



GREENWASHING AND ADVERTISING

What Your Agency Needs To Know When Making
Environmental Claims

If the modern environmental movement in America can be traced back to a single year, that year would be 1970.

On the heels of the publication of Rachel Carson's groundbreaking book *Silent Spring*, the year 1970 saw both the introduction of Earth Day and the establishment of the Environmental Protection Agency (EPA). With fifty+ years in the rearview mirror, where is the modern environmental movement headed, and how can agencies and brands ensure that they are not just complying with the letter of the law when it comes to environmental claims in advertising, but also working to shape the kind of sustainable brands consumers are looking for?

It can be difficult to know where to start. The rules of the road can be a little murky when it comes to understanding what kind of environmental claims can be made in advertising, what entities have the jurisdiction to enforce them, and what exactly consumers are looking for when it comes to sustainable brands. The process is rarely straightforward, and the rules and consumer expectations are evolving at warp speed.

And increasingly, consumers are putting their money behind their values. A 2020 Capgemini study found that 79% of consumers are changing their purchase preferences based on a brand's social responsibility, inclusiveness, and environmental impact.

A 2021 Forrester study found that consumers are starting to push even harder, requiring that brands go beyond just touting their environmental efforts, to actually proving that those efforts are resulting in real change. It's increasingly clear that just slapping the word "green" on your package labeling and promising to recycle is no longer going to cut it with most consumers.

While this paper and accompanying video series can't address all the questions agencies and brands will have in this area, they will provide a good starting point to think about these questions. You'll hear from experts at the Environmental Protection Agency (EPA), the Federal Trade Commission (FTC), the National Advertising Division (NAD), legal experts on the FTC Green Guides, as well as from agencies that have recently become B-corp certified.

"The objective was to get a nationwide demonstration of concern for the environment so large that it would shake the political establishment out of its lethargy," Senator Gaylord Nelson of Wisconsin said, "and, finally, force this issue permanently onto the national political agenda." (Founder of Earth Day)



What Are The Rules When Making Environmental Claims In Advertising?

The FTC Green Guides

The foundational guidance in this area are the FTC Green Guides. The Guides were first issued in 1992, and have been revised three times since then. As the last revision was issued in 2012, the FTC is expected to begin the process of revision within the next year. It's expected that the next revision of the Green Guides will draw intense interest from industry and consumer advocacy groups.

The FTC Green Guides cover several key areas in advertising claims, including the use of carbon offsets, certifications and seals of approval (i.e. "ecolabels"), compostables, degradables, "free-of" claims, non-toxic claims, ozone-safe and ozone-friendly claims, recyclables, recycled content, renewable energy claims, and renewable materials claims.

In its 2012 [video guidance](#) on the Green Guides, the FTC laid out some of the highlights that companies should keep in mind when making environmental claims in advertising, including:

- Businesses need reliable evidence to back-up environmental claims.
- Businesses should avoid unqualified claims, and for qualified claims, they should disclose details clearly and prominently.
- If the upside of a touted benefit is negligible, businesses shouldn't imply that it is a significant benefit.
- Seals and certifications (i.e. "ecolabels") are actually covered by the FTC's [Endorsement Guides](#), in addition to being covered in the Green Guides.
- If a business says that its product is biodegradable, that means that the product will degrade completely within a year.
- If a business says that their product is recyclable, then that claim might need to be qualified if recycling facilities aren't available to much of the community where the product is sold.
- If a business says that its product is compostable, that means the product should be compostable at a consumer's home, and not require a professional grade composting facility.
- If a business says its product is "free of" a certain ingredient or chemical, then the replacement ingredient or chemical cannot pose similar risks.



In its last iteration of the Green Guides, the FTC decided against issuing guidelines on “sustainability” or “organic” in order to avoid overlap with the U.S. Department of Agriculture’s National Organic Program’s organic food guides. Recently, many brands, particularly in fashion, have signed a letter to the FTC asking the FTC to include new guidelines specifically around sustainability in its next version of the Green Guides. It seems likely that addition of guidance around sustainability claims will be included in the next iteration of the Green Guides.

