

SELLING SUSTAINABLE SODAS, SHOES, SWEETS SUSTAINABLY: REASONABLE, OBJECTIVE, SUSTAINABILITY MARKETING IN A GLOBAL ENERGY AND ENVIRONMENTAL TRANSITION

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INTRODUCTION

Green advertising—the marketing of reduced reliance on fossil fuels and increased use of slimmed-down packaging materials, recyclable products, and sustainability—is on the rise.¹ Whether it is a business' practices or a specific product itself, marketing with sustainable statements, commitments, promises, or pledges, is common.² Products abound with varying claims of eco-friendly or sustainability declarations.³ With the awareness of the need

¹ See Olivier Hagenbeek & Shikha Jain, *2022 Global Sustainability Study: The Growth Potential of Environmental Change*, SIMON KUCHER (Oct. 23, 2022), <https://www.simon-kucher.com/en/insights/2022-global-sustainability-study-growth-potential-environmental-change> [<https://perma.cc/UR43-3C5V>] (finding that consumers' decisions are increasingly focused on sustainable goods and services); see also *Global Study Finds US Consumers Still Committed to Making Sustainable Purchases Amid Inflation*, BUSINESSWIRE (Oct. 19, 2022, 9:18 AM), <https://www.businesswire.com/news/home/20221019005655/en/Global-Study-Finds-US-Consumers-Still-Committed-to-Making-Sustainable-Purchases-Amid-Inflation> [<https://perma.cc/PF38-3NB6>]; BRAND FINANCE, SUSTAINABILITY PERCEPTIONS INDEX 2023 16–17 (2023), https://iaaglobal.s3.amazonaws.com/bulk_images/brand-finance-sustainability-perceptions-index-2023-preview.pdf [<https://perma.cc/938T-7L5S>]; Alexa Riccolo, *The Lack of Regulation in Preventing Greenwashing of Cosmetics in the U.S.*, 47 J. LEGIS. 133–34 (2021); *Environmentally Friendly Products: FTC's Green Guides*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides> [<https://perma.cc/V98V-LPMS>]; *Statement of Chair Lina M. Khan Regarding the Regulatory Review of the Guides for the Use of Environmental Marketing Claims, Commission File No. P954501*, FED. TRADE COMM'N (Dec. 14, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_lina_m._khan_re_green_guides_-_final.pdf [<https://perma.cc/LH7N-Q7K3>]; Dieter Holger, *Recycling and Regulation Are Hot Issues in Likely Update to U.S. Sustainable Marketing Guides*, WALL ST. J., <https://www.wsj.com/articles/recycling-and-regulation-are-hot-issues-in-likely-update-to-u-s-sustainable-marketing-guides-7f59cd8a> [<https://perma.cc/EV37-HVE9>] (June 8, 2023, 3:36 PM).

² See Hagenbeek & Jain, *supra* note 1; see also *Global Study Finds US Consumers Still Committed*, *supra* note 1; SUSTAINABILITY PERCEPTION INDEX 2023, *supra* note 1, at 1617, 28; Riccolo, *supra* note 1, at 133; *Environmentally Friendly Products: FTC's Green Guides*, *supra* note 1; *Statement of Chair Lina M. Khan Regarding the Regulatory Review*, *supra* note 1; Holger, *supra* note 1.

³ See Hagenbeek & Jain, *supra* note 1; see also *Global Study Finds US Consumers Still Committed*, *supra* note 1; SUSTAINABILITY PERCEPTION INDEX 2023, *supra* note 1, at 17; Riccolo, *supra* note 1, at 133; *Environmentally Friendly Products: FTC's Green Guides*,

to protect the Earth increasing, consumers respond and consider these environmental statements and representations when making purchases.⁴

Amid the great global energy transition—changes in business’ best environmental practices and an ever-growing understanding of climate change—criticism of the environmental actions of businesses, and in turn their accompanying environmental marketing, are increasing.⁵ One party may wish, or even demand, that a business’ environmental action be greater and that its environmental marketing communications reflect this action. Other parties may be satisfied with the pace of, and measures taken by, an enterprise in addressing its environmental footprint and its corresponding environmental marketing. Despite the potential critique, as businesses undertake and plan to commence both minor and major changes to address their environmental impact, entities share and want to share this information. Given subjective consumer perspectives, crafting honest and fair sustainability advertising is essential, but complicated.

When a business—whether it produces dresses, gasoline, bottled water, or dog food, or serves as the retailer for these or any other products—looks to its energy usage and overall environmental impact, how does the business determine if its actions are “sustainable” in the environmental context? How does it articulate those evaluations of sustainability and its future plans for sustainability? How may those who make sustainability declarations, share sustainability aspirations, plan sustainability projects, provide sustainability strategy, or avoid false advertising or consumer protection law violations in a rapid energy and environment evolution? How do consumers evaluate these same issues from their perspective? How may regulators, such as the Federal Trade Commission in its current Green Guides revisions, treat sustainability?

Whether an enterprise’s environmental marketing claims are legal, how such assertions should be evaluated, and what marketing may include in the future, are critical considerations for all stakeholders.⁶ Set against the backdrop of the Federal Trade Commission’s (“FTC”) review of the “Green

supra note 1; *Statement of Chair Lina M. Khan Regarding the Regulatory*, *supra* note 1; Holger, *supra* note 1.

⁴ See Hagenbeek & Jain, *supra* note 1; see also *Global Study Finds US Consumers Still Committed*, *supra* note 1; SUSTAINABILITY PERCEPTION INDEX 2023, *supra* note 1, at 16; Riccolo, *supra* note 1, at 133.

⁵ See Hagenbeek & Jain, *supra* note 1; see also *Global Study Finds US Consumers Still Committed*, *supra* note 1; SUSTAINABILITY PERCEPTION INDEX 2023, *supra* note 1, at 17; Riccolo, *supra* note 1, at 133; *Environmentally Friendly Products: FTC’s Green Guides*, *supra* note 1; *Statement of Chair Lina M. Khan Regarding the Regulatory Review*, *supra* note 1; Holger, *supra* note 1.

⁶ See Clara Hudson, *Coca-Cola Wins in Greenwashing Suits Show Hazy Marketing Limits*, BLOOMBERG L. (Dec. 29, 2022, 2:00 AM), <https://news.bloomberglaw.com/securities-law/coca-cola-wins-in-greenwashing-suits-show-hazy-marketing-limits> [<https://perma.cc/CV67-AF5T>]; see also Irina D. Manta, *Branded*, 69 SMU L. REV. 713, 744 (2016).

Guides,”⁷ the very statements and representations made by businesses are timely and significant to legally and ethically operating, disclosing, and marketing.

While green advertising or environmental marketing has been the subject of prior analysis, the time is *now* to set the line with respect to *sustainability* that balances consumer perception and a business’ reality.⁸ Recent cases involving consumer products (including Coca-Cola and bottled water), the use of fossil fuels, plastic production and utilization, and connected sustainability claims, provide a common thread that may be utilized by regulators, consumers, businesses, and consumer watch organizations.⁹ Reasonableness and objectivity concepts readily found throughout existing law, are the solid ground to build upon for a sustainability marketing analysis.¹⁰

Businesses are unquestionably in an era where energy and environmental practices are scrutinized, discussed, and challenged as part of their branding and marketing. Looking to aspirations versus actions when grounded in

⁷ Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77766, 77766–67 (Dec. 20, 2022) (to be codified at 16 C.F.R. pt. 260); Regulatory Review Schedule, 86 Fed. Reg. 35239 (July 2, 2021) (to be codified at 16 C.F.R. ch. 1); Brook J. Detterman et al., *Environmental Marketing Claims: Regulatory and Litigation Outlook*, NAT’L L. REV. (Aug. 12, 2021), <https://www.natlawreview.com/article/environmental-marketing-claims-regulatory-and-litigation-outlook> [<https://perma.cc/A8J3-F273>].

⁸ See Paulette Stenzel, *Connecting the Dots: Synergies Among Grassroots Tools for Authentic Sustainable Development*, 25 FORDHAM ENV’T L. REV. 393, 400 (2015) (“The GRI program has become a benchmark around the world for measuring, monitoring, and reporting corporate sustainability efforts.”); see also Becky L. Jacobs & Brad Finney, *Defining Sustainable Business—Beyond Greenwashing*, 37 VA. ENV’T L.J. 89, 127 (2019); Galit A. Sarfaty, *Regulating Through Numbers: A Case Study of Corporate Sustainability Reporting*, 53 VA. J. INT’L L. 575, 590–92 (2013); Shannon L. Moncure & Mark E. Burbach, *Social Reinforcement of Environmentally Conscious Consumer Behavior at a Grocery Store Cooperative*, 3 J. MGMT. & SUSTAINABILITY 14, 14 (2013); Martha C. Wilson, *A Critical Review of Environmental Sustainability Reporting in the Consumer Goods Industry: Greenwashing or Good Business?*, 3 J. MGMT. & SUSTAINABILITY 1, 1 (2013); Paulette L. Stenzel, *The Pursuit of Equilibrium as the Eagle Meets the Condor: Supporting Sustainable Development Through Fair Trade*, 49 AM. BUS. L.J. 557, 557–58 (2012); Kai-Michael Griesse et al., *Avoiding Greenwashing in Event Marketing: An Exploration of Concepts, Literature and Methods*, 7 J. MGMT. & SUSTAINABILITY 1, 1 (2017); Adam Sulkowski, *Blockchain, Business Supply Chains, Sustainability, and Law: The Future of Governance, Legal Frameworks, and Lawyers?*, 43 DEL. J. CORP. L. 303, 311 (2019); William T.J. de la Mare, *Locality of Harm: Insurance and Climate Change in the 21st Century*, 20 CONN. INS. L.J. 189, 189 (2013); Olivia Suraci, *The Best-Dressed Polluter – Regulation and Sustainability in the Fashion Industry*, 27 HASTINGS ENV’T L.J. 225, 232 (2021); Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863, 870 (2018).

⁹ See Complaint at 1–2, *Earth Island Inst. v. Coca-Cola Co.*, No. 2021 CA 001846 B, 2022 D.C. Super. LEXIS 59 (D.C. Super. Ct. Civ. Div. Nov. 10, 2022); see also Complaint at 1–2, *Earth Island Inst. v. BlueTriton Brands*, No. 2021 CA 003027 B, 2022 D.C. Super. LEXIS 11 (D.C. Super. Ct. Civ. Div. June 7, 2022).

¹⁰ See David Heffernan & Brian Doll, *Why DOT Should Interpret “Deceptive Practices” Using a “Reasonable Consumer” Standard*, 33 AIR & SPACE LAW. 1, 1 (2020) (arguing for the adoption of FTC’s reasonable consumer standard by the DOT).

reasonableness, a structure exists for evaluating sustainability claims that not only protects consumers but encourages businesses to continue to participate in the sustainability dialogue and global environmental efforts. Part one of this article presents and analyzes how sustainability is currently unevenly defined and used across multiple contexts, demonstrating the grand scope involved and the challenges encountered by stakeholders asserting, receiving, and evaluating messages of sustainability. Utilizing key components of current cases and their common analytical thread of reasonable objectivity, Part two proposes a framework for assessing sustainability claims and inclusion in future Green Guides, regardless of perspective and purpose. Finally, this Article concludes by looking ahead to the role that sustainability plays in addressing existing and future challenges and the importance of encouraging sustainable action and communication.

I. SUSTAINABILITY

Ascertaining whether marketing sustainability is inaccurate greenwashing or whether advertising sustainability is an accurate and honest reflection of current actions, strategic plans, and/or future goals may, for some perspectives, strain evaluation and analysis. Further, some may also contend that determining what is permissible green marketing for sustainability defies creating a workable framework for making such a determination. This leads to essential questions, what is *sustainability* objectively? How may sustainability be legally and ethically used in marketing within a world that is presently dependent upon resources such as plastic and energy from fossil fuels?

A broad look at the term “sustainability” or “sustainable,” spanning different contexts and uses, demonstrates the complicated layers of this term, which is as common and flexible in its use as the word “runner.” When a business engages in a sustainability review or action, is it looking to whether it will: exist in five years, protect human rights, decide if the particular industry will persist, evaluate if a relationship with a vendor is long-lasting, consider the duration of a connection with a community or community organization, assess its employment practices, or answer other significant strategic questions?¹¹ Alternatively, when a business engages conceptually with the term sustainability or communicates about sustainability, is it in the en-

¹¹ See Sandeep Gopalan & Katrina Hogan, *Ethical Transnational Corporate Activity at Home and Abroad: A Proposal for Reforming Continuous Disclosure Obligations in Australia and the United States*, 46 COLUM. HUM. RTS. L. REV. 1, 1 (2015); see also *Highlights of the Year in Review 2014 Energy, Water, and Climate Change*, in THE YEAR IN REVIEW 2014: ENVIRONMENTAL ENERGY & RESOURCES LAW xviii (2014); Maria L. Banda, *The Bottom-up Alternative: The Mitigation Potential of Private Climate Governance After the Paris Agreement*, 42 HARV. ENV'T L. REV. 325, 325 (2018); Jesse R. Catlin et al., *Consumer Perceptions of the Social vs. Environmental Dimensions of Sustainability*, 40 J. CONSUMER POL'Y 245, 245 (2017); BRAND FINANCE, *supra* note 1, at 5.

vironmental setting?¹² Appreciating the broad scope of this word is key, and context will provide clues for any realm to which a sustainable reference may pertain.

