

Clean Technology-Can You Say That?

Elliot P. Laws* and Christopher B. Leopold, Jr.*

Pillsbury Winthrop Shaw Pittman

2300 N Street, N.W., Washington, DC 20037

elliott.laws@pillsburylaw.com; christopher.leopold@pillsburylaw.com

ABSTRACT

Over the past several years, the issues of climate change and sustainability have gained increasing prominence in the minds of the public; and, as a consequence, consumers now demand greater access to “greener” products and services. Many companies have responded by adopting practices that allow them to deliver more environmentally responsible products and services to the marketplace, which, in turn, has led to a proliferation of “green” marketing claims. The Federal Trade Commission (“FTC”), the federal agency with primary responsibility for policing these types of marketing claims, has taken notice. And as a consequence, the agency has launched a systematic and comprehensive review of its regulations pertaining to green marketing claims – the FTC “Green Guides” (officially referred to as the Guides for the Use of Environmental Marketing Claims) [1]. The FTC does not have a concrete timeline for completion of the review or for when the revised Guides will be issued.

1 OVERVIEW OF THE GREEN GUIDES

The FTC first issued the Guides in 1992, and they were most recently updated in 1998. A flurry of enforcement actions followed the 1992 publication of the Guides, but there has been little enforcement since the mid 1990’s. It should be noted that the Green Guides are strictly advisory, and are not directly the basis of enforcement actions. However, the agency investigates and enforces cases stemming from allegations of deceptive advertising and fraud concerning environmental claims. Currently the Guides set forth a series of environmental categories and provide a set of permissible examples of claims that could be made by a company. The environmental categories in the Guides include: general environmental benefit claims (i.e. “environmentally friendly” or “environmentally safe”); degradability claims; compostability claims; recyclable claims; recycled content claims; source reduction claims (i.e. “10% less packaging”); refillability claims; and ozone safe/ozone friendly claims. By providing examples of claims that are both accurate and misleading, the FTC has successfully merged complicated concepts of environmental law with the equally baffling world of marketing. It is a surprisingly user-friendly system that permits manufacturers to gauge the limits on promoting their products. For example the Guides provide that a source reduction claim that a package contains “10% less packaging than our previous package” is not deceptive, but that a source reduction claim

that a package contains “10% less waste” is deceptive unless it specifies the comparison embodied in the claim.

Since their adoption, the Federal Trade Commission has overseen the use of key environmental identifiers in the marketing and packaging of products and services that claim to use recycled materials, biodegradables or organics. Today, manufacturers and service providers are adding new terms to their marketing lexicons, such as “carbon neutral” and “carbon offsets”. The FTC has acknowledged that environmental marketing is evolving along with consumers’ sophistication and knowledge of climate change and other environmental issues. However, the evolution of environmental marketing has been accompanied by what some consider to be a rash of potentially false or misleading claims. A recent study of 1,753 environmental marketing claims from products found at leading “big box stores” concluded that only one of these claims did not contain false or misleading statements [2].

2 2008 REVIEW OF THE GUIDES

The Guides were scheduled for a systematic review by the FTC in 2009, but due to the increase in environmental marketing claims, and an expansion in the types of products displaying environmental marketing claims, the FTC decided to conduct the review in 2008. In November 2007, the FTC solicited comments on several specific issues with respect to the Guides, and also on general issues such as the continuing need for the Guides, their economic impact, and their effect on the accuracy of environmental marketing claims. Specific issues that the FTC sought comment on were: whether the Guides should be extended to include guidance on renewable energy certificates (“RECs”) and carbon offsets; whether the Guides should be revised to include guidance on “sustainable” claims; whether the Guides should include “renewable” claims; what method the Guides should adopt for calculating recycled content; whether the Guides provide sufficient guidance for recycled content claims for textile products; and whether the provisions in the Guides that deal with degradability should contain specific time frame requirements.

A wide variety of stakeholders submitted comments in response to the FTC's solicitation. Industry stakeholders generally support the agency's initiative to update the Guides to account for new technologies and concepts that have become prevalent environmental attributes. However, some industry players have urged the FTC to move cautiously with respect to new environmental concepts like renewability, sustainability, carbon offsets, and renewable energy certificates because there is not a consensus in the scientific community on how to substantiate these marketing claims.

Given the lack of scientific consensus behind such terms, numerous industry stakeholders have advocated for a regime that does not embody strict definitions and standards for "sustainability" or "renewability". Rather, many parties support a regime in which advertisements must clarify why their product is "renewable" or "sustainable". Other industry players want to see the FTC provide more detailed and thorough examples in the Guides, thus creating a bright-line for companies to determine if a claim is deceptive. The advertising industry claims that significant changes to the guides will have a chilling effect on companies that are "greening" their products, and points to current industry efforts at self-regulation as an alternative to strict FTC oversight.

