

# Analyzing 1 Year Of Comments On FTC's Green Guides

By **Mark Levy and Emma Lombard** (December 20, 2023)

One year ago, on Dec. 20, 2022, the Federal Trade Commission issued a request for public comment on its Guides for the Use of Environmental Marketing Claims — also known as the Green Guides — effectively initiating the regulatory review the FTC performs once every decade.[1]

In the year since, the commission has received over 7,000 comments, which it is tasked with reviewing as part of its upcoming publication of the revised Green Guides.[2] This article highlights the importance of this review, analyzes the comments submitted by interested parties and outlines what to expect as the FTC's review continues in 2024.[3]



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## Why the Present Review Matters

The importance of the FTC's present review and revision of the Green Guides cannot be overstated, as the updates resulting from this process will affect environmental advertising and labeling claims for the next 10 years across a variety of industries.



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The last decade has seen an increase in consumer focus on how companies are pursuing more environmentally conscious measures, a heightened emphasis on purchasing products that consumers consider in alignment with efforts to ameliorate the effects of climate change, and major advancements in energy technologies and environmental regulations.

Though tough to predict with precision, some forms of these same trends will inevitably shape the next decade. As a result, the FTC is faced with the difficult task of revising the Green Guides in a way that accounts not only for the changes we've seen in the last 10 years, but also for the changes we expect to see in the next 10.

## Overview of Public Comments

The FTC's request for comment sought input from industry and consumers regarding a variety of topics and terms, including whether and to what extent the commission should revisit the following phrases within the Green Guides:

- "Carbon Offsets" and "Climate Change";
- "Compostable";
- "Degradable";
- "Ozone-Safe/Ozone-Friendly";
- "Recyclable";
- "Recycled Content";
- "Energy Use" and "Energy Efficiency"; and
- "Sustainable."

We believe that it is helpful to review the comments to date in order to see what the FTC is

reading — and to understand how these comments may shape its thinking moving forward. Comments range from those that may be characterized as pro-industry to pro-consumer.

The substance of the respective comment submissions inherently varies from industry to industry, and from commenter to commenter. But one common theme emerged from many comments: The existing Green Guides — which, as the name suggests, are meant to guide rather than dictate the types of claims that can be made — inherently leave room for interpretation that puts businesses in a challenging position when marketing products.

Some commenters highlighted that the proverbial gray area surrounding permissible environmental marketing claims has become increasingly problematic for both industry and consumers, as the gap between their respective understandings of many terms has widened in recent years. Commenters thus asked for clarity and legal certainty to assist them in ensuring their claims do not run afoul of the FTC's guidelines.

Other commenters approached this topic from a slightly different perspective, urging the commission to adopt more proscriptive definitions to curtail potential exploitation by industry participants whose marketing efforts demonstrate less concern for this knowledge gap.

While commenters recognized that not all industry participants approach marketing claims with dubious intentions, the lack of clarity around certain terms inherently contributes to market confusion, because companies with fewer resources to dedicate may experience compliance difficulties, or may be unaware of their noncompliance.

Regardless of the source, commenters cited an increase in labeling inaccuracy as one prevailing problem. Others noted the prevalence of "greenwashing" by advertisers as a contributing factor — along with increased "wish-cycling" by consumers who are either unaware of an item's nonrecyclability, or who rely upon inaccurate labels suggesting a nonrecyclable item can be recycled — as further evidence of the need for more stringent requirements around these terms.[4]

In connection with the theme highlighted above, some of the commonly requested revisions include:

- Adding the 60% threshold that currently applies to "recyclable" claims to "compostable" claims as well — i.e., restricting unqualified claims to those products and packages for which composting facilities are available to a "substantial majority" of consumers, defined as at least 60% of consumers;
- Defining "recyclable" by material type to allow for greater harmonization among industry-specific claims;
- Defining all terms in a technologically neutral and material-neutral manner to avoid creating potentially conflicting standards;
- Differentiating between preconsumer and post-consumer for "recycled content" claims, or requiring disclosure of a threshold percentage of the amount of recycled content;
- Providing guidelines around best practices or approved methods for substantiating recycling claims using recognized standards, certifications, or third-party assessments that ensure the accuracy and credibility of such claims;

- Introducing the concept of "more sustainable" or "improved sustainability" to more accurately reflect sustainability attributes, while banning the term "sustainable" because there is no absolute level of sustainability at present;
- Adopting the U.S. Environmental Protection Agency's definition of "sustainability," which is: "efforts to create and maintain the conditions under which humans and nature can exist in productive harmony to support present and future generations";
- Addressing the use of vague and undefined terms like "green," "eco-friendly" and "reusable" to avoid confusion, either by defining them or by prohibiting their use;
- Limiting use of the term "recyclable" to products and packaging for which the total mass can be recycled or for which collection and recycling infrastructure or capabilities exist for a majority of consumers;
- Excluding from the definition of "recycled" the use of otherwise wasted products or byproducts that are not transformed during a recycling process, such as products that are "upcycled" instead.

