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# **IT AIN'T EASY BEIN' GREEN GETTING GREEN ADVERTISING RIGHT**

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**Patricia A. Foster**  
Attorney at Law

**Frost  
Brown Todd**<sup>LLC</sup>  
ATTORNEYS

2200 PNC Center  
201 East Fifth Street  
Cincinnati, OH 45202-4182

(513) 651-6730  
(513) 651-6981  
pfoster@fbtlaw.com  
www.frostbrowntodd.com

**Patricia A. Foster**  
Attorney at Law  
2200 PNC Center  
201 East Fifth Street  
Cincinnati, OH 45202-4182  
(513) 651-6730

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Patricia A. Foster is a litigator and IP attorney with Frost Brown Todd LLC in Cincinnati, Ohio. Mrs. Foster was admitted to the Order of the Coif upon receiving her J.D. from University of Cincinnati College of Law in 2005.

Prior to entering the legal profession, Mrs. Foster enjoyed many years of employment in the hospitality industry. She obtained a high-honors degree from Michigan State University in Hotel, Restaurant, and Institutional Management and worked in operations, sales, and marketing for Inter-Continental Hotel Corporation and Doubletree Hotel Corporation. She worked onsite in hotels in Houston, Ft. Lauderdale, and Cincinnati and in regional offices in Chicago.

Mrs. Foster then lived and worked overseas for fourteen years as a hospitality consultant affiliated with BDO Stoy Hayward, Greene Belfield-Smith, and Horwath & Horwath. Her projects in the United Kingdom, Europe, Australia, and North Africa included advising hoteliers and tourist boards, researching tourism markets, and predicting financial feasibility for new hotels and resorts.

As a litigator, Mrs. Foster has significant jury trial experience in federal court. She has also represented clients in mediation and acted as a mediator in the Office of the Circuit Mediators in the Court of Appeals for the Sixth Circuit. Mrs. Foster has a strong resume involving constitutional issues and she has argued a wide variety of issues relating to free speech. Her focus on free speech and her prior career in marketing merge on issues related to corporate speech, such as advertising, promotions, branding, copyright, and trademarks. Mrs. Foster is a frequent publisher on these and other topics and has been cited in a federal published opinion for her analysis relevant to constitutional issues.

Mrs. Foster's training and many years in the hospitality industry make her uniquely capable to counsel and represent hospitality clients in legal matters. She brings the insight of a business person and consultant to her legal practice. Mrs. Foster has advised hotels, restaurants, casinos, country clubs, and other businesses on matters as diverse as trademarks, advertising, labor disputes, premises liability, reverse age-discrimination, contests, and contracts.

Frost Brown Todd has assembled a team of attorneys such as Mrs. Foster who genuinely understand the legal needs of the hospitality industry. Our attorneys focus on issues important to lodging, food service, and recreation including acquisitions and mergers, financing, titles, construction, contracts, tax, franchising, labor and employment, immigration, advertising, intellectual property, litigation, mass torts, premises liability, licensing, and dram shop laws.

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## Citations and Sources:

- 15 U.S.C. § 45.
- 15 U.S.C. § 57a.
- 16 C.F.R. § 260.5.
- 1983 FTC Policy Statement on Deception, appended to Cliffdale Assocs., 103 F.T.C. 110, 176-84 (1984).
- FTC Policy Statement Regarding Advertising Substantiation, *available at* <http://www.ftc.gov/bcp/guides/ad3subst.htm>.
- Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260 (1992).
- National Advertising Division, *available at* <http://www.nadreview.org/>.
- MasterNet Ltd. (Plastic Netting Packaging Products), Report #5092, *NAD Case Reports* (Oct. 2009).
- In the Matter of America's Favorite Chicken Company, Fed. Trade Comm. Decisions, July 5, 1994 (118 FTC).
- FTC Announces Actions Against Kmart, Tender and Dyna-E Alleging Deceptive 'Biodegradable Claims, *available at* <http://www.ftc.gov/opa/2009/06/kmart.shtm>.
- Courts Bar Firms from Making Deceptive Claims for Home Insulation Products, *available at* <http://www.ftc.gov/opa/2009/03/rvalue.shtm>.
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**IT AIN'T EASY BEIN' GREEN**  
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**Patricia A. Foster and Austin Padgett**

