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New FTC "Green Guides" Provision Sets Standards for the Use of Associations' Environmental Certifications and Seals of Approval in Advertising

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On October 1, 2012, the Federal Trade Commission ("FTC") issued revised *Guides for the Use of Environmental Marketing Claims* ("Green Guides"), 16 C.F.R. Part 260.

One of the most significant changes in the revised "Green Guides" is a new section on the use of environmental certifications and seals of approval in advertising.

Many industry trade associations now have certification programs. (For example, the National Association of Home Builders and the U.S. Green Building Council have created environmental certification programs.) Marketers in many different industries increasingly use certifications and seals of approval to communicate environmental claims.

Any association that is considering the creation of such a program and any association member considering the use of such a certification or seal of approval in its advertising or on its packaging should take a close look at what the FTC has to say in the revised "Green Guides."

A Closer Look at the New "Green Guides" Provision on Environmental Certifications and Seals of Approval

The new section on certifications and seals of approval (16 C.F.R. Part 260.6) has five parts.

First, part (a) of the new section states what should be obvious – that it is deceptive to claim that a product, package, or service has been endorsed or certified by an independent, third-party organization when it has not.

Next, part (b) says that an advertiser's use of the name, logo, or seal of approval of a third-party certifier may be considered an endorsement – and so may need to meet the criteria for endorsements set forth in the FTC's *Guides Concerning Use of Endorsements and Testimonials in Advertising* (16 C.F.R. Part 255). If a seal of approval does constitute an endorsement and there is a "material connection" between the certifier and the advertiser, that "material connection" should be disclosed. (Generally speaking, payment of a fee to a third-party certifier for the use of a seal of approval does not need to be disclosed.)

Part (c) of the proposed new section points out that third-party certification does not necessarily provide the necessary substantiation for all the claims that may be communicated by the mention of the certification in an advertisement. It remains the advertiser's responsibility to determine what claims are communicated by reference to an environmental certification or seal of approval in its advertising, and to ensure that the certification adequately substantiates its claims.

Part (d) warns against the use of broad and unqualified certifications or seals of approval because they likely convey a general environmental benefit claim, and the FTC believes that it is "highly unlikely" that advertisers can back such claims up.

Part (e) of the new section states that any language qualifying a general environmental benefit claim communicated by a certification or seal of approval should be "clear and prominent" and should clearly convey that the certification or seal of approval refers only to specific and limited benefits. This qualifying language may be part of the certification or seal itself.

How the Examples in the New Section Illuminate the FTC's Thinking

The FTC has included eight hypothetical scenarios in Part 260.6 to help explain what that new "Green Guides" section means.

Example 1: An advertisement for paint features a “GreenLogo” seal and the statement “GreenLogo for Environmental Excellence.” According to the FTC, this advertisement likely implies that the GreenLogo seal was awarded by a third-party certifier with expertise in evaluating the environmental attributes of paint, that the certifier objectively evaluated the paint using independent standards, and that the environmental benefits of the advertised paint are far-reaching.

If the advertiser created and awarded that seal to itself, there needs to be a clear and prominent disclosure of that fact. The advertiser also should limit the broad and unqualified “green” claim communicated by the seal by stating the specific environmental benefit or benefits for which it has substantiation.

Example 2: A manufacturer advertises its product as “certified by the American Institute of Degradable Materials.” The advertisement does not mention that the American Institute of Degradable Materials is an industry trade association, so the certification likely implies that it was awarded by an independent certifier.

If a manufacturer that uses the certification in its advertising has met standards that have been developed and maintained by a “voluntary consensus standard body”¹ and an independent auditor is hired to apply the standards objectively before the certification is granted, the advertisement is not deceptive (assuming that the product meets the requirements of the “Green Guides” provision that applies to degradable claims).

In the corresponding example in its proposed guides, the FTC said that such an advertisement would be deceptive unless the advertiser added clear and prominent language indicating that the certifier was an industry trade association.² But the FTC was persuaded by the public comments it received that such a disclosure was not necessary if the certification was based on independently-developed standards applied objectively by an independent auditor. If so, there is no need for a “scarlet letter” disclosure.

Example 3: A product features a seal of approval from “The Forest Products Industry Association.” Because it is clear from the certifier’s name that the product’s seal was issued by an industry group, no further disclosure of that fact is necessary regardless of whether the seal program meets the “independent” standard discussed above.

Example 4: A marketer’s package features a certification with the text “Certified Non-Toxic,” which likely conveys a message that the product is certified by an independent organization. The certifier’s standards were developed by a voluntary consensus standard body and are applied by an independent auditor. But although non-industry members comprise a majority of the certifier’s board of directors, industry members may veto any proposed changes to the standards. Therefore, the certifier is not truly independent, and the package would be deceptive.

