COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

FEDERAL TRADE COMMISSION

Concerning

REQUESTS FOR COMMENTS REGARDING PROPOSED REVISIONS TO FTC'S GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS

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December 10, 2010

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Submitted Electronically
Federal Trade Commission
Office of the Secretary
Room H-135 (Annex J)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: FTC Proposed Revisions to Guides for the Use of Environmental Marketing Claims – Comments
16 C.F.R. Part 260
75 Fed. Reg. 63552 (October 15, 2010)

Dear Commissioners:

The Washington Legal Foundation (WLF) appreciates this opportunity to submit these comments to the Federal Trade Commission (FTC) in connection with the FTC's Proposed Revisions to its Guides for the Use of Environmental Marketing Claims (the "Guides"). WLF is a non-profit public interest law and policy center based in Washington, D.C. with supporters nationwide. WLF promotes free-market policies through litigation, administrative proceedings, publications, and advocacy before state and federal government agencies, including the FTC.

As set forth below, WLF in general applauds the FTC's efforts to update the Guides, for the purpose of responding to changes in the marketplace since the FTC last revised them in 1998, and to help marketers avoid making unfair or deceptive environmental marketing claims. WLF believes that the vast majority of marketers have no desire to mislead consumers, and thus increased and updated guidance from the FTC will be viewed by marketers, in the great majority of instances, as helpful assistance in their ongoing efforts to avoid pitfalls.

WLF fully support the new section of the proposed Guides that addresses certifications and seals of approval. That section provides much needed guidance; in particular, it provides that marketers must make clear what attributes of their product have merited the seal of approval. To the extent that widely used environmental terms convey somewhat conflicting meanings, the proposed Guides wisely attempt to mandate a single definition. In particular, WLF applauds the FTC's proposal to require disclaimers in connection with use of the word "recyclable," for the purpose of disclosing the extent to which recycling programs are available.

WLF has three areas of concern with the proposed Guides. First, we take issue with the FTC's decision to ban all unqualified general environmental claims. While such unqualified claims may be deceptive in some instances, WLF believes that in many instances they will not be. We do not believe that the FTC's consumer perception study adequately supports your assertion that consumers hearing such unqualified claims will ascribe to the product attributes which it does not possess. To the contrary, most consumers will assume that a product labeled (for example) "green" has some unspecified environmental advantages but will not conclude that it has any specific attribute.

Second, WLF is concerned with the Guides' definition of the term "degradable." The Guides require substantiation that the entire product or package will completely break down and return to nature within a reasonably short period of time after "customary disposal." That language prevents unqualified "degradable" claims when – although the product will degrade in the presence of water and oxygen – the product is likely to be disposed in environments (such as landfills) that lack those elements. WLF fears that by restricting speech in this manner, the FTC is preventing consumers from receiving information that they would want to hear: that a product, when exposed to water and oxygen, is more likely to degrade than are competing products.

Third, although WLF applauds the FTC's decision to provide guidance regarding the marketing of carbon offset programs, we are concerned by one aspect of the proposed Guides. The FTC proposes that marketers not be permitted to advertise a carbon offset if the activity that forms the basis of the offset is already required by law. We can see no legitimate basis for that prohibition against claims that are 100% truthful. Regardless whether the activity being undertaken is voluntary or is one required by law, consumers would want to know that the activity is actually occurring; the proposed Guides would prevent consumers from acquiring such knowledge.

I. *Interests of the Washington Legal Foundation*

The Washington Legal Foundation is a public interest law and policy center based in Washington, D.C., with members and supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF regularly appears before federal and State courts and administrative agencies to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF has devoted substantial resources over the years to promoting the free speech rights of the business community, appearing before numerous federal courts in cases raising First Amendment issues. *See, e.g., Nike v. Kasky*, 539 U.S. 654 (2003). WLF has successfully challenged the constitutionality of Food and Drug Administration (FDA) restrictions on speech by pharmaceutical manufacturers. *Washington Legal Found. v. Friedman,* 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd,* 202 F.3d 331

(D.C. Cir. 2000).

WLF also regularly appears in federal court and before the FTC in matters involving the FTC's regulation of "unfair or deceptive acts" under the FTC Act. *See, e.g., Trans Union LLC v. FTC*, 536 U.S. 915 (2002); *WLF Comments to the FTC Regarding Use of Endorsements and Testimonials in Advertising* (June 17, 2007); *WLF Comments to the FTC Concerning Commercial Alert Petition on Word-of-Mouth ("Buzz") Marketing* (Feb. 2, 2006). WLF also regularly publishes articles regarding the FTC's regulation of trade practices, including the FTC's regulation of "green" marketing. *See, e.g.*, Christopher A. Cole and Carly N. Van Orman, *Green Marketing: Avoiding Unwanted Attention from Regulators and Lawyers*, WLF LEGAL BACKGROUNDER (May 16, 2008).

