

FTC RELEASES FINAL GUIDES FOR "GREEN" MARKETING AND ENVIRONMENTAL CLAIMS

After years of deliberation, the Federal Trade Commission this week released its final "Green Guides" for environmental benefit claims. FTC's final Guides are similar to the "proposed" guides, which FTC released for public comment two years ago. But the final Guides include some important new recommendations and points of clarification.

General "Green" Or "Eco-Friendly" Claims

In the final Guides, FTC once again strongly discourages advertisers from making broad, unqualified environmental benefit claims. Unqualified "green" or "eco-friendly" claims, in FTC's view, are highly susceptible to misinterpretation by consumers. To avoid potential confusion, advertisers should qualify environmental claims and explain, for example, that a product is "green" specifically because it is "made from recyclable material."

One question FTC's proposed Guides left unanswered was whether advertisers that want to make qualified environmental benefit claims must first conduct a "life-cycle analysis" – an analysis that attempts to estimate a product's overall environmental impact based on its raw materials, manufacture, storage, distribution and disposal. FTC has now clarified that a life-cycle analysis is generally not required.

Rather, before making a qualified environmental claim, the FTC recommends that advertisers consider whether their products have any hidden environmental trade-offs. FTC warns that a qualified claim such as "green, made with recycled content" could be deceptive – even if the claim is literally true – if using recycled content results in an obvious environmental trade-off that outweighs the advertised benefit.

Environmental Certifications and Seals

FTC's final Guides reaffirm that environmental certifications and seals are essentially endorsements and must comply with FTC's Guides for Endorsements and Testimonials. Consequently, marketers generally must disclose when they have financial relationships and other material connections to the organization that is providing the seal or certification.

That said, the final Guides clarify that when a marketer's only connection to a certification organization is the payment of a reasonable certification fee, it is not necessary to disclose this fee because reasonable consumers understand that such fees are often required. Additionally, if an advertiser uses a trade association's certification program, FTC's final Guides clarify that advertisers do not need to disclose their connection with the trade association under certain circumstances. Specifically, if the trade association's certification program is administered by an independent certifier applying a "consensus standard" based on input from various stakeholders, no disclosures may be required.

FTC's final Guides also reiterate that advertisers should generally explain what their "green" seals and certifications actually mean. Some seals and symbols already do this by, for example, including statements like "Certified Biodegradable" in the seal itself. Additional disclosures, however, may be necessary if the basis for the seal or symbol is not obvious to consumers.

FTC's final Guides acknowledge that some environmental seals and symbols are based on an assessment of numerous environmental attributes. In such cases, the final Guides clarify that advertisers can rely on a disclosure that directs consumers to a website for further information, such as: "Virtually all products impact the environment. For more details on the attributes we evaluated, go to [a website which provides a detailed summary of the environmental attributes that were examined]."

"Free-Of" Claims

In its proposed Guides, FTC said that advertisers can sometimes claim that their products are "free of" a substance, even if the substance is present in a very small amount. FTC's final Guides, however, clarify that advertisers should only make such "free of" claims if they meet the following three-part test.

First, the product should not have more than a "trace" amount of the substance, which FTC defines as the substance's "background level" in the environment.

Second, the amount of the substance present in the product cannot cause "material harm that consumers typically associate with the substance."

Third, the substance cannot have been added to the product intentionally.

Recyclable Claims

For many years, FTC has cautioned advertisers that, if their products are only recyclable in special facilities that are not widely available to consumers, they should qualify any "recyclable" claims and disclose that appropriate recycling facilities may not be available in all areas.

FTC's final Guides clarify that this disclosure obligation is triggered whenever the appropriate recycling facilities are available to less than sixty percent of the consumers where the product is sold.

Moreover, if appropriate recycling facilities are only available in a small minority of communities, FTC recommends that advertisers use even stronger qualifying language, such as: "This product is recyclable only in the few communities that have appropriate recycling programs."

Made with Renewable Energy Claims

The final Guides advise that advertisers should not make unqualified renewable energy claims if their products are made with energy derived from fossil fuels, unless they purchase renewable energy certificates (RECs) to match the energy use.

Additionally, advertisers should not make unqualified "made with renewable energy" claims unless all, or virtually all, of the significant manufacturing processes involved in making the product or package are powered with renewable energy, or by non-renewable energy matched by RECs. When this is not the case, advertisers should clearly and prominently specify the percentage of renewable energy that powered the significant manufacturing processes.

FTC encourages advertisers to specify the source of the renewable energy being touted, such as "wind" or "solar." But when a company relies on multiple sources of renewable energy, the final Guides recommend that the advertiser disclose that the product is "made from a mix of renewable energy sources" and specifically identify the renewable source that makes up the greatest percentage of the mix.

Other "Green" and Environmental Claims

The revised guides address a host of other environmental claims – including "carbon offsets," "compostable," "degradable," "biodegradable," "ozone-safe," "ozone-friendly," "recycled content," and "refillable." But the FTC's final guidance for these claims is not significantly changed from the proposed revisions put forth by the FTC two years ago. With regard to "non-toxic" claims, marketers must still possess competent and scientific evidence that the product is safe for both people and the environment, but the FTC has clarified that the "environment" includes household pets.

If you would like more information or for a copy of the FTC's "Green Guides," please contact one of the following attorneys or call your regular Patterson contact.

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