

# New “Green” Claims Lead to Review of the Federal Trade Commission “Green Guides”

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In response to interest in new “green” environmental marketing claims – from “carbon neutral” to “sustainable” – the U.S. Federal Trade Commission is reviewing its “Green Guides.” Those guides, which are administrative interpretations of laws enforced by the FTC, provide advice to businesses and consumers on allowable environmental marketing claims.

The Green Guides, formally known as the “Guides for the Use of Environmental Marketing Claims,” are designed to help marketers avoid making claims that the agency would challenge as “unfair” or “deceptive” under Section 5 of the FTC Act, and can also influence state and private false advertising litigation. The guides were first issued in 1992 and were revised most recently in 1998. The current guides fill almost a dozen pages in the U.S. Code of Federal Regulations and are explained at length in a 36-page FTC brochure. The FTC had planned to revise the guides in 2009, but the agency decided to advance its review because of the current increase in green claims.

The current guides outline general principles that apply to all environmental marketing claims and provide guidance regarding specific claims. They advise, for example, that qualifications and disclosures should be sufficiently clear and prominent to avoid deception; marketers should indicate whether their claims apply to the product, the package or a component of either; claims should not overstate an environmental attribute or benefit expressly or by implication; and marketers should present comparative claims in a manner that makes the basis for comparison sufficiently clear to avoid deception.

The current FTC guidance addresses such terms as “environmentally friendly,” “recyclable,” “recycled content,” “biodegradable,” “degradable,” “compostable” and “refillable” to claim that packaging is green. Illustrative examples provide “safe harbors” for marketers who seek certainty about how to make claims, although other approaches may also be lawful.

The guides advise, for example, that to claim a product is biodegradable, it must break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal, unless the claim is qualified. They also advise that a product should not be marketed as recyclable unless it can be collected, separated or otherwise recovered from the solid waste stream for reuse, or use in the manufacture or assembly of another package or product, through an established recycling program.

## NEW GREEN CLAIMS

Sellers and marketers are now using other green claims not addressed in the current FTC Guides, including such terms as “sustainable” and “renewable.” Recognizing that it needed to learn more about the use of such claims, consumer perceptions and substantiation, as well as environmental seals and third-party certification programs that purport to verify the positive environmental impact of product packaging, on April 30 the FTC held a public workshop. Parties interested in providing comments on the issues may do so, with submissions due on Monday, May 19.

At the workshop, the FTC heard from environmental groups and industry representatives regarding (1) trends in packaging and environmental claims, (2) use of packaging terms covered by the current guides as well as new green packaging terms not currently addressed by the guides, (3) claims based on third-party certification, (4) use of new packaging materials and their impact on the environment and (5) the current state of substantiation for green packaging claims.

There was general agreement at the workshop that the sections of the Green Guides dealing with packaging are out of date and need revision – both to provide more specific definitions of key terms and to update the guidelines with clearer standards.

Issues raised at the workshop included:

- Whether certain “green” claims – such as “sustain-

able” and “renewable” – are so general and vague that they should be subject to an absolute ban;

- Whether more research should be done to determine how many local governmental entities collect various types of recyclable items so that the assertion that an item is “recyclable” would be more accurate;
- Whether the term “biodegradable” can be defined more specifically in terms of time and focus; and
- Whether a life cycle assessment (LCA) is necessary before any meaningful environmental claims can be made.

## CARBON OFFSETS AND RENEWABLE ENERGY CERTIFICATES

This workshop was the agency’s second, as part of its Green Guides review. In January, the agency examined marketing of carbon offsets and renewable energy certificates (RECs) as demand for such products is growing quickly, and updated Green Guides are likely to address those issues.

The January workshop was a response to the increased attention to global warming and increased claims relating to greenhouse gas emissions and marketing of carbon offsets and RECs to environmentally conscious consumers. Companies from Continental Airlines to Volkswagen are offering customers carbon offsets along with their airline itineraries and automobile purchases.

Carbon offsets are purchased to fund projects designed to reduce greenhouse gas emissions in one area in or-

der to counterbalance or offset emissions elsewhere. RECs are created when renewable power generators sell their electricity as conventional electricity, and then sell the environmental attributes of their power separately through a certificate, to subsidize electricity from renewable sources and thereby reduce greenhouse gas emissions.

The January workshop examined such issues as:

- **Additionality** – whether the project would have occurred in the absence of emissions mitigation;
- **Double counting** – whether offsets or RECs are claimed by more than one owner or transaction;
- **The level of substantiation** that should be required to claim reductions; and
- **Confusion and uncertainty** from terms such as “carbon neutral” and the difficulty of standardizing metrics for measuring the carbon emissions benefit, for example, from preserving a forest.

The FTC appears to be moving toward providing clarity. In the meantime, it is wise to make claims as specific as possible with clear and conspicuous disclaimers to provide clarification.

The FTC is likely to hold at least one additional workshop and invite further comments in the coming months to address other “green” issues, before revising its Green Guides. If you would like to be kept informed directly of developments in this area of the law, please let us know.

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