

# Trends in ESG Advertising Claims: What Advertisers Should Expect in the U.S. and for Cross- Border Campaigns

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# Agenda

- FTC Green Guides
- EU Greenwashing Laws and Enforcement Trends
- Recent US Class Actions
- Aspirational vs. Actionable ESG Claims
- Key Takeaways

# FTC Green Guides Overview

- Last revised in 2012.
- Green Guides provide guidance as to:
  - 1) general principles that apply to all environmental marketing claims
  - 2) how consumers are likely to interpret particular claims and how marketers can substantiate these claims
  - 3) how marketers can qualify their claims to avoid deceiving consumers
- In 2021, the FTC announced plans to initiate a review of the Green Guides, and in December 2022, the FTC published a notice requesting public comments on the Green Guides.
- Public comment period ended on April 24, 2023.

# Anticipated Revisions

- **Carbon offsets** and **climate change**-related claims
  - Current guides do not address “carbon neutral”, “net zero”, or climate change goals and targets
- **Recycled content** and **recyclable** claims
- **Sustainability** claims
  - Current guides state that the FTC lacked a basis to give specific guidance on how consumers interpret “sustainable” claims
- **Energy consumption**-related claims
- **Chemical “Free”** Claims
  - Current definition of “trace amount” is hard to operationalize

# New EU Laws on Greenwashing (I)

- General EU consumer law (*Unfair Commercial Practices Directive* & *Consumer Rights Directive*) bans unfair (misleading or aggressive) practices, with a blacklist of practices that are always deemed 'unfair' -> This can include B2C 'greenwashing' (cf. 2021 EC Guidance Note)
- Amended in February 2024 by Directive 2024/825 'Empowering Consumers for the Green Transition (Member States to transpose by 27/3/26 and apply by 27/9/26):
  - Banned commercial practices: generic and unsubstantiated green claims (e.g. "environmentally friendly"); unsupported claims on future environmental performance; presents as distinctive environmental features required by law; unverified claims based on emissions offsetting schemes; sustainability labels that are not based on approved certification schemes.
  - Requires information on durability to address early obsolescence.

# New EU Laws on Greenwashing (II)

- Draft 'Green Claims' Directive – still under discussion. Expected during 2024.
  - Will complement the revised UCPD with detailed rules explicit environmental claims.
    - **Substantiation:** claims must be based on widely recognised scientific evidence; life-cycle perspective; no harmful impacts on climate change, resource consumption, biodiversity etc; must go beyond requirements imposed by law; special requirements for comparative claims
    - **Verification:** Must be independently verified; Member States to adopt appropriate verification procedures.
  - **Information:** Must direct consumer to “substantiation” info (e.g. weblink, QR code)
  - Once adopted, Member States will have 24 months to transpose.

# Enforcement Trends in Europe

- Civil courts in various Member States:
  - *CLCV v. Nespresso* - carbon neutrality, 100% recyclable (action time-barred, pending appeal);
  - “Since May 2022, the Deutsche Umwelthilfe has opened more than 30 legal proceedings and has not lost a single lawsuit regarding climate neutrality promises in court.” (DUH Executive Director, 09/20/2023).
- Consumer authorities
  - 2023 - DGCCRF (FR) national investigation on greenwashing: 1,100 undertakings inspected, 25% found to be in breach: 141 warnings, 114 injunctions and 18 criminal or administrative reports.
- Advertising standards bodies
  - UK Advertising Standards Authority – many rulings codified in June 2023 guidance on green claims
- EU coordinated actions
  - 2023: BEUC complaints against 17 airlines (claims that extra credits can “offset” emissions; extra charges for ‘Sustainable Aviation Fuels’); against bottled water brands (100% recycled / recyclable).
  - Feb 2024: Zalando committed to remove sustainability flags and icons next to products

# ► Recent U.S. Consumer Class Actions



# Increasing Litigation, Including Consumer Class Actions

- TINA.org has tracked more than 100 class-action lawsuits accusing marketers of making misleading environmental claims.
- Of the greenwashing class-action lawsuits:
  - At least **30%** have alleged false and/or misleading **environmentally friendly, earth friendly, eco-friendly or environmentally responsible** claims.
  - **18%** have alleged false and/or misleading **sustainable** claims.
  - **14%** have alleged false and/or misleading **recyclable** claims.
  - **11%** have alleged false and/or misleading **compostable** or **biodegradable** claims.
  - **5%** have alleged false and/or misleading **carbon reduction** claims.

