

Avoiding Greenwashing: How to Frame Your Green Marketing Claim

ACC SFBA

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Agenda

- Warm-up “Greenwashing” exercises
- Key Concepts and Legal Framework
- Recent Third Party Certification Cases
- The New EU Legal Framework on Sustainability Claims
- Some Best Practices
- Team Exercise: Reframe a “Greenwashed” Claim

Let's warm up with some exercises

- We will show you some products and marketing claims and you spot the “greenwashing” issues
- Click on the QR code and upload your answers

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Spot and upload the Greenwashing issues

① Start presenting to display the poll results on this slide.

- Greenwashing lawsuit filed alleging Procter & Gamble misled consumers with label suggesting product is natural when it also contained synthetic ingredients
- The courts disagreed. The Ninth Circuit affirmed the District Court's dismissal of the lawsuit, stating that "Nature Fusion" is not misleading, but rather ambiguous (McGinty v. P&G, No. 22-15080 (9th Cir. 2023))
- A reasonable consumer would also look at the back label and determine that it was not all natural
- In a separate concurrence, Judge Gould opined that the labeling looks like greenwashing



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- Netherlands Authority for Consumers and Markets (ACM) found “Fly greener to” misleading
- “Businesses must be honest and clear about the sustainability claims they make. Even with CO2-compensation schemes, flying remains a highly polluting way of travelling. . . . Airlines may offer CO2 compensation schemes, but they cannot give the impression that CO2 compensation will make flying sustainable.”
- In response, Ryanair:
 - Replaced “Fly greener to” with “compensate your estimated CO2 emissions”
 - Removed misleading graphics like green leaves
 - Displays the calculation and amount of CO2 it’ll compensate for
 - Explains which carbon-offsetting projects your money will be spent on

The screenshot shows a flight page for Ryanair titled "Fly greener to Eindhoven". It features a green header and footer. The main content area is white with a light green border. At the top, there is a green banner. Below it, the title "Fly greener to Eindhoven" is displayed. A text box explains that each passenger contributes an average of 66g of CO2 emissions per km and provides information about a mature tree's carbon absorption capacity. Below this, there is a section for offsetting emissions, featuring a green leaf icon with a plus sign and a minus sign, the text "Fully offset your CO2 emissions for this flight", and an "Add" button with a price of "£1.15 Total per person".

Speakers

- ***Erin Ickes***, Senior Director – Legal and Compliance Officer, American Textile Co.
- ***Molly Stark***, General Counsel & Secretary, Rainforest Alliance, Inc.
- ***Allyn Stern***, Principal, Beveridge & Diamond, P.C.
- ***Sharon Mathew***, Associate, Beveridge & Diamond, P.C.

Greenwashing: Key Concepts and Legal Framework

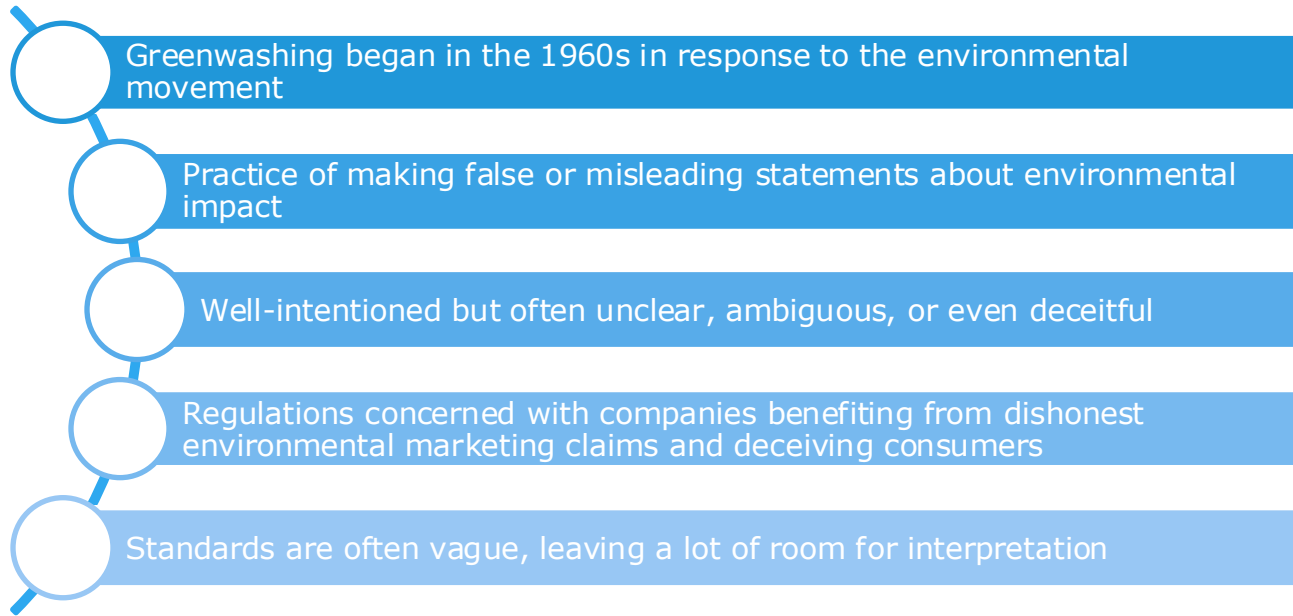
Allyn Stern, Beveridge & Diamond P.C.



