.").

143. *See* Hope Mehlman et al., *What Are the Drivers of Sustainability?*, *in* ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS 81, 81–87 (Katayun I. Jaffari & Stephen A. Pike eds., 2022).

144. *See* ALAN R. PALMITER, SUSTAINABLE CORPORATIONS 287–95 (2022) [hereinafter PALMITER, SUSTAINABLE CORPORATIONS] (detailing the five ways ESG creates value, which are top-line growth, cost reductions, regulatory and legal interventions, productivity uplift, and investment and asset optimization).

provision is Rule 10-5, promulgated under the Exchange Act § 10(b), which implies a private right of action. This provision prohibits fraudulent practices and is used by both private plaintiffs and the SEC in enforcement actions to address false and misleading statements regarding ESG disclosure.

B. *Securities Law and ESG*

Currently, disputes over ESG statements are focused on the interpretation of the concept of materiality and impacts on a reasonable investor, as this determines whether ESG-related litigation can proceed.[145] Prior to the issuance of the climate-related disclosure rule, corporate disclosure regarding ESG and climate-related information was not mandated by the SEC, except for "material" information that is important for a reasonable investor.[146]

The Supreme Court has held that "materiality" is a mixed question of law and fact, deciding that, for an omitted fact to be material, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[147] Thus, ESG statements can be actionable when they have been "sufficiently factual and measurable as opposed to generalized and aspirational."[148]

Before the introduction of the disclosure rule, there have been several attempts by the SEC to provide ESG climate change guidance to public companies. In 2010, the SEC issued guidance to public companies regarding the Commission's existing disclosure requirements as they apply to climate

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145. *See generally* Ajax & Strauss, *supra* note 140.

146. *See generally* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) (mandating the disclosure of certain climate-related risks and other climate-related information).

147. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); *see id.* at 440 (decided under the proxy rules); Basic Inc. v. Levinson, 485 U.S. 224, 226 (1988) (decided under Rule 10b-5); *see also* 3 HAZEN TREATISE, *supra* note 130, § 12:60 (containing a fuller discussion of the nuances of the law).

148. Peter P. Tomczak, *Litigation and Risk Management*, *in* ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS 173, 178 (Katayun I. Jaffari & Stephen A. Pike eds., 2022).

change matters.[149] The objective of the 2010 guidance is to assist companies in satisfying their disclosure obligations under the federal securities laws and regulations,[150] and it specifically outlines areas where climate change may trigger disclosure requirements.[151] These areas encompass the impact of legislation and regulation in disclosure requirements and international accords that may impact businesses with global operations.[152] Additionally, these areas include the indirect consequences of climate change, such as evolving market trends and shifts in consumer preferences, along with the physical impacts of climate change that have the potential to disrupt operations and financial performance.[153]

The SEC Division of Enforcement ("Division") is responsible for detecting and investigating potential violations of the federal securities laws and regulations.[154] In March 2021, the SEC announced the creation of the Climate and ESG Task Force ("ESG Task Force") under the scope of the Division.[155] The ESG Task Force, discussed further in Part III.C below, aims to increase transparency and accuracy in ESG disclosures and investments to protect investors from potential

149. *See* Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 33-9106, Exchange Act Release No. 34-61469, 75 Fed. Reg. 6289 (Feb. 8, 2010).

150. *See id.* at 6289 ("This release outlines our views with respect to our existing disclosure requirements as they apply to climate change matters. This guidance is intended to assist companies in satisfying their disclosure obligations under the federal securities laws and regulations.").

151. *See id.* at 6295–97. Though an important first step for the consideration of climate-related risks, the 2010 guidance was considered a failure because it did not have the rulemaking characteristics or enforcement requirements to produce major changes to business as usual. *See* PALMITER, SUSTAINABLE CORPORATIONS, *supra* note 144, at 352.

152. *See* Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. at 6295–97 (assessing numerous ways in which climate change can directly and indirectly impact businesses and the physical world).

153. *See id.* at 6297 ("Possible consequences of severe weather could include: For registrants with operations concentrated on coastlines, property damage and disruptions to operations, including manufacturing operations or the transport of manufactured products . . . .").

154. *See About the Division of Enforcement*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/M4EB-WTGD (last updated Aug. 2, 2007).

155. *See SEC Announces Enforcement Task Force Focused on Climate and ESG Issues*, U.S. SEC. & EXCH. COMM'N (Mar. 4, 2021), https://perma.cc/3RWN-PU56.

misrepresentations or omissions.[156] As ESG concerns have become increasingly important to many investors, the ESG Task Force has focused on these issues with respect to public companies, investment products, and investment strategies.[157] In doing so, the staff applies established principles concerning materiality and accuracy of disclosures under existing rules.[158]

In April 2021, the Division of Examinations of the SEC issued a risk alert on ESG investing to "highlight observations from recent exams of investment advisers, registered investment companies, and private funds offering ESG products and services."[159] It encouraged investment advisers and funds to address ESG factors and to "evaluate whether their disclosures, marketing claims, and other public statements related to ESG investing are accurate and consistent with internal firm practices."[160] SEC Commissioner Lee also emphasized the SEC's work on ESG, climate change and human rights issues, and the SEC's commitment to promote informational regulatory frameworks to protect investors and promote global solutions.[161] Furthermore, the SEC published a Sample Letter to Companies Regarding Climate Change Disclosures that illustrated examples of climate-related disclosure requirements the SEC Division of Corporation Finance has been issuing to

156. *See id.*

157. *See generally* LINDA CHATMAN THOMSEN, INT'L INST. SEC. MKT. DEV., AN OVERVIEW OF ENFORCEMENT (2005), https://perma.cc/8G4L-X4CD (PDF).

158. *See Enforcement Task Force Focused on Climate and ESG Issues*, U.S. SEC. & EXCH. COMM'N [hereinafter *Enforcement Task Force*], https://perma.cc/9NJG-UML5 (last updated Apr. 11, 2023).

159. DIV. EXAMINATIONS, U.S. SEC. & EXCH. COMM'N, THE DIVISION OF EXAMINATIONS' REVIEW OF ESG INVESTING 1 (2021), https://perma.cc/U5YK-ZEYX (PDF).

160. *Id.* at 7.

161. *See* Allison Herren Lee, *A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC*, U.S. SEC. & EXCH. COMM'N (Mar. 15, 2021), https://perma.cc/7XCU-TL7F ("Human capital, human rights, climate change—these issues are fundamental to our markets . . . . That's why climate and ESG are front and center for the SEC.").

companies,[162] providing a practical tool for businesses to evaluate the management of ESG disclosures.[163]

However, the SEC struggles with its contradictory mandates of protecting a fair free market and sustaining the concept of materiality that demands impartiality on the view of potential securities risk.[164] Climate change risks are constantly being disputed in political conflicts, and there are opposing views for their incorporation in the securities law agenda.[165] Climate-related and ESG disclosures in the SEC have historically been treated as public relations rather than a securities disclosure risk.[166] But now, certainly climate change (e.g., physical risks)[167] and perhaps other ESG criteria[168] are seen as material to business interests, leading to an expansion of SEC interventions and setting the stage for new SEC climate risk and ESG disclosure rules.

The aforementioned SEC toolkit, composed of guidelines, announcements, and the creation of a regulatory body, does not

162. *See* S*ample Letter to Companies Regarding Climate Change Disclosures*, U.S. SEC. & EXCH. COMM'N [hereinafter *Sample Letter*], https://perma.cc/YAK6-CUUW (last updated Sept. 22, 2021); *see also* Barros et al., *supra* note 112, at 146 (highlighting the SEC's recent climate and ESG-related efforts, including the sample letter).

163. *See* POE ET AL., *supra* note 121, at 31 (indicating that the sample letter and other 2021 guidance provide "practical tool[s]" so companies can self-evaluate their ESG disclosure policies).

164. *See* Peirce, *supra* note 113 ("The proposed rule dispenses with materiality in some places and distorts it in others."); *see also* Mark T. Uyeda, *A Climate Regulation Under the Commission's Seal: Dissenting Statement on The Enhancement and Standardization of Climate-Related Disclosures for Investors*, U.S. SEC. & EXCH. COMM'N (Mar. 6, 2024), https://perma.cc/9M86-HUGM (arguing that the final rules are climate regulation under the SEC "seal").

165. *See* Peirce, *supra* note 113 (asserting that current framework already assesses "risks relating to climate change").

166. *See* PALMITER, SUSTAINABLE CORPORATIONS, *supra* note 144, at 352; *see also* Jeff Sommer, *On Wall St., 'Socially Responsible' Is Common Sense. In Congress, It's Political*, N.Y. TIMES (Mar. 4, 2023), https://perma.cc/C3KX-ADDL (identifying ESG disclosures as increasingly political).

167. *See* Madison Condon, *Climate Services: The Business of Physical Risk*, 55 ARIZ. ST. L.J. 147, 147–48 (2023) (outlining the growing importance of physical climate risks and emphasizing the need for actionable and transparent disclosure about these risks).

168. *See* Sommer, *supra* note 166 (noting that ESGs may also look at issues like a company's track record for diversity, equity, and inclusion or attitude towards access to reproductive health care).

have the full force of the law.[169] This means that the SEC's guidance does not alter or amend applicable law, nor does it create new or additional obligations.[170] The guidance serves to clarify existing disclosure obligations rather than modify or change the long-established interpretations of materiality.[171]

Due to the growing need for a response to climate and ESG risks and opportunities as a result of the consensus that ESG and climate-related information is important to investors,[172] the SEC decided to adopt a more proactive role. In 2022, the SEC released the proposed rules for The Enhancement and Standardization of Climate-Related Disclosures for Investors ("proposed rules").[173] It also proposed two rules for amendments to enhance ESG: Enhanced Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices,[174] and the Investment Company Names ("names rule"),[175] which contains rule changes to prevent misleading or deceptive fund names.[176] Through these regulations, the SEC aims to improve the consistency, comparability, and reliability of information provided to investors regarding the incorporation

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169. *See* OFF. FED. REG., A GUIDE TO THE RULEMAKING PROCESS, https://perma.cc/J5M9-MQHG (PDF) (last visited Jan. 13, 2024) (stating that "[i]nterpretive rules, policy statements, and other guidance documents" are not law); *see also* MAEVE P. CAREY, CONG. RSCH. SERV., IF10003, AN OVERVIEW OF FEDERAL REGULATIONS AND THE RULEMAKING PROCESS (2021), https://perma.cc/K23S-MBGV (PDF) ("An agency need not follow notice and comment procedures when promulgating certain rules such as interpretive rules . . . . ").

170. *See* S*ample Letter*, *supra* note 162 ("This guidance is not a rule, regulation, or statement of the Securities and Exchange Commission . . . .").

171. *See SEC Issues Interpretive Guidance on Climate Change Disclosures*, GIBSON DUNN (Feb. 4, 2010) [hereinafter *SEC Issues Interpretive Guidance*], https://perma.cc/8X57-WGXH.

172. *See* Sommer, *supra* note 166 (emphasizing that investment firms believe investors consider social concerns important when choosing to invest).

173. 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

174. 87 Fed. Reg. 36,654 (proposed June 17, 2022) (to be codified at 17 CFR pts. 200, 230, 232, 239, 249, 274, 279).

175. 88 Fed. Reg. 70,436 (Dec. 11, 2023) (to be codified at 17 C.F.R. pts. 230, 232, 239, 270, 274).

176. *See id.* at 70,436.

of ESG factors by registered investment companies, business development companies, and investment advisers.[177]

The proposed rules required enhanced disclosure, including a new, "separately captioned 'Climate-Related Disclosure' section in applicable SEC filings, which would cover a range of climate-related information."[178] The disclosure requirements were mostly prescriptive and derived from established frameworks like the Task Force on Climate-Related Financial Disclosures and the Greenhouse Gas Protocol.[179] By issuing these regulations, the SEC aims to promote consistency, comparability, and reliability of ESG-related information provided to investors.[180]

In addition to this rule, the SEC introduced amendments related to ESG standardization[181] and limitations on the use of green names for funds.[182] The ESG standardization amendment aims to provide a consistent and transparent approach to measuring and disclosing ESG-related risks and opportunities.[183] This will enable investors to make informed

177. *See* U.S. SEC. & EXCH. COMM'N, FACT SHEET: ESG DISCLOSURES FOR INVESTMENT ADVISERS AND INVESTMENT COMPANIES 1 (2022), https://perma.cc/UJF9-265P (PDF); *see also* U.S. SEC. & EXCH. COMM'N, FACT SHEET: THE ENHANCEMENT AND STANDARDIZATION OF CLIMATE-RELATED DISCLOSURES: FINAL RULES [hereinafter FACT SHEET: ENHANCEMENT AND STANDARDIZATION], https://perma.cc/2C67-WSK2 (last visited Mar. 21, 2024).

178. Aaron Briggs et al., *Summary of and Considerations Regarding the SEC's Proposed Rules on Climate Change Disclosure*, GIBSON DUNN (Apr. 15, 2022), https://perma.cc/AH6Y-ATE2. The SEC proposed to apply the proposed rules to companies that have "Exchange Act reporting obligations pursuant to Exchange Act Section 13(a) or Section 15(d) and companies filing a Securities Act or Exchange Act registration statement." The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,407–08; *see also* 15 U.S.C. § 78m(d) (issuing broad authority to the SEC to require disclosures when "necessary or appropriate in the public interest or for the protection of investors"); 17 C.F.R. § 240.15d-1 (2024).

179. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,337–41.

180. *See* Briggs et al., *supra* note 178.

181. *See* Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36,654, 36,654 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, 279).

182. *See* Investment Company Names, 88 Fed. Reg. 70,436, 70,441 (Dec. 11, 2023) (to be codified at 17 C.F.R. pts. 230, 232, 239, 270, 274).

183. *See SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices*, U.S.

decisions about investments that align with their values and goals.[184] The amendment related to green names for funds, the names rule, was adopted in September 2023 and limits the use of terms like "green," "sustainable,'" and "socially responsible" in fund names, ensuring that they accurately reflect the investment strategy of the fund.[185]

In March 2024, the SEC issued the long-awaited final rules for The Enhancement and Standardization of Climate-Related Disclosures ("final rules") for SEC registrants, including foreign private issuers.[186] The final rules underwent some modifications from the original proposal and establish a disclosure framework floor that aims to provide investors with climate risk information and aid investors' investment decisions.[187]

For purposes of this Article, two parts of the now-issued disclosure framework are highlighted, each affecting the availability of climate-related information and influencing greenwashing litigation.[188] First, the final rules require larger registrants to disclose material Scope 1 and Scope 2 GHG

SEC. & EXCH. COMM'N (May 25, 2022), https://perma.cc/C78G-TTGT (emphasizing that the amendments are aimed at giving investors "consistent, comparable, and reliable information"); *see also SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, U.S. SEC. & EXCH. COMM'N (Mar. 21, 2022), https://perma.cc/W697-9PHK (noting the clarity the proposed amendments would give to companies).

184. *See SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, *supra* note 183 ("[I]nvestors need reliable information about climate risks to make informed investment decisions."); *see also* Sommer, *supra* note 166 (describing how investors choose ESGs based on personal values).

185. *See* Investment Company Names, 88 Fed. Reg. at 70,439, 70,442 (Dec. 11, 2023) (to be codified at 17 C.F.R. pts. 230, 232, 239, 270, 274).

186. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) (incorporating a gradual implementation period for all registrants, and varying the date of compliance based on the registrant's filer status and the nature of the disclosure content).

187. *See* Caroline A. Crenshaw, *A Risk by Any Other Name: Statement on the Enhancement and Standardization of Climate-Related Disclosures,* U.S. SEC. & EXCH. COMM'N (Mar. 6, 2024), https://perma.cc/5ZGR-GYEY.

188. For the main requirements highlighted by the SEC, see generally FACT SHEET: ENHANCEMENT AND STANDARDIZATION, *supra* note 177. For a high-level summary of the new requirements, see generally Rachel Barrett et al., *SEC Adopts Scaled-Back Climate-Related Disclosure Requirements*, LINKLATERS (Mar. 7, 2024), https://perma.cc/C6QQ-3SAF.

emissions "as a quantitative metric to gauge transition risk or a company's publicly stated target or goal."[189] Second, the final rules mandate registrants to quantitatively disclose how their expenditures align with qualitative disclosures and stated plans, targets, and goals.[190] Essentially, registrants are required to disclose "certain expenditures associated with activities to mitigate or adapt to climate-related risks, transition plans, targets, and goals so that investors can assess any progress or cash allocated for those purposes."[191] Stated another way, this section of the framework directs registrants to disclose material climate-related targets or goals as carbon offsets and net zero targets, which can influence greenwashing litigation.[192]

Under the final rules, the SEC has been accused of watering down the proposed-rule prescriptive requirements surrounding climate-related risks.[193] The final rules reflect several modifications from the proposed rules, including the addition of materiality qualifiers for certain disclosures, such as impacts of climate-related risks, use of scenario analysis, and maintained internal carbon pricing.[194] Arguably, the final rules transformed

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189. Crenshaw, *supra* note 187; *see also Scope 1 and Scope 2 Inventory Guidance*, U.S. ENV'T PROT. AGENCY, https://perma.cc/E5KA-K6YX (last updated Mar. 8, 2024) (defining Scope 1 and Scope 2 GHG emissions).

190. *See id.*

191. *See id.* These disclosure requirements are only triggered when a company has voluntarily chosen to adopt this transition plan, or climate-related targets and goals, or conduct scenario analysis, or come up with an internal carbon price. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668, 21,829 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249). The SEC does not require companies to have climate-related goals or targets. *See* Jaime Lizárraga, *Enhancing and Standardizing Climate-Related Disclosures for Investors*, U.S. SEC. & EXCH. COMM'N (Mar. 6, 2024), https://perma.cc/DEU5-ZCRU. (stating that the SEC "does not intend to be a climate or merit regulator").

192. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. at 21,674–76 (requiring the disclosure of targets and goals).

193. *See* David Gelles, *How a Climate Rule Got Watered Down*, N.Y. TIMES (Mar. 5, 2024), https://perma.cc/SXV5-ZLNS.

194. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. at 21,703–08, 21,723–26 (requiring registrants to provide disclosures for impacts of climate-related risks on strategy, targets and goals and financial statements effects when this is considered material to registrant).

the proposed prescriptive model into a hybrid model because most of the disclosure requirements are dependent upon a finding of materiality.[195] Thus, registrants who determine that certain climate-related risks are not material will have fewer disclosure obligations in comparison to the proposal,[196] but are also risking potential litigation for that determination.[197]

Furthermore, the final rules eliminated the proposed requirement for Scope 3 emissions disclosure.[198] The SEC also acknowledged concerns about potential cascading litigation risks and justified the watering down of the rules as an attempt to mitigate these concerns.[199]

Before issuing the final rules, corporate disclosure regarding ESG and climate-related matters was not mandated by the SEC other than the "material" information for a reasonable investor as described above.[200] Now, the new rules require registrants to disclose certain climate-related information, but most disclosure requirements are contingent upon the longstanding definition of materiality.[201] In other words, companies will still rely on the "reasonable investor" standard to determine whether certain disclosures (e.g., disclosures regarding impacts of climate-related risks) are material.[202] Furthermore, the final rules do not mandate

195. *But see* Hester M. Pierce, *Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors*, U.S. SEC. & EXCH. COMM'N (Mar. 6, 2024), https://perma.cc/KSC2-Q54S (arguing that the final rules have replaced the current principle-based regime for a prescriptive regime).

196. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668, 21,851 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

197. See *infra* Part V.B for an analysis of the SEC final rules and the new litigation landscape.

198. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. at 21,732–37 (limiting the scope of GHG emissions requirements).

199. *See id.*

200. *See SEC Issues Interpretive Guidance*, *supra* note 171 ("[T]he Interpretive Release . . . does not . . . change longstanding interpretations of materiality.").

201. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668, 21,694–96 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

202. *See id.*

companies to disclose the most significant bulk of their GHG emissions, which may exacerbate greenwashing.[203]

Potential greenwashing litigation regarding securities class actions is governed by antifraud provisions found in the Exchange Act and related SEC rules.[204] Under the new rules, registrants are subject to liability under securities laws. Thus, when companies disclose false or misleading information, with respect to material facts found in securities filings required by the final rules, investors and enforcers can bring suit using securities laws and regulations.[205] However, under the new rules, certain climate-related disclosures are shielded from private liability.[206]

On a state level, California has been at the forefront of regulating climate-related disclosure by passing its own disclosure regulations for U.S. companies doing business within their borders.[207] In 2023, as part of the Climate Accountability Package,[208] California enacted two climate bills mandating that companies publicly disclose both their direct and indirect GHG emissions, as well as climate-related financial risks.[209] These disclosure laws come into force in 2026 and impose more stringent requirements compared to those issued by the SEC, extending their application to both public and private U.S. entities operating in California with annual revenues exceeding

203. *See* Kohn, Kohn, & Colapinto LLP, *SEC Climate Disclosure Rule "Paves Way for Greenwashing," According to Ex-SEC Commissioner Allison Herren Lee*, PR NEWSWIRE (Mar. 6, 2024), https://perma.cc/GWA8-JWWF.

204. *See supra* Part III.A.

205. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. at 21,849.

