

Getting The Green Light From FTC For Green Claims

Law360, New York (November 14, 2013, 6:29 PM ET) -- On Oct. 29, 2013, the Federal Trade Commission announced that it had brought enforcement actions against six companies for making misleading claims about plastic products to make them appear more environmentally friendly to consumers. In each case, the FTC alleged that the companies falsely asserted that additives in the plastic products made them biodegradable.

Five companies entered settlements with the FTC in which they agreed to withdraw their marketing claims, and one paid a penalty of \$450,000. The sixth company, which is devoted to producing chemical additives that it says can make plastic products biodegradable, continues to defend its product.

The FTC stated that the six enforcement actions were the first to address biodegradable plastic claims. In its announcement, the FTC made clear its intention to send a message to the marketplace, stating, among other things, that the six actions were part of a “program to ensure compliance with the agency’s recently revised Green Guides.”

Companies that have invested or intend to invest capital in developing or promoting products that have environmental benefits valued by prospective consumers should take notice.[1]

FTC Regulation of Green Marketing Claims

The FTC made its first foray into regulation of green marketing — advertising that highlights environmentally beneficial characteristics of consumer products — in 1992, when it issued its first version of the Green Guides (16 C.F.R. Part 260). Like other FTC guidelines, the Green Guides do not have the force of law, but the FTC relies heavily on them to measure whether any claim of environmental benefits is deceptive or misleading and therefore actionable under the FTC Act (15 U.S.C. § 45).

In 2007, the FTC initiated an extensive public process to reassess and revise the Green Guides.[2] The new Green Guides were issued five years later, in October 2012.[3] After a long hiatus, and with the advent of the new guidelines, the FTC ramped up enforcement on green marketing claims. In the last year, the agency has brought at least 12 actions alleging deceptive and misleading claims based on the Green Guides.

The Green Guides provide detailed guidance on interpretation and substantiation of environmental benefit claims. They consist of general principles and specific guidance on the use of particular environmental claims, such as “degradable,” “recyclable,” “nontoxic,” and “free of.” the guides also address use of certifications and seals of approval.

Overall, the import of the guides is that all claims must be clear and unambiguous to consumers; accurate based on how the product is used and disposed; and substantiated with scientific evidence.

The guides require that all “reasonable interpretations” of a claim — and all implicit representations made about a product — must be truthful and not misleading. They provide specific examples of when a reasonable interpretation of a claim may be misleading and how the claim may be revised to be more accurate.

For example, the guides specify that a claim should indicate to which portion of the product it applies (packaging, product or service) and that any claims based on comparisons (containing less toxic or more renewable or recyclable materials) must make clear the baseline used for comparison. If a claim may be interpreted in a manner that would make it untruthful or misleading, the marketer must further define the boundaries of that claim by providing a qualification, disclosure or distinction.

This drive for qualification and exactitude can be problematic for companies attempting to craft bold, attractive and memorable slogans to market and brand their products. The Green Guides, for example, reject as misleading the unqualified claim “degradable” and quote with approval the alternative formulation, “will break down into small pieces if left uncovered in sunlight.”

One of the most common offenders of the FTC’s guidelines, in fact, is the “general environmental benefit claim” — a claim that represents a product or service is good for the environment in general. Examples include statements that a product is the following:

- Sustainable
- Green
- Eco-friendly
- Eco-smart
- Environmentally friendly

General claims of this nature have a broad range of reasonable interpretations, which tend to make them vague, misunderstood by consumers and too broad to be substantiated. For this reason, the Green Guides specifically warn marketers to avoid general environmental benefit claims by adding qualifying language explaining to the consumer the basis and limits of such claims.

Other common offenders include the following:

- Claims that are inaccurate as applied to actual product usage and disposal conditions: A claim that a product is recyclable, for example, may be misleading if there are no recycling facilities available in the area where the product is marketed. Similarly, a claim that a product is degradable may be misleading if it will not degrade within a reasonable time in the environment where it is customarily disposed in that area.

- Claims that overstate environmental attributes: A claim that a product is manufactured using a more environmentally friendly process, or with less toxic ingredients, or with fewer raw materials may be misleading if the net environmental benefit is de minimis. Likewise, claims that products are “free of” particular substances cannot have more than background concentrations of such substances commonly encountered in the environment.
- Empty certifications: Certifications and logos placed on products may be misleading if they imply that they were authenticated by an independent third party but were not or if they suggest benefits beyond the attributes for which they were issued. For example, a trade association controlled by the entities for which it grants certifications would not be considered independent. And icons and labels that imply far-reaching environmental benefits — e.g., “EarthSmart” — may be misleading if they are certified based on one undisclosed attribute.

In terms of substantiation, the Green Guides provide that claims must be “supported by a reasonable basis.” This “often require[s] competent and reliable scientific evidence,” including “tests, analyses, research or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.”

Most important, the claim must be substantiated based on actual product conditions; testing done based on an industry approved standard will be of no use if the testing parameters are not representative of such conditions. Based on its most recent prosecutions, the FTC is enforcing the substantiation requirement to give it real meaning.

