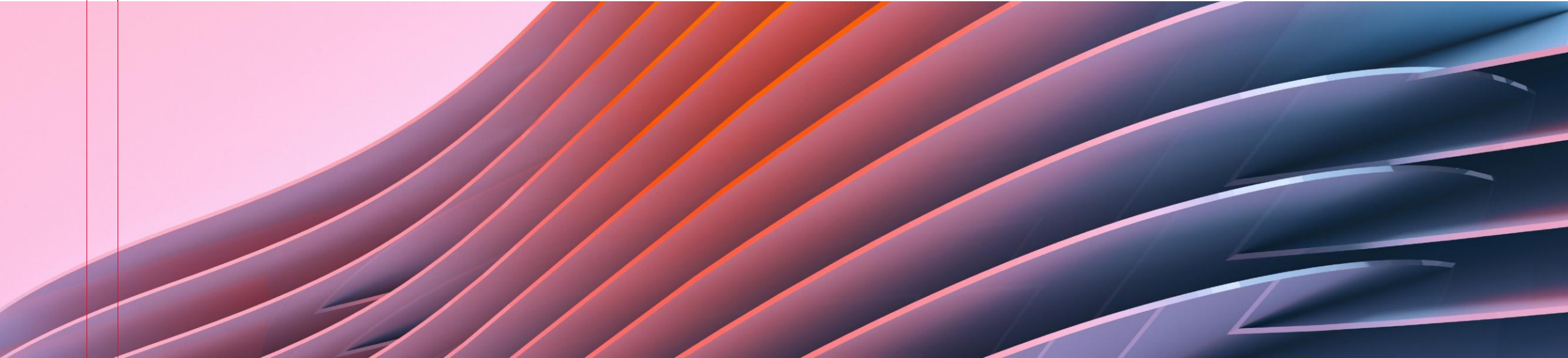




APRIL 3, 2025

ESG Developments for Boards & Directors



Speakers



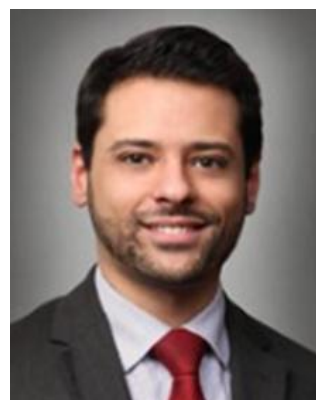
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Is ESG Dead?

What Do We Know?

- U.S. withdrew from the Paris Climate Agreement.
- The DoD, GSA, and NASA withdrew the proposed rule to amend the FAR to require major federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk as well as set science-based reduction targets.
- The DOJ rescinded its “Environmental Justice Enforcement Strategy” and related memoranda as well as closed the Office of Environmental Justice.
- SEC’s climate-related disclosure rules are stayed. The SEC Chair has directed staff to:
 - Ask the appeals courts over the litigation to delay any arguments; and
 - Pause any legal defense of the rules.



What Do We Know?

