DENTONS

Avoiding Greenwashing Litigation

A guide to mitigating risks when marketing your Environmental, Social and Governance (ESG) impacts

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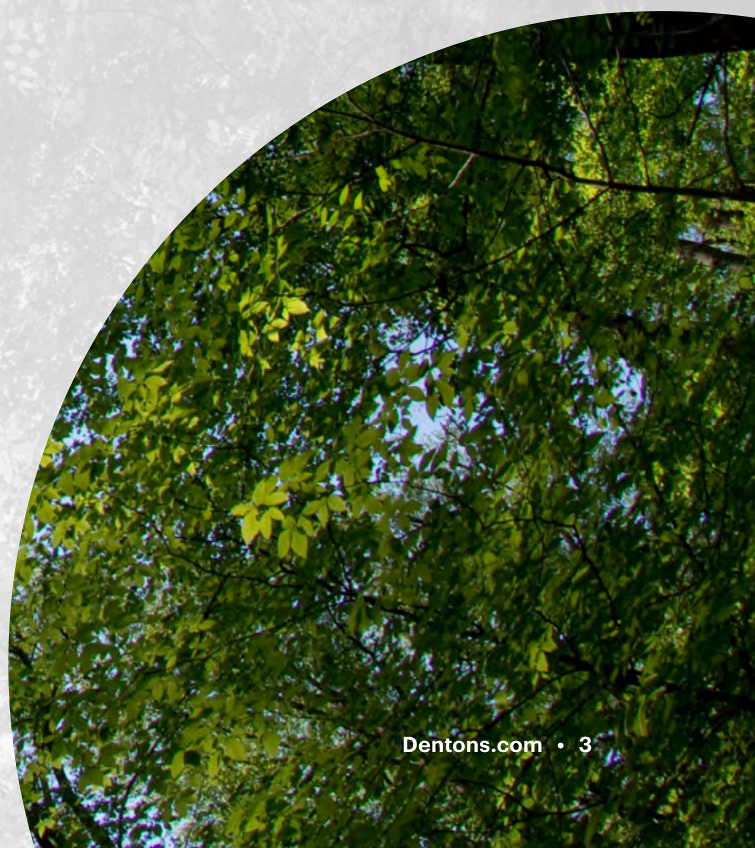
Businesses are increasingly marketing the environmental and social benefits of their companies and products. Government regulators and the plaintiffs’ bar are paying attention.

The phrase “greenwashing” has come to mean overstating or misrepresenting ESG claims. Of particular concern are statements about products, services, operations and supply chains.

Government regulators, shareholders, employees and consumers—all stakeholders—examine ESG claims and are on the lookout for exaggerated, overstated and unsubstantiated claims. Plaintiffs seek to turn environmental and social statements into the basis for lawsuits. Often these lawsuits are prompted by regulatory oversight, as well as by market competition, NGO claims and stock price movements.

The challenge, in the United States in particular, is that even properly substantiated assertions can result in government enforcement actions and litigation. We expect to see more consumer class actions alleging mislabeling, false advertising and breaches of consumer protection laws. We also expect, in the near future, to see more government regulatory actions, securities litigation, breach of warranty claims and contract disputes.

Businesses need to be prepared and have rigorous processes for selecting, evaluating and substantiating their ESG claims. This guide provides an overview of relevant considerations when reviewing ESG claims about products, operations and services.



US Regulatory Guidelines

United States Environmental Protection Agency (EPA):

PEPA administers laws that govern claims relating to certain products and services and provides guidance regarding environmental claims that can be made regarding other products and services. These laws and policies can provide context on issues related to greenwashing.

Under the **Federal Insecticide, Fungicide and Rodenticide Act** (FIFRA), EPA regulates products; including those that prevent, block, remove, neutralize or control bacteria or other pests that cause odors; or that sanitize, disinfect or sterilize, or that contain anti-microbial claims. This includes many products that one might not think of as a "pesticide," such as household cleaners, cleaning wipes, etc.

Unless otherwise exempted from registration under another provision of law or regulation, pesticide products intended for a pesticidal purpose must be registered with EPA and also, most likely, in the states in which they are sold. It is unlawful under FIFRA to sell an unregistered pesticide.

Once a product label or other statement made in connection with the sale or distribution of a product claims, states or implies that the product prevents, destroys, repels or mitigates a pest, the product becomes subject to the registration provisions of FIFRA. A claim can be made in labeling, advertising, promotional materials and all other forms of marketing, including product brand names.

Green Products. EPA provides guidance to consumers on "buying green." The agency identifies claims on products such as "environmentally friendly," "eco safe," or "green" as vague or generic. Such claims, when arguably misleading or inaccurate, can lead to assertions of greenwashing. Mitigating against some risk, EPA has developed several ecolabels such as ENERGY STAR® (energy efficiency), Safer Choice (chemical ingredients), SmartWay® (transportation-related emissions) and WaterSense (water-efficiency). Authorized use of these labels requires passing agency requirements for technical and performance specifications and independent product certification.