WLF believes that over the years the FTC has done a good job of balancing the need to regulate potentially deceptive marketing claims with the need to respect the First Amendment rights of advertisers. WLF is concerned that the FTC not upset that balance by focusing too much on the arguably inappropriate actions that some consumers might take in response to truthful advertising.

II. FTC's Statutory Authority

Federal law authorizes the FTC to prevent businesses and individuals (with certain limited exceptions) from "using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). In determining what acts and practices are unfair or deceptive, the FTC may not declare them unfair or deceptive even if they are "likely to cause substantial injury to consumers," if the injury is "reasonably avoidable by consumers themselves," and if such injury is "outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). Pursuant to that statutory authority, the FTC has issued its Guides for the Use of Environmental Marketing Claims (the "Guides" or the "Green Guides"). 16 C.F.R. § 260. The Guides were most recently updated in 1998; the FTC is proposing to update the Guides in response to changes in the marketplace in the past 12 years.

III. First Amendment Considerations.

Any restrictions imposed by the FTC on marketing are subject to strict First Amendment constraints. In particular, the FTC may not ban truthful marketing claims simply because it believes them to be "unfair." If it believes that some consumers might misunderstand a truthful marketing claim, the FTC may (under certain circumstances) require the marketer to include disclaimers that will tend to reduce the possibility of misunderstanding; but the FTC is virtually never permitted to impose a blanket prohibition on truthful speech regarding a product whose sale is not illegal.

The First Amendment comprehensively safeguards freedom of speech. U.S. Const. amend. I. In determining the degree of protection accorded, however, the Supreme Court has drawn a distinction between "commercial speech" and other forms of protected speech. *E.g., Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-56 (1978). Noncommercial speech (pure speech) that expresses ideas, communicates information or opinions, or disseminates views or positions is extended protection of the highest order. In contrast, commercial speech is extended less, but certainly not insubstantial, protection than expressions that are noncommercial in nature. *E.g., Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 562-63 (1980). For purposes of First Amendment analysis, "commercial speech" is identified as communication that principally "proposes a commercial transaction." *E.g., Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989) [hereinafter "*Board of Trustees of SUNY*"] (quoting *Virginia State Board of Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). The communication relates "solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561.[1]

The First Amendment "protects commercial speech from unwarranted governmental regulation." *Central Hudson*, 447 U.S. at 561. The government is empowered to prohibit commercial speech that is false or misleading. However, in order to be entirely prohibited, the subject communication must be either inherently misleading or actually misleading, as opposed to only potentially misleading. *See Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 109-110 (1990); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 640 n. 9 (1985); *In re R.M.J.*, 455 U.S. 191, 202-03 (1982). Information that is only potentially misleading may not be completely banned if the information can be presented in a manner that is not deceptive. *See Peel*, 496 U.S. at 100; *In re R.M.J.*, 455 U.S. at 203. Commercial speech that is not misleading also may be regulated; however, interference must be in proportion to the governmental interest served, and may be

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[1] The FTC should not make the mistake of assuming that any statements regarding a product should be deemed "commercial" speech simply because they are the utterances of a commercial entity or someone who has been compensated by the entity. The fact that a speaker has an "economic motivation" for speaking is not by itself sufficient to classify the speech as "commercial." *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 67 (1983). Indeed, in one of its most famous First Amendment decisions, the Supreme Court granted full First Amendment protection to a paid newspaper advertisement soliciting donation of funds. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). Any efforts by individuals or firms to speak out on issues of public importance – such as speech on issues related to environmental attributes of specific products, not uttered for the purpose of inducing a specific sales transaction – are fully protected by the First Amendment and thus are largely off-limits to government regulation. WLF urges the FTC to make clear that the Green Guides do not apply to speech of that nature.

regulated only to the extent that such regulation furthers a substantial interest. *See In re R.M.J.*, 455 U.S. at 203-04.

