

MEMORANDUM

To: Amcor

From: Davis Wright Tremaine LLP

Date: November 26, 2025

Subject: Current Legal and Regulatory Environment Re: Use of Mass Balance Accounting as Substantiation for Recycled Content Claims

Per Amcor's request, the discussion below addresses the current legal and regulatory environment related to the use of the mass balance accounting methodology relative to recycled content claims. The analysis centers on the Federal Trade Commission ("FTC"), the National Advertising Division of BBB National Programs ("NAD"), state legislative activity, and litigation to the extent any of these have considered mass balance accounting. In short, only NAD has opined on the use of mass balance accounting to support recycled content (specifically in packaging claims). NAD found that mass balance accounting was appropriate provided that the claim was appropriately disclosed and qualified to avoid being misleading. To date, there are no federal or state laws prohibiting the use of mass balance accounting to substantiate recycled content claims, nor did we find that any U.S. court has opined directly on the issue.

I. The Federal Trade Commission Has Not Ruled on Mass Balance Accounting

The FTC has jurisdiction over advertising in the United States. Although the FTC has not opined directly on the use of mass balance accounting, the FTC's Green Guides¹ provide interpretive guidance intended to assist marketers in avoiding deceptive or misleading environmental claims under Section 5 of the FTC Act.² The Green Guides are designed to ensure that environmental marketing claims are truthful, substantiated, and not misleading to reasonable consumers, and provide the FTC's interpretation of environmental claims.

The Green Guides are not law and are not legally binding on advertisers (although some states, *e.g.*, California, have expressly incorporated them into their states' unfair and deceptive acts and practices codes); however, noncompliance with the Green Guides may expose businesses to enforcement risk for deceptive or unfair practices under the FTC Act or state Unfair and Deceptive Acts and Practices ("UDAP") laws, particularly where states have expressly incorporated the Green Guides by reference. Likewise, where companies have been able to demonstrate that their

¹ See 16 C.F.R. Part 260, *et seq.*

² See 15 U.S.C. § 45.

claims complied with the Green Guides, courts have found this sufficient to overcome private UDAP actions.³

Last updated in 2012, the Green Guides address “recycled content” claims (in addition to other commonly used environmental claims).⁴ The FTC’s regulation on recycled content claims does not speak directly to the use of mass balance accounting as substantiation. However, one example provided as illustration implies that mass balance accounting may be used to support a truthful and non-misleading claim about recycled content. The example states as follows:

A manufacturer labels a paper greeting card “50% recycled fiber.” The manufacturer purchases paper stock from several sources, and the amount of recycled fiber in the stock provided by each source varies. If the 50% figure is based on the annual weighted average of recycled material purchased from the sources after accounting for fiber loss during the papermaking production process, the claim is not deceptive.⁵

In 2022, the FTC initiated the notice and comment process to update the Green Guides, and specifically sought comments related to mass balance calculations for recycled content claims, among a range of other related topics.⁶ To date, the FTC has not finalized the updates to the Green Guides and we believe that it is unlikely that the current Commission will prioritize completion of the update. More specifically, it is unknown at present whether any future updates to the Green Guides will further elucidate the Commission’s standards for substantiation of recycled content claims or use of mass balance accounting specifically.

II. NAD Has Opined as to Mass Balance Accounting as a Means of Supporting Recycled Content Claims

NAD is an industry self-regulatory body that informally adjudicates advertising disputes. Although its decisions are not binding, NAD’s attorney reviewers are experts in advertising law and their decisions provide helpful guidance to the industry on a variety of advertising issues. Based on our research, NAD is the only quasi-judicial body in the U.S. to have opined directly on a dispute involving recycled content claims based on mass balance accounting.

Specifically, NAD recently decided a case involving Boxed Water is Better®’s (“Advertiser”) advertising of the recycled content of its Boxed Water packaging (among other

³ See, e.g., *Swartz v. Coca-Cola Co.*, 2023 WL 4828680, at *3-4 (N.D. Cal. July 27, 2022) (In dismissing the plaintiff’s complaint alleging violations of California’s false advertising law, unfair competition law and the California Legal Remedies Act, the Court found that the defendant’s statements including “100% recyclable” were not misleading, noting they aligned with “the concerns stated in the Green Guides and corresponding California regulations.”)

⁴ 16 C.F.R. § 260.13.

⁵ 16 C.F.R. § 260.13 (Example 7).

