

# Going green? An update on the legal and regulatory environment surrounding environmental advertising claims

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**Leonard L. Gordon**

Partner | 212.370.6252 | [LLGordon@Venable.com](mailto:LLGordon@Venable.com)

**Shahin O. Rothermel**

Partner | 202.344.4550 | [SORothermel@Venable.com](mailto:SORothermel@Venable.com)

**VENABLE** LLP

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# Agenda

- Background: Green Claims
- FTC's Green Guides, "Green Claims," and Call for Comments
- National Advertising Division of BBB National Programs
- Private Plaintiffs and Lawsuits
- State Law
- How to Reduce Risk

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# Background: Green Claims

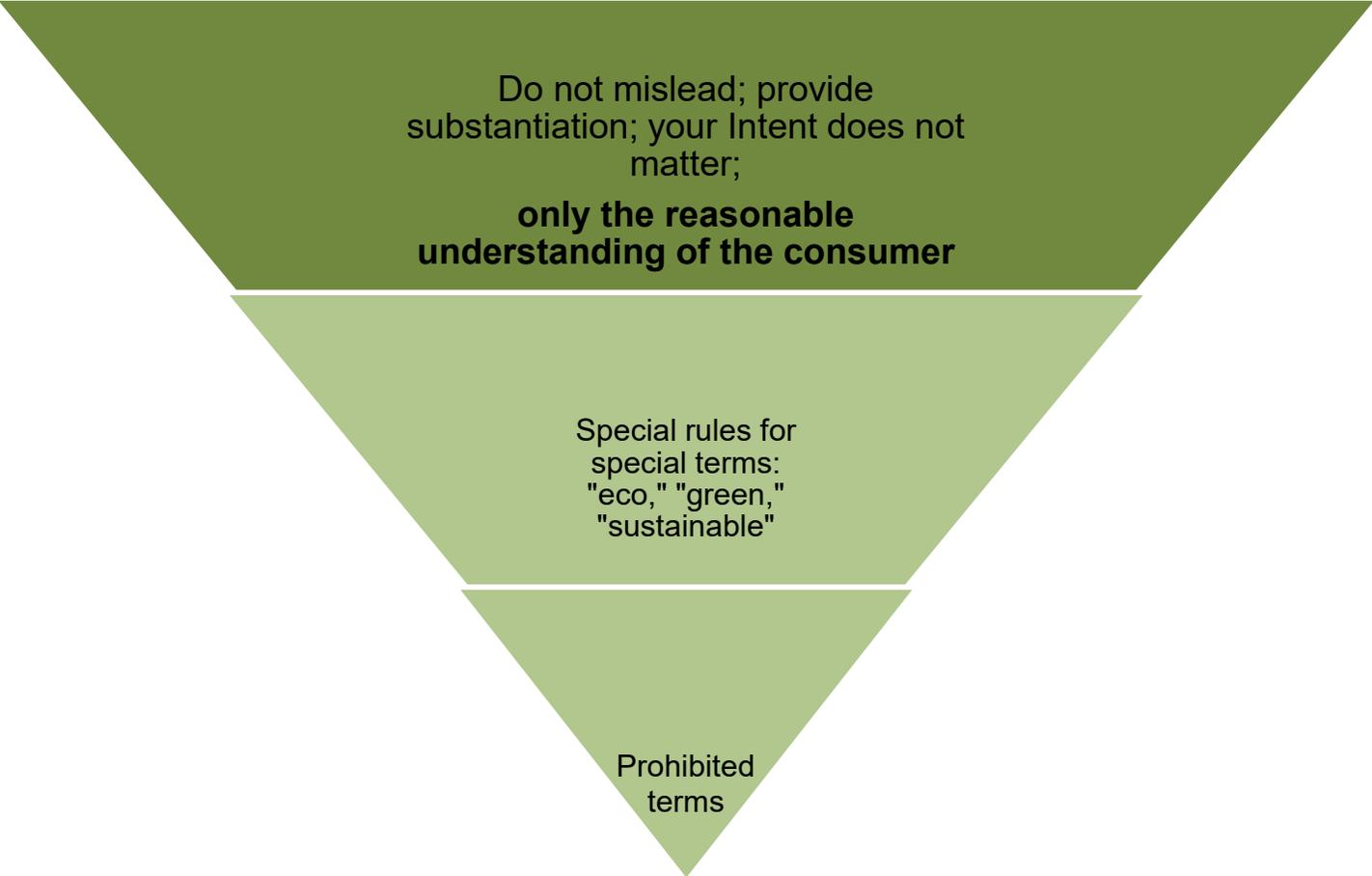
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# Environmental and “Green” Advertising

