

Washington: Marketing Green

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Manufacturing Today, September 2009

The growth in green marketing is getting a lot of attention these days, especially from the Federal Trade Commission (FTC), the federal agency tasked with preventing unfair and deceptive trade practices. Mindful of potential false and misleading advertising, FTC has been revising its Guides for the Use of Environmental Marketing Claims, known as the “Green Guides.”

The FTC is focusing on issues surrounding carbon offsets, renewable energy certificates and environmental packaging claims, and is moving forward with its Green Guides as well as other efforts to revise the marketing claims. Green Guides as well as other efforts to revise the marketing claims.

Advertising Authority

While the FTC plays a prominent role in policing advertising claims, it is not the sole regulator. Many states have adopted laws similar to the Federal Trade Commission Act, which are enforced by state attorneys general (AG), who seek to prevent false and misleading advertising.

The FTC derives its authority to prevent unfair and deceptive trade practices from the Federal Trade Commission Act. Under it, all marketers that make express or implied claims about their products must have a reasonable basis for their claims. What constitutes a “reasonable basis” requires competent and reliable scientific evidence. The FTC has issued many rules and guides intended to enforce the provisions of the Federal Trade Commission Act, key among them are the Green Guides.

The Green Guides provide information on the interpretation of certain environmental marketing claims and guidelines for marketers aimed at preventing false or misleading product claims. Originally developed in 1992, the guides were last revised in 1998. They set forth some general principles with which all environmental marketing claims must comply.

These include: substantiation – marketers must substantiate claims under a “reasonable basis” test; qualification and disclosure – marketers must qualify claims where the claimed environmental attribute relates only to a portion of the product (i.e., packaging) if the claim would otherwise expressly or impliedly overstate the attribute or benefit; display of qualifying language – any qualification should be clear to prevent consumer deception; avoidance of overstated claims – marketers should avoid implications of significant environmental benefits if the benefit is negligible; and comparative statements – where marketing materials make explicit or implicit comparisons between the environmental attributes of different products, the materials should be clear to avoid consumer deception.

As for environmental claims, the Green Guides give particular attention to general claims such as “environmentally friendly,” “environmentally preferable,” “earth-smart,” “essentially non-toxic,” and related claims. Unqualified general claims of “environmental benefit” are, according to the

FTC, difficult to interpret and may convey a wide range of meanings to consumers, and are thus discouraged. The Green Guides also provide guidance regarding appropriate use of certain types of environmental claims that the FTC has identified during past regulatory efforts. Claims that use terms such as “degradable,” “biodegradable,” “photodegradable,” “compostable,” “recyclable,” “recycled content,” “source reduction,” “refillable,” “ozone safe,” and “ozone friendly” are specifically addressed.

In late 2007, the FTC announced that it was beginning a regulatory review of the Green Guides. In a related notice, the FTC announced that it would hold public workshops on several green marketing topics. The workshops were prompted by a request from the House Select Committee on Energy Independence and Global Warming, which asked the FTC to consider the potential for false marketing claims in carbon offsets trading, which is largely unregulated.

More recently, the FTC has initiated new proceedings on other aspects of the Green Guides.

State Consumer Protection Laws

Most states have enacted laws similar to the Federal Trade Commission Act, which are enforced by state AGs. The National Association of Attorneys General has long been active in the area of green claims.

In 1990, for example, a task force of 11 state attorneys general issued its Green Report and Green Report II, both of which offered recommendations for addressing the proliferation of green marketing claims. The FTC relied upon these recommendations when it issued the first Green Guides in 1992.

Next Steps/Key Issues

The FTC is reviewing the many comments it has received in connection with its public meetings on various aspects of the Green Guides. A few key issues are noted below:

- **Sustainability** - Many business entities express commitments to “sustainability.” The FTC might offer guidance on how to differentiate between product-specific claims for sustainability and corporate goals on sustainability, with the former likely to be subject within the Green Guides.
- **Carbon offsets** - In the FTC’s view, carbon offset and renewable energy certificate (REC) marketing activities raise important consumer protection issues. The FTC is not sure whether consumers know what they are actually buying, or how consumers may interpret express or implied claims about the environmental benefits from offsets and RECs. The FTC notes that substantiation of claims in the REC and carbon offset market poses challenges. For example, according to the FTC, methods used to track RECs and offsets through the market often involve many people and complicated facts. Marketers could inadvertently sell multiple certificates based on the same carbon reduction or renewable energy activity.

- **Green claims** - The FTC convened a public meeting on environmental packaging claims in April 2008. Among the topics discussed was the issue of defining terms like “recyclable,” “refillable,” “degradable,” and “bio-based.” It is widely agreed that these terms are used in many different ways and that greater clarity is needed so that consumers are not misled.
- **Third-party claims** - Among the many entities involved in this process are Energy Star (for energy efficiency), Green-e (for renewable energy and greenhouse gas reductions) and the Gold Standard (for carbon offsets). The FTC is evaluating the impact of these certifications on green claims and consumer understanding.

Word to the Wise

To avoid problems, marketers are urged to follow the Green Guides. Keep claims factual, avoid exaggeration and hyperbole, and if comparisons are to be made, ensure they are grounded in fact. When in doubt, seek legal review. Manufacturers should stay tuned to the developments noted above, watch the Federal Register for updates, and market their products in a way that reflects current guidelines.

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