Steptoe

It's Not Easy Selling Green

Tips for Retailers on Navigating Gray Areas and Reducing Red-Hot Greenwashing Risks

By: Stephanie A. Sheridan, Meegan Brooks, Surya Kundu, Joe Dages, and Reid Gaa

As green marketing proliferates, so does the risk of greenwashing allegations – from consumer class actions, state and federal regulators, competitors, and even investors. On top of that, new legislation is constantly changing the compliance landscape, leaving retailers to navigate a maze of new and often vague rules and regulations. Below, we outline the most important guidelines and prominent litigation trends, and share some tips for how retailers can reduce the risk of seeing red from trying to sell green.

Anticipated Updates to The Green Guides

The Federal Trade Commission's "Guides to the Use of Environmental Marketing Claims" (16 C.F.R. § 620) are the most frequently cited authority on the best practices a company should when touting their environmental efforts.[1] The "Green Guides", as they are commonly known, are intended to help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45. Generally speaking, they address a central theme – a representation or omission about a "green" product, product component, or retailer's practices is "deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers' decisions." (See here for more information.)

While they are not legally binding, the Green Guides are regularly cited by courts, state and federal regulators when bringing enforcement actions, arbitral bodies, and plaintiffs bringing consumer class action lawsuits when determining how reasonable consumers may interpret challenged claims. Additionally, several states--including California, Maine, Rhode Island, and New York--have explicitly adopted significant portions (or all) of the Green Guides into state law.[2] Although some states incorporate the idea that the Green Guides are a "safe harbor" or a defense to a claim that a state environmental marketing law may be violated, in practice those provisions may be of limited utility. This is because compliance with the Green Guides is, in some cases, a question of fact that Courts are reluctant to address at early stages in litigation.

[1] https://www.ftc.gov/legal-library/browse/federal-register-notices/guides-use-environmental-marketing-claims-green-guides

[2] Some states have enacted stricter requirements relating to environmental issues. California, for example, has multiple green advertising laws, including a longstanding prohibition on "any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied," and requires advertisers to maintain records supporting all green claims. Cal. Bus. & Prof. Code § 17580.5(a). The same statute incorporates compliance with the Green Guides as a safe harbor.

Broadly speaking, the Green Guides require retailers to: state all green marketing claims accurately and without overstatements; explain and qualify claims in consumer-friendly language; and substantiate green claims with competent and reliable scientific evidence (including with proof along the supply chain as necessary).

The Green Guides also provide guidance around popular green marketing issues, including: advising against unexplained use of broad, open-to-interpretation buzzwords like "sustainable" and suggesting appropriate qualifying language; issuing strict definitions for terms like "compostable," "free-of," "recyclable" and other popular terms; and recommending the type of evidence that retailers can use to support green advertising claims. Find out more here.

Evidencing its importance to the FTC's overall priorities, in December 2021, as part of its Statement on Regulatory Agenda, the Commission announced plans to review and update the Green Guides, and indicated its intent to solicit public comments sometime in 2022. This gives retailers a unique opportunity to clarify FTC's understanding of green marketing issues and shape its eventual actions. Retailers and industry groups should use this time to review their current green marketing practices and identify areas where additional definitions, guidance, or flexibility may be helpful, and accordingly, consider submitting this information to the Commission once the public comment period is opened.

One issue to watch closely in regards to the Green Guides update is the potential role of consumer perception studies and to what extent they will impact the new edition of the Green Guides. The FTC and Courts have said that the touchstone for deception, as alluded to above, is consumer perception. For this reason, the FTC has, in the past, conducted consumer perception studies before updating previous iterations of the Green Guides, and relies on the feedback from those studies in preparing the Green Guides. Given that the focus on sustainability issues has significantly increased since the last Green Guides update in 2012, it will be important to see whether the FTC has conducted new consumer perception studies, and how those perceptions will impact the final version of the next iteration of the Green Guides.

Red-Hot Risk: Recycling Claims

The Green Guides place particular emphasis on recycling claims in marketing materials. Specifically, the FTC advises against making unqualified "recyclable" claims unless the product is recyclable at facilities available to at least 60% of consumers or communities in the markets where the product is sold. Similarly, when it comes to the phrase "recycled content," the Green Guides reserve use for "materials that have been recovered or diverted from the waste stream during the manufacturing process or after consumer use."

