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February 11, 2008

By electronic submission

Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex B)  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

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

Dear Secretary Clark:

Please accept these comments regarding the Green Guides Regulatory Review, 16 CFR Part 260, Project No. P954501. We write to you individually and on behalf of the Harvard Law School Environmental Law & Policy Clinic.<sup>1</sup> In our view, the Green Guides have been beneficial to the extent that they have imposed some clarity and consistency on environmental marketing claims, thereby enabling consumers to make better-informed decisions about the products and services they buy. However, because of the explosion in the number and type of such claims since the Guides were issued in 1998, the Guides now require revision, expansion, and updating.

**I. Background: The Changed Marketplace**

The majority of consumers today care about the environment, and they factor the environmental impacts of products and services into their purchasing decisions.<sup>2</sup> As a consequence, consumers today place increased importance on access to accurate information about the environmental consequences of products and services in the

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<sup>1</sup> The Harvard Law School Environmental Law and Policy Clinic (ELPC) works on a variety of local, national, and international projects covering the spectrum of environmental issues.

<sup>2</sup> See “New Survey Conducted Indicates Green is No Longer a Marginalized Issue in the United States” (available at <http://www.landor.com/?do=aboutus.pressrelease&storyid=507> (research from marketing companies reveals the 2007 ImagePower Green Brands Survey and shows that “in the U.S.’s collective consciousness, green is no longer an issue marginalized to fanatical environmentalists.”); see also “Consumers Warned: Beware of ‘Green’ Product Claims” (Nov. 20, 2007; available at CityNews.ca); “A Green Energy Industry Takes Root in California” (THE NEW YORK TIMES, February 1, 2008).

marketplace.<sup>3</sup> A recent survey shows that most Americans want to buy environmentally-friendly products and are even willing to spend more money in order to do so.<sup>4</sup>

The market has responded to this wide-spread concern for the environment. The number of businesses making environmental marketing claims is staggering.<sup>5</sup> Thousands of manufacturers are now claiming their products to be “green,”<sup>6</sup> or “environmentally responsible.”<sup>7</sup> Notably, claims are made today regarding products and services that did not even exist in 1998 – carbon offsets and renewable energy credits, for example – and regarding environmental attributes of which consumers were largely unaware in 1998 – “sustainable” and “renewable,” for example.

Environmental advertising significantly affects consumer choices.<sup>8</sup> Pursuant to Section 5 of the Federal Trade Commission Act, consumers are entitled to assume that the claims in advertisements and on packaging are accurate and reliable so that they (the consumers) can fairly distinguish from among the competing claims what are truly “environmentally

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<sup>3</sup> For example, see “Consumer Spending On Green Will Double, Reach \$500 Billion In 2008,” <http://ecoamerica.typepad.com/blog/2007/10/consumer-spendi.html> (last visited February 8, 2008); “News Flash: 110% of Consumers Shop Green,” <http://ecoamerica.typepad.com/blog/2008/01/news-flash-110.html> (last visited February 8, 2008).

<sup>4</sup> Maronick et al., “The Role of Qualifying Language on Consumer Perceptions of Environmental Claims.” *Journal of Consumer Affairs*, Vol. 33 (1999).

<sup>5</sup> See Technorati’s chart of environmentally-related advertising at <http://technorati.com/chart/green+marketing?chartdays=360&language=n&authority=n>. (last visited February 8, 2008).

<sup>6</sup> See, e.g., *The New Yorker*, October 29, 2007, BMW of North America LLC advertising its Hydrogen 7 as “Available in Green,” Attachment 1.

<sup>7</sup> See, e.g., Honda’s claim, “committed to developing environmentally responsible technology,” Attachment 2.

<sup>8</sup> For example, see “Majority Tells Mayors’ Poll Going Green Makes Economic Sense,” <http://ecoamerica.typepad.com/blog/2008/01/majority-tells.html> (last visited February 8, 2008); See also “IRI Study Finds Sustainability an Emerging Key to Product and Store Selection,” [http://us.infores.com/page/news/pr?mode=single&pr\\_id=246](http://us.infores.com/page/news/pr?mode=single&pr_id=246) (last visited February 8, 2008). (Information Resources, Inc. (IRI) asked 22,000 U.S. consumers to determine the impact of four key sustainability features in their product and store selection—organic, eco-friendly products, eco-friendly packaging and fair treatment of employees and suppliers. One-fifth of those surveyed were determined to be “sustainability driven,” taking at least two sustainability factors into account when making their selections. Among the IRI results: Approximately 30 percent look for eco-friendly products and packaging in their brand selection; and up to one-quarter of those surveyed consider fair trade practices along with eco-friendly or organic designations in selecting a shopping destination.). Lastly, see “Green Marketing Shakeout in 2008,” <http://ecoamerica.typepad.com/blog/2008/01/green-marketing.html> (last visited February 8, 2008)(“According to the Technorati chart, the average number of daily references to ‘green marketing’ in the blogosphere doubled from about 150 per day in 2006 to more than 300 per day during the second half of 2007.”); <http://technorati.com/chart/green+marketing?chartdays=360&language=n&authority=n>. (showing the Technorati chart).

