



## FTC Issues its Revised “Green Guides” for Environmental Marketing Claims

The Federal Trade Commission (“FTC”) has just updated its [Green Guides](#), providing new and clarified advice to marketers on how to avoid greenwashing when making claims about the environmental attributes of a product, package or service. The Green Guides, formally known as Guides for the Use of Environmental Marketing Claims, serve as the FTC’s administrative guidance on how to avoid making deceptive environmental claims that could mislead consumers and violate the prohibition in Section 5 of the FTC Act (15 U.S.C. § 45) against unfair or deceptive claims. The Green Guides were last updated in 1998 and, in 2010, the FTC proposed revisions to the Guides. The FTC has now finalized its update to the Guides which is designed to address the proliferation of “green” claims in the marketplace in recent years.

In this update to the Green Guides, the FTC makes clear that the Guides apply to more than just manufacturers, noting in its Statement of Basis and Purpose issued with the Guides, that certifiers, auditors, and wholesale and retail sellers who make environmental marketing claims may also be liable under Section 5 for deceptive claims. In addition, the FTC clarifies that the Green Guides cover business-to-business marketing claims, as well as marketing claims made to individual consumers. Likewise, the content of the revised Green Guides is described quite broadly, covering all “environmental claims in labeling, advertising, promotional materials, and all other forms of marketing in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names or any other means.”

Although the Green Guides are not legally-binding regulations (even though published in the Code of Federal Regulations at 16 C.F.R. Part 260), any claims that are inconsistent with the Green Guides may be subject to FTC enforcement action under Section 5 of the FTC Act. The FTC has stepped up its enforcement in recent years, bringing actions against companies related to deceptive claims concerning recyclability, biodegradability, bamboo and environmental certifications. Because the determination as to whether a claim is unfair or deceptive is based upon a reasonable consumer’s understanding of the environmental claim, the FTC used the results of a consumer perception survey to develop its revisions to the Green Guides. In addition, it considered the input received at three public workshops and from thousands of comments received in response to its 2010 proposed revisions. Below are highlights of some of the new and updated provisions.

## 1. General Environmental Benefit Claims

The revised Green Guides caution marketers not to make broad, unqualified general environmental benefit claims, such as “green” or “eco-friendly,” since such claims can be very difficult, if not impossible, to substantiate. Further, they explain that it may be difficult for consumers to interpret such claims since they are susceptible to a wide range of meanings and, in many cases, may convey specific and far-reaching environmental benefits and without any negative impacts. To avoid deception, the Green Guides recommend that marketers qualify their general environmental benefit claims using language that clearly and prominently limits the claim by explaining the specific aspects that make a product, package, or service environmentally beneficial. The Guides provide, by way of example, a qualified general environmental benefit claim of “eco-friendly: made with recycled materials” and describe the criteria that would be required to substantiate such a claim and avoid deception. The Green Guides also caution marketers who do qualify their general environmental benefit claims, not to use the context of an advertisement to imply any other environmental benefits that might be deceptive. Further, if a general environmental benefit is negligible, marketers are warned not to imply that the benefit is significant.

## 2. New Sections Added to the Green Guides

The FTC has added several new sections to the Green Guides, addressing six types of environmental marketing claims: (i) carbon offsets, (ii) certifications and seals of approval, (iii) made with renewable energy, (iv) non-toxic, (v) “free-of”, and (vi) made with renewable materials. The Green Guides broadly caution marketers that it is “deceptive” to misrepresent, either directly or through implication, that a product, package or service possesses any of these attributes and provides guidance and examples on how to address these attributes so as to avoid misrepresentation and deception, as highlighted below.

- Carbon offsets: Marketers should support any carbon offset claims with competent and reliable scientific evidence, especially with respect to the accounting methods used to quantify emission reductions, and should ensure that the offsets have not been double-counted. In addition, companies should disclose if the emission reductions will occur outside a two-year window. Also, if the activity generating the offset is required by law, then it would be deceptive to claim that the offset represents an emission reduction.
- Certifications and seals of approval: The FTC explained that third-party certifications and seals of approval may be endorsements and would also be subject to the FTC’s Endorsement Guides, which cover topics such as disclosure of material connections between the marketer and the certifying organization. Further, the use of a third-party certification does not obviate the need to substantiate any environmental claims, express or implied, that are conveyed by the third-party certification. Moreover, because an environmental certification or seal, in isolation, likely conveys a general environmental benefit, marketers should avoid the use of certifications or seals of approval that fail to convey the specific basis for the certification or seal, and should clearly and prominently identify the specific environmental benefits associated with the certification.

