

# Cleaning Up Greenwashing:

## Regulating Environmental Marketing Claims

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Products labeled as “green,” “eco-friendly,” “biodegradable,” and “recyclable” abound in today’s marketplace. Environmental claims such as these can describe a myriad of products and services. Examples include houses, automobiles, foods and beverages, and dry cleaning services. What exactly do these environmental marketing claims really mean?

In 2010, environmental marketing company TerraChoice surveyed over 5000 consumer products that make an environmental claim. TerraChoice concluded that 95% of them were guilty of “greenwashing”—the act of misleading consumers about the environmental practices of a company or the environmental benefits of a product or service.<sup>1</sup>

Unless environmental claims are substantiated by competent and reliable scientific evidence, green advertising could result in liability under both federal and California law. As a general rule, and under current Federal Trade Commission (FTC) guidelines, broad environmental claims should be avoided or clearly qualified to prevent deception about the specific nature of the asserted environmental benefit. 16 C.F.R. § 260.7 (1996). Further, the FTC requires environmental marketing claims to be substantiated with competent and reliable scientific evidence. 16 C.F.R. § 260.5.

The FTC has proposed changes to its environmental marketing guidelines, with expected adoption this October. Companies making environmental marketing claims must pay careful attention to these guidelines to avoid FTC enforcement actions or litigation initiated by consumers or competitors. According to FTC Chairman Jon Leibowitz, “what companies think green claims mean and what consumers really understand are sometimes two different things. The proposed updates to the Green Guides will help businesses better align their product

claims with consumer expectations.”<sup>2</sup>

### The Authority of the Federal Trade Commission

The Federal Trade Commission Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1) (2006). Other federal laws may also apply to greenwashing, such as the Lanham Act, which establishes a cause of action for false advertising. 15 U.S.C. § 1125(a) (2006). State laws generally provide for similar consumer protection laws to prohibit false advertising, unfair trade practices, and unfair competition.

More specifically, the FTC has established national standards for environmental marketing claims in its *Guides for the Use of Environmental Marketing Claims*, better known as the “Green Guides.”

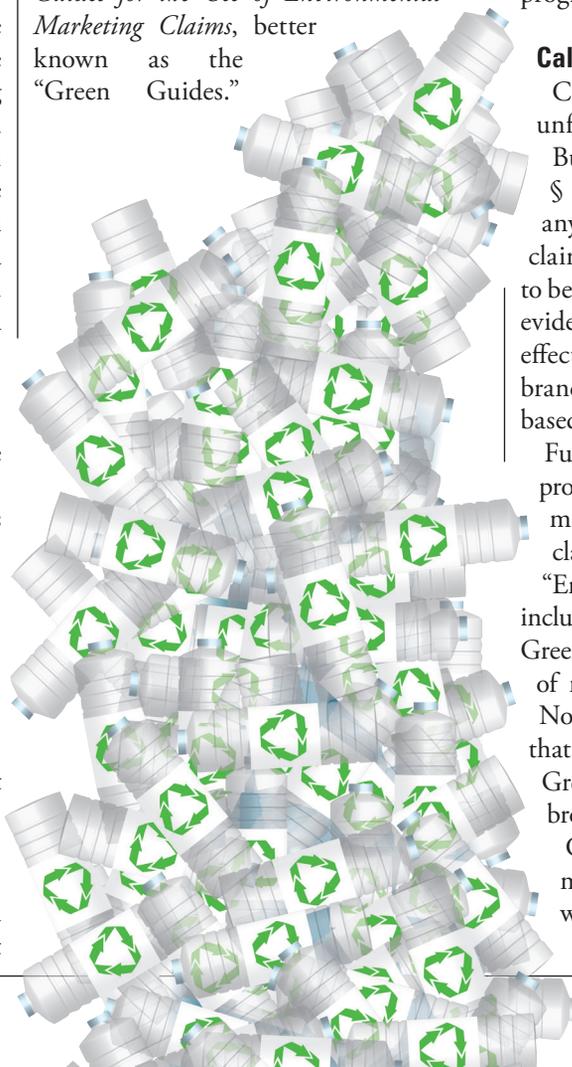
16 C.F.R. § 260 (1996).<sup>3</sup> The Green Guides specifically address the application of the FTC Act to environmental marketing and advertising practices. They apply to any claim about the environmental attributes of a product, package, or service in connection with the sale or marketing thereof, whether for household, commercial, or industrial use. 16 C.F.R. §§ 260.1, 260.2. Although the Green Guides are not enforceable regulations, they provide instruction on how the FTC evaluates green marketing claims and interprets its authority to regulate greenwashing. 16 C.F.R. § 260.2. In particular, the Green Guides provide a “safe harbor” for marketers seeking certainty in their green advertising programs. 16 C.F.R. § 260.3.

### California’s Greenwashing Laws

California has its own laws governing unfair and deceptive practices. California Business and Professions (B&P) Code § 17508(a) makes it unlawful to make any false or misleading advertising claim, including claims that “(1) purport to be based on factual, objective, or clinical evidence; (2) compare the product’s effectiveness or safety to that of other brands or products; or (3) purport to be based on any fact.”

