

Professional Perspective

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# Five Questions for Avoiding Greenwashing

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Allegations of greenwashing are all over the news. In many ways, this development was arguably inevitable. Many of the ESG and sustainability disclosures born over the past decade grew up in organizations' marketing, public relations, and investor relations departments.

However, we are now light-years from the days when a little corporate social responsibility or sustainability disclosure puffery was harmless. As ESG-related regulations continue to proliferate, and as investors' and the public's expectations continue to expand with respect to the scope of corporate responsibility, the legal arguments that can be made concerning the potential liabilities associated with ESG disclosures have also expanded.

The reality is we are in a very vulnerable time, where the clarity regarding potential ESG liability is likely far less than the exposure to that liability. ESG professionals should consider themselves subject to a number of duties, including the duty to both avoid and internally identify possible greenwashing issues. And we are now facing a world in which ESG professionals could face liability as "gatekeepers" for greenwashing or other ESG-related allegations.

While nothing is perfectly settled with respect to greenwashing claims, one of the key challenges in sussing out latent greenwashing issues internally is that the practice can arguably arise from more than one "gap" in an organization's ESG journey and story. For organizations to best identify the risks associated with budding greenwashing claims, they must first understand each of these potential "gaps" and create mechanisms for proactively addressing them.

1. **The gap between ESG/sustainability disclosures & corporate practice.** When people think of greenwashing, this is often what they imagine: a company saying it is doing something that it is not in fact doing. Whether the gap is the result of overenthusiastic puffery, inadequate internal controls, or something else, basically, the walk does not match the talk.

While this might have gone unnoticed or produced little concern in the past, a new day has dawned. The first question that organizations now need to ask whenever they disclose anything with respect to past or current ESG or sustainability efforts is: Are we actually doing this?

Ultimately, this means having the internal controls to make sure that disclosures align to provable practice, but it also means having policies around how ESG disclosures are created to begin with, including who is involved in their creation and approval. If your ESG or sustainability strategy speaks to an aspect of your organization—such as its investment strategies, operations, and risk management, to name a few—the people charged with the oversight of those aspects should be involved in determining how ESG practices are evidenced.

This means that, at a minimum, disclosure approvals should be required from each business unit implicated. Use of sub-certifications and disclosure policies, including policies that address recordkeeping, document retention, and internal audit considerations, are also appropriate and necessary.

2. **The gap between ESG goals and what is actually achievable.** Companies are increasingly feeling the pressure from multiple stakeholders to make commitments to a greener, more renewable future. But not all of the pledges, commitments, and goals are likely to be achieved on schedule.

When it comes to most of the global issues that fall under the ESG umbrella, we are likely further from understanding the full scope of what we are actually dealing with than we realize. The technology, infrastructure, and data we need to make it to the next step are still in progress. So, the second question organizations need to ask whenever they make any future ESG or sustainability commitments is: Can we actually achieve this?

Measuring what can actually be achievable means creating a clearly articulated plan that considers both the risks to which the plan is exposed and the assumptions included in the plan. For example, does your next zero or carbon neutrality plan assume the continued availability of certain technologies, assets, or resources, or access to new energy sources; does it consider how energy costs may change in the future? Does your plan to improve worker conditions require the performance of certain suppliers and sub-suppliers?

3. **The gap between what the company is doing, and what it can prove.** As Denzel Washington said in *Training Day*, “It’s not what you know, it’s what you can prove.” Even if a company has been delivering on its ESG and sustainability efforts internally, and even if that company can ultimately deliver on its ESG and sustainability goals, if it cannot prove that it has been delivering or can deliver, it may be out of luck. This brings us to the third question that organizations need to ask whenever they disclose anything about ESG or sustainability matters: Can we actually prove this?

Ultimately, any enforcement action or potential litigation is going to come down to what the organization can prove, and that means paperwork. As discussed above, ESG frequently depends on the boring stuff: internal controls, document retention, sub-certifications and verification, document controls, effective materiality mapping, and internal auditing. This means getting all of your relevant teammates on the same page and all of your document ducks in a row.

4. **The gap between what the company is doing and what regulatory bodies expect.** Many regulatory bodies worldwide expect companies to have the answers when it comes to ESG and sustainability. More than one regulatory body seems to hope that corporations have the financial resources, data, impetus, and options for collaboration to create something that governments have failed to—a unified and consistent approach to our world’s most complex problems.

This means it might not just be a businesses’ investors, employees, customers, competitors, and communities asking the company to speak to complex systemic issues, but also the company’s regulators. Regulators may not be explaining everything they hope for when it comes to new and evolving regulation, but that does not mean that their hope fails to spring eternal. For this reason, the fourth question organizations need to ask whenever they disclose anything about ESG or sustainability matters is: Are we actually ready to talk to our regulators about this?

Answering this question means talking to your ESG lawyers, as self-serving as that might sound. Ultimately, this is a legal strategy question. Your ESG lawyers need to understand your full scope of potential regulatory risk, which means considering all of your areas of potential material legal exposure that could be implicated by your ESG disclosures. Sophisticated ESG counsel is spending time thinking through not just how regulators are currently engaging on ESG issues, but how they are likely to engage in the future.

5. **The gap between ESG today and ESG tomorrow.** ESG will hit a series of challenges soon that will require it to evolve. In the interim, companies are having to address the ESG expectations of tomorrow, today. Without a doubt, this creates potential liability, as facts and the materiality of those facts are always assessed with the benefit of hindsight.

Addressing the ESG expectations of tomorrow requires companies to embrace a level of dynamic materiality that US securities laws have yet to clearly address—setting the SEC’s proposed climate change disclosure regulations to one side. As such, the fifth question organizations need to ask whenever they disclose anything about ESG or sustainability matters is: Are we prepared for whatever all of this is actually going to look like tomorrow?

This might seem to be the most challenging of the tasks this article sets for organizations—looking into the future. However, ultimately this is what ESG is designed to do: always asking the hardest questions in the room. If you want to know where ESG will be tomorrow, ask yourself this: What are the issues our society is facing that are the most uncomfortable, or the most likely to spark debate or, worse yet, silence? What are the issues we completely avoid addressing or that drive the deepest wedges between family members, neighbors, and coworkers? If you are drawing a blank, ask your ESG lawyer. And then make a plan.