

## CLIENT ADVISORY

## FTC Examines Green Packaging Claims

MAY 2008

### OVERVIEW

On April 30, the Federal Trade Commission (“FTC”) held a workshop to examine green packaging claims. This was the second in a series of workshops held in connection with the FTC’s review of its *Guides for the Use of Environmental Marketing Claims*, or “*Green Guides*.”<sup>1</sup> Although the purpose of the workshop was to explore packaging claims, much of the discussion focused on concepts and issues applicable to general environmental claims. In his opening remarks, Chairman Kovacic noted that the *Green Guides* provide a set of norms for legitimate businesses seeking to meet consumers’ demand for environmentally friendly products. In turn, truthful and substantiated environmental claims enable consumers to make wiser purchasing decisions. While there was significant discussion of environmental claims, the FTC revealed little about how it might revise the *Green Guides*. James Kohm, Associate Director, Division of Enforcement, gave the only clear indication of what the FTC intended to do (or not do). Consistent with prior Commission statements, Mr. Kohm emphasized that the FTC was not an environmental policymaking body but would focus on addressing consumer protection concerns.

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### TRENDS AND ISSUES IN GREEN CLAIMS

The first session of the workshop focused on trends in green packaging claims. There was a general consensus that the average consumer does not make purchasing decisions based solely on the environmental effect or benefit of products. But, given products of similar quality and performance, consumers may break the tie by choosing the product that provides an environmental benefit that competing products do not. Alternatively, as discussed by one of the panelists, consumers are attracted to products with environmental benefits if those benefits are also practical; for example, a light bulb that uses less energy than standard bulbs. Although the average consumer is not solely environment-focused, as one panelist noted, surveys indicate that consumers do admire companies that are concerned with the environment.

The first panel noted several ways in which environmental marketing claims can be misleading. Some marketers seize on a single product attribute and attempt to convert it into a broad environmental claim. Marketers also exaggerate the

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<sup>1</sup> <http://www.ftc.gov/bcp/online/pubs/buspubs/greenguides.pdf>

environmental harms of competing products. Third-party certifications can also present problems depending on the message conveyed by their use and their sufficiency (e.g., the criteria used to award the certification and verification that the criteria are met). The common problem with all environmental claims is that consumers cannot readily verify them. Therefore, consumers must be able to trust the claims being made.

During the workshop, the panelists identified several general issues with the *Green Guides*. Several panelists noted that many companies involved in packaging, from brand owners to packagers, are not aware of the *Green Guides*. They suggested that the FTC should do more to market the *Guides* to these companies. A couple of panelists criticized the FTC's lack of *Green Guides* enforcement. One panelist asserted that there are many products that contain improper markings and claims on their labeling, particularly improper recyclable claims. This panelist lamented that it may be too late to effectively change these practices because they are widespread and have been allowed to go unchallenged for so long. However, we would expect the FTC to increase enforcement against deceptive environmental claims soon after the revised *Green Guides* are published. This would also be consistent with the FTC's recent testimony before the Senate subcommittee on government appropriations, in which the agency requested additional funding for environmental enforcement in 2009.<sup>2</sup>

The awareness and enforcement concerns also arise in the context of business-to-business transactions. Several panelists agreed that applying and enforcing the *Green Guides* in business-to-business transactions in the packaging industry is important because consumers are less attentive to environmental packaging claims than product claims. One panelist suggested that in its revision to the *Green Guides* the FTC should emphasize that the *Guides* apply to business-to-business marketing.

In addition, the panelist suggested that the FTC partner with other federal agencies, such as the Environmental Protection Agency's Environmentally Preferable Purchasing program, to promote the *Green Guides*. Although the *Green Guides* might apply to environmental claims made by one business to another, we do not think that such cases would be attractive to the FTC, which is more likely to focus on environmental claims made to consumers. The seller of consumer products that relies on the representations of its suppliers as to the environmental attributes of its inputs to make environmental claims to the public is in the best position to verify such representations. Thus, the seller has a duty to reasonably investigate its suppliers' environmental claims.

Some panelists suggested that the *Green Guides* should highlight the problem of hidden trade-offs and require full disclosure in such cases. That is, an improvement in one aspect of a product's environmental impact that causes a worsening of the product's environmental impact in another aspect. For example, reducing the water usage in a manufacturing process may require additional energy input or the use of an environmentally harmful chemical.

Several panelists recommended that the FTC review the *Green Guides* regularly, suggesting formal review every five years. A shorter review period will allow the FTC to stay on top of current environmental marketing developments and hopefully get in front of emerging claims and consumer protection problems.

Finally, some of the panelists thought that the FTC should encourage businesses to establish and promote other avenues for disseminating information to consumers, such as websites and text messaging. This might also have the beneficial effect of reducing label sizes. We believe that the FTC will not abandon the longstanding principle that a disclaimer must be clear and conspicuous and in close proximity to the claim it qualifies. Websites or other means for providing additional product information must also be truthful and not misleading.

