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Sustainability Advertising: Key Takeaways

Consumers and brands are well aware of the benefits of environmentally friendly products. A recent report found that nearly 89% of brands implementing sustainability initiatives see an improvement in brand reputation. However, brands should take care to comply with applicable state and federal guidance and legal requirements, as regulators, competitors, and class action attorneys continue to scrutinize eco-friendly marketing. In this issue of the Perkins Coie Summer Sustainability Series, we discuss best practices based on Federal Trade Commission (FTC) guidance and the most recent green advertising litigation trends.

The FTC's guidelines regarding environmental and sustainability advertising claims are generally referred to as the "[Green Guides](#)." The Green Guides warn marketers against making broad and unqualified environmental claims. This is because, according to the FTC, such claims may convey a wide range of meanings and brands likely cannot substantiate all reasonable interpretations of these claims. For example, the Green Guides warn that a broad claim such as "eco-friendly" or "green" may convey multiple meanings to consumers. At a high level, the Green Guides caution advertisers to:

- Not overstate the claimed environmental attribute or benefit;
- Identify what component of the product or service the environmental claims apply to; and
- Comply with guidance for various specific environmental claims, such as advertising regarding carbon offsets, the ability to compost a product or package, "non-toxic" claims, and "ozone-safe" or "ozone-friendly" claims, to name only a few.

The Green Guides also reiterate general truth-in-advertising standards, including:

- Ensure that the basis for any comparative claim is clear and substantiated;
- Support green advertising and other technical and science-based claims with competent and reliable scientific evidence; and
- Clearly and prominently disclose necessary qualifications in an understandable manner.

Some states, such as [Rhode Island](#) and [Maine](#), have explicitly incorporated the Green Guides by reference into state law. Other states, such as California, have enacted statutes with their [own guidelines](#) for environmental marketing claims while also [incorporating](#) the Green Guides by reference.

A Closer Look at Specific "Green" Claims

While marketers should take care with all environmental claims, we highlight the following best practices for certain specific claims based on recent litigation and enforcement trends.

Recyclable

According to the Green Guides, marketers should clearly and prominently qualify recyclable claims to avoid potentially misrepresenting the availability of recycling programs and collection sites to consumers. The Green Guides specifically state that:

- Unqualified recyclable claims should only be used for products if recycling facilities are available to a substantial majority (at least 60%) of consumers or communities where the product is sold.

- If recycling facilities are available to less than 60% of consumers or communities where the product is sold, marketers should qualify the claims by:
 - Stating the percentage of consumers or communities that have access to recycling facilities; or
 - Conveying limitations based on the availability, such as "may not be recyclable in your area" if facilities are available to slightly less than the 60% threshold; or "recyclable only in the few communities with appropriate recycling facilities" if facilities are scarce.

Before making recyclable claims, marketers should evaluate whether any component limits the ability to recycle the item (including, for example, its size or frequent contamination with food waste) and, based on the results of such evaluation, whether the recyclability claims and related disclosures are appropriate.

Because the availability of collection sites for certain products may change over time, marketers may want to reevaluate from time to time whether collection centers will accept their products and update recyclability claims and disclosures as appropriate.

Recyclable claims also persist as a hot topic of class action litigation. For example, plaintiffs have alleged that recyclable claims are misleading when the products are capable of being recycled but, in practice, are more often processed into a landfill. Plaintiffs also have alleged that brands have deceptively marketed their products as recyclable while failing to disclose their current impact on plastic pollution and other environmental harms.

Biodegradable

The Green Guides state that it is deceptive to make an unqualified degradable claim unless the entire product will "completely break down and return to nature . . . within a reasonably short period of time after customary disposal." For items customarily disposed of in landfills and other solid waste streams, the Green Guides specify that a "reasonably short period of time" is one year unless the claim specifies another period of time. However, in 2015, after the publication of the Green Guides, the FTC issued a [Final Order](#) in an administrative action involving the degradation of plastic bottles forbidding the advertiser from making unqualified biodegradable claims for plastics that will not break down within five years of customary disposal. This order suggests that the FTC may take a fact-specific approach and not necessarily enforce the one-year timeline for all degradable claims.

As with other environmental claims, brands should qualify any biodegradable claims as needed to ensure they are not misleading. For example, the FTC advises brands to disclose any material limitations regarding the product's ability to degrade in the environment where it is customarily disposed (e.g., a degradable product that typically ends up in a landfill) and the rate and extent of degradation.

Regulators have targeted consumer products for using biodegradable claims over the past several years. As companies continue to develop new alternatives to single-use products, marketers should consider whether they can substantiate their biodegradable claims about such products.

"Sustainable" Sourcing

The Green Guides also warn marketers about the use of unqualified claims such as "sustainable," based on a concern that it may be difficult to substantiate all reasonable interpretations of such a claim. Brands should therefore consider specifying the sustainable source or process that they can substantiate, or using clear and prominent language to qualify the claim and limit it to specific benefits. For example, a brand could clarify and qualify a "sourced sustainably" message by modifying it to read "sourced sustainability -- made from recycled materials" if the product meets the Green Guides' standards for those claims.

But, consistent with the points made above, where claims are specific, the FTC still advises that brands have a reasonable basis (competent and reliable scientific evidence) to support the claims. For claims that depend on a supplier following certain sustainability practices, brands may want to audit or enlist a third-party certifier to review the supplier's practices. For example, brands that market third-party products as "made from recycled materials" may want to verify that the products meet the Green Guides' standards, rather than relying on the supplier's claims alone.

As mentioned in the last installment ([issue 5](#)) of Perkins Coie's Summer Sustainability Series, consumers recently filed class action lawsuits against several brands, alleging that their products were not sustainably or ethically sourced, as their ads claimed.

Conclusion

Given increasing consumer awareness of environmental practices, brands should take into account both truth-in-advertising laws and the FTC's Green Guides when making "recyclable," "biodegradable," and other eco-friendly claims.

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