

# The FTC'S "Green Guides" and the challenges of environmental marketing

BY CHRISTOPHER P. McCORMACK

Is this article earth friendly? Would you like it more if it were? Advertisers are betting you would. As consumers increasingly consider the environmental consequences of purchases, marketers increasingly tout environmental attributes and benefits. But the U.S. Federal Trade Commission's (FTC) "Guides for the Use of Environmental Claims," 16 C.F.R. Part 260 (the "Green Guides"), issued in 1998, have not kept pace with marketing practices. As the FTC works on revisions, boundaries for environmental marketing claims remain uncertain.

The Green Guides address misleading or deceptive environmental claims but do not cover many concepts now common in advertising. They show their age in focusing on specific, objective waste disposal and reuse terms such as biodegradability, compostability, and recycling and recycled content. Though still useful, these terms are today subsumed within broader concepts of sustainability, including waste management, resource conservation, and energy efficiency. Similarly, the Green Guides touch on atmospheric and climate concerns only in relation to the terms "ozone safe" and "ozone friendly." Climate change has displaced narrow concerns with chlorofluorocarbons and stratospheric ozone.

Environmental marketing claims have also expanded beyond specific concepts like "recyclability." One such expansion involves governmental and third-party certifications, ranging from the Environmental Protection Agency's "Energy Star" program and the United States Green Building Council's LEED program to a bewildering array of third-party and industry seals, labels, and logos. Another is the constant development of new concepts that are general, even amorphous. What does it mean to be "earth friendly"? "Environmentally preferable"?

It is often not simple to say an environmental claim is misleading or deceptive. Is it misleading, for example, to stress positive aspects of a product or process while omitting negative aspects? From a life-cycle perspective, something that is "renewable" or "sustainable" in one dimension may have adverse effects in another. An improvement that merely complies with legal requirements may reflect no extraordinary solicitude for the environment. Advocacy groups have criticized such claims as "greenwashing" and expressed concern that market incentives for environmental improvements will be eroded if claims are seen as ill-defined or unsupported.

Against this background, the FTC in 2007 announced intent to revise the Green Guides and in 2008 held public hearings to gather information. In June 2009, however, an FTC witness told a congressional subcommittee that the commission needed more research on consumer perceptions. And several enforcement initiatives announced at the same time involved alleged misuse of terms the Green Guides had

addressed a decade earlier.

Despite their age, the Green Guides contain general interpretive guidance that remains useful. They provide that any express or implied objective assertion about an environmental attribute or benefit must have a reasonable basis substantiating the claim, often requiring scientific evidence. They caution against deceptive claims of general environmental benefit. They require clear, prominent, and understandable qualifications and disclosures. Claims must make clear whether the attribute or benefit refers in whole or part to the product, packaging, or service. The claim should not expressly or impliedly overstate the environmental feature. The basis of any comparison must be presented clearly enough to avoid deception.

Many states mirror the Green Guides, but some have gone further. Florida and California, for example, require advertisers to maintain "records documenting and supporting the validity of" representations concerning environmental harm or benefit and expand the Green Guides list of terms by including concepts such as "environmentally friendly," "ecologically sound," "environmentally safe," and "any other like term." FLA. STAT. § 403.7193(1); CAL. BUS. & PROF. CODE § 17580(a).

At least two states have attempted to address life-cycle impacts, a subject the Green Guides expressly disclaim intent to address. California and Indiana require documentation of significant adverse environmental impacts "directly associated with the

production, distribution, use, and disposal of the consumer good," as well as measures taken to reduce such impacts. CAL. BUS. & PROF. CODE § 17580(a)(2) and (3); IND. CODE § 24-5-17-2(b)(2) and (3).

Enforcement precedents may elucidate matters the Green Guides do not expressly cover. In August 2009, for example, the FTC announced complaints against sellers that advertised clothing as made from "bamboo fiber." The FTC challenged claims that the fabric was "biodegradable," but also took issue with claims that it was "environmentally friendly." The FTC reasoned that while bamboo cultivation may be sustainable, fabric production used harsh chemicals and produced hazardous air emissions—and yielded ordinary rayon rather than a genuine "bamboo fabric." [www.ftc.gov/bcp/edu/pubs/business/alerts/alt172.shtm](http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt172.shtm).

As this example illustrates, the broad variety and rapid evolution of environmental marketing claims pose continuing challenges from both the regulatory and compliance perspectives. Is this article environmentally preferable? The answer remains elusive.



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