Additionally, when sustainability is part of environmental marketing, one might currently look to a number of resources for determining whether such statements are permissible within existing advertising and consumer protection laws.¹³ Given this vast set of definitions and applications, an objective line is needed to guide the determination of acceptable and unacceptable sustainability marketing claims.¹⁴

A. *United Nations and Sustainability*

In 1987, the United Nations Brundtland Commission defined sustainability as “meet[ing] the needs of the present without compromising the ability of future generations to meet their own needs.”¹⁵ A quick scan finds this definition used in numerous settings outside of the United Nations.¹⁶ After the Brundtland Report, the United Nations Earth Summit was held in Rio de Janeiro, Brazil in June 1992, leading to plans and actions by countries and

¹² See Scott Fulton et al., Comment, *Environmental Sustainability: Finding a Working Definition*, 47 ENV'T. L. REP. 10488, 10490 (2017) (proposing a definition of environmental sustainability as “[t]he avoidance, to the maximum practicable extent, of irreversible and irretrievable commitment of resources.”) (emphasis removed); see also David Feber et al., *Sustainability in Packaging: Inside the Minds of US Consumers*, MCKINSEY & CO. (Oct. 21, 2020), <https://www.mckinsey.com/industries/paper-forest-products-and-packaging/our-insights/sustainability-in-packaging-inside-the-minds-of-us-consumers> [<https://perma.cc/QPC7-GFP5>]; Shelie A. Miller, *Five Misperceptions Surrounding the Environmental Impacts of Single-Use Plastic*, 54 ENV'T SCI. & TECH. 14143, 14143 (2020); *The Sustainability Disconnect Between Consumers & Retail Executives*, FIRSTINSIGHT: REPS. & WHITEPAPERS (Jan. 2022), <https://www.firstinsight.com/white-papers-posts/the-sustainability-disconnect-between-consumers-and-retail-executives> [<https://perma.cc/R6HM-CFFA>]; *The State of Consumer Spending: Gen Z Influencing All Generations To Make Sustainability-First Purchasing Decisions*, FIRSTINSIGHT: REPS. & WHITEPAPERS (Nov. 2021), <https://www.firstinsight.com/white-papers-posts/gen-z-influencing-all-generations-to-make-sustainability-first-purchasing-decisions> [<https://perma.cc/WL9K-ZYDY>]; *The Sustainability Movement is 50. Why Are World Leaders Ignoring It?*, NATURE (June 1, 2022), <https://www.nature.com/articles/d41586-022-01508-2> [<https://perma.cc/H6GS-PKPX>].

¹³ Sheila A. Millar et al., *The Changing Face of Environmental Marketing Claims*, PACKAGING L. (Aug. 16, 2021), <https://www.packaginglaw.com/special-focus/changing-face-environmental-marketing-claims> [<https://perma.cc/K4UU-ASSL>]; David G. Mallen, Comment, *Private Governance of Green Claims in the Marketplace: The Role of NAD and Advertising Self-Regulation*, 44 ENV'T. L. REP. 10095, 10095–96 (2014).

¹⁴ See Jacobs & Finney, *supra* note 8, at 99.

¹⁵ UNITED NATIONS, REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE (1987), <http://www.un-documents.net/our-common-future.pdf> [<https://perma.cc/6FUX-NKLS>]; *Sustainability*, UNITED NATIONS, <https://www.un.org/en/academic-impact/sustainability> [<https://perma.cc/252G-UAMG>].

¹⁶ See, e.g., *Brundtland Report*, SCIENTIFIEDIRECT, <https://www.sciencedirect.com/topics/social-sciences/brundtland-report> [<https://perma.cc/AUS6-9F3B>].

the United Nations.¹⁷ This included adopting Agenda 21, “a comprehensive plan of action to build a global partnership for sustainable development to improve human lives and protect the environment.”¹⁸ During 2015, collaborative efforts ultimately resulted in the adoption of the 2030 Agenda for Sustainable Development.¹⁹ The 2030 Agenda includes seventeen “sustainable development goals:”

no poverty; zero hunger; good health and well-being; quality education; gender equality; clean water and sanitation; affordable and clean energy; decent work and economic growth; industry, innovation, and infrastructure; reduced inequalities; sustainable cities and communities; responsible consumption and production; climate action; life below water; life on land; peace, justice and strong institutions; [and] partnerships for the goals.²⁰

The United Nations definition of sustainability has broad applications, particularly when counting the seventeen goals.²¹ One might argue that this prominent definition alone could serve as the sole meaning of sustainability and provide a framework for evaluation of sustainability marketing. However, without context, this would still need guidance for its applicability, and would not stand on its own for legal analysis purposes.²² This is particularly true when the seventeen goals were added, moving beyond environmental objectives, which would likely muddle the scrutiny in determining the reasonableness of the message. To which of the seventeen sustainability goals, if any, was a specific sustainability marketing claim referencing? This definition alone exemplifies the challenges faced in creating environmental marketing and all that the use of the term “sustainability” may generate.

B. United States Federal Trade Commission

Important and informing to all United States’ businesses for environmental marketing claims, are the FTC’s Green Guides which *excluded* “sustainability” and “sustainable” from its most recent version.²³ Current revi-

¹⁷ *The 17 Goals*, U.N. DEP’T OF ECON. & SOC. AFFS., <https://sdgs.un.org/goals#history> [http://perma.cc/C7DJ-7E4W].

¹⁸ *Id.*

¹⁹ *Id.*; Pantea Foroudi et al., *Consumer Perceptions of Sustainable Development Goals: Conceptualization, Measurement and Contingent Effects*, 34 BRITISH J. MGMT. 1157, 1159 (2022).

²⁰ Foroudi et al., *supra* note 19; *The 17 Goals*, *supra* note 17.

²¹ See Erika George, *Shareholder Activism and Stakeholder Engagement Strategies: Promoting Environmental Justice, Human Rights, and Sustainable Development Goals*, 36 WIS. INT’L L.J. 298, 325 (2019); see also Mihaela Cristina Paul, *The 2030 Agenda. The Way to Global Sustainability*, 16 J. L. & ADMIN. SCIS. 153, 157 (2021); Shivi Chhaberiya, *Green Consumerism and Sustainable Consumption*, 19 SUPREMO AMICUS 493, 498 (2020).

²² See Jacobs & Finney, *supra* note 8, at 130; see also Wynn Heh, *Who Certifies the Certifiers?*, 16 VT. J. ENV’T L. 688, 704 (2015).

²³ Guides for the Use of Environmental Marketing Claims, 16 C.F.R. pt. 260 (2023); see also Joseph J. Swartz, *Thinking Green or Scheming Green?: How and Why the FTC*

sions will revisit this choice and the previously articulated decision to not include the term.²⁴ Broadly speaking to all advertising, under the Federal Trade Commission Act, “[a]dvertising must be truthful and non-deceptive,” “[a]dvertisers must have evidence to back up their claims,” and “[a]dvertisements cannot be unfair.”²⁵

With respect to environmental advertising, the FTC’s Guides for the Use of Environmental Claims (the Green Guides) provide guidance for how businesses may use words like “biodegradable” and “recyclable” in advertisements.²⁶ First issued in 1992 and revised in 1996, 1998, and 2012, the

Green Guide Revisions Should Address Corporate Claims of Environmental Sustainability, 18 PENN ST. ENV’T L. REV. 95, 119 (2009) (“[T]he FTC should expand the coverage of the Green Guides and require substantiation and independent certification of corporate claims of environmental sustainability.”); David Hackett et al., *Growing ESG Risks: The Rise of Litigation*, 50 ENV’T L. REP. 10849, 10853 (2020); Greg Northen, *Greenwashing the Organic Label: Abusive Green Marketing in an Increasingly Eco-Friendly Marketplace*, 7 J. FOOD L. & POL’Y 101, 117 (2011).

²⁴ *FTC Seeks Public Comment on Potential Updates to its ‘Green Guides’ for the Use of Environmental Marketing Claims*, FED. TRADE COMM’N (Dec. 14, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-public-comment-potential-updates-its-green-guides-use-environmental-marketing-claims> [<https://perma.cc/2DRS-RYNP>]; *Federal Trade Commission Extends Public Comment Period on Potential Updates to its Green Guides for the Use of Environmental Marketing Claims*, FED. TRADE COMM’N (Jan. 31, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/federal-trade-commission-extends-public-comment-period-potential-updates-its-green-guides-use> [<https://perma.cc/CHE3-UCUY>]; Kathleen Benway et al., Consumer Protection/FTC Advisory: *FTC Looks to Update Its Green Guides for Environmental Marketing Claims*, ALSTON & BIRD (Dec. 16, 2022), <https://www.alston.com/en/insights/publications/2022/12/ftc-looks-to-update-its-green> [<https://perma.cc/GVN7-X8T9>].

²⁵ *Advertising FAQ’s: A Guide for Small Business*, FED. TRADE COMM’N, <https://www.ftc.gov/business-guidance/resources/advertising-faqs-guide-small-business> [<https://perma.cc/6YKZ-SN38>]; see also 15 U.S.C. §§ 41–58, as amended; 15 U.S.C. § 1125(a) (prohibiting persons from making false or misleading statements of fact); Jennifer Thurswell Radis, Note, *The Lanham Act’s Wonderful Complement to the FDCA: POM Wonderful v. Coca-Cola Enhances Protection Against Misleading Labeling Through Integrated Regulation*, 47 LOY. U. CHI. L.J. 369, 422 (2015); Charla M. Claypool & John B. Greenberg, *Basics of False Advertising Litigation*, 60 ST. LOUIS BAR J. 4, 8 (2013); Isabel Teuton, Note *Greenwashing: In the Age of Sponsored Ads, “Organic” Mugs, and Diversity Initiatives*, 17 RUTGERS BUS. L. REV. 214, 228 (2022); Carol J. Miller & Ross D. Petty, *The FTC’s Environmental Marketing Guides: Clarify Attributes*, 72 J. MO. BAR 196, 199 (2016); *Sustainability Toolkit: Sustainability Marketing Claim Regulation and Enforcement*, COVINGTON, <https://www.cov.com/-/media/files/corporate/sustainability-toolkit/sustainability-toolkit-marketing-claims.pdf> [<https://perma.cc/2E48-A48F>]; *Is Your Green Marketing Deceptive? Look to the FTC Green Guides to Limit the Risk of an FTC Enforcement Action*, VINSON & ELKINS (Mar. 24, 2021), <https://www.velaw.com/insights/is-your-green-marketing-deceptive-look-to-the-ftc-green-guides-to-limit-the-risk-of-an-ftc-enforcement-action/> [<https://perma.cc/KW7Y-FLA4>]. See generally Carolyn Carter, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, NAT’L CONSUMER L. CTR. (March 2018), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf [<https://perma.cc/YS5N-RXZK>] (listing state consumer protection statutes).

²⁶ *Advertising FAQ’s: A Guide for Small Business*, *supra* note 25.

Green Guides provide: “1) general principles that apply to all environmental marketing claims; 2) how consumers are likely to interpret particular claims and how marketers can substantiate these claims; and 3) how marketers can qualify their claims to avoid deceiving consumers.”²⁷

The Green Guides “are administrative interpretations of law . . . [that] do not have the force and effect of law and are not independently enforceable.”²⁸ As discussed herein, the Green Guides are a significant *guidance* for all stakeholders, including businesses evaluating claims they make, consumers receiving the messages, regulators evaluating the legality of such claims, state lawmakers that incorporate the language of the Green Guides into state statutes, or judges who utilize the Green Guides in making rulings.²⁹

Foundational analysis for this article requires a direct look at the current version of the FTC’s Green Guides and its intentional exclusion of “sustainable” or “sustainability.”³⁰ While the FTC received numerous comments during the last revision of the Green Guides, it declined to include advice for the use of sustainable in this version, because it had “no single meaning” and it also “conveys non-environmental characteristics.”³¹

Parties commenting during the 2012 revision process with respect to “sustainable” made many suggestions including: proposing that the FTC not provide guidance for the term sustainable, providing guidance, prohibiting the use of sustainable, having specific “substantiation” for a sustainable claim, and/or “adopt[ing] a specific definition” of sustainable.³² This Article asserts that sustainable should be included in future Green Guides, but within the proposed objective, the reasonable analysis below echoes in part the

²⁷ *Environmentally Friendly Products: FTC’s Green Guides*, *supra* note 1.

²⁸ Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62122 (Oct. 11, 2012) (to be codified at 16 C.F.R. pt. 260), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/guides-use-environmental-marketing-claims-green-guides/greenguidesfrn.pdf [<https://perma.cc/VL27-A7J8>]; Sydney Helsel, *The Truth is Always in Style: Targeting Greenwashed Advertising in the Fashion Industry*, 21 SUSTAINABLE DEV. L. & POL’Y 15, 15 (2021); Claire Fischer, *Is Twitter the New FTC and EPA? Publicized Private Action as the Anti-Greenwashing Mechanism in Modern Society*, 33 GEO. ENV’T L. REV. 315, 319 (2021).

²⁹ Meegan Brooks & Anthony Anscombe, *Navigating FTC Guidance and Green Marketing Litigation*, BLOOMBERG L. (Oct. 2019), <https://www.steptoe.com/a/web/195909/NavigatingFTCGuidance.pdf> [<https://perma.cc/N9VT-LEKJ>].