friendly products”. Unfortunately, today, consumers cannot make that assumption and cannot reasonably identify truly pro-environment (or minimally harmful) goods and services. And from the business point of view, companies offering products with significantly positive environmental attributes get an insufficient return on their investments in cleaner products because their claims are indistinguishable from “generic” green claims being made by their competitors.

Consumers are also losing confidence and becoming increasingly skeptical about environmental claims, particularly claims to “general environmental benefits.”<sup>9</sup> To dispel this skepticism and provide for clarity and consistency in regard to general environmental benefits, we recommend that 16 C.F.R. § 260.7(a) be revised, as detailed below. We also recommend that the Guides should be revised specifically to address claims regarding carbon offsets and renewable energy credits, as discussed further below.

## II. General Environmental Benefit Claims

We make the following specific recommendations for revisions to 16 C.F.R. § 260.7(a):

(1) Define “General environmental benefit claim.” By way of example only (we have seen literally dozens of similar advertisements), an Amazon.com advertisement displays in large green type “**Think Green**”. The ad then states “shop our wide selection of cordless and electric Lawn & Garden tools.”<sup>10</sup> “**Think Green**” is neither substantiated (there is nothing to indicate that using the lawn and garden tools referenced benefits the environment) nor qualified. The Guide requires substantiation/qualification only of an “*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 ...*” Amazon might argue that “**Think Green**” does not require substantiation/qualification because it does refer to any “objective quality” or feature of the tools.<sup>11</sup> The Guide should be revised to conform to today’s consumer expectations regarding such terms. Until the FTC has the opportunity to conduct additional consumer research to identify those expectations, it should amend the Guide to establish a presumption that any claim that a product, service, or company has “green” attributes (other than objective characteristics like actual color, of course), or is “environmentally friendly,” “environmentally safe,” “sustainable,” “renewable,” or uses similar terms is a “claim” within the meaning of the Guides that must be substantiated.

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<sup>9</sup> See Eric Corey Freed, “Avoid Greenwashers’ False Claims: How Do I Know I’m Buying Green?” July/August 2007, <http://www.naturalhomemagazine.com/Health/2007-07-01/buying-green.aspx>, (last visited February 8, 2008); “Eco-Friendly Product Claims Often Misleading,” <http://www.npr.org/templates/story/story.php?storyId=16754919> (last visited February 8, 2008); Consumer Reports Greener Choices webpage <http://www.greenerchoices.org/pcategories.cfm?pcat=autos> (last visited February 8, 2008)(a resource for understanding environmental claims about products).

<sup>10</sup> See reproduction at <http://gadgets.boingboing.net/2007/08/31/irony-thy-name-is-am.html>.

<sup>11</sup> The FTC may disagree with this argument, but not openly, through enforcement efforts: these types of general environmental benefit claims appear everywhere.

(2) A General Environmental Benefit Claim Must be Substantiated. By way of example only, a Honda Accord magazine ad has a large picture of auto parts in the shape of a tree and the words “**Green, through and through**” displayed immediately beneath the image. (Attachment 3.) In small print at the very bottom of the page, the ad also indicates that the car has a “fuel conserving 253-hp gas-electric engine,” “tree friendly partial zero emission rating,” and a gas mileage of 28 city/ 35 hwy.

It could perhaps be argued that the specific data on the Accord’s performance “qualifies” the general claim that the car is “**Green, through and through.**” But in fact it does not. Nor is there any realistic way to qualify these general claims precisely because they are so general. Therefore, they must be substantiated. We recognize that this requirement may sharply curtail general environmental claims. But that would be consistent with the original Guides, which acknowledge that “[i]t is deceptive to misrepresent, directly or by implication, that a product ... offers a general environmental benefit.” And that is exactly what too many companies are doing.

(3) Define what constitutes adequate substantiation for commonly used claims. In the original Guides, the FTC defines precisely how a claim that a product is “degradable/biodegradable” must be substantiated: “by competent and reliable scientific evidence the entire product or package will completely break down and return to nature, i.e., decompose into elements found in nature within a reasonably short period of time.” The Guides should be revised to include comparable guidance in regard to other commonly-used general environmental claims.

