

An Overview of the FTC's New and Improved Green Guides

Randal Shaheen and Amy Ralph Mudge

The Federal Trade Commission released the final version of its revised Guides for the Use of Environmental Marketing Claims (2012 Green Guides) on October 11, 2012¹—almost two years to the day from when the FTC proposed them,² and some twenty years after its prior Green Guides were first issued in 1992.³ The Prior Green Guides themselves followed on the heels of various regulatory enforcement efforts undertaken by the FTC and state attorneys general, as well as increasing (and often inconsistent) state efforts to regulate specific claims—such as a product's being “biodegradable” or “recycled” properties—that prompted many companies to call upon the FTC to provide a consistent set of trade regulation rules or guidance.

In the last few years, advertisers have responded to consumer interest in a growing list of environmental matters through a new generation of green marketing claims, including claims relating to carbon emissions and use of renewable energy and materials. Regulatory interest in these new claims intensified when, in July 2007, then-Chairman Edward Markey of the House Select Committee on Energy Independence and Global Warming held a hearing on the (potentially fraudulent) marketing of carbon offsets.⁴ After the hearing, Congressman Markey sent the FTC a letter urging it to “undertake a public process designed to update the Commission's Guides for the use of Environmental Marketing Claims.”⁵ In reply, FTC Chairman Deborah Platt Majoras sent Congressman Markey a letter noting that the Agency planned to conduct a review of its Prior Green Guides and update as appropriate.⁶

Thus began an FTC-led process to issue revised Green Guides that lasted more than five years, including workshops in early 2008, receipt of numerous comments, conducting of the Commission's own consumer surveys, release of the proposed Guides in October 2010, and receipt and evaluation of more than 300 non-duplicative comments on the proposed Guides.

The 2012 Green Guides show some significant changes from the Prior Green Guides—key differences include (1) clarifying or revising provisions that were in the Prior Green Guides; (2) elevating claims that were discussed briefly in footnotes or examples in the Prior Green Guides to

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¹ 77 Fed. Reg. 62,122 (Oct. 11, 2012) (to be codified at 16 C.F.R. Part 260).

² 75 Fed. Reg. 63,552 (Oct. 15, 2010) (Proposed Guides).

³ Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (Aug. 13, 1992). The initial Guides were then slightly revised in 1996 and 1998. See 61 Fed. Reg. 53,311 (Oct. 11, 1996); 63 Fed. Reg. 24,240 (May 1, 1998). We refer to the former guides as updated by the 1996 and 1998 revisions as the Prior Green Guides.

⁴ See *Carbon Offsets: Keeping Faith with Climate—Conscious Consumers: Hearing Before the Select Comm. on Energy Independence and Global Warming*, 110th Cong. (2007) [hereinafter *Carbon Offset Hearing*].

⁵ Letter from Rep. Edward Markey, Chairman, Select Committee on Energy Independence and Global Warming, to Deborah Platt Majoras, Chairman, Fed. Trade Comm'n (July 18, 2007), available at http://globalwarming.markey.house.gov/mediacenter/letters_id=0002.html.

⁶ Letter from Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, to Rep. Edward Markey (Aug. 9, 2007), available at http://globalwarming.markey.house.gov/mediacenter/pressreleases_id=0069.html#main_content (summary).

their own specific sections, and; (3) adding claims that were not addressed in the Prior Green Guides and, in most instances, were not part of green marketing at that time. Yet the 2012 Green Guides leave lingering questions as to how the Commission will treat key claims for which it has stated it will not provide guidance at this time.

Our analysis mainly addresses the text of the 2012 Green Guides—but the Commission has also provided a 302-page analysis that contains additional insight into several issues that many might miss if they look only at the 2012 Green Guides themselves.⁷

The 2012 Green Guides provide a carefully thought-through, important step forward in the regulation of green claims, and give clear guidance for those who wish to avoid any entanglement with the Commission. They also continue, and arguably expand, the Commission's practice of providing numerous easy to understand examples of how their industry guides may be applied. Although some questions are left for another day, there is clearly much here to applaud.

