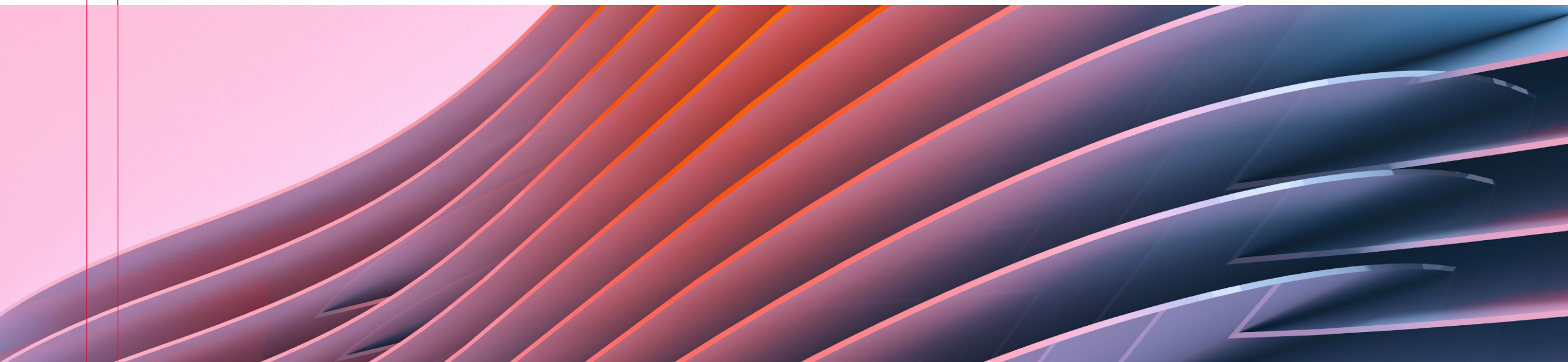




MAY 7, 2024

ESG Hot Topics



Panelists



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Case Study





EVERLASTING MULTIPOWER

#1

What We Know About Everlasting Multipower

- Everlasting's holding company is based in Luxembourg with a headquarters in Birmingham, England.
- Its net profit in FY 2023 was \$1 billion.
- Everlasting employs 1,000 employees in England and 80 employees in California.
- Its "EVER" stock trades on the NYSE.
- Everlasting describes its engines as creating "almost no air pollution."
- Everlasting has a \$75 million agreement with the U.S. DoD.
- Everlasting has delivered vehicles to consumers in New York, California, Texas and Florida.





What Potential Legal Risks Are There?



Federal & State Climate-Related Disclosure Laws

what are the scopes of carbon emissions?



scope 1

GREENHOUSE GAS EMISSIONS

Scope 1 emissions are direct greenhouse (GHG) emissions that occur from sources that are controlled or owned by an organization (e.g., emissions associated with fuel combustion in boilers, furnaces, vehicles).

SOURCE: EPA.GOV



SCOPE 1
Direct Emissions from Reporting Company



SCOPE 2
Indirect Emissions from Upstream Activities

GREENHOUSE GAS EMISSIONS

Scope 2 emissions are indirect GHG emissions associated with the purchase of electricity, steam, heat, or cooling and are a result of the organization's energy use.

SOURCE: EPA.GOV



SCOPE 3

Indirect Emissions from

Upstream Activities
Purchased Goods & Services
Capital Goods
Fuel & Energy Related Activities
Transportation & Distribution
Waste Generated in Operations
Business Travel
Employee Commuting
Leased Assets
and...

Downstream Activities
Transportation & Distribution
Processing of Sold Products
Use of Sold Products
End-of-Life Treatment of Sold Products
Leased Assets
Franchises
Investments

Scope 3 emissions are all indirect emissions (not included in scope 2) that occur in the value chain of the reporting company, including both upstream and downstream emissions.

SOURCE: EPA.GOV



Requirements	SEC Final Rule (Currently Stayed)	California Laws	CSRD
Form of Disclosures	In registration statements, annual reports & audited financial statements	One annual report on emissions; one report on risks every other year	Annual report "Equivalent" report as substitute
Data Reported	Material Scope 1 and 2 emissions, climate-related risks, any activities "to mitigate or adapt to a material climate-related risk," processes and oversight over "assessing and managing" those climate-related risks and climate-related targets or goals that have or reasonably likely to materially affect the business	Scope 1, 2 and 3 emissions, climate-related risks, and measures to reduce them	Extremely broad: covers 12 standards that cover all aspects of sustainability reporting
First Disclosures	LAFs-2025/emissions-2026; AFs-2026/emissions-2027; others-2027	2026	2025 and later
Which companies does it affect?	Scope 1 & 2 emissions disclosure--Large Accelerated Filers and Accelerated Filers only; other disclosures generally applicable to SEC reporting companies	Public and private firms operating in CA making more than \$1 billion or more than \$500 million per year	All companies with securities listed on an EU-regulated market; "large" EU companies that are not listed; EU companies that are parent of a "large group" and not listed
Third party verification required?	Yes for Scope 1 & 2 disclosures	Yes	Yes
In line with GHG Protocol/TCFD?	Partially modeled on GHG Protocol & TCFD	Yes	Yes
Materiality	Single materiality (company effects only)	Double (company and the environment) materiality for SB261	Double materiality
Penalties	Registration statements—company strictly liable to purchasers for material misstatements/omissions; directors and officers liable subject to due diligence defense. Annual reports—claims are generally fraud-based	Fines up to \$500,000 per reporting year for failing to meet requirements, up to \$50,000 for inadequate report	Individual member states will have 18 months to phase-in CSRD criteria into laws. Specific EU countries will set their own enforcement and penalty rules
Any safe harbors?	Forward-looking statement protection for disclosures of transition plans, scenario analyses, the use of internal carbon prices, targets and goals	Yes, the only penalties on Scope 3 disclosures before 2030 are for not filing	Same as penalties




