

Preventing Greenwashing from Becoming Mainstream: 2022 Revisions to the FTC's Green Guides

Emily Binger
Student Fellow

Institute for Consumer Antitrust Studies
Loyola University Chicago School of Law

I. Conscious Consumerism and Greenwashing

Conscious consumerism is on the rise, and companies have noticed. Conscious consumerism is the practice of participating in the economy with more awareness of how one's consumption impacts society at large.¹ Shopping sustainably, with the intent to preserve the environment, is one of the most prevalent ways in which shoppers worldwide are consuming more deliberately.² According to the U.S. Chamber of Commerce, consumers in the U.S. alone were projected to spend up to \$150 billion on sustainable products by the end of 2021—or twenty-five percent of all goods sold.³ Recent studies have found that, on average, over one third of the population is willing to pay more for sustainable products or services, and those willing to pay more would accept a twenty-five percent premium on average.⁴ What's more, over seventy-

¹ See Sam Mesquita, *Conscious Consumerism: What it is, Why it Matters, and How to Become a More Conscious Consumer*, PEPP. BUS. BLOG (May 27, 2021), <https://bschool.pepperdine.edu/blog/posts/conscious-consumerism.htm#:~:text=The%20consumer%20model%20is%20constantly,%2C%20economic%2C%20and%20environmental%20impact> (defining conscious consumerism as buying practices driven by a commitment to making purchasing decisions that have a positive social, economic, and environmental impact).

² A recent Nielsen study reported that 81% of global respondents feel strongly that companies should help improve the environment. NIELSEN, *SUSTAINABLE SHOPPERS BUY THE CHANGE THEY WISH TO SEE IN THE WORLD 5* (2018), <https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/global-sustainable-shoppers-report-2018.pdf> [hereinafter NIELSEN BUY THE CHANGE REPORT].

³ See Julia Wilson, *Sustainability is a Long-Term Growth Opportunity with Consumers*, U.S. CHAMBER OF COM. FOUND. (July 19, 2019), <https://www.uschamberfoundation.org/blog/post/sustainability-long-term-growth-opportunity-consumers> (noting that from 2018 to 2017, sales of sustainable products grew by almost 6%, higher than their non-sustainable competitors); see also Jeff Gelski, *Sustainable Product Market Could Hit \$150 Billion in U.S. by 2021*, FOOD BUS. NEWS (Jan. 10, 2019), <https://www.foodbusinessnews.net/articles/13133-sustainable-product-market-could-hit-150-billion-in-us-by-2021#:~:text=New%20York-based%20Nielsen%20forecasts,22%25%20of%20total%20store%20sales> (stating that in 2019, Nielsen forecasted that the sustainable product market to reach somewhere between \$142.4 billion and \$150.1 billion by 2021).

⁴ See NIELSEN BUY THE CHANGE REPORT, *supra* note 2, at 10; see also SIMON KUCHER & PARTNERS, *GLOBAL SUSTAINABILITY STUDY 2021: INITIAL INSIGHTS 4*, 24 (October 2021), https://www.simon-kucher.com/sites/default/files/studies/Simon-Kucher_Global_Sustainability_Study_2021.pdf; see also CGS, 2019

five percent of Millennials and GenZ, those born from 1981 to 2012, are willing to pay more for a sustainable product.⁵

To meet this public demand, corporations across industries are employing green marketing strategies to help gain competitive advantage and attract ecologically conscious consumers. However, not all green marketing claims accurately reflect companies' environmental conduct. Such inaccurate claims are known as "greenwashing", a form of deceptive marketing in which a company, product, or business practice is falsely or excessively promoted as being environmentally friendly.⁶ Companies engaged in greenwashing typically exaggerate benefits and omit from their marketing a wide variety of additional environmental considerations in an attempt to win business from consumers.⁷ These deceptive or misleading claims can be difficult to distinguish from genuine claims, and may present in several forms. A company may promote an environmental program or product while its core business is inherently polluting or unsustainable, or utilize arguments, such as *100% natural*, *recyclable*, or *biodegradable*, that are false or trivial, rather than credentials of actual environmental significance. Buzzwords like

U.S. CONSUMER SUSTAINABILITY SURVEY 1 (2019),

https://www.cgsinc.com/sites/default/files/media/resources/pdf/CGS_2019_Retail_Sustainability_infographic.pdf [hereinafter CGS, 2019 U.S. CONSUMER SUSTAINABILITY SURVEY].

