

# FTC Releases Proposed Changes and New Guidance to The Green Guides

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Yesterday, the Federal Trade Commission ("FTC" or "Commission") issued its proposed revisions to the "[Guides for the Use of Environmental Marketing Claims](#)" (the "Green Guides")<sup>1</sup> and announced that it will be accepting public comment on the Proposed Guides until December 10, 2010. 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.

The proposed revisions update the existing Guides with respect to claims such as "degradable," "compostable," and "recyclable," and they propose new guidance for claims not currently addressed by the existing Guides. Popular recent environmental claims that receive specific guidance for the first time include "renewable" and "carbon offsets."

The Commission declined to propose definitions or specific guidance for other environmentally-friendly terms such as "sustainable," "natural," "organic," "life cycle assessment," and "biobased." The FTC's rationale for not giving these terms specific treatment was based in large part on lack of consumer perception data, along with deference to sister agencies' existing standards and definitions for these terms.

The FTC's changes to the existing Green Guides and its proposed revisions are summarized below.

## Proposed Changes to Claims Addressed by the Current Guides

- **Claims of General Environmental Benefit**

The FTC proposes to make it very clear that unqualified general environmental benefit claims such as "green" and "eco-friendly" cannot be made without clear and prominent qualifications that limit the claim to a specific attribute. The Commission also requests comment on consumer interpretation of qualified-general environmental benefit claims and on whether to include more specific guidance on this issue.

- **Certifications and Seals of Approval**

Third-party certifications and seals of approval constitute endorsements and are, therefore, covered by other FTC guidance (i.e., "the Endorsement Guides"). In addition, the Commission stated that a certification or seal, by itself, may imply a general environmental benefit claim that should be qualified using clear and prominent language.

Notably, logos developed internally by company-specific standards are not off-limits. The FTC proposes an example where a seal is developed internally and would not be considered deceptive if language qualifies the seal to alert consumers that the company created the certifying program.

- **Degradable**

The FTC proposes that, for products that would not customarily be 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 would be defined as no more than a year. The FTC noted that it has been focused on "biodegradable" claims and is concerned that there is a lack of consistency regarding the meaning of the term. This is particularly true for products that ultimately are disposed of in landfills which typically lack exposure to oxygen, water, and other factors that contribute to biodegradation.

- **Compostable**

The FTC proposes that a product qualifies as 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. Also, marketers must qualify compostable claims to avoid deception about the limited availability of composting facilities.

- **Recyclable**

The FTC proposes a 3-tiered analysis for disclosing the limited availability of recycling programs:

1. If a substantial majority of consumers/communities have access to recycling facilities, which is defined in the Federal Register notice as at least 60%, an unqualified recyclable claim may be made.
2. If a significant percentage of consumers/communities have access to recycling facilities, qualified recyclable claims may be made (e.g., "package may not be recyclable in your area").
3. If less than a significant percentage of consumers/communities have access to recycling facilities, the marketer must qualify the claim to state that this is the case.

- **Free-of**

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. Free-of claims, however, may be made in some instances even when a product contains a *de minimis* amount of a substance.

## Proposed Guidance for Claims Not Addressed in the Current Guides

- **Made with Renewable Materials/Energy**

The FTC expects marketers to qualify claims within this category by identifying how the renewable energy is sourced, what it is and why it is renewable. Also, qualification is required if the product is not made entirely of renewable material.

If any part of the product was made from fossil fuels, renewable energy claims should not be made. Also, renewable energy claims should be qualified by stating the source of the renewable energy. If less than, or virtually all of, the significant manufacturing process involved in making the product/package was powered by renewable energy or conventional energy offset by renewable energy certificates ("RECs"), the claim should be qualified.

- **Carbon Offsets**

The FTC proposes to require competent and reliable scientific evidence 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.

## Specific Guidance Not Proposed For Popular Claims

Although the Commission declined to propose specific guidance for some popular terms, the agency warned that claims using them 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.

- **Sustainable**

The FTC explained that testing on the term "sustainable" was not practical because it contains no cue alerting consumers that it refers to the environment. Without consumer perception testing, the Commission said it lacked a sufficient basis to provide meaningful guidance on the use of "sustainable" as an environmental marketing term.

