

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

Comment Number:

Received:

Organization: The Scotts Company LLC

Commenter: The Scotts Company LLC

State: Ohio

Agency: Federal Trade Commission

Rule: FTC Guides Concerning the Use of Environmental Marketing Claims

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

On behalf of The Scotts Company LLC we are pleased to provide comments to the Federal Trade Commission (“FTC”) in response to its Notice of Proposed Changes to its Guides Concerning the Use of Environmental Marketing Claims (the “Guides” or “Green Guides”) and appreciate the opportunity to comment on these important guidelines. The Scotts Company LLC (“Scotts”) is a leading supplier and marketer of consumer lawn and garden care products. Scotts is committed to providing consumers with effective lawn and garden care solutions and to educating consumers through product labeling and outreach efforts about the proper selection and use of these products.

Scotts is constantly striving to improve the environmental quality of our products, our packaging, and our general business operations. Scotts strongly supports the goal of responsible marketing and supports the establishment of a comprehensive set of guidelines designed to provide the industry with sound and clear guidance when making environmental marketing claims. Which guidelines also work to help stop deceptive or misleading advertising claims while still allowing for the free, open and truthful communication of products’ attributes.

General Comment

While Scotts supports much of the guidance set forth in the proposed Green Guides, we strongly feel that key sections of the proposed Guides are unclear, confusing, and at times provide contradictory guidance. In addition, the heavy burden imposed on companies to make lengthy disclosures as well as the potential confusion caused by certain sections of the Guides will have the effect of discouraging a broad range of truthful environmental benefit claims, and, as a result, will severely stifle innovation and investment in this critical area.

General Environmental Benefit Claim

As relates to unqualified general environmental benefit claims, the FTC is proposing to turn away from the historic flexible approach that acknowledged that which exact express and implied claims consumers take away from these types of claims varies greatly depending on the product category, how the claim is used, and, importantly, the context in which it is made or used. Unfortunately, the FTC is now attempting to impose a rigid standard that for all intents and purposes bans the use of such a claim in US marketing. This absolute ban goes too far. In addition, much of the proposed guidance on how a company may make a general environmental benefit claim may instead only serve to confuse companies and discourage them from trying to explain the environmental impacts of their products. This information is important to consumers and it would be detrimental to marketplace for companies to feel they can’t make truthful, substantiated environmental claims for fear that the guidance of this section may be used against them. Furthermore, if a company can not advertise its environmental achievements, it will have less of an incentive to invest in technologies that have less of an environmental impact.

Environmental benefits (improved soil, less run-off, carbon offset) are an inherent result of certain lawn-and-garden products and will often result from the proper use of certain of our products. Being able to truthfully communicate these environmental benefits is a key part of Scotts' ability to helpfully inform consumers about its products.

We note that FTC has not attempted to define or even give extensive guidance on what exactly constitutes a general environmental benefit claim. While Scotts applauds the FTC for not trying to impose strict definitions or standards for each one of these claims, it seems reasonable that a company, after carefully studying the Guides, could reach the conclusion that nearly anything referencing the environment or any illustrations resembling a nature scene in advertising or on packaging could be construed by consumers to be a general environmental claim. The Guides basically leave it to companies to try to figure out on their own which part(s) of their messaging may violate the new de facto prohibition on such claims. Scotts, for example, uses a great deal of environmental imagery on its packaging for the obvious reason that many of our products are for use on vegetation. Clearly a reasonable consumer would understand that an image of grass on the packaging for lawn fertilizer is not making a broad environmental claim. But what if in addition to the grass, we also color the entire bottle green and add images of flowers, trees, the sun, and a stream. Does the addition of this "extra" environmental imagery mean, per the Guides, that we are now making a general environmental benefit claim, so that consumers now believe our product has no negative impact on the environment? Unfortunately, there is no way to know the answer to that question from the Guides, and, as a result, because of the unreasonable strict ban on general environmental benefit claims, companies may feel they have to back away from making or doing anything that could be perceived as making an unqualified claim. The strict ban may eliminate the use of certain obvious broad environmental benefit claims, but it may too, have the unintended consequence of eliminating other truthful and substantiated claims because companies will be afraid of a broad interpretation and then finding themselves in violation of FTC law. It seems likely that due to the FTC's proposed guidance companies will be severely restricted in their options for designing advertising and branding products.

