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An Advertiser's Guide to Green Marketing

Guidance for businesses on making truthful, substantiated claims in compliance with FTC principles

By Lewis Rose and Katherine Rogers

Consumers have little difficulty finding "green" products on the market today. The options are endless - non-toxic cleaning supplies, recyclable cars, sustainable coffees, snacks made from renewable energy, and carbon-neutral flying, among others. Companies are thinking of new ways every day to market their products with new or different environmental attributes that will set them apart from their competitors.

Part one of this two-part article summarizes the key developments in the "green marketing arena" and provides guidance for businesses on making truthful, non-misleading, and substantiated green claims while staying within the parameters of the Federal Trade Commission's (FTC) general advertising principles.

Standards for Green Advertising

In 1992, the FTC established the national standards for green advertising — the "Guides for the Use of Environmental Marketing Claims" or "the Green Guides." These standards have only been revised once, in 1998. The Commission is currently reviewing the Green Guides and plans to issue revised guidance in the near future.

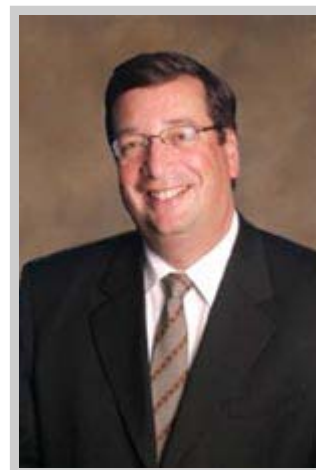
The Green Guides do not have the force of law. They are intended to provide guidance for advertisers regarding how the FTC will interpret Section 5 of the FTC Act, which broadly prohibits unfair or deceptive acts or practices, as it relates to environmental marketing claims. At the outset, the Green Guides lay out four general principles, as described below, for all environmental advertising claims.

1. Qualifications and disclosures necessary to avoid misleading consumers must be clear, prominent, and understandable

For example, a company may advertise itself as "green" but not state how it is "green." Using the phrase without specific qualifying language explaining what steps the company is taking to reduce its environmental impact is deceptive if it leads consumers to believe that the company is doing more than it can substantiate.

2. Claims must be presented in such a way as to make it clear whether they relate to a product, the packaging, and/or the company's practices

For example, a cleaning product is labeled "biodegradable." Although the chemical cleaner is biodegradable, the spray bottle is not. By itself, the claim may be deceptive if consumers understand the claim to mean that the entire product, including the packaging, is biodegradable. To avoid potential deception, it should be qualified to say, for example, "the chemical cleaning solution is biodegradable."



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3. A claim must not overstate an environmental attribute or benefit, either expressly or by implication

Katherine Rogers, Kelley Drye & Warren

For example, a product is advertised as "carbon neutral." Although the company purchases carbon credits to offset the carbon released from packaging the product, the carbon generated during all other phases of the product's life cycle were not considered in making this claim. Because consumers are likely to think that the carbon-neutral claim covers more than just the packaging, it would likely be deceptive. Instead, the advertiser might consider saying, "carbon-neutral packaging" followed by the qualifier "no net carbon emissions generated in the packaging of this product."

4. Comparative environmental claims must be presented in a way that makes the basis for the comparison clear

For example, a washing machine is advertised as "30 percent more efficient." This claim is ambiguous because it could be a comparison to the advertiser's immediately preceding washing machine or to a competitor's washing machine. The marketer should make the basis for comparison clear, saying, for example, "30 percent more efficient than typical washing machines were in 2006."

The Green Guides also provide guidance on general and specific environmental claims and provide useful illustrations to highlight common scenarios in which the claims are made.

Types of Advertising Claims Addressed by the Current Green Guides

1. General environmental benefits

This category covers claims like "environmentally friendly," "eco-safe," "environmentally safe," "essentially/practically non-toxic," and "environmentally preferable," as well as eco-logos and seals.

The Green Guides emphasize that these types of general environmental claims may be confusing because they are difficult to interpret and may convey a wide range of meanings to consumers. Advertisers have a duty to substantiate all express and implied claims. For general claims, like "green" or "environmentally friendly," it may be impossible for an advertiser to substantiate all reasonable interpretations. For this reason, the Green Guides recommend qualifying these broad claims by identifying the specific attribute to which the general claim refers.