SEC Final Climate Rules Common Disclosures

- The disclosures must be filed via annual reports on Form 10-K or 20-F or registration statements; and not by merely posting them on a corporate website.
- The rules require, among other things, the disclosure of:
 - Climate-related risks that “have had or are reasonably likely to have a material impact” on the business strategy, operations’s results or financial condition;
 - “[A]ctual and potential material impacts” of the identified climate-related risks on the “registrant’s strategy, business model, and outlook”;
 - Activities “to mitigate or adapt to a material climate-related risk,” including any transition plans, scenario analyses, or internal carbon prices;
 - A quantitative and qualitative description of incurred material expenditures and impacts on financial estimates and assumptions that directly resulted from “mitigation or adaptation activities”;
 - Board of directors and management’s oversight over “assessing and managing the registrant’s material climate-related risks”;
 - Processes for identifying, assessing, and managing material climate-related risks as well as whether and how such processes are integrated into the registrant’s overall risk management system and processes;
 - Any climate-related targets or goals that have “materially affected or are reasonably likely to materially affect” the business, operations’s results, or financial condition.
- Unlike in the draft proposed rules, companies do not need to disclose whether their board members have climate expertise.




Proposed FAR: Disclosure of Greenhouse Gas Emissions & Climate-Related Financial Risk

- The largest federal suppliers/contractors including receiving more than \$50 million in annual contracts would be required to publicly disclose:
 - Scope 1, Scope 2, and relevant categories of Scope 3 emissions;
 - Climate-related financial risks; and
 - Set science-based emissions reduction targets.
- Federal contractors with more than \$7.5 million but less than \$50 million in annual contracts would be required to report Scope 1 and Scope 2 emissions.


Administration

NOVEMBER 10, 2022

FACT SHEET: Biden-Harris Administration Proposes Plan to Protect Federal Supply Chain from Climate-Related Risks


BRIEFING ROOM
STATEMENTS AND RELEASES

Proposed rule to improve efficiency and reduce financial risks from climate change

Today, the Biden-Harris Administration is taking historic action to address greenhouse gas emissions and protect the Federal Government's supply chains from climate-related financial risks. In support of President Biden's Executive Orders on *Climate-Related Financial Risk* and *Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability*, the Administration is proposing the *Federal Supplier Climate Risks and Resilience Rule*, which would require major Federal contractors to publicly disclose their greenhouse gas emissions and climate-related financial risks and set science-based emissions reduction targets.



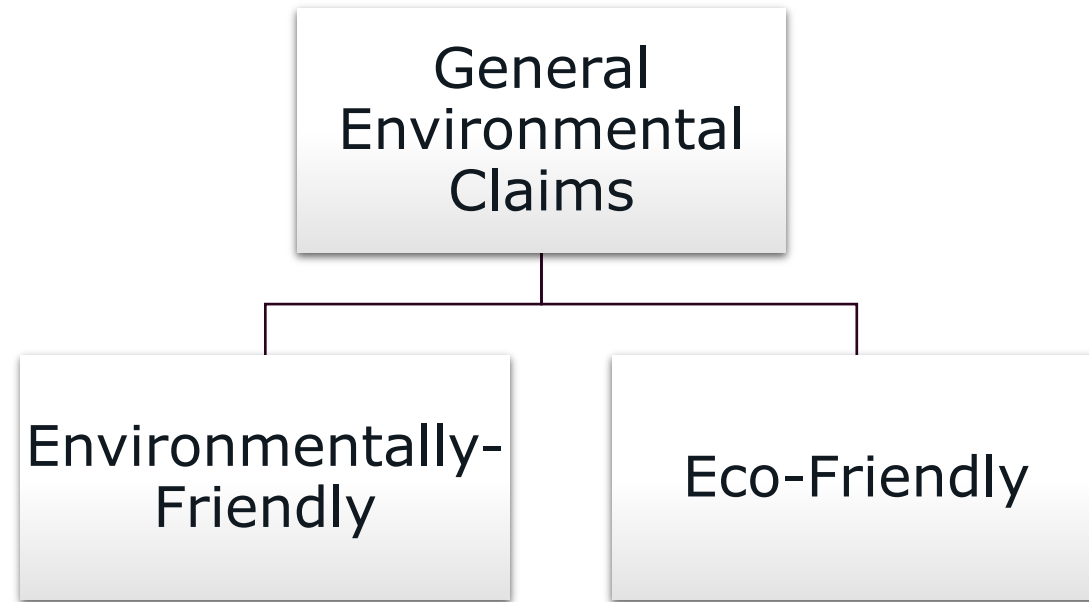
Advertising & Marketing Claims

Advertising Clearance & Substantiation

Two Questions to Ask Before Running Any Ad:

1. What claims — express *and* implied — does my ad convey to reasonable consumers?
2. Do I have substantiation for all claims reasonably conveyed?

General Environmental Claims



“Because it is highly unlikely that marketers can substantiate all reasonable interpretations of these claims, **marketers should not make unqualified general environmental benefit claims.**” 16 C.F.R. § 260.4(b) (2012)

Substantiating General Environment Claims

- **QUALIFY THE CLAIM**
- Do “not imply that any specific benefit is significant if it is, in fact, negligible.”
- Substantiation for a specific environmental attributes will not adequately qualify a general environmental benefit claim if the ad otherwise implies deceptive claims.
- Analyze trade-offs.
- Remember that context is important.



EVERLASTING MULTIPOWER

#2

What We Know About Everlasting Multipower

- Everlasting's 2022 & 2023 ESG Reports reference how it will be "net zero" and "carbon neutral" by 2028.
- Everlasting promotes on its UK-based website how the vehicles are "environmentally friendly" and "reliable."
- Everlasting's USA-based website (everlasting.com) links to the UK website.
- Everlasting also promoted its commitment to science-based targets.
- Everlasting detailed its commitment to diversity, equity, and inclusion including completing a pay equity analysis, instituting benchmarks on inclusive hiring, and ethical sourcing of materials and labor.





