

February 11, 2008

Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex B)  
600 Pennsylvania Avenue, NW.  
Washington, DC 20580

E-file: <https://secure.commentworks.com/ftc-GreenGuidesReview> or <http://www.regulations.gov>

**Re: Green Guides Regulatory Review, 16 CFR Part 260, Comment,  
Project No. P954501**

The Formaldehyde Council, Inc. appreciates the opportunity to submit comments on the Federal Trade Commission's Guides for the Use of Environmental Marketing Claims ("Green Guides" or "Guides"), 16 C.F.R. Part 260, in response to the Commission's notice at 72 Fed. Reg. 66091 (Nov. 27, 2007).

The Formaldehyde Council, Inc. ("FCI") is a nonprofit trade association that represents the leading producers and users of formaldehyde in the United States.<sup>1</sup> Formaldehyde is a simple organic molecule that plays an invaluable role in many areas of the economy including the aerospace, automotive, and building and construction sectors. It is essential to the workings of the human body and other biological systems, and is used in making pill coatings, heart valves, and vaccines.

FCI and its members continue to invest considerable resources to advance the scientific understanding of formaldehyde. We have a strong interest in the Commission's review and enforcement of the Green Guides. The association and its members have expended significant effort and resources in responding to false or misleading environmental claims about formaldehyde and products made with formaldehyde. The cost of pursuing even a single false claim is quite high. When faced with many false or misleading environmental claims, companies, or industries can easily find themselves unable to muster an adequate or effective

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<sup>1</sup> Since its founding, FCI has become recognized as an expert resource in the science of formaldehyde toxicology and applicable risk assessment models. FCI members manufacture the majority of the U.S. production volume of formaldehyde. FCI's mission is to encourage accurate scientific evaluation of formaldehyde and formaldehyde-containing products and to communicate sound scientific information relating to the uses and benefits sustainability of these products.

FCI is committed to advancing the state of scientific understanding on potential toxicology, epidemiology, and environmental effects related to formaldehyde, as well as providing accurate technical and scientific information relating to potential exposures, uses and effects of formaldehyde or formaldehyde-based products. For more information about the FCI, including a list of members, visit [www.formaldehyde.org](http://www.formaldehyde.org).

response. In contrast to more traditional topics, letters concerning environmental claims are routinely ignored, even when we take care to specify factual errors, legal obligations, and the Green Guides. Thus, FCI supports the FTC's review and improvement of the Green Guides, together with their enhanced enforcement.

**A. "Formaldehyde-Free" and Other "X-Free" Claims Constitute Comparative Advertising and, If Unqualified, Are Impermissible General Claims Of Environmental Superiority**

A common environmental marketing statement that FCI and its members confront consists of "Formaldehyde-Free" claims by competitors. To a consumer, this statement may be interpreted in several ways if it is not properly qualified. Plainly, an "X-Free" statement is, in part, a claim by the manufacturer or marketer that its product does not contain the substance in question. For purposes of these comments, we assume that this portion of the manufacturer's claim is true.

More importantly, while an "X-Free" statement represents the absence of a substance, it is first and foremost a claim of comparative superiority. In other words, the "X-Free" product is better than the competing product because it does not contain X. Unfortunately, the vast majority of "X-Free" claims fail to follow the guidance in the current Green Guides that, "claims that include a comparative statement should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception." 16 C.F.R. § 260.6(d). Unqualified claims of "X-Free" are deceptive for several reasons:

- An unqualified claim of "X-Free" does not inform the consumer of the basis of comparison. Standing alone, it is uncertain whether an "X-Free" claim might relate to environmental, safety, and/or performance characteristics of a product. Such a statement might be interpreted as addressing environmental or consumer safety concerns, or both. Such unqualified claims might even be understood to relate to product performance, such as the shelf life, expected useful life, or the compatibility of the product with other materials. Without some descriptive characterization, bald "X-Free" claims should be presumed to be false, misleading, and deceptive because they generally overstate the facts, create false implications, and are incomplete.
- "X-Free" claims need to clarify whether the basis for comparison is the product alone, the packaging, the product's overall environmental or health and safety performance, or some other measure. The need to clarify whether a claim relates to the product or its packaging is addressed in the current Guides, but a new generation of claims address neither; they are focused on broader life cycle considerations.
- An unqualified "X-Free" claim is misleading because it is a comparative claim that does not provide the consumer with information on which to base a comparison. If the comparison is based on the content of the product, an "X-Free" claim should be accompanied with a statement such as "Contains Y," with Y being the chemical identity of the comparative material. However, even such claims need to be carefully assessed within the context of the product and the advertisement as to whether they are deceptive or misleading. For example, if there is no consumer exposure or if environmental releases during manufacturing are comparably controlled, the fact that X or Y was used in the manufacturing process may make no difference.

