

Washington Watch

The Explosion of Green Marketing Claims: FTC Jumps into the Fray *Concerns about “greenwashing” grow as the environmental market expands*

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Most people would agree that “green” sells. For example, according to the *New York Times*, consumers spent approximately \$54 million in 2007 on carbon credits to support tree planting, wind farms, solar power generation, and other projects intended to offset greenhouse gas emissions created by driving and flying activities.

While there is broad agreement about the impact of green marketing, there is far less agreement on whether the majority of environmental marketing claims are accurate. According to a 2007 report by TerraChoice Environmental Marketing, Inc., most green marketing claims either are “demonstrably false” or “risk misleading intended audiences.”¹

The growth of environmental advertising has caught the attention of the Federal Trade Commission (FTC), the federal agency tasked with monitoring and preventing unfair and deceptive practices in the marketplace. Mindful of the potential for mischief arising from false and deceptive practices in environmental marketing, the FTC announced late last year that it plans to review its *Guides for the Use of Environmental Marketing Claims*, commonly known as the “Green Guides.” The Commission will focus especially on issues surrounding carbon offsets, renewable energy certificates, environmental packaging claims, and green building issues.

This “Washington Watch” column briefly reviews the TerraChoice report, and then discusses some of the legal issues surrounding the growing avalanche of green marketing claims, including FTC’s Green Guides and the Commission’s efforts to revise them.

TerraChoice Study of Green Marketing

According to TerraChoice, “[m]ore and more consumers expect to use their spending as an expression of their environmental commitment. More and more businesses are establishing environmental performance as a point of competitive distinction and social responsibility.”² The proliferation of green claims has, however, invited more than its share of concern about the credibility and inherent reliability of these assertions.

To assess their integrity, TerraChoice initiated a study last year of environmental claims regarding consumer products ranging from cleaning and personal care items to televisions and printers. Research teams were dispatched to six “big box” stores to identify and record green claims. The teams examined 1,018 consumer products bearing approximately 1,753 environmental claims.

The “Six Sins” of Environmental Marketing

According to the resulting TerraChoice report, of the many products examined, all but one made claims that were deemed to be false and/or misleading. Based on the nature of the environmental assertions made, TerraChoice identified six “sins” or categorical problems:

- claims that are not usually false, but that are used to create a “greener” product image than would be supported by a more complete environmental analysis;
- claims made without proof to substantiate them;
- claims that are inherently vague and are likely to be misunderstood by the public;
- claims that are irrelevant to their particular products;
- claims that are true, but that “distract” purchasers from a product’s real problems; and
- claims that are false (this category includes claims that misuse or misrepresent certification standards offered by independent authorities).

Difficulties in Evaluating Green Claims

Intuitively, consumers often may be able to differentiate claims that are inherently false and misleading from those that are credible and compelling. After all, consumers have been confronted with false and misleading claims since the beginning of recorded history.

As claims become more sophisticated, however, it may be increasingly challenging for consumers to distinguish the “puff” from the rock solid. This is likely to be particularly true with respect to environmental claims, given that few consumers have the expertise to judge assertions about carbon neutrality, recyclability, and product packaging.

Problems with False and Misleading Green Claims

According to TerraChoice, there may be identifiable adverse consequences that flow from the propagation of false, misleading, and/or spurious green marketing claims.

First, consumers may be misled by claims that lack support. Purchasers may be induced to purchase products claiming environmental benefits that simply are not there. Thus, the potential environmental benefit falsely offered by the mislabeled product is, according to TerraChoice, “squandered.”

Second, false claims offer competitive benefits and may siphon market share away from products offering legitimate benefits, thus “slowing the penetration of real environmental

innovation in the marketplace.”³

Finally, greenwashing may invite consumer cynicism and doubt about the integrity of all claims, real or false. This can diminish the positive impact of legitimate market-based innovation in promoting products that offer environmental value.

As discussed below, the FTC would appear to agree that mischief may arise from false and deceptive green advertising, leading the Commission to step into the fray.

Legal Authority over Advertising Claims

While the FTC may play the most prominent role in policing the lawfulness of advertising claims, it is not the sole regulator in this area. At the federal level, the U.S. Environmental Protection Agency (EPA) also has regulatory control over advertising rules specific to the marketing of pesticide products under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

In addition, many states have adopted laws, similar to the FTC Act, that aim to prevent false and misleading advertising. These laws typically are enforced by state attorneys general.

Federal Trade Commission Act

The FTC derives its authority to prevent unfair and deceptive trade practices from the Federal Trade Commission Act.⁴ Under the Act, all marketers that make express or implied claims about the attributes of their products must have a reasonable basis for their claims. What constitutes a “reasonable basis” is somewhat fluid, but it generally requires competent and reliable scientific evidence.

