

## Advertising Law



Brands continue to build their sustainability and environmental marketing programs

in response to consumer demand. A recent report found that nearly [eight out of ten consumers are making sustainability-based](#) purchase choices. The report further found that about 67% of consumers say they are more concerned about the scarcity of natural resources due to COVID-19. Companies [have responded by stepping up their eco-friendly](#) marketing efforts. But it is easy to run afoul of state and federal regulations and to receive unwanted attention from regulators, competitors, and class action attorneys when engaging in eco-friendly marketing. This update highlights important pitfalls to avoid.

### Claims Must Be Substantiated

First, the truth-in-advertising baseline—advertisers are responsible for all express and implied claims that an advertisement reasonably conveys. In other words, brands must make sure that all reasonable interpretations of their ads, promotional materials, and labels are truthful and supported by adequate substantiation. One of the most difficult aspects of green advertising is that terms like "green," "environmentally-friendly," and "sustainable" are broad and can convey many meanings to different people.

### Federal Regulations Specific to Environmental Claims

In recognition of how easily sustainability marketing can become misleading—even unintentionally—the Federal Trade Commission (FTC) released revised "[Green Guides](#)" in 2012. The Green Guides specifically caution marketers that broad and unqualified sustainability claims likely convey a wide range of meanings and that it is unlikely a brand can substantiate all reasonable interpretations of these claims. At a high level, the guides caution that advertisers should:

- Make necessary qualifications and disclosures in a clear, prominent, and understandable manner
- Identify to what aspect of the product or service the claims apply
- Do not overstate the claimed environmental attribute or benefit
- Ensure that the basis for any comparative claim is clear and substantiated

The Green Guides also offer specific guidance regarding various claims, such as advertising regarding carbon offset, claims regarding the ability to compost a product or package, advertising that a product is "non-toxic," or claiming that products or services are "ozone-safe" or "ozone-friendly," to name only a few.

Some states, such as [Rhode Island](#) and [Maine](#), have explicitly incorporated the FTC guidelines by reference into state law. Other states, such as [California](#), have enacted statutes providing their own guidelines for environmental marketing claims while also incorporating claims contained in the Green Guides.

## **Companies Face Regulatory Enforcement and Litigation Risks for Unsubstantiated Green Claims**

The FTC and state regulators can take enforcement action where they see false or deceptive sustainability advertising. For example, in 2017, the FTC filed complaints against four paint companies, Benjamin Moore & Co., Inc.; ICP Construction Inc.; YOLO Colorhouse, LLC; and Imperial Paints, LLC, for the allegedly deceptive advertising that their products were free of emissions and volatile organic compounds. The FTC [approved final consent orders with the four companies in April 2018](#). In [2019, the FTC sued Miami-based company Truly Organic Inc.](#), alleging that its products were not "100% organic" nor "certified organic." In 2017, Walmart paid nearly \$1 million to settle a claim brought by the offices of 23 California district attorneys alleging that Walmart sold plastic products in stores and online that were misleadingly labeled "biodegradable" or "compostable" in violation of California law.

Scrutiny of environmental marketing in advertising does not stop with federal and state regulators. Companies could face actions from watchdog organizations, competitors, or consumer class actions. For example, the Animal Welfare Institute filed a complaint with the National Advertising Division (NAD) self-regulatory forum, challenging a claim by Clemens Food Group LLC/Hatfield Quality Meats that their products were "Ethically Raised by Family Farmers Committed to a Higher Standard of Care, Governed by Third Party Animal Welfare Audits." Following an investigation, NAD recommended that Hatfield discontinue those claims. Similarly, consumers brought a class action against Ben & Jerry's for allegedly misleading consumers by advertising its products as being produced by "happy cows."

Sometimes competitors challenge potentially deceptive or misleading advertising, such as the claim brought before [NAD by Stokely-Van Camp, Inc., maker of Gatorade sports drinks, against BA Sports Nutrition, LLC's](#) use of "The More Natural Sports Drink," "More Natural Ingredients than Gatorade Thirst Quencher & Gatorade Zero," and related claims on point-of-sale and online advertising. The [NAD recommended that](#) BA Sports

Nutrition discontinued use of "The More Natural Sports Drink" and "More Natural Ingredients than Gatorade Thirst Quencher & Gatorade Zero," in part because the claims did not provide a clear basis for the comparison being made.

## **Best Practices in Environmental Marketing**

As brands continue to grapple with what it means to be "green," "sustainable," or "environmentally-friendly," they need to pay attention to their advertising when they make claims regarding their positive environmental impact. Given the risk of regulatory enforcement, competitor challenges, and class actions, companies should keep the Green Guides, state regulations, and general truth-in-advertising laws in mind and closely scrutinize broad environmentally-friendly marketing and labeling claims. Contact experienced counsel with any questions about these issues.

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