What Potential Legal Risks Are There?



Legal Risks Surrounding ESG Disclosures

Potential Legal Risks Surrounding ESG Disclosures



GOVERNMENT ENFORCEMENT

- SEC Regulatory Compliance
- International Regulatory Compliance
- State Regulatory Compliance
- Federal and State Consumer Protection Laws
- False Claims Act
- Fraud



SHAREHOLDER ACTIONS

- Directors & Officers Litigation
- Breach of Fiduciary Duty
- Misleading the Market
- Making False Statements
- Derivative Actions
- Shareholder Proposals
- Vote-No Campaigns



CONSUMER ACTIONS

- Product Liability
- Discriminatory Practices
- Breach of Unfair Competition Statutes
- Breach of Consumer Protection Laws
- Unfair Trade Practices
- False Advertising



BUSINESS LITIGATION

- Breach of Contract
- Fraud
- Alternative Dispute Resolution



Advertising & Marketing Claims

Science-Based Targets

Of the companies that committed to reduce GHG, 54.5% use Science-Based Targets

- Science-Based Targets provide companies with a clearly-defined path to reduce emissions in line with the Paris Agreement goals.
- Targets are considered 'science-based' if they are in line with what the latest climate science deems necessary to meet the goals of the Paris Agreement – limiting global warming to 1.5°C above pre-industrial levels.



World's biggest firms failing over net-zero claims, research suggests



World's biggest companies accused of exaggerating their climate actions

Zeroing in on greenwashing: How corporations misuse net zero pledges



Net Zero By 2050? Don't Plan on It

WSJ | OPINION

What is net zero?

Targets that are easier set than done



Are "net-zero" climate targets just hot air?



Carbon Claims – Be Wary

- Carbon claims require very specific disclosures.
- Just a few cases in this area and not directly addressed in the current Green Guides but certainly an area of focus.
- No uniform definition of “carbon neutral” or “net zero.” What does the consumer think it means?
- Be careful with using voluntary carbon offsets to substantiate. Issues with third party certifications.



Social Initiatives

Diversity Equity & Inclusion

- In *Students for Fair Admissions, Inc. v. Harvard/UNC*, the Court held that it is unconstitutional under the U.S. Constitution's Equal Protection Clause (as it relates to public institutions) and a violation of Title VI of the Civil Rights Act of 1963 (as applicable to private institutions accepting federal financial assistance) for colleges and universities to consider race as a factor in the admissions process.
- After the Supreme Court's decision and in response to President Biden's executive order, the U.S. Department of Commerce introduced a Business Diversity Principles (BDP) Initiative to promote "inclusive capitalism and equitable economic growth for all Americans."
 - The Initiative aims to guide private sector companies in incorporating DEI.
 - Specifically, it wants employers to "strive" for diverse C-suites and corporate boards, maintain a diverse talent pipeline and create an inclusive supply chain.
- Employers should continue to ensure that their employment and supplier decisions are made based on legitimate business reasons; not race or other protected characteristics.



U.S. DEPARTMENT OF COMMERCE

BUSINESS DIVERSITY PRINCIPLES

Each of the following six principles presents a set of strategies and objectives aimed at promoting equity and economic development. These principles function as an organizational framework for best practices and offer clear actions that institutions can take to drive equity, innovation, and economic growth.

Executive Leadership: Strive for diverse C-suites and corporate boards by developing clear strategies to increase diversity among the organization's executive ranks. Understand and break down barriers to executive roles for internal and external candidates. Ensure leaders model equitable and inclusive behavior and possess key competencies, such as empathy, cultural competence, and inclusive leadership. Ensure leaders have the necessary resources to drive business diversity efforts, such as toolkits, research, and access to DEIA professionals. Recognize leaders' commitment to Business Diversity and hold them accountable through performance evaluations and compensation.

Organizational Strategy: Use comprehensive assessments to evaluate the current state of Business Diversity within the organization, including demographic data across all levels and departments, company policies, practices, and workers' perceptions. Develop and maintain DEIA councils, which oversee the implementation of Business Diversity initiatives and ensure alignment with overall company objectives. Regularly share progress updates to promote transparency and accountability.

Workforce Development: Cultivate and maintain a diverse talent pipeline by partnering with educational institutions and community organizations and allocating resources for workforce development initiatives and accommodations. Remove barriers to entry, using demographic data to understand workforce composition, identify gaps, and shape organizational strategy. Equip workers, including those from underserved communities, with the necessary skills for advancement.

Human Resources: Prioritize the promotion of internal talent, regularly review promotion data to identify barriers, and provide senior leader sponsors for workers from underserved communities. Establish and maintain employee resource groups for workers from underserved communities. Clearly communicate potential internal career paths and advancement opportunities. Foster work-life balance through HR policies, such as flexible working arrangements, comprehensive parental leave, support for caregivers, and inclusive benefits packages.



Examples of Supply Chain Disclosure Laws

Fighting Against Forced Labour and Child Labour in Supply Chains Act (Canada)

Modern Slavery Act (UK)

Swiss Code of Obligation

Duty of Vigilance Law (France)

Uyghur Forced Labor Prevention Act (U.S.)
California's Climate Corporate Data Accountability Act (U.S.)
California's SB 261 on Climate-Related Financial Risk Reports (U.S.)
Proposed FAR Revision on Climate-Related Financial Risk (U.S.)*
Supply Chain Act (LkSG) (Germany)

Respect for Human Rights in Responsible Supply Chains Guidelines (Japan)*

ILO Conventions 29 & 105 (Brazil)

Modern Slavery Act (Australia)

Corporate Sustainability Due Diligence Directive (EU CSDDD)*
Corporate Sustainability Reporting Directive (EU CSRD)



Uyghur Forced Labor Prevention Act

- UFLPA became effective in June 2022.
- There is a rebuttable presumption that goods from the Xinjiang region or produced by certain entities are presumed to be made by forced labor, and are not entitled to entry into the U.S.
- The presumption applies unless CBP determines that the importer of record has complied with specified conditions and, by **clear and convincing evidence**, that the goods were not produced using forced labor.


