



VENABLE_{LLP}

An Overview of Green Claims Regulation

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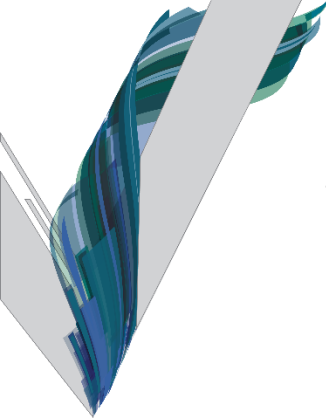
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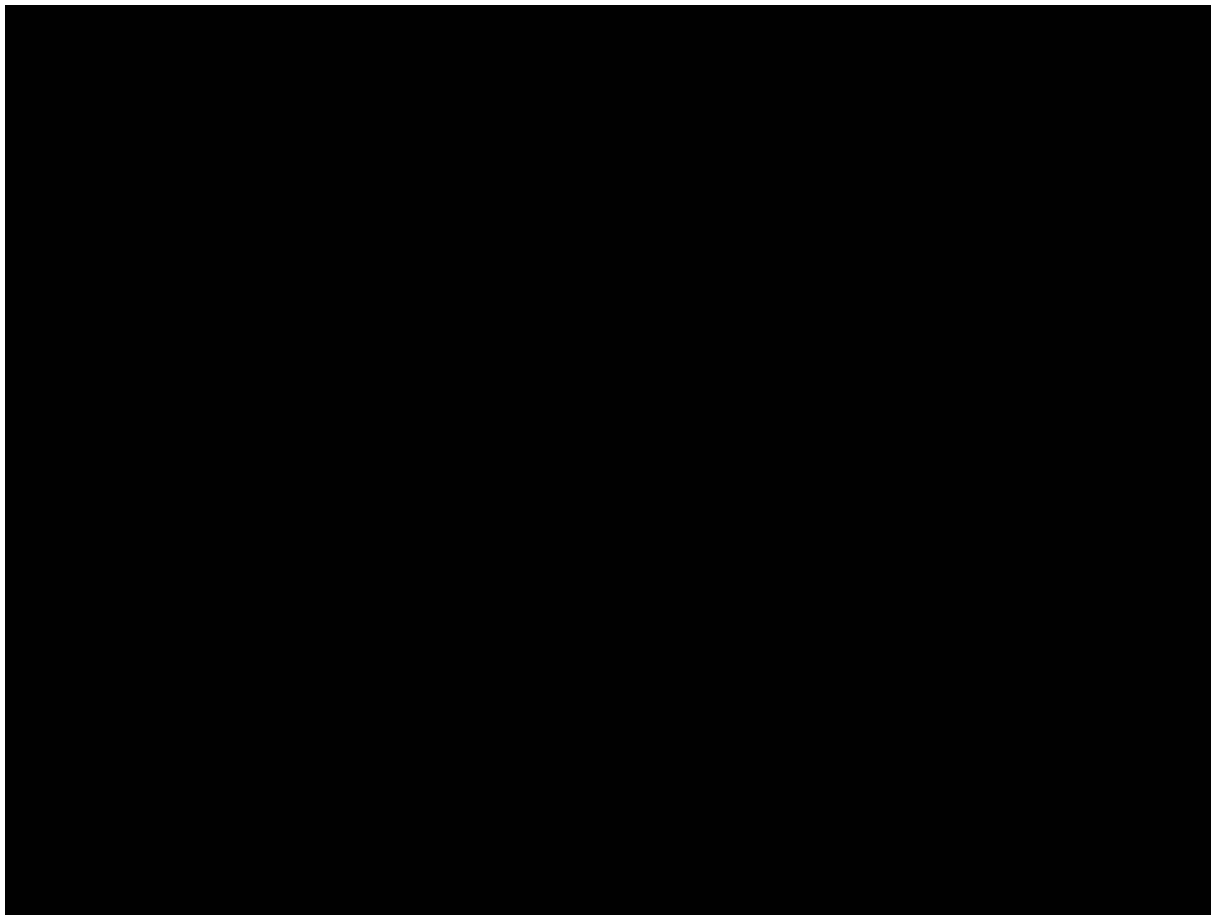
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The Green Police





Basis for Green Claims Law Enforcement

- Federal Trade Commission (FTC) enforces Section 5 of the FTC Act (15 USC 45)
- FTC Act prohibits deceptive or unfair marketing practices
- FTC has issued guides to help advertisers understand how the agency will interpret Section 5 in various settings
 - These Guides are not legally binding but rather reflect the agency's enforcement decisions/interpretations



Basis for Green Claims Law Enforcement

- FTC first issued Guides relating to the making of environmental advertising claims in 1992
 - Done in response to increasing state regulation
- Substantially revised in 2012
- Provides lots of helpful definitions and illustrations
- Note that FTC's job is not to create standards but rather interpret how consumers perceive various green terms such as recyclable and then enforce those meanings
- Violations of Section 5 as interpreted by the Green Guides can result in injunctions and/or consumer redress
- Most states have baby FTC Acts that track Section 5 and some permit class actions
- NAD, as will be discussed later, also self-regulates green advertising claims

Can You Spot the Environmental Issue?





