

BEFORE THE
FEDERAL TRADE COMMISSION

In Re:

GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS; GREEN
BUILDING AND TEXTILES WORKSHOP, 16 CFR PART 260, COMMENT, PROJECT NO.
P084203. 73 FED. REG. 32,662 (June 10, 2008).

COMMENTS OF THE
NORTH AMERICAN INSULATION
MANUFACTURERS ASSOCIATION

L. Mark Wine P.C.
Joseph A. Eisert
Kirkland & Ellis LLP
655 15th Street, N.W.
Washington, D.C. 20005

Angus E. Crane
Vice President, General Counsel
NAIMA
44 Canal Center Plaza, #310
Alexandria, VA 22314
(703) 684-0084
acrane@naima.org

**COMMENTS OF THE NORTH AMERICAN
INSULATION MANUFACTURERS ASSOCIATION
ON THE FTC GUIDES FOR THE USE OF
ENVIRONMENTAL MARKETING CLAIMS-
GREEN BUILDING AND TEXTILES WORKSHOP**

The North American Insulation Manufacturers Association (“NAIMA”) appreciates the opportunity to provide comments on the Federal Trade Commission’s (“FTC”) Guides for the Use of Environmental Marketing Claims (“Guides”) – Green Building and Textiles Workshop (Project No. P084203). The following comments are essentially identical to comments NAIMA submitted in response to the FTC’s November 27, 2007 request for public comments on the FTC Guides for the Use of Environment Marketing Claims (Project No. P954501). NAIMA is resubmitting these comments because they are directly relevant to the issues raised in the Green Building and Textiles Workshop. NAIMA is the association for North American manufacturers of fiber glass, rock wool, and slag wool insulation products. NAIMA’s role is to promote energy efficiency and environmental preservation through the use of fiber glass, rock wool, and slag wool insulation, and to encourage the safe production and use of these materials. NAIMA submits these comments on behalf of its members: Aislantes Minerales, S.A. de C.V.; Amerrock Products LP; CertainTeed Corporation; FiberTEK Insulation; Fibrex Insulations, Inc.; Guardian Building Products; Industrial Insulation Group; Isolatek International; Johns Manville; Knauf Insulation; Owens Corning; Rock Wool Manufacturing; Roxul, Inc.; Sloss Industries Corp.; Thermafiber, Inc.; and USG Interiors Inc.

Manufacturers of insulation products frequently make environmental marketing claims. Insulation products deliver energy savings which in turn reduce the pollutants associated with energy consumption. As with many products currently on the market, insulation products possess other environmental characteristics that are often promoted in advertising campaigns. Based on its years of experience with environmental marketing claims by its members and competitors, NAIMA provides detailed comments on the importance of maintaining and strengthening the Guides.

NAIMA’s comments are provided as responses to the following Issues for Comment identified by the FTC. The issues below are numbered as they are in the FTC’s Federal Register notice, but because NAIMA is not responding to all of the issues, the issues below are not consecutively numbered.

ISSUES FOR COMMENT

A. *General Issues*

(1) Is there a continuing need for the Guides? Why or why not?

NAIMA strongly urges the FTC to maintain and substantially upgrade its Guides for the Use of Environmental Marketing Claims. There is an urgent need for updated Guides as such claims have become much more frequent in recent years.

In the strongly competitive market for residential insulation products, advertising the environmental benefits of insulation generally and the environmental characteristics of individual insulation products is of paramount importance. Indeed, the “environment” is the new center stage of the competitive insulation marketing arena just as it is for many other products. Consumers make critical comparisons among competing insulation products and frequently they base their choice on each product’s claims of environmental characteristics. Hence, it is imperative that consumers get accurate, truthful, and reliable information about the environmental impact of all products, including insulation products. Therefore, application of these Guides to all consumer products should continue.

The FTC Guides encourage the free flow of non-deceptive product information, which benefits both consumers and product promoters. Without reliable marketing guides, consumers could fall victim to an array of deceptive and misleading claims. More importantly, promoters of environmental attributes of products would have no authoritative standards by which to guide their marketing claims. The FTC Guides establish strict guidelines for truthfulness and accuracy for manufacturers and advertisers, and consumers benefit enormously from that standard of accountability.

Even with the Guides in place, some insulation and building product manufacturers are making environmental claims that are deceptive and confusing. NAIMA has found the Guides useful in challenging the appropriateness of competitors’ claims to help ensure that products compete on a level playing field. When challenging certain types of claims, NAIMA often uses the FTC Guides to illustrate that a particular claim is not appropriate. Without such Guides, such an assertion would not be possible. In response to NAIMA’s letters, many competitors have altered their advertising by either removing or modifying the claims that violated the Guides. In other words, the FTC Guides provide an essential and effective tool for each industry to police itself and provide “safe harbors” for certain environmental claims. The FTC Guides therefore discourage misleading and insupportable environmental claims while at the same time promote legitimate and useful environmental information to be conveyed to consumers.

