

Analyzing ESG Legal Risks & Trends: Corporate Voluntary Disclosures

June 22, 2023



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Is There a Trend to Stay Quiet About ESG Efforts?

Companies Quiet Diversity and Sustainability Talk Amid Culture War Boycotts

Mentions of social-impact initiatives during earnings calls have declined, reversing a trend that had picked up after the killing of George Floyd in 2020

By [Mark Maurer](#) [Follow](#)

June 12, 2023 5:30 am ET

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MAGA rapper Forgiato Blow poses with a sign during an anti-LGBTQ protest in front of a Miami Target as part of a boycott of the department store's selling pro-LGBTQ merchandise during LGBTQ Pride Month. PHOTO: DOMINIC GWINN/ZUMA PRESS

Source: [Companies Quiet Diversity and Sustainability Talk Amid Culture War Boycotts](#) - WSJ

- “Companies’ mentions of green and social initiatives during earnings calls have fallen off sharply in recent quarters....”
- “Executives at U.S.-listed companies mentioned ‘environmental, social and governance,’ ‘ESG,’ ‘diversity, equity and inclusion,’ ‘DEI’ or ‘sustainability’ on 575 earnings calls from April 1 to June 5, down 31% from the same period last year....”

Power of Stakeholder Pressure

“But many companies, pushed by a variety of groups—including sustainability-focused shareholders, regulators in other jurisdictions and eco-conscious consumers—are proceeding as though the [SEC] rule is in force. About 70% of companies intend to comply with the SEC rule regardless of when it becomes final....”

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RISK & COMPLIANCE JOURNAL

SEC's Climate-Disclosure Rule Isn't Here, but It May as Well Be, Many Businesses Say

Legal challenges to the regulator's proposed mandate for emissions tracking are all but certain, but many companies see value in assessing their suppliers even if so-called Scope 3 rules get watered down

By [Richard Vanderford](#) [Follow](#)

April 25, 2023 9:00 am ET

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A Philips Digital 3T MRI scanner. The company has worked not just to quantify emissions stemming from its supply chain, but also has pushed suppliers to adopt their own carbon-emission targets. PHOTO: JASPER JUINEN/BLOOMBERG NEWS

A sweeping U.S. climate-disclosure rule isn't yet in place, and it is sure to face legal challenges when it is, but many companies have begun assessing greenhouse-gas emissions from parties in their supply chain as if it were.

7 Steps, 7 Questions to Prepare for New SEC Climate Disclosure Rules

Understanding their obligation to disclose targets and goals, refining governance, and building reporting agility are among the ways companies can prepare for proposed climate disclosure rules.

Tap Controller Know-How for Climate Disclosure Reporting

Inherent similarities between sustainability and financial reporting highlight the role controllers can play in shaping controls and processes for the proposed SEC climate rules.

Risk Disclosures Lengthen as Climate Issues Rise

As climate-related risk factors climb, an analysis finds many companies have room to

Source: SEC's Climate-Disclosure Rule Isn't Here, but It May as Well Be, Many Businesses Say - WSJ

Agenda

- ESG Basics
- ESG Corporate Voluntary Statement Review
- Environmental Takeaways & Risks
- Environmental Advertising
- Social Takeaways & Risks
- Governance Takeaways & Risks

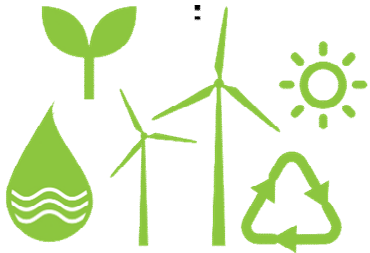


ESG Basics



What is ESG?

ESG



Environmental



Social



Governance

Environmental

A word cloud centered around the word "SUSTAINABILITY" in large, bold, dark teal letters. The word "SUSTAINABILITY" has a small plant icon at the end of it. Surrounding it are various other terms and icons in different sizes and orientations, mostly in shades of teal and grey. The terms include: "CLIMATE CHANGE" (large, bold, dark teal), "WATER CONSERVATION" (medium, dark teal), "RENEWABLE ENERGY" (small, grey), "AIR QUALITY" (vertical, dark teal), "CONFLICTS" (vertical, grey), "MINERALS" (vertical, grey), "CARBON FREE" (vertical, dark teal), "AVOID" (medium, dark teal), "ZERO EMISSIONS" (small, grey), "GREENWASHING" (large, bold, dark teal, in quotes), "RESPONSIBLE SUPPLY CHAIN" (small, grey), "FREE" (vertical, dark teal), and "EMERGENCY" (small, grey). Icons include a sun, two wind turbines, a recycling symbol, a lightbulb, and a water drop.

Social

EMPLOYEE WELLNESS
POLITICAL CONTRIBUTIONS
DIVERSITY & INCLUSION
PHILANTHROPY
CHARITABLE CONTRIBUTIONS
HUMAN RIGHTS
AVOID
ETHICAL SOURCING
"SOCIAL WASHING"

Governance



Potential Legal Risks of 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 & Offices 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



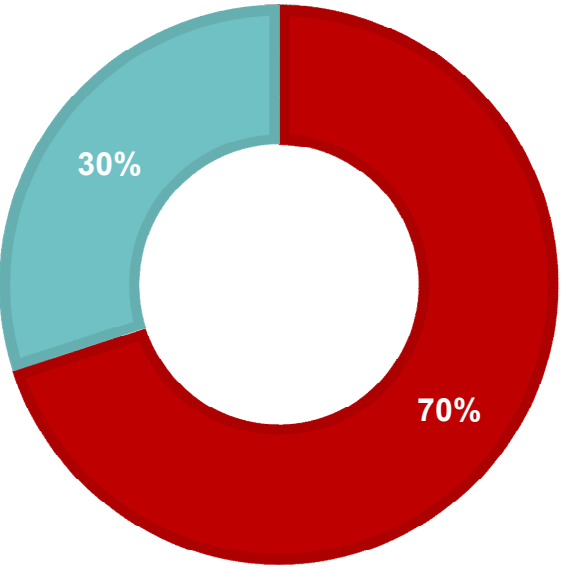
ESG Corporate Voluntary Statement Review



