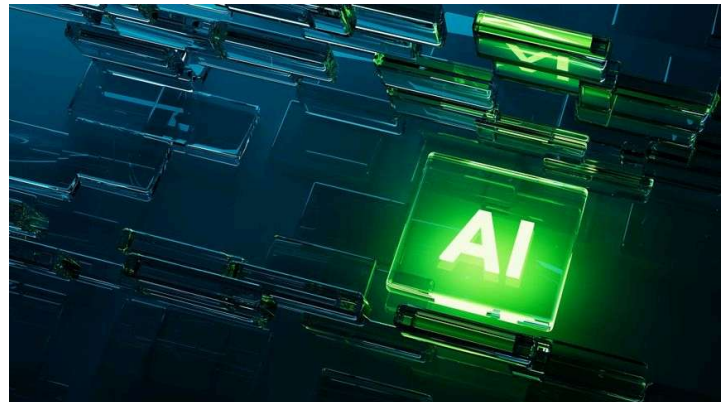




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NAD Signals Increased Scrutiny of AI Advertising Claims



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As artificial intelligence (AI) functionality becomes a central selling point across industries, advertisers face growing scrutiny over how they market these capabilities. The National Advertising Division (NAD) of BBB National Programs is an advertising dispute resolution forum that says it has prioritized enforcement regarding advertising claims related to AI. As its 2025 annual report notes, the year reflected growth in NAD's focus on monitoring claims in the AI space and offers early guidance on how NAD may evaluate advertising regarding AI performance, functionality, and features.

Notably, one of NAD's 2025 decisions stands out as the only case in which NAD squarely evaluated both the technical substantiation for an "AI-powered" claim and whether specific advertising conveyed unsupported representations about the functionality and reliability of the AI itself. In a joint inquiry, NAD and the Children's Advertising Review Unit examined a baby monitor marketed as an "AI-Powered" solution capable of detecting crying, laughing, and movement. NAD found support for the general AI-powered claim based on the product's AI chip. However, internal testing showed limited accuracy (approximately 89% for laugh detection and 78% for cry detection), and the technology only functioned at certain distances and when the infant was in frame. NAD determined that the motion and emotion detection claims could convey safety assurances that were not substantiated and recommended clear and conspicuous disclosure of these functional limitations. ADC Solutions USA, LLC d/b/a Horizon Brands, LLC, NAD Case #7486 (December 22, 2025).

Key Takeaways

- **NAD seems ready to use self-monitoring to examine AI claims**, including those made by some of the largest and most sophisticated advertisers. In each of the cases involving AI, NAD commenced an inquiry with its self-monitoring authority. Although self-monitoring cases can be easier to defend because there is no motivated challenger, NAD's commencement of a self-monitoring case signals its substantive concern.
- **Nothing about AI changes the existing rule that one must substantiate performance claims with objective evidence.** Claims about productivity, efficiency, accuracy, or performance must be supported by reliable testing or through data demonstrating actual results. Perception-based studies or user impressions alone are unlikely to suffice.
- **Clearly disclose material limitations of AI functionality.** If AI features work only in certain conditions, require specific inputs, or have material performance constraints, advertisers should disclose those limitations in their advertising.
- **Carefully consider whether the technology is in fact "AI"**, as broad claims such as "AI-powered," "AI-enhanced," or "AI-driven" must be supported by competent and reliable technical evidence. NAD has found such claims substantiated where the advertiser provided documentation regarding the underlying AI component, including information about the specific AI chip and product inspection reports confirming the technology's functionality.



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Mass Balance Claims



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Mass balance is an accounting method that tracks materials through a supply chain to ensure input quantities match output quantities in finished products. Consider a hypothetical supply chain with 500,000 pounds of a commoditized, raw material available for purchase, to which a supplier adds 500,000 pounds of recycled content. If the product pool cannot be segregated into recycled and nonrecycled streams, no buyer of the commodity will be able to say exactly how much recycled material they are buying. They will know that in the overall pool, 50 percent of all the content is recycled, but the particular batch they buy may contain less or more than 50 percent recycled content.