⁵ See D. Tighe, *U.S. consumer willingness to pay for socially compliant products by generation 2018*, STATISTA (Feb. 4, 2022), <https://www.statista.com/statistics/936491/shoppers-who-would-pay-more-for-sustainable-products-by-generation-us/> (showing that seventy-five percent of Millennials and eighty-seven percent of Generation Z consumers are willing to pay extra for sustainable products); <https://www.globenewswire.com/news-release/2019/01/10/1686144/0/en/CGS-Survey-Reveals-Sustainability-Is-Driving-Demand-and-Customer-Loyalty.html>; <https://sgbonline.com/consumers-willing-to-pay-up-for-sustainability/#:~:text=According%20to%20CGS%202019,pay%20more%20for%20sustainable%20products.&text=Gen%2DZ%20was%20found%20to,compared%20to%20other%20age%20groups>

⁶ *Greenwash*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/greenwash> (last visited Mar. 17, 2022); *Greenwashing*, MERIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/greenwashing> (last visited Mar. 17, 2022); *Greenwashing*, BRITANNICA, <https://www.britannica.com/topic/greenwashing> (last visited Mar. 17, 2022).

⁷ For example, was there any pollution during the manufacturing phase? What are the aspects of the product that aren't made of recycled content—are they also environmentally friendly?; See also *Companies Accused of Greenwashing*, TRUTH IN ADVERTISING: CONSUMER NEWS, <https://truthinadvertising.org/articles/six-companies-accused-greenwashing/> (April 2021), for one detailed, updated list of some companies that have been accused of not being as environmentally friendly as advertised.

“green,” “environmentally-friendly,” “natural,” and “sustainable” have no clear definition, or any widely recognized standard to warrant their use. A soap marketed as “natural” can still pollute waterways and generate plastic waste. Without specific evidence of the properties and practices that make them true, these words indicate little about the real sustainability of a given product.

Consumption is now a social and environmental issue. Through the use of misleading labels and marketing strategies, companies seek to profit off shoppers’ growing interest in conscious consumerism—without making meaningful changes to their manufacturing and production practices. By inaccurately portraying their products as environmentally friendly, consumers are deceived into feeling as though they are making the greener choice by purchasing from them. The United States Federal Trade Commission (FTC), through its Guides for the Use of Environmental Marketing Claims (Green Guides), addresses the problem of greenwashing.⁸ Updated most recently in 2012, and on schedule for review in 2022, the Green Guides remain the most significant policy framework for environmental marketing in the U.S.⁹ Yet, the Guides’ true regulatory effect is limited, enforcement for violations has been minimal, and the guidance they provide is outdated and lacks the depth and clarity needed to be truly effective. As a result, the practice of greenwashing continues to grow in the U.S., leaving the American public inadequately protected against false environmental claims. More comprehensive guidelines must be put in place if the U.S. is to effectively hold corporations accountable and allow citizens to make informed decisions.

II. The Harms of Greenwashing

⁸ 12 C.F.R. § 260.1–.17 (2022).

⁹ John Gardella, *ESG, PFAS and Emerging Chemicals: FTC Taking Aim?*, NAT’L L. REV. (Jan. 26, 2022), <https://www.natlawreview.com/article/esg-pfas-and-emerging-chemicals-ftc-taking-aim>.

Greenwashing, a term coined in 1986 by American environmentalist Jay Westerveld, is not a recent phenomenon.¹⁰ Starting in the late 1980s and early 1990s, manufacturers responded to a growing environmentalist demand by increasingly using green marketing claims.¹¹ Between 1989 and 1990, green marketing claims on labels more than doubled, and claims in TV and print advertising more than tripled.¹² However, although greenwashing has been around for decades, its use has sharply escalated in recent years as companies scramble to meet changing generational expectations for greener products and services.¹³

Willingness to pay a premium for sustainable products and the associated market growth has incentivized companies to promise “ecofriendly” products but deliver goods or services in the most cost-effective way possible, regardless of environmental impact.¹⁴ Greenwashing targets information-overloaded consumers who may not have the time to research, or access to, truthful information. Consumers may believe they are making the right purchasing decisions for the environment, but instead are paying inflated prices for less-than sustainable products. As a result, greenwashing leads citizens to make choices which harm the environment more than they

¹⁰ Lauren Mullen, *Greenwashing’s Sneaky Place in Modern Consumerism*, U. COLO.: ENV’T CTR. (Nov. 27, 2020), <https://www.colorado.edu/ecenter/2020/11/27/greenwashings-sneaky-place-modern-consumerism>. Jay Westerveld coined the term “greenwashing” in 1986 in response to a hotel’s efforts to encourage guests to help the environment by reusing towels. *Id.* While the hotel’s stated purpose was to reduce water, energy, and detergent use, Westerveld suspected its true motivation was profit. *Id.*

¹¹ Glenn Isreal, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims*, 20 B.C. ENV’T AFF. L. REV. 303, 303 (1993).