Third-party certification of products is an issue not covered by the current Guides that could be prominent in the 2008 revision. A number of independent organizations exist that test the environmental attributes of products, and in turn allow companies to display a certification seal on their labels if the product passes muster. Numerous stakeholders take the position that third-party certification is beneficial because it can be an easy and reliable means of substantiating an environmental marketing claim. However, mandatory third-party certification is strongly opposed by several groups because it is seen as an impediment to environmental marketing. The FTC's decision on third-party certification could be influenced by the Environmental Protection Agency's ("EPA") recent decision to restrict third-party certification on pesticide product labels pursuant to its authority under the Federal Insecticide Fungicide and Rodenticide Act [3]. In contrast to the FTC, the EPA has a stronger enforcement authority with regard to its regulation of health and safety claims made on pesticide labels because it approves pesticide labels prior to their release to the public.

The FTC asked for general input from stakeholders on whether existing international standards for environmental marketing should be incorporated into the Guides. The International Organization for Standardization ("ISO") series that covers environmental marketing claims is ISO 14021 [4]. The majority of stakeholders support using ISO 14021 as guidance for the current revision. Many parties

also cautioned against the wholesale incorporation of ISO 14021 because it was issued in 1999, and is almost as dated as the current Guides. Additionally, the ISO standards prohibit claims that market a product as "sustainable". Although nearly all stakeholders acknowledge that sustainability is an evolving and complicated concept that incorporates numerous non-environmental components, most of them do not support a prohibition on sustainability claims. Rather, several commenting parties encourage the FTC to address only the environmental components of sustainability in the revised Guides.

The ISO also offers standards for Life Cycle Assessments of products [5]. A Life Cycle Assessment ("LCA") evaluates the environmental impact of a product from cradle to grave, meaning from the raw materials extraction stage to the ultimate disposal or reuse of the product. Given the increasing appearance of LCAs in product advertising, several comments suggested that the FTC look to ISO 14044 – Life Cycle Assessment, for guidance in determining how to properly incorporate LCA marketing into the revised Guides.

In recent years there has been an increasing trend of tying human health impact claims to environmental marketing. The current Guides do not address human health impacts. Some stakeholders believe that the FTC should not expand the Guides to cover human health claims because it is beyond the scope of environmental marketing. However, there are also parties who believe that environmental marketing and human health impacts are intrinsically related, and that the guides should require clarification and substantiation of any human health impact claim. The latter position still gives companies the flexibility of advertising health attributes without the FTC treading into technical areas with which it is not familiar.

Lastly, several commenting parties indicated that the FTC should implement a public education program for consumers on environmental marketing. Such a program would arm consumers with the practical knowledge they need to make educated purchasing decisions with respect to a product's environmental attributes.

3 PUBLIC MEETINGS

As part of the 2008 review of the Guides, the FTC plans to hold a series of public meetings. The meetings will serve as an information gathering forum where a wide variety of stakeholders will be able to present their concerns. The FTC does not have a set schedule for the public meetings, and has

not determined all of the topics that will be addressed. The first meeting, addressing carbon offsets and RECs, was held in January 2008, and another is scheduled to take place on April 30th that will cover “green” packaging.

3.1 Carbon Offsets and Renewable Energy Certificates

The FTC held the first in a series of public meetings with consumers and industry groups to sort out issues related to carbon offsets, carbon neutrality, RECs, and other descriptors and products that resonate with consumers’ concerns over climate change in January 2008. The specific areas that the agency sought comment on were: 1) the claims that sellers of carbon offsets and RECs are making about their products and how consumers interpret these claims; 2) what express claims companies are making on their products based on their own purchase of RECs or carbon offsets, and what claims are implied by the advertising; 3) what property rights consumers get when they purchase carbon offsets or RECs; 4) what consumers think they are buying when they purchase carbon offsets or RECs; 5) the impact that consumers think their REC or carbon offset purchase will have on future quantities of greenhouse gasses (“GHG”) in the future; 6) when consumers perceive that their purchase of offsets or RECs will have an impact on GHG quantities; 7) the relationship between “additionality” in carbon offset markets and the FTC’s standard for deception; 8) whether any existing state laws address consumer protection in carbon offset or REC markets; and 9) whether there are any self-regulatory programs that address consumer protection in carbon offset or REC markets.