THE WALL STREET JOURNAL

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Adria Douglas ▾

U.S. Lawmakers Press Customs on Enforcement of Uyghur Forced Labor Law

A group of Republican lawmakers want U.S. Customs to answer questions on its enforcement of a law that restricts the importation of goods from China's Xinjiang region



A cotton field in China's Xinjiang region.
PHOTO: CHEN YANG/SIPA ASIA/ZUMA PRESS

By [Richard Vanderford](#) [Follow](#)
Sept. 1, 2022 8:23 pm ET

American Express Executive: Take an Intentional Approach to Work and Life
Stacy Poritzky, vice president of strategic marketing partnerships at American Express, discusses how she integrates her personal and professional priorities over time.

Lessons From the Field: Fast-tracking the Path to Net Zero

In a Season of Uncertainty, Back-to-School and Back-to-College Spending Surge

CONTENT FROM OUR SPONSOR: DELOITTE
The Wall Street Journal news department was not involved in the creation of this content.

Deloitte

Source: <https://www.wsj.com/articles/u-s-lawmakers-press-customs-on-enforcement-of-uyghur-forced-labor-law-11662078197>



What Has Happened Since the UFLPA's Enactment?

- From enactment to May 3, 2024, the CBP has denied 3,262 shipments worth \$3.17 billion.
- The detained goods originated from countries other than China (11%):
 - Malaysia (46%);
 - Vietnam (29%); and
 - Thailand (13%).
- Types of seized goods:

Polysilicon (to make solar panels)	Lead-acid or lithium-ion batteries	Downstream products of vinyl, copper, aluminum & steel
Agricultural products	Automobile and aerospace components	Electronics
Apparel, footwear & textiles	Pharmaceuticals	Chemicals





EVERLASTING MULTIPOWER

#3

What We Know About Everlasting Multipower

- The CEO promoted how Everlasting continues to invest in being “net zero” and “carbon neutral” despite the complexity in calculating Scope 3 emissions.
- The CEO shared how Everlasting is increasing its global operations by building more factories and assembly plants outside of England.
- Everlasting should complete construction on the first round of three factories by 2026.
- Influencers consistently post about how environmentally friendly and innovative Everlasting’s hydro vehicles are.
- They shared that these posts are not ads.





What Potential Legal Risks Are There?



Advertising & Marketing Claims

Aspirational Claims



Aspirational Claims: JBS Holdings, NAD Case Report #7135 (Sept. 2020)

WHAT THEY CLAIMED

- “Company is committing to be net zero by 2040.”
- “Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040”
- “Food with net zero emissions. It’s possible.”
- “Leading change across the food industry and achieving our goal of net zero by 2040 will be a challenge. Anything less is not an option.”

WHAT THEY DID

- Signed a contract with company to help create a net-zero plan
- Issued a \$1 Billion sustainability bond linked to net-zero goals
- Partnered with universities to study supply chain to address Scope 3 reductions and develop methods to reduce GHG emissions
- Signed agreement to purchase carbon offsets

Aspirational Claims: JBS Holdings

NAD: Good evidence of plan and significant preliminary investment

BUT

The plan is not being implemented NOW

Takeaway: Company should have specific, current plan that it is actively implementing to achieve a given goal prior to advertising the aspirational claim.

“An aspirational ‘net zero’ claim reasonably creates high expectations on the part of consumers and requires significant evidence that the advertiser’s efforts are providing environmental benefits with a very specific measurable outcome.”

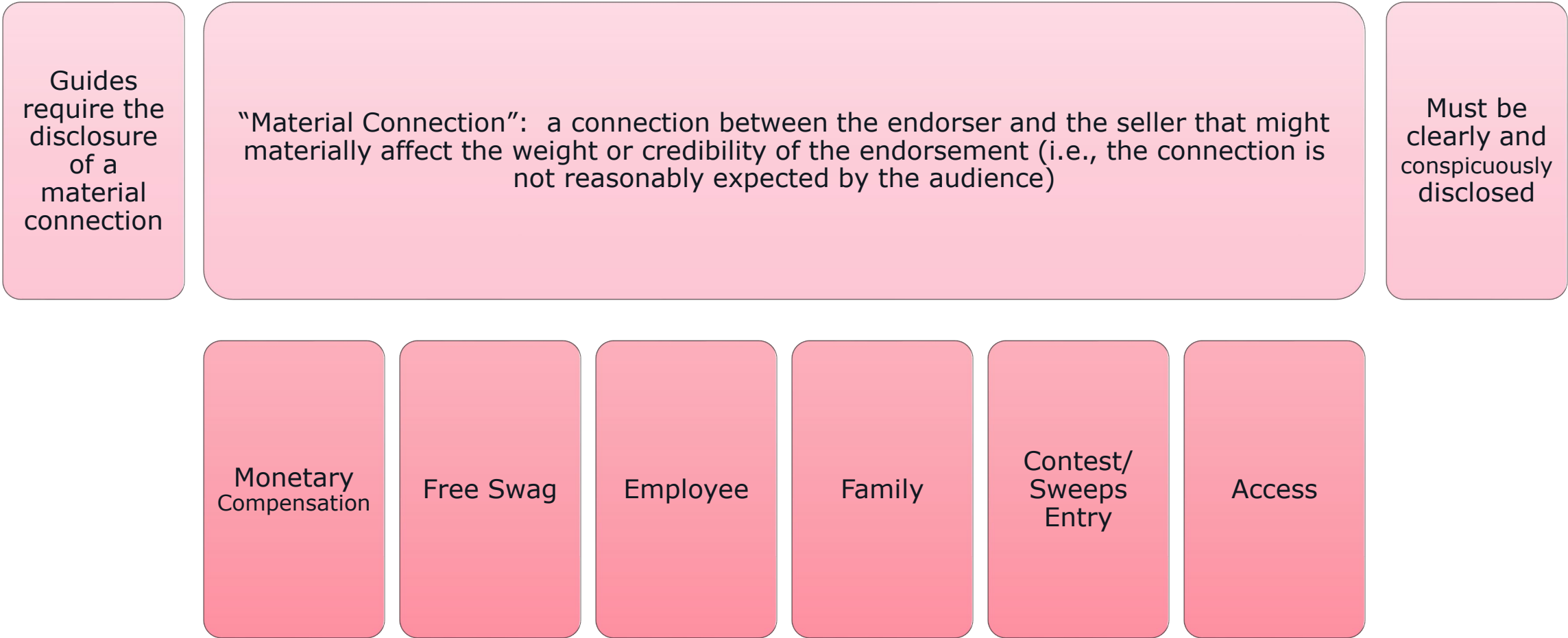
National Advertising Review Board recently affirmed NAD Decision.

