

New Guidelines for Environmental Marketing Claims

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Businesses that utilize "green" marketing — claims of environmental benefit or superiority — should be aware of regulatory changes that are likely to take effect within a few months.

Since 1992, the Federal Trade Commission (FTC) has regulated environmental marketing claims through "Green Guides," which outline general principles that apply to all general environmental marketing claims and provide guidance on specific green claims, such as whether a product can be labeled as "biodegradable," "compostable," "recyclable" or "ozone safe." Responding to the recent proliferation of green claims in the marketplace, the FTC proposed revisions to its guidelines last October and is expected to approve the revisions very soon.

At the heart of the FTC's revised Green Guides is research regarding consumers' understanding and perception of common green marketing terms. Overall, this research, which was conducted by the FTC, found that without appropriate explanation almost every green marketing claim is at risk of causing some form of consumer deception.

As a result, the revised Green Guides will focus on consumer deception, whether intentional or not. As explained by FTC Chairman Jon Leibowitz, "businesses have increasingly used green marketing to capture consumers' attention and move Americans toward a more environmentally friendly future. But what companies think 'green claims' mean and what consumers really understand are sometimes two different things."

The new Green Guides, as currently proposed, are available atwww.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf.

Under the revised Green Guides, businesses may no longer market a product as "green" or "eco-friendly," no matter how many explanations or qualifications are attached to that statement. Such broad claims of general environmental benefit are difficult, if not impossible, to substantiate. Instead, businesses may tout the specific environmental benefit they are trying to convey, such as recyclability or the reduced use of materials or wind energy, but, as seen in the following, even these specific claims are subject to changes in regulation.

Substantiation itself will require greater attention. For example, the new Green Guides recognize third-party certifications and seals as official endorsements governed by the FTC's Endorsement Guides, and mandate new qualifications and substantiation procedures for third-party seals.

The meaning of "degradable" and "recyclable" will also change. "Degradability" will no longer indicate that the product or package will break down "within a reasonably short period of time." It may be used only if the product or package will break down no more than a year after customary disposal. Furthermore, the claim must be qualified if the items are destined for landfills, incinerators or recycling facilities.

"Recyclable" claims will undergo a three-tier analysis. Whether and how such a claim should be qualified will depend on whether a "substantial majority," "significant percentage" or a "less than significant percentage" of consumers have access to recycling facilities.

For the first time, the revised Green Guides address claims of renewable materials and renewable energy. Renewable material claims must include specific information about the renewable material, such as what it is, how it is sourced and why it is renewable. In addition, it must indicate if the item is not made entirely with renewable materials.

Renewable energy claims must specify if any part of the manufacturing process utilized fossil fuels and should identify the source of renewable energy. Additional qualifications should be made if renewable energy certificates (RECs) are used to offset conventional energy use. Marketers that generate renewable energy but sell RECs for all of it should not make renewable energy claims at all.

Finally, the revised Green Guides address carbon offset claims, which must be supported by competent scientific evidence, including appropriate accounting methods. Further, carbon offset claims must be qualified unless the emission reductions will occur within two years, and should not be made at all if the underlying activity is already required by law.

The revised Green Guides arrive in an era of increased regulation of green marketing. In recent years, the FTC has brought several law enforcement actions targeting allegedly false or unsubstantiated environmental claims. Because the Green Guides are administrative interpretations of the law, they do not have the force and effect of law and they are not independently enforceable. However, if a marketer makes claims that are inconsistent with the guides, the FTC can take action under Section 5 of the FTC Act, which prohibits unfair or deceptive practices.

In the face of such increased regulation, businesses should take care to ensure deception-free environmental claims. With proper disclosures, businesses can continue to promote the environmentally-friendly aspects of their products without running afoul of the FTC's revised Green Guides. tbl

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