The Supreme Court set forth a four-part test for determining permissible regulation of commercial speech in *Central Hudson*:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566. The test is no less applicable in assessing the constitutionality of restrictions on speech in the context of products being marketed for their environmental attributes than in other contexts, so long as the product being marketed is lawful; there are no exceptions to the First Amendment based on the nature of the product being sold or the nature of the claims being made. *E.g., 44 Liquormart v. Rhode Island*, 517 U.S. 484, 513-14 (1996); *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 482 n.2 (1995); *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 564 (2001).

While restrictions imposed under the *Central Hudson* test need not be the least severe needed to meet the regulatory objective, the means chosen must be "narrowly tailored." *Board of Trustees of SUNY*, 492 U.S. at 477-478; *In re R.M.J.*, 455 U.S. at 203. In order to be "narrowly tailored," restrictions on commercial speech must be aimed at eliminating false or misleading communication "without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Ward v. Rock Against Racism,* 491 U.S. 781, 800 n. 7 (1989). The Supreme Court expressly directed that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U.S. at 646.

The Supreme Court further has indicated that in choosing between a highly paternalistic regulatory approach and one that fosters open communication, regulators must choose the latter because "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of misuse if it is freely available, that the First Amendment makes for us." *Virginia State Board of Pharmacy*, 425 U.S. at 770. "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Thompson v. Western States Medical Center,* 535 U.S. 357, 375 (2002) (quoting *44 Liquormart,* 517 U.S. at 503). "The premise of our system is that

there is no such thing as too much speech – that the people are not foolish but intelligent, and will separate the wheat from the chaff." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Scalia, J., dissenting). This being the case, requirements for disclosure, disclaimer, or explanation are highly favored over regulations that entirely would prohibit commercial speech. *See Zauderer*, 471 U.S. at 650-51; *In re R.M.J.*, 455 U.S. at 203.

IV. The Current and Proposed Guidelines

WLF believes that the FTC in general has an exemplary record of balancing its statutory mandate to protect consumers with the First Amendment's mandate to protect free speech. It prevents deceptive speech by requiring marketers to be able to substantiate factual claims included in their advertising or labeling. When it obtains evidence that substantial numbers of consumers may misunderstand a claim that is not inherently misleading, it has opted to require use of disclaimers as a means of reducing the potential for misunderstanding rather than (as some other government agencies are prone to do) attempting to ban the speech altogether. The FTC is to be commended for recognizing that consumers are well-served by a robust exchange of information, and that the First Amendment prohibits the government from suppressing truthful speech simply because some consumers might misuse the information provided to them.

WLF believes that the Guides have been effective in providing guidance to businesses seeking to make environmental marketing claims. Moreover, it applauds the FTC's efforts to update the Guides, for the purpose of responding to changes in the marketplace since the FTC last revised them in 1998, and to provide additional assistance to marketers who seek to avoid making unfair or deceptive environmental marketing claims. WLF believes that the vast majority of marketers have no desire to mislead consumers, and thus increased and updated guidance from the FTC will be viewed by marketers, in the great majority of instances, as helpful assistance in their ongoing efforts to avoid pitfalls.

As WLF supports a significant majority of the proposed changes, we will only briefly mention our areas of agreement. WLF fully support the new section of the proposed Guides that addresses certifications and seals of approval. That section provides much needed guidance; in particular, it provides that marketers must make clear what attributes of their product have merited the seal of approval.

To the extent that widely used environmental terms convey somewhat conflicting meanings, the proposed Guides wisely attempt to mandate a clearer definition. In particular, WLF applauds the FTC's proposal to require disclaimers in connection with use of the word "recyclable," for the purpose of disclosing the extent to which recycling programs are available. In response to the FTC's specific request for comments regarding whether it should quantify the "substantial majority" and "significant percentage" thresholds for recyclability:

WLF sees no need for such quantification. Given the inherent imprecision of "access to recycling" figures, WLF believes that the proposed Guides provides as clear guidance as the FTC can realistically provide in this area.

V. Unqualified General Environmental Claims

As noted above, WLF has concerns regarding three provisions of the proposed Guides. Most prominently, we take issue with the FTC's decision to ban all unqualified general environmental claims. Proposed § 260.4. While such unqualified claims may be deceptive in some instances, WLF believes that in many instances they will not be. We strongly suspect that the typical consumer does not attribute *any specific* qualities to a product marketed as "green" or "eco-friendly." Under those circumstances, we believe that the FTC's blanket prohibition is a disservice to consumers and cannot withstand First Amendment challenge.

