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Combating The Menace Of Greenwashing: Guidelines For Advertisements Making Environmental / Green Claims

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India Environment

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I. Introduction

As consumer consciousness of environmental issues grows, businesses have increasingly sought to present their products and services as green or environmentally friendly. However, the lack of reliability and verification procedures in relation to such claims could lead to incorrect and misleading green claims flying under the radar, making it difficult for consumers, stakeholders, and the public at large, to leverage their purchasing decisions to reward better environmental performance. Evidently, such false or misleading green claims present a serious challenge in the path of net zero and green transition. Accordingly, regulators are proactively legislating to target greenwashing and regulate advertisements making green claims.

The Advertising Standards Council of India (**ASCI**) 'Code for Self-Regulation of Advertising Content in India' (**ASCI Code**) dated 8 June 2022 requires truthfulness and honesty of representations and presents an avenue to combat greenwashing through misleading claims. Targeting environmental / green claims specifically, the ASCI published the 'Guidelines for Advertisements Making Environmental / Green Claims' (**ASCI Guidelines**) to monitor and enforce transparent environmental claims and provide guidance on avoiding greenwashing, on 15 January 2024, which became effective from 15 February 2024. The ASCI Guidelines explain the ASCI's approach in determining whether an environmental / green claim violates Chapter I of the ASCI Code (*Truthful & Honest Representation*) and seek to assist consumers in making informed choices and advertisers in making clear and evidence-based claims that are understandable to consumers.

While the ASCI is a self-regulatory body, and its decisions are not binding unless the party in question submits to them, the consumer rights watchdog, i.e., the Central Consumer Protection Authority (**CCPA**) formed under the Consumer Protection Act, 2019 ("**COPRA**") has taken a cue from the ASCI Guidelines and issued the draft 'Guidelines for the Prevention and Regulation of Greenwashing, 2024' (**Draft CCPA Guidelines**) on 20 February 2024. The Draft CCPA Guidelines have been issued in exercise of the CCPA's powers under Section 18 of the COPRA, and the public's comments were sought with a deadline of 21 March 2024. Once brought into force, these guidelines would apply to all advertisements, regardless of the form and medium, as well as to service providers, product sellers, advertisers, or advertising agencies or endorsers whose services are availed for the advertisement of such goods or services

This article examines the key provisions and potential impact of the non-binding ASCI Guidelines and the Draft CCPA Guidelines on advertising practices followed by businesses in respect of green claims.

II. Defining the concept of Environmental Claims / Green Claims and Greenwashing

The Preamble to the ASCI Guidelines defines 'environmental claims / green claims' to include explicit or implicit environmental claims that create an impression that the product or service, as a whole: (a) has a neutral or positive environmental impact; (b) has specific environmental benefits; or (c) causes comparatively less environmental damage than a previous version of the same product or service or than competing goods or services. The definition is broad, and provides that such claims may appear in advertisements and marketing materials, branding, packaging or in any other information that may be provided to consumers. A claim should not be seen in isolation and the meaning behind the terms used, the qualifications, explanations and evidence supporting the claim, overall presentation, colours, pictures and logos would all be relevant aspects. Specifically, even information that is not included or hidden would be relevant in evaluating a green claim.

Similarly, the Draft CCPA Guidelines define 'Environmental Claims' as any representation, in any form, suggesting environmentally friendly attributes, regarding: (i) a good (either in its entirety or as a component) or the manufacturing process or packaging or the manner of use of the good or its disposal; and/or (ii) a service (or any portion thereof) or the process involved in providing the service.

The Preamble to the ASCI Guidelines defines the concept of 'Greenwashing', as referring to unsubstantiated, false, deceptive or misleading environmental claims about products, services, processes, brands or operations as a whole; or claims that hide and omit information to give the impression that they are less harmful or more beneficial to the environment than they actually are; and clearly provide that 'greenwashing' violates Chapter I of the ASCI Code.

