

# Green Isn't Just a Color: Navigating the Green Marketing Legal Landscape

Product Stewardship  
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# Verdant Law

Verdant is a Washington, DC law firm specializing in product risk management with an emphasis on the regulation of chemical products.

- Green Marketing
- TSCA
- FIFRA
- FHSA
- Media programs (CAA, CWA, RCRA, Superfund)
- Internal investigations and compliance audits
- Litigation, including enforcement

# Overview of Today's Presentation

- Background on green marketing
- Recent activity in the courts and elsewhere
- Overview of the regulation of green marketing in the U.S.

# Background on Green Marketing and Enforcement

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# Green Marketing

- Generally refers to marketing products or services in a manner intended to communicate their environmental benefits.
  - The product or service may have objective attributes that are “environmentally friendly”
  - The product or service may be produced in an “environmentally friendly” way
- Also known as: Eco-marketing or Environmental Marketing

# Green Marketing

- Green marketing is on the rise for a number of reasons, including the “green premium”
  - Research shows that consumers in the United States and Europe are willing to pay more for “green” products
- A 2017 Cone Communications Study found the following:
  - 68% of millennials bought a product with a social or environmental benefit in the past 12 months
  - 87% of consumers have a more positive image of a company that supports social or environmental issues
  - 87% of consumers would buy a product with a social and environmental benefit if given the opportunity
  - 92% of consumers would be more likely to trust a company that supports social or environmental issues

# Greenwashing

Although the number of environmental marketing claims is on the rise there is also an increase in the number of claims that are false or deceptive.

- “Greenwashing” is a term applied to overstated marketing claims. It is somewhat in the eye of the beholder. However, there are key stakeholders whose opinions matter – customers, competitors, and regulators.
- TerraChoice defines greenwashing as “the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service.”

# “Seven Sins” of Greenwashing

According to TerraChoice, greenwashing consists of the following “Sins”:

- **Hidden Trade-Off** – suggesting a product is green based on unreasonably narrow set of attributes while ignoring others (e.g., paper, is not necessarily environmentally-preferable just because it comes from a sustainably-harvested forest. Other important environmental issues in the paper-making process, such as greenhouse gas emissions, or chlorine use in bleaching may be equally important.)
- **No Proof** – lacking substantiation for claim
- **Vagueness** – defining claim so broadly or vaguely that it’s likely to be misunderstood (e.g., ‘All-natural;’ arsenic, uranium, mercury, and formaldehyde are all naturally occurring, and poisonous. ‘All *natural*’ isn’t necessarily ‘green.’)



# “Seven Sins” of Greenwashing

Greenwashing “Sins” (continued):

- **Irrelevance** – making an environmental claim that may be truthful but is unimportant or unhelpful (e.g., ‘CFC-free;’ is a frequent claim despite the fact that CFCs are banned by law.)
- **The Lesser of Two Evils** – making claims that may be true within the product category, but that risk distracting from the greater environmental impacts of the category as a whole (e.g., Organic cigarettes, fuel-efficient sport-utility vehicle.)
- **Fibbing** – making a false claim
- **Worshipping False Labels** – exploiting demand for third-party certification with “fake” labels or claims of certification

# Why Do We Care About Greenwashing?

- Potential loss of market share to unscrupulous competitors
- Potential loss of market acceptance because of consumer cynicism – injury to brand/reputation
- Legal liability
  - Government enforcement
  - Private party lawsuits
  - Competitor challenges
- Not all instances of greenwashing are violations of law, but there's substantial overlap because both involve deception.
- Goal is compliance with the law while avoiding allegations of greenwashing by other key stakeholders.

# Litigation over Green Marketing Claims

## *ECM Biofilms, Inc. v. FTC*

(US Court of Appeals , Sixth Circuit (2017))

At issue, an additive manufacturer's unqualified biodegradability claim conveyed an implied claim that its plastic completely biodegraded within five years.

- FTC found that ECM violated the prohibition in section 5 of the FTC Act on the use of deceptive advertising
- Upheld by 6<sup>th</sup> Circuit

## ***Mattero v. Costco Wholesale Corp.***

**(US District Court, Northern District California (2018))**

- Kirkland Signature Premium Liquid Dish Soap & Kirkland Signature Premium Laundry Detergent marketed as "environmentally responsible" and "environmentally friendly"
- Allegation: claims are false and misleading

# State Attorney Generals v. Volkswagen For Deceptive Marketing (2016)

Volkswagen paid states \$1,100 per car for violations of consumer protection laws, for a total of \$570 million nationwide.