³⁰ See *generally* Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260 (2023).

³¹ FED. TRADE COMM’N, THE GREEN GUIDES: STATEMENT OF BASIS AND PURPOSE 250 (2012), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf> [<https://perma.cc/MM3P-LSYM>]; see also Eric L. Lane, *Greenwashing 2.0*, 38 COLUM. J. ENV’T L. 279, 288 (2013).

³² THE GREEN GUIDES: STATEMENT OF BASIS AND PURPOSE, *supra* note 31, at 254, 256.

cautionary language that the FTC previously used to decline including “sustainable” within their Green Guides.³³

C. *United States Environmental Protection Agency*

The Green Guides’ future inclusion of “sustainability” would be in the context of *environmental* marketing claims. The FTC and other stakeholders may look, now and in the future, to the United States Environmental Protection Agency’s (“EPA”) use of the term. The EPA has defined “sustainable” and “sustainability” to mean to “create and maintain conditions, under which humans and nature can exist in productive harmony, that permit fulfilling the social, economic, and other requirements of present and future generations.”³⁴ In its effort to become more sustainable, the EPA relies upon what are referred to as the three pillars of sustainability, which are “environmental, economic, and social.”³⁵ As detailed by the EPA, these pillars can overlap and have multiple subparts and create a very large range for sustainability.³⁶

The EPA also states that sustainability is “based on a simple principle: [e]verything that we need for our survival and well-being depends, either directly or indirectly, on our natural environment. To pursue sustainability is to create and maintain the conditions under which humans and nature can exist in productive harmony to support present and future generations.”³⁷

A standout definition for use in truthful advertising analysis does not emerge from the EPA’s definition and utilization of sustainability *and* the three pillars.³⁸ As found with the UN’s definition and seventeen goals for

³³ See *id.* at 250; see also Brooks & Anscombe, *supra* note 29, at 2; Detterman et al., *supra* note 7.

³⁴ Exec. Order No. 13514 § 19(l), 74 Fed. Reg. 52117, 52126 (Oct. 5, 2009); see also *Report: A Framework for Sustainability Indicators at EPA*, ENV’T PROT. AGENCY, <https://www.epa.gov/sustainability/report-framework-sustainability-indicators-epa> [https://perma.cc/W8VF-END8] (Feb. 27, 2023) (“‘A Framework for Sustainability Indicators at EPA’ provides useful methods and guidance to support the application of sustainability indicators in EPA decision making.”).

³⁵ JOSEPH FIKSEL ET AL., A FRAMEWORK FOR SUSTAINABILITY INDICATORS AT EPA, ENV’T PROT. AGENCY 5 (Tarsha Eason ed., 2012), <https://www.epa.gov/sites/default/files/2014-10/documents/framework-for-sustainability-indicators-at-epa.pdf> [https://perma.cc/HKG3-4KVE].

³⁶ *Id.* at 7.

³⁷ *Learn About Sustainability*, ENV’T PROT. AGENCY, <https://www.epa.gov/sustainability/learn-about-sustainability#what> [https://perma.cc/B4PJ-AT68] (Nov. 14, 2022).

³⁸ See *Recommendations of Specifications, Standards, and Ecolabels for Federal Purchasing*, ENV’T PROT. AGENCY, <https://www.epa.gov/greenerproducts/recommendations-specifications-standards-and-ecolabels-federal-purchasing> [https://perma.cc/8E27-ZH6R] (Aug. 1, 2023); see also *Sustainable Marketplace: Greener Products and Services*, ENV’T PROT. AGENCY, <https://www.epa.gov/greenerproducts> [https://perma.cc/7ZLG-ZAYB]

sustainability, the EPA adds layers and breadth to sustainability.³⁹ Viewing “sustainability” from a business or consumer’s perspective with the UN and EPA’s definition of “sustainability” informing the sustainability analysis, subjective perspectives would certainly arise, and therefore an objective approach is necessary.

D. United States Securities and Exchange Commission

The United States Securities and Exchange Commission (“SEC”) utilizes sustainability in the field of investor protection; the agency is undertaking significant work in this space, and much scholarship has focused on those specific issues.⁴⁰ The SEC is particularly attentive to the concepts of greenwashing from an investor’s perspective and ESG investing as a whole.⁴¹

With respect to ESG investing details and its overlap with sustainability, the SEC provides that “‘ESG’ stands for environmental, social, and governance.”⁴² “ESG investing is a way of investing in companies based on their commitment to one or more ESG factors . . . often also called *sustainable* investing, socially responsible investing, and impact investing.”⁴³

The SEC defines “greenwashing” as:

the act of exaggerating the extent to which products or services take into account environmental and *sustainability* factors. Funds and advisers that engage in greenwashing may exaggerate or overstate the environmental and *sustainability* practices or factors considered in their investment products or services, while labeling and marketing themselves in a manner that makes it

(Sept. 5, 2023); Jennie Romer, *Green Guides Review*, Matter No. P954501, ENV’T PROT. AGENCY (Apr. 20, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-1366> [<https://perma.cc/B82W-79LS>] (proposing a “lifecycle assessment” and inclusion of “sustainable” in future Green Guides); Charles Franklin, *Chasing Hazards: Toxicity, Sustainability, and the Hazard Paradox*, 29 NAT. RES. & ENV’T 39, 42 (2015).

³⁹ See *Learn About Sustainability*, *supra* note 37; see also *The 17 Goals*, *supra* note 17.

⁴⁰ Comm’r Elad L. Roisman, *Can the SEC Make ESG Rules that are Sustainable?*, U.S. SEC. & EXCH. COMM’N (June 22, 2021), <https://www.sec.gov/news/speech/can-the-sec-make-esg-rules-that-are-sustainable> [<https://perma.cc/MX77-A8WZ>]; see also Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L. J. 923, 923 (2019); Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 AM. BUS. L.J. 645, 645 (2019); Laura Corb et al., *Understanding the SEC’s Proposed Climate Risk Disclosure Rule*, MCKINSEY & CO. (June 3, 2022), <https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/understanding-the-secs-proposed-climate-risk-disclosure-rule> [<https://perma.cc/Y4EP-PCB5>].

⁴¹ See *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); see also *Environmental, Social and Governance (ESG) Investing*, INVESTOR.GOV U.S. SEC. & EXCH. COMM’N, <https://www.investor.gov/introduction-investing/investing-basics/glossary/environmental-social-and-governance-esg-investing> [<https://perma.cc/JBA9-JN2W>].

⁴² *Environmental, Social and Governance (ESG) Investing*, *supra* note 41.

⁴³ *Id.* (emphasis added).

difficult for investors to distinguish them from funds and advisers that are truly using environmental and *sustainability* strategies.⁴⁴

This investor approach is central to the SEC's work, but in providing information to better inform investors, it also expands its explanation of greenwashing by adding that: "Other entities or industry professionals may also engage in greenwashing. For example, companies may exaggerate or overstate the environmental and *sustainability* aspects of their products or services or make unsupported claims about taking environmental or *sustainability* actions."⁴⁵

As SEC Chairman Gensler explained, the SEC has "seen an increasing number of funds market themselves as 'green,' 'sustainable,' 'low-carbon,' and so on."⁴⁶ Concerns about accurate sustainability measurements, potential greenwashing, and questionable ESG reporting have given rise to significant time, energy, and action on the part of the SEC, including the engagement of stakeholders in proposing rules for climate risk disclosures.⁴⁷ Accordingly, the SEC is finalizing climate risk disclosure rules.⁴⁸

⁴⁴ *Greenwashing*, INVESTOR.GOV U.S. SEC. & EXCH. COMM'N, <https://www.investor.gov/introduction-investing/investing-basics/glossary/greenwashing> [<https://perma.cc/H4QE-3KYV>] (emphasis added).

⁴⁵ *Id.* (emphasis added); see also Amanda Shanor & Sarah E. Light, *Greenwashing and the First Amendment*, 122 COLUM. L. REV. 2033, 2072 (2022).

⁴⁶ Chair Gary Gensler, *Statement on ESG Disclosures Proposal*, U.S. SEC. & EXCH. COMM'N (May 25, 2022), <https://www.sec.gov/news/statement/gensler-statement-esg-disclosures-proposal-052522> [<https://perma.cc/3JDP-EPZY>]; see also Dan Esty & Todd Cort, *Toward Enhanced Corporate Sustainability Disclosure: Making ESG Reporting Serve Investor Needs*, 16 VA. L. & BUS. REV. 423, 458–59 (2022) (outlining a reform agenda for ESG disclosures building in part upon the concepts of reasonable shareholder and reasonable investor); Tim Quinson, *Most Investors Still Fail to Back Climate Resolutions*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2021-03-09/most-investors-still-fail-to-back-climate-resolutions?leadSource=uverify%20wall> [<https://perma.cc/X7TQ-KVWT>] (Mar. 9, 2021, 10:23 AM).

⁴⁷ *The Enhancement and Standardization of Climate-Related Disclosures for Investors, Proposed Rule, 17 CFR 210, 229, 232, 239, and 249*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/rules/proposed/2022/33-11042.pdf> [<https://perma.cc/YW3R-3KUY>]; *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, U.S. SEC. & EXCH. COMM'N (Mar. 21, 2022), <https://www.sec.gov/news/press-release/2022-46> [<https://perma.cc/8UWW-UBHW>]; U.S. SEC. & EXCH. COMM'N, FACT SHEET: ENHANCEMENT AND STANDARDIZATION OF CLIMATE-RELATED DISCLOSURES 3, <https://www.sec.gov/files/33-11042-fact-sheet.pdf> [<https://perma.cc/MKN9-DYG7>].

⁴⁸ Zach Warren, *Upcoming SEC Climate Disclosure Rules Bring Urgency to ESG Data Strategy Planning*, REUTERS (Jan. 30, 2023, 2:17 PM), <https://www.reuters.com/legal/legal-industry/upcoming-sec-climate-disclosure-rules-bring-urgency-esg-data-strategy-planning-2023-01-30/> [<https://perma.cc/SXF9-C55T>]; Joan Michelson, *Pushback on the SEC's Proposed Climate Risk Disclosure Rules is a Good Sign*, FORBES (Feb. 8, 2023, 7:25 AM), <https://www.forbes.com/sites/joanmichelson2/2023/02/08/pushback-on-the-secs-proposed-climate-risk-disclosure-rules-is-a-good-sign/> [<https://perma.cc/GA6T-W6U9>]; *The SEC's Mandatory Climate Risk Disclosure Plan*, BRIGHTTEST, <https://www.brighttest.io/sec-climate-disclosure-rules> [<https://perma.cc/P7KJ-PYGL>].

When looking at the SEC's climate risk disclosure rulemaking that has been underway since early 2022, and the FTC's Green Guides reevaluation that commenced in late 2022, preventing deceptive environmental claims is a common underlying policy of both agencies, even though the focus differs when considering the perspectives of consumers and investors.⁴⁹ The SEC's process and approach additionally demonstrate the challenges encountered by stakeholders asserting, receiving, and evaluating messages of sustainability.

1. *Scopes 1, 2, and 3*

A key component of the SEC's proposed climate risk disclosure rules are the required disclosures with respect to Scopes 1, 2, and 3 emissions.⁵⁰ Incorporated in the proposed analytical framework below in Part II, scopes of emissions and a broad understanding of all that they entail, provides support for a reasonable, objective approach (distinguishable from the SEC's rules) to evaluating sustainability claims in the context of consumer marketing messages and future versions of the FTC's Green Guides.

Under the new SEC rules, listed companies' disclosures would include providing information "about its direct greenhouse gas (GHG) emissions (Scope 1) and indirect emissions from purchased electricity or other forms of energy (Scope 2)," and emissions "from upstream and downstream activities in its value chain (Scope 3)."⁵¹

Specifically, the proposed rules would require a registrant to disclose information about:

[t]he registrant's direct GHG emissions (Scope 1) and indirect GHG emissions from purchased electricity and other forms of energy (Scope 2), separately disclosed, expressed both by disaggregated constituent greenhouse gases and in the aggregate, and in absolute terms, not including offsets, and in terms of intensity (per unit of economic value or production).⁵²

⁴⁹ See Statement of Chair Lina M. Khan Regarding the Regulatory Review, *supra* note 1.

⁵⁰ *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, *supra* note 47, at 402; *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, *supra* note 47; Tara Bernoville, *What are Scopes 1, 2 and 3 of Carbon Emissions?*, PLANA (June 12, 2022), <https://plana.earth/academy/what-are-scope-1-2-3-emissions> [<https://perma.cc/PN55-Q9SA>]; *Going Back to Basics with Energy ESG Reporting*, HART ENERGY (Sept. 21, 2022, 9:00 AM), <https://www.hartenergy.com/exclusives/going-back-basics-energy-esg-reporting-202157> [<https://perma.cc/PN55-Q9SA>].

⁵¹ Warren, *supra* note 48 (quoting *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, *supra* note 47); *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, *supra* note 47.

⁵² *Fact Sheet, Enhancement and Standardization of Climate-Related Disclosures*, *supra* note 47; *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, *supra* note 47; *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, *supra* note 47.

