

## Publications

### Going Green? Be Careful – It’s a Jungle Out There!

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By *Daren S. Garcia* and *Steven A. Chang* on February 1, 2016

Allegations of “greenwashing”—generally defined as “the practice of making an unsubstantiated or misleading claim about the environmental benefits of a product, service, technology or company practice”<sup>[i]</sup>—are on the rise. A [study](#) by TerraChoice, a Canadian-based environmental marketing agency, found in 2010 that approximately 95 percent of products marketed as eco-friendly at that time committed at least one or more greenwashing-related “sins.”<sup>[ii]</sup> And while some commentators have [criticized](#) the accuracy of the TerraChoice report,<sup>[iii]</sup> allegations of greenwashing are becoming increasingly pervasive in the U.S. marketplace and have received growing attention from state and federal regulators, legislators, and consumers alike.

Businesses are scrambling to distinguish themselves from their competitors as the most “eco-friendly.” A [survey](#) by the Boston Consulting Group published in 2010 found that close to seventeen percent of U.S. consumers were willing to pay more for environmentally-friendly products.<sup>[iv]</sup> And, when compared to previous studies, that number is on the rise. Another consumer [study](#) by BBMG, GlobeScan, and SustainAbility in 2012 found that nearly two-thirds of consumers surveyed in six markets internationally felt “a sense of responsibility to purchase products that are good for the environment and society,” and 70 percent would buy an environmentally-friendly product over a standard one.<sup>[v]</sup>

As a result, being “green” has become more than a way to convey a businesses’ aptitude for moral and social responsibility—it has become a profitable and sustainable business model.

Retailers and marketers beware, however. As the number of “green” claims in the U.S. marketplace has risen, so has state and federal oversight of such claims and class action lawsuits. The Federal Trade Commission (FTC), which is tasked with the responsibility and authority to address unfair and deceptive competition methods under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), has brought an increased number of enforcement actions against marketers for

making allegedly deceptive environmental marketing claims. To help marketers navigate the permissible and impermissible practices related to “green” advertising, the FTC created the “Green Guides” designed to “help marketers avoid making environmental claims that are unfair or deceptive,” which was last amended in 2012.<sup>[vi]</sup> The FTC is not alone. Several states, including the largest consumer market in the nation—California—have enacted legislation aimed at curbing deceptive marketing practices or have explicitly adopted the Green Guides as binding authority, giving rise to a number of class action lawsuits against would-be eco-friendly marketers.

This article reviews the various types of greenwashing claims that have surfaced over the past few years and provides a general overview and analysis of the FTC’s guidance to marketers on how to avoid common mistakes that can lead to allegations of greenwashing.

## Types of Greenwashing – an anecdotal survey

While there is certainly no shortage of examples of alleged “greenwashing,” separating greenwashing claims into clearly-defined categories can be a challenge. Greenwashing claims can range from a relatively benign exaggeration of environmental benefits (or a consumer’s subjective misconception of an alleged benefit) to intentional and direct misrepresentations in advertising.

Several of the most common greenwashing claims seen in the U.S. market are analyzed below.

### Unsubstantiated Claims

One of the most common greenwashing allegations—and that which has received by far the most attention from the FTC—is when a marketer makes an environmental marketing claim without sufficient scientific proof of its truth or accuracy. Last year, the FTC emphasized in a press release that—consistent with its guidance set forth in the Green Guides—environmental marketing claims must be substantiated and that the substantiation must “be based on the expertise of professionals in the relevant area . . . using procedures generally accepted in the profession to yield accurate and reliable results.” Further, testing must, without limitation, “replicate the physical conditions of the claimed environment in which the item can be properly disposed.”<sup>[vii]</sup> In nearly every enforcement action to date, the FTC has focused on whether marketers’ environmentally-friendly claims are substantiated by competent and reliable scientific evidence.

As just one example, in 2013 the FTC brought enforcement actions against several marketers of “biodegradable” plastic products that allegedly relied on insufficient scientific evidence to support their claims that certain plastic products—ranging from bags and food containers to plastic bottles—were completely biodegradable when placed in a landfill. According to the FTC’s complaints, approximately 92% of total municipal waste in the United States is disposed of either in landfills, incinerators, or recycling facilities, which “[do not] allow [the plastics] to completely break down and decompose into elements found in nature within a reasonably short period of time.”<sup>[viii]</sup> Further, the FTC alleged that the testing methods employed by the companies did not replicate the physical conditions of landfills, and thus could not substantiate the “biodegradable” claims.<sup>[ix]</sup>

The FTC's focus on substantiation is consistent with its guidance in the Green Guides, which reiterates that environmental marketers' statements related to carbon offsets and compostable, degradable, and non-toxic claims must be supported by reliable and competent scientific evidence.<sup>[x]</sup> As a result, the FTC's close scrutiny of the scientific basis for environmental marketers' claims is likely to continue.

