



Federal Trade Commission

RESPONSIBLE GREEN MARKETING

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at the

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I. Introduction

I am pleased to be here today to discuss the Commission's recent activities regarding the Guides for the Use of Environmental Marketing Claims, more commonly known as the "Green Guides."² As all of you have probably noticed, "green" marketing claims seem to have recently become ubiquitous – running the gamut from "luxury vodka that's good for the environment"³ to

¹ The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Beth Delaney, for her invaluable assistance in preparing these remarks.

² 16 C.F.R. § 260 (2008). Industry guides, such as the Green Guides, are administrative interpretations of the law. As such, they do not have the force and effect of law and are not independently enforceable. The Commission can take action under the FTC Act, however, if a business makes environmental marketing claims inconsistent with the Guides. In such an enforcement action, the Commission has to prove that the challenged act or practice at issue was unfair or deceptive.

³ Stuart Elliott, "Green Grows the Vodka," The New York Times, Mar. 17, 2008, available at www.nytimes.com/2008/03/17/business/media/17adnewsletter1.html?

⁴ Michael S. Rosenwald, “*A Tactical Turn to Green for Marriott*,” The Washington Post, Apr. 8, 2008, at D1, *available at* www.washingtonpost.com/wp-dyn/content/article/2008/04/07/AR2008040702630.html.

⁵ Scott Edward Anderson, “*Greening the Gridiron: Environmental Responsibility at the Superbowl and Beyond*,” Feb. 6, 2006, *available at* www.climatebiz.com/feature/2006/02/06/greening-gridiron-environmental-responsibility-superbowl-and-beyond.

⁶ Press Release, “*Natural Resources Defense Council ‘Greens’ the Academy Awards*,” Feb. 25, 2007, *available at* www.nrdc.org/media/2007/070225.asp.

⁷ CBS Evening News, “*A Closer Look at ‘Green’ Products*,” May 18, 2008, *available at* www.cbsnews.com/stories/2008/05/18/eveningnews/main4105507.shtml.

⁸ GreenBiz Staff, “*Eco Trademarks Made Big Gains in 2007*,” Apr. 28, 2008, *available at* www.greenbiz.com/news/2008/04/28/eco-trademarks-made-big-gains-2007.

¹³ See, e.g., Annual Report of the Federal Trade Commission for the Fiscal Year Ended June 30, 1971, *available at* www.ftc.gov/os/annualreports/ar1971.pdf (“Because of recent, widespread concern with the effect of commercial products on the envir

¹⁶ Final Rule and Statement of Basis and Purpose, 35 Fed. Reg. 11784 (July 23, 1970). The Commission later repealed the “Light Bulb Rule,” determining that the Rule was no longer necessary in light of the more comprehensive lamp labeling rules adopted in 1994 under the Energy Policy and Conservation Act, and current industry light bulb marking practices. *See “FTC Turns Out the Light on 1970 Light Bulb Rule,”* July 1, 1996, available at www.ftc.gov/opa/1996/07/bulbs4.shtm.

In the Matter of Crown Central Petroleum Corporation

In 1991, the FTC held public hearings and initiated a 90-day comment period on issues concerning environmental marketing and advertising claims, and in 1992, issued the Green Guides.²¹ In fact, one of the Commission attorneys primarily responsible for this commendable work is here today – Mary Engle – you will see her on the children’s advertising panel later today.

III. The Green Guides Now

Now I would like to make a couple of general observations about the Green Guides themselves. I was long gone from the agency when the Green Guides were issued, but in preparing my remarks to you I went back and reviewed some of the speeches I gave to the advertising community in 1974 about the basic legal principles applicable to advertising and I was struck by how firmly rooted the Guides are in those basic principles. The Guides do nothing more than reflect, with respect to particular types of claims – whether it be recyclability, biodegradability or compostability – the basic requirements that have been spelled out over the years in FTC statements and cases for *all* advertising claims.

