2014

The Law and Economics of Corporate Social Responsibility and Greenwashing

Miriam A. Cherry
Saint Louis University School of Law

Recommended Citation
Cherry, Miriam A., The Law and Economics of Corporate Social Responsibility and Greenwashing (2014). 14 U.C. Davis Business Law Journal 282 (2014).

UC Davis
Business Law Journal
Volume 14, Edition 2 Spring 2014

The Law and Economics of Corporate Social Responsibility and Greenwashing

Miriam A. Cherry

UC Davis
School of Law

THE LAW AND ECONOMICS OF CORPORATE SOCIAL RESPONSIBILITY AND GREENWASHING

MIRIAM A. CHERRY*

ABSTRACT

In this symposium article, I explore the link between corporate social responsibility (CSR) and the threat of greenwashing. In the first part of the article, I start with first principles, examining the origins of greenwashing, structuring its definitions, and identifying the economic incentives that lead firms into the practice. The second part of this article examines the legal structure that allows greenwashing to occur, and with it, explores the pervasiveness and extent of greenwashing. The third part of this article articulates the harms of greenwashing. Intuitively, greenwashing involves deception, falsity, and hypocrisy that reflexively seem problematic. Identifying the actual harm inflicted by some forms of greenwashing, however, is much more difficult to pinpoint. The last portion of the paper outlines a law and economics analysis to argue that greenwashing might, in the aggregate, represent one of the most serious challenges to achieving corporate social responsibility in business today.

TABLE OF CONTENTS

---

* Miriam A. Cherry, Professor of Law, Saint Louis University Law School; B.A., 1996, Dartmouth College; J.D., 1999, Harvard Law School. Support for this research was provided by the Center for Sustainability at Saint Louis University. Thanks to Gustavo Hernandez, Rachael Salceido, M. Six Silberman, Joseph "Chip" Pitts III, Judd Sneirson, and Douglas Williams, who all offered insights on this topic. My appreciation to Professors Afra Asharipour, Eric Lane, and the other participants in the symposium for their contributions, and to William Stanger and the other editors of the *U.C. Davis Business Law Journal* for organizing and hosting the symposium. Special thanks to David Kullman, research librarian at Saint Louis University, for his excellent research assistance.

INTRODUCTION

One of the most significant challenges to achieving corporate social responsibility (CSR) in business today is the threat of greenwashing. As green technology becomes increasingly common, and consumers request or, in some instances, even demand green products and services, many businesses have become financially incentivized to improve their social and environmental reputations. A firm can increase its reputation legitimately, by investing in sustainable practices or engaging in corporate social responsibility with its emphasis on the triple bottom line – people, profit, planet. Some firms, however, have responded to this new move toward CSR by cultivating a green image without evidencing genuine commitment to change or investing the (sometimes quite considerable) money that such a change would entail. As such, greenwashing may ultimately undermine the credibility of even the most well-meaning and well-implemented CSR efforts.

Greenwashing occurs when a corporation increases its sales or boosts its brand image through environmental rhetoric or advertising, but in reality does not make good on these environmental claims.[1] In an earlier article, my co-author Judd Sneirson and I analyzed the 2011 BP oil spill disaster as a case study of greenwashing in the energy sector.[2] While BP compiled a record rife with safety and environmental violations, at the same time the company mounted a highly successful advertising campaign, portraying itself as environmentally friendly, or at the very least, not as bad as other oil companies, and cast itself as the champion of alternative energy and environmental causes.[3] This disconnect between myth

---

[1] *See* Tom Wright, *False "Green" Ads Draw Global Scrutiny*, WALL ST. J., Jan. 30, 2008, at B4. *But see* Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 796 (2007) (noting that psychological research indicates that corporations are more likely to "buy in" to CSR philosophies the more that CSR rhetoric is repeated).

[2] *See generally* Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 1027-28 (2011) (analyzing faux CSR and greenwashing using the 2011 BP oil spill as a case study).

[3] *See* Joe Stephens, *Oil Spill Threatens to Stain Alliances; Environmental Nonprofits Face Potential Backlash as Supporters Learn of Ties to BP*, WASH. POST, May 24, 2010, at A1 (detailing contributions from BP to nonprofit Nature Conservancy, and noting that "BP has been a major contributor to a Conservancy project aimed at protecting Bolivian forests. In 2006, BP gave the organization 655 acres in York County, Va., where a state wildlife management area is planned. In Colorado and Wyoming, the Conservancy has worked with BP to limit environmental damage from natural gas drilling."). "BP . . . is now watching the halo created by a decade of smart advertising vanish as a mammoth oil slick makes its way across the Gulf of Mexico. BP's 'Beyond

and reality caused us to question whether the law could be more effective in establishing a cause of action for consumers and investors who have been led astray by dubious claims of greenwashing or Faux CSR. Other forms of what Judd Sneirson and I have termed "Faux CSR" involve claims of corporate social responsibility toward workers or investment in local communities that by objective evidentiary standards fail to measure up to reality.

As currently structured in the United States, CSR is a voluntary endeavor that largely relies on the alignment of environmental consciousness and long-term firm reputation with shareholder value, the consciences of corporate managers and directors, and the goodwill of consumers and investors toward a planet and people-friendly vision. While ideally, the aspects of the triple bottom line would align, the reality at times is far more complicated. Furthermore, the challenge that greenwashing poses to CSR strikes at its very core and indeed, may threaten to undermine its existence. As CSR depends on the support of consumers and investors, if these groups suspect they are being defrauded, they will be more inclined to dismiss all such claims of CSR and corporate environmentalism, regardless of whether those claims are accurate. Such dismissal and cynicism could be seriously detrimental to the CSR endeavor.

In this symposium article, I explore the concept of greenwashing in more depth. In the first part of the article, I start with first principles, looking at the origins of greenwashing, its definitions, and identifying the economic incentives that lead firms into the practice. The second part of this article examines the legal structure that allows greenwashing to occur, and with it, explores the pervasiveness and extent of greenwashing. The third part of this article articulates the harms of greenwashing. Intuitively, greenwashing involves deception, falsity, and hypocrisy that reflexively seem problematic. Precisely identifying the actual harm inflicted by some forms of greenwashing, however, may sometimes be more difficult to pinpoint. The last portion of the paper outlines the law and economics analysis to argue that greenwashing might, in the aggregate, represent one of the most serious challenges to achieving corporate social responsibility in business today.

Petroleum' campaign had positioned the company on the green side of energy development. But its sunken drilling platform — and the resulting environmental catastrophe — has sent it firmly back into the dirty carbon company territory." Peter D. Hart & Dan McGinn, *Advice for BP's Reputation Crisis*, WALL ST. J., May 27, 2010, at A19. BP has indeed fallen from grace as a result of the oil spill, garnering a "devastating 4-to-1 negative-to-positive ratio on feelings about the company." *Id.*; *see also* Ron Lieber, *Driving Past the BP Station, and Tilting at Windmills*, N.Y. TIMES, June 12, 2010, at B1 (noting consumer boycotts of BP gas stations).

