

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

Comment Number:

Received:

Organization: American Association of Advertising Agencies, American Advertising Federation and the Association of National Advertisers

Commenter: Trade Organizations

State: District of Columbia

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

The American Association of Advertising Agencies (“AAAA”), the American Advertising Federation (“AAF”) and the Association of National Advertisers (“ANA”) (jointly referred to herein as “The Advertising Trade Associations”) appreciate the opportunity to jointly submit these comments to the Federal Trade Commission (“FTC”) regarding the FTC’s Guides Concerning the Use of Environmental Marketing Claims (the “Guides”).¹ The Advertising Trade Associations broadly support the goal of responsible marketing and wholeheartedly support the FTC’s periodic review 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

As the “Unifying Voice for Advertising,” the American Advertising Federation (AAF), headquartered in Washington, D.C., is the trade association that represents 50,000 professionals in the advertising industry. AAF’s 130 corporate members are advertisers, agencies and media companies that comprise the nation’s leading brands and corporations. AAF has a national network of 210 ad clubs and connects the industry with an academic base through its 210 college chapters. More information is available at www.aaf.org

The Association of National Advertisers (ANA) is the industry's premier trade association dedicated exclusively to marketing and brand building. ANA represents more than 340 companies with over 8,000 brands that collectively spend more than \$100 billion annually in marketing communications and advertising. Its members market products and services to both consumers and businesses. More information is available at www.ana.net

¹ 16 C.F.R. § 260 (2007), available at <http://www.ftc.gov/bcp/grnrule/guides980427.htm>.

Together these national trade associations represent virtually every segment of the advertising industry and are uniquely qualified to comment on the relevance and impact of the Guides to the advertising industry.

The Advertising Trade Associations strongly believe that the current Guides are beneficial to advertisers and consumers alike and are effective in ensuring the truth and accuracy of environmental marketing claims without imposing unnecessary burdens on advertisers. We further believe that any significant changes to these well-accepted 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, 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.

While our members all embrace the enforcement of non-deceptive claims in advertising, there is no compelling evidence to support the need for significant changes to the Guides at this time. In fact, there is currently no evidence that consumers are confused or misled by the types of environmental marketing claims being made in today's marketplace, or that advertisers are using environmental claims to create false or misleading advertising.

For these reasons and the reasons set forth below, The Advertising Trade Associations urge the FTC to proceed slowly as it considers whether to modify the Guides. If the FTC decides to update the Guides, it should be extremely cautious about "new" environmental concepts, such as renewable energy, carbon offsets, and sustainability, particularly since there are divergent views among scientific experts about these concepts. We believe that any environmental claim that is put forth must be used in a manner consistent with long settled law that advertising must be truthful, not misleading and not deceptive. The FTC should not make any changes that could result in the Guides impeding an advertiser's ability to communicate to its consumers truthful information regarding the environmental benefits or impact of its products, the environmental technologies used in its business, or its general environmental practices.

While there is an increasing amount of media and public attention to environmental claims and it is a dynamic and fast-moving subject area, we encourage the FTC not to take any action that would stifle the ability or the interest of a company to make positive steps in improving the environment or that would restrict a company's ability to market and communicate its activities in this area. As such, it is not in the interest of the advertising industry or of consumers for the FTC to mandate environmental certification or to set comprehensive environmental regulations. Instead, the FTC should continue to exercise its powers under Section 5 of the Federal Trade Commission Act (the "FTC

Act”) to prevent false and deceptive environmental marketing claims by direct enforcement action.

I. The Guides Are Effective In Ensuring The Truth And Accuracy Of Environmental Claims

A. The Current Guides Prohibit Unsubstantiated Claims

The Guides have been in existence since 1992 and were revised most recently in 1998. Generally, the Guides have been well received by advertisers and consumers. Since the 1990s the advertising community has embraced the Guides as the benchmark of responsible advertising and designed their environmental claims in compliance with such Guides. As environmental concepts evolve, advertisers continue to look to the Guides as a model for communicating important environmental marketing claims to consumers in a clear and non-deceptive manner.