The FTC bases its proposed prohibition on a "consumer perception study" conducted for it in July and August 2009 by Harris Interactive (the "Study"). The Study asked participating individuals whether they thought a specific product advertised as "green" or "eco-friendly" possessed the following specific environmental attributes: (1) recyclable; (2) made from recycled materials; (3) biodegradable; (4) compostable; (5) made with renewable energy; and (6) made with renewable materials. Because a significant number of consumers responded that they believed that the product possessed one or more of those attributes, the FTC has concluded that many consumers are misled by unqualified general environmental claims.

WLF respectfully submits that the Study does not support the FTC's conclusion. We think it highly likely that respondents, in order not to sound uninformed about environmental issues, responded positively (when prompted) to the suggestion that the hypothetical "green" product possessed two or more of the six attributes. We strongly suspect that, had the Study not suggested the six potential attributes to them, no more than a minute fraction would have volunteered those attributes on their own. Indeed, it is our experience that a significant majority of consumers, if asked to define such terms as "biodegradable,""compostable," or "made with renewable materials," could not begin to provide a definition. Many consumers have a vague sense that those terms are related to environmental issues and that they are generally positive attributes in a product – thus their willingness to respond that a "green" product might possess those qualities. But such a response is an unsound basis for concluding that they are likely to be misled by a claim that the product is "green." Consumers cannot be deemed to be misled by the terms "green" or "eco-friendly" if they can come up with attributes for which there is no substantiation only after having those attributes suggested to them.[2]

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[2] It is no answer to respond that Study participants were less likely to attribute the same six attributes to products described as "new and improved." So long as Study participants are sufficiently familiar with the six terms to know that they are somehow related to environmental

Rather, WLF believes that a reasonable consumer, after reading a claim that a product is "green" or "eco-friendly," concludes that it possesses at least one attribute that makes the product environmental superior to competing products with respect to that undefined attribute. So long as the marketer possesses information to substantiate that claim, WLF submits that the FTC cannot reasonably conclude that the claim is "deceptive." Any effort by the FTC to categorically prohibit such generalized claims cannot pass First Amendment muster. There may, of course, be individual instances where the specific circumstances of a "green" or "eco-friendly" claim make it highly likely that a significant number of consumers will be deceived; in those instances, the FTC would be justified in initiating an enforcement action. But the evidence gathered by the FTC to date cannot support a categorical ban.

Moreover, consumers are likely to suffer if the FTC imposes a categorical ban and thereby reduces the scope of commercial information they receive. Manufacturers whose product truly contains an environmentally friendly attribute may decide not to convey that information at all if, in order to do so, they must go to the expense of adding disclaimers that qualify their environmental claim.

Indeed, we strongly suspect that, in light of the widespread proliferation of environmental claims, many consumers have long since concluded that unqualified general environmental claims amount to little more than puffery. The FTC at times seems to concede that such claims are largely incapable of being proven true or false.[3] And if a commercial statement is puffery that cannot be proven false, then the First Amendment virtually never permits its outright prohibition. As one federal appeals court has explained:

> Puffery and statements of fact are mutually exclusive. If a statement is a specific, measurable claim or can be reasonably interpreted as being a factual claim, i.e., one capable of verification, the statement is one of fact. Conversely, if the statement is not specific and measurable, and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained, the statement constitutes puffery. Defining puffery broadly provides advertisers and manufacturers

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issues, of course they are more likely to associate those attributes with a "green" product than with a "new and improved" product. But that finding does not support a finding that use of the unqualified term "green" is misleading, in the absence of evidence that consumers – without prompting – will ascribes two or more of the six attributes to a product marketed as "green."

[3] For example, the FTC concedes that "[u]nqualified general environmental benefit claims are difficult to interpret." Proposed § 260.4(b). We agree. And a reasonable consumer, when faced with a difficult-to-interpret claim, will most likely conclude that the claim is puffery that does not convey any verifiably-true-or-false meaning – except perhaps that the product possesses at least one environmentally desirable attribute.

> considerable leeway to craft their statements, allowing the free market to hold advertisers and manufacturers accountable for their statements, ensuring vigorous competition, and protecting legitimate commercial speech.

American Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 391 (8th Cir. 2004).

