



Environmental Update

December 2022

FTC Gearing Up for Potential Crackdown on False Environmental Benefit Claims

For the first time in 10 years, the Federal Trade Commission (FTC) will be updating its Guides for the Use of Environmental Marketing Claims ("Green Guides"). On December 20, it published a [notice requesting public comment on revisions to the Green Guides](#) (Notice), which seeks feedback on general issues relating to the Green Guides' efficacy in decreasing the prevalence of false environmental benefit claims and the associated burdens compliance places on small businesses. The Notice also seeks comment on specific environmental benefit claims like carbon offsets, degradability, recyclability, and sustainability. Since the Green Guides were last updated in 2012, there has been a sea change in consumer perceptions regarding climate change and the environment. Revisions to the Green Guides are desperately needed to keep pace with current science, consumer expectations, and marketing campaigns. The public comment period is now open and will close on February 21, 2023.

The Green Guides, first published in 1992, are administrative interpretations of the application of Section 5 of the FTC Act, 15 U.S.C. 45(a) ("Section 5") and are intended to help companies and marketers understand how consumers may interpret environmental benefit claims. For each specific claim covered, the Green Guides explain how a reasonable consumer may interpret the claim, provide the basic elements necessary to substantiate the claim, and present alternative qualifications that are non-deceptive. The Green Guides do not carry the force of law but are regarded as authoritative on the question of whether an environmental marketing claim is deceptive. They are often cited by private plaintiffs in both state and federal cases. Although the Green Guides are not self-enforcing, the FTC

can initiate enforcement proceedings against violators by proving that the challenged marketing is unfair or deceptive in violation of Section 5. Violators are liable to face potential multimillion-dollar civil monetary penalties. Since 2012, the FTC has initiated over 40 enforcement proceedings against private companies for deceptive environmental marketing claims.

Modernizing the Green Guides

The FTC is chiefly concerned with ensuring that the Green Guides reflect the current consumer marketplace and consumer perceptions. To achieve this goal, it is seeking comment on 19 general issues related to "efficacy, costs and benefits" and feedback on whether to "retain, modify or rescind" the Green Guides. For example, the FTC would like to know whether they are beneficial to businesses, the degree of industry-wide compliance, whether modifications are needed to address technology or economic circumstances, and whether they conflict or overlap with other federal, state, or local laws. Commenters are asked to provide evidence supporting their requests for proposed modifications.

The FTC also seeks comment on whether it should initiate a rulemaking under both the FTC Act and Administrative Procedure Act to transform the Green Guides into law. If the rulemaking were to succeed, the FTC would be required to provide violators of Section 5 with an informal administrative hearing before issuing a penalty. A rulemaking would also mean that the FTC could recoup civil penalties for violations by referring cases to the Department of Justice for prosecution in federal district court.

The FTC seeks comment on 12 specific claims ranging from recyclability to energy use/energy efficiency. In 2012, it declined to provide marketers with guidance on how consumers interpret sustainable and organic claims. In the Notice, the FTC seeks comment on whether it should revisit this decision. The proposed revisions also attempt to tackle another hot-button claim – carbon offsets and climate change. The current Green Guides solely address claims related to carbon offsets. In the coming proposed revisions, however, the FTC seems apt to expand its guidance to include derivative claims such as “net zero,” “carbon neutral,” “low carbon,” or “carbon negative.” The FTC is also ready to revisit its guidance related to unqualified recyclability claims. The current guidance allows marketers to make an unqualified claim if a “substantial majority” (defined as at least 60%) of the consumers of a particular product have access to a recycling facility.

What Lies Ahead

So far, at least Rhode Island, Maine, and California have incorporated the Green Guides into their state laws. The FTC will likely ensure that its proposed revisions do not conflict with other federal, state, and local regulations. It could also consider how compliance with revised Green Guides may place an increased regulatory burden on the small business community. The Biden administration may also consider how the Green Guides dovetail with its other policy goals, as revised Green Guides might provide an opportunity to examine how deceptive environmental benefit claims impact the consumer choices of marginalized and underprivileged communities who are at the center of its environmental justice agenda.

The public comment period provides an important opportunity for stakeholders to participate and highlight how public perceptions have shifted around environmental issues of pressing concern. The Green Guides will continue to provide the most authoritative framework for both the FTC and private plaintiffs to challenge deceptive false environmental benefit claims for the foreseeable future. For these reasons, we urge stakeholders to share appropriate guidance, research, and evidence on what should constitute a permissible environmental benefit claim before the February 21, 2023 deadline.

FOR MORE INFORMATION

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