Gray Areas in Green Claims: Why Greenwashing Regulation Needs an Overhaul

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GRAY AREAS IN GREEN CLAIMS: WHY GREENWASHING REGULATION NEEDS AN OVERHAUL

I. A GRAYING DEFINITION: AN INTRODUCTION TO GREENWASHING

Merriam-Webster defines greenwashing as “the act or practice of making a product, policy, activity, etc. appear to be more environmentally friendly or less environmentally damaging than it really is.”¹ The concept involves the occurrence of one of two behaviors: (1) hiding negative information about a company’s environmental performance from the public, or (2) selectively sharing positive information about a company’s environmental performance with the public.² At present, there is confusion among agencies about how to best regulate greenwashing, as neither common law elements for a tort of greenwashing nor an official statutory definition exists.³ Further, no centralised regulator or authority is responsible for instituting environmental disclosure standards, which adds to agencies’ confusion.⁴ This absence of guidelines impedes companies’ ability to pinpoint the best disclosure of sustainability practices and consumers’ ability to compare sustainability practices between companies in the same industry.⁵

Nevertheless, there are various sources in the current legal landscape under which companies can be subject to liability for greenwashing.⁶ Consumers can hold companies accountable by bringing class-action lawsuits under consumer protection laws and using the Federal Trade Commission’s (FTC) Green Guides for the

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⁵. Id. (pointing to difficulties that lack of centralized oversight of environment-related assertions causes). Multiple studies indicate investors’ discontent in their ability to compare sustainability practices between similar companies, which is the result of each company’s freedom to choose “which metrics or standards to use for [its] disclosures and which among those standards to report on.” Id. (highlighting absence of greenwashing standardization).
⁶. See Cherry, supra note 5 (stating potential causes of action for allegations of greenwashing).
Use of Environmental Claims (Green Guides) to strengthen their claims.\textsuperscript{7} The United States Securities and Exchange Commission (SEC) might utilize federal consumer protection laws under the Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 to further regulate companies’ conduct.\textsuperscript{8} Shareholders can allege adverse effects to their investments under these same consumer protection laws.\textsuperscript{9}

Ultimately, however, greenwashing is not a legal term but a “broad descriptor” with lackluster enforcement.\textsuperscript{10} The current fragmented regulatory framework empowers companies to manipulate data to highlight their sustainability while omitting the practices where they fall short.\textsuperscript{11} To complicate the enforcement of greenwashing, lawsuits and regulations often must contend with questions surrounding whether companies’ allegedly unsound claims trigger First Amendment protection.\textsuperscript{12}

This Comment seeks to bring attention to the importance of regulating greenwashing and the challenges associated with holding companies responsible.\textsuperscript{13} A balance between providing consumers with information they can trust and allowing companies to advertise and share information without undue restrictions is likely the optimal outcome for companies, consumers, and regulators alike.\textsuperscript{14} Part II of this Comment outlines the current legal framework related to greenwashing.\textsuperscript{15} Part III analyzes the present state of greenwashing.


\textsuperscript{8} See Securities Exchange Act of 1934, 15 U.S.C. § 78(j) (granting SEC authority to prescribe rules in public interest to prevent fraud in connection with sale or purchase of securities); Rule 10b-5, 17 C.F.R. § 240.10b-5 (1951) (aiming to protect investors from dishonest companies).

\textsuperscript{9} See 17 C.F.R. § 240.10b-5 (illustrating shareholders’ ability to bring private lawsuits pursuant to Rule 10b-5).

\textsuperscript{10} Amanda Shanor & Sarah E. Light, Greenwashing and the First Amendment, 122 Colum. L. Rev. 2033, 2037-38 (2022) (clarifying that, unlike fraud or negligence, greenwashing is not legal term, but generic term referring to variety of behaviors).

\textsuperscript{11} See Fisch, supra note 4, at 947 (indicating piecemeal regulation of environmental claims motivates companies to greenwash).

\textsuperscript{12} Shanor & Light, supra note 10, at 2038 (highlighting concerns that greenwashing lawsuits infringe on defendants’ First Amendment right to free speech).

\textsuperscript{13} See, e.g., Cherry, supra note 3, at 289 (considering pervasiveness of greenwashing because of its potential to affect even well-meaning and well-implemented corporate social responsibility efforts).

\textsuperscript{14} For a discussion of the difficulties in creating a more comprehensive legal framework for accusations of greenwashing, see infra notes 156-69 and accompanying text.

\textsuperscript{15} For a discussion of the laws and rules relevant to greenwashing claims, see infra notes 50-69 and accompanying text.
detailing the landscape and evaluating the legal framework from the perspectives of consumers, investors, and companies. In Part IV, this Comment discusses the strengths and shortcomings of the current greenwashing litigation and regulation. Finally, Part V evaluates solutions to diminish the uncertainties surrounding greenwashing.

II. GREEN CLAIMS MIGHT NOT BE SO GREEN: AN OVERVIEW OF GREENWASHING

Many trace the origin of the term “greenwashing” to American environmentalist Jay Westerveld’s 1986 essay. In his piece, Westerveld described a hotel sign urging patrons to use fewer towels to reduce their environmental impact. Despite the hotel’s purported concern for the environment, Westerveld opined that the hotel’s true incentive for posting the sign was to save money by not having to launder as many towels. Based on the term “whitewashing” — using white paint to cover up dirt — environmental groups adopted the term “greenwashing” to signal misleading environmental claims.

The push for “conscious consumerism,” in which consumers make purchase decisions based on social, economic, and environmental impacts, is increasing company participation in greenwashing. Over the past five years, online searches for sustainable products have risen seventy-one percent globally, with at least one survey reporting

16. For a discussion of measures to combat deceptive sustainability claims, see infra notes 84-134 and accompanying text.
17. For a discussion of criticisms surrounding the legal landscape of greenwashing, see infra notes 135-55 and accompanying text.
18. For a discussion of potential solutions related to this topic, see infra notes 156-209 and accompanying text.
19. E.g., Cherry, supra note 3, at 284 (chronicling origin of term in popular usage).
20. See id. (illustrating way for companies to appear environmentally conscious).
21. See Bruce Watson, The Troubling Evolution of Corporate Greenwashing, The Guardian (Aug. 20, 2016, 10:00 AM), https://www.theguardian.com/sustainable-business/2016/aug/20/greenwashing-environmentalism-lies-companies (suggesting alternate reason for hotel’s request that guests use fewer towels); see also Cherry, supra note 3, at 284 (describing Westerveld’s understanding of hotel’s true motivations).
22. See Cherry, supra note 3, at 284 (explaining inspiration for and connotation of term “greenwashing”).
sixty-six percent of all respondents consider sustainability when making a purchase.24 This shift prompts companies to appear “green” to appeal to environmentally conscious consumers.25 A common tactic employed by companies to appear “green” is to run advertising campaigns that proclaim themselves as the superior choice compared to their supposedly less eco-friendly competition.26 A lack of adequate and reliable information, however, prevents consumers and investors from making well-informed decisions about their purchases and investments.27 As many as sixty-six percent of global consumers are willing to spend more for so-called “sustainable” products because companies commonly raise the prices of them.28 Likewise, some investors choose to invest in companies with so-called “sustainable” business practices either because of concern for the environment or the notion that such practices lead to improved economic performance.29