How Are The FTC Green Guides Enforced By Regulators?

The FTC Green Guides are really an extension of the FTC’s jurisdiction to enforce general Truth-In-Advertising claims, i.e. not a separate source of authority for the FTC. And the FTC is not the only one enforcing them - independent self-regulatory bodies such as the National Advertising Division (NAD) will also bring cases for false or misleading environmental claims in advertising under the FTC Green Guides.

Additionally, some states (including Minnesota, New York, Florida, Rhode Island, and others) also have issued their own state-level guidance around environmental claims in marketing. The states vary in how they define and enforce - New York has an actual regulation covering environmental claims in advertising, and the regulation has teeth. In California, if you can show that your brand is in compliance with the FTC Green Guides, there’s a safe harbor under the state’s consumer protection laws.

Len Gordon, a partner with Venable LLP, and a former FTC employee, works closely with businesses in helping them understand how the Guides apply to their environmental marketing claims. Regarding enforcement, Mr. Gordon points out that while the FTC has probably brought forth roughly 50 cases under the Guides, they’ve been a bit quiet in bringing cases forward in the past few years.

Mr. Gordon expects that to change. Not only because of the increased focus on all things environmental under the Biden Administration, but also because there has been an explosion of advertising containing environmental marketing claims, many of those claims with somewhat shaky foundations. An area of environmental claim that is increasingly on the radar of the FTC involves the use of phrases like “carbon zero,” “net carbon zero,” “carbon free,” etc.



While the FTC Green Guides do currently address claims around carbon offsets, much has changed since the Guides were last updated in 2012. Given the FTC’s attention and focus on reliable scientific evidence and substantiation to support environmental claims in advertising, the problem with claims around “net carbon zero” increasingly comes into focus. Due to much of the uncertainty around the effectiveness of certain types of carbon offsets, many of the current “net carbon zero” claims by brands are relying on modeling, and not actual substantiation.

To what extent the FTC allows modeling in place of actual substantiation when it comes to “net carbon zero” claims will likely be a hotly contested area of debate when the FTC Green Guides are opened for a new round of revisions.

“One of the areas where you see a lot of action by the FTC is on the use of seals and/or certifications by brands. It’s not enough just to say you have the seal and/or certification and to actually have it - if the FTC thinks the seal and/or certification itself is meaningless they may challenge its usage as misleading.” - Len Gordon, Partner, Venable LLP

How Does the National Advertising Division (NAD) Review Environmental Claims In Advertising?

BBB National Programs’ National Advertising Division (NAD) is the centerpiece of the advertising industry’s system of self-regulation. Founded in 1971, NAD is celebrating its 50th anniversary this year. NAD reviews misleading or deceptive advertising in a variety of ways, including competitor challenges as well as cases opened after complaints from consumers, local BBB’s or on its own initiative.

The NAD has a strong track record in getting companies to comply with NAD recommendations - according to Laura Brett, VP, National Advertising Division, BBB National Programs, 90 to 95% of companies that participate in the process comply with NAD recommendations. The voluntary process does not allow for monetary relief but does get meaningful support from the FTC as any unresolved complaints are referred to the FTC for investigation. The FTC has a strong track record of following up on referrals.

In the past decade, NAD estimates it has reviewed 40-50 cases involving environmental claims in advertising. While there were several cases in the 2010 to 2012 period, there was a lull in new cases involving environmental claims in advertising from 2012 to 2018. Starting in



2018, cases starting picking-up again, and the NAD expects there to be renewed interest in this area going forward.

“Just because we’ve opened a case doesn’t mean that we’ve found the advertising to be misleading.” - Laura Brett, VP, National Advertising Division, BBB National Programs

“Once you see something become a priority for consumers, the response of course is for the industry to offer products that meet that demand, and I think that is why we have seen an increase in challenges to environmental claims, a high-profile issue that a lot of consumers are concerned about,” said Ms. Brett.

