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Considerations When Reviewing and Revising Sustainability Targets

By Rebecca Grapsas and Lyuba Goltser

Companies set and disclose sustainability targets for a range of reasons—from driving long-term strategy to engaging with customers, employees, suppliers, and other stakeholders. It is important that companies regularly revisit their sustainability targets, making sure that they still align with corporate strategy, priorities and resources, risk management, and communications, including in light of technological developments and pressures from regulators, plaintiff firms, and others. Sustainability targets may relate to environmental topics such as greenhouse gas emissions (including intensity or absolute reductions, carbon neutral, and net zero), renewable energy, water, recycling, packaging, waste, circularity, biodiversity, and plastics and other product materials, or social topics such as workplace safety, pay equity, modern slavery, community initiatives, and diversity, equity, and inclusion (DEI).

This article explores how to approach updating sustainability goals and class action litigation that can ensue from these goals. While targets are generally phrased in quantifiable and time-bound terms, similar principles apply to less specific sustainability goals, commitments, ambitions, and plans.

- **Understand the target and the circumstances of its adoption.** Companies should understand who approved the target and when and why it was adopted. If senior management or the board approved the target, they should be kept apprised of its review (as discussed below). The assumptions and methodologies underpinning the target and related data should be understood, as should any work plan and related resources dedicated to achieving the target.

  Companies should be aware of circumstances surrounding the target's adoption, including whether it was to satisfy a regulatory requirement, funding commitment, loan provision, vendor requirement, shareholder demand, voluntary coalition requirement, or some other reason, and whether and how the target has been baked into executive compensation incentives. If the company is a member of or represented by an alliance, coalition, pact, or other group with a stated target, that should be known, including whether the company's involvement is in the public domain.

  Companies should also understand whether the target has been disclosed externally and, if so, in which locations (such as the corporate website, sustainability report, regulatory filings such as Securities and Exchange Commission filings or California reports, social

media, advertising, and packaging) and whether the target has been verified by an independent third party such as the Science Based Targets Initiative (SBTi). Sustainability targets have been the source of ample greenwashing class action litigation in recent years. The most common theory asserted in this litigation is that the plaintiffs (a) read a company's target, (b) relied on that target to purchase a product from the company that announced the target, and (c) paid more for that product than they otherwise would have, had they known the target was allegedly false.

- **Review the reasonableness of the target, including achievability and updates relating to assumptions and methodologies.** To determine whether the target continues to be reasonably achievable, the company's progress against the target should be assessed, including the likelihood of it being achieved by executing a credible plan of action within the specified time frame. This assessment should take into account updates relating to assumptions and methodologies. If a target was predicated on expected technological advancements that are unlikely to come to fruition in the relevant time frame, that may have an impact on the reasonableness of the target. A target may also have factored in mitigants (such as certain carbon offset, carbon credit, and renewable energy projects) that may draw unwanted attention to the target due to scrutiny by regulators and others. Enhancements in data collection and related robustness may also have an impact on a target's achievability, as the company may have more accurate information and insights now than it had at the time the target was first adopted. A company should always be able to substantiate a target—doing so often provides a strong defense to greenwashing claims associated with a target.

- **Decide whether to continue, withdraw, or revise the target and related disclosure, and understand related risks.** Companies that determine that a target continues to be reasonably achievable and aligned with corporate strategy and risk appetite may stay the course or make adjustments to the target and related disclosure. Companies may decide to continue with a target but stop making public statements about the target or progress toward achievement (which is referred to as "greenhushing"). Different considerations may be relevant in different markets and at different times. For example, many U.S. companies no longer disclose DEI-related targets in light of executive orders and regulatory guidance issued by the Trump administration. In addition, many companies have withdrawn from alliances focused on net zero in light of antitrust and other scrutiny. On the other hand, sustainability continues to be an important economic driver in the European Union and many other countries.

  Companies that determine that a target is no longer reasonably achievable should consider whether steps could be taken to change that assessment (for example, by dedicating more resources, changing course operationally, adjusting assumptions or methodologies, or a combination of these) or whether the target should be withdrawn or revised. Senior management or the board (or both) should provide input on changes to

sustainability targets where material and appropriate. Potential impacts on executive compensation incentive programs and related disclosures should be understood.