The Green Guides make clear that environmental seals and logos can connote general environmental benefits. The types of logos and used on products today vary from seals of certification issued by third parties to logos developed internally by company-specific standards. Internal logos have greater potential for consumer deception than third-party seals of approval. Internal logos may confuse consumers to the average consumer they may look like an independent third-party seal of approval that is based on standards that were independently developed by an organization that has professional expertise in the area that is being certified. For this reason, it is important that internal logos clearly indicate that they have been developed by the company. Even with this protection in place, however, a company may not be completely insulated.

For example, SC Johnson & Son, Inc. was subjected to public scrutiny when it was sued in March 2009 for purportedly "misleading consumers about the environmental safety and soundness of its leading household cleaning product Windex." The complaint alleged that "SC Johnson has prominently placed a deceptive seal of approval label [i.e., Greenlist] on the front of its Windex product" that represents "Windex is made with natural ingredients and is environmentally safe and sound," and that it was "subjected to a neutral, third party's testing regime that had determined that Windex is environmentally friendly."

The Commission is proposing to change the section of its guidance on expert endorsements to clarify that if an endorser is not a bona fide independent testing organization (it was established and operated by the advertiser, for example), the endorsement would be deceptive. As they stand now, the FTC's guides do not preclude advertisers from establishing and operating their own internal seals of approval, but explain that if a seal implies that a third party has certified the product, the certifying party must be truly independent from the advertiser and must have professional expertise in the area that is being certified. As long as the seal makes clear that the advertiser established and operates the seal, the claim would not be deceptive under the current guidance.

While the FTC's revised guidance on endorsements and testimonials is not final yet, it does represent the Commission's current position on this issue and may affect companies' internal seal programs. Even when companies are careful to avoid any implication that the internal seal was granted by independent organizations, this may not be enough to insulate companies from FTC scrutiny under the FTC's proposed changes.

2. Biodegradable

The Green Guides explain that claims about biodegradability mean that the materials will break down and return to nature within a reasonably short time after customary disposal. The FTC and the National Advertising Division of the Council of Better Business Bureaus ("NAD") have made clear that claims of degradability or biodegradability "should be qualified to the extent necessary 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."

On June 9, 2009, the FTC announced actions against Kmart, Tender, and Dyna-E, alleging deceptive biodegradable claims. Kmart Company called its American Fare brand disposable plates biodegradable, Tender Corp. called its Fresh Bath-brand moist wipes biodegradable, Dyna-E International called its Lightload brand compressed dry towels biodegradable. The FTC alleged that each of these products is disposed in landfills, incinerators, or recycling facilities, where it is impossible for waste to biodegrade within a reasonably short time due to the lack of oxygen and sunlight. Kmart and Tender agreed to orders that bar them from making deceptive degradable claims and require them to have competent and reliable evidence to support environmental product claims. The matter against Dyna-E and its owner will proceed to administrative litigation.

3. Recycled content

The Green Guides state that "[a] recycled content claim may be made only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer), or after consumers use (post-consumer)." The Green Guides further state that "[f]or products or packages that are only partially made of recycled material, a recycled claim should be adequately qualified to avoid consumer deception about the amount, by weight, of recycled content in the finished product or package." If the plastic mix of pre-consumer and post-consumer recycled material, the Green Guides note that the advertiser may (but is not obligated to) make distinctions between pre-consumer and post-consumer materials. When using pre-consumer plastic, the Green Guides make it clear that companies must have support for concluding that the pre-consumer material would otherwise have entered the solid waste stream.

4. Recyclable

To make this claim without qualification, a company must be able to show that the entire product is "recyclable," and that the entire product can be collected, separated, or recovered from the solid waste stream and used again, or reused in the manufacture or assembly of another product through an established recycling program. The product must also be separated or recovered from the solid waste stream in a substantial majority of communities or by a substantial number of consumers where the product is sold.

Check back next month for part two of this series, which will include a discussion of the current environment for Green Marketing and how to stay in legal compliance.

Lewis Rose is chair of the Advertising and Marketing practice group at Kelley Drye & Warren LLP. Katherine Rogers is a former associate in the Advertising and Marketing group.

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