The Draft CCPA Guidelines similarly define 'Greenwashing' as any deceptive or misleading practice by exaggerated, vague, false, or unsubstantiated environmental claims. Similar to the definition in the ASCI Guidelines, this definition includes concealing, omitting or hiding relevant information. The definition includes emphasising positive environmental aspects through the use of misleading words, symbols or imagery, while downplaying harmful attributes. Hyperboles, puffery, or the usage of generic colour schemes or pictures, however, are excluded, and would not amount to deceptive or misleading practice under the Draft CCPA Guidelines.

III. Analysis of the ASCI Guidelines

(a) Absolute and comparative claims

The ASCI Guidelines demarcate environmental / green claims as: (i) absolute; and (ii) comparative claims, allowing for more specialised criteria to be applied to determine whether the claims are misleading and thereby providing more clarity. Claims that imply that the entire product has no impact, positive impact or reduced adverse impact, constitute absolute claims and include claims such as environment friendly, eco-friendly, sustainable, planet friendly. Such claims must be substantiated with credible and robust evidence to be in compliance with chapter I of the ASCI Code and cannot be diluted with disclaimers or mechanisms such as links to websites or QR codes which lead the consumer to clarifications. Comparative Claims, such as greener or friendlier would require advertisers to provide evidence that a product or service has a real environmental benefit over that of a previous product or service offered by the advertiser or competing products or services, along with the basis for such comparison.

(b) General environmental claims

The ASCI Guidelines lay down detailed criteria that general environmental claims must follow in order to not breach Chapter I of the ASCI Code. The ASCI Guidelines

emphasise upon transparency by emphasising on the specificity of claims and highlight which information cannot be omitted to protect against consumers being intentionally or unintentionally misled by the omission of vital information. Some of these guidelines that act as an important safeguard, include the following:

- (i) a general environmental claim must refer to the full life cycle of the advertised product or service;
- (ii) the environmental claim must specify whether the claim relates to the product, its packaging, a service, or just a portion of the product, its packaging or a service;
- (iii) a "free of" claim must be accompanied with an appropriate disclaimer to support it. Such a claim would be misleading if the product / service contains some other environmentally damaging ingredient or if the absence of the ingredient is required by law and competitors are subject to the same requirement;
- (iv) *Top of Form* if a product or service has been evaluated by a certifier certified by a nationally / internationally accredited certifying agency and uses certifications or seals of approval to create the impression of an environmental claim to consumers, the attributes of the product or service that have been evaluated by a certifier should be clarified;
- (v) further, visual elements falsely conveying a product's environmental impact, should not be used in an advertisement, unless required by law (e.g., logos representing a recycling process); and
- (vi) claims regarding a product being biodegradable, compostable, recyclable, non-toxic and free-of, etc. should be qualified with reference to the aspects of the product the claim relates to. The claims must be backed by scientific evidence.

(c) Carbon offset claims

Carbon neutrality claims are one of the primary claims that have come under scrutiny for frequently being used by corporations to engage in greenwashing. In an important step, the ASCI Guidelines require that if a carbon offset claim is made by an advertiser and the offset does not happen within a timeline of 2 (two) years, this fact must be prominently disclosed. No direct or indirect carbon offset claims should be made to suggest that an offset represents an emissions reduction if such reduction or the activity causing such reduction was required by law.

IV. Analysis of the Draft CCPA Guidelines

The Draft CCPA Guidelines apply to all advertisements (irrespective of form, format or medium), service providers, product resellers, advertisers, advertising agencies or endorsers whose service is availed for advertising such goods or services. However,

the Draft CCPA Guidelines exclude any advertisement or communication that is not specific to any product or service, unless a direct or indirect nexus can be established between the advertisement and a product or service.

As per the Draft CCPA Guidelines, any business that makes environmental claims as part of an advertisement by using generic terms such as clean, green, eco-friendly, eco-consciousness, good for the planet, minimal impact, cruelty-free, carbon neutral, or similar assertions will have to substantiate it through an appropriate disclosure backed by verifiable evidence to support such claim, and use adequate qualifiers.

The Draft CCPA Guidelines also specify that where technical terms like Environmental Impact Assessment, Greenhouse Gas Emissions, Ecological Footprint, etc., are used in an advertisement, consumer-friendly language shall be used the meaning and implications of such technical terms shall be explained.

