

GREENWASHING AND SUSTAINABILITY CLAIMS IN FOOD AND AGRICULTURE: UNDERSTANDING AND MINIMIZING RISK

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ABSTRACT

As food companies increasingly make claims regarding sustainability and their products, consumer litigation is on the rise, making it important for companies to understand the regulatory landscape and manage litigation risk. Product labels are an educational tool, and studies show that when it comes to food products, consumers are highly influenced by the information on those labels and advertising. Federal agencies such as the FDA, USDA, and the FTC are charged with ensuring that food labels are not false or misleading, however their effectiveness and authority is being challenged in new ways. With consumers demanding more information about how food was produced and processed, companies are responding by adding information to the label, with claims related to sustainability increasing dramatically. However, the accuracy and reliability of these claims is a matter of intense debate with little being done at the federal level to address consumer concerns about greenwashing. This Article first provides an overview of how key federal agencies regulate food labels, labeling, and advertising, including limitations and failures of the regulations. It then focuses on evaluation of deceptive and misleading advertising claims, enforcement options, and recent agency actions. It next provides an overview of recent competitor and consumer litigation at the state level. In closing, the Article provides suggestions on managing risk when making environmental, social, and governance claims and discusses how regulators could do more to support consumers and manufacturers.

I. INTRODUCTION

The term “sustainable” has meaning beyond food and agriculture, but it is difficult to work within almost any aspect of this industry and not have questions related to how sustainability impacts the business. From how a product is produced, to how it is labeled—producers, processors, and consumers have different perceptions and challenges when it comes to supporting sustainable agriculture and food production.

One of these challenges is defining what sustainability means in the agriculture context. The United Nations Food and Agricultural Organization (FAO) identifies “[five] key principles of sustainability for food and agriculture” as (1) increasing “productivity, employment and value addition in food systems,”

(2) protecting and improving the world’s natural resources, (3) considering economics to “[i]mprove livelihoods and foster inclusive economic growth,” (4) focusing on improving resilience in all areas (people, environment, etc.), and (5) adapting “governance to new challenges.”¹ More succinctly, the FAO states that its “vision for sustainable food and agriculture is one in which food is nutritious and accessible for everyone, and where natural resources are managed in a way that maintains ecosystem functions to support current, as well as future human needs.”² From a global perspective, sustainability involves a balance of human, economic, and environmental needs that considers the current and future impacts of decisions.

More locally, USDA defines sustainable development by combining two different definitions, both of which include the multiple dimensions stated by the FAO. First, two different Farm Bills (1977 and 1990) included a definition of “sustainable agriculture” focused on a “system of plant and animal production practices.”³ Over the long-term, the system will address a number of needs including: “human food and fiber,” improving the “environmental quality and natural resource base upon which the agricultural economy depends,” efficiently managing all resources (non-renewable and on-farm), ensuring “economic viability of farm operations,” and “enhanc[ing] the quality of life for farmers and society as a whole.”⁴ Two decades later, USDA issued a Consensus Statement noting its commitment to the “sustainability of diverse agricultural, forest and range systems” that balance a set of goals similar to those identified in the previous Farm Bills.⁵ USDA noted that as part of this process it “encourages the development and adoption of place-and-scale-appropriate management, production, distribution, and information systems that advance continuous, integrated progress toward all of these goals across landscapes, supply chains and markets.”⁶ This encouragement recognized the need not only for policies and programs that support these principles, but for partnerships, outreach, and

1. *Sustainable Food and Agriculture*, FOOD AND AG. ORG. OF THE UNITED NATIONS (June 22, 2024, 8:13 PM), <https://www.fao.org/sustainability/en/> [<https://perma.cc/W48P-7SJ8>].

2. *Sustainable Food and Agriculture—Background*, FOOD AND AG. ORG. OF THE UNITED NATIONS (June 29, 2024, 10:04 PM), <https://www.fao.org/sustainability/background/en/> [<https://perma.cc/2K85-8J3X>].

3. *Definitions: Sustainability and Food Systems*, U.S. DEP’T OF AGRIC. (June 22, 2024, 8:56 PM), <https://www.usda.gov/oce/sustainability/definitions> [<https://perma.cc/JN6L-HUBR>].

4. *Id.*

5. *Id.*

6. *Id.*

collaboration throughout the industry related to successful implementation of sustainable principles.

II. CONSUMER DEMAND DRIVES COMPANY ACTION AND UNCERTAINTY RISES

Sustainable production is important to producers to ensure the availability of valuable natural resources for future agricultural production to meet the demand for food, feed, and fuel at costs viable for sellers and buyers. It is the buyers that play one of the biggest roles in this industry—consumers drive many of the decisions made within other aspects of the food chain, and consumers now indicate that sustainability is an important factor in the decision-making process.⁷ Over 40% of consumers responded in a 2023 survey that “they always or nearly always consider” the environment when making purchasing decisions.⁸ Consumers also indicated that food producers should take on the bulk of “the responsibility for shifting toward more environmentally friendly food choices.”⁹ Consumers indicate a willingness to put their money behind this focus as well, with a 2021 report noting “over 70% of consumers are willing to pay more for eco-friendly packaging,”¹⁰ even in the current economy with concerns related to high inflation and cost of living.¹¹ A 2024 survey indicated that more than 80% of consumers were willing to pay more for sustainably produced or packaged goods, with a price premium of 9.7% on average.¹² Consumers indicated this sustainability premium was applied across a broad array of environmentally-friendly factors, including locally-sourced products, evaluating a products’ overall carbon footprint, packaging, resource conservation, and environmental impacts of food production (i.e. reassessing consumption of red meat).¹³

7. Chris Casey, *More Than 40% of Consumers Factor in Sustainability When Purchasing Food, Survey Finds*, FOOD DIVE (April 21, 2023), <https://www.fooddive.com/news/more-than-40-of-consumers-factor-in-sustainability-when-purchasing-food-s/648201/> [<https://perma.cc/SS7V-UQ2Q>].

8. *Id.*

9. *Id.*

10. Steve Rosenstock, *Sustainability Examples in the Food & Beverage Industries*, CLARKSTON CONSULTING (Nov. 4, 2021), <https://clarkstonconsulting.com/insights/sustainability-examples-food-bev/> [<https://perma.cc/73ZA-PS4F>].

11. Imran Javaid & Dan Barabas, *Consumers Willing to Pay 9.7% Sustainability Premium, Even as Cost-of-Living and Inflationary Concerns Weigh: PwC 2024 Voice of the Consumer Survey*, PwC (May 15, 2024), <https://www.pwc.com/gx/en/news-room/press-releases/2024/pwc-2024-voice-of-consumer-survey.html> [<https://perma.cc/89E9-AAF4>].

12. *Id.*

13. *Id.*

Consumer demand for sustainable products, including food, is reflected in the actions of many food company's initiatives seeking to demonstrate their commitment to sustainability.¹⁴ Companies are increasingly introducing, altering, and/or marketing products that meet consumer requests for increasingly sustainable products.¹⁵ Product labels have become the focus, the primary way consumers can see and evaluate if products sufficiently address individual concerns related to environmental, social, and governance (ESG) issues.¹⁶ A McKinsey study found that between 2017 and 2022, "products making ESG-related claims accounted for 56[%] of all growth—about 18[%] more than would have been expected . . . [and] products making these claims averaged 28[%] cumulative growth over the five-year period, versus 20[%] for products that made no such claims."¹⁷ While products bearing ESG-related claims continue to appear on the market, and companies continue to announce related initiatives and goals, the veracity of these claims is a matter of increasing uncertainty.¹⁸ The term "greenwashing" refers to "empty or misleading claims about the environmental or social merits of a product or service."¹⁹ While concerns over greenwashing are not new—the Federal Trade Commission (FTC) first released its "Green Guides" regarding environmental marketing in 1992—regulators, consumers, attorneys, and others are bringing renewed focus to this concern in the food sector.²⁰

Concerns about industry greenwashing are not unsupported. When a 2022 Harris Poll asked almost 1500 global corporate executives in 16 countries about their company's actions related to environmental concerns, "58% of the respondents admitted their companies have overstated their sustainability efforts and engaged in greenwashing, which jumped to 72% for companies based in North America."²¹ Relatedly, corporate greenwashing efforts are increasing in

14. Rosenstock, *supra* note 10.

15. *See generally id.*

16. Jordan Bar Am et al., *Consumers Care About Sustainability—and Back It Up with Their Wallets*, MCKINSEY & CO. (Feb. 6, 2023), <https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/consumers-care-about-sustainability-and-back-it-up-with-their-wallets> [<https://perma.cc/LA2B-SV73>].