206. See *infra* Part V.B for a description of the safe harbor from private liability for climate-related disclosures.

207. *See* Climate Corporate Data Accountability Act, CAL. HEALTH & SAFETY CODE § 38532 (West 2024); Greenhouse Gases: Climate-Related Financial Risk, CAL. HEALTH & SAFETY CODE § 38533 (West 2024)

208. *See California Senators Announce Climate Accountability Package to Raise the Bar for Corporate Climate Action*, SCOTT WIENER (Jan. 30, 2023), https://perma.cc/ZHF6-L3V8 ("The Climate Accountability Package [is] a suite of bills that work together to improve transparency, standardize disclosures, align public investments with climate goals, and raise the bar on corporate action to address the climate crisis.").

209. *See* Climate Corporate Data Accountability Act, HEALTH & SAFETY CODE § 38532; Greenhouse Gases: Climate-Related Financial Risk, HEALTH & SAFETY CODE § 38533.

specified thresholds.[210] Additionally, the legislation mandates the disclosure of Scope 3 GHG emissions for all reporting entities.[211] As the world's fifth largest economy, California will reshape the ESG and climate reporting field through its legislation, which has the potential to set a new national standard.[212]

C. *Greenwashing Regulatory Enforcement: The Climate and ESG Task Force*

The role of the SEC as a regulatory enforcer of securities law regarding climate-related and ESG disclosures has gained momentum in the last few years.[213] This subpart explores the implications and consequences of the SEC enforcement actions related to ESG disclosure.

Greenwashing securities litigation can arise when investors or the SEC take legal action against businesses that either (1) fail to disclose required information, or (2) provide inaccurate information to investors.[214] The SEC possesses enforcement powers and is responsible for civil enforcement and administrative actions in cases involving securities law violations.[215]

"In a civil enforcement action filed in a United States District Court, the [SEC] can obtain a court order enjoining an

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210. *See* Climate Corporate Data Accountability Act, HEALTH & SAFETY CODE § 38532(c)(1)(A), (c)(1)(F); Greenhouse Gases: Climate-Related Financial Risk, HEALTH & SAFETY CODE § 38533(c).

211. *See* PAUL WEISS, CALIFORNIA CLIMATE ACCOUNTABILITY PACKAGE 1 (2023), https://perma.cc/V66L-Z7RJ (PDF) ("[T]he rules will . . . mandate the disclosure of Scope 3 GHG emissions for all reporting entities."); *see also* Climate Corporate Data Accountability Act, HEALTH & SAFETY CODE § 38532(c)(1) (requiring the disclosure of Scope 3 GHG emissions).

212. *See* WILLIAM J. STELLMACH ET AL., WILLKIE FARR & GALLAGHER LLP, CALIFORNIA'S COMPREHENSIVE CLIMATE ACCOUNTABILITY REGIME: SETTING AN AGGRESSIVE NEW NATIONAL STANDARD 1 (2023), https://perma.cc/TQL7-6LCG (PDF) (noting California's unique economic position as a reason it may change ESG reporting).

213. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Enforcement Results for FY22 (Nov. 15, 2022), https://perma.cc/SF2V-585L (indicating increased SEC focus on ESG concerns and giving examples of recent cases against bad actors).

214. *See infra* Part IV.B.

215. *See* 15 U.S.C. §§ 77h-1, 77t, 78u(d), 78u-2, 78u-3, 80b-3, 80b-9.

individual from further violations . . . , disgorgement of any money obtained from the illegal conduct, and . . . civil penalties" against individuals and entities associated with regulated firms.[216] "In an administrative proceeding, the [SEC] can require a respondent to 'cease and desist' certain activities, disgorge illegal profits, and institute procedures to prevent further violations."[217] "The [SEC] can also . . . bar a firm [or individual] from acting as a securities firm or investment adviser," or from "practic[ing] before the Commission" through administrative disciplinary proceedings.[218] Additionally, the SEC can refer violations of securities law to the Department of Justice for criminal prosecution.[219] The SEC's enforcement actions aim to deter fraudulent conduct and protect investors in the securities markets.[220]

Generally, when pursuing civil enforcement against false and misleading ESG disclosures, the SEC utilizes Rule 10b-5, promulgated under § 10(b) of the Exchange Act,[221] which is considered a powerful tool in SEC enforcement.[222] Under the implied remedy for fraud, Rule 10b-5, both private plaintiffs and the SEC can bring cases in federal district court.[223] In these

216. CHATMAN THOMSEN, *supra* note 157, at 1; *see also* 15 U.S.C. §§ 77t, 78u(d), 80b-9 (allowing the SEC to obtain injunctive relief, seek disgorgement, and impose civil penalties); Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 339 (2015) ("[T]he SEC . . . us[es] a variety of tools, including . . . injunctions . . . and monetary sanctions—civil fines, disgorgements of ill-gotten gains, and compensation clawbacks.").

217. CHATMAN THOMSEN, *supra* note 157, at 1; *see also* 15 U.S.C. §§ 77h-1, 78u-2, 78u-3, 80b-3 (identifying the administrative penalties the SEC can dole out).

218. CHATMAN THOMSEN, *supra* note 157, at 1; *see also* 15 U.S.C. §§ 77h-1, 78u-3, 80b-3 (authorizing the SEC to bar violators of securities law from being an officer or director of a securities firm and from participating in administrative proceedings).

219. *See* CHATMAN THOMSEN, *supra* note 157, at 1 (noting that the Department of Justice can institute criminal proceedings with assistance from the SEC).

220. *See id.* (describing various administrative proceedings which resulted in the entity at issue giving funds back to investors and committing to new policies protecting investors).

221. *See supra* Part III.A.

222. *See* PALMITER, SECURITIES REGULATION, *supra* note 13, at 403.

223. *See supra* Part III.A.

instances, the SEC must meet the principal elements of the 10b-5 claim and must demonstrate that the misstatement or omission was material to a reasonable investor and the element of scienter for demonstrating fraud or deceit.[224] Unlike in private 10b-5 actions, the SEC does not need to prove reliance or causation of damage as elements of fraud.[225] Moreover, private plaintiffs must meet the purchaser seller requirement to establish standing.[226] These distinctions constitute the main differences between the SEC enforcement action and private action initiated by investors.[227]

In an effort to protect investors, the SEC has brought enforcement actions and administrative proceedings for false and misleading ESG disclosures against companies, including

224. *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (explaining that a stated or omitted fact made by a company is "material" when there is a substantial likelihood that a "reasonable investor" would be influenced by the business claim in his decision to buy or sell the security). For demonstrating fraud or deceit, the scienter standard applies. *See* Aaron v. SEC, 446 U.S. 680, 701–02 (1980) (holding the scienter element is applicable to antifraud provisions under Rule 10b-5). The term "scienter," as applied to conduct necessary to give rise to an action for civil damages under the Securities Exchange Act of 1934 and Rule 10b-5, "refers to a mental state embracing intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976). However, when alleging scienter, the standard that the SEC must prove is much less stringent than that of private securities class actions, as it is not required to demonstrate the heightened pleading requirements imposed on private actions by the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.). *See* 3 HAZEN TREATISE, *supra* note 130, § 12:105; *see also infra* Part V.A.

225. Reliance, causation and damages are elements needed for succeeding Section 10(b) securities litigation. *See, e.g.*, SEC v. Rind, 991 F.2d 1486, 1490 (9th Cir. 1993) (stating injury is not an element of SEC claim for disgorgement of profits under rule 10b-5); SEC v. Rana Rsch., Inc., 8 F.3d 1358, 1359 (9th Cir. 1993) (holding that reliance is not an element the SEC must prove to enjoin violations of the securities laws). For readers seeking an overview of Rule 10b-5, see PALMITER, SECURITIES REGULATION, *supra* note 13, at 397–457.

226. *See* Birnbaum v. Newport Steel Corp., 193 F.2d 461, 462–63 (2d Cir. 1952) (holding that an action for damages based upon alleged violations of Rule 10b-5 could be brought only by a purchaser or a seller of securities). See 3 HAZEN TREATISE, *supra* note 130, § 12:32 for a fuller discussion of nuances of the law.

227. *See infra* Part IV.

cases such as *SEC v. Vale S.A.*,[228] *BNY Mellon Investment Adviser, Inc.*,[229] *Goldman Sachs*,[230] and *DWS Investment Management Americas, Inc.*[231] The SEC's first enforcement action related to ESG was against Vale S.A. for false and misleading claims in their ESG disclosures, including sustainability reports and periodic filings, regarding the safety conditions of a dam that ultimately resulted in a disaster.[232] This caused significant losses in market capitalization, underscoring the importance of transparency and accuracy in ESG disclosures.[233] In March 2023, Vale S.A. settled with the SEC for $55.9 million over allegations of false and misleading claims.[234]

228. Complaint, SEC v. Vale S.A., No. 22-cv-02405 (E.D.N.Y. Apr. 28, 2022) [hereinafter *Vale* Complaint]; *see id.* at 6 (alleging that Vale made ESG disclosures that were "materially false and misleading").

229. Order Instituting Administrative and Cease-And-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-And-Desist Order, BNY Mellon Inv. Adviser, Inc., Investment Advisors Act Release No. 6032, Investment Company Act Release No. 34591 (May 23, 2022) [hereinafter *BNY* Order]; *see id.* at 2 (alleging claims that arise out of ESG-related "material misstatements and omissions").

230. Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Goldman Sachs Asset Mgmt., L.P., Investment Advisers Act Release No. 6189 (Nov. 22, 2022) [hereinafter *Goldman Sachs* Order]; *see id.* at 2 (finding that the respondent had failed to institute adequate policies and procedures to ensure Advisors Act compliance for its ESG investment opportunities).

231. Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, DWS Inv. Mgmt. Ams., Inc., Investment Advisers Act Release No. 6432 (Sept. 25, 2023) [hereinafter *DIMS* Order 1]; *see id.* at 7 (finding that the respondent committed fraud and deceit in its ESG marketing).

232. *See* SEC Brings First ESG-Related Action Since Creating Climate and ESG Task Force, SIDLEY AUSTIN LLP (May 9, 2022), https://perma.cc/9J34-9XJY ("[T]he complaint against Vale appears to be the first action based in part on disclosures made in publicly-available facility sustainability reports . . . ."); *see also Vale* Complaint, *supra* note 228, at 1 (alleging ESG-related "false and misleading" statements about the conditions of a dam).

233. *See Vale* Complaint, *supra* note 228, at 2 ("[A]fter the dam collapsed, Vale's market capitalization declined by over $4 billion.").

234. *See also Brazilian Mining Company to Pay $55.9 Million to Settle Charges Related to Misleading Disclosures Prior to Deadly Dam Collapse*, U.S. SEC. & EXCH. COMM'N (Mar. 28, 2023), https://perma.cc/67Q6-8QNR (announcing the settlement of the civil action against Vale, S.A.).

In 2022, the SEC Task Force filed an administrative and cease-and-desist proceeding against BNY Mellon Investment Advisors, which showed that investment advisers and funds must have adequate policies and procedures in place to prevent potentially misleading ESG disclosures.[235] The SEC charged the company for misstatements and omissions about ESG considerations in making investment decisions for certain mutual funds that it managed.[236] The company agreed to pay a $1.5 million penalty to settle the charges.[237]

Also in 2022, the latest SEC administrative proceeding was instituted against Goldman Sachs Asset Management, L.P. for failing to follow its policies and procedures involving ESG investments.[238] The investment company failed to write policies and procedures for ESG research and did not follow the completion of ESG procedures like questionnaires included in its investment portfolios, leading to a failure to comply with its own guidelines and share accurate information with third parties.[239] To settle the charges the company agreed to pay a $4 million penalty.[240]

Moreover, in 2023, DWS Investment Management Americas, Inc. ("DIMA") was also charged by the SEC in two separate enforcement actions for anti-money laundering violations[241] and misstatements regarding ESG investments.[242] DIMA advertised that ESG was in its "DNA," but the SEC found

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235. *See BNY* Order, *supra* note 229, 6–7 (alleging inadequate policies and procedures related to ESG disclosures).

236. *See id.* at 2.

237. *See id.* at 7.

238. *See Goldman Sachs* Order, *supra* note 230, at 2.

239. *See id.* (finding that the respondent had failed to do the questionnaires as was the respondent's policy).

240. *See id.* at 7 ("[Goldman Sachs Asset Management, L.P.] shall . . . pay a civil money penalty in the amount of $4,000,000.00 . . . .").

241. *See* Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing Order, DWS Inv. Mgmt. Ams., Inc., Investment Company Act Release No. 6431, at 3 (Sept. 25, 2023) (discussing DIMA's failure to develop and implement a reasonably designed anti-money laundering program with Bank Secrecy Act and regulations created by the Financial Crimes Enforcement Network).

242. *See DWS* Order, *supra* note 231, at 2 (discussing DIMA's misstatements and failure to implement policies and procedures designed to prevent violations of the Advisers Act).

it failed to follow the ESG investment processes.[243] DIMA settled the charges and agreed to pay a total of $25 million in penalties.[244]

Instances of enforcement actions against greenwashing can also occur at the state level. For example, in New York State, the law empowers the New York Attorney General to bring a civil action against individuals engaging in greenwashing.[245] In 2024, Attorney General Letitia James filed a lawsuit against JBS, a Brazil-based meat giant—highlighting the authority states possess in enforcing their regulations against greenwashing.[246] The suit alleges that JBS misled consumers and the public about its greenhouse gas emissions and climate change contributions, resulting in illegal profits.[247] As part of the larger regulatory landscape, enforcement actions at the state level may complement the SEC's role in enforcing securities laws related to ESG disclosures and combating greenwashing.[248]

Overall, regulatory enforcement is crucial for protecting investors and promoting economic and social policies.[249]

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243. *See id.* at 4, 5.

244. *See Deutsche Bank Subsidiary DWS to Pay $25 Million for Anti-Money Laundering Violations and Misstatements Regarding ESG Investments*, U.S. SEC. & EXCH. COMM'N (Sept. 25, 2023), https://perma.cc/3SK9-6JUM (noting that DIMA agreed to a $6 million penalty in the AML action and a $19 million penalty in the ESG misstatement action).

245. *See* N.Y. EXEC. LAW § 63(12) (McKinney 2024) (empowering the New York Attorney General to bring a civil action against persons who "engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business"); s*ee also* N.Y. GEN. BUS. LAW §§ 349, 350 (McKinney 2024) (prohibiting deceptive acts and practices and false advertising in the State of New York).

246. *See* People v. JBS USA Food Co., No. 450682/2024 (N.Y. Sup. Ct. filed Feb. 28, 2024), https://perma.cc/YLT3-VXJJ (PDF).

247. *See id.* ¶ 119.

248. This complaint aligns with a whistleblower complaint filed with the SEC by an environmental advocacy group in January 2023. *See Mighty Earth Files Complaint with US Securities and Exchange Commission Against JBS 'Green Bonds'*, MIGHTY EARTH (Jan. 18, 2023), https://perma.cc/P65R-A5GY.

249. *See* U.S. SEC. EXCH. COMM'N, REPORT PURSUANT TO SECTION 308(C) OF THE SARBANES OXLEY ACT OF 2002, at 20 (2003) [hereinafter SEC REPORT PURSUANT TO SECTION 308(C)], https://perma.cc/53YY-ZH5H (PDF) (highlighting the importance of private litigation in complementing agency efforts at enforcement and compensation); *see also* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund*

"Effective enforcement of the federal securities laws helps maintain[] investor confidence in the fairness and transparency of our securities markets, and deterring future violations."[250] "While the Commission may seek to return disgorged funds to injured investors, the main objective of disgorgement is to take the profits away from wrongdoers and thereby make violations unprofitable."[251]

IV. PRIVATE PLAINTIFFS IN ESG DISCLOSURE GREENWASHING LITIGATION

Part IV focuses on the litigation paths available for private plaintiffs to pursue ESG disclosure greenwashing claims. Whether acting individually or as a lead plaintiff in a class action, private plaintiffs have access to various remedies when businesses employ false and misleading statements. Subpart A examines the private right of action under the Lanham Act. Subpart B explores securities greenwashing litigation and the federal securities laws that permit shareholders to initiate class actions. Subpart C describes consumer greenwashing litigation and the state consumer protection laws that enable consumers to bring forth class actions.

A. *Lanham Act: Business Greenwashing Litigation*

This subpart introduces the Lanham Act provisions for private remedies in false advertising claims, highlighting its criteria for establishing liability. At the federal level, businesses can sue other companies for greenwashing when competing for consumers.[252] The Lanham Act provides a private remedy for

Distributions, 67 STAN. L. REV. 331, 335 (2015) (noting that various commentators have derided the SEC's contribution as "insignificant supplementation to private securities litigation").

250. *See* SEC REPORT PURSUANT TO SECTION 308(C), *supra* note 249, at 19–20.

251. *Id.* at 20.

252. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 131 (2014) ("Although 'unfair competition' was a 'plastic' concept at common law, it was understood to be concerned with injuries to business reputation and presented future sales.").

false advertising claims.[253] Companies can be held liable through a civil action for greenwashing claims of products and services. To prevail in court, "a plaintiff must allege an injury to a commercial interest in reputation or sales."[254] Civil penalties may include injunctions, disgorgement of profits, and payment of plaintiffs' damages and costs.[255] Although this cause of action has not been widely utilized,[256] it provides a pathway for private plaintiffs to pursue greenwashing claims.[257]

The Lanham Act addresses all forms of misleading advertisement; whether entirely untrue or literally true but misleading, or deceiving to the target audience.[258] To prevail in a false advertising claim under the Act, a plaintiff must ultimately show: "(1) a false or misleading statement, (2) in connection with commercial advertising or promotion that (3) was material, (4) was made in interstate commerce, and (5) damaged or will likely damage the plaintiff."[259] Moreover, to support a claim for unfair competition through false advertising under the Lanham Act, an alleged misrepresentation must be of an inherent quality or characteristic of the product.[260]

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253. *See* 15 U.S.C. § 1125(a)(1) ("Any person who, on or in connection with any goods or services . . . uses in commerce any word . . . which is likely to cause confusion . . . shall be liable in a civil action by any person . . . likely damaged by such act.").

254. *Lexmark Int'l*, 572 U.S. at 131–32.

255. *See* 15 U.S.C. § 1117 (listing the rights of recovery for violations under the Lanham Act).

256. *See* Christian Robledo, Note, *An American Dream Gone Green: A Discussion of Existing Environmental Marketing Regulations and the Need for Stricter Legislation*, 38 TOURO L. REV. 937, 947–48 (2022) (discussing the obstacles to bringing a successful claim under the Lanham Act).

257. *See, e.g.*, Vt. Pure Holdings, Ltd. v. Nestlé Waters N. Am., Inc., No. Civ.A.03-11465, 2006 WL 839486, at *11 (D. Mass. Mar. 28, 2006) (discussing the court's decision on the claims of injunction, disgorgement of profits, and payments of plaintiffs' damages and costs).

258. *See* Robledo, *supra* note 256, at 947 ("This means that any marketing practices, whether entirely untrue, or even literally true but 'misleading or deceiving to the target audience,' will create a cause of action.").

259. Gen. Mills, Inc. v. Chobani, LLC, 158 F. Supp. 3d 106, 117 (N.D.N.Y. 2016).

260. *See id.* at 118 ("[C]ourts regularly recognize that even where 'no combination of words' found in the advertisement is untrue, the message conveyed by the advertisement may still be 'literally false' if its clear meaning, considered in context, is false.").

Section 43(a) of the Lanham Act operates similarly to § 5 of the FTC Act.[261] Both acts encompass wide-ranging standards of "misrepresentation" and "deceptiveness" that can be used to pursue legal action against marketers engaging in such practices.[262]

However, the Lanham Act, as opposed to the FTCA, does not provide guidance regarding environmental marketing claims.[263] This means that, unlike the FTC Act, the Lanham Act does not provide private litigants with the assistance of the FTC's Green Guides to assess the deceptive nature of specific advertising practices.[264]

Another important difference is that the Supreme Court has held that only parties with commercial or competitive interests have standing, and consumers cannot bring claims under the Lanham Act.[265]

There is no general trend in the use of this provision for promoting environmental and social governance. However, in 2006, water bottling company Vermont Pure sued its competitor, Nestlé, under § 43(a) of the Lanham Act.[266] Vermont Pure alleged that Nestlé made false or misleading statements in its advertising about the source, nature, and purity of Nestlé's Poland Spring Brand.[267] Vermont Pure also accused Nestlé of

261. *See* Robert B. White, Note, *Preemption in Green Marketing: The Case for Uniform Federal Marketing Definitions*, 85 IND. L.J. 325, 330 (2010).

262. *See* 15 U.S.C. § 1125(a) ("Any person who . . . misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable [to] . . . any person who believes that he or she is or is likely to be damaged by such act."); *id.* § 45 ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

263. *See* Robledo, *supra* note 256, at 947 (discussing how the major difference with false advertisement action under § 5 of the FTCA is the guidance that's provided for environmental marketing under its Green Guides whereas "the Lanham Act is silent").

264. *See* White, *supra* note 261, at 330.

265. The Supreme Court has stated, "A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact . . . but he cannot invoke the protection of the Lanham Act." Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 132 (2014).

266. *See* Vt. Pure Holdings, Ltd. v. Nestlé Waters N. Am., Inc., No. Civ.A.03-11465, 2006 WL 839486, at *1 (D. Mass. Mar. 28, 2006).