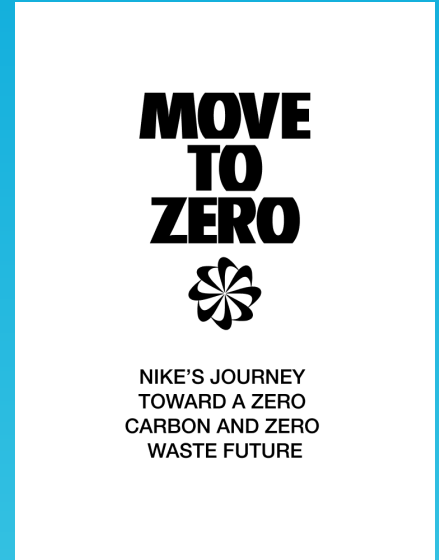
# *Della v. Colgate-Palmolive Co.*, No. 23-cv-04086-JCS (N.D. Cal. Feb. 6, 2024) (recyclability claims)

- Plaintiffs brought a putative class action under California law based on statements Defendant made about the recyclability of the toothpaste tubes of its products. Plaintiffs argue these statements are false and misleading because only a “miniscule” number of recycling plants in the U.S. actually accept them for recycling.
- Defendant’s motion to dismiss was denied.
- The Court ruled that a reasonable consumer might assume that “recyclable” would mean that it could be sent to a recycling plant by consumers.



# ▶ *Ellis et al. v. Nike USA, Inc.*, No. 23-cv-632, E.D. Mo. (May 2023) (sustainable apparel claims)

- Plaintiffs brought claims against Nike asserting violations of Missouri's Merchandising Practices Act, among others, over Nike's sustainability claims.
- Nike's sustainable clothing line products claim that they are "sustainable," made with "sustainable materials," "eco-friendly," and environmentally friendly.
- Plaintiffs alleged that Nike's "Sustainability" Collection Products are predominately made with synthetic materials and the vast majority are made from plastic-based materials.
- Nike filed a motion to dismiss.



# ▶ *Dorris et al. v. Danone Waters of America*, No. 22-cv-8717 (S.D.N.Y. Oct. 2022) (carbon neutral claims)

- Plaintiffs brought a class action suit against Defendant over false and misleading statements stating that Evian spring water bottles are “carbon neutral.”
- Plaintiffs argue that the claim implies the product does not emit CO<sub>2</sub> during its lifecycle, while Defendant contends that it only conveys that the product was certified carbon neutral by the Carbon Trust.
- Court ruled the term “carbon neutral” to be scientific and technical and thus easily misunderstood by the reasonable consumer, denying Defendant’s motion to dismiss in part.



## ► *Boyd et al. v. Target Corp.*, 23-cv-2668 (D. Minn. Aug. 2023) (environmentally friendly claims)

- Plaintiffs brought a class action against Target for false advertising in connection with “Target Clean” label, which is used to convey that those products are free from a list of certain chemicals.
- Plaintiffs allege that these products contain other harmful chemicals not included on the list of chemicals and non-transparent ingredients like “fragrance.”
- Target filed motion to dismiss.



# White v. Kroger Co., No. 21-cv-08004-RS (N.D. Cal. Mar. 25, 2022) (environmentally friendly claims)

- Plaintiff alleged that sunscreen products produced and sold by defendants were misleadingly labeled as “reef friendly,” when they in fact contain ingredients with the potential to damage reefs.
- Kroger moved to dismiss, arguing the claim “reef friendly” is inactionable as it is “mere puffery.”
- Court denied motion to dismiss stating that while neither the FTC Green Guides, nor the California statute codifying the Green Guides directly creates a private cause of action, they do undermine any argument that “reef friendly” can be dismissed as mere puffery.



# ▶ *Palmer v. P&G*, 2023 U.S. Dist. LEXIS 160374 (N.D. Ill. September 11, 2023) (plant-based claims)

- Plaintiff alleged “90% PLANT BASED APPLICATOR” claim was misleading.
- Defendant argued statement is an accurate description of the material used in the plastic applicator, which plaintiff did not dispute.
- Plaintiff cited survey showing almost “80 percent of consumers thought ‘plant-based plastic’ meant a compostable and biodegradable alternative to plastic, whereas only 11 percent knew that plant-based plastic is no different from regular plastic.”
- Court denied motion to dismiss.