Recent FTC Enforcement Actions

In the last year, the FTC has brought at least 12 green marketing enforcement actions, targeting three types of products: paints, mattresses and plastics. A review of the complaints and settlement orders for these actions demonstrates that the FTC is targeting claims that are unsubstantiated and/or not in accordance with a consumer’s reasonable interpretation of the claim.

Overstating “Free of” Claims

Less than a month after the FTC issued its most recent version of the Green Guides, the agency announced settlements of enforcement actions against two of the nation’s leading paint companies, the Sherwin-Williams Company and PPG Architectural Finishes Inc. Each claimed that its paint was free of volatile organic compounds (VOCs). The FTC found two problems with their claims.

First, the “VOC free” claim actually pertained solely to the base paint and not to the tint typically added when customers purchased the product. The tint contained VOCs. The claims therefore were misleading to customers who reasonably may have assumed the “Zero VOCs” claim applied to the product as purchased. Second, the claims as understood by the consumer were unsubstantiated by scientific evidence.

The settlement agreements required the companies to refrain from making a “Zero VOCs” claim unless the tinted paints, in fact, contained zero VOCs or only trace amounts or unless the companies added clear qualifying statements informing the consumer that tinted paints may contain VOCs. The settlement agreement also required that any “Zero VOCs” claim be substantiated.

VOC-free claims were also the subject of three recent FTC enforcement actions against foam mattress manufacturers Relief Mart Inc., Ecobaby Organics Inc. and Essentia Natural Memory Foam Company Inc. Each claimed that its foam mattresses were free of VOCs, chemicals and odor.

Proposed settlement agreements, awaiting approval from the commission, bar the companies from making VOC-, chemical- and odor-free claims in the future without competent and reliable scientific evidence to substantiate the claims as true.

Empty Certifications

A separate claim in the FTC's complaint against Ecobaby Organics alleged that Ecobaby Organics' claim that its product obtained a seal of approval from the National Association of Organic Mattress Industry was misleading because that industry association was controlled by Ecobaby Organic, and a reasonable consumer would believe that an independent third-party had provided the seal.

Ecobaby Organics agreed to desist from making misleading statements implying that it had obtained any independent third-party certification of its products.

Failure to Substantiate

Most recently, the FTC announced six enforcement actions against companies making biodegradable plastic claims (AJM Packaging Corporation, ECM BioFilms Inc., Clear Choice Housewares Inc., Carnie Cap Inc., American Plastics Manufacturing Inc. and MacNeill Engineering Company Inc.).

These actions were brought against two types of companies — a company making additives that it claimed would make plastic products biodegradable and several companies marketing products as biodegradable based on the use of such additives. Proposed settlements, awaiting approval from the commission, have been made with five of the six companies but not the company making the additive (ECM BioFilms Inc.).

In each case, the FTC alleged that the defendant overstated the environmental benefits of its product because it would not biodegrade completely within a reasonable time when placed in a landfill or under other common disposal scenarios.

The settlements require the companies to have competent and reliable scientific evidence that the entire plastic product will completely decompose into elements found in nature within one year after customary disposal (defined as disposal in a landfill, incinerator or recycling facility) before making any unqualified biodegradability claim. Any qualified claims must accurately describe the boundaries and limits of the claim that the product, in fact, is biodegradable.

The biodegradable plastics prosecutions make very clear the dangers of relying on unsubstantiated certifications provided by vendors or on industry-accepted testing methods applied to unrepresentative test conditions. Specifically, the FTC alleged that the certifications provided by additive makers to their customers were both misleading and unsubstantiated.

In addition, the FTC alleged that the manufacturers' reliance on American Society for Testing and Materials (ASTM) International D5511 standard (a test standard commonly used in the additive industry) was unwarranted because the standard did not accurately measure the rate or extent to which biodegradation would occur in typical disposal conditions.

Private Rights of Action Against Misleading Green Marketing Claims

The FTC Act grants exclusive authority to the FTC to enforce its provisions. It does not create any private right of action. Many states, however, have adopted “little FTC Acts” and other consumer protection statutes that convey rights of action to state attorneys general and, in some instances, to private citizens.

Some states, such as California and Minnesota, have gone further and have expressly adopted the Green Guides as binding authority. It therefore is reasonable to expect that the Green Guides, and FTC precedents construing them, will be cited and followed in suits based on state law claims that particular green marketing claims are deceptive or misleading.

In fact, the Green Guides were expressly incorporated into a recent state law-based complaint filed in California federal court by consumer plaintiffs for allegedly deceptive claims that Kimberly-Clark has made about its Huggies “pure and natural” Diapers and Huggies “Natural Care” Wipes (Jou et al. v. Kimberly-Clark Corp. (No. C13-3075 JSC)).

Plaintiffs allege, based on the Green Guides, that unqualified use of the terms “natural,” “pure” and “organic” is unfair and deceptive because organic cotton is only used on the outside of diapers, the diaper lining continues to contain non-natural materials that are harmful to the environment, and the wipes contain non-natural, hazardous, endocrine-disrupting substances banned by the European Union. The plaintiffs also allege that Kimberly-Clark’s claims were not substantiated as required by the Green Guides.

