

# Green Marketing

## GREEN MARKETING

Today, it seems that every company has a “green” story. And no wonder. Not only does the development and offering of “green” products and services positively impact consumer and investor perceptions of a company, it can also improve the bottom line.

So it’s only natural that businesses in almost every industry are touting the “green” aspects of their products and services every chance they get. But embarking on an uninformed and poorly prepared “green” advertising initiative can severely backfire, exposing a company to investigations and penalties by federal and state agencies, false advertising lawsuits by competitors, and perhaps worst of all, charges of “greenwashing” from the media and the blogosphere. Any one of these consequences can harm corporate identity and brand value, effectively eliminating any benefits that a green marketing campaign may have conveyed.

Holland & Hart can help clients avoid these pitfalls. Our attorneys are knowledgeable in the laws and regulations guiding green marketing and have experience advising clients on issues relating to all kinds of advertising and promotions, including green advertising. This paper is designed to provide some general guidance on developing your company’s green advertising.

Green advertising, like all other forms of advertising, should be truthful and not deceptive or misleading to reasonable consumers. While a determination of whether a promotion or advertising claim is “misleading” to a reasonable consumer is more art than science, the following guidelines can help you minimize the legal and public relations risks associated with a green marketing campaign. These guidelines apply to advertising as well as any form of promotional materials, including product packaging and websites. They also apply to business-to-business promotional materials and claims.<sup>1</sup>

### Your Environmental Claims Must Be Accurate and Not Misleading

While the technical accuracy of your advertising is important, technical accuracy will not necessarily insulate your company from legal liability.

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<sup>1</sup> Of course, these guidelines are no substitute for legal advice or a thorough legal review of your advertising. You should have an attorney review every advertising claim before you make it.

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This is because the “accuracy” of an environmental claim is evaluated from the average consumer’s point of view. Therefore, even if your claim is technically accurate, if a reasonable consumer would interpret the claim to mean something different, and this different interpretation is inaccurate, you are liable for deceptive advertising. For example, the Federal Trade Commission has determined that consumers think the phrase “please recycle” on a product means that a product *is* recyclable. Therefore, if product or packaging bearing this phrase is not completely recyclable, the advertising message is deceptive.

## Substantiate Your Environmental Claims

You should substantiate all claims regarding the environmental benefits of a product *before* you make them. This includes specific, explicit claims as well as implicit claims. If you don’t have solid evidence to support an environmental claim, don’t make it. And remember that many environmental claims like “degradable” or “compostable” must be substantiated through scientific evidence, such as tests, analyses, research, or studies.

## Make Your Claims Clear and Specific

The more specific an environmental claim is the less likely it is to be misleading. Vague claims that are open to varying interpretations are more likely to be deemed misleading. For example, a claim like “zero carbon” on a product could lead consumers to believe that no carbon dioxide is omitted during the production of the product, when in fact a company merely purchases credits to offset its carbon production. Other environmental claims like “sustainable” or “green powered” are also problematic because they are not clearly defined.

Vague generalized claims are also difficult to substantiate. For example, to substantiate a claim that a shirt is “sustainably produced” could involve an in-depth analysis of every environmental impact associated with the shirt’s materials, manufacture, and distribution.

On the other hand, specific claims that can be easily substantiated are less likely to be deemed misleading. For example, the following claims are sufficiently specific:

- “This cloth bag is reusable and made from 100% recycled fibers.”
- “Printed in the USA on recycled paper that contains 30% post-consumer waste.”

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## Qualify and Limit General Terms

If you do use general terms or catch phrases like “eco-friendly,” “environmentally friendly,” or “sustainable,” you should qualify and explain them clearly so that consumers can understand the nature of your claim.

For example, the following claim that a product is “earth conscious” is specific and qualified and should not be deemed deceptive:

Our **GREEN SNEAK** sneaker utilizes several earth-conscious materials and construction methods, including:

- Lining made from biodegradable merino wool
- An insole made with 30% recycled rubber
- USDA organic cotton
- Fast growing hemp
- Recycled cardboard boxes printed with soy-based inks

Although the claim includes the vague and non-specific term “earth conscious,” it goes on to qualify the term so that consumers can understand the exact nature of the environmental benefit that the product and its packaging convey.

## Avoid Fine Print

Although general environmental claims like “eco-friendly” and “earth conscious” may be acceptable when qualified and explained, any “qualifications,” “explanations,” or “disclaimers” need to be clear and prominent so that they are easy for consumers to read and understand. This means that the explanations should be placed near the claims in an equivalent font size. Referring consumers to the company website for a full clarification of a claim made on packaging or advertising would probably not be sufficient.

