"Non-Toxic" Advertising Claims Can Lead to Toxic Litigation

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In light of the ongoing COVID-19 pandemic, consumers have prioritized products that help keep their homes and families clean and safe. Cleansers and sanitizers that kill germs and viruses are highly valued, but consumers also want to know that the cleaning products they purchase are safe. "Non-toxic" advertising has, to that end, become one of the most important ESG claims influencing consumer purchasing decisions.[1]

What does "non-toxic" really mean? Understanding whether and to what extent a product is "non-toxic" can impact consumer purchasing decisions. As with many other ESG topics, like "natural" claims, there is not a clear definition of what it means for a product or ingredient to be "non-toxic." The absence of a one-size fits all definition has led to ongoing litigation with advertisers claiming that the appropriate definition should focus on serious harm, while plaintiffs contend the reasonable takeaway from such claims is that a product will not cause *any* harm, however minor, even if misused.

Given this uncertainty, advertisers must understand legal developments and have a plan in place to substantiate "non-toxic" claims, or risk exposure to possible state and federal enforcement actions and costly class action litigation.

FTC Regulatory Guidance – Green Guides

The primary guidance for "non-toxic" advertising claims comes from the FTC's Green Guides, addressed in our first article in this ESG series. The Guides are not FTC rules or regulations, but they contain general advice for businesses to consider when making environmental claims about a product. Of course, in an enforcement action the FTC would need to establish that the challenged claim is deceptive and could not rely solely on the Guides to establish a legal violation.

[1] "American Shopping Guilt & Buying Dilemmas," *Crestline* (May 9, 2019), https://crestline.com/c/consumer-guilt-and-buying-dilemmas.

The section of the Green Guides concerning "Non-toxic claims" suggests that such claims "should be clearly and prominently qualified to the extent necessary to avoid deception." Other principles emphasized in the Green Guides include:

- **"Non-toxic" implies a product is safe for humans, the environment and household pets**. A "non-toxic claim likely conveys that a product, package, or service is non-toxic both for humans and for the environment generally" and therefore marketers "should have competent and reliable scientific evidence that the product, package, or service is non-toxic for humans and for the environment." In addition, according to the Guides, marketing a product as "essentially non-toxic" or "practically non-toxic" likely conveys that the product "does not pose any risk to humans or environment or pets" (emphasis added).[2]

- **Standard for *de minimis* levels of toxicity**. There is no allowance for *de minimis* or trace levels of toxicity in "free of" claims, but the rule is more nuanced for "non-toxic" claims. For "non-toxic" claims, if a product contains a substance that is arguably toxic in some circumstances, but that substance is present in the product at levels that are not harmful to humans or the environment, a "non-toxic" claim may be permitted because the claim is not deceptive in that circumstance. Affirmatively proving that a *de minimis* level is not harmful, though, may be difficult; for that reason, advertisers pursuing such claims may have to be prepared to defend against regulatory inquiries, advertising challenges, and class action lawsuits. An alternative approach that may be easier to defend would be to specify that only the primary ingredients are non-toxic (if true) or that the product is non-toxic when used as directed.

Although the Green Guides remain the best starting point to determine how to substantiate or qualify "non-toxic" advertising claims, the Guides have not been updated since 2012 and the next review is not scheduled to begin until next year. Accordingly, responsible advertisers should also consider case law developments and NAD decisions (addressed below) for a more up-to-date view of the legal landscape, particularly in light of the FTC and NAD's focus on health and safety claims during the COVID-19 pandemic.[3]

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[2] The use of "non-toxic" claims is closely related to "free of" claims in advertising – and the Green Guides address the two types of claims in adjacent sections. Advertisers must exercise similar caution in making claims that a product is "free of" or does not contain or use a certain substance, as misleading messaging may invite the scrutiny of the FTC. For example, "free of" claims may be considered deceptive where they imply that the absence of a substance eliminates environmental risk associated with that substance, when in fact another substance in the product presents the same risk. Such claims may also be deceptive where the absent substance would not usually be associated with the advertised product at all, and thus the claim falsely implies an environmental advantage over competitors.

[3] *See, e.g., In re One Home Brands, Inc. d/b/a Blueland*, NAD Case No. 6416 (Sept. 25, 2020) (challenging express and implied claims that Blueland cleaning products kill COVID-19 and acknowledging advertiser's decision to

Recent NAD Decisions

Real-world Substantiation Required to Substantiate "No Harm" Message

The NAD has been at the forefront of an expansive definition of "non-toxic" claims, and has required substantiation that appears to go beyond that recommended by the Green Guides. For example, in *In re S.C. Johnson & Son, Inc.*, NAD Case No. 6354 (March 11, 2020), *affirmed* National Advertising Review Board (NARB) Panel #266 (July 20, 2020), the NAD considered a claim that appeared on the front of Method cleaning products that stated that the cleaner was "SURFACE SAFE" and "NON-TOXIC" (see Figure 1 below). Although S.C. Johnson submitted extensive evidence on the safety of its product, the NAD nevertheless recommended that the claim be discontinued because the product might cause minor irritation in certain circumstances.