Companies Reviewed

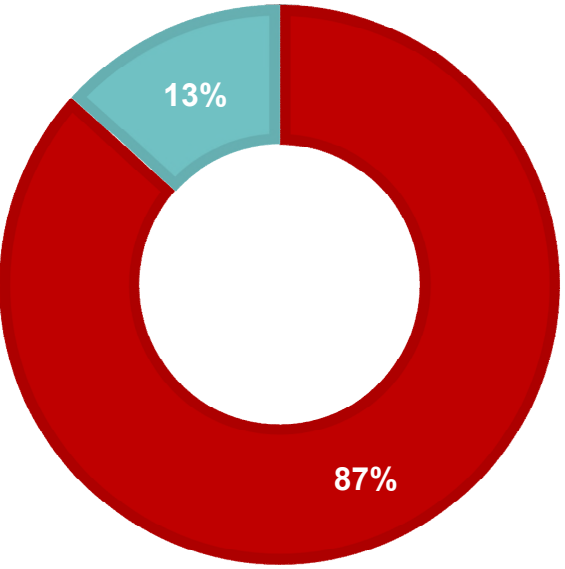
COMPANY TYPE

■ Public ■ Private



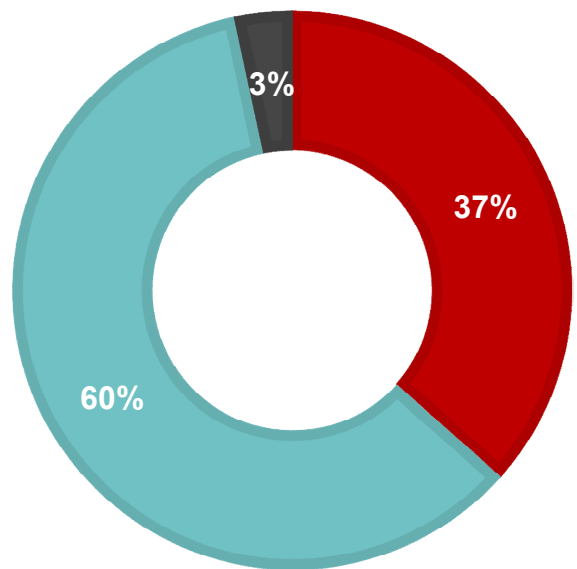
INTERNATIONAL OPERATIONS

■ Yes ■ No

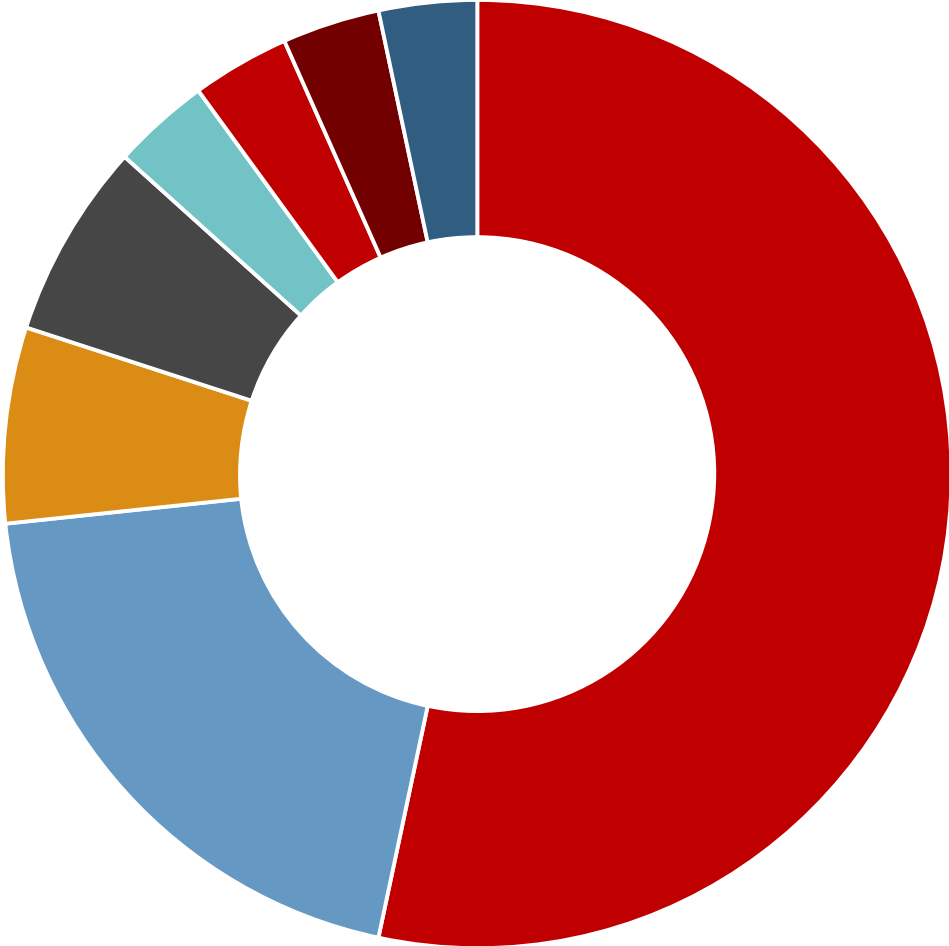


FEDERAL U.S. CONTRACTOR

■ Yes ■ No ■ Not Clear



Industries of Companies Reviewed



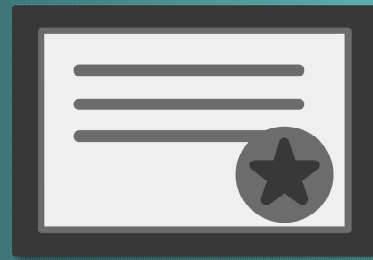
- Manufacturing
- Retail
- Telecommunications
- Research Institution
- Airlines
- Hotels
- Finance/Commercial Banking
- Software

“Buzz” Words & Facts

80% of the companies also included statements outside of their formal reports.



Most public companies relied on third-party certifications to substantiate the claims, while only half of the private companies relied on third parties.



Nearly 90% of operational statements are tied to facts and metrics.



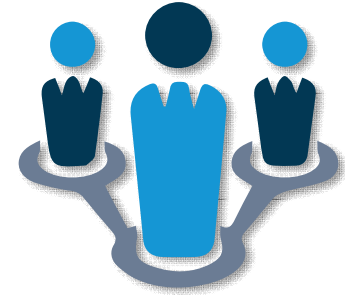
Initiatives, Goals & Progress



Approximately half of the companies clearly describe their initiatives, such as the purpose, who is responsible for the initiative and what success would look like. This percentage was consistent across private and public companies.



Most companies had both short-term and long-term goals or targets (at or under five years and more than five years respectively).



Nearly 90% of the reports and websites provide what has been accomplished thus far or their current progress. However, most do not detail what more needs to be done to meet their targets and deadlines.



Environmental Takeaways & Legal Risks



AMBITIOUS, RIGOROUS AND SCIENCE-BASED EMISSION REDUCTION GOALS



50% reduction in Scope 1 & Scope 2 emissions by 2030
30% reduction in Scope 3 emissions by 2030
Targets submitted to SBTi in 2021 based on 1.5°C or less limits for Scopes 1 and 2 and well below 2°C limit for Scope 3


657 thousand

tons of carbon offset since 2007

SUSTAINABILITY

93,973 metric tonnes
of carbon dioxide equivalent avoided and millions of dollars saved as a result of emissions reduction initiatives since 2015

6 / 7 of our owned facilities are **zero waste** *

 **33%**
reduction in potable water use per square foot

Reduce Scope 3 emissions from purchased goods and services **50% on an absolute basis** by 2030 from a 2019 base year



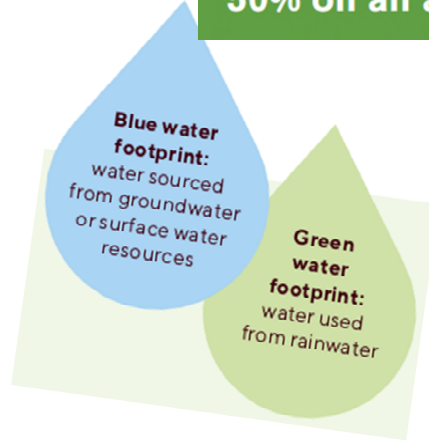
Zero Waste to Landfill

56%[†]

OF PLANTS

(vs. goal of 100% global plants achieving zero waste to landfill by 2025)

