COMMENTS SUBMITTED FOR THE FTC PROPOSED, REVISED GREEN GUIDES, 16 CFR PART 260, PROJECT NO. P954501

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The American Association of Advertising Agencies ("AAAA") and the American Advertising Federation ("AAF") (jointly referred to herein as the "Advertising Trade Associations") appreciate the opportunity to submit these comments to the Federal Trade Commission ("Commission" or "FTC") in response to its Notice of Proposed Changes to its Guides Concerning the Use of Environmental Marketing Claims (the "Guides" or "Green Guides"). The Advertising Trade Associations support the goal of responsible marketing and wholeheartedly supports the FTC's periodic review and revision of current regulations and guides.

The American Association of Advertising Agencies (AAAA), founded in 1917, is the national trade association representing the American advertising agency business. Its nearly 500 members, comprised of large multi-national agencies and hundreds of small and mid-sized agencies, maintain 2,000 offices throughout the country. Together, AAAA member advertising agencies account for nearly 80 percent of all national, regional and local advertising placed by agencies in newspapers, magazines, radio, television and the Internet in the United States. AAAA is dedicated to the preservation of a robust free market in the communication of commercial and noncommercial ideas. More information is available at www.aaaa.org

The American Advertising Federation (AAF) acts as the "Unifying Voice for Advertising." The AAF is the oldest United States advertising trade association, representing 40,000 professionals in the advertising industry. The AAF has a national network of 200 ad clubs located in ad communities across the country. Through its 225 college chapters, the AAF provides nearly 7,500 advertising students with real-world case studies and recruitment connections to corporate America. The AAF also has 130 blue-chip corporate members that are advertisers, agencies and media companies, comprising the nation and the world's leading brands and corporations.

On February 11, 2008, the AAAA and the AAF, along with the Association of National Advertisers, submitted joint comments[1] ("2008 Joint Comments") in response to the Commission's first request for public comments on the Guides. Finding the current Guides to be quite effective in providing guidance on how to truthfully and accurately promote a package, product or service's environmental attributes, the 2008 Joint

[1] Comments submitted for the FTC Green Guides Regulatory Review by the American Association of Advertising Agencies, the American Advertising Federation and the Association of National Advertisers, submitted February 11, 2008. See http://ftc.gov/os/comments/greengudesregreview/533431-00041.pdf

Comments encouraged the FTC to tread lightly in revising the Green Guides. The 2008 Joint Comments asked that the FTC not make major and unnecessary changes to the Green Guides, particularly changes that would impose strict definitions for certain environmental terms, or that would require third-party certification for environmental marketing claims, or that would limit or restrict the types of truthful environmental claims an advertiser could make, as these types of restrictions would be impractical, if not impossible, to implement and could have a chilling effect on an advertiser's ability to communicate important and valuable information to consumers. Fortunately, the proposed Green Guides heed many of the recommendations contained in the 2008 Join Comments; however, notwithstanding the 2008 Joint Comments, the Commission has proposed various modifications and additions to the Guides that, if adopted, would severely limit or restrict an advertiser's ability to truthfully communicate the positive environmental attributes of its products, the environmental technologies used in its business, or certain aspects of its general environmental practices to consumers. Furthermore, if adopted, certain provisions in the Guides could stifle the ability or the interest of a company to make positive steps in improving the environment because such provisions would restrict a company's ability to speak freely and openly about its activities in this area.

While the Advertising Trade Associations embrace the enforcement of deceptive claims in advertising, there is no compelling evidence to support the need for some of the proposed significant changes to the Guides at this time. In fact, beyond one single study conducted by the Commission, there is no real body of evidence that indicates that consumers are generally confused or misled by the types of environmental marketing claims being made in today's marketplace, or that advertisers are using environmental claims on a broad basis to create false or misleading advertising.

I. Many of the Proposed Revisions are Based on the Results of a Single FTC Consumer Perception Study

As an initial matter, it is important to note that many of the proposed revisions to the Guides are based almost entirely on a single FTC consumer perception study. A single study, no matter how comprehensive, cannot be representative of all product categories, types of advertising, or of all consumers generally. Furthermore, the FTC study was limited in design and methodology.