The Green Guides: Key Provisions

The Commission has issued many rules and guides intended to enforce the provisions of the FTC Act. Of key relevance here are the Commission’s *Guides for the Use of Environmental Marketing Claims* (the “Green Guides”).⁵

The Green Guides provide information on interpretation of certain environmental marketing claims and guidelines for marketers aimed at preventing false or misleading product claims. The Green Guides were originally developed in 1992 and last revised in 1998.⁶

The Green Guides set forth some general principles with which all environmental marketing claims must comply:

- **Substantiation:** Marketers must be able to substantiate claims under a “reasonable basis” test.
- **Qualification and disclosure:** Marketers must qualify and limit claims where the purported environmental attribute or benefit relates to only a

portion of the product (such as the packaging) if the claim would otherwise expressly or impliedly overstate the attribute or benefit.

- **Display of Qualifying Language:** Any qualification or disclosure should be sufficiently clear, prominent, and understandable to prevent consumer deception.
- **Avoidance of overstated claims:** Marketers should “avoid implications of significant environmental benefits if the benefit is in fact negligible.”
- **Comparative statements:** Where marketing materials make explicit or implicit comparisons between the environmental attributes of different products or processes, the materials should make the basis for the comparison sufficiently clear to avoid consumer deception.
- **General Environmental Claims:** The Guides give particular attention to general environmental claims, including terms such as “environmentally friendly,” “environmentally preferable,” “earth-smart,” “essentially non-toxic,” and related language. The Guides note that “[u]nqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers.” Specifically, the Guides make clear that “every express and material implied claim . . . about an objective quality, feature or attribute of a product or service must be substantiated” and qualified to prevent consumer deception and confusion.⁷

The Green Guides also provide more targeted guidance regarding appropriate and inappropriate 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.

Regulatory Review of the Green Guides

On November 27, 2007, the FTC announced that it was beginning a regulatory review of the Green Guides.⁸ The Commission requested comment on the Guides, including aspects such as the costs and benefits associated with the Guides, the effectiveness of the Guides, and specific topics such as claims relating to sustainability and renewability.

Carbon Offsets and Renewable Energy Certificates

In a related notice issued on the same day, the FTC announced that it would hold public workshops on several green marketing topics.⁹ The first workshop was convened on January 8, 2008, and addressed the marketing of carbon offsets and renewable energy certificates (RECs). According to the Commission,

[i]n general, carbon offsets are credits or certificates that represent the right to claim responsibility for greenhouse gas emission reductions In some cases, carbon offset sellers use the proceeds to purchase RECs By acquiring these greenhouse gas reduction credits, purchasers, including individuals and businesses, seek to reduce their “carbon footprints” or to make themselves “carbon neutral.”¹⁰

The workshop was prompted in part by a request from the House Select Committee on Energy Independence and Global Warming, which asked the Commission to consider the potential for false marketing claims in carbon offsets trading, which is largely unregulated.

RECs can play a role in certain mandatory energy-related programs. Some states, for example, require energy providers to purchase a minimum percentage of their electricity from renewable sources. Where offsets and RECs are not part of mandatory programs, they generally are offered, bought, and sold in a voluntary market. It is these voluntary measures that are the focus of the FTC Green Guide review effort.

In the absence of mandatory standards governing carbon offsets and RECs, several voluntary third-party certification programs have arisen, and many more are under development. The January 8 public workshop was intended to focus specifically on these voluntary programs, as well as on other issues pertinent to carbon offsets and RECs, including consumer perception, substantiation of claims, and self-regulation.

Packaging and Green Building

More recently, the FTC has initiated new proceedings on other aspects of the Green Guides. In March, the Commission announced a public workshop on *Guides for the Use of Environmental Market Claims: The Green Guides and Packaging*.¹¹ In June, the FTC announced another public workshop, on *Guides for the Use of Environmental Marketing Claims: Green Building and Textiles*.¹²

The Commission is currently reviewing the many comments it has received since initiating its regulatory review of the Green Guides, and is expected to issue revised guidance in the future.

FIFRA Regulation of Advertising Claims

Advertising claims are very much a part of pesticide regulation in the United States, and have been for years. FIFRA, the federal law that governs the manufacture and sale of pesticide products, prohibits the sale or distribution of “any registered pesticide if any claims made for it as part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration.”¹³

By regulation, EPA has stated that it interprets this provision “as extending to advertisements in any advertising medium to which pesticide users or the general public have access.”¹⁴ Under this regulation, advertisements would be considered part of the distribution and

sale of a pesticide. Accordingly, any claims made in advertisements must be consistent with the pesticide's registered label and with other materials submitted to EPA as part of the pesticide's registration.

