



American Coatings ASSOCIATION

December 10, 2010

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

RE: Comments of the American Coatings Association on the Proposed Revised
FTC Guides for the Use of Environmental Marketing Claims (Green Guides)

To Whom It May Concern:

The American Coatings Association (ACA) is submitting these comments on the October 2010 DRAFT FTC Guides for the Use of Environmental Marketing Claims (Green Guides). ACA is a voluntary, nonprofit trade association representing some 350 manufacturers of paints, coatings, adhesives, sealants, and caulks, raw materials suppliers to the industry, and product distributors. As the preeminent organization representing the coatings industry in the United States, ACA's primary role is to serve as ally and advocate on legislative, regulatory and judicial issues at the federal, state, and local levels. In addition, ACA provides members with such services as research and technical information, statistical management information, legal guidance, and community service project support.

The American Coatings Association (ACA) has a keen interest in the proposed, revised FTC Green Guides as they seek to address unfair and deceptive practices associated with environmental-related claims made on product labels, in advertising and promotional materials in any medium. ACA has a long history in advising paint manufacturers on hazard and precautionary labeling claims in its detailed Industry Labeling Guide, practices which are covered by regulatory requirements administered by other government agencies, including the Consumer Product Safety Commission (CPSC) under the Federal Hazardous Substances Act (see 16 CFR 1500.121), The Occupational Safety and Health Administration (OSHA) under the Hazard Communication Standard (see 29 CFR 1910.1200) and in various other statutes administered by the U.S. Environmental Protection Agency (EPA) for products subject to air quality and pesticide regulations. These labeling regulations are complex and difficult to apply to paints, which are complex mixtures of chemicals.

Increasingly, paint manufacturers are seeking to formulate and offer products that have environmental attributes; most frequently lower emissions of volatile organic compounds (VOCs) that help reduce air pollution and improve indoor air quality. The basis for many of these claims is grounded in regulatory requirements, including sampling and test

methods that have been validated through notice and comment and serve as a clear basis for substantiation of claims. Accordingly, ACA and its members appreciate the clarity and level of detail provided in the proposed, revised Green Guides on how marketing claims are to be viewed by the Federal Trade Commission.

That being said, however, it is recognized that the scope and application of the eventual, finalized Green Guides, however detailed cannot possibly address all of the specific environmental marketing claims that may emerge for all products in commerce. In fact, then FTC's own research efforts to address the efficacy of environmental marketing claims with purchasers only offered a limited inquiry into a few, more frequently used claims. As a result, we appreciate the fact that the current proposal offers an acknowledgement that the scope and contents have been developed to be broad and far reaching on critical principles for environmental claims, but individual product manufacturers may also seek to create specific, but substantiated environmental claims arising out of regulatory requirements unique to their industry. Acceptance of this principle will help address any claims of unfair or deceptive practices under Section 5 of the FTC Act. Accordingly, the statement in the proposed, revised guidelines that "compliance with... laws... will not necessarily preclude Commission enforcement action under the FTC Act" (p194, Section 260.1) seems an overreach and a challenge that need not be introduced.

ACA also appreciates the fact that the proposal clarifies what types of information may constitute a "reasonable basis" for environmental marketing claims, choosing to lay a foundation of reliable scientific evidence, and objecting test and research data.

The following specific comments address certain sections of the proposal that we feel may need clarifying in any final guidance.

Respectfully Submitted,



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IV. General Issues

A. Continuing Need for the Guides

FTC ANALYSIS:

Based on the consensus that the Guides benefit both consumers and businesses, the Commission proposes to retain them. As discussed below, however, the Commission proposes several revisions to ensure that the Guides reflect consumer perception and new claims in the marketplace.

ACA COMMENTS:

ACA believes that the Green Guides continue to serve an important purpose. They are a helpful resource for marketers, product stewards, regulatory affairs professionals and other professionals. They provide a helpful barometer to assist in measuring the clarity of a marketing message.