Nevertheless, a significant problem for companies that wish to be environmentally friendly is that adopting green practices tends to come at a tremendous monetary cost.30 Although some companies follow through with their eco-friendly commitments despite added costs, others take advantage of consumers’ well-intentioned sustainable shopping by failing to uphold their advertised green image claims.31 For instance, in one study, seventy-two percent of participating executives admitted to inflating their companies’ sustainability efforts.32

27. See Fisch, supra note 4, at 925-26 (expressing necessity of sustainability disclosures for investors to make well-informed decisions).
29. See Fisch, supra note 4, at 924-25 (indicating common motivations for investing in sustainable companies).
30. See Hickey, supra note 28 (describing need for companies to thoroughly investigate sustainability practices in every step of their supply chains).
31. See Cherry, supra note 3, at 282, 287 (explaining pervasiveness of dishonest greenwashing practices).
32. See Shawn Collins & Lisa M. Northrup, The Legal Risks of Greenwashing Are Real, BL (July 25, 2022, 4:00 AM), https://news.bloomberglaw.com/
Some companies may reduce the size of their packaging to create the appearance of being more eco-friendly and claim to reduce carbon emissions from shipping, yet their main incentive is cost-minimizing. Others claim their product is environmentally friendly because of a single, relatively insignificant attribute or use terms like “biodegradable” or “renewable” without articulating their meaning. For example, a theoretically “biodegradable” item might not completely degrade if the conditions in a landfill where such items are ordinarily disposed of do not permit it.

Ultimately, there are tiered levels of corporate social responsibility. Companies in the bottom tiers have the following three approaches: breaking the law, complying with laws without making efforts to be more environmentally friendly, or implementing only minor “green” changes. In contrast, companies in the top tiers integrate green concepts into their long-term success and growth or design the company to maximize corporate social responsibility.

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33. See Cherry, supra note 3, at 288 (elucidating relationship between cost advantages for companies and use of eco-friendly measures).

34. See Dahl, supra note 26, at A 250 (describing ways companies deceptively promote allegedly sustainable products and practices). Other examples of terms in this category include “sustainable,” “ethical,” “environmentally friendly,” “green,” and “cruelty-free.” See, e.g., Niemann & Singh, supra note 23 (describing product advertising claims at issue in increasingly popular consumer greenwashing suits).

35. See Dahl, supra note 26, at A 248 (providing examples of how companies use terms like “biodegradable” to deceive consumers).


37. Id. (describing characteristics of companies with comparatively little corporate social responsibility).

Consumer and environmental groups have taken an increasingly significant role in informing consumers and applying pressure to companies that greenwash.\(^{39}\) One such group, TerraChoice Environmental Marketing, proposed the “seven sins of greenwashing” marketing claims categories as a framework for recognizing companies’ disingenuous practices.\(^{40}\) The “seven sins” include the “sin of irrelevance,” which refers to making a valid environmental claim that is ultimately unimportant, and the “sin of false labels,” which involves making untrue claims of third-party endorsement.\(^{41}\) TerraChoice’s findings indicate that as many as ninety-five percent of products in the United States and Canada have committed at least one of the “seven sins.”\(^{42}\)

Volkswagen and Nestlé are two examples of companies that faced public greenwashing scandals.\(^{43}\) In 2015, the Environmental Protection Agency (EPA) found that Volkswagen had installed software designed to cheat emissions tests in as many as eleven million cars worldwide.\(^{44}\) The software could detect when the car was undergoing an emissions test and emit less pollutants than when it ran normally.\(^{45}\) Meanwhile, Volkswagen ran advertising campaigns praising its cars’ low emissions.\(^{46}\)

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\(^{39}\) See Dahl, supra note 26, at A 250 (discussing consumer and environmental groups’ involvement in disseminating information).

\(^{40}\) See, e.g., Timothy C. Bradley, Likelihood of Eco-Friendly Confusion: Greenwashing and the FTC “Green Guides,” 4 LANDSLIDE fig. 1 (2011) (illustrating TerraChoice’s “seven sins” tool to help consumers identify greenwashing).

\(^{41}\) See Dahl, supra note 26, at A 249 (providing list of “seven sins of greenwashing” and examples for each category). The remaining “sins” are the “sin of vagueness” (broadly or poorly defining terms to deceive consumers); “sin of the hidden trade-off” (focusing on narrow set of attributes while ignoring detrimental environmental impacts); “sin of no proof” (lack of easily accessible supported information and reliable third-party certification); “sin of lesser of two evils” (claims which may be true but are designed to detract from the greater environmental impacts); and the “sin of fibbing” (making false claims). Id. (explaining how companies can commit one or several greenwashing sins).

\(^{42}\) Vieira de Freitas Netto et al., supra note 2, at 2 (reporting unpleasant reality behind companies claiming their products are environmentally friendly).

\(^{43}\) See Robinson, supra note 25 (listing companies accused of making deceptive claims about their sustainability and environmental impacts).


\(^{45}\) See id. (summarizing Volkswagen’s misleading emissions tests results). The affected Volkswagen vehicles emitted nitrogen oxide pollutants up to forty times the legal limit under normal conditions, but during emissions tests, the specialized software allowed the vehicles to run below their normal power and performance. See id. (recounting EPA’s implications of Volkswagen “defeat device”).

\(^{46}\) See Robinson, supra note 25 (highlighting inaccuracy of Volkswagen's advertisements about its cars' low emissions).
In another well-known greenwashing scandal, Nestlé announced in 2018 its goal of making one hundred percent of its packaging recyclable or reusable by 2025.\textsuperscript{47} The company stated that its incentive for pursuing this goal was to “[p]revent[] packaging material ending up as waste, including in seas, oceans, and waterways . . .”\textsuperscript{48} Not only has Nestlé failed to announce any efforts thus far toward this goal, but Break Free From Plastic’s 2020 annual report named Nestlé as the world’s third-highest plastic polluter brand for the third consecutive year.\textsuperscript{49}

A. Consumer Lawsuits

Consumers who wish to take legal action against companies they believe are greenwashing can bring consumer class action suits for false or deceptive advertising claims.\textsuperscript{50} The claims can stem from deceptive advertising itself or “a failure to disclose the presence of supposed harmful substances.”\textsuperscript{51} State consumer protection laws commonly serve as the basis of private greenwashing lawsuits.\textsuperscript{52} For example, the District Court for the Southern District of New York has evaluated the General Business Law (GBL), the state’s consumer protection law, several times concerning greenwashing claims.\textsuperscript{53} The GBL covers false advertising, as well as “[d]eceptive acts or practices in the conduct of any business, trade[,] or commerce . . ..”\textsuperscript{54}

\textsuperscript{47} See Nestlé Aiming at 100% Recyclable or Reusable Packaging by 2025, Nestlé (Apr. 10, 2018), https://www.nestle.com/media/pressreleases/allpressreleases/nestle-recyclable-reusable-packaging-by-2025 (stating company’s planned sustainability initiative).