# ► Aspirational vs. Actionable Claims

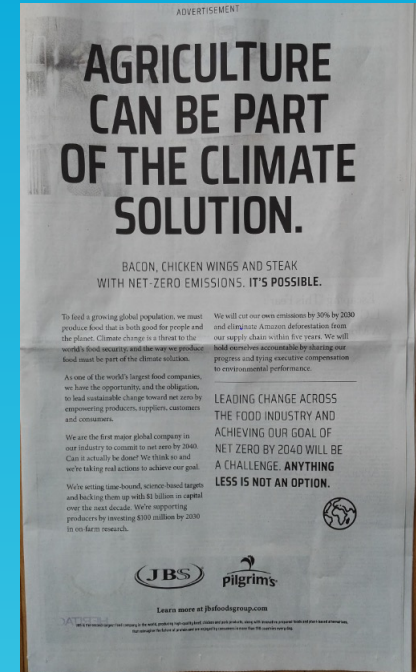


# NAD Guidance

- The NAD follows FTC guidance, but is able to fill in gaps when there is no specific guidance in an area such as aspirational claims
- Generally, NAD has concluded that aspirational claims can convey a message to a reasonable consumer of expectations of future environmental benefits, which could be misleading if the company's efforts and plans are not consistent with its stated goals.
- Goals should be measurable and attainable, and companies should be able to provide evidence of their plan to meet the goals.

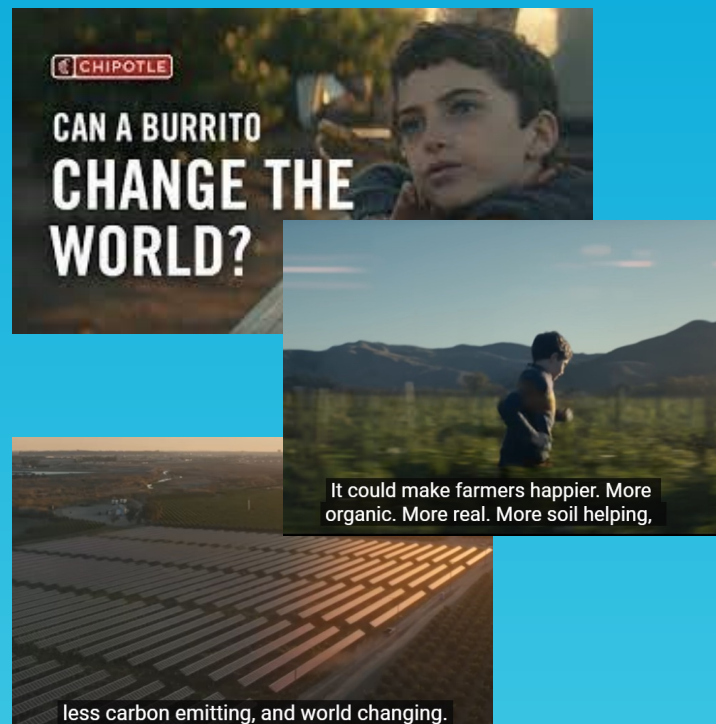
# JBS USA Holdings, Inc. (Net Zero 2040), Report #7135, NAD/CARU Case Reports (February 2023)

- NAD ruled that labeling JBS's products with the claim "net zero emissions" was misleading and should be discontinued, but the phrase "Leading change across the food industry and achieving our goal of net zero by 2040 will be a challenge" by itself was fine.
- NAD stated that advertisers must be able to demonstrate that goals and aspirations are not "merely illusory" and that a reasonable consumer would interpret JBS's claims to mean that it was already acting toward specific objectives and measurable outcomes that would enable its operations to have net zero impact on the environment by 2040.
- "Consumers are unlikely to understand what is involved in a business enterprise reaching net zero."



