



# Federal Trade Commission

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WHITHER FTC REGULATION  
OF  
ADVERTISING CLAIMS  
CONCERNING  
HEALTH, NUTRITION AND THE ENVIRONMENT?

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The views expressed are those of the Commissioner and do not necessarily reflect those of the Federal Trade Commission or the other Commissioners.

Thank you, and good evening. I am pleased to be here tonight and to offer a few thoughts on two topics that may be of interest to you -- health claims in food advertising and labeling and environmental claims. As usual, I begin by noting that the views I offer are my own and not necessarily those of the Commission or any other commissioner.

Last week, when I saw Manley Molpus at another meeting, he suggested that perhaps I could announce tonight that the Commission has decided to issue "green guides." I know you are all eager for some word on that, and I am sorry that I cannot make such an announcement tonight. I can assure you, however, that the Commission is working hard to assess the numerous thoughtful and informative comments that we have received and to review the recommendations of our staff on the issues. And yes, there is light at the end of the tunnel.

Before I begin to tell you about some of the things that are happening at the Commission, I would like to digress to offer a small background note. Recently, I have heard two statements that came from different people, both bemoaning the state of government advertising regulation: The first statement was, "Advertisers cannot market their products effectively because there is insufficient government guidance to tell them what claims may and may not be deceptive." And the second statement was, "Advertisers cannot market their products effectively

because there is too much government regulation." On their face, these two statements are inconsistent but could there be any truth to them if placed in context?

The first opinion, blaming the lack of government action for the problems of advertisers, was expressed in a discussion of environmental claims. The second opinion, blaming an excess of government activity for the same problems, was offered in a discussion of health claims in food advertising. Can it be that one is underregulated, and the other overregulated? I think not, but perhaps there is some risk in each area that the government would be well advised to keep in mind. The comments do provide some food for thought as we attempt to navigate the shoals of enforcement and regulation in these areas during these transitional times.

#### FOOD AND NUTRITION ADVERTISING CLAIMS

I am very pleased to be able to tell you tonight about the most recent example of the Commission's enforcement efforts in the area of deceptive advertisements for food and nutritional products. The Commission has just accepted for public comment an important consent agreement in the matter of the Isaly Klondike Company.<sup>1</sup> This case involves several issues of significance in food advertising.

The product that is the subject of the challenged advertising is the Klondike Lite bar, a frozen dessert. You may

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<sup>1</sup> Commission File No. 912 3067.

have seen the Klondike bar in the ice cream section at your grocery store. Loosely described, because I do not know all the exact ingredients, it is a square of vanilla ice cream covered by chocolate. There is a regular Klondike bar and, more recently, the Klondike Lite bar. I can attest that the regular Klondike bar tastes good, but this case is not about taste. The advertisements at issue contained express and implied claims that the Lite bar was "93% fat-free," "low fat," "lite" and "low in cholesterol."

Our action in the Klondike case represents the first time that the Commission has challenged an allegedly deceptive "lite" claim. It also is the first time that the Commission has challenged the low fat implications of a percentage fat-free claim since the American Dairy Association case in 1973. And, it is the first time that the Commission has taken action against a claim that a product is "low in cholesterol." Last, but decidedly not least, Klondike represents yet another food advertising order in which the Commission has harmonized its enforcement efforts with the FDA.

The Commission has alleged four misrepresentations in Klondike: (1) that the advertisements falsely claimed that the Lite bar was 93% fat-free (Klondike had neglected to include the chocolate coating in its calculations and this made a significant difference in the resulting percentage); (2) that the advertisements falsely claimed that the bar was low in fat when it derived more than half of its calories from fat and contained

10 grams of fat (a high percentage of FDA's total recommended daily limit); (3) that the advertisements claimed that the bar had significantly less fat or provided significantly fewer calories than Klondike's regular bar and that this claim was false; and (4) that the "low in cholesterol" phrases in the advertisements falsely represented to consumers that consuming the Lite bars will cause little or no increase in serum cholesterol levels (the bars contained a substantial amount of saturated fat, which would in many cases cause a substantial increase in serum cholesterol).

