
retail

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Dear Retail Clients and Friends,

The Federal Trade Commission (FTC) recently revised its Guides for the Use of Environmental Marketing Claims, often called the “Green Guides,” which describe how the FTC intends to prohibit deceptive and unfair business practices in many of the latest environmental marketing claims and practices. This edition of ***Morgan Lewis Retail Did You Know?*** describes the Green Guides and their potential implications for retailers.

Background

On October 1, the FTC released final revisions to the “Green Guides” (Guides), which were first released in 1992 and last revised in 1998. The release follows extensive studies by the FTC regarding consumer perception of environmental claims in advertising, along with reviews of thousands of comments. The FTC has indicated that it does not expect to revisit the Guides for at least 10 years.

The Guides

Central to the Guides is a prohibition on unqualified claims of general environmental benefit. Examples of broad terms include “green,” “environmentally-friendly,” or “eco-friendly.” Concluding that such claims may be perceived by consumers as conveying far-reaching benefits without any negative impact and that advertisers will find such claims almost impossible to substantiate, the FTC advises that such advertising be qualified or limited to specific attributes of a product.

The Guides also address use of environmental certifications and seals of approval. According to the FTC, such certifications and seals should not be used to convey general environmental benefits. Rather, their use should be appropriately qualified to indicate the specific and limited benefits that the seal or certification denotes. Qualifying language may be included in the seal or certification itself and should be clear and prominent. Use of seals or certifications from third parties requires disclosure of material connections between the advertiser and third party, such as if the marketer is a dues-paying member or if the third-party organization is an industry trade association.

The Guides include strict limitations on the use of specific terms, including “recyclable,” “recycled content,” “degradable,” “compostable,” “non-toxic,” and “free-of.” For example, the FTC advises that unqualified “degradable” claims are deceptive if the items do not completely decompose within one year after customary disposal and/or if such items are customarily disposed of in landfills, incinerators, and recycling facilities because those locations do not allow for decomposition. Use of “recyclable” claims is appropriate only if (a) the entire product or package (except for minor components) is recyclable and (b) recycling facilities are available to a “substantial majority” of consumers or communities where the item is sold. Similar guidance is provided for other common environmental marketing claims.

For more discussion of the FTC’s revisions to the Guides, please read our October 3 Advertising, Consumer Protection, and Privacy LawFlash, “FTC Releases Final ‘Green Guides’ for Environmental Marketing Claims,” available at http://www.morganlewis.com/pubs/ACPP_LF_FinalGreenGuidesForEnviroMarketingClaims_3oct12.

Application to Retailers

One issue raised by commenters is whether the Guides apply to entities other than manufacturers. The FTC has now expressly clarified that the Guides do apply to retailers and that they may be responsible for environmental

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marketing claims related to the products they sell.

Practical Implications

Although the Guides do not have the force of law, they provide important guidance regarding how the FTC will exercise its own enforcement powers, and they will be a critical touchstone for the evaluation of retailers' environmental marketing claims. Although compliance with the Guides does not eliminate the threat of enforcement actions or private class action litigation regarding advertising claims, the Guides provide important guidance for retailers in evaluating the advertising claims they make about their own products and may provide a defense to the extent retailers can show that their promotions conformed to the Guides.

How We Can Help

Morgan Lewis can assist with the analysis of advertising, labeling, and related compliance programs. Our lawyers routinely advise clients regarding advertising issues and have experience guiding clients through advertising-related investigations and litigation.

Contacts

If we can be of assistance to you in these matters, please feel free to get in touch with your Morgan Lewis contact or any of our Retail Practice leaders:

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These individuals are part of our international Retail Practice. Attorneys from our 24 offices regularly represent national, regional, and local retailers in a broad array of subject matters including litigation, labor and employment, real estate, tax, transactional, and regulatory.

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About Morgan Lewis Retail Did You Know? This message is part of our effort to educate our retail clients and friends about important legal developments. One thing we hear frequently from our retail clients is that it is hard to keep track of new and emerging laws and lawsuit trends that affect retailers. All too frequently, the first notice comes in the form of a lawsuit seeking millions of dollars. To help you be more proactive in managing legal compliance, we are providing these emails.

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