



New Green Guides Lay Out Rules for Environmental Marketing

by Ken Odza, Anne Glazer and Joseph Eckhardt

One does not have to look very hard to find “green” marketing in today’s economy. Consumers are keen to buy all manner of environmentally friendly products, from the grocery store to the car lot. But consumers and regulators are growing increasingly wary of false and misleading claims about the environmental attributes of products. And the Federal Trade Commission (FTC) is now stepping in with revised Guides for the Use of Environmental Marketing Claims – the “Green Guides.”¹

FTC published proposed, revised Green Guides for public comment last October, 12 years after the last revision.² The agency will likely issue the final version of the revised Green Guides this year. The Green Guides are not binding regulations. Instead,

they provide guidance on how FTC will define deceptive environmental marketing claims under the FTC Act.³ The FTC Act gives the agency broad powers to prosecute “deceptive acts or practices,” including, among other things, false and misleading advertising and marketing. While the new Green Guides will not include dramatic changes over the prior version, they do add guidance for several popular environmental marketing claims.

FTC’s Latest Generation of the Green Guides

The current 12-year-old version of the Green Guides sets forth interpretations and guidance on marketing buzzwords that were popular in the 1990s, such as “biodegradable,” “compostable,” “recyclable,” “refillable” and “ozone safe.”⁴ The revised Green Guides address several new types of marketing claims, including



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claims relating to renewable energy, carbon offsets, environmental certifications and seals of approval.

Among other things, the Green Guides describe several types of environmental marketing claims that FTC will automatically deem deceptive. Given FTC's investment in the revised Guides, it is likely that the agency will apply the Green Guides in numerous enforcement actions in the near future. Also, while the Green Guides were developed for use in applying the FTC Act, they provide persuasive authority for the enforcement of other laws by various stakeholders, including consumers and competitors.

The Green Guides Cover Several Types of Claims

In all cases, the key issue under the Green Guides is deception. False or misleading environmental marketing claims violate the FTC Act. But the Green Guides go much further than that simple proposition, providing advice on specific types of environmental marketing claims.

Disposal, Degradation and Re-use

Both the prior version and the new Green Guides address the following types of claims about the environmental impact of product packaging:

- Biodegradable/photodegradable
- Compostable
- Recyclable
- Refillable

In order to make these types of claims, marketers must confirm that product packaging is actually capable of degrading or being effectively recycled or refilled. The Green Guides warn that these types of claims are deceptive if the items in question will not typically degrade or be recycled or refilled in actual practice.

FTC prosecuted three companies in 2009 that made biodegradability claims for their paper products.⁵ While the products *could* biodegrade under certain conditions, in practice most of the paper products in question ended up in landfills, where conditions preclude biodegradation. Likewise, products that *can* be recycled should not be labeled as recyclable if there are not sufficient recycling facilities in place across the country to receive and process those products. Similarly, in order to make refillable claims, containers must not only be refillable, there must be a means available to consumers to actually refill them.

Source Reduction, Recycled Content

Claims that certain products use less material than competing products, or use less material than products previously sold by the company making the claim, as well as claims about recycled content, should be clearly explained and appropriately qualified. Source reduction claims often provide comparisons against competitors. Such claims (e.g., 50 percent less plastic than the leading brand) can be perilous. If competitors change their products, previously valid comparisons to those products may become deceptive comparisons.

New Types of Claims Covered by the New Green Guides

The popularity of environmentally friendly products has dramatically grown since the release of the last version of the Green Guides. With this latest revision, FTC has attempted to tackle some (but not all) of the most popular types of environmental marketing terms.

Certifications and Seals of Approval

As marketers race to paint their products green, dozens of third-party organizations have emerged, offering seals of approval or certifications for use on products that fit their standards and criteria. Many companies have gladly taken on third party certifications. Others have devised their own certification programs, with mixed results.

The new Green Guides devote special attention to certification programs, because both FTC and marketers recognize that consumers may place a great deal of trust in certifications and seals of approval. However, a certification must stand for something meaningful. The new Green Guides note that a certification must accurately reflect the fact that a given product has met objective criteria required for a certification. In addition, the criteria should reflect verifiable environmental benefits.

