

**REGULATION OF ENVIRONMENTAL MARKETING
CLAIMS**

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REGULATION OF ENVIRONMENTAL MARKETING CLAIMS

I. Introduction

A. Federal Trade Commission

1. The Federal Trade Commission (“FTC”) regulates environmental marketing claims (or “green claims”) under Section 5 of the FTC Act, 15 U.S.C. § 45(a), which empowers the FTC to prevent “unfair or deceptive acts or practices.”
2. To assist companies making green claims in voluntarily complying with Section 5, the FTC has promulgated *Guides for the Use of Environmental Marketing Claims*. 16 C.F.R. pt. 260 [hereinafter *Green Guides*].
3. The *Green Guides* are not formal rules with the force and effect of law. 16 C.F.R. § 260.2. Rather, they are administrative interpretations of the application of Section 5 to green claims and provide safe harbors for complying with Section 5. *Id.* §§ 260.1, 260.3. Conduct inconsistent with the *Green Guides* may result in an FTC enforcement action only if the FTC determines that the conduct violates Section 5 after an investigation. *Id.* § 260.1.
4. The FTC has also issued additional guidance to assist companies in complying with the *Green Guides*. FTC, *Complying with the Environmental Marketing Guides*,

[hereinafter *Complying with the Green Guides*].¹

5. The FTC originally issued the *Green Guides* in 1992 and last revised them in 1998. In November 2007, the FTC announced that it would undertake a review and revision of the *Green Guides* prior to the previously scheduled 2009 review. The FTC moved up the review to ensure the continued relevance of the *Green Guides* in light of the increasing prevalence of green claims. The FTC held three workshops in 2008 and has conducted its own study of consumers' perception of green claims. Revised *Green Guides* are expected in 2010.

B. National Advertising Division of the Council of Better Business Bureaus

1. The National Advertising Division of the Council of Better Business Bureaus ("NAD") is the primary self-regulatory body of the U.S. advertising industry.
2. The NAD provides a forum for advertisers to challenge competitors' advertising that they believe is false or misleading without resorting to litigation.
3. The NAD also monitors advertising, and may initiate a case on its own.
4. Compliance with NAD decisions is voluntary, but the failure of an advertiser to comply with a NAD decision may

¹ <http://www.ftc.gov/bcp/edu/pubs/business/energy/bus42.pdf>.

result in the NAD referring the matter to the FTC.

5. When deciding green marketing cases, the NAD generally follows the principles enunciated in the FTC's *Green Guides* and *Complying with the Green Guides*. Because the FTC has brought relatively few green marketing cases, NAD decisions often provide guidance on specific issues where no FTC guidance may exist.

C. Environmental Protection Agency and Department of Energy: The Energy Star Program

1. Neither the Environmental Protection Agency ("EPA") nor the Department of Energy ("DOE") has responsibility for regulating environmental marketing claims. They do, however, administer the Energy Star program, which assists consumers in identifying more energy efficient products from computers to household appliances.

D. State Enforcement

1. Many states' consumer protection laws mirror the FTC Act and follow the FTC's and the court's interpretation of that Act, either as the law of the State or as guidance for applying the State's law. *See, e.g.*, Fla. Stat. § 501.203 (providing that violations of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") may be based on FTC rules and FTC unfairness and deception standards); *id.* § 501.204 (providing that in construing FDUTPA "due consideration and great weight shall be given to the interpretations

2. Some states do have specific statutes regulating green claims, which may codify the *Green Guides* into state law. *See, e.g.*, Cal. Bus. & Prof. Code § 17580.5(b) (making conformance with the *Green Guides* a defense to California’s prohibition on false or misleading green claims); R.I. Gen. Laws § 6-13.3-1 (“The uniform standards for environmental marketing claims, as contained in the FTC guidelines for environmental marketing claims are hereby adopted by the state of Rhode Island.”).
3. Because of their breadth and variation, state laws are not covered in this outline.

II. The FTC’s *Green Guides*

A. Introduction

1. There is no specific federal statute regulating environmental marketing claims. The FTC regulates green claims through its general authority under Section 5 of the FTC Act, 15 U.S.C. § 45(a) to prevent “unfair or deceptive acts or practices.”
2. With the emergence of recyclability and similar claims in the early 1990s, the business community sought uniform guidance on what substantiation would be required to support such claims. In response, the FTC issued the first set of *Green Guides* in 1992. The *Guides* were revised in 1998. As discussed in more detail below, the FTC is currently

reviewing the *Green Guides*, and revised *Guides* are expected sometime in 2010.

3. The *Green Guides* are not legislative rules with the force and effect of law. 16 C.F.R. § 260.2. They are administrative interpretations of Section 5 as applied to green claims. *Id.* § 260.1. They provide safe harbors for marketers to comply with Section 5, but do not necessarily represent the only ways by which green marketers can comply with Section 5. *Id.* § 260.3. The FTC cautions, however, that multiple guidelines may apply to a particular claim and that the overall context of the marketing materials or labeling will be considered to determine the appropriateness of the claim(s). *Id.*
4. As noted in the Overview, the FTC has also issued *Complying with the Green Guides*, which provides additional guidance for marketers making green claims.
5. The following sections discuss general FTC advertising principles and the guidance contained in the *Green Guides* and *Complying with the Green Guides*, with emphasis on product packaging claims and third-party certifications.

