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## **Environmental Marketing: The New Green Guides**

Strategies to Meet Regulatory Standards and Minimizing Greenwashing Liability

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WEDNESDAY, DECEMBER 12, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Brian Fergemann, Partner, **Winston Strawn**, Chicago

Christina Carroll, Partner, **McKenna Long Aldridge**, Washington, D.C.

Bridget Calhoun, Partner, **Crowell Moring**, Washington, D.C.

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## Environmental Marketing: The New Green Guides

Strategies to Meet Regulatory  
Standards and Minimizing  
Greenwashing Liability

Stafford CLE  
Webinar/Teleconference  
December 12, 2012 1:00 – 2:30  
p.m. ET

Bridget E. Calhoun  
Partner

Crowell & Moring LLP

[bcalhoun@crowell.com](mailto:bcalhoun@crowell.com) / 202.624.2581

# I. LEGAL FRAMEWORK

## » **Competitors**

- Federal and state litigation
- National Advertising Division challenges
- Complaints to federal and state agencies

## » **Consumers**

- Class action litigation
- Complaints to the NAD and federal and state agencies

## » **The Federal Trade Commission**

## » **State Attorneys General**

## ➤ Consent Orders

- 18 involving environmental claims past 3 years
- Recent targets
  - 2012: 8 so far, latest 2 involving “free-of” claims
  - Others: bamboo, biodegradable, “up-to”

## ➤ Warning Letters

- Aug. 2012: 15 letters sent for energy efficiency & cost savings for “up-to” claims

## ➤ Closing Letters

- 10 involving environmental claims (2001-2012)
- Common claims: biodegradable, degradable (3); recycled content (3); “free of” (3)

. . . The [case] – began as a referral from the National Advertising Division. We follow the NAD’s work closely and support the NAD process. If the NAD found an unsubstantiated claim . . . We will take a close look.

**David Vladeck, Director,  
*Bureau of Consumer Protection***



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## IT'S TOO EASY BEING GREEN: DEFINING FAIR GREEN MARKETING PRACTICES



Subcommittee on Commerce, Trade and Consumer Protection

Jun 9, 2009

The Subcommittee on Commerce, Trade, and Consumer Protection held a hearing titled, "It's Too Easy Being Green: Defining Fair Green Marketing Practices" on Tuesday June 9, 2009, in 2123 Rayburn House Office Building. The hearing examined "green" marketing claims, their interpretation by consumers, and the role of the Federal Trade Commission (FTC) in establishing guidelines for fair and effective green marketing practices.

### Witness List

- James Kohm, Director, Enforcement Division, Federal Trade Commission
- M. Scot Case, Vice President, TerraChoice, Executive Director, EcoLogo Program
- Urvashi Rangan, Ph.D., Director, Technical Policy, Consumers Union
- Dara O'Rourke, Ph.D., Associate Professor, University of California Berkeley, Co-Founder, GoodGuide
- Scott P. Cooper, Vice President, Government Relations, American National Standards Institute

### RECENT NEWS

[Ranking Members Waxman and Rush Call on Committee Republicans to Hold Hearing on Hurricane Sandy and Climate Change](#) 10/31/2012

[GAO Report Finds Physician Self-Referrals Cost Medicare More Than \\$100 Million Annually, Pose Risk to Beneficiaries](#) 10/31/2012

[GAO Report Confirms Health Reform Law New Medicare Drug Discounts Saving Seniors Money](#) 10/26/2012

[Ranking Members Waxman and Rush](#)

- **FTC Act, Sec. 5, prohibits “unfair or deceptive acts or practices”**
  - » Deceptive to represent, omit, or practice “that is *likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.*”
  - » Must have a reasonable basis for claims
  - » Must have substantiation for all express and implied claims
  - » Marketers must be aware of reasonable interpretations of ads
  - » Marketers must have a reasonable basis, adequate substantiation before a claim is made



- Issued on Oct. 1, 2012, updates 1998 Guides
- Guides cover statements made about the **environmental attributes** of a product, packaging, or service
  - Encompass labeling, advertising, promotional materials
  - Apply to claims asserted “through words, symbols, logos, depictions, product brand names, or any other means”
- Guides do not have the force of law, but do reflect the FTC’s enforcement views of relevant claims
- Guides do not preempt regulations established by other federal, state, or local agencies regarding environmental standards or marketing claims

