

Analysis of Proposed Consent Order to Aid Public Comment

In the Matter of N.E.W. Plastics Corp., File No. 132 3126

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from N.E.W. Plastics Corp., a corporation (“Respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter addresses allegedly deceptive green claims that Respondent made while promoting two brands of plastic lumber products, Evolve and Trimax, to retailers, independent distributors and end-use consumers. According to the FTC complaint, Respondent marketed (1) Evolve products as made from 90% or more recycled content; (2) Trimax products as made from mostly post-consumer recycled content; and (3) both Trimax and Evolve as recyclable. The complaint alleges first that each of these claims is false and misleading. It also alleges that Respondent did not possess or rely upon a reasonable basis to substantiate these representations. Finally, it alleges that Respondent provided its retailers and distributors with deceptive promotional materials, *i.e.*, the means and instrumentalities to deceive consumers. Thus, the three-count complaint alleges that Respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains several provisions designed to prevent Respondent from engaging in similar acts and practices in the future. Part I prohibits N.E.W. from making representations regarding the recycled content, the post-consumer recycled content, or the environmental benefit of any product or package unless they are true, not misleading, and substantiated by competent and reliable evidence. Part I further provides that if, in general, experts in the relevant scientific field would conclude it necessary, such evidence must be competent and reliable scientific evidence. Consistent with the Guides for the Use of Environmental Marketing Claims (“Green Guides”), 16 C.F.R. § 260.13(b), Part I specifically requires N.E.W. to substantiate recycled content claims by demonstrating that such recycled content is composed of materials that were recovered or otherwise diverted from the waste stream.

Part II prohibits N.E.W. from making an unqualified claim that any product or package is recyclable unless: (1) the item, excluding minor incidental components, can be recycled in an established recycling program, and (2) recycling facilities that accept the item are available to at least 60% of consumers or communities where it is sold. If recycling facilities are available to fewer than 60%, consistent with the Green Guides, 16 C.F.R. § 260.12(b), Part II requires N.E.W. to qualify its claim regarding the availability of recycling facilities. Part II requires such claims to be true, not misleading, and substantiated by competent and reliable evidence. It further provides that if, in general, experts in the relevant scientific field would conclude it

necessary, such evidence must be competent and reliable scientific evidence. Finally, Part II provides that if Respondent promotes as recyclable an item that is only partially recyclable, Respondent must disclose the part or portion of the product or package that is recyclable.

Part III prohibits N.E.W. from providing others with the means and instrumentalities to make any false, unsubstantiated, or otherwise misleading representation of material fact regarding any product or package.

Part IV requires N.E.W. to deliver a letter to its distributors and retailers that instructs them to stop using Evolve and Trimax plastic lumber advertising and marketing materials provided by N.E.W. prior to December 2013. This requirement seeks to ensure that deceptive claims will be entirely removed from the market.

Parts V through IX are reporting and compliance provisions. Part V requires Respondent to keep (and make available to the Commission on request): copies of advertisements and promotional materials containing the representations covered by the order; materials relied upon in disseminating those representations; evidence that contradicts, qualifies, or calls into question the representations, or the basis relied upon for the representations. Part VI requires dissemination of the order now and in the future to principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of the order. It also requires Respondent to maintain and make available to the FTC all acknowledgments of receipt of the order. Part VII requires notification to the FTC of changes in corporate status. Part VIII mandates that Respondent submit an initial compliance report to the FTC and make available to the FTC subsequent reports. Part IX is a provision terminating the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed consent order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.