

Quick Hit: ESG



Speaker



AJ Bartolomeo

Partner
Tadler Law LLP
ajd@tadlerlaw.com

AJ has thirty years of experience prosecuting class actions, complex and collective matters in courts throughout the country. Ms. de Bartolomeo has earned a national reputation as a zealous and passionate advocate and is the former Chair of the Women’s Trial Lawyer Caucus of the American Association of Justice.

Speaker



William (Bill) Tarantino

Partner
Morrison & Foerster LLP
Wtarantino@mof.com

Bill's national litigation practice focuses on environmental law, hazardous materials, and consumer class actions, with a particular focus on California's unique environmental, health and safety laws. He serves on his firm's ESG Steering Committee and frequently counsels clients on how to develop and maintain their ESG commitments.

Quick Hit Overview

- What is ESG?
- ESG Spotlight: Governance and Board Diversity
- ESG Spotlight: Environmental and Social Claims – Litigation Trends

ESG – What is it?

- Environmental and Social Governance
 - **Environmental:** Climate change, greenhouse gas emissions, biodiversity loss, pollution mitigation, energy efficiency, waste and water management.
 - **Social:** Employee safety and health, working conditions, diversity, equity, and inclusion, and conflicts and humanitarian crises.
 - **Governance:** Bribery, corruption, board diversity, executive compensation, cybersecurity and privacy practices.
- Framework for organizational management and investment decisions

ESG: Governance and Board Diversity

- States and the NASDAQ have acted to diversify public company boards to include women and systematically underrepresented communities (including members of the Black, Indigenous, LGBTQ, Hispanic and Latino, Native American, Asian and Pacific Islander communities)

CALIFORNIA

- SB 826, enacted as Corp. Code §301.3, and AB 979 enacted as Corp. Code §301.4:
- **Increase of women on Boards:**
 - by 2020 at least 1
 - by 2021, 2 if the board has 5 directors and 3 if the board has 6 or more directors.
- **Increase of systematically underrepresented communities:**
 - By end of 2021:
 - 1 if the board has 4 or fewer directors
 - 2 if the board has between 5-8 directors
 - 3 if the board has 9 or more directors

ESG: Governance and Board Diversity

NASDAQ

- NASDAQ Rule 5605(f) requires DISCLOSURE by listed companies, with some exceptions for smaller companies and foreign issuers, of:

the number of “Diverse Directors” on the Board; or
the reasons for the company’s failure to have “Diverse Directors” on its Board.
(NASDAQ will not judge the sufficiency of the reasons for a non-diverse board.)

- NASDAQ’s rule does not mandate a minimum number of Diverse Directors – distinct from the California legislation. It does provide “aspirational diversity objectives,” to have 2 Diverse Directors.

Rule 5605(f)(2)(A).

ESG: Governance and Board Diversity

CALIFORNIA

- Two cases challenged the constitutionality, under the California Constitution, both laws intended to rectify the imbalance and inequity of public company board membership. *See Crest v. Padilla*, Case No. 19STCV27561(LA Super. CT.); *Crest v. Padilla*, Case No. 20STCV37513 (LA Super. CT.)
- Each judge (after trial or on motions for summary judgment) rejected the California laws as overstepping California's constitutional requirements.
- Each case is on appeal to the 2d District, though briefing is nowhere near complete.

ESG: Governance and Board Diversity

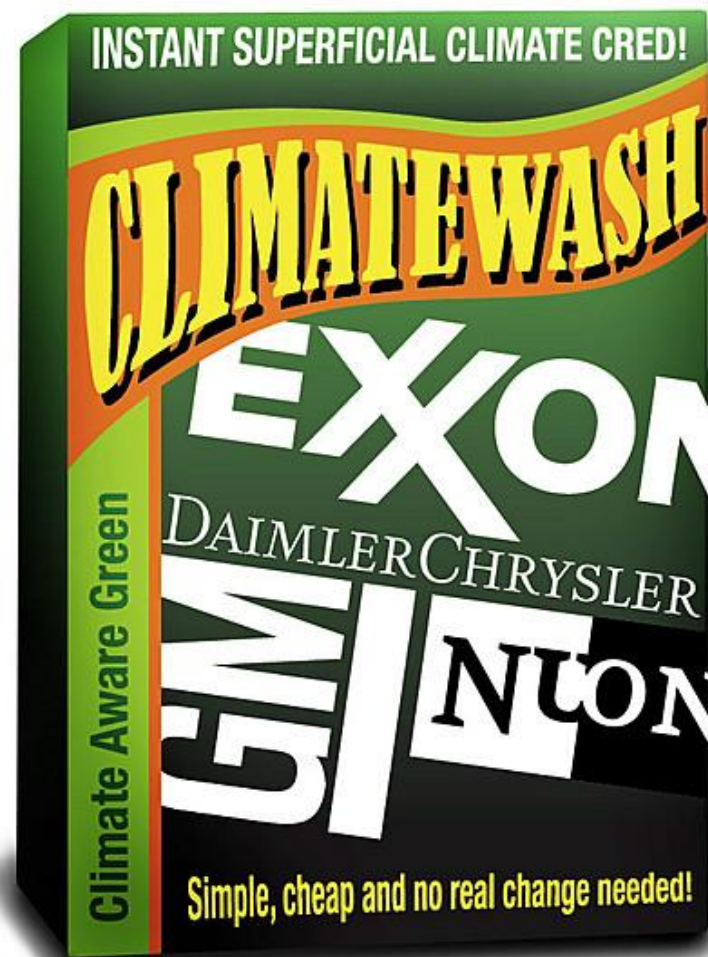
NASDAQ

- In *Alliance for Fair Board Recruitment v. SEC*, No. 21-60626 (5th Cir.), an anti-affirmative action group received direct review by the Fifth Circuit in challenging the SEC-approved NASDAQ rule. The Fifth Circuit heard argument in late August 2022 and has not yet issued its decision.