<sup>2</sup> <http://www.ftc.gov/os/testimony/P072104fy09budget.pdf>

## TREATMENT OF SPECIFIC ENVIRONMENTAL MARKETING CLAIMS

The panelists also addressed consumer protection issues with several specific environmental marketing claims:

*Recyclable claims.* There was general agreement that there is significant consumer confusion about what is recyclable. This confusion mainly arises from the Society of the Plastics Industry (“SPI”) codes that identify the recyclability of plastics. Although there was agreement about consumer confusion, there was disagreement on the proper approach the *Green Guides* should take. One panelist thought the FTC should revise the *Green Guides* so that more products could bear the chasing arrows recyclable logo in order to encourage recycling. Another wanted to eliminate the influence of the logo by requiring it to be placed in an inconspicuous place with no green claims in close proximity to it. Because many factors go in to determining whether a material is recyclable, another panelist suggested prohibiting the use of the term “recyclable” and replace it with a statement that would encourage consumers to check whether the material is recyclable in their area. Moreover, one panelist noted that it is difficult for companies to substantiate recyclable claims because there is no adequate source of data on the availability of recycling for certain materials. For example, certain multi-layer plastic products can be recycled, but facilities accepting such products for recycling are not readily available. Recycling was also cited as one of the areas in which the *Green Guides* needs to be brought up to date in terms of materials, technology, and availability.

*Biodegradable and compostable claims.* The panel discussions illustrated, perhaps unsurprisingly, that the biodegradability and compostability of materials are technical subjects that consumer do not fully understand. For example, some materials can be composted at commercial composting facilities but will not degrade under conditions normally found in home composting piles. Consumers also generally believe that natural, bio-based, or renewable materials are all biodegradable or compostable, which is

not always the case. Since the last edition of the *Green Guides*, new ASTM specifications and test methods have been developed and disseminated. It was suggested that these be incorporated into the *Guides*. However, we do not think that the FTC is likely to take this approach. As noted before, the FTC has stated that it is not in the business of making environmental policy. Thus, it is not likely to incorporate technical environmental standards in the *Green Guides*. However, such specifications and other industry standards could be relevant to the truthfulness of certain environmental claims.

*Sustainability claims.* According to the Environmental Protection Agency’s website, sustainability means “meeting the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>3</sup> The panel discussions revealed that consumers do not fully understand the concept of sustainability. When surveyed, they generally can only recall a couple of factors related to determining whether a product or its packaging is sustainable. Panelists noted that there are no generally acceptable criteria and testing procedures for sustainability. Furthermore, it is difficult to substantiate sustainability at a specific point in time. Rather, sustainability is a long-term measure. Accordingly, the panelists suggested that the *Green Guides* explain the concept of sustainability for consumers, but not establish a precise definition. However, it was suggested that the *Guides* establish a framework for making sustainability claims. Sustainability claims should be specific. Companies should not be able to rely on a single factor to make a general claim that their product is sustainable. Further, a panelist commented that sustainability claims must be properly qualified because there are very few, if any, products that are truly sustainable, although many companies have improved their products’ sustainability. It was also suggested that the *Green Guides* address cradle-to-cradle claims; that is, claims about how the product or its components can be completely re-used again, either as a raw material input or as composting material.

<sup>3</sup> <http://epa.gov/sustainability>

*Carbon claims.* Carbon is emerging as the metric by which a company's environmental performance will be measured, and many companies have been making claims about the carbon footprint of their operations and products, including claims that they are carbon neutral. Thus, according to one panelist, it is important that the FTC get in front of the issue and establish guidelines for carbon claims. This panelist described the current carbon claims environment as the "Wild West." He explained that with no credible definition or standards, carbon claims are losing credibility and their force with the public.

*Seals and certifications.* According to a panelist, for seals and certifications to have meaning, there must be established criteria and a way to verify that the product meets the criteria. Third-party seals and certifications must be independent and verified against consistent and transparent standards developed through an open process. This panelist also suggested that all seals should be accompanied by a statement of the basis for awarding the seal.

*"Free" claims.* One panelist suggested that claims that a product is free from a certain substance or component be severely restricted. Some "free" type claims, such as "CFC free," are irrelevant because the chemicals or substances are no longer in use. Most importantly, this type of claim also can imply that competing products are environmentally harmful.

## CONCLUSION

Although the workshop raised many issues, the FTC was largely silent on how it intends to revise the *Green Guides* with respect to packaging claims. Before issuing the revised *Guides*, the FTC has other topics to consider. Although no official announcement has been made, the FTC has indicated that it will hold its next workshop on textiles and building materials in July.

Until the FTC issues the revised *Green Guides*, companies should continue to follow the guidance provided by the current *Green Guides*. Although the *Guides* do not

address recently popularized environmental claims, such as sustainability and carbon claims, companies should apply its general principles and the principles of advertising law to such claims. Perhaps the most important of these principles is to avoid overstating the environmental benefits or attributes of products. General environmental claims are difficult to substantiate, so claims should be specific as to the product's environmental attributes and how those attributes are achieved.

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*We hope you find this summary helpful. If you would like more information, please feel free to contact your Arnold & Porter attorney or*

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