I. DEFINITION AND THE INCENTIVES TO GREENWASH

The term "greenwashing" has often been used more colloquially or polemically than systematically, and so this section returns to first principles in order to examine how the term originated as well as its many definitions. The second sub-part amplifies the economic incentives that lead firms to engage in greenwashing behavior.

A. Origins and Definitions of Greenwashing

Since the genesis of the environmental movement, activists and consumer watchdogs have noted that certain claims of corporate social responsibility were potentially dubious, misleading, inflated, or intended to deceive. For example, in the 1960s, groundbreaking environmentalist Rachel Carson, whose book *Silent Spring* called attention to the environmental impact of pesticides, noted misleading "green" advertising by chemical companies.[4]

While somewhat apocryphal, many trace the origin of the term "greenwashing" to a 1986 essay by American environmentalist, Jay Westerveld, who wrote about a sign in a hotel where he was a guest.[5] As described in accounts of the essay, the sign urged patrons to use fewer towels during their stay. The sign claimed that using fewer towels would help the environment through lower consumption of both laundry detergent and energy. Westerveld, however, claimed that the real purpose of the sign was to increase hotel profits by saving on the labor costs of washing the towels. As such the sign evidenced deception – environmental concerns were falsely being enlisted for profits. Instead of "whitewashing," i.e., using white paint to cover over dirt in a shallow or transparent way, the colorful term "greenwashing" came to be used to signify misleading claims as they applied to the environment.

Since that time, various environmental groups have objected to the use of the "green" label or "green" advertising was being used in problematic ways.[6] As Joshua Karliner wrote in his 1997 book, *The Corporate Planet: Ecology and Politics in the Age of Globalization*:

---

4 *See* RACHEL CARSON, SILENT SPRING 30-31 (1962).

5 *See* Alice Rawsthorn, *The Toxic Side of Being, Literally, Green*, N.Y. TIMES (Apr. 4, 2010), http://www.nytimes.com/2010/04/05/arts/05iht-design5.html?pagewanted=all (referring to a 1986 Jay Westerveld essay as the origin of the term "greenwashing"). While extensive Internet and database searching revealed many secondary references to the Westerveld essay as the genesis of the term, there are no definitive citations provided for the essay. Nor is the Westerveld essay available online. The author sent several emails to Westerveld to confirm a citation, but no reply has been received as of the date of this writing.

6 *Cf.* Tom Wright, *supra* note 1, at B4 (noting how environmental advocates support increased regulatory vigilance over greenwashing).

> [T]he corporate world went to great lengths to market itself and its products as the greenest of the green. One-fourth of all new household products that came on to the market in the United States around the time of "Earth Day 20" advertised themselves as "recyclable, "biodegradable" "ozone friendly" or "compostable." Simultaneously, some of the world's greatest polluters spent millions putting on a shiny new coat of green paint — both literally and figuratively. DuPont worked with Madison Avenue giant BBDO to produce an ad full of seals clapping, whales and dolphins jumping and flamingos flying, all set to Beethoven's "Ode to Joy," to project its newfound green image.[7]

Historically, then, greenwashing has been with us almost as long as it "being green" has been seen as desirable. As long as consumers continue to look more favorably upon green products and services, then there is a marketing and public relations advantage to being perceived as engaged in a positive environmental approach.

At present, there is neither an official statutory definition nor common law elements of a tort of "greenwashing" that would systematize our understanding in a legal, doctrinal sense. However, there are a group of doctrines around false advertising and securities fraud that police some of the more egregious example in this area. The origins of the term suggest elements of deception, deployment of CSR as a distraction, and an element of hypocrisy, but again, a more systematic definition of greenwashing has generally been lacking.

TerraChoice, a division of product testing and certification company Underwriters Laboratories, recently attempted to define "The Seven Sins of Greenwashing." While the sins only referred to green products, *per se*, they provide a useful structure for identifying and classifying greenwashing.[8] The more straightforward and obvious sins include: no proof; vagueness; fibbing; and worshipping false labels (fake endorsements).[9] While these sins seem clear, the other forms of greenwashing are complicated, yet just as potentially misleading to the consumer.

For example, in the sin of "hidden tradeoffs," a product is defined as green based on one attribute, but there may have been other environmental factors at play that make the product less than optimal for the environment.[10] A

---

[7] JOSHUA KARLINER, THE CORPORATE PLANET: ECOLOGY AND POLITICS IN THE AGE OF GLOBALIZATION 171 (1997).

[8] *See generally The Seven Sins*, UNDERWRITERS LABS., http://sinsofg renewashing.org/findings/the-seven-sins (last visited Mar. 9, 2014) (noting seven ways to identify the use of greenwashing in advertisements).

[9] *See id.*

[10] *See id.*

packaging claim may also commit the "sin of irrelevance," touting a factor (such as no CFCs) when there is already a legal rule in place against it. While not a lie, per se, such product marketing may be designed to over-state a product's green nature and may ultimately misled consumers.[11] Finally, the sin of "lesser of two evils" tries to minimize the harm done by the category of goods overall. So, for example, a greenwashing company might tout the fuel-saving benefits of its hybrid SUVs even though hybrid SUVs overall consume more gas than smaller non-hybrid cars.[12] The categorization of these sins is useful in trying to analyze an overall definition of greenwashing.

Another attempt to define greenwashing can be found in the law review literature. In an recent article, Professor Lesley Wexler explored legal definitions of the term "whitewashing."[13] While Professor Wexler's article focused more on labor and employment practices and the recent gender discrimination lawsuits against WalMart, her article also set forth a useful, and broader, definitional rubric for whitewashing.[14] As noted there:

> [A]s a conceptual matter, a whitewash has three essential components: an underlying defect, an attempt to conceal the defect by diverting attention, and a failure to fix the underlying defect. By extension, I define extralegal washing as (1) a wrongdoer's (2) deployment and publicity of policies and practices (3) in response to the identification of a legal grievance, (4) which does not address the underlying concern of the aggrieved and (5) is intended to establish, maintain, burnish, or restore institutional reputation.[15]

These elements are useful as an analytical tool for understanding greenwashing as a type of distraction, or diversionary tactic. Under Professor Wexler's framework, there is wrongdoing, distraction in the form of a "wash," and at its heart, an underlying structural problem never receives proper redress.

