

## FTC and Unfair Trade Practices Alert

### Still Not Easy Being Green: FTC Proposes Revised Guidance on Marketing “Green” Products and Services

October 27, 2010

On October 6, 2010, the Federal Trade Commission (FTC) proposed changes to its Guides for the Use of Environmental Marketing Claims (commonly called the “Green Guides”)—the FTC’s guidance to companies marketing their products or services as “green” or otherwise environmentally friendly. The Green Guides set forth the FTC’s enforcement views and priorities on environmental marketing claims. Given the recent enforcement focus on such claims, any company making or considering “green” claims about its products or services should become familiar with the FTC’s proposed new guidelines, public comment on which is being solicited through December 10 of this year.

#### Background

The FTC issued the first Green Guides in 1992 to assist marketers in avoiding misleading environmental claims that would violate section 5 of the FTC Act.<sup>1</sup> The Green Guides have been revised twice since then, the latest version having been issued in 1998.

The current Green Guides provide advice on—

- general principles applicable to all environmental marketing claims
- how consumers are likely to interpret particular claims and how those claims can be substantiated by marketers
- how marketers can qualify their environmental claims to avoid deceiving consumers.

The current Guides, moreover, provide specific guidance to marketers on how to use the following seven terms or concepts: 1) “degradable/biodegradable/photodegradable,” 2) “compostable,” 3) “recyclable,” 4) “recycled content,” 5) “source reduction,” 6) “refillable” and 7) “ozone safe and ozone friendly.”

Given dynamic changes in green marketing since 1998, however, the FTC, in 2007, began a process of assessing the effectiveness of the Guides. After an extensive public comment period, three day-long workshops and an FTC-commissioned consumer perception study, the FTC, on October 6, 2010, issued an extensive *Federal Register* notice setting forth proposed revised Guides and requesting additional public comment. The changes to the Green Guides proposed by the FTC would further revise the guidance offered on the seven previously identified types of environmental claims, provide more complete advice on environmental certifications and seals and “free-of and non-toxic” claims and add new categories of guidance for claims of “renewable materials,” “renewable energy” and “carbon offsets.” The FTC, however, declined to provide specific advice with regard to claims that a product is “sustainable” and “organic and/or natural.”

<sup>1</sup> 16 CFR Part 260.



## The Proposed Revisions

Highlights of important changes or clarifications of topics in the current Guides include:

### *General Environmental Benefit*

Broad claims of environmental benefit are disfavored, and the revisions to the guidelines effectively ban unqualified general environmental benefit claims. The FTC notes that consumers interpret such claims to promise wide-ranging environmental benefits and that unqualified general environmental marketing claims remain very difficult, if not impossible, to substantiate. This position differs from the existing guidance, which allowed unqualified claims if the marketer could substantiate all express and implied claims. General claims that are limited to certain benefits or attributes can be made if properly substantiated and qualifications are clear and prominent. The FTC, however, further noted that it is concerned about attribute-specific qualifications if the effect of the attribute did not provide a net environmental benefit; it has requested comment on this issue.

### *Certifications and Seals of Approval*

The FTC notes that the use of independent, third-party certifications and seals, as well as self-certified programs, is an increasingly popular marketing technique. While such programs can provide important and valuable information to consumers, companies will need to take care when using such tools. The proposed revisions, for example, clarify that the use of third-party certifications and seals are endorsements covered by the FTC's Endorsement Guides, and marketers should disclose to consumers all material relationships with the certifying body. Marketers also have to be careful in avoiding seals or certifications that appear to "overpromise" on environmental benefits. For example, the proposed Guides recommend that marketers limit clearly a certification or seal to a particular attribute for which the marketer has substantiating evidence. Similarly, the new advice notes that a marketer has an obligation to substantiate all conveyed claims, even if those claims are certified by a third party.

### *Degradable*

The FTC has challenged degradable claims more than any other specific claim covered by the current Guides. In light of this enforcement history, the proposed revisions would impose a bright line rule that general degradable claims concerning solid waste products destined for landfills, incinerators or recycling facilities should only be used when the entire product or package will completely break down within one year of customary disposal (as opposed to "within a reasonably short period of time"). Appropriately qualified solid waste claims, however, can continue to be used, taking into account the package's ability to degrade when disposed of in a customary manner. Regarding liquid waste, the FTC has asked for additional comments on whether it should provide additional specificity for unqualified degradability claims.

