

Modernizing the Green Guides in the age of carbon neutrality

By Ken Markowitz, Esq., Haidee L. Schwartz, Esq., Shawn Whites and Nicole Franklin,
Akin Gump Strauss Hauer & Feld LLP

SEPTEMBER 2, 2021

Introduction

The Federal Trade Commission's (FTC) *Guides for the Use of Environmental Marketing Claims*¹ ("Green Guides" or "Guides") provide guidance for companies that make environmental claims. Since the FTC last updated the Guides in 2012, environmental claims have expanded dramatically, yielding greater potential for actionable "greenwashing" or other deceptive marketing.

While the Guides are not law, they provide marketers with general principles to consider when making environmental claims about a product, package, or service.

As the FTC prepares for its 10-year review² of the Green Guides, one area for further clarity surrounds "climate claims," or claims that promote the effect a product, service or business has on greenhouse gas (GHG) emissions, and by extension, global climate change.³

Examples of climate claims abound — e.g., "carbon neutral," "climate neutral," "net-zero," "zero-carbon," etc. — and are often used interchangeably. We thus collectively refer to these claims herein as "carbon neutrality claims."

Governments, investors and consumers increasingly are making demands for the private sector to align with the Paris Agreement's aspirational goal to hold temperature rise to 1.5°C. In response, corporate net-zero targets and carbon neutral products offerings have proliferated,⁴ with "large differences in the transparency of these claims and targets and what they actually mean in terms of their impact on GHG emissions."⁵

As such, these claims may create consumer confusion or mislead consumers, and are vulnerable to allegations of greenwashing, prompting questions for the FTC to consider as it reviews the Guides and continues its compliance enforcement.

This article explores how the Green Guides might evolve in response to the expanding landscape of carbon neutrality claims. First, we provide background on the Guides and its application to carbon neutrality claims. Second, we summarize trends in greenwashing allegations affecting marketers making carbon neutrality claims. Third, we analyze environmental marketing guidance from other countries, identifying commonalities that may inform best practices. Finally, we incorporate lessons from this analysis in offering suggestions for modernizing the Green Guides to address carbon neutrality claims more directly.

A modernized Green Guides would provide companies with clearer expectations for making carbon neutrality claims to reduce enforcement and litigation risk, even if it did little to quell greenwashing allegations.

Marketers of carbon neutral products continue to face increased public scrutiny, which often focuses on the extent of the product life-cycle covered by the carbon neutrality claim — i.e., "well to wheels" or simply production — and the use of offsets to support such claims.

The Green Guides should not, however, be viewed in a vacuum. They should account for, and avoid duplicating, the Securities and Exchange Commission's (SEC) efforts on climate-related disclosures, and the Environmental Protection Agency's (EPA) efforts to ensure the veracity of emissions data through its GHG Reporting Program.

Background

What are the Green Guides?

The Guides reflect the FTC's interpretation of Section 5 of the FTC Act, 15 U.S.C.A. § 45,⁶ as it relates to "unfair or deceptive" environmental marketing claims, or "green marketing."

While the Guides are not law, they provide marketers with general principles to consider when making environmental claims about a product, package, or service, i.e., principles to avoid making claims that the Commission is likely to view as unfair or deceptive. They also define the competent and reliable scientific evidence necessary for substantiating claims, and consider how reasonable consumers are likely to interpret specific claims.

Despite its non-binding status, the FTC can take action under the FTC Act against a company for green marketing that is inconsistent with the Guides. For example, in the immediate two years after the 2012 Green Guides update, the FTC brought more than 20 enforcement actions against marketers related to environmental marketing claims.

The FTC has an opportunity to offer specific advice to marketers of carbon neutral products by clarifying ambiguities in the Green Guides related to carbon neutrality claims and clearly presenting its expectations for substantiating such claims.

The FTC also sent warning letters to environmental certification seal providers, and marketers, for seals the agency suspected failed to comply with the Green Guides. Every year since, however, FTC enforcement actions have dwindled, reaching a low of a single case in 2019 and 2020.

How do the Guides apply to carbon neutrality claims?

The Guides do not discuss carbon neutrality claims explicitly.⁷ However, the Guides offer general principles and specific guidance on carbon offsets that will inform treatment of carbon neutrality claims.

A carbon offset, sometimes referred to as a carbon “credit,” represents one ton of carbon dioxide (or GHG equivalent) removed from the atmosphere or not released to the atmosphere during a business as usual scenario.

