MAYER | BROWN

# Greenwashing

## NAVIGATING THE RISK

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## WHAT ARE THE KEY TAKEAWAYS?

// At its core, greenwashing is about misrepresentation, misstatement and false or misleading practices in relation to environmental, social and governance credentials.

// Greenwashing carries with it reputational, regulatory and litigation risks for which companies should be prepared.

// There is no harmonised legal definition and the concept of greenwashing will vary by product, service, regulator and jurisdiction.

// Greenwashing is not purely a legal or regulatory concept; allegations can have a significant reputational impact.

// Tackling greenwashing is a priority for regulators around the globe who are taking tougher stances.

// The prominence of greenwashing litigation is rising. These claims have a wider pool of claimants than in "traditional" litigation, who also have different barometers for what constitutes a "successful" outcome.

// The best defences for organisations against greenwashing risk lie in existing principles of good practice in governance, disclosure and due diligence, in conjunction with a comprehensive understanding of the sustainability profile of the product, activity or transaction at hand.

"

Greenwashing is marketing that portrays an organisation's products, activities or policies as producing positive environmental outcomes when this is not the case"

**UK Financial Conduct Authority**

"

Behaviour or activities that make people believe a company is doing more to protect the environment that it really is"

**Cambridge Dictionary**

"

The practice of falsely promoting an organisation's environmental efforts or spending more resources to promote the organization as green than are spent to actually engage in environmentally sound practices"

**Encyclopedia of Corporate Social Responsibility**

"

A practice whereby sustainability-related statements, declarations, actions, or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or financial services. This practice may be misleading to consumers, investors, or other market participants"

**European Banking Authority**

"

The practice of misrepresenting sustainability-related features of investment products"

**International Organization of the Securities Commissions**

# Introduction

The risk of an accusation of "greenwashing" is now an important concern for many companies. Greenwashing is an ill-defined concept but, nevertheless, is increasingly a source of litigation and regulatory scrutiny – with more of both expected. It carries with it reputational, regulatory and litigation risks for which companies should be prepared. Whilst the risks are always context specific – varying by jurisdiction, industry and product - there are common themes. Here, we take an in-depth look at those themes and make suggestions for how organisations can think about mitigating greenwashing risk.

## WHAT IS GREENWASHING?

There is no harmonised definition of greenwashing. Broadly, it is about claiming or creating the perception that activities, products and services are more environmentally friendly or sustainable than they actually are. Precisely what constitutes greenwashing will vary according to the type of product and service, as well as between different sectors, regulators and jurisdictions. It may also vary depending on the person making the claim – one person's treasured sustainability claim can be another person's greenwashing trash. For some, greenwashing is seen as a purely environmental concern, whereas many also use the term to cover social and governance issues.

This lack of clarity is significant, as it makes it difficult for organisations to establish what actually amounts to greenwashing and what they should prepare for. It is especially significant given that allegations can have substantial financial and reputational impacts.

In lieu of definitional precision, we think it is helpful to look at real-world examples. We have reviewed a wide range of greenwashing claims and controversies globally and see some common sources of dispute - see ''Common themes in Greenwashing controversies'' opposite.

## COMMON THEMES IN GREENWASHING CONTROVERSIES

**"Is that correct?"** – A statement about environmental or ESG credentials or activities is misleading or simply not correct.

**"Is that the full story?"** – A statement does not tell the whole story of a product or service, or relates to one part of the product or service but misleads people about the other parts or the overall impact on the environment. Sometimes, the caveats or conditions to an environmental or ESG statement are not adequately disclosed.

**"Your science isn't right….."** – A statement about environmental or ESG credentials is based on flawed or incomplete evidence.

**….or maybe your maths"** – A statement about environmental or ESG credentials is based on flawed calculations or assumptions.

**"Your offsetting looks off"** – Net zero targets contain a wealth of assumptions and uncertainties, particularly around the use of carbon offsets. These can be vulnerable to challenge.

**"A label paints a thousand words….but not necessarily the ones you intended"** – A sustainable label, name, tag or rating in relation to a product or service is misleading about environmental credentials.

**"Your regulator would like to see you"** – A regulatory statement or classification is incorrect or misleading in relation to environmental or ESG credentials.

# Why are allegations of greenwashing on the rise?

According to the Grantham Research Institute on Climate Change and the Environment's 'Global trends in climate change litigation: 2022 snapshot', a minimum of 20 greenwashing cases have been filed before courts in the US, Australia, France and the Netherlands since 2016, whilst 27 cases have been filed before non-judicial oversight bodies over the same period.

