



Johns Manville

A Berkshire Hathaway Company

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Federal Trade Commission
Office of the Secretary
Room H-135 (Annex B)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: ***Green Building and Textiles Workshop –
Comment, Project No. P084203***

Dear Mr. Donald S. Clark:

Johns Manville is pleased to provide these comments for the record in response to the Federal Trade Commission's ("FTC" or "Commission") request for public comments regarding its Guides for the Use of Environmental Marketing Claims (the "Green Guides").¹

Johns Manville is a Berkshire Hathaway company and a leading manufacturer and marketer of premium-quality building and engineered products. Johns Manville has committed itself to seeking ways by which its manufacturing processes and the products it produces can eliminate hazardous air pollutant manufacturing emissions, reduce volatile organic compound product emissions, and promote the health and well-being of its neighbors, employees, the contractors who install its products, and the building occupants who live and work around its products everyday. To achieve these goals, in 2002 Johns Manville converted its complete line of fiber glass building insulation products to a no-added formaldehyde formulation. This was accomplished by switching from the formaldehyde-based binder that is still used by most of the rest of the fiber glass insulation industry to an acrylic binder.

¹ 73 Fed. Reg. 32662 (June 10, 2008).

Johns Manville appreciates the Commission's efforts in revisiting the Green Guides and soliciting comments from industry on how the Green Guides can be updated to better reflect the current marketplace of green claims. The Commission's interest in this subject comes at an appropriate time. Johns Manville has begun to see friction in the marketplace over new green claims that are not addressed by the current Green Guides. The current Green Guides are revealing gaps in this area, in part, because companies are marketing products that meet consumers' growing interest in more environmentally smart alternatives that help improve indoor air quality and reduce effects on the environment.

Johns Manville urges the Commission to update its Green Guides with guidance on new and emerging green claims to reduce consumer confusion, or the potential for consumer confusion, and to add clarity that will avoid unnecessary disputes among competitors over these types of claims. Johns Manville supports the Commission in its efforts to update the Guides and offers recommendations for possible revisions to the Guides in the area of green building products. Johns Manville's proposed principles for addition to the Green Guides are as follows:

- If the FTC addresses "free" claims in its revised Green Guides, "free" claims should be permitted, but only when they can be substantiated by competent and reliable scientific evidence showing that: (1) none of the chemical was added during the manufacturing process, and (2) when tested, the product does not emit or off-gas levels of the chemical that are material to consumers, *i.e.*, in the context of health considerations, no more than background and applicable health-based standards for safe exposure.²
- An unqualified "free" claim should be considered deceptive if it is based on the absence of a chemical that has never been associated with a particular product.

² Johns Manville and its principal competitors (through their trade association, the Formaldehyde Council, Inc.) recently ended a long dispute over "free" claims and other environmental claims relating to Johns Manville's Formaldehyde-freeTM fiber glass building insulation. Johns Manville's claims are not currently covered by the Green Guides. (See *Johns Manville, Corp.*, FTC File No. 072-3077 (<http://www.ftc.gov/os/closings/staffclosing.shtml>); NAD News Release, "Johns Manville Substantiates 'Formaldehyde-Free' Tagline in NAD Forum." (search "Johns Manville" at <http://www.nadreview.org/NewsRoom.asp?SessionID=1440909>)). The "free" claims were addressed in the NAD's November 2005 decision (available for purchase from the NAD at <http://www.nadreview.org/ContactUs.asp?SessionID=1440909>). The NAD concluded that Johns Manville possessed adequate substantiation for its "formaldehyde-free" claim because: (1) Johns Manville does not add formaldehyde to its building insulation as part of the binder that holds the glass fibers together in batts; and (2) when tested, the insulation does not off-gas formaldehyde in amounts that are important to consumers. In determining what amounts are important to consumers, the NAD held both that the amount of formaldehyde emitted from the products should not be above background levels (3 – 4 parts per billion in the case of formaldehyde) and the amount should be a fraction of any applicable health standard. The NAD expressed in that decision that Johns Manville's "formaldehyde-free product constitutes a genuine product innovation," and that, "even though formaldehyde-bonded insulation on its own does not pose health problems, the product in combination with many other formaldehyde-emitting products, such as furniture and carpeting, could contribute to higher levels of formaldehyde in the home environment."

