

Green Guidance for Retailers: Avoiding FTC Claims of Unfair or Deceptive Marketing

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Shopping center owners and retailers, like other business owners, while genuinely concerned about the impact of their operations and products on the environment, also recognize the benefits of differentiating their businesses in the competitive marketplace. As a result, shopping center owners and retailers promote their efforts to recycle and/or to reduce waste and energy usage and appeal to environmentally conscious customers. But making broad unsubstantiated claims about environmental practices, commonly known as “greenwashing” can expose a company to liability for multiple damages and attorney fees under various federal and state laws, including the Lanham Act, the Federal Trade Commission Act and state consumer protection statutes.

Additionally, for several years, energy-conscious investors have persuaded U.S. companies, including big-box retailers and shopping mall operators, to disclose information to shareholders about their energy-efficiency and management practices, operation and maintenance programs, and green, solar or other renewable power use. (See www.greenbiz.com/news/2006/03/05/investors-persuade-big-box-retailers-disclose-energy-and-climate-performance.)

So before launching any such promotion, shopping center owners and retailers are wise

to consult the Federal Trade Commission’s revised *Guides for the Use of Environmental Marketing Claims* released last October. (The Green Guides are available at www.ftc.gov). The revised Green Guides modified and clarified the prior version, and also provide new guidance on certain types of claims. First issued in 1992, the Green Guides had not been revised since 1998. The new Green Guides illustrate how the FTC evaluates green claims about facilities and/or products. While not binding, a violation of the revised Green Guides means a violation of Section 5 of the FTC Act, which grants the agency enforcement power to stop deceptive or misleading acts affecting commerce. Of particular relevance to shopping center owners and retailers, the guides provide helpful guidance for promoting energy sources, waste disposal and using certifications and seals of approval.

The revised guides do not preempt state law. Therefore, deceptive environmental claims can be brought under both federal and state law. Additionally, owners and retailers must be sure to comply with applicable standards of any environmental or green rating or certification program they participate in to avoid losing their membership or recognition status, or other penalties.

The guides apply to electronic and print marketing and advertising materials, as well

as products, packages, all claims and general marketing. They contain generally applicable guidance on green marketing, coupled with some specific guidance on certain types of claims. We present here an overview of key points in the guidance given in the revised Green Guides, followed by practice tips to assist shopping center owners and retailers in avoiding unfair or deceptive marketing claims.

Be Specific in Making Environmental Advertising Claims

Shopping center owners should consider what advertising statements in signage and other media they want to make about the environmental benefits of their centers. A general statement such as “Our mall is eco-friendly” or “We are green!” will likely be considered broad and unqualified. Consumers hearing these vague claims about environmental benefits generally interpret them in many different ways, which is why they are usually considered greenwashing. To avoid greenwashing claims, the revised Green Guides recommend that businesses make specific, more focused or limited environmental advertising and marketing claims. A specific, limited claim for a shopping center would be something like: “An Eco-Friendly Shopping Experience,” followed by the specific, prominent statements about the center’s features that explain how this claim is true. Such statements might include: (1) the use throughout the center of low-volatile organic compound (VOC) paints, adhesives and sealants; (2) detailed specifics on the center’s collection of rainwater for irrigation of its landscaping; (3) highlights that there are designated preferred parking areas for hybrids, and (4) description of the predominant use of

recycled materials in the construction of the center.

Practice Tip

- Because consumers interpret broad claims as meaning broad environmental benefits, which go well beyond what is intended, make narrow, focused statements about the facilities or the services rather than general claims.

Substantiate Environmental Advertising Claims

Consider how to substantiate the truth of environmental advertising claims. Generally, the more specific the claim, the easier it is to substantiate it. Substantiation means having a reasonable basis in the truth of the claim before making it. (See “FTC’s Policy Statement Regarding Advertising Substantiation” at 104 FTC 839 (1984), available at www.ftc.gov.)

Depending on the claim, independent scientific evidence might be needed to demonstrate the claim is true. For example, one could substantiate the claim that the material has “20% less plastic than before” with third-party testing or analysis of the before-and-after percentage of plastic content.