NAIMA is troubled, however, by the large proliferation of guidelines and standards similar to the Guides. These competing guidelines define what constitutes “green” or environmentally preferable products. Such guidelines and policies emanate from various agencies within the Federal government, and many state and local governments. Add to the governmental guidelines the large number of public interest groups generating green standards and the result is mind-boggling.

Instead of providing clarity and greater understanding, these conflicting and competing guidelines and standards generate confusion. Some of them endorse or promote specific brands or types of products rather than provide generic or unbiased, source-based guidance. In this instance, more does not mean better. A single, authoritative, and consistent voice is what is needed. NAIMA believes that the FTC has the expertise and experience to regulate and oversee these types of advertising issues. NAIMA strongly urges the FTC to establish its Guides as the preeminent authority on advertising of environmental attributes and green marketing issues. By establishing exclusive jurisdiction on advertising or promotion of these matters, the FTC will help to alleviate the confusing and conflicting guides that are competing in the marketplace.

- (2) What benefits have the Guides provided to consumers? What evidence supports the asserted benefits?

Since the Guides are generally followed by advertisers and promoters of environmental claims, the consumer is provided with more accurate information and able to make better decisions when evaluating products individually or comparing them.

- (3) What modifications, if any, should be made to the Guides to increase their benefits to consumers? (a) What evidence supports your proposed modifications? (b) How would these modifications affect the costs the Guides impose on businesses, and in particular on small businesses? (c) How would these modifications affect the benefits to consumers?

While the Guides have been helpful in getting businesses to make clearer, less deceptive environmental marketing claims and thereby promote consumer understanding of, and confidence in, such claims, some producers still provide misleading and inaccurate information in advertising and package labels. To strengthen the Guides, the FTC should address the specific situations identified in NAIMA's response to Question 15 that illustrate environmental claims that are deceptive or confusing. In addition, NAIMA asks the FTC to consider strengthening prohibition against vague, meaningless claims of "environmentally friendly" products.

The intended purpose of the FTC Guides is to discourage unsupported environmental claims that would mislead or confuse consumers. Vague, unverifiable claims that a product is "environmentally friendly," "eco-friendly," "earth friendly," "climate friendly," or other words to that effect, have the potential to mislead and confuse because without specific definition or elaboration they are essentially meaningless. NAIMA and its members have noted an increased proliferation of such terms in the last five years. The more general the claim, the more difficult it is to substantiate the claim. Nonetheless, the very concept of "environmentally friendly," when applied to a product, may be given unwarranted weight by consumers. Cellulose and foam-based insulation products assert the type of claims noted above. None of these vague phrases are defined or elaborated, and they are likely to confuse and mislead consumers. These types of vague environmental claims should only be permissible when the product meets clearly defined criteria of environmental performance. NAIMA urges the FTC to add to the Guides these additional terms connoting "environmentally friendly." In the alternative, FTC could include all encompassing language that will cover these and any new phrases that may be developed in the future.

(4) What impact have the Guides had on the flow of truthful information to consumers and on the flow of deceptive information to consumers?

As discussed throughout NAIMA's comments, the Guides have set parameters within which responsible environmental claims may be asserted. Because environmental attributes of products have become an important and common issue in promotional campaigns, the Guides provide a standard by which individual businesses and their competitors' claims can be measured. NAIMA and its member companies consult the Guides in developing promotional material and abide by the direction given in the Guides. NAIMA has also been able to challenge competitors on the soundness of their environmental claims by using the Guides. NAIMA believes its experience has been similar to those of many other industries who market to consumers. As a result, NAIMA strongly believes that the Guides help promote fair competition.

(8) Please provide any evidence that has become available since 1998 concerning consumer interest in particular environmental issues. Does this new information indicate that the Guides should be modified? If so why, and how? If not, why not?

Various surveys over the past several years have demonstrated that there are an increasing number of consumers who are concerned about climate change and state that they are willing to modify their purchasing and lifestyle choices.¹ Consumers International conducted a survey in 2007 that prompted them to conclude that "ethical consumerism" has come of age. The specific findings of Consumers International may be of interest to the FTC. In a consumer survey of people in the United States and the United Kingdom during 2007, the following findings were reached:²

- Consumers in the US and UK are concerned about global warming and are ready to take responsibility for their personal consumer choices that may contribute to global warming.
- The majority of consumers have already done something about reducing their energy consumption by buying various energy efficient products.
- Consumers want more information from businesses about how they address the climate impacts of their products. Sixty percent of consumers in both the US and UK want more product-based information at the point of sale.

