

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 343 (Allen)
Version: March 17, 2021
Hearing Date: April 6, 2021
Fiscal: Yes
Urgency: No
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SUBJECT

Environmental advertising: recycling symbol

DIGEST

This bill tightens the requirements around the permissible use of the “chasing arrows” recycling symbol and when claims regarding recyclability can be made. It provides for the creation of a statewide list of the types and forms of plastic products and packaging that can be represented as recyclable.

EXECUTIVE SUMMARY

AB 1583 (Eggman, Ch. 690, Stats. 2019) established the California Recycling Market Development Act, which required the Department of Resources Recycling and Recovery (CalRecycle) to convene a Statewide Commission on Recycling Markets and Curbside Recycling (Commission) consisting of representatives of public agencies, private solid waste enterprises, and environmental organizations with expertise in recycling. It requires the Commission to issue policy recommendations to achieve specified recycling policy goals and identify products that are recyclable or compostable, as specified, and regularly collected in curbside recycling programs. AB 2287 (Eggman, Ch. 281, Stats. 2020) required the Commission to issue preliminary policy recommendations by January 1, 2021.

The Commission issued the report and included a series of policy proposals to advance the recycling goals of the state. Based on the proposals, this bill limits the use of the well-known “chasing arrows” symbol and prescribes when claims regarding recyclability can be made. Unless the product or packaging meets specified criteria, such uses or claims are deemed deceptive or misleading. This bill is co-sponsored by Californians Against Waste and the National Stewardship Action Council and is supported by a wide coalition of organizations. It is opposed by various industry associations, including the Plastics Industry Association. This bill passed out of the Senate Environmental Quality Committee on a 5 to 0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Requires, pursuant to the Environmental Representations Law, any person who represents in advertising or on the label or container of a consumer good that the consumer good that it manufactures or distributes is not harmful to, or is beneficial to, the natural environment, through the use of such terms as “environmental choice,” “ecologically friendly,” “earth friendly,” “environmentally friendly,” “ecologically sound,” “environmentally sound,” “environmentally safe,” “ecologically safe,” “environmentally lite,” “green product,” or any other like term, to maintain in written form in its records the following information and documentation supporting the validity of the representation:
 - a) the reasons why the person believes the representation to be true;
 - b) any significant adverse environmental impacts directly associated with the production, distribution, use, and disposal of the consumer good;
 - c) any measures that are taken by the person to reduce the environmental impacts directly associated with the production, distribution, and disposal of the consumer good;
 - d) violations of any federal, state, or local permits directly associated with the production or distribution of the consumer good; and
 - e) whether the consumer good conforms with the uniform standards contained in the Federal Trade Commission Guidelines for Environmental Marketing Claims for the use of the terms “recycled,” “recyclable,” “biodegradable,” “photodegradable,” or “ozone friendly.” (Bus. & Prof. Code § 17580(a).)
- 2) States it is the intent of the Legislature that the above information and documentation shall be fully disclosed to the public and requires it to be furnished to any member of the public upon request. (Bus. & Prof. Code § 17580(b), (d).)
- 3) Makes it unlawful for any person to make any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied. “Environmental marketing claim” includes any claim contained in the “Guides for the Use of Environmental Marketing Claims” published by the Federal Trade Commission (FTC). (Bus. & Prof. Code § 17580.5(a).)
- 4) Provides that it shall be a defense to any suit or complaint brought pursuant to the above that the person’s environmental marketing claims conform to the standards or are consistent with the examples contained in the FTC guides. (Bus. & Prof. Code § 17580.5(b).)

- 5) Provides that a violation of the above provisions is a misdemeanor punishable by imprisonment in the county jail not to exceed six months, or by a fine not to exceed \$2,500, or by both. (Bus. & Prof. Code § 17581.)
- 6) Provides that it is the public policy of the state that environmental marketing claims, whether explicit or implied, should be substantiated by competent and reliable evidence to prevent deceiving or misleading consumers about the environmental impact of plastic products. (Pub. Res. Code § 42355.5.)
- 7) Requires all rigid plastic bottles and rigid plastic containers sold in California to be labeled with a code that indicates the resin used to produce it. The code shall consist of a number placed inside a triangle, and letters placed below the triangle. (Pub. Res. Code § 18015.)
- 8) Establishes the Unfair Competition Law (UCL), which provides a statutory cause of action for any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising, including over the internet. (Bus. & Prof. Code § 17200 et seq.)
- 9) Establishes the False Advertising Law (FAL), which proscribes making or disseminating any statement that is known or should be known to be untrue or misleading with intent to directly or indirectly dispose of real or personal property. (Bus. & Prof. Code § 17500 et seq.) Provides that it is unlawful for a person, with bad faith intent, to register, traffic in, or use a domain name that is confusingly similar to the personal name of another person. (Bus. & Prof. Code § 17525.)
- 10) Establishes the Consumer Legal Remedies Act (CLRA), which prohibits unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer. (Civ. Code § 1770(a).)