Offsets often serve as a form of currency to support carbon neutrality claims. Former FTC chair Deborah Platt Majoras recognized that relationship in her opening remarks at the FTC’s carbon offset workshop: “[i]n an effort to become ‘carbon neutral,’ many purchasers seek to obtain enough offsets to match their emissions.”

Green Guides’ principles and guidance particularly relevant to carbon neutrality claims include:

General principles/applicable provisions

- *Qualifications and disclosures:* To avoid deception, marketers should use clear and prominent qualifying language that limits the claim to a specific benefit or benefits. (16 C.F.R. § 260.4)

- *Overstatement of environmental attribute:* Marketers should not overstate, directly or by implication, an environmental attribute or benefit; marketers should not state or imply environmental benefits if such benefits are negligible — even if the claim is “technically true.”⁸ (16 C.F.R. § 260.3(c))

Carbon offsets

- Marketers should employ competent and reliable scientific and accounting methods to quantify properly claimed emission reductions and to ensure that the same offset is not sold more than once.
- Marketers should disclose if the offset represents emission reductions that will not occur for two years or longer.
- Marketers should not advertise an offset if the law already requires the activity that is the basis of the offset. (16 C.F.R. § 260.5)

Current trends in greenwashing allegations

Consumers and other private actors regularly allege deceptive greenwashing claims and pursue novel legal actions against companies. In March, Global Witness, Greenpeace USA, and Earthworks filed a “first of its kind” complaint with the FTC against Chevron, asserting, among other things, the company misleads consumers on the environmental impacts of its products through deceptive advertisements that overstate Chevron’s climate commitments and renewable energy investments.⁹

Similarly, the non-profit Earth Island Institute filed a complaint in June against the Coca-Cola Company (Coke) under the District of Columbia’s Consumer Protection Procedures Act, alleging¹⁰ that Coke engaged in deceptive marketing by representing itself as “sustainable” despite being a major contributor of global plastic waste.

Marketers of carbon neutral products continue to face increased public scrutiny, which often focuses on the extent of the product life-cycle covered by the carbon neutrality claim — i.e., “well to wheels” or simply production — and the use of offsets to support such claims.

In July, for example, Mountain Valley Pipeline project developers announced they would purchase offsets “to make [the pipeline’s] operational emissions carbon neutral.”¹¹ Sierra Club called this “a shameless ploy to greenwash[.]” primarily because offsetting the pipeline’s direct operational emissions “wouldn’t address the massive climate impact of actually burning the fracked gas this pipeline would transport.”¹²

Cumulatively, these examples suggest that companies marketing carbon neutral products are vulnerable to allegations of violating the Green Guides’ principle regarding the overstatement of environmental attributes. This is especially true for claims based on a small fraction of a product’s overall environmental footprint.

Comparative analysis

In this section we survey how other countries approach carbon neutrality claims, drawing from green marketing guides (most as

old as the Green Guides) and government-led certification schemes and standards.

We limit our analysis to a snapshot of countries with explicit references to carbon neutrality or related climate claims — Australia, Netherlands, Norway and the United Kingdom (U.K.) — and identify three commonalities that may inform best practices.

1. Clear guidance regarding the scope of the carbon neutrality claim

In its 2011 green marketing guidelines, Australia's Competition & Consumer Commission (ACCC) cautions that a carbon neutral product advertisement "could potentially be misleading" if the marketer only offsets the emissions from manufacturing to point of sale.¹³

The ACCC explains that claims should clearly "[l]ink the environmental benefit to a specific part of the product or its production process, such as extraction [or] transportation," to "help remove any misleading impressions."

Meanwhile, 2021 guidelines issued by the Netherlands Authority for Consumers and Markets (ACM) advise that companies can make carbon neutrality claims only if the total emissions associated with the product's *production process* is zero, which can be achieved, for example, through offsets.¹⁴

The U.K. Competition & Markets Authority issued draft guidance in May that parallels the Netherlands in this regard, stating that a carbon neutrality claim may only be made if "relevant production processes do not create emissions, or because the business offsets the gases that are produced by investing in" carbon offset projects.¹⁵

On the other hand, Norway's 2009 "Guidelines on Using Claims such as 'Climate Neutral' etc. in Marketing" restricts marketers from making carbon neutrality claims that are limited to certain aspects of a product's footprint. Instead, a marketer must conduct a life-cycle analysis of a product's total GHG emissions in order to make a carbon neutrality claim.¹⁶

Norway also requires marketers of carbon neutral products to reduce, to the extent possible, GHG emissions at each stage of the product's life cycle, and create a corresponding reduction plan every other year. However, a marketer may avoid this requirement if an "impartial third party" verifies that the product has exhausted its reduction potential. For any remaining emissions, a company may compensate by purchasing offsets "at the time of marketing."

