

24 January 2019

## ADVERTISING AND LABELLING

Each country has its own fair-trading and advertising laws and codes of practice. Symphony are not experts on those matters and can give informal advice only on proposed wording and images, subject always to the proviso that customers/distributors consult their own lawyers as to what is permissible in the country where they intend to sell or market goods before issuing any statement printed on a product or in advertising material or on a website.

By way of example, we set out below our understanding of the position in the United States of America, where the Federal Trade Commission issued in October 2012 a revised edition of its “Green Guide” on Environmental claims<sup>1</sup>, together with a “Statement of Basis and Purpose” (the Review”).<sup>2</sup>

It is important to remember that in the case of finished-products it is the customer’s finished-product which must comply with the legislation and Codes of Practice on environmental claims, not Symphony’s masterbatch.

### The Federal Trade Commission (“FTC”)

The FTC does NOT prohibit the sale or advertising of oxo-biodegradable plastic additives or finished products, and it does NOT require oxo-biodegradable finished products to fully decompose within one year of customary disposal - see below.

The important point to remember is the difference between an **UNQUALIFIED** claim (a simple statement such as “this product is biodegradable”) which is generally not allowed; and a **QUALIFIED** claim (which gives consumers information as to how, where, and when, the product will and will not biodegrade) - which is generally allowed.

The FTC enforces Section 5 of the FTC Act 1942, which prohibits practices, including advertising or labelling, that are false or misleading. The FTC requires truthful, non-deceptive advertising claims that are substantiated by competent and reliable evidence.<sup>3</sup>

According to the FTC’s Deception Policy Statement,<sup>4</sup> an advertisement is deceptive if (1) it contains a statement or an omission that is likely to mislead a reasonable consumer and (2) the statement is material.

To determine whether a publication is deceptive, the FTC:

<sup>1</sup> <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf>

<sup>2</sup> <http://www.ftc.gov/os/fedreg/2012/10/greenguidesstatement.pdf>

<sup>3</sup> which need not be published (Review p 112)

<sup>4</sup> <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>

- (1) looks at it from the point of view of the "reasonable consumer" - the typical person looking at the publication. Rather than focusing on certain words, the FTC looks at the publication in context - words, phrases, and pictures - to determine what message it conveys to consumers.
- (2) looks at both `stated' and `implied' claims. 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.
- (3) 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 would actually receive abridged versions of the books.
- (4) looks at whether the claim would be "material" - that is, important to a consumer's decision to buy or use the product, such as representations about a product's performance, features, safety, price, or effectiveness.
- (5) 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 is published, but the FTC may use post-claim evidence to decide whether there is a public interest in continuing an investigation or taking legal proceedings

## **FTC GREEN GUIDES**

The Green Guides set out the FTC's position on when environmental claims may or may not be consistent with the general requirements of the FTC Act. Several states, including California<sup>5</sup>, have enacted laws incorporating FTC Guides into state law.

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

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<sup>5</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).

mail, 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 FTC have confirmed<sup>6</sup> that this applies to business-to-business transactions as well as sales to consumers.

The FTC have made it clear<sup>7</sup> that “websites cannot be used to qualify otherwise misleading claims appearing on labels or in other advertisements because many consumers would not see that information before their purchase.” They added “of course, marketers can provide valuable, supplemental information to consumers on their websites.”

The FTC do not accept general environmental benefit claims such as “green” or “eco-friendly”<sup>8</sup> They believe that very few products, if any, have all of the attributes that consumers perceive from general environmental benefit claims. In addition, they think that as all products have some environmental impact it is doubtful that a marketer could substantiate that a product has no, or a negligible, negative environmental impact.

## **Biodegradable**

The FTC treat oxo-biodegradable claims like any other degradable claims<sup>9</sup>.

The FTC focus is not on the technical meaning of claims, but on **how they are perceived by consumers**, although the FTC accept<sup>10</sup> that “if a marketer can substantiate that consumers purchasing its product interpret a claim differently than what the Guides provide, its claims comply with the law.” The FTC added that “when a marketer targets a particular segment of consumers, such as those who are particularly knowledgeable about the environment, the Commission will examine how reasonable members of that group interpret the advertisement.”

Generally, the FTC believes that:

“It is deceptive to [mis]represent, directly or by implication, that a product or package is degradable, biodegradable, or photodegradable.<sup>11</sup>” In their view an **unqualified** claim that a product or package is degradable, biodegradable, or photodegradable must be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and

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<sup>6</sup> Green Guide Oct 2012 para 260.1(c)

<sup>7</sup> Review page 16

<sup>8</sup> Or such claims implied by the use of images of birds, trees, or flowers.

<sup>9</sup> Review p 124

<sup>10</sup> Review p 25

return to 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 must therefore 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.**

### Timescale

The FTC believe that consumers expect biodegradable solid waste to decompose in five years or less. Therefore, if an oxo-biodegradable product is not likely to *completely* decompose in one year after disposal, **it must be qualified with a statement** as to the likely timescale in the place where the product is likely to be disposed of.<sup>12</sup>

The FTC have decided in several cases<sup>13</sup> that as most of the solid waste 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 would not expect or desire it to biodegrade in an incinerator or in recycling facilities and would not therefore be likely to buy it for that purpose. It would be absurd to say “will not degrade in an incinerator” but the FTC has not changed its position on this.