Companies should be cognizant of the risks involved in continuing with a target as compared with withdrawing it or revising it. For example, continuing with a target that is reasonably expected to be unachievable could give rise to a risk of greenwashing claims by regulators or private plaintiffs (or both). Courts have found that an unattainable target or goal can be the basis for a greenwashing claim, even if the deadline for that target or goal has not yet arrived (e.g., if no feasible plan is in place or insufficient resources have been dedicated to achieve the target or goal). Withdrawing or revising a target could also be scrutinized as potential greenwashing (with the benefit of hindsight) and could breach agreements between the company and its funders, vendors, and others. Sustainable financing commitments should be closely scrutinized, such as funds established pursuant to Article 8 or Article 9 of the European Union's Sustainable Finance Disclosure Regulation. So while a plaintiff could use a change or update as the basis for a greenwashing class action against a company, it is important to ensure that the company's targets remain accurate and viable and, to the extent that changes, that the company timely updates its disclosures as necessary.

Regulatory requirements underpinning sustainability targets should also be factored into decision-making for companies where relevant. For example, the European Union's Corporate Sustainability Reporting Directive and Corporate Sustainability Due Diligence Directive (which are both under review by the European Union's legislature at the time of writing) will require in-scope companies (which could include U.S. companies) to adopt and disclose a transition plan for climate change mitigation.

- **Determine whether and how to disclose a withdrawn or revised target, and update disclaimers and risk factors.** Companies that decide to withdraw or revise a sustainability target should also decide whether and how to disclose this, with feedback from the disclosure committee, senior management, the board, or a combination of these, including as to materiality. For example, several companies that have withdrawn or adjusted emissions reduction targets have disclosed this in press releases, sustainability reports, social media, or other places, describing the reasons for the change (for example, that technological progress has not kept pace with company expectations at the time the target was set; the change is due to changes in the methodology, assumptions, or data; or the company's strategy has shifted) and outlining the company's plan going forward. This approach allows the company to control the timing of the announcement and provide its own narrative. Companies should be judicious about where to disclose sustainability targets—for example, in sustainability reports as of a certain date, as opposed to an undated website disclosure. Given that litigation could ensue from a withdrawn or revised target, it is important for a company to ensure that it is creating an internal record that is consistent with the external messaging, as all such nonprivileged

communications will be discoverable.

Assumptions and methodologies that underpin the target should be described—a lack of description or use of ambiguous language can form the basis of greenwashing class actions because representations can be actionable even if they are true as long as they are deceptive. Disclosures around sustainability targets and progress against targets should be accompanied by best-practice forward-looking statements and disclaimers that make it clear the company has no duty to update the information and, where appropriate, that the information in the report is not material unless also included in the company's financial reports. Companies should also ensure the appropriate use of risk factors, which should be reviewed and updated regularly, tailored to the relevant document and context, and not expressed in boilerplate terms.

If a company withdraws or changes a target but does not disclose it, this could nevertheless be identified by a third party, who could announce it at an inconvenient time or in a way that casts an unfavorable light on the company. For example, a third party could notice that a newly posted sustainability report no longer includes a target from last year's report or that the company's emissions reduction target is now tagged with "commitment removed" on the SBTi public database (as occurred with more than 200 high-profile companies in 2024 that reportedly failed to meet deadlines for submitting climate targets for validation).

Companies should consider whether to engage with key stakeholders around a decision to withdraw or revise a sustainability target, to provide additional context where appropriate and hopefully mitigate potential backlash (and greenwashing claims). Companies should be prepared to handle media coverage of changes in sustainability targets.

- **Plan for ongoing review of sustainability targets.** Sustainability targets and progress against targets should be factored into disclosure controls and procedures to ensure information is reliable and disclosures are consistent. Targets should be assigned to responsible owners, who can ensure accountability for progress and ongoing review as to achievability. Owners should understand what data will be used and the source of the data, whether data are assurance-ready (to the extent needed), and what is the baseline against which targets will be measured. The roles of the owners, senior management, and the board should be clear.

Sustainability targets are an important aspect of companies' environmental, social, and governance (ESG) investments and plans. But to the extent that a company wants to publicize these targets, it should do so in a way to mitigate the potential risk of a greenwashing class action. This can best be achieved through full disclosures that contextualize, qualify, and explain

the targets, and that continue to do so as a company moves closer to (or further from) those targets.

