



THE REVISED GREEN GUIDES: NEW STANDARDS FOR ENVIRONMENTAL MARKETING CLAIMS

With the release of the FTC's revised Green Guides, marketers can expect even greater scrutiny of any environmental marketing claims they make. Accordingly, marketers should carefully review the revised Green Guides and ensure that their claims comply with the new standards.

The Federal Trade Commission (FTC) recently issued the long-awaited final revisions to its *Guides for the Use of Environmental Marketing Claims* (Green Guides). The Green Guides are designed to help marketers ensure that claims they make about the environmental attributes of their products or services are truthful and not misleading.

The revised Green Guides, released on October 1, 2012, represent the most substantial changes to the Green Guides since the FTC initially issued them 20 years ago. The revised Green Guides set out the FTC's current views on environmental marketing claims and are expected to result in an increase in related enforcement actions.

It is important to note, however, that the Green Guides themselves are not laws or regulations. This means that the FTC cannot directly enforce the Green Guides. Still, they are more than mere suggestions. The Green Guides describe the types of environmental claims that the FTC may or may not find deceptive under Section 5 of the FTC Act (15 U.S.C. § 45 (2012)), which grants the FTC the power to investigate and prevent deceptive trade practices. Environmental marketing claims that fail to comply with the Green Guides may be considered deceptive and prosecuted under Section 5 of the FTC Act.

>> For more information on how environmental marketing claims are regulated in the US, search [Green Marketing in the US](#) on our website.

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Although some of the information in the revised Green Guides may be common sense, a number of the provisions are not obvious and some may even seem counterintuitive. Moreover, what claims or disclosures are appropriate often depends on the context in which they appear. Therefore, marketers should carefully review their environmental marketing claims and consult with counsel to make sure that their claims comply with the new standards.

This article summarizes the key provisions of the revised Green Guides, outlining:

- General principles that apply to all environmental marketing claims.
- Specific guidance on particular types of environmental marketing claims.

Both the general principles and the specific guidance are illustrated with examples of deceptive and non-deceptive claims.

This article also discusses recent examples of enforcement actions taken by the FTC.

GENERAL PRINCIPLES

The revised Green Guides begin by setting out general principles that apply to all environmental claims. These principles address four key areas:

- Qualifications and disclosures.
- Distinctions between the benefits of product, package and service.
- Overstatement of environmental attribute.
- Comparative claims.

Although the FTC does not specifically highlight it among these other general principles, a “reasonable basis” principle also underlies much of the specific guidance in the revised Green Guides. Marketers must have a reasonable basis to substantiate any:

- Express claims, meaning what an advertisement actually says.
- Implied claims, meaning what a reasonable consumer may take away from the advertisement. Typically, if at

least 20% of consumers interpret a claim in a certain way, an advertiser must be able to support that interpretation. Because environmental claims often deal with subjects that many consumers do not fully understand, substantiating implied environmental claims can pose unique challenges.

QUALIFICATIONS AND DISCLOSURES

To prevent consumer confusion, marketers may need to add a disclosure to qualify a claim. The revised Green Guides state that all disclosures should be clear, prominent and understandable. More specifically, the FTC encourages marketers to:

- Use plain language.
- Ensure that a disclosure appears:
 - in a sufficiently large font; and
 - in close proximity to the claim it qualifies.
- Avoid making inconsistent statements or otherwise undercutting or contradicting the disclosure.

DISTINCTIONS BETWEEN BENEFITS OF PRODUCT, PACKAGE AND SERVICE

Unless it is clear from the context, an environmental marketing claim should specify whether it refers to the product, the product's packaging, a service, or just to a portion of the product, package or service. An unqualified claim generally is only appropriate if an attribute applies to all but minor, incidental components of a product or package. Even then, certain exceptions apply. For example, if all but incidental components of a product are recyclable, a marketer may be able to make a recyclable claim. However, if any of those incidental components significantly limits the ability to recycle the product, the claim would be deceptive.

OVERSTATEMENT OF ENVIRONMENTAL ATTRIBUTE

An environmental marketing claim should not overstate an environmental attribute or benefit. For example, if a manufacturer increases the recycled content of a rug from 2% recycled fiber to 3%, it would be technically true to advertise that the rug has “50% more recycled content.” However, that claim is likely to convey the false impression that the manufacturer has significantly increased the use of recycled fiber and therefore would be deceptive.

COMPARATIVE CLAIMS

To avoid misleading consumers, marketers who make comparative claims should clearly disclose what is being compared. For example, if a marketer simply claims that a product has “20% more recycled content,” it may not be clear to consumers whether that is a comparison to the previous version of the product or to a competitor’s product. The claim should be qualified to avoid consumer confusion. In addition, marketers should have substantiation for the comparison.

