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Going Green? Proceed With Caution to Avoid Greenwashing

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President Biden signed an executive order during his first week in office that put climate change at the center of all national security and foreign policy matters.[1] In addition to the United States, key stakeholders across the world are demanding that corporate citizens recognize the global threat posed by climate change. Global leaders recently gathered in Glasgow for the United Nations' COP 26 summit, where they affirmed their commitment to accelerate measures to combat the climate crisis. United Kingdom Prime Minister Boris Johnson, host of the COP 26 summit, called on leaders to "act now."[2] Financial institutions have echoed this demand for action on climate change. Christine Lagarde, President of the European Central Bank, stated that "[t]he fight against climate change should be one of the considerations that we take when we determine monetary policy."[3] There is change on the horizon and world leaders are promising imminent action.

Due to this transformation in policy, businesses across the world will start to encounter an increase in government regulations and environmental disclosure requirements. Companies will be required to thoroughly evaluate their environmental impact and publicly disclose the results. This presents a significant risk to both public and private businesses. Public companies could benefit from planning and completing the necessary due diligence in advance of these looming regulations. Moreover, private businesses will likely also have to disclose information about their environmental impact. Consumers are demanding enhanced transparency from manufacturers. Many retailers are also implementing heightened environmental standards in order to achieve net-zero carbon emission plans. It is becoming increasingly clear that selling on a retailer's platform is a privilege and not a right.

While it is still early in the process and there is limited guidance, any corporate misstep at these preliminary stages could come back to haunt a company in the near future. BlackRock CEO Lawrence Fink noted that "companies with a well-articulated long-term strategy, and a clear plan to address the transition to net zero, will distinguish themselves with their stakeholders – with customers, policymakers, employees and shareholders – by inspiring confidence that they can navigate this global transformation."[4] The wait-and-see approach is no longer a viable option for companies. If a business

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[1] President Joseph Biden, Remarks by President Biden Before Signing Executive Actions on Tackling Climate Change, Creating Jobs, and Restoring Scientific Integrity (Jan. 27, 2021) (transcript available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/27/remarks-by-president-biden-before-signing-executive-actions-on-tackling-climate-change-creating-jobs-and-restoring-scientific-integrity/).

[2] Sam Meredith, *Boris Johnson warns it's 'one minute to midnight' to prevent climate catastrophe*, CNBC (Nov. 1, 2021), https://www.cnbc.com/2021/11/01/cop26-boris-johnson-says-one-minute-to-midnight-amid-climate-crisis.html.

[3] Interview by Klaus Schwab with Christine Lagarde, President, European Central Bank, TIME 100 Talks (Sept. 1, 2021) (transcript available at https://www.weforum.org/agenda/2021/09/klaus-schwab-christine-lagarde-covid-19-climate-change-inequality/).

[4] Lawrence Fink, Larry Fink's 2021 letter to CEOs, BLACKROCK (2021), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

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fails to assess its environmental impact, it risks losing market share in the upcoming years. Climate change-related court cases have nearly doubled around the world between 2017 and 2020 – as of May 2021, more than 1,800 claims have been filed across 40 countries.[5]

Despite this sense of urgency, businesses would be well served to proceed with great caution. Companies can make “green” promises with the best of intentions, but these aspirations have the potential to go awry and cause serious reputational harm. Thus, it is advantageous for a business to generate a thoroughly researched environmental assessment before publicly announcing ambitious commitments to environmental initiatives.

Greenwashing Overview

President Biden has repeatedly suggested that time is of the essence in changing our environmental impact, stating that “[w]e don’t have much more than 10 years.”[6] Corporate citizens recognize this trend and are rapidly announcing commitments to reduce their environmental footprint. However, many of these bold corporate initiatives are made without completing the necessary due diligence. As a result, businesses risk overpromising and underdelivering on environmental initiatives. This often results in negative publicity due to greenwashing claims.[7] As corporate disclosure requirements increase, a business may also be prosecuted for greenwashing.