I would further elaborate on Professor Wexler's framework to say that the elements suggest not merely diversion, but deception. The elements of the whitewash she describes also speak to hypocrisy. As pointed out by the vast variety of the "Seven Sins," greenwashing may come in many forms, some of which may fall outside of this framework. Ultimately, what is clear is many firms

---

11 *See id.*

12 *See id.*

13 *See generally* Lesley Wexler, *Extralegal Whitewashes*, 62 DEPAUL L. REV. 817 (2013) (discussing Wal-Mart's response to the Wal-Mart Stores, Inc. v. Dukes class action litigation as an example of extralegal whitewashing).

14 *Id.* at 826.

15 *Id.*

apparently engage in some of these forms of greenwashing, however defined; the next question is, why do these firms engage in such behavior?

B. Economic Icentives to Greenwash

Given the norms surrounding short-term shareholder profit maximization, there is an incentive to promise consumers "eco-friendly" products, but then deliver goods or services cheaply, regardless of environmental impact. While that may sound blatant, the incentive to shirk the promises and obligations described in advertising (which run to an uncertain environmental or social constituency outside the firm), are certainly present without much in the way of countervailing forces to check them. That said, ethical companies will stand by their CSR commitments and follow through with their obligations. Is there any way to predict which companies will fall prey to the lure of greenwashing?

Currently, there are a range of levels of CSR, indicating that a choice exists as to how much CSR a firm may engage in. At the bottom of such ranges are firms that break the law, or treat law as price, paying fines or penalties in order to run their business at the edge of what may be *ultra vires*.[16] Other firms operate at the level of legal compliance, but make no effort toward CSR. While that may seem problematic, Professor Joseph Grundfest notes that merely the act of complying means that many important laws, regulations, and decrees that are embodied in regulatory acts are followed; he suggests that on its own compliance results in a large amount of (regulatory-mandated) corporate pro-social behavior.[17] Of course some firms strive for additional CSR, and many of these firms engage in charitable giving. Through corporate donations to local or national non-profits, these firms cooperate to advance social goals. At the same time, these kinds of corporate philanthropy programs may be more "bolted on" than "baked in" to a firm's business model.

Other firms voluntarily decide to take CSR to the next level, for example, integrating triple bottom line concepts into their definition of long-term growth and company success.[18] Finally, firms that are at the highest levels of CSR design their business model to maximize CSR. Such companies may almost seem a hybrid of the best that for-profit and non-profit businesses have to offer. In recent years, in the jurisdictions that offer them, such businesses may have the option to organize as a B Corporation or flexible purpose corporation.

---

[16] These classifications and levels are elaborated in Janet Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 857 (2008) and Marcel van Mrrewijk & Marco Werre, *Multiple Levels of Corporate Sustainability*, 44 J. BUS. ETHICS 107, 112 (2003).

[17] Hofstra University, *Joseph Grundfest: Social Responsibility and Business in the 21st Century*, YOUTUBE (Dec. 20, 2010), http://www.youtube.com/watch?v=CGjAOaD5RmQ&feature=share.

[18] van Mrrewijk & Werre, *supra* note 16, at 112.

The levels are important to consider based on commitment level and the incentives that lead firms to greenwash. When incentives for profit and social goals align, we have an easy question. In some instances, a firm may decide to engage in "green behavior" not because it is good for the environment, but for cost-savings reasons. There is nothing wrong with trimming waste and streamlining emissions, regardless of the reason behind it. Indeed, many have pointed out that if a business is clever, it can do both – make a profit and do right by its employees and the environment. But if a CSR measure is undertaken because of cost savings, the commitment to CSR more generally may look far different than if that same measure is undertaken to promote social goals. The difficult questions arise when the incentives do not align. If a business is merely at the level of compliance or even bolted on CSR, then when faced with difficult tradeoffs where cost savings and the environment clash, the environment will, most likely, lose. Intent matters, not because of ideological purity, *per se*, but because a true commitment to CSR involves a long-term set of goals and values, even when those goals conflict with profit.

For example, if a large big box retailer decides to cut some of its extraneous packaging in order to save costs, and (incidentally) the cut will save trees and reduce carbon emissions from shipping, we may say that intent makes no difference. There will be positive environmental benefits from the cost savings measure, so why should we care about why the action was implemented? But such a program undertaken for cost savings measures will look very different from a program that has the environmental concerns at the forefront. If these concerns are built into the CSR program, they will not be so easily sacrificed if cost savings or structures change in the future. If for example, packing materials suddenly became extremely cheap, the firm that had adopted the green practices only because of cost could very well abandon those practices. The firm that had ethically committed on a deeper level to CSR, on the other hand, would likely continue. And so the question is actually one of thoughtful design and long-term implementation of the values underlying CSR.

II. LEGAL INFRASTRUCTURE AND THE PERVASIVENESS OF GREENWASHING

While there are legal possibilities for policing or enforcing CSR claims, which would in turn cut down the incentives for firms to engage in greenwashing, at present these are mostly only proposals or possibilities of reform. In the meantime, the regulatory environment remains, in the words of commentators Magali Delmas and Vanessa Burbano, "lax and uncertain."[19] Rather than provide guidelines that would enforce accountability, firms instead must navigate

[19] Magali A. Delmas & Vanessa Cuerel Burbano, *The Drivers of Greenwashing*, 54 CAL. MGMT. REV. 64, 69 (2011).

uncertain regulatory structures. As noted in the previous section, this patchwork form of regulation creates incentives to shirk and to greenwash.

A. The Patchwork of Regulation Against Greenwashing

In our previous article, Judd Sneirson and I noted that BP was a "free rider" on the CSR efforts of other firms and the public's goodwill toward companies involved in socially responsible practices.[20] The gap that BP so effectively exploited – to take advantage of the public relations upside of CSR without actually expending the time or money to integrate or engage in it – is potentially dangerous for those who care about CSR, because it could ultimately result in the erosion of positive sentiment toward companies that in reality are actually engaged in meaningful CSR. In our previous work, we suggested a number of possibilities to police greenwashing and Faux CSR, including: remedies under false advertising laws; claims under the securities fraud laws; private standard-setting by independent organizations or other watchdogs; and the newly established Bureau of Consumer Financial Protection.[21]

As we noted, there are few reported cases based on a theory of faux CSR for false advertising, and those that have been brought typically concern specific product labeling that asserted the product was "green." For example, successful claims have been made against insecticide companies that labeled their products as safe or environmentally friendly, when that was not the case.[22] In addition, cases have also been brought based on the use of the word "recycled," "recyclable," or "biodegradable," all which now have strict legal definitions.[23] Although these cases dealt with false representation claims concerning product labeling, the claim of false advertising around an environmental claim could be seen as analogous.