\textsuperscript{48} See id. (explaining reason behind Nestlé’s desire to use exclusively recyclable or reusable packaging by 2025).


\textsuperscript{50} See Niemann & Singh, supra note 23 (stating one way consumers can hold companies accountable for their alleged deception); see, e.g., Companies Accused of Greenwashing, TRUTH IN ADVERT., https://truthinadvertising.org/articles/six-companies-accused-greenwashing/ (June 13, 2023) (listing companies facing consumer greenwashing allegations).

\textsuperscript{51} See Niemann & Singh, supra note 23 (describing how consumers can bring greenwashing-related lawsuits).

\textsuperscript{52} See id. (illustrating that plaintiffs commonly use consumer protection claims in greenwashing suits).


\textsuperscript{54} See generally Consumer Protection from Deceptive Acts and Practices, N.Y.
B. FTC Enforcement

Consumers are not the only enforcers of false and deceptive advertising. With authority from the FTC Act (Act), the FTC prohibits “[u]nfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce.” The Act is the only legislation granting the FTC the power to protect consumers from deceptive advertising. It authorizes the FTC to act upon “reason to believe” that a person or company is violating the Act. The FTC holds a hearing in the public interest to evaluate the act or practice, and, upon finding a violation of the Act, may order corrective advertising or, most commonly, issue a cease-and-desist order. After issuing a cease-and-desist order, the FTC may commence a civil action in a district court to recover a civil penalty of up to $10,000 per violation.

To help police environmental marketing claims, the FTC publishes interpretive rules known as the Green Guides. The goal of the Green Guides is to enable consumers to depend on the truthfulness of marketers’ claims and learn how the products they purchase affect the environment. The FTC first issued its Green Guides in 1992, with revisions in 1996, 1998, and 2012. The FTC intends for its Green Guides to assist marketers in avoiding making “unfair or deceptive” environmental marketing claims under the Act. Consumers using consumer protection laws as the basis for their

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55. See Dahl, supra note 26, at A 248 (explaining FTC’s responsibility to enforce false or deceptive claims).
58. 15 U.S.C. § 45(b) (describing standard by which FTC has authority to act).
59. See id. (outlining process for enforcing Act); Rotman et al., supra note 57, at 421 (expressing that cease-and-desist order is most common of FTC’s enforcement tools).
60. See 15 U.S.C. § 45(m) (expressing district court’s requirements for FTC to recover for Act violations).
61. See Dahl, supra note 26, at A 248 (detailing Green Guides and their uses).
63. See Environmentally Friendly Products, supra note 7 (recounting history of Green Guides).
64. 16 C.F.R. § 260.1 (2012) (discussing FTC’s rationale for producing Green Guides). For a discussion of courts’ interpretations of “unfair or deceptive,” see infra notes 84-94 and accompanying text. For a discussion of the FTC’s standards, see infra notes 95-101 and accompanying text.
greenwashing lawsuits can cite both the Green Guides and the FTC Act to bolster their claims.  

C. SEC Securities Fraud

With the growing public awareness of environmental issues, various stakeholders, namely “investors, consumers, governments, and corporate customers,” are exerting increasing demand on companies to manufacture environmentally-sound products. When public companies announce their sustainability measures, however, they put themselves at risk of lawsuits for alleged securities fraud from investors and the SEC for any misleading statements or omissions they may make. Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 form the legal basis for such lawsuits. Securities lawsuits operate under the premise that publicly traded companies compromise investor protection by making misleading statements and omissions.

III. The Expansion of Gray Areas: The Present State of Greenwashing

Due to the efforts of environmental groups such as Break Free From Plastic and Truth in Advertising, companies face more scrutiny today for greenwashing than ever before. Whether companies engaged in greenwashing will face the consequences for their deceitful or misleading claims, however, is another issue entirely.

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66. Vieira de Freitas Netto et al., supra note 2, at 1 (explaining how pressure to be environmentally friendly comes from several sources).

67. See Henriques, supra note 65 (considering risks companies face when making voluntary corporate social governance disclosures).

68. See id. (explaining legal basis for claims of securities fraud based on misleading or deceitful statements).


70. See, e.g., Companies Accused of Greenwashing, supra note 50 (exemplifying work of consumer rights organizations to disseminate information related to greenwashing).

71. For criticisms of the current legal framework in place to minimize greenwashing, see infra notes 135-54 and accompanying text.
Without one binding statutory definition or prima facie elements of greenwashing, plaintiffs often are left to rely on vague and uncertain precedent from court and financial agency administrative decisions.\(^72\)

Courts and federal agencies must be careful not to infringe on companies’ rights related to advertising and free speech.\(^73\) First, it is crucial to distinguish between misleading commercial speech, which can be subject to regulation or even complete prohibition, and political speech, which refers to constitutionally protected speech and generally cannot be regulated in most instances.\(^74\) Second, even if speech is commercial, assertions of fact are separate from assertions of opinion, as opinions are less capable of regulation.\(^75\) Third, a commercial assertion of fact must be false, misleading, or fraudulent to be outside the First Amendment’s protections.\(^76\) Deciding whether a statement falls into one of these categories can be complicated, as it requires expert opinion, and the assertion must be deemed false, misleading, or fraudulent “from the perspective of its audience, not the commercial speaker.”\(^77\)

A. Private Lawsuits Under State Law

One difficulty with private greenwashing lawsuits is that most states lack laws specific to environmental claims.\(^78\) Instead, courts must conduct fact-specific analyses of companies’ statements and images to determine the viability of sustainability-related claims brought under consumer protection laws.\(^79\) These assessments can

\(^72.\) See Niemann & Singh, supra note 23 (highlighting uncertainty among companies regarding accusations of greenwashing based on conflicting court and agency decisions).

\(^73.\) For discussion of the need for a balance between consumer protections and corporate rights, see infra notes 156-69, 196-201 and accompanying text.

\(^74.\) See Shanor & Light, supra note 10, at 2076 (differentiating commercial speech from political speech as applied to First Amendment protections).

\(^75.\) See id. at 2077 (asserting differences between assertions of fact and assertions of opinion when evaluating claims of greenwashing).

\(^76.\) See id. at 2077, 2087 (describing actionable standard for court to find commercial assertion of fact).

