

**COMMENTS ON THE  
FTC GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS**

Green Guides Review, Matter No. P954501

Submitted by the Center for Climate Integrity

April 24, 2023

**Executive Summary**

Thank you for the opportunity to provide comments on the Federal Trade Commission’s (“FTC” or the “Commission”) request for public comment on the Guides for the Use of Environmental Marketing Claims (“Green Guides” or “Guides”), 16 C.F.R. § 260.1, *et seq.*

The Center for Climate Integrity (“CCI”) is a non-profit organization whose mission is to help communities hold oil and gas corporations accountable for the massive costs of climate change. CCI empowers communities and elected officials with the knowledge and tools they need to hold oil and gas corporations accountable, including for deceptive advertising campaigns that mislead the public about their products’ central role in the climate and plastics crises.

The Green Guides are needed now more than ever. Since the Commission last updated the Green Guides, environmental marketing has changed dramatically. With the world now facing the consequences of both a climate crisis and plastic waste crisis, a growing number of U.S. consumers are demanding environmentally-conscious business practices and products. A business or industry branded as “green” or “sustainable” is no longer a novelty, it is a necessity to meet the needs of consumers who are calling for change. Continued and further guidance is needed to set clear standards and address new means of deception and disinformation in environmental marketing.

Deceptive environmental claims made through marketing, commonly known as “greenwashing,” violate the protections afforded to consumers and undermine their ability to make informed purchasing decisions. CCI respectfully calls on the FTC to update the Green Guides to address the various forms of greenwashing described below.

***Explicitly address new and insidious forms of greenwashing, specifically “paltering” and “reputation advertising.”***

Since 2012, companies have become more sophisticated in their greenwashing strategies and tactics, changing the way they market their products and services to persuade consumers that they are environmentally-friendly and that their values are aligned with sustainability goals. The Green Guides must be updated to address these new tactics, namely “paltering,” defined as the active use of true statements that create an overall false or misleading impression, and “reputation advertising,” defined as the practice of making environmental claims outside of the traditional point-of-sale context, focusing instead on the company’s reputation. The Green Guides already advise against the unfair and deceptive use of these tactics – the Commission now needs to identify and address them explicitly.

***Set standards for common green marketing buzzwords, specifically “net zero.”***

More than 700 of the world’s largest companies have claimed “net zero” targets, yet there is no established interpretation for this claim. The Green Guides must establish a standard definition for “net

zero” that is comprehensive in scope and credible in application. Corporate “net zero” claims must cover all direct and indirect greenhouse gas emissions from across the company’s entire portfolio and value chain, and they must distinguish between emission reductions, post-emission compensation, and emission divestments. Further, the Green Guides must ensure that companies cannot make or imply long-term “net zero” claims that are unsubstantiated by company plans, even if such commitments are qualified as “ambitions” or “goals.”

***Address ongoing deception regarding the recyclability of plastic waste, specifically claims regarding “advanced recycling” and “circular economy.”***

Consumers are universally concerned about plastic waste, and they make purchasing decisions based on the perceived recyclability and environmental impact of plastic products and packaging. Yet, for the last 30 years, only PET#1 bottles and HDPE#2 plastic jugs have been widely recyclable. Even though the plastics industry has known about the technical and economic limitations of plastic recycling for decades, they have misled consumers into believing plastic is more recyclable than it is. Consumers have been misled by deceptive labeling, including the “chasing arrows” symbol, and are now being misled that so-called new technologies in “advanced recycling” will bring plastics into the “circular economy.” Such claims are unfounded. The Green Guides must be modified to address consumer deception concerning plastic recycling, specifically deceptive labeling on plastic products and emerging claims about advanced recycling. They must also establish appropriate standards for circular economy claims.

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CCI greatly appreciates the opportunity to provide the following comments. If the Commission has any questions or requires additional information, please do not hesitate to contact CCI Legal Fellow Naomi Spoelman, [naomi@climateintegrity.org](mailto:naomi@climateintegrity.org). We look forward to continuing to support the FTC in this important work.

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## I. The Green Guides are needed now more than ever.

Since 2012, when the Green Guides were last updated, environmental marketing has changed dramatically. With the world now facing the consequences of both a climate crisis and plastic waste crisis, a growing number of U.S. consumers are demanding environmentally-conscious business practices and products. As a result, a business or industry branded as “green” or “sustainable” is no longer a novelty, it is a necessity to meet the needs of consumers who are calling for change. Continued and further guidance is needed to set clear standards and address new means of unfair and deceptive environmental marketing claims.

As reflected in the market, Americans are using their purchasing power as “agents of change” for sustainability – in turn, companies are responding and adapting to meet consumer demand.<sup>1</sup> The 2022 Global Sustainability Study found that 75% of global consumers view environmental sustainability as an important factor when making purchasing decisions.<sup>2</sup> Another global study found that, since 2016, there has been a 71% increase in Google searches related to sustainable goods.<sup>3</sup> Likewise, a 2021 LendingTree survey found that 55% of respondents were willing to spend more on goods perceived as eco-friendly while 40% were likely to boycott companies that were not committed to these principles.<sup>4</sup> With respect to energy and utilities, the Global Sustainability Study reported that consumers view emissions, pollution, and industrial waste as their primary consideration when making sustainable purchasing decisions.<sup>5</sup>

Consumers are increasingly making purchasing decisions based on perceived sustainability. A survey published in Fall 2021 found that “81% of people polled expect companies to be environmentally conscious in their advertising and communications, and 69% of respondents said they were doing everything possible to minimize their carbon footprint” – up from 63% in 2020.<sup>6</sup> The researchers concluded that neither consumers nor companies seem inclined to backtrack on their environmental commitments, especially in light of worsening climate change, and that “as the emphasis on sustainability continues to intensify, companies will want to continue to focus on innovations that please consumers,” which is good for business.<sup>7</sup>

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<sup>1</sup> See Rachel Pope, *Recent Study Reveals More than a Third of Global Consumers Are Willing to Pay More for Sustainability as Demand Grows for Environmentally-Friendly Alternatives*, BUS. WIRE (Oct. 14, 2021), <https://www.businesswire.com/news/home/20211014005090/en/Recent-Study-Reveals-More-Than-a-Third-of-Global-Consumers-Are-Willing-to-Pay-More-for-Sustainability-as-Demand-Grows-for-Environmentally-Friendly-Alternatives>.

<sup>2</sup> SIMON KUCHER, ENVIRONMENTAL SUSTAINABILITY IN BUSINESS 8 (2022), <https://analytics-eu.clickdimensions.com/cn/ajppn/thank-you-esg-brochure>.

<sup>3</sup> ECONOMIST INTELLIGENCE UNIT LTD., AN ECO-WAKENING: MEASURING GLOBAL AWARENESS, ENGAGEMENT AND ACTION FOR NATURE 6 (2021), [https://files.worldwildlife.org/wwfmsprod/files/Publication/file/93ts5bhvyq\\_An\\_EcoWakening\\_Measuring\\_awareness\\_engagement\\_and\\_action\\_for\\_nature\\_FINAL\\_MAY\\_2021.pdf?\\_ga=2.190056994.868570924.1681917131-515100604.1681917126](https://files.worldwildlife.org/wwfmsprod/files/Publication/file/93ts5bhvyq_An_EcoWakening_Measuring_awareness_engagement_and_action_for_nature_FINAL_MAY_2021.pdf?_ga=2.190056994.868570924.1681917131-515100604.1681917126).

<sup>4</sup> Dawn Papandrea, *55% Would Spend More on Eco-Friendly Products While Willing to Boycott Less-Green Companies*, LENDING TREE (Apr. 20, 2021), <https://www.lendingtree.com/credit-cards/study/consumers-would-spend-more-on-eco-friendly-products/>.

<sup>5</sup> Simon Kucher, *supra* note 2 at 12.

<sup>6</sup> Amy Emmert, *The Rise of the Eco-Friendly Consumer*, STRATEGY & BUS. (July 8, 2021), <https://www.strategy-business.com/article/The-rise-of-the-eco-friendly-consumer> (referencing a study conducted by Visual GPS in conjunction with YouGov).

<sup>7</sup> *Id.*

The lead author of the Global Sustainability Study, Shikha Jain, laid out the stakes for companies, stating:

Millennials and Gen Z are becoming a force to be reckoned with as they continue to represent a larger share of the consumer demographic. Companies that don't have sustainability as part of their core value proposition need to act now to protect against future reputational impacts and loss of market share.<sup>8</sup>

Companies have recognized the changes in consumer preferences and have responded by making significant financial investments in environmental marketing.<sup>9</sup>

In fact, the five major oil and gas companies – BP, Chevron, ExxonMobil, Shell and TotalEnergies – are collectively spending around \$750 million each year on public communications that boast so-called climate action.<sup>10</sup> Based on a survey of 3,421 items of public communication materials in 2021, 60% of these companies' communications contained at least one green claim, while only 23% contained claims promoting oil and gas.<sup>11</sup>

But the reality is that oil companies' actions and investments in climate solutions are not aligned with their environmental marketing claims. Only 12% of the 2022 capital expenditure of these companies was dedicated to 'low carbon' activities, while their oil production is not aligned with any net zero ambitions.<sup>12</sup>

A growing number of experts have found the discrepancy between the environmental marketing claims made by companies and their actual environmental impacts to be deceptive. For example, a 2022 peer-reviewed study comparing the oil companies' climate discourses with their related actions between 2009 and 2020 concluded that "accusations of greenwashing appear well-founded."<sup>13</sup>

Governmental bodies, public officials, and consumer advocates have also alleged extensive and ongoing greenwashing campaigns by fossil fuel companies. A congressional investigation by the U.S. House Committee on Oversight and Reform found evidence that oil and gas companies "have tried to create the impression that they are taking ambitious steps to reduce emissions – without actually doing so."<sup>14</sup> Separately, an investigation by the House Natural Resources Committee found that public relations firms use misleading messages and advertising to "help oil and gas companies avoid having to take real action on the climate crisis, or stop others from doing so."<sup>15</sup> At least 20 judicial and 27 non-judicial

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<sup>8</sup> Pope, *supra* note 1.

<sup>9</sup> Neringa Vilkaite-Vaitone & Ilona Skackauskiene, *Green Marketing Orientation: Evolution, Conceptualization and Potential Benefits*, 2 OPEN ECON. 53, 54 (2019).

<sup>10</sup> *Big Oil's Real Agenda on Climate Change 2022*, INFLUENCEMAP (2022), <https://influencemap.org/report/Big-Oil-s-Agenda-on-Climate-Change-2022-19585>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Mei Li, Gregory Trencher, & Jusen Asuka, *The Clean Energy Claims of BP, Chevron, ExxonMobil and Shell: A Mismatch Between Disclosure, Actions and Investments*, 17 PLOS ONE 1, 1 (2022).

<sup>14</sup> Memorandum to Members of the Committee on Oversight and Reform from Chairwoman Carolyn B. Maloney and Chairman Ro Khanna on Investigation of Fossil Fuel Industry Disinformation 2-3 (Sep. 14, 2022), <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2022.09.14%20FINAL%20COR%20Supplemental%20Memo.pdf> [*hereinafter* Oversight & Reform Investigation Memo].

<sup>15</sup> *The Role of Public Relations Firms in Preventing Action on Climate Change: Hearing Before the H. Nat. Res. Subcomm. on Oversight & Investigations*, 117th Cong. 1 (2022) (report prepared by H. Nat. Res. Comm. Staff), available at <https://www.congress.gov/117/meeting/house/115094/documents/HHRG-117-II15-20220914-SD007.pdf>.

“climate-washing” complaints (greenwashing complaints brought on climate change grounds) have been filed since 2018.<sup>16</sup>

Similar claims have been filed against manufacturers of plastic products. Earth Island Institute, a California-based environmental group, has filed three separate lawsuits against beverage bottlers, alleging that the companies falsely portray themselves as environmentally friendly.<sup>17</sup> One lawsuit challenges BlueTriton Brands’ advertising campaigns in which it claims to be a “sustainable” company working for “a waste-free future,” despite its ongoing and increasing contributions to plastic pollution.<sup>18</sup> Another suit challenges Coca-Cola’s claims that it is a “sustainable” company that “takes responsibility” for its plastic, although it has made no significant changes to its business model and remains one of the largest contributors to plastic pollution in the world.<sup>19</sup>

Companies are incentivized to portray themselves as environmentally-conscious or sustainable, even when their practices and products are not in fact sustainable, which has resulted in a new wave of deception and disinformation. These corporate actors knowingly promote and profit off of deceptive claims about the environmental impact of their products. The Commission must not only retain the guides, but also strengthen them as a means to protect consumers.

## **II. The Green Guides must be updated to address new and insidious forms of deceptive environmental marketing.**

The purpose of the Green Guides is to protect consumers by “help[ing] marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act.”<sup>20</sup> But as discussed previously, companies have become more sophisticated in their greenwashing strategies and tactics, changing the way they market themselves and their products as a means to persuade consumers that their values are aligned with environmental and sustainability goals. For this reason, the Green Guides must be updated to address new forms of deceptive environmental marketing, namely “paltering” and “reputation advertising,” which are intended to deceive and mislead consumers.

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<sup>16</sup> Akriti Bhargava et al., CSSN, CLIMATE-WASHING LITIGATION: LEGAL LIABILITY FOR MISLEADING CLIMATE COMMUNICATIONS 5 (2022), <https://cssn.org/wp-content/uploads/2022/01/CSSN-Research-Report-2022-1-Climate-Washing-Litigation-Legal-Liability-for-Misleading-Climate-Communications.pdf>.

<sup>17</sup> Earth Island Inst. v. Coca-Cola Co., No. 2021 CA 001846 B (D.C. Sup. Ct. 2021); Earth Island Inst. v. BlueTriton Brands, No. 2021 CA 003027 B (D.C. Sup. Ct. 2022); Earth Island Institute v. Crystal Geyser Water Co., No. 20CIV01213 (Cal. Super. Ct. 2020).

<sup>18</sup> Earth Island Inst. v. BlueTriton Brands, No. 2021 CA 003027 B (D.C. Sup. Ct. 2022).

<sup>19</sup> Earth Island Inst. v. Coca-Cola Co., No. 2021 CA 001846 B (D.C. Sup. Ct. 2021).

<sup>20</sup> 16 CFR 260.1.

A. Paltering is intended to deceive consumers and therefore must be identified as a deceptive practice.

Companies use paltering to promote themselves and their products as more environmentally friendly and less environmentally damaging than they really are. Also known as “lying by telling the truth,” paltering is the use of truthful statements that create an overall false or misleading impression.<sup>21</sup> Paltering is a distinct form of deception that differs from lying by omission (passively omitting relevant information).<sup>22</sup> Although there are similarities between the two, lying by omission is defined by passively avoiding the truth, while paltering is defined by actively telling selective truths.<sup>23</sup>

Paltering is widespread yet difficult for consumers to identify if they are not familiar with the science or technology underlying a claim. Harvard researchers have found that paltering “may promote conflict fueled by self-serving interpretations,” where the palterers “focus on the veracity of their statements (‘I told the truth’), whereas their targets focus on the misleading impression palterers convey (‘I was misled’).”<sup>24</sup> Without explicit guidance from the FTC, companies will continue to palter, justifying their deceptive claims as sound because they aren’t outright lies – and consumers will continue to be misled and unable to make informed decisions.