- **Green Advertising** can be any communication (text, imagery, logos, labels) stating or implying that a product or business has a positive or no impact on the environment, is less damaging to the environment than other products or businesses, or has improved their impact over time



# Environmental and “Green” Advertising



# Substantiation Standard

- 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)
- Make information that you cannot easily fit in any ad easily available to consumers (e.g., via QR code, clear link to your website, etc.)

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# FTC's Green Guides, "Green" Claims, and Call for Comments

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# Environmental Claims and the FTC's Current Green Guides

- FTC's Green Guides discuss qualities or benefits that should not be exaggerated in environmental marketing:
  - **Use of a general term like “eco-friendly,” “green,” or “earth-smart” is *per se* deceptive.** The FTC encourages the use of qualified advertising claims, e.g., “Environmentally Friendly: 20% less packaging.”
- Claim should make clear whether an environmental marketing claim applies to the entire product, the packaging, the advertised service, or just a portion or limited aspect of the product, packaging, or service
- “Compostable” claims are appropriate on products or packages that will break down, or that will become part of usable compost (e.g., soil-conditioning mulch), in a safe and *timely manner* in home or municipal compost piles—but not if that is the case only in municipal facilities

# FTC's Green Guides

- Guides for the Use of Environmental Marketing Claims (“Green Guides”)
  - 16 C.F.R. Part 260
  - Administrative interpretation of law; thus, does not have force and effect of law
  - First Issued: 1992
  - Last Revised: 2012
- “To be effective, the Green Guides have to keep up with developments in both science and consumer perception.”  
–Chair Lina Khan
- FTC has initiated its 10-year review of the Green Guides and called for comments, including on the following items:



# Environmental Claims and the FTC's Current Green Guides (continued)

Broad claims should be qualified.

- Identification of the specific attribute to which the claim refers
- Use of clear and prominent qualifying language
- “Bottle uses 25% less plastic than before” vs. “Eco-Friendly Package”

Generally, a recycling claim is considered deceptive marketing where a product cannot be “collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item.”

- Recycling claims should be properly qualified to avoid deception on the availability of recycling programs for consumers (e.g., must be collected for recycling in a substantial majority of communities or by a substantial majority of consumers)
- Recycling claims should not misconstrue increased recyclability (e.g., claiming a product is 50% more recyclable than before where the recyclability went from 1% to 1.5%)
- Where a product is made of recyclable materials, but cannot be recycled because of its shape, size, or other attribute, it cannot feature a recycling claim
- This applies to products containing recycled content (e.g., a product can feature this claim only when it actually contains recycled materials)



# FTC's Request for Comments Concerning Green Guides

- **Carbon Offsets and Climate Change Claims**

- The Guides currently include guidance relating to carbon offsets. Should the Commission consider revising this section or provide additional guidance addressing other types of advertising claims related to carbon offsets and/or climate change?
- Are there any specific claims related to carbon offsets not currently addressed by the Green Guides that are appropriate for further consideration during the review?
- What, if any, evidence is there of deceptive claims related to climate change in the market?
- If such evidence exists, what specific guidance should the FTC provide to help marketers avoid deceptive claims?
- Is there any consumer research available regarding consumer perception of climate change-related claims such as “net zero,” “carbon neutral,” “low carbon,” or “carbon negative”?
- Are there any specific deceptive claims related to climate change prevalent in the market?