# WHY?

### INCREASED PUBLIC SCRUTINY

An obvious point, but one worth making. Socio-environmental issues, particularly climate change, are at the forefront of public consciousness. Consumers, investors and civil society are, therefore, placing closer attention to the environmental and sustainability credentials of organisations, with the risk that they will react negatively if the underlying information is not being sufficiently, or accurately, disclosed.

### INCREASED NUMBER OF STATEMENTS

Environmental and sustainability statements are increasingly a common feature of corporate disclosure and the marketing of services and products. Companies are now making, and will increasingly be required to make, detailed environmental and sustainability disclosures and aiming to demonstrate progress year on year. We have covered the details of many these new requirements in depth elsewhere (please read our articles on the EU Corporate Sustainability Reporting Directive here, the EU Corporate Sustainability Due Diligence Directive here, the UK Sustainability Disclosure Requirements here, and the US Securities and Exchange Commission's ESG Disclosure Proposal here, and regulatory developments in Singapore here and Hong Kong here).

### A COMPLEX AND EVOLVING CHALLENGE

There is no harmonised approach to tackling sustainability challenges. Whilst general objectives may be clear, determining the correct manner and pace by which an institution should tackle the various societal and environmental problems posed is complex and subject to debate and challenge. Such disagreement has set the scene for greenwashing allegations with looming greenhouse gas related targets and pledges likely to accelerate the trend.

### INCREASED AVENUES FOR REGULATORY ACTION AND LITIGATION

In recent years, there has been a rapid uptake in ESG-related legislation by legislators across the globe imposing a wide variety of obligations and duties on organisations. This has increased the number of avenues open to regulators and prospective litigants to take action and bring claims against organisations in respect of their ESG-related disclosures (please read our articles on ESG-related litigation here, here and here).

### INCONSISTENT DEFINITIONS

The lack of a harmonised definition of what constitutes 'green' or 'sustainable' means that it can be difficult for organisations to establish whether or not they are 'greenwashing'. What is considered to be a 'greenwashed' claim will vary between regulators in different jurisdictions, further adding to the complexity for organisations attempting to publicly state their environmental credentials. For example, the US Federal Trade Commission ("FTC") has not updated its influential "Green Guides" since 2012, and announced in December 2022 that it was considering amending that guidance to address claims related to carbon offsets, energy-use claims, and claims that products are "recyclable," "organic," "sustainable," "compostable," "degradable," and "ozone-friendly" (please read our article on the FTC's December 2022 announcement here).

### DATA NOT AVAILABLE, COMPARABLE OR CONSISTENT

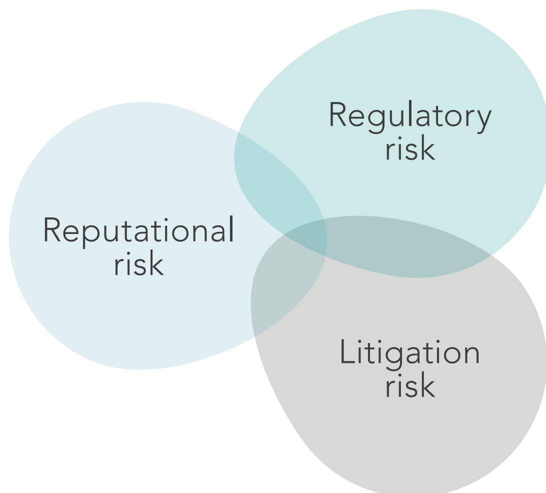
ESG-related data can be difficult to measure and obtain, given that it is often comprised of a mix of quantitative and qualitative data. Combined with a lack of sophisticated benchmarks as to what 'market standards' are, it can be difficult for organisations to ensure that socio-environmental claims are properly validated, or validated in a way that is fit for purpose from all perspectives. Products and services are, therefore, open to being marketed as 'sustainable' in a way that some stakeholders may argue is inappropriate.

### INCONSISTENT ESG-RELATED KNOWLEDGE AND CAPABILITIES

Organisations may have a lack of (or lack of consistent) ESG-related knowledge and capabilities. This presents difficulties for organisations when they are attempting to make, and validate, socio-environmental claims, as expertise on ESG 'market standards' and regulatory compliance can be difficult to obtain. There is also a significant cost element of getting appropriate ESG-related advice from consultants and advisors in multiple jurisdictions.