Many “X-Free” claims appear to communicate a general claim of environmental benefit. An “X-Free” claim can be intended to imply that one product is superior to another because “X” is not used in the manufacturing process or that the absence of “X” makes the product “environmentally friendly.” Obviously, it is not the intent of the claim that is controlling, but whether the information is false or misleading.

Claims of general, comparative environmental superiority are not permissible under the current Guides in the absence of substantiation and qualification by the manufacturer. In the years since the Green Guides were initially formulated, the science of life cycle assessment has advanced considerably. Yet, there continues to be debate as to how various factors used in life cycle assessment are themselves weighted in developing an overall assessment. One product may use less energy while the comparative product uses less non-renewable resources or emits fewer pollutants. For example, the International Organization for Standardization (ISO) has issued and revised ISO standard 14040 “Environmental management - Life cycle assessment - Principles and framework.” ISO 14040 describes the principles and framework for life cycle assessment (LCA) and includes definitions of the goal and scope of the LCA, the life cycle inventory analysis (LCI) phase, the life cycle impact assessment (LCIA) phase, the life cycle interpretation phase (LCIP), reporting and critical review of the LCA, limitations of the LCA, the relationship between the LCA phases, and conditions for use of value choices and optional elements. While ISO 14040 covers LCA and LCI studies, reflective of the state of the art, it does not describe the LCA technique in detail, nor does it specify methodologies for the individual phases of the LCA.

For these reasons, the Commission should continue to emphasize that “clear and prominent qualifying language limiting the environmental superiority representation to the particular product attribute or attributes for which it could be substantiated, provided that no other deceptive implications were created by the context.” § 260.7(a)(Example 6). The Commission should also place unqualified “X-free” claims in the category of general environmental claims.

## **B. “We Read It On The Internet” Is Not Adequate Substantiation**

When confronted with claims thought to be false or misleading, competitors or their associations will often seek to determine the basis on which the claim is made. In attempting to investigate the substantiation for claims, there appears to be an impression among some segments of the business community that simply referencing the claims of other organizations constitutes adequate substantiation. We ask the Commission to explain the general meaning of adequate substantiation and emphasize that unexplored reliance on statements or claims by environmental non-governmental organizations (ENGOS) does not constitute a presumption of substantiation. We wish to stress that we are not impugning the truthfulness or accuracy of statements or publications by ENGOS or their efforts to effect policy changes that they deem prudent.<sup>2</sup> Rather, the FTC should emphasize that a business making an advertising claim has an obligation to explore and understand the factual basis for the claims and whether they are misleading or deceptive within the context of the advertisement under review. Parroting the

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<sup>2</sup> We recognize that the Commission does not have jurisdiction over certain nonprofit entities. Nothing in these comments is intended to suggest Commission action with regard to such entities.

advocacy claims of others in the context of product advertising does not constitute substantiation; it is commercial speech and must be treated as such. Reliable, scientific evidence is needed to support express and implied claims.

**C. Sustainability Claims are ‘Environmentally Friendly’ Claims Married to General Economic and Social Claims. General Claims of Sustainability are Themselves Unsustainable; Substantiating Claims of Sustainability Creates a Daunting Issues of Proof.**

**1. What is Sustainability?**

It may be helpful to frame our comments by clarifying what we mean by sustainability. Common use of the term "sustainability," in the context of modern environmentalism, began with the publication of the World Commission on Environment and Development report, "Our Common Future," in 1987. Also known as the Brundtland Report, this document characterized sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

In 1992, the United States and other governments signed the Report of the United Nations Conference on Environment and Development, more commonly known as the Rio Declaration, which proclaimed that: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

In 1997, John Elkington introduced the Triple Bottom Line definition based on economic, environmental and social sustainability. The Global Reporting Initiative, which started in 1999 and includes many corporate participants, adopted the Triple Bottom line approach.<sup>3</sup>

Consistent with this history, the U.S. Environmental Protection Agency (EPA) currently describes sustainability as balancing economic and environmental health interests.<sup>4</sup>

*What is sustainability?*

Sustainability has many definitions but the basic principles and concepts remain constant: balancing a growing economy, protection for the environment, and social responsibility, so they together lead to an improved quality of life for ourselves and future generations.

. . . . The principles of sustainability can stimulate technological innovation, advance competitiveness, and improve our quality of life.