If the strict ban on making an unqualified general environmental benefit claim – a standard that does not allow for context – remains in the official Guides, it may have the unintended consequence of severely reducing the use of environmental marketing claims in US marketing, as well as of overly restricting ad design and brand options. Clearly the FTC's current position banning unqualified environmental benefit claims is overly harsh and restrictive, especially considering the difficulty in defining what constitutes such a claim. Imposing such strict rules on how a company can truthfully advertise may have 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.

The Guidance on Qualifying Environmental Claims Will Lead to Further Confusion That Will Deter Innovation

The Guides' proposed Section 260.4(c) states that "[m]arketers can qualify general environmental benefit claims to prevent deception about the nature of the environmental benefits being asserted." And examples in this section are meant to provide companies with guidance on how to properly qualify a general environmental benefit claim. However, the examples only serve to confuse and may therefore actually deter the use of environmental claims.

The Guides provide confusing guidance on what is proper qualification of a general environmental benefit claim, especially since the only example on qualifying a general environmental benefit claim indicates 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. Here the Commission is instructing that regardless of the fact that a company may have gone to great efforts to find a way to make its product but without polluting the water through the chlorine bleach process, if in any other part of the manufacturing process of that wrapper any harmful materials are released into the environment, no matter in what amounts, the company is prohibited from explaining the positive steps it took with regards to bleaching. This approach may have the effect of killing environmental innovation, since advertisers will feel that they cannot explain the steps they are taking to have less of an environmental impact. (This subject is discussed in more detail in the section on "Free-of" claims.)

And finally, even though Section 260.4(c) 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 indicates that a limiting qualification may not be sufficient. So in multiple places in the one section to the Guides the FTC has attempted to lay out a principal, which principal is immediately contradicted by the example. The result of this approach will obviously be immense confusion, but also 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. Since companies will be unsure of what exactly would be considered adequate qualification, their response to the uncertainty may be to decide to stop making such environmental communications all together.

Brand Names Deserve an Extra Level of Protection

The purpose of trademark registration is to protect consumers from confusion and protect a company's property rights in a trademark and the brand's valuable goodwill.

Consumers rely on brands to ensure quality, reliability, and determine sources (companies) they can trust. The Guides propose to make the determination that even brand names can be general environmental benefit claims and therefore are inherently deceptive or cannot be used. However, there are many brand names in existence today that the FTC may consider to be the same as a general environmental benefit claim, but which have an extensive history of use and to which consumers have become very familiar. Consumers are not confused by them. To the contrary, they use them to recognize brands and, therefore, sources of products they do and do not wish to purchase again. Due to the number and variety of products available to consumers, this is precisely how consumers are able to differentiate products and their sources – via their brand names.

Requiring changes to trademarked brand names is likely to lead to consumer confusion. As noted, consumers use brand names as a source of origin. Terms used in trademarked brand names are not descriptive and do not mean anything to consumers. In fact, names that are merely descriptive are not protected by trademarks. When terms no longer merely describe a product but, instead, become a source of origin for a product, they achieve “secondary meaning” and they are entitled to trademark protection.

Since consumers rely on brand names and use them to differentiate products in the marketplace, companies spend millions of dollars to develop and trademark product brand names to compete in the United States. Consumers benefit from this competition as new products continue to come into the marketplace and products that do not satisfy consumers are replaced. Any change in well-recognized brands, which are protected by trademark registrations, can destroy both the validity of trademark registrations protecting the brands, the integrity of the brands themselves, and a company’s goodwill.

Free-of claims

Proposed section 260.9(b) of the Guides as currently written would be extremely harmful to Scotts. Scotts is an industry leader in investing in environmentally preferable technologies and practices. In fiscal year 2010 alone, Scotts spent nearly \$40 million in research and development, much of which was spent on finding ways to have a positive effect on the environment. We take great pride in the fact that we are consistently out in front when it comes to improving the environmental profile of our products.

Scotts is continually focused on what the company can do to ensure that the manufacture, distribution, use and disposal of our products has as little environmental impact as possible. Sometimes we are able to make multiple improvements at once, creating more positive environmental effects in all stages of product’s lifestyle. However, there are other times where due to certain constraints we cannot make every environmental improvement that we would wish to all at once. In those situations we focus on what is possible for us at that moment with the understanding that we will continue to make improvements, incrementally, as we are able to. Unfortunately, the current direction on making “free-of” claims seems like it might punish Scotts and other companies that make improvements in products as they are able to.

