

# Environmental & Energy Advisory

An update on law, policy and strategy

## Making the Case for Your Green Marketing Claims

In television, print, and Internet media alike, there has been a recent surge in environmental marketing – advertising that highlights the environmentally beneficial characteristics of consumer products. Through environmental marketing, producers seek to capitalize on increased consumer awareness of and demand for environmentally friendly manufacturing practices and products, including those, for example, that do not contain dangerous or persistent chemicals, waste energy or other natural resources, or contribute to climate change.

Any environmental marketing strategy, however, must dovetail with the overlapping array of federal and state law that governs environmental marketing claims. At the federal level, the Federal Trade Commission (“FTC”) has issued a set of guidelines specifically targeted to environmental marketing claims – the “Green Guides.” The FTC is in the process of updating the Guides to better address current environmental marketing claims, such as those related to carbon offsets and green buildings. Some states also have their own environmental marketing statutes that are sometimes more stringent than the Green Guides.

Knowledge of federal guidelines and state standards is essential not only to avoid potential litigation and enforcement actions, but also to ensure that any environmental marketing claims ultimately do enhance rather than undermine the image of the company and its products. Notwithstanding concerns over greenwashing and eco-fatigue, significant opportunities remain for businesses to develop goodwill for their brands and markedly differentiate themselves from their competitors by undertaking and advertising environmentally beneficial practices. It is vital, then, that these businesses understand the changing legal and regulatory requirements for making and substantiating such claims.

## FTC REGULATION AND GREEN GUIDE REVISIONS

### Introduction to the Green Guides

The FTC Green Guides are the primary tool in federal regulation of green advertising. Understanding their provisions and continuing development is key to any company’s green marketing strategy. The FTC has published the Guides as part of its mandate to “prevent persons, partnerships, or corporations [with some exceptions] ... from using ... unfair or deceptive acts or practices in or affecting commerce.”

In the Guides, the FTC emphasizes that it evaluates environmental claims using the same approach that it brings to analyze any other potentially deceptive trade practices. Advertising is deceptive “if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances.” With respect to environmental claims, the Green Guides also emphasize that the claims must have a “reasonable basis” that will often consist of scientific research and studies performed by objective experts, a requirement known as “substantiation.”

The Green Guides establish four “general principles” regarding environmental marketing claims and provide examples of claims that would either violate or comply with these principles. These principles require that:

1. qualifications or disclosures be sufficiently clear when such statements are necessary to prevent a claim from being deceptive,
2. marketers make clear whether a claim applies to a product, its packaging, or to a service,
3. claims not overstate an environmental benefit, and
4. an advertisement that compares a product to another be clear what the baseline for comparison is.

The Guides also discuss specific requirements for particular types of environmental claims. These types of claims can be grouped into two categories: 1) claims that a product has a general environmental benefit and 2) claims that a product has a specific environmental benefit, such as being “biodegradable,” “compostable,” or “ozone safe.” The environmental terms currently laid out by the Guides relate to waste management (for example the claim of being “recyclable”) and depletion of the stratospheric ozone layer (for example “ozone friendly”).

### The Green Guide Revision Process

The FTC is currently considering revision of the Green Guides. The timing for these revisions is apt, given that the limited list of environmental advertising claims specifically defined by the Guides falls well short of environmental benefits now being promoted. For example, the Green Guides do not address claims regarding perhaps the biggest current environmental issue – climate change. They also do not specifically govern claims regarding sustainability, green buildings, or environmentally friendly fabrics.

The Green Guides revision process outlined by the FTC consists of two elements that are nearing conclusion – the acceptance of comments by the FTC and a series of workshops on specific issues in green marketing. These workshops address three important issues in environmental marketing – 1) carbon offsets and renewable energy certificates (RECs), 2) green packaging, and 3) green buildings and textiles. Tracking the FTC’s efforts in these areas is paramount because it gives an indication of how the FTC will regulate some of the hottest fields of environmental marketing.

## **1. Carbon Offsets and RECs**

The FTC is contemplating regulating an area of almost certain growth in marketing as Congress contemplates mandatory greenhouse gas reductions – carbon offsets and RECs. Carbon offsets represent the commoditization of reductions in greenhouse gas emissions, and RECs specifically commoditize reductions from energy produced from renewable instead of fossil fuel sources. In the United States, to date, offsets have been marketed to consumers and business entities so that they can make voluntary reductions in their individual “carbon footprints.” This market is rapidly evolving, as a result of state and regional programs for reducing carbon emissions, and more radical growth is expected if and when Congress adopts a federal program. Thus, future years will likely see a tremendous increase in advertising related to carbon offsets.

