

1993

Of Diapers, Lawnbags, and Landfills: The Federal Trade Commission Cracks down on False Advertising in the Environmental Marketplace

Carl F. Patka

Attorney, Whiteman, Osterman & Hanna, Albany, NY.

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>



Part of the [Consumer Protection Law Commons](#)

Recommended Citation

Carl F. Patka *Of Diapers, Lawnbags, and Landfills: The Federal Trade Commission Cracks down on False Advertising in the Environmental Marketplace*, 5 Loy. Consumer L. Rev. 43 (1993).

Available at: <http://lawcommons.luc.edu/lclr/vol5/iss2/4>

This Feature Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

Of Diapers, Lawnbags, and Landfills: The Federal Trade Commission Cracks Down on False Advertising in the Environmental Marketplace

by Carl F. Patka

I. INTRODUCTION

Claims that certain products or packaging materials offer tangible benefits to the environment are not new to the advertising landscape.¹ Nevertheless, increasing environmental awareness of the consumer public has made marketing "earth friendly" products big business.² Concurrently, increasing consumer environmentalism has resulted in an array of false or unsubstantiated environmental benefit claims.³

Marketers eager to exploit the environmental conscience of consumers have made misleading biodegradability claims for disposable diapers and lawnbags, which will be preserved pristinely in airtight landfills for generations to come. One marketer even had the temerity to make a biodegradability claim for its galvanized steel trash cans.⁴ Cosmetics, spray glues, and other aerosols have been touted as "ozone safe" when, in fact, the products contained a witch's brew of ozone depleting substances.⁵ Moreover, general claims of environmental benefit such as "earth friendly" and "good for the environment," have been bandied about by advertisers with little basis in fact.⁶

The rise in misleading advertising has planted the seed of consumer cynicism toward environmental claims. Absent assurances of their reliability, many consumers simply dismiss environmental claims as untrustworthy.⁷ Attempting to address these concerns, several states implemented a series of laws and regulations to crack down on false advertising.⁸ The result, however, was a collection of conflicting state requirements that caused a reactionary movement among many national marketers to avoid making any environmental claims at all.⁹

In response, the attorneys general of eleven states formed the Environmental Marketing Task Force and, in a collective effort, issued the widely-heralded *Green Report* and *Green Report II*.¹⁰ In addition to calling for tighter control on environmental marketing claims, the Task Force called for a national consensus on environmental marketing.¹¹ Meanwhile, industry lobbied for the introduction and passage of federal legislation that would codify marketing standards in the nation's environmental laws.¹² Congress failed to enact any of these proposals.

Ultimately, environmental groups, the task force and twenty-four companies and trade associations demonstrated rare unanimity in petitioning the Environmental Protection Agency ("EPA") and the Federal Trade Commission ("FTC") for uniform environmental marketing guidelines.¹³ After holding public hearings on the use of the terms "recyclable" and "recycled content" in advertising and labeling, the EPA joined the chorus in calling upon the FTC to issue uniform national guidelines on these and all environmental benefit claims.¹⁴

In the summer of 1992, the FTC heeded these calls. After holding two days of public hearings, the FTC broke with its tradition of fulfilling its false advertising mandate through case-by-case enforcement actions.¹⁵ The agency issued purportedly voluntary environmental marketing standards to guide industry and government in measuring the basis for environmental benefit claims such as "recyclable," "compostable," "ozone safe," and general claims such as the ubiquitous "environmentally friendly."¹⁶ The guidelines undoubtedly provide a welcome national standard. Nonetheless, some

Mr. Patka received his J.D. from Boston College Law School. He formerly served as a Senior Court Attorney for the New York Court of Appeals. Mr. Patka is associated with the firm of Whiteman, Osterman & Hanna, of Albany, New York, where he practices environmental, corporate, and tax law.

have questioned whether the guidelines are actually binding regulations unlawfully promulgated by the FTC without providing the public with notice and an opportunity to comment before issuance.¹⁷

II. FTC AUTHORITY TO COMBAT FALSE ADVERTISING AND LABELING

Since its inception in 1914,¹⁸ the FTC's mission has been to fight "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce . . ."¹⁹ The Federal Trade Commission Act specifically prohibits false advertising likely to induce the purchase of food, drugs, devices, or cosmetics.²⁰ Based

[G]eneral claims of environmental benefit such as "earth friendly" and "good for the environment," have been bandied about by advertisers with little basis in fact.

upon this authority, the FTC has waged a vigorous campaign against advertisements and product labels aimed at deceiving consumers.

The determination that a product advertisement or label is false or misleading is grounded in many sources. The Federal Trade Commission Act itself sheds little light on the subject, circularly defining a false advertisement as one which is "misleading in a material respect."²¹ Hence, in addition to establishing precedent in agency enforcement decisions, the FTC has elaborated on the topic of deceptive marketing in agency policy statements.²² The FTC will find deception if a representation, omission, or practice is likely to mislead, to the consumer's detriment, a consumer acting reasonably under the circumstances.²³

Advertising is also deceptive if a marketer fails to substantiate claims

about its product or packaging. FTC substantiation policy requires that, prior to promoting a product, marketers must possess a reasonable basis in fact for both express and implied claims.²⁴ Whether an advertisement or label has a reasonable basis turns on a number of factors: the nature of the product, the type of claim, the consequences of a false claim, the advantages of a truthful claim, the cost of developing substantiation, and the amount of substantiation experts consider reasonable.²⁵ These principles underlie all FTC enforcement and regulatory initiatives in the marketplace for "earth friendly" products.