Climate journalist Emily Atkin described and illustrated the ways in which fossil fuel companies have used paltering in practice:

This is what oil and gas companies do in their advertisements. Technically, they tell the truth—they’re investing in greener, cleaner technology. But the investments are small, the technology is unproven, and their companies are overall failing to reduce their emissions. The selective truth they choose is designed to create a false impression, so everyone gets off their back about climate change.

Atkin uses an ExxonMobil advertisement,<sup>25</sup> as an example:

The ad claims the oil giant is “advancing climate solutions” by investing in carbon capture technology. And technically, Exxon *is* investing in carbon capture, which is a climate solution.

But this truth is incredibly selective. Because overall, Exxon is doing far more to worsen the climate crisis than to solve it. The company is still refusing to slow down fossil fuel production—in fact, it plans to expand its oil and gas business.<sup>26</sup>

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<sup>21</sup> Todd Rogers et al., *Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others*, 112 PERSONALITY & SOC. PSYCHOL. 456, 456 (2017).

<sup>22</sup> *Id.*

<sup>23</sup> Emily Atkin, *Big Oil’s Favorite Way to Lie: Paltering*, HEATED (Apr. 6, 2023), [https://heated.world/p/big-oils-favorite-way-to-lie-paltering?utm\\_source=profile&utm\\_medium=reader2](https://heated.world/p/big-oils-favorite-way-to-lie-paltering?utm_source=profile&utm_medium=reader2).

<sup>24</sup> Rogers, *supra* note 21 at 456.

<sup>25</sup> Emily Atkin (@emorewee), Twitter (Nov. 17, 2022), <https://twitter.com/emorewee/status/1460998705734197264>.

<sup>26</sup> Atkin, *supra* note 23.

The Exxon ad that aired last Monday and Tuesday on The Daily reads as follows:

A number of climate experts agree that carbon capture and storage is crucial to reducing emissions to combat climate change.

That's why ExxonMobil is working to deploy this technology at scale for the highest-emitting sectors.

For Exxon's ad in The Daily to be accurate, it would have to read something like this:

A number of climate experts agree that carbon capture and storage (CCS) is crucial to reducing emissions to combat climate change. **But it's a small number, and it's always only when paired with significant fossil fuel reductions, which Exxon is actively fighting against.**

That's why ExxonMobil is working to deploy this technology at scale for the highest-emitting sectors. **But it's at a place too slow to make any sort of difference. Exxon is currently capturing less than 1% of its annual emissions, and most of that carbon is being used to produce more oil. Exxon is working much harder to keep emitting.**

*Images from Emily Atkins' Twitter post discussing Exxon's use of paltering.*

Another frequent use of paltering by fossil fuel companies involves claims explicitly stating or implying that natural gas is a “low carbon” source of energy. Shell labels natural gas a “low carbon fuel,”<sup>27</sup> and reports investments in natural gas under “Renewables and Energy Solutions” expenditures.<sup>28</sup> BP similarly couples “gas & low carbon energy” together in its corporate structure.<sup>29</sup> While burning natural gas results in lower carbon emissions than coal or oil, the lifecycle greenhouse gas emission potential of natural gas is often on par with coal due to methane leaks during production.<sup>30</sup> The UK’s Advertising Standards Authority recently made a finding that such paltering around natural gas is deceptive. In 2019, the regulator directed Equinor to pull an advertisement that claimed: “We’re the low carbon energy just over the horizon. Equinor is Britain’s biggest supplier of imported gas – and a key provider of wind power too.”<sup>31</sup> From fossil fuel advertisements to corporate statements about plastic recycling, the use of paltering is a growing threat to consumers.

It is important to note that paltering constitutes speech that is intentionally disingenuous, and thus should not be afforded protection under the First Amendment.<sup>32</sup> Such assertions are not only misleading, but they also do not further our interest in governing ourselves through a free and open exchange of information and ideas. They “involve the betrayal of the public interest . . . [and] rob[] another of the

<sup>27</sup> *Low Carbon Fuels*, SHELL, <https://www.shell.com/energy-and-innovation/new-energies/low-carbon-fuels.html#iframe=L2ZvcmlzL2xvd19jYXJib25fZnVlbHM> (last visited Apr. 24, 2023).

<sup>28</sup> *Shell Faces Groundbreaking Complaint for Misleading US Authorities and Investors on Its Energy Transition Efforts*, GLOBAL WITNESS (Feb. 1, 2023), <https://www.globalwitness.org/en/campaigns/fossil-gas/shell-faces-groundbreaking-complaint-misleading-us-authorities-and-investors-its-energy-transition-efforts/>.

<sup>29</sup> *Gas & Low Carbon Energy*, bp, <https://www.bp.com/en/global/corporate/what-we-do/gas-and-low-carbon-energy.html> (last visited Apr. 24, 2023).

<sup>30</sup> *Environmental Impacts of Natural Gas*, UNION OF CONCERNED SCIENTISTS (UCS) (June 19, 2014), <https://www.ucsusa.org/resources/environmental-impacts-natural-gas>.

<sup>31</sup> Murray Worthy, *Oil Company Forced to Backtrack on Claims Gas is Low Carbon*, GLOBAL WITNESS (Sep. 12, 2019), <https://www.globalwitness.org/en/blog/oil-company-forced-backtrack-claims-gas-low-carbon/>.

<sup>32</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–64 (1980) (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”); see also Katherine G. Horner, *Does the First Amendment Protect Fossil Fuel Companies’ Public Speech?*, 53 ELR 10036 (2023).



ability to exercise her own autonomy . . . [and thus] exist outside the sphere of autonomy that . . . should be a ground for constitutional protection.”<sup>33</sup>

1. *The Green Guides advise against marketing that implies negligible benefits are significant but must go further to explicitly address paltering.*

In the 2012 updates to the Green Guides, the section titled General Environmental Benefit Claims was revised to state:

. . . marketers should use clear and prominent qualifying language to convey that a general environmental claim refers only to a specific and limited environmental benefit(s). *In addition, this section cautions marketers that explanations of specific attributes, even when true and substantiated, will not adequately qualify general environmental marketing claims if an advertisement’s context implies other deceptive claims.* Moreover, the Guides advise marketers not to imply that any specific benefit is significant if it is, in fact, negligible.<sup>34</sup>

The Guides further describe what it looks like to “imply that [a] specific benefit is significant [when] it is, in fact, negligible”:

*Example 4:* A manufacturer’s Website states, “Eco-smart gas-powered lawn mower with improved fuel efficiency!” The manufacturer increased the fuel efficiency by 1/10 of a percent. Although the manufacturer’s claim that it has improved its fuel efficiency technically is true, it likely conveys the false impression that the manufacturer has significantly increased the mower’s fuel efficiency.<sup>35</sup>

Sections 260.4(c)-(d) provides guidance that clearly cautions against paltering, yet this language is not adequate to prevent such practices that intentionally mislead consumers. As such, the Green Guides must explicitly address and identify paltering as a deceptive practice.

2. *The Commission should collaborate with SEC and other agencies in efforts to prevent paltering.*

The use of paltering by the fossil fuel industry in particular is an area ripe for collaboration. Last year, the Security and Exchange Commission (SEC) proposed rule changes that would require registrants to include certain climate-related disclosures in their registration statements and periodic reports, including information about climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements.<sup>36</sup> In light of the SEC’s proposed rules changes, fossil fuel industry experts are expecting the SEC to crack down on industry paltering.<sup>37</sup> Given that both

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<sup>33</sup> Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RTS. J. 1203, 1253 (2008).

<sup>34</sup> 16 CFR 260(I) (citing sections 260.4(c), Example 4 and 260.4(d)) [emphasis added].

<sup>35</sup> 16 CFR 260.4, Example 4.

<sup>36</sup> Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), <https://www.sec.gov/news/press-release/2022-46>.

<sup>37</sup> Leonard Hyman & William Tiles, *Oil & Gas Companies Face Tough Decision on Emissions*, OILPRICE.COM (Nov. 3, 2021), [https://oilprice.com/Energy/General/Oil-Gas-Companies-Face-Tough-Decision-On-Emissions.html?utm\\_source=substack&utm\\_medium=email](https://oilprice.com/Energy/General/Oil-Gas-Companies-Face-Tough-Decision-On-Emissions.html?utm_source=substack&utm_medium=email) (“The SEC has higher standards than politicians and cable news presenters in terms of financial projections and environmental compliance. Corporations found to be too egregiously paltering with the truth may find themselves under investigation.”).

the FTC and the SEC have a shared interest in seeing the fossil fuel companies provide truthful climate disclosures, and the fact that the practice of paltering is being used to obfuscate them, both agencies have an interest in advising businesses on how to avoid paltering, and thus should coordinate efforts.

B. Reputation advertising is a new form of greenwashing that uses misleading and deceptive environmental claims and therefore must be explicitly referenced in the Green Guides.

The Green Guides should be updated to advise against the improper use of greenwashing in reputation advertising. Reputation advertising – also known as corporate advertising, corporate social responsibility communication, or corporate image advertising<sup>38</sup> – has grown dramatically with the opportunities that the internet provides for marketers. Companies are increasingly making environmental claims outside of the traditional point-of-sale context, focusing instead on the reputation of the company or business practice without a direct call to purchase. The primary goal of reputation advertising is to increase sales by capitalizing on consumers’ desire to conduct business with environmentally conscious or sustainable businesses.<sup>39</sup>

Companies use reputation advertising to greenwash their brand images in ways that intentionally mislead and deceive consumers. Oil and gas companies claim that their operations will be “net zero by 2050,” yet fail to disclose that this calculation does not account for greenhouse gas emissions from the end use of their products. Plastic companies claim that they are “contributing to the circular economy,” yet fail to disclose that they are rapidly expanding resource extraction and production. These (and other) reputation campaigns do not sell consumers on specific products, they sell consumers on specific industries.

A recent report titled “Buzz on Buzzwords” by public relations firm Shelton Group describes the types of environmental claims commonly used in reputation advertising.<sup>40</sup> These terms include: “eco-friendly,” “net zero,” “low carbon footprint,” “carbon neutral,” “circular economy” and “social responsibility.”<sup>41</sup> The report underscored the problem with allowing companies to “educate” consumers about what these terms mean – this has led to consumer confusion, skepticism, and lack of confidence about the meaning of these corporate claims. The report concluded:

Consumers are getting more and more skeptical – and more and more concerned – about how effective sustainability tactics like recycling actually are.

More skeptical ... We’ve all been doing them for a while now, and the waste and ocean plastics problems don’t seem to be improving.

More concerned ... To further complicate matters, consumers’ reported understanding of some of these terms has decreased, while their demonstrated understanding (based on follow-up questions) has, in reality, increased. We believe this is because of that growing

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<sup>38</sup> Eunjin (Anna) Kim, Margaret Duffy & Esther Thorson, Under the Influence: Social Media Influencers’ Impact on Response to Corporate Reputation Advertising, 50 J. ADVERTISING 119, 122 (2021) (collecting citations from prior scholarship on the topic using these various terms).

<sup>39</sup> See generally Amanda Shanor & Sarah E. Light, *Greenwashing & The First Amendment*, 122 COLOMBIA L. REV. 2033 (2022).

<sup>40</sup> See Shelton Group, THE BUZZ ON BUZZWORDS: SEVEN YEARS LATER (2022).

<sup>41</sup> *Id.* at 4-18.

skepticism. They're thinking, 'I thought I understood this term but the more I've learned about it, the more I've started to wonder if it's really doing what it promised.'<sup>42</sup>

As this report highlights, when companies are at liberty to define these terms themselves, the terms become meaningless and consumers are the ones who suffer.

1. *Reputation advertising has become a widespread practice among fossil fuel and plastic companies.*

Environmental claims in reputation advertising have caused and will continue to cause harm to consumers. The fossil fuel industry's decades-long deceptive marketing campaigns – which denied the industry's knowledge and role in perpetuating the climate crisis and gave rise to decades of unabated use of fossil fuel products – underscores how remarkably significant the harm from reputation advertising can be.

One example is ExxonMobil's promotion of carbon capture and storage (CCS). While ExxonMobil does not sell CCS, the company promotes its use of this technology as a "solution" for climate harms and, in doing so, claims to be a leader in climate action. Yet, as of 2021 "more than 80 percent of all CCS capacity deployed to date has been used for [enhanced oil recovery]," a process by which captured carbon dioxide is injected into an oil field to force out new crude oil that would otherwise be unrecoverable.<sup>43</sup> The majority of CCS capacity is used to expand oil production, thereby prolonging the transition from fossil fuels, and doing little to address our immediate need to mitigate carbon emissions.<sup>44</sup> Exxon's promotion of CCS promotes its reputation as a climate innovator, easing consumer pressure and guilt, without actually offering the "solution" that consumers expect.

CCS isn't the only false "climate solution" peddled by Exxon for reputational gain. Exxon's goal to have "the technical ability to produce 10,000 barrels of algae biofuel per day" (only 0.2% of their total refinery production) by 2025, similarly positioned the company as an innovator working on climate solutions.<sup>45</sup> The company ran an extensive (and costly<sup>46</sup>) advertisement campaign, featuring scientist "energy farmers"<sup>47</sup> mining the ocean to harvest "renewable biofuels,"<sup>48</sup> and touting algae's "potential to

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<sup>42</sup> *Id.* at 10.

<sup>43</sup> CIEL, CONFRONTING THE MYTH OF CARBON-FREE FOSSIL FUELS 8 (2021), <https://www.ciel.org/wp-content/uploads/2021/07/Confronting-the-Myth-of-Carbon-Free-Fossil-Fuels.pdf>; Samira Garcia Freitas & Christopher Jones, TYNDALL CENTRE, A REVIEW OF THE ROLE OF FOSSIL-FUEL BASED CARBON CAPTURE AND STORAGE IN THE ENERGY SYSTEM 12, (2021), [https://pure.manchester.ac.uk/ws/portalfiles/portal/184755890/CCS\\_REPORT\\_FINAL\\_v2\\_UPLOAD.pdf](https://pure.manchester.ac.uk/ws/portalfiles/portal/184755890/CCS_REPORT_FINAL_v2_UPLOAD.pdf).

<sup>44</sup> See CIEL, *supra* note 43.

<sup>45</sup> See INFLUENCEMAP, BIG OIL'S REAL AGENDA ON CLIMATE CHANGE (March 2019), <https://influencemap.org/report/How-Big-Oil-Continues-to-Oppose-the-Paris-Agreement-38212275958aa21196dae3b76220bddc>.

