

PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION

on

“IT’S TOO EASY BEING GREEN:
DEFINING FAIR GREEN MARKETING PRINCIPLES”

Before the

COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION
UNITED STATES HOUSE OF REPRESENTATIVES

Washington, DC
June 9, 2009

I. Introduction

Chairman Rush, Ranking Member Radanovich, and Members of the Committee, I am James A. Kohm, Associate Director of the Enforcement Division in the Bureau of Consumer Protection at the Federal Trade Commission (“FTC” or “Commission”).¹ I appreciate the opportunity to appear before you today to discuss the Commission’s role with respect to environmental advertising claims.

In the past few years, there has been a virtual tsunami of environmental marketing. Businesses in a diverse array of industry sectors are touting the “green” attributes of their products and services, and several major retailers have launched their own green product lines. The FTC plays an important role in helping to ensure that these environmental advertisements are truthful, substantiated, and not confusing to consumers. In fulfilling this role, the Commission employs a multi-tiered approach. First, the agency promulgates rules and guides (the “Green Guides”) to make the “rules of the road” clear for businesses. Second, the FTC challenges fraudulent and deceptive advertisements through enforcement actions. In fact, today the FTC announced three complaints alleging that Kmart Corporation, Tender Corporation, and Dyna-E International made false and unsubstantiated claims that their products were biodegradable. Finally, the FTC publishes materials to help consumers make informed purchasing decisions. This testimony describes the FTC’s work in each of these three areas.

¹ This written statement represents the views of the Commission. My oral presentation and responses to questions are my own, however, and do not necessarily reflect the views of the Commission or any individual Commissioner.

II. Business Guidance and Rulemaking

The FTC does not establish environmental standards or encourage particular claims or consumer behavior based on environmental policy concerns. Rather, the agency's role in the environmental arena involves its traditional consumer protection authority: ensuring that consumers do not become the victims of unfair or deceptive practices. The Commission's authority stems from the Federal Trade Commission Act ("FTC Act") as well as several other statutes.² Pursuant to these statutes, the Commission has developed a variety of rules and guides related to energy and environmental marketing practices, including (1) guidance to help marketers ensure their environmental claims are truthful and substantiated, (2) requirements for energy use disclosures on most major home appliances and lighting products, and (3) rules mandating disclosures for automotive fuels.³

A. The Commission's Green Guides

The Commission's Guides for the Use of Environmental Marketing Claims ("Green Guides" or "Guides"), 16 C.F.R. Part 260, are the centerpiece of the agency's environmental marketing program. The Guides help marketers avoid making green claims that are "unfair or

² FTC Act, 15 U.S.C. §§ 41-58. Other statutes include the Energy Policy and Conservation Act, 42 U.S.C. §§ 6201-6422, and the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2841.

³ Under the FTC Act, the Commission can issue rules that define with specificity unfair or deceptive acts or practices in particular industries. 15 U.S.C. § 57a. The Commission may seek civil penalties for knowing violations of these rules. 15 U.S.C. § 45(m)(1)(A). The Commission also issues rules that have the force and effect of law pursuant to specific Congressional mandates. *See, e.g.*, Energy Policy and Conservation Act, 42 U.S.C. § 6294; Petroleum Marketing Practices Act, 15 U.S.C. § 2823. In contrast, FTC guides "are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements." 16 C.F.R. § 1.5. Conduct that is inconsistent with the guides may result in enforcement action by the Commission, if, after investigation, the Commission has reason to believe that the conduct is unfair or deceptive in violation of the FTC Act.

deceptive” in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). The Commission issued the Guides in 1992 to address confusion surrounding the meaning and proper use of proliferating green claims.⁴ The Guides explain how consumers understand commonly used environmental claims,⁵ such as “recyclable” and “biodegradable,” and describe the basic elements needed to substantiate those claims.⁶ They also provide examples that demonstrate how to qualify specific claims to avoid deception. This guidance assists marketers in making truthful and substantiated statements about the environmental attributes of their products and services.

The Commission currently is reviewing its Guides to ensure that they are responsive to today’s marketplace. The Commission periodically reviews the efficacy, costs, and benefits of each of its rules and guides. The agency initiated review of its Green Guides a year earlier than planned in response to the explosion of green marketing. In November 2007, the FTC sought public comment on several issues, including the continuing need for the Guides, their efficacy,

⁴ 57 Fed. Reg. 36363 (Aug. 13, 1992). The Commission revised the Guides in 1996 and in 1998. 61 Fed. Reg. 53311 (Oct. 11, 1996); 63 Fed. Reg. 24240 (May 1, 1998).