III. THE FIRST APPROACH: ENFORCEMENT INITIATIVES TO STEM THE RISING TIDE OF SPECIOUS CLAIMS

Traditionally, the FTC fought its battles against false advertising through individual enforcement actions that set precedent and sent warnings to unscrupulous marketers.²⁶ Such enforcement initiatives are not new in the environmental arena. During the early 1970s, Ex-Cell-O Corporation made sweeping environmental benefit claims for its plastic-coated paper cartons. Commonly known as Pure-Pak, these cartons were used to package milk. In its promotional materials, Ex-Cell-O made grandiose claims about the environmental benefits of incinerating or landfilling its milk cartons, such as the following:

Another nice thing. Pure-Pak cartons are completely biodegradable. We made sure of that. If they're incinerated, for instance, they go up as harmless carbon dioxide and water vapor. Or if they're used as land fill, they disintegrate. Even the plastic film breaks down.

* * *

A Pure-Pak carton is biodegradable. Tests performed by the Swedish Government showed that exposed to normal weathering, the carton will return to the

soil within 12 to 18 months, as opposed to glass which will virtually last forever.²⁷

As it turned out, the Swedish Government had performed no tests on the milk cartons, and the evidence indicated that Pure-Pak cartons did not biodegrade in landfills or release only harmless vapors when burned.²⁸ In a settlement of false advertising charges lodged by the FTC, Ex-Cell-O agreed to cease misrepresenting the environmental benefits of its milk cartons.²⁹

As the nation's environmental movement took flight in the 1970s, the FTC began cracking down on other environmental benefit claims, including deceptive fuel emission claims by petroleum manufacturers and false biodegradability claims for phosphate detergents that were foaming up lakes and streams around the country.³⁰ Once the movement to sell "earth friendly" products regained steam in the late 1980s and early 1990s, the FTC attacked false and unsubstantiated environmental benefit claims with renewed vigor. One of the principal areas of enforcement activity was products claiming to be "ozone safe."

Although the EPA banned chlorofluorocarbons ("CFCs") from use in aerosol sprays in 1978, one of the chief areas of public environmental concern today remains the release of CFCs and other substances that destroy the protective ozone layer of the atmosphere. Therefore, as CFCs decreased in use, manufacturers began claiming that their spray products were "ozone safe" even though they still contained other ozone depleting substances. For example, the FTC charged Jerome Russell Cosmetics with making false claims in labeling and advertising its Fluorescent Ultra Hair Glo, Hair and Body Glitter Spray, and similar products as "ozone safe" and "ozone friendly."³¹ According to the agency's complaint, these products contained 1,1,1-trichloroethane, a substance that destroys ozone in the upper atmosphere.³² In a settlement of these charges, Jerome Russell

Cosmetics entered into a consent agreement with the FTC prohibiting the company from making unsubstantiated claims that any product containing ozone depleting substances offers an environmental benefit.³³

In addition, consumers have expressed recent concern regarding the overwhelming volume of trash disposed of each day in the nation's landfills. Landfill space is rapidly disappearing, and consumers are increasingly aware that landfills are not inert heaps of yesterday's trash but active systems that may leach harmful contaminants into community water supplies. Consumer purchasing decisions are affected by solid waste disposal issues, and no industry is more painfully aware of this fact than manufacturers of disposable diapers. In response, certain manufacturers have aimed to develop and market "biodegradable" diapers that assuage environmental concerns, yet maintain the convenience of a disposable diaper.

For instance, American Enviro Products, Inc. claimed that its "Bunnies" brand of disposable diapers, when disposed of in a landfill, would decompose and return to nature "within 3-5 years" or "before your child grows up."³⁴ Because very little organic matter, much less synthetic diapers, biodegrades in the oxygen-deprived conditions of a landfill, the FTC charged American Enviro Products with false advertising.³⁵ Ultimately, the company entered into a consent agreement with the FTC prohibiting it from making unsubstantiated claims that its product biodegraded or offered a more significant environmental benefit than other disposable diapers.³⁶

Like the disposable diaper industry, manufacturers of plastic trash bags attempted to maintain their market share by making various degradability claims for their products. In one of its most recent enforcement actions, the FTC charged Mobil Oil Corporation, maker of Hefty Degradable Bags, with making false and unsubstantiated claims. Package labeling claimed that the bags

contained a "special ingredient" which promoted breakdown of the bags after exposure to the elements, and that this breakdown, once triggered, would continue even after the bags were deposited in a landfill.³⁷ As with diapers, plastic garbage bags do not degrade from exposure to the elements or bacteria when they are locked in a sanitary landfill. Accordingly, Mobil entered into a consent agreement with the FTC forbidding the company from making future degradability claims unless those claims are substantiated by competent scientific evidence.³⁸

