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FTC Proposes Revised Green Marketing Guides

Introduction

On October 6, 2010, the Federal Trade Commission ("FTC") published a 225-page *Federal Register Notice* that proposed revisions to the *Guides for the Use of Environmental Marketing Claims* ("Guides"), 16 C.F.R. Part 260. The proposed revisions would clarify the guidance provided in the existing Guides and provide new guidance on certain "green" claims that are not addressed in the current Guides. The FTC is seeking public comment on the proposed changes as well as on the specific questions in its *Federal Register Notice* until December 10, 2010.

Some of the more significant changes to the Guides proposed by the FTC include an explicit statement that marketers should not make unqualified general claims that products are "green" or "earth-friendly," more specific advice on how marketers should qualify "recyclable" claims, and a new section on the use of certifications and seals of approval.

The proposed Guides also contain new guidance on "renewable materials" and "renewable energy" claims, as well as "carbon offset" claims. The proposed Guides do not address "sustainable," "natural," and "organic" claims.

While the Guides are not binding regulations, the FTC may bring enforcement actions under the FTC Act if a marketer makes an environmental claim that the agency believes is deceptive.

Proposed Revisions to Claims Currently Addressed in the Guides

General Environmental Benefit (e.g., "green," "earth-friendly"). The current Guides warn marketers that unqualified claims of general environment benefit may be deceptive. The proposed revised Guides take a stronger stand, stating that marketers "should not make" unqualified general environmental claims because "it is highly unlikely that marketers can substantiate all reasonable interpretation of these claims."

Marketers should use clear and prominent language to qualify general "green" claims to the specific and limited environmental benefits that marketers can substantiate. In addition, marketers should ensure that the advertisement's context does not imply more in the way of environmental benefits than the advertiser can deliver. (See proposed 16 C.F.R. Part 260.4.)

Certifications and Seals of Approval. The current Guides barely address certifications and seals of approval. The FTC is proposing to add a new section to the Guides devoted to this subject. That proposed new section cautions marketers not to use unqualified certifications or seals of approval – those that do not specify the basis for the certification or seal of approval – because they likely convey general environmental benefit claims. (As noted above, the FTC believes marketers are unlikely to be able to substantiate such claims.) Once again, qualifications should be clear and prominent and should convey that the certification applies only to a specific and limited benefit.

According to the new section, third-party certifications are endorsements that must comply with the FTC's Endorsement Guides. So if a marketer uses a certification from a trade association of which it is a dues-paying member in its advertising, it should disclose that "material connection." In addition, the use of a certification will likely imply that there has been an independent, third-party review, so the marketer must disclose if it has created the certification itself.

Finally, the Guides note that third-party certification does not eliminate a marketer's obligation to ensure that it has adequate substantiation for any claims conveyed by the mention of that certification. (See proposed 16 C.F.R. Part 260.6.)

Compostable. The proposal clarifies that the "timely manner" requirement in the current Guides for an unqualified "compostable" claim means that a product or package will break down in approximately the same time as the materials with which it is composted. Unqualified compostable claims should not be made unless governmental or institutional composting facilities are available to a "substantial majority" (at least 60%) of consumers or communities where the advertised product is sold. (See proposed 16 C.F.R. Part 260.7.)

Degradable. The Commission brought several cases challenging "degradable" claims this past year. The current Guides state that a marketer should qualify a "degradable," "biodegradable," or similar claim unless it can substantiate that the entire product or package will completely break down and return to nature within a "reasonably short period of time" after customary disposal. For solid products, the "reasonably short period of time" is defined as no more than one year after customary disposal. Marketers should not make unqualified

degradable claims for items destined for landfills, incinerators, or recycling facilities because complete decomposition will not occur in those locations within one year. (See proposed 16 C.F.R. Part 260.8.)

Free-of/Non-toxic. The current Guides address "free-of" and "non-toxic" claims only in examples and do not contain a section that specifically discusses such claims. Under the proposed revised Guides, claims that an item is free-of a substance, even if true, may be deceptive if (1) the item has substances that pose the same or similar environmental risk, or (2) the substance has never been present in or otherwise associated with the product category. Free-of claims may be appropriate even if an item contains a *de minimis* amount of a substance.