Aspirational Claims: JBS Holdings

NY AG Steps Up to the Plate:

- On February 28, 2024, New York state Attorney General Letitia James sued JBS in state court for allegedly misleading the public about a pledge the company made to slash its climate pollution in the coming decade.
- Prosecutors said JBS continued making deceptive marketing claims even NAD recommended the company stop advertising because it didn't have a strategy to achieve its climate target.
- Prosecutors said that even if JBS had developed a plan, the company couldn't "feasibly" deliver on its climate commitment. The state said there aren't proven ways right now to zero out agriculture emissions at the scale of JBS's operations, and offsetting the company's emissions with things like carbon credits "would be a costly undertaking of an unprecedented degree."

Influencers & Material Connections



Influencers & Material Connections

FTC v. CSGO Lotto: Sept. 2017

- Settlement with 2 influencers
- Influencers did not disclose that they owned the company that produced the video game
- Also paid other influencers \$2,500-\$55,000 to promote the game, but contractually prohibited influencers from saying anything negative about the game
- Same Day: FTC announced having sent 21 influencers warning letters for failing to disclose material connections.



Influencers & Material Connections



NOT JUST THE FTC

DJ Khaled and Floyd Mayweather Jr. settled with SEC – alleged violation of the anti-touting provision of the federal securities laws.

Failed to tell their social media followers that they received money for promoting investments in Initial Coin offerings (“ICOs”).

Examples:

- DJ Khaled received a \$50,000 payment referring to Centra’s ICO as a “Game changer” on various social media accounts.
- Mayweather received a \$300,000 payment tweeting that Centra’s ICO “starts in a few hours. Get yours before they sell out, I got mine . . .”
- Mayweather allegedly failed to disclose his relationship with two other ICOs that paid him \$200,000 for posts such as, “You can call me Floyd Crypto Mayweather from now on.”

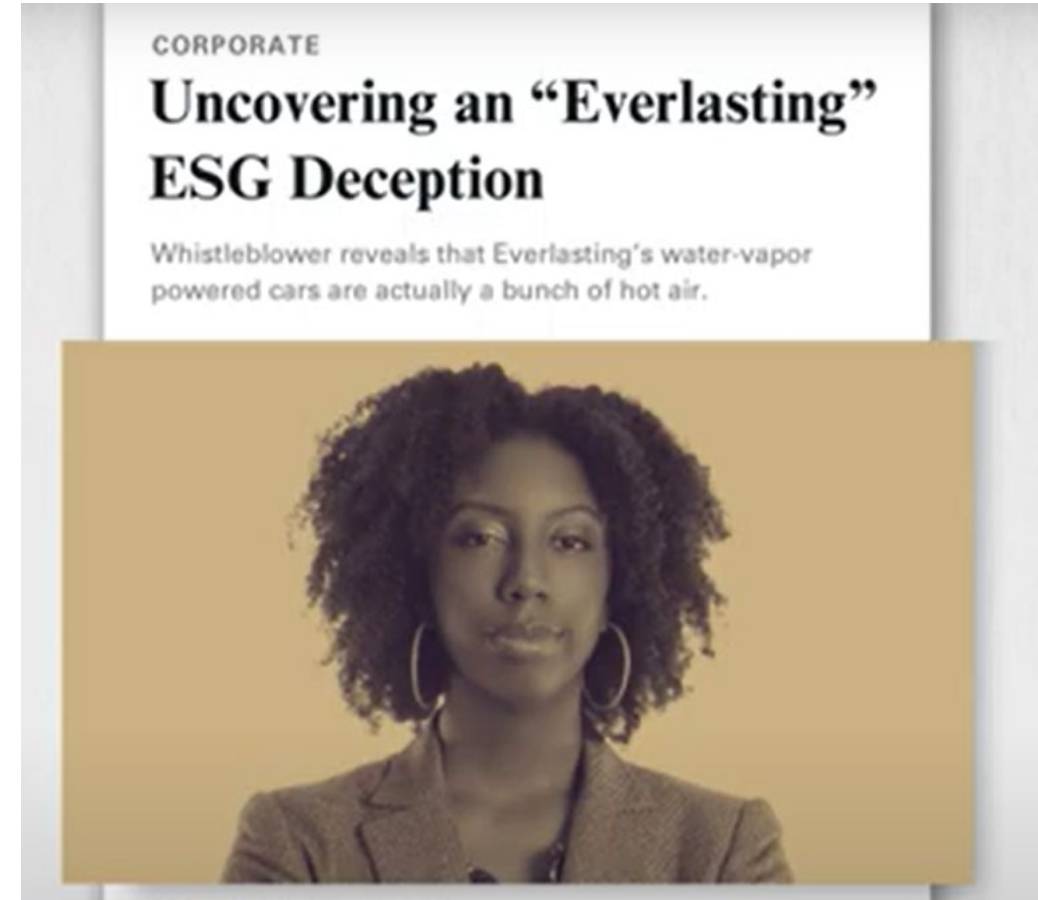


EVERLASTING MULTIPOWER

#4

What We Know About Everlasting Multipower

- Everlasting's former Chief of Sustainability claims:
 - Everlasting's engines do not use water as fuel;
 - The engine's gas chamber powers the vehicles at least 85% of the time;
 - Everlasting did not disclose that it signed an agreement to purchase verified emission reductions or carbon offsets; and
 - Everlasting is not sure how to measure Scope 3 emissions, so it has provided projected estimates on the emissions levels it hopes to reach by the time its mandatory and voluntary disclosures are published.