The proposed order would prohibit Klondike from misrepresenting, through numerical or descriptive terms or any other means, the existence or amount of fat or any other nutrient or ingredient in any frozen food product or the amount of calories provided by any frozen food product. In addition, Klondike would be prohibited from misrepresenting in any manner, through the use of terms such as "low in cholesterol," the effect of any frozen food product on serum cholesterol levels or the risk of heart disease. As with other cases that the Commission has settled since passage of the Nutrition Labeling and Education Act, the proposed order contains a safe harbor that allows Klondike to make representations that are expressly permitted by any labeling regulations promulgated by the FDA under the Act.

The Commission is combining its announcement of the Klondike order with the announcement of a new fact sheet for consumers entitled "Food Advertising Claims." The fact sheet tells

consumers how to evaluate food claims in advertisements that relate to fat or cholesterol content and claims that a food is "light," whether it is spelled in the traditional way, "l-i-g-h-t," or in what we might call ad-speak, "l-i-t-e." The sheet highlights, among other things, the recommendation of the Surgeon General that no more than 30% of one's daily calories come from fat, and it contains advice for consumers to help them shop wisely when confronted by claims such as "93% fat-free." For example, it cautions consumers that foods advertised with percentage fat-free claims based on weight still can be relatively high in fat. It suggests that consumers focus on the number of grams of fat and the percentage of calories from fat in each serving, and it explains how to do so. It also explains that some foods with no or low cholesterol are very high in fat.

Educating consumers is a critical part of consumer protection. Knowledge is often a consumer's best defense. What deceives a consumer today may be harmless tomorrow if, by then, the consumer has gained the necessary knowledge to evaluate the merits of the claim. The Commission's consumer education program, therefore, contributes in an important way to helping consumers become effective purchasers. Of course, advertisers, too, can play an essential role in educating consumers by stressing truthful and nondeceptive claims for their products.

A final note on the subject of food and nutritional advertising claims may be in order. As most of you are aware, the FDA is presently in the throes of analyzing thousands of

public comments on its proposed regulation to implement the NLEA. Formulation of that regulation is surely one of the most difficult jobs that Congress has set for an executive agency in many years.

The Commission has participated in the project by authorizing its staff to file comments on the proposed regulation and by maintaining close staff contact with the FDA. Although, strictly speaking, the comment expresses only the opinion of our staff, I support the comment fully and would have been happy to vote to submit it to the FDA as a formal Commission comment. I am sure that those of you who are interested in this formidable project have read the comment -- and if you have not, I urge you to do so. It has received some informal support from, among others, some of the very fine minds within your own ranks. I am hopeful that it will assist FDA and, equally important, that it will make very clear the Commission's commitment to harmonize its policies with those of the FDA under the new statute. We surely will heed FDA's expertise in the science of nutrition, and we will continue to share with that agency our own expertise in advertising and marketing. Together, as two federal agencies with overlapping but different congressional mandates, we will endeavor to speak with one voice to identify and eliminate deceptive claims with respect to food and nutritional products.

## ENVIRONMENTAL GUIDANCE

Now, I would like to turn to the issue of "green guides." One of the things for which the Federal Trade Commission is known and, I hope, respected is identifying potential adverse effects that may stem from official government pronouncements of various kinds and considering how to avoid or minimize those effects. In drafting environmental guidelines, for example, adverse effects may arise if particular guidelines unintentionally discourage truthful, nondeceptive claims; or if they inadvertently encourage some misleading claims; or if they limit firms' incentives to develop products that are better for the environment; or if they limit the Commission's flexibility to enforce the law against deceptive advertising on a case-by-case basis.

Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit articulated a similar concern in a recent article entitled "The Dark Lessons of Utopia." Judge Kozinski said, "[O]ur ability to predict the full effects of governmental actions -- much less the synergistic effects of hundreds of thousands of simultaneous government interventions -- is very limited. Far too often there are unanticipated results and costs, despite the most careful efforts of government officials."<sup>2</sup> Even with the best of intentions, issuing "green guides" is a somewhat risky venture.

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<sup>2</sup> Kozinski, Alex, "The Dark Lessons of Utopia," 58 U. Chi. L. Rev. 575, 592-93 (1991).



But I am not here tonight to revisit the issue whether the Commission should issue guidelines, although a number of valid questions can be raised about the wisdom of taking such an action. Rather, I want to set that issue aside for the moment and address some of the problems of drafting guidelines, since that process must precede any informed decision whether to issue guidelines.

