

The Nature of “Natural” Advertising Claims

July 21, 2021

As consumers grow increasingly aware and concerned about Environmental, Social and Governance (“ESG”) issues and personal wellness, they are demanding greater transparency in the products they purchase. They want to know where their products are produced and what ingredients they include, so that they can choose products that are good for both them and the environment. As a result, more and more brands are touting products as “natural,” and consumers are increasingly willing to pay a premium for them. From food, to personal care products (e.g., soaps, shampoos, lotions, toothpastes), to cosmetics and fragrances, to household cleaning products (e.g., dish soaps, detergents, wipes), products are being advertised as “natural,” “all natural,” “100% natural,” “naturally-derived” or “derived from natural sources.”

Not surprisingly, these “natural” claims have led to a corresponding increase in litigation. Hundreds of lawsuits have been filed in the past decade alleging that the claims are misleading because the products in question contain some synthetic or genetically modified, not entirely “natural,” ingredients. These claims have had varying levels of success, in part because there are no clear laws, or even industry standards, governing exactly what “natural” means.

What is a company to do? Certain principles are relatively clear: if the product comes directly from nature, it is probably “natural.” For example, a company that harvests and sells wild mushrooms from the forest can rest assured that those mushrooms may be called “natural.” But the question becomes more complicated when companies use chemicals at some point in their production process—or use ingredients that were manufactured through a chemical process, even if they merely replicate ingredients that are otherwise found in nature. Should orange juice that contains trace amounts of non-natural herbicides that had been sprayed on the oranges during the growing process, for example, be labeled as “natural”? What about food with added vitamin C, where the vitamin was produced chemically in a lab but is exactly the same as the citric acid that could be extracted from citrus fruits?

When companies get these difficult questions wrong and face legal scrutiny for misleading “natural” claims, they can also face reputational backlash and accusations of

“greenwashing.” Such responses can undermine a company’s legitimate ESG efforts, leading consumers seeking “natural” products to conclude that the company’s product lines more generally are less healthy or environmentally sustainable than they actually are. On the other hand, companies that refrain from making any “natural” advertising claims on their natural products can lose the opportunity to effectively market to consumers focused on ESG issues.

While the answers to these questions are not always straightforward or clear, there is guidance to take away from courts, regulators and self-regulatory bodies that have considered these issues. As with all advertising, substantiation and support for the claims remains key.

The Lack of Statutory and Regulatory Standards

Complicating brands’ decisions regarding “natural” claims is the dearth of statutes, regulations and other comprehensive guidance on the issue. While several government agencies have at some point attempted to define “natural,” none have been fully successful to date.

The Food and Drug Administration

In 1991, the FDA implemented an informal policy defining “natural” to mean that “nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there.” That means that a product colored with natural juices (like beet juice, to make it appear red) could not be labeled as “natural” if the juice would not normally be in the product (such as a strawberry-flavored beverage). In such cases, a company could say that the colors are “derived from natural sources,” or that the product “contains no artificial colors,” but could not advertise that the product “has natural colors.” Importantly, the FDA later [clarified](#) that the policy does not offer an exhaustive or enforceable definition of the term “natural” and that it was intended only to address food composition, not food production methods (e.g., the use of pesticides) or food processing and manufacturing methods (e.g., pasteurization and use of thermal technologies).

More recently, in 2015, the FDA [requested comment](#) on whether it should establish a comprehensive definition for the term “natural” in the context of food labeling. In response, some courts stayed pending cases regarding “natural” claims on food labels under the primary jurisdiction doctrine, in anticipation that the FDA would clarify the meaning of “natural” as applied to food products. The comment period closed in 2016, but the FDA has not yet issued any rulemaking or modifications to its 1991 policy.

The Federal Trade Commission

Although the FTC is the [primary federal agency](#) responsible for regulating advertising and for undertaking enforcement actions to deter and punish misleading advertising, the agency has [expressly declined](#) to offer a specific definition of “natural.” In declining to promulgate a specific definition, the FTC cited insufficient evidence on consumer perception and the fact that “natural” claims “may be used in numerous ways and convey widely different meanings depending on context.” As described in more detail below, the FTC nevertheless has taken enforcement actions against “natural” advertising that the agency has considered to be misleading to consumers.

The U.S. Department of Agriculture

The USDA issued [guidance](#) in 1982 specifically pertaining to meat and poultry-based products. That guidance permits use of a “natural” claim only where (1) the product “does not contain any artificial flavor or flavoring, coloring ingredient, or chemical preservative . . . or any other artificial or synthetic ingredient,” and (2) its ingredients are “not more than minimally processed.” The USDA has separately [explained](#) this to mean that the ingredients of the meat and poultry products must be “processed in a manner that does not fundamentally alter the product.” In 2016, the USDA issued new [guidance](#) for distinguishing between “synthetic” and “natural” ingredients for purposes of the agency’s [National Organic Program](#)—a program that develops and enforces standards for organically produced agricultural products in the United States.

