

Federal Trade Commission Announces Review of Environmental Marketing Guidelines

INTRODUCTION

In late November, the Federal Trade Commission (“FTC”) announced that it will be reviewing its environmental marketing guidelines (the “Green Guides”).¹ The FTC is conducting this review a year before the Green Guides were scheduled for revision in light of the increased marketing of environmental product and packaging features by businesses, and the use of new types of environmental or “green” advertising claims that are not covered by the current Green Guides.

The new green claims that could be covered by the revised Green Guides include renewable energy, carbon offsets, and sustainability claims, as well as potentially more general “eco-friendly” and other environmental-related marketing claims. The FTC also will examine how consumers interpret environmental claims and, depending on its findings, may revise the Green Guides to provide updated guidance to businesses on how to avoid making misleading environmental claims.

As an initial step, the FTC will hold a workshop on January 8, 2008, in which it will examine the marketing of carbon offsets and renewable energy certificates (“RECs”). Businesses are

encouraged to participate through the workshop itself or via written comments, as contributions to this and future workshops will likely guide FTC enforcement actions.

While the FTC has stated that it does not plan to develop environmental standards for carbon offsets and RECs, it will continue to review these and other types of environmental marketing claims to determine whether they are deceptive or unfair under Section 5 of the FTC Act.² If the FTC determines a business has violated Section 5 of the FTC Act, such as by making misleading or unfair environmental marketing claims, the statute authorizes the Commission to seek injunctive relief and equitable monetary remedies.

A detailed discussion of the Green Guides, the FTC’s proposed review of the Green Guides, the upcoming FTC workshop, and factors to consider when making certain environmental claims follows.

I. THE GREEN GUIDES

In determining whether a company has violated Section 5 of the FTC Act in connection with advertising environmental marketing claims, the FTC examines such claims within the

¹ See FTC, Press Release, *FTC Reviews Environmental Marketing Guides, Announces Public Meetings*, at <http://www.ftc.gov/opa/2007/11/enviro.shtm>.

² Guidance published by the Environmental Protection Agency on comparable measures, such as an emission reduction credit, requires that a carbon offset be 1) quantifiable, 2) surplus, 3) enforceable, and 4) permanent. We anticipate similar standards would apply for carbon offsets. See *Guidance on SIP Credits for Emission Reductions from Electric-Sector Energy Efficiency and Renewable Energy Measures*, at http://www.epa.gov/ttn/oarpg/t1/memoranda/eresecerem_gd.pdf.

³ Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260 (2007).

context of the guidance provided in the Green Guides.³ Although the Green Guides are not legislative rules (and thus they are not directly enforceable regulations), the Guides are instructive on how the FTC views certain types of environmental marketing claims, and the type of evidence necessary to support such claims to prevent them from being considered deceptive or unsubstantiated.

For example, the Green Guides provide instruction to businesses that an environmental claim should be specific on whether the claim refers to a product, the packaging, or a service (e.g., “recycled box,” rather than a general reference to “recycled”). The Green Guides also provide guidance on:

1. The use of general environmental benefit claims, such as “eco-safe” or “environmentally friendly,” degradable, biodegradable, and photodegradable claims, compostable claims, recyclable claims, recycled content claims, source reduction claims (e.g., “now 10 percent less waste than our previous package”), refillable packaging claims, and ozone safe and ozone friendly claims; and
2. The type of evidence that is necessary to support such claims. Specifically, the FTC underscored that adequate substantiation for such claims requires a business to have a reasonable basis for the marketing claim, which, depending on the type and specificity of the claim, may require scientific evidence.

In its review of the Green Guides, the FTC is seeking comments from the public on:

1. The continuing need for the Green

Guides;

2. Benefits provided to consumers and businesses;
3. The impact on truthful information to consumers;
4. Costs imposed on consumers and businesses;
5. Consumer perception of environmental claims;
6. Industry compliance;
7. Outdated or unnecessary provisions;
8. New marketing claims that are not currently covered;
9. The relevance of technology or economic conditions;
10. Potential overlap or conflict with other laws or regulations; and
11. International laws that the FTC should consider. It is likely that many of these issues will be discussed at the FTC’s upcoming workshop on carbon offsets and renewable energy certificates.

