



Overview of the Green Guides

Section 5 of the FTC prohibits “unfair methods of competition in or affecting commerce.”³ The Green Guides contain principles and examples concerning the application of Section 5 to common environmental marketing claims. The Guides do not bind the FTC to take enforcement actions against marketers that do not comply with its guidance, but the FTC may choose to do so.⁴ The FTC has in the past entered into consent orders with companies whose environmental marketing claims allegedly violated the Green Guides.⁵ More recently, the FTC has secured settlements with marketers who allegedly violate its guidance under Section 5 for other types of marketing claims not involving the Green Guides.⁶

The Guides contain general principles applicable to environmental marketing claims. As one example, they state that claims, labels, and disclosures should use plain language and sufficiently large type in order to be understandable to consumers and not deceptive under federal law.⁷ The Guides also contain guidance and examples for specific marketing claims (e.g., the claim that products were made using renewable energy or materials) and discrete labels (e.g., “degradable,” “refillable,” or made with “recycled content”). For each marketing claim or label, the Guides (1) explain how reasonable consumers are likely to interpret the representation, (2) describe the basic elements necessary to substantiate the representation, and (3) present options for qualifying representations to avoid deception.⁸

The FTC’s guidance includes a number of scenarios that illustrate the Commission’s views. For example, a marketer who advertises its trash bags using a “degradable” label, without any qualification, would likely mislead consumers under the FTCA. The FTC states that marketers using “degradable” labels should have competent and reliable scientific evidence that their entire product will “completely break down and return to nature (i.e., decompose into elements found in nature) within a reasonably short period after customary disposal.”⁹ Marketers generally rely on soil burial tests to show that a product will decompose in the presence of water and oxygen. Because consumers dispose of those bags in the solid waste stream, which generally leads to incineration or a landfill, the bags will not degrade in the same way or at the same rate as when they are buried. The FTC therefore recommends that the marketer clearly and prominently qualify its label with information about how fast the bags degrade and how much of the bags degrade when incinerated or disposed aboveground.¹⁰

The FTC’s Planned Update

The FTC first issued the Green Guides in 1992 and has engaged in its decennial review process three times, with the most recent update occurring in 2012. In its recent notice, the FTC presents both general and specific issues for public comment. It seeks new evidence concerning consumer perception of environmental claims, including those not covered by the Guides.¹¹ And it asks for information concerning the benefits (to consumers, to sustainable businesses) and the costs (for businesses to comply, for example) related to the Guides. The FTC also flags several specific areas “that have generated increased attention and interest over the last several years,” including existing representations about carbon offsets, “compostable” labels, and energy-use or efficiency claims.¹²

Finally, the Commission asks for evidence concerning the “overlap or conflict” between the Green Guides and other federal, state, or local laws or regulations. And it seeks evidence addressing whether the Guides have assisted in promoting “national consistency with respect to the regulation of environmental claims.”¹³ The next section describes the results of a survey that begins to address these questions.



How the Green Guides Intersect with State Consumer Protection Laws

The Green Guides do not preempt state or local consumer protection laws.¹⁴ However, **36 states and territories** have incorporated the FTC’s regulations and guidance on Section 5 of the FTCA into their state statutes or regulations in some form.¹⁵ In some cases, these statutes or regulations reference the Green Guides by name or citation. The 36 states and territories fall into four “buckets,” as **Figure 1** summarizes.¹⁶

