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CHAPTER 3

Green Claims Advertising: What You Can Say and What You Can't

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NOTES

CHAPTER 3

GREEN CLAIMS ADVERTISING: WHAT YOU CAN SAY AND WHAT YOU CAN'T

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I. INTRODUCTION

Everyone is climbing on the “green” bandwagon. Green claims in advertising have exploded. Before you sign on for this ride, you need to know the ground rules.

Many green claims are not substantiated, are vague or unqualified, or are just plain misleading. As a result, the Federal Trade Commission (the FTC), which regulates unfair or deceptive advertising nationally, has focused its attention on and stepped up enforcement efforts against such advertising. Most important, it has issued guidelines on green advertising in its publication *Complying with the Environmental Marketing Guides* (the *Guides*). The *Guides* do not have the force of law and are not binding on the FTC. Rather, they set forth the FTC staff’s position with respect to what constitutes, in the context of green claims, an unfair or deceptive act or practice under section 5 of the FTC Act. State attorneys general are also active in this area, enforcing state unlawful trade practice acts and rules issued under such acts, and foreign governments are beginning to regulate green claims as well.

II. THE FTC GUIDES

Here are the key points, as set forth in the *Guides*, with respect to green advertising:

A. Substantiation

The FTC takes the position that there must be substantiation for all advertising claims, particularly green claims, and that this substantiation must have existed at the time the claim was made. The FTC’s opinion (several courts have disavowed this principle) is that even if a claim was truthful, it is deceptive if substantiation did not exist at the time the claim was made. 16 C.F.R. § 260.5 states that “any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product, package or service must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim.”

B. What Constitutes Substantiation?

Substantiation means “competent and reliable evidence.” The *Guides* state that this often requires scientific evidence or test or research data. Relying on generalized knowledge or assumptions won’t work. In the context of environmental marketing claims, “such substantiation will often require competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.” 16 C.F.R. § 260.5.

C. Specificity

The broader or more general the claim, the more likely it is to be deceptive. “Specific environmental claims are easier to substantiate than general claims and less likely to be deceptive. An unqualified general claim of environmental benefit may convey that the product has far-reaching environmental benefits, when it doesn’t.” *Guides* p. 4. For instance, if a product is advertised as being “RECYCLABLE,” the claim will be deceptive unless every component of the product and its packaging is recyclable. Similarly, unqualified claims that a product is “eco-friendly,” or other general green claims, are likely to be deceptive because of lack of specificity or qualification.

D. Qualification

Most green claims will need to be qualified. That means additional text in the advertising. Qualifications must be “clear, prominent, and understandable.” 16 C.F.R. § 260.6(a). If the claim appears prominently on the front of the product, the qualifications cannot appear in fine print on the back of the product, according to the FTC. The FTC gives this example: A paper box containing a product says “RECYCLED” prominently on the front of the box. In small print on the back of the box is the explanation, “This carton contains 100% recycled fiber.” The FTC maintains this is deceptive because the word “recycled” on the front of the box will cause consumers to think that the entire product, not just the box, was made from recycled content. *Guides* p. 4.

E. Comparative Claims

Comparative environmental claims should be clear about what is being compared. A claim that a product has “50% more recycled content” is deceptive, because it is not clear whether the comparison is to an earlier version of the same product or to a competitor’s product.

F. Overstatements and Materiality

Environmental claims often mislead by overstating benefits or failing to disclose materiality. The claim may be literally true but still misleading. The FTC used the example of an ad that says “50% more recycled content than before,” in which the manufacturer increased the recycled content from 2 percent recycled material to 3 percent recycled material. This claim is technically accurate, but misleading, because consumers will assume that the use of recycled material was increased significantly. *Guides* p. 4.

G. Implied Claims

Advertisers often attempt to get on the green bandwagon by suggesting in some indirect way that their products are eco-friendly. This is often done through use of a symbol or photograph, such as a drawing of the earth or a picture of a green setting. To the extent that such uses imply a broad or vague claim of green or eco-friendly attributes, explanatory or qualifying text may be necessary to keep the claim from being deceptive.

H. Certifications

Certifications or eco-seals, or advertisement of compliance with any set of environmental or green standards, should be accompanied by information that explains the significance of the certification or the basis for the seal of approval. If the claim implies that a third party has

certified the product (which would be true for almost all certification- or seal-type claims), the certifying party must be “independent from the advertiser and must have professional expertise in the area that is being certified.” *Guides* p. 6.

I. Use of “Biodegradable”

The FTC takes a tough position on use of the term “biodegradable,” at least for products that are normally disposed of as garbage going to a landfill. “Biodegradable” means that the material “will break down and return to nature within a reasonably short time after customary disposal.” *Guides* p. 6. Products taken to landfills do not break down within a reasonably short period of time, according to the FTC.

J. Use of “Recyclable”

“RECYCLABLE” means that the products can be collected, separated, or recovered from the solid waste stream and used again, which is true for an established recycling program. Any recycling claim should make clear whether it refers to the product, the package, or both. Unless the claim is qualified, the FTC takes the position that the product “must be collected for recycling in a substantial majority of communities or by a substantial majority of consumers where the product is sold.” *Guides* p. 8. Many products do not meet this standard.

K. “Please Recycle” Claims

The FTC treats this phrase as meaning “the product or package is ‘recyclable.’” *Guides* p. 9. The same guidelines for making “recyclable” claims apply in this case.

L. Use of “Compostable”

A claim that a product is “compostable” means that a product or its package “will break down, or become part of usable compost (for example, soil-conditioning material or mulch), in a safe and timely manner in home compost piles.” According to the FTC, “a timely manner” is the time it takes organic compounds, such as leaves, grass and foods, to turn into usable compost. If something is compostable only in municipal or institutional composting facilities, that must be disclosed as part of the claim. *Guides* p. 7.