¹ I Makower J. (2007), Earth Day and the Polling of America (2007) – makower.typepad.com/joel_makower/2007/04/earth_day_and_t.html; Lippincott Mercer (2006) Serving the Climate Change Conscious Consumer – www.theclimategroup.org/index.php/news_and_events/news_and_comment/new_research_serving_the_climate_conscious_consumer/; Landor Associates (2007), ImagePower® Green Brands Survey – www.landor.com/?do=cNews.news&storyid=507; Jon Dee (2007), First Annual World Environment Review Poll Reveals Britons Want Government to Take Strong Actions on Climate Change – www.sourcewire.com/releases/rel_display.php?relid=31771&hilite, Energy Savings Trust (2007), Green Barometer, Measuring Environmental Attitude – [www.energysavingtrust.org.uk/uploads/documents/aboutest/GreenBarometer.Web\(spread\).pdf](http://www.energysavingtrust.org.uk/uploads/documents/aboutest/GreenBarometer.Web(spread).pdf).

² AccountAbility, "What Assures Consumers on Climate Change? Switching on Citizen Power," Consumers International, June 2007, pp. 9-12.

- Consumers say they want more independent assurance of product information. Seventy percent of survey respondents in the US and UK said that climate change claims should be proven by independent parties.

Public opinion research on global warming conducted by American Environics for the Nathan Cummings Foundation found that 82 percent of survey respondents believe that global warming exists and that seventy percent believe that solutions to the problem should be found.³ These EcoPinion Survey results confirm that consumers are concerned about global warming, and that consumers want to buy green and conserve energy. The EcoPinion Survey also reveals that a gap in communications sometimes frustrates consumer's stated intentions. For example, the survey found the following:⁴

- Consumers do not know the difference between energy conservation and energy efficiency.
- Only a small percentage of survey respondents thought energy efficiency was connected with saving money or cutting down fuels costs.
- Other energy efficiency and green terms were confusing or not understood by consumers.

These surveys document that a significant new awareness of environmental issues related to climate change has grabbed the attention of consumers, and that those consumers are actually seeking the ways and means to take personal responsibility for their contribution to climate change. But the surveys also demonstrate that there is confusion and uncertainty with regard to a number of environmental issues and claims. These survey results therefore confirm that there is a continued need for the FTC Guides and for their expansion to cover terms and concepts not before the consumer in 1998.

(9) What benefits, if any, have the Guides provided to businesses, and in particular to small businesses? What evidence supports the asserted benefits?

As indicated in the response to Question 4 above, the Guides have benefited businesses in several ways. First, the Guides established reasonable and understandable parameters in which to formulate, develop, and disseminate marketing materials that feature environmental attributes of specific products. The Guides have been particularly useful to small businesses by enabling them to develop appropriate marketing claims while also making them less dependent on legal counsel or other third parties to review advertising copy before it is published. As another benefit to all businesses, advertisers who consult neither the Guides nor legal counsel or just ignore its obligations, the Guides provide an industry a basis upon which to challenge and police the environmental claims of such careless and unethical advertisers.

(10) What modifications, if any, should be made to the Guides to increase their benefits to businesses, and in particular to small businesses? (a) What evidence

³ American Environics, "Energy Attitudes," The National Cummings Foundation, Summer 2007, pp. 1-2.

⁴ Dana Cogar, "EcoPinion: Survey Report – The GreenGap: Communication and language," Ecoalign, November 2007, p. 1.

supports your proposed modifications? (b) How would these modifications affect the costs the Guides impose on businesses, and in particular on small businesses? (c) How would these modifications affect the benefits to consumers?

In response to Question 15, NAIMA identifies a number of issues that should be addressed in the Guides. Addressing these issues would constitute modifications that would increase the benefits of the Guides to businesses.

- (11) What significant costs, including costs of compliance, have the Guides imposed on businesses, and in particular on small businesses? What evidence supports the asserted costs?

Although NAIMA has no specific evidence concerning the costs the Guides have imposed on business, the Guides presumably have imposed at least some minimal costs on businesses that attempt to assure compliance. For example, individual businesses must invest time and resources in reviewing the Guides and obtaining or developing the “reasonable basis” required to support advertising claims, which could include activities ranging from reviewing existing studies to developing and funding its own costly research. Moreover, businesses must review advertising claims to determine whether such claims comply with the Guides and, if they do not, revise them accordingly. Regardless of whether such review is done in-house or farmed out to third-party specialists or lawyers outside the business, it costs businesses time and money.

But the Guides also benefit businesses and, in some cases, may help them save money. The Guides “describe the basic elements necessary to substantiate claims within each category and present options for qualifying specific claims to avoid deception.” 72 Fed. Reg. at 66092. Moreover, “[t]he illustrative qualifications provide ‘safe harbors’ for marketers who want certainty about how to make environmental claims.” *Id.* Businesses therefore can follow the Guides and, as long as their environmental marketing claims are consistent with the Guides, have some assurance that they won’t be subject to a Commission enforcement action under the FTC Act. 15 U.S.C. § 45. Similarly, businesses can try to fit within these safe harbors and short-circuit the advertising review processes that otherwise would require more time and expense to complete. Indeed, revising the Guides to provide more such safe harbors could help companies reduce their compliance costs.