Recent Legislative Efforts to Define “Natural”

In 2019, Representative Maloney of New York introduced the [Natural Cosmetics Act](#) in the U.S. House of Representatives. The Act would have amended the Federal Food, Drug, and Cosmetic Act to prohibit labelling cosmetics products as “natural” unless the products (1) contain only water or ingredients derived from minerals, plants, microbes, or animals, and (2) contain no more than 30% chemically processed ingredients. The bill did not make it out of the House Energy and Commerce Committee.

Industry Efforts to Define “Natural”

To fill the void in regulatory guidance, certain industry and standards groups have attempted to define the term “natural” for certain types of products. For example, the Association of American Feed Control Officials (“AAFCO”) [defines](#) “natural” in the context of pet food. The Swiss-based International Organization for Standardization (“ISO”) has set “natural” standards for various types of goods, including [cosmetics](#) (which has been adopted by companies like [Burt’s Bees](#)), [textiles](#) and [food products](#). Cosmetics industry groups in Europe created the global [COSMOS standard](#) for natural cosmetics products. Such industry standards generally are not binding or enforceable in

court, and compliance with such standards does not generally, by itself, eliminate a company's risk of liability.

The FTC, NAD and Courts Have Filled in Some of the Gaps

Despite (or perhaps because of) the lack of clear statutory and regulatory standards, brands have found themselves as the targets of litigation in federal courts by consumers and competitors, enforcement actions by the FTC or challenges initiated by competitors before the National Advertising Division ("NAD") of BBB National Programs. Decisions from these bodies have helped to fill some of the gaps in the law surrounding "natural" advertising and provide at least *some* guidance to brands about when and how they may claim that their products are "natural."

Substantiate All "Natural" Claims

With the exception of claims that are mere "puffery" (*i.e.*, claims that will not reasonably be taken to convey an objectively provable fact, such as Champion Petfoods' claim that its products "nourish as nature intended," see [Song v. Champion Petfoods U.S., Inc.](#) (D. Colo. 2020)), calling a product "natural" is an objective claim that must be substantiated. In other words, all reasonable interpretations of the claim must be true and supported by evidence, even if one reasonable consumer takeaway from the claim is not what the advertiser intended.

What it means for a product to be "natural" may vary depending on the type of product, and the message consumers take away from a "natural" claim may vary depending on the full context in which the claim appears. All parts of the advertising will be considered, including:

- the entire phrasing of the claim,
- the claim's relationship to other words or images in the advertisement,
- the origin and processing of the ingredients,
- any qualifiers or disclaimers included with the claim or on product packaging, and
- consumer expectations.

As a General Rule, Products Advertised with Unqualified or Absolute “Natural” Claims Must Contain Only Natural Ingredients, with No Synthetic or Artificial Ingredients.

In 2016, the FTC took [enforcement actions](#) against four companies that marketed personal care products containing synthetic ingredients as “all natural” or “100% natural,” including an “all natural” hand and body lotion that contained synthetic preservatives and silicone-based polymers that make lotions feel smooth and silky. The settlements (1) prohibited the companies from making any misleading “natural” claims, ingredient and composition claims, or environmental or health-benefit claims and (2) required the companies for a period of five years to provide the FTC with copies of all such claims and the substantiating evidence for those claims. The [lesson](#) the FTC wanted other marketers to take from the settlements is “[t]hat ‘all-natural’ or ‘100% natural’ mean just that. If you advertise your product as ‘all-natural’ or ‘100% natural’ and it contains artificial ingredients or chemicals, now is the natural time for a compliance check.” Accordingly, companies should only use absolute claims, like “100% natural” or “all natural,” when the products unquestionably contain no genetically modified, chemically produced, or otherwise non-natural ingredients.

More recently, the NAD examined advertising for an air freshener that claimed to “transform[] natural essential oils into a fragrant mist” and included imagery of “waves, trees, flowers, [and] misty air.” Finding that the ad reasonably conveyed the message that the essential oils were the only or primary ingredient in the air freshener, the NAD ultimately concluded that the ad was misleading because the product also contained some synthetic materials. *In re Reckitt Benckiser LLC (Air Wick Home Fragrance Products)* (NAD Case No. 6374). This case demonstrates that “natural” claims without disclaimers can sometimes be subject to the same substantiation standards as explicit “all-natural” claims. Brands should take care to precisely identify the ingredients in their products that are actually natural and state in what ways those ingredients fit that label.

