



# Alert

## Environmental Client Service Group

To: Our Clients and Friends

November 8, 2013

### FTC Environmental Marketing Enforcement Actions

On October 29, 2013, the Federal Trade Commission announced six enforcement actions that it characterized as an “ongoing crackdown” against companies with unsubstantiated environmental marketing claims. The actions, five that targeted claims of biodegradable plastics and one that targeted claims of environmentally friendly paper products, provide warning to companies who veer from the FTC’s “Green Guides”, which relate to environmental marketing claims.

ECM Biofilms, Inc. marketed an additive named MasterBatch Pellets, claiming it made plastic products biodegradable in nine months to five years even when disposed of in landfills, the most common means of consumer disposal. The FTC allegations include, first, that landfill conditions do not permit these plastic products to break down and decompose in a reasonably short period of time and, second, that standard testing methods relied upon by ECM Biofilms, namely ASTM D5511, do not assure decomposition within the stated time periods.

Two ECM customers, American Plastic Manufacturing and CHAMP, also faced FTC complaints for claims they made based on the use of ECM’s additive. American Plastic Manufacturing produces plastic bags and claimed their product, APM Biodegradable Bags, was biodegradable because of ECM’s additive. With the additive’s claims unsubstantiated, the marketing materials included problematic qualified and unqualified claims. CHAMP produces plastic golf tees, which it similarly claimed was biodegradable because of ECM’s additive. Their marketing materials noted the use of ECM’s technology and even listed the various tests intended to substantiate their claims. The FTC complaint alleges that the tests used by CHAMP do not assure decomposition in either one year or the timeframes claimed in their marketing materials.

Clear Choice Housewares, Inc. marketed reusable plastic food containers that were allegedly biodegradable in a short period of time because their production used Bio-Tec Environmental’s additive EcoPure. The FTC found issue with Clear Choice’s claims, noting that disposal in landfills does not allow the claimed biodegradation and that the tests relied on by the company do not provide adequate support.

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Carnie Cap, Inc. faced an FTC complaint after making an unqualified claim of 100% biodegradability for plastic rebar caps made with Ecologic’s Eco-One additive. As with ECM, American Plastic, CHAMP, and Clear Choice, the FTC alleges Carnie Cap’s claims are unsubstantiated for landfill disposal and that its reliance on ASTM D5511 and other tests is insufficient for its marketing claims. While not facing immediate monetary penalties, the plastics companies face prohibitions from making future unsubstantiated environmental marketing claims.

The final announced enforcement placed a \$450,000 fine on AJM Packaging Corporation, a manufacturer of paper products, for violating its 1994 consent order barring unsubstantiated representations of biodegradability. The company marketed its products as biodegradable, recyclable, and compostable, claims the FTC contends are not supported by competent and reliable evidence.

The Green Guides, which the FTC publishes to aid marketers in avoiding unfair or deceptive environmental marketing claims, are available here, <http://www.ftc.gov/os/2012/10/greenguides.pdf>. A few key takeaways from the Green Guides and these enforcement actions may protect companies marketing environmental benefits from FTC actions similar to those faced by the companies above:

- Unqualified environmental claims are difficult to substantiate, with unqualified degradability claims specifically requiring that the entire product completely breakdown after customary disposal within a year. Customary disposal is most often a landfill, and products terminating in landfills, incinerators, or recycling facilities will not degrade within one year, so unqualified claims should simply not be made.
- Qualifying environmental claims may help avoid FTC action, but the proposed consent orders make clear that the qualification should be clear, prominent, and in close proximity to the claims made. A degradability qualification should express either the time needed for decomposition or the rate and extent of the decomposition. The qualification should also provide suggested alternative means of disposal if customary means, namely landfills, do not allow the claimed degradation. Further, like unqualified claims, the qualifications must be appropriately substantiated.
- All claims require substantiation, and therefore marketers should possess and rely upon a reasonable basis to substantiate the claim. A reasonable basis must, among other things, replicate the conditions found in a landfill or other, qualified means of disposal and comply with appropriately rigorous scientific standards.

If you would like to discuss how this matter may affect your organization, please contact one of the following Bryan Cave attorneys:

Brandon Neuschafer St. Louis Tel 1 314 259 2317 <a href="mailto:Brandon.Neuschafer@bryancave.com">Brandon.Neuschafer@bryancave.com</a>	David Zetoony Washington D.C. Tel 1 202 508 6030 <a href="mailto:David.Zetoony@bryancave.com">David.Zetoony@bryancave.com</a>	Brian Jacobson St. Louis Tel 1 314 259 2264 <a href="mailto:Brian.Jacobson@bryancave.com">Brian.Jacobson@bryancave.com</a>
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