Roadmap

- Background
- Common Issues and Concerns
- Common Mistakes and Marketing Traps
- Case Studies
- New and Noteworthy: What's Coming?
- Resources

Background



Emphasis on Consumer Protection and Perception

Consumer perception of claims both express and implied

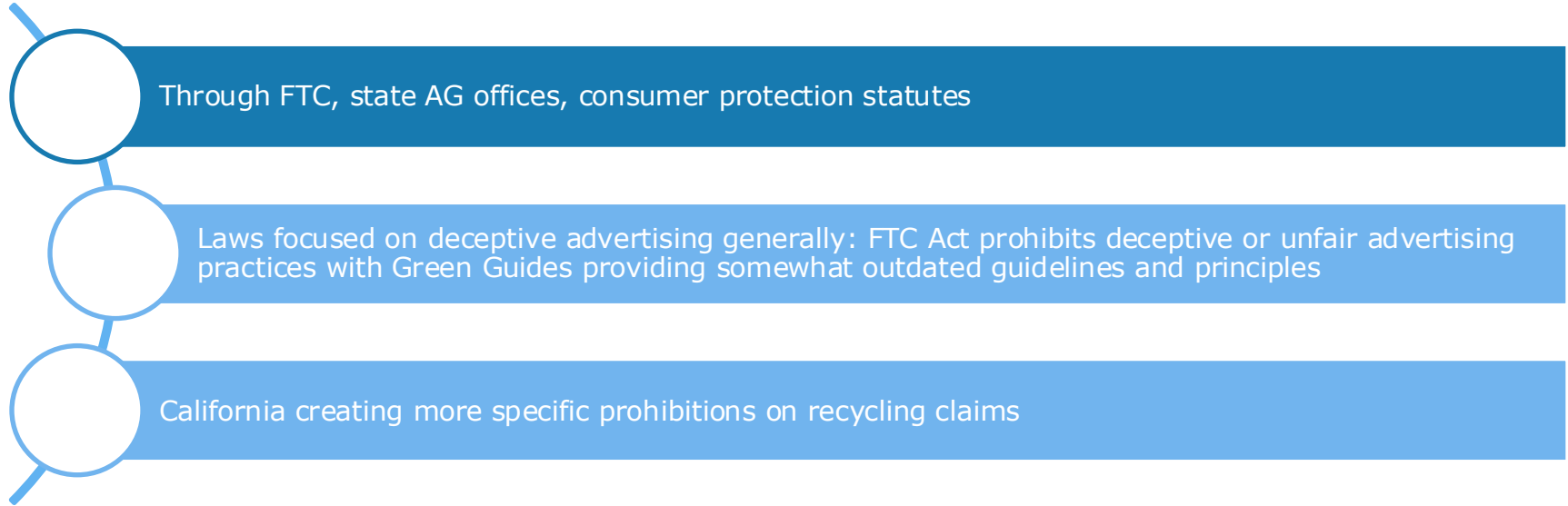
Consumer protection research not required but can be used to support claims

Requires substantiation

In the U.S., FTC Act and consumer protection statutes used to enforce

Other examples: Green Claims Code in the UK; Unfair Commercial Practices Directive in the EU

US Regulation of Greenwashing



Increased Global Attention to Greenwashing

Canada

Amended the Competition Act to explicitly prohibit deceptive environmental claims and requires substantiation in accordance with internationally recognized methodology

United Kingdom

Green Claims Code: Must not omit or hide relevant information; comparisons must be fair and meaningful; consider product's entire life cycle; truthful, accurate and substantiated claims

Australia, China, Singapore, New Zealand also among the countries targeting greenwashing