Figure 1 - Source: Toth v. S.C. Johnson & Son, Inc., Case No. 20-cv-3553, Class Action Complaint

To show the safety of its product, S.C. Johnson explained that it followed a rigorous four-step process to confirm that its product was not toxic:

(1) it compared its product's formulation to a variety of human health and environmental classifications as described by the UN Globally Harmonized System;

voluntarily discontinue such claims); *In re NanoTouch Material, LLC*, NAD Case No. 6390 (July 22, 2020) ("Claims that a product can make 'dirty, high traffic public touchpoints into clean surfaces' using 'safe, non-toxic materials' are very compelling to consumers. In the current COVID-19 pandemic environment, these claims have even more impact as the world evaluates how to reopen our public areas as safely as possible. Accordingly, it is as important as ever that such claims are substantiated and a good fit for the evidence upon which they are based.").

(2) it calculated the acute toxicity levels for the formula and estimated exposure levels when the product is used in both foreseeable and extreme ways;

(3) it compared the product ingredients to a master list of "substances of concern" as identified by a large list of regulatory and independent databases; and

(4) it modeled a risk assessment of these substances of concern based on a conservative estimate of exposure during a hypothetical cleaning scenario.

The NAD found that S.C. Johnson's four-step framework suffered from a "lack of connection between the theoretical [safety of the product] and the product's real-world performance." Moreover, the NAD held that industrial and academic standards alone are not necessarily sufficient to support the broad consumer implications of unqualified "non-toxic" labeling. Instead, the NAD held, an advertiser must substantiate all reasonable claims that consumers may take away from a "non-toxic" claim, and must consider how the product will be used in real world situations.

Moreover, in assessing toxicity, the NAD held that an advertiser must not focus only on the risk of serious injury or death; rather, consumers would reasonably understand such a claim to mean that the product "will not harm" people, pets or the environment even in less severe ways. Thus, if the product might cause "temporary physical illness, such as vomiting, rash, and gastrointestinal upset," it cannot be labeled "non-toxic."

Here, the NAD found that the Method product might cause such minor irritants, even if the product met S.C. Johnson's four-step safety analysis. Because S.C. Johnson failed to show that its product would cause no harm whatsoever in all foreseeable ways in which it might be used or even abused, the NAD held that S.C. Johnson had not substantiated its "non-toxic" claim. *See also S.C. Johnson & Son, Inc. (Windex Vinegar Glass Cleaner)*, Report #6353, NAD/CARU Case Reports (March 2020) (advertiser must take real-world situations into account when making advertising claims, such as whether spilling the product on a child's skin would cause a rash).

In our view, the NAD standard goes too far. First, it is questionable whether consumers really understand a claim of "non-toxic" to mean that a product will cause no irritation at all. Something that is "toxic," after all, is commonly understood to mean something that is deadly, lethal or poisonous. *See, e.g., Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/toxic (last visited Sept. 27, 2021) ("containing or being poisonous material especially when capable of causing death or serious debilitation"). In light of this definition, "non-toxic" should not be understood as "non-irritating." Second, the NAD's approach is not workable because it would appear to always require an advertiser to conduct "real-world" testing—including assessing how a child might be affected by contact with the product—before making a "non-toxic"

claim. Such a requirement, for example, would make it nearly impossible for an advertiser to make claims about the safety of a product for use around children or animals since most companies will not test certain products on children or animals (and ethically should not do such testing on children).

Unless and until the courts or FTC weigh in on this issue, advertisers should be aware of the NAD's approach. Although NAD decisions do not carry the force of law, they are often seen as having persuasive authority, and they can act as a red flag for class action plaintiffs, as discussed in greater detail below.

Judicial Interpretations of Non-Toxic Claims

In the wake of the NAD decisions addressed above, multiple class action lawsuits have been filed against S.C. Johnson concerning "non-toxic" claims made on product packaging." Whether these cases will provide further guidance on the appropriate standard for "non-toxic" advertising claims remains to be seen.