CLAIM-SPECIFIC GUIDANCE

After setting out the general principles, the revised Green Guides address the following particular types of environmental claims:

- General environmental benefit claims.
- Carbon offset claims.
- Green certifications and seals of approval.
- Compostable claims.
- Degradable claims.
- Free-of claims.
- Non-toxic claims.
- Ozone-safe and ozone-friendly claims.
- Recyclable claims.
- Recycled content claims.
- Refillable claims.
- Renewable energy claims.
- Renewable materials claims.
- Source reduction claims.

GENERAL ENVIRONMENTAL BENEFIT CLAIMS

The revised Green Guides advise marketers to:

- **Avoid making unqualified general environmental benefit claims, such as “green” or “eco-friendly.”** The FTC states that these sorts of broad claims are difficult to interpret and likely to convey a wide range of meanings. Because it is unlikely that an advertiser will be able to support all the meanings that consumers may take away from these types of claims, the FTC considers them inherently deceptive.
- **Qualify environmental claims to explain the specific benefit.** For example, rather than simply label paper plates as “eco-friendly,” a marketer may state that the plates are “eco-friendly, made from recyclable materials.” This provides context to the eco-friendly claim and minimizes the risk of deception.
- **Ensure that the ad’s context does not imply deceptive environmental claims.** Marketers must keep in mind that an ad may convey a general

environmental benefit claim, even if one is not explicitly stated. The FTC notes, as an example, an ad that features a picture of a laser printer in a bird’s nest balancing on a tree branch, surrounded by a dense forest. In green type, the ad states: “Buy our printer. Make a change.” The FTC opines that although the ad does not expressly claim that the product has any environmental benefits, the featured images, in combination with the text, may convey that the product has far-reaching environmental benefits or that the product has no negative environmental impact.

- **Avoid highlighting features that offer only negligible benefits.** For example, a claim of “improved fuel efficiency” may be inappropriate if the manufacturer has increased fuel efficiency by only one-tenth of a percent.
- **Evaluate trade-offs of a touted benefit to prove the claim.** If a claim conveys that a product is better for the environment because of a particular benefit, marketers should analyze trade-offs resulting from that benefit to determine if they can substantiate the claim. For example, if a company uses less plastic to make a bottle, but the manufacturing process uses more energy, a green claim may not be appropriate. The FTC suggests that, in some cases, a company may have to conduct a life-cycle analysis covering all aspects of a product’s environmental impact, from raw materials procurement to disposal, to determine whether an environmental claim is non-deceptive.

CARBON OFFSET CLAIMS

Given the complexities of carbon offsets, marketers should employ competent and reliable scientific and accounting methods to quantify the emission reductions they claim and to ensure they do not sell the same reduction multiple times. Marketers should also disclose whether the offset purchase pays for emission reductions that will not occur for at least two years. Finally, the FTC warns that marketers should not advertise a carbon offset if the law already requires the activity that is the basis of the offset.

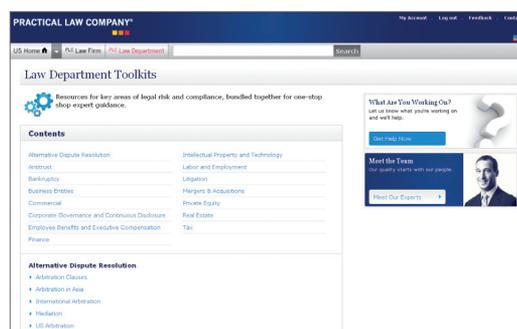
CERTIFICATIONS AND SEALS OF APPROVAL

The FTC opines that a certification or seal of approval likely conveys to consumers a general environmental benefit claim if the basis of the certification or seal is not obvious. Accordingly, the rules on general environmental benefit claims apply to certifications and seals as well. Among other things, this means marketers may need to disclose the specific basis of the certification. For example, a seal that simply reads “EarthSmart” may mislead consumers into thinking the product has far-reaching benefits that it may not have. But a disclosure that the product “meets EarthSmart standards for reduced chemical emissions during product usage” helps to clarify what environmental attributes were evaluated.

