

Environmental Law

Policing Unfair and Deceptive Environmental Product Claims in Advertising

The FTC attempts to meet present day challenges

By Vincent J. Mangini

In 1992, the Federal Trade Commission first issued its Guide for the Use of Environmental Marketing Claims, also known as the “Green Guides,” to assist marketers of products and services having environmental attributes to avoid running afoul of the FTC Act. Although compliance with the Green Guides by members of industry is voluntary, marketing activity that is inconsistent with the rules outlined therein may provide a basis for corrective action by the FTC “if, after investigation, the Commission has reason to believe that the behavior falls within the scope of conduct declared unlawful by the statute.”

According to its statement of purpose, the Green Guides “address the application of Section 5 of the FTC Act to environmental advertising and marketing practices[,]” establishing general principles that apply to

Mangini is a shareholder in the real estate, zoning and land use group at Stark & Stark in Lawrenceville.

all such sales promotional activities, including “labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means,” and providing direction on particular environmental marketing claims. These general principles and specific guidance are followed by examples often containing one or more options for qualifying a claim. “These options are intended to provide a ‘safe harbor’ for marketers who want certainty about how to make environmental claims [but] do not represent the only permissible approaches to qualifying a claim.”

Some “general principles” under the Green Guides are the use of “clear, prominent and understandable” qualifications and disclosures in advertising and the avoidance of overstatements relating to environmental attributes, especially ones created by implication. An example of this later precept included in the Green Guides is that of a package, which indicates it contains 50 percent more recycled content, implying a substantial increase, but which neglects to say how total recycled content went up 1 percent from 2 percent to 3 percent — technically a 50 percent increase over the

previous recycled content, but which in that context does not actually constitute a substantial change.

Direction on particular environmental marketing claims in the Green Guides relates to the use of terms connoting general environmental benefits, such as “eco-friendly,” and representations on specific attributes, such as degradability, compostability, recyclability, recycled content, source reduction, refillability and ozone safety and friendliness. For instance, in order for a marketer to claim that a product or package is “compostable,” the product or package must be able to “break down into, or otherwise become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device.” In this regard, as an example in the Green Guides expressly states, it is not deceptive for a manufacturer of unbleached coffee filters to represent that they are compostable provided “the manufacturer can substantiate that the filter[s] can be converted safely to usable compost in a timely manner in a home compost pile or device.”

The concept of “substantiation” is a common theme that permeates the instruction provided by the Green Guides

for general environmental marketing claims and each of the categories of particular environmental marketing claims. Accordingly, 16 C.F.R. § 260.5 notes:

[Indeed], any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product, package or service must, at the time the claim is made, possess and rely upon a reasonable basis in substantiating the claim. A reasonable basis consists of competent and reliable evidence. In the context of environmental marketing claims, such substantiation will often require competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

Since the Green Guides were last updated in 1998, consumer interest in green products and services has increased substantially. In order to meet this rising demand and to assist the regulated community in responding to the proliferation of government regulation over the environment and energy, the economy has produced a plethora of green products, packaging and services and with it a host of marketing claims that are not currently addressed in the Green Guides. The principles and direction contained in the Green Guides are no less important to the proper marketing of these other environmental claims and, as such, the FTC has “accelerated [its] review of the FTC’s Green Guides” to meet these new challenges. See Deborah Platt Majoras, Chairman, Federal Trade Commission, Opening Remarks at the FTC workshop on Carbon Offsets and Renewable Energy Certificates 8-9 (Jan. 8, 2008).

During the course of 2008, the FTC held a series of workshops to obtain feedback from the public on ways to improve

the Green Guides to address and provide meaningful guidance with respect to environmental marketing claims having to do with carbon offsets and renewable energy certificates, innovative packaging, green textiles and energy-efficient building materials, equipment and systems. The first of these was held on January 8, 2008, and dealt exclusively with the topic of carbon offsets and renewable energy certificates, focusing on the various challenges consumers face in verifying the integrity of carbon offsets or renewable energy certificates and the ways in which the FTC can guide marketers in their advertising.

For example, given that a consumer does not usually have access to the project that a marketer alleges produced the renewable energy to which a given certificate relates, the consumer cannot easily confirm that the project or the renewable energy production stated on the certificate is real. Likewise, verifying that a certificate meets all applicable government regulatory standards and has not already been sold or retired is also challenging without assistance in substantiation from the marketer. As such, the potential for abuse is enormous.

Although the FTC made clear that it is not the intention of the agency to adopt any specific environmental performance standards, one solution, as suggested during the workshop, might be to have marketers base their advertising claims on audits conducted by certification organizations or compliance with government guidelines and accounting methodologies, such as the Environmental Protection Agency’s Climate Leaders Program. In short, rather than endorsing a particular environmental performance standard, the FTC could simply include in its revised Green Guides an example under environmental marketing claims for offsets and renewable energy certificates that indicates the seller of these products can achieve substantiation by basing representations pertaining to the certificates on the certification of a reputable third-party auditor.

Additionally, in states that have a carbon emissions budget and trading program requiring mandatory reductions in carbon emissions or a renewable portfolio standard requiring electricity retailers to include in their energy portfolios electricity generated from renewable sources, the applicable regu-

latory scheme may have a certificate tracking system (upon which consumers can rely at least with respect to a certificate’s existence and its eligibility for sale). This certainly is the case in New Jersey, where the creation, trading and regulation of carbon offsets and renewable energy certificates is governed respectively by the Carbon Dioxide Trading Program, N.J.A.C. 7:27C-1.1, et seq. and the Renewable Energy and Energy Efficiency Rules, N.J.A.C. 14:8-1.1, et seq.

The other two FTC workshops, which were held on April 30 and July 15, 2008, provided a wealth of information on environmental marketing claims pertaining to green packaging, textiles and building materials, equipment and systems. A description of the content of these other workshops is beyond the scope of this article. Suffice it to say that one of the overarching themes at these workshops was whether a life cycle analysis should be incorporated into environmental marketing claims to account for all of the impacts created by a product, process or service. For example, a particular product may be made from 100 percent recycled content, but may also require the consumption of a great deal of energy in the manufacturing process. As such, without a life cycle analysis, consumers could be misled as to the environmental benefit of a given product. However, providing guidance to marketers in this regard may prove to be a daunting task, especially in light of the insufficiency of life-cycle data on products and the lack of consensus on scientific methodologies for life cycle analyses.

The explosion of environmental marketing claims in the economy has created many challenges and demands on the producers and consumers of green products, packaging and services. The dissemination of concise and accurate advertising claims and the drive to promote the educated consumerism of environmentally safe and sustainable goods form a significant part of this reality. Perhaps, when the FTC finalizes its assessment of environmental marketing claims related to carbon offsets and renewable energy certificates and green packaging, textiles and building materials, equipment and systems, the amended and supplemented Green Guides will make the exchange of these products and services a little bit easier. ■