In the scenario described above, mass balance accounting allows the buyer to advertise to consumers that they sell products having 50 percent recycled content. The buyer may have to pay more to the seller to make the claim. Accounting is in place to ensure there is no double-counting. With respect to recycling, the buyer/claimant gets credit for purchasing a certain amount of recycled material, although the consumer ultimately may not actually receive a finished product that actually has the claimed amount of recycled content.

The mass balance concept has been successfully used for decades. It incentivizes recycling by allowing the purchaser to make a claim about recycled content even if the supply chain does not segregate streams. Its use has been applied in many contexts and is endorsed by the FTC Green Guides, which include an example supporting the concept: “A manufacturer labels a paper greeting card ‘50% recycled fiber.’ The manufacturer purchases paper stock from several sources, and the amount of recycled fiber in the stock provided by each source varies. If the 50% figure is based on the annual weighted average of recycled material purchased from the sources after accounting for fiber loss during the papermaking production process, the claim is not deceptive.” Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260.13, Example 7. The concept is also

supported by iSeal and is incorporated into independent sustainability certification standards.

The National Advertising Division (NAD) has also recognized the benefits of the mass balance approach. In a recent decision, NAD acknowledged that “using mass balance may even be the more environmentally friendly option since it may reduce unnecessary duplication of production.” *Boxed Water is Better® (Boxed Water)*, Report #7385, *NAD/CARU Case Reports* (May 2025) (reviewing claims based on mass balance for boxed water). However, NAD did recommend that the advertiser there disclose that mass balance means that the individual product may not have precisely the recycled content claimed. *Id.*

Economic analysis also supports using the mass balance method, with one recent paper concluding: “Well-designed mass balance frameworks, combined with technology-open policy and harmonised MRV [Monitoring, Reporting, and Verification], can unlock significant volumes of recycled feedstock and accelerate the chemical industry’s transition to a more circular, low-carbon future.” C. Rueger, Krkljuš, I. and Reuber, J., “Chemical recycling: a new toolbox for materials recycling in industry and the application of the mass balance chain-of-custody approach,” *Royal Soc. Chem. Sustainability J.* (2/10/26) (DOI: 10.1039/d5su00505a).

Unfortunately, some activists and plaintiffs’ lawyers are attacking mass balance. They allege that whether the product actually contains the claimed amount of recycled content is material to the consumer who buys a product containing what is claimed to be “recycled material.” [This could apply to any commodity, not just to recycled content.] In other words, a consumer holding a plastic cup claimed to have 90 percent recycled plastic should know whether that cup actually has 90 percent recycled content, or whether that claim is instead based on a weighted average.

In litigation, plaintiffs have thus far had mixed success. An illustrative complaint is pending in the Northern District of Illinois in which plaintiffs alleged that a label saying the chocolate cookies were made with “100% Sustainably Sourced Cocoa” is false because “[d]efendant uses an accounting method called ‘mass balance,’” which “allows [d]efendant to mix cocoa beans from [certified] farms with non-certified cocoa beans from other farms ... Such allegedly mixed sourcing results in cookies with an ‘uncertain composition.’” (internal cites omitted) The complaint also alleged that the plaintiff would not have bought the cookies if she had known that the cocoa might have come from farms that use child labor. In partially denying the motion to dismiss, the Northern District of Illinois held that the plaintiffs had sufficiently alleged potential deception. *Waggener Van Meter v. Mondelez International, Inc.*, No. 24-cv-7468 (N.D. Ill. 12/18/2025). Thus, the mass balance issue remains open in that case.

In other words, the plaintiffs attack the entire concept of mass balance. Unless the cocoa beans are grown on farms 100 percent free of child labor, their theory is that no claims should be made.