Greenwashing is a broad term that includes: (1) conduct or representations that overstate a company’s response to climate change; (2) an over-emphasis by a business of its environmental credentials; and/or (3) the failure to acknowledge the impact of climate change on corporate goals. It is understandable why greenwashing occurs – corporate citizens want to capture a share of the expanding market. According to a Nielsen study conducted in 2018, young adults are 85% more likely to pay an increased price for environmentally sustainable products/brands. This is an increase of nearly 35% from a similar survey conducted in 2014.[8] Thus, to increase product value and grow market share, businesses are focusing on building sustainable brands and products.

Similarly, studies show that companies that have committed to developing a robust Environmental, Social, and Governance (“ESG”) profile are significantly more likely to attract external investments. Global ESG investments have increased exponentially in recent years and are expected to continue to rise. It is estimated that ESG assets will exceed $53 trillion by 2025.[9] However, a recent study conducted by Schroders identified that 59% of investors consider greenwashing to be a barrier to sustainable investing.[10]

Disclosure Requirements: The Future of Sustainability Practices for Corporations

Stakeholders at every level are demanding action and increased transparency from corporate citizens. Regulations and disclosure requirements regarding environmental initiatives are imminent. This trend has already begun in the European

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[5] Irene Madongo, *S&P Warns Business To Face More Climate Litigation*, LAW360 (Oct. 7, 2021), https://www.law360.com/articles/1429030/s-p-warns-business-to-face-more-climate-litigation.

[6] Zolan Kanno-Youngs & Jim Tankersley, *Biden Urges Climate Action: ‘We Don’t Have Much More Than 10 Years’*, N.Y. TIMES (Sept. 17, 2021), https://www.nytimes.com/2021/09/14/us/politics/biden-climate-change.html.

[7] Matt Fair, *Suit Says Danimer Overstated Green Plastic’s Biodegradability*, LAW360 (Oct. 7, 2021), https://www.law360.com/articles/1428915/suit-says-danimer-overstated-green-plastic-s-biodegradability.
A shareholder of Danimer Scientific, Inc., filed a derivative lawsuit alleging millions of dollars in market capitalization losses following overstated sustainability claims. The Wall Street Journal published an article questioning the science behind Danimer’s biodegradability claims and the company’s stock fell by almost 13% on the next day of trading.

[8] Oliver Eitelwein, *Why Sustainability Has Become a Corporate Imperative*, EY PARTHENON (Jan. 4, 2021), https://www.ey.com/en_gl/strategy/why-sustainability-has-become-a-corporate-imperative.

[9] *ESG assets may hit $53 trillion by 2025, a third of global AUM*, BLOOMBERG (Feb. 23, 2021), https://www.bloomberg.com/professional/blog/esg-assets-may-hit-53-trillion-by-2025-a-third-of-global-aum/.

[10] Sustainability: Institutional Investor Study 2021, SCHRODERS (2021), https://www.schroders.com/en/sysglobalassets/digital/institutional-investor-study-2021/assets/SIIS_2021_Sustainability.pdf.

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Union, which is leading the charge in persuading firms to report on climate and sustainability factors through regulatory measures. It is essential that companies start to research and understand the production process instead of making ambiguous promises to promote environmental sustainability.

The Current View of the United States

In response to President Biden's environmental initiatives, the U.S. Securities and Exchange Commission ("SEC") developed the Climate and ESG Task Force in the Division of Enforcement to identify ESG-related misconduct.[11] The SEC recently distributed letters to public businesses encouraging companies to increase disclosures related to climate risks in any SEC filing.[12] While this will certainly impact public businesses, private operations will also feel pressure to make similar disclosures in order to compete in the evolving marketplace.