ADVERTISING AND MARKETING TOOLKIT

The Advertising and Marketing Toolkit available on practicallaw.com offers a collection of resources designed to help in-house counsel structure their companies' advertising and marketing campaigns to comply with applicable law, minimize the risk of legal challenges and overcome potential regulatory obstacles. It features a range of continuously maintained resources, including:

- [Advertising: Overview](#)
- [Online Advertising and Marketing](#)
- [Comparative Advertising Law in the US](#)
- [Green Marketing in the US](#)
- [Direct Marketing](#)
- [Cause-Related Marketing by For-Profit Companies Checklist](#)
- [Mobile Marketing: What Companies Need to Know](#)



In some cases, a seal may be based on a large number of factors that cannot easily be explained on a label or in an ad. Although the FTC suggests that marketers have some leeway to provide a website reference for additional details, it also reminds marketers that information on a website cannot be used to qualify otherwise misleading claims. Therefore, marketers still must ensure that the label does not imply a broader claim than they can support. To guard against this, the FTC offers the following as an example of a disclosure that marketers may use: “Virtually all products impact the environment. For details on which attributes we evaluated, go to [a website that discusses this product].”

The FTC states that the use of the name, logo or seal of approval from a third-party organization is likely to be deemed an endorsement and, therefore, subject to the FTC’s *Guides Concerning the Use of Endorsements and Testimonials in Advertising*. Among other things, this means that if a marketer awards a seal to its own products, and no third-party organization has evaluated the products, the marketer must clearly disclose that the seal is an internal award. The FTC also reminds marketers that a third-party certification does not eliminate a marketer’s obligation to ensure that it has substantiation for all claims reasonably communicated by the certification.

COMPOSTABLE CLAIMS

Marketers who claim that an item is compostable should have competent and reliable scientific evidence that all the materials in the item will break down into, or otherwise become part of, usable compost safely and in about the same time as the materials with which it is composted. Marketers should qualify compostable claims if any of the following apply:

- The item cannot be composted safely or in a timely manner in a home compost pile or device.
- The claim misleads consumers about the environmental benefit provided when the item is disposed of in a landfill.

- Appropriate facilities are not available to a substantial majority of consumers where the item is sold. The more limited the availability of appropriate facilities, the more prominent the marketer should make the qualification. (The term “substantial majority” is not defined for compostable claims in the revised Green Guides, but the section on recyclable claims defines the term to mean at least 60% of consumers.)

DEGRADABLE CLAIMS

Marketers should not claim that a product or package is degradable, biodegradable, oxo-degradable, oxo-biodegradable or photodegradable unless it has competent and reliable scientific evidence that the entire item will completely break down and return to nature within a reasonably short period of time after customary disposal. The FTC defines “a reasonably short period of time” as one year for solid waste products. The FTC also warns marketers that they should not make these types of claims for items that are customarily disposed of in landfills, incinerators or recycling facilities. Although these items may technically be capable of degrading, the customary method of disposal will not permit degrading.

FREE-OF CLAIMS

Marketers may claim that a product is free of a certain substance, even if the product contains small amounts of that substance, as long as each of the following apply:

- The product contains only a trace or background level of the substance.
- The amount of the substance present does not cause material harm that consumers typically associate with that substance.
- The substance has not been intentionally added to the product.

Nevertheless, it may be deceptive to make these types of claims if either:

RECENT ENFORCEMENT ACTIONS

The FTC has brought several actions in recent years related to environmental marketing claims, demonstrating that these claims have become an important enforcement priority for the FTC. For example, the FTC has pursued enforcement actions relating to the claims set out below.

Unqualified Biodegradable Claims

In 2009, the FTC announced settlements with three companies that advertised that their paper products were biodegradable. The Green Guides advise marketers that unqualified biodegradable claims are acceptable only if they have scientific evidence that a product will completely decompose within a reasonably short period of time under customary methods of disposal. The FTC alleged that the defendants' products typically are disposed in landfills, incinerators or recycling facilities, where it is impossible for waste to biodegrade within a reasonably short time. Each company agreed to an order that bars it from making deceptive degradable product claims and requires it to have competent and reliable evidence to support environmental claims.

Misrepresentations Regarding Certifications and Endorsements

In 2011, the FTC announced a settlement with a company that purported to test products and provide environmental certifications. The FTC alleged that the company never tested any of the products it certified, and that the company would certify anyone willing to pay a fee. The FTC also alleged that the company deceived consumers by implying that it had been endorsed by independent third parties, when the third parties were actually owned and operated by the company. The company agreed

to an order that prohibits it from making various types of misrepresentations regarding its certifications or endorsements by third parties.

Exaggerated and Unsupported Energy Savings Claims

In 2012, prior to the release of the revised Green Guides, the FTC announced settlements with five companies that sell replacement windows. The FTC alleged that the companies had made exaggerated and unsupported claims about the energy efficiency of their windows, and how much money consumers could save on their heating and cooling bills by having them installed. Among other things, each company agreed not to make energy savings claims unless the claims are non-misleading and, when the company makes the claims, it has competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to achieve the maximum savings claimed.

