ClientEarth

Comments in Support of Updates to the Federal Trade Commission "Green Guides"

ClientEarth U.S.A. Comment Letter, Green Guides Review (16 CFR part 260) (Matter No. P952501)

ClientEarth is an international non-profit organization dedicated to changing systems to protect life on Earth. Its team of over 250 people works to create change in over 50 countries. ClientEarth addresses climate risk, offers practical solutions to the world's toughest economic challenges related to climate, and works with people, campaigners, governments, and industry to make those solutions a reality. ClientEarth's U.S. operations specialize in the intersection of finance, securities laws, and climate, with a specific goal of achieving purposeful markets in the context of the ongoing climate crisis.

EXECUTIVE SUMMARY

United States consumers' deep and increasing interest in environmental issues influences their purchasing decisions. But the prevalence of misleading environmental marketing claims creates consumer confusion and a resulting misallocation of consumer purchasing power. In order to ensure consumers can align their purchases with their values, factual accuracy and transparency are necessary. The Green Guides, as an important consumer protection tool, can be revised to promote this transparency and discourage deception by expanding the range of defined environmental marketing terms, and modifying the existing definitions to keep pace with scientific progression.

Specifically, we respectfully submit that the FTC should:

(1) Update the Green Guides to include present-day environmental terms, reflecting up-to-date and widely-agreed upon scientific consensus.

(2) Modify the current "Carbon offsets" section of the Guides by providing clarifying guidance on "offsetting" and related climate and carbon-based claims. Specifically:

   a. Provide guidance that representations that directly or by implication equate carbon "offsets" with value chain emission reductions are

misleading, and generally caution against the use of "offset" claims. Update the language used to refer to voluntary carbon credits (although historically used, "offset" is not the correct noun according to up-to-date standards). In particular, rename the section to reflect an inclusion of a broader range of climate and carbon-based claims.

b. Provide guidance on the related range of climate and carbon terminology including, but not limited to, claims such as "net zero" and "carbon neutral." Specifically, clarify the meaning of claims like net zero, carbon neutral and related terms, and expressly characterize as misleading any use of these terms in a manner inconsistent with their scientific definitions, or unsupported by clear, objective and verifiable commitments and actions.

For example, net zero and carbon neutral claims that do not include Scope 1-3 emissions, interim reduction targets, and/or are based on unproven, unscalable, or unfunded technology or "offsets" should be called out as misleading.

Terms like "net-zero oil" and "carbon neutral natural gas", that link highly polluting products with environmental terminology, should also be called out as misleading.

(3) Align the Green Guides with international standards that, in addition to the above, deter cherry-picking, discourage vague and generic claims, including "sustainability" claims, and involve heightened obligations for fossil fuels and highly polluting industries. In light of the EU's proposed amendments to consumer law and the already implemented restrictions in various countries, the FTC should also consider a rulemaking on these issues.

In this comment, we respond to questions[1] 1, 3, 7, 8, 10, 15, 18, and 19 in the General Issues section and questions 1 and 12 in the Specific Claims section. For ease of reference, the questions being addressed are denoted in the headings.

1. THE GREEN GUIDES ARE A VALUABLE RESOURCE THAT SHOULD REFLECT UP-TO-DATE CONSUMER RESEARCH AND ENVIRONMENTAL TERMINOLOGY[2]

The Green Guides are a vital tool for educating businesses and protecting consumers. We are at a critical juncture in which consumers are increasingly basing their purchasing decisions on environmental factors, and yet misleading and deceptive advertising regarding environmental practices ("greenwashing") is pervasive. To ensure their decisions are accurately informed, consumers must be able to correctly delineate between the validity of companies' environmental claims. The Green Guides, once updated, can serve as a valuable mechanism in safeguarding this needed clarity for consumers and businesses.

[1] 87 FR 77766, https://www.ftc.gov/system/files/ftc_gov/pdf/GreenGuides-FRN-11-5-22.pdf.
[2] This section responds to General Issues questions 1, 3, 7, 8, and 10.

Strong Consumer Interest in Environmental Issues Influences Purchasing Decisions

Seventy-four percent of U.S. survey respondents regard it as "important or very important for corporations to commit to reducing their carbon emissions and [to] becoming net zero."[3] Younger consumers, which represent the fastest-growing economic power around the world,[4] are notably interested in environmental issues.[5] Expected to hold more than a quarter of the global income by 2030,[6] "three-quarters of them prefer to buy sustainably rather than to go for brand names."[7] These findings mirror global trends, with over half of global consumers surveyed agreeing that "environmental sustainability is more important to them today than it was 12 months ago."[8]

This concern for corporate environmental accountability is increasingly translating into action by consumers via their purchasing decisions. According to the Business of Sustainability Index, 66% of US consumers are "willing to pay more for a product that is environmentally friendly."[9] Forty-one percent of U.S. consumers reported spending more buying from companies "that protect the environment" in 2022, up from 37% in 2021.[10] And "54% of Gen Z is willing to spend up to 10% more for sustainable products."[11] This again reflects global trends, with 49% percent of consumers globally saying they've paid a premium for products branded as sustainable or socially responsible in the last 12 months.[12] This result remains true

[3] Simon Cooper, *Consumers Want Companies to Take a Stand on Climate*, OliverWyman Forum (Apr. 22, 2021), https://www.oliverwymanforum.com/climate-sustainability/2021/apr/consumers-want-companies-to-take-a-stand-on-climate.html.

[4] Ben Winck, *Gen z's surging economic power will permanently change the investing landscape over the next decade, Bank of America says*, Markets Insider (Nov. 19, 2020), https://markets.businessinsider.com/news/stocks/gen-z-economic-impact-outlook-spending-permanently-change-investing-bofa-2020-11-1029822486#:~:text=Gen%20Z%27s%20earnings%20are%20set,will%20surpass%20millennials%27%20spending%20power..