Notwithstanding the benefits that may result from more comprehensive Guides, however, the FTC should proceed cautiously to ensure that any revisions to the Guides do not inadvertently impose unwarranted costs on businesses.

- (13) What evidence is available concerning the degree of industry compliance with the Guides? (a) To what extent has there been a reduction in deceptive environmental claims since the Guides were issued? Please provide any supporting evidence. Does this evidence indicate that the Guides should be modified? If so why, and how? If not, why not? (b) To what extent have the Guides reduced marketers’ uncertainty about which claims might lead to FTC law enforcement actions? Please provide any supporting evidence. Does this

evidence indicate that the Guides should be modified? If so why, and how? If not, why not?

As indicated throughout NAIMA's comments, there are violations of the Guides for the Use of Environmental Marketing Claims, but the Guides provide guidance for the conscientious advertiser and a tool to challenge those advertisers that do not comply with the Guides.

(14) Are there claims addressed in the Guides on which guidance is no longer needed? If so, explain. Please provide supporting evidence.

Based on NAIMA's and its members experience with environmental marketing claims made by their competitors in the marketplace, all of the categories of claims addressed in the current FTC Guides continue to be relevant in our industry. As indicated in NAIMA's comments, there are claims that should be added to the Guides, but no claims presently addressed in the Guides should be deleted.

(15) What potentially unfair or deceptive environmental marketing claims, if any, are not covered by the Guides? (a) What evidence demonstrates the existence of such claims? (b) With reference to such claims, should the Guides be modified? If so why, and how? If not, why not?

NAIMA has identified the following unfair or deceptive environmental marketing claims that are not currently covered by the Guides but should be:

- Government Approvals/Certifications – Some environmental marketing claims falsely represent that a particular product is approved or certified by federal or state agencies because of its environmental characteristics. Government agencies typically do not endorse, approve, or certify commercial products. In fact, NAIMA does not know of any government agency that has ever endorsed or approved commercial products. In an August 12, 1999 letter to NAIMA, the Environmental Protection Agency (“EPA”) stated that “it is EPA’s practice to apply a neutral approach to establishing product specifications for a particular project . . . and EPA does not endorse specific products or manufacturers or show favor to offerors that may specify or refuse to specify the products of a particular manufacturer.” Therefore, claims that a product is certified, approved, or endorsed by a government agency are most likely per se false and misleading. There is a provision in the FTC’s Home Insulation Rule that specifically prohibits making false or misleading references to government approvals or standards. 16 C.F.R. § 460.21. Although some insulation companies may violate that prohibition, the presence of the Rule enables such claims to be authoritatively challenged. Similar language may be extremely useful in the FTC’s Guides for the Use of Environmental Marketing Claims because many government agencies have created guidelines on the acquisition of environmentally preferable products and services. Just because a government agency has established recycled content requirements for a particular product does not mean that the government agency has certified, approved or endorsed that particular product. Yet that is exactly what some companies claim. Specifically, some cellulose insulation companies have claimed that their products are approved or endorsed by the Consumer

Product Safety Commission (“CPSC”) because the CPSC regulates cellulose insulation as a fire threat. *See* 16 C.F.R. Part 1209. This is inaccurate and deceives customers. Regulation of a product is significantly different from approval, endorsement or certification. NAIMA urges the FTC to incorporate into the Guides for the Use of Environmental Marketing Claims the concept that any representation that government bodies certified or approved the product must be truthful and set forth in documentation that will be made available upon request to the FTC, consumers, or competitors. Documentation of any government certification, endorsement or approval must be in the possession of the advertiser at the time the claim is made.

- **Climate and Carbon Neutral Claims** – With increased frequency, advertisements feature claims that a product or service is “climate neutral” or “carbon neutral.” NAIMA urges the FTC to require verifiable quantification as to how a product has achieved a climate or carbon neutral product. For example, the Harvard School of Public Health has conducted a number of studies that document the amount of pollution reduced through the use of increased insulation. Other products making similar claims should be required to have adequate substantiation.
- **Energy Savings Claims** – Energy savings has become a popular claim to make. The insulation industry has been making energy savings claims for decades. The claims made within the insulation industry are subject to specific requirements set forth in the Home Insulation Rule, 16 C.F.R. Part 460. These requirements mandate that disclosures be made that energy savings may vary and any specific energy savings claim or money saving must have a reasonable basis. Manufacturers are required to maintain records of all data upon which its energy savings claims are based. With the increased emphasis on environmental issues in all advertising, many other products and services are claiming to save energy. For example, Hummelstein Recycling claims that its services saves energy and its advertisements provide specific energy savings achieved from the recycling of certain products. In fairness, the FTC should impose precisely the same type of requirements on all advertisements making energy savings claims that the FTC imposed upon the insulation industry. NAIMA and its members have invested significant resources in creating a database of information that substantiates the energy savings achieved through insulation products. In fact, the Department of Energy, the Environmental Protection Agency, and a variety of other federal and state agencies promote the use of insulation as one of the most, if not the most, effective means to improve energy savings. Even the FTC itself acknowledges that insulation provides significant energy savings. Despite this broad recognition that insulation saves energy, the insulation industry is required to follow specific rules in advertising energy claims and must be meticulous in substantiating its claims. If producers of other services or products wish to make energy savings claims, the FTC Guides should mandate just as exacting requirements as are imposed upon the insulation industry.
- **Non-Toxic Claims** – Toxicity issues are no longer limited exclusively to the health and safety arena. Many products make claims of being non-toxic or non-hazardous because it has become an important attribute of environmental preferability and sustainability. Cellulose and cotton insulation manufacturers frequently make claims that their products

