

Green marketing standards — overhaul on the horizon

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Market demand for environmentally sustainable offerings has steadily increased in recent years, prompting companies across industries to ramp up marketing efforts focused on showcasing the environmental benefits of their products, services, and processes — often referred to as sustainability marketing or “green marketing.”

The potential rewards associated with green marketing are significant. Companies that successfully establish themselves as environmentally responsible stand to benefit from increased brand loyalty, improved financial performance, and enhanced brand equity. With great reward, however, comes great risk. Failing to properly execute green marketing strategies in compliance with legal guidelines and requirements can result in regulatory enforcement actions (at both the state and federal level), private consumer and class action litigation, and severe reputational damage.

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With such high stakes, the need for guidance on how to engage in effective and compliant green marketing is paramount. The Federal Trade Commission’s (FTC’s or Commission’s) Guides for the Use of Environmental Claims (the so-called “Green Guides” or “Guides”) serve as a de facto roadmap or reference manual for companies looking to engage in this space.

Widely regarded as the principal reference point for evaluation of green marketing claims, the Green Guides set out standards for environmental marketing and guidelines on how marketers can substantiate such claims to avoid deceiving consumers.

Although the Guides themselves are not binding as a matter of federal law, the FTC, and private-party litigants, frequently rely on the Guides to bring enforcement actions or lawsuits related to environmental claims. Several states — including California, Maine, and Rhode Island — have incorporated the Green Guides into their laws in some capacity. In a similar regard, companies defending these types of claims often look to compliance with the Green Guides as a defense. Courts, too, rely on and cite the Green Guides when considering false or misleading advertising claims.

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Green Guides remain instructive, the Guides are noticeably silent on some of the more recent (and prevalent) green marketing trends, including the increased use of descriptors such as “natural,” “organic,” and “sustainable.” This absence of particularized guidance has created uncertainty for businesses looking to engage in responsible sustainability marketing efforts.

At a high level, the Commission has signaled that it is looking to fill in the gaps for businesses seeking guidance on environmental marketing claims while enhancing consumer understanding of such claims.

The FTC last month announced its intention to revamp the Guides in 2023, and it formally opened the public comment period by inviting stakeholders across industries to submit their comments and feedback on the efficacy of the Guides.

At a high level, the Commission has signaled that it is looking to fill in the gaps for businesses seeking guidance on environmental marketing claims while enhancing consumer understanding of such claims. The FTC expressed its intent to update the Guides in a manner that reflects current market realities, including recent developments in environmental science and technology, as well as increasing demand for environmentally friendly products from conscientious consumers.

The FTC is currently seeking public comment on 19 general issues and 12 categories of specific claims.

Of note, the Commission has explicitly expressed its interest in receiving comments on the following topics by Feb. 21:

- Carbon offset and climate change/renewable energy claims;
- Claims about recyclability and “recycled content” — including claims related to “preconsumer” and “postindustrial” content;
- Claims such as “compostable,” “degradable,” “ozone-friendly,” “organic,” and “sustainable”;
- Claims regarding energy use and energy efficiency.

During the last review and update of the Guides in 2012, hundreds of stakeholders across industries submitted comments. Given the exponential growth of the sustainability movement — which has been driven by consumers, companies, and investors alike — the upcoming review is likely to draw substantial interest once again from stakeholders far and wide.

What can companies do to prepare?

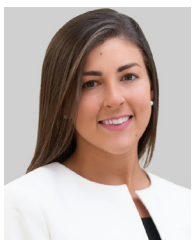
- If companies have views on any of the areas addressed in the Green Guides, they should consider taking the opportunity to submit comments and feedback to the Commission prior to the Feb. 21, 2023, deadline. This can be done directly (by the company itself) or through trade associations and industry groups that are likely to submit comments on behalf of their respective stakeholders.
- Looking ahead, companies should be aware of the potential regulatory changes that may ensue as a result of the Green Guides. Companies should closely review the 19 general issues and 12 categories of specific claims for which the FTC is seeking comment, as these are the best indicators of the areas in which the FTC is likely to implement guidance. This may require modifications to current business practices and advertising strategies. Companies should anticipate the costs and time associated with implementing any anticipated changes and plan accordingly.
- Companies should continue to abide by the key principles set out in the Green Guides. Regardless of what is to come, any company engaging in green marketing should strive for advertising that is truthful, clear, and substantiated. Notably,

companies should take care to substantiate environmental benefit claims — and any reasonable interpretations of those claims — prior to dissemination. To that end, companies should take appropriate steps to confirm that claims are supported by a reasonable basis, which requires competent and reliable evidence — typically tests, analyses, or studies. Further, companies should be careful not to overstate environmental benefits. Broad, unqualified claims pose a greater inherent risk than specific, qualified claims. Of note, companies should consider the legality of environmental benefit claims in all contexts — not just in traditional TV and print advertisements or public statements and press releases. Environmental marketing claims featured in user-generated content or promoted by influencers on social media platforms like TikTok, Instagram, and Snapchat carry the same (if not greater) risk than traditional marketing channels.

Although the updated Green Guides are expected to provide some additional clarity on green marketing, there is and always will be a baseline level of inherent risk that comes with environmental benefit claims. Companies would be wise to consult experienced marketing and advertising counsel before making claims of this nature, regardless of the context. With changes to green marketing standards on the horizon, adherence to fundamental advertising principles and prudent input from counsel will enable responsible and helpful marketing of the attributes of valuable products and services. When executed with care, environmental marketing can be informative and beneficial to businesses, consumers, and other stakeholders.

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