From this perspective, the notion of "sustainability" embodies environmental, economic, and societal welfare elements. While the general elements of sustainability in this broad sense may be understood, the appropriate metrics and methodologies for demonstrating sustainability are unsettled, and its use in advertising even more so.

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<sup>3</sup> <http://www.globalreporting.org>.

<sup>4</sup> <http://www.epa.gov/sustainability/basicinfo.htm#what>.

It should be evident that there is no definitive answer to the question of which products, services, or activities are sustainable. Some advertisers appear focused on a single attribute, say recyclability, and then link it to a broader claim of “sustainability.” A sustainability analysis is typically a comparative analysis of one product or system with another product or system. Simply stated, a sustainability analysis seeks to determine which product performs its intended functions better, at lower cost, and with a smaller environmental footprint while supporting or advancing general worker and societal welfare considerations.<sup>5</sup> Incorporating these aspects in a U.S. legal system, however, may require some different approaches, as the “social welfare” goal of advertising policy in the U.S. focuses on promoting the truthful dissemination of information. We agree with the FTC’s position that it is not the FTC’s role to adopt environmental standards as part of this review. It is equally clear, however, that it should address the use of “sustainable” in environmental advertising.

## **2. Unqualified, Broad Sustainability Claims Should Be Disfavored And, If Made, May Also Need to Be Treated as Comparative Advertising**

The Commission should treat “sustainability” claims just as it does “Environmentally Friendly” and other general environmental claims in the existing Green Guides, as stated in § 260.7(a):

It is deceptive to misrepresent, directly or by implication, that a product, package, or service offers a general environmental benefit. Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product, package, or service has specific and far-reaching environmental benefits. As explained in the Commission’s Advertising Substantiation Statement, every express and material implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product or service must be substantiated. Unless this substantiation duty can be met, broad environmental claims should either be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.

Consistent with the existing Guides, if a manufacturer elects to make a sustainability claim in advertising, that claim must be accompanied by qualifying text that provides a high degree of assurance that consumers will not be misled or deceived about the overall environmental impact of the product, package or service. In addition, given the debate and uncertainty surrounding such claims, it is imperative that companies making such claims provide the scientific substantiation for analysis by others. Substantiation based on life cycle assessments should be consistent with recognized and transparent LCA methodology, such as that found in ISO 14040, as referenced previously.

There are a number of organizations that validate certain environmental attributes of products. Our comments are not intended to discourage well-conceived programs, which can provide important information to consumers and the public. For example, the Composite Panel

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<sup>5</sup> Paul T. Anastas, John C. Warner, *Green Chemistry: Theory and Practice* (2000) (Jessica Kingsley Publishers); TerraChoice, *The ‘Six Sins of Greenwashing’* at 7 (Nov. 2007) available at <http://www.terrachoice.com/Home/Six%20Sins%20of%20Greenwashing>.

Association (CPA) adopted a voluntary Environmentally Preferable Product Specification (EPPS). CPA certifies products to this EPPS within its accredited and independently conducted Grademark Program. All EPP-certified products must meet American National Standards Institute (ANSI) standards for product emission and contain 100% recycled or recovered fiber content, thereby diverting millions of tons of wood waste from landfills and incinerators each year. Products meeting the criteria are labeled with the Program's EPP certification logo.

Products carrying marks from programs, such as the CPA Grademark program, can provide valuable information to consumers. The hallmarks of such programs include objective criteria and metrics that are transparent to the public. At the same time, it is important to stress two points. First, advertisers should be free to make truthful, non-misleading claims, subject to the legal obligation to provide and make available scientific and technical substantiation for the claim and all implied claims. Second, FTC Guidance should not be applied so restrictively as to stifle the provision of information about corporate "sustainability" and other initiatives, restrict businesses from responding to false, misleading, and unfair statements about their products or activities, or bar companies from making truthful claims because of the product or industry sector involved. Our comments are intended to promote fair competition, not stifle communication and innovation.

#### **D. Conclusion**

FCI and its members continue to invest heavily in research to support the scientific community's efforts to better understand the properties of formaldehyde, refine risk assessment methodologies, and continue to protect human health and the environment with increasing levels of certainty. Clear and enforced environmental advertising rules not only serve to inform consumer choice and set the bounds of fair competition, but also create a framework that supports continued advancement of our collective, environmental understanding within the U.S. framework for treatment of advertising under the First Amendment.

We would be happy to discuss this matter or provide additional analysis if it would assist the Commission.

Sincerely,



Betsy Natz  
Executive Director

OF COUNSEL  
Peter L. de la Cruz  
Keller and Heckman, LLP  
1001 G Street, N.W.  
Washington, DC 20001