

# FTC FINALIZES GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS

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## FTC Finalizes Guides for the Use of Environmental Marketing Claims

On October 1, 2012, the Federal Trade Commission ("FTC" or "Commission") finalized its much-anticipated revisions to the Guides for the Use of Environmental Marketing Claims ("Green Guides" or "final Guides"). This culminates a multi-year review process that included several FTC workshops and two rounds of extensive comments from stakeholders.

The final Guides maintained much of the FTC's guidance proposed in October 2010. This includes guidance in the area of compostability, degradability, non-toxic, recycled content, ozone-safe or ozone-friendly, carbon offsets, made with renewable energy, and made with renewable materials. Significant revisions have been made to general environmental benefit claims, certifications and seals of approval, recyclable claims, and "free-of" claims. The final Guides do not address organic, sustainable, and natural claims, consistent with the 2010 proposal.

We provide a brief overview below of key revisions from the proposed Guides, and an overview of FTC guidance on those claims that did not change.

### Key changes from the proposed Guides:

- **General claims:** Guidance on general environmental benefit claims are almost identical to those in the proposed Guides, except the Commission clarifies that marketers should not imply that any specific benefit is substantial if it is, in fact, negligible; and marketers should analyze trade-offs in making a qualified general claim, if the claim conveys that the product is more environmentally beneficial overall because of the particular touted benefit. The FTC has also provided several new examples. One such example makes clear that if images featured in the advertisement, in combination with text, convey that a product has far-reaching environmental benefits, or that the product has no negative impact, the advertisement is likely deceptive.
- **Certifications and seals of approval:** One controversial point in the proposed Guidelines was the Commission's view that certifications and seals of approval are subject to the FTC's Endorsement and Testimonial Guides and require disclosure of any "material connection" between the certifier and the product/service involved. The final Guides, however, make clear that a "material connection" does not automatically include membership in industry trade associations offering certifications, so long as an independent certifier administers the industry trade association certification program by objectively applying a voluntary consensus standard. If, however, an industry veto could override proposed changes to such voluntary consensus standard, the certifier would not be considered independent and the certification would be considered deceptive. Further analysis of this guidance will be needed to evaluate the practical impact. The Commission also clarifies that marketers featuring certifications from third-party certifiers need not disclose that they paid a reasonable certification fee if that is their only connection to the certifier as part of the obligation to adhere to the Endorsement and Testimonial Guides. The final Guides also advise that an environmental certification or seal is deceptive if it fails to clearly state, either through its name or other means, the basis for the certification. A certification or seal should contain clear and prominent language to convey that it refers only to specific and limited benefits.



- **Recyclable:** Despite a significant number of critical comments, the FTC retained its proposed guidance that to make an unqualified recyclable claim, the product or package must be recyclable to a "substantial majority" of consumers or communities, which means at least 60%. The FTC, however, deleted the "significant percentage" threshold, acknowledging that commenters suggested it confused both marketers and consumers. Instead, the Commission collapsed the analysis into two tiers depending on whether recycling is available to a "substantial majority," or "less than a substantial majority." When qualifying claims for "less than a substantial majority" of consumers or communities, the final Guides advise that marketers may qualify the claims by either: (1) stating the percentage of consumers or communities that have access to recycling facilities, or (2) using qualifications that vary in strength depending on the facility availability. The Commission maintained its position that "please recycle" and "check to see" disclosures, standing alone, are not adequate to qualify a recycling claim where facilities are not available to a substantial majority of consumers, this type of positive disclosures, including referring to websites or toll-free telephone numbers, may be appropriate qualifiers in combination with other disclosures outlined in the Guides. Claims that "Recyclable where facilities exist" or "Recyclable - Check to see if recycling facilities exist in your area" are allowed if recycling programs for the product are available to a substantial majority of consumers nationwide.

- **"Free of" claims:** The final Guides maintain that a "free of" claim may be deceptive if new or substituted material poses the same or similar environmental risks, or if the substance has never been associated with the product. Such claims may be acceptable if the item contains de minimis or trace amounts of the material referenced. The FTC expanded guidance in this area, explaining that the presence of trace amounts of the substance do not make the claim misleading or deceptive if: (1) the level of the specified substance is no more than that which would be found as an acknowledged trace contaminant or background level; (2) the substance's presence does not cause material harm that consumers typically associate with that substance; and (3) the substance has not been intentionally added. What constitutes a "trace amount" depends on the substance at issue, and requires a case-by-case analysis.

Guidance substantially similar to the proposed Guides:

- **Compostable:** A material can be called "compostable" if it breaks down in a "timely manner." The final Guides adopt the proposed Guides in this area, and define a "timely manner" to mean breaking down in approximately the same time as other materials that are composted with the claimed product.

- **Degradable:** The FTC did not make any substantial revisions to the text of the final Guides in this area, despite considerable objections from commenters and a consumer survey submitted by EcoLogic. The final Guides maintain that it is deceptive to make an unqualified degradability claim for items destined for landfills, incinerators or recycling facilities, and that a "reasonably short period of time" for complete degradation is approximately one year after customary disposal. The FTC also declined to create a safe harbor for any particular testing protocol, suggesting that current protocols do not replicate actual, highly variable landfill conditions, such as the size of the disposed item, its compression, and levels of moisture and temperature. The FTC's guidance and discussion in this area seem to leave the door open to biodegradable claims for landfills, provided that such claims are qualified clearly and prominently to the extent necessary to avoid deception about: (1) the product's or package's ability to degrade in the environment where it is customarily disposed; and (2) the rate and extent of degradation.



- **Non-Toxic:** The FTC retains its previous guidance that an unqualified claim conveys that the product is non-toxic to both humans and to the environment. The Commission notes that "the environment" includes pets and domestic animals.
- **Recycled Content:** The Commission continues to advise that marketers use the annual weighted average of recycled content when making a recycled content claim, and maintains that a recycled content claim be qualified if less than 100% of the product or package, excluding minor, incidental components, is made with recyclable content.
- **Ozone-Safe or Ozone-Friendly:** The Commission retained its guidance regarding ozone-safe claims, and declined to offer further guidance on "no-CFCs" claims.
- **Carbon Offsets:** The final Guides continue to offer limited guidance on these claims, recognizing that consumer perception of carbon offset and similar claims, like "carbon neutral," are still evolving. The Green Guides require use of appropriate accounting methods to avoid "double-counting," advise that qualifiers are needed if the carbon reductions will not occur more than two years later. It also incorporates the principle of "additionality," meaning that claims may not be made if the reductions are required by law. The FTC urges marketers to provide information necessary to prevent consumers from being misled, and to have competent and reliable evidence supporting the claim.
- **Made with renewable energy:** Such claims should be qualified if less than virtually all production used renewable sources (which exclude fossil fuels), and the type of renewable energy (e.g., solar, wind) should be disclosed. If the company uses renewable energy from a portfolio of sources, the claims should clearly and prominently disclose all renewable energy sources. The Commission adopted its proposed advice that using the term "hosting" is deceptive when a marketer generates renewable power but has sold all of the renewable attributes of that power.
- **Made with renewable materials:** The final Guides confirm that renewable material claims should be qualified if less than 100% of the product is made with renewable content, excluding minor, incidental components. Unless marketers have substantiation for all their express and reasonably implied claims, they should clearly and prominently qualify their renewable materials claims. The FTC provides that marketers may minimize the risk of unintended, implied claims, by identifying the material used and why it is renewable, although it makes clear that this is not the only way to qualify such claims.

For more information on the final Green Guides, or how they apply to your environmental marketing claims, please contact:

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