Indirect emissions from upstream and downstream activities in a registrant's value chain (Scope 3), if material, or if the registrant has set a GHG emissions target or goal that includes Scope 3 emissions, in absolute terms, not including offsets, and in terms of intensity.⁵³

The reality is that there is an overlap in investor messaging and consumer messaging.⁵⁴ The SEC's climate disclosure rules with enhanced metrics are swiftly forthcoming, and for the businesses affected by investor messaging rules, it will add to the existing layers of complication in evaluating sustainability claims in consumer advertising.⁵⁵ Accordingly, for the reasonable consumer, a distinct framework to evaluate sustainability from the *consumer's* perspective is needed.

Businesses falling under the SEC's authority will have to implement systems to ensure timely compliance with the new rules. It may be difficult for the FTC to not incorporate terminology and definitions from the SEC in the interest of not creating additional difficulties in the field. However, with respect to specifically evaluating sustainability as a term for the FTC, states, or consumers in evaluating environmental marketing, an approach utilizing reasonableness, a concept that also overlays with investing, would provide structure and flexibility for context and fairness for all stakeholders.

E. United States Department of Energy

Given the global energy shift underway, the use of sustainable or sustainability by the U.S. Department of Energy ("DOE") also serves as an indicator of the term's express and implied meaning.⁵⁶ The DOE deploys the terms "sustainable" and "sustainability" in conjunction with particular forms of energy fueling transportation, power generation, and federal agencies'

⁵³ FACT SHEET, ENHANCEMENT AND STANDARDIZATION OF CLIMATE-RELATED DISCLOSURES, *supra* note 47, at 2; *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, *supra* note 47; *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, *supra* note 47; Commissioner Hester M. Peirce, *It's Not Just Scope 3: Remarks at the American Enterprise Institute*, U.S. SEC. & EXCH. COMM'N (Dec. 7, 2022), <https://www.sec.gov/news/speech/peirce-remarks-american-enterprise-institute-120722> [<https://perma.cc/34PJ-LPWG>].

⁵⁴ See Sylvia Bartell, *Increased Scrutiny on Greenwashing*, HUSCH BLACKWELL, https://hbfiles.blob.core.windows.net/webfiles/ESG_Increased%20Scrutiny%20on%20Greenwashing.pdf [<https://perma.cc/CQU9-QZNV>]; Tony Subketkaew, *When It Comes to Climate Disclosures, SEC and FTC Speak Different Languages*, CORP. COMPLIANCE INSIGHTS (May 11, 2022), <https://www.corporatecomplianceinsights.com/climate-change-sec-ftc-speak-different-languages/> [<https://perma.cc/XXC8-K7EZ>].

⁵⁵ See Sarah Murray, *Measuring What Matters: The Scramble to Set Standards for Sustainable Business*, FIN. TIMES (May 13, 2021), <https://www.ft.com/content/92915630-c110-4364-86ee-0f6f018cba90> [<https://perma.cc/P3BU-Y976>].

⁵⁶ See *Earth Day, Every Day: Sustainable Practices for Work and Home*, U.S. DEP'T OF ENERGY: SUSTAINABILITY PERFORMANCE OFF., <https://www.energy.gov/management/osp/earth-day-every-day-sustainable-practices-work-and-home> [<https://perma.cc/47PP-JFUH>].

collective use of energy.⁵⁷ These specific applications of sustainable and sustainability to energy are essential elements in the analysis in Part II below and in connection to the overlap of SEC scopes disclosures. The evaluation of sustainable enterprises or sustainability practices from a consumer perspective likely include the kind of energy or energy source that was used to extract the resources for a product, to produce a product, to provide a service, to transport a product, to fuel a retail location for a product, to energize the product, and/or was involved in the end of life for the product.⁵⁸ In a world dependent upon fossil fuels for the foreseeable future,⁵⁹ this element alone makes sustainable/sustainability marketing claims complicated.

Turning to specific examples, the DOE's Office of Energy Efficiency & Renewable Energy Sustainable Transportation states that *sustainable* trans-

⁵⁷ See *Environmental Sustainability*, U.S. DEP'T OF ENERGY: OFF. OF LEGACY MGMT., <https://www.energy.gov/lm/listings/environmental-sustainability> [<https://perma.cc/6QPE-5YUZ>]; see also *Office of Resource Sustainability*, U.S. DEP'T OF ENERGY: OFF. FOSSIL ENERGY & CARBON MGMT., <https://www.energy.gov/fecm/office-resource-sustainability> [<https://perma.cc/H9SN-3J3B>]; *Sustainable Transportation and Fuels*, U.S. DEP'T OF ENERGY: OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY, <https://www.energy.gov/eere/sustainable-transportation-and-fuels> [<https://perma.cc/BZ3X-6HYQ>]; *Identify Institutional Change Tools for Sustainability*, U.S. DEP'T OF ENERGY: FED. ENERGY MGMT. PROGRAM, <https://www.energy.gov/femp/identify-institutional-change-tools-sustainability> [<https://perma.cc/7YDL-R64W>].

⁵⁸ See, e.g., *Environment*, LEGO, <https://www.lego.com/en-ch/sustainability/environment?locale=en-ch> [<https://perma.cc/MUV4-8CCB>]; Kanika Sanghi et al., *Consumers Are the Key to Taking Green Mainstream*, BOS. CONSULTING GRP. (Sept. 13, 2022), <https://www.bcg.com/publications/2022/consumers-are-the-key-to-taking-sustainable-products-mainstream> [<https://perma.cc/7D8N-AM27>].

⁵⁹ *Remarks as Prepared for Delivery by Secretary Jennifer Granholm At CERAWeek 2023*, U.S. DEP'T OF ENERGY (Mar. 8, 2023), <https://www.energy.gov/articles/remarks-prepared-delivery-secretary-jennifer-granholm-ceraweek-2023> [<https://perma.cc/X5U9-7LBQ>] ("We know that oil and gas will remain part of our energy mix for years to come."); *World Energy Outlook 2022 Shows the Global Energy Crisis Can be a Historic Turning Point Towards a Cleaner and More Secure Future*, INT'L ENERGY AGENCY (Oct. 27, 2022), <https://www.iea.org/news/world-energy-outlook-2022-shows-the-global-energy-crisis-can-be-a-historic-turning-point-towards-a-cleaner-and-more-secure-future> [<https://perma.cc/H4MG-GB5F>] ("The share of fossil fuels in the global energy mix in the Stated Policies Scenario falls from around 80% to just above 60% by 2050."); *U.S. Energy Facts Explained*, U.S. ENERGY INFO. ADMIN, <https://www.eia.gov/energyexplained/us-energy-facts/> [<https://perma.cc/PF2P-2YW6>] ("Fossil fuels—petroleum, natural gas, and coal—accounted for about 81% of total U.S. primary energy production in 2022."); *Annual Energy Outlook 2022*, U.S. ENERGY INFO. ADMIN. (Mar. 3, 2022), <https://www.eia.gov/outlooks/aeo/> [<https://perma.cc/3EGL-WQLS>] ("Petroleum and natural gas remain the most-consumed sources of energy in the United States through 2050, but renewable energy is the fastest growing."); see also Nathaniel Bullard, *Big Oil Splits On Oil's Future*, BLOOMBERG (Sept. 30, 2021, 3:48 AM), <https://www.bloomberg.com/news/articles/2021-09-30/big-oil-splits-on-oil-s-future#xj4y7vzkg> [<https://perma.cc/CH6B-3J4X>]; Kate Mackenzie, *How the Finance World Started Turning Against Fossil Fuels*, BLOOMBERG (Oct. 1, 2021, 3:00 AM), <https://www.bloomberg.com/news/articles/2021-10-01/how-the-finance-world-started-turning-against-fossil-fuels?leadSource=uverify%20wall> [<https://perma.cc/HRT8-GGZ7>].

portation “refers to low- and zero-emission, energy-efficient, affordable modes of transport, including electric and alternative-fuel vehicles, as well as domestic fuels.”⁶⁰ Within the DOE’s discussion of clean energy, the term is used to discuss how “the Energy Department is working to *sustainably* transform the nation’s abundant renewable resources into biomass energy,” and that “[n]uclear power, the use of *sustained* nuclear fission to generate heat and electricity, provides around 6 percent of the world’s energy.”⁶¹

While the DOE does not, at this time, directly define sustainable or sustainability, its use of the term contributes to the complexities of this term and analyzing its use in consumer advertising, given the global energy transition.⁶² Guidance for objective, reasonable sustainability that allows for a broad enough scope to encompass the energy transition and shift away from fossil fuels is necessary.

F. States and Sustainability

The prior analysis of the United Nations’ and the United States government agencies’ use of “sustainable” and “sustainability” provides insight into the importance, varied use, and differing applications of these terms.⁶³ Similarly, state laws also have state-level regulations for environmental marketing claims.⁶⁴ For example, the District of Columbia and all fifty states have

⁶⁰ *Sustainable Transportation and Fuels*, *supra* note 57.

⁶¹ *Clean Energy*, U.S. DEP’T OF ENERGY, <https://www.energy.gov/clean-energy> [<https://perma.cc/B79D-BGS2>] (emphasis added); *see also Federal Leadership in Sustainability and Resilience by DOE*, U.S. DEP’T OF ENERGY: SUSTAINABILITY PERFORMANCE OFF., <https://www.energy.gov/management/spd/federal-leadership-sustainability-and-resilience-doe> [<https://perma.cc/8S93-69VM>]; *Bioenergy*, U.S. DEP’T OF ENERGY: BIOENERGY TECHS. OFF., <https://www.energy.gov/eere/bioenergy/bioenergy> [<https://perma.cc/GB2F-D59R>]; *Nuclear*, U.S. DEP’T OF ENERGY, <https://www.energy.gov/nuclear> [<https://perma.cc/7XUH-UAGZ>]; *Department of Energy Agency Progress*, OFF. OF THE FED. CHIEF SUSTAINABILITY OFFICER COUNCIL ON ENV’T QUALITY, <https://www.sustainability.gov/doe.html> [<https://perma.cc/8VBW-2E3B>]; *Advanced and Sustainable Energy*, U.S. DEP’T OF ENERGY: OFF. OF SCIENCE, <https://www.energy.gov/science/advanced-and-sustainable-energy> [<https://perma.cc/3B3K-7XL8>]; *Minerals Sustainability*, U.S. DEP’T OF ENERGY: OFF. OF FOSSIL ENERGY & CARBON MGMT., <https://www.energy.gov/fecm/minerals-sustainability>. [<https://perma.cc/TA8S-3FS3>].

⁶² *See* Paul A. Griffin & Amy Myers Jaffe, *Are Fossil Fuel Firms Informing Investors Well Enough About the Risks of Climate Change?*, 36 J. ENERGY & NAT. RES. L. 381, 391, 405 (2018); *see also* Shelley Welton & Joel Eisen, *Clean Energy Justice: Charting an Emerging Agenda*, 43 HARV. ENV’T L. REV. 307, 333 n.114, 368 (2019); Matthew Rimmer, *Divest New York: The City of New York, C40, Fossil Fuel Divestment, and Climate Litigation*, 14 NEWCASTLE L. REV. 51, 60, 69 (2019).

⁶³ *See supra* Sections I.A–E.

⁶⁴ Brooks & Anscombe, *supra* note 29, at 3; Carter, *supra* note 25, at 5–8 (listing state consumer protection statute resources); Claypool & Greenberg, *supra* note 25, at 4; Jeffrey A. Rosenfeld et al., *Food & Beverage / Environment, Land Use & Natural Resources Advisory: Making Environmental Marketing Claims: A Balancing Act*, ALSTON & BIRD (Apr. 11, 2022), <https://www.alston.com/en/insights/publications/2022/04/making-enviro>

laws broadly prohibiting unfair or deceptive conduct and similar consumer protection laws that reach environmental marketing claims.⁶⁵ Certain states have passed laws to address marketing with terms such as biodegradable, compostable, and recyclable.⁶⁶ As discussed below, states have also incorporated the FTC's Green Guides as standards for evaluating environmental marketing claims.⁶⁷

Clearly, knowing the law is necessary for business leaders.⁶⁸ Certainty with respect to sustainability claims and their legality is needed for consumers, regulators, marketers, and businesses alike. An objective, reasonable framework can provide the fair analysis needed when considering the state and federal laws for accurate advertising.

G. Sustainability Communications Sampling—Toys, Soda, Shoes, Sweets, Cars, and Energy

The previous Sections have provided examples of the multiple strands in the complex web of sustainable/sustainability when studying the policy and regulatory outlook of the term as found globally, nationally, and at state-levels. Before turning to the proposed analysis, a sampling of sustainable language in messaging is needed.

First, Lego demonstrates the challenges found in a company embracing sustainability and the practical considerations that all stakeholders must study when evaluating these and similar sustainability messages. Legos are made from plastic,⁶⁹ plastic is made in part from oil,⁷⁰ and Legos have existed for decades.⁷¹ How does Lego successfully embrace sustainability, and communicate it to its stakeholders, given where it is starting from? The direct

mental-marketing-claims [<https://perma.cc/7WQR-6QXJ>].

⁶⁵ Brooks & Anscombe, *supra* note 29, at 3; Carter, *supra* note 25, at 19–20; Claypool & Greenberg, *supra* note 25, at 6, 8; Rosenfeld et al., *supra* note 64.

⁶⁶ Millar et al., *supra* note 13; Sarah E. Merkle, *Tips for Navigating the “Greenwashing” Landscape*, 22 BUS. TORTS & UNFAIR COMPETITION 7, 9 (2015).

⁶⁷ See Millar et al., *supra* note 13; Merkle, *supra* note 66, at 9, 11.

