

**Before the
FEDERAL TRADE COMMISSION
IN THE MATTER OF REVISED GUIDES
FOR ENVIRONMENTAL MARKETING CLAIMS (“GREEN GUIDES”)
Project No: P104503**

COMMENTS OF:

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COMMENTS OF THE PROMOTION MARKETING ASSOCIATION, INC.
ON THE FEDERAL TRADE COMMISSION'S PROPOSED, REVISED GREEN GUIDES
16 CFR PART 260, PROJECT NO. P954501

The Promotion Marketing Association, Inc. (“PMA”) respectfully submits these Comments in response to the request by the Federal Trade Commission (“FTC” or “Commission”) for public comments on the Commission’s Proposed, Revised Green Guides, 16 C.F.R. Part 260. *Request For Public Comment On Proposed, Revised Guides For The Use Of Environmental Marketing Claims*, October 6, 2010 (FTC File No. P954501).

Established in 1911, the PMA is the premier not-for-profit organization and resource for research, education and collaboration for marketing professionals. Representing the over \$1 trillion integrated marketing industry, the organization is comprised of Fortune 500 companies, top marketing agencies, law firms, retailers, service-providers and academia, representing thousands of brands worldwide. Championing the highest standards of excellence and recognition in the promotion and integrated marketing industry globally, the PMA’s objective is to foster a better understanding of promotion and integrated marketing and its role in the overall marketing process.

PMA supports the Commission’s efforts to clarify and define the manner in which companies may make environmental claims under Section 5 of the Federal Trade Commission Act. The proposed Green Guides, if adopted, will provide much-needed guidance for companies advertising their products and services. In particular, the proposed revisions provide welcome guidance regarding newly fashionable claims, such as those relating to the purchase of carbon offsets and renewable energy use, neither of which were addressed in previous generations of the Guides.

PMA appreciates the efforts that the FTC has made to revise and update the Guides because there is clearly a continuing need for the Guides. It is our experience that consumers and marketers are becoming more sophisticated regarding their understanding of environmental marketing claims, and care should be exercised not to “over-regulate” the field. Advertisers should be encouraged to promote product and service improvements that have verifiable benefits to the environment without unnecessary fear of the Guides being misapplied in a manner that will squelch truthful and non-misleading speech. The Guides need to balance the encouragement of innovation, which is rewarded in part by the ability to advertise the new benefit, with protection of the consumer from theoretical shortcomings in substantiation.

Before the proposed Green Guides are adopted, the PMA has a number of recommendations that we believe would provide better clarity to marketers that make environmental claims about their products and services. These suggestions would also benefit consumers by providing clearer guidance as to what particular claims mean. We address each of these topics below.

Applicability of Guides

We agree with the Commission's proposal that the Guides should apply both to business-to-business transactions, as well as to consumer-directed transactions. There is no reason why fundamentally differing rules should apply to environmental marketing claims in either context. We note, however, that the level of sophistication of the audience should be taken into account when considering the net impression of environmental claims. The evidence of consumer perception in this rulemaking proceeding has consisted almost exclusively of surveys of ordinary consumers, and not of business purchasers. In a business-to-business marketing campaign, the

purchaser may generally be assumed to have a higher degree of understanding of certain environmental benefit terms and, as a result, may require less in the manner of qualification or additional disclosure than would an ordinary consumer. We encourage the Commission to make clear that the level of qualification or disclosure for environmental benefit claims may be tailored to the sophistication of the audience to whom they are directed.

General Environmental Benefit Claims

As set forth in proposed 16 C.F.R. § 260.4, “[u]nqualified general environmental benefit claims are difficult to interpret and likely convey a wide range of meanings.... Because it is highly unlikely that marketers can substantiate all reasonable interpretations of these claims, marketers should not make unqualified general environmental benefit claims.” PMA generally supports the FTC’s efforts to ensure that general claims of environmental benefit are meaningful, not overbroad, and appropriately qualified. However, the FTC has insufficient evidence on which to conclude that all claims of general environmental benefit, such as “green” or “eco-friendly,” are necessarily likely to convey implied benefits beyond those that can be substantiated.