17. *Id.*

18. *Id.*

19. *Id.*

20. *Green Guides*, FED. TRADE COMM'N (June 21, 2024, 8:30 PM), <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides> [<https://perma.cc/PYX5-J9MY>].

21. Ekaterina Aristova, *Greenwashing Exposed: A Close Look at the Existing Case Law (Part 3)*, UNIV. OF OXFORD: FAC. OF L. BLOG (Dec. 12, 2023), <https://blogs.law.ox.ac.uk/oblb/blog-post/2023/12/greenwashing-exposed-close-look-existing-case-law-part-3> [<https://perma.cc/K32N-TZXJ>].

complexity, “ranging from misleading statements to pledges, certifications, and commitments.”²² A review of greenwashing litigation around the world identified six key ways in which corporations engaged in greenwashing: (1) use of unclear, vague language; (2) selectively disclosing information or providing incomplete information; (3) increasing reliance on emission offsetting schemes; (4) unsupported or uncredible aspirational statements and pledges; (5) making false representations about a product’s “green” qualities; and (6) falsifying or misusing third-party certifications.²³

When asked about greenwashing, consumer feedback identifying areas of concern tends to fall within these categories as well. When one study asked consumers about their understanding of various “green” labeling terms, confusion and distrust were evident.²⁴ Often, lack of knowledge or uncertainty is an issue, for example, “[w]hen asked to determine which of two given products generated higher carbon emissions, consumers were wrong or didn’t know about 75% of the time.”²⁵ A lack of information and understanding also existed with certification programs and labels—what consumers rely upon the most “to identify sustainable products.”²⁶ Despite the clear importance and value of labels and certifications to consumers, “most were unable to accurately describe the meaning behind common sustainability logos, such as organic production or Fairtrade.”²⁷ Perceptions of corporations and corporate values factor into consumer concerns as well, as “only 28% of consumers trust large corporations to create genuinely sustainable products, compared to 45% who trust small, independent businesses.”²⁸ Other studies show similar results, with another finding that more than half of 26,000 consumers surveyed indicated a belief that brands mislead consumers with environmental claims.²⁹ Misleading claims or deceptive statements are not harmless and have the potential to further erode consumer trust while also having

22. *Id.*

23. *Id.*

24. Bain & Company, *Consumers Say Their Environmental Concerns Are Increasing Due to Extreme Weather; Study Shows They’re Willing to Change Behavior, Pay 12% More for Sustainable Products*, PR NEWswire (Nov. 13, 2023),

<https://www.prnewswire.com/news-releases/consumers-say-their-environmental-concerns-are-increasing-due-to-extreme-weather-study-shows-theyre-willing-to-change-behavior-pay-12-more-for-sustainable-products-301985233.html> [<https://perma.cc/CSW7-6NTC>].

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Ria Kakkad, *Poll Reveals Low Consumer Trust in Company Environmental Claims*, SUSTAINABILITY / BEAT (Oct. 5, 2023), <https://www.sustainability-beat.co.uk/2023/10/05/consumer-trust-greenwash/> [<https://perma.cc/7CAK-LSQ3>].

potentially significant economic impacts.³⁰ These potential impacts are just a few of the reasons that federal regulators pay attention to environmental claims.

A. Who's in Charge? Regulation of Food Label Claims and Advertising

At the federal level, three agencies play a primary role in regulating food advertising and labeling claims. FDA regulates the majority of food labeling, as they are responsible for oversight of about 80% of food products.³¹ USDA manages the rest, with responsibility for meat, eggs, and related products.³² While the agencies have their own sets of standards, regulations, and guidance documents, the underlying principle related to voluntary labeling claims (those not required by the relevant agency on products, such as nutrition, ingredients, etc.) is fundamentally the same: a label cannot be false or misleading.³³ Regulating the food label means regulating information not on the product directly as well. Materials such as point of sale coupons and signage are considered labeling and are subject to USDA and FDA regulations.³⁴ The label itself is the “display of written, printed, or graphic matter upon the immediate container . . . of any article,” while the term labeling is broader, including “all labels and other written, printed or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.”³⁵

The third federal agency involved in regulation of food claims is the FTC. The FTC has authority to review and prevent false advertising related to food.³⁶ Under the authorizing statute, advertising does not include labeling, seemingly leaving that category to USDA or FDA purview.³⁷ However, the FTC does have authority to prevent “unfair or deceptive acts or practices in or affecting commerce,” allowing the FTC to investigate and take action against all types of

30. *Id.*

31. See *Food Safety and Nutrition: FDA Can Build on Existing Efforts to Measure Progress and Implement Key Activities*, U.S. GOV'T ACCOUNTABILITY OFF. (Mar. 5, 2018), <https://www.gao.gov/products/gao-18-174> [<https://perma.cc/5V4T-YDQY>].

32. FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., *A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS FOR MEAT, POULTRY, AND EGG PRODUCTS 4–6* (R. Post et al. eds., 2007) [hereinafter *A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS*], https://www.fsis.usda.gov/sites/default/files/media_file/2021-07/Labeling_Requirements_Guide.pdf [<https://perma.cc/4CUE-NFGF>].

33. See 21 U.S.C. § 343 (FDA regulations related to misbranded food); *id.* § 601(n) (USDA regulations related to misbranded food for meat); *id.* § 453(h) (USDA regulations related to misbranded food for poultry).

34. *A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS*, *supra* note 32.

35. 21 U.S.C. § 601.

36. See Federal Trade Commission Act (FTCA), 15 U.S.C. § 45.

37. *Id.*

unfair/deceptive actions taken by food companies, including false or misleading labeling materials.³⁸ The FTC thus has the ability to regulate essentially all forms of food product marketing.

With this extensive overlap between the FTC's authority over deceptive advertising and labeling and that of USDA and FDA regarding misleading food labels and labeling, the potential for duplicative work could be great. For the most part, voluntary agreements between the various agencies remove that potential. Since the 1950s, "the FTC and the FDA have operated under a Memorandum of Understanding, under which the Commission has assumed primary responsibility for regulating food advertising, while FDA has taken primary responsibility for regulating food labeling."³⁹ The relationship between USDA and FTC largely operates along the same lines.⁴⁰

B. Evaluating Materials for Deceptive or Misleading Claims

For companies looking to share information and market ESG characteristics with consumers, understanding how FDA, FTC, and USDA evaluate and define misleading claims becomes an important concern—one that's not as simple to understand as many assume.⁴¹ All three agencies provide guidance to companies when it comes to labels, labeling, and advertising claims, but most of these guidance materials are non-binding and not legally enforceable—essentially recommendations of the agency.⁴² When it comes to how terms are defined in the context of labeling, the less administrative process in defining the term, the less weight the definition carries. For example, the term natural has been hotly contested as being used in deceptive and misleading ways, as discussed in more detail in a later section.⁴³ For years, consumers, regulators, and manufacturers argued about if or how the word "natural" should be allowed on a food label.⁴⁴

38. *See id.*

39. *Enforcement Policy Statement on Food Advertising*, FED. TRADE COMM'N (May 13, 1994), <https://www.ftc.gov/legal-library/browse/enforcement-policy-statement-food-advertising> [<https://perma.cc/ZZE5-FCFP>].

40. *Id.*

41. *See* A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS, *supra* note 32, at 7–11.

42. *See* *Reese v. Odwalla, Inc.*, 30 F. Supp. 3d 935, 939 (N.D. Cal. 2014).

43. *See infra* notes 70–71, 133–40 and accompanying text.

44. *See* NICOLE E. NEGOWETTI, BROOKINGS INST., FOOD LABELING LITIGATION: EXPOSING GAPS IN THE FDA'S RESOURCES AND REGULATORY AUTHORITY 2 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/Negowetti_Food-Labeling-Litigation.pdf [<https://perma.cc/K8TJ-AJAC>]; Stephanie Zimmermann, *Food Fight: Do Lawsuits Challenging Product Labels Benefit Consumers?*, ABA J., June 1, 2022.

