



December 10, 2010

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

REF: Guides for the Use of Environmental Marketing Claims; Project No. P954501

To Whom It May Concern:

On behalf of the American Apparel & Footwear Association (AAFA) – the national trade association for the apparel and footwear industries, and their suppliers – I am writing to comment on the Federal Trade Commission (FTC) proposal to revise the Guides for the Use of Environmental Marketing Claims (the so-called “Green Guides”).

As a general point, we are pleased that the FTC has undertaken this project since the last revision of the Green Guides was more than 10 years ago. We also commend the FTC for undertaking these reviews with significant industry and stakeholder input, including through workshops, public requests for comment, and briefings with industry groups, such as AAFA. As ongoing changes in environmental sciences continue, and as business practices and government actions evolve in response and in anticipation of these changes, we would encourage the FTC to adopt a more regular schedule – perhaps more frequently than every 10 years – to consider and accommodate these changes.

Environmental marketing, both in our industries and throughout the business world, has expanded significantly over the last decade as more and more companies have woven environmental and sustainability practices and goals into their businesses and their bottom line. AAFA member companies have increasingly invested in environmentally friendly technologies and inputs, and adopted sustainable best practices, as a way to: promote healthier and safer workplaces and products; meet evolving government and customer compliance targets; and “do the right thing.” Some companies have opted to incorporate these “green” practices into their marketing for a variety of reasons, including conferring a competitive advantage, distinguishing their product, or educating the public.

Like the FTC, we are concerned that the growth of environmental marketing without clear and common guidance creates confusion and uncertainty, and leads, in some circumstances, to the practice of “green-washing,” in which companies claim environmental benefits without proper foundation. At the same time, we are concerned that overly strict or rigid guidance inadvertently retards the development and proliferation of environmentally friendly activities

by creating unrealistic thresholds that are simply too high to meet or that carry too much liability or risk of being declared a deceptive marketing practice.

At the AAFA, environmental work has been a growing and sustained area of our agenda for some time. For example, our Environmental Committee has grown tremendously over the past decade and now numbers about 150 professionals from throughout the industry. Through this Committee, AAFA has developed an array of environmental tools, including a best practices list and an industry restricted substances list (RSL) that is freely available at www.apparel and footwear.org. Moreover, in conjunction with AFIRM group, we have conducted a series of environmental, sustainable, and chemical management programs throughout the United States and around the world. Last month we held our first seminar on this important topic in Vietnam to educate our members' suppliers – our 7th such program in Asia in the past three years.

In addition, we have partnered with a number of other organizations doing ground breaking work on sustainable initiatives. We recently endorsed the Eco Index, which has been developed by the Outdoor Industry Association (OIA), to provide apparel and footwear companies (among others) with a common approach to measuring sustainability at the product and facility level. We are also encouraging our members to explore other initiatives, such as those promoted by Business for Social Responsibility's (BSR) Apparel, Mills and Sundries Working Group and the National Resources Defense Council (NRDC) Clean By Design.

It is with this in mind that we are offering the following comments. While we commend the FTC for its efforts in simplifying and reorganizing the Green Guides, we offer these comments to encourage the FTC to make additional changes that will make the Green Guides even more practical.

The Green Guides Should Emphasize Business To Business Practices

We note that the FTC puts considerable emphasis on consumer perception data in the development of the Green Guides. But we notice a lack of perception data that reflects business standards and practices. While we believe consumer perception data is important, we believe that business perceptions (including business perception data) and standard business and industry practices should play an equal role. We note that the Green Guides apply to business to business (or B2B) transactions as well as business to consumer (or B2C) transactions. ***Because of this B2B application, it is important to make sure the Green Guides reflect perceptions in the business community as well. The use of a wide range of tools that are not intended to be consumer facing – but to provide supply chain partners with greater information about environmental or sustainable attributes of particular supply chains – makes it imperative that the FTC adequately reflect business perceptions.***

Moreover, we understand the FTC is hoping to emphasize this point.¹ While §260.1(c) does note that the Green Guides cover transactions involving “individuals, businesses, or other

¹ Proposed Revision of Green Guides. p. 20

entities,”² the clear focus of the Green Guides seems to be on business to consumer transactions. We recommend further revision of §260.1(c) to add additional language that clarifies this point. Moreover, we believe additional examples throughout the Green Guides – that are clearly constructed to cover B2B scenarios – would better reinforce this point. While the FTC has moved in this direction³, more examples that reflect B2B activity would better illustrate this point.

