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A Proliferation Of “Green” Claims Leads The FTC To Consider Updates To Its “Green Guides” – Taking A Closer Look At “Eco-Friendly,” “Carbon Neutral” and Other Terms

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What does a company mean by a statement that its product is “carbon neutral”? Or that its product is manufactured using “environmentally sustainable” practices? Or that it has reduced its “carbon footprint”? These, and a proliferation of similar green marketing claims, have caused the Federal Trade Commission (FTC or Commission) to begin the process of updating its environmental marketing guidelines, commonly known as

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the Green Guides (16 C.F.R. Part 260), at least one year earlier than expected.

On November 27, 2007 (72 *Fed. Reg.* 66091), the FTC announced that it was initiating a series of workshops to determine whether updates to its Green Guides were warranted. The FTC held an initial hearing on January 8, 2008, in Washington, D.C., taking testimony on the issue of carbon offsets and renewable energy certificates (RECs). The FTC accepted written comments on these topics until February 11. The FTC has just announced a second workshop on green packaging claims, to be held on April 30, 2008, in Washington, D.C. (73 *Fed. Reg.* 11,371). Comments on green packaging claims will be accepted until May 19, 2008. Additional hearings on other aspects of the Green Guides may be held in other parts of the country later this year.

The Green Guides were first published by the FTC in 1992 and later updated in 1998. The Guides were issued pursuant to Section 5 of the FTC Act, which prohibits unfair or deceptive trade practices. The Guides are intended to protect consumers from unfair and deceptive claims and to create a level playing field among business competitors.

Substantiating Green Marketing Claims

An environmental marketing claim includes any statement, symbol or graphic that refers to an environmental aspect of a product, component or product packaging,



Amy L. Edwards

which is made on the product, product packaging, in product literature, or in advertisements. Green marketing may involve environmental attribute claims, environmental preferability claims, or sustainability claims. Any environmental marketing claim *must be supported by competent and reliable scientific evidence* (16 C.F.R. 260.5). The disclosure must be *clear, prominent and understandable* and *should not overstate* the environmental benefit or attribute (16 C.F.R. 260.6(a), (c)). The existing Green Guides provide “safe harbor” examples of acceptable claims for products or services relying on terms such as recyclable, containing recycled content, biodegradable, compostable or ozone friendly.

More than 70 sets of comments were submitted in response to the Commission’s initial notice. In general, these comments affirmed the continuing need for the Green Guides and confirmed that the fundamental principles in the Guides remain sound. Several companies stated that they had used the Guides to police the marketplace by putting their competitors on notice that they were using unfair and deceptive marketing claims. Several cited studies that show that consumers base their purchasing decisions, at least in part, on the perceived impact of those choices on the environment. Given the explosion in new types of “green” claims, most of the commentators felt that additional examples in the Guides would be helpful. Several commentators urged that the principles beneath the existing examples be explained more clearly so that the principles could be extrapolated to new fact patterns.¹ Some commentators suggested that the role of independent, third-party certification or

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accreditation organizations be recognized more clearly, so that if a claim is based upon the standards set by that third-party accreditation or certification organization, the marketing claim should be presumed to *not* be misleading.² Other commentators felt that there were too many organizations (governmental, public interest and others) trying to certify or accredit environmental claims, and urged the FTC to declare its preemptive role in this field.³ Some expressed concern about qualified general environmental marketing claims, feeling that this was a “loophole” that allowed companies to promote selectively an incomplete picture of just the positive environmental attributes of their product.⁴ All of the commentators seemed to concur that the FTC should have no role in actually setting environmental standards. Many of the companies and trade associations filing comments urged more educational outreach and enforcement by the FTC.

In their written comments, several companies requested updated guidance in the following areas:

- general claims of environmental benefit without the inclusion of clear qualifying language
- misleading “X free” or “contains no X” claims, particularly when those claims implied some type of health benefit
- “reduced carbon footprint” or “carbon neutral” type claims
- “renewable” claims
- other claims, such as “natural,” “green,” “eco-friendly,” “climate friendly,” “renewable,” “recovered energy,” “reduced resource use,” “waste reduction,” “reclaimed material,” “energy efficient” and “non-toxic”
- environmental seals and logos

Many companies and trade associations cautioned the Commission to proceed slowly in certain areas, such as in addressing “sustainability” claims,⁵ but added that further guidance would be helpful. Sustainability claims are broad claims that involve environmental, economic and social considerations. The Dow Chemical Company (Dow), the Vinyl Institute and the Formaldehyde Council, Inc. (FCI) argued that sustainability claims are similar to “environmentally preferable” or “general environmental benefits” claims, and should be subject to the same disclosure and substantiation claims currently described in Section 260.7(a) of the Guides. Dow and FCI encouraged the FTC to limit its efforts to the environmental aspects of sustainability claims. They pointed out that the marketplace is increasingly asking for “environmentally preferable” products,⁶ so there is a need to have some consistency in what this term means. Several commentators, including the American Chemistry Council, FCI, The Soap and

