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MARKETING

What Companies Should Know about the FTC's Green Guides

By Scott J. Slavick

Nowadays you can't go grocery shopping, open a newspaper or turn on the television without being inundated by advertisements offering environmentally-friendly, or "green" products. Unfortunately, according to a recent advertising study conducted by EnviroMedia and Green Seal, 30 percent of Americans admit to having no idea how to properly evaluate the veracity of environmental claims, while an additional 10 percent admit to blindly trusting them.

Combine this with the fact that many companies are intentionally "greenwashing" their ads, and you have a recipe for disaster. Greenwashing occurs when a marketer makes misleading claims about the environmental superiority or benefit of one of its products in an effort to sell more products or to improve the company reputation among consumers.

Currently, there are two primary sources of federal law governing environmental marketing. The Lanham Act prohibits the use of any word, term, name, symbol, or device that in commercial advertising misrepresents the nature, characteristics, qualities, or geographic origin of goods, services, or commercial activities.

The FTC Act prohibits unfair or deceptive acts or practices, as well as unfair methods of competition. Unfair methods have been defined as those that are likely to mislead reasonable consumers and are material to the reasonable consumer's purchasing decision. Deceptive acts have been defined as those that cause substantial consumer injury, are reasonably avoidable and are not outweighed by the alleged benefits to consumers or competition.

After an initial burst of misleading green advertising claims in the late 1980's, the Federal Trade Commission issued regulatory "Green Guides" in 1992, updating them in 1998. In general, the Green Guides advised marketers to provide clear qualifications to their environmental claims. For example, if a box of diapers claims to be "recyclable," unless that claim is appropriately qualified it could be considered deceptive if any part of either the box or the diapers, other than minor, incidental components, cannot be recycled.

The Green Guides also advised marketers to be specific. If a package is labeled "60% more recycled content than before," that claim

could be considered misleading if the manufacturer had increased the use of recycled material just by some minimal percentage over the earlier product. Marketers were also advised to make product comparisons clear and easy to understand. For example, if a manufacturer states that "Product X is easier on the environment," it should disclose if the comparison is just with the manufacturer's prior formulation or with a competitor's product.

Finally, the Green Guides advised marketers not to overstate their product's attributes. Claiming that a product is "Environmentally Friendly" may be considered inaccurate, even if the product has some features that are beneficial to the environment, if that same product has other features that are not.

Environmental claims are on the upswing. A 2008 survey conducted by Terrachoice found that the number of large retail store products making green claims grew 79 percent from 2007 through 2008. Terrachoice also reviewed 18,000 ads in 2008 issues of Time, Fortune, National Geographic, Sports Illustrated and Vanity Fair, and it found that more than ten percent of the ads made environmental marketing claims. That was up from three percent in 2006.

Due in part to this large increase in environmental marketing claims, the FTC has decided to update its Green Guides for the first time in over a decade. To determine areas that may need revision or inclusion, it has conducted hearings with various industries. It also studied consumers understanding of general environmental claims and terms — such as "green" — and whether consumers interpret such claims to imply specific environmental benefits.

The FTC also examined general marketing claims coupled with a specific representation, such as "Green — made with renewable materials," to determine if consumers perceive such a claim as implying environmental benefits beyond the specific attribute mentioned. And, it examined whether environmental claims were suggesting something about the environmental impact through the actual life cycle of a product, from production and transportation through use and disposal.

The FTC can and does bring enforcement actions against marketers that cannot substantiate their claims. For example, it recently

charged three companies — Kmart Corp., Tender Corp. and Dyna-E International — with making unsubstantiated claims that their paper products were “biodegradable.” Kmart Corp. had called its American Fare brand disposable plates biodegradable. Tender Corp. had called its Fresh Bath brand moist wipes biodegradable, and Dyna-E International had called its Lightload brand compressed dry towels biodegradable.

The FTC alleged that these products are typically disposed in landfills, incinerators, or recycling facilities where it is impossible for waste to biodegrade within a reasonably short time.

All three of these cases were settled, with the Dyna-E matter resulting in a consent order.

The FTC has plenty of enforcement options at its disposal beyond suing alleged offenders. It can, for example, issue cease-and-desist orders lasting up to 20 years. In addition, an FTC prohibition against deceptive claims can extend to subsidiaries and other divisions of the offending company, as well as corporate officers. The FTC’s authority includes what is often referred to as “fencing-in relief,” which could result in a prohibition against additional deceptive claims covering all the offending company’s products.

The relief also may include such draconian terms as a requirement that the FTC be notified if senior management responsible for marketing departs for a new company. In other words, the terms of a consent order can follow significant decision-makers to future jobs. In the case of Dyne-E, the consent order required its president to notify the FTC about changes in his home address or his employment status for the next ten years .

The FTC also can hold officers individually liable for the actions of their companies.

Parties other than the FTC also may help to police green claims. Competitors, for example, can be an important source of policing. They can bring actions regarding alleged mislabeling of products as environmentally friendly before the National Advertising Division (NAD) of the Better Business Bureau. These actions may address general environmental claims, comparative claims, claims regarding a product being “degradable” and claims regarding environmental certificates.

The NAD forum can be a quick, private and inexpensive alternative to litigation for advertising disputes. There is a drawback, however. Response is voluntary. If a party refuses to submit to an NAD hearing, there is nothing a complainant can do about it.

Another alternative for a marketer that believes a competitor’s

green claims are deceptive is to bring a private civil suit under the Lanham Act.

In addition, individual state attorneys general may bring actions through state consumer fraud statutes, Uniform Deceptive Trade Practice Acts and the guides set out in The Green Report II, which was drafted by the National Association of Attorneys General. Indeed, many states have their own Green Guides, some of which are tougher than the FTC’s.

Finally, in many states consumers can challenge advertisements, either as individuals or as members of a class, based on state deceptive practices acts (known as “Little FTC Acts”), or for breach of express or implied warranties.

What are businesses that want to tout the environmental benefits of their products to do during the uncertain period before the updated Green Guides are issued?

James A. Kohm, currently the Director of the Enforcement Division of the FTC’s Bureau of Consumer Protection, offered some potentially helpful advice for marketers. He suggested that companies avoid life cycle claims that are difficult or impossible to substantiate, and he pointed to the current Green Guides to provide the FTC’s views on what is necessary to substantiate claims that products are “recyclable,” “recycled,” and “biodegradable.” He also warned that the FTC will continue to go after companies who “live over the line,” i.e. consistently make environmental claims that are impossible to substantiate.

David Mallen from the Better Business Bureau’s National Advertising Division also warned advertisers against falling victim to a common mistake: developing a product with a particular environmental benefit, then attempting to parlay that particular benefit into a broader environmental claim.

Before making any green claims in their advertising, businesses should read the Green Guides carefully and seek legal advice. Green claims, if handled correctly, can help a company’s bottom line. If done incorrectly, they can backfire in any number of ways.



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