Those principles are fivefold. First, advertising claims should be substantiated before the claims are made. The Commission has said that since the *Pfizer*²² and *Firestone*²³ cases more

consumers get accurate information about the environmental advantages of packaging and products, while the manufacturer gets clear guidance for claiming certain attributes).

²¹ Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36363 (Aug. 13, 1992).

²² *Pfizer Inc.*, 81 F.T.C. 23 (1972).

²³ *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972), *aff’d* 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

16 C.F.R. § 206.5 (2008).

²⁹ *In the Matter of American Home Products Corp.*, 70 F.T.C. 1524 (1966).

³⁰ 16 C.F.R. § 260.6(c)(2008).

16 C.F.R. § 260.7(a), Example 5 (2008).

their practices. Likewise, this is an area that we will need to consider as we review the Guides. Does current guidance provide enough assistance? What do consumers understand about the claims made about one part of the manufacturing, distribution or disposal process, when actual practices in other parts of the process may “undo” the good accomplished by that part of the process? One environmental marketing agency identifies this as the “Sin of the Hidden Trade-Off” – and gives the following example: a product may come from a sustainably harvested forest, but what are the impacts of the milling and transportation practices?³⁴ In terms of advertising practices, what is important is the net impression taken away by the consumer about the claims made.

Participants in the comment process and the workshops have also highlighted the fact that the Guides could be fine tuned to address the use of terms like “biodegradability” and “recyclability” in light of consumer perception about what these words mean. For example, the Guides point out that an unqualified biodegradability claim should be substantiated by competent and reliable scientific evidence that the entire product or package will break down and return to nature “**within a reasonably short period of time after customary disposal.**”³⁵ One issue raised concerns the meaning of the term “reasonably short period of time.” Consumers may have a very different per

³⁴ TerraChoice Environmental Marketing, Inc., “*The Six Sins of Greenwashing – A Study of Environmental Claims in North American Consumer Markets*,” Nov. 2007, available at www.terrachoice.com/files/6_sins.pdf. See also Christopher A. Cole & Carly Van Orman, “*Green Marketing: Avoiding Unwanted Attention from Regulators and Marketers*,” Legal Backgrounder, May 19, 2008, available at www.wlf.org/upload/05-16-08vanorman.pdf.

³⁵ 16 C.F.R. § 260.7(b)(2008).

making truthful and accurate claims. How consumers actually dispose of biodegradable products is another issue. The Guides talk about “**customary disposal**” with respect to claims of biodegradability. However, disposal for many consumers means a landfill, and landfills today are often constructed in a manner that specifically thwarts biodegradability. Do claims need to be clarified so that consumers have this information?

Recyclability claims raises similar issues – the Guides point out that such claims “should be qualified to the extent necessary to avoid consumer deception **about any limited availability of recycling programs and collection sites.**”³⁶ As newer products develop that have the capability to be recycled, producers must keep in mind the fact that facilities may not be yet be widely available for the recycling of such products. As a policy matter, it is tempting to label as “recyclable” anything that is even remotely so. However, it is my view that the goal of the Green Guides should be focused on promoting accurate and truthful advertising. While I believe that motivating socially responsible behavior is very useful, I personally think that motivating socially responsible behavior, as such, is not the FTC’s mission as its mission is defined by Section 5 of the FTC Act. However, I do think that consumer education as a byproduct of accurate and truthful advertising, ultimately, can lead to more responsible behavior.

Another issue is the growing use of words like “sustainable” and “renewable” in environmental marketing. As many of you know, the basic framework of the Guides, for the most part, anticipates claims about specific attributes of a product. Some commenters have suggested that these terms are too vague and that the FTC should not try to define them for purposes of the Guides. Others have opined that these terms are comparable to phrases such as

³⁶ 16 C.F.R. § 260.7(d)(2008).

