

# Greenwashing into the Red: The New Risks of Deceptive Environmental Marketing

*By Jonathan S. Storper and  
Lance Alarcón*



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Capitalizing on consumer interest in sustainability just got more complicated. BP's Gulf of Mexico oil disaster has reversed years of goodwill built by its "Beyond Petroleum" rebranding campaign, perhaps the best-known green marketing effort in history. But consumers' growing environmental-marketing skepticism is not the only challenge companies will need to overcome when they tout the environmental benefits of their products. The Deepwater Horizon spill is both a political and legal disaster because it is occurring in the context of renewed interest by the Federal Trade Commission, the courts, state legislatures and states' attorneys' general in curbing misleading environmental claims. Marketers take note: Prosecution for "greenwashing" is now more likely than ever.

## Resurgence in FTC's Greenwashing Prosecutions

After filing 37 misleading environmental-marketing complaints between 1992 and 2000, the FTC took an 8-year hiatus during the Bush administration, during which it filed none. The FTC is now back on greenwashing duty. Speaking to Congress six months after President Obama took office, FTC Chairman Kovacic testified that prosecuting misleading green marketing would be one of the seven priority areas for the agency's consumer protection division. The agency reported in a March 2009 press release that it had developed an "ambitious plan to address the virtual explosion of green marketing claims." Since then, the FTC has prosecuted seven companies for greenwashing and issued warning letters to a great many more, including some of the nation's largest retailers.

The first wave of prosecutions focused on products deceptively labeled as "biodegradable." These included disposable plates (Kmart), moist wipes (Tender Corp.), and disposable towels (Dyna-E). The second wave targeted clothing and other textile products advertised and labeled as being made of environmentally-friendly and biodegradable bamboo fiber when they were actually made of rayon. The FTC charged four manufacturers, and sent warning letters to 78 retailers, including Wal-Mart, Target, Kmart and Amazon.

## Green Packaging Claims, Carbon Offsets, and Green Building: The Next Wave of Prosecutions?

The FTC's latest green-marketing policing priorities are expected to be revealed soon with the update to its Guides for the Use of Environmental Marketing Claims ("Green Guides"). The Guides were last updated in 1998. The latest revision process was initiated a year earlier than planned "in response to the explosion of green marketing," according to FTC Consumer Protection Enforcement Division Associate Director James Kohm. Although the content of the update has not been made public, the FTC's updating process provides clues about likely new content – and likely new areas of prosecution.

In a move that reveals how seriously the FTC is now approaching greenwashing, the FTC gained approval in 2009 to fund its own research on consumer understandings of green marketing terms such as "sustainable" and "carbon neutral," terms that were less common when the Green Guides were last updated. (The Green Guides already provide standards for terms such as "recyclable," "biodegradable," and "environmentally friendly"). The FTC also held a series of public workshops bringing together representatives from industry, government, consumer groups, environmental organizations and academia to identify issues surrounding the marketing of carbon offsets and renewable energy certificates, green packaging claims and claims for green building and textiles.

The FTC has not yet published its findings, but workshop participants have revealed a range of key issues that may form the basis of emerging policing priorities. With regard to carbon offsets and renewable energy certificates, the main concern was that consumers often have unrealistic expectations about these products, and that there are few ways for consumers to validate product performance. In the area of green packaging claims, key concerns included consumer misunderstanding of the concept of sustainability (including the term "natural"), and the potential abuse of unregulated environmental certifications. In the area of green building and textiles, there were concerns over the misleading use of general terms such as "renewable," "organic," and "non-toxic," as well as confusion over whether green claims applied to a product's contents or to the process of making the product. Given the FTC's investment in the process of revising the Green Guides, these issues seem likely to influence future policing efforts.

### Avoiding Unwanted FTC Attention

FTC greenwashing enforcement actions can be time consuming, costly and embarrassing for targeted companies. Past sanctions have included: (i) halting misleading advertising; (ii) reporting periodically to FTC staff about substantiation for new claims; (iii) civil penalties ranging from thousands to millions of dollars, depending on the nature of the violation; (iv) full or partial refunds to all consumers who bought the product; and (v) requiring new advertisements to correct the misinformation conveyed in the original advertisements.

