



### Changes Coming with Green Guides

It has long been an aspect of the law that when a seller says something about its product to induce sale, it needs to be a fair representation or liability can result. This type of claim can be frustrating for the seller. The consumer keeps the product, which appears to be working fine, but he or she sues for economic damage claiming to have been misled.

The potential for such situations grows substantially with environmentally-related product representations. The reason is confusion as to exactly what is meant by terms such as “biodegradable,” “recyclable” and “compostable.” Add to this, the notion of “sustainable” practices and “life cycle assessment” and it become clear that the industry has to learn how to handle itself in this area.

A key resource for manufacturers and marketers on this front has been the “Green Guides,” promulgated by the Federal Trade Commission. This document, see 16 C.F.R. Part 260, provides direction to businesses making “green” or environmental marketing claims so as to not mislead or deceive consumers. The guides apply to any claim about an environmental attribute of a product, package or service made during the sale, offer of sale, or marking of the product.

The Green Guides actually pre-date their significance in the building products arena. Since the guides were initially enacted in 1992, and even since they were revised in 1996 and 1998, the popularity of buying “environmentally-friendly” products has exploded. This is evident in the rise of the green building movement, which has virtually entered the mainstream.

The FTC responded to this rise

in green marketing representations with important revisions to its Green Guides. It also has proposed new regulations on environmental representations not previously addressed. A comment period designed to allow people to respond to the FTC proposals closed in December 2010, and now a new finished version of the guides is expected to be published within a few months.

The new Green Guides will provide specific guidance for environmental marketing claims in several categories, such as claims

about products or packaging being degradable, biodegradable or photodegradable; compostable; recyclable; made with recycled content; refillable; and ozone safe or ozone friendly. The new guidelines will also address source reduction claims, which involve advertising with respect to lowering the weight, volume or toxicity of a product or package.

#### CERTIFICATION

New additions to the guides will include comprehensive rules for product certifications, references to renewable materials and carbon offsets. Life cycle assessment rules will not be included, but they are likely to be part of future editions.

The proposed revisions create an entire section addressing product certification and seals (e.g. logos or marks), a topic which is currently addressed in a single example. With respect to the use of third-party certifications and seals, the FTC recognizes that the use of a certification or seal by itself could imply a general environmental benefit claim and cautions businesses and marketers to refrain from using “unqualified” certifications or seals. A “qualification” in this regard would be an explanatory note that keeps the certification

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from being misleading.

For example, in the fenestration industry, the new rules would cover a window manufacturer’s unqualified use of the “Green Seal Certified” mark in advertising if not all of its products in the advertisement are certified under the program. An acceptable qualification may be “our X brand windows are Green Seal Certified,” in an advertisement that includes both X and Y brand windows and Y brand windows are not certified.

As a further example, use of the Energy Star mark should be qualified if not all the products in the advertisement are Energy Star products. “Ask about our Energy Star products” or “we sell Energy Star qualified

products” would place the consumer on notice that not all of the products in the advertisement are Energy Star products.

The FTC’s proposed examples where qualifications are appropriate include a business’ use of a certification or seal only to show an alliance with an industry trade organization or that the business is a member of that organization, and not that the business obtained an environmental-related certification from the organization. For example, use of the Energy Star Partner mark in advertising by an Energy Star Partner should not be placed near non-Energy Star products because a consumer may conceive the mark to mean that the particular product is Energy Star compliant when the business’ use of the mark was actually intended to highlight its position as an Energy Star Partner.

Associations and organizations providing these marks may already have rules restricting their use, but the FTC’s new guidelines will provide other legal avenues for penalizing companies who fail to properly use the marks. The FTC also proposes to treat third-party certifications and seals as “endorsements” which must also comply with the FTC’s Endorsement Guides.

### OTHER CHANGES

Another proposed revision concerns advertising the use of renewable materials. According to the FTC, businesses and consumers generally have different ideas on what a “renewable material” claim means. Businesses generally believe it to mean a product is made from material that is replenished at the same rate or faster than it is consumed. Consumers tend to believe it means that the product is being made with recyclable content, recyclable material, or biodegradable material.

The FTC proposes that unless an entire product or package—with the

exception of minor, incidental components—is made from renewable materials a business should qualify the claim by specifying the amount of renewable material in a product or package. The same qualification is advised for renewable energy claims.

The next edition of the guidelines will also address carbon offsets for the first time. Carbon offsets are credits or certificates that represent a reduction in greenhouse gas emissions and can be used by a business in a couple of ways. Businesses can determine their greenhouse gas reductions and sell “carbon offsets” to buyers who try to reduce or eliminate their carbon footprint. Businesses can also purchase carbon offsets to balance out the greenhouse gas emissions attributable to the production, sale or use of their products and services. These carbon offsets can then be advertised by the business in connection with its products and services.

The FTC proposed revisions advise businesses to state if it will take longer than two years from the offset purchase to see a reduction in emissions. Businesses also need to make sure they can substantiate any carbon offset claims, and will need to qualify carbon offset claims if necessary to avoid deceiving the consumer.

### LCAS STILL TO COME

Life cycle analysis or LCAs provides an assessment of a product’s environmental impact throughout the stages of a product’s life. The green building movement is looking for such analysis, and that makes this a soon-to-be hot issue in the window industry.

The FTC considered whether to provide guidance on advertising claims regarding LCA for the proposed guides. It ultimately determined not to, citing as reasons its ignorance as to how consumers view LCA marketing claims. The FTC also determined the complexity

and varying nature of LCA claims being made now is too great for it to provide generalized advice. Needless to say, even though the FTC chose to not provide specific guidance on LCA claims, a business should still be prepared to substantiate any LCA claims.

Businesses must also be able to substantiate any other environmental claim not specifically addressed in the Green Guides. A claim is substantiated when at the time of making the claim, the seller has a reasonable basis for making the claim consisting of competent and reliable evidence. In marketing, according to the FTC, this requires “competent and reliable scientific evidence, defined as tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.”

Window manufacturers and resellers have lived through a decade (or two) of construction defect litigation in which every party involved in any way with exterior walls is sued, often regardless of fault. What is likely to play out in the next several years involves environmental product representations or “green claims.” It takes work to keep up on the evolving standards. The new Green Guides serve as an important reminder that companies must perform due diligence and be prepared to substantiate all their environmental statements. ☐

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