⁶⁸ See Caiti Zeytoonian et al., *Green Marketing Standards—Overhaul on the Horizon*, REUTERS (Feb. 7, 2023, 7:10 AM), <https://www.reuters.com/legal/legalindustry/green-marketing-standards-overhaul-horizon-2023-02-07/> [<https://perma.cc/GS2Z-S2ES>].

⁶⁹ *Materials in LEGO® Elements*, LEGO: SUSTAINABILITY, <https://www.lego.com/ms-my/sustainability/product-safety/materials/> [<https://perma.cc/Y2RL-P2YH>].

⁷⁰ *How Much Oil is Used to Make Plastic?*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.php?id=34&t=6> [<https://perma.cc/K37C-PZP8>] (“Although crude oil is a source of raw material (feedstock) for making plastics, it is not the major source of feedstock for plastics production in the United States. Plastics are produced from natural gas, feedstocks derived from natural gas processing, and feedstocks derived from crude oil refining. The U.S. Energy Information Administration (EIA) is unable to determine the specific amounts or origin of the feedstocks that are actually used to manufacture plastics in the United States.”)

⁷¹ *Sustainable Materials*, LEGO: SUSTAINABILITY, <https://www.lego.com/en-us/sustainability/environment/sustainable-materials/> [<https://perma.cc/BER7-9HY4>].

language utilized by Lego demonstrates the challenges with its “bold ambition” that just this one company has in seeking to address sustainability, given these fundamental realities.⁷²

Our ambition is to make LEGO® bricks from more sustainable sources without compromising on quality or safety. This is a bold ambition as we need to develop entirely new materials that are safe and strong enough to be passed down through generations. A LEGO brick of the future needs to fit seamlessly with a brick made over 60 years ago.

For the LEGO Group, a sustainable material must be responsibly produced, using renewable or recycled resources, generate little or no waste, use more sustainable chemistry – while meeting our high standards for safety, quality and durability.

We are joining forces with suppliers, research institutions and other industries to develop these new materials.⁷³

For Lego to achieve sustainability as presented in this message to stakeholders, it basically requires a new product that functions identically to the prior successful product in form, quality, and safety. This is no small feat as Lego unambiguously identified. In fact, Lego recently announced that it will no longer pursue this new brick “after finding that its new material led to higher carbon emissions,” but will focus on “lower emissions and potentially circular materials.”⁷⁴

Turning to chocolate and candy, Mars describes sustainability as:

We are a global business of people and brands with a clear purpose. We believe the world we want tomorrow starts with how we do business today. It is the vision at the heart of our Sustainable in a Generation Plan - one where the planet is healthy, people and pets are thriving, and society is inclusive.

With the increasing impacts of climate change, the pandemic and social injustice, we are as committed as ever to the critical actions needed to tackle the environmental and societal threats we face through science-based actions and in support of the UN’s Sustainable Development Goals. We are transforming the way we work – from how we source raw materials like palm oil and cocoa, to how we fish the oceans for our pet food ingredients – to ensure every part of our operations and extended supply chains help people and the planet thrive.

At the same time, we recognize that fixing these issues is a generational challenge, which is why we are building lasting partnerships with NGOs, gov-

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Richard Milne, *Lego Ditches Oil-Free Brick in Sustainability Setback*, FIN. TIMES (Sept. 25, 2023), <https://www.ft.com/content/6cad1883-f87a-471d-9688-c1a3c5a0b7dc> [<https://perma.cc/Y265-QL5W>].

ernments and industry, to help transform the systems that have made issues like climate change or limited incomes for smallholder farmers so pervasive and intractable.

This is a critical moment and we are working to ensure that Mars is a positive force in the world for years to come.⁷⁵

Considering a global soda brand, PepsiCo “aim[s] to make each stage of [its] complex value chain more circular and inclusive to help address global challenges” by “taking bold action designed to reduce [its] climate-related impacts, replenish watersheds and minimize water use, innovate more sustainable packaging and recapture packaging materials and help improve people’s lives throughout [its] value chain.”⁷⁶

Similarly, Adidas includes in its communications, “Innovation is our solution.”⁷⁷ Adidas states that “[b]y 2024, we’ll replace virgin polyester with recycled polyester, wherever possible, [and] [b]y 2025, 9 out of 10 of our articles will contain a sustainable material.”⁷⁸ Additionally, Adidas shares on its website a message about rethinking its materials: “We are rethinking the standard materials we use and expanding our portfolio to include recycled, and natural materials as well as exploring new more sustainable material innovations.”⁷⁹

Within automobile manufacturing, Tesla plays a prominent and interesting role in the electric vehicle market:

Tesla’s purpose is to accelerate the world’s transition to sustainable energy. We strive to be the best on every metric relevant to our mission to accelerate the world’s transition to sustainable energy. To maximize our impact, we plan to continue increasing our production volumes and the accessibility of our products. In more concrete terms, this means that by 2030 we are aiming to sell 20 million electric vehicles per year (compared to 0.94 million in 2021)

⁷⁵ *Mars Sustainability Plan*, MARS, <https://www.mars.com/sustainability-plan> [<https://perma.cc/474W-34MB>]; see also Rachel Goldstein, *Guides for the Use of Environmental Marketing Claims* [Docket FTC-2022-0077-0001], MARS, INC. (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-1272> [<https://perma.cc/6JCF-M2NX>] (“Mars agrees that unqualified and vague ‘sustainable’ claims should not be made, as these terms are broad and can be confusing to the consumer.”) (posted by the Federal Trade Commission on May 9, 2023).

⁷⁶ *ESG Summary*, PEPSICO, <https://www.pepsico.com/our-impact/sustainability/2021-esg-summary> [<https://perma.cc/X3GU-HUPQ>]; see also LeRoy Paddock & Natasha Rao, *Green Supply Chain Management: A Perspective on Best Practices in GSCM Design*, 71 ARK. L. REV. 487, 511 (2018) (providing insight into sustainability reporting of companies).

⁷⁷ *Our Mission*, ADIDAS, <https://www.adidas.com/us/sustainability/our-mission> [<https://perma.cc/6583-Z4L9>].

⁷⁸ *Sustainability*, ADIDAS, <https://www.adidas.ca/en/sustainability> [<https://perma.cc/2HNK-7SFP>].

⁷⁹ *Id.*; see also Mark K. Brewer, *Slow Fashion in a Fast Fashion World: Promoting Sustainability and Responsibility*, 8 LAWS 1, 1–2 (2019) (analyzing sustainability within the fashion industry).

and deploy 1,500 GWh of energy storage per year (compared to 4 GWh in 2021).⁸⁰

Global energy company BP articulates that “[s]ustainability at bp is about creating value by connecting the business opportunities of the energy transition with our aims,” which include “improv[ing] people’s lives,” “car[ing] for our planet,” and “get[ting] to net zero.”⁸¹

This sampling reflects sustainability phrasing and language found in different communications and different industries. The excerpts included are only a portion of the environmental messaging from each of these companies. As discussed below, how should similar sustainable messages be evaluated from a consumer’s perspective? How should these and similar assertions be evaluated?

H. Succinct Sustainability

The review of just some of the many contexts in which sustainability arises, such as how it is defined and utilized, makes clear that attempting to place sustainable and sustainability presently in a small replicable box with the same direction, purpose, policy, set of metrics, and requisite evidentiary support for all industries, would be complex, layered, and for some, may seem impossible. The reasonable, objective framework analysis provides the flexibility needed to allow for businesses to utilize sustainable and sustainability in their marketing claims to ensure reasonable consumers are informed, while recognizing the fluidity of the global environmental, energy, and resource changes underway.⁸²

In Part II below, this Article will examine specific contemporary cases involving Coca-Cola and BlueTriton and propose an evaluation for environmental marketing that involves sustainability. Part II includes an argument that future Green Guides should include the term “sustainable,” but only if it meets a reasonable analysis and echoes the cautionary language that was articulated in the FTC over a decade ago.

⁸⁰ *Impact Report 2021*, TESLA, https://www.tesla.com/ns_videos/2021-tesla-impact-report.pdf [<https://perma.cc/2GNC-PPCZ>].

⁸¹ *BP Sustainability Report 2022*, BP, <https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/sustainability/group-reports/bp-sustainability-report-2022.pdf> [<https://perma.cc/RW9H-YCXQ>].

⁸² See Jacobs & Finney, *supra* note 8, at 106 (“Definitional clarity could assist consumers and companies align their expectations for sustainable products and services and provide a more transparent risk/reward profile for the business community.”).

II. SUSTAINABLE FRAMEWORK

Reasonableness is a concept found throughout the law, including the “reasonable consumer” and the “reasonable investor.”⁸³ Reasonableness is key to creating a framework for evaluation as courts must decide new environmental claims cases, legislatures evaluate environmental claims laws, and the FTC considers sustainability for future Green Guides inclusion. It is “reasonableness” that must inform evaluations of truth-in-advertising concerns from every stakeholders’ perspective.⁸⁴ As demonstrated herein, the use of “sustainability” and “sustainable” is prevalent throughout the world, and businesses use those terms in their external communications.⁸⁵ Utilizing key components of cases and their common analytical thread of reasonableness, a framework for evaluating sustainability claims, regardless of perspective and purpose, is proposed herein.

A. *Contemporary Sustainable Lawsuits*

In 2021, Earth Island Institute (“EII”), a non-profit organization, brought a lawsuit against BlueTriton Brands, formerly Nestle Waters North America, and a separate lawsuit against The Coca-Cola Company.⁸⁶ EII filed the lawsuits with allegations against each company “concerning its false and deceptive marketing representing itself as a sustainable and environmentally friendly company.”⁸⁷

1. *Coca-Cola*

EII’s false marketing allegations encompass Coca-Cola’s use of plastic, the use of fossil fuels in generating plastic, low recycling rates, and the failure to take responsibility for these actions.⁸⁸ Incorporating several examples from Coca-Cola, EII’s allegations include multiple uses of the term sustainable, including Coca-Cola’s Sustainability Report.⁸⁹

⁸³ See Adam Sulkowski & Sandra Waddock, *Beyond Sustainability Reporting: Integrated Reporting Is Practiced, Required, and More Would Be Better*, 10 U. ST. THOMAS L.J. 1060, 1070 (2013); see also STEVE LYDENBERG, ON MATERIALITY AND SUSTAINABILITY: THE VALUE OF DISCLOSURE IN THE CAPITAL MARKETS 12 (2012), https://iri.hks.harvard.edu/files/iri/files/on_materiality_and_sustainability_the_value_of_disclosure_in_the_capital_markets.pdf [<https://perma.cc/74MD-YE6J>]; Aisha I. Saad & Diane Strauss, *The New “Reasonable Investor” and Changing Frontiers of Materiality: Increasing Investor Reliance on ESG Disclosures and Implications for Securities Litigation*, 17 BERKELEY BUS. L.J. 391, 393 (2020).

⁸⁴ LYDENBERG, *supra* note 83, at 6.

⁸⁵ *Id.* at 23.

⁸⁶ Complaint at 1, *Earth Island Inst. v. BlueTriton Brands*, No. 2021 CA 003027 B, 2022 D.C. Super. LEXIS 11 (D.C. Super. Ct. 2022); Complaint at 1, *Earth Island Inst. v. The Coca-Cola Co.*, No. 2021 CA 001846 B, 2022 D.C. Super. LEXIS 59 (D.C. Super. Ct. 2022).

⁸⁷ Complaint at 1, *Coca-Cola*, 2022 D.C. Super. LEXIS 59.

⁸⁸ *Id.* at 10, 20.

⁸⁹ *Id.* at 7–11.

EII specifically alleged that Coca-Cola “remains a major plastic polluter, has made no significant effort to transition to a ‘circular economy’ or to otherwise operate as a ‘sustainable’ enterprise, and has a long history of consistently breaking its public promises on sustainability goals.”⁹⁰ Additional allegations arise from the use of plastic and plastic production’s reliance on fossil fuels, “plastic products are inherently harmful to the environment: as a fossil fuel based material, plastic production requires extracting, transporting, and refining fossil fuels, processes which often emit significant amounts of greenhouse gases into the atmosphere.”⁹¹

EII further contended that “Coca-Cola will never be a truly ‘sustainable’ company unless it moves away from its reliance on single-use plastic entirely, which it has no plans to do.”⁹² Accordingly, EII alleged that Coca-Cola was engaged in false and misleading representations and omissions in violation of the District of Columbia Consumer Protection Procedures Act (“CPPA”), D.C. Code §§ 28-3901, *et seq.*⁹³

Refuting the Complaint, Coca-Cola responded to EII with a Motion to Dismiss, and Coca-Cola was successful.⁹⁴ The matter is on appeal, but evaluating *why* the Coca-Cola Motion to Dismiss was affirmed is key to understanding how sustainable/sustainability claims may be made and gaining insight into *why* all stakeholders may want to encourage businesses to provide sustainability information.

⁹⁰ *Id.* at 2–3.

⁹¹ *Id.* at 4.