### 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. **This is an advantage, because it will not emit methane, which is a dangerous greenhouse gas.**

It is therefore necessary to include a statement such as **“Degrades in landfill if oxygen is present.”**

When a consumer buys a plastic product he may think it likely that the product and/or its packaging, will end up in landfill or in other authorised disposal facilities, but he cannot be sure. That is why in the 96 countries in which Symphony operates

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<sup>11</sup> Guide para 260.8

<sup>12</sup> For a general discussion of timescales see:

[http://www.biodeg.org/files/uploaded/biodeg/Timescale\\_for\\_Degradation.pdf](http://www.biodeg.org/files/uploaded/biodeg/Timescale_for_Degradation.pdf)

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. This is now mandatory in the United Arab Emirates, Saudi Arabia, and other countries.

### **Recyclable<sup>14</sup>**

The FTC thinks that “a product or package should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item.”

Although recycling is not the primary purpose<sup>15</sup> for oxo-biodegradable plastics, they can be recycled together with ordinary plastic without the need for separation. For details see <http://www.biodeg.org/recycling.html>

The FTC thinks<sup>16</sup> that recyclability claims should not be made for trash bags or bin liners because they are not usually separated for recycling from the trash which they contain. This would probably also apply to dog-waste bags.

### **Local Availability of Facilities**

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

As a national or international supplier is unlikely to know whether recycling facilities exist in the localities where the product is used, the FTC advise that a recyclability claim be qualified by saying “can be recycled as recommended by the manufacturer only in the few communities that have appropriate recycling facilities.”

### **Recycled Materials**

If the product/package is advertised as made with recycled materials the percentage of recycled material should be specified

### **Composting**

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<sup>13</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

<sup>14</sup> 260.12

<sup>15</sup> They are designed to address the problem of plastic waste which gets into the open environment from which it cannot realistically be collected for recycling or for anything else.

<sup>16</sup> Review p 271

Oxo-biodegradable plastic is not currently marketed for composting or anaerobic digestion, so in case consumers should think otherwise advertising should include a statement **“Not for composting or anaerobic digestion” and it must not be claimed that the product complies with EN13432 or ASTM D6400 or their equivalents.** See below as to compostable plastic generally.

### **Non-toxic**

It is best to avoid unqualified claims that a product is non-toxic<sup>17</sup> and to be more specific, e.g. by specifying the test (such as OECD 203) to which the material has been subjected.

### **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 not because there is anything wrong with biodegradable plastic but because the advertiser failed to pay attention to the points made above.

### **INTERNATIONAL STANDARDS**

Do not claim that a product has been tested according to a particular standard e.g. ASTM, EN, or ISO, unless it is a relevant standard, and you have evidence that it has been so tested. Samples of plastic film made with Symphony's d<sub>2</sub>w masterbatch have been tested according to ASTM D6954, but please check with Symphony's technical dept whether these tests apply to your product.

There is an ISO Standard (14021) for Environmental Claims, and it is good practice to comply with it.

### **CALIFORNIA**

In relation to goods which will or may be sold in California<sup>18</sup>, it is important to note that The California Public Resources Code imposes restrictions on the labelling of plastic products as follows:

#### **42357**

- (b) ..... a person shall not sell a plastic product in this state that is labelled with the term "biodegradable," "degradable," or "decomposable," or any form of those terms,

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<sup>17</sup> Review p 146

<sup>18</sup> It is understood that other States may be considering similar legislation



or in any way imply that the plastic product will break down, fragment, biodegrade, or decompose in a landfill or other environment.

In California (and any other State with similar legislation) very little can therefore be said on the label, and the Oxo-biodegradable Plastics Association logo should not be used.

In relation to advertising within California it is necessary to comply also with FTC and NAD guidance as mentioned above.

In our view California legislators have been misled by the bio-based compostable (“hydro-biodegradable”) lobby so as to permit labelling of compostable plastic designed to ASTM D6400 but not oxo-biodegradable plastic designed to ASTM D6954.

### **COMPOSTABLE PLASTIC**

Compostability of plastic is not the same thing as biodegradability.

In the 2012 “Green Guide” the FTC says at 260.7(a) that “It is deceptive to misrepresent, directly or by implication, that a product or package is compostable.”

The FTC had two concerns – explained in their “Statement of Basis and Purpose”<sup>19</sup> - the first related to the very limited availability of industrial composting facilities where plastics would be accepted, and the second related to the performance of “compostable” plastics in home and industrial composting.

They noted<sup>20</sup> that in a public opinion survey 62% of respondents said that they did not have access to large-scale composting facilities, and a further 28% did not know whether they had access to such facilities.

