

FTC Finalizes Revisions to Green Guides for Environmental Marketing Claims

The Federal Trade Commission (FTC) has published a final revision to its Guides for the Use of Environmental Marketing Claims (Green Guides) at 16 CFR Part 260.¹ The changes are intended to help marketers avoid making environmental claims the FTC would consider to be unlawful, unfair or deceptive advertising under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and were preceded by public notice of the proposed revisions and the opportunity to comment in late 2010.²

The new Green Guides became effective immediately upon publication by the FTC on October 11, 2012. While the Green Guides are administrative interpretations that are not enforceable as regulations, they do explain how the FTC intends to take action under Section 5 of the FTC Act.

General Principles

The Green Guides begin by setting forth general advertising law principles applying to all environmental advertising claims:

- Marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading and are supported by a reasonable basis before making them.
- A reasonable basis often requires competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that each representation is true.
- Environmental claims should not overstate an environmental attribute or benefit, and negligible benefits should not be stated or implied.
- Qualifications and disclosures should be clear, prominent and understandable. Marketers should use plain language and should avoid making inconsistent statements or otherwise undercutting or contradicting the disclosure.
- Comparative claims should be clear and substantiated.

Summary of New or Revised Provisions

The Green Guides then include a series of new or revised provisions relating to specific types of environmental claims. Some of the more significant provisions are as follows:

General environmental benefit claims like “green,” “environmentally friendly” or “eco-friendly” are strongly discouraged because they are viewed as difficult, if not impossible, to substantiate. Environmental claims instead should be qualified to relate to specific environmental benefits. If a qualified claim conveys that a specific attribute provides an

¹ See Final Rule Regarding Guides for Use of Environmental Marketing Claims at 77 Fed. Reg. 62122 (October 11, 2012). The Green Guides are also available at the FTC’s website, <http://www.ftc.gov/os/fedreg/2012/10/greenguidestatement.pdf>.

² See *Squire Sanders Environmental Alert* “FTC Proposes Changes to Its Green Guides for Environmental Marketing Claims,” http://www.squiresanders.com/ftc_proposes_changes_to_its_green_guides_for_environmental_marketing_claims/.

overall environmental benefit, the marketer first should analyze the trade-offs resulting from the attribute to prove the claim.

Carbon Offsets should be backed by competent and reliable scientific information, including use of appropriate accounting methods to ensure proper quantification of emissions reductions. Marketers must disclose whether carbon offset purchases will fund reductions that will not occur for two years or longer. Finally, marketers must refrain from advertising a carbon offset if the activity that forms the basis of the offset is required by law.

Certifications and seals of approval from third-party organizations may constitute endorsements subject to the FTC's Endorsement Guides at 16 CFR Part 255, which require such measures as disclosure of any material connections to the endorser. A marketer's use of a third-party certification does not relieve the marketer from the requirement to substantiate all express and implied claims.

"Recyclable" claims should not be made unless a product can be collected, separated or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item. Claims should be qualified when recycling facilities are not available to a substantial majority (at least 60 percent) of the consumers or communities where the product is sold. This is a simplification of the originally proposed provision.

"Free-of" claims may be made for a product that contains trace amounts of a substance if (i) the product contains no more than trace amounts or background levels of the substance, (ii) the amount of the substance present does not cause harm that consumers typically associate with the substance and (iii) the substance was not added intentionally.

The Green Guides also contain provisions addressing a number of other types of environmental claims, including compostable claims, degradable claims, non-toxic claims, ozone-safe and ozone-friendly claims, recycled content claims, refillable claims, renewable energy claims, renewable materials claims and source reduction claims.

Notably, the Green Guides do not address the use of the terms "natural" or "organic" because the FTC wanted to avoid providing guidance that duplicates or contradicts guidance provided by the Food & Drug Administration and the US Department of Agriculture. The Green Guides also do not address the use of "sustainable" claims because the FTC determined it lacked a sufficient basis to offer meaningful guidance on them.

Further, companies doing business internationally should be aware that the revised Green Guides are not completely consistent with the standards set forth in ISO 14021 (on environmental labels and declarations). Although the FTC attempted to harmonize the Green Guides with ISO14021, the agency acknowledged that this was not entirely possible. Accordingly, some labeling and documentation requirements in the US may be different than international requirements for the same or similar environmental claims.

Increased Enforcement By the FTC

The FTC has increased its level of enforcement based on the Green Guides in recent years. The increase is expected to continue as green marketing claims proliferate. As a result, it is important that companies making environmental marketing claims carefully review the final Green Guides to assure compliance. Please feel free to contact the lawyers listed in this publication or your regular Squire Sanders contact for further information about the FTC's final Green Guides.

Contact

Karen A. Winters
+1 614 365 2750
karen.winters@squiresanders.com

Barry A. Pupkin
+1 202 626 6662
barry.pupkin@squiresanders.com

Allen A. Kacenjar, Jr.
+1 216 479 8296
allen.kacenjar@squiresanders.com

Stephen A. Owens
+1 602 528 4170
steve.owens@squiresanders.com

Chris Amantea
+1 213 689 5131
chris.amantea@squiresanders.com

Iain R. McPhie
+1 202 626 6688
iain.mcphie@squiresanders.com