

Revisions to the “Green Guides”

By

Lynn L. Bergeson¹

The U.S. Federal Trade Commission (FTC) released in early October, important revisions to its *Guides for the Use of Environmental Marketing Claims* (Green Guides). The changes are designed to update the Green Guides and make them easier for companies to use and understand. This column briefly summarizes the proposal.

Background

Product manufacturers are keenly aware of the purchasing public’s desire to “go green.” Last revised in 1998, the FTC has struggled to keep the Guides current with a burgeoning number of claims purporting to reflect a product’s environmentally friendly profile. Some states have adopted and exceeded the FTC’s Guides. For example, Florida and California require manufacturers to maintain records corroborating such claims. Other states impose other requirements.

The Proposed Guides

The proposal revises existing guidance and provides new guidance for claims that were not common previously. Changes to existing guidance cautions marketers from making unqualified general claims that a product is “environmentally friendly” or “eco-friendly.” These

types of claims suggest the product has specific and far-reaching environmental benefits that are difficult to substantiate.

Importantly, the proposal adds a new section advising marketers that it is deceptive to misrepresent that a product has been endorsed or certified by a third-party organization and that third-party certifications are endorsements that should meet the criteria for endorsements set forth in the FTC Endorsement Guides. The FTC is aware of the jumble of domestic certification programs and concerned about consumer confusion.

The Green Guide also advise marketers on public perception and use of the terms “degradable,” “compostable,” “ozone-safe/ozone-friendly,” “recyclable,” and “free-of/non-toxic.” A proper “degradable” claim means the product should decompose in a reasonably short period of time, or no more than one year.

The proposed changes add advice about claims for products made with “renewable materials” or “renewable energy.” The FTC suggests 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 renewable energy (*e.g.*, wind or solar) and cautions against unqualified claims if any part of the product is made with non-renewable material or manufactured using fossil fuels. The new guidance provides advice on carbon offset claims. It suggests marketers have competent and reliable scientific evidence to support the carbon offset claim and disclose if any offset purchase funds emissions reductions that will not occur for more than two years.

Reportedly to avoid potentially “duplicative” rules or guidance issued by other agencies, the proposed Guides expressly do not address use of the terms “sustainable,” “natural,” and “organic.” Organic claims, for example, may be subject to U.S. Department of Agriculture regulations if made in association with agricultural products under the National Organic Program. “Natural” claims made in association with pesticide products are subject to U.S. Environmental Protection Agency regulations. Other agencies regulate natural claims pertinent to other articles. The FTC states that it is simply “unable to provide specific advice on sustainable” as a marketing claim.

The proposed Guides are detailed and important to any business that markets to consumers and other purchasing entities. The proliferation of green product claims in recent years has complicated considerably purchasing decisions and invited abusive marketing practices. While the proposed Guides helpfully respond to many questions that have arisen over the years, they also raise new issues while leaving unanswered others. The interface between the Guides and other regulatory programs remains unclear in many instances. Quality of information and level of specificity to substantiate claims remains 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 any formaldehyde emissions “likely are inconsequential to consumers.” Reasonable people can be expected to disagree as to what is “inconsequential.” The proposal takes a much needed stab at renewable energy claims and renewable materials claims.

A careful read of the proposal is essential and the FTC is plainly solicitous of specific and meaningful public comment. Such comment will undoubtedly improve and help FTC to address any specific issues raised by the current proposal, which clearly reflects a great deal of thought and effort on the part of FTC.

¹ Lynn L. Bergeson is Managing Director of Bergeson & Campbell, P.C., a Washington, D.C. law firm focusing on conventional and engineered nanoscale chemical, pesticide, and other specialty chemical product approval and regulation, environmental health and safety law, chemical product litigation, and associated business issues, and President of The Acta Group, L.L.C. and The Acta Group EU, Ltd with offices in Washington, D.C. and Manchester, UK.