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

Re: Proposed, Revised Green Guides, 16 C.F.R. Part 260, Project No. P954501

Dear Sir or Madam:

The Association of National Advertisers ("ANA") respectfully submits these Comments in connection with the solicitation by the Federal Trade Commission ("FTC") for public comments on the proposed revisions to the Guides for the Use of Environmental Marketing Claims (the "Green Guides"). *See Guides for the Use of Environmental Marketing Claims: Request for Public Comments*, 75 Fed. Reg. 63552, Fed. Trade Comm'n (Oct. 15, 2010) (hereinafter, "Comment Request").

INTRODUCTION

The ANA is a leader in the marketing community that strives to communicate best practices, coordinate industry initiatives, and influence industry practices. Its membership includes approximately 400 companies with 9,000 brands in every commercial industry sector that collectively spend over $250 billion in advertising and marketing communications annually. More information about ANA is available at www.ana.net.

The ANA fully recognizes the important role advertising plays in the commerce and economy of the United States. Advertising provides consumers with useful information about the features and benefits of goods and services when making informed purchasing decisions. Advertising alerts consumers to product availability and purchase locations. Advertising helps consumers differentiate among competitive choices. Ultimately, advertising assists consumers in saving money by encouraging competition in a defined market that exerts downward pricing pressures. With respect to environmental marketing, advertising assists consumers to the extent they wish to make informed purchasing decisions about the environmental qualities of a particular good or service.

ANA supports the Commission's approach of basing its changes on evidence and refraining from making significant changes in the absence of such data. ANA also supports the Commission's conscious adherence to the principles of truthfulness and non-deceptiveness underlying Section 5 of the FTC Act. By helping industry to understand where it believes the line between deceptive commercial speech and non-deceptive commercial speech lies, rather than trying to set new standards or promoting

an environmental agenda, the Commission is providing great service to businesses and consumers alike. Nevertheless, after reviewing the proposed revisions, ANA has several concerns and comments which it provides in response to the Comment Request.

I. CLARIFICATION REQUESTED CONCERNING THE ABILITY TO MAKE TRUTHFUL, QUALIFIED, SPECIFIC CLAIMS

The Commission has emphasized in the revised Green Guides that even a truthful single-attribute claim can deceptively imply a broader environmental promise. At the same time, the Commission has rejected the need for a life-cycle analysis ("LCA") for substantiation of every environmental claim. ANA is concerned that some of the examples set forth in the revised Green Guides suggest that nothing short of a LCA would suffice to ensure that an advertising claim does not communicate deceptive implied claims.

A. Section 260.9(b)

The Commission has proposed to create a new section that pertains specifically to "free-of/no" claims. In proposed §260.9, Example 1, the FTC describes a marketer who has labeled some t-shirts as "made with a chlorine-free bleaching process." The FTC states that this would be deceptive if the advertiser cannot support the additional claim that nothing in the production of the t-shirts creates a risk to the environment. The example gives no reason to believe that anything but the single-attribute claim of "chlorine-free bleaching process" triggers the obligation to substantiate that the production of the t-shirts will have a net positive environmental impact. This interpretation, if correct, would place a significant burden on advertisers and could cause them to choose to avoid making the triggering claim altogether. Moreover, if an advertiser cannot make the claim, it has little or no economic reason to invest in the technology to change the environmentally damaging bleaching process in the first place. At the same time, the Green Guides clarify that a general environmental benefit claim can be properly qualified with reference to a specific environmental attribute, posing a possible inconsistency with proposed guidance in this example. Thus, ANA requests that the FTC provide clarification as to whether it intends to require a broad LCA for every single-attribute claim.