2. Certification standards as potential safe harbors¹⁷

The Australian Government maintains the voluntary Climate Active Carbon Neutral Standard for Products and Services to assist companies "credibly claim carbon neutrality and to seek carbon neutral certification."¹⁸

Entities seeking to certify a claim against the Product & Services Standard must:

- (1) define an emissions boundary for the product and calculate emissions;
- (2) develop and implement an emissions reduction strategy;

- (3) purchase offsets to compensate for remaining emissions (which are limited to offsets verified through "internationally recognized standards" such as Verra's Verified Carbon Standard);
- (4) secure third-party validation; and
- (5) issue a public statement of the carbon neutrality claim.

Notably, the Product & Services Standard does not require entities to base carbon neutrality claims on a product's entire footprint. Instead, claims may be limited to a "cradle-to-gate" boundary — i.e., all emissions from resource extraction up to "when the product leaves the responsible entity's gate."

3. Transparency rules for offsetting

Each jurisdiction reviewed strongly emphasizes transparency when carbon offsets form the basis of a carbon neutrality claim. The U.K.'s draft guidance, for instance, advises companies that base carbon neutrality claims on equivalent offsets to "provide information about the [offset] scheme," which "should be based on recognized standards and measurements, capable of objective verifications."

Similarly, where offsets "play[] an important role in the process of making your product carbon-neutral," the Netherlands requires marketers to "inform consumers about the exact form" of offset used. This entails providing consumers with "relevant" information, including: (i) the exact amount of carbon that is offset; (ii) project type and location; (iii) the entity "organizing" the project; and (iv) whether the offset project was certified by a specific standard."

Considerations for the 10-year review of the Green Guides

The FTC has an opportunity to offer specific advice to marketers of carbon neutral products by clarifying ambiguities in the Green Guides related to carbon neutrality claims and clearly presenting its expectations for substantiating such claims. This will enable companies to ensure they take necessary precautions to protect against greenwashing allegations and offer a safe harbor if followed.

While we do not expect the FTC to "create definitions or standards,"¹⁹ our comparative analysis suggests several ways the FTC could provide additional clarity on carbon neutrality claims to aid businesses and consumers, including the following:

1. Clarify ambiguities regarding carbon neutrality claims the FTC might deem "negligible" and therefore misleading

The Green Guides' ambiguity concerning the level at which an environmental benefit is considered "negligible" or "overstated" presents challenges for marketers of carbon neutral products.

As noted above, companies are increasingly subject to allegations of greenwashing for limiting carbon neutrality claims to certain portions of a product's life-cycle emissions.²⁰

Clear FTC rules regarding transparency over life-cycle considerations and expectations would remove regulatory risk and enable market growth in carbon neutral products.

2. Clarify whether the FTC will pursue enforcement for deceptive or misleading implied green “brand” claims

Recent consumer protection lawsuits and greenwashing accusations have focused on companies’ forward-looking or aspirational statements — e.g., “net-zero” targets and related climate change commitments. These instances target broader corporate “brand” claims, including those implying a company’s “greenness,” rather than specific product marketing claims.

Through the Green Guides, the FTC has an opportunity to clarify whether the scope covers these broader corporate brand claims or aspirational statements.

Notably, within the context of the Green Guides, the FTC has examined a somewhat analogous scenario whereby a “marketer touts its relationship with a third party [by displaying a seal to show its membership status with said third party] that has neither evaluated nor endorsed the environmental attributes of its products.”²¹

The FTC explained that “displaying the organization’s seal may cause consumers to mistakenly believe that the organization has evaluated and endorsed the product,” although companies could avoid deception in this scenario “by stating that the seal refers to the company’s membership only and that the association did not evaluate the product’s environmental attributes.”²²

This suggests that should the Green Guides cover broader corporate brand or aspirational claims, the FTC should indicate the level of specificity and detail regarding such claims, as well as any substantiation, it will require.