<sup>46</sup> Exxon spent \$68 million to air three algae-focused advertisements on television between 2017 and 2020, just under a quarter of the amount it spent on algae research since 2009. Oversight & Reform Investigation Memo, *supra* note 14, at 2.

<sup>47</sup> ExxonMobil, *Renewable Biofuel: 24 Hours at an Algae Farm* | ExxonMobil, YouTube (Dec. 4, 2018), <https://www.youtube.com/watch?v=yG67aJvOOR0>.

<sup>48</sup> ExxonMobil, *Working on Tomorrow's Biofuel*, YouTube (May 28, 2019), <https://www.youtube.com/watch?v=T7ijbGqIPlk>.

change our energy future.”<sup>49</sup> The campaign even used children to spread the word,<sup>50</sup> promoting a product that did not yet exist, and wouldn’t for a long time per the company’s own estimates.<sup>51</sup> Despite knowing that the technology was unproven and unfeasible, Exxon prominently publicized its comparatively small investment in algae biofuel to boost its own reputation as an actor working towards climate solutions, and assuage consumers’ concerns about its products’ contribution to the climate crisis.

Plastics producers and the American Chemistry Council (ACC) are engaged in a similar reputation advertising campaign, ramping up spending on advertisements that promote “advanced recycling” as a solution to plastic waste. “Advanced recycling” is a term used to refer to various plastic-to-fuel conversion processes that incinerate or burn plastic as a fossil fuel, rather than turn it into new plastic products. The advertisements claim, among other things, that advanced recycling keeps plastics in the “circular economy,” a term that has been co-opted to mislead consumers into believing that plastics are being sent back into the same production cycle.<sup>52</sup> In 2022, the ACC spent more than \$265,000 on ads portraying advanced recycling as an innovative and sustainable future for plastic,<sup>53</sup> more than double what it spent in 2021.<sup>54</sup> During the first few months of this year, the organization has spent more than \$526,000 on advanced recycling ads.<sup>55</sup>

These and other examples of reputation advertising highlight how marketers *are* overstating both explicitly and implicitly the environmental attributes or benefits of their practices, engaging in unqualified comparative claims, and making claims about a general environmental benefit.

2. *The Commission has the authority to address unfair or deceptive environmental claims in reputation advertising.*

The FTC’s mission is to protect the public from unfair or deceptive business practices and from unfair methods of competition.<sup>56</sup> In pursuit of this mission, the Commission published the Green Guides to help marketers avoid making unfair or deceptive environmental claims.<sup>57</sup> Because reputation

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<sup>49</sup> T Brand Studio, *Algae May Be Small – But Its Impact Could be Big* | Presented by ExxonMobil, YouTube (Sep. 25, 2018), <https://www.youtube.com/watch?v=pWcIx1LFSWk>.

<sup>50</sup> ExxonMobil, *School of ExxonMobil: Algae Biofuel*, YouTube (Dec. 4, 2018), <https://www.youtube.com/watch?v=9IuAkMJqb7Y>.

<sup>51</sup> See Nick Cunningham, *Internal Documents Show Big Oil PR Messages Still ‘Mislead’ Public on Climate*, DESMOG (Sep. 16, 2022), <https://www.desmog.com/2022/09/16/shell-exxon-oil-pr-mismatch-carbon-capture-algae/>.

<sup>52</sup> See, e.g., America’s Plastic Makers, *Meet Matthew*, Meta Ad Library, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=political\\_and\\_issue\\_ads&country=US&id=583623639954381&q=matthew&view\\_all\\_page\\_id=106244251043808&sort\\_data\[direction\]=desc&sort\\_data\[mode\]=relevancy\\_monthly\\_grouped&search\\_type=page&media\\_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&id=583623639954381&q=matthew&view_all_page_id=106244251043808&sort_data[direction]=desc&sort_data[mode]=relevancy_monthly_grouped&search_type=page&media_type=all) (last visited Apr. 20, 2023).

<sup>53</sup> See Jordan Wolman, *Advanced Recycling Mines the Meta-verse*, POLITICO (Jan. 5, 2023), <https://www.politico.com/newsletters/the-long-game/2023/01/05/advanced-recycling-goes-digital-00076537>; see also, e.g., America’s Plastic Makers, *Meet Susan*, Meta Ad Library, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=all&country=US&q=susan&view\\_all\\_page\\_id=106244251043808&sort\\_data\[direction\]=desc&sort\\_data\[mode\]=relevancy\\_monthly\\_grouped&search\\_type=page&media\\_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&q=susan&view_all_page_id=106244251043808&sort_data[direction]=desc&sort_data[mode]=relevancy_monthly_grouped&search_type=page&media_type=all) (last visited Apr. 20, 2023).

<sup>54</sup> Wolman, *supra* note 53.

<sup>55</sup> Emily Sanders, *Why Big Oil and the Chemical Lobby are Blasting Us With “Advanced” Recycling Ads*, EXXONKNEWS (Mar. 28, 2023), <https://www.exxonknews.org/p/why-big-oil-and-the-chemical-lobby>; see also, e.g., America’s Plastic Makers, *Meet Jacob*, Meta Ad Library, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=all&country=US&q=jacob&view\\_all\\_page\\_id=106244251043808&sort\\_data\[direction\]=desc&sort\\_data\[mode\]=relevancy\\_monthly\\_grouped&search\\_type=page&media\\_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&q=jacob&view_all_page_id=106244251043808&sort_data[direction]=desc&sort_data[mode]=relevancy_monthly_grouped&search_type=page&media_type=all) (last visited Apr. 20, 2023).

<sup>56</sup> *Mission*, FTC, <https://www.ftc.gov/about-ftc/mission> (last visited April 12, 2023).

<sup>57</sup> 16 C.F.R. part 260.1 *et seq.* [hereinafter Green Guides]

advertising is a marketing strategy that plays a direct role in the promotion and sale of products and services, and because environmental claims in reputation advertising are more than “puffing representations,” the Green Guides should address the use of reputation advertising.

The link between a company’s positive reputation and their increased sale of goods is widely recognized. Reputation consists of consumers’ “accumulated opinions, perceptions, and attitudes towards the company.”<sup>58</sup> Numerous studies have shown that a positive reputation has a “significant effect” on a company’s sales and profits.<sup>59</sup> Similarly, a negative corporate reputation “significantly aggravates consumers’ attitudes and purchase intention.”<sup>60</sup> In other words, having a positive reputation, or preventing a negative reputation, results in greater sales and thus greater profits.

Reputation advertising is thus a form of marketing for every product that the company sells, because it creates a positive association and brand recognition that makes the consumer feel good, or at least less guilty, about purchasing that company’s products. As noted above, there is increasing pressure for companies to “greenwash” their brand reputation, as consumers are becoming increasingly concerned about the impact of their consumer behavior on the existential issues of climate change and plastic waste. When reputational advertising is unfair or deceptive, consumers are misled, and their resulting purchasing decisions are the result of fraudulent marketing.<sup>61</sup>

Greenwashing and other types of environmental claims made in reputation advertising are actionable by the Commission when they are unfair or deceptive. The Commission generally does not pursue “obviously exaggerated or puffing representations, *i.e.*, those that the ordinary consumers do not take seriously.”<sup>62</sup> Non-actionable puffery includes claims that are highly subjective, that consumers are not likely to take seriously, and that are not measurable.<sup>80</sup> Environmental claims made in reputation advertising are not general or aspirational “puffing representations.” Rather, they create consumer expectations that can often be proven or disproven by measurable data and scientific evidence.

In 2021, Earth Island Institute sued plastics manufacturer BlueTriton under D.C.’s consumer protection statute, alleging that reputational statements, for example, that the company is “shap[ing] a waste-free future” and is a “guardian of sustainable resources,” are deceptive, because “the company remains a major plastic polluter, and has made no significant effort to ‘shape a waste-free future’ or to otherwise operate as a ‘sustainable’ enterprise.”<sup>63</sup> BlueTriton moved to dismiss the case, arguing that it could not be held accountable for claims of “sustainable and environmentally beneficial manufacturing practices” because they were only aspirational puffery.<sup>64</sup> The D.C. Superior Court denied BlueTriton’s

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<sup>58</sup> Na Young Jung & Yoo-Kyoung Seock, *The Impact of Corporate Reputation on Brand Attitude and Purchase Intention*, 3 FASHION & TEXTILES 1, 1 (2016).

<sup>59</sup> See, e.g., *id.*; Violina P. Rindova et al., *Being Good or Being Known: An Empirical Examination of the Dimensions, Antecedents, and Consequences of Organizational Reputation*, 48 ACADEMY OF MANAGEMENT J. 1033 (2005); Peter W. Roberts & Grahame R. Dowling, *Corporate Reputation and Sustained Superior Financial Performance*, 23 STRATEGIC MANAGEMENT J. 1077 (2002); Benedikt Spangardt, *Impact of Corporate Advertising on Consumers’ Attitudes Toward Products*, 2 BUSINESS & MANAGEMENT STUDIES 95 (2016).

<sup>60</sup> Jung & Seock, *supra* note 64, at 1.

<sup>61</sup> The results of this are discernable in consumer’s increasing skepticism and lack of confidence about environmental claims. See Shelton Group, *supra* note 40.

<sup>62</sup> FED. TRADE COMM’N, FTC POLICY STATEMENT ON DECEPTION (1983), available at [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf).

<sup>63</sup> Complaint & Demand for Jury Trial, *Earth Island Inst. v. BlueTriton Brands*, 2021 CA 003027 B at 2-3 (D.C. Sup. Ct. 2022).

<sup>64</sup> *Earth Island Inst. v. BlueTriton Brands, Inc.*, No. 2021 CA 003027 B, 2022 WL 2132634 at \*3 (D.C. Super. June 7, 2022).

motion, agreeing that deceptive reputation advertising was not *de facto* non-actionable puffery and raised an issue of fact for the jury to decide.<sup>65</sup>

The FTC has the authority to address unfair or deceptive environmental claims such as these in reputation advertising, and should update the Green Guides accordingly.

3. *The Green Guides provide a useful framework but must go further to explicitly reference reputation advertising.*

The Green Guides provide an existing framework that should be used to address unfair and deceptive environmental claims when promoting a company’s reputation and business practices. Specifically, the principles articulated in Sections 260.3 and 260.5 apply to reputation advertising in the same way they apply to marketing of an individual product.

Section 260.3(a) requires marketers to make “clear, prominent, and understandable” qualifications and disclosures.<sup>66</sup> Yet marketers often use ambiguous language and buzzwords to promote their reputation and business, for example, by calling themselves “low carbon,” “net zero,” or part of the “circular economy.” Such terms are often unclear to consumers without additional background and context.

In a 1996 public statement on “Myths and Half-Truths About Deceptive Advertising,” Former FTC Commissioner Roscoe B. Starek, III stated that “a statement that is literally true can have a deceptive implication when considered in the context of the whole advertisement, even if that implication is not the only possible interpretation.”<sup>67</sup> This principle holds true today, requiring qualifications and disclosures to prevent confusion and deception.

The Commission’s 2013 report entitled *.com Disclosures* is instructive in how marketers should implement disclosure rules in reputation advertising:

2. When practical, advertisers should incorporate relevant limitations and qualifying information into the underlying claim, rather than having a separate disclosure qualifying the claim.

...

5. If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, and it is not possible to make the disclosure clearly and conspicuously, then that ad should not be disseminated. This means that if a particular platform does not provide an opportunity to make clear and conspicuous disclosures, then that platform should not be used to disseminate advertisements that require disclosures.<sup>68</sup>

Under this guidance, if a marketer is not able to make a qualification or disclosure on a reputation advertisement that prevents it from being misleading to the consumer, then they should be prohibited from making such a claim.

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<sup>65</sup> *Id.* at \*5.

<sup>66</sup> Green Guides, §260.3(a)

<sup>67</sup> Roscoe B. Starek, III, Former Commissioner, *Myths and Half-Truths About Deceptive Advertising*, Federal Trade Commission (Oct. 15, 1996), [https://www.ftc.gov/news-events/news/speeches/myths-half-truths-about-deceptive-advertising#N\\_1](https://www.ftc.gov/news-events/news/speeches/myths-half-truths-about-deceptive-advertising#N_1).

<sup>68</sup> FTC, *.COM DISCLOSURES ii-iii* (2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>

Other sections of the Green Guides also provide relevant guidance on how to address reputation campaigns, including:

- §260.3 (c) *Overstatement of Environmental Attribute*: Stating that a “claim should not overstate, directly or by implication, an environmental attribute or benefit. Marketers should not state or imply benefits if the benefits are negligible.
- §260.3(d) *Comparative Claims*: Stating that “[c]omparative environmental marketing claims should be clear to avoid consumer confusion about the comparison [and] should have substantiation for the comparison.
- §260.4 *General Environmental Benefit Claims*: Calling it deceptive to misrepresent that the quality being marketed offers a general environmental benefit.

For the commonly used environmental claims in reputation advertising, the Commission should consider updating the Green Guides to include guidance on the proper use and definition of these terms. These may include the “buzzwords” identified by the Shelton Group, such as “eco-friendly,” “net zero,” “low carbon footprint,” “carbon neutral,” “circular economy” and “social responsibility.”<sup>69</sup> As discussed herein, CCI urges the Commission to update the Green Guides to specifically provide guidance on the use of terms “net zero” and “circular economy.” More broadly, the Commission must explicitly reference reputation advertising as a form of marketing covered by the Green Guides.

### **III. The Green Guides must establish a standard definition for “net zero” that is comprehensive in scope and credible in application.**

More than 700 of the world’s largest public companies have announced “net zero” targets, yet there is no universally accepted definition or set of criteria for evaluating these pledges.<sup>70</sup> In the absence of a standard definition for net zero, companies are setting – and advertising – net zero targets that vary widely in scope and credibility. According to the U.N. High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, “too many of these pledges are not aligned with the science, do not contain enough detail to be credible, and use the terms ‘net zero’ or ‘net zero aligned’ (as well as many other similar terms) inconsistently.”<sup>71</sup>

In the absence of a standard definition, consumers are confused about the meaning of net zero. A qualitative study conducted via 75 in-depth interviews by the UK’s Advertising Standards Authority (ASA) found that while “carbon neutral” and “net zero” were the most familiar terms for participants, “there was little consensus as to their meaning” and many incorrectly believed the terms could be used interchangeably.<sup>72</sup> The study also concluded that claims could have an impact on customer purchasing decisions, both directly and indirectly (by improving brand reputation).<sup>73</sup> When companies advertise net

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<sup>69</sup> Shelton Group, *supra* note 40, at 4-18.

<sup>70</sup> NEWCLIMATE INST. ET AL., NET ZERO STOCKTAKE 2022 4 (2022), <https://cal-nzt.edcdn.com/Net-Zero-Tracker/Net-Zero-Stocktake-Report-2022.pdf?v=1655074300> [*hereinafter* Stocktake].