# FTC's Request for Comments Concerning Green Guides (continued)

- **Recycled Content Claims:**
  - The Guides suggest marketers can substantiate “recycled content” claims using per-product or annual weighted average calculation methods. Should the Guides be revised to provide guidance on making “recycled content” claims based on alternative method(s), e.g., mass balance calculations, certificate (i.e., credit or tagging) systems, or other methods? If so, why, and what guidance should be provided? If not, why not? What evidence supports your proposed revision?
  - What changes, if any, should the Commission make to its guidance on pre-consumer or post-industrial recycled content claims? How do consumers interpret such claims?
- **Energy Use/Energy Efficiency Claims:**
  - Should the Commission consider adding guidance on energy use or efficiency claims for home-related products, electric vehicles, or other products?
  - What, if any, evidence is there of such deceptive claims in the market?
  - What types of products are typically involved with deceptive claims? If deception exists, what specific guidance should the Commission provide to help marketers avoid deceptive claims? What evidence supports your proposed revision?



# FTC's Request for Comments Concerning Green Guides (continued)

- FTC called for comments, including on the following items:
- ***Sustainable:*** *The Green Guides do not currently expressly cover sustainable claims:*
  - “for sustainable [] claims, the Commission lacks sufficient evidence on which to base general guidance”
  - The FTC’s request for comments asks whether the FTC should revisit this determination, and to provide evidence as to why or why not
  - The Commission also seeks comment on the need for additional guidance regarding claims such as “compostable,” “degradable,” “ozone-friendly,” “organic,” and “sustainable,” as well as those regarding energy use and energy efficiency



# FTC: Open Meeting Concerning “Recyclable” Claims

- On May 23, 2023, the FTC held a half-day event covering topics surrounding “recyclable” claims, including:
  - the current state of recycling practices and recycling-related advertising in the United States
  - consumer perception of current and emerging recycling-related claims and
  - the need for any updates or other changes to the Green Guides related to recycling claims



## Talking Trash at the FTC: **Recyclable Claims** **and the Green Guides** AN FTC WORKSHOP

# “Green” Seals and Warning Letters

- **“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”

## Green Certification Examples

### Good Example



If this seal is accurate, it’s **not deceptive** because it lists the specific attributes that form the basis for the product’s certification.

In the FTC’s Green Guides, Section 260.6, example 7, there is an example for when it is impractical to clearly list all applicable attributes adjacent to the seal itself.

### Bad Example



This seal **may be deceptive** because it does not convey the basis for the certification. It is highly unlikely that marketers can substantiate all the attributes implied by general environmental benefit claims. That’s why marketers should only use environmental certifications or seals that convey the basis for the certification.

*Source: FTC*

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# National Advertising Division of BBB National Programs

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# Aspirational Claims: American Beverage

- **Challenged Claims:**
  - “We’re carefully designing our bottles to be 100% recyclable, including the caps.”
  - “They’re collected and separated from other plastics so they can be turned back into material that we use to make new bottles.”
  - “Increasing awareness about the value of our 100% recyclable plastic bottles.”
  - “That completes the circle and reduces plastic waste.”
  - “Working with World Wildlife Fund through the ReSource: Plastic initiative to reduce our plastic footprint.”



PRESS RELEASES

**AMERICA'S LEADING BEVERAGE COMPANIES UNITE TO REDUCE NEW PLASTIC USE & INCREASE COLLECTION OF THEIR VALUABLE BOTTLES THROUGH 'EVERY BOTTLE BACK' INITIATIVE**

# Aspirational Claims: American Beverage

- **NAD:** “While the advertiser supported its recyclability claims, this claim also refers to the use of recycled material that “reduces plastic waste.” The advertiser provided evidence as to efforts by ABA members to reduce total waste in their manufacturing practices, but the evidence is less clear about a meaningful reduction in plastic waste.”
- **NARB:** The claims convey to reasonable consumers that a significant amount of recycled content currently is used by the industry to produce new single-use plastic bottles and that there is a resulting reduction in plastic waste today. The panel finds that the video’s use of the phrasing “so they can be turned back into material that we use to make new bottles,” along with the visual of new bottles on a conveyer belt, communicates that a significant amount of recycling into new bottles is currently occurring
  - ABA failed to provide evidence of a significant use by industry members of recycled plastic to produce new bottles and it did not provide any evidence that the current use of recycled plastic reduces plastic waste