The FTC has not limited its enforcement initiatives in the environmental arena to aerosols, diapers, and lawn bags. The FTC filed and settled charges against a grocery chain for falsely claiming that its produce was pesticide-free.³⁹ Another marketer agreed to stop making false and unsubstantiated claims that its "Phototron" indoor greenhouses would remove all home air contaminants.⁴⁰ In sum, the agency's published enforcement orders and consent agreements settling charges against certain marketers provides a body of precedent indicating how the FTC will approach false or unsubstantiated environmental benefit claims. Nevertheless, the FTC's case-by-case enforcement policy has done little to keep states from imposing their own, often conflicting requirements on green marketing claims, leading to heightened confusion among manufacturers and consumers alike.⁴¹

IV. THE SECOND APPROACH: THE FTC ISSUES UNIFORM GREEN MARKETING GUIDELINES

In September 1992, the FTC published federal guidelines in an attempt to provide industry uniformity and to reduce consumer confusion on virtually every aspect of green marketing claims under federal false advertising proscriptions.⁴² The FTC guidelines were drawn from the agency's law-enforcement initiatives, two days of

public hearings, and more than 100 written comments received from the public.⁴³ The guidelines apply broadly to express and implied environmental claims regardless of their form, including promotional materials, labels, symbols, emblems, logos, and product brand names.⁴⁴

Once the movement to sell "earth friendly" products regained steam in the late 1980s and early 1990s, the FTC attacked false and unsubstantiated environmental benefit claims with renewed vigor.

A. General Principles and Types of Claims

In addition to providing standards for specific claims, the FTC established general principles applicable to all forms of green marketing. According to these principles: claims should be qualified and disclosures made in large type and clear language near to the statement being qualified; claims should make it clear whether they apply to the product, its packaging, or to a component of either product or packaging; environmental benefit claims should not be expressly or implicitly overstated; and environmental marketers that make comparisons with competing products should make the basis of their comparisons clear enough to avoid consumer deception.⁴⁵

1. General Environmental Benefit Claims

Sweeping claims of environmental benefit, such as "earth friendly," are difficult to interpret and may provide a wide range of meanings to consumers. In many cases, such claims may convey that a product or package has specific and far-reaching environmental benefits. Accordingly, the guidelines declare general benefit claims deceptive unless they are appropriately qualified, or both express and implied messages

conveyed to consumers are substantiated.⁴⁶ For instance, a product wrapper states that it is “environmentally friendly because it was not chlorine bleached, a process that has been shown to create harmful substances.” Although the wrapper was not bleached with chlorine, production of the wrapper released significant quantities of other harmful chemicals to the environment. According to the FTC, the claim is deceptive because reasonable consumers may interpret the claim “environmentally friendly” to mean that the wrapper will release no harmful substances to the environment.⁴⁷

[T]he result of FTC action may simply be an addition to the chorus of voices that have already imposed divergent standards upon environmental advertising.

2. Degradability Claims

Representations that a product or package will degrade when exposed to light, bacteria, or other elements must be either qualified or substantiated by reliable scientific evidence that it will completely break down and return to nature within a reasonably short period of time after disposal. For example, the FTC found non-deceptive an advertisement for a commercial agricultural plastic mulch film stating that the film was “photodegradable” and qualified with the phrase, “will break down into small pieces if left uncovered in sunlight.” The FTC concluded that the claim was not deceptive under the guidelines because scientific evidence indicates that the product will break down and return to the soil in a reasonably short period of time after being exposed to sunlight.⁴⁸

3. Compostable Products

A claim that a product or package is compostable should be based upon re-

liable scientific evidence that it will break down into usable fertilizer or mulch in a home compost pile or in a municipal composting program. Even if the item is capable of degrading into compost, the claim should be qualified if consumers will misunderstand the claim to mean that the item can be safely composted at home, when in fact it cannot; municipal composting facilities are not available to most consumers or communities where the product is sold; or the claim will mislead consumers about the environmental benefit provided when the item is disposed in a landfill.⁴⁹

To illustrate, a manufacturer makes an unqualified claim that its package is compostable. In fact, the package will break down into usable mulch or fertilizer in a municipal composting program, but not in a home compost pile. If municipal composting facilities are available where the package is sold, the FTC states that the claim will not be deceptive so long as the manufacturer discloses that the package cannot be composted at home.⁵⁰

4. Recyclable Products

A product or package should be marketed as recyclable only if consumers can separate it from their trash and the item can be reused to manufacture a new package or product. Items may be touted as recyclable so long as any non-recyclable components are minor and do not interfere with recycling. Recyclability claims will be considered deceptive if they are not properly qualified or if facilities for recycling do not exist where the item is sold.⁵¹ For example, the packaging material for a juice box is composed of four layers of materials, bonded together. Only one of the layers is made from recyclable material. A label claims that the package “contains some recyclable material.” Although it is technologically feasible to separate the layers, facilities capable of recycling laminated packaging materials are very few. According to the FTC, the claim will be

deceptive unless it is appropriately qualified to indicate the limited number of communities that have recycling programs for laminated packages.⁵²