\(^77.\) Id. at 2087, 2090 (explaining why greenwashing suits are rarely straightforward and instead subject to fact-specific analysis and interpretation).


diverge between courts, adding to the confusion for companies trying to avoid being the subject of consumer greenwashing lawsuits.\textsuperscript{80}

For example, \textit{Lee v. Canada Goose U.S., Inc.},\textsuperscript{81} and \textit{Spindel v. Gorton’s, Inc.},\textsuperscript{82} in contrast to \textit{Dwyer v. Allbirds, Inc.},\textsuperscript{83} illustrate the fine line and arguably arbitrary determinations of whether a corporation’s representation is misleading.\textsuperscript{84} In \textit{Lee}, the main issue regarded Canada Goose’s purported commitment to using only fur suppliers who employed “ethical” and “sustainable” trapping methods.\textsuperscript{85} The court denied Canada Goose’s motion to dismiss, finding that the plaintiff showed sufficient evidence that the company misled consumers.\textsuperscript{86} According to the Southern District of New York, if the company’s trappers used methods such as leg traps and snares, which cause inhumane distress and injury to trapped animals, that alone could be misleading to a reasonable consumer.\textsuperscript{87} Although the plaintiff could not pinpoint Canada Goose’s exact fur-trapping practices, the court found that the widespread use of such methods in the regions the trappers frequented supported the reasonable inference that Canada Goose employed such methods.\textsuperscript{88}

In \textit{Spindel}, the plaintiff claimed Gorton’s representation that its tilapia was “sustainably sourced” deceived reasonable consumers.\textsuperscript{89} The Massachusetts District Court reasoned it was plausible...
that Gorton’s tilapia suppliers, Chinese fish farms, were unsustainable because they used “environmentally destructive and inhumane” practices.\textsuperscript{90} As such, the court held that the plaintiff asserted a sufficiently plausible claim to survive Gorton’s motion to dismiss.\textsuperscript{91}

In contrast to \textit{Lee} and \textit{Spindel}, however, the Southern District of New York held that Allbirds’s use of a Life Cycle Assessment (LCA) tool did not mislead reasonable consumers as the plaintiff claimed.\textsuperscript{92} Although the standard definition of the LCA tool is the carbon outputs from “cradle to grave,” Allbirds omitted the carbon produced from its wool suppliers in its calculations.\textsuperscript{93} The court reasoned that by making its methodology accessible on its website, Allbirds could not mislead reasonable consumers.\textsuperscript{94}

\textbf{B. The FTC’s Power}

Statements, images, and labels fall within the FTC Act’s ambi\textsuperscript{95}t. The Act limits the FTC’s power, however, as it only considers companies’ acts or practices unfair if they “cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”\textsuperscript{96} To declare a representation, omission, or practice deceptive, the FTC states it must be likely to mislead a reasonable consumer in the circumstances.\textsuperscript{97} The depiction may be false, deceptive, imply misleading claims, or contain claims that are accurate but misleading nonetheless.\textsuperscript{98}

\textsuperscript{90} \textit{Id.} at *3 (acknowledging why advertising products as “sustainably sourced” when suppliers use “environmentally destructive” practices is potentially misleading).

\textsuperscript{91} \textit{Id.} (finding plaintiff’s claims that Gorton’s marketed tilapia products as “sustainably sourced” sufficient to deny Gorton’s motion to dismiss).

\textsuperscript{92} Dwyer v. Allbirds, Inc., 598 F. Supp. 3d 137, 149-50 (S.D.N.Y. 2022) (reasoning LCA tool’s methodology could be misleading, but Allbirds’s claims are separate issue for court to resolve).

\textsuperscript{93} \textit{Id.} at 150 (describing excluded categories in Allbirds’s LCA tool carbon footprint calculations).

\textsuperscript{94} \textit{Id.} at 149-50 (deferring to Allbirds’s calculations of its carbon outputs despite deviation from plaintiff’s desired method of measurement).

\textsuperscript{95} See Shanor & Light, supra note 10, at 2062 (listing variety of advertising that could lead to FTC enforcement).

\textsuperscript{96} 15 U.S.C. § 45(n) (stating standard for unfairness pursuant to FTC Act).


\textsuperscript{98} See Shanor & Light, supra note 10, at 2062-63 (showing that failure to tell whole truth is deceptive under FTC Act, such as by citing only portion of research study).
Misleading claims can be difficult for the FTC to police, however, as vagueness, extravagance, inclusion of an opinion, or irrelevance may not reach the threshold to likely influence a reasonable consumer’s decisions.\textsuperscript{99} Notably, the marketing claim does not need to deceive a customer literally to violate the FTC Act, so long as there was a capacity or likelihood of deception.\textsuperscript{100} The materiality standard is defined by the effect it has on a consumer’s actions: the claim is material if the act or practice can influence a consumer’s purchasing decision.\textsuperscript{101}

This does not mean, however, that FTC enforcement of greenwashing is nonexistent.\textsuperscript{102} One notable example of the FTC’s enforcement was against Walmart.\textsuperscript{103} The corporation claimed products such as sheets, towels, and blankets were made of bamboo, advertising them as “eco-friendly & sustainable” and “renewable and environmentally sustainable.”\textsuperscript{104} On the contrary, the FTC discovered Walmart’s products contained rayon, which requires a “manufacturing process [that] uses toxic chemicals and emits hazardous pollutants.”\textsuperscript{105} Walmart settled with the FTC in 2022 for over three million dollars.\textsuperscript{106}

\textsuperscript{99} See id. at 2057, 2063-64 (illustrating scope of FTC Act as applied to claims of greenwashing); see also Dahl, supra note 26, at A 252 (indicating oftentimes minimal application of FTC Act to representations made about products or services).

\textsuperscript{100} See Shanor & Light, supra note 10, at 2063-64 (noting FTC Act meant to protect typical customer who purchases products based on general impressions rather than careful examination); see, e.g., FTC v. Colgate-Palmolive Co., 380 U.S. 374, 377, 383 (1965) (upholding FTC’s finding that using sandpaper as prop in shaving cream commercial was misleading because consumers led to “believe[,] they had seen [the evidence] with their own eyes”).

\textsuperscript{101} 2 The Law of Advertising § 19.01 (2022) (advancing requirement of materiality as one of solely material unfairness).


\textsuperscript{104} Id. (highlighting Walmart’s environment-related false claims).

\textsuperscript{105} Id. (proving Walmart’s knowledge of its misrepresentation because of warning letters notifying it of FTC Act violation).

\textsuperscript{106} See id. (indicating companies can face harsh punishment if found guilty of greenwashing).
The FTC’s other enforcement tool, its Green Guides, provide: “1) [G]eneral principles that apply to all environmental marketing claims; 2) how consumers are likely to interpret particular claims and how marketers can substantiate these claims; and 3) how marketers can qualify their claims to avoid deceiving consumers.”

The Green Guides apply broadly to marketing or sales claims relating to the environmental attributes of products, packaging, or services. Indeed, the Green Guides include all marketing, “whether asserted directly or by implication, through words, symbols, [amongst others].”

As expansive as the Green Guides are, they lack the force of law and thus do not bind the FTC or the public. They are interpretive rules, or “general statement[s] of policy,” rather than precise definitions of acts or practices that are unfair or deceptive, as in legislative rules. The Guides nevertheless provide marketers with insights into how the FTC will likely view environmental claims. For instance, even when an environmental claim complies with federal, state, or local laws, the FTC can act if the claim is inconsistent with the Guides.

