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Environmental Marketing: Legal Risks of Claiming to be Green

Strategies to Meet Regulatory Standards and Minimize Greenwashing Liability

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Environmental Marketing: Legal Risks of Claiming to Be Green

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November 30, 2010

FTC Green Guides

- First published in 1992 (also revised in 1996 and 1998)
- Federal Trade Commission proposed to revise the Green Guides on 10/6/2010 (see 70 Fed. Reg. 63,552)
- Not yet final – comments due 12/10/10
- Revisions intended to reflect developments in green marketing
- Addresses new categories such as “renewable materials”, “renewable energy”, and “carbon offsets” and adds specificity to guidance on general environmental benefit claims, environmental seals, and claims such as “compostable”, “degradable”, and “recyclable”
- Declines to address “sustainable”, “natural”, or “organic”

Green Marketing – Legal Landscape

- Where do the Green Guides fit in?
 - Law related to green marketing
 - Federal
 - State
 - International
 - Non-governmental organizations

Federal Law

- FTC
 - FTC Act, Section 5 – prohibits unfair or deceptive acts or practices
 - A representation, omission, or practice is *deceptive* if: (1) it is likely to mislead consumers acting reasonably under the circumstances; and (2) it is material, that is, likely to affect consumers' conduct or decisions with respect to the product at issue.
 - Green Guides are not regulations pursuant to the FTC Act but indicate how the FTC will apply and enforce the law.
 - Green Guides do not establish enforceable standards or protocols for environmental performance claims.
 - FTC also administers other environmental and energy-related guides.

Federal Law

- Lanham Act - Section 43(a) (15 U.S.C. § 1125(a))
 - vehicle for companies to sue commercial competitors for false and misleading green marketing claims
- U.S. Department of Agriculture
 - organic labeling rules for agricultural products
 - some guidance on use of “natural”
- U.S. Food & Drug Administration
 - some guidance on use of “natural”

State Law

- FTC Green Guides do not preempt state law
- Some states incorporate Green Guides into law
 - E.g., Cal. Bus. & Prof. Code §§ 17580, 17580.5
- Other relevant state law
 - Unfair competition laws

Role of Non-Governmental Organizations

- National Advertising Division of the Council of Better Business Bureaus (“NAD”)
 - non-litigation
 - non-governmental
 - underlying data kept confidential
 - quicker than litigation

FTC Enforcement

- Enforcement activity
 - Increased under Obama Administration
- Bamboo cases
 - FTC charged companies with making false and unsubstantiated green claims
 - Bamboo-based textiles, actually made of rayon, are not made in an environmentally friendly manner or biodegradable
 - Pure Bamboo LLC; Sami Designs, LLC; and CSE, Inc. settled
 - FTC file nos. 082 3193, 082 3194, 082 3181, respectively

FTC Enforcement

- Biodegradability of paper products case
 - Actions against Kmart, Tender and Dyna-E
 - Since 1992, the FTC’s “Green Guides” have advised marketers that unqualified biodegradable claims are acceptable only if they have scientific evidence that their product will completely decompose within a reasonably short period of time under customary methods of disposal
 - Settled

Related FTC Enforcement

- Appliance Labeling Rule
 - FTC announced on November 1, 2010 that three online retailers (Abt Electronics, Pinnacle Marketing Group, and P.C. Richard & Son) would pay \$417,500 in civil fines for failing to provide Energy Guide information on their websites in violation of the rule.
 - Energy Policy and Conservation Act – authorizes FTC to assess fines for violations of the rule
 - First FTC cases brought against online retailers related to this rule

National Advertising Division Cases

- Increase in green marketing challenges at NAD
- Example NAD Cases
 - **Ziploc Evolve**
 - SC Johnson ads stated “made with wind energy*”
 - “*Made with a combination of renewable energy and energy from traditional sources.”
 - NAD concluded ad gives the impression that no fossil fuels were used in making the bags (Oct. 19, 2010). NAD stated:
 - "The claim 'made with wind energy' could reasonably convey a message that the product is made entirely from renewable energy.”
 - SC Johnson pulled the ads
 - Dovetails with proposed FTC Green Guides on renewable energy claims

Example NAD Cases

- **Seventh Generation**

- Proctor & Gamble challenge to Seventh Generation ads
- The claims in question include:
 - Seventh Generation Household Cleaning Products do not contain “hazardous” chemicals.
 - Seventh Generation Detergents are [100%] natural.
 - All products that compete with Seventh Generation Household Cleaning Products, particularly P&G household cleaning products: (1) are not safe, (2) are not as safe as Seventh Generation Household Cleaning Products, (3) require consumers to hold their breath during use and (4) are leading to a rapid increase in childhood illnesses such as autism, ADHD, asthma, allergies, cancer and diabetes.
- NAD recommended that the ads be modified or discontinued

