



The Green Guides: Staying Clean While Going Green in Household & Personal Care

AN OVERVIEW OF REGULATORY AND LITIGATION TRENDS RELATED TO GREEN MARKETING, WITH KEY TAKEAWAYS TO HELP COMPANIES MANAGE REGULATORY AND LITIGATION RISKS.

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Consumers are increasingly environmentally-conscious with their spending habits. A 2023 McKinsey & Company and NielsenIQ study found that products advertised as “environmentally friendly” accounted for 56% of retail sales market growth during the past five years.¹ Companies are taking note. Turn on any

channel, walk down any drugstore aisle, or scroll through any social media platform, and you can expect to see advertising touting a personal care or household product is “green” in some capacity.²

The increase in “green” products comes with increased scrutiny of “green” claims by regulatory bodies and the plaintiff’s bar—including some notable trends that should be on the radar of any company intending to tout the environmental benefits of personal care or household products in 2024. This article provides a brief overview of key regulatory and litigation trends related to green marketing, while closing with key takeaways to help companies manage regulatory and litigation risks (while touting the environmental benefits of their products) in 2024 and beyond.

TRENDS TO WATCH

The biggest news throughout much of 2023 was the Federal Trade Commission's (FTC) request for comments regarding its Guides for the Use of Environmental Marketing Claims (or, as they are generally known, the "Green Guides"), as it started the process to update the guides for the first time since 2012. The FTC solicited comments on a number of topics of interest to companies marketing personal care and household products, including whether the FTC should provide guidance regarding "organic" and "sustainable" claims, or revise its guidance on "recyclable" claims to account for whether articles marketed as recyclable are actually recycled.³ It may be at least a year until the Green Guides are updated and finalized by the FTC. In the interim, however, companies must pay attention to other regulatory and litigation activity related to green marketing claims.

For example, 2023 marked relevant regulatory activity by the Environmental Protection Agency (EPA) related to the Safer Choice program, a voluntary program created by the EPA to help consumers, businesses and purchasers find products that perform and contain ingredients that are safer for human health and the environment. To be eligible for the Safer Choice label, a product must comply with the Safer Choice Standard, which, according to EPA, has very stringent human health and environmental criteria, including incorporating chemical criteria for individual component class ingredients, like surfactants, solvents and chelants. In addition to entering conversations with FDA regarding expanding the program to cover cosmetics,⁴ the EPA proposed several updates to its Safer Choice program, including:

- Implementing additional sustainable packaging requirements, such as requiring (1) primary packaging be either recyclable and contain a minimum level of post-consumer recycled content, or be designed to be reused; (2) product labels on primary packaging not affect the packaging's recyclability; and (3) recycling instructions be clearly disclosed on the packaging;
- Prohibiting the intentional use of PFAS, all bisphenol-based chemicals, and certain heavy metals in product packaging;
- Adding a category for products intended for use in pets; and
- Allowing disposable wipes be made from both natural fibers and synthetic fibers from renewable sources, so long as the material meets certain biodegradability standards.⁵

- EPA accepted comments on the proposal until January 16, 2024, after which potential updates to the program should be anticipated.

State enforcement and litigation trends related to green marketing are also evolving. After experiencing the 2021 passage of California Assembly Bill 1201 that expanded the prohibition of "biodegradable" marketing to all consumer products sold in California, companies must prepare for the implementation of Senate Bill 343, which may prohibit the chasing arrows symbol and other implications of recyclability on certain products. In December 2023, CalRecycle published its preliminary report identifying the material types and forms for which "recyclable" claims can be made in California.⁶ CalRecycle's preliminary report suggests that "recyclable" claims may eventually be prohibited for several materials, including (1) tin/steel aerosol containers; (2) single-use mixture of multiple plastic resins; (3) other (7) single-use rigids; and (4) plastic bags.⁷ Further, while currently only a few states, such as Alabama, Maryland and Washington, have state regulations governing whether a product can be labeled as "biodegradable" or "compostable,"⁸ similar legislation is expected to expand to other states. For example, on January 1, 2024, restrictions on whether a product can be advertised as "compostable" or "biodegradable" went into effect in Colorado.⁹

Further, although the Green Guides are only "guidance" at the federal level, certain states, including California, Maine and Minnesota, incorporated the Green Guides into their own laws, thereby providing the Green Guides the force of law.¹⁰ As a result, consumer class action lawsuits have proliferated over the years, frequently targeting green claims made via product packaging, advertising and social media. In 2023, there was a particular focus on claims that products are "natural," "clean," "non-toxic," "safe for use around pets/animals" or recyclable, with an influx of litigation alleging that a product cannot be (1) "natural" or "non-toxic" if testing shows that the product contains per- and polyfluoralkyl substances ("PFAS");¹¹ (2) "clean" if the product contains "harmful" or "unwanted" ingredients, including alleged carcinogens, PFAS and hormone disruptors;¹² or (3) "recyclable" if less than 60% of municipal recycling facilities will actually accept the product or its packaging for processing.¹³ All of these trends are important to take into consideration while implementing green marketing strategies for 2024 and beyond.