When evaluating if a label claim is misleading, FDA looks beyond just the actual words used, and considers

not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.⁴⁵

FDA does not need to prove that any consumer was actually misled by the allegedly misleading claim, nor must there be proof of intent to deceive by the manufacturer.⁴⁶ In evaluating a claim, FDA applies the mindset of “the ignorant, the unthinking and the credulous’ consumer,” meaning that “[e]ven a technically accurate description of a food[’s] . . . content may violate [the statute] if the description is misleading in other respects.”⁴⁷ FDA’s evaluation of labels and labeling materials does not happen prior to a product’s release, as FDA does not preapprove food labels.⁴⁸ Thus, a food manufacturer regulated by FDA should consider how this test applies to claims made on its products, the amount of risk the claims might raise, and how much risk the company is willing to take related to sustainability and other marketing claims.

Unlike FDA, USDA requires that some food labels be approved by the agency prior to release into interstate commerce, including those containing “special statements and claims,” such as those referencing that meat was “[e]nvironmentally [r]aised” or other claims that fall under the sustainable umbrella.⁴⁹ When it comes to labeling claims regarding how an animal was raised or environmental practices related to the operation, USDA “has not defined these

45. 15 U.S.C. § 55(a)(1).

46. *United States v. An Article of Food . . . “Manischewitz . . . Diet Thins”*, 377 F. Supp. 746, 748–49 (E.D.N.Y. 1974).

47. *Id.* at 749.

48. See A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS, *supra* note 32, at 7–8.

49. FOOD SAFETY & INSPECTION SERV., U.S. DEP’T OF AGRIC., FSIS GUIDELINE FOR LABEL APPROVAL 20 (2024), https://www.fsis.usda.gov/sites/default/files/media_file/documents/FSIS-GD-2024-0001.pdf [<https://perma.cc/C8N3-V532>].

claims in regulations or policy guidelines,”⁵⁰ leading to questions of if consumers are able to truly understand or verify what these statements might mean.

Although USDA has not defined these types of claims or terms for labeling purposes, it does require that the label provide some sort of explanation or definition of the terms/standards used.⁵¹ If not included on the label itself, the label can refer the consumer to the food processor’s website or third party website that includes this information.⁵² Third-party certifications may be used as long as the certifying entity includes the standards used in the certification on a website and the certifying body’s information is included on the food label.⁵³

Beyond these labeling requirements, the company seeking label approval must also provide documentation to USDA, including a “detailed written description explaining the meaning of the . . . claim and the controls used for ensuring that the raising claim is valid;”⁵⁴ a “document describing how the animals are raised to support that the claims are not false or misleading;”⁵⁵ a description of how the products to bear the label are tracked and segregated through the post-slaughter process; and a description of how the company tracks, identifies, controls and segregates animals that do not meet the claim standards to ensure they are not falsely labeled.⁵⁶ While these requirements only apply to label approval, and USDA does not require prior approval of labeling not attached to the product (such as point of sale materials), these materials must still meet the same standard of not being “false or misleading in any particular way.”⁵⁷

Despite the approval process and documentation requirements, USDA recently acknowledged truth in ongoing criticism regarding the label approval process failing to ensure truth in labeling. In 2023, USDA indicated it would revise and reissue guidance to industry seeking to make these voluntary claims,

50. FOOD SAFETY & INSPECTION SERV., U.S. DEP’T OF AGRIC., FOOD SAFETY AND INSPECTION SERVICE LABELING GUIDELINE ON DOCUMENTATION NEEDED TO SUBSTANTIATE ANIMAL RAISING CLAIMS FOR LABEL SUBMISSIONS 6 (2019), https://www.fsis.usda.gov/sites/default/files/media_file/2021-02/RaisingClaims.pdf [<https://perma.cc/3A9K-H8Y6>].

51. *Id.* at 7.

52. *Id.*

53. *Id.*

54. *Id.* at 8.

55. *Id.*

56. *Id.* at 11.

57. A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS, *supra* note 32, at 5.

recommending that documentation to support label claims be strengthened and “strongly encourag[ing] use of third-party certification.”⁵⁸

As noted earlier, the FTC first issued a guide related to environmentally related marketing claims on products in 1992, issuing revisions in 1996, 1998, and 2012.⁵⁹ The FTC determined these guides were needed because “what companies think their green claims mean and what consumers really understand are two different things,” which can lead to companies making claims that are later deemed misleading.⁶⁰ The Green Guides provide guidance to companies seeking to market products as “green” with three key areas of focus: (1) basic principles that apply to all types of environmentally-based claims, (2) ways in which consumers interpret green claims and what types of substantiation companies should have for claims, and (3) ways in which claims can be qualified to avoid consumer deception.⁶¹

The FTC Act itself “prohibits deceptive acts and practices in or affecting commerce.”⁶² The FTC further defines a deceptive representation, omission, or act as one that “is likely to mislead consumers acting reasonably under the circumstances and is material to consumers’ decisions.”⁶³ As stated previously, consumers are increasingly focused on green claims and basing purchasing decisions upon these concerns, thus making statements or claims in this area important to consumers.⁶⁴ With this definition, the FTC puts the burden on marketers to “identify all express and implied claims that the advertisement reasonably conveys [and to] ensure that all reasonable interpretations . . . are truthful, not misleading, and supported by a reasonable basis.”⁶⁵ The Green Guides then provide examples of the scope and extent of support companies should have, including scientific evidence of sufficient type, quality, and quantity to substantiate all claims.⁶⁶

58. Press Release, U.S. Dep’t of Agric., USDA Launches Effort to Strengthen Substantiation of Animal-Raising Claims (June 14, 2023), <https://www.usda.gov/media/press-releases/2023/06/14/usda-launches-effort-strengthen-substantiation-animal-raising> [<https://perma.cc/GD4Q-MFKB>].

59. *Green Guides*, *supra* note 20.

60. *Id.*

61. *Id.*

62. 16 C.F.R. § 260.2 (2024).

63. *Id.*

64. Bain & Company, *supra* note 24.

65. 16 C.F.R. § 260.2.

66. *Id.*; *Green Guides*, *supra* note 20.

The Green Guides are scheduled to be updated in 2024, a long overdue update given the sharp increase of these types of claims across all products, not just food.⁶⁷ One expectation for the update is that it “promises stricter guidelines and harsher penalties for companies playing fast and loose with their environmental marketing.”⁶⁸ In terms of new areas of focus, the Green Guides do not address sustainable or natural claims, as the FTC stated in 2012 that “the Commission lacks sufficient evidence on which to base general guidance.”⁶⁹ When it comes to terms in which there are many potential interpretations or definitions, these two are high on the list. The FTC is not the first to avoid the term “natural” due to concerns over its complexity; FDA has failed to promulgate a definition for years.⁷⁰ Litigation against food companies using “natural” on the label spiked and continues today as FDA occasionally seeks comments and ideas on how to define it, or if it should take any official agency action at all.⁷¹ The term “sustainable” is starting to see the same attention in the courts.⁷² Given the FTC’s role in protecting consumers from misleading or deceptive advertising, it is important the agency take steps to provide some type of guidance to those seeking to market sustainable or natural products. When there is little or no guidance from federal agencies, litigation over misleading or deceptive statements often becomes a concern, including through consumer-initiated lawsuits.⁷³

67. See Adam Freedgood, *What Brands Need to Know About the FTC’s 2024 Green Guides Update*, THIRD PARTNERS (Mar. 5, 2024), <https://thirdpartners.com/blog/what-brands-need-to-know-about-the-ftcs-2024-green-guides-update/> [<https://perma.cc/N5WE-LQVE>].

68. *Id.*

69. Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62122, 62124 (Oct. 11, 2012) (to be codified at 16 C.F.R. pt. 260).

70. Lynn C. Tyler, *Will FDA Finally (and Officially) Define “Natural?”*, THE NAT’L L. REV. (Nov. 16, 2015), <https://natlawreview.com/article/will-fda-finally-and-officially-define-natural> [<https://perma.cc/BD87-V5ZZ>]; *Use of the Term Natural on Food Labeling*, U.S. FOOD & DRUG ADMIN. (Oct. 22, 2018), <https://www.fda.gov/food/food-labeling-nutrition/use-term-natural-food-labeling> [<https://perma.cc/9TNW-5HXP>].

