



Federal Trade Commission

OPTIONS FOR HELPING THE MARKET WORK
ON BEHALF OF THE ENVIRONMENT

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The views expressed are those of the Commissioner and do not necessarily reflect those of the Federal Trade Commission or the other Commissioners.

Thank you. I am delighted to join you today to talk about what I think the FTC should do in addressing the very important policy issues that arise from the "greening" of trade regulation, as our symposium has been so aptly named. Before I embark on this topic, let me express a few important caveats. First, I would like to stress that the views I offer today are my own and do not necessarily represent the views of the Commission or any other individual Commissioner. Second, it is worth emphasizing that the development of policy in this area is very much an on-going process. We do not have all the answers yet and certain of the answers may continue to elude us for some time to come. Third, the FTC has no special expertise in the science underlying environmental claims and no mandate to establish or promote environmental policy. Fourth, even if we could eliminate all consumer confusion and deceptive environmental claims today, that would not resolve many of the larger questions about preserving or improving the quality of the environment in which we live.

Having sounded my cautionary note, I would like to offer some general observations on the positive side. First, it is worth pointing out that the policymaking debate on the "greening" of trade regulation has been remarkably open, thoughtful and free of non-productive and divisive factionalism. Given the complexity and dimension of the policy issues and the dimension of the stakes involved for consumers, the business community and the environment, the professionalism of the debate bodes well for our continuing work.

Second, it is worth noting several promising governmental developments that have taken place in the last two years. First, the Task Force of State Attorneys General deserves a round of applause for the hearings they held and the reports they subsequently issued. In addition to gathering useful information, the hearings performed an important service by focusing public attention on problems and concerns in the area of environmental advertising.

I particularly want to highlight the two reports of the Task Force. Those reports contain recommendations for responsible environmental advertising. As government institutions continue to struggle with the public policy issues, the reports will undoubtedly help to focus the debate.

As I read the recommendations of the Task Force, an underlying theme that emerges is the need and desire on the part of consumers for more information. Rarely, if ever, have I seen as great a hunger for information as now appears to exist in the area of environmental claims, and the recommendations of the Task Force provide a number of meaningful alternatives for providing information that would be useful to consumers. I encourage the responsible business community to look within itself to help bring meaning and usefulness to environmental marketing. Firms that care enough to make the effort, of which there are many, could make an enormous contribution to consumer education by implementing some of the suggestions in Green II.

Another significant event was the formation in January, 1991, by the EPA, the Office of Consumer Affairs and the FTC of a joint, federal task force to reduce market place confusion and to provide federal agency leadership and cooperation in addressing the issue of environmental claims. The organization and work of this group demonstrate the commitment of the federal agencies and their understanding of the need to draw from and share their respective fields of expertise in order to make meaningful progress in the area.

The final event I would like to mention is the hearing that the FTC held last July. Chairman Steiger is to be congratulated for fostering the kind of atmosphere in which the free and extensive exchange of views that is needed can and did take place. She has my support in this effort and that of my other colleagues on the Commission, as well. With her continued leadership, the Commission can and should play a key role in the debate and in helping to ensure that market forces are best positioned to work on behalf of the environment.

Where do we go from here and what does the Federal Trade Commission bring to the process? The FTC has several important contributions to make. First, I think there is a great deal the Commission could do to advance consumer knowledge through our consumer education program. Second, the FTC could facilitate a continuing informed debate among interested federal, state and local governments and private parties. Third, the Commission must maintain a strong enforcement presence. Because consumers

generally cannot evaluate the truthfulness of environmental claims, the FTC must be especially vigilant to protect consumers from deceptive claims about the environmental attributes of products as they occur. Fourth, the Commission can try to reduce confusion about environmental claims by explaining its enforcement policies better and more extensively through policy statements, trade regulation rules or, the subject of our current focus, guidelines.

