

FTC regulation of green advertising—an overview

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Authors' note:

Your clients need your help and counsel dealing with the complicated mosaic of laws and regulations which affect their advertising. The Lanham Act is only one part of the mosaic—the part with which most intellectual property lawyers are most familiar. This article deals with another part, FTC regulation of environmental advertising. We prepared this article based on our recent experience representing a client in an FTC investigation of environmental claims made by the client in its advertising. Despite the FTC's early stated intent to prosecute, we persuaded FTC personnel to exercise their prosecutorial discretion to discontinue the investigation and the client avoided the undesirable publicity which would have accompanied formal action by the commission. In this article, we share ideas about how to handle such an FTC investigation.

On July 28, 1992, the Federal Trade Commission (FTC) issued voluntary guidelines regarding environmental claims made in advertising. The guidelines represent the FTC's first effort to regulate so-called green advertising and were welcomed by many advertisers with the hope that they would displace the inconsistent, and often idiosyncratic, regulations promulgated by various states.¹ Although beyond the scope of this article, it is not clear whether the FTC's guidelines preempt state regulation of green advertising. Moreover, the exact status of the guidelines is in doubt because the FTC adopted them without the benefit of notice and comment. As FTC Commissioner Azcuenaga noted when dissenting to the issuance of the guidelines, their mandatory language suggests that they are rules, which the FTC can only adopt pursuant to specific procedures that were not followed.

In this article we first provide an overview of the guidelines and of the restraints they place upon advertisers. We then discuss FTC enforcement procedures, including the opportunities presented during the investigation phase for the target to avoid enforcement proceedings.

Nature of the guidelines

The guidelines represent an effort to balance the concern that green claims, even when true, can mislead consumers into thinking that products are better for the

environment than they really are with the recognition that green claims help to inform consumers about the environmental merits of particular products.

The guidelines present a compromise; not surprisingly, they make neither environmentalists nor advertisers entirely happy. But both sides benefit from having uniform national standards as opposed to a hodge podge of state-by-state regulation. Though advertisers may find the guidelines restrictive, they at least benefit from having bright lines and safe harbors instead of ad hoc enforcement actions. In addition, advertisers may be able to use the guidelines offensively to defeat more restrictive state or local regulation.

FTC authority

Section 5 of the FTC Act, 15 U.S.C. §45(a)(1), which prohibits "unfair or deceptive acts or practices in or affecting commerce," grants the FTC the power to regulate advertising. Using this power, the FTC issues both binding trade regulations and nonbinding guidelines. In addition, the FTC brings enforcement actions, which are discussed in more detail below.

By statute, the FTC has regulatory authority over advertising, promotion and labelling for all types of products. With respect to food, cosmetics and drugs, however, the FTC generally defers to the FDA pursuant to a memorandum of understanding executed in 1954.²

This arrangement reflects the FDA's greater institutional expertise regarding the nutrition, health and safety aspects of foods, drugs and cosmetics. Because the FDA's expertise does not extend to environmental issues, it might be logical for the FTC to exercise its jurisdiction over environmental claims made for foods, drugs or cosmetics. We would not be surprised if the FTC were to move in this direction.³

"Green advertising" guidelines

The guidelines apply four general principles to all environmental marketing claims. First, qualifications of or disclosures regarding any claim should be made clearly and prominently. Second, it should be clear whether a claim applies to the product or to the packaging. Third, environmental claims should not be overstated. Fourth, the basis for any comparative statements should be fully disclosed. 16 CFR §260.6.

Specific environmental claims

Going beyond general principles, the guidelines specifically address the proper use of several common environmental claims. In this regard, the guidelines contain several specific examples of approved and disapproved usages. The approved usages probably amount to safe harbors; the disapproved usages warn of probable enforcement action against violators. The claims that the guidelines specifically address include claims that a product:

- has general environmental benefits
- is degradable, biodegradable, and photodegradable
- is compostable
- is recyclable
- has recycled content
- represents source reduction
- is refillable
- is ozone safe and ozone friendly

Space precludes recounting all the specific advice contained in the guidelines, but as an example, the guidelines disapprove of claims that a product is degradable, biodegradable, or photodegradable (even if it is under ideal circumstances) when the product as typically disposed of does not degrade in a reasonable period of time. Thus, the guidelines would not permit labelling trash bags that degrade in sunlight "degradable" if the trash bags are usually disposed of in sanitary landfills and do not easily degrade in landfills.⁴

Similarly, under the guidelines, a product containing no CFCs still cannot be labelled "No CFCs" if the product contains any ozone depleting substance. Apparently, the FTC fears that consumers equate "No CFCs" with "safe for the ozone layer."⁵ In the same vein, the guidelines disapprove of promoting a product as "recyclable" unless recycling facilities exist for that product in the communities where it is marketed. A qualified claim of recyclability may be made for a product that is recyclable but for which a recycling infrastructure is not yet in place.⁶

Although the guidelines are technically voluntary, they make clear the FTC's position on many controversial green claims. Accordingly, one may assume that the FTC will proceed against violators of the guidelines under its general authority to take enforcement action to prevent deceptive advertising. Thus, all advertisers should be aware of the guidelines, and only the bold will disregard them.

Advertising agency liability

Advertising agencies as well as advertisers should be aware of the environmental guidelines. Recently, the FTC has sought to hold agencies accountable for deceptive marketing claims made by their clients.⁷ To protect themselves, advertising agencies need to know the rules and seek appropriate assurances from their clients regarding compliance. While the FTC's position on the vicarious liability of advertising agencies is evolving, it seems unlikely that the FTC would seek to hold an agency vicariously liable for a client's claims when the agency can demonstrate due diligence in requesting substantiation from the client.