What issues then should be addressed before publishing such a document? Let me suggest several: (1) identifying the objective of the guidelines; (2) deciding what claims should be covered; (3) determining how to use available consumer survey data and scientific evidence; (4) choosing an effective format; (5) deciding on the role and form of illustrative examples; (6) evaluating the need for and usefulness of required disclosures; and (7) deciding to what extent advertising and labeling claims should be treated the same.

#### OBJECTIVE OF GUIDES

First of all, what should be the objective of Commission guidelines on environmental claims? Some of the proposals that have been submitted to the Commission as well as the proposed EPA guidelines reflect environmental policy agendas. For example, the EPA's goals, as indicated in its Federal Register notice of

October, 1991, are to increase the use of recycled materials and to increase the recovery of materials for recycling.<sup>3</sup>

I venture to say that everyone who favors the concept of guidelines has in mind some policy goal. But not all those favoring guidelines have the same goals. The Commission too would have a policy goal if it were to issue guidelines, but that goal might differ markedly from the goals of the EPA and from the goals of other groups that have expressed interest in FTC guidelines. Suffice it to say that the FTC does not purport to be expert in environmental policy. Its goal in issuing guidelines on environmental advertising claims would be to assist the public in understanding how the Commission is likely to evaluate whether environmental claims are deceptive under Section 5 of the FTC Act.

It is important that guidelines reflect consideration of their economic impact. Guidelines on environmental claims could have a significant effect on industry incentives to develop and sell environmentally preferable products, which, in turn, could affect the variety of such products available to consumers, which ultimately could affect the environment. A significant portion of the Commission's notice initiating the current process sought to elicit information on the economic impact of available Commission options. It is critical, if the Commission decides to

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<sup>3</sup> Environmental Protection Agency, "Guidance for the Use of the Terms 'Recycled' and 'Recyclable' and the Recycling Emblem in Environmental Marketing Claims," 56 Fed. Reg. 49,992 (Oct. 2, 1991)

issue guidelines on environmental advertising claims, that we try to anticipate the market incentives likely to result from those guidelines before forging ahead.

#### CLAIM COVERAGE

Once the objective of guidelines is established, the next consideration is what claims to cover. Should guidelines address issues not previously addressed in the context of individual cases? Should they address claims or terms that do not appear likely to mislead reasonable consumers to their detriment?<sup>4</sup>

The principal drawback to issuing guidelines that address issues not previously considered by the Commission is that the less experience the Commission has with particular claims -- experience derived from careful investigation and consideration in individual cases -- the less likely it is that the guidelines will be "correct." Guidelines that are not correct, in that they are more restrictive than necessary to prevent deception or insufficiently clear to ensure their success as predictors of Commission action, can discourage firms from making truthful and nondeceptive claims and from developing products with environmental benefits.

A reasonable substitute for having examined environmental claims on a case-by-case basis is to obtain reliable survey

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<sup>4</sup> See Policy Statement on Deception, Letter from the Commission to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983, reprinted in Cliffdale Associates, Inc., 103 F.T.C. 110, 174-83 (1984)).

evidence or consumer perception information. Absent one of these learning bases, environmental guidelines that attempt to explain what is deceptive and what is not may impose unwarranted burdens on industry that could reduce or eliminate any advantages gained by their publication. One way to steer around this problem might be to issue guidelines in phases, covering issues as they are addressed by the Commission in its enforcement program or as an independent empirical basis for them develops.

A second question in considering the scope of potential guidelines is whether all of the terms and claims now appearing in the market are sufficiently likely to be deceptive to warrant their treatment in such a document. There is a danger that in trying to respond to the widespread public clamor for comprehensive guidelines, the Commission could end up regulating commercial speech without the requisite governmental interest to satisfy the protective requirement of the First Amendment. Here, the governmental interest is the Commission's statutory mandate to prevent deception in the market. In addition to the constitutional question, unless deception is likely, it would seem unduly regulatory to "reach out and touch" marketing claims the only evident sins of which are that they relate to the environment.