# Chipotle Mexican Grill, Inc., Report #7020, NAD/CARU Case Reports (Feb. 2022)

- NAD examined a claim in Chipotle’s “Can a Burrito Change the World?” television commercial that a Chipotle burrito “could make our farmers . . . more organic . . . less carbon emitting.”
- Chipotle referred to its Supplier Code of Conduct as evidence that reducing its carbon emissions is a focus of its sustainability efforts and that those efforts are growing and evolving, an aspirational claim.
- Also referred to recent corporate sustainability reports showing purchases of organic ingredients and efforts to assist farmers in achieving organic certification.
- NAD determined that Chipotle had a reasonable basis for the aspirational claims.



# ▶ Butterball, LLC (BUTTERBALL Turkey Products), Report #6930, NAD/CARU Case Reports (August 2021)

- Many environmental claims were challenged, including the aspirational claim that Butterball “recognizes” its “responsibility” to “preserve the planet.”
- NAD ruled that this aspirational claim specifically was not misleading, as the advertiser’s efforts to improve its environmental impact were sufficient to show that the vague, non-specific aspirations communicated by these challenged claims were not illusory, and sufficiently supported.



# Federal Court Guidance

- Courts use the “reasonable consumer” standard to determine whether advertising statements are misleading, even with aspirational claims.
  - When a reasonable consumer would understand the claim to be merely aspirational in nature, it would not be considered deceptive.
  - However, aspirational claims can convey specific goals and measurable outcomes, which could be interpreted by consumers as implying the company has solidified plans and steps undertaken to achieve them, which if shown to be false could make the statements misleading.

# *Earth Island Inst. v. Coca-Cola Co.*, 2022 D.C. Super. LEXIS 59 (D.C. Super. Ct. Nov. 10, 2022)

- Plaintiffs allege violations of the DC CPPA based on a variety of statements made by Defendant regarding the company's commitment to sustainability. Examples include:
  - "[C]omitted to creating a World Without Waste by taking responsibility for the packaging we introduce to markets and working to reduce ocean pollution."
  - "Our planet matters. We act in ways to create a more sustainable and better shared future. To make a difference in people's lives, communities and our planet by doing business the right way."
- Court granted Defendant's motion to dismiss because:
  - Defendant's statements are aspirational in nature and not a violation of the CPPA
  - Defendant's statements are not tied to a "product or service," as required by the CPPA
  - Defendants statements cannot be combined to allege a misleading "general impression"



# *Berrin v. Delta Air Lines Inc.*, Docket No. 2:23-cv-04150 (C.D. Cal. May 30, 2023)

- Plaintiff brought class action against Delta claiming it engaged in deceptive advertising through carbon emissions statements.
- Specifically, Delta claimed it is “the world’s first carbon-neutral airline.”
- Delta filed a motion to dismiss.



# Key Takeaways

- Lawsuits involving ESG claims continue to gain steam, and increased regulation is likely to result in increased litigation.
- EU Directive:
  - Regulation serves as a warning to EU and US companies about the continued dangers of overzealous and unsupported environmental marketing claims.
  - Member states have two years to transpose to national law, but companies operating in the EU may consider implementing policies and procedures proactively.
- Aspirational ESG Claims:
  - Aspirational claims should be measurable and achievable.
  - Companies should be prepared with evidence of an articulate and achievable plan, a timeline on which to achieve it, as well as efforts and actions taken.





Thank You



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Anna is a first chair litigator with a reputation of staying in front of emerging market trends. Being at the forefront of trademark, copyright, and false advertising litigation with deep experience in intellectual property and advertising law, class action defense, and jury and bench trials, she has an impeccable ability to partner with clients, providing practical solutions and counseling for their most complex issues. She routinely litigates high-stakes cases for some of the world's most renowned brands before federal trial and appellate courts, the Trademark Trial and Appeal Board (TTAB) of the US Patent and Trademark Office (USPTO), and the National Advertising Division.

Anna has led a string of victories for her clients, including in jury and bench trials, requests for injunctive relief, and defeating class certification. She has also secured a number of appellate wins including a first-impression copyright infringement and complex trademark and unfair competition cases.

Anna also counsels clients on advertising claims substantiation (including such cutting-edge areas as sustainability/ESG, Web3 and blockchain, and social media campaigns and promotions), trademark enforcement, copyright, and right of publicity issues. Anna was selected as a DC Rising Star by the National Law Journal and as a Managing Intellectual Property (MIP) Rising Star and a Legal Media Group America's Rising Stars award winner for copyright and trademark work. She has consistently been recognized as a Rising Star by Legal Media Group and as one of DCA Lives Rising Stars of Law: 40 Under 40.