First, the online survey presented recipients with generic screens containing a very limited number of stand-alone environmental claims. The survey recipient was never presented with any claims made within any surrounding context or presented along with any other cues. In other words, unlike in the actual marketplace, the claims were neither expanded nor limited based on the context in which they were made. As a result of this

design limitation, the survey could not, and did not, capture any information about how customers' perceptions may change depending on context. Secondly, the number of respondents in this study is simply too small and limited, especially in light of the fact that the no steps were taken to consider these results compared to the numerous product and service offerings.

Accordingly, the FTC survey does not provide a reliable basis for adopting many of the proposed changes to the Guides. As an example, proposing a blanket ban on all unqualified general environmental claims or for reaching the conclusion that an unqualified "made with renewable material" claim has such far-reaching environmental meanings for consumers, that it is a de facto general environmental benefit claim, is simply not supported by the evidence. In fact, in drafting the proposed Guides, the Commission acknowledged that it did not have sufficient data to truly conclude what consumer perceptions in this area actually are. Thus, many sections were intentionally drafted to be not unequivocal statements of actual consumer perception, but ambiguous statements with respect to how consumers *likely* would interpret or how they *may* perceive certain types of claims. And yet, even with this admission and based largely on this one study's findings, the Commission has proposed eliminating or severely restricting many types of environmental benefit claims, even though such changes would result in many advertisers no longer being able to speak freely and truthfully about the environmental aspects of their products.

II. The Proposed Revisions for General Environmental Benefit Claims are Overly Harsh and Do Not Provide Clear Guidance

A. The Proposed Ban on Unqualified General Environmental Benefit Claims Would Impose an Unreasonable Burden on Advertisers

The Commission's proposed Section 260.4(b) provides, in part, that "marketers should not make unqualified general environmental claims." Unfortunately, the Commission does not attempt to define or to provide significant or clear guidance on what types of messaging might constitute a "general environmental claim." Instead, advertisers are left to try to determine on their own which parts of their messaging might violate this de facto prohibition. As an example, might the mere color of the packaging or the background color or design of an advertisement be enough to meet the vague standard of a "general environmental claim," and, as a result, be enough to create a deceptive environmental benefit claim?

While, at first glance, it would seem absurd that the Commission is proposing guidance prohibiting the use of one of the primary colors (green) in advertising, upon further

consideration an advertiser is truly left to wonder if that is, in fact, the case. In Example One of proposed Section 260.4, the FTC determines that something as general as a product name or brand name can, on its own without additional claims, be considered a general environmental benefit claim. It therefore stands to reason that if a brand name can constitute a general environmental benefit claim, so too could illustrations or designs used in advertising or packaging for a product. Does an advertisement for a bottle of shampoo where the shampoo is photographed in a vast green field with trees and flowers and the sun; somehow, without the inclusion of any other type of environmental claim, constitute an unqualified general environmental benefit claim? It is hard to imagine that any reasonable consumer would understand such an advertisement, without more, to be making a general environmental benefit claim. Yet, since the Guides provide such scarce guidance on the issue, advertisers would likely be forced to take the conservative and restrictive position for fear of now suddenly being perceived to run afoul of Section 5 of the FTC Act based on the new vague language. So while the Advertising Trade Associations fervently supports the notion that marketing communications should not contain statements or visual treatment likely to mislead consumers in any way about the environmental aspects or advantages of products, we feel the FTC's position regarding unqualified environmental benefit claims, especially in light of its failure to define what constitutes such a claim, is overly harsh and restrictive.