# How should my company understand greenwashing as a risk?

We see greenwashing as posing three fundamental, overlapping risks:




## REPUTATIONAL RISK

Consumers, investors and civil society are increasingly scrutinising organisations' sustainability profiles. According to Simon-Kutcher & Partners' Global Sustainability Study 2021, more than a one third of the UK population are willing to pay more for sustainable products and services, and those willing to pay more would accept up to a 25 per cent premium. Conversely, the impact of allegations of greenwashing on an organisation's brand can result in a loss of consumer trust or potential divestment by investors. For example, Shift Insight's 2020 Report found that 48 per cent of survey respondents claimed they would buy the products and services of brands associated with greenwashing "as little as possible".

Similarly, there are many instances of companies and financial institutions facing public criticism on account of their sustainability disclosures, products, services and, in relation to financial services, their involvement in financing transactions. The risk of reputational damage in this area is difficult to control. In some cases, the basis of the criticism may be unfounded or short of what would be required to bring the matter to litigation. Therein lies the difficulty - the standards required to bring a company's reputation into the public eye are not necessarily the same as bringing a successful action in a court. Nevertheless, the risk of reputational damage from negative social media and press coverage remains.

## REGULATORY RISK

Tackling greenwashing to ensure market integrity and consumer and investor (particularly retail investor) protection is a top priority for regulators across the globe. By way of example:

### UK

In the UK, regulatory bodies including the Advertising Standards Agency ("ASA") and the Competition and Markets Authority ("CMA"), are focussed on greenwashing. The ASA published Advertising Guidance on misleading environmental claims and social responsibility in June 2022, whilst the CMA published a Green Claims Code in September 2021 (for further information on the Green Claims Code, read our blog post here). The Advertising Guidance and Green Claims Code set out key principles for advertisers and traders to follow when making socio-environmental claims, whilst also implying that enforcement in this area – flowing from underlying UK consumer protections laws, such as the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008 - will soon follow. The UK Financial Conduct Authority (the "FCA") has warned that it will "challenge firms where we see potential greenwashing, clarify our expectations and take appropriate action to prevent consumers being mislead", whilst the CMA have announced that it intends to investigate the accuracy of environmental claims made by businesses in the fast-moving consumer goods sector (read our blog post on the CMA's announcement here). Amongst other initiatives, the FCA also recently proposed the introduction of a new "anti-greenwashing" rule applicable to all FCA regulated firms (see our briefing here).

### EUROPE

In Europe, the EU's Action Plan on Financing Sustainable Growth references tackling greenwashing as a key priority. The EU aims to do so through legislation such as the Sustainable Finance Disclosure Regulation ("SFDR"), Taxonomy Regulation (the "EU Taxonomy") and Benchmark Regulation. The EU Taxonomy establishes a unified EU classification system aimed at determining whether economic activities can be labelled as environmentally sustainable. The SFDR aims to standardise the language and labels of sustainable investment products by categorising them in respect of how 'sustainable' they are and by imposing disclosure requirements in relation to those categories. The Benchmark Regulation, on the other hand, creates definitions for investment benchmarks that attempt to demonstrate alignment with the Paris Agreement or low carbon objectives (for further information on the SFDR, the EU Taxonomy and the Benchmark Regulation, read our blog posts here, here, here and here).

In Europe, "tackling" greenwashing was cited last year as the number one priority of the European Securities and Markets Authority in its Sustainable Finance Roadmap 2022-2024 (see our earlier briefing here). Putting this into action, the European Supervisory Authorities have recently published a Call for Evidence in relation to potential greenwashing practices in the EU financial sector (ESAs Call for evidence on Greenwashing (europa.eu)) and recently set out their progress reports on 1 June 2023. In addition, the European Commission has published its proposal for a Directive on the substantiation and communication of explicit environmental claims (for further information on this 'Green Claims Proposal', read our briefing here).