⁹² *Id.* at 4; *see also* Leslie Kaufman, *UN Plastic Pledge a Climate Diplomacy Bright Spot: Green Insight*, BLOOMBERG L. (Mar. 7, 2022, 3:00 AM), https://www.bloomberglaw.com/bloomberglawnews/environment-and-energy/X8C4LKQC000000?bna_news_filter=environment-and-energy#jcite [<https://perma.cc/9B56-LFWY>]; *Historic Day in the Campaign to Beat Plastic Pollution: Nations Commit to Develop a Legally Binding Agreement*, UNITED NATIONS ENV’T PROGRAMME (Mar. 2, 2022), [https://www.unep.org/news-and-stories/press-release/historic-day-campaign-beat-plastic-pollution-nations-commit-develop-op#:~:text=\[https://perma.cc/R5F7-VS3F\]](https://www.unep.org/news-and-stories/press-release/historic-day-campaign-beat-plastic-pollution-nations-commit-develop-op#:~:text=[https://perma.cc/R5F7-VS3F]); Kenneth Rapoza, *China Quits Recycling U.S. Trash as Sustainable Start-Up Makes Strides*, FORBES (Jan. 10, 2021, 5:00 PM), <https://www.forbes.com/sites/kenrapoza/2021/01/10/china-quits-recycling-us-trash-as-sustainable-start-up-makes-strides/?sh=2443cbc25a56> [<https://perma.cc/K9YE-ASR9>].

⁹³ Complaint at 4, *Coca-Cola*, 2022 D.C. Super. LEXIS 59.

⁹⁴ *Earth Island Inst. V. Coca-Cola Co.*, No. 2021 CA 001846B, 2022 D.C. Super. LEXIS 59, at *18 (D.C. Super. Ct. Nov. 10, 2022); *see also* Gonzalo Mon, *Coca-Cola Beats False Advertising Suit Over Aspirational Claims*, JDSUPRA (Nov. 17, 2022), <https://www.jdsupra.com/legalnews/coca-cola-beats-false-advertising-suit-6195815/> [<https://perma.cc/6YHB-JJ3B>]; Clara Hudson, *Coca-Cola Wins in Greenwashing Suits Show Hazy Marketing Limits*, BLOOMBERG L. (Dec. 29, 2022, 2:00 AM), <https://news.bloomberglaw.com/securities-law/coca-cola-wins-in-greenwashing-suits-show-hazy-marketing-limits> [<https://perma.cc/6YHB-JJ3B>].

2. *BlueTriton*

EII's false marketing allegations against BlueTriton are very similar to those against Coca-Cola, focusing on issues with plastic, recycling, fossil fuel usage to create plastic, plus depletion of water resources.⁹⁵ EII asserts in this lawsuit that BlueTriton's marketing claims are "false and deceptive because the company portrays itself as being sustainable and committed to reducing plastic pollution."⁹⁶ EII alleged "[c]ontrary to BlueTriton's representations, the company remains a major plastic polluter, and has made no significant effort to 'shape a waste-free future' or to otherwise operate as a 'sustainable' enterprise."⁹⁷

Specifically, EII made almost identical allegations against BlueTriton in connection to its use of plastic that is dependent on fossil fuels: "as a fossil-fuel based material, plastic production requires extracting, transporting, and refining fossil fuels, processes which often emit significant amounts of greenhouse gases into the atmosphere."⁹⁸ Further, EII alleged that "BlueTriton, in its harmful water extraction practices and its proliferation of single-use plastic, is not a truly 'sustainable' company."⁹⁹ As with Coca-Cola, EII alleged that BlueTriton's marketing contained "false and misleading representations and omissions [that] violate the District of Columbia Consumer Protection Procedures Act ("CCPA"), D.C. Code §§ 28-3901, *et seq.*"¹⁰⁰

EII supports its claims against BlueTriton with marketing examples using sustainability.¹⁰¹ This includes quotes that BlueTriton "consider[s] the principles of sustainability" and explains what its "commitment to environmental sustainability means."¹⁰² EII contends that BlueTriton is not a sus-

⁹⁵ Complaint at 11, 15–16, *Earth Island Inst. v. BlueTriton Brands*, No. 2021 CA 003027 B, 2022 D.C. Super. LEXIS 11 (D.C. Super. Ct. 2022); Julie Steinberg, *BlueTriton Brands Hit with Deception Suit Over Sustainability (I)*, BLOOMBERG L., <https://news.bloomberglaw.com/product-liability-and-toxics-law/bluetriton-brands-hit-with-deception-suit-over-sustainability> [<https://perma.cc/Y3QJ-MW6A>] (Sept. 3, 2021, 9:45 AM).

⁹⁶ Complaint at 9, *BlueTriton*, 2022 D.C. Super. LEXIS 11.

⁹⁷ *Id.* at 2–3; see also Sharon Lerner, *Bottled Water Giant BlueTriton Admits Claims of Recycling and Sustainability Are "Puffery"*, INTERCEPT (Apr. 26, 2022, 6:00 AM), <https://theintercept.com/2022/04/26/plastic-recycling-bottled-water-poland-spring/> [<https://perma.cc/F6RA-7P76>].

⁹⁸ Complaint at 3–4, *BlueTriton*, 2022 D.C. Super. LEXIS 11.

⁹⁹ *Id.* at 4.

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 10.

¹⁰² *Id.* at 11 (alteration in original) (first quoting *Sustainability*, NESTLÉ PURE LIFE, <https://www.nestlepurelife.com/us/en-us/sustainability> [<https://perma.cc/A6H9-AX4U>]; then quoting *Our Environmental Impact*, BLUETRITON, <https://www.bluetriton.com/planet/sustainable-operations/our-environmental-impact/landfill-free> (website has since been moved or deleted)).

tainable company as a result of its actions involved in its bottled water enterprise, in contrast to its marketing claims.¹⁰³

Similar to Coca-Cola, BlueTriton filed a Motion to Dismiss.¹⁰⁴ However, unlike Coca-Cola, BlueTriton was not successful in its Motion, and the lawsuit persists.¹⁰⁵ This critical juncture of allowing such claims to continue in *BlueTriton* when juxtaposed to the outcome in *Coca-Cola* provides a key insight into how sustainability claims should be evaluated.

3. Different Outcomes

Turning specifically to a comparison of the distinct results of these two similar cases demonstrates that an objective, reasonable thread exists in the ability to interpret these claims from varying stakeholder perspectives. The specific statute at issue in both sustainability cases is the District of Columbia Consumer Protection Procedures Act (“CPPA”).¹⁰⁶ In evaluating the allegations in both cases, the Superior Court for the District of Columbia Civil Division identified that any alleged representation or misrepresentations are evaluated in the eyes of a “reasonable D.C. consumer,” and “[t]he fact that a reasonable consumer *could be* reasonably misled is sufficient to constitute a violation.”¹⁰⁷ While the specifics of the CPPA impact certain components of the cases, the court’s reasoning and instructive language could be applicable to cases in other jurisdictions, including cases involving the FTC.

With respect to *Coca-Cola*, the court relied upon *National Consumers League v. Wal-Mart Stores, Inc.* to rule that the alleged statements are “aspi-

¹⁰³ *Id.* at 14; see also Hannah Ford-Stille, *Regulated and Hydrated: A Case for Regulating Bottled Water*, 60 SANTA CLARA L. REV. 325, 351 (2020); Chantal Carriere & Rachael Beavers Horne, *The Case for a Legislated Market in Minimum Recycled Content for Plastics*, 50 ENV’T. L. REP. 10042, 10044–45 (2020); Paul Hagen et al., *Accelerating Circularity for Plastics*, 37 NAT. RES. & ENV’T 46, 48 (2022); Christoph Herrmann et al., *Consumers’ Sustainability-Related Perception of and Willingness-to-Pay for Food Packaging Alternatives*, 181 RES., CONSERVATION & RECYCLING 1, 1–2 (2022).

¹⁰⁴ BlueTriton Brands, Inc.’s Motion to Dismiss Plaintiff’s Complaint, Earth Island Inst. v. BlueTriton Brands, No. 2021 CA 003027 B, 2022 D.C. Super. LEXIS 11 (D.C. Super. Ct. Mar. 4, 2022).

¹⁰⁵ Earth Island Inst. v. BlueTriton Brands, No. 2021 CA 003027 B, 2022 D.C. Super. LEXIS 11 at *1 (D.C. Super. Ct. June 7, 2022); see also Kathleen Benway et al., *Marketing Best Practices Amid FTC Green Guide Review*, LAW360 (Mar. 14, 2023), <https://www.alsaton.com/en/insights/publications/2023/03/marketing-best-practices-amid-green-guide-review> [https://perma.cc/PEP7-F37R]; but see Caitlin M. Ajax & Diane Strauss, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere “Puffery”?*, 45 ECOLOGY L.Q. 703, 733 (2018) (“Court decisions to date suggest that reliance on many informal sustainability statements would be misplaced and unreasonable, despite the fact that these disclosures are often the sole public indicators of a company’s sustainability goals and performance.”).

¹⁰⁶ Consumer Protection Procedures D. C. CODE §§ 28-3901, *et seq.*

¹⁰⁷ Earth Island Inst. v. Coca-Cola Co., No. 2021 CA 001846 B, 2022 D.C. Super. LEXIS 59 at *2–3 (D.C. Super. Ct. Nov. 10, 2022); Earth Island Inst. v. BlueTriton Brands, No. 2021 CA 003027 B, 2022 D.C. Super LEXIS 11 at *12, *13 (D.C. Super Ct. June 7, 2022).

rational and general statements” that “do not successfully create a claim under the CPPA.”¹⁰⁸ Using “qualifying terms [such as] ‘expect,’ ‘goal,’ and ‘ask’ is demonstrative of the aspirational nature of the statements and further demonstrates that the statements are not promises to consumers.”¹⁰⁹ “[T]he defendants did not use qualifying terms binding retailers such as ‘ensure,’ ‘promise,’ or ‘forbid.’”¹¹⁰

When looking at the Coca-Cola statements that EII alleged violated the CPPA, the court held that the statements are “general, aspirational corporate ethos” and that “[t]here are no promises or measurable datapoints that would render the above statements true or false.”¹¹¹ The court added that the statements “are extremely vague.”¹¹² That “while they point to a general theme of sustainability and corporate improvement, there is not a measurable standard to apply as to whether or not [Coca-Cola] has met these general goals.”¹¹³ Coca-Cola “made no promises in the . . . statements with specific steps being taken to ensure a specific amount of sustainability for the company.”¹¹⁴ The court further relied upon *National Consumers League*, reasoning that “general and unspecific statements are not actionable due to the fact that no reasonable consumer would rely upon them.”¹¹⁵ The court found “[i]n short, Earth Island Institute has not alleged that any statement by Coca-Cola is provably false or plausibly misleading.”¹¹⁶ The court described how “[s]uch a vague, subjective, and undefinable allegation does not state a claim under the CPPA.”¹¹⁷

The court’s language in *Coca-Cola* is instructive in creating an objective, reasonable analytical framework for evaluating sustainability claims. Asking questions and providing definitive language, the court gives all stakeholders pause to consider, “[w]hat is a sustainable company,” “[w]ho defines the terms,” and “[w]hat are consumer expectations?”¹¹⁸ The court recognized

¹⁰⁸ *Coca-Cola*, 2022 D.C. Super. LEXIS 59, at *6–7; *Nat. Consumers League v. Wal-Mart Stores, Inc.*, No. 2015 CA 007731 B, 2016 WL 4080541 at *7 (D.C. Super. Ct. July 22, 2016).

¹⁰⁹ *Coca-Cola*, 2022 D.C. Super. LEXIS 59, at *4 (quoting *Wal-mart*, 2016 WL 4080541 at *6).

¹¹⁰ *Coca-Cola*, 2022 D.C. Super. LEXIS 59, at *4 (quoting *Wal-mart*, 2016 WL 4080541 at *6).

¹¹¹ *Coca-Cola*, 2022 D.C. Super. LEXIS 59, at *6; *Wal-mart*, 2016 WL 4080541 at *4.

¹¹² *Coca-Cola*, 2022 D.C. Super. LEXIS 59, at *6.

¹¹³ *Id.*

¹¹⁴ *Id.* at *6–7.

¹¹⁵ *Id.* at *8 (quoting *Nat. Consumers League v. Wal-Mart Stores, Inc.*, No. 2015 CA 007731 B, 2016 WL 4080541 at *7 (D.C. Super. Ct. July 22, 2016)).

¹¹⁶ *Coca-Cola*, 2022 D.C. Super. LEXIS 59, at *9.

¹¹⁷ *Id.* at *14.

¹¹⁸ *Id.* at *15.

that “the law does not regulate expectations” and that “goals cannot be promises.”¹¹⁹

In making its determination in *Coca-Cola*, the court distinguishes the previously decided Motion to Dismiss *denial* in *BlueTriton* (of course, the *BlueTriton* lawsuit simply continues at this point, with no outcome presently).¹²⁰ The court critically notes that “BlueTriton’s language is significantly more concrete than the language by [Coca-Cola].”¹²¹ The court recognized that BlueTriton had made a “promise with fortifying language,” but Coca-Cola had made “another aspirational goal.”¹²² The court focused on the fact that “Coca-Cola [had] made no definitive claims, and in fact, acknowledged its limitations by publicly setting goals.”¹²³ The court concludes that the statements by Coca-Cola are “aspirational, limited, and vague such that, as a matter of law, such statements cannot be misleading.”¹²⁴ Evaluating and building upon these objective, reasonable distinctions, an analysis emerges that permits for sustainable communications.