This bill:

- 1) Extends the Environmental Representations Law to cover persons that represent a consumer good as not harmful to, or as beneficial to, the environment, through use of a chasing arrows symbol or by otherwise directing a consumer to recycle it.
- 2) Defines the “chasing arrows symbol” to mean an equilateral triangle, formed by three arrows curved at their midpoints, depicting a clockwise path, with a short gap separating the apex of each arrow from the base of the adjacent arrow; or variants likely to be interpreted by consumers as an implication of recyclability.

- 3) Requires such persons who use the term “recyclable,” use a chasing arrows symbol, or otherwise direct consumers to recycle a consumer good, to record whether the consumer good meets all of the criteria for statewide recyclability, pursuant to Section 42355.51 of the Public Resources Code (Section 42355.51).
- 4) Enacts Section 42355.51, which prohibits a person from offering for sale, selling, distributing, or importing into California any product or packaging for which a deceptive or misleading claim about the recyclability of the product or packaging is made.
- 5) Provides that a product or packaging that displays a chasing arrows symbol, a chasing arrows symbol surrounding a resin identification code, or any other symbol or statement indicating the product or packaging is recyclable, or directing the consumer to recycle the product or packaging, is deemed to be a deceptive or misleading claim unless CalRecycle has determined the product or packaging is of a material type and form that is determined to be recyclable. This applies to a product or packaging manufactured 90 days or more after the date the list of approved material types and forms is published or updated.
- 6) Directs CalRecycle to promulgate regulations and develop a list to determine the material types and forms that are deemed recyclable, as specified. It further provides producers a process to submit a plan for including a material type or form on the list.
- 7) States findings and declarations that it is the public policy of the state that claims related to the recyclability of a plastic product be truthful in practice and accurate.
- 8) Prohibits the required resin identification code from being placed inside a chasing arrows symbol, unless the product is deemed recyclable pursuant to Section 42355.51.

COMMENTS

1. Expanding the law combatting greenwashing

“Greenwashing” refers to a practice of falsely conveying that a company’s products are more environmentally friendly than they really are. California’s Environmental Representations Law is one example of how the state is attempting to combat such practices. It requires strict supporting documentation and information, to be made publicly available, of any representations made in advertising or on labels or containers of consumer goods that the good is not harmful to, or is beneficial to, the environment through the use of specified terms, including “environmentally safe” or “green product.” The statute makes it unlawful for any person to make any untruthful,

deceptive, or misleading environmental marketing claims, whether explicit or implied. (Bus. & Prof. Code § 17580.5(a).) Violations are a misdemeanor punishable by imprisonment in the county jail not to exceed six months, or by a fine not to exceed \$2,500, or by both. (Bus. & Prof. Code § 17581.)

Currently the law is tied to the uniform standards contained in the FTC's "Green Guides." According to the FTC:

A growing number of American consumers are looking to buy environmentally friendly, "green" products, from recycled paper to biodegradable trash bags. Companies have responded with "green" marketing touting the environmental benefits of what they're selling. But sometimes what companies think their green claims mean and what consumers really understand are two different things. The Federal Trade Commission's Green Guides are designed to help marketers avoid making environmental claims that mislead consumers.

The Green Guides were first issued in 1992 and were revised in 1996, 1998, and 2012. The guidance they provide includes: 1) general principles that apply to all environmental marketing claims; 2) how consumers are likely to interpret particular claims and how marketers can substantiate these claims; and 3) how marketers can qualify their claims to avoid deceiving consumers.¹

Policy #15 within the Commission's report, discussed above, proposes to expand the Environmental Representations law to include use of "chasing arrows" and to go beyond the FTC guides "to ensure that only products that are truly recyclable can make this environmental claim." It also proposes the state create a standardized list of items that are truly recyclable. The Report states the purpose of this policy "is to ensure that residential and commercial recycling collection programs only collect material that is capable of being recycled through the collection and processing process."

