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Green and Organic Marketing Claims: Practices for Compliance

By Nicole Gewinner

Advertising a product as "green" or "organic," otherwise known as "greenwashing," may accomplish any number of marketing goals, including boosting the product's sales, enhancing its brand recognition, aligning it with a recognizable political cause or inspiring brand loyalty. Greenwashing can also lead to false advertising claims at both the federal and state level. The Federal Trade Commission Act, and many of its state counterparts, generally prohibit deceptive representations in advertising, labeling and sales presentations. In 1992, the Federal Trade Commission issued the Guides for the Use of Environmental Marketing Claims, otherwise known as the "Green Guide," in order to provide some clarity as to what would be considered deceptive green advertising.

The Green Guide provides guidance on general methods and types of advertising, such as comparative claims, as well as guidance on specific advertising claims, such as a claim that a product is biodegradable, photodegradable, compostable, recyclable or ozone-safe. For example, a product with recycled content should not be labeled as "recycled" unless that content meets the standards imposed by the Green Guide. Even if the product were able to make a recycled claim, the Green Guide may require that these claims be qualified on the label. Companies are often reluctant to clog up their advertising with lengthy disclosures and disclaimers. However, such disclaimers may be the best way to avoid a deceptive advertising claim or enforcement action. It is important to recognize, however, that while a disclaimer or qualifier can help make a statement not deceptive, it cannot cure an otherwise patently deceptive statement.

"Green" and "organic" are terms that are often conflated and equated in the mind of both companies and consumers. Under the law, however, organic marketing claims are addressed by legislation separate from the Green Guide and supervised by the U.S. Department of Agriculture's National Organic Program. When making an organic marketing claim, companies should review and comply with both the Green Guide and the Organic Foods Production Act of 1990. The Act provides that agricultural products must be produced in accordance with the Act in order to make an organic marketing claim. Although the Act primarily applies to raw and processed agricultural products, the Act imposes a \$10,000 civil penalty for labeling *any* product in a way that does not comply with the Act. Companies that make organic product claims should therefore consider: first, whether the product meets the standards for organic set forth in the Act; and second, if its marketing claims are accurate, based on that organic standard.

A company that markets its products in substantial compliance with the FTC's Green Guide, and the Organic Foods Production Act of 1990, if applicable, could reasonably expect to avoid liability for federal deceptive advertising claims and enforcement actions.

However, there could be product-based federal and state legislation in place that may also apply to green and environmentally-friendly advertising claims. For example, in Texas, advertising claims regarding the renewable or green nature of energy are subject to requirements enforced by the Public Utility Commission.

Recent FTC greenwashing enforcement actions have concerned biodegradable claims and claims regarding the properties of bamboo clothing. There is some speculation that the FTC will bring more greenwashing enforcement actions under the current administration. There is also speculation regarding the revised Green Guide to be published by the FTC this year or the next. The Green Guide was last updated in 1998 and the FTC has held three workshops for public comment on the Green Guide since 1998. These workshops have covered the marketing of carbon offsets and renewable energy certificates, green packaging and greenwashing for certain products, including textiles and building products.

On October 6, 2010, the FTC issued proposed revisions to the Green Guide. The subjects of these revisions include product certifications, the use of the term "environmentally friendly," carbon offsets, and "renewable" claims. Between October 6, 2010, and December 10, 2010, the FTC will accept public comment to these revisions before issuing the final revised Green Guide.

If you have any questions regarding this e-Alert, please contact **Nicole Gewinner** at 512.236.2366 or ngewinner@jw.com or **Brad Knippa** at 512.236.2284 or bknippa@jw.com.

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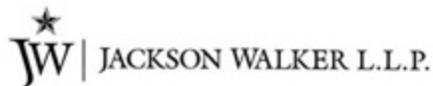
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