

CURRENT REVISIONS TO THE GREEN GUIDES AND THE FUTURE OF ENVIRONMENTAL MARKETING



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With the ever-increasing importance of climate change to consumers, more and more companies are touting their beneficial environmental impact as a form of marketing. The Federal Trade Commission (FTC) does its part to regulate these claims under the framework of their so-called Green Guides, which provide guidelines for marketing “green” claims about eco-friendly, sustainable, ethical, recycled, and all other similar terms to the US consumer.

This article will review the Green Guides as they stand and where they might be going, both generally and from the perspective of the world of jewelry. Jewelry has outperformed all other luxury verticals and most other retail verticals over the past three years ascending in relevance and bottom-line importance to many companies. But jewelry can be a complex trade and there are special considerations to take into account before advising clients who have significant jewelry activity in their company.

What are the Green Guides?

First issued in 1992 to help companies avoid making misleading environmental claims in their marketing materials, Guides for the Use of Environmental Marketing Claims (Green Guides) were subsequently revised in 1996, 1998, and 2012.¹ In December 2022, the FTC sought public comments on potential updates with new Guides being issued likely in 2024.²

The Green Guides cover a wide range of industries and are intended to help marketers and advertisers avoid making environmental claims that could mislead consumers. Although the Green Guides are just that—*guidelines*—they draw their authority from Section 5 of the Federal Trade Commission Act (FTCA) which prohibits “unfair or deceptive acts or practices in or affecting commerce.”³ Violation of the Green Guides can (and does) result in all manner of penalty and enforcement by the FTC.

In general, an advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a reasonable consumer and was material to a consumer’s purchasing decision. Advertising claims must provide adequate disclosures that must be conspicuous and obvious to the average American. This disclosure must be made on all digital platforms and in print or in person in a plainly obvious and easy to understand manner.

For example, The Green Guides advise that marketers should not make “unqualified” or unsubstantiated general environmental benefit claims (e.g., the brand name “Eco-friendly”).⁴ Qualified claims (e.g., “greener than our previous packaging”) should be substantiated and accompanied with specific language (e.g., “We’ve reduced the weight of our packing by 15 percent”). The Green Guides also provide guidance on environmental terms, such as

“compostable,” “non-toxic,” and “recyclable”⁵ as well as claims about carbon offsets.⁶

The FTC has initiated enforcement actions—from warning letters to federal lawsuits—against companies for deceptive practices, resulting in monetary penalties and other equitable relief, such as prohibitions on making deceptive green claims or using other misleading advertising. Recent examples of FTC enforcement actions include:

- In 2022, the FTC sued Kohl’s, Inc. and Walmart, Inc. for: (i) falsely marketing rayon products as bamboo; and (ii) making deceptive environmental claims that the bamboo textiles were eco-friendly, while in reality converting bamboo into rayon involved toxic chemicals and hazardous pollutants. The settlements prohibited the companies from making deceptive green claims or using other misleading advertising and required them to pay penalties of \$2.5 million and \$3 million, respectively.⁷
- In 2019, a judge ordered Lights of America to pay \$21 million to the FTC for making false claims about the energy efficiency of its LED lightbulbs.⁸
- In 2018, Truly Organic Inc. and its CEO, Maxx Harley Appelman, agreed to pay \$1.76 million to settle an FTC complaint alleging that their nationally-marketed bath and beauty products were neither “100% organic” nor “certified organic” by the US Department of Agriculture (USDA).⁹

Our current moment

The FTC does a review of the administrative guides it promulgates approximately every 10 years; a review of the Green Guides is now timely, in large part because of societal and cultural forces at work. Since the last revision to the Green Guides in 2012, our understanding of the climate and environmental impact of commerce has changed significantly. At this specific moment, the 2012 Green Guides remain active and applicable, but we are now several months into a revision process that will likely completely redefine our reality.

As FTC Chair Lina M. Khan noted, consumers increasingly consider environmental impact when deciding whether or not to buy a product. “Before making a purchase, [they] want to know how a product contributes to climate change, or pollution, or the spread of microplastics. Businesses have noticed ... you’re likely to see packages trumpeting their low carbon footprint, their energy efficiency, or ... sustainability.”¹⁰ Without independent verification of these claims, however, consumers cannot assess them. The current revisions will help “the Green Guides ... to keep up with developments in both science and consumer perception.”¹¹

So much has changed since 2012. We need guidelines that reflect this new reality and definitions that are easy to understand and communicate in truncated digital form. The technology being used to manufacture products has also evolved, creating exciting new possibilities for harm reduction to the planet and yet also accelerating negative impacts in some cases. Lastly, as our collective ecological consciousness has continued to evolve, so have marketing claims about environmental packaging, services, and manufacturing practices. It makes sense that now is the time for a revised approach to environmental marketing.

Currently, there are no solid definitions for claims such as “ethical,” “natural,” or “sustainable” so those terms can be—and are—used freely. Because these terms are commonplace, their meaning has been diluted. Making such claims without real substantiation could bring accusations of “greenwashing” from even the average consumer. Any “green” claim must stand on the totality of its own merits and may not include a comparison (i.e., “more green”) with another player. In the world of jewelry, we see that the players most serious about the environmental impact of their products have totally abandoned these terms and claims and instead “show their work” on their websites and with their clients, sharing the data and decision-making that informs their business and manufacturing plans. This seems to resonate with their consumers, but it is a time-and-word-intensive approach. Clarity and defined terms

from the updated guides of the near future will be a relief for many.

The FTC's specific requests for comments may indicate particular areas of interest. For example, the FTC asked whether it should revise its guidance on carbon offsets as well as its definitions for "compostable," "degradable," "ozone-safe," "recyclable," "energy efficiency," "organic," and "sustainable."