In addition, the California Supreme Court decision in *Nike v. Kasky*[24] brought a great deal of attention to Faux CSR. Plaintiffs brought an action under California's false advertising law against Nike for making assertions about its labor practices, and the lower courts had summarily dismissed their actions on free speech grounds.[25] Holding that Nike's assertions were commercial speech and thus subject to a lower level of constitutional protection, the California

---

[20] Cherry & Sneirson, *supra* note 2 at 1036.
[21] *Id.* at 986.
[22] *See* Douglass M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 646 (2001) (citing case); John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information*, 79 MINN. L. REV. 245, 301-04 (1994) (citing cases).
[23] Church, *supra* note 22, at 305.
[24] Nike v. Kasky, 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003).
[25] *Id.* at 274.

Supreme Court remanded the case for further factual findings to see if Nike's statements were, indeed, false.[26] As the *Nike* court stated:

> Our holding, based on decisions of the United States Supreme Court, in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully.[27]

The case later settled out of court with Nike's promising to fix various issues, subject itself to third-party monitoring, and make a monetary payment to a worker's advocacy non-profit group. While many commentators have discussed *Nike v. Kasky* as a promising avenue to keep corporations honest regarding worker rights, it is more tantalizing than fulfilling, as the issue itself was never litigated and the Supreme Court of the United States never heard the case.[28]

With that said, the issue is likely an open one; but if "green" claims were a significant part of a company's consumer marketing, and consumers did, indeed, rely on false statements, the corporation's claims would only be accorded the (lesser) deference afforded to commercial speech. State governments retain the right to regulate commercial speech that is false or misleading, and this could pave the way for actions based on a claim of greenwashing or faux CSR.

Another cause of action could lie with investors under Section 10(b) and Rule 10b-5 for securities fraud. 10b-5 requires that a plaintiff show a material misstatement or actionable omission of fact, made with scienter, on which another justifiably relies, causing damages.[29] Securities fraud additionally

---

[26] *See id.* at 262.

[27] *Id.* at 247.

[28] Robert L. Kerr, *From* Sullivan *to* Nike*: Will the Noble Purpose of the Landmark Free Speech Case Be Subverted to Immunize False Advertising*, 9 COMM. L. & POL'Y 525 (2004) (focusing on the social value in protecting some false speech in the discussion of public issues); Tamara R. Piety, *Grounding* Nike*: Exposing Nike's Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151 (2005) (arguing that Nike was engaging in marketing and that Nike attempted to raise a First Amendment defense to fraud); Michele Sutton, *Between a Rock and a Judicial Hard Place: CSR Reporting and Potential Legal Liability Under* Kasky v. Nike, 72 UMKC L. REV. 1159 (2004)(examining the issue of firms forfeiting profits in the social interest in the environmental realm); Samuel A. Terilli, Nike v. Kasky *and the Running-But-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL'Y, 383 (2005) (arguing that when expression is at issue, intermediate or strict scrutiny should be applied to commercial speech); David C. Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE W. RES. L. REV. 1049 (2004) (evaluating the impact of *Nike* on the commercial speech doctrine).

[29] *Compare* WILLIAM LLOYD PROSSER ET AL., PROSSER & KEETON ON TORTS 727 (5th ed. 1984) (common law fraud) *with* Dura Pharms. Inc. v. Broudo, 544 U.S. 336, 341-42 (2005) (fraud actions under Section 10B and Rule 10b-5) *and* Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988).

requires that the fraud be "in connection with the purchase or sale of a security";[30] if the security is traded on an efficient market such as the New York Stock Exchange, reliance can be presumed under the "fraud on the market theory";[31] and, regarding causation, the plaintiff must show both that the misstatement or omission caused the purchase or sale (transaction causation) and that the misstatement or omission caused the complained-of loss (loss causation).[32]

A Sixth Circuit case raises a key obstacle that plaintiffs will likely face in bringing any sort of action for CSR fraud under the securities laws: showing materiality.[33] In the Sixth Circuit case, Ford was charged with securities fraud for its statements regarding the safety of the tires installed on the Ford Explorer.[34] Plaintiffs noted that they were in part suing Ford for calling itself a "socially responsible company" while meanwhile marketing products that were dangerous. The court there dismissed the claim, stating the following about Ford's claim that it was "a leader in corporate social responsibility":

> Such statements are either mere corporate puffery or hyperbole that a reasonable investor would not view as significantly changing the general gist of available information, and thus, are not material, even if they were misleading. All public companies praise their products and their objectives. Courts everywhere "have demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace-loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important to the total mix of information available."[35]

And, indeed, one of the concerns or problems that investors bringing an action against a company like BP might face is that it might be difficult to point to one fact specifically identified as false,[36] or that even if that were easy to prove, that the statement was material.

---

[30] *See* 15 U.S.C. § 78j(b).

[31] *See Basic*, 485 U.S. at 241-48.

[32] *See Dura*, 544 U.S. at 341-42 (distinguishing between transaction and loss causation).

[33] In re Ford Motor Co. Sec. Litig., Class Action, 381 F.3d 563, 570-571 (6th Cir. 2004); *see* Kerr, *supra* note 16, at 857 (2008); David Monsma & John Buckley, *Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure*, 11 U. BALT. J. ENVTL. L. 151 (2004).

[34] *In re Ford Motor Co.*, 381 F.3d at 570-71.

[35] *Id.* at 571-72.

[36] *See generally*, David Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395 (2006) (discussing puffery).

However, as socially conscious investing increases in volume and popularity,[37] the materiality hurdle may not seem so insurmountable. As two commentators noted, a "large institutional investor or a class of socially responsible mutual funds may have a more objective basis for relying on non-financial company statements, policies and practices. In other words, once a company states a position on climate change or child labor, there is no going backwards in the marketplace without first retracting or re-establishing performance expectations once they are made."[38] Such funds explicitly make their investment decisions based on the triple bottom line. In light of these investment criteria, it becomes difficult to say that CSR would be anything else other than material to the investment decision.

Over the years, there have been calls for both more disclosure of the true state of a company's environmental record and for the creation of a remedy for fraudulent or misleading claims of CSR. For example, in 1999, Professor Cynthia Williams wrote an article in the *Harvard Law Review*, arguing that the SEC should require accurate and standardized disclosure of environmental information from publicly-traded companies.[39] Since then, numerous commentators have advocated for more comprehensive and substantive standards for CSR programs.[40] For example, Professor Michael Siebecker noted that, much as it is difficult to test the truth of CSR advertising, commercials and the social responsibility reports that some companies have issued could mislead investors.[41] And, in a 2008 article, Professor Janet Kerr began sketching some preliminary contours of what an action under 10b-5 for misleading CSR might look like.[42]

---

[37] *See* George Djurasovic, *The Regulation of Socially Responsible Mutual Funds*, 22 J. CORP. L. 257, 258 (1997).

[38] *See* Monsma & Buckley, *supra* note 33, at 189-90.

[39] Cynthia A. Williams, *The SEC and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1293-306 (1999) (proposing that SEC mandate disclosure of environmental information, thus providing a check against inflated advertising claims).