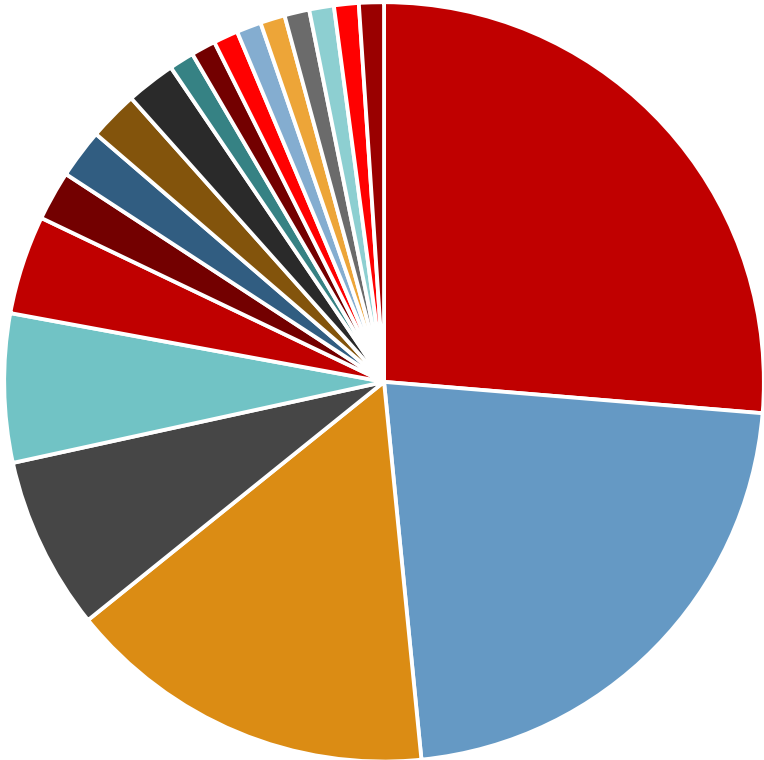
100%
of activities completed



Achieve Net Zero by 2050
Announced intention to set science-based targets to achieve net zero GHG emissions no later than 2050 and improve emissions intensity no later than 2035 compared to a 2019 baseline

Making Progress on Packaging

Environmental Priorities

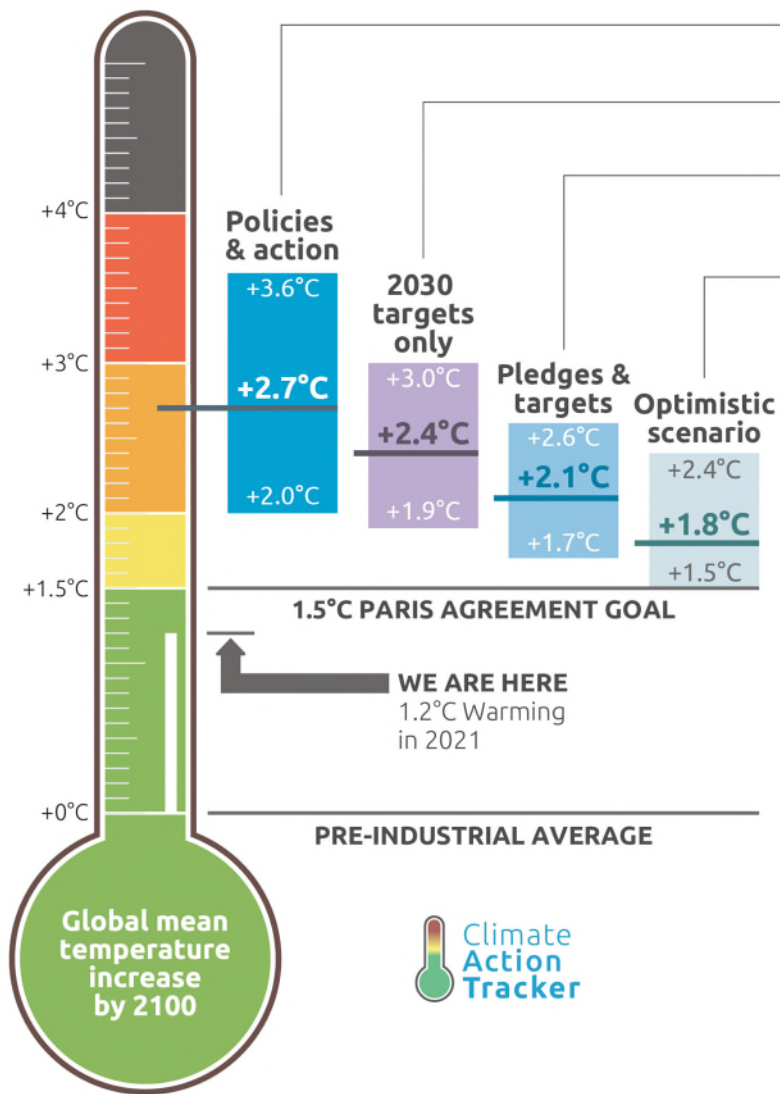


- Reduce Carbon Footprint
- Sustainability
- Wastewater Management
- Afforestation
- Noise

- Waste Reduction
- Packaging
- Plastics
- Operational Efficiency
- Product Innovation

- Water Conservation
- Protecting Biodiversity
- Hazardous Substances Disposal
- Noise
- Pollution Control

- Responsible Sourcing
- Reducing Environmental Footprint
- End-of-Life Product
- Chemical Management



Policies & action
Real world action based on current policies

2030 targets only
Full implementation of 2030 NDC targets*

Pledges & targets
Full implementation of submitted and binding long-term targets and 2030 NDC targets*

Optimistic scenario
Best case scenario and assumes full implementation of all **announced** targets including net zero targets, LTSs and NDCs*

* If 2030 NDC targets are weaker than projected emissions levels under policies & action, we use levels from policy & action

CAT warming projections
Global temperature increase by 2100

November 2021 Update



Warmer, wetter, drier, more destructive

It's likely to get worse . . .

- There's not enough pledges to prevent exceeding by 1.5°C
- Even starting from emission levels implied by NDCs and current policy projections, 1.5°C and 2°C pathways are still technically feasible

What are the scopes of carbon emissions?



scope

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

scope

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

GREENHOUSE GAS EMISSIONS

SCOPE 3

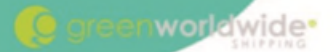
Indirect Emissions from

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



Measuring GHG Emissions

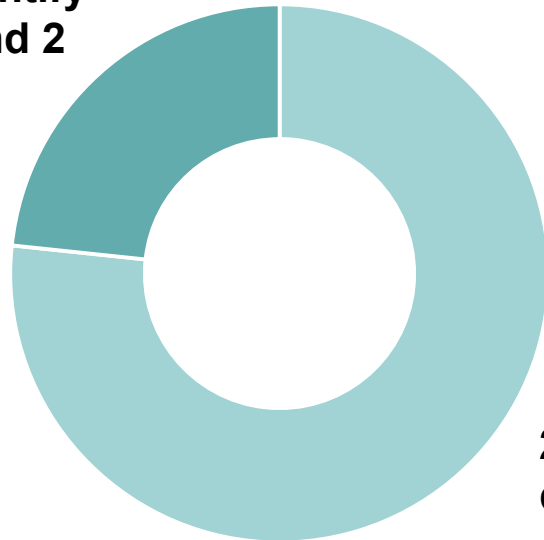
76.7% of companies quantified Scope 1 and 2 GHG emissions

56.7% of companies estimated Scope 3* GHG emissions



<https://www.pca.state.mn.us/air-water-land-climate/air-pollutants>

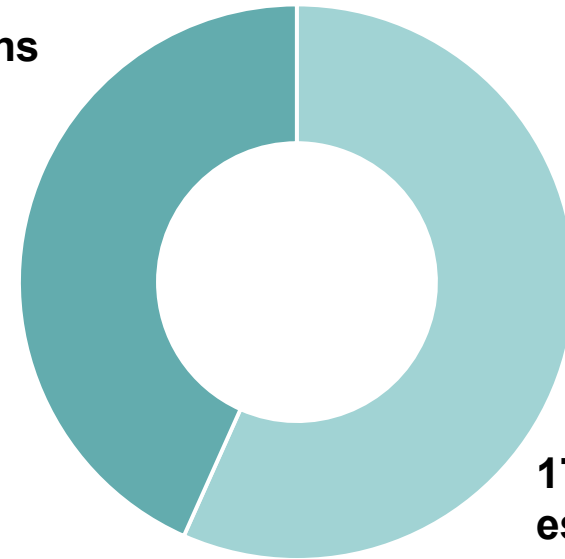
7/30 companies do not quantify Scope 1 and 2 emissions



