Anti-Greenwashing Rule guidance

UK Finance consultation response

February 2024

UK Finance is the collective voice for the financial services industry. Representing around 300 firms, we act to enhance competitiveness, support customers, and facilitate innovation. We are pleased to respond to the consultation on the FCA's guidance document GC23/3 (the "Guidance") on its proposed Anti-Greenwashing rule (the "Rule").

In addition to the three questions outlined in the consultation, we have set out below a high-level overview of our position. We previously responded to the FCA's consultation on Sustainability Disclosure Requirements (SDR) and investment labels in January 2023, and the comments made in this submission build on thoughts previously provided. Unless otherwise stated in this response, we adopt the defined terms used in the Guidance.

OVERVIEW

As set out in our response to the FCA's SDR and investment labels in January 2023, we support the overarching intent of the FCA to introduce anti-greenwashing intervention to help ensure the right consumer outcomes as the industry and regulatory landscape evolves.

We welcome the publication of the Guidance to combat concerns that firms may be making exaggerated, misleading or unsubstantiated sustainability-related claims about their products, which do not stand up to closer scrutiny. This aligns to previous messaging from the FCA and builds on existing requirements and expectations for firms.

We recommend the FCA amend and/or supplement the Guidance in certain places, and provide a greater number and variety of examples. The FCA should:

- clarify how the expectations set out in the Guidance relate to each of the four requirements under the Rule;
- work with overseas authorities (e.g. the European Securities and Markets Authority (ESMA)) to ensure that there is maximum alignment between the Guidance and guidance published in other jurisdictions relating to the same issues;
- provide confirmation that existing rules and guidance relating to communications and financial promotions (e.g. the Conduct of Business Sourcebook (COBS)) also apply to claims regarding the sustainability characteristics of a product or service;
- provide greater clarity as to how the Guidance will operate alongside existing guidance on greenwashing published by the Advertising Standards Authority (ASA) and Competition and Markets Authority (CMA);

- provide greater clarity on the scope of the Rule, by confirming that it only applies to claims regarding products and services, rather than claims about firms more broadly; and
- supplement and/or clarify certain aspects of the Guidance regarding the application of the Rule, including on the presentation of claims to different audiences, the use of technical terms, the use of images, and the substantiation of claims.

We would recommend the FCA take a proportionate approach when applying the Rule, in line with existing rules on communications and financial promotions. This would include taking into account the level of sophistication of the audience (e.g. between a qualified investor and a customer in a retail context), and not penalising firms which communicate sustainability claims in reasonable reliance on third party statements. Such an approach would help support the market for sustainable or transition products and services by encouraging firms to adopt ambitious long-term sustainability goals. We set further detail and examples out throughout this response.

RESPONSES TO QUESTIONS

Q1: Does the proposed guidance clarify the anti-greenwashing rule? If not, what more could we do to provide clarity?

Overall, the Guidance is helpful, appears broadly in line with previous messaging from the FCA, and shares consistent themes with the guidance of other UK regulators such as the ASA and CMA. We understand that, in practice, the application of the Guidance to individual claims will be highly fact- and context-specific.

Following the publication of the Rule and Guidance, and as sustainability products and markets develop and scale up, we would welcome open and continued dialogue between the FCA and industry to share best practice and discuss emerging supervisory concerns. Further recommendations as to how the FCA might clarify the application of the Rule are set out in response to Q2.

Q2: Do you have any comments on the proposed guidance including the examples given?

The following areas in the Guidance may benefit from further clarity or additional content:

- **Terminology**: The Guidance is intended to help firms understand the FCA's expectations with regard to the application of the Rule, by setting out four principles. However, the terminology used in the Guidance ("correct"; "capable of being substantiated"; "complete"; "meaningful in relation to any comparisons") does not mirror the four requirements set out in the Rule. While the Guidance builds on and provides further context for understanding the Rule, the lack of alignment between the terminology used in the Rule and the Guidance creates risk that the Guidance may be read as supplemental to the well-established concepts set out in the Rule, rather than explanatory. To increase certainty in this regard, the FCA should clarify how the expectations set out in the Guidance relate to each of the four requirements under the Rule. This would also promote better harmony with other areas of the FCA Handbook which refer to the principles of "fair, clear and not misleading".