<sup>71</sup> U.N.’S HIGH-LEVEL EXPERT GROUP ON THE NET ZERO EMISSIONS COMMITMENTS OF NON-STATE ENTITIES, INTEGRITY MATTERS: NET ZERO COMMITMENTS BY BUSINESSES, FINANCIAL INSTITUTIONS, CITIES AND REGIONS, 15 (2022), available at [https://www.un.org/sites/un2.un.org/files/high-level\\_expert\\_group\\_n7b.pdf](https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf) [*hereinafter* UN Net Zero Report].

<sup>72</sup> ASA, ENVIRONMENTAL CLAIMS IN ADVERTISING: QUALITATIVE RESEARCH REPORT 2 (2022), <https://www.asa.org.uk/static/6830187f-cc56-4433-b53a4ab0fa8770fc/CCE-Consumer-Understanding-Research-2022Final-090922.pdf>.

<sup>73</sup> *Id.*

zero targets that are limited in scope and unsubstantiated by company actions, consumers may believe the company and its products are more sustainable than they actually are, improperly affecting their purchasing decisions.

Of particular concern are fossil fuel companies' claimed net zero targets, which are neither comprehensive nor credible. While the industry has one of the highest rates of announced net zero targets, evidence suggests many are "symbolic in nature, without the detailed plans required to achieve them. Or at worst, they are flat-out greenwashing."<sup>74</sup> Experts who testified before the U.S. House Oversight and Reform Committee last year affirmed that oil companies use deceptive and ambiguous language to claim net zero targets that will not deliver the implied emission reductions.<sup>75</sup> In the words of U.N. Secretary General António Guterres, "[u]sing bogus 'net-zero' pledges to cover up massive fossil fuel expansion is reprehensible. It is rank deception. This toxic cover-up could push our world over the climate cliff. The sham must end."<sup>76</sup>

The Commission should update the Green Guides to establish a clear definition for net zero that is comprehensive in scope and credible in application to set a clear standard for consumer expectations, level the playing field for companies, and deter intentionally deceptive claims. Companies that diverge from this standard definition when making a net zero claim must assume the burden to ensure that consumers understand the limitations of their statement and, at a minimum, include clear and prominent disclaimers. These disclaimers should explain and contextualize the difference between the net zero claim and the standard definition, not simply state what is covered by the claim.

A. Corporate "net zero" claims must cover all direct and indirect greenhouse gas emissions from across the company's entire portfolio and value chain.

It is deceptive for a company to make a net zero claim that excludes any portion of their emissions using hidden loopholes and carve outs. These exclusions can create a dramatic discrepancy between the emission reductions a company plans to achieve, and the emission reductions customers assume from a net zero claim. For example, New Climate Institute analyzed the net zero targets of 25 major companies, finding that, though the term "net zero" implies a 100% reduction of emissions, the companies' targets aimed to reduce "aggregate emissions by only 40% at most."<sup>77</sup>

To help prevent consumer deception, the Green Guides should require net zero emission claims to cover *all* greenhouse gas emissions, and specifically clarify that this includes, at a minimum:

- *All major greenhouse gases:* Though CO<sub>2</sub> is historically the primary driver of climate change, other greenhouse gases, including methane, have an even greater potential for short-term warming. A 2021 analysis of net zero targets by The Energy & Climate Intelligence Unit and Oxford Net Zero found that oil companies' net zero targets focused on "CO<sub>2</sub> emissions reductions over those of other gases, leaving the door open for the expansion of methane (fossil

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<sup>74</sup> *Net Zero Stocktake 2022*, NET ZERO TRACKER (June 13, 2022), <https://zerotracker.net/insights/pr-net-zero-stocktake-2022> (quoting Richard Black, Senior Associate at Energy & Climate Change Intelligence Unit (ECIU)).

<sup>75</sup> Oversight & Reform Investigation Memo, *supra* note 14, at 3.

<sup>76</sup> U.N. Secretary-General, *Bogus Net-Zero Pledges 'Rank Deception,' Sham Must End, Secretary-General Stresses at Launch of Report by High-Level Expert Group on Non-State Actors' Commitments*, U.N. Doc SG/SM/21576 (Nov. 8, 2022), <https://press.un.org/en/2022/sgsm21576.doc.htm>.

<sup>77</sup> NEWCLIMATE INSTITUTE, *CORPORATE CLIMATE RESPONSIBILITY MONITOR 2022 5* (2022), <https://newclimate.org/sites/default/files/2022-06/CorporateClimateResponsibilityMonitor2022.pdf>.



gas) products even as carbon intensity is reduced.”<sup>78</sup> Consumers should not be expected to understand the intricate differences between the impacts of carbon versus other greenhouse gases. Companies should be advised not to claim “net zero carbon” targets without clearly and prominently acknowledging any major greenhouse gases excluded from the target, along with the respective percentage of company emissions this exclusion represents.

- *All emission scopes*: The Greenhouse Gas Protocol categorizes corporate emissions into three scopes: direct operational emissions (Scope 1), indirect operational emissions (Scope 2), and value chain emissions (Scope 3).<sup>79</sup> Though widely used by scientists and policy-makers, this framework is not widely known or understood among consumers. Companies commonly exclude Scope 3 emissions from their net zero targets; just 38% of corporate net zero targets assessed by Net Zero Tracker fully cover Scope 3 emissions.<sup>80</sup> This omission is particularly problematic for fossil fuel companies because it excludes emissions from the intended use of their product and can represent up to 90% of a company’s emissions, obscuring the meaning of the net zero claim for consumers<sup>81</sup> For example, ExxonMobil’s net zero claims include a disclaimer that the target applies only to Scopes 1 and 2.<sup>82</sup> This is insufficient because it does not acknowledge the exclusion of Scope 3, which represents an estimated 80% of the company’s emissions. Moreover, the “solutions” presented in their advertisements represent strategies to reduce end-use emissions, which may mislead viewers to believe end-use (Scope 3) emissions are covered by the company’s net zero target. Companies should be advised not to claim partial net zero targets without clearly and prominently acknowledging what emissions are excluded from the target and their respective percentage of total company emissions.
- *The company’s entire portfolio*: Companies also misrepresent their emission plans by excluding significant portions of their business from net zero claims. These loopholes include but are not limited to emissions from joint ventures, subsidiaries, and specific product categories. For example, an analysis by Global Climate Insights found that BP’s net zero targets address *only 17%* of the company’s total emissions by excluding emissions from refined products, crude oil, and ‘physically traded’ products.”<sup>83</sup> BP’s net zero advertisements claim its target is “to become a net zero *company*” (emphasis added) with no indication that any portion of its business is excluded from the target.<sup>84</sup> Companies should be advised to avoid net zero claims that do not cover their entire portfolio, or to prominently state the portion of their business covered by the net zero claim.

These requirements for a “net zero” definition align with recommendations from the U.N. High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, which calls for net zero targets to “account for all greenhouse gas emissions (based on internationally approved measures of warming effects) and include separate targets for material non-CO<sub>2</sub> greenhouse gas emissions (e.g.,

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<sup>78</sup> ENERGY & CLIMATE INTELLIGENCE UNIT, TAKING STOCK: A GLOBAL ASSESSMENT OF NET ZERO TARGETS 18 (2021), [https://ca1-eci.edcdn.com/reports/ECIU-Oxford\\_Taking\\_Stock.pdf?v=1616461369](https://ca1-eci.edcdn.com/reports/ECIU-Oxford_Taking_Stock.pdf?v=1616461369).

<sup>79</sup> WORLD RES. INST. & WORLD BUS. COUNCIL FOR SUSTAINABLE DEV., THE GREENHOUSE GAS PROTOCOL: CORPORATE ACCOUNTING AND REPORTING STANDARD, REV. 25 (2015), <https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf>.

<sup>80</sup> Stocktake, *supra* note 70, at 30.

<sup>81</sup> GREENHOUSE GAS PROTOCOL, SCOPE 3 FREQUENTLY ASKED QUESTIONS 2 (2022), [https://ghgprotocol.org/sites/default/files/standards\\_supporting/Scope%203%20Detailed%20FAQ.pdf/](https://ghgprotocol.org/sites/default/files/standards_supporting/Scope%203%20Detailed%20FAQ.pdf/).

<sup>82</sup> ExxonMobil (@exxonmobil), Instagram (Sep. 27, 2022), <https://www.instagram.com/p/CjA9MV0goXo/>.

<sup>83</sup> *Initiation of Coverage: BP*, ACCR (Mar. 28, 2022), <https://www.accr.org.au/research/initiation-of-coverage-bp/>.

<sup>84</sup> bp (@bp\_plc), Twitter (Aug. 18, 2020), [https://twitter.com/bp\\_plc/status/1295745171305508865](https://twitter.com/bp_plc/status/1295745171305508865).

fossil methane and biogenic methane)” and to “include emissions reductions from a non-state actor’s full value chain and activities.”<sup>85</sup>

B. “Net zero” claims must distinguish between emission reductions, post-emission compensation (offsets and removals), and emission divestments.

It is deceptive for companies to make net zero claims that are covertly and/or unrealistically reliant on emission offsets. The U.K.’s Advertising Standards Authority found offsets to be “the primary source of confusion and misunderstanding [in relation to net zero claims],” stating that consumers assumed “the claims referred to a direct reduction of carbon emissions.”<sup>86</sup> Further, “[p]eople tended to feel misled when they learned that companies were often relying on offsetting, either partially or wholly, rather than directly reducing carbon emissions.”<sup>87</sup>

While net zero targets will be achieved through a mix of both emission reductions and offsets, credible net zero claims must prioritize reductions. As the Commission knows, carbon offsets present a number of problems, including “additionality, permanence, avoidance of double counting, leakage, and the accuracy of quantified impacts.”<sup>88</sup> A recent investigation found that more than 90% of rainforest carbon offsets approved by a leading certifier were likely to be “phantom credits’ and do not represent genuine carbon reductions.”<sup>89</sup> Yet sponsored content placed by Shell on *The Atlantic*’s website (the modern “advertorial”) – titled *Creating a Net-Zero World* – promotes the use of offsets without acknowledging any of their challenges.<sup>90</sup>

Net zero claims that rely on vast amounts of offsets cannot be deemed credible. Carbon offsets require finite natural resources. The offsets in Shell’s net zero plan, for example, dubiously require “planting forests the size of Spain,” which would require 10% of all land available for forest planting.<sup>91</sup> Because this is not a realistic undertaking, Shell’s net zero plan is deceptive.

The use of carbon removal technologies such as CCS and direct air capture (DAC) presents similar credibility challenges for corporate net zero claims. Despite decades of industry claims, CCS and DAC technologies remain unproven at scale. The 28 CCS facilities operating globally in 2021 had the *technical capacity* to capture just 37 megatons of CO<sub>2</sub> annually, or 0.1% of fossil fuel emissions.<sup>92</sup> The actual quantity of emissions captured was substantially lower as some of the facilities, including Chevron’s Gorgon project in Australia, have never realized their capturing capacity.<sup>93</sup> Moreover, a peer-

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<sup>85</sup> UN Net Zero Report, *supra* note 71, at 17.

<sup>86</sup> ASA, *supra* note 72, at 2.

<sup>87</sup> *Id.*

<sup>88</sup> Stocktake, *supra* note 70, at 26.

<sup>89</sup> Patrick Greenfield, *Revealed: More Than 90% of Rainforest Carbon Offsets by Biggest Certifier are Worthless, Analysis Shows*, GUARDIAN (Jan. 18, 2023), <https://www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe>.

<sup>90</sup> *Creating a Net-Zero World*, ATLANTIC RE:THINK, <https://www.theatlantic.com/sponsored/shell-2022/creating-a-net-zero-world/3758/> (the banner stating in small print “created by the Atlantic’s marketing team and paid for by Shell” but nowhere stating the piece is an advertisement).

<sup>91</sup> Rachel Kyte, *Don’t Be Fooled by ‘Net Zero’ Pledges*, WASH. POST (Mar. 22, 2021), <https://www.washingtonpost.com/opinions/2021/03/22/net-zero-pledges-carbon-emissions/>.

<sup>92</sup> Andy Rowell & Lorne Stockman, *Carbon Capture: Five Decades of False Hope, Hype, and Hot Air*, OIL CHANGE INT’L (June 17, 2021), <https://priceofoil.org/2021/06/17/carbon-capture-five-decades-of-industry-false-hope-hype-and-hot-air/>.

<sup>93</sup> *Id.*

reviewed analysis of CCS and DAC literature found that when all life-cycle emissions are taken into account, both technologies are almost always “net CO<sub>2</sub> additive: CO<sub>2</sub> emissions exceed removals.”<sup>94</sup> Indeed, an analysis of Shell’s Quest facility in Canada found that the plant released 60% more emissions than it captured over a five-year period.<sup>95</sup> But this is not clear to consumers when CCS and DAC are included in net zero claims.

Given the unproven nature and persistent challenges facing offsets and carbon removal technologies, the U.N. recommends that companies not only disclose removals required by net zero pledges but also include an explanation for why they are needed to avoid “undue reliance on the use of offsets and potential unrealistic dependence on removals (in lieu of concrete mitigation action) to reduce absolute emissions which is the priority this decade.”<sup>96</sup> Yet 60% of corporate net zero pledges do not explicitly disclose if they are reliant on emission removals or offsets.<sup>97</sup> Chevron<sup>98</sup> and ExxonMobil<sup>99</sup> both acknowledge that CCS plays a role in their net zero claims, but do not disclose the portion of emissions they expect removals or offsets to abate. Shell claims its net zero plan will employ 25 megatons of carbon capture annually by 2035,<sup>100</sup> equivalent to nearly 70% of current global technical capacity<sup>101</sup> for a technology that results in net-additive emissions.<sup>102</sup>

The third strategy companies use to pursue net zero targets involves emissions divestment, which is when companies divest from high-emission and hard-to-abate assets. These divestments allow companies to remove the asset from their emissions calculation, thus bringing them closer to net zero, but do not actually “reduce emissions” as many advertise.<sup>103</sup> Emissions divestments often do not reduce global emissions, and in some cases actually lead to global increased emissions, like BP’s sale of Alaskan assets to the privately held oil company Hilcorp.<sup>104</sup> It is thus deceptive for companies to use asset divestment as a strategy for reaching net zero and then claim that they are “reducing emissions.”

To ensure that net zero claims are properly understood by customers, the Green Guides should require companies to disclose the portion of the target that will result from emission divestments. Companies should be advised to qualify claims of “reducing emissions” as “reducing company emissions” if they cannot confirm that their actions reduce emissions from the global stock.

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<sup>94</sup> June Sekera & Andreas Lichtenberger, *Assessing Carbon Capture: Public Policy, Science, and Societal Need*, 5 BIOPHYSICAL ECON. & SUSTAINABILITY 13, 13 (2020).

<sup>95</sup> *Hydrogen’s Hidden Emissions*, GLOBAL WITNESS (Jan. 20, 2022), <https://www.globalwitness.org/en/campaigns/fossil-gas/shell-hydrogen-true-emissions/>.