- Claims regarding product emissions certification that are granted based on meeting a defined certification threshold are deceptive if they communicate a health, safety, or environmental benefit, expressly or by implication, and if the pre-determined threshold is not consistent with well-established health, safety, or environmental standards.
- Third-party organizations that certify products as “low-emitting” or otherwise should be truly independent from the organization that tests for product emissions and, if they are not, this fact should be fully disclosed in any advertising for the certified product.
- The methods or scientific principles that are used to make claims about building product attributes should be transparent and based on competent and reliable scientific data derived using a reliable methodology.
- Environmental claims should be substantiated with competent and reliable scientific evidence, and environmental claims based on product testing or modeling should be limited to the conditions in the testing or modeling. Otherwise, a clear and conspicuous disclosure is required to prevent deception.

I. “Free” Claims

Given that many consumers may be concerned about the level of certain chemical emissions in their homes, like formaldehyde, advertisers should be entitled to tout the availability of a “free” product.³ Unqualified “free” claims are not inherently comparative claims, and are not somehow automatically deceptive because, as one commenter noted, without any support, “they generally overstate the facts.”⁴ A claim must be qualified only if it is susceptible to more than one interpretation by a non-insignificant portion of the target audience, and at least one such interpretation is false, misleading, or unsubstantiated. A new general rule couched as guidance in the Green Guides requiring all “free” claims to be qualified is unnecessary, inconsistent with FTC law, and has the potential to frustrate or discourage innovation. It also has implications for a myriad of other “free” claims not subject to the Green Guides.

³ Fully 85% of consumers want insulation with no added formaldehyde if given the choice, according to a study performed in 2001 by HousingZone.com.

⁴ See Comment filed by the Formaldehyde Council, Inc., Feb. 11, 2008, regarding Green Guides Regulatory Review, Comment Project No. P954501 (emphasis added).

In November 2005, the National Advertising Division of the Council for Better Business Bureaus (“NAD”) found that Johns Manville possessed adequate substantiation for its “formaldehyde-free” claim.⁵ The NAD did not require qualification for the formaldehyde-free claim. And, when the case was referred to the FTC, the FTC did not require qualification for the formaldehyde-free claim, unless the claim is made in the context of statements either about a “healthier, safer home” or about the International Agency for Research on Cancer’s 2004 action to move formaldehyde to Group 1 known human carcinogen status.⁶

It is also absurd to require that all “free” claims “qualify whether the basis for the comparison is the product alone, the packaging, the product’s overall environmental or health and safety performance, or some other measure.”⁷ Whether a disclosure or qualification is required in any instance is fact-specific, based on what the claim communicates to a non-insignificant portion of reasonable members of the target audience. No blanket rule is necessary or prudent under longstanding FTC principles.

Principle: If the FTC addresses “free” claims in its revised Green Guides, “free” claims should be permitted, but only when they can be substantiated by competent and reliable scientific evidence showing that: (1) none of the chemical was added during the manufacturing process, and (2) when tested, the product does not emit or off-gas levels of the chemical that are material to consumers *i.e.*, in the context of health considerations, no more than background and applicable health-based standards for safe exposure.

By allowing these types of claims, the FTC would provide an incentive for companies to create innovative new products that provide what consumers want, such as products that are consistent with their goals of making their homes healthier and safer and that benefit the environment.

If a “free” claim can be adequately substantiated, it should be permitted by the Green Guides. Johns Manville offers the following example as a permissible “free” claim:

Example 1: *Company A offers formaldehyde-free fiber glass building insulation. This claim would be substantiated if the Company does not add formaldehyde to the binder for its building insulation products and if the Company has reliable, independent laboratory product emission test data.*

⁵ NAD News Release, “Johns Manville Substantiates ‘Formaldehyde-Free’ Tagline in NAD Forum.” (search “Johns Manville” at <http://www.nadreview.org/NewsRoom.asp?SessionID=1440909>). The NAD’s November 2005 decision is available for purchase from the NAD at <http://www.nadreview.org/ContactUs.asp?SessionID=1440909>.

