

FTC Releases Proposed Revisions to “Green Guides”

On October 6, 2010, the Federal Trade Commission (FTC) announced the much anticipated proposed revisions to the Guides for the Use of Environmental Marketing Claims, commonly known as the “Green Guides” (Guides).¹ The Guides were first issued in 1992 to assist advertisers in ensuring that environmental marketing claims were accurate and properly substantiated. The Guides have been periodically reviewed and updated to respond to the evolution in consumer perceptions, and the advent of new environmental marketing slogans and phrases. The Guides were last revised in 1996 and 1998.²

In recent years, companies have responded to consumers' increasing desire for more environmentally friendly, green products and services, both with increased use of traditional environmental claims and adoption of new claims, such as sustainability and carbon offsets. This marketplace response prompted the FTC to initiate an early review of the Guides, both to determine whether its guidance concerning traditional green claims required revision and to assess whether and what guidance to provide for new green claims. As part of its review, the FTC initiated three separate workshops, hired a firm to conduct consumer perception research, conducted a broad review of Internet green advertising to understand what claims were being made and by which industry sectors in particular, and solicited public comment regarding the effectiveness of and need to update the existing Guides.³

As a result of almost three years worth of evidence gathering, the agency has reaffirmed the need for the Guides, while acknowledging that substantive revisions are necessary. The FTC also made clear its position that the Guides apply to business-to-business claims, as well as to consumer claims, though there may be differences as to how the two groups understand particular claims. Many of the revisions strengthen

¹ See Proposed Revisions to the Green Guides, 16 C.F.R. pt. 260 at 3 (proposed Oct. 6, 2010) available at <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf>; see also a Summary of the Green Guides Proposal Changes published by the FTC Staff available at <http://www.ftc.gov/os/2010/10/101006greenguidesproposal.pdf>; Press Release, Federal Trade Commission, Federal Trade Commission Proposes Revised “Green Guides” (Oct. 6, 2010) available at <http://www.ftc.gov/opa/2010/10/greenguide.shtm>.

² The current Green Guides, which remain in effect as an interpretation of substantiation requirements under Section 5 of the FTC Act for environmental claims until the FTC finalizes its revisions, are available at <http://ftc.gov/bcp/grnrule/guides980427.htm>.

³ Materials from the workshops, the consumer perception studies, the internet surf and the comments received to date are available at <http://www.ftc.gov/green>.

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or add more specificity to current guidance on use of general environmental claims, as well as claims such as “compostable,” “biodegradable,” “recycled content” and “recyclable.” Other revisions address new claims that have sprouted in the marketplace in recent years, including “renewable materials,” “renewable energy,” and “carbon offsets.” There are some claims, however, that are not addressed by the existing Guides, or the proposed revisions, including terms such as “natural,” “organic,” or “sustainable.” The key specific proposed revisions are described in detail below. The FTC Staff has explained that as a general matter the Guides were maintained as they were, unless there was specific evidence suggesting that a change was in order. While some commenters urged the FTC to harmonize the Guides with international environmental standards and/or to adopt specific tests and standards needed to substantiate particular claims, the FTC Staff has explained that its role is to prevent deception in the marketplace and not to set standards or set environmental policy. As a general matter the proposed revisions gave more guidance than some expected but perhaps less guidance than others had urged.

Specific Revisions to the Existing Guides

General Environmental Benefit

At the outset, the revised Guides include a strong warning to advertisers about general or broad environmental claims. Recent consumer perception surveys confirm what the existing Guides already address: unqualified, blanket environmental claims such as “eco-friendly” or “environmentally friendly” are likely to suggest wide-reaching environmental benefits that are nearly impossible to substantiate.⁴ In fact, over half of survey participants viewing a broad “environmentally friendly” claim believed that the product had a variety of specific green attributes that were not mentioned in the actual advertisement.⁵ As a result, the revised Guides take one step further than the existing Guides, cautioning advertisers to

avoid unqualified environmental claims altogether.⁶

The FTC Staff has raised an interesting question as to whether even qualified general claims can raise issues of deception. The example given is when a marketer truthfully asserts that its product is “green” and qualifies that this means “made with 70% recycled content.” The questions asks what if the recycled content must be sourced from farther away, necessitating greater expenditures of energy to transport the materials to the manufacturing plant. Asking such a question suggests that at least some within the FTC are questioning whether a life-cycle assessment or overall environmental impact assessment must be made for any product including an environmental claim. If the answer is yes, this surely would minimize the number of environmental claims being made and likely reduce the amount of truthful information about products’ environmental attributes available to consumers.