<sup>96</sup> UN Net Zero Report, *supra* note 71, at 21, 38.

<sup>97</sup> Stocktake, *supra* note 70, at 29.

<sup>98</sup> *Lower Carbon Intensity of Our Operations*, CHEVRON, <https://www.chevron.com/sustainability/environment/lowering-carbon-intensity> (last visited Apr. 21, 2023).

<sup>99</sup> EXXONMOBIL, ADVANCING CLIMATE SOLUTIONS PROGRESS REPORT 12 (2023), <https://corporate.exxonmobil.com/-/media/global/files/advancing-climate-solutions-progress-report/2023/2023-advancing-climate-solutions-progress-report.pdf>.

<sup>100</sup> *In-Depth: Royal Dutch Shell plc (Shell) Climate Vote*, ACCR (Apr. 30, 2021), <https://www.accr.org.au/research/in-depth/royal-dutch-shell-plc-shell-climate-vote/>.

<sup>101</sup> See Garcia Freitas & Jones, *supra* note 43, at 12 (noting that the “global capture capacity of the operations CCS plants stands around 37 Mt CO<sub>2</sub> per year).

<sup>102</sup> Sekera & Lichtenberger, *supra* note 94, at 13.

<sup>103</sup> See, e.g., bp (@bp\_plc), Twitter (Aug. 18, 2020), [https://twitter.com/bp\\_plc/status/1295745171305508865](https://twitter.com/bp_plc/status/1295745171305508865).

<sup>104</sup> *Tracking Carbon Emissions 2021*, BLOOMBERG, <https://www.bloomberg.com/graphics/2021-tracking-carbon-emissions-BP-hilcorp/> (last visited Apr. 21, 2023).

C. Companies must not make or imply long-term “net zero” claims that are unsubstantiated by company plans, even if such commitments are qualified as “ambitions” or “goals.”

As forward-looking statements, net zero targets are naturally subject to external risks and carry some uncertainty. However, it is deceptive for a company to make or imply a net zero target that it has no credible plans to pursue. According to Net Zero Tracker, half of the 700 net zero targets made by the world’s largest companies have not been incorporated into company strategy documents or annual reports.<sup>105</sup> Climate Action 100+ has similarly found “the encouraging uptake of net zero commitments is not matched by the development and implementation of credible decarbonisation strategies.”<sup>106</sup>

The Green Guides should, as a priority, advise companies to avoid implying a net zero claim that they have no intention of pursuing. For example, in 2016, Shell launched a communications campaign centered around its Net Zero Emissions scenario and related report, *A Better Life with a Healthy Planet: Pathways to Net-Zero Emissions*.<sup>107</sup> A leaked strategy document for the campaign detailed business objectives including “Brand perception and advocacy... Build Shell’s reputation as an innovative, competitive and forward-thinking energy company of the future.”<sup>108</sup> Yet while the campaign sought to link Shell’s brand with its net zero emissions scenario, a small disclaimer within report revealed, “While we seek to enhance our operations’ average energy intensity through both the development of new projects and divestments, we have no immediate plans to move to a net-zero emissions portfolio over our investment horizon of 10–20 years.”<sup>109</sup>

Similarly, in 2020, ExxonMobil claimed to “respect and support society’s ambition to achieve net-zero emissions by 2050,”<sup>110</sup> but did not have its own net zero target until 2022,<sup>111</sup> even though a global net zero target would, necessarily, include ExxonMobil. To deter deceptively implied net zero claims, the Green Guides should advise companies to avoid marketing campaigns that are unsupported by company business plans.

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<sup>105</sup> Stocktake, *supra* note 70, at 26.

<sup>106</sup> *Climate Action 100+ Net Zero Company Benchmark Shows Continued Progress on Net Zero Commitments is Not Matched by Development and Implementation of Credible Decarbonisation Strategies*, CLIMATE ACTION 100 (Oct. 13, 2022), <https://www.climateaction100.org/news/climate-action-100-net-zero-company-benchmark-shows-continued-progress-on-net-zero-commitments-is-not-matched-by-development-and-implementation-of-credible-decarbonisation-strategies/>.

<sup>107</sup> See generally, *A BETTER LIFE WITH A HEALTHY PLANET: PATHWAYS TO NET-ZERO EMISSIONS*, SHELL (2016), [https://www.shell.com/energy-and-innovation/the-energy-future/scenarios/a-better-life-with-a-healthy-planet/jcr\\_content/root/main/section/call\\_to\\_action/links/item0.stream/1655563112084/f53f377c72c622102c589336d7eb60bfc1cf0c6b/scenarios-nze-brochure-interactive-afwv9-interactive.pdf](https://www.shell.com/energy-and-innovation/the-energy-future/scenarios/a-better-life-with-a-healthy-planet/jcr_content/root/main/section/call_to_action/links/item0.stream/1655563112084/f53f377c72c622102c589336d7eb60bfc1cf0c6b/scenarios-nze-brochure-interactive-afwv9-interactive.pdf) [*hereinafter* Shell Brochure].

<sup>108</sup> Georgie Johnson & Damian Kahya, *Leaked: The Strategy Behind Shell’s Low Emission PR Push*, UNEARTHED (June 7, 2016), <https://unearthed.greenpeace.org/2016/07/07/leaked-strategy-behind-shells-low-emissions-pr-push/>.

<sup>109</sup> Shell Brochure, *supra* note 107, at 1.

<sup>110</sup> *Climate Policy Decisions That Can Help Drive Energy Investments*, EXXONMOBIL (Jan. 24, 2022), <https://corporate.exxonmobil.com/what-we-do/delivering-industrial-solutions/carbon-capture-and-storage/climate-policy-energy-investments>.

<sup>111</sup> News Release, ExxonMobil Announces Ambition for Net Zero Greenhouse Gas Emissions by 2050 (Jan. 18, 2022), [https://corporate.exxonmobil.com/news/news-releases/2022/0118\\_exxonmobil-announces-ambition-for-net-zero-greenhouse-gas-emissions-by-2050](https://corporate.exxonmobil.com/news/news-releases/2022/0118_exxonmobil-announces-ambition-for-net-zero-greenhouse-gas-emissions-by-2050).

Shell formally announced a net zero target in April 2020.<sup>112</sup> Yet two years later in April 2022, a dropdown legal disclaimer on the webpage for Shell’s net zero strategy still advised:

Shell’s operating plan, outlook and budgets are forecasted for a ten-year period and are updated every year. They reflect the current economic environment and what we can reasonably expect to see over the next ten years. Accordingly, Shell’s operating plans, outlooks, budgets and pricing assumptions do not reflect our net-zero emissions target. In the future, as society moves towards net-zero emissions, we expect Shell’s operating plans, outlooks, budgets and pricing assumptions to reflect this movement.<sup>113</sup>

ExxonMobil’s 2023 *Advancing Climate Solutions Progress Report* notes that:

The reference case for planning beyond 2030 including impairment assessments and future planned development activities is based on our Outlook for Energy. The Outlook is reflective of the existing global policy environment and does not attempt to project the degree of necessary future policy and technology advancement and deployment for the world, or ExxonMobil, to meet net zero by 2050.<sup>114</sup>

If a company announces a net zero claim, a reasonable customer would assume the company has integrated the target into its strategy and has established a credible plan to achieve the target. The U.N. High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities calls for companies to “publicly disclose comprehensive and actionable net zero transition plans which indicate actions that will be undertaken to meet all targets, as well as align governance and incentive structures, capital expenditures, research and development, skills and human resource development, and public advocacy.”<sup>115</sup>

Further, it is deceptive for a company to claim a net zero pledge that assumes customers will offset or otherwise abate any portion of the company’s emissions. For example, Shell’s net zero claim includes “mitigation actions taken separately by our customers,”<sup>116</sup> who are expected to purchase offsets that will address Shell’s Scope 3 emissions. The Green Guides should advise companies to only market emission reduction targets that can be substantiated by company actions.

#### **IV. The Green Guides must be updated to address deceptive environmental marketing concerning plastic recycling.**

The plastic waste crisis is being perpetuated by unfair and deceptive advertising claims about plastic recycling. Consumers want to make environmentally-conscious choices, and thanks to decades of industry advertising, they are apt to believe that recycling is the solution to the plastic waste crisis. By

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<sup>112</sup> Ben van Beurden, CEO, Shell, Address at Shell’s Responsible Investor Day Event: A Net Zero Emissions Energy Business (Apr. 16, 2020), available at <https://www.shell.com/media/speeches-and-articles/2020/a-net-zero-emissions-energy-business.html>.

<sup>113</sup> *Powering Progress*, Shell, <https://web.archive.org/web/20220422045002/https://www.shell.com/powering-progress.html> (last visited Apr. 21, 2023).

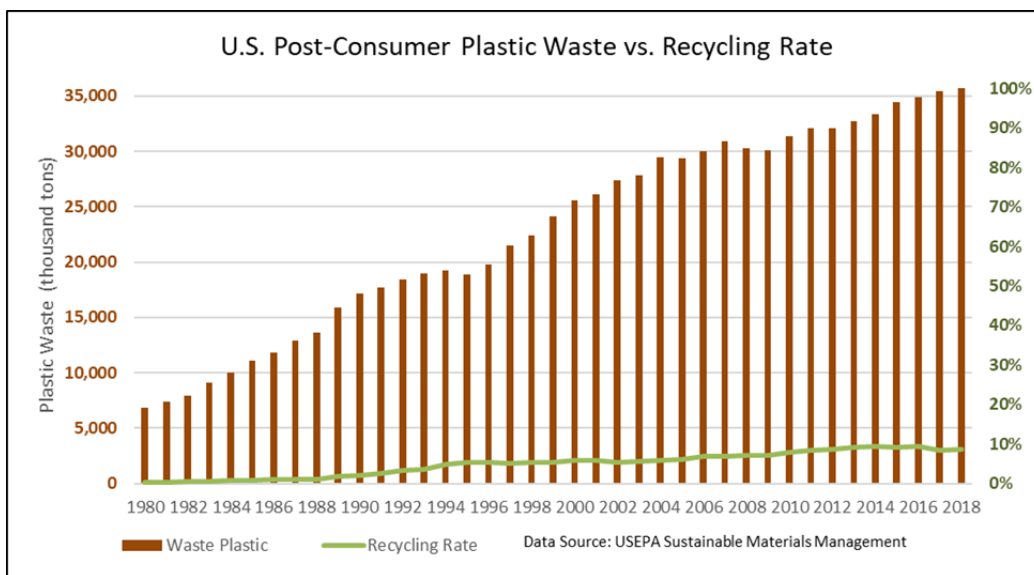
<sup>114</sup> EXXONMOBIL, *supra* note 99, at 13.

<sup>115</sup> UN Net Zero Report, *supra* note 71, at 21.

<sup>116</sup> *Targets Used By Shell to Manage Climate-Related Risks and Opportunities and Performance Against Targets*, SHELL, <https://reports.shell.com/annual-report/2022/strategic-report/our-journey-to-achieving-net-zero/climate-related-metrics-and-targets/targets.html> (last visited Apr. 24, 2023).

promoting plastic products as recyclable, marketers assuage consumer guilt about contributing to the growing plastic crisis.

Yet, plastic is overwhelmingly not recyclable,<sup>117</sup> and marketers know – and have known – this for decades. The U.S. recycles only 5-6% of its own plastic waste.<sup>118</sup> Of all plastic ever made, only about 9% has been recycled, while approximately 12% has been incinerated and 79% has accumulated in the environment or in landfills.<sup>119</sup> Even as plastic waste generation in the U.S. increased five-fold, from 7.4 million tons to 35.7 million tons per year between 1980 and 2018,<sup>120</sup> the recycling rate has never exceeded the 2014 peak of 9.5% (a figure that includes significant plastic waste exports to Asia).<sup>121</sup> Despite long-standing knowledge that plastic recycling is neither economically nor, in many cases, technically viable, the industry has repeatedly held recycling out as a solution to plastic waste, because, as described by a former industry executive, “selling recycling [sells] plastic.”<sup>122</sup>



Consumers are demanding action. According to a 2021 survey by Consumer Brands Association/Ipsos, 73% of Americans feel that the federal government is not doing enough to address plastic waste.<sup>123</sup> Industry’s recycling claims are not harmless to consumers. The Commission must take

<sup>117</sup> Judith Enck & Jan Dell, *Plastic Recycling Doesn’t Work and Will Never Work*, ATLANTIC (May 30, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/single-use-plastic-chemical-recycling-disposal/661141/>

<sup>118</sup> BEYOND PLASTICS & LAST BEACH CLEANUP, THE REAL TRUTH ABOUT THE U.S. PLASTIC RECYCLING RATE 3 (2022), [www.lastbeachcleanup.org/files/ugd/dba7d7\\_9450ed6b848d4db098de1090df1f9e99.pdf](http://www.lastbeachcleanup.org/files/ugd/dba7d7_9450ed6b848d4db098de1090df1f9e99.pdf).

<sup>119</sup> Roland Geyer, Jenna R. Jambeck & Kara Lavender Law, *Production, Use, and Fate of All Plastics Ever Made*, 3 SCI. ADVANCES 1, 2–3 (2017).

<sup>120</sup> Beyond Plastics & The Last Beach Cleanup, *supra* note 118, at 3.

<sup>121</sup> *Id.* at 3; GREENPEACE, CIRCULAR CLAIMS FALL FLAT AGAIN 27 (2022), [https://www.greenpeace.org/usa/wp-content/uploads/2022/10/GPUS\\_FinalReport\\_2022.pdf](https://www.greenpeace.org/usa/wp-content/uploads/2022/10/GPUS_FinalReport_2022.pdf) (citing U.S. Census Bureau, “USA Trade Online”). “The ‘recycled’ material, totaling 3.09 million tons, includes a significant amount of exported material: in 2018, 943 million kg (1.04 million tons) of U.S. plastic waste was exported (not including to Canada). If the exported plastic waste counted as “recycled” is deducted from the total, then only 2.05 million tons, or 5.7% of the total U.S. plastic waste generated, were recycled.” *Id.*

<sup>122</sup> FRONTLINE: PLASTIC WARS (PBS Mar. 31, 2021, May 11, 2021), <https://www.pbs.org/wgbh/frontline/documentary/plastic-wars/transcript/>.

<sup>123</sup> CONSUMER BRANDS ASS’N, LAUNCHING AMERICA’S RECYCLING MOON SHOT 3 (2019), [https://consumerbrandsassociation.org/wp-content/uploads/2019/11/ConsumerBrands\\_RecyclingMoonShot.pdf](https://consumerbrandsassociation.org/wp-content/uploads/2019/11/ConsumerBrands_RecyclingMoonShot.pdf).

action to address the unfair and deceptive claims about plastic recycling that are fueling the plastic waste crisis. The Green Guides should be updated accordingly.

A. Consumers are universally concerned about plastic waste and make purchasing decisions based on the perceived recyclability and environmental impact of plastic products and packaging.