⁶ “8. Recycled Content, 16 CFR 260.13. The Guides suggest marketers can substantiate “recycled content” claims using per-product or annual weighted average calculation methods. Should the Guides be revised to provide guidance on making “recycled content” claims based on alternative method(s), e.g., mass balance calculations, certificate (i.e., credit or tagging) systems, or other methods? If so, why, and what guidance should be provided? If not, why not? What evidence supports your proposed revision?” <https://www.federalregister.gov/d/2022-27558/p-78>.

claims).⁷ In that case, the International Bottled Water Association (“IBWA”) challenged the following recycled content claims: “Explore our renewable packaged option,” “For those times when reusable bottles aren’t an option, our paper-based cartons are the most renewable option in the water aisle,” “92% plant-based carton,” and “Our carton is made from 92% renewable materials.” The IBWA questioned whether the liner and the cap of the cartons—which together accounted for roughly 36% of the total packaging—were in fact made from renewable plastic. IBWA also challenged the Advertiser’s reliance on mass balance accounting to substantiate its claims.⁸

NAD acknowledged that the current FTC Green Guides may allow for the use of mass balance accounting to support recycled- or renewable-content claims in certain situations.⁹ NAD opined that its permissibility hinges on how the resulting claims are communicated to consumers. In so finding, NAD emphasized two longstanding advertising principles: (1) an advertiser is responsible for substantiating all reasonable interpretations of the claims it makes, and (2) where qualifying information is necessary to avoid a misleading impression, that information must be clearly and conspicuously disclosed.

NAD noted that consumers could reasonably interpret an unqualified numerical claim (*e.g.*, “92% renewable materials”) as describing the actual, physical proportion of the product made from renewable inputs. Therefore, because the advertiser relied on mass balance accounting to achieve its percentages, NAD recommended that the advertiser modify its claims “to provide additional information on how their calculations are done.”¹⁰ In short, NAD did not question the use of mass balance accounting as a methodology itself, but rather recommended that the advertiser explicitly disclose the nature of the methodologies on which they rely and avoid claims that could reasonably be understood as describing the literal physical composition of the product.

III. State Statutes & Regulations Expressly Allow Mass Balance Accounting in Non-Claims Contexts

We are not aware of any state law, to date, that specifically allows or prohibits the use of mass balance accounting as substantiation for a recycled content claim. It does appear, however, that mass balance accounting is expressly allowed by some states for non-claims purposes. In Washington state, for example, when calculating the resin weight and post-consumer recycled content percentage for required reporting, the state allows for the use of certified mass balance

⁷ *Boxed Water is Better® (Boxed Water)*, NAD Case #7385 (05/16/2025).

⁸ “The [IBWA] argued that the Advertiser could not make a 92% renewable claim for its cartons when any given carton could, and likely does, contain less than that amount of renewable materials.” *Boxed Water is Better® (Boxed Water)*, NAD Case #7385 at 7 (05/16/2025).

⁹ “NAD also noted that the current version of the Green Guides is largely silent on mass balance but suggests that, at least in some circumstances, it may be permissible to claim that a product has a certain amount of material even if any particular product does not physically contain that much.” *Boxed Water is Better® (Boxed Water)*, NAD Case #7385 at 7 (05/16/2025).

¹⁰ “NAD noted that consumers may not perceive the ‘made from 92% renewable materials’ claim as merely referring to the outcome of a mass balance process. An advertiser is responsible for all reasonable messages conveyed by its advertising. Material information that is necessary to prevent a consumer from being confused or misled should be disclosed. NAD therefore recommended that the Advertiser modify the claims ‘92% plant-based carton’ and ‘[o]ur carton is made from 92% renewable materials’ to provide additional information on how their calculations are done.” *Boxed Water is Better® (Boxed Water)*, NAD Case #7385 at 7 (05/16/2025).

attribution as identified in ISO22095:2020.¹¹ Indiana defines “recycled product” in part as products produced from postconsumer plastics via mass balance attribution.¹² Texas likewise allows for the use of mass balance attribution to “identify the portion of the total content of a product which consists of recycled material and recycled plastics.”¹³ While these are not dispositive to the question of using mass balance accounting for substantiation of recycled content claims, it does indicate that mass balance accounting is used in certain situations related to determining the amount of recycled content in a product.

IV. No U.S. Court Has Opined Directly on Mass Balance Accounting as a Means of Supporting Recyclability or Recycled Content Claims

We did not find that any U.S. court has opined directly, to date, on mass balance accounting as a means of supporting recyclability or recycled content claims. The State of California’s litigation against ExxonMobil, filed in September 2024, is the most prominent case touching on the issue.¹⁴ The lawsuit contends that ExxonMobil’s advertising and public statements fostered the false belief that recycling could solve the plastic waste crisis, whereas internal documents and outside reporting indicated a different story. In February 2025, the case was sent back to California state court after having been removed by ExxonMobil to federal court.¹⁵ The case is ongoing.