- **International Interoperability**: Many firms will be subject to anti-greenwashing regimes and guidance in other jurisdictions. The final report of ESMA on greenwashing is due to be published in May 2024, updates to the EU's Unfair Commercial Practices Directive are expected in the near future, and the proposed Green Claims Directive is being negotiated by the EU's institutions. To support firms operating across multiple jurisdictions with overlapping anti-greenwashing regimes, the FCA should work with the authorities in the relevant jurisdictions to ensure that there is maximum alignment (and, at a minimum, no material divergence) between the Guidance and guidance published in other jurisdictions on the same issues.

- **Interoperability with existing guidance**:

    - **Existing FCA guidance:** The introduction to the Guidance provides that it is designed to help firms better understand the FCA's expectations under the Rule "and other existing, associated requirements". The FCA should specify which other requirements it is referring to in this context, as there are various regimes and requirements addressed in the Guidance. The FCA should also clarify how the Guidance will operate alongside other existing guidance that would apply to sustainability-related claims. In particular, we would welcome confirmation from the FCA that existing rules and guidance relating to communications and financial promotions (e.g. COBS) also apply to communications regarding the sustainability characteristics of a product or service, including any relevant exemptions under those associated regimes.

    - **Existing ASA/CMA guidance:** The FCA should clarify how the Guidance will operate alongside existing ASA/CMA guidance on greenwashing.[1] We would welcome clarification on areas where its Guidance is consistent with ASA and CMA guidance, and any areas where it is inconsistent.[2] Any clarifications should take into account the fact that the ASA/CMA requirements fall under different regimes to the FCA's Rule, and that the Guidance would therefore not typically apply to the ASA/CMA regimes and *vice versa*.[3]

- **Scope of the Rule**: We recommend that the FCA provide clarity as to the scope of the Rule along with examples of threshold sustainability-related claims that would / would not fall within scope.[4] In particular, the following aspects of the Guidance would benefit from expansion or clarification:

    - We would welcome confirmation from the FCA that the Rule applies to sustainability-related claims and financial promotions made by firms in relation to their products and services only.[5] If a firm publishes a greenhouse gas emissions target for its business as a whole (i.e. not necessarily limited in scope to its products and services), we understand that this would not fall in scope of the Rule. Likewise, we understand that sustainability disclosures, such as TCFD-aligned disclosures, would not fall in scope of the Rule. However, the Guidance provides that sustainability-related claims might

[1] We note that the FCA, ASA and CMA share overlapping responsibilities with regard to the protection of consumers, as delineated in their respective memoranda of understanding.

[2] We note the FCA's statement in the Guidance that it has worked closely with the CMA and ASA to ensure consistency between its Guidance and CMA/ASA guidance in relation to environmental claims. However, there are certain inconsistencies in the underlying guidance. For example, both the FCA and the CMA require that environmental claims are clear, but the underlying guidance as to what "clear" means / how to satisfy this requirement in the context of the two regimes is different in certain respects. While the CMA states that "claims about future goals should only be used for marketing purposes if the business has a clear and verifiable strategy to deliver them", the FCA does not set out a corresponding expectation in the Guidance. It would be helpful for the FCA to clarify how the Guidance should be read in light of guidance published by the ASA/CMA. See "CMA guidance on environmental claims on goods and services", CMA, 20 September 2021, accessible here.
It would be helpful for Guidance to track the language and guidance of the ASA/CMA more closely to the extent that the intentions are aligned.

[3] We note that the FCA expects the Guidance to "help clarify existing requirements and expectations for firms as outlined in […] consumer protection law, CAP and BCAP Codes, and the CMA's and ASA's corresponding guidance". It is unclear what legal force this statement would have given that it would typically be for the ASA and CMA to state whether and how the FCA's Guidance is applicable to their respective codes and requirements. We would not expect the FCA's Guidance to apply to the respective codes of the ASA/CMA, because the underlying requirements are different and apply in different contexts.

