



Asking the Expert: Packaging Laws and Environmental Marketing

James Asali, President and CEO of PGC, with
Sheila Millar, Partner at Keller and Heckman LLP

This past September, I had the privilege of attending the 2023 U.S. Product Stewardship Institute Forum in Portland, Oregon. At the session entitled “Truth in Labeling & Next Generation Packaging” one of the panelists was Sheila Millar, a Washington, DC attorney who specializes in consumer protection regulatory practices. Ms. Millar is a partner at Keller and Heckman LLP who counsels international and domestic businesses on compliance questions and processes, represents them in regulatory enforcement matters, and advocates on their behalf before federal and state legislative and regulatory bodies. Recently I was able to catch up with her to talk about packaging laws relative to environmental marketing and how we might see them evolve in the future.

Asali: We hear a lot these days about packaging material being sustainable. There’s a lot that goes into that claim – reasonable people can differ over what it really means when you look at a product’s cradle-to-grave life cycle. But a major element of that claim often includes recyclability. What is the federal legal standard for marketing a product as “recyclable”?

Millar: Before we talk about how recyclability fits with the larger concept of sustainability, we should start with why we use packaging. Paper, glass, metal and plastic are all great packaging materials and can be used for a variety of products. They each have benefits and drawbacks that relate to their physical characteristics, including relative durability, breakability, permeability, weight, corrosivity or other factors, including economics. When companies consider packaging choice, the primary considerations are what material will best protect the contents, as well as people handling the product as it goes from factory to home. It’s great that along with packaging performance considerations, more thought is now going into sustainability and end of life considerations, but the primary focus has to remain on protecting and safeguarding the contents and people handling the products.

Sustainability involves a great number of considerations. Recyclability, as you note, is simply one potential element that goes into an analysis of the “sustainability” of packaging, but let’s start with the definition of “recyclable” in the Federal Trade Commission (FTC) Guides for the Use of Environmental Marketing Claims, commonly referred to as the “Green Guides.” As use of the term, “Guides,” implies, the Guides reflect the FTC’s interpretation of standards for certain terms used in environmental marketing based on its general authority under Section 5 of the FTC Act, the legal framework governing advertising, and its interpretation of consumer perception. The Guides include examples as well as a definition in the “recyclable” section of the Guides (16 C.F.R. § 260.12). According to the FTC, a product

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or package should not be advertised as “recyclable” unless the product or package “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.” The Guides further specify that claims should be qualified as needed to avoid deception about the availability of recycling programs and collection sites to consumers. To make an unqualified claim of “recyclable,” recycling facilities must be available to at least 60% of consumers or communities in the area where the product is advertised. That means that you evaluate national metrics for products sold and advertised nationally, and regional or local metrics for products sold and advertised in smaller areas. A product or package made of recyclable material but which, because of its shape, size, or other factors is not accepted in recycling facilities shouldn’t be advertised as recyclable per the Guides.

The FTC Guides are material- and product-agnostic, and also aim to be technology neutral. The goal of the Guides is to encourage truthful claims about “recyclability” or other environmental attributes. Thus, the concept of qualifiers is central to how we interpret the FTC Guides. A qualifier is an additional contextual statement that provides added information about limitations or conditions relevant to the stated performance characteristic. The Guides do not bar claims about “recyclability” of packaging or products that are recycled in a limited way. Instead, the Guides promote more speech, or qualifiers, to clarify limits. That is why a claim such as “Recyclable where facilities exist. Facilities not available in all locations. Check locally,” would be acceptable for many products. The Guides do not require specific wording, but simply require that qualifiers convey that facilities are limited, so stronger qualifiers would be expected if recycling options are quite limited, just as they would be needed where industrial composting options are quite limited.

Asali: Most consumers associate the famous “chasing arrows” symbol with recyclability and, in all likelihood, feel better about dropping a product so labeled into the appropriate bin for collection. Is this feeling justified? What does the symbol really mean when affixed to packaging material or any other product?

Millar: Let’s start with two important questions: what do we mean by the “chasing arrow” symbol, and what is a product label? This question has generated some confusion about plastic packaging in particular. Let’s consider first the Mobius loop versus the original Plastic Resin Identification Code or RIC design:



The Mobius loop can convey either that a product or package is recyclable, or that it contains recycled content, so unless the meaning is clear, that should be disclosed. That is addressed in the FTC Guides.

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The original RIC had a “triangle of arrows” design that is different from the Mobius loop. The RIC design lacks the “flipped” element of the Mobius loop:



The appearance of the RIC when it is molded on the bottom of a rigid plastic container is a marking, not a label. The FTC Guides expressly recognize the difference between a “marking” and a “label” in Example 2 of § 260.12 of the Guides (and in so doing recognize that a version of the RIC is required by law in most states):

Example 2: A nationally marketed plastic yogurt container displays the Resin Identification Code (RIC) (which consists of a design of arrows in a triangular shape containing a number in the center and an abbreviation identifying the component plastic resin) on the front label of the container, in close proximity to the product name and logo. This conspicuous use of the RIC constitutes a recyclable claim. Unless recycling facilities for this container are available to a substantial majority of consumers or communities, the manufacturer should qualify the claim to disclose the limited availability of recycling programs. If the manufacturer places the RIC, without more, in an inconspicuous location on the container (e.g., embedded in the bottom of the container), it would not constitute a recyclable claim.