**I. SCOPE OF ARTICLE**

Green is the new black. In almost every activity that you do throughout the day, there is a way to do it that, at least in some respects, would make less of an impact on the environment. Companies know that being green has the potential to influence consumers, and they advertise their products and services as “eco-friendly,” “eco-resorts,” “sustainable,” “environmentally safe,” “carbon neutral,” “biodegradable,” “contains recycled materials,” and numerous similar messages. Certainly, many businesses are looking for the “low-hanging fruit” that allow them to market the environmental benefits of their products and services without making expensive changes in their behavior.

The public has become concerned about global warming, carbon footprints, and the fate of the Earth, however, and consumers want to be able to rely on the accuracy of advertisers’ environmental marketing claims. With that in mind, government agencies and self-regulatory bodies have created rules for those engaged in green marketing. This article examines some of the fundamental rules of advertising, why these rules are important to follow, and provides some tips for proper compliance.

**II. THE BASICS OF ADVERTISING LAW**

This overview of the field of Advertising Law is meant to give the reader a cursory explanation of the major issues and regulatory bodies of this area of the law. Advertising Law is a broad substantive topic, including sweepstakes, telemarketing, social media, product labeling, website content, and many other topics that are not addressed in this article. The information contained below, however, should provide a business with enough information to understand several of the fundamental legal issues that relate to its advertising.

**A. The Basic Rules of Advertising**

At the heart of Advertising Law is this directive: Be fair and truthful. Set forth in Section 5 of the Federal Trade Commission Act, the government prohibits “unfair or deceptive acts or practices.”<sup>1</sup> Unfair practices involve situations where consumers are or are likely to be

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<sup>1</sup> 15 U.S.C. § 45.

significantly harmed by the relevant advertisement or where consumers could not reasonably be expected to discover necessary information. Although intended to protect consumers, claims of unfair advertising are often brought by competitors with an obvious interest in policing each other's advertising claims.

The prohibition on deceptive advertising forbids both false and misleading advertising claims.<sup>2</sup> If an advertiser publishes a claim that is false or misleading, and that claim is crucial, or material, to a consumer's decision to purchase goods or services, the claim violates the law. Advertising is reviewed from the perspective of a "reasonable consumer" to determine the messages encompassed in the advertisement in question. The advertisement must not be deceptive in relation to any express claims (the literal or straightforward claims) and any implied claims that are made indirectly or by inference.

The advertiser must have sufficient evidence, or a reasonable basis, to support the claims in the advertisement—generally known as "substantiation."<sup>3</sup> Importantly, advertisers must substantiate their claims *before* publishing them. This requirement may involve very simple steps for apparent or easy to measure claims. However, in some cases, such as claims regarding environmental issues, extensive scientific research may be required to substantiate an advertised claim.

## **B. Regulatory bodies**

There are three major regulatory bodies governing advertising: the National Advertising Division of the Better Business Bureau ("NAD"), the Federal Trade Commission ("FTC"), and various state agencies. These regulatory bodies' rules often overlap and are, generally, harmonious with one another.

### **1. The National Advertising Division**

The National Advertising Division of the Better Business Bureau<sup>4</sup> is the investigative arm of the voluntary self-regulation program for the advertising industry. Cases come to NAD by way of challenges brought by third parties and its own routine monitoring programs of advertised claims. To date, the NAD has managed over 5,000 total complaints, and the NAD's process is often recommended for its low-cost, expeditious, and confidential dispute resolution.