■ Disclosure ■ No Disclosure

23/30 companies quantify Scope 1 and 2 emissions

13/30 companies do not estimate Scope 3 emissions



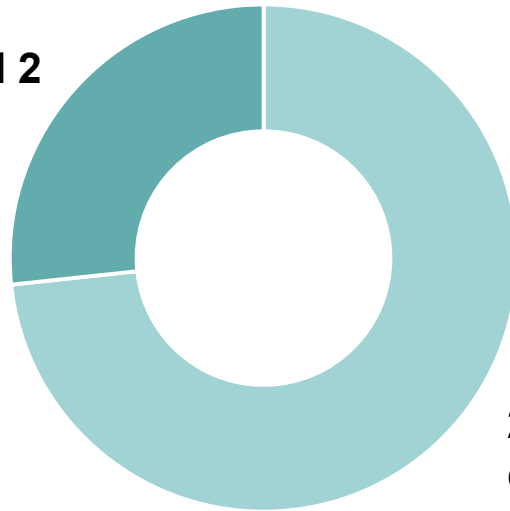
■ Disclosure ■ No Disclosure

17/30 companies estimate Scope 3* emissions

Reducing GHG Emissions

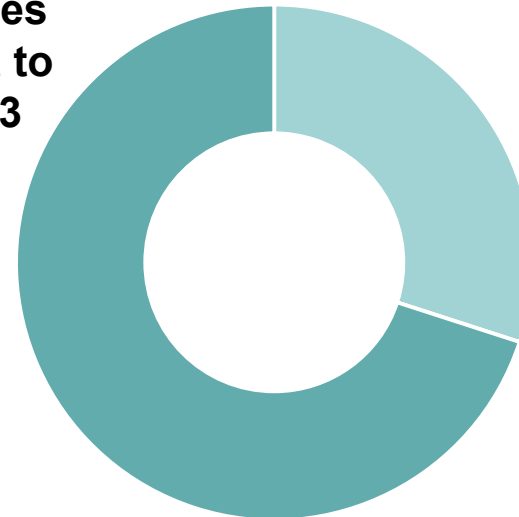
73.3% of companies committed to reduce Scope 1 and 2 GHG emissions

8/30 companies do not commit to reduce Scope 1 and 2 emissions



■ Disclosure ■ No Disclosure

21/30 companies do not commit to reduce Scope 3 emissions



■ Disclosure ■ No Disclosure

22/30 companies commit to reduce Scope 1 and 2 emissions



<https://theedgemaalaysia.com/article/malaysia-continues-efforts-reduce-carbon-footprint>

9/30 companies commit to reduce Scope 3* emissions



Listed companies are on a path to warm the planet by 2.7° above preindustrial levels this century.

MSCI May 2023 Net Zero Tracker report

Science-Based Targets

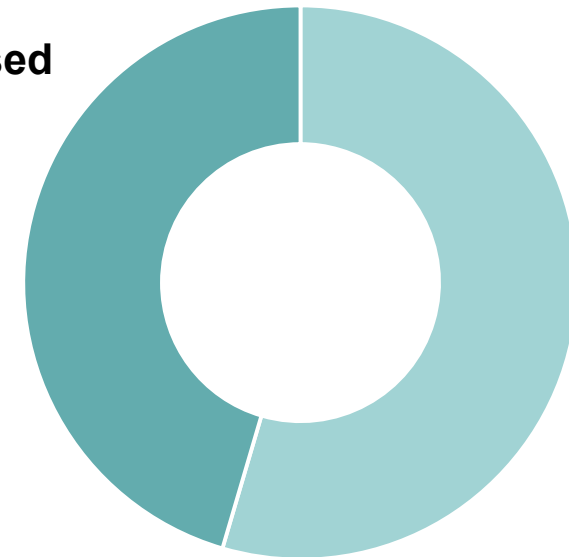
Of the companies that committed to reduce GHG, 54.5% use Science-Based Targets

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.



10/22 companies do not use science-based targets



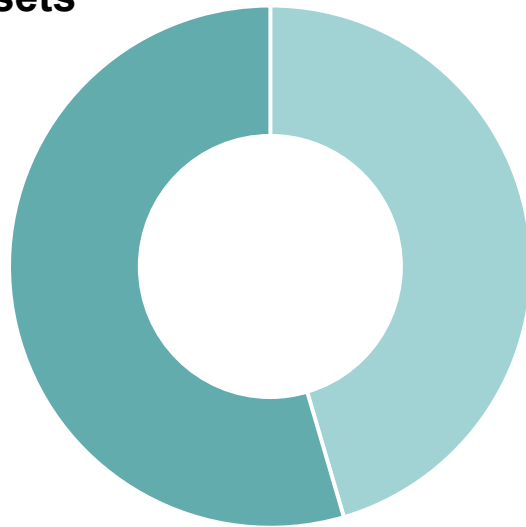
12/22 companies use science-based targets

Carbon Offset Credits

Of the companies that committed to reduce GHG emissions, 45.4% rely on carbon offsets

Of the companies that rely on carbon offsets, 30% provide credible evidence to support offsets

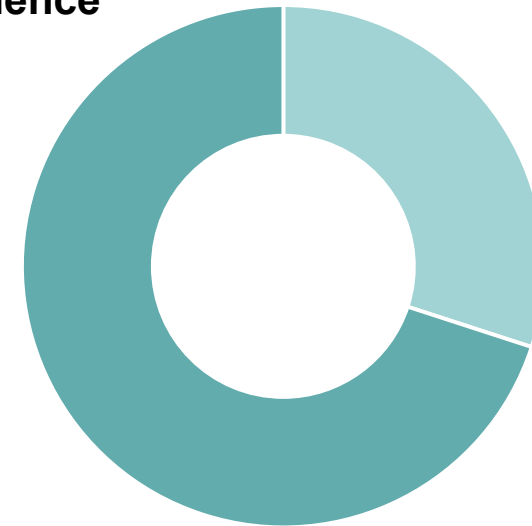
12/22 companies
do not rely on
carbon offsets



■ Disclosure ■ No Disclosure

10/22 companies
rely on carbon
offsets

7/10 companies
do not provide
credible evidence



■ Disclosure ■ No Disclosure

3/10 companies
provide credible
evidence

2023 Trends: Voluntary carbon offset market will continue to grow and be questioned.

**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

Carbon Offset Credits





Addressing Climate Change

2023 Trends:

- **Scope 3 emissions may not be included in the SEC climate disclosure mandate but will not go away.**
- **More companies will question net zero commitments.**



Environmental Advertising



What is Advertising?

Advertising or promotion is:

- Commercial speech;
- Made for the purpose of influencing consumers to buy; and
- Disseminated sufficiently to the relevant purchasing public.