# Aspirational Claims: American Beverage

- **NARB:** While ABA may have intended simply to explain the potential for bottles to be recycled, the ad went beyond that, conflating current recycling practices and outcomes with aspirational practices and outcomes
  - Further clarification by the ABA is necessary to ensure that the claims convey only the message that the advertiser intended – how recycling by consumers could help the industry meet its aspirational goal of significantly increasing the use of recycled plastic to create new bottles, which, if successful, could lead to a measurable reduction in plastic waste
- The panel recommends that the advertiser modify the video claims to further clarify that these statements relate to aspirational goals. The claims should not convey that there is a current significant use of recycled bottles by industry to produce new bottles or any current significant reduction in plastic waste from recycling its bottles if that is not the case
- **American Beverage Association (Every Bottle Back Initiative):** Report #7011, NAD/CARU Case Reports (November 2022)

## NAD Cases: Environmental Claims

- “To the extent an advertiser makes express or implied representations concerning sustainability (or animal welfare) in its advertising, NAD considers the relevant scientific evidence, as well as consumer understanding and expectation, to ensure that such advertising is truthful and non-misleading.”
  - ***Chipotle Mexican Grill (Chipotle Restaurants)***, Report #5450 (April 2012).
- “When aspirational claims are tied to measurable outcomes an advertiser must be able to demonstrate that its goals and aspirations are not merely illusory and to provide evidence of the steps it is taking to reach its stated goal.”
  - ***Everlane, Inc. (Everlane ReNew Clothing)***, Report #7019 (October 2021)

# ***JBS USA (NetZero 2040), Case 7135***

- Challenged Claims:
  - “JBS is committing to be net zero by 2040.”
  - “Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040.”
  - “The SBTi recognized the Net Zero Commitment of JBS.”
  - “Bacon, chicken wings and steak with net zero emissions. It’s possible.”
  - “Leading change across the food industry and achieving our goal of net zero by 2040 will be a challenge. Anything less is not an option.”

# JBS USA (Net Zero 2040), Case 7135



JBS NET ZERO 2040 STRATEGIES WHAT WE ARE ALREADY DOING CERTIFICATES VIDEOS



## Strategies for JBS to be Net Zero



### Reducing emissions in our facilities

JBS will reduce its global scope 1 and 2 emissions intensity by at least 30% by 2030 against base year 2019.



### Investing more than US\$ 1 billion in incremental capital expenditures over the next decade in emission reduction projects

We will engage our team members, and award funding for projects to our facilities using a panel consisting of company executives, specialists and academics.



### Eliminate illegal deforestation from our Brazilian cattle supply chain

including the suppliers of our suppliers – in the Amazon and other Brazilian biomes by 2025.

# ***JBS USA: NetZero by 2040***

- Contract with Carbon Trust Advisory Limited to provide a detailed “Global Footprinting and Net Zero” plan detailing steps that the parties will take together to set targets in line with SBTi inclusive of Scope 1, 2, and 3 emissions across the entirety of JBS’s operations
- Issuance of a \$1 billion Sustainability-Linked Bond, linked to its net zero climate goals.
- Partnered with experts to help it reach its net zero by 2040 goal
- Funded research projects with the University of Minnesota and Colorado State University
- Partnered with science-based companies and research centers to develop and expand the use of feed additives to help reduce methane emissions in the beef value chain
- Agreement with Royal DSM to use Bovaer® in its beef chain, which is a feed additive for cows that will reduce methane emissions
- Funds commitment to the Partnerships for Climate-Smart Commodities proposal submitted by the Iowa Soybean Association in partnership with the Soil and Water Outcomes Fund
- Agreement to purchase verified emission reductions
- Commitment to creating targets in line with the SBTi Forest, Land and Agriculture project

## **JBS USA: Net Zero by 2040 – NARB # 313 (May 2023)**

- “The panel concludes that consumers are unlikely to understand what is involved in a business enterprise reaching net zero. Consumers are, however, likely to interpret the challenged advertising as communicating that the goal is a feasible one, and a feasible plan is being implemented....JBS has failed to support the feasibility of reaching the announced goal with credible evidence of the steps that would be considered necessary to achieve the goal.”