B. Claim Interpretation and Substantiation

1. The starting point for an analysis of a green claim is to determine what claims are being conveyed to consumers. *See*

generally FTC, *Policy Statement on Deception*.²

2. The FTC looks not only at express claims (*i.e.*, the literal words of the claims), but also at any implied claims (*i.e.*, what a reasonable consumer would understand was being promised). The FTC examines the entire context of the advertising to determine what claims may be implied by the advertising. Symbols (such as the triangular chasing arrows symbol for recycling) and other graphics (such as images of trees or wildlife, or the color green) can also convey green claims. Furthermore, an omission may make a claim deceptive if the omission is necessary to prevent the claim from being misleading.
3. Claims are examined from the perspective of a reasonable consumer. A claim is deceptive if it is likely to mislead a reasonable consumer under the circumstances. If the claim is targeted to a specific audience, the claim is evaluated from the perspective of a reasonable member of that audience.
4. To be deceptive the claim must be material—the claim must be likely to affect the consumer's choice of which product to purchase. Express claims are presumed to be material.
5. All express or implied claims must be substantiated. The marketer must have a reasonable basis supporting the claims

² <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

before the claims are made. Certain types of claims, such as those related to health and safety, “require competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.” Green claims will often require this rigorous level of substantiation. FTC, *Policy Statement Regarding Advertising Substantiation*³; 16 C.F.R. § 260.5; *Complying with the Green Guides*, at 3.

C. General Principles of Green Claims

1. Claims of General Environmental Benefit Should Be Avoided (16 C.F.R. § 260.7(a); *Complying with the Green Guides*, at 4-5)
 - a. Unqualified general claims of environmental benefit may convey that the product or package has far-reaching environmental benefits. Such claims are very difficult to substantiate and likely to be deceptive.
 - b. *Example:* A box of crackers states, “Eco-Friendly Box.” Without any qualification, such a claim will likely convey a wide range of environmental benefits to consumers, each of which must be

³ <http://www.ftc.gov/bcp/guides/ad3subst.htm>.

substantiated. To avoid deception, the claim should be accompanied by a clear and conspicuous disclosure limiting the claim to a particular product attribute that can be substantiated. For example, “Eco-Friendly Box. Our new box is eco-friendly because it is made from 100% post-consumer material.” *See* 16 C.F.R. § 260.7(a) exs. 1& 6.

- c. *Example:* The plastic wrap around a case of bottled water states, “Environmentally Preferable Packaging.” Such a claim would likely convey to consumers that the plastic packaging is environmentally superior to all other bottled water packaging. This broad claim would be deceptive unless the advertiser could substantiate it. Again, the better option would be to limit this claim with an appropriate, substantiated qualification. For example, “Environmentally Preferable Packaging because we use 50% less plastic than the closest competing bottled water.” *See* 16 C.F.R. § 260.7(a) exs. 1& 6.
- d. *Example:* Consumers understand “non-toxic” claims to apply not only to human health, but also the environment. An unqualified “non-toxic” claim means that the product has no adverse environmental consequences. *See* 16 C.F.R. § 260.7(a) ex. 4;

Complying with the Green Guides, at 5.

2. Qualifications and Disclosures (16 C.F.R. § 260.6(a); *Complying with the Green Guides*, at 3-4)
 - a. Qualifications and disclosures, such as those described in the *Green Guides*, necessary to prevent a claims from being deceptive must be clear and conspicuous.
 - b. Relevant factors in determining whether a particular qualification or disclosure is clear and conspicuous include proximity to the claim being qualified, type size, and the presence of other claims contrary to the qualification being made.
3. Product vs. Packaging Claims (16 C.F.R. § 260.6(b); *Complying with the Green Guides*, at 3)
 - a. A green marketing claim should make clear whether it relates to the product, the product's packaging, or some part of the product or packaging.
 - b. *Example:* A box of holiday cards is simply labeled "recyclable." Unless there are other contextual factors indicating which part of the box of cards is recyclable, the claim is deceptive if any part of the package, the cards, or

envelopes cannot be recycled.
See 16 C.F.R. § 260.6(b) ex. 1.⁴

- c. If the claim applies to all but a minor, incidental component of the product or package, a qualified claim may not be necessary. This rule may not apply in all circumstances. For example, if an incidental component severely limits the ability to recycle a product, an unqualified “recyclable” claim would be deceptive.
 - d. *Example:* A plastic water bottle is labeled “recycled.” The bottle is made from recycled plastic, but the cap is made from virgin plastic. Because consumers would likely consider the cap to be a minor, incidental component, an unqualified “recycled” claim would not be deceptive. *See* 16 C.F.R. § 260.6(b) ex. 2.⁵
4. Overstating Environmental Attributes (16 C.F.R. § 260.6(c); *Complying with the Green Guides*, at 4)
- a. A green marketing claim should not expressly or implicitly overstate the environmental

⁴ Recyclability claims are addressed in more detail in section II.D.3 below.