F. Life Cycle Analysis

FTC ANALYSIS:

After reviewing the comments and the results of its consumer perception study, the Commission has decided not to propose guidance about the use of life cycle information either in marketing or as substantiation for environmental claims. First, the Commission lacks information about how consumers interpret life cycle claims in marketing. Moreover, due to the complexity and variability of these claims, general advice is unlikely to be useful in any particular case. Therefore, the Commission will continue to analyze these claims on a case-by case basis.

Second, the Commission declines to propose advising marketers either to conduct an LCA to substantiate environmental claims or to follow a particular LCA methodology. Relatively few respondents viewing broad environmental claims (approximately 15 percent) considered each of the life cycle stages. Therefore, the results of the study do not provide a basis for advising marketers to conduct an LCA to substantiate environmental claims. Marketers may rely on the results of an LCA as all, or part of, their substantiation, as long as they ensure that the LCA results constitute competent and reliable scientific evidence to support their claims.

ACA COMMENTS:

ACA strongly supports the FTC's decision not to propose guidance about the use of life cycle information either in marketing or as substantiation for environmental claims. We believe that the current LCA standards are not uniform enough to provide meaning to marketing or substantiation efforts.

V. Claims Addressed by the Current Green Guides

A. General Environmental Benefit Claims

4. Analysis and Guidance

b. Qualified General Environmental Benefit Claims

FTC ANALYSIS:

The Commission is concerned that a general environmental benefit claim, in combination with a particular attribute, may imply that the particular attribute provides the product with a net environmental benefit. If a particular attribute represents an environmental improvement in one area, but causes a negative impact elsewhere that makes the product less environmentally beneficial than the product otherwise would be, consumers may be misled. For example, a marketer that claims its product is “Green – Now contains 70 percent recycled content,” needs to import more materials from a distant source, resulting in increased energy use which more than offsets the environmental benefit achieved by using recycled content. If consumers interpret the claim “Green – Now contains 70 percent recycled content” to mean that the product has a net environmental benefit, the claim would be deceptive. The Commission, therefore, requests comment on consumer interpretation of qualified-general environmental benefit claims and on whether to include guidance concerning this issue.

ACA COMMENTS:

In a previous section, FTC has wisely decided that LCA methodologies are currently not uniform enough to require them for product marketing and substantiation. Given this reasoning, why would the FTC then essentially require an LCA-like analysis when a manufacturer makes a qualified general environmental benefit claim? If a product truly contains 70 percent recycled content and this is truthfully substantiated on the label, why is the FTC concerned that the recycled content in the product may have been imported from a distant land, and therefore the energy used in the process may outweigh the environmental benefit? The fact that recycled materials are being used in the process of manufacturing a new product means that less of that old material will end up in a landfill. That is the purpose of using recycled content. Also, using this flawed logic; one could argue that the energy a consumer uses to drive to the store and purchase the product outweighs the environmental benefit of the product. If an environmental claim is truthfully substantiated, then the FTC should be satisfied with that. There is no need to issue additional consumer guidance on this matter.

B. Certifications and Seals of Approval

FTC ANALYSIS:

Given the widespread use of certifications and seals and their potential for consumer confusion, the Commission proposes providing additional guidance, specifically in a new Guide section devoted to this subject. This section emphasizes that third-party certifications and seals constitute endorsements covered by the FTC’s Endorsement Guides. This section also states that the use of a certification or seal by itself may imply a general environmental benefit claim.

Because, as discussed above, such claims are so difficult to substantiate, this section further advises marketers not to use unqualified seals or certifications. Marketers should

accompany seals or certifications with clear and prominent language limiting the general environmental benefit claim to the particular attribute or attributes for which they have substantiation. Finally, the section addresses the use of certifications as substantiation.