The Green Guides describe how to avoid FTC intervention. Broad claims must be backed up with specifics. Advertising claims will evaluate into the lens of a hypothetical reasonable consumer, which means that vague claims about the environmental impact of a given product might lead to various interpretations. In

essence, the FTC deems valid any reasonable meaning a consumer might give to advertising. The way to avoid confusion is to be as specific as possible when making claims regarding a product's environmental impact. Substantiation is best provided with competent and reliable scientific evidence in the form of professional analysis or research into the environmental impact of a product. The duty to substantiate all reasonable interpretations of environmental claims is made more onerous by the fact that the burden is on the company making the claim to prove that the claim is not deceptive. Proactive use of the Green Guides to avoid FTC involvement is strongly recommended.

### **California's Latent Environmental Marketing Law**

California is among eight states that have enacted laws regulating the use of environmental terms. California's law states that compliance with the FTC's Green Guides provides a safe harbor for marketers in California, with one exception: Any company that advertises its products using broad claims of environmental friendliness such as "ecologically sound," "environmentally safe," "eco-friendly," or any similar term must provide written documentation supporting such claims to any member of the public upon request. This documentation must, in addition to specifying compliance with the Green Guides where applicable, show the following: (i) the reasons why the company believes the representation to be true; (ii) any significant adverse environmental impacts directly associated with the production, distribution, use, and disposal of the product; (iii) any measures that are taken to reduce the environmental impact directly associated with the production, distribution, and disposal of the product; and (iv) violations of any Federal, State, or local permits directly associated with the production or distribution of the product. A violation of the statute is a misdemeanor punishable by jail and/or a fine of up to \$2,500.

The California Department of Justice ("DOJ") has yet to file a greenwashing complaint under this statute. However, the California DOJ has begun investigating the environmental claims of a number of companies. Because investigations are kept confidential until the California DOJ files a complaint, it is hard to predict whether or when the California DOJ may begin initiating prosecutions. In a state as environmentally conscious as California, it's a safe bet that the California DOJ will continue to ramp up enforcement of greenwashing claims.

### **Consumers Attack Greenwashing under California's Unfair Competition Law**

Individual consumers, on the other hand, have had several recent successes pursuing greenwashing-type claims under California's Unfair Competition Law. This law allows a consumer who has lost money in reliance on a deceptive-advertising/labeling claim to bring a complaint against the company directly. This year, a consumer won a \$100,000 settlement against Honda under this law for misrepresenting the gas mileage of the Honda Civic Hybrid. There are three pending class-action lawsuits that rely on this law that have survived motions to dismiss. The suits allege that: (i) The maker of Windex put a "Green list" logo on the label to deceive consumers into believing the product was certified as environmentally-friendly by a third party; (ii) the maker of Snapple misleads consumers into believing the product is "all natural" when it includes processed

high-fructose corn syrup; and (iii) the maker of Healthy Choice pasta sauce also misleads consumers into believing the product is “all natural” when it includes processed corn syrup. These types of private actions are likely to increase in the future.

### Conclusion

Four trends are converging to make unsubstantiated and misleading environmental claims risky. First, the FTC is once again making greenwashing a priority. Second, consumers have discovered their power under California’s Unfair Competition Law to sue greenwashing companies for potentially substantial damages. Third, the California DOJ is using its latent power under California’s Environmental Marketing Law to investigate, and possibly prosecute, greenwashing. Finally, the political and legal fallout from the sudden transformation of BP from “Beyond Petroleum” to “Beyond Propaganda” (among other monikers now being devised by creative detractors) has increased public awareness of this issue. Its effect on other companies who make grand environmental pronouncements not entirely tethered to reality has yet to be fully determined. One thing is certain: Companies are now more likely to pay a price for misleading environmental claims.

**If you have any additional questions, please contact:**



**Jonathan S. Storper**, Partner  
(415) 995-5040  
jstorper@hansonbridgett.com



**Lance Alarcón**, Summer Associate

### SAN FRANCISCO

425 Market Street, 26th floor  
San Francisco, CA 94105  
TEL 415-777-3200  
FAX 415-541-9366

### NORTH BAY

Wood Island  
80 E. Sir Francis Drake Blvd, Ste. 3E  
Larkspur, CA 94939  
TEL 415-925-8400  
TEL 707-546-9000  
FAX 415-925-8409

### SACRAMENTO

500 Capitol Mall Ste. 1500  
Sacramento, CA 95814  
TEL 916-442-3333  
FAX 916-442-2348

### SILICON VALLEY

950 Tower Lane, Ste. 925  
Foster City, CA 94404  
TEL 650-349-4440  
FAX 650-349-4443

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