Loss Prevention Standards – Financial Lines

Management Liability - Greenwashing

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A guide for Directors and Officers on implementing authentic and transparent sustainability practices.

AVIVA

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Introduction

The pressure on companies to demonstrate their commitment to sustainability is greater than ever. Companies and their investors are dependent on their Directors and Officers to properly navigate the complex terrain surrounding ESG issues.

This responsibility has the potential to give rise to a number of new regulatory and legal risks for Directors and Officers. This guide is focussed on the legal and regulatory dangers presented by potential greenwashing and greenhushing, covering the legal risks involved and strategies for directors and officers to manage those risks responsibly and ensure they are only implementing genuine and transparent sustainability practices.

Greenwashing

Greenwashing describes a situation where a company's environmental credentials have been overstated. This might occur for a number of reasons. Publishing environmental credentials is important to many companies in order to address:

- Competitive pressures – in industries where sustainability is highly valued, companies need to remain competitive with other companies in their industry sector.
- Attraction of Investors – Many investors are increasingly prioritising ESG criteria when making investment decisions.
- Consumer Demand – There is growing customer awareness and demand for sustainable products and business practices.
- Regulatory requirements – Companies need to ensure they are compliant with growing regulation within this area.

As such, Directors and Officers might (whether inadvertently, misguidedly, or dishonestly) be persuaded to misrepresent the true position in respect of their company's sustainability efforts to meet or take advantage of the above factors.

Greenhushing

Greenhushing is where a company has underreported or concealed its sustainability efforts and positive environmental achievements. This might occur where companies are worried about:

- Drawing public attention to weaker areas – Publicising ESG credentials could attract additional scrutiny of other areas that are weaker in respect of sustainability.
- Fear of being accused of greenwashing - if their claims are not fully substantiated.
- Maintaining a competitive advantage – preventing competitors from copying their strategy, particularly where it is innovative in some way.
- Cultural or market factors – aligning with local expectations or customer's commercial interests.

Some companies might view Greenhushing as a safer route. However, it carries its own risks – such as missed opportunities to attract environmentally conscious consumers and investors, or stakeholder mistrust where there is the perception of a lack of transparency around sustainability reporting.

What are the risks?

1. Regulatory Compliance Failures. Directors must ensure that their companies comply with various ESG reporting regulations. This is a continually developing area, and will be dependent on a company's work type, industry, company size and jurisdiction. Regulators such as the FCA have stringent anti-greenwashing rules. Failures to meet these reporting standards, or providing misleading information when reporting, could result in fines, enforcement action or other legal sanctions on Companies and directors themselves.
2. Legal claims for misrepresentation or breach of duty from shareholders, investors, or consumers. Derivative claims (assuming permission is granted by the court) can include damages to reflect losses to the company (e.g. reputational damage resulting in lower share prices); orders for the director to account to the company for any profit obtained; orders to set aside transactions; or injunctions to prevent particular breaches. Shareholders can claim for loss suffered from untrue or misleading statements under sections 90 and 90A FSMA (depending on whether the misleading information was provided in a prospectus or other documents, such as a Director's report).
3. Reputational damage - Poor ESG practices can harm a company's reputation leading to a loss of business, decreased investor confidence and potential legal claims.
4. Stakeholder mistrust – where they perceive a lack of transparency about the company's environmental practices.

It is important to note that Directors face financial consequences related to these risks, even where there has been no intentional or actual wrongdoing. Directors should be aware that they run the risk of:

- Inadvertently breaching reporting requirements
- Failing to properly evidence positive sustainability practices, which could affect claims defensibility as well as the cost and complexity of the defence.
- Being forced to defend themselves against weak or poorly constructed claims – Directors can find themselves having to defend claims even where there has been no wrongdoing, and the claim has poor prospects of success.

Risk guidelines for avoiding Greenwashing claims against Directors

- Review your current commitments and the progress made against achieving them.
- Ensure accurate reporting. All ongoing reporting must be accurate, verifiable, and transparent. Share relevant data and be honest about what has been achieved and what needs more work. Consider the whole lifecycle of your service or product.
- Be specific in your communications. Avoid vague terms such as "eco-friendly" or "green" where possible. Provide specific details about your environmental initiatives and their impact.
- Audit your practices regularly to ensure compliance and identify areas of improvement. Ensure these are properly documented.

- Obtain third party verification of key information where appropriate.
- Control all future statements on ESG to ensure statements are accurate and not misleading.
- Review subsidiaries and suppliers in case they are a potential source of liability. Ensure you have up to date information from them to ensure compliance and areas for improvement.
- Ensure there is a proper process for monitor changes to ESG legislation and responding to it.
- Educate your employees and ensure they are clear on what the company's ESG commitments are, and ensure any internal messaging is consistent with them.
- Foster good communication with stakeholders. Regular, accurate reporting can help to reduce the chances of miscommunication and will also provide you with the opportunity to manage any general concerns or expectations.

Checklist

A generic Management Liability - Greenwashing is presented in Appendix 1 which can be tailored to your own business.

Specialist Partner Solutions

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For more information please visit:

Aviva Risk Management Solutions – Specialist Partners

Sources and Useful Links

- Sustainability Disclosure Requirements: Implementation Update 2024 - GOV.UK (www.gov.uk)
- PS23/16: Sustainability Disclosure Requirements (SDR) and investment labels | FCA
- FG24/3: Finalised non-handbook guidance on the anti-greenwashing rule | FCA
- Recommendations | Task Force on Climate-Related Financial Disclosures (fsb-tcfd.org)
- IFRS - ISSB and TCFD
- Companies Act 2006 (legislation.gov.uk)
- The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 (legislation.gov.uk)

To find out more, please visit Aviva Risk Management Solutions or speak to one of our advisors.

Email us at riskadvice@aviva.com or call 0345 366 6666.*

*The cost of calls to 03 prefixed numbers are charged at national call rates (charges may vary dependent on your network provider) and are usually included in inclusive minute plans from landlines and mobiles. For our joint protection telephone calls may be recorded and/or monitored.

Appendix 1 – Management Liability - Greenwashing Checklist

Location	
Date	
Completed by (name and signature)	
Next review date	

		Y/N	Comments
1.	Do you have clear oversight on your company's current ESG commitments? What are they?		
2.	Do you have an effective system in place to monitor your progress against achieving them?		
3.	Have you reviewed the entire lifecycle of your products and services?		
4.	Do you have systems and ongoing checks in place to ensure your ESG reporting complies with relevant laws, regulations, and industry standards, both now and as they develop?		
5.	Are your ESG commitments communicated in a clear and specific way? How do you ensure that sustainability commitments do not use vague language (such as "eco-friendly" or "green") or goals that cannot be evidenced?		
6.	How do you ensure that all reporting is accurate, verifiable, and transparent? Do you share relevant data, including on areas which might need more work?		
7.	Does your policy identify key individuals or departments responsible for overseeing your ESG commitments and progress against your targets?		

8	What training and educational resources are provided to employees in respect of your company's sustainability commitments, and what can be communicated?		
9	How regularly are your ESG commitments audited?		
10.	How are improvements arising from audits implemented? Is there are a robust system to monitor these?		
11.	Are your audits properly documented and the outcomes shared with all relevant parties?		
12.	Do you obtain third-party verification of key information where appropriate from a reputable organisation? How are you satisfied of the accuracy of any third-party verification?		
13.	Have you reviewed all subsidiaries and suppliers? How do you monitor their progress and areas for improvement?		
14.	Do you have a process for reporting progress on sustainability commitments to key stakeholders? Does this process provide an opportunity for you to discover any concerns of expectations from them?		

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