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Truth in Green Advertising: FTC Releases Final Revised “Green Guides”

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The U.S. Federal Trade Commission (FTC) has released final revisions to its Environmental Marketing Guides, commonly known as the “Green Guides.” The Green Guides, the FTC’s guidance document on enforcement of Section 5 of the FTC Act join similar state laws that prohibit deceptive or misleading marketing acts or practices and illustrate the FTC’s new commitment to ensure that marketing statements referencing environmental attributes are truthful and not misleading.

The October 1, 2012 release of the new Green Guides comes two years after the FTC first announced proposed revisions to the Guides to address increases in potentially deceptive green marketing. In October 2010, our [prior update](#) provided insights into those proposed revisions and what they could mean to companies involved in making any sort of environmental claims. The FTC’s current action largely reflects its 2010 proposal and contains important revisions to the agency’s previous, longstanding version of the Green Guides.

As in 2010, the FTC’s final updated version of the Green Guides shy away from proposing guidance on the terms “sustainable,” “natural,” and “organic.” However, they do reiterate general principles that “when a marketer targets a particular segment of consumers, the Commission will examine how reasonable members of that group interpret the advertisement.” This suggests that the FTC will continue to assess whether a marketing claim is misleading based on the eyes of a consumer or subset of consumers and the FTC may, in the future, narrow how it interprets an advertisement depending on the target audience of that advertisement.

A broader overview of the most relevant aspects of the updated Green Guides follows.

NEW SECTIONS OF THE GREEN GUIDES

The FTC has added six new sections to the Green Guides regarding the following types of environmental claims: (1) Carbon Offsets, (2) Certifications and Seals of Approval, (3) “Free-of” claims, (4) “Non-toxic” claims, (5) “Made with Renewable Energy” claims, and (6) “Made with Renewable Materials” claims.

Carbon Offsets

No significant changes have been made to this section since it was proposed in 2010. In keeping with the general requirements of substantiation, companies must have evidence to support their carbon offset claims, including using generally applicable accounting methods. In addition, the updated Green Guides advise companies to disclose if offset purchases fund emissions reductions that will not occur for at least two years, and the guides caution marketers not to advertise offsets if the activity that forms the basis of the offset is already required by law.

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Certifications and Seals of Approval

The final revisions have made slight changes to the 2010 proposal with respect to certifications or seals of approval by third parties. This new section still cautions companies from making implied “general” environmental benefit claims by not conveying the specific basis of a certification. Express and implied general environmental benefit claims that are not qualified, such as suggesting that a product is “environmentally friendly” or “green” in general, have been prohibited by the Green Guides since their inception. Beyond this, however, there may now be some flexibility on whether certifications and seals are also further subject to the FTC’s Endorsement Guides, 16 C.F.R. Part 255. The 2010 proposal advised that all uses of certifications or seals of third parties were necessarily endorsements, whereas the final revisions provide that these uses “may” be endorsements. The suggestion seems to be that companies should look to the FTC’s Endorsement Guides for a final determination.

“Free-of” and “Non-toxic” Claims

The 2010 proposal combined “free-of” and “non-toxic” claims into one new section. The final revisions separate out these claims into two distinct sections. With regards to “free-of” claims, the final revisions clarify that a company may make “free-of” claims where the product, package, or service at issue contains only a “trace amount” of the substance, as opposed to a “de minimis” amount. The “trace amount” of the substance is required to be (1) no more than an “acknowledged trace contaminant or background level”; (2) present in an amount that does not cause material harm to consumers; and (3) cannot be added intentionally. The new section still advises that an otherwise truthful “free-of” claim may be deceptive if the product, package, or service at issue contains a replacement substance that poses similar risks, or if the substance is simply not associated with the product category.

Other than providing a separate section for “non-toxic” claims, the significance of the guidance has not changed. Companies should have strong scientific evidence substantiating a “non-toxic” claim, including evidence that the product is non-toxic for both humans and the environment; otherwise the non-toxic claim must be clearly and prominently qualified to limit its implications.

Made with Renewable Energy and Made with Renewable Materials Claims

These new sections deal with claims that products are made with either renewable energy or renewable materials. With regard to “made with renewable energy” claims, it is still presumptively considered deceptive to make unqualified claims if fossil fuels or electricity derived from fossil fuels is used to make any part of the product. However, the final revisions modify this somewhat by allowing companies to match any such non-renewable energy uses in its products with renewable energy certificates. The final revisions also add a suggestion that companies should specify the percentage of renewable energy used in making a product when making a qualified “made with renewable energy” claim.