The FTC request for comments and workshops suggest several ways in which the FTC may become involved in offset marketing. Like the guidance that the FTC already has established for what can be advertised as “biodegradable,” it might also provide guidance for which projects can claim to yield carbon offsets. The FTC is examining many facets of this issue, especially “additionality,” the concept that a project has reduced carbon emissions below “business-as-usual.” The problem with this approach, however, is that it would require the FTC to develop and apply its own expertise on potentially complex technical and policy issues. It is more likely that the FTC will require offsets to meet certification standards set by other agencies or non-governmental entities. For example, the Greenhouse Gas Registry already has a rigorous method for certifying offsets as “real” carbon reductions. A third approach could be for the FTC to regulate claims related to offsets. For instance, many companies are attempting to reduce their carbon emissions below a baseline or are claiming to be “carbon neutral.” The FTC could set up deception and substantiation guidelines relating to these types of claims.

The potential entry of the FTC into the market for offsets has important consequences for both buyers and sellers. For buyers of offsets, FTC involvement may reduce uncertainty in whether an offset really equates to a carbon reduction. At the same time, however, FTC involvement may interfere with their ability to make claims of net carbon emissions reductions or “carbon neutrality.” For sellers, FTC involvement may reduce the number of projects that can be claimed to yield offsets, and depreciate the value of offsets that have already been sold. On the flip side, however, FTC involvement may help boost buyer confidence in offset markets by providing transparent and uniform market standards. Either way, the method by which FTC chooses to dovetail its Guides with upcoming regulatory programs may significantly affect opportunities companies have to buy, sell, and market offsets.

## **2. Green Packaging, Building, and Textiles**

While a significant increase in offset advertising likely lies in the future, claims regarding green packaging, buildings, and textiles have already skyrocketed. Thus, any FTC action to define advertising and promotional standards in this area will have an immediate impact.

FTC's consideration of green packaging revisits an issue that was the focus of the initial Green Guides. The Guides already address, for instance, claims of being "recyclable," "biodegradable," or "refillable." The FTC's re-involvement in this area indicates that it recognizes that its past guidance has become outdated. In particular, terms that have become commonplace such as "sustainable" and "renewable" remain unaddressed by the Guides. Since these terms are now being considered by the FTC, companies making them need to be prepared to more rigorously substantiate their claims. The FTC is also concerned with environmental seals and certifications that claim that packaging has environmental benefits. FTC's concern with certification is a warning to companies – it indicates that third-party certification may not protect companies from FTC enforcement actions. The lesson, again, is that companies should consider independently substantiating their claims and ensuring that they are not deceptive.

The FTC is also contemplating involvement in two other areas of current importance – green buildings and textiles. This raises issues similar to those associated with green packaging. For example, green fabrics are marketed as "natural," "renewable," and "sustainable." The FTC may choose to restrict use of these terms, cautioning companies to ensure that their use of them is clear and substantiated. In the green building context, builders often turn to third parties for certification that their buildings are in fact environmentally beneficial. However, the certification process can be complex, allowing builders to pick and choose among various complex alternatives in order to obtain certification. Again, the FTC may not honor third-party certification, creating a risk that it may impose new requirements on advertising related to green buildings.

## STATE REGULATION OF GREEN MARKETING

Some states have supplemented the FTC Green Guides with their own statutes and regulations that relate to environmental marketing. Aside from providing another set of rules for companies to follow, these laws demonstrate alternate routes that the FTC could use to govern green marketing claims.

California and Indiana are examples of states that have chosen in part to mimic the Green Guides. A California statute specifically prohibits "any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied." It also incorporates aspects of the Green Guide by reference. Claims governed by the law include those discussed in the Guides, and compliance with the Guides is a defense to liability. Indiana's environmental marketing statute follows the approach of the second half of the Guides – it defines a select set of environmental marketing claims and prohibits the assertion of those claims unless a product fits the definition. Indiana allows marketers to comply with the statute by meeting either applicable Green Guide or state definitions. By incorporating the Green Guides into state law, states like California and Indiana have increased the significance of the Green Guide revisions. These revisions will not only be potentially enforced under federal law by federal authorities but under state law by state authorities as well.