Furthermore, B&P Code § 17580.5(a) prohibits “any untruthful, deceptive or misleading environmental marketing claim, whether explicit or implied.” “Environmental marketing claim” includes any claim contained in the FTC Green Guides, which apply to all forms of marketing for products and services. Notably, B&P Code § 17580.5(b) provides that conformance to the standards in the Green Guides is a defense to lawsuits brought under that section.

California law also requires maintaining comprehensive records when it comes to advertising consumer goods. Under B&P Code § 17580,



a manufacturer or distributor who represents that a consumer good does not harm, or is beneficial to, the environment by using terms such as “environmentally safe” or “green product,” must maintain comprehensive written records that contain the reasons why the representation is believed to be true and explain whether or not the consumer good conforms with the Green Guides.

With respect to plastic products, California’s laws are stricter than the federal Green Guides. California prohibits labeling plastic bags and plastic food and beverage containers as “biodegradable,” “degradable,” or “decomposable.” Cal. Pub. Res. Code §§ 42357(b), 42357.6 (West 2009). Pursuant to Senate Bill 567, adopted in 2011, prohibition will expand to all plastic products on January 1, 2013.

### FTC Greenwashing Enforcement Actions

The Green Guides’ “safe harbor” is important for establishing an effective marketing campaign that can avoid liability under the FTC Act. Since President Obama took office, the FTC has amplified its efforts to enforce the FTC Act and scrutinize environmental marketing claims. Notably, in June 2009, the FTC charged Kmart Corp. and other companies with making false and unsubstantiated claims that their paper products were biodegradable.<sup>4</sup> Specifically, the FTC alleged that Kmart’s representations that its American Fare paper plates were biodegradable were deceptive because the paper plates would not completely break down and decompose within a reasonably short period of time after disposal. Kmart settled the case by agreeing to an order barring it from making deceptive “degradable” product claims, and requiring it to support any environmental claims with competent evidence.<sup>5</sup>

In another matter, a company called Tested Green advertised and sold environmental certifications on its website, representing itself as the nation’s leading certification program. However, the FTC’s complaint alleged that Tested Green never tested the products of any of the companies for which it provided environmental certifications, and would “certify” products for anyone willing to pay a significant fee. The FTC settlement barred Tested Green from making future misrepresentations. In a press release, David Vladeck, the director of

the FTC’s Bureau of Consumer Protection, stated, “It’s really tough for most people to know whether green or environmental claims are credible. Legitimate seals and certifications are useful tools that can help consumers choose where to place their trust and how to spend their money. The FTC will continue to weed out deceptive seals and certifications like the one in this case.”<sup>6</sup>

More recently, the FTC charged five window marketers of making unsupported energy efficiency and money-savings claims, including that consumers could cut their energy bills in half by using replacement windows alone. For example, the FTC alleged that Maryland-based Long Fence & Home, LLLP made

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unsubstantiated advertising claims through its marketing program, such as “50% Energy Savings Guaranteed.” As of February 2012, the five companies agreed to stop making exaggerated and unsupported claims about the energy efficiency of their windows, and about how much money consumers would save on their heating and cooling bills by installing those windows.<sup>7</sup>

### California’s Greenwashing Challenges

Consumers and competitors also have legal avenues available under state and federal law to challenge misleading and deceptive green advertising claims. Such cases may become more common, given the prevalence of greenwashing and increasing consumer awareness.

On October 26, 2011, the California Attorney General filed a greenwashing suit

in Orange County Superior Court against two bottled water companies and their plastic resin supplier who allegedly made misleading claims by marketing plastic water bottles as 100% biodegradable and recyclable. The complaint alleged the claims were deceptive to consumers because plastic bottles will not biodegrade as claimed, whether in a landfill or any environment. *People of the State of California ex rel. Kamala D. Harris v. Enso Plastics*, Case No. 30-2011-00518091-CU-MC-CJC (Cal. Super. Ct., Cnty of Orange, Oct. 2011). This case remains pending.

In *Hill v. Roll Int’l Corp.*, 195 Cal. App. 4th 1295 (2011), the manufacturer of Fiji bottled water successfully defended a challenge by a plaintiff who alleged that the picture of a green water drop shown on the Fiji label led her to believe that Fiji water was environmentally superior and endorsed by an independent environmental organization. *Id.* at 1298. She also asserted that she had paid a premium for Fiji water, and would not have purchased it had she known that it was not environmentally superior to other bottled water products. *Id.* at 1299. The court held that, even if the plaintiff actually was misled to believe that the green drop symbol on Fiji labels indicated environmental superiority, her beliefs did not satisfy the reasonable consumer standards expressed in the Green Guides. *Id.* at 1304. The Court found that the picture of a green drop bore no name or logo of any environmental group or third-party organization, and nothing to indicate it was anything but a symbol of Fiji water. *Id.*

### Current FTC Green Guides

The cases and enforcement actions discussed above highlight the importance of developing an environmental marketing program with substantiated and well-documented claims. The following are some key provisions in the Green Guides:

- **Substantiation of claims.**

Substantiated claims about an objective quality of a product requires competent and reliable scientific evidence, defined as tests, analyses, research, studies, or other evidence based on the expertise of professionals. 16 C.F.R. § 260.5.