267. *See id.* at *2.

contaminating ground and well water with its production procedures.[268] The U.S. District Court of Massachusetts denied Nestle's motion to dismiss without addressing the merits of the case and the parties decided to settle during the pleading stage.[269]

B. *Investor Greenwashing Litigation*

There are general and specific requirements for plaintiffs to bring a securities class action against a company that has made materially false and misleading statements or failed to disclose ESG information. This subpart aims to lay down the basic elements that investors need to consider when bringing a lawsuit against a company for greenwashing securities class action. It also provides an overview of the current trends in litigation related to securities greenwashing claims and their potential implications for companies. By describing the current rules and limitations encountered in the investor realm, it is possible to draw parallels and identify synergies with the consumer realm, and predict future trends that would have an effect on investors' capabilities to bring lawsuits against businesses for greenwashing.

Private litigation, in the form of securities class actions, offers the "dual benefit" of complementing SEC enforcement actions and providing a mechanism to compensate investors through the award of restitution or damages.[270] As previously mentioned, an important difference between an SEC action and a private action concerning securities greenwashing litigation resides in the fact that the SEC is not required to prove reliance, causation of damage, or injury.[271] While the SEC may have

268. *See id.*

269. *See id.* at *15; *see also* Marc McAree & Gieselle Davidian, *Greenbiz and Getting to Market: What It Takes to Go Green and Limit Liability*, AM. BAR ASS'N (Apr. 25, 2019), https://perma.cc/5QZ4-L7RS (noting how Nestlé agreed to pay Vermont Pure $780,000 to settle the matter).

270. SEC REPORT PURSUANT TO SECTION 308(C), *supra* note 249, at 20. *See generally* Velikonja, *supra* note 216.

271. *See supra* Part III.C. Reliance, causation, and damages are elements needed for succeeding § 10(b) securities litigation. *See, e.g.*, SEC v. Rind, 991 F.2d 1486, 1490 (9th Cir. 1993) (stating injury is not an element of SEC claim for disgorgement of profits under rule 10b-5); SEC v. Rana Rsch., Inc., 8 F.3d

several aims in its enforcement actions, the aim of private litigation is solely to compensate injured investors.[272] The ability of investors to fully recover their losses may largely depend on the use of private actions. Additionally, courts have recognized that the SEC's limited resources may oblige it to prosecute only the most "flagrant abuses" and that private actions complement SEC enforcement actions and allow for the fullest investor recovery.[273] Thus, securities class actions are an important litigation path for shareholders to hold companies accountable for false or misleading statements regarding their ESG practices.

In recent years, public companies have increasingly provided ESG-related information on their corporate websites, in sustainability reports, and in public speeches.[274] More recently, companies have also begun to include these disclosures in their SEC filings, particularly in proxy statements that link to additional information on ESG efforts.[275] However, the inclusion of this information in SEC filings subjects it to the same scrutiny as other information included in those filings.[276]

Shareholders are particularly concerned with greenwashing claims as they can negatively impact a business's stock price, making it a material issue for investors to consider.[277] Investors care about the transparency of ESG and climate-related disclosure because it can affect a company's image, financial performance and long-term viability on the

1358, 1363 n.4 (9th Cir. 1993) ("Defendants also claim, erroneously, that the SEC was required to prove injury. It is not.").

272. *See* SEC REPORT PURSUANT TO SECTION 308(C), *supra* note 249, at 19–20; *see* Velikonja, *supra* note 216, at 394 ("[P]ublic compensation should persist and even increase as the availability of private litigation declines.").

273. SEC REPORT PURSUANT TO SECTION 308(C), *supra* note 249, at 20.

274. *See* SOCIETY FOR CORP. GOVERNANCE & GIBSON DUNN, ESG LEGAL UPDATE: WHAT CORPORATE GOVERNANCE AND ESG PROFESSIONALS NEED TO KNOW 3 (2020) [hereinafter ESG LEGAL UPDATE], https://perma.cc/RUX4-DPSF (PDF) (discussing while there has been an increase in ESG-related information on corporate websites, such information is not audited by third-party sites).

275. *See id.* at 5.

276. *See id.*

277. *See id.* at 5–6.

market.[278] Furthermore, the ability of shareholders to file greenwashing securities class action lawsuits against companies for materially false and misleading statements or the failure to disclose ESG information is an important mechanism for ensuring businesses' accountability.

In order to bring an ESG disclosure greenwashing claim, plaintiffs must meet certain general and specific requirements. General requirements include those mentioned previously in Part III and are set out in § 10(b) of the Securities Exchange Act[279] and SEC Rule 10b-5, which contains the general, catch-all, antifraud provision of the federal securities laws.[280] Specific requirements, such as the need of a high level of proof for fraud allegations[281] and the safe harbor provision for forward-looking statements, are particularly important in greenwashing securities litigation.[282] These requirements are critical to determining the success of § 10(b) claims and have been used to distinguish securities fraud misstatements from corporate puffery.[283]

When pleading scienter, plaintiffs must satisfy Rule 9(b) of the Federal Rules of Civil Procedure and state with particularity the facts constituting the alleged fraud.[284] Furthermore, the Private Securities Litigation Reform Act of 1995[285] ("PSLRA") expanded the requirement on alleging fraud, particularly concerning the inference of scienter and imposed heightened

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278. *See* PALMITER, SUSTAINABLE CORPORATIONS, *supra* note 144, at 287–94 (describing how ESG creates value); *see also* Mehlman et al., *supra* note 143, at 81–87 (describing what drives sustainability).

279. 15 U.S.C. § 78j.

280. 17 C.F.R. § 240.10b-5 (2024); *see also* Practical Law Litigation, *supra* note 129.

281. *See* FED. R. CIV. P. 9(b).

282. *See* 15 U.S.C. § 78u-5(c); *see also id.* § 78u-5(i)(1) (defining a "forward-looking statement"). For a fuller discussion of the nuances of the law see 3 HAZEN TREATISE, *supra* note 130, § 14:46–14:52.

283. *See In re* Sanofi Sec. Litig., 155 F. Supp. 3d 386, 400 (S.D.N.Y. 2016) (stating that certain alleged misstatements that constitute expressions of puffery and corporate optimism do not give rise to securities violations).

284. *See* FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

285. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 12, 15, and 18 U.S.C.).

pleading standards.[286] Notably, the particularity requirements of the heightened pleading standards imposed by the PSLRA do not apply to the SEC enforcement actions.[287] Thus, the PSLRA demands of shareholder plaintiffs a higher level of specificity and evidentiary support when making fraud allegations, while the SEC enjoys a relatively lower burden in terms of pleading standards.

The PSLRA "safe harbor" provision is especially relevant for ESG and climate-related disclosures that contain future projections and long-term commitments, such as net-zero pledges. The safe harbor provision covers any future-oriented statements[288] made by a company related to its financial projections, economic performance, and objectives.[289] To qualify for the safe harbor, these statements must be accompanied by adequate cautionary language that identifies important facts that could cause actual results to differ from those in the statement.[290] This is a powerful tool used as a "shield" by the defendants when arguing in securities class actions that contest forward looking statements. This defense is often supported by invoking the "bespeaks caution" doctrine by which statements must be examined within their appropriate context and considering whether a reasonable investor would find the omitted information significant in their investment decision-making process. [291]

The climate-related disclosure rules introduced a safe harbor from private liability for climate-related disclosures,

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286. *See* 15 U.S.C. § 78u-4; *id.* § 78u-5(c). For a fuller discussion of the PSLRA application on securities class actions, see HAZEN, FEDERAL SECURITIES LAW, *supra* note 119, at 75–83.

287. *See* 3 HAZEN TREATISE, *supra* note 130, § 12:105; *see also supra* Part III.C.

288. *See* 15 U.S.C. § 78u-5(i)(1) (defining a forward-looking statement).

289. *See id.* § 78u-5(c)(1).

290. *See id.* § 78u-5(c)(1)(A)(i) (explaining that for the safe harbor provision to apply, the forward-looking statement must be identified as such and be "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement").

291. *See, e.g.*, Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d 832, 851 (N.D. Tex. 2018) ("The 'bespeaks caution' doctrine merely reflects the unremarkable proposition that statements must be analyzed in context." (citation omitted)). For a fuller discussion of the "bespeaks caution" doctrine, see generally 3 HAZEN TREATISE, *supra* note 130, § 12:73.

excluding historical facts, related to a registrant's transition plan, scenario analysis, internal carbon pricing, and targets and goals.[292] In other words, registrants required to report specific climate-related information under the final rules may avoid greenwashing liability by demonstrating that those statements are "forward-looking" and fall within the exemptions established in the rules. Thus, in addition to the forward-looking statement exemptions in the PSLRA, the SEC has granted exemptions from liability for other statements based on projections or other forward-looking information.[293] The SEC is authorized to provide these exemptions under its statutory authority after determining that such exemptions are consistent with the public interest and the protection of investors.[294] However, the listed exemptions to the safe harbor provision are noteworthy as, to reiterate, these items (e.g., all past disclosures, transition plans) are still subject to litigation.[295]

Generally, courts reject securities litigation lawsuits related to ESG disclosures when these statements are "either sufficiently vague that they could not be shown to be objectively false or misleading, or were so clearly aspirational that a reasonable investor could not rely on them."[296] However, as ESG investing continues to gain prominence, it is likely that courts will be asked to decide on more cases involving alleged misrepresentations or omissions related to a company ESG disclosure under § 10(b) of the Exchange Act and SEC Rule 10b-5.

292. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668, 21,773–76 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) (describing safe harbor for certain climate-related disclosures). See *infra* Part V.B for a description of the safe harbor from private liability for climate-related disclosures.

293. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. at 21,773–76.

294. 15 U.S.C. §§ 77z-2(g), 78u-5(g); *see* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. at 21,775 n.1686.

295. *See* Sara Adler et al., *SEC Adopts Climate Risk Disclosure Rules*, ARNOLD & PORTER (Mar. 11, 2024), https://perma.cc/2ZVS-PQ5K ("The new disclosures will be . . . subject to potential liability . . . .").

296. ESG LEGAL UPDATE, *supra* note 274, at 6.

In conclusion, there are certain requirements that plaintiffs must meet to initiate a securities class action against companies accused of making materially false and misleading statements or failing to disclose ESG information. Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5 serve as fundamental legal provisions that prohibit material misstatements and omissions in securities filings and other public statements. Among other elements, shareholder plaintiffs must provide a high level of proof to substantiate fraud allegations, demonstrate scienter, and navigate the safe harbor provision for forward-looking statements. These requirements are pivotal in differentiating securities fraud misstatements from other statements that are considered forward-looking or immaterial for a reasonable investor and non-actionable under securities laws. As the importance of ESG disclosures continues to grow, these legal considerations will play a significant role in shaping the outcomes of securities litigation.

1. Trends in Securities Greenwashing Litigation

Considering the rules described previously and the SEC's recent advancements in climate-related and ESG disclosures, it is important to examine securities greenwashing litigation trends. This analysis sheds light on what types of claims are contested, and how securities laws and SEC regulations related to ESG are applied. Additionally, by examining different litigation pathways, companies can assess their potential overlaps and litigation risks, and ensure compliance with relevant laws and regulations.

In a first of its kind climate-related lawsuit that contested Exxon's failure to disclose climate risks, the plaintiffs sought remedies under § 10(b) and § 20(a) of the Securities Exchange Act and SEC Rule 10b-5.[297] Investors questioned the "business model and its transparency and reporting integrity, particularly with regard to its oil and gas reserves and the value of those reserves."[298] The plaintiffs alleged that public statements were

297. *See Ramirez* Complaint, *supra* note 70, at 2.

298. *Id.* Plaintiffs allege that after the price of oil and gas declined in 2014, Exxon made false and misleading statements by failing to disclose in its reports (a) the environmental risks associated with climate change, (b) the inability to extract claimed hydrocarbon reserves due to climate change risks,

materially false and misleading and that Exxon failed to disclose climate change reports.[299] Exxon's defense asserted, among other legal defenses, the forward looking nature of their statements, the application of the PSLRA safe harbor provision, and the common law "bespeaks caution" doctrine.[300]

The court dismissed the defense alleging the applicability of the safe harbor provision.[301] Overall, the court found that Exxon's general cautionary language regarding proved reserves did not adequately warn investors about the specific de-booking operations, rendering the forward-looking statement insufficient to provide meaningful cautionary language and voiding the safe harbor protection.[302] Therefore, it is essential for companies to provide comprehensive and context-specific warnings to avoid potential material misstatements in relation to ESG claims.

Furthermore, the case embraces the concept of the "fraud on the market" doctrine by which the plaintiff can bypass the need to prove a connection between the purchase of the security and the misstatement or omission.[303] In essence, the 10b-5 requirement of individual reliance can be replaced by the presumption that, in an open market, the price of a company's securities is influenced by all relevant information.[304] Consequently, misleading statements can defraud investors even if they do not rely directly on those statements.[305] Thus,

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resulting in stranded reserves that should have been devalued, and (c) the use of an inaccurate "price of carbon" to artificially inflate the value. *See id.* at 2–3.

299. *See id.* at 2.

300. *See* Defendants' Motion to Dismiss the Consolidated Complaint & Brief in Support at 15–16, Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d 832 (N.D. Tex. 2018) (No. 16-cv-031111).

301. *See Ramirez*, 334 F. Supp. 3d at 850–51.

302. *See id.* at 851.

303. *See Ramirez* Complaint, *supra* note 70, at 22; *see also* Robert W. Staley et al., *U.S. Supreme Court Upholds Fraud on the Market Theory in Securities Class Actions*, BENNETT JONES (June 25, 2014), https://perma.cc/6XZK-ZGFA.

304. *See* Staley et al., *supra* note 303 ("The 'fraud on the market' presumption essentially allows plaintiffs to side-step the need to establish individual reliance with respect to a 10b-5 claim, allowing plaintiffs to demonstrate the common questions of law or fact necessary for certification.").

305. *See Ramirez* Complaint, *supra* note 70, at 22 (relying on the presumption that the misrepresentations caused the plaintiffs to misjudge the value of the stock); *see also* Staley et al., *supra* note 303. Interestingly, the

the "fraud on the market" doctrine allows plaintiffs to prove a direct connection between the purchase of a security and the misstatement or omission.[306]

However, in 2023, the U.S. District Court for the Northern District of Texas denied the plaintiff's motion to certify a class for alleged misstatements on carbon proxy, citing the defendants' successful rebuttal of reliance presumption.[307] The court based its decision on an expert's analysis, which found no statistically significant negative price reactions to alleged corrective disclosures.[308] This analysis included various articles concerning investigations into Exxon's statements on climate change.[309] The court's decision highlights the challenges in proving reliance on alleged misstatements and the pivotal role of expert analysis in such cases.

In a decision regarding a securities class action against Volkswagen for the "Clean Diesel" Emission scandal,[310] the U.S. District Court for the Eastern District of Virginia found that the name change disclosure of Volkswagen constituted a false

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same argument has been used to defy the Climate Change SEC proposed rule by aligning price impact with the concept of materiality. *See* J.W. Verret, Comment Letter on Proposed Rule for the Enhancement and Standardization of Climate-Related Disclosures for Investors (June 8, 2022), https://perma.cc/R4GT-266X (PDF) ("[T]he Commission notes that a series of institutional investors have demanded climate-related information from companies—which justifies the Commission's proposed mandate that such climate-related information be disclosed. But the definition of materiality under federal securities laws takes no notice of expressed preferences that have no price impact.").

306. *See* Staley et al., *supra* note 303 (articulating that any fraud can misrepresent stock price to the investor).

307. Ramirez v. Exxon Mobil Corp., No. 16-cv-03111, 2023 WL 5415315, at *15 (N.D. Tex. Aug. 21, 2023). The court did certify a class for remaining claims regarding alleged failures in disclosing losses linked to specific operations in Canada and the Rocky Mountains. *See id.* at *1–4, *22–23 (outlining the classes that the court decided to certify).

308. *See id.* at *15.

309. *See id.* (explaining how the expert analyzed whether certain news articles impacted the stock price).

310. *See* Jack Ewing et al., *Ex-VW Chief Knew of Diesel Scheme Years Earlier Than He Admitted, S.E.C. Says*, N.Y. TIMES (Mar. 15, 2019), https://perma.cc/EU3V-8L4P (providing an overview of legal pressure against Volkswagen for the emission scandal).

statement.[311] The court evaluated the evidence, found that the statements were false, and determined the statements were "significant to the 'total mix' of information available to the reasonable investor and therefore me[t] the materiality threshold."[312] The court distinguished this case from other allegations, which constitute puffery, and confirmed that "the statements made in the press release . . . are actionable because they are both sufficiently specific to the Company's business strategy and concrete as to the Company's commitment to such a strategy."[313] This case opens the possibility for future securities litigation plaintiffs to challenge voluntary disclosures that qualify as alleged false statements under § 10(b) and Rule 10b-5.[314] This means that companies can no longer rely on the fact that their statements were not required by law to avoid potential liability.

The court cited several decisions and concluded that § 10(b)'s "in connection with" requirement should be applied broadly, meaning that the alleged false and misleading statement must not be directly connected to a security transaction but can merely "coincide" or "touch" upon a security transaction.[315] The court suggested that any statement made by a company, whether it is a formal disclosure or a non-mandatory public announcement, can be subject to scrutiny and potential legal action if it is found to be connected to a securities transaction and materially false or misleading.[316] Although the

311. *See In re* Volkswagen AG Sec. Litig., 661 F. Supp. 3d 494, 519 (E.D. Va. 2023) (finding the name change to be a factually false statement). Shareholder plaintiffs promoted a class action against Volkswagen for false and misleading statements that the company would be changing its name from Volkswagen to Voltswagen. *See id.* at 506–508, 517. Plaintiffs did not allege with particularity that Volkswagen had control and final approval of the statement, so the court dismissed the case with a leave to amend a second complaint and asserted that the case was plausible as a matter of law. *See id.* at 537.

312. *Id.* at 519.

313. *Id.* at 520.

314. *See id.* at 537 (hinting that a voluntary name change could provide grounds for legal liability).

315. *Id.* at 528.

316. *See id.* ("The Supreme Court has consistently embraced an expansive reading of § 10(b)'s 'in connection with' requirement. That broad reading requires courts to gauge whether the alleged fraudulent activity 'touches' or 'coincides' with a securities transaction." (citations omitted)).

court dismissed the case due to the lack of particularity in Volkswagen's control and final approval of the statement, this does not diminish the significance of the precedent set in the case.[317] While the plaintiffs may have failed to provide sufficient evidence of Volkswagen's control over the false statement, the court still found the case plausible as a matter of law and allowed the plaintiffs to amend their complaint.[318]

In a securities class action brought against a manufacturer specializing in bioplastics, plaintiffs alleged that the company's sustainability statement describing one of its products as biodegradable was materially false and misleading.[319] Plaintiffs alleged that following a media scandal backed up by scientific reports demonstrating the misleading nature of the company's sustainability statements, shareholders experienced a significant financial detriment.[320] The combination of media scrutiny and scientific evidence challenging the accuracy of the statements had a tangible impact on the shareholders' investments, leading to financial losses.[321] This complaint demonstrates how media articles, supported by scientific reports, can play a crucial role in uncovering greenwashing and influencing litigation.[322]

Overall, by providing insights into the different securities claims being contested, it is possible to analyze how securities

317. *See id.* at 522 (finding that plaintiffs did not sufficiently allege that Volkswagen AG actually approved the press release of the name change).

318. *See id.* at 537 (dismissing without prejudice).

319. *See Danimer* Complaint, *supra* note 49, at 3.

320. *See id.* at 3–4 (explaining the *Wall Street Journal* published an article alleging that, "according to several experts on biodegradable plastics, 'many claims . . . are exaggerated and misleading" and that the day after "Danimer's stock price fell $6.43 per share, or 12.87%, to close at $43.55 per share"); *see also* Saabira Chaudhuri, *Plastic Straws That Quickly Biodegrade in the Ocean? Not Quite, Scientists Say*, WALL ST. J. (Mar. 20, 2021), https://perma.cc/62MJ-XTV5 (calling into question claims made by Danimer).

321. *See Danimer* Complaint, *supra* note 49, at 3–4.

322. However, in 2023, the U.S. District Court for the Eastern District of New York granted the defendants' motion to dismiss, as the plaintiffs did not adequately demonstrate that all the statements were materially misleading or that the defendants acted with the requisite level of scienter. *See In re* Danimer Sci., Inc. Sec. Litig., No. 21-CV-02708, 2023 WL 6385642, at *16 (E.D.N.Y. Sept. 30, 2023). Plaintiffs filed an appeal to this decision. *See* Notice of Appeal, *In re* Danimer Sci., Inc. Sec. Litig., No. 21-CV-02708 (E.D.N.Y. Oct. 27, 2023).

laws and SEC regulations related to ESG are being applied. One important takeaway has to do with the need for companies to provide comprehensive and context-specific warnings regarding ESG claims to avoid potential material misstatements. Furthermore, companies need to be aware that voluntary disclosures may be disputed as alleged false statements under the Exchange Act and SEC Rule 10b-5, regardless of whether they were required by law. These cases demonstrate the evolving landscape of securities greenwashing litigation and the increased scrutiny on companies' ESG disclosures. Indeed, plaintiffs must navigate the complexity of securities laws and meet the requirements to succeed under a greenwashing securities class action. For instance, to succeed in a securities class action for false and misleading statements regarding climate change pledges, shareholders are limited by the stringent requirements of price stock depreciation and economic harm, which sometimes do not manifest the real long-term depreciation for environmental degradation and social harms.[323] However, the SEC climate-related disclosure rule and the synergistic relationship between consumer protection law and securities law analyzed in Part V could modify this trend.

