Green Marketing or “Greenwashing”

By Andrea Lynn Evensen

Green, green, green. Everyone is going green. From “environmentally friendly” tote bags to “environmentally safe” chemicals to “sustainable, renewable” products claiming to save the planet — companies are searching for new ways to “greenwash” their products to entice consumers. But what green claims constitute deceptive advertising?

To keep pace with the evolving marketplace, the U.S. Federal Trade Commission (FTC) recently proposed important revisions to its longstanding Green Guides — and companies will ignore these at their own peril. The revised Green Guides clearly articulate that they apply to business-to-business marketing — as opposed to what some believed to be only business-to-consumer marketing in the current guides.

The FTC’s Green Guides, first published in 1992 and revised in 1998, were created to help prevent deceptive environmental claims and provide guidance to companies interested in marketing the environmental advantages of their products. Changes in the marketplace since 1998 have been dynamic, greenwashing has proliferated, and “warm and fuzzy” claims about a product’s environmental benefit now abound. Accordingly, the FTC began its periodic 10-year review of its guides one year ahead of schedule.

After years of receiving comments, holding hearings, conducting a consumer perception study, and analyzing the current Green Guides, the FTC published proposed revisions on Oct. 6, 2010, for public comment until Dec. 10, 2010, after which it will now decide whether to make any changes final. While the revised Green Guides still focus on providing guidance as to what may constitute deceptive environmental advertising, they strengthen and add specificity as well as new guidance.

For example, the revised Green Guides provide further guidance to certain previously addressed environmental claims. Specifically, while the current Green Guides state that environmental disclosures should be “clear, prominent, and understandable” to prevent deceptive advertising, the revised Green Guides provide that a “clear and prominent” environmental disclosure:

...should use plain language and sufficiently large type, should [be] placed in close proximity to the qualified claim, and should avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosure. (Proposed Revisions to Green Guides (“PRGG”) at 196.)

The revised Green Guides also provide that companies “should not make unqualified general environmental benefit claims” because “it is highly unlikely that marketers can substantiate all reasonable interpretations of these claims.” (PRGG at 199.) For example, claims that a product is “eco-friendly” are likely misleading, since the scope of the claim is far-reaching, and consumers may mistakenly believe that the product has absolutely no negative environmental impact. But a company is highly unlikely to be able to substantiate such a reading.

On the other hand, according to the revised Green Guides, a claim that a product is “eco-friendly: made with recycled materials” is likely not to be deceptive provided that the statement is clear and prominent, can be substantiated, and does not imply any other meaning. Accordingly, companies must qualify their claims with clear and prominent language limiting the claims to a specific benefit. Corporate counselors should note that, even if the company can substantiate its claims with scientific evidence, the claims still may be improper if the advertisement implies deceptive claims. Thus, the FTC considers not only the literal meaning of...
the claims but also the implied meanings.

When using certifications and seals to convey an environmental-related endorsement, the revised Green Guides suggest consulting the FTC Endorsement Guides, updated in late 2009. Products or packaging claiming to be compostable should break down to usable compost in a safe and timely manner “in approximately the same time as the materials with which it is composted.” (PRGG at 206.) Likewise, a product or package claiming to be biodegradable should “completely decompose within one year after customary disposal.” (PRGG at 208.) “Free of” and “nontoxic” claims are now provided their own section, expanding FTC guidance that advertising may be deceptive even if truthful when “the substance has never been associated with the product category.” (PRGG at 210.)

Guidance for recycling claims has been more concisely articulated into a three-tier system to address when recycling facilities are available to: 1) a “substantial majority”; 2) a “significant percentage”; or 3) “less than a significant percentage” of the consumers or communities where the item is sold. (PRGG at 213.) Claims relating to the first group may be unqualified, but claims relating to the second and third group should be qualified to avoid deceiving consumers.

The revised Green Guides also provide new sections addressing newly popular environmental claims. These include the following.