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Revisions to Existing Guidance

The 2012 Green Guides make minor changes to some provisions in the Prior Green Guides, by providing additional clarification and more specific guidance as to the use of three of the most frequently encountered green claims—that products are “environmentally friendly,” “biodegradable,” or “recyclable.”

“Environmentally Friendly.” The Prior Green Guides discouraged the use of general environmental-benefit claims like “environmentally friendly” because they could imply the product offered both far-reaching environmental benefits and no adverse environmental effects.⁸ The 2012 Green Guides clarify it is “highly unlikely” that such general claims can be substantiated and marketers should not make them.⁹ Nevertheless, a claim that a product is “environmentally friendly” can be made if coupled with the specific green attribute or attributes; for example, “environmentally friendly: 20% less packaging.”¹⁰

“Biodegradable.” Similarly, the Prior Green Guides discouraged making claims that products disposed of in landfills are “biodegradable,” and said that any such claims should be substantiated by evidence that the product or package will completely break down within a reasonably short period of time after customary disposal.¹¹ The 2012 Green Guides state much more definitively that biodegradable claims should not be made for products typically disposed of in landfills because a “reasonably short period of time” is a year or less, and items will not biodegrade in a landfill in a year or less.¹²

The FTC's separate Analysis also addresses claims by some companies that they have developed technologies that accelerate biodegradability in landfills, as substantiated by ASTM D 5511,¹³ and comments suggesting that the Commission should adopt ASTM D 5511 as a “safe har-

⁷ Fed. Trade Comm'n, Statement of Basis and Purpose (Oct. 1, 2012) [hereinafter Analysis] available at <http://www.ftc.gov/os/fedreg/2012/10/greenguidestatement.pdf>, linked to the 2012 Green Guides at 77 Fed. Reg. 62,122.

⁸ *Id.* at 35.

⁹ 77 Fed. Reg. 62,126 (to be codified at 16 C.F.R. § 260.4(b)).

¹⁰ 77 Fed. Reg. 62,126 (to be codified at 16 C.F.R. § 260.4 (c)).

¹¹ Analysis, *supra* note 7, at 116.

¹² 77 Fed. Reg. 62,128 (to be codified at 16 C.F.R. § 260.8 (c)). The Commission continues to decline to provide more specificity with respect to biodegradable claims for products disposed of in the liquid waste stream. Analysis, *supra* note 7, at 124–25.

¹³ ASTM International, formerly the American Society for Testing and Materials, is a global leader in developing international voluntary consensus standards. ASTM D 5511 was developed to assess the biodegradation of plastic materials.

bor.”¹⁴ The Commission declined to endorse the ASTM standard in the 2012 Green Guides, stating that it is not aware of any standard, including ASTM D 5511, that adequately mimics actual landfill conditions.¹⁵ Some efforts are underway to create landfills with conditions that are more hospitable to degradation.¹⁶ Should such landfills become widely available to consumers, then perhaps the Commission may be open to revisiting its guidance on biodegradability claims.¹⁷

“Recyclable.” The 2012 Green Guides also slightly revise and clarify how the FTC views use of the term “recyclable.” The Prior Green Guides had permitted sellers to make an unqualified “recyclable” claim when all elements of a product are capable of being recycled in facilities available to a “substantial majority” of consumers or communities. If necessary facilities were only available to a “significant percentage” of consumers or communities, then the Prior Green Guides provided that the materials could be claimed to be “recyclable” when accompanied by the disclaimer that “this product may not be recyclable in your area.” (The Prior Green Guides required even more explicit disclaimers if the percentage dropped below a “significant” percentage.¹⁸)

