

## **ADVERTISING AND LABELLING**

The information contained in this paper has been prepared to assist users of d<sub>2</sub>w Controlled-life Plastic Technology in respect of advertising and marketing claims.

Please note however that Symphony is not qualified to advise on law, and customers should consult their own lawyers before issuing any statement printed on a product or in advertising material or on a website.

Each country has its own fair-trading and advertising laws and codes of practice, and it is the responsibility of customers to be aware of and comply with such laws and codes of practice in the countries in which they sell or market their goods.

By way of example we set out below our understanding of the position in the United States of America

### **The Federal Trade Commission ("FTC")**

The Federal Trade Commission Act of 1942 declares unlawful "unfair or deceptive acts or practices in or affecting commerce." The FTC enforces Section 5 of the FTC Act, which generally prohibits practices, including advertising or labelling that are false or misleading. The FTC Act, therefore, requires truthful, non-deceptive advertising claims that are substantiated by competent and reliable evidence.

The FTC's authority covers both deception and unfairness in advertising. According to the FTC's Deception Policy Statement,<sup>1</sup> an

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<sup>1</sup><http://www.ftc.gov/bcp/policystmt/ad-decept.litm> and <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>. See also <http://www.ftc.gov/bep/edu/pubs/business/adv/bus35.shtm>.

advertisement is deceptive if (1) it contains a statement or an omission that is likely to mislead a reasonable consumer acting under the circumstances and (2) the statement is material. A claim is material if it is important to a consumer's decision to buy or use the product.

To determine whether an advertisement is deceptive under the FTC Act, the Commission will typically engage in the following analysis:

- (1) The FTC looks at the ad from the point of view of the "reasonable consumer" - the typical person looking at the ad. Rather than focusing on certain words, the FTC looks at the ad in context -- words, phrases, and pictures -- to determine what it conveys to consumers.
- (2) The FTC looks at both 'express' and 'implied' claims. An express claim is literally made in the ad. For example, 'ABC Mouthwash prevents colds' is an express claim that the product will prevent colds. An implied claim is one made indirectly or by inference. 'ABC Mouthwash kills the germs that cause colds' contains an implied claim that the product will prevent colds. Although the ad doesn't literally say that the product prevents colds, it would be reasonable for a consumer to conclude from the statement 'kills the germs that cause colds' that the product will prevent colds. Under the law, advertisers must have proof to back up express and implied claims that consumers take from an ad.
- (3) The FTC also looks at what the ad does not say -- that is, if the failure to include information leaves consumers with a false impression about the product. For example, if a company advertised a collection of books, the ad would be deceptive if it did not disclose that consumers actually would receive abridged versions of the books.
- (4) The FTC looks at whether the claim would be "material" -- that is, important to a consumer's decision to buy or use the

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<http://www.ftc.gov/os/2007/11/P954501ggfrn.pdf>



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product. Examples of material claims are representations about a product's performance, features, safety, price, or effectiveness.

- (5) The FTC looks at whether the advertiser has sufficient evidence to support the claims in the ad. The law requires that advertisers have proof before the ad runs.
- (6) The FTC has authority to impose penalties against companies that disseminate false or deceptive advertisements.

The Commission may use post-claim evidence to evaluate the truth of a claim, or use such evidence to decide whether there is a public interest in continuing an investigation or issuing a complaint.

#### *FTC Guidance Documents*

The Commission has authority to promulgate guides for industry. Although the guides are not themselves enforceable regulations, nor do they carry the force and effect of law, the guides represent "administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements." Several states, including California<sup>2</sup>, have however enacted laws that have incorporated FTC guides into state law.

#### *FTC Green Guides*

The FTC Green Guides set forth the Commission's position on when environmental claims may or may not be consistent with the general requirements of the FTC Act. The Commission is reviewing the guides and has invited submissions from interested parties. Symphony has made a submission. It is expected that the revised Guide will be issued in the Spring of 2011.

