

CLIENT ALERT



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Green Marketing - Dos and Don'ts

Green products and services have firmly taken hold in the marketplace. The green industry has exploded into a multi-billion dollar phenomenon. In some industries, it has become difficult to find marketing materials that do not identify the "green" characteristics of a product. As a result, brand owners are struggling with best practices to effectively and lawfully market their products and services – and to prevent competitors from misrepresenting their products and services.

Protect your company and your markets. The Federal Trade Commission is attempting to pave a path to ensure that such claims do not confuse or mislead consumers.

FTC enforcement relating to "green" marketing claims is on the rise. The FTC recently announced several initiatives designed to ensure that such claims do not confuse or mislead consumers. These initiatives are particularly relevant to anyone promoting green products or services, touting building materials as green, or otherwise attempting to obtain a green certification for a project.

Since 1992, the FTC has regulated this area through the Guides for the Use of Environmental Marketing Claims (known informally as the "Green Guides"), available on the [FTC's web site](#). The Green Guides define environmental marketing terms such as "biodegradable" and "recyclable" and explain how marketers should substantiate such claims. Although there has been little enforcement of the Green Guides over the last decade, the FTC has already initiated seven enforcement actions during the new Obama administration. Significantly more enforcement actions are expected.

For example, in 2009, the FTC cracked down on manufacturers and retailers of towelette wipes alleging that the products were falsely advertised as "biodegradable." The FTC also warned retailers that labeling rayon products "made of bamboo" is potentially misleading and may lead to enforcement actions. Moreover, the FTC is expected to release updated Green Guides in late 2010 and to continue aggressively pursue enforcement of greenwashing claims.

The Consequences of Greenwashing

If a company engages in greenwashing, the term being used to describe vague or misleading green marketing claims, it may face more consequences than potential FTC enforcement. Companies engaged in greenwashing could be subject to claims by consumers or competitors based on breach of contract, fraud, unfair competition, or detrimental reliance. They could find themselves restricted from selling their products through retailers that assess the green attributes of a product before carrying it. They could also experience consumer backlash and brand dilution if the public believes these green claims are bogus.

If you believe that a competitor is engaging in greenwashing, you have enforcement options, which include:

- Notify the FTC that your competitor is engaging in unfair or deceptive acts or practices
- File a lawsuit under the federal Lanham Act, claiming liability for misrepresentations in commercial advertising
- Pursue a claim under state consumer protection statutes
- Notify state authorities to pursue enforcement under state consumer protection statutes
- Pursue a non-judicial determination under the National Advertising Division (NAD) of the Council of Better Business Bureaus

Green Claims

In connection with the marketing of a green product or service, a brand owner might be tempted to make "green claims" that can be misleading to the consumer. This could include overemphasizing energy efficiency benefits that cannot be substantiated. When developing environmentally-friendly branding programs and evaluating strategies for creating new trademarks, brand owners should be mindful of some practical tips:

DON'T - make factual claims like "carbon neutral" or "wholly recyclable" unless you can substantiate them.

By testing the product and keeping a record of tests, an advertiser should be able to demonstrate that claims about the product are honest and truthful.

DON'T - use vague terms.

The use of terms such as "sustainable," "green," "non-polluting," "environmentally-friendly," "earth-friendly," "earth-smart," "eco-safe," "essentially non-toxic," and "ozone-friendly" have been found to be misleading. Using qualified or comparative claims such as "greener" and "friendlier" have been acceptable if clear and substantiated.

DO - make the basis of any comparisons clear.

If, for example, an advertisement for a car claims that it is "better for the environment" or "has lower emissions," it should be clear which cars are being compared.

DO - make it clear if there is a significant division of scientific opinion.

Also state that evidence is inconclusive about a particular environmental issue that is relevant to your advertisement.

Until the FTC provides additional guidance, advertisers need to make certain that any claims about the green attributes of their products or services are clear, truthful, and independently substantiated.

Trademark Protection of Green Names

Genuinely "green" products tend to excel in today's marketplace. As a result of the "green" phenomenon, there are a multitude of product names, slogans, or other identifying marks that are virtually non-distinguishable. Brand owners can effectively build brand equity and loyalty in their "green" products by following the basic rules for selecting trademarks. As with any trademark, brand owners should strive to select trademarks that are unique and arbitrary. This provides for easier registration and stronger brand identification compared to merely descriptive marks that may not even qualify for the primary trademark register.

AT's Green Marketing Services include:

- **Legalities of Green Branding** - Advise clients on making truthful and non-misleading claims relating to: green seals and logos; recyclable and recycled products; sustainability initiatives; organic textiles and food products; natural, carbon neutral, renewable, or chemical-free products; third-party certification; green buildings and building products; green packaging products and other environmental attributes.
- **File the Trademark** - Pursue national or international trademark protection for your brand and continue to monitor the trademark to prevent copying.
- **Making the Move to Green** - Develop practical strategies to help companies "go green" by interpreting existing marketing guidelines and policies and anticipating future regulatory changes.
- **Regulatory Representation** - Counsel on regulatory compliance with the FTC and related federal and state government agencies, self-regulatory bodies, and industry guidelines. AT helps clients develop reliable substantiation to support product and advertising claims to avoid the risk of enforcement action.
- **Compliance and Counseling** - Prepare and file comments on proposed rulemakings with the FTC.
- **Monitor the Competition** - Implement processes to monitor the advertising claims of competitors to assure that they do not engage in greenwashing.
- **Pursue the Competition** - Pursue legal claims against competitors who are engaging in greenwashing.

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