One such common claim is that a given product is “sustainable,” a term containing little in the way of definition but still conveying a wealth of (often misleading) connotations to consumers. Broad, unsubstantiated claims of “sustainability” are being made in numerous contexts. Wal-Mart advertises a wide range of “sustainable products.”<sup>12</sup> BASF advertises its PremAir automotive catalyst as a “sustainable innovation.” (Attachment 4.) Wexler advertises “sustainable packaging.”<sup>13</sup>

“Green” is another claim for which the Guides should define substantiation. For example, Honda’s “Green, through and through” Accord does have a gas-electric engine and a partial zero-emission rating. But no car manufactured today can, in any meaningful sense, be deemed “green through and through.” “Renewable” is another. For example, an ad by Chevy promotes its vehicles which use E85 ethanol, a “mostly renewable fuel source.” (Attachment 5.) Corn may indeed be renewable, but what of the adverse environmental and energy impacts from the amount of petroleum energy required to plant, fertilize, and harvest the corn and the water required to grow it?

<sup>12</sup> <http://www.walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=355>.

<sup>13</sup> [http://www.wexlerpackaging.com/sustainable\\_packaging.html?gclid=CP-P187XupECFQoMIgod6XArOQ](http://www.wexlerpackaging.com/sustainable_packaging.html?gclid=CP-P187XupECFQoMIgod6XArOQ).



We recommend that the FTC set forth the specific criteria which must be met to substantiate any of these claims,<sup>14</sup> as it did for “degradable,” and do further research to determine on what other, comparable general benefit claims consumers today rely. We further recommend that § 260.5 be amended to clarify that the scientific tests, analyses, research, studies and other evidence of substantiation must be readily available to consumers.<sup>15</sup>

### **III. Carbon Offsets and Renewable Energy Credits Require the FTC’s Immediate Attention to Protect Consumers**

The consumer market for carbon offsets and Renewable Energy Credits (RECs) is ripe for fraud. In general, consumers only have a rudimentary knowledge regarding RECs and offsets while simultaneously, the market is exploding. Thus, it is imperative that the FTC provide guidance for consumers and marketers in this area. In particular, the many possibilities for deceptive and misleading advertising to consumers purchasing offsets and RECs<sup>16</sup> strongly underscore the need for definite substantiation requirements.<sup>17</sup>

The number of companies making “carbon neutrality” and other green marketing claims (“First Beauty Company Manufactured with 100% Wind Power,” Attachment 6) is growing at a rapid rate, and there are no uniform standards for substantiation. Thus, the FTC should devote a section in the Green Guides to this particular aspect of environmental marketing claims, defining relevant terms and outlining the parameters of acceptable environmental marketing. This will enable businesses to promote legitimate offset and REC claims while simultaneously informing consumers about their options by providing accurate information.

### **IV. Consumer Confidence in Environmental Claims Marketing Requires Active FTC Investigation of Claims and Enforcement of the Guides**

Given the near-universal awareness of global warming, shrinking petroleum deposits, and other pressing environmental issues, American consumers would consider choosing environmentally friendly products and services (price permitting) if they could identify such products. But general environmental benefits are so commonly claimed, and so

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<sup>14</sup> In the alternative, the FTC could require substantiation through verification/certification by independent companies. For example, a “green building” could be certified as such by the United State Green Building Council (“USGBC”), a non-profit organization which has developed its Leadership in Energy and Environmental Design (“LEED”) Green Rating System as a way to certify “green buildings.” But the standards used by these independent certifiers may vary; we believe universal criteria developed by the FTC would be preferable.

<sup>15</sup> This requirement should not be unduly onerous given the availability of a company’s web site to post this information.

<sup>16</sup> See, e.g., Comments Submitted by the Center for Resource Solutions to the Carbon Offset Workshop dated January 25, 2008.

<sup>17</sup> We concur, in general, with the comments submitted by the Attorney General for the State of Vermont in this regard.

rarely substantiated, that consumers cannot reasonably make those choices. The FTC should, by taking appropriate investigatory and enforcement actions, ensure that American businesses are adhering to the Guides so that consumers can assume environmental benefit claims are accurate and reliable, an assumption to which they are entitled pursuant to the Federal Trade Commission Act

Thank you for your consideration of our comments.