KEY TAKEAWAYS

Despite these regulatory and litigation trends, there are steps that can be taken by personal care and household product companies to effectively share truthful environmental benefit information about their products without triggering undue business risk, including the following:

- Ensure claims are substantiated before making them. While it is a foundational principle that an advertiser must have substantiation for a claim before making it, this principle is of utmost importance for high risk green claims. These are not claims for which a company can just rely on its vendor. Companies should verify every environmental benefit they want to tout and keep records of this verification in the event they are ever questioned about the veracity of their advertising claims.
- Vet both product and company claims. Importantly, claims do not have to be tied to specific products to create potential liability. In November 2023, New York filed a complaint against a consumer product company and its subsidiaries, alleging violations of New York's consumer protection law and that the companies had created a public nuisance and failed to warn consumers of a substantial risk of harm because the companies' single-use plastic packaging had allegedly resulted in pollution of the Buffalo River.¹⁴ Importantly, the complaint cited statements that the parent company had made about its recycling strategy, participation in a circular economy for plastic packaging and progress toward reducing its contribution to plastic pollution as examples for how the company had misled consumers.¹⁵ This case serves as an important reminder that green claims that are not tied to products must also be thoughtfully crafted and substantiated.
- Consider all regulatory guidance that may apply to a claim. Companies should consider all regulatory bodies with potential authority over the claims of interest to a marketing team. For example, suppose a company is considering making a "non-toxic" claim for an EPA-regulated pesticide product. While the FTC Green Guides may permit the claim, EPA has expressed skepticism over whether a non-toxic claim would be appropriate on pesticide products,¹⁶ and the plaintiff's bar has tried to rely on this skepticism to pursue litigation demands. A company will want to ensure it is aware of conflicting regulatory precedent before moving forward with environmental claims in the marketplace.

- Develop a compliance plan that works across state lines. As noted above, several states have requirements for making environmental marketing claims. While it may be tempting to brush off state laws as only applying within their borders, the reality is that a single compliance plan is easier and less expensive to execute than multiple state-specific plans. All green claims, especially those related to recyclability, biodegradability or any other form of disposal, should only be made when federal, state and local laws for such claims have been considered.
- Analyze "green claims" in the context of the entire supply chain. For example, is there anything in the product's supply chain that could make a green claim appear misleading? Consider that the Green Guides state a "free of" claim may be deceptive if (1) the product or its package "contains or uses substances that pose the same or similar environmental risks as the substance that is not present" or (2) the substance is not associated with the product at all.¹⁷ It is therefore necessary to consider whether the substance your product is "free from" may contain an ingredient that presents a similar hazard, or whether such a substance was used in the product's processing. These considerations are particularly important when crafting disclosures to appropriately narrow otherwise general environmental benefit claims, as detailed below.
- Disclose, disclose, disclose. The Green Guides discourage unqualified general environmental benefit claims (such as "sustainable or "eco friendly") as they can have broad implications that may be difficult to substantiate. It is therefore not surprising that advertisers generally get into the most trouble when they make such claims without specifying what exactly makes the product (or method) environmentally beneficial. While it may require some creative reorganizing of the product label, a company can significantly lower the risk of its environmental marketing claims by qualifying a claim to clarifying what the advertiser means when using an ambiguous term (such as "natural" or "clean").
The potential risk that environmental marketing claims can pose should not discourage personal care and household product companies from touting the environmental benefits of their products. It should, however, serve as a reminder that all green claims should be carefully and thoughtfully crafted with consideration of the evolving regulatory and litigation framework, to best ensure that consumers are provided the information they desire without bring undue risk to the company. ■

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8. Ala. Code § 22-27A-1; Md. Code, Envir. § 9-2102; Wash. Rev. Code § 70A.455.040. 9 S.B. 23-253 (Colo. 2023).
9. S.B. 23-253 (Colo. 2023).
10. See Cal. Bus. & Prof. Code § 17580.5; Me. Stat. tit. 38, § 2142; Minn. Stat. § 325E.41.
11. See, e.g., Complaint, Esquibel v. Colgate-Palmolive Co., No. 1:23-cv-00742-RA (S.D.N.Y. Jan. 27, 2023); Complaint, Brewer v. Period Co., No. 2:23-cv-09526 (C.D. Cal. Nov. 10, 2023).
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14. Complaint, New York v. PepsiCo, Inc., No. 814682/2023 (N.Y. Sup. Ct. Nov. 15, 2023).
15. Id.
16. Green Guides, Statement of Basis and Purpose, at 146-47.
17. 16 C.F.R. § 260.9(b).