C. *Consumer Greenwashing Litigation*

Class action lawsuits targeting false and misleading "green" advertising (i.e., greenwashing) can be initiated by consumers in state or federal courts applying state law.[324]

323. *See* Clayton, *supra* note 114 (explaining how the complexity and long-term nature of climate change and ESG issues posed a challenge for materiality considerations).

324. State consumer greenwashing claims involve state consumer protection laws; however, many of these cases are heard in federal court utilizing diversity jurisdiction. *See generally* 28 U.S.C. § 1332. In these cases, federal standing requirements, focusing on injury-in-fact, causation, and redressability under Article III of the U.S. Constitution, still apply. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (laying out the elements of standing). Defendants have generally raised Federal Rule of Civil Procedure 12(b)(1) motions to challenge the court's subject matter jurisdiction. *See* FED. R. CIV. P. 12(b)(1); *e.g.*, Dakus v. Koninkljjke Luchtvaart Maatschappij N.V., No. 22-cv-7962, 2023 WL 5935694, at *1 (S.D.N.Y. Sept. 12, 2023) (noting the defendant brought a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)). Defendants have utilized different dismissal strategies. *See, e.g.*, *In re* Coca-Cola Prods. Mktg. & Sales Pracs. Litig. (*No. II*), No. 20-15742, 2021 WL 3878654, at *2–3 (9th Cir. Aug. 31, 2021) (dismissed

"Several states have incorporated or codified the Green Guides into their own state consumer protection acts, oftentimes called Baby FTC Acts."[325] State laws may impose specific limitations and enforcement measures to prevent the inappropriate use of certain terms that have been deemed deceptive or unfair. For example, California state law contains an express provision that references the Green Guides, stating that:

> For the purpose of this section, "environmental marketing claim" shall include any claim contained in the "Guides for the Use of Environmental Marketing Claims" published by the Federal Trade Commission . . . . It shall be a defense to any suit or complaint brought under this section that the person's environmental marketing claims conform to the standards or are consistent with the examples contained in the "Guides for the Use of Environmental Marketing Claims" published by the Federal Trade Commission.[326]

This subpart explores recent litigation related to greenwashing and consumer protection in California and New York state law. California has some of the most comprehensive consumer protection and unfair competition laws in the United States, making it a favorable jurisdiction for the pursuit of consumer greenwashing claims. Additionally, in New York, two recent complaints arose from carbon neutrality pledges made by businesses,[327] and one complaint related to sustainability claims and the use of environmental scorecards.[328]

In California, the consumer protection package of laws in the state includes, among others, the Consumer Legal Remedies

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for lack of standing for no demonstrated harm). Defendants also have contested the factual basis of injury-in-fact allegations. *See, e.g.*, *Dakus*, 2023 WL 5935694, at *1 (noting defendant challenges plaintiff's alleged injury by alleging they did not choose the flight themselves).

325. Paul Davies et al., *Anticipated Changes to FTC Green Guides Portend New Areas of Potential Litigation*, LATHAM & WATKINS (Feb. 6, 2023), https://perma.cc/YY6Y-88QV.

326. CAL. BUS. & PROF. CODE § 17580.5(a)–(b)(1) (West 2024).

327. *See Danone Waters* Complaint, *supra* note 59, at 2–3 (alleging defendant's carbon neutral pledge is false); *Allbirds* Complaint, *supra* note 33, at 1–3 (alleging defendant's environmental statements are false).

328. *See H&M* Complaint, *supra* note 55, at 1 (calling the "environmental scorecards" misleading).

Act ("CLRA"),[329] Unfair Competition Law ("UCL"),[330] and False Advertising Law ("FAL").[331]

The CLRA is a broad consumer protection law that prohibits businesses from engaging in unfair or deceptive practices that harm consumers.[332] The UCL provides consumers with a private right of action to sue businesses for unfair and unlawful business practices.[333] Meanwhile, the FAL is a law that specifically targets false or misleading advertising and prohibits businesses from making claims that are untrue or misleading.[334] These laws are complemented by the FTC Green Guides, which are used as a standard for environmental marketing claims.[335] These laws are particularly relevant in cases of greenwashing, where companies make false or

329. CAL. CIV. CODE §§ 1750–1784 (West 2024). The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices" in consumer transactions, allowing those who suffer damages to bring actions for recovery. *Id.* § 1770(a).

330. CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2024). Under the UCL, private plaintiffs must show they have "suffered injury in fact and has lost money or property as a result of the unfair competition." *Id.* § 17204. Class representatives must meet standard requirements. *See* Arias v. Superior Ct., 209 P.3d 923, 929 (Cal. 2009) ("[O]ne purpose of Proposition 64 was to impose class action requirements on private plaintiffs' representative actions brought under the Unfair Competition Law."); *see also In re* Tobacco II Cases, 207 P.3d 20, 41 (Cal. 2009).

331. BUS. & PROF. §§ 17500–17509. The FAL enables anyone who has suffered injury in fact and financial losses due to false advertising to seek injunctive relief, damages, and restitution. *See id.* § 17535 (allowing private parties to seek relief).

332. *See* CIV. § 1760 (stating the purpose of the CLRA is to "protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection").

333. *See* Hackett et al., *supra* note 80, at 10851. The UCL prohibits any business act or practice that is unlawful, unfair, fraudulent, or involves unfair, deceptive, untrue, or misleading advertising. *See* BUS. & PROF. § 17200.

334. *See* Hackett et al., *supra* note 80, 10851 (noting why the FAL is used). The FAL prohibits individuals from making or disseminating statements that are known or should be known as untrue or misleading to the public. *See* BUS. & PROF. § 17500.

335. *See, e.g.*, *Peterson* Complaint, *supra* note 42, at 4 (alleging violations of the CLRA, FAL and UCL in addition to the Green Guides provisions to sustain their claims).

misleading claims about the environmental benefits of their products or services.[336]

Moreover, the California Business Professional Code requires businesses to provide documentation to individuals upon request and to maintain records of their compliance with the FTC Green Guides for their green marketing efforts.[337] Also, compliance with the Green Guides is considered a safe harbor under California law[338] and violating this law can result in criminal penalties if prosecuted by the state.[339]

In New York, private plaintiffs rely on the General Business Law ("GBL") § 349 and § 350 to raise complaints that involve deceptive acts or practices and unlawful business in trade and commerce and false advertising.[340]

Similar to the context of FTC regulatory enforcement, courts have relied upon the "reasonable consumer" standard to determine whether a statement is material or simply aspirational, in which case a reasonable consumer would not rely upon it.[341] In California, courts have understood that the

336. *See, e.g.*, *id.* at 1 (alleging that Glad made false statements about the environmental impact of its product); Complaint at 2–3, Last Beach Cleanup v. Terracycle, Inc., No. RG21090702 (Cal. Super. Ct. Mar. 4, 2021) [hereinafter *Terracycle* Complaint] (alleging defendant violated the UCL by making unqualified recycling representations); Walker v. Nestle USA, Inc., No. 19-CV-723, 2022 WL 901553, at *1 (S.D. Cal. Mar. 28, 2022) (alleging violations of the CLRA and UCL by Nestle for falsely advertising that their products are environmentally sustainable). Many greenwashing consumer litigations in the State of California are brought under two or more of these laws. *See, e.g.*, *Walker*, 2022 WL 901553, at *1 (alleging violations of both the CLRA and the UCL).

337. *See* CAL. BUS. & PROF. CODE § 17580(b) (West 2024) (requiring relevant documentation to be available upon request).

338. *See id.* § 17580.5(b)(1) (providing a defense if defendant was compliant with The Green Guides). Safe harbor refers to a defense from liability for companies that adhere to the Green Guides.

339. *See id.* § 17581 ("Any violation of this article is a misdemeanor punishable by imprisonment in the county jail not to exceed six months, or by a fine not to exceed two thousand five hundred dollars ($2,500), or by both.").

340. The GBL establishes that any person injured by the deceptive acts or practices made by businesses may bring an action to enjoin such unlawful act or practice or seek damages. *See* N.Y. GEN. BUS. LAW § 349(h) (McKinney 2024).

341. *See, e.g.*, Dwyer v. Allbirds, Inc., 598 F. Supp. 3d 137, 149, 154 (S.D.N.Y. 2022) (applying a reasonable consumer standard and deciding to dismiss the claim finding that, among other facts, the plaintiff failed to allege that a reasonable consumer would be misled by the defendant's statements).

reasonable consumer standard applies to actions brought under the UCL, FAL and CLRA.[342] The "reasonable consumer test" establishes a liability threshold by which courts measure if a reasonable consumer would have been deceived by the alleged false or misleading statement.[343]

1. Trends in Consumer Greenwashing Litigation

As previously described, class action lawsuits addressing false and misleading "green" advertising are initiated in federal courts applying state law, and some states have integrated the FTC Green Guides into their consumer protection acts. This section analyzes litigation trends related to consumer protection laws in California and New York.

The terms "recyclable" and "recyclable content" are two of the most disputed terms in consumer greenwashing lawsuits.[344] These terms are considered vague and problematic because recycling claims can be interpreted in different ways.[345] For instance, a product may be technically recyclable, but if there are no facilities or markets to process it, it may not actually be recycled in practice.[346] Not surprisingly, the FTC drew attention

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342. *See Walker*, 2022 WL 901553, at *2 (explaining that violations of the CLRA or UCL are determined by the reasonable consumer test); Moore v. Mars Petcare US, Inc., 966 F.3d 1007, 1016–17 (9th Cir. 2020) (applying the reasonable consumer test to alleged FAL, UCL, and CLRA violations).

343. *See Moore*, 966 F.3d at 1017 (explaining that the test requires that a significant portion of the public could be misled).

344. *See, e.g.*, *Peterson* Complaint, *supra* note 42, at 1 (taking issue with defendant's use of the term "recycling"); *Terracycle* Complaint, *supra* note 336, at 2 (disputing defendant's portrayal of its products as recyclable); Smith v. Keurig Green Mountain, Inc., 393 F. Supp. 3d 837, 841 (N.D. Cal. 2019) (noting plaintiff's allegations that defendant's products were not actually recyclable); Complaint at 6, Woolard v. Reynolds Consumer Prods., Inc., No. 22-cv-01684 (S.D. Cal. Oct. 28, 2022) (alleging defendant's products were not recyclable); Earth Island Inst. v. Coca-Cola Co., No. 21-1926, 2022 WL 872605, at *1 (D.D.C. Mar. 24, 2022) (outlining allegations that Coca-Cola's statement that it was "committed to reducing plastic pollution" was misleading); Swartz v. Coca-Cola Co., No. 21-cv-04643, 2022 WL 17881771, at *1 (N.D. Cal. Nov. 18, 2022) (explaining plaintiff's allegation that defendant's statement on the recyclability of its products was false and misleading).

345. *See* Tom Perkins, *'A Sea of Misinformation': FTC to Address Industry Greenwashing Complaints*, GUARDIAN (May 4, 2023), https://perma.cc/H8JC-4EQ4 (highlighting the use of the term "recyclability" and its lack of definition).

346. *See id.*

to these terms when it requested public comment for potential updates to its Green Guides.[347]

The FTC and litigants are placing significant emphasis on "recyclable" claims because, according to the current guidelines, a "substantial majority" of consumers must have access to recycling facilities for that product.[348] This requirement ensures that a reasonable number of consumers have the ability to recycle the product. Currently, the threshold for this accessibility is set at 60 percent.[349] The FTC has solicited input on both the 60 percent threshold and the factors, such as market demand and budgetary limitations, that should be taken into account when determining if a product can be recycled and defined as "recyclable."[350] Given these considerations, it is probable that the FTC's guidelines for claims of recyclability will undergo modifications.[351]

In 2021, The Last Beach Cleanup ("LBC") lawsuit exemplified product greenwashing. In that case, LBC sued TerraCycle and eight other consumer product companies (Coca-Cola, Procter & Gamble, Late July Snacks, Materne, Gerber, L'Oreal, Tom's of Maine, and Clorox) in federal court for alleged unlawful and deceptive recycling claims regarding the recyclability of their product.[352] That same year, a settlement was reached between LBC and TerraCycle and the eight consumer product companies.[353] Changes to product labels were agreed to by all parties, and TerraCycle agreed to the

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347. *See FTC Seeks Public Comment*, *supra* note 87 (requesting public comment on the terms "recyclable" and "recycled content").

348. *See* 16 C.F.R. § 260.12(b)(1) (2024) ("When recycling facilities are available to a substantial majority of consumers or communities where the item is sold, marketers can make unqualified recyclable claims.").

349. *See id.*

350. *See FTC Seeks Public Comment*, *supra* note 87.

351. *See* Davies et al., *supra* note 325 (explaining there could be potential changes to the Green Guides).

352. *See Terracycle* Complaint, *supra* note 336, at 2 ("This Complaint seeks to remedy Defendants' unlawful, unfair, and deceptive business practices with respect to the advertising, marketing, and sale of the Products."). A settlement agreement was announced on November 15, 2021. *See* Statement, The Last Beach Cleanup, TerraCycle and Eight Consumer Product Companies Settle Lawsuit, Agree to Change Product Labels and TerraCycle Will Implement a Supply Chain Certification Program (Nov. 15, 2021) [hereinafter LBC Statement], https://perma.cc/P6U9-JW7D (PDF).

353. *See* LBC Statement, *supra* note 352.

implementation of a supply chain certification program.[354] Subsequently, California's new Truth-In-Labelling Law[355] (S.B. 343) was signed into law, specifying that only products and packaging that are accepted in curb side bins may be labelled as "recyclable."[356] The new law prohibits the use of symbols or other claims suggesting recyclability on any product or packaging that fails to meet California's strict recyclability criteria.[357] The referenced law took full effect on January 1, 2024.[358]

In a 2023 consumer class action filed in California, plaintiffs alleged that Glad and Clorox Companies were deceiving consumers by selling trash bags with "Recycling" labels, when these could not be properly recycled by recovery facilities.[359] Plaintiffs included the S.B. 343 criteria as part of their claims to question the recyclability of the products and point out that the "chasing arrows symbol" and the "Designed for Municipal Use" are deceptive because most recycling programs in California and the United States prohibit municipal use of the bags, so the "Recycling" labelled bags end up in landfills or incinerators.[360] The U.S. District Court denied defendants' motion to dismiss, in which defendants argued Peterson lacked Article III standing for injunctive relief.[361] The company's lawyers contended that the plaintiff failed to show any future harm as consumers could have independently

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354. *See id.*

355. S.B. 343, 2021–2022 Leg. Reg. Sess. (Cal. 2021).

356. *See* CAL. PUB. RES. CODE § 42355.51(d)(5) (West 2024).

357. *See id.* § 42355.51(b)(1) (stating that a product that displays symbols or statements "indicating the product or packaging is recyclable, or otherwise directing the consumer to recycle the product of packaging, is deemed to be a deceptive or misleading claim pursuant to this section").

358. *See* George Gigounas et al., *New California Law Adds Significant Restrictions for Recycling Claims on Products and Packaging: Action Steps*, DLA PIPER (Jan. 6, 2022), https://perma.cc/NM5G-E4ER.

359. *See Peterson* Complaint, *supra* note 42, at 2–3.

360. *See id.* at 1.

361. *See* Peterson v. Glad Prods. Co., No. 23-cv-00491, 2023 WL 4600606, at *1, *9 (N.D. Cal. July 17, 2023). State consumer greenwashing claims involve state consumer protection laws, however, these cases are typically heard in federal courts utilizing diversity jurisdiction. *See, e.g.*, Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 37–40 (D. Mass. 2020) (explaining that the Commonwealth brought a cause of action against Exxon Mobil for greenwashing under diversity jurisdiction); *see also supra* note 324 and accompanying text.

researched recycling information on the product's website.[362] The district court disagreed, finding that the consumer faced a risk of future injury and had standing for injunctive relief.[363] The basis for the court's decision was whether the plaintiff could "rely on the product's advertising or labeling in the future."[364]

Moreover, Coca-Cola Company was recently sued for making false and misleading statements regarding the sustainability and environmental friendliness of its plastic bottle.[365] The corporation was accused of making false and misleading claims about plastic bottles labelled as "100% Recyclable."[366] However, the U.S. District Court for the Northern District of California dismissed the case, deciding that "[n]o reasonable consumer would understand '100% recyclable' to mean that the entire product will always be recycled or that the product is 'part of a circular plastics economy in which all bottles are recycled into new bottles to be used again.'"[367] The court also noted that "whether a product is properly labelled 'recyclable' under the Green Guides depends on whether it is comprised of materials that can be recycled by existing recycling programs—not, as plaintiffs say, on whether the product is converted into reusable material."[368] Although plaintiffs' asserted that the bottles were not, in fact, "100% recyclable," the court held that the law does not imply a guarantee that the product will actually be recycled but only that it is capable of being recycled.[369]

In addition, the court stated that the federal Green Guides provide a standard for environmental marketing claims, and

362. *See Peterson*, 2023 WL 4600404, at *4 (explaining Defendants' argument that the "plaintiff lacks standing to pursue injunctive relief if they can conduct independent research to determine whether the pertinent facts about the product have changed").

363. *See id.*

364. *Id.* at *5.

365. *See* Swartz v. Coca-Cola Co., No. 21-cv-04643, 2022 WL 17881771, at *1 (N.D. Cal. Nov. 18, 2022).

366. *See id.*

367. *Id.*

368. *Id.* at *2.

369. *See id.* at *1 (reasoning that "'recyclable' is an adjective that means capable of being recycled" or "a noun that denominates an object that can be recycled," and it "does not mean a promise that an object will actually be recycled, as plaintiffs would have it").

that a product can be marketed as "recyclable" if it "can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing."[370] The court dismissed the plaintiffs' claims for failure to prove that the defendants' use of the term "recyclable" was different from the definition provided in the Green Guides and failure to demonstrate the processing capabilities of recycling facilities in California.[371] Consequently, the court ruled that the plaintiffs' broad interpretation of "recyclable" was inconsistent with California law and the Green Guides.[372] This case illustrates the uncertainty and outdated nature of current FTC regulations concerning the scope of the standard of "Recyclability" and signals the need for updates to the guides concerning this issue.[373]

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370. *Id.* at *2.

371. *See id.* ("Plaintiffs do not plausibly allege that defendants' representations deviate from the commonly understood meaning of recyclable or the Green Guides definition.").

372. *See id.* (stating that the plaintiffs have failed to show that the defendant's products "are not capable of being recycled or that they are not accepted by existing recycling programs"). Plaintiffs filed a second amended compliant after the court granted two motions to dismiss with a leave to amend. *See id.* (granting leave to file an amended complaint); Swartz v. Coca-Cola Co., No. 21-cv-04643, 2023 WL 4828680, at *4 (N.D. Cal. July 27, 2023) (granting leave to file a second amended complaint); Second Amended Consolidated Complaint at 2, Swartz v. Coca-Cola Co., No. 21-cv-04643 (N.D. Cal. Aug. 17, 2023). Plaintiffs alleged that defendants did not fall within Green Guides safe harbor, and that the products exceeded the standard of "Recyclability." *See* First Amended Consolidated Complaint at 2, Swartz v. Coca-Cola Co., No. 21-cv-04643, 2023 WL 4828680 (N.D. Cal. July 27, 2023) ("Defendants label the Products as '100% Recyclable,' but these representations are false, misleading, and likely to deceive the reasonable consumer because the Products are not *100%* recyclable."); Swartz v. Coca-Cola Co., No. 21-cv-04643, 2022 WL 17881771, at *1 (N.D. Cal. Nov. 18, 2022) (explaining Plaintiffs' argument that 100% recyclable means that the products are always able to be recycled); Second Amended Consolidated Complaint, *supra*, at 3 ("Defendants do not fall within the Green Guides safe harbor . . . . Instead of calling their Products Recyclable, they label them *100%* Recyclable . . . . The addition of the 100% language suggests to consumers that the Products exceed the ordinary standard of 'Recyclability." (internal quotations omitted)).

373. *See The Future of Green Marketing: Anticipated Changes to the FTC's Green Guides*, LATHAM & WATKINS (June 27, 2023), https://perma.cc/7GPL-VM5D (discussing anticipated changes to the FTC's Green Guides and emphasizing the need for revision).

These cases underscore the importance of the authority of the FTC to create the Green Guides and define product terms which can lead to greenwashing litigation from a consumer perspective.[374] The judicial interpretation of certain terms, as in the case of "recyclable," depends on the Green Guides' capacity to expand or contract the meaning of the terms, which determines whether they are actionable in court or not. Thus, the fact that the Green Guides may undergo modifications depending on consumer and businesses considerations[375] makes the FTC's authority and regulatory capacity adaptable to the ongoing changes in sustainability claims.[376]

In recent years, the cause of action for false and misleading statements has been extended to the business practices undertaken throughout the supply chain and is categorized as "firm-level greenwashing".[377] Consumers are scrutinizing advertisements and claims by evaluating the product's environmental, sustainability, and ethical practices at every stage of its life cycle.[378] For instance, Nestlé faced a consumer lawsuit for allegedly deceiving consumers through its "NESTLÉ Cocoa Plan" label.[379] The label advertises environmental and social welfare to improve the lives of farmers and increase the yield and quality of cocoa.[380] The plan includes various initiatives such as farmer training, community development, and responsible sourcing of cocoa.[381] The plaintiffs contended

374. See *supra* Part II for a discussion of the FTC's authority and the Green Guides.

375. *See FTC Seeks Public Comment*, *supra* note 87 (announcing that the FTC was "seeking public comment on potential updates and changes to the Green Guides for the Use of Environmental Claims").

