

Global Regulatory Considerations for Green Packaging



What food companies need to know to comply with packaging guidelines

The global market for green packaging is growing rapidly as consumers, retailers and both food and consumer product companies seek to develop products for which they can make claims of being “environmentally friendly” or “green.” This growth has prompted several private organizations to develop standards for green packaging and has also resulted in new or updated regulations and guidelines that impact the development of green packaging materials or claims made for them. The legal landscape is such that to avoid allegations of unfair or deceptive practices, companies selling and marketing products as green must become familiar with applicable regulations and standards.

U.S. FTC Labeling Guidelines

The principle guidance governing the legality of “green” claims in the U.S. is the Federal Trade Commission’s (FTC) “Guides for the Use of Environmental Marketing Claims” (or “Green Guides,” available at www.ftc.gov/os/2012/10/greenguides.pdf [16 CFR Section 260]). The most recent revision of the Green Guides, which was published in October 2012, was the culmination of a multiyear review process. While these guides are not regulations as such, they illustrate how FTC evaluates an environmental claim to determine whether it may constitute an unfair or deceptive act and therefore be prohibited under Section 5 of the Federal Trade Commission Act (FTC Act). Thus, in a sense, the guides are

FTC’s way of putting the industry on notice as to what it intends to prosecute as an unfair or deceptive act or practice. However, the Green Guides are not laws or regulations, and do not pre-empt state or local laws on the subject.

The Green Guides apply to all forms of environmental marketing, including labeling, advertising and promotional materials. Besides general environmental claims, the Green Guides address carbon offsets, certifications and seals of approval, compostable, degradable, ozone-safe and ozone-friendly, recyclable, recycled content, refillable, renewable energy, renewable materials and source reduction. Additionally, the guides address nontoxic and “free-of” claims that can be relevant food safety claims as well. The final guides do not address organic, sustainable, natural or bio-based claims. More details on specific guidelines impacting food packaging are provided below.

General Claims: General environmental benefit claims should be qualified by clear and prominent language, limited to the specific benefit and should not include any deceptive implications.

Carbon Offsets: FTC offers limited guidance on these claims, noting that consumer perception of carbon offset and similar claims is still evolving. Use of appropriate accounting methods to avoid “double-counting,” and use of qualifiers if the carbon reductions will not occur for at least 2 years are required. In addition, claims may not be made if the reductions are required by law.

Certifications and Seals of Approval: FTC suggests that it will consider it deceptive to misrepresent that a package has been endorsed or certified by an independent third party, or to use an environmental certification or seal without clearly stating the basis for the certification. A certification or seal should contain clear and prominent language

to convey that it covers only specific and limited benefits, and marketers must have substantiation for all claims communicated by third-party certifications. A “material connection” does not automatically include membership in industry trade associations offering certifications, so long as an independent certifier administers the trade association certification program by objectively applying a voluntary consensus standard.

Compostable: A material can be called “compostable” if it breaks down in a “timely manner,” which is defined as approximately the same time as other materials with which it is composted.

Degradable: The guides indicate that it is deceptive to make an unqualified degradability claim for items destined for landfills, incinerators or recycling facilities. Unqualified degradable claims should be based on reliable scientific evidence that the item will completely break down within 1 year of entering the solid-waste stream. FTC did not create a safe harbor for any particular testing protocol, suggesting that current protocols do not replicate actual, highly variable landfill conditions. “Oxo-degradable” and “oxobiodegradable” claims are treated like all other unqualified degradable claims.

Free-of Claims: This type of claim may be deceptive if a new or substituted material poses the same or similar environmental risks as the original material, or if the substance has never been associated with the product. However, free-of claims may be acceptable if the item contains trace amounts of the material referenced if: (1) the level of the specified substance is no more than an acknowledged trace contaminant or background level; (2) the substance’s presence does not cause material harm that consumers typically associate with that substance; and (3) the substance

has not been intentionally added.

What constitutes a “trace amount” depends on the substance at issue, and requires a case-by-case analysis. For example, in its publication “The Green Guides: Statement of Basis and Purpose” (available at www.ftc.gov/ost/fedreg/2012/10/greenguidesstatement.pdf), FTC suggests that consumers

may want to know if a product contains a trace amount of a substance like mercury, which is toxic and may accumulate over time in the tissues of humans and other organisms. For some other substances, a *de minimis* analysis may be more in order.

Nontoxic Claims: An unqualified non-

toxic claim conveys that the product is nontoxic to both humans and the environment. “The environment” includes pets and domestic animals. The guides advise marketers to qualify nontoxic claims to the extent necessary to avoid deception. While there is no allowance for trace toxicity of a substance, FTC points out that a product could contain a toxic substance at a level that is not harmful to humans or the environment and therefore justify a claim of “nontoxic.” The commission gives the example, in “The Green Guides: Statement of Basis and Purpose,” that while apple seeds contain cyanide, which is toxic, the amount in an apple is so low that it is not harmful to humans and, therefore the apple may be labeled nontoxic.