- **Natural**

The FTC declined to address the term "natural" because it lacked consumer perception testing, and, like sustainable, the term is used in multiple contexts and may mean different things in each of those contexts. Although it did not formally address this term in the Green Guides, the Federal Register notice provides some informal guidance on the use of this claim:

*If reasonable consumers could interpret a natural claim as representing that a product contains no artificial ingredients, then the marketer must be able to substantiate that fact. Similarly, if, in a given context, a natural claim is perceived by reasonable consumers as a general environmental benefit claim or as a comparative claim (e.g., that the product is superior to a product with synthetic ingredients), then the marketer must be able to substantiate that claim and all attendant reasonably implied claims.*<sup>2</sup>

- **Organic**

The Commission deferred to the United States Department of Agriculture's ("USDA") definition for organic. With respect to non-agricultural products that do not fall under USDA's jurisdiction, the Commission explained that it lacks a basis to provide guidance since no consumer perception testing was submitted. The Commission is therefore requesting comment on what guidance, if any, it should provide regarding the use of organic claims to describe non- agricultural products.

- **Life Cycle Assessment (LCA)**

Again, the Commission declined to address this term without consumer perception data and because of the variability in meanings for this claim. The Commission also declined to propose advising marketers to conduct an LCA to substantiate environmental claims or follow a particular LCA methodology.

- **Biobased**

USDA is currently conducting its own consumer perception study on biobased claims as part of its voluntary labeling program for biobased products, so the FTC declined to address this term as well.

## Final Comment Regarding International Standards

The FTC acknowledged comments asking the Commission to align itself with international standards, such as those developed by the International Organization for Standardization (known as the "ISO"). The FTC declined to do so, stating that the goals and purposes of ISO and the Green Guides are not the same. In particular, the Guides' purpose is to prevent the dissemination of misleading claims; while ISO focuses in part on preventing misleading claims, it also focuses on encouraging the demand for and supply of products that may cause less stress on the environment.

## Questions for Comment on the Proposed Green Guides

The Commission invites comments on all issues raised in the Federal Register notice concerning the proposed revisions to the Green Guides, as well as responses to the following specific questions:

1. Do consumers interpret general environmental claims, when qualified by a particular attribute, to mean that the particular attribute provides the product with a net environmental benefit? Please provide any relevant consumer perception evidence. Should the Commission advise marketers that a qualified-general environmental claim is deceptive if a particular attribute represents an environmental improvement in one area, but causes a negative impact elsewhere that makes the product less environmentally beneficial than the product otherwise would be? Why or why not?
2. Would it be helpful to include an example in the Guides illustrating a qualified general environmental claim that is nevertheless deceptive? For example, a marketer advertises its product as "Eco-friendly sheets - made from bamboo." Consumers would likely interpret this claim to mean that the sheets are made from a natural fiber, using a process that is similar to that used for other natural fibers. The sheets, however, are actually a man-made fiber, rayon. Although bamboo can be used to make rayon, rayon is manufactured through a process that uses toxic chemicals and releases hazardous air pollutants. In this instance, the advertisement is deceptive.
3. The Commission's consumer perception study found that 27 percent of respondents interpreted the claims "green" and "eco-friendly" as suggesting that a product has no (rather than "some") negative impact. Viewing this finding alone, would it be deceptive for a product to be advertised with an unqualified general environmental benefit claim if the product had a negligible environmental

impact? Please provide any relevant consumer perception evidence.

4. If a marketer makes an unqualified degradable claim for a liquid substance (or dissolvable solid), how long do consumers believe the substance will take to completely degrade? Please provide any relevant consumer perception evidence. Should the Commission provide guidance concerning this time period in the Guides? Why or why not?

5. The Commission proposes adopting a maximum period of one year for complete decomposition of solid materials marketed as degradable without time qualification. Would this guidance lead to deceptive claims in circumstances where consumers would expect a material to degrade in less than one year?

6. Should the Commission quantify the "substantial majority" threshold in the recyclable section of the Guides? If so, how? If not, why not?

7. Should the Commission quantify the "significant percentage" threshold in the recyclable section of the Guides? If so, how? If not, why not?

8. What changes, if any, should the Commission make to its guidance on pre-consumer recycled content claims? How do consumers interpret such claims? Please provide any relevant consumer perception evidence.

a. If the Commission should retain its guidance that pre-consumer recycled materials be diverted from the solid waste stream: (1) should the Commission continue to consider "reuse in the original manufacturing process" and "significant reprocessing" to determine if material is diverted from the solid waste stream; (2) what factors should the Commission consider to determine whether material was diverted from the solid waste stream; and (3) when processes that divert material from the waste stream become standard practice in an industry, do consumers continue to consider that material recycled content?

b. If materials have historically been diverted from the solid waste stream and reused for one purpose (e.g., fiber fill in toys), but now may be reused for other higher purposes (e.g., as raw fiber for textiles), do consumers still consider that material to be recycled content even though the material was already being diverted from the solid waste stream?

