

FTC Opens Review of Green Guides

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In an open meeting held on December 14, 2022, the Federal Trade Commission (“FTC”) unanimously authorized a comprehensive review of the Guides for the Use of Environmental Marketing Claims, popularly known as the Green Guides.¹ This year marks the 10th year since the last Green Guides revision, and this year’s review comes pursuant to the FTC’s formal policy of reviewing all guides and rules on a 10-year cycle.

Background

The Green Guides are neither statutes nor legislative rules, so they do not carry the force of law. They are guides to how the FTC will apply its enforcement discretion to police “deceptive acts or practices in or affecting commerce,” prohibited by Section 5 of the FTC Act.² Nevertheless, although the Guides do not formally bind the FTC, they serve as a fairly definitive roadmap of what the FTC considers “deceptive” environmental marketing claims, and the FTC “can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the guides.”³ They serve as an important resource to industry and Staff alike.

Timing and Public Interest

The review comes at a critical time for companies intent on marketing their contributions to environmental sustainability. Concerns about climate change, much like concerns over social inequities and corporate governance, have built to a fever pitch in the last several years and have captured scientific, public, and consumer attention. Companies and investment managers of all sizes are devoting substantial resources to address these concerns through formal Environmental, Social, and Governance (“ESG”) policies and are competing fiercely with each other on factors rooted in social responsibility.

The public’s focus on ESG issues has also been reflected in the initiatives of regulatory agencies, particularly those tasked with monitoring companies’ advertising and marketing, and policing “greenwashing,” the broad term for “the act or practice of making a product, policy, activity, etc. appear to be more environmentally friendly or less environmentally damaging than it really is.”⁴ For example, in the last two years, the Securities and Exchange Commission has taken a number of actions to ensure accurate disclosures of ESG-related activities and products, including the creation of a Climate and ESG Task Force in the Division of Enforcement charged with identifying material gaps or misstatements in issuers’ ESG disclosures, proposing a rule to require enhanced ESG disclosures by certain entities, and pursuing enforcement actions in 2022 against companies that allegedly misled investors and others on ESG marketing and safety.⁵

¹ 16 C.F.R. Part 260.

² 15 U.S.C. §15.

³ 16 C.F.R. §260.1(a).

⁴ Merriam-Webster Dictionary (2022). For an additional resource on greenwashing, see the Vedder Thinking article available [here](#).

⁵ See SEC Press Release, *SEC Announces Enforcement Results for FY22* (Nov. 15, 2022), discussed in our recent [bulletin](#) and available on the [SEC’s website](#).

In addition, as public interest in sustainability has increased and as climate change science has advanced both in substance and in the pocketbooks of consumers, efforts to improve recycling technology (and to profit from it) have kept pace. New methods of dealing with discarded consumer products have entered the mix since 2012. These range from efforts to fully automate the separation of single-sourced waste from recyclables at transfer stations, to the treatment of discarded plastics. As these and other options become more creative and seek broader public acceptance, questions have arisen around what it means to be “recycled” and “recyclable.” Similarly, in the past ten years, the sources and use of renewal energy have expanded, along with marketers’ attempts to capitalize on their use of renewable energy through carbon offsets or the arbitrage and marketing of renewable energy credits. These and other developing issues will occupy the FTC Staff for many months in their effort to update the Guides to a changing world.

Once the notice is published in the *Federal Register*, the public and other stakeholders will have 60 days to submit comments for consideration by the FTC. Because the Green Guides are essentially truth-in-advertising guides, claims are judged from the perspective of the “reasonable member” of the audience to which the statement is directed.⁶ Accordingly, consumer perception studies are encouraged, and FTC Staff has cited liberally from studies submitted in prior reviews establishing or changing rules and guides.

The Green Guides review will generate a large number of comments and it is likely that the comment period may be extended. Companies with an interest in sustainability marketing should consider submitting comments expressing their views, or encouraging their relevant trade associations to do so.

We will keep you apprised of future significant developments in the evolution of the Guides.

If you have any questions regarding the topics discussed in this article, please contact **Brian K. McCalmon** at bmccalmon@vedderprice.com or any Vedder Price attorney with whom you have worked.

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⁶ 16 C.F.R. §260.1(d).