

Washington Watch

Selling Green: US FTC Releases Proposed Revisions to the “Green Guides”

Greater clarity in guidance — and more potential for enforcement

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After more than three years of discussion, research, review, and debate, the United States Federal Trade Commission (US FTC) released proposed revisions to its *Guides for the Use of Environmental Marketing Claims* (the “Green Guides”)¹ in late 2010. The Green Guides provide FTC “guidance” on what is and is not appropriate in the ever-fluid area of environmental marketing. They are designed to help product marketers avoid making false and misleading environmental claims that might violate section 5 of the Federal Trade Commission (FTC) Act.²

The proposed changes were posted on the Commission’s website on October 6, 2010 and released in the *Federal Register* on October 15, 2010.³ They are intended to update the existing Green Guides and make them easier for companies to use and understand.

This “Washington Watch” column provides background on the Green Guides, discusses the proposed revisions, and identifies some areas that will likely continue to pose challenges for product marketers.

Background: A Brief History of the Green Guides

Original Guidance

The Commission first issued the Green Guides in 1992.⁴ It can be challenging to recall how relatively nascent green marketing was at the time. Products were beginning to be marketed with assertions that they were “environmentally friendly,” “safe for the environment,” and similar claims.

The US FTC has always been keenly aware of the difference between free speech and permissible marketing on the one hand, and false and deceptive advertising on the other. In developing the Green Guides, the Commission endeavored to craft guidance that could help marketers avoid crossing the line between the two.

The Green Guides do not have the force and effect of law, and are not independently enforceable. Even with the Green Guides, under the FTC Act the Commission has the legal burden of proving that a challenged act or marketing claim is unfair or deceptive.

1990s Revisions

The Commission revised the Green Guides in 1996⁵ and again in 1998.⁶ At each iteration, the US FTC has sought to provide help in distinguishing the increasingly fuzzy line between honest marketing that extols the environmental virtues of products to an increasingly sophisticated consuming public, and engaging in practices and making claims that are intended to deceive.

Need for New Revisions

The Commission notes that, since the last revision of the guidance more than ten years ago, “both anecdotal evidence and empirical research indicate that consumers have a heightened awareness of environmental concerns and, therefore, place increased importance on buying products and services that will cause less harm to the environment.”⁷ This trend has led to a proliferation of environmental claims.

Given this background, the Commission began its decennial review of the Green Guides in late 2007, a full year ahead of schedule. On November 27, 2007, the US FTC solicited public comment on a range of issues, including the need for and economic impact of the Green Guides, the general accuracy of environmental claims, and, importantly, whether the Commission should seek to provide guidance on emerging types of product claims, such as “carbon neutral,” “sustainable,” and “renewable.”⁸

An Extensive Revision Effort

The Commission actually did far more than solicit comment. In fact, it pursued a quest for clarity on marketing practices and claims with a gusto not often seen in federal guidance development. The US FTC convened three public workshops to consider emerging product claims, including claims regarding renewable energy, carbon offsets, and “green” packaging, buildings, and textiles. The workshops were well attended. They featured a diversity of views from the public, academia, consumer groups, environmental organizations, and product marketers.

In addition, the Commission contracted with research groups to study and survey consumer preferences. Over four million people participated through convenience sampling techniques. From this number, a more focused group was recruited to complete a detailed survey.

Each of these data points was carefully considered in the Commission’s review. A more detailed discussion of the US FTC’s efforts is available in the lengthy (and uniquely detailed) preamble to the October 15, 2010, *Federal Register* notice announcing the proposed revisions to the Green Guides.

Overview of Proposed Revisions

The proposed revisions to the Green Guides include changes to the existing guidance, along with new guidance for claims that were not thought to be common when the Guides were last revised more than a decade ago. The proposed revisions are discussed in more detail in the paragraphs that follow.

Simplification and Administrative Changes

The proposed changes to the existing guidance include simplifying the Guides wherever possible to make them easier to understand.