The 2012 Green Guides clarify that a “substantial” majority means at least 60 percent of consumers and eliminates the Prior Green Guides’ three-tier approach. Instead, if recycling facilities are not available for at least 60 percent of consumers or communities, then any “recyclable” claim must be qualified. The smaller the percentage of consumers who have access to recycling facilities, the stronger the qualification must be. Alternatively, an advertiser can disclose the actual percentage of consumers or communities who have access to recycling programs.¹⁹

In the accompanying analysis, the Commission also clarified how to calculate “community.” A “community” is defined as an “area within a reasonable distance of where the consumers to whom the product is advertised live, work, and shop.” Effectively, communities may be much smaller in an urban area, where consumers typically travel shorter distances, than in a rural area. The Commission also cited the American Forestry and Paper Association and American Beverage Association’s Community surveys utilizing U.S. Census Bureau data surveys as reasonable means of defining communities.²⁰

Elevation of Previously Discussed Claims

In addition, a few claims that did not merit their own section in the Prior Green Guides were “promoted” and given their own separate discussion and guidance by the 2012 Green Guides—in particular, claims that a product has received an organization’s “seal” or “certification,” is “free of” particular materials, is “non-toxic,” or has undergone a “life cycle assessment.”

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¹⁴ Analysis, *supra* note 7, at 119.

¹⁵ *Id.* at 123.

¹⁶ Mark Hudgins, James Law, David Ross & Jun Su, *The “Sustainable Landfill” Becomes a Reality*, WASTE MGT. WORLD, Vol. 11, Issue 3 (May 1, 2010), http://www.waste-management-world.com/index/display/article-display/5626047122/articles/waste-management-world/volume-11/Issue_3/Features/The_sustainable_landfill_becomes_a_reality.html.

¹⁷ In that case, the Commission could adopt an analysis of how landfill biodegradability claims might be made similar to those currently used regarding compostable claims and the limited availability of municipal compost facilities. 77 Fed. Reg. 62,128 (to be codified at 16 C.F.R. § 260.7 (d)).

¹⁸ Analysis, *supra* note 7, at 155.

¹⁹ 77 Fed. Reg. 62,129 (to be codified at 16 C.F.R. § 260.12 (b)(c)).

²⁰ Analysis, *supra* note 7, at 172–73. “Communities [in these surveys] were defined as: (1) incorporated municipalities with their own governing bodies typically responsible for recycling; (2) unincorporated “Census Designated Places” with no local governing body that falls under the domain of the county in which they reside; (3) “remaining areas” that do not fall under (1) or (2). *Id.*

Seals and Certification. The 2012 Green Guides add a new section on environmental certifications and seals of approval.²¹ The Guides state that a seal or certification that uses broad, general environmental terms can falsely imply far-reaching environmental benefits. To combat this, seals should convey, through their names, the environmental benefit(s) they certify (e.g., “Certified Carbon Emissions Offset”). Alternatively, the advertiser can disclose the basis for the certification in close proximity to the seal. Reference on product packaging to a website is generally not acceptable unless the attributes evaluated are too numerous to mention. In that case, advertisers may make a statement to the effect that “[v]irtually all products impact the environment. For details on which attributes we evaluated, go to [a website that discusses this product].”²²

The 2012 Green Guides also make clear that, consistent with the Commission’s Endorsement Guides,²³ any material connection between the advertiser and the certifying organization must be disclosed.²⁴ Yet, in doing so, the 2012 Green Guides retract a statement in the Proposed Guides that a trade association’s certification of a member’s product was a “material connection” that was relevant to consumers’ purchase decisions and should be disclosed.