B. Section 260.4(d)

Even if the Commission clarifies that a LCA is not required for every single-attribute claim, confusion may still persist in the context of general environmental claims. In §260.4(d), the Commission warns that even when a marketer adequately qualifies a general environmental marketing claim by specifying exactly which attribute constitutes the justification for the "green" claim, a marketer may have to substantiate an overall net environmental benefit. In the Comment Request, the Commission states, "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, the consumer may be misled." Comment Request, at 63564. The Commission goes on to posit that if an advertiser used a qualified, general claim, such as "Green – Now contains 70% Recycled Content," there might be a heightened likelihood that consumers would look beyond the recycled content claim and infer that there is a general "net environmental benefit," even if the claim regarding the recycled content were true. *See id.* ANA asks the Commission to clarify that it does not intend to infuse a LCA

requirement into every qualified, general environmental claim and that §260.4(d), Example 2 should not be interpreted as creating a new "net environmental benefit" substantiation burden on qualified, general environmental claims.

C. Refrigerants: §260.10, Example 3

The ambiguity as to whether the FTC is requiring a LCA to substantiate single-attribute claims is further deepened by a new example. In new §260.10, Example 3, the Commission responds to input from the EPA Stratospheric Protection Division regarding refrigerants. EPA-SPD recommended that the Commission provide guidance for air conditioning manufacturers that substitute non-ozone depleting refrigerants for the prohibited HCFCs. Specifically, EPA-SPD suggested advising marketers not to make unqualified ''environmentally friendly'' claims about their air-conditioning equipment. The EPA-SPD noted this equipment still may have adverse environmental effects because it uses large quantities of energy and because its refrigerants are greenhouse gases. Comment Request at 63578.

In its proposed Example 3, the Commission describes a situation in which an air-conditioning unit manufacturer substitutes non-ozone-depleting refrigerant for a known ozone-depleting refrigerant and simply claims that its units are "environmentally friendly." The Example goes on to explain that such a claim would be deceptive because that phrase could have far reaching implications. The Commission's analysis up to this point is no different than any other unqualified general environmental marketing claim and should be treated identically. However, the Commission goes on to state that the manufacturer's unit "relies on refrigerants that are greenhouse gases" and "consumes a substantial amount of energy." ANA requests that the Commission clarify the principle underlying this last admonition and whether and to what extent the example has any implications outside of the area of refrigerants.

Furthermore, ANA is concerned that this example could be interpreted to prohibit even a "no-ozone-depleting refrigerant" claim when paired with a general environmental claim such as "environmentally friendly." Although it is true that Example 3 purports to only involve the claim "environmentally friendly," the Commission has chosen to place this example in a section that is specifically targeting "Ozone Safe and Ozone Friendly Claims." If the Commission was only interested in communicating that unqualified general environmental claims were problematic, it could have easily placed this in §260.4. By placing the example in the context of more specific claims, one might infer that the Commission means to suggest applicability in contexts that not only include a general environmental claim such as "environmentally friendly," but also specific claims about the removal of ozone depleting substances. To the extent that one can make this inference, the final sentence of Example 3 suggests that a specific-attribute claim related to ozone-depleting materials might be prohibited in the case of an air conditioning unit because the unit "consumes a substantial amount of energy." It is quite understandable that the EPA-SPD would like to further efforts toward the reduction of greenhouse gases and to lower our carbon footprint generally; however, this is a policy choice and the Commission has specifically sought to avoid taking sides in any sort of debate about normative environmental stewardship. The FTC's mission is to draw the line between deceptive and non-deceptive speech, not to promote a greener world. *See* Comment Request at 63596-63597 (discussing carbon offsets and RECs and limits on the Commission's authority to set policy).

Elsewhere in the Comment Request, the Commission appears to have rejected the need for a LCA and has expressly permitted a single-attribute claim even in instances where the product itself clearly has a significant environmental net impact. In discussing renewable energy claims, the Commission provides the following illustration: "For example, a vehicle manufacturer should not state that its product is made with renewable energy when the claim applies only to certain components of the vehicle." Comment Request at 63591. Applying the basic principle that marketers must identify whether their environmental marketing claims apply to the product, the package, or only to a component, the Commission suggests that one could make a qualified claim as to one aspect of a car, (that the upholstery of the back seats is made from recycled material, for example), even though the overall product – a fuel-burning automobile – obviously consumes energy and emits greenhouse gases.

