

## How FTC Is Cracking Down On Environmental Ad Claims

*Law360, New York (December 02, 2013, 3:29 PM ET)* -- The Federal Trade Commission's recent actions against nine companies making allegedly deceptive environmental marketing claims send a strong message to companies about the enforcement priorities of the FTC and the need for companies to possess adequate substantiation for claims about the environmental benefits products.

Recognizing the growing consumer interest in environmentally friendly products and the proliferation of green claims in the marketplace, the FTC issued, in October 2012, revised Guides for the Use of Environmental Marketing Claims ("The Green Guides").<sup>[1]</sup> The purpose of the green guides is to prevent deception by offering the FTC's interpretation of the types of green marketing claims that are considered deceptive or misleading under section 5 of the FTC Act.

This past month, the FTC announced settlements with three mattress companies that were marketing their products as having no volatile organic compounds ("VOC") or chemicals, and six other companies that marketed plastic products or additives as biodegradable. This enforcement activity highlights the importance of the complying with the green guides and offers lessons to companies marketing the environmental benefits of their products or services.

### The Mattress Cases

In July 2013, the FTC announced that it had brought complaints against three companies alleging violations of section 5 of the FTC Act. Mattresses that were marketed by Relief-Mart, Essentia Natural Memory Foam Company and Ecobaby Organics, included advertising materials claiming that the products are VOC free and "chemical-free."<sup>[2]</sup> According to the FTC, these three companies did not have a reasonable basis to support their "free of" claims. The green guides specifically address "free of" claims as well as claims that a product is "non-toxic."

According to the FTC green guides, a company can make a "free-of" claim (i.e., "free of VOCs") even if when a trace amount of the substance is present but only when three conditions are met: (1) the level of the specified substance is no more than that which would be found as an acknowledged trace contaminant or background level, (2) the substance's presence does not cause material harm that consumers typically associate with that substance, and (3) the substance has not been added intentionally to the product.<sup>[3]</sup>

According to the FTC, these companies did not have competent and reliable scientific evidence, in the form of appropriate testing, demonstrating that these mattress products emitted only trace levels of VOCs. The consent orders, approved by the FTC in November 2013, prohibit the companies from making VOC-free claims and claims of any other environmental benefit or environmental attribute absent

appropriate scientific testing.

The Ecobaby case, in particular, was also significant because the FTC's complaint alleged that the company's use of an environmental certification was false or misleading. Environmental seals and certifications, or eco-labels, are very popular but also potentially very confusing. According to the Ecolabel Index, a global directory of eco-labels and environmental certifications, there are over 400 different eco-labels and green certifications being used globally. The 2012 green guides included a new section specifically addressing certifications and seals of approval and provided that it is deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent third party.[4]

In Ecobaby, the promotional materials included a seal of approval from an entity called the National Association of Organic Mattress Industry ("NAOMI") which, according to the FTC, suggested to consumers that an independent certifying organization NAOMI grants the seal based on objective standards. Yet according to the FTC's complaint, NAOMI is simply an alter ego of Ecobaby and awards seals to its own products.

### **The Biodegradable Cases**

In October 2013, the FTC announced six enforcement actions addressing marketing claims that certain plastic products or additives are biodegradable.[5] The marketing of a product as "biodegradable" is also covered by a section of the green guides. Under the guides, an unqualified degradable claim for items entering the solid waste stream should be substantiated with competent and reliable scientific evidence that the entire item will fully decompose within one year after customary disposal.[6]

Four of the recent enforcement actions were brought against companies who market plastic products (including golf tees, food storage containers and plates) made with an additive advertised to make plastics biodegradable. A fifth case was brought against ECM Biofilms, the company which marketed the additive (Master Batch Pellets) used by the certain of the other companies in the manufacture of their consumer products. Finally, a sixth enforcement action was brought against AJM Packaging, the makers of paper plates, lunch bags, grocery bags and lawn bags for making unsubstantiated biodegradable, compostable and recyclable claims and for violating a 1994 consent order. AJM's settlement includes a \$450,000 civil penalty.

This was not the first time that the FTC took action against companies for allegedly false biodegradable claims. In 2009, the FTC charged K-mart and two other companies Tender Corp. and Dyna-E International with making false and misleading claims that its paper plates were biodegradable. But several factors make the recent cases notable. First, they represent the first FTC enforcement actions addressing biodegradable claims since the issuance of the 2012 green guides. More significantly, they include a case against a company, ECM Biofilms that does not market products to consumers.

