

The New Green Guides: Has The Federal Trade Commission Finally Become Serious About Environmental Marketing Claims?

By Mark Hammond and Darren Cahr

“Green” advertising has reemerged as a focus for the Federal Trade Commission – a development that could mean both trouble *and* opportunity for any business that uses environmental marketing claims to gain an edge with consumers. Even more critically, the FTC has provided business with a framework to better understand the agency’s concerns about consumer deception – and a path to avoiding some problems in the future – but left a variety of key questions unanswered.

The New Green Guides: A Proposal

The Green Guides¹ represent the FTC’s long-standing counsel to businesses interested in making environmental claims regarding their products and services. In the words of the FTC’s own regulations, the guides reflect the FTC’s “application of Section 5 of the FTC Act to environmental advertising and marketing practices.” More specifically, the Green Guides tell American business how far it could push claims regarding environmental impact, recycling, biodegradability and any number of other statements regarding energy efficiency, pollution and product content. The Green Guides were long overdue for an update: marketing practices clearly has moved well beyond the simple claims of environmental benefits envisioned by the previous drafters, and new technologies had complicated the manner in which consumers received product information.

After years of unmet promises (the original request for comments was in 2007), the FTC finally released a series of proposed revisions to the Green Guides² on October 6, 2010. The public comment period for this proposal closes on December 10, 2010. On a very basic level, these proposed revisions to the Green Guides reaffirm the FTC’s fundamental guidance on environmental advertising: ensure that your claims are (a) true, (b) understood by the consumer, and (c) based on competent and accurate scientific evidence.

¹ 16 CFR Part 260, Guides for the Use of Environmental Marketing Claims

² <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf>

The proposed revisions also provide first-time guidance specific to a number of topics, most notably renewable content, renewable energy and carbon offsets.

Existing guidance specific to a number of issues also receive relatively minor updates in the proposed Green Guides, and more substantive revisions are made to the topics of Certifications and Seals of Approvals and “general” claims. Expected guidance in a number of areas – particularly sustainability, organic and natural – failed to materialize. For that reason, the proposed Green Guides may beg more questions than they answer, and the FTC specifically requests comment on 18 areas that were essentially left unresolved in the proposal.

Five Big Changes

The FTC proposes five changes to existing guidance in the proposed Green Guides that will be of particular significance to many businesses:

- > *General Green Claims*: The FTC considerably strengthens the current Green Guides position that “general” environmental claims should be avoided in the new proposal. In fact, the proposed revisions explicitly bar general environmental benefit claims in their entirety: “It is deceptive to misrepresent, directly or by implication, that a product, package, or service offers a general environmental benefit.” The use of terms such as “green,” “eco-friendly,” “environmental friendly” and the like will require qualification, such as “greener than our previous packaging because we’ve reduced the weight of our packaging 15 percent.” Significant attention is given to the accuracy of any implied claims – the FTC clearly is focused on ensuring that general environmental benefit claims become an historical relic. Given that many companies have spliced general environmental benefit claims into their marketing practices’ DNA (and in some cases into their trademarks), this proposal could create a particularly complex issue for many companies if adopted in the final Green Guides.
- > *“Made with Renewable Materials”*: While the term “renewable” does not itself appear in the current Green Guides, it makes its mark throughout the proposal. Mimicking the treatment of recycled content, products made with less than 100 percent renewable materials are advised to qualify their claims. The FTC’s research, reflected in the proposed Green Guides, indicates that reasonable consumers interpret “made with renewable materials” to mean that the product is made with recycled content *and* is itself both recyclable and biodegradable. The FTC refuses to define “renewable,” instead advising that claims should disclose the material, how the material is sourced and why it is renewable. Bamboo flooring is proposed for use as an example in the Green Guides, and the FTC indicates that the claim could be properly qualified by including the statement, “Our flooring is made from 100% bamboo, a fast-growing plant, which we cultivate at the same rate, or faster, than we use it.” The Commission is seeking additional comment on this issue.

- > *Certifications and Endorsements*: The proposed Green Guides provide considerable new detail on how endorsements and other third-party certifications may be used. Third-party certifications must meet existing FTC regulations (See the Endorsement Guides, 16 CFR Part 255) and do not eliminate or reduce the marketer's obligation to have substantiation for all claims made and implied by the certification. Certifications cannot be used to provide a general green claim and the use of the certification must be appropriately qualified to the appropriate portion of the product/packaging, as well as to only the specific benefits as certified. Self-certifications, related-party certifications, "membership" certifications and industry-sponsored certifications present special issues and are discussed at length in the proposed Green Guides.
- > *Made with Renewable Energy*
 - Part 1: The proposed Green Guides do not define Renewable Energy, other than to disqualify fossil fuel generation as "renewable." The proposed Green Guides indicate that if any part of the product (or packaging, depending on the claim) was manufactured with energy derived from fossil fuels, a Renewable Energy claim *must* be qualified. The proposed Guides further require that marketers specify the source of the renewable energy (wind, solar, etc.). The Commission requests comments regarding whether product distribution is implicit in the claims.
 - Part 2: Facilities that generate (and use) renewable energy and sell the associated renewable energy credit cannot claim to use renewable energy or to host a renewable energy project. The FTC determined that the renewable energy credit, typically a creation of state law pertaining to the portfolio of generation sources used by public utilities, includes all of the marketing rights. This is inconsistent with current practice, policy and/or regulation in a number of states.
- > *Carbon Offsets*: Despite great expectations to the contrary, the FTC only dips its toes in the carbon offset pool. Carbon credits are *not* subject to EPA regulation, but rather are generally created by protocols set forth by non-governmental entities and then traded in the "voluntary" market (the credits are created voluntarily, and companies purchasing them do so without any legal obligation whatsoever). The proposed Green Guides provide the limited and relatively non-controversial guidance that carbon credits should be subject to appropriate accounting methods to avoid double sales and that mandated (by law) carbon emission reductions are not voluntary and therefore should not be advertised. The FTC's determination that, absence disclosure to the contrary, the offset must occur in less than two years is noteworthy and fairly novel.