II. THE FTC’S UPCOMING CARBON OFFSETS AND RENEWABLE ENERGY CERTIFICATES WORKSHOP

The FTC’s first workshop relevant to its review of the Green Guides will focus on carbon offsets and renewable energy certificates (RECs). Carbon offsets permit a business to fund greenhouse gas emission reduction programs to offset emissions occurring in other locations. Through offsets, a business can reduce its “carbon footprint” or become “carbon neutral.” Some businesses also may use carbon offsets to support “carbon neutral” product

³ Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260 (2007).

claims in their advertising. Renewable energy providers create RECs when they sell their renewable energy at the same rate as non-renewable energy while selling the environmental attributes of the energy separately through a certificate. This allows REC purchasers to fund renewable energy, even if the energy is not produced or available in their home areas.

In terms of the workshop (and possible future FTC enforcement activities), the Commission is focused on consumer protection issues related to carbon offsets and RECs. These issues may include consumer perception of carbon offset and REC advertising claims, substantiation for these claims, and industry self-regulation. These areas are of particular interest to the FTC given the challenges in consumer verification of such claims (i.e., consumers cannot easily confirm that a purchase actually funds the purported “green” project or provides an environmental benefit in the manner represented by the business in its marketing). In addition, the FTC is interested in obtaining more information on consumer understanding of carbon offsets or REC-related claims generally.

The FTC has suggested topics of discussion for the workshop, including:

- Marketing trends;
- The nature of the commodities in question;
- Consumer perception of these claims;
- Market problems such as double-counting and fraud;
- Third-party certification;
- “Additionality” (e.g., whether a claimed benefit would have occurred anyway);
- The use of RECs as the basis for carbon

offset claims;

- Substantiation; and
- The need for additional FTC guidance.

This workshop will serve as an ideal forum for businesses engaged in green advertising (or who are likely to use environmental marketing claims in the future given the consumer demand for such products) to better understand the FTC’s current and future views on such claims.

The workshop also will provide an opportunity for interested businesses to help develop policy on the use of green advertising claims, either through the workshop itself or through written comments, which may guide the workshop discussion and any future revisions to the Green Guides. The Commission intends to hold additional workshops and public meetings addressing other green topics to aid in its review of the Green Guides. Future topics may include green labeling and advertising developments, and consumer perception of green marketing claims.

III. CONSIDERATIONS WHEN MAKING CARBON OFFSETS AND RENEWABLE ENERGY ADVERTISING CLAIMS

Businesses that have purchased RECs and plan to advertise the environmental attributes of their purchase should be mindful of the relationship between RECs and carbon offsets, and should note that the FTC may draw distinctions between claims based on carbon reductions and claims based on the purchase of RECs.⁴ This distinction becomes increasingly complex given the relationship between renewable energy generation and carbon emissions. Thus, depending on the specific claim at issue, it may be helpful to have evidence analyzing the type of energy

⁴ Note that a REC only certifies that a megawatt hour of renewable energy was generated from a renewable source.

generation that the renewable asset displaces to the extent this can be determined, such as grid displacement studies.

In any event, given the FTC's likely close scrutiny of such claims, it is in the interest of a business to avoid making broad environmental benefit claims associated with the purchase of a REC or the extent to which a business effort results in carbon reduction or other environmental benefits unless the business has a clear understanding of the evidence supporting such claims. The challenges associated with articulating sufficiently narrow claims and identifying reliable substantiation are valid points to consider raising at the FTC's workshop.

CONCLUSION

All of these developments highlight a need for businesses to closely review any proposed environmental benefit advertising claims, and the proposed substantiation for such claims before publishing such claims. In addition, businesses are encouraged to participate in the FTC's review of the Green Guides, through the workshop(s) or via written comments, and to pay close attention to developments by the FTC and any revisions that it makes to the Green Guides to help ensure that all such marketing claims remain accurate and substantiated.

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ADVERTISING LAW PRACTICE

Kelley Drye's Advertising Law Practice Group has a national reputation for excellence in advertising litigation and National Advertising Division (NAD) proceedings; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; broad experience at the Federal Trade Commission (FTC), the offices of State Attorneys General, the NAD, and the networks; and extensive expertise in comparative advertising and trademark cases under Section 43(a) of the Lanham Act.

ENVIRONMENTAL LAW PRACTICE

Kelley Drye's Environmental Law Practice Group specializes in providing comprehensive solutions for complex problems to facilitate effective business strategies. We provide both advice and representation for clients participating in rule-making and policy-making activities by federal regulatory agencies, including the U.S. Environmental Protection Agency, the Occupational Safety and Health Administration, the U.S. Fish and Wildlife Service, and the U.S. Army Corps of Engineers.

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