C. The SEC’s Power

The SEC mandates environmental-related disclosures “only to the extent it relates to an existing disclosure requirement or is necessary to prevent a required disclosure from being misleading.” While consumer protection laws safeguard consumers against a company’s products or services, securities laws’ protections are limited to consumers who hold, purchase, or sell stock in a company.
Indeed, the Supreme Court determined that to establish a claim of securities fraud under Rule 10b-5, the plaintiff must prove the defendant, with the requisite state of mind, made a material misrepresentation or omission that the plaintiff relied on in purchasing or selling a security.\textsuperscript{116}

As a result, the plaintiff must have suffered an economic loss and prove “loss causation”: the connection between the defendant’s fraudulent conduct and the plaintiff’s economic loss.\textsuperscript{117} This requirement for investors to show that a material representation caused economic loss, such as a drop in share price, diminishes investors’ chances to succeed in greenwashing claims under Rule 10b-5.\textsuperscript{118} Suppose an investor invests in a corporation’s stock based on its environmental friendliness and the desire to increase personal wealth; there may not be any harm to the investor under Rule 10b-5 if the corporation’s stock price rises, regardless of whether it is honest about its environmental friendliness.\textsuperscript{119}

Similarly, the materiality requirement can frustrate investors.\textsuperscript{120} As the Sixth Circuit has held, for example, even if evidence shows a corporation made an inaccurate representation, the representation must be one that would “significantly chang[e] the general gist of available information” from the perspective of a reasonable investor.\textsuperscript{121} In other words, it is insufficient merely to mislead; instead, the information must have an economic or financial impact.\textsuperscript{122}

The SEC also faces obstacles in enforcing greenwashing due to its limited tools for bringing environmental cases.\textsuperscript{123} The lack of

\textsuperscript{116} See, e.g., Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008) (listing elements necessary for plaintiff to prove Rule 10b-5 private action); Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d 832, 852 (N.D. Tex. 2018) (quoting Southland Sec. Corp. v. INSpire Ins. Sols., Inc., 365 F.3d 353, 366 (5th Cir. 2004)) (defining requisite state of mind as “‘intent to deceive, manipulate, or defraud’ or that ‘severe recklessness’ in which the danger of misleading buyers or sellers is either known to the defendant or is so obvious that the defendant must have been aware of it.”)

\textsuperscript{117} See, e.g., Stoneridge Inv. Partners, 552 U.S. at 159 (describing loss causation requirement for claim brought under Rule 10b-5).

\textsuperscript{118} See Cooper, supra note 102, at 407 (highlighting difficulty for investors to hold corporation accountable for misleading or deceptive disclosure successfully).

\textsuperscript{119} See Cherry, supra note 3, at 300 (pointing out challenge for investors to prove identifiable harm when bringing greenwashing claims under Rule 10b-5).

\textsuperscript{120} See Cooper, supra note 102, at 424 (expressing typical slogan or affirmation about company’s environmental friendliness is not sufficiently material).

\textsuperscript{121} Cherry, supra note 3, at 291 (quoting In re Ford Motor Co. Sec. Litig., 381 F.3d 563, 570-71 (6th Cir. 2004)) (highlighting interpretation of SEC’s materiality standard as applied to public company information).

\textsuperscript{122} See Fisch, supra note 4, at 935 (explaining requisite materiality standard for actionable claims of misleading information).

\textsuperscript{123} Ramonas, supra note 102 (noting SEC’s few options in protecting investors from greenwashing).
rules specifically banning misleading or incomplete environmental disclosures forces the SEC to depend on broad anti-fraud laws instead. Without concrete greenwashing standards on which the SEC can rely, investors also face confusion because of the “significant variability in terms of the quality and quantity of disclosure provided by issuers.”

Regulation S-K, one of the SEC’s potential enforcement tools against greenwashing, requires public companies to disclose their financial conditions and material risks and information to investors. To ease uncertainty, the SEC issued guidance in 2010 that interpreted how the general Regulation S-K disclosures apply to climate-related risks. The mandated environmental disclosures include the cost of compliance with environmental laws, any environmental issues that may affect asset use, material pending legal actions, significant risk factors, and a general assessment of financial condition. Such disclosures only apply where management has knowledge of the information that is reasonably likely to materially affect the company’s “financial condition or results of operation.”

Despite the SEC only mandating disclosures in specific circumstances, over ninety-five percent of Fortune Fifty companies included Environmental Social Governance disclosures in their SEC filings as of 2021. As many of these disclosures are voluntary, public corporations can choose which information to disclose. Voluntary disclosure is “distinct in location, format, and rigor from other investor-oriented information,” making it difficult for investors to understand. The regulatory standards are generally less rigorous.

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124. Id. (articulating broad, general laws that SEC must apply to narrow greenwashing claims encompassing specific terms).
125. Halper et al., supra note 23 (explaining why lack of guidance on greenwashing matters).
128. Id. at 6,293-94 (listing additions to Regulation S-K’s mandated disclosures for publicly traded companies).
129. Fisch, supra note 4, at 953 (explaining rule determining when disclosure of information is required).
130. See Henriques, supra note 65 (describing prevalence of companies making voluntary disclosures about their sustainability practices).
131. See id. (suggesting decision-making process companies should undergo before making non-mandatory disclosures).
132. See Fisch, supra note 4, at 926-27 (illustrating problems with voluntary disclosures of corporate and financial information).
than those applied to securities filings, and due to this discrepancy in the quality and accuracy of the information, investors can have difficulty understanding how companies within the same industry compare.\textsuperscript{133} Further, it is unclear whether a corporation can be liable for federal securities fraud based on voluntary disclosures, primarily because the SEC does not generally review such disclosures.\textsuperscript{134}

IV. Extending the Gray Areas: Criticism of Greenwashing Regulation

One major challenge in greenwashing lawsuits is the difficulty plaintiffs face in articulating the harm caused by the defendant’s misrepresentation or deceit.\textsuperscript{135} For example, when companies omit information about their environmental practices or impacts, agencies generally do not have the authority to bring enforcement actions if such disclosures were voluntary.\textsuperscript{136} This practice leaves courts to grapple with whether omitted material can be materially misleading and whether plaintiffs can prove they relied on withheld information.\textsuperscript{137}

A. The SEC’s Complications

Even initiatives to dispel confusion can fall short.\textsuperscript{138} Despite the potential utility of the 2010 disclosure guidance, climate-related disclosures in 10-Ks still commonly include vague, boilerplate language.\textsuperscript{139} The SEC also rarely uses the guidance, as it has