First, overly legalistic language would be replaced with more reader-friendly wording. For example, the proposal would change the formal description of the Green Guides found in 16 CFR section 260.1 to use simpler and more straightforward language. Some language that is viewed as redundant and/or confusing would also be eliminated.

Second, the Commission proposes to reorganize the Green Guides, largely to

enhance their clarity. For example, the revised Guides would cover each product claim in its own section, reorganize the claims alphabetically, and divide the Guides within each section into useful subparts.

Third, the Commission would delete certain sections of the Green Guides that it believes are extraneous to the Guides' core purpose. For example, the guidance contains a provision (section 260.4) stating that the Commission reviews the Guides periodically. Because this periodic review is common to all of its guidance, and not unique to the Green Guides, the Commission has proposed to delete this section.

Clarification of Existing Guides

The proposals would strengthen, clarify, and enhance the existing Green Guides.

■ ***Unqualified General Claims***

The proposal would expand on existing guidance, which cautions marketers to avoid making unqualified general claims, including assertions that a product is "environmentally friendly" or "eco-friendly." These types of claims suggest that products have specific and far-reaching environmental benefits that are difficult, if not impossible, to substantiate.

■ ***Qualifying Language and Claim Substantiation***

Building on existing guidance, the proposed revisions urge marketers to use clear and prominent qualifying language in order to telegraph to consumers that a general environmental claim refers to a more limited environmental benefit. The proposals also admonish marketers to substantiate claims, making clear that marketers should seek to ensure that overly broad environmental assertions do not give rise to deceptive claims.

■ ***Certifications and Seals of Approval***

The proposals would strengthen existing cautions against using unqualified certifications or seals of approval that do not specify the basis for the certification. The US FTC states that unqualified product certifications and seals of approval are likely to constitute "general" environmental benefit claims. The proposal cautions marketers that the qualifications applied to seals or certifications must be clear, prominent, and specific.

The Commission's proposal offers guidance on using certifications and seals of approval in marketing, the need to limit the environmental benefits asserted by the seal or certification to particular attributes for which the marketer has substantiation, and the need for disclosure of any "material connections" that may exist between the marketer and the certifying organization.

In regard to "material connections," the Commission offers the example of a manufacturer advertising its product as being certified by a "third party" organization that is actually an industry trade association of which the manufacturer is a member. The proposal observes that, if the marketer were otherwise in compliance with the Green Guides, the certification would not be considered false and misleading if the marketer accompanied its certification statement with an explanation identifying the certifying entity as an industry trade association.

Public Perception and the Use of Certain Terms

The proposed revisions to the Green Guides advise marketers on the topics of public perception and the use of the terms “degradable,” “compostable,” “ozone-safe/ozone-friendly,” “recyclable,” and “free-of/non-toxic.” For example, the proposal states that a proper “degradable” claim means the product should decompose in a reasonably short period of time, or no more than one year. For “compostable” claims, the product must break down within the same general timeframe as other materials with which it is composted.

The integrity of “recyclable” claims turns on the availability to consumers of recycling programs and collection sites. When recycling facilities for a particular type of product are available to a “substantial majority” of consumers where the product is sold, marketers may make unqualified recycling claims. If, however, recycling facilities are available to only a “significant percentage” of consumers in a given geographic area, unqualified recycling claims run the risk of being considered false and misleading. In such cases, the proposal suggests qualifying language, such as “recycling programs may not exist in your area” and “this product may not be recyclable in your area.”

The proposal would also clarify guidance regarding “free of” claims. The Commission specifies that a “free of” claim may be deceptive if the product contains another substance that may cause environmental harm, even if the product is actually free of the specified claimed substance. This caution is especially open ended, since most products contain a wide range of ingredients, only some of which may have a negative public reputation. The proposal makes clear that “free of” claims may be considered false and misleading if the product has never been associated with the presence of the particular substance on which the claim is made.

Proposed New Guidance

The proposed changes would add new guidance covering claims that products are made with “renewable materials” or “renewable energy.” The US FTC suggests that marketers qualify these claims with specific information about the renewable material (e.g., what it is, how it is sourced, why it is renewable) or form of energy (e.g., wind or solar). The Commission cautions against making unqualified claims if any part of the product is made with non-renewable materials or manufactured using fossil fuels.