Based on this policy proposal, the bill applies the documentation requirements of the Environmental Representations Law to the use of the chasing arrows symbol and any direction, within advertising or on labels or containers, to recycle the consumer good. It also adds a requirement that when a person uses the term "recyclable," uses the chasing arrows symbol, or otherwise directs consumers to recycle the consumer good, they must state whether the good meets the criteria for statewide recyclability pursuant to Section 42355.51. The bill creates that section within the Public Resources Code, directing CalRecycle to promulgate regulations and develop a list to determine the material types and forms that are deemed recyclable, as specified. The bill also changes

¹ *Green Guides, Environmentally Friendly Products: FTC's Green Guides*, FTC, <https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides>.

the law governing labeling on plastic bottles and containers, restricting the placement of the various “resin identification codes” within the chasing arrows symbol to those products that are deemed recyclable in California pursuant to Section 42355.51.

Section 42355.51 also explicitly prohibits a person from offering for sale, selling, distributing, or importing into California any product or packaging for which a deceptive or misleading claim about the recyclability of the product or packaging is made. It further deems a product or packaging that displays a chasing arrows symbol, a chasing arrows symbol surrounding a resin identification code, or any other symbol or statement indicating the product or packaging is recyclable, or directing the consumer to recycle the product or packaging, to be a deceptive or misleading claim unless CalRecycle has determined the product or packaging is of a material type and form that is determined to be recyclable and has placed it on the relevant statewide list.

A major impetus for placing guardrails around and restrictions on the use of the chasing arrows symbol is the confusion and the resulting consequences in recycling programs around what that symbol means. Many consumers assume, and make purchasing decisions based upon that assumption, that any product with the symbol is recyclable and/or made from 100 percent recycled materials. A Consumers Brand Association report describes the problem with regard to plastics:

Confusion is understandable. There are seven plastic resin codes, representing different types of plastic. In most cases, codes one and two are consistently accepted from curbside recycling programs. But a total of 92 percent of Americans did not understand the labels: 68 percent said they assume that any product with symbols for all seven codes would be recyclable; the other 24 percent said they did not know. Only eight percent said no. Upon learning that only two of the seven codes were typically recyclable curbside, 73 percent were surprised. Even more confusing, those codes are intended for the recycling processing centers, but consumers are interpreting them – and incorrectly at that.²

The author makes the case for how this bill addresses the issue:

In California, less than 15 percent of single-use plastic is recycled. Despite robust curbside recycling programs and decades of public education efforts, the vast majority of single-use items are used once and then landfilled, incinerated, or dumped into the environment. This dismal recycling rate is due to many factors, most notably a severe drop in the market for recycled material and the low cost of virgin petroleum.

² *Reduce. Reuse. Confuse.*, Consumer Brands Association, https://consumerbrandsassociation.org/wp-content/uploads/2019/04/ConsumerBrands_ReduceReuseConfuse.pdf.

Consumers dutifully fill their blue bins with items they believe are recyclable, which contaminate the recycling stream and make it more costly to sort and clean the truly recyclable material. The plastic resin identification coding (RIC) system, which classifies plastic types by numbers one through seven often displayed in the chasing-arrows symbol, further confuses consumers. The RIC system was designed as method for waste facilities to properly sort plastics. Most consumers simply see the chasing arrows and assume a product can be recycled. Manufacturers have used this confusion to their advantage by greenwashing unrecyclable products. Consumers need to know what is truly recyclable.

SB 343 will end consumer confusion about which material is suitable for the blue bin, reduce contamination, lower waste volume, and improve recycling rates. The measure expands the existing “Truth in Environmental Advertising” law that prohibits the use of the word “recyclable” on unrecyclable products to include the use of the chasing-arrows symbol or any other suggestion that a material is recyclable, unless the material is actually recyclable in most California communities.

2. Methods of enforcement

California has many consumer-protection laws that combat deceptive or unfair practices by authorizing causes of action and providing attendant remedies to various parties.

The UCL (Bus. & Prof. Code § 17200) provides remedies for “anything that can properly be called a business practice and that at the same time is forbidden by law.” (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 [citations omitted].) The UCL provides that a court “may make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.” (Bus. & Prof. Code § 17203; *see also Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1146 [“An order for restitution, then, is authorized by the clear language of the [UCL.”].) The law also permits courts to award injunctive relief and, in certain cases, to assess civil penalties against the violator. (Bus. & Prof. Code §§ 17203, 17206.)