There are instances in which marketers *can* substantiate all reasonable interpretations of such general claims. Products that are a positive benefit to the environment in all respects should be permitted to advertise themselves as green or eco-friendly. The FTC’s flat-out ban on unqualified general environmental benefit claims is overbroad and should be reexamined. The Green Guides should indicate that advertisers may make these claims if all reasonable interpretations can be substantiated. We submit the following example for consideration by the Commission:

Example: A local nursery sells an organically grown, indigenous species of tree for local planting in an area in which tree cover has been depleted. Because the product has no known negative environmental impact, and all reasonable interpretations of these claims can be substantiated, the company may make general environmental claims about the trees without qualification.

Definition of “Sustainable”

The FTC has stated in its proposal that it is declining to define the term “sustainable” because it is unclear what consumers understand the term to mean. The Commission’s proposal also cites widely diverging views from industry, academia, and advocacy groups regarding how best to define the term. Therefore, the Commission stated, “the Commission lacks a sufficient basis to provide meaningful guidance on the use of sustainable as an environmental marketing term. Marketers, however, are responsible for substantiating consumers’ understanding of this claim in the context of their advertisements.” (Commission’s Proposed Revisions to the Green Guides, at 127.)

The diversity of views regarding the meaning of sustainability does not suggest that guidance is infeasible. Rather, it suggests a need for meaningful guidance. We believe that the FTC should revisit the issue of defining sustainability with regard to environmental marketing claims. There are a few broad recommendations that can be made without unduly restricting the use of the term.

First, in the context of industries where the term is already well-defined, such as forestry and paper products, the FTC should make clear that the claim may be substantiated by compliance with well-accepted industry standards.

Second, the Commission should advise that advertising using the claim should make clear whether the term as used applies to (a) the product or service, (b) the process used to make product or deliver the service, or (c) the operations of the advertiser more generally (whether now or as a future goal).

Third, even where the term “sustainable” is used in a general sense, the Commission should indicate that the advertiser should have and substantiate a plausible and reasonable meaning, such as that provided by Merriam-Webster, e.g., “a method of harvesting or using a resource so that the resource is not depleted or permanently damaged,” or by the United Nations’ Brundtland Commission Report, which defined sustainability as “meet[ing] the needs of the present without compromising the ability of future generations to meet their own needs.”

Under these definitions, a company could, with appropriate substantiation and qualification, make sustainability claims if its products or services are based on sustainable practices that do not deplete resources or permanently damage the environment. They could also make sustainability claims based on the certification of groups such as the Sustainable Forestry Initiative. The Commission’s own research shows that such claims would not mislead consumers, very few of whom understood that the term suggested an environmental benefit. Adherence to these basic tenets would contribute to clarity in an area that is somewhat chaotic, and would close a potential loophole that would lead to the increasing use of “sustainability” claims in place of the soon-to-be-prohibited, unqualified claims of general environmental benefit. The Green Guides should therefore provide better guidance for companies that provide sustainable products or services so that companies can make the claims with meaningful import to consumers and so that both can have greater certainty of what these claims mean.

Definition of "Natural"

Another significant omission in the proposed Guides is the FTC's refusal to provide guidance on the use of the term "natural," as it pertains to products featuring some environmental or health benefit. The claim is ubiquitous on foods and consumer products, and it has widely diverging definitions in each industry. As the National Advertising Division (NAD) of the Better Business Bureau has stated, "The prevalence of the use of the term 'natural' by advertisers in describing products and/or ingredients, and what that term means to consumers, has been the source of a great deal of uncertainty and ambiguity in the food and cosmetic industry." *Tom's of Maine, Tom's of Maine Natural Mouthwash*, Case No. 3470 (June 1, 1998). The lack of a formal definition creates great uncertainty for companies making natural claims and leads to the risk of individual courts and jurisdictions creating conflicting standards. *See, e.g.*, 58 Fed. Reg. 2302, 2407 (January 6, 1993) (Food and Drug Administration's informal definition of natural, which means that "nothing artificial or synthetic has been included in, or has been added to, a food that would not normally be expected to be in the food"); *Holk v. Snapple Beverage Corp.*, 575 F. 3d 329 (3rd Cir. 2009) (rejecting the FDA's informal definition of natural as not preemptive or binding).