Because most consumers are unlikely to base a purchase decision on an unqualified statement that a product is "green," many manufacturers may decide – for competitive reasons – to spell out the specific environmental benefit being asserted, along the lines set forth in Proposed § 260.4(c). Such specification is likely to add to the strength of the claim, because consumers may well be attracted by a specific (and presumably verifiable) claim that the product has the very attribute that they most look for in a product. But the inclusion of such specification should come about as a result of market forces only, not as a result of an FTC mandate issued in the absence of any credible evidence that consumers are being deceived. In the absence of such evidence, the FTC prohibition fares no better than the New York statute that imposed an absolute prohibition against law firms adopting a nickname or tradename that "implie[d] an ability to obtain results in a matter" on behalf of a legal client. The Second Circuit struck down the statute earlier this year on First Amendment grounds, concluding that such law firm names "are akin to, and no more than, the kind of puffery that is commonly seen, and indeed expected, in commercial advertisements generally." *Alexander v. Cahill*, 598 F.3d 79, 95 (2d Cir. 2010).

VI. Degradable Claims

The Green Guides currently provide that unqualified degradable claims should be substantiated with competent and reliable scientific evidence that the entire product or package will completely break down and return to nature within a reasonably short period of time "after customary disposal." 16 C.F.R. § 260.7(b). Under the proposed Guides, that provision will be largely unchanged. Proposed § 260.8(b).

WLF has no objection to the Guides as written, except for the very last clause, the portion in quotation marks above. The FTC takes the position that if, for example, a product is most commonly disposed of in a landfill (as most products are) and will not degrade in a landfill due to the absence of sufficient water and oxygen in that environment, then the manufacturer may not make a claim that the product degradable.

That rule cuts against the commonly understood definition of the terms "degradable" and "biodegradable" and deprives consumers of information that most would want to have. The word "degradable" is generally understood as conveying that a product is easily capable of completely breaking down in a reasonably short period of time. Thus, most consumers would consider a plastic bag that breaks down quickly in the presence of water and oxygen to be

"degradable." Plastic bags have become a controversial item in a number of communities because, some individuals fear, they will be present in the environment for centuries to come due to their resistance to degradation. It is unimaginable that such individuals, if given a choice between non-degradable plastic bags and bags that are degradable when exposed to water and oxygen, would not choose the latter. Yet, the Guides largely deprive such individuals of the ability to differentiate between "good" and "bad" plastic bags.

If the FTC believes that it has solid evidence that environmental activists – the very people who are most likely to push for degradable plastic bags and who are most knowledgeable about scientific issues surrounding degradability – might actually be deceived by claims that a product customarily disposed of in a landfill is degradable (*i.e.*, they interpret the claim to mean that the product will always degrade quickly, even when disposed of in a landfill), then perhaps the FTC could require a short disclaimer to accompany the degradable claim. For example, it could require language such as "degradable under appropriate environmental conditions." But the Guides require far more than is necessary (and far more than is permissible under the First Amendment) when they require lengthy explanation regarding the ability of the product to degrade when disposed of in the most customary manner. The result of such cumbersome disclaimer requirements is readily apparent: marketers will rarely say anything about the degradabilty of their products, consumers will be deprived of information they wish to obtain, and manufacturers will cease competing by providing products that degrade easily in water and oxygen.

VII. Carbon Offset Programs

WLF applauds the FTC's decision to provide guidance in this rapidly growing area. While WLF claims no expertise in the area, it is readily apparent that some uniform standards for marketing claims are badly needed.

WLF objects to only one provision of the proposed Guides. The FTC proposes that marketers not be permitted to advertise a carbon offset if the activity that forms the basis of the offset is already required by law. We can see no legitimate basis for that prohibition against claims that are 100% truthful. Regardless whether the activity being undertaken is voluntary or is one required by law, consumers would want to know that the activity is actually occurring; the proposed Guides would prevent consumers from acquiring such knowledge.

By analogy, when the FTC Commissioners adopt a good set of regulations, the admirability of their work is not diminished by the fact that they all received salaries that were commensurate with their accomplishment, and that they were simply doing what they had been paid to do. Instead, each is entitled to trumpet his or her accomplishments. So too, when a company undertakes an activity that can legitimately be deemed to constitute a carbon offset, its motivation for doing so (*e.g.*, that it was required to do so by law) should be irrelevant to

whether a market may advertise the carbon offset.

CONCLUSION

WLF applauds the Agency for its commendable efforts to update the Green Guides to respond to changes in the marketplace, and to provide improved guidance to marketers seeking to avoid being subjected to FTC enforcement actions. WLF urges the FTC to amend the proposed Guides in the manner outlined above.

Sincerely,

/s/ Daniel J. Popeo
Daniel J. Popeo
Chairman and General Counsel

/s/ Richard A. Samp
Richard A. Samp
Chief Counsel