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<sup>2</sup> See, e.g., Environmental Representations Law, California Business and Professions Code, Sections 17580 and 17580.5 (1998) (Incorporating, at least in part, the Green Guides into California's own law of false advertising). <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=17001-18000&file=17580-17581>



The Green Guides apply broadly "to environmental claims included in labelling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names or through any other means, including marketing through digital or electronic means, such as the Internet or electronic mail. Furthermore, "the [Green Guides] apply to any claim about the environmental attributes of a product, package or service in connection with the sale, offering for sale, or marketing of a product, package or service for personal, family or household use, or for commercial, institutional or industrial use."

The Commission does not allow general environmental benefit claims such as "green" or "eco-friendly" They believe that very few products, if any, have all of the attributes that consumers appear to perceive from general environmental benefit claims. In addition, given that all products have some environmental impact, it is doubtful that a marketer could substantiate that a product has no or negligible negative environmental impact.<sup>3</sup>

The Commission takes the view that consumers expect biodegradable solid waste to decompose in one year or less.<sup>4</sup> Accordingly, if an oxo-biodegradable product is not likely to completely decompose in one year after disposal, **it should be qualified with a statement** as to the likely timescale.

The Commission's focus is not on the technical meaning of claims, but rather **how they are perceived by consumers**. As the Commission thinks that consumers are unlikely to understand the technical implications of the terms "degradable," "biodegradable," or "photodegradable" they are addressed generically by the FTC as follows:

"It is deceptive to misrepresent, directly or by implication, that a product or package is degradable, biodegradable, or photodegradable. An **unqualified** claim that a product or package is degradable, biodegradable, or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to

<sup>3</sup> <http://www.ftc.gov/os/fedreg/2010/october/101015greenguidesfrn.pdf>

<sup>4</sup> Ibid page 63569



nature, i.e., decompose into elements found in nature within a reasonably short period of time after customary disposal. **Claims of degradability, biodegradability, or photo degradability should be qualified to the extent necessary to avoid consumer deception about: (1) the product or package's ability to degrade in the environment where it is customarily disposed; and (2) the rate of and extent of degradation.**

The FTC has taken the view in several cases<sup>5</sup> that as most of the solid waste in the US is disposed of in landfills, incinerators, or recycling facilities it is deceptive to label a product with an unqualified claim as "biodegradable" because it will not biodegrade in those facilities.

The logic of this is questionable because consumers with any knowledge at all of the country in which they live will know that much of the solid waste is disposed of in incinerators or recycling facilities, where they would not expect or desire it to biodegrade. It would be absurd to qualify the claim by saying "will not biodegrade in an incinerator".

The existing Green Guide concerns itself not only with (a) the characteristics of the product and/or its packaging (eg is it compostable, is it recyclable can it be safely incinerated etc.) but also with (b) whether in a particular locality it can actually be composted or recycled or incinerated.

Consumers are of course entitled to know the characteristics of the product but much of the goods sold in the United States are sold on a national basis, and thousands of tonnes of identical packaging is manufactured and printed for the brand-owner for national distribution. Some of these goods and their packaging will be sold in places where suitable composting or recycling or incineration facilities exist, but some will not, and it is impossible for the marketer to know which piece of packaging will be sold in which place. Even if he did, it is simply not practical to print different packaging for sale in different cities, towns, and districts; and goods could in any event be bought in a place where facilities exist, and then taken away and disposed of in a place where no



<sup>5</sup> Eg Dyna-E 15.Dec 2009 9336; Kmart Corp 15 Jul 2009 C-4263; and Tender Corp 13 July 2009 C-4261. See also <http://www.ftc.gov/os/fedreg/2010/october/101015greenguidesfrn.pdf> Page 63568



such facilities exist. Even if the facilities existed on the date the package is printed, they may not exist even in that locality when it is disposed of.

Symphony has submitted that the Guide should therefore be amended so that it would no longer be considered deceptive to market goods or packaging as recyclable or capable of incineration just because no suitable facilities exist at the time and locality where the goods are purchased.