### Vagueness and Misleading Descriptions

Another common type of greenwashing allegation that has received significant attention by both the FTC and private class action lawsuits happens when common terms normally associated with positive health or environmental benefits—such as “eco-friendly,” “natural,” or “non-toxic”—are used generically in advertising without qualification, giving rise to alleged consumer misconceptions. In fact, the FTC has cautioned environmental marketers to avoid making such generic claims, noting that—for example—the term “‘eco-friendly’ likely conveys that the product has far-reaching environmental benefits and may convey that the product has *no* negative environmental impact.”<sup>[xi]</sup>

Another variation of this type of greenwashing allegation is when a product is stated to be “made of” a natural component that is associated with some type of health or environmental benefit. As just one example, the FTC has focused heavily on the proper labeling and advertising of products in the textile industry that are made of rayon fabric, which can be derived from a variety of plant sources including bamboo (commonly associated with having antimicrobial properties). The FTC has cautioned marketers and retailers from labeling rayon-based textiles as bamboo, noting that “most ‘bamboo products, if not all, really are rayon, which typically is made using environmentally toxic chemicals in a process that emits hazardous pollutants into the air.”<sup>[xii]</sup> Unless the textile is “made of actual bamboo fiber,” a rayon fabric should be labeled and advertised as either “rayon,” or “rayon made from bamboo.”<sup>[xiii]</sup>

### Certifications and Seals of Approval

A particular type of green advertising tactic that has increased in recent years is the use of “certifications,” “seals of approval,” or “labels,” either created by the marketer itself or as an endorsement by a third-party organization. Greenwashing allegations in this category can come in many variations, but generally involve a label, seal, or certification that either gives the consumer the impression that a product has been certified by an independent third party organization—when it has not—or conveys insufficient information regarding what specific environmental benefits the “label” is meant to convey.

Due to the increased use of labels, seals, and other certifications in environmental marketing claims, in 2012 the FTC issued additional guidance on the appropriate use of labels in its revisions to the Green Guides.<sup>[xiv]</sup> Notably, the first example listed in the revised section indicates that when a marketer awards a “logo” or “seal” to its own product, it must indicate that it has done so “with clear and prominent language” accompanying the seal.

Although the FTC has brought few actions to date specific to internal or third-party endorsements to date, recent statements by the agency indicate that it intends to ramp up its enforcement of green claims arising from improper use of certifications. In September 2015, the FTC sent warning letters to five providers of environmental certification seals and businesses that use them, alerting them to the “agency’s concerns that the seals could be considered deceptive and may not comply with the FTC’s [Green Guides].”<sup>[xv]</sup> Jessica Rich, Director of the FTC’s Bureau of Consumer Protection, stated in the Press Release that “[e]

Environmental seals and certifications matter to people who want to shop green . . . [b]ut if the seals' claims are broader than the products' benefits, they can deceive people."

In its Press Release, the FTC also provided additional guidance on the appropriate use of "performing seals." Specifically, the FTC emphasized the need for marketers to clearly and prominently state the basis of the seal to avoid any "implied" general environmental benefits claims that typically cannot be substantiated:

The FTC's additional guidance will likely prompt marketers using product seals to closely review advertising materials for compliance.

### **Ignoring the Bigger Picture – The Hidden Trade-Off**

Another, more subtle, type of greenwashing allegation is known as the "hidden trade-off," which is generally **defined** as "promoting a small act of environmental stewardship while ignoring broader environmental effects."<sup>[xvi]</sup> The FTC has explicitly acknowledged in its Green Guides summary that ignoring the bigger picture, while advertising a product as environmentally-friendly, may be deceptive. For example, claiming a product is "'green' made with recycled content," may be deceptive if the environmental costs of using recycled content outweigh the environmental benefits of using it."<sup>[xvii]</sup>

Although the Green Guides provide a useful starting point for marketers seeking to avoid greenwashing allegations, marketers should nonetheless be aware of the fact that state law—particularly in markets known to have stricter laws such as California—may differ and provide easier avenues for potential litigants to bring claims. As just one example of greenwashing allegations brought under California law (and successfully defended), in *Hill v. Roll International Corp.*, plaintiff Ayana Hill brought claims under California's unfair competition law, false advertising law, and Consumers Legal Remedies Act, as well as common law claims for fraud and unjust enrichment, alleging that Fiji Water's use of the "Green Drop" logo and similar representations on its product "led [consumers] to believe that those products are 'environmentally superior' when compared to products that lack such designations."<sup>[xviii]</sup>

