

Talking Trash: Takeaways from FTC Workshop on Recyclable Claims

The Bottom Line

- The FTC is continuing its review of the Green Guides and companies should stay tuned for further updates.
- The FTC is accepting public comments on “recyclable” claims through June 13, 2023.

The FTC is in the process of reviewing – and potentially revising – its Guides for the Use of Environmental Marketing Claims (Green Guides). As part of this review, the FTC recently held a public workshop focused on “recyclable” claims.

The “Talking Trash at the FTC: Recyclable Claims and the Green Guides” workshop built off of the FTC’s request last year for public comment on proposed revisions to the Green Guides. Among other things, the FTC sought public comment on consumers’ understanding of the term “recyclable” (as items may not be ultimately recycled due to market demand, budgetary constraints or other factors); if the current threshold for unqualified recyclable claims should be changed; if further guidance is needed for “recycled content” claims; and if the FTC should initiate a rulemaking to codify the Green Guides.

During the workshop, a wide range of panelists generally discussed these issues, notably focusing on:

Capable of Being Recycled vs. Actually Recycled

The panel was divided regarding whether “recyclable” should mean that a product is capable of being recycled or that a product is actually recycled into something new. Capability is the current gold standard. In fact, some courts have determined that “recyclable” simply means that a product is capable of being recycled – not that the entire product will

always be recycled. Given the complexities in substantiating “actually recycled” claims, a move away from the current standard would likely need to be accompanied by very clear guidance from the FTC.

“Wish-cycling”

There was extensive discussion on “wish-cycling,” which is when non-recyclable items are put in curbside recycling bins because consumers believe that they are (or should be) municipally recyclable.

- Some panelists indicated that “wish-cycling” is the result of consumer confusion regarding how to recycle items that are only recyclable through in-store programs. For example, the panelists discussed that film plastics (like plastic bags) are usually not recyclable in curbside programs, but are commonly collected through in-store programs. The high levels of film plastic contamination in curbside facilities may indicate that consumers believe that items recyclable in-store are also recyclable curbside.
- Resin identification codes (numbers enclosed within a solid or “chasing arrows” triangle) are used to identify plastic types, but some panelists noted that consumers may think they indicate recyclability. Because some state laws require use of a chasing arrows symbol for resin identification codes, there may be a potential conflict between FTC guidance and state laws.
- Some panelists indicated that consumers read an implied recyclability claim into products made with recycled content, despite the fact that not all products made with recycled materials can be recycled.

Negative Disclosures

Some panelists suggested that negative disclosures are needed for plastics that are generally not recyclable. This is a departure from the current Green Guides, which state that qualifiers are only needed when recyclability claims are made (e.g., a strong qualifier is needed if a product is labeled as “recyclable,” but may be recycled by only a few consumers).

- Panelists generally agreed that consumers look to product labels to determine recyclability, but there was a lack of consensus on if negative disclosures were needed for all product labels or only for product labels that may cause confusion (e.g., only recyclable in-store, resin identification codes or recycled content claims).

The “Substantial Majority” Test

The Green Guides state that a company can make an unqualified “recyclable” claim as long as a substantial majority (60%) of communities or consumers where a product is marketed have access to recycling facilities that will accept the item. The FTC is very interested in whether the 60% threshold should be changed. The panelists did not suggest an alternate threshold, but some emphasized that the localized nature of the recycling system (which can vary by municipality) may create difficulties if a stricter standard is used.

Chemical Recycling

While the workshop was not intended to discuss environmental policy, there was a very interesting debate on chemical recycling. Plastics are primarily recycled through manual means (e.g., sorting, grinding and washing), but chemical recycling breaks down plastic polymers and can be used to create new plastics or even fuel. Some panelists were particularly concerned with the harms of chemical recycling, as there may not be a net overall environmental benefit given pollutants. In light of this discussion, the FTC may provide guidance on chemical recycling claims (e.g., requiring a life cycle analysis to show an overall benefit).

Rulemaking

Since *FTC v. AMG Capital Management*, the FTC has been focused on avenues to obtain monetary penalties – including through rulemaking. Some panelists pushed for rulemaking while others argued that the FTC’s relatively limited enforcement regarding false or misleading recyclability claims indicate that enforcement is not needed. Moreover, the discussion of chemical recycling raised concerns that a rule may be too ridged to keep up with evolving technologies in this area.

While the general comment period on the Green Guides ended in April, the FTC is accepting public comments on issues related to “recyclable” claims through June 13, 2023.

For More Information

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