

FTC Releases Proposed “Green Guides” Revisions

October 7, 2010

After almost three years of review and analysis, the Federal Trade Commission (FTC) on October 6 released proposed revisions to its Guides for the Use of Environmental Marketing Claims, generally termed the “Green Guides” (the Guides), which were initially introduced in 1992 and last revised in 1998. The revisions delineate how the FTC intends to apply its existing powers prohibiting deceptive and unfair business practices to the latest environmental marketing practices. While it proposed numerous changes to the Guides, the FTC avoided defining or qualifying the use of some more contentious terms, including “natural,” “organic,” “sustainable,” and “life cycle analysis” (LCA). The FTC did, however, propose significant revisions and qualifications to other important terms, including “recyclable,” “degradable,” and “compostable,” as well as providing guidance regarding general “green” claims and the use of environmental certifications and seals. In addition, the FTC for the first time provided limited guidance regarding claims about renewable materials and energy, as well as carbon offsets. Comments on the proposed Guides can be made until December 10, 2010.

Following is a summary of the most outstanding changes contained in the revised Guides:

General environmental benefit claims. The Guides now expressly state that marketers should not make unqualified general environmental benefit claims. The wording of the Guides also has been strengthened to caution that products bearing such unqualified claims may be perceived by consumers not just as possibly conveying specific and far-reaching environmental benefits, but as being likely to do so, and that such claims may also imply that a product has no negative environmental impact. These changes are based on consumer perception research conducted on behalf of the FTC in which a very high percentage of consumers surveyed interpreted terms such as “green,” “environmentally friendly,” or “eco-friendly” to convey one or more specific attributes (e.g., made with recycled or renewable materials, made with renewable energy, recyclable, biodegradable, nontoxic, or compostable) and to suggest there was no negative environmental impact made by products bearing these claims. As a result, the FTC views general environmental benefit claims as almost impossible to substantiate.

The Guides include examples of qualifications to general claims in order to prevent deception. As with disclaimers in other contexts, the FTC expects qualifications to be clear and prominent, as well as adequately substantiated. The Guides also note that the context must not otherwise imply other deceptive claims. Illustrating that it may be difficult to effectively qualify a general environmental claim, the Guides specify that qualifying a product as “environmentally friendly” because its wrapper is “not bleached with chlorine” likely implies that no significant harmful substances are released into the environment during production and would be deceptive if the production process in fact releases harmful substances. As a result, marketers are likely to continue to find the process of crafting general

environmental product claims to be challenging. The FTC also declined to endorse use of an LCA to substantiate broad environmental claims or to recommend any particular standards for LCA substantiation purposes.

Environmental certifications and seals of approval. In a completely new section, the Guides similarly state that unqualified environmental certifications and seals of approval should not be used because they likely convey general environmental benefit claims. In this context, the qualifying language may be included as part of the certification or seal itself, but in any event should be clear and prominent and should clearly convey the specific and limited benefits to which the certification/seal denotes. With respect to third-party certifications and seals, the proposed revised Guides expressly state that these constitute endorsements that require compliance with the FTC’s Guides Concerning the Use of Testimonials and Endorsements in Advertising.¹ This means that a marketer using a certification must clearly and prominently disclose any material connections likely unexpected by consumers between itself and the certifying organization.

The Guides provide examples of material connections that should be disclosed, such as if the marketer is a dues-paying member of the relevant organization or if the certifying organization is an industry trade association (whether or not the marketer is a member). In addition, the FTC states that third-party certification does not eliminate a marketer’s obligation to ensure that it has substantiation for all claims reasonably communicated by the certification. Claims should be limited to the specific product attributes for which there is substantiation, and care should be taken to avoid implications that an organization has conducted a product evaluation if it has not. It is not surprising that the FTC focuses on certifications, as certifications have increased and have become a hot topic of enforcement action and litigation, including class actions.

“Recyclable,” “degradable,” or “compostable” claims. The Guides also propose significant revisions and qualifications to the use of the terms “recyclable,” “degradable,” and “compostable.” The changes are based both on the results of the FTC’s consumer research and on data regarding the recycling and disposal methods currently in use. The proposed Guides state that unqualified “degradable” claims—including any variations such as oxo-degradable and photo-degradable—are deceptive if the items do not completely decompose within one year after customary disposal. Further, such claims are always deceptive in the case of items that are customarily disposed of in landfills, incinerators, and recycling facilities because these locations do not present conditions in which complete decomposition will occur within one year. The one-year period was based on the FTC’s interpretation of its consumer perception study.