The new guidance would also provide advice on carbon-offset claims. The Commission suggests that marketers should have competent and reliable scientific evidence to support carbon-offset claims and that they should disclose whether any offset purchase is funding emission reductions that will not occur for more than two years.

No Guidance on Other Important Claims

Surprisingly (and reportedly to avoid potential duplication of rules or guidance issued by other agencies), the proposed Green Guides expressly do not address use of the terms “sustainable,” “natural,” and “organic.”

“Organic” claims may be subject to regulations issued by the United States Department of Agriculture (USDA) under the National Organic Program if they are made in association with agricultural products. “Natural” claims made in association with pesticide products are subject to regulations issued by the United States Environmental Protection Agency, while “natural flavor or natural flavorings” claims are under the jurisdiction of the

Food and Drug Administration. Other agencies regulate “natural” claims pertinent to other articles.

The Green Guide proposals also offer no guidance on the use of life cycle analysis (LCA). The Commission states that it “lacks sufficient information on which to base guidance”⁹ in this area. The Commission adds, however, that it will continue to apply substantiation analysis to claims relying on LCA. This analysis will seek to assess whether particular claims have been evaluated by objective sources and whether the LCA is sufficient in quality and quantity based on “standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that each of the marketer’s claims is true.”¹⁰

Comments Requested

The US FTC sought comment on all aspects of its proposed revisions to the Green Guides, with comments due by December 10, 2010. The Commission specifically requested comment on a range of issues. Examples included:

- How (if at all) should marketers qualify “made with renewable materials” claims to avoid deception?
- Should the US FTC provide guidance concerning how long consumers think it will take a liquid substance to degrade completely?
- How do consumers understand “carbon offset” and “carbon neutral” claims?

Analysis of the Proposed Changes

The proposed revisions to the Green Guides and the Commission’s preamble discussion are detailed and long. They also are very important reading for any business that markets products to consumers or other purchasing entities.

The proliferation of green-product claims in recent years has complicated purchasing decisions considerably. At times, these claims have also contributed to abusive marketing practices, which the US FTC has properly attempted to address. The proposed guidance helpfully responds to many concerns that have arisen over the years. But it also raises new issues, while leaving some key questions unanswered.

The Green Guides and Their Relationship to Other Regulatory Programs

One key area of concern for product marketers is the interface between the Green Guides and other regulatory or guidance programs run by local, state, and federal agencies. This area remains unclear and the proposed Guides offer little help in sorting out the issues.

Some commenters urged the Commission to consider preempting state and local laws and regulations that are thought to be inconsistent with the Guides. The Commission declined to accept this recommendation, stating that the Green Guides do not appear to be inconsistent with any state or local provision of which it is aware.

Similarly, the US FTC opted not to address certain types of claims that are left to the unique province of other federal agencies, such as “organic” claims made with respect to agricultural products, which are now governed by USDA regulations.

Information Quality and Claims Substantiation

The quality of information and the level of specificity required to substantiate claims remain unclear and somewhat fluid. For example, a manufacturer's claim that a product is "formaldehyde free" would not be deceptive if the manufacturer is able to substantiate that formaldehyde emissions from the product "likely are inconsequential to consumers." Reasonable people can be expected to disagree about what "inconsequential" means, however.

Adding Guidance on Emerging Areas

The proposal takes a much-needed stab at clarifying the standards applicable to "renewable energy" and "renewable materials" claims, which were not covered by previous iterations of the guidance. Given the inherent vagueness of these claims and the multiple ways in which they arguably can be made with little actual substantiation, the proposed Guides offer considerable help. The public's response and comments on this topic will further clarify an area badly in need of guidance.

Improving Clarity in Established Areas

The proposed Guides offer much greater clarity on a broad range of claims that have already become familiar to the public, including assertions regarding general environmental benefits and degradability, certifications and seals of approval, and "free of" claims. The overarching message to marketers here (as with newer claims) is to emphasize specificity, substantiation, and qualification.