We are all concerned with ensuring that environmental claims do not deceive consumers to their detriment. Similarly, I assume that we all want to ensure the free flow of truthful, nondeceptive environmental information to consumers. Armed with such information, consumers can use the power of the marketplace to improve the quality of the environment. Informed consumers will demand products that meet their needs while benefitting, or at least minimizing harm to, the environment, and astute business men and women will strive to make those products available, competing with one another in the effort. The key is consumer information. As Abraham Lincoln has said, "[i]f we could first know where we are, and whither we are tending, we could better judge what to do, and how to do it."¹

The Commission has long been active in consumer education. Often in conjunction with consumer groups, trade associations and private enterprise, the Commission has been successful in

¹ A speech by Lincoln delivered at the close of the Republican state convention that named him the candidate for the U.S. Senate. Springfield, Illinois, June 16, 1858.

providing information to a wide audience of consumers on such diverse topics as credit rights and remedies and health care fraud. A similar approach may be helpful in the environmental area. For example, the Commission, perhaps in conjunction with an interested trade association or environmental group, could provide information and help consumers ask the right questions about available disposal alternatives such as landfills, composting facilities and incinerators, and the prevalence and environmental effects of each. Consumers then could assess advertising claims more accurately and direct their purchases accordingly.

The Commission also may be able to contribute to the informational process by continuing to promote public debate on issues, the resolution of which will contribute to further policy development. I will not attempt today to set forth a specific program or to identify particular issues that should be addressed. Suffice it to say that there are many discrete issues that would benefit from further airing and study -- whether in symposia, in additional public hearings or in some other format or forum.

Of course, the Commission must continue to bring cases. Case law is the workhorse of this country's legal system, and the Commission's decisions do more than stop ongoing unlawful conduct. Building on one another, these decisions form a body of guidance that can assist advertisers in formulating their claims, help the Commission staff maintain consistency in its enforcement

efforts and, over the years, provide the basis for developing policy. Recent enforcement actions help illuminate how the Commission will apply the law in evaluating environmental claims.

I am pleased to inform you that just this morning, the Commission accepted for public comment its first consent agreement with a major national advertiser, a manufacturer of plastic trash bags.² Attorneys General in ten states assisted the FTC in its investigation, and the company also cooperated fully. The Commission alleged that the company made unsubstantiated degradability claims. These claims allegedly were made notwithstanding that the usual means of disposal of the respondent's product, the landfill, is a facility designed in a manner that inhibits degradation or decomposition. In my opinion, this case demonstrates the Commission's unwillingness to allow claims that take advantage of consumers' lack of understanding, or misunderstanding, concerning landfills.

Other recent actions having to do with ozone safety claims³ and decomposition of disposable diapers⁴ also should provide a

² First Brands, File No. 902 3110 (accepted for public comment and placed on the Commission's public record on October 9, 1991).

³ Zipatone, Inc., File No. 902 3366 (issued July 29, 1991); Jerome Russell Cosmetics, U.S.A., Inc., File No. 902 3365 (accepted for public comment and placed on the Commission's public record on Aug. 30, 1991).

⁴ American Enviro Products, Inc., File No. 902 3113 (accepted for public comment and placed on the Commission's public record on Aug. 30, 1991).

good deal of help in predicting how similar claims will be treated. The Commission's enforcement activities are continuing, and its actions over the coming year are likely to provide further elucidation. These cases also may provide a sound basis for further explication of policy in guidelines.

In the meantime, however, advertisers are not without some guidance. Let me remind you that the Commission's policy statements on deception, unfairness and advertising substantiation continue to govern our approach to enforcement. There is nothing magic or unique about an advertising claim that happens to make representations about the environmental attributes of a product, as opposed to its performance or convenience.

