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PERSPECTIVE

FTC guides could put greenwashers in hot water

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Products advertised as “green,” “eco-friendly” or “environmentally safe” are nearly ubiquitous, from cleaning products and paper goods to clothing and cars. But what exactly do such terms mean and when can companies market their products as green?

In October 2012, the Federal Trade Commission finalized updates to its Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260, popularly known as the “Green Guides.” The Green Guides, which were first issued in 1992, are intended to help marketers avoid making deceptive or misleading environmental marketing claims that violate Section 5 of the FTC Act. While the Green Guides are not independently enforceable, the guides help define environmental marketing claims that would be considered deceptive or misleading to a reasonable consumer and, therefore, subject to enforcement under the FTC Act. They also offer examples of how a reasonable consumer may interpret certain environmental marketing claims, describe general principles to apply to marketing efforts, and identify facts to substantiate before making certain environmental marketing claims. As compared to the previous Green Guides, the updated Green Guides put a greater emphasis on the problems associated with broad, unqualified, general environmental marketing claims and offer a strong caution against them.

[T]he guides take a pragmatic, but also at times factually intensive, approach that is based on the perception of the consumer and the factual basis for the claim rather than on the intent of the marketer.

The updated guides also explain the proper use of environmental certifications and seals of approval in marketing efforts, parameters for marketing carbon offsets, and the basic requirements to make certain specific environmental claims such as that a product is recyclable, made with recycled content, made with renewable energy or materials, compostable, degradable, nontoxic, refillable, or free of a certain substance. Certain of these environmental claims are newly included in the updated guides (e.g., carbon offset claims) and others have been updated to

clarify how they should be substantiated (e.g., recyclability claims).

The Green Guides warn marketers not to make broad, unqualified, general environmental marketing claims unless they can substantiate all express or implied claims that a reasonable consumer may infer about the product based upon the general marketing claim. For example, if a product is advertised as “eco-friendly,” one consumer may infer that the product is recyclable and made from 100 percent recycled materials, another that no toxic chemicals were used in its manufacture, and yet another that the manufacture of the product emitted no greenhouse gases. Because a marketer would be tasked with substantiating every reasonable inference, the FTC recommends that such broad claims should be qualified to clearly indicate the type of environmental benefit being asserted. This advice governs not only the words used to market a product, but also the product name and imagery used in marketing efforts.

In situations where marketers include a specific qualification to an otherwise general environmental marketing claim (e.g., eco-friendly: made with recycled materials), the FTC considers such a claim deceptive if the environmental benefit is the result of a trade-off with another favorable environmental attribute. So, for example, if the use of recycled materials causes a substantial increase in air emissions during manufacturing, then not only would a general and unqualified claim that the product was eco-friendly violate the FTC Act, but a general but qualified claim that highlighted only the positive benefits to the environment (where other, negative impacts are present) would as well. In short, marketers must be able to substantiate specific claims and, if more general language is used, an overall net benefit.

The Green Guides also discuss the use of certifications and seals of approval from third parties. Such certification must not be misleading. Furthermore, obtaining such certification does not obviate the need for the marketer to substantiate all claims reasonably communicated by the certification. For example, if the certification appears to convey a general environmental benefit, even if the certification only refers to a limited benefit, all general environmental benefits must be substantiated or, instead, such certification must have clear qualifying language that limits the claim to what is actually being certi-

fied. To explain this concept, the FTC references a seal with the text “Environment Approved.” It would not be deceptive to use this seal as long as it is accompanied by clear and prominent language that explains that the seal relates only to certain specific benefits.

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Such certifications may also be considered endorsements and, therefore, should meet FTC’s Endorsement Guides, 16 C.F.R. Part 225. To the extent there are any material connections between the certifying organization and the marketer that could affect the certification’s credibility, the marketer should clearly disclose this connection. The most extreme example of this is when a company develops its own internal certification that a reasonable consumer may interpret as being conveyed by an independent third party; however other connections, such as a marketer’s membership in the industry trade association that certified its product, also must be disclosed. The Green Guides caution marketers to accompany such internal certifications with clear and prominent language that indicates these connections.

The Green Guides also provide concrete information on how marketers should substantiate a number of popular environmental claims. For instance, they advise marketers about when and how they can market a product as compostable, degradable, recyclable, refillable, free-of-a certain substance, nontoxic, ozone-friendly, or made with renewable energy, renewable materials, or recycled content. The guides also provide direction on circumstances in which a marketer may claim that a product or package is smaller, lighter, or less toxic than previous versions and include a new and highly anticipated section that discusses how to market carbon offsets.

For each of these specific environmental marketing claims, the guides take a pragmatic, but also at times factually intensive, approach that is based on the perception of the consumer and the factual basis for the claim rather than on the intent of the marketer. Such an approach re-

quires a thorough analysis of the consumer’s circumstances. For example, the FTC advises marketers that it is insufficient to market a product as recyclable based only upon substantiation that all or substantially all portions of that product are, in fact, recyclable. Marketers must also determine whether a substantial majority (defined in this instance as 60 percent) of consumers in the areas where the product is sold have access to the types of facilities necessary to recycle such product. If this threshold is not met, such recyclability claims should be qualified. The FTC offers alternatives for qualifying language depending upon the level of recyclability access. A bottle for which recycling facilities are only available to 55 percent of consumers may be qualified by stating that this bottle “may not be recyclable in your area.” If the recycling facilities are only available to a small percentage of consumers, a recyclability claim may be qualified by stating that it “is recyclable only in the few communities that have appropriate recycling facilities.” For each of the specific environmental claims mentioned in the preceding paragraph, the Green Guides provide similarly useful direction.

In sum, the Green Guides provide companies with practical help on how to highlight the environmental benefits of products without running afoul of laws on deceptive advertising. The Green Guides are not, however, legally binding, and they should be considered in the context of underlying local, state and federal laws and regulations concerning marketing practices. For example, under California law, Cal. Bus. & Prof. Code Sections 17580-17581, marketers are required to maintain and provide to the public upon request documentation related to environmental marketing claims that support why the claim is true, any related significant adverse environmental impacts, measures taken to reduce environmental impacts, related violations of law, and whether, in certain circumstances, the claims conform to the standards set forth in FTC’s Green Guides. The Green Guides are a great resource for marketers and consumers alike, but are only the first step in ensuring that environmental marketing claims comply with applicable laws.

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