



Federal Trade Commission

RESPONSIBLE GREEN MARKETING

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I. Introduction

I am pleased to be here today to discuss the Commission's recent activities regarding the Guides for the Use of Environmental Marketing Claims, more commonly known as the "Green Guides."² As all of you have probably noticed, "green" marketing claims seem to have recently become ubiquitous – running the gamut from "luxury vodka that's good for the environment"³ to

¹ The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Beth Delaney, for her invaluable assistance in preparing these remarks.

² 16 C.F.R. § 260 (2008). Industry guides, such as the Green Guides, are administrative interpretations of the law. As such, they do not have the force and effect of law and are not independently enforceable. The Commission can take action under the FTC Act, however, if a business makes environmental marketing claims inconsistent with the Guides. In such an enforcement action, the Commission has to prove that the challenged act or practice at issue was unfair or deceptive.

³ Stuart Elliott, "Green Grows the Vodka," *The New York Times*, Mar. 17, 2008, available at www.nytimes.com/2008/03/17/business/media/17adnewsletter1.html?

the purported ability to offset greenhouse gas emissions from hotel stays⁴ to “carbon-neutral” Super Bowl games⁵ and “green” Academy Awards ceremonies.⁶ One news organization reported that by one count, manufacturers launched 328 “environmentally friendly” products last year, up from only 5 such products in 2002.⁷ Activity at the U.S. Patent and Trademark Office reflects this trend as well – applications with the word “green” more than doubled from 2006 to 2007, while applications with the words “clean,” “eco,” “environment,” “earth,” “planet,” and “organic” also jumped.⁸

In light of this scale of activity, it comes as no surprise that the FTC decided to accelerate its periodic regulatory review of the Green Guides. This past November, the Commission published a Federal Register notice soliciting comments on the Green Guides.⁹ Part of the review focuses on general issues: the continuing need for the Guides; their effect on the accuracy of various environmental claims; and their interaction with other environmental

⁴ Michael S. Rosenwald, “*A Tactical Turn to Green for Marriott*,” The Washington Post, Apr. 8, 2008, at D1, *available at* www.washingtonpost.com/wp-dyn/content/article/2008/04/07/AR2008040702630.html.

⁵ Scott Edward Anderson, “*Greening the Gridiron: Environmental Responsibility at the Superbowl and Beyond*,” Feb. 6, 2006, *available at* www.climatebiz.com/feature/2006/02/06/greening-gridiron-environmental-responsibility-superbowl-and-beyond.

⁶ Press Release, “*Natural Resources Defense Council ‘Greens’ the Academy Awards*,” Feb. 25, 2007, *available at* www.nrdc.org/media/2007/070225.asp.

⁷ CBS Evening News, “*A Closer Look at ‘Green’ Products*,” May 18, 2008, *available at* www.cbsnews.com/stories/2008/05/18/eveningnews/main4105507.shtml.

⁸ GreenBiz Staff, “*Eco Trademarks Made Big Gains in 2007*,” Apr. 28, 2008, *available at* www.greenbiz.com/news/2008/04/28/eco-trademarks-made-big-gains-2007.

⁹ Guides for the Use of Environmental Marketing Claims, 72 Fed. Reg. 66,091 (Nov. 27, 2007).

marketing regulations. At the same time, the Commission recognizes that science and technology in the environmental area is constantly changing. As a result, consumer perception of environmental claims may have evolved since the initial issuance of the Guides in 1992,¹⁰ and the subsequent reviews of the Guides.¹¹ Accordingly, the Commission also asked for submission of any relevant consumer survey evidence and consumer perception data that addresses environmental claims – including claims not currently covered by the Guides.

In addition to seeking information through the questions published in the Federal Register, the FTC also is holding a series of public workshops to explore developments in environmental and “green-energy related” marketing.¹² Topics for these workshops include carbon offsets, “green” packaging claims, and “green” claims in the building and textiles markets. In a few minutes, I will discuss some of the issues raised by those participating in the comment process and the workshops, but first, I would like to begin by talking a little bit about the history of the FTC’s involvement in the oversight of environmental marketing claims.