71. See *Use of the Term Natural on Food Labeling*, *supra* note 70.

72. See Clara Hudson, *‘100%’ Sustainable Claims Pose Mounting Legal Risk for Companies*, BLOOMBERG L. (Feb. 20, 2024, 4:00 AM), <https://news.bloomberglaw.com/esg/100-sustainable-claims-pose-mounting-legal-risk-for-companies> [<https://perma.cc/6Y23-R5N2>].

73. See, e.g., Complaint for Permanent Injunction & Other Equitable Relief, Fed. Trade Comm’n v. Truly Organic Inc., No. 19-23832 (S.D. Fla. Sept. 18, 2019) [hereinafter Truly Organic Complaint].

C. Agency Enforcement

1. Permissible Action

Primarily, USDA and FDA are the agencies capable of enforcing the labeling and advertising statutes, with oversight of food labels and labeling.⁷⁴ Any labeling that is “false or misleading in any particular” causes the product to be deemed misbranded.⁷⁵ Misbranded foods are subject to a host of penalties, as both agencies have the authority to enforce the law through product seizures, injunctions, warning letters, inspections, recalls, civil penalties, and criminal prosecutions, while working with the United States Department of Justice (DOJ) as necessary.⁷⁶

The FTC enforces advertising and coordinates with the DOJ as necessary.⁷⁷ When the FTC believes an advertisement is deceptive, actions it may take include “bringing law enforcement actions in federal and administrative courts, issuing warning letters, developing rules and guidance to businesses, advocating effective industry self-regulation, and preparing consumer education materials.”⁷⁸ Despite its primary focus on advertising, courts have made clear that the FTC has authority to take enforcement actions for “false and misleading labeling of food products.”⁷⁹ The FTC can seek injunctions and occasionally, damages, for deceptive advertising, and can also require companies to produce “‘corrective advertising’ if necessary to remedy the effects of past deception.”⁸⁰

Warning letters are often the first step all three agencies take when they believe a labeling issue exists.⁸¹ Warning letters serve to notify the company of agency concerns and possible penalties if the concern is not satisfactorily addressed.⁸² Warning letters are publicly available on agency websites and can

74. See A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS, *supra* note 32, at 4–6.

75. See 21 U.S.C. § 343(a) (FDA regulations related to misbranded food); *id.* § 601(n) (USDA regulations related to misbranded food for meat); *id.* § 453(h) (USDA regulations related to misbranded food for poultry).

76. CONG. RSCH. SERV., R43609, ENFORCEMENT OF THE FOOD, DRUG, AND COSMETIC ACT: SELECT LEGAL ISSUES 3 (2018) [hereinafter ENFORCEMENT OF FD&C ACT].

77. *Id.*

78. *Division of Advertising Practices*, FED. TRADE COMM’N (June 22, 2024, 8:30 PM), <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-advertising-practices> [<https://perma.cc/9EFQ-E8XP>].

79. A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS, *supra* note 32, at 11–12.

80. *Id.* at 12.

81. ENFORCEMENT OF FD&C ACT, *supra* note 76, at 3.

82. See *id.* at 9–10; see also *Legal Library: Warning Letters*, FED. TRADE COMM’N (June 22, 2024, 10:04 PM), <https://www.ftc.gov/legal-library/browse/warning-letters> [<https://perma.cc/NE5U-AFVU>].

provide insight into enforcement priorities and interpretations,⁸³ and may also serve as the underlying basis for consumer litigation that immediately follows a public warning letter.⁸⁴

There is little to find on any of the agency websites regarding past or current enforcement actions related to greenwashing concerns on food marketing and labeling. The Environmental Marketing Section of the FTC's website provides a one-stop location for information on its enforcement actions in the greenwashing area.⁸⁵ As of June 2024, it does not appear as though any of the almost 100 cases the FTC has initiated in this area involve claims made on food.⁸⁶ Recent cases have involved clothing, cosmetics, lighting, and paint.⁸⁷ A review of those cases provides background on how the FTC analyzes this issue.

2. FTC Cases Involving Environmental Marketing—Recent Actions

The FTC Environmental Marketing website includes information on all the action taken by the FTC in this area of enforcement, including advisory opinions (none listed as of June 2024), Federal Register notices, cases, and other information such as blog postings and public comments.⁸⁸

83. See *Environmental Marketing*, FED. TRADE COMM'N (June 22, 2024, 8:31 PM), <https://www.ftc.gov/business-guidance/advertising-marketing/environmental-marketing> [<https://perma.cc/7Z8T-VH2S>] (including links to FTC enforcement actions related to environmental marketing); *Legal Library: Advisory Opinions*, FED. TRADE COMM'N (June 22, 2024, 8:33 PM), <https://www.ftc.gov/legal-library/browse/advisory-opinions?page=4> [<https://perma.cc/8EGM-UYHG>] (searchable database of all FTC advisory opinions); *Warning Letters*, U.S. FOOD & DRUG ADMIN. (June 22, 2024, 9:51 PM), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/compliance-actions-and-activities/warning-letters> [<https://perma.cc/Q27M-96KD>] (searchable database of all FDA warning letters).

84. See Amanda Groves & Peyton Miller, *How FDA Warning Letters to Other Companies Increase Your Business' Litigation Risk*, FOOD MFG. (June 20, 2017), <https://www.winston.com/a/web/124220/7Y2uZQ/6-20-17-food-manufacturing-groves-miller.pdf> [<https://perma.cc/W2LD-427D>]; Elaine Watson, *And Now the Lawsuits . . . FDA Warning Letter to KIND Triggers Wave of Consumer Litigation*, FOOD NAVIGATOR USA (Apr. 20, 2015, 8:26 PM), <https://www.foodnavigator-usa.com/Article/2015/04/20/FDA-warning-letter-to-KIND-triggers-wave-of-litigation> [<https://perma.cc/348N-8XQP>].

85. *Environmental Marketing*, *supra* note 83.

86. *Legal Library: Cases and Proceedings*, FED. TRADE COMM'N (June 25, 2024, 3:05 PM), https://www.ftc.gov/legal-library/browse/cases-proceedings?sort_by=field_date&field_mission%5B29%5D=29&field_consumer_protection_topics=1408 [<https://perma.cc/PBR2-6ZTE>].

87. *Id.*

88. *Environmental Marketing*, *supra* note 83.

Upon reviewing the website, the FTC seems to have the most concentrated action surrounding cases related to environmental marketing claims. There are over 90 cases included in the database, while there are no advisory opinions.⁸⁹ Advisory opinions are issued by the FTC “to help clarify FTC rules and decisions regarding either competition or consumer protection issues, often in response to requests from businesses and industry groups.”⁹⁰ I suspect the lack of advisory opinions in this area is due to the relatively “new” focus on these types of marketing claims, and perhaps more importantly, the desire for companies to remain under the radar and not bring attention to uncertainty or concerns about terms used to make environmental marketing claims. The old saying “it is better to ask forgiveness than permission,” may resonate with companies when it comes to voluntarily seeking advice from regulatory agencies. Bringing a request to one of the regulatory bodies regarding a claim’s use or definition may make an issue public.⁹¹ Instead, companies hope to use claims in ways that do not garner negative attention from consumers or regulators but still allow them to reap the potential benefits of the marketing claims.⁹² While none of the recent FTC cases involved food marketing claims, the most recent are summarized below as examples of what types of environmental marketing claims have received FTC notice.

i. Kohl’s and Walmart—When Bamboo Is Not Bamboo

Kohl’s and Walmart were both sued by the FTC in 2022 “for falsely marketing dozens of rayon textile products as bamboo,” and for “making deceptive environmental claims, touting that the ‘bamboo’ textiles were made using ecofriendly processes, while in reality converting bamboo into rayon requires the use of toxic chemicals and results in hazardous pollutants.”⁹³ The FTC based the deceptive marketing claims off statements made by Kohl’s on its website, both for products manufactured by third parties and for those from its own brands.⁹⁴ Kohl’s marketed these products on the website as part of the “Sustainability at Kohl’s”

89. See generally *Legal Library: Cases and Proceedings*, *supra* note 86.

90. *Legal Library: Advisory Opinions*, *supra* note 83.

91. Groves & Miller, *supra* note 84.

92. See generally *id.*

93. *Kohl’s Inc., U.S. v.*, FED. TRADE COMM’N (May 4, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2023171-kohls-inc-us-v> [<https://perma.cc/VWP7-8KPU>] (includes summary of case and links to complaint and stipulated order for Kohl’s); *Walmart, U.S. v.*, FED. TRADE COMM’N (Apr. 8, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2023173-walmart-us-v> [<https://perma.cc/YH37-53PU>] (includes summary of case and links to complaint and stipulated order for Walmart).