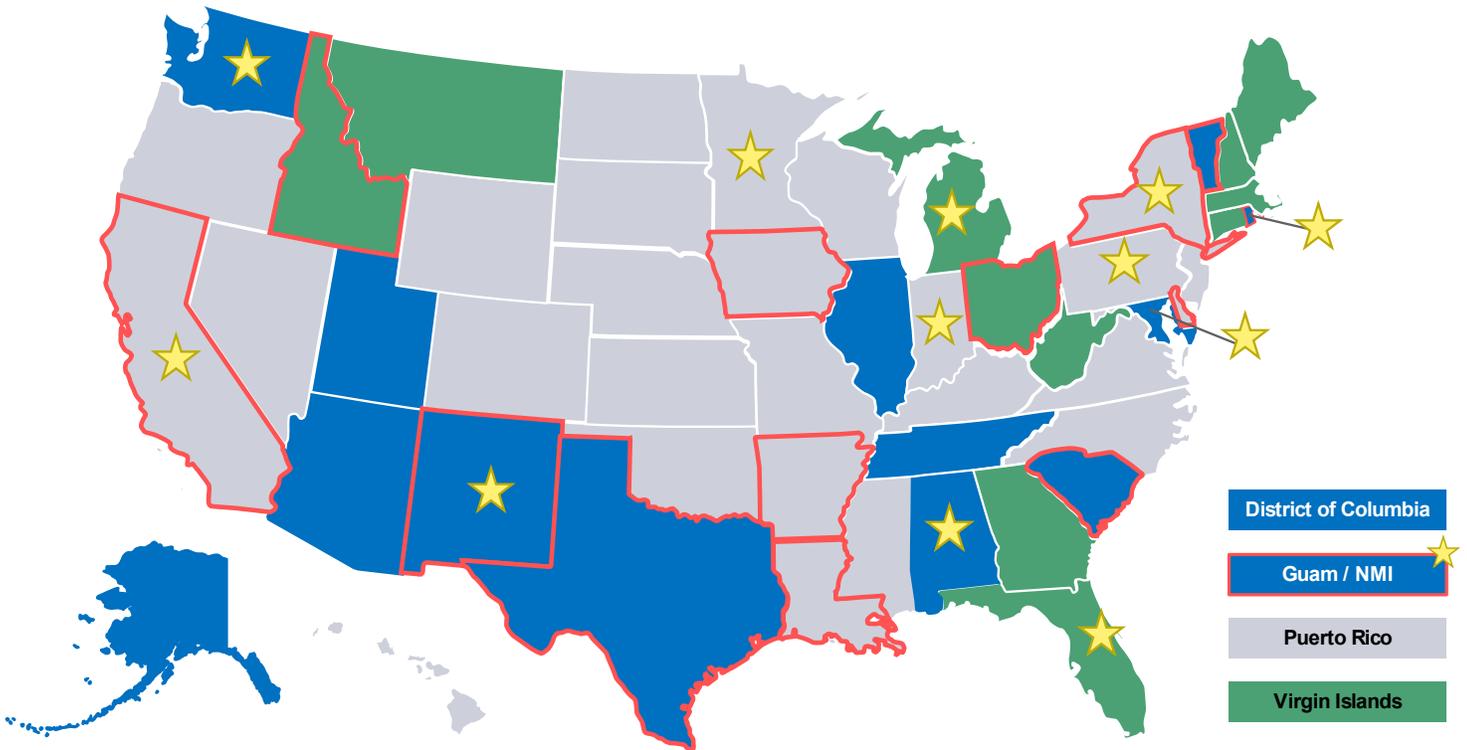
- **BUCKET 1:** Thirteen states and territories¹⁷ have incorporated the Green Guides as the standard for lawfully including environmental marketing claims on consumer products. These provisions often refer to specific terms and/or sections of the Guides. For example, New York’s regulations state that “[a] person may only use the term ‘recyclable’ on a product or package that is in conformance with Section 260.12 of the Federal Trade Commission’s ‘Guides for the Use of Environmental Marketing Claims’ published in 16 CFR Part 260.”¹⁸ Alabama’s consumer protection statute states that “no person shall distribute, sell, or offer for sale any rigid plastic container, including a plastic beverage container, labeled ‘degradable,’ ‘biodegradable,’ ‘compostable,’ or any other word suggesting the container will biodegrade” unless it complies with the FTC’s Green Guides, which discusses each of those labels.¹⁹
- **BUCKET 2:** Twenty-seven states and territories have codified a rule that the FTC’s interpretation of Section 5 of the FTCA should guide how courts and the legislature construe their state consumer protection laws. As an example, Connecticut’s unfair or deceptive acts or practices act states that “[i]t is the intent of the legislature that in construing [this section], the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 USC 45(a)(1)), as from time to time amended.”²⁰ This type of provision implicates the Green Guides as a persuasive source of authority for interpreting state consumer protection law. It was the most common type of incorporation among the states and territories.
- **BUCKET 3:** Twelve states and territories reference the FTC’s interpretations of Section 5 of the FTCA as the “floor” for state or territorial regulations concerning environmental marketing claims—if the state chooses to promulgate them. For example, Florida’s code prohibits unfair methods of competition, unconscionable acts and practices, and unfair or deceptive acts and practices. It authorizes the state’s Department of Legal Affairs to “adopt rules which set forth with specificity acts or practices that violate [this part].”²¹ And it requires that “[a]ll substantive rules promulgated under this part must not be inconsistent with the rules, regulations, and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of [FTCA Section 5].”²² Only 3 states—New Mexico, New York, and Pennsylvania—have issued regulations addressing environmental marketing claims and referencing the Green Guides.
- **BUCKET 4:** Fourteen states and territories reference the FTC’s rules, regulations, and guidance under FTCA Section 5 (which would include the Green Guides) as the standard that would

