

FTC Unveils Stricter Guidelines for Green Marketing

The Federal Trade Commission yesterday released its much anticipated revisions to its "Green Guides," tightening the rules governing how advertisers should craft and substantiate environmental benefit or "green" claims. Of particular note, according to the revised Green Guides, advertisers going forward should:

- Avoid unqualified claims that your product or service is "green," "eco-friendly," or otherwise provides a general environmental benefit.
- Avoid unqualified "green" seals or environmental certifications that convey that your product or service provides a general environmental benefit.
- Avoid unqualified "biodegradable" claims for almost all types of solid waste.
- Avoid unqualified "renewable" energy claims if fossil fuels are used to power any aspect of your manufacturing process.
- Avoid unqualified "carbon offset" claims unless your purchased offsets reduce emissions within two years.

FTC has been debating its Green Guides revisions for years, and that debate will continue. Unexpectedly FTC issued its revised Guides as "proposals" and invited further feedback from advertisers and the public.

No More "Green" and "Eco-Friendly" Claims

The heyday for unqualified claims that a product is "green" or "eco-friendly" is gone. After conducting survey research to gauge consumers' understanding of these claims, FTC concluded that broad "green" and "eco-friendly" type claims suggest that a product has a host of environmental benefits that no single product can provide. Accordingly, FTC believes such claims are virtually "impossible to substantiate" and should be avoided.

Now, when making an environmental claim, FTC advises that "green" or "eco-friendly" claims should be accompanied by "clear and prominent" qualifying language that explains the specific way in which the product is environmentally good or advantageous. In addition, an advertiser must ensure that its qualifications are sufficiently clear and prominent to prevent consumers from taking away implied messages that the product has environmental benefits that it does not.

FTC provides only limited guidance on how big or prominent any necessary qualifications must be. But on one point FTC was clear: Advertisers generally cannot rely on explanations posted only to the internet, or the company's website, to qualify environmental claims on a product's package or in an ad.

Explain Your Seals and Certifications

Environmental seals and certifications raise two concerns for FTC. First, a seal or certification is effectively an endorsement and therefore must comply with the FTC's Guides for Endorsements and Testimonials. Second, a seal or certification may also constitute a claim that the product provides environmental benefits. A seal or certification therefore

should be explained or qualified so that consumers are not left with the impression that the product has far-reaching, unsubstantiated environmental benefits.

Thus, advertisers that employ an environmental seal or certification should among other things (1) indicate if the seal was created by the company rather than a third-party or certifying organization, (2) disclose if the certification was granted by an organization with which the advertiser is associated or a member, (3) disclose when a certifying organization is an industry or trade group rather than a fully independent third-party, and (4) ensure that consumers appreciate the meaning of any seals or certifications.

Degradable, Compostable, and Renewable

FTC's revised Guides also clarify the standards governing some common environmental buzzwords including degradable, compostable and renewable.

For a product to be "biodegradable," an advertiser traditionally has been required to show that it will completely break down within "a reasonably short period of time" after customary disposal. Now, for the first time, FTC has specified that solid waste must degrade "within one year" for it to meet that standard. Moreover, since most solid waste is put in landfills or sent to incinerators where it will not decompose within one year, FTC warns that almost no solid waste can accurately be touted as "biodegradable" anymore.

"Compostable" products also must degrade within a reasonably short period of time. For products that consumers may compost at home, FTC says the product should degrade at a comparable rate to natural plant matter in a home composter. An advertiser's substantiation for compostable claims also should assess the rate of degradation under consumer relevant conditions. Notably, FTC expressed skepticism that the existing industry ASTM tests for compostable claims, which assess compostability under "optimal" conditions, can supply adequate substantiation.

Claims that a product is made with "renewable" material also should be qualified. In FTC's view, a consumer should be told what material is renewable, how it is sourced, and why it is renewable. Similarly, claims that a product is made with "renewable" energy may need to be qualified to explain the source of the renewable power and disclose when energy from renewable and non-renewable sources is used.

Carbon Offsets

FTC largely declined to weigh in on the thorny issue of "carbon offsets" – the purchasing of environmental "credits" to offset the environmental impacts of an advertiser's own products, production methods, or so-called carbon footprint. Recognizing that the science and regulation of carbon offsets is still emerging, FTC gave only limited advice.

Advertisers must have competent and reliable scientific evidence to back any carbon offset claims, including proper accounting methods to ensure that offsets are not being double-counted. An offset should confer its emission reducing benefit within two years and, if not, the advertiser should disclose that the emissions reduction will accrue only after time. Advertisers also cannot tout any carbon offsets that are required by law.

Things Left Unsaid (For Now)

Perhaps most remarkable are the issues that FTC has left unaddressed. Chief among them, FTC decided not to comment on when, or how, a company should perform a "life cycle assessment" of a product's environmental impacts. FTC also provides no new guidance to marketers regarding "sustainable," "natural," or "organic" claims. For now, FTC will continue to defer to other agencies, including the FDA and USDA, that have wrangled with how "natural" and "organic" should be defined. ♦

For more information or a copy of FTC's revised "Green Guides," please contact one of the following attorneys or your Patterson contact:

Kim J. Landsman	212.336.2980	kjlandsman@pbwt.com
Robert W. Lehrburger	212.336.2996	rwlehrburger@pbwt.com
Christine H. Miller	212.336.2625	chmiller@pbwt.com
Saul B. Shapiro	212.336.2163	sbshapiro@pbwt.com
Travis J. Tu	212.336.2765	tjtu@pbwt.com
Steven A. Zalesin	212.336.2110	sazalesin@pbwt.com

IRS Circular 230 disclosure: Any tax advice contained in this communication (including any attachments or enclosures) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication. (The foregoing disclaimer has been affixed pursuant to U.S. Treasury regulations governing tax practitioners.)

This alert is for general informational purposes only and should not be construed as specific legal advice.

To subscribe to any of our publications, call us at 212.336.2329, email info@pbwt.com, or sign up on our website, www.pbwt.com/resources/publications. To unsubscribe, please send an email to info@pbwt.com with the subject: unsubscribe.