

FTC provides companies a valuable opportunity to comment on updates to its “Green Guides”

By Mark Carlisle Levy, Esq., and Jessica L. Rosenblatt, Esq., Eckert Seamans Cherin & Mellott, LLC

FEBRUARY 3, 2023

Demand for “green” products has skyrocketed in recent years as consumers seek more environmentally conscious goods and packaging. While industry tries in good faith to meet this demand, it is left with aging and inadequate guidance on how to advertise and market green products to consumers.

Now, for the first time in over a decade, companies have an opportunity to comment on potential updates to the Federal Trade Commission’s “Green Guides,” which could provide marketers, including manufacturers, a valuable opportunity to better understand responsible green marketing.

Despite the ubiquity of discussions on “sustainable” products and how much money consumers are willing to pay for them, there is no single definition of “sustainable” or guideposts to evaluate when it is appropriate to use the term.

The Federal Trade Commission (FTC) is the federal agency tasked with enforcing consumer protection laws. It first provided some clarification on “green claims” in 1992 when it published the “Guides for the Use of Environmental Marketing Claims,” more commonly known as the Green Guides.

The objective of the Green Guides is to provide guidance to companies on general principles that apply to all environmental marketing claims, how consumers are likely to interpret the claims and how companies can substantiate them, and how companies can qualify their marketing claims so as to avoid misleading customers.

Since their publication over thirty years ago, the Green Guides have been revised and updated just three times — in 1996, 1998, and 2012.

However, on December 14, 2022, the FTC announced it is seeking public comment on a potential set of updates to its Green Guides that may have a significant impact on manufacturers across the

country. Companies and individuals wishing to submit comments must do so by April 24, 2023, or risk waiting ten years or more before another opportunity to comment arises.

Estimates suggest that consumers are more than ever before concerned about the environmental impact of the products they purchase, so much so that consumers *expect* companies to offer environmentally conscious products for sale. Even in the face of rising inflation, recent reports — such as those from First Insight, Capterra, and GreenPrint — show the percentage of consumers willing to pay more for sustainable goods has increased in recent years.

Yet, despite the ubiquity of discussions on “sustainable” products and how much money consumers are willing to pay for them, there is no single definition of “sustainable” or guideposts to evaluate when it is appropriate to use the term when marketing a product sold into the stream of commerce.

The FTC declined to address “sustainable” (or “natural” or “organic”) claims in its last update to the Green Guides admitting it “lacks sufficient evidence on which to base general guidance.” But even where the FTC has been able to provide guidance on specific green marketing claims, it is often vague and unclear.

Companies are increasingly facing class action lawsuits, enforcement cases brought by the FTC, and state enforcement actions alleging false or misleading green marketing claims.

For example, several lawsuits have focused on “biodegradable” marketing claims, which generally must be qualified “to the extent necessary to avoid deception” about a product’s ability “to degrade in the environment where it is customarily disposed” and “[t]he rate and extent of degradation.”

But what exactly does “to the extent necessary” mean? How does a company determine where a product is “customarily disposed” when it is purchased by consumers in different states and counties

all with varying waste streams? These kinds of questions, coupled with the complexities of modern-day supply chains, can leave companies feeling confused about how they can safely and adequately market their products. That confusion can lead to significant legal risk and liability.

The FTC is considering making the Green Guides enforceable under federal law, a move that could have significant effects on manufacturers doing business in the United States.

As consumer demand for green products has risen, so too have consumer suits against the companies selling them. Companies are increasingly facing class action lawsuits, enforcement cases brought by the FTC, and state enforcement actions alleging false or misleading green marketing claims. These suits can be attributed in part to a lack of sufficient clarity in the Green Guides and the state laws that incorporate them in varying degrees.

Although the Green Guides are non-binding enforcement guidance for environmental marketing claims, they attempt to clarify those claims the FTC considers deceptive and therefore actionable under Section 5 of the Federal Trade Commission Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.”

The Green Guides are cited in court decisions in civil suits, and several states, such as California, Rhode Island, and Maine, have

adopted the Green Guides by reference, in whole or in part, making them enforceable under state law.

Importantly, in its request for comment, the FTC is considering making the Green Guides enforceable under federal law as well, a move that could have significant effects on manufacturers doing business in the United States.

Additional questions posed by the FTC’s request for comment include whether further information is needed on claims related to carbon offsets and climate change (i.e., claims asserting “net zero” or “carbon neutral”), whether the FTC should revise the current threshold for unqualified recyclability claims, whether guidance should be added for claims on energy use or efficiency, and whether additional or revised guidance is needed for claims like “compostable,” “degradable,” “ozone-friendly,” “recyclable,” “organic,” and “sustainable,” among others.

The FTC is also inviting broader comments from the public, such as whether there are international laws, regulations, or standards it should consider in its review.

Due to the fact the FTC generally reviews the Green Guides once every ten years, the FTC’s request for comment is an excellent opportunity for manufacturers and others to weigh in on what is and is not working in the Green Guides before they are finalized and relied upon for another decade.

Submitting comments on or before the April 24, 2023, deadline permits a company to help inform FTC’s thinking on this subject and shape the scope and content of its guidance. In this way, a company can reduce its exposure to costly litigation, enforcement actions, and possible injury to its reputation.

About the authors



Mark Carlisle Levy (L) is a member of **Eckert Seamans Cherin & Mellott** in the firm’s Philadelphia office. He is a trial attorney who has represented Fortune 500 companies in complex commercial litigation in state and federal forums across the country, counseling them in managing the risks associated with product liability and regulatory compliance. He can be reached at mlevy@eckertseamans.com. **Jessica L. Rosenblatt (R)** is an associate based in the firm’s Pittsburgh office. She assists clients with solving challenges arising under federal and state environmental laws. She can be reached at jrosenblatt@eckertseamans.com.

This article was first published on Westlaw Today on February 3, 2023.