Fiji Water Litigation

- Consumer filed suit in California state court alleging:
 - Green drop implied certification of environmental benefits by a third part
 - That product was environmentally superior to competitive products
 - Court dismissed case holding that no reasonable consumer could interpret drop in such a manner

Issue Spotter No. 2





Greenworks Wipes

- Product labeled as biodegradable
- Typically disposed of in garbage which then ends up in landfills
- Disclaimer noted that product will only biodegrade in compost piles
- Claims found to be misleading
- Disclaimer also placed on back of label



Issue Spotter No. 3





SC Johnson Greenlist

- Greenlist was a self-certification program
- Lawsuit filed alleging that it implied third party certification
- Also could be issue as to whether there is adequate disclosure of the criteria for certification



FTC's Views on Environmental Marketing Claims

- Undertook over Two Year Review of Guides for the Use of Environmental Marketing Claims
 - Workshops
 - Consumer Perception Surveys
- Announced Proposed Revisions in late 2012
 - Updated some current guidance
 - Added guidance on some new issues
 - Declined to provide guidance on other issues



Types of Green Claims Covered

- General Environmental Benefits
- Recyclable
- Recycled content
- Renewable
- Degradable, biodegradable, and photodegradable
- Source reduction
- Environmental Seals
- Carbon offset
- Free of





General Environmental Benefit Claims

- “Environmentally Friendly”; “Green”; “Eco-safe”
- Convey broad environmental benefits to consumers
- New Guides – “impossible” to substantiate
 - Must account for overall environmental impact of product
- Broad claims should be qualified
 - Identify the specific attribute to which the claim refers
 - *E.g.*, “Bottle uses 25% less plastic than before”



Seals of Approval

- FTC View – “Environmental seals-of-approval, eco-seals, and certifications from third-party organization are endorsements and must comply with endorsement guides (e.g. disclose materials connection)
- Also can imply that a product is environmentally superior to other products.
- To avoid this should be accompanied by information that explains the basis for the award
 - E.g. “for reduced greenhouse gas emissions”
 - But no obligation to disclose criteria used
- If you self-certify make sure that’s clear (Windex case)



Recyclable



- Product can be collected, separated, or recovered from the solid waste stream and used again
- Must be collected for recycling in a substantial majority of communities or by a substantial majority of consumers where product sold
 - Guides suggest 60% threshold for “substantial majority”
 - If only a “significant percentage” qualify claim (*e.g.* “This product may not be recyclable in your area”)
 - If even less than further qualify (“may not be recyclable”)
 - No guidance on how convenient location must be



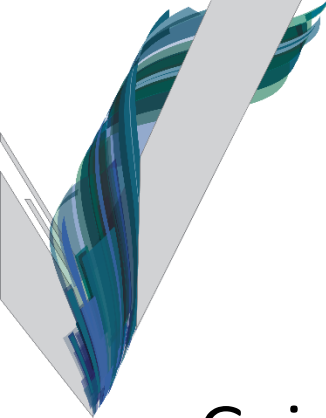
Biodegradable

- Most common environmental case brought by FTC
- Entire product or package will decompose into elements found in nature within a reasonably short period of time after customary disposal
- For solid waste, reasonably short period of time is one year
 - Will not happen in landfill so don't make unqualified claim
- No guidance on liquid waste
- Can you qualify biodegradable claim?
- Compostable
 - Same time as plant material



Free of

- True, but misleading, if product still has substances that pose same or similar risk to environment
 - We offset the carbon emissions from our cows so that our herd is “carbon free”
- Could falsely imply comparative superiority if substance has never been associated with product category
 - “CFC free baby wipes”
- But might sometimes provide useful information if competing against a product that does contain the substance
 - “Mercury-free steak”



New Guidance – Renewable Materials

- Guides propose disclosing what is the material, how is it sourced, why is it renewable
- Qualify if not wholly made with renewable materials (de minimis exception)



Made with Renewable Energy

- Means no power used to manufacture product comes from fossil fuels
 - Unclear if this includes distribution channels (delivery trucks)
- Specify source of renewable energy
- It's cheating if you generate renewable energy, sell it to someone else as a REC and then also claim you used it to make something



Carbon Offsets

- Need competent and reliable scientific evidence to calculate emissions and amount of offset
- FTC declined to provide guidance on a number of issues that they felt were largely scientific in nature or involved public policy, including what are legitimate offsets and how to calculate emissions
 - But went out on a limb and said don't sell the same offset twice
- Must disclose if will take two years or more to offset emissions (trees)
- Mostly declined to address additionality (would it have happened anyway) because still too much debate
 - But it doesn't count if the law requires you to do it
- Unclear whether you must offset supplier inputs



What the Guides Don't Address

- Natural
- Organic
- Sustainability



Legal Requirements and Greenwashing

- Legal Requirements and Positions advocated by Environmental proponents are not always the same
- Greenwashing has become a well-known term but not all greenwashing is necessarily unlawful
 - Sin of hidden trade-off
 - Lesser of two evils





Greenwashing, cont.

- Lesser of two evils
 - Advertising SUV as most fuel efficient in its class or a hybrid
- Some may view entire product category as environmentally undesirable
- However, not unlawful to advertise that specific brand has an environmental benefit
- Further, some products may be environmentally undesirable but necessary
 - Ability to advertise an environmental benefit products incentive to make product as environmentally friendly as possible



Greenwashing, cont.

- Sin of Hidden Trade-off
 - Paper from sustainable forest but consider bleaching, emissions, etc.
 - Sustainability claim isn't necessarily unlawful
 - FTC's position is that you can claim a specific environmental benefit without having to "confess" your other environmental sins
 - Much the same way that you market product on other attributes
 - Might say your product is the fastest without having to also say it is the most expensive
 - Exception is if the attribute is related – reduced carbon but increased methane emissions
 - Bottom Line – BP can advertise that it recycles paper on its offshore wells