Accordingly in para. 260.7 (d) the FTC warn that “to avoid deception about the limited availability of municipal or institutional composting facilities a marketer should clearly and prominently qualify compostable claims if such facilities are not available to a substantial majority of consumers or communities where the item is sold.”

There is therefore no point in “compostable” plastic if the facilities for processing it are not locally available.

Most of these plastics cannot be processed in home-composting. Home-composting is not a controlled process operated according to standards such as EN13432 and ASTM D6400, and temperatures are unlikely to be high enough to kill the pathogens adhering to plastic

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<sup>19</sup> pp 113-115

<sup>20</sup> p 113

which has been used for food-packaging.<sup>21</sup> Para. 260.7(c) (1) of the Guide therefore provides that marketers should clearly and prominently qualify compostable claims to the extent necessary to avoid deception if the item cannot be composted safely or in a timely manner in a home compost pile or device.

Plastics marketed as compostable are also often marketed as “renewable”, but the FTC said (260.16) that “It is deceptive to misrepresent, directly or by implication, that a product or package is made with renewable materials.” The FTC takes the view that “reasonable consumers may interpret renewable materials claims differently than marketers may intend, and that “unless marketers have substantiation for all their express and reasonably implied claims, they should clearly and prominently qualify their renewable materials claims.”

Consumers may be misled by a “renewable” claim unless they are advised that the product contains a proportion of oil-based material (if that is the case) and that substantial amounts of non-renewable resources (fossil fuels) are used in the agricultural production and the polymerisation process<sup>22</sup> of bio-based plastics.

As to the performance of the product, the FTC has said that a “compostable” claim should be substantiated by competent and reliable scientific evidence that the entire item would break down into or otherwise *become part of usable compost* in a safe and timely manner in an appropriate composting facility or a home composting pile.

The FTC has also said that it is not sufficient to show that a test item had complied with ASTM D6400 or D6868<sup>23</sup>, because those standards “likely do not typify compost facility operations nationwide.<sup>24</sup> Rather they reflect “optimum [operating] conditions and ignore wide variation in actual facility operations. Because of these variations, the ASTM protocols likely do not replicate typical compost facility environments. Therefore, consumers whose local facility [if they have one at all] operates differently than the ASTM’s assumptions would be deceived if their item were incapable of being composted.” (These standards do not apply to home-composting at all).

In addition, it is unlikely that a plastic marketed as complying with ASTM D6400 or D6868 (or EN13432, Australian 4736 or the ISO equivalents) would break down into or otherwise become part of usable compost. This is because these standards require the plastic to break down substantially into CO<sub>2</sub> gas within 180 days.<sup>25</sup> The gas is typically released to atmosphere where it contributes to climate-change but it does not *become part of usable compost*.

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<sup>21</sup> <http://www.biodeg.org/Composting.pdf>

<sup>22</sup> <http://www.biodeg.org/biobased.html>

<sup>23</sup> See also EN13432, Australian 4736 or ISO 14855 and 17088

<sup>24</sup> p114

<sup>25</sup> See eg D6400 at para. 6.3



These plastics should not therefore be described as “compostable” and marketers may risk prosecution if they are so described.

Further, - the EU Commission has said<sup>26</sup> that “advertising a packaging product as biodegradable when in fact it will not readily biodegrade in natural conditions can be misleading for the consumer and can contribute to the proliferation of littering of products that will persist in the environment.” Products marketed as compliant with ASTM D6400, EN13432 or their equivalents are designed to biodegrade in industrial composting facilities in controlled conditions, and they should not therefore be described as “biodegradable.” They should be described as “Biodegradable in industrial composting.”

With regard to landfill, Para. 260.7 (c) (2) of the FTC Green Guide provides “that marketers should clearly and prominently qualify compostable claims to the extent necessary to avoid deception if the claim misleads reasonable consumers about the environmental benefit provided when the item is disposed of in a landfill.” Consumers may be deceived if the marketer does not draw attention to the fact that bio-based plastics can generate methane deep in landfill and that methane is a dangerous greenhouse gas 23 times more powerful than CO<sub>2</sub>.

### **SUGGESTED LABELS**

[not for California]

This NEW packaging [or product] is made with Symphony’s d<sub>2</sub>w Controlled-life technology, to last a much shorter time than ordinary plastic if it gets into the open environment, and to become biodegradable at the end of its useful life. Timescale is variable as conditions in the open environment are variable. Not for composting or anaerobic digestion. Can be incinerated, and can be recycled as recommended by the manufacturer, only in the few communities having suitable facilities. Degrades in landfill if oxygen is present. Please dispose of this product and all packaging, responsibly.

In countries other than the USA and Canada the following shorter form may be used if compatible with regulations and Codes of Practice in the country concerned.

“This product was made with d<sub>2</sub>w ® oxo-biodegradable technology which converts it into biodegradable materials at the end of its useful life if it gets into the open environment. Until degraded it can be recycled. Not recommended for composting or for anaerobic conditions.”

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<sup>26</sup> [http://ec.europa.eu/environment/consultations/plasticbags\\_en.htm](http://ec.europa.eu/environment/consultations/plasticbags_en.htm)