In addition to the state consumer protection statutes, the Lanham Act grants companies a private right of action to sue competitors for misleading representations in advertising, including misrepresentations regarding “the nature, characteristics, qualities or geographic origin of ... goods, services or commercial activities” (15 U.S.C. § 1125(a)). The Lanham Act has been used to address misleading green marketing claims, such as claims that a product is recycled upon return to a company and claims that a product is all natural or pure.

Courts reviewing Lanham Act claims are likely to give weight to the Green Guides when determining whether the advertising is misleading, even though the guides were not issued under the same act. While individual consumers may not bring claims under the Lanham Act, courts are split on whether companies other than direct competitors may.

The U.S. Supreme Court will take up the issue this fall when it hears *Lexmark Int’l Inc. v. Static Control Components Inc.* The outcome of that case could significantly expand the potential for Lanham Act cases on green marketing.

The Green Guides are also relied on by the National Advertising Division of the Council of Better Business Bureaus (NAD), which serves as an investigative arm of the U.S. advertising industry’s self-regulatory process. NAD seeks to ensure that claims made in national advertising are truthful, accurate and not misleading.

Cases may be initiated by NAD staff or through “challenges” to advertising claims filed by competitors, consumers or public interest groups. Between 1988 and 2012, NAD decided more than 40 cases related to green marketing claims, often requiring that the claims be modified or discontinued. In deciding

green marketing claims, NAD accords great weight to the Green Guides.

While compliance with NAD decisions is voluntary, compliance rates are high, and noncompliant advertisers are referred to the government.

Key Lessons From FTC's Enforcement Actions and State Law Claims

The number of enforcement actions that the FTC has initiated in the one year since it issued the revised Green Guides shows that it is implementing a program to ensure they are followed in the marketplace. The allegations made in those enforcement actions, and in private actions brought by others, provide important practical lessons for any company considering green claims as part of a product or market strategy.

- Claims must be true in fact, not just in theory. Both the VOC-free and the biodegradable plastics cases drive home the point that the environmental benefit promoted must be realized when the product is used and disposed of under actual conditions typically encountered by the consumer. If a consumer must use untinted paint or compost his own garbage to obtain the promised benefit, then the claim is misleading.
- Simple unqualified claims will be challenged. Notwithstanding the importance to marketers of making bold statements that will catch the eye and the imagination of the consumer, the Green Guides reject unqualified statements of environmental benefits as misleading. Claims that a product is natural, pure or environmentally friendly, for example, should be qualified with statements clearly indicating the basis for and limits of the claim.
- Substantiation should be based on data reflecting actual conditions. Recent FTC prosecutions show that the agency does expect to see scientific evidence to substantiate environmental claims. Further, the agency will not be satisfied with just any testing, even if performed in accordance with an established industry standard. The parameters of the testing must reflect and measure results under real-world conditions.
- Do not rely solely on certifications and testing provided by vendors. Environmental certifications that vendors offer to promote their products must be independently verified. First, the Green Guides make clear that it may be misleading to promote a certification rendered by an interested party unless that qualification is made clear as part of the claim. Second, the FTC has shown that it will not excuse a party for repeating vendor-certified claims that the FTC finds were not substantiated.

When in doubt, provide a qualification or disclosure explaining the limitation of the claim. Before launching any product or marketing campaign, a company should try to review every green marketing claim with the same kind of scrutiny and skepticism that it can expect to see from the FTC and from plaintiffs' counsel. If the claim is susceptible to any reasonable interpretation that cannot be substantiated, or if it implies any environmental benefit that is not intended, then it should be qualified.

While compliance with this principle poses a challenge to marketing efforts, the FTC has shown that it will pursue companies that fail to comply with it.

—By Gregory Bibler and Corrine Lusic, Goodwin Procter LLP

Greg Bibler is a partner, and Corrine Lusic is an associate in the firm's Boston office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] The Federal Food, Drug and Cosmetic Act of 1938 (FDCA) also prohibits the sale or distribution of misbranded foods. Under Section 343(a), a food is misbranded if "its labeling is false or misleading in any particular." The term "misbranded" under the FDCA operates as the functional equivalent of "deceptive" under the FTC Act and state analogs. For more information on food labeling claims see "Food Labeling Litigation: Recent Decisions on Preemption and Primary Jurisdiction," Goodwin Procter Alert (May, 14, 2013), and "Product Liability Without Personal Injury: Food, Supplement and Other Labeling Claims," Class Actions and Mass Litigation Update (June 27, 2012).

[2] See "Making the Case for Your Green Marketing Claims," Environmental & Energy Advisory (Sept. 18, 2008).

[3] See "Top Ten Considerations for Environmental Marketing under the FTC's Revised Green Guides," Intellectual Property Advisor (Nov. 28, 2012).

All Content © 2003-2013, Portfolio Media, Inc.