[40] *See, e.g.*, Kerr, *supra* note 16 (offering five benchmarks of efficient creative capitalism: potential, relevance, impact, suitability, and morale); Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613 (2006) (proposing that an institutional approach to First Amendment jurisprudence provides sufficiently strong reasons for insulating the securities regulation regime); Williams, *supra* note 39 (proposing that SEC mandate disclosure of environmental information, thus providing a check against inflated advertising claims).

[41] Siebecker, *supra* note 40, at 616-17.

[42] Kerr, *supra* note 16, at 839-48; *see also* Janet E. Kerr, A *New Era of Responsibility: A Modern American Mandate for CSR*, 78 UMKC L. REV. 327, 364-65 (2009) (arguing that governments ought to mandate CSR in some instances, like when a multinational corporation engages in various functions in a third-world country that make it more akin to a government than a corporation); Monsma & Buckley, *supra* note 33 (arguing that corporate statements about the extent of their CSR programs could in some instances be material); Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603, 625 (2000) (noting that corporate "codes of ethics" could also potentially be

Another possibility for policing CSR claims may be on the horizon. In July of 2010, Congress passed a historic financial reform bill, known as the Dodd-Frank Act after its sponsors.[43] Section 1011 of the Dodd-Frank Act sets out the enabling legislation for the establishment of the Bureau of Consumer Financial Protection, which is to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[44] The language in the statute concerning consumer education, appropriate disclosure, and tracking of consumer complaints could overlap with the area of "faux CSR" or "greenwashing," as these are consumer information issues and accurate disclosure could certainly influence a consumer's informed investment decision. Further, in the process of providing consumers education and knowledge about their rights, it would be wise to help consumers understand whether a purchase (for altruistic reasons) is actually going to advance the cause that they believe in, and that can only be done through accurate disclosure of information. As the legislation and the Bureau is so new, it is difficult to know how various provisions will be enforced or what litigation will be brought. That said, it is intriguing to think about the possibility that accurate corporate social responsibility information could be one aspect of consumer fraud that might receive attention from the new agency.

Finally, private mechanisms can also serve to police corporate claims of social responsibility. Before the U.S. Department of Agriculture organic label was introduced, private organizations such as Quality Assurance International played a central role in certifying organic food claims.[45] Organic food purveyors would contact one of these certifiers who would then inspect and verify any organic food claims according to each organization's specific standards. In 2002, the U.S.D.A. developed uniform standards for organic food and empowered these organizations (and state departments of agriculture) to certify and label products as U.S.D.A. organic.[46]The organic food example suggests other additional models

---

subject to liability as a form of false advertising if the company's executives fail to comply with the codes).

[43] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *see also* Hal S. Scott, *The Reduction of Systemic Risk in the United States Financial System*, 33 HARV. J. L. & PUB. POL'Y 671 (2010) (discussing proposed legislation that became the Dodd-Frank Act).

[44] Dodd-Frank Act, § 1011(a).

[45] *See* QUALITY ASSURANCE INTERNATIONAL, http://www.qai-inc.com/about/index.asp (last visited Mar. 17, 2014); OREGON TILTH, http://tilth.org/about (last visited Mar. 17, 2014).

[46] Federal Organic Foods Production Act of 1990, 101 Pub. L. No. 624, 104 Stat. 3359, 3935 (1990); *see* 7 U.S.C. §§ 6503-04; 7 C.F.R. §§205.1–205.600. Similar private certification systems exist for kosher food and for green "LEED certified" buildings. *See, e.g.*, ORTHODOX UNION KOSHER CERTIFICATION, http://www.oukosher.org (last visited Mar. 9, 2014) (describing the O-U kosher and mark); LEED, http://www.usgbc.org/leed (last visited Mar. 9, 2014) (describing the LEED building designations).

for policing corporate social responsibility claims. Private organizations could develop marks and license corporations to use them upon verification of any social responsibility claims.

Certification as a B Corporation is an especially intriguing and fruitful possibility for reducing the incidence of greenwashing. B Corporations are a class of for-profit entities that also strive to create benefits to the environment and/or communities. As such, and noted by leading commentators Robert Katz and Antony Page, they operate as a hybrid, straddling the environment of for- and non-profit entities.[47] B Corporations strive for transparency, and investors in such firms understand that there may be tradeoffs, opportunities for profit that may in fact be passed by in pursuit of social goals.[48] To date, eleven states have passed enabling legislation to recognize B Corporation status, with additional states passing similar or complimentary types of legislation, such as California's flexible purpose corporation.[49]

As part of the enabling legislation in the states that have adopted B Corporation status, the firm seeking such status must show independent certification that they have met their social goals.[50] B Corporations must show a "general public benefit" that is met through "a material positive impact on society and the environment taken as a whole, as measured by a third-party standard[.]"[51] Each year, the firm must produce a benefit report, again independently certified, that shows the firm's adherence to its social goals.[52] The accountability and third-party verification elements could prove a strong antidote to greenwashing, as the incentives to greenwash decrease with oversight and accountability. The more accurate the information in the market for CSR becomes, the more that consumers and investors can accurately assess how and in what ways they wish to support various hybrid business endeavors.

---

47 *See generally* Robert A. Katz & Antony Page, *Sustainable Business*, 62 EMORY L.J. 851 (2013) (discussing various business forms and the possibilities generated for encouraging sustainable businesses).

48 Antony Page, *New Corporate Forms and Green Business*, 37 WM. & MARY ENVT'L L. & POL'Y REV. 347, 347 (2013).

49 BENEFIT CORPORATION, http://benefitcorp.net/state-by-state-legislative-status (last visited Feb. 7, 2014).

50 Page, *supra* note 49, 358-60.

51 William H. Clark Jr. & Larry Vranka, *The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public*, BENEFIT CORP. 1, 15 (2013), http://benefitcorp.net/storage/docum ents/Benecit_Corporation_White_Paper_1_18_2013.pdf.

52 Page, *supra* note 49, at 364-65.

B. The Pervasiveness of Greenwashing

The symposium held at University of California-Davis Law School led to a lively panel discussion about the extent, nature, and pervasiveness of greenwashing. One panelist emphasized that greenwashing was mostly a phenomenon of the past, and she noted that "greenwashing is not a term that I've heard used much lately. It used to be used a lot . . . not that it has gone away . . . but it is not as easy to greenwash as it used to be."[53] During the panel the same speaker noted that "it is getting harder to cheat because people are checking up on corporate performance and products."[54] The speaker suggested that enough watchdogs and reporting requirements were already in place in order to deter potential greenwashers. Finally, the speaker noted that "the time is coming where [greenwashing is] going to be harder and harder to do."[55] In essence, her view as presented was that greenwashing is at this point largely an artifact of the past, and the problem is currently less than pervasive.