Thus, from an advertising standpoint, the FTC recognizes that placement and appearance matter in determining what constitutes a claim subject to the Guides. Your readers likely also know that the arrow design of the RIC was replaced by a solid triangle through the ASTM process, and while some state laws mandate use of the original RIC code design, use of the alternative design seems unlikely to generate state enforcement action.

Asali: [California recently enacted a Truth in Labeling law](#) that set forth some standards that producers must meet if they want to claim recyclability. What are some of the issues your clients have faced as they navigate compliance?

Millar: We are still waiting for Cal Recycle to release its report on statewide recycling. The primary question for clients is the conflict between the California requirements, long-standing advertising principles reflected in the FTC Guides, and various state laws that require the RIC. Companies worry that this law will suppress innovation and investment in recycling without materially addressing the larger problem of litter. If this law had been in place 30 years ago, would we see advances in recycling certain types of packaging? Will the apparent effort to bar on-pack statements about recycling suppress



investment in recycling? What will the impact be on product safety, quality and shelf life if packaging choices disappear? How will this affect state “recycled content” mandates for packaging? It’s already difficult to obtain an adequate supply of recycled material that will meet the relevant requirements for food contact or medical -grade packaging that meets federal Food and Drug Administration (FDA) requirements, so clients are concerned about packaging safety and integrity considerations.

Asali: Do you see any tension between the federal standards you described earlier and the relatively new California law? And can you see other states taking California’s lead and imposing their own set of thresholds for environmental marketing?

Millar: Yes, as I said earlier, it is unfortunate that the California law doesn’t draw the same distinction that the FTC does between labeling and marking. The biggest concern to me is the apparent effort to restrict any reference to the term “recyclable” without considering how truthful labeling could encourage more recycling. The FTC has historically recognized that truthful, non-deceptive speech generally enhances consumer choice, promotes innovation, and promotes a competitive market that helps maintain competitive pricing. “Truth in advertising,” and “truth in labeling,” mean encouraging truthful information so purchasers can make informed purchasing choices.

Asali: What happens if/when states set differing standards for, say, recyclability claims? Should producers simply look at the most stringent rules and aim to comply with those?

Millar: It may prove difficult for state enforcement authorities to prevail in an action against a national advertiser who labels a packaging product as “recyclable” and includes a well-constructed disclaimer about potential limits. It’s possible that advertisers would expand disclaimers to include a further qualifier in reaction to state laws, such as “not considered recyclable in California,” or other wording. Companies may simply engage in “greenhushing,” and not say anything at all.

Asali: What are the typical enforcement mechanisms for non-compliance? And who usually raises concerns about a producer that may be overzealous in touting their environmental bona fides? Competitors? Consumer groups? The government sua sponte? Whistleblowers?

Millar: Enforcement mechanisms depend on a variety of factors. Regulatory bodies have the authority to enforce their laws. Additionally, there is a well-established self-regulatory process in the U.S. for advertising claims to be challenged. Competitors, consumer groups and the self-regulatory body itself

can initiate a challenge to claims. We are seeing a rise in false advertising challenges as well, although a number of courts have dismissed some of the recycling claims challenges.

Asali: Is there anything pertinent that the current set of laws are failing to take into account? Or are there any areas of emphasis that any of these laws that are misguided or perhaps given too much weight?

Millar: The short answer is yes. The human element and economic realities are probably two big factors. As to the human element, I haven't seen supporting evidence that broad restrictions on recyclable claims will alter consumer behavior in a meaningful way and reduce litter or waste. On the second point, there are complex economic factors at play, some of which were discussed at the FTC's recycling workshop. Weight and distance make it challenging to recycle glass in a way that is both cost-effective and offers a net environmental benefit, for example. There are limits to how many times paper and plastics can be recycled, because those materials can lose physical properties over time. Regulatory considerations are a key factor that may limit the ability to utilize recycle, so Food and Drug Administration (FDA) standards are a key factor for the food industry.

From a legal standpoint, courts may have to decide. State authorities might not prevail if they challenge a well-qualified recycling claim along the lines of the example I provided earlier because it would represent a ban on truthful speech, even if recycling levels do not meet the 60% threshold.

Another concern is that laws on recyclability claims focus on only one facet of what makes a product or package "sustainable." Depending on the product and material, "recycling" might involve added environmental burdens, including increased greenhouse gas emissions, higher water usage, or the like.

Thoughtful policy debates about how to tackle and balance aspects of sustainability, ways to build a more circular economy, and options to reduce waste are necessary and useful. A great deal of effort is being spent to explore options beyond recycling, like more reusable or refillable packaging, industrial compostability, and of course for plastics, chemical recycling, as options to help reduce waste. When considering how we achieve sustainability goals for packaging, however, we can never lose sight of the main purpose of packaging, which is to protect the contents it holds, as well as the people handling the product throughout the supply chain. Ultimately, getting the balance right seems to require a more holistic analysis that considers a multiplicity of factors, and a recognition that incremental changes may be a more realistic way of reaching those goals.