are non-toxic and non-hazardous. Yet both of these insulation products apply toxic fire retardants to their products in amounts up to 25 percent by weight. These fire retardants are toxic and are regulated as hazardous substances under the Occupational Safety and Health Administration's ("OSHA") HAZCOM Standard. Because non-toxic claims are very persuasive and compelling to consumers, it is imperative that false non-toxic claims be prohibited. NAIMA suggests that the FTC specifically prohibit non-toxic claims from products that contain substances that are regulated as toxic or hazardous environmental substances in amounts of 10 percent by weight or higher.

- **Untested Products** – Similar to claims that a product is non-toxic, specific manufacturers make claims that their products are safe or “not a carcinogen” or “no carcinogens.” The FTC should require that such claims be based on scientific studies. Just because a product is inadequately tested or untested does not mean it is safe or “not a carcinogen.” Ignorance should not be rewarded; an untested product should not be given the benefit of the doubt. Nor should a product be promoted as safe or “free of health risks” simply because its manufacturers have neglected responsible product stewardship and refused or failed to test the product. Claims that a product is safe and “not a carcinogen” should not be allowed when this really means the product is untested as to its carcinogenicity or safety. For example, Dr. JMG Davis of the Institute of Occupational Medicine Ltd. Reaffirms this concept in the following statement: “It is disappointing to find that . . . some fibre products are being manufactured and promoted as safe when this really means they are untested. A current example of this concerns the increasing use of materials based on cellulose fibres.”⁵
- **Embodied Energy** – Claims that a product has low embodied energy can be misleading. Embodied energy should be established through a life cycle assessment. If a life cycle assessment has not been conducted on the product, it may be difficult to accurately state whether or not the embodied energy is low. Moreover, life cycle assessments can vary significantly in scope depending on where the ultimate life cycle assessment begins and ends. These variations can easily alter the conclusion. The possibility of such variation should be acknowledged to consumers and any claims about embodied energy required additional language that qualifies the claim by disclosing its uncertainty and variability or discloses the methodology's beginning and end points.
- **Bio-Based and Soy-Based Claims** – Claims that products are bio-based or soy-based have significantly increased in the last four to five years. In fact, many insulation products are now claiming to be bio-based or soy-based, yet upon closer examination there are many other constituents in the product. What makes one product bio- or soy-based? For example, an insulation product claims that it is a soy-based foam insulation. In reality, a soy-based foam insulation typically uses an isocyanate, which is petroleum based, and the only soy-based component is the polyol. To give the FTC an idea of the complexity of these mixtures, consider the following definition of polyurethane foam: “Commercially, polyurethanes are produced by reacting a liquid isocyanate with a liquid blend of polyols,

⁵ J.M.G. Davis, “The need for standardized testing procedures for all products capable of liberating respirable fibres; the example of materials based on cellulose,” *British Journal of Industrial Medicine* 1993; 50: 187-190. Twelve years after this admonishment, cellulose insulation manufacturers have still not adequately tested their products.

catalyst, and other additives. These two components are referred to as a polyurethane system, or simply a system. The isocyanate is commonly referred to in North America as the 'A-side' or just the 'iso.' The blend of polyols and other additives is commonly referred to as the 'B-side' or as the 'poly.' This mixture might also be called a 'resin' or 'resin blend'. In Europe the meanings for 'A-side' and 'B-side' are reversed. Resin blend additives may include chain extenders, cross linkers, surfactants, flame retardants, blowing agents, pigments, and fillers.” ([http://en.wikipedia.org/wiki/ Polyurethane](http://en.wikipedia.org/wiki/Polyurethane)). When a claim is made that a product is bio- or soy-based, there may be an assumption that the majority of the product is soy. The reality may be something quite different. NAIMA urges the FTC to add bio- or soy-based claims to the Guides and prohibit such claims unless the advertiser can substantiate that at least a majority (51 percent or greater) of the ingredients are soy by weight.