[4] Currently, the examples primarily address non-compliance, rather than the threshold question of whether the claim would fall in scope (i.e. that they relate to the sustainability characteristics of the firm's products or services).

[5] In line with this, the Guidance defines "sustainability-related claim" as any claim that includes "references relating to the sustainability characteristics of a product or service".

be located in, *inter alia*, "statements, assertions, strategies, targets, policies, information, and images". To clarify the position, it would be helpful for the FCA to provide examples of the types of in-scope sustainability-related claims that might be located in targets, strategies and policies.

- Likewise, the statement that "information about the firm itself may be considered part of the 'representative picture' in a decision-making process" suggests that claims regarding the firm in a more general sense (e.g. greenhouse gas reduction targets, transition plans, or a commitment to net-zero) may fall in scope of the Rule, even if they are not necessarily being used to influence decision-making in relation to specific products or services. It would be helpful for the FCA to confirm in the Guidance (with pertinent examples provided) that claims about the sustainability characteristics of a firm more generally would only fall in scope of the Rule if they are being used to influence decision-making in communications relating to specific products or services.[6] There is concern that if "information about the firm itself" falls in scope, this may broaden the territorial scope of the Rule to activities outside the FCA's regulatory jurisdiction.

- The word "related" ("sustainability-related claims" / "sustainability-related references") creates uncertainty as to the substantive scope of the Rule, as it could be construed narrowly or broadly. While certain types of claim will clearly "relate" to the sustainability characteristics of the product or service (e.g. that a savings account is "green"), the position may be less clear for claims which refer to the sustainability characteristics of a product more tangentially or alongside other characteristics.

- Our understanding is that the Rule would apply to the regulated activities which firms are authorised by the FCA to carry out. However, there is concern that, as currently drafted, the Rule might be construed as extending beyond regulated activities, particularly in light of there being no definition for the terms "product" or "service" under ESG 4.3.1R. This creates uncertainty as to whether the Rule may apply to products and services carried out by firms more generally, even if those products/services are not within the scope of regulated activities. We recommend that the FCA confirm this aspect of the Rule's scope in the Guidance.

- **Territorial scope of the Rule:** The FCA should clarify its FCA's expectations regarding communications or promotions made on cross-border platforms, such as websites, apps, social media, or retail platforms. The ASA states in its "UK Code of non-broadcast advertising and direct and promotional marketing" (CAP Code) that its rules do not apply to marketing communications on cross-border platforms unless certain limited conditions are satisfied.[7] It would be helpful for the FCA to confirm whether the same position applies with respect to the Rule.

- **Application to capital markets activities**: The FCA should clarify how the Rule applies to capital markets activities, such as when a bank is acting in an advisory or underwriting capacity. This includes where sustainability claims are made by third party issuers with respect to their issuances or corporate activities, and where the claim is subsequently communicated by authorised firms at the direction of the issuer. Firms are already required to seek confirmation from the third-party issuer that the information in the offering documents is accurate and complete. Our understanding is that the Rule and accompanying Guidance do not impose any

[6] This determination will be highly fact- and context-specific.

[7] Specifically, the communication must be (i) a non-paid-for marketing communication from or by marketers with a UK registered company address; (ii) marketing communications appearing on websites with a ".uk" top-level domain; or (ii) paid-for marketing communications from or by marketers targeting people in the UK. *See* ASA, CAP Code, "Scope of the Code", accessible here.

additional obligations on firms in this regard. We would welcome confirmation from the FCA that this is the case in the Guidance.