### *Compostable*

Having received few comments on the current advice on compostable claims, the FTC proposes few changes to its current advice. The proposed revisions, for example, clarify that an unqualified compostable claim should only be made when the product or package will break down in approximately the same time as the materials with which it is composted.

### *Ozone-safe/Ozone-friendly*

The proposed revisions make minor changes to the examples concerning ozone-safe/ozone-friendly claims to harmonize the examples with changes in regulations concerning ozone-depleting chemicals.

### *Recyclable*

Following the approach of the current Green Guides, the revisions will continue to require marketers to take great care in making recyclable claims. FTC guidance focuses upon whether particular materials or packaging that is theoretically recyclable will, in fact, be recycled. That is, marketers should only make an unqualified claim of "recyclable" only if a "substantial majority" of consumers have access to recycling facilities. Moreover, the FTC asks for additional comments on whether the Guides should formally quantify the "substantial" threshold. The FTC also proposes additional advice in situations where recycling opportunities are much more limited. A marketer, for example, should qualify a recyclable claim if a "significant percentage" of consumers have access to recycling facilities (e.g., "package may not be recyclable in your area") or if "less than a 'significant percentage' of consumers/communities" have access to recycling facilities (e.g., "product is recyclable only in the few communities that have recycling programs").

### *Recycled*

Another area of confusion for marketers has been recycled content claims. The proposed revisions provide additional guidance on pre-consumer recycled content claims, the distinction between pre- and post-consumer waste and the appropriate method for calculating recycled content.

### *Free-of/Non-toxic*

The proposed revisions expand the current section concerning “free-of” claims, noting that claims that an item is free of a substance may be deceptive if the item has substances that pose the same or similar environmental risk as the absent substance. Similarly, the revisions point out that a free-of claim may be deceptive if the substance has never been associated with the product category. The proposed revisions allow certain free-of claims when an item contains a de minimis amount of a substance. The proposed revisions note that a “non-toxic” claim likely conveys that an item is nontoxic both for humans and, generally, the environment.

## The Proposed New Guidance

The proposed revisions also add advice on three additional categories of green claims.

### *Made with Renewable Materials*

The proposed changes add guidance for marketers making or considering claims of “made with renewable materials.” These new sections guide marketers to qualify such claims with specific information about the renewable material, including what it is, how it is sourced and why it is renewable. The proposed revisions also guide marketers to qualify renewable material claims if the item is not made entirely with renewable materials.

### *Made with Renewable Energy*

The proposed changes add guidance to marketers making or considering claims of “made with renewable energy.” These new sections guide marketers not to make unqualified renewable energy claims if the power used to manufacture any part of an item was derived from fossil fuels. The proposed revisions also guide marketers to qualify renewable energy claims by specifying the source of renewable energy.

### *Carbon Offsets*

The issue of carbon offsets is technically complex. Accordingly, the proposed changes direct marketers to use “competent and reliable scientific evidence” to support carbon offset claims and to use appropriate accounting methods. These proposed revisions also guide marketers to disclose if the emission reductions will not occur for two years or longer. The proposed revisions guide marketers not to advertise a carbon offset if the basis of that offset is already required by law.

## Impact

The FTC’s proposed revised Green Guides concern all environmental marketing claims, with special focus on 10 types of common environmental claims, and will affect all marketers making or considering environmental claims about their products if the changes are adopted by the FTC. The FTC is accepting comments on the proposed changes until December 10, 2010. The full text of the FTC’s notice is available [here](#).

---

## CONTACT INFORMATION

If you have any questions concerning this alert, please contact—

**Karol A. Kepchar**  
[kkepchar@akingump.com](mailto:kkepchar@akingump.com)  
202.887.4104  
Washington, D.C.

**Daniel F. McInnis**  
[dmcinnis@akingump.com](mailto:dmcinnis@akingump.com)  
202.887.4359  
Washington, D.C.

**Charles L. Franklin**  
[clfranklin@akingump.com](mailto:clfranklin@akingump.com)  
202.887.4378  
Washington, D.C.