The Commission’s Endorsement Guides consider the payment for an endorsement to be a “material connection” that should be disclosed,²⁵ and the Commission reasoned in the Proposed Guides that the dues paid by members to their trade associations constituted “payment” for the certification.²⁶ Numerous commentators questioned use of “payment” as the basis for a determination that disclosure is required because all third-party certifiers, even wholly independent ones, require payment. They argued the issue should be whether there is potential for bias or subjectivity in the trade association certification.²⁷ In its Analysis of the 2012 Green Guides as ultimately released, the Commission agreed that the critical issue is not payment but rather the credibility of the certification. Thus, disclosure is not required with respect to trade association certifications when the standards are “voluntary consensus standards” objectively applied by an independent auditor.²⁸

Free-of and Non-Toxic. “Free-of” claims were also promoted to their own section in the Proposed Guides,²⁹ and then further subdivided into “free-of” and “non-toxic” claims in the final 2012 Green Guides.

²¹ The Prior Green Guides had an example in the General Environmental Benefit Claims section that addressed seals and said they could imply environmental superiority. Former 16 C.F.R. § 260.7(a), Example 5 (2012).

²² 77 Fed. Reg. 62,126–27 (to be codified at 16 C.F.R. § 260.6 (d), (e), Example 7).

²³ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2012) (Endorsement Guides).

²⁴ 77 Fed. Reg. 62,126 (to be codified at 16 C.F.R. § 260.6 (b)).

²⁵ Endorsement Guides, *supra* note 23, 16 C.F.R. § 255.5 (2012).

²⁶ Proposed 16 C.F.R. § 260.6, Examples 2 & 3, 75 Fed. Reg. 63,552 (Oct. 15, 2010)).

²⁷ Analysis, *supra* note 7, at 86–88.

²⁸ 77 Fed. Reg. 62,126–27 (to be codified at 16 C.F.R. § 260.6(b), Example 2). A “voluntary consensus standard” is one that involves openness, a balancing of interests, due process, an appeals process, and consensus; consensus in turn does not mean unanimity but rather the fair consideration of all objections. See Circular No. A-119 Revised, Office of Management and Budget, http://www.whitehouse.gov/omb/circulars_a119.

²⁹ The Prior Green Guides had three examples touching upon “free-of” claims: former 16 C.F.R. § 260.6(c), Example 4 (2012) (“chlorine-free” coffee filters); former 16 C.F.R. § 260.7(a), Example 4 (2012) (“essentially non-toxic” lawn care pesticide); and former 16 C.F.R. § 260.7(h), Example 3 (2012) (“CFC-free” aerosol product.).

A company can make “free-of” claims even when a trace amount of the substance is present, if three conditions are satisfied.³⁰ First, the substance must not have been intentionally added. (The Guides do not explicitly address substances used in the manufacturing process but not “added” to the product—for example, if a product is bathed or washed in a liquid. Nevertheless, at one point in the accompanying Analysis, the Commission discusses the use of a substance “in the manufacturing process,”³¹ which may suggest that use of a substance in this manner may trigger the “intentionally added” test.) Second, the amount of the substance in the product must not be more than what would be considered a “trace contaminant” or background levels at which the substance is commonly found in the environment. Third, the amount of the substance present must be so low as not to cause whatever harm has been associated with the substance. This last factor, of course, can vary widely. Some substances are harmful even at very low levels while others require a much higher degree of exposure.³² The risk of harm may also vary depending upon who is exposed to the substance.

In its Proposed Guides, the Commission also raised a question regarding products claiming to be free of a substance that they had never contained in the first place. The Commission noted that such a claim could deceptively imply that the product used to contain the substance, which had now been eliminated, but could also potentially present a legitimate comparison to other types of products that contain the substance.³³ In the 2012 Green Guides, the Commission ultimately decided to permit such claims as long as the substance is associated with that product category.³⁴ For example, a water bottle that does not, and has never, contained BPA nevertheless would be able to make the claim “BPA-free” because other products in that category contain BPA.

