



# Federal Trade Commission

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"The FTC's Environmental Marketing Guides:  
Thoughts on the Upcoming Three-Year Review"

Prepared Remarks

of

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before the

1995 Environmental Affairs Conference  
of the  
Grocery Manufacturers of America  
and the Food Marketing Institute

Washington, D.C.  
April 25, 1995

I'm delighted to speak with you this afternoon about the Federal Trade Commission's guidelines for environmental marketing claims. Most of you know that the promised three-year review of the guides is rapidly approaching, so I am going to share some of my thoughts on the successes and shortcomings of the guides, and identify some issues that may be considered during the review process.

When the Commission issued the guides in 1992, we established a third-anniversary schedule that called for seeking public comment on whether and how the guides should be modified in light of experience. We built in this review, in part because we recognized that the available data on important questions like consumer perception were not as complete as we would have liked. We also wanted to ensure that the guides would be responsive to changes in consumer understanding and developing environmental technology. Our plan is to publish a Federal Register notice soliciting comments on the guides around the time of their third anniversary, which comes at the end of July.

Before I go any further, I have to make the usual disclaimer that the views I express today are my own and are not necessarily those of the Federal Trade Commission or any of the other Commissioners. In addition, my comments today reflect my preliminary thoughts about the review and are certainly not set in stone. Obviously, the point of a comment period is to give parties an opportunity to identify issues and viewpoints that we

may not even know about. Just as GMA and FMI played an important role in framing the discussion when we were formulating the guides, I'm sure that your comments during the upcoming review process will be helpful to the Commission.

This examination of the environmental guides is consistent with the regulatory review program initiated by the Commission in 1992. Under that program, the Commission reviews each FTC rule and interpretive guide at least once every ten years to evaluate its usefulness and economic impact. Based on these reviews, the Commission determines whether to retain, repeal, or amend the rule or guide at issue. We recognize that even well-written, well-justified rules or guides can become outmoded or unnecessary. So far, in the regulatory review project, the Commission has completely repealed one rule and four guides because the Commission found that they were either obsolete or no longer needed by the industry.<sup>1</sup>

One set of guidelines the Commission recently amended concerned the nursery industry. We revised these guides to

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<sup>1</sup> Rule Concerning Discriminatory Practices in Men's and Boy's Tailored Clothing Industry, 16 C.F.R. Part 412, repealed at 59 Fed. Reg. 8527 (Feb. 23, 1994); Guides for the Greeting Card Industry Relating to Discriminatory Practices, 16 C.F.R. Part 244, repealed at 59 Fed. Reg. 8527 (Feb. 23, 1994); Guides for Advertising Fallout Shelters, 16 C.F.R. Part 229, repealed at 58 Fed. Reg. 68,292 (Dec. 27, 1993); Guides for Advertising Radiation Monitoring Instruments, 16 C.F.R. Part 232, repealed at 58 Fed. Reg. 68,292 (Dec. 27, 1993); and Guides for Advertising Shell Homes, 16 C.F.R. Part 230, repealed at 59 Fed. Reg. 49,804 (Sept. 30, 1994).

reflect changes in environmental concerns and consumer perception that have occurred since the guides were originally issued in 1979.<sup>2</sup> The 1979 guides permitted plants collected from the wild to be called "nursery-grown" if they spent at least one growing season in the nursery before being marketed. This policy was designed as a response to consumer beliefs that nursery-grown plants were hardier and more likely to survive than plants collected from the wild. So, the original guide was intended to assure that inferior wild-collected plants would not be passed off as nursery grown until they had survived at least one growing season.

Since that time, however, ecological concerns about harming wild plant species have arisen and some consumers wish to avoid wild-collected plants. That concern clashed with the Nursery Guides' provision allowing a wild-collected plant to be recharacterized as nursery-grown merely by surviving one growing season in the nursery. Thus, in response to a petition by the Natural Resources Defense Council, and with the support of the nursery industry, the Commission revised the guides to eliminate the "one growing season" exception. This is an illustration of how consumer perceptions can change and why the Commission must recognize such changes.

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<sup>2</sup> Guides for the Nursery Industry, 16 C.F.R. Part 18.

Another example of the Commission's commitment to sensible regulation is our review of the Light Bulb Rule,<sup>3</sup> which requires the disclosure on light bulb packages of information such as wattage, light output, and bulb life. A possible problem arises because these disclosures may be duplicative of new energy efficiency regulations mandated by Congress in an amendment to the Energy Policy Act. Because of this potential overlap, the Commission scheduled the Light Bulb Rule for review this year, to determine if the Rule is still needed, and if so, whether it should be amended.

