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Making Environmental Marketing Claims: A Balancing Act

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“Green” claims and commitments—from “recyclable” to “sustainable” to third-party certified—are proliferating on product labels and websites, in corporate reports, in Securities and Exchange Commission (SEC) filings and investor communications, and in other media. Regulators, investors, consumer class action attorneys, nongovernmental organizations (NGOs), and competitors alike are paying attention. Labeling and advertising claims that highlight a product’s environmental impact are increasingly scrutinized. Accusations of “greenwashing” abound. How can marketers tout environmental benefits while avoiding scrutiny?

Regulatory Developments: FTC Green Guides Update and New State Legislation

In recent years, marketers of food, consumer goods, and services have increasingly been making use of environmental marketing claims to meet consumer demand for products and services with environmentally friendly attributes, as well as to ensure alignment with sustainability pledges levied by retailers. Understanding how these claims are regulated at the federal and state levels is the first step in ensuring statements comply with applicable requirements.

At the federal level, environmental marketing claims are subject to the Federal Trade Commission (FTC) Act of 1914, which declares unlawful “unfair or deceptive acts or practices in or affecting commerce.” The FTC Guides for the Use of Environmental Marketing Claims (“Green Guides”) establish the FTC’s “current views about environmental claims” and describe situations when claims may or may not be consistent with the FTC Act, helping marketers avoid making claims that are unfair or deceptive under Section 5 of the FTC Act. Some states (e.g., New York) have adopted portions of the FTC Green Guides into state law.

Importantly, the Green Guides themselves are not binding but are nevertheless an important tool that industry can use to ensure claims conform to federal guidance. And the FTC can take action “if a marketer makes an environmental claim inconsistent” with the Green Guides. Over the past several years, the FTC has initiated enforcement actions against marketers targeting various environmental claims, such as “Green Promise” and “Eco Assurance” seals, VOC-free claims, and certified organic, among others, as violations of the FTC Act. While the FTC and state enforcement action targeting environmental claims has been relatively sparse over the past several years, should resources permit, we expect increased regulatory enforcement given consumer interest in this space.

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Green Guides update

It is likely the Green Guides will be updated soon. The most recent update to the Green Guides was in 2012, and the FTC recently stated that it plans to initiate a review to update them in 2022. In addition to general environmental benefit claims, the Green Guides currently address a number of different types of claims, including compostable, degradable, recyclable, recycled content, free-of, and nontoxic claims, as well as carbon offset claims. The Green Guides are informed by the FTC's "views on how reasonable consumers likely interpret certain claims." While the FTC has not yet indicated what areas may be under review in 2022, we may see the FTC renew its guidance for recyclable claims and also potentially address sustainable, organic, and natural claims, which the FTC declined to review for its 2012 update.

New state legislation

In addition to federal oversight, some states and localities have taken an active role in regulating environmental marketing claims in recent years. For example, with the passage of SB 343 and AB 1201 in 2021, California is out in front of other states in enacting restrictions on the use of the "chasing arrows" symbol surrounding resin identification codes (RIC) on plastic containers and updating its restrictions on compostable and degradable marketing claims pertaining to the sale of plastic products in the state. Under the Green Guides, "inconspicuous" use of the RIC, such as at the bottom of a container, does not in and of itself constitute an unqualified recyclable claim, but under SB 343, the use of the RIC placed inside a chasing arrows symbol is deemed a recyclable claim under state law. California requirements on RIC are especially interesting because the state may disallow claims of recyclability for plastics that could arguably satisfy requirements established in the Green Guides. States other than California have enacted their own laws governing environmental claims, such as Washington's standards for compostable and degradable claims, which became effective in July 2020.

States have also passed legislation related to the recyclability of materials. Manufacturers should be aware of initiatives at the state level that both regulate packaging requirements for various consumer products and aim to support recyclability of plastics. For example, both California and Washington have enacted minimum postconsumer recycled content requirements for certain types of plastic packaging.

Maine and Oregon have enacted, and several states are contemplating, so-called "extended producer responsibility" or EPR laws. Generally speaking, EPR laws require those who manufacture certain packaging materials to pay fees to support the improvement and expansion of recycling programs. Ultimately, regulated industries should be monitoring this evolving patchwork of state requirements that is developing around certain labeling and marketing claims and what enforcement may look like at the state level. Marketers should also watch for updates to the Green Guides and track associated FTC enforcement.

International Considerations

The above considerations are focused on the U.S. market, but, of course, companies often must address international considerations too. These can come in the form of international conventions, national or local legislation, industry guidance such as the International Chamber of Commerce's Framework for Responsible Environmental Marketing Communications, or corporate pacts, for example. And international regulators are likewise increasing their scrutiny of green claims. Competition Bureau Canada (CBC) imposed civil penalties, costs, and donations totaling almost CAN\$4 million on Keurig due to recyclability claims made by Keurig Canada on its K-cup pods that were allegedly false or misleading in areas where they are not accepted for recycling. As part of an agreement with the CBC, Keurig also agreed to qualify some of its recyclable claims. Canada has also announced draft regulations that would prohibit

certain single-use plastics and issued a Notice of Intent on the development of regulations that would set minimum recycled content requirements for certain plastics. Similarly, the European Commission recently proposed amendments to its Unfair Commercial Practices Directive to prohibit marketers from making generic, vague environmental claims, such as “environmentally friendly,” “eco,” or “green,” among other things. And there is a framework of international conventions, such as the Basel Convention, and voluntary multinational pledges, such as the Ellen MacArthur Foundation’s New Plastics Economy Global Commitment, that contemplates a circular economy for plastic. These are but a few examples of the various layers of stakeholders and requirements that may impact multinationals as they develop commitments related to their environmental claims.

