



# Green Marketing in the US

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This Note discusses key regulatory requirements and sets out practical tips for companies to consider when engaging in green marketing in the US.

Marketing a product or service as environmentally friendly (or “green”) can be an effective way to stand out in the market. However, marketers that overstate or misstate the green benefits of the advertised product or service, whether expressly or by implication, risk facing scrutiny from regulators and challenges from competitors.

This Note examines:

- How green marketing claims are regulated in the US.
- Key provisions of the Federal Trade Commission’s (FTC’s) Guides for the Use of Environmental Marketing Claims (Green Guides) (*16 C.F.R. pt. 260*).
- The FTC’s proposed updates to the Green Guides.
- Enforcement of applicable law by the FTC and other agencies, including examples of recent actions taken by the FTC.

## REGULATORY FRAMEWORK

Green marketing claims are subject to regulation through a combination of federal and state advertising and consumer protection laws.

### FEDERAL TRADE COMMISSION

The FTC is the primary federal agency responsible for:

- Regulating marketing and advertising claims.
- Ensuring that advertising claims comply with the Federal Trade Commission Act (FTC Act).

For more information on the FTC Act and the FTC’s authority to regulate marketing and advertising activities, see *Practice Note, Advertising: Overview: Regulatory Framework: The Federal Trade Commission Act* (<http://us.practicallaw.com/2-501-2799>).

The FTC has established national standards for green marketing claims in the Green Guides, which were published in 1992 and last revised in 1998. Although the Green Guides are not laws or administrative rules, they provide instruction on how the FTC:

- Evaluates green marketing claims.
- Interprets its authority to regulate unfair or deceptive acts or practices under Section 5 of the FTC Act when examining green marketing claims.

The FTC released proposed revisions to the Green Guides in October 2010 (see *Updates to the Green Guides*). However, until the FTC gives final approval of these proposals, it will continue to police the marketplace based on existing guidance.

### OTHER FEDERAL AGENCIES

Other federal agencies may also regulate certain green marketing claims for products or services that these agencies have the authority to regulate. For example, the Food and Drug Administration (FDA) and US Department of Agriculture (USDA) apply additional regulation and oversight to the extent that certain food products are claimed to be “natural” or “organic” (*21 C.F.R. § 101.22(a)(3)* (defining natural flavor), USDA Policy Memo 055 (addressing natural claims), and *7 C.F.R. pt. 205* (USDA National Organic Program)).

### STATE LAW

Although the states generally have not enacted laws specifically regulating green marketing claims, each state can do so, if making these claims could be considered an unfair or deceptive act or practice in violation of that state's consumer protection laws. For example, legislators in California are considering bills addressing the sale and labeling of compostable or marine degradable plastic bags (*Cal. SB 228*; *Cal. SB 1454*). If passed, the bills would, among other things, limit how companies can identify these products.

### THE GREEN GUIDES

The Green Guides address how the FTC treats certain environmental advertising and marketing practices under the FTC Act. In addition to outlining general principles that apply to all green marketing claims, the Green Guides provide guidance on making specific types of claims regarding the environmental attributes of a product, package or service.

### SCOPE

The FTC applies the Green Guides to:

- All forms of marketing, including labeling, advertising and promotional materials.
- All express and implied claims, including claims made through words, symbols, emblems, logos, depictions, brand names or any other means.
- Products, packages and services.
- Marketing through any means of communication, including the internet or e-mail.

### GENERAL PRINCIPLES

The Green Guides set out four general principles that apply to all green marketing claims:

- **Make clear, prominent and understandable statements.** Any qualifications or disclosures required to avoid misleading consumers must be clear, prominent and understandable. The FTC evaluates, among other things:
  - whether clear language has been used;
  - what type size is used for the qualification or disclosure and how it compares to the type size used for the rest of the marketing claim;
  - how close the qualification or disclosure is to the marketing claim; and
  - whether there are any contrary claims.

For example, if a company's advertising headlines refer to that company as "green," it is not enough to put qualifying language describing the company's approach to reducing its environmental effect at the bottom of the advertisement in a small type size identified by an asterisk.

- **Identify to what the claims apply.** The consumer should be able to easily determine whether any green marketing claim applies to a company's:

- product or service;
- product packaging; or
- business operations, such as manufacturing or shipping.