The FAL proscribes making or disseminating any statement that is known or should be known to be untrue or misleading with intent to directly or indirectly dispose of real or personal property. (Bus. & Prof. Code § 17500 et seq.) Violators are subject to a civil penalty not to exceed \$2,500 for each violation in an action brought by the Attorney General or by any district attorney, county counsel, or city attorney. (Bus. & Prof. Code § 17536.) Similar to the UCL, the FAL provides that a person may bring an action for an

injunction or restitution if the person has suffered injury in fact and has lost money or property as a result of a violation of the FAL. (Bus. & Prof. Code § 17535.)

The CLRA prohibits “unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer,” (Civ. Code § 1770(a)), and prohibits conduct “likely to mislead a reasonable consumer,” (*Colgan v. Leatherman Tool Grp., Inc.* (2006) 135 Cal. App. 4th 663, 680; internal quotation marks omitted.) The CLRA enables a consumer who suffers damage as a result of a violation of section 1770 to bring an action for actual damages, an order enjoining the behavior resulting in the violation, restitution of property, punitive damages, and any other relief the court deems proper. (Civ. Code § 1780.)

These laws have been used to address untruthful, deceptive, or misleading environmental marketing claims. One example is a class action in which the plaintiff has certified a class action asserting six causes of action against Keurig for falsely representing their pods as “recyclable,” including CLRA and UCL claims. (*Smith v. Keurig Green Mt., Inc.* (N.D.Cal. 2019) 393 F. Supp. 3d 837, 842.) In 2013, then Attorney General Kamala Harris’ office secured a consent judgment against defendants based on allegations of false, misleading, and deceptive marketing and advertising statements regarding the biodegradability and recyclability of their plastic bottles in violation of the Environmental Representations Law, the UCL, and the FAL. (*People ex rel. Barris v. Enso Plastics* (Super. Ct. Orange County, 2013, No.518091) (2013 Cal. Super. LEXIS 21809).)

As discussed above, the Environmental Representations law specifically makes it unlawful for any person to make any untruthful, deceptive, or misleading environmental marketing claim. (Bus. & Prof. Code § 17580.5(a).) However, that same section of law, Section 17580.5(b), also states: “It shall be a defense to any suit or complaint brought under this section that the person’s environmental marketing claims conform to the standards or are consistent with the examples contained in the ‘Guides for the Use of Environmental Marketing Claims’ published by the Federal Trade Commission.”

The intent of this bill is to go further than the standards laid out in the FTC guides and therefore calls into question how this defense would operate. For instance, while the FTC guides acknowledge the placement of an RIC inside the chasing arrows symbol in a conspicuous place on a product constitutes a recyclable claim, it appears to allow such symbols even though the product is likely not recyclable in most jurisdictions where clearly qualified or placed in an inconspicuous location.³ This bill clearly goes beyond such a standard.

³ 16 CFR 260.12, 260.13.

While violations of this bill likely already serve as predicate offenses for the other laws discussed above, including the UCL and FAL, despite the defense in Section 17580.5(b), in order to make clear that the defense is not intended to foreclose enforcement of the new requirements imposed by this bill, the author has agreed to the following amendment:

Amendment

Add the following provision as Section 17580.5(b)(2): “This subdivision does not apply to claims for violations of Sections 18015(d) and 42355.51(a), (b), and (e)(2) of the Public Resources Code.”

Consumers and public entities can thus enforce the provisions of this bill where persons deceptively deploy the chasing arrows symbol or otherwise convey a product is recyclable when it fails to meet the criteria for statewide recyclability pursuant to Section 42355.51.

3. Stakeholder positions

A coalition of over two dozen organizations, including Californians Against Waste and the National Stewardship Action Council, the co-sponsors of the bill, write in support:

Most consumers lack a clear understanding of what is recyclable or acceptable to put in the curbside “blue bin” and dutifully fill their bins with materials they believe are recyclable, especially when the material displays the “chasing arrows” recycling symbol. However, due to misinformation by labeling tactics, most materials have been falsely considered “recyclable” by consumers. This confusion contaminates and overwhelms the recycling stream, which places an incredible strain on local recycling and waste collection systems, and leads to a less efficient, more expensive system that falls to local jurisdictions and their ratepayers. This is further exacerbated by the confusion caused by the plastic resin identification coding system (RIC), which was introduced in 1988. The RIC is the number code (1-7), that is displayed on plastic packaging, intended to be used by waste facilities to properly sort the different types of plastic. However, the chasing arrows symbol that typically surrounds the RIC falsely conveys recyclability and leads to widespread confusion for consumers when they are sorting their waste into different bins.

