

## The Future of Green Marketing: Anticipated Changes to the FTC's Green Guides

***The FTC will likely update Green Guides provisions, impacting corporate decision-making in marketing and throughout the value chain.***

*Latham & Watkins is pleased to present a series of Clients Alerts on environmental, social, and governance (ESG) and value chains.<sup>1</sup> This series addresses how the shifting ESG landscape is impacting global value chains and provides practical takeaways for companies looking to manage the risks and opportunities. The [first Client Alert](#) focuses on increasing regulatory pressure in the US, Europe, and Asia and the resulting compliance challenges. The [second Client Alert](#) examines a revised UN draft treaty on business and human rights and offers practical guidance for companies to consider when implementing programs and policies regarding human rights due diligence. This third Client Alert addresses rapidly shifting ESG regulatory developments around environmental marketing claims, particularly in the US, and offers practical steps for companies to consider taking in anticipation of new agency guidance on deceptive marketing claims.*

The US Federal Trade Commission (FTC) has initiated a review of its 2012 “Guides for the Use of Environmental Marketing Claims” — commonly known as the Green Guides — and likely will be under pressure to address certain thorny environmental marketing claims that it declined to weigh in on 10 years ago, including provisions on climate change, sustainability, “environmentally preferable,” “eco-friendly,” and “free” of hazardous chemicals claims.

The Green Guides can inform companies in their supply chain decision-making. The FTC designed the Green Guides to provide guidance to marketers and companies on (1) general principles that apply to all environmental marketing claims; (2) how consumers are likely to interpret particular claims and how marketers can substantiate these claims; and (3) how marketers can qualify their claims to avoid deceiving consumers.<sup>2</sup> The FTC closed its request for public comments on revisions to the Green Guides on April 24, 2023.

In this Client Alert, we address how revisions to the Green Guides could impact value chains around the world and what companies can do to prepare for anticipated changes.

## The Significance of the Green Guides

The FTC monitors environmentally themed marketing for potentially deceptive claims and evaluates compliance with Section 5 of the FTC Act by reference to the Green Guides. Marketing inconsistent with the Green Guides may be considered unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45.

The Green Guides, located at 16 C.F.R. § 260,<sup>3</sup> are a series of FTC guidelines initially promulgated in 1992 and most recently updated in 2012 to help marketers avoid FTC actions by ensuring that environmental advertising is not deceptive. The Green Guides are also used by the National Advertising Division of the Better Business Bureau, a self-regulatory mechanism for the advertising industry, before which the veracity of green marketing claims are often challenged. Moreover, some states, such as Rhode Island and Maine, have explicitly incorporated the Green Guides by reference into state law. Other states, such as California, have enacted statutes with their own guidelines for environmental marketing claims while also incorporating the Green Guides by reference.

## The Current Review of the Green Guides

### Background

In 2021, the FTC announced plans to initiate a review of the Green Guides, and in December 2022, the FTC published a notice requesting public comments on the Green Guides (hereinafter the 2022 Notice).<sup>4</sup> Notably, instead of seeking comment on proposed revisions to the Green Guides, the FTC sought comment on a set of substantive questions about certain types of environmental marketing claims, the efficacy of the Green Guides in the market, and whether the Green Guides overlap or conflict with other US federal, state, or local laws.

The FTC also sought comment on whether it should consider any international laws, regulations, or standards as it reviews the Green Guides.<sup>5</sup> Notably, one regulatory regime that the FTC may lean on is that of the European Union, which is undergoing amendments to its Unfair Commercial Practices Directive and Consumer Rights Directive. Further, the EU has introduced a proposal for a Green Claims Directive to protect consumers against deceptive environmental marketing claims and encourage active consumer participation in the green transition.<sup>6</sup>

In addition to soliciting input on whether and what revisions should be made to the Green Guides, the FTC has suggested that it is even open to initiating a rulemaking proceeding under the FTC Act related to deceptive or unfair environmental marketing claims.<sup>7</sup> However, given the recent and likely future evolution in this area, including the explosion of ESG-related public disclosures, the normalization of “sustainability reporting,” and the practice of companies making “green” claims of various types not even contemplated a few years ago, we would expect that the FTC would initiate any such rulemaking on a more targeted and limited basis and not as a wholesale replacement for the Green Guides.