- Bogus and Misleading “Does Not Contain” Claims – Claims that a product does not contain a particular substance can be useful when consumers would otherwise expect the named substance to be present in the product, but can be misleading and confusing when used in other contexts. When a product is labeled or advertised as not containing a particular material, it creates a perception by the public that the identified material is in some way bad. Such claims about what a product does not contain therefore have the potential to be misleading and abused for competitive or deceptive purposes. To take an extreme hypothetical example, a processed fruit drink that boldly proclaims that it does not contain cyanide might unnecessarily scare consumers and lead to the erroneous assumption that some other competing fruit drink may contain cyanide. Unnecessary and irrelevant “does not contain” claims that unfairly disparage competing products by association or other means are misleading to the public. Again, using a hypothetical example, a processed fruit drink that is advertised as containing no “cyanide, arsenic, or apple juice” would unfairly disparage apple juice competitors by implying without any basis that apple juice presented a potential health concern.

Some insulation manufacturers are currently using such misleading advertising practices. For example, an advertisement may feature a claim that states NO “asbestos, formaldehyde, fiber glass, or rock wool fibers.” Another advertisement may state that the product does not contain any “irritating, abrasive, airborne glass fiber particles.” These types of claims provide no meaningful information to consumers because they are silent as to whether the product advertised, in both of these cases cellulose insulation, is irritating or creates airborne fibers. A review of a Material Safety Data Sheet for cellulose insulation would reveal that the chemical fire retardants used on cellulose insulation products are irritating and that the National Institute for Occupational Safety and Health (“NIOSH”) recommends that people handling cellulose insulation use dust masks because of airborne fiber and dust. Certainly the consumer reading that advertisement would conclude or assume that cellulose insulation is not irritating and poses no exposure to fibers or dust. This is not true. Moreover, the assertion unfairly disparages fiber glass and rock and slag wool insulation products. This disparagement is both direct – by the use of derogatory comments about competing products such as “irritant” – and indirect – by implying that the absence of fiber glass and rock wool is a beneficial attribute. Such an implication is unwarranted and unfair.

It also is unfair and misleading for advertisements to provide meaningless information about what a product does not contain and omit any mention of what the advertised product does contain. Historically, the FTC has closely scrutinized such comparisons. In *Adria Labs, Inc.* 103 F.T.C. 512 (1984), the Commission required manufacturers of an analgesic to cease and desist promoting their product as aspirin-free or safer than aspirin-containing substances unless accompanied by a conspicuous disclosure that its analgesic has side effects of its own. NAIMA urges the FTC to incorporate similar guidelines into the Guides for the Use of Environmental Marketing Claims.

It is important that the FTC recognize that claims dealing with the constituents that make up a product are very much a part of today's environmental/green landscape. Therefore, revisions to the FTC Guides that discourage and restrict bogus "does not contain" claims would be timely, relevant, and extremely beneficial to consumers and businesses. The FTC Guides should mandate that products that make statements about what their products do not contain must disclose information on the properties and content of the products advertised. For example, if a cellulose insulation advertiser claims that its product does not contain irritating fiber glass, the cellulose insulation advertising must disclose that cellulose insulation does contain irritating fire retardants such as ammonium sulfate and boric acid. Similarly, the FTC Guides should prohibit use of such "does not contain" claims where they are directed at constituents in competing products.

- (17) Do the Guides overlap or conflict with other federal, state, or local laws or regulations? If so how? (a) What evidence supports the asserted conflicts? (b) With reference to the asserted conflicts, should the Guides be modified? If so why, and how? If not, why not? (c) Is there evidence concerning whether the Guides have assisted in promoting national consistency with respect to the regulation of environmental claims? If so, please provide that evidence.

The Guides overlap with an ever-increasing number of local government regulatory requirements and quasi-regulatory or industry standards, such as those of the National Association of Home Builders, the U.S. Green Building Council, the City of Austin, and others. Many of the regulations and quasi-regulatory standards do not address environmental marketing claims per se, but they do prescribe standards for environmental performance and criteria for concepts such as, among others, "green," "sustainable," "environmentally friendly," that often are repeated as environmental marketing claims in many businesses' advertising. These standards/regimes vary in quality and therefore consumer utility.

Accordingly, the FTC should assert the primacy of the Guides over all environmental claims. Moreover NAIMA recommends that the FTC impose, to the maximum extent practicable, federal preemption to address the conflicting requirements. The FTC should consider preempting state and local laws and regulations that are inconsistent with or frustrate the purposes of the Guides.⁶

⁶ See R-value Rule, 16 CFR 460.23.b ("State and local laws and regulations that are inconsistent with, or frustrate the purposes of, the provisions of this regulation are preempted. However, a State or local government may petition

- (18) Are there international laws, regulations, or standards with respect to environmental marketing claims that the Commission should consider as it reviews the Guides, such as the International Organization for Standardization (“ISO”) 14021, Environmental Labels and Declarations—Self-Declared Environmental Claims? If so, what are they? Should the Guides be modified in order to harmonize with these international laws, regulations, or standards? If so why, and how? If not, why not?

NAIMA’s members recognize that harmonizing the Guides with international laws, regulations, or standards could make commerce more efficient and benefit both consumers and businesses. For example, it could enhance consumers’ ability to comparison-shop products from around the world on the basis of consistent environmental marketing claims and promote international trade by eliminating the burdens associated with multiple regulatory regimes and any different advertising and product labeling requirements. Indeed, advertising materials and product packaging could be used worldwide.

