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## **Greenwashing, the next “big thing”?**

A comparative snapshot of laws applicable to voluntary corporate ESG disclosures

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Dentons has undertaken a survey of “greenwashing” laws in 19 jurisdictions around the globe.<sup>1</sup> The survey explores how existing legal frameworks apply to voluntary communications made by multinational corporations when the communications relate to environmental, social and governance (**ESG**) aspects of their internal operations, products, services, supply chains and broader value chains. This snapshot presents some of the key findings of the survey, concentrating specifically on greenwashing.

<sup>1</sup> Dentons would like to thank NYU Law in Paris and PILnet (the Global Network for Public Interest Law) for their valuable collaboration and assistance. The following jurisdictions are covered in this snapshot: Australia, Belgium, Brazil, Canada, Chile, China, the European Union, France, Hong Kong, Italy, Kenya, Mexico, Nigeria, South Africa, the Netherlands, the United Kingdom, US: Federal, US: California and US: New York.

The business landscape, as we know it today, has been fundamentally transformed by climate change and nature loss, renewed calls for equality, the pandemic, a demand for improvements to working conditions and, more generally, changing expectations on the role of companies in society. As the demand for eco-friendly sustainable and socially responsible products and services grows, **companies around the globe are increasingly promoting their ESG credentials through various forms of public communications** (press releases, website announcements, public policies, advertising campaigns, product packaging, environmental labels, etc.).

Claiming to be “green” or sustainable (including in relation to governance or social aspects, such as diversity and inclusion and gender advancement) has become a competitiveness factor among global businesses.

This presents a range of **legal and reputational risks, including allegations of “greenwashing” and “ESG washing,”** and liability risks resulting from misrepresentation, breach of contract, loss of business and possibly even fraud and criminal sanctions. Civil society and regulators have become more aggressive in seeking to hold companies accountable for greenwashing.

### What is Greenwashing?

- **Framing of “greenwashing” by the European Commission:**
  - **“Greenwashing”** means the practice of making unclear or not well-substantiated environmental claims. [Paragraph 1.1(a), *Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive)*, COM(2023) 166 final, hereafter the “Proposal for a Green Claims Directive”].

- **“Environmental claim”** means “any message or representation, which is not mandatory under Union law or national law, including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication, which states or implies that a product or trader has a positive or no impact on the environment or is less damaging to the environment than other products or traders, respectively, or has improved their impact over time.” [Proposed Article 2, point (o) in the *Proposal for a directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information*, COM/2022/143 final, hereafter the “Proposal on Empowering Consumers for the Green Transition”].

- **What is ESG-washing?**

“ESG-washing” is understood to be more comprehensive; it includes greenwashing, but more broadly it is the practice of **making false, unclear or not well-substantiated sustainability and ESG-related claims that state or imply that a product, service or company has a positive or no impact on the environment or society, or is less damaging socially or to the environment than competing products, services or companies, without providing reliable, comparable and verifiable information to support such claims.**



## Typical situations in which ESG and/or greenwashing accusations may arise (examples)

### • **Mandatory and regulated disclosures**

- **Inadequate slavery act disclosures** (e.g., under the UK or Australian modern slavery acts, or the California Transparency in Supply Chains Act): A textile company declares it has a zero-tolerance policy towards child labor. However, it fails to implement social compliance audits to check on the practices of its suppliers.
- **Inaccurate impact reports** (e.g., under the EU Taxonomy Regulation): A solar power company misreports the efficiency of its solar panels to claim alignment with taxonomy criteria.
- **Inaccurate disclosure on conflict minerals** (e.g., under the US Dodd-Frank Act and the EU Conflict Minerals Regulation): A tech company uses conflict minerals in its products but fails to maintain a record tracing the minerals from their source.
- **Misleading information in IPOs** (e.g., violating the US Securities and Exchange Commission rules): A pharmaceutical company, preparing to be listed on the New York stock exchange, misrepresents its gender pay ratio in its annual report.