- **Maryland AG:** "Volkswagen's deceptions are particularly egregious because they told consumers that these cars—which are environmental nightmares—were good for the environment, even going so far as saying they were as environmentally friendly as hybrids. Consumers who bought these cars not only did not get what was advertised, but they also paid a premium because they wanted to be responsible environmental stewards"
- **Virginia AG:** Volkswagen made false statements to consumers in their marketing and advertising, misrepresenting the cars as environmentally friendly or "green"

# FTC Enforcement against Green Marketing Claims

## Benjamin Moore, ICP Construction, YOLO Colorhouse, and Imperial Paints (2018)

- Allegedly misled consumers through claims that their products were free of emissions and volatile organic compounds (VOCs).
  - Some promotions also made explicit safety claims regarding babies, children, pregnant women, and other sensitive populations.
- FTC alleged that the companies had no evidence to support these claims.
- Benjamin Moore and ICP Construction also marketed their paint using environmental seals without adequately disclosing that they had awarded the seal to their own products.

# FTC Enforcement against Green Marketing Claims

## Warning letters to manufacturers and marketers of dog waste bags (2015)

- “biodegradable,” “compostable,” and other environmental claims may be deceptive.



# FTC Enforcement against Green Marketing Claims

## Engineered Plastics Systems (2014)

- Deceptive claims in its advertising and marketing material, including that many of its products are made entirely of recycled plastic.

# NAD Recommendations Concerning Green Marketing

- **Olivet International (2018)** – Van Ness Plastic Molding Company challenged Olivet’s claim that its containers are “made of recycled materials.”
- **Beech-Nut Baby Foods (2017)** – NAD recommended that Beech-Nut discontinue its unsupported claims that “glass is the ultimate in sustainability.”
- **Rubbermaid (2017)** – OXO challenged claims over the company’s FreshWorks’ Produce Saver Containers that specified how much longer produce remains fresh.
- **Applegate Insulation (2016)** – NAD recommended that Applegate discontinue its unsupported comparative performance claims that cellulose insulation provides superior energy savings over fiberglass insulation.

# Regulation of Green Marketing Claims in the United States

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# Sources of Regulation

- **Self-regulatory bodies** – e.g., Council of Better Business Bureaus, National Advertising Division (NAD)
- **State Attorneys General or Consumer Protection Agencies**
  - Some laws modeled on Federal Trade Commission Act (FTC Act)
  - Some laws modeled on Uniform Deceptive Trade Practices Act
- **Private parties**, including consumers and competitors, pursuing common law claims or claims under state and federal statutes (e.g., common law fraud, section 43(a) of the Lanham Act for “false or misleading description[s] of fact,” etc.)
- **Federal Trade Commission (FTC)** through the FTC Act

# National Advertising Division

- NAD investigates competitor challenges and consumer complaints:
  - Quick resolution (~ 60 days) using ADR
  - Internal appeals process available
  - No authority to impose penalties/injunctions
  - May refer cases to the FTC
  - Adverse findings have negative publicity value
- Nestle Nutrition challenged Beech-Nut’s claim that its glass containers were “the ultimate in sustainability.”

## State Law

All states and the District of Columbia have enacted statutes prohibiting deceptive practices in consumer transactions. (See e.g., <https://www.nclc.org/issues/how-well-do-states-protect-consumers.html>). Some states have expressly adopted portions of the Green Guides into their own laws, for example:

- California
- Maine
- Minnesota
- New York

# Private Causes of Action

- Consumers and competitors might pursue various claims:
  - Common law fraud, negligent or intentional misrepresentation;
  - State consumer protection statutes are available in some states to consumers and/or competitors – e.g., class action in CA against Costco Wholesale Corp for "environmentally responsible" claim and use of various "environmentally friendly" phrases and images on labeling and marketing; and
  - Violation of Section 43(a) of the Lanham Act for "false or misleading description[s] of fact" in commerce - e.g., lawsuit in NY against U.S. Green Building Council re energy efficiency claims. (Note: Courts are split on availability of consumer action).

# FTC Act and the Green Guides

- Section 5 of the FTC Act, 15 U.S.C. § 45, authorizes the FTC to take legal action against “unfair or deceptive” practices in commerce.
- Doesn’t give FTC the authority to set environmental policy or standards (e.g., testing protocols).
- FTC published the Green Guides to help advertisers avoid making unfair or deceptive claims under Section 5.
- Green Guides are non-binding administrative interpretations. They don’t preempt other law.



# FTC Act and the Green Guides

Because the Green Guides are non-binding administrative interpretations:

- They don't preempt federal, state, or local law.
  - Compliance will *not* necessarily preclude FTC enforcement of Section 5.
  - Compliance with voluntary standards won't guarantee Section 5 compliance.
- The Guides merely reflect the FTC's views on how reasonable consumers interpret certain claims.
- Marketers may use alternative approaches if they satisfy the requirements of Section 5. Claims that are inconsistent with the Guides will receive greater scrutiny.

