Environmental Claims in Advertising

BY ART DECELLE

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enturies ago, brewers were among the first to recognize the importance of clean water and the consequences of contamination of local water supplies. The need for a steady supply of agricultural products also makes brewers keenly aware of threats to crops and commodity supplies. The relative weight of beer and the need to maintain product integrity, quality, and flavor also pose ongoing challenges in packaging, transportation, and storage. All of these factors heighten brewers’ sensitivity to environmental issues.

The Brewers Association 2015 Sustainability Benchmarking Report covers a broad range of topics and reference materials prepared by brewers and colleagues involved in brewery design and construction, equipment manufacturing, and logistics. Brewers and allied industry members who apply these principles and practices are upholding an industry legacy of good citizenship, sound business practices, and conscientious environmental stewardship.

Beyond achieving personal and professional satisfaction from efforts to protect the environment, brewers can communicate their good works to consumers. Product labels, point of sale (POS) advertising, social networks, and other media provide opportunities to inform customers of your efforts. Like all advertising claims, any public statement about the environmental attributes of products or services must be truthful and substantiated by evidence. The claims must not be deceptive to reasonable consumers.

Before signing off on labels, packaging, POS, or social media informing consumers of your initiatives to protect or improve the environment, carefully consider the language you use and any potential for consumer deception. Regulators, plaintiffs’ lawyers, and activists are vigilant at recognizing and calling out false or deceptive environmental claims.

RULES AND REGULATIONS

Two federal regulatory agencies have jurisdiction over alcohol beverage advertising: the Alcohol and Tobacco Tax and Trade Bureau (TTB) and the Federal Trade Commission (FTC). As most brewers know, TTB must also approve almost all alcohol beverage labels. The TTB’s primary concerns over labeling and advertising are addressed in regulations that require an accurate description of a product and information about the brewer.

TTB guidance instructs industry members to make sure that environmental claims or certifications do not conflict with the product type and class, the brewer, and other mandatory information on a container label or can. A TTB certificate of label approval (COLA) or approval of advertising copy voluntarily submitted to TTB for review does not end the review process for an environmental claim. The FTC could still find that an environmental claim made in an advertisement is deceptive.²

The FTC and state consumer protection agencies have broader missions than the TTB to seek out and take action against deceptive advertising claims. FTC enforcement personnel “will find deception if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”³

Over the last two decades, the FTC developed and updated its “Guides for the Use of Environmental Marketing Claims,” otherwise known as the Green Guides.⁴ These federal regulations are designed to ensure that environmental claims are not unfair or deceptive to consumers, and apply to all types of promotional “claims about the environmental attributes of a product, package, or service…in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names, or any other means.” The standards that apply to claims about beer and other consumer products also apply to equipment manufacturers and others involved in business-to-business transactions. Several state consumer protection laws incorporate the FTC regulations.

The Green Guides require claims as well as any qualifications and disclosures to be “clear, prominent, and understandable” and in close proximity. If the context of the claim does not clearly indicate that it applies to a product or packaging materials, that information must be added. Also, a claim can be made about a specific component of a product if it does not apply to minor components. The FTC provides a useful example of a soft drink container that is labeled “recycled”:

“The bottle is made entirely from recycled materials, but the bottle cap is not. Because the bottle cap is a minor, incidental component of the package, the claim is not deceptive.”

There are also other ways to clearly address a product with multiple components, such as a beer container with closures and labels enclosed in a carton or six-pack carrier. For example, a claim can state that the container or “this carton” is “made from XX percent recycled materials.”

TYPES OF ENVIRONMENTAL CLAIMS

Environmental claims should not be exaggerated or overstated, as this could also be perceived as deceptive. If you make a positive comparison of the attributes of a new product or package to...
an older version, for example, the improvements should be significant. Thus, an increase in the use of recycled materials from 2 percent to 3 percent should not be hyped as a “50 percent increase.” Reasonable consumers could believe that the claim of a 50 percent increase represented a more substantial absolute increase.

**Comparative environmental claims** pose the same challenges as other comparative marketing claims. You must have credible evidence to substantiate a comparative claim and provide additional context to clearly inform consumers about the products being compared. A safe approach to comparative claims is to cite improvements between a new and older version of your product—you can then demonstrate the difference with evidence that clearly supports the claim. For example, purchasing records and manufacturers’ product descriptions could serve as the basis for a claim that a newer container has more recycled content. Likewise, plant records and water bills could show that a new brewhouse process reduces water usage by 10 percent compared to the old process.

Comparative claims based on your product and a competitor’s require substantiation about the attributes of both products. An ongoing risk arises because the competitor may change its product in a manner that renders a comparison outdated. **Generic environmental claims**, such as “new greener packaging” should not be used alone. The FTC generally views such claims as deceptive unless they are used in conjunction with other statements that explain actions taken, processes, or other facts that support the general claim. The FTC provides an example of an acceptable general claim supported by a specific comparative statement: “Environmentally preferable: contains 50 percent recycled content compared to 20 percent for the leading brand.”