Comprehensive Approach in the EU

Product information relating to environmental impact, longevity, reparability, composition, production and usage must be substantiated by verifiable sources -- includes future benefits of environmental & GHG objectives

- Preapproval is required before claims are made

No generic environmental claims without proof

Cannot rely on emissions offsets to make climate neutral or GHG reduction claims

Sustainability labels must be based on approved certification schemes or established by public authorities

Prohibits claims about the entire product when the benefit only relates to one aspect

Common Mistakes and Marketing Traps

Common traps

- All environmental claims must be truthful and substantiated – burden is on claimant
- Applies to express or implied claims – including graphics and color scheme
- Any reasonable interpretation of an environmental claim is fair game
- Avoid general claims and ensure emphasis is on meaningful benefits

Puffery and Aspirational Claims

- Puffery = Exaggerated descriptions of a good or service
- Defense of puffery unavailable in greenwashing litigation under the Green Guides
- Aspirational claims: Demonstrate capacity and method to meet future commitment and goal

Social media and influencers

- Influencers have a duty under the FTC Act to disclose brand relationship
- Could be considered “extension” of the brand/company, which is subject to greenwashing regulations
- Brands should ensure their influencers are aware of Green Guides

Commonly Spotted Issues

Recycled content and recyclability Claims

- Avoid referring to entire products or packaging as “recycled” and indicate percentage
- Distinguish between product and packaging

Sustainability Claims

- Regulators frequently take the position that sustainability claims are difficult or impossible to substantiate

“Free of” claims

- Be cautious when regulations prohibit or limit substance
- Do not refer to the absence of substances never associated with the product

Net zero/emissions reduction

- Back with scientific evidence and ensure claimed reductions being achieved

Compostable

- Qualify if the product cannot be composted at home
- Qualify if product is not widely compostable to a substantial majority of consumers

Key Takeaways

Claims should be precise
– avoid generalities

Substantiate with
reliable sources

If you market globally,
watch the EU for best
practices and most
stringent requirements:
others will follow

Claims review should
not be limited to
marketing material –
include ESG, financial
reporting and other
public statements



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Recent Third Party Certification Cases

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- **Dorris v Danone Waters of America, 2024 WL 112843 (Jan. 10, 2024 SDNY)**
- Evian used 3rd Party Certifier, Carbon Trust to label Evian water as “carbon neutral”



Bohen v. Conagra Brands, Inc., 2024 WL 1254128 (N.D. Ill. Mar. 25, 2024)

Challenged claims:

- Certified Sustainable
- Certified Sustainably Sourced
- We have full traceability of all our fish
- Good for the Environment



Sanchez v. Walmart, 2024 WL 2132426 (N.D. Ill. May 13, 2024).

- “Sustainably Sourced – 100% – Sustainability”
- “This product comes from a fishery that has been independently certified to the MSC’s standard for a well-managed and sustainable fishery.”



sourced – 100% – Sustainability.” [26] ¶ 33 nn.34, 36.

The New EU Legal Framework on Sustainability Claims

The new EU legal framework on sustainability claims

Directive on Empowering Consumers

Lex generalis

Introduces new unfair practices in terms of sustainability claims (social AND environmental)

Green Claims Directive

Lex specialis

Sets specific rules on the substantiation, verification and communication of voluntary environmental claims and labels on the EU market

The 'Empowering Consumers' Directive

The Rainforest Alliance

STATUS: in force – start of implementation: 27 September
2026

Key elements

- Introduces new unfair trading practices on claims and labels, including:
- **Displaying a sustainability label which is not based on a certification scheme or not established by public authorities. => END OF SUSTAINABILITY LABELS BASED ON COMPANY AND SECOND-PARTY VERIFIED SCHEMES**
- Making a generic environmental claim for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim.
- Making an environmental claim about the entire product or the entire trader's business when it actually concerns only a certain aspect of the product or a specific activity of the trader's business;
- Claiming, based on greenhouse gas emissions offsetting, that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions*
- Presenting requirements imposed by law on all products within the relevant product category on the EU market as a distinctive feature of the trader's offer.