Truth in Advertising “Police”

Advertising practices regulated by the Government:

- **Federal Trade Commission** (“FTC”), pursuant to the FTC Act, 15 USC § 45 (\$11,000 per violation)
- **State Attorneys General**, pursuant to state “Little FTC Acts”
- **Municipalities, Local County and District Attorneys**
- **National Advertising Division (NAD) of BBB**, industry self-regulatory body (routine monitoring authority)

Truth in Advertising “Police”

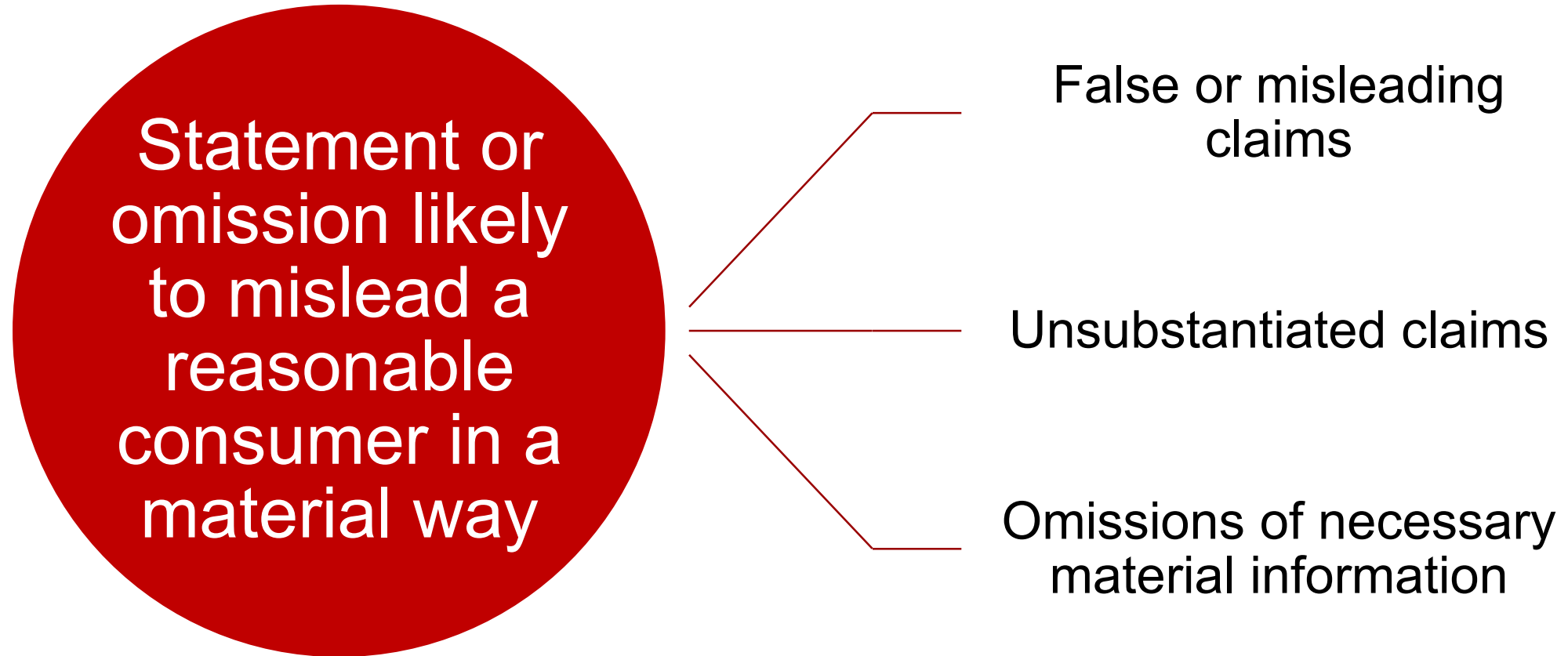
Advertising practices regulated by the Marketplace:

- **Private companies/Competitors** affected by false advertising have standing
 - Lanham Act 43(a) Claims (Federal Law)
 - State Unfair Competition Claims (*e.g.* NY) Similar to Lanham Act Claims
 - NAD Challenge
- **Plaintiff’s Class Actions:** Consumers, Non-Profit organizations

Environmental Claims: FTC Green Guides and Sustainability Claims



When is Advertising Deceptive



Advertising Clearance & Substantiation

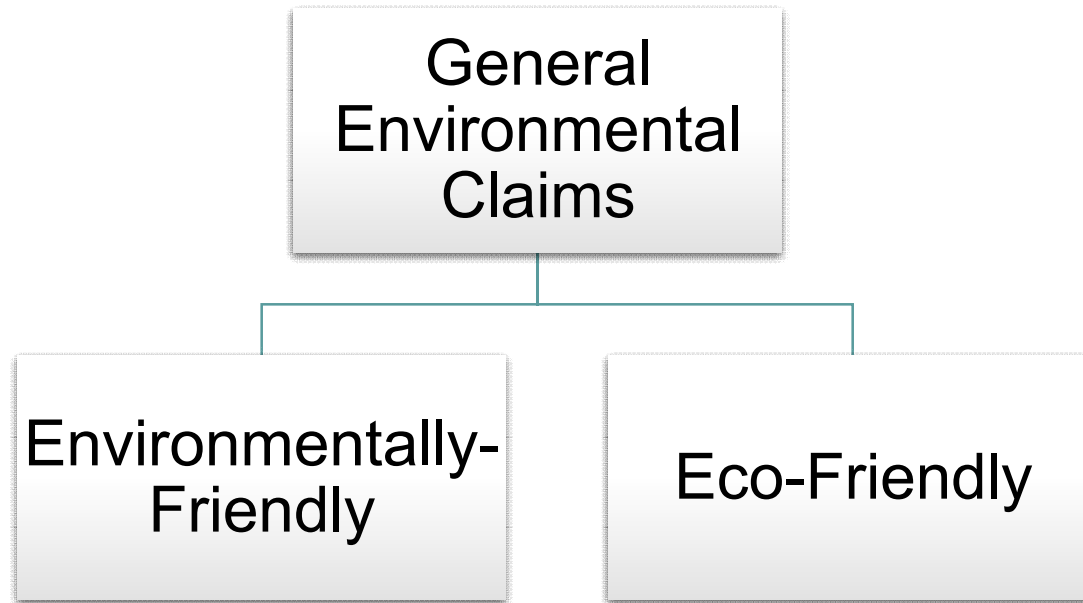
- **Prior Substantiation** doctrine
- Advertiser must have a “reasonable” basis for all objective product claims
- And the advertiser must have the substantiation in advance, *i.e.*, before running the claims

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) (emphasis added).

Substantiating General Environment Claims

- **QUALIFY THE CLAIM**
- Do “not imply that any specific benefit is significant if it is, in fact, negligible.” 16 C.F.R. § 260.4(c) (2012).
- Substantiation for a specific environmental attributes will not adequately qualify a general environmental benefit claim if the ad otherwise implies deceptive claims. 16 C.F.R. § 260.4(d) (2012).
- Analyze trade-offs
- Remember that context is important

Substantiating General Environment Claims

ENERGYbits Spirulina Algae), NAD Case Report No. 6280 (May 20, 2019)

- **Claim:** “Production of ENERGYbits is beneficial to the environment because it specifically – rather than algae in general – creates enough oxygen to repair the ozone layer”
- No evidence that trade-offs were considered
 - Environmental impact of shipping the product thousands of miles

EcoAdvanced Recycled Batteries), NAD Case Report No. 5893 (Oct. 19, 2015)

- **Claim:** “Reduction in Environment Impact”
- Adequately substantiated by:
 - Life-Cycle Assessment (LCA)
 - Calculations using EPA’s calculator to show the impact of the LCA results in terms of CO2 reductions and global warming potential

Biodegradable Claims

Biodegradable Claims

- Must prove that “entire product or package will completely break down and return to nature”
- Must prove occurrence “within a reasonably short period of time after customary disposal”
- “Reasonably short period of time” for complete decomposition of solid waste products = One Year
 - Only way to permissibly make unqualified claim
 - **Items destined for landfills, incinerators, or recycling facilities cannot usually biodegrade within a year**
 - If able to substantiate claims regarding biodegradability under particular circumstances may warrant prominent disclaimer

Example: Down to Earth - gDiapers

- Claim: Diapers were biodegradable
- They contained some plastic
- Entire product not biodegradable, thus false claim

gRefills are beyond biodegradable.

50 million diapers enter landfills every day. And they can take up to 500 years to break down. It's because disposable diapers are made of plastic and plastic doesn't biodegrade. gDiapers biodegradable gRefills are plastic-free, and they can be flushed, home composted or tossed. No stinky diaper pail. No landfill necessary.



Recyclable Claims

- Must qualify where recycling facilities are not available to 60% of population where product is sold
 - Example: “Recycling facilities may be unavailable or scarce in your area.”
- If facilities are only available to a few consumers, should use strong disqualifying language
 - Example: “This product is only recyclable in select communities.”