376. *See infra* Part V.

377. See *supra* Part I for a discussion about the different types of ESG disclosure greenwashing claims.

378. *See* Singh & Niemann, *supra* note 54.

379. *See* Walker v. Nestlé USA, Inc., No. 19-cv-00723, 2020 WL 901553, at *1 (S.D. Cal. Mar. 28, 2022) ("Plaintiff claims that the statements on product labels are deceptive because they falsely lead consumers to believe that the products were produced in accordance with environmentally and socially responsible standards, when they were not.").

380. *See The Nestlé Cocoa Plan*, NESTLÉ COCOA PLAN, https://perma.cc/95H3-585S (last visited July 12, 2023) ("Better farming, better lives, better cocoa.").

381. *See id.* (including statements like "[a]iming at closing the living income gap for cocoa-farming families by incentivizing positive practices in

that Nestlé's cocoa was sourced from West African plantations that relied on child labor and child slave labor, contributed to deforestation, and employed other environmentally harmful practices.[382] The "NESTLÉ Cocoa Plan" is promoted by Nestlé on the packaging of some of its products.[383] Furthermore, products carrying the "NESTLÉ Cocoa Plan" seal are certified through UTZ as a program that promotes sustainable farming practices, social and environmental responsibility, and traceability in the cocoa supply chain.[384]

The court found that the "NESTLÉ Cocoa Plan" and the efforts to support and help improve the lives of cocoa farmers and promote sustainability are "at odds with the fact that the child labor problem the Nestlé Cocoa Plan is said to address has grown more, and not less, severe."[385] Moreover, the court stated that "the addition of the UTZ certification enhances the advertising statements by suggesting they are true because they were approved by a third party,"[386] which raises the issue of greenwashing through private certification systems. When businesses add a certification to audit their product compliance with the certification standards, the certification suggests that the statements were true because they had been approved by a third party. Such voluntary disclosures allow companies to choose which data to disclose and which environmental or social standards to prioritize in order to meet the certification standards.[387] As a result, certifications, such as the UTZ certification scheme, may not guarantee that a company's practices are free from child slavery or exploitation, as was evident in the case of "NESTLÉ Cocoa Plan." The Green Guides have a specific section dedicated to certifications and seals of

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cocoa communities" and stating that the Nestlé Cocoa Plan "has engaged more than 150,000 cocoa-farming families").

382. *See Nestlé USA, Inc.*, 2020 WL 901553, at *1.

383. *See id.* ("The hot cocoa and morsels packages each also separately display a 'NESTLÉ Cocoa Plan' seal with a statement, 'Supporting farmers for better chocolate. The NESTLÉ Cocoa Plan works with UTZ to help improve the lives of cocoa farmers and the quality of their products.'").

384. *See id.*

385. *Id.* at *3.

386. *Id.*

387. *See* White et al., *supra* note 32 (explaining that many public companies have disclosure committees to help support the corporate officers with disclosure decisions).

approval by which it is considered deceptive for a business to use a third-party certification or seal that does not clearly communicate the basis for the certification or implies broad environmental benefits.[388]

Another example of firm-level greenwashing involves a claim raised against Red Lobster Management LLC, Red Lobster Seafood Co., LLC, Red Lobster Restaurants LLC, and Red Lobster Hospitality LLC ("Red Lobster") for the deceptive marketing and sale of their Maine lobster and shrimp products as "sustainable," despite being sourced from "suppliers that use environmentally harmful and inhumane practices."[389] The company was accused of making false claims regarding the sustainability of its animal products under California's consumer protection statute.[390] The complaint relies on suppliers' environmental practices to question the sustainability representations of Red Lobster by alleging that the company uses environmentally destructive and inhumane practices.[391] The complaint states that "contrary to Red Lobster's claims, its Maine Lobster Products do not meet the highest standards of sustainability. In reality, they are sourced from suppliers that allegedly have used environmentally destructive practices that threaten endangered populations of North American right whales."[392]

388. *See* 16 C.F.R. § 260.4 (2024); *see also* Czarnezki et al., *Greenwashing and Self-Declared Seafood Ecolabels*, *supra* note 31, at 46–47 (describing the FTC's Green Guides as providing a safe harbor, for consumers, "concerning certain 'green' claims so that they will know when a claim is potentially deceptive or misleading" (citation omitted)).

389. *Red Lobster* Complaint, *supra* note 55, at 2; *see also Marshall v. Red Lobster Mgmt. LLC*, No. 21-cv-04786, 2023 WL 9111611, at *11 (C.D. Cal. Dec. 18, 2023).

390. *See Red Lobster* Complaint, *supra* note 55, at 5 ("Contrary to Red Lobster's claims, its Maine lobster menu items . . . are sourced from suppliers that use environmentally destructive practices that threaten endangered populations of North American right whales."); *see also id.* at 6–7 ("Red Lobster shrimp suppliers use inhumane practices including routine eyestalk ablation, a practice in which the eyestalk gland of female shrimps is crushed, burned, or cut off—without painkillers—in order to increase reproduction.").

391. *See id.* at 3 ("[C]onsumers have grown concerned about the environmental, animal welfare, and public health impacts of seafood production, and they consciously seek out seafood products that are sourced sustainably in accordance with high environmental and animal welfare standards.").

392. *Id.* at 14.

The problem with claims that promote "sustainable" practices is that they "likely convey that the product . . . has specific and far-reaching environmental benefits and may convey that the item . . . has no negative environmental impact."[393] Although the Green Guides do not offer clear directions on the usage of the term "sustainable" due to the FTC's lack of adequate information to provide valuable advice on the environmental marketing term's use, marketers have the responsibility of substantiating consumers' perception of this claim in their advertisements.[394] The FTC has warned companies not to use unqualified claims such as "sustainable" due to its determination that "it is highly unlikely that [marketers] can substantiate all reasonable interpretations of these claims."[395]

Firm-level greenwashing has expanded the grounds for materiality in consumer protection litigation. This shift reflects consumers' growing awareness and consideration of environmental factors throughout the supply chain when evaluating the importance of information provided by businesses.[396] For instance, in the case of certification schemes and the selection and collection of data, when businesses choose to ignore important material facts to prioritize others (for example, by stating that a product is sustainable because it contains organic materials, but it ignores the overall contribution to deforestation), the Green Guides have a specific section that provides guidance on their uses and narrows its capacity for deceptiveness (for example, by preventing the use of the "sustainable" term if the company is unable to substantiate all of their uses).[397] At the same time, consumers can challenge certain statements that may not be considered

393. 16 C.F.R. § 260.4(b) (2024); *see also Red Lobster* Complaint, *supra* note 55, at 11 (quoting 16 C.F.R. § 260.4(b)).

394. *See* Czarnezki et al., *Greenwashing and Self-Declared Seafood Ecolabels*, *supra* note 31, at 47.

395. *FTC Sends Warning Letters to Companies Regarding Diamond Ad Disclosures*, FED. TRADE COMM'N (Apr. 2, 2019), https://perma.cc/P425-M5ZX.

396. *See, e.g.*, Walker v. Nestlé USA, Inc., No. 19-cv-00723, 2022 WL 901553, at *3 (S.D. Cal. Mar. 28, 2022).

397. *See* 16 C.F.R. § 260.4(a) ("It is deceptive to misrepresent, directly or by implication, that a product, package, or service offers a general environmental benefit."); *see also* Czarnezki et al., *Greenwashing and Self-Declared Seafood Ecolabels*, *supra* note 31, at 47.

material in the investor realm (discussed below) but may be material from a consumer perspective (for example, consumers can challenge false and misleading statements that claim to prioritize animal welfare, such as products claiming to be "animal friendly" while causing harm to animals, even if such claims are not material to investors).

The capacity of the FTC's Green Guides for regulating firm-level greenwashing contrasts with the investor's tools to protect themselves from greenwashing when managing securities, which is limited to the materiality standard of a reasonable investor and relies mostly on economic loss considerations.[398] The Green Guides differ from an investor protection perspective because they focus on consumer understanding and prevent deceptive practices that can mislead environmental choices.[399]

In a case filed in New York, H&M is accused of engaging in firm-level washing as well as product-level washing.[400] The fashion company has not only been accused of sustainability misrepresentations regarding its products' recyclability and sustainable attributes, but also accused of falsifying the environmental data found in the environmental Higg scorecards

398. *See, e.g.*, Bondali v. Yum! Brands, Inc., 620 F. App'x 483, 492–93 (6th Cir. 2015) (dismissing the case because the court decided that a company's statements about its commitment to responsibly sourcing its food were non-actionable for being too aspirational).

399. *Compare Green Guides*, *supra* note 97 (stating how the Green Guides are assisting American consumers who are looking to buy environmentally friendly products), *with Enforcement Task Force*, *supra* note 158 (stating how the SEC Climate and ESG Task Force helps to assist investors that rely on climate and ESG-related disclosure and investment).

400. *See H&M* Complaint, *supra* note 55, at 1 ("This case is about H&M's labeling, marketing, and advertising that is designed to mislead consumers about its products' environmental attributes, through the use of false and misleading 'environmental scorecards' for its products called 'Sustainability Profiles.'"). Two cases were filed against H&M in the same year. H&M's "conscious choice" campaign was also targeted in a case filed in Missouri where the court dismissed plaintiffs' claims, highlighting the importance for companies to provide accurate information and substantiate their claims to mitigate legal risks associated with advertising that involves sustainability allegations. *See* Lizama v. H&M Hennes & Mauritz LP, No. 22-CV-01170, 2023 WL 3433957, at *1 (E.D. Mo. May 12, 2023) (explaining that the plaintiff purchased a sweater from the "conscious choice" collection, thinking that this meant it was produced in an environmentally friendly manner).

published on its website.[401] The plaintiffs asserted that H&M's sustainability claims were deceptive considering its significant environmental impact over the entire product life cycle.[402] Additionally, H&M was accused of incorporating false information about the underlying Higg Index scores data,[403] raising concerns about its transparency.[404] This case highlights the importance for businesses to pay attention when relying on third-party data and to be aware that disclosing this information in an unclear way can expose them to litigation risks.

Also in New York, plaintiffs have relied on General Business Law § 349 and § 350 to pursue climate-washing litigation.[405] To succeed in these cases, the plaintiff must demonstrate that the act or practice was consumer-oriented, misleading in a material way, and that the plaintiff suffered an injury as a result of the deceptive act.[406] However, the materiality threshold, which is the degree to which a misrepresentation is significant to a consumer's purchasing decision, is different in California compared to other states, such as New York.[407] California's consumer protection laws go beyond

401. *See H&M* Complaint, *supra* note 55, at 4 ("H&M conveniently, and egregiously, ignored negative signs in Higg Index scores, and simply presented them as positive results in every instance." (internal quotations omitted)). The Complaint was raised after an article exposed H&M's use of scorecards in its campaign. *See* Amanda Shendruk*, Quartz Investigation: H&M Showed Bogus Environmental Scores for Its Clothing*, QUARTZ (June 29, 2022), https://perma.cc/6HS9-YMMW (discussing how the H&M Higg scorecards were created using the Higg Material Sustainability Index, which is a standard developed by the Sustainable Apparel Coalition to measure the environmental impact of apparel materials).

402. *See H&M* Complaint, *supra* note 55, at 17.

403. *See id.* at 3–5 (providing an example of where H&M's website claimed that a product was made with 30% less water, but that the Higg scorecard revealed that it was actually made with 31% more water).

404. *See* Shendruk*, supra* note 401 (discussing how greenwashing, like what was seen with H&M, presents serious transparency issues).

405. *See generally Danone Waters* Complaint, *supra* note 59; *Allbirds* Complaint, *supra* note 33. See also *supra* Part I for a discussion about the different types of ESG disclosure greenwashing litigation.

406. *See* Stutman v. Chem. Bank, 731 N.E.2d 608, 611 (N.Y. 2000); Dwyer v. Allbirds, Inc., 598 F. Supp. 3d 137, 148 (S.D.N.Y 2022).

407. *Compare* N.Y. GEN. BUS. LAW § 350 (McKinney 2024) ("False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful."), *with*

prohibiting false advertising and also prohibit advertising that, although true, has the capacity, likelihood, or tendency to mislead or confuse the public.[408] This means that in California, a plaintiff may bring a claim based on a statement that is technically true but still misleading or likely to deceive consumers, even if the statement is not material to their purchasing decision.[409]

In a recent case, Allbirds, Inc., a manufacturer and seller of shoes made from wool, was sued in New York under General Business Law § 349 and § 350, among others, for allegedly misleading claims about its carbon pledges, besides other environmental issues related to animal welfare.[410] The defendant used life cycle assessment ("LCA") to measure the product's carbon footprint and the previously mentioned Higg Material Sustainability Index ("Higg MSI"), used to compare the environmental impact of products.[411] Consumers alleged that the LCA tool was unreliable because it "use[d] data from several sources, and there [were] unspecified discrepancies in industry-sourced data."[412] Moreover, plaintiffs alleged that the Higg MSI's methodology only addressed raw materials and lacked standards for comparing different materials.[413] The plaintiffs argued that the company omitted information about the environmental impact of their industry on water, land occupation, and eutrophication.[414]

The court dismissed the case, stating that the plaintiff's criticism over the tool's methodology was not a "description of a false, deceptive, or misleading statement about the Product."[415] First, this case highlights the existing gap in ESG disclosure where companies are able to cherry-pick their preferred

Kasky v. Nike, Inc., 45 P.3d 243, 250 (Cal. 2002) (explaining that California law goes a step further to include misleading advertising that is likely to confuse the public).

408. *See Kasky*, 45 P.3d at 250.

409. *See id.*

410. *See* Dwyer v. Allbirds, Inc., 598 F. Supp. 3d 137, 145–46 (S.D.N.Y. 2022).

411. *See id.* at 149.

412. *Id.* at 145–46.

413. *See id.* at 145.

414. *See Allbirds* Complaint, *supra* note 33, at 3.

415. *Allbirds*, 598 F. Supp. 3d at 149.

methodology to comply with their carbon goals.[416] Second, the court's ruling implies that a business is not required to disclose all information that a consumer may want to know, but rather it is only obligated to disclose material information that is relevant to the consumer.[417]

There are limitations of consumer protection laws in addressing claims of climate-washing. The effectiveness of consumer protection laws in driving meaningful change for climate-washing is limited because these laws prioritize access to information rather than the actual environmental impact of statements as perceived by consumers.[418] Even if a consumer can show that a company's claims are misleading or deceptive, there may be no course of action if the company has not made false statements about its product or omitted information that it alone possesses.[419] This is particularly relevant when companies may make misleading or exaggerated claims about their environmental impact or carbon footprint, and scientific evidence is often needed to verify the accuracy of these claims, but obtaining such information can be challenging for consumers.[420]

On the other hand, from a business perspective, the case of Allbirds, Inc. can provide useful guidance for businesses to follow when making environmental impact claims.[421] The company was able to defend itself against deceptive marketing claims by disclosing data and information with a set

416. *See id.* at 151 ("A plaintiff can only state a claim for omission under the GBL where the business alone possesses material information that is relevant to the consumer and fails to provide this information.").

417. *See id.* ("There is no obligation under GBL § 349 or § 350 to provide whatever information a consumer might like to know.").

418. *See supra* note 110.

419. *See Allbirds*, 598 F. Supp. 3d at 151 (noting that a claim for omission under the GBL requires the business alone to possess material information that is relevant to the consumer and subsequently fail to disclose it).

420. *See, e.g.*, *Green Claims*, EUR. COMM'N, https://perma.cc/5KBE-HHRX (last visited Jan. 16, 2024) (finding both that "40% of [green] claims have no supporting evidence" and that "[h]alf of all green labels offer weak or non-existent verification").

421. *See* William J. Hubbard, *Allbirds' Defeat of Consumer Class Action Offers Valuable Greenwashing-Avoidance Guideposts*, WASH. LEGAL FOUND. (May 19, 2022), https://perma.cc/QY73-3BQJ (concluding that Allbirds prevailed because it had calculations and data to back up its claims and provided analysis and calculations on its website for consumers to evaluate).

methodology.[422] Thus, following the court decision, a criticism of the methodology used does not amount to a substantive allegation of false, deceptive, or misleading statements about the product.[423]

These issues highlight the limitations of voluntary ESG disclosure and standardization. On one hand, there is no obligation to disclose material information,[424] which makes consumers extra vulnerable to climate-washing. On the other hand, existing laws and regulations may unintentionally contribute to climate-washing by allowing companies to make broad and ambiguous climate commitments without providing concrete details or being held accountable, making it difficult for companies that genuinely commit to sustainability to differentiate themselves from those that do not.[425] When it comes to climate change commitments, companies usually make broad claims that aim for future carbon neutrality and are not liable for their "empty promises."[426] However, broad statements, like real pledges, can promote ESG because they enhance the long-term characteristics of business sustainability goals.[427]

A class action lawsuit, *Dorris v. Danone Waters of America*,[428] was brought against Danone's water brand, Evian Natural Spring Water, for misleading customers about the

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422. *See id.*

423. *See* Dwyer v. Allbirds, Inc., 598 F. Supp. 3d 137, 149–50 (S.D.N.Y. 2022).

424. *See* Lesley Fair, *Full Disclosure*, FED. TRADE COMM'N (Sept. 23, 2014), https://perma.cc/J45N-UD7G (explaining that disclosure is only required when it is necessary to prevent an advertisement from being misleading).

425. *See* Oren Perez & Michael P. Vandenbergh, *Making Climate Pledges Stick: A Private Ordering Mechanism for Climate Commitments*, ECOLOGY L.Q. (forthcoming) (manuscript at 16), https://perma.cc/HBG6-4Q3E (PDF) (describing the numerous ways in which companies can game the climate pledge system).

426. Terry Slavin, *Greta Thunberg: 'Our Hopes Drown in Your Empty Promises' to Tackle Climate Change*, REUTERS EVENTS (Oct. 7, 2021), https://perma.cc/JT97-2SPM.

427. *See* MEKALA KRISHNAN ET AL., MCKINSEY GLOB. INST., THE NET-ZERO TRANSITION: WHAT IT WOULD COST, WHAT IT COULD BRING 46 (2022), https://perma.cc/AZT4-ZRJ6 (PDF) ("Stakeholders will need to act with singular unity, resolve, and ingenuity and toward equitable, long-term outcomes to support the economic transformation a net-zero transition entails.")

428. No. 22 Civ. 8717, 2024 WL 112843 (S.D.N.Y. Jan. 10, 2024).

carbon neutrality of their product.[429] In order to achieve its carbon-neutral goals, the company co-founded the Livelihoods Carbon Funds, which collects carbon offset credits to neutralize the CO_2 emissions of its product.[430] However, since the implementation of the fund takes ten to twenty years, the product is not actually carbon neutral.[431] The plaintiffs claimed that the term "Carbon Neutrality" and the product promote climate-washing by being misleading and false.[432]

First, the plaintiffs asserted that "Carbon Neutral" is an ambiguous and deceptive term.[433] The case cites the FTC guidelines on marketing carbon offsets.[434]

> The FTC guidelines provide that "it is deceptive to misrepresent, directly or by implication, that a carbon offset represents emission reductions that have already occurred or will occur in the immediate future. To avoid deception, marketers should clearly and prominently disclose if the carbon offset represents emission reductions that will not occur for two years or longer."[435]

Second, the plaintiffs asserted that the "carbon neutral" term is not reflected in the product's lifecycle because it still releases CO_2 into the Earth's atmosphere.[436] For example, they point to the company's rail freight operator and manufacturers for their contributions to CO_2 emissions as part of the supply chain.[437] This highlights the importance of considering the entire lifecycle of a product when making carbon offset claims

429. *See id.* at *1–2.

430. *See Danone Waters* Complaint, *supra* note 59, at 14.

431. *See id.* at 14–15.

432. *See id.* at 2.

433. *Id.* at 10.

434. *See Dorris*, 2024 WL 112843, at *6 ("The FTC published the Green Guides as guidance 'to help marketers avoid making environmental marketing claims that are unfair or deceptive' under the FTC Act." (quoting 16 C.F.R. § 260.1 (2024))). As previously noted, in 2022, the FTC requested public comment for "Carbon Offsets and Climate Change." *FTC Seeks Public Comment*, *supra* note 87.

435. *Danone Waters* Complaint, *supra* note 59, at 12 (quoting 16 C.F.R. § 260.4).

436. *See id.* at 13.

437. *See id.* at 13–14.

and being transparent about the methodology used to achieve carbon neutrality.

On the other hand, businesses may choose to limit their environmental pledges to specific practices in their business operations to avoid accusations of greenwashing. For instance, a consumer packaged-goods company may commit to reduce its carbon emissions specifically from its distribution channel instead of making broad statements about the sustainability of its product.