One of these recent class action complaints targets S.C. Johnson's Method cleaning products. In *Connary v. S.C. Johnson & Son, Inc.*, Case No. RG20061675 (Sup. Ct. of Cal. May 15, 2020), the plaintiffs parroted the NAD decision, claimed that Method might cause minor irritation, and concluded that S.C. Johnson's "non-toxic" claim was therefore deceptive. In particular, the plaintiffs claimed that ethanol, an ingredient in several of the Method products, is a possible eye and skin irritant that may also cause nausea or even liver damage if ingested (which, needless to say, is not the way that Method is supposed to be used). S.C. Johnson filed a motion to dismiss in August 2020 and, in response, plaintiffs amended their complaint in January 2021. In May 2021, presumably because it found settlement would be cheaper and more expeditious than protracted litigation, S.C. Johnson agreed to a settlement with the class, established a $2.25 million settlement fund, and agreed to cease marketing the covered Method products as "non-toxic."[4]

In *Moran v. S.C. Johnson & Son, Inc.*, Case No. 4:20-cv-03184 (N.D. Cal. 2020), another group of class action plaintiffs alleged that S.C. Johnson's use of "non-toxic" labeling on Windex products deceives consumers because the claim conveys the false message that consumers, pets and the environment are unlikely to suffer any harm, however slight, from use or misuse of its allegedly "non-toxic" formula (thus adopting the NAD standard for non-toxic claims). The plaintiffs further alleged that, in response to

[4] See "Method Cleaners $2.25M Class Action Settlement," Top Class Actions (July 19, 2021), https://topclassactions.com/lawsuit-settlements/consumer-products/cleaning-products/1026509-method-cleaners-2-25m-class-action-settlement/.

consumers' desire for safe and non-toxic cleaning products, "many companies 'greenwash' their products by deceptively claiming that their cleaning products are safe when, in fact, they contain ingredients that are harmful to humans, animals, and/or the environment."

S.C. Johnson moved to dismiss the claims, arguing that the plaintiffs' personal definition of non-toxic does not reflect reasonable consumer understanding, and that a product must produce more than "mild discomfort" in order to be considered deceptively labeled as non-toxic. S.C. Johnson pointed to FTC guidance (from the Green Guides, discussed above) suggesting a "non-toxic product could contain a toxic substance at a level that is not harmful to humans or the environment." S.C. Johnson also cited dictionary definitions and case law narrowly construing "hypoallergenic" labeling on similar products.

The court denied S.C. Johnson's motion because, the court held, the plaintiffs' interpretation of "non-toxic" was plausible under the lenient "reasonable person" standard, and the complaint sufficiently pled that a reasonable consumer would adopt the plaintiffs' understanding of the claim. That decision is not entirely surprising at the motion-to-dismiss stage because there are questions of fact as to whether reasonable consumers understand the term "non-toxic" to refer to a product that will not cause serious injury or to a product that will not cause even mild discomfort.

One can only hope that S.C. Johnson will see this case through so that the court can assess its defenses on the merits and provide the industry with important guidance on the meaning of "non-toxic" claims to consumers and the standard for making such claims.

Getting a final decision in this case or others concerning "non-toxic" advertising may help pave the way to greater clarity around "non-toxic" claims. If courts interpret "non-toxic" narrowly and construe it to communicate only serious bodily injury or death, advertisers may feel greater comfort making unqualified claims in the future; if courts instead adopt the NAD's expansive approach, it will be difficult for any advertiser to claim that even the most innocuous product is "non toxic." We will continue to monitor developments in this area.

What Kind of Substantiation is Enough?

In the meantime, while uncertainty around what "non-toxic" claims convey to consumers remains, advertisers should be prepared to substantiate "non-toxic" claims with scientific evidence where possible. That evidence, though, must be reliable—a

lesson that Orkin Exterminating Co. learned when its advertising was challenged by the FTC. Orkin had advertised that its lawn care products were "practically non-toxic." In support of that claim, Orkin noted that its advertisements clarified that "practically nontoxic" was the lowest toxicity rating according to the most accepted product rating scale, signifying a lower toxicity rating than many household products such as suntan lotion and shaving cream, and that "[c]ommon sense suggests avoiding unnecessary contact with any chemical." The FTC was not persuaded; it held that industry rating standards and common sense were not a satisfactory foundation for the "non-toxic" claims. Instead, relying on federal regulations, the FTC determined that representations "concerning the safety or degree of risk to human health or the environment of any pesticides" required scientific evidence in the form of "tests, analyses, research, studies, or other evidence that has been conducted and evaluated in an objective manner by persons qualified to do so." Orkin ultimately agreed to discontinue those claims through a consent order. *In re Orkin Exterminating Co.*, 117 F.T.C. 747 (1994).

More basic "non-toxic" claims, however, may be capable of being supported by less complex scientific studies. For example, *In re NanoTouch Material, LLC,* NAD Case No. 6390 (July 22, 2020), addressed antiseptic surface coverings that were advertised as "self-cleaning" without the use of "toxic chemicals." The advertiser presented a series of studies by independent laboratories showing that their surface coverings killed bacteria and viruses without the addition of antimicrobial cleaning agents. In fact, the self-cleaning feature of the material was accomplished without the use of chemicals at all; rather, the physical construction of the fabric made it impossible for bacteria or viruses to survive on its surface. This evidence was considered sufficient to support claims that the antiseptic surfaces operated by novel technological methods rather than using "toxic chemicals."

