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October 6, 2010

Businesses Beware: FTC Looks To Put “Green” Marketing Claims Under The Microscope

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The U.S. Federal Trade Commission (FTC) has announced its highly-anticipated proposed revisions to its Environmental Marketing Guides. When final, the FTC guidance will establish significant new rules of the road for companies that advertise the environmental attributes of their products, services, or business practices. Companies currently making any environmental marketing claims to consumers, whether through traditional advertising, web sites, or social media, need to pay careful attention to the FTC's existing and newly-proposed guidance if they wish to avoid the prospect of enforcement action or related consumer litigation.

Informally known as the “Green Guides,” the FTC’s Environmental Marketing Guides provide guidance on how Section 5 of the FTC Act and similar state laws – all of which prohibit deceptive or misleading marketing acts or practices – are likely to be enforced with respect to environmental advertising claims. Noncompliance with the Green Guides has also been used as the basis of consumer class actions and claims initiated by competitors under the federal Lanham Act. Moreover, the National Advertising Division of the Better Business Bureau (the NAD), a self-regulatory organization that resolves disputes between competitors and has the authority to initiate its own challenges, operates an active enforcement program in the area of green advertising. Like the FTC and state regulators, the NAD looks to the Green Guides when evaluating green advertising claims.

Among other things, the proposed Green Guides significantly tighten the FTC’s guidelines for: (1) “general” environmental benefit claims (e.g., “environmentally friendly”), (2) use of environmental certifications and seals of approval, and (3) degradability of products or their packaging (e.g., “compostable”). They also provide additional guidance for specific types of environmental marketing claims, such as those dealing with “renewables”, that are not addressed by the existing Green Guides.

BACKGROUND

The FTC first issued the Green Guides in 1992 and revised them in 1996 and 1998. During the last 10 years, the FTC has brought few enforcement actions on misleading environmental claims. However, citing an increase in potentially deceptive green marketing, the FTC commenced a formal review process in November 2007, which culminated in the latest proposed revisions. The revised Green Guides are the product of a consumer perception study and numerous public meetings, including specific workshops to discuss the marketing of carbon offsets and renewable energy, green packaging, and green buildings and textiles.

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KEY REVISIONS TO EXISTING GUIDANCE

General Environmental Claims

Citing the pervasive and deceptive use of unqualified general environmental claims, the proposed revision clearly states that marketers should *never* make such claims. This bright-line rule is a departure from the current Green Guides, which allow for unqualified claims when all express and implied claims could be substantiated. While the FTC does not propose an absolute prohibition against all environmental benefit claims, the proposed revision requires clear and prominent qualification that conveys “to consumers that a general environmental claim refers only to a specific and limited environmental benefit.” The FTC also warns companies to avoid making implied environmental claims that they cannot substantiate.

Certifications and Seals of Approval

The revisions to the Green Guides provide that environmentally-related certifications and seals should use clear and prominent language that indicates whether the certification is created by the company itself or awarded by an independent third party. Moreover, the language associated with use of the certification or seal should clearly and prominently limit claims to specific environmental benefits that can be substantiated. The proposed revision confirms that certifications and seals are endorsements covered by the FTC’s Endorsement Guides. Accordingly, the proposed revisions require that companies demonstrate independence by disclosing any material connections that the company may have to the certifying body.

“Free-of” (Certain Chemicals) Claims

Under the proposed revisions to the Green Guides, the FTC advises companies that “free-of” claims (i.e. “lead free” or “PVC free”) may be deceptive if: (1) substances contained in a product contain the same or similar environmental risks as the substance of which the product is claimed to be free, and (2) the substance has never been associated with the product. The revised guidance also contains a new *de minimis* exception that allows companies to make free-of claims if their products contain trace amounts of a substance that would be “inconsequential to consumers.” As an example, the revised Green Guides state that a company may permissibly claim that its product is “formaldehyde-free” even if it emits formaldehyde at levels lower than typically present in outdoor environments.

Recyclable Claims

To determine the adequacy of qualifications for recyclable claims, the FTC proposes a three-tiered analysis based on the availability of the applicable recycling program. The level of qualification required will depend on whether recycling programs are available to: (1) a substantial majority of consumers or communities; (2) at least a significant percentage but not a substantial majority; or (3) less than a significant percentage. The proposed revisions allow for unqualified recyclable claims when a substantial majority of consumers or communities have access to appropriate recycling facilities. The FTC noted that it informally interprets “substantial majority” to mean at least 60 percent and requests comments on whether the Green Guides should more formally quantify “substantial majority.” The revisions direct that an even stronger qualification must be provided when less than a significant percentage has access (e.g., “product is recyclable only in the few communities that have recycling programs”).

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Degradable Claims

The proposed revisions clarify language used in the current Green Guides regarding unqualified claims that a product is “degradable,” “biodegradable,” or “photodegradable.” Degradable claims for solid waste products and packages should be qualified to avoid consumer deception about: (1) the product or package’s ability to degrade in the environment where it is customarily disposed; and (2) the rate and extent of degradation. The current Green Guides allow for unqualified degradability claims for solid waste *not* destined for landfills, incinerators, or recycling facilities if a company can substantiate that the product or package “completely breaks down and return to nature within a reasonably short period of time after customary disposal.” The proposed revisions clarify that “reasonably short period of time” means no more than one year after customary disposal. The FTC proposes revising the Guides to clarify that any unqualified degradable claims are deceptive for products or packages destined for landfills, incinerators, or recycling facilities.