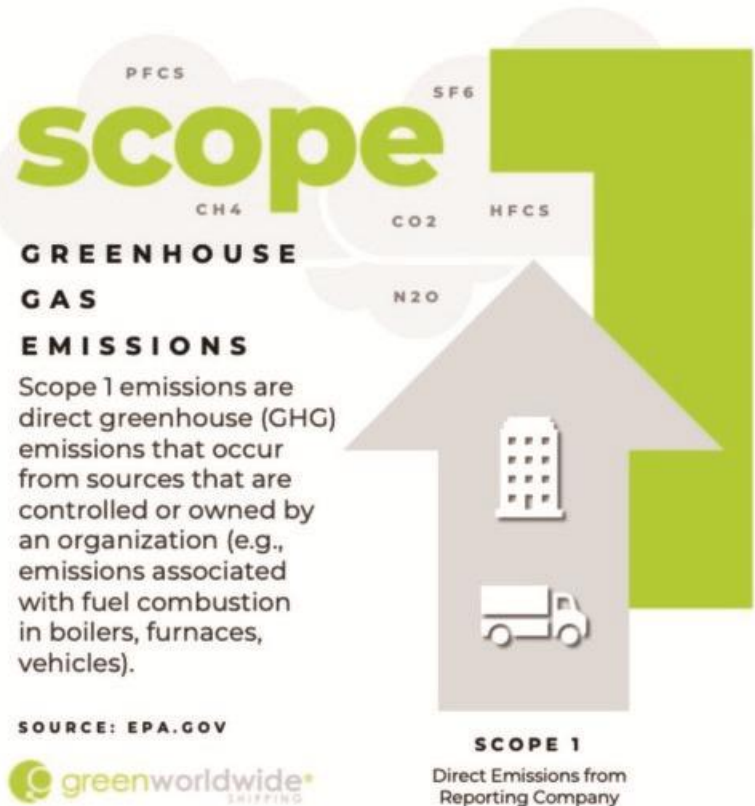
- On February 12, 2025, the SEC published an update allowing companies to exclude shareholder proposals, including those focused on social and environmental issues.
- There are international and domestic disclosure and due diligence laws that are still in effect, including:
 - Uyghur Forced Labor Prevention Act;
 - California's climate disclosures laws; and
 - EU's CSDDD and CSRD as well as Canada's Fighting Against Forced Labour & Child Labour in Supply Chains Act.
- On February 26, 2025, the EU Commission published its "Sustainability Omnibus" proposal to reduce redundant reporting requirements.
- The current administration characterizes DEI as "illegal."
- There is a tension between certain state attorneys general and the federal government.





GHG Disclosures – Regulatory Uncertainty

what are the scopes of carbon emissions?





GHG Disclosures – Regulatory Uncertainty

- SEC Rule
 - Federal government is retreating from climate change legislation
- EU – CSRD and CSDDD
 - Proposed legislation to significantly reduce the sustainability reporting and due diligence requirements
- California and Other States

CA SB 253: Climate Corporate Data Accountability Act

- Public and private firms operating in CA making more than \$1 billion
- Annual report disclosing Scope 1 and 2 emissions (2026) and Scope 3 emissions (2027)
- Third-party verification required
- Consistent with GHG Protocol/TCFD
- Single materiality
- Fines up to \$500,000 per reporting year for failing to meet requirements
- Safe harbor: the only penalties on Scope 3 disclosures before 2030 are for not filing



CA SB 261: GHG: Climate-Related Financial Risk Act

- Public and private firms operating in CA making more than \$500 million
- Bi-annual report disclosing climate-related risks and measures to reduce them (2026)
- Third-party verification required
- Consistent with GHG Protocol/TCFD
- Double (company and the environment) materiality
- Fines up to \$50,000 for inadequate report



CA AB 1305: Voluntary Carbon Markets Disclosure Act

- Public and private firms operating in CA which:
 - Market and/or sell voluntary carbon offsets in CA
 - Purchase and/or use carbon offsets to make climate-related emission claims within CA
 - Make any climate-related emission claims within CA
- Entities marketing and/or selling offsets in CA must provide information on their websites regarding the offset projects
- Companies that purchase or use carbon offsets to make carbon neutral, net zero and/or emissions reduction claims are required to disclose information related to the carbon offsets on their public website
- Companies making carbon neutral or net zero claims and/or claims that they have achieved significant emissions reductions must disclose information on how their claims were determined to be accurate or accomplished, and how interim progress toward their goal(s) is being measured as well as whether there is independent third-party verification of company data and claims listed



NY's "Climate Corporate Data Accountability Act" Bill

- The bill currently require entities to report annual Scope 1, 2, and 3 emissions.
 - Scope 1 & 2 emissions would be due in 2027 for 2026 data.
 - Scope 3 emissions would be required in 2028 for 2027 data.
- The bill applies to an entity that does business in NY and its total revenues exceed \$1 billion in the preceding fiscal year, including revenues received by subsidiaries doing business in NY.
- An entity is not considered to be doing business in NY if it is only engaging in maintaining or defending an action or proceeding; holding meetings; maintaining a bank account or maintaining an office solely to transfer or exchange securities in NY.