¹² *Id.*

¹³ See Don-Alvin Adegeest, *42 percent of companies exaggerate sustainability claims, says new report*, FASHION UNITED (Feb. 2, 2021), <https://fashionunited.uk/news/fashion/42-percent-of-companies-exaggerate-sustainability-claims-says-new-report/2021020253349>; see also Tiffany Hsu, *Skepticism grows over products touted as eco-friendly*, LA TIMES (May 21, 2011, 12:00 AM), <https://www.latimes.com/business/la-xpm-2011-may-21-la-fi-greenwash-20110521-story.html> (explaining that greenwashing is reaching “epidemic proportions”).

¹⁴ See Magali A. Delmas & Vanessa Cuerel Burbano, *The Drivers of Greenwashing*, 54 Cal. Mgmt. Rev. 63, 71–72 (2011) (explaining that the greater the perceived consumer and investor pressure for environmentally friendly firms, the more likely a firm who is not environmentally friendly is to greenwash) [hereinafter *The Drivers of Greenwashing*]; see also Judd F. Sneirson, *Shareholder Profits and the Sustainable Corporation*, 46 WAKE FOREST L. REV. 541, 556 (2011) (discussing how firms greenwash in order to maximize short-term profit).

realize. Such misdirection leaves consumers unintentionally contributing to pollution while companies reap economic benefits.

Additionally, a consumer trust problem has emerged.¹⁵ The skyrocketing incidence of greenwashing can have significant negative effects on consumer confidence in green products,¹⁶ which could erode the consumer market for green products and services.¹⁷ Distinguishing between a true green claim and greenwashing is difficult for consumers due to their inability to confirm the claim and lack of sophisticated knowledge about certain environmental attributes.¹⁸ Thus, by tainting the product information received, greenwashing confuses consumers and decreases consumer confidence in all green products.¹⁹ Green cynicism obstructs true green marketing, leading real green claims to suffer from greater skepticism due to consumer difficulty in differentiating the reliability of green marketing initiatives.²⁰ In fact, recent studies have found that perceived greenwashing puts consumers on high alert, subsequently decreasing their concern for the environment due to fear of being duped.²¹

¹⁵ See *The Drivers of Greenwashing*, *supra* note 14, at 64–65; see also Szerena Szabo & Jane Webster, *Perceived Greenwashing: The Effects of Green Marketing on Environmental and Product Perceptions*, 171 J. BUS. ETHICS 719, 739 (2021).

¹⁶ See Menno D. T. de Jong, Gabriel Huluba, & Ardion D. Beldad, *Different Shades of Greenwashing: Consumers' Reactions to Environmental Lies, Half-Lies, and Organizations Taking Credit for Following Legal Obligations*, J. BUS. & TECH. COMM'N (2019), <https://doi.org/10.1177/1050651919874105> (explaining that research on the effects of greenwashing on consumers shows that greenwashing, when discovered, has negative effects on consumers' attitudes and behavioral intentions toward the brand or organization).

¹⁷ Sebastião Vieira de Freitas et al., *Concepts and Forms of Greenwashing: A Systematic Review*, 32 ENV'T SCI. EUROPE 1, 2 (2020) [hereinafter *Concepts and Forms of Greenwashing*]

¹⁸ See Saeed M.Z. A. Tarabieha, *The impact of greenwash practices over green purchase intention: The mediating effects of green confusion, Green perceived risk, and green trust*, 11 MGMT. SCI. LETTERS 451, (2021) 451, 452 (explaining that the use of ecological words and phrases without a clear or consistent interpretation is one cause of confusion).

¹⁹ *Id.* at 453 (stating that deceptive advertising may cause customers to suspect Green products, thus “destroying the industry”).

²⁰ See Anne Brouwer, *Revealing Greenwashing: A Consumers' Perspective* (International Conference on Sustainability, Technology and Education, 2016). The study notes that this segment was considered to be more socially, cultural, ethically and environmentally involved than other consumer segments. *Id.*

²¹ See Cagri Bulut et al., *The Effect of Environmental Concern On Conscious Green Consumption of Post-Millennials: The Moderating Role of Greenwashing Perceptions*, 22 YOUNG CONSUMERS 306, 313–314 (2021) (finding that “when the concern on green products is high, the awareness of perceiving that “if the product is

Greenwashing has a greater societal cost than other deceptive marketing practices; it not only affects consumers and companies but the environment as a whole. When companies effectively market their products as better for the environment than they truly are, consumers are likely to continue purchasing from those companies and, therefore, are helping to perpetuate non-sustainable business practices and products. By impeding consumers' ability to make truly environmentally friendly decisions and fostering confusion and skepticism towards all products touting green attributes, including those that are genuinely more environmentally friendly, greenwashing threatens the progress of real sustainability efforts and harms consumers and businesses.