With respect to claims that a product is “non-toxic,” the Commission reiterated its prior view that the claim implies non-toxicity to humans and the environment, including pets.³⁵ In its analysis the Commission refused to create a similar “trace” exception for toxic substances, but emphasized that although trace amounts of a toxic substance cannot be labeled “non-toxic,” a product that contains trace elements of a toxic substance could be so labeled assuming that the trace amount present was not harmful.³⁶ However, despite urging from EPA, the Commission declined to take a position on whether a “non-toxic” claim implies that a product is “non-toxic” under all circumstances or only when used as directed.³⁷

Life Cycle Assessment. The Prior Green Guides specifically declined to address specific “life cycle assessment” (LCA) claims because the Commission lacked sufficient information about them.³⁸ LCA is essentially a cradle-to-grave analysis of a product’s impact on the environment, from manufacture to use through disposal. The 2012 Green Guides reaffirm the FTC’s reluctance

³⁰ 77 Fed. Reg. 62,128 (to be codified at 16 C.F.R. § 260.9(c)).

³¹ Analysis, *supra* note 7, at 141.

³² The FTC has already brought its first “free-of” case since issuing the revised Guides. The Commission settled with two paint companies over claims that their paint was “VOC-free,” because although the base paint was free of VOCs, the Commission alleged that consumers understood, incorrectly, that once tinted, the paints remained VOC-free. See PPG Architectural Finishes, Inc., FTC No. 112-3160 (Oct. 27, 2012), available at <http://www.ftc.gov/os/caselist/1123160/121025ppgagree.pdf>.

³³ Analysis, *supra* note 7, at 127.

³⁴ 77 Fed. Reg. 62,128 (to be codified at 16 C.F.R. § 260.9(b)(2)).

³⁵ 77 Fed. Reg. 62,129 (to be codified at 16 C.F.R. § 260.10 (b), Example 1).

³⁶ The Analysis cites the example of the cyanide found in apple seeds. Analysis, *supra* note 7, at 148–49.

³⁷ *Id.* at 146–47. EPA cited an example of at least one consumer who was injured by not using a product as directed.

³⁸ 16 C.F.R. § 260.7 n.2, 63 Fed. Reg. 24,240 (May 1, 1998).

to provide specific guidance for LCA claim substantiation.³⁹ However, the Guides do address under what circumstances a LCA might be required to substantiate other green claims.

As noted, the 2012 Green Guides permit a general environmental claim, when coupled with the specific green attribute or attributes; for example, “environmentally friendly: 20% less packaging.”⁴⁰ However, combining a general environmental claim with a specific green benefit may also imply that the specific benefit resulted in an overall benefit to the environment and so could require an LCA. Compare two situations: in the first, the manufacturer used the same packaging as before but simply used less of it; in the second, the packaging reduction was brought about in whole or in part by substituting one type of packaging material for another. In the first case, the FTC’s Analysis indicates that no LCA should be required because there are no environmental tradeoffs to assess; in the second case, there may be tradeoffs that could lead the FTC to require some type of LCA.⁴¹ However, the Commission declined to endorse a particular LCA methodology.⁴²

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Guidance on New Types of Green Claims

The 2012 Green Guides also include several green claims for which guidance has not previously been provided—claims involving “carbon offsets” and claims that a product involves “renewable energy” or “renewable materials.”

Claims Regarding Carbon Offsets. Carbon offset claims were the initial focus of the 2007 House hearings and one of the primary drivers behind the FTC’s decision to revisit the Prior Green Guides. The 2012 Green Guides respond by providing some guidance as to how carbon offset claims may and may not be made.

The House hearings evidenced concerns about double counting of offsets (whether the same offsets have been sold to multiple parties), additionality (whether the activity offsetting the carbon emissions would have occurred regardless), and legitimacy (whether, e.g., seeding the ocean to promote kelp blooms achieves a demonstrable offset).⁴³

In the 2012 Green Guides, the Commission declined to address issues it deemed outside its consumer protection mission, such as the soundness of particular offset methods or additionality, as those issues are more appropriate for scientific or public policy debate.⁴⁴ However, the 2012 Green Guides provide limited guidance in four areas where the Commission felt there could clearly be consumer deception.