The complaint points, in part, to ExxonMobile’s claims that its plastic products are certified by the third-party certifier International Sustainability and Carbon Certification (“ISCC”) under

¹¹ “(2)(a) For the purposes of reporting PCRC [post-consumer recycled content], producers may calculate resin weight and PCRC percentage from the following sources: (i) PCRC derived from mechanical recycling using post-consumer materials; (ii) PCRC from nonmechanical processing of post-consumer materials calculated using an existing and recognized international or multinational third-party certification system which incorporates chain of custody, and certified mass balance attribution as identified in ISO 22095:2020; or (iii) Other sources or methods that the producer demonstrates to the department to have a comparable degree of accuracy. (b) Plastic sold or marketed for use as fuel feedstock may not be included as contributing to required PCRC reports to the department.” Wash. Admin. Code 173-925-060 PCRC product requirements (emphasis added).

¹² “‘Recycled plastic’ means products that are produced from: (1) mechanical recycling of preconsumer recovered feedstocks or plastics, and postconsumer plastics; or (2) advanced recycling of preconsumer recovered feedstocks or plastics, and postconsumer plastics via mass balance attribution under a third party certification system.” Ind. Code Ann. § 13-11-2-179.8 – “Recycled plastic” (emphasis added).

¹³ “(a) A product is eligible to be considered a recycled product when it conforms with the minimum content of recycled material as specified in the Comprehensive Procurement Guidelines (CPG) and the Recovered Materials Advisory Notice (RMAN) published by the Environmental Protection Agency (EPA) as described in §328.7(4) of this title (relating to Definitions of Terms and Abbreviations). (b) Manufacturers may use a third-party certification system for mass balance attribution as identified under §328.303 of this title (relating to Third-party Certification Systems for Mass Balance Attribution) to identify the portion of the total content of a product which consists of recycled material and recycled plastics.” 30 Tex. Admin. Code § 328.304 – Recycled Products (emphasis added). *See, also,* Tex. Health & Safety Code Ann. § 361.427 (“(a) The commission, in consultation with the comptroller, shall promulgate rules to establish guidelines by which a product is eligible to be considered a recycled product based on: ... (2) the portion of the total content of a product that is determined to consist of recycled material according to a third-party certification system for mass balance attribution identified by the commission under Section 361.4215.”) (emphasis added).

¹⁴ *People v. Exxon Mobil Corporation*, complaint available here: https://oag.ca.gov/system/files/attachments/press-docs/Complaint_People%20v.%20Exxon%20Mobil%20et%20al.pdf. *See, also,* Press Release, Attorney General Bonta Sues ExxonMobile for Deceiving the Public on Recyclability of Plastic Products, Sept. 23, 2024, <https://oag.ca.gov/news/press-releases/attorney-general-bonta-sues-exxonmobil-deceiving-public-recyclability-plastic>.

¹⁵ *California v. Exxon Mobile Corporation*, 2025 WL 595267 (N.D. Cal. 2025) (No. 3:24-cv-07594-RS).

its relatively new plastics certification scheme (“ISCC PLUS”) and ISCC’s allowance of the use of mass balance accounting with “free allocation” or “free attribution” to support its ISCC PLUS certification.

The complaint alleges that such claims about certification misleadingly convey that those plastic products have significant environmental benefits or are made of recycled plastic. The complaint further alleges that the use of mass balance accounting to support the environmental claims is not appropriate substantiation because the actual recycled-plastic feedstock ending up in those products may be minimal. California alleges that the system of mass balance accounting “divorces the need for end products to reflect the actual amount of physical waste plastic content that the products contain....”¹⁶ The lawsuit does not expressly challenge mass-balance accounting as an inherently unlawful method, however.

Mass balance accounting is widely used to calculate recycled content across a range of consumer products. As discussed herein, no U.S. law prohibits the use of mass balance for this purpose and state laws implicitly recognize it as a valid approach in other contexts. No U.S. court has opined directly on the issue to date. The FTC has offered limited guidance indicating that a mass balance approach may be non-deceptive in certain circumstances. NAD, the only body to address the question in detail, has concluded that with appropriate disclosures mass balance accounting can serve as a viable method of substantiating recycled-content claims.

¹⁶ *California v. Exxon Mobile Corporation*, ¶ 300 of Complaint.