“Companies are just trying to meet consumer demand and so they’re putting out products that they think are easier on the air or more environmentally friendly and that’s certainly a good thing, and we want to encourage that. But we need to make sure that the claims that are being made are true, and that consumers are getting the benefit they think they’re getting.”

One area that the NAD is really starting to take a closer look at is the use of “aspirational” claims in environmental marketing. Aspirational claims could take various forms, but one form is the increasing use of claims around “net zero carbon emissions.”

These types of claims often can be difficult to substantiate. The NAD expects to examine these types of claims more closely in the future to see if modeling provides reliable support for such claims and whether the claims can be made in a way that is truthful and transparent to consumers.

“Consumers understand that aspirations may not be achieved, but they also understand the message that the company is trying to achieve with these goals and has set goals that are feasible and achievable,” said Ms. Brett.

What Are Ecolabels And What Should Agencies And Brands Know When Obtaining Them And When Using Them In Advertising?

While the term “ecolabel” might not have a completely agreed-upon definition, it’s generally understood to mean a voluntary method of environmental performance certification and labeling. And there are a lot of them out there.

The [Ecolabel Index](#), a global directory of ecolabels, identifies over 400 active ecolabels



globally, and over 200 ecolabels active domestically. Some of the more well-known ecolabels in use domestically include B Corporation, ENERGY STAR, Fairtrade, Forest Stewardship Council (FSC), Leaping Bunny, LEED Green Building Rating System, Marine Stewardship Council, Rainforest Alliance Certified, and USDA Organic.

The FTC covers the use of ecolabels in advertising both under the FTC Green Guides as well as the FTC Endorsements Guides (note that the FTC refers to ecolabels as “seals and certifications” under the Green Guides). As there are so many ecolabels out there, it can be very difficult to know which ones have value to consumers, actually have merit and are not merely “greenwashing.”

There is wide variation in how ecolabels are managed and structured. Some are managed by federal agencies, but most are managed by private sector organizations. Some rely on self-attestation by businesses, and some require rigorous third-party audits. Many are very specific to a certain category of consumer goods, but some are broad enough to include many different types of businesses.

For ecolabels managed by federal agencies (i.e. the EPA and USDA manage several ecolabels), there can be added benefits to obtaining third party certification to some ecolabels when federal purchasers are required to procure products and/or services bearing these labels. The General Services Administration’s [Green Procurement Compilation Tool](#) offers a comprehensive list of ecolabels and standards by product and service category when used in federal procurement.

For many federal agency backed ecolabels, a business that contracts with the federal government can be awarded extra points when competing for federal contracts if they have certain ecolabels.

How Does The Environmental Protection Agency (EPA) Create Its Own Ecolabels And How Do They Work With The FTC On Setting Standards For Environmental Claims In Advertising?

The EPA provides additional guidance for questions and topics not yet covered by the FTC Green Guides. For example, while the FTC Green Guides currently cover this topic, the EPA’s Green Power Partnership Program can help agencies and brands navigate more complex questions about claims around renewable energy use. For instance, the Green Power Partnership Program encourages all suppliers, buyers and consumers to substantiate any claims that their electricity was generated from renewable resources using market



instruments called renewable energy certificates.

The EPA also offers several [different ecolabels](#) that are designed to help consumers or institutional purchasers find more sustainable products. Some of these EPA-backed ecolabels include:

- ENERGY STAR - focused on energy efficient products.
- WaterSense - for water efficient products.
- Safer Choice - for products containing safer chemicals.
- Smartway Transport Partnership Program - for fleets with reduced emissions.
- SNAP - for products containing chemicals with minimal impact on ozone depletion or the climate.

