Green Issues Are Ripe: The Regulation of Environmental Marketing Claims

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GREEN ISSUES ARE RIPE: THE REGULATION OF ENVIRONMENTAL MARKETING CLAIMS

By Eric F. Greenberg*

I. Introduction

Surveys indicate that consumers are increasingly aware of environmental concerns.¹ Many consumers say they will pay more for products they consider environmentally responsible.²

With that audience, it is no wonder that manufacturers are using more environmental claims in packaging and in advertising. Manufacturers tout products or their packages as “recyclable,” or “recycled,” “environmentally friendly,” or “degradable,” with increasing frequency.

The proliferation of environmental claims has resulted in much useful information of interest to consumers. It has also, however, led to increased confusion because there are no nationally recognized definitions for any of these terms. While some instances of outwardly false or deceptive claims exist, a perhaps larger problem is the confusion caused by innocent but inconsistent use of terminology. Several states have already set requirements for the use of environmental terminology in connection with consumer products.³ States are also taking enforcement actions against what they perceive as false or deceptive environmental marketing claims.⁴ However, national standards are still lacking despite the many efforts to generate them.

An individual product or package labeled “recycled” may by itself raise no issues of concern to regulators. However, place it on a shelf next to another product or package also labeled “recycled,” and questions begin to arise: Do they both have the same recycled content? Is the recycled content material that has already been in the consumer waste stream, or is it manufacturing plant scrap?

Most interested parties addressing these issues, including some state officials, are clamoring for a national solution. For example, the National Association of Attorneys General has proposed Green Report II, a revision to its November 1990 report, in which it addressed environmental marketing claims.⁵ Trade groups, including the National Food Processors Association, and other consortiums, have also stated their positions.⁶ New York, California and several other states already have effective laws regulating these claims.⁷ The Federal Trade Commission and other federal regulators are evaluating the possible national solutions. Likewise, Congress is evaluating proposed legislative solutions.

This article will review some of the major national efforts to develop definitions and controls on environmental claims, and will explore the legal issues raised by these claims. First, the article examines common environmental claims, and then analyzes the Environmental Claims Marketing Bill, a solution currently being considered in Congress. The article then outlines the other approaches being presented by federal regulators, state attorneys general and private organizations. Finally, the article concludes that although it is unclear from which source the new regulatory solution will come it will hopefully provide a national framework for more uniform definitions and use of environmental claims.

II. Common Environmental Claims

Each environmental marketing claim raises different legal issues. The following is a summary of the typical claims and their resultant legal questions.

A. “Recycled”

When a package or product is referred to as “recycled,” a natural question is how much of it is recycled. Few products or packages are made of 100% recycled material.

Another issue is whether the material used is post-consumer, that is, did the recycled material already serve its intended consumer purpose? Many industries have long collected scrap of their own manufacturing process and used it again to make products. With more frequency, regulators are claiming that companies do not deserve credit for use of such “plant scrap,” arguing that this material is not diverted directly from the waste stream, in contrast to post-consumer material.⁸ Defining “recycled” to include only post-consumer material forces more companies actually to reduce the waste stream.

Finally, sometimes a label or advertisement fails to adequately distinguish between recycled packaging and a recycled product.

B. “Recyclable”

Anything is recyclable, at least theoretically. Many regulators would like to see the term used only when the prospect of recycling is realistic. For example, the state of New York requires that the particular product or package must be currently recyclable only in a relevant local area before the claim can be made.⁹

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C. "Degradable"

If a product can degrade, many regulators want to be provided assurance that it will degrade under expected conditions of its life cycle. Thus, Mobil Chemical Co. was slapped with suits in several states for deceptively claiming its Hefty bags were "degradable," when most ended up in landfills, unexposed to the light needed to break them down. Another issue is whether degradable plastics are really better than those that are incinerated or landfilled.

D. "Environmentally Friendly"

A reasonable argument can be made that a term like "environmentally friendly" applies to some products; however, it may be difficult to find a consensus on how to evaluate a product's friendliness.

In one recent effort, private companies are evaluating products for possible issuance of a stamp of approval, such as a "green seal," based on the environmental effects of the entire life-cycle of a product, from manufacturing through distribution and disposal.