⁵ Under FTC law, it is illegal to make advertising claims that are likely to mislead reasonable consumers. *See FTC Policy Statement on Deception*, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984). To determine if a claim is likely to mislead, marketers must determine how consumers interpret the claim. The Commission’s guidance on consumer interpretation can be useful if consumer perception is not self-evident.

⁶ Marketers must possess a reasonable basis substantiating the objective claims they make about their products and services. *See FTC Policy Statement on Advertising Substantiation*, appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984). In the context of environmental marketing claims, such substantiation will often require competent and reliable scientific evidence, defined as tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results. 16 C.F.R. § 260.5.

and whether they should address certain green claims, such as “carbon neutral” and “sustainable,” that were not common when the Commission completed its last review.⁷

To develop a robust record upon which to base its guidance, the Commission also held a series of public workshops on emerging green marketing issues. The workshops brought together representatives from industry, government, consumer groups, environmental organizations, and the academic community to explore the marketing of carbon offsets and renewable energy, green packaging claims, and claims for green building and textiles.⁸ The Commission also sought additional public comment in connection with each workshop.⁹ To date, the FTC has received nearly 200 written comments from various individuals and organizations.¹⁰

In its requests for public comment and at the workshops, the Commission specifically solicited consumer perception data. This information would help the Commission provide accurate, informed advice on consumer understanding of green claims. Unfortunately, few commenters submitted such information. Without this data, the Commission would face the difficult choice of either providing guidance that might inadvertently chill otherwise useful green claims or forgoing valuable guidance altogether. The Commission, therefore, plans to conduct

⁷ 72 Fed. Reg. 66091 (Nov. 27, 2007).

⁸ Information about the review, including the workshop transcripts and written comments, is available online at www.ftc.gov/green.

⁹ 72 Fed. Reg. 66094 (Nov. 27, 2007); 73 Fed. Reg. 11371 (Mar. 3, 2008); 73 Fed. Reg. 32662 (June 3, 2008).

¹⁰ The comments are available online at <http://www.ftc.gov/os/comments/greengudesregreview/index.shtm>, <http://www.ftc.gov/os/comments/carbonworkshop/index.shtm>, <http://www.ftc.gov/os/comments/greenpkgworkshop/index.shtm>, and <http://www.ftc.gov/os/comments/buildingandtextilesworkshop/index.shtm>

its own research.¹¹ This study will focus on consumer understanding of particular green marketing claims, such as “eco-friendly,” “sustainable,” and “carbon neutral.”¹² The Commission expects that the survey and its analysis will be completed later this year, and that it will help us provide sound guidance in this important and growing area.

B. The Appliance Labeling Rule

The FTC’s Appliance Labeling Rule, 16 C.F.R. Part 305, helps consumers comparison shop for energy-efficient appliances, lighting, and plumbing products. The Rule requires manufacturers of most major home appliances to attach labels to their products that estimate the product’s annual operating cost and energy use, as well as the highest and lowest operating costs of similar models. The Rule also requires energy disclosures for certain lighting products and water use disclosures for certain plumbing products. The Commission recently completed one rulemaking to improve the Rule’s utility and has two others underway.¹³

Specifically, in 2007, the Commission improved the content and design of the familiar yellow and black EnergyGuide label for major home appliances.¹⁴ The streamlined label, which

¹¹ See 74 Fed. Reg. 22396 (May 12, 2009) (requesting comment on the FTC’s consumer perception study, as required by the Paperwork Reduction Act).

¹² Because many currently used green claims such as “sustainable” and “carbon neutral” were not common when the Commission last revised the Guides, FTC staff also is reviewing the state of green marketing claims by conducting an Internet surf to analyze the nature and incidence of particular claims. FTC staff plans to issue its findings in the near future.

¹³ Information about these rulemakings is available online at www.ftc.gov/energy.

¹⁴ 72 Fed. Reg. 49948 (Aug. 29, 2007). FTC-commissioned research found that more than 85% of recent appliance purchasers who visited a retail showroom recalled seeing a label with energy characteristics. Of those respondents, 58% correctly recalled that the label was yellow with black letters. Fifty-nine percent (59%) of respondents who recalled seeing a label scored the usefulness of the label at a seven or higher on a scale of zero to ten. *Id.* at 49951.

now prominently displays yearly operating costs for most appliances, resulted from a rulemaking that included significant public comment and consumer research into the efficacy of various label designs.

