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## Red Alert on Greenwashing

Today's direct sale and consumer product businesses, while genuinely concerned about the impact of operations and products on the environment, also recognize the benefits of differentiating themselves in the competitive marketplace. Promoting efforts to recycle and/or reduce energy use or waste generation appeals to environmentally conscious consumers, but making what the government may view as broad or unsubstantiated claims about environmental practices can lead to trouble. This practice, commonly known as "greenwashing," can expose a company to liability for multiple damages and fees under various federal and state laws, including the Lanham Act, the Federal Trade Commission Act, consumer protection statutes, and state laws.

To help navigate this terrain, the Federal Trade Commission (FTC) recently released a revised *Guides for the Use of Environmental Marketing Claims* (Green Guides). The new version applies to all forms of advertising and explains how the FTC evaluates green claims that might be in violation of Section 5 of the FTC Act, which grants the FTC agency enforcement power to stop deceptive or misleading acts affecting commerce. Below is some key guidance from the Green Guides, with tips for staying on the right side of enforcement.

### **BE SPECIFIC IN MAKING ENVIRONMENTAL ADVERTISING CLAIMS**

The FTC is clear that signage and other advertisements should not make general environmental claims, such as "Eco-Friendly" or that products or services "are green." These may be considered broad and unqualified, failing to explain to customers the exact nature of the practices that they would be supporting. To avoid consumers thinking there are broad environmental benefits well beyond what is the case, businesses should use focused statements about the facilities, products, or services rather than general claims.

### **SUBSTANTIATE ENVIRONMENTAL ADVERTISING CLAIMS**

The Green Guides urge advertisers to consider how to substantiate the truth of environmental advertising claims. Simply put, be sure to have a reasonable basis in the truth of the claim before making it. Depending on the claim, independent scientific evidence from a source acknowledged as reliable might be valuable, if not needed, to demonstrate that the claim is true. This is especially important in any instances in which the advertising includes comparisons to competitors or to the business practices used prior to implementing changes.

## **INCLUDE QUALIFICATIONS IN CLEAR, PLAIN LANGUAGE**

Per the Green Guides, claims about environmental benefits should be qualified as appropriate to ensure they are not misleading. To accomplish this, disclose limitations and explain any claim in a way that is prominent, understandable, and placed in close proximity to the claim. Claims must not mislead consumers with promises of benefits unlikely to be realized. The FTC suggests that businesses should limit claims to substantiated benefits and present all qualifications in clear language that is prominent and proximal to the claims they address.

## **WHAT MATTERS IS WHAT CONSUMERS THINK**

The guidance in the revised Green Guides advises that environmental marketing claims should be written so that an ordinary, reasonable consumer is able to interpret them. The Green Guides state clearly that all enforcement actions are considered through the lens of what a perfectly average consumer understands any claims or advertisements to mean. It is important to note that this also applies to the marketing of products or services to another business rather than directly to a consumer.

## **USE THIRD-PARTY CERTIFICATIONS AND SEALS OF APPROVAL**

Certifications and seals recognizing environmental efforts or benefits can be powerful marketing tools. Many manufacturers and retailers promote recognitions they have received from third-party entities (LEED, ENERGY STAR, Green Globes, etc.) to differentiate their position and/or attract energy-conscious consumers. These certifications are permissible as environmental claims under the revised Green Guides; however, they also state that businesses must comply with applicable standards of any rating or certification system in which they participate to avoid losing their membership or recognition status or to face other penalties. Additionally, certifications and endorsements are monitored by the FTC for substantiation, truthfulness, and an explanation of the basis for the award as well as any limitations on its breadth.

Special rules apply if a connection exists between the business and the entity providing the certification or seal. For these, advertisers are referred to the FTC's *Guides Concerning the Use of Endorsements and Testimonials in Advertising*. These guides dictate that steps must be taken to ensure that the endorsing party is not connected in a way that calls into question the endorsement. In general, trade groups are permitted to issue certifications and seals to trade group members, and trade group members may use these if the process is transparent and open.

## **RENEWABLE MATERIALS AND ENERGY**

The FTC requires that businesses be very clear when promoting their use of either renewable materials or energy. Materials should be identified with a clear explanation of exactly how they are renewable. For example, bamboo flooring that the manufacturer claims to be "made with renewable materials" might be considered deceptive by the FTC because consumers could reasonably interpret the claim to be broader than intended. A consumer could think that the floor was made with recycled content and is recyclable and biodegradable. The FTC advises a clear and qualified explanation of the exact environmental benefit of the product, such as this: "The floor is made entirely of bamboo, a source of wood that grows at the same rate, or faster, than if we harvest and use it." When making claims of renewable energy, businesses may benefit by specifying the exact type of energy they are using (wind, solar, etc.) and should not make unqualified claims of renewable energy use if fossil fuels are still used in some aspects of their business. If renewable energy credits are purchased to cover fossil fuel use, then the

claim of renewable energy use is allowable, but businesses may be well advised to include a qualification making clear their purchase of credits to cover fossil fuel consumption.

### **SPECIAL CLAIMS**

The revised Green Guides provide specific guidance on advertising the use of carbon offsets and on certain words in claims about products or materials, such as degradable, biodegradable, photodegradable, compostable, recyclable, recycled content, refillable, ozone-safe, ozone-friendly, and source reduction; these terms may need qualifying explanations of their effectiveness or substantiation. Before making a claim about a product being green, business should weigh the cost of developing and producing the green product against the environmental benefit of the product itself. Claims of degradability should not be made unless the product and its package will completely degrade within one year.

### **ENFORCEMENT: DON'T PAINT YOURSELF INTO A CORNER!**

The FTC has brought charges against Sherwin-Williams Paint Company, stating that they misled purchasers of their Dutch Boy Refresh style of paint. Sherwin-Williams claimed that this line was zero VOC<sup>1</sup>, appealing to health and environmentally conscious customers who do not want to bring potentially harmful VOCs into their homes. Sherwin-Williams advertised the VOC-free brand across any number of media, including the Internet, point-of-purchase marketing, brochures, and labels on the product itself. The FTC took exception. It noted that while it was technically true that the uncolored base paint from this line has zero VOCs, the tinted paints in this line, which vastly outsell the base, contain much higher levels of the compound consumers are trying to avoid.

The proposed consent order gives Sherwin-Williams two options: (1) it is prohibited from claiming any paint as zero VOCs without an independent test confirming a total absence of VOCs or (2) it must clearly and prominently disclose that "zero VOC" claims only apply to the base paint and state that tinting raises the VOC count, indicating the amount that VOCs increase with the different colors. Additionally, Sherwin-Williams is prohibited from providing anyone (independent retailers, distributors, etc.) with the means to make those deceptive claims. Finally, at its own expense, Sherwin-Williams must make sure that retailers remove all of the "zero VOC" advertisements and affix corrective stickers to all existing cans of paint making this claim.

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<sup>1</sup>Volatile organic compounds, or VOCs, are organic chemical compounds whose composition makes it possible for them to evaporate under normal indoor atmospheric conditions of temperature and pressure.

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### **FOR MORE INFORMATION**

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