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# Private Plaintiffs and Lawsuits

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# Environmental Claims: Lawsuits

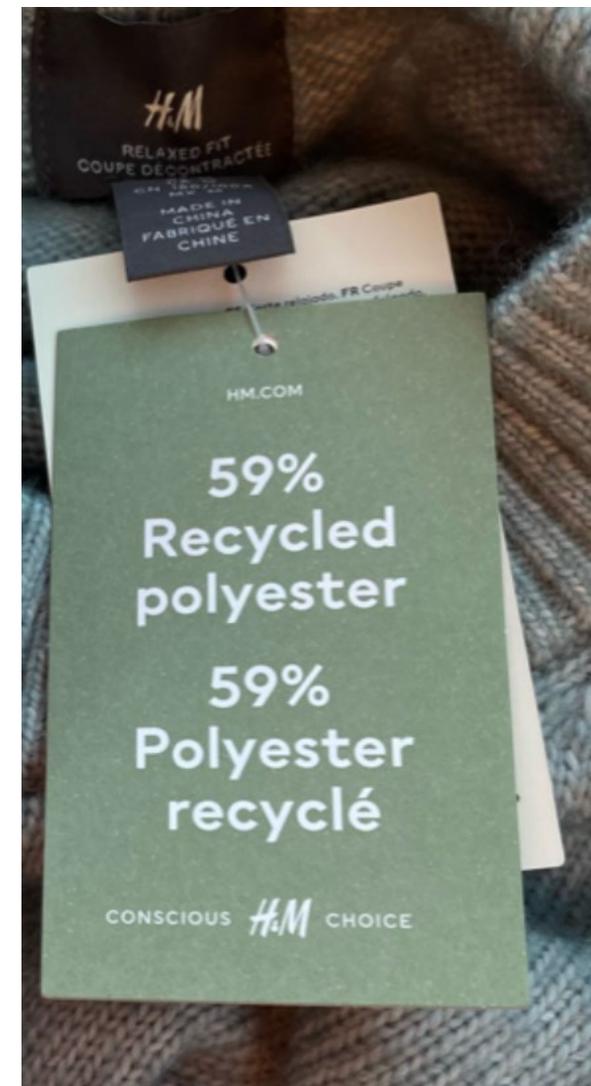
- ***Spencer et al. v. Knix Wear LLC et al., 23-cv-7823, S.D.N.Y. (Sept. 2023)***
  - Plaintiffs allege that Knix represented that its underwear is “sustainable,” “PFAS free,” “fluorine free,” and “tested and cleared for harmful substances.”
  - Knix further represented on its websites and social media sites that the fabric or technology used in the Underwear is OEKO-TEX® certified, which indicates that a product has been tested for harmful substances and that the results meet safety standards set by the association
  - Plaintiffs’ independent testing has shown that certain samples of the underwear contained PFAS chemicals in amounts that are detectable

## Certifications

All Knix products are PFAS free. All of the main fabrics used in our bras and underwear are also OEKO-TEX® certified— meaning they've been tested and cleared for harmful substances. For more details about manufacturing and to read copies of the reports, check out our blog below.

## ***Lizama v. H&M*, 4:22-cv-01170 (E.D. Missouri)**

- The court dismissed a class action complaint asserting that H&M misrepresented and failed to substantiate its claims that its Conscious Choice clothing line contained “more sustainable materials” and that the line includes “its most sustainable products.”



# ***Lizama v. H&M, 4:22-cv-01170 (E.D. Missouri)***

- H&M does not represent that its products are “sustainable” or even “more sustainable” than its competitors’. Rather, H&M states that its conscious choice garments contain “more sustainable materials” and that the line includes “its most sustainable products.” No reasonable consumer would understand this representation to mean that the conscious choice clothing line is inherently “sustainable” or that H&M’s clothing is “environmentally friendly” when neither of those representations was ever made. Instead, the only reasonable reading of H&M’s advertisements is that the conscious choice collection uses materials that are more sustainable than its regular material
- Lizama’s allegations fail to meet the plausibility standard in this case because H&M provides consumers with copious amounts of information about the relevant comparison between recycled versus virgin polyester on its website, which Lizama alleges that he reviewed prior to purchasing his conscious choice clothing
- H&M disclosed on its website all of the information Lizama needed to determine the source, composition, and relevant comparison of the “more sustainable materials” used by H&M in its conscious choice collection. For this reason, Lizama’s claims that he was misled into believing something that was never represented by H&M must fail