As to non-toxic claims, the FTC believes that consumers likely think that non-toxic claims apply both to humans and the environment. Marketers should be cautious when relying on regulatory standards as substantiation for non-toxic claims because some regulatory thresholds will not be consistent with consumer expectations. (For example, a standard relating to acute toxicity may not be sufficient to support a non-toxic claim if the substance may be toxic to humans or the environment over a longer time period.) (See proposed 16 C.F.R. Part 260.9.)

Ozone-Safe/Ozone-Friendly. The new proposal contains only minor modifications to the current Guides. A new example cautions marketers not to make "environmentally friendly" claims for non-ozone refrigerants because all current non-ozone refrigerants are greenhouse gases and also consume a substantial amount of energy. (See proposed 16 C.F.R. Part 260.10.)

Recyclable. The current Guides advise marketers to qualify "recyclable" claims if necessary to avoid deceiving consumers about the limited availability of recycling programs and collection sites. Whether a disclosure of the limited availability of recycling programs would be necessary depends on whether recycling facilities are available to (1) a substantial majority (once again, at least 60%) of consumers or communities, (2) a "significant percentage" but not a substantial majority or (3) less than a significant percentage. (The proposed revision does not define "significant percentage.")

An unqualified recyclable claim is fine where recycling is available to a substantial majority. Otherwise, the claim should be qualified – e.g., "This product may not be recyclable in your area." (The FTC believes that "positive" disclosures – e.g., "Check to see if recycling facilities exist in your area" – are usually not adequate.) (See proposed 16 C.F.R. Part 260.11.)

Recycled Content. The new proposal, like the current Guides, provide that marketers may make a "recycled content" claim for materials that have been diverted from the solid waste stream, either during the manufacturing process ("pre-consumer") or after sales to consumers ("post-consumer"). Spilled raw materials or scraps that are normally reused by the manufacturer do not constitute recycled content because they have not been diverted from the solid waste stream. (See proposed 16 C.F.R. Part 260.12.)

Proposed New Guidance for Claims Not Currently Addressed in the Guides

The FTC also proposes to update the Guides by addressing claims not included in the current Guides, such as "carbon offsets," "renewable energy," and "renewable materials."

Carbon Offsets. The FTC chose to tread lightly in this area, acknowledging its limited authority, the limited available data on consumer perceptions of such claims, and ongoing policy debates among experts in the field concerning the appropriate tests for offset claim substantiation.

The new section provides that sellers should have competent and reliable evidence to properly quantify claimed emission reductions and make sure that they do not sell the same reduction more than once. The proposed Guides also advise marketers to disclose if the offset purchase funds emission reductions that will not occur within two years and provide that marketers should not advertise a carbon offset, if the activity that produces the offset is already required by law.

Finally, the FTC warns marketers that basing carbon offset claims on the purchase of renewable energy certificates ("RECs") could result in the double counting of emission reductions. (See proposed 16 C.F.R. Part 260.5.)

Made with Renewable Energy. Marketers should not make an unqualified "made with renewable energy" claim if the power used to manufacture any of part of the product was generated by fossil fuels. Marketers that sell renewable energy certificates for all of the renewable energy they generate should not represent that they use renewable energy. (See proposed 16 C.F.R. Part 260.14.)

Made with Renewable Materials. The proposed new section advises that marketers should qualify a "made with renewable materials" claim with specific information about the renewable material (e.g., what it is, how it is sourced, and why it is renewable). Additionally, marketers should qualify renewable materials claims unless the item is made entirely with renewable materials (excluding minor, incidental components). (See proposed 16 C.F.R. Part 260.15.)

Conclusion

If approved by the FTC, the proposed revised Green Guides could transform current green marketing practices. The FTC is seeking public comment on the proposed changes as well as on the specific questions in its *Federal Register Notice* until December 10, 2010. For further information on the FTC's proposals and advice on how to support or oppose any or all parts of the proposed changes, please contact Venable's

Advertising and Marketing Group (Melissa Landau Steinman, Ian D. Volner or Gary D. Hailey) or Energy Practice Group (Elias B. Hinckley).

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