It is important to note that a product containing only natural ingredients is not necessarily “natural” and is not necessarily immune from liability. For example, as described above, a food product can ultimately be considered “non-natural” if it contains ingredients that a reasonable consumer would not normally expect to be there. In addition, as we describe in more detail below, processing natural ingredients in certain ways can also render a product non-natural.

Special Consideration Is Given to the Exact Type of “Natural” Claim Being Made

Substantiation also is required for other types of “natural” claims, although exactly what is required may change depending on the exact wording of the claim. For example:

- Implied “natural” claims. A brand might be communicating a “natural” claim even when it does not use the word “natural.” For example, the NAD treated claims that a product was “artificial-free” as a kind of “natural ingredient” claim. *In re Petco Animal Supplies, Inc.* (NAD Case No. 6357). In another case, the NAD found that a misleading “natural” claim was communicated about cooking oil based on advertisements that “feature[d] farms, farmers and soybeans and state[d] that soybeans [were] being used to make a new fat-free cooking oil.” The NAD ultimately found the oil was not “natural” and that the claims should be changed because the product contained sugar molecules that had been chemically broken apart and then recombined with oil molecules to form a new molecule not found in nature. *In re Procter & Gamble* (NAD Case No. 3499).
- “Naturally derived.” [One court](#) recently explained the need to clearly set forth the limits of “natural” claims when it equated a “naturally derived” claim to a claim that the ingredients were “all natural,” finding that a consumer might reasonably expect a product labeled “naturally derived” to contain no synthetic ingredients. Similarly, the NAD recommended that ASPIRE Beverage Company discontinue claims that its sports drink was a “natural sports drink” when it contained vitamins and citric acid that were not proven to be “naturally derived”; however, the NAD made clear that ASPIRE was free to promote that its product was “naturally sweetened, naturally flavored or that it is made with natural ingredients,” all of which were supported claims. *In re ASPIRE Beverage Company* (NAD Case No. 5861).

How Much Processing Renders a Product Unnatural?

Most products labelled as “natural” undergo some kind of processing before they are sold. Mechanical processing and certain chemical processes that can occur naturally between materials found in nature (e.g., fermentation, baking and saponification) often do not render a product unnatural. However, with enough processing, or with particularly transformative processing, an ingredient sourced from nature can become something unrecognizable and unnatural in the eyes of consumers, courts and regulators.

The NAD has held that ingredients that are derived from nature but that undergo “significant chemical alterations” often are not “natural” in the way that consumers expect them to be. For example, the NAD found a claim that mouthwash was “natural” to be unsubstantiated when one ingredient (comprising only 1% of the total product) was produced through a chemical treatment of natural gas. The NAD found that the target consumers for “natural” oral hygiene products are likely to have “heightened concerns and expectations regarding the ingredients in the products they purchase,” and likely would be misled into thinking that the mouthwash contained no ingredients produced through chemical processes. *In re Tom’s of Maine* (NAD Case No. 3470).

In recent years, manufacturers of stevia-based sugar substitutes, including the maker of Truvia, have [settled](#) class-action lawsuits alleging that their products are misleadingly marketed as “natural,” because they allegedly used a chemical process to extract the natural compound steviol glycoside from natural stevia leaves. Similarly, in 2020, the NAD found that the treatment of wheat starch (an indisputably natural ingredient) with food-grade hydrochloric acid to yield the wheat dextrin found in Benefiber represented a significant alteration of the source ingredient that is inconsistent with consumers’ reasonable understanding of a product that claims to be “100% Natural.” *In re GlaxoSmithKline Consumer Healthcare, LLC* (NAD Case No. 6366).

Cases involving chemical processes are often close calls and very fact-specific. Advertisers should be sure they understand which ingredients in their products can confidently be called “natural” without processing and ensure they take efforts to substantiate the “natural-ness” of any ingredients that are chemically processed.

Trace Amounts of Non-Natural Materials Are Sometimes Permissible

Several courts have found that the presence of trace amounts of synthetic herbicides on otherwise “natural” products is not likely to mislead consumers, at least where the presence of the herbicide is incidental to the production process and not a result of the producer deliberately adding it to the product.

For example, last year, the U.S. Court of Appeals for the Second Circuit [affirmed](#) dismissal of a lawsuit claiming that orange juice sold under the name “Florida’s Natural” was deceptive because the juice contained trace amounts of an herbicide (glyphosate) that was present on the oranges when they were juiced. The court explained that other claims on the packaging, including “100% Orange Juice,” “Not from Concentrate” and “Non-GMO,” provided sufficient context such that the brand name would not mislead reasonable consumers. In addition, because the presence of glyphosate was merely a contaminant from the production process, rather than an “intentionally-added ingredient,” a reasonable consumer “would not make assumptions regarding the presence or absence of trace amounts of glyphosate.” These facts distinguished the case from others where the defendant had either added unnatural ingredients or advertised products as “pure” or “100% natural,” indicating the “absolute absence” of non-natural contaminants.