5. Recycled Content

A product or package can be marketed as containing recycled materials only if it is made from materials recovered from trash or that otherwise would have been disposed of as trash. This includes materials reclaimed after consumer use or from manufacturing processes if the material otherwise would have entered the solid waste stream. For instance, if a manufacturer routinely collects spilled raw material and trimmings for reuse as virgin material during production, the FTC states that it would be deceptive to claim that the product has recycled content.⁵³

A manufacturer may make an unqualified claim that an item is made from recycled material only if the entire product or package is composed of such material. Otherwise, the claim should be qualified to inform consumers about the amount of new and recycled materials contained in the item. To illustrate, a greeting card contains 20 percent paper collected from manufacturing that otherwise would have been discarded as trash and 30 percent paper thrown away by consumers. The FTC states that the manufacturer may properly claim that the greeting card “contains 50% recycled material.”⁵⁴

6. Source Reduction

A claim that a product or package has been reduced in weight, volume, or toxic content should be made only if the marketer includes appropriate qualifiers and can substantiate its claim with reliable evidence. For example, an advertiser asserts that disposal of its product creates “10% less waste.” Unless it is qualified to indicate the basis of the comparison, the FTC states that the claim is deceptive because consumers could read it as distinguishing either its own prior product or competitors’ products.⁵⁵

7. Refillable Containers

A claim that a package is refillable will be deceptive unless a system is provided for collecting and returning the package for refilling, or unless provisions are made for consumers to refill the container themselves. For instance, a small bottle of fabric softener proclaims that it is a "handy refillable container." The manufacturer also sells a large container of the product that instructs consumers to refill the small bottle. The FTC states that the claim is not deceptive because the manufacturer provides a means for consumers to refill the bottle themselves.⁵⁶

8. Ozone Safe Products

A claim that a product is "safe" or "friendly" to the ozone is deceptive if the item contains a substance that destroys ozone in the upper atmosphere. To illustrate, the maker of an aerosol product makes an unqualified claim that its spray "[c]ontains no CFCs." Although there are no CFCs contained in the product, it uses the propellant HCFC-22, another ozone-depleting substance. Because reasonable consumers may interpret the "no CFCs" claim to mean that the product does not harm the ozone layer at all, the FTC states that the claim is deceptive.⁵⁷

B. FTC Policy Objectives

The FTC issued its guidelines for green marketing claims in response to a unified plea from consumers, industry, and the states for the agency to take action that would quell the confusion generated by conflicting state regulations.⁵⁸ It is therefore puzzling that the FTC decided to act upon this plea by issuing voluntary guidelines expressly disclaiming any preemption of environmental advertising standards issued by other state and federal agencies.⁵⁹ Indeed, the result of FTC action may simply be an addition to the chorus of voices that have already imposed divergent standards upon environmental advertising. On the other hand, if, as the following discussion indicates, the FTC actually issued binding regula-

tions under the guise of voluntary guidelines, the agency may have already accomplished the preemption of other federal and state green marketing standards that it explicitly eschewed.⁶¹

V. CONTROVERSY OVER WHETHER FTC BYPASSED MANDATORY RULEMAKING PROCEDURES

Although widely heralded, the FTC's determination to issue environmental marketing guidelines was by no means unanimous. FTC Commissioner Mary L. Azcuenega published a vociferous dissent from the agency's decision to release final green marketing guidelines.⁶¹ Principally, Azcuenega disagreed with the majority of commissioners because she believed that the agency had issued groundbreaking regulations bearing the full force of law, not voluntary guidelines merely interpreting existing false advertising prescriptions.⁶²

According to Azcuenega, voluntary guidelines interpreting existing agency rules must be couched in qualified and permissive language, such as statements that the FTC "is likely" to consider certain claims false advertising, or that industry "ought" to act in a particular way. By contrast, the dissenting commissioner pointed out that the FTC phrased its guidelines in the mandatory language of binding regulations proclaiming that a certain claim "is" or "is not" deceptive under law.⁶³ The agency issued these regulations unlawfully, Azcuenega opined, because it failed to comply with federal statutes requiring that the FTC follow stringent rulemaking protocols.⁶⁴

Commissioner Azcuenega's contention that the FTC unlawfully promulgated binding regulations under the guise of voluntary guidelines has considerable merit. The Administrative Procedure Act requires all federal government agencies to comply with certain procedures providing the public with notice and an opportunity to comment on regulations before they are issued.⁶⁵ Moreover, the Magnuson-

Moss Warranty-Federal Trade Commission Improvement Act ("Magnuson-Moss Act") directs the FTC to provide the public notice and a chance to comment in some fashion before it issues regulations or any other type of rule.⁶⁶