So far as landfill is concerned when a consumer buys a plastic product he may think it likely that the product he has just bought, and/or its packaging, will end up in landfill, but he cannot be sure. That is why in the 92 countries in which Symphony operates worldwide, people are increasingly demanding that all short-life plastic products and packaging are made from oxo-biodegradable plastic, so that they will harmlessly biodegrade if they get into the open environment instead of being sent to landfill.

Oxo-biodegradable plastic will degrade in landfill where oxygen is present (sometimes trapped in the very plastic bag which is degrading) and the resulting fragmentation will save space, but it will not degrade in parts of a landfill where oxygen is absent.

The consumer needs to know whether the plastic is biodegradable, but the existing Guide prevents him from being told simply that it is biodegradable. For consumers who might otherwise think that an oxo-biodegradable bag can be expected to degrade under all conditions in landfill, the revised Guide should require a statement such as "Works in landfill if oxygen is present."

Although the FTC Green Guide is currently under review<sup>6</sup> until a suitably amended Code is issued, claims of biodegradability or recyclability on packaging or in publicity material, including the internet, must be carefully qualified, even for business-to-business transactions. See suggested label at the end of this paper.



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<sup>6</sup> <http://www.ftc.gov/os/2010/10/101006greenguidesproposal.pdf>



## NATIONAL ADVERTISING DIVISION ("NAD")

The NAD, an arm of the US Council of Better Business Bureaux, hears complaints about advertising, and applies the FTC Green Guides. It has heard several cases relating to biodegradable plastic, which were lost because the advertiser failed to pay sufficient attention to the points made above.

## CALIFORNIA

The CALIFORNIA PUBLIC RESOURCES CODE<sup>7</sup> Sections 42356 and 42357 impose restrictions on the labelling of certain plastic bags as follows:

**Section 42357 (a) (1)** A person shall not sell a plastic bag in this state that is labelled with the term "**compostable**" or "**marine degradable**," unless, at the time of sale, the plastic bag meets the applicable ASTM standard specification, as specified in paragraph (1) of subdivision (b) of Section 42356. [ie ASTM D6400 or D7081 or D6868]

**Section 42357(b)** provides "Except as provided in subdivision (a) [ie labelled as compostable or marine degradable] a person shall not sell a plastic bag in this state that is **labelled with the term "biodegradable," "degradable," or "decomposable," or any form of those terms, or in any way imply that the bag will break down, fragment, biodegrade, or decompose in a landfill or other environment**

It is unlikely that any oxo-biodegradable plastic will comply with ASTM D6400, which is a test for **industrial compostability**. This is because ASTM D6400 contains a biometric test which requires emission of CO<sub>2</sub> at a rate which is too high for oxo-biodegradable plastic to achieve. If any supplier of oxo-biodegradable additive claims otherwise, their claims should be carefully investigated.

**Compostability of plastic is not the same thing as biodegradability.** Oxo-biodegradable plastic degrades then biodegrades in the same way as nature's wastes such as leaves and straw, which is not fast enough to pass the compostability test in D6400.



<sup>7</sup><http://www.leginfo.ca.gov/cgi-bin/displaycode?section=prc&group=42001-43000&file=42355-42358>



It is arguable (but not certain) that 42357b would not be contravened if a carrier bag were not **sold in California**, but were sold outside California and supplied free of charge to customers at shops in California, However, this argument could not be applied eg to a bread-wrapper sold with the bread inside. You can buy a tin of beans and choose to put it or not put it into a free carrier bag. You cannot buy wrapped bread without its wrapper, and the California courts would probably hold that the wrapper had been "sold" with the bread.

**In addition Section 42359.6<sup>8</sup>** of the Code provides that "a person shall not sell a food or beverage container that is labelled with the term "compostable" or "marine degradable," unless, at the time of sale, the food or beverage container meets the relevant ASTM<sup>9</sup>standard specification", and "a person shall not sell a **food or beverage container** that is labelled with the term "biodegradable," "degradable," or "decomposable," or any form of those terms, or in any way imply that the food or beverage container will break down, fragment, biodegrade, or decompose in a landfill or other environment

**Section 42359.5** (c) defines "**Food or beverage container**" as a product that contains food or drink items, or utensils, for retail sale and is composed of one or more of the following: (1) Plastic.