III. Federal Regulation of Greenwashing

After two decades investigating claims of misleading and deceptive environmental advertising on a case-by-case basis, the FTC responded to state and consumer concerns by creating the Green Guides in 1992.²² The Guides reflect the FTC's interpretation of Section 5 of the FTC Act as it relates to "unfair or deceptive" environmental marketing claims.²³ They do not preempt federal, state, or local laws and cannot be used independently to bring an action. However, while the Guides do not have the force and effect of law, failing to follow the guidance exposes marketers to liability.²⁴ Violation of the Green Guides may result in a warning letter, a cease and desist order or, for repeat offenders, monetary penalties.²⁵

actually green or pretending to be green" is high. When the post-millennials take the greenwashing perception into account, their environmental concern has lower effects on their green behavior. Greenwashing perception decreases the effects of environmental concern on green behavior."); see also Szerena Szabo & Jane Webster, *Perceived Greenwashing: The Effects of Green Marketing on Environmental and Product Perceptions*, 171 J. BUS. ETHICS 719, 739 (2021).

²² See Robin M. Rotman et al., *Greenwashing No More: The Case for Stronger Regulation of Environmental Marketing*, 72 ADMIN. L. REV. 417, 421–23 (2020) (explaining that the FTC began deploying its enforcement tools under Section 5 of the FTC Act to address unsubstantiated and misleading environmental claims in the 1970s).

²³ 15 U.S.C. § 45 (2022).

²⁴ Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62, 122 (Oct. 11, 2012).

²⁵ <https://www.natlawreview.com/article/esg-pfas-and-emerging-chemicals-ftc-taking-aim>

The Guides set forth the Commission’s “current views about environmental claims” in order to help “marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act.”²⁶ To do so, the Guides explain how reasonable consumers are likely to interpret environmental claims and describe the basic elements necessary to substantiate such claims.²⁷ They set forth four general principles that apply to environmental claims about products, packaging, or services, when the claims are made in the marketing or sale of an item or service to the public.²⁸ First, to avoid deception, qualifications and disclosures related to environmental claims should be “clear, prominent, and understandable.”²⁹ Second, marketers should make clear whether their claim pertains to the entirety of a product, just one component of the product, or just the packaging.³⁰ Third, claims should not overstate, directly or by implication, an environmental attribute or benefit.³¹ Lastly, marketers should ensure that comparative claims are clear and substantiated.³² To supplement these overarching principles, the Commission provides examples of the permissible use of “general” environmental benefit claims, such as a claim that a product is “eco-friendly” or that a product's packaging is “greener” than previous packaging.³³

In addition to these general principles, the Green Guides provide specific guidance on the use of particular environmental claims,³⁴ including standards for: carbon offsets, green

²⁶ 16 C.F.R. § 260.1(a) (2022); *Environmentally Friendly Products: FTC’s Green Guides*, FTC, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides> (last visited Mar. 10, 2022).

²⁷ See 16 C.F.R. § 260.1(d) (2022) (“The guides are based on marketing to a general audience. However, when a marketer targets a particular segment of consumers, the Commission will examine how reasonable members of that group interpret the advertisement. Whether a particular claim is deceptive will depend on the net impression of the advertisement, label, or other promotional material at issue.”).

²⁸ 16 C.F.R. § 260.1(c) (2022).

²⁹ *Id.* § 260.3(a).

³⁰ *Id.* § 260.3(b).

³¹ *Id.* § 260.3(c).

³² *Id.* § 260.3(d).

³³ *Id.* § 260.4(a)–(d).

³⁴ *Id.* § 260.1(d).

certifications and seals of approval, compostable claims, degradable claims, free-of claims, non-toxic claims, ozone-safe and ozone-friendly claims, recyclable claims, made of recycled content claims, refillable claims, made with renewable energy claims, made with renewable materials claims, and source reduction claims.³⁵ For each of these thirteen categories, the Guides supply illustrative examples to explain how potentially deceptive claims may be qualified to avoid consumer confusion.

a. *Shortcomings of the Green Guides: Dated and Lacking*

The FTC revises the Green Guides infrequently. Last updated in 2012, the Guides are ripe for significant overhaul to keep pace with a changing marketplace.³⁶ Over the past decade, environmental claims have grown dramatically, yielding greater potential for actionable greenwashing.³⁷ Given the rapid developments seen in the last ten years, such as technological advancements, scientific findings, and the changing forms of greenwashing and perceptions of today's consumers, the Guides are outmoded. For example, since the last update, scientific consensus around terms like “biodegradable” and “bioplastics” has changed after recognizing that these materials may do more harm than good.³⁸

In addition to being outdated, there are a few commonly used terms that the FTC chose not to interpret in during the 2012 revisions. For example, the guides do not specifically cover the term “sustainable.”³⁹ When considering the topic for the 2012 updates, although recognizing

³⁵ *Id.* § 260.5–17.

