

Bringing Clarity to an ESG Grey Area: Advertising Claims

October 17, 2022

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KEY TAKEAWAYS & RECOMMENDATIONS

Bringing Clarity to an ESG Grey Area: Advertising Claims

[Barry M. Benjamin](#), managing partner of the New York office and chair of Kilpatrick Townsend's Advertising and Marketing group, was honored to co-present with Jessica Hiney, Associate General Counsel with PVH Corp., and [Farah Cook](#), also with Kilpatrick Townsend, a session for the Association of Corporate Counsel, Bringing Clarity to an ESG Grey Area: Advertising Claims. They discussed recent cases involving Environmental, Social, and Governance (ESG) advertising claims, and provided insight and advice around how to limit regulatory risk in today's highly engaged advertising marketplace.

Takeaways from the program include:

1

View Advertising from the Consumer's Perspective. As with all advertising, the truth or falsity of a claim is always evaluated from the consumer's perspective. It does not matter what the company intended to say or not say in its advertising—rather, what matters is what the consumer perceives the advertisement to mean. The Sixth Circuit recently re-emphasized this principle in a case involving environmental claims and the FTC: “[T]he scientific validity of a consumer’s belief is not the standard for reasonableness. Rather, in considering charges of false and deceptive advertising, the public’s impression is the only true measure of deceptiveness.” *ECM BioFilms, Inc. v. Federal Trade Comm’n*, 851 F.3d 599 (6th Cir. 2017).

What’s the Worst that Can Happen? A lot. When clients are skeptical about the potential downside legal risks of making an ESG claim, they often ask “What’s the worst that can happen?” The answer, unfortunately, is a parade of horrors that can devastate a company. Government enforcers can step in to challenge the claims, including federal and state regulators (FTC, SEC, State AGs, others). Shareholders can bring actions for misleading the marketplace or breach of fiduciary duty claims. Consumers can bring class action and similar claims under unfair and deceptive trade practices, unfair competition, or consumer protection laws. And even competitors can bring actions, whether for Lanham Act false advertising claims, unfair competition, or related state claims. On top of all of these potential plaintiffs bringing actions, they are not mutually exclusive – all can be brought at the same time.

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Know the FTC's Green Guides. Section 5 of the Federal Trade Commission Act gives the FTC regulatory and enforcement powers over unfair and deceptive trade practices, and the FTC issued its Green Guides to educate the marketplace as to how the FTC views environmental advertising and claims as backed by Section 5. The Green Guides provide advice on specific eco-friendly claims such as "recyclable", "non-toxic," "compostable," and many others. The Green Guides also provide guidance on making general eco-friendly claims, suggesting that because consumers understand general eco-friendly claims to constitute far greater eco-friendliness than advertisers intend, generalized eco-friendly claims should not be made at all without significant qualification. The qualifications should limit the claim so that consumers are not wrongfully misled as to its actual scope.

Take Care with Aspirational Claims. Companies often make aspirational claims about their future environmental benefit activities, whether by reducing plastic use, increasing recycling efforts, or using less water and limiting waste during the manufacturing process. While aspirational claims may seem like puffery, if the reasonable consumer takes one to mean something specific, then the advertiser still needs substantiation for the claim. Do not lightly make aspirational environmental benefit claims. It is safe to assume that consumers (or other interested parties) are watching, and will not hesitate to challenge them.

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The "S" and "G" are Equally Risky. While much of the focus of ESG advertising claims is around Environmentally friendly claims, Social-benefits and Governance-benefits advertising are equally risky. Advertisers should not lightly make claims of supporting social justice causes without strong substantiation for the claims. Similarly, good governance claims are subject to the same types of legal challenges that environmental and social justice claims are subject to. Do not lightly accept social benefit or good governance claims without confirming the substantiation for making them.

Recommendations from the program include: Advertising in the ESG area is not new, but the laser focus on ESG claims is. Companies should take special care to ensure that what formerly may have been broad, non-specific statements of support for the environment, social justice causes, and good government issues, does not turn out to be a hornet's nest of liability because consumers construed them to be more specific. Recommended steps for in-house counsel to adopt in an effort to limit a legal risk around ESG advertising claims include:

1

Plan ahead with key decision-makers and stakeholders, inform them of the claims and risks, and secure their buy-in;

Plan for disasters with relevant stakeholders including the top executives, marketing team, public relations team, and all others who may be involved in an "all-hands" disaster – while you cannot predict exactly what will happen, the playbook you develop will be extremely valuable to work from;

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Ask the team an easy, straightforward question: “what does this mean?” You may be surprised at how difficult it is to answer that question. Until you get a straight, clear answer, consider not approving the claim; and

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Become very familiar with the FTC’s Green Guides

Take care that all claims, including vague, aspirational statements, have limited and clear meanings and, if necessary, ensure the company has substantiation supporting any reasonable consumer take-aways. It is not “just advertising”—it could lead to liability.

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