provide a *defense* against state consumer protection claims. For example, New York’s General Business Law, which prohibits unfair and deceptive trade practices, states that “[i]n any such action it shall be a *complete defense* that the act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission” or any other federal agency “as such rules, regulations or statutes are interpreted by the federal trade commission” or such agency.²³

Only 2 states out of these 14 states and territories—California and Rhode Island—reference the Green Guides by name in their statutory provisions creating a defense to liability. It’s therefore a question of state law whether complying with the Green Guides would shield a marketer from liability in the remaining 12 states or territories. In New York, a federal judge recently determined that the Green Guides were “regulations” within the meaning of the New York General Business Law’s “complete defense” provision.²⁴

FIGURE 1: Survey of State Law Connections with the Green Guides²⁵

★ Standard ■ Construction ■ Construction & Floor □ Defense



13 states/territories incorporated the Green Guides as a **standard** for violations (★)
 27 states/territories declare that the FTC’s Section 5 interpretations should guide how the courts/legislature **construe** their statutes/regulations (■ & ■ fill)
 12 states/territories incorporate the FTC’s Section 5 regulations or guidance as the “**floor**” for their state’s or territory’s regulations (■ fill)
 14 states/territories reference the FTC’s Section 5 regulations or guidance as the standard for a **defense** against claims under state or territorial law (□ outline)

Application to “Recyclable” Labels on Plastic Products

The Green Guides’ definition of “recyclable” is a strong example of how environmental marketing claims can cause consumer confusion and marketer uncertainty. Because many states incorporate the Green Guides as the standard for lawfully complying with state statutes or regulations—or establishing a defense to liability—litigation over “recyclable” labels often turns on whether marketers followed the FTC’s guidance on the term. Looking closely at recent conflicts over the “recyclable” labels illustrates some of the issues that the FTC will face as it updates the Guides. In fact, FTC Chair Lina M. Khan, in her statement on the FTC’s public review announcement, specifically noted that the recyclability of plastics is a concern: “[R]ecent reports suggest that many plastics that consumers believe they’re recycling actually end up in landfills.”²⁶ Accordingly, an issue the FTC plans to consider is whether “recyclable” labels should reflect “where a product ultimately ends up, not just whether it gets picked up from the curb.”²⁷

In the current version of the Green Guides, a “product or package shall 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.”²⁸ For example, a container burned in incinerator facilities to produce heat and power is not “recyclable,” as it cannot be processed into another product or package. The crucial aspect of the definition is that a plastic product is actually used to make another plastic product. If a product is not recyclable in some areas, then marketers in those areas “should clearly and prominently qualify” their recyclability claims to avoid deception.²⁹ Those qualifying statements could be as simple as “this product may not be recyclable in your area.”