## REGULATORY RISK (CONTINUED)

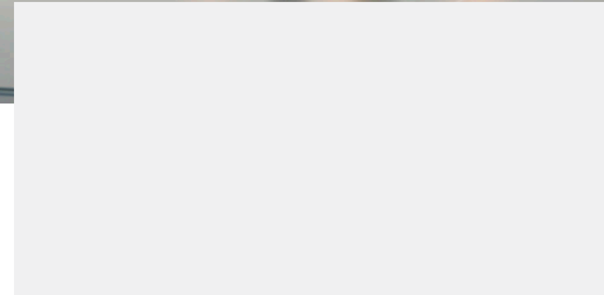
### UNITED STATES

In the US, in March 2021, the US Securities and Exchange Commission ("SEC") launched its Enforcement Task Force focused on Climate and ESG issues, with the aim of developing initiatives to identify ESG-related misconduct that is consistent with increased investor reliance on climate and ESG-related disclosure and investment. The SEC has stated that the Task Force will initially focus on greenwashing by identifying material gaps or misstatements in investor disclosure materials, whilst also analysing disclosure and compliance issues relating to fund managers' ESG strategies. The SEC have stated that the Task Force will use sophisticated data analysis to mine and assess public information to identify potential greenwashing.

In the US, the FTC also announced in December 2022 that it was considering making amendments to its influential Green Guides — the advisory document that communicates standards for certain types of environmental claims, with commentary and advice on how companies should approach issues related to substantiation. The current version of the Green Guides, last updated in 2012, provides guidance for general environmental claims (such as "eco-friendly") and several specific claims, including claims related to certifications and seals of approval. The FTC's 2022 release did not propose any changes, but rather sought comment from the public regarding whether the FTC should provide additional guidance on a number of specific claims, including "sustainable," "organic," and claims regarding carbon offsets.

### HONG KONG

In Hong Kong, the Hong Kong Monetary Authority ("**HKMA**") released a research report in November 2022, entitled "Greenwashing in the Corporate Green Bond Markets", showing evidence that about one-third of global corporate green bond issuers are reaping the benefits of issuing green bonds without cutting down their greenhouse gas ("**GHG**") emissions. The HKMA noted that this type of 'greenwashing' behaviour can impede progress on combating climate change and could lead to financial instability if the market loses confidence in green bonds and other green asset classes (for further information on the HKMA report, read our blog post here).



## REGULATORY RISK (CONTINUED)

### SINGAPORE

Singapore has also recognised the threat that greenwashing poses to the green finance sector and the government is implementing a taxonomy based on consistent set of global standards and establishing requirements for disclosures and reporting to combat greenwashing. In particular, the Monetary Authority of Singapore ("**MAS**") established the Green Finance Industry Taskforce ("**GFIT**") to develop a taxonomy for Singapore-based financial institutions to provide a common framework for classification of economic activities upon which financial products and services can be built (the "**Singapore Taxonomy**"). A key purpose of developing the Singapore Taxonomy is to encourage the flow of capital to support the low carbon transition needed to avoid catastrophic climate change, as well as the environmental objectives of Singapore. The MAS is also actively participating in regional efforts to develop a taxonomy for ASEAN countries which are serviced by Singapore-based financial institutions, These efforts take international goals into account while, at the same time, factoring in the ASEAN region's specific "context and circumstances". See our blog posts on GFIT's first and second consultation papers on Singapore's proposed green taxonomy for financial institutions here and here.

### BRAZIL

In Brazil, the Brazilian Securities and Exchange Commission (the "CVM") recently approved guidelines to discuss and build a Brazilian taxonomy addressing sustainable finance issues and to take oversight action to inhibit greenwashing on the Brazilian stock market. The Brazilian Congress and the CVM are also discussing whether the Brazilian regulatory framework should evolve to better accommodate greenwashing concerns. Currently, greenwashing is predominantly governed by the Brazilian Consumer Protection Code 1990, which prohibits the use of misleading and/or abusive claims in advertisements. However, bills of law have been proposed with the aim of requiring companies to explain green claims within their product labels and marketing materials.

Regulatory enforcement action has already begun. In the UK, the CMA has launched investigations into retailers focussing on (among other things) whether the statements made regarding the environment credentials of the retailers' products are too vague and whether the criteria adopted to decide which products are included in eco-friendly collections are lower than consumers may reasonably expect. The CMA has warned that it may issue sanctions following the conclusion of its investigations, which could result in the retailers being forced to give undertakings to change the way they operate.

Moreover, the ASA has banned a number of advertisements made by companies in the oil & gas, aviation and food sectors for misleading the public on the socio-environmental credentials of their products. The ASA has warned these companies that the advertisements "must not appear again in the form complained of", otherwise they may face sanctions (for further information on the recent ASA action, read our blog post here).

