

FTC Requests Comment on Potential Revisions to Green Guides

December 22, 2022

On December 20, 2022, the Federal Trade Commission (FTC) published a Request for Comment (Request) on potential revisions to its Green Guides for the Use of Environmental Claims (Green Guides). The Request seeks information on a wide range of environmental marketing claims both currently and potentially covered by the Green Guides – including claims related to recycling, climate change, energy use and efficiency, and sustainability. The Green Guides outline the FTC’s position on avoiding deceptive environmental marketing claims, including the level of evidence needed to support specific kinds of claims. The FTC and others, including state and private-party litigants, often rely on the Green Guides in bringing enforcement actions related to environmental claims.

The Green Guides were last updated in 2012, and, given the pace of change and the importance of environmental claims over the last 10 years, the Request provides the best opportunity to engage with the FTC on any revisions to the Green Guides for years to come. The Request broadly seeks comment on how the Green Guides have worked in practice, and whether any changes should be made going forward. Comments are due February 21, 2023.

Background on Green Guides

The Green Guides set forth the FTC’s guidance for making environmental marketing claims consistent with Section 5 of the FTC Act, which prohibits unfair and deceptive practices. The Green Guides were first issued in 1992, and the latest revisions were published in 2012. They are intended to inform companies and marketers about how consumers are likely to interpret certain environmental claims and how these claims can be substantiated and/or should be

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qualified. In their current form, the Green Guides are neither law nor regulation, but offer an administrative interpretation. At the federal level, they are not enforceable on their own, but are generally viewed as authoritative on the subject of the acceptability of environmental claims, and the FTC cites their guidance when bringing enforcement actions under the FTC Act. And at least one state, California, has referenced the Green Guides explicitly by reference, making them enforceable as an incorporated part of state law.

Request for Comment

The Request invites comments on 19 general issues, in addition to asking questions about specific kinds of claims. First, the Request asks for comments on the current effectiveness of the Green Guides, including what benefits they have provided, what costs they have imposed, and to what degree industry has complied. Second, the Request asks a series of questions about the societal changes that have occurred since the last round of revisions, including changed consumer concerns, changed industry concerns, whether certain claims no longer need to be addressed by the Green Guides, which if any need to now be included, and how to account for changes in relevant technology or economic conditions.

A key question in the Request is whether the Green Guides should remain a guidance document or whether the FTC should initiate rulemaking proceedings and incorporate some or all of the principles of the Green Guides into a rule. The Request also asks how the Green Guides currently interact with other environmental marketing regulations at the state level and internationally.

Beyond these general issues, the FTC invites interested parties to comment on specific environmental marketing claims. One notable claim on which the FTC is seeking comment relates to the level of local recycling infrastructure that must be present for a marketer to make a recyclability claim in that area. FTC's current position in the Green Guides is that marketers can claim that their product is "recyclable" if recycling facilities are available to at least 60% of consumers in each location where the item is sold. Over the past 10 years since the most recent revision of the Green Guides, substantial technological progress has been made in product manufacturing and recycling capacity, awareness has matured, and legal interpretations of the standard have developed. Some states have undertaken or considered rulemakings or enacted legislation directed at recyclability claims based on local recycling capacity. Moreover, the plaintiffs' bar is proffering a test for using this term that goes well beyond collection to include whether the material is actually processed and reused in a product. All of these factors may affect consumers' views of what it means for a product to be "recyclable." The FTC's Request seeks comments on whether the 60% threshold should be revised and what it means for something to be "recyclable."

The Request also asks about a number of other claims. One question is whether the Green Guides should cover certain kinds of climate change-related claims, as they currently cover only claims related to carbon offsets. The Request highlights the need to consider whether the Green Guides should provide guidance on terms like "net zero emissions" and other comparative claims related to reducing emissions and carbon footprints, which are becoming more common in the marketplace. The Request also asks whether the Green Guides should cover energy use or energy efficiency claims, including for electric vehicles. Additionally, in 2012, the FTC declined to issue guidance on certain claims, including "sustainable" and "organic," and the

Request now asks for comments on revisiting those determinations. Revisiting the term “sustainable” may be timely given that earlier this year, the White House Office of Science and Technology Policy issued a Request for Information to the public on what the term “sustainable chemistry” means.

Finally, the FTC is looking to modernize the Green Guides. The Request notes that new environmental benefit claims proliferated in the market since the last revision. Scientific and consumer understandings of environmental claims have changed, and the FTC is anticipating that it may need to address new claims and new perceptions by consumers. The Biden Administration has committed to including environmental justice and holistic sustainability considerations, including attention to ecosystems and biodiversity, in its efforts, and these may be factors in any revisions.

Importance of Green Guides and Next Steps

Any revisions to the Green Guides are critical for industry – even if the FTC chooses not to go forward with converting them to regulations, they can serve as the basis for civil liability or enforcement actions, even if they are not directly enforceable. The FTC and state attorneys general can bring enforcement actions against companies and marketers that deviate from the Green Guides, based on allegations of deceptive practices under Section 5 of the FTC Act or state law. In the last 10 years, the FTC has brought almost 50 enforcement actions against American companies for making environmental claims in ways that the FTC argued to be deceptive or misleading. Through either court orders or settlements, companies have been forced to pay millions of dollars in penalties, including several multimillion-dollar penalties in just the last year. Additionally, consumer groups and public interest law firms are increasingly looking to the Green Guides as a basis for bringing claims against businesses, alleging that noncompliance with the Green Guides demonstrates that a product claim is misleading.

The upcoming public comment period is a critical time for stakeholders to provide input on permissible claims and appropriate guidance from the agency. Complexities abound in association with specific types of environmental claims, the potential for new guidance, and the interface with litigation and enforcement. Although companies have until mid-February to weigh in, we’re already working with clients on their strategic planning. In our experience, discussions on where industry would like this update to land cannot start soon enough.