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# FTC Moves May Signal Start of 'Greenwashing' Crackdown

By GABRIEL NELSON of  
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The Federal Trade Commission is expected to crack down on "greenwashing" when it updates its environmental marketing guidelines for the first time since 1998.

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commission's agenda.

"In response to the explosion of green marketing in recent years, the agency initiated a review of its Green Guides to ensure that they are responsive to today's marketplace," Vladeck said in his written testimony. The commission is looking into topics beyond the scope of the existing guides, he noted, "because many currently used green claims, such as 'sustainable' and 'carbon neutral,' were not common when the Commission last revised the Guides."

Industry and environmental groups are also eager to find out whether the revised Green Guides will weigh in on the largely unregulated markets for carbon offsets, renewable energy credits and environmental certifications, all of which were addressed during public workshops in 2008. Regulatory experts say stricter marketing guidelines would fit into the Obama administration's efforts to expand environmental oversight by the executive branch.

The agency's Guides for the Use of Environmental Marketing Claims, or Green Guides, define terms such as "recyclable" and "biodegradable" and explain how businesses should back up environmental assertions. Though FTC cannot force businesses to adopt greener practices, Section 5 of the FTC Act authorizes the agency to intervene when businesses are misrepresenting their practices to clients -- in other words, turning greenwashing into fraud.

FTC did not use those guidelines to file any complaints regarding environmental claims during the administration of President George W. Bush, but it has filed seven since Obama took office.

David Vladeck, director of FTC's Bureau of Consumer Protection, told the Senate Subcommittee on Consumer Protection last summer that tougher enforcement and environmental guidelines are a major part of the

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"If they can't get climate change regulations passed through Congress, the administration is going to do whatever it can to keep moving the ball forward," said Hamilton Hackney, an environmental attorney and shareholder at the Boston office of Greenberg Traurig LLP. "Sometimes, these 'collateral regulations' can have almost as much of an impact."

Most industry groups are closely following U.S. EPA's efforts to regulate greenhouse gas emissions, Hackney said, but even agencies historically uninvolved with environmental issues have started assuming environmental oversight responsibilities. The Securities and Exchange Commission, for instance, voted last month to require publicly traded companies to disclose to investors the potential economic impact of new greenhouse gas regulations ([E&ENews PM](#), Jan. 27).

Environmental groups are excited that FTC is examining the issue of greenwashing, though they are not sure what to expect. The agency has remained tight-lipped on details of the revisions, said Claudette Juska, a research specialist at Greenpeace. "It's been a little bit hard to see into the process," said Juska, who submitted a comment during the public review process in 2008.

FTC's information-gathering process was completed in the fall when the results of a consumer perception study arrived, said James Kohm, director of the commission's enforcement division, in an interview. The commission has begun deliberating on revisions, he said, but no timeline has been announced for their release or implementation.

### Fighting greenwash

FTC takes action on relatively few environmental cases. Around 45 complaints have been filed under the Green Guides since their initial implementation in 1992, according to commission data.

While the complaints might only scratch the surface of greenwashing, Juska said, they serve as a deterrent. She said Greenpeace would like to see the Green Guides become stricter, but FTC could achieve the same goal by cracking down on greenwashing using the standards that are already in place.

"The Green Guides themselves serve as great guidelines," Juska said. "But if they're not being enforced, they're not useful."

As part of its environmental enforcement campaign last year, FTC went after Kmart Corp., which ultimately agreed to change the marketing for a line of house-brand paper plates. Kmart had advertised the plates as biodegradable, which FTC deemed misleading because the plates would not usually decompose in municipal solid waste facilities, where about 90 percent of garbage is disposed.

The commission filed two other complaints over the biodegradability of products, as well as four against companies using environmental claims in the marketing of bamboo clothing. In all four of those cases, FTC argued that because the clothing material had been made from bamboo into rayon using harsh chemicals, consumers were being misled by claims that the use of bamboo was environmentally friendly.

Stricter guidelines could signal an intention to step up enforcement, but revisions would also have an impact beyond the agency's own enforcement mechanisms, environmental attorneys say.

California state law has incorporated the Green Guides into its own environmental marketing laws, as has Indiana. The statutes defer to the Green Guides whenever certain environmental marketing claims are made, opening up violators of the Green Guides to criminal penalties and civil suits rather than just administrative action by FTC.

In emerging industries, where there is little legal precedent, courts would likely look to federal guidelines even if they lack the weight of law, said Brad Mondschein, an alternative energy and green development attorney at Hartford, Conn.-based Pullman & Comley LLC.

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"The Green Guides would become extremely persuasive to a court, especially in the early cases, because the courts would otherwise have very little guidance to go on," said Mondschein, who has written about the guidelines. "While they certainly won't be definitive, I would think they probably hold a lot of sway."

## New markets

FTC's consideration of guidelines for the marketing of renewable energy credits and carbon offsets has prompted particular debate, most of it hinging on the lack of a regulatory framework to ensure that the purchase of offsets actually reflects greenhouse gas reductions. Various studies have suggested a significant fraction of offsets are linked to projects that were already close to completion or that would have been completed regardless.

Terrapass Inc., a San Francisco-based carbon offset provider, submitted a letter to FTC during the comment process saying the integrity of the market depends on the interpretation of this concept, typically referred to as "additionality."

"If the offsetting reductions would have happened without a carbon market, the market as a whole will fail to achieve its environmental objective," the letter said.

Rep. Edward Markey (D-Mass.) specifically cited the carbon offset market as an area to examine when he asked FTC to begin review of the Green Guides in 2007, and the attorneys general of nine states submitted a letter during the review process urging the government to intervene in that market.

"The lack of common standards and definitions, along with the intangible nature of carbon offsets, makes it difficult if not impossible for consumers to verify that they are receiving what they paid for and creates a significant potential for deceptive claims," said the letter, sent by the office of Vermont Attorney General William Sorrell (D). "We need to ensure, by law, that carbon offsets are real, additional, verifiable, enforceable, and accompanied by some system that will permit average consumers to make informed decisions as to whether and what to buy," the letter went on to say.

Some industry groups asked FTC to avoid weighing in on the industry, saying oversight would quash the emerging market and the commission lacked the authority to impose new regulatory standards or testing protocols.

The Edison Electric Institute, which represents publicly held utilities, submitted a letter saying any attempt by FTC to define additionality would lead the commission into a "conceptual thicket."

"Any further encumbrance on qualifying offsets projects based on additionality would create confusion and be a barrier to GHG reductions, avoidances and sequestration from a policy standpoint," the group wrote.

Though some offset and renewable energy credit providers might currently provide a greater environmental benefit than others, FTC would have a hard time judging marketing practices as misleading, Hackney said.

"Most people at the consumer level are buying them as a feel-good sort of thing, which is a lot different from buying a \$2,000 refrigerator on the assumption that you're going to save \$500 over its lifetime through energy efficiency," Hackney said.

Kohm said FTC is careful not to issue guidelines that would stifle the development of an industry, such as the market for carbon offsets.

"The commission traditionally has been wary of getting involved in new technologies where the science isn't clear and where the market is developing," Kohm said. On the other hand, he added, "there's outright fraud, and the commission would always be concerned by that."

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