¹⁰ Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36363 (Aug. 13, 1992) (publication of final guides).

¹¹ Guides for the Use of Environmental Marketing Claims, 61 Fed. Reg. 53311 (Oct. 11, 1996)(publication of revised guides); Guides for the Use of Environmental Marketing Claims, 63 Fed. Reg. 24240 (May 1, 1998)(final revised guides).

¹² See Guides for the Use of Environmental Marketing Claims; Carbon Offsets and Renewable Energy Certificates; Public Workshop, 72 Fed. Reg. 66,094 (Nov. 27, 2007)(workshop held on January 8, 2008); Guides for the Use of Environmental Marketing Claims; The Green Guides and Packaging; Public Workshop, 73 Fed. Reg. 11371 (Mar. 3, 2008)(workshop held on April 30, 2008); and Press Release, “*FTC Announces Workshop on ‘Green Guides’ and Environmental Claims for Buildings and Textiles,*” June 3, 2008, available at www.ftc.gov/opa/2008/06/greenguides.shtm.

II. Environmental Marketing Claims Before the Green Guides

As many of you know, the Green Guides were initially issued in 1992, in response to a similar proliferation of environmental marketing claims during the late 1980s and early 90s. However, as a veteran of the Bureau of Consumer Protection, it behooves me to mention that the FTC had begun addressing environmental claims and concerns even earlier. In 1971, for example, the Commission proposed a trade regulation rule to address the environmental effect of detergents.¹³ Among other things, that proposed rule would have deemed it an unfair or deceptive act or practice to sell or distribute any detergent containing phosphorous without incorporating in all labeling and advertising, a “warning” that the product contains phosphorous and that phosphorous contributes to water pollution.¹⁴ Ultimately, rather than promulgating a rule, the Commission negotiated an industry-wide agreement on phosphate and degradability claims for detergents.¹⁵

Around the same time, the Commission adopted a trade regulation rule relating to incandescent light bulbs, after finding that, contrary to what most consumers thought, light bulbs of the same wattage level could have different rated lives as well as varying amounts of actual light output. In order to give consumers the opportunity to weigh greater light output versus

¹³ See, e.g., Annual Report of the Federal Trade Commission for the Fiscal Year Ended June 30, 1971, available at www.ftc.gov/os/annualreports/ar1971.pdf (“Because of recent, widespread concern with the effect of commercial products on the environment, advertising based on claims of beneficial environmental effects were subjected to intensive scrutiny”).

¹⁴ Notice of Public Hearing and Opportunity to Submit Data, Views or Arguments Regarding a Proposed Trade Regulation Rule, 36 Fed. Reg. 1012 (1971).

¹⁵ FTC News Release, “*Detergent Manufacturers to Adopt Uniform Labeling for Phosphorous Content and Biodegradable Statements*,” (Aug. 6, 1973).

longer life, the Rule required the disclosure of certain information on the bulbs or their packages.¹⁶

Another example of our early intervention with respect to environmental claims were our challenges and subsequent Commission orders regarding anti-pollution claims made for gasoline additives.¹⁷ In those cases, manufacturers had claimed that gasoline additives would dramatically reduce exhaust emissions and thereby reduce air pollution.

By the early 1990s, it became clear that there was broad-based support for the view that truthful and reliable advertising had an important role to play in encouraging the development of more environmentally sound products and packages.¹⁸ At the same time, there was concern about the potential for the development of differing or inconsistent standards on a state-by-state basis.¹⁹ Ultimately, the issuance of national industry-wide guidance for environmental marketing claims was recognized as a way to promote truthful and substantiated advertising while providing certainty in the marketplace for both advertisers and consumers.²⁰

¹⁶ Final Rule and Statement of Basis and Purpose, 35 Fed. Reg. 11784 (July 23, 1970). The Commission later repealed the “Light Bulb Rule,” determining that the Rule was no longer necessary in light of the more comprehensive lamp labeling rules adopted in 1994 under the Energy Policy and Conservation Act, and current industry light bulb marking practices. See “*FTC Turns Out the Light on 1970 Light Bulb Rule*,” July 1, 1996, available at www.ftc.gov/opa/1996/07/bulbs4.shtm.