Recent polling conducted by both industry and environmental groups demonstrates that U.S. consumers are concerned about plastic pollution and its impact on the environment and oceans. A 2021 poll by Consumer Brands Association/Ipsos found that 84% of consumers are concerned about plastic packaging waste.<sup>124</sup> Polling conducted in 2023 by Data for Progress likewise reported that 78% of respondents were “somewhat concerned” or “very concerned” about the impact of plastic pollution, and found that “strong concerns persist across partisanship.”<sup>125</sup> In a 2022 survey commissioned by the World Wildlife Fund, 74% of respondents agreed that the U.S. needs to reduce its reliance on plastic, and 84% of respondents agreed that we need to change our economy from one that throws things away to one that emphasizes reuse and recycling.<sup>126</sup> As Data for Progress noted, plastic pollution is a “visible and salient” issue for American consumers.<sup>127</sup>

Based on this near-universal concern, the vast majority of American consumers consider recyclability and environmental impact when making purchasing decisions. A 2020 Survey performed by industry consultants, the Shelton Group, found that 76% of U.S. consumers agree that recycling makes them feel better about purchases, and 67% of U.S. consumers look at the recycling label before deciding how to manage an item after use.<sup>128</sup> Most pointedly, Data for Progress reported that 69% of bipartisan survey respondents reported supporting a ban on single-use plastics in their communities after learning that such plastics generally can’t be recycled.<sup>129</sup>

Deceptive labeling and recycling claims impact consumers’ ability to make informed decisions and exercise their buying power in a way that aligns with their values. Last year, the Shelton Group reported that consumers are more skeptical and concerned about the effectiveness of sustainability tactics like recycling: “They’re thinking ‘We’ve all been doing them for a while now, and the waste and ocean plastics problem don’t seem to be improving.’”<sup>130</sup>

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<sup>124</sup> Katie Denis, *The Future is Bright for American Recycling*, CONSUMER BRANDS ASS’N (Aug. 7, 2021), <https://consumerbrandsassociation.org/blog/the-future-is-bright-for-american-recycling/>.

<sup>125</sup> Grace Adcox & Kevin Hanley, *Voters Express Concern About Plastic Pollution, Strongly Support Mitigation Proposals*, DATA FOR PROGRESS (Mar. 27, 2023), <https://www.dataforprogress.org/blog/2023/3/27/voters-express-concern-about-plastic-pollution-strongly-support-mitigation-proposals>.

<sup>126</sup> WWF, PUBLIC OPINION SURROUNDING PLASTIC CONSUMPTION AND WASTE MANAGEMENT OF CONSUMER PACKAGING 7 (2022), [https://files.worldwildlife.org/wwfcmprod/files/Publication/file/5k1qyg7hor\\_CI\\_Public\\_Opinion\\_Research\\_to\\_WWF\\_FINAL.pdf](https://files.worldwildlife.org/wwfcmprod/files/Publication/file/5k1qyg7hor_CI_Public_Opinion_Research_to_WWF_FINAL.pdf).

<sup>127</sup> Grace Adcox & Kevin Hanley, *Voters Express Concern About Plastic Pollution, Strongly Support Mitigation Proposals*, DATA FOR PROGRESS (Mar. 27, 2023), <https://www.dataforprogress.org/blog/2023/3/27/voters-express-concern-about-plastic-pollution-strongly-support-mitigation-proposals>.

<sup>128</sup> SHELTON GROUP, ENGAGING MIDDLE AMERICA IN RECYCLING SOLUTIONS (2020), [https://sheltongrp.com/work/recycling\\_pulse\\_2020\\_engaging-middle-america-in-recycling-solutions](https://sheltongrp.com/work/recycling_pulse_2020_engaging-middle-america-in-recycling-solutions).

<sup>129</sup> Adcox & Hanley, *supra* note 127.

<sup>130</sup> Shelton Group, *supra* note 40, at 10.

B. The vast majority of plastic has not been “recyclable” for decades, and labeling it “recyclable” is a deceptive practice.

The nature and characteristics of plastics makes them difficult if not impossible to recycle. Although the industry breaks plastics down into seven broad categories of resin, identified by the industry’s “Resin Identification Codes” illustrated below, there are actually thousands of different plastics, each with its own composition and characteristics.<sup>131</sup> The vast majority of these plastics cannot be recycled.



First, certain types of plastics are impossible to recycle. Because of their nature, thermoset plastics and mixed materials cannot be recycled.<sup>132</sup> Further, some types of plastic that are technically recyclable may include different colorants and additives which cannot be recycled together. For example, polyethylene terephthalate (PET#1) is widely accepted for recycling, yet PET#1 bottles cannot be recycled with PET#1 clamshells and other thermoforms, which are a different PET#1 material and unlikely to be recycled at most facilities. Similarly, green PET#1 bottles cannot be recycled with clear PET#1 bottles.<sup>133</sup>

Second, the quality of plastic degrades as it is recycled, limiting its use and recyclability. Consumer assumptions that recycling plastic means a cyclical and repeated use of plastic are inaccurate. Thus, the concept of “recycling” plastics is itself misleading. In reality, plastic can only be recycled once, rarely twice. When plastic is recycled, it is only briefly delayed on its journey to the landfill, incinerator, or environment rather than meaningfully kept in production.

Third, the toxicity of plastic and its chemical additives limits its ability to be used as a recycled material. Many plastics are made from toxic chemical building blocks and commonly contain toxic additives such as stabilizers, plasticizers, softeners, antioxidants, coatings, catalysts, and flame retardants, which are harmful to both environmental and human health.<sup>134</sup> According to a 2021 study published by

<sup>131</sup> *Recycling 101 – What Do The Plastic Codes Mean?*, METHOD, <https://methodrecycling.com/world/journal/recycling-101-what-do-the-plastic-codes-mean> (last visited Apr. 24, 2023).

<sup>132</sup> Jefferson Hopewell et al., *Plastics Recycling: Challenges and Opportunities*, 364 PHIL. TRANSACTIONS ROYAL SOC'Y B 2115 (2009).

<sup>133</sup> Enck & Dell, *supra* note 117; Greenpeace, *supra* note 121, at 19-20.

<sup>134</sup> CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL), *BEYOND RECYCLING: RECKONING WITH PLASTICS IN A CIRCULAR ECONOMY* 7 (2023), <https://www.ciel.org/wp-content/uploads/2023/03/Beyond-Recycling-Reckoning-with-Plastics-in-a-Circular-Economy.pdf>; INTERNATIONAL POLLUTANTS ELIMINATION NETWORK (IPEN), *PLASTIC'S TOXIC ADDITIVES AND THE CIRCULAR ECONOMY*, [https://ipen.org/sites/default/files/documents/plastics\\_and\\_additives\\_final-low-o-en.pdf](https://ipen.org/sites/default/files/documents/plastics_and_additives_final-low-o-en.pdf) (last visited Apr. 24, 2023).



the Government of Canada, the toxicity risks in recycled plastic prohibit the “vast majority of plastic products and packaging” from being recycled into food grade packaging.<sup>135</sup>

Finally, the cost of plastic recycling is simply prohibitive, meaning plastic recycling is not now and never will be a true solution to the plastic waste crisis. Recycled plastic costs more than new plastic because collecting, sorting, transporting, and reprocessing plastic waste is exorbitantly expensive.<sup>136</sup> Recycled plastic directly competes with virgin plastic, which is far cheaper to produce and of higher quality – not to mention that the petrochemical industry is rapidly expanding, effectively lowering the cost of new plastic even further.<sup>137</sup> As long as the petrochemical industry continues its rapid expansion and production of cheap virgin plastic, the idea that post-consumer recycled plastic markets will improve or keep up is false.

These limitations have been understood by the fossil fuel and petrochemical industries for decades. As early as 1974, an industry insider associated with the Society of the Plastics Industry expressed “serious doubt that [recycling plastic] can ever be made viable on an economic basis.”<sup>138</sup> In 1991, a report published by the U.S. Environmental Protection Agency (EPA) concluded that, “[p]ending better means of sorting the various types of plastic materials into relatively pure fractions, it appears that at the present only two types could be considered for making into high quality objects, PET and HDPE.”<sup>139</sup> Little has changed in the three decades since then.<sup>140</sup>

A recent Greenpeace report found that of all plastic, only PET #1 and HDPE#2 bottles and jugs – specifically those without non-recyclable or -sortable shrink sleeves – can be recycled at scale.<sup>141</sup> These plastic products are the only ones widely accepted by the 375 MRFs in operation in the U.S. today,<sup>142</sup> a finding that is consistent with the 2021 California Statewide Recycling Commission’s determination that only PET#1 and HDPE#2 bottles and jugs are recyclable in California.<sup>143</sup> The remainder – including PET#1 clamshells, cups, lids, and other thermoforms as well as Plastics #3-7 – have negligible-to-negative value. These plastics are products that municipal recycling programs may collect, but do not actually recycle.<sup>144</sup> The vast majority of plastics are not recycled, because it’s not profitable to do so.

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<sup>135</sup> ENV’T & CLIMATE CHANGE CAN., ASSESSING THE STATE OF FOOD GRADE RECYCLED RESIN IN CANADA & THE UNITED STATES 4 (2021),

[http://www.plasticmarkets.org/jsfcode/upload/wd\\_492/20211201120602\\_9\\_jsfwd\\_492\\_q2\\_1.pdf](http://www.plasticmarkets.org/jsfcode/upload/wd_492/20211201120602_9_jsfwd_492_q2_1.pdf).

<sup>136</sup> See Jillian Ambrose, *War on Plastic Waste Faces Setback as Cost of Recycled Material Soars*, GUARDIAN (Oct. 13, 2019),

<https://www.theguardian.com/environment/2019/oct/13/war-on-plastic-waste-faces-setback-as-cost-of-recycled-material-soars>.

<sup>137</sup> Matthew Taylor, *\$180bn Investment in Plastic Factories Feeds Global Packaging Binge*, GUARDIAN (Dec. 26, 2017),

<https://www.theguardian.com/environment/2017/dec/26/180bn-investment-in-plastic-factories-feeds-global-packaging-binge>.

<sup>138</sup> FRONTLINE: PLASTIC WARS, *supra* note 122.

<sup>139</sup> U.S. ENVTL. PROT. AGENCY, TEN YEAR REVIEW OF PLASTICS RECYCLING (1991) (available at Box 14, Jack Milgrom Papers, Special Collections Research Center, Syracuse University Libraries) [*hereinafter* EPA 1991 Report].

<sup>140</sup> Judith Enck & Jan Dell, *Plastic Recycling Doesn’t Work and Will Never Work*, ATLANTIC (May 30, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/single-use-plastic-chemical-recycling-disposal/661141/>.

<sup>141</sup> Greenpeace, *supra* note 121, at 3, 9.

<sup>142</sup> *Id.*

<sup>143</sup> CAL.’S STATEWIDE COMM’N ON RECYCLING MKTS. & CURBSIDE RECYCLING, POLICY RECOMMENDATIONS REPORT 4 (2021), <https://www.calrecycle.ca.gov/markets/commission>.

<sup>144</sup> See generally, Greenpeace, *supra* note 121.

Despite its knowledge that plastic recycling would never be economically viable, caused in part by its continued production and expansion of virgin plastic, the industry has invested heavily in environmental marketing campaigns to convince the public that plastic is recyclable and “circular,” and that plastic recycling is the solution to plastic waste. It continues to do so today with deceptive labeling and misleading reputation advertising about “advanced recycling” and the “circular economy.” The Green Guides should be updated to address these deceptive marketing claims.

C. “Qualified statements” about the recyclability of plastic must be identified as a deceptive practice.

The Green Guides should not permit “qualified” recyclability claims on plastic products which are “technically” recyclable, but for which there is no market or proven scalable technology. The Green Guides provide:

It is deceptive to misrepresent, directly or by implication, that a product or package is recyclable. A product or package should 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.<sup>145</sup>

The Guides further provide that marketers “should clearly and prominently qualify recyclable claims to the extent necessary to avoid deception about the availability of recycling programs and collection sites to consumers.”<sup>146</sup> For example, the Guides state:

[I]f recycling facilities are available to slightly less than a substantial majority of consumers or communities where the item is sold, a marketer may qualify a recyclable claim by stating: “This product [package] may not be recyclable in your area,” or “Recycling facilities for this product [package] may not exist in your area.”<sup>147</sup>

If recycling facilities are available only to a few consumers, marketers should use stronger clarifications. For example, a marketer in this situation may qualify its recyclable claim by stating, “This product [package] is recyclable only in the few communities that have appropriate recycling facilities.”<sup>148</sup>

Qualified statements about the recyclability of plastics are effectively meaningless, because although some plastics are “technically recyclable,” virtually no facilities or markets exist to recycle the vast majority of plastic. These qualifications do not help consumers – rather they mislead consumers into believing that plastic is more recyclable than it is. As discussed above, recent studies have detected that “the availability of recycling programs and collection sites” is absent for the vast majority of plastics in the United States. Just as the EPA concluded in 1991, only PET bottles and HDPE jugs are actually “recyclable” in the U.S. today.<sup>149</sup> Other plastics may be collected in municipal systems across the country but are sent to landfills or incinerated.<sup>150</sup>

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<sup>145</sup> 16 C.F.R. 260.12(a).

<sup>146</sup> 16 C.F.R. 260.12(b).

<sup>147</sup> 16 C.F.R. 260.12(b)(2).

<sup>148</sup> *Id.*

<sup>149</sup> Greenpeace, *supra* note 121; EPA 1991 Report, *supra* note 139, at 22.

<sup>150</sup> Greenpeace, *supra* note 121, at 3 (Greenpeace’s 2022 report “confirmed that acceptance of a plastic item by a MRF does not mean that the item will be recycled. As reported by the Wall Street Journal in August 2022, a California MRF admitted to accepting PP#5 tubs and disposing of them. The City of Knoxville, Tennessee, also publicly states that it accepts plastics #3-7 at its recycling facility but disposes of them because “there is no end-market buyer.”).

The Commission should not permit “qualified statements” of recyclability on products that have not been widely recyclable in over 30 years. Qualified statements appear on an overwhelming majority of products that may be “technically recyclable,” but for which there are few facilities to recycle them and no end market for the recycled material. Often, consumers either “wish-cycle” PET#1 clamshells, cups, lids, and other thermoforms as well as Plastics #3-7, hoping that the product will be recycled and/or they believe that the overall recycling rate of the product is much higher than it is. This form of deceptive environmental claim harms consumers by creating confusion and frustration about recyclability, and overburdens recycling facilities that must collect, sort, and dispose of “wish-cycled” plastic.

Because the current use of “qualified statements” obscures the truth about the true recyclability of plastic, the Commission should amend the Green Guides. Before any recyclability claim is permitted, via words or symbols, marketers must be required to demonstrate, with verifiable data, that the product satisfies the Guides’ definition of “recyclable.” This means demonstrating, among other things, that facilities for processing exist in more than 60% of communities, and that markets are available. Technologies that are unproven – or unproven at scale – must not be used to support recyclability claims.

