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A L E R T

SO WHAT'S SO BAD ABOUT GREEN WASHING?

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On October 1, 2012, the Federal Trade Commission (the "FTC") issued its revised "Green Guides."¹ The FTC first issued its Green Guides in 1992 to assist marketers avoid making misleading environmental claims. These guidelines were revised in 1996 and 1998, with proposed further revisions in October 2010 which culminated in the 2012 Guide. These guides are intended to give guidance related to misleading environmental claims about products, services or packaging that are unfair or deceptive under Section 5 of the Federal Trade Commission Act (the "Act").²

While these guidelines do not have the force and effect of law, they provide guidance as to what claims the FTC will consider as deceptive. Over-selling the green attributes or "green washing" your products, services or materials may result in the FTC bringing enforcement action under the Act.

The 2012 Guide, by way of examples, gives guidance as to whether a label, logo, claim or other marketing signature is deceptive based on a reasonable consumer's interpretation of the environmental claim. Determining the perceptions of a reasonable customer is no easy task.

Under the 2012 Guide, the FTC modified previous guidance sections for the following claims: General Environmental Benefit, Compostable, Degradable, Ozone, Recyclable and Recycled Contents, and created the following new sections: Carbon Offsets, Certifications and Seals of Approval, Free-Of, Non-Toxic, Made with Renewable Energy, and Made with Renewable Materials. This *Alert* deals only with the new sections.

The 2012 Guide cautions marketers about making unqualified general environmental benefit claims in that according to the FTC "it is highly unlikely that marketers can substantiate all reasonable interpretations of these claims."³ The 2012 Guide further provides that marketers may be

able to qualify general environmental benefit claims by focusing consumers on the specific environmental benefits that marketers can substantiate. In doing so, the marketers should use clear and prominent qualifying language to convey that a general environmental claim refers only to a specific and limited environmental benefit or benefits.

In the **Carbon Offsets** section, the 2012 Guide cautions marketers against advertising carbon offsets if the basis for the offset is already required by law. In order to utilize a carbon offset label, marketers should have competent and reliable scientific evidence to support the claims; including using proper accounting methods to ensure that they are quantifying emission reductions and not repeatedly selling the same reductions. The 2012 Guide also suggests that marketers disclose if the consumer's offset purchases fund emission reductions that will not occur for two years or more.

The **Certifications and Seals of Approval** section provides that it may be deceptive to represent an item or service has been endorsed or certified by an independent third party. The 2012 Guide states that certifications and seals may be endorsements covered by the FTC's Endorsement Guides. The guide advises that an environmental certification or seal likely conveys the disfavored general environmental benefit claim when it does not clearly convey, either through its name or other means, the basis for the certification. Marketers should clearly state that such seals or certifications specifically refer to a specific or limited benefit. This may be difficult with broad based or comprehensive standards certifications. Under the 2012 Guide, a third-party certification does not eliminate a marketer obligation to have substantiation for all claims.

The 2012 Guide includes a new section on claims that products or services have no, are "**free of**," or do not contain certain substances. These "free of" claims may be deceptive if the items contain substances that pose the same or similar environmental risks as the substance the service, product or

1. www.FTC.gov/bcp/edu/microsites/energy/about_guides.shtml

2. 15 U.S.C. §45

3. 16 CFR 260.4(b).

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packaging is “free of” or the substance has not been associated with the product category. This two-part test addresses the claim that the product is free of a negative attribute associated with that substance and suggesting that competing products contain the substance or that the marketer has improved the product by removing the substance. A marketer can make a claim that a product is “free of” if that product still contains some amount of a substance if it follows three guidelines: (i) the level of specified substance is no more than that would be found at an acknowledged trace contaminated or background level; (ii) the substance’s presence does not cause material harm that consumers typically associate with the substance; and (iii) the substance has not been added intentionally to the product.

As to **Non-Toxic** claims, the 2012 Guide includes a new section that reiterates the same advice as the 1998 Guide regarding deceptive practices related to representing that the product package or service is non-toxic for both humans and the environment.

The new section on **Renewable Energy Claims** advises marketers to avoid making unqualified renewable energy claims based on energy derived from fossil fuels. Under this section marketers may make such claims if they purchase renewable energy certificates (“RECs”) to match their energy use. The FTC also warns marketers that consumers likely interpret renewable energy claims differently than marketers may intend. Unless the marketer has substantiation for their express and reasonably implied claims, they should clearly and prominently qualify their renewable energy claims. The 2012 Guide suggests that one way to minimize the risk of deception is to specify the renewable energy source. The guide also advises against making unqualified claims unless all or virtually all of the significant manufacturing process involved in making a product are powered with renewable energy or non-renewable energy matched with RECs.

The last new section focuses on **Renewable Materials** claims. Similar to renewable energy guidance, this section

advises that the consumers are likely to interpret renewable materials differently than marketers may intend. Unless the marketers have substantiation for all their express and reasonably implied claims, they should clearly and prominently qualify their renewable material claims. The 2012 Guide suggests that marketers specify the material used and why the material is renewable. Additionally, the guide states that marketers should further qualify these claims for products containing less than 100 percent renewable materials, excluding minor incidental components.

The 2012 Guide does not address organic, sustainable and natural claims. The U.S. Department of Agriculture’s national organic program provides guidance governing organic claims for agricultural products. Before you brand a product or make claims of a service, product or packaging being “eco” friendly reference should be made to these guidelines to avoid a FTC enforcement action. ♦

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