9. Do consumers understand the difference between pre-consumer and post-consumer recycled content? Please provide any relevant consumer perception evidence.

10. Should the Commission continue to advise marketers that recycled content claims may be based on the annual weighted average of recycled content in an item? If so, why? If not, why not? Are recycled content claims based on this method likely to mislead consumers? Would qualifying the claim avoid that deception? If so, please describe what the disclosure should be, and why. Please also provide any relevant consumer perception evidence.

11. If a product is advertised as "made with recycled materials," either in whole or in part, should the Commission advise marketers to qualify that claim to indicate that the product is not recyclable if it is not? Why or why not? If a disclosure is needed, please describe what the disclosure should be, and why.

12. Are consumers aware that manufacturers are no longer permitted to use CFCs in their products? Do no-CFCs claims imply that other products still contain CFCs? Please provide any relevant consumer perception evidence.

13. What guidance, if any, should the Commission provide concerning free-of claims based on

substances which have never been associated with a product category? How do consumers understand such claims? Please provide any relevant consumer perception evidence.

14. What guidance, if any, should the Commission provide concerning organic claims about non-agricultural products? How do consumers interpret organic claims for non-agricultural products? Do consumers understand such claims as referring to the products' ingredients, manufacturing, or processing, or all three? Please provide any relevant consumer perception evidence.

15. How should marketers qualify "made with renewable materials" claims, if at all, to avoid deception? Does disclosing the type of material, how the material was sourced, and the reason the material is renewable adequately qualify the claim? Why or why not? Are there other disclosures that would adequately qualify a "made with renewable materials" claim? Please describe such disclosures. Please also provide any relevant consumer perception evidence.

16. How, and under what circumstances, should marketers qualify "made with renewable energy" claims to avoid deception?

a. Does disclosing the source of the renewable energy adequately qualify the claim and prevent deceptive implications that the advertised product is made with renewable or recycled materials? Why or why not? Are there other disclosures that would adequately qualify a "made with renewable energy" claim? Please describe such disclosures. Please also provide any relevant consumer perception evidence.

b. Should the Commission advise marketers to qualify a "made with renewable energy" claim if the advertised product is not made entirely with renewable energy? If so, should marketers qualify such claims if all or virtually all significant processes used in making a product are powered by renewable energy? Why or why not? Please provide any relevant consumer perception evidence.

17. How do consumers understand "carbon offset" and "carbon neutral" claims? Is there any evidence of consumer confusion concerning the use of these claims? Please provide any relevant consumer perception evidence.

18. How should marketers qualify carbon offset claims, if at all, to avoid deception about the timing of emission reductions? Should marketers disclose if their offsets reflect emission reductions that are not scheduled to occur in two years? Should marketers make a disclosure if emission reductions are not scheduled to occur in some other time period? If so, what time period, and why? Would such a disclosure adequately qualify an offset claim to avoid deception? Please provide any relevant consumer perception evidence about this issue or on carbon offsets, generally.

## Conclusion

The proposed revisions to the Guides, available on the FTC's website [here](#), highlight the need for businesses to closely review any proposed environmental benefit claims, and the proposed substantiation, before publishing such claims. In addition, businesses are encouraged to participate in the FTC's review of the Guides through written comments, and to pay close attention to future developments by the FTC concerning the Guides to help ensure that all related claims remain accurate and substantiated.

For more information on the guidance documents, please see the following:

[Federal Trade Commission Unwinds Green Textile Claims and Frames Up Green Building Claims](#), Kelley Drye Client Advisory, August 13, 2008.

[Federal Trade Commission Announces Workshop on Environmental Claims for Green Buildings and Textiles](#), Kelley Drye Client Advisory, June 10, 2008.

[Federal Trade Commission Announces Workshop on Green Packaging Claims](#), Kelley Drye Client Advisory, March 19, 2008.

[FTC Examines Carbon Offsets and RECs](#), Kelley Drye Client Advisory, January 24, 2008.

[FTC Announces Review of Environmental Marketing Guidelines](#), Kelley Drye Client Advisory, December 12, 2007.

## Kelley Drye & Warren LLP

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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<sup>1</sup>See FTC, Press Release, *Federal Trade Commission Proposes Revised "Green Guides"*, at <http://ftc.gov/opa/2010/10/greenguide.shtm>.

<sup>2</sup>Proposed Revisions to the Green Guides, p. 139-140.