NY's "Climate Corporate Data Accountability Act" Bill

- The entity would have to engage an independent third-party assurance provider to review and assure its reporting.
 - There are levels of assurance that will be required for Scope 1, 2, and 3, such as limited versus reasonable assurance.
- New York Attorney General would be able to bring a civil action seeking civil penalties of up to \$100,000 per day for willful failure to comply with the requirements of the Act, including for non-filing, late filings or other failures.
- However, the civil penalties could not exceed \$500,000 in a reporting year.





Disclosures and Risk

There are Still Risks Surrounding 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

“Illegal DEI” Affects Disclosures

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Environmental, Social & Governance (ESG)




Photo Illustration: Jonathan Hurtado/Bloomberg Tax; Photos: Getty Images

March 13, 2025, 11:39 AM EDT

'Diversity' Becomes 'Belonging' as Companies Shift DEI Lingo

Clara Hudson
Reporter

- New terms in investor reports reflect mounting DEI backlash
- Changes don't necessarily represent program reversals

References to “DEI” and “diversity, equity and inclusion” in corporate annual reports to shareholders have dropped by more than half so far this year amid a Trump administration crackdown on such efforts.

The acronym “DEI” appeared in 10-K reports 180 times from January 1 to March 12, down 55% from 396 times in the same date range the year before, according to a review of 10-K annual reports by Bloomberg Law. References over the same time frames for “diversity, equity and inclusion” fell 57% to 422 from 991 the year before.

Companies from Delta Air Lines Inc. to Bank of America Corp. instead are embracing a new corporate lexicon in their reports to investors—selecting phrases like “inclusion,” “merit-based hiring,” and “belonging”—in the midst of the Trump administration’s moves to purge DEI programs in both government and the private sector. In some cases the about-face has been dramatic. AT&T, for instance, told investors it believes in “championing” diversity a year ago, and then purged references to the term in this year’s report.

Related Stories

- [AT&T Prioritizes Workforce ‘Inclusion’ in Report to Shareholders](#)
Feb. 13, 2025, 4:50 PM EST
- [Delta Underscores ‘Merit-Based’ Hiring in Report to Investors](#)
Feb. 12, 2025, 11:30 AM EST
- [Southwest Retools DEI Messaging in Annual Investors Report \(I\)](#)
Feb. 7, 2025, 5:59 PM EST
- [Hilton Ditches the Term ‘ESG’ in Annual Report to Investors \(I\)](#)
Feb. 7, 2025, 1:36 PM EST
- [Companies Parse What Makes a DEI Program ‘Illegal’ Under Trump](#)
Jan. 23, 2025, 1:26 PM EST

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US companies drop DEI from annual reports as Trump targets corporate values

Federal investigation of initiatives is bosses’ ‘number one’ worry as Trump attacks ‘immoral discrimination’



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Eva Xiao and Taylor Nicole Rogers in New York and Clara Murray in London

Published MAR 16 2025 [785](#)

Hundreds of US companies have removed references to “diversity, equity and inclusion” from their annual reports in a rapid pullback from the corporate values that have become a target of President Donald Trump’s administration.

More than 200 of America’s largest corporate groups have culled mentions of DEI and related terms such as “diversity”, according to FactSet data and company filings analysed by the Financial Times.

Of the top 400 companies in the S&P 500 index, 90 per cent of those that have filed an annual report since Trump’s election have cut at least some references to DEI, with many ditching the term entirely.

The figures, which relate only to annual reports covering companies’ financial years that ended since the election, underscore the speed and scale of the impact of Trump’s crusade against what he has described as “illegal and immoral discrimination programmes”.

In addition, many companies no longer include statistics breaking down their workforce by race or have dropped references to awards for DEI initiatives or internal affinity groups, such as networks for Black professionals.



False & Misleading Advertising

Link Snacks, Inc. v. We are the Chompions, LLC, NAD Case Report #7383 (January 2025)

