





PAINTING A GREENER PICTURE

By Kevin P. Holewinski

The FTC's Future Regulation of the Business of Climate Change

As every antitrust and competition lawyer knows, the Federal Trade Commission ("FTC") seeks to prevent deception and unfairness in the marketplace through the FTC Act. That act gives the FTC the power to bring law enforcement actions against false or misleading marketing claims, including environmental, or "green," claims. The FTC issued its Environmental Guides, often referred to as the "Green Guides," in 1992 and revised them most recently in 1998. The Guides explain how the FTC will apply Section 5 of the FTC Act, which prohibits unfair or deceptive acts and practices, to environmental marketing claims. Until recently, environmental, energy, and climate change lawyers have had little reason to be well versed in them. But that is expected to change soon.

The Green Guides are expected to address more broadly the "greenwashing" of products by companies, that is, marketing the "environmentally friendly" nature of products without necessarily being able to reasonably and fully substantiate those claims. If the findings by the environmental marketing firm TerraChoice are reasonably accurate, 99 percent of 1,018 products randomly surveyed were found to have been greenwashed. See "The Six Sins of Greenwashing," TerraChoice, December 2007. Two areas of green marketing that have drawn the most attention from environmental organizations as they focus on climate change are carbon offsets and renewable energy certificates ("RECs"). Generally speaking, "carbon offsets" are greenhouse gas emission reduction products, which effectively represent the commoditization of those reductions. An offset is essentially a property right to claim ownership or responsibility for a quantity of greenhouse gas emissions avoided or removed from the atmosphere. RECs, in turn, commoditize the reductions in emissions achieved through energy produced from renewables instead of carbon sources. For example, RECs may represent the renewable attributes of power sold from sources such as wind or solar.



BACKGROUND: THE GREEN GUIDES TODAY

The FTC, through its Green Guides, looks at advertising from the consumer's perspective—specifically, what message does the advertising actually convey to consumers? To answer that question, the Guides give environmental marketing claims the meaning consumers would give them, which is not necessarily the technical or scientific definition of the terms used, so that marketers can avoid making claims that are false or misleading. (The Guides do not establish standards for environmental performance or prescribe testing protocols.)

For environmental claims that the Guides do not address specifically, FTC law requires “substantiation” and “specificity” for all reasonable interpretations of an ad. These general concepts are described below.

SUBSTANTIATION

All marketers making express or implied claims about the attributes of a product, package, or service must have “substantiation,” that is, a reasonable basis for their claims. When it comes to environmental claims, a reasonable basis often may require “competent and reliable scientific evidence”—tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective way by qualified people, using procedures generally accepted in the profession to yield accurate and reliable results.

SPECIFICITY

An environmental marketing claim should specify whether it refers to the product, the packaging, or both, or just to a component of the product or its packaging. An example used by the FTC's Guides is a box of cereal that is labeled “recycled package.” The package consists of a paperboard box with a wax-paper bag inside holding the cereal. By itself, the claim “recycled package” could apply to both the box and the bag. But as the Guides emphasize, if only the box is recycled, the claim is deceptive. It should be qualified to say, for example, “recycled box.” Conversely, a steel can that contains vegetables is sufficiently specific if it is labeled “recycled.” No qualification is necessary for this claim because it is obvious to consumers that the can is recycled, not the vegetables.

Equally important, the Guides make plain that qualifications (that is, disclosures or explanations) pertaining to an environmental claim should be clear, prominent, and understandable. Clarity can be achieved through the size of the typeface, the proximity of the qualification to the claim being qualified, and the absence of contrary language that could undercut effectiveness. Finally, environmental claims should not exaggerate or overstate attributes or benefits. For example, a greeting card seller declares on its web site that its greeting cards now contain “50 percent more recycled con-



tent than before,” which may convey a false impression that the use of recycled material was increased significantly, even if the increase in recycled content was only 1 percent, according to the Green Guides.

GENERAL CLAIMS

Specific environmental claims are easier to substantiate than general claims and are less likely to be deceptive. An unqualified general claim of environmental benefit may convey that the product has far-reaching environmental benefits when it actually does not. Some examples of the FTC’s philosophy regarding general claims, as contained in the existing Green Guides, are summarized below.

The packaging on a pad of writing paper claims that the writing paper is “environmentally safe” with this explanation: The paper is “environmentally safe because it was not chlorine bleached, a process that has been shown to create harmful substances.” As the Green Guides explain, this may be a deceptive claim, because although the paper was not bleached with chlorine, the production process created and released significant quantities of other harmful substances into the environment. Thus, according to the FTC, because consumers are likely to interpret the “environmentally safe” claim and the explanation to mean that the paper caused no significant harmful substances to be released into the environment, the “environmentally safe” claim would be deceptive.