For example, if a company sells an electronic device with packaging labeled "recycled," a consumer may think this means that both the device and the packaging are made from recycled material. If the device is not, the claim should be clear that only the packaging is made from recycled material.

- **Do not overstate the environmental attribute or benefit.** For example, a company should not label its product with "packaging made from 50% more recycled material than before" if the company merely increases the total amount of recycled material in the product from 2% to 3%. While the claim is technically true, it is likely to mislead a consumer into thinking that there has been a bigger increase in the amount of recycled packaging.
- **Ensure that the basis for any comparative claims is clear.** Marketers should avoid using an open-ended comparative claim such as "30% more recycled material." Comparative claims should clearly identify the basis of the comparison, such as a comparison to either:
  - a specific competitor's product; or
  - the company's product from the previous year.

For more information on comparative advertising law in the US and the FTC's regulation of comparative advertising, see *Practice Note, Comparative Advertising Law in the US* (<http://us.practicallaw.com/3-503-3503>).

As with any other form of marketing or advertising, marketers should make sure that their green marketing claims are supported by adequate substantiation. Every claim made in an advertisement about an objective quality, feature or attribute of a product or service, whether express or implied, must be substantiated. If the marketer cannot adequately substantiate the claim, the FTC or a state attorney general may assert that the claim is deceptive (see *FTC Policy Statement Regarding Advertising Substantiation*).

### CLAIM-SPECIFIC REQUIREMENTS

The Green Guides also provide regulatory guidance for specific types of claims, including:

- **General environmental benefits.** These are broad marketing claims that can be difficult or impossible to substantiate. Examples of general claims include:
  - "Eco-Safe;"
  - "Environmentally Friendly;"
  - "Environmentally Safe;"
  - "Practically Non-Toxic;"
  - "Earth Smart;" and
  - "Environmentally Preferable."

The Green Guides state that marketers can promote a product or service as having a general environmental benefit, provided



they can substantiate all related express and implied claims contemplated by that benefit. If a marketer cannot provide enough substantiation to satisfy the FTC's requirements, it should consider using qualifications and disclosures to narrow the scope of the claim.

- **Degradable, biodegradable or photodegradable.** To rely on these claims, marketers must ensure that:

- the claims are supported by competent and reliable scientific evidence; and
- the product or package will completely degrade within a reasonably short period of time after it is disposed.

Qualifying language may be required regarding the:

- product or package's ability to degrade in the environment where it is usually disposed; and
  - rate or extent of degradation.
- **Compostable.** This type of claim refers to a product or package's ability to break down into usable compost. The Green Guides state that marketers should use qualifying language identifying whether the product or packaging can be safely composted either:
    - in a consumer's home compost pile or composter; or
    - when it is thrown away in a landfill.

- **Recyclable.** To make this claim, the product or package must be capable of being:

- collected, separated or recovered from the regular solid waste stream; and
- reused in whole or used again in the manufacture or assembly of another package or product.

This must be done through an established recycling program.

Qualifying language may be required if:

- the product or package is made of both recyclable and non-recyclable components; or
  - there is limited availability of recycling programs and collection sites for the material used in the product or package.
- **Recycled content.** Marketers may use this claim only if the materials have been recovered or diverted from the regular solid waste stream either:
    - during the manufacturing process, known as pre-consumer recycled content; or
    - after a consumer has used the product or packaging, known as post-consumer recycled content.

For any recycled content claims based on pre-consumer materials, marketers:

- must show that the material would otherwise have entered the solid waste stream; and
  - should consider qualifying the claim by identifying the amount of recycled content used in the final product or packaging, if the product or package is only partially made of recycled material.
- **Ozone-safe and ozone-friendly.** To make this claim, marketers must:

- ensure that any product for which an ozone-safe or ozone-friendly claim is made does not contain any ozone-depleting substance;
- review the lists of substances considered to be ozone-depleting by the Environmental Protection Agency (EPA) and others before making the claim; and
- include language to qualify the extent to which the product is safe or friendly to the ozone layer.

## UPDATES TO THE GREEN GUIDES

On October 6, 2010, the FTC released its proposed revisions to the Green Guides for public comments. The proposed changes were developed using information collected from public workshops, public comments and a study of how consumers understand certain environmental claims. The FTC decided to update the Green Guides because of both the:

- Increased marketing of environmental products and packaging.
- Use of new types of environmental marketing claims that are not specifically covered by the current Green Guides.

