

BEFORE
THE UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMENTS OF THE
AMERICAN HERBAL PRODUCTS ASSOCIATION

ON

PROPOSED REVISED GREEN GUIDES
16 CFR Part 260, Project No. P954501

December 10, 2010

The American Herbal Products Association (AHPA) is the national trade association and voice of the herbal products industry. AHPA is comprised of domestic and foreign companies doing business as growers, processors, manufacturers, and marketers of herbs and herbal products. AHPA serves its members by promoting the responsible commerce of products that contain herbs.

Background

The Federal Trade Commission (FTC or the agency) issued a proposed rule in the Federal Register on October 15, 2010 in which it identified proposed revisions to its Guides for the Use of Environmental Marketing Claims (“Green Guides” or “Guides”). In its proposed rule, the agency states that the Guides were originally issued in 1992 and were revised in 1996 and in 1998. The agency states that the Guides help marketers that make environmental marketing claims to avoid making deceptive environmental marketing claims.

AHPA includes in its membership companies that make, or that may make, environmental marketing claims. AHPA therefore has an interest in FTC’s revision of the Green Guides and offers the following comments. AHPA appreciates FTC’s attention to the issue of environmental marketing claims and the opportunity to comment on the proposed rule.

Summary of comments

AHPA is providing here comments on four specific sections of the proposed revised Green Guides as these sections have been identified as of possible relevance to AHPA’s members. The absence of comments on the other sections of the proposed rule indicates that AHPA has not at this time identified a need to modify these sections. AHPA is also providing comments to one of the several specific requests for comments solicited by FTC in the proposed rule.

An unqualified general environmental benefit claim can feasibly be substantiated

In the preamble of the proposed rule, FTC states that the revised Guides “cautions marketers not to make” unqualified general environmental benefit claims. 75 FR 63552 at 63552. The revised Guides themselves, however, bluntly state that marketers “should not make unqualified general environmental benefit claims.” Proposed 16 CFR § 260.4 (b).

AHPA believes that there may be conditions under which an unqualified general environmental benefit claim would not be deceptive. An example might be, for

example, “Eco-Friendly Farms,” a small farm or orchard that is certified as in compliance with USDA’s National Organic Program; that produces much or all of its needed energy through wind or solar power, or through purchase of carbon offsets; that uses only recycled materials for packaging, or that ships or delivers its produce unpackaged; and that is engaged in other activities such that a consumer’s expectation of what is meant by “eco-friendly” is entirely realized.

AHPA therefore recommends that § 260.4 (b) be revised to recognize that there may be conditions under which an unqualified general environmental benefit claim would not be deceptive. FTC may consider adding an example, such as the one provided here, to indicate that while it may be uncommon for such general claims to be able to be made without deception, there may be instances in which such claims are not deceptive.

AHPA further believes that if FTC decides to maintain its position that marketers “should not make” unqualified general claims, that position may serve as a disincentive for marketers to invest in making their products comply with more strict environmental standards. While it is outside of the scope of FTC’s role to take actions that explicitly or implicitly advocate for more strict environmental standards, neither should the agency take actions that might have the opposite effect. AHPA therefore encourages FTC to revisit this language in the proposed revised Guides.

Claims for legally required carbon offsets may not be necessarily deceptive

The proposed revised Guides at § 260.5 (c) state, “It is deceptive to claim, directly or by implication, that a carbon offset represents an emission reduction if the reduction, or the activity that caused the reduction, was required by law.” An example is given of an offset provider that makes a claim based on legally required methane capture at a landfill, which claim FTC identifies as deceptive.

AHPA is not commenting on the specific example described here, and acknowledges that the market for carbon offsets and the rules that govern this market are outside of AHPA’s scope of expertise. Nonetheless, a scenario can be envisioned in which a marketer that purchases legally required carbon offsets and wants to claim that it does so can do so without being deceptive. For example, a company may wish to truthfully claim that its factory is “carbon neutral” due to its purchase of carbon offsets, some of which are related to renewable energy production in states that require its utilities to produce some portion of its energy by renewable means.

AHPA therefore suggests that FTC re-examine whether all claims related to carbon offsets that are legally required are, in fact, necessarily deceptive. AHPA further suggests that the agency examine whether truthful disclosure of the fact that carbon offsets are related to legally required emission reductions may serve to mitigate any potential deception. FTC may also consider whether reconsideration of this point and recognition that carbon offset claims that are associated with legally required emission reductions may not always be deceptive might prove to be a motivation for businesses to promote laws that mandate emission reductions in their municipalities or states. While it is outside of the scope of FTC's role to take actions that explicitly or implicitly advocate for laws that mandate emission reductions, neither should the agency take actions that might have the opposite effect.

The Guides should directly state an absence of concern for recycling claims for commonly recyclable materials

The proposed revised Guides as written may place a burden on marketers of goods that are packaged with recyclable materials and bear a recycling claim to know what recycling facilities are available in every community where their products are sold. Specifically, § 260.11(b) describes three different scenarios of the degree to which recycling facilities are available in different communities and states that certain qualifications would need to be stated on product labels in areas where recycling facilities are not available "to a substantial majority" or are only available "to less than a significant percentage" of consumers or communities in order to avoid deceptive recyclable claims.