ACA COMMENTS:

Over the past ten years a large number of certification programs have emerged to evaluate different product attributes and offer a marketable “seal of approval”. To the extent these certification programs compete in the marketplace for both the participation of product manufacturers and for consumer confidence, this phenomenon has been intriguing. The proposal’s efforts to provide a sound footing for certification and seals of approval are welcome as it serves to require substantiation and reduces the likelihood of inappropriate “green signals” that such programs have the potential to generate.

We also note and appreciate the proposal’s reference to marketer-developed certification and/or seal programs. Given that the scope of the Green Guides could never address all products, the fact that some niche product markets may never warrant a commercial certification programs, and that innovative manufacturers have the best and most detailed information that can appropriately differentiate the environmental attributes of their products, it is vital to allow marketer-created programs.

ACA agrees with FTC that manufacturers should continue to be allowed to use certifications and seals of approval in order to draw attention to the environmental attributes of a particular product. ACA also understands why FTC is proposing that marketers use accompanying language on the product label to support and substantiate the certification or seal of approval. However, ACA must point out that due to other federal and state regulatory requirements, there is increasingly less space on the product label in which to do so. Also, FTC should consider that some small products will not have enough space on the label for both a certification/seal of approval and substantiation language.

F. Recycled Content Claims

ACA GENERAL COMMENTS ON RECYCLED CONTENT CLAIMS:

Nationally, there is a concerted effort underway, to the extent possible, to have manufacturers of products assume extended responsibility for their eventual disposal. This has resulted in the advancement of numerous regulatory initiatives and voluntary demonstration programs that seek to promote both the “recyclability” of a product and the “availability of recycling facilities”. Right now, however, these two facets of an environmental claim are mutually exclusive, which brings up a critical consideration. If a product is in fact recyclable (in other words there is substantiation that the product can be and is being recycled in some venues where it is distributed), is it not a useful environmental claim to make on the product label everywhere it is distributed? Such a claim, again substantiated with feasibility and examples, may serve to foster the creation of local recycling operations that would drive environmental benefits for all. The fact that a product is marketed nationally, and that inevitably some jurisdictions do not have recycling services for that product, would preclude making a valid environmental claim,

and ACA views this as counterproductive. The final Green Guides should allow for recyclable claims appropriately substantiated.

b. Distinction between Pre- and Post-consumer Recycled Content

FTC ANALYSIS

Some commenters recommended that the Guides advise marketers to make claims only for the total amount of recycled content in an item, and not to distinguish between the amount of pre-consumer and post-consumer materials used in that item. The Commission does not propose adding this advice to the Guides. Currently, marketers making recycled content claims have the option to disclose whether the recycled content is pre-consumer or post-consumer. The Commission has no evidence that specific claims about the type of recycled content mislead consumers. In the absence of evidence that these terms are deceptive, the Commission declines to advise marketers that they should discontinue using them.

The Commission also does not propose incorporating the ISO 14021 definition of “postconsumer” material into the Guides. As discussed above, material returned from the distribution chain (e.g., overstock magazines) qualifies as “post-consumer” recycled material under ISO 14021. It is unlikely, however, that consumers would interpret such material as “post-consumer” recycled content because the material never actually reaches consumers. The commenters did not provide any consumer perception evidence to the contrary. Under the Guides, therefore, marketers may claim that this material constitutes recycled content, but not “post-consumer” recycled content.

ACA COMMENTS:

ACA agrees with the FTC’s analysis of this issue. There is no good reason to force manufacturers to make a distinction between the amount of pre-consumer and post-consumer recycled materials used in the manufacturing of a product. Recycled materials that are used in the manufacturing of a new product will not be sent to the landfill. Whether the recycled material comes from another manufacturing process or from a product discarded by a consumer should not matter. Consumers may not really understand the difference between the two types of recycled materials. Also, there is equal benefit in either type of recycled material not ending up in a landfill.

c. Calculating Recycled Content

FTC ANALYSIS:

Currently, the Guides advise marketers that recycled content claims may be based on the annual weighted average of recycled content in an item. Certain commenters suggested that the Guides allow for alternative calculation methods, such as the average amount of recycled content within a product line or across all product lines, or an offset-based approach.