Despite the increasing scrutiny of environmental representations, many questions remain unresolved. There is not a uniform approach in responding to climate change. Specifically, there is not a universal standard to measure, monitor, and enforce environmental initiatives across geographical borders.[13] The SEC recognized these concerns and asked for public input while evaluating potential environmental disclosure requirements.[14]

Executives can take this time of uncertainty to proactively research and better understand the production process. A fundamental first step is often to generate a sustainability report. This report provides an update on a company's ESG goals by analyzing the current environmental impact and life cycle of a product. Regardless of the type or size of a business, it is important to understand that a sustainability report is a significant and continuous investment. Consumer expectations and knowledge are constantly evolving. As a result, forward thinking businesses have already dedicated extensive resources to better understand how a company can create a competitive advantage in the realm of environmentally sustainable products.

The Current View of the United Kingdom

In the United Kingdom, the government has expressed growing concern over greenwashing. When the United Kingdom left the European Union, it did not adopt the Sustainable Finance Disclosure Regulation, which came into effect in the European Union in March 2021. However, in October 2021, the United Kingdom released its roadmap to sustainable investing, which highlighted the concerns of greenwashing and outlined steps to mitigate the risks. Amongst its objectives is the introduction of mandatory sustainability disclosure requirements.[15]

Additionally, the United Kingdom's Financial Conduct Authority ("FCA") recently published its ESG strategy, which emphasized the need for consumers "to be able to rely on firms t[hat] take ESG seriously, avoid 'greenwashing' and

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[11] Press Release, U.S. Securities and Exchange Commission, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

[12] Al Barbarino, *SEC Letter Raises Climate Reporting Bar Before Rules Drop*, LAW360 (Sept. 23, 2021), https://www.law360.com/articles/1424603/sec-letter-raises-climate-reporting-bar-before-rules-drop.

[13] *See* Guidance, HM Treasury, Greening Finance: A Roadmap to Sustainable Investing (Oct. 18, 2021), https://www.gov.uk/government/publications/greening-finance-a-roadmap-to-sustainable-investing. Recently, the International Financial Reporting Standards ("IFRS") Foundation announced the establishment of the International Sustainability Standards Board ("ISSB"). ISSB will attempt to implement global reporting standards for environmental sustainability practices commencing in 2022.

[14] Public Statement from Acting Chair Allison Herren Lee, U.S. Securities and Exchange Commission, Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

[15] *See* Guidance, HM Treasury, Greening Finance: A Roadmap to Sustainable Investing (Oct. 18, 2021), https://www.gov.uk/government/publications/greening-finance-a-roadmap-to-sustainable-investing.

deliver on their ESG promises."[16] Moreover, several of the FCA's key committed actions include challenging firms where there is evidence of greenwashing.

The Competition and Markets Authority ("CMA") estimates that 40% of online green claims could be misleading.[17] As a result, the government intends to implement new regulations and strategies beginning in 2022 to combat greenwashing. The CMA wants to ensure that businesses are not making green claims that "omit or hide important information" while "consider[ing] the full life cycle of the product." Therefore, the CMA is planning to carry out a full review of greenwashing claims starting in 2022. Businesses were recently informed that greenwashing claims will be reviewed with a focus on six principles of consumer law.[18] The six principles established by the CMA include:[19]

1. Claims must be truthful and accurate;
2. Claims must be clear and unambiguous;
3. Claims must not omit or hide important relevant information;
4. Comparisons must be fair and meaningful;
5. Claims must consider the full life cycle of the product or service; and
6. Claims must be substantiated.

In order to promote these six objectives, the United Kingdom recommends that businesses adhere to a thirteen-step checklist.[20] In addition to ensuring that the claims are accurate and supported by credible data, the CMA provides that "[i]nformation that really can't fit into the claim can be easily accessed by customers in another way (QR code, website, etc.)."[21] Thus, any business will have to produce and publish sufficient data to support all environmental claims in order to comply with the Green Claims Code.