⁵ Recycled content claims are addressed in more detail in section II.D.4 below.

attribute or benefit, even if the claim is technically true.

- b. *Example:* A bottle of laundry detergent states, “This bottle is made with 50% more recycled content than before.” The bottle now contains 3% recycled content, whereas it previously contained 2% recycled content. Although technically true, this claim is deceptive because it will likely be interpreted to mean that the recycled content was increased significantly. The claim, “This bottle contains 3% recycled content, 50% more than before,” likely would not be deceptive because it states the basis of comparison. *See* 16 C.F.R. § 260.6(c) ex. 1.
- c. *Example:* A trash bag is labeled “recyclable.” This claim is deceptive because the fact that the trash bag is recyclable, even if true, provides no environmental benefit because trash bags are typically not separated out from other trash to be recycled. *See* 16 C.F.R. § 260.6(c) ex. 2.
- d. *Example:* A package of printer paper states, “This paper was made using a chlorine-free bleaching process.” Instead, the paper is bleached using another process that releases the same harmful byproducts into the environment, but in lesser amounts. Because consumers

would likely interpret this claim to mean that the printer paper eliminates the environmental harms of chlorine bleaching, the claim is deceptive. If substantiated, the claim “whitened with a process that reduces but does not eliminate harmful byproducts associated with chlorine bleaching” likely would not be deceptive. *See* 16 C.F.R. § 260.6(b) ex. 4.

5. Comparative Claims (16 C.F.R. § 260.6(d); *Complying with the Green Guides*, at 4)
 - a. Comparative green claims should make the basis of comparison sufficiently clear to avoid deception.
 - b. *Example:* A cereal box states, “Box made from 25% more recycled content.” Depending on the context, this could be a comparison to the advertiser’s previous cereal box or to a competitor’s cereal box. Unless the claim is revised to make the basis of comparison clear (*e.g.*, “Box made from 25% more recycled content than before”), the advertiser must substantiate either interpretation. *See* 16 C.F.R. § 260.6(d) ex. 1.
 - c. As illustrated by the example in section II.C.4.b above, the difference in the attribute being compared must be significant.

See also 16 C.F.R. § 260.6(d) ex. 2.

- d. An advertiser should verify that the comparison remains active at reasonable intervals. For example, if the advertiser becomes aware of circumstances that may affect the comparison, it should verify its continued accuracy. *See* 16 C.F.R. § 260.6(d) ex. 3.

D. Specific Green Marketing Claims

- 1. Degradable and Biodegradable Claims (16 C.F.R. § 260.7(b); *Complying with the Green Guides*, at 6-7)
 - a. “An unqualified claim that a product or package is degradable, biodegradable or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, *i.e.*, decompose into elements found in nature within a reasonably short period of time after customary disposal.” 16 C.F.R. § 260.7(b).
 - b. Such claims should be qualified so that they accurately convey (i) the product’s or package’s ability to degrade under its customary circumstances of disposal, and (ii) the rate and extent of degradation. *Id.*

- c. In several recent cases, the FTC has indicated that degradable or biodegradable claims are virtually never appropriate for products or packages that are customarily disposed of in landfills. *See infra* sec. III.A.1.
- 2. Compostable (16 C.F.R. § 260.7(c); *Complying with the Green Guides*, at 7)
 - a. “A claim that a product or package is compostable should be substantiated by competent and reliable scientific evidence that all the materials in the product or package will break down into, or otherwise become part of, usable compost (*e.g.*, soil-conditioning material, mulch) in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device.” 16 C.F.R. § 260.7(c).
 - b. Such claims should be qualified so that they accurately convey (i) the product’s or package’s ability to be composted in a home compost pile, (ii) the availability of municipal or institutional composting facilities, and (iii) the environmental benefit of disposing of the product or package in a landfill. *See id.*
 - c. It is deceptive to make compostable claims for a product or package requiring a municipal or industrial composting facilities if such facilities “are not available

to a substantial majority of consumers or communities where the [product] is sold.” 16 C.F.R. § 260.7(c) ex. 4.

3. Recyclable (16 C.F.R. § 260.7(d);
Complying with the Green Guides, at 7-9)
 - a. “A product or package should not be marketed as recyclable unless it can be collected, separated or otherwise recovered from the solid waste stream for reuse, or in the manufacture or assembly of another package or product, through an established recycling program.” 16 C.F.R. § 260.7(d).
 - b. Unless recycling programs or facilities accepting the product or package are available to a substantial majority of consumers or communities, a recyclable claim should be qualified to convey the limited availability of recycling. *See* 16 C.F.R. § 260.7(d) exs. 2, 4-6 & 8; *Complying with the Green Guides*, at 8.
 - c. Unqualified recyclable claims are appropriate if the entire product or package excluding minor, incidental components is recyclable. Where necessary, recyclable claims should be adequately qualified to point out which components are recyclable. *See* 16 C.F.R. § 260.7(d) ex. 1; *see also infra* sec. II.C.3.