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Genevra Forwood is a partner in the EMEA Competition – Regulatory practice based in the Firm's Brussels office.

Genevra advises and litigates on a broad range of areas of EU law, across a variety of industrial sectors ranging from energy and manufacturing to pharmaceutical and chemicals. As a seasoned litigator, Genevra has pleaded a number of high-profile cases before the EU courts.

One particular area of focus is the EU's economic sanctions against third countries. She co-leads the Firm's EU and UK Sanctions teams, and over the years has handled hundreds of queries on this topic, spanning advisory and transactional work through to investigations and contentious matters.

Genevra also advises on other aspects of EU regulatory compliance, including in the areas of public procurement, EU public contracts, environmental laws and consumer protection. She assists clients with their own compliance, and has drafted a number of complaints to the European Commission in respect of failures of Member States to comply with their obligations under EU law.

Genevra also advises and litigates on EU antitrust and State aid law. She frequently advises on the rules and procedures governing the grant of State aid, and has acted for both beneficiaries and complainants in proceedings before the European Commission and EU courts. She is currently involved in cutting-edge cases on the interface between EU law and international investment protection treaties.



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Rosie Norwood-Kelly focuses on trademark, false advertising, and copyright litigation. Rosie has worked with clients across a broad range of industries, including fashion and apparel, consumer goods, food and beverage, technology, hospitality, and media and entertainment.

Rosie's practice includes trademark prosecution and counseling for clients on the selection, registration, maintenance, portfolio management, and enforcement of trademarks in the United States and abroad. Rosie is regularly involved in cases before the federal trial courts and the Trademark Trial and Appeal Board (TTAB) of the US Patent and Trademark Office (USPTO).

In addition to her prosecution, enforcement, and litigation experience, Rosie also advises clients on a broad range of domestic and global intellectual property issues, including licensing, advertising, and claim substantiation. Prior to joining White & Case, Rosie worked for a global intellectual property boutique firm.

# About White & Case



# Diversity and White & Case

**“We are a truly global law firm, with individuals of diverse backgrounds who speak 91 different languages, and offices in 44 countries around the world. We depend on our global, One Firm culture to channel this diversity and use it to serve our equally diverse clients. Over the years, I have been pleased to see us move into the top tiers for law firm diversity, but that recognition is not why we value our diversity. We value our diversity because it is essential to who we are.”**

*Hugh Verrier, Chairman*

## External recognitions of note

### **2021 Mansfield Rule Certification Plus**

(third consecutive year)

(fifth consecutive year – overall certification)

*Diversity Lab*

### **#1 Most Diverse Law Firm in Am Law 50**

(eighth consecutive year)

*The American Lawyer, Diversity Scorecard*

### **100% rating on our commitment to lesbian, gay, bisexual and transgender (LGBT+) workplace equality**

(fourteenth consecutive year)

*Human Rights Campaign Foundation, Corporate Equality Index 2022*

### **International Firm of the Year**

– Minority Women Lawyers

– Work-life balance

*Women in Business Law Awards, Europe 2021*

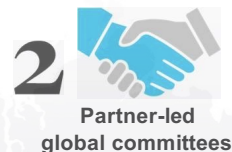
### **Top 75 employers in the UK**

*Social Mobility Foundation, 2020 Employer Index Report*

# Diversity highlights



with more than  
**1,000**  
members



with engagement in  
**40**  
offices

and more than  
**800**  
members



Received a #2 ranking  
on the *American Lawyer*  
**Diversity Scorecard**  
among the  
**Am Law top 10 firms**  
by revenue for fifteen  
consecutive years

**100%**  
Fourteenth consecutive 100%  
rating on our **commitment to**  
**Lesbian, Gay, Bisexual, and**  
**Transgender (LGBT+)** workplace  
equality on the 2022 Human  
Rights Campaign's Corporate  
Equality Index





**44**  
offices

**30**  
countries

**6**  
continents



### Americas

Boston	Miami
Chicago	New York
Houston	São Paulo
Los Angeles	Silicon Valley
Mexico City	Washington, DC

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Berlin	Frankfurt	Madrid	Tashkent
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Brussels	Hamburg	Muscat*	
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Jakarta*	Sydney
Melbourne	Tokyo
Seoul	

\* Associated firm