First, I should note that the extent of greenwashing, or non-greenwashing for that matter, is extremely difficult to quantify empirically. Part of the confusion is based on definitional matters, as there is a wide range of variability as to what constitutes a greenwash. From my first definitional section, it is clear that there is no one canonical notion of what greenwashing is, which makes quantification problematic. Likewise, the empirical efforts that try to prove the frequency with which greenwashing exists are far from categorical. The TerraChoice study noted that 95 percent of green products on the market in 2010 were engaged in some form of greenwashing under their rubric of "The Seven Sins of Greenwashing."[56] But not everyone would necessarily agree with the definition employed in that study. Further, while some watchdogs and government agencies have attempted to report on accountability of green claims, as I noted in my section on legal infrastructure, *supra* Section IIA, these accountability measures are hardly comprehensive. Therefore, in some ways it is not surprising that the symposium speaker noted no particular studies to support her position that the incidence of greenwashing has been declining.

Apart from these rather nascent empirical measures, we can turn to salient case studies of greenwashing in order to determine whether current measures are effective at deterring or policing greenwashing. As noted previously, my co-author Judd Sneirson and I studied greenwashing in the context of the BP

---

[53] Nicole Biggart, University of California-Davis Business Law Journal Symposium: Greenwashing (Nov. 21, 2013) *available at* http://www.law.ucdavis.edu/publications-broadcasts/symposia.html.
[54] *Id.*
[55] *Id.*
[56] TerraChoice, *The Sins of Greenwashing Home and Family Edition* 1, 16 (2010), http://sinsofgreenwashing.org/index35c6.pdf.

Deepwater Horizon oil disaster.[57] With its "beyond profit" advertising campaign, BP held itself out as a company that practiced corporate social responsibility and invested in alternative energy. Consumers and investors wanted to believe that these claims were true: consumers drove out of their way to fuel their cars at BP gas stations; investors could put their money in BP stock, as it was listed on socially conscious investing funds.

In the aftermath of the 2011 Deepwater Horizon explosion and oil spill, it became apparent that the "green" image that BP sought to cultivate was only a surface image, not reality. While spending money on their green advertising campaign, BP was engaged in risky extraction practices and had poor safety protocols. The Deepwater Horizon disaster killed 11 workers and resulted in over a million gallons of oil spilled into the gulf. Yet, based on media watchdogs and reports in the news, no one would have predicted that it would have been BP – as opposed to some other oil company – that would have caused an environmental disaster. Given that the Deepwater Horizon oil disaster happened in 2011, it is difficult to relegate the concept of greenwashing solely to the past.

My co-author and I also examined another prominent instance of greenwashing when examining Chevron's "We Agree" advertising campaign. In 2012, Chevron sponsored a widespread campaign listing green sentiments and phrases, followed by the words "We Agree." According to a company press release, "[t]he campaign highlights the common ground Chevron shares with people around the world on key energy issues."[58] "We hear what people say about oil companies—that they should develop renewables, support communities, create jobs and protect the environment—and the fact is, we agree."[59]

Another advertisement admits that the company makes considerable profits but argues that it puts those profits "to good use," reinvesting them in future energy supplies, employing workers at good wages, paying billions in taxes, helping communities and small businesses, and distributing profits to shareholders "who rely on [Chevron] dividends."[60] And a final advertisement "agrees [that] oil companies should support the communities they're part of."[61] When it partners with a country, Chevron continues, it "commits for the long term," and although Chevron does not claim to "replace the role of government,"

---

[57] Cherry & Sneirson, *supra* note 2, at 983-84.

[58] *See Chevron Launches New Global Advertising Campaign: "We Agree,"* CHEVRON CORP. (Oct. 18, 2010), http://www.chevron.com/chevron/pressreleases/article/10182010_chevronlaunchesnewglobaladvertisingcampaignweagree.news (last visited Sept. 4, 2011) (introducing the ad campaign).

[59] *See id.* (quoting Rhonda Zygocki, Chevron's Vice President of Policy, Government, and Public Affairs).

[60] *See Oil Companies Should Put Their Profits to Good Use, See Investment and Opportunity 2001*, CHEVRON CORP., http://www.chevron.com/chevron/ speeches/article/03262001_investmentandopportunity2001.news (last visited Mar 19, 2014).

[61] *See Oil Companies Should Support the Communities They're A Part Of*, CHEVRON CORP., http://www.chevron.com/weagree/?statement=community (last visited Sept. 5, 2011).

it strives to "make a difference" where it operates, particularly in the areas of "health, education, and welfare."[62] The advertisements connoted "buy in" to an environmental message and to investment in local communities.

At the same time that Chevron was touting its green image, the company was embroiled in a long-standing lawsuit over its actions in the Amazon rain forest.[63] The Ecuadorian plaintiffs sought billions of dollars for "environmental remediation, excess cancer deaths, impacts on indigenous cultures, and unjust enrichment" stemming from Texaco's activities there between 1964 and 1992.[64] Chevron acquired Texaco, assuming its legal obligations, in 2001.[65] All told, the company is alleged to have "dump[ed] an estimated 18 billion gallons of toxic wastewater into [Ecuadorean] rivers and streams and spill[ed] roughly 17 million gallons of crude oil into the ancestral territory of six indigenous tribes."[66] The Ecuadorean plaintiffs originally brought suit in the United States against Texaco in 1993, but the oil company successfully moved to dismiss the case for *forum non conveniens*, leaving plaintiffs to litigate their claims, if at all, back in Ecuador.[67] Plaintiffs refiled their suit in Ecuador against Chevron as Texaco's successor in 2003[68] and won a staggering $18 billion judgment on February 14,

---

[62] *See id.* (describing Chevron's positive impacts in partner countries).

[63] Stuart Elliott, *Pranksters Lampoon Chevron Ad Campaign*, N.Y. TIMES MEDIA DECODER BLOG (Oct. 18, 2010), http://mediadecoder.blogs.nytimes.com/2010/10/18/pranksters-lampoon-chevron-ad-campaign/ ("The spoof is a direct consequence of Chevron's trying to fool people into thinking it is environmentally conscious when the company is responsible for the extensive contamination found in Ecuador's rain forest....") (quoting a spokesperson for the Ecuadorean plaintiffs).

[64] *See* CRUDE (Entendre Films 2009) (documenting the ongoing suit against Chevron for oil pollution in Ecuador).

[65] *See* In re Chevron Corp., 749 F. Supp. 2d 141, 143 n.3 (S.D.N.Y. 2010) (noting Chevron's acquisition of Texaco). As a general rule, following a merger, a target's liabilities become the acquiror's. *See, e.g.*, DEL. CODE ANN. tit., 8 § 259(a) (2010) (providing that a target's liabilities following a merger "attach to [the] surviving corporation[] and may be enforced against it to the same extent as if said liabilities had been incurred or contracted by it").