### • **Voluntary disclosures**

- **Misleading product descriptions:** A food company indicates that its seafood is “ethically sourced,” but the company has no reliable data on the employment practices of its suppliers.
- **Misleading service descriptions:** A renewable energy company promotes its electricity provision as “100 percent carbon neutral,” but it does not disclose that a portion of the electricity is still generated by burning fossil fuels.
- **Deceptive packaging:** A chemicals company uses green packaging and images of forests for plant fertilizer in order to insinuate that the product is sustainable, but it contains chemicals harmful to local wildlife, misleading consumers into believing they’re buying an environmentally safe product.

- **Abuse of certifications and logos:** A clothing brand adds an “ethically sourced and slave-free” logo to its tag, suggesting its cotton is ethically produced, but the methodology used in application of the logo is not comprehensive and concerns have been raised about the traceability of the cotton certified by the logo.
- **False claims on operations and supply chains:** A tech company claims it is eradicating child labor from its supply chains, but it fails to conduct audits or work with independent organizations to verify its efforts—creating a false impression of social responsibility.
- **Misleading descriptions on recyclability:** A company claims that its packaging is recyclable, but its recyclability varies by region and recycling operations.

“This 100% virgin synthetic dress has a zero-waste design”

“This shirt is made from 100% organic cotton”

“Your purchase helps reduce carbon emissions and protect rainforests”

“Plant-based”

“Our packaging is fully biodegradable”

“Our tea is 100% slave free”

“This eco bottle is made from 100% recycled plastic”

“We use climate neutral and regenerative packaging”

“We have proudly incorporated the UNGPs into all aspects of our business operations, ensuring zero contribution and zero tolerance to human rights abuses by our suppliers or business partners in our value chain”

## Scope of the survey

- For the purposes of this survey, a distinction is made between, on the one hand, **mandatory disclosures** required by law, which are strictly defined with clear sanctions (e.g., under securities, capital markets and non-financial disclosures laws, such as the EU Corporate Sustainability Reporting Directive) and **voluntary disclosures** made at the discretion of the company, either for marketing purposes or in compliance with soft law reporting frameworks (e.g., the UN Global Compact, GRI or ISSB).
- **Whereas mandatory disclosures provide companies with clear legal duties and sanctions, the legal consequences in the case of voluntary disclosures may be unclear.** The boundaries between the mandatory legal or regulatory frameworks and soft law and/or voluntary frameworks are often also unclear, in particular where companies are dealing with significant discrepancies in the regulatory frameworks governing ESG across different jurisdictions. What may be a legal or regulatory obligation in one country may well be voluntary in another. Likewise, **unregulated claims made voluntarily for marketing purposes in one jurisdiction, may be highly regulated with the possibility of sanctions and liability in another.**
- The survey concentrates specifically on greenwashing claims.



## **Greenwashing litigation examples:**

### ***Frankfurt am Main Higher Regional Court, Judgment, 10.11.2022 – 6 U 104/22***

In Germany, the applicant, a manufacturer of ecological detergents, sought an injunction against the respondent, a competitor, for advertising its products and company as “climate neutral” without providing sufficient information on the calculation and compensation of its CO2 emissions. The court held that the term “climate neutral” was misleading in the context of the respondent’s website, as it did not disclose that certain indirect emissions (Scope 3) were excluded from the CO2 balance. The court also found that information about the certification standard and climate projects supported by the respondent was not easily accessible or comprehensible for the average consumer. The court granted the injunction in part and dismissed it in part, depending on the design and placement of the logo and the information on the website.

### ***Lee v. Canada Goose US, Inc., No. 20 CIV. 9809 (VM), 2021 WL 2665955 (US District Court, Southern District of New York, June 29, 2021)***

The plaintiffs alleged that the defendant’s claim of “ethical, responsible, and sustainable” sourcing of the coyote fur used in their clothing and outerwear products was misleading, as the defendant’s alleged inhumane trapping practices leading to unnecessary suffering and death for countless animals did not align with their sustainability claim. The plaintiffs also cited consumer-perception research that indicated a “sustainably produced” claim would indicate to consumers a compliance with higher animal welfare standards. The Court agreed that animal welfare standards would be persuasive in the average unsophisticated consumer’s consideration of a sustainability claim and that the elevated animal welfare standards implied by that claim would influence their decision to purchase the product. Therefore, the court denied the defendant’s motion to dismiss in part, allowing the plaintiffs to pursue all claims regarding the defendant’s sustainability claims.