In addition, with regard to §260.6, we'd like the FTC to provide clarity on the chain of custody (paper trail) from one business to another, through the supply chain, since many businesses are involved in the production process, from raw materials to the final packaged product. Is there a process the FTC requires or recommends in which raw materials, which are certified to reflect an environmental marketing claim, need to be tracked in order to verify that the certified raw materials are indeed incorporated into the final product? For example, polyester fibers are certified as being recycled. How is the chain of custody of the certified recycled polyester fibers verified from fiber manufacturer to yarn manufacturer, to fabric mill to garment vendor; so that the final product can be accurately labeled as containing recycled polyester? If the FTC does not require a set process, and will instead allow certification entities to set their own processes, we believe it would be helpful for the FTC to clarify that reliance on such procedures will be sufficient substantiation.

Factual Claims Should Trump Consumer Perception Data.

On a related point, the strong reliance on consumer perception data creates interpretation problems in the Green Guides. In several places in its analysis, and in the Green Guides themselves, the FTC notes that a factual and substantiated claim may not be good enough because consumers, based on the data submitted, may believe something else. Yet, throughout the Green Guides, the FTC rightly stresses the need for claims that are fully substantiated. Such contradictory advice erodes the effectiveness of the Green Guides and make it difficult for the business community, which is seeking predictable guidance, to interpret the information in a manner to prevent deceptive practices. Further, in our judgment, configuring the Green Guides around incorrect consumer perceptions seems to be the wrong approach in an effort to achieve greater understanding of environmentally beneficial or sustainable policies. We understand the FTC does not view the purpose of the Green Guides as advancing environmental policies *per se*. If so, it should be equally true that the Green Guides are not intended to undermine environmental activities. Yet that is a possible outcome if the Green Guides require conformity with consumer misperceptions as is suggested at several points. ***A substantiated claim should always trump a consumer misperception. The Green Guides should state this explicitly. Not only is this consistent with the underlying concept – to provide accurate information – but it is also easier advice to follow. While we sympathize with concerns that the FTC has regarding how consumers perceive various claims, we believe that substantiated claims, especially if done so with context, should be viewed unequivocally by the FTC as not deceptive.***

² Proposed Revision of Green Guides. p. 194.

³ See footnote 45 in Proposed Revision of Green Guides, p. 20.

Material Disclosure Guidance For Endorsements, Seals, Certifications, and Associations Does Not Provide Useful Information

We are concerned over the treatment in the Green Guides of endorsements, seals, certifications, and association memberships. This section of the Green Guides treats a wide range of different entities and initiatives – trade associations, good housekeeping seals, certification schemes backed by rigorous third party testing – with a single approach. The main advice of the Green Guides in this section emphasizes the need to disclose material interest in the certifying body, trade association, or seal. We understand greater disclosure of material relationships is required so that consumers (and presumably businesses but this is unclear from the Green Guides) can more fully assess the credibility of such seals, certifications, associations, and endorsements.

Given the full range of organizations and trade associations involved in the environmental movement, we are not sure that this material relationship disclosure provides any information that the consumer or consuming business entity will find useful. It simply adds a disclosure burden that may ultimately prove to be misleading by, for example, suggesting an inappropriate relationship where none exists. If an individual is required to disclose that he sits on the board of a certifying agency, even though she may not play any role in reviewing certifications, a company's certifications and the agency itself become suspect for no reason. Similarly, the guidance may also prevent business from making simple statements about their industry affiliations if they believe a consumer or other entity may conjure up some imaginary certification or endorsement status. Examples in §260.6 would, for example, make it difficult for a company to state that it is "a proud member of" an industry trade association at a trade show or on its website.

We are also concerned regarding reliance on consumer perceptions as they relate to such seals. Reliance on consumer perceptions would stifle the development and proliferation of many initiatives. Some certification schemes, for example, are well known in Europe and in the industry, but are not well known in the United States.⁴ Would marketers be unable to use such seals in the United States because consumers might misperceive what those seals mean even though the marketer has a fully factual and substantiated basis to use that seal?

In this section, we think the more relevant information is what steps the seals, certifications, and endorsements take to back up the claims they make. On this point, we would underscore that there are a variety of such initiatives that are backed up by a wide range of procedures and protocols so it is probably impossible to identify a single approach, other than to insist that any such claims be supported.

Business should be free to avail themselves of seals, certifications, endorsements or association memberships as long as they can substantiate a factual basis for such initiatives. If a business wants to make a further claim that such affiliations represent an endorsement or certification by an entity, that

⁴ One such example is Oeko Tex. See http://www.oeko-tex.com/OekoTex100_PUBLIC/index_portal.asp

additional claim should be substantiated and verifiable (by for example having information on a website or a point of sale if appropriate).

Recycled Content Guidance Penalizes Current Recyclers

The Green Guides emphasize that recycled content can be disclosed only if such content has been diverted from the waste stream. While we generally support the approach, we believe the FTC has adopted too narrow a definition of exactly what waste stream diversion entails. One reading of the Green Guides suggests that manufacturing processes that efficiently capture scraps for reuse and repurpose might not meet the definition of “recycled” since such waste might not have otherwise gone to the waste stream that the FTC has in mind. Such an approach can be highly subjective and appears to penalize companies who have already adopted a high standard of what byproducts can be discarded. It also discourages innovation as companies find increasingly higher value uses of waste or begin to view that waste as a marketable by-product on its own. Moreover, by removing the ability of companies to describe products made with such inputs as made with pre-consumer recycled materials, this guidance denies consumers a ready marker to find those products that do contain recycled content.