¹⁷ *In the Matter of Crown Central Petroleum Corporation*, 84 F.T.C. 1493 (Nov. 26, 1974); *In the Matter of Standard Oil Company of California*, 84 F.T.C. 1401 (Nov. 26, 1974).

¹⁸ Roscoe B. Starek, III, “*The Federal Trade Commission’s Green Guides: A Success Story*,” Speech Before the Alliance for Beverage Cartons and the Environment Symposium, Dec. 4, 1996, available at www.ftc.gov/speeches/starek/egstarek.htm.

¹⁹ *Id.*

²⁰ Keith Schneider, “*Guides on Environmental Ad Claims*,” *The New York Times*, July 29, 1992, available at (noting that manufacturers praised the agency’s work, and that

In 1991, the FTC held public hearings and initiated a 90-day comment period on issues concerning environmental marketing and advertising claims, and in 1992, issued the Green Guides.²¹ In fact, one of the Commission attorneys primarily responsible for this commendable work is here today – Mary Engle – you will see her on the children’s advertising panel later today.

III. The Green Guides Now

Now I would like to make a couple of general observations about the Green Guides themselves. I was long gone from the agency when the Green Guides were issued, but in preparing my remarks to you I went back and reviewed some of the speeches I gave to the advertising community in 1974 about the basic legal principles applicable to advertising and I was struck by how firmly rooted the Guides are in those basic principles. The Guides do nothing more than reflect, with respect to particular types of claims – whether it be recyclability, biodegradability or compostability – the basic requirements that have been spelled out over the years in FTC statements and cases for *all* advertising claims.

Those principles are fivefold. First, advertising claims should be substantiated before the claims are made. The Commission has said that since the *Pfizer*²² and *Firestone*²³ cases more

consumers get accurate information about the environmental advantages of packaging and products, while the manufacturer gets clear guidance for claiming certain attributes).

²¹ Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36363 (Aug. 13, 1992).

²² *Pfizer Inc.*, 81 F.T.C. 23 (1972).

²³ *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972), *aff’d* 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

than 30 years ago. This principle is reflected in the Green Guides' prohibition against unsubstantiated environmental claims.²⁴

Second, do not make “open-ended” claims – broad, unqualified claims that are applicable only in quite limited circumstances. This kind of claim is no newcomer to the Commission. Way back in 1944, the Vacu-Matic Carburetor Company made an unqualified claim that its device to be used on car engines would reduce gasoline consumption.²⁵ In fact, the device wasn't useful except where “the fuel mixture, due to improper adjustment of the carburetor, is excessively rich.” The Commission said no. Just as it says in the Green Guides for example, that claims about recyclability must correspond to the availability of recycling facilities in the area where the claim is made.²⁶

Third, do not make “dangling comparative” claims – claims that something is “better” or “safer” without saying what it is being compared with. The landmark decision in this area is the Commission's decision in *Liggett & Myers*.²⁷ There, the company claimed that “Chesterfields are milder,” then argued that this just meant “milder than *some* other cigarettes,” not milder than cigarettes generally. The Commission found the claim deceptive. Thus, the Green Guides warn against making comparative environmental claims without identifying the basis of comparison.²⁸

Fourth, do not make “exaggerated feature” claims – claims that dwell on a product

²⁴ 16 C.F.R. § 206.5 (2008).

²⁵ *Vacu-Matic Carburetor Co. v. F.T.C.*, 38 F.T.C. 704 (1944), *aff'd*, 157 F.2d 711 (7th Cir. 1946). *See also In the Matter of Octa-Gane, Inc., et al.*, 53 F.T.C. 195 (1956).

²⁶ 16 C.F.R. § 260.7(d)(2008).

²⁷ *In the Matter of Liggett & Myers Tobacco Co.*, 55 F.T.C. 354 (1958).