[5] Jacopo Paoletti, *Gen Z And Environmental Issues: How to Earn Young Consumers' Trust*, Forbes (Jun. 1, 2022), https://www.forbes.com/sites/forbescommunicationscouncil/2022/06/01/gen-z-and-environmental-issues-how-to-earn-young-consumers-trust/?sh=78bbe26733ab.

[6] Winck, *supra* note 4.

[7] Johnny Wood, *Gen Z cares about sustainability more than anyone else – and is starting to make others feel the same*, World Economic Forum (Mar. 18, 2022), https://www.weforum.org/agenda/2022/03/generation-z-sustainability-lifestyle-buying-decisions/.

[8] *Balancing sustainability and profitability*, IBM, at 2 (Apr. 2022), https://www.ibm.com/downloads/cas/5NGR8ZW2. In addition, 72% of global consumers consider reducing their carbon footprint a personal priority. *9 out of 10 Consumers Make Direct Link Between Climate Change and Rising Energy Bills Schneider Electric Global Study Finds*, Schneider Electric (Aug. 23, 2022), https://www.se.com/ww/en/about-us/newsroom/news/press-releases/9-out-of-10-consumers-make-direct-link-between-climate-change-and-rising-energy-bills-schneider-electric-global-study-finds-630380714b56c941150a776c.

[9] *Business of Sustainability Index*, PDI Technologies, at 4 (Jun. 2022), https://pditechnologies.com/resources/report/business-sustainability-index/.

[10] *Sustainability Sentiment Tracker 2022*, Brodie & Public First, at 12 (2022), https://static1.squarespace.com/static/5d1f083a0b4f4100012c59cb/t/62cbe404d7a0421f9079bd79/1657529350768/BRODIE+%7C+Public+First+Sustainability+Sentiment+Tracker_2022.pdf.

[11] *Gen Z buyers: the future is ethical consumption*, Maersk (Nov. 3, 2022), https://www.maersk.com/insights/growth/gen-z-buyers-the-future-is-ethical-consumption.

[12] IBM, *supra* note 8, at 3.

regardless of wealth, with 43% of global consumers in the lower income bracket saying they paid a premium for sustainable or socially responsible products.[13]

Consumer Purchasing Power is Misallocated due to Widespread Misleading Environmental Marketing Claims

Despite this deep consumer concern and willingness to pay more for environmentally reputable products, consumers lack the transparency and reliable information needed to allocate their earned dollars as they intend. Misleading environmental marketing tactics are widespread and on the rise.[14]

In recent polling, 58% of business executives admit their companies are guilty of greenwashing and 66% question whether their company's sustainability efforts are genuine.[15] "This is especially true in North America, where 72% of [executive] respondents believe that their organization has overstated its sustainability efforts."[16] Many companies use terminology like "net zero" or "carbon neutral" to communicate alignment with environmental objectives, but fail to take the necessary steps to achieve these goals.[17] And these terms are often linked directly to products at the point of purchase (e.g. on product labels and bills).[18]

As a result, consumers are skeptical of companies' environmental marketing claims and a significant portion of U.S. consumers remain uncertain about the meaning of common environmental terminology.[19] Seventy-eight percent report that despite their desire to buy from environmentally friendly companies, they have trouble identifying them.[20] About a third of U.S. consumers (and 44% of 18 to 24-year-olds) "agree that businesses claiming to reduce their impact on the environment are just lying to sell more products."[21] This lack of consumer confidence is also present in their understanding of widely-agreed upon environmental terminology. One in four Americans believe in the two most common net zero misinformation narratives: that "the US cannot afford to reach the target of net zero emissions by 2050 and that the world does not need to rapidly de-carboni[z]e and achieve net-zero by 2050 to ensure the prosperity and welfare of humans across the world."[22]

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[13] *Id*. at 7.
[14] *Greenwashing Claims on the Rise: Avoiding Dirty Laundry*, Quinn Emanuel (Mar. 22, 2021), https://www.quinnemanuel.com/the-firm/publications/greenwashing-claims-on-the-rise-avoiding-dirty-laundry/.
[15] *CEOs are Ready to Fund a Sustainable Transformation*, Google Cloud, at 5 (2022), google_cloud_cxo_sustainability_survey_final.pdf.
[16] *Id*.
[17] ClientEarth has created *The Greenwashing Files*, which document some of the misleading claims that companies make to consumers through branding, advertising campaigns, and net zero commitments. *See* https://www.clientearth.org/projects/the-greenwashing-files/.
[18] Dieter Holger, *Carbon-Neutral Product Labels are Proliferating. Will they Pay Off?*, The Wall Street Journal (Dec. 22, 2021), https://www.wsj.com/articles/carbon-neutral-product-labels-are-proliferating-will-they-pay-off-11640170803.
[19] *See generally* Brodie, *supra* note 10.
[20] PDI Business of Sustainability Index, *supra* note 9, at 4.
[21] Brodie, at 7.
[22] *The Impacts of Climate Disinformation on Public Perception*, CAAD, at 11 (2022), https://caad.info/wp-content/uploads/2022/11/The-Impacts-of-Climate-Disinformation-on-Public-Perception.pdf.

Prioritizing mechanisms like the Green Guides to guard against this uncertainty and confusion will protect consumers' purchasing preferences and power. It will also prevent unfair competition against those businesses that are actually investing in making measurable environmental progress, but whose efforts lack differentiation in the market due to others' greenwashing. Specifically, the Guides can provide a clear framework for businesses to assess how they should and should not communicate to consumers. Robust and clear guidance results in less legal and reputational uncertainty for businesses and less consumer confusion when making purchasing decisions.