NAD is empowered to review advertising claims, to make findings as to whether advertised claims are substantiated, and to recommend modification or discontinuation of claims it deems

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<sup>2</sup> See 1983 FTC Policy Statement on Deception, appended to *Cliffdale Assocs.*, 103 F.T.C. 110, 176-84 (1984) (detailing the FTC's three-pronged test to determine deceptive advertising, asking whether (1) a claim was made, (2) the claim was likely to mislead a reasonable consumer, and (3) the claim was material).

<sup>3</sup> See FTC Policy Statement Regarding Advertising Substantiation, *available at* <http://www.ftc.gov/bcp/guides/ad3subst.htm>.

<sup>4</sup> National Advertising Division, *available at* <http://www.nadreview.org/>.

unsubstantiated. If an advertiser agrees to take action as recommended, the case is closed. NAD publishes a report of its findings, and, usually, an accompanying press release. If an advertiser either fails to capitulate to NAD recommendations, or professes capitulation but continues to make disfavored claims, NAD will refer advertisers to the FTC where the administrative process will begin anew.

Advertisers unhappy with NAD's advice may seek review by the National Advertising Review Board ("NARB"). NARB review is performed by ad-hoc panels selected from an industry peer group. This process is relatively benign when compared with FTC challenges because the NAD has no power to compel participation in a proceeding, levies no fines or damages, and has no enforcement authority.

Beginning in the 1990s, NAD expressed its specific interest in monitoring environmental labels and advertising claims, and, since 1991, NAD has heard over 40 cases related, at least in part, to environmental claims.

## **2. The Federal Trade Commission**

The Federal Trade Commission is the federal agency charged with protecting consumers from unfair and deceptive advertising.<sup>5</sup> The FTC is empowered with broad power to prohibit unfair or deceptive acts or practices. The FTC may order cease and desist, fencing-in, corrective advertising, disclosures, consumer education, and financial awards. Advertisers who flout FTC's cease and desist orders face a possible daily penalty of \$11,000.<sup>6</sup> FTC actions often result in "consent orders," a binding judicial decree expressing a voluntary agreement between the parties. FTC consent orders can require advertisers to pay redress to consumers or disgorge profits. In addition to possible financial awards, defendants in any legal action (NAD, FTC, or litigation) face costs related to the proceeding and representation. Acceptance of an FTC consent order ensures that the case will not be further litigated by the FTC in district court. However, the result of an FTC administrative proceeding does not protect advertisers from other litigants.

## **3. State Regulation**

Most states have implemented "baby FTC Acts," which generally contain provisions that, similar to the FTC Act, prohibit unfair and deceptive advertising. The most important distinction between the state and federal legislation is that, often, the state laws allow for consumers to bring a lawsuit against an advertiser.

## **III. GREEN ADVERTISING**

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<sup>5</sup> 15 U.S.C. § 45; 15 U.S.C. § 57a.

<sup>6</sup> 15 U.S.C. § 45(m).

As discussed above, many businesses want to tout their products as environmentally friendly without necessarily committing major resources to the cause or changing any convenient patterns of behavior. Because the preservation of the environment is important to consumers, the deceptive use of green marketing has come under the scrutiny of the citizens, the media, and the oversight agencies.

Public condemnation of overstated “green” claims first emerged in 1986 when Jay Westervelt, a scientist and environmentalist, criticized New York hotels for placing advertising placards in hotel rooms that encouraged guests to re-use their bath towels in an effort to stop global warming. Westervelt stated that the hotels’ advertising was disingenuous because the environmental impact of re-using towels was insignificant and overshadowed by a lack of other environmentally sound practices. He claimed the hotels were solely motivated by profits, not environmentalism, and the term “greenwashing” was coined. During this same period, the 1980s and 1990s, Congress and regulatory agencies also began to take an active role in environmental issues and passed several key pieces of legislation and regulations designed to protect the environment.