However, this might not be achievable for a number of reasons, including conflicting regulatory requirements, the administrative hurdles of regularly revising the Guides to keep them current and in harmony with international requirements, and differences in products. Once a harmonized system has been adopted by many nations and implemented by thousands of businesses, the obstacles and barriers to maintaining, changing or modifying, updating, and revising the system may be enormous. This burden could be alleviated by incorporating by reference such international laws, regulations or standards, but to do so would abdicate to others the FTC’s control over the content of the Guides. While NAIMA believes the FTC still should consult other relevant sources, including international ones, NAIMA would oppose any effort to completely harmonize the Guides with international requirements because of the tremendous effort and delay that would surely follow. In the event the FTC determines that it should modify the Guides in order to harmonize them with international laws, regulations, or standards, the FTC should proceed cautiously to the extent such international laws, regulations, or standards were developed without any due process as to American companies and people.

B. *Specific Issues*

- (2) Should the Guides be revised to include guidance regarding “sustainable” claims? If so, why, and what guidance should be provided? If not, why not? (a) What evidence supports making your proposed revision(s)? (b) What evidence is available concerning consumer understanding of the term “sustainable”? (c) What evidence constitutes a reasonable basis to support a “sustainable” claim?

Sustainability claims in advertisements and promotional materials are multiplying rapidly. Many of these sustainability claims seem exaggerated and irresponsible, so the FTC might be tempted to address this issue in the Guides. Yet to provide specific guidance, the FTC would need to

the Commission, for good cause, to permit the enforcement of any part of a State or local law or regulation that would be preempted by this section.”)

come to some definition of precisely what is “sustainability.” There is no clear, concise definition of sustainability. To attempt a succinct and understandable definition of sustainability would cast the FTC into a quagmire. Conceivably, sustainability is anything that fosters the general welfare of the entire planet. That encompasses not just the environment, but the economy, public health, and every other facet of life. Indeed, sustainability is a systems concept, and cannot be narrowed down to one or two single attributes.

Therefore, NAIMA strongly urges the FTC to avoid tackling the onerous and possibly unachievable task of defining the specific attributes of sustainability as part of this proceeding. Instead, NAIMA requests that the FTC focus its effort on applying its advertising substantiation standard to all sustainability claims. See “FTC Policy Statement Regarding Advertising Substantiation,” Appended to Thompson Medical Co., 104 F.T.C. 648, 839 (1984), aff’d 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987) (available at <http://www.ftc.gov/bcp/guides/ad3subst.htm>). This would require that all sustainability claims be accurate and free from false or misleading elements. More importantly, all sustainability claims would be required to have a reasonable basis in fact.

That reasonable basis is, of course, substantiation.⁷ The substantiation requirement exists because every time an advertiser makes an objective claim, the advertiser implies that there is a reasonable basis behind the claim.⁸ NAIMA urges that the FTC also require that the substantiation be available to the FTC and the public, including both consumers and competitors, upon request. This allows both the FTC and those policing their own industry to effectively keep claims and assertions responsible. Even though the established law and FTC’s policy already mandates substantiation of claims, it is not widely known and it bears repeating here in the Guides so that the fundamental concept is not lost.

- (3) Should the Guides be revised to include guidance regarding “renewable” claims? If so, why, and what guidance should be provided? If not, why not? (a) What evidence supports making your proposed revision(s)? (b) What evidence is available concerning consumer understanding of the term “renewable”? (c) What evidence constitutes a reasonable basis to support a “renewable” claim?

NAIMA supports providing guidance on claims of renewability. Nonetheless, creating that guidance may be problematic because there is ongoing debate as to the definition of renewable. For example, the U.S. Green Building Council (“USGBC”) limits renewable resources to such things as agrifibers, soy bean products, bamboo and cork. This is far too limiting, and there are many who disagree with the constricted scope of renewable resources envisioned by the USGBC. Specifically, fiber glass, as with all glass products, relies upon sand as its primary raw material. Geological studies have concluded that sand renews itself and should be considered renewable. Geologist H. Kuenne “estimated that during each and every second in the incredibly long past, the number of quartz grains on earth has increased by 1,000 million grains!”⁹ Dr. Nelson R. Shaffer concluded that “sand is considered a renewable, even rapidly renewable

⁷ <http://www.ftc.gov/speeches/starek/nima96d4.shtm>.

⁸ *Ibid.*

⁹ Pettijohn, Potter and Seiver, *Sand and Sandstone* (New York, New York: Springer-Verlag, 1073), p. 7.

resource.”¹⁰ Shaffer reports that sand deposits are increased daily by the normal, ongoing geological processes that generate new deposits of sand in the hundreds of millions of tons each year. The renewability of sand makes it the most abundant mineral on earth. It can be found virtually everywhere. The United States Geological Service estimates that known deposits of sand can satisfy expected demands for centuries. In essence, silica sand resources are virtually inexhaustible.¹¹ Many of the problems mentioned above regarding “sustainability” apply equally to renewability.