Recyclable: To make an unqualified claim that an article is “recyclable,” a product or package should be recyclable to a “substantial majority” of consumers or communities, which FTC defines to mean at least 60 percent. Marketers may make qualifying claims for “less than a substantial majority” of consumers or communities by either stating the percentage of consumers or communities that have access to recycling facilities or using other qualifications. However,

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“please recycle” and “check to see” disclosures without additional information are not adequate to qualify a recycling claim where facilities are not available to a substantial majority of consumers.

Recycled Content: Both pre- and post-consumer recovered materials qualify as recycled content, but the materials must be diverted from the waste stream. A recycled content claim must be qualified if less than 100 percent of a package is made with recyclable content. For example, a package made from laminated layers of foil, plastic and paper may be labeled “one of the three layers of this package is made of recycled plastic” if the plastic layer is made entirely of recycled plastic. FTC does not consider the claim deceptive, provided the recycled plastic layer constitutes a significant component of the entire package.

Renewable Materials: Made-with-renewable-materials claims should be qualified if less than 100 percent of the package is made with renewable content, excluding minor, incidental components. One way for marketers to minimize the risk of unintended, implied claims is to identify the material used and explain why it is renewable. The Green Guides provide the following example of an acceptable renewable materials claim: “Our packaging is made from 50% plant-based renewable materials. Because we turn fast-growing plants into bio-plastics, only half of our product is made from petroleum-based materials.” [16 CFR Section 260.16]

Sustainable Claims: In “The Green Guides: Statement of Basis and Purpose,” FTC explains that it is not providing guidance on the use of the term “sustainable” due to the wide range of meanings for the term. Nevertheless, the commission cautioned that marketers who use these claims should test them in the context of their advertisements to ensure they can be substantiated. “Given the potential for confusion, this area is ripe for further consumer perception research and one that the Commission will continue to monitor,” FTC stated.

Bio-Based Claims: Concerning bio-based claims, FTC cites the U.S. De-

partment of Agriculture's BioPreferred voluntary labeling program and explains that it does not want to make marketers subject to potentially contradictory advice from two federal agencies.

Alignment with ISO Standards

During the comment period for the revised Green Guides, FTC specifically asked if there were any international laws, regulations or standards that it should consider. In particular, FTC asked about the ISO 14021 standard on self-declared environmental claims. This standard was introduced in 1999 by the International Organization for Standardization (ISO), which develops standards through international consensus and has a membership of more than 160 national standards institutes. In "The Green Guides: Statement of Basis and Purpose," FTC stated that while it tries to harmonize with international standards whenever possible, it did not adopt the ISO standard because consumers might interpret unqualified recyclable claims allowed in the standard to mean that facilities are available in their area even when they are not. Further explaining, FTC said that the Green Guides' purpose is to prevent the dissemination of misleading claims, while ISO focuses on both preventing deception and encouraging products that cause less stress on the environment.

State Laws

California has joined in the effort to regulate environmental claims on packaging. A prohibition on the sale of any plastic bag or plastic food or beverage container labeled as "biodegradable," "degradable" or "decomposable" in California was expanded to include all plastic products, effective January 1, 2013. California also requires that any

plastic products labeled as "compostable," "home compostable" or "marine degradable" must comply with an applicable ASTM Standard Specification, the Vinçotte OK Compost HOME certification requirements (Vinçotte is a European Union-based company that provides third-party certifications) or a standard adopted by the California

Department of Resources Recycling and Recovery (CalRecycle). The California Public Resources Code, Section 42355-42358.5, specifies that ASTM Standard Specification refers to the following ASTM standards: D6400 for Compostable Plastics, D7018 for Nonfloating Biodegradable Plastics in the Marine Environment or D6868 for Biodegradable Plastics Used as Coating on Paper and Other Compostable

Substrates.

Current EU Framework

Taking a different approach from the U.S., the European Union (EU) does not have legislation specifically dealing with and harmonizing environmental marketing claims. Instead, the EU has taken a command-and-control approach, in which it sets out the requirements for companies to follow to reduce the use of packaging materials. In particular, the EU Packaging and Packaging Waste Directive (94/62/EC) contains "essential requirements" to prevent production of packaging waste and to increase recycling of packaging materials. While the goal is to minimize packaging waste, this needs to be done in a way that maintains: (1) the functionality of the package throughout the supply and user chain; (2) the safety and hygiene of the product (i.e., for food, keeps it safe); and (3) the acceptability of the packaged product to the user.