First, any offset should not be sold more than once.⁴⁵ Second, claims that an offset occurred must be substantiated by competent and reliable scientific and accounting evidence.⁴⁶ Third, any offset directed toward current or soon-to-occur emissions must be qualified if the offset will not occur for two or more years.⁴⁷ (What is not clear, however, is whether the entire offset must occur

³⁹ Analysis, *supra* note 7, at 37.

⁴⁰ See *supra* note 10 and accompanying text.

⁴¹ Analysis, *supra* note 7, at 33–34.

⁴² *Id.*

⁴³ *Carbon Offset Hearing*, *supra* note 4, Testimony of Russ George, President & CEO Planktos, Inc. at 92; Statements of Reps. Mackey & Sensenbrenner, *id.* at 2, 6.

⁴⁴ Analysis, *supra* note 7, at 70.

⁴⁵ 77 Fed. Reg. 62,126 (to be codified at 16 C.F.R. § 260.5 (a)).

⁴⁶ *Id.*

⁴⁷ 77 Fed. Reg. 62,126 (to be codified at 16 C.F.R. § 260.5(a)(b)).

within the two-year period. For example, if one or more trees are planted as a form of offset, the trees will begin to convert carbon dioxide immediately but the offset claim may be tied to the cumulative effect of that conversion over a much longer period of time. Further, does it matter if only a small amount of the offset occurs within the two-year period versus a substantial majority?) Fourth, although the Commission largely declined to address issues of additionality, its Analysis notes that activities required by law cannot be claimed as an offset. (The 2012 Green Guides give the example of mandatory methane capture at a landfill.)⁴⁸

Claims Regarding Use of Renewable Energy or Renewable Materials. The 2012 Green Guides also address “renewable energy” and “renewable materials.” In both instances, the Commission declined to define these terms, “finding their meaning was more within the province of scientists.”⁴⁹ During the process of finalizing the 2012 Green Guides, the Commission learned that consumers lacked a clear understanding of both terms. In the case of “renewable energy,” many consumers equated that term with “renewable materials” or “recycled content.”⁵⁰ With regard to “renewable materials,” many consumers confused the term with “recycled,” “recyclable,” or “biodegradable.”⁵¹

To combat these consumer misperceptions, the 2012 Green Guides call for disclosures. For “renewable energy” claims, the 2012 Green Guides recommend disclosing the source or sources of the energy.⁵² Presumably the Commission believed that a claim of “made with renewable *solar* energy” would not be misunderstood by consumers to relate to recycled content. In the case of mixed sources, all sources can be disclosed or the advertiser can disclose that it is a mix and specify the source that makes up the greatest percentage, calculated on an annual basis.⁵³

For “renewable materials” claims, the recommended form of disclosure involves setting forth both the type of renewable material and why the seller characterizes it as renewable (e.g., “bamboo, which grows at the same rate or faster than we use it”).⁵⁴ In both instances, the Commission’s analysis stresses that it did not test consumer perceptions of its recommended disclosures because it had not anticipated finding consumer confusion and that therefore the Commission was particularly open to further evidence and testing on this issue.⁵⁵

The 2012 Green Guides also state that it is misleading to make a “renewable” energy or materials claim unless the claim is true for all or virtually all of the manufacturing process and product. Otherwise, an appropriate qualification must be used, such as stating the relevant percentage, or specifying to which part of the manufacturing process or product the claim applies.⁵⁶ The 2012 Green Guides leave open the possibility that a company that largely assembles products might be able to make a “made with renewable energy” claim even though the components it purchases are made with fossil fuels, while a competitor that manufactures most of its own components may not be able to make such a claim even though it uses an equivalent amount of renewable

⁴⁸ 77 Fed. Reg. 62,126 (to be codified at 16 C.F.R. § 260.5(c)).