What Potential Legal Risks Are There?



Government Enforcement Risks

Reporting Risks: Vale S.A. & DWS Group

Vale S.A.

- A year ago, Vale paid \$55.9 million to resolve the company's allegedly false and misleading disclosures about the safety of its dams.
- In the press release, the Associate Director of the SEC's Division of Enforcement explained: "Our action against Vale illustrates the interplay between the company's sustainability reports and its obligations under the federal securities laws...[and] demonstrate[s] that public companies can and should be held accountable for material misrepresentations in their ESG-related disclosures, just as they would for any other material misrepresentations."

DWS Group

- Last September, Deutsche Bank investment adviser sub DWS agreed to pay \$19 million for ESG misstatements.
- The SEC explained that, although DWS "marketed itself as a leader in ESG that adhered to specific policies for integrating ESG considerations into its investments," DWS failed to adequately implement certain provisions of its policy.
- The SEC also alleged that DWS also failed to adopt and implement policies and procedures reasonably designed to ensure that its public statements about the ESG integrated products were accurate.



SEC Climate Change Comment Letters

- Inconsistencies between a company's corporate social responsibility report and its SEC filings
 - Example: "We note that you provided more expansive disclosure in your corporate social responsibility report (CSR report) than you provided in your SEC filings. Please advise us what consideration you gave to providing the same type of climate-related disclosure in your SEC filings as you provided in your CSR report."
- Lack of disclosure in SEC filings of risks, trends, and impact of climate change
 - Example: "Disclose the material effects of transition risks related to climate change that may affect your business, financial condition, and results of operations, such as policy and regulatory changes that could impose operational and compliance burdens, market trends that may alter business opportunities, credit risks, or technological changes."
- Lack of disclosure in SEC filings related to climate-related legislation and regulations
 - Example: "There have been significant developments in federal and state legislation and regulation and international accords regarding climate change that you have not discussed in your filing. Please revise your disclosure to identify material pending or existing climate change-related legislation, regulations, and international accords and describe any material effect on your business, financial condition, and results of operations."





Advertising & Marketing Claims

Companies Are Buying Large Numbers of Carbon Offsets That Don't Cut Emissions

THE WALL STREET JOURNAL.

Revealed: more than 90% of rainforest carbon offsets by biggest certifier are worthless, analysis shows

The Guardian

THE GREAT CASH-FOR-CARBON HUSTLE

THE NEW YORKER



Rebuilding Trust in Carbon Offsets Faces Uphill Battle

WSJ

Airlines want you to buy carbon offsets. Experts say they're a 'scam.'

The Washington Post



Carbon Offset Credits

Greenwashing Lawsuit:

Berrin v. Delta Air Lines, Inc. Central Dist. of Cal. (May 30, 2023)

Claims: “Carbon Neutral Since 2020” and “Travel confidently knowing that we will offset the carbon emitted on your Delta flight”

Allegations:

- Accounting Issues
- Non-Additional Offsets
- Timing of Offsets
- Impermanent Offsets