M. Use of “Non-Toxic”

A product advertised as “non-toxic” is interpreted by consumers to mean “that the toxicity claims apply not only to human health effects, but also to environmental effects. If a product poses a significant risk to humans or to the environment, a non-toxic type of claim would be deceptive.” *Guides* p. 5.

N. Use of “Environmentally Preferable”

According to the FTC, a product advertised as “environmentally preferable” is likely to be interpreted by consumers as superior to other products. Such a claim would be deceptive if it cannot be substantiated. The claim would not be deceptive only if “accompanied by clear and prominent qualifying language that limits the environmental superiority representation to the particular product attribute that can be substantiated, provided that the context does not create any other deceptive implications.” *Guides* p. 5.

O. Use of the Universal Recycling Symbol

This is sometimes referred to as the “three chasing arrows” or “Möbius loop” symbol¹. It is used to communicate both “recyclable” and “recycled.” Unless both claims can be substantiated, qualifying language will be needed. If “recycled” is intended, and the packaging or product is not made entirely from recycled material, the label should disclose the percentage of recycled content.

P. Other Claims

The *Guides* discuss restrictions on use of other claims, such as “environmentally preferable,” “environmentally safe,” “non-toxic,” “photodegradable,” “compostable,” and “ozone friendly.” *Guides* pp. 5-7, 14.

Q. Use of the Word “Green”

The *Guides* contain no discussion of the use of the word “green” in connection with environmental advertising. Use of the word “green” will be subject to the guidance on use of general, vague, or broad environmental claims, meaning that explanatory language or qualifications may be needed to avoid deception.

III. STATE REGULATION

Although the FTC has led the charge against deceptive green advertising claims, states are active as well and are likely to be a principal source of statutes and regulations in this field, especially if the FTC continues to offer only “guidelines” and not a green advertising trade regulation rule. Obviously, state regulation raises the possibility of conflicting regulations in various states and difficulty in clearing a national advertising campaign.

A good example of a good broad state statute is section 17,580(a) of the California Business and Professions Code, which reads as follows:

(a) Any person who represents in advertising or on the label or container of a consumer good that the consumer good that it manufactures or distributes is not harmful to, or is beneficial to, the natural environment, through the use of such terms as “environmental choice,” “ecologically friendly,” “earth friendly,” “environmentally friendly,” “ecologically sound,” “environmentally sound,” “environmentally safe,” “ecologically safe,” “environmentally lite,” “green product,” or any other like term, shall maintain in written form in its records the following information and documentation supporting the validity of the representation:

- (1) The reasons why the person believes the representation to be true.
- (2) Any significant adverse environmental impacts directly associated with the production, distribution, use, and disposal of the consumer good.



(3) Any measures that are taken by the person to reduce the environmental impacts directly associated with the production, distribution, and disposal of the consumer good.

(4) Violations of any federal, state, or local permits directly associated with the production or distribution of the consumer good.

(5) Whether or not, if applicable, the consumer good conforms with the uniform standards contained in the Federal Trade Commission Guidelines for Environmental Marketing Claims for the use of the terms “recycled,” “recyclable,” “biodegradable,” “photodegradable,” or “ozone friendly.”

Interestingly, the California legislature went even further than just regulating the specified terms. It called on all other states to adopt guidelines similar to those put out by the FTC. Section 1 of Senate Bill 426, passed in 1995, provides:

The Legislature finds and declares that it is the public policy of the state that environmental marketing claims, whether explicit or implied, must be substantiated by competent and reliable evidence to prevent deceiving or misleading consumers about the environmental impact of products and packages. Accurate and useful information about the environmental impact of products and packages will not be available to consumers unless uniform standards for environmental marketing claims, such as the Federal Trade Commission Guidelines for Environmental Marketing Claims, are adopted by the various states.

IV. FOREIGN REGULATION

Although the United States has largely pioneered the green movement, and the consequent regulation of green advertising, foreign governments will be active in this field as well, and if recent history is any example, laws and regulations in the European Union are likely to be even more stringent than in the United States. This means that products destined for overseas will be subject to yet another layer of clearance with respect to any green claims.

An example of green advertising regulation in Europe is Norway’s adoption in September 2007 of guidelines that prohibit use of the word “green” (or “environmentally friendly,” “clean” or other general environmental terms) in connection with marketing cars. Such claims were made by most of the major car manufacturers and judged by Norway to be misleading and apparently not subject to remedy by qualification or specificity. Norway’s state-run advertising watchdog agency apparently concluded that there is nothing “green” or “environmentally friendly” about automobiles. Car manufacturers risk fines if they use any of the prohibited terms in advertising in Norway.

V. CONCLUSION

Surveys show that over 90 percent of Americans are willing to pay more for products that are environmentally benign². Reacting to this heightened environmental consciousness, companies are now moving rapidly to position themselves and their products and services as green or having laudable environmental attributes. Many of these claims are unsupportable or misleading. Governments are moving to regulate such claims. Understanding and complying with the resulting complex matrix of federal, state, local and foreign statutes, regulations and guidelines will be increasingly important for companies making green claims. The lesson of all this: Get advice before advertising goods or services as being green or having environmental benefits. Failure to comply with applicable laws and regulations could torpedo an ad campaign and result in costly litigation, fines, and statutory damages.

² Ciannat M. Howett, *The "Green Labeling" Phenomenon: Problems and Trends in the Regulation of Environmental Product Claims*, 11 VA. ENVTL. L.J. 401, 401 (1991-92).