

What are the compliance considerations for companies making environmental claims in the US?

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Step toe associate Joseph M Dages outlines the purpose, scope and focus of the Federal Trade Commission's Green Guides which seek to help companies avoid deceptive marketing



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Companies are driven by internal priorities and consumer preferences to offer products and services that are environmentally friendly. While these drivers have existed for some time, the pressure to introduce new products and services that respond to them continues to escalate, especially for companies producing consumer-facing products, such as household goods, cleaning products, food and its packaging.

But companies that intend to make environmental claims should be aware that these may be scrutinised under the US Federal Trade Commission (FTC) Act and, in particular, the FTC's so-called Green Guides.

Why do the guides exist and what is the FTC's authority for issuing them?

The Green Guides exist to help companies avoid making environmental marketing claims that are unfair or deceptive under section 5 of the FTC Act. Importantly, the guides only express the commission's current thinking on

such claims, and are an administrative interpretation of the law, without its force and effect. They are not independently enforceable. Thus, while the FTC can take action under the Act if a marketer makes an environmental claim inconsistent with the Green Guides, it must prove that the challenged act or practice is unfair or deceptive under section 5 of the Act.

We would be remiss not to mention that many consumer lawsuits and those initiated by state attorney generals, which are brought under the various state 'little FTC Acts', reference the guides and leverage their existence to assert a practice is unlawful under applicable state law. A few points are worth mentioning in this regard.

Firstly, while there is no private right of action under the federal FTC Act, these lawsuits are often brought as 'follow-on' actions after a federal FTC action becomes public, thus greatly increasing liability exposure for companies.

Secondly, brought under state law, they often allege an environmental claim is unlawful because it was made in 'violation' of the Green Guides, even though one cannot truly 'violate' them, but rather only section 5 of the FTC Act.

Thirdly, a number of states have adopted their own laws that also deal specifically with green claims, such as those

used for the marketing of plastic materials. Consequently, it is often important to confirm compliance with these state level laws when considering whether it is acceptable to make a claim.

What is their scope?

The Green Guides are broad in scope in that they apply to any express or “reasonably implied” claim made about the environmental attributes of a product, package or service sold in commerce. Importantly, they apply to both business-to-consumer and business-to-business transactions. In addition, this covers not only representations or labels on packaging for products sold in commerce, but also other advertising and promotional marketing materials.

What are the important standards, definitions and terms used in the guides?

It is the deception prong of the prohibited “unfair and deceptive practices” language in section 5 of the FTC Act that is primarily implicated when environmental claims are made. Deceptive practices, as the term is used by the FTC, are those involving a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances. The FTC determines whether an advertisement is deceptive by engaging “in a three-step inquiry, considering:

- what claims are conveyed in the ad;
 - whether those claims are false, misleading, or unsubstantiated; and
 - whether the claims are material to prospective consumers.”
- Its judgment is given great weight by courts reviewing any of its decisions or actions.

In terms of interpreting the “reasonable consumer” or the “consumer acting reasonably under the circumstances” standard, the applicable test is whether their interpretation or reaction is reasonable. The evaluation also centres on the net impression of the claim, not on a particular word or image used. In addition, if it is targeted at a specific audience, then the effect on a reasonable member of that group is the focus of the inquiry.

Companies should have a reasonable basis for any environmental claim that is made, which often is established using “competent and reliable scientific evidence”. Such evidence means “tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate

that a representation is true.” Whether an environmental claim is deceptive under section 5 of the FTC Act often hinges on the quality and quantity of scientific evidence that exists to substantiate it.

What types of claims do the guides discuss?

The bulk of the Green Guides is dedicated to discussing specific types of claims that the FTC considers to be deceptive, as well as discussing how this can be avoided. Examples of claims are provided to assist companies. These are based on how individual consumers are likely to interpret environmental claims, and the commission has crafted them to be consistent with these interpretations. The following types of claim are specifically addressed:

- general environmental benefit;
- carbon offsets;
- certifications and seals of approval;
- compostable;
- degradable;
- free-of;
- non-toxic;
- ozone-safe and ozone-friendly;
- recyclable;
- recycled content;
- refillable;
- renewable energy;
- renewable materials; and
- source reduction.

Companies should take care to not overlook section 5 compliance for an environmental claim simply because the claim in question is not explicitly captured in the Green Guides. Any environmental claim or category of claims can be deceptive under section 5 of the FTC Act. Thus, those addressed in the guides should not be considered to represent the universe of potential FTC enforcement targets.

The fact that some commonly used terms that could be interpreted to convey an environmental benefit are not included in the Green Guides is, at least in some cases, quite intentional. For example, ‘sustainability’, ‘natural’, and ‘organic’ claims were considered for inclusion. In the case of the term sustainability, the FTC ultimately declined to incorporate a discussion of the term because it can have a wide range of meanings and be interpreted differently. In other words, the commission believes it is difficult to provide specific guidance on them, but these terms can nevertheless be deceptive. It can be challenging to substantiate such claims due to their propensity to be misinterpreted.

What are some relevant compliance considerations and best practices?

While it is always necessary to focus on the specific

facts and details of a claim in determining whether it is deceptive, we share below some general considerations and best practices.

1. Do not over generalise

General claims about the environmental attributes of a product or service (for example, 'environmentally friendly') are risky to make because consumers are more likely to misinterpret them than narrower claims.

2. Qualify the claim if necessary

If there is a risk that a claim could be misinterpreted by a reasonable consumer, use of qualifying language, for example: "20% of packaging consists of post-consumer recycled plastic" rather than "made from recycled plastic" should be considered.

3. Don't separate your qualifier from the claim itself

To the extent that a claim is qualified or explained, that disclosure must be clear, prominent, and in close proximity to the claim itself. Websites should not be used to qualify a claim that appears on a label or advertisement because the FTC is aware that many consumers would not see that information before their purchase.

4. Substantiate, substantiate, substantiate

Consistent with the discussion above on the meaning of "competent and reliable scientific evidence", whether a claim is deceptive ultimately requires one to focus on the specific facts and information available to support it. The quality and quantity of the scientific evidence used is a natural focus point, but consumer perception studies can form an important part of the substantiation process

too. In terms of scientific evidence, care should be taken to ensure this is objective. For example, even if a claim references a third-party standard developed by a group of individuals that are mostly not affiliated with industry, the FTC may consider the claim to be deceptive if one of the individuals worked for industry and had veto power over portions of the content.

5. Make a plan and involve counsel and other experts, if necessary

Formulate a marketing plan that involves counsel and ensure all parties are involved in the claim development process from the very beginning. Assessing whether a claim may be deceptive, and determining what substantiation may be needed, can take time. In addition to working with counsel, it also can be helpful for companies to work with experts that are well versed in the scientific area relevant to the claim.

6. Watch this space

The FTC recently announced in its regulatory review schedule that it intends to initiate rulemaking to update the Green Guides in 2022. The announcement is not all together surprising – the guides have not been updated since 2012 – but it remains to be seen whether this will in fact happen next year. In addition, at the state level, we can expect continued activity in this area, either through the adoption of new laws or development of new regulations.

The views expressed in this article are those of the author and are not necessarily shared by Chemical Watch. The author transparency statement can be [seen here](#).

FURTHER INFORMATION

[FTC, The Green Guides, statement of basis and purpose](#)

[A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority](#)

[FTC Policy statement on deception](#)