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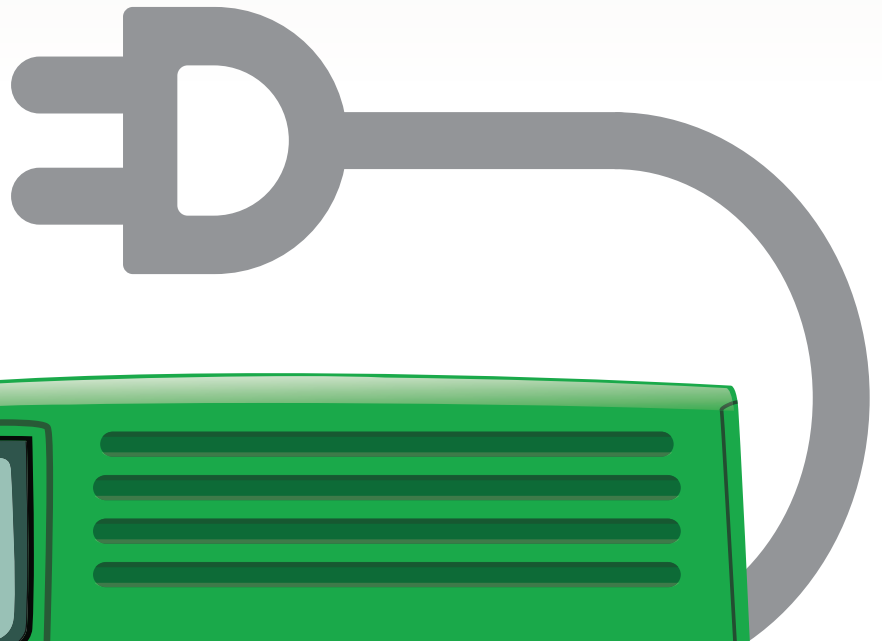


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# ENVIRONMENTAL MARKETING CLAIMS: WHERE WE ARE AND WHERE WE'RE HEADED

by PREETHA CHAKRABARTI, HELEN O. OGUNYANWO, and TIFFANY C. AGUIAR

**E**nvironmental claims are statements made by organizations about the environmental impact or benefits of the organization's goods, services, and/or operations. Some common environmental claims include "sustainable," "zero emissions," "recyclable," and "carbon neutral." However, the list of environmental claims is long and not always intuitive. For instance, claims such as a "better world" has been considered an environmental claim. As covered in more detail below, environmental claims are heavily scrutinized, and regulatory bodies, such as the Federal Trade Commission, look skeptically upon unqualified environmental claims.



## **Environmental Marketing Claims Have Become More Common as Consumers' Interests Focus More on Environmental Issues**

Consumers have shown more interest in an array of environmental issues over the last decade. Within the last two years, consumers have listed recycling and reusing; reducing single-use plastics; and air pollution as among their top concerns.<sup>1</sup> The list of concerns grows as additional environmental issues gain traction with consumers. For example, in 2022, more than two-thirds of Americans reported that they are now concerned about climate change, and more than 50% expect their fellow Americans to be willing to change their consumption habits as a result.<sup>2</sup> And consumer interest in brands' environmental impact is translating to consumer spending habits.<sup>3</sup>

The COVID-19 pandemic impacted consumer attitudes toward environmental issues. According to a study conducted by MasterCard, changes in consumer attitudes and actions increased more rapidly during the pandemic because consumers had more time to think about the effect their purchases have on the planet during a period of reduced travel and a rise in sustainability focused social media content and documentaries.<sup>4</sup> The global study across twenty-four countries (including the U.S.) revealed that consumers are calling on companies and brands to act in more environmentally conscious ways.<sup>5</sup> More specifically, consumers revealed that they want companies and brands to focus on reducing waste, reducing air and water pollution, and tackling the issue of plastic pollution in packaging and products.<sup>6</sup> The report explains that media outlets, such as social media, played a role in educating and shifting consumer sentiments about environmental issues.<sup>7</sup>

## **Regulatory Bodies and Class Action Lawyers Are Actively Holding Companies Accountable for Their Environmental Marketing Claims**

In response to consumers' interest in environmental issues, numerous brands are communicating their environmental efforts in their advertising, stores, websites, and annual reports. Because many brands are not privy to the complexities behind how best to communicate their environmental efforts and the evidence required to substantiate those claims, they risk being accused of "greenwashing." Greenwashing takes place when a company makes unsubstantiated claims that deceive consumers into thinking that its products, services, and/or operations are environmentally friendly.

