



FCA launches guidance consultation on anti-greenwashing rule

December 2023

The FCA has issued the final version of its new anti-greenwashing rule – part of a package that includes additional rules as stage one of the UK’s new Sustainability Disclosure Requirements or SDR, plus the FCA’s new ESG product labelling regime.

The thrust of the anti-greenwashing rule is unchanged from the FCA’s original consultation, published in October 2022. But unexpectedly, the FCA has included in the overall package draft guidance on the new anti-greenwashing rule and has commenced a consultation exercise on this draft guidance.

This paper provides a summary of key points from that draft guidance – please get in touch if you wish to see our full briefing on SDR and the new labelling regime, a compare of the original draft vs final version of the rules, or some FAQs on the full regime.

1. FAQs about the new anti-greenwashing rule and draft guidance

What does the new anti-greenwashing rule say?

The new rule is contained in the FCA’s Environmental, Social and Governance sourcebook (**ESG**); in particular, in ESG 4.3.1, and provides as follows:

4.3 Naming and marketing

Anti-greenwashing

4.3.1 R (1) This rule applies to a firm (whether it is undertaking sustainability in-scope business or not) which:

- (a) communicates with a client in the United Kingdom in relation to a product or service; or
 - (b) communicates a financial promotion to, or approves a financial promotion for communication to, a person in the United Kingdom.
- (2) A firm must ensure that any reference to the sustainability characteristics of a product or service is:
- (a) consistent with the sustainability characteristics of the product or service; and
 - (b) fair, clear and not misleading.

Did the wording of the rule change from what was originally consulted on?

Yes, as below – but not so as to change the thrust of what was originally consulted on.

The implementation date has also been pushed back by half a year. The anti-greenwashing rule was originally proposed to come into effect on the date of the policy statement (i.e. the policy statement proposed to contain the final rules), and will now only be effective from 31 May 2024.

Plus as above, the FCA has issued a consultation on draft guidance to clarify its “expectations” for firms that make claims about the sustainability of a product or service – the text of this draft guidance is obviously new.

Where can I get a copy of the new rule?

It is set out in the FCA’s policy statement on SDR and the product label regime - see www.fca.org.uk/publication/policy/ps23-16.pdf. See ESG 4.3.1 on page 173 of the overall policy statement.

Within Appendix 1 (containing the final rules), it is on page 36.

The new rule is also available in the FCA Handbook at www.handbook.fca.org.uk/handbook/ESG/4/3.html?date=2104-01-01.

What is the new guidance consultation about?

The consultation concerns draft new FCA guidance on the anti-greenwashing rule. For a copy of the consultation, see www.fca.org.uk/publications/guidance-consultations/gc23-3-guidance-anti-greenwashing-rule.

What does the guidance say?

At the heart of the guidance is a requirement that sustainability references should be:

- Correct and capable of substantiation.
- Clear and presented in a way that can be understood.
- Complete – i.e. they should not omit or hide important information and should consider the full life cycle of the product or service.
- Fair and meaningful in relation to any comparisons to other products or services.

When will the rule and guidance come into effect?

Key dates:

- 28 November 2023 – FCA guidance consultation and final version of anti-greenwashing rule issued
- 26 January 2024 – end of consultation
- 31 May 2024 – anti-greenwashing rule to come into force
- 31 May 2024 – new guidance to come into force

Original text	Final text
<p>3.3 Naming and marketing</p> <p>3.3.1 R A firm (whether it is undertaking sustainability in-scope business or not, including firms that approve financial promotions for unauthorised persons) must ensure that any reference to the sustainability characteristics of a product or service is:</p> <p>(1) consistent with the sustainability profile of the product or service; and</p> <p>(2) clear, fair and not misleading.</p>	<p>4.3 Naming and marketing</p> <p>Anti-greenwashing</p> <p>4.3.1 R (1) This rule applies to a firm (whether it is undertaking sustainability in-scope business or not) which:</p> <p>(a) communicates with a client in the United Kingdom in relation to a product or service; or</p> <p>(b) communicates a financial promotion to, or approves a financial promotion for communication to, a person in the United Kingdom.</p> <p>(2) A firm must ensure that any reference to the sustainability characteristics of a product or service is:</p> <p>(a) consistent with the sustainability characteristics of the product or service; and</p> <p>(b) fair, clear and not misleading.</p>

Why has the FCA issued the guidance consultation on greenwashing?

The FCA guidance is stated to have been designed to help firms that make sustainability claims about products and services better understand the FCA's expectations under the new anti-greenwashing rule and other existing, associated requirements.

"Ultimately, we expect that firms' sustainability-related claims about their products and services should live up to what they are claiming, and firms should have the evidence to back them up."

Three other statements from the policy statement provide insight into the FCA concerns:

"As it stands, 7 in 10 investors say they think that many investments that claim to be sustainable actually aren't."

"We have been concerned that some firms may be making misleading or exaggerated sustainability-related claims about their investment products."

"Firms and industry groups have expressed support that the market needs guardrails as it develops. This will help to ensure the market remains trusted and credible."

Does the draft guidance represent a change in the law or FCA practice?