Challenged Claims

Non-specific carbon neutral claim

Net-positive environmental impact claims

Products are made using natural regenerative agricultural methods

Results

Chomps voluntarily discontinued the challenged claims



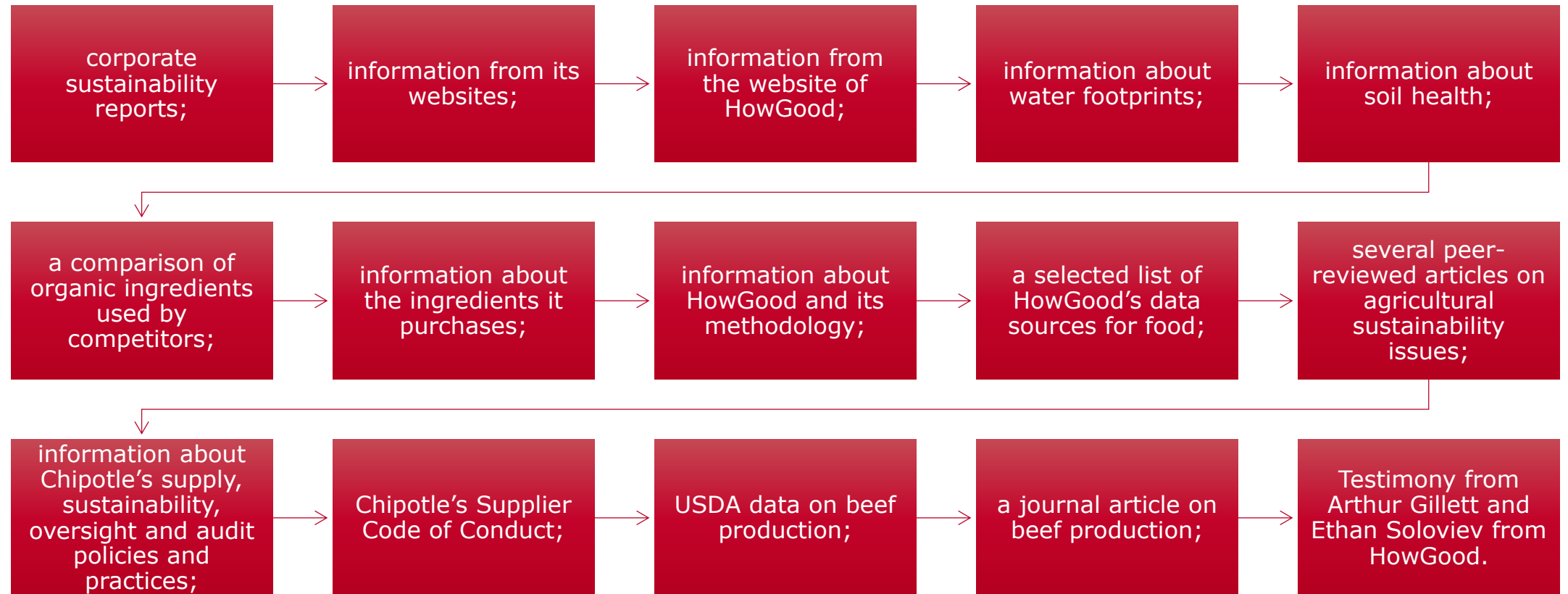
Aspirational Claims: *Chipotle Mexican Grill*, Report #7020 (February 2022)

WHAT THEY CLAIMED



- “Reduced Carbon Emissions: From farm to foil, we’re reducing greenhouse gas emissions by optimizing our supply chain, compared to conventional ingredients.”
- “Improved Soil Health: Ingredients sourced from farms with sustainable agriculture practices, like planting cover crops, can improve soil health.”
- “It [the burrito] could make our farmers . . . more organic . . . less carbon emitting.”
- “With Real Foodprint, you’ll see how the Chipotle difference is real. From how ingredients are raised, grown, and cared for, Chipotle’s impact on real food and the planet starts at the source.”
- “Foodprint calculates an average sustainability impact across each of our 53 real ingredients based on our leading sourcing standards as compared to conventional ingredients.”
- “Water Saved: We’re sourcing from farms with sustainable agriculture practices that save more water primarily through greywater reduction.”
- “We commit to divert 50% of waste from landfills during 2020.”
- Chipotle’s food is more environmentally friendly based on its farm-to-table practices.

What They Did



Aspirational Claims: *NY v. JBS Holdings*



Changes Afoot?