The entities that most often scrutinize and challenge environmental claims are the U.S. Federal Trade Commission (FTC), state attorneys general, and plaintiffs' attorneys filing class action lawsuits. For instance, just last year, the FTC settled with Kohl's Inc. requiring the company to pay \$2.5 million to settle allegations that it falsely marketed dozens of rayon textile products as bamboo.<sup>8</sup> In addition, the FTC alleged that Kohl's deceptively touted that bamboo textiles are made using ecofriendly processes, when in reality, converting bamboo into rayon requires the use of toxic chemicals and results in hazardous pollutants.<sup>9</sup> States are also focusing on greenwashing claims. This year, sixteen state attorney generals submitted comments urging the FTC to strengthen its Guides for the Use of Environmental Marketing Claims ("Green Guides")<sup>10</sup> by allowing states and localities to enact stronger environmental standards. Although some greenwashing lawsuits are defeated in the motion to dismiss stage, those that do force brands to pay significant legal fees to litigate the case or settle the allegations. For instance, recently, Porsche paid \$80 million to settle allegations that it misleadingly marketed its gasoline sports car's fuel economy ratings.<sup>11</sup>

## **Brands Can Minimize Legal Risks Associated With Their Environmental Claims**

Using proper evidence to substantiate environmental claims, avoiding broad and unqualified claims, and relying on a regulatory guide, such as the FTC's Green Guides, are some of the steps that brands can take to minimize legal risks related to their environmental claims.

Using proper evidence to substantiate environmental claims means relying on competent and reliable evidence to support both express and implied claims. Competent and reliable scientific evidence includes studies or tests conducted and evaluated in an objective manner by qualified persons in a way that is generally accepted in that profession to yield accurate and reliable results. Some examples of unreliable evidence include anecdotal evidence from customers, newspaper or magazine articles, and sales materials from manufacturers.

Another way to mitigate a brand's legal risk is to avoid broad and unqualified claims and instead use qualified language and list a specific benefit. For instance, the FTC would consider the use of terms like "green" or "eco-friendly" to be unqualified claims because they are broad and nearly impossible to substantiate. Instead, qualified claims include specific

environmental benefits and information that can be substantiated such as "our widget is eco-friendly because it contains 95% recycled plastic." Benefits must be significant and the environmental costs of the product or service cannot outweigh the environmental benefits. In other words, the environmental impact of the product or service's lifecycle must be evaluated and compared to the environmental benefit in order to determine if the benefit is accurate and significant.

To help marketers avoid making environmental claims that mislead consumers, the FTC released the Green Guides. First issued in 1992 and last updated in 2012, the Green Guides provide businesses guidance for making accurate environmental marketing claims and, if followed, help businesses ward off allegations of deceptive advertising claims. Although not considered law, entities other than the FTC look to the Green Guides to determine whether certain environmental marketing claims mislead consumers. For instance, the Green Guides play an important role in guiding courts across the country.<sup>12</sup>

The Green Guides provide guidance on a host of environmental claims, such the following:

- **General Environmental Benefit Claims:** This includes principles, interpretation, and substantiation; how to view general claims such as "green" and "eco-friendly"
- **Claims About Waste:** Compostable Claims; Degradable Claims; Recyclable Claims
- **Claims About the Impact of Manufacturing:** Recycled Content Claims, Refillable Claims, Renewable Materials Claims
- **Other topics including, but not limited to,** the use of seals and certifications, as well as claims about the impact or toxicity of product use.

For the topics covered, the Green Guides explain likely interpretations of reasonable consumers, describe the elements necessary for marketers to substantiate, and present options to qualify claims to avoid deception. The current Green Guides do not cover all environmental marketing claims or concepts such as "organic," "natural," "sustainable," and life cycle analyses. One reason for not covering these topics is that some of these terms can be vague or have multiple meanings, making it nearly impossible to impose a bright line rule that will apply neatly to a variety of industries. This may change in light of customers' evolving understanding on environmental claims and with the FTC working on an updated version of the Green Guides.

## How We Predict That the Green Guides Might Be Updated

An update to the Green Guides has been expected and desired by many. On December 20, 2022, the FTC sought out<sup>13</sup> public comments regarding potential updates and changes to the Green Guides on the Federal Register. While the original deadline to submit comments was February 21, 2023, the FTC extended the public comment period to April 24, 2023. Predictably, the FTC received a significant number of public comments. Of the 7,066 comments, over 1,000 are available for review online. The comments came from individuals, corporations, industry and trade associations, environmental advocacy groups, and consumer advocacy groups, among others.

The FTC has not issued specific amendments or planned alterations to the Green Guides. But one can glean information about the issues that the FTC is focused on by reviewing the nineteen-question framework it provided to the public. The framework requested comments regarding (1) the need for the guides, (2) their economic impact, (3) their effect on the accuracy of environmental claims, (4) their interaction with other environmental marketing regulations, and (5) evidence of consumer perception of environmental claims. Finally, the FTC provided twelve specific claim terms where it expects to receive comments, including: (1) carbon offsets and climate change, (2) compostable, (3) degradable, (4) ozone-safe, (5) recyclable (two issue areas), (6) recycled content (three issue areas), (7) energy use and efficiency, (8) organic, and (9) sustainable.

The framework included multiple questions suggesting the possibility of potentially broad modifications, and the final question asked if the FTC should consider a rulemaking related to deceptive or unfair environmental claims. Given the FTC's recent wave of rulemaking efforts, this could signal the FTC's first step at yet another rule. Why might the FTC be interested in rulemaking? One reason is that rulemaking allows for increased civil penalties; the FTC can now seek up to \$50,120 in civil penalties per violation of a FTC rule (or per day for ongoing violations).

