

BY LARA PEARSON, ESQ.

HISTORY OF THE GREEN GUIDES – THE 1990S

The Federal Trade Commission (FTC) was created in 1915 to regulate unfair trade practices under the Federal Trade Commission Act of 1914.¹ As its tagline states, “Protecting America’s Consumers” is what the FTC does. The FTC issued its first set of Guides for the Use of Environmental Marketing Claims² (Green Guides) in 1992, far preceding general acceptance of global warming and the resultant environmental degradation. The Green Guides provided guidance to marketers to help them avoid making unfair and/or deceptive environmental advertising claims. The guides were updated in 1996 and 1998, before the long hiatus preceding the October 6, 2010 updates. The FTC encouraged comments³ on its proposed updates until December 10, 2010.

The Green Guides informally interpret Section 5 of the FTC Act, which addresses unfair and/or deceptive advertising claims generally, with specific attention given to marketing claims about environmental features and benefits. The guides address how reasonable consumers are likely to interpret environmental marketing claims and how marketers can substantiate and qualify those claims to avoid consumer deception. Although the Green Guides may be enforced only by the FTC, the Guides may be relied upon as persuasive evidence of accepted definitions and “best practices” in false advertising claims before other tribunals, such as the National Advertising Division of the Better Business Bureau, as well as in state and federal courts. Thus, practically speaking, the Green Guides function as a generally applicable play book for how to stay out of trouble when making environmental claims. Knowledge of the Green Guides is important for legal practitioners who market their own green initiatives, as well as for those practitioners who counsel clients that operate green businesses or clients who might be inclined to pretend to do so.

GREEN IS GOOD;

When used in marketing and advertising, the word green commonly means environmentally friendly. The term “greenwashing” describes the act of deceptively marketing products or services as having an environmental benefit when they do not or exaggerating the environmental benefits of a product or service. The guides that were created and revised in the 1990s outlined general principles applicable to all environmental marketing claims and helped companies avoid accusations of greenwashing. For example, the guides stated that an environmental claim on product packaging should make clear whether the claim refers to the packaging and/or to the product, in whole or part. Likewise, a claim that a service has an environmental benefit should make clear what aspect of the service produces what benefit.

The guides also cautioned against making overstated and unqualified claims. Use of specific terms in marketing and advertising, namely, “biodegradable,” “compostable,” “recyclable,” “recycled content,” “refillable” and “ozone safe & friendly” were defined by the early Green Guides and suggested examples of use of each were provided therein. The guides stated repeatedly that environmental marketing claims should be substantiated by competent and reliable scientific evidence and qualified to the degree necessary to avoid consumer deception.

From 1990 to 2000, there were 37 FTC Environmental cases.⁴ Most cases challenged the use of the aforementioned defined terms, such as “biodegradable” and “recyclable.” There were no FTC environmental cases during George W. Bush’s presidency.

GREENWASHING IS BAD: GET TO KNOW THE FTC GREEN GUIDES

The Green Guides Review Process

As an increasing number of consumers consider the environmental impacts of their purchases, it becomes even more important to protect those consumers from false advertising claims about the environmental attributes of products and services. Recognizing this, the FTC commenced review of its Green Guides on November 26, 2007, a year before it was scheduled to do so. As part of its review of the Guides, the FTC actively engaged with the public by soliciting public comment and holding a series of meetings about green marketing issues. The FTC held three public workshops involving more than 450 people in identifying emerging environmental marketing issues from corporate and consumer perspectives. (The archived webinars and transcripts from each of the three workshops are available through links in the endnotes 5-7.)

The commission's first public workshop, on January 8, 2008, covered carbon offsets and renewable energy credits (RECs).⁵ Carbon offsets fund projects in one location to counter-balance (aka offset) emissions being produced elsewhere. RECs are certificates that represent that one megawatt hour (MWh) was generated from a renewable energy source (e.g., solar, wind, geothermal, biofuels and fuel cells) and delivered to the power grid, after which the REC may be sold on the open market as a commodity. The second workshop, on April 30, 2008, examined consumer perception of green packaging claims, including terms like "recyclable," "biodegradable," "compostable" and "sustainable."⁶

A "recyclable" product can be collected separately from the waste stream for reuse or use in the manufacture of another product or package through an established recycling program. "Biodegradable" means that the substance can be broken down through the actions of living organisms, i.e., by biological processes. "Compostable" products will break down into usable compost (e.g., mulch), whether in a composting facility or home composter. "Sustainable" has multiple meanings

and generally indicates that something is environmentally friendly, similar to the word "green." The third and final FTC workshop took place on July 15, 2008. It investigated environmental claims regarding textiles, buildings and building products.⁷

The FTC received a total of 125 written comments relating to its workshops. It received and reviewed an additional 75 written comments about the Green Guides and engaged in a consumer perception study⁸ of 3,777 individuals during July and August, 2009. Based upon all of the information it gathered, the FTC proposed revising the Guides.