In addition, the proposed Guides would not allow an advertiser to account for context in determining how to use a general environmental benefit claim. The failure to account for context or for other cues used in the advertising goes against the spirit of allowing truthful, robust commercial speech, and also against the spirit of the Guides themselves. For example, Section 260.3 which details the Guide's General Principles, states that "*unless it is clear from the context*, an environmental marketing claim should specify whether it refers to the product [or] the product's packaging." The Guides recognize that context is critical in determining how to properly craft an environmental marketing message. Clearly then, this same standard should apply to general environmental benefit claims. Instead of proposing a straight ban, the Guides should also allow an advertiser to account for context when determining how to craft a truthful, non-deceptive advertising message. The proposed imposition of a strict ban will certainly have a chilling effect on an advertiser's simple communications, and not only on the words it can use, but also the use of colors or of any sort of imagery of or about the environment, especially considering the lack of guidance as to what exactly constitutes a general environmental benefit claim. In addition, for brand and/or category names, this strict ban could effectively prevent entire categories from being established.

Finally, as detailed in Section I above, the FTC is proposing this de facto ban based on a single, limited, consumer perception study, which study did not account for "real-world" context or cues. Even without such context, the study found that only 52% of respondents

found that an unqualified general environmental claim conveyed a broad range of environmental messaging. These are hardly overwhelming results, and certainly not enough to justify such strong and fundamental changes.

The Commission must recognize that major changes to the Guides, such as the proposed strict requirements as to what types of environmental claims can and cannot be made, may result in the opposite effect of what is intended. Instead of encouraging more truthful advertising, such changes likely could dissuade companies from advertising their environmental messages at all or from disclosing the full range of any environmental benefits. Less, rather than more, information does not benefit the marketplace. Furthermore, because environmental marketing claims are used to communicate messages about all types of products in all product categories, such a radical change to the Guides would have a significant impact on the entire advertising industry and would cross all product industry lines.

B. The FTC Has Not Provided Sufficient Guidance on How to Qualify a General Environmental Claim

Proposed Section 260.4(c) instructs that "[m]arketers can qualify general environmental benefit claims to prevent deception about the nature of the environmental benefits being asserted," and seemingly provides advertisers with guidance on how to avoid the unqualified general environmental claim trap. However, as discussed earlier, without clearer instructions as to what exactly constitutes a general environmental claim, it is nearly impossible for advertisers to recognize all the instances in which qualification would be necessary.

Furthermore, the Guides do not provide sufficient guidance on what is proper qualification of a general environmental benefit claim. In fact, the only example on qualifying a general environmental benefit claim seems to indicate that qualification will often not be enough. In example two of Section 260.4, an advertiser qualifies its "environmentally friendly" claim by immediately disclosing that this environmental claim refers only to the fact that the wrapper was not chlorine bleached, a process that releases harmful substance into the environment. Yet the example states that such qualification is not enough to avoid deception if the production of the wrapper releases *any other* harmful substances into the environment. So while the advertiser may have gone to great efforts and expense to find a manner to not pollute the water through the chlorine bleach process, if, as is almost certainly the case, the factory producing the wrapper emits any pollutants into the air, no matter in what amounts, the advertiser would be, under this example, prohibited from touting the positive steps it took with regards to bleaching. As discussed in more detail in Section IV, this approach may have the effect

of killing environmental innovation, since advertisers will feel that they cannot tout the steps they are taking to have less of an environmental impact.

And while 260.4(c) of the Guides states that an advertiser can qualify a general environmental claim with "qualifying language that limits the claim to a specific benefit," example two for the same section finds that a limiting qualification may not be sufficient. What is an advertiser to take away from this? The likely takeaway will be confusion and the general belief that in actuality no general environmental claim can be used no matter how well qualified, because there will always exist some aspect of the design, manufacture, transportation and/or use of a product that will have some negative environmental impact. In the end the advertiser is left to wonder what could possibly be considered adequate qualification and in response to the uncertainty, may decide to back away from such environmental communications all together.

III. The FTC's Interpretation of What May Constitute a Material Connection is Too Strict

The Advertising Trade Associations believe that the emergence of environmental seals and third-party certifications is a welcome and important trend. Such seals and certifications offer benefits to consumers and reflect the long-standing practice in the US markets of using voluntary standard-setting organizations. Furthermore, we support the FTC's position that such seals are not necessary to substantiate an environmental claim. In addition, we support new Section 260.6(b) which states that "[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..." Consumers should know whether a seemingly independent certification organization is in fact owned and operated by the advertiser itself.

