

The Race To Go Green: Potential Legal Pitfalls

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Businesses have been ramping up efforts to “go green” for some time now due to the growing environmental consciousness of the public. A recent survey of consumer preferences found nearly 40% of Americans actively seek products they believe to be environmentally friendly.

However, significant confusion exists among American consumers regarding the meaning of various phrases commonly used in green advertising, such as “environmentally friendly,” “biodegradable,” “photodegradable,” “compostable,” “recycled content” or “green.” Businesses should, for obvious reasons, attempt to avoid being labeled with one of the least desirable environmental monikers: “greenwashing” - the practice of cultivating a mistaken consumer belief that a company is more environmentally friendly than it actually is. The trend toward satisfying consumer environmental awareness and potential accusations of greenwashing also carries with it increased legal scrutiny and risk.

Federal Law

The Federal Trade Commission (“FTC”), which is the arm of the federal government in charge of enforcing advertising statutes is expected to issue enhanced rules called the “Green Guides to Environmental Marketing” near the end of 2008. Businesses making environmental claims about products can expect a higher level of legal scrutiny following the issuance of the new rules.

In the past, federal sanctions for violations of law have included: (i) requiring companies to stop running the advertisement; (ii) reporting periodically to FTC staff about the substantiation for new claims; (iii) civil penalties range from thousands of dollars to millions of dollars, depending on the nature of the violation; (iv) full or partial refunds to all consumers who bought the product; and (v) requiring new advertisements to correct the misinformation conveyed in the original advertisements.

Broad claims must be backed up with specifics. Advertising claims will be evaluated through the lens of a hypothetical reasonable consumer, which means that vague claims about the environmental impact of a given product might lead to various interpretations. In essence, the FTC deems valid any reasonable meaning a consumer might give to advertising. The way to avoid confusion, therefore, is to be as specific as possible when making claims regarding a product’s environmental impact. Substantiation is best provided with competent and reliable scientific evidence in the form of professional analysis or research into the environmental impact of a product. The duty to substantiate all reasonable interpretations of environmental claims is made more onerous by the fact that the burden is on the company making the claim to prove that the claim is not deceptive. Once the FTC decides to challenge a given instance of environmental advertising, the onus is on the company to prove its claims.

FTC enforcement actions can be an expensive proposition for a company. Typically, an enforcement action will result in the FTC and defendant company entering into a consent decree that prohibits the company from making any further claims of environmental benefit without substantiation, requires the company to distribute copies of the decree internally, mandates the ongoing maintenance of records relating to the company's environmental claims and the disclosure of those records to the FTC immediately upon request, obligates the company to provide a written report of its compliance to the FTC within sixty days of the decree, and may require additional measures to correct past harms or prevent future ones such as a notice to customers. Thus, not only can an enforcement action be quite costly, it may result in a significant degree of public embarrassment for a company and damage to the company's brand.

The next edition of the Green Guides will likely include additional clarifying terms such as "sustainable," "all natural" and "renewable." The FTC will also likely address advertising regarding renewable energy certificates, carbon offsets, green buildings, third-party certification of products and a life cycle theory of environmental harm.

California Law

California's False Advertising Statute specifically incorporates the Green Guides as part of California law. However, there is one additional trap in California's environmental advertising law that is not in the Green Guides: any company that advertises its product using broad claims of environmental friendliness such as "ecologically sound," "environmentally safe," "green product" or any similar term must provide written documentation supporting such claims to any member of the public upon request.

This documentation must, in addition to specifying compliance with the Green Guides where applicable, show the following: (1) the reasons why the company believes the representation to be true; (2) any significant adverse environmental impacts directly associated with the production, distribution, use, and disposal of the product; (3) any measures that are taken to reduce the environmental impacts directly associated with the production, distribution, and disposal of the product; and (4) violations of any federal, state, or local permits directly associated with the production or distribution of the product. A violation of the statute is a misdemeanor punishable by jail and/or a fine up to \$2,500.



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