However, research and litigation has shown that “recyclable” labels are likely to mislead consumers in practice. There is potential confusion around three main issues.

1. Theoretical vs. Practical Reuse

Many plastic products labeled “recyclable” are not actually reused to make other plastic products, as the Green Guides’ definition requires. Nationwide recycling statistics from 2021 show that between five and six percent of plastic waste was recycled.³⁰ Most types of plastics are unlikely to be collected, sorted, and reused by local recycling facilities consistent with the Green Guides’ definition of “recyclable.”³¹ However, consumers can take the label “recyclable” at face value when they purchase plastic products, as several recent court cases illustrate.

In recent cases in California,³² Illinois,³³ and New York,³⁴ consumers brought unfair and deceptive trade practices and false advertising claims under state law against marketers of plastic products labeled “recyclable.” Relying on nationwide recycling statistics, consumers in each case alleged that the products were not “recyclable” per the Green Guides and therefore the products’ labels were misleading. The cases involved several types of plastic products: plastic beverage bottles

labeled “100% recyclable,”³⁵ foam cups and plates labeled “recyclable,”³⁶ and plastic freezer bags labeled “made with recyclable polyethylene,”³⁷ as **Figure 2** illustrates. The federal judge in each case examined whether the labels on defendants’ products complied with the Green Guides’ definition of “recyclable.” Each judge reasoned that the products were “recyclable” because facilities existed that could *in theory* reuse the product—even if the product was very unlikely *in practice* to be converted into another plastic product. “Recyclable,” in one judge’s reasoning, “does not mean ‘Will Be Recycled at a Facility Near YOU!’”³⁸ The court then dismissed the plaintiff’s claims in each case.

The FTC could address this ambiguity by revising its definition of “recyclable.” The Green Guides do not define “established recycling program.” The FTC should strongly consider explaining that “establishing recycling program” means a program *currently exists* in the local community that will collect, sort, and reprocess the plastic product into a new plastic product. To support a marketing claim that a plastic product is “recyclable,” there should be evidence that reprocessing of the product takes place in the relevant market, not just that reprocessing could occur somewhere in the country. Consistent with its general guidance for all environmental marketing claims,³⁹ the FTC should place the burden on marketers to verify that all steps of the recycling process occur in practice for a product before labeling that product as “recyclable.”

FIGURE 2: Example Labels from Recent Cases



Plastic Water Bottles in *Swartz* (Cal.)⁴⁰



Plastic Water Bottles in *Duchimaza* (N.Y.)⁴¹



Plastic Plates, Cups, and Freezer Bags in *Curtis* (Ill.)⁴²

2. Qualified vs. Unqualified Labels

It's also ambiguous when marketers should qualify their "recyclable" labels. Although the Green Guides instruct marketers to qualify recyclable claims to avoid deception, they may make "unqualified" claims when recycling facilities are available to a "substantial majority" (which the FTC defines as at least 60 percent) "of consumers or communities where the item is sold."⁴³ The Green Guides do not define "communities" or provide guidance on how to evaluate the pool of consumers for a product.

A recent case illustrates that challenges that arise from the FTC's guidance on qualification. In *Duchimaza v. Niagara Bottling*, a consumer sued a manufacturer and distributor of plastic water bottles for deceptively labeling them as "100% recyclable."⁴⁴ The federal judge considered whether the defendant had complied with the Green Guides' guidance on qualifications, and he noted that the relevant community could be New York City, New York State, or some other subdivision of the state.⁴⁵ Although studies have shown that the national reprocessing rates for plastic bottles are low,⁴⁶ the consumer could not provide more granular data showing that facilities did not exist at the municipal or state level to reprocess the bottles she purchased. Agreeing with the defendants, the court reasoned that the national data was not enough to establish that recycling facilities did not exist for a "substantial majority" of consumers of the bottles and, therefore, that the bottle marketer has violated the Green Guides.⁴⁷ The FTC should consider explaining what "communities" means. Moreover, given the low estimated reprocessing rates for plastic waste across the country, the FTC should consider increasing the threshold for what constitutes a "substantial majority" of consumers.

