

## Opportunities and Risks in the New Green Marketing Rules

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Sometimes it is difficult to determine if brands are responding to consumer demand, or trying to create it. The market has been awash in various "environmentally-friendly" product choices across every category from cars to laundry detergents to wrist-watches. The green marketing messages accompanying these products have promised and championed everything from sustainable farming techniques, minimal or zero carbon footprints and cradle-to-cradle recycling.

The [2010 Edelman Good Purpose Study](#) provides compelling evidence that the overwhelming majority of consumers think and care about the impact of issues such as health, poverty and education in their purchases and personal behavior. However the environment remains the No.1 social cause consumers care about. As a result

green products and green marketing claims are on the rise. According to a survey by the marketing firm TerraChoice, the number of [products claiming to be green](#) increased 73 percent since 2009, and more than 95 percent of consumer products marketed as "green," make misleading or inaccurate claims, otherwise known as "greenwashing."

A decade ago there were only a handful of environmental seals and certifications attempting to bolster the environmental claims of marketers, however today sites like the [Ecolabel Index](#) and the [ISEAL Alliance](#) track literally hundreds. As a result there is growing concern that too many of these seals and certifications are misleading. There is also concern that the green marketing bubble may burst if the performance of green products and the credibility of green marketing claims do not match consumer expectations.

Could the increase in green products and the rise of unqualified green marketing claims be too much of a good thing? A recent [GfK Roper Green Gauge study](#) shows there have been big swings in the number of consumers who believe environmentally friendly alternatives are too expensive, don't work as well as other products and aren't actually better for the environment. The share of consumers who think green products are too

expensive rose eight points in two years to 61 percent, while those who believe they don't work as well jumped nine points to 33 percent and those who believe they're not even as better for the environment in the first place increased eight points to 38 percent.

Whether you are a marketing professional, an advertising professional, a public relations professional, or a consumer, there are changes in the regulatory climate that you need to be aware of. The Federal Trade Commission, The Better Business Bureau, the media and a growing number of consumer advocates are taking action to reduce confusion in the marketplace for green products, increase self-regulatory efforts and step up enforcement of truth in advertising laws.

### **The FTC "GreenGuides" & Proposed Changes**

With the growth of green products and marketing, as well as evidence of more and more murky environmental claims, the Federal Trade Commission has recently proposed revisions to its "Green Guides" for businesses that make environmental marketing claims. The original Guide was issued by the FTC in 1992 and revised them in 1996 and 1998 to provide administrative interpretations for the application of Section 5 of the FTC Act regarding environmental advertising and marketing practices. The updates were deemed to be necessary due to the dramatic increase in the numbers and kinds of environmental benefit claims being made by advertisers.

According to FTC Chairman Jon Leibowitz: "In recent years, businesses have increasingly used 'green' marketing to capture consumers' attention and move Americans toward a more environmentally

friendly future. But what companies think green claims mean and what consumers really understand are sometimes two different things. The proposed updates to the Green Guides will help businesses better align their product claims with consumer expectations." The FTC is seeking public comment to its proposed changes to the FTC Green Guide by Friday December 10th. Interested parties can submit comments in paper form by following the instructions in the "Request for Comment" section of the Federal Register notice. Comments can be submitted electronically at: <https://ftcpublic.commentworks.com/ftc/revise/greenguides>.

### **What do the proposed changes to the FTC Green Guides address?**

The revised Green Guides caution marketers and their agencies not to make blanket, general claims that a product is "green," "environmentally friendly" or "eco-friendly" because a consumer perception study conducted by the FTC confirms that such claims are likely to suggest that the product has specific and far-reaching environmental benefits. (The entire study is available to the public at [ftc.gov/green](http://ftc.gov/green).)

The proposed revisions to the Guides also caution marketers not to use unqualified certifications or seals of approval – those that do not specify the basis for the certification. The growing number of certifications and seals of approval is making it difficult and confusing for institutional buyers as well as individual consumers. Accordingly, the changes proposed by the FTC also include new guidance on use of product certifications and seals of approval in addition to "renewable energy" claims, "renewable materials" claims, "carbon

offset" claims and other environmental claims.