### Timing

Although the public comment period is now closed, the FTC appears to be continuing its information gathering and public dialogue about the issues in earnest. Notably, the FTC convened a workshop on May 23, 2023, with a variety of speakers titled “Talking Trash at the FTC: Recycling Claims and the Green Guides.”<sup>8</sup> The workshop focused on the current Green Guides’ recommendation that companies should not make unqualified recycling claims unless recycling facilities exist for 60% of the consumers to which they sell their product. The workshop also covered the potential confusion created by (1) the chasing-arrows symbol that identifies (with numbers 1–7) the type of plastic resin used in a product (which consumers may understand to mean that a product is “recyclable” even though municipal recycling

programs are not widely available for some types of resin), and (2) statements that encourage recycling (e.g., “please recycle”), especially when paired with other types of sustainability or environmental marketing claims.

It is not certain when the FTC will take action. The FTC last updated the Green Guides in 2012 after initially seeking public comments in 2007.<sup>9</sup> However, the FTC will likely take at least some action more quickly this time around. Certain states have weighed in strongly about the urgent need for the FTC to both revise and expand the Green Guides, especially because the Green Guides have been incorporated into various state laws and because courts look to the Green Guides in deceptive marketing actions.<sup>10</sup> In addition, the increasing industry and consumer pressure to regulate ESG-related matters may spur the FTC to move more quickly than in the past to finalize revisions to its Green Guides (and potentially initiate targeted rulemaking).

### **What to Expect**

Regardless of how soon the FTC acts, the FTC will likely have to update Green Guides provisions pertaining to “sustainability,” “recyclability,” “environmentally friendly,” and other ESG-relevant marketing claims given the increasing prevalence of such claims and significant concerns expressed by stakeholders about these types of claims. Whether and how the FTC will tackle environmental marketing claims that it declined to address in 2012, particularly climate change-related marketing claims, is less certain. Notably, climate change-related marketing claims may shift significantly in the event that the US Securities and Exchange Commission’s (SEC’s) proposed climate disclosure rule becomes final.<sup>11</sup> It is not inconceivable that the FTC may be cautious in this area, despite the pressure by many stakeholders for clarity and guidance, unless and until the SEC rule becomes final.

In the final analysis, much water has flowed under the bridge since the 2012 Green Guides. Although the FTC has yet to publish proposed revisions to the Green Guides, below we discuss some of the relevant areas and questions that the FTC will confront as part of its review of the Green Guides.

## **Areas of Focus of the Green Guides**

### **Climate Change**

In line with how common “carbon neutral” and “net zero” marketing claims have become in recent years,<sup>12</sup> the FTC sought comment on whether the Green Guides should address such claims as well as whether the Green Guides should address any other specific claims not currently addressed by the 2012 Green Guides, such as those related to “carbon offsets” or “climate change.”<sup>13</sup> The FTC also sought comment on evidence of deceptive climate change-related claims in the market and any consumer research available regarding consumer perception of climate-related claims.

Indeed, the FTC will be under pressure to provide additional guidance on climate change-related claims in this next turn of the Green Guides, especially given the “large differences in the transparency of these claims and targets and what they actually mean in terms of” emissions<sup>14</sup> and the fact that the SEC’s proposed climate rule, if finalized, would mandate disclosures — and those disclosures, in turn, could be used for marketing purposes. In the meantime, companies should consider evaluating the climate impact of their entire value chains so as to ensure that consumers receive more useful — and accurate — information to the extent possible.