California and Indiana both add an element to their statutes that the FTC has not explicitly required – persons making environmental claims must maintain

documentation supporting the validity of their claims that must be produced on demand to either the public or government. Under the California environmental marketing statute, any person who makes an explicit claim of general environmental benefit on a label or container of a consumer good must maintain records supporting the validity of the representation. This information includes not only documentation of the environmental benefits of the product, but also knowledge of any adverse environmental impacts of the product or violations of any environmental laws that have occurred in association with the production or distribution of the good. Under the California scheme, any member of the public may demand access to the documentation. This aspect of the California green marketing regulatory scheme provides a model for the FTC to address concerns that environmental marketing claims are not adequately substantiated. The FTC could essentially enlist public interest groups and other members of the public to aid it in the enforcement of marketing requirements by making companies share the bases for their marketing claims.

Delaware and Texas take a different approach to the regulation of green marketing. Statutes in these states are specifically tailored to the electric generating industry. In Delaware, regulations define what can be marketed as a “Green Power Product” or otherwise environmentally beneficial. These claims are restricted to electricity that is generated by a greater percentage of alternative energy than is required by law. To substantiate that the electricity is actually derived from alternative energy sources, suppliers must submit RECs. Texas requires that print and Internet advertisements highlighting the environmental quality of an electricity product be accompanied by an “Electricity Facts Label.” This label must indicate the fraction of electricity in the product that is produced by various types of fuel sources – coal, natural gas, nuclear, renewables (biomass, hydro, solar, and wind), and others. It must also compare these fractions to state-wide averages. In addition, the label must also contain information regarding the carbon dioxide, nitrogen oxide, sulfur dioxide, particulate matter, and nuclear waste generated from each type of electricity. The Delaware and Texas statutes provide alternate routes for how the FTC could regulate advertising related to carbon offsets or other environmental issues. While the FTC has not stated that it is explicitly considering electric generation in Green Guide revisions, the FTC might choose to regulate carbon offsets using a similar labeling method. Labels might be required, for example, to disclose the particulars of the methods by which a project has reduced carbon emissions.

### Litigation

While private party arbitration rather than government enforcement has recently served as the principal dispute resolution mechanism for environmental marketing claims, revisions to the Green Guides and actions under other federal laws could usher a new era of litigation. Despite actively pursuing environmental marketing claims in the 1990s, the FTC has been dormant in this area in the 2000s. Contemporaneous with 1992 and 1998 releases of the Green Guides, the FTC brought 37 environmental marketing actions in the 1990s. There appear to have been no actions brought since then. While the FTC seems to have temporarily backed away from environmental marketing enforcement, it is clearly contemplating once again becoming active. Through the Green Guides revision

process, the FTC has shown where environmental marketing may be straying into areas of consumer deception. Once a new version of the Guides clarifies FTC's positions on various issues, it may choose to engage in enforcement actions to ensure compliance with the new Guides. Such a spurt of enforcement actions likely would mirror those seen in the 1990s.

Litigation under state law has been sporadic, but Green Guide revisions, and the multiplication of environmental marketing claims, also may jump start state enforcement. State attorneys general have periodically pursued environmental marketing claims under environmental or general consumer deception statutes. In other cases, private parties have sought state law remedies against competitors making allegedly false claims. Revision of the Guides will give states a new opportunity to examine misleading claims under state law. Given the current public concern with environmental issues, attorneys general could seize on enforcing the Green Guides through state law as a way of building public support.

In the absence of consistent state and federal enforcement, the National Advertising Division of the Council of Better Business Bureaus ("NAD") has served as an alternate forum that interprets and decides cases and similar principles as those espoused by the Green Guides and state environmental marketing laws. Cases are initiated either by the NAD itself, which monitors advertisements for compliance with federal laws, or by competitors alleging deficiencies in the advertising. At the end of an NAD investigation, the NAD may recommend the addition of an "Advertiser's Statement" to correct any deficiencies in an advertisement. Participation in the NAD process is voluntary, but companies that fail to participate or comply with NAD decisions may be referred to federal or state enforcement authorities. The NAD has decided cutting-edge advertising cases in areas that the FTC has not yet reached. For example, in 2008 it decided a case brought by Procter & Gamble against the producers of Arm & Hammer Essentials Liquid Laundry Detergent, holding that it was inappropriate for the company to refer to its product as "natural." In a 2007 case brought by Sony against Panasonic, the NAD ruled that it was inappropriate for Panasonic to market plasma televisions as "environmentally friendly" in comparison to LCDs. The NAD determined that, although plasmas do not use mercury or lead, their larger consumption of electricity made the claim of environmental friendliness questionable. NAD involvement means companies must be conscious of the principles of substantiation and clarity articulated in the Green Guides even in the absence of direct federal or state enforcement.