### ***Rawson v. ALDI, Inc., No. 21-CV-2811, 2022 WL 1556395 (US District Court, Northern District of Illinois, May 17, 2022)***

The plaintiff alleged that the defendant deceptively marketed its Atlantic Salmon as “Simple. Sustainable. Seafood,” when the salmon was in fact sourced from large industrial fish farms that use environmentally harmful and unsustainable farming practices. These allegations were based upon the alleged environmental harm caused by such large farms. In denying the defendant’s motion to dismiss, the Court determined that a claim of sustainability will likely lead to a consumer assumption of increased animal welfare standards and a lack of ecological harm.

## Summary of findings

### Basic approaches to greenwashing among the jurisdictions surveyed

	Legal definition of greenwashing	Targeted greenwashing legislation	Greenwashing is directly regulated (through consumer protection/ advertising standards/ unfair competition or environmental law frameworks)	Soft law guidance or standards on greenwashing	Existing national legal frameworks may apply to greenwashing (depending on facts)
Group 1	✓	✓	✓	✓	✓
Group 2	✗	✗	✓	✓	✓
Group 3	✗	✗	✗	✓	✓
Group 4	✗	✗	✗	✗	✓

#### **Group 1: Proposed legal definition of greenwashing and targeted legislation.**

There is a legal framework for specifically regulating “greenwashing,” including binding legislation. Pre-existing EU law may also regulate “greenwashing,” e.g., the Unfair Commercial Practices Directive. (European Union, provided that the *Proposal for a Green Claims Directive* and the *Proposal on Empowering Consumers for the Green Transition* ultimately become law.)



#### **Group 2: No legal definition of greenwashing or targeted legislation, but greenwashing is directly regulated.**

Jurisdictions have amended various laws on consumer protection, advertising standards and environmental protection in order to address practices that may amount to “greenwashing.” In addition, various other legal frameworks, such as contract law, unfair competition law, tort law, or criminal law may apply, depending on the context and the jurisdiction. (France and US: California)



**Group 3: No legal definition of greenwashing, targeted legislation or direct regulation, but there is soft law guidance or standards on greenwashing, and existing legal frameworks may apply to greenwashing.**

In addition to soft law norms, various legal frameworks may apply, such as tort law, contract law, company law, environmental law, unfair competition law and criminal law (as well as laws that prohibit deceptive, false or unfair practices in advertising as well as consumer protection law), depending on the context and the jurisdiction. (Australia, Belgium, Canada, Italy, the Netherlands, United Kingdom, US: Federal)



**Group 4: No definition, no targeted legislation, no direct regulation and no soft law guidance or standards, but existing legal frameworks may apply to greenwashing.**

Various legal frameworks, such as tort law, contract law, company law, environmental law, unfair competition law and criminal law (as well as laws that prohibit deceptive, false or unfair practices in advertising and consumer protection law), depending on the context and jurisdiction, may apply. (Brazil, Chile, China, Hong Kong, Kenya, Mexico, Nigeria, South Africa, US: New York)





## General findings

- **Most jurisdictions lack exact definitions of what constitutes greenwashing**, or any definitions at all.
- The **European Union is moving the furthest and fastest** to clearly define green claims and regulate greenwashing, primarily building upon existing consumer protection and advertising standards frameworks. The **Proposal for a Green Claims Directive is globally the first legislation of its kind**. It aims to specifically prevent greenwashing and promote sustainable consumption by **setting minimum requirements on the substantiation, communication and verification of voluntary environmental claims** made by traders about their products or activities. The Proposal for a Green Claims Directive is complemented by the Proposal on Empowering Consumers for the Green Transition. This would, for example, expand misleading and unfair commercial practices to include the making of certain kinds of misleading environmental claims.
- **Regulators around the globe have developed soft law guidelines** for companies making claims about the sustainability or environmentally friendly properties / impacts of goods and services. Typically, these guidelines are developed in the context of **consumer protection and advertising standards regulation but sometimes also environmental regulation** (e.g., NL, BE, UK, US: FED, CAN, AUS, IT).
- Some jurisdictions (e.g., FR and US: CA) have **narrow legal provisions in force that effectively target corporate claims related to sustainability or to environmentally friendly properties and impacts of goods and services** (e.g., related to whether goods are recyclable, biodegradable or carbon neutral). However, these provisions are **typically extensions of more general provisions of consumer protection, advertising standards, unfair competition or environmental law**. They are not incorporated into any broader regulatory or legislative framework related to and targeted at “greenwashing” as such (such as the Proposal for a Green Claims Directive).