Sincerely yours,

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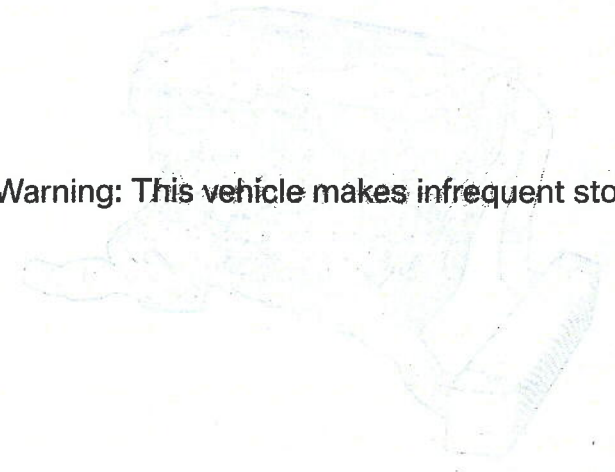


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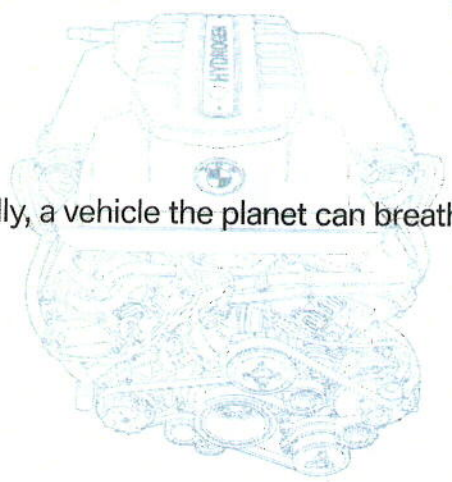
THE NEW YORKER, OCTOBER 29,

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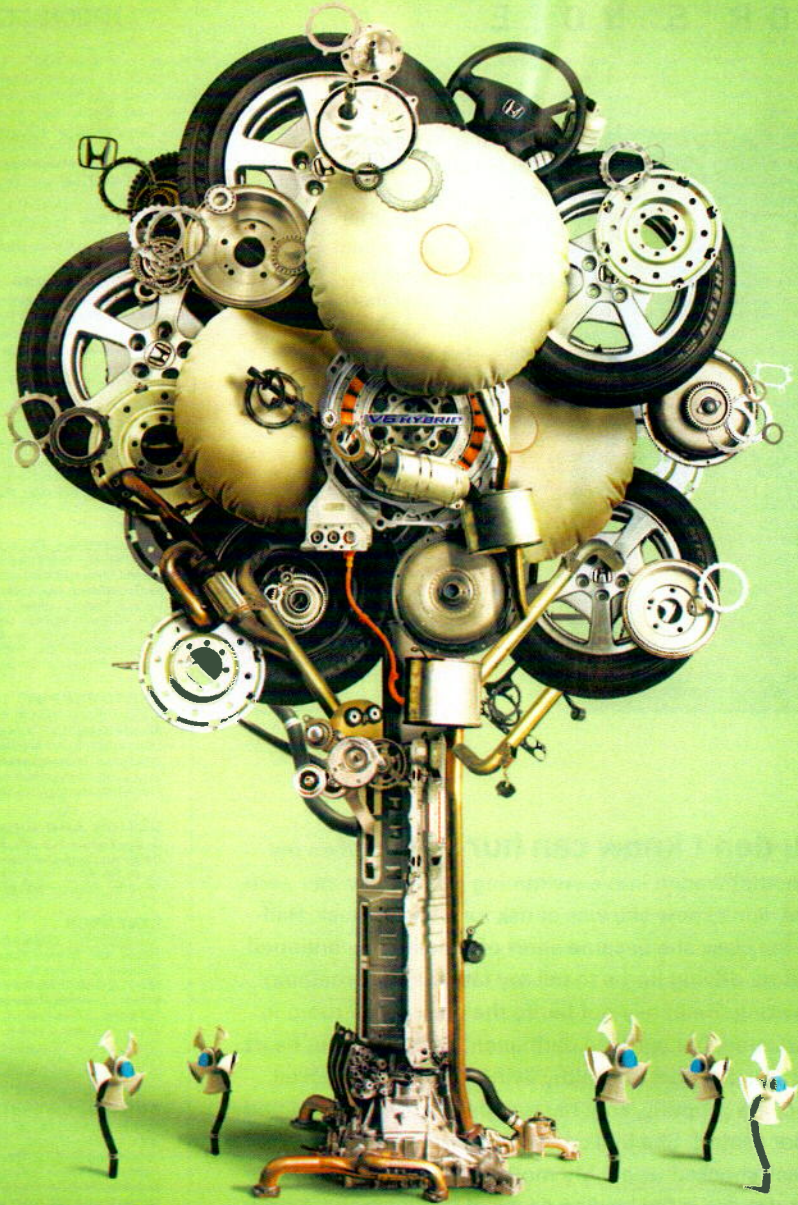
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