

Comments of the American Chemistry Council
Proposed, Revised Green Guides,
16 CFR Part 260, Project No. P954501

December 10, 2010

Introduction

The American Chemistry Council (ACC) appreciates the opportunity to comment on the Proposed, Revised Green Guides. The American Chemistry Council (ACC) represents the leading companies in the business of chemistry.¹

We commend the FTC for its thorough and thoughtful review. ACC has participated throughout the Green Guides revision process, including workshop participation and written comments. Our comments here therefore focus on several new solicitations for comment by the Commission.

The Commission noted in its commentary that due to the proliferation of green claims, it had elected to accelerate its scheduled review of the Guides. We strongly support this decision because the Green Guides provide invaluable assistance to marketers making environmental claims. We believe that the proliferation of novel and new environmental claims is likely to continue. We therefore encourage the FTC to find ways to keep the Green Guides current as new terms come into use and as consumer perception solidifies regarding the meaning of these terms. Selected review of specific claims or examples on a more frequent schedule may be helpful.

Comments

Overlap with Other Federal, State, or Local Laws

In our previous comments, we observed that we did not believe there to be significant conflicts between the Green Guides and the operation of other federal, state, or local laws. This is because compliance with FTC Act Section 5 is independent of other federal, state, and local laws related to marketing claims.

We noted the Commission's comment that it "actively consults with other agencies, such as the EPA, the Department of Energy ("DOE"), and the Department of Agriculture ("USDA")" in order "to ensure that the Commission does not issue guidance that duplicates or possibly conflicts with their regulations and programs." We believe that this consultative effort is extremely important, especially with respect to the interpretation and application of regulatory

¹ The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing.

requirements related to marketing under other statutory and regulatory authority. For example, EPA's regulation, at 40 CFR 156.10(a)(5) considers the following claims to be a misbranded statement: "[s]afety claims of the pesticide, or its ingredients, including statements such as trusted, safe, nonpoisonous, noninjurious, harmless or nontoxic to humans and pets with or without such a qualifying phrase as when used as directed." See also Label Review Manual at 12-1, 12.2 (<http://www.epa.gov/oppfead1/labeling/lrm/chap-12.pdf>). While agencies are afforded deference in the interpretation of their own regulations, we believe it would be beneficial for both consumers and marketers if FTC would continue to coordinate interagency discussions regarding interpretations of such marketing claims.

FTC can provide important guidance to the regulated community by clarifying that few if any conflicts should exist due to the specific role of FTC in evaluating marketing claims based on consumer perception. FTC can and should remind marketers not to assume that compliance with specific state or local law requirements means the claim is compliant with FTC requirements; an independent FTC compliance assessment should be conducted.

Consumer Interpretation of Qualified-General Environmental Benefit Claims

At page 50 of its proposal, FTC expresses concern that "a general environmental benefit claim, in combination with a particular attribute, may imply that the particular attribute provides the product with a net environmental benefit." FTC requests comment on whether to include guidance on this topic.

We believe additional guidance by FTC on this topic is warranted, coupled with a specific example. This is particularly the case since the revised Green Guides caution marketers against making unqualified general environmental benefits claims. It is fair to assume that many marketers will respond to this guidance not by seeking to cease making such claims altogether, but by seeking to appropriately qualify these claims.

We believe that marketers have considerably more difficulty in identifying and qualifying implied claims than express claims. We also believe some marketers have difficulty discerning between what marketing claims they intend versus those that are perceived or understood.

Certifications and Seals of Approval

ACC supports FTC's approach regarding certifications and seals of approval. We agree with FTC's guidance that a material connection of an endorser should be disclosed. While we recognize that the Commission did not want to replicate the Guides Concerning the Use of Endorsements and Testimonials in Advertising (Endorsement Guides) wholesale in the Green Guides, we nevertheless suggest that it would be very helpful to import a brief discussion of the definition of "material connection" from the Endorsement Guides into the Green Guides for the ease of users. The Green Guides should make readily clear in the text that a material connection is deemed to be any connection between the endorser and the "seller of the advertised product [service, company, or industry] that might materially affect the weight or credibility of the endorsement." We further suggest that the Commission make clear that non-profit entities and

other organizations engaged in marketing (other than just companies and industries) are subject to the Endorsement Guides.

We also suggest that if being a dues or fee-paying member of an endorsing organization is in itself sufficient to create a “material connection,” then any dues- or fee-paying relationship; relationship where any financial contribution is made or received; or other material membership or affiliation with any other organization or entity granting a certification, would likewise be a material connection requiring disclosure. A certifying entity, for example, might exist as a non-profit 501(c)(3) entity, in which case any party making a financial donation or a donation in kind (e.g., goods or services) should be deemed to have a material connection with the entity.

It is also the case that third-party certifying organizations typically require an application or review fee from applicants. FTC should consider the possibility that in all cases where a fee has been paid by an applicant, a “material connection” might exist that requires disclosure under the Endorsement Guides. Additional guidance on this topic would be helpful.