Misleading Free-of Claims

In 2012, just after the release of the revised Green Guides, the FTC announced settlements with two paint companies that allegedly misled consumers to believe that some of their paints are free of potentially harmful volatile organic compounds (VOCs). The companies advertised that their paints contained zero VOCs. According to the FTC, while this may have been true for the uncolored base paints, it may not have been true for tinted paints. The settlements discuss what companies must do to make a zero-VOC claim and include language that is similar to the free-of section of the revised Green Guides.

- The product contains substances that pose similar risks.
- The substance has never been associated with the product category.

NON-TOXIC CLAIMS

The FTC opines that a non-toxic claim likely conveys that a product, package or service is non-toxic both for humans and for the environment generally. Therefore, marketers who make non-toxic claims should either:

- Have competent and reliable scientific evidence that the product, package or service is non-toxic for humans and for the environment.
- Clearly qualify their claims to ensure they do not mislead consumers.

OZONE-SAFE AND OZONE-FRIENDLY CLAIMS

The revised Green Guides do not provide a lot of detail on ozone-safe or ozone-friendly claims. They state simply that it is deceptive to misrepresent, whether directly or by implication, that a product, package or service is safe for, or friendly to, the ozone layer or the atmosphere. This is true if a product contains any ozone-depleting substance, including those substances listed as Class I or Class II chemicals in Title VI of the Clean Air Act Amendments of 1990, and other substances subsequently designated by the Environmental Protection Agency as ozone-depleting substances.

RECYCLABLE CLAIMS

Marketers can make unqualified recyclable claims only if a substantial majority of consumers have access to recycling facilities. The FTC defines "substantial majority" as at least 60% of consumers in the area in which a product is sold.

When recycling facilities are available to less than a substantial majority of consumers or communities, marketers must qualify their claims. The lower the level of access, the more a marketer should highlight the limited availability. For example, if recycling facilities are available to slightly less than 60% of consumers, a marketer may disclose that the “product may not be recyclable in your area.” However, if only a small percentage of consumers will have access to those facilities, the following disclosure would be more appropriate: “This product is recyclable in only the few communities that have appropriate recycling facilities.”

RECYCLED CONTENT CLAIMS

Marketers should only make recycled content claims if a product is composed of materials that have been recovered or otherwise diverted from the waste stream, either during the manufacturing process (pre-consumer) or after consumer use (post-consumer). If the source of recycled content includes pre-consumer material, marketers should have substantiation that the pre-consumer material would have otherwise entered the waste stream. If a product is only partially made with recycled material, marketers should disclose the percent of the recycled material, for example: “Made from 30% recycled material.”

REFILLABLE CLAIMS

Marketers should not make unqualified refillable claims unless they provide the means for refilling the package. The FTC notes that a marketer may either:

- Provide a system for the collection and refill of the package.
- Offer for sale a product that consumers can purchase to refill the original package.

For example, a company that sells a small bottle of fabric softener can advertise that it comes in a “handy refillable container” if the company also sells a large bottle that can be used to refill the smaller bottle.

RENEWABLE ENERGY CLAIMS

Marketers should generally not make unqualified renewable energy claims unless all, or virtually all, of the significant manufacturing processes involved in making the product or package are powered with renewable energy or non-renewable energy matched by renewable energy certificates (RECs). If part of the manufacturing process was powered by non-renewable energy that was not matched by RECs, marketers should disclose the percentage of renewable energy that powered the significant manufacturing processes.

The FTC’s consumer perception research suggests that some consumers may interpret renewable energy claims differently than marketers may intend. For example, consumers may interpret an unqualified renewable energy claim to mean

that a product is made with recycled content or renewable materials. One way marketers can minimize the risk of consumer confusion is to specify the source of the renewable energy (such as wind or solar energy).

RENEWABLE MATERIALS CLAIMS

As with renewable energy claims, the FTC’s consumer perception research suggests that some consumers may interpret renewable materials claims differently than marketers may intend. Unqualified claims about renewable material may imply that a product is either:

- Recyclable.
- Made with recycled content.
- Biodegradable.

One way marketers can minimize the risk of consumer confusion is to identify the material that is used and explain why it is renewable. For example: “Our flooring is made from 100% bamboo, which grows at the same rate, or faster, than we use it.”

SOURCE REDUCTION CLAIMS

Marketers should clearly qualify source reduction claims to avoid deception about the amount of the source reduction and the basis for any comparison. For example, rather than advertise that a product generates “10% less waste,” a marketer could advertise that the product generates “10% less waste than our previous product.”