- In the majority of jurisdictions surveyed, **greenwashing practices might be caught by existing legal frameworks, including consumer protection law, advertising law, tort law, contract law, company law, environmental law, unfair competition law and criminal law** (depending in each case on the factual circumstances and on the jurisdiction). **Courts and public agencies are further interpreting these pre-existing laws** with respect to their precise applicability to voluntary corporate ESG communications which might amount to “greenwashing.”

## Comparative findings

### Group 1 – European Union

- The EU is taking a proactive approach to regulating greenwashing in order to protect consumers, foster fair competition, and support the green transition. **The key piece of legislation is the Proposal for a Green Claims Directive**, which aims to **harmonize the minimum requirements for market participants to provide evidence, verification, and transparency for their voluntary environmental claims**, and to limit the proliferation of public and private environmental labels. The Proposal for a Green Claims Directive has the same personal and geographic scope as the EU Unfair Commercial Practices Directive. It thus **would apply to all “traders” targeting consumers on the EU market** in the meaning of that Directive (i.e., **also non-EU based companies selling goods to consumers based in the EU**).



- The Proposal for a Green Claims Directive complements several existing EU measures and upcoming legislation:
  - The **EU Unfair Commercial Practices Directive** (UCPD), which is not specifically focused on environmental claims. Rather, it prohibits traders from making false, misleading or aggressive claims that deceive or harm consumers' economic interests. The UCPD also provides a blacklist of 31 practices that are always considered unfair—such as falsely claiming a product has been endorsed by an environmental organization. It applies to business-to-consumer transactions and can be enforced by public authorities, consumer organizations or individual consumers, depending on the national laws of each member state. It is currently being revised and updated to add specific provisions and blacklisted practices on greenwashing.
  - Proposed Article 2, point (o) in the **Proposal on Empowering Consumers for the Green Transition** defines "**Environmental claim**" as "any message or representation, which is not mandatory under Union law or national law, including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication, which states or implies that a product or trader has a positive or no impact on the environment or is less damaging to the environment than other products or traders, respectively, or has improved their impact over time."
  - The **EU Misleading Comparative Advertising Directive** (MCAD) regulates the use of comparative advertising—defined as any advertising that explicitly or implicitly identifies a competitor or its products. Comparative advertising is allowed for example if it is not misleading, does not create confusion, does not discredit or denigrate competitors, does not take unfair advantage of their reputation, compares relevant, verifiable and representative features. The MCAD applies to business-to-business and business-to-consumer transactions and can be enforced by public authorities, competitors or consumers, depending on the national laws of each member state.
  - Finally, the **EU Ecolabel scheme** is a voluntary certification system that awards a label to products and services that meet high environmental standards throughout their life cycle. EU Ecolabel criteria are developed by the European Commission, in consultation with stakeholders, and are regularly reviewed and updated. The EU Ecolabel is granted by national competent bodies, which verify the compliance of applicants and monitor their performance. The EU Ecolabel scheme aims to promote credible and reliable environmental claims and to help consumers make informed choices. The EU Ecolabel scheme does not directly regulate environmental claims, but it provides a reference for consumers and traders to assess the environmental impact of products and services.

### Example

Under the Proposal for a Green Claims Directive, companies would need to carry out an assessment to substantiate explicit environmental claims. Such assessment would need to (among other things):

- a. Specify whether the claim applies to the entire product, a part of it, specific features, or to the company's operations.
- b. Back up claims using credible science, accurate data and pertinent global standards.
- c. Show that the claimed environmental benefits have a substantial impact over the product's life cycle.
- d. If claiming environmental performance, consider all significant environmental impacts.
- e. Ensure that the claims go beyond legal requirements for the product or sector.
- f. Compare the product or company's environmental performance with industry norms.
- g. Evaluate whether the claimed environmental improvements could harm other aspects, such as climate, resource use, water protection, pollution, biodiversity, animal welfare and ecosystems.
- h. If greenhouse gas emissions are offset, this should be specified separately, detailing the type and quality of the offsets and how they are correctly accounted for in climate impact claims.