Sustainability Claim: *Blueland Cleaning Products*, NAD Case Report #6416 (September 2020)



- **Claim:** “Every piece of packaging – from our tablet wrapper, shipping materials, our Forever Bottles (which aren’t intended for you to recycle) – is 100% recyclable.”
- **Reasonable Consumer Takeaway**
 - The Forever Bottles were recyclable at available facilities.
- **Problem:**
 - Recyclable through Blueland’s take-back program

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.”

JBS has appealed to the National Advertising Review Board

Takeaways & Tips for Practitioners

Sustainability is a worthy goal that can improve business
but be truthful!

- Align environmental promises with results
- Avoid broad environmental claims
- Substantiate claims with supporting evidence
- Environmental certifications must be earned

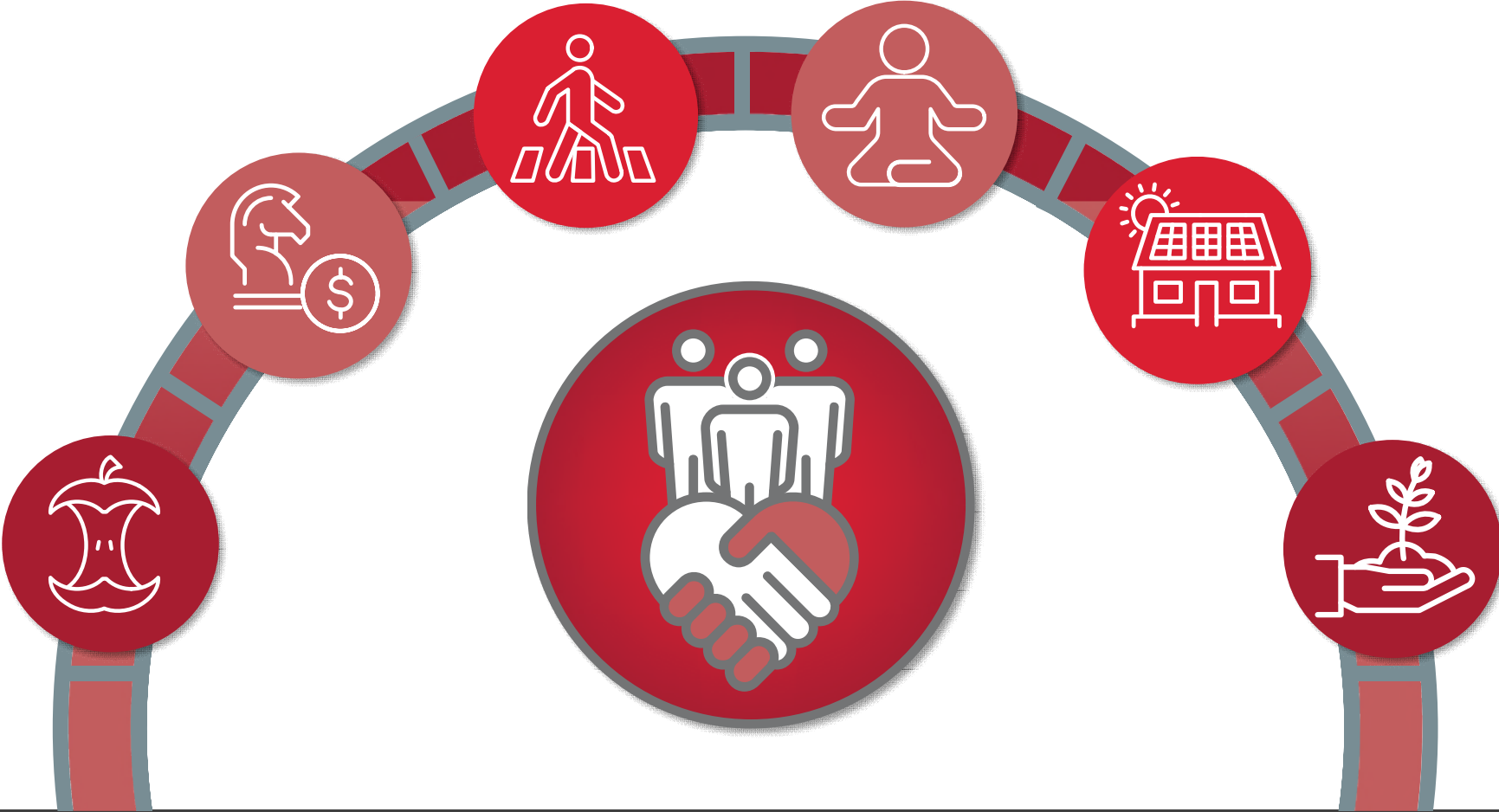




Social Takeaways & Legal Risks



Social Takeaways



Legal Risks: Ethical Sourcing & “Responsible Production”

Polysilicon from Xinjiang



Cobalt from the DRC



Managing E-Waste



Uyghur Forced Labor Prevention Act


- UFLPA became effective last June.
- 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.

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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

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The Wall Street Journal news department was not involved in the creation of this content.

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

Government Targets a Global Company with U.S. Ties

RISK & COMPLIANCE JOURNAL

U.S. Puts Chinese Company With Kentucky Ties on Forced Labor Ban List

The U.S. has blocked goods from printer maker Ninestar, majority owner of Lexington, Ky.-based Lexmark International, over forced labor concerns

By [Richard Vanderford](#) [Follow](#)

June 9, 2023 6:24 pm ET

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The Department of Homeland Security said goods from Ninestar and eight subsidiaries will be restricted from entering the U.S. as of Monday. PHOTO: SUSAN WALSH/ASSOCIATED PRESS

Source: U.S. Puts Chinese Company With Kentucky Ties on Forced Labor Ban List - WSJ

- Earlier this month, the U.S. government blocked the import of goods made by Ninestar.
- Ninestar is a Chinese laser printer maker, that is the majority owner of U.S.-based Lexmark International.
- The U.S. government alleges that Ninestar and its Chinese-based subsidiaries participate in business practices that target members of persecuted groups.

Combatting AI Bias & Discrimination

- U.S. law-enforcement officials announced that they seek to combat discrimination and bias arising from the use of AI.
- “There is not an exemption in our nation’s civil-rights laws for new technologies... Companies must take responsibility for the use of these tools.” --Rohit Chopra, director of the CFPB
- “We already see how AI tools can turbocharge fraud and automate discrimination, and we won’t hesitate to use the full scope of our legal authorities to protect Americans from these threats.” --FTC Chair Lina M. Khan.

THE WALL STREET JOURNAL.

TECH

U.S. Law-Enforcement Agencies Seek to Combat AI Bias

DOJ, FTC and others focus on how ChatGPT and other tools could be used to discriminate or harm competition

By [Ryan Tracy](#) [Follow](#)

Updated April 25, 2023 2:09 pm ET

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CFPB Director Rohit Chopra has said new technologies must be fully compliant with civil-rights law.

PHOTO: ROD LAMKEY/ZUMA PRESS

Source: <https://www.wsj.com/articles/u-s-law-enforcement-agencies-seek-to-combat-ai-bias-b0d7e763>

Combatting AI Bias & Discrimination

- There is a newly announced 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.”