Respectfully, consumers and the world would be worse off if the plaintiffs' theory takes hold. The real-world consumer has no ability to determine the percentage of recycled content merely by looking at, drinking from or holding the cup. Similarly, they cannot tell where the cocoa beans used in their chocolate cookie came from. They must rely on the advertiser to tell them. They may buy the cup or cookie, and perhaps even pay more for it, because they feel “good” about choosing a product that supports recycling or a campaign against child labor (which it *does*). The item performs the same either way. The cookie tastes the same, looks the same and feels the same. Why should it matter to the consumer that the specific item they hold possibly contains somewhat less than the claimed amount of recycled (or certified) content? Tomorrow, they might hold a product *exceeding* the claimed content.

In a mass balance world, the consumer supports improving the supply chain through their purchase. Conversely, by not buying, funding for improvements quickly dries up.

Plaintiffs' theory envisions a world in which money falls from the sky and instantly makes everything 100 percent better. Until that magical state occurs, no label statements can be made. Under their proposed policy, any incremental, market-based solutions that rely on mass balance are inherently deceptive. This is bad policy and bad law.

What should advertisers who currently use mass balance do? We'd suggest that the NAD *Boxed Water* approach may be more conservative, as it encourages more disclosure. Also, the advertiser should avoid coupling mass balance claims with other sustainability-focused label claims, which can augment a plaintiff's complaint.



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EPR Reports May Increase Risk of Class Actions



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In May 2026, seven states (California, Colorado, Maine, Maryland, Minnesota, Oregon and Washington) will require covered businesses to submit Extended Producer responsibility (EPR) Reports. Many other states are now evaluating whether they should follow suit.

Two main goals of EPR laws, which have been used in Europe, are to incentivize reporting companies to reduce the potential packaging waste they use and to increase recycling rates. [Commentators](#) have lamented the lack of harmonization across state EPR programs, which can create significant compliance hurdles for covered companies.

EPR reports are mandatory compliance documents that indicate the types, materials and total weights of packaging and products that companies put on the market. These data are used by the states (or their designated Producer Responsibility Organizations) to

calculate fees. Penalties for noncompliance range from \$5,000 to \$50,000 per day, per violation.


Concerningly, EPR reports, to the extent not confidential, can give plaintiffs a potential roadmap to class action litigation.

Plaintiffs evaluate whether they should invest in potential cases in based on potential recovery, which is largely based on sales volume. In early settlement discussions, plaintiffs' counsel will typically ask to see the defendant's sales data. Defendants must choose whether to provide such data and are more likely do so when the data are favorable, e.g., showing low sales. Defendants will usually cite this in responses to plaintiffs' pre-suit demands. EPR-mandated disclosure may give plaintiffs a leg up and drive plaintiffs to evaluate more cases involving products for which disclosure is already mandated, making them less likely to (favorably) settle cases where EPR disclosure reveals substantial volumes.

Consumer class action lawsuits alleging “greenwashing” may focus on whether EPR data show that “recyclable” or “sustainable” packaging claims are being met. Since recycling systems can be poor, even though a product may be labeled as recyclable, in practice the product may not be recycled at substantial rates. Plaintiffs may allege that a recyclable claim under such circumstances misleads consumers into thinking that the product will actually be recycled, thus influencing consumers' choice.

Theories often espoused in these kinds of consumer class action cases are that a company's display of “recyclable” claims conflicts with data showing low recycling rates – exactly the kind of issue that EPR laws are supposed to address. This is a lowering of FTC Green Guides standards, which have heretofore asked whether a product labeled as “recyclable” *can* be recycled, not whether it *actually is* recycled. *See, e.g., Swartz v. Coca-Cola Company*, No. 3:21-cv-04644 (N.D. Cal. 2023). Thus, EPR disclosures could be a roadmap for lawsuits against any company displaying recyclable claims.

This appears to be a situation where plaintiffs are gun-jumping and undermining EPR compliance. If plaintiffs can piggyback off EPR disclosures to seek windfall judgments or settlements, then fewer companies will (a) use recyclable claims; or (b) offer packages that are recyclable – thus undermining two core goals of EPR laws. If a package does not display a recyclable claim due to risk avoidance by advertisers, then how will consumers know to toss it in the recycling bin? The situation actually disincentivizes recycling.