In addition, to the extent that advertisements and other related documents might be considered "labeling," they could be in violation of FIFRA's Section 12(a)(1)(E) "misbranding" provision if they bear "any statement . . . which is false or misleading."¹⁵ FIFRA Section 2(p)(2)(A) defines "labeling" to include "all labels and all other written, printed, or graphic matter . . . accompanying the pesticide or device at any time."¹⁶

Courts have reached different conclusions regarding what materials are considered to "accompany" a product, and thus constitute labeling. Even if a press release or other advertising material were not considered labeling, however, under EPA's regulations, such advertising would be subject to the FIFRA prohibition on selling or distributing any pesticide with claims that differ from the pesticide's registration statements.

EPA Enforcement Action

Using pesticide promotional documents that are not consistent with approved labeling and other registration statements can give rise to EPA enforcement action under FIFRA. For example, in one case, an EPA administrative law judge assessed a penalty against a registrant for delivering "false and misleading" promotional materials to a hospital where its pesticide disinfectant products were present or being used. The judge found that statements in the promotional materials were "claims" within the meaning of FIFRA. Moreover, the judge determined that these claims were part of the "distribution and sale" of the products because a presumption exists that claims are made to induce product purchase and use.

Definition of "False and Misleading" Statements

In its labeling regulations, 40 C.F.R. section 156.10(a)(5), EPA offers guidance as to the types of statements that will be considered false and misleading for purposes of the FIFRA misbranding provision.¹⁷ These include, among others:

- false or misleading statements concerning the composition of the product;
- false or misleading statements concerning the effectiveness of the product as a pesticide or device;¹⁸
- false or misleading comparisons with other pesticides or devices;
- statements directly or indirectly implying that the pesticide or device is recommended or endorsed by any agency of the federal government;
- true statements used in such a way as to give a false or misleading impression to the purchaser;

- label disclaimers that negate or detract from labeling statements required under FIFRA and EPA regulations;
- claims about the safety of the pesticide or its ingredients, including statements such as “safe,” “nonpoisonous,” “noninjurious,” “harmless,” or “nontoxic to humans and pets,” with or without a qualifying phrase such as “when used as directed”;¹⁹ and
- non-numerical and/or comparative statements about the safety of the product, including but not limited to “contains all natural ingredients,” “among the least toxic chemicals known,” and “pollution approved.”

While this guidance is provided in the context of labeling, EPA likely would consider any advertising statement that falls into one of the above categories as “false or misleading” for enforcement purposes.

FTC Jurisdiction over Pesticide Advertising

The FTC also has jurisdiction over impermissible claims made in advertising materials for pesticide products. As an example of such claims, an administrative law judge offered the following:

A lawn care pesticide is advertised as “*essentially non-toxic*” and “*practically non-toxic.*” Consumers would likely interpret these claims in the context of such a product as applying not only to human health effects but also to the product’s environmental effects. Since the claims would likely convey to consumers that the product does not pose any risk to humans or the environment, if the pesticide in fact poses a significant risk to humans or environment, the claims would be deceptive.²⁰

In one instance, FTC prohibited Orkin Exterminating Company from

representing that the pesticides it uses in its residential lawn care services, when used as directed in such services, are as safe or safer than common household products such as suntan lotion and shaving cream, and that the pesticides used in its residential lawn care services, when used as directed in such services, are *practically non-toxic and do not pose any significant risk to human health or the environment*, unless respondent has a reasonable basis, consisting of competent and reliable scientific evidence that substantiates the representation, at the time the claims are made.²¹

State Consumer Protection Laws

Most states have enacted laws similar to the Federal Trade Commission Act. These laws authorize state attorneys general to challenge false and deceptive environmental marketing claims and allow them to bring enforcement actions for false, deceptive, and unsubstantiated

claims.

The National Association of Attorneys General has long been active in the area of green claims. In 1990, for example, a task force of eleven 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.

Advertising Self-Regulation

Some non-regulatory initiatives are also worth noting here. The advertising industry has long been at the forefront of self-regulation. Among the key players in this industry effort are the National Advertising Division of the Council of Better Business Bureaus and the National Advertising Review Board. These entities monitor compliance with the Green Guides and report non-compliance to the FTC for possible enforcement action.

Key Issues and Next Steps

As noted above, the FTC is reviewing the many comments it has received over the course of the past several months in connection with its public meetings on various aspects of the Green Guides. A few key issues -- among the many the Commission is addressing -- are noted below.