In California, a stricter standard applies. In October of 2021, California enacted SB 343 (a.k.a. the "The Truth in Labeling for Recyclable Materials"), a broad new environmental marketing law banning all recyclability claims unless a product and/or its packaging specifically identifies the recyclable components or meets stringent standards. The new law will apply to any express or implied recyclability claims, including labels that request that consumers recycle an item or its packaging, any advertising that describes a product as "recyclable," and the universal "chasing arrows" recyclability symbol, including use of the chasing arrows with a Resin Identification Code (RIC) inside of it. SB 343takes effect January 1, 2024.

To qualify as recyclable under SB 343, components must be: free of dyes/inks/components that would contaminate or otherwise interfere with recyclability; eligible for curbside recycling programs in at least 60% of the state or demonstrate special commercial value; and routinely incorporated into new products/packaging. In other words, any product or product component marketed as "recyclable" must actually and easily be recycled. Significantly, SB 343 instructs California's Department of Resources Recycling and Recovery ("Cal Recycle") to publish additional specific regulations and guidelines before the law takes effect, including a report by January 1, 2024. These specific Cal Recycle activities and publishings will shed necessary light on how businesses are expected to comply with this new and very restrictive California law. Importantly, if Cal Recycle implements SB 343 as currently expected, California law will be in direct conflict with the laws in place in over thirty other states that currently require products with plastic resins to use of the American Society for Testing and Materials ("ASTM") Resin Identification Code ("RIC")— a.k.a the familiar and ubiquitous chasing arrows symbol bearing the RIC code (a number from 1-7 identifying the type of resin) inside of it. Other states, including Oregon, appear poised to act in a similar way as California. A Task Force in Oregon, which was formed in response to a call from the legislature, recently recommended a recycling labeling scheme similar to SB 343 be adopted in Oregon in the future, restricting the use of the chasing arrows with the RICs inside, though it remains to be seen whether and how those Task Force recommendations get incorporated into the new Oregon law.

Another noteworthy provision in California's SB 343 is that consumers now have a "substantiation right to know" for products that include a recycling claim. This means, in practice, that a business must provide to a consumer the substantiation it has for making a recycling claim, even if that claim is limited to use of the chasing arrows symbol with the RIC inside. This is a significant change, as this "right to know" was previously limited only to generic environmental marketing claims in California.

Businesses, with the assistance of counsel as needed, should closely follow new developments in this arena and consider actively participating in raising these and other practical considerations to the regulators' attention. Businesses should also consider taking the time to gather and organize their substantiation in advance of the law taking full effect.

Growing Focus on Biodegradability and Compostability Claims

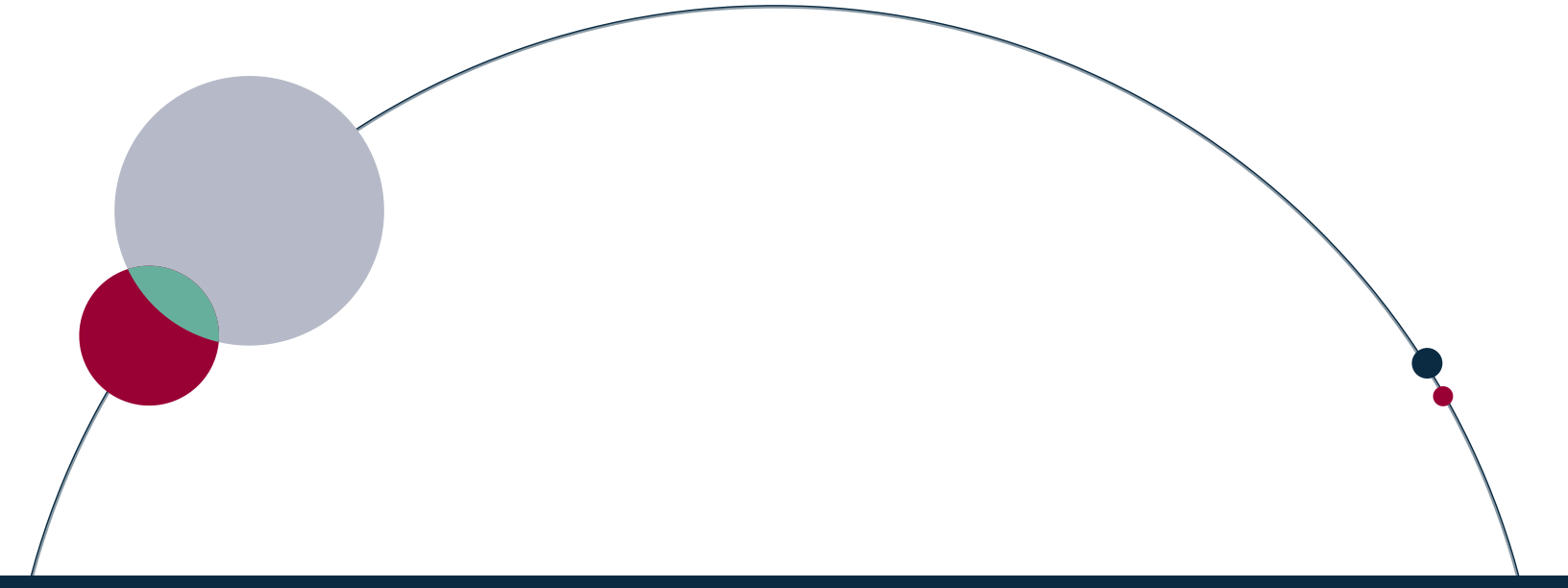
Biodegradability and compostability claims are also facing increasing scrutiny. The Green Guides provide that these terms should only be used if the "entire product or package will completely break down and return to nature within a reasonably short period of time after customary disposal", which for solid products, is one year. The FTC further cautions that "Items destined for landfills, incinerators, or recycling facilities will not degrade within a year, so unqualified biodegradable claims for them shouldn't be made." When making biodegradability claims over products that take longer to completely degrade, retailers should specifically state how long the breakdown process will take. Similarly, the FTC cautions against unqualified "compostable" claims unless that product or package can safely, and easily be composted at home about as quickly as other commonly composted materials (like food scraps and garden waste). The Commission also encourages retailers to qualify claims if composting facilities aren't available to most (i.e. 60%) of consumers.