The FTC has not provided a timeframe for publishing the final version.

## REVISIONS TO EXISTING GUIDELINES

The proposed revisions update existing guidance regarding several categories of claims, including:

- **General environmental benefit claims.** The updated Green Guides would provide stronger guidance on making unqualified general environmental benefit claims and address issues that are covered in the current Green Guides only through examples. The revised Green Guides state that marketers should:
  - not make unqualified general environmental benefit claims;
  - use clear and prominent qualifying language to convey to consumers that a general environmental claim refers only to a specific and limited environmental benefit;
  - ensure that the advertising's context creates no deceptive implications because qualifying language is insufficient if the advertisement's context implies other deceptive claims; and
  - ensure their qualifying language does not make additional claims that they cannot substantiate.
- **Certifications and seals of approval.** The current Green Guides contain only one illustrative example regarding the use of broad environmental seals and certifications. Under the revised Green Guides:
  - marketers should not use unqualified seals or certifications, including third-party certifications, as they may imply a general environmental benefit;
  - seals and certifications should include clear and prominent language limiting the general environmental benefit to the particular attribute or attributes that can be substantiated;
  - third-party seals and certifications are subject to the

FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, which provide guidance on the non-deceptive use of endorsements in marketing;

- seals and certifications developed internally should include clear and prominent language alerting consumers that it is the marketer's own seal or certification; and
- a marketer must substantiate a green marketing claim independent of a third-party seal or certification.
- **Degradable.** The FTC added some clarity to claims regarding the degradation of solid waste. The revised Green Guides state that:
  - marketers may make an unqualified claim only if the solid waste product typically is not disposed of in landfills, incinerators or recycling facilities and takes one year or less to decompose completely;
  - marketers should not make unqualified degradable claims for solid waste products that are typically disposed of in landfills, incinerators or recycling facilities, because it often takes longer than one year for solid waste products to completely decompose at these facilities; and
  - claims regarding oxo-degradable and oxo-biodegradable products, which are products that depend on a catalyst, such as water or oxygen, to begin the decomposition process, would be treated the same as "degradable" claims.
- **Compostable.** Under the revised Green Guides, marketers should qualify this type of claim if:
  - the product will not break down into, or become a part of, usable compost in approximately the same amount of time as the materials with which it is composted; and/or
  - consumers have limited or no access to composting facilities in their area.
- **Recyclable.** The updated Green Guides provide expanded guidance for qualifying a claim based on the availability of recycling facilities with the following three-tiered approach:
  - if a "substantial majority," meaning at least 60%, of customers or communities where the product is sold have access to recycling facilities, no qualifying disclosure is necessary;
  - if a "significant percentage" of customers or communities, but not a substantial majority, have access to recycling facilities, marketers should qualify their claims (for example, by stating "this product may not be recyclable in your area" or "recycling programs for this product may not exist in your area"); and
  - if less than a significant percentage of customers or communities have access to recycling facilities, marketers should either disclose that the product is recyclable only in the few communities with recycling facilities available for that particular product, or state the number or percentage of communities or customers that have access.
- **"Free of" and non-toxic.** The revised Green Guides expand on guidance currently contained only in examples, advising that:
  - a truthful claim that a product, package or service is free of, or does not contain or use, a substance may still be deceptive if it contains or uses substances that pose the same or similar

environmental risks as the substance that is not present, or has never been associated with the product category;

- depending on the context, these types of claims may be appropriate where a product, package or service contains or uses only a *de minimis* amount of a substance;
- if reasonable consumers would interpret this type of claim to convey additional environmental claims, including general environmental benefits or comparative superiority, a marketer must substantiate these additional claims; and
- because a non-toxic claim likely conveys that a product, package or service is non-toxic both for humans and for the environment generally, a marketer should clearly and prominently qualify this claim to avoid deception, unless it can support it with competent and reliable scientific evidence.