Carbon Offsets. It is “deceptive to misrepresent, directly or by implication, that a carbon offset represents emission reductions that have already occurred or will occur in the immediate future.” (PRGG at 201.) A company should “clearly and prominently disclose if the carbon offset represents emission reductions that will not occur for two years or longer.” (PRGG at 201.) Additionally, the revised Green Guides suggest that a claim that a product will, for example, “offset your own ‘dirty’ driving habits,” is deceptive if the reduced emissions would have occurred despite the fact that consumers purchased the offsets.

Renewable Energy Claims. It is “deceptive to misrepresent, directly or by implication, that a product or package is made with renewable energy or that a service uses renewable energy. Marketers should not make unqualified renewable energy claims, directly or by implication, if power derived from fossil fuels is used to manufacture any part of the advertised item or is used to power any part of the advertised service.” (PRGG at 222.) Claims should clearly identify the source of the renewable energy, whether solar, wind, or something else. For example, a claim that products are “made with wind power” is deceptive if the company purchases renewable energy certificates to match a percentage of the energy used. A consumer would likely interpret such a claim to mean that the power used was entirely renewable when, in fact, it was not.

Renewable Materials Claims. It is “deceptive to misrepresent, directly or by implication, that a product or package is made with renewable materials.” (PRGG at 224.) The revised Green Guides suggest that unqualified “made with renewable materials” claims should be made only if the entirety of the product (excluding minor, incidental components) is made with renewable materials; otherwise, the claims should be qualified. (PRGG at 224.) Moreover, because the FTC’s research indicated that consumers often confuse claims that products are “made with renewable materials” to mean that they are made with recycled content, are recyclable, or are biodegradable, such claims should be clear, prominent, and specify the material used, how it is sourced, and why it is renewable. For example, the revised Green Guides suggest that a claim stating the flooring is “made with renewable materials” is likely deceptive, but a clear and qualifying claim stating the flooring is made from “100% bamboo, a fast-growing plant that we cultivate at the same rate, or faster than, we use it,” if substantiated, would not be deceptive. (PRGG at 224.)

Should the revised Green Guides become final, the impact

This article first appeared in the August 2011 issue of Kane County Bar Association’s Bar Briefs and is reprinted with permission.
of the proposed revisions on marketing practices remains to be seen. But from 1990 to 2000, the FTC filed approximately 40 environmental claim enforcement actions. During the Bush administration, there were none. Since 2008, the FTC has brought at least seven cases against alleged deceptive green advertisers.

Corporate counsel should therefore consider the potential for an FTC enforcement action before making green claims. Although few enforcement actions have occurred in the past, if recent FTC enforcement actions and the proposed revisions are any indication, the FTC likely intends to confront deceptive greewashing advertisers to protect consumers. Therefore, counsel “must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims.” (PRGG at 195.) In the environmental arena, marketing claims should be substantiated with competent and reliable scientific evidence.

Corporate counsel and marketing staff should review their product claims for any that consumers could reasonably consider to be environmental claims and ask themselves:

- Are any general environmental claims used?
- Are the claims conducive to multiple reasonable meanings or interpretations? Would consumers reasonably believe the claims to be asserting something broader or different from that intended?
- Are the claims, and each of their reasonable interpretations, substantiated with competent and reliable scientific evidence?
- Are the claims qualified, clear, and prominently placed so as not to mislead consumers as to their meaning?
- Are the claims written in plain language using sufficiently large type?
- Are there any product statements or claims inconsistent with the environmental claims used?
- Are there any distracting elements that could undercut or contradict the claim’s qualification?
- Are the claims consistent with the guidance and numerous examples provided by the revised Green Guides?

Because eco-friendly claims often can support multiple interpretations — the majority of which are likely to be unsubstantiated — corporate counsel and marketing staff will need to revise such claims to include clear and prominently placed qualifying language to avoid misleading the public. Simply making an unsubstantiated, unqualified claim that a product will make the planet happy is not a risk worth taking.

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