The significant and long-lasting effects of commercial misrepresentations on consumer perception further underscore the importance of transparent and clear environmental marketing. For instance, before the Deepwater Horizon oil spill, BP engaged in an extensive campaign entitled "Beyond Petroleum" and rebranded their symbol to the helios, in a self-proclaimed "newly stated dedication to environmental stewardship and commitment to production methods that mitigated environmental degradation."[23] This branding strategy (which many have labelled as "greenwashing"[24]) *worked* – as consumers "consistently rated BP as the most environmentally friendly oil company during the mid-2000s"[25] – and it *stuck*. Even after the 2010 oil spill, the negative effects on BP's reputation were dampened in areas with more pre-spill advertising.[26] The result is that "firms may have incentives to engage in green advertising without investments in environmental stewardship" because of its impact on consumer perceptions.[27]

Recommendations

The stated purpose of the Green Guides is to "help marketers avoid making environmental marketing claims that are unfair or deceptive."[28] The Guides' impacts are further magnified via FTC enforcement actions,[29] and where states have incorporated them, in full or in part, into state law.[30] Additionally, various federal district

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[23] Lint Barrage, Eric Chyn, & Justine Hastings, *Advertising and Environmental Stewardship: Evidence from the BP Oil Spill*, AM. ECON. J. 33, 34 (Feb. 2020).
[24] Fred Pearce, *Greenwash: BP and the myth of a world 'Beyond Petroleum'*, The Guardian (Nov. 20, 2008), https://www.theguardian.com/environment/2008/nov/20/fossilfuels-energy.
[25] Evidence from the BP Oil Spill, *supra* note 23, at 34.
[26] *Id*. at 35.
[27] *Id*. at 33.
[28] 16 CFR 260.1.
[29] Legal Library: Cases and Proceedings, FTC, https://www.ftc.gov/legal-library/browse/cases-proceedings?sort_by=field_date&items_per_page=20&search=&field_competition_topics=All&field_consumer_protection_topics=1408&field_federal_court=All&field_industry=All&field_case_status=All&field_enforcement_type=All&search_matter_number=&search_civil_action_number=&start_date=&end_date=.
[30] California, Maine, Rhode Island and Michigan have all incorporated the Green Guides to some degree. Bruce Ratain, Olivia Adendorff, & Ross Weisman, *What Cos. Can Expect From FTC's Green Guides Updates*, Kirkland & Ellis (Jan. 12, 2023), https://www.kirkland.com/publications/article/2023/01/what-cos-can-expect-from-ftcs-green-guides-updates#:~:text=Courts%20have%20also%20applied%20the%20Green%20Guides%20where,sale%20of%20sunscreen%20that%20is%20labelled%20as%20%22reef-friendly.%22.

courts have relied on the Guides as a relevant standard for determining misleading uses of included terms such as “non-toxic”[31] and “recyclable”.[32]

But in order for the Guides to meaningfully protect consumers, action must be taken now to prevent deceptive advertising from fueling public misunderstanding and mistrust. Research shows that solutions such as using clear language on product labels may improve consumer trust in corporate claims.[33] More specifically, targeted consumer research by the UK’s independent advertising regulator finds that definitions must be standardized, and usage of these definitions should be enforced by an independent body.[34] Participating consumers agreed that “the best practice would be for all companies to be as transparent as possible, highlighting the reliance on offsetting in claims. It was felt this should also apply where Carbon Neutral and Net Zero claims were used . . . .”[35] **The guidance should therefore be updated to include these and other present-day environmental terms that are being misused, and to define them to reflect up-to-date scientific consensus.** Simply put, environmental terms of art like “net zero” are “too valuable a tool to lose to cheap marketing.”[36]

2. THE FTC SHOULD MODIFY THE CURRENT “CARBON OFFSETS” SECTION OF THE GUIDES BY PROVIDING CLARIFYING GUIDANCE ON “OFFSETTING” AND RELATED CLIMATE AND CARBON-BASED CLAIMS[37]

The term carbon “offset” is misleading and can lead to the mischaracterization of related terms. Carbon credits are often falsely represented as “offsetting” value chain emissions, or, in other words, as being equivalent to direct emission reductions by companies. Voluntary carbon credits, however, are not the same as value chain emission reductions, and therefore, do not result in a direct “offset”. The conflation of these concepts by companies using carbon credits as “offsets” results in significant consumer misunderstanding. As detailed below, the Commission should revise the “Carbon offsets” section of the Guides to guard against such misstatements and provide guidance for additional types of advertising claims related to carbon emissions and climate change.

[31] *Rosenberg v. S.C. Johnson & Son Inc.*, No. 20-CV-869-JPS-JPS, 2021 WL 3291687, at *2 (E.D. Wis. Aug. 2, 2021) (court recognized that the Green Guides provide a relevant standard for the term “non-toxic”).
[32] *Downing v. Keurig Green Mountain, Inc.*, No 1:20-CV-11673-IT, 2021 WL 2403811, at *3 (D. Mass. June 11, 2021) (Court embraced the Guides’ definition of “recyclable”, finding that the plaintiff plausibly alleged Keurig’s statement was deceptive).
[33] PDI Business of Sustainability Index, *supra* note 9, at 4, 8.
[34] *Environmental Claims in Advertising Qualitative Research Report*, ASA, at 2 (Oct. 2022), https://www.asa.org.uk/static/6830187f-cc56-4433-b53a4ab0fa8770fc/CCE-Consumer-Understanding-Research-2022Final-090922.pdf.
[35] *Id*. at 3.
[36] Catherine McKenna, *Want Consumers to Make Smart Climate Choices? Stop Greenwashing*, TIME (Nov. 8, 2022), https://time.com/6229965/consumers-to-make-smart-climate-choices-stop-greenwashing/.
[37] This section responds to General Issues questions 3 and 15, and Specific Claims question 1.