The main goal of advertisers when making environmental marketing claims is the desire to communicate the company’s positive or improved environmental practices, or a product’s environmentally beneficial attributes, to its consumers. In the past, such practices were usually limited to a small number of concepts. Today, companies are expanding their environmental messages, publicizing not only the environmental attributes of certain products, but also making numerous “green” claims regarding their business practices, including reduced emissions of carbon dioxide and other green house gases, and efforts to “shrink” their overall carbon footprint. It is abundantly clear from the FTC’s *“Carbon Offsets and Renewable Energy Credits”* Workshop on January 8, 2008, that a broad consensus does not yet exist on how these new green terms should be properly defined or used in product advertising. Therefore, it is imperative that the FTC proceed slowly in updating the Guides; while the Guides are not regulations, they are followed closely by the advertising and marketing community with the implicit assumption that non-compliance could result in an adverse FTC action.

The Guides promote responsible marketing by advising that all environmental qualifications and disclosures be sufficiently clear and prominent to prevent deception, and that advertisers make clear whether the environmental claims apply to the product advertised, the package, or a component of either. Furthermore, the Guides mandate that environmental marketing claims not overstate an environmental attribute or benefit, and that advertisers present comparative claims in a manner that makes the basis for the comparison sufficiently clear to the consumer to avoid deception. Most importantly, the Guides require that all environmental marketing claims be fully substantiated. In

addition, it is well-settled that an advertiser must have support for any express or implied environmental marketing claim, the same as with express or implied claims about any other objective attributes of their product.

While we understand the need for the FTC to keep pace with the growing number and varying types of environmentally related claims in consumer advertising, we believe an appropriate forum would be an FTC sponsored Workshop. A Workshop would provide information to help advertisers and consumers understand the breadth of the various environmental issues of concern in today's marketplace and allow for an interactive public dialogue.

II. 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

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.

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 With The Guides

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 monitor compliance with the Guides and report non-compliance to the FTC for enforcement. In addition, most of the major television networks maintain their own guidelines which 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 2007 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.

III. Significant Changes To The Guides Could Have A Chilling Effect On A Valuable Advertising Message

A. Environmental Marketing Claims Are Valuable Advertising Messages

Each day advertisers are deciding not only to improve their environmental business practices, but also to communicate those changes to consumers as part of an effective marketing and advertising message. There are a growing number of consumers who believe the environmental practices of a company and the environmental impact of a product is important to their purchasing decision. For these reasons, advertisers are using environmental marketing claims more extensively to connect with consumers and truthfully communicate facts about their services and products.

If a consumer should learn that a company's environmental claims are false or deceptive – something that is increasingly easy to discover in today's age of instant, global communication – that consumer is likely to walk away from that company and its products forever. Thus, it is in every company's interest to be as truthful as possible when making environmental marketing claims because not only is it responsible marketing, it also is good business.

Major changes to the Guides, including the addition of strict requirements as to what types of environmental claims can be made, easily could result in the opposite effect. Such changes likely could dissuade companies from advertising their environmental messages or from disclosing the full range of any environmental benefits. Furthermore, environmental marketing claims are used to communicate messages about all types of products in all product categories - from cosmetics to paper goods, to hair care products, to telephone/wireless services, to videogames and movies, and many more. Accordingly, any change to the Guides would have a significant impact on the entire advertising industry and would cross all product industry lines.

Consumers rely on environmental claims in making some of their most important purchasing decisions. Consequently, any change to the Guides, especially changes that would dissuade companies from using environmental marketing claims, could deprive consumers of this valuable information that is important in helping them make their buying decisions.

B. Changes To The Guides May Be Impractical Or Impossible To Implement And Impose An Unnecessary Burden On Advertisers, Thereby Having A Chilling Effect

As noted above, the Guides currently state that the advertiser must have adequate substantiation for any environmental marketing claim. Any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product, package or service must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim.