# Environmental Claims: Lawsuits

- ***Blackburn et al. v. Etsy, Inc.* 23-cv-5711, C.D. Cal. (July 2023)**
  - Plaintiffs allege that Etsy has marketed itself across various platforms as “100% offsetting all carbon emissions from shipping.” The three major voluntary carbon credit vendors from which Etsy purchases offsets have repeatedly engaged in fraudulent projections that grossly overstate their guarantee of carbon reduction. Etsy almost exclusively relied on carbon offsets that are “non-additional,” non-immediate, and impermanent.
- ***Didwania et al. v. HexClad Cookware, Inc.* 23-cv-5110, C.D. Cal. (June 2023)**
  - Plaintiffs alleged that HexClad misled consumers through its marketing related to HexClad cookware products, including claims related to the cookware being “non-toxic” or “free from” certain chemicals, PFOA, and PFAS
  - Consumer Reports published a report from a test it conducted on several purported “non-toxic” cookware. It tested three nonstick pans that all claimed to be free of PFAS, including the coatings on the Swiss Diamond, Always, and Red Copper nonstick frying pans, to see if they were really free from PFAS chemicals. The Swiss Diamond pan had a PTFE coating and was said to be PFOA-free and used PTFE in its non-stick coating, which is identical or substantively similar to HexClad’s cookware

# Environmental Claims: Lawsuits

- ***Woodiwiss et al. v. Berkshire Blanket & Home Co., Inc.*, D. Mass. (June 2023)**
  - Plaintiff alleges that Berkshire falsely marketed its blankets as environmentally friendly by using the term “EcoSoft” and the phrase “for the planet” in marketing materials when they are made of polyester, which is a synthetic fiber that harms the environment
  - In addition, plaintiff alleges that Berkshire misled consumers through its marketing and packaging about the environmental impact of its so-called “EcoSoft Blanket,” including misleading claims related to water usage and an “eco thread dry dye” process. But despite Berkshire’s “eco,” “50% less water,” and “for the planet” claims, Berkshire does not provide any information related to its water use to the public

# Environmental Claims: Lawsuits

- “Recyclable” claim:
  - Plaintiffs allege that unqualified “recyclable” claims are false unless: (1) the entire product or package, excluding minor incidental components, is recyclable; and (2) recycling facilities are available to at least 60% of consumers or communities where the item is sold. If recycling facilities are available to a smaller percentage then qualifying all recyclable claims is required.
  - One court recently rejected this view, holding that “[t]he term ‘recyclable’ is about the inherent qualities of the product. It is about what can happen. It is not a promise about the state of the recycling industry.” See *Curtis v. 7-Eleven Inc.*, Case No. 21-cv-6079, 2022 WL 4182384, at \*13 (N.D. Ill. Sept. 13, 2022)
- “Low carbon footprint”:
  - A court dismissed a plaintiff’s challenge of “low carbon footprint” claims because the defendant used a life cycle assessment tool (LCA) and the Higg Material Sustainability Index (Higg MSI), which analyzed the carbon footprint to determine the product’s carbon footprint, and provided a web page explaining how the calculations were conducted
  - The plaintiff criticized the Higg MSI’s underlying methodology as addressing only raw materials
  - However, the court held that the defendant’s website “provides consumers with details regarding the LCA tool’s methodology and the categories used in its calculation” and “makes clear what is included in the carbon footprint calculation, and does not suggest that any factors are included that really are not.” *Dwyer v. Allbirds, Inc.*, 598 F. Supp. 3d 137, 157 (S.D.N.Y. 2022)

## Reversing Climate Change Through Better Business

Reducing our environmental impact has been a top priority since day one. But now, we're taking things further. Explore our overall sustainability approach, our progress thus far, and our bold list of commitments for 2025.

OUR SUSTAINABLE PRACTICES

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# State Laws and Regulatory Activity

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# California Law: “Recyclable”



## Updated Legal Standard for “Recyclable” Claim in California:

The law sets new substantiation standards for any “recyclability” claim. Specifically, to be considered “recyclable” under SB 343, a product or packaging must be made from a material type and form that is **both** (1) collected for recycling by recycling programs in jurisdictions that collectively encompass at least 60% of the population of the state; **and** (2) sorted into defined streams for recycling processes by large volume transfer or processing facilities that process materials and collectively serve at least 60% of recycling programs statewide.