\begin{itemize}
  \item \textsuperscript{133} See id. at 927, 949-50 (distinguishing standards for mandatory versus voluntary disclosures).
  \item \textsuperscript{134} See id. at 950 (highlighting questions surrounding SEC’s power to enforce quality and accuracy of voluntarily disclosed information).
  \item \textsuperscript{135} See Cherry, supra note 3, at 300 (discussing difficulty of identifying greenwashing’s harms).
  \item \textsuperscript{136} See Fisch, supra note 4, at 950 (stating complications of finding liability in instances of omitted information).
  \item \textsuperscript{137} See, e.g., Loritz v. Exide Techs., No. 2: 13-cv-02607-SVW-E, 2015 U.S. Dist. LEXIS 100471, at *66 (C.D. Cal. July 21, 2015) (evaluating whether Exide’s withholding of information related to its financial corporation’s environmental matters was materially misleading). The court reasoned that although the plaintiffs accused Exide of making several misleading statements, their reasoning strictly hinged on Exide’s alleged failure to include certain material information in its statements. Id. at 67 (expressing careful analysis required when evaluating whether omitted information makes claim misleading). The court also noted that generally, plaintiffs must demonstrate reliance on the alleged omissions. Id. at 68 (highlighting that plaintiffs did not need to show reliance in this case).
  \item \textsuperscript{138} See Andrew Ramonas, New SEC’s First Climate Disclosure Tool is Blast from the Past, BL (Feb. 9, 2021, 4:46 AM), https://news.bloomberglaw.com/securities-law/new-secs-first-climate-disclosure-tool-is-blast-from-the-past (describing SEC guidance on climate-change disclosures as “collecting dust”).
  \item \textsuperscript{139} See Shanor & Light, supra note 10, at 2074 (criticizing SEC’s limited attention to corporate disclosure guidance).
\end{itemize}
brought less than one hundred enforcement actions for alleged violations since Regulation S-K’s adoption.\footnote{140} One rationale for the lack of enforcement actions is that the SEC will only mandate disclosure for information that investors need to make investment decisions, as determined by the financial or economic impact.\footnote{141} Sustainability disclosures are therefore typically considered too insignificant to be included as a mandatory component of financial reporting.\footnote{142}

Insofar as the SEC evaluates securities fraud concerning environment-related disclosures, the agency may have limited resources available to address violations.\footnote{143} This is compounded by the agency’s vulnerability to “both political pressures and shifting administrative priorities.”\footnote{144} Since the agency came under Democratic leadership in 2021, Republicans have criticized its use of authority, adherence to the rule-writing rules, and attitude toward the industries it regulates.\footnote{145}

B. The FTC’s Complications

Although the FTC’s authority under the FTC Act appears straightforward, the inquiries are heavily fact-specific, and the evidence needed to prove violations of the Act is unclear.\footnote{146} Further, the FTC can only rely on the Green Guides to a limited extent: since violations of the Green Guides are not legally enforceable on their own, the agency must prove they violate the FTC Act.\footnote{147} Judicial

\footnote{140. See Fisch, supra note 4, at 965 (articulating SEC’s few enforcement actions related to failure to disclose information pursuant to Registration S-K); Ramonas, supra note 138 (highlighting SEC’s rare use of corporate disclosure guidance).}

\footnote{141. See Fisch, supra note 4, at 935 (rationalizing SEC’s considerations when deciding whether to require disclosure of certain information).}

\footnote{142. See id. at 933-34, 939 (explaining SEC’s tendency to make environmental information voluntary to report in financial documents); Harris Fischman, SEC Proposed Greenwashing Disclosure Requirements: The Devil Is in the Details, LAW.COM (Nov. 1, 2022, 11:30 AM), https://www.law.com/corp counsel/2022/11/01/sec-proposed-greenwashing-disclosure-requirements-the-devil-is-in-the-details (highlighting how SEC has historically used materiality framework, defined by what information “a reasonable investor would consider important in making an investment decision”).}

\footnote{143. See Daniel C. Esty, Environmental Protection in the Information Age, 79 N.Y.U. L. REV. 115, 144 (2004) (addressing significant resources needed to track, analyze, and respond to violations).}

\footnote{144. See Fisch, supra note 4, at 965 (noting politics influence SEC decisions).}


\footnote{146. See Shanor & Light, supra note 10, at 2066 (questioning what evidence companies need to substantiate their claims).}

\footnote{147. See Rotman et al., supra note 57, at 429 (explaining FTC’s authority to bring enforcement actions for Green Guide violations can create difficulties).}
review and deference to the FTC can also be complicated because courts do not typically view voluntary guidelines as final agency actions.\footnote{148} In addition to these concerns, the language used in the Green Guides issued by the FTC has also faced criticism.\footnote{149} Federal, state, and local laws preempt the Guides, but with language classifying certain practices as “deceptive,” and describing what marketers “should” and “should not” do when making environmental claims, the Guides appear to be more akin to binding regulations.\footnote{150}

C. State Laws

The FTC’s “piecemeal” enforcement actions against corporations making fraudulent environmental claims in the 1970s and 1980s ignited frustration from industry and consumers alike.\footnote{151} States thus began to effectuate their own regulations to combat fraudulent environmental claims in marketing, but nonconformity between states has led to more frustration for manufacturers.\footnote{152} For example, a law in California stated that the term “biodegradable” could only be used if the product decomposed within one year; however, in Pennsylvania, a product could be labeled “biodegradable” if it decomposed after any length of time.\footnote{153} To further complicate matters, Rhode Island at one point banned “biodegradable” claims in product marketing entirely.\footnote{154} These and other state green marketing laws illustrate the need for national, uniform green guidelines.\footnote{155}

\footnote{148. See id. (addressing interpretive guidance’s effect on court evaluation of FTC’s decisions, as opposed to effect of binding regulations).}

\footnote{149. See Shanor & Light, supra note 10, at 2110-11 (pointing out vague language in Green Guides can raise more questions than it clarifies).}

\footnote{150. See Rotman et al., supra note 57, at 428 (clarifying why some believe FTC overextends its authority).}

\footnote{151. Id. at 422 (highlighting widespread criticism of how FTC historically enforced violations).}

\footnote{152. Id. at 422-23 (demonstrating inconsistency among state laws).}

\footnote{153. See CAL. BUS. & PROF. CODE § 17508.5 (West 1973) (repealed 1995) (stating limitation on use of “biodegradable” in advertising); S. 920, 175th Gen. Assemb., Reg. Sess. § 2 (Pa. 1991) (addressing when products can be considered “biodegradable”); see also Rotman et al., supra note 57, at 423 (showcasing why nationwide marketing without violating state law can be unfeasible).}


\footnote{155. Rotman et al., supra note 57, at 423 (explaining how lack of controlling federal laws can make nationwide marketing and interstate commerce unfeasible).}
V. Shedding Light on the Gray: The Potential Impact of Greenwashing

Ultimately, companies want to freely express their future intentions and initiatives without fearing meritless lawsuits and unwarranted agency enforcement. In contrast, consumers, investors, and federal agencies want to believe companies’ assertions so they can make informed decisions. As greenwashing becomes more prevalent, consumers are increasingly likely to become so skeptical of environmental claims that they disregard them entirely, leading to a lack of environmentally responsible purchasing choices. For both sides, therefore, clear guidelines are advantageous as they have the potential to reduce much of the uncertainty surrounding greenwashing.

Ideally, clear guidelines cause companies to provide annual, uniform sustainability reporting that is also specific enough to provide meaningful and readily comparable information. Mandating “green” disclosures would also allow states to use disclosures in false advertising and investor fraud claims. In greenwashing litigation, elimination of the “gray area,” where claims are factually accurate but still misleading to the reasonable consumer, would provide plaintiffs a clearer pathway to hold companies liable. Additionally, clarity in the mandated disclosures should “discourage firms from making misleading claims in the first place

156. See, e.g., William J. Hubbard, Allbirds’ Defeat of Consumer Class Action Offers Valuable Greenwashing-Avoidance Guideposts, WASH. LEGAL FOUND. (May 19, 2022), https://www.wlf.org/2022/05/19/publishing/allbirds-defeat-of-consumer-class-action-offers-valuable-greenwashing-avoidance-guideposts/ (emphasizing importance for companies to have factual support for their environmental assertions).