ESG: Governance and Board Diversity

- Current Impact: California’s legislation has already changed the landscape of board membership, though not for all identified communities. More women have joined boards in the last 2 years.
- New Legislation. California and other states may pass new legislation following the NASDAQ/New York disclosure-based framework.
- Market Participants announced their intentions to influence the companies they underwrite or invest with to ensure progress on board diversity.
 - BlackRock has stated it will consider board diversity when voting for Nominating Committee board members and asks companies how diversity is used in nominating board members.
 - Goldman Sachs announced in 2020 “a new standard for taking companies public: at least one diverse board member” and in 2021 increased that standard to two diverse board members.
- Shareholder Activism by large public pension plans (e.g., CALPERS) is likely to continue.
- Observers including non-profits will continue to analyze data to evaluate board diversity:
 - As You Sow <https://www.asyousow.org>
 - Just Capital <https://justcapital.com>

Environmental and Social Claims – Litigation Trends



Environmental and Social Claims – Litigation Trends

Theories of Liability

- **Omissions.** *See, e.g., Ferrante v. Trader Joe's Company, No. 2:23-cv-00046 (E.D.N.Y)* (alleging defendants failed to disclose on product packaging that their dark chocolate products contain lead and cadmium).
- **Affirmative misrepresentations.** *See, e.g., Brown v. Cover Girl Cosmetics, No. 1:22-cv-02696 (S.D.N.Y.)* (alleging defendant misrepresented that its waterproof mascaras were safe, effective, and high quality when testing revealed the presence of PFAS).
- **Breach of warranty.** *See, e.g., Gruen v. The Clorox Company, No. 3:22-cv-935 (N.D. Cal.)* (alleging defendant breached express and implied warranties by selling products containing PFAS).

Environmental and Social Claims – Litigation Trends

- Dwyers v. Allbirds, Inc. (June 2021 SDNY Class Action)
 - Alleged that Allbirds made misleading claims in:
 - Estimating its products' carbon footprint;
 - Relying on the Higg Material Sustainability index (MSI) to measure its environmental impact;
 - Overstating its animal welfare claim.
 - Court dismissed in April 2022
 - “In advertising the Product’s carbon footprint calculations, [Allbirds] describes the exact components of the calculation...”
 - Allbirds “does not mislead the reasonable consumer because it makes clear what *is* included in the carbon footprint calculation and does not suggest than any factors are included that really are not.”
 - Criticism of the animal welfare certification does not demonstrate that animal cruelty exists at the farms supplying Allbirds with wool.

Environmental and Social Claims – Litigation Trends

- In re Oatly Group AB Securities Litigation (S.D.N.Y. 2021)
 - Two securities class actions filed in the federal district court for the Southern District of New York alleged that Oatly Group AB, the oatmilk company, and Oatly officials and directors made false statements and failed to disclose adverse facts that deceived the investing public and artificially inflated the prices of Oatly stock shares between the time of the company's initial public offering in the United States in May 2021 and July 2021,
 - A short seller issued a report on “a number of improprieties at Oatly, including improper accounting practices and greenwashing (making the Company's product appear more sustainable than it actually is).”
 - The complaint alleged that Oatly's statements in the registration statement filed with the Securities and Exchange Commission and in an investor presentation including misleading statements related to the greenhouse gas emissions and energy consumption associated with its product.

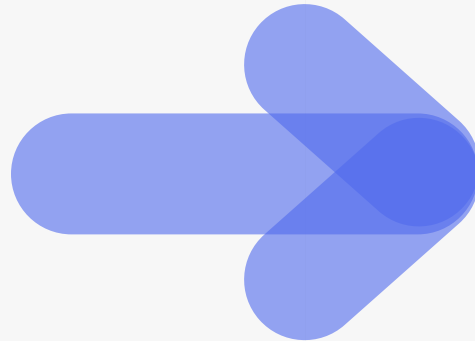
Environmental and Social Claims – Litigation Trends

- Anderberg v. Hain Celestial (S.D.Cal. 2021)
“Reef safe” is misleading -- two ingredients alleged to be harmful to reefs
- Spindel v. Gorton's Inc. (D. Mass. 2022)
“Sustainably sourced” tilapia in Chinese fish farms “environmentally destructive”
- Curtis v. 7-Eleven, Inc. (N.D. Ill. 2022)
Recyclable means ‘can be recycled’ not ‘will be recycled’
- Earth Island v. Coca-Cola. (D.C. Sup. 2022)
Aspirational statements not actionable - “help develop,” “more sustainable future”

Environmental and Social Claims – Litigation Trends

FTC Green Guides Update

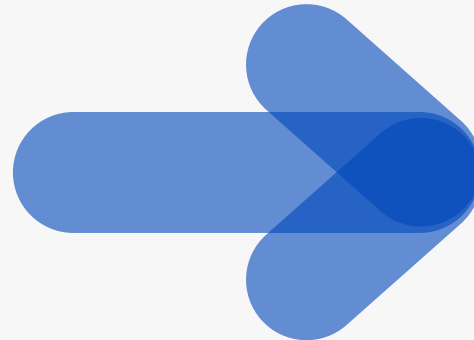
FTC has promised to update its Green Guides to address climate and carbon claims more specifically.



Public comment period extended to April 24, 2023. Timeline is uncertain.

Climate Disclosure Rule

The SEC is moving ahead with its 490-page Climate Disclosure Rule, although it has recently reopened the public comment period and is certain to face legal challenges when finalized. A final rule is expected some time in 2023.



Final rule is expected some time in 2023.



Thank You for Joining Us

Please contact us if you have any additional questions after our presentation today.