The Green Guides also warn against self-certification. A self-certification program may deceive consumers simply because it gives the impression that an independent third party granted the certification. Even if a self-certification program is scientifically rigorous, it will be deceptive under the new Green Guides unless it is clearly disclosed in advertising and labeling.

Renewable Energy, Carbon Offsets

A new wrinkle in the world of green marketing is the issue of energy use. Many companies are eager to convey the fact that they use energy in green ways – either by using renewable energy or by taking steps to offset greenhouse gas emissions.

The Green Guides suggest a number of pitfalls that may occur with these

types of energy use and carbon emissions claims. First, it is important to clarify how renewable energy is used in production and distribution of products. It might be tempting for a company that purchases wind energy for its plant to label products as “wind-powered,” but if its manufacturing processes also use natural gas, and delivery trucks burn diesel fuel to move products from the factory to stores, the “wind-powered” claim will be classified as deceptive.

Another problem identified by the Green Guides is the possibility of double counting renewable energy credits. If a company covers its factory roof with solar panels, it is misleading to claim the factory is solar powered and at the same time sell the solar energy credits for that power to others.

The new Green Guides also describe proper marketing for carbon offset claims. Principally, the Guides are concerned with claims that products are “carbon neutral,” when in fact offsets are speculative or uncertain. For example, advertising carbon offsets premised on planted trees that may grow in the future may be misleading.

The Green Guides Don't Address All Environmental Claims

While FTC determined that certain types of green claims would benefit from explanation in the new Green Guides, other popular types of environmental claims were deliberately left out.

Manufacturers and retailers in the food industry may have anticipated guidance on the terms “natural” and “organic,” given their prevalent use in food marketing. But out of deference to other federal agencies that have shared or overlapping jurisdiction with FTC, FTC decided to not provide guidance on these terms. The U.S. Department of Agriculture (USDA) regulates the use of the term “organic” for agricultural products and defines

“natural” meat and poultry products, and the Food and Drug Administration (FDA) has regulations on “natural flavors.” Given these regulations already in place, FTC determined that further interpretations of these terms in the Green Guides might contradict existing rules. However, the fundamental principles of consumer protection under the FTC Act still apply to “organic” or “natural” claims—such claims remain under FTC’s jurisdiction. Notwithstanding supervision by other agencies, FTC is free to challenge false or misleading claims concerning organic or natural products.

Notably, FTC made the surprising decision not to provide guidance on the term “sustainable.” While immensely popular, the agency determined that the word is so vague that it would be confusing or counterproductive to offer guidance on proper and misleading uses of the term.

Marketing terms like “sustainable” are popular because they may lead consumers to believe that there are definitive environmental benefits associated with advertised products. But the new Green Guides warn that marketers should not feel emboldened to make vague claims precisely because they may mislead consumers. Accordingly, a term like “sustainable,” if offered without qualification or explanation, is much more likely to run afoul of the Green Guides than it would if substantiated with objective information, limitations or explanation.

A Diverse Enforcement Environment

FTC is not the only stakeholder empowered to challenge environmental marketing claims. Regulators, consumers, competitors and even the Better Business Bureau may invoke principles set forth in the Green Guides, as well as alternative regulations, in separate actions against marketers:

- **Federal Regulators**—Regulators like FDA, USDA and the Environmental Protection Agency (EPA) may enforce special marketing and labeling rules devised for the industries they regulate.
- **The National Advertising Division**—Competitors, consumers and the Division itself (a non-government organization, subsidiary of the Council of Better Business Bureaus) may bring claims against misleading advertising.⁶ Compliance with rulings is voluntary, but the Division notifies the FTC when parties fail to comply.
- **State Attorneys General**—All 50 states have consumer protection laws that prohibit false and misleading advertising. Many states have laws that incorporate FTC guidance and policy by reference, and California,⁷ Maine,⁸ Minnesota⁹ and Rhode Island¹⁰ apply the Green Guides to their state consumer protection laws.
- **Consumer Claims**—Consumer protection laws in many states allow individual consumers and groups of consumers to bring private causes of action against misleading advertising claims.
- **Competitor Claims**—Companies may challenge false and deceptive advertising claims made by their competitors under the Lanham Act.¹¹
- **The Court of Public Opinion**—Outside the realm of legal liability, there is always a risk that disappointed consumers will reject products or the companies that make or sell them, due to negative publicity about misleading environmental claims.