The Guides should clarify that voluntary carbon credits (used as "offsets") do not equate to value chain emission reductions, and representations to this effect are misleading.

Carbon credits are generally linked to projects aimed at reducing, avoiding, or removing carbon emissions. While voluntary carbon credit purchases that contribute to high-quality projects can serve as valuable conduits for financing climate action, these credits are not equal to value chain emission reductions, and therefore, do not result in a direct "offset". (For clarity, the compliance market for carbon–often referred to as cap-and-trade programs, emissions trading systems, or allowance trading–is distinct from the voluntary markets where credits are typically purchased to further corporate social responsibility goals)."[38]

This important differentiation between carbon credits (and the use of them as "offsets") and emission reductions is widely recognized. First, carbon credit projects come with an array of risks, including that the benefit they aim to achieve is not guaranteed. For example, "it is difficult to establish that the . . . project would not have avoided emissions regardless, given other drivers of decarbonization (a problem known as 'additionality') or that the anticipated emissions were actually avoided in practice (given challenges of accurate monitoring and verification involved)."[39] Further, "leakage" can occur when the suppression of harmful activity in one place results in an increase in that activity elsewhere.[40] An example of this is a carbon credit project that protects a forest, but in reality, simply shifts deforestation elsewhere.

Next and perhaps even more problematic, nature-based carbon credit projects, which typically last two or three decades, are incomparable with the permanence of the emissions themselves, whose warming effects last hundreds of years. If a forest protected by a carbon credit project is harmed by fire, pests, disease or ongoing climate change, the carbon it was storing is released into the atmosphere, negating the claimed benefit of the project.[41] No carbon credit project can guarantee against such risks over the necessary timescale, which leads experts to conclude that:

[38] "Carbon markets exist as mandatory (compliance) schemes and as voluntary programs. Mandatory carbon markets, which are also referred to as cap-and-trade programs, emissions trading systems (ETSs) or allowance trading, represent a market-based approach to reducing carbon emissions […] The voluntary carbon markets function outside of compliance schemes and enable companies, governments, non-profit organizations, universities, municipalities and individuals to purchase carbon credits (offsets) on a voluntary basis. The majority of voluntary credits are purchased by the private sector, where corporate social responsibility goals are typically the key drivers of credit purchases." *Role of Derivatives in Carbon Markets*, ISDA, at 4 (Sept. 2021), https://www.isda.org/a/soigE/Role-of-Derivatives-in-Carbon-Markets.pdf.

[39] *Net Zero, Carbon Removal and the Limitations of Carbon Offsetting*, CSSN, at 5 (2022), https://cssn.org/wp-content/uploads/2022/06/Net-Zero-and-Carbon-Offsetting-Position-Paper.pdf.

[40] *Carbon Offsets: A Coming Wave of Litigation?*, Quinn Emanuel (Sept. 7, 2022), https://www.quinnemanuel.com/the-firm/publications/client-alert-carbon-offsets-a-coming-wave-of-litigation/

[41] *Id*.

As a general rule, it is prudent to treat carbon credits for [nature based solutions] as helpful complements to actions that reduce and avoid emission from fossil fuels, but not as substitutes or compensation for them.[42]

[Q]uality concerns make it problematic to use voluntary carbon credits in the accounting-like net-zero framework in which emissions and carbon credits can be equally matched. Conceptually, certain emissions and more uncertain offsets should not be placed on an equal footing.

Voluntary carbon credits may have environmental benefits, but their role should generally be kept outside of the net-zero framework and should be strictly defined. Carbon credits reflect a voluntary corporate contribution to fighting climate change . . .[43]

Finally, the globally-accepted climate science emphasizes a need for emission reductions—distinct from the use of carbon credits to "offset". Consumer marketing that suggests carbon credits are a means of mitigating the environmental impact of a product misrepresents this reality. In actuality:

Reliance on offsetting makes achieving a net zero balance harder. This is because most offsets merely shuffle the sources of emissions around in a 'zero-sum' manner, while a safe carbon budget for 1.5ºC requires accelerated elimination of emissions and early closure of fossil infrastructure.[44]

The principle at the heart of this science-driven mandate is the "mitigation hierarchy," under which "companies should set near- and long-term science-based targets to address value chain emissions and implement strategies to achieve these targets as a first order priority ahead of mitigating emissions outside their value chains,"[45] such as the use of carbon credits to "offset'" emissions. In short, the use of carbon credits as "offsets" must not be conflated with actual value chain emission reductions.

The extent of this problem is demonstrable. A recent investigation of Verra, the world's leading carbon standard for the voluntary offsets market, found that "more than 90% of their rainforest offset credits . . . do not represent genuine carbon reductions."[46] Additionally, various examples of misleading offsetting marketing claims exist globally:

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[42] Expert Report – Derik Broekhoff, at 9 (July 4, 2022), productie-4-broekhoff-expert-report-v2-2-final.pdf (clientearth.org).
[43] Gerko Wessel & Remco de Boer, *Voluntary Carbon Markets*, AFM – The Dutch Authority for the Financial Markets, at 3, 21 (2023), https://www.afm.nl/~/profmedia/files/rapporten/2023/occasional-paper-handel-in-co2.pdf.
[44] CSSN, *supra* note 39, at 1.
[45] *SBTi Corporate Net Zero Standard Version 1.1*, at 20-21 (Apr. 2023), https://sciencebasedtargets.org/resources/files/Net-Zero-Standard.pdf.
[46] Patrick Greenfeld, *Revealed: more than 90% of rainforest carbon offsets by biggest certifier are worthless, analysis shows*, The Guardian (Jan. 18, 2023), https://www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe.