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Green on Trial: Consumer Perception and the Scrutiny of ESG Claims

By Ceren Canal Aruoba

ESG Marketing Claims under Legal Scrutiny

From "recyclable" plastic packaging to "carbon neutral" airline tickets and "sustainably sourced" chocolate, companies are facing a wave of environmental, social, and governance (ESG)-related consumer class actions and regulatory scrutiny challenging the accuracy of environmental marketing claims. Plaintiffs argue that these statements mislead consumers and lack adequate substantiation, triggering litigation under false advertising and consumer protection statutes.

The Role of the Reasonable Consumer Standard

In these cases, courts have increasingly scrutinized how reasonable consumers interpret ESG messaging. Thus, it is essential to understand what the term "reasonable consumer" refers to in consumer protection laws. Unfortunately, there is no explicit statutory definition of "reasonable consumer" in U.S. law. Instead, the concept has evolved through case law and agency guidance, particularly in the context of consumer protection statutes like California's Unfair Competition Law and Consumers Legal Remedies Act, as well as section 5 of the Federal Trade Commission Act, and the Federal Trade Commission's Deception Policy Statement from 1983.

At their core, what all these statutes and acts have in common is that, under the reasonable consumer standard, an advertisement or practice is deceptive if its overall impression would mislead a typical consumer in the intended audience in a manner that affects the consumer's purchasing decision. The key here is the "typical" consumer—not all consumers or most consumers or "least sophisticated" or "unduly gullible" consumers, but the ordinary consumer who is likely to view the advertisement or the practice. For example, in *Lavie v. Procter & Gamble*, 105 Cal. App. 4th 496 (2003), the California Court of Appeals rejected the "least sophisticated consumer" standard. It held that plaintiffs must show "that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." Thus, in ESG-related consumer class actions and regulatory challenges, the reasonable consumer standard requires plaintiffs to show that a company's environmental, social, or governance claims, when analyzed within the entire context of the advertisement or practice, are likely to mislead a significant portion of the targeted audience that is material to their decision-making process.

Empirical Analysis Tools in ESG Claims Litigation

When plaintiffs present such evidence, whether through consumer surveys, publicly available market research, or internal company documents, defendants can provide their own empirical analysis to present their own evidence. Specifically, as the Ninth Circuit determined in *Moore v. Trader Joe's Co.*, the reasonable consumer "should take into account all the information available to consumers and the context in which that information is provided and used." This distinction is important. That is, a range of analytical tools—such as choice experiments and content analysis—can help uncover the context in which consumers view the ESG claims on product labels, company websites, and marketing materials, and whether that information was material to their decision.

Consider consumer choice experiments, for example, a type of survey that is set up in a randomized experiment format to address causality. In an experimental setup, researchers introduce manipulations, such as variations in wording, changes in framing, and updates to content, into a survey to test causal effects. Then respondents are randomly assigned to different versions of the manipulations and asked the same questions. Once complete, their responses are compared across various groups to estimate the impact of the manipulation. For example, imagine a hypothetical case in which plaintiffs claim that the "ocean-friendly" statement on a sunscreen bottle is misleading because the product contains ingredients that could harm ocean life. A materiality survey or experiment can test whether the "ocean-friendly" claim is material to consumers' purchasing decisions, where two sets of identically profiled customers get exposed to the product packaging, with and without the "ocean-friendly" label, and are asked the same set of questions related to their likelihood of purchase (or understanding). A lack of statistical difference between the answers of the two groups would demonstrate a lack of causality between the "ocean-friendly" claim and purchase behavior.

Another such tool is automated content analysis, a research method used to analyze and interpret the content of various forms of communication, such as text, audio, and video, to identify patterns, themes, and meanings. Using data from company-generated content (such as product packaging, marketing materials, and statements) and customer-generated content (including consumer complaints, reviews, and social media content), content analysis can answer questions such as the following: (1) What product representations were communicated to customers, and what portion of them included alleged ESG-related representations? (2) When and how frequently were the consumers aware of the allegedly deceptive ESG marketing campaign? (3) Are the at-issue product features (such as recyclability, sustainability, and carbon neutrality) important to consumers in their purchase decision for the given product or service? Compared with the survey analyses, the automated content analysis provides the additional benefit of making it possible to assess consumer perceptions and attitudes over time, which may be relevant in ESG litigation where allegations extend back in time.

These methods provide valuable empirical insights into the real-world impact of companies' consumer-facing ESG efforts on consumer perception and behavior. Thus, the examination of

ESG claims using these empirical tools in litigation provides an opportunity for both plaintiffs and defendants to plead their case more effectively and present the court market-based evidence rooted in scientific rigor.