The current FTC Green Guides do not explicitly discuss carbon neutrality claims, but they do provide general principles[438] and general environmental benefit claims[439] and specific guidance on carbon offsets.[440] However, it is important to note that the current regulatory framework set by the FTC for offsetting emissions is inadequate due to the unclear rules regarding life-cycle considerations and expectations.[441] The lack of clarity regarding the FTC's definition of "negligible" under the general provisions of environmental benefits and general principles,[442] when applied to carbon neutrality claims, creates difficulties for marketers of carbon neutral products.[443] This ambiguity in the Green Guides poses challenges for companies, as they face accusations of greenwashing when they limit their carbon neutrality claims to specific parts of a product's life-cycle emissions.

In summary, with growing awareness and concern about climate change, companies are under increasing pressure to demonstrate their environmental commitments.[444] Although

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438. 16 C.F.R. § 260.3 (2024).

439. *Id.* § 260.4.

440. *Id.* § 260.5.

441. *See* Markowitz et al., *supra* note 60, at 3 (noting the benefits of clear FTC rules regarding transparency with respect to life-cycle considerations).

442. *See* 16 C.F.R. § 260.3(c) ("Marketers should not state or imply environmental benefits if the benefits are negligible."); *id.* § 260.4(c) ("Marketers should not imply that any specific benefit is significant if it is, in fact, negligible.").

443. *See* Markowitz et al., *supra* note 60, at 3 (noting various standards for carbon neutral products internationally).

444. *See* Mike Scott, *Pressure from Above, Pressure from Below Compels Companies and Investors to Tackle Climate Change*, FORBES (Apr. 19, 2019), https://perma.cc/XNT2-K428 (noting pressures faced by companies from

incomplete, consumer protection laws provide a potential litigation path for companies engaging in greenwashing of carbon offset pledges, as demonstrated by the class action lawsuit *Dorris v. Danone Waters of America*.[445] Companies that use carbon offsets in their GHG emissions reduction targets for advertising purposes could be engaging in deceptive practices if they fail to disclose that the reductions will not occur for two years or longer, violating consumer protection laws.

To conclude, exploring greenwashing liability at the state level highlights the significant impact and potential liability that companies engaging in greenwashing may face. The FTC's authority and the development of the Green Guides play a crucial role in defining product terms and influencing the interpretation of sustainability statements, thereby shaping the landscape for potential greenwashing litigation. In addition, it is important to acknowledge the influence of consumer behavior, as consumers increasingly demand that businesses substantiate their broad sustainability claims reflecting litigation risks across the supply chain.[446] The risks of greenwashing extend beyond sustainability claims, with increasing pressure on businesses to lower their emissions and address climate change.[447] This has led to a rise in consumer litigation targeting such deceptive practices, particularly in relation to incomplete or misleading carbon offset pledges, which can lead to potential consumer protection violations.[448]

below, in the form of consumer action, and above, in the form of government action and investor influence).

445. *See* Dorris v. Danone Waters of Am., No. 22 Civ. 8717, 2024 WL 112843, at *1–3 (S.D.N.Y. Jan. 10, 2024) (alleging defendant violated, among other things, California's Consumers Legal Remedies Act by misrepresenting its carbon offset pledges).

446. *See* Scott, *supra* note 444.

447. *See Consumers Expect Brands to Address Climate Change*, WALL ST. J. (Apr. 20, 2021), https://perma.cc/F6TX-8RQT (citing a Deloitte study that found 55 percent of polled consumers want brands to create awareness around climate change, with 41 percent of consumers wanting brands to donate to climate-oriented nonprofits).

448. *See* Jacob H. Hupart et al., *Greenwashing Class Action Litigation: An Emerging Risk for Companies' Claims of Sustainability*, NAT'L L. REV. (Aug. 4, 2023), https://perma.cc/9X7L-ZG8Z.

V. INVESTORS, CONSUMERS AND THE NEW LITIGATION LANDSCAPE

The investor and consumer realms in greenwashing claims converge in a number of important areas. First, as discussed in subpart A, the overlapping jurisdiction of the SEC and FTC in regulating sustainability claims may promote integrated approaches in regulating, overseeing and litigating greenwashing claims, creating a more cohesive regulatory framework that provides greater clarity for businesses. Second, as discussed in subpart B, the Climate-related Rule and ESG amendments by the SEC may create a new litigation landscape, expanding the available information for shareholders about climate-related risks. However, the safe harbor provisions in securities litigation contain a limitation on legal action over long-term ESG and climate goals which are not present in consumer protection laws.[449] Thus, the importance of considering the intersection between consumer protection and securities regulations, enforcement actions, and greenwashing litigation. The joint analysis of consumer and securities greenwashing litigation can lead to the development of considerations that benefit businesses, regulators, and potential plaintiffs in managing ESG disclosures and associated litigation risks.

A. *Synergies Between Securities and Consumer Litigation*

There are existing synergies between consumer protection laws and federal securities laws regarding sustainability claims. First, at a federal agency-level there is overlapping jurisdiction between the SEC and the FTC authority in regulating ESG statements that a company discloses.[450] Second, from a state-level litigation perspective, investors that lack remedies under securities law may pursue remedies instead under state consumer protection statutes.[451] Third, ESG data can be used

449. 15 U.S.C. § 78u-5.

450. *See, e.g.*, *Enforcement Task Force Focused on Climate and ESG Issues*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/4CEM-7NW2 (last updated Apr. 11, 2023); *Green Guides*, *supra* note 97.

451. *See* 12A JOSEPH C. LONG ET AL., BLUE SKY LAW § 9:86 (2023) ("Investors who may lack a remedy under state securities laws may nevertheless attempt to pursue a remedy under their state's

for different reporting purposes, such as public-facing disclosures or for advertising purposes, which may activate different legal risks and compliance mechanisms.[452]

1. Overlapping FTC and SEC Enforcement

Whether the FTC and SEC have overlapping jurisdiction in regulating sustainability claims has not been analyzed in-depth. Historically, the FTCA has not been applied to securities transactions because such issues have been addressed by the SEC since its inception in the 1930s.[453] While the FTCA makes specific exemptions to its scope, it does not exempt securities transactions.[454] Hence, if a company makes false and misleading ESG disclosures in documents used by investors or required on securities law, it could potentially raise claims under the FTCA.[455]

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consumer-protection statute, if one exists. Most states have some form of consumer-protection statute.").

452. *See* Hupart et al., *supra* note 448.

453. Courts have discussed the role of the FTCA in state consumer protection statutes to analyze the application of Mini FTCAs to securities transactions as an alternative remedy for shareholders. The majority of courts have argued that, historically, the FTC has not covered securities transactions. *See* Spinner Corp. v. Princeville Dev. Corp., 849 F.2d 388, 390–91 (9th Cir. 1988) (stating that the FTCA has not been applied in a securities context since 1923); Algrant v. Evergreen Valley Nurseries Ltd. P'ship, 126 F.3d 178, 186–87 (3d Cir. 1997) (stating that the FTCA has not been applied to securities transactions despite its broad language and remedial scope); Stephenson v. Paine Webber Jackson & Curtis, Inc., 839 F.2d 1095, 1101 (5th Cir. 1988) (stating that the FTCA has been interpreted to preclude coverage of securities claims); Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162, 167–68 (4th Cir. 1985) (stating fact that no federal court decision has applied § 5(a)(1) of the FTCA to securities transactions); Bowen v. Ziasun Techs., Inc., 116 Cal. App. 4th 777, 786–87 (Cal. Ct. App. 2004) (stating that the FTC has not viewed the FTCA as reaching securities transactions); Russell v. Dean Witter Reynolds, Inc., 510 A.2d 972, 978–79 (Conn. 1986) (stating that the FTC has never undertaken to adjudicate deceptive conduct in sale and purchase of securities.).

454. *See* 15 U.S.C. § 45(a)(2)–(3).

455. *See* FTC v. Ken Roberts Co., 276 F.3d 583, 586 (D.C. Cir. 2001) (affirming FTC authority to investigate allegedly deceptive advertising by sellers of courses in commodities and securities investing and clarifying that this authority was not preempted by the Commodity Exchange Act or the Investment Advisors Act). *But see Spinner Corp.*, 849 F.2d at 393 (holding that Hawaii's "baby" FTCA does not apply to claims arising from securities transactions); *see also* Brock Bosson & Helene Banks, *Are Your ESG*

The FTC is empowered by the FTCA § 5 "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[456] Thus, the law does not prevent the FTC from taking action over unfair and deceptive acts or practices related to the management of securities.[457] However, the FTC set forth a Policy Statement on Deception in 1983, which established that to activate FTC deception cases, the practice must be related to the "consumer's conduct or decisions with regard to a product or service."[458] Hence, the FTC interpreted its legislative authority to regulate unfair and deceptive practices that affect commerce related to consumer-related practices.

Notably, FTC regulatory enforcement can collide with SEC enforcement when they pursue different violations related to the same issue, as in the Volkswagen "clean diesel" scandal.[459] The FTC complaint against Volkswagen ("VW") for deceptive advertising practices alleged that VW had misled consumers by promoting its "clean diesel" vehicles as environmentally friendly, when in fact they were not.[460] The SEC also raised a complaint against Volkswagen for making false and misleading statements to investors.[461] This interaction between FTC and SEC enforcement in the Volkswagen case highlights how

Disclosures Vulnerable to Claims of 'Greenwashing'?, GOVERNANCE INTELLIGENCE (Oct. 18, 2022), https://perma.cc/L3TW-AMM5 (discussing that FTCA lawsuits do not typically allege securities laws violations but can provide important insights into what might become successful claims for investors).

456. 15 U.S.C. § 45(a)(2).

457. *Id.*

458. FTC Statement on Deception, 103 F.T.C. 174, 175 (1984).

459. *See* Lesley Fair, *Billions Back to Consumers for VW's False "Clean Diesel" Claims*, FED. TRADE COMM'N (June 28, 2016), https://perma.cc/RGS3-82VD; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Volkswagen, Former CEO With Defrauding Bond Investors During "Clean Diesel" Emissions Fraud (Mar. 14, 2019), https://perma.cc/GTK9-XZ8V. The EPA also resolved a civil enforcement case for the VW scandal under violations of the Clean Air Act. *See Learn About Volkswagen Violations*, U.S. ENV'T PROT. AGENCY (Sept. 14, 2023), https://perma.cc/6WDF-KUMP.

460. Complaint at 1–2, Fed. Trade Comm'n v. Volkswagen Grp. of Am. Inc., No. 16-CV-01534 (N.D. Cal. filed March 29, 2016).

461. Complaint at 1, U.S. Sec. & Exch. Comm'n v. Volkswagen Aktiengesellschaft, No. 19-CV-01391 (N.D. Cal. filed March 14, 2019).

different agencies can have complementary jurisdiction when it comes to regulatory enforcement.

The SEC complaint alleged in its summary that VW, including its CEO and numerous senior officials, "lied to and misled United States investors, consumers, and regulators as part of an illegal scheme to sell its purportedly 'clean diesel' cars and billions of dollars of corporate bonds and other securities in the United States."[462] Importantly, the SEC complaint relies upon VW's marketing campaign which promised to reduce toxic vehicle emissions.[463] This highlights the nature and extent of ESG disclosure, which may involve not only investors but also consumers and regulators.

By drawing parallels between FTC regulations and federal securities law, it is possible to (1) address the different litigation standards that are being used and (2) the ways they could be transformed and integrated.

First, there are different litigation standards that each system contains. Although the concept of materiality is present in both regulatory landscapes, the threshold is different in each system. In greenwashing consumer litigation, the relevant test is the "reasonable consumer test."[464] Meanwhile, in SEC securities litigation the test is the "reasonable investor test."[465] Both tests rely on the principle of "materiality," which requires a showing that the reasonable investor or consumer would be influenced by the ESG disclosure.[466] In both cases, the concept of materiality is related to a financial detriment or impact on the consumer (when the consumer has inquired about an extra expenditure for the advertised product) or on the investor (for the effects it can have on the security). However, this threshold is different in the litigation standards of consumer protection versus securities law.[467] In order to succeed in securities

462. *Id.* at 2.

463. *Id.* at 3.

464. *See also* 16 C.F.R. § 260.1(d) (2014).

465. *See, e.g.*, TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976) (declaring that a stated or omitted fact made by a company is "material" when there is a substantial likelihood that a "reasonable investor" would be influenced by the business claim in his decision to buy or sell the security).

466. *See id.*

467. *See* Dorris v. Danone Waters of Am., No. 22 Civ. 8717, 2024 WL 112843, at *3–4 (S.D.N.Y. Jan. 10, 2024). Generally, consumers need to purchase the product to raise a consumer greenwashing claim but the value of

litigation plaintiffs have the burden of showing the fraud elements of a private Rule 10b-5 action, and defendants can use the safe harbor provision as a shield for long-term projections, which allows them to escape liability for some climate-related disclosures.[468] The interpretation that the courts make of what financial detriment is actionable can be essential for assessing long-term corporate value;[469] particularly given that "maximizing wealth for the long term demands that managers consider tradeoffs."[470] This logic opposes the modern view and innovative business perspective that represents the very notion of ESG as a tool for long-term value creation.[471] In consumer litigation there is also a requirement to allege economic injury when the consumer decided to purchase that product for its sustainable qualities. However, this requirement is much less stringent.[472]

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the product or the difference in price does not form the basis of the argument. *See, e.g.*, Peterson v. Glad Prods. Co., No. 23-cv-00491, 2023 WL 4600404 (N.D. Cal. July 17, 2023). *But see Dorris*, 2024 WL 112843, at *3–4. The complaint uses the price "premium" argument to enhance the reasonable consumer standard. *See Danone Waters* Complaint, *supra* note 59, at 4. Complaints usually mention the price premium argument to seek monetary relief, but this is symbolic because it represents fifty to five hundred dollars.

468. 15 U.S.C. § 78u-5(c). For readers seeking an overview of Rule 10b-5, see PALMITER, SECURITIES REGULATION, *supra* note 13, at 397–457. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668, 21,773–76 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) (describing safe harbor for certain climate-related disclosures).

469. *See, e.g.*, Motion to Dismiss at 15–16, Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d 832 (N.D. Tex. 2018) (No. 16-cv-03111) (arguing that plaintiffs are not liable for their climate-related financial projections under PSLRA safe harbor provisions).

470. PALMITER, SUSTAINABLE CORPORATIONS, *supra* note 144, at 295.

471. *See id.* at 294–95 (stating that ESG helps generate wealth for the long-term).

472. *See, e.g.*, Peterson v. Glad Prods. Co., No. 23-cv-00491, 2023 WL 4600404 (N.D. Cal. July 17, 2023) (denying defendant's 12(b)(1) motion to dismiss where consumer was led to purchase Glad product depicting chasing arrows symbol suggesting that the product was recyclable when it was in fact not); Complaint at 2, Last Beach Cleanup v. Terracycle, Inc., No. RG21090702, (Cal. Super. Ct. Mar. 4, 2021) (alleging misleading advertising where product was labeled as recyclable when it was in fact not); Walker v. Nestlé USA, Inc., No. 19-CV-00723, 2022 WL 901553, at *1 (S.D. Cal. Mar. 28, 2022) (alleging misleading advertising where products were labeled as environmentally friendly when they were in fact not).

Second, there are ways in which both systems (consumer and investor) can be transformed and integrated. The transformation and integration of consumer and investor systems refer to the current legal landscape surrounding greenwashing claims and the potential merger between the two realms. Transformation involves the development of the regulatory landscape and changes in enforcement strategies. The FTC is looking to update its Guides and the SEC finalized its rules and amendments related to ESG and climate-related disclosures.[473] The agencies are also authorized to pursue enforcement actions against greenwashing.[474]

Pursuant to the FTC's regulatory review of the Green Guides, the FTC requested comments on expanding its scope of interaction with other environmental marketing regulations and establishing enforceable requirements related to unfair and deceptive environmental claims.[475] The FTC has asked for guidance on whether the Green Guides overlap or conflict with other federal, state, or local laws or regulations, and it is seeking input from stakeholders on how best to address these concerns.[476] The results of this review could have far-reaching implications for the agency's regulatory authority.

Moreover, the FTC's proposals in its request for public comments may also signal a potential shift in the FTC's approach to regulating environmental claims. The agency has historically relied on a case-by-case enforcement model.[477]

473. *See supra* note 450 and accompanying text.

474. *See supra* Part II. However, it is important to note that both the FTC and the SEC have not initiated any greenwashing enforcement actions as of 2022. *See Enforcement Task Force Focused on Climate and ESG Issues*, *supra* note 450. At the date this Article was written, the most recent instance of greenwashing enforcement litigation was raised at the state level, indicating a potential avenue for greenwashing enforcement in states that permit such actions. *See supra* note 258.

475. *See* Green Guides, *supra* note 97; *see also* Request for Comment, Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77,766 (Dec. 20, 2022) (to be codified at 16 C.F.R. pt. 260).

476. *See* Request for Comment, Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. at 77,767–69.

477. *See* George Gigounas et al., *FTC to Revise Its Guidance on Environmental Marketing as It Seeks Public Comment on the Green Guides*, DLA PIPER (Jan. 12, 2023), https://perma.cc/LM8D-ZX7S (noting that, since the Green Guides were introduced, "the FTC has brought approximately 90

However, it may be considering a more prescriptive model with rule-based requirements in this area.[478] This shift could have significant implications for businesses operating in industries that make environmental claims for consumers and disclose ESG data or climate-related risks for investors' communications.

The integrated approach that this Article proposes, and that coincides with the transformation and development of the ESG disclosure movement, refers to the merging of laws and regulations that protects consumers and investors to create a holistic approach to greenwashing claims. This integrated approach can encompass different aspects, such as the synergies in enforcement efforts between the FTC and SEC that may lead to a more comprehensive oversight of companies' ESG disclosures. For example, coordination and information sharing between these agencies could ensure that misleading claims are targeted from both a consumer protection and investor standpoint. Additionally, integration refers to the possibility of coordinating litigation strategies from both realms. Investors and consumers harmed by the same deceptive practices could collaborate, potentially leading to more impactful legal actions and outcomes.[479]

From a broader perspective, businesses could also benefit from the integration and transformation of consumer and investor realms. This is because it would result in a clearer regulatory landscape for them to follow. If businesses decide to set a more coordinated approach for data and information gathering from both realms, they would be able to navigate the intricate landscape of laws and regulations concerning greenwashing claims with greater clarity. This harmonization could potentially help businesses mitigate litigation risks and operate in a more compliant and responsible manner.

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enforcement actions and issued one advisory opinion related to environmental marketing claims").

478. *See id.* (explaining the FTC may pursue "actual environmental marketing regulations").

479. *See* Hupart et al., *supra* note 448 (pointing out that increasing litigation efforts and increasing scrutiny from the SEC and FTC makes it more important for companies to adjust their marketing to avoid litigation).

2. State Consumer Laws as Alternative Remedies for Shareholders

Shareholders may have the opportunity to pursue action under state consumer protection statutes when they are affected by false and misleading business practices related to the management of securities.[480] Nevertheless, there are two important layers of limitations to the application of consumer protection remedies for shareholders. First, securities laws mandate that class actions involving publicly traded securities be brought in federal courts, thus preempting the application of state consumer protection laws for the management of securities in certain instances.[481] Second, while most states have consumer protection statutes that incorporate the FTC Green Guides,[482] they typically do not extend their consumer protection laws to cover securities,[483] with some exceptions.[484]

The interplay between federal and state securities laws becomes relevant in determining the application of securities

480. *See supra* Part IV.B.

481. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.) (preempting certain class actions that allege fraud "in connection with the purchase or sale" of covered securities). For a fuller discussion of the preemptive provisions of this statute, see HAZEN, FEDERAL SECURITIES LAW, *supra* note 119, at 83–86 (explaining, in-depth, the Securities Litigation Uniform Standards Act).

482. *See supra* Part IV.C.

483. At least fifteen jurisdictions held that claims based upon securities violations are not actionable under consumer protection statutes. *See, e.g.*, Bowen v. Ziasun Techs., Inc., 11 Cal. Rptr. 3d 522, 530 (Cal. Ct. App. 2004); Spinner Corp. v. Princeville Dev. Corp., 849 F.2d 388, 393 (9th Cir. 1988); Russell v. Dean Witter Reynolds, Inc., 510 A.2d 972, 978 (Conn. 1986).

484. Three states have ruled that their Mini FTCA apply to securities transactions. *See* Denison v. Kelly, 759 F. Supp. 199, 203 (M.D. Pa. 1991) (interpreting the plain meaning of the state consumer law to include the defendant's conduct in connection with the security transactions at issue); Onesti v. Thomson McKinnon Sec., Inc., 619 F. Supp. 1262, 1267 (N.D. Ill. 1985) (holding that securities are considered merchandise under the Illinois Consumer Fraud and Deceptive Practices Act and that the Act applies to securities fraud claims, thus allowing plaintiffs to bring an action under the Act); State *ex rel.* Corbin v. Pickrell, 667 P.2d 1304, 1307 (Ariz. 1983) (finding the state consumer fraud act provided an additional cause of action for securities act violations).

into the consumer protection statutes.[485] Each state contains state securities laws called "Blue Sky Laws," although these have been significantly limited in their scope by federal law.[486] Moreover, the Securities Litigation Uniform Standards Act[487] ("SLUSA") directs publicly traded securities class actions to be brought in federal court.[488] SLUSA preemption applies to any class action involving misrepresentations, omissions, deception, or manipulation in connection with the purchase or sale of a security and applies to "covered" securities under the 1934 Act.[489] For instance, securities class actions under Rule 10b–5 must be brought in federal district court.[490]

However, there are specific class actions that SLUSA does not preempt,[491] allowing investors the opportunity to pursue

485. *See* Tonya M. Esposito et al., *Deputizing State AGs: CFPB Issues Broad New Interpretive Rule on States' Ability to Enforce Federal Consumer Protection Laws*, GREENBERG TRAURIG (May 23, 2022), https://perma.cc/5LKB-X269 (explaining that the Consumer Financial Protection Bureau issued an interpreting rule providing states with the ability to enforce federal consumer protection laws).

