

October 6, 2010

Practice Area Links

FTC Releases Highly Anticipated Updates to Environmental Marketing Guides and PMA Webinar

- [Advertising, Marketing & Media](#)

The Federal Trade Commission (FTC) today released a long-anticipated draft of its revised Guides for the Use of Environmental Marketing Claims (“Green Guides”), which provide critical guidance for companies making environmental claims about their products and services.

The draft Green Guides—which will be issued in final form sometime after a public comment period ends on December 10, 2010—propose to significantly tighten the standards for a range of environmental claims. Any company that makes environmental claims—including that their products or services are “green,” biodegradable, compostable, ozone safe, recyclable, or recycled—should first consult these revised Guides.

The Guides help companies avoid running afoul of Section 5 of the FTC Act when making environmental claims. Section 5 broadly prohibits unfair or deceptive acts or practices, which include unsubstantiated claims that mislead consumers. Although the Guides do not have the force of law, they indicate how the FTC will interpret whether green claims or practices are unfair or deceptive. The Obama administration has already brought seven “green” advertising enforcement actions at the FTC, compared to zero under the entire Bush Administration.

Among the major proposed changes:

The draft Guides warn companies not to make general environmental claims, such as that their products are “green” or “eco-friendly,” without clear and prominent qualifications explaining the basis for the claim. The FTC warns that such unqualified claims are “difficult, if not impossible, to substantiate.” Consumers often interpret these claims to mean no environmental impact, so these claims likely are deceptive without qualification. Advertisers cannot qualify the claims adequately by simply referring consumers to a Web site for more information.

The draft Guides also warn about the use of environmental certifications or seals of approval. The Guides make it clear that the FTC considers this to be an endorsement, subject to its Endorsement and Testimonial Guidelines. Companies should therefore disclose any material connections to the certifier. Furthermore, since the use of a

certification or seal is essentially a general environmental claim, it must be sufficiently qualified so that it is not deceptive.

The Guides also provide clearer definitions for common green claims. Companies making environmental claims about their products must meet the following definitions:

- **Biodegradable:** Must break down to elements found in nature within one year. Anything destined for a landfill or incinerator is not biodegradable.
- **Compostable:** Must decompose in the same time frame as other compost materials, such as leaves and grass.
- **Recyclable:** If a claim is made without qualification, the product must be recyclable in a "substantial majority" of communities where the product is sold. If the product can only be recycled in more limited areas, the claim must be qualified.
- **Recycled content:** Means that the entire product or package, excluding minor, incidental components, is made from recycled material. Lesser amounts of recycled content should be qualified. Furthermore, companies must substantiate that the material otherwise would have entered the waste stream.
- **Carbon offsets/made with renewable energy:** The Guides will generally require heightened disclosure, contemporaneous use or generation, and in the case of offsets in particular, advertisers may not claim offsets if the reduction in emissions is already required by law.
- **Free of:** Must be "free of" not only the substance claimed, but also of any substances that pose the same or similar environmental risks. Companies cannot claim that their product is "free of" a substance that is not generally associated with the product. For example, if a company claims that its baby bottles are "free of" mercury, then consumers will assume that competitive products contain that element.
- **Non-toxic:** Must be non-toxic both for humans and for the environment generally.

The FTC decided not to give specific advice on several topics, including how to describe whether companies can claim that products are "sustainable" or "organic," and how to conduct life cycle analysis.

Although it declined to provide specific guidance, the FTC may still bring actions against companies whose claims are deceptive or unfair. The FTC also declined to bar the more than 300 environmental seals of approval that companies now use. Again, however, the draft Guides warn companies to be cautious in their use of seals and to disclose material information about the meaning of the seals.

Click [here](#) to read the complete draft Guides. The public comment period ends on December 10, 2010. The FTC is particularly interested in specific data regarding consumer interpretation of these claims. Manatt can assist clients in preparing comments to the proposed Guides. For

any questions, contact Chris Cole, at (202) 585-6524 (ccole@manatt.com).

If you are interested in more information about how the revised Guides will impact companies' marketing claims, Chris will be leading a webinar discussion for the Promotion Marketing Association (PMA) on Tuesday, October 12 from 2:00 - 3:00 pm Eastern. His presentation, titled "Your Guide to Green Marketing: Understanding the New Legal Landscape," will focus on the actions marketers need to consider for complying with the updated Guides. To register for this event, please click [here](#).

ATTORNEY ADVERTISING pursuant to New York DR 2-101(f)

Albany | Los Angeles | New York | Orange County | Palo Alto | Sacramento | San Francisco | Washington, D.C.

© 2010 Manatt, Phelps & Phillips, LLP. All rights reserved.