The Commission does not propose making the suggested changes. As some commenters

cautioned, claims based on these alternative calculation methods could mislead consumers by implying that products contain more recycled content than they actually do. Indeed, these approaches could permit marketers to make recycled content claims for products that do not contain any such material. For example, a marketer may sell residential carpeting that contains no recycled content and commercial carpeting that contains 50 percent. If the marketer believes that individuals are more interested than businesses in recycled content, it could choose to average the amount of recycled content in both products and then make a 25 percent recycled content claim for its residential carpeting (even though this carpeting contains no recycled content). Such a claim appears to be deceptive; therefore, without consumer perception evidence to the contrary, the Commission declines to sanction it.

ACA COMMENTS:

While ACA generally agrees that recycled content claims should be restricted to each individual product, we can understand why some commenters suggested the allowance of the average amount of recycled content within a product line. Quite frankly, materials that are used in the manufacturing process are not always uniformly distributed in each product. It is possible to have recycled content vary in certain instances. The intent behind allowing the average amount of recycled content to be used is to capture this natural variation. It is not an attempt at consumer deception.

d. Unqualified Recycled Content Claims

FTC ANALYSIS:

The Guides currently advise marketers to qualify recycled content claims unless the entire product or package, excluding minor, incidental components, is made with recycled content. Any needed qualifications should specify the percentage of recycled content in the item. The Commission's study indicates that this guidance remains valid. Specifically, a significant minority of respondents (35 percent) indicated that an unqualified recycled content claim means that the entire product was made with recycled materials. The Commission, therefore, proposes retaining this guidance.

ACA COMMENTS:

ACA agrees with the FTC's analysis of unqualified recycled content claims. The amount of actual recycled content should be clarified, unless the entire product is manufactured with recycled materials.

e. Implied Claims

FTC ANALYSIS:

The results of the Commission's consumer perception study suggest that some consumers understand a "made with recycled materials" claim to convey a recyclable claim. In response to a closed-ended question, 52 percent of respondents indicated that they believed that a "made with recycled materials" claim suggested that the product was recyclable. In response to an open-ended question, however, only three percent of respondents stated that they thought the advertised product was recyclable.

Although the responses to the closed-ended questions suggest that many consumers may perceive an implied recyclable claim; the Commission does not propose advising marketers that make unqualified recycled content claims to disclose if their product is not recyclable. Even if some consumers do perceive an implied recyclable claim, their understanding appears to be accurate. The Commission's study asked respondents only about an unqualified "made with recycled materials" claim. Assuming marketers are following the Guides, they make unqualified recycled content claims only where the products are made from 100 % recycled materials. Products that are made of 100 percent recycled materials appear to be recyclable. Assuming this is the case; marketers would be able to substantiate any implied claim that their product is recyclable. Therefore, the Commission does not propose advising marketers that make unqualified recycled content claims to disclose that the product is not recyclable. The Commission requests comment on this advice and seeks any additional consumer perception evidence addressing this issue.

ACA COMMENTS:

ACA strongly supports the FTC's position that marketers making an unqualified recycled content claim (due to 100% recycled content) should not be required to disclose that their product is not recyclable. The inclusion of such information on the label would likely prevent some consumers from buying the product.

H. Free-of and Non-toxic Claims

a. Free-of Claims

FTC ANALYSIS:

The Commission agrees with commenters that it should provide expanded guidance for free-of and non-toxic claims. Accordingly, the Commission proposes including a new Guides section to address these claims. The Commission also proposes moving two of the three examples in the current Guides, cited above, into this section, and adding an additional example.