## Take Care with Comparative Claims

Claims comparing your product to a competitor’s are particularly tricky and should be rock solid. If you say your detergent biodegrades faster than your competitor’s, you should have scientific evidence such as test results

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conducted by a professional testing facility to back up your statement. If your substantiation data is thin or open to varying interpretations, expect a lawsuit.

Other comparative claims not involving competitors should be sufficiently explicit so that consumers can readily understand the basis for the comparison. For example, a claim that a shampoo bottle contains “20% more recycled content” is ambiguous and potentially deceptive because it doesn’t tell consumers what is being compared. On the other hand, the statement “20% more recycled content than our previous package” should provide sufficient data for consumers to understand the claim.

## Choose Your Certifying Partners Wisely

Over the past several years, numerous private certifying organizations have surfaced that offer environmental “certification” services for products. Before you decide to partner with one of these organizations, understand that you are responsible for any explicit or implicit environmental claims that they make about your products. For example, if a certifying organization gives your product a rating of “carbon neutral,” you are on the hook if this claim turns out to be less than 100% accurate. Therefore, choose certifying agencies and partners with care. Work with reputable industry leaders that have established track records.

## Don’t Take Your Suppliers’ Claims at Face Value

Similarly, if a vendor, supplier, or manufacturer makes a deceptive environmental claim to you about its product, and you repeat that claim to consumers, you (in addition to your supplier) are liable for false advertising. It makes no difference that you were also misled. Therefore, demand substantiation of all environmental claims made by suppliers and vendors before you include these claims in your advertising.

## Take Extra Care with “Hot-Button” Terms

The Federal Trade Commission (“FTC”) has provided detailed guidance for the use of several popular advertising terms, and failure to comply with this guidance could result in a finding that your advertisement is false or deceptive.

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## Degradable

A product or package advertised as degradable or biodegradable must completely break down and return to nature in a reasonably short period of time after customary disposal. For example, a trash bag marketed as “degradable” should completely break down in a landfill where trash bags normally end up after consumer use. It is not sufficient that the bag breaks down when buried in soil.

## Compostable

Product or packaging advertised as compostable must break down into usable compost in a safe and timely manner in a composting facility or in a home compost pile or device. If the material will not break down through typical home composting, the advertiser must qualify the claim to state this fact.

## Recyclable

A product or package can be marketed as recyclable only if it can be collected, separated, or otherwise recovered from the solid waste stream through an established recycling program. If the product is comprised of both recyclable and non-recyclable components, the advertising claim should make this clear. And you should make clear whether the claim refers to the product, the package, or both. Recyclable claims are only appropriate when the product or packaging is made from materials that are accepted by recycling programs in a substantial majority of communities.

## Recycled

A claim that a product is produced from recycled content is appropriate only where materials have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer) or after consumer use (post-consumer). If the product or packaging is only partially constructed from recycled material, this must be clear. Where a product’s content consists of used, reconditioned, or remanufactured components, the “recycled” claim should be qualified.

## Refillable

A “refillable” claim is appropriate only where a system is provided for the collection and return of the packaging for refill by consumers. You should not make “refillable” claims where it is up to the consumer to find new ways to refill the package.

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## Please Recycle

You should use this phrase only if your product or packaging is recyclable through recycling programs in a substantial number of communities.



Similarly, the recycling symbol implies that a product is recyclable, and should only be used where the product or its packaging is completely recyclable, unless you use prominent qualifying language or disclaimers.

## Organic

The FTC has not issued guidance regarding the term “organic.” However, the U. S. Department of Agriculture regulates the use of the term in connection with “agricultural products.” Before you claim that your product incorporates an “organic” agricultural product, like cotton, you should confirm that the product satisfies USDA standards. The term “organic” is not regulated for personal care and cosmetic products, but producers of these products may seek “USDA Organic” certification.

## Ozone Safe/Friendly

This claim is inappropriate and deceptive where the product contains chemicals that contribute to ozone formation at lower levels (smog) even where the product does not harm the upper ozone layer.

## Watch this Space For Future Developments

The FTC first published guidance on environmental marketing claims in 1998. This guidance is available from the FTC’s website at ([www.ftc.gov/bcp/online/pubs/buspubs/greenguides.pdf](http://www.ftc.gov/bcp/online/pubs/buspubs/greenguides.pdf)). Since that time, many environmental claims like “sustainable,” “renewable,” “carbon neutral,” “zero carbon,” “wind powered,” and “zero waste” have emerged that the FTC has not addressed.

Sensing that consumers may be misled or confused by these new terms, the FTC is in the process of updating its environmental marketing guides to include guidance on the use of recently-coined advertising terms. The FTC may publish new proposed guidelines as early as January 2009.

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Analysis and recommendations for compliance with the new environmental advertising guidelines will be available on Holland & Hart's IPH2 website as soon as the FTC publishes them. Stay tuned to <http://www.IPH2.com> for developments that may affect your company's green advertising strategy.

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