I would also briefly note that our effort to be responsible and efficient led us to request public comment on whether orders in consumer protection cases ought to terminate automatically, or sunset, after a certain period of time. In contrast to competition orders, where we've had the benefit of a thorough airing of views by outside parties, we had virtually no outside data to inform a decision on sunseting consumer protection orders. So we published a Federal Register notice seeking comment on this issue, and I expect that the staff will soon be forwarding a recommendation to the Commission.

Turning now to the environmental guides, I would like to discuss how the guides are working so far and then to address

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<sup>3</sup> Rule Concerning Incandescent Lamp (Light Bulb) Industry, 16 C.F.R. Part 409.

some issues that will likely be raised during the review. But first let me take a minute to review the basics about the environmental guides.

First, the guides are deception based. They implement the Commission's general authority to prohibit false or unsubstantiated claims in labeling and advertising. Thus, they focus on the question of what environmental marketing claims mean to consumers.

Second, the guides are a statement of enforcement policy by the Commission -- they are not substantive rules. Although they are in that sense voluntary, they alert manufacturers and advertisers to where the Commission may use its authority to enforce section 5 of the Federal Trade Commission Act. The Commission is the only federal agency that has the combined ability to give guidance in this area and to supplement this guidance with enforcement.

Third, the guides do not preempt state or local regulations concerning environmental marketing.

With that overview, what are the successes and the shortcomings of the guides? To measure whether the guides have been a success, we should recall the Commission's two-fold purpose when we issued them: first, to prevent consumer

deception, and second, to reduce manufacturers' uncertainty about which claims might lead to FTC law enforcement actions.

Let me address those goals in reverse order. I think the guides really have helped manufacturers understand how they can promote the environmental features of their products without being deceptive. We've received a lot of informal feedback from industry letting us know that the guides have proved very helpful to them. And I know that the staff fields many questions from companies attempting to apply the general principles laid out in the guides to their particular fact situations.

This is consistent with the very function of FTC industry guides: to facilitate voluntary compliance with the law. And it is my impression that advertisers generally are complying with the guides. Certainly, the most outrageous claims that provoked the calls for government regulation in the late 1980s and early 1990s are no longer evident.

Still, while voluntary compliance has generally been good, it has not been perfect, and the Commission has continued to investigate false and misleading claims, some of which have led to formal Commission action. For example, in the past year or so, about ten consent orders have been issued, either in proposed or final form.

Part of the Commission's efforts to encourage voluntary compliance by advertisers was the objective of setting a single, national standard for the veracity of such claims. We know that national marketers cannot readily adjust their claims to conform to a variety of possibly conflicting state laws. The state attorneys general were quite candid when they told us that avoiding such inconsistency was a principal reason why they wanted the FTC to issue non-preemptive guidance in this rapidly evolving area. So, one of our goals in issuing the guides was to fill the perceived vacuum at the federal level, and the guides do appear to have achieved that result.

Specifically, I'm not aware that any state has enacted new environmental legislation concerning general labeling or advertising restrictions without considering our guides. To the contrary, several states have adopted some version of our guides as regulations.<sup>4</sup>

The accomplishment of the Commission's other goal -- to prevent consumer deception -- is more difficult to assess. But to the extent that advertisers are more aware of their responsibility to substantiate both express and implied claims and to be specific about the way in which their products benefit

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<sup>4</sup> E.g., 1994 Mich. Pub. Acts 46 (Amendment to Michigan Compiled Laws section 445.903); Wis. Stat. Ann. § 100.295 (West Supp. 1993); Wis. Admin. Code § ATCP 137 (Feb. 1, 1994); Me. Rev. Stat. Ann. tit. 38, § 2142 (West Supp. 1993); Ind. Code Ann. § 24-5-17 (Burns Supp. 1993).

the environment, then fewer misleading claims should be in the marketplace.

Now, in terms of this summer's review process, let me summarize what I anticipate will be the general areas of interest, followed by an examination of some specific issues that will probably be raised. Three general areas of interest come to mind: first, how the guides have affected green marketing; second, the state of consumer knowledge; and third, additional terms that the guides should cover.

Taking those issues in order, the first is "how have the guides affected green marketing?" We would like to receive comments on whether the guides have fulfilled their promise of creating a level playing field for marketers, and on whether claims are more accurate than they were before. We would also be interested in reviewing data on whether environmental claims are being made more or less frequently than before, and whether environmental claims are more or less qualified than they had been. We would also want to know if the guides have had any undesirable effects. For example, have they have permitted deceptive claims to slip through? Have they restricted truthful claims? Or have they impeded product innovations?