Although we agree that defining the term "natural" is a complex endeavor, PMA is concerned that each federal agency having potential jurisdiction over the issue has thus far declined to adopt any formal definition, leaving marketers at peril of *ad hoc* enforcement. In the absence of federal guidance, advertisers should be given broad latitude to use the term "natural" to describe products that contain natural content when the claim is appropriately qualified and the claim can be substantiated.

Recycling Claims for Pre-Consumer Waste

The Green Guides should permit manufacturers to claim that a product contains “pre-consumer recycled material” if manufacturing scraps are re-added to the process where current, prevailing industry practice would be to discard those scraps into the solid waste stream. The current proposed Guides would not permit such claims unless the recycled materials can be shown to have been diverted from the solid waste stream, either during the manufacturing process or after consumer use, without regard to current, prevailing industry practice.

Determining what would otherwise be discarded is relatively simple for post-consumer waste, but is not so simple for pre-consumer waste. For example, as the FTC itself notes, textile and fiber manufacturers long ago developed methods to re-incorporate scrap materials to their processes. Before they developed these methods, these scraps were sent into the solid-waste stream, so these materials are being diverted from that stream. Today, however, the scraps are generally re-used. The FTC should consider a standard that takes into account current, prevailing industry practice. Such a standard has at least three advantages: (a) it allows companies that remove material from the current solid waste stream in a truly innovative way to make claims of pre-consumer recycled content; (b) it avoids rewarding inefficient companies not using contemporary manufacturing techniques from making recycled content claims; and (c) it allows for flexible development over time to accommodate changes in technology.

Furthermore, any company that incorporates manufacturing scraps that historically ended up in the solid-waste stream should be permitted to state that it uses pre-consumer recycled content in the form of manufacturing scraps. If a company clearly qualifies its recycled content

claim and can fully substantiate any reasonable interpretation of that qualified claim, it should be permitted to make this claim.

Third Party Certifications and Seals of Approval

The emergence of third-party environmental auditing certification organizations is an important and beneficial development, where those certifying organizations follow accepted methods and a transparent process. We agree with the Commission that the use of such seals and certifications on packaging and in marketing should be appropriately qualified if the seal might convey a broader environmental benefit than it actually represents. We also agree that material affiliations with the seal-granting organization should be disclosed, consistent with the Endorsement and Testimonial Guides. However, we think the proposal should be modified in two ways.

First, in order to ensure that the Green Guides are consistent with the Endorsement Guides, and to provide clear and useful guidance to industry, the Commission should clarify that mere payment of money to a certifying organization to carry out the review should not require disclosure. Many certifying organizations charge their applicants for the costs of undertaking the review that leads to the grant or denial of a seal or certification. The payment of the funds for such activity does not bear on the reliability or trustworthiness of the seal, and it is reasonably expected by consumers. Just as the Endorsement Guides do not require disclosure of a payment to an expert, which is reasonably expected by consumers, the FTC should clarify that payments to certifying organizations should be treated in the same manner.

Second, we think the FTC overstates the concern that marketers' use of an "unqualified" environmental certification or seal of approval (*i.e.*, one that does not state the basis for the

certification) likely conveys general environmental benefit claims that are impossible to substantiate (as addressed in §260.4). We recognize that many existing seals and certifications are unqualified at present. They are also trademarked, which is a time-consuming and expensive process. Requiring modification to seal logos themselves could impose heavy costs on such organizations, and could cause some to lose their trademark protection. Additionally, marketers who currently use the seals are often concerned about the space requirements for excessive disclosures on packages and may be loath to add significant additional qualifying language. This would tend to discourage them from using the seal or third-party certification at all, and merely to make the underlying claim without independent proof. Were this to occur, it would tend to reduce the use of third-party seals and certifications, which would have a net-negative environmental impact.

Instead of the Commission's broad-brush restriction, we think it would be sufficient for a certifying logo to be accompanied by a clear and succinct statement of the basis for the certification, or by a reference to a website that clearly explains the criteria for certification.

Conclusion

The PMA greatly appreciates the Federal Trade Commission's work in drafting the proposed Green Guides and its attention to the above suggestions.

Respectfully submitted,

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