3. "Minor Incidental Components"

Finally, the Green Guides permit unqualified recyclable claims for a product if the entire product, "excluding minor incidental components" is recyclable.⁴⁸ The Guides also do not define "minor incidental components." But it's common that plastic product are made with several types of plastic, which each have varying likelihoods of being reprocessed into new plastic products. For example, the plastic bottles at issue in *Duchimaza* had bodies, caps, and labels that were each a different type of plastic.

Duchimaza illustrates the confusion that arises from the exception for minor incidental components. Defendants argued that they had complied with the Green Guides because the plastic caps and labels—each of which has extremely low national reprocessing rates compared to the plastic in the body of the water bottles⁴⁹—were "minor incidental components." Therefore defendants' "100% recyclable" label was a permissible unqualified claim. The court turned to the dictionary to interpret the scope of "minor incidental components" and reasoned that the caps and labels each fell into that exception (for example, "[r]elative to the bottle, the label is patently inferior in size, degree and importance").⁵⁰ The court concluded that 100% recyclable labels on the bottles did not violate the Green Guides. In revising the Green Guides, the FTC should consider defining "minor incidental components" to explain what types of plastic components do not trigger the need for qualifying statements. That guidance would clarify when marketers must disclose to consumers that parts of a plastic product are not "recyclable."

Endnotes

- 1 Press Release, Fed. Trade Comm'n, FTC Seeks Public Comment on Potential Updates to its 'Green Guides' for the Use of Environmental Marketing Claims (Dec. 14, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-public-comment-potential-updates-its-green-guides-use-environmental-marketing-claims>.
- 2 15 U.S.C. § 45 (prohibiting unfair acts or practices affecting commerce); *see also* Guides for the Use of Environmental Marketing Claims ("Green Guides"), 16 C.F.R. § 260 (2022).
- 3 15 U.S.C. § 45(a)(1).
- 4 16 C.F.R. § 260.1(a).
- 5 Pamela J. Harbour, *Advertising and Unfair Competition: Federal and State Enforcement*, SP050 ALI-ABA 449, 515–17 (2009) (collecting the FTC's consent orders related to the Green Guides).
- 6 *See, e.g.*, United States v. Walmart Inc., No. 1:22-cv-00965 (D.D.C. Apr. 8, 2022) [[U.S. v. Walmart complaint](#)] (involving claims that products were made of "bamboo" and violations of the FTC's Rules and Regulations Under the Textile Fiber Products Identification Act, 16 C.F.R. § 303); *United States v. Kohl's Inc.*, No. 1:22-cv-00964 (D.D.C. Apr. 8, 2022) [[U.S. v. Kohl's complaint](#)] (same).
- 7 16 C.F.R. § 260.3(a).
- 8 Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77,766, 77,767 (Dec. 20, 2022).
- 9 16 C.F.R. § 260.8(b).
- 10 16 C.F.R. § 260.8(d) ex. 1.
- 11 87 Fed. Reg. at 77,767.
- 12 *Id.* at 77,768–69.
- 13 *Id.* at 77,768.
- 14 16 C.F.R. § 260.1(b)(1).
- 15 Nine additional states (for a total of 45 states and territories) broadly reference rules or regulations promulgated by federal agencies in their statutes prohibiting unfair and deceptive trade practices or false advertising.
- 16 This section surveys statutes and regulations across the 50 states and the U.S. territories. It does not address precedents under the law of any particular state or territory. However, understanding the exact nature of the relationship between the Green Guides and the law in any one state or territory requires looking to precedents in specific cases, which is beyond the scope of this brief.
- 17 They are Alabama, California, Florida, Guam, Indiana, Maryland, Michigan, Minnesota, New Mexico, New York, Pennsylvania, Rhode Island, and Washington.
- 18 N.Y. COMP. CODES R. & REGS. tit. 6, § 368-1.3(a) (Westlaw through Feb. 1, 2023).
- 19 ALA. CODE § 22-27A-1 (Westlaw through 2022 Reg. Sess. & First Special Sess.).
- 20 CONN. GEN. STAT. ANN. § 42-110b(b) (West, Westlaw through 2022 Reg. Sess. & Special Sess.).
- 21 FLA. STAT. ANN. §§ 501.201, 501.205 (West, Westlaw through 2022 Second Reg. Sess. & Special A, C, D Sess.).
- 22 *Id.* § 501.205.
- 23 N.Y. GEN. BUS. LAW § 349(d) (McKinney 2019) (emphasis added).
- 24 *Duchimaza v. Niagara Bottling, LLC*, No. 1:21-cv- 06434, 2022 WL 3139898, at *8 (S.D.N.Y. Aug. 5, 2022).
- 25 This survey is based on a Westlaw search of state and territorial codes and regulations for references to the Green Guides; Section 5 of the FTCA; and/or FTC rules, regulations, or guidance. Individual code provisions from one state or territory can fall within multiple categories, and one state or territory can have multiple code provisions within the same category.
- 26 Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77,766, 77,770 (Dec. 20, 2022).
- 27 *Id.*

