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Anticipating The New “Green Guides”: FTC Promises Review of Environmental Marketing Guidance

BY FRANCES BANDAS / ON SEPTEMBER 20, 2022



Photo by Ivan Bandura on Unsplash

The Federal Trade Commission (“FTC”) is poised to review its “Green Guides,” a series of guidelines issued to help marketers make nondeceptive environmental claims that comply with federal regulations.¹ Guidance is supplied for claims about a product or its packaging, claims made in connection with a sale or service, and all forms of marketing claims.²

Though the Green Guides broadly reflect FTC views, they are not binding in and of themselves.³ Section 5 of the Federal Trade Commission Act—which prohibits unfair or deceptive trade practices—captures deceptive environmental marketing in its regulatory scope.⁴ However, compliance with the Green Guides may serve as a defense against liability in states which have adopted the Green Guides as law.⁵

The current Green Guides, which offer general principles, specific advice, and corresponding examples,⁶ were last updated in 2012.⁷ Contemporary revisions were designed to reflect public input and industry comments, introducing “new sections on the

use of carbon offsets, ‘green’ certifications and seals, and renewable energy and renewable materials claims.”⁸

Notably, mounting consumer interest in sustainable corporate practice has led to a rise in green marketing. From a brand perspective, this consumer interest has the potential to result in increased spending on sustainable products.⁹ On the other hand, vague or unsubstantiated marketing claims risk generating consumer perception of “greenwashing.”¹⁰

In recent years, a number of fashion retailers have claimed carbon neutrality,¹¹ yet some skeptics warn “the offsetting market is historically unreliable, and . . . accounting for offsets is often inaccurate.”¹² This unreliability poses a risk of perceived greenwashing for brands and marketers engaged in environmental positioning. Further examples of greenwashing risk include vague public commitment to climate action, waste incineration branded as a “waste-to-energy” practice, and indefinite claims of “more responsible” fiber usage.¹³

Fashion retailer H&M was recently sued for false advertising in a related instance. The brand was accused of making false and misleading sustainability claims which did not comport with third-party verification on its labeling, packaging, and marketing.¹⁴ The case is one of numerous in which brands have been accused of false advertising over sustainability claims.¹⁵ “To date, most brands have been able to avoid litigation and regulatory action in response to potentially misleading sustainability and broader ESG claims,” The Fashion Law comments, “but that may be changing.”¹⁶

The 2022 update to the Green Guides is speculated to include recyclability guidelines,¹⁷ guidance concerning climate-related claims, and further regulation of claims related to carbon offsets.¹⁸

In the interim, marketers may benefit from careful selection of language. The FTC has historically “issued warning letters and brought claims against deceptive environmental advertisements, most commonly regarding environmental buzzwords such as ‘biodegradable,’ ‘recyclable,’ ‘compostable’ and renewable.”¹⁹ The Green Guides have thus far declined to define similarly widespread terms “sustainable” and “net-zero.”²⁰ Room for interpretation by consumers and the FTC alike presents a potential liability that may be mitigated by accurate wording.

Marketers may further benefit by substantiation of claims. The Green Guides call for claims which are not only truthful but also supported by a reasonable basis—and in the “context of environmental marketing claims, a reasonable basis often requires competent and reliable scientific evidence.”²¹

Forthcoming review and public comment on the Green Guides promise added clarity in this hot-button area of marketing law.

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1. 16 C.F.R. § 260.1. Sarah Grey, Brian D. Israel, Raqiyyah Pippins, Kelsie Sicinski, Trenton H. Norris & David M. Barnes, Changes to the FTC’s Green Guides on the Horizon, Arnold & Porter (Aug. 8, 2022), <https://www.arnoldporter.com/en/perspectives/blogs/environmental-edge/2022/08/changes-to-the-ftcs-green-guides> [<https://perma.cc/6MUL-A4EZ>].
2. 16 C.F.R. § 260.1.
3. Id.
4. 15 U.S.C. § 45. See also 16 C.F.R. § 260.2.
5. See Grey et al., supra note 1; A Lawsuit Over Products Marketed as “100% Recyclable” Has Lessons for Fashion, The Fashion Law (Aug. 15, 2022), <https://www.thefashionlaw.com/a-lawsuit-over-products-marketed-as-100-recyclable-has-lessons-for-fashion/> [<https://perma.cc/R8D6-PCD2>] [hereinafter 100% Recyclable].
6. 16 C.F.R. § 260.1.
7. Grey et al., supra note 1.
8. FTC Issues Revised “Green Guides”, Fed. Trade Comm’n (Oct. 1, 2012), <https://www.ftc.gov/news-events/news/press-releases/2012/10/ftc-issues-revised-green-guides> [<https://perma.cc/2G6Y-DWHB>].
9. Dean Hickey, Amid Increasing Scrutiny, How Brands Can Counter the Risk of Greenwashing, The Fashion Law (Aug. 11, 2022), <https://www.thefashionlaw.com/amid-rising-scrutiny-how-brands-can-counter-the-risk-of-greenwashing/> [<https://perma.cc/U9UA-TNWQ>].
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13. Kaley Roshitsh, The Top 5 Greenwashing Trends to Look Out for in Fashion, Women’s Wear Daily (Oct. 6, 2021), <https://wwd.com/sustainability/business/how-to-spot-greenwashing-in-fashion-consumer-industry-guide-trends-1234959327/> [<https://perma.cc/PXR5-BGCG>].
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15. Id. See also Rhonda Richford, Lawsuits and Legislation Are Trying to Clean Up Fashion’s Greenwashing Problem, Women’s Wear Daily (Aug. 31, 2022), <https://wwd.com/sustainability/business/lawsuits-legislation-are-trying-clean-up-fashion-greenwashing-problem-1235305054/> [<https://perma.cc/7Y7J-ZSPY>].
16. H&M Sued, supra note 14.
17. Advertising & Marketing, Crowell & Moring LLP 1, 15 (Mar. 25, 2022) https://www.crowell.com/files/Getting%20the%20Deal%20Through_2022%20AdvertisingMarketing_USA.pdf [<https://perma.cc/VFM3-EP79>].
18. Grey et al., supra note 1.
19. Advertising & Marketing, supra note 17, at 15. See also Grey et al., supra note 1.
20. 100% Recyclable, supra note 5.

21.16 C.F.R. § 260.2.