Notice of Proposed Revisions

On October 6, 2010, the FTC issued a 229-page notice: a request for public comment on proposed, revised guides for the use of environmental marketing claims.⁹ This notice proposes retaining, modifying and adding to the Green Guides to address changes in the marketplace, while continuing to help marketers avoid making unfair or deceptive environmental marketing claims.¹⁰ The notice contains eight sections:

- I. Overview
- II. Background
- III. Non-Substantive Changes
- IV. General Issues
- V. Specific Claims Addressed by the Current Green Guides
- VI. Claims Not Addressed by the Current Green Guides
- VII. Request for Comment
- VIII. Proposed Revised Green Guides

In a brief 186 pages, the notice describes the FTC's three-year review process, previews all of the proposed changes and additions to the guides in detail, and seeks additional public comment on all issues raised in the notice, all aspects of the proposed revised Green Guides and 16 specific questions (not including subparts).

The notice discusses the need for the guides, stating that none of the comments submitted during the review process suggested that the guides were no longer needed. Conversely, several comments indicated that the guides help marketers make truthful and accurate environmental marketing claims while ensuring a level

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playing field amongst companies, to the benefit of businesses and consumers alike. Many who commented said that the guides were successful in accomplishing their goals without being unduly burdensome. In response to some of the comments received, the notice proposes revising the guides to make it clear that they also apply to business-to-business transactions and not just in business-to-consumer marketing. Additionally, the notice indicates that the commission will expand its outreach efforts in order to increase businesses' familiarity with the guides.

Interestingly, many of those commenting on the guides suggested that the FTC look to International Organization for Standardization (ISO)¹¹ for guidance on life cycle analysis – examining a product's environmental impact at each of four stages – production, transportation, consumption and disposal. However, the FTC declined to offer guidance about life cycle marketing, or substantiation thereof, given the complexity of such claims and the lack of information on consumer perception of these types of claims.

The notice reiterates over and over again that marketers should expect to substantiate their environmental marketing claims with “competent and reliable scientific evidence,” including objective tests, analyses, research, studies or other evidence, performed by qualified professionals using generally accepted procedures to yield accurate and reliable results.

The FTC also issued a (much appreciated) two-page summary entitled, “Green Guides Summary of Proposal.”¹² The Summary highlights proposed guidance both for claims that were addressed by the previous Guides – such as “compostable,” “degradable” and “recyclable” – as well as those that were not, including “renewable materials,” “renewable energy” and “carbon offsets.”

Proposed Revisions to the Green Guides

The proposed revised guides found at the end of the October 6 notice contain 16 sections:

- 260.1 Purpose, Scope and Structure of the Guides
- 260.2 Interpretation and Substantiation of Environmental Marketing Claims
- 260.3 General Principles
- 260.4 General Environmental Benefit Claims
- 260.5 Carbon Offsets
- 260.6 Certifications and Seals of Approval
- 260.7 Compostable Claims

- 260.8 Degradable Claim
- 260.9 Free-of and Non-Toxic Claims
- 260.10 Ozone-Safe and Ozone-Friendly Claims
- 260.11 Recyclable Claims
- 260.12 Recycled Content Claims
- 260.13 Refillable Claims
- 260.14 Renewable Energy Claims
- 260.15 Renewable Materials Claims
- 260.16 Source Reduction Claims

The revised guides offer detailed direction on the claims defined therein. They offer insight into how consumers are likely to interpret such claims, what elements are needed to substantiate those claims, and options for qualifying the claims in order to avoid deception. They also contain an entire section on certifications and seals, previously addressed in only a single example.

Although the proposed guides apply to every imaginable environmental marketing claim in every imaginable medium, whether now known or hereinafter devised, they are non-binding and non-preemptive to other federal, state and local laws. The guides apply to “claims about the environmental attributes of a product, package, or service in connection with the marketing, offering for sale or sale of such item or services to individuals, businesses or other entities ... 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 by any other means.” Whew!