The Commission currently is reviewing its required energy disclosures for lighting.¹⁵ The lighting market is changing, and Congressional standards will eliminate low-efficiency light bulbs over the next several years.¹⁶ Given these changes, Congress asked the FTC to consider the effectiveness of lighting disclosures to help consumers understand newer, high-efficiency products, such as compact fluorescent lamps and light-emitting diodes. To aid in this endeavor, the Commission solicited public comment and commissioned consumer research on alternative labeling approaches.¹⁷

In addition, the Commission initiated a rulemaking in March to explore energy labeling for televisions and other consumer electronics.¹⁸ Some of today's large televisions use as much energy as refrigerators. However, consumers can choose among a variety of technologies that differ significantly in their energy usage. Energy labels that disclose the product's operating costs or energy use, therefore, could assist consumers seeking to make more energy-efficient choices.

C. Fuel Rating Rule

¹⁵ The Rule now requires disclosure of energy use (in watts), light output (in lumens), and life (in hours) on the packaging of most light bulbs.

¹⁶ Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 321.

¹⁷ 73 Fed. Reg. 40988 (July 17, 2008); 74 Fed. Reg. 7894 (Feb 20, 2009). Although the Commission requested consumer perception studies related to labeling disclosures, no commenters submitted any recent, comprehensive consumer research.

¹⁸ 74 Fed. Reg. 11045 (Mar. 16, 2009).

The Fuel Rating Rule, 16 C.F.R. Part 306, provides consumers with information about the fuel they use in their automobiles. Among other things, it requires retailers to post the fuel's rating on a label at the pump.¹⁹ Last year, the Commission amended the Rule to incorporate specific labeling requirements for biodiesel, biomass-based diesel, and blends of those fuels, as required by the Energy Independence and Security Act of 2007, Pub. L. No. 110-140.²⁰ In addition, the agency currently is reviewing the Rule to ensure that it continues to benefit consumers and to determine if other changes are needed to account for the development of new alternative fuels.²¹

III. Law Enforcement Efforts

It is critical to complement business guidance and rules with a solid law enforcement presence. The Commission, therefore, actively enforces its requirements through civil prosecutions. The agency's recent efforts in this area target misleading green claims, false energy savings claims, and bogus gas-saving devices.

The Commission's latest enforcement actions alleged that three companies made false and unsubstantiated claims that their products were biodegradable.²² The FTC's complaints

¹⁹ For gasoline, the fuel rating is the octane rating. For alternative fuels, the fuel rating is the minimum percentage by volume of the principal component of the fuel.

²⁰ 73 Fed. Reg. 12916 (Mar. 11, 2008). The biodiesel fuel rating is the percentage by volume of biodiesel or biomass-based diesel in the fuel.

²¹ 74 Fed. Reg. 9054 (Mar. 2, 2009).

²² *K-mart Corp.*, File No. 082-3186 (June 9, 2009) (accepted for public comment); *Tender Corp.*, File No. 082-3188 (June 9, 2009) (accepted for public comment); *Dyna-E Int'l, et al.*, Docket No. 9336 (June 9, 2009). Past FTC cases have targeted a range of other allegedly false or unsubstantiated green advertising claims, such as claims that a product or its packaging is recyclable, non-toxic, or ozone safe. See, e.g., *FTC v. OneSource Worldwide Network, Inc., et al.*, No. 3:99-CV-1494-L (N.D. Tex. July 1, 1999) (challenging claims that liquid-filled discs

alleged that the companies could not substantiate that their products would decompose into elements found in nature within a reasonably short period of time after customary disposal.²³ According to the complaints, the substantial majority of solid waste is disposed in landfills, incinerators, and recycling facilities, and these disposal methods do not present conditions that would allow the products to completely break down and return to nature within a reasonably short period of time. Two companies settled the Commission's charges,²⁴ and the third is in administrative litigation.²⁵