- **Substantive elements of Guidance**:

    - **Presentation of claims to different audiences:** The FCA should confirm whether the presentation of claims differ depending on the audience of the claim, in line with the existing principle under COBS 4.2.2G.[8] For example, while wholesale-only firms currently rely on disclaimers, caveats or other similar approaches to mitigate risk with respect to sustainability claims, this approach may not always be appropriate in a retail/consumer-facing context. We would encourage the FCA to provide pertinent examples of how the presentation of sustainability claims should differ depending on the context in which the claim is made, including an example addressing communications in a wholesale context (such as ESG derivatives), and an example addressing communications regarding commercial products aimed at SMEs.

    - **Use of technical terms:** The Guidance provides that "any technical terms should be explained unless their meaning is clear and widely understood". The Guidance should clarify where the explanation for the technical language needs to be located, and whether the level of explanation required should vary depending on the sophistication of the audience.

    - **Use of images:** The Guidance provides that the Rule would apply to images if these convey a misleading impression about the sustainability characteristics of a firm's products or services. The example given refers to a web page regarding savings accounts with a "green" image at the top, which conveys a misleading impression that all of the savings accounts listed on the page are sustainable. To complement this, the FCA should provide examples of situations when green or sustainable imagery would be allowed under the Rule.

    - **Substantiation of claims**: The FCA should clarify how to apply the requirement that claims "should be capable of being substantiated at the point in time at which they are made". In particular:

        i. Firms would benefit from greater clarity as to the type of evidence that would be needed to substantiate claims, and when/where such evidence would need to be disclosed (if at all). For example, within the FCA policy statement on Sustainability Disclosure Requirements for asset managers, there is reference to the "robust, evidence-based standard" and the need for standards used in relation to the sustainable investment product labels to be "independently assessed".

        ii. In the case of green bond issuances, firms may provide a timeline for the funds raised to be allocated or used to support the provision of green loans, with full allocation only being achieved two to five years after the bond issuance. In such cases, it is unclear how the FCA's expectation for firms to fully substantiate the claim at the time of the communication would apply. Our understanding is that it is acceptable for communications relating to such products/services be made in accordance with existing market principles (e.g. ICMA's Green Bond Principles), unless there are mandatory rules or standards in the UK which provide otherwise.

[8] The FCA may also consider drawing on the client classification system under MiFID II to distinguish between customers in different contexts.

iii. Likewise, where a product is aimed at financing sustainability-related outcomes (e.g. a "green" mortgage), the Guidance should make clear that the Rule does not apply to that aspect of the product where the sustainability-related outcome (in the example of a green mortgage, a more energy-efficient building) is contingent on actions by the customer, rather than from the bank providing the product. We would welcome an example from the FCA of the evidence needed to support a claim regarding a "green" mortgage.

- **Completeness of claims**: The expectation that firms consider the whole life cycle of a product or service may be challenging for firms to achieve. It may not always be possible to determine whether a new heat pump will lead to lower emissions over its full lifecycle than prolonging the life of an existing gas boiler, or the same with respect to a new electric vehicle versus an existing, fuel-efficient non-electric vehicle. However, that does not mean that references to the new heat pump or electric vehicle as "sustainable" would be misleading. A strict interpretation of the Guidance regarding life cycles – from manufacture and installation to decommission and disposal – could discourage firms from offering products that are designed and reasonably expected to mitigate adverse impacts on the environment. It would be helpful to have more detail on the nature and extent of the requirement to consider the whole life cycle of the product or service. The FCA might consider clarifying this by adding qualifying language, e.g. "[t]o the extent that such data is reasonably available, firms should consider the whole life cycle […]".

- **Reliance on third party claims, data and ratings**: The FCA should clarify the approach that will be taken where firms make sustainability claims in reasonable reliance on third party data and ratings:

  - We recommend that the FCA adopt a proportionate approach in relation to cases where the party communicating the sustainability claim acts in reasonable reliance on a statement made by a third party and having put in place adequate risk management and governance structures. In a bond issuance, for example, a financial institution acting as underwriter may have conducted appropriate due diligence but be unaware of a misleading statement included by the issuer in the offering documents, resulting in good-faith reliance on data that subsequently proves to be inaccurate. Firms may also rely on government data sources such as EPC ratings or vehicle emissions data from the Driver and Vehicle Licensing Agency (DVLA) or CAP HPI[9] when making sustainability-related claims in scope of the Rule. We welcome additional examples in the Guidance addressing situations where firms replicate sustainability-related claims made by a third party, or make sustainability-related claims in reliance on data obtained from a third party, and when it would be reasonable to do so.[10]

