

## Environmental Law

### Policing 'Green' Marketing Claims

The FTC takes the next step in revising its outdated guides

By Vincent J. Mangini

**D**eceptive or untruthful marketing claims about “environmentally friendly” products can constitute violations of the Federal Trade Commission Act. In order to help advertisers avoid such violations, the FTC publishes a “Guide for the Use of Environmental Marketing Claims” (codified at 16 C.F.R. Part 260), also known as the “Green Guides.”

In an article published in the *New Jersey Law Journal* on July 19, 2010, entitled “Policing Unfair and Deceptive Environmental Claims in Advertising,” this author discussed the current version of the Green Guides and the FTC’s review of green marketing claims that have penetrated the market since the FTC last amended the Green Guides in 1998.

On Oct. 6, 2010, the FTC released to the public proposed revisions to its Green Guides, which were published in the *Federal Register* about one week later. Among the changes being proposed by the FTC is the addition of new guidance for the use of product certifications and seals of approval, and carbon offset claims. Also noteworthy was the FTC’s decision not to include specific guidance for cer-

tain claims not currently addressed by the Green Guides, such as the term “sustainability,” or corporate image advertising — speech that touts a business’ corporate policies and practices or responds to public criticism. These FTC proposals should be examined.

#### Product Certifications and Seals of Approval

The FTC found, during the course of its Green Guides review, that “[m]arketers across industry sectors increasingly use certifications and seals of approval to communicate environmental claims” and that “[t]hese certifications vary from seals of approval issued by third parties to logos developed internally pursuant to company-specific standards.” In this regard, the FTC expressed concern about marketers’ use of unqualified certifications or seals, which may imply a general environmental benefit claim that is difficult to substantiate and potentially misleading. The FTC is also interested in promoting adherence to its “Guides Concerning the Use of Endorsements and Testimonials in Advertising” when utilizing any third-party representation about the environmental benefits of a product or service. According to the FTC, “third-party certifications and seals constitute endorsements covered by the Endorsements Guide.” See 75 Fed. Reg. 63,566.

“Given the widespread use of cer-

tifications and seals and their potential for consumer confusion, the Commission proposes providing additional guidance, specifically in a new Guide section devoted to this subject.” Under the FTC’s proposed guidance, it is a deceptive practice “to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent third party.” Marketers can avoid violating this directive by stating clearly and prominently (1) the basis for any certification or seal of approval used in an advertisement and (2) the specific environmental benefit to which the certification or seal relates. Additionally, marketers who employ “the name, logo, or seal of approval of a third-party certifier . . . should meet the criteria for endorsements provided in the FTC’s Endorsements Guides,” and be able to substantiate “all claims reasonably communicated by the certification.” 75 Fed. Reg. 63,601 (proposed to be codified at 16 C.F.R. §§ 260.6(a), (b), (d) and (e)).

#### Carbon Offsets

A “carbon offset” represents a reduction in greenhouse gas (GHG) emissions produced by an offset project, such as landfill methane capture and destruction or afforestation. See Carbon Dioxide Trading Program, N.J.A.C. 7:27C-10.3. In states that have a carbon emissions budget and trading program requiring mandatory reductions in carbon emissions, such as New Jersey (for the moment) through its participation in the Regional Greenhouse Gas Initiative, program participants may use carbon offsets to achieve regulatory compliance. In the voluntary carbon offset market, businesses and individuals may

*Mangini is an attorney with Stark & Stark in Lawrenceville, concentrating his practice in real estate, zoning and green development law.*

also purchase offsets to reduce the “carbon footprint” created by their operations or lifestyles.

The FTC discovered through its consumer perception survey that information about timing of emissions reductions was important to survey respondents. Specifically, 43 percent indicated that a carbon offset claim was misleading if emissions reductions did not occur for several years. The FTC also found that carbon offsets present unique challenges in the area of substantiation, particularly with respect to “additionality,” which is the measure of proof required to show that the reduction in emissions created by an offset product would not have occurred, but for the offset sale.