Best Practices Drawn from the Green Guides

The new Green Guides provide an important warning to environmental marketers about the risks associated with

misleading marketing claims, but they also validate certain types of environmental claims that should not be deemed misleading. Manufacturers, marketers and retailers should carefully review the Green Guides to identify specific advice that may apply. In addition, there are several best practices that clearly arise from the Green Guides:

- **Avoid Broad Claims**—Broad, unqualified claims are easily deemed misleading. It is misleading to label a product with a popular term such as “sustainable,” “green” or “eco-friendly” and leave its meaning to the imagination of consumers. The Green Guides teach that broad claims require clarification and qualification.
- **Clarify and Qualify All Claims**—All claims benefit from clarification. For example, it is deceptive to broadly label a product as “wind-powered” unless all aspects of the product’s manufacture, distribution and sale are conducted using wind energy. A simple qualification can eliminate the potential for deception.
- **Competent and Reliable Scientific Evidence**—Claims must be supported by objective proof. For claims involving measurable, testable facts, a marketer should conduct or collect research

supporting the claims. For example, claims about “sustainable” farming techniques that prevent soil erosion should be supported by evidence showing that the techniques actually do prevent soil erosion.

- **Caution with Comparative Claims**—Comparisons against competitors are always risky. If a claim is even slightly incorrect, competitors are likely to challenge it. Also, competitors frequently change their products. Claims that rely on comparisons with prior versions of products can be misleading.
- **Carefully Choose Seals and Certifications**—Third-party certifications can provide context and clarification and may be trusted by consumers. However, it can be counterproductive to choose a third party certification that is itself suspect. Well-intentioned use of a bogus or unreliable certification can generate liability for the company that advertises the certification. It may also be counterproductive to advertise a certification that is difficult to earn or win, year after year.

Conclusion

Environmental marketing claims are extremely popular in the current economy, and they undoubtedly will remain

so for a long time. However, there are significant risks associated with false and misleading claims. Fortunately, while FTC has demonstrated an interest in prosecuting false and deceptive claims, the agency’s new Green Guides also provide an excellent compliance tool to help marketers avoid liability. **▲**

- 1 *Federal Register Notice: Proposed Revisions to the Green Guides* (available at: <http://www.ftc.gov/opa/2010/10/greenguide.shtm>).
- 2 *Federal Trade Commission Press Release: “Federal Trade Commission Proposes Revised ‘Green Guides,’”* Oct. 6, 2010 (<http://www.ftc.gov/opa/2010/10/greenguide.shtm>).
- 3 *Federal Trade Commission Act*, 15 U.S.C. §45 (available at: http://www.law.cornell.edu/uscode/html/uscode15/uscode15_00000045_00000000.html).
- 4 *Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. Part 260 (available at: <http://www.gpoaccess.gov/>).
- 5 *Federal Trade Commission Press Release: “FTC Announces Actions Against Kmart, Tender and Dyna-E Alleging Deceptive ‘Biodegradable’ Claims,”* June 9, 2009 (<http://www.ftc.gov/opa/2009/06/kmart.shtm>).
- 6 See, e.g., *National Advertising Division, Case Reports and Procedures* (available at: <http://www.nadreview.org/start.aspx>).
- 7 *Cal. Bus. & Prof. Code* §§ 17580 – 17581 (available at: <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=17001-18000&file=17580-17581>).
- 8 *38 Me. Rev. Stat. tit. 38 § 2142* (available at: <http://www.mainelegislature.org/legis/statutes/38/title-38sec2142.html>).
- 9 *Minn. Stat. § 325E.41* (available at: <https://www.revisor.mn.gov/statutes/?id=325E.41>).
- 10 *R.I. Gen. Laws* §§ 6-13.3 et seq. (available at: <http://www.rilin.state.ri.us/Statutes/TITLE6/6-13.3/INDEX.HTM>).
- 11 *Lanham Act*, 15 U.S.C. §1125(a) (available at: http://www.law.cornell.edu/uscode/15/uscode15_00001125_00000000.html).

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