As with recyclability, California has enacted stricter standards—as a result, it has become a hotbed for litigation on this issue, often from public enforcers. California's Public Resources Code section 42357(b) prohibits retailers from selling products labeled with the term "biodegradable," "degradable," or "decompostable," or any form of those terms, unless the product satisfies certain rigorous standards issued by the ASTM. These standards are very difficult to satisfy, especially for products containing plastic components.

When originally passed in 2011, California's strict rules only applied to plastics products, but in October 5, 2021, this was expanded to include all products, including but not limited to any product or part of a product "used, bought, or leased for use by a person for any purpose", "a package or packaging component", "a bag, sack, wrap, or thin plastic sheet film product", and food or beverage containers and components including straws, lids, and utensils. Additional stringent requirements apply for claims that a product is "compostable" or "home compostable."

Over the last several years, a "Greenwashing Task Force" consisting of California District Attorneys from 11 (previously 23) counties has brought dozens of cases—including against e-commerce giants like Amazon and Overstock, big box stores, outdoor goods retailers, and pet store chains. These cases have consistently settled for hundreds of thousands or even millions of dollars.

California is not the only state focusing on biodegradability and compostability claims in advertising. Both Maryland and Washington State prohibit labeling most plastic products as "biodegradable," "degradable," "decomposable," or "oxo-degradable unless applicable ASTM standards are satisfied, and impose additional strict requirements for labeling products as "compostable." Washington, for example, does not permit "compostable" labels unless a product is either comprised only of wood or fiber-based substrate, or satisfies one of two designated ASTM composting standards. Both Washington and Maryland also require advertisers to meet all FTC Green Guide labeling requirements.



EPR Laws: Increasing Retailer Responsibility for Recycling Consumer Packaging

Extended Producer Responsibility laws, aka EPR laws, shift the cost of post-purchase recycling back onto retailers and manufacturers by requiring them to absorb at least some of the costs for collecting and recycling specific packaging materials. The cost-shifting is also designed to promote less wasteful alternatives, and to expand consumer access to recycling facilities. Already common in Europe, Australia, and parts of Asia, EPR laws related to consumer packaging are gaining traction in the US.

