

WSGR ALERT

OCTOBER 2010

FTC PROPOSES REVISIONS TO ITS GUIDES FOR ENVIRONMENTAL MARKETING CLAIMS

On October 6, 2010, the Federal Trade Commission (FTC) published proposed revisions to its Guides for the Use of Environmental Marketing Claims (the "Green Guides").¹ The Green Guides, which apply to marketing directed at both consumers and business, were last updated in 1998 and have become outdated as companies have increased the nature and frequency of environmental marketing claims. The FTC is seeking public comment on the proposed revisions until December 10, 2010, after which it will finalize the updated Green Guides. The FTC's summary of the proposed revisions is available at <http://www.ftc.gov/os/2010/10/101006greenguidesproposal.pdf>.

The proposed revisions maintain the Green Guides' focus on helping marketers to avoid false and deceptive environmental marketing claims. They seek to improve upon the current Green Guides' instructions for use of environmental terms common in 1998, for example, "biodegradable," "recyclable," and "ozone safe." In addition, the proposed revisions address more recently adopted environmental terms that are prevalent today, such as "renewable energy," "renewable materials," and "carbon offsets." The FTC explicitly declined to have the Green Guides address certain other forms of environmental marketing, including "sustainable," "natural," and "organic" claims.

While the Green Guides do not serve as law, they offer meaningful insight into the FTC's

view of the law and provide a basis under the FTC Act for future FTC enforcement. In the past year, the FTC has increased enforcement based on the current Green Guides, bringing seven actions against companies alleged to have made deceptive or unsubstantiated environmental claims. The FTC very likely will continue enforcement of environmental claims once the revised Green Guides become final. As a result, the proposed revisions to the Green Guides provide sound guidance for marketers seeking to implement best practices with regard to environmental claims.

Certificates and Seals of Endorsements

The FTC proposes to create a new section in the revised Green Guides regarding the use of certifications and seals of approval, due to the growing prevalence of such labels. Because of the often unknown relationship between a party issuing the certificate/seal and the marketer of a product bearing such label, the proposed revisions require disclosure of the relationship. For example, where a manufacturer advertises that its product is "Certified by the Green Renewable Energy Association" and the advertisement does not mention that the product manufacturer is a dues-paying member of the association, the advertisement would be deceptive because it likely conveys that the parties are independent of one another. In addition, the proposed rules clarify that the marketer is responsible for substantiating any

claims communicated by the certification/seal and for qualifying any certification/seal that implies a general environmental benefit. For instance, where an "EarthSmart" seal—known for certifying products' chemical emissions—is placed on product packaging, the use of the seal would be considered deceptive unless the marketer displays appropriate qualifying language, such as "EarthSmart certifies that this product meets EarthSmart standards for reduced chemical emissions during product usage."

Renewable Energy Claims

The proposed revisions to the Green Guides prohibit marketers from making unqualified claims that a product is made using renewable energy if power used to manufacture any part of the product was derived from fossil fuels. The proposed revisions also would require marketers to specify the source of the renewable energy (for example, wind, solar, or fuel cells) used to make the product, but do not specify which sources of energy (other than energy derived from fossil fuels) are considered to be renewable. The proposal provides much needed guidance with regard to claims involving renewable energy certificates (RECs), which are certificates representing the renewable attributes associated with the production of renewable energy. RECs often are sold by energy producers to third parties, which then market their use of renewable energy. For example, the proposed revisions

¹ The proposed revisions to the Green Guides are available at <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf>.

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state that where a marketer generates renewable energy but sells all of the associated RECs, the marketer cannot “double count” by also advertising that it uses renewable energy or that it “hosts a renewable energy facility.”

Renewable Materials Claims

The proposed revisions include a new section devoted to renewable materials claims. FTC studies concluded that the public’s understanding varies widely as to what “renewable materials” means. As a result, the proposed revisions state, “Unless marketers have substantiation for all their express and reasonably implied claims, they should clearly and prominently qualify their renewable materials claims by specifying the material used, how the material is sourced, and why the material is renewable.” The proposed revisions also deem it deceptive for a marketer to use an unqualified “made with renewable materials” claim unless the product or package is almost completely made with renewable materials.