We believe FTC should consider exploring further what consumers and businesses perceive to be third parties. If a program markets third party verification of claims, consumers may expect the third party to be financially, operationally, and organizationally independent. It is also possible for entities or programs to be established as independent third parties but to lose integrity in the operational phase. Further commentary explaining that third parties need to be established as financially, operationally and organizationally independent – and actually operate that way - would be helpful.

Degradability Claims

We support the Commission’s proposed revision to clarify that unqualified degradable claims would be considered deceptive for products or packages destined for landfills, incinerators, or recycling facilities. FTC’s suggestion of adopting a maximum period of one year for complete decomposition of solid materials marketed as degradable without time qualification is reasonable, based on available consumer perception data. FTC now requests comment on whether setting this one year, maximum period may lead to deceptive claims in cases where consumers would expect a material to degrade in a much shorter time frame. Proposed Revisions at p. 71. We believe that this possibility is remedied by clear guidance from FTC that the one year period is a maximum period, along with a strong caution that for products and packaging placed into the solid waste stream (e.g., household or municipal waste) or into the recycling stream (e.g., a recycling bin) a degradable claim cannot be made. FTC’s statement that “unqualified degradable claims for a vast majority of disposable solid waste items are likely to be deceptive because the customary methods of disposal do not present conditions for decomposition in a reasonably short period of time” should be emphasized in the final guidance.

We also note that our experience suggests that the terms, “degradable,” “biodegradable,” and “oxo-degradable,” and the like are interchangeable in terms of consumer perception. We support

the Commission's proposal to treat oxo-degradable and oxo-biodegradable claims, and any other claim including the root word "degradable," like all other degradable claims.

Compostable Claims

We support the Commission's approach that the time period for composting of a product or packaging should be that it will break down in approximately the same time as the materials with which it is composted. Given that authorities note that composting can be completed in as little as three weeks under optimal conditions, we suggest that the Commission clarify that the time period for composting may be significantly less than the one year period set for degradable claims, and in no event would exceed the year maximum for degradable claims.

Recyclable Claims

The Substantial Majority Threshold

FTC requests comment on whether the Guides should formally quantify the "substantial majority" threshold, and if so, how. The presumed default approach would be to formalize the interpretation of Commission staff that "substantial majority" means at least 60% of communities or consumers have access to recycling facilities for a given product or package. We support formalizing the 60% threshold, as it will supply needed clarity to the guidance. That said, it should be permissible to satisfy the 60% threshold by aggregating all "established recycling programs" available with respect to recycling of a particular product. For example, if curbside recycling is available in some locations; retail store drop off in others; and beach and park recycling bins available elsewhere, it should be permissible to add these facilities to determine the cumulative availability of recycling programs within the community.

We further suggest that FTC provide additional guidance with respect to what is meant by a "community," and how to determine whether a recycling program or facility is established within that community. If a community is served by a start-up recycling program, for example, at what point does the program become "established?" Clarification whether the term is meant to apply only to urban communities would also be of value.

We do not support quantifying the "significant percentage" threshold in the recyclable section of the Guides. With "substantial majority" defined as 60% or more of consumers or communities, it becomes clear that "significant percentage" ranges downward from 60% to more than a "few communities with recycling facilities available." Marketers should be able to tailor the disclosure that accompanies the availability of recycling facilities and programs to the specific facts for the greatest accuracy.

Recycled Content Claims

The Commission is soliciting comments on what changes, if any, it should make to its existing guidance on pre-consumer recycled content claims for all products. One of the critical areas of analysis is what constitutes more than minimal, or significant, reprocessing of the

material diverted from the waste stream. While we do not believe the existing guidance needs to be changed at this time, it would be helpful to add an example of reprocessing (for example, a significant financial investment into a specialized piece of equipment to clean or otherwise prepare scrap material for reprocessing).

The Commission also seeks comment on whether recycled content claims based on annual weighted average are misleading, and if so, whether such claims should be qualified. Proposed Revisions at p. 102. We do not believe they are misleading, nor that such claims should be qualified. Consumer websites promoting selection of products with recycled content suggest that consumers seeking products with recycled content are choosing these products because they want to support recycling generally: they want to help drive the environmental benefits that accrue from recycling; want to help “close the loop” with respect to recycling; want to improve the markets for recycled products (increase demand); and want to support manufacturers that include recycled content in their products. See, e.g., <http://www.recycledproducts.org>. Products and packaging containing recycled content are not themselves marketed as having different or better performance or appearance, and consumers do not appear motivated to seek them out for such reasons. Accordingly, consumer expectations when purchasing products with recycled content are fully satisfied through the use of annual weighted averages.