The Magnuson-Moss Act distinguishes between interpretive rules that merely elaborate on existing law and policy respecting false advertising and legislative rules that make binding regulations on the subject.⁶⁷ The FTC may issue binding legislative rules "which define with specificity acts or practices which are unfair or deceptive" only if it complies with certain strict procedures.⁶⁸ These procedures require the agency to: (1) publish a notice of the

Commissioner Azcuenega's contention that the FTC unlawfully promulgated binding regulations under the guise of voluntary guidelines has considerable merit.

proposed rulemaking that states the text of the regulation in detail, any alternatives to the rule, and why the new regulation is necessary; (2) allow interested persons to submit written comments on the rule, and make those comments publicly available; (3) provide for an informal hearing on the proposed regulation; and (4) publish a final regulation based on the entire rulemaking record, along with a statement of the regulation's basis and purpose.⁶⁹ As Commissioner Azcuenega noted in her dissent, the FTC did not follow these procedures in issuing its environmental marketing guidelines.⁷⁰ The question, then, is whether the guidelines are actually binding legislative rules that the FTC issued unlawfully when it failed to comply with Magnuson-Moss Act rulemaking requirements.

The distinction between legislative rules that require public notice and

comment, and interpretive rules that do not, has been drawn in a body of case law adjudicated by the Federal Circuit Court of Appeals for the District of Columbia. Initially, the District of Columbia Circuit held that an agency's characterization of its own rule as voluntary rather than binding is not dispositive.⁷¹ Although the agency's label is entitled to some deference, the courts determine as a matter of law whether a particular rule is voluntary or binding.⁷² Thus, the green marketing standards may constitute mandatory regulations even though the FTC itself claims that they are only voluntary guidelines.⁷³

Although the law of the Circuit is not settled, the leading case distinguishing between legislative and interpretive rules is *General Motors Corp. v. Ruckelshaus*.⁷⁴ In that case, General Motors Corporation appealed an administrative order of the EPA requiring manufacturers to repair all recalled vehicles regardless of their age or mileage at the time of repair. General Motors argued that the order constituted legislative rulemaking unlawfully undertaken by the EPA without adhering to the notice and comment requirements imposed by the Administrative Procedure Act.⁷⁵ In considering this argument, the District of Columbia Circuit held that an interpretive rule merely states what the agency thinks existing statutes mean and reminds regulated parties of their current obligations. By contrast, if the agency creates new law, rights, or duties, the agency pronouncement is a legislative rule.⁷⁶

According to the court, one of the principal means by which interpretive and legislative rules may be distinguished is the language of the rule.⁷⁷ If the language is precatory or merely cautions regulated parties on what actions the agency is likely to consider permissible within current laws, the rule may safely be categorized as interpretive. Wording that is mandatory and directs affected parties to undertake specific actions, however, denotes a binding legislative rule.⁷⁸ In *General*

Motors, the District of Columbia Circuit held that the EPA's rule was interpretive because the language of the rule revealed that it simply articulated the agency's views respecting existing recall obligations imposed on automobile manufacturers.⁷⁹

In other cases, however, the District of Columbia Circuit has struck down agency pronouncements as improper legislative rulemaking because the agency issued rules phrased in the hallmark mandatory language of binding regulations without first complying with public notice and comment procedures. For example, in *State of Alaska v. United States Department of Transportation*, twenty-seven states challenged orders of the Department of Transportation that defined certain acts as false and deceptive advertising by airlines.⁸⁰ The states argued that the orders were legislative rules unlawfully adopted by the agency without following notice and comment procedures. The District of Columbia Circuit agreed, striking down the orders as unlawful legislative rules because they employed obligatory language to define new duties concerning advertising by airlines.⁸¹

The environmental marketing guidelines promulgated by the FTC present strikingly similar circumstances. The FTC surely possesses the authority to offer voluntary guidance on what manufacturers should do to comply with existing false advertising proscriptions.⁸² Nevertheless, throughout the guidelines, the FTC defines in specific mandatory terms the scope of permissible activity in the environmental marketing field. The agency consistently declares that "it is deceptive to misrepresent, directly or by implication that a product or package" offers a general or specific environmental benefit, such as biodegradability or recyclability.⁸³ Similarly, in illustrating how each marketing guideline will apply, the FTC repeatedly declares that a certain claim "is" or "is not" deceptive.⁸⁴ In sum, the mandatory language employed by the FTC in the guidelines

clearly indicates that the agency has defined specific acts as false advertising and imposed new duties upon industry in the realm of environmental marketing. The guidelines constitute binding legislative rules that the FTC promulgated without following the stringent Magnuson-Moss Act rulemaking procedures.⁸⁵ Consequently, the environmental marketing guidelines appear susceptible to legal challenge as unlawful agency rulemaking.⁸⁶

VI. CONCLUSION

The FTC may have promulgated unlawfully binding regulations in the guise of voluntary green marketing guidelines. Nevertheless, a legal challenge to these guidelines appears highly improbable. Both private industry and state attorneys general pleaded for uniform national marketing standards.⁸⁷ The guidelines are also likely to enjoy broad support among consumer and environmental groups. Moreover, if the green marketing guidelines were invalidated, state and federal agencies probably would redouble their regulatory efforts and further add to the confusion surrounding green marketing. In short, little purpose would be served by invalidating the guidelines on rulemaking technicalities. Indeed, to the extent that the guidelines actually demonstrate power of enforcement and preempt conflicting standards issued by other state and federal agencies, the guidelines will be so much more effective in achieving a national consensus on green marketing. ♦