### **What is the opportunity for leading brands?**

A level playing field and clear boundaries have always benefited those players who are well conditioned and ready to play by the rules to win. A revised Green Guide that provides greater clarity for the administration and enforcement of [Section 5 of the FTC Act](#) will allow truly green brands to communicate with consumers with greater clarity and establish a credible basis for making claims about the environmental benefits of their products and services.

In recent years a growing number of companies and brands have examined their business practices and innovated in their product and packaging development enabling their brands to have a more positive environmental profile. These brands should most definitely include environmental messages in their marketing and advertising and find any green competitive advantage they can in the pursuit of consumer hearts and minds, and more importantly consideration and purchase.

### **What can you do minimize risk to your brand?**

Companies and brands that are unsure of what stands behind green marketing claims should not be complacent. Engage qualified resources to review your brands advertising, marketing and branding strategy to determine if any explicit or implied environmental marketing claims you are making could be construed as misleading by consumers or could be challenged as false or unfair by a competitor. Learn how your company's marketing professionals should

be sensitized to these issues to avoid potential liability.

Better to err on the side of caution than to expose your brand to a warning letter from the FTC, a Better Business Bureau challenge by a competitor, consumer backlash from an NGO activist campaign accusing you of "Greenwash" ...or a potential lawsuit. It is probably a safe bet that the new Green Guide changes will be followed by greater regulatory activism, more competitor challenges and more scrutiny by the media.

According to [Susan Mac Cormac](#), a partner with the law firm Morrison & Foerster LLP "Since President Obama took office in 2008, the FTC has used the Green Guides in seven lawsuits to enforce laws against unfair and deceptive advertising with regards to environmental marketing claims. This reflects a significantly greater enforcement rate when compared to prior administrations. If the recent proposed Green Guide revisions become final, more vigilant enforcement is likely to continue."

Consumers and advertisers who believe that brands are making misleading or unfair claims have a right and a responsibility to take action accordingly by making their specific complaints known to the FTC or to the Better Business Bureau. They can also register their concerns about "greenwash" in response to the FTC's recently issued request for public commentary on its revisions to the Green Guides for marketers making environmental benefit claims. Interested parties can submit their comments in paper form.

### **Agencies Take Notice, Too**

Advertisers have always had both legal and ethical responsibilities to communicate and

market honestly. In addition there is no "safe harbor" for agencies who rely on an advertiser's assurance that their claims are substantiated. The FTC emphasizes that as a matter of law, firms lacking substantiation of claims before an ad is disseminated violate Section 5 of the FTC Act and are subject to prosecution. Advertising agencies, public relations firms and design firms have a duty to be truthful and to make an independent check on the information used to substantiate marketing claims.

In addition to advertisers, advertising agencies also may be held legally responsible for misleading claims in ads. A recent precedent in this regard was an FTC false advertising enforcement action brought against the PR firm [Reverb Communications](#). This case has the distinction of being the first case where the FTC enforced new Internet regulations that require full disclosure for product endorsements and the first case where an agency was pursued for false advertising claims by FTC but the advertiser that engaged the agency was not.

Commenting on the Reverb case, Mary Engle, director of the FTC's Division of Advertising Practices noted "Companies, including public relations firms involved in online marketing, need to abide by long-held principles of truth in advertising."

### **Why Else It Matters**

Stepping back from any one particular brand or company, there is also an imperative for all marketers and advertisers.

Advertising plays a significant role in stimulating the nation's economic activity and supporting jobs in all sectors of the economy. According to the Association of National Advertisers U.S. businesses

annually spend \$279 billion on advertising that supports 15 percent, of the nation's 133.4 million jobs. Looking at it another way, each million dollars of ad spending results in the creation of 69 American jobs.

If the public's faith in advertising is eroded because of green-washing, the integrity of markets is eroded and the entire economy suffers. Legitimate marketers can lose sales to competitors when unscrupulous advertisers make false, misleading or unfair advertising claims. When false or misleading environmental benefit claims are allowed to proliferate we all loose – the public, brands and the environment.