B. A Proposed Analysis

When allowing for the perspectives of all the stakeholders, guidance is needed for sustainability claims. As demonstrated herein, how “sustainable” is defined and used varies throughout the globe and nation, which increases the likelihood for litigation alleging misleading sustainability claims if an objective, contextual perspective is not established.¹²⁵ When framing the sustainability analysis with reasonableness and in the context of the global energy and environmental transition, a logical, thoughtful approach emerges.

As businesses evaluate marketing claims and plans, and consumers assess sustainability claims made by businesses, a foundational reasonable understanding will shape the opportunity for all participants to engage in meaningful communication in the middle of the present global shift. The ques-

¹¹⁹ *Id.*

¹²⁰ *Id.* at *15–16.

¹²¹ *Id.* at *16; *see also* Ajax & Strauss, *supra* note 105, at 730 (“Another question remains as to what a sustainability disclosure or statement outside of a formal securities filing needs to look like in order to be an actionable ‘affirmative misrepresentation’ as opposed to a nonactionable ‘aspirational statement.’ If all sustainability reports, CSR reports, and ethics statements have ‘aspirational’ aspects, our research suggests that plaintiffs may have no recourse even if such statements are misleading.”).

¹²² *Coca-Cola*, 2022 D.C. Super. LEXIS 59, at *16.

¹²³ *Id.*

¹²⁴ *Id.* at *18; *see also* John P. Vail, *The Need for a Sustainability Pledge: Fighting Planned Obsolescence*, 13 GEO. WASH. J. ENERGY & ENV’T L. 1, 14 (2022) (asserting (prior to the *Coca-Cola* and *BlueTriton* litigation) that “Courts have not provided a clear definition of what distinguishes an affirmative false, and therefore actionable, sustainability statement from one that is merely ‘aspirational.’”).

¹²⁵ *See* Vail, *supra* note 124, at 3–4.

tions raised in the *Coca-Cola* analysis, “[w]hat is a sustainable company,” “[w]ho defines the terms,” and “[w]hat are consumer expectations,” are critical queries.¹²⁶ Stakeholders in their varying roles and perspectives should seek to actively engage in the ongoing, ever-evolving sustainability conversation, development, and action.

Building upon the ruling in *Coca-Cola*, for a business that seeks to engage in environmental sustainability actions, sustainability strategic planning, and then to communicate about its sustainability activities in a marketing claim, it must consider whether: (1) the language is specific or general, (2) whether it makes a promise or includes a measurable datapoint, or (3) whether it is aspirational or goal oriented.¹²⁷ When answering these questions, an organization can begin to determine how it may or may not construct its sustainability claims. A definitive and/or measurable sustainability claim will require evidence and proof, but with this analysis, claims of aspirations, goals, dreams, and even hopes must not be evaluated as misleading, even when the most frustrated or passionate consumer wishes a business to move faster or take greater steps in its environmental endeavors.¹²⁸

Existing advertising laws help bolster this analysis. For example, when the FTC is determining whether an advertisement is deceptive or not (regardless of whether it includes a sustainability claim), it “looks at the ad from the point of view of the ‘reasonable consumer’ - the typical person looking at the ad . . . in context—words, phrases, and pictures—to determine what it conveys to consumers.”¹²⁹ “The FTC looks at whether the claim would be ‘material’—that is, important to a consumer’s decision to buy or use the product [and] . . . whether the advertiser has sufficient evidence to support the claims in the ad . . . before the ad runs.”¹³⁰

¹²⁶ *Coca-Cola*, 2022 D.C. Super. LEXIS 59, at *15.

¹²⁷ See Brief of Appellee at 28, *Earth Island Inst. v. Coca-Cola Co.*, No. 22-CV-0895, (D.C. May 15, 2023); see also *Ellipso, Inc. v. Mann*, 460 F. Supp. 2d 99, 106–07 (D.D.C. 2006); Monica J. Stover, *Environmental Marketing Claims and the FTC’s “Revised Green Guides”*, 37 MICH. ENV’T L.J. 2, 2 (2020); Jason Czarnecki et al., *Creating Order Amidst Food Eco-Label Chaos*, 25 DUKE ENV’T. L. & POL’Y F. 281, 302 (2015); Jason S. Howell et al., *Sustainability Advertising: Key Takeaways*, PERKINS COIE (Sept. 8, 2021), <https://www.perkinscoie.com/en/news-insights/ftc-green-guides.html> [https://perma.cc/GP4V6U2C]; Cheryl Falvey, *‘Natural’ & ‘Sustainable’: Risks of Using Undefined Terms in Food Marketing*, CROWELL (Nov. 11, 2013), <https://www.crowell.com/en/insights/publications/natural-sustainable-risks-of-using-undefined-terms-in-food-marketing> [https://perma.cc/CEL2-HFPJ].

¹²⁸ *Ajax & Stauss*, *supra* note 105, at 733 (“[C]ourts could begin to recognize the growing importance of [sustainability] disclosures and clarify their interpretations of ‘materiality’ and ‘reliance’ based on a predetermined process and set of criteria that allow companies to identify material issues related to sustainability. By doing this, courts would be better able to hold companies accountable for responsibly and accurately depicting material sustainability practices to the public.”).

¹²⁹ *Advertising FAQ’s: A Guide for Small Business*, *supra* note 25.

¹³⁰ *Id.*

From a consumer's perspective and a court's analysis of a deceptive advertising claim, the reasonable consumer and the court must take into account the context of sustainability claims. An important aspect of the context is whether the sustainability claim is clearly identifiable as environmental sustainability. Adding a notable layer to context, what may be aspirational and plausible today, may be simple, easy, and readily achievable in one year or ten years or greater. The *BlueTriton* and *Coca-Cola* litigation make clear the need to rely upon an objective, reasonable, and contextual analysis.

Businesses may aspire to participate in environmental changes with respect to the energy resources utilized to create or deliver a product or the materials used to construct a product such as plastic, but do not currently have the capacity or ability to deliver on these goals. A *subjective* interpretation of sustainability claims asserted as false advertising or consumer deception may stifle businesses from growing their environmental strategy, opportunities, and engaging communications.¹³¹ Thus, when environmental marketing of sustainability is aspirational, general, broad, or impossible to prove false or true, the guidance for sustainability should not require such claims to be measurable and definitive.¹³² The *Coca-Cola* Order was correct in recognizing that the "law does not regulate expectations[,] [and] goals cannot be promises."¹³³

C. FTC Should Include Sustainability in the Green Guides.

The expansion of green marketing and increasing concern for greenwashing places a greater emphasis and focus on the revisions of the Green Guides presently underway.¹³⁴ The FTC Green Guides are simply that,

¹³¹ See Brief of Appellee, *supra* note 127, at 9–10. *Contra* Ajax & Strauss, *supra* note 105, at 733.

¹³² See Brief of Appellee, *supra* note 127, at 28. *Contra* Ajax & Strauss, *supra* note 105, at 733 ("It follows that there is no clear way to hold companies legally accountable for sustainability statements because many such statements are aspirational in nature. This is an undesirable scenario in today's world where numerous facets of sustainability—from labor to environmental impact—are of 'material' importance to many investors and consumers.").

¹³³ *Earth Island Inst. v. Coca-Cola Co.*, No. 2021 CA 001846 B, 2022 D.C. Super. LEXIS 59 at *15 (D.C. Super. Ct. Nov. 10, 2022).

¹³⁴ *FTC Seeks Public Comment on Potential Updates to its 'Green Guides' for the Use of Environmental Marketing Claims*, *supra* note 24; *Federal Trade Commission Extends Public Comment Period on Potential Updates to its Green Guides for the Use of Environmental Marketing Claims*, *supra* note 24 ("On December 14, 2022, the Federal Trade Commission announced it is seeking public comments on potential updates and changes to the Green Guides for the Use of Environmental Claims. The Commission's Green Guides help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act. The Commission seeks to update the guides based on increasing consumer interest in buying environmentally friendly products.").

guides.¹³⁵ They do not bind the FTC.¹³⁶ Specifically, “[t]he guides help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. 45.”¹³⁷ They are instructive to businesses in evaluating environmental marketing and have been adopted by state legislation and utilized in caselaw.¹³⁸

On December 14, 2022, the FTC announced it was “seeking public comment on potential updates and changes to the Green Guides for the Use of Environmental Claims.”¹³⁹ The FTC determined that it was seeking “to update the guides based on increasing consumer interest in buying environmentally friendly products.”¹⁴⁰ Specifically, the FTC “invite[d] comments on whether the revised Guides should provide additional information on related claims and issues,” and “comment on the need for additional guidance regarding claims such as . . . ‘sustainable.’”¹⁴¹

The most recent Green Guides did not include “sustainable” intentionally.¹⁴² The FTC declined to include advice for the use of sustainable in this version because it had “no single meaning” and also “conveys non-environmental characteristics.”¹⁴³ When discussing its rationale for exclusion in the 2012 version of the Green Guides, the FTC still cautioned against using sustainable, lest a “general environmental benefit claim” be made that could not be substantiated.¹⁴⁴ Given this potential that a consumer could receive a sustainability claim as a general environmental benefit claim, and that litigation arises that could utilize the Green Guides for significant legal

¹³⁵ 16 C.F.R. § 260.1 (2023).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Millar et al., *supra* note 13; *see also* Warren, *supra* note 48.

¹³⁹ *FTC Seeks Public Comment on Potential Updates to its ‘Green Guides’ for the Use of Environmental Marketing Claims*, *supra* note 24; *Federal Trade Commission Extends Public Comment Period on Potential Updates to its Green Guides for the Use of Environmental Marketing Claims*, *supra* note 24; Benway et al., *supra* note 24.

¹⁴⁰ *FTC Seeks Public Comment on Potential Updates to its ‘Green Guides’ for the Use of Environmental Marketing Claims*, *supra* note 24; *Federal Trade Commission Extends Public Comment Period on Potential Updates to its Green Guides for the Use of Environmental Marketing Claims*, *supra* note 24.

¹⁴¹ *FTC Seeks Public Comment on Potential Updates to its ‘Green Guides’ for the Use of Environmental Marketing Claims*, *supra* note 24; *Federal Trade Commission Extends Public Comment Period on Potential Updates to its Green Guides for the Use of Environmental Marketing Claims*, *supra* note 24.

¹⁴² THE GREEN GUIDES: STATEMENT OF BASIS AND PURPOSE, *supra* note 31, at 249.

¹⁴³ *Id.* at 250.

¹⁴⁴ *Id.* at 258; Brooks & Anscombe, *supra* note 29; Detterman et al., *supra* note 7; *FTC Sends Warning Letters to Companies Regarding Diamond Ad Disclosures*, FED. TRADE COMM’N (Apr. 2, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/04/ftc-sends-warning-letters-companies-regarding-diamond-ad-disclosures> [<https://perma.cc/MHT8-5NBP>].

direction, guidance using the sustainability analysis proposed herein is needed.¹⁴⁵

1. *Proposed Language*

Following the structure of the existing Green Guides, Sustainable guidance could be drafted as follows¹⁴⁶

- (a) It is deceptive to misrepresent, directly or by implication, that a product or packaging or business practice is sustainable if it is a specific statement of fact, and the marketer cannot substantiate the claim.
- (b) Marketers should clarify whether environmental, economic and/or social sustainability is intended.
- (c) Marketers may claim aspirations, goals, dreams and hopes, but must ensure that no implied statements of measurable facts are made. If implied facts are included, they must be substantiated.

Example 1: An advertiser asserts that it looks to a sustainable future for the flowers and the trees. The advertiser is making a broad, general statement with no express or implied claims that require substantiation or are likely to deceive a reasonable consumer.

Example 2: An advertiser asserts that a business aspires to sustainably manufacture without fossil fuels in the future. The advertiser is making a broad, general, aspirational statement without any express or implied measurable claims that would require substantiation.¹⁴⁷

The FTC faces significant challenges in balancing the interests of all stakeholders while still encouraging businesses to engage and communicate regarding positive environmental efforts. Guidance will help stakeholders who engage with the FTC and beyond.¹⁴⁸

¹⁴⁵ See Wilson, *supra* note 8, at 1 (providing historical context for the present day need for sustainability inclusion in the Green Guides); see also Halley Herbst, *The Price of Fashion: The Environmental Cost of the Textile Industry in China*, 45 FORDHAM INT'L L.J. 907, 953–54 (2022) (arguing for inclusion of sustainability to be included in the Green Guides).

¹⁴⁶ See 16 C.F.R. § 260.1 (2023); see also Saijel Kishan, *Should There Be a Higher Bar to Call Products 'Sustainable'?*, BLOOMBERG (July 7, 2022), <https://financialpost.com/pmn/business-pmn/should-there-be-a-higher-bar-to-call-products-sustainable> [<https://perma.cc/56V5-JME2>].

¹⁴⁷ See 16 C.F.R. § 260.1 (2023) (intending the proposed format to follow the formatting of existing guidance).

¹⁴⁸ *FTC Seeks Public Comment on Potential Updates to its 'Green Guides' for the Use of Environmental Marketing Claims*, *supra* note 24; *Federal Trade Commission Extends*

2. *FTC Green Guides and SEC Climate Risk Disclosure Rules*

The Green Guides' focus on guiding businesses and the FTC's "views on how reasonable consumers likely interpret certain claims,"¹⁴⁹ is separate from the climate risk disclosure rulemaking process for reasonable investors at the SEC.¹⁵⁰ The SEC's proposed rules seek to "provide investors with consistent, comparable, and decision-useful information for making their investment decisions, and . . . provide consistent and clear reporting obligations for issuers."¹⁵¹ While the reasonable consumer and the reasonable investor intersect, there are distinctions.¹⁵²

For the reasonable consumer perspective, whether a sustainability claim is misleading must be evaluated with the reasonable, objective analysis. This evaluation is not a one size fits all box with specific metrics, but a broad horizon with all the factual realities of current dependence on fossil fuels, lack of a replacement for plastic in many instances, insufficient recycling opportunities, the time it takes to make changes to manufacturing processes, and more.