Thus, ANA requests that the FTC should either delete or substantially clarify §260.10, Example 3. It is unnecessary because of the guidance on general environmental claims elsewhere in the Green Guides. In the alternative, ANA urges the FTC to delete the final sentence of Example 3 and modify the penultimate sentence to more clearly explain that the reason the advertising is problematic is because it is an unqualified general environmental claim.

II. *DE MINIMIS* PRESENCE OF A SUBSTANCE

In new §260.9(c), the Commission states that "depending on the context, some no, free-of, or does-not-contain claims may be appropriate even where a product, package, or service contains or uses a *de minimis* amount of a substance." The Commission cautions that even trace amounts can be material. See Comment Request at 63580. ANA requests that the Commission clarify the meaning and significance of this limiting statement. ANA also requests that the Commission provide additional guidance on the methods that are acceptable for determining what constitutes a *de minimis* or trace amount, as well as what the Commission would consider appropriate substantiation for "free-of" claims.

III. CERTIFICATIONS AND SEALS OF APPROVAL

The Commission has created a new §260.6 to deal with certifications and seals of approval. ANA is concerned that this section raises significant questions as to how these guidelines could be applied in practice. In part, the concern arises from the Commission's application of the recently revised Guides on the Use of Endorsements and Testimonials, 16 C.F.R. Part 255 ("Endorsement Guides).

A. Independence, the Payment of Dues, and Deceptive Organization Names, §260.6 Example 2 and Example 3

Section 260.6, Example 2 and Example 3 deal with certification marks. In Example 2, a seal bears text that reads, "Certified by the Renewable Energy Association." The example posits that if someone has to pay for the use of the certification seal, it would be deceptive to use the seal but fail to disclose that the user paid a fee for the use of the seal. This example goes beyond what the Endorsement Guides would require.

The first step in the analysis of a certification mark in this context is whether it is an endorsement. ANA believes that the FTC should not presume that every seal is an endorsement but rather should look at the

net impression of the seal and its incorporation on the packaging or product in order to determine whether an endorsement is stated or implied. Assuming that the seal communicates an endorsement by the Renewable Energy Association, the next question is whether there is a material connection and whether knowledge of that connection would affect the weight that a consumer would give to the endorsement. The present Example 2 simply states that the seal "conveys that the association is independent from the product manufacturer." This is true. They are not one and the same; there is no shared management; etc. The manufacturer paid a fee to the organization for the right to bear the logo. This is par for the course in countless organizations. The question is whether consumers would evaluate the endorsement that emanates from the seal differently if they knew that the logo was part of a membership program. ANA questions whether there is adequate evidence on the record to conclude that such a "connection" is always relevant and material to consumers.

Similarly, in Example 3, the manufacturer advertises that its product is "certified by the American Institute of Degradable Materials." The advertisement does not mention that this organization is a trade association. The Commission states that a disclosure concerning the nature of the organization is necessary to avoid deception. It is reasonable to assume that the Commission might evaluate whether in the context of the advertisement there is a misrepresentation of the nature of the organization due to the use of the word, "Institute," which might imply that the organization is a "certifying organization." This would be appropriate for an *ad hoc* inquiry. However, this is hardly something that needs to be inserted into the Green Guides as if this is a unique issue concerning environmental marketing. ANA believes that the record does not support the need for this example and it urges the Commission to reconsider its inclusion.

Seals and certification programs are ubiquitous, not just in environmental marketing but in conjunction with many different safety and health standards. In some cases, they are operated by trade associations and available to association members and often to non-members. The proposed guidance lacks clarity and creates a potential for anticompetitive results. For example, if a trade association make its certification program available to non-members to comply with antitrust laws the result of the guidance may be that a member would have to include a disclosure while the non-member would not. Furthermore, the proposed guides do not adequately address situations where consumers might perceive a connection with the U.S. Government, which could potentially include any program that uses "U.S." in the name. Thus, ANA urges the Commission to provide analysis and examples in light of the breadth of the industry uses of seals and the plethora of seal and certification programs governing a variety of attributes.