On July 13, 2021, Maine became the first US state to enact EPR rules covering most types of consumer packaging, including cardboard boxes, and plastic tubs, bags, and pouches. Maine's law would require producers of this kind of packaging to pay into a statewide fund designed to reimburse local municipalities for certain recycling and waste management costs, improve recycling infrastructure, and educate Maine citizens on how to recycle effectively. Maine has defined "producer" broadly to account for the many different ways in which products enter the Maine market, including brands that sell items in the US, trademark/license holders of branded items, entities that package and/or distribute products in Maine, and/or the importers of foreign products. However, in an effort to ease the burden of complying, Maine's law modifies the obligations on small and/or new businesses, and excludes tax-exempt organizations entirely. The Maine Department of Environmental Protection is still studying the issue and developing implementation details and schedules, but starting July 2022, anticipates issuing a quarterly newsletter starting July 2022 to inform all interested and parties of its progress in advance of its December 31, 2023 deadline to initiate rulemaking.

In some respects, the Maine law does not represent a true EPR scheme. Based on the way it is drafted, it is more focused on a shifting of the burden for who pays for collecting trash (i.e., business), without the attendant role for business in shaping how that system is implemented. The Maine law also includes some vague provisions that need to be addressed, such as how the law will impact e-commerce companies, including e-commerce retailers. Finally, the Maine law incorporates eco-modulation concepts, which seek to penalize companies through increased fees for use of certain types of packaging, among other factors.

Just weeks after Maine passed its law, Oregon on August 6, 2021 passed the Plastic Pollution and Recycling Modernization Act, extending EPR rules over common post-consumer packaging, food service ware, and paper products. The Oregon law requires at least one entity along a product's path to Oregon consumers (i.e. a distributor, retailer, manufacturer, etc.) to join a Producer Responsibility Organization ("PRO"). Each PRO will collect fees from its member producers, propose plans for and (subject to the Oregon Department of Environmental Quality's approval) fund improvements in recycling facilities and efforts to expand consumer access. While the law designates March 31, 2024 as the deadline for these responsible entities to provide EPR proposals to the Oregon Dept. of Environmental Quality in advance of a target July 1, 2025 implementation, Oregon – like Maine – also includes limited exemptions for smaller businesses but has not yet announced details for what these plans must include or other implementation details. Oregon's law also incorporates eco-modulation concepts.

Most recently, on June 3, Colorado's Governor Jared Polis signed into law the nation's newest EPR law covering consumer facing packaging and some paper products. Like Oregon, Colorado's law would task a system of PROs with collecting funds from producers of consumer packaging and using the proceeds to improve and manage a statewide recycling system. Also similar to Oregon and Maine, Colorado has not yet announced detailed implementation plans for this EPR program, projected to start sometime in 2026. However, Colorado's PROs would play a much more active role in overseeing and administering the eventual improvements, with oversight from advisory groups and government bodies, even beyond raising and disbursing funds. Another EPR law over plastic packaging had been proposed in New York but did not pass during the 2021-2022 legislative session.

PFAS Cases on the Rise

Perfluoroalkyl and polyfluoroalkyl substances compounds (PFAS) have received significant recent attention for their potential impact on the environment. They are sometimes characterized as "forever chemicals" because some PFAS are persistent and break down slowly in the environment. PFAS refers to thousands of man-made chemicals that are ubiquitous in consumer products across industries. They are often in food containers to make them more grease-resistant; added to cosmetics to improve product consistency and make the products more water-resistant; and are used to make outerwear apparel and accessories water-resistant.

In the last few months alone, at least 22 lawsuits have been filed across the country against a wide range of retailers for products containing PFAS—including outdoor gear, cosmetics, food wrappers, and Thinx period underwear. These lawsuits are generally predicated on purported omissions or misrepresentations in marketing statements regarding the risks associated with PFAS as well as breach of warranty claims. Plaintiffs claim they would not have purchased the product, or would have paid less for it, had they known of the presence and dangers of PFAS, and that products with PFAS fail to conform to advertised promises of quality, safety, or sustainability.

On the government side, the Environmental Protection Agency (EPA) has identified PFAS as a top priority, announcing a "PFAS Strategic Roadmap" for 2021 to 2024,[3] and establishing a new EPA Council on PFAS.[4] Additionally, a number of state legislatures have already enacted laws targeting PFAS in consumer products, including:

California: regulating use of PFAS chemicals in cosmetics (Cal. Health & Safety Code § 108980), rugs and carpets (Cal. Code Regs. tit. 22, § 69511), cookware and food packaging (Cal. Health & Safety Code § 109000), juvenile products (Cal. Health & Safety Code § 108945), and regulating environmental advertising claims of products or packaging containing PFAS (Cal. Pub. Res. Code § 42355.51); [5]