⁴⁹ Analysis, *supra* note 7, at 218, 240.

⁵⁰ *Id.* at 220. According to the Commission 28% of consumers took away a meaning of “renewable materials” and 21% “recycled content.”

⁵¹ *Id.* at 241. Thirty-one percent of respondents interpreted the claim as made from recycled materials and 17% believed it meant these materials can be recycled.

⁵² 77 Fed. Reg. 62,131 (to be codified at 16 C.F.R. § 260.15(b)).

⁵³ *Id.* Example 2.

⁵⁴ 77 Fed. Reg. 62,132 (to be codified at 16 C.F.R. § 260.16(b), Example 1).

⁵⁵ Analysis, *supra* note 7, at 221, 242.

⁵⁶ 77 Fed. Reg. 62,131 and 62,132 (to be codified at 16 C.F.R. § 260.15(c) and § 260.16(c)).

energy. However, were such a claim made by a company that largely engages in assembly, it could potentially be misleading to the extent it implies significant manufacturing activity.

Finally, the Commission declined to require companies to disclose the geographic location where they use the renewable energy.⁵⁷ However, it held out the possibility that a renewable energy claim could imply a local benefit—for example, showing clean skies over a city and discussing a company’s use of clean solar energy at a plant thousands of miles away—and cautioned that those claims must not be misleading. For example, if the local facility serving St. Louis, Missouri, is in fact using coal, then the claim of a local St. Louis impact from the company’s use of solar energy in Los Angeles, California, may be deceptive.⁵⁸

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Claims for Which No Guidance Was Provided

Although the Commission carried out an extensive review and revision of the Prior Green Guides, it declined to provide guidance on the use of two common claims—“sustainable” and “natural.”

The Commission in its survey found that the term “sustainable” meant many different things to consumers, including that a product was “strong/durable” or “long-lasting.”⁵⁹ Given the wide range of possible meanings, the Commission declined to provide guidance.⁶⁰ What is less clear, however, is why the Commission felt it could not offer guidance when the term is used in a context that is clearly environmental. Instead, the Commission simply cautioned that any green “sustainability” claim must be appropriately substantiated and that substantiation could be a “challenge” if consumers interpret the claim to mean that the product does not have any significant adverse environmental consequences.⁶¹

As was the case with “sustainable,” the FTC found that “natural” can have many different meanings depending upon context and therefore it was unable to provide general guidance.⁶² The Commission’s decision to not provide guidance on use of the term “natural” has deep roots. Both the FDA and FTC have previously declined to define the term.⁶³

The issue with “natural,” however, is both more and less pressing than with “sustainable”—more pressing because numerous class action lawsuits have been filed challenging “natural” claims where products contain processed ingredients like high-fructose corn syrup or GMO (Genetically Modified Organism) ingredients⁶⁴—and less pressing because the courts may define the term in the absence of guidance from the Commission.

⁵⁷ 57 Analysis, *supra* note 7, at 226.

⁵⁸ *Id.* at 226–27.

⁵⁹ *Id.* at 258. Nineteen percent of the study participants stated that “sustainable” means “strong/durable,” while 16% stated it means “long-lasting.”

⁶⁰ *Id.*

⁶¹ *Id.* at 258.

⁶² *Id.* at 264.

⁶³ 58 Fed. Reg. 2,407 (Jan. 6, 1993) (FDA declines to initiate rulemaking on use of “natural”); 48 Fed. Reg. 23,270 (May 24, 1983) (FTC terminates rulemaking on use of “natural”).