In our view, no – although in practice, the FCA may provide more leeway to firms in terms of taking stock of the new guidance (once it is in final form) and ensuring compliance – in other words, a short period of informal regulatory forbearance.

We note also the FCA statement in the consultation:

"We expect the anti-greenwashing rule and associated guidance to impose a minimal burden on firms, given they broadly reaffirm and help clarify existing requirements and expectations for firms as outlined in the FCA Handbook, consumer protection law, CAP and BCAP Codes, and the CMA's and ASA's corresponding guidance."

What should I do?

The guidance is not long, comprising just six and a half pages, and is set out in Annex I of the consultation.

Our recommendations:

- Read and consider the draft guidance.
- Consider which internal teams, divisions etc make ESG-related claims.
- Sense check the draft guidance against existing policies and procedures to consider if they would survive a challenge.
- Collect a sample of historically made claims, statements etc and sense check them against the FCA draft guidance.

In our view, this is a prudent approach, bearing in mind that the FCA's statements in the consultation and policy statement suggest it believes that industry standards are not where they should be in all respects.

Who is in scope?

The new anti-greenwashing rule applies to all firms in relation to all of their products and services (ESG 1.1.3 and 4.3.1), subject to some nuances set out below.

Based on the draft guidance, the FCA has in mind that sustainability-related references can be conveyed via statements, assertions, strategies, targets, policies or information – even by the use of an image.

Is both retail and institutional business in scope as regards the new rule?

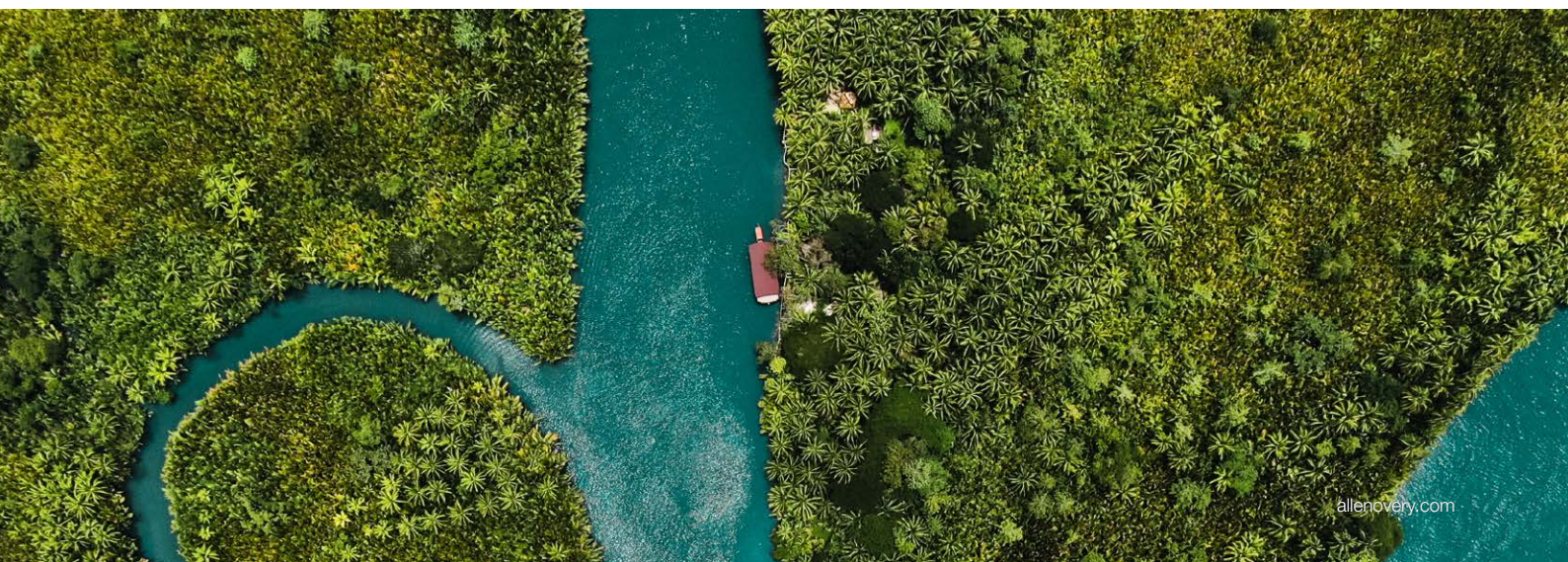
Yes.

As regards institutional business, we note in particular the following from the draft guidance: *"The rule applies to all FCA-authorized firms ... irrespective of whether they are subject to the Consumer Duty."*

Are non-UK clients and investors in scope?

For the anti-greenwashing rule:

- Technically no – in general terms, the rule only applies where a firm communicates with a client in the UK in relation to a product or service, or (in general terms) communicates a financial promotion to a person in the UK.
- However, in our view, the FCA could (at minimum) consider its high level principles for businesses breached if a firm failed to comply with the new anti-greenwashing rule in any other scenario.



Do I need to consider the guidance in relation to products/services marketed only to institutional clients or investors?

Yes.