For products containing more complex chemical compounds, such as the pesticides in *In re Orkin*, regulators often expect deeper scientific substantiation in the form of tests, analyses, research, and studies that analyze the chemical composition of the product and its potential effects in real-world, everyday use cases. In some cases, the Environmental Protection Agency (EPA) may already have reviewed and approved the pesticides pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which may help support advertising claims. Advertisers should therefore exercise judgment on a case-by-case basis and examine regulatory precedent to gauge what level of substantiation may be required to claim that their product is "non-toxic."

Cosmetic Products: Alternatives to "Non-toxic" Claims

Beauty and cosmetic products are often advertised as safe and "clean," which allows those advertisers to communicate positive messages without using the phrase "non-toxic." The cosmetics industry, for example, has invested in "clean" beauty marketing, creating apps to track product toxicity, and even adding "clean" verticals to their websites touting the non-toxic and environmentally-friendly qualities of their products.

Using terms such as "clean" or "hypoallergenic"[5]—particularly when those terms are defined and explained in the advertisement—may allow advertisers to avoid some of the scrutiny surrounding explicit "non-toxic" claims. If, though, the implied message of these claims is that the product is "non-toxic," advertisers may need to be ready to defend all such communicated messages. For that reason, "clean" and other related claims made in the beauty industry should be carefully vetted and substantiated.

What Is a Brand Owner to Do?

Best practices for minimizing the risk of liability for "non-toxic" claims include:

- **Proactively monitor industry and regulatory developments**. Although not binding, NAD decisions can be influential, so it is important to monitor what the NAD is saying about non-toxic claims. Monitor NAD and NARB decisions as well as lawsuits stemming from such action and any FTC consent orders. Also, be prepared to evaluate the next FTC update of the Green Guides. The FTC will begin soliciting comments for the next review of the Green Guides in 2022—the first update since the Guides were last revised in 2012.

- **Develop substantiation for "non-toxic" claims prior to making them**. Scientific evidence is key to substantiating "non-toxic" claims. However, meeting scientific or industry standards for non-toxicity may not always be sufficient to support such a claim in advertising. Advertisers should, where possible, develop real-world evidence prior to marketing the product as "non-toxic." The NAD expects testing of household products to model situations that could actually occur within the home—including unintended or unlikely uses of the product. To the extent that such evidence is unavailable (*e.g.*, when testing on children or pets would be required to

[5] A number of independent groups claim to review cosmetic ingredient safety/toxicity, such as the Environmental Working Group (EWG) and the Campaign for Safe Cosmetics, which publish extensive guides evaluating the safety of cosmetic products (and ingredients) and the veracity of environmental marketing claims.

substantiate claims), advertisers should consider what other forms of substantiation may exist or can be developed.

- **Clearly qualify the scope of "non-toxic" claims**. Advertisers may be held liable for any express or implied claims that a reasonable consumer takes away from their labeling or advertising. Avoiding broad unqualified claims can help limit potential liability. Unqualified claims may be appropriate in certain situations, but it is often a better strategy to present "non-toxic" claims in a context that clearly defines the scope of the claim and limits it as necessary (*e.g.*, situations where the claim is only true if a product is used as directed).

- **Consider Alternatives to "Non-Toxic" Claims**. Advertisers may be able to convey a message about the safety of their products without using the words "non-toxic." Claims such as "hypoallergenic," "clean" or "safe [for a particular use]" may be useful to consumers, and may carry less legal risk than "non-toxic" (particularly when the terms are defined by the advertiser). Of course, advertisers should ensure that any such alternative claims are substantiated.

- **Consult with outside counsel as necessary**. There is no substitute for informed legal advice from an attorney who specializes in advertising law and ESG claims. An experienced attorney will be able to spot pitfalls and develop creative solutions to ensure claims are truthful and appropriately substantiated.

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For more information about this series on ESG issues in consumer product advertising, see our June 9 article, "ESG for Consumer Product Brands: Whitewashing the Greenwash—Identifying and Reducing Greenwashing Risk" and our July 21 article "The Nature of 'Natural' Advertising Claims."

Please do not hesitate to contact us with any questions.

NEW YORK


Megan K. Bannigan
mkbannigan@debevoise.com


David H. Bernstein
dhbernstein@debevoise.com


Justin C. Ferrone
jcferrone@debevoise.com


Jared I. Kagan
jikagan@debevoise.com


Kyle Kysela
kkysela@debevoise.com

WASHINGTON, D.C.


Paul D. Rubin
pdrubin@debevoise.com


Melissa Runsten
mrunsten@debevoise.com