Given the prevalence of the issue of climate change, a wide variety of stakeholders attended the meeting and submitted comments for the FTC’s consideration. There was nearly universal sentiment from stakeholders that the FTC’s effort to bring clarity to the carbon offset and REC market is much needed. Given the abstract nature of products in this field, namely reductions in greenhouse gasses or power generated from renewable energy sources, there is an increased likelihood for consumer deception. Numerous stakeholders from both industry and government expressed the need for greater clarity in what exactly consumers of a carbon offset or REC get with their purchase. There is a strong sentiment that sellers of RECs and carbon offsets need to provide greater details of the GHG reduction projects that underlie the product. Corporate and household consumers as well as traders of carbon offsets and RECs all believe that sellers should be required to provide specific information on the project(s) that create the offset or generate the renewable energy. Details such as the type of project, location, and timing of an offset project are seen as essential to avoiding consumer deception.

There are a number of technical issues related to RECs and carbon offsets which complicate their inclusion in the Guides. For example, there is not a clear international consensus on how to calculate the baseline emissions for a project, what the actual reductions are, or on the issue of additionality (whether the purchase of a REC or offset actually creates GHG reductions, or whether it would have been created in the absence of the purchase: a “business-as-usual” scenario). Some in the energy industry have indicated that they think the FTC is overstepping its bounds and expertise if they create definitions and parameters for complex issues like additionality.

If the FTC decides to create parameters in the Green Guides for emissions baselines, additionality, reductions, and general GHG accounting, there are several international and domestic guidelines from which they can draw. Non-governmental organizations have created standards in this area such as the World Resources Institute GHG Accounting Protocols [6] and the Center for Resource Solutions Green-e Climate Standard for GHG Emission Reductions [7]. Additionally, market entities like the Chicago Climate Exchange (“CCE”) outsource verification of carbon offsets to several different organizations [8]. The CCE lists several approved companies for verification for each type of offset project. Thus, if the FTC decides to expand the Guides to cover these issues, they will not necessarily have to chart their own path: they could either incorporate the existing standards, or rely on the CCE’s model for certification.

Individual States have also taken noteworthy strides in regulating carbon offsets and RECs. In 1999 the National Association of Attorneys General (“NAAG”) issued the Environmental Marketing Guidelines for Electricity [9]. Although not binding law, the NAAG guidelines are meant to provide guidance to states regulating in this area. Additionally, several states such as Delaware, Pennsylvania, Massachusetts, New Jersey, Rhode Island, and Texas have existing laws covering marketing of “clean” energy. A bill was recently proposed in the California Assembly that creates a voluntary certification program for companies selling GHG offsets, a potentially significant development if enacted given that State’s unchallenged leadership in climate change legislation. Additionally, a coalition of ten states led by Vermont and California submitted comments following the January 8 workshop, encouraging the FTC to undertake comprehensive regulation in this area. Given that consumer protection is not an area of federal preemption, states may institute or revamp

their own regulatory efforts if they are not satisfied with the FTC's final product.

3.2 Green Packaging Public Meeting

The FTC will hold another public meeting on April 30, which will focus on green packaging claims. Although this topic is not as publicized in the media as carbon offsets, the meeting will draw attention because packaging affects a broad variety of industries. The FTC is seeking comments on the following types of packaging claims: recyclability; recycled content; degradability (bio, photo, and compostability); source reduction; refillability; and ozone safe/friendly. The FTC also solicited input on whether the Guides should be expanded to include guidance on bio-based packaging, life cycle claims about packaging, and third-party certifications or seals on packaging.

4 CONCLUSION

There is currently little indication as to what extent the FTC will regulate the emerging areas of environmental marketing. Nor is there any reliable projection as to the timeframe for the agency's decision. The current agency information gathering and analysis process will almost certainly lead to some new guidance and will almost certainly be controversial to some stakeholders. Thus, it is important for businesses, especially those on the cutting edge of these new technologies, to participate in this process now while the regulations are still taking shape.

REFERENCES

- [1] Guides for the Use of Environmental Marketing Claims, 16 Code of Federal Regulations Part 260.
- [2] Terra Choice Environmental Marketing, Inc., "The Six Sins of Greenwashing", November 2007.
- [3] See 72 Federal Register 61638, October 31, 2007.
- [4] ISO 14021, "Environmental labels and declarations -- Self-declared environmental claims", 1999.
- [5] ISO 14044, "Environmental management -- Life cycle assessment -- Requirements and guidelines", 2006.
- [6] Information available at: <http://www.wri.org/project/ghg-protocol>.
- [7] Documents available at: http://www.green-e.org/getcert_ghg_standard.shtml.
- [8] Information available at: <http://www.chicagoclimatex.com/content.jsf?id=102>.
- [9] National Association of Attorneys General, "Environmental Marketing Guidelines for Electricity", 1999.