Key requirements on substantiation

Proposed Green Claims Directive

- Specify if the claim is related to the whole product, part of a product or certain aspects of a product, or to all activities of a trader or a certain part or aspect of these activities;
- Rely on widely recognised scientific evidence, use accurate information and take into account relevant international standards
- Demonstrate that environmental impacts that are subject to the claim are significant from a life-cycle perspective
- Demonstrate that the claim is not equivalent to requirements imposed by law on products within the product group, or traders within the sector;
- Provide information whether the product or trader which is subject to the claim performs significantly better regarding environmental impacts than what is common in the relevant sector
- Identify whether improving environmental impacts subject to the claim leads to significant harm in relation to other environmental impacts (e.g. climate change, resource consumption, sustainable use of water)

Key requirements on communication Proposed Green Claims Directive

- Only state the environmental impact(s) that are covered by the claim's substantiation
- Ensure information and data used to substantiate the claim are made publicly available – weblink, QR code or equivalent

Some best practices

Be conservative/realistic

Consider all interpretations

Qualify if appropriate

Maintain and periodically update your supporting data

Continue to monitor

Train your teams

Whiteside v. Kimberly Clark Corp., - F.4th-, **2024 WL 3435308 (9th Cir. July 17, 2024)**

- When can back labels and side labels be considered to qualify front label claims?
- “A front label is ambiguous when reasonable consumers would necessarily require more information before reasonably concluding that the label is making a particular representation.”
- “A front label can be unambiguous...*even if it may have two possible meanings...*”
- Qualifiers and disclaimers to save the day! (sort of)

Whiteside (ctd.)



Hypoallergenic • Dermatologically Tested • Alcohol Free • Paraben Free

Hypoallergéniques • Testées dermatologiquement • Sans alcool • Sans parabènes

NATURAL AND SYNTHETIC INGREDIENTS / INGRÉDIENTS NATURELS ET SYNTHÉTIQUES :
WATER/EAU/AQUA, BUTOXY PEG-4 PG-AMODIMETHICONE, CAPRYLYL GLYCOL, SODIUM
BENZOATE, COCO-BETAINE, MALIC ACID, POLYSORBATE 20, SODIUM CITRATE, ALOE
BARBADENSIS LEAF EXTRACT, TOCOPHERYL ACETATE.

For more information on how our ingredients care for your baby's skin, please visit Huggies.com
Pour plus de renseignements sur la manière dont nos ingrédients prennent soin de la peau de
votre bébé, veuillez visiter le site Huggies.com

Adequacy of Qualifiers/Disclosures – General Guidelines

- Proximity to qualified claim
- Plain language
- Qualify if appropriate
- Prominence of size, color and graphics

Adequacy of Qualifiers/Disclosures -Online or in Media

- Are they buried somewhere?
- Is scrolling necessary?
- Use of hyperlinks/QR codes
- Length of time a visual disclosure is displayed

Team Exercise: Reframe a “Greenwashed” Claim

Applying lessons learned to an environmental marketing ad

- “This is a heavy duty, plant-based, nontoxic, 100% compostable trash bag.”
- “It breaks down in weeks.”
- “This bag is an optimist.”
- “It believes small things can lead to lasting change if we stop and say HoldOn.”



“100% compostable and planet-friendly”

HOW TO USE

— CAN I USE HOLDON BAGS FOR TRASH?

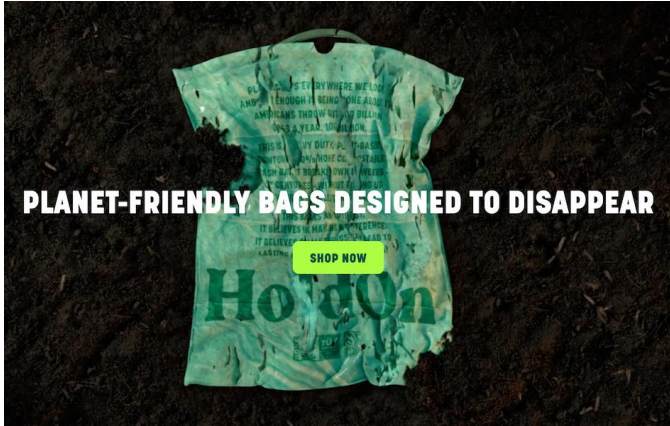
Yes! Use HoldOn bags just like you would a normal waste bag: fill, tie, and toss.