ENDNOTES

- ¹ See, e.g., *Ex-Cell-O Corp.*, 82 F.T.C. 36 (1973) (consent agreement with milk carton manufacturer concerning biodegradability and environmental safety claims for plastic-coated paperboard milk cartons); *Standard Oil of California*, 85 F.T.C. 1401 (1974) *aff'd as modified sub nom. Standard Oil Co. v. Federal Trade Commission*, 577 F.2d 653, 655 (9th Cir. 1979)

- (order against a gasoline manufacturer regarding misleading fuel emission reduction claims).
- 2 FTC Petitions for Environmental Marketing and Advertising Guides, Notice of Public Hearings, 56 Fed. Reg. 24,968 (1991).
 - 3 See *Lack of Standards on Environmental Claims Leads to Confusion, Witnesses Say*, DAILY REPORT FOR EXECUTIVES (BNA), May 17, 1990, at A-14.
 - 4 See Joanna Ramey, *Bogus 'Green' Claims: Placing the Blame; Retailers Want Manufacturers Held Responsible for False Good-for-the-Environment Marketing Claims*, HFD -- THE WEEKLY HOME FURNISHINGS NEWSPAPER, Sept. 23, 1991, at 73.
 - 5 See FTC Notice of Public Hearings, *supra* note 2, at 24,969 (1991); *Zipatone, Inc., et al.*, FTC Proposed Consent Agreement, 56 Fed. Reg. 19,865 (1991) (manufacturer of spray adhesives and cleaning products prohibited from making "ecologically safe" claims for products containing ozone-depleting chemicals); *Jerome Russell Cosmetics U.S.A., Inc., et al.*, FTC Proposed Consent Agreement, 56 Fed. Reg. 26,827 (1991) (cosmetics manufacturer barred from making "ozone safe" and "ozone friendly" claims for products containing ozone depleting chemicals).
 - 6 See *Mobil Oil Corporation*, FTC Proposed Consent Agreement, 57 Fed. Reg. 35,589 (1992) (prohibiting manufacturer and seller of plastic bags from making unsubstantiated degradability and general environmental benefit claims).
 - 7 See, e.g., EPA Public Hearing Notice, 56 Fed. Reg. 49,992, 49,993 (1991).
 - 8 At least twenty-two states have enacted restrictions on environmental benefit claims, including California, Indiana, Maine, New Hampshire, New York and Rhode Island. See Cal. Bus. & Prof. Code § 17508.5(e) (West Supp. 1991); Ind. Code Ann. § 24-5-17 (Burns 1991); Me. Rev. Stat. Ann. tit. 28, § 2141 (1991); N.H. Rev. Stat. Ann. § 149-N:4 (1990); N.Y. Env'tl. Conserv. Law § 27-0717(2) (McKinney 1984 & Supp. 1993); N.Y. Comp. Codes R. & Regs. tit. 6, pt. 368 (1990); R.I. Gen. Laws §§ 23-18.8-2 *et seq.* (Supp. 1990).
 - 9 See Felix H. Kent, *Addressing the Environment*, N.Y. L. J., May 22, 1992, at 3.
 - 10 Environmental Marketing Task Force, *The Green Report: Findings and Preliminary Recommendations for Responsible Environmental Advertising (1990)* [hereinafter *The Green Report*]; Environmental Marketing Task Force, *The Green Report II: Recommendations for Responsible Environmental Advertising* [hereinafter *The Green Report II*]. The Task Force consisted of the Attorneys General of California, Florida, Massachusetts, Minnesota, Missouri, New York, Tennessee, Texas, Utah, Washington, and Wisconsin.
 - 11 See *The Green Report* at 1; *The Green Report II* at 1. See also *supra* note 10, and accompanying text.
 - 12 See Environmental Marketing Claims Act of 1991, S. 615, 102d Cong., 1st Sess. (1991); H.R. 1408, 102d Cong., 1st Sess. (1991). The Environmental Marketing Claims Act was introduced by Senator Frank Lautenberg and Congressman Gerry Sikorski. 137 Cong. Rec. S3020 (daily ed. Mar. 12, 1991) (statement of Sen. Lautenberg); 137 Cong. Rec. H1669 (daily ed. Mar. 12, 1991) (statement of Rep. Sikorski). Environmental marketing standards were also included in the legislation reauthorizing the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* Introduced by Congressman Al Swift, the legislation was entitled the National Waste Reduction, Recycling, and Management Act. H.R. 3865, 102d Cong., 2d Sess. (1991); 137 Cong. Rec. H10930 (daily ed. Nov. 22, 1991) (statement of Rep. Swift).