Although the FTC has neither the expertise nor the authority to develop policies or standards for carbon offsets, it proposes to include in the revised Green Guides limited guidance. For example, respecting the timing of emissions reductions, the FTC proposes making it a deceptive practice “to misrepresent, directly or by implication, that a carbon offset represents emissions reductions that have already occurred or will occur in the immediate future.” In order to “avoid deception” in this regard, “marketers should clearly and prominently disclose if the carbon offset represents emissions reductions that will not occur for two years or longer.” The FTC’s revised Green Guides, as proposed, also recognize the concept of additionality as an important component in establishing the validity of an offset and, as such, prohibit marketers from making claims that “a carbon offset represents an emission reduction if the reduction, or the activity that caused the reduction, was required by law.” 75 Fed. Reg. 63,601 (proposed to be codified at 16 C.F.R. §§ 260.5(b) and (c)).

#### **Sustainability**

In addition to carbon offsets, the FTC evaluated several other environmental claims that are not addressed in the current version of the Green Guides, such as the term *sustainability*. Consumer perception research, including results from the

FTC’s own survey, confirmed that this word has no single environmental meaning and, to some, conveys the nonenvironmental attribute of *durability*. “In addition, the evidence indicates that consumers view sustainable claims differently than general environmental benefit claims.” In light of these findings, the FTC opted not to create a new section of the Green Guides for sustainability claims, but did not prohibit its use. Marketers who use sustainability claims to describe products or services must be able to substantiate consumers’ understanding of the claim in the context of their advertisements. The FTC also rejected an invitation to establish guidelines for using the term in the context of corporate image advertising, “[b]ecause the determination of an advertisement’s constitutional status must be conducted on a case-by-case basis, [and therefore] the issue is not appropriate for general guidance.” 75 Fed. Reg. 63,583

#### **Corporate Image Advertising and the First Amendment**

In light of the FTC’s position on corporate image advertising, as noted above, a brief discussion of the constitutional protections afforded to the communications of market participants is warranted. Generally, an “expression related solely to the economic interests of the speaker and its audience” constitutes speech that is commercial in nature. *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980). The United States Supreme Court has long recognized that the right of free speech guaranteed by the First Amendment encompasses commercial speech, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976), and that such right is enjoyed not only by individuals, but also corporate entities. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

Although government may regulate marketing activities and may even ban commercial speech that is false or misleading, it may not prohibit commercial speech that is potentially misleading “if narrower

limitations can ensure that the information is presented in a nonmisleading manner.” *Ibanez v. Fla. Dept. of Bus. and Prof’l Regulation, Bd. of Accountancy*, 512 U.S. 136, 152 (1994). Moreover, when commercial speech is inextricably intertwined with commentary on matters of public concern, which receives greater protection under the First Amendment, courts must apply strict scrutiny to any law that infringes upon such expression. *Riley v. Nat’l Fed’n of the Blind, Inc.*, 487 U.S. 781, 796 (1988). Under this test, where even an “erroneous statement” is entitled to protection, the FTC could not enjoin a marketer’s communication of any such hybrid speech through the FTC Act using the Green Guides as a basis for enforcement. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).

It is unclear whether corporate image advertising falls into the hybrid speech category requiring full protection under the First Amendment. The California Supreme Court in *Kasky v. Nike* answered this question in the negative, concluding that “[w]hen a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech that may be regulated to prevent consumer deception.” *Kasky v. Nike*, 27 Cal.4th 939 (2002), cert. dismissed as improvidently granted, 539 U.S. 654 (2003).

The U. S. Supreme Court has not yet squarely address this issue, but the Court’s decision not to review the California ruling may provide insight into how it might decide the matter if given another opportunity.

#### **Next Steps**

The fate of the FTC’s proposed revisions to the Green Guides remains uncertain. The period for submitting comments to the FTC ended on Dec. 10, 2010, and for the time being the ball continues to bounce in the FTC’s court. Certainly, if the FTC adopts any of the changes discussed in this article, it will likely have a profound effect on advertising in the green marketplace. ■