for example, in Austria (Austrian Airlines[47]), the Netherlands (Shell[48], KLM[49]) and France (EasyJet[50], Butagaz[51]). Notably, various examples are linked directly to products, not just general corporate advertising, such as "CO2-compensated" heating oil.[52]

With this in mind, it is clear that companies' use of carbon "offsetting" claims can deceive consumers. Research shows that consumers feel misled when they learn that companies' environmental marketing claims refer not to direct carbon emission reductions, but instead rely on offsetting.[53] Consumer misinformation surrounding this issue is further exacerbated by its link to various common environmental marketing claims. For example, terms like "carbon neutral" purport to indicate an equalling out that is not in fact occurring if carbon credits are being used to "offset" a company or a product's emissions. Terms like "net zero by 2050" also become muddled when the companies' stated emission reductions are largely based on "offsetting" with carbon credits.

Claims like "net zero" and "carbon neutral" should align to their well-established scientific meanings and be grounded in clear, objective, and verifiable facts.

Terms like net zero and carbon neutrality have gained vast recognition since the Green Guides were last revised. In particular, net zero by 2050 has become a common organizing principle for tackling climate change. Corporate net-zero target setting and parallel future performance advertising has increased exponentially. More than one-third of the world's largest publicly traded companies have net zero targets,

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[47] Austrian Airlines was reprimanded by the Austrian advertising watchdog for a misleading advertisement about CO2-neutral flying. *After KLM, Austrian Airlines was also reprimanded for misleading CO2 neutral claims*, Reclame Fossielvrij (Sept. 1, 2022), https://verbiedfossielereclame.nl/na-klm-ook-austrian-airlines-op-vingers-getikt-voor-misleidende-co2-neutraal-claims/.

[48] Shell's use of the term "CO2 compensation" was determined as misleading. *Shell also loses on appeal: Co2 compensation is misleading*, Reclame Fossielvrij (Oct. 21, 2022), https://verbiedfossielereclame.nl/shell-verliest-ook-in-hoger-beroep-co2-compensatie-is-misleidend/.

[49] The Dutch Advertising Code Committee ruled that KLM was misleading its customers by giving them the impression that they can fully neutralize their flight if they buy compensation. The Committee determined that by using terms such as 'CO2ZERO' and 'CO2-neutral', the average consumer will wrongly think that, through reforestation projects, their flight has no impact on the climate. *Dutch advertising watchdog: KLM misleads with CO2-neutral claim and CO2ZERO program*, Reclame Fossielvrij (Apr. 8, 2022), https://verbiedfossielereclame.nl/dutch-advertising-watchdog-klm-misleads-with-co2-neutral-claim-and-co2zero-program/.

[50] EasyJet's claim that they "offset [their] emissions" was determined as likely to mislead the public. *EasyJet – Press – Well-Founded Complaint*, Jury de Déontologie Publicitaire (Jan. 4, 2022), https://www.jdp-pub.org/avis/easyjet-presse-plainte-fondee/.

[51] The Jury found that an advertisement describing the purchase of a Butagaz gas cylinder as a "gesture for the planet", on the grounds that the bottle is "100% carbon offset", was misleading. *Butagaz – Display – Well-Founded Complaint*, Jury de Déontologie Publicitaire (Mar. 8, 2021), https://www.jdp-pub.org/avis/butagaz-affichage-plainte-fondee/.

[52] Carolina Kyllmann, *Environmental NGO wins greenwashing lawsuit against TotalEnergies*, Clean Energy Wire (Apr. 5, 2023), https://www.cleanenergywire.org/news/environmental-ngo-wins-greenwashing-lawsuit-against-totalenergies. *See also Swedish court bans Arla's net-zero advertising claim*, JustFood (Feb. 6, 2023), https://www.just-food.com/news/swedish-court-bans-arlas-net-zero-advertising/.

[53] ASA, *supra* note 34.

up from one-fifth in December 2020,[54] and over 1700 companies have made "Net Zero" commitments since 2015.[55] Many of these companies market these commitments to consumers.[56] Unfortunately, "the encouraging uptake of net zero commitments is not matched by the development and implementation of credible decarbonisation strategies."[57] Notably, the 2022 Net Zero Stocktake report states that only around half of companies with net zero targets have some type of interim greenhouse gas (GHG) emission reduction target and about two-thirds of corporate pledges do not yet meet minimum procedural standards for target setting.[58] In a detailed corporate responsibility study evaluating the transparency and integrity of 25 of the world's largest companies' net zero pledges, researchers determined that "[n]et zero targets commit to reduce the analysed companies' aggregate emissions by only 40% on average, not 100% as suggested by the term 'net zero'."[59] And, a majority of the companies also rely on offsetting to reach net zero.[60]

The term "Net zero 2050", or the notion of global carbon neutrality by 2050 (or an earlier date) is a scientific concept, the definition of which is well established. The objective, derived from the Paris Agreement and coined in subsequent IPCC reports, is to cap the increase in global average temperatures within certain limits (1.5°C). Meeting this goal requires a drastic, rapid and sustained reduction in GHG emissions combined with a very limited budget of CO2 and other GHGs that can still be emitted. Beyond this limited budget, additional emissions must be compensated by direct carbon dioxide removal.