⁶ See *Johns Manville, Corp.*, FTC File No. 072-3077 (<http://www.ftc.gov/os/closings/staffclosing.shtml>).

⁷ See Comment filed by the Formaldehyde Council, Inc., Feb. 11, 2008, regarding Green Guides Regulatory Review, Comment Project No. P954501.

The Commission might consider the following example to be an impermissible “free” claim:

Example 2: A manufacturer makes fiber glass insulation with a binder that contains added formaldehyde. The manufacturer has received “certification” that its product is “low-emitting” or made with some emission reduction technology. The manufacturer claims that its products are “formaldehyde-free” or that there is no difference between “low-emitting” products and products that are formaldehyde-free. This type of claim would be considered deceptive, not only because formaldehyde is added, but also if the levels of formaldehyde expose consumers to levels above those considered safe by well-established health standards.

Principle: An unqualified “free” claim should be considered deceptive if it is based on the absence of a chemical that has never been associated with a particular product.

The following example illustrates this point:

Example 3: An advertiser claims that its windows are formaldehyde-free. Even though the advertiser can substantiate this claim by showing that: (1) the window is manufactured without formaldehyde, and (2) the window does not off-gas levels of formaldehyde material to consumers, this claim would be deceptive because windows are not a source of formaldehyde in the home.

II. Third-Party Certification of Building Products Attributes

There are an increasing number of third-party “green” certification organizations entering the marketplace today. In the building sector, many of the third-party certification standards relate to air quality and provide certification for building products that can demonstrate a “low” emission rate for hazardous chemicals. The certification standards are often based on limits for chemicals established by governmental agencies, like the U.S. Environmental Protection Agency or California’s Air Resources Board and Office of Environmental Health Hazard Assessment. Some certification thresholds, however, are merely performance-based (based on what industry generally achieves) and do not demonstrate that a product is below the level of health concern (or for that matter, environmental significance) because such standards are typically higher than the recommendations or limits established by the many health and environmental agencies or organizations or by environmental experts. Johns Manville believes that claims based on these types of performance-based certifications may be deceptive without adequate qualification disclosing the fact that the threshold is performance-based.

Principle: Claims regarding certifications that are granted based on meeting a defined certification threshold are deceptive if they communicate a health, safety, or environmental benefit, expressly or by implication, and if the pre-determined threshold is not consistent with well-established health, safety, or environmental standards.

Johns Manville provides the following example to illustrate this point:

Example 1: A building product is advertised as having been certified by a third-party certification organization for products emitting low levels of X chemical that is known to have health impacts if inhaled. The claim does not disclose the fact that the certification threshold is performance-based (based on what industry generally achieves) and not health-based. As a result, the threshold level to achieve certification is higher than many health-based standards and recommendations from well-regarded health and environmental agencies and organizations. Without a disclosure indicating that the certification is performance-based and not intended to be health-based to achieve health-based standards or recommendations, this claim would be deceptive because the certification may convey to consumers that the product is safer or healthier and meets actual health-based standards and recommendations, when in fact that implied claim lacks any substantiation.

The FTC's guidance on endorsements and testimonials is useful and can readily be applied to third-party certifications of building products. This guidance states that third-party certification organizations must be truly independent from the advertiser and must have professional expertise in the area that is being certified.⁸ Johns Manville would like to see examples in the Green Guides to demonstrate this principle as it relates to green building claims.

Principle: Third-party organizations that certify products as "low-emitting" or otherwise should be truly independent from the organization that tests for product emissions and, if they are not, this fact should be fully disclosed in any advertising for the certified product.

Johns Manville offers the following example to illustrate this point:

Example 2: A manufacturer advertises its building product as having been certified by X Third-Party organization as "low-emitting." The certification is based on product testing by Y Testing organization. There is some affiliation between the X Third-party Certification organization and the Y Testing organization. For example, some members of the Y Testing organization's board of directors overlap with X Third-Party

⁸ FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 45 FR 3873, Jan. 18, 1980, as amended, 16 C.F.R. § 255.4.

Certification organization's board of directors, but this fact is not disclosed. The failure to disclose this relationship may be material to consumers in evaluating the reliability of the certification organization's results. Failure to disclose such a material fact violates the FTC Act.