With regard to “made with renewable materials” claims, the changes made by the final revisions are largely cosmetic. The FTC cautions that these claims may be interpreted differently than intended by marketers, so companies should minimize risk by qualifying their claims and explaining what materials are used in their products and why those materials are renewable.

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REVISIONS TO OLD SECTIONS OF THE GREEN GUIDES

In addition to adding the new sections discussed above, the final revisions also modify existing sections of the Green Guides regarding the following types of claims: (1) General Environmental Benefit, (2) Compostable, (3) Degradable, (4) Ozone, (5) Recyclable, and (6) Recycled Content. The sections on compostable claims, degradable claims, ozone claims, and recycled content claims remain largely the same with no significant changes from the 2010 proposal. There have also been changes made to the sections on general environmental benefit claims and recyclable claims since the 2010 proposal. These changes are summarized below.

General Environmental Benefit Claims

Perhaps the most significant revision to the old Green Guides is in this section involving general environmental benefit claims. The final revisions, as did the 2010 proposal, clearly warn companies against making unqualified general environmental benefit claims. Such claims, the FTC explains, are difficult to interpret and it is highly unlikely that companies can substantiate all the possible reasonable interpretations. Companies must use “clear and prominent qualifying language” to limit these claims to specific benefits of a product.

The final revisions add one additional instruction to the 2010 proposal: “Marketers should not imply that any specific benefit is significant if it is, in fact, negligible.” Companies should be able to substantiate all claims that convey that a product is environmentally beneficial overall, including as properly qualified because of a specific environmental benefit. As substantiation, the FTC suggests that companies still willing to go down this risky road be sure to analyze the environmental trade-offs inherent in the creation and use of the products at issue.

Recyclable Claims

The Green Guides advise that companies should qualify claims that their products are recyclable to avoid deception about the availability of recycling programs and collection sites to consumers. Companies may make unqualified recyclable claims if applicable recycling facilities are available to a “substantial majority” of consumers or communities where the product is sold. The 2010 proposal informally interpreted “substantial majority” to mean at least 60 percent. The final revisions incorporate this interpretation.

The final revisions also clarify how companies should qualify recyclable claims when recycling facilities are not available to at least 60 percent of product consumers. Marketers may qualify their recyclable claims by stating the percentage of consumers or communities that have access to applicable recycling facilities. Alternatively, marketers may qualify their claims by varying the strength of the claims depending on the availability of recycling facilities. The final revisions offer specific examples of qualifications that companies may use if recycling facilities are available to “slightly less” than 60 percent of product consumers as well as if recycling facilities are available only to “a few consumers.”

CONCLUSION

The Green Guides will soon be published in the Federal Register and formally codified under 16 C.F.R. Part 260: Guides for the Use of Environmental Marketing Claims. The text of the Green Guides may be found on the FTC’s website, linked [here](#). The Green Guides are technically non-binding guidance, but, in effect, they can be expected to operate as rules.

In California, public prosecutors, including the California Attorney General and County District Attorneys have prosecuted numerous green marketing cases using the broad powers granted by the Unfair Competition Law, Cal. Bus. & Prof. Code

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§17200 et seq., and California's green advertising law, Business & Professions Code 17580 et seq. That law incorporates the FTC's Green Guides by reference, and provides that conformance to the Green Guides is a defense to lawsuits brought under that section. Not to be left out, plaintiffs' lawyers have also brought several private consumer class actions against consumer product companies under the California Consumer Legal Remedies Act, Cal Civ. Code §1740 et seq., among other laws, asserting that their green claims were false and misleading, and that consumers who relied on such claims deserve refunds.

In sum, any company that markets by reference to the environmental attributes of their products, services, or operations should be familiar with the updated version of FTC's Green Guides, and should review existing and future environmental attribute-oriented marketing statements to ensure that their practices remain compliant.

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Morrison & Foerster LLP is widely recognized as a leader among law firms on cleantech issues, including those concerning "green advertising" and also maintains full service environmental law and consumer products practices. We have advised clients with respect to environmental marketing claims since the inception of FTC's Green Guides and throughout its revisions. Our attorneys include former FTC and environmental prosecutors. If you would like assistance, please contact Robert Falk, William Tarantino, or Brooks Beard in our San Francisco office at (415) 268-7000, Peter Hsiao in Los Angeles at (213) 892-5200, or Reed Freeman or Julie O'Neill in Washington, D.C. at (202) 887-1500.

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