The Commission also recently targeted marketers of home insulation for overstating the insulating properties of their products. In one case, the agency alleged that the insulation's R-value (the measure of its resistance to heat flow) was only about one quarter of what the defendants claimed in their advertising.²⁶ The court order settling the Commission's charges requires the defendants to pay a \$155,000 civil penalty, revise the challenged claims, and substantiate any future energy-related efficacy claims. The defendants in a second case also

effectively clean laundry without polluting the earth's waterways and are 100% recyclable); *RBR Productions, Inc.*, 122 F.T.C. 471 (Dec. 10, 1996) (cited in Lexis as 122 F.T.C. 444) (challenging claims that a disinfectant is biodegradable, non-toxic, and environmentally safe, and that an aluminum aerosol can is recyclable); *Texwipe Co.*, 116 F.T.C. 1169 (Oct. 8, 1993) (challenging ozone safe claims for an aerosol cleaning product).

²³ Therefore, the companies' actions allegedly contravene the Green Guides' advice concerning the term "biodegradable." See 16 C.F.R. § 260.7(b).

²⁴ *K-mart Corp.*, File No. 082-3186 (June 9, 2009) (accepted for public comment); *Tender Corp.*, File No. 082-3188 (June 9, 2009) (accepted for public comment).

²⁵ *Dyna-E Int'l, et al.*, Docket No. 9336 (June 9, 2009).

²⁶ *United States v. Meyer Enterprises, LLC, et al.*, No. 09-1074 (C.D. Ill. Mar. 2, 2009). The defendants claimed that their product's R-value was 7.54, but the Commission alleged that it could be no more than 2.

settled the Commission's allegations, and in the third, the Department of Justice filed a complaint at the agency's request.²⁷

In addition, the Commission is litigating two federal court actions against marketers of "miracle" devices advertised to dramatically increase gas mileage in ordinary cars. In the first case, the promoters of the Hydro-Assist Fuel Cell placed advertisements in major magazines claiming that the device can boost automobile gas mileage by at least 50% and "turn any vehicle into a hybrid."²⁸ In the second matter, the defendant advertised that the NanoDetonator would allow ordinary passenger cars to harness the power of nuclear fusion, thereby eliminating the need for gasoline.²⁹ In both cases, the Commission alleged that the claims for the devices violate basic scientific principles. Through litigation, the Commission is seeking a permanent halt to the claims and reimbursement to consumers who purchased the devices.

IV. Consumer Education

In addition to business guidance, rules, and law enforcement, the Commission creates and distributes materials to help consumers make informed, green purchasing decisions and avoid energy savings scams. The Commission's vast array of award-winning, consumer education campaigns include creative online sites, as well as written materials that the agency and its partners distribute to consumers throughout the country.

The agency's interactive website, *Saving Starts @ Home* (www.ftc.gov/energysavings), offers tips to help consumers conserve energy and save money in almost every room of their

²⁷ *United States v. Enviromate, LLC, et al.*, No. 09-CV-00386 (N.D. Ala. Mar. 2, 2009); *United States v. Edward Sumpolec*, No. 6:09-CV-379-ORL-35 (M.D. Fla. Feb. 26, 2009).

²⁸ *FTC v. Dutchman Enterprises, LLC, et al.*, No. 09-141-FSH (D.N.J. Jan. 12, 2009).

²⁹ *FTC v. Five Star Auto Club, Inc., et al.*, No. 99-CIV-1693 (S.D.N.Y. Dec. 15, 2008).

homes. For example, in “the kitchen,” consumers can learn about using the EnergyGuide label to select energy-efficient appliances; in “the attic,” consumers can find tips on choosing insulation; and in “the trash room,” they encounter explanations of terms like recyclable and biodegradable and the meanings of common environmental symbols. Another interactive webpage, *Saving Money at the Pump* (www.ftc.gov/savegas), gives consumers advice on how to avoid bogus gas-saving devices and suggests legitimate gas-saving tips to help consumers save money at the pump. Since 2006, consumers have accessed these two sites and their Spanish language counterparts over 450,000 times.

V. Conclusion

Consumer interest in conserving energy and protecting the environment will likely result in continued environmental marketing. Competition based on green claims drives businesses to greater innovation, which ultimately benefits consumers by increasing the availability of the types of green products and services they desire. For the marketplace to thrive, however, companies must compete on the basis of legitimate advertising claims and consumers must be able to rely on those claims. The Commission, therefore, will continue its efforts to ensure the truthfulness and accuracy of environmental marketing.

Thank you for providing the Commission an opportunity to appear before the Committee to describe these efforts.