Similarly, products advertised as “environmentally preferable” are likely to convey to consumers an environmental superiority to other products. A broad claim of this kind would be deceptive if the manufacturer could not substantiate it. On the other hand, the claim would not be deceptive if it was accompanied by clear and prominent qualifying language that limited the environmental-superiority representation to the particular product attribute that could be substantiated, provided that the context did not create any other deceptive implications.

Finally, “ozone safe” and “ozone friendly” claims mean that neither the product nor its packaging harms the atmosphere by contributing to the depletion of the stratospheric (upper-atmosphere) ozone layer or to the formation of ground-level ozone. The FTC cautions that because consumers may con-

fuse the upper ozone layer with ground-level ozone, companies marketing their products must be especially careful in this regard. Generally speaking, the ozone layer in the upper atmosphere prevents the sun’s harmful radiation from reaching the earth. But when ozone develops at ground level, it forms smog, which can cause serious breathing problems. Accordingly, the FTC’s Green Guides caution that companies should avoid “ozone safe” and “ozone friendly” claims on products that contribute to the formation of ground-level ozone, even if the product is safe for the upper ozone layer.

THE FTC GREEN GUIDES REVISION PROCESS, CARBON OFFSETS, AND RECs

On November 27, 2007, the FTC published a *Federal Register* notice commencing the decennial regulatory review of the FTC’s Green Guides, 72 Fed. Reg. 66094. That notice solicited



public comment in response to questions about the Guides' costs and benefits, and it also raised claim-specific questions. The notice further indicated that the FTC would hold public hearings on issues related to the review of the Guides. Thereafter, the FTC conducted a series of public meetings on the Guides, including one on January 8, 2008—a workshop on carbon offsets and RECs.

At and following this workshop, the FTC accepted public comment on carbon offsets, RECs, and related advertising claims. Because carbon offsets and RECs are increasingly marketed to consumers, the chair of the House Select Committee on Energy Independence and Global Warming specifically asked the FTC to consider the potential for false marketing claims with respect to these two products. The need for some administrative guidance is driven by the existing legislative vacuum; currently, there is no federal cap-and-trade program to address greenhouse gas emissions. Instead, there are several U.S. regional greenhouse cap-and-trade programs, and approximately 32 states have adopted renewable portfolio standards or requirements and voluntary REC and carbon offset markets, all with varying, if not conflicting, requirements. Whatever the future might hold with respect to a federal cap-and-trade program, it is very likely that under any federal program adopted, the environmental marketing of RECs and carbon offsets will greatly increase. For example, the market for carbon offsets has been estimated to exceed \$100 million and is projected to multiply 40-fold by 2010. See “Voluntary Carbon Offsets—Getting What You Pay For,” Testimony of Derik Broekhoff before the House Select Committee on Energy Independence and Global Warming (July 18, 2007). Thus, it is very likely that the FTC, state attorneys general, and private citizens' organizations will assert themselves to ensure that the markets governing carbon offsets are appropriately regulated and enforced.

Given the various comments submitted to the FTC on the environmental marketing of carbon offsets and RECs, the key question of what constitutes a “real” offset of carbon emissions remains difficult to answer and has been the subject of much debate among the various stakeholders. Indeed, the lack of common standards and definitions, along with the intangible nature of carbon offsets and RECs, makes it difficult for companies to substantiate, as well as for regula-

tors and consumers to verify, that the claims being made are valid, and it creates the potential for deceptive claims.

Consumer marketing claims occur in two contexts: representations made in conjunction with the sale of carbon offsets (and RECs) directly to consumers, and representations made by companies about their carbon footprints or their products' or services' carbon footprints. Given reports estimating that 80 percent of offset purchases are currently made by companies, the latter subset of claims may, for the moment, be the more important.

Among the difficult issues implicated by the offer and sale of carbon offsets and RECs that drew substantial comments on the revision to the Green Guides are these:

Additionality. While there appears to be a conceptual consensus that carbon offsets should be “additional,” there is broad disagreement over the meaning of “additionality.” Some stakeholders take the position that for offsets to be additional, the money raised from the sale of the offsets must cause a project that would not otherwise be built to go forward (“financial additionality”). Others, including the U.S. Environmental Protection Agency, argue that it is sufficient if offsets are generated by newer projects that perform with lower emissions than the vast majority of existing projects, even if they would have gone forward without the money raised from selling offsets (“performance-based additionality”).¹ Ultimately, the FTC must look to consumers and stakeholders to determine what additionality criteria will be necessary to substantiate a “carbon offset” certificate for marketing claims of “carbon neutrality” made on the basis of purchase of carbon offsets. As the FTC noted (at page 10 of its announcement in the *Federal Register*), the FTC's Guides “focus on the way in which consumers understand environmental claims and not necessarily the technical or scientific definition of various terms.”

