An Overview of Green Claims Regulation

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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?

tiny drop of green
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