- d. *Example:* A product package contains recyclable and non-recyclable components that are bonded together. No recycling programs exist that can separate the recyclable and non-recyclable components. A recyclable claim would not be appropriate in these circumstances. *See* 16 C.F.R. § 260.7(d) ex. 7.
 - e. The triangular chasing-arrows symbol conveys a recyclable (and a recycled) claim. A package with the phrase “Please Recycle” implies a recyclable claim. *See* 16 C.F.R. § 260.7(d) exs. 2 & 11; *Complying with the Green Guides*, at 9, 12-13.
4. Recycled Content (16 C.F.R. § 260.7(e); *Complying with the Green Guides*, at 10-12)
- a. “A recycled content claim may be made only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer). To the extent the source of recycled content includes pre-consumer material, the manufacturer or advertiser must have substantiation for concluding that the pre-consumer material would otherwise have entered the solid waste stream.” 16 C.F.R. § 260.7(e).

- b. “Unqualified claims of recycled content may be made if the entire product or package, excluding minor, incidental components, is made from recycled material. For products or packages that are only partially made of recycled material, a recycled claim should be adequately qualified to avoid consumer deception about the amount, by weight, of recycled content in the finished product or package.” *Id.*
- c. *Example:* A multi-component packaging consisting of a cardboard box and plastic shrink-wrap states, “Recycled Packaging.” The cardboard box is made of 100% recycled materials, but the plastic shrink-wrap is made from virgin material. The recycled content claim is deceptive. *See id.* ex. 5.
- d. Recycled content claims can distinguish between pre-consumer and post-consumer content.
- e. *Example:* A frozen-dinner box is made from 25% post-consumer content and 15% pre-consumer content diverted from the waste stream. A claim that the box “contains 40% recycled content” is not deceptive. A claim that the box “contains 25% post-consumer content, and 15% pre-consumer content” is also not deceptive. *See id.* ex. 3; *Complying with the Green Guides*, at 10.

5. Source Reduction (16 C.F.R. § 260.7(f);
Complying with the Green Guides, at 13)
 - a. Advertisers cannot misrepresent the amount a product or package has been reduced in weight, volume, or toxicity.
 - b. Claims should be adequately qualified to avoid misrepresenting the magnitude of the source reduction or the basis of comparison.
 6. Refillable (16 C.F.R. § 260.7(g);
Complying with the Green Guides, at 14)
 - a. An unqualified refillable claim is appropriate if (i) there is a system for collecting and returning the package to the manufacture for refilling, or (ii) consumers can refill the package using a subsequently purchased product.
- E. Third-Party Certifications (*Complying with the Green Guides*, at 6)
1. Eco-seals, seals of approval, and other indicia of third-party certifications convey the message that the product bearing the seal is environmentally superior to other products.
 2. As discussed above, such broad claims of environmental benefit are difficult to substantiate and likely to be deceptive.
 3. Seals and third-party certifications should be accompanied by an explanation of the basis for awarding the seal or certification.

4. Third-party certification programs “must be truly independent and must have professional expertise in the area being certified.”
5. Third-party certifications do not absolve advertisers of liability for deceptive claims such certifications convey. Advertisers are responsible for verifying that the claims conveyed by the certification are substantiated.
6. In a class action pending in the United States District Court for the Northern District of California, a putative class representative brought a suit under California consumer protection law alleging that S.C. Johnson & Son’s “Greenlist” label was deceptive because it looked like a third-party seal of approval.⁶ In January 2010, the court denied S.C. Johnson’s motion to dismiss. *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-927 (Jan. 5, 2010).⁷ The court found that the plaintiff’s allegation that he paid more for the product because the deceptive label lead him to believe that it was environmentally superior was a cognizable injury under the California statute. The court also ruled that the question of whether a reasonable consumer would be misled by the label was a question of fact that could not be resolved on a motion to dismiss.

⁶ The complaint is available at http://greenpatentblog.com/oneclick_uploads/2009/04/koh_complaint.pdf.

⁷ The court’s decision can be found at <http://rms3647.typepad.com/files/koh-v.-sc-johnson.pdf>.

7. In an October 20, 2009 letter of complaint to the FTC, the Coalition for Fair Forest Certification (the “Coalition”) alleged that the Forest Stewardship Council’s (“FSC”) sustainable forestry certifications were deceptive because of failings in FSC’s certification system. Letter from Thomas C. Collier Jr., Steptoe & Johnson LLP, to FTC, at 2 (Oct. 20, 2009).⁸ First, the Coalition alleged that the FSC’s certification labels are deceptive because they fail to identify under which of several different national and regional standards products are certified. *See id.* at 3-4. Second, the Coalition alleged that the FSC’s “Mixed Sources” label is misleading because products bearing that label do not meet the established standards. *See id.* at 4-6. Finally, the Coalition alleged that FSC does not adequately audit certified products, and that its auditors are not truly independent. *See id.* at 7-9. We do not know what actions, if any, the FTC has taken in response to this complaint.