According to the FTC complaint, ECM Biofilms advertised its Master Batch Pellets to other businesses claiming that that its additive would make plastics "fully biodegrade in 9 months to 5 years." But according to the FTC, plastics containing ECM's additive do not break down and decompose into elements found in nature within one year after customary disposal or after disposal in a landfill and, consequently, are not "biodegradable." Although ECM claims to have test data in support of its claims (conducted pursuant to ASTM D 5511), FTC alleged that the test results don't support the company's marketing claims and don't simulate the conditions in landfills or at other disposal facility.

## The Role of Self-Regulation

The FTC's cases on biodegradable claims are also instructive when viewed in the light of the decisions issued by the National Advertising Division, the advertising industry's self-regulatory organization, on biodegradable claims in advertising.[7] In issuing recommendations concerning environmental claims in advertising, NAD seeks to harmonize its efforts with the FTC and frequently applies and cites to the green guides. Between 2008 and 2012, NAD has issued at least six case decisions involving a review of biodegradable claims and, each time, has applied the appropriate provisions of the FTC Green Guides.[8]

NAD has recommended that companies refrain from making biodegradable claims for any product typically disposed of in a landfill because the product will not, based upon the available and reliable scientific evidence, break down within a period of one year. In at least two of the NAD cases, FP International and Masternet LTD,[9] NAD found that companies were making unsubstantiated biodegradable claims for plastic products that were made with the additive provided by ECM Biofilms, the additive supplier that was just made the subject of last month's FTC enforcement action.[10]

## Conclusion

Companies making environmental claims about their products or services should carefully consider the green guides and make sure that their advertising is consistent with the FTC's guidance. The FTC's recent enforcement actions also provide some additional take-away principles for advertisers:

The need for sound scientific evidence. Claims of environmental benefits — or reduction of environmental impact — frequently raise complex scientific issues. Companies making such claims must be in possession of competent and reliable scientific evidence supporting those claims.

Business-to-business marketing counts too. The FTC has made clear that the green guides "apply to claims about the environmental attributes of a product, package, or service in connection with the marketing ... of such item or service to individuals. These guides also apply to business-to-business transactions" and also include a specific example covering a business-to-business transaction.[11] Suppliers of materials who advertise through the trade may be subject to FTC enforcement. Moreover, manufacturers who advertise to consumers must exercise caution if relying on representations from suppliers about the environmental benefits of additives or other materials.

Use self-regulation as a guide. The national advertising not only provides a forum for the resolution of advertising disputes. Its decisions on environmental marketing and application of the FTC green guides provide important guidance on properly substantiating environmental claims and can help companies avoid enforcement pitfalls.

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[1] 16 C.F.R. § 260 et seq. (2012).

[2] In the Matter of Relief-Mart, Inc., FTC File No. 122 3128; In the Matter of EcoBaby Organics, Inc., FTC File No. 122 3129; In the Matter of Essentia Natural Memory Foam Company, FTC File No. 122 3130.

[3] 16 C.F.R. § 260.9(c).

[4] 16 C.F.R. § 260.6 (d). The Green Guides state that if there is a material connection between the advertiser and the certifying organization, it must be disclosed, consistent with the FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2009).

[5] Federal Trade Commission, Plaintiff, v. AJM Packaging Corporation, a corporation, Defendant (United States District Court for the District of Columbia) Case No. 1:13-cv-1510; FTC Docket No. C-3508; , Docket No. 9358 FTC File No. 122 3118; In the Matter of Clear Choice Housewares, Inc., also d/b/a FARBERWARE® EcoFresh, FTC File No. 122 3288; In the Matter of Carnie Cap, Inc. FTC File No. 122 3290; In the Matter of American Plastic Manufacturing, Inc., FTC File No. 122 3291; In the Matter of MacNeill Engineering Company, Inc., d/b/a CHAMP, FTC File No. 122 3292.

[6] 16 C.F.R. § 260.8(c).

[7] NAD's is investigatory arm of the advertising industry's system of self-regulation and a part of the Advertising Self-Regulatory Council (ASRC), a service of the advertising industry and Council of Better Business Bureaus, Inc.

[8] See, e.g. Pactiv Corp., NAD/CARU Case Reports, #5472 (2012); FP International, NAD/CARU Case Reports # 5256 (2010).

[9] Masternet Ltd, NAD/CARU Case Reports, #5092 (2009).

[10] In a prior case, NAD also reached a finding similar to the one stated in FTC's complaint, noting that "the ASTM D 5511 test method was meant to simulate conditions in anaerobic digesters in very specific conditions, not landfill conditions." FP International, NAD/CARU Case Reports # 5256 (2010).

[11] 16 C.F.R. § 260.1(c).