Other courts have recently issued similar rulings, including a [case](#) dismissing a lawsuit claiming that Rachael Ray Nutrish dog food was misleadingly labelled as “natural” because it contained trace amounts of glyphosate.

Clear Disclaimers and Qualifiers May Save the Day

As noted above, claims that a product is “all natural” or “100% natural” are treated at face value as absolute, even if those claims are accompanied by disclaimers or other qualifiers. Typically, the same absolutist principle applies to unqualified “natural” claims, such as claims that a product contains “natural ingredients.”

On the other hand, where an advertiser clearly disclaims or qualifies a “natural” claim, the claim may withstand scrutiny. The NAD recently held, for example, that a product claiming to contain “natural ingredients” could permissibly also include artificial ingredients (*e.g.*, synthetic vitamins) where a “properly qualifying disclaimer” is used, such as a clear definition of “natural ingredients” and a list of what types of ingredients are excluded from the definition. *In re Petco Animal Supplies, Inc. (Case No. 6357)*.

Courts and the NAD have found that reasonable consumers cannot always be expected to review the entirety of a product’s packaging, so the inclusion of qualifications and disclaimers does not eliminate an advertiser’s risk of liability. However, conspicuous qualifications can alter consumer expectations and lower the risk that they will be misled. Under well-established [FTC guidance](#), disclaimers should be clear, proximate and conspicuous in order to be effective.

What Is a Brand Owner To Do?

Despite the lack of clear statutory and regulatory standards, there are steps brands can take to minimize their risk of liability for “natural” claims.

- **Substantiate your claims prior to making them.** Ensure that your product development and marketing teams are on the same page as to what substantiation you have to defend against any challenges to your “natural” claim. Do not advertise beyond the substantiation you possess.
- **Audit your ingredient lists and production methods.** Look out for synthetic ingredients (*e.g.*, preservatives, herbicides and synthetic vitamins), highly processed ingredients (*e.g.*, high-fructose corn syrup, ascorbic acid and xanthan gum), and genetically modified ingredients (*e.g.*, products like corn, soy and sugar beets) in your products. If you incorporate ingredients sourced from a third party, make sure you understand the process the third party used to produce the ingredients and get certifications concerning the “natural” status of those ingredients prior to making any “natural” claims. Avoid using ingredients in a product that consumers would not expect in a product of that nature.
- **Where the ingredients or processing is even slightly questionable, use alternative phrases that do not include the word “natural.”** Although certain

alternative claims might be considered implied “natural” claims, they could instead be considered aspirational (as in “turning our back on artificial ingredients,” see *In re Petco Animal Supplies, Inc.* (NAD Case No. 6357)) or held to a clearer and more narrow standard of substantiation (as in “no artificial colors” or “no artificial ingredients”).

- **Be specific in your claims and use qualifiers to explain what “natural” means, where appropriate.** Instead of making general claims about a product being “natural,” state which specific ingredients are natural or naturally derived. Phrases like “contains natural ingredients” or “derived from natural ingredients” can be easier to substantiate than “all natural” because they can be qualified or explained, whereas absolute claims are treated at face value. Explain what you mean by “natural”—do this clearly, conspicuously (*i.e.*, not in “fine print”) and in close proximity to the “natural” claim.
- **Weigh the cost of ingredient modifications against litigation risk and the value of advertising the product as “natural.”** Consider the cost of replacing synthetic, genetically modified or otherwise controversial ingredients with natural ingredients. Compare those costs to the risk-adjusted cost of facing (and potentially losing) a class action lawsuit relating to your advertising claims. It might make sense, as a business decision, to make your products unquestionably “natural.”
- **Monitor Industry and Regulatory Developments, and Consult Outside Counsel.** Guidance within your industry can help you navigate the acceptable standards for “natural” claims. Monitoring new regulations and enforcement trends by regulators, such as the FTC, also can help identify where lines are being drawn. Given the shifting and uncertain landscape, it is always a good idea to consult with outside counsel in the early stages of developing advertising claims to understand the risks involved and steps you can take to minimize them.

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.”

* * *

Please do not hesitate to contact us with any questions.

NEW YORK



Megan K. Bannigan
mkbannigan@debevoise.com



David H. Bernstein
dhbernstein@debevoise.com



Timothy Cuffman
tjcuffma@debevoise.com



Justin C. Ferrone
jcferrone@debevoise.com



Jared I. Kagan
jikagan@debevoise.com

WASHINGTON, D.C.



Paul D. Rubin
pdrubin@debevoise.com



Melissa Runsten
mrunsten@debevoise.com