- The Guides apply to business-to-consumer and business-to-business advertising
- Website disclosures generally insufficient to qualify point-of-sale marketing claims (exception for some seals and certifications)

## II. The Final Green Guides: Key Changes and Enforcement

Brian D. Fergemann  
Partner  
Winston & Strawn LLP  
(312) 558-8024  
bfergemann@winston.com

# The Final Green Guides

- What Changed? The Green Guides clarify and update the earlier proposed guidance on:
  - General Environmental Benefit Claims
  - Certifications and Seals of Approval
  - “Free-of” Claims
  - Recyclable Claims
  - Renewable Energy Claims

# The Final Green Guides

- The FTC also noted that it has revised the standard for “competent and reliable scientific evidence” needed to adequately substantiate claims, including environmental marketing claims, since issuing the 1998 Guide.
- The standard now applied by the FTC is that evidence “should be sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that [a] representation is true.”
  - The most significant difference is the requirement that an advertiser’s evidence be “considered in light of the entire body of relevant and reliable scientific evidence.”

## II.A. General Environmental Benefit Claims

# General Environmental Benefit Claims

- General Environmental Benefit Claims:
  - Green
  - eco-friendly
  - a green leaf
- Advertisers should avoid making *unqualified* general environmental benefit claims
  - FTC: these claims are not capable of being substantiated in most cases because such claims likely communicate a wide range specific environmental benefits which are not supported
- While these claims are not prohibited, they must be used in connection with *clear and prominent* disclosures that communicate the specific environmental benefit(s) of the product

# General Environmental Benefit Claims

- New: do not imply any benefit is significant if the benefit is negligible
- New: consider trade-offs
  - Does adding a small amount of recycled content do more harm than good? If so, a general claim environmental benefit claims may be deceptive
- New: FTC believes imagery, suggestive language or color (green!) may communicate a general environmental benefit

## II.B. Certifications and Seals of Approval

# Certifications and Seals of Approval

- Subject to FTC's Guides Concerning Endorsements and Testimonials, so companies using a seal or certification must disclose:
  - Self-certification
  - Any material connections to the certifier
    - However, you don't need to disclose payment of a reasonable certification fee if that is the only connection
    - Key question, as with any material connection analysis, is whether the connection affects the weight or credibility

# Certifications and Seals of Approval

- Certifications should be qualified with clear and prominent language limiting the claim to particular attributes of the product
  - seals or certifications are likely to convey general environmental benefits

# Certifications and Seals of Approval

- New: Certifications based on multiple attributes may be qualified by disclosing that information about the relative attributes can be found on a website where the number of attributes evaluated is so great that it is not possible to effectively communicate all such attributes in the advertising
  - “Virtually all products impact the environment. For details on which attributes we evaluated, go to [a website that discusses this product].”
- You must still substantiate all express and implied claims

## II.C. Degradable, Compostable, Recyclable, Recycled Content, Free of, Non-toxic, Ozone-friendly

# Degradable

- Guidance did not change: unqualified claims should not be made unless the product will completely breakdown in no more than one year after typical disposal
- Claims should not be made about products intended for disposal in landfills, incinerators, or recycling facilities

# Compostable

- Compostable claims may be made without qualification if the product or package will break down in the same approximate amount of time as the materials with which it is composted

# Recyclable

- Advertisers should qualify recyclable claims so as to not misrepresent the availability of available recycling programs
- New: final guides clarify that an *unqualified* recyclable claim requires recycling facilities be available to 60 percent of consumers or communities where the item is sold
  - Simplified by eliminating the potentially confusing standard requiring that “a significant percentage” of consumers and communities have access to recycling facilities for the material

# Recycled Content

- Materials must have been recovered or diverted from the waste stream during the manufacturing process or after consumer use
  - Be specific/qualify – pre-consumer/post-consumer
- Qualify claims for products or packages made partly from recycled material