## Recycling

The Green Guides' discourse related to recycling marketing claims is arguably outdated, tying such claims to the availability of municipal recycling without mentioning the third-party recycling programs that companies have funded, but that require additional actions (and sometimes costs) to consumers — some of which have become the subject of lawsuits.<sup>15</sup> In its 2022 Notice, the FTC sought comment not only on whether updated guidance on “recyclable” claims is generally warranted, but also on specific characteristics that make products “recyclable.”<sup>16</sup> The FTC specifically requested comment on:

- whether unqualified “recyclable” claims should be made when recycling facilities are available to a “substantial majority” (currently defined as 60%) of consumers or communities where the item is sold, even if the item is not ultimately recycled due to market demand, budgetary constraints, or other factors;
- whether the current limit on “recycled content” claims to materials recovered or otherwise diverted from the solid waste stream is sufficient;
- whether alternative methods to substantiating “recycled content” claims, such as mass balance calculations or certificate systems (i.e., credit or tagging), should be considered; and
- whether pre-consumer or post-industrial “recycled content” claims require additional guidance.

Relatedly, the FTC sought comment on whether “substantial majority” from the “recyclable” claims definition should be extended to “compostable” claims as well.<sup>17</sup>

For “degradable” marketing claims, the FTC requested comment on whether it should clarify or change existing guidance on such claims in light of the 2015 *ECM BioFilms* decision (and, if so, how it should do so),<sup>18</sup> in addition to seeking comment on its current one-year timeframe for “reasonably short period of time.” The *ECM BioFilms* case was the first of its kind, challenging the FTC to evaluate “biodegradability” claims made by a manufacturer of additives that purported to accelerate the biodegradation of plastic. The claims at issue hinged on the length of time it took for the plastic to fully biodegrade in a landfill.<sup>19</sup> The FTC ultimately barred the company from making *unqualified* “biodegradability” claims with its existing substantiating tests, although it did not bar the company from using results of such tests for future *qualified* biodegradability claims.<sup>20</sup> The case highlights the importance of making true and accurate representations substantiated by competent and reliable scientific evidence, which we discuss in greater detail below.

In addition, the advent of recycling-based claims that are the analogue of climate change-related claims, such as “plastics neutral,” “net zero plastics,” or “bio-based plastics,” may warrant additional FTC guidance, particularly given the strong nexus between such claims and the overall consumer impression that such products are eco-friendly or environmentally preferable. Some would argue that this consumer impression is not accurate, especially in a situation where such claims are made on the basis of steps taken by a company to “offset” the plastic waste generated by its product, but where its product is not directly recyclable. Notably, these types of analogue claims are neither addressed in the Green Guides nor referenced in the 2022 Notice seeking public comment.

## Sustainability

In 2012, the FTC determined that it lacked a basis to give specific guidance on how consumers interpret “sustainable” marketing claims. Section 260.4 of the Green Guides recognizes that broad terms like “sustainable” are capable of conveying a range of reasonable meanings. As such, marketers using those

terms are responsible for substantiating all of these meanings, unless the term is qualified with language that explains which meaning was intended (e.g., that the product is recyclable, carbon neutral, biodegradable, etc.).

The Green Guides also advise against “general environmental benefit” claims that “likely” cannot be substantiated and suggest including “clear and prominent qualifying language” to convey the basis for any certification and the specific benefits asserted by the certification and ensuring “substantiation for all claims reasonably communicated by the certification.”<sup>21</sup> Arguably, the widespread use of such claims underscores the need for more defined guidance from the FTC, but it remains an open question how far the FTC will go to do so. In the 2022 Notice, the FTC sought comment on whether it should revisit its initial determination, and if so, what evidence is available regarding consumer understanding of the term “sustainable.”<sup>22</sup>

The black-letter law of consumer protection is keyed to the “net impression” of the “reasonable consumer” who is the target of any marketing claim. It seems apparent that confusion often arises today among the “reasonable consumer” regarding claims that relate to or imply “sustainability” — especially due to the practice dubbed as “greenwashing” in which companies, when making sustainability claims, don’t account for activities in their larger supply chain (e.g., the activities of Tier 2 or Tier 3 suppliers in the chain and of other actors, ranging from retailers to end users) or for the activities of the company as a whole.<sup>23</sup>