#### **A. The Green Guides**

In 1992, the Federal Trade Commission adopted the Guides for the Use of Environmental Marketing Claims, commonly referred to as the “Green Guides.”<sup>7</sup> The Guides do not carry the force of law, but they provide the FTC’s current interpretation of the laws governing environmental advertising. Other agencies and the National Advertising Division are often deferential to the Green Guides’ provisions.<sup>8</sup> The Guides will soon become a topic of conversation and debate because the FTC is currently in the process of updating them and revisions are expected in early 2010.

In the Green Guides, the FTC applies Section 5’s prohibition of unfair and deceptive advertising to environmental marketing and establishes the following four principles:

1. Qualifications and disclosures should be clear and prominent.
2. There must be a clear distinction between the benefits of the product and the package.
3. Advertisers must not expressly or impliedly overstate environmental attributes.
4. The basis for comparative claims must be made clear, and advertisers should substantiate their claims.

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<sup>7</sup> Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260 (1992). The Green Guides were updated in 1996 and 1998. 61 Fed. Reg. 53,311 (Oct. 11, 1996); 63 Fed. Reg. 24,240 (May 1, 1998).

<sup>8</sup> See *MasterNet Ltd. (Plastic Netting Packaging Products)*, Report #5092, *NAD Case Reports* (Oct. 2009).



While these principles appear relatively clear on their face, many advertisers find themselves confused with the finer points of how these rules operate in practice. For example, consider a product package labeled “50% more recycled content than before.” In actuality, the product manufacturer increased the recycled content of its package from 2% recycled material to 3%. Though the claim is technically true, it conveys the false impression to consumers that the advertiser has increased significantly the use of recycled material and is likely an overstatement of the environmental attribute. Further, the claim does not make clear whether it’s referencing the package or the product, and this advertisement stands in violation of the Green Guides’ principles.<sup>9</sup>

The FTC has demonstrated a keen interest in how businesses advertise the environmental benefits of their packaging or bagging. For example, the FTC took action against America’s Favorite Chicken Company,<sup>10</sup> which sold food products contained in disposable paper packaging. The business advertised that its paper packaging was recyclable after use, but the FTC found that the company had not substantiated its claim. Though the packaging was capable of being recycled, the FTC stated that virtually no collection facilities accept food contaminated paper for recycling. The FTC ordered the business to cease and desist its misrepresentations.

During the summer of 2009, the FTC sent stern warnings to three companies: Kmart Corp., Tender Corp., and Dyna-E International.<sup>11</sup> The agency alleged that each company had made improper claims that their products, respectively disposable plates, body wipes, and light towels, were “biodegradable.” The FTC argued that the word “biodegradable” has a specific definition to consumers, that the products will break down and return to nature—specifically, “decompose into elements found in nature, within a reasonably short period of time after customary disposal.” The advertisers, the FTC claimed, could not substantiate their claims that their products met this definition. Reports indicate that all of the parties have settled or are currently settling their disputes with the FTC.

The FTC also recently challenged advertisers that make “energy efficient” claims.<sup>12</sup> In one action against a home insulation manufacturer that advertised a “trumped-up” R-Value—the insulation industry’s rating for the insulation’s heat insulation qualities—the FTC successfully obtained a court order that demanded the defendant to pay \$155,000 in civil penalties and to revise its advertising claims.

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<sup>9</sup> See 16 C.F.R. § 260.5.

<sup>10</sup> In the Matter of America’s Favorite Chicken Company, Fed. Trade Comm. Decisions, July 5, 1994 (118 FTC).

<sup>11</sup> FTC Announces Actions Against Kmart, Tender and Dyna-E Alleging Deceptive ‘Biodegradable Claims,’ available at <http://www.ftc.gov/opa/2009/06/kmart.shtm>.

<sup>12</sup> Courts Bar Firms from Making Deceptive Claims for Home Insulation Products, available at <http://www.ftc.gov/opa/2009/03/rvalue.shtm>.

The FTC has expressly stated and demonstrated that it will continue to monitor environmental claims to assure that advertisers behave in a truthful manner and substantiate all claims.<sup>13</sup> Therefore, the four principles set forth in the Green Guides should fundamentally inform advertisers that participate in green marketing. Advertising that is inconsistent with the Guides risks the possibility of costly legal action.