³⁶ John Gardella, *ESG, PFAS and Emerging Chemicals: FTC Taking Aim?*, NAT'L L. REV. (Jan. 26, 2022), <https://www.natlawreview.com/article/esg-pfas-and-emerging-chemicals-ftc-taking-aim>.

³⁷ *Id.*

³⁸ Evan Jasica, *The Threat of Greenwashing and the Need for Substantive Regulation*, RICE U.: BAKER INST. FOR PUB. POL'Y (Nov. 12, 2021), <http://bisf.bakerinstitute.org/rjpp-short-form/2021/11/12/the-threat-of-greenwashing-and-the-need-for-substantive-regulation> (explaining that studies suggest that lifecycle carbon costs of biodegradable plastics can often exceed any benefit they offer. The production of biodegradable plastics can sometimes be more carbon intensive than normal plastic production, and most still require industrial recycling processes in order to fully break down.).

³⁹ Monica J. Stover & Barnes & Thornburg LLP, *Environmental Marketing Claims and the FTC's "Revised Green Guides"*, 37 MICH. ENV'T L. J. 8, 9 (2020).

the proliferation of such marketing, the FTC declined to address sustainability claims, stating it lacked a sufficient basis on which to provide meaningful marketing guidance.⁴⁰ However, the FTC qualified that this lack of guidance “does not mean unscrupulous marketers are free to deceive consumers,” and reiterated that “[m]arketers are still responsible for substantiating consumer’s reasonable understanding of these claims.”⁴¹ The FTC further noted that this is an area that it would continue to research and monitor.⁴²

The FTC also declined to address the use of the terms “natural” and “organic” in marketing claims, despite the rapid growth in their utilization.⁴³ With respect to “organic” claims, the FTC decided to defer to the United States Department of Agriculture (USDA). The USDA currently regulates the use of the term “organic” in advertising through their “National Organics Program,” which provides a comprehensive regulatory framework governing the use of the term with respect to agricultural products.⁴⁴ The FTC did not wish to issue conflicting or duplicative guidance.⁴⁵ As for “natural” claims, as well as “sustainable” claims, the Commission stated that it lacked a basis to provide generally applicable guidance on these claims, given they may be used in numerous ways and convey widely different meanings depending on context.⁴⁶

⁴⁰ *Id.*; *FTC Issues its Revised “Green Guides” for Environmental Marketing Claims*, Special Alert: MGFK Law (2012), https://www.mankogold.com/assets/htmldocuments/FTC_Revised_Green_Guides.pdf.

⁴¹ Albert Cohen, *Marketing “Sustainability”: Don’t Forget the Green Guides*, SUSTAINABLE BRANDS (Feb 21, 2013, 6:00 PM), <https://sustainablebrands.com/read/marketing-and-comms/marketing-sustainability-don-t-forget-the-green-guides>.

⁴² *Id.*

⁴³ FED. TRADE COMM’N, GREEN GUIDES: STATEMENT OF BASIS AND PURPOSE 260 (2012), <http://www.ftc.gov/%E2%80%8Bos/%E2%80%8Bfedreg/%E2%80%8B2012/%E2%80%8B10/%E2%80%8Bgreen-guidesstatement.pdf> [hereinafter GREEN GUIDES: FTC STATEMENT 2012].

⁴⁴ *Guides for the Use of Environmental Marketing Claims*, 77 Fed. Reg. at 62,124.

⁴⁵ *FTC Issues Revised “Green Guides”*, FTC (Oct. 1, 2012), <https://www.ftc.gov/news-events/news/press-releases/2012/10/ftc-issues-revised-green-guides> (noting that organic claims made for textiles and other products derived from agricultural products are covered by the U.S. Department of Agriculture’s National Organic Program); *Guides for the Use of Environmental Marketing Claims*, 77 Fed. Reg. at 62,124, 63,585–86.

⁴⁶ GREEN GUIDES: FTC STATEMENT 2012 *supra* note 43, at 250, 264. As for sustainable claims, the Commission cited consumer perception evidence indicating that the claim has no single meaning to a significant number of consumers, and to some it conveys non-environmental characteristics (e.g., durable or long-lasting). *Id.* at 250. For natural claims, the Commission received only limited evidence regarding how consumers perceive natural claims.

Despite requests to define these terms, the Commission stated it does not have the legal authority to do so.⁴⁷ It remains uncertain when the FTC will provide guidance on sustainability, organic, or natural claims in the context of environmental marketing during its 2022 review of the Green Guides.