Certifications and Seals of Approval

The proposed revisions to the Guides also include an expanded section devoted to certifications and seals of approval.⁷ The current Guides do not contain a specific section on this topic, rather a single example highlights potential issues. The revisions to the Guides note that certifications and seals of approval are becoming an increasingly popular method of conveying environmental benefits. The new section added to the revised Guides highlights the fact that third party certifications or seals of approval require adequate substantiation, qualification and constitute endorsements that would also be covered by the FTC’s Endorsement and Testimonial Guides (Endorsement Guides).⁸

The proposed revisions note that, pursuant to the Endorsement Guides, any connection between a marketer and a body providing certification must be disclosed. Additionally, if an advertiser creates a self-certification program, a claim that the product has been certified

⁴ See Press Release, Federal Trade Commission Proposes Revised “Green Guides,” *supra* note 1.

⁵ See generally Proposed Revisions to the Green Guides at 41-50.

⁶ See Press Release, Federal Trade Commission, Green Guides, Summary of Proposal (Oct. 6, 2010) available at <http://www.ftc.gov/os/2010/10/101006greenguidesproposal.pdf>.

⁷ See Proposed Revisions to the Green Guides at 50-65.

⁸ See 16 C.F.R. pt. 255.

must be qualified to make it clear that the marketer created the certifying program. Similarly, if a marketer is a member of an organization that provides certification to the product, the membership (or any relevant material connection) must be disclosed. Finally, this section of the revised Guides emphasizes that third party certifications or seals of approval do not negate the need for all claims to have proper substantiation. Obtaining a certification from a third party can serve as adequate and scientifically reliable substantiation for a claim, but the marketer is held responsible for ensuring the testing done for certification meets this standard.

The proposed revisions note that the use of some certifications and seals of approval with general names (e.g., certified by Green Dream) convey the type of general environmental benefit claim that the FTC views as problematic. The Guides advise that when using a symbol with a name that can convey a broad environmental benefit marketers should include language explaining the basis for the award. While many certifying bodies have clear standards even if their names are general, use of a seal on a product label with a link to the website or other materials explaining the certifying body and its standards likely is not sufficient as this information is not available to consumers at the time of purchase.

Degradable Claims

Degradability claims account for the largest group of FTC environmental marketing cases to date. This is due in large part to the fact that these claims are difficult to substantiate because biodegradation requires air, light and water—elements that are absent within most waste facilities. The proposed revisions to the Guides include a bright line rule that degradable claims for solid waste are deceptive for any products or packages destined for landfills, incinerators, or recycling facilities.⁹ An unqualified claim can be made only if complete decomposition of solid materials will occur within one year. This “one year” rule is based on the consumer perception studies the FTC

conducted as to how long consumers believe it should take for a biodegradable product to decompose. The FTC noted that it did not receive any comments related to the decomposition of liquids or other “dissolvable solids.” As a result, the proposed revisions do not propose a specific decomposition time for these substances when marketed without qualification, and the agency is soliciting comments and consumer perception data in this area.

Compostability

With regard to compostability claims, the current Guides inform advertisers that substantiation requires evidence that the package or materials will break down into usable compost “in a safe and timely manner.”¹⁰ The proposed revisions would define “timely manner” to mean that the product would break down in about the same amount of time as other materials with which it is composted (e.g., plant materials).

For those products that will only decompose in a municipal facility, an unqualified claim can only be made when a substantial majority of consumers or communities have access to composting facilities. The FTC notes that municipal composting facilities remain uncommon and that most consumers likely do not have access to them. As a result, a significant percentage of these types of claims will require qualification.