# “Free of”

- “Free of” Should not be made if the product or package contains substances that pose the same environmental risks
- New: it may be appropriate to make a “free-of” claim even when trace amount of a substance are present
  - Must be no more than trace level
  - Must not cause the material harm typically associated with the substance
  - Naturally occurring

# Non-toxic

- Unqualified non-toxic claims convey that the product is non-toxic for both humans and the environment

# Ozone-friendly

- It is deceptive to misrepresent that a product is ozone-friendly or safe for the ozone layer or atmosphere



## Environmental Marketing: The Revised FTC Green Guides

Christina M. Carroll  
McKenna Long & Aldridge LLP  
1900 K Street NW  
Washington, DC 20006  
(202) 496-7212  
Email: [ccarroll@mckennalong.com](mailto:ccarroll@mckennalong.com)



**II.D - Claims:  
Made With Renewable Materials,  
Made With Renewable Energy,  
Carbon Offsets**



# Renewable Materials Claims

- Must have substantiation for express or reasonably implied claims.
- “Made with renewable materials” must be qualified if any portion of the product or packaging is not made with renewable materials.
- Best to identify the material used and explain why it is renewable.
- Even if product is made 100% of renewable materials, qualification is still necessary:
  - Example - Unqualified claim that flooring is “made with renewable materials.” Reasonable consumer likely to think that flooring also is biodegradable, recyclable, and made with recycled content.



# Renewable Energy Claims

- “Made with renewable energy”
  - Deceptive if a portion of the energy used for the product or packaging comes from conventional sources
- Must qualify claims
  - Must specify percentage of renewable energy used for manufacturing process
  - Recommends specifying the source of renewable energy to avoid consumer confusion
    - e.g., wind or solar energy
- Use of renewable energy credits to match percentage of fossil fuel energy use permitted
  - But, marketer cannot claim it uses renewable energy if it separately sells all the renewable electricity it generates for renewable energy certificates.



# Carbon Offsets

- Marketers must have substantiation for claims
  - Competent and reliable scientific evidence and proper accounting methods
  - To establish proper quantification
  - To demonstrate that same offset was not used more than once
- Deceptive to misrepresent that offset represents reductions that have taken place or will take place in the immediate future
  - Marketers must prominently disclose if emissions reductions will not occur for two years or longer
- Marketers should not advertise the offset if the reduction already is required by law

# II.E. CLAIMS NOT ADDRESSED IN THE 2012 GREEN GUIDES

## ➤ Sustainable Claims

- Wide range of meanings so FTC unable to provide guidance on consumer perception
- Key is to test for consumer perception of term and be able to substantiate all implied meanings.
- Be careful of “broad general environmental” meaning that may be difficult to verify.

## ➤ Biobased Claims

- Avoid conflicting with USDA’s guidance
- Outside USDA’s program, FTC lacks evidence on consumers’ perception to provide meaningful guidance, but cautions marketers to substantiate all reasonable meanings.

## ➤ Organic Claims

- Avoid conflicting with USDA's NOP guidance for ag products
- For non-ag products, FTC lacks evidence on consumers' perception to provide meaningful guidance and concerned about leading to conflict/confusion with NOP's guidelines.

## ➤ Natural Claims

- FTC lacks evidence on consumers' perception due to multiple meanings which also depend on context (e.g., nothing artificial, eco-friendly, superiority, etc.)
- *Key Takeaway: Consider all express and implied claims conveyed when making these types of claims and have competent and reliable scientific evidence to substantiate them. Qualify them when necessary to prevent deception.*



### III. – “Greenwashing” Civil Litigation Class Actions – Examples



# Emerging “Greenwashing” Litigation

- Separate from NAD and FTC enforcement proceedings, class action litigation has emerged.
- May look to FTC Revised Green Guides for standards in the future.



## “Greenwashing” Litigation

- *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
  - Settled July 2011

A photograph of several white wind turbines against a blue sky, positioned in the top-left corner of the slide.