Another area that lacks clarity surrounds “climate claims,” or claims that promote the effect a product, service, or business has on greenhouse gas emissions. Climate claims—like “carbon neutral,” “climate neutral,” “net-zero,” “zero-carbon,” etc.— are ubiquitous.⁴⁸ The Guides, however, do not discuss climate claims explicitly. Instead, they offer general principles and specific guidance on carbon offsets that appear inform treatment of carbon neutrality claims.⁴⁹

IV. FTC Enforcement of the Green Guides

Despite the Guides’ non-binding status, the Commission can take action under the FTC Act for green marketing that is inconsistent with the Guides. In the two years after the 2012 Green Guides revisions were released, the FTC brought over twenty enforcement actions related to environmental marketing claims.⁵⁰ Since then, however, the number of enforcement actions

Id. at 264. Such evidence showed that consumers interpreted an unqualified natural claim as conveying a variety of messages. *Id.*

⁴⁷ See GREEN GUIDES: FTC STATEMENT 2012 *supra* note 43, at 257 (“To prevent “deceptive acts and practices” pursuant to Section 5, the Commission provides information regarding how consumers perceive terms. Here, given the wide range of meanings of “sustainable,” the Commission lacks a basis for providing this guidance.”).

⁴⁸ INT’L CHAMBER OF COMMERCE, ICC FRAMEWORK FOR RESPONSIBLE ENVIRONMENTAL MARKETING COMMUNICATIONS 2 (2019).

⁴⁹ 16 C.F.R. § 260.3(c), § 260.5.

⁵⁰ *Is Your Green Marketing Deceptive? Look to the FTC Green Guides to Limit the Risk of an FTC Enforcement Action*, INSIGHTS: VINSON & ELKINS (Mar. 24, 2021), <https://www.velaw.com/insights/is-your-green-marketing-deceptive-look-to-the-ftc-green-guides-to-limit-the-risk-of-an-ftc-enforcement-action/>.

brought per year has declined, with only a single case brought between 2019 and 2020.⁵¹ In total, the FTC has brought thirty-nine cases since the 2012 updates.⁵²

Although enforcement of the Guides has been limited, it is not nonexistent. In 2013, for example, the FTC brought five actions against companies making deceptive biodegradable plastic claims.⁵³ Later in 2013, marketers of a fuel additive were ordered to pay \$800,000 in consumer redress due to unsubstantiated claims that their “Enviro Tabs” would increase fuel efficiency, reduce emissions, and save consumers money.⁵⁴ In 2014, the FTC settled charges against a diaper manufacturer that had falsely claimed its products were “100% biodegradable,” “‘certified’ biodegradable,” and “compostable.”⁵⁵ That same year, the FTC entered a consent order with a manufacturer of plastic lumber that had “misled consumers and distributors about the recycled content, post-consumer recycled content, and recyclability of its products.”⁵⁶

Another case of note, from 2016, involved an FTC cease and desist order against a sunscreen

⁵¹ See generally *Legal Library: Cases and Proceedings*, FED. TRADE COMM’N, <https://www.ftc.gov/legal-library/> (last visited Mar. 3, 2022). According to the FTC website, such environmental cases totaled thirty-seven from 1990 to 2000, zero from 2000 to 2009, and five in 2009. *Id.*

⁵² *Id.* Of these, about 60 percent involved claims highlighting the absence of VOCs in the product or otherwise relating to the product’s emissions, biodegradable claims, and claims of natural or organic product composition. Another 20 percent of the actions were brought against major retailers for selling Rayon products incorrectly marketed as bamboo. The remaining cases included actions over the use certifications, claims as to the amount of recycled materials in the product, and false energy efficiency and or emissions claims. *Id.*

⁵³ See Press Release, Fed. Trade Comm’n, *FTC Concludes ECM BioFilms Made False, Misleading, and Unsubstantiated Claims About the Biodegradability of Plastic Products Treated with Its Additive* (Oct. 19, 2020), <https://www.ftc.gov/news-events/pressreleases/2015/10/ftc-concludes-ecm-biofilms-made-false-misleading-unsubstantiated>.

⁵⁴ Stipulated Order for Permanent Injunction and Monetary Judgment Against Green Foot Global, LLC, William C. Hyman, and Mary Ann P. Hyman at 3, 4–6, *FTC v. Green Foot Glob., LLC*, No. 2:13-cv-02064 (D. Nev. Nov. 19, 2013); see also Press Release, Fed. Trade Comm’n, *FTC Sends Refunds to Consumers Duped by Marketers Who Claimed Fuel Additive Could Drastically Increase Fuel Economy and Reduce Emissions* (Apr. 30, 2014), <https://www.ftc.gov/news-events/press-releases/2014/04/ftc-sends-refunds-consumers-duped-marketers-whoclaimed-fuel>.

⁵⁵ *Down to Earth Designs, Inc.*, 157 F.T.C. 476, 510–13 (2014); see also Press Release, Fed. Trade Comm’n, *FTC Approves Final Order Settling Charges that Down to Earth Designs, Inc. Made Deceptive Environmental Claims for its Diapers and Related Products* (Mar. 19, 2014), <https://www.ftc.gov/news-events/pressreleases/2014/03/ftc-approves-final-order-settling-charges-down-earth-designs-inc>.