III. Recent FTC and NAD Green Cases

A. FTC

1. Biodegradable Claims

- a. In June 2009, the FTC filed administrative complaints alleging that Kmart,⁹ Tender Corp.,¹⁰ and

⁸ http://www.fairforestcertification.com/sitebuildercontent/sitebuilderfiles/coalition_letter_1.pdf.

⁹ <http://www.ftc.gov/os/caselist/0823186/index.shtm>.

Dyna-E¹¹ made false and unsubstantiated biodegradability claims for their American Fare paper plates, Fresh Bath Wipes, and Lightload Towels, respectively.

- b. The complaints indicate that the FTC is extremely skeptical of any biodegradability claims for consumer products because they usually end up in landfills, which do not present the conditions necessary for such products to decompose into elements found in nature within a reasonably short period of time. *See supra* sec. II.D.2.
- c. All three companies entered into consent orders resolving the complaints against them. The consent orders are for settlement purposes only and are not admissions of wrongdoing or that the facts alleged in the complaints are true.

2. Bamboo Fibers

- a. In August 2009, the FTC filed administrative complaints against four companies—Sami Designs, LLC (d/b/a Jonäno)¹²; CSE, Inc.

Footnote continued from previous page

¹⁰ <http://www.ftc.gov/os/caselist/0823188/index.shtm>.

¹¹ <http://www.ftc.gov/os/adjpro/d9336/index.shtm>.

¹² <http://www.ftc.gov/os/caselist/0823194/index.shtm>.

(d/b/a Mad Mod)¹³; Pure Bamboo, LLC¹⁴; and The M Group, Inc. (d/b/a Bamboosa)¹⁵—alleging that these companies made false and misleading statements about their products being made from “bamboo fiber,” the environmentally friendly nature of the manufacturing process, and the products’ biodegradability, as well as violations of the Textile Act, 15 U.S.C. § 70 *et seq.*, and Rules, 16 C.F.R. pt. 303.

- b. All four companies advertised that their textile products were made of bamboo or bamboo fiber. The FTC did not contest that bamboo was used as the raw material for the manufacture of the textiles used. The FTC alleged that despite this, the final product was not bamboo or bamboo fiber but rayon that happened to be produced from cellulose derived from bamboo.
- c. Thus, under the consent orders, the companies are allowed to state that the source of cellulose for their textile is bamboo as long as they also state the recognized generic name of the fiber, *e.g.*, “rayon made from bamboo.”

¹³ <http://www.ftc.gov/os/caselist/0823181/index.shtm>.

¹⁴ <http://www.ftc.gov/os/caselist/0823193/index.shtm>.

¹⁵ <http://www.ftc.gov/os/adjpro/d9340/index.shtm>.

- d. The FTC also objected to claims that their manufacturing processes were environmentally friendly when the processes used toxic chemicals and released hazardous air pollutants.
- e. Pure Bamboo and The M Group also made biodegradability claims about their products. Consistent with the enforcement actions discussed above, the FTC alleged that these claims are deceptive because textile products are usually disposed of by recycling or in a landfill, neither of which present conditions that will allow textiles to break down completely as required in the *Green Guides*.
- f. Earlier this year, the FTC sent letters to 78 companies warning them not to make the same mistakes that these four companies did. *See* Press Release, FTC, *FTC Warns 78 Retailers, Including Wal-Mart, Target, and Kmart, to Stop Labeling and Advertising Rayon Textile Products as “Bamboo”* (Feb. 3, 2010).¹⁶ If any of these companies are later found to have misrepresented bamboo products in a similar way, they could face civil penalties of up to \$16,000 per violation.

¹⁶ <http://www.ftc.gov/opa/2010/02/bamboo.shtm>. The model letter is available at <http://www.ftc.gov/os/2010/02/100203model-bamboo-letter.pdf>.

B. NAD

1. Biodegradable vs. Compostable

- a. In October 2009, the NAD issued a press release¹⁷ on its findings in a challenge brought by Method Products about advertising claims made by Clorox for its Green Works Natural Cleaning Wipes that described the wipes as “biodegradable” but qualified that claim on the back of the container with “biodegradability validated in typical compost conditions.”
- b. Thus, the issue before the NAD was whether you can qualify a broader biodegradable claim to make it a narrower compostable claim.
- c. Because Clorox stated that it was transitioning to only compostable claims, NAD did not resolve this issue, but appreciated Clorox’s decision to discontinue the qualified biodegradable claim. Even though Clorox had reliable evidence from testing showing that its product would degrade in a reasonable amount of time under certain conditions, NAD noted that the original claim could cause consumer confusion. In particular, NAD pointed out that a compostable product may or may

¹⁷ <http://www.nadreview.org/docView.aspx?DocumentID=7764&DocType=1>.

not be biodegradable as FTC defines that term.