The proposed 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, can be reasonably interpreted to go even further, possibly establishing 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 will stifle advancements in environmental practices. As we described above, Scotts is always looking for ways to improve the environmental profile of our products. And often it requires a great deal of additional investment and time to do so. The corresponding reward is not only in knowing that the company has done something positive towards protecting our environment, but also the fact that we can advertise what exactly we have done, which facts are material to consumers in their decision of which brand to purchase. Under the proposed Guides, however, we may no longer be able to advertise the fact that we have removed one or more, but not all, environmentally hurtful substances from our product, because certain other harmful substances may still exist. In essence, per the FTC’s proposed guidance, Scotts would be forced to market its product, at least for environmental claims, the exact same way as a competitor that did not remove any environmentally harmful substance from its product. All of Scotts’ additional effort and additional expense would, in terms of sales and customer goodwill, be for nothing. This could discourage us from engaging in similar efforts for other products. Or consider a situation where the technology exists to remove a once present harmful substance, but technology is such that a second harmful substance - even one found in much smaller quantities - cannot be removed. Why invest in the one if we cannot tell our customers that we have done so?

We believe that the FTC’s proposed guidance would significantly hamper our ability to make many truthful and material environmental claims and as a result consumers may be deprived of useful information. In addition, companies would have no incentive to invest time and money in new technologies or new production methods since they could not advertise any incremental benefits achieved through such investment. This guidance seems to indicate that companies are now required to disclose all environmental characteristics of their products whenever they make any advertising claims about any characteristic. The FTC has specifically rejected this standard in the past yet now has built it into the Guides.

Made With Renewable Material Claims

Made with renewable materials claims are extremely important to us as we have made significant efforts to use renewable materials when possible in many of our products. The fact is that today Scotts and many other companies are finding ways to incorporate renewable materials into a broad array of items, resulting in real and tangible positive benefits to the environment. We agree that now 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.

However, Scotts does not agree with the FTC’s 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 conclusion could have a very negative effect on a company’s ability to communicate how its products are made, and, as a result, may end up stifling innovation in product design. If this guidance stands it will serve as a de facto ban on unqualified “made with renewable materials” claims. Because if the Guides instruct that consumers may interpret such claims as having 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. We note that the guidance of Section 260.15(b) seems to be directly contradictory to the guidance in 260.15(c), which allows an unqualified “made with renewable materials” claim.

Scotts believes 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 company can substantiate. To mandate that a renewable claim must always be qualified is unreasonable. As the Commission must realize, to disclose, as it suggests a company always must, exactly what renewable materials are used, how they were sourced, and why they are renewable, takes a significant amount of copy and of space. The ability to include this amount of information simply does not exist on most of our product packaging. The effect of the proposed guidance would be to make it impossible for us to make a “made with renewable materials” claim for many of our products. This hurts Scotts by not allowing us to explain the manner in which we are trying to improve the environment and hurts the consumer by restricting her access to material information about the product in which she is interested. Not being able to inform potential customers about the significant steps we’ve taken to reduce environmental impact could serve to slow the trend of Scotts, and other companies, finding ways to incorporate renewable materials into products. Both consumers and the environment will suffer as a result.

Conclusion

While it is important to Scotts to explain the environmental qualities of our products, if it becomes too burdensome or too risky to do so, we likely will back away from making such claims and, perhaps even more importantly, from engaging in innovation to produce such environmentally-beneficial products - to the detriment of the consumer and a market place with greater choice and information. In addition, if the Guides require a myriad of

mandatory disclosures and qualifications any time an environmental benefit claim is made, this will also likely cause companies to back off the use of such claims. The reason for backing off is simple – consumers are generally confused when product labels and advertising contain large amount of disclosures and disclaimers. In marketing, less is often more. Consumers when faced with a choice between two products often will go for the cleaner design and label. If by making an environmental claim, a company is obligated to clutter up its label and ads with disclaimers, the company may decide its not worth it to make the claim.

In light of the foregoing, for the FTC to now create substantial barriers on a company's ability to effectively and efficiently communicate the benefits of its products and services runs the risk of stifling competition and innovation. This is the reason why Scotts has filed these comments.

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Respectfully Submitted,

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