EPA also administers a program called "Recommendations of Specifications, Standards, and Ecolabels for Federal Purchasing" (Recommendations). These Recommendations help federal purchasers identify and procure products and services under Executive Order 14057: Catalyzing American Clean Energy Industries and Jobs through Federal Sustainability and the Federal Sustainability Plan. The Recommendations define and measure sustainability by including over 40 private-sector standards/ecolabels in more than 30 purchase categories. These sectors and categories include cafeteria (e.g., food service ware, commercial dishwasher detergent); construction (e.g., wallboard, insulation); custodial (e.g., cleaners); electronics (e.g., computers, electronics recycling, imaging equipment); grounds/landscaping; machine shop operations; and office/furniture.

Green Power Partnership. EPA established the Green Power Partnership to encourage organizations to use green power voluntarily. The partnership includes large corporations, small and medium-sized businesses, local, state and federal governments, nonprofit institutions, and colleges and universities. The partnership provides organizations a framework for purchasing green power, including credible benchmarks for minimum green power use, market and supply options, procurement assistance and guidance, and public recognition.

Under the partnership, EPA published The Guide to Purchasing Green Power, which provides guidance on, among other things, product certification and verification, and measuring and accounting for emissions.

EPA cautions that organizational purchasers of green power should understand that making unsubstantiated and inaccurate claims about its use could lead to legal and financial risks and reputational damage.

EPA advises that organizations:

- make credible claims and substantiate them,
- ensure their contractual right to make such claims,
- limit their claims to the scope and scale of the purchase,
- purchase certified green power to support their claims,
- be cautious regarding claims of emissions reduction,
- use terms correctly,
- and follow Federal Trade Commission guidance (discussed below).

Federal Supplier Climate Risks and Resilience Rule:

Last year, the Federal Acquisition Regulatory (FAR) Council published the Federal Supplier Climate Risks and Resilience Rule (Proposed Rule, 87 FR 68312) which would require climate disclosures from "major" or "significant" US federal government contractors. The proposed rule would require suppliers of goods and services to the federal government to expand climate-related representations and set emission-reduction goals aligned with the Paris Agreement in a tiered approach, depending on which category the supplier falls under.

"Major" contractors are those receiving more than $50 million in annual contracts and "significant" contractors are those receiving at least $7.5 million in annual contracts, but less than $50 million.

The completeness and accuracy of the required climate disclosures would likely be complex, leading to increased costs and impacting the responsibility of the disclosing contractor by creating False Claims Act and False Statements Act risks.

Federal Trade Commission (FTC) Green Guides:

The Guides for the Use of Environmental Marketing Claims (the Green Guides) are guidelines promulgated by the FTC and designed to help marketers avoid making environmental claims that mislead consumers. The FTC first issued the Green Guides in 1992; the Green Guides were subsequently revised in 1996, 1998 and 2012.

The principle at the core of the existing guidance is that a general environmental benefit claim is likely to mislead consumers and, as such, claims should be properly qualified to avoid deception. The FTC remains focused on the Green Guides because consumers appear to increasingly consider how their purchases may affect the environment. It is also difficult for consumers to independently verify green claims before purchasing a product (allegedly on the basis of those claims).

For these reasons, the Green Guides remain at the regulatory forefront. As a result, at the end of 2022, the FTC announced it was seeking public comments on potential updates and changes to the Green Guides. The period for public comments has since been extended to April 24, 2023.

As part of this public comment period, the FTC is requesting general comments on the continuing need for the Guides, their economic impact, their impact on claim accuracy, and their interplay with other environmental marketing regulations. The Commission also seeks information on consumer perception evidence of environmental claims, including those not currently treated by the Green Guides. The FTC has announced that it anticipates comments on matters such as carbon offsets and climate change, the term "recyclable", the term "recycled content", and whether there is need for additional guidance.

The FTC is also seeking comments on whether the Green Guides should be independently enforceable. By way of background, at current, violations of the Green Guides may serve as evidence of a violation of Section 5 of the FTC Act, which prevents unfair or deceptive claims. If the Green Guides were to be independently enforceable, they would have the full force and effect of law.

Securities and Exchange Commission (SEC):

The US federal securities laws broadly prohibit materially false or misleading public statements by public companies in offering documents, marketing materials, financial reports, proxy statements and other SEC reports and filings.

The SEC has brought civil enforcement actions and assessed substantial penalties against public companies based on alleged material misrepresentations or omissions concerning a variety of ESG issues, including environmental impact, compliance with international regulatory standards, and corporate governance. The SEC can bring an enforcement action even if the alleged misrepresentation or omission is merely negligent and not intentionally misleading.

