

ESG for Consumer Product Brands: Whitewashing the Greenwash—Identifying and Reducing Greenwashing Risk

June 9, 2021

As the world begins to recover from the global pandemic, environmental, social and governance performance and sustainability efforts (commonly referred to as “ESG”) are influencing decisions by consumers, investors and employees more than ever. From “green” products to responsible farming to reducing carbon footprints, brand values are under a public microscope. In direct response to stakeholders’ expectations, brands have increasingly undertaken marketing efforts to highlight their ESG activities. But unfortunately, not all marketing campaigns are leading to the desired results: brands are increasingly being accused of what has been coined “greenwashing”—the practice, whether intentional or unintentional, of misrepresenting or exaggerating a brand’s actual ESG efforts.

Greenwashing can lead to reputational backlash and legal scrutiny. Specifically, greenwashing has spawned class-action lawsuits, advertising challenges by competitors and increased scrutiny from federal regulators. Traditional false advertising principles and other resources, such as the Federal Trade Commission’s (“FTC’s”) “Green Guides,” continue to provide helpful guideposts for companies trying to avoid claims of greenwashing. Nevertheless, the landscape of greenwashing claims is rapidly evolving, with certain industries and companies encountering unique legal challenges.

This update is the first in a series highlighting recent greenwashing trends applicable to consumer product brands. While this update provides an overview of several common issues, the updates to follow will take a deeper look at specific ESG-related claims and practical steps companies should take to minimize litigation risks and reputational harm.

Lies, Tradeoffs and the Temptation to Exaggerate

The Cambridge Dictionary defines “greenwashing” as the act of making “people believe that your company is doing more to protect the environment than it really is.” The problem is prevalent. One 2010 [study](#), for example, revealed that of 4,744 products advertised as “green,” 95% of them overstated or misled consumers as to how “green” the products really were. The study identified the “Seven Sins of Greenwashing,” which

include hidden trade-offs (e.g., organic farming that promotes the elimination of pesticides, fertilizers and antibiotics at the expense of broader damage caused by excessive land use), making environmental claims without proof (e.g., claiming that light bulbs are “energy efficient” without any evidence) and making irrelevant claims (e.g., advertising ketchup as “non-GMO” when there were no GMO tomatoes (or ketchup) on the market). Despite a proliferation of new products and advertisements over the past decade, as indicated by more recent studies, these “seven sins” remain highly relevant in the current marketplace. For instance, in 2020 the [European Commission examined](#) 344 “seemingly dubious” green marketing claims on the websites of certain key sectors, such as garments and household products, and found that 42% of these claims may be false or deceptive.

The temptation to engage in greenwashing (either intentionally or unintentionally) is driven by increased attention to ESG, which is becoming an important distinguishing factor between products and companies. For example, data shows that only 20% of consumers are willing to purchase goods from companies with a low ESG score.¹ Younger consumers, in particular, place greater weight on ESG factors in their purchasing decisions.² ESG may also be a factor consumers consider when deciding to recommend a product.³ Strong ESG performance has also been shown to [attract investors](#), and new indices that measure company performance on ESG metrics have emerged. [Studies also indicate](#) that strong ESG performance helps companies attract and retain younger employees and improve employee satisfaction.

A Costly Boast: The Risks and Consequences of “Greenwashing”

Greenwashing has both legal and reputational consequences.

Government Actions

The FTC has opened investigations into companies for claims of unfair or deceptive advertising relating to the environmental performance of their products. These investigations may result in injunctive relief and monetary remedies, including civil penalties for certain categories of violations. For instance, the FTC [ordered](#) a number of major retailers to pay civil penalties totaling \$1.3 million for allegedly falsely marketing rayon textiles as containing bamboo, which is considered environmentally friendly. The consent orders also prohibited the companies from violating the FTC’s Textile Act and

¹ RepTrak, *ESG Drives Business, Especially with Millennials*, (Sept. 10, 2020), <https://www.reptrak.com/blog/esg-drives-business-especially-with-millennials-data-science/>.

² *Id.*

³ RepTrak, *How much does ESG matter to consumers? It depends...*, (Sept. 18, 2020), <https://www.reptrak.com/blog/how-much-does-esg-matter-to-consumers-it-depends-data-science/>.

implementing regulations by failing to properly identify fiber content when labeling and advertising any textiles containing manufactured fibers. The FTC has also recently investigated apparel companies for allegedly disseminating false or misleading representations about the treatment of geese whose down was used in certain branded apparel. FDA-regulated companies (including medical device companies) are also [not immune](#) from FTC scrutiny and should take into consideration whether, for example, recycling and biodegradable claims are accurate.

More recently, a coalition of three environmental groups [filed](#) with the FTC what it claims to be the first complaint to rely on the “Green Guides” as a basis for challenging a fossil fuel company for misleading consumers about the environmental impact of its operations. The complaint alleges that the company: (1) overstated its investment in renewable energy, as well as its efforts to curb emissions and (2) made various misrepresentations in its advertising, including with respect to the benefits of biomethane and claims that the company’s actions do not harm the environment. At the time of writing, the complaint has not yet been publicly disseminated.