D. The use of the “chasing arrows” symbol on plastic products and packaging must be identified as a deceptive practice.

The use of the chasing arrows symbol in the plastic industry’s “Resin Identification Codes” (RIC) misleads and deceives consumers into believing that products bearing the symbol are recyclable, even though the majority are not.<sup>151</sup> The “chasing arrows” symbol was originally designed in 1970 by a 23-year-old contestant in a competition to create a symbol for recycled paper. Since then, companies have sold their products with the iconic symbol to communicate recyclability. The chasing arrows symbol has been called “one of the most recognizable logos of all time,” and “a design classic that ranks with Coca-Cola and Nike marks, for sheer ubiquity.”<sup>152</sup> There can be no doubt that consumers associate this symbol with a product’s recyclability.

The chasing arrows symbol was co-opted by the Plastics Industry Association in 1988 and incorporated into the RIC as part of the industry’s “major program of unprecedented proportions to reverse [the] fast-moving tidal wave of growing negative public perception” of plastic.<sup>153</sup> The symbol is printed on nearly all plastic products, regardless of their recyclability.

In July 2022, CCI conducted focus groups in Cleveland, Ohio, Houston, Texas, and Bakersfield, California,<sup>154</sup> to assess consumers’ knowledge about plastic recycling and the impact of recycling marketing on consumers. When asked what consumers understood about the recyclability of products imprinted with the industry’s RIC codes, almost all believed that the products were recyclable due to the presence of the chasing arrows. Participant responses included:

- “Anything that has this symbol you can recycle.” - Cleveland<sup>155</sup>

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<sup>151</sup> See generally Greenpeace, *supra* note 121.

<sup>152</sup> Kim Bhasin, *This 23-Year-Old USC Student Created One Of The Most Recognizable Logos Of All Time*, BUS. INSIDER (July 9, 2012), <https://www.businessinsider.com/gary-anderson-the-man-who-created-the-recycling-logo-2012-7?r=US&IR=T>.

<sup>153</sup> FRONTLINE: PLASTIC WARS, *supra* note 122.

<sup>154</sup> Expedition Strategies, *Center for Climate Integrity July 2022 Qualitative Research, Focus Groups Transcripts*, (available upon request) [*hereinafter* CCI Focus Group].

<sup>155</sup> *Id.*, Cleveland Transcript at 20.

- “The three arrows, I know it’s recycle [sic].” - Bakersfield<sup>156</sup>
- “The arrow icon, isn’t that just the universal symbol for recycling?” - Houston<sup>157</sup>
- *Do you assume most of these are recyclable?* “Yes.” - Houston<sup>158</sup>

Consumers had little-to-no understanding what the RIC numbering system meant, though some guessed that it had to do with sorting materials for recycling. Others believed it referred to the number of times a product had been recycled. Respondents’ guesses included:

- “Thickness or grade.” - Bakersfield<sup>159</sup>
- “Maybe to identify whether it’s plastic, the glass, the aluminum and all that.” - Bakersfield<sup>160</sup>
- “I was thinking it’s all the 1s are recycled together, all the 2s are recycled together.” - Bakersfield<sup>161</sup>
- “I don’t know if the [sic] level of the recycling with the numbers.” - Cleveland<sup>162</sup>
- “Or like how many times it’s been recycled in its life.” - Cleveland<sup>163</sup>
- “Drinking out of a six or seven is worse than drinking out of a plastic with one . . . That’s my assumption . . . I’m saying the higher numbers is not the best one for you because it’s, because of the number of times it’s been recycled. That’s what I’m thinking.” - Cleveland<sup>164</sup>
- “I never even saw that.” - Cleveland<sup>165</sup>

Just one person in the Houston focus group believed that the city of Houston does not accept certain numbers for recycling, while one person in the Cleveland focus group guessed that not all RIC numbers could be recycled. He stated:

- “I’m going to go with my gut I guess and say that it’s - you can’t recycle them all I don’t think . . . I hope I’m wrong. . . God, I hope I’m wrong.” - Cleveland<sup>166</sup>

The deceptive use of the chasing arrows symbol creates a serious burden on municipal recycling facilities, which must sort and dispose of non-recyclable products. In addition to misleading consumers into believing that the products or packaging they purchase can be recycled, the symbol creates increased contamination and burdens recycling facilities (paid for by taxpayers). These impacts have been described in recent reporting as follows:

- In 2020, NPR reporters interviewed the owner of a San Diego recycling facility who stated that “the [chasing arrows] symbol starts showing up on the containers,” causing consumers to believe that any plastic item with the symbol could be recycled. He found that other recycling plants around the country were facing the same problem, that the “stamp made people believe something that wasn’t true – that all this plastic trash could be and would be turned into something else.”<sup>167</sup>

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<sup>156</sup> *Id.*, Bakersfield Transcript at 20.

<sup>157</sup> *Id.*, Houston Transcript at 9.

<sup>158</sup> *Id.*, at 9.

<sup>159</sup> *Id.*, Bakersfield Transcript at 20.

<sup>160</sup> *Id.*, at 16.

<sup>161</sup> *Id.*, at 17.

<sup>162</sup> *Id.*, Cleveland Transcript at 20.

<sup>163</sup> *Id.*, at 20.

<sup>164</sup> *Id.*, at 18-20.

<sup>165</sup> *Id.*, at 19.

<sup>166</sup> *Id.*, at 21.

<sup>167</sup> Laura Sullivan & Sarah Gonzalez, *Waste Land*, NPR (Sep. 11, 2020), <https://www.npr.org/2020/09/11/912150085/waste-land>.

- An NBC Video entitled, “How Misleading Labels Are Overwhelming Recycling Facilities,” shows an Amazon plastic mailing pouch with a large chasing arrows symbol creating contamination in a material recovery facility (MRF). As the MRF operator states, consumers see the symbol and put the plastic pouch in their curbside recycling bin.<sup>168</sup>
- A CBS Morning Video shows flexible plastic packaging, including Amazon plastic pouches, that were mistakenly put in curbside recycling bins by consumers. The MRF worker explains the harms caused by the plastic pouches, including that store drop-off bins where the plastic is collected are so often contaminated with other garbage that it cannot be recovered. Even plastic film separated properly is rarely accepted by plastic processing factories because there are few facilities that want to buy waste plastic and turn it into cheap, new plastic.<sup>169</sup>

The Oregon Truth in Labeling Task Force – created in 2021 to study and evaluate misleading or confusing claims regarding the recyclability of products made on a product or product packaging<sup>170</sup> – found that public confusion about what and how to recycle is one of the root drivers of instability in Oregon’s recycling system.<sup>171</sup> That confusion stems in part from misleading recycling labels. The report states that the existing “patchwork of labels and lack of standards” – due to the use of the chasing arrows symbol and misleading qualified statements – “leads to confusing and misleading recycling labels that confuse consumers and leads to contamination in the recycling system.”<sup>172</sup>

The final report relied on data from a survey conducted in the Portland Metro Region in 2018. The majority of people surveyed were confident that items typically labeled with the RIC code inside chasing arrows, including square plastic tubs, plastic berry containers, lids, and plastic to-go containers, could be recycled. However, these items are considered a contaminant to the recycling system across the entire state. The majority of Americans (61%) mistakenly believe that flexible plastic packaging, bags, and pouches are recyclable through curbside recycling bins.<sup>173</sup> The use of large recycling symbols on plastic packaging, bags, and pouches misleads consumers into believing that the flexible plastics are recyclable through curbside bins.<sup>174</sup>

On October 5, 2021, California enacted Senate Bill 343, entitled “Truth in Labeling for Recyclable Materials,” amending the state’s law relating to environmental advertising, and imposing certain common-sense limitations on recyclability representations, including the use of the chasing arrows.

Under SB 343, the use of the chasing arrow symbol (and placement of the RIC inside a chasing arrows symbol) will be considered a misleading environmental marketing claim in advertising or on a product label unless the product meets the state’s standard of “recyclable.”<sup>175</sup> Similar to the Green Guides

<sup>168</sup> NBC News, *How Misleading Labels Are Overwhelming Recycling Facilities*, YouTube (June 17, 2022), <https://www.youtube.com/watch?v=Ya56bWwX3a0>.

<sup>169</sup> CBS Mornings, *Program Aims to Help Consumers Recycle Plastic Film Correctly*, YouTube (July 19, 2022), <https://youtu.be/JjsuNhSUgnM>.

<sup>170</sup> 2021 Oregon Laws Ch. 681 (S.B. 582)

<sup>171</sup> OREGON TRUTH IN LABELING TASK FORCE REPORT, TRUTH IN LABELING FINAL REPORT AND RECOMMENDATIONS, (2022), <https://www.oregon.gov/deq/recycling/Documents/TIL-Report.pdf>.

<sup>172</sup> *Id.* at 8.

<sup>173</sup> Leah Pezzetti, *61% Believe Flexible Plastics are Recyclable in Curbside Bins. They're Not.*, KING5.COM, (Nov. 25, 2022), <https://www.king5.com/article/tech/science/environment/recycling-confusion-survey/281-742fa168-b328-4146-814d-bcc0acd1c99e>.

<sup>174</sup> Katherine Martinko, Treehugger, *Don't Believe the 'Store Drop-Off' Label When It Comes to Plastic Packaging*, TREEHUGGER (June 15, 2021), <https://www.treehugger.com/plastic-packaging-store-drop-off-label-5188913>.

<sup>175</sup> Cal. S.B. 343, 2021-2022 Leg., Reg. Sess. (Cal. 2021) (amending Cal. Bus. & Prof. Code, Section 17580(a)(6)), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=202120220SB343](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB343).

definition, a product or packaging is “recyclable” under the law only if it is made from a material type and form that is (1) collected by recycling programs in jurisdictions encompassing at least 60 percent of the state’s population and (2) sorted into defined streams for recycling processes by at least 60 percent of the state’s recycling programs.<sup>176</sup>

The bill goes further, addressing the toxicity limitations of recycling, specifying that a product or packaging is *not recyclable* in California if:

1. It includes components, inks, dyes, adhesives, or labels that prevent its recyclability;
2. It contains intentionally added chemicals identified pursuant to regulations implementing section 42370.2(g)(4) of the California Public Resources Code; or
3. It is made from plastic or fiber containing PFAS that have been intentionally added with a functional or technical effect or that measure above 100 parts per million total organic fluorine.<sup>177</sup>

Notwithstanding the above, a product or packaging *is recyclable* if:

1. The product or packaging has a demonstrated recycling rate in California of at least 75% (note this is a different metric from the 60% population target above);
2. The product or packaging is not collected pursuant to a curbside program, but the non-curbside collection program recovers a certain portion of the product or packaging *and it has sufficient commercial value*; or
3. The product or packaging is part of, and in compliance with, a program established on or after January 1, 2022, governing the recyclability of that product or packaging and the director of CalRecycle determines that it will not increase contamination of curbside recycling or deceive consumers.<sup>178</sup>

The Green Guides should take action to prevent the use of the chasing arrows and other claims of recyclability on products that do not meet an unqualified definition of “recyclable.”

E. The use of “advanced recycling” to refer to plastic-to-fuel conversion processes must be identified as a deceptive practice.

The industry uses the term “advanced recycling,” sometimes referred to as “chemical recycling,” to refer to a variety of processes that use heat or chemicals to break down plastic into its chemical building blocks. Most often, advanced recycling refers to materials destruction processes that destroy plastic waste and create a small amount of unrefined oil byproduct that is incinerated or refined to burn as fuel. Producing fuel from plastic waste does not qualify as recycling under the Green Guides, or by federal<sup>179</sup> or international standards.<sup>180</sup> The Green Guides should address the deceptive use of advanced recycling when referring to plastic-to-fuel conversion processes, as they are neither “advanced” nor “recycling.”

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<sup>176</sup> *Id.* (amending Pub. Res. Code, Section 42355.51. (d)(2)).

<sup>177</sup> *Id.* (amending Pub. Res. Code, Section 42355.51. (d)(3)).

<sup>178</sup> *Id.* (amending Pub. Res. Code, Section 42355.51. (d)(4)-(6)).

<sup>179</sup> Valerie Volcovici, *US EPA Calls for Testing of Oil Derived from Plastic Waste*, REUTERS (April 21, 2023), <https://www.reuters.com/business/sustainable-business/us-epa-calls-testing-oil-derived-plastic-waste-2023-04-21/>.

<sup>180</sup> See, e.g., European Union, “Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on Waste and Repealing Certain Directives,” Pub. L. No. Article 3(17), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0098> (excluding “energy recovery and reprocessing into materials that are to be used as fuels or for backfilling operations” from the definition of “recycling” and treating “re-use and material recycling” as distinct and preferred to “energy recovery from waste”)

The Green Guides provide: “It is deceptive to misrepresent, directly or by implication, that a product or package is recyclable. A product or package should 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.”<sup>181</sup> Thus, it is deceptive to misrepresent waste-to-fuel conversion as recycling when it does not result in “reuse or use in manufacturing or assembling another item.” Moreover, it should not be used to support recyclability claims under the Green Guides.

The industry argues that the chemical byproducts produced through “advanced recycling” technology can be refined and used to manufacture “new plastics and products.”<sup>182</sup> However, this has never been proven.<sup>183</sup> In 2020, the Global Alliance for Incinerator Alternatives found that, of the 37 so-called advanced or chemical recycling facilities proposed since the early 2000s, only three were currently operational and none were successfully recovering plastic to produce new plastic.<sup>184</sup> Similarly, a 2020 report by Greenpeace examined 52 advanced or chemical recycling projects financed by the American Chemistry Council, and found that many were unlikely to be viable or misleadingly promoted as recycling when they largely produce fuels and waxes.<sup>185</sup> A February 2022 study by the Natural Resources Defense Council that examined eight chemical recycling plants found that the majority of facilities are actually burning – not recycling – plastics.<sup>186</sup>

The industry’s attempt to conflate plastic-to-fuel and plastic-to-plastic conversion under these terms is misleading to consumers. The following chart<sup>187</sup> illustrates how the industry uses the term “recycling” to refer to different processes with dramatically different outcomes, not all of them recycling, and none of them circular.<sup>188</sup>

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<sup>181</sup> 16 C.F.R. 260.12(a).

<sup>182</sup> *Advanced Recycling*, AM. CHEM. COUNCIL, <https://www.americanchemistry.com/better-policy-regulation/plastics/advanced-recycling> (last visited Apr. 24, 2023).

<sup>183</sup> See Taylor Uekert et al., *Technical, Economic, and Environmental Comparison of Closed-Loop Recycling Technologies for Common Plastics*, 11 ACS SUSTAINABLE CHEM. ENG’G 965, 969 (2023).