Marketers can always substantiate free-of claims by confirming that their products are, in fact, completely free of the relevant substance. As noted above, however, commenters raised a more difficult issue: whether marketers should be able to make free-of claims if their products contain background levels or trace amounts of a substance. No commenters provided evidence regarding how consumers interpret free-of claims. Accordingly, the Commission must apply its own expertise to determine how consumers likely would interpret such claims. Consistent with the National Advertising Review Council's National Advertising Division (NAD) decision, discussed above, the Commission proposes advising that free-of claims may be appropriate where a product contains a de minimis amount of a substance that would be inconsequential to consumers. To illustrate this point, the Commission proposes adding a new example. In proposed Example 2, an insulation seller advertises its product as "formaldehyde free." Although the seller does

not use formaldehyde as a binding agent to produce the insulation, tests show that the insulation emits trace amounts of formaldehyde. The seller has substantiation that formaldehyde is produced both synthetically and at low levels by people, animals, and plants; that the substance is present in most indoor and (to a lesser extent) outdoor environments; and that its insulation emits lower levels of formaldehyde than are typically present in outdoor environments. In this context, the trace amount of formaldehyde likely would be inconsequential to consumers, and, as a result, a formaldehyde-free claim likely would not be deceptive.

However, as the NAD cautioned, the determination of what constitutes de minimis depends upon the substance at issue and, therefore, requires a case-by-case analysis. In some cases, consumers may view the presence of even trace amounts of a substance as material. For example, trace amounts of a substance such as mercury, which is toxic and may accumulate in the tissues of humans and other organisms, likely would be relevant to consumers.

As suggested by several commenters, the Commission proposes cautioning marketers that an otherwise truthful free-of claim may nevertheless be deceptive. For example, it may be deceptive if a marketer claims that its product is free of a particular substance but does not disclose that the product contains another substance that may cause environmental harm, particularly if it is the same type of harm caused by the absent substance. To illustrate this point, the Commission proposes moving the chlorine-free coffee filter example, discussed above, into the new proposed section.

The Commission also proposes advising marketers that an otherwise truthful claim that a product is free of a substance may be deceptive if the substance has never been associated with that product category. This proposed guidance is consistent with ISO 14021's free-of standards. Such claims may deceive consumers by falsely suggesting that competing products contain the substance or that the marketer has "improved" the product by removing the substance. However, in some circumstances, these claims may provide useful information to consumers who are interested in knowing whether a particular substance is present in a product.

This could be the case, for example, where products in one category contain a substance and products in a competing category do not. Marketers making such "free-of" claims can minimize the risk of deception if they clarify that the entire product category is free of the substance. The Commission solicits comment on what guidance it should give for "free-of" claims based on substances which have never been associated with a product category. The Commission also seeks consumer perception evidence regarding these claims.

The Commission also agrees with several commenters that free-of claims may, depending on the context, convey that the product has broad environmental benefits or is environmentally superior to competing products. Thus, a marketer who makes a free-of claim that reasonable consumers would interpret to convey additional environmental claims must have substantiation for all of those claims. The Commission, however,

declines to advise that all free-of claims be qualified. In the absence of evidence that reasonable consumers would, no matter the context, perceive free-of claims as making implied general environmental benefit or comparative superiority claims, such guidance is not appropriate.

ACA COMMENTS:

The particular category of environmental claims is critical to have clarified in the final Green Guides. The terms **toxic** and **highly toxic** are defined in federal regulations for hazard and precautionary labeling (see preceding comment at 16 CFR 1500.121 and 29 CFR 1910.1200). Similarly, there is a well recognized program for evaluation of the hazards of art materials according the Labeling of Hazardous Art Materials Act (LHAMA) administered by the CPSC that allows for the determination of “Non-toxic” products (see www.acmi.org for more details). The criteria for this program recognizes that virtually all materials are “toxic” at some level to some biological organisms (table salt for instance, where the dose makes it “toxic”), but that some level is generally associated with “non-toxic”. While well-meaning, the current proposal creates difficulty for product manufacturers that have selected materials that would warrant and acknowledged “non-toxic” designation for human use but might still impact the environment (the table salt example, while a foodstuff is illustrative in that it is toxic to fish and plant life, all elements of the environment). For this reason, the final Green Guides should afford the opportunity to allow non-toxic claims arising from a recognized protocol used to assess the nature and degree of toxicity.