We are aware that some efforts to document how green claims are evolving are already underway. For example, a University of

Utah study is looking at trends in the frequency, content, and format of green claims on product labels.<sup>5</sup> The first audit of claims was done in September 1992, shortly after the guides were issued, and has continued at six-month intervals. While the first sweep suggested that compliance with the guides was not widespread, later sweeps found significant improvement in the presentation of several types of environmental claims.

For example, the Utah study shows that recycled content claims have become more specific in referring to an exact percentage of recycled content, while claims of source reduction have become more specific about the baseline for measuring the reduction.

There are also indications that the guides are having an effect in the area of degradability claims. The Utah study suggests that degradability claims for products disposed of in landfills have virtually disappeared, although they still are being made -- and appropriately so -- for products disposed of in the sewage system.

Claims of recyclability, however, is one category of claims that shows much less improvement. The audits reveal that more

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<sup>5</sup> R.N. Mayer, B. Cude, J. Gray-Lee & D.L. Scammon, Trends in Environmental Marketing Claims Since the FTC Guides: Two-Year Auditing Results, Consumer Interest Manual: Proceedings of the 1995 ACCI Conference (forthcoming).

than two years after the guides were issued, most of these claims were still not appropriately qualified. And even when they were qualified, the disclosure statements were weaker than those suggested by the Commission's guides. Perhaps this is an area where we may need to bring a few more enforcement actions.

One interesting result reported by the audits is that environmental claims are apparently being made more often now than before the guides were issued. Moreover, claims have become more prominent, as claims featured on the fronts of packages have increased by more than a third. Assuming of course that the claims are not deceptive, this is a positive development, since it suggests that the guides are achieving their goal of reducing manufacturers' uncertainty about how to make environmental claims.

We also have followed with interest the data generated by companies like Marketing Intelligence Service about the frequency of green claims made during new product introductions. That information also suggests that green claims for new products continue to rise.

The second broad topic that the Commission will want to examine during the review period is the state of consumer knowledge. The guides are premised on certain assumptions about consumer understanding of environmental terms like "degradable"

and "recycled," and we'll want to know whether those assumptions accurately reflect current consumer thinking. It is possible that consumers have become more knowledgeable about environmental issues and about specific terms. It would be important to know, for example, if today's consumers have a more sophisticated understanding of the difference between pre-consumer and post-consumer recycled content. Our initial data suggested that many consumers were unfamiliar with these terms, which was one reason why we did not require disclosure of post-consumer and pre-consumer content.

One example of useful research that's already been done is the consumer perception surveys conducted regularly by the industry trade group known as the Council on Packaging in the Environment, or "COPE." As part of its research, COPE asked consumers what kinds of packaging approaches they preferred. Consumers were given the choice of recyclable packaging, recycled packaging, less packaging, and refillable packaging. Forty-four percent of respondents chose recyclable packaging as their first choice, compared to 22% for less packaging, 21% for recycled, and 11% for refillable. This result contrasts pretty starkly with EPA's "reduce, reuse, recycle" hierarchy of environmental preferences, suggesting that there is still considerable room for further consumer education about what activities are best for the environment.

Another aspect of consumer knowledge that needs research is the efficacy of the disclosures required by the guides. As I'm sure you'll agree, the guides require a lot of disclosures (such as the requirement to indicate limited recycling facilities), and we'll want to know whether these disclosures are appropriate and adequate to prevent consumer deception. COPE has analyzed the effectiveness of certain recyclability disclosures. Those results suggest that certain of the disclosures contained in the guides may be more effective than others in communicating to consumers the limited availability of recycling programs. This kind of data is sure to be of interest to the Commission.

The final broad topic of interest is whether there are new green claims that need to be added to the guides. A few that come to mind are "non-toxic," "please recycle," and the three-chasing-arrows recycling logo. We hope that surveys like the Utah study will help provide us with some guidance on new trends in environmental marketing.

Now, I'd like to turn to several specific issues that are likely to be raised during the review. One is the definition of the term "degradable." Here, we anticipate reviewing the state of consumer understanding about degradability and its environmental benefits.

Another specific issue relates to the disclosures about recyclability. This was one of the most difficult issues that we faced during development of the guides, and it's still likely to pose tough questions. The main questions are (1) when disclosures are necessary, and (2) what disclosures are adequate to communicate the limited availability of recycling programs. As I mentioned before, we have at least some data suggesting that certain of the disclosures are less effective than others.

