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## Are Consumers Savvy About “Carbon Neutral” and “Green” Energy Marketing Claims?

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The Federal Trade Commission (“FTC”) recently announced that it will undertake a review of its *Guides for the Use of Environmental Marketing Claims* (“Green Guides”) to account for the growing array of “green” energy marketing claims, including those relating to carbon “offsets,” carbon neutrality, or “reducing your carbon footprint.” If your business advertises or otherwise makes claims relating to greenhouse gas reductions, renewable energy certificates (“RECs”), or other opportunities for consumers who buy your goods or services to “offset” or neutralize carbon emissions, you will want to monitor the Green Guides’ review process.

### Background

Section 5 of the FTC Act (“FTCA”) gives the FTC the power to protect consumers by prosecuting misleading and deceptive advertising. In administering the FTCA, the FTC periodically publishes guides setting out how the FTC interprets the FTCA. These guides are not legally enforceable regulations, but serve to inform the public how to comply with the FTCA. For issues dealing with environmental advertising, the FTC published the Green Guides in 1992, with additions in 1996 and 1998. 16 C.F.R. Part 260. By supplying general principles and specific examples, the Green Guides contains advice for determining whether environmental representations made in advertisements violate the FTCA.

The standard by which the FTC determines if an advertisement violates the FTCA can be reduced to two basic questions: first, is there a material representation that a reasonable consumer could construe from the advertisement, and second, if there is a material representation, is the representation misleading or

deceptive. See *FTC’s Policy Statement on Deception*, 103 F.T.C. 110 (1984). A material representation is one that affects a consumer’s conduct or decision making. *Id.* In order to avoid deceptive claims, advertisers must be able to substantiate representations at the time they are made. 16 C.F.R. § 260.5. This substantiation must provide a reasonable basis to support the representation and often must be derived from reliable scientific evidence. *Id.* All environmental claims must also be clear and accurate as to the type and degree of the environmental attributes or benefits, and all qualifications or disclosures must be clear, prominent, and understandable. 16 C.F.R. § 260.6. In addition, claims must not overstate environmental attributes or benefits, expressly or by implication, and marketers must present comparative claims in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception. *Id.*

In addition to the general principles guiding marketing claims, the Green Guides provides specific examples for general environmental benefit claims, such as “environmentally friendly”; degradable claims; compostable claims; recyclable claims; recycled content claims; source reduction claims; refillable claims; and ozone safe/ozone friendly claims. For each of these claims, the Green Guides explain how reasonable consumers are likely to interpret them. The Green Guides also describe the basic elements necessary to substantiate claims within each category and present options for qualifying specific claims to avoid deception. The examples provide “safe harbors” for marketers who want certainty about how to make environmental claims.

## FTC Workshops and Revisions to the Green Guides

On November 27, 2007, the FTC published two notices requesting comment on carbon offset and renewable energy marketing claims. 72 *Fed. Reg.* 66091 and 66094. In the first notice, the FTC announced that it will be hosting public meetings to “explore developments in environmental and green energy-related” marketing. 72 *Fed. Reg.* 66091. One such meeting has already been announced – the FTC is hosting a workshop January 8, 2008, to examine the market for carbon offsets, RECs, and related advertising claims. Among other issues, the FTC will be discussing consumer perception of carbon offset and REC claims, the nature of the programs underlying such claims, and potential market problems relating to “green energy” programs, including double-counting of emissions offsets. The FTC will take public comment on the issues covered at the workshop until Jan. 25, 2008.

Interested parties will still have a chance to provide input to the FTC after January 25, 2008, deadline for comments related to the public workshop. First, the FTC has suggested that more meetings will be held to discuss green energy claims. Additionally, in the second of the November 27, 2007, companion notices, the FTC announced a general review of the Green Guides, to account for, notably, “green energy-related” marketing. Comments related to the general Green Guides review will be received until February 11, 2008.

## The Next Wave of FTC Concerns

Now that it has published the companion notices, it seems inevitable that the FTC will amend its Green Guides. In an era marked by growing concerns of global warming, more and more companies are making claims related to emissions reductions by offering programs related to carbon offsets and RECs. Renewable energy, carbon offsetting, and neutrality marketing claims seem to be all around us. They are different in kind from the types of *product* claims the FTC has addressed previously in the Guides (*e.g.*, “recyclable,” “compostable,” “biodegradable”), yet they pose the same type of public policy concerns that the earlier generation of claims posed. As the FTC’s notice reiterates, its role here is its “traditional consumer protection role, addressing deceptive and unfair

practices under the FTC Act.” 72 *Fed. Reg.* 66096. The core issue in the development of new guides will be consumer perceptions of what they are getting when they spend money to be “carbon neutral,” to participate in greenhouse gas offset programs, or to promote renewable energy.

The new Green Guides guidance will address the sorts of “green” energy claims that are clear and capable of substantiation. The FTC will be examining how consumers perceive claims related to carbon offsets and RECs by looking at the sorts of claims that are express and implied in typical advertisements such as those related to emissions offsets and renewable energy. For instance, when consumers purchase carbon offsets or RECs, what do they think they are buying? What impact do consumers believe their carbon offset purchases will have on the future quantities of greenhouse gasses in the atmosphere? Do consumers understand that some activities supported by carbon offset programs do not result in immediate carbon emission reductions? When do consumers expect such offset programs will have an impact?

Given the sorts of claims that consumers think are being made, the FTC will also address forms of substantiation. For instance, are claims of greenhouse gas reductions additional to other reductions, or would those reductions have taken place anyway? In other words, is there an “additionality”? Similarly, are offsets and renewable energy certificates being double-counted by the same or different advertisers? What sort of third-party verification or self-audit programs address consumer protection issues in the carbon offset and REC markets? Do the administrators of offset and renewable energy programs adequately address potential forms of fraud?

After the notice and comment period, the FTC will almost certainly update the Green Guides to account for specific examples of permissible and impermissible “green” energy marketing claims relating to greenhouse gas offsets and RECs. The FTC is accepting comments to generate data related to the issues mentioned above and to become informed about the nature of “green” energy programs and customer perceptions of them. Businesses with a stake in green energy advertisements will want to participate in or at least pay close attention to the revisions of the Green Guides in order to fall within a “safe harbor” provided by the FTC.

## Conclusion

The FTC has indicated its concern with the growth of “green” energy claims and is almost certain to issue new guidance relating to acceptable and unacceptable forms of such advertising. In an era marked by increasing supply of, and demand for, products and services that claim to reduce greenhouse gas emissions, advertisers

that make “green” energy and similar claims should ensure that express and implied representations are clear to consumers and capable of being backed up with empirical evidence. Businesses that make such claims will benefit by vetting their carbon offset and renewable energy programs and participating in the Green Guides updating process.



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