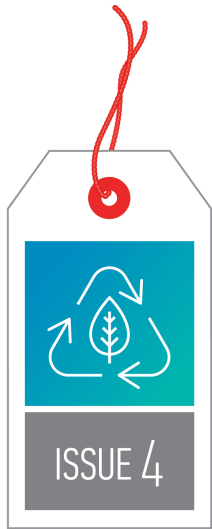


## [Updates](#)

July 27, 2023

### Sustainability Advertising: US and EU Regulators Boost Guidance and Enforcement



Brands continue to promote sustainable and eco-friendly qualities of their products and

services, and regulators are sharpening their enforcement tools in response. Both the United States and European Union took steps in the past year to add to their guidance and enforcement mechanisms related to green advertising. Regulators are clearly concerned about green advertising claims, and in particular the use of terms that could convey multiple meanings such as "sustainable," "compostable," and "recycled content," as well as ensuring that brands have credible substantiation for their claims.

Of course, while brands review the latest regulatory guidance, they should also remember that such claims can trigger challenges in the United States from consumer class action lawyers, competitors, and the National Advertising Division (NAD), a self-regulatory forum. "Aspirational claims" in particular—claims that make promises about future environmental goals—can still generate risk for brands.

This Update summarizes certain regulatory developments in the United States and EU related to green claims.

## FTC Invites Comments for *Green Guides* Review

First published in 1992, the Federal Trade Commission's (FTC) *Green Guides for the Use of Environmental Claims (Guides)* provide direction and guidance to brands and advertisers making environmental marketing claims. Last updated in 2012, the FTC [sought public comment](#) early this year on the *Guides*, including whether to make the *Guides* independently enforceable. (Currently, the *Guides* are the FTC's interpretation of how the FTC Act applies to environmental marketing claims, although states, such as California, can incorporate the *Guides* into state law.) The FTC also sought comment on specific environmental claims, including:

- **Carbon offsets and climate change.** Whether the revised *Guides* should include more information about carbon offset and climate change-related claims and issues.
- **The term "recyclable."** Whether the current threshold that informs marketers about when they can make unqualified recyclable claims should be changed, and whether the *Guides* should address claims for products that are collected (picked up curbside) by recycling programs but are ultimately not recycled.
- **The phrase "recycled content."** Whether consumers typically understand unqualified claims about recycled content—particularly claims about "pre-consumer" and "post-industrial" content—and whether alternate means of substantiating recycled content claims may be appropriate.
- **The need for guidance on other commonly used terms.** Whether additional guidance is needed regarding definitions of terms such as "compostable," "degradable," "ozone-safe," "ozone-friendly," "organic," and "sustainable," as well as those referring to energy consumption and energy efficiency.

Brands should keep an eye out for updated *Guides*, while also carefully considering the signals that the FTC sent with its request for public commentary on the current *Guides*. In particular, the FTC is focused on the consumer understanding of common terms used in sustainability advertising. As discussed in our prior articles, brands should continue to consider all reasonable consumer takeaways when making green claims and ensure that they have adequate substantiation for such claims.

## EU Proposes Directive on Environmental Claims

On March 22, 2023, the European Union Commission (the EU Commission) proposed a [Directive on Substantiation and Communication of Explicit Environmental Claims](#) (the Directive). The Directive aims to provide a harmonized approach to green claims across the EU by setting minimum standards on how to (1) substantiate green claims, (2) communicate green claims, (3) certify environmental labeling programs, and (4) verify green claims. The Directive, if approved by the EU Parliament and EU Council, must be adopted into national law by each member state before it takes effect. A few key requirements follow:

- **Substantiation of environmental claims.** Brands that make express environmental claims must carry out a substantiation assessment that at least meets 10 specific criteria, including:
  - Rely on widely recognized scientific evidence.

- Show that the claimed environmental impacts are significant from a lifecycle perspective.
- Take into account all significant environmental aspects.
- Demonstrate whether the claim is accurate for the whole product or only for parts of it.
- Provide information on whether the product has a better environmental impact than what is common practice for products in the relevant product group.
- Identify whether a positive achievement leads to worsening of another impact.
- Report greenhouse gas offsets.
- **Verification.** Each member state must set up procedures for an independent third party (the Verifier) to verify the substantiation of environmental claims *before* they are communicated to consumers. Brands can rely on a certificate issued by the Verifier to advertise across the EU without challenge by another member state.
- **Enforcement.** Each member state must designate at least one agency to enforce the Directive. However, each member state can determine its own rules on penalties, although the rules must include some component of fines, disgorgement of revenue, and a temporary exclusion from participating in public procurement process and accessing public funding.

In sum, the Directive indicates that the EU takes green advertising seriously and seeks to curb claims that may not be appropriately supported. While the process for each member state to adopt and implement the Directive may take up to four years, brands selling products in the EU should take note of the specific substantiation requirements now and not be caught off guard once enforcement begins.

### **Current State of Play: Green Claims Present Risk of Challenge**

While brands should carefully follow U.S. and EU regulatory developments, they obviously should not ignore the present risk of consumer class actions and NAD challenges resulting from sustainability claims. See, for example, [last year's Update](#), which described popular consumer claims.

In particular, brands should also be aware that aspirational claims are not automatically "safe" and may face different levels of scrutiny in different forums.

Some advertisers have successfully defended their aspirational claims in courts. For example, a court held that Coca-Cola's claims, such as "a more sustainable and better-shaped future" and "scaling sustainability solutions and partnering with others is a focus of ours," were not misleading statements as they were aspirational in nature, and limited and vague in nature. See *Earth Island Institute v. The Coca-Cola Company*, Civil Action No. 2021 CA 001846 B.

On the other hand, the NAD has opened several inquiries against companies making aspirational claims, requiring them to substantiate such claims, including that they are taking the necessary steps to meet future goals. For example, NAD recommended discontinuing claims such as "Working with the World Wildlife Fund through their ReSource: Plastic program to reduce our plastic footprint" because it determined that the claim overstated the American Beverage Association's currently provable sustainability efforts towards the stated goal. NARB Panel 308, appeal of NAD Case 7011, NAD/CARU Case Reports (Feb. 2023).

In other words, brands should be aware that even a vague, aspirational statement may need to be substantiated.

## Conclusion

With regulatory developments and inconsistent case outcomes on green claims, brands should take caution to mitigate risk by reevaluating their green claims and securing credible evidence to support such claims.

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