



Driving Innovation in Housing Technology

December 10, 2010

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

Re: Proposed, Revised **Green Guides**, 16 CFR Part 260, Project No. P954501

Dear Sir or Madam:

On behalf of the NAHB Research Center I would like to thank you for the opportunity to provide comments on the proposed revisions to the Federal Trade Commission's Guides for the Use of Environmental Marketing Claims ("**Green Guides**").

The NAHB Research Center

The NAHB Research Center is an independent research organization and accredited, third-party testing laboratory. The Research Center was established in 1964 by the National Association of Home Builders as a wholly-owned subsidiary that would operate autonomously from the trade association. For the past 45 years, the Research Center's mission has been to improve the durability, affordability, and performance of housing. The Research Center is incorporated as a for-profit company. Our clients include the United States Military, U.S. Department of Housing and Urban Development, U.S. Department of Energy, local government entities, product manufacturers, builders, academic institutions, and industry trade associations.

Our housing expertise is unparalleled. In our more than 45-year history in the home building industry, the NAHB Research Center has helped to improve products, practices, and operations for nearly every segment of the industry—from those who regulate, to those who build, to those who supply the building products. We employ a team of over 80 professional staff whose expertise range from building science, civil and structural engineering, market research, product testing, city planning, environmental studies, and sociology. Our staff is knowledgeable in all building industry-related disciplines—construction, remodeling, all types of engineering, architecture, applied sciences, planning, land development, market research, educational development, IT, and communications.

In order to demonstrate competency and independence, third-party research, testing, and certification laboratories become accredited by independent accreditation organizations. To become accredited, a third party must show on an ongoing basis that it is competent to do the work, can operate independently and free of conflict-of-interest, keeps appropriate records, and has appropriate quality management policies and procedures in place.

The Research Center has earned accreditations from numerous independent accreditation organizations. With regard to product testing, the Research Center is accredited by the International Accreditation Service (a subsidiary of the International Code Council) to conduct over 100 ASTM/ANSI tests, including:

- Material properties testing
- Structural systems & component testing
- Building envelope testing
- Plumbing fixtures testing
- ANSI ADA compliance testing

Since 2001, the Research Center has been an American National Institute of Standards (ANSI) accredited standards developer. To maintain ANSI accreditation, standards developers are required to consistently adhere to a set of requirements or procedures that govern the consensus development process.

The Research Center's interest in the proposed revisions to the FTC's **Green Guides** is twofold. First, we serve as Secretariat for the ANSI-approved **ICC 700-2008 National Green Building Standard™** ("Standard"). Second, the Research Center serves as an Adopting Entity for the Standard and provides builders third-party certification services for residential projects in compliance with the Standard's requirements. The Research Center's provision of an objective and verifiable green certification program for residential projects serves to improve the environmental performance of conventional residential construction while helping consumers make informed decisions about homes claiming to be green.

General Comments

The Research Center concurs with the FTC that there is consumer confusion about environmental claims. This confusion spills over to home buyers and renters seeking homes with green features. The FTC **Green Guides** will serve an important role in dispelling confusion and reducing deception by publishing clear and specific guidance to those that make environmental claims aimed at consumers.

Further, we concur the **Green Guides** should address certifications, specifically those certifications conferred to green buildings. The concept of a "green home" is relatively new and over the past decade there has been a proliferation of green building labeling programs and rating systems. The credibility, legitimacy, and rigor of these programs vary considerably. Unfortunately, the programs' veracity is not always transparent to the home buyer, thus frustrating the original goal of many of the programs – to help consumers be better informed about the housing choices they are making. We support the FTC's decision that marketers, including builders, should not use unqualified certifications.

Two areas warrant further discussion and guidance in the FTC **Green Guides**. First, guidance is needed regarding how information is made available to the public regarding green building certification. Second, specific guidance is necessary to ensure educational designations for professionals that have undergone green building training are not confused with building certifications.