- d. *But see In re Archer Daniels Midland Co.*, 117 F.T.C. 403, 415 (1994) (consent order provision suggesting that under certain circumstances a biodegradability claim can be qualified to a compostable claim if it is clearly and conspicuously disclosed that the product will not degrade in a landfill).

2. Bamboo Content

- a. In July 2009, the NAD announced¹⁸ resolution of a challenge brought by Dixie Consumer Products, LLC against Solo Cup Company for claims that Solo's Bare Disposable Plates were made from bamboo.
- b. Dixie presented laboratory testing results showing that only one sample of Solo's plates contained any bamboo content (only 2.5%).
- c. For its part, Solo presented laboratory results showing that all samples contained bamboo. Solo also provided evidence showing purchases of bamboo used in manufacturing its Bare Disposable Plates. Solo argued that this evidence demonstrated that its

¹⁸ <http://www.nadreview.org/DocView.aspx?DocumentID=7468&DocType=1>.

plates contained at least 50% bamboo, an amount sufficient to substantiate its bamboo-content claims.

- d. Solo ultimately voluntary discontinued use of the bamboo content claims. NAD described this action as “necessary and proper given the evidence presented in the record.”

3. “Green” Computers

- a. In June 2009, NAD announced¹⁹ resolution of a case in which Dell challenged Apple’s claims that Apple’s notebooks were “the world’s greenest.”
- b. NAD suggested that Apple change its “world greenest family of notebooks” claim to clarify that the comparisons it was making were between Macbooks and competing notebook computers and not between competing product lines.
- c. NAD also suggested that Apple stop using a “world’s greenest” claim because a Toshiba notebook fared better in the Electronic Product Environmental Assessment Tool ratings Apple was relying on.

¹⁹ <http://www.nadreview.org/docView.aspx?DocumentID=7421&DocType=1>

IV. The *Green Guides* Review

A. Background

1. The FTC original issued the *Green Guides* in 1992 and last revised them in 1998.
2. In November 2007, the FTC announced that it would undertake a review and revision of the *Green Guides* prior to the previously scheduled 2009 review. The FTC moved up the review to ensure the continued relevance of the *Green Guides* in light of the increasing prevalence of green claims. See Press Release, FTC, *FTC Reviews Environmental Marketing Guides, Announces Public Meetings* (Nov. 26, 2007).²⁰
3. As part of this review, the FTC held three workshops in 2008, which are discussed further below:
 - a. Carbon Offsets and Renewable Energy Certificates—Jan. 8, 2008²¹
 - b. Green Packaging Claims—April 30, 2008²²
 - c. Green Building and Textiles—July 15, 2008²³

²⁰ <http://www.ftc.gov/opa/2007/11/enviro.shtm>.

²¹ <http://www.ftc.gov/bcp/workshops/carbonoffsets/index.shtml>.

²² <http://www.ftc.gov/bcp/workshops/packaging/index.shtml>.

²³ <http://www.ftc.gov/bcp/workshops/buildingandtextiles/index.shtml>.

4. Throughout the review, the FTC has emphasized that its focus is to protect consumers from deceptive green claims; neither its mission nor expertise involves environmental science or policy. Accordingly, the FTC is unlikely to provide scientific guidelines to address green claims issues. But, the FTC will provide guidance on what type and the amount of substantiation required for various green claims.

B. Workshops

1. Carbon Offsets and Renewable Energy Certificates
 - a. As its title suggests, this workshop looked at the market for carbon offsets and renewable energy certificates (“RECs”) and associated marketing claims that had emerged as businesses sought ways to reduce their greenhouse gas (“GHG”) emissions and touted their efforts to the public.
 - b. Carbon offsets involve investing in an activity (such as tree planting) that will reduce GHGs by an amount equal to the GHG emissions to be offset.
 - c. RECs involve subsidizing electricity production from renewable energy sources thereby reducing the GHG emissions associated with the purchaser’s electricity consumption.

- d. A key concern identified during the workshop is consumers' and buyers' understanding of offsets and RECs. Because these concepts and associated terminology are not well-understood generally, buyers and consumers may have expectations that exceed what these products can deliver. Furthermore, buyers and consumers lack information about the provenance and accuracy of offsets and RECs, and likely would not be able to verify them even if they had the opportunity to do so.

2. Green Packaging Claims

- a. Panelists generally agreed that consumers do not make purchasing decisions solely on a product's environmental attributes. But, given similar quality and performance, consumers may break the tie by choosing the "greener" product.
- b. Consumers may however prefer products that provide environmental benefits if they also have practical benefits (*e.g.*, energy-efficient light bulbs).
- c. There was a general concern that marketers seize on a particular "green" attribute and attempt to use that to convey broader environmental benefits. This can occur with the use of third-party certifications that may only

address a specific, narrow aspect of the product.