The SEC has proposed amendments to rules and reporting forms to promote consistent, comparable and reliable information for investors concerning funds' and advisers' use of ESG factors. The proposed changes would apply to certain registered investment advisers, advisers exempt from registration, registered investment companies (i.e., mutual funds), and business development companies.

The proposed amendments seek to categorize certain types of ESG strategies broadly and would require funds and advisers to provide more specific disclosures in fund prospectuses, annual reports and adviser brochures based on the ESG strategies that they pursue. Funds with investment objectives focused on environmental factors generally would be required to disclose the greenhouse gas emissions associated with their portfolio investments. Funds claiming to achieve a specific ESG impact would be required to describe the specific impact they seek to achieve and summarize their progress on achieving that impact.

Funds that use proxy voting or other engagement with issuers as a significant means of implementing their ESG strategy would be required to disclose information regarding their voting of proxies on particular ESG-related voting matters and information concerning their ESG engagement meetings.

Finally, to complement the proposed ESG disclosures in fund prospectuses, annual reports and adviser brochures, the SEC proposal would require certain ESG reporting on the forms on which funds and advisers, respectively, report census-type data that inform the SEC's regulatory, enforcement, examination, disclosure review and policymaking roles.

The SEC has proposed amendments to enhance and modernize the Investment Company Act "Names Rule" to prevent funds from using names that imply a degree of ESG focus and investment objective which does not exist.

A fund's name is an important marketing tool and can have a significant impact on investors' decisions when selecting investments, and the Names Rule addresses fund names that are likely to mislead investors about a fund's investments and risks.

The Names Rule currently requires registered investment companies whose names suggest a focus in a particular type of investment (among other areas) to adopt a policy to invest at least 80 percent of the value of their assets in those investments (an "80 percent investment policy"). The proposed amendments would enhance the rule's protections by requiring more funds to adopt an 80 percent investment policy. Specifically, the proposed amendments would extend the requirement to any fund name with terms suggesting that the fund focuses in investments that have (or whose issuers have) particular characteristics.

State Attorneys General (AGs):

Using consumer protection statutes, State AGs are actively targeting companies that make false or misleading statements regarding the ESG impacts. We have seen such actions in states such as California, New York and Vermont, and also in the District of Columbia.

ESG Statement Checklist

The following is an overview of relevant considerations when making and reviewing ESG-related assertions in the United States. The guidance below is a starting point and general in nature. Sector-specific and technical requirements must be considered and applied in addition to the guidance below (e.g., energy-efficiency labeling requirements, organic certifications for food products and financial reporting requirements).

The first step is to identify all ESG claims. Claims can be made in governance disclosures, investor reports, government filings, advertising campaigns, product names, product literature, labeling, logos and packaging. Images and visual representations are also relevant, in addition to "use of" language.

Visit Dentons ESG Global Solutions for more information.

1. **Is the claim truthful and accurate?**
   Claims must not be false or deliberately deceptive and must not create an inaccurate impression of the overall environmental impact of the product or service, even if technically factually correct.

2. **Is the claim clear and unambiguous?**
   Broad and general claims in buzzwords such as "eco-friendly," "green," "sustainable" and "natural" may be characterized as likely to mislead if not properly qualified. Explanations, particularly if provided in small print, may be insufficient to detract from the overall impression.

3. **Does the claim avoid overstatement or exaggeration?**
   Claims should be factual and measured. Claims relating to future performance or objectives must be realistic and accompanied by a clear and deliverable strategy. Be honest about progress and where more needs to be done.

4. **Does the claim omit important information?**
Claims should include enough information to help consumers make informed choices. Cherry-picking information to promote the positive aspects of a product while ignoring important negative attributes could be characterized as misleading.

5. **Are any comparisons fair and meaningful?**
Comparisons should compare like with like. They should be fair and representative of products offered (rather than, for example, being based on a limited sample).

6. **Has the claim been substantiated?**
Robust, credible and current evidence must support all claims. Companies should develop comprehensive internal policies and procedures to document their claims and periodically review the claims after they are originally substantiated.

7. **Does the claim consider the full life-cycle of the product or service?**
A product's impact on the environment is affected by a wide range of factors, including locality of materials used, production processes, packaging, transportation, use, recycling and disposal. Claims should not focus on a narrow set of attributes to the exclusion of other considerations.

8. **Are your disclosures consistent across all communications and all media?**
A robust process should ensure consistency and accuracy of information shared and should assign responsibility for reviewing all communications from all relevant departments and regions across the organization. Communications should not be viewed narrowly and should include all media platforms and product packaging.

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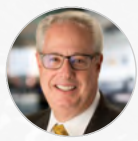

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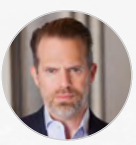

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