AHPA recognizes that some of the examples provided in the Guides in this section describe packaging for which recycling facilities may only be rarely available (e.g., foam polystyrene and a material of bonded layers only some of which are recyclable). But there are other recyclable materials for which recycling facilities are generally available throughout the U.S.

The Environmental Protection Agency (EPA) reports that the portion of municipal solid waste that is recycled has increased steadily from 6.2% in 1965 to 33.2% in 2008. EPA also reports recycling rates in 2008 of 71% of office-type papers; 63% of steel cans; 48% of aluminum cans; 29% of HDPE bottles; 28% of glass containers; and 27% of PET bottles and jars.¹ For many or all of these readily recycled materials it may be assumed that recycling facilities are widely available throughout the country.

¹ United States Environmental Protection Agency. November 2009. Municipal solid waste generation, recycling, and disposal in the United States: Facts and Figures for 2008. U.S. EPA: Washington, DC.

AHPA believes that the language in § 260.11(b) may nonetheless be read to imply that a marketer that provides a recyclable message on products in steel or aluminum cans or in glass or commonly used plastics bottles would need to conduct research to determine whether adequate recycling facilities for these materials exist for a “substantial majority” of consumers throughout its product distribution range or in specific communities where its products are sold. At the same time, AHPA does not believe this to be FTC’s intention.

AHPA believes that most consumers already know whether such commonly recycled materials can be recycled in their communities, even without having this information provided on package labeling. AHPA therefore requests that FTC revise § 260.11 to declare that the agency does not have concerns over deceptive recycling claims for commonly recycled packaging materials, such as glass, steel, aluminum, HDPE, and PET, either through added text in this section or with examples.

Consumers can be aware of the capabilities of available composting facilities

Much as AHPA believes that most consumers already know whether commonly recycled materials can be recycled in their communities, AHPA also believes that consumers can know, or become aware, of what composting facilities are or are not available in their communities and of the capabilities of these facilities. Such knowledge can be imparted either by a qualifying statement to the effect that facilities may not be available, or by describing the needed capabilities on package labeling. But it should not be necessary to provide both of these kinds of qualifying statements to avoid deception.

The Guides in § 260.7 address compostable claims and make a similar point as is made for recycling claims with regard to possible deception when a claim is made without taking into account whether adequate facilities are available for composting the material identified in claims. The Guides state that to avoid deception with regard to this issue, claims should be qualified “if such facilities are not available to a substantial majority of consumers or communities where the item is sold.” § 260.7 (d).

AHPA has no opposition to this concept, but believes that a statement as to the capabilities required for composting the specific material identified as compostable is sufficient qualification, and that such statement is not deceptive even if not accompanied by another statement that informs consumers that facilities without such capabilities might not be present where they live.

It may be that Example 4 in § 260.7 could be modified to convey this message. This could be done by adding the following as an alternative qualifying statement: “Compostable only at facilities that compost lawn and leaf bags.”

It may be best though to provide a separate example, for example, for a box that is made of recycled cardboard in which heavy metals may have accumulated due to recycling processes, and from which these potentially toxic compounds should be removed prior to or as a function of composting. A composting claim could be appropriately qualified either by stating, “Compost only at facilities with toxic removal capabilities,” or “Appropriate composting facilities may not be available in your area.” But AHPA does not believe that both of these qualifications are needed to avoid deception.

The Green Guides should not address organic claims for non-agricultural products

FTC states in its proposed rule that it does not propose to address organic claims in the Guides. 75 FR at 63585. The agency notes that USDA’s National Organic Program (NOP) regulates the term “organic” for agricultural products, and states that NOP does not regulate organic claims for non-agricultural products. 75 FR at 63583. The agency requests comments on what guidance, if any, it should provide in its Green Guides regarding the use of organic claims to describe non-agricultural products.

AHPA believes that FTC has correctly determined that the Green Guides should not address organic claims, either for agricultural or non-agricultural products. The agency correctly states that USDA’s NOP regulates such claims for the former, and asserts that a marketer that makes an organic claim must be able to substantiate such claim. This last position is not in conflict with the NOP, since substantiation is already required through adherence with NOP’s complex rules for organic production and handling.

On the matter of organic claims for non-agricultural products, AHPA believes that this topic is complex, and that significant expertise already exists on this issue at NOP and the associated National Organic Standards Board. AHPA therefore recommends that FTC leave this issue to NOP, and refrain from providing any guidance in this area at this time.

Conclusion

The American Herbal Products Association has provided comments here to those sections of FTC’s proposed revised Green Guides that have been identified as of possible interest to AHPA member companies that currently make

environmental benefit claims or that may have an interest in doing so in the future. AHPA appreciates the opportunity to provide this information.

Please feel free to contact us if further clarification is needed on any of the points raised herein.

Respectfully submitted,

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