The SEC's Enforcement Task Force has also taken enforcement action against multinationals regarding the alleged deliberate manipulation of audits, fraudulent declarations and misleading material statements in respect of ESG-related disclosures and regulatory filings. As well as taking-up a significant amount of organisational resource to deal with the regulators, the actions have had adversely affected the share prices of the relevant organisations (for further information on the SEC's enforcement action, please read our blog post here).

While there has been no notable greenwashing enforcement action to date in Asia, as regulators in Hong Kong and Singapore begin to implement globally consistent sustainability reporting requirement for listed companies and across the financial services industry, regulatory enforcement actions are expected to develop over time in these jurisdictions.

## LITIGATION RISK

In addition to the risk of enforcement action by regulators, civil litigation against organisations accused of greenwashing – in particular, climate-related greenwashing – is becoming increasingly common.

The rise can be broadly attributed to the following key factors:

// a more sophisticated and stringent ESG-related regulatory landscape, combined with increased recognition of the fact that false, misleading, overstated or unsubstantiated environmental advertising is largely prohibited under existing consumer protection and advertising law, has provided more avenues for potential litigants to hold organisations to account;

// the increased availability of litigation funding, and the ability of not-for-profit organisations to gain access to grants and donations from philanthropic foundations, has deepened the pockets of litigants;

// a broader range of stakeholders in ESG-related matters than in 'traditional' litigation has led to a wider pool of prospective litigants; and

// the 'winning isn't everything' nature of strategic litigants, who's aim is not always to necessarily 'win' the litigation, but to create negative publicity to deter consumers and investors from the purchasing the products and services of, or investing in, alleged 'greenwashers'.

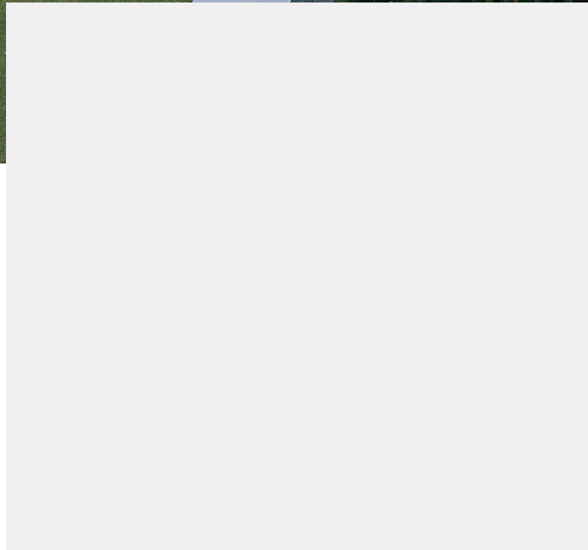
As noted in the Grantham Research Institute's 2022 snapshot, the recent wave of greenwashing-related litigation can be divided into three types of case, namely cases challenging misrepresentation, omissions, misleading evidence and mislabelling in respect of organisations' claims regarding "(1) corporate and governmental commitments, (2) product attributes, and (3) disclosure of climate investments, financial risks and harm caused by companies".

For further discussion on the rise of climate-related litigation, please see our blog posts here and here.

In terms of corporate and governmental commitments, organisations have faced claims alleging that their GHG reductions plans - usually 'net zero' or 'carbon neutral' targets – are not sufficiently clear or credible. For instance, in a recent claim against a multinational energy company, the claimants alleged that the company's net zero plan failed to account for expected production and emissions growth from long term fossil fuel exploration opportunities, whilst also failing to represent accurate modelled reductions in respect of the company's scope 1, 2 and 3 GHG. For more on this area, see section "A case study – the challenge of net zero and offsets" below.

Financial institutions, in particular, are increasingly being challenged by civil litigation. As key actors in financing the energy transition, their activities have been subject to particular scrutiny. Recent actions have included cases focussing on the inadequacy of corporate disclosure and failure to comply with recently developed human rights and environmental due diligence obligations.

With regards to product attributes, claims have been brought against retailers, for example, on the grounds that the publicised environmental credentials of their products – through the use of the likes of 'environmental scorecards' and 'sustainable attribute criteria' – were misleading, alleging that such publications contained falsified information that did not align with the underlying data. Moreover, energy companies have also faced claims alleging that the affirmative misrepresentation of the environmental benefits of fossil fuel-based products has violated consumer protection laws.