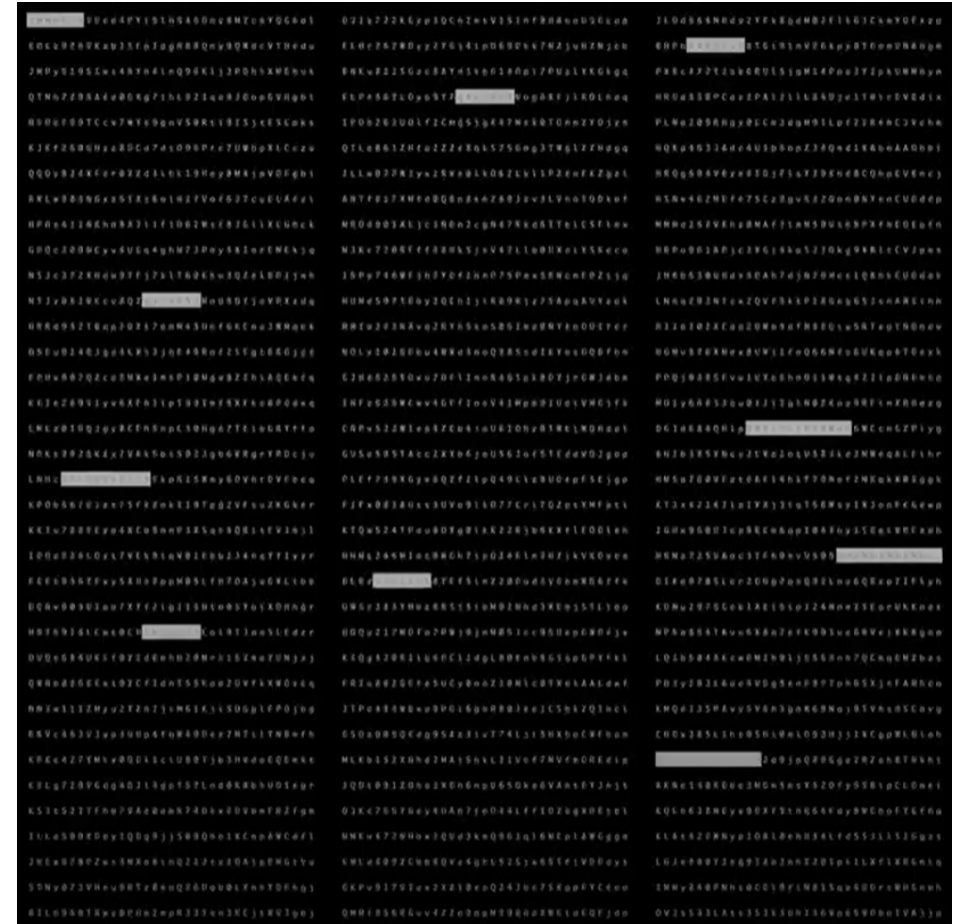


EVERLASTING MULTIPOWER

#5

What We Know About Everlasting Multipower

- Another whistleblower claims that Everlasting’s pricing model discriminates against individual consumers by charging higher prices and deposit amounts to certain demographics by using an AI algorithm.
- Everlasting’s stock price plummeted to \$10 per share after the whistleblower’s claims.
- A bad actor breached Everlasting’s network and inserted malware. When Everlasting implemented a software update for the vehicles, the malware infiltrated the vehicles purchased by the U.S. DOD and consumers.
- Everlasting is still investigating the extent of cybersecurity incident.





Government Enforcement Risks

President Biden's Executive Order on AI

- There is not any comprehensive AI federal legislation in the U.S.
- The EO asks certain federal agencies to take specific actions.
- For example, the DOJ Attorney General to coordinate with and support agencies in their enforcement of existing federal laws to address civil rights and civil liberties violations and discrimination related to AI.
- On February 22, 2024, the DOJ named its first Chief Science & Technology Advisor & Chief AI Officer.



The image shows a fact sheet from the Biden-Harris Administration. At the top right is the word "Administration" and a circular logo of the White House. The date "OCTOBER 30, 2023" is centered. The main title is "FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence". Below the title is a navigation bar with a building icon, "BRIEFING ROOM", and "STATEMENTS AND RELEASES". The body text describes the Executive Order's goals: ensuring America leads in AI, establishing new standards for AI safety and security, protecting privacy, advancing equity and civil rights, supporting consumers and workers, promoting innovation and competition, and advancing American leadership. A second paragraph notes that the EO builds on previous actions, including voluntary commitments from 15 leading companies to drive safe, secure, and trustworthy development of AI.

Administration

OCTOBER 30, 2023

FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence

BRIEFING ROOM STATEMENTS AND RELEASES

Today, President Biden is issuing a landmark Executive Order to ensure that America leads the way in seizing the promise and managing the risks of artificial intelligence (AI). The Executive Order establishes new standards for AI safety and security, protects Americans' privacy, advances equity and civil rights, stands up for consumers and workers, promotes innovation and competition, advances American leadership around the world, and more.

As part of the Biden-Harris Administration's comprehensive strategy for responsible innovation, the Executive Order builds on previous actions the President has taken, including work that led to voluntary commitments from 15 leading companies to drive safe, secure, and trustworthy development of AI.



Combatting AI Bias & Discrimination

- Last year, the federal government announced a joint effort between the DOJ Civil Division, CFPB, EEOC and FTC to confront AI bias and discrimination.
- Among other things, the government authorities are looking at:
 - Anticompetitive conduct and unfair methods of competition;
 - Illegally deceptive business practices; and
 - Hiring and lending discriminatory practices.
- In the WSJ article, the authorities mentioned how they are also making a concerted effort to reach “tech whistleblowers,” who can explain where “their own technology” may be violating the law.

JUSTICE NEWS

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE

Tuesday, April 25, 2023

Justice Department’s Civil Rights Division Joins Officials from CFPB, EEOC and FTC Pledging to Confront Bias and Discrimination in Artificial Intelligence

The Justice Department’s Civil Rights Division and officials from the Consumer Financial Protection Bureau (CFPB), the Equal Employment Opportunity Commission (EEOC) and the Federal Trade Commission (FTC) jointly pledged today to uphold America’s commitment to the core principles of fairness, equality and justice as emerging automated systems, including those sometimes marketed as “artificial intelligence” or “AI,” become increasingly common in our daily lives – impacting civil rights, fair competition, consumer protection and equal opportunity.

“As social media platforms, banks, landlords, employers and other businesses that choose to rely on artificial intelligence, algorithms and other data tools to automate decision-making and to conduct business, we stand ready to hold accountable those entities that fail to address the discriminatory outcomes that too often result,” said Assistant Attorney General Kristen Clarke of the Justice Department’s Civil Rights Division. “This is an all hands on deck moment and the Justice Department will continue to work with our government partners to investigate, challenge and combat discrimination based on automated systems.”

“Technology marketed as AI has spread to every corner of the economy, and regulators need to stay ahead of its growth to prevent discriminatory outcomes that threaten families’ financial stability,” said CFPB Director Rohit Chopra. “Today’s joint statement makes it clear that the CFPB will work with its partner enforcement agencies to root out discrimination caused by any tool or system that enables unlawful decision making.”

“We have come together to make clear that the use of advanced technologies, including artificial intelligence, must be consistent with federal laws,” said EEOC Chair Charlotte A. Burrows. “America’s workplace civil rights laws reflect our most cherished values of justice, fairness and opportunity, and the EEOC has a solemn responsibility to vigorously enforce them in this new context. We will continue to raise awareness on this topic; to help educate employers, vendors and workers; and



The DOJ Will Apply Stricter Penalties When Using AI to Commit Violations

“Discrimination using AI is still discrimination.

Price fixing using AI is still price fixing.

Identity theft using AI is still identity theft...

And — our enforcement must be robust.

The U.S. criminal justice system has long applied increased penalties to crimes committed with a firearm. Guns enhance danger, so when they’re used to commit crimes, sentences are more severe.

