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Green Guides makeover's impact on fashion and cosmetics marketers

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Consumer emphasis on sustainability has skyrocketed in recent years, prompting an emergence of environmentally focused marketing in the apparel and cosmetics industries. But as the prevalence of sustainability-focused marketing campaigns in these markets has surged in an effort to meet the demands of conscious consumers, so too has the level of scrutiny applied to such claims by consumers, the plaintiffs' bar, governments and investors alike.

The apparel industry has seen an uptick in false-advertising lawsuits challenging the validity of environmental, social and governance (ESG) and sustainability-centric labeling and marketing claims.

In the cosmetics industry, big-name brands and companies have found themselves at the center of an onslaught of lawsuits challenging the use of now-ubiquitous buzzwords such as "clean" and "conscious" to describe products that, in the litigants' view, do not fit these descriptors.

While there is, and always will be, a level of inherent risk that comes with sustainability-centric marketing claims in any industry, the potential liability associated with these claims in the apparel and cosmetics markets has no doubt been exacerbated by the overall lack of regulation concerning their use.

Luckily for companies operating in these spaces, the Federal Trade Commission (FTC) is commencing a long-awaited regulatory review of the Guides for the Use of Environmental Marketing Claims (the Green Guides, or Guides).

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Green Guides: Background and what to expect

First issued in 1992 and last updated in 2012, the Green Guides are widely regarded as the principal reference point for the evaluation of green marketing claims.

The Guides set out standards for environmental marketing and guidelines for how marketers can substantiate environmentally focused claims to avoid deceiving consumers and serve as a *de facto* roadmap or reference manual for companies.

While the fundamental principles set out in the Green Guides remain instructive, they are noticeably silent on topics and trends of increasing prevalence such as recyclability and "recycled content" claims including claims related to "pre-consumer" and "post-industrial" content and the use of descriptors such as "clean," "conscious," "natural" and "sustainable."

This gap has created confusion for businesses looking to engage in responsible sustainability marketing efforts and provided a springboard for consumer groups and enterprising plaintiffs' attorneys seeking to capitalize on the lack of certainty by filing new lawsuits and potential claims.

The FTC's announcement of its intention to revamp the Guides in 2023 has largely been welcomed by stakeholders seeking specific and tangible guidance on the most pressing topics in the current marketplace.

The Commission is currently requesting public comment on 19 general issues and 12 categories of specific claims, which have been published in the Federal Register (see here).

In late January, the Commission announced an extension of the public comment period to April 24. Of particular note for apparel and cosmetics companies, the Commission has explicitly expressed its interest in receiving comments on the following topics:

- Use of the term "recyclable" and whether the Commission should modify the current threshold that guides marketers on when they can make unqualified "recyclable" claims
- Use of "recycled content" claims, including whether and how these claims are understood by consumers and whether additional guidance is needed on the use of "pre-consumer" and "post-industrial" content claims
- Whether guidance is needed on the use of "organic" claims with respect to non-agricultural products and what evidence would constitute a reasonable basis to support "organic" claims in such contexts
- Use of "sustainable" and "sustainability" claims and consumer understanding of these claims, as well as what evidence would constitute a reasonable basis to support a "sustainable" claim

What can apparel and cosmetics companies do to prepare?

This long-anticipated review provides an opening for companies to communicate points of concern or feedback to the Commission regarding sustainability-centric marketing.

Companies should consider submitting comments and feedback to the Commission prior to the April 24 deadline, either individually or collectively through trade associations and industry groups.

In anticipation of the updated Green Guides, companies should closely review the 19 general issues and 12 categories of specific claims outlined by the Commission.

While the exact nature and content of the upcoming Green Guide modifications remain to be seen, the issues and claims identified by the Commission can be viewed as a harbinger of what is to come.

For some, the modifications may require changes in business strategies and practices. Companies can and should reflect on their current practices in light of these topics and take them into consideration when engaging in long-term strategic planning.

As always, companies should continue to adhere to the fundamental principles set out in the Green Guides.

Substantiation remains key in the area of sustainability marketing. Any and all "green" representations and claims must be able to be substantiated in other words, supported by a reasonable basis prior to dissemination.

Substantiation of sustainability claims requires reliable evidence, typically in the form of tests, analyses, or studies.

Companies should remember that substantiation is required not only for their intended interpretation of a claim, but

Companies should remember that substantiation is required not only for their intended interpretation of a claim, but for any and all reasonable interpretations that may be conveyed to consumers.

Prior to making such representations or statements, companies should (i) identify all claims, express and implied, that a representation or statement reasonably conveys and (ii) confirm that each claim is truthful, not misleading or deceptive, and supported by a reasonable basis.

TO THAT END, broad, unqualified statements that are open to broader interpretation and may convey a wide range of express and implied claims pose a greater risk than specific, qualified claims.

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