b. Non-toxic Claims

FTC ANALYSIS:

The Commission proposes moving its guidance concerning non-toxic claims from the existing example in current Section 260.7(a) to the proposed new Section 260.9. This proposed section states that consumers likely think a non-toxic claim conveys that a product is non-toxic both for humans and for the environment. This section also advises marketers to qualify non-toxic claims to the extent necessary to avoid consumer deception. Marketers should use caution when relying on regulatory standards as substantiation for claims that products are non-toxic. Reasonable consumers would likely interpret non-toxic claims to mean that a product is not harmful to humans or to the environment. Yet, as EPA’s Sustainable Products Network (EPA-SPN) noted, some regulatory thresholds allow moderately to highly toxic substances that do not meet these consumer expectations. Therefore, marketers should examine the scope and purpose of the regulatory standard to ensure that it substantiates a non-toxic claim in light of consumer expectations. For example, the standard for acute toxicity, which measures the effects of the substance from exposure during a short time period, may not provide an appropriate basis for non-toxic claims if the substance may be toxic to humans or the environment over a longer period of time.

ACA COMMENTS:

Similarly to non-toxic claims, for “free-of” claims, there are established test methods and protocols for the assessment of trace impurities that are widely recognized by product

manufacturers and regulators and these should be acknowledged in the final Green Guides. It is important as well to allow for the concept of de minimis levels, but the final Green Guides should acknowledge that such levels are determined on the basis of qualified testing and trade practice.

I. Source Reduction Claims

FTC ANALYSIS:

Section 260.7(f) of the Guides states that it is deceptive to misrepresent that a product or package has been reduced in size or is lower in weight, volume, or toxicity. The Guides advise marketers to qualify source reduction claims to avoid deception about the amount of the reduction and the basis for any comparison. The Soap and Detergent Association agreed that marketers should qualify source reduction claims and “measure source reduction through a ‘package weight per unit or use of the product’ approach as well as physical reduction of packaging material.” No comments suggested modifying the guidance in this section. The Commission, therefore, proposes retaining this section without change.

ACA COMMENTS:

ACA agrees that this section is still useful guidance for manufacturers. It should be retained.

J. Refillable Claims

FTC ANALYSIS:

Section 260.7(g) states that it is deceptive to misrepresent that a package is refillable. It advises marketers not to make unqualified refillable claims unless: (1) they provide a system to collect and return the package for refill; or (2) consumers can refill the package with a separately purchased product. The Glass Packaging Institute stated that this guidance remains useful, and no other commenters recommended changes. The Commission, therefore, proposes retaining this section.

ACA COMMENTS:

ACA agrees that this section is still useful guidance for manufacturers. It should be retained.

VI. Claims Not Addressed by the Current Green Guides

C. Renewable Materials Claims

FTC ANALYSIS:

To avoid deception, the Commission proposes advising marketers to qualify a “made with renewable materials” claim with specific information about the material. In addition, marketers should qualify this claim for products containing less than 100 percent renewable materials, excluding minor, incidental components. The Commission does not propose defining the term or endorsing any particular test to substantiate such claims.

ACA GENERAL COMMENTS ON RENEWABLE MATERIALS CLAIMS:

ACA appreciates the distinction in the proposal for raw material components that are derived from “renewable sources”. Considerable emphasis is underway with raw material suppliers and paint manufacturers alike seeking to identify valid renewable sources. To the extent that substantiated claims can be made for these raw materials and the products they are incorporated into, considerable progress can be made on any of a number of sustainability indices being used to evaluate companies and commercial enterprises.