Despite the abundance of sand and natural processes that continue to renew sand deposits, sand would not satisfy the USGBC’s definition of renewable because it is not agriculturally based. If the FTC provides guidance on renewable claims, NAIMA strongly urges the Commission to approach renewability broadly and recognize that there is no consensus on what should be treated as a renewable resource.

- (4) The Guides provide that a recycled content claim may be made only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process or after consumer use. Do the current Guides provide sufficient guidance for recycled content claims for textile products? If so why? If not, why not, and what guidance should be provided? What evidence supports making your proposed revision(s)?

NAIMA urges the FTC to retain its current guidance that allows recycled content claims to be based on materials that have been diverted from the solid waste stream during the manufacturing process or after consumer use. The intent of any recycling is to divert materials entering the solid waste stream from filling the nation’s landfills. Whether the diverted material is pre- or post-consumer, it still will occupy landfill space unless diverted and recycled. The volume of material is the issue, not its exact route to the landfill.

There are advocates for limiting recycled content claims to the use of post-consumer materials. Such a practice would be a disincentive to manufacturers who currently use pre-consumer materials. Such a disruption in the marketplace could shift attention away from the need to reduce waste materials from entering landfills and cause a new influx of pre-consumer waste into the landfills. Consumers are interested in recycled content claims because the idea that a product contains materials diverted from the dump appeals to them, not necessarily that the material diverted from the landfill originated in the neighbor’s trash.

NAIMA urges the FTC to recognize that selecting a product based strictly on a higher recycled content percentage may be more harmful to the environment than choosing a product with a lower recycled content percentage. The product with the lower recycled content may not require the use of valuable natural resources and may generate less pollution than a product with a higher recycled content. The environmental benefits of a product are a function of many characteristics, including energy efficiency, renewability of raw materials, product performance, longevity of product performance, embodied energy, recycled content, product packaging, transportation and

¹⁰ Nelson R. Shaffer, “The Time of Sands: Quartz-rich Sand Deposits as a Renewable Resource,” *University of Idaho’s Electronic Green Journal*, Winter 2006.

¹¹ *Ibid.*

distribution impacts, use and reuse, recyclable characteristics, and disposal. Despite this vast array of environmental attributes, many advocates of environmentally-friendly product choices focus exclusively on recycled content. Certainly recycled content is the most immediately noticeable and most readily grasped environmental characteristic, but to promote a product as environmentally beneficial or environmental friendly simply because of recycled content is deceptive and misleading.

Indeed, such a narrow assessment of environmental attributes has been discouraged by the Environmental Protection Agency (“EPA”).¹² The EPA recognizes that an environmental benefit is a function of numerous attributes, not just one or two. The EPA specifically noted that one-dimensional assessment of a product, for example, recycled content, could blind the purchaser to environmental impacts whose severity may outweigh the benefits exhibited in the one favored aspect.¹³

NAIMA suggests that the FTC mandate disclosure language when a product links recycled content to environmental benefits. The disclosure language could simply alert the consumer to the fact that environmental benefits can be derived from numerous attributes and that additional information beyond recycled content may be desirable.

- (5) The Guides suggest that recycled content be calculated on the annual weighted average of a product. Should the Guides be revised to include alternative method(s) of calculating recycled content, e.g., based on the average recycled content within a product line, or an average amount of recycled content used by a manufacturer across many or all of its product lines? If so, why, and what is the appropriate method(s) of calculation? If not, why not? What evidence supports making your proposed revision(s)?

NAIMA strongly urges the FTC to retain the current recycled content calculation formula which is an annual weighted average of a product. Many industries have made substantial investments in processes and materials procurement, as well as marketing materials. For our industry, fiber glass and rock and slag wool insulation products contain recycled content. Fiber glass uses glass cullet and slag wool and rock wool use blast furnace slag. For the fiber glass manufacturers, suitable glass cullet is not always available on a consistent and continuous basis from recyclers. Finally, process upsets, low throughput and other technical limitations will cause a substantial variance in the amount of glass cullet that can be used at any given time. For those manufacturing reasons, calculated recycled content must be done on a longer timeframe, so the FTC’s annual weighted basis is appropriate. The State of California requires that fiber glass production contain at least 30 percent, by weight, recycled cullet.¹⁴ This percentage is to be calculated in tons used on an annual basis.¹⁵ If the FTC changed its requirement, the revised requirement would be in conflict with State of California requirements for fiber glass manufacturers.

¹² 60 Fed. Reg. 50,722, 50,728 (1995).

¹³ *Ibid.*

¹⁴ California Public Resources Code, Division 12.9 § 19522(b).

¹⁵ California Public Resources Code, Division 12.9 § 19510 and 19511.