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FTC Proposes Revised Green Guides

Following several years of stakeholder process and internal review, the FTC recently announced proposed revisions to its Guides for the Use of Environmental Marketing Claims, also known as the “Green Guides.” The release of these revisions concludes an almost three year undertaking by the FTC to update the Green Guides in order to address a wider range of marketing claims being made about the environmental attributes of consumer products. While the Green Guides remain agency guidance and are not independently enforceable, they indicate how the FTC will likely apply Section 5(a) of the FTC Act, which prohibits unfair or deceptive acts or practices, to environmental marketing claims. In the past several years, the FTC has noticeably increased the number of enforcement cases based on marketing claims that allegedly ran afoul of the Green Guides.

Companies involved in the manufacture or sale of consumer goods should review these proposed revisions closely and consider submitting public comments in advance of the December 10, 2010, deadline.

The FTC first issued the Green Guides in 1992, in response to an explosion of “green” marketing and advertising claims. After revising the Green Guides in 1996 and 1998, the FTC scheduled another round of revisions for 2008. However, in response to the proliferation of claims being made by companies wishing to tout the “environmental friendliness” of their products, the FTC commenced that revision process a year earlier in 2007. These proposed changes would: revise and update current sections in the Green Guides; add several sections addressing new types of claims; and change the format of the Green Guides to make them more user-friendly. These revisions are discussed in more detail below.

Updates to the Current Green Guides

The revised Green Guides caution marketers not to make blanket, general claims that a product is “environmentally friendly” or “eco-friendly.” This admonition stems from a consumer perception study commissioned by the FTC, which confirmed that consumers view such claims as suggesting that the product has specific and far-reaching environmental benefits. The FTC contends that very few, if any, products have all the attributes consumers seem to perceive from “environmentally friendly” or “eco-friendly” claims, making these claims nearly impossible to substantiate. In the current Green Guides, general claims are permitted as long as all express and implied claims can be substantiated.

Certifications and seals of approval have received increased attention in the revised Green Guides. While the current Green Guides only address certifications and seals of approval in an example, the proposed Green Guides have a separate section addressing such claims. The proposed Green Guides emphasize that certifications and seals of approval are covered by FTC’s Endorsement Guides, newly revised in December 2009, and provide new examples illustrating how the Endorsement Guides apply to environmental claims. The FTC cautions marketers to not use unqualified certifications or seals of approval. The revised Green Guides emphasize that marketers must disclose material connections to the certifier and unqualified

certifications or seals of approval, and should use clear and prominent language to limit the claim to particular attributes for which they have substantiation.

The revised Green Guides also offer guidance on how the FTC anticipates consumers are likely to understand certain environmental claims such as “degradable,” “compostable,” “ozone-safe,” or “free of” a particular substance. Phrases used in defining claims in the current Green Guides, such as “reasonably short period of time,” have been further defined to avoid confusion.

Significantly, a three-tiered analysis was created for disclosing the availability of recycling programs. If a “substantial majority” of consumers/communities have access to recycling facilities, marketers can make unqualified recyclable claims. If a “significant percentage” of consumers/communities have access to recycling facilities, marketers must make a qualified recyclable claim to indicate that recycling may not be available in the area. If there is less than a “significant percentage,” marketers must qualify the claims to indicate the product is recyclable only in the few communities that have recycling programs.

New Additions in the Revised Green Guides

The proposed revisions to the Green Guides would also address three types of claims not currently covered in the Green Guides. The FTC’s consumer perception research suggests consumers could be misled by “renewable materials” and “renewable energy” claims because consumers may interpret them differently than marketers intend. Accordingly, the revised Green Guides advise marketers to provide specific information about the materials and energy used. The revised Green Guides further advise that marketers may not make unqualified renewable energy claims if the power used to manufacture any part of the product was derived from fossil fuels. The FTC has also added guidance on “carbon offset” claims to the revised Green Guides. Carbon offsets arise from projects that reduce greenhouse gas emissions in one place in order to counterbalance or “offset” emissions that occur elsewhere. The revised Green Guides counsel marketers to disclose if the emission reductions that are being offset by a consumer’s purchase will not occur within two years. They also advise marketers to avoid advertising an offset if the activity that produces the offset is already required by law (an issue referred to as “additionality”).

Format Changes to the Green Guides

The revised Green Guides contain several non-substantive changes as well. The FTC has reorganized and renumbered the regulations that comprise the Green Guides, dividing environmental claims into separate sections to make information easier to find. Additionally, in an effort to avoid redundancies, several sections containing information found elsewhere has been deleted. Finally, the FTC has simplified the language in the revised Green Guides to make it clearer and easier for everyone to understand.

Comment Period and Finalization of the Revised Green Guides

Notice of the revised Green Guides has been published in the *Federal Register* and public comments are due by December 10, 2010. Interested parties may submit written comments electronically or in paper form to the FTC in response to one of the eighteen questions proposed by the FTC in the Notice or with regard to any other matters regarding the revised Green Guides. Once the comment period concludes, the FTC will review the comments and then vote on finalizing the revised Green Guides, although the timeline for finalizing the Green Guides has not been set.

- For the revised Green Guides, go to: www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf.
- For the FTC’s summary of the proposed Guides, go to: www.ftc.gov/os/2010/10/101006greenguidesproposal.pdf.

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