3. Provide examples of third-party organizations or voluntary consensus bodies capable of substantiating carbon neutrality claims

The Green Guides instruct marketers to “substantiate” their environmental claims. Marketers could substantiate claims through a “voluntary consensus standards body,” a third-party organization that plans, develops, establishes or coordinates “voluntary consensus standards using agreed-upon procedures” and possesses several general attributes (16 C.F.R. § 260.6).

Given the plethora of certification organizations with relevant qualifications, the FTC could identify a subset of voluntary consensus bodies as “examples” of adequate or credible third-party certification for substantiating carbon neutrality claims.

For example, the FTC maintains a public list of approved Children’s Online Privacy Protection Act (COPPA) “Safe Harbor” organizations, and it could similarly do so regarding approved Green Guides certifying organizations.

4. Require transparency disclosures regarding the characteristics of carbon offsets

The FTC can avoid complex policy questions but still require greater disclosure regarding the use of carbon offsets in substantiating carbon neutrality claims.

Among the many criticisms concerning carbon offsets is the lack of transparency, for example, regarding purchase price, project type

(i.e., avoidance or removal), whether the offset was certified on a credible registry, and timing of the claimed emissions removals or reductions.

If the FTC requires disclosure of tenets like these, consumers could assess these claims independently, while protecting marketers from complaints they omitted relevant information.

5. Take the Biden-Harris “whole-of-government” approach to climate change to heart: coordinate with SEC, EPA and other relevant agencies

The FTC should coordinate with other agencies such as the SEC and EPA, which are implementing complimentary climate-risk disclosure and GHG emissions reporting programs that may inform or substantiate green marketing claims.

In addition, should Congress pass the Growing Climate Solutions Act prior to the FTC concluding its review and update to the Green Guides, the FTC could look to the Department of Agriculture for the types of third-party carbon offset standards and verifiers that would satisfy consideration (3) above.²³

Notes

¹ <https://bit.ly/2WzIKsq>

² <https://bit.ly/3gO4E2p>

³ Int’l Chamber of Commerce, Framework for Responsible Environmental Marketing Communications 6, 22-23 (2019), <https://bit.ly/3t4efH2>.

⁴ See, e.g., Climate Pledge Friendly Certifications, Amazon.com, <https://amzn.to/3kGhlgL> (last accessed July 25, 2021) (listing third-party certifications used by Amazon to distinguish “sustainable products” on its marketplace, including certifications for “carbon neutral,” “carbon free,” and “climate neutral” products).

⁵ Aki Kachi, Silke Mooldijk & Carsten Warnecke, Climate neutrality claims: How to distinguish between climate leadership and greenwashing 1 (2020), <https://bit.ly/2WBYkUn>.

⁶ <https://bit.ly/3t4RMtr>

⁷ The FTC’s 2010 proposed revisions to the Guides, 75 Fed. Reg. 63,552 (Oct. 15, 2010) (2010 Proposed Revisions), offers insight. In describing a study gauging consumers’ understanding of “carbon neutrality” (among other terms), the FTC explained the study “suggest[ed] that some consumers have a general understanding of . . . products advertised as carbon neutral, but few reported seeing advertisements for such items, and even fewer have actually purchased them.” Since the FTC “provides guidance to marketers on how consumers understand” certain terms — but does not create “definitions or standards” for such terms — it deemed it unnecessary at that time to provide guidance on carbon neutrality claims. Despite these survey findings, many commenters — responding to the FTC’s proposed revisions — argued that there was confusion surrounding the term. See, e.g., Comments from EnviroMedia Social Marketing; TerraPass; and Scientific Certification Systems, Inc. (accessible at <https://bit.ly/3jsZmeq>). Even environmentally conscious consumers expressed confusion, with Ruth Heil writing, “Carbon neutral sounds like it sequesters any carbon it creates leaving a neutral result.”

⁸ As an example, a manufacturer increases the recycled content of a certain product from a mere 2% to 3%, and then markets the product as having “50% more recycled content than before.” While this claim “is technically true,” the FTC explains that it “likely conveys the false impression that the manufacturer has increased significantly the use of recycled content.” 16 C.F.R. § 260.3(c).

⁹ Press Release: Accountability groups file first of its kind FTC complaint against Chevron for misleading consumers on climate action (Mar. 16, 2021), <https://bit.ly/3Dzr4y8>.