### NEW GUIDANCE

The FTC is also proposing new guidance for the following claims that the Green Guides do not already address:

- **Made with renewable materials.** FTC studies found that the public's understanding varies greatly as to what "renewable materials" means. As a result, the proposed Green Guides state that marketers should:
  - provide specific information about the materials being used when making this claim, for example, by identifying the renewable materials used, how they were sourced and why the materials are considered renewable. Otherwise, consumers may believe that the product benefits the environment more than it actually does; and
  - qualify this claim for products or packaging containing less than 100% renewable materials, excluding minor, incidental components. Marketers can do so by specifying the amount of renewable materials used in the product or package.
- **Made with renewable energy.** Marketers must clearly and prominently specify the source of renewable energy (for example, wind or solar energy) when making a claim regarding renewable energy. In addition, marketers should not make unqualified renewable energy claims expressed or implied if:
  - power derived from fossil fuels is used to manufacture any part of the product or package, or power any part of the advertised service;
  - less than all, or virtually all, of the significant manufacturing processes involved in making the product or package are powered with renewable energy or offset by renewable energy certificates; or
  - a marketer generates renewable electricity, but sells the renewable energy certificates for all of that electricity.
- **Carbon offsets.** Carbon offsets fund projects that reduce greenhouse gas emissions in one place to counterbalance (offset) emissions that occur elsewhere. Individuals, businesses and other organizations often purchase carbon offsets to help reduce the environmental effect of greenhouse gas emissions generated through their own activities. To help consumers



understand this type of claim, the updated Green Guides instruct marketers to:

- use competent and reliable scientific and accounting methods to quantify claimed emission reductions and ensure that they do not market the same reduction more than once; and
- avoid making an unqualified claim, expressed or implied, that a carbon offset represents an emission reduction that has already occurred or will not occur within two years, or if the reduction, or the activity that caused the reduction, was required by law.

## CLAIMS NOT ADDRESSED

The FTC declined to propose definitions or specific guidance for other terms such as “sustainable,” “natural,” “organic,” “life cycle assessment” and “biobased.” The FTC is also seeking public feedback on whether it should release additional guidance on other green marketing claims, such as liquid waste and recycled content.

## RISING ENFORCEMENT

The updates to the Green Guides reflect an increased effort by the FTC to more closely scrutinize environmental marketing claims. Along with the FTC and other federal agencies, state regulators, consumers and competitors have methods to challenge misleading and deceptive green marketing claims.

## FTC ENFORCEMENT

The FTC actively enforces the FTC Act regarding the types of marketing claims that the Green Guides address, so companies should make sure that their green marketing campaigns, advertisements and materials are in compliance. The FTC can seek both:

- Injunctive relief and consumer redress against marketers that violate the FTC Act.
- Civil penalties for any violations of an order once it is in place.

For food-related claims, the FTC works closely with the FDA to ensure that relevant marketing claims in advertisements and labeling promote accurate, truthful and non-misleading claims using methods such as comparing food-related claims reviewed by the FTC to relevant FDA standards.

## Recent Settlements

The FTC has settled claims with Kmart Corp., Tender Corp. and Dyna-E International related to alleged false or deceptive claims that their respective products were biodegradable. The FTC argued that the companies could not substantiate that their products would biodegrade within a reasonably short period of time, given the circumstances in which these products were normally disposed. The companies reached the following settlement agreement with the FTC:

- Each company agreed not make deceptive degradable product

claims.

- Each company agreed to have competent and reliable evidence to support their respective environmental product claims.
- Tender Corp. agreed to disclose whether any biodegradable claim applies to the product, the packaging or a component of either.

The FTC also settled claims with several companies related to alleged false or deceptive claims that, among other things, their rayon clothing and other textile products were made from 100% bamboo fiber. These companies agreed to change how they market the composition of their products, for example, by describing their products as “rayon made from bamboo,” provided that the description used is truthful and can be substantiated.

## OTHER ENFORCEMENT

Besides the FTC, federal agencies such as the USDA and EPA enforce product labeling rules and can bring actions against companies making false or misleading green marketing claims.

Noncompliance with the Green Guides can also result in claims initiated by competitors under the Lanham Act, as well as consumer class actions. In addition, the National Advertising Division of the Council of Better Business Bureaus (NAD), a self-regulatory organization, actively monitors and investigates green marketing claims. Like the FTC and state regulators, the NAD looks to the Green Guides when evaluating green marketing claims.

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