B. Section 260.6, Example 5

ANA is concerned that the record does not support the broad and general mandate of additional language in advertising and labeling (often adjacent to very small logos or seals) any time someone uses a globe icon or the suffix "eco." The record does not contain evidence of wide spread abuse or deception perpetrated by the misuse of certain icons or artwork. Moreover, the proposed guides do not provide sufficient guidance as to which visual depictions would be likely to give rise to liability, and they do not address widespread use of globe artwork and symbols in a variety of corporate and brand names that may have been in use for decades. In §260.6, Example 5, a product label contains a seal

consisting of a globe with the text "EarthSmart." The Commission posits that the logo communicates a broad, general environmental benefit claim, and consequently would apply the same principles as with any other unqualified, general environmental claim. But, this example leaves open the question of whether the visual depiction of the globe was enough to trigger the need to qualify the claim. What if the logo has a flower motif? Is that a general unqualified environmental claim? Does this only apply if it is in a logo or seal?

ANA agrees that seals and logos can contribute to a false or misleading communcation, but context is critical and the Commission should address these issues on a case-by-case basis. By creating specific guidance that is broad and ambiguous, the Commission is likely to chill truthful, non-deceptive speech and potentially expose the Green Guides to broader challenges on First and Fifth Amendment grounds.

IV. RECYCLABLE CLAIMS

The Commission has elevated existing examples from §260.7(d) to a new §260.11. In that section, the Commission creates a three-tiered system: (1) If recycling facilities exist in a "substantial majority" of communities where the product is sold, then unqualified recyclable claims are permitted; (2) If recycling facilities exist in a significant percentage of communities where the product is sold, but not a substantial majority, then marketers should use a disclosure that "recycling programs may not exist in your area" or the like; and (3) If recycling facilities exist in fewer than a significant percentage of communities, then a stronger disclaimer must be used, such as "This package/product is recyclable only in the few communities that have recycling programs." The Commission has informally interpreted the term "substantial majority" to mean at least 60%. It has also requested comment as to whether it should define "significant percentage." It would be helpful for the FTC to provide clarity on the factual basis used to establish the suggested 60% standard. Without understanding the factual predicate for the recommendation, it is difficult for the ANA to comment on whether the FTC should seek to quantify the "significant percentage" threshold and, if so, what level to suggest and why.

V. RENEWABLE MATERIALS CLAIMS

The Commission has requested comment on suggested qualifiers. For example, the Commission has suggested that if a marketer advertises that its product is "made with renewable materials," the marketer must disclose "the material used, how the material is sourced, and why the material is renewable." Although the research conducted by the Commission suggested that consumers take away multiple meanings from unqualified "renewable materials" claims, the research did not conclude consumers would be confused if, from the context of the advertisement or the packaging, it is clear that material at issue is an organic substance such as a crop (*e.g.*, corn, beets, sugar, etc.) and naturally renewable. ANA believes that sourcing information and the reason an item is renewable may be obvious if, from the context, it is clear to the consumer what the renewable material is. The Commission appears to be focusing on bamboo, which was the subject of several enforcement actions for various abuses and may be proposing disclosures that are overbroad when applied generally. ANA suggests that the Commission reevaluate §260.15(b) and Example 1 to allow for less wordy disclosures to the extent the context makes it clear what the renewable material is and why it is renewable.

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VI. DEGRADABLE AND COMPOSTABLE CLAIMS

The FTC has expressly rejected national consensus standards that were developed based on scientific input. Although consumer perception and expectations are important, facts and science are also important. Specifically, in the area of compostable claims, there are industry standards. *See* Comment Request at 63570. The Commission did not provide any detailed discussion as to why it rejected reliance on national consensus standards to substantiate claims such as "biodegradable." The Commission seems to suggest that the burden is on the advertiser to show why a scientific, consensus standard would meet consumer expectations, and absent that information, the Commission will devise its own standards. ANA requests that the Commission provide analysis as to why it should jettison such scientific, consensus standards across the board.

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As these comments express, the ANA is concerned that the revised Green Guides create ambiguous requirements. Such ambiguities have the tendency to burden or even block truthful speech. The ANA appreciates the opportunity to assist the Commission in clarifying the Green Guides and in evaluating their impact on the advertising industry.

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Respectfully Submitted,

By

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