

Analysis of FTC's revised Green Marketing Guidelines: A Focused and Balanced Approach to Environmental Marketing Claims

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Presenter

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Background of the Green Guides

- First issued in 1992
 - Interpretations of law
 - Revised in 1998
- Began review of the Guides in 2007
 - Comments – requested consumer data
 - Workshops
 - FTC’s own consumer perception research in 2009
 - The entire survey is available to the public at www.ftc.gov/green
 - Internet-based study

The FTC Approach

- Focused on the line separating deceptive from non-deceptive speech
 - Respectful of its authority under Section 5 of the FTC Act
 - Agnostic as to environmental policy
 - Cognizant of international standards
 - Different goals
 - Harmonization was not a priority
- Only change in response to evidence
 - Most important: consumer perception data

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Proposed Changes to Claims Currently Addressed by Guides

General Environmental Benefit Claims

- Consumer research showed that about 50% of respondents on average thought unqualified “green” claims communicated a particular environmental attribute
- Marketers should not make general environmental claims (e.g., “earth-friendly”) without qualifying with the attributes that make the product “green”
- Qualifications must be clear and prominent and should limit the claim to a specific benefit
 - Ensure that the context does not imply deceptive environmental claims



Certifications and Seals of Approval

- Self-certification must be disclosed
- Certification by a trade association of which you're a member
- Certification/seal name may require qualification if they communicate general unqualified "green" claims
 - E.g., "GreenSmart" vs. "GreenSmart – Biodegradable"
- Distinguish between being a member of an organization and being "certified" by that organization

Degradable

- Current guides: Marketers should qualify a degradable claim unless it can prove that “the entire product or package will completely breakdown and return to nature within a reasonably short period of time after customary disposal”
- Based on consumer research performed for the American Chemistry Council: “Reasonably short period of time” = 1 year
- No unqualified degradable claims for items destined for landfills, incinerators, or recycling facilities because decomposition will not occur within 1 year
- Degradable = biodegradable = oxo-biodegradable

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Compostable

- Current guides: “All materials in the product/package will break down into, or otherwise become part of, usable compost...in a safe and timely manner....”
- American Chemistry Council: 43% think an unqualified compostable claim means that a large-scale composting facility is available in their area even though 90% either don't have facilities or don't know
- No unqualified compostable claims unless
 - Facilities are available to a “substantial majority of consumers or communities” = 60%; and
 - The product or package will break down in approximately the same time as the materials with which it is composted (e.g., natural plant matter)
- ASTM standard for plastics is rejected because not based on consumer perception/expectations

Recyclable

- Elevates three-tiered analysis from examples to the guides themselves
- Availability of recycling facilities
 - (1) When available to “substantial majority” of consumers or communities, then unqualified claim is OK
 - (2) When available to “significant %” of consumers or communities, then OK to use disclaimer such as “This package/product may not be recyclable in your area” or by providing approximate percentage
 - (3) When available to less than a significant % of consumers or communities, then disclose that the product is recyclable only in the few communities with facilities or by providing the approximate percentage or number of facilities

Recyclable (cont.)

- Although FTC retained the “substantial majority” standard, it has proposed to quantify it at 60% of consumers or communities
 - Plain meaning – greater than simple majority
 - Nowhere near an “all or virtually all” level
 - Consistent with previous Commission statements and court opinions
- No quantification for “significant percentage” at this time, but comments are sought
- Positive statements (e.g., “check to see if facilities exist in your area”) are inadequate to qualify recyclable claims

Ozone-Safe and Ozone-Friendly

- FTC proposes deletion of examples that discuss products that do not contain CFCs because EPA bans the use of CFCs in all products
- However, FTC declined to bar marketers from making no-CFCs claims because it can still communicate valuable information
- New example warns against broad environmentally friendly claims from removal/substitution of ozone-depleting ingredients in products where the substitute ingredients still produce greenhouse gases or consume substantial energy

Free-of/Non-Toxic

- Even if true, claims that an item is free-of a substance may be deceptive if
 - (1) the item has substances that pose the same or similar environmental risk as the substance not present; or
 - (2) the substance has never been associated with the product category
- Following NAD, guides permit free-of claims if products contain “background levels” or “trace amounts” of a substance
 - However, the determination of what constitutes de minimis depends on the substance at issue and requires case by case analysis

Free-of/Non-Toxic (cont.)

- New section in guides states that consumers are likely to think that a non-toxic claim conveys that a product is non-toxic for both humans and the environment
- Marketers using regulatory standard as substantiation for a non-toxic claim must examine the scope and purpose of the standard to ensure that it takes into account consumer expectations
 - (E.g., “acute toxicity” which measures toxicity during a short period may not provide an adequate basis for a non-toxic claim if the substance may be toxic to humans or the environment over a longer period of time)

Recycled Content

- Pre/Post Consumer Recycled Content
 - Essentially unchanged in guides: either pre-consumer or post-consumer recycled content can be used to support a “recycled” content claim without disclosure of which is being used
 - To constitute pre-consumer recycled content, materials must have been “recovered or otherwise diverted from the solid waste stream...during the manufacturing process...”
 - E.g., when spilled raw materials and scraps undergo only “minimal amount of reprocessing, they are not diverted from the solid waste stream and do not constitute recycled content”

Recycled Content (cont.)

- Considerations in textile industry
 - Scraps have been reused for many years but recent innovations allow industry to put such materials to higher use
 - Textile industry believes that these higher-end processes should satisfy the requirement for purposes of “recycled”
 - FTC declined to add a specific reference but noted they (1) involve significant reprocessing before reuse; and (2) are reused in something different from the original manufacturing process
 - An area in which FTC does not have enough evidence and is seeking more guidance

Recycled Content (cont.)