157. See Matt Mace, One in Five Cases of ESG RisksLinked to Greenwashing, EDIE (July 15, 2022), https://www.edie.net/one-in-five-cases-of-esg-risks-linked-to-greenwashing/ (citing data articulating most investors’ negative view of current environmental reporting). A PwC survey found that thirty-three percent of investors believe they see good-quality environmental reporting; and twenty-nine percent stated, “[c]urrent reporting adequately considers how ESG performance will impact a company’s bottom line.” Id. (indicating priorities for investors and consumers where environment-related assertions are concerned).

158. See Dahl, supra note 26, at A 250 (pinpointing likely harms greenwashing could cause).

159. See id. (highlighting why clear disclosures guidelines are beneficial for both companies and consumers).

160. Fisch, supra note 4, at 928-29, 940, 948 (arguing why both uniform methodology and specificity of environment-related disclosures are important for reporting accountability).

161. See Shanor & Light, supra note 10, at 2112 (emphasizing positive outcome for investors, consumers, and federal agencies should FTC require additional “climate risk” disclosures).

162. See id. (analyzing “gray area” in greenwashing litigation that updates to Green Guides might be able to clarify).
because they will lack the requisite ‘reasonable basis’ to do so.”

The goal of clarity might not be as simple as it appears, however, because often specialists calculate and describe the mandated disclosures, so the disclosures’ meaning is lost on the average novice who lacks expertise. Furthermore, presenting disclosures in a clear matter is complex: adopting a “line-item approach” is challenging because relevant sustainability issues might vary depending on the company and industry, but employing a “principles-based approach” makes it difficult to ensure accuracy and prevent low-quality or boilerplate disclosures.

The Dwyer opinion is one example of such complication because companies can calculate their carbon emissions using chosen categories for tools as well-established as the LCA. As such, there is now precedent that companies have flexibility in measuring and representing their environmental impacts. Additionally, while a company must disclose “material information,” the law does not necessarily oblige it to disclose other information a consumer may want to know to fully evaluate the company’s claims. The plaintiff in Lee successfully drew a sufficient inference about Canada Goose’s trapping practices; however, the Dwyer court’s unwillingness to entertain a similar inference about fraudulent intent indicates a narrowing application of consumer protection laws to greenwashing claims.

163. See id. (predicting updated Green Guides could prevent deceptive claims from the onset).


165. See Fisch, supra note 4, at 929, 951 (contrasting two common approaches to presenting information in reports).


168. See id. (presenting difficulty uninformed plaintiffs could face in bringing greenwashing lawsuits).

169. See id. (indicating importance of different interpretations of greenwashing claims in same district court); Dwyer v. Allbirds, Inc., 598 F. Supp. 3d 137, 149-50 (S.D.N.Y. 2022) (rejecting plaintiff’s fraudulent intent inference due to lack of pleaded facts).
A. State Initiatives

In terms of state initiatives, California is leading the way in attempting to clarify the environmental claims landscape. The California State Legislature has considered several bills with an environmental focus in the past couple of years, but not all have succeeded. One successful bill passed in 2021, “The Truth in Labeling for Recyclable Materials,” prohibits the use of the chasing arrows recycling symbol on non-recyclable products or packaging. From one perspective, the bill could effectively preclude companies from vaguely indicating to consumers that their products are recyclable when they are not. Alternately, replacement labeling without the chasing arrows symbol could confuse consumers, thereby increasing the amount of plastic in landfills. Furthermore, the bill creates many of the same problems as the existing laws surrounding greenwashing, as it does not provide a private right of action and creates difficulties for manufacturers who sell products inside and outside of California.

A bill specifically aimed at greenwashing, the “Climate Corporate Accountability Act,” failed to pass the California State Legislature by one vote. The bill would have required companies with annual


171. See id. (outlining successes and failures of California State Legislature in better regulating greenwashing).


174. See id. (describing how S.B. 343 aims to provide consumers with more accurate information about how to properly recycle products).

175. See id. (expressing limitations of bill in terms of effect on greenwashing litigation).

176. See S.B. 260, 2021 Leg., Reg. Sess. (Cal. 2021) (detailing failed Climate Corporate Accountability Act); see also Stephen Jenkins, Key Corporate Climate
revenues in excess of one million dollars to publicize their greenhouse gas emissions data “in a manner that is easily understandable and accessible.”\footnote{177} The bill’s mandated disclosures could have reached every part of a company’s supply chain and required independent, third-party verification.\footnote{178} One criticism of the bill, which will likely become a mainstay in the fight against greenwashing laws, is that much of the required emissions data is unreliable and does not have objective criteria.\footnote{179}

B. Agency Initiatives

Both the FTC and SEC are updating regulations related to greenwashing.\footnote{180} As of December 14, 2022, the FTC is requesting “public comment on potential updates and changes to the Green Guides.”\footnote{181} Also in 2022, the SEC issued the Enhancement and Standardization of Climate-Related Disclosures, which would expand the mandatory climate-related disclosures beyond the 2010 guidance requirements.\footnote{182} The updated guidance could require companies to reveal the “financial risk they face from climate change . . . [to] provide an effective counter to greenwashing.”\footnote{183}

\footnote{Accountability Bill Fails to Pass in California, JD SUPRA (Sept. 8, 2022), https://www.jdsupra.com/legalnews/key-corporate-climate-accountability-3692165/ (expressing governor’s desire to try to pass Climate Corporate Accountability Act for second time).}

\footnote{177. S.B. 260 (describing public disclosure requirements, which are similar to requirements in SEC’s proposed climate guidance).}

\footnote{178. See id. (listing mandated characteristics of greenhouse gas disclosures); Jenkins, supra note 176 (highlighting breadth of failed Climate Corporate Accountability Act).}

\footnote{179. See Jenkins, supra note 176 (articulating main criticism of California failed bill).}

\footnote{180. See Halper et al., supra note 23 (pointing to potential changes to current greenwashing regulation).}


\footnote{182. Halper et al., supra note 23 (indicating SEC’s reported plan to update its corporate disclosure guidance for avoiding deceptive advertising where climate change is concerned). See generally Proposed SEC Climate Disclosure Rule, BL (Aug. 15, 2022), https://pro.bloomberglaw.com/brief/proposed-sec-climate-disclosure-rule/ (introducing prospective changes to environmental data disclosure).}

\footnote{183. Huberman et al., supra note 166 (depicting possible goal for mandatory climate-related disclosure).}
1. FTC Proposals