### ➤ Recyclable Disqualifications:

To be considered recyclable, the product and packaging must not have any of the below characteristics:

1. The product or packaging must not contain components, inks, additives, or labels that prevent them from being recycled
2. The product or packaging is not “designed to ensure recyclability.” However, this requirement is not defined under the statute
3. The product/packaging must not contain an intentionally added chemical that is identified pursuant to the regulations implementing [42370.2\(g\)\(4\)](#)
4. The product/packaging must not be made from plastic or fiber that contains PFAS that meet either of the following two criteria:
  - a. PFAS that are intentionally added to a product or packaging and that have a functional or technical effect in the product or packaging. (Including the PFAS components of intentionally added chemicals and PFAS in breakdown products of an added chemical)
  - b. The presence of PFAS in a product component or packaging or packaging component at or above 100 parts per million, as measured in total organic fluorine

# California Law: “Recyclable”

## ➤ Exceptions:

There are three general exceptions to all of the above requirements. A product or its packaging can still make a “recyclable” claim if it falls into **any** one of the following three categories:

1. At least 75 percent of the product or packaging that is sorted in California is *actually recycled* – meaning reprocessed into new products or packaging.
2. Prior to January 1, 2030, a product or packaging not collected through curbside collection is recyclable if the collection program recovers at least **60 percent** of it and can market it for recycling and send it to a transfer, processing, or recycling facility. After January 2030, the non-curbside collection program will have to recover at least **75 percent** of the product or packaging for this exception to apply.

Products or packaging that comply with a relevant state or federal program established on or after January 1, 2022, will also be considered recyclable if it will not increase contamination of curbside recycling or deceive consumers.



# California Voluntary Carbon Market Disclosure Act (VCMDA)

- Enacted in October 2023, the new California law requires requires detailed disclosures of the methodology for tracking and verifying claims regarding net zero, carbon neutrality, or emissions reductions, as well as disclosure regarding voluntary carbon offsets (VCOs) purchased, used, marketed, or sold within California
- The types of disclosures include:
  1. Details regarding the applicable carbon offset project
  2. Details regarding accountability measures if a project is not completed or does not meet the projected emissions reductions or removal benefits; and
  3. The pertinent data and calculation methods needed to independently reproduce and verify the number of emissions reduction or removal credits
- Disclosures must be updated annually, and violations are subject to \$2,500 civil penalty per day, per violation
- The bill's sponsor recently requested to postpone the effective date from January 1, 2024 to January 1, 2025

# New York v. PepsiCo Inc.

- New York attorney general alleges that Pepsi contaminated the Buffalo River through its plastic waste. (17% of identifiable plastic waste in the river was produced by Pepsi)
- The New York complaint asserts that Pepsi violated New York General Business Law 349:
  - Pepsi's plastic food packaging is not recyclable, and the vast majority of its PET beverage bottles are not recycled
  - Alternatives to single-use plastic packaging are available, but Pepsi does not use them
  - Pepsi made misleading statements to create the misimpression that its plastic packaging is recyclable, that its strategy will "keep the material in the circular economy," and gave a misleading impression of the company's progress toward reducing plastic pollution
  - Pepsi announced in 2019 a target to reduce the total virgin plastic in its bottles by 35% by 2025. However, Pepsi's use of virgin plastic increased by 5% two years later. In 2021, Pepsi stopped reporting its progress and instead announced a new target of 50% reduction by 2030. However, in 2022, Pepsi's total use of virgin plastic in its packaging increased by 11%



The Buffalo River in April 1951.

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# How to Reduce Risk

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Ensure claims have a reasonable basis of support

Make sure you have reliable scientific evidence & get support from scientific experts

Use caution when relying on third party certifications

Avoid broad general claims & consider providing more transparency and specificity

Pay close attention to aspirational claims and keep them grounded  
Modify as facts and projections change

Consider that what aren't you saying could undermine the claims you are making

Educate yourself & monitor claims and legal actions in the marketplace

These are high risk claim spaces. Educate your client that even with its best efforts, it may face legal, regulatory, self-regulatory actions, or public criticism of your efforts.

# Questions?