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Reading the 'Green' Tea Leaves: FTC Signals Increased Scrutiny of Environmental Marketing Claims

During the 1990s, the Federal Trade Commission (FTC) undertook a number of regulatory and enforcement initiatives to respond to allegedly false or misleading marketing claims regarding environmental attributes of consumer products. Under the Bush administration, these efforts slowed significantly. Recent actions and statements by the FTC, however, indicate that the regulatory pendulum is swinging in the other direction, as environmental marketing claims are very much back on the FTC's regulatory agenda.

On the enforcement front, according to the FTC's website, the FTC resolved 37 environmental marketing enforcement cases between 1990 and 2000, but filed no new enforcement cases between 2000 and 2008. In the past several months, however, the FTC has resolved three separate enforcement actions against consumer product manufacturers involving allegedly false or misleading claims about the environmental benefits of their products. At issue were labels for three different product types (paper plates, wipes and towels) which stated that the products were "biodegradable." According to the administrative complaints ([Kmart Corporation](#); [Tender Corporation](#); [Dyna-E International Inc. and George Wheeler](#)), the defendants failed to qualify or explain that term or explain whether it applied to the product and/or its packaging (or a component or portion of the product and/or packaging). The FTC further alleged in each case that most municipal solid waste is disposed in landfills, incinerators or recycling facilities, and these disposal methods would prevent the products and/or their packaging from "completely break[ing] down and return[ing] to nature, i.e., decompos[ing] into elements found in nature, within a reasonably short period of time."

The FTC alleged that the labeling for each product expressly or impliedly made representations that were false or misleading in violation of section 5 of the Federal Trade Commission Act. Although not cited in any of the complaints, the FTC directly relied on its "Guides for the Use of Environmental Marketing Claims" (the so-called "Green Guides") in crafting these allegations. Even though the FTC published the Green Guides in the Code of Federal Regulations ([16 C.F.R. part 260](#)), the Green Guides are not enforceable regulations, but rather are intended to provide a basis for voluntary compliance by companies regulated by the FTC. However, the allegations in the three complaints come directly from the section in the Green Guides addressing biodegradability (16 C.F.R. § 260.7(b)).

In each case, the defendant agreed to resolve the charges through a consent agreement. While no civil penalties were imposed, the defendants entered into enforceable agreements that obligate them to avoid advertising claims regarding any environmental benefit (including biodegradability) that are untrue and lack competent and reliable scientific evidence to support to the claim. According to the

FTC, such evidence would include “tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.”

In addition to these enforcement cases, the FTC is currently evaluating whether the Green Guides should be revised, due to both a substantial increase in environmental marketing claims and the recent marketing to consumers of renewable energy-related products, such as carbon offsets and renewable energy credits. The Green Guides, which were originally issued in 1992 and last updated more than a decade ago, offer the FTC’s guidance on how “reasonable consumers” may or may not be misled by marketing claims involving environmental benefits of consumer products, including biodegradation, composting, recycling, recycled content, source reduction, refilling and ozone-safe. The FTC solicited public comment on the Green Guides in 2008 and is now conducting consumer perception research. At this time, when the revision process will be completed and what the final outcome will be remains unclear.

Finally, during his [recent testimony before Congress](#), the FTC’s Director of the Bureau of Consumer Protection (David Vladeck) confirmed that the FTC’s advertising enforcement agenda will include environmental marketing or “green” claims. The Director discussed in detail how the proliferation of environmental marketing has led the FTC to respond with its “own green initiative” – including greater enforcement activity.

These actions provide a clear message that marketing claims based on environmental attributes of consumer products will face heightened scrutiny going forward. Consumer product manufacturers should review how their marketing claims compare to the guidance offered in the Green Guides – although the Green Guides are not technically enforceable, the recent enforcement cases indicate that the FTC will rely on those guidelines to determine whether enforcement is warranted.

In addition, companies marketing renewable energy-related products, such as carbon offsets and renewable energy credits, should follow the ongoing Green Guide revision process closely. That process may very well result in the expansion of the Green Guides to include carbon offsets, renewable energy credits and other renewable energy-related consumer products.

Consumer product manufacturers should also be mindful that their environmental marketing claims may be scrutinized by others in addition to the FTC. Enforcement could potentially also occur through independent actions by state attorneys general, or even through private actions filed by competitors either under section 43(a) of the FTC Act or through the National Advertising Division (NAD) of the New York City Better Business Bureau.

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