Unlike other cases targeting water bottle manufacturers for claims that their plastic bottles are "biodegradable," Hill argued that the Fiji "Green Drop" logo and other statements were deceptive because the distribution and packaging of the water allegedly caused "as much, if not more, of an adverse environmental impact when compared to similar bottled waters," and required the consumption of "46 million gallons of fossil fuel, producing approximately 216,000,000 billion pounds of greenhouse gases per year," for creation and transportation.<sup>[xix]</sup> Hall further claimed that the "Green Drop" logo was misleading because it "look[ed] similar" to seals of approval conveyed by independent, third-party organizations.

The California Court of Appeals ultimately found that Hall's claims lacked any merit and dismissed the case. The Court concluded that "Hill's beliefs do not satisfy the reasonable consumer standard, as expressed in the FTC guides," because the "green drop on Fiji water bottles [does not] convey to a reasonable consumer in the circumstances that the product is endorsed for environmental superiority by a third party organization."<sup>[xx]</sup> Further, the "[e]very drop is green" slogan, displayed above, which was allegedly used at some point in store displays and advertising, did not "alter the overall impression conveyed by the green drop and Web site address[.]"<sup>[xxi]</sup>

## federal regulation of greenwashing – the green guides

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), broadly prohibits all persons from making “unfair or deceptive acts or practices in or affecting commerce.” Pursuant to this provision, the FTC has brought **several actions** against companies making “green” marketing claims it deemed to be unfair and deceptive over the past 20 years.

In 1992, the FTC promulgated the “**Green Guides**” to “help marketers avoid making environmental claims that are unfair or deceptive under Section 5 of the FTC Act[.]”<sup>[xxii]</sup> Subsequently, the FTC **revised** the Green Guides in 1996, 1998, and most recently 2012, to “take into account recent changes in the marketplace,” and to “provide new guidance on environmental claims that were not common when the Guides were last reviewed”—i.e. different variations of “greenwashing” that surfaced during this timeframe.<sup>[xxiii]</sup>

Importantly, although the Green Guides is codified in the Code of Federal Regulations, it is neither binding on the FTC nor does it preempt federal, state, or local laws.<sup>[xxiv]</sup> Rather, it is intended only to provide guidance to marketers, and “consist[s] of general principles, specific guidance on the use of particular environmental claims, and examples.” The FTC further cautions that compliance with the Green Guides does not “necessarily preclude Commission law enforcement action under the FTC Act.”<sup>[xxv]</sup>

Nevertheless, the Green Guides provides crucial guidance to marketers that want to advertise the environmental-friendly qualities of their products, packaging, or services. The Green Guides offers specific guidance with respect to 13 specific types of environmental marketing claims, including claims relating to: (1) general environmental benefits; (2) carbon offsets; (3) certifications and seals of approval; (3) compostable; (4) degradable; (5) “free-of”; (6) non-toxic; (7) ozone-safe and ozone-friendly; (8) recyclable; (9) recycled content; (10) refillable; (11) made with renewable energy; (12) made with renewable materials; and (13) source reduction.

While marketers should consult the Green Guides directly and applicable laws prior to making any environmental marketing claim, a brief summary and analysis of the Guides is below.

## Summary of the Green Guides

### Interpretation and Substantiation of Environmental Marketing Claims (16 CFR 260.2)

- A representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to the consumers’ decisions.
- Marketers must identify all **express and implied** claims in their advertisement to ensure that such claims are truthful, not misleading, and supported by a “reasonable basis.”
- If the claim in the advertisement is environmental, a “reasonable basis” should include competent and reliable scientific evidence.

### General Principles (16 CFR 260.3)

- Qualifications and disclosures must be clear, prominent, and understandable.

- An environmental marketing claim should specify whether it refers to the product, the product's packaging, a service, or portions of each.
- An environmental marketing claim should not overstate, directly or by implication, an environmental attribute or benefit.
- An environmental marketing claim that is "comparative" should be clear about the comparison and should have substantiation for the comparison.