[66] *See* Mitch Anderson, *Chevron Adds Insult to Injury in the Amazon*, SF. GATE (Feb. 7, 2011, 8:00 AM), http://www.sfgate.com/cgi-bin/blogs/manderson/detail?entry_id=82541 (detailing the extent of the environmental damage).

[67] *See* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001) (dismissing the case), *aff'd*, 303 F.3d 470 (2d Cir. 2002); *see also* Ecuador v. Chevron Corp., 638 F.3d 384, 396 (2d Cir. 2011) (noting Texaco's "promise that it would 'satisfy judgments that might be entered in plaintiffs' favor. subject to [its] rights under New York's Recognition of Foreign Country Money Judgments Act" dealing with fraud and due process) (quoting an earlier Texaco memorandum of law).

[68] *See In re Chevron Corp.*, 749 F.Supp.2d at 143 ("Chevron is the target of litigation brought in Ecuador by the so-called Lago Agrio plaintiffs in which the latter seek to recover $113 billion for alleged environmental pollution by Texaco, Inc., from Texaco's current owner, Chevron Corporation."). The film CRUDE, *supra* note 65, documents the lawsuit in Ecuador and includes scenes where the court holds hearings in the field and hears arguments from the lawyers just steps from oil-contaminated sites.

2011,[69] which Chevron is now appealing.[70] Whatever the merits of the Ecuadorean action,[71] Chevron's critics cry hypocrisy: "Chevron's rhetoric and the public image that they put forward [are] very different from how they're actually operating."[72] Again, while these are merely two case studies, and not empirical evidence *per se*, they provide at least a current image of the greenwashing landscape.

The speaker's comment about "not hearing as much about greenwashing lately" is also susceptible to various interpretations. Of course, not hearing about greenwashing could be evidence that greenwashing is declining over time; but it could also stem from a lack of awareness about the problem, or from a failure of watchdogs to pay attention. Over the years, some environmental groups have accepted financial, technical or other assistance from corporate sources. While such assistance may help to sustain and foster these organizations' environmental missions, there is a trade-off that may happen in those circumstances. One assumes that the receipt of funds from a corporation makes an environmental or watchdog group less likely to criticize their benefactors. Increasingly, as many environmental groups benefited financially from corporate donations, it was only the more radical groups, such as Greenpeace,[73] who continued their critique of environmental CSR programs. Thus a lack of hearing about greenwashing may not equate to its true disappearance, but perhaps its continuation undercover.

---

[69] *See* Felicity Carus, *Chevron Chiefs Face Shareholders After Huge $18bn Ecuador Fine*, THE GUARDIAN (May 25, 2011), http://www.guardian.co.uk/environment/2011/may/25/chevron-heads-shareholders-huge-fine (breaking the judgment down as follows: $8.6 billion for environmental remediation, $860,000 to the named plaintiffs, and $8.6 billion in punitive damages).

[70] *See id.* (noting Chevron's appeal efforts).

[71] For more on the Ecuador lawsuit and related issues, see generally Chris Jochnick & Nina Rabaeus, *Business and Human Rights Revitalized: A New U.N. Framework Meets Texaco in the Amazon*, 33 SUFFOLK TRANSNAT'L L. REV. 413 (2010) (analyzing the impact of Texaco in Ecquador and the struggle to hold the company accountable); Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and* Aguinda v. Texaco, 38 N.Y.U. J. INT'L L. & POL. 413 (2006); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081 (2010) (analyzing the decision to dismiss the lawsuit) ; Cortelyou Kenney, Comment, *Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation*, 97 CALIF. L. REV. 857 (2009) (arguing that succeeding courts must do everything in their power to ensure that foreign continuations go smoothly if a matter was dismissed once on forum non conveniens grounds).

[72] *See* Ben Casselman, *Chevron Ad Campaign Answers Critics Head-On*, WALL ST. J. (Oct. 18, 2010), http://online.wsj.com/news/articles/SB10001424052702304250404575558363902469440 (discussing criticism of Chevron's new ad campaign); *see also* Elliott, *supra* note 64 ("Chevron's trying to fool people into thinking it is environmentally conscious when the company is responsible for extensive contamination found in Ecuador's rain forest and in other places as well.") (quoting a spokesperson for the Ecuadorean plaintiffs).

[73] *See* John Vidal, *Artists Prepare for BP Protest at Tate Britain*, GUARDIAN U.K., (June 25, 2010), http://www.theguardian.com/environment/2010/jun/24/artists-bp-protest-tate.

Furthermore, the panelist seemed to be under the impression that government mechanisms for policing greenwashing were far more robust and powerful than they are in reality. At one point, she remarked, incorrectly, that companies today "need to report" additional environmental efforts and carbon emissions to the Securities and Exchange Commission (SEC).[74] While legal scholars such as Cynthia Williams have long advocated mandatory disclosure and anti-fraud protection for investors who are misled by false claims of CSR, this is far from the current state of the law. CSR and any additional disclosure about environmental practice (above the level of basic compliance) largely remains in the realm of voluntary effort. As one commentator put it, "Recently, the Government Accountability Office . . . was quite critical of the SEC's failure to both work more closely with the EPA in assessing companies' environmental disclosures, concluding that such an assessment was not possible due to weaknesses in the SEC's collection of information about its registrants' environmental disclosures."[75] Any disclosures, including those about climate change,[76] are subject to the standard of materiality, meaning that the information would significantly alter the total mix available to investors.[77]

Rather than the optimistic picture painted by one of the symposium speakers that greenwashing is a relic of the past, I would argue that greenwashing, unfortunately, is very much a live concept. At the present time, there is no clear policing of greenwashing by any particular government agency. As noted in the last part, while private lawsuits have been brought under the rubric of false advertising, they are limited and must point to specific instances of greenwash; mere puffery about being a socially conscious company is not enough to be actionable, even in the face of noncompliance.

III. THE HARMS OF GREENWASHING

At first, the harms of greenwashing seem intuitive. As discussed in the initial definitional section, greenwashing may involve wrongdoing, efforts at distraction, and ultimately deception and hypocrisy. While these elements, especially deception, seem inherently problematic both ethically and legally, sometimes pinpointing the exact harm in individual cases could be difficult. The most serious harm of greenwashing, however, is much larger than any individual case. Rather, it is the threat that greenwashing poses to the entire CSR endeavor

---

[74] *See* Biggart, *supra* note 54.

[75] *See generally* JAMES COX ET AL., SECURITIES REGULATION 614 (7th ed. 2013).

[76] *See* 39 Sec. Reg. L. Rep. (BNA) No. 37, at 1452 (Sept. 24, 2007) (providing guidance on disclosure of climate change issues).

[77] *See* TSC Industries Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (articulating standard for materiality).

itself. First I will discuss the ambiguity of individual harm, and then examine the collective harms to the CSR endeavor.