Practice Tips

- Make sure you have competent and reliable evidence to substantiate your claims as true.
- Determine whether you need to substantiate claims with evidence, testing or research by third parties who are qualified and generally accepted in the relevant profession.
- Obtain the substantiation *before* making the claim; it cannot wait until challenged.

- Substantiate any comparisons to competitors or to the center prior to its redevelopment.

Include Qualifications in Clear, Plain Language

Claims about environmental benefits should be qualified as appropriate to make them not misleading. A qualification can be accomplished by disclosing limitations on or explaining the claim. The qualification should be prominent, understandable and placed in close proximity to the claim. *See* §260.3 of the Green Guides available at www.ftc.gov.) For example, suppose a shopping center claims, without qualification, that “this center uses only recyclable trash bags.” In this case, the claim is deceptive. Trash bags are not usually separated from the trash inside them, which may or may not be recyclable. Thus, while the bags themselves may be recyclable, it is unlikely that they will ever be recycled. Therefore, the claim is deceptive, as it suggests a benefit that does not really exist.

Under the revised Green Guides, a retailer’s claims that floor tiles in its store were “eco-friendly, made with recycled materials” would not be deceptive if the “made with recycled materials” statement was prominent and clear to qualify why the tiles were eco-friendly, provided the retailer can substantiate that the tiles were made entirely from recycled materials (except for minor, incidental aspects), that making the tiles with recycled materials makes them more environmentally friendly, and that the claims do not imply other deceptive claims.

Practice Tips

- Include relevant qualifications (disclosures or explanations) on claims.

- Write qualifying language in words that are clear and understandable.
- Use color, special font type and size to make your qualifying language prominent.
- Place your qualifications close to the claim you are qualifying.
- Avoid words that could undercut effectiveness of qualification or imply deceptive environmental claims.
- If your claim relates only to a minor component or aspect of your overall facility, services or product, add qualifying language to limit the claim to component or packaging, etc.
- Do not exaggerate claims or overstate attributes or benefits.

What Matters Is What Consumers Think

The guidance in the revised Green Guides provides that environmental marketing claims should be written so that an ordinary reasonable consumer is able to interpret them. Although the claim must be written in this way, this same guidance applies to when a company is marketing products or services to another business rather than to a consumer.

Practice Tips

- Write your environmental advertising claims so that an ordinary reasonable consumer, and not other businesses, can read and understand them.
- If you are targeting a particular segment of consumers, direct the claims to an ordinary reasonable consumer in that segment.

Use Third-Party Certifications and Seals of Approval

Certifications and seals touting environmental benefits can be powerful marketing tools. Many owners and retailers promote the recognition they have received from third-party entities such as the Leadership in Energy and Environmental Design (LEED) Rating System of the U.S. Green Building Council; Green Globes, developed by the Green Building Initiative; and ENERGY Star, developed by the U.S. Environmental Protection Agency and the Department of Energy, to differentiate their location and attract energy-conscious consumers. These certifications and seals are permissible as environmental claims under the revised Green Guides.

They may be considered an endorsement, however, if there is a connection between the endorsing party and the owner or retailer that might affect the credibility of the endorsement. If, in fact, they are an endorsement, they would also be subject to the requirements under the FTC's "Guides Concerning the Use of Endorsements and Testimonials in Advertising," available at www.ftc.gov. The owner/retailer must ensure that the endorsing party is not connected to it in a way that could undermine the credibility of the endorsement or unknowingly subject it to the Endorsement Guides. Trade groups are permitted to issue certifications and seals to trade-group members if the process is transparent and open. *See* §260.6 of the Green Guides available at www.ftc.gov).

Third-party organizations with transparent, documented rating systems are credible because the uniform standards required to earn the certification or seal are publicly available. But certifications and endorsements will be monitored by the FTC for substantiation and truthfulness.

In 2011, the FTC barred the company Tested Green, and its sole shareholder from offering environmental certifications to businesses, after finding it was selling the certifications for cash rather than based on the businesses' environmental attributes. Additionally, the company failed to disclose that its sole shareholder also owned the associations that had endorsed its certification program. (*See In the Matter of Nonprofit Management LLC, a limited liability corporation, also doing business as Tested Green, and Jeremy Ryan Claeys, also doing business as Tested Green, individually and as an officer and member of Nonprofit Management LLC*, FTC File No. 102 3064. Available at www.ftc.gov/os/caselist/1023064/110301testedgreendo.pdf).

