



FTC Issues First Proposed Revision to Green Guides Since 1998

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Use of environmental claims in promotions and advertising has greatly expanded in recent years. Inaccurate or unsupported claims can result in an action by the Federal Trade Commission (“FTC”), an objection before the National Advertising Division of the Better Business Bureau or the filing of a federal lawsuit for false advertising under the Lanham Act by a competitor. Such lawsuits have become more common as environmental claims play a greater role in consumer perception of products.¹

To address the expanding role of environmental claims, the FTC has proposed revisions to its Guides for the Use of Environmental Marketing Claims,² referred to as the “Green Guides,” for the first time since 1998 (the “Proposed Revisions”). The Proposed Revisions are available on the FTC web site: <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf>. Comments on the Proposed Revisions will be accepted through December 10, 2010. Below is a brief summary of the main proposals by the FTC.

- Background of the Proposed Revisions

The Background section of the Proposed Revisions provides helpful guidance on how the FTC interprets environmental claims. For example, to substantiate environmental marketing claims,

¹ The FTC Act does not provide a private right of action. False advertising claims by competitors are analyzed under Section 43(a)(1)(B) of the Lanham Act. Generally, to prove a false advertising claim the plaintiff must show a defendant (1) made a false or misleading statement, (2) that actually deceives or is likely to deceive a substantial segment of the advertisement's audience, (3) on a subject material to the decision to purchase the goods, (4) regarding goods entering interstate commerce, (5) and that results in actual or probable injury to the plaintiff. See *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 971 (7th Cir. 1999). Substantiation for an advertising claim that is “not sufficiently reliable to conclude with reasonable certainty that [it] established the claim made” is actionable. See, e.g., *McNeil P.C.C., Inc. v. Bristol Myers Squibb Co.*, 938 F.2d 1544 (2d Cir. 1991).

² 16 C.F.R. 260 et seq.



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marketers need “competent and reliable scientific evidence.” 16 C.F.R. 260.5. Such evidence “should be sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that [a] representation is true.” Proposed Revisions, p. 7.

- General Issues

The revisions also address some general issues, including industry compliance with the Guides and consistency with international standards. Of particular interest is the FTC’s discussion of life cycle analysis (“LCA”), i.e., “the assessment of a product’s environmental impact through all the stages of its ‘life.’” The FTC decided not to propose any guidance in the Proposed Revisions regarding marketing claims arising from LCA or use of LCA to substantiate other claims. Nevertheless, marketers likely can anticipate greater scrutiny of LCA-based claims going forward.

Additionally, the FTC makes clear that the Green Guides do apply to business-to-business claims. *Id.*, p. 24.

- General Environmental Benefit Claims

The Proposed Revisions suggest a change in policy regarding general environmental benefit claims, (e.g., “environmentally friendly” or “green”). Specifically, the Proposed Revisions would advise “marketers not to make unqualified general environmental benefit claims”, but it does not prohibit them. Proposed Revisions, p. 44. The FTC’s consumer perception study supporting this advice is telling: “61 percent of respondents viewing an unqualified “green” claim believed the product is made from recycled materials... 27 percent of respondents interpreted the unqualified claims ‘green’ and ‘eco-friendly’ as suggesting the product has no negative environmental impact.” *Id.*, p. 45.

If unqualified general environmental claims are made, the FTC proposes that marketers:

“use clear and prominent qualifying language to convey to consumers that a general environmental claim refers only to a specific and limited environmental benefit.”;

“substantiate additional claims conveyed by the qualification itself.”; and

assess a claim in the context of the overall advertisement to avoid deception.

- Certifications and Seals of Approval

The FTC proposes a new section devoted to the use of certification programs and seals of approval as environmental claims. For example, a third-party seal of approval would be an endorsement covered by the Endorsement Guides. See 16 C.F.R. 255. The Proposed Revisions also add a number of specific examples to address common marketing issues surrounding certificates and seals of approval. These examples address disclosure of the relationship between the marketer and the entity granting the certificate or seal and qualifying environmental claims conveyed through a certificate or seal.

Furthermore, like unqualified general environmental claims, the FTC advises that marketers “should not use unqualified certifications or seals of approval.” Proposed Revisions, p. 63.

