

Environmental Marketing Rules Being Revised By FTC

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The Federal Trade Commission closed the public comment period on December 10, 2010 for proposed revisions to the Green Guides that it give businesses guidance on avoiding false or misleading environmental or “green” marketing claims.

The changes to the Green Guides include new guidance on business use of third party certifications and seals of approval, “renewable energy” claims, “recycled content” claims, “carbon offset” claims and more.

“In recent years, businesses have increasingly used ‘green’ marketing to capture consumers’ attention and move Americans toward a more environmentally friendly future. But what companies think green claims mean and what consumers really understand are sometimes two different things,” said FTC Chairman Jon Leibowitz.

The Green Guides were first issued in 1992, as FTC staff guidance of how the Commission will apply the law, to help businesses ensure that the claims they are making are true and substantiated. The Guides were last revised in 1998. The FTC received only 335 comments during the recent 60 day public comment period and it has been suggested the Commission will decide which changes to make final in early 2011.

The proposed Guides caution business not to make blanket, general claims of “environmentally friendly” or “eco-friendly” because an FTC consumer perception study found that such claims are likely to suggest specific and far-reaching environmental benefits. Very few products, if any, have all the attributes consumers seem to perceive from such claims, making these claims nearly impossible to substantiate. This is a change from the existing Guides that state businesses can make unqualified claims if they can substantiate express and implied claims.

A new section in the Guides emphasizes that certifications/seals are endorsements covered by the Commission’s Endorsement Guides and provides new examples illustrating how those Guides apply to environmental claims, including that a business who displays a seal of approval bestowed by a trade association in which it is a member, must disclose that material connection to the certifier. “Accordingly, this example makes clear that the marketer’s failure to disclose its material connection with the endorsing association, i.e., that it is a dues paying member of the endorsing association, is deceptive.” Commentators have suggested U.S. Green Building Council members displaying LEED® Certified seals should disclose they are a USGBC member.

The proposed changes would also update the Guides by giving advice about claims that are not addressed in the current Guides, such as claims about the use of, made with “renewable materials.” Businesses should qualify claims with specific information about the renewable material (what it is; how it is sourced; why it is renewable). Additionally, businesses should qualify renewable materials claims if the item is not made entirely with renewable materials (excluding minor, incidental components).

Also new in the Guides, businesses should not make unqualified “renewable energy” or green electricity claims if any portion of the power used is derived from fossil fuels. Businesses should qualify claims by specifying the source of renewable energy (e.g., wind or solar). Additionally, businesses should qualify claims if less than all, or virtually all, of the significant manufacturing processes involved in making the materials were powered with renewable energy or conventional energy offset by renewable energy certificates (“RECs”). Businesses that generate renewable energy (e.g., by using solar panels), but sell RECs for all of the renewable energy they generate, should not represent that they use renewable energy.

The proposed revised Guides also provide new advice about carbon offset claims. Carbon offsets fund projects that reduce greenhouse gas emissions in one place in order to counterbalance or “offset” emissions that occur elsewhere. The Guides advise businesses to disclose if the emission reductions that are being offset by a consumer’s purchase will not occur within two years. They also advise businesses to avoid advertising an offset if the activity that produces the offset is already required by law.

The more than 200 pages of proposed revisions to the Green Guides also provides guidance on “recyclable” and “compostable” as well as “free of” and “non toxic.” And apparently because the FTC lacks a sufficient basis to provide meaningful guidance or because it wants to avoid proposing guidance that duplicates rules or guidance of other agencies, the proposed Guides do not address use of the terms “sustainable,” “natural,” or “organic.”

The FTC advises the Green Guides apply to all forms of marketing for products and services, including real estate. They apply to any claim about the environmental attributes of a product (the definition of which is broad enough to include a building, “green” or otherwise and the component parts of that building from steel to carpeting) or a service (including real estate brokerage services) in connection with the sale, offering for sale or marketing “for personal, family or household use, or for commercial, institutional or industrial use.”

Be aware there are also state laws regulating false and deception Green claims. By way of example, the Maryland statute, while broader in scope of practices regulated, is less all encompassing than the FTC’s authority because Maryland only seeks to protect “consumers” and not the marketplace in general when it defines “consumer realty.” In the Old Line State may not regulate marketing claims for commercial green building, but residential green building, including LEED for Homes and Enterprise Green Communities® will be subject to heightened state enforcement.

Today there are only a modest number of lawsuits pending accusing a business of misleading environmental marketing, but the FTC reports that it is beefing up government enforcement having brought several dozen actions in the last 18 months. And the revised Green Guides significantly change the rules.

Moreover, as businesses increasingly use green marketing to capture sales, in our increasingly more environmentally conscious culture, in 2011 businesses must comply with the FTC environmental marketing guides.

If you have a question about marketing green, or if we can assist you generally in matters of green building or sustainable business, please feel free to email Stuart Kaplow

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