Class Action Litigation

Greenwashing has also given rise to class action lawsuits alleging that consumers were deceived into purchasing a product based on false or misleading advertising claims. Importantly, the literal truth of an advertising claim is not necessarily a complete defense if the claim nevertheless conveys a false impression. In 2016, several class action lawsuits were [filed](#) against an auto manufacturer for marketing its BlueTEC vehicles as being “Clean Diesel” and “Earth Friendly” when in fact the vehicles allegedly emitted more Nitrogen Oxide than the EPA allows. The complaints alleged that the vehicles were designed to emit less nitrogen during official tests but that systems within the vehicle emitted more nitrogen when the vehicles drove in normal conditions. The cases were eventually consolidated and were [settled](#) in 2020 with an agreement that mandated that the company implement a vehicle emissions system that ensured its vehicles met certain emission standards. The company was also required to pay [more than \\$700 million](#) to owners of the vehicles in question.⁴

Lanham Act Litigation

Section 43(a) of the Lanham Act provides a cause of action to sue competitors based upon the dissemination of advertising—including allegedly deceptive “green” claims—that misrepresents the nature, characteristics, qualities or geographic origin of goods, services or commercial activities.

⁴ See also *MB BlueTEC Settlement*, [%20https://www.mbbluetecsettlement.com/](https://www.mbbluetecsettlement.com/) (last visited May 28, 2021).

In one case, for example, three large manufacturers of plastic bags sued ChicoEco, a maker of durable, reusable shopping bags, alleging that ChicoEco had made false and misleading statements regarding the environmental qualities of plastic bags in order to make its own bag appear better in comparison. Two of the plaintiffs voluntarily dismissed their claims, and ChicoEco settled with the third plaintiff, with both ChicoEco and the third plaintiff undertaking mutual obligations regarding marketing statements.⁵ As part of the [settlement](#), ChicoEco agreed to restrictions on its marketing, including not citing archived EPA websites, linking to full NOAA reports if these are used in advertising, informing web users that reusable bags should be washed when dirty and noting that plastic retail carryout bags comprise only a small portion of plastic bags in ocean debris reports.

Administrative Challenges before the National Advertising Division of the Better Business Bureau

Green advertising claims have been the subject of numerous administrative challenges before the National Advertising Division (“NAD”) of the Better Business Bureau (which is the advertising industry’s forum for self-regulation of advertising disputes). Although the NAD lacks enforcement power, its decisions are highly influential given its general expertise in assessing the accuracy of advertising claims and because companies that refuse to participate or follow NAD decisions may be referred to the FTC for enforcement. NAD decisions are also public and often form the basis of separate class action complaints or FTC investigations.

For instance, a manufacturer’s advertising of certain of its cleaning products as “non-toxic” was challenged before the NAD, which [recommended](#) that the claim be discontinued because it conveyed an unsubstantiated message that the product would not harm people, common pets or the environment. After the NAD issued its recommendation, a follow-on class action lawsuit was [filed](#) in which the plaintiff leveraged the NAD’s reasoning to allege that the manufacturer’s definition of “non-toxic” did not align with reasonable consumer expectations.

NAD cases (as with the FTC) have [often focused](#) on “generalized” environmental claims and images that might overstate the environmental benefits of a product. For example, the NAD recommended that the maker of baby food discontinue its claim that its glass-based container was “the ultimate in sustainability.” Although the company presented evidence that its product had a lower carbon footprint than comparable-sized PET plastic containers, the NAD found this evidence insufficient to substantiate the advertising claim, since a product’s carbon footprint is only one aspect of its sustainability. In certain instances, the best practice for an advertiser may be to focus on

⁵ *Hillex Poly Co., LLC v. ChicoEco, Inc.*, Case No. 11-cv-116 (D.S.C.).

clearly communicating the specific environmental benefits of a product as opposed to making broad claims about a product's environmental benefits or sustainability.

Reputational Harm

Allegations of greenwashing can also generate significant negative publicity, counteract the purpose and message of the initial green advertisement and lead consumers to view a company's future ESG claims with skepticism. The reputational harm of such accusations can, therefore, be long term and difficult to overcome.

In thinking about ways to minimize greenwashing risks, companies should review regulations, identify and assess express and implied claims, substantiate all claims before making them and consult counsel when necessary. Businesses also can calibrate their advertising by utilizing reference guides such as the FTC "[Green Guides](#)," which provide advice to advertisers on a wide range of potential environmental claims, from the usage of Carbon Offsets, to claims regarding recycling or compostability. Although the Green Guides are a helpful starting point in thinking about ESG claims, they have not been updated since 2012, and the legal landscape has continued to evolve in the interim.

Companies can also reduce the risk of greenwashing allegations by substantiating ESG claims with product certifications, which can add credibility to an ESG claim and demonstrate a company's efforts to comply with recognized standards. Certification programs, however, are not free from controversy. The Forest Stewardship Council has, for instance, [refused to withdraw](#) certifications from companies engaged in illegal mass logging in the Russian taiga and Romania. [Research](#) has also indicated that 83% of fish certified by the Marine Stewardship Council was caught using unsustainable fishing methods, such as bottom trawling, dredging and purse seining. Businesses should, therefore, research the reputation of any certification they wish to use. In addition, companies touting environmental certifications should ensure the validity of the certifying entity and confirm that the seals themselves would not be considered [deceptive by the FTC](#).

Future Updates by Debevoise

This overview on greenwashing is part one of a multipart series of updates that will provide more detailed coverage of some of the key issues surrounding green advertising. Future updates will include an analysis of key NAD and class action decisions to provide clarity to the legal landscape for certain hot-button claims, industry-specific updates that delve into some specific advertising claims that have been the focus of legal challenges and government scrutiny (such as "natural" claims, "non-toxic" claims, "plant-based" claims, "recycling" and "sustainable sourcing" commitments and "fair

trade” claims) and additional guidance on how companies can navigate product certification programs.

We hope that this series will provide you with a strong grounding in the key issues surrounding environmental advertising.

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