⁶⁴ *See, e.g.*, Complaint, *Ries v. Hornell Brewing Co.*, No. 3:10-cv-01139-RS (N.D. Cal.) (challenging claim of natural when beverage contained high fructose corn syrup); Complaint, *Frito-Lay N. Am., Inc. “All Natural” Litig.*, No. 12-cv-408-RRM-RLM (E.D.N.Y.) (challenging genetically modified ingredients as natural); Complaint, *Astiana v. Dreyer’s Grand Ice Cream, Inc.*, No. 3:11-cv-012910-EMC (N.D. Cal.) (challenging alkalized cocoa powder as natural); Complaint, *In re Tropicana Orange Juice Mktg. and Sales Practices Litig.*, MDL No. 2353 (D.N.J.) (challenging claim that “not from concentrate” orange juice is natural due to processing); Complaint, *Jernigan v. Beam Global Spirits & Wine, Inc.*, No. 3:11-00842 (S.D. Ill.) (challenging claim that cocktails are natural due to preservative sodium benzoate); Complaint, *Trewin v. Church & Dwight, Inc.*, No. 3:12-cv-01475-FLW-DEA (D.N.J.) (“natural” claims for a deodorant false and misleading because the deodorant contains dipropylene glycol, propylene glycol, triclosan, and tetrasodium EDTA).

Absent guidance from some regulatory authority or court, companies may find themselves in the position of finding it too risky to make the claim at all. In that case, there may be no easy way for consumers to distinguish between foods that contain highly-processed or artificial ingredients and those that have GMO ingredients or ingredients with only very minimal processing. In any event, with respect to both “sustainable” and “natural” claims, the Commission indicated that it is open to receiving additional evidence relating to consumer perception of these claims.⁶⁵

Other Issues

Finally, the 2012 Green Guides and the accompanying analysis touch upon two additional topics of general interest—business-to-business transactions and the role of international standards. Reasserting that the Commission has general Section 5 jurisdiction over business-to-business claims,⁶⁶ the 2012 Green Guides specifically state that they apply to business-to-business transactions,⁶⁷ and even include an example of such a transaction.⁶⁸ Indeed, the first post-Guides environmental claims’ case brought by the Commission included a claim by a manufacturer to its distributors.⁶⁹

The Commission also has stated it recognizes the value of harmonizing its revised Guides with international standards, but cautions that this was not fully possible because the final Guides are intended to discourage consumer deception while international standards, such as the ISO 14021, are also intended to advance specific environmental goals or policies.⁷⁰

Conclusion

As is often the case when the FTC provides new guidance, companies should expect a period of sustained vigilance and enforcement. Indeed, the Analysis accompanying the Guides notes that the “Commission agrees that enforcement is a key component of greater compliance.”⁷¹ At the same time, the 2012 Green Guides show a willingness on the part of the Commission to provide specific guidance and address numerous questions and concerns. Companies that find themselves faced with uncertainty regarding compliance might consider reaching out to the Commission staff—recognizing, however, that there are far more companies making green claims than there are FTC staff.

The initial Green Guides were issued in 1992 and then updated in 1996 and 1998 before the 2012 comprehensive revisions. Green claims continue to be a quickly evolving area and one where, even in the 2012 Green Guides and accompanying Analysis, the Commission has recognized that there are still unresolved questions and further possible work to be done. Thus, companies should not be surprised if the Commission, as it has done in the past, periodically updates the Green Guides, though likely on a less comprehensive basis. ●

⁶⁵ Analysis, *supra* note 7, at 258, 265.

⁶⁶ *Id.* at 9. The Commission cites several cases, including *Verrazzano Trading Corp.*, 91 F.T.C 888 (1978).

⁶⁷ 77 Fed. Reg. 62,124, (to be codified at 16 C.F.R. § 260.1 (c)).

⁶⁸ 77 Fed. Reg. 62,127 (to be codified at 16 C.F.R. § 260.6, Example 5).

⁶⁹ PPG Architectural Finishes, Inc., FTC No. 112-3160 (Oct. 27, 2012), available at <http://www.ftc.gov/os/caselist/1123160/121025ppgagree.pdf>.

⁷⁰ Analysis, *supra* note 7, at 16–17.

⁷¹ *Id.* at 10.