The European Committee for Stan-

dardization (CEN), under mandate from the European Commission (EC), developed standards to enable companies to demonstrate compliance with the directive. The CEN standards were last updated in 2004 and are referenced in the February 19, 2005, edition of the *Official Journal of the European Union*. Use of the CEN standards is voluntary; however, packaging conforming to the standards is considered compliant with the directive's essential requirements. CEN packaging and waste standards include the following:

- EN 13427:2004, Packaging – Requirements for the use of European Standards in the field of packaging and packaging waste
- EN 13428:2004, Packaging – Requirements specific to manufacturing and composition – Prevention by source reduction
- EN 13429:2004, Packaging – Reuse
- EN 13430:2004, Packaging – Requirements for packaging recoverable by material recycling
- EN 13431:2004, Packaging – Requirements for packaging recoverable in the form of energy recovery, including specification of minimum inferior calorific value
- EN 13432:2000, Packaging – Requirements for packaging recoverable through composting and biodegradation – Test scheme and evaluation criteria for the final acceptance of packaging

EN 13428:2004 includes methodology and procedures for determining the presence of four heavy metals (lead, cadmium, mercury and hexavalent chromium) and other dangerous substances. The European Organization for Packaging and the Environment's (EUROPEN) 2006 publication, *Understanding the CEN Standards on Packaging and the Environment: Some Questions and Answers*, is available through the organization's website at www.europen.be/index.php?action=onderdeel&onderdeel=3&titel=Key+Topics&categorie=1&item=14&back=%3Faction%3Donderdeel%26onderdeel%3D3%26titel%3DKey%2BTopics%26categorie%3D1.

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Industry Guidelines and Standards

ICC Guidelines to Encourage Claim Substantiation: The proliferation of environmental claims has led a number of industry organizations to issue voluntary guidelines. These guidelines generally encourage marketers to make only claims that can be substantiated. For example, the International Chamber of Commerce's (ICC) *Framework for Responsible Environmental Marketing Communications*, published in 2010, states, "General environmental claims that may prove difficult to substantiate using accepted scientific methods should be avoided."

ICC's *Framework* defines a "green" or "environmental" claim as any type of claim where "explicit or implicit reference is made to the environmental or ecological aspects relating to the production, packaging, distribution, use/consumption or disposal of products." Importantly, the framework advises that all marketing communication, including green claims, should be judged by how it will be perceived by the reasonable consumer. This would apply to a green claim that is scientifically accurate, but misleads consumers because of what it implies or omits. Such a claim could be deceptive.

An Environmental Claims Checklist is provided in Appendix 1 of ICC's *Framework*. Some of the checklist questions include the following:

- Are the proposed claims subject to mandatory regulations or legislation?
- Are the proposed claims verifiable based on appropriate test methods or scientific data?
- What is the test method used? Is it recognized by government agencies or reputable standards organizations?
- Does the method accurately reflect how the product, component or package will likely be used or disposed of by the consumer in the manner reflected by the claim?
- Has the product for which the claim is made (or one substantially identical) been tested?
- Is the information provided understandable to the reasonable consum-

er, avoiding confusing jargon?
The CGF Global Protocol on Packaging Sustainability: An industry group that has addressed sustainability claims specific to packaging is the Consumer Goods Forum (CGF), a Paris-based network of approximately 650 retailers, manufacturers, packaging suppliers and other stakeholders from 70 countries. CGF developed the "Global Protocol on Packaging Sustainability 2.0" (GPPS) to help the consumer goods industry assess the sustainability of packaging. The first element of GPPS, published in June 2010, is a framework and measurement system, titled "A Global Language for Packaging Sustainability." The second element, "The Global Protocol on Packaging Sustainability," which was published in September 2011, describes the metrics and indicators for sustainability of packaging. (The GPPS can be downloaded at globalpackaging.mycgforum.com/.)

The GPPS is based on packaging sustainability guidelines developed by EUROOPEN and the metrics for sustainable packaging developed by Green-Blue's Sustainable Packaging Coalition.

The GPPS may be considered complementary to the ISO standards, as several of the GPPS environmental attributes are based on ISO and CEN standards. Noting that the GPPS uses pre-existing internationally recognized metrics where they exist, CGF states that the GPPS is not intended to replace any existing standards or guidelines.

The recently published ISO environmental packaging standards are the following:

- ISO 18601:2013 Packaging and the environment – General requirements for the use of ISO standards in the field of packaging and the environment
- ISO 18602:2013 Packaging and the environment – Optimization of the packaging system
- ISO 18603:2012 Packaging and the environment – Reuse
- ISO 18604:2013 Packaging and the environment – Material recycling
- ISO 18605:2013 Packaging and the

environment – Energy recovery

- ISO 18606:2013 Packaging and the environment – Organic recycling

While ISO 18602 is based on EN 13428 and includes methodologies for determining the presence of four heavy metals and other dangerous substances in packaging, it places more emphasis on the amount of packaging necessary for a package to function effectively. Thus, although food safety is not the pre-eminent goal of the directive, it is something that clearly is to be taken into account in balancing waste minimization.

Conclusions

A heightened interest in potential environmental impacts of packaging, along with new technologies in this area, has led to discussions on how to provide accurate information to business customers, consumers and other stakeholders when marketing "green" products. While efforts are being made to develop a consistent approach to defining and regulating sustainable packaging as new standards and guidelines for green packaging are introduced, differences remain. It is important that companies working in this arena keep abreast of developments. ■

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