These different 'categories' of greenwashing cases serve to show that there are a number of grounds that prospective claimants may pursue alleged 'greenwashers'. Regardless of the 'category' of greenwashing, any such litigation poses a variety of challenges to the defendant organisation, as it requires an expenditure of organisational resource (often for an uncertain duration, with an uncertain outcome) and may well result in a court order to pay damages, both of which can have significant financial and reputational repercussions.

However, it is important to note that there are jurisdictional nuances to litigation risk. The risk of third party litigation and/or representative action relating to greenwashing is likely to be less significant in jurisdictions such as Hong Kong and Singapore. This is due, in part, to cost and the fact that class action proceedings of this nature are restrictive and uncommon. Further, contingency fees are generally not allowed for court litigation in these jurisdictions.

CASE STUDY

# The challenge of net zero and offsets

Net zero policies and targets and the use of carbon offsets present particular challenges in the context of greenwashing. It is an area where many claims, targets and aspirations are made, but one where there is little by way of formal regulation to guide businesses.

This has resulted in a landscape where it is difficult to verify whether the use of carbon offsets actually represents genuine carbon reductions, as exemplified by the Guardian recently claiming that over 90% of Verra-certificated rainforest offset credits are "phantom credits", a claim that Verra has stringently denied. (for more information on the integrity challenge in carbon offsets, read our briefing here).

## Several disparate, but interrelated, developments illustrate the challenges of navigating net zero commitments, carbon markets, and carbon disclosures:

A UN report, "Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions", published in November 2022 gives rise to a number of new hurdles that businesses must cross in implementing net zero commitments, and sets out recommendations for use of voluntary carbon credits. Some of the recommendations have, however, been criticised as having a lack of clarity, including on how to determine a non-state entity's "fair share" of emissions.

The Science Based Targets Initiative, requires that "A company is only considered to have reached net-zero when it has achieved its long-term science-based target. Most companies are required to have long-term targets with emission reductions of at least 90-95% by 2050. At that point, a company must use carbon removals to neutralize any limited emissions that cannot yet be eliminated." Note that carbon removal credits are different to carbon avoidance credits – an area misunderstood by many.

The Integrity Council for the Voluntary Carbon Market ("ICVCM") has been established to set and enforce definitive global threshold standards, drawing on the best science and expertise available, so high-quality carbon credits can efficiently mobilise finance towards urgent mitigation and climate resilient development. As part of the above, the ICVCM's Core Carbon Principles ("CCPs") and Assessment Framework ("AF") will set new threshold standards for high-quality carbon credits, provide guidance on how to apply the CCPs, and define which carbon-crediting programs and methodology types are CCP-eligible. These initiatives are developing in tandem and will add a further layer of due diligence that needs to be carried out.

Meanwhile, Verra, a non-profit organisation that sets standards for voluntary carbon markets, has expressed its view that the ICVCM should drastically revise its process for developing the CCPs and AF for the voluntary carbon market. This indicates that there is no firm view, and is unlikely to be a firm view, on what represents an acceptable offset for some time.

### In order to "promote the deployment of high quality carbon removals whilst minimising the risk of greenwashing", the European Commission has proposed a regulation to facilitate the deployment of carbon removals by establishing a voluntary EU certification framework.

To do this, it proposes to set out:

// Quality criteria for carbon removal activities in the EU;

// Rules for the verification and certification of carbon removals; and

// Rules for the functioning and recognition of certification schemes by the European Commission.

Putting all of these pieces of the 'net zero jigsaw' (and the many others that already exist) is no mean feat. Care will need to be taken about clearly identifying how net zero targets will be disclosed and met, the use of offsets and removal credits, and the kinds of offsets and removal credits that will be used.

# Navigating the risks

## HOW TO NAVIGATE GREENWASHING RISK?

In our view, mitigating greenwashing risk lies in existing principles of good practice with respect to governance, disclosure and due diligence, in combination with an understanding of the sustainability profile of the product, activity or transaction at hand.

Although the exact practices and procedures that organisations adopt will, and should, differ between products and services, sector and jurisdiction, organisations may wish to consider the following 'good practice' steps.