²⁸ 16 C.F.R. § 260.6(d)(2008).

feature which may have no significance or benefit for consumers. The leading case here is the Commission's 1966 decision in *American Home Products*.²⁹ There *AHP* highlighted the ingredient "Bio-Dyne" in ads for Preparation H. The Commission found the claim deceptive because the ingredient had little or no therapeutic value. This conclusion is reflected in the Green Guides' admonition that environmental claims should not exaggerate or overstate attributes or benefits.³⁰

Fifth, do not make claims using terms that consumers don't generally understand. The prime example I used in 1974-75 was use of the term "food energy" which simply meant calories, though most consumers did not realize that. This principle is reflected in the Green Guides' caution against the use of symbols or seals of approval whose significance the public doesn't understand, and therefore could be deceptive.³¹

IV. Where To Next?

So, where are we now? As I mentioned earlier, this past November, the Commission put the Guides out for review.³² The Commission also requested comments in conjunction with the workshops it is conducting on various "green" topics. To date, the Commission has received

²⁹ *In the Matter of American Home Products Corp.*, 70 F.T.C. 1524 (1966).

³⁰ 16 C.F.R. § 260.6(c)(2008).

³¹ 16 C.F.R. § 260.7(a), Example 5 (2008).

³² Guides for the Use of Environmental Marketing Claims, 72 Fed. Reg. 66,091 (Nov. 27, 2007).

over 150 comments from interested parties.³³ There is an enthusiastic consensus among commenters that the Guides are important to both consumers and industry. Commenters have many thoughtful ideas about how we can improve the Guides and how the Guides might need to be supplemented to address new issues in environmental marketing. As you can imagine, staff is still in the process of reviewing and synthesizing all of these ideas and suggestions. Speaking entirely on my own behalf, however, there are a few major themes that are apparent and that I would like to highlight for you today.

I think one of the most interesting challenges is raised by the concept called “life cycle analysis.” Life cycle analysis involves looking at the entire lifespan of a product – beginning with how the product is manufactured and what types of materials and equipment are used, to how the product is transported for distribution, to how the consumer uses the product and ultimately, disposes of it. Life cycle analysis is a “big picture” concept, and is a new way of looking at the impact of consumer products on the environment. Instead of focusing merely on the disposal of a product, this analysis takes into consideration all of the components involved in the manufacture, distribution, use and disposal of the product. Some commenters call this a cradle-to-grave analysis, while others have coined the term “cradle to cradle.”

As the focus of environmental marketing turns more in this direction, product manufacturers will face challenges on how to truthfully and accurately inform consumers about

³³ Seventy-two responses were submitted in response to the request for comments for the review of the Green Guides. The comment period closed in mid-February and the comments can be found at www.ftc.gov/os/comments/greenguidesregreview/index.shtm. The Commission received 56 comments regarding issues raised by the Carbon Offsets and Renewable Energy Certificates workshop held on January 8, 2008 (comments available at www.ftc.gov/os/comments/carbonworkshop/index.shtm); and received 30 comments for the Green Packaging Claims workshop held on April 30, 2008 (comments available at www.ftc.gov/os/comments/greenpkgworkshop/index.shtm).

their practices. Likewise, this is an area that we will need to consider as we review the Guides. Does current guidance provide enough assistance? What do consumers understand about the claims made about one part of the manufacturing, distribution or disposal process, when actual practices in other parts of the process may “undo” the good accomplished by that part of the process? One environmental marketing agency identifies this as the “Sin of the Hidden Trade-Off” – and gives the following example: a product may come from a sustainably harvested forest, but what are the impacts of the milling and transportation practices?³⁴ In terms of advertising practices, what is important is the net impression taken away by the consumer about the claims made.

Participants in the comment process and the workshops have also highlighted the fact that the Guides could be fine tuned to address the use of terms like “biodegradability” and “recyclability” in light of consumer perception about what these words mean. For example, the Guides point out that an unqualified biodegradability claim should be substantiated by competent and reliable scientific evidence that the entire product or package will break down and return to nature “**within a reasonably short period of time after customary disposal.**”³⁵ One issue raised concerns the meaning of the term “reasonably short period of time.” Consumers may have a very different perception of how long it takes for something to degrade. More information about consumers’ understanding of this will help the FTC provide guidance on

³⁴ TerraChoice Environmental Marketing, Inc., “*The Six Sins of Greenwashing – A Study of Environmental Claims in North American Consumer Markets*,” Nov. 2007, available at www.terrachoice.com/files/6_sins.pdf. See also Christopher A. Cole & Carly Van Orman, “*Green Marketing: Avoiding Unwanted Attention from Regulators and Marketers*,” Legal Backgrounder, May 19, 2008, available at www.wlf.org/upload/05-16-08vanorman.pdf.