**Section 42359.6** (b) would be contravened if a plastic bag labelled "biodegradable," "degradable," or "decomposable," or any form of those terms were used **to contain food or drink items, or utensils, for retail sale.**

## COMMENT

It is our view that California legislators have been misled by the cornstarch ("hydro-biodegradable") lobby, into using an **industrial compostability** standard for plastics which are not intended for composting, but are intended instead to self-destruct if they escape into the open environment. They should have used ASTM D6954 but were persuaded to reject it.

There appears to be a proposal for legislation in Michigan (and possibly in other states) similar to that in California.

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<sup>8</sup><http://www.leginfo.ca.gov/cgi-bin/displaycode?section=prc&group=4200143000&file=42359-42359.8>  
<sup>9</sup> D6400, D7081 or D6868



However, the tide is beginning to turn. On 28th September 2010 Governor Arnold Schwarzenegger of California rejected Senate Bill 1454 proposed by Sen. De Saulnier which would have extended to almost all plastic products the already unreasonable restrictions on the labelling of oxo-biodegradable plastic bags and food & beverage containers

Oxo-biodegradable plastics will degrade in the environment where oxygen is present. However plastics made from cornstarch do NOT readily biodegrade except in industrial composting conditions, and they are therefore of little or no value in relation to plastic litter which escapes into the open environment. Much of this litter cannot realistically be collected and taken to an industrial composting unit.

There are in any event very few such units, and most of them do not want plastic of any kind in their feedstock except as part of a dedicated scheme. They do not want to have to separate compostable from non-compostable plastic, and even "compostable" plastic is of little or no value in compost. This is because the plastic has to convert itself to CO<sub>2</sub> gas within 180 days in order to pass the composting standard ASTM D6400 so it contributes to climate change but does nothing for the soil

"Compostable" plastics do NOT have a smaller carbon footprint than conventional plastics – consider the hydrocarbons burned by the trucks and machines which clear the land, plough and harrow the land, make the fertilisers and pesticides and bring them to the land, sow the seed, harvest the crop, take it to the factory, and run the autoclaves.<sup>10</sup>

Land and water should be used to grow food, not to make plastic. Also as they are thicker and heavier than normal plastic "compostables" need more trucks to transport them, using more diesel fuel and occupying more road space.<sup>11</sup>

"Compostable" plastic can be too expensive for everyday use, and most of it is not suitable for home-composting. Compostable plastics can damage the

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<sup>10</sup>See:

<http://www.biodeg.org/files/uploaded/Hydrobiodegradable%20Plastic%20Production%20Process.pdf>

<sup>11</sup> <http://www.biodeg.org/files/uploaded/Oxo%20vs%20Hydro-biodegradable.pdf>

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recycling process if they get into in a normal plastic recycling waste stream, but oxo-biodegradable plastics do not.<sup>12</sup>

Finally, it is important to remember that it is the customer's finished product which must be tested so as to show conformity with environmental claims, not Symphony's additive.

**END**

For a video of d2w plastic film degrading, go to: <http://degradable.net/play-videos/4>



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<sup>12</sup> <http://www.biodeg.org/position-papers/recycling/?domain=biodeg.org>



## SUGGESTED PRODUCT LABEL



This **NEW** packaging is made with Symphony's **d<sub>2</sub>w** Controlled-life technology, to last a much shorter time in the open environment than ordinary plastic. Timescale depends on climatic and other factors, and it will not necessarily be gone within one year. Not for composting or anaerobic digestion. Can be safely incinerated if facilities exist in your area. Works in landfill if oxygen is present. Can be recycled as recommended by Symphony if facilities exist in your area. Please dispose of this, and all packaging, responsibly.

**NB Do not claim recyclability on trash bags or bin liners because these bags are not ordinarily separated from other trash for recycling.**



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