<sup>184</sup> Denise Patel et al., GLOB. ALL. FOR INCINERATOR ALTS., ALL TALK AND NO RECYCLING: AN INVESTIGATION OF THE U.S. “CHEMICAL RECYCLING” INDUSTRY (2020), [https://www.no-burn.org/wp-content/uploads/All-Talk-and-No-Recycling\\_July-28.pdf](https://www.no-burn.org/wp-content/uploads/All-Talk-and-No-Recycling_July-28.pdf).

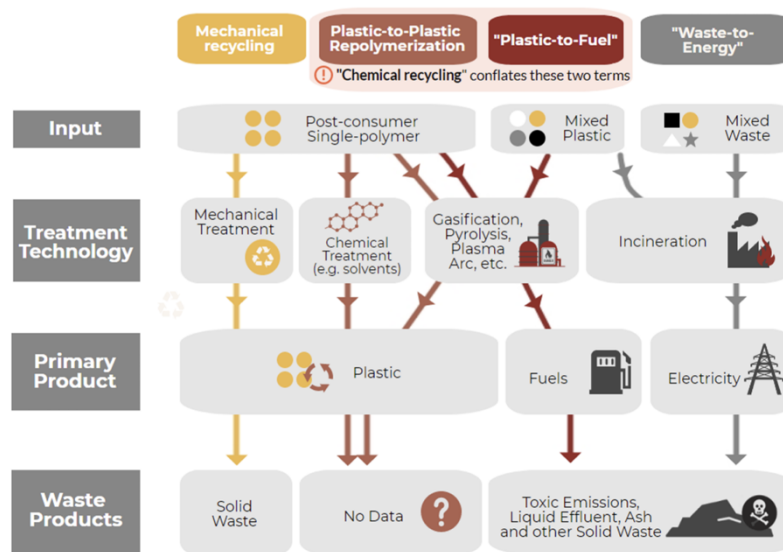
<sup>185</sup> Ivy Schlegel, GREENPEACE, DECEPTION BY THE NUMBERS: AMERICAN CHEMISTRY COUNCIL CLAIMS ABOUT CHEMICAL RECYCLING INVESTMENTS FAIL TO HOLD UP TO SCRUTINY (2020) [https://www.greenpeace.org/usa/wp-content/uploads/2020/09/GP\\_Deception-by-the-Numbers-3.pdf](https://www.greenpeace.org/usa/wp-content/uploads/2020/09/GP_Deception-by-the-Numbers-3.pdf).

<sup>186</sup> Veena Singla, *Recycling Lies: “Chemical Recycling” of Plastic is Just Greenwashing Incineration*, NRDC (Sep. 7, 2022), <https://www.nrdc.org/resources/recycling-lies-chemical-recycling-plastic-just-greenwashing-incineration>.

<sup>187</sup> Patel, *supra* note 184, at 1.

<sup>188</sup> See *infra* IV.F.

[Image 1] Technologies conflated as “chemical recycling”



Source: Global Alliance for Incinerator Alternatives. (2019)

Advanced recycling is used by the plastics industry to greenwash and re-brand long-existing technologies, such as pyrolysis and gasification. Since the 1970s, these technologies have been used, with marginal success, to recover plastic waste.<sup>189</sup> Like mechanical waste, the high costs of sorting and processing plastic to be used in these processes, along with quality and toxicity limitations, make the technology economically unfavorable. As observed in 1973:

To utilize the ability to pyrolyze plastics to given products (e.g. monomer wax, crude-type oil) of high chemical value, however, a source of very pure (but possibly mixed) plastic feed would be necessary. Separation of plastics from [municipal solid waste] is neither technically nor economically feasible at the present time, and probably will not be in the future.<sup>190</sup>

Where existing technologies are used, such as pyrolysis or gasification, the names of those technologies should be used and should not be conveyed as new technologies or greenwashed under the term advanced recycling. Consumers generally lack the knowledge and understanding of what the term means, as evidenced by the data from CCI’s focus groups in July 2022. When asked what advanced recycling refers to, participants responded as follows:

- “I would say advanced maybe just the manpower we’re talking about. If you have more technology something in it will expedite the process, something.” - Cleveland<sup>191</sup>
- “Maybe to do it quicker even.” - Cleveland<sup>192</sup>
- “Robots.” - Cleveland<sup>193</sup>
- “Just a more tailored way of recycling.” - Houston<sup>194</sup>

<sup>189</sup> Patel, *supra* note 184 (collecting citations).

<sup>190</sup> Arthur D. Little, Inc., A State-of-the-Art Study of the Pyrolysis of Solid Wastes 49-50 (1973) (Box 4, Jack Milgrom Papers, Special Collections Research Center, Syracuse University Libraries).

<sup>191</sup> CCI Focus Group, *supra* note 154, Cleveland Transcript at 44.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*, Houston Transcript at 14.



- “Targeted. A more specific – this goes here, and this goes here, and this goes here, maybe? The paper here, the plastic here. I have no idea.” - Houston<sup>195</sup>
- “Well I mean there’s always advances in technology and all that so they’re probably trying to make it – I’m sure looking at cost and speed and all that. I mean just progressive measures. I don’t have any specifics.” - Cleveland<sup>196</sup>

Only one respondent in Bakersfield had a close guess:

- "Advanced recycling, my opinion would be breaking it down into the lowest part, the lowest possible . . . It’s structure, the lowest that you can break something back down into. You can’t probably break a plastic bottle back into oil, but whatever form you can break it down into, yeah.” - Bakersfield<sup>197</sup>

An industry-commissioned poll conducted in early 2023<sup>198</sup> purports to show broad public support for advanced recycling.<sup>199</sup> While the findings indicate near-universal agreement with the statements: “[i]f a product is labeled as recyclable, I would assume that means that it is technically capable of being recycled” (95%)<sup>200</sup> and “I care more that a plastic item doesn’t end up in the trash or litter than which process is used to recycle the item” (90%),<sup>201</sup> the poll’s supposed support for advanced recycling is based on a false premise. Respondents expressed agreement that “advanced recycling” should qualify as recycling, when they were told that it is a process “in which plastic molecules are broken down into smaller molecules that can be used to make new products” and “there is no burning of plastic involved.”<sup>202</sup> As a result, all of the corresponding findings are based on an inaccurate description of advanced recycling. In reality, the data merely highlights consumers’ desire for clarity in labeling and a reduction in plastic waste.

The Green Guides should define the term recyclable to exclude advanced recycling. The definition set forth in Beyond Plastics’ Model Local Law concerning single use plastics provides a useful model:

RECYCLABLE – The term “recyclable” means a product or packaging material a) that can be sorted by entities that process post-consumer materials generated in the United States, b) that has a consistent market for purchase by end users in the production of new products, and c) which can be recycled with minimal losses of material during processing and manufacturing. “Recyclable” does not include material processed through advanced recycling, chemical recycling, combustion, gasification, incineration, pyrolysis, hydrolysis, methanolysis, solvolysis, thermal desorption, enzymatic breakdown, waste-to-energy, waste-to-fuel, or any other chemical conversion process used to transform plastic or plastic-derived materials into plastic

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*, Cleveland Transcript at 44.

<sup>197</sup> *Id.*, Bakersfield Transcript at 29.

<sup>198</sup> RG STRATEGIES, NATIONAL SURVEY CONDUCTED FEBRUARY 22 – 28, 2023, (2023),

<https://8568633.fs1.hubspotusercontent-na1.net/hubfs/8568633/US%20Recycling%20Survey%20Memo.pdf>.

<sup>199</sup> Steve Toloken, *Plastics Industry Survey Shows Public Support For Chemical Recycling*, PLASTICS NEWS (April 19, 2023), <https://www.plasticsnews.com/news/plastics-industry-ftc-poll-backs-chemical-mechanical-recycling-equally>.

<sup>200</sup> RG Strategies, *supra* note 198, at 3.

<sup>201</sup> *Id.* at 3.

<sup>202</sup> *Id.* at 4.

monomers, chemicals, waxes, lubricants, chemical feedstocks, crude oil, diesel, gasoline, or home heating oil.<sup>203</sup>

Excluding advanced recycling technologies from the Commission's definition of recyclability would be consistent with the EPA's position outlined in a new draft federal strategy for preventing plastic pollution released this month, which "reaffirms that...it does not consider activities that convert non-hazardous solid waste to fuels or fuel substitutes or for energy production to be 'recycling' activities."<sup>204</sup>

F. The use of "circular economy" when referring to linear models of consumption that rely on continued resource extraction must be identified as a deceptive practice.

In recent years, the plastics and fossil fuel industries have co-opted the concept of "circular economy" through deceptive marketing that supports the growth of plastic and fossil fuel production. To protect consumers, it is essential to establish a common understanding of what should (and should not) be considered circular. While there is no standard international definition of circular economy, the concept is founded on two core principles that are shared among the current frameworks:

1. The minimization of resource extraction.
2. The elimination of 'externalities,' that is, costs or harmful impacts from a material's production on the public.<sup>205</sup>

Recycling plastics – whether mechanically or through advanced recycling – violates the two core principles of circularity. First, the plastics industry has no intention of minimizing resource extraction. In fact, the industry plans to significantly expand its resource extraction for virgin plastics production.<sup>206</sup> Underscoring the industry's misuse of the term, some industry analyses even, paradoxically, emphasize a circular economy's capacity to *expand the oil and gas industry* through increased plastics production.<sup>207</sup>

In addition, the plastic waste "solutions" touted by the industry almost universally violate the second principle of eliminating externalities throughout the plastics lifecycle. Plastics and proposed plastic-to-fuel technologies have enormous adverse impacts on human health and the climate system, from resource extraction, production, manufacture, transport, and consumption to disposal, leakage, and contamination of the surrounding environment. As observed by the U.N. Special Rapporteur on Human Rights and Toxics, "[o]ne of the greatest constraints to plastics joining ... the circular economy is the toxic chemical additives they contain."<sup>208</sup> For the limited proportion of plastics being recycled, toxic chemicals in the resulting material pose insurmountable challenges to the notion of circularity.

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<sup>203</sup> The Beyond Plastics Bill: Model Local Law to Ban Single-Use Plastic Bags, Straws, Stirrers, and Splash Guards, Polystyrene, and Intentional Balloon Releases, <https://static1.squarespace.com/static/5eda91260bbb7e7a4bf528d8/t/63c1bd9f17ed38201aea81c5/1673641376235/Beyond+Plastics+Bill+January+2023.pdf> [emphasis added.]

<sup>204</sup> U.S. Env'tl. Prot. Agency, Draft National Strategy to Prevent Plastic Pollution 15 (April 2023), <https://www.epa.gov/circulareconomy/draft-national-strategy-prevent-plastic-pollution> [hereinafter EPA 2023].

<sup>205</sup> CIEL, *supra* note 134, at 1.

<sup>206</sup> *Id.* (citing MINDEROO FOUND., THE PLASTIC WASTE MAKERS INDEX 40-41 (2021), <https://cdn.minderoo.org/content/uploads/2021/05/27094234/20211105-Plastic-Waste-Makers-Index.pdf>).

<sup>207</sup> See, e.g., *How Can a Circular Plastics Economy Grow The Oil Industry?*, WOOD MACKENZIE (Aug. 12, 2018), <https://www.woodmac.com/news/feature/circular-plastics-economy>.

<sup>208</sup> Marcos Orellana (Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes), *The Stages of the Plastics Cycle and Their Impacts on Human Rights*, ¶27, U.N. Doc. A/76/207 (July 22, 2021), available at <https://undocs.org/A/76/207>.

To prevent deceptive environmental claims relating to the circular economy, the Commission should update the Green Guides to provide necessary guidance that not only takes the two core principles into account but also is consistent with the EPA’s position outlined in the new draft federal strategy for preventing plastic pollution.<sup>209</sup> The Guides should require that any “circular economy” claim necessitates showing a decline or, at a minimum, a cap on virgin resource extraction, production, and product manufacturing and an overall reduction in emissions and toxic pollution throughout the lifecycle of the material.

**V. To prevent the improper use of the Green Guides as a shield from liability, the Commission must strengthen the Green Guides to ensure that they address new and emerging trends in environmental marketing.**

The Green Guides have proven to be a much-needed framework and resource for states and marketers alike. State legislatures rely on the Guides when crafting laws, regulations, and standards for unfair and deceptive environmental marketing acts and practices. State courts look to the Green Guides as persuasive authority when assessing unfair and deceptive environmental claims. Given that several states have explicitly or implicitly incorporated the Green Guides into their consumer protection laws,<sup>210</sup> the Commission’s updates will have an impact not only on claims brought under Section 5 of the FTC Act, but also on many claims brought under state consumer protection laws across the country. As such, the Green Guides should be updated to address and advise against unfair or deceptive greenwashing, including claims involving paltering, reputation advertising, “net zero,” “advanced recycling” and “circular economy.”

Marketers use the Green Guides, often as intended, but also as a means to justify compliance under state law.<sup>211</sup> Marketers are increasingly using this strategy to defend themselves against alleged violations of state consumer protection laws.<sup>212</sup> The notion that marketers are using the Green Guides not as guidance to protect consumers but rather as a shield to evade liability under state laws that share the same objectives is a perverse outcome that should concern the Commission.

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<sup>209</sup> Objective A of the Draft National Strategy to Prevent Plastic, issued as “Part of a Series on Building a Circular Economy for All,” builds on these two principles. EPA 2023, *supra* note 204 at 17.

<sup>210</sup> See Connor J. Fraser, STATE ENERGY & ENV’T L IMPACT CTR., WHAT’S IN A LABEL? THE FTC’S “GREEN GUIDES” IN CONTEXT 4-5 (2023), <https://stateimpactcenter.org/files/Whats-in-a-Label-The-FTC-Green-Guides-Issue-Brief.pdf>.

<sup>211</sup> *Id.*

<sup>212</sup> See, e.g., N.Y. Gen. Bus. Law § 349(d) (McKinney 2019); *Duchimaza v. Niagara Bottling, LLC*, No. 1:21-cv-06434, 2022 WL 3139898, at \*8 (S.D.N.Y. Aug. 5, 2022).

**VI. Once the Green Guides have been updated, the Commission should initiate rulemaking under the FTC Act related to unfair and deceptive environmental claims.**

Given the urgent need for additional guidance and clarity on environmental marketing claims, the Commission should move expeditiously to update the Green Guides. Once that work has been completed, the Commission should then initiate rulemaking under the FTC Act related to unfair and deceptive environmental claims. When doing so, the Commission should take into account the following principles:

- Consumer protection must remain at the fore.
- The rules should set the floor for unfair and deceptive environmental marketing, and not create a ceiling.
- States must not be preempted or otherwise precluded from regulating deceptive and unfair environmental claims under their own consumer protection statutes.
- Clear and workable enforcement mechanisms should be enacted, including a private right of action.
- The rules should accommodate a diverse set of remedies, including damages and injunctive relief.

The guiding tenet to any Green Guides rulemaking efforts must be the protection of consumers. The above listed principles, and others, will help guide the Commission in this process, and ensure that any proposed rulemaking will further consumer protection, not inadvertently or unnecessarily hinder it.