Each of these ecolabels has its own method for getting products certified as meeting the criteria and then allowing use of the ecolabel. [The EPA's Environmentally Preferable Purchasing Program](#) also leverages some of the good work being done in the private sector by assessing and recommending use of certain private sector managed ecolabels for use in federal purchasing.

Federally managed ecolabels use an array of approaches to ensure products and services bearing their labels are in conformance with their performance criteria. For instance, ENERGY STAR has a comprehensive logo use monitoring process. All products bearing the EPA WaterSense ecolabel are certified by an EPA licensed certifying body, and companies agree to use the label and marks correctly and provide data on program participation and certified products shipped to the US.

"Just as the FTC is responsible for policing claims, the EPA's ecolabel programs internalize its requirements throughout the process - from third-party certification through a rigorous product testing process - to ensure claims are accurate." - Holly Elwood, Senior Advisor, Environmentally Preferable Purchasing Program, EPA

While the FTC has broad authority over environmental claims in advertising, the EPA does retain enforcement authority over the use of its ecolabels, although that enforcement authority can vary from ecolabel to ecolabel. For instance, to ensure consumer confidence in the ENERGY STAR ecolabel, the EPA requires that:



- All ENERGY STAR products must be third-party certified.
- ENERGY STAR partners must certify product models prior to associating the label or marketing them as ENERGY STAR.
- All ENERGY STAR products are subject to post-market verification testing administered by EPA-recognized certification bodies.
- Products that fail verification testing are disqualified from using the ENERGY STAR label.

For the EPA's WaterSense ecolabel, the EPA vigorously protects its registered trademarks, and reserves the right to refer egregious violators to not only the EPA's General Counsel, but also the Department of Justice. The WaterSense program also works with U.S. Customs and Border Protection as necessary.

"Approximately half (45%) of U.S. households knowingly purchased an ENERGY STAR labeled product in the past year. Of these purchasers, about 74% report the label as influential in their purchasing decision. Eighty percent of households report that they are likely to recommend products that have earned the ENERGY STAR to friends and approximately 27% of these households reported they were "extremely" likely to recommend ENERGY STAR labeled products." – Holly Elwood, Senior Advisor, Environmentally Preferable Purchasing Program, EPA

Why Should Advertising Agencies And Brands Obtain Ecolabels At All?

While much of the paper thus far has focused on what agencies and brands should know when using ecolabels (i.e. seals and certifications) in their advertising, the more existential question remains - why should agencies and brands consider obtaining ecolabels at all? The reasons are diverse, and sometimes even a bit surprising.

As previously mentioned, the obtainment of certain ecolabels can be a benefit for agencies and brands that engage in bidding for federal contracting opportunities. For instance, under the Obama Administration, federal agencies were required to procure products meeting EPA recommended standards and ecolabels, but that use became voluntary under the Trump Administration. The Biden Administration has indicated an increased focus on federal



sustainable procurement to help meet key Administration environmental priorities.

While it's beyond the scope of this paper, it's also likely that the obtainment of certain ecolabels are highly beneficial for those involved with state, city and even international public purchasing programs.

But contracting opportunities aside, many agencies and brands choose to obtain ecolabels for reasons that go far beyond that. One of the most popular ecolabels with a growing roster of participants is the [B Corp certification](#). While most ecolabels are somewhat specific to a certain area (i.e. cleaning products, energy usage, construction, logging, etc.), the B Corp certification requires that participants look across their business holistically, and consider the welfare of diverse stakeholders from employee well-being to environmental impact.

"Becoming a B Corp has been huge for us in hiring. Virtually every person who has come to us has said that it was one of the main reasons that they were attracted to us, because it was shorthand for what kind of people they'd be working with." - Carol Russell, CEO, Russell Herder

Increasingly, many agencies and marketing communications firms are choosing to become [B Corp certified](#). While there is still some confusion in the marketplace about what exactly a B Corp is (it's actually both a certification and a legal status in most states, but not all companies that obtain the certification go on to obtain the legal status for various reasons), the B Corp is becoming one of the most recognized ecolabels in the marketplace. Companies such as Patagonia, Ben & Jerry's, Athleta, Tillamook, S'well, Tom's of Maine, and Allbirds are all B Corp certified.