- d. Panelists also noted that many in the packaging industry are not aware of the *Green Guides*. One reason for this is that business-to-business transactions in the packaging industry are more important because consumers are less attentive to packaging. Sellers of consumer products are in a better position to verify green claims being made by packaging suppliers.
- e. Panelists also addressed several specific issues. Being familiar with these will assist marketers in crafting effective and truthful packaging claims.
 - (i) Hidden trade-offs (*e.g.*, improvements in water consumption may require the use of more harmful chemicals) should be fully disclosed.
 - (ii) Recyclable claims: There is considerable consumer confusion about recycling. It is difficult for companies to substantiate recyclable claims because of the lack of data on recycling facilities.
 - (iii) Biodegradable and compostable claims:

These are technical subjects that consumers do not fully understand. Consumers generally believe that natural, bio-based, or renewable products are always biodegradable or compostable when this is not necessarily the case.

- (iv) Sustainable claims:
Consumers do not fully understand the concept of sustainability. Furthermore, it is difficult to substantiate sustainability claims because of its long-term nature and the lack of established criteria. (A key issues discussed was whether a life-cycle analysis was required.) Such claims should be as specific as possible. Properly qualified claims regarding improvements in sustainability may be easier to substantiate.
- (v) Seals and certifications:
There must be established criteria and robust means to verify compliance with criteria. Standards must be transparent and established by independent organizations in an open process.

3. Green Building and Textiles

- a. This workshop examined green claims for textiles, for building materials, and for the buildings themselves.
- b. Panelists in both areas raised many of the same issues. Key concerns included:
 - (i) The misuse of “organic.”
 - (ii) Eliminating the use of general environmental terms (such as “renewable,” “sustainable,” “Earth friendly,” and “non-toxic”).
 - (iii) Getting marketers to identify which parts of a product or package the green claims do and do not apply to.
 - (iv) Getting marketers to state whether the green claims apply to the content of the product or to the process of making the product.
- c. Also discussed were some of the drawbacks of certification programs, such as manufacturers’ ability to take advantage of loopholes and certification organizations’ incentives to maintain clients, leading to lax standards and enforcement. It

was suggested that FTC more strictly regulate the certification process.

C. Next Steps

1. In June 2009, Jim Kohm, the Director of Enforcement at the Bureau of Consumer Protection (“BCP”) discussed the status of the *Green Guides* review. Disappointed with the lack of data on consumers’ perceptions of green claims submitted by commenters, the FTC decided to undertake its own research in order to “get it right.”
2. In July, BCP Director David Vladeck testified before the Senate that the FTC had received OMB clearance to undertake this research, with results expected in Fall 2009.
3. Accordingly, we expect the revised *Green Guides* to be unveiled in the first half of 2010.

D. Other Green Marketing Guidance

1. More recent guidance on green marketing may provide some clues as to what direction the FTC may take.
2. For example, the International Chamber of Commerce (“ICC”) recently issued a new framework for environmental claims. *See* Press Release, ICC, *Getting the “green” message right: ICC issues new*

environmental ad framework (Jan. 26, 2010).²⁴

- a. The *Consolidated ICC Code of Advertising and Communication Practice*²⁵ and the *Framework for Responsible Environmental Marketing Communications*²⁶ address new topics, such as sustainability and life-cycle analyses, that are not currently addressed in the *Green Guides*.
- b. With regard to sustainability, because there are not accepted methods for measuring sustainability, the ICC frowns upon claims that sustainability has been achieved. *Consolidated ICC Code*, art. E1, at 41. Accordingly, the ICC recommends that sustainability claims be as specific as possible and properly qualified to avoid deception. *Framework*, at 2. The ICC also cautions that advertisers should be clear about whether they are referring to environmental sustainability because “sustainability” is also an economic concept. *Id.* at 1-2.

²⁴ <http://www.iccwbo.org/iccdefih/index.html>.

²⁵ <http://www.iccwbo.org/uploadedFiles/ICC/policy/marketing/Statements/330%20Final%20version%20of%20the%20Consolidated%20Code%20with%20covers.pdf>.

²⁶ http://www.iccwbo.org/uploadedFiles/ICC/policy/marketing/pages/557_FRAMEWORK_ENVIRONMENTAL_CLAIMS_FINAL_140110.pdf.

- c. With respect to life-cycle analyses, the ICC urges advertisers to make sure that the analysis covers the expected environmental impacts of the product. *Id.* at 7.
 - d. The ICC's *Framework* also provides guidance on some specific claims not currently covered by the *Green Guides*, including designed for disassembly claims, extended-life product claims, and recovered energy claims. *See id.* at 21-23.
3. Another useful guide that takes *Green Guides* principles and applies them to real-world practices is TerraChoice Environmental Marketing's *Seven Sins of Greenwashing* (Apr. 2009).²⁷
- a. "Greenwashing" is a claim that misleads consumers about the environment benefits of a product. *See Seven Sins*, at 1.
 - b. The "seven sins" are:
 - (i) The Hidden Trade-Off: Using a narrow set of attributes (or a single attribute) to suggest that a product is green while ignoring other environmental issues.

²⁷ http://sinsofgreenwashing.org/?dl_id=2.

