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FTC Updates “Green Guides” to Environmentally Friendly Marketing

Client Alert

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Everyone is green these days, or so it seems. Claims that products are environmentally friendly, organic or all-natural are ubiquitous in promotional materials. Indeed, nearly every industry touts the environmental aspects of their respective products or services. In this day and age, there can be no legitimate debate that advertising a product's positive environmental impact or health benefit can greatly influence purchasing decisions. Owing largely to the competitive advantage green claims may provide, not to mention the fact that these claims have been largely unregulated, the Federal Trade Commission (FTC) has recently updated its “Guides for the Use of Environmental Marketing Claims,” commonly known as the Green Guides.

The original Green Guides – which were last revised in 1998 – set forth four general principles for companies making environmental claims in their advertising, marketing or other promotional materials. First, any qualifications and disclosures necessary to avoid misleading consumers must be clear, prominent and understandable. Second, claims must present distinctions between benefits of the product, the packaging and any associated service. For example, if a package is labeled with the claim “recyclable” without further elaboration, the claim could be considered deceptive if any part of either the package or the product cannot be recycled. Third, a claim must not overstate an environmental attribute. Thus, for example, if a product is advertised as “100% biodegradable,” it must be biodegradable within a reasonably short period of time in landfill conditions or the claim must be sufficiently qualified to indicate the limited nature of the conditions tested. Additionally, in order to claim that a product is “green,” companies must be able to substantiate such a claim with life-cycle evidence demonstrating an absence of negative environmental impact from the product's production, use and disposal. Finally, comparative claims must be presented in a way that makes the basis for the comparison clear.

In order to address the confusion associated with substantiating green claims, the FTC recently issued proposed revisions to the Green Guides, which are available at the FTC's website at <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf>. By the proposed revisions, the FTC notes that, in addition to the four general principles outlined above, it will regulate five additional types of green claims: (i) sustainable; (ii) organic and natural; (iii) made with renewable materials; (iv) made with renewable energy; and (v) carbon offsets. The FTC invites comment on all issues regarding the proposed revisions. The comments are due by December 10, 2010, after which the FTC will decide which proposed revisions to include as part of the updated Green Guides.

As to ever-popular “sustainable” environmental marketing claims, the Green Guides do not provide specifics regarding usage of the term because commentators have not come to an agreement as to the meaning of “sustainable” or whether the term was even amenable to definition. Compounding the challenge is the fact that many consumers feel that “sustainable” connotes certain non-environmental characteristics (e.g., durable or long-lasting). Despite the lack of clear guidance about the term “sustainable,” companies are well-advised to have demonstrable and valid substantiation for any sustainability claims.

With respect to the oft-cited terms “organic” and “natural,” the FTC proposed to apply the general principles set forth in the current Green Guides. Marketers must therefore have substantiation for their organic or natural claims that reasonable consumers may perceive as claiming an environmental or health-related benefit. Notably, the natural and organic food segment is one of the fastest growing markets in the food industry. Domestic sales of organic food and beverages have exploded in recent years increasing from \$1 billion in 1990 to \$24.8 billion in 2009. The proposed revisions are expected to provide additional guidance, and hopefully lessen the number of consumer class action lawsuits filed as a result of allegedly deceptive labeling.

With respect to the term “made with renewable materials,” the revised Guides propose advising marketers to qualify such claims with specific information about the materials, especially for products containing less than 100% renewable materials. And, for the term “made with renewable energy,” the Guides suggest advising marketers not to make an unqualified claim if an item was made with energy produced using fossil fuels. Finally, for the term “carbon offsets,” marketers are cautioned to substantiate claims with competent and reliable scientific evidence and accounting methods to ensure that consumers are not misled. Moreover, marketers may need to disclose whether their offsets represent greenhouse gas emission reductions that will not occur within two years.

In sum, companies should carefully consider potential legal challenges before touting the environmentally friendly aspects of their products, particularly when employing such terms as “biodegradable,” “sustainable” or “organic.” Unsubstantiated claims could expose companies to potential legal challenges (i) before the National Advertising Division of the Council of Better Business Bureaus, (ii) in the form of administrative proceedings

brought by the FTC and (iii) in court by both competitors under the Federal Lanham Trademark Act and state law or by consumers via a class action lawsuit challenging the labeling as deceptive, fraudulent or somehow misleading.

The FTC's recent actions in updating the Guides indicate that it will be paying close attention to "green" and other environmental claims in order to level the playing field. Accordingly, all such claims should be fully substantiated prior to their use for marketing or promotional purposes. Given the complex legal and regulatory framework in this area, companies seeking to avail themselves of the undeniable benefits of green marketing are well advised to retain counsel to review their marketing claims.