94. Complaint for Civ. Penalties, Permanent Injunction, & Other Relief, United States v. Kohls Inc., No. 22-964 (D.D.C. May 4, 2022).

series of initiatives that demonstrate Kohl's commitment to the planet.⁹⁵ Products at issue here were advertised as "Cleaner Solutions," products produced without harmful chemicals and using only non-toxic materials.⁹⁶ Other products touted the broader aims of sustainable practices, such as environmentally-friendly manufacturing and "safe and socially responsible work practices."⁹⁷ The complaint details numerous other types of environmental marketing claims related to the bamboo/rayon products that highlighted terms such as "green," meeting consumers "desire to help the planet," and "eco-friendly," among many terms and statements.⁹⁸ The complaint against Walmart similarly identified numerous items for sale on the company website made from the disputed bamboo/rayon fibers with the various environmental benefit claims included.⁹⁹

Both Walmart and Kohl's entered stipulated orders with the FTC in which they admitted no wrongdoing, but ultimately agreed to ensure they would no longer falsely claim rayon-based products were bamboo with associated environmental benefits.¹⁰⁰ The two companies also agreed to a combined penalty of \$5.5 million.¹⁰¹ The environmental marketing claims grabbed attention and were the main priority throughout the press releases accompanying these enforcement actions.¹⁰² The action highlights that some of the country's largest retailers were subject to environmental marketing enforcement, which should make companies of all sizes alert. But it is also important to consider the scope and details of website content that was in dispute in both actions. The companies were held accountable for all information related to products on their website, including logos and program links that attribute consumer-friendly claims.¹⁰³ Thus, companies need to

95. *Id.* at 9–10.

96. *Id.* at 10.

97. *Id.*

98. *Id.* at 16, 27.

99. Complaint for Civ. Penalties, Permanent Injunction, & Other Relief at 1–2, United States v. Walmart, Inc., No. 22-965 (D.D.C. Apr. 8, 2022).

100. Stipulated Ord. & Judgment for Civ. Penalties, Permanent Injunction, and Other Relief at 4, United States v. Kohls Inc., No. 22-964 (D.D.C. May 4, 2022); Stipulated Ord. & Judgment for Civ. Penalties, Permanent Injunction, and Other Relief at 4, United States v. Walmart, Inc., No. 22-965 (D.D.C. Apr. 8, 2022).

101. Press Release, Fed. Trade Comm'n, FTC Uses Penalty Offense Auth. to Seek Largest-Ever Civ. Penalty for Bogus Bamboo Mktg. from Kohl's & Walmart (Apr. 8, 2022) [hereinafter FTC Uses Penalty Offense Auth. to Seek Largest-Ever Civ. Penalty], <https://www.ftc.gov/news-events/news/press-releases/2022/04/ftc-uses-penalty-offense-authority-seek-largest-ever-civil-penalty-bogus-bamboo-marketing-kohls> [https://perma.cc/3852-2ANW].

102. *Id.*

103. *Id.*

verify information related to marketing claims made by outside manufacturers that are used on the company website.¹⁰⁴

ii. Truly Organic, Inc.—Bath and Beauty Products Not Organic as Labeled

Truly Organic, Inc. was the subject of an FTC enforcement action in 2019 regarding its bath and beauty products.¹⁰⁵ According to the complaint, Truly Organic’s products were classified in two ways: (1) products the company made by adding ingredients to other products purchased via wholesale and repackaging them and (2) finished soaps and bath bombs purchased from wholesalers and then resold by Truly Organic.¹⁰⁶ The company marketed products directly online and through third parties with materials that claimed they were in whole or in part organic, certified organic, or vegan.¹⁰⁷ However, the FTC contended that despite the company’s name, the products were far from “truly organic” and in fact contained numerous non-organic ingredients.¹⁰⁸ USDA, as administrator of the National Organic Program, was also investigating the company and issuing warning letters regarding the illegal and improper claims.¹⁰⁹ After USDA closed its investigation, believing the matter resolved, Truly Organic falsified certification documents and other materials to support their own claims.¹¹⁰ The FTC reviewed the company website and identified numerous false and deceptive claims.¹¹¹ Truly Organic settled the case without admitting any wrongdoing, but agreed to no longer deceptively market products and pay \$1.76 million in penalties.¹¹²

This was a more egregious case of clear deceptive marketing of products, particularly since two agencies investigated the company while Truly Organic continued to engage in deceptive practices.¹¹³ Unlike various environmental marketing claims that are more ambiguous, organic certification is a regulatory-

104. *See id.*

105. Truly Organic Complaint, *supra* note 73, at 3.

106. *Id.*

107. *Id.* at 4.

108. *Id.*

109. *Id.* at 5.

110. *Id.* at 5–6.

111. *Id.* at 8.

112. Stipulated Ord. for Permanent Injunction and Monetary Judgement; Ord. Closing Case at 3, Fed. Trade Comm’n v. Truly Organic Inc., No. 19-23832 (S.D. Fla. Sept. 18, 2019).

113. *See* Truly Organic Complaint, *supra* note 73, at 5–8.

established program with clear requirements, guidelines, and procedures.¹¹⁴ When well-defined and regulated programs are in effect, it is harder for a company to claim there were no deceptive practices or misleading statements because there is clarity as to what an organic or certified organic claim means, and what the proper process is for becoming certified.

III. CONSUMERS AND COMPETITORS ARE ALSO ENFORCERS

While greenwashing claims on food and agricultural products are an area of increased focus, regulators have not engaged in much action in this area.¹¹⁵ Instead, much of the litigation is brought by consumers seeking clarity and more definitive definitions for contested terms from the courts when the agencies do not provide it.¹¹⁶ Only the federal government can enforce labeling law through FDA and USDA regulations related to misrepresentations, as the authorizing statutes (including the Federal Food, Drug and Cosmetic Act (FDCA), Poultry Products Inspection Act (PPIA), and the Federal Meat Inspection Act (FMIA)) all prohibit “private litigants . . . from suing to enforce compliance with the federal regulations.”¹¹⁷ In spite of this fact, greenwashing litigation, including in the food and agricultural field, is mostly initiated outside the federal government.¹¹⁸ These citizen suits related to labeling claims must base their reliance upon other laws, such as state consumer protection acts.

“[F]ederal courts in 2022 and the first quarter of 2023 saw 47 complaints filed against companies for deceptive claims related to environmental impact or social responsibility,” nearly all of them filed by consumers.¹¹⁹ This demonstrates that consumers are not just using power to demand increased transparency and

114. See generally *National Organic Program*, AGRIC. MKTG. SERV., U.S. DEP’T OF AGRIC., (June 22, 2024, 9:44 PM), <https://www.ams.usda.gov/about-ams/programs-offices/national-organic-program> [<https://perma.cc/8BZD-MCRE>].

115. Aristova, *supra* note 21.

116. *FDA is Finally Addressing Requests for a Definition of “Natural”*, FDA COMPLIANCE SIMPLIFIED (Nov. 14, 2015), <https://fdasimplified.com/fda-is-finally-addressing-requests-for-a-definition-of-natural/#:~:text=From%20the%20brief%20history%3A%20Three,for%20a%20definition%20of%20natural> [<https://perma.cc/573T-ECBZ>]; Jonathan Sandler & Ruth Elizabeth Morris, *Greenwashing—While the FTC Gets into the Weeds, Don’t Lose Sight of the Bigger Picture*, BROWNSTEIN (Aug. 3, 2023), <https://www.bhfs.com/insights/alerts-articles/2023/greenwashing-while-the-ftc-gets-into-the-weeds-don-t-lose-sight-of-the-bigger-picture> [<https://perma.cc/4YSN-NTHP>].

117. See *Bruton v. Gerber Prods. Co.*, 961 F. Supp. 2d 1062, 1080 (N.D. Cal. 2013); A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS, *supra* note 32, at 4–6.