To the first point, the Research Center encourages the FTC to be specific in what information consumers should have access to regarding any seal of approval or certification program, including building certification programs. Unlike certain product certifications, building certifications are necessarily complex and multi-faceted. However, not all building certification programs are equally robust with regard to the green building criteria and/or the certification process. More importantly, not all programs are open and transparent with regard to their program's policies, procedures, and processes. Such information is just as important to consumers as a marketer openly identifying any material connection between them and the certification agent.

The Research Center strongly encourages the FTC to specify that information regarding the performance criteria, third-party verification, internal quality controls, and certification processes should be easily accessible online and in print to any interested party. Disclosure will help ensure that consumers can best evaluate the veracity and credibility of certifications being offered to them by builders.

To the second point, the Research Center encourages the FTC to provide guidance to professionals that have attained any educational designation that it is misleading and deceptive to represent, directly or by implication, that their professional designation automatically results in their constructing a certified building or development. The Research Center certifies specific residential buildings and developments, not individuals or builders. Some individuals would lead the public to believe that their professional designation has bearing on the buildings they design or construct. It does not. To advertise such projects as green by virtue of a professional designation the builder or designer has earned is deceptive and misleading.

Specific Comments

RE: § 260.6 – Certifications and Seals of Approval

- (a) It is deceptive to misrepresent, directly or by implication that a product, package, or service has been endorsed or certified by an independent third-party.*
- (b) A marketer's use of the name, logo, or seal of approval of a third-party certifier is an endorsement, which should meet the criteria for endorsements provided in the FTC's Endorsement Guides, 16 C.F.R. Part 255, including Definitions (§ 255.0), General Considerations (§ 255.1), Expert Endorsements (§ 255.3), Endorsements by Organizations (§ 255.4), and Disclosure of Material Connections (§ 255.5).*

Comment: This new section clarifies that third-party certifications and seals constitute endorsements covered by the **Endorsement Guides** and that, consequently, marketers are required to disclose a "material connection," or a "connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement." Specifically, the FTC added a new section that advises marketers that it is deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent, third-party organization.

The NAHB Research Center concurs that trade associations that issue certifications to members have a "material connection" to the member. However, trade associations may have

autonomous subsidiaries that operate completely independent of the parent association and provide certifications within their industry. If a certification body does not have members, is not sustained by member dues-generated revenue, and operates as an independent, third-party organization should, the FTC should deem such an organization as meeting the definition of an independent, third-party even if they are a subsidiary of a trade association.

Independent, third-party organizations follow a fairly consistent set of rules and procedures that govern their third-party practice. The common operating procedures for third parties are as follows:

- *Identifiable Entity* – The entity providing third-party services must be legally identifiable and have documentation which describes its functions and the technical scope of activity for which it is competent to inspect or certify. Third parties may be an independent company, a subsidiary of another company, or an entity within a company. Whatever the structure of the entity, its organization and management must be identified in an organizational chart with roles and responsibilities of the staff identified, including who has the ultimate decision-making authority and the ultimate accountability.
- *Qualified Personnel* – The entity must have permanent personnel with the range of appropriate qualifications, training, experience, and knowledge of the third-party work being done to ensure it is compliant with the standards. Each job must have a job description which includes requirements for education, training, technical knowledge, and experience of its personnel.
- *Institutional Capability* – The entity must maintain a capability to provide the services it is accredited to provide including named persons it will “deputize” in the absence of any manager responsible for inspection/certification. That is, the entity must be able to conduct business even in the absence or loss of key staff.
- *Independence, Impartiality, and Conflict of Interest* – The entity must be able to demonstrate it is free of influence of outside parties, including parent companies, and impartial in its inspection/certification decisions. Certification decisions must be governed exclusively by the agency’s determination of the product’s compliance with applicable standards and no other factors. Even the appearance of conflict of interest must be avoided, especially when they are closely affiliated with or have existing relationships with those they would inspect or certify.
- *Record Keeping* – Records of all evaluations, reports, and certification decisions must be kept and made available to auditors upon demand.
- *Management of Subcontractors* – The entity must ensure and demonstrate that any subcontractor involved with providing the service is competent to perform the service and complies with all standards and criteria. The organization must maintain the ultimate responsibility for any work done by a subcontractor.