 - 13 FTC Notice of Public Hearings, *supra* note 2, at 24,969-970 (seeking petitions for environmental marketing and advertising guidelines).
 - 14 EPA Public Hearing Notice, *supra* note 7, at 49,992 *et seq.*
 - 15 The FTC usually limits action in the advertising arena to adjudications of fraud causing consumer injury. See *FTC Conducts Two-Day Hearing on Need to Develop Environmental Marketing Guide*, 61 ANTI-TRUST AND TRADE REG. REP. 117 (BNA) (July 25, 1991).
 - 16 Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 *et seq.* (1992) (to be codified at 16 C.F.R. Part 260).
 - 17 *Id.* at 36,368-369 (dissenting statement of Commissioner Mary L. Azcuenaga).
 - 18 Act of Sept. 26, 1914, ch. 311, § 1, 38 Stat. 717 (codified and amended at 15 U.S.C. § 41 (1973)).
 - 19 15 U.S.C. §§ 45(a)(1), 46(g) (1973 & Supp. 1992). The Act authorizes the FTC to carry out its mandate through enactment of rules and regulations.
 - 20 15 U.S.C. § 52 (1973 & Supp. 1992).
 - 21 15 U.S.C. § 55 (1973 & Supp. 1992).
 - 22 See, e.g., *Thompson Medical Company*, 104 F.T.C. 648, 839 app. (1984); *Cliffdale Assocs.*, 103 F.T.C. 110, 174, *et seq.*, app. (1984).
 - 23 *Cliffdale Assocs.*, 103 F.T.C. at 177.
 - 24 *Thompson Medical Company*, 104 F.T.C. at 839.
 - 25 *Id.* at 840.
 - 26 See *FTC Conducts Two-Day Hearing on Need to Develop Environmental Marketing Guide*, *supra* note 15.
 - 27 *Ex-Cell-O Corp.*, § 2 FTC, at 38-39.
 - 28 *Id.* at 40-41.
 - 29 *Id.* at 43-44.
 - 30 See, e.g., *Standard Oil of California*, 85 F.T.C. 1401 (1974); *Detergent Manufacturers to Adopt Uniform Labeling for Phosphorous Content and Biodegradable Statements*, FTC News, Aug. 6, 1973.
 - 31 *Jerome Russell Cosmetics U.S.A.*, *supra* note 5, at 26,829.
 - 32 *Id.*
 - 33 *Id.* at 26,827. The FTC has entered into similar settlements with other manufacturers of aerosol products. See *Tech Spray, Inc., et al.*, FTC Proposed Consent Agreement, 57 Fed. Reg. 2101, *et seq.* (1992) (prohibiting manufacturer from using "ozone friendly formula" label for technical cleaning products that contained CFCs and other ozone-depleting substances); *Zipatone, Inc.*, *supra* note 5, at 19,867 (barring marketer of commercial spray adhesive containing 1,1,1-trichloroethane from making false claims including "Ecologically-Safe Propellant").
 - 34 *FTC Settlement With "Bunnies" Disposable-Diaper Maker Would Prohibit Unsubstantiated Biodegradability Claims*, FTC News, Aug. 30, 1991.
 - 35 *American Enviro Products, Inc.*, 56 Fed. Reg. 46,184 *et seq.* (1991).
 - 36 *Id.* at 46,185-186. The FTC has settled similar charges against other makers of disposable diapers. See, e.g., *RMED International, Inc., et al.*, FTC Proposed Consent Agreement, 57 Fed. Reg. 6,608 (1992) (consent agreement barring maker of TenderCare disposable diapers from making degradability claims unless they possess competent scientific evidence to substantiate such claims).
 - 37 *Mobil Oil Agrees to Settle Charges it Made Unsubstantiated "Degradability" Claims for Hefty Trash Bags*, FTC News, July 27, 1992.
 - 38 *Mobil Oil Corp.*, *supra* note 6, at 35,589. The Commissioner has entered into similar agreements settling charges against other makers of disposable trash bags. See, e.g., *First Brands Corp.*, FTC Proposed Consent Agreement, 56 Fed. Reg. 54,863 (1991) (settlement prohibiting maker of Gladbags from representing without substantiation including competent scientific evidence that plastic bags offer any environmental benefits when disposed as trash in a sanitary landfill).
 - 39 *The Vons Companies, Inc.*, FTC Proposed Consent Agreement, 55 Fed. Reg. 24,314 (1990).
 - 40 *Pyraconic Industries II, Inc.*, FTC Pro-