Carbon Offset Claims

Carbon offsets are credits or certificates attributed to quantified greenhouse gas emission reductions resulting from various types of projects, such as tree planting and methane capture at landfills. Carbon offsets are purchased by individuals, businesses, and organizations seeking to reduce their “carbon footprint” by offsetting the greenhouse gas emissions associated with their activities. While the proposed revisions to the Green Guides do not establish any standard for the use of carbon offsets, they do instruct sellers of carbon offsets to use “competent and reliable scientific and accounting methods” for measuring claimed emission reductions. The revised Green Guides would require disclosure of emission reductions that will not occur for two years or longer into the future, and would advise offset marketers not to imply that offsets already have reduced emissions or will do so in the near future if such reductions will occur at a significantly later date. The

proposed revisions also prohibit the use of carbon offsets where the underlying emission reduction or activity causing the reduction is required by law.

Sustainable, Natural, and Organic Claims

The FTC decided that claims involving the terms “sustainable” or “natural” were outside of the scope of the Green Guides because, among other things, purchasers do not exclusively associate the terms with environmental qualities of products.

To the extent that organic claims concern agricultural products, the FTC directs marketers to follow the guidelines provided by the U.S. Department of Agriculture’s National Organic Program. The FTC continues to evaluate the use of organic claims for non-agricultural products and has requested public comments on this topic.

Practical Tips for Marketers Making Environmental Claims in Light of the Proposed Revisions to the Green Guides

- *If appropriate, submit comments on the proposed revisions to the Green Guides by the December 10, 2010, deadline.* If your concerns regarding environmental claims have not been addressed by the proposed revisions or if the proposed revisions will negatively impact your business, then consider submitting comments to the FTC on a timely basis. Wilson Sonsini Goodrich & Rosati is available to evaluate whether it would be strategic for your company to submit comments and to assist in the preparation of such comments.
- *Continue to use environmental claims that are specific and not misleading.* Both the current and the proposed revisions to the Green Guides require marketers to use claims that are unambiguous with regard to the nature and scope of the environmental benefit. These recommendations apply not just to the situations specified in the proposed

revised Green Guides, but to all claims, including those using the terms “sustainable” and “natural.”

- *Maintain records to substantiate all claims.* Normal advertising laws apply to environmental claims, including the requirement for businesses to be able to substantiate all claims before the claims are made. As a result, prior to publishing any environmental claim, conduct reasonable diligence to confirm its validity and then maintain all appropriate records.
- *Modify current “green” marketing practices to accommodate the proposed revised Green Guides.* The final Green Guides will become effective—without a grace period—once released, which should be in 2011. Proactive adoption of the practices identified by the proposed revised Green Guides will facilitate a smoother transition to the final Green Guides.
- *Watch for the issuance of the final Green Guides.* Although the final Green Guides likely will be very similar to the proposed revisions, the FTC will consider all comments before issuing the final version. Count on the final Green Guides to contain additional requirements and guidance in response to public comments.
- *Develop and follow internal marketing guidelines to ensure compliance with the Green Guides.* Establishing and adhering to an effective review protocol for all environmental marketing claims will limit the likelihood of problematic advertisements. Should regulators question your company’s green marketing practices, evidence of a documented and followed protocol also may go a long way in demonstrating your company’s genuine efforts to engage in responsible green marketing.
- *Follow applicable advertising requirements in addition to the Green Guides.* Marketing activities that include

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environmental claims may be subject to FTC guides in addition to the Green Guides (such as the FTC's Guides Concerning Use of Endorsements and Testimonials) and to requirements mandated by other federal agencies (for example, the USDA's National Organic Program).

Further Guidance

For further guidance on environmental or "green" marketing, or any related issues, please contact Aaron Hendelman, John Slafsky, or Matt Kuykendall in the trademarks and advertising practice or Sheridan Pauker in the energy and clean technology practice at Wilson Sonsini Goodrich & Rosati.



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