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Risks and Pitfalls from Increasing Balkanization of State-Level ESG Regulation

By Morgan Donoian MacBride and Tiffany Kim

Companies operating across state lines face an unprecedented compliance paradox: Meeting regulatory requirements in one jurisdiction may trigger financial penalties in another. This fragmentation—driven by diametrically opposed state approaches to environmental, social, and governance (ESG) regulation—creates material legal, financial, and operational risks that defy more traditional compliance frameworks. While the federal government has seemingly limited its enforcement of ESG practices and representations, state attorneys general and the private plaintiff bar have increasingly asserted greenwashing class actions—and all actions, for that matter.

The Broad Spectrum of ESG Regulation

At one end of the regulatory spectrum are California's twin disclosure mandates: California Senate Bill 261 (codified at Cal. Health & Safety Code § 38533) (S.B. 261) and California Senate Bill 253 (codified at Cal. Health & Safety Code § 38532) (S.B. 253). The two pieces of legislation aim to establish a comprehensive climate risk disclosure regime that imposes broad disclosure obligations on large entities doing business in California, irrespective of their place of incorporation within the U.S.

S.B. 261 requires covered business entities to disclose (1) their climate-related financial risk, in accordance with the Task Force on Climate-Related Financial Disclosures framework, or an equivalent reporting requirement; and (2) the measures adopted to reduce and adapt such risks by January 1, 2026, and biennially thereafter. These climate-related financial risk reports must be made publicly available on the company's website. S.B. 253 requires covered business entities to comprehensively report their greenhouse gas emissions—scope 1 (direct emissions), scope 2 (indirect emissions from purchased energy), and scope 3 emissions (all other indirect emissions across the value chain)—in accordance with certain specified standards. Further, companies must obtain independent verification of their disclosures under S.B. 253 from third-party assurance providers with proven expertise in greenhouse gas measurement and reporting.

However, even the regulatory landscape under S.B. 261 and S.B. 253 is quickly evolving, as demonstrated by the U.S. Chamber of Commerce's lawsuits challenging the legality of these statutes. On November 18, 2025, the Ninth Circuit enjoined enforcement of S.B. 261, but not S.B. 253, pending appeal and scheduled an expedited oral argument for January 9, 2026—notably, this is after the deadline for the first reports under S.B. 261 of January 1, 2026. Recently, others have also challenged the statutes, including by arguing that the disclosure

requirements imposed thereunder amount to unconstitutional government-mandated speech in violation of the First Amendment. Complaint, *Exxon Mobil Corp. v. Sanchez, et al.*, No. 2:25-at-01462 (E.D. Cal. filed Oct. 24, 2025). Such challenges—which have been frequently mounted against both pro- and anti-ESG regulations by various states—add another layer of complexity to the rapidly evolving legal landscape surrounding ESG regulation. S.B. 253 and S.B. 261 are also subject to ongoing rulemaking and enforcement of other guidance by the California Air Resources Board, including as to the deadline for first reports under S.B. 253 and the minimum mandatory content of first reports under S.B. 253 and S.B. 261.

Toward the other end of the regulatory spectrum is Texas Senate Bill 13 (S.B. 13), which creates the first comprehensive state-level prohibition on ESG-based investment practices. Several other states have enacted similar laws since. Texas S.B. 13 requires the Texas Comptroller of Public Accounts to maintain a list of financial companies that boycott energy companies and prohibits state agencies from investing funds in the listed companies. It also bars state agencies from contracting for goods or services with companies that have 10 or more full-time employees, unless the contract contains a written verification from the company that it does not boycott energy companies and will not boycott energy companies during the term of the contract. This requirement applies to contracts of $100,000 or more.

Since the enactment of S.B.13, Texas's state comptroller has backlisted 11 major financial institutions, along with 350 investment funds, pursuant to the statute's requirements. The Texas Attorney General's October 2023 advisory expands enforcement beyond the comptroller's list, instructing state agencies to "exercise due diligence" and consider "evidence [that] is readily and publicly available [of whether] a company is a boycotter" of energy companies.

And the plaintiff bar is likely to exploit this divergence in state legislation. In recent years, there has been a sharp increase in the number of greenwashing class actions filed against companies. At core, a greenwashing action asserts that a company has engaged in a deceptive marketing practice whereby it falsely presents its products or operations as more environmentally friendly or sustainable than they actually are. Companies' inability to comply with contradictory state regulatory schemes will create fertile grounds for the private litigation.