Example 5: A marketer’s industry sales brochure for overhead lighting features a seal with the text “EcoFriendly Building Association” to reflect that the marketer is a member of that organization. The marketer is a member of this association, but the association has not evaluated the environmental attributes of the company’s product.

The use of the seal would be deceptive unless the advertiser disclosed that the seal referred to the company’s association membership only, and that the association had not evaluated the product’s environmental attributes. The advertiser should also qualify the general environmental benefit representation likely communicated by the seal by stating the particular product attributes for which it has substantiation. For example, the marketer could state, “We are a member of the EcoFriendly Building Association, which has not evaluated this product. Our lighting is made from 100 percent recycled metal and uses energy-efficient LED technology.”

Example 6: A product label contains an environmental seal, either in the form of a globe icon alone, or in the form of a globe icon with the text “EarthSmart.” EarthSmart is an independent, third-party certifier that is technically qualified to evaluate products’ chemical emissions. While the marketer meets EarthSmart’s standards for reduced chemical emissions during product usage, the product has no other specific environmental benefits.

Neither seal would be deceptive if the marketer accompanied it with clear and prominent language limiting the general environmental benefit claim implied by the globe icon or the EarthSmart seal of approval to the particular benefits for which the manufacturer has substantiation. For example, the marketer could use this language: “EarthSmart certifies that this product meets EarthSmart standards for reduced chemical emissions during product usage.” Alternatively, qualifying language already incorporated in the seal itself (e.g., “EarthSmart-certified for reduced chemical emissions during product

usage”) could accomplish this.

Example 7: A bottle of window cleaner features an “Environment Approved” seal granted by an independent, third-party certifier (or industry association) with appropriate technical expertise. The certifier granted the seal after evaluating 35 different environmental attributes. This seal likely conveys that the product has far-reaching environmental benefits and that the certifier certified the product for all of these benefits, which makes it likely to be deceptive.

The seal would likely not be deceptive if the marketer accompanied it with clear and prominent language disclosing that the seal refers only to specific and limited benefits. For example, the seal could state: “Virtually all products impact the environment. For details on which attributes we evaluated, go to [website that discusses this product].” The referenced webpage would provide a detailed summary of the examined environmental attributes.

The reference to a website is sufficient here only because the disclosure language quoted above – which tips off consumers to the fact that this product may not have zero negative environmental impact – was added to the seal. Without that qualifying language, the advertiser would be relying wholly on the website to cure the deceptive general environmental benefit claim. The FTC’s position is that a seller can’t use a website to qualify a misleading claim of any kind on a product label – any qualifying language required to prevent an ad from being deceptive must be on the label.

Example 8: Great Paper Company sells photocopy paper with packaging that has a seal of approval from the No Chlorine Products Association, a nonprofit, third-party association. There are no undisclosed material connections between Great Paper Company and the No Chlorine Products Association. Using standards widely recognized by industry experts, the No Chlorine Products Association certifies that products are chlorine-free.

Unlike the hypothetical “EarthSmart” and “Environment Approved” seals discussed in the previous two examples, the name of the hypothetical certifier in this example (“No Chlorine Products Association”) conveys that the certification applies only to one specified environmental attribute rather than implying to the overall environmental benefits of the product.

Conclusion

The revised FTC “Green Guides” are aimed primarily at advertisers, so their provisions are of particular importance to association members who want to make environmental claims for their products or services.

But Part 260.6 of the guides has considerable relevance for associations that currently administer environmental certification programs, as well as those who are considering such programs.

The FTC probably wouldn’t take action against a trade association just because one advertiser misused its environmental certification or seal of approval in its advertising (assuming that the program is *bona fide* and honestly administered). But if the association allowed its members to misuse its certification or seal of approval to deceive the public, or if the association promoted its program in a deceptive manner, the FTC might take action against the association as well.

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This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.

¹ Voluntary consensus standard bodies are “organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. . . . A voluntary consensus standards body is defined by the following attributes: (i) openness, (ii) balance of interest, (iii) due process, (iv) an appeals process, (v) consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus members are given an opportunity to change their votes after reviewing the comments.” Circular No. A-119 Revised, Office of Management and Budget at www.whitehouse.gov/omb/circulars_a119.

² The proposed guides also contained an example that stated that a product advertisement featuring an industry association certification seal would be deceptive if the advertiser was a member of that association but failed to disclose that fact. That example was deleted from the final guides. If the association’s certification program is independent, no disclosure of an

advertiser's membership in that association is required under the new guides.