FTC action

The FTC often initiates its inquiries informally. Frequently, the staff of an FTC regional office will send a letter asking the company making a claim to substantiate it. Such a letter also will likely seek information about advertising budgets, the scope of distribution of the ads, how much product the company sells, and so forth. Although response is technically voluntary, the FTC has the power to subpoena the information if the company does not voluntarily produce it. The FTC may also issue a civil investigative demand under 15 U.S.C. §57b-1, which allows the FTC staff to engage in wide ranging, compulsory discovery.

An inquiry letter from a regional office presumably reflects at least an initial judgment by the office that the claim in question is deceptive or otherwise improper. Nonetheless, the FTC staff may be willing to reexamine its initial judgment in light of the information and explanation it receives from the target company. In the early stages, the inquiry can be highly interactive, with the target providing favorable information beyond the strict scope of the letter of inquiry, and the FTC staff modifying its requests. Several exchanges of requests and information may occur. Even though this process may proceed amicably, the FTC

staff functions as prosecutor. Accordingly, counsel should be involved from the outset to make sure that the target's interests are protected and that the best possible case for no enforcement action is made. This does not mean, however, that the client should be completely removed from the process. Experienced counsel know that a client's personally demonstrated good faith can often sway the decision of the FTC staff. Indeed, it may be appropriate for counsel to arrange a meeting where the client can directly address the FTC staff's concerns in an effort to resolve them informally.

At this stage in the process, a thoughtful and forthcoming presentation is critical. Obviously, every effort must be made to demonstrate that no deceptive claims have been made. But even when a perfect defense is impossible, the FTC's limited resources make an appeal to prosecutorial discretion an option. The FTC staff may be willing to forego formal enforcement actions if the target shows a willingness to cooperate, a sincere desire to correct any missteps, and a record of reasonable (even if imperfect) efforts to comply with FTC regulations. When seeking to have an investigation closed, counsel should be aware that the FTC operating manual provides a partial list of reasons for closing an investigation. The FTC staff should be advised of why one or more of the listed reasons applies to a particular case. If the investigation is closed, the staff will, upon request, issue a "closing letter," which of course, will preserve the commission's right to reopen the investigation at a later date. Closing letters are public documents; hence, an investigation will lose any confidentiality it may have had if the target requests a closing letter.

The authority to decide to bring a formal complaint alleging false, deceptive or unfair advertising resides exclusively in the commission. Often, a recommendation to file a complaint will be reviewed by two levels of FTC staff before it reaches the commission. First, as just discussed, the regional office will conduct an investigation and make a recommendation as to whether to proceed to formal complaint. When the regional office recommends against formal action, that is typically the end of the matter. A recommendation by the regional office to proceed goes to the Bureau of Consumer Protection. The bureau can reject the recommendation and end the matter or endorse it for action by the commission, which has the final say.

Even if the commission authorizes a formal complaint, it does not always proceed with the action. Typically, the FTC will serve a proposed consent decree (or "notice order") with its complaint. A defendant can accept the proposed consent decree or attempt to negotiate different terms to the consent decree in lieu of litigation. Indeed, the FTC favors consent decrees and encourages its staff to negotiate them wherever possible, regardless of the stage of the investigation or litigation. Also, the operating manual allows targets to submit unilateral proposed consent decrees at any time.

When the commission proceeds to a formal complaint, it typically files an administrative action seeking a cease and desist order under 15 U.S.C. §45. This results in an administrative hearing held before an FTC administrative law judge (ALJ) and governed by the Administrative Procedures Act, 5 U.S.C. §551 *et seq.*, as well as the FTC's Rules of Practice, 16 CFR pt. 3. Appeals from the ALJ's decision go first to the commission, and then to the appropriate circuit court of appeals. Under some circumstances

the FTC may forego administrative proceeding and file an action in a federal district court. *See, e.g.*, 15 U.S.C. §45(m).

In addition to cease and desist orders, the FTC has more draconian remedies available under some circumstances. For example, violations of trade regulations or of cease and desist or consent orders⁸ may result in proceedings to force refunds to consumers, to exact damages or penalties, or to require corrective advertising. Injunctive relief may also be available. 15 U.S.C. §53; *see also* 16 C.F.R. §1.61.

Conclusion

The new FTC guidelines reflect the commission's growing concern over environmental claims in advertising and indicate that the commission will investigate those claims much more aggressively than in the past. Advertisers, their advertising agencies, and their attorneys should be familiar with the guidelines and should use caution in making environmental claims.

- 1 In fact, the regulations grew out of a petition filed in February 1991 by a group of advertisers seeking uniform national standards on these issues.
- 2 *See* Kanwit, Federal Trade Commission, §26.01.
- 3 The FTC relies on the EPA's expertise with respect to certain environmental claims. For example, the guidelines provide that a product may not be designated "ozone safe" if it contains certain chemicals listed in the Clean Air Act or otherwise designated as ozone-depleting by the EPA. 16 CFR §260.7(h).
- 4 16 CFR §260.7(b).
- 5 16 CFR §260.7(h).
- 6 16 CFR §260.7(d).
- 7 For example, in August 1991 Volvo and its advertising agency, Scali, McCabe, Sloves, New York, agreed to pay \$150,000 each to the FTC to settle allegations that certain Volvo advertisements, emphasizing Volvo's safety features, used cars with reinforced roofs. *See, e.g., New York Times*, August 22, 1991, Section D, page 19.
- 8 Even a nonparty to a prior order can be held liable for violating the order if it can be shown that the nonparty had actual knowledge of the order. 15 U.S.C. §45(m)(1)(B).