As stated above, NAD acts as the self-regulatory body that serves, like the FTC, to protect consumers from false or misleading advertising. Since the beginning of 2009, NAD has begun to hear greenwashing challenges at an exponential rate. Between the early 1990s and the end of 2008, NAD heard around 30 cases involving environmental claim; since January 2009, NAD has already heard nearly twenty such cases. Further, NAD is highly deferential to the FTC's Green Guides and rulings, and its decisions are consistent with that guidance, further emphasizing the need for proper compliance.

#### **IV. BEST PRACTICES FOR THE HOSPITALITY INDUSTRY**

Though the popular allegation of “greenwashing” initially emerged from the hospitality industry, the industry has remained largely safe to date from agency action. Clearly, however, the industry in invested in “greening.” The American Hotel and Lodging Association (“AH&LA”) has a Green Task Force that is developing comprehensive, sustainable greening guidelines that it claims will make a hotel environmental-friendly and sustainable.<sup>14</sup> These sixty-nine guidelines, eleven of which are listed as key or minimum, aim to educate hotel owners and operators on ways to reduce operating costs and environmental impacts through reduced utility consumption, recycling programs, employee training, and supply chain management.

Clearly, companies invested in greening may wish to reap the benefit from increased consumer good will by advertising their environmental efforts including claims about “carbon footprints,” “carbon neutrality,” “recyclability,” etc. Companies that are making these claims, or are considering making such claims, should weigh the potential risk of liability from improper advertising and the burdens of FTC's requirement of substantiation before making such claims. These companies should also remember that the Green Guides apply to all industries and relate broadly to the advertised *message* as interpreted by the “reasonable consumer.” Some best practices for compliance with the Green Guides include:

- Environmental claims should be specific. Further, companies that desire to proclaim their products' or services' environmental benefits must be careful not to exaggerate the

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<sup>13</sup> See FTC Reviews Environmental Marketing Guides, Announces Public Meetings, *available at* <http://www.ftc.gov/opa/2007/11/enviro.shtm>.

<sup>14</sup> See [http://www.ahla.com/Green.aspx?id=24560&ekmense1=935ecbf6\\_174\\_570\\_btnlink](http://www.ahla.com/Green.aspx?id=24560&ekmense1=935ecbf6_174_570_btnlink).

“greenness” of their product. Generally, claims that tout the precise benefit of a product or service will guard against the potential for overstatement.

- All express claims should be adequately substantiated and have a reasonable basis for the claims. From the planning stages, advertisers should know that environmental claims may require rather expensive scientific, technical tests. These cost-prohibitive tests may require the proposed claim to be altered or abandoned to avoid the risk of an enforcement action.
- Additionally, companies should maintain all of the supporting documentation related to their advertising claims. Should the advertisement be challenged, the company will likely undergo a holistic review of its business practices and its products or services to substantiate any environmental marketing claims. The more documentation that the challenged advertiser maintains, the easier the challenge will be to defend.
- Companies should becoming familiar with the FTC’s Green Guides and should be mindful as new revisions are released. Revisions to the Green Guides are likely to trigger increased enforcement by the FTC, therefore companies should be particularly careful not to overstate green claims that might draw the FTC’s (or their competitors’ or customers’) attention.
- It is better, and cheaper, to carefully plan and undertake substantiation efforts and to carefully examine and tailor advertised claims *before* they are made. Outside counsel who are monitoring developments in this field of law and actions involving specific advertising claims can provide invaluable advice and review during the planning stages of an advertising campaign.

## V. CONCLUSION

In conclusion, any company’s efforts to responsibly care for the environment should be commended and should provide a competitive edge in the marketplace where consumers are increasingly motivated by “green” initiatives. An understanding of basic advertising law and adherence to the FTC’s Green Guides should enable a company to promote its environmentally beneficial attributes without creating unnecessary liability.