Yet an open question exists as to whether the FTC will have the appetite to grapple with the upstream and downstream aspects of supply chains given both the complex and global nature of today’s supply chains and the fact that supply chains remain a challenging area for assessment — as evidenced by the Scope 3 emissions aspects of the SEC’s proposed climate rule and the broader questions about supply chains’ characterization in the ESG and sustainability reporting realm.<sup>24</sup>

Further underscoring this open question is the fact that, to address greenwashing, the FTC would need to wade into areas where debate and disagreement currently exist, across and within industry. For example, is characterizing a product that is not a food as “vegan” or “organic” appropriate, and does this characterization mean that the product qualifies as “sustainable”? The answer might be yes for a product of natural origin, such as a cotton fiber, but no for a product that could be of natural origin but is not actually so, such as synthetic leather made of petrochemicals.<sup>25</sup>

### **Chemical “Free”**

Section 260.9 of the Green Guides prohibits misrepresentations about whether a product is “free of, or does not contain or use, a [particular] substance.” For “free of” marketing claims, the company must be able to show that the product contains only a “trace amount” rather than a “de minimis” amount of the substance. “Trace amount” is defined as no more than an “acknowledged trace contaminant or background level,” present in an amount that does not cause material harm to consumers and which cannot be added intentionally. Arguably, this definition is confusing and would benefit from further clarification and updating in several respects.

In particular, the FTC’s definition of “trace amount” can be challenging for a company to determine in practice given both the complexity of global supply chains and the potential to debate what constitutes a “trace” or “background” level of any specific chemical. Nor does the definition account for the fact that chemical regulations that effectively ban chemicals generally do so by establishing measurement limits (e.g., the chemical cannot be present above 1 part per billion); it is unclear whether, when the chemical is present below such a measurement limit, that equates to the FTC’s concepts of “trace contaminant” and “background level.” Moreover, a chemical may be unintentionally present as a byproduct at very low

levels — and thereby arguably could fit within the FTC’s “trace contaminant” concept that would allow a “free of” claim as to that chemical — and yet, the US Environmental Protection Agency (EPA) would regard the chemical’s presence as triggering a regulatory notification and approval requirement.

Moreover, another area worthy of clarification pertains to chemical substitution. If a product is “free of” a chemical, but contains a similar chemical, then when might it be deceptive to make that “free of” claim? Would it be deceptive only if the substitute substance poses comparable risks to the “free of” ingredient, or also deceptive if the substitute substance is in the same family of chemicals, even if it poses less risk. For example, if a product is claimed to be “free of” a long-chain PFAS, but contains a short-chain PFAS, under what criteria would the FTC gauge whether that “free of” claim is deceptive?<sup>26</sup>

## Substantiation

The FTC requires all marketing claims to be substantiated before the claim is made. Further, the substantiation required must be robust for more novel claims and for health-related claims. Section 260.2 of the Green Guides advises that “[m]arketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims.” And specifically within the context of environmental marketing claims, this “reasonable basis” often requires competent and reliable scientific evidence, which consists of tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results. Furthermore, such scientific evidence should be based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that each of the marketing claims is true.

As shown by the *ECM BioFilms* case discussed above, in which the company failed to produce evidence that its products biodegraded within five years despite labeling them as “biodegradable,” such evidence is especially crucial for unqualified environmental marketing claims, and the FTC is scrutinizing such evidence closely. The 2022 Notice appears to be focused on the level of substantiation necessary for many environmental marketing claims that the FTC is evaluating. Notably, the FTC is specifically requesting evidence that would constitute a reasonable basis for particular claims (e.g., “recyclable,” “organic,” “sustainable,” etc.).

## Conclusion

Given the critical importance of substantiation in the FTC’s view and heightened scrutiny in relation to ESG matters, companies should take proactive steps to avoid allegations of deceptive environmental marketing claims. Potential steps to consider might include, but are not limited to, the following:

1. Evaluate and map supply chains from raw materials to finished goods.
2. Qualify environmental marketing claims where feasible, particularly “recyclable,” “degradable,” “organic,” and “sustainable,” by stating whether the claim encompasses the activities of all or only some third-party partners. If the claim asserts a *net* environmental benefit, disclose any significant trade-offs or adverse attributes in calculating the benefit.
3. Develop sustainability vendor policies and contract language.
4. Explore tracing technologies.
5. Conduct on-site vendor audits.