II. The Legislative Approach

A. Legislative Background

It is uncertain who will win the regulatory derby to set national standards for environmental claims. However, Senator Frank F. Lautenberg's (D-NJ) Environmental Marketing Claims Bill has broad support. It is likely to be considered along with other solid waste issues as part of hearings on reauthorizing the Resource Conservation and Recovery Act. A counterpart bill has been introduced in the House.

Thorough though it may be if passed in its present form, national legislation often results only after several years of tinkering and debate. Industry guides issued by the Federal Trade Commission ("FTC") or Environmental Protection Agency ("EPA") definitions to guide voluntary compliance may be part of the solution, and they could be quicker fixes.

The proposed legislation is complex approach to environmental claims. Although predictions about the passage of the bill are difficult to make, this article will review the bill's provisions as a framework for analyzing the issues in this area.

Senator Lautenberg introduced his Environmental Marketing Claims Bill in 1990, but it was unsuccessful. In reintroducing it this year, the Senator noted that "American businesses realize the growing consumer demand for products that do not harm or are less harmful to the environment. They have responded with a plethora of environmental claims on products and packages." He added that not all claims are reliable, and many are deceptive and misleading.

Lautenberg lamented the plight of the environmentally conscious consumer: "Without any direction, the good-willed consumer who wants to do something to protect our environment is being confused, misled, and sometimes deceived."

"Without any direction, the good-willed consumer who wants to do something to protect our environment is being confused, misled, and sometimes deceived." Senator Lautenberg noted that "American businesses realize the growing consumer demand for products that do not harm or are less harmful to the environment. They have responded with a plethora of environmental claims on products and packages."

At a minimum, the Board must make recommendations on definitions and standards for regulating environmental marketing claims. The Administrator will consider the Board's recommendations and issue regulations governing the use of environmental marketing claims. The Board must also prepare and submit an annual report to the EPA Administrator, outlining its activities and recommendations.

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The regulations issued by the Administrator must meet certain specific requirements. For example, the Administrator is required to insure that environmental marketing claims are not false, misleading or deceptive, and must assure that they are related to a specific environmental impact or attribute.

Under the regulations, environmental marketing claims must not state the absence of an environmental attribute, (i.e. "does not pollute"), unless (1) the attribute is a usual characteristic of the product or package; (2) the statement is permitted by a regulation which is turn must be based on a finding that it would assist consumers making environmental value comparisons; and (3) the statement discloses that the attribute is not a usual characteristic. Also, statements cannot be made if found to be misleading "in light of another environmental characteristic of the product or package."27

Finally, specific parameters for some of the most common words are included in the bill. A product or package making a claim about its "recycled content" must refer to post-consumer material and secondary material (pre- and post-consumer) for a wide range of specific materials. These regulations have been effective since December 1990.

New York also regulates the use of words like "recycled" and "recyclable." For example, only packages or products that meet the applicable minimum percentage requirements can use the "recycled" claim.28

California also has a new law that defines a variety of environmental claim terms.33 Only those that meet the definitions can use the terminology. California recognizes the possibility of future federal regulation. It permits products to meet definitions "in trade rules adopted by the Federal Trade Commission."34

The bill provides that a claim relating to a "recyclable" product or package is limited to situations where the person responsible for the claim can demonstrate that the product or package "shall be recycled (presumably nationwide) at a minimum rate of twenty five percent per annum" until 2000, fifty percent thereafter.

of percentages at least has the virtue of simplicity, as compared with the regulations already in place in the state of New York.31

The New York system employs an elaborate chart specifying a minimum percentage of post-consumer material and secondary material (pre- and post-consumer) for a wide range of specific materials. These regulations have been effective since December 1990.