We now await the next step, which will either be another round of questions or a first draft of the new rules. There will be additional comment periods for any further revisions. If this process follows previous FTC guide revisions, it will likely be at least a year from now before we land at the final version. This timeline allows plenty of opportunity to both participate in the comments process on behalf of your clients and prepare them for the changes coming.

The larger regulatory ecosystem

Other agencies in the US also protect consumers from deceptive environmental claims. In March 2022, the Securities and Exchange Commission (SEC) proposed new rules that would require public companies to disclose information about the climate risks their businesses face, as well as the carbon emissions of parts of their operations.¹² The USDA promulgates rules and regulations for the production, handling, labeling, and enforcement of organic products.¹³ Similarly, the State of California has several initiatives, legislation, and law enforcement activities dedicated to environmental claims on consumer products.¹⁴

The United Kingdom and Europe are also actively reviewing their standards. Standards there are shaping up to be quite demanding of scientific substantiation for claims and are worth separate investigation. While the FTC is focused on the US consumer and unlikely to proactively harmonize with international standards, our global economy merits familiarity with international standards.

Jewelry: special considerations

In the jewelry industry, manufacturers often craft marketing materials in alignment with the five-step Organisation for Economic Co-operation and Development (OECD) standards¹⁵ and the UN Sustainable Development Goals.¹⁶ If you are advising jewelry clients or those with jewelry verticals, it is very important to also consider a few other things. First, determine how to support any ethical claims with evidenced facts in sourcing. Additionally, check current sanctions lists—several countries (including Russia) have sanctioned products, companies, and individuals related to jewelry. Likewise, be sure your jewelry clients are current in their Anti-Money Laundering compliance programs if they generate more than \$50,000 annually from precious materials. Finally, familiarize yourself with the FTC jewelry guides updated in 2018.¹⁷

The jewelry industry provides a perfect example of the limitations of the current Green Guides and the need for the revisions. The current standard for "recyclable" in The Green Guides is "diverted from the waste stream" and is thus inapplicable to jewelry. Although gold mined illegally in the Amazon, used by a cartel in dealing illegal drugs, then melted down and passed along the supply chain could technically be called "recycled," that would be an illusion, as it is deeply problematic but semantically blessed. The revised Green Guides will further define sustainability, responsibility, and "eco" as concepts and will also help curb current problematic usages.

Conclusion

While waiting for the revisions to the Green Guides to be released, keep advising clients to develop their own narrative under current Green Guides or refrain altogether from making claims until we have more clarity. Any marketing, ESG, or sustainability claims should be in compliance with the current Green Guides, state laws, industry best practices, and requirements of other agencies (e.g., SEC, FDA, etc.). Clients should avoid broad statements that are not substantiated by objective scientific evidence.

Any green claims must be specific, conspicuous (even on social media), and easy to understand. When applicable, clients should disclose supporting evidence. With these standards in mind, clients should review their marketing materials and company statements and modify them as needed. 📌

Notes

- 1 Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260 (2012).
- 2 Request for Public Comment, Guides for the Use of Environmental Marketing Claims, RIN 3084-AB15, 87 Fed. Reg. 77766 (Dec. 20, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-12-20/pdf/2022-27558.pdf>. Originally set to expire on February 21, 2023, the public comment period was extended until April 24, 2023. Additionally, the FTC held a one-day workshop on May 23, 2023, focused on the key area of “recyclable” advertising with a separate comments period which is active as of this publication.
- 3 15 U.S.C. § 45.
- 4 16 C.F.R. § 260.4.
- 5 *Id.* at §§ 260.7-260.17
- 6 *Id.* at § 260.5.
- 7 *US v. Kohl’s*, 22-cr-272 (WMW/TNL) (D. Minn. Nov. 14, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/%283%29%20Kohl%27s%20Order.pdf; *US v. Walmart*, Case No. 1:22-cv-00965 (D. D.C. Apr. 8, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/Walmart%20Order.pdf
- 8 *FTC v. Lights of America, Inc.*, SACV10-01333 JVS (MLGX) (C.D. Cal. Jan. 15, 2014), available at <https://www.ftc.gov/system/files/documents/cases/140220lightsorder.pdf>.
- 9 *FTC v. Truly Organic Inc.*, No. 19-23832-Civ-Scola (S.D. Fla. Sept. 18, 2019), available at https://www.ftc.gov/system/files/documents/cases/truly_organic_stipulated_final_order_0.pdf.
- 10 Statement of Chair Lina M. Khan Regarding the Regulatory Review of the Guides For the Use of Environmental Marketing Claims Commission File No. P954501 (Dec. 14, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_lina_m._khan_re_green_guides_-_final.pdf.
- 11 *Id.*
- 12 The Enhancement and Standardization of Climate-Related Disclosures for Investors, RIN 3235-AM87 (to be codified at 17 CFR 210, 229, 232, 239, and 249) (Mar. 21, 2022).
- 13 7 C.F.R. § 205.
- 14 See, e.g., Cal. Public Resources Code §§ 42355-42358.5.
- 15 OECD Due Diligence Guidance for Responsible Minerals Supply Chains (2016), available at <https://europeanpartnership-responsibleminerals.eu/cms/view/dfd50466-30aa-4f0a-a387-0be8ed1fc1ef/about-the-oecd-due-diligence-guidance>
- 16 <https://sdgs.un.org/goals>.
- 17 The Guides for the Jewelry, Precious Metals, and Pewter Industries, 16 C.F.R. pt. 23 (2018), available at <https://www.govinfo.gov/content/pkg/FR-2018-08-16/pdf/2018-17454.pdf>.