As I suggested earlier, the Commission can still work to improve and expand the articulation of its enforcement policies regarding the use of environmental claims in advertising and other marketing. In this, as in other areas, the Commission has an obligation to explain its policies as best it can. Informal guidelines provide one vehicle for clarifying policy. Guidelines are not enforceable, and guidelines are not preemptive of state and local laws and regulations. Nevertheless, it is fair to assume that guidelines are likely to have a salutary effect on firms' compliance with the law. On the assumption that guidelines do affect the behavior of the business community, if they are written, they should be written with care.

The usual assumption is that guidelines are good, or at least benign. After all, they are intended to address in some useful way costly problems in the market. It is important to recognize, however, that guidelines themselves can result in the unintended imposition of costs.

What does the FTC bring to the discussion regarding guidelines? First and foremost, the Commission brings its expertise and experience in ascertaining and analyzing consumer perceptions and market behavior. The Commission has considerable expertise in understanding the role of advertising and labeling in providing consumers with information, in analyzing the benefits of requiring information disclosures and of mandating standards, and in identifying and quantifying costs. It also has experience with the interplay between government requirements and market incentives. Through its analytical processes, the Commission seeks to determine the likely effects of particular regulations. Not infrequently, the effect of regulations is unintended and sometimes even counterproductive to the goals they are intended to serve.

At the hearings the Commission held last summer, although there was not universal agreement, most of the participants who commented on the issue favored national guidelines for environmental claims. Despite this support for national guidelines, there was not much agreement about what such guidelines should say. Many parties did not endorse either of the proposals, perhaps because of perceived flaws in each.

The hearing participants also offered different opinions regarding how various claims should be regulated. For example, while some parties argued that only "post-consumer waste" should be considered recycled material, others argued that "pre-consumer waste" is also recycled material.

Some of the disagreements that surfaced appear, at least in part, to stem from the different interests and perspectives of the participants. A simple hypothetical will illustrate why this might be true. Curbside recycling programs encourage greater reuse or recycling of post-consumer waste. Those who seek to promote markets for waste collected in curbside recycling programs might like the FTC to opine that the term "recycled" can only be used for post-consumer waste. Firms interested in making recycled products might then be more likely to buy post-consumer waste as their raw material and this, in turn, presumably would make those who promote curbside recycling happy.

One of the first questions, the Commission needs to ask is whether it knows enough about consumers' interpretations of environmental claims at this point to pronounce in any detail which claims will, or will not, be considered deceptive. The hearings this summer did not yield much information regarding consumers' interpretations of environmental claims. Indeed, it appears that we still have much to learn regarding what messages consumers take from particular environmental claims. I am sure we will gain insight as more research is done in this important area.

To the extent that we lack certainty about the meanings consumers take from environmental claims, we will be unable accurately to define the source of any confusion and to devise an appropriate response. Indeed, we might take action that inadvertently could encourage misleading claims or discourage representations that are truthful and nondeceptive.

Information on consumers' perceptions, however, is just the beginning. In order to have a sound basis on which to develop guidelines, the Commission needs to explore a number of complexities. I think that Laurence Peter might have been thinking of the environmental area when he said, "[s]ome problems are so complex that you have to be highly intelligent and well informed just to be undecided about them."⁵

Consider recycled content claims. A vigorous debate is now raging over whether pre-consumer waste should be considered "recycled material." Let's start with a simple case and assume for the moment that we are 100% certain that consumers think only of post-consumer waste when they think of "recycled material." This suggests that it would be appropriate to establish a standard under which the term "recycled material" could be used only for products made from post-consumer waste. But would it be appropriate to impose that requirement in all situations? If it is costly for firms to distinguish between pre- and post-consumer waste, some firms might choose to refrain from making "recycled"

⁵ Laurence J. Peter, Peter's Almanac, entry for September 24, 1982.

claims altogether rather than incur these costs. This, in turn, might reduce their incentives to include post-consumer waste in their product.