Because some of the requested revisions cannot be reconciled into a single revision, the FTC will necessarily have to choose between the suggestions from commenters, if it elects to revise any of the terms as requested. However, given the commission's approach to other types of marketing claims, such as "made in USA" claims, it is unlikely to create industry-specific standards, or to adopt definitions that feature a bright-line rule for permissible claims.[5]

This is not to suggest that the FTC is unwilling or unable to adopt the revisions requested. But by their nature and scope, the Green Guides are inherently limited to providing general principles, specific guidance on the use of certain environmental claims, and examples — all of which are based on marketing to a general audience.

As a result, the revised Green Guides are unlikely to include industry-specific definitions, or to prescribe standards that could nonetheless be interpreted as allowing marketing claims that are compliant with the guides on paper while still misleading consumers.

The FTC may incorporate these suggestions as factors for consideration when making such claims, while avoiding the outright adoption of additional requirements, to avoid over- or underrepresenting what may be a deceptive claim, depending on the surrounding circumstances.

### **What to Expect Next**

The FTC's regulatory review is guided by traditional administrative rulemaking procedures — meaning that at a minimum, it will publish its proposed Green Guides and allow for public comments thereon, before publishing its final Green Guides. Though the time frame for when we can expect the proposed Green Guides is less than clear, the commission's last regulatory review provides valuable insight.

While the last revision concluded in 2012, the regulatory review process spanned nearly five years, from initial comment solicitation through publication of the final Green Guides. The FTC began seeking comments in 2007, then conducted a consumer perception study in 2008, published its proposed revisions in 2010 and released the final Green Guides in 2012.

The commission noted that the consumer perception study delayed the revisions, but suggested its decision to conduct the study stemmed from the "limited consumer perception evidence regarding sustainable claims" submitted by commenters.

Similarly, in May of this year, the FTC convened a workshop titled, "Talking Trash at the FTC: Recycling Claims and the Green Guides," which focused on the existing recommendation that unqualified recycling claims should only be made by companies whose products satisfy the 60% recyclable content threshold.[6]

If that timeline is any indication of how the FTC will proceed with the current review, the next opportunity to comment on the proposed Green Guides could be coming up in the next few months, while the final Green Guides could be published as late as 2025.

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[1] See also Mark C. Levy and Jessica L. Rosenblatt, FTC provides companies a valuable opportunity to comment on updates to its "Green Guides," Westlaw Today (Feb. 3, 2023), [https://www.eckertseamans.com/app/uploads/WestLaw-Green-Guides\\_Edited.pdf](https://www.eckertseamans.com/app/uploads/WestLaw-Green-Guides_Edited.pdf).

[2] See Regulations.gov, Docket ID: FTC-2022-0077, accessible at: <https://www.regulations.gov/docket/FTC-2022-0077> (last accessed Nov. 8, 2022).

[3] See Federal Trade Commission, Regulatory Review Schedule published Nov. 30, 2023, Federal Register 88 FR 83498, accessible at <https://www.federalregister.gov/d/2023-26064> (last accessed Dec. 5, 2023).

[4] "Wish-cycling" is the act of placing something in a recycling bin with the hope it will be recycled, even if there is no or little evidence to confirm this assumption.

[5] This approach would be consistent with the FTC's promulgation of "made in USA" marketing regulations, for which it has provided guidance about, and examples of, the types of claims that can be made if truthful and substantiated. Though the guidance and accompanying standards include several factors to consider, the commission purposefully leaves terms undefined, suggesting that manufacturers and marketers are in the best position to assess whether their products and manufacturing processes are compliant therewith.

[6] FTC to Host Workshop on "Recyclable" Claims as Part of its Ongoing Review of the Agency's Green Guides, Federal Trade Commission (March 1, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-host-workshop-recyclable-claims-part-its-ongoing-review-agencys-green-guides>.