⁵⁶ *N.E.W. Plastics Corp.*, 157 F.T.C. 900, 922 (2014); see also Press Release, Fed. Trade Comm’n, *FTC Approves Final Order Settling Charges That N.E.W. Plastics’ Claims for Its Plastic Lumber Products Were Misleading* (Apr. 7, 2014), <https://www.ftc.gov/news-events/pressreleases/2014/04/ftc-approves-final-order-settling-charges-new-plastics>

manufacturer that had falsely claimed its product was “100% natural.”⁵⁷ In 2018, the FTC entered consent orders against four paint companies for falsely claiming their products would not emit volatile organic compounds (VOCs) or other harmful chemicals and marketed its products using self-awarded environmental seals.⁵⁸

A developing enforcement trend is the FTC’s recent pursuit of misleading “organic” claims. In 2017, the FTC brought its first ever enforcement action for fraudulent “organic” claims in *In the Matter of Moonlight Slumber, LLC*.⁵⁹ The FTC issued a four-count complaint against Moonlight Slumber, which manufactures baby mattresses and maternity pillows, for falsely advertising its baby mattresses as “organic,” “natural,” and “plant-based,” falsely claiming it’s products contained no VOCs, and for deceptively representing that its mattresses were certified by Green Safety Shield, without disclosing it was a self-awarded designation.⁶⁰ The final consent order prohibits Moonlight Slumber from continuing to engage in deceptive environmental marketing practices and provides that it may be liable for civil penalties for future violations of the consent order.⁶¹ In 2019, the FTC brought its second enforcement action for fraudulent “organic” claims in *FTC v. Truly Organic Inc.*⁶² The FTC alleged that, from 2015 to 2019, Truly Organic made unsubstantiated “organic” claims,⁶³ including “certified organic,”

⁵⁷ Cal. Naturel, Inc., 162 F.T.C. 1066, 1070–71 (2016); *see also* Press Release, Fed. Trade Comm’n, FTC Rules California Naturel, Inc. Misled Consumers, Violated the FTC Act (Dec. 12, 2016), <https://www.ftc.gov/news-events/press-releases/2016/12/ftc-rules-californianaturel-inc-misled-consumers-violated-ftc>.

⁵⁸ *Id.* at 750–52, 761; *see also* Press Release, Fed. Trade Comm’n, FTC Approves Final Consent Orders Settling Charges That Four Paint Companies Misled Consumers Through Claims Their Products Are Emission- and VOC-Free (Apr. 27, 2018), <https://www.ftc.gov/newsevents/press-releases/2018/04/ftc-approves-final-consent-orders-settling-charges-four-paint>.

⁵⁹ 164 F.T.C. 869 (2017) (Complaint).

⁶⁰ Moonlight Slumber, LLC, 164 F.T.C. 869 (2017) (Complaint). These claims appeared on the company website and on product packaging. *Id.*

⁶¹ Moonlight Slumber, LLC, 164 F.T.C. 869, 901–04 (2017).

⁶² Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. Truly Organic Inc.*, No. 1:19-cv-23832 (S.D. Fla. Sept. 13, 2019).

⁶³ None of Truly Organic’s products had ever been certified as organic by the USDA, and some do not contain any organic ingredients at all.

“USDA organic,” “USDA certified organic,” and “100% organic ingredients,” even after Truly Organic informed the USDA that it would discontinue making such claims absent proper substantiation.⁶⁴ The consent order imposed a monetary penalty of \$1.76 million—the FTC’s first penalty collected for false “organic” claims.⁶⁵

What sets *Moonlight Slumber* and *Truly Organic* apart is that they were the first enforcement actions by the FTC to tackle the burgeoning problem of false or deceptive “organic claims.” Although “organic” claims are not expressly covered by the Guides, “the Guides’ general principles apply to these claims.”⁶⁶ Notably, however, the FTC has yet to pursue any carbon or climate related claims, despite their proliferation.

V. Modernizing the Green Guides

The FTC arguably plays the largest role in protecting consumers from greenwashing through enforcement of its Green Guides. However, the Guides’ true regulatory effect is limited, enforcement for violations has been minimal, and the guidance they provide is increasingly outdated. These downfalls leave consumers inadequately protected from the harmful realities of greenwashing. Fortunately, with the news that the FTC will undertake a review its Guides in 2022, steps to mitigate greenwashing in the U.S. appear underway. With comprehensive revisions that reflect the current landscape of environmental marketing and increased enforcement, the FTC can more effectively regulate greenwashing.

a. *Green Guide Revisions*

As previously mentioned, the 2012 Guides intentionally omitted “organic,” “natural,” and “sustainable” claims. This decision was made in order to avoid overlap with USDA guidelines as

⁶⁴ Stipulated Order for Permanent Injunction and Monetary Judgment, *Federal Trade Commission v. Truly Organic Inc.*, Case No. 1:19-cv-23832 (S.D. Fl. Sept. 18, 2019).