Detergent Association, and Consumer Specialty Products Association, encouraged evaluation and potential incorporation of international standards, such as ISO 14040 on life cycle analysis, to allow consumers to make more informed decisions about the environmental attributes of a product throughout its existence. They also encouraged the FTC to evaluate other existing international standards, such as ISO 14021 on environmental marketing claims (while at the same time urging that 14021’s prohibition on sustainability claims be rejected as being outdated). They pointed out that other private organizations are also developing standards to measure sustainability, such as the World Business Council on Sustainable Development, the Global Reporting Initiative and the Dow Jones Sustainability Indexes.

Voluntary Carbon Offsets

At the January hearing, the FTC focused on the issue of voluntary carbon offsets and whether RECs may be used to support carbon offset claims. According to some sources, the voluntary carbon offset market was a \$91 million market in 2006. People are willing to pay for reductions in greenhouse gas emissions, which reductions are considered to be a public good, as an alternative to reducing their own greenhouse gas emissions. Nevertheless, environmentalists and others have expressed concern that voluntary carbon offsets must be *real*; *surplus*; *permanent*; *verifiable*; and *enforceable*. In particular, commentators focused on the questions of additionality and going beyond business as usual (BAU).⁷ Some commentators have expressed concern that the voluntary offsets market will collapse if consumers do not feel that they are receiving credible information about the quality of the offsets they are purchasing.⁸

A recent example of this concern was reflected in an article in *The Washington Post* on January 28, 2008. This article described the fact that the U.S. House of Representatives had spent \$89,000 on carbon offsets to reduce its greenhouse gas emissions as part of its Green Capital Initiative. The offset money was spent to encourage “no till” farming in North Dakota, to pay for a pilot project involving the burning of switch grass at a power plant in Iowa and to pay for the planting of trees on tribal land in Idaho. Questions were raised whether most of these activities would have happened anyway (*i.e.*, no additionality) without the offset money.

Several experts have stated that a credible offset trading system must address three primary concerns:

1) it needs common and credible procedures, such as accounting standards;

2) it needs monitoring and verification standards to verify that reductions have occurred as claimed;

3) it needs contractual and tracking standards, so that the property rights to the offsets are unambiguous and tracked.

There are a plethora of certification organizations and voluntary carbon offset standards in use at the present time, but it is not clear whether any of these organizations or standards is achieving each of the three critical elements identified above. It has been reported that some foreign countries, notably the United Kingdom, Belgium and Norway, have taken enforcement actions against companies which they believe are engaged in deceptive green advertising (also known as “greenwashing”).⁹

Once it has had an opportunity to obtain more feedback from consumers and the regulated community, the FTC is expected to issue updated guidance on green marketing claims. The updated Green Guides should be helpful in minimizing consumer confusion and leveling the playing field for companies claiming that their products or services are “carbon neutral,” “environmentally preferable,” “sustainable,” or “renewable.”

¹ See, e.g., the comments of Dow Chemical Company, p. 3.

² The American Chemistry Council, Dow, Center for Resource Solutions, Anadarko Petroleum Corporation, Carbonfund.org and Formaldehyde Council, Inc. were generally supportive of recognizing the role of independent, third-party accreditation or certification organizations.

³ North American Insulation Manufacturers Association and Saint-Gobain Corporation urged the FTC to assert a preemptive role, asserting that these competing and conflicting standards cause confusion.

⁴ See comments of GreenBlue, p. 2.

⁵ The concept of sustainability began in 1987 with the publication of the Brundtland Report. According to the EPA, sustainability means “meeting the needs of the present without compromising the ability of future generations to meet their own needs.” See <<http://www.epa.gov/sustainability/>>

⁶ The federal government, pursuant to Executive Order 13,423 (72 Fed.Reg. 3919), is encouraged to acquire goods and services that use sustainable environmental practices.

⁷ Anadarko Petroleum Corporation and Exelon Corporation submitted extensive written comments discussing additionality and related issues and urged the Commission to proceed cautiously in developing any additional guidance in this area.

⁸ See the comments (pp. 1-2) of the State of New Jersey, Department of Environmental Protection, which opined that “there is a serious risk of the current voluntary market collapsing due to a lack of standards, policing and credibility. The guidelines must assure the consumer that they are purchasing real, quantifiable and surplus (additionality) carbon reduction offsets.”

⁹ TerraChoice Environmental Marketing, Inc., “The Six Sins of Greenwashing,” available at www.terrachoice.com/Home/Greenwashing/The%20Six%20Sins.> Those who refute these charges argue that there currently are no objective standards for evaluating whether a company, as a whole, with multiple products, services and activities, adversely affects the environment.