### Guidance on Specific Categories of Claims (16 CFR 260.4-16).

- *General environmental benefits claims* – marketers should not make general, unqualified environmental benefit claims (such as 'eco-friendly') about a product, package, or service.
- *Carbon Offsets* - marketers should have competent and reliable scientific and accounting methods able to quantify claimed emissions reductions and should not claim that a carbon offset represents emission reductions that have already occurred or will occur in the immediate future or that are already required by law.
- *Certifications and Seals of Approval* – certifications and seals of approval are permitted if the third-party certifier meets the criteria for endorsements in the FTC's endorsement guides and the certification conveys the basis for the certification or seal.
- *Compostable Claims* – a marketer claiming that a product is "compostable" must have scientific evidence that all the materials in the item will break down into, or become part of, usable compost in a safe and timely manner.
- *Degradable Claims* – a marketer should not make an unqualified degradable claim unless it can prove that the entire product or package will completely break down and return to nature within a "reasonably short period of time" after customary disposal (one year for solid waste products).
- *"Free-of" Claims* – marketers may claim that a product is "free of" a substance if (1) the product has trace amounts or background levels of the substance; (2) the amount of substance is not harmful to consumers; and (3) the substance wasn't added to the product intentionally. A "free-of" claim is still deceptive, however, if the product contains a similar substance or the substance has never been associated with that product category.
- *Non-Toxic Claims* – non-toxic claims must be "clearly and prominently qualified to the extent necessary to avoid deception." General non-toxic claims imply that the product, package, or service is non-toxic to humans, household pets, and the environment.
- *Ozone-safe and Ozone-friendly Claims* – a product that contains an "ozone-safe" or "ozone-friendly" claim is deceptive if it contains any ozone-depleting substance.
- *Recyclable claims* – a product must be able to be collected, separated, or otherwise recovered from the waste stream through an established recycling program. The claim must be qualified if: (1) recycling facilities are not available to at least 60% of the consumers or communities where a product is sold; or (2) if only part of the product is recyclable.
- *Recycled Content Claims* – a product must contain materials that have been recovered or otherwise diverted from the waste stream, either during the manufacturing process or after consumer use. Marketers must qualify claims unless the entire product or package (excluding minor components) is made from recycled material.

- *Refillable Claims* – a marketer should not make an unqualified refillable claim unless the marketer provides the means for refilling the package, such as a system for the collection and refill, or a product that can be purchased to refill the original package.
- *Renewable Energy Claims* – a marketer should not make unqualified renewable energy claims if fossil fuel, or electricity derived from fossil fuel, is used to manufacture any part of the item or to power any part of the advertised service, unless the non-renewable energy use is matched by purchase renewable energy certificates (RECs). As a general practice, marketers should specify the source of renewable energy.
- *Renewable Materials Claims* – marketers should clearly and prominently qualify their renewable materials claims, such as identifying the material used and explaining why the material is renewable.
- *Source Reduction Claims* – marketers should clearly and prominently qualify any source reduction claims to the extent necessary to avoid deception and, if based on a comparison, the basis for the comparison.

## Green Guides Analysis: Tips For Avoiding Deceptive Environmental Marketing Claims

A closer look at the Green Guides reveals several recurring themes that may be useful to marketers seeking to avoid allegations of misleading or deceiving green claims.

### (1) Avoid Overly Broad, Vague, or General Environmental Marketing Claims

At the outset, the Green Guides makes clear that broad, unqualified environmental benefit claims are deceptive in nature. The FTC reasons that “unqualified general environmental benefit claims are difficult to interpret and likely convey a wide range of meanings.” For example, the term “eco-friendly” is “likely to convey that the product has far-reaching environmental benefits . . . and no negative environmental impact.” As a result, marketers should not make unqualified general environmental benefit claims.<sup>[xxvi]</sup>

### (2) Environmental Marketing Claims Must Be Supported By Competent and Reliable Scientific Evidence.

If any lesson is to be gleaned from the various enforcement actions to date by the FTC, it is that environmental marketing claims must be supported by competent and reliable scientific evidence. This requirement is set forth not only under the “Interpretation and Substantiation” section of the Green Guides, but is also repeated in the FTC’s guidance specifically with respect to carbon offsets and compostable, degradable, and non-toxic claims.<sup>[xxvii]</sup>

Under the Green Guides, the “evidence” must consist of “tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results,” and “should be sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that each of the marketing claims are true.”<sup>[xxviii]</sup>

With respect to the last prong, recent FTC actions show that tests may be insufficient if they do not attempt to replicate the variables or conditions upon which the claim is based. For example, to determine whether a product is biodegradable, testing must “replicate the physical conditions of the claimed environment in which the item can be properly disposed.”<sup>[xxix]</sup> The FTC will likely scrutinize the sufficiency of marketers’ testing in future enforcement actions to ensure that testing is sufficient to “yield accurate and reliable results[.]”