Qualifying language for certificates and seals “should be clear and prominent and should convey that the seal of approval or certification applies only to a specific and limited benefit.” *Id.*

Additionally, the FTC counsels that third-party certification may constitute adequate substantiation of an environmental claim, provided that “marketer ensures that the certification constitutes competent and reliable scientific evidence to support its claims.” *Id.*, p. 64.

- Use of Specific Terms in Environmental Marketing

The Proposed Revisions suggest changes to the FTC’s analysis of specific terms commonly used in environmental marketing claims, including “degradable,” “compostable,” “recyclable,” “recycled content,” “ozone-friendly,” and “free-of” or “non-toxic.” While these changes generally are not substantial, a few highlights are below.

Degradable claims will be deemed deceptive if the products and packages subject to the claims are destined for landfills, incinerators or recycling facilities. *Id.*, p. 70. Furthermore, to substantiate a claim of degradability of solid waste a “technical protocol (or combination of protocols) must assure complete decomposition within one year and must replicate the physical conditions found in the relevant disposal environment.” *Id.*, pp. 71-72.

The Proposed Revisions would maintain the substantial majority threshold for making unqualified recyclable claims. That is, a marketer must “qualify recyclable claims when recycling facilities are not available to a ‘substantial majority’ of consumers or communities where a product is sold.” *Id.* at 81. The FTC seeks comment on quantifying the meaning of “substantial majority.”

The FTC proposes adding a new section to address “free-of” and “non-toxic” claims. Specific proposed guidance includes that a “free-of” claim may be appropriate even when a product contains “de minimis amount of a substance that would be inconsequential to consumers.” *Id.*, p. 114. The determination of what constitutes a de minimis amount would be made on a case-by-case basis. Additionally, the FTC notes two situations in which a “free-of” claim may be deceptive: 1) “if a marketer claims that its product is free of a particular substance but does not disclose that the product contains another substance that may cause environmental harm, particularly if it is the same type of harm caused by the absent substance.”; and 2) “if the substance has never been associated with that product category.” *Id.*, p. 115.

- New Environmental Claims Not Previously Addressed by the Green Guides

The Proposed Revisions addressed potential changes to the Green Guides regarding the proliferation of claims about: (1) sustainability; (2) organic/natural materials; (3) made with renewable materials; (4) made with renewable energy; and (5) carbon offsets.

The FTC declined to issue guidance regarding claims of sustainability and organic/natural. Sustainability claims, according to the FTC’s research, do not appear to convey a specific environmental message to consumers. *Id.*, p. 127. The term “organic” already is regulated in the context of agricultural products by the USDA’s National Organic Program. Likewise, the term “natural” is governed by varying standards in different contexts by the Textile Products Identification Act, the USDA and the FDA. The FTC received no consumer perception studies for “organic” or “natural” in unregulated contexts and, therefore, declined to offer guidance in the Proposed Revisions.

The FTC proposed new guidance that marketers “qualify a ‘made with renewable materials’ claim with specific information about the material.” *Id.*, p. 148. Claims for products containing less than 100 percent renewable materials, excluding minor, incidental components, also should be qualified.

The Proposed Revisions also suggest new guidance regarding “renewable energy” claims. Specifically, the FTC notes that there appears to be a consensus that fossil fuels are not renewable energy. *Id.*, p. 160. Thus, “the Commission proposes advising marketers not to make an unqualified ‘made with renewable energy’ claim if an item was manufactured with energy produced using fossil fuels.” *Id.* Marketers should disclose the type or source of the renewable energy. An unqualified renewable energy claim should not be made unless “all, or virtually all, of the significant manufacturing processes used to make the product are powered by renewable energy or powered by conventionally produced energy that is offset by [renewable energy certificates.]”

Finally, the FTC proposed some guidance regarding carbon offset claims. Specifically, marketers must disclose if an offset purchase will fund an emissions reduction that will not occur for two years or longer. *Id.*, p. 184. Also, selling carbon offsets where a marketer is subject to a mandatory reduction would be deceptive. *Id.*, p. 185.

The Proposed Revisions are still subject to comment, but marketers should be aware of these proposed changes and their impact on environmental marketing claims. When in doubt, consult an attorney familiar with the Green Guides and the standards of the Lanham Act.

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