The proposed Green Guides also refresh previously established guidance on a variety of topics. These revisions include: providing firmer definitions of terms such as "biodegradable" and "compostable"; addressing minor issues specific to recyclability; establishing updated references to HCFC claims in regards to "Ozone Safe" claims; and sketching out

further details regarding “free of” type claims that have become so important to consumers who seek to avoid specific chemical additives.

No Guidance Proposed

While the FTC provides business with a great deal of proposed new guidance on a variety of different topics, the agency chose to avoid some key issues and could not come to a final conclusion on a number of other ones:

- > *Sustainability*: According to the FTC, if you believe that sustainability is one of today’s most popular environmental buzzwords, you’re wrong. Based on its own research, sustainability claims are *not* perceived by consumers as being specific to environmental issues and are therefore not appropriate for inclusion in the Green Guides. The FTC notes that if the sustainability claim is used in conjunction with environmental terms, however, marketers are responsible for substantiating consumers’ understanding of these sustainability claims in the context of their advertisements and the guidance given by the Green Guides. The FTC also appears to have been influenced by the fact that a significant portion of sustainable claims pertain to corporate image, a difficult area to regulate given interplay with the First Amendment and precedent involving commercial speech. Ultimately, it is likely that the FTC will receive significant comments requesting inclusion of sustainability in the Green Guides, and it is possible that the final form regulations may address sustainability claims directly.
- > *Life Cycle Analysis*: The FTC determined that the comments and results of its own consumer perception study did not provide sufficient information regarding consumer perceptions to propose guidance in this area. The FTC further noted general advice is unlikely to be useful, as life cycle analysis is complex and highly variable. The FTC is unlikely to include life cycle analysis in the final guides, even in response to comments received in response to this proposal.
- > *Organic*: The FTC determined that it lacked sufficient information to provide specific guidance regarding “organic” claims and that regulation was inappropriate given the existence of USDA’s National Organic Program. Although the FTC did not propose a new section for these claims, it reiterates that the general principles set forth in the Green Guides still apply: substantiation is required for environmental benefit claims, including implied claims. To the extent that reasonable consumers perceive organic (and natural) claims as general environmental benefit claims or comparative claims, the marketer must be able to substantiate those claims and all other implied claims.
- > *Natural*: “Natural” claims are excluded for reasons similar to those for excluding organic claims – a lack of consumer perception information and active regulation of the term by other governmental agencies. The FTC goes to great lengths to defend its decision not to ban the term entirely from marketing and reaffirms that the marketer must substantiate the use of terms

such as “natural” to reasonable consumers. The preamble includes a specific reminder that the marketer must be able to substantiate both that claim and all attendant reasonably implied claims for “natural” that can be perceived by reasonable consumers as a general environmental benefit or comparative claim (*e.g.*, that the product is superior to a product with synthetic ingredients). Although guidance regarding natural (and organic) claims was widely expected, the lack of consumer perception data and the importance placed on that data in the proposal makes it unlikely that the FTC will modify its proposal to include natural (and organic) claims. As with “organic” claims, however, businesses should not assume that the terms are without meaning, or that misuse or overbroad usage of the terms would not be actionable.

Consumer Impact

Finally, the FTC significantly increased its focus on understanding consumer perceptions as part of its analysis in developing these proposals. Many of the agency’s decisions turned on the results of consumer surveys conducted by the FTC itself. Left unstated is whether the FTC expects companies to perform consumer perception research before making green marketing claims not directly addressed in the Green Guides.

What’s Next

Comments on the proposed Green Guides can be submitted until December 10, 2010. In addition to comments on the specific changes to the Green Guides described by the FTC, the agency has posed 18 specific questions on green marketing claims, seeking input from the public and effected industries. Based on those requests, the proposed rule may be modified significantly before it is finalized, or modified and then re-published for public comment. Regardless of the outcome of these specific proposals, however, these suggestions from the FTC’s staff provide dramatic and useful insights into the current thinking of key regulators, many of whom will be determining whether *your* marketing practices are deceptive. With that in mind, we suggest that every client consider whether to provide comments before the deadline of December 10, 2010.

In response to the FTC’s original request for comments in November 2007, a number of commentators noted that “sustainability” is a journey, not a destination. A similar comment could be made about the proposed revisions to the Green Guides – they are not a definitive end in themselves, but represent a significant step on the way to the ultimate goal.

For more information on the matters discussed in this alert, please contact the authors Mark Hammond at Mark.Hammond@dbr.com or (215) 988-2994, Darren Cahr at Darren.Cahr@dbr.com or (312) 569-1465, or your regular Drinker Biddle contact.

Drinker Biddle

Environmental and Energy Practice Group

CALIFORNIA | DELAWARE | ILLINOIS | NEW JERSEY
NEW YORK | PENNSYLVANIA | WASHINGTON DC | WISCONSIN