As before, the revised guides caution against unsubstantiated environmental claims, and particularly general benefit claims. They stress the importance of qualifying general environmental terms in a clear, prominent and understandable manner in close proximity to the qualified claim. They require an obvious connection between the claim and to what it refers, e.g., an entire product, an aspect of a product, product packaging, a service etc. The guides also define numerous deceptive practices including: (a) making general, unqualified, environmental benefit claims; (b) use of third-party endorsements and certifications outside of compliance with the FTC's Endorsement Guides¹³; and (c) claims that misrepresent or exaggerate a product or service's environmental benefits. The guides also include many helpful, practical examples of their application to each type of claim. Only 32 pages long, the proposed guides are an important read for everyone who is involved with environmental marketing.

Parting Wisdom

Whether evaluating your firm's environmental marketing claims, or those of your clients, the general rules expressed by the Green Guides are quite simple: be honest, be precise, be willing and able to substantiate your claims, and *if you cannot prove it, don't use it!* ■

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- 1 15 U.S.C. §§ 41-58 (as amended).
- 2 16 CFR Part 260.
- 3 <https://ftcpublishcommentworks.com/ftc/revisedgreenguides/>.
- 4 <http://www.ftc.gov/bcp/grnrule/environ-cases.htm>.
- 5 <http://www.ftc.gov/bcp/workshops/carbonoffsets/index.shtml>.
- 6 <http://www.ftc.gov/bcp/workshops/packaging/index.shtml>.
- 7 <http://www.ftc.gov/os/2008/06/P084203ggfrn.pdf>.
- 8 <http://www.ftc.gov/bcp/edu/microsites/energy/green-consumer-perception-study.shtml>.
- 9 16 CFR Part 260: Guides for the Use of Environmental Marketing Claims: Request for Public Comment on Proposed Revised Guides, FTC File No. P954501, 16 CFR Part 260: Guides for

- [the Use of Environmental Marketing Claims: Request for Public Comment on Proposed Revised Guides](#), FTC File No. P954501
- 10 <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf>.
 - 11 ISO is a non-governmental organization that develops voluntary manufacturing and trade standards, including standards for environmental marketing claims.
 - 12 <http://www.ftc.gov/os/2010/10/101006greenguidesproposal.pdf>.
 - 13 16 CFR Part 255, Guides Concerning the Use of Endorsements and Testimonials in Advertising <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>

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{ Test #9 }

Get to know the FTC Green Guides – 1 Hour CLE Credit

1. The FTC was created under the Federal Trade Commission Act of 1915.
True or False
2. Before October 6, 2010's proposed revisions, the Green Guides last were updated in:
a. 1992 b. 1996 c. 1998 d. 2010
3. The Green Guides are not enforceable by the courts.
True or False
4. An example of "greenwashing" is:
a. Misrepresenting a product's environmental benefits
b. Overstating the environmental features of a service
c. Making unsubstantiated claims about general environmental benefits
d. All of the above
5. There were 37 environmental cases brought during George W. Bush's presidency.
True or False
6. The FTC commenced review of its Green Guides approximately:
a. Three years ago b. Three months ago
c. Two years ago d. Two months ago
7. _____ fund projects in one location to counter-balance (aka offset) emissions being produced elsewhere.
8. The FTC received a combined total of _____ comments on its workshops and Green Guides.
9. During the FTC's review process, many commenters suggested the guides were no longer needed.
True or False
10. The FTC review process included:
a. Written comments and consumer protection research
b. Written comments, public workshops and consumer perception research
c. Written comments, public workshops and consumer protection research
d. Written comments, private workshops and consumer perception research
11. The revised Green Guides do not apply to business to business marketing.
True or False
12. ISO is an acronym for:
a. International Standards Organization
b. Independent Standards Organization
c. International Scammers Organization
d. International Organization for Standardization
13. The proposed Green Guides apply only to print marketing.
True or False
14. The proposed guides discourage general environmental benefit claims.
True or False
15. The proposed guides apply to direct and implied claims.
True or False
16. Under the proposed guides, environmental seals and certifications should meet the standards set forth in the FTC's Endorsement Guides.
True or False
17. The proposed guides apply to imagery as well as to words.
True or False

CERTIFICATION: This self-study activity has been approved for one hour of continuing legal education credit by the Nevada Board of Continuing Legal Education.

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TEST #9 GET TO KNOW THE FTC GREEN GUIDES TEST

- 1) Read the article on pages 25-27
- 2) Answer the quiz questions above. Each question has only one correct answer.
- 3) Mail completed form and a \$40 processing fee to:

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