118. Sandler & Morris, *supra* note 116.

119. *Id.*

certain types of production practices, but that they are also willing to hold companies accountable and increase the amount of risk that companies undertake when making these types of claims.¹²⁰ Utilizing various state laws and other federal statutes related to establishing fair business practices, greenwashing litigation is increasing globally, and companies cannot afford to ignore compliance and enforcement-type risks that exist beyond government agencies.¹²¹

A. Competitor Claims

It is important to note that there is another category of litigation beyond the scope of this Article that can play into non-government litigation related to label claims that comes from within the industry, typically from competitors.¹²² The primary way companies engage in this type of litigation is pursuant to the Lanham Act, which gives companies a private right of action against competitors it believes are utilizing false or misleading labels or advertising.¹²³ The right of private companies to use the Lanham Act, even in cases of food labeling where preemption is often a defense, was confirmed by the United States Supreme Court in a 2014 decision involving POM Wonderful and Coca-Cola.¹²⁴ POM and Coca-Cola were engaged in a dispute related to labeling of Coca-Cola's juice product and POM's belief that it was deceptively marketed in a way that caused them harm.¹²⁵ As summarized in the Court's opinion:

Petitioner POM Wonderful LLC, which produces, markets, and sells, inter alia, a pomegranate-blueberry juice blend, filed a Lanham Act suit against respondent Coca-Cola Company, alleging that the name, label, marketing, and advertising of one of Coca-Cola's juice blends mislead consumers into believing the product consists predominantly of pomegranate and blueberry juice when it in fact consists predominantly of less expensive apple and grape juices, and that the ensuing confusion causes POM to lose sales.¹²⁶

Coca-Cola's argument that POM's case was preempted by the FDCA failed, instead the Supreme Court held that "[c]ompetitors may bring Lanham Act claims like POM's challenging food and beverage labels regulated by the FDCA."¹²⁷ The

120. *See generally id.*

121. *See id.*

122. Ashley Lorange, *An Assessment of U.S. Responses to Greenwashing and Proposals to Improve Enforcement*, HOFSTRA L. STUDENT WORKS, 2010, at 1, 13.

123. Lanham Act, 15 U.S.C. § 1125(a).

124. POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102 (2014).

125. *Id.* at 102.

126. *Id.*

127. *Id.*

Court noted that rather than a preemption concern, “the FDCA and the Lanham Act complement each other in the federal regulation of misleading food and beverage labels.”¹²⁸ While there is no private right of action for claims regarding misleading labels or misbranded products under the FDCA, “[c]ompetitors, in their own interest, may bring Lanham Act claims like POM’s that challenge food and beverage labels that are regulated by the FDCA.”¹²⁹ While we have not seen much of this type of litigation in the area of more ambiguous terms such as “natural” or “sustainable,” it is worth noting that this is an area of potential litigation when it comes to allegations of deceptive labeling and marketing of food.¹³⁰

B. Consumers Take Things into Their Own Hands

Consumer class action lawsuits related to labeling claims are not a recent trend springing out of greenwashing concerns. Consumer-driven lawsuits have, over the past decade or two, increasingly been used as a tool to hold companies accountable for controversial claims on the food label when agencies do not step forward to do so.¹³¹ What transpired regarding the term “natural” is similar to what is happening now with greenwashing and food label concerns—consumer dissatisfaction with how companies use the term on the label; a lack of federal guidance, definition, and enforcement; and a turn to private litigation and the courts to fill that role.¹³²

The “natural” litigation is an example worth reviewing for companies looking to market a product’s attributes voluntarily on the food label. Like many of the environmental marketing terms of concern in greenwashing allegations, the term “[n]atural” is not defined in the [FDCA], and, notwithstanding repeated requests, the FDA has expressly declined to define [it] in any regulation or formal policy statement.”¹³³ FDA knew as early as 1991, when it first solicited comments on potential rulemaking regarding a definition of natural, that use of this term “on food labels ‘is of considerable interest to consumers and industry.’”¹³⁴ Despite seeking comments several times since the early 1990s on defining the term natural for use on food labels,¹³⁵ and despite acknowledging that a definition for this

128. *Id.* at 106.

129. *Id.*

130. See NEGOWETTI, *supra* note 44, at 1.

131. See generally *id.*; Zimmermann, *supra* note 44.

132. NEGOWETTI, *supra* note 44, at 1, 2.

133. *Janney v. Mills*, 944 F. Supp. 2d 806, 811 (N.D. Cal. 2013).

134. *Id.* at 812.

135. *Use of the Term Natural on Food Labeling*, *supra* note 70.

ambiguous term would be helpful,¹³⁶ FDA has never engaged in any formal rulemaking, and instead relies on a policy statement as the only “official” FDA definition of the term natural related to use on labels.¹³⁷ Litigation on this issue exploded, with the majority of it coming from the private sector.¹³⁸ Most litigation involved requests to FDA for a definition and citizen petitions seeking action from FDA.¹³⁹ Companies were left to make decisions about continued use of the term on labels in light of evidence that demonstrated consumer confusion and misunderstandings regarding what the term meant.¹⁴⁰

Litigation involving the term natural on food labels continues, although it is far from the only term under attack as misleading.¹⁴¹ Given the history of the natural litigation, it is likely that the spike in greenwashing litigation will continue, particularly when food labels are involved.¹⁴² As noted previously, most litigation filed regarding food label claims typically relies upon state law claims, specifically laws related to unfair competition, deceptive practices and advertising, and other state labeling laws that are not preempted by federal law.¹⁴³ The examples below highlight the types of claims alleged by consumers and the various areas of focus.

136. *Janney*, 944 F. Supp. 2d at 812.

137. *Use of the Term Natural on Food Labeling*, *supra* note 70.

138. *See generally Case Law Index Food Labeling*, NAT’L AGRIC. L. CTR. (Aug. 16, 2023), <https://nationalaglawcenter.org/aglaw-reporter/case-law-index/food-labeling/> [<https://perma.cc/7A4K-JKFS>] (identifying over 100 federal and state court decisions that involved litigation in whole or part over use of the word “natural” on food labels).

139. *FDA is Finally Addressing Requests for a Definition of “Natural”*, *supra* note 116.

140. *See* FRED KUCHLER ET AL., ECON. RSCH. SERV., U.S. DEP’T OF AGRIC., *THE PREVALENCE OF THE “NATURAL” CLAIM ON FOOD PRODUCT PACKAGING 2–3* (2023), <https://www.ers.usda.gov/webdocs/publications/106479/eb-35.pdf?v=3257.9> [<https://perma.cc/7VZ2-NZV5>].

141. *Zimmermann*, *supra* note 44.

142. *Sandler & Morris*, *supra* note 116 (noting that food was one of the top four most targeted categories of greenwashing litigation); *Zimmermann*, *supra* note 44 (noting that label lawsuit filings continue to soar and increasingly target animal welfare and environmental claims); *see supra* notes 118–21 and accompanying text.

143. *Zimmermann*, *supra* note 44; Theodora McCormick, *Food and Supplement Class Action Suits That Rely on Alleged Regulatory Violations*, FOOD & DRUG L. INST. (June 29, 2024, 9:57 PM), <https://www.fdi.org/2021/05/food-and-supplement-class-action-suits-that-rely-on-alleged-regulatory-violations/> [<https://perma.cc/A4BA-5JGX>] (noting that “litigants have employed a variety of approaches premised on state consumer protection statutes to indirectly bring the FDCA into play”).

1. Hershey Company and Rainforest Alliance—100% Certified Sustainable Claim

In early 2024, Hershey Company and the Rainforest Alliance were named in a lawsuit alleging that Hershey’s organic and plant-based chocolate bars were falsely and deceptively marketed as ethically sourced and sustainable.¹⁴⁴ Specifically, the complaint alleges that the cocoa certified by Rainforest Alliance and purchased by Hershey was not sourced ethically or sustainably despite the company’s claims to use only “100[%] certified and sustainable cocoa.”¹⁴⁵ The plaintiffs allege that the cocoa is produced with child labor, forced labor, and other forms of labor abuse known to exist in the cocoa industry.¹⁴⁶ Further, the complaint contends that by using the Rainforest Alliance seal on its products, Hershey is marketing its products as meeting consumer demand for ethical and sustainable products, and yet misleading them because the products are in fact tied to harmful labor and environmental practices.¹⁴⁷

The complaint focuses on a few key facts to support its contentions, including that Hershey is only certain that 68% of its cocoa is sourced from verified farmers.¹⁴⁸ Because of this, the complaint claims that Hershey cannot support or verify its 100% claims as to sustainability or certification.¹⁴⁹ The complaint further argues that the “certification” from Rainforest Alliance is not met as Rainforest Alliance does not verify the information it provides, instead considering it “guidance” for those purchasing the cocoa.¹⁵⁰ Given the documented issues within the cocoa industry, the complaint argues that Hershey and Rainforest Alliance are working together to deceive consumers to increase product sales.¹⁵¹ Documented in the complaint are examples from both Hershey’s and Rainforest Alliance’s websites regarding pledges, procedures, and other statements.¹⁵² Filed as a proposed class action lawsuit in the Northern District of Illinois, it alleges violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, Breach of Express Warranty, and Unjust Enrichment.¹⁵³

144. Class Action Complaint at 2, *Yeh v. The Hershey Co.*, No. 24-00453 (N.D. Ill. Jan. 18, 2024) [hereinafter *Hershey Class Action Complaint*].