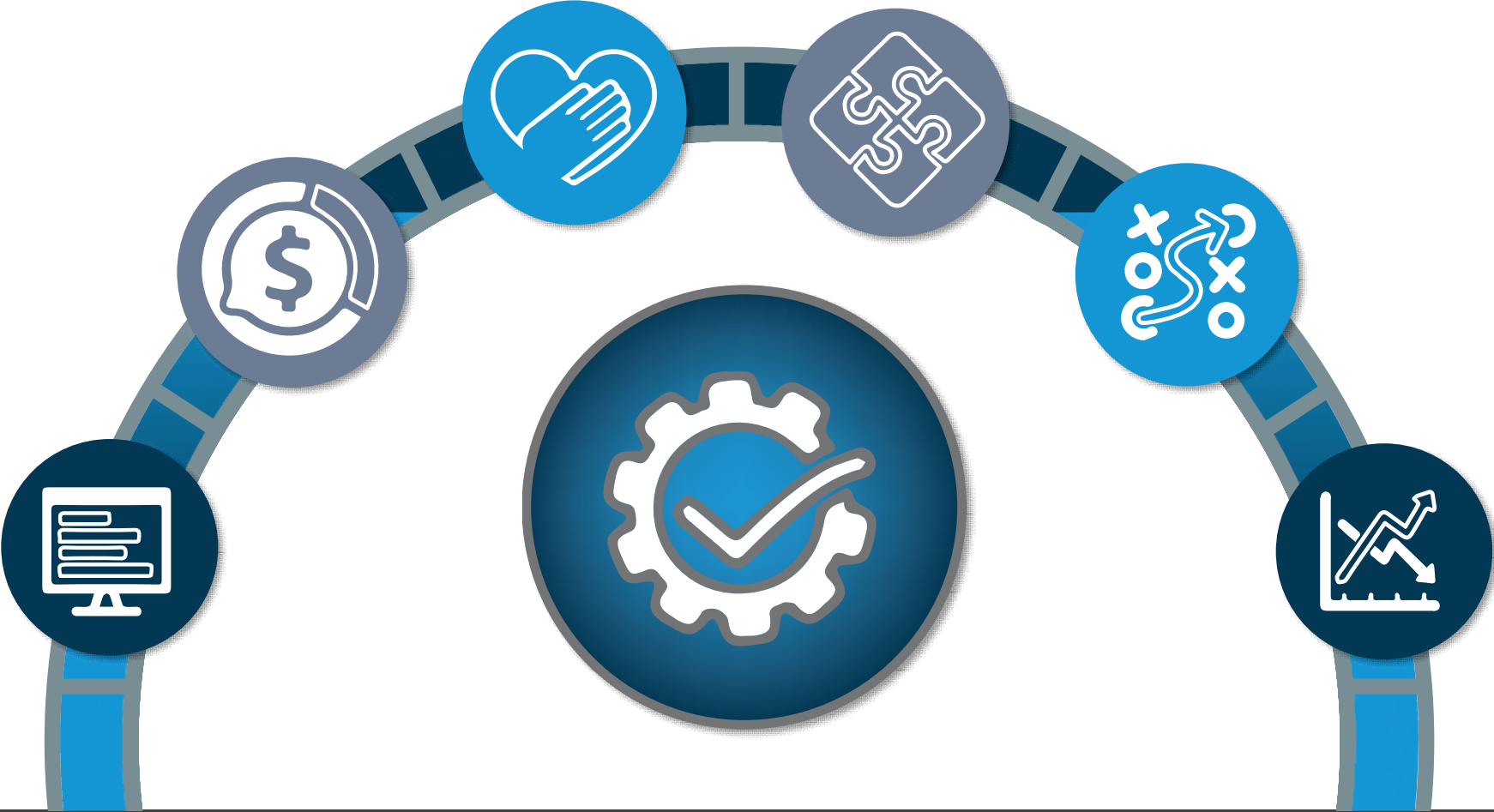
“We have come together to make clear that the use of advanced technologies, including artificial intelligence, must be consistent with federal laws,” said EEOC Chair Charlotte A. Burrows. “America’s workplace civil rights laws reflect our most cherished values of justice, fairness and opportunity, and 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



Governance Takeaways & Legal Risks



Governance Takeaways

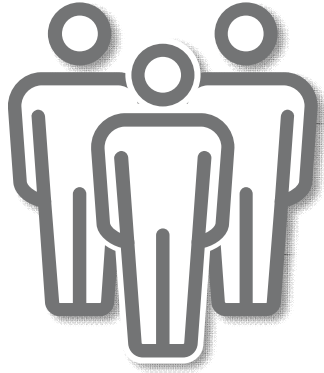


Governance Takeaways

- Priorities listed included anti-bribery and anti-corruption; employee training; and ethical leadership.
- Nearly half of companies do have a Board of Directors committee dedicated to ESG.
- Most companies do not clearly state governance oversights and roles.



Governance Takeaways



About a third of the companies report having an interdisciplinary ESG committee.



The compliance training referenced included Code of Conduct, anti-bribery and safety training.



Compliance training is typically referenced for public companies and listed by a third of the private companies. Most do not mention participation rates.

Governance Legal Risks: Typical Pitfalls

Failure to implement a thoughtful, risk-based compliance program

Inadequate auditing or testing of corporate disclosures for adequacy and completeness

Insufficient corporate whistleblower program

Failure to properly monitor third-parties based on the highest corporate risks

Poor corporate culture that does not include values that match the compliance efforts

Proposed Federal Supply Chain Rule for Government Contractors

- 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.
- All Federal contractors with less than \$7.5 million in annual contracts would be exempt from the rule.



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.

Reporting Risks: DWS Group



- According to an August 2021 *WSJ* article, among other things, DWS:
 - Had difficulty defining and implementing an ESG strategy;
 - Issued a 2020 annual report that may have painted a “rosier-than-realty picture” to the public on its ESG efforts;
 - Referenced “ESG integration,” in its report, when possibly “only a small fraction of the investment platform” applies it; and
 - Allegedly terminated the former Sustainability Chief, the day before the report’s issuance.
- After the *WSJ* article, both the U.S. Attorney's Office for the Eastern District of New York and the SEC initiated an investigation of DWS.
- BaFin, a German regulator, also opened an investigation.

Reporting Risks: DWS Group

- DWS Group's 2022 Annual Report provides the latest on the investigation:
 - We have received requests for information from regulatory and law enforcement authorities concerning certain allegations made by a former employee in relation to ESG matters, as well as concerning the use of off-platform communications channels by DWS employees. We continue to cooperate fully with the authorities. These investigations are ongoing, and the outcome is still to be determined, for further information please refer to note '17 – Provisions' within the 'Consolidated Financial Statements'.

Misleading Disclosures: SEC v. Vale S.A.

- In 2015, a dam in Mariana, Brazil, which was co-owned by Vale, collapsed and killed 19 people.
- According to the SEC, Vale vowed “Mariana Never Again,” and publicly declared its “commitment to sustainability” and achieving “zero harm” to employees and surrounding communities.
- In 2019, Vale’s Brumadinho dam collapsed and killed a total of 270 people, while poisoning a river and tributaries.
- The SEC described how the collapse caused “immeasurable environmental, social and economic devastation.”



Source: <https://www.panoramas.pitt.edu/health-and-society/brumadinho-dam-collapse-and-brazilian-infrastructure>

Misleading Disclosures: SEC v. Vale S.A.

- In April 2022, the SEC filed its complaint against Vale for violating antifraud and reporting provisions of the federal securities laws and seeks injunctive relief, disgorgement plus prejudgment interest and civil penalties.
- The SEC believes that since 2003, Vale knew the Brumadinho dam was “dangerously fragile,” and the dam did not meet its own safety and the international standards.
- The SEC alleges that, among other things, Vale management and employees:
 - Manipulated processes;
 - Misled local governments, communities and investors about safety;
 - Engaged in deceptive acts to avoid regulatory safety requirements, such as “cut[ting] backroom deals with one of its auditors” in exchange for “lucrative contracts” with Vale; and
 - “[S]uppressed” evidence from its own retained experts.

Misleading Disclosures: Vale Pays \$55.9 Million

- Last March, Vale agreed to pay \$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."