Recyclable

The current Guides advise that advertisers should only claim that a product is recyclable if it can be “collected, separated, or otherwise recovered from the solid waste stream for reuse,” or in the manufacture of another product through an established recycling program.” In addition, the current Guides only provide advice in the context of examples. The proposed revisions to the Guides dedicate a stand-alone section to recycling claims and address the issue of accessibility of recycling facilities.¹¹ The agency is requesting comment on the current percentage of facilities

⁹ See Proposed Revisions to the Green Guides at 66-73.

¹⁰ See *id.* at 74-79.

¹¹ See *id.* at 80-91.

in a marketer's sales area that must recycle a given product before (1) an unqualified recycling claim can be made; (2) a qualified claim may be made, such as "may not be recyclable;" and (3) further qualified claims should be made (e.g., recyclable only in the few communities that have recycling programs). The agency has informally proposed that 60 percent be the cutoff for an unqualified claim, but is seeking input as to whether this figure should be formally adopted. The proposed Guides do not include a request for comment on how convenient a recycling facility must be in order for consumers to be deemed to have "access" to it.

Recycled Content

The FTC proposes to leave its guidance on recycled content claims largely as is, but raises a number of specific questions for public comment.¹² The current Guides provide that a recycled content claim is appropriate only for materials that have been recovered or diverted from the solid waste stream and can only be unqualified if the entire product and packaging is made from recycled content.

Ozone-Friendly

The current Guides employ four examples to illustrate that it is deceptive to misrepresent that a product is safe or "friendly" to the atmosphere. The proposed revisions dedicate a section of the Guides for ozone-friendly claims.¹³ The agency notes that although CFCs (chlorofluorocarbons) have been banned for years, many consumers are unaware of this. Therefore, the revisions do not propose that marketers avoid using no-CFC claims. The proposed revisions do, however, remove dated references to HCFC (hydrochlorofluorocarbon) claims, in light of the US Environmental Protection Agency's general prohibition on its use.

"Free Of" and "Non-Toxic"

The proposed revisions to the Guides include expanded guidance on the use of these types of claims, removing them from examples and providing a stand-alone section

to discuss them.¹⁴ Specifically, the agency states that "free of" claims "may be appropriate where a product contains a *de minimis* amount of a substance that would be inconsequential to consumers." What constitutes "*de minimis*" will depend on the substance at issue, and will require a case-by-case analysis. Highly toxic ingredients, such as mercury, will always be material to consumers, and their presence thus can never be *de minimis*.

The revisions advise marketers that if a product removes one harmful substance, but replaces it with another that poses the same, or similar environmental risk, a "free of" claim would be inappropriate. In addition, if a product never included a referenced ingredient, and no products in the same category include the ingredient, then a "free of" claim could be viewed as deceptive since it may imply that competing products might include the offending ingredient. However, if two different categories of products compete and only one category is "free of" the substance, such a claim may be helpful to consumers. In terms of non-toxic claims, the proposed revisions maintain the original position that a product must be non-toxic to both people and the environment, or it must be qualified.

New Additions to the Existing Guides

Made With Renewable Materials

The FTC discovered that the takeaway for consumers viewing renewable materials claims was different than the message marketers were attempting to convey. Marketers are often trying to illustrate that a product is made of materials that are growing or developing at a faster rate than they can be used. Consumers, on the other hand, appear to take away a recyclable or recyclable content claim from these messages, which often cannot be substantiated. As a result, the revised Guides propose that marketers qualify a claim that a product was "made with renewable materials" with specific information about the material (i.e., what it is, how it is sourced and why it is renewable).¹⁵ Moreover, the revised Guides recommend that advertisers qualify

¹² See *id.* at 91-102.

¹³ See *id.* at 104-106.

¹⁴ See *id.* at 107-117.

¹⁵ See *id.* at 140-151.

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a renewable materials claim if a particular item does not contain 100 percent renewable materials.

