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FTC Unveils Proposed New Guides for Environmental Marketing Claims

On October 6, 2010, the FTC unveiled the first proposed update since 1998 to its Guides for the Use of Environmental Marketing Claims (the “Green Guides”). The new Green Guides will have a major impact on environmental or natural benefit claims companies use to advertise or describe their products or services to consumers. The proposed Green Guides include clarification on guidance in the existing Green Guides and new guidance on several issues that were not significant when the previous guides were issued, including:

- Product certifications
- Seals of approval
- Renewable energy claims
- Renewable materials claims
- Carbon offset claims

For claims of carbon offsets, the new FTC guidance requires full disclosure in advertising, marketing or packaging. The new Green Guides define carbon offsets as projects that reduce greenhouse gas emissions in one place in order to counterbalance or “offset” emissions that occur elsewhere. The proposed Green Guides advise marketers to make a disclosure if the emission reductions that are being offset by consumers’ purchases will not occur within two years. The proposed guides also advise marketers to avoid advertising a carbon offset if the activity that produces the offset is already required by law.

The proposed Green Guides emphasize the difference between what companies think green claims mean and what consumers really understand. As with all advertising and packaging, advertisers should carefully consider all potential express and implied claims that a consumer may reasonably take-away from the advertising

or packaging—and ensure each claim is properly substantiated.

The FTC Chairman announced that “the proposed guide updates to the Green Guides will help businesses better align their product claims with consumer expectations.” For example, the proposed Green Guides warn that general claims of “environmentally friendly” or “eco-friendly” are likely to suggest to consumers that the product has specific and broad environmental benefits. The FTC advises that such claims should be qualified and narrowed to disclose the particular environmental benefit advertised. Further, the FTC advises that such claims must be substantiated before publication, and the substantiation bar is high—the FTC commented that general environmental benefit claims such as “green” and “eco-friendly” are “difficult, if not impossible, to substantiate.”

While not having the effect of law, the proposed Green Guides will be considered as strong indicators of the policy direction to be taken by the FTC in its enforcement and investigation procedures. Also, when final, the new Green Guides may be used as grounds for consumer class action suits and state attorney general suits under state deceptive trade practice laws.

The FTC is seeking public comments on the proposed changes until December 10, 2010, and will then decide which changes to make final.

The FTC is seeking comment on all aspects of its proposal. Examples include:

- How should marketers qualify “made with renewable materials” claims, if at all, to avoid deception?

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FTC Unveils Proposed New Guides for Environmental Marketing Claims (cont'd.)

- Should the FTC provide guidance concerning how long consumers think it will take a liquid substance to completely degrade?
- How do consumers understand “carbon offset” and “carbon neutral” claims? Is there any evidence of consumer confusion concerning the use of these claims?

Attorneys in the Locke Lord Advertising and Marketing practice are closely monitoring the proposed Green Guides and are available to assist with submitting specific comments to the FTC on behalf of clients. For assistance with submitting comments or in interpreting and applying the proposed guides, please call one of the authors of this *Client Alert*.

About the Authors

Paul Van Slyke is a litigation Partner at Locke Lord and a member of its Advertising and Marketing Law practice group. He has significant experience in litigation, trial and counseling in trademark infringement, copyright infringement and false advertising cases. As part of his litigation practice, he has represented clients in internet advertising cases involving keyword advertising. He also has substantial experience in clearance of advertising and packaging for compliance with legal requirements. His experience also includes providing advice and counsel to clients on advertising and marketing that makes claims to environmental and natural benefits.

Michael R. Schulman is a partner at Locke Lord and chair of its Trademark, Copyright and Advertising Practice group. He concentrates on advertising and intellectual property law and is a frequent speaker at advertising seminars. He counsels advertisers and advertising agencies on a wide variety of legal issues relating to advertising, packaging, marketing, branding and trademark and copyright usage. His experience includes review, analysis and clearance of advertising for compliance with FTC and other legal requirements, brand and trademark selection, searching and registration, trademark oppositions and counseling, unfair competition law, licensing, transfer of intellectual property, e-commerce intellectual property issues, copyright

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Jason Mueller is a member of the firm's Intellectual Property and Advertising and Marketing Law practice group. Mr. Mueller's practice includes litigation, licensing and exploitation of patent, copyright and trademark rights. He also has significant experience in advertising and sales promotion law including advertising and claim identification, review and clearance; claim substantiation analysis; and the laws governing sweepstakes, promotions and contests.

Sean C. Fifield is a partner at Locke Lord. His practice focuses on the protection and licensing of trademarks, copyrights and other intellectual property, advertising clearance, sweepstakes compliance and merger and acquisition transactions. Mr. Fifield is a member of the firm's Advertising and Marketing Law practice group, Technology Transactions practice group, Intellectual Property practice group and Merger and Acquisitions practice group.

Gregory T. Casamento is a partner in Locke Lord's New York office and chair of the firm's Advertising and Marketing Law practice group. He focuses his practice on advertising, marketing, and intellectual property litigation. Mr. Casamento has significant experience litigating trademark and trade dress, infringement claims, trade secrets, unfair competition, contract and restrictive covenant disputes for his clients before both State and Federal Courts. His experience also includes advising clients on e-Matters issues, including, e-signature, e-discovery, e-admissibility and e-records management.

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