Compliance Considerations Going Forward

For companies doing business in boycott states, the ambiguity of the phrases "boycott" and "ordinary business purpose" (as used in Texas's S.B. 13) has the potential to create persistent legal uncertainty. When financial institutions maintain billions in Texas energy investments, yet still appear on the state's blacklist due to their climate risk policies, the signal to compliance officers seems clear: No safe harbor exists. Similarly, the breadth of California's S.B. 261's

climate risk definition may require companies to make materiality determinations knowing that any disclosure may become evidence in enforcement actions in anti-ESG jurisdictions.

Financial institutions in particular potentially face disclosure traps born of conflicting state-level approaches. For example, California's S.B. 261 requires these institutions to publicly disclose climate-related financial risks and mitigation measures. But when a bank publishes its TCFD-compliant climate risk report to comply with S.B. 261, Texas authorities could potentially cite that very disclosure as evidence of energy company boycotting. Mandatory compliance in one jurisdiction can anchor a securities class action for violations of section 10b of the Securities and Exchange Act.

Supply chain requirements may create additional conflicts for companies that work with suppliers across jurisdictions. California's S.B. 253 scope 3 emissions reporting mandates data collection from suppliers about their greenhouse gas emissions. But in states deploying anti-ESG policies, requesting such information from suppliers could theoretically constitute discrimination against higher-emission vendors, potentially triggering boycott prohibitions like the one in Texas's S.B. 13. The result is that companies that serve both government and commercial markets across jurisdictions may face incompatible data collection obligations.

Moreover, as a result of the increasing divergence in state regulatory policy around ESG, companies face compounding and costly compliance infrastructure requirements. Such requirements may include multi-jurisdiction tracking systems, parallel reporting frameworks for pro- and anti-ESG states, enhanced documentation establishing financial rationales for decisions that may be construed as pro-ESG, and third-party verification costs.

The current trajectory of state and national policies suggests prolonged fragmentation and confusion, leaving companies to navigate an increasingly complex patchwork of state-level regulations. In the absence of clear and focused guidance from the executive branch, federal preemption appears unlikely given persistent congressional gridlock. The gridlock can and likely will expose companies to additional litigation, including class actions. For companies that previously announced forward-looking ESG investments and goals, continued investments and reporting progress toward those goals could result in enforcement actions in certain states. Conversely, an abandonment of those investments or reporting progress could result in a class action asserting that those goals were deceptive, exposing a company to a costly litigation with potentially huge damages.

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The Expanding Economic Scope of Greenwashing

By Robin Cantor

In the last decade, environmental labeling and corporate claims have become routine. At the same time, there has been an increased scrutiny of commercial environmental, social, and governance (ESG) disclosures by watchdog organizations and consumers. This scrutiny has substantially expanded group and class action matters involving allegations of greenwashing.

The term "greenwashing" generally refers to claims challenging a company's ESG disclosures and/or when a business represents that its practices or products are socially beneficial or responsibly manufactured, absent evidence validating the representations or contrary to known facts. As ESG disclosures and greenwashing issues have evolved, they increasingly encompass not only the product or services sold but the entire sphere of business practices of the organization, including considerations such as labor makeup and practices, corporate investments, and sources of financing. Greenwashing allegations now might have little or no direct relation to the performance of the product or service being marketed.

Class action plaintiffs often bring litigation under the consumer and business protection laws of various states that prohibit unfair and deceptive practices to gain a competitive advantage. These laws emphasize whether the purportedly false environmental claim misled consumers and caused them to buy products that they otherwise would not have purchased or that, absent the label, they would have purchased at a lower price. The proffered class-wide damages often are based on a "benefit of the bargain" theory of economic injury and are routinely measured as a pricing premium reflecting the value of the challenged environmental claims to an average or "reasonable" consumer. However, as the focus of the challenge moves beyond the claims made on the specific product, the relationship between the product pricing and the alleged deception becomes more tenuous.

Recyclability and Lifecycle Claims

For example, greenwashing litigation has expanded into the consequences of the product outside of its primary use or into related upstream and downstream activities. Such product lifecycle cases have typically involved allegations of false or misleading statements related to either recyclability or the product's carbon footprint broadly defined.