486. *See* National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (codified as amended in scattered sections of 15 U.S.C.) (preempting state authority concerning the registration and qualification of securities offerings deemed "national" in character and creating defined categories of "covered securities" to establish such limitations). For a fuller discussion of the preemptive provisions of this statute, see Robert N. Rapp & Fritz E. Berckmueller, *Testing the Limits of NSMIA Preemption: State Authority to Determine the Validity of Covered Securities and to Regulate Disclosure*, 63 BUS. LAW. 809, 812–13 (2008) (discussing NSMIA preemption relating to "covered securities").

487. Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended in scattered sections of 15 U.S.C.).

488. *See id.* § 77p(b)(1) (preempting certain class actions that allege fraud "in connection with the purchase or sale" of covered securities). For a fuller discussion of the preemptive provisions of this Act, see HAZEN, FEDERAL SECURITIES LAW, *supra* note 119, at 83–86.

489. *See* HAZEN, FEDERAL SECURITIES LAW, *supra* note 119, at 63.

490. *See* 15 U.S.C. § 78aa(a) ("The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder . . . .").

491. SLUSA does not preempt individual actions, derivative suits, or suits on behalf of fifty or fewer persons; class actions by states or their political subdivisions, as well as class actions by state pension plans; investigations and enforcement actions by state securities administrators; and class actions seeking to enforce a contractual agreement under a trust indenture for a debt security. *See* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 87 (2006) (noting the general presumption that Congress does not "cavalierly

legal action under consumer protection laws.[492] If not preempted by federal law, the application of securities transactions to consumer protection laws may be possible.

The exceptions that allow the application of securities transactions to consumer protection laws are based on judicial interpretations that have held such laws are applicable to shareholders' claims despite state and federal securities provisions.[493]

State and federal courts applying state law have used the specific provisions and legislative intent of each state's consumer protection laws to determine the availability and scope of remedies for shareholders under state consumer protection statutes.[494] When determining whether consumer protection laws apply to securities transactions, courts may consider whether there is a directive to interpret the consumer

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pre-empt state-law causes of action" and that "SLUSA does not actually pre-empt any state cause of action" (internal quotations omitted)); 15 U.S.C. § 78bb(f)(3)(A)–(B) (preservation of certain actions and state actions); *id.* § 78bb(f)(5)(B) (covered class actions); *id.* § 78bb(f)(5)(C) (exceptions for derivative actions). Class actions that allege fiduciary breaches under state corporate law may still be brought in court. 15 U.S.C. §§ 77p(d)(2)–(3), 77p(f)(3); *see also* Gibson v. PS Grp. Holdings, Inc., No. 00-CV-0372, 2000 WL 777818, at *6 (S.D. Cal. Mar. 8, 2000) (deciding that a securities fraud class action that alleges state fiduciary breaches is permitted to be brought in state court). For a fuller discussion of the preemptive provisions of this Act, see HAZEN, FEDERAL SECURITIES LAW, *supra* note 119, at 83–85. *See also* 2 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 7:2 (8th ed. 2021) (discussing actions that remain in state court).

492. *See, e.g.*, Roskind v. Morgan Stanley Dean Witter & Co., 95 Cal. Rptr. 2d 258, 263 (Cal. Ct. App. 2000) (deciding that the state consumer protection law was not preempted by federal law when a customer alleged that a brokerage firm breached its fiduciary duty by "trading ahead" for its own benefit before processing those sales for its customers).

493. *See supra* note 484 and accompanying text.

494. *See, e.g.*, Spinner Corp. v. Princeville Dev. Corp., 849 F.2d 388, 392 (9th Cir. 1988) (noting that providing plaintiffs with "yet another remedy is inconsistent with a coherent legislative intent"); *see also* Bowen v. Ziasun Techs., Inc., 11 Cal. Rptr. 3d 522, 531 (Cal. Ct. App. 2004) (determining there is no suggestion that the California legislature intended to provide an additional remedy). *But see* Overstock.com, Inc. v. Gradient Analytics, Inc., 61 Cal. Rptr. 3d 29, 51 (Cal. Ct. App. 2007) (distinguishing the statute at issue from *Bowen* and *Spinner* because the plain language did not contain a directive to exclude securities from the consumer protection statute).

protection statute consistently with the FTCA.[495] If this is the case, and the state consumer protection statute contains such directive, courts will likely rule that state consumer protection remedies do not apply to securities transactions.[496] This is because, historically, the FTC has interpreted that its legislation does not cover securities transactions.[497] Conversely, the absence of such a directive may influence courts to rule in favor of applying state consumer protection remedies for securities transactions.[498]

For instance, in Illinois, a district court held that securities are considered merchandise under the Illinois Consumer Fraud and Deceptive Practices Act, and therefore, the Act applies to securities fraud claims, allowing plaintiffs to bring an action under the Act.[499] Similarly, the Middle District Court of Pennsylvania held that state consumer law could be applied to securities transactions.[500] In this instance, based on the rationale that there was no irreconcilable conflict between the state's Consumer Protection Law and the state's securities laws, the court found that both laws could operate simultaneously and be enforced together.[501]

In Tennessee, the Court of Appeals emphasized that neither federal nor state statutes that regulate the marketing or sale of securities provide the sole remedies for unfair or deceptive acts

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495. *See, e.g.*, *Spinner Corp.*, 849 F.2d at 391 (deciding that the state consumer protection statute did not encompass securities transactions, relying, in part, on a provision directing that the statute be construed in accordance with the judicial interpretation of similar federal antitrust statutes).

496. *See* Russell v. Dean Witter Reynolds, Inc., 510 A.2d 972, 977 (Conn. 1986) ("The FTC has never undertaken to adjudicate deceptive conduct in the sale and purchase of securities . . . ."); *see also Spinner Corp.*, 849 F.2d at 393 (discussing the "legislative command to refer to federal FTCA jurisprudence"); *Bowen*, 11 Cal. Rptr. 3d at 531 (stating "in this case, taking our guidance from the FTC, we must construe [the little FTCA] as not purporting to cover transactions for the purchase and sale of securities").

497. *See supra* note 496 and accompanying text.

498. *See, e.g.*, *Overstock.com, Inc.*, 61 Cal. Rptr. 3d at 51 (emphasizing that the UCL does not contain a directive to interpret it consistently with the FTCA and, thus, its potential applicability to securities violations).

499. *See* Onesti v. Thomson McKinnon Sec., Inc., 619 F. Supp. 1262, 1267 (N.D. Ill. 1985).

500. *See* Denison v. Kelly, 759 F. Supp. 199, 204 (M.D. Pa. 1991).

501. *See id.* at 203–05.

or practices related to the marketing or sale of securities.[502] Furthermore, the court held that securities are considered "goods" under the Tennessee Consumer Protection Act ("TCPA"), while investment counseling and advice are classified as "services," making the offering of securities for sale and the provision of investment counseling "consumer transactions."[503] However, in 2011, an amendment to the TCPA eliminated the private right of unfair or deceptive act or practice involving the marketing or sale of a security.[504]

These notable exception rulings have implications for potential future litigation related to greenwashing in other states because they can be used by plaintiff-shareholders when the state laws do not contain an express provision that prohibits the use of state consumer protection remedies for securities transactions.[505]

However, in the absence of explicit preemption, defendants in several states have challenged these claims on constitutional grounds, arguing that applying state consumer protection remedies would unduly burden interstate commerce under the

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502. *See* Johnson v. John Hancock Funds, 217 S.W.3d 414, 424 (Tenn. Ct. App. 2006).

503. *Id.*

504. The Tennessee Consumer Protection Act has since been amended to exclude a private right of action for the sale of securities. *See* TENN. CODE ANN. § 47-18-109(h) (2023); *see also* Gregory v. Lane, No. 11-CV-132, 2012 WL 5289385, at *9 (E.D. Tenn. Oct. 24, 2012) (noting that the 2011 amendment eliminated the private right of action).

505. In California, recent decisions have limited and questioned the scope and validity of the leading case that limited California's consumer protection statute as a shareholder remedy. *See, e.g.*, Strigliabotti v. Franklin Res., Inc., No. C 04-00883 SI, 2005 WL 645529, at *10 (N.D. Cal. Mar. 7, 2005) (limiting *Bowen*'s holding to fraud in the sale of securities and allowing the application of the UCL Section 17200 where securities are implicated); Siegal v. Gamble, No. 13-cv-03570, 2016 WL 1085787, at *7–8 (N.D. Cal. Mar. 21, 2016) (acknowledging existing challenges to the validity of the *Bowen* decision, but emphasizing that California courts, rather than federal courts, must decide whether to overturn it); Overstock.com, Inc. v. Gradient Analytics, Inc., 61 Cal. Rptr. 3d 29, 50 n.20 (Cal. Ct. App. 2007) (noting that the Attorney General filed an amicus brief arguing that *Bowen* was wrongly decided); Roskind v. Morgan Stanley Dean Witter & Co., 95 Cal. Rptr. 2d 258, 352 (Cal. Ct. App. 2000) (holding that federal law did not preempt the unfair competition law claim under California state law).

Commerce Clause.[506] Importantly, the Supreme Court has not yet rendered a definitive decision on the use of state consumer remedies for securities transactions, leaving the issue open for plaintiffs in some states to pursue this litigation path amidst the complexities and limitations posed by federal laws.[507]

To conclude, the application of state consumer protection laws to securities transactions varies depending on the jurisdiction. Some state and federal courts applying state laws have held that state consumer protection laws do not apply to securities transactions because the latter are already subject to pervasive and intricate regulation under federal securities laws and therefore should not be subject to the broader remedies provided by consumer protection statutes.[508] Other courts, on the other hand, have decided that federal regulation of securities is not so pervasive as to preempt state consumer protection statutes in some cases.[509] It is important to evaluate the specific provisions and legislative intent of the relevant state

506. U.S. CONST. art. I, § 8, cl. 3. *See, e.g.*, Cabot Corp. v. Baddour, 477 N.E.2d 399, 400 (Mass. 1985) (highlighting defendants' argument that federal securities laws preempt application of the state consumer statute and that applying the state statute to securities sales would impermissibly burden interstate commerce); *see also* Polaris Int'l Metals Corp. v. Ariz. Corp. Comm'n, 652 P.2d 1023, 1028 (Ariz. 1982) (discussing the constitutionality of applying the state statute to the sale of securities).

507. *See, e.g.*, *Cabot Corp.*, 477 N.E.2d at 400. The defendant in *Cabot Corp.* argued that the federal securities laws preempt the application of state law to the transaction in question. *Id.* However, in this case, the Supreme Court of Massachusetts determined that the issue of preemption is a federal question and must be resolved by the federal courts. *Id.; see also* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983) (deciding that the Supreme Court must understand the intent of Congress in enacting the federal statute at issue when determining whether a federal law supersedes a state statute). *But see Overstock.com*, *Inc.*, 61 Cal. Rptr. 3d at 29 (holding that federal law did not preempt the unfair competition law claim under California state law).

508. *See* Shearson Lehman Bros. v. Greenberg, No. 93-55535, 1995 WL 392028, at *3 (9th Cir. July 3, 1995) (stating that securities transactions are already subject to pervasive and intricate regulation under the Securities Act of 1933 and the Securities and Exchange Act of 1934); *see also* Singer v. Dean Witter Reynolds Inc., 614 F. Supp. 1141, 1145 (D. Mass. 1985) (providing that courts are to be guided by interpretations of the FTCA in applying state consumer protection laws and are pervasively regulated by federal securities laws).

509. *See* Denison v. Kelly, 759 F. Supp. 199, 203 (M.D. Pa. 1991) (stating that Pennsylvania law is different from other states and approaching the issue of securities claims under state consumer protection laws differently).

consumer protection laws and the interplay with federal securities laws to determine the availability and scope of remedies under state consumer protection laws.[510]

3. ESG Data for Different Reporting Purposes: The Legal Risks

There has been an expansion on the use of ESG data for investor communications,[511] but this information can also be used for companies making sustainability claims in their advertising and marketing materials.[512] These different reporting purposes raise questions about whether certain disclosures create friction with consumer protection laws.[513] One potential issue is of climate-related disclosures which are directed to investors and may not be appropriate for use in advertising to consumers.[514] An analysis of the different ESG disclosure reporting purposes shows how there may be different legal risks in the consumer and investor realms and signals the need for an integrated approach to ESG disclosure.

One example is carbon offsets and net-zero targets that a company discloses in its public filings. These targets may be included in their SEC filings to provide investors with information about their efforts to mitigate climate risks and transition to a low-carbon economy.[515] However, if companies use this same information for advertising purposes, consumers may interpret the emissions reduction targets as immediate and tangible benefits, and businesses may face legal risks under

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510. *See id.* at 205 (interpreting that the plain meaning of the state consumer protection statute allows the consideration of securities transactions).

511. *See* Lis Anderson, *The Case for Investing in ESG Communications*, FORBES AGENCY COUNCIL (Mar. 17, 2022), https://perma.cc/2RYG-KNQX.

512. *See* Tim Cross, *ESG Data in Media and Advertising: Explained*, VIDEOWEEK (July 24, 2023), https://perma.cc/Q6GU-YHVJ (explaining how ESG metrics are used to calculate sustainability credits and its importance in the advertising and media space).

513. *See* Tony Subketkaew, *When It Comes to Climate Disclosures, SEC and FTC Speak Different Languages*, CORP. COMPLIANCE INSIGHTS (May 11, 2022), https://perma.cc/8PLP-T3TB.

514. *See id.* (exploring how climate-related goals shared with investors in SEC filings could conflict with FTC advertising rules).

515. *See id.*

state consumer protection statutes for false and misleading statements.[516]

On one hand, before the issuance of the final rules, the SEC did not have specific regulations or guidelines on carbon offsets.[517] Now, the SEC's final rules on climate-related disclosures require registrants to disclose material climate-related targets or goals when they affect or are reasonably likely to affect the registrant's business, results of operations, or financial condition.[518] Under the final rules, companies are required to determine, based upon their specific facts and circumstances, whether carbon offsets or renewable energy credits or certificates ("RECs") are a material component for them to achieve their overall transition plan.[519] If a registrant decides that carbon offsets are material, companies are required to disclose information—such as the amount of carbon avoidance, reduction, or removal represented by the offsets or the amount of generated renewable energy represented by the RECs, the nature and source of the offset, the terms of the offset contract, and the verification process used to ensure the offset's validity.[520]

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516. *See id.*

517. *See supra* Part III.B. Before the issuance of the final rule for climate-related disclosures, corporate disclosure regarding ESG and climate-related information was not mandated by the SEC, except for "material" information that is important for a reasonable investor. However, the SEC sought public feedback on the state of climate risk disclosures and introduced a template requiring companies to disclose their carbon offset assets. The SEC also requested climate disclosures from a diverse range of companies and released a risk alert concerning internal controls regarding carbon offsets, emphasizing the variations in examinations, disclosure, governance, and control schemes. The alert acknowledged the need to strengthen internal controls and ensure accurate public disclosures regarding ESG portfolios, indicating that the SEC would take action to address these issues. *See supra* notes 159–160 and accompanying text; *see also* HANNAH STORY BROWN & DYLAN GYAUCH-LEWIS, REVOLVING DOOR PROJECT, THE INDUSTRY AGENDA: CARBON OFFSETS 9 (Mar. 2022), https://perma.cc/4S72-CN4V (PDF) (discussing the key agencies the carbon offset industry is seeking to influence).

518. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668, 21,699–70 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

519. *See id.* at 21,675.

520. *See id.* 21,675–76.

On the other hand, and as mentioned previously, the Green Guides currently include guidance on marketing carbon offsets, establishing the deceptiveness and misrepresentation of certain statements that contain carbon offset emission reductions, and require the disclosure of carbon offsets statements that represent emissions reductions that will not occur for two years or longer.[521]

Federal regulatory enforcement and state consumer class actions that embrace the Green Guides enable greenwashing actions for carbon offset statements under false and misleading marketing strategies. By relying on consumer protection provisions, consumer actions can question the methodology and the product life cycle treatment of products over the supply chain.[522] Before the issuance of the final rules, the scope of consumer protection laws was much broader than the securities laws regarding carbon offsets, due to the fact that the SEC had not issued specific regulation of carbon offsets.[523] Although the final rules now mandate that companies disclose climate-related targets or goals, their reliance on materiality assessments means not all carbon offsets may be deemed material components for achieving plans or goals. Thus, consumer protection laws may cover certain carbon offset statements that securities laws do not.

For instance, a company may include carbon offsets for its packaging but may determine that these are not material for their contributions to their overall climate goals or targets under the SEC final rules. However, the company could be engaging in deceptive practices if they use this information for advertising purposes and they fail to disclose that the reductions will not occur for two years or longer.[524] Such practices would violate the Green Guides but may not violate the SEC

521. *See supra* Part IV.C (analyzing how the guidance affects consumer greenwashing litigation); *see also* 16 C.F.R. § 260.1 (2024) (explaining the purpose, scope, and structure of the Guides). A recent class action was brought against Evian Natural Spring Water for misleading customers about the carbon neutrality of their product. *See Danone Waters* Complaint, *supra* note 59, at 1–3 (detailing the nature of the lawsuit).

522. *See Danone Waters* Complaint, *supra* note 59, at 3 (pursuing a claim for greenwashing under California's Consumers Legal Remedies Act).

523. *See* CHIKE-OBI & PETROLEKA, *supra* note 142, at 2.

524. *See* 16 C.F.R. § 260.2 (identifying omissions in marketing claims as deceptive and misleading).

regulations. This highlights the potential for many carbon offsets to be classified as greenwashing, even if they do not violate securities laws.

As another example, the Green Guides establish specific requirements for labelling products.[525] For instance, and as explained previously, a product can be labelled "recyclable" as long as 60 percent of consumers have access to recycling facilities.[526] In contrast, when it comes to securities regulations, they do not prescribe specific thresholds related to labelling claims, such as recyclability or other environmental attributes of products.[527] As previously mentioned, securities regulations primarily focus on financial materiality that can impact reasonable shareholders.[528] Therefore, it is imperative that companies exercise caution when using ESG data from securities filings for advertising or marketing purposes and ensure that their claims are transparent and not misleading or deceptive to consumers. Additionally, businesses can benefit if they choose to oversee the implementation of ESG disclosure with an integrated lens that considers both investors and consumers realms.

Depending on the audience it is intended for, ESG data may also be subject to different reporting standards and frameworks. For instance, the Task Force on Climate-Related Financial Disclosures developed a set of recommendations for disclosing climate-related risks and opportunities to investors.[529] However,

525. *See id.* § 260.1.

526. *Id.* § 260.12(b)(1).

527. *See supra* Part V.A.

528. *See supra* Part III.A. In the context of labelling, shareholders can take legal action if they claim that a company misrepresented an environmental attribute or failed to provide accurate and material information about an environmental attribute, and as a result, suffered a financial detriment. *See* 15 U.S.C. § 78j (prohibiting "manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe" under the Exchange Act). For example, if a company's stock price drops after a media scandal related to misleading environmental claims, shareholders may seek legal recourse. *See, e.g.*, *In re* Danimer Sci., Inc. Sec. Litig., No. 21-cv-02708, 2023 WL 6385642, at *4 (E.D.N.Y. Sept. 30, 2023) (alleging that a company materially misrepresented the biodegradability of their product).

529. *See* TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 13 (2017), https://perma.cc/M9B5-UGX2 (PDF) ("[T]he Task

these recommendations may not be applicable or relevant for consumer-facing disclosures.[530] To address these issues, regulators may need to provide more guidance and clarity on the appropriate use of ESG data in advertising and marketing. They may also need to develop clearer reporting standards and frameworks that take into account the different audiences for ESG data. This would help to ensure that companies are able to communicate their sustainability efforts effectively, while also protecting consumers from misleading or deceptive claims. Ultimately, this would help to build greater trust and credibility in the sustainability claims made by companies and promote more responsible and sustainable business practices.

Overall, the challenges of using ESG disclosure for diverse reporting purposes relate to the need to harmonize investor and consumer interests while navigating legal risks. If climate-related disclosures that are intended for investors are used for consumer advertising, legal risks may emerge. As exemplified by carbon offsets, the SEC's evolving regulations on climate risks differ from the Green Guides' marketing guidance.[531] These are two different regulatory landscapes that allow for greenwashing litigation based on diverse standards, with consumer protection laws encompassing a broader scope than securities laws.[532] Thus, a comprehensive approach is imperative for businesses to ensure transparent and non-misleading ESG claims, addressing both investor and consumer realms. An integrated approach to the content and the uses of ESG disclosure can benefit both regulatory agencies and businesses by providing clear guidance and mitigating legal risks.

Force developed four widely adoptable recommendations on climate-related financial disclosures applicable to organizations across sectors and jurisdictions.").

530. *See id.* at iii (targeting "investors, lenders, and insurance underwriters" rather than consumers).