Renewable Energy Certificates as “Carbon Offsets.” There is also substantial disagreement among stakeholders on the question of whether selling a REC as a “carbon offset” is always, sometimes, or never deceptive. This debate is linked in part to the differing standards for additionality. Some regard offsets as limited to actions that directly reduce emissions from an existing practice (e.g., capturing emissions

from an existing landfill) and question whether REC projects are actually displacing generation from existing fossil fuel plants as opposed to meeting an increased demand for power. For others, the question is linked to the debate over the standard for additionality, where a financial test would allow offsets to be sold only if the sale of RECs caused a renewable energy project to go forward.

Baseline Emissions. While there is little disagreement over the need to calculate the baseline emissions for a project, for many project types there is a lack of agreed-upon standards for quantification of those baseline emissions. Rather, there are competing standards. The concern here is that this lack of common standards allows for the inflation of baselines—directly increasing the quantity of offsets—and leads to deceptive claims.

Benefit Quantification. Similarly, there are no common standards for quantifying the emissions reductions from offset projects. Aside from the technical differences in measurement formulas and techniques, there can be disagreements over what to count (e.g., are indirect increases in emissions subtracted?) and when to count it.

Avoiding Double-Counting of Offsets. Because carbon offsets and RECs are intangible products, there must be safeguards against the double-selling of the offset or REC. Part of the solution to this problem is the creation of registries for the retirement of offsets and RECs. However, the existence of multiple registries, along with the possibility that the same offset or REC is being claimed by multiple entities, creates uncertainty.²

FUTURE ENFORCEMENT

Revisions to the Green Guides under the Obama administration are likely to usher in a new era of litigation. While the FTC actively filed environmental marketing claims in the 1990s, there was very little similar enforcement activity by the FTC in the 2000s. With the Green Guides certain to be revised, the FTC will once again become active in enforcing environmental marketing claims, including those with respect to carbon offsets and RECs.

Litigation under analogous state law programs has similarly been sporadic. But with the Green Guides revisions and the

increase in environmental marketing claims, states also are likely to increase their enforcement. State attorneys general have periodically pursued environmental marketing claims under environmental or general consumer deception statutes. Given the current public concern with environmental issues, attorneys general could seize on enforcing the Green Guides through state law as a way of building public support.

Finally, aside from the upsurge in environmental marketing enforcement that likely will follow Green Guides revisions, another enforcement window may open to more federal environmental marketing claims by private parties, *i.e.*, the Lanham Act, which governs federal trademark law and also bans false or misleading representations in the advertising of goods and services. The Lanham Act creates a cause of action for “any person who believes that he or she is likely to be damaged” by such misrepresentation. However, while it has been applied to a variety of other types of claims, it has not been applied by a court to a claim in environmental advertising. But corporate counsel should bear in mind that the Lanham Act potentially gives consumer and environmental groups a powerful tool to privately enforce environmental marketing claims in the future. ■

Kevin P. Holewinski

1.202.879.3797

kpholewinski@jonesday.com

¹ For an example of a “tool” used to evaluate additionality, see *United Nations Framework Convention on Climate Change, Tool for the demonstration and assessment of additionality* (EB 39 Annex 10), http://cdm.unfccc.int/Reference/tools/ls/meth_tool01.pdf. (Web sites last visited June 1, 2009.)

² See 1999 NAAG Environmental Marketing Guidelines for Electricity (“NAAG Guidelines,” accessible at <http://www.oregon.gov/ENERGY/RENEW/docs/GreenMarketing.pdf>, sec. 2(b) (Comment), in connection with a related concept, substantiating the generation characteristics of electricity marketed as “green”:

For any claim that is based on a tagging system, the supplier should have certificates that reliably establish that, for the period relevant to the claim, the supplier purchased the sole rights to the claimed attributes in an amount adequate to meet consumption demand for the product consistent with the claimed attributes. In addition, no more than one certificate should be issued for any one unit of power. To help consumers understand what they are buying, it is recommended that the claim be accompanied by a clear and prominent disclosure of the use of a tagging system to substantiate the claim.