

# Client Alert

ANTITRUST AND CONSUMER PROTECTION AND ENVIRONMENTAL LAW  
GROUPS | NOVEMBER 2012

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## *The FTC's Revised Green Guides*

On October 1, 2012, the Federal Trade Commission (“FTC”) issued final revisions to its Guides for the Use of Environmental Marketing Claims (“Green Guides” or “Guidance”). The FTC will publish the more than 300-page Green Guides in the Federal Register at 16 C.F.R. Part 260; you may review the text of the Guidance here and at the FTC’s website. Though the Guidance does not comprise a legally binding agency regulation, it serves to illustrate the agency’s commitment to ensure that people and entities that make environmental marketing statements do so truthfully and without deception to consumers. The Guidance aims to ensure that “green” marketers clearly support claims alleging purported environmental benefits. These claims often take the form of unqualified and overbroad statements, and the FTC has cautioned that such general statements suggest to consumers a false level of environmental benefit that they may not actually obtain through the use of the product, package, or service.

FTC considers this kind of deceptive advertising subject to its enforcement authority under Section 5 of the FTC Act, 15 U.S.C. § 45. The Section 5 enforcement relevance of the Green Guides results in the immediate effectiveness of the Guidance—there is no grace period for implementation of the Green Guides. Neither the Guidance nor its immediate effect should come as a surprise to industry. The 2012 version is a modification of the agency’s initial 1992 version, and the final revisions also incorporate comments received after the FTC published a draft version two years ago. The 2012 Green Guides modify FTC’s prior guidance but also add new sections, both of which we describe in more detail below.

### MODIFICATIONS TO EXISTING FTC GUIDANCE

The final revisions to the Green Guides specifically advise marketers to qualify overly broad and unqualified environmental claims with statements that justify the purported environmental benefit claim. For example, the FTC specifically advises companies not to make claims such as describing their products, packages, or services as “green” or “eco-friendly” in the absence of specific justification. The FTC explains that consumers find it difficult to interpret these claims accurately. Also, according to the agency, it is unlikely that the companies that make the claims can in fact substantiate the multitude of consumer interpretations that arise in connection with the environmental benefits of their products, packages, or services.

Additionally, the final revisions modify the FTC’s guidance on recyclable claims. To avoid consumer deception, the Guidance advises industry members to qualify these claims as to the availability of recycling programs for the products, packages, or services that they

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market. If recycling programs are available to a “substantial majority” of the marketed community, then companies may make unqualified recyclable claims. In keeping with the FTC’s 2010 interpretation, a “substantial majority” is deemed to comprise at least 60 percent of consumers to whom the company markets the product, package, or service. Companies that market products where recycling programs are not available to at least 60 percent of their consumer base may qualify their recyclable claims by simply listing the percentage of consumer access to recycling programs.

NEW SECTIONS OF THE GREEN GUIDES

In addition to modifying the FTC’s existing guidance, the 2012 Green Guides also add new sections in connection with the following environmental benefit claims:

- **Certifications and Seals of Approval** - The FTC has long cautioned against the use of overly broad and general environmental benefit claims that are not qualified, such as “green” or “eco-friendly.” The new Green Guides state that the use of third-party certifications or seals, however, may be endorsements, suggesting that industry should look to the FTC’s Endorsement Guides in connection with such certifications and/or seals.
- **“Free-of” Claims** - The Green Guides now clarify that a “free-of” claim may be made where a product, package, or service at issue only contains a “trace amount” of a particular substance. This term is a modification to the proposed language of “de minimis” amount, a legal term of art used in connection with the Environmental Protection Agency’s regulatory framework. The Green Guides define “trace amount,” but also cautions that a “free-of” claim may still violate Section 5 as a deceptive claim if there is a substitute substance that poses similar risks.
- **“Non-toxic” Claims** - The FTC advises companies to substantiate “non-toxic” claims with defensible scientific evidence, both related to toxicity levels in humans and in the environment.
- **Carbon Offset Claims** - Similar to the substantiation required for “non-toxic” claims, companies are advised to support carbon offset claims. This justification can include demonstrating generally applicable accounting methods, as well as showing that no governmentally required carbon reductions are claimed as offsets. For example, if a local regulation requires a company to reduce its carbon emissions, that reduction cannot be included in the company’s purported benefit attributed to the consumer’s offset purchase. Additionally, disclosure is advised for offset reductions that will not occur for at least two years from the date of the consumer’s offset purchase.

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- Renewables Claims - The FTC considers it deceptive to make an unqualified “made with renewable energy” claim if any part of the product is made with fossil fuel-derived energy. Companies may, however, match non-renewable energy use with renewable energy certificates. The FTC advises that companies making such renewable energy claims qualify such claims with the actual percentage of renewable energy used to make the product.

ENFORCEMENT OF FTC’S GUIDANCE

The Green Guides, while not legally binding, expressly explain how the FTC will look at misleading environmental benefit claims in the context of Section 5 of the FTC Act. Significantly, the FTC has not been complacent in its enforcement efforts with regard to such claims. For example, earlier this year a company named Tested Green settled with the agency and agreed to cease its marketing of unsubstantiated environmental certifications. Tested Green allegedly sold worthless environmental certifications for hundreds of dollars, and falsely told more than 100 customers that its certifications were endorsed by two independent firms - which it actually owned. Other examples of recent FTC review under the Green Guides include the following products: (1) “biodegradable, flushable and septic-safe” kitty litter; (2) wedding bands manufactured “completely green from start to finish”; (3) rayon textiles marketed as “100% bamboo fiber”; and (4) “biodegradable” disposable paper goods marketed by Kmart and other retailers. In contrast to the FTC’s recent enforcement efforts, the FTC has received a mere forty-five consumer complaints since the Green Guides were initially published in 1992.[1]

“Green” marketers should carefully review all marketing strategies for their products, packages, and services to ensure compliance with the new final revisions. Failure to comply with the Green Guides could lead to enforcement by the FTC, as well as potential liability under state consumer protection laws.

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[1] “FTC Moves May Signal Start of ‘Greenwashing’ Crackdown,” New York Times, 3 Feb. 2010.

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*The FTC's Revised Green Guides* CONTINUED

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*For assistance evaluating your company's products, packages or services with respect to the finalized revisions of the Green Guides, please contact:*

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