Made With Renewable Energy

The proposed revisions note that the Commission's evidence raised three main issues related to consumers' perception of renewable energy claims: (i) the actual meaning of "renewable energy;" (ii) claims implied by renewable energy advertisements; and (iii) potentially overbroad renewable energy claims. In response, the revisions to the Guides propose that marketers should be advised that unqualified claims are misleading if any part of the product was manufactured with energy derived from fossil fuels. Second, the revised Guides would advise marketers to qualify claims by specifying the source of renewable energy (e.g., solar or wind). The Commission is seeking comment on whether specifying the source of the renewable energy adequately qualifies a "made with renewable energy" claim. Finally, the proposed revisions caution marketers not to use unqualified "made with renewable energy" claims unless virtually all of the manufacturing process (but not necessarily all of the transportation costs to market post-production) used to make the product are powered by renewable energy, or conventionally produced energy that is off-set by renewable energy credits (RECs). Similarly, marketers that generate renewable energy, but sell RECs for all of the energy they generate, should not represent to consumers that they use renewable energy.

Carbon Offsets

The FTC acknowledged in the proposed revisions that carbon offsets are relatively new claims in the green marketing field. As such, the Commission opted to provide only limited guidance in the area.¹⁶ The agency also noted that advice on carbon offsets would be limited due to the limits of the FTC's authority, the available consumer perception evidence, and the ongoing policy debate amongst experts in the field concerning appropriate tests to substantiate these types of claims. The FTC did, however, provide some guidance in the proposed revisions, including recommending that marketers

use appropriate accounting methods to properly quantify any emission reductions and ensure they are not selling reductions more than once. Furthermore, in the absence of any disclosure to the contrary, the agency will assume that the offset will fully take place in less than two years. Finally, while the FTC chose not to address the issue of additionality in the proposed revisions, there is a proposal that if the basis for a carbon offset is already required by law, that offset should not be advertised.

What Was Not Included in the Proposed Revisions?

Sustainability

The FTC noted that while sustainability claims may intend to convey an environmental benefit, existing consumer perception data shows consumers view sustainability claims differently than general environmental claims, sometimes taking away from the claim that a product is durable. The Commission concluded that it lacks a sufficient basis to provide meaningful guidance on these types of claims, because the term "sustainable," in the mind of consumers, is not always associated with an environmental benefit, and often has other social connotations.¹⁷ Similarly, the revised Guides do not take a clear position on substantiation required for life cycle claims for similar reasons—the science is still developing and consumers do not have a clear understanding (or misunderstanding) of such claims.

Organic and Natural

The FTC declined to add a section to the Guides addressing organic and natural claims. While the agency emphasized that marketers are still required to have substantiation for any express or implied claims, any further guidance on these types of claims is likely better left to other agencies that specifically handle these types of claims (e.g., the US Department of Agriculture). In terms of "natural" claims, which many thought the revisions would encompass, the FTC noted that it received no evidence indicating how consumers generally understand the term "natural." As such, the agency has no basis upon which to provide guidance

¹⁶ See *id.* at 166-86.

¹⁷ See *id.* at 118-27.

about these types of claims. The FTC did note, however, that if there is an implication that a product contains no artificial ingredients, the marketer must be able to substantiate that implied claim.

The FTC is seeking comment on all aspects of the proposed revisions to the Guides. A complete set of specific questions raised by the FTC Staff may be found in Section VII of the Guides (Request for Comment). The FTC is particularly interested in receiving either preexisting or newly-conducted consumer perception evidence. FTC Staff has noted recently that absent such evidence, comments that address specific issues and include a specific proposal as to how questions should be resolved will be more helpful as the comments are reviewed and considered and the Commission moves to publishing the final revised Green Guides. The FTC is accepting comments on the Guides for 60 days, or until December 10, 2010.

To keep abreast of developments relating to the Green Guides, please visit the Consumer Advertising Law Blog at www.consumeradvertisinglawblog.com.

If you would like more information about any of the matters discussed in this advisory, please contact your Arnold & Porter attorney or:

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