BBB's National Advertising Division (NAD) finds:

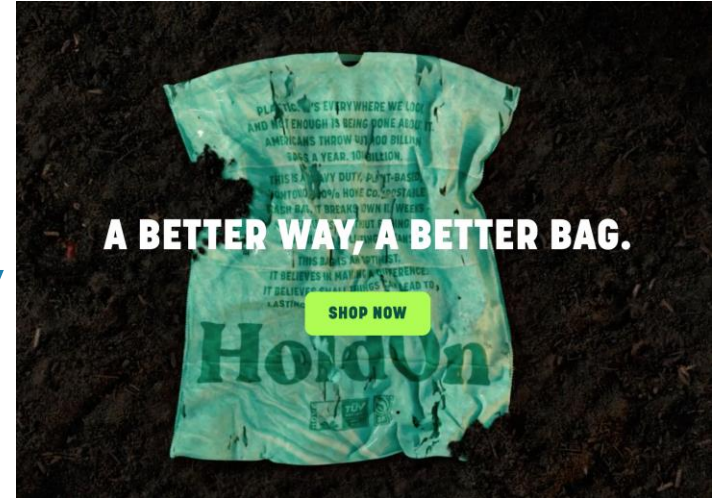
- HoldOn has a basis to claim its trash bags break down in compost environments
 - Biodegradable Products Institute (BPI) certifies HoldOn Bags as compostable in commercial and home composting settings.
- But HoldOn did not provide evidence to support claim that its bags break down in non-composting environments, such as landfills.
- Nor did HoldOn provide evidence to support claims of general environmental benefits or that its bags were not made out of plastic.
- Therefore, NAD recommends HoldOn discontinue claims about the general environmental benefits of its bags, and to limit such claims solely to how the bags are able to degrade in composting environments.
- <https://bbbprograms.org/media-center/dd/holdon-bags-compostability>

Greenwashing Exercise - Reframe the claim





Replaced by



HOW TO USE

— CAN I USE HOLDON BAGS FOR TRASH?

Yes! Use HoldOn bags just like you would a normal waste bag: fill, tie, and toss.



Replaced by

HOW TO USE

— CAN I USE HOLDON BAGS FOR TRASH?

Yes, HoldOn bags could be used for trash however, our bags are made from compostable materials that would perform best in a composting environment.

Thank You!

Please don't forget to provide session feedback

Resources

Selected Laws, Statutes, and Regulations

- United States
 - FTC’s Green Guides ([16 CFR Part 260](#)): Will impact enforcement of state consumer protection laws, court decisions, and competitor challenges
 - FTC Act ([15 USC §§ 41 et seq.](#)): Sets standard for consumer protection at the federal level
- California
 - [SB 253](#): Climate Corporate Data Accountability Act
 - [SB 261](#): Climate-Related Financial Risk Act
 - [SB 343](#): Environmental advertising and recyclability
 - [AB 1305](#): Voluntary carbon market disclosures
- Canada:
 - Deceptive Marketing Practice of the Competition Act ([R.S.C., 1985, c. C-34, Part VII.1](#)): Sets standards for consumer protection
 - Consumer Packaging and Labelling Act ([R.S.C., 1985, c. C-38](#)): Sets standards for packing, labeling, sale, importation, and advertising of products
 - Textile Labelling Act ([R.S.C., 1985, c. T-10](#)): Sets standards for labeling and advertising of textile fiber products
 - [Bill C-59](#): Amends the Competition Act by setting new standards for assessing green claims; received Royal Assent June 20, 2024
- United Kingdom:
 - Competition and Markets Authority: Enforces general consumer protection laws including the [Unfair Terms in Consumer Contract Directive and Regulations](#)
 - Advertising Standards Authority: Enforces [Consumer Protection from Unfair Trading Regulations 2008](#), which prohibits traders in all sectors from engaging in unfair commercial practices with consumers
- Australia:
 - Australian Consumer Law of 2010 ([Competition and Consumer Act 2010, Schedule 2](#)): Promotes fair trading and competition through consumer protections
- New Zealand:
 - [Fair Trading Act](#) and Commerce Commission: Protects consumers from misleading and deceptive trade behavior

Beveridge & Diamond Resources

- [EU Cracks Down on Environmental Claims \(bdlaw.com\)](#)
- [Mitigating “Greenwashing” Litigation Risk in the U.S. and Beyond \(urlisolation.com\)](#)

New and Noteworthy: What's Coming?

- United States: [FTC "Green Guides" update](#)
 - Non-binding enforcement guidance for environmental marketing claims may become enforceable in the U.S.
- European Union: [Empowering Consumers for the Green Transition Directive \(Directive 2005/29/EC\)](#)
 - Concerns unfair business-to-consumer commercial practices relating to sustainability and environmental claims
 - European Parliament approved the Directive which amended Directive 2005/29/EC
 - EU countries have until 2026 to incorporate the amendments into their national law
 - European Parliament also working on [proposal for a directive](#) on substantiation and communication of explicit environmental claims as of March 22, 2023