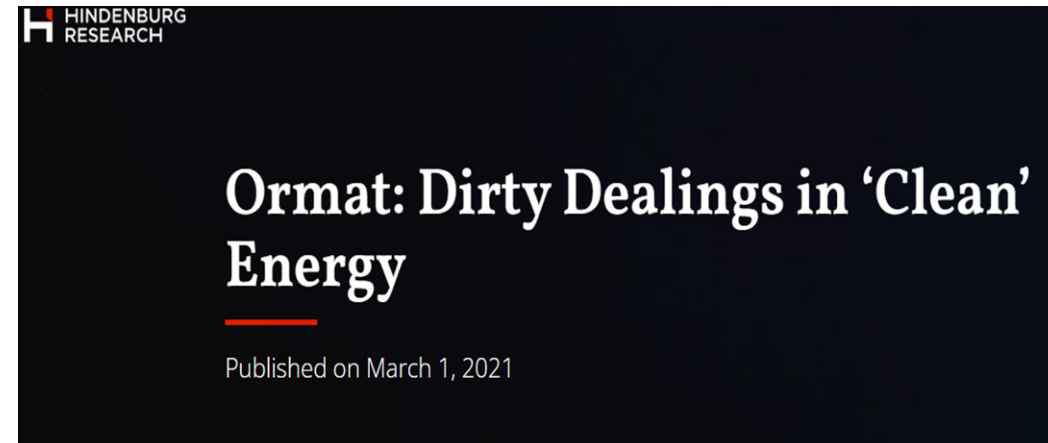


The screenshot shows the U.S. Securities and Exchange Commission (SEC) website. At the top, the SEC logo and name are visible, along with a search bar containing "Search SEC.gov". Below the header is a navigation menu with links for ABOUT, DIVISIONS & OFFICES, ENFORCEMENT, REGULATION, EDUCATION, and FILINGS. The main content area is titled "Press Release" and features a sub-header "Brazilian Mining Company to Pay \$55.9 Million to Settle Charges Related to Misleading Disclosures Prior to Deadly Dam Collapse". The release is dated "FOR IMMEDIATE RELEASE 2023-63" and is dated "Washington D.C., March 28, 2023". The text of the release states that the SEC announced that Vale S.A., a publicly traded Brazilian mining company, agreed to pay \$55.9 million to settle charges brought last April stemming from the company's allegedly false and misleading disclosures about the safety of its dams prior to the January 2019 collapse of the Brumadinho dam that killed 270 people. The SEC's complaint alleged that, for years, the dam did not meet internationally-recognized safety standards even as Vale's public sustainability reports assured investors that all of its dams were certified as stable. The release quotes the Associate Director of the SEC's Division of Enforcement, Mark Cave, stating: "Our action against Vale illustrates the interplay between the company's sustainability reports and its obligations under the federal securities laws," said Mark Cave, Associate Director of the SEC's Division of Enforcement. "The terms of today's settlement, if approved by the court, will levy a significant financial penalty against Vale and demonstrate 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." The settlement, which remains subject to approval by the U.S. District Court for the Eastern District of New York, requires Vale to pay a civil penalty of \$25 million and disgorgement and pre-judgment interest of \$30.9 million and would permanently restrain and enjoin Vale from violations of the Securities Act of 1933 and of the Securities Exchange Act of 1934. The SEC's litigation is being led by Dean Conway and Michelle Zamarin, under the supervision of Melissa Armstrong and Sharan Custer.

Reporting Risks: Hindenburg Research LLC

Its investigative reporting has led to investigations by the:

- SEC & DOJ into Ormat Technologies Inc. regarding international corruption;
- SEC into Lordstown Motor Corp's alleged misrepresentation of its preorder numbers and production readiness;
- SEC & DOJ into Nikola Corp and its founder into the misleading of investors over its technology capabilities;
- SEC into Clover Health Investments Corp. as to whether it mislead shareholders by failing to disclose a DOJ probe; and
- SEC into DraftKings concerning its recent acquisition of a Bulgarian-based sports betting technology company.



Source: <https://hindenburgenresearch.com/ormat/>

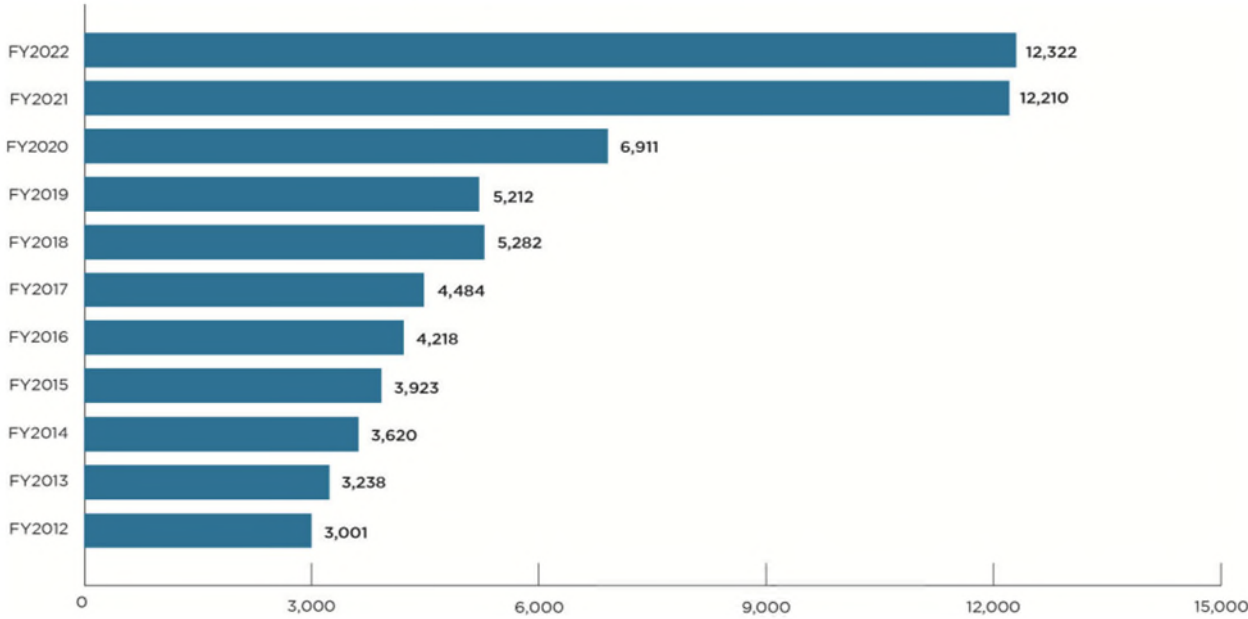
Compliance Risks: Environmental Justice

- In May, the DOJ launched a new:
 - Office of Environmental Justice (“OEJ”); and
 - Environmental justice enforcement strategy (developed in partnership with the EPA).
- The strategy sets forth, among other things, how:
 - Each U.S. Attorney’s Office will designate an environmental justice coordinator;
 - Local or regional task forces, including federal, state, tribal, territorial and local government law enforcement authorities should be established or “reinvigorated” as a tool to develop and pursue environmental justice enforcement matters; and
 - The DOJ will consider enforcement action “tools,” including traditional environmental protection laws, civil rights laws, worker safety, consumer protection statutes and the False Claims Act.

Compliance Risks: U.S. Government Seeks to Create a “Speak Up” Culture

Increase in Whistleblower Tips

In FY 2022, the Commission received over 12,300 whistleblower tips—the largest number of whistleblower tips received in a fiscal year—which represented a slight increase over FY 2021. The table below shows the number of whistleblower tips received by the Commission on a yearly basis since the inception of the Whistleblower Program.¹⁴



https://www.sec.gov/files/2022_ow_ar.pdf



Questions?



Locations

Counsel to innovative companies and brands around the world

We help leaders create, expand, and protect the value of their companies and most prized assets by bringing an equal balance of business acumen, technical skill, and creative thinking to the opportunities and challenges they face.



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