Practice Tips

- Utilize certifications and endorsements if they can be substantiated and are not deceptive.
- Make sure the endorser is independent of you.
- Determine that the endorser has credibility in the area it is endorsing.
- Make sure the certificate, seal or award explains the basis upon which the designation has been given.
- Make sure the certificate, seal or award is qualified so as to limit the claim to the attributes being certified.

Source Reduction Claims

The shopping center owner may want to promote the reduction in the use of potable water at its center with this claim: "We use 10 percent less potable water." This claim would be considered deceptive under the revised Green Guides because it does not

clarify whether the 10 percent less is a comparison with the center's potable water use prior to this time, or if it is a comparison with a competitor's use of potable water. The claim would not be deceptive if it stated "We used 10 percent less potable water in 2012 than we did in 2010," as long as the comparison was substantiated.

Practice Tip

- Qualify any source reduction claims to avoid deception about the amount of source reduction and the basis for any comparison.

Renewable Materials and Energy

The revised Green Guides provide new guidance for businesses on how to promote the use of renewable materials and energy. The FTC urges caution when making claims regarding renewable materials and energy use, because its research suggests that consumers understand renewable materials and renewable-energy advertising claims differently from the way in which a retailer may intend them. The following examples involving renewable-materials and energy-use claims underscore the reason for this cautious advice.

For example, when promoting the use of renewable materials, the FTC advises identifying the type of materials used, together with a disclosure about why they are renewable. The claim that flooring is "made with renewable materials" is considered deceptive by the FTC because it believes consumers may interpret this claim to mean "made with recycled content, recyclable and biodegradable." The FTC recommends qualifying the original claim with this clear and prominent statement: "The flooring is made from 100 percent bamboo, which grows at the same rate, or faster, than we use it."

When a shopping center owner promotes its center by stating "Our center is powered by renewable energy," such as solar or wind, the FTC says the claim should specify the type of renewable energy. However, the revised Green Guides state that one should not promote a facility as using renewable energy if fossil fuel is used to power an aspect of its location, such as its hot water. If, for example, fossil fuel used at a center is offset by renewable-energy certificates, the FTC guidance would allow the owner to make the "powered by renewable energy" claim, but likely with the qualification that any non-renewable energy use is offset by the certificates.

Practice Tips

- Consult the revised Green Guides carefully before making a claim involving renewable materials or energy use.
- Identify the type of renewable materials or energy used when making a claim.

Special Claims

The revised Green Guides provide special specific guidance about advertising the use of carbon offsets and about certain words in claims about products or materials, such as degradable, biodegradable, photodegradable, compostable, recyclable, recycled content, refillable, ozone safe, ozone friendly and source reduction. See §260.5 and §§260.7-17 of the revised Green Guides, available at www.ftc.gov). These special claims may need qualifying language to explain that the product might not break down quickly unless it is disposed of in an appropriate manner. Retailers should consult the revised Green Guides when making any type of a claim that uses these special terms.

Practice Tips

- Weigh the claims about being “green” with the statement as to how that has environmental benefit as compared with the cost of creating and using the product; determine whether the costs to create and produce the product exceed the environmental benefit of doing so.
- Do not claim that a product is degradable unless within one year, it (and its package) will completely degrade.

What Is Missing From the Revised Green Guides

The examples given in the revised Green Guides are not meant to be exhaustive. The FTC makes clear that one may make legiti-

mate environmental marketing claims and qualifications in ways that are not expressly stated in the revised Green Guides. However, the revised guides still do not provide guidance on the use of the terms sustainable, organic and natural, because the FTC determined it did not have enough of a basis to define and substantiate these claims. We are likely to see additional guidance on these topics as the FTC gains new insight into these areas. In the meantime, shopping center owners and retailers should give careful attention to the guidance in the revised Green Guides because it can be expected that the FTC will increase its review of green marketing claims.

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