- *Dorris v. Danone Waters of America* (S.D.N.Y)
 - In January 2024, a federal court in New York allowed a lawsuit against Danone to continue, holding that the company's "carbon neutral" claim was potentially misleading since it may confuse consumers about whether any carbon is actually emitted during the production of the product.
 - On a motion to reconsider, the court reversed course and dismissed the case. The court held that, in light of the fact that the "carbon neutral" claim is ambiguous, it was unreasonable for consumers to assume that the claim meant something specific. Instead, consumers should consult the back of the label and other available information. In other words, if consumers were confused, it's their own fault.



Changes Afoot?

- *City of New York v. Exxon Mobil Corp. et al.*
 - On April 1, 2021, the City of New York filed suit alleging violations of the NYC's Consumer Protection Law because large fossil fuel companies, along with an industry trade association, "have systematically and intentionally misled consumers in New York City . . . about the central role their products play in causing the climate crisis."
 - Product Greenwashing: publishing misleading statements about the climate benefits of specific gasoline products without disclosing the adverse impacts of those products on the climate.
 - Corporate Greenwashing: publishing misleading statements that were intended to present them as climate-friendly, thereby inducing consumers to purchase their fossil fuel products.
 - In January 2025, a New York State lower court dismissed the action.



Changes Afoot?

- *City of New York v. Exxon Mobil Corp. et al.*
 - **Product Greenwashing:** The court noted that the City did not assert that these types of statements were false – only that they were misleading by failing to disclose that the product “still causes climate change despite the claims of reduced emissions.” Fossil fuel companies shouldn’t be held liable for failing to disclose information that is already publicly-known.
 - Court said the City could not claim its climate-conscious residents were sensitive to how fossil fuels cause climate change, only to then be duped by the oil companies’ failure to disclose how their fossil fuel products contributed to it.
 - Court also held that some of the statements – such as “better than ordinary fuels,” “take you further,” and “created to let you drive cleaner, smarter and longer” – are not actionable because they are puffery. The court wrote, “No reasonable consumer would be misled by these subjective, non-specific and vague statements.”

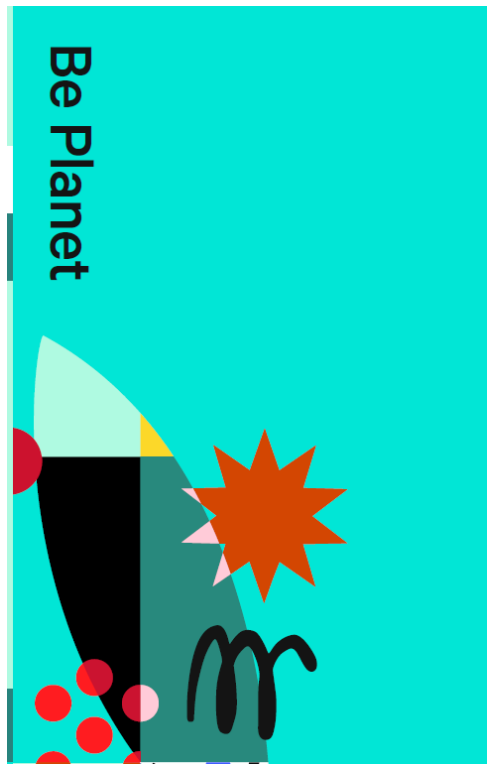


Changes Afoot?

- *City of New York v. Exxon Mobil Corp. et al.*
 - **Corporate Greenwashing:** City argued that the fossil fuel companies also misled consumers by portraying themselves as committed to renewable energy and sustainability while continuing to invest heavily in fossil fuel production. Pointed to statements like “we’re working to make our energy cleaner and better,” “cleaner-burning,” and “powering progress together with more and cleaner energy solutions.”
 - Statements were not actionable because the fossil fuel companies’ statements were not made “in connection with” with sale of goods or services.
 - “The statements as to investments in clean energy resources, such as wind and solar, and alternative energy sources, such as LNG, hydrogen fuel cells, and biofuels, are not alleged to be ‘made in connection with the sale’ of a consumer good because Plaintiff does not allege that Defendants sell these non-fossil fuel products or technologies anywhere, let alone in NYC.”
 - “Plaintiff provides no legal authority for the notion that statements about unrelated product (e.g., alternative fuels such as natural gas) or technologies (e.g., wind and solar energy) are actionable as related to the sale of a different product (fossil fuels).”



