



# Recent Developments in Green Marketing: How to Make Sustainable Sustainability Claims

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# Agenda

Sources of risk

Carbon neutral/carbon offsets claims

Recyclable/Recycled content claims

Aspirational claims

Use of seals

“Free of” claims

Review of practice pointers

# Green Claims: Sources of Risk (USA)

- FTC
- State AGs
- Class actions
- NAD
- Watchdogs
- PR risks

# Substantiating Green Claims

- Must have substantiation before making the green claim
- When an ad lends itself to more than one reasonable interpretation, must have substantiation for each interpretation
- An advertiser must have a “reasonable basis” for any verifiable green claim (whether express or implied)
- Base green claims on the full life cycle of the product (unless clearly stated otherwise)
- For ambiguous terms, use disclosures to clarify meaning

# Carbon Neutral Claims and Use of Carbon Offsets

- January 2024: SDNY in *Danone*: “carbon neutral” = “zero carbon emissions”
- May 2023: Delta Airlines sued for “carbon neutral” claims
- New CA law requires extensive disclosures in connection with carbon offset claims
- Third-party certifications: useful but are not necessarily dispositive



# PRACTICE TIPS: Carbon Neutral /Carbon Offsets

- Disclose/qualify
- Reliance on a third-party certification body may not be sufficient support
- Don't rely on website explanations when making claims on packaging
- Understand obligations, if any, under new California laws

# Aspirational/Future-looking Claims

- September 2024: District of Columbia Court of Appeals: Coca-Cola's claims (e.g. “a more sustainable and better-shaped future”) were deemed *not* puffery (reversal of D.C. Superior Court.)
- February 2024: “Net Zero by 2040” claim, which had been previously reviewed by NAD and NARB, is now the subject of a lawsuit filed by the New York Attorney General



# Aspirational/Future-looking Claims

- July 2024 class action complaint against Lululemon’s “Be Planet” campaign, which touted reduction of environmental impact in the next ten years. Plaintiffs allege more harm than good.
- September 2024 class action complaint against Tyson Foods regarding its claims to reach net-zero emissions by 2050.





# PRACTICE TIPS: Aspirational/Future-looking Claims

- For concrete future-oriented claims: step-by-step timeline of substantiation
- Further off the goal, more challenging to craft detailed operational timeline

# “Free Of” Claims

- Can make “free of” claims even if trace amounts are present if
  - Not intentionally added
  - Only trace/background amounts found in environment
  - Causes no harm
- Cannot say “free of” a substance that was never associated with your product category
- Cannot say “free of” something if your product contains another component/ingredient that poses the same/similar threat to the environment



# “Free Of” Claims: NAD Decisions

- March 2024: Invoking the FTC’s Green Guides relating to “free of” claims, NAD found fault with Biossance’s claim that its cosmetics contain “Clean ingredients and clean formulas—we ban over 2000 ingredients that are known to be toxic to you and the environment.” (Case # 7132).
- November 2023: NAD found that “no aluminum” claim on Dr. Squatch deodorant misleadingly implied that competing deodorants do indeed contain aluminum (Case # 7225).
- September 2022: The advertiser’s “plastic free” claims created a misleading implication that competing gums contain plastic (NARB Panel #304).

## PRACTICE TIPS: “Free Of” Claims

- No need to hold marketers to an “absolute zero” standard if substance is found in mere “background levels”
- Consider whether other substances in the product pose the same, or even similar, threat
- Make “free of” claims in context of industry norms (i.e., avoid such claims where the substance at issue is not found in competing products)

# Recyclability Claims

- Green Guides update: “The FTC seeks comments on whether it should **change the current threshold that guides marketers on when they can make unqualified recyclable claims**, as well as whether the Guides should address in more detail claims for products that are collected (picked up curbside) by recycling programs but not ultimately recycled.



# Recyclability Claims

## Collected in 60%+ Communities

- Product can be collected, separated, or recovered from the sold waste stream and used again
  - Incidental non-recyclable pieces ok
- Must be collected for recycling in a substantial majority
  - Of communities or
  - By a substantial majority of consumers where product is sold
- Qualified claims allowed (“may not be recyclable in your area”)



# Recent lawsuits alleging deceptive recycling claims

- September 2024: California Attorney General filed of a lawsuit against ExxonMobil for allegedly falsely promoted all plastic as recyclable, when in fact, the vast majority of plastic products are not and likely cannot be recycled.
- September 2024: SEC settled charges against the beverage company Keurig Dr. Pepper. SEC alleged that the company had mislead consumers by claiming that its K-Cups could “effectively” be recycled. \$1.5 million civil penalty.
- August 2024: Minnesota AG settled with Reynolds and Walmart regarding deceptive marketing of “recycling bags.”

# Use of Seals

## Third party certified and specific

- Independent bodies
- Suggest product surpasses baseline
- Seals must be self-explanatory or include basis
- Seal providers should have objective criteria and verify
- Any material connection (besides paying standard licensing fee) must be disclosed





# Use of Seals: Recent NAD Decisions

- NAD: While the CARE Certified standards may not match the *highest* animal welfare standards, NAD determined that these standards nonetheless exceed conventional industry standards. Accordingly, CARE Certified logo/seal: substantiated. (CARE Certified Seal, # 7149, 2023).
- NAD: USDA approval of the standard and the logo does not support a message that the standards meet consumer expectations of heightened animal care. Further, approval of the logo by the USDA does not preclude NAD's own review of the advertising messages conveyed by the logo. (Certification of Poultry Products, # 7129, 2023).

# Use of Seals: Recent NAD Decisions

- “Green” Seals: Advertisers may use seals or certifications to show that their products meet an organization’s standard for some environmental benefit
- Green Guides (16 C.F.R. § 260.6): “A marketer’s use of the name, logo, or seal of approval of a third-party certifier or organization may be an endorsement, which should meet the criteria for endorsements provided in the FTC’s Endorsement Guides”

# Sustainability Claims

- Green Guides declined to address
  - Construed broadly; huge range of consumer takeaway
  - Perhaps update will address
- Best practice – Provide specifics... sustainable because ...? (i.e. because 80% of our power is supplied by renewable energy sources)



# Narrow > Broad

- May 2024: NAD reviewed advertising by HoldOn Bags, Inc.
  - NAD found that HoldOn had provided a reasonable basis for its claim that HoldOn's compostable trash bags break down in composting facilities.
  - BUT NAD found that the advertiser had not supported its claim that HoldOn trash bags are "a sustainable replacement for traditional plastic bags."



# Key Takeaways: How to Reduce Risk

Ensure	Confirm	Use	Avoid	Use	Monitor
your claims can be supported	you have reliable scientific evidence	caution when relying on independent third parties	broad general claims	caution with aspirational claims	your claims and legal landscape