New York also regulates the use of words in conjunction with phrases like "recycled" and "recyclable." For example, only packages or products that meet the applicable minimum percentage requirements can use the "recycled" claim.27

Even citizens can play a role in enforcement. Citizens may sue violators or the EPA Administrator to force him to act as the law requires.51

Bill are not intended to restrict existing statutory or common law remedies, nor to alter existing remedies against false or misleading claims. States would still be free to enact or enforce environmental marketing claim rules that are "more stringent" than a federal standard or requirement.42

D. Certification System

The bill would create a certification system for those intending to use environmental marketing claims. The user would have to submit a certification that it complies with the requirements of the law, such as those for the given claim. EPA may disapprove of the
certification if it does not meet the regulation's requirements. In addition, recertification is required when product or package changes are made or when new regulations are promulgated.43

The law would prohibit failure or refusal to comply with a regulatory definition, or any EPA order issued pursuant to the regulation.44 It also prohibits failure to file a certification, use of a disapproved certification, or use of a claim "that is inconsistent with the requirements of section 6(d)."45 This last phrase appears to fill the loophole for any claims that EPA did not specifically anticipate.

E. Penalties

The penalties called for by the legislation are severe. Civil penalties can be as high as $25,000 per separate "violation," defined as each day a violation continues. EPA must afford notice and an opportunity for hearing before assessing penalties.46

In addition, knowing or willful violations carry the extra wallop of criminal penalties: Up to $25,000 in fines for each day of violation, and up to a year in prison.47 The law even builds in a program to increase the fines to keep up with inflation and the cost of living.48

IV. Other Approaches To Regulation

A. The FTC Option

On May 31, 1991, the FTC issued a Federal Register notice which reviewed the petitions and input it had received on environmental claims, and requested public comment on the issue.

The FTC noted that in the past it has applied its traditional, case-by-case enforcement approach for "deceptive unsubstantiated, or unfair advertising or labeling claims"49 to the regulation of environmental claims. The FTC relies on Policy Statements on Deception,50 Advertising Substantiation,51 and Unfairness52 to guide its actions regarding advertising claims.

Given the efforts of other parties to provide guidance for environmental marketing, and in light of four formal petitions and other less formal requests for action, the FTC has now decided to consider more formal options. The FTC has scheduled hearings in July to seek input on how to approach the regulation of environmental claims.54

The FTC regulates unfair or deceptive trade practices under Section 5 of the Federal Trade Commission Act.55 This means the Commission regulates advertising and marketing practices. The Act provides FTC with the authority to promulgate trade regulation rules which have the force of law.56

A less cumbersome system is the issuance of industry guides. FTC regulations describe those guides as "administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements."57

Industry guides "provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry," and violation can result in "corrective action."58 They may be promulgated pursuant to the Commission's own initiative or a citizen's petition "when it appears to the Commission that guidance as to the legal requirements applicable to particular practices would be beneficial in the public interest and would serve to bring about more widespread and equitable observance of laws administered by the Commission.59

One petition, from the National Food Processors Association, asks the FTC to set voluntary national guidelines for environmental marketing claims.60 NFPA prefers guides because they provide a more flexible system; guides do not dictate specifically the parameters of acceptable marketing claims.61 In short, the guides provide flexibility while still providing guidance and national-level leadership.

The NFPA proposal contains both general guidelines and guidelines for claims. For example, a general guideline may state: "It is deceptive to misrepresent, directly or by implication, that a product or package, or a portion thereof, is made of recycled materials," followed by examples of specific applications.62

This more flexible approach leaves more to market forces while still identifying deceptive or false uses of terminology. For this reason, the flexible approach may encourage the making of claims that are helpful to consumers.63

The FTC points out, however, that guides have certain inherent disadvantages. For example, guides cannot be an independent legal basis for FTC enforcement action; the agency must still determine that a particular claim violates section 5 of the FTCA.64 Guides also lack "formal, preemptive effect on state or local laws or regulations", therefore they "will not necessarily impose uniformity on a system of diverse regulations."65

The Green Report II authors explicitly state that the recommendations are neither laws nor "an attempt at rulemaking," and do not change existing state laws against false, misleading or deceptive advertising. The Report may, however, help industry avoid violating those state laws.

B. The Environmental Protection Agency

The U.S. Environmental Protec-
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The Green Report II's final recommendation is intended to provide "interim guidance to the business community." The attorneys general recommend that environmental claims be: (1) specific; (2) reflective of current solid waste management options; (3) substantive; and (4) supported by scientific evidence. The Report specifically recommends that only post-consumer material be referred to as "recycled," and that separate percentages of pre- and post-consumer content be disclosed.