Aside from the upsurge in environmental marketing enforcement that likely will follow Green Guides revision, another window may open to more federal environmental marketing claims by private parties. The Lanham Act, which governs federal trademark law, also bans false or misleading representations in advertising of goods or services. The Act creates a cause of action for "any person who believes that he or she is likely to be damaged" by such misrepresentation. Although it has been applied to a variety of other types of claims, the Act has not yet been applied by a court to a claim in environmental advertising. The Lanham Act gives consumer and environmental groups a powerful tool in privately enforcing environmental marketing claims in the future. Its broad scope additionally creates the potential for

plaintiffs' lawyers to bring class action suits alleging broad-based harm from misleading environmental marketing.

### Strategic Considerations

Despite the potential pitfalls associated with green marketing, companies are using it to distinguish and promote their products. Green marketing seeks to capitalize on growing consumer preference for environmentally beneficial products. In targeting this market, however, it is essential that companies also protect their brands from being eroded by claims which the FTC, a state, or consumers ultimately may determine have been untruthful or exaggerated. As the Green Guide revisions bring environmental marketing techniques into even greater focus, both the federal government and environmental "watchdog" groups will continue to challenge the environmental marketing campaigns as mere "greenwashing."

The following considerations will maximize the upside of a green marketing strategy and protect the core assets of brand and reputation:

- ***Carefully evaluate the potential environmental benefits of products and operations.*** The first step in any environmental marketing campaign must be to identify and accurately describe environmental benefits of products, packaging, or manufacturing practices, ideally as part of an overall strategic plan for achieving and promoting specific environmental objectives.
- ***Seek certification from third parties.*** Many non-profit and for-profit organizations specialize in the certification of claimed environmental benefits. For example, the Greenhouse Gas Registry certifies carbon offsets, and Green Seal certifies a variety of products such as hand cleaners and floor-care products. Obtaining third-party certification of an environmental claim, based on widely applied standards, spares the company from establishing its own expertise and approach and reinforces the legitimacy of the claim. It should be noted, however, that the FTC has suggested that the certifications may not insulate an advertiser from liability under green marketing rules. Thus, even after obtaining certification, marketers should ensure that the certification criteria and process are in keeping with the Guides.
- ***Substantiate and document any environmental claims.*** It is important that companies obtain and keep the technical data they need to substantiate any environmental claim. This is especially true in states like California that have expressly adopted documentation requirements. Companies should be especially focused on substantiating claims related to carbon offsets, green packaging, green building, and green textiles, since these are the subject of FTC consideration. In evaluating a product, companies may need to consider its entire life cycle. Doing so can prevent embarrassing revelations regarding negative impacts from the manufacturing or disposal of a product that counteract positive claims regarding its use.
- ***Make precise environmental claims.*** The broader a claim of environmental benefit, the more difficult it is to substantiate. Marketers should strive to make environmental claims as specific as possible, balancing this goal with clarity

and consumer appeal. A claim of “carbon neutrality,” for example, may be difficult to substantiate, or, at the very least, be less compelling to consumers than a more specific statement clearly indicating what steps a company has taken to reduce or balance its carbon emissions.

- ***Ensure that representations concerning the environmental impacts and benefits of the company’s products and operating practices are consistent.***  
Green marketing campaigns often use the full spectrum of advertising media available to maximize the visibility of an environmentally beneficial product – including blogs, viral marketing, product placements, and sponsorships. Companies must keep in mind, however, that all of these forms of advertising are subject to the Green Guides and many state laws. Thus, claims through these media should also be checked for substantiation and clarity. Even implicit claims – such as picturing a product with natural symbols – can be interpreted as a claim of environmental benefit, triggering the Green Guides requirements. More generally, companies should carefully review all of their voluntary and financially required disclosure statements to ensure that all claims that they make about their products and practices are consistent.

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