Three Tips for Success: Competing in a Fishbowl

Due to the increase in monitoring mechanisms, a business might consider taking a cautious and disciplined approach when implementing environmental sustainability practices. Greenwashing claims, regardless of the accuracy of the allegations, may permanently damage a company's reputation. In order to reduce the risks associated with greenwashing, it is best to keep the following concepts at the forefront of any decision.

First, a business may complete its due diligence by continuously measuring its environmental impact and setting attainable environmental goals. Successful companies frequently establish specific, easily measurable, and realistic environmental initiatives. Furthermore, stakeholders have a better understanding of a company's long-term plan when it publishes explicit goals regarding environmental initiatives. With regulations imminent, it would be beneficial for a business to establish

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[16] Corporate Documents, Financial Conduct Authority, A strategy for positive change: our ESG priorities (Aug. 8, 2021), https://www.fca.org.uk/publications/corporate-documents/strategy-positive-change-our-esg-priorities.

[17] Press Release, United Kingdom Competition and Markets Authority, Greenwashing: CMA Puts Businesses on Notice (Sept. 20, 2021), https://www.gov.uk/government/news/greenwashing-cma-puts-businesses-on-notice.

[18] Press Release, United Kingdom Competition and Markets Authority, 'Green' claims: CMA sets out the dos and don'ts for businesses (May 21, 2021), https://www.gov.uk/government/news/green-claims-cma-sets-out-the-dos-and-don-ts-for-businesses.

[19] Press Release, United Kingdom Competition and Markets Authority, Guidance: Making Environmental Claims on Goods and Services (Sept. 20, 2021), https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services.

[20] Guidance, United Kingdom Competition & Markets Authority, The Green Claims Code Checklist (Sept. 20, 2021), https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/green-claims-and-your-business.

[21] *Id.*

quantifiable objectives. Corporate leaders can mitigate the risk of a greenwashing claim by exercising caution when publicly disclosing environmental initiatives. Every promise a business makes will be closely scrutinized by stakeholders. Executives may want to consider using well-established metrics in measuring a company's environmental impact. This would allow corporate leaders to rebut any potential greenwashing allegations with irrefutable data.

Additionally, in a society where information is accessible around the clock, every business would be well served to focus on transparency. If an environmental objective will not be achieved, a business ought to consider being upfront and admitting its failure. If a business chooses to inform the public of a failed environmental initiative, it is important to explain why unforeseeable consequences contributed to a miscalculation. A transparent business will build trust with consumers. This approach will also alert the necessary stakeholders that the business is aware of the issue and is working to remedy the situation.

Lastly, it would be beneficial for a business to evaluate the entire production process when establishing environmental initiatives. During the COVID-19 pandemic, the supply chain faced unforeseen difficulties, which forced businesses to make swift adjustments. Once again, this emphasizes why successful businesses continuously invest and update their environmental assessment report. Many businesses focus solely on the end product. A minor adjustment at multiple stages of the production process can result in a significant difference in a company's environmental impact. If a business fails to evaluate and disclose changes in the supply chain, environmental advocates and consumers will not hesitate to raise greenwashing claims.

Key Takeaways

Greenwashing is a prevalent issue for businesses of all backgrounds. Stakeholders across the world are pushing businesses to develop production processes that will reduce their environmental impact. In addition, it is clear that environmental regulations and/or anticipated financial institutional standards will soon become the norm. Therefore, it is critical that businesses not overstep and set unrealistic goals. Businesses would benefit from taking an organized approach and completing the necessary due diligence before setting quantifiable and realistic environmental initiatives. It is important to remember that it only takes one misleading or exaggerated statement to cause potentially permanent reputational harm.

Vedder Price has the experience and resources to assist businesses in assessing their environmental and life-cycle impact. In the United Kingdom, we provide clients with sustainable finance and ESG advice, including how to benefit from sustainable finance products and navigating the evolving regulatory framework. Please feel free to contact Brett Heinrich in the United States or Henrietta Worthington in the United Kingdom for assistance.

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