The authors explicitly state that the recommendations are neither laws nor "an attempt at rulemaking," and do not change existing state laws against false, misleading or deceptive advertising. The Report may, however, help industry avoid violating those state laws.

V. Conclusion

It is still unclear from which regulatory authority national definitions will come. They may be legislated, promulgated as regulations, or merely established as voluntary guidelines.

In the meantime, federal and state authorities can be expected to continue to rely on their generalized statutory powers to thwart false or deceptive labeling and advertising. These enforcement actions will probably be less consistent than they would be if preemptive national definitions existed. Authorities may be forced to limit themselves to acting against only the most blatantly false or deceptive claims.

The proliferation of environmental marketing claims, on the other hand, appears certain to continue.

ENDNOTES

2 Id.
3 See e.g. 6 NYCRR § 368.
5 "The Green Report: Findings and Preliminary recommendations for Responsible Environmental Advertising," November 1990, endorsed by the Attorneys General of CA; FL; MA; MI; MO; NY; TX; UT; WA; WI; "The Green Report II: Recommendations for Responsible Environmental Advertising," May 1991, endorsed by the same attorneys general and that of TN.
6 Two additional examples are The Coalition of Northeastern Governors ("CONEG") and The Northeast Recycling Council.
7 See supra note 3 and accompanying text.
8 New York's regulations define "secondary" or "recovered material" as including pre- and post-consumer waste but exclude materials or by-products "generated from, and commonly used with, an original manufacturing process or separate operations within the same parent company." 6 NYCRR § 368.2 (o). In The Green Report II, May 1991, a group of state attorneys general recommend that "recycled" refer only to post-consumer materials, that recycled content claims should be specific and separate percentages of pre- and post-consumer materials should be disclosed. The Green Report II, p. 6(b).
9 See 6 NYCRR § 368.2 (k), defining "recyclable" in terms of "access to community recyclable recovery programs" for at least 75% of the state, among other grounds.
11 Many experts believe biodegradability, while a favorite of the public, is not a major part of the solution to solid waste disposal, preferring source reduction, composting and recycling, for example. Holusha, J., "So, What is 'Environmentally Friendly?", The New York Times, January 26, 1991, Consumer's World, p. 17.
12 The Green Report notes: "...[T]he production and use of products necessarily has adverse environmental consequences .... Such claims [as] environmentally friendly should be avoided altogether, or, if used at all, should specify in close proximity and comparable prominence to the generalized claim the basis for the claim." The Green Report, pp. 32-33.
16 The Environmental Protection Agency is reportedly working on standardized definitions of "recycled" and "recyclable" that would be voluntary.
18 137 Cong. Rec. 42 at S3035.
19 Id.
20 Id.
21 As an aid to future legal researchers, the bill contains an extensive and appropriately puffy list of findings and purposes. Among other things, the U.S. is facing growing environmental problems, and that environmental marketing claims convey information about products and influence purchasing decisions. The bill's stated purposes include the prevention of fraudulent, deceptive and misleading environmental marketing claims; the empowerment of consumers with reliable and consistent guidance; the establishment of uniform, accurate standards and definitions; and the encouragement of innovative product development and practices that consider the environmental perspective. The Environmental Marketing Claims Bill, 102nd Cong. 1st Sess. S. 615, 2 (1991).
23 Id. at § 5.
24 Id. at § 6(a).
25 Id. at § 6(b).
26 Id. at § 5(d).
ANNOUNCEMENT

New Committee To Focus On
Consumer Protection

The Section of Antitrust Law of the American Bar Association has created a Consumer Protection Committee to focus on consumer protection developments and enforcement initiatives. State and private enforcement activities and counseling issues involving consumer fraud, deceptive advertising and marketing will be the principal interests of the Committee. The Committee’s membership includes state and federal agency lawyers, corporate counsel, and private practitioners involved in advertising and consumer protection matters.

If you wish to join the Committee or if you want further information about its activities, contact the Committee Chair:

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