Colorado: regulating use of PFAS in carpets or rugs, fabric treatments, food packaging, juvenile products, oil and gas products, cookware, cosmetics, textile furnishings, and upholstered furnishings (Colo. Rev. Stat. Ann. § 25-15-601 et seq.);

Connecticut: regulating use of PFAS in food packaging (Conn. Gen. Stat. §22a-255i);

Hawaii: regulating use of PFAS in food packaging (HB 1644 HD1 SD1 CD1)

Maine: regulating use of PFAS in food packaging (32 M.S.R.A. 26A. §§ 1731 et seq.) and in carpets, rugs, and fabric treatments, as well as prohibiting PFAS in all products by 2030 (38 M.S.R.A. 16 § 1614);

Maryland: regulating use of PFAS in xcosmetics (Md. Code Ann., Health-Gen. § 21-259.2) and rugs, carpets, and food packaging or food packaging components (Md. Code Ann., Env't §§ 6-1601 et seq.; Md. Code Ann., Env't §§ 9-1901 et seq.);

Minnesota: regulating use of PFAS in food packaging (Minn. Stat. Ann. § 325F.075);

New York: regulating use of PFAS in juvenile products (N.Y. Env't Conserv. Law §§ 37-0901 et seq.) and food packaging (N.Y. Env't Conserv. Law §§ 37-0203 et seq.);

Oregon: regulating use of PFAS in juvenile products (Or. Rev. Stat. Ann. §§ 431A.250, et seq.);

Vermont: regulating use of PFAS in juvenile products (18 V.S.A. § 1773), ski wax (Vt. Stat. Ann. tit. 18, § 1691), food packaging (Vt. Stat. Ann. tit. 18, § 1671), and rugs, carpets, and certain stain-resistant treatments (Vt. Stat. Ann. tit. 18, § 1681); and

Washington: regulating use of PFAS in juvenile products (WAC 173-334-010 et seq.) and food packaging (RCW 70A.222.070).

Numerous other states are considering such laws.

[3] EPA PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024, https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf.

[4] EPA Administrator Regan Establishes New Council on PFAS, https://www.epa.gov/newsreleases/epa-administrator-regan-establishes-new-council-pfas.

[5] California is also considering an expansive bill targeting PFAS in textile articles: AB 1817. If passed, it would prohibit any person from manufacturing, distributing, selling, or offering for sale any textile articles where PFAS has a functional or technical effect and was intentionally added, or if PFAS is present in the product or a product component at 300 ppb as measured in total organic fluorine. The bill also requires manufacturers to use the least toxic alternative when removing regulated PFAS in textile articles and to provide distributors and retailers with a certificate of compliance stating that the textile article complies with the new law or contain any regulated PFAS.

New York Considers Sustainability Disclosure Requirements for Fashion Retailers

New York is currently considering legislation that would impose sustainability, and other environmental and social issues related, disclosure requirements on fashion brands. If passed, this would be the first such disclosure law in the US. Similar laws are already in force in several countries including the UK, Australia, and some EU countries.

The pending "Fashion Sustainability and Social Accountability Act (S7428/A8352)", introduced in October 2021, has advanced into the New York state Senate's Consumer Protection Senate Committee. If passed, the law would require all apparel/footwear manufacturers and retail sellers with revenues over $100 million and who transact, in any way, to New York consumers doing business in New York with revenues exceeding $100 million to keep track of and publish detailed information regarding their: supply chain across all production tiers; policies and procedures for identifying, preventing, and mitigating potential environmental and social risks; actual and potential negative impacts on a wide range of environmental and social issues including climate change, greenhouse gas emissions, water use, recycling, and labor conditions. Fashion brands would also be required to set and then meet yearly targets for reducing environmental impacts. Each of these disclosures would become publicly available, and must be posted on the retailer's website. Noncompliance would carry steep penalties of up to 2% of a company's annual revenues over $450 million, and create the risk of lawsuits brought either by the New York Attorney General or private citizens.

