Clients&FriendsMemo

UK Financial Regulator Publishes Guidance on New Anti-Greenwashing Rule

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Overview

Greenwashing remains at the top of enforcement agendas in 2024. Marketing products and services as "green" and "sustainable" is a common practice and seen as an important way to attract the attention of environmentally conscious customers. In 2023, the European Commission reported that 53% of sustainability claims were misleading or vague, and 40% were unsubstantiated. 'Green claims' are increasingly scrutinized by regulatory authorities, activist shareholders and NGOs. Incoming regulation, increased enforcement, and climate-linked litigation mean greenwashing is a key concern for companies across all sectors. There is growing awareness that many corporate claims regarding positive environmental impacts, sustainability and carbon-neutrality do not tell the whole story or are simply inaccurate. In light of that growing awareness, regulatory authorities are taking action to minimise greenwashing and enhance consumer protection. Among these is the UK's Financial Conduct Authority (the "FCA"). In this article, we take a detailed look at the FCA's recently published guidance for companies outlining how they can ensure they comply with the authority's new anti-greenwashing rule.

Background

The FCA's anti-greenwashing rule (the "Rule") is due to come into effect on May 31, 2024, prompting the regulator to publish industry guidance aimed at assisting firms with compliance. The Rule requires firms to ensure that any references to the sustainability characteristics of a product or service are consistent, fair, clear and not misleading. The Rule applies both when a firm communicates: (i) with clients in the UK in relation to a product or service; and (ii) a financial promotion (or approves a financial promotion for communication) to a person in the UK.

In principle, the Rule should be familiar to most firms authorised by the FCA since various sections of the FCA Handbook already require firms to ensure that the information they communicate is fair, clear and not misleading (see, for example, the Principles for Businesses (PRIN)). Some firms will also be familiar with greenwashing guidance published by other UK authorities such as the

Competition and Markets Authority's (the "CMA") guidance on environmental claims, and the Advertising Standards Authority's (the "ASA") guidance. The FCA collaborated closely with both authorities to ensure cohesion between the different frameworks.

Anti-Greenwashing Rule Guidance

The Guidance sets out what the effect of the Rule is in practice and provides example scenarios of both non-compliance and good practice. Sustainability references should be:

1. **Correct** and **capable** of being substantiated;
2. **Clear** and presented in a way that can be understood;
3. **Complete** – they should not omit or hide important information and should consider the full life cycle of the product or service; and
4. **Fair** and **meaningful** where comparisons are made to other products or services.

Correct and capable of being substantiated

Sustainability-related claims should be factually correct and should not exaggerate or overstate the environmental or social impact that a product or service has. The FCA notes that claims can also be misleading if they provide conflicting or contradictory information. The relevant product or service should also live up to the claims made and such claims should be supported with robust and credible evidence.

Alongside ensuring that sustainability claims are true at the outset, the FCA requires firms to regularly review their claims, and any evidence that supports them, to ensure that the claims remain true and the evidence remains relevant for as long as the product or service is provided or offered. And firms should consider whether making the underlying evidence of its claims easily publicly available would be helpful.

Illustrative examples include a firm stating that one of its funds is "fossil fuel free" but noting in its terms and conditions that the fund includes investments in companies involved in the production, selling, and distribution of fossil fuels where the company's revenue earned from those activities is below a certain threshold.

Clear and presented in a way that can be understood

The FCA requires all firms to ensure that sustainability claims they make are transparent and straightforward. The meaning of all the terms used should be easily understood by the intended audience. The Guidance warns that the use of broad terms or general statements can be unclear and confusing and the firms should not use terms that might imply that a product or service has sustainability characteristics that it does not have.

Importantly, the FCA highlights that firms should exercise caution in the way that it uses images, logos and colours and the overall impression that a visual presentation of a claim can create. Claims that are factually correct but presented in a way that visually conveys a different impression could be deemed unclear. For example, the FCA describes a webpage of a firm outlining its savings accounts products, which contains a large image of a rainforest, a text overlay of "Sustainable Savings" but only one of the several savings account products listed uses deposits to lend to companies to fund sustainable projects, while its other savings accounts do not. This is a theme echoed in other similar greenwashing and consumer protection frameworks such as the CMA's guidelines.

