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Fashion Alert

MAY 1, 2023

Will the European Commission's eco-marketing plan curb greenwashing?

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The proposed plan would require brands to back up environmental claims with proven methodology for assessing environmental impacts, aspects, and performance of products.



What's the Impact?

- / While the EC's proposal marks a significant step toward specific and concrete regulation of environmental claims, it has the potential to create as much ambiguity as it purports to resolve.
- / Even if your brand solely does business in the US, the EC's proposed eco-marketing rules can serve as instructive guideposts as US laws continue to develop.

The global climate crisis is an unsurprisingly powerful catalyst that is prompting companies and organizations to scrutinize their environmental practices and marketing. "Green" claims and commitments are proliferating in response to increasing public awareness and concern, causing a corresponding uptick in litigation and evolution in regulatory standards.

In response, regulatory agencies in the United States and Europe are actively working to develop proposals to address the greenwashing of products and brands — misleading or deceptive publicity to present a false public image of being environmentally responsible.

As of today, the US Federal Trade Commission (FTC) has begun to review public comments submitted in anticipation of its long-awaited update of the 2012 edition of the “Green Guides,” and the European Commission (EC) has moved one step ahead by publishing a draft proposal of new eco-marketing rules aimed at curbing greenwashing. Even if your brand solely does business in the US, the EC’s proposed eco-marketing rules can serve as instructive guideposts as US laws continue to develop.

The European Commission’s Green Claims Directive

The EC’s March 22, 2023, proposal offered common criteria for implementation among its Member States of the regulation of a host of environmental claims (Green Claims Directive). In its proposal, the EC primarily focuses on substantiation: requiring brands to back up their environmental claims with independently verified and internationally recognized scientific approaches for identifying and measuring the environmental impacts, aspects, and performance of products. This includes not just the environmental attributes of the product but its entire life cycle, from inception to final destination.

Substantiating and Verifying Green Claims

In Article 3 of the Green Claims Directive, the EC endeavors to provide specific criteria for ensuring that “explicit environmental claims” are appropriately substantiated. More specifically, in making such claims, companies would have to:

- / Specify whether a claim is related to the whole or part of the product or services, or to all or only certain aspects;
- / Rely on widely recognized scientific evidence and use accurate information;
- / Demonstrate that the claimed environmental impacts are significant from “a life-cycle perspective” and account for all environmental aspects;
- / Include comparative information about whether the product’s environmental aspects are “significantly better” than common products;
- / Disclose whether any improvement in environmental aspects also leads to a significant harm in relation to other environmental areas, including climate change, resource consumption and circularity, biodiversity, animal welfare, etc.;
- / Separately and specifically describe any greenhouse gas emissions offsets; and
- / Include primary (or secondary) information available to the company about environmental impacts.

Crucially, under the Green Claims Directive, all “substantiated” environmental claims will have to be verified independently and certified before they can be marketed to the general public. In

being made publicly available, claims would have to include such “substantiation” in either physical or electronic form (i.e., a URL or QR code).

Enforcement and Penalties

The Green Claims Directive encourages Member States to enact domestic legislation to ensure that specific environmental marketing statements are presented in a “reliable, transparent, comparable[,] and verifiable” manner to consumers.

The Green Claims Directive is intended to expand the EC’s March 2022 proposal to update the EU Unfair Commercial Practices Directive (UCPD) and the Consumer Rights Directive, prohibiting marketers from, among other things, making generic, vague environmental claims, such as “environmentally friendly,” “eco,” or “green.”

Currently, the Green Claims Directive exist solely as an EC proposal and will have to undergo the EU legislative process before enactment. That process entails possible amendments on the way to approval by the European Parliament and Council, which could take up to 18 months. Once the Directive is adopted, EU Member States will have 18 months to implement corresponding domestic laws and will be required to begin enforcement within the six months that follow.

The Green Claims Directive contemplates a variety of enforcement mechanisms, including imposing injunctive relief and monetary penalties of up to 4% of a company’s total revenue in the Member State concerned. Penalties are to be determined according to “the nature, gravity, extent[,] and duration of the infringement” and “the economic benefits derived from the infringement by those responsible.”

Offending companies also face temporary exclusion from public procurement processes and public funding, as well as the attendant risk of reputational damage if a product turns out to be falsely touting environmental benefits.

Best Practices Moving Forward

While EC’s proposal marks a significant step toward specific and concrete regulation of environmental claims, it has the potential to create as much ambiguity as it purports to resolve.

The Green Claims Directive is laudable for its identification and inclusion of explicit environmental claims that have become abundant. For example, the EC takes specific aim at claims like “carbon-neutral,” “net-zero,” and “ocean-friendly sunscreen.” The proposal specifies that claims regarding the use of recycled plastic PET bottles to make clothing can cause ambiguity for consumers who are unaware that the use of recycled polymers potentially competes with their inclusion in other “closed-loop recycling system[s].”

Yet, beyond the inclusion of specific examples, the Green Claims Directive offers little in terms of a harmonized, definite methodology and remains vague about technical details and overarching standards required to discern problematic claims.

Given the breadth and variety of greenwashing pervading diverse industries, stakeholders at various levels will have to independently examine how their own claims measure up against the EC's vision.

While there is still time before any new rules from the proposed Green Claims Directive come into effect, companies should already be reviewing and gathering relevant data, not just about their marketing statements, but about their supply and manufacturing processes as well, to ensure that they can substantiate their environmental claims. Communications along the entire length of supply chains will be crucial, as will a consistent approach throughout Member States.

If you have questions about how the rise of greenwashing litigation can affect your business, please contact any member of [Nixon Peabody's Fashion Group](#).

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