531. For a discussion of carbon offsets and differences between the Green Guides and the SEC, see *supra* note 97 and *supra* Part IV.

532. *See* CHIKE-OBI & PETROLEKA, *supra* note 142, at 2.

B. *The Final Rules New Litigation Landscape*

This subpart analyzes how the introduction of new rules may transform the judicial landscape, particularly with respect to the issue of ESG disclosure greenwashing.[533] First, by expanding the available information for shareholders about climate-related risks. Second, by introducing safe harbors that may mitigate legal risks and limit the scope of admissible greenwashing claims under securities regulations.[534] The final rules establish limits on liability by introducing "safe harbor" provisions for companies regarding forward-looking statements pursuant to the PSLRA.[535] However, certain greenwashing claims that are not actionable under securities laws may be admissible under consumer protection statutes,[536] thus underscoring the need to consider both investor and consumer perspectives to mitigate potential greenwashing liabilities and foster an integrated approach to regulating greenwashing claims.

The political pendulum's swing towards promoting environmental policy through President Biden's "Whole of Government" approach to climate change has set the stage for

533. Aside from the SEC proposed rules that are being analyzed in this Article, the European Union has been at the forefront of climate legislation influencing U.S. legislation and litigation trends. *See* Council Directive 2022/2464, 2004 O.J. (L 322) (EU). Additionally, the California Legislature approved two bills that impose mandatory climate-related reporting requirements for large public and private companies doing business in the state. *See* CAL. HEALTH & SAFETY CODE §§ 38532, 38533 (2024); *see also* Climate Corporate Data Accoountability Act, S.B. 253, 2023–2024 Leg., Reg. Sess. (Cal. 2023), 2023 Cal. Stats. 382; Greenhouse Gases: Climate-Related Financial Risk, S.B. 261, 2023–2024 Leg., Reg. Sess., 2023 Cal. Stats. 383; S. RULES COMM., OFF. S. FLOOR ANALYSES, S.B. 261, 2022–2023 Leg., Reg. Sess. (Cal. 2023); Eugene Scalia et al., *California Passes Climate Disclosure Legislation*, GIBSON DUNN (Sept. 27, 2023), https://perma.cc/N4SC-FY7S (explaining how the mandatory climate-related reporting requirements can be significant for large public and private companies doing business in the state).

534. *See supra* Part IV.B.

535. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668, 21,773–76 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) (describing safe harbor for certain climate-related disclosures).

536. *See supra* Part V.A.

mandatory disclosure requirements.[537] As previously mentioned, the SEC has issued the final rules related to Climate Change Disclosure, and proposed two amendments related to ESG standardization,[538] and limitations on the use of green names for funds.[539]

The introduction of the Climate-Related Rule and ESG amendments by the SEC has immediately led to challenges of the SEC's authority to do so.[540] Constitutional challenges to SEC authority may also be on the horizon, particularly in light of the Supreme Court's increasingly narrow view of agency deference.[541] While in the eyes of many, the new rules got "watered down" to avoid these legal challenges,[542] the statutory

537. *See* Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7623 (Feb. 1, 2021) (establishing a National Climate Task Force).

538. *See generally* Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36,654 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, 279).

539. *See generally* Investment Company Names, 88 Fed. Reg. 70,436 (Dec. 11, 2023) (to be codified at 17 C.F.R. pts. 230, 232, 239, 270, 274).

540. On the day it was finalized, the SEC rule was been challenged by a coalition of Republican states. *See* Petition for Review at 5, West Virginia v. U.S. Sec. & Exch. Comm'n, No. 24-10679 (11th Cir. Mar. 6, 2024), https://perma.cc/ST7F-AJRY (PDF). On March 15, 2024, the U.S. Court of Appeals for the Fifth Circuit granted a request from two oilfield companies and temporarily paused the new rules issued by the SEC. *See* Andrew Ramonas, *SEC Climate Disclosure Regulations Paused by Fifth Circuit*, BLOOMBERG L. (Mar. 15, 2024), https://perma.cc/W2Q3-SN6Q. On April 4, 2024 the SEC ordered to stay the climate-related disclosure rule pending judicial review. *See* Order Issuing Stay, Securities Act Release No. 11280, Exchange Act Release No. 99908 (Apr. 4, 2024), https://perma.cc/HL8Z-TASS (PDF).

On the other side of the spectrum, the SEC final rules are also being challenged for their weaknesses. An environmental organization has challenged the SEC's final rules, arguing that the SEC is not fulfilling its statutory mandate to protect investors, maintain fair, orderly and efficient market and promote capital formation. *See generally* Petition for Review, Sierra Club v. U.S. Sec. & Exch. Comm'n, No. 24-1067 (D.C. Cir. Mar. 13, 2024), https://perma.cc/57KF-DFQC (PDF).

541. *See* West Virginia v. EPA*,* 142 S. Ct. 2587, 2616 (2022) (narrowing EPA authority over the CAA).; Sackett v. EPA, 598 U.S. 651, 684 (2023) (narrowing EPA jurisdiction over the CWA); *see also* Peirce, *supra* note 113 (expressing disapproval of the National Climate Task Force).

542. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668, 21,687 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) (stating that the final rules have been "appropriately tailored . . . with a number of significant

basis of the final rules will nevertheless be questioned, impacting their ultimate validity, implementation and enforcement. Furthermore, constitutional challenges may arise under the First Amendment of the U.S. Constitution, which protects the freedom of speech.[543] Companies may argue that the proposed rules infringe upon their constitutional rights to free speech by mandating them to disclose information (i.e., compelled commercial speech).[544] However, businesses could also be influenced to comply with these standards voluntarily for reasons such as long-term value creation, risk reduction, or global trends in mandatory disclosures.[545]

1. The Value of, and the Litigation Risks Involved in, ESG and Climate-Related Information

Regarding the enhancement and clarity in disclosures, and the informational value of the rules, the final rules have been substantially changed in order to adapt to a materiality-based approach and, allegedly, to reduce litigation risks.

The proposed rules required companies to determine and define time horizons of their commitments (short, medium, and long term).[546] Furthermore, the proposed rules required businesses to consider direct and indirect impacts of climate change as well as the disclosure of the setting and methodology of the price on carbon.[547] This means that the proposed rules

changes having been made from the proposal to take account of the burdens imposed by requiring such disclosures").

543. U.S. CONST. amend. I. For instance, the climate-related disclosure in California has been challenged on First Amendment grounds and similar challenges can arise after the issuing of the SEC Final Rules. *See* Complaint for Declaratory and Injunctive Relief at 3, U.S. Chamber of Com. v. Cal. Air Res. Bd., No. 24-cv-00801 (C.D. Cal. Jan. 30, 2024), https://perma.cc/SZN7-7P5X (PDF) [hereinafter California Complaint].

544. *See* California Complaint, *supra* note 543, at 3 (claiming that the relevant laws "impermissibly compel thousands of businesses to make costly, burdensome, and politically fraught statements").

545. *See Corporate Sustainability Reporting*, EUR. COMM'N, https://perma.cc/LGV4-X7DY (last visited Mar. 26, 2023) (explaining the newly imposed rules for reporting within the European Union).

546. *See* Briggs et al., *supra* note 178 (exploring the potential impact of requiring companies to consider various time horizons).

547. *See id.* (discussing the required disclosures surrounding internal prices on carbon as set by individual companies).

included financial statements of the business as well as impacts on their value chains.[548] The final rules limit the scope of the GHG emission requirement by removing Scope 3 emissions, adding materiality qualifiers to most of the requirements of climate-related risks on strategy, targets and goals, and financial statement effect, and extending certain defenses for forward-looking statements to help mitigate litigation risks.[549]

Notwithstanding these limitations, the climate-related disclosures will expand the available information for shareholders about climate-related risks and could trigger enforcers and shareholders to question this information in court. In its proposal, the SEC has noted that "[t]his leads to inadvertent non-compliance, [and] registrants may face additional exposure to litigation or enforcement action."[550] Thus, companies that are not properly advised when preparing disclosures may face uncertainty and legal risks.

Furthermore, in the final rules, most disclosures are conditioned by materiality, and materiality is evaluated using the standard determined by federal securities laws as explained above.[551] Thus, companies must be careful and build a robust framework when establishing the processes for materiality assessments because these will be scrutinized by the SEC, and the companies' exposure may lead to greenwashing litigation risks from both SEC enforcement actions and private litigation.

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548. *See id.* (identifying the direct and indirect impacts of "climate-related risks" as defined by the proposed rules).

549. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668, 21,685 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249). While mandatory Scope 3 emissions disclosures have been removed, if a company has a goal or target that relies on Scope 3 emissions—and the most aggressive targets and goals do—then such emissions must be disclosed. *See* Sara Adler et al., *SEC Adopts Climate Risk Disclosure Rules*, ARNOLD & PORTER (Mar. 11, 2024), https://perma.cc/XW69-8NRU. Thus, the rules may not be as "watered-down" as the media has suggested in the days following the release of the rules. *See* Yusuf Khan & Richard Vanderford, *The SEC Watered Down Its Climate Reporting Requirements. Here's What That Means for Companies.*, WALL ST. J. (Mar. 6, 2024), https://perma.cc/4BRB-H4XA.

550. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,444 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

551. *See supra* Part III.A.

2. Limits on Liabilities and Greenwashing Scenarios: The Safe Harbor Provisions and the Materiality Qualifiers

The SEC has extended the PSLRA "safe harbor" provision defense to certain disclosures to protect companies from liability.[552] The safe harbor provision can help companies mitigate legal risks associated with climate-related disclosures, while providing shareholders with more comprehensive and accurate information about these risks.[553] Thus, these provisions contain a limitation on legal action over long-term ESG and climate goals.

Before the issuance of the final rules, the proposed rules sought to limit liability for Scope 3 disclosures by providing a safe harbor.[554] The proposed rules established that such disclosures "would be deemed not to be a fraudulent statement unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith."[555] For purposes of the safe harbor, the SEC defined the term "fraudulent statement" to mean "a statement that is an untrue statement of material fact, a statement false or misleading with respect to any material fact, an omission to state a material fact necessary to make a statement not misleading."[556] While the proposed rules provided certain protections for companies regarding Scope 3 disclosures, they still left open the possibility for litigation in cases of fraudulent or misleading statements.[557]

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552. *See supra* Part IV.B.

553. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,413.

554. *See id.* ("[W]e are proposing a targeted safe harbor for Scope 3 emissions data in light of the unique challenges associated with [these disclosures] . . . .").

555. *Id.* at 21,391.

556. *Id.*

557. *See* Americans for Financial Reform Education Fund et al., Comment Letter on The Enhancement and Standardization of Climate-Related Disclosures for Investors (June 17, 2022), https://perma.cc/K9TS-QYNU (PDF) (suggesting that the SEC should eliminate the protection provided by the safe harbor provision regarding fraudulent Scope 3 disclosures because the safe harbor provision may reduce legal accountability for any inaccuracies or misrepresentations).

As mentioned previously, the final rules curtailed the scope of GHG emission reporting by cutting out Scope 3 emissions disclosure and adding materiality qualifiers for certain disclosures that allow companies to avoid disclosure obligations when these are deemed immaterial.[558] Furthermore, the final rules included a safe harbor from private liability for climate-related disclosures related to a registrant's transition plan, scenario analysis, internal carbon pricing, and targets and goals, in order to mitigate litigation risks.[559]

However, despite the existence of the safe harbor defense, there are still areas where businesses may need to exercise caution, as some significant disclosures remain exposed to litigation under securities law. Notably, historical information and past disclosures do not fall under the safe harbor defense.[560] For example, the final rules exclude historical information related to carbon offsets or RECs under a target or goal, as well as a registrant's statements in response to transition plan or targets and goals regarding material expenditures actually incurred.[561]

Additionally, the safe harbor does not apply to forward-looking statements included in financial statements prepared in accordance with Generally Accepted Accounting Principles (GAAP).[562] Also, the SEC declined to extend the safe harbor to enforcement actions.[563] Finally, disclosures of Scopes 1 and 2 emissions are not covered by the safe harbor under the final rules.[564] Therefore, risk of litigation under securities law remains.

Perhaps surprisingly, the addition of materiality qualifiers could potentially increase litigation risks and greenwashing scenarios.[565] Climate-related targets and goals are required to

558. *See supra* Part III.B.

559. *See supra* Part IV.B.

560. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668, 21,773–76 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

561. *See id.* at 21,776.

562. *See id.*

563. *See id.*

564. *See id.*

565. *See The SEC Final Climate Disclosure Regulation: Key Considerations and Next Steps*, *Webcast On-Demand,* LATHAM & WATKINS, at

be disclosed if the information materially affects or is reasonably likely to materially affect the registrant's business results, operations, or financial conditions. However, there is no clear guideline or bright-line test to determine what constitutes materiality in this context, leaving room for inconsistent interpretation and litigation; nor are the disclosure requirements for transition plans and climate scenario analysis clear in terms of what needs to be disclosed and under what circumstances.[566]

The final rules establish a hybrid disclosure system that combines prescriptive rules with a reliance on the "broad-based concept of materiality."[567] Thus, even when there is a duty to disclose climate and ESG matters, disclosures may not always be accurate or effective.[568] Materiality determinations, which are initially made by management, can be influenced by subjective factors such as personal experiences and biases.[569] Studies suggest that preparers and auditors often apply higher materiality thresholds than investors, leading to potential discrepancies in what is deemed material.[570] Consequently, the final rules' disclosure framework may inadvertently create feedback loops wherein investors rely on materiality determinations that are inaccurate, potentially exacerbating greenwashing litigation.

In essence, the introduction of materiality qualifiers and the safe harbor provision for certain disclosures, while aiming to provide flexibility, can also act as a double-edged sword that

18:29 (Mar. 13, 2024), https://perma.cc/64NV-R4PN (accessed by registering) (arguing that the final rules' materiality qualifiers may worsen the disclosure regime because they leave a lot of room for interpretation that could lead to liability).

566. *See id.* at 19:27.

567. Allison Herren Lee, Former Comm'r, U.S. Sec. & Exch. Comm'n, Living in a Material World: Myths and Misconceptions About "Materiality," Keynote Remarks at the 2021 ESG Disclosure Priorities Event (May 24, 2021), https://perma.cc/9ADF-WSS5.

568. *See id.* (stating that it is a myth that "where there is a duty to disclose climate and ESG matters, we can rest assured that such disclosures are being made").

569. *See id.*

570. *See id.*

may exacerbate litigation risks.[571] Companies must be careful when evaluating materiality and when making statements that may or may not be shielded by the safe harbor provisions. Ultimately, the reliance upon these requirements may generate potential greenwashing litigation for businesses navigating climate-related disclosures.

Thus, considering the overlapping and synergistic relationships between securities and consumer protection laws and regulations analyzed above in Part V.A., it is necessary for businesses to approach compliance, and construct their litigation strategies, with an integrated perspective. The SEC rule may expand the available information for shareholders about climate-related risks and trigger more (or fewer) lawsuits.[572] At the same time, this information may also be available for consumers. The interaction between consumer protection and securities greenwashing claims requires a nuanced and holistic perspective.

The safe harbors introduced by the final rules demonstrate the need to consider both realms simultaneously. Businesses may not be liable under securities laws for certain ESG and climate-related disclosures, but they may be liable under consumer protection laws and regulations.[573] Therefore, even if emission reduction targets are covered by the safe harbor provisions under securities laws, companies should still exercise caution when using these targets in consumer advertising.

Furthermore, the regulatory enforcement by the FTC under the Green Guides at the federal level, as well as state Mini FTCs, can cover misleading statements that may not be actionable under securities litigation due to being forward-looking "safe harbors" under the PSLRA.[574] Additionally, state consumer greenwashing litigation may be

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571. *See The SEC Final Climate Disclosure Regulation: Key Considerations and Next Steps*, *Webcast On-Demand, supra* note 565, at 20:00 (stating that the final rules materiality qualifiers work as a "double edge sword").

572. *See* PALMITER, SUSTAINABLE CORPORATIONS, *supra* note 144, at 365 (mentioning that it is uncertain if litigation for climate-risk disclosure will increase or decrease).

573. *See supra* Part V.A.1.

574. See *supra* Part III.B for a discussion of greenwashing and regulatory enforcement, and *supra* Part IV.C for a discussion of Mini FTCs.

viable in states that allow this type of remedy for securities transactions when not preempted by federal law.[575]

Thus, an integrated approach acknowledges that businesses and regulatory bodies no longer operate within distinct silos of consumer and investor realms. Instead, businesses and regulators must embrace the complexity of an integrated landscape where the interests of shareholders, consumers, and ESG disclosure converge.

CONCLUSION

The expansion of ESG pledges, voluntary disclosures, and reporting rules may result in a big wave of greenwashing claims and public disclosure suits. Companies need to be aware of the potential liabilities related to climate change and ESG disclosure requirements.[576]

Consumer law litigation involves claims made by consumers under federal and state law, while securities law litigation involves claims made by investors based on securities law. It is important for businesses to understand both areas of litigation and consider them together before engaging in greenwashing practices to avoid potential legal risks. There are potential collisions between consumer and investor scopes in greenwashing claims, underscoring the need for an integrated approach to prevent contradictory and ineffective frameworks.

In the investor space, the expansion of federal securities law to consider ESG metrics in public governance is weak in the United States in comparison to the expansion of the voluntary and private ESG and climate-related disclosure movement, as well as in comparison to EU law. Although the final rules contain prescriptive climate-related regulations, they are generally dependent upon findings of materiality, which will be hotly contested within the federal courts.

Thus, the main concern for ESG litigation focuses on the concept of materiality which considers the stakeholder or

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575. *See supra* Part V.A.2.

576. *See* David Adams & Karina Bashir, *SEC Begins "Greenwashing" Enforcement: A Sign of Increasing Risk to Come?*, CLIFFORD CHANCE (May 27, 2022), https://perma.cc/V7D6-JZ2Q (urging companies to "closely consider the regulatory, enforcement, and litigation risks associated with . . . the looming formal SEC disclosure proposals").

consumer value of informational, product, and governance disclosure and practices. For now, plaintiffs in a securities fraud class action must present evidence that meets the materiality and "reasonable investor" standards for alleging false and misleading statements in greenwashing securities litigation.

Shareholders bringing securities class actions are further limited by the particularity standard and the heightened pleading requirements of PSLRA. Adding another layer of limitations, the intrinsic link between financial return and the concept of materiality may disregard climate change or ESG risks because it relies on traditional notions of cost.

Considering the challenges of securities class actions and the hybrid nature of the final rules, the Green Guides provisions at the federal and state levels trigger more effective responses. Greenwashing claims under state consumer protection laws that contain "Mini FTC" provisions are easier to prove in court than U.S. federal securities class actions, in which plaintiffs must establish scienter. The final SEC rules may increase consumer greenwashing claims as businesses disclose information material to a reasonable consumer that may be inaccurate or that may conflict with their marketing claims.

Thus, greenwashing claims from a consumer perspective can provide a pathway for shareholders that is currently unexplored. In 2021, environmental groups jointly filed a complaint with the FTC against Chevron alleging that the oil company misled consumers about its climate actions.[577] Although the FTC did not end up taking action against Chevron in response to the complaint, this was the first complaint that sought to spur the FTC into enforcing the Green Guides as a regulatory framework against a fossil fuel greenwashing campaign.[578] If the FTC strengthens its use of the Green Guides as an enforcement tool to crack down on greenwashing by big industry players, businesses may find themselves exposed not only by allegedly deceived consumers, but also by shareholders.[579]

577. *Accountability Groups File First of Its Kind FTC Complaint Against Chevron for Misleading Consumers on Climate Action*, *supra* note 11.

578. *See* Maxine Joselow, *The FTC Is Expected to Crack Down on 'Greenwashing'*, WASH. POST: THE CLIMATE 202 (Apr. 12, 2023), https://perma.cc/Q6XK-4TFX.

579. *See id.*

Investor and consumer litigation trends evince the existing gaps in climate-related and ESG disclosure in the consumer and investor regulatory landscapes—for instance, in the regulation of carbon offsets. While carbon offsets may be relevant to both consumer protection laws and securities laws, the requirements and standards for disclosure differ. The Green Guides provide more specific guidance on how to market carbon offsets in a truthful and non-misleading manner, while securities law primarily focuses on the materiality of carbon offsets to a company's financial performance. Regulators may need to provide more guidance and clarity on the appropriate use of ESG data in advertising and marketing, and develop clearer reporting standards and frameworks to ensure transparency and protect consumers and investors.

The overlapping jurisdiction of the FTC and the SEC to regulate sustainability claims can advance ESG goals through integrated approaches in litigating and regulating greenwashing claims. The potential for SEC-FTC interaction in this area further underscores the importance of clarifying the regulatory landscape for businesses. By working together, the SEC and FTC could create a more cohesive regulatory framework that provides greater clarity and certainty for businesses while protecting consumers and promoting a well-functioning marketplace. The FTC is currently reviewing the Green Guides and requesting input from stakeholders on how best to address concerns related to overlapping or conflicting laws and regulations.[580]

Nontheless, it remains to be seen how the interaction between both regulatory agencies will evolve in the future. The FTC's proposals may signal a shift towards a more prescriptive model with rule-based requirements. Such a shift could have significant implications for businesses operating in industries that make environmental claims for consumers and disclose ESG data or climate-related risks for investor communications.

580. *See FTC Seeks Public Comment*, *supra* note 87.