However, the FTC in two of its examples to this section has gone too far in its interpretation of what constitutes a material connection. In example two, the mere fact that a marketer is a dues-paying member of an association, regardless of the size of the association or the number of dues-paying members it has, is said to be a material connection which must be disclosed. This interpretation is overly broad since often the connection between a member and the association to which it merely pays dues can be tenuous at best. Clearly, the fact that membership dues are paid to an organization does not automatically mean that this payment is a material connection of the sort that would need to be disclosed under the Endorsement Guides. Payment of dues does not destroy the independence of an organization. For example, the fact that an attorney pays dues to the American Bar Association or state bar association(s) does not automatically mean that the independence of those organizations has somehow been comprised or that there needs

to be a disclosure made when an attorney or a law firm states it has received a seal from the ABA.

Example three states that if a certifying party is an industry trade association, *whether or not the marketer carrying its seal is a member of that organization*, the fact that the certifying organization is an industry group must be disclosed. Again, this interpretation finds materiality where none truly exists. The fact that an organization is industry based does not mean, in the abstract, that the industry element is in all cases material such that it needs to be disclosed. Most organizations will be based around some affinity – an industry segment, a particular subject matter, a particular point of view or the like. And, there may be times that it is necessary to make certain disclosures to avoid a misleading impression. But, to assume that in all circumstances and in all situations, the fact that an organization is an industry group must be disclosed is simply not supported by the facts. Further, the precedential effect of the FTC's conclusion is also disturbing.

IV. Advertisers Making Truthful Free-Of Claims Should Not Have to Account for Every Other Possible Environmental Effect of Their Product

Proposed section 260.9(b) of the Guides states that a truthful "free-of" claim may still be deceptive if "the product… contains or uses substances that pose the same or similar environmental risks as the substance that is not present." And example one to Section 260.9, much like example two in Section 260.4, seems to go even further, possibly instructing that a "free-of" claim can never be made if there is any other aspect to the product's manufacture or use that has a negative environmental impact.

In example one an advertiser cannot make a chlorine-free bleaching claim if the bleaching process it currently uses releases anything negative into the environment. Unfortunately, this guidance has the potential for stifling real and beneficial progress. If a company is able to remove a once present harmful substance, but technology is such that a second harmful substance - even one found in much smaller quantities - cannot yet be removed, then not allowing the company to speak to the beneficial result that has been achieved could result in real consumer harm. A company may decide it is not worth the effort and time to invest in an activity if it cannot promote this fact to its potential customers about.

Or consider the situation where a company with limited resources is considering investing in an expensive process to remove a harmful substance from its product. Since it cannot afford to invest sufficient funds to remove all harmful substances, it may decide to not invest anything, since any limited investment and corresponding environmental benefit cannot, under the proposed Guidelines, be communicated to the public.

And what if the new bleaching technique does not release any harmful substances into the water, but the overall manufacture of the product still releases certain harmful pollutants into the air? From reading example one in Section 260.9 and example two of Section 260.4 it would not be unreasonable to conclude that even though the advertiser has achieved an environmental benefit by eliminating at least one harmful substance, because there is a separate detriment somewhere else in the manufacture of the product, the benefit, even if much greater than the detriment, cannot be communicated. This simply is too harsh a standard that may serve to curtail, not only truthful environmental claims, but also, sadly, investment and progress in new environmental technologies.

While the Advertising Trade Associations believe that when making a claim about environmental benefit it is imperative that advertisers not ignore significant impacts that would affect the claim, it seems unreasonable, especially considering the limited technologies and the relative newness of environmental ingenuity, to require an advertiser to account for every environmental effect in the production or use of its product, even for matters not raised by the claim itself. To do so would significantly hamper an advertiser's ability to make any environmental claims and thus consumers may be deprived of useful information.

