



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

**Division of Advertising Practices**

July 17, 1998

**Public Information and Records Integrity Branch Information Resources and  
Services Division Office of Pesticide Programs**

*Environmental Protection Agency*

401 M Street, S.W.

Washington, D.C. 20460

ATTN: **Walter Francis**

Dear Mr. Francis:

The staff of the Federal Trade Commission ("Commission") appreciates this opportunity to comment on the Environmental Protection Agency's ("EPA") proposed Notice regarding the scope of the "treated articles" exemption under the EPA's registration rules pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").<sup>(1)</sup> The Notice is intended to provide guidance to pesticide product manufacturers and others about the extent to which treated articles -- items that are treated with a pesticide to protect the product from bacteria, fungus or insect infestations -- need not be registered under FIFRA. The Notice addresses the question of what advertising or labeling claims can be made about the protective features of such pesticides under the treated articles exemption, and states that claims that expressly or by implication suggest a public health benefit do not fall within that exemption.<sup>(2)</sup>

The Commission staff notes, as has EPA, the recent proliferation of consumer products containing "antibacterial" or "antimicrobial" agents, accompanied by advertising and labeling claims about the efficacy of those agents in providing protection against bacteria or germs. We support EPA's judgment that, in many instances, claims concerning the antimicrobial or antibacterial properties of such products imply a public health benefit, i.e., that the control or elimination of germs and bacteria helps protect users against disease, rather than simply preserving the product itself against rot, deterioration, mold, or mildew. This implication is likely to be particularly strong for products and in circumstances where consumers are not concerned about microbial damage to the product itself, but instead have generalized concerns about the spread of disease-causing germs. Thus, for example, a claim that a children's toy or a toothbrush has been treated with an antibacterial agent is very likely to convey that the toy or toothbrush can reduce the risk of spreading disease-related germs. The Federal Trade Commission Act requires that material claims be truthful and substantiated.<sup>(3)</sup> The Commission has challenged a number of companies making antibacterial or other germ killing claims that were not adequately substantiated.<sup>(4)</sup>

The staff also believes that terms such as "antibacterial" and "antimicrobial," when used in conjunction with consumer products, are likely to convey that the bacteria, germs or microbes that are killed have some relation to human health.<sup>(5)</sup> In many circumstances, adding a qualifying phrase that limits the protection provided by the "antibacterial" treatment for the product only may not be effective. Even if consumers notice and understand the qualifying disclosure, it may be overwhelmed by a stronger message of efficacy for human health, or it may appear to contradict that message and simply confuse consumers.<sup>(6)</sup>

The Commission staff appreciates your consideration of these views.

Very truly yours,

C. Lee Peeler, Associate Director

1. These comments represent the views of the staff of the Bureau of Consumer Protection of the Federal Trade Commission, and do not necessarily represent the views of the Commission or any individual Commissioner.
2. Products bearing claims outside the treated articles exemption are permissible if they are registered by EPA, based on its review of the relevant efficacy data.
3. Section 5 of the FTC Act prohibits unfair or deceptive practices in or affecting commerce. 15 U.S.C. 45(b). An advertising claim or other practice that is likely to mislead reasonable consumers in a material way is deceptive. *Cliffdale Associates, Inc.*, 103 F.T.C. 110, at 176, 176 n.7, n.8, Appendix, reprinting letter dated Oct. 14, 1983, from the Commission to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (1984) ("Deception Statement"). Because consumers may be misled by innuendo as well as by outright false statements, both implied and express representations may be found deceptive under the Federal Trade Commission Act. *Fedders Corp. v. FTC*, 529 F.2d 1398, 1402-02 (2d Cir.), cert. denied, 429 U.S. 818 (1977). An advertisement will be deemed to convey an implied claim if consumers, acting reasonably under the circumstances, would interpret the ad to convey that message. *Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), aff'd, 970 F.2d 311 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993); *Thompson Medical Co.*, 104 F.T.C. 648, 788-89, aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987). The Commission has developed considerable expertise in evaluating consumers' interpretation of implied advertising claims. Such expertise has been judicially recognized. See, e.g., *Kraft, Inc. v. FTC*, 970 F.2d at 319; *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Thompson Medical v. FTC*, 791 F.2d at 197; *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40 (D.C. Cir. 1985); *American Home Products v. FTC.*, 695 F.2d 681, 687 n.10 (3d Cir. 1982).
4. See also, *RBR Productions, Inc.*, Docket No. C-3690 (consent order, Dec. 10, 1996) (beauty salon disinfectant for combs and scissors); *FTC v. The Sporidicin Co. et al.*, MJG-91-3542 (D. Md.) (1993) (germicide for medical instruments); and *Merck & Co., Inc.*, 69 F.T.C. 526 (1966) (germ killing claims for "Screts" throat lozenges).
5. In one case, for example, the Commission found that dishwashers advertised as "hygienically clean" conveyed to consumers, at a minimum, a health-related message. *Sears Roebuck and Co.*, 95 F.T.C. 406, 511 (1980).
6. It is well established in Commission law that qualifying language that contradicts the main message of the ad is not adequate to avoid deception. In addition, the Commission may order excision of a deceptive trade name if any qualification would simply be a contradiction in terms or would confuse consumers. *Brake Guard Products, Inc.*, Docket No. 9277 (Slip. op. at 52, Jan. 15, 1998). See also, *Litton Industries, Inc.*, 97 F.T.C. 1 (1981), aff'd as modified, 676 F.2d 364 (9th Cir. 1982), modified, 100 F.T.C. (1982); *Giant Food, Inc.*, 61 F.T.C. 326 (1962), aff'd, 322 F.2d 977 (D.C. Cir. 1963), cert. denied, 376 U.S. 967 (1964); *Continental Wax Corp. v. FTC*, 330 F.2d 475 (2d Cir. 1964).