Greenwashing Litigation Examples

- *Koh v. SC Johnson & Son, Inc.*, No. 09-00927, 2010 WL 94265 (N.D. Cal. Jan. 6. 2010)
 - Causes of action
 - California's Unfair Competition Law
 - California's Consumer Legal Remedies Act
 - Fraud
 - Unjust enrichment
 - Claim – SC Johnson Greenlist trademark on Windex is misleading because it is not a third-party seal of approval but SC Johnson touting its own product
 - Court denied motion to dismiss
 - Trial scheduled for December 2010

Greenwashing Litigation Examples

- ***Paduano v. Am. Honda Motor Co.*, 169 Cal. App. 4th 1453 (2009)**
 - alleged hybrid Honda Civic did not achieve stated gas mileage
 - counts – breach of warranty, violation of CA unfair competition law, violation of CA Consumer Legal Remedies Act
 - affirmed grant of summary judgment in favor of Honda on breach of warranty claims
 - reversed summary judgment in favor of Honda as to deceptive advertising claims
 - federal law on fuel economy does not preempt all state suits

Greenwashing Litigation Examples

- *True v. Am. Honda Motor Co. Inc.*, 520 F. Supp. 2d 1175 (C.D. Cal. 2007)
 - similar claims
 - class action complaint
 - motions to dismiss denied
 - class action settlement – pending
- *Bernstein v. Toyota Motor Sales U.S.A., Inc.*, No. 09-cv-3472 (N.D. Cal. 2009)
 - dismissed for lack of federal jurisdiction

More About the FTC Green Guides Generally

- Provided Clarity on How to “Qualify” a Claim
 - **Qualification must be in “close proximity” to claim**
- Footnote likely **not sufficient**
 - **Reference to website can’t be used to qualify a claim**
 - No: “More information at www.winston.com”
 - because consumers won’t see that information in conjunction with the claim

What Was Addressed

- Addressed w/ New Sections and/or Changes:
 - general environmental benefit claims
 - use of certifications and seals
 - “degradable”
 - “compostable”
 - “ozone-safe/ozone-friendly”
 - “recyclable”
 - “free of”/“non-toxic”
 - “made with renewable materials”
 - “made with renewable energy”
 - carbon offsets

Green Guidelines Elsewhere – What's Out There?

- **Green Guidelines/Chapters/Appendices include:**

- Canada (2009)
- Australia (2008)
- Malaysia (2008; App K)
- France (2009)
- Hungary (2009)
- Denmark (1994; 2005)
- Iceland (1994; 2005)
- South Africa (App. J)
- USA (2010)
- New Zealand (2008-09)
- Singapore (2008 App L)
- Norway (2007-2009)
- Greece (2007)
- Finland (2002; 2009)
- EU Com (2000)
- UK (2003-2010)

- **Sections within General Ad Codes:**

- Costa Rica (2010)
- Ireland
- Netherlands (1991; 2010)

- **International Guidelines:**

- ISO 14021 (1999; 2010)
- ICC Consolidated Code (2001)

General Environmental Benefit Claims

- 1) No unqualified general environmental benefit claims
 - No: **“eco-friendly” or “green”**
- 2) Qualify claims to specific environmental benefit
 - Yes: **“eco-friendly – *since made with recycled materials*”**
 - Qualified claims still illegal if false implied message**
 - No: **“Greener than previous packaging”**
 - where only weight of packaging reduced – since “greener” may imply more environmental improvements than just packaging
 - Yes: **“Greener than previous packaging – reduced weight by 15%”**
 - Maybe: **“Green – now contains 70 percent recycled content”**
 - Illegal if implies greater benefit than the recycled content

General Environmental Benefit Claims Elsewhere

Unqualified – Discouraged everywhere

Qualified – STILL NOT PERMITTED some places

General Environmental Benefit Claims Elsewhere

STRICTER RULES

Norway (2007)

- Unqualified claim – must be among top 1/3 of products in category for eco benefit touted “use 100% recycled content in fabric” – not OK if 2/3 of all products also do that

Finland (cars) (2009)

- DON'T say consumer can do his share to slow down climate change by single purchase decision

“Environmentally Friendly”

Elanco Animal
Health Division,
#5134 (2010)

Comfortis®
(spinosad)

Environmentally friendly

The introduction of spinosad for use in agriculture resulted in the receipt of a Presidential Green Chemistry Challenge Award in 1999 from the US Environmental Protection Agency. The award criteria for judging included health and environmental benefits, scientific innovation and industrial applicability.⁹

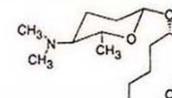


COMFORTIS™ (spinosad) Chewable Tablets

Caution: Federal (USA) law restricts this drug

Description:

COMFORTIS chewable tablets (spinosad) are for oral administration to dogs and puppies. It is formulated to provide a minimum spinosad. It is a member of the spinosyns class of insect macrolides. Spinosad contains two major naturally occurring bacterium. *Saccharopolyspora spinosa* is the chemical composition 2-[[6-deoxy-2,3,4-dimethylamino)-tetrahydro-6-methyl-2H-pyran-16a,16b-tetradecahydro-14-methyl-1H-as-indeno[1,2-b:4,5-b']pyran-9-ethyl-2,3,3a,5a,5b,6,9,10,11H-as-indeno[3,2-d]oxacyclododecin-7,15