Adopted in 2015, the international Paris Agreement, signed by 195 nation states (including the U.S.), set the goal of "[h]olding the increase in global average temperature to well below 2°C above pre-industrial levels and by continuing efforts to limit the increase in temperature to 1.5°C above pre-industrial levels . . . ."[61] To achieve this temperature target, Article 4(1) of the Paris Agreement states that "Parties aim to reach global peaking of greenhouse gas emissions as soon as possible . . . and to undertake rapid reductions thereafter in accordance with the best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century . . . ."[62]

In 2018, in response to the Paris Agreement, the IPCC published a special report documenting the climate emergency based on the contributions of thousands of experts ("SR15"). The report predicts that carbon neutrality must be achieved by

[54] *Net Zero Stocktake 2022*, Net Zero Tracker, at 5 (Jun. 2022), https://ca1-nzt.edcdn.com/Net-Zero-Tracker/Net-Zero-Stocktake-Report-2022.pdf?v=1655074300.
[55] *Companies Taking Action*, Science Based Targets (accessed Apr. 20, 2023), Companies taking action - Science Based Targets.
[56] The Greenwashing Files, *supra* note 17.
[57] *Climate Action 100+ Net Zero Company Benchmark Interim assessments*, Climate Action 100+ (Oct. 2022), October-2022-Benchmark-interim-assessments_public-summary_Final_13Oct22.pdf (climateaction100.org).
[58] *Net Zero Stocktake,* at 6.
[59] Thomas Day *et al.*, *Corporate Climate Responsibility Monitor 2022*, NewClimate Institute & Carbon Market Watch, at 5 (Feb. 2022), https://carbonmarketwatch.org/wp-content/uploads/2022/02/CMW_CCRM2022_v08_FinalStretch2.pdf.
[60] *Id*. at 7.
[61] Paris Agreement, United Nations (2015), https://unfccc.int/sites/default/files/english_paris_agreement.pdf.
[62] *Id*.

2050 to have a 50/50 chance of limiting global warming to 1.5°C.[63] According to the report, limiting warming to 1.5°C requires a drastic, rapid and sustained reduction in GHG emissions, specifically, an initial 45% reduction in CO2 emissions by 2030[64] and a deep reduction in other non-CO2 GHGs. The report also highlights that CO2 emissions accumulate in the atmosphere, and if the amount of CO2 exceeds a certain value, the chances of limiting warming are greatly reduced. As a result, there is now an extremely limited "budget" of CO2 that can still be emitted.[65] In short, the report clearly shows it is insufficient to consider a long-term target as the only goal to pursue; the cumulative emissions over the entire trajectory and the trajectory itself are essential.

The minimum requirements for company net zero by 2050 commitments are set forth in various widely-recognized benchmarks and standards, including the "Net Zero" benchmark of the Science Based Targets Initiative ("SBTi")[66] and the United Nations' High Level Expert Group report on Net Zero Commitments.[67] Their common principles provide that, first, a company's goal must be based on a commitment to reduce the company's GHG emissions throughout its value chain, covering both direct emissions (scope 1) and indirect emissions (scope 2 and 3), particularly when scope 3 represents a major share. Second, commitments must consist of a GHG emissions reduction trajectory that is compatible with the best available scientific knowledge and with the global objective of limiting warming to 1.5°C. Third, companies should set an interim GHG emissions reduction target of 50% by 2030.

Notwithstanding the globally-recognized definition of these terms, many of the companies making and advertising net zero goals are not aligning their business practices to these clear standards. Companies may rely heavily on carbon "offsets" and undeveloped technology to meet net zero goals or may exclude Scope 3 emissions from consideration. For example, a report analyzing net zero pledges found that most companies were not aligned with science-based targets, effectively invalidating their pledges.[68] Further, only 37% of those companies set Scope 3 emission reduction targets and the majority of companies relied on offsets to achieve their pledges.[69] This misleads consumers because it misrepresents a company's ability to achieve environmental goals and confuses important environmental terms.

[63] *2018: Summary for Policymakers*, IPCC, https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf.
[64] Compared to 2010 levels.
[65] *Id.* "Limiting global warming requires limiting the total cumulative global anthropogenic emissions of CO2 since the pre-industrial period, that is, staying within a total carbon budget (*high confidence*). By the end of 2017, anthropogenic CO2 emissions since the pre-industrial period are estimated to have reduced the total carbon budget for 1.5 ºC by approximately 2200 ± 320 GtCO2 (*medium confidence*). The associated remaining budget is being depleted by current emissions of 42 ± 3 GtCO2 per year (*high confidence*)."
[66] *SBTi Corporate Net Zero Standard*, Version 1.1 (April 2023), https://sciencebasedtargets.org/resources/files/Net-Zero-Standard.pdf.
[67] *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions*, *Cities and Regions*, Report from the United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities (2022), https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf.
[68] Jack Arnold & Perrine Toledano, *Corporate Net-Zero Pledges: The Bad and the Ugly*, Columbia Center on Sustainable Investment (Dec. 01, 2021), https://ccsi.columbia.edu/news/corporate-net-zero-pledges-bad-and-ugly.
[69] *Id*.

The European Commission has explicitly identified the consumer harms this conduct causes in its proposed "anti-greenwashing" consumer law reforms:

> *Environmental claims, in particular climate-related claims, increasingly relate to future performance in the form of a transition to carbon or climate neutrality, or a similar objective, by a certain date. Through such claims, traders create the impression that consumers contribute to a low-carbon economy by purchasing their products.*[70]

This issue is exacerbated when terms like "net-zero" and "carbon neutral" are linked directly to emissions-intense products. Terms like "net-zero oil" and "carbon neutral natural gas", which often rely on the use of carbon credits as "offsets", result in consumer confusion because they attribute these environmental concepts to products inherently misaligned with the goal of global net zero.[71] Further, such claims engage directly and misleadingly with consumer concerns about their own carbon footprint, encouraging them to purchase "green" versions of highly polluting products which, in fact, do not exist.