145. *Id.* at 4.

146. *Id.* at 5.

147. *Id.* at 5, 15.

148. *Id.* at 13.

149. *Id.*

150. *Id.* at 5.

151. *Id.* at 6.

152. *Id.* at 8, 11.

153. *Id.* at 28–29, 31–32.

This case is notable for the fact that it involves not just the company in question but a third-party certifier.¹⁵⁴ As noted earlier, use of third-party certification is often suggested by regulators to help substantiate voluntary claims, such as those related to sustainability.¹⁵⁵ Yet, it appears that consumers are uncertain about the procedures and policies of these third parties as well.¹⁵⁶

2. Mondelez International and 100% Sustainable Claims

Mondelez International, a global snack food company, was sued in a similar manner in January of 2024 for its packaging and labeling claims of certified and/or 100% sustainable products (such as Oreos, Chips Ahoy!, and Clif Bars).¹⁵⁷ This proposed class action did not involve a third-party certifier in addition to the manufacturer, but did allege that the company was misleading in its claims to be socially and environmentally responsible.¹⁵⁸ The complaint was filed in the Northern District of California, and included violations of California Consumers Legal Remedies Act, California’s Unfair Competition Law, and Unjust Enrichment.¹⁵⁹ The complaint contends that Mondelez “knows its practices perpetuate child labor and child slavery” and yet, still markets its products as sustainable in a misleading fashion.¹⁶⁰ Other allegations relate to environmental harm and continued use of marketing that “misleads consumers into believing its products are procured in accordance with environmentally and socially responsible standards, when it knows they are not.”¹⁶¹

3. Keurig—Coffee Pod Recyclability

This class action lawsuit claimed violations of California law due to the allegations that Keurig “markets and sells plastic single serve coffee pods as recyclable, when the pods cannot in fact be recycled” as a way to “take advantage of consumers’ concerns” related to plastic waste and efforts to personally purchase products that are compostable and recyclable.¹⁶² A preliminary settlement was

154. *Id.* at 9.

155. *Id.* at 18.

156. *Id.* at 22.

157. Class Action Complaint at 2, *Van Meter v. Mondelez Int’l, Inc.*, No. 24-00565 (N.D. Cal. Jan. 30, 2024).

158. *Id.* at 2.

159. *Id.*

160. *Id.* at 1.

161. *Id.* at 2.

162. Class Action Complaint at 1, *Smith v. Keurig Green Mountain, Inc.*, No. 18922722 (Cal. Super. Ct. Sept. 28, 2018).

approved in 2022.¹⁶³ The settlement included Keurig making a \$10 million payment for all related costs, including payments to class members, attorney fees, and expenses.¹⁶⁴ Depending on class member status and proof of purchase, class members would receive payments between \$5.00 and \$36.00.¹⁶⁵ Keurig also agreed to qualify its recyclability claims on packaging, adding “Check Locally – Not Recycled in Many Communities” to any packaging making a recyclability statement and in any sort of advertising or promotional materials and corporate reports.¹⁶⁶

4. Danone Waters of America—Carbon Neutral Claims

This litigation highlights concerns related to company claims of carbon neutral products and manufacturing. Plaintiffs contend that Danone “holds itself out as an environmentally friendly brand,” marketing to consumers in various ways, including on product labels, such as the “carbon neutral” claim included on Evian bottled water.¹⁶⁷ The plaintiffs argue that under the reasonable consumer standard, reading that claim would leave someone to “believe the manufacturing of the [p]roduct is sustainable and does not leave a carbon footprint.”¹⁶⁸ In truth, the manufacturing of the Evian product still releases carbon dioxide into the atmosphere, thus making the claim that Evian water leaves no carbon footprint false and deceptive.¹⁶⁹ Companies like Danone that make carbon neutral claims often contend that the use of carbon credits to offset emissions makes the claim true—the net effect of production is zero carbon.¹⁷⁰ Plaintiffs, however, argue that purchasing carbon credits does not actually reduce carbon emissions and cannot offset any emissions created by the purchasing company.¹⁷¹ Like many of the other cases discussed, plaintiffs contend that these misleading claims induced consumers to pay a premium to purchase their products, which they would not have done had the claims not been present.¹⁷²

163. Ord. Granting Preliminary Approval of Class Action Settlement at 2, *Smith v. Keurig Green Mountain, Inc.*, No. 18-06690 (N.D. Cal. July 8, 2022).

164. *Id.* at 3.

165. *Id.*

166. *Id.* at 3–4.

167. Class Action Complaint at 1–2, *Dorris v. Danone Waters of America*, No. 22-08717 (S.D.N.Y. Oct. 13, 2022) [hereinafter *Danone Waters of America Class Action Complaint*].

168. *Id.* at 2.

169. *Id.*

170. *Id.* at 3.

171. *Id.*

172. *Id.* at 3–4.

In early 2024, the court allowed the case to move forward after hearing Danone’s motion to dismiss.¹⁷³ Of note, the court held that “a reasonable consumer could plausibly be misled by the ‘carbon neutral’ representation on the [p]roduct’s label.”¹⁷⁴ The holding was supported by two dictionary definitions of the phrase, “both of which lack specificity and may be difficult to comprehend.”¹⁷⁵ After evaluating a number of terms involved with carbon credit transactions, the court determined that “carbon neutral” is an ambiguous and “technical word not within an average consumer’s common parlance.”¹⁷⁶ This case will be important to watch as the court continues to apply the reasonable consumer test to carbon neutral claims.

Carbon neutral and similar carbon offset claims likely do appeal to a number of consumers who seek out environmentally friendly products, particularly on products like Evian, packaged in one-time use plastic bottles that often receive negative environmental attention.¹⁷⁷ These claims also bring up the complexity of the carbon credit system and raise questions about consumer understanding.¹⁷⁸ This is an area where claims are likely to increase as carbon markets and carbon credits continue to expand, and companies like Danone attempt to utilize these systems to make products more attractive to consumers.

5. Walmart, Bumble Bee Foods—Seafood Sustainability Claims

Bumble Bee Foods and Walmart had separate lawsuits filed against them related to sustainability claims made on seafood products certified by the Marine Stewardship Council (MSC).¹⁷⁹ The plaintiffs claim that the certification means nothing considering how the seafood is actually sourced based upon the harmful operations of the MSC.¹⁸⁰ Plaintiffs contend that both companies used the certification to appeal to consumers, therefore increasing profits and sales, while

173. Op. & Ord. at 1, *Dorris v. Danone Waters of America*, No. 22-08717 (S.D.N.Y. Jan. 10, 2024).

174. *Id.* at 12.

175. *Id.*

176. *Id.*

177. See *Danone Waters of America Class Action Complaint*, *supra* note 167, at 1.

178. *Id.* at 2, 12.

179. Class Action Complaint for Damages, *Sanchez v. Walmart Inc.*, No. 23-01297 (N.D. Ill. Mar. 2, 2024) [hereinafter *Walmart Class Action Complaint*]; Class Action Complaint for Damages, *Nasser v. Bumble Bee Foods, LLC*, No. 23-01558 (C.D. Cal. Mar. 16, 2023) [hereinafter *Bumble Bee Class Action Complaint*].