“eco-friendly” and other general “green” claims and should be prohibited as a “general environmental benefit” claim unless the marketing claim is limited to a particular attribute of a product and it could then be substantiated.³⁷ Still other commenters have noted that their industries can and have defined terms such as “sustainable,” and accordingly, they should be allowed to use them in their marketing and self-regulatory efforts. These are some of the issues that staff is in the process of sorting out.

V. First Amendment/Free Speech/Image Advertising – Then and Now

Even when our mission is defined in narrow terms, we must be mindful of the First Amendment. I say this for five reasons.

First, image advertising can be a very effective tool, especially for an advertiser whose products are more or less fungible. As the public becomes increasingly aware of the fungibility, the advertiser may try to differentiate itself on some basis and image is one way to do it. A company that is viewed by consumers (and/or shareholders) as a “good” company, as compared to its rivals may do better in the competitive and capital markets than those rivals.

Second, image advertising is not a new phenomenon. When I was at the Commission in the mid-1970s, we saw a lot of it, as you can imagine, by petroleum companies. After I left, the Commission brought a case against R.J. Reynolds based on a paid advertisement it placed in major magazines regarding its “Of Cigarettes and Science” message – basically an advertorial looking at medical studies and questioning the link between smoking and heart disease. The

³⁷ 16 C.F.R. § 260.7(a)(2008)(“Unqualified claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers”).

ALJ dismissed the case on the basis that the message was fully protected speech, but then the Commission reversed that order, remanding the matter back to the ALJ.³⁸ Ultimately, the parties settled, avoiding further exploration of these difficult issues.

Third, I am well aware that “image” and “message” advertising continues to pose difficult constitutional issues. For example, the Supreme Court recently avoided tough issues in the *Nike v. Kasky* case by ruling that certiorari was improperly granted.³⁹ More specifically, I understand that the First Amendment shields non-commercial advertising from challenges except in very unusual circumstances, and I think that shield is available to many, if not, most companies (and entities) engaged in First Amendment image and message advertising, and environmental issues, for example – regardless of whether the “message” is true or false.

Fourth, however, that said, I am not convinced that all image ads are shielded from

³⁸ *In the Matter of R.J. Reynolds Tobacco Co., Inc.*, 111. F.T.C. 539 (1998).

³⁹ *Nike, Inc., et al. v. Kasky*, 539 U.S. 654 (2003).

Finally, I don't suggest for a moment that the Commission should go after all unprotected ads. There may well be sound policy reasons – internal policy reasons – for not going after some ads insofar as that would conflict with other law enforcement activities. There may also be some valid law enforcement strategic reasons for not challenging some ads; in particular, if the invalidity or protectability of the claim made turns on facts that are hard to prove, the game may not be worth the candle. Or, some matters may be better resolved in actions by competitors, either through Lanham Act cases or the self-regulatory process. But I

⁴⁰ *Dura Lube Corporation, et al.*, D-9292 (May 3, 2000) (challenging claims that the companies' motor oil additive, among other things, reduces emissions). From 1990 to 2000, the FTC brought 37 cases involving environmental marketing claims. See Energy & Environment microsite available at www.ftc.gov/energy/ (cases listed under the Enforcement tab of the Environment portion of the microsite).

Since 2000, the Commission has brought other cases, however, that relate to energy efficiency. See, e.g., *U.S. v. Northwestern Ohio Foam Packaging, Inc.*, Civil Action No. 3:06-cv-02407 (filed Oct. 5, 2006)(alleging that an insulation made exaggerated R-value claims for its insulation product); *F.T.C. v. Intl. Research and Dev. Corp. of Nevada, et al.*, Case No.: 04C 6901 (filed Oct. 7, 2004)(alleging deceptive claims about an “automatic fuel saver” device); *In the Matter of Kryton Coatings Intl., Inc.*, Docket No. C-4052, File No. 012 3060 (decision issued June 14, 2002)(alleging unsubstantiated performance and R-value claims for building coatings).