- **Renewable energy:** Claims regarding the use of renewable energy to manufacture products should be qualified if fossil fuel or electricity derived from fossil fuels was used to manufacture any part of a product, unless the marketer has matched the energy used with the purchase of renewable energy certificates (RECs). The FTC considers it deceptive to make unqualified claims regarding renewable energy use unless all, or virtually all, of the significant manufacturing processes involved in making the product are powered with renewable energy or covered by RECs. In addition, to reduce the risk of misinterpreting a renewable energy claim, marketers should specify the renewable energy source (e.g., wind, solar, etc.). Companies that generate renewable electricity but sell RECs representing all that generation cannot represent that they use renewable energy or even advertise that they “host” a renewable power facility without adding that the renewable energy is sold to others.
- **Non-toxic:** Because a non-toxic claim likely conveys the absence of toxicity to humans and the environment, marketers should have competent and reliable scientific evidence to support the claims relative to both humans and the environment (including household pets), and these claims must prominently and clearly qualified consistent with that evidence. The FTC declined, however, to adopt any standards that should be used to evaluate toxicity.
- **“Free-of”:** In this category, a technically truthful claim that a product, package or service is “free-of” or “does not contain” a particular substance may nonetheless be deceptive if the product, package or service uses a different substance that poses a similar environmental risk, or the absent substance has not been associated previously with the product, package or service (thereby incorrectly implying that something harmful has been removed). Conversely, a “free-of” claim can be used even if a trace amount of the substance is present if: (i) the level of the substance is no more than would be considered a trace amount or background, (ii) the presence of the substance does not cause material harm that is typically associated with the substance, **and** (iii) the substance has not been added intentionally.
- **Renewable materials:** Marketers should qualify any claims that a material is renewable to the extent they cannot substantiate all express or reasonably implied renewable claims. The FTC, however, declined to define “renewable” or endorse a particular substantiation test. The section does suggest that the risk of unintended implied renewable claims can be minimized by specifying the material and explaining why it is renewable. In addition, marketers should qualify any claims that something is made with renewable materials unless the product is made entirely with renewable materials, excluding minor or incidental components.

### 3. Updates to Existing Sections of the Green Guides

The FTC also made several modifications to existing sections in the Green Guides concerning claims that products are compostable, degradable, ozone-layer-impacting, recyclable or recycled. Among the more significant modifications are the following:

- **Compostable claims:** As in the past, claims as to compostability must be based on scientific evidence that the materials will break down in a safe and “timely” manner; however, “timely” is clarified to mean “approximately the same time as the materials with which it is composted.” Also, qualification may be necessary to avoid deception if the item cannot be composted safely or timely in a home compost, if landfilled, or if there is limited availability of municipal or institutional composting facilities.
- **Degradable claims:** In order to claim that a product is unqualifiedly degradable, the claimant must now be able to substantiate that it will fully decompose within one year after customary disposal. Degradability claims for materials that customarily end up in a landfill, incinerator, or recycling center must be qualified.
- **Ozone claims:** Examples were deleted from this section to clarify that claims of product safety to the ozone layer could not be based on the absence of ozone-depleting chemicals that have been banned by the U.S. Environmental Protection Agency.
- **Recyclable claims:** Recyclable claims should be qualified as necessary to avoid deception regarding the availability of recycling facilities to consumers. Recycling facilities for the product must be available to a substantial majority (at least 60%) of the consumers or communities where the item is sold in order to make a non-deceptive unqualified recyclable claim. Guidance is also provided on (i) appropriate qualifications to use where the access to recycling is more limited and where items are only partially made with recyclable material, (ii) the meaning of “community”, and (iii) the use of industry codes in product labeling.
- **Recycled Content claims:** The FTC clarifies in the update that (i) a new, higher use for a pre-consumer material would not by itself support a recycled content claim and (ii) alternative methods are acceptable to calculate recycled content. Several examples also were modified as to their general applicability versus applicability to specific industries (e.g., automotive recycling).

#### 4. Life-Cycle Assessment

Given the complexity and variability of life-cycle assessments (“LCA”), the FTC determined that it lacked sufficient information on which to provide guidance regarding LCA in marketing. However, the FTC did clarify its guidance on the use of LCA in substantiating marketing claims. The FTC advised that marketers may rely on the results of an LCA to substantiate their environmental claims if their LCA is based on competent and reliable scientific evidence. On this point, several commenters had recommended that the FTC identify a particular LCA methodology, such as ISO 14040 standards or a third-party certified LCA, which marketers should employ to substantiate their claims. The FTC declined to recommend a particular LCA methodology to marketers, suggesting that such a recommendation would be inconsistent with the flexibility provided in Section 5 of the FTC Act, which permits marketers to substantiate their claims with any competent and reliable scientific evidence. Rather, the FTC confirmed that it would continue to evaluate the reliability of a LCA to substantiate the

truth of a marketer's claim based on whether the assessment was sufficient in quality and quantity, evaluated in an objective manner by qualified persons, and in accordance with generally accepted standards in the relevant scientific fields.

### **5. Claims Not Addressed by the Final Revisions - Sustainable, Natural and Organic**

The FTC declined to address the use of the terms "sustainable," "natural," and "organic" in marketing claims, although recognizing the proliferation of such claims. The FTC explained that, for those claims, it either lacked a sufficient basis on which to provide meaningful guidance or wanted to avoid proposing guidance that might duplicate or contradict guidance or rules of other federal agencies. In particular, it noted that for all of these claims, it lacked sufficient evidence regarding how consumers perceive these claims and they may convey a wide range of meanings. Further, with respect to "organic" claims, the FTC decided to defer to the USDA, which has a "National Organics Program" providing a comprehensive regulatory framework governing the use of the term with respect to agricultural products. Nevertheless, although the FTC did not provide guidance on the use of these terms, it reminded marketers that they remain responsible for substantiating the reasonable expectations of consumers when making claims using these terms.

If you have any questions concerning the FTC Green Guides, please contact our office at 484-430-5700 and ask for any of the following MGKF attorneys: Brenda Gotanda, Todd Kantorczyk, Bruce Katcher, Joe Manko, Nicole Moshang, or Michael Dillon.

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