Lead Articles

- posed Consent Agreement, 57 Fed. Reg. 21,291 (1992).
- ⁴¹ Kent, *supra* note 9.
- ⁴² 15 U.S.C. § 55 (1973 & Supp. 1992).
- ⁴³ *Summary of FTC Environmental Marketing Guidelines*, FTC News, July 28, 1992, at 1.
- ⁴⁴ Guides for the Use of Environmental Marketing Claims, *supra* note 16, at 36,364.
- ⁴⁵ *Id.* at 36,364-365.
- ⁴⁶ *Id.* at 36,365.
- ⁴⁷ *Id.*
- ⁴⁸ *Id.* at 36,365-366.
- ⁴⁹ *Id.* at 36,366.
- ⁵⁰ *Id.*
- ⁵¹ *Id.*
- ⁵² *Id.* at 36,367.
- ⁵³ *Id.*
- ⁵⁴ *Id.*
- ⁵⁵ *Id.*
- ⁵⁶ *Id.* at 36,368.
- ⁵⁷ *Id.*
- ⁵⁸ See FTC Notice of Public Hearings, *supra* note 2, at 24,969-970.
- ⁵⁹ Guides for the Use of Environmental Marketing Claims, *supra* note 16, at 36,364.
- ⁶⁰ *Id.*
- ⁶¹ *Id.* at 36,368-369 (dissenting Statement of Commissioner Mary L. Azcuenega).
- ⁶² *Id.* at 36,369.
- ⁶³ *Id.*
- ⁶⁴ *Id.* at 36,368.
- ⁶⁵ 5 U.S.C. § 553(b)-(d) (1977).
- ⁶⁶ 15 U.S.C. § 57a(b) (1973 & Supp. 1992); Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. 93-637, Title II, § 202(a), 88 Stat. 2193 (1975) (codified at 15 U.S.C. § 57a).
- ⁶⁷ 15 U.S.C. § 57a(a)(1) (1973 & Supp. 1992).
- ⁶⁸ *Id.* §§ 57a(a)(1)(B), 57a(b)(1)
- ⁶⁹ *Id.* § 57a(b)(1)
- ⁷⁰ Guides for the Use of Environmental Marketing Claims, *supra* note 16, at 36,368 (dissenting statement of Commissioner Azcuenega). See also *supra* note 61 and accompanying text.
- ⁷¹ See *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (giving only limited deference to an agency's characterization of its rule); *Arrow Air, Inc. v. Dole*, 784 F.2d 1118, 1122 (D.C. Cir. 1986) (listing agency intent as only one among other factors distinguishing interpretive and legislative rules); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (*en banc*) (holding agency's own label relevant but not dispositive), *cert. denied*, 471 U.S. 1074 (1985).
- ⁷² *Community Nutrition Institute*, 818 F.2d at 946; *General Motors*, 742 F.2d at 1565.
- ⁷³ Guides for the Use of Environmental Marketing Claims, *supra* note 16, at 36,364.
- ⁷⁴ 742 F.2d 1561 (D.C. Cir. 1984).
- ⁷⁵ *Id.* at 1564.
- ⁷⁶ *Id.* at 1565.
- ⁷⁷ *Id.*
- ⁷⁸ See *State of Alaska v. United States Dep't of Transp.*, 868 F.2d 441, 446 (D.C. Cir. 1989); *Community Nutrition Institute v. Young*, 818 F.2d at 946.
- ⁷⁹ *General Motors Corp.*, 742 F.2d at 1565.
- ⁸⁰ *State of Alaska*, 868 F.2d at 442-43.
- ⁸¹ *Id.* at 446-47. See *Community Nutrition Institute*, 818 F.2d at 947. (invalidating rule defining actionable levels of contamination in food as improper legislative rulemaking because language employed by the Food and Drug Administration suggested that the action levels were binding regulations).
- ⁸² 15 U.S.C. § 46(g) (1973 & Supp. 1992) (authorizing the FTC to adopt rules and regulations to carry out the provisions of the Federal Trade Commission Act).
- ⁸³ Guides for the Use of Environmental Marketing Claims, *supra* note 16, at 36,365-368.
- ⁸⁴ *Id.*
- ⁸⁵ 15 U.S.C. § 57a(b)(1) (1973 & Supp. 1992).
- ⁸⁶ See *State of Alaska v. United States Dep't of Transp.*, 868 F.2d at 446-47; *Community Nutrition Institute*, 818 F.2d at 947.
- ⁸⁷ See FTC Notice of Public Hearings, *supra* note 2, at 24,969-970. See also *supra* note 13 and accompanying text.

Announcements

Airlines Restore Bereavement Discounts

Some of the major airlines have restored discounts for people who must travel unexpectedly to attend a relative's funeral. Some airlines eliminated the discounted fare during last spring's price wars. But now American, Northwest, United, and USAir have restored the discount for competitive reasons. The discounts apply only to members of the immediate family of the decedent. Travelers must furnish the name of the person who died and the name and number of the doctor or funeral director. The discounts vary from airline to airline, but generally, a family member can receive up to a 50 percent discount off the regular coach fare.

Child-Safety Seats Recalled

The National Traffic Safety Administration has recalled nearly a million automobile child-safety seats because tests showed that they could jam in a crash and make it difficult to remove a child. The safety seats being recalled are made by Century Products Company and are known as the Century 3000 STE-3500 STE and Century 5000 STE-5000, produced between September 1989 through April 1992. The push-button latch release on these seats could jam in a crash, which would make it difficult to release the harness and shield restraining the child. But the problem with the latch does not affect the crash protection provided by the seat, so consumers should continue to use the seats while awaiting arrival of a repair kit. A free kit can be obtained by calling the company at (800) 231-2755.