6. Implement internal protocols to minimize the use of vague or aspirational language and maximize the use of disclaimers in product branding.
7. Explain what is meant by all terms for which the company does not have data demonstrating a common and generally accepted understanding, which might apply, as one example, to the term “carbon neutral.”

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## Endnotes

- <sup>1</sup> In this Client Alert series, the term “value chains” is used in a general, colloquial sense to encompass not only value chain concepts pertaining to consumers, but also to encompass supply chains in the fullest sense (i.e., not only direct suppliers, but also upstream and downstream suppliers and other supply chain actors, ranging from retailers to end users to post-end user entities, such as recyclers).
- <sup>2</sup> *Green Guides*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides> (last visited Dec. 1, 2022).
- <sup>3</sup> A copy of the Green Guides is also available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf>.
- <sup>4</sup> Regulatory Review Schedule, 86 Fed. Reg. 35239 (July 2, 2021); Guides for the Use of Environmental Claims, 87 Fed. Reg. 77766 (proposed Dec. 20, 2022) (to be codified at 16 C.F.R. pt. 260).
- <sup>5</sup> See 87 Fed. Reg. 77766 (§ III.A. General Issues, Questions 17 and 18).
- <sup>6</sup> These EU legislative actions have been prompted by the European Green Deal, 2020 Circular Economy Action Plan, and the Corporate Sustainability Reporting Directive (CSRD). For more information on these developments, please refer to our blog posts on the [Green Deal](#), [Circular Economy Action Plan](#), and [CSRD](#).
- <sup>7</sup> See 87 Fed. Reg. 77766 (§ III.A. General Issues, Question 19).
- <sup>8</sup> *FTC to Host Workshop on “Recyclable” Claims as Part of its Ongoing Review of the Agency’s Green Guides*, FED. TRADE COMM’N (Mar. 1, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-host-workshop-recyclable-claims-part-its-ongoing-review-agencys-green-guides>.
- <sup>9</sup> Public Comment & Meeting Notice, Guides for the Use of Environmental Marketing Claims, 72 Fed. Reg. 66091 (Nov. 27, 2007).
- <sup>10</sup> Letter from Rob Bonta, Att’y Gen., State of Ca., et al., to Lina Kahn, Chair, Fed. Trade Comm’n (Apr. 24, 2023), <https://oag.ca.gov/system/files/attachments/press-docs/Comments%20to%20FTC%20re%20Green%20Guides%204.24.23.pdf>.
- <sup>11</sup> Please refer to Latham’s [Client Alert](#) on the SEC proposed climate rule for more information. Many questions that the FTC raises in its 2022 Notice are focused on climate change-related claims such as carbon offsets, net zero, carbon neutral, low carbon, ozone-safe/ozone-friendly, energy efficiency, and energy use claims.
- <sup>12</sup> And with the proliferation of such claims, and lack of clear guidance, lawsuits have followed. For example, a 2023 class action lawsuit against Delta Airlines illustrates certain greenwashing risks associated with relying on carbon credits to meet advertised “net zero” targets. *Berrin v Delta Air Lines, Inc.*, No. 2:34-cv-04150 (C.D. Cal). Among other claims, the *Berrin* Plaintiffs allege that “foundational issues” in the voluntary carbon market mean that Delta cannot be “the world’s first carbon neutral airline.” *Id.* at ¶ 6.
- <sup>13</sup> See 87 Fed. Reg. 77766 (§ III.B. Specific Claims, Question 1).
- <sup>14</sup> AKI KACHI, SILKE MOOLDIJK & CARSTEN WARNECKE, CLIMATE NEUTRALITY CLAIMS: HOW TO DISTINGUISH BETWEEN CLIMATE LEADERSHIP AND GREENWASHING 1 (2020), <https://bit.ly/2WBYkUn>.
- <sup>15</sup> See, e.g., *Bargetto v. Walgreen Co.*, No. 3:22-CV-02639 (N.D. Cal. Apr. 29, 2022); *The Last Beach Cleanup v. Terracycle, Inc.*, No. 4:21-cv-06086 (N.D. Cal. Aug. 6, 2021).
- <sup>16</sup> See 87 Fed. Reg. 77766 (§ III.B. Specific Claims, Questions 5–9).
- <sup>17</sup> See 87 Fed. Reg. 77766 (§ III.B. Specific Claims, Question 2).
- <sup>18</sup> See 87 Fed. Reg. 77766 (§ III.B. Specific Claims, Question 3).
- <sup>19</sup> *In re ECM BioFilms, Inc.*, 160 F.T.C. 652 (2015); see also *ECM BioFilms, Inc. v. F.T.C.*, 851 F.3d 599 (6th Cir. 2017) (denying ECM’s petition for review).
- <sup>20</sup> Despite the *ECM BioFilms* decision, some states ban “biodegradable” claims for certain products regardless of whether they are qualified. See, e.g., CAL. PUB. RES. CODE § 42357(b).
- <sup>21</sup> See 16 C.F.R. §§ 260.4, 260.6.
- <sup>22</sup> See 87 Fed. Reg. 77766 (§ III.B. Specific Claims, Question 12).
- <sup>23</sup> Annalee Bloomfield, *The Newest Form of Greenwashing Is Poised to Meet Its Match*, FORBES (Apr. 6, 2022, 7:15 AM), <https://www.forbes.com/sites/forbestechcouncil/2022/04/06/the-newest-form-of-greenwashing-is-poised-to-meet-its-match/amp/> (“[M]any companies don’t count scope 3 or supply chain emissions.”); Tinglong Dai & Christopher S. Tang, *Supply Chain Issues Expose Loopholes in Measuring ESG Risks*, QUARTZ (Nov. 11, 2021), <https://qz.com/2087694/supply-chain-issues-expose-loopholes-in-measuring-esg-risks/> (“[S]upply chains are treated separately from other items, such as carbon emissions, climate change effects, pollutants, and human rights. This means all those items, if not captured in the ambiguous ‘supply chain’ metric, reflect each company’s own actions but not their supply chain partners. Even when companies collect their suppliers’ performance, ‘selective reporting’ can arise because there is no unified reporting standard.”).
- <sup>24</sup> Stakeholder and investor focus on ESG issues is prompting companies to increase transparency and accountability within their supply chains, which in turn has led to more public disclosure of companies’ supply chain management practices. Because of