Compostable Claims

Under the current Green Guides, an unqualified compostable claim may be deceptive if: (1) the product or package cannot be safely composted in a home compost pile or device; or (2) the claim misleads consumers about the environmental benefit provided when the product is disposed of in a landfill. Unqualified compostable claims must be “substantiated by competent and reliable scientific evidence that all the materials in the product or package will break down into, or otherwise become a part of, usable compost . . . in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device.” The proposed Green Guides clarify that “safe and timely manner” means that a product or package will break down in approximately the same time as the materials with which it is composted.

GUIDANCE FOR EMERGING ENVIRONMENTAL CLAIMS

The FTC had discussed several other common environmental marketing claims at the various workshops, which were otherwise unaddressed in prior versions of the Green Guides. For these claims, which generally reflect how marketers can communicate about emerging environmental issues, the proposed Green Guides address them generally and request further input from the regulated community.

“Renewable” Claims

With respect to “made with renewable energy” claims, the proposed Green Guide revisions state that companies should not claim that a product is “made with renewable energy” if the product was manufactured with energy produced using fossil fuels. The FTC recommends that companies specify the source of renewable energy (e.g. solar, wind) and requests comment on whether specifying the source of the renewable energy is adequate qualification. FTC also indicates that companies should not use unqualified claims about the use of renewable energy unless all, or virtually all, significant manufacturing process used to make the products are powered by renewable energy or energy that is offset by renewable energy credits (“RECs”). Moreover, the FTC states that when companies sell RECs for renewable energy generated onsite, they should not make a “made with renewable energy” claim on that basis alone.

The proposed Green Guides also offer specific guidance for companies claiming that products are “made with renewable materials.” Such claims should be substantiated with information regarding: (1) what the material is, (2) how it sources the material, and (3) why the material is renewable. The FTC further indicates that renewable material claims should be qualified if the product is not made entirely of renewable material, excluding minor, incidental components.

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Carbon Offsets

The FTC specifically declined to offer detailed guidance in this area given “the extent of the Commission’s authority, the available consumer perception evidence, and the ongoing policy debates among experts in the field concerning the appropriate tests to substantiate offset claims.” As with all other environmental marketing claims, the FTC states that companies should support their claim of carbon offsets with competent and reliable scientific evidence, employing sophisticated accounting protocols to properly quantify emissions reductions and to avoid double counting. Moreover, the FTC indicates that a company must disclose if an emissions reduction in connection with an offset purchase will not occur within two years. Furthermore, the FTC cautions that offsets sold pursuant to a mandatory emission reduction should not be marketed.

Sustainability Claims

The proposed Green Guides surprisingly provide no guidance on claims of sustainability, citing consumer survey evidence indicating that consumers do not normally perceive “sustainable” as an environmental claim. The FTC survey revealed that 13 percent of consumers did not think “sustainable” had any particular meaning. For 19 percent, “sustainable” suggested that a product was “strong” or “durable.” Only seven percent stated that “sustainable” suggested any environmental benefit. The FTC concluded it was “unable to provide specific advice on “sustainability” as an environmental marketing claim. However, the FTC believes that consumers may attribute many possible meanings to the term and could be deceived or misled absent appropriate qualification.

PUBLIC COMMENT PERIOD - DECEMBER 10, 2010 DEADLINE

The proposed revisions to the Green Guides are now open for public comment. The FTC invites comments on “all aspects of the proposed, revised Green Guides.” In addition, the FTC seeks further comment on a list of eighteen specific categories of questions, many of which are identified above. Comments from the regulated community may have an important effect on the ultimate rule and will likely need to be compelling and supported by data to have a meaningful impact the FTC’s final action. All comments must be received by December 10, 2010. The FTC press release and related regulatory materials can be found [here](#).

WHAT THE PROPOSED GREEN GUIDES MEAN TO YOU

Since President Obama took office in 2008, the FTC has used the Green Guides in seven lawsuits to enforce unfair and deceptive advertising laws against environmental marketing claims, which reflects a significantly greater enforcement rate when compared to prior administrations. Competitor challenges to green advertising claims through the National Advertising Division of the Better Business Bureau are also on the rise.

In California, the Attorney General’s Office has expressed concern about green marketing claims and indicated that it planned to initiate enforcement action on such claims. Recently, this threat came a step closer to reality when the Attorney General’s Office sent out a number of letters to retailers and manufacturers of products that make environmental marketing claims, demanding to know their basis, including studies and publications that substantiate the claims.

In light of this increase in enforcement and litigation activity and FTC’s proposed new guidance on environmental marketing claims, companies will need to develop legal and technical expertise in this area to ensure that claims are specific, appropriately qualified, and adequately supported in advance by competent and reliable evidence.

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Companies should also specify whether their environmental claims apply to the product, package, or manufacturing process. To be effective and provide a potential defense to liability, qualifications must be clear to the consumer when viewed in the larger context of the environmental claim. In sum, environmental marketing claims should always be limited to specific environmental benefits that have been substantiated, and considerable care must be taken to ensure that those benefits are not exaggerated as measured from the perspective of a reasonable consumer. Most importantly, companies should communicate with their marketers, third-party certifiers, and counsel to ensure that environmental marketing claims are not misleading or deceptive, and do not violate the parameters set forth in the FTC's regulatory guidance.

Morrison & Foerster LLP is widely recognized as a leader among law firms on cleantech issues, including those concerning "green advertising" and also maintains full service environmental law and consumer products practices. If you would like assistance, please contact Bob Falk or Brooks Beard in our San Francisco office at (415) 268-7000, Peter Hsiao in Los Angeles at (213) 892-5200, or Reed Freeman or Julie O'Neill in Washington, D.C. at (202) 887-1500.

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