Similarly, new guidance on “compostable” claims requires substantiation that all the materials in the item will break down into or otherwise become part of usable compost, and that all will break down in a timely manner, although no specific time limit is given. Under the proposals, unqualified “recyclable” claims can be made only if (i) the entire product or package (excluding minor components) is recyclable and (ii) recycling facilities are available to a “substantial majority” of consumers or communities where the item is sold (the FTC staff informally has interpreted “substantial majority” in this context to mean at least 60%). The Guides give examples of how to qualify claims not meeting these standards by specifying the particular components that are recyclable and/or explaining limitations on the availability of recycling facilities.

¹ For more information, see our October 13, 2009 Morgan Lewis LawFlash, “FTC Releases Guidelines Detailing Advertiser and Blogger Responsibilities in Social Media,” available at http://www.morganlewis.com/pubs/IP_SocialMediaGuidelines_LF_13oct09.pdf.

The Guides also maintain prior guidance that explain that the use of a three-chasing-arrows symbol (a Mobius Loop), as well as conspicuous use of the Society of the Plastics Industry’s SPI Code, likely conveys both a “recyclable” and “recycled content” claim, and should be qualified unless the marketer has substantiation for these messages. This category of claims also has been the focus of substantial enforcement activity, including cases relating to disposable cups and dishes, as well as plastic bags and bottles.

Renewable energy, renewable materials, and carbon offset claims. For the first time, the Guides propose to address renewable energy, renewable materials, and carbon offsets. Although many comments submitted to the FTC urged a comprehensive approach to these claims, given the complexities involved, the FTC’s initial foray in each case is limited to setting out a few key principles. The principles primarily are aimed at encouraging claims to be qualified, based in large part on information that the meaning of these claims is unclear to consumers. The Guides state that “made with renewable energy” claims should not be asserted unless virtually all of the significant manufacturing processes are powered with renewable energy or conventional energy offset by renewable energy certificates, and, in any event, should not be made if any fossil fuel–derived power is used.

Regarding carbon offsets, the Guides note they are complex and state that competent and reliable scientific methods should be used to properly quantify claimed emission reductions and to ensure the same reduction is not sold more than once. There must be clear and prominent disclosure if the carbon offset represents emission reductions that will not occur for two years or longer. In addition, carbon offsets should not be based on emission reductions that are required by law. Based on its consumer research, the FTC also concluded that unqualified “made with renewable materials” claims are likely to be interpreted to mean such products are made with recycled content or are recyclable and biodegradable, and, accordingly, need to be fully substantiated or, more likely, prominently qualified.

“Organic,” “natural,” “nontoxic,” and “free of” claims. The FTC declined to address the terms “organic” and “natural,” but did address “nontoxic” and “free of” claims. Regarding “organic,” the FTC deferred to the expertise of the U.S. Department of Agriculture’s National Organic Program, which has issued standards for agricultural products and a recent fact sheet for finished textile products. Regarding “natural,” the FTC concluded that it did not have sufficient consumer perception data to provide general guidance and that the term may be too dependent on context, also referencing USDA and FDA informal treatment of the term. In contrast, the FTC concluded that it has sufficient evidence to state that “nontoxic” claims likely convey general environmental claims and require competent and reliable scientific evidence and qualification. Regarding “free of” claims, the Guides state that they may be deceptive if another substance is present that poses a similar environmental risk or if the relevant substance has never been associated with the product category.

Designed to help advertisers and others to maintain compliance with the FTC Act, the Guides are not binding law, but they do provide insight on the FTC’s current thinking as to compliance with the FTC Act. The Guides focus on environmental claims generally; other FTC guides may also be relevant for particular industries, including fuel and automotive, light bulbs and appliances, and home insulation. The FTC received approximately 200 comments in response to its initial request for comments regarding potential changes to the existing Guides, and conducted workshops to gather comments in key areas. In addition, as previously indicated, the FTC conducted its own consumer perception study to assist in its analysis and heavily relied on the results to support its proposals. Although consumer surveys are regularly used in false advertising litigation under the U.S. Lanham Act, as well as in contentious administrative proceedings at the National Advertising Division of the Council for Better Business Bureaus, it is uncommon for the FTC to conduct its own studies, and, up to this point, those submitting

comments have not had a chance to take into account the results of the FTC's study or the conclusions drawn from it. In this final round, consumer perception evidence can be expected to be of continued interest to the FTC and those providing further comments on the proposals.

If you would like more information on any of the issues discussed in this LawFlash, or if you would like assistance submitting comments on this proposal by the deadline of December 10, 2010, please contact the LawFlash's authors, **Stephen Paul Mahinka** (202.739.5205; smahinka@morganlewis.com) or **Karen A. Butcher** (202.739.5526; kbutcher@morganlewis.com), or any of the following Morgan Lewis attorneys:

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