

GOING GREEN  
WITHOUT GIVING UP  
YOUR GREENBACKS

By Christie L. Grymes  
and  
Christopher M. Loeffler\*

YOUR MARKETING DOLLARS HAVE TO WORK MORE  
EFFICIENTLY THAN EVER

It's no surprise that in our current economic condition consumer spending is down. Your company budget, and especially your marketing dollars, have to work more efficiently than ever before. While consumers may be watching their purse strings, "green" products are prevalent, and green marketing claims can be an effective way to break out of the clutter. Marketers must ensure, however, that those claims do not overstate the "green" benefits or they could face regulatory investigations or challenges from competitors, which cause further budgetary strain.

FEDERAL TRADE COMMISSION STANDARDS - THE GREEN  
GUIDES

The Federal Trade Commission has established national standards for green marketing claims in the Guides for the Use of Environmental Marketing Claims, commonly called the Green Guides, located at 16 C.F.R. Part 260. Although the Green Guides are not laws or administrative rules, they provide instruction on how the FTC views environmental marketing claims and how it will interpret its authority to regulate unfair or deceptive acts or practices under Section 5 of the FTC Act when examining environmental marketing claims. The Green Guides currently identify four general principles that apply to all environmental marketing claims:

1. If qualifications or disclosures are required in order to avoid misleading consumers, the statements must be clear, prominent, and understandable. The Commission will examine elements including (a) whether clear language has been used, (b) the type size is used for

---

\* Christie Grymes is a partner in the Advertising and Marketing practice at the law firm Kelley Drye & Warren LLP, and Chris Loeffler is an associate in the firm's Advertising and Marketing group. They help clients communicate their products' environmental and health benefits while staying within the legal boundaries that govern such green-marketing claims. The firm regularly works with business-to-business and business-to-consumer entities, including national advertisers, direct marketers, consumer product retailers, distributors, and manufacturers with interests in legal issues and trends in environmental marketing and advertising law. For more information, visit [www.kelleydrye.com](http://www.kelleydrye.com), or contact Christie and Chris directly at [cgrymes@kelleydrye.com](mailto:cgrymes@kelleydrye.com) and [cloeffler@kelleydrye.com](mailto:cloeffler@kelleydrye.com).

Volume XXIX  
Issue 24  
December 21, 2009  
Page 5

the qualification or disclosure and how it compares to the type size used for the marketing claim, (c) how close the qualification or disclosure is to the marketing claim, and (d) whether there are any Contrary claims. For example, if your company's advertising headlines refer to your company as "green," any qualifying language necessary to describe your company's approach to reducing its environmental impact should not be placed at the bottom of the ad in a small type size identified by an asterisk.

2. Identify Whether Claims Apply to the Product, Packaging, or Your Company's Practices. The consumer should be able to easily determine whether any environmental marketing claim you make applies to your product or service, the packaging for your product, or your practices. For example, if your company sells an electronics device and the packaging containing the device is labeled "recycled," a consumer may understand the claim to mean that the device and the packaging are made from recycled material. If the device is not made from recycled material, to avoid potential deception, you should clarify that the packaging is from recycled material.

3. Do Not Overstate the Environmental Attribute or Benefit. For example, your product is labeled "packaging made from 50% more recycled material than before," but the increase is from 2% to 3%. While this claim is technically true, it is likely to mislead a consumer into thinking that there has been a significant increase in the amount of recycled packaging.

4. Ensure that the Basis for Any Comparative Green Claims is Clear. Any comparative claims should clearly identify the basis of the comparison, such as a comparison to a specific competitor's product, or a comparison to your company's product from the previous year. You should avoid using a general comparative claim such as "30% more recycled material."

In addition to the general principles which are applicable to all environmental marketing claims, the Green Guides provide specific instruction for certain types of green claims. These include general environmental benefit claims, degradable/biodegradable/photodegradable, compostable, recyclable, recycled content, and ozone safe and ozone friendly. An important consideration to keep in mind is that every environmental marketing claim about an objective quality, feature, or

Volume XXIX  
Issue 24  
December 21, 2009  
Page 6

attribute of a product or service, whether it is expressly stated or implied by the advertisement, must be substantiated. If there is not adequate substantiation for the claim, the FTC or a state Attorney General may assert that the claim is deceptive. Key takeaway points for the specific green claims identified in the Green Guides include:

1. General Environmental Claims. Claims such as "Eco-Safe," "Environmentally Friendly," "Environmentally Safe," "Practically Non-Toxic," "Earth Smart," and "Environmentally Preferable" are broad environmental marketing claims that can be difficult or impossible to substantiate. Consider making a more detailed and defined environmental claim through the use of qualifications and disclosures to satisfy the substantiation requirement.

