

FTC Issues Final Revisions to the Green Guides: New Guidance for Substantiating Environmental Marketing Claims

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On Monday, the Federal Trade Commission (“FTC” or “Commission”) issued its long-awaited final revisions to the [“Guides for the Use of Environmental Marketing Claims”](#) (the “final Guides” or the “Green Guides”). The Green Guides, first issued in 1992 and last revised in 1998, are designed to help businesses ensure that the environmental marketing claims they make are true and substantiated. Although the Green Guides are not legislative rules (and thus not directly enforceable regulations), they are instructive on how the FTC views certain types of environmental marketing claims, and the evidence necessary to support such claims to prevent them from being considered deceptive or unsubstantiated.

Background

The FTC issued a draft of the revised Guides (the “draft Guides”) nearly two years ago with a number of significant updates to the 1998 version of the Guides.^[1] Specifically, the [draft Guides](#) updated existing guidance with respect to general environmental benefit claims, certifications and seals of approval, and claims like “degradable,” “compostable,” and “recyclable”; and they add guidance for new “green” claims, such as “renewable” and “carbon offsets.” As we anticipated, the final Guides do not make significant changes to the draft Guides. We have summarized some of the most notable changes below:

- **General environmental benefit claims.** The FTC added two points: (1) companies should not imply that any specific benefit is significant if it is, in fact, negligible; and (2) if a qualified general claim conveys that a product is more environmentally beneficial overall because of the touted benefit, marketers should analyze trade-offs resulting from the benefit to determine if they can substantiate the claim. The final Guides add examples to illustrate these points.
- **Certifications and seals of approval.** The final Guides add some examples to this section. One important example describes how a seal that conveys a general claim that is based on multiple environmental attributes may be appropriately qualified by referring to a website for additional information on the attributes.
- **Free-of claims.** Consistent with the draft Guides, the final Guides note that free-of claims may be appropriate even for a product that contains trace amounts of a substance. The final Guides add three factors that must be met for a product with trace amounts of the substance to use a

free-of claim.

- **Recyclable claims.** The draft Guides provided a 3-tiered analysis for disclosing the limited availability of recycling programs based on whether (a) a substantial majority of consumers/communities have access to recycling facilities, (b) a significant percentage of consumers/communities have access to recycling facilities, or (c) less than a significant percentage of consumers/communities have access. “Substantial majority” was defined in the draft Guides, but “significant percentage” was not. The final Guides now contain two tiers and the Commission deletes the “significant percentage” threshold because commenters suggested it confused marketers and consumers.
- **Renewable energy and material claims.** The final Guides have added language stating that an unqualified renewable energy claim may be made if the marketer matches the non-renewable energy use with renewable energy certificates (“RECs”). The final Guides do not require that companies state how the renewable energy is sourced or the source of the renewable material, as the draft Guides did. Instead, the final Guides state that this type of qualifying information may be helpful in minimizing the risk of deception.

Summary of Green Guides

The FTC’s final changes to the Green Guides are summarized below.
General Environmental Benefit Claims

Similar to the proposed Guides, the final Guides make it very clear that unqualified general environmental benefit claims likely would be considered deceptive, and that qualifications should be clear and prominent and limit the claim to a specific attribute. A new example in the final Guides illustrates how the FTC is casting a broader net in determining what constitutes general environmental benefit claims.^[2] The example states that a claim like “*Buy our printer. Make a change.*” when appearing in green type, together with a picture of the printer sitting in a bird’s nest balancing on a tree branch, surrounded by a dense forest, is deceptive because it is an unqualified general environmental benefit claim.

As noted above, the final Guides also state that if a qualified general claim conveys a **net environmental improvement** because of a touted benefit, marketers may have to analyze environmental trade-offs associated with that attribute to determine if they can substantiate the broader claim. Whether the marketer should examine the complete life cycle of a product or conduct a more limited analysis depends on the context of the claim. An example provides some guidance. The example describes a company that makes a plastic bottle with 25% less plastic than previous versions. The example notes that the company would not likely need to do a full-blown life cycle assessment to analyze the hidden trade-offs, unless manufacturing the bottles significantly alters environmental attributes earlier or later in the bottle’s life cycle (i.e., manufacturing the bottle requires more energy or a different kind of plastic).^[3]

Certifications and Seals of Approval

Third-party certifications and seals of approval constitute endorsements and are, therefore, covered by the Endorsement Guides. Several examples illustrate the Endorsement Guides’ principle that marketers disclose a “material connection” — that is, a connection that might materially affect the weight or credibility of an endorsement.^[4] In addition, the Commission acknowledges that a certification or seal may imply a general environmental benefit claim when it does not clearly

convey, either through its name or other means, the basis for the certification.

All seals and certifications should be accompanied by clear and prominent language that effectively conveys that the certification or seal refers only to specific and limited benefits. The FTC acknowledges the difficulty in doing this when the certification is based on comprehensive, multi-attribute standards.^[5] As noted above, the Commission illustrates an effective way to accomplish this with an example describing a window cleaner with a seal stating, “Environment Approved,” issued by a bona fide independent, third-party certifier. The seal was based on 35 environmental attributes. Because the seal constitutes a general environmental benefit claim, the FTC indicated that it may not be deceptive if it is appropriately qualified, for example, by stating: “Virtually all products impact the environment. For details on which attributes we evaluated, go to [a website that discusses this product].”