¹⁰ <https://bit.ly/3jxfvU>

¹¹ Mountain Valley Pipeline Announces Plan to Offset Carbon Impacts, Business Wire.com (July 12, 2021, 4:15 PM), <https://bwnews.pr/3ysU9aB>.

¹² Press Release, Mountain Valley Pipeline Attempts to Greenwash Polluting Fracked Gas Pipeline (July 12, 2021), <https://bit.ly/3jvfOdX>.

¹³ Australian Competition & Consumer Comm'n, Green marketing and the Australian Consumer Law 15 (2011), <https://bit.ly/3zA1W7V>.

¹⁴ The Netherlands Auth. for Consumers and Mkts., Guidelines: Sustainability Claims (2021), <https://bit.ly/2WGpMAO>.

¹⁵ U.K. Competition & Mkts. Auth., Draft guidance on environmental claims on goods and services 22 (2021), <https://bit.ly/3DA4wx1>.

¹⁶ Norway Consumer Ombudsman, The Consumer Ombudsman's Guidelines on Using Claims such as "Climate Neutral" etc. in Marketing (2009), <https://bit.ly/38lq3pr>. Norway's guidelines list the NS-EN ISO 14040 Environmental management – life cycle assessment – principles and framework and NS-EN ISO 14044 Environmental management – life cycle assessment – requirements and guidelines as examples of reputable life-cycle analyses.

¹⁷ We note, but do not assess, the European Union's initiative to develop a single certification standard that marketers must use to substantiate claims "about the environmental footprint" of their products (which would seemingly include carbon neutrality claims). See European Comm'n, Environmental performance of products & businesses – substantiating claims, <https://bit.ly/3BnXwBu> (last accessed Aug. 9, 2021).

¹⁸ Commonwealth of Australia, Climate Active Carbon Neutral Standard for Products & Services 2 (2020), <https://bit.ly/3BvcMfY> (Products & Services Standard).

¹⁹ 2010 Proposed Revisions, 75 Fed. Reg. at 63,596.

²⁰ In the 2010 Proposed Revisions, 75 Fed. Reg. at 63,562, n.112, the FTC cited similar concerns from several commenters.

²¹ 2010 Proposed Revisions, 75 Fed. Reg. at 63,567.

²² 2010 Proposed Revisions, 75 Fed. Reg. at 63,567.

²³ This legislation directs the Department of Agriculture to establish a GHG Technical Assistance Provider and Third-Party Verifier Certification Program to "provide transparency, legitimacy, and informal endorsement of third-party verifiers and technical service providers of agriculture and forestry carbon offset projects." We recognize that, while this program would serve as a de facto U.S. government endorsement of third parties only as it relates to agriculture and forestry offsets, many of these third parties would likely be deemed a "voluntary consensus standards body" as it relates to other types of offsets. See Stacey H. Mitchell, Kenneth J. Markowitz et al., Senate's Passage of Growing Climate Solutions Act Highlights Focus on Sustainable Agriculture, Akin Gump Speaking Sustainability (July 13, 2021), <https://bit.ly/3kFnPwo>

About the authors



Ken Markowitz (L) co-leads **Akin Gump's** climate change cross-practice initiative. He provides regulatory, policy, transactional and litigation counsel on environmental issues in the United States and internationally, including on carbon markets and voluntary offsets, carbon pricing, renewable fuels, energy efficiency and target setting. He can be reached at kmarkowitz@akingump.com. **Haidee L. Schwartz (C)** is a partner in the firm's antitrust practice and a former acting deputy director of the Federal Trade Commission's Bureau of Competition. She provides strategic

counseling on antitrust and consumer protection and guides clients through government merger transaction reviews and federal and state nonmerger investigations, as well as litigation. She can be reached at hschwartz@akingump.com. **Shawn Whites** (not pictured) is an energy regulatory specialist at the firm who focuses on federal energy regulatory matters and corporate strategies related to climate change and assisting clients on issues such as carbon pricing, environmental target setting and carbon offsets. He can be reached at swhites@akingump.com. All three are based in Washington, D.C. **Nicole Franklin (R)** is a member of the class of 2022 at Harvard Law School and was a 2021 summer associate at the firm. She can be reached at nfranklin@jd22.law.harvard.edu.

This article was first published on Westlaw Today on September 2, 2021.