- Express rejection of ISO 14021 definition of “post-consumer” material
 - Material returned from the distribution chain (e.g., overstock magazines) qualifies as “post-consumer” recycled material under ISO 14021
 - That would not be likely to work under the guides because the material never reaches the consumer
 - Could constitute “recycled content” but not “post-consumer recycled content”

Recycled Content (cont.)

- Measurement
 - Guides continue to state that using an annual weighted average is not deceptive
 - FTC recognizes that such weighted averages (across several plants) could be deceptive when selling to local consumers who place a premium on products containing recycled materials, and it is seeking comment
- Unqualified recycled content claims = entire product or package, excluding minor, incidental components is made with recycled content
 - Essentially an “all or substantially all” standard
 - Or else disclose percentage of recycled content

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Recycled Content (cont.)

- FTC study (closed ended question) suggested that some consumers equate “made with recycled materials” with a “recyclable” claim (52%)
- But in open ended questions, only 3% equated the two
- Based on that data, FTC is not going to require that unqualified recycled content claims to be accompanied with disclosure of whether the product is not recyclable (but is seeking comments)



Proposed Guidance for Claims Not Currently Addressed by Guides

Made with Renewable Materials

- Marketers should qualify claims with specific information about the renewable material
 - E.g., “Renewable – made with fast growing bamboo”
- Marketers should qualify renewable materials claims if the item is not made entirely with renewable materials, excluding minor, incidental components (essentially an “all or substantially all” standard)
- No definition or particular test to substantiate
- No definition or treatment of “biobased” as another word for “renewable” – USDA has ongoing work

Made with Renewable Energy

- Marketers should not make unqualified renewable energy claims if the power used to manufacture any part of the product was derived from fossil fuels
- Marketers should qualify claims by specifying the source of renewable energy (e.g., wind, solar)
- Marketers should qualify claims if less than all, or virtually all, of the significant manufacturing processes involved in the making the product/package were powered with renewable energy or conventional energy offset by renewable energy certificates (RECs)
 - No evidence in the record that the renewable claims were based on REC purchases is material to consumers

Made with Renewable Energy (cont.)

- Limitations
 - Local claims – if a particular advertisement implies that renewable energy yields local benefits, marketers should inform consumers that this is not the case to prevent deception (not in the Guides)
 - Double counting – if a marketer generates renewable energy (e.g., using solar panels) but sells RECs for all of the renewable energy it generates, then it cannot represent that it uses renewable energy (in the Guides)

Carbon Offsets


- FTC declined to set any standard for the use of carbon offsets
 - Not a standard setting or policy setting body
 - Technology is changing too fast
- But, FTC can offer guidance to place the use of carbon offsets in the context of Section 5 of the FTC Act.

Carbon Offsets (cont.)

- Marketers should have competent and reliable scientific evidence to support their carbon offset claims, including appropriate accounting methods to ensure they are properly quantifying emission reductions and are not selling those reductions more than once
 - Consider whether use of voluntary standards groups like Voluntary Carbon Standards Association (<http://www.v-c-s.org>) might be important for substantiation moving forward
 - Commission warns against using RECs as the basis for offset claims – risk of double counting

Carbon Offsets (cont.)

- Marketers should disclose if the offset purchase funds emission reductions that will not occur for two years or longer
 - FTC study found that 43% of respondents believed that emission reductions that would not occur within two years was misleading
- Additionality – Marketers should not advertise a carbon offset if the activity that forms the basis of the offset is already required by law



Claims for which FTC is Not Currently Providing Guidance

Sustainable

- FTC tested the word without context
 - Communicated “durable”
 - Did not contain a general environmental claim
 - “Aspirational”/company’s environmental philosophy – outside of scope of Guides unless clearly commercial speech
 - Case by case basis

Organic/Natural

- Not covered by Guides
 - USDA's National Organic Program (NOP) already regulates "organic" for agricultural products
 - For non-agricultural products the record is insufficient for FTC to provide guidance
 - For "natural," no consumer perception data in the record and FTC will apply case-by-case analysis in context

Life-Cycle Analysis

- FTC lacks consumer perception data
- Too complex and variable in nature for guidance to be of substantial use
- FTC is not going to require marketers to engage in a LCA to substantiate environmental claims
 - Consumers didn't think that consideration of life-cycle stages were material
 - FTC has no basis for choosing one LCA methodology over another
 - If marketer makes claim based on LCA, FTC will apply general substantiation principles



Other Important Issues Related to Issuance of Revised Guides



Enforcement Trends

- Once final, there will be no “grace period” because marketers are already subject to Section 5 of FTC Act
- Revised guides make clear that they apply to business-to-business transactions as well as business-to-consumer transactions
- If disclosures for labels are required, you can’t just refer consumers to a website even if the website would provide extensive information

Interaction with Other Federal, State, and Local Laws

- No preemptive effect – the Guides are not law
- FTC actively consults with EPA, DOE, and USDA to avoid conflict and duplication
 - E.g., “organic”

Issues to watch for...

- The interplay between LCA and implied general environmental claims, especially “give and take” claims
- “Negligible” benefit concerns: Watch for commenters to try to hem in marketers who will qualify a general environmental benefit claim but fail to disclose the negligible benefit – again a concern about implied claims
- Very active NAD in this area
- Suggestion of percentage definition of “significant percentage” for “recyclable” claims



Deadline for Submission of Comments

- Comments must be received on or before December 10, 2010 (unless time is extended)



Questions?

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