

Environmental Law

It's Not Easy Being 'Green'

Addressing the practice of 'greenwashing'; moving toward more realistic environmental enforcement

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It's not easy being "green," but that is how a lot of companies would like to promote their products. Despite the fact that environmentally responsible products typically carry price premiums, consumer demand for these goods continues to rise even in these difficult economic times. As a result, companies seeking to capitalize on this growing trend have flooded the marketplace with a variety of goods, from baby wipes to automobiles touting the purported environmental benefits of their products. This has resulted in a myriad of products carrying buzzword designations such as "sustainable," "eco-friendly," "biodegradable" and the like in an effort to take advantage of consumer preferences for "green" products. Unfortunately, there is no strict definition of what qualifies as a "green" product or when a company can put these buzzwords on a product, leav-

ing customers at the mercy of marketers.

As a result, companies are able to confuse or mislead consumers regarding the purported environmental benefits of their products. This practice is called "greenwashing," and it is becoming more and more prevalent. For example, in a recent study, researchers were sent to six big-box stores to observe and record every claim that a product was green. That study found that all but one of the over 1,000 products making green claims included some form of greenwashing. See TERRACHOICE ENVTL. MKTG., *The Six Sins of Greenwashing: A Study of Environmental Claims In North American Consumer Markets* 1 (2007), available at <http://www.terrachoice.com>.

Due to the prevalence of greenwashing, various enforcement efforts have been undertaken, with mixed results. However, the current greenwashing problem could be curtailed significantly if the Federal Trade Commission (FTC) and United States Environmental Protection

Agency (EPA) partnered to develop and enforce objective regulations for green product marketing.

Current Approaches to Enforcement

In the absence of regulations defining what it means to be green, responsibility for policing such claims has fallen on the FTC. Under its power to prosecute false and misleading advertising pursuant to the FTC Act, 15 U.S.C. § 41, et seq. Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." In 1973, the FTC began using the act to prosecute deceptive environmental advertising claims. As demand for increased regulation became more widespread, in 1992 the FTC promulgated its Guides for the Use of Environmental Marketing Claims ("Green Guides"). 57 Fed. Reg. 36,363. The Green Guides are the FTC's interpretation of Section 5 of the FTC Act as applied to environmental advertising and marketing, and provide advertisers with safe harbors in the form of examples of acceptable environmental claims. While the Green Guides are not regulations, the FTC has taken enforcement action against companies based on conduct inconsistent with the guides.

In response to the dramatic growth in the number of companies employing green marketing, the FTC proposed its most recent revisions to the Green Guides in 2010. 75 Fed. Reg. 63,551. Two years, three public workshops, a consumer perception study and over 5,000 comments later, the FTC adopted

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new Green Guides on Oct. 1, 2012. *See* 16 C.F.R. Part 260. The new guides generally are consistent with past FTC guidance, though some modifications have been made to strengthen existing sections.

Consistent with past practice, the new guides instruct companies to avoid broad, unqualified, general environmental benefit claims. However, going one step further, the new guides also require a trade-off analysis. In short, a company cannot claim that its plastic bottle is environmentally friendly because it uses less packaging, if the manufacturing process to make the bottle requires more energy than the previous process. Also of note, new sections have been added to cover issues such as the use of seals of approval, carbon offsets and renewable energy claims. More specifically, marketers using seals of approval should disclose any material connections to the certifying entity. For carbon offsets, companies should employ reliable scientific and accounting methods to measure claimed emission reductions. Unqualified "renewable energy" claims should be avoided if the power used to manufacture any part of the product was derived from fossil fuels.

Although the new Green Guides have addressed some significant prior deficiencies, inherent problems remain because the FTC's enforcement model is based on the agency's subjective interpretation, rather than on clear standards of conduct found in regulations. When subjective guidelines rather than clear regulations are used, inconsistent results have been produced. *See Hill v. Roll Int'l Corp.*, 128 Cal. Rptr. 3d 109, 114 (Cal. Ct. App. filed May 26, 2011) (considering the Green Guides and finding green water drop symbol was not likely to be perceived as a third-party seal of approval because the label listed *fijigreen.com* next to the image), *with Koh v. S.C. Johnson & Son*, Civ. No. 09-00927, 2010 WL 94265, at *2-3 (N.D. Cal. Jan. 6, 2010) (applying the Green Guides and finding that a reasonable consumer would interpret the "Greenlist" seal as being that of a third party even though it directed consumers to visit *scjohnson.com* for more information). Therefore, even with the potential improvements found in the new guides, the FTC's challenges in regulating the green marketplace will likely persist.