### Group 2 – France and United States: California

- **Greenwashing is not expressly defined by law** in France or California. However, it is directly regulated by legal frameworks that aim to protect consumers, competitors and the environment from deceptive practices.
- In general, within these jurisdictions, existing **consumer laws, unfair competition laws, advertising laws and environmental laws** (as relevant in each case) have been amended to cover (often narrowly defined) voluntary green claims. In addition, in these jurisdictions **greenwashing may also be regulated by various other pre-existing legal frameworks** that prohibit deceptive, false or unfair practices—for example, within contract law, tort law or criminal law, depending on the context and the jurisdiction.
- **France and California both prohibit untruthful, misleading or deceptive environmental marketing claims as a form of unfair commercial practice** (e.g., under the French Consumer Code, the French Environmental Code, the Californian Business and Professions Code and the Californian Public Resources Code), which could be enforced by administrative bodies or administrative and judicial courts and allow customers or consumer associations to seek remedies.
- **France and California also have specific laws on advertising that apply to statements on the environmental impact of goods and services, such as carbon neutrality, recyclability or compostability**, which require reliable information and justification of the claims.
- In France self-regulatory authorities also issue and monitor guidelines on environmental claims. California looks to both the FTC Green Guides and its own—often stricter—guidelines adopted at the state level, such as California's SB 343 "Truth in Labeling for Recyclable Materials" law, which regulates environmental advertising.

**Group 3** – Australia, Belgium, Canada, Italy, the Netherlands, United Kingdom, United States: Federal

- **Greenwashing is not explicitly defined by law** in any of the seven jurisdictions in this group. However, **various legal frameworks** that aim to protect consumers, competitors and the environment from false or deceptive advertising, unfair practices or noncompliance with environmental standards may apply.
- Regulators in all seven of the jurisdictions have issued **guidelines and standards that seek to establish soft law norms related to greenwashing**. Regulators in the Netherlands, Belgium, US, UK, Australia and Canada have issued specific guidance or codes of conduct for businesses making green claims while **Italy relies on a self-regulatory code**. The **guidance and codes vary in their scope, detail and enforcement mechanisms, but generally require truthfulness, clarity, substantiation and relevance of green claims**.
- Such guidelines and codes of conduct are usually **based on existing laws that protect consumers and fair competition** and provide guidance to businesses on how to make **honest and clear sustainability claims that are supported by evidence and relevant to the product or service**. Some examples of these tools are the Sustainability Claims Guideline in the Netherlands, the Code of Self-Regulation of Advertising Practice and Commercial Communication in Italy, the Green Claims Code in the UK, the US Federal Trade Commission (FTC) Green Guides concerning environmental marketing claims, the Competition Bureau's Guidance on Environmental Claims and Greenwashing in Canada, and the Guidance on Green Marketing and the Australian Consumer Law in Australia.<sup>2</sup>

- These tools cover various aspects of environmental claims, such as general claims, specific claims, certifications and seals, and comparative claims, and **may indicate how the regulators may enforce the laws or impose sanctions or remedies for noncompliance**. For example, while the Green Guides are not binding regulations, they indicate how the FTC may apply Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices, to environmental marketing claims. Additionally, while the Green Guides are not binding, they are often relied upon by plaintiffs and looked to by US courts in cases involving environmental marketing claims and accordingly, the Green Guides do carry precedential value.

### Examples

In **Italy**, the Code of Self-Regulation of the Advertising Practice and Commercial Communication (the Italian Advertising Self-Regulatory Code or CAP), issued by the Italian Self-regulatory Advertising Authority (IAP), contains rules of conduct for advertising operators that cover environmental claims. The CAP is based on the principles of truthfulness, fairness, social responsibility and respect for consumers, and is enforced by the IAP through a system of sanctions and remedies.