⁶⁵ *Id.* at 3. The Commission voted 5-0 to approve the filing of the complaint and proposed Stipulated Final Order. *Id.* at 1.

⁶⁶ GREEN GUIDES: FTC STATEMENT 2012 *supra* note 43, at 259.

well as due to lack of sufficient basis to provide meaningful guidance. However, consumer demand for organic and sustainable products continues to grow with no signs of slowing, providing great incentive for marketers to take advantage of the terms. Given this space is largely undefined and unregulated, updates to the Guides should include direction regarding “organic” claims for nonagricultural and partially nonagricultural products.

Additionally, in order to truly modernize the Green Guides, climate and carbon neutrality claims should be addressed more directly. Due to consumer and investor demand for more “green” initiatives, corporate net-zero targets and carbon neutral product offerings have proliferated.⁶⁷ Promises to reduce emissions and buzzwords like “carbon neutrality” are presented to the public with varying levels of transparency and little clarity as to what they actually mean in terms tangible steps to lower carbon footprints.⁶⁸ Examples abound: Microsoft said it would not only go carbon negative but also somehow remove all the emissions the company has ever produced.⁶⁹ Lloyds, the British financial group, pledged to cut by “more than 50 percent” the carbon emissions generated by the projects it finances by 2030.⁷⁰ BlackRock, the world’s largest institutional investor, said it would place climate change at the center of its investment strategy.⁷¹ Missing, though, is a clear answer to the question of what exactly the company would do about it and how quickly.

⁶⁷ See, e.g., *Climate Pledge Friendly Certifications*, AMAZON.COM, <https://www.amazon.com/b?node=21221608011> (last visited Mar. 14, 2021) (listing third-party certifications used by Amazon to distinguish “sustainable products” on its marketplace, including certifications for “carbon neutral,” “carbon free,” and “climate neutral” products).

⁶⁸ See David Gelles & Somini Sengupta, *Big Business Says It Will Tackle Climate Change, but Not How or When*, NY TIMES (Jan. 23, 2020), <https://www.nytimes.com/2020/01/23/business/corporate-climate-davos.html> (discussing how a group of 140 of the world’s largest companies pledged to develop a core set of common metrics to track environmental and social responsibility, without giving details about how or when).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

In the case of energy consumption and climate claims, consumers must often take the information companies provide at face value, as they lack the resources to verify the accuracy of their statements independently. As such, these claims may create consumer confusion or mislead consumers, and are vulnerable to allegations of greenwashing, prompting questions for the FTC to consider as it reviews the Guides and continues its compliance enforcement. By clarifying ambiguities in the Guides, such as those related to organic, sustainable, and carbon neutrality claims, and clearly presenting its expectations for substantiating such claims, the FTC can help to avoid unsubstantiated accusations and protect genuinely green companies.

b. Increased Enforcement

The FTC has clear authority to take enforcement actions against entities that make misleading environmental claims. Yet, since they were implemented, the Guides have seen nearly decades-long gaps in their enforcement.⁷² However, the FTC's relatively low activity level related to environmental marketing enforcement actions may reverse under the current presidential administration, because of both President Biden's stated prioritization of sustainability, renewable energy, and climate change,⁷³ and increased pressure from outside groups to bring such cases.⁷⁴ Additionally, by clarifying the ambiguities present in the 2012 Guides, the FTC will be able to more consistently evaluate green claims and bring action against unsubstantiated statements.

⁷² See generally *Legal Library: Cases and Proceedings*, FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/> (last visited Mar. 3, 2022).

⁷³ Biden made clean energy a key pledge in his election campaign last year and took the industry by surprise in the first months of his presidency by canceling the Keystone XL crude pipeline and restricting drilling on federal land.

⁷⁴ Kevin Crowley, *Chevron 'Greenwashing' Targeted in Complaint Filed With FTC*, BLOOMBERG NEWS (Mar. 16, 2021) (noting environmentalist groups' hopes that Biden will follow through with his campaign promises).

VI. Conclusion

When companies make false or misleading environmental claims about their products or services, it not only hurts consumers financially but also increases the environmental impact they sought to lessen. The Green Guides serve as a starting point, but in their current form, they are not strong enough, precise enough, or broad enough to protect consumers and the environment. With increased clarity surrounding environmental terms like “net-zero,” “sustainably-sourced,” and “carbon-free” and more stringent enforcement of greenwashing, the Green Guides could more effectively quell greenwashing practices and assure consumers they are able to make informed, environmentally conscious decisions.