Credible third parties meet all of the criteria above, not just the condition that there is no material connection between the endorser and the seller. We suggest that the FTC include these

additional criteria in its consideration of whether an organization is an independent, third party. Furthermore, this information should be publically available for consumers to be able to make informed decisions about certification programs.

RE: §260.3 – General Principles

(a) Qualifications and disclosures – To prevent deceptive (environmental marketing) claims, qualifications and disclosures should be clear, prominent, and understandable. To make disclosures clear and prominent, marketers should use plain language and sufficiently large type, should place disclosures in close proximity to the qualified item, and should avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosure.

Comment: The Research Center concurs that qualifications should be clear, prominent, understandable, and in plain language. However, the FTC should explicitly allow marketers to meet their obligations by directing consumers from promotional materials to a secondary source such as a website for additional, supporting information. There is a tension between providing consumers with sufficient information to make an informed decision and overwhelming them with detailed information so that marketers cannot effectively market product features.

As an example, the NAHB Research Center certifies homes in compliance with the National Green Building Standard. Homes compliant with the Standard include building practices to improve water, resource, and energy efficiency; minimize the impacts of lot design and construction; protect indoor air quality; and ensure the home owner receives information on the home's operation and maintenance. Over 85 green building practices, as identified by the Consensus Committee that developed the Standard, are included in a home certified to the Standard. Under our certification program, we would suggest to the FTC that the statement "Green Certified to ICC 700" be deemed acceptable because it provides the consumer with meaningful substantiation with regard to the green claims a builder might make of a home. It would be impracticable for the builder to have to provide in their marketing materials the detailed list of green practices to make a claim that the home has sustainable attributes.

Another reason "Green Certified to ICC 700" should be acceptable is that the Standard requires the builder to provide the owner with information about the green features of their certified building and a certificate of completion indicating the rating level that the building has achieved. Thus, inherent with the certification is a disclosure which qualifies the green claim.

The FTC should allow a marketer to provide additional information and substantiation on a website or as part of a secondary set of marketing materials readily available to any potential consumer. Consumers have been conditioned to seeking supplementary information from additional sources. For example, the Food and Drug Administration does not require drug companies to include all of a drug's risk information in a broadcast advertisement. Instead, the advertisement may tell where viewers or listeners can find more information about the drug in the FDA-approved prescribing information. This is called the "adequate provision" requirement. For broadcast ads, the FDA sanctions a variety of sources of prescribing information to fulfill this

requirement. According to the FDA, broadcast ads can give the following sources for finding a drug's prescribing information:

- A healthcare provider (for example, a doctor)
- A toll-free telephone number
- The current issue of a magazine that contains a print ad
- A website address

The Research Center suggests that the FTC adopt a similar provision to the FDA's "adequate provision" requirement and allows comparable sources for a certification's substantiation information.

Example: Advertisement claim – *"Our certified green homes are built in compliance with the ANSI-approved ICC 700-2008 National Green Building Standard™.*"*

Qualification or disclosure – *For more information go to www.nahbgreen.org/Standard or reference the homeowner's manual available from the builder.

Conclusion

The NAHB Research Center appreciates the opportunity to provide comments on the proposed revisions to the **Green Guides**. To reiterate, the NAHB Research Center wholeheartedly supports the FTC's efforts through the **Green Guides** to help marketers avoid making unfair or deceptive environmental marketing claims and is generally supportive of the proposed revisions.

If you have any questions about these comments, or require additional information about the NAHB Research Center's National Green Building Certification program, please do not hesitate to contact our Director of Green Building Programs, Michelle Desiderio (mdesiderio@nahbrc.com or 301.430.6205).

Best,

Michael Luzier
President