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December 10, 2010

Ms. Laura Koss
Federal Trade Commission
Office of Secretary
Room H-135 (Annex J)
600 Pennsylvania Avenue NW
Washington, DC 20580

Dear Ms Koss,

Thank you for the opportunity to provide comments regarding the Proposed Rule for Guides for the Use of Environmental Marketing Claims. My comments and recommendations are included below.

Certification and seal of approval (Section 260.6)

As written, this section could be interpreted to only apply to names, logos and seal of third party certifiers, not to names, logos and seals of all organizations. For example, the United States Green Building Council is not a third-party certifier, but it allows members to use their seal. This distinction should be clarified.

- Recommend Section 260.6 (b) be modified as follows: A marketer's use of the name, logo, or seal of approval of a third-party certifier or organization is an endorsement, which should meet the criteria for endorsements provided in the FTC's Endorsement Guides

Free of Claims (Section 260.9)

Comments:

Free-of and non-toxic claims present several challenges:

- When making such claims, marketers should consider if the product contains a substance that will negatively impact human health or the environment while in use. To determine impact, the route of exposure must be considered. If no mechanism exists for exposure to a substance, then a non-toxic claim based on absence of the substance would be deceptive. Consumers and manufacturers most likely have different basis for what free-of, no-added, and non-toxic mean. Without qualification of the health or environmental benefit, such claims would be deceptive. For example, claims that a drinking container is "BPA free", without further qualification, would be an unqualified claim that would result in confusion to the consumer. The absence of a particular substance is not meaningful to the consumer and in most cases, is misleading.
- Test methods and analytical techniques vary and can result in different interpretations of whether or not a product contains, or is free-of, a particular substance. One example is testing for lead content. "Free-of lead" claims can be based on content or extraction test methods. Content test methods such as X-Ray Fluorescence, Optical Emission Spectroscopy Arc /Spark, or Scanning Electron Microscopy/Energy Dispersive Spectrometer are acceptable methods for screening surface components. These tests many reveal that the surface is free of lead, therefore a human is unlikely to come in contact with lead. Yet, these products may still contain lead and an acid extraction test will reveal this fact.



- Two types of “free of claims” should be included or at least explained in the guidance. The first is free of emissions and the second is free of the chemical as a raw material. This guide attempts to address the latter, content based claims, but does not address the emissions based claims. It would be helpful for the guide to include an example of an acceptable ‘emission based claim’, because there are many standards that have evolved and become regulatory requirements for various industries. (i.e. California Air Resources Board Air Toxics Control Measure on Formaldehyde Emissions from Composite Wood Products).
- Section 260.9(c) is problematic because it leaves it up to the marketer to determine what is ‘de minimis’. One of the most contentious issues facing the scientific community today is agreement on what are acceptable threshold limits for specific chemicals under which there is no concern. Inclusion of this paragraph would very likely result in claims that are deceptive.

Recommendations:

- Change the title of 260.9 to “Free-of, No-added and Non-toxic claims”
- Delete 260.9 (c) and replace with “Free of claims must be consistent with ISO 14021; however the acknowledged trace contaminant or background level must be identified”.
- Add the following language to 260.9: “Claims of free-of must be based on the entire supply chain and chemicals added by others must be considered as content” and add the following example to illustrate this point: “A manufacturing facility produces interior doors and wall products. This facility only processes and assembles vended materials. This manufacturer does not add chemical X to his products. He does not know if his vended materials contains chemical X, but he makes the claim that his products do not contain chemical X and are chemical X free. Both of these claims would be deceptive because the manufacturer is required to verify that all vended products comply with the claim, not just the finished/assembled product.”
- Recommend that the language in the preamble (page 63578) which includes an expand list of “free of” claims be included in the regulatory language. For example, please include “no, are free of and do not contain certain substances” in the regulatory language, not just the preamble.
- Recommend adding the following language to address emissions based claims: Products which are marketed as “zero” or “free of” emissions are deceptive if they are based on tests showing that the product is below the analytical detection limits . Claims of zero or free of emissions shall not be made when a products is below analytical detection limits. Products with emissions below detectable limits should state that emissions are below detectable limits, not claim “zero” emissions.

Recycled Content (Per VII. Request for Comment #8a)

The FTC should retain the “reuse in the original manufacturing process”, but should delete the concept of “significant reprocessing”. This language is subjective and allows individual entities to define. The FTC should provide specific guidance as to what constitutes “a minimal amount of reprocessing” or eliminate this language from Example 1 in 260.12. A manufacturer should be held accountable for generating and handling waste, not incentivized to generate waste. As written, Example 1 in Section 260.12 implies that if a scrap material from the original manufacturing process requires more than a minimal amount of reprocessing then it can be considered recycled content. For example, in the plastics industry it is very typical for trim pieces to be recycled within the original manufacturing process. This material should not be considered recycled content. However, depending on the marketer’s interpretation of “significant reprocessing”, a marketer may make the case that this is recycled content. This should be clarified in the guide and removing the qualifier “significant reprocessing” would achieve this.

Recommendation:

- Delete the following language from Example 1: “after a minimal amount of reprocessing”.

Made with Renewable Materials (Per VII. Request for Comment #15)

Comments:

There are two primary clarifications that need to be made regarding renewable claims:

- Renewable claims should be qualified with the environmental benefit that results from the use of renewable materials. This guide implies that renewable materials are “environmental preferable” materials. For example, Example 1 in Section 260.15 states: “Our flooring is made from 100% bamboo, a fast-growing plant, which we cultivate at the same rate, or faster than we use it”. This example is provided to show how a marketer should substantiate a claim; however this example is misleading, because it implies that a product containing a renewable material is preferable. Just because a material is “cultivate at the same rate, or faster” than it can be used does not make it “environmental preferable”. For example, many renewable materials require fertilizers that result in the eutrophication of water or require cultivation practices that contribute to global warming.
- The term ‘renewable material’ should be changed to “rapidly renewable” and defined with examples given in the Guide. For example, some marketers are making the assertion that sand is a renewable resource as it is constantly being formed as the earth erodes into the sea. This is not consistent with the fact that sand is a finite resource and it is widely accepted that materials like sand and other minerals are not classified as renewable.

Recommendations:

- Change the title of Section 260.15 to rapidly renewable, defining what type of renewable materials are acceptable or requiring a time scale to be included.
- Recommend that a renewable claim must be accompanied with data substantiating the environmental benefit of using renewable materials.

Other Recommendations:

- Recommend that the FTC consider include guidance requiring life cycle assessment data must be presented for all phases of a product’s life (raw materials, production, use, and end of life) or state that the life cycle data only include X phase and the additional impacts result in other phases. Recommend including the following example. Company X provides life cycle assessment data for product Z. This data only includes impacts associated with the manufacturing process for Product Z. It does not include any upstream impacts associated with the manufacturing or harvesting of raw materials or downstream impacts associated with using or disposing of Product Z. This claim is misleading because product X has huge impacts during the use phase of the product, but the consumer may not understand this issue, therefore all impacts (cradle to grave) must be provided to the consumer.

Again, thank you for the opportunity to review and comment. If you require additional clarification regarding my comments or recommendations, please do not hesitate to contact me at 717-396-5676.

Sincerely,

Steve Pfeifferberger
Vice President of Environment, Health and Safety