- **General environmental benefit claims.** Unqualified general claims of environmental benefit are difficult to interpret and may convey that the product has far-reaching environmental

benefits, even though that may not be the case. Thus, unless the substantiation requirement can be met, broad environmental claims (terms like “green” or “environmentally friendly”) should be avoided or qualified to prevent deception about the specific nature of the environmental benefit asserted. 16 C.F.R. § 260.7.

• **Clarity.** Any qualifications or disclosures should be sufficiently clear and prominent. 16 C.F.R. § 260.6(a).

• **Distinction between a product and its components.** An environmental marketing claim must be clear about whether the environmental benefit refers to the whole product or components thereof. 16 C.F.R. § 260.6(b).

• **Overstatement.** Environmental claims should not overstate the environmental benefit, whether expressly or by implication, and implying significant environmental benefit should be avoided if the benefit is only negligible. 16 C.F.R. § 260.6(c).

• **Comparative claims.**

Environmental marketing claims that include a comparative statement should be sufficiently clear. 16 C.F.R. § 260.6(d). For instance, simply stating that a product contains “20% more recycled context” is unclear, and this statement should indicate whether it refers to a preceding product or a competitor’s product.

### Proposed Revisions to the FTC Green Guides

The proposed revisions to the FTC Green Guides are significant because, if adopted, they will provide stronger guidance on making unqualified general environmental benefit claims (such as through use of the words “green” or “eco-friendly”). While the current Green Guides allow broad environmental claims only when all express and implied claims can be substantiated, the proposed revisions would prohibit unqualified general environmental benefit claims; any general benefit claims must be accompanied by clear and prominent qualifying language to convey that the claim refers only to a specific and limited benefit. The revised Green Guides would prohibit blanket, general claims that a product is “environmentally friendly” because the FTC has found that “very few products,

if any, have all the attributes consumers seem to perceive from such claims, making these claims nearly impossible to substantiate.”<sup>8</sup> The proposed revisions also address the following issues:

• **Certifications and seals of approval.**

Unqualified certifications or seals must be accompanied by clear and prominent language explaining the use of the certification or seal.

• **Degradable claims.** For items described as “biodegradable,” the proposal clarifies that the “reasonably short period of time” for complete decomposition is no more than one year after customary disposal.

• **Compostable claims.** Items described as “compostable” must break down in approximately the same time as the materials from which they are composed.

• **Recyclable claims.** The proposal includes a three-tiered analysis where use of “recyclable” depends on the access of consumers and communities to recycling facilities.

• **Renewable materials.** Marketers should qualify claims of renewable materials with specific information about the renewable material, including what it is, how it is sourced, and why it is renewable.

• **Renewable energy.** Marketers should not make unqualified claims of renewable energy if the power used to manufacture any part of the product was derived from fossil fuels.

The FTC expects to adopt the final Green Guides in October 2012. Regardless of the contents thereof, the increasing enforcement actions of the FTC and state agencies, the upsurge in “green” products nationwide, and the uptick in litigation all accentuate the need for an environmental marketing program that is clear, substantiated, and well-documented.

### ENDNOTES

(1) TerraChoice Press Release, *TerraChoice 2010 Sins of Greenwashing Study Finds Misleading Green Claims on 95 Per Cent [sic] of Home and Family Products* (Oct. 26, 2010), <http://www.terrachoice.com/files/TerraChoice%202010%20Sins%20of%20Greenwashing%20Release%20-%20Oct%2026%202010%20-%20ENG.pdf> (last visited Apr. 12, 2012).

(2) Federal Trade Commission Press Release, *Federal Trade Commission Proposes Revised “Green Guides”* (Oct. 6, 2010), <http://www.ftc.gov/opa/2010/10/greenguide.shtm> (last visited Apr. 12, 2012).

(3) According to its Office of Public Affairs, the FTC expects to adopt new revisions to the Green Guides in October 2012. Until then, the FTC will continue using the 1998 version of the Green Guides.

(4) *Kmart Corp.*, F.T.C. No. 062 3088 (July 15, 2009).

(5) Federal Trade Commission Press Release, *FTC Announces Actions Against Kmart, Tender, and Dyna-E Alleging Deceptive “Biodegradable” Claims* (June 9, 2009), <http://www.ftc.gov/opa/2009/06/kmart.shtm> (last visited Apr. 12, 2012).

(6) Federal Trade Commission Press Release, *FTC Settlement Ends “Tested Green” Certifications That Were Neither Tested Nor Green* (Jan. 11, 2011), <http://www.ftc.gov/opa/2011/01/testedgreen.shtm> (last visited Apr. 12, 2012).

(7) Federal Trade Commission Press Release, *Window Marketers Settle FTC Charges That They Made Deceptive Energy Efficiency and Cost Savings Claims* (Feb. 22, 2012), <http://www.ftc.gov/opa/2012/02/windows.shtm> (last visited Apr. 12, 2012).

(8) Federal Trade Commission Press Release, *Federal Trade Commission Proposes Revised “Green Guides,” supra* note 1.



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