Recyclability matters are notable because the challenged environmental claims and alleged deceptive marketing depend on local economic conditions beyond the manufacturer's control. In *Smith v. Keurig Green Mountain, Inc.*, the plaintiff alleged that Keurig deceptively marketed its single-use K-Cup pods as "recyclable" even though municipal recycling programs often cannot recycle the pods. For various reasons, local facilities vary in their abilities to process small

container sizes, food residue, and mixed materials. *Curtis v. 7-Eleven, Inc.*, however, presents a different example of the recycling litigation. The plaintiff filed a class action in the Northern District of Illinois claiming that 7-Eleven's labeling of certain store-brand plastic products as "recyclable" was deceptive. The complaint centered on two allegations: (1) that some products at issue did not feature a resin identification code (RIC), which the plaintiff claimed was necessary for recycling operations; and (2) that, even if the products at issue did feature a RIC, many recycling facilities nationwide do not accept the specific products at issue. The court rejected the second of the two claims, finding that the limited recyclability due to a lack of recycling facilities that accept the products at issue for recycling did not make 7-Eleven's "recyclable" labeling deceptive. The court noted the broader systemic failure of the U.S. recycling infrastructure, pointing out that many consumer products labeled "recyclable" are, in practice, rarely recycled due to limited access to appropriate facilities, and instead are incinerated or buried. The court cautioned that accepting the plaintiff's theory could open the door to widespread litigation against manufacturers for conditions largely outside their control, as accessibility to recycling facilities is a factor extrinsic to the product and subject to geographic, economic, and temporal variability, and not something product manufacturers can guarantee.

Carbon Intensity, Offsets, and Scope 3 Emissions

In another expanding area of greenwashing claims, companies are facing growing challenges to their firm-wide marketing claims about the carbon intensity of their products, their use or production of "clean" energy, and their corporate commitments to a "net-zero" or "carbon-neutral" future. Challenges to product claims of carbon intensity, including carbon neutrality or net-zero emissions, generally rely on one or both of the following arguments: (1) Carbon accounting: Companies have not truthfully represented to consumers the full extent of the carbon emissions embodied in their products—the so-called "carbon footprints" of their products; and (2) Reliability of offsets: Companies' claims rely on purchases of carbon offsets that are unreliable and may not yield the avoidance of carbon emissions they promise.

Environmental nongovernmental organizations and consumer groups have challenged disclosures that exclude emissions from a product's full supply chain (known as scope 3 emissions) when companies report their carbon footprint, their net-zero emissions commitments, or the carbon intensity of their products. The plaintiffs in *Dwyer v. Allbirds, Inc.*, for instance, allege they were misled by the exclusion of some scope 3 emissions from the shoemaker's carbon intensity calculations. A study by the Columbia Center on Sustainable Investment determined that only 37 percent of companies reporting net-zero emissions commitments included targets for scope 3 emissions reductions even though these constituted 90 percent of direct and indirect emissions for some companies.

Many carbon credits are issued for projects that sequester *additional* carbon in forests. However, determining what counterfactual forest carbon sequestration would have been absent the purchase of carbon credits is challenging and prone to manipulation. In *Berrin v. Delta Airlines Inc.*, the plaintiffs challenged the airline's representation that it is "the world's first carbon neutral airline" because its credits may not generate additional emissions reductions, rendering Delta a net-carbon emitter. In *Zajac v. United Airlines Inc.*, however, the court dismissed similar climate-washing litigation because the 1978 Airline Deregulation Act preempted challenges to an airline's rates, routes, or services. Firm-wide greenwashing claims also have been dismissed when the allegations clearly are not product-specific. For example, the court in *Blackburn v. Etsy, Inc.*, found that the proposed class of consumers failed to demonstrate that their claims about the general practices of the business affected the prices paid for individual products.

Transparency Gaps and Litigation Risk

Importantly, disclosed corporate environmental targets are actively scrutinized by third parties to identify gaps between disclosures and commitments. As one example, Greenpeace investigated dozens of the largest international corporations that had committed to cross-commodity forest protection policies. Greenpeace reported that none had identified sufficient information on their commodity sources to substantiate that they met their deforestation-free targets. Similar, ongoing assessments published in the *Corporate Climate Responsibility Monitor* emphasize transparency and integrity gaps between corporate climate targets and international climate goals that can encourage greenwashing litigation.

