



Environmental Endorsements Can Be Marketing Scams

Federal regulators turn focus on 'green' seals of approval for products

By **CHRISTOPHER P. McCORMACK**

The Federal Trade Commission regulates environmental marketing claims both by rule and by enforcement actions. Recent developments on both fronts highlight the difficulty of defining meaningful regulatory bounds for environmental certification claims — or at least of doing so for any but the most egregiously misleading claims.

On the rulemaking side, the big news has been the publication in October 2010 of a long-awaited proposal to revise the FTC "Green Guides" environmental marketing rules. Previously updated 12 years earlier, the rules showed their age in their focus on a virtual ancient history of environmental concerns — recycling, ozone depleting chemicals, biodegradability — that may have been closer to the cutting edge of environmental marketing in 1998, but have long since been displaced by a highly generalized lexicon of sustainability and "earth friendliness."

Updating the rules has proved problematic for these more amorphous labels, not least because many "green" claims defy quantification: percentage recycled content can be expressed as a number, but "sustainability" is a more elusive concept. And it is not only the claims that have evolved: the environmental impact of a product or practice is increasingly understood in terms of life-cycle analysis that attempts to account for externalities. That electric car? In parts of North America, it may actually be powered by coal. And what's your plan for the batteries?

The proposed Green Guides revisions fall well short of engaging with all of these issues. To take only one conspicuous omission, they renounce any intent to take up life-cycle analysis at all. While declining to address the notion of "sustainability," the proposal unhelpfully notes that marketers are "responsible for substantiating consumers' understanding of this claim in the context of their advertisements."

The major additions are consistent with the pattern of regulating claims about quantifiable attributes: proposed new provisions would address "renewable" energy or materials and "carbon offsets." When virtually every advertiser strives to wrap itself in the environmental flag, these are modest proposals indeed.

Abstract Claims

The subject of environmental certifications provides an interesting case study in the past, present and future of environmental marketing claims — and, perhaps, of the limitations of regulation. The problem is clear: manufacturers and sellers seek to differentiate themselves by qualifying for this or that "approval" or "seal," and third party providers are happy to oblige. The result is a proliferation of purported third-party certifications that are difficult for consumers to understand or verify.

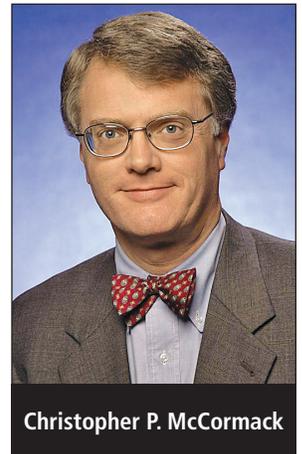
To mention the consumer is to recall, however, that the FTC's mandate in this area comes not from any environmental protection agenda, but from its general role with respect to unfair and deceptive marketing practices. The touchstone therefore is whether an environmental marketing

claim is deceptive, and the general rule is that the advertiser must have substantiation for its claims.

With these concepts as a starting point, it is not surprising that the rules

gravitate toward concepts of "quantification." It becomes more challenging to adapt this analytical framework to amorphous claims that something is "sustainable" or "green." Third-party certifications occupy a conceptual middle ground: they tend to relate to abstract environmental values or benefits but can often be analyzed objectively.

The Green Guides illustrate how thinking on this subject has evolved. In 1998, the FTC addressed certifications only as an example in the context of "general environmental benefit" claims, which were (and are) generally discouraged because they often cannot be quantified. At that time, the Green Guides counseled that ad-



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vertisements mentioning certifications or seals should be accompanied by “clear and prominent” explanations of the product’s particular environmentally advantageous attribute.

The 2010 proposal would give the certification issue its own subsection of the Green Guides. Importantly, a key element of the proposal is to note that environmental certifications are a species of third-party endorsements subject to existing FTC guidance on such endorsements. That guidance in turn counsels that endorsements must reflect the opinions or beliefs of a party other than the sponsoring advertiser, must reflect the honest judgment of the endorser, and must fully disclose connections between the endorser and the advertiser that might materially affect the weight or credibility of the endorsement.

The proliferation of third-party certifications and the overlap with industry groups is aptly illustrated by comments on the FTC proposal from the wood products sector. Two commenters, the Sustainable Forestry Initiative and the Forest Stewardship Council, offer certifications for “sustainable” forestry practices and wood products. A third commenter, the American Forest & Paper

Association, is an industry association. One of the “sustainable forestry” certification providers has been associated with AF&PA. Can you tell which? Can consumers? Is that good or bad? Would the certifying body’s relationship with an industry association “materially affect the weight or credibility” of a certification of compliance?

However difficult the challenges of defining rules for environmental certification claims, little more guidance is to be found in FTC enforcement cases. In the enforcement realm, the problem is not that the lines are too elusive, but that they are too clear: the cases prosecuted tend to be egregious instances of outright fraud.

Certainly this seems to have been the case in a recent administrative decision involving “Tested Green,” a business that advertised and sold environmental certifications. The FTC’s complaint alleged that “Tested Green” neither tested nor verified anything, with the possible exception of its customers’ credit card numbers.

Two “endorsing” organizations (including one with the sunny title of “National Green Business Association”) were owned by the same individual who owned “Tested Green.”

The certification process was nonexistent. In essence, customers paid a fee for the right to put the “Tested Green” logo on their web sites. *Voilà* — environmental credibility for less than \$600.

The “Tested Green” proceeding is consistent with the FTC’s pattern of devoting enforcement resources to outright scams. The facts of such cases hold little potential to mature into a body of precedent that would help resolve the close issues that seem to have stymied the rule writers.

The revised “Green Guides” remain a proposal as the FTC continues to digest nearly 350 comments from industry, environmental and consumer groups. With or without the new rules, regulation of environmental certification claims seems likely to remain problematic. The search for environmental differentiation in marketing will certainly intensify, and with it the temptation to accommodate sellers by providing “third party” indicia of environmental superiority.

Outright scams are easy to recognize and, for even the minimally scrupulous, easy to avoid. The harder calls will be in the middle where neither the rules nor the precedents provide meaningful guidance. ■