We should consider another effect that may result if we say that the term "recycled material" can be used only to refer to post-consumer waste. Such a standard might lead firms to use less of the pre-consumer, or in-house reprocessed scrap that is easily collected and more of the post-consumer scrap that is relatively costly to collect. A firm that switched from pre-consumer to post-consumer waste in order to claim that its product is made from recycled material might raise its production costs and increase the price it charges to consumers for the product yet, because it is merely substituting one waste product for another, do nothing to reduce the overall accumulation of waste.

Before you conclude that I am here to promote a pre-consumer waste standard, let me also pose a problem with the alternative solution. If we allow firms to characterize reprocessed manufacturing scrap as recycled-material, this in turn might reduce their incentives to avoid producing scrap in the first place. There are no easy answers.

Pre- versus post-consumer waste is only one of the issues that arises in deciding whether a recycled claim is deceptive. Another issue is what constitutes pre-consumer waste. One proposal submitted to the Commission attempts to work around this by stating that any material that "otherwise would have been

disposed of as trash" should be considered "recycled." Although this solution has intuitive appeal, would not all material be disposed of as trash if it were not reused? If so, does this mean that all reused material should be considered recycled?

The proposal we received notes that scrap material that is routinely spilled and collected should not be considered "recycled" because the material would not normally have entered the "waste stream." Of course, this raises the question of how we define the "waste stream," but let us set that question aside for the moment.

Perhaps the key is to insert the word "normally" so that recycled material would include material that "otherwise normally would have been disposed of as trash." Or is it? This standard might inadvertently penalize firms that have been reusing their industrial scrap all along. Why should firms that normally reuse their industrial scrap not be allowed to refer to the material as recycled if firms that have only recently begun to reuse their scrap can refer to it as recycled? In addition, is an "otherwise normally would have entered the waste stream" standard enforceable in practice? How would we as regulators determine whether a material "otherwise normally would have been disposed of as trash"?

Plainly, many questions remain. As several of the hearing participants noted, the Commission is trying to hit a moving target. Scientific understanding of the issues is evolving over time, and it is difficult to keep up to date.

For example, although I have only limited information on the issue, it has recently come to my attention that the inclusion of more recycled content in a product may not always be better for the environment. Let me hasten to add that I am not here today to promote that point of view. Having lived in Berkeley in the 1960's and again in the 1970's, I have assumed for many years that recycling is the only way to heaven. Old beliefs die hard, but I think we have to try to be open-minded in this process.

I understand that at a recent conference on eco-labelling, Ian Boustead, a leading scientist specializing in life cycle analysis, noted that "There is nothing inherently good about recycling." While this observation is certainly counter-intuitive, it has a simple and logical premise. If some kinds of recycling use more of the world's resources, or generate more pollution, than simple disposal of the original product and production of a new product using virgin materials, we are likely to be better off without recycling.

Whether and how often this may in fact be true, I do not claim to know. But it has been said that "[t]hat which seems the height of absurdity in one generation often becomes the height of wisdom in the next."⁶ No doubt Boustead's comments will spark a lively debate within the scientific community, the fruits of which are yet to come.

⁶ Attributed to John Stuart Mill. Adlai Stevenson, Call to Greatness, p. 102 (1954). Unverified.

Evolving science is only part of the challenge. Developing guidelines that are reasonably correct in all contexts is a daunting task. A claim that is acceptable in one context may be deceptive in another. We see this phenomenon all the time in our review of advertising. It is very difficult to draft a guideline that takes account of all the contexts in which a claim might occur.

Guidelines can have unintended effects. Suppose, for example, that we ascertain that most consumers consider manufacturing scrap to be recycled material. If the Commission advises firms that they should not refer to reprocessed manufacturing scrap as recycled material, two adverse effects might result. First, it might deprive consumers of truthful, nondeceptive information regarding the environmental attributes of various products. They might end up paying higher prices for products that contain lower "recycled" content. Firms would have a reduced incentive to reuse their manufacturing scrap and develop more efficient technologies for reuse if they could not effectively convey this reuse to consumers. Some of the material that was previously reused might end up going to the landfill instead. As a result of a well intentioned guideline, consumers and the environment actually could be worse off.