This appears to be a situation where plaintiffs are gun-jumping and undermining EPR compliance.



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Notes from the FTC Conference on Marketing and Public Policy



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Every few years, the Federal Trade Commission convenes a consumer protection-focused conference that features academic research regarding consumer protection issues of interest to the FTC. Last week, I attended the third such conference, which has not been held since before COVID.

The conference has a heavy economic focus and is well attended by employees of the Bureau of Economics. It is structured academically, with participants (typically junior professors and post-doctoral students) presenting research papers and receiving comments from full professors and also fielding audience questions.

Although some of the papers reflect work already completed by the FTC, such as studies on influencers, other papers provided signals about areas of emerging enforcement interest. For that reason, attendance provided some vital clues about where FTC enforcement may focus in the future. Rather than recapping every presentation, I discuss below some major takeaways from the two day conference.

1. Because most sales are now digital, companies are routinely collecting reams of data in the ordinary course of business that the FTC might use against them in the future. Many research papers presented relied on huge and easily-accessed data sets for analysis, often made available freely to the researchers. Such data might include usability studies, A/B testing of consumer reactions to design changes, and of course, e-mails. Although some of the types of studies done in the past, often by third-party vendors, were captured in hard copy and later discarded, digital data are more easily collected by companies and tend to persist. One can expect that the FTC will ask for this evidence during an investigation.

2. The FTC remains focused on big players in the tech industry. There appear to be plenty of practices that concern the agency that are conducted by some of the largest and most well--respected companies in the world.
3. The agency is focused on artificial intelligence ("AI"). For example, what impact will AI have on consumer search behavior? Will it harm smaller players and, if so, will ad revenue gravitate more to larger publishers? Also, do AI summaries of consumer reviews accurately reflect comments or are they unfairly complimentary? If they are systematically inaccurate, how does that affect consumer choice?
4. The FTC continues to look at the impact of influencers, although research presented seemed to show they have less of an effect on sales than may have been previously believed.
5. One paper that raised eyebrows was about data brokers. Researchers at Stanford and the University of California at Davis provided a hair-raising look into the practices of common data brokerage schemes. Their research showed that filling out an online form, say for a loan, could generate hundreds of spam calls, all from spoofed numbers, over a period beginning minutes later and persisting for up to a year. One researcher explained that some data brokers collect key-logging data from consumers data before they even click "submit". They swiftly sell such data (sometimes augmented with fictitious information), where it typically triggers aggressive sales tactics that often continue despite consumers' repeated efforts to cancel or to opt out. Given the reaction of the room, I would expect that the FTC will focus on this area in the future.
6. The FTC is watching the gaming industry and marketing behavior such as embargoing of influencer reviews.
7. The Bureau of Consumer Protection Staff touted their planned work on Advanced Notice of Proposed Rulemakings regarding fee disclosures in the [rental housing industry](#) and [Negative Option rules refinements](#). The FTC will almost certainly seek to have both proposals go into effect, despite the Chairman having previously touted the cessation of rulemaking, which had become more popular during the last administration. As one economist stated at the conference, no rule has generated as much positive feedback as the one regarding so-called "junk fees." Extension of that rule to other unpopular industries seems very likely.
8. The FTC remains concerned about limitations on its jurisdiction and its inability to obtain monetary relief in many cases. Nevertheless, it touted that it is using workarounds, such as lawsuits in which the FTC pairs up with State Attorneys General, to achieve restitution. In the absence of legislation, one would expect this trend to continue.
9. The pipeline of consumer research continues to flow. The FTC Bureau of Economics appears to have strong relationships with major academic institutions, despite today's political winds. An implicit understanding in this conference, which

highlighted the work of many fine young researchers, is that the FTC remains a destination of choice for young economists. So long as that linkage persists, the FTC will be privy to ongoing and emerging academic research into various consumer harms.

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