#### USE OF CONSUMER PERCEPTION DATA AND SCIENTIFIC EVIDENCE

Another concern is the meaning consumers take from environmental claims. Until we know that, we cannot accurately define the source of any confusion and devise an appropriate

response. Indeed, we might take action that inadvertently could have exactly the results we are trying to avoid: increased incidence of misleading claims, reduced efforts to communicate truthful and nondeceptive product information, or decreased incentives for development of -- and I use this term with some trepidation -- "environmentally friendly" products.

To what extent and how should guidelines be based on either consumer perception data or current scientific substantiation of particular claims? This evidence is important, but consumer perceptions and technology may change over time. Even if the Commission has accurate data showing how consumers interpret each environmental term, some of their interpretations may be based on false perceptions or on misinformation. What would happen if, in the future, some of the misperceptions are corrected, or the faulty information is cured? This does not mean that consumer perception data should be thrown out. It does mean that we should be careful before carving certain requirements, such as lengthy affirmative disclosures, too deeply in stone.

For example, if consumers confuse landfills with composting facilities, then a degradability claim that fails to distinguish the two may be deceptive.<sup>5</sup> But if consumers clearly understand the difference between landfills and composting facilities, a required disclosure that a product is designed to degrade in a composting facility but not in a landfill may simply impose

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<sup>5</sup> See e.g., First Brands Corp., FTC File No. C-3358, consent order issued, Jan. 3, 1992; and American Enviro Products, Inc., FTC File No. C-3376, consent order issued, Mar. 3, 1992.

unnecessary costs on firms. With environmental claims, as with other advertising, what may be incorrectly perceived by consumers today, with proper consumer education can be correctly perceived by consumers tomorrow.

One way around this dilemma might be to couch guidelines in the conditional. For example, we might say, as suggested by GMA in the petition it submitted to the FTC in conjunction with the National Food Processors Association and others, that "a recyclable" claim would be deceptive "if consumers understand the reference to mean that collection programs for the material are more widely available than is actually the case."<sup>6</sup> On the other hand, if the consumer perception data are strong and it is unlikely that these data will change soon, the guidelines could be more definitive. They could say, for example: a "recyclable" claim will be considered deceptive because consumers understand the reference to mean that collection programs are available locally.

Science also changes, and what claims can or cannot be substantiated will vary accordingly. Again, using conditional language in guidelines can help ensure flexibility. For example,

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<sup>6</sup> Petition to the FTC filed by the National Food Processors Ass'n, the American Association of Advertising Agencies, the American Frozen Food Institute, the Association of National Advertisers, the Can Manufacturers Institute, the Chemical Specialties Manufacturing Ass'n, the Food Marketing Institute, the Grocery Industry Committee on Solid Waste, the Grocery Manufacturers of America, the International Dairy Foods Ass'n, and the Steel Can Recycling Institute, reprinted in 56 Fed. Reg. 24,968, 24,972 (May 31, 1991), Proposed guides, § 4b, Example 1.

it currently appears that "degradable" claims made for plastic products destined to be discarded in a sanitary landfill cannot be substantiated. A guideline could state that "degradable" claims for plastic products are deceptive if the products are destined for a landfill. Alternatively, it could state that if the product is destined for a landfill, then a "degradable" claim would be deceptive unless the advertiser can substantiate that the product will degrade in a landfill. Or, perhaps we know enough to say something like the following: "Current science and technology implies that photodegradable plastic trash bags will not degrade in landfills; a "degradable" claim for photodegradable plastic trash bags will, therefore, be considered unsubstantiated."

#### FORMAT OF GUIDELINES

Another question in fashioning guidelines is what format to use. At least three possible formats could be used, each with its own merits and drawbacks: First, we could simply define acceptable terms; second, we could advise against certain types of claims, such as use of the terms "environmentally friendly" or "safe for the environment," providing an explanation or rationale for the advice; or third, we could articulate general principles, following each with appropriate examples.

At least one commenter to the Commission has suggested the definitional approach, on the ground that it would provide the most guidance. The disadvantages of this approach, however, are considerable. First, the Commission may not have the expertise

to define terms used in environmental claims. In efforts to construct workable and substantiated definitions, the Commission may risk error that could result in unduly limiting advertisers who seek to provide useful and nondeceptive product information or in inadvertently misleading consumers. Second, even assuming the Commission could draft correct definitions, the scientific bases for the definitions could erode or change, making them outdated. Third, the definitional approach provides little flexibility, thereby failing to account for the context in which terms are likely to be used. Finally, definitions, although perhaps useful in accomplishing some goals, are not as adaptable as other approaches to fulfilling the Commission's presumed objective -- issuing guidelines that limit advertising claims only insofar as they are likely to mislead consumers. The definitional approach might place the agency in the position of making environmental policy decisions more properly left to EPA or others.