For agencies that choose to become B Corp certified, the process is not easy. The certification process requires much investigation and data gathering, particularly in areas concerning corporate governance, community engagement, environmental impact, and employee welfare and equity.

For agencies, the environmental impact assessment component is perhaps not nearly as onerous as companies in the packaged goods business with the accompanying supply chain sustainability issues. But even the agencies who've become B Corp certified have found room for improvement on the environmental impact front by advocating for better recycling programs, reducing unnecessary business travel, paying more attention to building

energy efficiency, opting for better cleaning products, introducing composting programs, purchasing from suppliers that are B Corp certified themselves, etc.

“We have an entire practice that’s focused on helping clients with their purpose and sustainability goals. That often involves synthesizing and pulling together disparate strategies across a client’s brand, and making sure their sustainability goals not only engage their employees to drive innovation, but of course work to win the hearts and minds of their consumers. As an agency that has become B Corp certified and given a lot of thought to achieving meaningful sustainability, we’re in a really good position to help our clients do the same.” - Lindsey DeWitte, EVP, Purpose & Sustainability, Barkley

As more agencies have become B Corp certified, the list of benefits both anticipated and unanticipated has continued to grow. Some of the benefits recognized include:

- Becoming a B Corp certified company gives the agency greater credibility and positioning when working with existing or prospective clients who are interested in becoming a more sustainable and environmentally aware brand themselves. The B Corp certification shows that the agency lives its values and understands what the client is trying to achieve.
- Agencies increasingly find that becoming a B Corp certified company helps them with recruiting and hiring. Prospective employees are often looking to work for employers that match their values.
- While having to review so many of the agency’s practices from business travel to supplier diversity, agencies are finding new ways to save money simply by adhering to different ways of doing business.
- One aspect of the B Corp certification process is taking an analytical look at how the agency engages with the community, and what kind of net positive impact is being had or could be had. That process has really led agencies to be more engaged with the community, and subsequently, given agencies more insight into local market conditions and opportunities.

“Since we started displaying our B Corp certification logo on our website and our materials over the past couple of years, it’s gone from clients saying what is a B Corp to clients saying oh, wow, you guys are a B Corp that’s really neat, tell me more.” - Melissa Palmer, CFO/COO, Butler/Till



As the ranks of B Corp certified companies continue to grow, the public awareness and recognition of a B Corp certification as a quality ecolabel will also continue to grow. It's also interesting to note that the B Corp certification appears to be evolving into a quality mark that has value in both B2B and B2C contexts (many ecolabels are really B2B as they tend to be indicators for buyers in manufacturing supply chains).

With consumer and regulatory interest in environmental issues at an all-time high, agencies and brands will be fording more perilous waters in the years ahead as they work to not only shape their brands to address the concerns of the times, but also to communicate that vision to existing and prospective consumers.

As climate change concerns continue to dominate headlines around the globe, consumers have begun to look more critically to brands to be leaders in developing environmentally-friendly products and services. And as brands and agencies seek to communicate these new benefits to their customers, they should expect to be held accountable for any benefits claimed, both by consumers and regulators.



A SPECIAL THANKS TO THE FOLLOWING PARTICIPANTS:

Len Gordon, Partner, **Venable LLP**

Holly Elwood, Senior Advisor, Environmentally Preferable Purchasing Program, **EPA**

Laura Koss, Assistant Director, Division of Enforcement, **FTC**

Laura Brett, VP, National Advertising Division, **BBB National Programs**

Carol Russell, CEO, **RussellHerder**

Melissa Palmer, CFO/COO, **Butler/Till**

Lindsey DeWitte, EVP, Purpose & Sustainability, **Barkley**