- (ii) No Proof:
Unsubstantiated claims.
- (iii) Vagueness: Claims whose real meanings consumers are likely to misunderstand.
- (iv) Irrelevance: Claims that may be true, but are unimportant or irrelevant to a product's environmental benefits. The most often cited example is "CFC free" because CFCs are banned by law.
- (v) Lesser of Two Evils: Claims that are true within a particular product category, but ignore the relatively greater environmental harm done by the category. For example, hybrid SUVs.
- (vi) Fibbing: Claims that are simply false.
- (vii) Worshiping False Labels: Products that give the impression of a third-party endorsement where none exists (*e.g.*, official looking, but fake, seals of

approval). *Seven Sins*, at 5.²⁸

V. Wal-Mart's Sustainable Packaging Initiatives

A. Background

1. Wal-Mart has set out three goals for improving the sustainability of the packaging of products offered in its retail stores and in Sam's Club:²⁹
 - a. Reduce packaging 5% globally by 2013 (using 2008 as the baseline);
 - b. Eliminate PVC from its private-label packaging; and
 - c. Be "packaging neutral" by 2025.³⁰
2. To achieve its goal of reducing packaging by 5%, Wal-Mart uses a "packaging scorecard," discussed further below, to measure and promote suppliers' progress.
3. Wal-Mart has also created what it calls a Packaging Sustainable Value Network ("SVN") to help achieve its packaging goals, particularly its "packaging neutral"

²⁸ The first six sins were originally discussed in TerraChoice Environmental Marketing's *Six Sins of Greenwashing* (Nov. 2007), http://www.terrachoice.com/files/6_sins.pdf.

²⁹ <http://walmartstores.com/Sustainability/9125.aspx>.

³⁰ "Packaging neutral" means that the amount of packaging on Wal-Mart or Sam's Club shelves will equal the amount of packaging recovered from or recycled by these stores. *See Wal-Mart Is Taking the Lead on Sustainable Packaging*, at 2 (Dec. 2008), <http://walmartstores.com/download/2339.pdf>.

goal. The Packaging SVN is composed of leaders from Wal-Mart, suppliers, academia, government, and non-governmental organizations (“NGOs”).³¹

B. Packaging Scorecard

1. Wal-Mart’s Packaging Scorecard was first unveiled in November 2006 as a tool for suppliers to measure their performance in improving the sustainability of their packaging relative to other suppliers. Press Release, Wal-Mart, *Wal-Mart Unveils “Packaging Scorecard” to Suppliers* (Nov. 1, 2006).³²
2. The Scorecard consists of nine weighted factors, resulting in an overall score. *Id.*
3. After a one-year trial run, the Scorecard was made available to all of Wal-Mart’s U.S. buyers. Buyers may preferentially purchase from suppliers that have demonstrated progress toward improving the sustainability of their packaging. Wal-Mart, *2009 Sustainability Report*, at 48.³³

C. Sustainable Packaging Expo

1. Every year Wal-Mart also hosts a Sustainable Packaging Expo in Bentonville, Arkansas.
2. The purpose of the Expo is to (a) bring product suppliers and packaging suppliers

³¹ See <http://walmartstores.com/Sustainability/7672.aspx>.

³² <http://walmartstores.com/FactsNews/NewsRoom/6039.aspx>.

³³ <http://walmartstores.com/download/3722.pdf>.

together to discuss sustainable packaging options, and (b) provide educational opportunities for attendees. 2009 *Sustainability Report*, at 49.

VI. The Energy Star Program

- A. In 1992, EPA introduced the Energy Star program to promote the use of energy-efficient products and to make it easier for consumers to identify energy-efficient products.³⁴
- B. EPA, and in some cases DOE, have established energy-efficiency criteria for over 50 products, homes, commercial buildings, and manufacturing plants to qualify for the Energy Star label.³⁵
- C. The first products to earn the Energy Star label were computers and monitors. Qualified products now include everything from household appliances, to home electronics, to commercial food service equipment.³⁶
- D. Manufacturers of products that meet established Energy Star criteria can use the Energy Star label once they enter into a partnership agreement with Energy Star and commit to fulfilling the applicable program requirements, which include testing

³⁴ See How a Product Earns the ENERGY STAR Label, http://www.energystar.gov/index.cfm?c=products.pr_how_earn; History of ENERGY STAR, http://www.energystar.gov/index.cfm?c=about.ab_history.

³⁵ See Product Specifications: Program Requirements, http://www.energystar.gov/index.cfm?c=product_specs.pt_product_specs.

³⁶ See Major Milestones, http://www.energystar.gov/index.cfm?c=about.ab_milestones.

procedures.³⁷ Manufacturers submit lists of qualified products, and EPA tests some number of products every year to verify compliance.

- E. Energy Star requirements are periodically revised. Because the program aims to recognize the most energy-efficient products in a category, a revision may be prompted when the market share of Energy Star qualified products reaches 50%. Other factors that may prompt a revisions include performance issues, problems with achieving expected energy efficiency, and technological changes.³⁸

³⁷ See Manufacturers: Join, http://www.energystar.gov/index.cfm?c=join.manuf_retail_agree.

³⁸ See How a Product Earns the ENERGY STAR Label, *supra* note 34.