

## Legal Updates & News

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#### Quarterly Cleantech Update: Green Marketing, “Greenwashing,” and False Advertising

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#### Introduction

With increasing concern over issues such as global warming, skyrocketing gas prices, sustainability, and other human impacts on natural resources, consumers are, more than ever, considering the environmental impacts of products and services when making purchasing decisions. The result has been thousands of marketing claims touting the environmental attributes of their products and services, labeling them “carbon-neutral,” “sustainable,” “environmentally friendly,” “green,” or otherwise. While many companies legitimately market the environmental attributes of their products and services, others (intentionally or not) engage in deceptive or misleading marketing efforts, often referred to as “greenwashing.”

#### “Greenwashing”

“Greenwashing” is generally viewed as the use of marketing claims or statements — whether words, names, seals, or other symbols — that deceive or mislead consumers as to the environmental benefits or attributes of a company’s product or service, or, more broadly, as to the company’s environmental practices as a whole. For example, where a company broadly claims on a package that its product is “environmentally friendly,” “sustainable,” or “green” (to name a few), but lacks technical substantiation for such a claim or fails to help put the claim into context by limiting it to specific attributes, that company may be engaged in “greenwashing.”

These types of “greenwashing” statements can expose companies to liability under various federal and state laws, including the Federal Trade Commission Act (the “FTC Act”), the Lanham Act, and certain state consumer protection statutes. Overly broad claims about a company’s environmental practices can also run afoul of securities laws and regulations. For example, the Securities and Exchange Commission can bring an enforcement action where a company makes unsubstantiated claims about its environmental practices on its website, where those claims influence company investors into purchasing stock.

#### The Federal Trade Commission Act

The FTC Act is enforced solely by the Federal Trade Commission (“FTC”). When evaluating whether green marketing claims are permissible, FTC considers whether the claims constitute “unfair or deceptive acts or practices in or affecting commerce ....” To make this determination, FTC first considers whether the claim is likely to mislead a reasonable consumer. In doing so, FTC will not attempt to interpret the claim nor consider what the company meant in making the claim, but instead will view the claim from the consumer’s perspective. If FTC concludes that the claim is likely to mislead a reasonable consumer, it will then consider whether the claim was material to the consumer’s decision to purchase or use the product or service. If so, FTC will conclude that the company has violated the FTC Act. Even where a claim is not likely to be misleading from the

consumer's perspective, the FTC can still find a violation of the FTC Act if the company cannot substantiate its claim through "competent and reliable evidence" (i.e., scientific, technical, or other credible evidence providing a reasonable basis for the claim).

### **FTC's Green Guides**

Companies need not operate without guidance. In 1992, FTC issued what has come to be known as its Green Guides, which outline the general principles applicable to green marketing claims and provides specific examples of claims that would likely be permissible under or violate the FTC Act. FTC revised its Green Guides in 1996 and 1998, and is currently evaluating whether to again revise them. While the Green Guides are not regulations and therefore do not carry the force of law that regulations do, they have been given — and will likely continue to receive — substantial deference by courts in litigation relating to environmental claims.

Generally, the Green Guides illustrate how using particular environmental claims such as "biodegradable" and "recyclable" could comply with or violate the FTC Act's more general requirements. The Guides also discourage using broad, unqualified statements suggesting that a product or service is "environmentally friendly," and reiterate that a claim should not overstate a product or service's environmental benefits.

### **FTC Enforcement – Then and Now**

Since its Green Guides were issued almost two decades ago, FTC's enforcement efforts relating to green marketing claims have been a mixed bag. Between 1990 and 2000, FTC brought 37 enforcement actions involving environmental marketing claims, most focusing on whether the company had sufficient substantiation for its claim. Since 2000, however, there have been no reported enforcement actions involving such claims.

But that may soon change. In April 2008, FTC welcomed new chair William Kovacic who has served as FTC's General Counsel and as an FTC Commissioner. Based on recent public statements, Mr. Kovacic appears passionate about his new position and FTC's role and responsibilities in addressing "greenwashing." As a result, we are likely to see a stronger emphasis on enforcement of the FTC Act with respect to green marketing claims than in the recent past. Indeed, according to FTC enforcement attorneys at both its headquarters and California regional offices, FTC is looking for, in essence, a "greenwashing" poster child — a company with a high-profile green marketing campaign that FTC can pursue to set an example and make clear that "greenwashing" violates the FTC Act and will not be tolerated.

### **International Enforcement of Green Marketing**

For those companies that market their products and services outside the United States, and particularly in Europe, it is wise to consider international regulations regarding environmental and sustainability marketing claims. The European Union, for example, has designed a voluntary labeling program to assist consumers in identifying products that reliably deliver on their environmental claims. Similarly, the Scandinavian countries have adopted mandatory guidelines. Revised most recently in 2005, these Scandinavian guidelines — which resemble the FTC's Green Guides — mandate that environmental claims be clear and state whether they apply to the product or the packaging. Recently, Norwegian regulators used these guidelines to prohibit car companies from claiming that cars are "green," "clean," or "environmentally friendly."

Likewise, in the United Kingdom, the Advertising Standards Authority ("ASA") has been set up as an independent body to assess and resolve disputes related to allegedly deceptive advertising. In the past year alone, the ASA has ruled against companies including Shell and Lexus over green claims in their advertising.

### **Practice Pointers**

Whether re-assessing existing green marketing efforts, or contemplating a new advertising plan relating to environmental claims, companies should proceed very carefully and thoughtfully with respect to such claims. To avoid potential liability:

- be precise with all green marketing claims;
- avoid broad or ambiguous claims in favor of specific claims;

- provide appropriate qualifications explaining the basis for your claim; and
- ensure that all claims are substantiated and well documented with scientific or other credible evidence.

If you would like further information or have questions relating to green marketing claims, FTC or state enforcement proceedings, or false advertising litigation, or would like compliance counseling on these topics, please contact Brooks Beard ([bbeard@mofo.com](mailto:bbeard@mofo.com) /415-268-7339) of our Litigation Department or Bob Falk ([rfalk@mofo.com](mailto:rfalk@mofo.com) /415-268-6294) of our Environmental Law Group.