...

SB 343 will reduce contamination in the recycling system, lower the costs for local governments and ratepayers, and empower consumers to make informed purchasing choices based on a product’s recyclability. This will encourage producers to make sustainable packaging choices, and support

companies looking for a steady supply of material to invest in recycling and reprocessing facilities in California.

The Plastics Industry Association writes in opposition to the bill:

While we support efforts to reduce contamination in the recycling stream, we oppose SB 343, because we do not believe a California-only labeling system is feasible or realistic. Getting rid of the current system and making it harder to recycle is going in the wrong direction. The criteria outlined in SB 343 to determine recyclability is severely restrictive. Using this same criteria, the Statewide Commission on Recycling Markets and Curbside Recycling determined only PET and HDPE bottles would be accepted as recyclable in the state. This designation would increase the material going to landfill and significantly decrease recycling. Not only would highly recyclable materials be labeled as non-recyclable, but there are no substitutes with the performance capabilities provided by these recyclable plastic materials.

The National Aerosol Association and the Western Aerosol Information Bureau write jointly in opposition:

SB 343, as currently drafted, would restrict the use of a chasing arrows symbol or a chasing arrows symbol surrounded by a resin identification code or other symbol or statement indicating a product is recyclable if the product does not meet certain requirements. We believe uniform labeling standards are essential to the free flow of interstate and international commerce and support the adoption of FTC Guides by states in conjunction with existing state truth-in advertising statutes.

We are concerned that it will be very difficult, if not impossible, for manufacturers to comply with the labeling standards in the bill as currently drafted to make their products available in California.

SUPPORT

Californians Against Waste (co-sponsor)
National Stewardship Action Council (co-sponsor)
California League of Conservation Voters
California Product Stewardship Council
California Resource Recovery Association
Californians Against Waste
California Public Interest Research Group
Center for Oceanic Awareness, Research, and Education
City of Thousand Oaks

Colorado Medical Waste, INC.

Ecology Center

Edco

Facts: Families Advocating for Chemical & Toxins Safety

Friends Committee on Legislation of California

Full Circle Environmental

Full Spectrum Strategy

Heal the Bay

Linkco INC.

Los Angeles County Solid Waste Management Committee/integrated Waste

Management Task Force

Marin Sanitary Service

Mendo Recycle

Merced County Regional Waste Management Authority

Ming's Recycling

National Stewardship Action Council

Natural Resources Defense Council

Northern California Recycling Association

Ocean Conservancy

Plastic Pollution Coalition

Prezero Us, INC.

Recology

Recyclesmart

Republic Services INC.

Rethinkwaste

Robin's Restaurant

Save Our Shores

Save the Albatross Coalition

Sea Hugger

Seventh Generation Advisors

Sierra Club California

Surfrider Foundation

The 5 Gyres Institute

The Last Beach Cleanup

The Last Plastic Straw

The Nectary

Tri-ced Community Recycling

Upstream

Waste Management

Zanker Recycling

Zero Waste Sonoma

OPPOSITION

California Manufacturers & Technology Association
Consumer Brands Association
Consumer Technology Association
EPS Industry Alliance
National Aerosol Association
Plastics Industry Association
Western Aerosol Information Bureau

RELATED LEGISLATION

Pending Legislation: AB 1201 (Ting, 2021) prohibits a person from selling a plastic product that is labeled with the term “compostable,” “home compostable,” or “soil biodegradable” unless the product meets specified standards and satisfies specified criteria. It authorizes CalRecycle to promulgate regulations for plastic product labeling. This bill is currently in the Assembly Appropriations Committee.

Prior Legislation:

AB 1583 (Eggman, Ch. 690, Stats. 2019) *See* Executive Summary.

AB 2287 (Eggman, Ch. 281, Stats. 2020) *See* Executive Summary.

PRIOR VOTES:

Senate Environmental Quality Committee (Ayes 5, Noes 0)