In its Proposed Revisions, the Commission declines to propose advising marketers that make unqualified recycled content claims to disclose that the product is not recyclable, and requested comment on this approach. Proposed Revisions at p. 103. FTC points out that only products or packaging made from 100% recycled materials can make unqualified recycled content claims, and that such products appear to be recyclable (or marketers can substantiate any implied claim that their product is recyclable). We suggest, however, that marketers be cautioned that a 100% recycled content claim may nonetheless require qualification with respect to the recyclability of the product. It is possible that a product could be made entirely out of recycled materials, but the finished product itself would not be recyclable without specialized disassembly at a remote location. It is also possible for a product to be made out of 100% recycled materials from a pilot recycling program, so that purchasers of the product do not have access to recycling facilities in their community. It is also possible that a product made out of 100% recycled materials may become contaminated or contain impurities such that recycling facilities will not accept it.

Free-of Claims

FTC solicits comment on what guidance it should give for “free-of” claims with respect to substances that have never been associated with a product category. We believe such claims are inherently difficult to make, if not highly suspect, since a “free of” claim can imply that the type of product may have once included the substance, and can imply that other products of that type do include the substance. Rather than inform consumer choice, these sorts of marketing claims can instill consumer confusion and make choice more difficult.

Where such substances have never been associated with a product category, a marketer's assertion of a "free-of" claim is not a response to consumer interest or concern, but a unilateral attempt to create consumer concern or preferences. In such circumstances, the implied claim is necessarily that other products in the same category do or may contain the substance of concern. The FTC should caution marketers that any "free-of" claim made under such circumstances be carefully analyzed for its implied claims, and that such claims be qualified where appropriate.

We would distinguish such claims from legitimate marketing response to consumer concern or interest, even if the product had not previously contained the substance before, as long as the marketer had not itself artificially prompted the concern. It is not inconceivable that a marketer could itself make public claims that a competing product might contain a particular substance and then seek to capitalize on public worry by marketing a product as "free of" that substance.

Non-toxic Claims

The Proposed Revisions state that marketers should use caution "when relying on regulatory standards as substantiation for claims that products are non-toxic." Proposed Revisions at 116. While we agree with the FTC's revised guidance with respect to the quality and quantity of scientific evidence needed to substantiate claims such as non-toxic claims, this caution about relying on regulatory standards should be deleted or even reversed. Marketers should be reminded that as a threshold matter, products should be compliant with applicable legislative and regulatory requirements, regarding toxicity or any other condition. Under the Federal Hazardous Substances Act alone (a primary statute governing the safety of consumer products), the term "toxic" has a very specific meaning.²

Compliance with legislative and regulatory requirements with respect to the safety of consumer products is a non-negotiable requirement for product manufacturers. For example, makers of food contact articles must seek regulatory approval that their products are safe for use before they can be marketed. A determination by the regulatory authority, in this case the federal Food and Drug Administration, that the food contact packaging is approved and safe for use provides ample basis for a manufacturer to make marketing claims based on and bounded by the approval. In this case, the FDA approval would also supply adequate substantiation for a safety claim properly associated with the approval.

The example provided in the commentary – noting that a claim based on a standard for acute toxicity may not provide an appropriate basis for a chronic toxicity – is underdeveloped and confusing to marketers. We do not believe that FTC can assume that consumers and marketers understand "non-toxic" to extend to complex chronic toxicity questions, which are typically dependent on use and exposure scenarios.

² Federal Hazardous Substances Act, 15 U.S.C. §§1261–1278, Sec. 2(g) (the term "toxic" shall apply to any substance (other than a radioactive substance) which has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface.)

We strongly suggest that FTC remove its caution about using regulatory compliance as the basis for claims substantiation, and instead clarify that non-toxic claims must meet the same standard of substantiation – both with respect to the quality and quantity of scientific evidence - as any other claim.

Sustainable Claims

We agree with the Commission’s decision not to provide guidance at this time with respect to sustainability claims. As this is a relatively new term, however, we note that over time consumers may associate the term with environmental protection, or associations with a product manufacturing, use, and disposal cycle that, taken as a whole, produces fewer impacts (including environmental, health, social and economic impacts). We therefore encourage the Commission to monitor marketing using this term, and to consider issuing guidance, if appropriate, as the use and meaning of the term matures.

Renewable Materials Claims

FTC seeks comment on its proposed approach for qualifying renewable materials claims. Proposed Revisions at p. 149. As more and more raw materials become renewably sourced, we believe there will be an increase in renewable content claims. We believe that without qualification, consumers likely will perceive a “made with renewable content” claim to mean the entire product or package is made from renewable materials. We support an approach, similar to recycled content, whereby marketers of products that are less than 100% renewably sourced qualify the amount of renewable content in their products, or packaging, as appropriate. It would be adequate to qualify the percentage amount of renewable content in the finished product or package, but in our view an unqualified “made with renewable materials” claim does not provide enough information to consumers. For example, a non-renewable package printed with soy-based ink does not support an unqualified claim that the package is “made with renewable materials.”

ACC appreciates the opportunity to comment. Any questions regarding these comments may be directed to Karyn Schmidt, Assistant General Counsel, karyn_schmidt@americanchemistry.com, (202) 249-6130.