Recommendations

"Offsetting is currently the primary source of confusion and misunderstanding" for consumers.[72] There is an assumption that claims refer to a direct reduction of carbon emissions, and "[p]eople tend[] to feel misled when they learn[] that companies [are] often relying on offsetting, either partially or wholly, rather than directly reducing carbon emissions."[73] **The Green Guides should therefore provide guidance that representations that directly or by implication equate carbon "offsets" with value chain emission reductions are false, and generally caution against the use of "offset" claims**. However, if a company does make a claim involving "offsets", the Guides should require disclosure in the advertisement that this claim is not based on emission reductions.[74] **The FTC should also update the language used to refer to voluntary carbon credits (although historically used, "offset" is not the correct noun according to up-to-date standards as discussed above)** and **rename the "Carbon offsets" section of the Guides to reflect an inclusion of a broader range of climate and carbon-based claims**.

Additionally, the Green Guides should provide guidance on a wider range of climate and carbon-related claims including, but not limited to: net zero, carbon neutrality, and related terms. Specifically, the Green Guides should

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[70] *Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information*, European Commission (Mar. 30, 2022), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0143&qid=1649327162410.

[71] Stephen Stapczynski, Akshat Rathi, & Godfrey Marawanyika, *How to Sell 'Carbon Neutral' Fossil Fuel That Doesn't Exist*, Bloomberg (Aug. 10, 2021), https://www.bloomberg.com/news/features/2021-08-11/the-fictitious-world-of-carbon-neutral-fossil-fuel.

[72] ASA, *supra* note 34.

[73] *Id*.

[74] If the claim is only partially based on emission reductions, this should also be disclosed. Notably, this is not a free pass against substantiation. Companies may be required to produce evidence of their evaluation and due diligence of relevant carbon-credit projects.

clarify the meaning of net zero and carbon neutrality as set forth above, and make clear that misalignment with scientific definitions is misleading. Companies should avoid making claims unless supported by clear, objective and verifiable commitments and actions. **In particular, net zero and carbon neutral claims that do not include Scope 1-3 emissions, interim reduction targets, and/or are based on unproven, unscalable, or unfunded technology or "offsets" should be called out as misleading. Further, terms like "net-zero oil" and "carbon neutral natural gas", that link highly polluting products with environmental terminology, should also be called out as misleading.**

3. THE FTC CAN LOOK TO INTERNATIONAL LAWS, REGULATIONS, AND STANDARDS THAT GOVERN ENVIRONMENTAL MARKETING CLAIMS FOR HELPFUL INSIGHT[75]

Since the last update to the Green Guides, the United States has unfortunately fallen behind its global counterparts in addressing environmental marketing practices. For example, the EU[76], the UK[77], and the Netherlands[78] have issued recent (2021) regulatory guidance on key misleading environmental claims, covering issues currently unaddressed in the Green Guides. Most recently, in 2022, the EU proposed amending consumer law to specifically ban certain environmental marketing practices and to set out rules for how to substantiate other green claims.[79] This development is ongoing and is likely to guide the international standard.

In particular, the FTC should take note of the following outcomes:

A proposed ban on cherry-picking

Both the EU proposal to amend consumer law and the UK Green Claims Code discourage companies from cherry-picking. The EU proposal states that: "Another misleading commercial practice which should be prohibited in all circumstances . . . is making an environmental claim about the entire product when it actually concerns only a certain aspect of the product."[80] Similarly, the UK Green Claims Code suggests that "[c]laims that focus on specific aspects of the environmental impact . . . should explain, or otherwise make clear, what is being claimed and what it relates to. If not, consumers are likely to be misled into thinking the claim relates to the whole product, service,

[75] This section responds to General Issues questions 18-19 and Specific Claims question 12.
[76] *Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market*, European Commission (Dec. 29, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC1229%2805%29&qid=1640961745514.
[77] *CMA guidance on environmental claims on goods and services*, UK Competition and Markets Authority (Sept. 20, 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018820/Guidance_for_businesses_on_making_environmental_claims_.pdf.
[78] *Guidelines sustainability claims*, The Netherlands Authority for Consumers and Markets (ACM) (Jan. 28, 2021), https://www.acm.nl/en/publications/guidelines-sustainability-claims.
[79] *EU Proposal: empowering consumers for the green transition*, *supra* note 70. *Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive)*, European Commission (Mar. 22, 2023), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A0166%3AFIN.
[80] *Id*.

process, brand or business, or to a range of the business's products, and that they are greener and more sustainable than they really are."[81] Importantly, this principle applies to product-related claims and claims about the larger brand or business when it is not clear whether the claim covers the company's overall performance or only certain activities.[82]

Vague and generic claims prohibited unless product has excellent environmental performance (is a truly "green" product)

Both the EU proposal to amend consumer law[83] and the UK Green Claims Code[84], along with the current version of the Green Guides, oppose the use of vague and generic claims. For example, the UK Green Claims Code highlights that "[b]roader, more general or absolute claims are much more likely to be inaccurate and to mislead. Terms like 'green', 'sustainable' or 'eco-friendly,' especially if used without explanation, are likely to be seen as suggesting that a product, service, process, brand or business as a whole has a positive environmental impact, or at least no adverse impact. Unless a business can prove that, it risks falling short of its legal obligations." The term "sustainable" is a notable inclusion as it is a vague and general claim that is commonly used by companies, and one that the Green Guides should seek to prevent. As stated in § 260.4(b) of the Green Guides, "Unqualified general environmental benefit claims are difficult to interpret and likely convey a wide range of meanings. In many cases, such claims likely convey that the product, package, or service has specific and far-reaching environmental benefits and may convey that the item or service has no negative environmental impact. Because it is highly unlikely that marketers can substantiate all reasonable interpretations of these claims, marketers should not make unqualified general environmental benefit claims."[85]