In the context of environmental marketing claims, such substantiation may require competent and reliable scientific evidence. The Guides allow each advertiser to make its own decision as to how to determine the best substantiation method for the claim being made. The Guides do not impose specific substantiation techniques or standards beyond those required for any other objective advertising claim, and do not impose the requirement of any type of third party certification for environmental marketing claims. The Guides grant advertisers the flexibility to create environmental marketing messages that reflect the specific issues raised by each product claim, and to substantiate those messages in a manner that is best determined by the advertiser itself. As noted, even though the exact manner of substantiation is not set forth in the Guides, all such environmental marketing claims must still be substantiated. For example, if an advertiser makes a claim that its factory reduced CO₂ emissions by 30% in one year but has no competent and reliable evidence to support the claim, that claim would not be supported under the Guides and would thus be deceptive under the Section 5 of the FTC Act.

The FTC Request for Public Comments suggests that the Guides may be revised to limit or restrict an advertiser's ability to make a wide range of environmental marketing claims, or to require certain predetermined standards for substantiating such claims, possibly under a system of third party certification. Were the Guides to adopt this approach, it would impose unnecessary and impractical burdens on advertisers. Any such restrictions beyond the current Guides would be flawed because unlike the existing Guides, these restrictions would assume that all types of environmental claims can be measured by certain universally accepted methods. A requirement that the advertiser use certain predetermined substantiation techniques or certain third-party certifications for certain environmental marketing claims would require the advertiser to spend unnecessary dollars and/or apply for third-party certification in an effort to support an environmental claim, even though such a claim may already be adequately substantiated under the FTC Act.

This compelled substantiation or certification requirement would not improve the quality or accuracy of the message to consumers, and would likely impose too many time-consuming and costly additional burdens on advertisers. The result would be that many advertisers would no longer choose to use this valuable advertising message. This proposal would likely have a chilling effect by increasing the burden on advertisers and marketers, ultimately harming consumers who have a strong desire to know about the environmental qualities of the products they are purchasing.

Of significant concern with predetermined substantiation techniques or third-party certification, is that such a requirement would subject environmental marketing claims to a more burdensome level of substantiation than if the advertiser made other objective

assertions regarding its products or practices. In the absence of any compelling evidence of fraud or deception with today's environmental claims, there does not appear to be any justification to require environmental marketing claims to be subject to a different standard of substantiation from all other objective marketing assertions.

IV. Conclusion

The existing Guides are well-accepted by the advertising industry, consumers, and self-regulatory organizations and their principles are currently enforced by the FTC under Section 5 of the FTC Act, State Attorneys General, private litigants and self-regulatory bodies. The Guides have been effective in facilitating truthful and non-deceptive environmental marketing claims.

Based on the foregoing reasons, The Advertising Trade Associations believe that any changes to the Guides would be unwarranted, particularly in the absence of compelling evidence warranting such changes, and that changes could have a chilling effect on advertisers' use of environmental marketing claims. Failure to allow truthful advertising may have an impact on product development since products with positive environment benefits may not be designed and built if the environmental benefits cannot be advertised.

The Advertising Trade Associations look forward to working with the FTC to address any concerns about the existing Guides and we stand ready to assist the FTC as it moves forward in its review on this important area.

Respectfully Submitted,

Adonis E. Hoffman, Esq.
Senior Vice President & Counsel
American Association of Advertising Agencies
1203 19th Street NW, Suite 4R
Washington, DC 20036

Jeffry Perlman, Esq.
Executive Vice President, Government Affairs & General Counsel
American Advertising Federation
1101 Vermont Avenue NW, Suite 500
Washington, DC 20005

Daniel Jaffe, Esq.
Executive Vice President & Director of Government Relations
Association of National Advertisers
1120 20th Street NW, Suite 520 S
Washington, DC 20036

OF COUNSEL TO AAAA, AAF, ANA
Ronald R. Urbach, Esq.
Matthew E. Smith, Esq.
Davis & Gilbert LLP
1740 Broadway
New York, NY 10019