³⁵ 16 C.F.R. § 260.7(b)(2008).

making truthful and accurate claims. How consumers actually dispose of biodegradable products is another issue. The Guides talk about “**customary disposal**” with respect to claims of biodegradability. However, disposal for many consumers means a landfill, and landfills today are often constructed in a manner that specifically thwarts biodegradability. Do claims need to be clarified so that consumers have this information?

Recyclability claims raises similar issues – the Guides point out that such claims “should be qualified to the extent necessary to avoid consumer deception **about any limited availability of recycling programs and collection sites.**”³⁶ As newer products develop that have the capability to be recycled, producers must keep in mind the fact that facilities may not be yet be widely available for the recycling of such products. As a policy matter, it is tempting to label as “recyclable” anything that is even remotely so. However, it is my view that the goal of the Green Guides should be focused on promoting accurate and truthful advertising. While I believe that motivating socially responsible behavior is very useful, I personally think that motivating socially responsible behavior, as such, is not the FTC’s mission as its mission is defined by Section 5 of the FTC Act. However, I do think that consumer education as a byproduct of accurate and truthful advertising, ultimately, can lead to more responsible behavior.

Another issue is the growing use of words like “sustainable” and “renewable” in environmental marketing. As many of you know, the basic framework of the Guides, for the most part, anticipates claims about specific attributes of a product. Some commenters have suggested that these terms are too vague and that the FTC should not try to define them for purposes of the Guides. Others have opined that these terms are comparable to phrases such as

³⁶ 16 C.F.R. § 260.7(d)(2008).

“eco-friendly” and other general “green” claims and should be prohibited as a “general environmental benefit” claim unless the marketing claim is limited to a particular attribute of a product and it could then be substantiated.³⁷ Still other commenters have noted that their industries can and have defined terms such as “sustainable,” and accordingly, they should be allowed to use them in their marketing and self-regulatory efforts. These are some of the issues that staff is in the process of sorting out.

V. First Amendment/Free Speech/Image Advertising – Then and Now

Even when our mission is defined in narrow terms, we must be mindful of the First Amendment. I say this for five reasons.

First, image advertising can be a very effective tool, especially for an advertiser whose products are more or less fungible. As the public becomes increasingly aware of the fungibility, the advertiser may try to differentiate itself on some basis and image is one way to do it. A company that is viewed by consumers (and/or shareholders) as a “good” company, as compared to its rivals may do better in the competitive and capital markets than those rivals.

Second, image advertising is not a new phenomenon. When I was at the Commission in the mid-1970s, we saw a lot of it, as you can imagine, by petroleum companies. After I left, the Commission brought a case against R.J. Reynolds based on a paid advertisement it placed in major magazines regarding its “Of Cigarettes and Science” message – basically an advertorial looking at medical studies and questioning the link between smoking and heart disease. The

³⁷ 16 C.F.R. § 260.7(a)(2008)(“Unqualified claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers”).

ALJ dismissed the case on the basis that the message was fully protected speech, but then the Commission reversed that order, remanding the matter back to the ALJ.³⁸ Ultimately, the parties settled, avoiding further exploration of these difficult issues.

Third, I am well aware that “image” and “message” advertising continues to pose difficult constitutional issues. For example, the Supreme Court recently avoided tough issues in the *Nike v. Kasky* case by ruling that certiorari was improperly granted.³⁹ More specifically, I understand that the First Amendment shields non-commercial advertising from challenges except in very unusual circumstances, and I think that shield is available to many, if not, most pure image and message advertisements – including ads relating to reforestation and environmental issues, for example – regardless of whether the “message” is true or false.