A. *Conundrums: The Individual Harm of Greenwashing?*

At times, it can be difficult to pin down the precise harms of greenwashing. In order to analyze the potential harms, the focus is on the classic case of greenwashing, the sign exhorting guests to reuse hotel towels for the sake of the environment. Assume that hotel management's true motivation is cost savings, and that the sign is therefore deceptive.

The difficult part of this analysis is that, even while the hotel seems to be engaged in some form of greenwashing, the harm is difficult to discern. Does it matter whether or not the "reason" given on the hotel sign is accurate? Ultimately, if less detergent runs off into streams and rivers, and less energy is expended in laundering surplus towels, should anyone really care that some of these measures are being implemented solely for their cost-saving aspects? In such a case, where natural resources are actually being preserved, this particular kind of greenwashing seems to lack a harm, *per se*.

Or consider another instance, where an investor decides to make an investment decision based on mixed motives. The investor's decision rests partially on the hopes for growth in the value of the investment, and partially due to a desire to support socially responsible business goals. If it turns out that one of the CSR companies decided to greenwash, rather than be responsible, and the stock price of the company rises, it is difficult to say that the individual investor has been harmed. Yes, there has been inadequate disclosure (although not of the sort that the law punishes, see *supra*), but if the investor's holdings have actually increased in value, there would appear to be no quantifiable harm to that individual investor. Thus these seem to be the difficult cases. But just because there might not be an easily identifiable harm in these cases, does not mean there is no foul. Indeed, it is the collective harm that presents the most serious challenge to the CSR endeavor.

B. *Greenwashing: A Serious Challenge to CSR*

As noted in the introduction to this paper, there is currently a demand for CSR, and firms that can supply it may gain an edge with consumers and investors who value socially responsible business practices. As such, I would refer to a "market for CSR" where being more responsible is generally seen as desirable. Based on what we know about how information is disseminated through the semi-strong form of the Efficient Capital Markets Hypothesis (ECMH), we would expect to receive signals about which companies truly engage in CSR programs. That way, those consumers and investors who find CSR programs desirable can buy and price appropriately in the market. However, based, on the weak legal and regulatory norms currently in place, coupled with the economic incentive to appear to look green, (even when the firm is not), the value of these signals is questionable currently.

Indeed, signaling in the market for CSR and greenwashing is noisy and subject to what economists would term "cheap talk." Consider a situation in which there is a company that engages in genuine CSR and makes efforts to improve all aspects of its environmental and carbon footprint. Consider another company, however, that instead of engaging in genuine efforts, largely shirks its environmental responsibility, but at the same time, spends a great deal of money on pro-environmental advertising. Which of the two companies should consumers and investors who want to support CSR believe? If relying on watchdogs or third-party certifiers, can those entities be trusted to be vigilant?

Some would say that a conscientious consumer or investor would have to investigate each individual firm's environmental, labor, and responsibility record on an individual basis to be sure of their standards. However, such an endeavor would invoke extensive search and informational costs. For most casual consumers, at least, such search and investigation costs would seem to go far beyond their mere desire to be green or socially responsible by choosing an item off the shelf. Thus, the market for CSR is a "noisy" one. Granted, there are some genuine signals, but there also is a great deal of overblown and inflated data in the market for CSR.

Given that signals in the market for CSR are noisy, consumers and investors may make assessment mistakes. One of the more frequent errors would be to believe the advertising that a firm promulgates, only to find out later that the data provided by that firm is incorrect. Such errors, for example, assuming that BP was an environmentally friendly green oil company, results in serious ire among the public. No one wants to be seen as a chump or a dupe.

In fact, if greenwashing is widespread within the market for CSR, then that greenwashing poses one of the largest threats to the CSR endeavor itself. Another way to put it, in economic terms, is within the terms of George Akerlof's classic article, *The Market for Lemons*. In *The Market for Lemons*, Akerlof focused on the market for used cars, and the incentives resulting from information asymmetries. A used car could, on the one hand be high performing and well-taken care of, a "cherry." But a used car could, on the other hand, be sub-optimal, prone to failure, and poorly cared after, a "lemon." The seller of the car knows and understands all of the defects, issues, and problems inherent in the car. But the potential purchaser has none of this information and the resulting asymmetry leads to potential distortions in the market.

To take Akerlof's thesis a step further, the resulting information asymmetries can lead to exploitation in the market, where unscrupulous sellers would try to pawn off inferior wares on unsuspecting buyers:

> Consider a market in which goods are sold honestly or dishonestly; quality may be represented, or it may be misrepresented. The purchaser's problem, of course, is to identify quality. The presence of people in the market who are willing to offer inferior goods tends to drive the market out of existence –as in the case of our automobile "lemons." It is this possibility that represents the major costs of dishonesty -for dishonest dealings tend to drive honest dealings out of the market. There may be potential buyers of good quality products and there may be potential sellers of such products in the appropriate price range; however, the presence of people who wish to pawn bad wares as good wares tends to drive out the legitimate business. The cost of dishonesty, therefore, lies not only in the amount by which the purchaser is cheated; the cost also must include the loss incurred from driving legitimate business out of existence.

Although in *The Market for Lemons*, Akerlof used the market for a particular type of goods - used cars – as his example, he noted that it was merely illustrative, and that his analysis had applicability to other situations. While the market for CSR is certainly more intangible than a market in cars, the parallels are relevant.

Some firms engaging in CSR may be "cherries," following through on CSR goals even when there is little public relations benefit or attention to be gained from them. But other firms, as noted in the first section, when confronted with the voluntary nature of CSR, a lack of effective regulatory oversight, and uneven accountability from watchdogs, might well find themselves engaged in the very shirking, lemon-creating behavior that Akerlof described.

Among those who lose in these situations are the individual consumers and investors who care about CSR and find themselves shocked to have mistakenly invested in non-CSR companies. The biggest loss, however, is to the foundation of CSR itself. If the market is so distorted by "greenwashing noise" that it is difficult to tell real from fake CSR, then why should anyone continue to support such an endeavor? This is especially true if such support is more costly than business as usual. Is it enough for consumers and investors to hope, or to put their trust in, what is often unreliable hearsay in order to safeguard CSR? More robust accountability is necessary in order to meet this challenge.

Conclusion

Ultimately, greenwashing and its associated behaviors create a serious challenge for CSR programs. The market for CSR depends on goodwill of corporate directors, investors, and consumers. If their trust in CSR is undermined, reform efforts will only be viewed with skepticism and cynicism. Bolstering trust in the market for CSR may be achieved by changing the mix of incentives –

reducing the ability of companies to greenwash. In my view, this can only be done by increasing policing and accountability, either through self-regulation or increased regulatory oversight. Consumers and investors – the public writ large – will increasingly require some form of reassurance that when a company says it is socially responsible, they may trust that it actually is.