180. *Walmart Class Action Complaint*, *supra* note 179, at 2; *Bumble Bee Class Action Complaint*, *supra* note 179, at 2.

knowing that the marketing claims do not align with consumer expectations.¹⁸¹ *Sanchez v. Walmart Inc.*, survived Walmart’s motion for summary judgment and will continue to move through the judicial process.¹⁸² However, *Nasser v. Bumble Bee Foods, LLC* was voluntarily dismissed by the plaintiffs.¹⁸³ Unlike the Hershey case discussed above, neither of these cases involve the third party certifier as a party, although they do both heavily rely upon the alleged falseness and deception involved in the certificate itself.¹⁸⁴

IV. FEDERAL OVERSIGHT—WHAT MORE CAN BE DONE?

Government regulators need to do more to resolve ambiguity and confusion regarding environmental marketing terms. The history of litigation and lack of regulation regarding the term “natural” on food labels is a strong example of what companies and consumers can expect to happen with sustainability marketing and the food label. As *Federal Trade Commission v. Truly Organic, Inc.* demonstrates, the more regulated a marketing term is, the easier it is for enforcement and to identify deceptive and misleading use.¹⁸⁵ Even if not as stringently regulated as organic claims, official definitions of ambiguous yet meaningful marketing terms will protect consumers in ways that the current trend of consumer litigation does not.

Consumer litigation is often settled with few results that apply outside the particular claim and without courts, let alone government regulators, making determinations regarding the alleged misleading or deceptive labeling claims.¹⁸⁶ While there is no doubt that attempting to define and regulate terms such as “natural” and “sustainable” in food labeling and marketing is a difficult task, the alternative is continued consumer confusion and the potential for failed consumer efforts to enact change. Regulatory definitions will be imperfect, but they can provide a baseline of continuity for consumers and a reference point that helps ensure consistency across different types of claims.

181. Walmart Class Action Complaint, *supra* note 179, at 2; Bumble Bee Class Action Complaint, *supra* note 179, at 2.

182. Memorandum Op. & Ord. at 1, *Sanchez v. Walmart Inc.*, No. 23-01297 (N.D. Ill. May 13, 2024).

183. Notice of Dismissal Pursuant to Fed. Rules of Civ. Proc. 41(a) or (c), *Nasser v. Bumble Bee Foods, LLC*, No. 23-01558 (C.D. Cal. Mar. 16, 2023).

184. Walmart Class Action Complaint, *supra* note 179, at 4; Bumble Bee Class Action Complaint, *supra* note 179, at 4.

185. See *Truly Organic Complaint*, *supra* note 73, at 5.

186. See *supra* note 69, 133–37 and accompanying text.

V. AVOIDING PROBLEMS—ADVISING COMPANIES

It is not just the government that needs to be more involved with environmental marketing and the potential for greenwashing food labels. A walk through any grocery store, or a review of most food manufacturer and retailer websites, demonstrates the plethora of claims across food and agricultural products. Those that advise companies on food labels and marketing can help minimize risk and avoid contributing to the confusion by taking a thoughtful approach to sustainability claims.

A. Trust, Verify, Educate, Document

As evidenced in the FTC cases noted above, companies have a duty to ensure all forms of labeling and advertising, including websites, packaging, and various forms of media, are accurate and substantiated.¹⁸⁷ This includes claims not just on proprietary products, but on third-party products as well.¹⁸⁸ Companies must ensure employees at all levels understand the need for providing all material information to consumers, and that deception can occur by omission as well as through misrepresented marketing claims.¹⁸⁹ Most importantly, claims must be supported and documented in case a challenge arises.¹⁹⁰ This means ensuring contracts require suppliers to maintain and provide access to records, verifying third-party claims, and developing a culture of transparency within the corporation where all employees understand the need to be a part of the solution. Ensuring regular education to keep up to date on company expectations and regulatory standards is also important, as is ensuring all aspects of your supply chain are on the same page regarding the veracity and substantiation of labeling and marketing claims.

B. Be Transparent

While it can be difficult to ensure common definitions of terms across all uses within a company, the more transparent a company is with how it defines or substantiates a marketing claim, the more protected it is from charges of fraud and deception. Being transparent on a website or other type of advertising may not be enough to avoid misleading labeling claims though, as it is important to remember

187. Truly Organic Complaint, *supra* note 73, at 9; *see supra* note 75 and accompanying text.

188. *See* Truly Organic Complaint, *supra* note 73, at 3.

189. *See* Truly Organic Complaint, *supra* note 73, at 9; *see also supra* note 63 and accompanying text.

190. *See* Truly Organic Complaint, *supra* note 73, at 6; *see also supra* note 54–56, 66 and accompanying text.

that in general, “[c]onsumer-protection laws do not impose on average consumers an obligation to question the labels they see and to parse them as lawyers might for ambiguities, especially in the seconds usually spent picking a low-cost product.”¹⁹¹ However, it is still best practice to ensure transparency exists throughout the supply chain of a sustainability claim, including on the label, supporting labeling, and marketing materials.

C. Words Matter—Choose Carefully

In addition to transparency, word selection is key to limiting risk. Companies should understand what the true goal of a claim is and how it is supported. Facilitate communication with the marketing and advertising team to ensure everyone is on the same page, all labeling claims are reviewed from the reasonable consumer perspective, and all reasonable interpretations are identified. Based upon a review of current consumer litigation trends in the environmental marketing space, the more definite a claim is, the more likely it may come under scrutiny.¹⁹² If making a claim of 100% anything, it is vitally important that there is significant transparency and documentation to support that absolute statement.¹⁹³ Instead of making finite claims, using words that do not make such strong promises to consumers about product attributes may help reduce the risk of litigation.¹⁹⁴ While there are trends in marketing that grab consumer attention, companies need to be sure the trend they wish to take advantage of truly fits the claim, the product, and the company overall.

D. Third-party Certifications

If using a logo or symbol of a third-party service on labeling as part of your sustainability marketing, companies should consider treating the certifier like any other member of the supply chain—trust and verify all information, standards, and resources. As noted in the recent Hershey and Bumble Bee Foods litigation, reliance on a third party may not resolve all potential liability related to deceptive or misleading claims tied to sustainability.¹⁹⁵ Moving forward, companies are going to be held to an increasingly higher standard regarding the use of certifications. The FTC’s action requiring Kohl’s and Walmart to verify marketing claims of products sold on their websites but manufactured by others is a prime

191. *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 476 (7th Cir. 2020).

192. *Hudson*, *supra* note 72.

193. *Id.*

194. *Id.*

195. *Hershey Class Action Complaint*, *supra* note 144, at 4, 18; *Bumble Bee Class Action Complaint*, *supra* note 179, at 26.

example.¹⁹⁶ The more transparent a certification program is, the stronger consumer support may be for a company's use of the symbol on its products.

E. Avoid Food Fraud

Economically motivated adulteration (EMA) of food products, also known as food fraud, occurs when “someone intentionally leaves out, takes out, or substitutes a valuable ingredient or part of a food [or] when someone adds a substance to a food to make it appear better or of greater value.”¹⁹⁷ While not something that is often associated with sustainability labeling or greenwashing issues, the potential for overlap exists as some types of EMA are also violations of misbranding regulations.¹⁹⁸ While most of the focus on EMA is on food safety concerns, other forms of EMA also have significant impacts on consumer economics and trust in the industry.¹⁹⁹

When sourcing ingredients to meet various sustainability claims, companies must be mindful that they maintain integrity as to regulated aspects of products such as quality, standards of identity, and labeling claims (i.e. 100% juice or organic).²⁰⁰ It can be difficult to maintain a consistent price or quantity, especially when suppliers may change. It is important to recognize the holistic aspects of the food label so that attempts to reduce costs associated with one marketing claim, such as carbon neutral or sustainable, do not result in sourcing ingredients that raise EMA concerns.

VI. CONCLUSION

If trends continue, we can expect that consumer litigation related to sustainability claims on food products will increase, and that action from FDA or USDA will be slow to occur, if it happens at all. There is a real risk of consumer litigation for companies seeking to target consumers willing to spend more in the environmentally friendly product space. Companies who wish to stand out will need to ensure they do so in carefully considered, transparent, and consistent ways. Consulting with legal and regulatory experts throughout the process will help companies fully understand and manage the risks associated with making claims within the sustainability field.

196. FTC Uses Penalty Offense Auth. to Seek Largest-Ever Civ. Penalty, *supra* note 101.

197. *Economically Motivated Adulteration (Food Fraud)*, U.S. FOOD AND DRUG ADMIN. (Apr. 18, 2024), <https://www.fda.gov/food/compliance-enforcement-food/economically-motivated-adulteration-food-fraud> [<https://perma.cc/Z4YW-7E27>].

198. *Id.*

199. *Id.*

200. *See id.*