The last revision to the Green Guides was nearly one decade ago.\textsuperscript{184} Environmental groups have called for the FTC to focus on two goals when revising the Guides: “(1) bringing clarity to the meaning of current contested or vague claims (what does ‘net zero’ mean, for example) and (2) detailing the sort of evidence that a firm must have . . . to substantiate certain claims.”\textsuperscript{185} Regarding the second goal, questions surround the methodologies by which companies should be allowed to calculate their plans for more sustainability, whether there will be guidance about the possibility of achieving these plans, and who between outside industry group or in-house may calculate metrics like a lifecycle assessment.\textsuperscript{186} Nevertheless, to ease much of the criticism the FTC is facing about overextending its power, the agency would need to make the Green Guides into legislative rules, which it cannot do without undergoing its extensive rulemaking process or absent a congressional mandate.\textsuperscript{187}

2. SEC Proposals

The big question going forward is how the SEC will view the materiality of its environmental-related disclosures, as some investors might be interested in a company’s nonfinancial or only somewhat financially-related information.\textsuperscript{188} Even those not concerned with these types of disclosures should see the utility in altering what the SEC views as “material” for investors, both for environmental claims and beyond.\textsuperscript{189} In the meantime, the SEC has indicated it may be more willing to enforce environmental-related claims with its newly created Climate and ESG Enforcement Task Force (Task Force), “responsible for overseeing ESG-related disclosures, investments, and compliance efforts by securities issuers and advisers.”\textsuperscript{190}

\begin{itemize}
\item \textsuperscript{184} See FTC Seeks Public Comment, supra note 181 (alluding to forthcoming updated Green Guides).
\item \textsuperscript{185} See Shanor & Light, supra note 10, at 2110-11 (outlining proposed changes to Green Guides).
\item \textsuperscript{186} See id. at 2111 (highlighting questions about upcoming possible changes to Green Guides).
\item \textsuperscript{187} See Rotman et al., supra note 57, at 442 (suggesting processes by which FTC could make Green Guides binding legislative rules instead of persuasive interpretive guidance).
\item \textsuperscript{188} Fisch, supra note 4, at 936 (noting possibility that investors want to invest in companies for reasons that are not purely financial).
\item \textsuperscript{189} See Special Report: ESG Under Strain, supra note 145 (contending investors might want to invest in companies that help female employees secure abortion services, for example).
\item \textsuperscript{190} Barton, supra note 69 (citing Press Release, U.S. Sec. Exch. Comm’n, SEC Announces Task Force Focused on Climate and ESG Issues (Mar. 4, 2021) (on file
Task Force’s first priority is to identify any misstatements or omissions in issuers’ environment-related disclosures under existing rules.\textsuperscript{191} The Task Force will also collect, review, and pursue whistleblower complaints on environmental and climate-related issues.\textsuperscript{192}

Furthermore, the proposed updates to the SEC’s 2010 corporate disclosure guidance would require public companies to publish their Scope One direct emissions, Scope Two emissions derived from their electricity needs, and Scope Three emissions arising from their supply chain in their annual filings.\textsuperscript{193} State attorneys general from California and New York have publicly endorsed the proposal.\textsuperscript{194} Scope Three is receiving the most significant criticisms but is arguably the most important, as it is generally a company’s largest contribution to global warming.\textsuperscript{195} Many commentators doubt the SEC’s power to promulgate rules requiring climate-related regulation to this magnitude and question whether mandatory disclosures infringe on First Amendment rights.\textsuperscript{196} They also question whether the existing disclosures and guidance need updating in the first place.\textsuperscript{197} Commentators further contend that the time and resources needed to produce the Scope Three disclosures would pose a problem to many companies, especially when the disclosures leave plenty


\textsuperscript{192} See Press Release, supra note 191 (describing effects Task Force might have on greenwashing litigation).

\textsuperscript{193} See Special Report: ESG Under Strain, supra note 145 (detailing SEC’s proposal for required information in securities filings).

\textsuperscript{194} See Huberman et al., supra note 165 (indicating support for mandatory climate-related disclosure from attorneys general, notably from states which have made efforts to increase environmental legislation).

\textsuperscript{195} See Eric Roston & Saijel Kishan, Five Key Takeaways From SEC’s Proposal for Climate Disclosures (Correct), BL (Apr. 8, 2022, 5:01 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/five-key-takeaways-from-secs-proposal-for-climate-disclosures (highlighting criticisms of SEC’s disclosure proposal). As companies could take advantage of a safe harbor from legal liabilities, the SEC proposed only mandating Scope Three-related disclosures if they are part of the company’s climate targets and information is not subject to third-party verification. Special Report: ESG Under Strain, supra note 145 (stating potential limitations placed on requirement to report certain environmental information).

\textsuperscript{196} See Roston & Kishan, supra note 195 (describing criticisms toward proposed mandatory climate change disclosures).

\textsuperscript{197} See id. (questioning why SEC cannot make use of its preexisting enforcement tools).
of opportunity for inconsistent and irrelevant information to be presented to shareholders.\textsuperscript{198}

Companies are concerned that the broadened scope of the proposed disclosure obligations will unfairly expose them to legal risks from investors and the government.\textsuperscript{199} They cite the additional opportunities for enforcement activity amidst the resources involved in obtaining the necessary information and preparing it for submission.\textsuperscript{200} Moreover, any additional detail required in public statements means investors will need to know how to interpret the disclosures and understand any limitations for them to be of any use.\textsuperscript{201}

Of equal importance, companies have yet to develop a standard for environmental data because it is challenging to calculate, inherently imprecise, and “reli[ant] on underlying assumptions that continually evolve . . . .”\textsuperscript{202} Nevertheless, it is reasonable to predict that more particularized disclosure requirements would lead to greater uniformity, and with more detailed information available, consumers and investors can better understand the data companies provide.\textsuperscript{203} One solution could be for companies to collaborate to standardize environmental data calculations and metrics, but this might cause antitrust issues because collaboration among competitors can be precompetitive.\textsuperscript{204}

Ultimately, there may not be a solution to eliminate the specificity required in analyzing potential greenwashing.\textsuperscript{205} This does not,
however, exclude further improvement in the standardization of environmental representations and disclosures. Agencies should work together to determine best practices and pressure Congress to grant increased federal oversight. Improved standardization would allow consumers and investors to feel more confident that they are spending their money responsibly. Meanwhile, as increased sustainability disclosures, straightforward advertising, and enforcement actions gain support, companies may experience heightened pressure to deliver more comprehensive and accurate disclosures, even in the absence of new regulations.

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206. See Cooper, supra note 102, at 434 (promoting standardization of methodologies as way to enhance reliability and effectiveness).

207. See id. (suggesting SEC model its guidelines after FTC’s Green Guides).


209. See Fisch, supra note 4, at 941 (articulating possibility for instances of greenwashing to decrease despite lack of changes to current regulations). For example, becoming benefit corporations, “whose pursuit of profit is subordinate to, or coextensive with, their mission to create a public benefit,” is one such method for companies to represent their environmental friendliness. Regina Robson, A New Look at Benefit Corporations: Game Theory and Game Changer, 52 AM. BUS. L.J. 501, 551-52 (2015) (contending success of b-corporations could push all companies to create public benefit in some way).

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