Regulatory Intermixing for Climate Claims: SEC Climate Disclosure Rules

Public companies often provide information about their sustainability efforts in corporate responsibility or sustainability reports (ESG reports) or in their public filings with the SEC. The SEC’s regulation of material information pertaining to sustainability—particularly climate change—is quickly evolving. As discussed in detail in our recent advisory, [“SEC Proposes Rules to Require Climate-Related Disclosures,”](#) the SEC proposed rules on March 24, 2022 that would require SEC registrants to make public disclosures of climate change risks and emissions targets in their registration statements and periodic reports. The SEC’s proposed rules intend to standardize climate-related disclosures, recognizing a growing investor desire for standardized ESG information.

As public companies look to make climate-related sustainability claims, they must be mindful that certain claims governed by the Green Guides can go hand in hand with the proposed SEC disclosure requirements. For example, a public company making a carbon offset claim, such as on a product’s packaging, in marketing materials, or in an ESG report, must ensure that the claim is supported by competent and reliable scientific evidence, as required by the Green Guides, and be prepared to disclose the role that carbon offsets play in the company’s climate-related business strategy. This example highlights the importance of ensuring that overall business and marketing strategies align across product claims, ESG reports, and SEC filings, in compliance with all federal and state requirements.

Litigation Landscape: Challenges on the Rise

In addition to complying with applicable state and federal laws, marketers should also assess their exposure to consumer, NGO, and competitor litigation. The past few years have seen an uptick in the number of challenges targeting environmental marketing claims, not only from consumers and NGOs (Greenpeace and Earth Island, for example) but also from competitors and investors. Packaging labels, ESG reports, websites, executive statements, and other media have all been targets for these challenges. That said, consumer plaintiffs seeking to litigate and certify a class action most frequently focus on product labeling claims.

Sustainability claims, such as “sustainably sourced” and “sustainably caught,” were the subject of consumer class actions in 2021. For example, one putative class action alleged that Red Lobster’s sustainable claims for its Maine lobster and shrimp products are deceptive because the restaurant purportedly sources its products from suppliers that use environmentally destructive and inhumane practices. In another challenge, the Southern District of California recently denied Nestlé’s motion to dismiss a putative class action because the plaintiff plausibly alleged that the company’s claims, including “sustainably sourced” and a “UTZ” certification, on its chocolate products are deceptive because Nestlé purportedly sourced cocoa from plantations that rely on child labor, contribute to deforestation, and use other practices harmful to the environment. It remains to be seen, however, whether the plaintiffs in these cases can adduce sufficient evidence in support of their claims to survive summary judgment.

Recyclable, biodegradable, and compostable claims are also the subject of increased scrutiny, with a focus on single-use plastic products and their ability to be recycled by municipal recycling facilities. For example, since 2018, Keurig has defended challenges to its recyclable claims out of the Northern District of California and the District of Massachusetts, where plaintiffs alleged that its single-serve plastic coffee pods are deceptive because the pods are not recyclable at all. The Northern District of California certified a class of Keurig products purchasers, and the parties recently reached a settlement in principle.

Though industry is actively engaged on various issues pertaining to green claims, including consumer labels (e.g., How2Recycle product labeling, the Terracycle program, various product certifications) and corporate plastics reduction pledges (both brokered and individual), some NGOs have taken a skeptical view. In 2020 and 2021, Greenpeace and Earth Island debuted lawsuits against numerous corporations in California and D.C. involving the recyclability of plastic bottles. In addition to consumer false advertising theories, which are typically deployed to challenge labeling claims, the alleged non-recyclability of plastic products has been challenged on other legal theories, such as nuisance, negligence, and strict liability.

These challenges are just a sampling of the types of marketing claims that are at an increased target risk. They do not just extend to food products and plastic packaging—we are also seeing challenges to environmental claims associated with cleaning products (e.g., nontoxic) and personal care products (e.g., plant-based) and other consumer goods (e.g., biodegradable trash bags). As marketers continue to look to distinguish their products and as the plaintiffs' bar views environmental labeling claims as another frontier, the rate of lawsuits challenging environmental marketing claims is likely to rise. The use of certain chemicals and other substances, such as PFAS, glyphosate, or chemicals on California's Proposition 65 list, may also present increased risk where certain environmental claims are made.

Best Practices

It is important for marketers to implement best practices to avoid enforcement action and mitigate the risk of litigation. Some best practices for marketers to consider include:

- Work with counsel to monitor regulatory and legislative trends and changes.
- Leverage marketing and legal teams to review both current and proposed on-package and off-package statements, taking into account evolving regulatory and litigation considerations.
- Understand the support needed to substantiate claims and evaluate whether the company can leverage in-house findings or whether additional substantiation may be necessary. Working with third-party certifying bodies may be useful in developing support for claims, but using certifications and seals does not completely insulate marketers from risk and should be closely vetted.
- Implement other risk-mitigation measures, such as use of aspirational language, disclaimers, and qualifying language.
- Consider supply chain and packaging requirements to anticipate stricter state and local plastics measures through the supply chain.
- Align product marketing and branding with ESG reporting and SEC disclosures, if applicable.
- Ensure that sustainability disclosures are properly vetted through disclosure controls and procedures.

These are just a few broad points for consideration—green marketing and consumer lawsuits are not going away. Marketers looking to utilize environmental marketing claims walk a tightrope when trying to relay the environmental impact of products while at the same time avoiding enforcement action or litigation challenges. Understanding the shifting regulatory and litigation landscape is the first step in finding that balance.

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