## Hybrid Car Lawsuits - Against Toyota and Honda

- Hybrid cars allegedly did not achieve advertised gas mileage under normal driving conditions
- Multiple class actions and dozens of small claims court actions filed
- Initial CA victory by plaintiff in small claims court reversed in May 2012
- Honda class actions settled in March 2012
  - *E.g., Lockabey v. American Honda Motor Co.*
  - Honda agreed to pay \$100 to \$200 to each owner and to provide a \$1,000 credit toward a new car
  - (Individual small claims court awards were much higher.)
- Toyota case (*Bernstein*) never succeeded



## From Electric Cars to Wind Turbines

- *Klee v. Nissan North American, Inc.*, No. 12-CV-8238 (filed C.D. Cal. Sept. 2012)
  - Complaint alleges that the 100 miles per charge advertised driving range of the LEAF is based on a fully charged battery and the automaker recommends charging the battery only up to 80% to avoid damage. Motions to dismiss due Dec. 14, 2012.
- *Wind Wire, LLC v. Finney*, 2012 WL 4903026 (Ind. Ct. App. 2012)
  - Homeowners won fraud in the inducement suit regarding residential wind turbine system.
  - Seller/installer misrepresented in sales brochure and oral communications the cost savings, timing of the return on investment, and tax implications of the residential system.



## IV. – Insurance Considerations



# Insurance Considerations

- Commercial general liability (CGL) insurance
  - Personal and advertising injury liability coverage for greenwashing?
- Example - ISO 2007 CGL form:
  - “We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘personal and advertising injury’ to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages.”
  - “Personal and advertising injury” is defined as:
    - injury, including consequential “bodily injury”, arising out of one or more of the following offenses:
      - \*\*\*\*
      - d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
        - \*\*\*\*
      - f. The use of another’s advertising idea in your own “advertisement”;...



## Personal and Advertising Liability Coverage

- Considerations
  - Scope of coverage grant
  - “Disparage” not defined
  - How underlying claim is pled
  - Potentially relevant exclusions:
    - Quality or performance of goods (failure to conform) (own product)
    - Fines and penalties
    - Material published with knowledge of falsity
    - Specific exclusions for green-related false advertising issues
  - Whether policies providing defense and indemnity coverage apply if injunctive relief is sought instead of damages

## Example - Failure to Conform Exclusion

- *Harleysville Mutual Insurance Co. v. Buzz Off Insect Shield, LLC*, 692 S.E.2d 605 (N.C. 2010)
  - Coverage dispute arose out of an underlying lawsuit by S.C. Johnson & Son, Inc. (SCJ) against its competitors Buzz Off Insect Shield and International Garment Technologies (IGT)
  - SCJ alleged that the defendants falsely advertised the attributes of their insect-repellent clothing, and that this harmed SCJ.
  - The question before the North Carolina court was whether IGT's CGL insurance carriers were required to defend it against SCJ's claims.
  - The court held that because SCJ only alleged it was injured by false statements defendants made about their *own* products (as opposed to SCJ's), the CGL policies' Failure to Conform exclusion dictated that there was no insurance coverage.



## Coverage Questions For Actions Not Seeking Damages

- E.g., pursuant to Unfair Competition Law, California Business and Professions Code § 17200, *et seq.*
  - Relief available: Civil penalties, restitution, and injunctive relief
  - Outside of the greenwashing context, California courts have held that there is no coverage under a CGL policy for a Section 17200 claim as a claim for damage due to advertising injury because (1) restitution but not damages were not available under Section 17200, and (2) unfair competition under the policy referred to common law but not statutory claims.
    - *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 833 P.3d 545 (1992)



# Insurance – Summary

- Check exclusions
- Failure to conform exclusion and coverage grant – Result in key differences between potential coverage for claims related to disparagement of competitors' products versus claims arising out of statements about the defendants' own products
- Are fines and penalties insurable by law in the applicable jurisdiction?
- Damages versus injunctive relief
- Potential for state law differences

# **IV. GREEN GUIDES – BEST PRACTICES**

- **Avoid unqualified general environmental benefit claims**
- **Be specific, where possible**
- **Meet any applicable requirements**
- **Substantiate with adequate level of support**
- **Evaluate consumer perception**
  - » Implied claims
  - » Overstatement of benefits
  - » Potential confusion
- **Consider whether trade-off analysis is appropriate**
  - » Do not hide or mask negative trade-offs