## GOVERNANCE

// **Policies and procedures:** Internal policies should be developed through collaboration between management and the compliance, external counsel, risk, sustainability and internal audit teams. Such policies should provide clear guidance on potential greenwashing risks facing the organisation and how such risks can be mitigated. The policies should also cover how management, and relevant employees, should monitor and record relevant information to ensure that there is evidence the organisation's policy was followed, which will be critical in the event an allegation of greenwashing is made. When developing such policies, the organisation should account for current, and likely future, legislation impacting how organisations make socio-environmental claims, as well as trends in greenwashing-related litigation and enforcement action by regulators;

// **Training:** Organisations should focus on enhancing awareness of greenwashing risks amongst their employees. Training, using illustrative examples of 'good' and 'bad' behaviour, will be key to ensuring that the organisation's position on greenwashing is understood, clear and transparent at all levels of the organisation; and

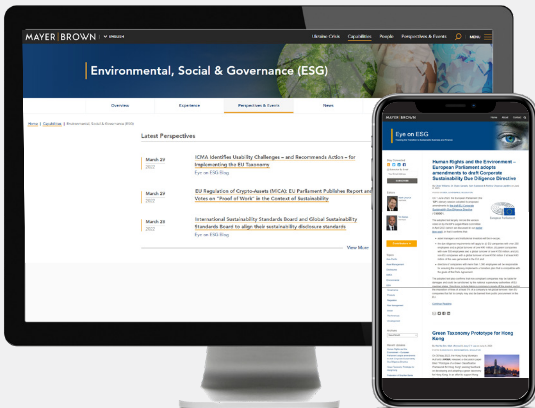
// **Understanding market practice:** Staying up-to-date with developments in the 'greenwashing' space will be key to ensuring that the organisation can pick-up 'lessons learnt' and understand what regulators and stakeholders want to see in terms of the publication of socio-environmental credentials.

## DISCLOSURE

- // **Clarity and accuracy:** Disclosures should be accurate, clear and comprehensible, avoiding the use of jargon. If 'broad terms' are being used, such as 'green' or 'sustainable', they need to be explained, evidence-based and verifiable. Moreover, information should not be 'cherry-picked', with the effect that only the positive socio-environmental credentials of products and services are highlighted, ignoring the negative aspects;
- // **Identify and cure any discrepancies between what is "said" or publicly disclosed and what is "done" in any sustainability claim:** This difference has been the basis of a number of regulatory enforcement actions and so needs to be addressed;
- // **Disclaimers:** Wherever possible, organisations should use risk factors, qualifications and/or disclaimers in an attempt to mitigate the risk of claims being deemed as inaccurate and/or misleading. Many socio-environmental claims will be "forward looking statements" and should be treated with the same care and disclaimer language as any other future projection;
- // **Don't overstate, do explain:** Care should be taken to ensure that a sustainability claim is verifiable and does not overstate. Where possible, the conditions, assumptions and calculations behind a sustainability claim should be clearly stated and publicly available;
- // **Third party verification:** Assessment of claims by third party consultants can be useful in providing back-up and confidence to socio-environmental claims;
- // **Legal review/audit:** As with any piece of public disclosure, socio-environmental claims should be reviewed by legal counsel and/or audit teams; and
- // **Silence may be golden, but can it be green?:** A number of commentators have observed the practice of "greenhushing" - choosing not to publicise details of climate targets in an attempt to avoid scrutiny and allegations of greenwashing. For many, this is unlikely to be a sustainable course of action (No pun intended….). Incoming or proposed US, EU and UK corporate disclosure regulations, such as the EU Corporate Sustainability Disclosure Reporting Directive, will simply require these disclosures for most large companies. Making every effort to ensure disclosures are correct, particularly as a variety of stakeholders will want to see them, is likely the better course of action.

## DUE DILIGENCE

- // **Review current socio-environmental claims:** Organisations should examine the claims that they are currently making about their products and/or services – used on their product packaging, public disclosures or advertising campaigns, for example – to ensure that such claims are justifiable and based on factual evidence. Such a review should be done in light of the evolving regulatory landscape and market standards, to consider whether any claims may be actionable;
- // **Review the achievability of future claims:** Organisations need to ask whether they can actually achieve intended future ESG-related commitments and claims. Measuring what is achievable requires planning and scenario-analysis, both of which will inevitably be underpinned by a series of assumptions. The assumptions need to be science-based, considering factors such as the availability of resources and technology;
- // **Transactional due diligence:** when undertaking transactions, organisations should consider the sustainability profile of the counterparty, the target company, target investment etc, but also their sustainability profile (including the compliance with due diligence obligations required by law, such as supply chain due diligence obligations. This will include (but is not limited to)) consideration of the impacts of the transaction on the organisation's reputation, how the transaction will fit-in with the organisation's sustainability profile and industry, and whether the transaction is aligned with the organisation's relevant policies and procedures; and
- // **Carbon offset integrity due diligence:** when it comes to leveraging carbon offsets to neutralise outstanding GHG emissions, organisations should consider carrying out due diligence to confirm the quality and integrity of their offsets. Although carbon offsets are certified and audited pursuant to relevant methodologies (as discussed above), the issuance and monitoring processes are by no means bullet-proof, meaning there is a significant greenwashing risk related to the use of offsets.