2. Degradable/Biodegradable/Photodegradable. These claims should be supported by competent and reliable scientific evidence. Further, complete degradation should occur within a reasonably short period of time after the product or package is disposed. This type of claim may require qualifying language regarding the product or package's ability to degrade in the environment where it is customarily disposed and the rate or extent of degradation.

3. Compostable. This claim may require qualifying language identifying whether the product or packaging can be safely composted in a consumer's home compost pile or composter, or whether the claim is applicable when the product or packaging is thrown away in a landfill.

4. Recyclable. To make a "recyclable" claim, the product or package must be able to be collect, separated, or recovered from the regular solid waste stream and reused, or used again in the manufacture or assembly of another package or product. This must be achievable through an established recycling program. This claim may require qualifying language if the product or package is made of recyclable and non-recyclable components or if there is limited availability of recycling programs and collection sites for the type of material used in the product or package.

5. Recycled Content. A recycled content claim is only permitted if the materials have been recovered or diverted from the regular solid waste stream during the manufacturing process ("pre-consumer"

Volume XXIX  
Issue 24  
December 21, 2009  
Page 7

recycled content), or after a consumer has used the product or packaging ("post-consumer" recycled content). Further, for any recycled content claims based on pre-consumer materials, the claim may only be made if you have support for determining that the material would otherwise have entered the solid waste stream. A recycled content claim may need to be qualified if a product or package is only partially made of recycled material. Consider identifying the amount of recycled content used in the final product or packaging.

6. Ozone Safe and Ozone Friendly. Ensure that any product, for which an ozone safe or ozone friendly claim is made, does not contain any ozone-depleting substance. Consider the lists of ozone-depleting substances provided by the Environmental Protection Agency and others before making any such claim. This type of claim may require qualifying language to describe how the product is safe or friendly to the ozone or atmosphere.

#### POTENTIAL UPDATES TO THE GREEN GUIDES

The Green Guides were first published in 1992 and later revised in 1998, but the Commission is currently reviewing them in light of the increased marketing of environmental products and packaging and the use of new types of environmental marketing claims that are not specifically covered by the current guides. The Commission has noted that "green" advertising claims such as "renewable," "carbon neutral," "carbon footprint," "sustainable," and "bio-based" have become more prevalent in recent years.

In support of this review process, the Commission has held three workshops addressing various aspects of current environmental marketing claims including:

- Carbon Offsets and Renewable Energy Certificates (RECs). Carbon offsets allow a company to fund greenhouse gas emission reduction programs to offset emissions occurring in other locations, while RECs are a method for energy providers to sell renewable energy (wind, solar, etc.) at the same rate as non-renewable energy while selling the environmental attributes of the renewable energy separately through a certificate. The FTC has noted the challenges for consumers to verify that their purchases actually fund the programs as marketed.

Volume XXIX  
Issue 24  
December 21, 2009  
Page 8

- Green Packaging. Industry representatives provided valuable viewpoints on trends in consumer packaging and how to make the Green Guides more relevant to the current marketplace. The Commission has not provided any insight on how it will address new types of green packaging if the Green Guides are revised.
- Green Textile and Green Building Claims. This workshop focused on claims about organic cotton and bamboo, and how consumers perceive these types of green textile claims. Additionally, the concept of third party certification of green building claims was discussed.

### RECENT ENFORCEMENT OF THE GREEN GUIDES

While the FTC is busy reviewing the Green Guides and considering whether it will revise them to address today's marketplace, there is no time for businesses to rest on their laurels. The Commission is still actively enforcing the concepts covered by the Green Guides via Section 5 of the FTC Act. For example, the Commission recently settled claims with Kmart Corp., Tender Corp. and Dyna-E International related to alleged false or deceptive claims that their products were biodegradable. The Commission alleged that because the products are customarily disposed of in landfills, incinerators, or recycling facilities, it is impossible for the products to biodegrade within a reasonably short period of time because of a lack of oxygen and sunlight. Each of the companies reached a settlement with the Commission, agreeing not to make deceptive "degradable" product claims and agreeing to have competent and reliable evidence to support environmental product claims. The settlement with Tender also requires it to disclose whether any biodegradable claim applies to the product, the packaging, or a component of either.

### WHAT YOU CAN DO

The FTC has not established a timeline for its review of the Green Guides or whether it will hold additional workshops, but based on the emphasis placed on this type of marketing activity, marketers should pay close attention to the developments as the Commission considers making revisions to its existing environmental marketing policies. Marketers should ensure that their environmental marketing claims are clearly presented to consumers, tailored to the specific attribute that the business is touting, and supported by adequate substantiation.

Volume XXIX  
Issue 24  
December 21, 2009  
Page 9

LAWYER'S REFERENCE SERVICE

Guides for the Use of Environmental Marketing Claims, commonly called the Green Guides, 16 C.F.R. Part 260.

# # #

Volume XXIX  
Issue 24  
December 21, 2009  
Page 10