A growing consensus that "offsetting" claims are misleading

In the current version of the EU proposal to amend consumer law, the amendments include a ban on product carbon "offsetting" claims. As the legislative process is currently mid-stream, this is not final law, but indicates the potential direction of travel in what will become EU law in 2024. For example, in Amendment 70, a new addition to the list of commercial practices which are prohibited in all the circumstances, states: "4ba. Claiming, based on carbon offsetting, that a product has a neutral, reduced, compensated or positive greenhouse gas emissions' impact on the environment."[86]

[81] CMA guidance, at 14.
[82] *Id.*
[83] *EU Proposal: empowering consumers for the green transition*, *supra* note 70.
[84] CMA guidance, *supra* note 77.
[85] 16 CFR 260.4(b).
[86] *Report on the proposal for a directive of the European Parliament and of the Council on amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information*, Committee on the Internal Market and Consumer Protection, at 94 (Apr. 12, 2023), https://www.europarl.europa.eu/doceo/document/A-9-2023-0099_EN.pdf.

Future environmental performance claims (like net zero goals) must be backed by a realistic, funded plan to deliver the future goal

The EU proposal to amend consumer law seeks to prohibit future environmental performance claims (future goal statements) "when they are not supported by clear, objective and verifiable commitments and targets . . . ."[87] This approach is also aligned with global advertising industry guidance:

> *Marketing communication containing specific environmental commitments, even if aspirational and likely not to be met until many years in the future (such as 'net zero', 'carbon negative', 'climate positive' claims) require the advertiser to demonstrate that it reasonably has the capacity and methodological approach to achieve such commitments in the specified timeframe*.[88]

Heightened obligations/restrictions for fossil fuels and highly polluting industries

Certain countries prohibit advertising for fossil fuel products, in view of the goal to transition to cleaner energy. For example, the French implemented a prohibition on all advertising for fossil fuel products (initially oil-related products; gas products to be banned from June 2023).[89] Related measures by local and regional governments in the Netherlands, the UK, and Australia prohibit fossil fuel advertising to varying degrees.[90] Under EU consumer law, heightened scrutiny applies to claims by fossil fuel-related businesses (referred to in legislative guidance as "highly polluting industries"). For example, guidance states that highly polluting industries should ensure their claims are relative (i.e. "less harmful for the environment" instead of "environmentally friendly") and may be required to clarify the overall negative environmental impact of a product.[91] European legislators are considering whether to prohibit all environmental claims promoting fossil fuel products or highly polluting industries (on the basis that such claims are prima facie misleading).[92]

Recommendations

The FTC should consider updating the Green Guides to align with relevant international standards. **Specifically, the Guides should discourage companies from (i) "cherry-picking", (ii) making vague and generic environmental claims, including "sustainability" claims, (iii) making "offsetting" claims, and (iv)**

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[87] *EU Proposal: empowering consumers for the green transition*, *supra* note 70.
[88] *Global Guidance on Environmental Claims*, World Federation of Advertisers, at 11 (Apr. 2022), https://wfanet.org/knowledge/sustainability-claims/download.
[89] Article L229-61, Légifrance (Aug. 25, 2022), https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043959995/2022-08-25#:~:text=Version%20en%20vigueur%20depuis%20le%2025%20ao%C3%BBt%202022&text=%2DEst%20interdite%20la%20publicit%C3%A9%20relative,renouvelables%20incorpor%C3%A9es%20aux%20%C3%A9nergies%20fossiles. *See also Draft decree on the prohibition of advertising on fossil fuels*, https://www.consultations-publiques.developpement-durable.gouv.fr/projet-de-decret-relatif-a-l-interdiction-de-la-a2605.html?id_rubrique=4.
[90] *Worldwide initiatives to ban fossil fuel advertisements*, Reclame Fossielvrij (accessed Apr. 22, 2023), https://verbiedfossielereclame.nl/only-words/.
[91] *Guidance on the interpretation and application of Directive 2005/29/EC, supra* note 76.
[92] *Report on the proposal for a directive of the European Parliament and of the Council on amending Directives 2005/29/EC and 2011/83/EU, supra* note 86.

making "net zero" claims without a realistic, funded plan. Additionally, the FTC should convey that fossil fuel companies and companies in highly polluting industries are under heightened scrutiny to make truthful environmental claims, as they are major contributors to environmental issues.

The EU's proposed amendments to consumer law and the already-implemented restrictions in various countries indicate **that the FTC should also consider a rulemaking on these issues**. A rulemaking would benefit both consumers and businesses, particularly those businesses that are taking the necessary steps and committing resources to minimizing their environmental impact but losing customers to deceptive advertisers. Even with enforcement mechanisms like FTC action or state-level interventions by consumers and consumer organizations, a federal rule would make important voluntary guidelines binding. A rulemaking would not only signal the seriousness of this issue, but would serve as a more substantial deterrent for bad actors.

If a rulemaking is to occur, the FTC should make explicit that the resulting rule represents a floor and not a ceiling in regard to preemption issues. Specifically, the FTC rule should not preempt state laws that provide additional consumer protection measures beyond those in a FTC rule. Example preemption provisions to look to can be found in existing law.[93]

CLOSING

Environmental marketing claims involving carbon "offsets", carbon neutrality, and net zero goals are becoming progressively popular and increasingly linked to greenwashing accusations. The repeated misuse of these terms confuses consumers, misallocates their purchasing power, and degrades their confidence in important scientific terminology. Businesses that are actually investing in making measurable environmental progress are also harmed. The Guides should seek to address these issues as discussed herein as a meaningful way to deter companies from making misleading statements.

Respectfully Submitted,

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[93] For example, 15 U.S.C. 1693q provides the following language: "This subchapter does not annul, alter, or affect the laws of any State . . . except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter."