



FTC Proposes Changes to Its Green Guides for Environmental Marketing Claims

The Federal Trade Commission (FTC) recently published proposed revisions to its Guides for the Use of Environmental Marketing Claims (Green Guides) at 16 CFR Part 260. The Green Guides provide direction to marketers to avoid making environmental claims the FTC would consider to constitute unfair or deceptive advertising under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Public comments on the proposed revisions and on specific questions raised by the FTC are due by December 10, 2010.^[1]

The proposed revisions are the result of the FTC's efforts to keep pace with evolving claims and come after considerable public outreach about the effectiveness of the current Green Guides. The Green Guides originally were published in 1992, and revised in 1998, to provide marketers with guidance for making environmental claims in advertising, promotional materials and all other forms of marketing. Although the Green Guides are not themselves enforceable regulations, they are instructive on how the FTC views environmental claims in applying Section 5 of the Act, which requires marketing claims in general to be truthful and nondeceptive, and to be substantiated by competent and reliable evidence.

The current version of the Green Guides addresses general environmental benefit claims, such as that products are "green" or "eco-friendly," as well as the

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use of such specific terms as "biodegradable," "recyclable" and "compostable." The proposed revisions would update the guidance with respect to these terms and would add new guidance concerning the use of product certifications, seals of approval and claims relating to "renewable materials," "renewable energy" and "carbon offsets."

The proposed revisions strengthen or add specifically in the following areas:

- **General Environmental Benefit** – The current Green Guides state that marketers can make unqualified general environmental benefit claims (such as that a product is "green" or "eco-friendly") if all such express and implied claims can be substantiated. The proposed revisions to the Green Guides advise marketers not to make these claims without clear and prominent qualifications (e.g., "green – made from recycled materials") because unqualified claims imply very broad benefits that are difficult, if not impossible, to substantiate.
- **Certifications and Seals of Approval** – The current Green Guides address the use of certifications and seals of approval only briefly. The proposed revisions emphasize that these claims are covered by the FTC's separate guidance covering endorsements, which requires such measures as disclosure of any material connections to the certifier. The proposed revisions to the Green Guides also caution that the use of an unqualified certification or seal likely would constitute a general environmental benefit claim, which, as discussed above, would be very difficult to substantiate.
- **Degradable** – The current Green Guides state that a marketer should qualify a "degradable" claim unless it can substantiate that the entire product or package would degrade within a "reasonably short period of time." The proposed revisions specify that a "reasonably short period of time" means no more than one year. Also, because items destined for landfills, incinerators or recycling facilities normally will not decompose within a year, unqualified degradable claims for such items would be deemed deceptive.
- **Compostable** – The current Green Guides advise that a claim that a product is "compostable" must be substantiated by evidence it will be composted "in a safe and timely manner." The proposed revisions to the Green Guides clarify that the time

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period must be approximately the same as for the materials with which the product is composted (e.g., natural plant matter).

- **Recyclable** – The Green Guides' proposed revisions would highlight and formalize the three-tiered analysis in the examples to the current guides describing what claims may be made regarding the availability of recycling programs: (1) if a "substantial majority" (proposed to be at least 60 percent) of consumers have access to recycling facilities, an unqualified recyclable claim can be made; (2) if a "significant percentage" (no specific percentage proposed) of consumers have access, a qualified claim can be made (e.g., "package may not be recyclable in your area"); and (3) if less than a "significant percentage" of consumers have access, a stronger qualification is required (e.g., "recycling programs for this product are available only in XX percent of communities").
- **Free of/Nontoxic** – The current guides do not specifically address these claims. The proposed revisions to the Green Guides state that claims that an item is "free of" a substance may be deceptive if (1) the item contains other substances posing a similar environmental risk, or (2) the substance has never been associated with the product category. The proposed revisions to the Green Guides also clarify that a "free of" claim may be made in some instances when a product contains a *de minimus* amount of a substance. Regarding "nontoxic" claims, the Green Guides' proposed revisions note that consumers are likely to interpret the claim as meaning a product is nontoxic to the environment as well as to consumers.
- **Made With Renewable Materials** – The current guides do not address this claim. The proposed revisions to the Green Guides caution that marketers should qualify claims with specific information about the renewable material and also should qualify claims if the item was not made entirely with renewable materials.
- **Made With Renewable Energy** – The proposed revisions to the Green Guides caution that marketers should not make unqualified claims with regard to renewable energy if the power used to manufacture any component of a product was derived from fossil fuel. The source of renewable energy also should be specified in any claim, and marketers that generate renewable

energy but sell their renewable energy credits (RECs) for all of the energy they generate should not represent that they use renewable energy.

- **Carbon Offsets** – The Green Guides' proposed revisions require competent and reliable scientific evidence to support carbon offset claims, including the use of appropriate accounting methods. The proposed revisions to the guides also caution that marketers should disclose if the funded emissions reduction will not occur for two years or longer, and also should not advertise a carbon offset if the emissions reduction already is required by law.

The FTC has increased its enforcement activity based on the current Green Guides in recent years, with several prominent cases brought since 2009. This level of enforcement can be expected to continue. As a result, it is important that companies making environmental marketing claims carefully review the proposed revisions to identify areas of potential comment on the proposed revisions and the other issues raised in the publication.^[2]

Please feel free to contact the lawyers listed in this Alert or your regular Squire Sanders contact for further information about the FTC's Green Guides or assistance with development of comments on the proposed revisions.

FTC Advises US EPA to Protect Sensitive Business Information

The FTC has submitted a comment to US EPA regarding the agency's proposed rule concerning the confidentiality of data submitted by businesses under US EPA's Greenhouse Gas Reporting Rule. The FTC advised US EPA that publication of certain competitively sensitive data could harm competition and raise antitrust concerns.

On July 7, 2010 US EPA published a proposed rule outlining the confidentiality status of data required to be reported under its Mandatory Greenhouse Gas Reporting Rule at 40 CFR Part 98 See *Proposed Confidentiality Determinations for Data Required Under the Mandatory Greenhouse Gas Reporting Rule and Proposed Amendment to Special Rules Governing Certain Information Obtained Under the Clean Air Act*, 75 Fed. Reg. 39094 (July 7, 2010). The proposed rule describes the categories that US EPA has developed for the Mandatory Greenhouse Gas Reporting Rule for the collection of data from facilities that directly emit

greenhouse gases from their processes or stationary fuel combustion sources. US EPA has also developed rules for upstream suppliers of fuels and industrial greenhouse gases and proposed confidentiality determinations for each category. US EPA accepted comments on the proposed rule through September 7, 2010.

The FTC commented that three categories including facility-specific data relating to production, throughput, raw material consumption, capacity and future operations should remain confidential because public disclosure of such firm-specific sensitive business information could make it easier for competitors to tacitly or explicitly coordinate their pricing decisions. This collusion, according to the FTC, would harm consumers through higher prices, decreased quality and decreased innovation. The FTC also recommended that US EPA delay publication of reported data until after reporting facilities have the opportunity to apply for confidential treatment. US EPA intends to finalize its proposed rule on confidentiality before data is released in 2011.

Please feel free to contact the lawyers listed in this alert or your regular Squire Sanders contact for further information about US EPA's Mandatory Greenhouse Gas Reporting Rule or the FTC's comment.

[1] The proposed revisions to the Green Guides are available on the [FTC website](#).

[2] Public comments may be submitted on the [FTC's website](#).

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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