Greenwashing Claims: *Gyani v. Lululemon USA Inc.* (S.D. Fla. 2025)



Our lives are one with the health of the planet.

Our products and actions avoid environmental harm and contribute to restoring a healthy planet. Our goals:

SUSTAINABLE PRODUCT & MATERIAL INNOVATION

Make 100% of our products with sustainable materials and end-of-use solutions to advance a circular ecosystem by 2030.

Achieve at least 75% sustainable materials for our products by 2025.⁶

CIRCULARITY & NEW GUEST MODELS

Offer our guests new business models that extend the life of products—reaching 100% of North American guests and piloting internationally by 2025.

CLIMATE ACTION

Meet our 2030 science-based targets.

Source 100% renewable electricity to power our owned and operated facilities by 2021.

WATER & CHEMISTRY

Reduce freshwater use intensity with our priority wet process suppliers by at least 20% by 2025.⁸

Implement ZDHC Manufacturing Restricted Substances List (MRSL) at 100% of priority suppliers by 2022.⁷

WASTE & PACKAGING

Reduce single-use plastic packaging by at least 50% per unit by 2025.



Greenwashing Claims: *Gyani v. Lululemon USA Inc.* (S.D. Fla. 2025)

- Lululemon made several express commitments to become more sustainable and reduce its environmental impact, such as promising that “100% of [its] products will include sustainable materials and end-of-use solutions by 2030.”
- Lululemon also made a number of general sustainability claims, e.g., that its “products and actions avoid environmental harm and contribute to restoring a healthy planet.”
- In July 2024, three consumers filed a putative class action against Lululemon, arguing that the Be Planet campaign was a form of greenwashing.
- “Critically, in the face of a global climate crisis—and contrary to its express commitments to reduce carbon emissions—Lululemon’s greenhouse gas emissions have more than doubled since the start of the Be Planet campaign in 2020,” according to the lawsuit.



Greenwashing Claims: *Gyani v. Lululemon USA Inc.* (S.D. Fla. 2025)

- On February 18, 2025, the court granted Lululemon's motion, dismissing all claims in the complaint.
 - Plaintiffs failed to adequately allege an injury in fact because they failed to tie these statements to the purported price premium. Even if the allegations regarding the Be Planet campaign were true, the plaintiffs did not allege that these practices had any direct relation to or impact on the actual products they purchased from Lululemon.
 - Plaintiffs failed to establish an imminent threat of future injury.
- Takeaways:
 - Are courts growing skeptical of these claims?
 - Greenwashing class actions have faced challenges establishing a concrete personal injury or economic harm, particularly involving general or aspirational comments on sustainability or environmental commitment.
 - While these plaintiffs were unable to establish standing, others have had more success, including in cases where the products themselves (as opposed to the brand generally) were described as being environmentally friendly.





Whistleblower Programs

Kilpatrick

The Whistleblower Process

Whistleblowers



Potential
Award



1

Whistleblower
Submits Tip
to DOJ



2

Tip Analysis /
Review



3

Investigation



4

Prosecution



5

Conviction /
Resolution



10



9



8



7



6

Practical Tips to Create an Effective Corporate Whistleblower Program

- Create continuous awareness of how to report internally.
- Be consistent when responding to; reviewing or investigating an issue; no matter who may be allegedly involved.
- Establish an independent investigative process to ensure trust.
- Investigate promptly.
- Implement follow-up practices to keep the whistleblower updated, as needed, in a manner that protects any internal reviews or investigations.
- Document consistently the response, investigative steps and conclusions.



Practical Tips to Create an Effective Whistleblower Program

- Share success stories of when whistleblowers have brought an issue to light in a manner that protects the investigations process and those involved.
- Provide middle management training and tools to spot and escalate key risks.
- Institute training dedicated to middle management.
- Use an employment engagement survey to test certain indicators, such as:
 - Pressure based on unrealistic expectations;
 - Trust amongst peers, supervisors and senior management; and
 - Awareness of where to go with concerns.
- Analyze substantiation rates to determine if there are any patterns or ways to improve the program.
- Ensure that internal audit or another independent party tests your whistleblower program for effectiveness on a consistent basis.





Final Thoughts

Questions?



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