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What is AI Washing? The SEC's Latest Target

Article By:

David A. Shargel

Rachel B. Goldman

Is AI the new green? Recent comments by Securities and Exchange Commission Chair Gary Gensler suggest the regulator is primed to begin turning its enforcement efforts against so-called "AI washing," presenting a new area of risk for some companies that are embracing rapidly expanding artificial intelligence technology.

Gensler this week cautioned reporting companies not to "AI wash," comparing it to the practice of "greenwashing," where a company's environmental or sustainability related statements are inflated, misleading or false. Emphasizing that securities laws require "full, fair and truthful" disclosures, Gensler warned "don't do it," while speaking at The Messenger AI Summit in Washington, DC. "One shouldn't greenwash, and one shouldn't AI wash. I don't know how else to say it," he said.

"AI washing" may occur when a company misleads investors regarding its true artificial intelligence capabilities. According to Gensler, misleading investors as to artificial intelligence is governed by the same "set of basic laws, but also the same basic concept" as misleading the public on other topics. Greenwashing has been a recent focus of SEC enforcement actions,[1] as well as shareholder suits alleging securities fraud arising out of misleading statements concerning environmental practices.[2] To avoid costly litigation and potential enforcement actions, companies should take precautions to ensure their public statements, including formal disclosures, regarding their AI capabilities are accurate and not misleading.

As enthusiasm for AI grows across business lines, so too is a potential for AI washing in corporate communications. Referring to the intelligence or ability of computers to process information like humans to perform critical tasks, AI technology brings numerous potential technological advancements to companies of all kinds, such as understanding natural language, providing suggestions, making decisions and generating content. But "AI" as a term embraces many iterations of the technology, and that ambiguity could lead to potential AI washing. For example, a business may promote itself as leveraging AI, even when only a small amount of AI — or almost no AI at all. One research analyst noted that "AI-washing is rampant," and that "AI vendors are able to get away with these exaggerations because artificial intelligence is such a large umbrella term."[3]

Gensler pointed to this issue during his December 5 remarks, stressing the gap between what companies promise regarding their AI capabilities versus what they are capable of implementing in their products and services.

Given this enhanced focus on AI issues and the potential risk of AI washing, companies should consider, among other things, whether the product at issue can truly be characterized as AI. In this regard, technology generally qualifies as AI only if it exhibits some level and learning and adopting. Technologies providing advanced automation and statistics analysis are not necessarily considered AI.

As with all reporting, the best defense against future litigation and investigation related to AI disclosures is a robust compliance program with controls for reporting and verification to ensure that all public statements are accurate and not misleading.

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[1] "SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations," https://www.sec.gov/news/press-release/2022-86; "Brazilian Mining Company to Pay $55.9 Million to Settle Charges Related to Misleading Disclosures Prior to Deadly Dam Collapse," https://www.sec.gov/news/press-release/2023-63.

[2] *Perri v. Croskrey, et al.*, D. Del., Case No. 1:21-cv-01423.

[3] Id.

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