- 28 16 C.F.R. § 260.12(a).
- 29 *Id.* § 260.12(b).
- 30 See LAST BEACH CLEANUP & BEYOND PLASTICS, THE REAL TRUTH ABOUT THE U.S. PLASTIC RECYCLING RATE: 2021 U.S. FACTS AND FIGURES 2 (2022), <https://bit.ly/US-plastics-recycling-rate> (basing estimates on data from the EPA; the National Academies of Science, Engineering & Medicine; U.S. trade data on exports; and the waste industry).
- 31 See JOHN HOCEVAR, GREENPEACE, CIRCULAR CLAIMS FALL FLAT: COMPREHENSIVE U.S. SURVEY OF PLASTICS RECYCLABILITY 4 (2020), <https://www.greenpeace.org/usa/research/report-circular-claims-fall-flat> (basing this conclusion on a survey of the U.S. plastic waste collection, sortation, and reprocessing systems from 2019 to 2020); James D. Brien, *Recycling is Rubbish: Reinvent, Realign, and Restructure U.S. Material Management*, 52 ENV'T L. REP. 10539, 10540–45 (2022) (summarizing problems with the United States' material management systems).
- 32 Swartz v. Coca-Cola, No. 3:21-cv-04643, 2022 WL 17881771 (N.D. Cal. Nov. 18, 2022).
- 33 Curtis v. 7-Eleven, Inc., No. 1:21-cv-06079, 2022 WL 4182384 (N.D. Ill. Sept. 13, 2022).
- 34 Duchimaza v. Niagara Bottling, LLC, No. 1:21-cv- 06434, 2022 WL 3139898 (S.D.N.Y. Aug. 5, 2022).
- 35 *Duchimaza*, 2022 WL 3139898, at *1 (considering consumer's claims that plastic water bottles had misleading labels because (1) low recycling capacity in New York made them effectively nonrecyclable and (2) not all components of the bottles were made of recyclable material); *Swartz*, 2022 WL 17881771, at *1 (considering consumers' and environmental group's claims alleging that plastic beverage bottles had misleading labels due to a lack of recycling capacity and lack of demand for recycled plastics in the state).
- 36 *Curtis*, 2022 WL 4182384, at *1 (considering consumer's claims that the products' labels were deceptive because local recycling facilities were very unlikely to accept and process them into new plastic products).
- 37 *Curtis*, 2022 WL 4182384, at *1–2 (considering consumer's claims that the freezer bags were both not recyclable in practice—making their labels deceptive—and not labeled with their plastic resin type, which prevented recycling facilities from even accepting them).
- 38 *Curtis*, 2022 WL 4182384, at *14. The court interpreted “recyclable” without explicit reference to the Green Guides despite the plaintiff's claims referencing the Guides.
- 39 The Green Guides require that marketers ensure their environmental marketing claims are supported by a “reasonable basis” of “competent and reliable scientific evidence” *before* they make such claims to the public. 16 C.F.R. § 260.2. “Scientific evidence” is defined as “tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.” *Id.*
- 40 Complaint ¶ 30, Swartz v. Coca-Cola Co., No. 3:21-cv-04643-JD (N.D. Cal. June 16, 2021).
- 41 Class Action Complaint ¶ 22, Duchimaza v. Niagara Bottling, LLC, No. 1:21-cv-06434, 2022 WL 3139898 (S.D.N.Y. Aug. 5, 2022).
- 42 Curtis v. 7-Eleven, Inc., No. 21-cv-6079, 2022 WL 4182384, at *2–3 (N.D. Ill. Sept. 13, 2022).
- 43 16 C.F.R. § 260.12(b)(1).
- 44 *Duchimaza*, 2022 WL 3139898, at *1.
- 45 *Duchimaza*, 2022 WL 3139898, at *9.
- 46 See, e.g., HOCEVAR, *supra* note 31, at 20 tbl.5 (estimating the national reprocessing rate for type #1 and type #2 plastic—the resins in the plastic bottles at issue in *Duchimaza*—as 22.5% and 12%, respectively, of all post-consumer plastic waste).
- 47 *Duchimaza*, 2022 WL 3139898, at *9.
- 48 16 C.F.R. § 260.12(c).
- 49 See, e.g., HOCEVAR, *supra* note 31, at 20 tbl.5 (estimating the national reprocessing rate for type #5 plastic—the resin in the plastic caps and labels in *Duchimaza*—as less than 5% of all post-consumer plastic waste).
- 50 *Duchimaza*, 2022 WL 3139898, at *10.