Complete – claims should not omit or hide important information

The sustainability claim made by a firm should be representative of the product or service and firms should not omit or hide important information that would influence a consumer's decision-making. This includes where the claim may be subject to certain conditions that should be stated clearly and prominently. The way a claim is presented should be balanced and positive sustainability impacts should not be used to distract from other aspects that may have a negative impact on sustainability.

The FCA also requires firms to base their claims on the full life cycle of a product or service or, alternatively, be clear about which aspect of the life cycle the claim relates to specifically. Firms should not, however, cherry-pick information as this would also contravene the Rule.

For example, the FCA notes that where a firm promotes a bond and claims that it is used to finance a range of sustainability projects, such as renewable energy, but fails to note that eligible activities also include projects that improve the energy efficiency of fossil fuel energy production but distribution would be non-compliant.

Comparisons should be fair and meaningful

Whether comparing a product or service to a previous version or to a competitor's offering, comparisons should be fair and meaningful such that the audience is able to make an informed choice. Aspects of the comparison, such as what is being compared, and how the comparison is being made, should be made clear. Firms should be wary of making sustainability claims about a particular characteristic that is simply meeting a minimum standard of compliance with existing legal requirements. While true, the FCA says that such claims could incorrectly give the impression that the product or service is superior to others available.

Enforcement Powers

The FCA utilises a wide range of criminal, civil and regulatory enforcement powers for non-compliance. These include imposing financial penalties, prohibiting individuals from carrying out regulatory activities, public censure and prosecution.

Wider sustainability-related measures

Preventing greenwashing is a key priority for the FCA and will not only protect consumers and allow them to make informed decisions, but will also foster a fairer market for businesses that are making genuine sustainability claims about their products and services. The adoption of the Rule is part of a wider package of measures introduced by the FCA in November 2023 through its statement on Sustainability Disclosure Requirements (the "SDR") and investment labels (PS23/16).

The wider package of measures includes: (i) naming and marketing rules for investment products to ensure that the use of sustainability-related terms are accurate; (ii) four labels to help consumers navigate the investment product landscape; (iii) consumer-facing information to provide consumers with more accessible information to help understand key sustainability features of a product; (iv) detailed information targeted at institutional investors and consumers seeking more information in pre-contractual, ongoing product-level and entity-level disclosures; and (v) requirements for distributors to ensure that product-level information (including the labels) is made available to consumers.

Multi-jurisdictional Compliance

Although the FCA is working closely with the CMA and the ASA to ensure that greenwashing guidelines for UK businesses are consistent, firms operating in both the UK and the EU or the U.S. will need to consider compliance under all applicable regimes. For example, the EU is taking several anti-greenwashing measures as part of the EU Green Deal including the implementation of the new Directive on Empowering Consumers for the Green Transition, a law banning exaggerated and unfounded claims relating to a company's environmentally friendly actions, including carbon neutral claims. In the U.S., the Federal Trade Commission announced that it is seeking public comment on potential revisions to its Green Guides for the Use of Environmental Marketing Claims, in particular to address carbon offsets and climate change-related marketing claims. The Securities and Exchange Commission (the "SEC") adopted amendments to the Investment Company Act 1940 to include the "Names Rule," which regulates appropriate naming of funds to ensure that they do not mislead investors regarding the fund's risks and investment characteristics. The Names Rule is consistent with the SEC's overall focus on ESG issues, including, as we have noted previously, the formation of the ESG Task Force within the Division of Enforcement "to develop initiatives to proactively identify ESG-related misconduct consistent with increased investor reliance on climate and ESG-related disclosure and investment." The SEC has been the subject of scrutiny recently since it announced that it would adopt a scaled back set of emissions disclosure requirements for public companies, as we discussed previously.

Conclusion

Greenwashing is a recurring theme across all sectors, and although the facts and the context differ in each case, the message remains that sustainability claims must be clear, accurate and capable of being substantiated. The Rule, and indeed the wider package of measures set to be implemented by the FCA, will require firms to undertake a detailed review of their financial promotion and marketing frameworks. For products and services that have sustainability claims made about them, firms will need to conduct a gap analysis to identify whether, come May 31, they would be in compliance with the Rule. As with all significant new regulatory measures, firms should also review existing policies and procedures, as well as external communication platforms such as websites and other marketing materials.

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