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the intersection between supply chain management and corporate governance (also known as the “G” in ESG), supply chain-related topics are often disclosed in companies’ ESG or sustainability reports rather than in their SEC public filings.

<sup>25</sup> See Hiroko Tabuchi, *How Fashion Giants Recast Plastic as Good for the Planet*, N.Y. TIMES (June 12, 2022), <https://www.nytimes.com/2022/06/12/climate/vegan-leather-synthetics-fashion-industry.html>.

<sup>26</sup> PFAS, or per- and polyfluoroalkyl substances, are a group of chemicals used in many products, including some food packaging and clothing. These substances are often termed “forever chemicals” because some of their components take many years to decompose. Recently, PFAS have been found throughout the environment and in the food supply, leading to concerns from consumers and governments alike about their use. See, e.g., *PFAS Explained*, U.S. EPA, <https://www.epa.gov/pfas/pfas-explained> (last updated Apr. 10, 2023); *Per- and Polyfluoroalkyl Substances (PFAS)*, U.S. FDA, [https://www.fda.gov/food/environmental-contaminants-food/and-polyfluoroalkyl-substances-pfas#:~:text=Per%2D%20and%20polyfluoroalkyl%20substances%20\(PFAS\)%20are%20a%20diverse%20group,or%20processed%20in%20contaminated%20areas](https://www.fda.gov/food/environmental-contaminants-food/and-polyfluoroalkyl-substances-pfas#:~:text=Per%2D%20and%20polyfluoroalkyl%20substances%20(PFAS)%20are%20a%20diverse%20group,or%20processed%20in%20contaminated%20areas) (last updated May 31, 2023).