Cherry picking of data to emphasise only favourable observations while making disclosures in relation to green claims is not permissible. Further, it is required to specify part of the product / service to which the claim applies, such as whether it applies to the manufacturing process, or packaging, etc. It is also required that the disclosures made in relation to an environmental claim should not contradict the relevant claim and should be readily accessible to the consumer.

The Draft CCPA Guidelines are accompanied by a guidance note ("**Guidance Note**") to assist the industry in complying with the regulations effectively. It emphasises the importance of truthfulness, accuracy, clarity, fair and meaningful comparisons, and relevant disclosures in making environmental claims. For example, an advertisement claiming "*Our sanitary pads are made from 100% biodegradable materials*" would qualify as an environmental claim; and may amount to greenwashing if the claim of the sanitary pad being made from completely biodegradable materials cannot be substantiated or scientifically verified. Further, if a green claim relates only to a specific feature, part or stage, this must be disclosed. All visual environmental claims should provide relevant details or context and not manipulate the consumer into believing that a product or service is environmentally responsible or eco-friendly.

Further, claims suggesting endorsements, certifications, or seals of approval that are non-existent, intentionally misleading or provided by non-official bodies and lacking recognition from credible authorities are not permitted. The Guidance Note also provides several illustrations, which make it clear that endorsements and certifications should be backed appropriately, and products should not give the impression that they meet certain standards which they, in reality, do not.

In a deviation from the ASCI Guidelines, which specifically prohibit the use of QR Codes to dilute absolute claims such as environmentally friendly or sustainable through disclaimers or other clarificatory mechanisms; the Draft CCPA Guidelines do

permit the disclosure of material information pertaining to the environmental claim by inserting a QR Code or URL that links to the relevant information.

The provisions of the COPRA will apply to any contravention of the CCPA Guidelines, once in force, and advertisements containing false or misleading environmental claims shall attract the punishment of imprisonment for a term extending to 2 (two) years and fine extending to INR 10,00,000 (Indian Rupees Ten Lakhs). In the recent past, the CCPA has ordered the discontinuation of several misleading advertisements by leading brands that made overly exaggerated claims regarding their product efficacy that were not substantiated by relevant market surveys and imposed heavy penalties; indicating that there is likely to be strong enforcement of the CCPA Guidelines, once they are in force.

V. Conclusion

While the ASCI has previously acted upon complaints relating to misleading carbon offset claims and the usage of terms such as greenest without the backing of adequate data, under Chapter I of the ASCI Code (*Truthful & Honest Representation*) and misleading advertisements have always been punishable under the COPRA the specificity provided by the framework introduced through the ASCI Guidelines and the Draft CCPA Guidelines will undoubtedly lead to greater clarity on which environmental claims are considered violations of the law; result in far greater enforcement and a more transparent marketplace.

The existence of self-regulatory ASCI Guidelines and the draft guidelines issued by the CCPA (once brought in force), will necessitate that corporations only make environmental claims where they are adequately supported by data and certifications and in a manner that transparently presents this information to the consumer in the correct context. Accordingly, these will become a powerful tool for advertisers looking to ensure the authenticity of their green claims and for consumers in deciding how to use their purchasing power in support of environmentally friendly products.

The release of these guidelines belies an increased regulatory and statutory focus that may result in growing litigation on the issue of greenwashing by corporations in the coming years. The necessary guidance in the Draft CCPA Guidelines provides corporations the scope to align their advertisements making green claims, in relation to the products and services offered, with the guidelines to avoid penal consequences. It is therefore the need of the hour for corporations to adapt to the regulatory nudge, cultivate customer confidence, foster transparency and prioritise sustainability through prompt compliance in letter and spirit. Entities compliant with the greenwashing norms may see increased investment due to increased consumer confidence since ESG conscious businesses have a competitive edge.

The need for clear, evidence-based claims on which consumers may place trust and reliance to make informed purchasing decisions exemplified by the guidelines will be transformative in bringing awareness to and combating greenwashing.

The content of this document do not necessarily reflect the views/position of Khaitan & Co but remain solely those of the author(s). For any further queries or follow up please contact Khaitan & Co at legalalerts@khaitanco.com

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