Even before the new Green Guides were finalized, the FTC had increased its enforcement efforts but could not maintain pace. In 2009, the FTC charged multiple companies with making false and unsubstantiated claims that their paper products were "biodegradable" because the companies' products were generally disposed of in landfills, incinerators and recycling facilities that made biodegradation within a reasonable amount of time an impossibility. *See, e.g., In re Kmart Corp.*, FTC File No. 082 3186, Dkt. No. C-4263 (July 15, 2009). Later that year, the FTC filed complaints against four companies alleging they made false and unsubstantiated green claims that their products were made using an environmentally friendly process, retained the natural antimicrobial properties of bamboo and were biodegradable. *See, e.g., In re The M Group*, FTC File No. 082 3184, Dkt. No. 9340 (Aug. 7, 2009). In 2010, faced with the continued proliferation of green marketing claims and rising concerns over greenwashing, the FTC disseminated letters to 78 companies warning that advertising rayon textile products as bamboo could result in public enforcement action. Notwithstanding these efforts, the FTC has limited resources and simply is unable to audit every greenwashing claim. Thus, there currently exists no comprehensive or effective enforcement mechanism to address greenwashing. And, as consumer interest in products that offer environmental benefits continues to rise, an effective enforcement solution is necessary.

Potential Solution

The current greenwashing problem could be resolved by an interagency partnership between the EPA and the FTC, in which the two agencies work together to create objective standards that are collectively enforced. The FTC's primary goal is the protection of consumers, and therefore its focus is on consumer perceptions regarding to the claimed environmental benefits of products and not on environmental policy issues. Conversely, the EPA's primary goal is the protection of human health and the environment, and its focus is on driving federal policies to that end. Nevertheless, their goals overlap in this field. The EPA's goal of protecting human health and the environ-

ment is met when consumers have the opportunity to purchase products that benefit the environment, while the FTC's goal of protecting consumers' expectations is met when green products actually provide the promised environmental benefits.

This interagency approach would not be unprecedented. Before the first Green Guides were issued in 1992, Congress considered two bills that would have empowered the EPA to create its own environmental marketing guidelines. Although neither bill was passed, the EPA has continued to play a role in regulating environmental marketing. For example, the EPA is involved in aspects of consumer protection through its work under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, et seq., regulating and enforcing, inter alia, the marketing of antimicrobial products and obligating marketers to substantiate product claims. The EPA also recently introduced a website devoted to helping consumers, retailers, manufacturers and institutional purchasers identify "greener" products. *See* EPA Environmentally Preferred Purchasing, available at <http://www.epa.gov/ooaujeag/basic-info/index.html>. Further, the EPA oversees several voluntary certification programs, including Energy Star, Water Sense and the Design for Living's Environmentally Preferred Purchasing Program. And, the EPA and Department of Energy have recently outlined a series of steps in which the agencies will work together to strengthen the Energy Star program through enhanced product testing and enforcement. To be sure, since 1970, the EPA has continued to gain expertise in setting environmental policy and writing and enforcing regulations.

Although the benefits to an interagency partnership that combines the environmental expertise of the EPA with the consumer protection knowledge of the FTC are evident, the FTC may be resistant because it views its role as limited to curbing consumer deception, not setting environmental policy and standards. The FTC has made clear that it does not intend to set environmental policy or adopt performance standards. *See* Vincent J. Mangini, *Policing Unfair and Deceptive Environmental Product Claims*

in Advertising, 201 N.J.L.J. 3 (2010). Nevertheless, this potential pitfall could be avoided if the EPA handles environmental policy issues and creates objective regulatory standards based on its environ-

mental expertise, while the FTC assists the EPA with enforcement. Thus, the issue of greenwashing could be resolved by a partnership between the EPA, with its established expertise in setting environ-

mental policy and standards and examining the scientific and technical support for product claims, and the FTC, with its extensive experience in the field of consumer protection. ■