In drafting the proposed Guides, the FTC stated that it considered it unnecessary and contrary to consumers' interests to require marketers to disclose all environmental impacts from the entire life cycle of their products when making any environmental claims. However, without further guidance or clarification, the proposed Guides could easily be read as requiring advertisers to disclose all environmental characteristics of their products whenever they make advertising claims about any characteristic. The proposed Guides would require the very same life cycle analysis that the FTC explicitly rejected.

V. The FTC's Guidance with Regard to Renewable Materials Claims is Overly Harsh and Contradictory

The Advertising Trade Associations support the FTC's decision to include new Section 260.15 in the proposed Green Guides. Renewable Material Claims are increasingly becoming an important way for advertisers to distinguish their products. Demand for products made with renewable materials is also leading to exciting innovations in the marketplace. Companies are finding ways to incorporate renewable materials into a broad array of items, resulting in real and tangible positive benefits to the environment. It is a perfect time for the FTC to provide advertisers guidance on how to properly make these types of claims. Guidance such as in Section 260.15(c), that to make an unqualified "made with renewable materials" claim an item must be made entirely with renewable

materials is helpful to advertisers and to ensuring consistency in the market place with regards to such claims.

Unfortunately, however, in Section 260.15(b), the Commission has taken the unreasonable position that a simple "made with renewable materials claim" is, in the minds of consumers, the same as a general environmental marketing claim. The Guides state that "[r]esearch suggests that reasonable consumers *may* interpret renewable material claims differently than marketers may intend", believing, for instance, that such a claim means that an item is made with recycled content, is recyclable and biodegradable.

This is an extremely strong conclusion that could have a chilling effect on an advertiser's ability to communicate how its products are made, and, as a result, stifle innovation in product design. And unfortunately the "research" from which this Guidance comes, is the one rather limited consumer perception study the FTC conducted. It just does not seem reasonable or fair for the Commission to so drastically tie the hands of advertisers. If this guidance stands it will serve as a de facto ban on unqualified "made with renewable materials" claims. Since the Guides advise that consumers may interpret such claims to have such far-reaching meanings, then a "made with renewable materials" claim is, in fact a "general environmental benefit" claim", and, under the misguided conclusions of Section 260.4, not permissible unless qualified.

Interestingly enough, the guidance of Section 260.15(b) is directly contradictory to the guidance in 260.15(c), which allows an unqualified "made with renewable materials" claim.

The Advertising Trade Associations believe that instead of stating unequivocally that a renewable claim is a general benefit claim, the FTC should instruct that if the context in which an unqualified renewable claim communicates far-reaching benefits, then disclosure is necessary to limit the claim to only what the advertiser can substantiate. To assume, however, that a renewable claim must always be qualified is unreasonable.

The FTC is, in essence, mandating mandatory disclosures that must accompany every "made with renewable materials" claim. The disclosures include, what renewable materials are used, how they were sourced, and why they are renewable, takes a significant amount of copy and of space. This is a lot of information, for which manner forms of advertising and packaging, simply do not have the space. The result therefore may be that for many advertisers it will now be impossible to ever make a "made with renewable materials" claim, which sadly, could serve to slow the trend of companies increasingly finding ways to incorporate renewable materials into items. Consumers will suffer as a result, and sadly, so too will the environment.

VI. The Existing Regulatory And Self-Regulatory Framework Ensures That Environmental Claims Are Not Deceptive And Are Supported

A. The FTC Has Authority To Challenge Deceptive and Unsupported Claims Under Section 5 Of The FTC Act

Many of the changes discussed in our comment, are wholly unnecessary in light of the current regulatory and self-regulatory framework, which effectively ensures against misleading or deceptive advertising without overly burdening advertisers. Under the existing regulatory structure, the Commission may regulate deceptive environmental advertising messages, as it has done successfully in the past, under Section 5 of the FTC Act. If the advertiser does not have support for its express or implied environmental marketing claims, or makes green claims that are deceptive to the consumer, the FTC can challenge such claims under the FTC Act, which prohibits unfair and deceptive acts in commerce.