# Scope of the Guides

- The Guides apply to claims about the environmental attributes **of a product, package, or service** in connection with the marketing, offering for sale, or sale of such item or service **to individuals, businesses, or other entities**.
- The Guides apply to environmental claims in **any** marketing medium, **whether asserted directly or by implication**.

# Principles – Avoiding Deception

- Guides establish principles to avoid unfair or deceptive practices. Focus is primarily on preventing deception.
- **Deception is not defined in the FTC Act**, but FTC has a Policy Statement on Deception.
  - According to the Policy, “a representation, omission, or practice is deceptive if it is **likely to mislead consumers acting reasonably under the circumstances** and is **material to consumers’ decisions.**”
  - A consumer is acting reasonably if its understanding of a claim is consistent with a “significant minority”.
  - Extrinsic evidence from consumer perception studies is the gold standard.
  - In absence of consumer perception data, FTC relies on its own expertise on how consumers are likely to interpret claims.
- **Disclosures and qualifications required for retail vs. business consumers may differ.** But don’t inadvertently provide business customers with means to deceive retail consumers.

## Principles – Substantiation

- Marketers must identify **all express and implied claims that the advertisement reasonably** conveys and ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis. **(Evaluate the entire context.)**
- For environmental marketing claims, a “reasonable basis” often requires **“competent and reliable scientific evidence”**. Ramboll will discuss this further.

# Principles

- Qualifications and disclosures should be **clear, prominent, and understandable**. (Can't bury them in the fine print, etc.)
- Claim should **specify whether it refers to the product, the product's packaging, a service**, or just to a portion thereof.
- **Don't overstate**, directly or by implication, an environmental attribute or benefit – don't emphasize negligible benefits either.
- **Comparisons should be clear** about what's being compared and substantiated.

# Examples of Specific Topics Covered

- General environmental benefit claims
- Recycled Content
- Certifications and seals of approval
- Free-of/Non-Toxic
- Degradable
- Carbon offsets
- Compostable
- Made with renewable materials
- Ozone-Safe/Ozone-Friendly
- Made with renewable energy
- Recyclable
- Source reduction
- Refillable

# General Environmental Benefit Claims

- Includes claims such as “**environmentally-friendly,**” “**green,**” etc.
- Marketers **should not make** unqualified general environmental benefit claims. It is difficult, if not impossible, to substantiate all express and implied claims.
- **Qualifications should be clear, prominent, and should limit the claim to a specific benefit.** For example, “Green – Made with Recycled Materials.”
  - Substantiation required for specific benefit used to qualify claim.
  - Marketers should ensure the advertisement’s context does not imply deceptive environmental claims.
  - Also, be careful that attribute used for qualification doesn’t imply product provides a net environmental benefit.

# Seals of Approval and Certifications

Certifications and seals of approval are often “endorsements” covered by the FTC’s Endorsement Guides, 16 CFR Part 255.

- Endorsements must reflect **honest opinion of endorser**; marketer remains liable for deception occurring through endorsements.
- Marketer or endorser **must have substantiation** for all conveyed claims.
- Marketer must **disclose “material connection” with endorser if endorser appears independent** (e.g., member of association giving the certification *may be* material). Connection affects independence of endorsement.
- Environmental endorsements require expertise - **qualified experts must be used** and their **evaluation must be based on actual exercise of that expertise**.
- Endorsements of an **organization must reflect its collective judgment**.



# Seals of Approval and Certifications

- Unqualified certifications or seals convey general environmental benefit claim.
- Marketers should use clear and prominent language limiting the claim to particular attribute(s) for which they have substantiation.
- In-house labels are an easy target if their ownership isn't clearly disclosed – i.e., it's a material connection.

# Free-of

- Claims that an item is “free-of” a substance may be deceptive if:
  - item has substances that pose the same/similar risk as the substance not present; or
  - substance has never been associated with the product category.
- Free-of claims may be appropriate when item contains or uses trace amount of a substance, if:
  - level is no more than what would be found as acknowledged trace contaminant or background level;
  - presence doesn’t cause material harm that consumers typically associate with substance; and
  - substance has not been intentionally added to product.

# Non-toxic

- Such claims might convey that an item is non-toxic **both for humans and for the environment** generally.
- **Cannot rely on compliance with regulation** as substantiation **if regulation does not support all such express and implied claims.**
- Qualify claim if substantiation would not otherwise support all conveyed claims.

# Questions?

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