III. Transparency

Johns Manville believes that the methods or scientific principles that are used to make claims about building product attributes should be transparent and based on sound science. The FTC's Home Insulation Rule, 16 C.F.R. Part 460, provides an example of why transparency is important. Under the Home Insulation Rule, all insulation manufacturers must use specific and transparent methods to determine the R-value of insulation. The consistency in R-values provides consumers with the assurance that the R-value in all insulation products is measured by the same standard.

Johns Manville believes that the Green Guides should be revised to include a discussion about the importance of transparency in technical claims.

Principle: The methods or scientific principles that are used to make claims about building product attributes should be transparent and based on competent and reliable scientific data derived using a reliable and independently repeatable methodology.

The Commission might consider the following example to demonstrate this point:

Example 1: An advertiser claims that its building product is low-emitting of a specific chemical. While an advertiser is not required to disclose its substantiation for making a product claim (unless it is at odds with methods used by experts in the field), the method or scientific principles used to support this claim should be made available to consumers and the scientific community to help them make informed purchase decisions.

IV. Advertising Substantiation

The Green Guides currently provide useful guidance on advertising substantiation by citing to the Commission's Advertising Substantiation Policy Statement.⁹ Under the Commission's Policy Statement on Advertising Substantiation, substantiation generally requires that one have a reasonable basis for any product claim at the time it is made.¹⁰ The Guides explain that

[i]n the context of environmental marketing claims, such substantiation will often require competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on the expertise of professionals in the

⁹ Federal Trade Commission Policy Statement Regarding Advertising Substantiation.

¹⁰ Federal Trade Commission Policy Statement Regarding Advertising Substantiation.

relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.¹¹

Principle: Environmental claims should be substantiated with competent and reliable scientific evidence, and environmental claims based on product testing or modeling should be limited to the conditions in the testing or modeling. Otherwise, a clear and conspicuous disclosure is required to prevent deception.

Given the increasing number of studies that have been published and used on “green” building materials, Johns Manville believes that industry would benefit from additional examples in the Green Guides regarding adequate substantiation in the area of environmental claims. Johns Manville provides the following example to illustrate this point:

Example 1: Manufacturer A cites to a building materials study to support certain comparative product emissions claims. The methods and results of the study have been widely criticized, including by one of the study’s principal investigators who cautioned manufacturers, architects, specifiers, builders and consumers not to rely on the study for the purpose of material selection. Manufacturer A’s claims would be considered deceptive because the study cannot be used to substantiate its claims.

Environmental claims based on product testing or modeling should be tailored to the conditions in the testing or modeling, and if these conditions differ from the conditions reasonably assumed by members of the target audience, an appropriate qualifier is necessary. For example, to determine how a product’s emissions affect indoor air quality, the product should be tested to emulate indoor air concentration of the chemical at issue.

A claim about a product’s emissions as it relates, directly or by implication, to indoor air quality in a home would be considered deceptive if the modeling uses the ventilation rate for commercial buildings instead of the generally lower rate for new homes. The ventilation rate for commercial buildings assumes the presence of continuous mechanical ventilation and a ventilation rate of approximately 1 air change per hour or more. In contrast, the majority of newly constructed homes do not have continuous mechanical ventilation and achieve a ventilation/infiltration rate in the range of 0.15 to 0.50 air changes per hour. The difference in the ventilation rates can grossly affect the indoor air concentration calculation. For example, a product may be certified to meet, *e.g.*, 50 parts per billion formaldehyde at a ventilation rate of approximately 1 air change per hour. In a new home with a much lower effective ventilation/infiltration rate of approximately 0.33 air changes per hour, the resulting estimated formaldehyde concentration could be as high as 150 parts per billion, well above the certification threshold. A discrepancy of this

¹¹ 16 C.F.R. § 260.5.

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magnitude may result in a deceptive claim about a building product's environmental attributes relating to a home's indoor air quality, thus misleading consumers in the target audience.

Johns Manville appreciates the opportunity to provide comments on the Green Guides review and looks forward to participating in further workshops and developments on this topic.

Sincerely,


Bruce D. Ray
Director, Governmental and Regulatory Affairs
Associate General Counsel