If an environmental marketing claim is not adequately supported, the FTC can prohibit or modify it under its Section 5 authority, as well as impose substantial remedies to prevent further deception through cease and desist orders, injunctions, consumer redress, disgorgement and fines. Indeed, the FTC has been quite successful at prohibiting deceptive and/or unsubstantiated claims under its Section 5 authority. And in the last year alone the Commission has brought a number of enforcement actions against advertisers for deceptive environmental advertising pursuant to its Section 5 enforcement authority.

In light of the FTC's unquestioned authority to prevent deceptive and unsupported claims through Section 5, it is unnecessary to significantly revise the Guides to prevent or restrict certain types of environmental marketing claims, especially in the absence of any abuse in the marketplace.

B. State Attorney General Actions and Private Litigation Provide Further Protection Against Deceptive Or Unsupported Environmental Marketing Claims

In addition to the FTC's authority to challenge false and deceptive environmental marketing claims, many states have adopted similar FTC Acts, which state Attorneys General have successfully used to bring enforcement actions for false, deceptive and/or unsubstantiated claims. These state laws and actions reflect and reinforce the principles of the Guides by ensuring that environmental claims are adequately substantiated. Thus, in addition to the FTC's Guides, state actions and private actions promote the principles

of the Guides by requiring environmental marketing claims to be adequately substantiated and by providing additional remedies for unsupported claims.

C. Industry Self Regulation Promotes Compliance

The advertising industry has been at the forefront of self-regulation, developing a credible framework and establishing several self-regulatory bodies that have been applauded by consumers, policymakers and regulators. These industry self-regulatory bodies adhere to strict guidelines which in most cases are modeled after FTC standards, guidelines or principles, and which typically include a referral mechanism for FTC enforcement in the event of non-compliance. Past and present FTC Chairmen have encouraged advertisers to voluntarily adopt the Guides as the benchmark for legitimate environmental marketing advertising.

The cornerstone of industry self-regulation is the National Advertising Division ("NAD") of the Council of Better Business Bureaus ("CBBB"), and the National Advertising Review Board ("NARB"), which systematically monitors compliance with the Guides and report non-compliance to the FTC for enforcement. In the past two years, the NAD has heard dozens of cases involving claims that an advertiser was misleading consumers as to certain environmental benefits of its products or services.

In addition, most of the major television networks maintain their own guidelines that require compliance with some of the key elements of the Guides. For example, NBC requires that "[a]ny express or implied claims regarding an environmental attribute of a product, package or service must possess a reasonable basis substantiating the claim. It should be clear that the benefits being asserted refers to the product, the product's packaging, service or a portion of the product, package or service." *NBC-Universal Advertising Guidelines*.

Since industry self-regulation actively promotes and relies on the Guides, and industry self-regulatory bodies are actively focused on environmental advertising, there is no reason to make any additional changes to the Guides. These organizations have the ability to react and respond quickly to changes in the area of environmental marketing and advertising. In the interest of public efficiency, the FTC should focus its efforts on enforcement in the event that industry self-regulation fails to stop marketing abuses.

VII. Conclusion

Green Advertising is fragile. There have already been several studies that suggest that consumer interest in products that provide an environmental benefit is waning. Will

consumers pay more for a product that provides an environmental benefit? These studies report and common sense dictates that especially in today's economy, consumers will not pay.

Confronted with this reality, creating substantial barriers for advertisers to be able to effectively and efficiently communicate the benefits of its products and services runs the risk of stifling competition and innovation. If marketers cannot effectively communicate to the public the real benefits of its products, then marketers, and product development, will simply stop. No one will be served in that situation. This is the reason why the Advertising Trade Associations have filed these comments.

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The AAAA and the AAF look forward to working with the FTC to address any concerns about the proposed Guides and we stand ready to assist the FTC as it moves forward in its final stages of its review on this important area.

Respectfully Submitted,

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