Recyclability claims also appear to be an important topic for the FTC. The original request for public comment addressed issues such as whether the FTC should distinguish between products that may be collected for recycling and products that are collected and ultimately recycled as well as consumer understanding of unqualified recycled

content claims (for example, "pre-consumer" or "post-industrial"). To further support the FTC's focus on recyclable claims, it hosted a public workshop titled "Talking Trash at the FTC: Recyclable Claims and the Green Guides" (the "Workshop") on May 23, 2023. The event featured three panel discussions on (1) the recycling market and recycling advertisements, (2) consumer perception of recycling claims, and (3) the future of the Green Guides.

One of the panel discussions focused on rulemaking related to recyclable claims and the pros and cons associated with a rule. According to some individuals on the panel, a rule would provide a clear standard across multiple jurisdictions, which is especially important for environmental marketing claims that vary tremendously across state and federal laws. However, if the rule is too strict, it could limit marketing and disfavor flexibility and responsiveness to changes in recycling methods.

Whether the FTC decides to engage in rulemaking for all or specific environmental claims, they will face a number of competing interests. As part of the Workshop, the FTC announced that it is seeking further public comments through June 13, 2023, in connection with the issues discussed during the event. As demonstrated through the Workshop, there will likely be additional opportunities to submit comments regarding specific claims before the FTC officially proposes any edits. We also expect updates to the Green Guides will be an ongoing endeavor throughout 2023.

### ENDNOTES

(1) See Cascone, Cook, O'Mara, and Renner, *Driving Accountable Sustainability in the Consumer Industry* (June 9, 2022), [www2.deloitte.com/us/en/insights/industry/retail-distribution/accountable-sustainability-consumer-industry.html](http://www2.deloitte.com/us/en/insights/industry/retail-distribution/accountable-sustainability-consumer-industry.html); see also, Mary H.J. Farrell, *Majority of Americans Want Cleaner Energy From Renewable Sources* (Oct. 29, 2018), [www.consumerreports.org/alternative-energy/majority-of-americans-want-cleaner-energy-from-renewable-sources/](http://www.consumerreports.org/alternative-energy/majority-of-americans-want-cleaner-energy-from-renewable-sources/) (showing consumers are interested in renewable sources of energy).

(2) See Denise Dahlhoff, *Changes in Consumers' Habits Related to Climate Change May Require New Marketing and Business Models* (Oct. 26, 2022), [www.conference-board.org/topics/consumers-attitudes-sustainability/changes-in-consumer-habits-related-to-climate-change](http://www.conference-board.org/topics/consumers-attitudes-sustainability/changes-in-consumer-habits-related-to-climate-change).

(3) See J.P. Morgan, *Companies Commit to More Sustainable Choices* (Mar. 4, 2021), [www.jpmorgan.com/insights/research/climate-change-consumer-spending](http://www.jpmorgan.com/insights/research/climate-change-consumer-spending).

(4) See Mastercard, *How the COVID-19 Pandemic has Impacted Consumer Attitudes About the Environment* (Mar. 2021), [www.mastercard.com/news/media/qdvnadh/consumer-attitudes-to-the-environment-2021.pdf](http://www.mastercard.com/news/media/qdvnadh/consumer-attitudes-to-the-environment-2021.pdf), at 4-5.

(5) See *id.*

(6) See *id.* at 34-35.

(7) See *id.* at 15-16.

(8) See *United States v. Kohl's Inc.*, Stipulated Order and Judgment, Case No. 1:22-cv-00964 (May 4, 2022), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/%283%29%20Kohl%27s%20Order.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/%283%29%20Kohl%27s%20Order.pdf).

(9) *Id.*

(10) 16 C.F.R. § 260 (2012).

(11) See David Shepardson, *Judge Approves \$80 Million Porsche U.S. Vehicle Settlement* (Nov. 9, 2022), <https://www.reuters.com/legal/judge-approves-80-million-porsche-us-vehicle-settlement-2022-11-09/>.

(12) See, e.g., *Rawson v. ALDI, Inc.*, No. 21-CV-2811, 2022 WL 1556395 at \*3 (N.D. Ill., 2022); *Downing v. Keurig Green Mountain, Inc.*, No. 1:20-cv-11673-IT (D. Mass. Sep. 9, 2020); *Duchimaza v. Niagara Bottling, LLC*, — F. Supp. 3d, —, 2022 WL 3139898 (S.D.N.Y. Aug. 5, 2022); *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-00927 RMW, 2010 WL 94265 (N.D. Cal. Jan. 6, 2010).

(13) Request for Public Comment, 87 Fed. Reg. 77766 (Dec. 20, 2022). 

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*This article first appeared in Orange County Lawyer, August 2023 (Vol. 65 No. 8), p. 32. The views expressed herein are those of the author. They do not necessarily represent the views of Orange County Lawyer magazine, the Orange County Bar Association, the Orange County Bar Association Charitable Fund, or their staffs, contributors, or advertisers. All legal and other issues must be independently researched.*