Sustainability Claims

Many corporations and other business entities now express commitments to “sustainability.” To the extent that products (as opposed to corporations), make sustainability claims, the FTC is likely to step in. The Commission 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 to the Green Guides.

Carbon Neutrality

In the FTC’s view, carbon offset and REC marketing activities raise important consumer protection issues. The Commission 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.

Similarly, the FTC is concerned that consumers may assume their offset purchases are creating reductions in greenhouse gas emissions beyond those that would have occurred without offsets, and that consumers may believe reductions occur more rapidly than they actually do.

Finally, the Commission 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.

The Green Guides may be revised specifically to address these and related issues.

Packaging Claims

The FTC convened a public meeting on environmental packaging claims on April 30, 2008. Among the topics discussed (and on which comment has been submitted) is 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 Certifications

Another issue commanding significant FTC attention is the growth of third-party certification. 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 Commission is seeking to evaluate the impact of these certifications on green claims and consumer understanding. It is generally agreed that there is a place for third-party certifications -- and possibly an important role. But many questions have arisen regarding the disparate standards used by these various organizations in certifying products.

Conclusion

Green marketing is here to stay, and green claims will continue to proliferate. The FTC is committed to ensuring that green claims are not false or deceptive, and that such claims help to fulfill their laudable environmental goals.

Given the significant amount of marketing clout that green claims command, it is clear that the FTC (and related federal, state, and private entities) will have their hands full for the foreseeable future.

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Notes

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- ¹ TerraChoice Environmental Marketing (2007, November). The six sins of greenwashing:TM A study of environmental claims in North American consumer markets, at 1. Available online at <http://www.terrachoice.com/Home/Six%20Sins%20of%20Greenwashing/The%20Six%20Sins>.
- ² *Ibid.* at 8.
- ³ *Ibid.* at 1.
- ⁴ 15 U.S.C §§ 41-58.
- ⁵ Codified at 16 C.F.R. part 260. Available online at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=b2333ddf96abf25788ef3037ffcfb40a&tpl=/ecfrbrowse/Title16/16cfr260_main_02.tpl
- ⁶ *See, e.g.*, Federal Trade Commission (1998, May 1). Guides for the use of environmental marketing claims; final revised guides, 63 Fed. Reg. 24240.
- ⁷ 16 C.F.R. §§ 260.5-260.7.
- ⁸ 72 Fed. Reg. 66091 (November 27, 2007).
- ⁹ *Ibid.* at 66096.
- ¹⁰ *Ibid.* at 66095.
- ¹¹ 73 Fed. Reg. 11371 (March 3, 2008).
- ¹² 73 Fed. Reg. 32662 (June 10, 2008).
- ¹³ FIFRA § 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B).
- ¹⁴ 40 C.F.R. § 168.22(a). EPA has defined advertising to include (1) brochures, pamphlets, circulars, and similar material offered to purchasers at the point of sale or by direct mail; (2) newspapers, magazines, newsletters, and other material in circulation or available to the public; (3) advertisements on broadcast media, such as radio and television; (4) telephone advertising; and (5) billboards and posters. 53 Fed. Reg. 15952, 15987 (May 4, 1988). In defining its authority under FIFRA Section 12(a)(1)(B) and other provisions, however, EPA has expansively noted that its jurisdiction over advertising extends to any claims made to induce the sale and use of a pesticide. 54 Fed. Reg. 1122, 1124 (January

11, 1989).

15 FIFRA § 2(q)(1)(A), 7 U.S.C. § 136(q)(1)(A).

16 FIFRA § 2(p)(2)(A), 7 U.S.C. § 136(p)(2)(A).

17 40 C.F.R. § 156.10(a)(5). *See also*: EPA Office of Pesticide Programs (1998). Label review manual (Chapter 12, General Claims).

18 *See, e.g.*, In the Matter of Elec. Exterminators, Inc., Docket No. I.F.& R. IV-384-c, 1981 FIFRA LEXIS 8 (Mar. 31, 1981), where the administrative law judge (ALJ) assessed a penalty for misbranding against a registrant for the sale of a device that failed to control effectively mice, rats, and roaches, contrary to its label claim.

19 *See, e.g.*, In the Matter of Mid-American Research Chem. Corp., I.F.& R Docket No. VII-261C, 1977 FIFRA LEXIS 49 (March 27, 1977), where the ALJ found that the statements “safe” and “EPA approved” on literature used to promote the sale of a product were labeling within the meaning of EPA regulations, and that these statements were false and misleading because they were not approved by EPA in connection with the registration of the product.

20 *Id.* (emphasis added).

21 58 Fed. Reg. 19444, 19446 (April 14, 1993) (emphasis added).