

Talking Trash at the FTC: Event Recap

Katie Rogers, Gonzalo E. Mon

May 25, 2023

This week, the FTC held its *Talking Trash at the FTC* workshop, a four-hour event intended to examine “recyclable” claims in ads. We’ve sifted through some of the trash and pulled out a few things worth noting.

- **Substantial Majority Test:** The Green Guides state that a company can make an unqualified “recyclable” claim, as long as a substantial majority – defined as 60% – of communities or consumers where a product is marketed have access to recycling facilities that will accept the material. We learned right up front that the FTC is particularly interested in whether it should take another look at the “substantial majority” test. No one recommended that the FTC change that threshold – and one audience member noted that doing so would cause confusion – so we don’t suspect the FTC will do so, unless there is compelling survey data to suggest it is necessary. As we heard during the workshop, whether something will be accepted for recycling can vary from state-to-state and town-to-town, so imposing a stricter standard would make “recyclable” claims harder to manage.
- **Capability v. Actuality:** Some panelists suggested that advertisers shouldn’t be able to make “recyclable” claims unless they have evidence that a product *is* actually recycled into something new. Plaintiffs have advanced similar theories in lawsuits, but some courts – like [this one](#) – have rejected them, noting that “no reasonable consumer would understand ‘100% recyclable’ to mean that the entire product will always be recycled.” Instead, that court held that “recyclable” simply means that a product is capable of being recycled. We agree, but we’ll see how the FTC comes out. Again, we think there would need to be pretty compelling consumer perception survey data suggesting consumers understand recycling to mean that it the entire product will always be recycled in order for the FTC to change its view in the Green Guides.
- **Resin Identification Codes:** Resin Identification Codes or “RICs” – little numbers at the bottom of a container enclosed within a chasing arrow triangle, like [this](#) – were also a hot topic. Because consumers may interpret a RIC to mean a package is recyclable, the Guides advise marketers to place it in an inconspicuous location, such as on the bottom of the container. Panelists generally agreed that consumers continue to be confused, and some suggested that for plastics that are generally not recyclable, companies should be required to include a disclosure stating that a product is not recyclable. Currently, if a product may be recycled by only a few consumers, companies must include a strong qualifier, such as “this product is recyclable only in the few communities that have appropriate recycling programs.” Will the FTC require another disclosure saying “this product is not recyclable” for a product that is not recyclable, and doesn’t claim to be recyclable, but has the RIC number at the bottom of the package? We’ll have to wait and see. In the meantime, remember that a [new law](#) in California

will also impact this issue.

- **Chemical Recycling:** Another hot topic at the workshop involved chemical recycling. Although FTC staff made it clear at the outset that the workshop was not for discussing environmental policy, that’s exactly what happened when panelists and attendees debated chemical recycling. Currently, the primary technology for plastic recycling is mechanical recycling, which uses physical processes – such as sorting, grinding, and washing – to recover used plastics. GAO [reports](#) that mechanical recycling technology is expensive, labor intensive, and generally results in lower quality plastics. Chemical recycling (or advanced recycling) uses heat or chemical reactions or both to break down plastic material from the polymer down to the monomers and additives. The industry says that through advanced recycling, a “circular” plastics economy can be created that reduces the need to tap virgin fossil fuels to make its products. Some chemical recycling is used to break down plastic into fuel, which was not favored at the workshop since fuel will eventually get burned and end up in the atmosphere. Whether claims around chemical recycling resulting in new plastics will be permitted is an open question and one that the FTC will assess during its review of the Guides. Since this is a new and emerging area of interest with open questions around the environmental benefits versus trade-offs, we think it is unlikely that the FTC will provide much concrete guidance on these types of claims.
- **Circular Economy:** Many of the panelists brought up the term, “circular economy,” which is about reusing products, rather than scrapping them and then extracting new resources. We heard how there has never been more momentum around circularity and products should be designed with recycling and end use in mind. To this end, a panelist from The Recycling Partnership noted that the organization provides helpful [guidance](#) for product design. While not discussed at the workshop, we expect the Green Guides might provide new examples of how marketers may substantiate claims touting that their product promotes a circular economy.
- **Rulemaking:** FTC staff was very interested in hearing from panelists on whether the FTC should engage in rulemaking or if the Guides are working. In the wake of the Supreme Court’s decision in AMG (holding that the FTC can’t obtain monetary relief under Section 13(b)), the FTC is increasingly relying on other legal tools to get money – notably, alleging rule violations wherever possible, which enables the FTC to seek civil penalties and/or consumer redress. This has resulted in a long list of proposed rules. Our colleague Jessica Rich covered many of the pending rules [here](#). Panelists were split on whether rulemaking should be initiated, and we’ll have to wait to see if the FTC adds this topic to its growing list.

While the comment period for the Green Guides is now closed, the Commission is still accepting comments until June 13, 2023 for those who wish to provide input on the topics discussed at the workshop.