- Technically, the anti-greenwashing rule applies equally to both retail and institutional facing business, as noted above.
- The same applies to the guidance – although it has clearly been drafted with a focus on retail.
- Some firms, where they conduct institutional facing business, rely in practice on disclaimers or similar tools to mitigate risk in relation to claims made in relation to ESG-related matters. However, it is unclear whether this view is viable in all respects going forward and what the FCA's appetite may be on this.
- For example, it is clear that the reference above to “clear and presented in a way that can be understood” will mean something different in a retail vs institutional context – and that there is more flexibility in the case of the latter. However, it is less clear whether “Correct and capable of substantiation” can be flexed in a similar way. Time will also tell whether the FCA has “red lines”, even in the institutional context.
- In this regard, we note the following text from the draft guidance (emphasis added):
*“14. The claims firms make should be factually correct. Firms should not state or imply features of a product or service that are not true. Nor should they **overstate or exaggerate** the sustainability or positive social and/or environmental impact of a product or service. **Claims should only give the impression that a product or service has the sustainability characteristics that it really has. Claims can also be incorrect if they provide conflicting or contradictory information.***

15. A firm's products or services should do what they say they do. They should live up to the claims made, and firms should be able to support those claims with robust, relevant, and credible evidence. Claims should be capable of being substantiated at the point in time at which they are made. Firms should think carefully about whether they have the appropriate evidence to support the claims they are making.”

“18. The claims firms make should be transparent and straightforward...”

“24. Claims should convey a representative picture of the product or service. Firms should not omit or hide important information that might influence decision-making.”

“25. Where claims are only true if certain conditions or caveats apply, those conditions or caveats should be clearly and prominently stated.”

For example, for product documents where the “headline” message is that a product or service is “ESG friendly”, with caveats, qualifications or disclaimers in the fine print, although it is uncertain, there may be a risk of a challenge from the FCA based on the above.

Can I still say in product documents that a product “may” have certain ESG-related features, without being too committed?

You may wish to seek specific advice if this is relevant to you.

We note the following from the draft guidance (emphasis added):

*“The use of **vague, broad, or general terms** may be also unclear and confusing. Firms should not **give the impression** that a product or service has sustainability characteristics that it does not have.”*

What is your recommendation?

Firms with a retail facing business should clearly consider the guidance closely.

Given the points made above, we are also recommending this for firms who make ESG-related claims in relation to products and services in an institutional or wholesale context.

Can you give us any examples as to where issues might arise?

Please get in touch with your usual A&O contact for a list of scenarios where risk may arise, our assessment of the risk level, and our recommended approach going forward.

Is the guidance relevant if I classify a product/service as sustainable for internal purposes (eg to meet internal ESG-related business targets), but make no statement to this effect to a client?

No – it is not relevant in this context.





How will the guidance impact my litigation exposure?

The new anti-greenwashing rule may increase the litigation risk for firms, whether under general law principles or claims by consumers under s.138D of the Financial Services and Markets Act 2000 (**FSMA**), which provides a right of action against firms where a private individual has suffered loss as a result of a breach by the firm of FCA rules. While the guidance will not be binding, it is likely to inform the view of a court as to what might be regarded as “*fair, clear and not misleading*”.

It might also be thought that the guidance should also assist to establish what will constitute reasonable steps that can be taken by a firm in order to avoid liability. However, while a right of action under s.138D will not arise in relation to the general “fair clear and not misleading” rule in COBS 4.2.1 if the firm takes reasonable steps to ensure it complies with that rule, there is currently no equivalent exception under the proposed anti-greenwashing rule. This does raise the possibility that a firm could be held liable to consumers for misleading statements in relation to the sustainability aspects of a product even where it has followed the guidance.

Your core contacts



Tamara Cizeika
Counsel – London
Tel +44 203 088 2329
tamara.cizeika@allenoverly.com



Bob Penn
Partner – London
Tel +44 20 3088 2582
bob.penn@allenoverly.com



Andrew Denny
Partner – London
Tel +44 20 3088 1489
andew.denny@allenoverly.com



Sarah Hitchins
Partner – London
Tel +44 20 3088 3948
sarah.hitchins@allenoverly.com



Matthew Townsend
Partner – London
Tel +44 20 3088 3174
matthew.townsend@allenoverly.com



Claire Hayden
Executive Director – London
Tel +44 20 3088 1941
claire.hayden@allenoverly.com



Sam Jones
Executive Manager – London
Tel +44 20 3088 1893
sam.jones@allenoverly.com



Ying-Peng Chin
Senior Knowledge Lawyer – London
Tel +44 20 3088 3708
ying-peng.chin@allenoverly.com

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy (Holdings) Limited is a limited company registered in England and Wales with registered number 07462870. Allen & Overy LLP and Allen & Overy (Holdings) Limited are authorised and regulated by the Solicitors Regulation Authority of England and Wales. The term partner is used to refer to a member of Allen & Overy LLP or a director of Allen & Overy (Holdings) Limited or, in either case, an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners, and a list of the directors of Allen & Overy (Holdings) Limited, is open to inspection at our registered office at One Bishops Square, London E1 6AD.

© Allen & Overy LLP 2023. This document is for general information purposes only and is not intended to provide legal or other professional advice.