  - The FCA should provide further clarity on its expectations regarding the establishment of internal frameworks and procedures to manage and mitigate the risk of greenwashing claims made in reliance on third party data or communications. This includes policies, governance arrangements, or other internal processes/procedures. We would expect the Rule to impose no new obligations on firms in this regard beyond those which already apply under existing FCA rules and guidance. Caution should be

[9] *See* CAP HPI website, accessible here.

[10] Without greater clarity, there is a risk that firms may refrain from certain activities for fear of legal liability, which would adversely impact the competitivity of the UK market. For example, firms acting in an underwriting capacity may refrain from marketing third party products on the basis that they do not have the capacity or capability to independently verify sustainability-related claims made in the offering documents.

taken not to place a disproportionate burden on firms that undertake reasonable due diligence and have adequate frameworks in place to address such risks.

  - While it is often considered best practice to rely on ESG ratings and data products in support of financing activities, such activities may also be perceived by some as giving rise to greenwashing concerns. We support the ongoing work around regulatory oversight of ESG ratings and data providers and look forward to HMT's proposals that are expected in Q1 2024.

- **Examples provided:** The examples provided are generally helpful in providing clarity on the application of the Rule. We have noted above some further examples which it would be helpful for the FCA to provide. In addition to these, it would be useful to see examples:

  - of claims made by different types of entity, including banks, insurance companies, asset managers, pension funds and other FCA-regulated firms;

  - addressing social claims and charitable activities (currently the examples in the Guidance focus on environmental claims);

  - addressing expectations with regard to the marketing of products (e.g. bonds) issued by third parties or circulation of materials prepared by third parties;

  - addressing expectations with regard to the treatment of claims made in reliance on ESG data and ratings provided by third parties;

  - addressing the use of disclaimers and caveats and the extent to which such practices can be used to protect firms from liability under the Rule in a retail and wholesale context; and

  - of best practice (i.e. compliance) by firms with the Rule, to supplement existing examples focused on non-compliance.

Q3: Do you agree that the guidance should come into force on 31 May 2024?

We support the proposal that the Guidance should become effective at the same time as the Rule.

Regarding the entry into force of the Rule, UK Finance members had differing positions on whether they supported existing plans for entry into force on 31 May, or a later date. We note the following regarding the date of entry into force:

- According to the proposed timetable, the final Guidance will be published with a relatively short window before its proposed entry into force on 31 May 2024. This may make it challenging for firms to conduct a full gap analysis in time for its entry into force, particularly given that firms are concurrently implementing other sustainability-related rules and expectations. If the Guidance changes substantially, any gap analyses and other implementation work that has already begun or been completed by firms will need to be revisited.

- ESMA's upcoming report on greenwashing is also due to be published in May 2024. In view of this, it is particularly important that the FCA works with ESMA to ensure maximum alignment with ESMA's guidance and a more cohesive and streamlined implementation process.

- As we stated in our previous response to the FCA's Sustainability Disclosure Requirements (SDR) and investment labels, it is important that the Rule does not inadvertently introduce the new SDR and labelling regime early, for example by allowing the FCA to hold firms to the

standards expected under the SDR and investment label regime before those standards have formally come into effect.

On this basis, if the FCA decides to proceed with May 2024 as the date of entry into force, we would strongly encourage the FCA to consider introducing transitional measures to support firms with initial implementation of the Rule, particularly given the short gap between the publication of the draft Guidance and the Rule's entry into force. These could include targeted and time-limited phase-in periods, safe harbour provisions, or other proportionality measures aimed at supporting firms that undertake in good faith to comply with the Rule.

If you have any questions on this response, please reach out to:

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