Under the proposed revisions to the Green Guides, broad and unqualified claims will be an invitation to further scrutiny. They might even leave a marketer open to a charge of making a *de facto* false and misleading claim in violation of section 5 of the FTC Act.

Importantly, the Commission offers many specific examples of claims that it believes to be inappropriate or inadequate for one reason or another. Moreover, the proposed revisions are organized and written in a clearer, more logical manner.

Crafting the Final Revised Green Guides

It remains unclear when the revised Green Guides will be issued in final form. The proposals received many comments, and the Commission likely will review and consider these thoughtfully. As a result, it may take the US FTC a bit of time to issue the final Guides.

As a practical matter, however, the proposed Guides in their current form offer considerable assistance to product marketers, thus lessening the significance of a protracted delay between the proposed and final Guides.

What Will the Revised Green Guides Accomplish?

In response to the revised Green Guides, we can expect to see narrower, more qualified and focused environmental claims with additional caveats, footnotes, and asterisks. Whether these qualifications and annotations will improve consumers' purchasing decisions is, of course, unclear.

Some speculate that the public will grow weary of trying to wade through the

additional reading material, which could make relatively simple purchases laborious and intellectually taxing. As a result, busy consumers may simply ignore much of the information provided. Other observers disagree, arguing that an increasingly sophisticated public will welcome the greater detail encouraged by the revised Green Guides, and will use the improved information when making more informed purchasing decisions.

In truth, the impact of the Guides may be minimal from the consumer's point of view. In these tough economic times, the prevailing factor in buying decisions may simply be product pricing. For much of the public, purchasing choices ultimately have little to do with environmental claims and everything to do with making a fixed income go as far as possible. Indeed, "green" claims may not figure into their calculus at all.

From a marketer's perspective, however, "green" cannot be excluded from the equation — especially for today's companies, which are experiencing heightened competitive pressure and intense scrutiny from discerning public interest groups, concerned Boards of Directors, activist investors, and other centers of influence.

What Should Companies Do?

Given the importance and strength of all these pressures, a careful read of the proposed Green Guides is essential for companies that have any interest in pursuing "green" marketing claims. The Guides are not regulatory requirements. But they do offer much greater specificity about what the Commission considers acceptable — and what is viewed as crossing the line.

This means that the specter of enforcement under section 5 of the FTC Act arguably looms larger. Companies thus should take care in assessing all green claims against the new, improved, and greatly clarified guidance offered in the proposed revisions to the Green Guides.

The US FTC has not strenuously enforced section 5 in the past with regard to environmental claims. But this could change given the rich and greatly expanded guidance it has now offered regarding what is and is not considered misleading and deceptive in "green" advertising.

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Notes

¹ 16 C.F.R. part 260.

² 15 U.S.C. § 45.

³ US Federal Trade Commission (US FTC) (2010, October 15). Guides for the use of environmental marketing claims, proposed revisions to guidelines, 75 Fed. Reg. 63552-63607.

⁴ US Federal Trade Commission (US FTC) (1992, August 13). Guides for the use of environmental marketing claims, 57 Fed. Reg. 36363.

⁵ US Federal Trade Commission (US FTC) (1996, October 11). Guides for the use of environmental marketing claims, final rule, publication of revised guides, 61 Fed. Reg. 53311-53320.

⁶ US Federal Trade Commission (US FTC) (1998, May 1). Guides for the use of environmental marketing claims, final revised guides, 63 Fed. Reg. 24240-24251.

⁷ 75 Fed. Reg. at 63553 (col. 3).

⁸ US Federal Trade Commission (US FTC) (2007, November 27). Guides for the use of environmental marketing claims, request for public comment, announcement of public meetings, 72 Fed. Reg. 66091-66093; Guides for the use of environmental marketing claims, carbon offsets and renewable energy certificates, announcement of public workshop, request for public comment, 72 Fed. Reg. 66094-66097.

⁹ 75 Fed. Reg. at 63559 (col. 1).

¹⁰ 75 Fed. Reg. at 63560 (col. 2).