

## Avoid Common Advertising Pitfalls



Brands recognize that consumers value sustainability and continue to promote the

green and eco-friendly qualities of their products and services. In fact, a [recent study](#) found that, on average, three out of five (64%) consumers report that products branded as environmentally sustainable or socially responsible made up at least half of their last purchase, and 51% say that environmental sustainability is more important to them today than it was 12 months ago. However, with growing popularity comes extra scrutiny, and "green claims" are increasingly subject to challenge by regulators, competitors, and class-action plaintiffs.

The risk of challenge is often present even when brands use aspirational claims (e.g., "we strive to be carbon neutral") or make *unqualified* environmental claims (e.g., "environmentally friendly" or "green"). This article shares key principles for truthful green advertising, highlights recent challenges against aspirational and broad, unqualified environmental claims, and offers tips to reduce the risk of challenge.

### The Basics

The Federal Trade Commission (FTC) published the [Guides for the Use of Environmental Marketing Claims](#) (Green Guides) to steer brands away from making false and misleading green advertising claims. In [last year's Summer Sustainability Series](#), we discussed the basics of the Green Guides, including that brands should:

- Support green advertising and other technical and science-based claims with competent and reliable scientific evidence.
- Clearly and prominently disclose necessary clarifications and qualifications in a manner that is easy to find and understand.
- Not overstate the claimed environmental attribute or benefit.
- If the environmental claims apply only to a portion of the product or package, clearly and prominently convey that information to consumers.

- Comply with guidance for various specific environmental claims, such as advertising regarding carbon offsets, the ability to compost a product or package, "non-toxic" claims, and "ozone-safe" or "ozone-friendly" claims, to name a few.

Brands that follow these guidelines are less likely to see their claims challenged. And, if litigation does arise, they will be in a better position to successfully defend their claims.

### **Aspirational Green Claims**

Brands sometimes seek to reduce risk by issuing forward-looking or aspirational green or environmental benefit claims such as "we hope to be carbon neutral by 2025." However, recent National Advertising Division (NAD) decisions indicate that making "aspirational" statements may not provide a safe harbor. The following NAD decisions serve as examples of aspirational claims that brands were required to substantiate:

- A poultry supplier defined the goal of its sustainability program as "preserving the planet." *Butterball, LLC* (NAD 6930, Aug. 2, 2021).
- A food chain's suppliers advertised that they were "more organic" and "less carbon emitting." *Chipotle Mexican Grill, Inc.* (NAD 7020, Feb. 28, 2022).
- A clothing company claimed that it was 90% of the way towards its goal of removing "virgin plastic from our entire supply chain by 2021." *Everlane, Inc.* (NAD 7019, Oct. 26, 2021).

While these decisions would not be treated as precedent by courts, the NAD is a self-regulatory body that specializes in analyzing ad claims and claim substantiation and in resolving false advertising challenges between competitors. The NAD can also initiate its own challenges against brands, and refers brands that do not comply with its decisions to the FTC. And, of course, unsupported aspirational claims run the risk of challenge from creative class action plaintiffs and public relations issues. Brands should therefore ensure that their aspirational green statements are supported by tangible steps and progress toward the stated goals.

### **Unqualified Green Claims**

Brands should be wary of unqualified environmental benefit claims, such as "sustainable," "green," or "eco-friendly." The FTC expressly warns against using such claims, and takes the position that it is typically difficult for marketers to substantiate *all* reasonable interpretations from such broad terms, and courts have found unqualified claims to be problematic too.

In recent consumer class actions, courts have held that certain broad, unqualified environmental claims do not guarantee an early exit from a plaintiff's class action complaint. For example, citing the Green Guides, the U.S. District Court for the Northern District of California determined that the phrase "reef friendly" when used by a sunscreen brand was not puffery but likely conveyed environmental benefits that must be substantiated. *White v. The Kroger Co. et al*, No. 3:21-cv-08004, 2022 WL 888657 (N.D. Cal. Mar. 25, 2022). The U.S. District Court for the Southern District of New York likewise held that a claim that eggs were "free range" was not puffery. *Mogull v. Pete and Gerry's Organics, LLC*, No. 7:21-cv-03521, 2022 WL 602971 (S.D.N.Y. Feb. 28, 2022). Both courts denied motions to dismiss on this basis, allowing the false advertising lawsuits against the defendants to proceed. Similarly, the NAD has recommended that a claim that a certain cleaning product was "better for your home and our planet" needed appropriate substantiation. *One Home Brands, Inc. d/b/a Blueland* (NAD 6416, Sept. 25, 2020).

In short, brands will reduce the risk of challenge if they craft their sustainability, green, and eco-friendly claims so they are narrowly tied to specific environmental benefits that are supported by credible evidence.

## **Looking Forward**

To reduce the risk of challenge, brands should carefully draft their eco-friendly advertising claims and ensure that they have credible evidence (often competent and reliable scientific evidence) to support such claims. Brands should also be cautious about making unsupported aspirational eco-friendly claims and focus on specific, supported claims rather than broad, unqualified messages. Taking these steps requires advance planning but will go a long way to help mitigate risk. In addition, the FTC plans to review the Green Guides this year for potential updates, so brands should keep a close eye on FTC and litigation and enforcement developments in this area.

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