Fourth, however, that said, I am not convinced that all image ads are shielded. Some such ads may be predominantly commercial in their purpose and effect. As I’ve said, there are commercial reasons for engaging in this kind of advertising. The closer the image claims are associated with specific branded products, I think the less likely it is that the First Amendment provides absolute protection. Or conversely, the more likely it is that the ad will only be afforded the protection given to commercial speech.

Fifth, it’s strongly arguable that the Commission should challenge ads that don’t enjoy absolute First Amendment immunity when the claims made are false. It’s a form of unfair competition when the bad guys are able to tune the public off on the good guys by making deceptive claims.

³⁸ *In the Matter of R.J. Reynolds Tobacco Co., Inc.*, 111. F.T.C. 539 (1998).

³⁹ *Nike, Inc., et al. v. Kasky*, 539 U.S. 654 (2003).

Finally, I don't suggest for a moment that the Commission should go after all unprotected ads. There may well be sound policy reasons – internal policy reasons – for not going after some ads insofar as that would conflict with other law enforcement activities. There may also be some valid law enforcement strategic reasons for not challenging some ads; in particular, if the invalidity or protectability of the claim made turns on facts that are hard to prove, the game may not be worth the candle. Or, some matters may be better resolved in actions by competitors, either through Lanham Act cases or the self-regulatory process. But I would not want to leave you with the impression that image ads are entirely off limits. At least in my own mind.

VI. Conclusion

The thought I would like to conclude with today is that I think the Green Guides are alive and well, and I am optimistic about their utility in the future. I make this point for two reasons.

First, because the Commission has not brought any environmental marketing cases that relate to conduct described in the Guides since 2000,⁴⁰ and one may legitimately ask why that is

⁴⁰ *Dura Lube Corporation, et al.*, D-9292 (May 3, 2000) (challenging claims that the companies' motor oil additive, among other things, reduces emissions). From 1990 to 2000, the FTC brought 37 cases involving environmental marketing claims. See Energy & Environment microsite *available at* www.ftc.gov/energy/ (cases listed under the Enforcement tab of the Environment portion of the microsite).

Since 2000, the Commission has brought other cases, however, that relate to energy efficiency. See, e.g., *U.S. v. Northwestern Ohio Foam Packaging, Inc.*, Civil Action No. 3:06-cv-02407 (filed Oct. 5, 2006)(alleging that an insulation made exaggerated R-value claims for its insulation product); *F.T.C. v. Intl. Research and Dev. Corp. of Nevada, et al.*, Case No.: 04C 6901 (filed Oct. 7, 2004)(alleging deceptive claims about an "automatic fuel saver" device); *In the Matter of Kryton Coatings Intl., Inc.*, Docket No. C-4052, File No. 012 3060 (decision issued June 14, 2002)(alleging unsubstantiated performance and R-value claims for building coatings).

so. I think the answer relates to the Commission's views as to whether and to what extent the Green Guides' teaching has been absorbed by the firms making environmental claims and whether and to what extent alternatives to Commission law enforcement exist. I think the Guides have been very successful as guides. That doesn't surprise me. I was skeptical when the FTC issued the Fuel Economy Guides⁴¹ in 1975, that guides, as opposed to rules, would be obeyed. But they were obeyed by the automobile industry, and I think the same thing is true of environmental claims. Additionally, the extent to which there is self-regulation and private enforcement – through the Lanham Act – in the advertising world far surpasses anything we saw in the early 70s.

Second, my own view is that if the incidence of objectionable claims increases or the alternatives dissipate, the FTC cop can and should get on the beat vigorously – because these are very important claims in today's world (and they will increasingly be important, I think in our grandchildren's world). Indeed, staff is currently investigating a variety of environmental product claims. Although some of these products may be new innovations – for example, “green” building materials and “environmentally friendly” textiles – and their advertising may use creative terminology, I believe that the current Green Guides, and any revisions to them, will continue to offer an extremely helpful framework to enforce truthful and accurate advertising.

Thank you for your time and attention.

⁴¹ Guide Concerning Fuel Economy Advertising for New Automobiles, 40 Fed. Reg. 42003 (Sept. 10, 1975); *see also* Guide Concerning Fuel Economy Advertising for New Automobiles, 16 C.F.R. § 259 (2008).