Like a firearm, AI can also enhance the danger of a crime.

Going forward, where Department of Justice prosecutors can seek stiffer sentences for offenses made significantly more dangerous by the misuse of AI — they will. And if we determine that existing sentencing enhancements don’t adequately address the harms caused by misuse of AI, we will seek reforms to those enhancements to close that gap.”

— Deputy A.G. Monaco’s February 14, 2024 Remarks





Federal Cybersecurity Disclosure Laws

SEC Cybersecurity Incident Reporting

- Companies must file Form 8-K within 4 business days of determining they have experienced a material cybersecurity incident.
 - Must describe material aspects of the nature, scope, and timing of the incident, and the material impact or reasonably likely material impact on the company.
 - If required information required isn't available, must amend report within four business days of the new information becoming available.
 - Don't have to disclose certain information that would impede remediating the incident.
 - Certain exceptions for national security and telecom carriers.
- Determination must be made "without unreasonable delay" following discovery; SEC advises that while the determination "need not be rushed prematurely, it also cannot be unreasonably delayed in an effort to avoid timely disclosure."
- The fact that the full extent of the incident is not yet known or that further investigation will be necessary "should not delay the company from determining materiality."



SEC Regular Cybersecurity Disclosure

Annual report must disclose:

- Processes for assessing, identifying and managing material cyber risks, which may cover:
 - Cybersecurity's place in the company's overall risk management.
 - Engagement of third-party cybersecurity professionals.
 - Management of cyber risk from third-party service providers.
- Whether cyber risks have materially affected or are reasonably likely to materially company.
- The board's or any board committee's oversight of cyber risks.
- Management's role in assessing and managing material cyber risks, which may cover:
 - Identification of cyber risk managers or committees and their expertise.
 - How cyber risk managers are informed of and monitor the prevention, detection, mitigation and remediation of cyber incidents.
 - Whether cyber risk managers report cyber risk information to the board or a board committee.



Cybersecurity: SolarWinds & CISO

- SEC filed suit against the company and CISO individually for fraud and internal control failures relating to allegedly known cybersecurity risks and vulnerabilities
- SEC further alleged that:
 - SolarWinds defrauded investors by overstating SolarWinds' cybersecurity practices and understating or failing to disclose known risks.
 - SolarWinds allegedly misled investors by disclosing only generic and hypothetical risks at a time when the company and CISO knew of specific deficiencies in SolarWinds' cybersecurity practices and elevated risks the company faced at the same time.

The screenshot shows the U.S. Securities and Exchange Commission (SEC) website. The main heading is "Press Release" and the title of the release is "SEC Charges SolarWinds and Chief Information Security Officer with Fraud, Internal Control Failures". The sub-heading is "Complaint alleges software company misled investors about its cybersecurity practices and known risks". The release is dated "FOR IMMEDIATE RELEASE 2023-227" and is dated "Washington D.C., Oct. 30, 2023". The text of the release states: "The Securities and Exchange Commission today announced charges against Austin, Texas-based software company SolarWinds Corporation and its chief information security officer, Timothy G. Brown, for fraud and internal control failures relating to allegedly known cybersecurity risks and vulnerabilities. The complaint alleges that, from at least its October 2018 initial public offering through at least its December 2020 announcement that it was the target of a massive, nearly two-year long cyberattack, dubbed 'SUNBURST,' SolarWinds and Brown defrauded investors by overstating SolarWinds' cybersecurity practices and understating or failing to disclose known risks. In its filings with the SEC during this period, SolarWinds allegedly misled investors by disclosing only generic and hypothetical risks at a time when the company and Brown knew of specific deficiencies in SolarWinds' cybersecurity practices as well as the increasingly elevated risks the company faced at the same time." The release also mentions that the complaint alleges SolarWinds' public statements about its cybersecurity practices and risks were at odds with its internal assessments, including a 2018 presentation prepared by a company engineer and shared internally, including with Brown, that SolarWinds' remote access set-up was "not very secure" and that someone exploiting the vulnerability "can basically do whatever without us detecting it until it's too late," which could lead to "major reputation and financial loss" for SolarWinds. Similarly, as alleged in the SEC's complaint, 2018 and 2019 presentations by Brown stated, respectively, that the "current state of security leaves us in a very vulnerable state for our critical assets" and that "tal[ent] access and privilege to critical systems/data is inappropriate."



What Can Corporate Counsel Do To Mitigate these Risks?

What Can Corporate Counsel Do?

01

Be part of any ESG taskforce or committee to identify legal risks.

02

Suggest that legal counsel and compliance personnel should get involved earlier to vet mandatory and voluntary disclosures.

03

Develop training and awareness building for executive management, board directors and key personnel, such as marketing and communications leaders, on ESG risks.

What Can Corporate Counsel Do?

04

Understand from your external auditors what they plan to focus on regarding ESG topics.

05

Determine which proposed and enacted laws apply to your company and when.

06

Conduct a gap analysis (even if it is basic) to determine whether your company has the requisite data and information to comply with the proposed and enacted laws.

What Can Corporate Counsel Do?

07

Conduct a risk assessment (even if it is basic) to determine which high-risk suppliers or sub-suppliers are the priority from which to gather information.

08

Establish a communication channel between the legal, compliance, risk, procurement, marketing, communications and sales departments concerning suppliers.

09

Determine which due diligence mechanisms you need to gather information from suppliers.

What Can Corporate Counsel Do?

10

Ensure and document how employment and supplier decisions are made based on legitimate business reasons; not race or other protected characteristics.

11

Promote a “speak up” culture to encourage and reward personnel for raising their constructive concerns.

12

Document and test supply chain tracing information.

What Can Corporate Counsel Do?

13

Establish consistency among mandatory and voluntary ESG disclosures, whether SEC filings, sustainability reports, press releases or website disclosures.

Questions?



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