Another unintended effect may stem from the suggestion that a firm should be allowed to make a claim of recycled content for waste material that has been purchased from another firm on the theory that "absent the purchase and reuse of this material by

others, it would have entered the solid waste stream." Implicit in this proposal is the belief that the waste of one firm would either enter the "waste stream" or be sold to another firm. The proposal does not address a third possibility that the original firm might reuse its own waste. One unintended consequence of this proposed guideline might be the creation of markets for trading wastes that would otherwise be reused by the original firm. This in turn potentially could raise production costs and prices without improving the environment.

Another proposal we have received involves restrictions on the use of the term "recyclable." The suggestion is that firms should refrain from making unqualified recyclable claims unless the product or package is currently being recycled in a significant amount everywhere the product is sold. In addition, if the product can be recycled in many, but not all of the communities in which it is sold, then firms desiring to make "recyclable" claims should set up 800 numbers so that consumers can find out if recycling facilities exist near them.

Although plausible, indeed laudible, on their face, these requirements if imposed across the board also could have unintended effects. By increasing the cost of making "recyclable" claims, they may discourage small, innovative firms from producing and advertising recyclable products. They may also discourage some established firms from providing the information to consumers and making innovative changes on product packages.

A more general concern is how robust guidelines would be -- that is, how they would hold up over time. Guidelines are based on beliefs regarding what is good for the environment that are current when they are written. Those beliefs, however, can change, as the recent questioning of whether recycling is always good for the environment may illustrate. Similarly, environmental priorities change over time, as do consumers' perceptions about environmental claims and their knowledge of environmental issues. All these changes can cause guidelines to become outdated, and given the current interest in the environment, this change may occur relatively quickly.

Guides enacted in the zeal to provide additional information to consumers may actually result in less information reaching consumers, less innovation, and less improvement in the environment. Of course, few, if any, costs would be incurred if the Commission succeeded in drafting the "right" guides.

The "right" guides would be perfect initially and remain correct over time. This situation is most likely to occur when: (1) we are relatively certain about the meaning consumers take from the claims at issue; (2) we have a relatively good understanding of the scientific issues underlying these claims; (3) the context of the claims are relatively unimportant in determining ad meaning; (4) consumers' understanding of the claims does not change over time; (5) the scientific bases for the claims do not change over time; and (6) the technology of

providing environmentally preferable products is relatively stable.

Unfortunately these conditions do not appear to characterize the market for environmental claims. This does not mean that guidelines are necessarily a bad idea, but it is a good reminder that guidelines must be drafted with care. As the chorus swells for a quick panacea to eliminate confusion in environmental claims, we must take care to avoid lending truth to the observation of H. L. Mencken, "There is always an easy solution to every human problem -- neat, plausible, and wrong."⁷

We must devote our very best efforts to reduce confusion, encourage truthful claims and eliminate deceptive claims in environmental advertising and marketing. But the Commission should not be content with unexamined solutions. It should follow through with its usual rigorous analysis and apply its own expertise and its considered judgment about how best to help consumers preserve and improve the quality of the environment. I encourage your patience in this regard.

I believe the Commission should work on all fronts to address concerns about environmental claims and I believe there is much the Commission can accomplish. Our knowledge in the area has grown enormously in just the last year and I predict that a year from now we will have made important progress in resolving concerns about environmental claims. As we proceed with our

⁷ H. L. Mencken, "The Divine Afflatus," A Mencken Chrestomathy 443 (1949).

work, we must keep in mind that the problems are complex and the solutions not always self-evident. But as long as we remain open, flexible and willing to learn from one another, to discard ideas that do not withstand scrutiny, and to remember our own fallibility, then I believe that we can make genuine progress in helping market forces to work on behalf of the environment.