Certifications and Seals of Approval

- 1) Don't use unqualified seals
 - Seal must clearly limit claim to particular beneficial attribute
 - No: **EarthSmart seal alone**
 - Yes: **EarthSmart seal + “*certified for reduced chemical emissions during product usage*”**
- 2) Seal doesn't eliminate obligation to ensure claims substantiated
 - **Although doesn't necessarily require independent testing if third-party substantiation meets FTC standards**
- 3) Seals are endorsements regulated by the FTC's Endorsement Guides
 - **Disclosure of material connections may be required**

Seals As Endorsements and Disclosure of Material Connection

- Seal created by marketer
 - No: “**GreenLogo for Environmental Excellence**”
 - Yes: “**GreenLogo for Environmental Excellence**
created by Winston & Strawn”
- Seal created by trade association of which marketer is a member
 - No: “**Certified by Renewable Energy Association**”
 - Yes: “**Certified by Renewable Energy Association**
of which W&S is a member”

Seals As Endorsements and Disclosure of Material Connection

- Seal that sounds like independent certifying organization
 - No: “**Certified by the American Institute of Degradable Materials**”
 - Yes: “**Certified by the American Institute of Degradable Materials, *a concrete industry trade organization***”
- Touting seal as a member
 - No: “**Member U.S. EcoFriendly Building Association**”
 - Yes: “**Member U.S. EcoFriendly Building Association. *Member only, product not evaluated***”

Degradable

- 1) Unqualified degradable claims should not be made about products intended for disposal in landfills, incinerators, or recycling facilities.
 - **Materials in landfills don't generally decompose w/in 1 year**
 - **No: "Biodegradable Trashbags" – since normally disposed in landfill**
 - **Yes: "Biodegradable Flower Pot" – flower pot normally buried in soil with plant where degrades**
- 2) Degradable claims for products disposed of in places other than landfills, etc. must break down within 1 year to be considered "degradable"

Degradable Elsewhere

- Same exclusions – **customary disposal, harmful**
- BUT no time period specified

Compostable

- 1) Unqualified compostable claims relating to composting in municipal facilities (rather than home) can only be made where facilities are available to substantial majority of consumers.
 - **“substantial majority” = 60%**
 - Yes: **“compostable coffee filter” = since composts at home (no reference to municipal facilities needed)**
 - No: **“compostable lawn bags” = since municipal composting facilities needed to compost, which are not available to most**
 - Yes: **“compostable lawn bags, appropriate facilities may not exist in your area”**
- 3) To be “compostable,” it must break down in a “timely manner”
 - **Now defined as “same time as other materials with which it is composted”**

Compostable Elsewhere

- Same basic principles but lower threshold for required availability of commercial facilities if not suitable for home composting
 - **ISO 14021: “reasonable proportion”**
 - **Canada: “reasonable proportion” - at least 50%**

Recyclable

- Unqualified claim allowed where recycling facilities are available to “substantial majority” of consumers where sold
 - Yes: “**Recyclable Packaging**”
 - “**substantial majority**” = at least 60%
- Must qualify when only available to “significant percentage”
 - Yes: “**Recyclable Packaging. *Recycling for this product may not exist in your area***”
 - “**significant percentage**” = not defined
- Must further qualify when only available to “less than a significant percentage”
 - Yes: “**Recyclable Packaging. *Recyclable in the few communities where facilities exist***”

Recyclable Elsewhere

- **ISO 14021, New Zealand, Canada Less Strict**
- **Australia Even Less Strict**

“Free of” / “Non-Toxic”

- 1) “Free of” can be deceptive where:
 - **contains something that poses similar environmental risk;**
or
 - **substance has never been associated with the product**
 - although there may be times when it is acceptable
- 2) May be able to make claim where a product contains a *de minimis* amount of substance which is inconsequential to consumers.
 - **However, even trace amounts could be material**
 - e.g., trace amounts of mercury is material, since it is toxic and can build in the system
- 3) “Non-toxic” means non-toxic for both humans and environment, unless qualified.

New Categories – Green Guides

- “Renewable materials”
- “Renewable energy”
- “Carbon offsets”

“Renewable Materials”

- Must qualify claims with specific information about the renewable material.
 - Must specify type
 - Must specify source
 - Must specify if not entirely made with renewable material

“Renewable Energy”

- Must qualify claims
 - Must specify if any portion of the product was made with fossil fuel
 - Must specify source of renewable energy
 - e.g., wind, solar
 - Must specify if conventional energy used in manufacturing processes was offset with renewable energy credits
 - Cannot state made with renewable energy if all renewable energy sold for renewable energy credits

Carbon Offsets per Proposed FTC Green Guides

- Marketers must have substantiation for claim
 - competent and reliable scientific evidence to support claim
 - proper accounting to ensure GHGs measured accurately
- Offsets cannot be sold more than once
- Marketers must disclose if the offset purchase funds emissions reductions that will not occur for two years or longer
- Marketers should not advertise the offset if it is already required by law

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