In **Australia**, the Australian Competition and Consumer Commission published *Guidance on Green Marketing and the Australian Consumer Law* (the ACL) in 2011, to help businesses understand their obligations and avoid making false or misleading environmental claims under the ACL. The guidance is based on the general provisions of the ACL that prohibit misleading or deceptive conduct, false or misleading representations and unconscionable conduct, as well as the specific provisions that apply to consumer guarantees, product safety and information standards. The guidance covers general environmental claims, as well as specific claims such as carbon neutral, organic, natural and renewable.

<sup>2</sup> The US FTC Green Guides were first issued in 1992 and then revised in 1996, 1998 and 2012. The Green Guides were last updated in 2012. The FTC announced in December 2022 that it is seeking public comments on potential updates and changes to the Green Guides and this update process is currently ongoing.

**Group 4** – Brazil, Chile, China, Hong Kong, Kenya, Mexico, Nigeria, South Africa, United States: New York

- **Greenwashing is neither defined by law, nor is it directly regulated by any specific law in the nine jurisdictions.** However, **various legal frameworks that prohibit deceptive, false or unfair practices** in advertising, consumer protection, contract law, unfair competition law, tort law or criminal law may apply—depending on the context and the jurisdiction.
- **Consumer protection law and advertising law are the most common and relevant legal frameworks that may indirectly regulate greenwashing,** as they aim to protect consumers from deceptive, misleading or unfair practices in the market.
- **Other legal frameworks—such as tort law, contract law, company law, environmental law, unfair competition law, and criminal law—may also indirectly regulate greenwashing in some circumstances,** depending on the nature and the impact of the greenwashing conduct and the parties and interests involved.
- The approaches to making claims, enforcement, sanctions, remedies, evidence and substantiation may vary significantly across the different legal frameworks and jurisdictions, depending on applicable laws, regulations, procedures and institutions. But generally:
  - **Claims** may be made by consumers, competitors, regulators, public prosecutors or other interested parties, depending on the legal basis and the standing requirements.
  - **Enforcement** may be carried out by administrative agencies, courts or self-regulatory bodies, depending on the jurisdiction and the nature of the violation.
  - **Sanctions** may include fines, penalties, injunctions, revocations, suspensions or criminal convictions, depending on the severity and the impact of the violation.

- **Remedies** may include compensation, restitution, damages, disgorgement, corrective advertising or public apologies, depending on the harm and the interest of the claimant.
- **Evidence and substantiation** may require scientific, technical or empirical data, or third-party verification or certification, depending on the type and the scope of the claim or representation.

#### Examples of case law that may be relevant to greenwashing claims

##### ***Beijing Ruibang Yonghe Technology and Trade Co., Ltd. v. Johnson & Johnson Medical (Shanghai) Ltd. and Johnson & Johnson Medical (China) Ltd. (2019)***

In **China**, a lawsuit was brought by a competitor against Johnson & Johnson for engaging in unfair competition by making false or misleading claims about its surgical products. The Shanghai High People's Court ruled in favor of the plaintiff, holding that Johnson & Johnson violated the Anti-Unfair Competition Law by exaggerating the performance and quality of its products and disparaging the plaintiff's products. The court ordered Johnson & Johnson to cease the unfair competition, apologize publicly and pay damages and litigation costs to the plaintiff.

##### ***Pioneer Foods (Pty) Ltd v. Bothaville Milling (Pty) Ltd. (2014)***

In **South Africa**, the case of Pioneer Foods (Pty) Ltd v. Bothaville Milling (Pty) Ltd, involved a lawsuit by a competitor against Pioneer Foods for engaging in unfair competition by making false or misleading claims about its bread products. The Supreme Court of Appeal of South Africa dismissed the appeal of Pioneer Foods, affirming the judgment of the High Court of South Africa, holding that Pioneer Foods violated the Competition Act and the Consumer Protection Act by falsely labeling its bread products as "whole wheat" when they contained refined wheat flour. The court ordered Pioneer Foods to cease the unlawful conduct, publish corrective notices and pay damages and costs to the plaintiff.

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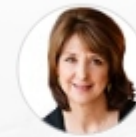
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