

October 1, 2012

FTC Issues Final Revised Green Guides

The Federal Trade Commission ("FTC") today adopted revised Guides for the Use of Environmental Marketing Claims ("Final Revised Green Guides"). [1] These Final Revised Green Guides set forth the FTC's "current views about environmental claims" and were issued nearly two years after publication by the FTC of its Proposed Revision to the Green Guides ("Proposed Revised Green Guides") [2] on October 5, 2010. Though they apply to advertising and marketing of environmental benefits generally, certain provisions of the Final Revised Green Guides have important implications for energy companies, particularly those that market retail renewable energy or carbon offset products, or that develop on-site renewable facilities. Failure to comply with the guides may result in enforcement action by the FTC under Section 5 of the Federal Trade Commission Act. [3] Those provisions most likely to affect energy companies relate to the marketing of renewable energy claims, general environmental benefit claims, carbon offsets, and certificates and seals of approval.

The guidance that most directly affects energy companies, particularly those that market renewable energy at retail, relates to renewable energy claims. The Final Revised Green Guides retain the original language of the Proposed Revised Green Guides permitting the marketing of energy matched with renewable energy credits, or "RECs," as "renewable energy." The FTC clarifies that companies can minimize risk of deception by specifying the source of renewable energy. For example, a product made up of a combination of renewable energy sources should state this fact clearly and prominently in its marketing materials, along with a disclosure of the renewable source that makes up the greatest percentage of the portfolio. The FTC declined to require companies to disclose the location of their renewable energy sources when making claims, but cautioned in its "FTC Green Guides Statement of Basis and Purpose," also released today, that the net impression of some advertisements could imply local benefits, in which case a non-local source of RECs would need to be disclosed to avoid deceptive advertising. As was the case in the Proposed Revised Green Guides, the Final Revised Green Guides clarify through examples that a property owner who "hosts" an on-site renewable energy facility but does not purchase the RECs produced by the facility may not claim it uses renewable electricity or that it "hosts" a renewable facility. However, the Final Revised Green Guides have added guidance that the manufacturer may advertise that it "generate[s] renewable energy, but sell[s] all of it to others." This provides some additional clarity to developers of on-site renewable energy projects.

With respect to General Environmental Benefit Claims, the Final Revised Green Guides contain essentially the same guidance as the Proposed Revised Green Guides. The final guides provide that unqualified statements of general environmental benefit are likely to be misleading and therefore should not be made. In other words, a company may not advertise itself or a product as "eco-friendly" or "green" without prominently explaining the basis for the claim. The Final Revised Green Guides also clarify that even a qualified general claim should be reviewed to determine whether the identified environmental benefit comes at the expense of the environment overall. For example, if reducing a product's packaging requires more energy to make the product, even the qualified statement "Eco-friendly?-- reduced packaging" could be deceptive.

The guidance offered by the Final Revised Green Guides with respect to advertising of carbon offsets also remains substantially unchanged from that contained in the Proposed Revised Green Guides. Any claimed emission reductions must be backed by "competent and reliable scientific and accounting methods," to ensure that they are properly quantified and there has been no double-counting of reductions. In addition, according to the guides, it is deceptive to claim a carbon offset represents an emission reduction if the reduction or activity causing it was required by law, or to make claims that imply a carbon offset represents emission reductions that have already occurred when the purchased offset credits fund future projects. For example, if an energy company attempts to sell carbon offsets based on methane capture at one of its landfill gas facilities, but the facility is required by law to capture all the methane gas the landfill emits, emission reduction claims based on those "offsets" would be deceptive.?

Finally, the Final Revised Green Guides provide further information regarding certificates and seals of approval. Certificates can be an important marketing tool for companies who sell retail renewable energy, allowing a customer to advertise its own renewable energy purchase in a prominent way. The Final Revised Green Guides state that the advertiser needs to provide the basis for any certification, through either the name of the certification itself or some other means. The certification also cannot be misrepresented, either directly or by implication, as being provided by an independent third party if that is not the case. Accordingly, if an energy company sells a company renewable energy and provides the company with materials "certifying" the purchaser as "green" or "eco-friendly," those materials should clearly and prominently explain the basis for the certification (e.g., "ABC Company Purchased 100% Renewable Energy in 2012"), as well as the fact that the company doing the certifying is the same one that sold the renewable energy. Any use of such a certification should also meet the criteria for endorsements provided in the FTC's Endorsement Guides. [4]

Though providing some needed clarity in the area of advertising of environmental claims, the Final Revised Green Guides leave some areas of uncertainty, particularly with respect to renewable energy and related claims. Our attorneys have significant experience advising energy companies with respect to environmental marketing claims. If you have questions concerning the Final Revised Green Guides or energy advertising issues generally, please contact any of the attorneys listed in this alert.?

[1] 16 C.F.R Part 60: Guides for the Use of Environmental Marketing Claims.

[2] 75 FR 63552 (Oct. 15, 2010).

[3] 15 U.S.C. ? 45.

[4] 16 C.F.R. Part 255.

Authors



Paul N. Belval

Partner

Hartford, CT | (860) 275-0381

pnbelval@daypitney.com