Another recycling-related issue that will certainly be raised during the comment period is the SPI code, that is, the Society of Plastics Industry code that identifies plastic resin type. One example given in the recyclability section of the guides states that the SPI code does not constitute a recyclability claim if it is inconspicuous and is not accompanied by other indicators that might convey such a claim. We are aware that the SPI code is required by law on certain containers in more than 30 states, although it is also being used on a lot of containers where it is not required. And we are also well aware that there has been controversy about the triangular chasing arrow design of the code and the utility of the plastic resin classifications. I was sorry to learn that efforts by SPI and the National Recycling Coalition to work out these concerns in a mutually agreeable way proved unsuccessful. Nonetheless, a Commission decision changing the circumstances in which the code

constitutes a recyclability claim would have to depend on data about how consumers interpret the code.

In the meantime, the Commission has enforced the principle set out in the SPI code example in the guides. The Commission brought a case against a company that used the SPI code prominently in conjunction with the word "recyclable" on the label of its foam polystyrene tableware.<sup>6</sup> Because the code was prominent and the word "recyclable" was used, the Commission challenged its use just like any other unqualified recyclability claim.

Another recycling-related issue that we'll be considering relates to pre-consumer vs. post-consumer recycled content. Recall that our guides allow both types of material to count toward recycled content, and we don't require the amount of either to be disclosed. This approach was taken because of extrinsic evidence suggesting that most consumers made no distinction between the two types of content and did not fully understand the terms "pre-consumer" and "post-consumer." However, some groups urged the Commission to require a separate disclosure of post-consumer content, and we anticipate that this issue will be raised again.

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<sup>6</sup> Amoco Chemical Co., No. C-3514 (Aug. 9, 1994).

Perhaps an even thornier issue that we'll consider is life cycle analysis. The guides noted that this type of analysis was still in its infancy and therefore the Commission did not believe it had enough information to address the issue effectively. Although we anticipate that there will be significant interest in this issue at review time, my general sense is that this remains an area fraught with difficult policy and technological issues. Arguably, EPA should take the lead on this issue, and indeed EPA is currently conducting a major research project on life cycle analysis.

Another issue that may be raised is certification or seal-of-approval programs, a topic about which the guides are currently silent. Thus far, the Commission has been relying on its general body of law dealing with endorsements and certifications to deal with environmental certification. The main concern for us has been to ensure that seals do not convey environmental benefits greater than the claim being certified. I believe that this approach has worked well, and I'm not aware of any particular demand that the Commission amend the guides to cover certification programs, but some comments may suggest otherwise.

A final issue is state regulation. As I said earlier, our impression is that states considering new environmental legislation have given careful thought to harmonization with our

guides. We're aware of few, if any, actual conflicts with our guides -- in the sense that compliance with both state law and the guides would be impossible. However, we will want to learn of any specific problems presented by inconsistencies between specific state and local regulations and our guides. As far as we are aware, the state attorneys general have been enforcing their little FTC Acts in a manner consistent with our guides. So, in terms of encouraging uniformity among the states and preventing a patchwork of conflicting state regulations, the guides seem to have worked almost as well as one could hope, given the fact that they do not legally preempt the states.

The next challenge for environmental marketing claims may be the international arena. There is a concern that differing national environmental labeling regulations may pose barriers to trade. This is an issue similar in some ways to the concerns of national marketers about conflicting state regulations. Many companies also have an interest in being able to market across international borders. I am aware of some work that is being done by the International Standards Organization to establish uniform international standards for environmental marketing claims. I was gratified to learn that the ISO considered the FTC's guides in drafting their guidelines, and the ISO's proposed guidelines appear to be quite consistent with our guides.

To sum up, it appears that the environmental guides have been working remarkably well and that implementation of the guides has not resulted in any significant unforeseen consequences, and at this point I do not anticipate major changes in the guides. The flexible approach of the FTC's guides, backed up by individual enforcement actions, seems to have been successful, a result largely due to the joint efforts of the industry, the states, and the environmental groups who helped us develop appropriate standards three years ago.

Your input was invaluable to the Commission in developing the green guides, and we look forward to similar assistance during their review. Since we still have several months to go before the review starts, let me take this opportunity to repeat my pitch for extrinsic evidence about consumer perceptions. I really can't overemphasize the importance that the Commission places on such evidence. If you believe that consumers interpret a claim differently than is assumed in the guides, or that a new claim needs to be added to the guides because it is being used deceptively, show us some consumer surveys or copy tests. If you think that the disclosures we suggest are too strict or negative, or not strict enough, send us evidence of how consumers interpret the disclosures.

Thank you very much, and I'd now be happy to answer any questions that you might have.