Certifications or seals of approval from environmental groups or other third-party organizations require a careful analysis beyond the scope of this article. Some of the obligations fall on the organization providing the certification. If applying for a third-party certification, a brewer or other industry member remains responsible for substantiating all claims reasonably communicated by the certification. Brewers should maintain records substantiating all environmental claims provided to a certification organization. A brewer should also provide updates to the certifying organization on a regular basis so that the information provided is current and demonstrates that the brewery continues to qualify for the certification.

In 2015, the FTC sent warning letters to five organizations that provide environmental certifications and 28 businesses that used seals in labels or promotional materials. The FTC also issued additional guidance on certifications:

> “Without careful qualification, general environmental benefit claims pose a risk of deception. General certifications can convey a wide range of meaning to consumers, including that a product has specific and far-reaching environmental benefits and that a product has no negative environmental impact.”

The FTC letters sent to certifying organizations and advertisers included a word of warning quoted directly from the Green Guides:

> “Because it is highly unlikely that marketers can substantiate all reasonable interpretations of these claims, marketers should not make unqualified general environmental benefit claims.”

**Recycled content and recyclable claims** about packaging may be made about materials “that have been recovered or otherwise diverted from the waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer).” For “pre-consumer material,” the advertiser should have substantiation that the pre-consumer material would otherwise have entered the waste stream. Recycled content claims may—but do not have to—distinguish between pre-consumer and post-consumer materials.

As with all other specific product claims, records and other evidence must substantiate recycled content claims. Unqualified claims of recycled content are permitted if the entire product or package, excluding minor, incidental components, is made from recycled material. Items that are partially made of recycled material should...
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clearly and prominently display the amount or percentage, by weight, of recycled content in the finished product or package.

“A product or package should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item.”

FTC guidance also calls for qualifying language if recycling facilities are not available to at least 60 percent of the consumers or communities where a product is sold, e.g., “This product is recyclable only in the few communities that have appropriate recycling programs.”

**Refillable claims** are fairly straightforward. A claim that a product is refillable would certainly apply to growlers or similar containers as long as the brewer (or a retailer that sells growlers) has the capability to safely and properly refill the container.

**Other environmental claims** are addressed in the FTC Green Guides that may apply to a specific brewer based on its unique facilities, operations, or other factors:
- Carbon offsets
- Compostable claims
- Degradable claims
- Free-of claims
- Non-toxic claims
- Ozone-safe and ozone-friendly claims
- Recyclable claims
- Renewable energy claims
- Renewable materials claims
- Source reduction claims

Most claims in these categories require detailed substantiation. Legal guidance should be sought to evaluate the adequacy of the information substantiating the claim. The FTC developed the following guidance on claims about carbon offsets:
- Marketers should have competent and reliable scientific evidence to support carbon offset claims. They should use appropriate accounting methods to ensure they measure emission reduction properly and don’t sell them more than once.
- Marketers should disclose whether the offset purchase pays for emission reductions that won’t occur for at least two years.
- Marketers should not advertise a carbon offset if the law already requires the activity that is the basis for the offset.

Additional guidance on the need for substantiation of claims was developed by the FTC following several enforcement actions in 2013 involving deceptive claims that products were biodegradable. The guidance is based on a common response from advertisers and provides an important reminder:

“But I’m not a scientist. How can you expect me to know if my environmental claims are truthful? We’ve heard that before, but sorry, it just doesn’t wash. It’s the law—and it’s always been the law—that companies need to back up objective product representations with solid proof. If you’re not sure you have scientific support for your green claims, don’t make them in the first place. It’s that simple.”

Some specific environmental claims pose unique challenges for alcohol beverages. “Free-of” claims may be very difficult to make without TTB approval, as they could be viewed as health claims prohibited by TTB regulations. “Non-toxic” claims should be avoided altogether for alcohol beverages as they could be misconstrued, triggering a wide range of legal issues. For example, consumers might view “non-toxic” as non-intoxicating and the state of California treats all ethyl alcohol in beverages as a reproductive toxin.

**BE PREPARED**

Public concern for the environmental impact of various businesses is significant. Larger environmental issues, such as climate change, pose challenges to society generally in the future. Individually and collectively, brewers will likely face more questions from consumers, lawmakers, and advocacy organizations about their commitments to sustainability, recycling, water use, and other practices. Carefully considered statements in your marketing materials can anticipate and provide a thoughtful response to such questions. They can also act as a resource to employees who interact with the public.
Regardless of the communication medium, environmental claims on behalf of your business and your products must be clear and supported with evidence. Practices necessary to implement the claims should be clearly incorporated into business operations. Employees, suppliers, service providers, and other stakeholders must all share these commitments.

REFERENCES
2. ttb.gov/faqs/alforganic.shtml. QA17
7. ftc.gov/tips-advice/business-center/guidance/environmental-claims-summary-green-guides

Art DeCelle is an attorney in the Alcohol Regulatory and Distribution Group of McDermott Will & Emery LLP, which advises the Brewers Association on a wide range of legal, business, and public policy challenges facing craft brewers. Art can be reached at adecelle@mwe.com. Note: This article is intended to raise awareness and provide an approach to analyze environmental claims. Independent review and legal guidance should be sought for specific claims.