### (3) When in Doubt, Qualify

Not only do the regulations advise against broad environmental benefit claims, nearly every section of the Green Guides also emphasizes the need for marketers to qualify environmental marketing claims that are subject to multiple interpretations in order to avoid deception. This includes, without limitation, the FTC’s guidance that:

- Marketers should qualify general environmental claims conveyed by certifications and seals of approval; (16 CFR 260.6(e))
- Marketers should qualify compostable claims if (1) the item cannot be composted safely or in a timely manner in a compost pile or device; or (2) the claim misleads consumers about the environmental benefit provided if the item is disposed in a landfill; (16 CFR 260.7(c))
- Marketers should qualify degradable claims unless they have competent and reliable scientific evidence “that the entire item will break down and return to nature within a reasonably short period of time after customary disposal”; (16 CFR 260.8(d)) and
- Marketers should qualify “non-toxic” claims unless it is non-toxic for humans, household pets, and the environment. (16 CFR 260.9(e))

Similar guidance regarding qualifications can be found in the sections relating to recyclable, recycled content, renewable energy, renewable materials, and source reductions claims.<sup>[xxx]</sup>

As a result, if there is a chance that an environmental marketing claim could be subject to multiple interpretations, marketers should qualify such claims in order to avoid greenwashing allegations that may arise from consumers’ misconceptions.

### (4) Less Is Not More – Omission of Relevant Information Is Deceptive

The Green Guides also emphasize that marketers should be forthcoming with respect to relevant, material information that may affect a buyer’s decision.

For example, pursuant to the Green Guides, a Marketer’s claim that a product is “free-of” a particular substance may still be deceptive if: (1) the product, package, or service contains or uses a substance that poses the same or similar environmental risks; or (2) the substance has never been associated with that product category.<sup>[xxxi]</sup> Other examples include making a statement that an item is technically “recyclable” but its shape, size, or other attribute would preclude it from being accepted in most recycling programs, claiming a “carbon offset” when the emission reduction at issue is already required by law, or claiming that an item is “non-toxic” if it is safe for humans but nonetheless harmful to the environment.<sup>[xxxii]</sup>



### (5) Thou Shalt Not Lie

Although it should go without saying that intentional misrepresentations may lead to liability under any number of state and federal laws, just in case it wasn't clear, almost every section of the Green Guides begins with a broad statement that it is deceptive to misrepresent, directly or by implication, that a product, package, or service is not what it claims to be or does not have the environmental benefits or attributes the marketer claims to have. For example, the Green Guides specifically state:

- It is deceptive to misrepresent, directly or by implication, that a product, package, or service offers a general environmental benefit; (16 CFR 260.4(a))
- It is deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent third party; (16 CFR 260.6(a)) and
- It is deceptive to misrepresent, directly or by implication, that a product or package is compostable (16 CFR 240.7(a)), degradable (260.8(a)), free-of a substance (260.9(a)), is non-toxic (260.10(a)), is ozone-safe or friendly (260.11(a)), is recyclable (260.12(a)), contains recycled content (260.13(a)), is refillable (260.14(a)), or is made of renewable materials (260.16(a)).

Even if the marketer's claim does not necessarily fall into one of the categories above, intentionally (or impliedly) misrepresenting that a product, package, or service has a beneficial environmental quality may still subject a marketer to potential liability.

## state law claims – private rights of action against deceptive and misleading advertising

Notwithstanding the FTC's authority to pursue actions against any person or entity engaging in interstate commerce, many greenwashing claims arise in the context of private actions brought under state laws that govern unfair or deceptive acts practices, false advertising, or similar claims. Because the Green Guides do not specifically preempt any state laws, Marketers should be cognizant of the fact that state laws may be more comprehensive or more strict than the FTC Act.

All states and the District of Columbia have enacted statutes prohibiting deceptive practices in consumer transactions.<sup>[xxxiii]</sup> Some states, such as New York, have expressly adopted portions of the Green Guides into their own laws.<sup>[xxxiv]</sup> Other states, such as California, have not only adopted the Green Guides but have also enacted additional statutes aimed at curbing deceptive or misleading marketing claims, including, without limitation, California's Environmental Marketing Claims Act, Unfair Competition Law, False Advertising Law, and the Consumer Legal Remedies Act.<sup>[xxxv]</sup> Further, the California Attorney General has pursued greenwashing actions under California's Business and Professions Code, which prohibits deceptive or misleading environmental marketing claims.<sup>[xxxvi]</sup>

As the foregoing makes clear, there are several potential perils associated with "going green" and environmental marketing. Accordingly, retailers and marketers must thoroughly analyze the legal implications associated with green initiatives to avoid unwanted FTC action or class litigation.

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## questions

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