Visit our Eye on ESG Thought Leadership Portal

Visit our our Environmental, Social and Governance (ESG) page

# Talk to us

Our team would be delighted to discuss any of the themes raised in the article. We recognise that greenwashing risk is top of the agenda for many institutions.

Please get in touch if you would like to discuss how we can help.

## LONDON

**Peter Pears**
Partner, London
**E:** ppears@mayerbrown.com
**T:** +44 20 3130 3297

**Tim Baines**
Partner, London
**E:** tbaines@mayerbrown.com
**T:** +44 20 3130 3073

**Sam Eastwood**
Partner, London
**E:** seastwood@mayerbrown.com
**T:** +44 20 3130 3087

**Airlie Goodman**
Partner, London
**E:** agoodman@mayerbrown.com
**T:** +44 20 3130 3422

**Musonda Kapotwe**
Partner, London
**E:** mkapotwe@mayerbrown.com
**T:** +44 20 3130 3778

**James Taylor**
Partner, London
**E:** jtaylor@mayerbrown.com
**T:** +44 20 3130 3136

**Oliver Williams**
Trainee Solicitor, London
**E:** owilliams@mayerbrown.com
**T:** +44 20 3130 3238


## EUROPE

**Pavlina Chopova-Leprêtre**
Partner, Brussels
**E:** pchopova-lepretre@mayerbrown.com
**T:** +32 2 5515973

**Patrick Scholl**
Partner, Frankfurt
**E:** pscholl@mayerbrown.com
**T:** +49 69 7941 1060

**Johannes Weichbrodt**
Partner, Düsseldorf
**E:** jweichbrodt@mayerbrown.com
**T:** +49 211 86224 150

**Marcel Hörauf**
Counsel, Frankfurt
**E:** mhorauf@mayerbrown.com
**T:** +49 69 7941 2236

**Luisa-Sophie Dany**
Associate, Frankfurt
**E:** ldany@mayerbrown.com
**T:** +49 69 7941 2974

**Teresa Gerhold**
Associate, Düsseldorf
**E:** tgerhold@mayerbrown.com
**T:** +49 211 86224 152

## TALK TO US (CONTINUED)

### UNITED STATES

**Henninger Bullock**
Partner, New York
**E:** hbullock@mayerbrown.com
**T:** +1 212 506 2528

**David A. Carpenter**
Partner, New York
**E:** dacarpenter@mayerbrown.com
**T:** +1 212 506 2195

**Paul Forrester**
Partner, Chicago
**E:** jforrester@mayerbrown.com
**T:** +1 312 701 7366

**Mark Hanchet**
Partner, New York
**E:** mhanchet@mayerbrown.com
**T:** +1 212 506 2695

**Christopher Leach**
Partner, Washington DC
**E:** cleach@mayerbrown.com
**T:** +1 202 263 3443

**Anna Pinedo**
Partner, New York
**E:** apinedo@mayerbrown.com
**T:** +1 212 506 2275

### ASIA

**Angie Chan**
Partner, Hong Kong
**E:** angie.chan@mayerbrown.com
**T:** +852 2843 2390

**Francis Chen**
Partner, Hong Kong
**E:** francis.chen@mayerbrown.com
**T:** +852 2843 2348

**Tom Kollar**
Partner, Hong Kong
**E:** thomas.kollar@mayerbrown.com
**T:** +852 2843 4260

**Alan H. Linning**
Partner, Hong Kong
**E:** alan.linning@mayerbrown.com
**T:** +852 2843 2231

**Dion Yu**
Partner, Hong Kong
**E:** dion.yu@mayerbrown.com
**T:** +852 2843 2523

**Wei Na Sim**
Counsel, Hong Kong
**E:** wn.sim@mayerbrown.com
**T:** +852 2843 2546

### SOUTH AMERICA

**Luiz Gustavo Bezerra**
Partner, Rio de Janeiro (T&C)
**E:** lgbezerra@mayerbrown.com
**T:** +55 21 2127 4231

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