The Green Guides should not require scopes 1, 2 and 3 disclosures prior to a business making a sustainability marketing claim and should clearly delineate that the SEC's climate risk disclosure rules are not incorporated into the Green Guides. The scopes 1, 2 and 3 disclosures proposed by the SEC seek a more uniform metric for all applicable businesses.¹⁵³ Important to note, reporting requirements that fall under the SEC's jurisdiction are not applicable to all businesses.¹⁵⁴ Advertising and consumer laws arguably have

Public Comment Period on Potential Updates to its Green Guides for the Use of Environmental Marketing Claims, *supra* note 24; see also *Open Commission Meeting – December 14, 2022*, FED. TRADE COMM'N (Dec. 14, 2022), <https://www.ftc.gov/news-events/events/2022/12/open-commission-meeting-december-14-2022> [<https://perma.cc/HB2E-Y4QC>]. The FTC extended the public comment period for 60 days, until April 24, 2023. Comments may be found at *Comments Docket FTC 2022-0077 Proposed Rule: Guides for the Use of Environmental Marketing Claims*, REGULATIONS.GOV (Dec. 19, 2022), <https://www.regulations.gov/document/FTC-2022-0077-0001/comment> [<https://perma.cc/7MJA-VM2A>].

¹⁴⁹ 16 C.F.R. § 260.1 (2023).

¹⁵⁰ *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, *supra* note 47.

¹⁵¹ *Id.*

¹⁵² See Sulkowski & Waddock, *supra* note 83, at 1065, 1073.

¹⁵³ See Ellen Meyers, *As SEC Works to Finalize Climate Rule, Both Sides Make Their Case*, ROLL CALL (Nov. 10, 2022, 7:00 AM), <https://rollcall.com/2022/11/10/as-sec-works-to-finalize-climate-rule-both-sides-make-their-case/> [<https://perma.cc/Z2FH-3JJW>].

¹⁵⁴ See *Securities and Exchange Commission (SEC)*, USAGOV, <https://www.usa.gov/federal-agencies/securities-and-exchange-commission> [<https://perma.cc/TFG3-N797>] ("The Securities and Exchange Commission oversees securities exchanges, securities brokers and dealers, investment advisors, and mutual funds in an effort to promote fair dealing, the disclosure of important market information, and to prevent fraud."); see also Jason J. Czarnezki et al., *Greenwashing and Self-Declared Seafood Ecolabels*, 28 TUL. ENV'T. L.J.

a greater reach with a broader set of stakeholders that necessitate a separate, larger, reasonable, objective analysis. As the current Green Guides declare, “[w]hether a particular claim is deceptive will depend on the net impression of the advertisement, label or other promotional material at issue.”¹⁵⁵ This net impression approach should continue in future Green Guides and be considered for incorporation in a specific sustainability guidance.

D. Proposed Application

Consumers look to the environmental actions and claims of businesses from which they presently seek to procure items or services and will likely enhance this consideration moving forward. Both the proposed sustainability claim analysis and proposed Green Guide sustainability language would provide stakeholders and potential litigants a reasonable, objective framework, which is currently absent, to evaluate sustainability claims.¹⁵⁶ The proposed analysis and guidance could be utilized in common law cases, future state statutes and actions under the Federal Trade Commission Act and the Lanham Act.¹⁵⁷

For example, when a company produces markers or pens that are encased in fossil fuel dependent plastic and created in a factory that relies on

37, 40–41 (2014) (Analyzing FDA and USDA regulation of sustainable claims in seafood industry. While beyond the scope of this current analysis, coordination with these agencies may also be necessary.); *see also* Robin M. Rotman et al., *Greenwashing No More: The Case for Stronger Regulation of Environmental Marketing*, 72 ADMIN. L. REV. 417, 430, 441 (2020).

¹⁵⁵ 16 C.F.R. § 260.1 (2023); *see also* Laura E Bladow, *Worth the Click: Why Greater FTC Enforcement is Needed to Curtail Deceptive Practices in Influencer Marketing*, 59 WM. & MARY L. REV. 1123, 1136 (2018).

¹⁵⁶ *See* FTC GREEN GUIDES STATEMENT OF BASIS AND PURPOSE, *supra* note 31, at 1; *see also* Brooks & Anscombe, *supra* note 29; *Comments Docket FTC 2022-0077 Proposed Rule: Guides for the Use of Environmental Marketing Claims*, REGULATIONS.GOV (Dec. 19, 2022), <https://www.regulations.gov/document/FTC-2022-0077-0001/comment> [<https://perma.cc/2BKC-ACQR>]; Jimmy Asa, *Comment to Docket FTC 2022-0077*, REGULATIONS.GOV (Jan. 9, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0009> [<https://perma.cc/JDV5-FUQC>]; Joanne Stephanie Jovan, et al., *Comment to Docket FTC-2022-0077*, REGULATIONS.GOV (Feb. 12, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0088> [<https://perma.cc/M6YV-X4PP>]; Lili Galleo, *Comment to Docket FTC-2022-0077*, REGULATIONS.GOV (Feb. 23, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0130> [<https://perma.cc/VX45-6GK3>]; Airlines for Am., *Comment to Docket FTC 2022-0077*, REGULATIONS.GOV (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0921> [<https://perma.cc/5NAE-GS2E>]; Truth in Advert. Inc., *Comment to Docket FTC-2022-0077*, REGULATIONS.GOV (Apr. 25, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0958> [<https://perma.cc/5QTM-7PGH>]; Am. Chemistry Council, *Comment to Docket FTC-2022-0077*, REGULATIONS.GOV (Apr. 25, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0986> [<https://perma.cc/N72C-YYXG>].

¹⁵⁷ *See* 15 U.S.C. § 41(a); *see also* 15 U.S.C. § 1125; Sophia von Bergen, *Holding Oregon Benefit Companies Accountable for Greenwashing and Faux CSR*, 24 LEWIS & CLARK L. REV. 1097, 1140 (2020).

fossil fuel power generation, a reasonable consumer takes in all this information from the world around them. Plastic and fossil fuels have yet to be reliably replaced and are both presently crucial to commerce.¹⁵⁸ They both stand as large examples of the realities an enterprise faces, even as it seeks environmentally sustainable changes and wishes to communicate about the transformations it can make and aspires to make in the future.

CONCLUSION—AN OPPORTUNITY

The energy transition and the environmental changes needed to combat climate change are two of the greatest undertakings in history. Bringing all parties to the table to actively participate in these endeavors requires sustainability communication. With the definitions and applications of the terms sustainable and sustainability presented herein, the scope of this concept and all that it entails, are enormous and incredibly important. Balancing the interests involved in avoiding potentially swindled consumers with the opportunity for businesses to move beyond their own interests, move into complex environmental matters and to communicate honestly about these details, is no small feat.

As stakeholders attempt to navigate the express and implied messages in environmental sustainability claims, word choice is critical, and context is key. When the core language and analysis found in *Coca-Cola* and *BlueTriton* are extrapolated, a reasonable, objective framework emerges for evaluating sustainability claims and providing guidance language for the FTC. Looking to the future, sustainability marketing will be challenging, but it

¹⁵⁸ See Remarks as Prepared for Delivery by Secretary Jennifer Granholm At CERA Week 2023, *supra* note 59 (“We know that oil and gas will remain part of our energy mix for years to come.”); see also *World Energy Outlook 2022 Shows the Global Energy Crisis Can be a Historic Turning Point Towards a Cleaner and More Secure Future*, *supra* note 59 (“The share of fossil fuels in the global energy mix in the Stated Policies Scenario falls from around 80% to just above 60% by 2050.”); *The United States Uses a Mix of Energy Sources*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/energyexplained/us-energy-facts/#:~:text=Fossil%20fuels> [https://perma.cc/NBE6-BW3Z] (Aug. 16, 2023) (“Fossil fuels—petroleum, natural gas, and coal—accounted for about 81% of total U.S. primary energy production in 2022.”); *EIA Projects U.S. Energy Consumption Will Grow Through 2050, Driven by Economic Growth*, U.S. ENERGY INFO. ADMIN. (Mar. 3, 2022), <https://www.eia.gov/pressroom/releases/press496.php#:~:text=Petroleum%20> [https://perma.cc/FU6F-V8F7] (“Petroleum and natural gas remain the most-consumed sources of energy in the United States through 2050, but renewable energy is the fastest growing.”); Nathaniel Bullard, *Big Oil Splits on Oil’s Future*, BLOOMBERG L. <https://www.bloomberglaw.com/product/blaw/bloombergtterminalnews/bloomberg-terminal-news/R097KUT1UM11> [https://perma.cc/5TVB-2G7V]; Mackenzie, *supra* note 59; Scott Foster & David Elzinga, *The Role of Fossil Fuels in a Sustainable Energy System*, U.N. CHRON. (Dec. 2015), <https://www.un.org/en/chronicle/article/role-fossil-fuels-sustainable-energy-system>, [https://perma.cc/8HPS-EBJ6].

also provides an opportunity to encourage sustainable action and communication.¹⁵⁹

FTC Chair Khan identified well the obstacles and potential troubles environmental marketing claims (not limited to sustainability) create.

For the average consumer, it's impossible to verify these claims. People who want to buy green products generally have to trust what it says on the box.

That's why it's so important for companies making these claims to tell the truth. If they don't, it distorts the market for environmentally friendly products. It puts honest companies, who bear the costs of green business practices, at a competitive disadvantage. And it harms consumers who want to make conscientious decisions about what products to buy and what businesses to support.¹⁶⁰

The proposed sustainability analysis and guidance herein will assist those endeavoring to engage in environmental change (regardless of perspective) and to evaluate communications objectively. The analysis and guidance provide limitations when the sustainability claims are statements of fact that are measurable and recognize the need for evidentiary support to such marketing.

The FTC has made clear to businesses that greenwashing will not be tolerated.¹⁶¹ "False environmental claims harm both consumers and honest businesses, and companies that greenwash can expect to pay a price."¹⁶² Thus, a better understanding of permissible sustainability communications must be established and articulated. With a reasonable, objective approach to sustainability claims, stakeholders' interests are protected and participation of all perspectives about future undertakings are encouraged.

¹⁵⁹ See Katherine White et al., *The Elusive Green Consumer*, HARV. BUS. REV. (Jul.–Aug. 2019) ("Using marketing fundamentals to connect consumers with a brand's purpose, showing benefits over and above conventional options, and making sustainability irresistible are central challenges for businesses in the coming decades. As more and more succeed, sustainable business will become smart business."); see also Albert C. Lin, *Myths of Environmental Law*, 1 UTAH L. REV. 45, 67–68 (2015); Michael Burger et al., *Rethinking Sustainability to Meet the Climate Change Challenge*, 43 ENV'T. L. REP. 10342, 10353 (2013).

¹⁶⁰ *Statement of Chair Lina M. Khan Regarding the Regulatory Review*, *supra* note 1.

¹⁶¹ *FTC Uses Penalty Offense Authority to Seek Largest-Ever Civil Penalty for Bogus Bamboo Marketing from Kohl's and Walmart*, FED. TRADE COMM'N (Apr. 8, 2022), <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/H4SY-VZJQ>]; Lesley Fair, *\$5.5 Million Total FTC Settlements with Kohl's and Walmart Challenge "Bamboo" and Eco Claims, Shed Light on Penalty Offense Enforcement*, FED. TRADE COMM'N (Apr. 8, 2022), <https://www.ftc.gov/business-guidance/blog/2022/04/55-million-total-ftc-settlements-kohls-and-walmart-challenge-bamboo-and-eco-claims-shed-light> [<https://perma.cc/4BLB-NVYR>].

¹⁶² See *FTC Uses Penalty Offense Authority*, *supra* note 161 (quoting Samuel Levine, Director of the FTC's Bureau of Consumer Protection).

Sustainability claims are made in the global context and in the wide definitional variations thoroughly examined herein. Reasonable objectivity exists and must be used in sustainability analysis, because consumers looking for sustainability and environmental action within messaging understand where the world sits in this transition. A base awareness exists, and reasonable consumer knowledge and wisdom should not be discounted.

While consumers may wish that their sodas, sweets, shoes and energy companies were plastic free or fossil fuel free, that is not currently the reality, but that does not mean the companies that are working to improve an environmental situation cannot talk about their efforts at an early stage of progress, even if it has the benefit of attracting customers. Sustainability claims may also be representative of aspirations and future plans. Reasonable consumers know that these aspirations will have their limitations.

While trust must be maintained, dissuading companies from potentially being part of the sustainability dialogue would be counterproductive. Legal analysis in state consumer protection cases, FTC enforcement, and state legislation must continue to require honesty, but also pave the way for necessary environmental action, marketing of actions taken, actions planned, and aspirational activities. A reasonable, objective analysis and guidance will promote the advancement of environmental measures and ensure that the interests of stakeholders are guarded.

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