Complicating the corporate responses to the increased publicized scrutiny are limited available data and reliable metrics to gauge performance even for large, sophisticated firms. Inadequate substantiation of performance remains a challenge and imposes considerable risks for firms by attracting greenwashing claims with broad economic implications well beyond attention to misrepresentation of a single product's attributes.

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Do ESG Disclosures Matter? A Review of Empirical Research

By Gina Waterfield

Balancing Market Advantage and Risk

Given increased litigation over corporate environmental, social, and governance (ESG) disclosures, the critical question for companies is whether the advantages conferred by such disclosures warrant the exposure to additional financial risk. In the past decade, sustainability and related issues have become salient to a broad swath of the consumer population. ESG performance has also become a key metric in investment decision-making. While the proliferation of ESG labeling and branding and the substantial flow of assets into sustainable funds suggest strong consumer and investor demand for ESG performance, recent empirical studies present a varied and nuanced picture.

Consumer Responses to ESG Disclosures

On the consumer side, a range of analytical approaches have been taken in the academic literature to evaluate willingness to pay (WTP) for ESG attributes. Among these approaches are surveys of various formats, econometric analysis of actual sales data, and field experiments and auctions. Simple surveys and correlational studies frequently find large estimates of WTP, but these should be interpreted with caution. Surveys are subject to "hypothetical bias," with respondents signaling a preference for sustainability, when asked directly, that does not translate into actual WTP at purchase time. Correlational studies may conflate the value consumers place on ESG attributes with other associated factors, like product quality or political leanings. Carefully considered "revealed preference" studies of market data and experiments, designed to identify causal associations, typically estimate more modest WTP.

Several comprehensive meta-analyses of economic studies confirm that WTP is generally estimated to be higher in survey-based studies. A 2024 review of 31 studies of WTP for voluntary carbon offsets in commercial air travel found that the single revealed preference study of actual consumer purchases yielded the lowest of any WTP estimates, with less than 5 percent of consumers opting to purchase the offset. Similarly a 2024 meta-analysis of 33 studies of WTP for sustainable seafood found lower average WTP in revealed preference studies. Importantly, the literature further indicates that WTP is highly heterogeneous and sensitive to several factors. It varies with consumer demographics, market characteristics, economic conditions, and the type of ESG-related information provided. A 2024 review of 110 studies of WTP for food sustainability labeling, for example, found higher WTP for specific environmental certifications among higher-end products but for generic sustainability labeling among lower-end products.

With increased scrutiny and litigation of ESG claims, consumers are now becoming more skeptical of disclosures. The economic incentive created by consumer WTP for certain ESG attributes also heightens the legal risk associated with disclosure. If an allegedly misleading or deceptive ESG claim is a significant driver of WTP, the greater the potential for plaintiffs' experts to identify a price premium. So, while the empirical evidence demonstrates that ESG disclosures can confer a market advantage under certain conditions, they must be made credibly and with adequate support.

Investor Perspectives on ESG Performance

The potential market advantage associated with ESG performance may be an indicator of stronger or more resilient long-term financial performance to investors. In addition, superior ESG performance can be seen as protective against downside risk, and investors themselves may have intrinsic ethical motivations to invest in companies that emphasize ESG. A 2023 working paper published by the National Bureau of Economic Research, based on mutual fund assets and returns data, indeed found that investors were willing to pay an additional 63 basis points per year in fees to invest in index funds with ESG mandates. Investor WTP is also heterogeneous, though, with higher estimates in parts of the country and in industries where concerns about climate are more salient, for example.

It may be the case, however, that ESG performance is correlated with other good firm characteristics, such as better or more transparent management, that attract investors, in which case ESG performance in itself is immaterial. Moreover, empirical research suggests that investors do not necessarily anticipate higher returns on ESG assets, and some may even expect relatively poorer financial performance. Increased financial risk associated with litigation may be a factor, with debates about fiduciary responsibility versus political ideology becoming more heated. In an experimental study published earlier this year, involving both start-up founders and venture capital investors, the researchers found a strong and significant penalty for ESG assets. However, once beliefs about negative financial performance are controlled for, investor preference for ESG emerges.

Overall, the economics literature provides ample evidence that ESG disclosures can be financially material drivers of both consumer and investor behavior. While it is the case that consumers generally prefer sustainable and ethically produced goods all else equal, the conditions under which those preferences may translate into an observable price premium are varied. The potential for increased or more stable consumer demand to lead to better corporate performance may be a motivator for investors, but investors are also increasingly aware of the associated financial risk.

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