Several members noted that they often play a dual role in the recycled content processing stream. On one hand, they generate scraps that become inputs for other companies. At the same time, they consume – as recycled content – the scraps of another company. In some cases, they play both roles simultaneously. In one such closed loop example, a company could contract to have scrap waste recycled and then agree to purchase this refiberized scrap material in yarn form back for either the same or another product. We are concerned that the Green Guides would frown on such activities because they efficiently incorporate scrap re-usage into supply chains and are not seen as a traditional “diversion” of waste from a waste stream. We expect that the final Green Guides will make explicitly clear that companies employing similar activities may refer to them as recycled content without triggering a deceptive practices complaint.

Pre consumer recycled content disclosure should be permitted in all cases where a company uses scrap materials that might have been discarded or sold by another manufacturing or producing entity.⁵

De Minimis Approach in “Free of” Claims is Correct

We are pleased that the FTC chose to recognize that a “free of” claim may be made even in the presence of *de minimis* amounts of that substance. We further agree that this is an area where case by case determinations, offer in close consultation with relevant regulations and test methods, should be made.

⁵ Ensuring a ready stream of pre consumer recycled textile materials is important, since post consumer recycled textiles present challenges due to costs associated with isolating textiles that are not treated or free from accessories (such as buttons and snaps.) Other materials – such as rubber - present similar challenges.

Greater Reliance on Harmonization and Regulations Should be Stressed

We read with interest the Federal Register on the use of ISO standards or harmonization with state or other federal guidelines. The FR discussion states the Green Guides are not intended to pre-empt state regulations or are unable to be reconciled with certain ISO initiatives. While we understand the practical considerations at stake, we believe the guidance leaves the impression that reliance upon such standards may result in a deceptive claim. In fact, in the discussion of “free of” and “non toxic” claims, the FTC analysis makes this very observation. The analysis specifically states, “Marketers should use caution when relying on regulatory standards as substantiation for claims that the products are non toxic....marketers should examine the scope and purpose of the regulatory standard to ensure that it substantiates a non-toxic claim in light of consumer expectations.” It is, simply put, impossible to know consumer expectations with respect to each regulation.⁶ ***We strongly encourage the FTC to make clear in the Green Guides that a marketing claim based on adherence to such standards and regulations cannot be considered a deceptive practice.***

It is Appropriate to Avoid Guidance on Certain Terms

As much as the industry would probably prefer a more predictable set of guidelines for some claims, we believe it is appropriate that the FTC declined to include those terms in this revision. For many of these terms there is insufficient consensus for a FTC Green Guide chapter to provide useful guidance. A frequent refrain at environmental meetings is that there is no commonly accepted definition of the term sustainable, especially since it can be used in so many different circumstances. While this is no doubt frustrating, it is equally frustrating for federal guidance to further complicate this picture.

Conclusion

We commend the FTC on revising and updating the Green Guides and fully support the goal of helping “marketers avoid making unfair or deceptive environmental marketing claims.” This is an extraordinarily complicated project that, like the underlying environmental goals, is probably a continuous effort.

While we broadly support the main thrust of the revised Green Guides – namely that claims should be properly qualified and substantiated so that they not be misleading – we are equally concerned that claims not be forcibly configured to meet and fuel consumer misperceptions. A wide number of stakeholders – consumers, businesses, retailers, suppliers, manufacturers, etc - are involved in supply chains that are increasingly reflecting environmental parameters and requirements. Although important, consumer perceptions reflect only one part of that supply chain. The Green Guides should reflect that role.

⁶ A 1997 project by an Idaho Junior High School student - Nathan Zohner - demonstrated how consumer perceptions can result in incorrect conclusions about the toxicity of substances. In that project, consumers were persuaded to sign a petition to ban “Dihydrogen Monoxide” (DHMO) – i.e., water - based on a series of facts presented out of context. See: <http://www.junkscience.com/news/glassman.html>

The Green Guides are intended to provide practical information for folks making environmental marketing claims. Ensuring that this guidance always steers marketers to claims that can be supported by facts is the simplest and most direct way to ensure that such claims will not be deceptive.

Thank you for providing us this opportunity to comment. We would welcome an opportunity to discuss these ideas further. In the meantime, please feel free to contact Greg Yahr (gyahr@apparelandfootwear.org) or Steve Lamar (slamar@apparelandfootwear.org) on my staff should you require additional information.

Sincerely

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President and CEO