



# EARTHJUSTICE

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Via Federal Trade Commission comment portal:

<https://ftcpublic.commentworks.com/ftc/revisedgreenguides>

## **Re: Proposed, Revised Green Guides, 16 CFR Part 260, Project No. P954501**

Earthjustice respectfully submits the following comments on the Federal Trade Commission's (FTC's) proposed revisions to its Guides for the Use of Environmental Marketing Claims ("Green Guides" or "Guides"). We appreciate FTC's consideration of these comments.

### **I. FTC should clarify the effect of the Guides**

We agree with FTC that the Green Guides do not preempt state laws. However, FTC may want to clarify the ways in which the Guides are relevant to a variety of state laws.

#### A. The Green Guides may be used as evidence to prove liability under state laws that require actual or constructive knowledge that a claim is misleading

Many state false advertising laws include actual or constructive knowledge as an element of liability. *See, e.g.,* KAN. STAT. ANN. § 50-626(b)(1) ("Deceptive acts and practices include ... [r]epresentations made knowingly or with reason to know...."); *Stevenson v. Louis Dreyfus Corp.*, 811 P.2d 1308, 1311-12 (N.M. 1991) (interpreting New Mexico's statutory requirement that false or misleading statement be "knowingly made" as being satisfied when the party making the statement "in the exercise of reasonable diligence should have been aware that the statement was false or misleading."); *see also Evaluation Research Corp. v. Alequin*, 439 S.E.2d 387, 390 (Va. 1994) (holding that common law claim for constructive fraud may be based on negligent misrepresentation). In such states, the advice and consumer perception evidence contained within the Green Guides are likely to be sufficient proof that a marketer knew or should have known that certain claims would be misleading.

#### B. The Green Guides are relevant to liability under state laws that refer to FTC interpretations

Liability under some other state false advertising laws explicitly depends on FTC interpretations of federal law. For example, Maine law states that liability determinations "will be guided by the interpretations given by the Federal Trade Commission ... to Section 45(a)(1) of the Federal Trade Commission Act...." ME. REV. STAT. ANN. tit. 5 § 207(1); *but see* ME. REV. STAT. ANN. tit. 5 § 208 (exempting deceptive practices only if they are authorized by "law, rule or regulation or other regulatory approval," but not by mere interpretations). Similarly, New York affords "a complete defense" to defendants who can show that their claims comply with "statutes administered by the federal trade commission ... as such ... statutes are interpreted by the federal trade commission." N.Y. GEN. BUS. LAW § 349(d). Even though the Green Guides are not enforceable regulations, 16 C.F.R. § 260.2(b), they "represent administrative interpretations of laws

administered by the Federal Trade Commission.” *Id.* at § 260.1. They thus appear to be the type of FTC guidance on which these state laws contemplate relying.

## II. FTC should place more weight on the perceptions of particular types of consumers

### A. FTC should reanalyze its consumer perception survey to focus on the perceptions of consumers who buy products because of associated environmental claims

FTC’s analysis of the results of its online survey makes no adjustment for consumer habits or preferences. As a result, FTC treats all perceptions the same, even those that have no impact on purchasing decisions. But a label that will not impact a consumer’s purchasing decision cannot mislead a consumer.

FTC policy acknowledges that “[w]hen representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of *that group*.” FTC Policy Statement on Deception (“Deception Policy Statement”, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984) (emphasis added). FTC can accomplish this in the Green Guides by focusing on the perceptions of consumers who are influenced by environmental labeling claims. And it can do so simply by reanalyzing the results of the consumer perception survey.

Just over one-sixth of all respondents to that survey reported having made, in the six-month period the survey asked about, six or more purchasing decisions based on environmental claims appearing on a product’s label. “Environmental Marketing Consumer Perception Study Background Information,” Section 4, Q910. Twenty percent of all respondents reported either having paid more or having made a special trip to get a product that claimed to be environmentally preferable. *Id.* at Q920. Research in this field suggests that such consumers are likely to continue to buy products based on the environmental claims they make. John Thøgersen, *Promoting ‘green’ consumer behavior with eco-labels*, in *NEW TOOLS FOR ENVIRONMENTAL PROTECTION: EDUCATION, INFORMATION AND VOLUNTARY MEASURES* 92 (Thomas Deitz and Paul C. Stern, eds., 2002).

Accordingly, the perceptions of these two overlapping groups of “green consumers” are especially important in determining what guidance to give marketers who are targeting these consumers. The perceptions of these groups are likely to be different from those of consumers who care less about environmental claims and are likely not as familiar with them. And paying closer attention to those different perceptions could influence the conclusions FTC draws.

For example, FTC declines to advise marketers that broad environmental claims should be substantiated with life cycle analysis. 75 Fed. Reg. 63,560. One of the reasons for this is that only 15 percent of survey respondents thought of all four phases of a product’s life cycle (production, distribution, use, and disposal) when viewing broad environmental claims. *Id.* But FTC does not know which respondents these were. It is possible, even likely, that the 15 percent of consumers who interpreted broad environmental claims in this way was composed largely of consumers who also are influenced by environmental claims. Thus, the effect of the claims should be evaluated based on the “specific audience” of “green” consumers. *See* Deception Policy Statement. FTC should not dismiss the need for life cycle analysis without first determining whether this specific audience expects it.

Similarly, FTC does not advise marketers to make specific claims rather than qualified general claims. 75 Fed. Reg. 63,564. This is because switching from a specific claim to a qualified general claim led to only modest increases in the number of survey respondents—eight percent—who incorrectly believed the product had environmental benefits beyond those that it mentioned. *Id.* at 63,563. FTC is effectively asserting that this increased confusion is within some de minimis exception. But it is almost impossible to make a judgment about the significance of that increase without first determining how many of those eight percent of respondents are likely to rely on such

claims. As in the previous example, these respondents may very well be responsible for a large portion of purchasing decisions made on the basis of environmental claims. If that is in fact the case, FTC should consider advising marketers that qualified general claims are likely to be deceptive.

B. FTC should study the perceptions of business consumers

Business consumers are another group whose perceptions are especially significant in determining whether claims are likely to be misleading. Business consumers are likely purchase certain products in much greater quantities than individual consumers do, and their perceptions of whether a product is environmentally preferable are often relied on by their customers.

As FTC notes, “[a] business consumer may interpret a marketer’s claims differently than an individual consumer.” 75 Fed. Reg. at 63,557 n.44. In many cases, business consumers will be the “specific audience” that environmental marketers target. *Id.* But FTC’s consumer perception survey fails to distinguish between the perceptions of business consumers and those of individual consumers. We encourage FTC to collect and analyze additional evidence focusing on business consumers’ perceptions of environmental claims.

Thank you for the opportunity to participate.

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