- 51 See Connor Fraser, *Plastics in the Courtroom: The Evolution of Plastics Litigation*, STATE ENERGY & ENV'T IMPACT CTR.: BLOG (July 15, 2022), <https://stateimpactcenter.org/insights/plastics-in-the-courtroom-the-evolution-of-plastics-litigation>.
- 52 See *Green Guides – Environmentally Friendly Products: FTC’s Green Guides*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides> (last visited Jan. 26, 2023). The FTC has in the past entered into consent orders with companies over their representations that their products were recyclable. See, e.g., In the Matter of Keyes Fibre Co., 118 F.T.C. 150 (1994) (disposable tableware); In the Matter of LePage’s, Inc., 118 F.T.C. 31 (1994) (adhesive tape).
- 53 See Complaint, State v. Reynolds Consumer Prods. Inc., No. HHD-CV22-6159769-S (Conn. Super. Ct. June 13, 2022) (alleging that Reynold’s sales of “Hefty” brand “Recycling” trash bags in the state violated the Connecticut Unfair Trade Practices Act). California Attorney General Rob Bonta announced in April 2022 his office’s investigation into the fossil fuel and petrochemical industries “for their role in causing and exacerbating a global plastic pollution crisis.” Attorney General Bonta Announces Investigation into Fossil Fuel and Petrochemical Industries for Role in Causing Global Plastics Pollution Crisis, STATE OF CAL. DEP’T OF JUST. (Apr. 28, 2022), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-investigation-fossil-fuel-and-petrochemical>.
- 54 The FTC voted to extend the comment period deadline by 60 days from February 21, 2023 to April 24, 2023. Press Release, Fed. Trade Comm’n, Federal Trade Commission Extends Public Comment Period on Potential Updates to its Green Guides for the Use of Environmental Marketing Claims (Jan. 31, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/federal-trade-commission-extends-public-comment-period-potential-updates-its-green-guides-use>.

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