Degradable

Consistent with the proposed Guides, the final Guides state that for solid waste not customarily disposed of in landfills, incinerators, or recycling facilities, degradable means that the entire product or package will completely breakdown and return to nature within a reasonably short time, which is now defined as no more than a year.^[6]

Compostable

Again, consistent with the proposed Guides, the final Guides state that a product is compostable if it will break down into, or otherwise become a part of, usable compost in a safe and timely manner. “Timely manner” means that it will break down in approximately the same time as the materials with which it is composted.^[7]

Recyclable

The final Guides advise marketers that if a substantial majority of consumers/communities have access to recycling facilities, which is defined as at least 60%, an unqualified recyclable claim may be made.^[8] However, when recycling facilities are available to less than a substantial majority of consumers or communities, marketers should qualify all recyclable claims by either stating the percentage of consumers or communities that have access or using another appropriate qualifier. For example, if recycling facilities are available to slightly less than 60% of consumers or communities, companies may state that “this product may not be recyclable in your area,” or “recycling facilities for this product may not exist in your area.” If recycling facilities are available to much less than 60% of consumers or communities, an appropriate qualification may state that “this product is recyclable in only a few communities that have appropriate recycling facilities.”

Free-of

The final Guides include a new section devoted to claims that products or services have no, are free of, or do not contain certain substances.^[9] These types of claims may be deceptive if other substances that pose the same or similar environmental risk are in the product, or if the substance has never been associated with the product category. We can glean from the preamble to the Guides that product category may mean the category of all competing products.

Free claims may be made in some instances even when a product contains a *de minimis* amount of a substance, but only if the following three factors are met: (1) the level of the specified substance is no more than that which would be found as an acknowledged trace contaminant or background level; (2) the substance’s presence does not cause material harm that consumers typically associate with that substance; and (3) the substance has not been added intentionally to the product.^[10]

Non-Toxic

The final Guides maintain the same advice as the 1998 version of the Green Guides on non-toxic claims but simply move it into its own section.^[11] The guidance states that it is deceptive to misrepresent that a product, package or service is non-toxic, and cautions that such claims likely convey that a product or service is non-toxic for both humans and the environment.

Renewable Energy

If any part of a product or service was made from or powered by fossil fuels, unqualified renewable energy claims should not be made, unless the company has matched the non-renewable energy used with renewable energy certificates (“RECs”).^[12] If 100% renewable energy was not used or RECs have not been purchased to offset the non-renewable energy used, then the FTC directs marketers to clearly and prominently specify the percentage of renewable energy that powered the significant manufacturing processes involved in making the product or package.

In addition, unless marketers have substantiation for all their express and reasonably implied claims, they should clearly and prominently qualify their renewable energy claims. One way to do this is to specify the renewable energy source (*e.g.*, wind or solar energy). Also, the final Guides state that the term “hosting” is deceptive when a marketer generates renewable power but has sold all of the renewable attributes of that power, unless it clearly discloses in advertising that it generates renewable energy but sells all of it to others.^[13]

Renewable Materials

Similar to the renewable energy claims, the final Guides state that unless marketers have substantiation for all their express and reasonably implied claims, they should clearly and prominently qualify their renewable materials claims.^[14] One way to do this is to specify the material used and why the material is renewable. The final Guides also state that marketers should qualify these claims for products containing less than 100% renewable materials, excluding minor, incidental components.

Carbon Offsets

The final Guides do not address anything new since its proposed Guides with respect to carbon offsets. Competent and reliable scientific evidence is required to support these claims, including accounting methods to ensure that double counting of emission reductions does not occur. If the emission reduction project will not occur for two years or longer, this should be disclosed, and, if the emission reduction is already required by law, it cannot form the basis for a carbon offset claim. The Commission noted that more detailed guidance was not provided because it may place the FTC in the inappropriate role of setting environmental policy.

Specific Guidance Not Proposed for New Environmental Claims

As noted in the proposed Guides, the Commission declined to propose specific guidance for some popular terms, such as “organic,” “sustainable,” and “natural” mainly because it lacks sufficient evidence on which to base general guidance. Nevertheless, the agency warned that claims using these terms will remain subject to the general standard of Section 5. All objective environmental claims, whether or not addressed in the guides, must be accurate and substantiated.

Conclusion

We have seen an increase in recent years of enforcement actions by the FTC against companies making false or misleading “green” claims.^[15] With the release of the final Guides, we expect the FTC to ramp up its enforcement of these claim, in particular, against companies making unsupported new “green” claims inconsistent with the final Guides. James Kohm, Associate Director of the FTC’s Enforcement Division, stated during a media briefing on Monday that there are two types of

marketers: those who live over the line; and those who step over the line. The Green Guides are not made for those who live over line; those marketers need enforcement action. The Green Guides are made for those who are trying to get it right. Therefore, it is critical for marketers to ensure that all environmental marketing is accurate and substantiated.

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The attorneys in Kelley Drye & Warren's [Advertising and Marketing](#) practice group have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

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^[1] 75 Fed. Reg. 63552 (Oct. 15, 2010). The FTC received 340 non-duplicative comments in response to its proposed Guides.

^[2] 16 CFR 260.4, Example 3.

^[3] 16 CFR 260.4(c), Example 5.

^[4] 16 CFR 260.6, Examples 2, 3, 4, and 8.

^[5] 16 CFR 260.6, Example 7

^[6] 16 CFR 260.8(c).

^[7] 16 CFR 260.7(b).

^[8] 16 CFR 260.12.

^[9] 16 CFR 260.9 The previous version of the Green Guides covered these claims only in examples.

^[10] 16 CFR 260.9(c).

^[11] 16 CFR 260.10.

^[12] 16 CFR 260.15(a).

^[13] 16 CFR 260.15(d), Example 5.

^[14] 16 CFR 260.16.

^[15] See complete list of enforcement actions at <http://business.ftc.gov/legal-resources/6/35>.