SEC Emerges as New Source of Public Enforcement

The Securities and Exchange Commission (SEC) has stepped into this growing field, and is increasingly weighing in on green marketing claims. On March 4, 2021, the Securities and Exchange Commission announced the creation of a Climate and ESG Task Force in the Division of Enforcement. This year, the SEC has identified ESG as its second highest examination priority, citing the growing number of investors whose decisions are motivated by a company's ethics and sustainability practices.[6]

Most recently, on April 28, the SEC charged a publicly traded Brazilian mining company and one of the world's largest iron ore producers, with making false and misleading claims about the safety of its dams prior to the January 2019 collapse of its Brumadinho dam, which "caused immeasurable environmental and social harm, and led to a loss of more than $4 billion in [the company's] market capitalization."[7] The Complaint specifically alleged that the company misled local governments, communities, and investors about the safety of the Brumadinho dam through its environmental, social, and governance (ESG) disclosures. In a press release, the Director of the SEC's Division of Enforcement stated, "By allegedly manipulating those disclosures, [the company] compounded the social and environmental harm caused by the Brumadinho dam's tragic collapse and undermined investors' ability to evaluate the risks posed by [its] securities."

Conclusion

As the growing tidal wave of lawsuits, regulatory actions, and legislative initiates makes clear, the scrutiny over retailers' green advertising claims is unlikely to subside. Businesses should consider proactively reviewing existing evidence supporting all green claims, and, if needed, approach other entities along the supply chain to request additional applicable substantiation. Consider using this review to spot and address any gaps in existing practices, prepare for new stricter legal requirements, and request additional guidance from relevant authorities as necessary.

[6] See 2022 SEC Examination Priorities at p. 12-13, available at https://www.sec.gov/files/2022-exam-priorities.pdf

[7] See SEC Charges Brazilian Mining Company with Misleading Investors about Safety Prior to Deadly Dam Collapse, available at https://www.sec.gov/news/press-release/2022-72

Team Bios:

Stephanie Sheridan

Retail & E-Commerce Practice Chair
San Francisco +1 415 365 6715 | ssheridan@steptoe.com

Stephanie is a trusted resource to many dozens of the country's most prominent retailers. She has defended dozens consumer class actions alleging false advertising, including greenwashing claims, in addition to claims brought by California's Greenwashing Task Force. Stephanie has also defended dozens of retailers against claims relating to chemicals or other dangerous ingredients in products—most recently, relating to PFAS in consumer products. Stephanie has been selected as a national "Retail & E-Commerce MVP" by Law360 for four consecutive years, a "Leading Lawyer" and one of the "Most Influential Women in the Bay Area" by the Daily Journal, and her jury trial success has been acknowledged with honors, such as the Best Defense Verdict of the Year in California.

Meegan Brooks

Associate (CIPP/US)
San Francisco +1 415 365 6718 | mbrooks@steptoe.com

Meegan works closely with Stephanie on all retail-related matters, and has defended retailers in dozens of consumer class actions and other cases involving false advertising claims. Meegan is currently defending claims brought by California's Greenwashing Task Force, threatened NAD claims, and consumer class actions alleging greenwashing. Meegan represents many companies with sustainability-related missions, including B corporations, Fair Trade Certified entities, and resale companies, and frequently advises other retailers on how to promote their environmental efforts.

Surya Kundu

Associate
San Francisco +1 415 365 6746 | skundu@steptoe.com

Surya Kundu balances litigation and counseling to serve a diverse range of retailers and manufacturers. She has defended her clients against threatened NAD Claims, consumer-protection, and Americans with Disabilities Act claims. She also advises her clients on risk mitigation and compliance issues, including sustainability marketing, consumer-facing claims and disclosures, and new regulatory developments. Surya has practiced at the trial and appellate levelacrossstate and federalcourts andis anaccomplishedoral-advocate.

Joseph Dages

Associate
Washington, DC +1 202 429 6263 | jdages@steptoe.com

Joe Dages is a food and drug lawyer. He helps companies regulated by FDA to bring new products to market and defends those companies when their products are scrutinized. He is particularly focused on legal issues involving food, food additives, food-contact materials, dietary supplements, and cosmetics. He advises companies on all aspects of the premarket review requirements and pathways to market for these materials, as well as GMPs, labeling, marketing, risk, and litigation avoidance issues. His practice is increasingly focused on providing counsel on ESG issues. He has worked with a wide variety of companies regulated by FDA to bring dozens of new products to market that are designed for sustainability.

Reid Gaa

Associate
San Francisco +1 415 365 6741 | rgaa@steptoe.com

Reid's practice focuses on representing retailers and manufacturers in consumer class actions, false advertising, unfair competition, and product liability matters, as well as counseling businesses regarding compliance with regulatory requirements and emerging "best practices" to help keep our clients out of litigation. Reid's clients range from large brick-and mortar businesses, such as big box stores and luxury brands, as well as both established and start-up e-commerce companies.