# Too green to be true: When a well-intentioned statement creates a world of risk

In today's increasingly environmentally conscious world, businesses are quick to capitalize on the growing demand for sustainability. However, amidst the hustle for eco-friendly practices, an unfortunate trend has emerged: greenwashing. As we delve deeper into the complexities of greenwashing, it becomes crucial to navigate this maze of half-truths and identify the true champions of environmental management.

*"We will be carbon neutral by 2030."*

*"This project will be self-sustaining, and fuelled entirely by sustainable sources."*

*"Our products are 100% ethically sourced."*

Statements like these have been the subject of regulatory intervention under anti-greenwashing rules. On one hand, they appear to be earnest statements, demonstrating a company's commitment to sustainability. On the other hand, they could be well-intentioned, but perhaps a bit cavalier or hollow in their aspirational approach. At the extreme, they could pose as simply cynical and even deceitful. These are just a few examples of the types of statements that could be central to greenwashing actions.

**An overview**

**What is greenwashing?**
Greenwashing refers to the intentional practice of deceiving, misleading, or confusing consumers and investors by presenting a company, initiative, or product as environmentally or socially friendly, or claiming specific environmental or social benefits or impacts when those claims are in fact questionable.

**Why does greenwashing matter?**
Greenwashing is significant for several reasons. Environmental, social, and governance (ESG) investing is rapidly growing; indices, rating agencies, investors, and funds are increasingly focusing on ESG-mandated investment strategies. According to Deloitte's projections, by 2024, approximately US$80 trillion, which represents half of the global assets under professional management, will be ESG-mandated.[1] This shift indicates a strong demand for investments that align with sustainability objectives.

Similarly, consumers and businesses make marketplace decisions that can be influenced by the same social or environmental consciousness. According to a 2023 YouGov survey in the UK, where consumer spending is approaching US$2 trillion per year, "a majority of consumers take into account environmental (66%) and social factors (70%) when making a purchase decision."[2] Incidentally, those numbers rise to 78% and 79% respectively for consumers in the UAE.[3]

Given the substantial amount of investment and consumer capital directed towards sustainable targets, it is increasingly crucial for companies to establish their sustainability credentials. Whether they are seeking investment capital, or aiming to capture consumers' attention, defining themselves in sustainability terms has become imperative. The question then becomes: Are their sustainability-related claims accurate? If these claims are false, are they intentionally and knowingly misleading, intended to deceive consumers or manipulate the markets?

**How are allegations likely to surface?**
Companies operating in today's globally-integrated markets have a wide range of stakeholders, including consumers, clients, employees, vendors, investors, regulators, governments, civil society organizations, NGOs, and even competitors. These stakeholders can be dispersed across multiple countries, resulting in a diverse and expansive stakeholder landscape. Whistleblowers can emerge from any corner of this complex network of stakeholders.

The nature of greenwashing allegations, and the manner in which they arise, can significantly impact the approach taken during an investigation.

A greenwashing allegation can carry serious consequences. It is subject to formal regulation by securities regulators who seek to protect the accuracy and reliability of market information, the potential threat of civil litigation from environmental groups or NGOs, and informally by the markets and consumers. Several regulators have emphasized that tackling greenwashing is already a priority on their enforcement agenda, with an increasing focus going forward.

It should be noted that for any company with connections to the US, the Dodd-Frank Act and the SEC Whistleblower Program provide incentives for potential whistleblowers to report serious allegations of corporate wrongdoing directly to regulators. If allegations are proven valid, the whistleblowers may be eligible for 15-30% of the fines or sanctions levied by the regulator. It is important for overseas branches and non-US companies to be aware that the reach of US regulators extends globally, and therefore, should not disregard the potential applicability of these regulations to their operations.

This underscores the urgency for companies to have strong internal whistleblowing policies that promote and protect good faith internal reporting. A whistleblower is more likely to go straight to the authorities (regardless of any reward) if they do not feel safe from retaliation or feel that they are not being taken seriously internally.

**What happens next? How and what should be investigated?**
The answer to this depends on the nature of the allegation. Is it an unsupported statement made to the markets which has attracted scrutiny from regulators or whistleblowers? Alternatively, does it involve deeper issues, such as allegations of cover-ups regarding environmental, social, or governance-related violations that challenge a company's stated ESG agenda? The course of action would vary for each scenario, however, in both cases, two aspects will need to be addressed:

1. Accuracy of the allegation: Is there an issue that needs to be addressed?
2. What is the severity of the issue and who is involved?

Taking the first scenario into consideration, where a company has allegedly made an unsupported ESG-related statement to the markets, there are some aspects to consider:

**The intention behind it:** Is it a benign, aspirational statement or a commitment to a specific outcome? This can be determined from the statement itself, for example, a general statement on a website such as "our company is committed to a more sustainable and just future" may not carry as much regulatory risk as a fund prospectus making misleading or unsubstantiated claims about the ESG credentials of its investment portfolio.

**The substance of the statement:** Is it reasonable and supportable? This question is quite complex and requires subject matter expertise in the relevant fields. An independent expert should be instructed to review the substance of the statement from a technical standpoint and try to answer questions around topics such as: Is the statement technically feasible? Has the company conducted relevant studies to support it? Has the company made tangible progress towards that goal? Has it developed key considerations such as regulatory approval, project financing, etc.? Is there a defined program to deliver the stated outcome with timeframes, contingency plans, and risk assessment?

**The company's seriousness about ESG:** Does it demonstrate commitment and purpose? This pertains to the overall quality of the ESG program and the compliance apparatus around it. The considerations could be two-fold. Firstly, are the allegations arising despite the company's best efforts to live by its ESG commitments or is it simply a mistake or a bad apple? Secondly, if there is a penalty or fine arising from the violation, the company's ability to demonstrate the quality and rigor of its ESG program could help it reduce penalties.

After considering the aforementioned points, the company will be in a better position to evaluate whether it has a greenwashing issue to be concerned about or not. If so, and the matter has the prospect for regulatory action or civil litigation, there may be a requirement to disclose the matter to the government regulator, depending on the jurisdiction. This can make it essential for the company to establish legal privilege over the investigation, which is typically achieved by instructing external legal counsel to oversee the investigation process. Further investigation should then be conducted to understand the knowledge and intention of the individuals involved, the timeline of associated events, as well as the benefits earned, following an established, robust process similar to other business conduct investigations.

ESG is serious business, and is being taken seriously by investors, society, and increasingly by regulators. As companies embrace the benefits of aligning themselves with the sustainability movement, they need to be cognizant of the risks of letting their words move faster than their actions.

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**Endnotes**
1. https://www2.deloitte.com/us/en/insights/industry/financial-services/esg-investing-and-sustainability.html.
2. https://business.yougov.com/content/7678-global-market-analysis-esg-importance-consumer-purchase-decisions.
3. https://www.macrotrends.net/countries/GBR/united-kingdom/consumer-spending.