A second approach would set forth specific advice about what not to say and also afford some explanation of the reason for the advice. Presumably, if firms adhered to the advice and applied the rationale to their advertising in general, they would benefit from the guidance. Like the definitional approach,



however, this approach is relatively inflexible because it too fails to account for the context in which claims may appear.<sup>7</sup>

Finally, as proposed in the petition in which you joined, the Commission could proceed by stating general principles and providing examples of their application. Under this approach, the guidelines would identify safe harbors and warn of mine fields. The principles could be relatively general and the examples could illustrate how to apply the principles in actual situations. This approach would provide needed flexibility to guidelines -- the same flexibility that appears to be lacking in the other two approaches.

#### STRUCTURE OF EXAMPLES

Of course, nothing is easy, and explaining examples is no exception. How, for instance, should examples treat claims that have a potential to mislead in several different ways? Should each example illustrate only one possible mode of deception, or should it attempt to handle several at once?

If a claim raises several deception issues, a safe harbor example for one of these issues might be read incorrectly to suggest a safe harbor for another. The Commission could try to make each example address each potential type of deception raised, but this approach might so inflate the length of the guidelines as to make them unworkable or erroneously suggest that

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<sup>7</sup> This approach is followed in "The Green Report II: Recommendations for Responsible Environmental Advertising," Ad hoc Task Force of State Attorneys General (May, 1991), reprinted in 56 Fed. Reg. 24,968, 24,976 (May 31, 1991).

they were all-inclusive. Perhaps a few introductory caveats would take care of potential problems like this. As you can see, however, the tasks inherent in developing guidelines of this nature can be daunting.

#### REQUIRED DISCLOSURES OF ENVIRONMENTAL HARM

Another task in writing guidelines is to evaluate the need for and usefulness of required disclosures. Suppose an advertiser chooses to make a truthful environmental benefit claim about a product, but the product also causes some other type of environmental harm in its production, use or disposal. Should a Commission guideline specify that the claim is deceptive without disclosure of the adverse information? Going a step further, should such a disclosure be required for any adverse environmental effect, or should it be required only for a significant adverse effect? And finally, should such a disclosure be required only if the adverse effect relates to the aspect of the product for which the benefit is claimed?

At this stage, I am inclined to think that only significant environmental effects ought to be the subject of mandatory disclosures. It seems likely that virtually all products, especially if they are considered in terms of life cycle analysis, have some environmental drawback. It may be appropriate to link the scope of any disclosure requirement to the scope of the claim. A broad claim such as "environmentally friendly" reasonably might trigger a disclosure of any significant, adverse effect of the product on the environment;

but a claim such as "No CFC's," which may imply that a product is safe for the ozone layer, perhaps should trigger a disclosure only of a significant, adverse environmental effect relating to that claim.

Last and not least, especially for those of you who have been following the debate over health and nutrition claims in food advertising, before issuing guidelines on environmental claims, the Commission should consider to what extent the principles it enunciates apply both to advertising and labeling. Many principles and examples that could be adopted would apply equally in both contexts. Affirmative disclosures, however, if applied across the board to both advertising and labels, could unduly raise advertising costs without providing consumers significant advantages. Disclosures that may fit on a label or package insert, such as a list of locations of suitable recycling facilities, may be prohibitively expensive to include in television and radio announcements. In addition, if disclosures are required on the product label or package insert, to require their inclusion in all advertising may be unnecessarily duplicative.

#### CONCLUSION

I offer these few comments to highlight the issues and concerns that should be addressed in considering how environmental guidelines might be drafted. It may be impossible to resolve all these issues with certainty. In that event, the Commission can and probably should include a sunset provision as

a protective measure in any environmental guidelines it may decide to issue.

Can the Commission craft guidelines that would provide useful information to industry and consumers? Can such guidelines reduce consumer skepticism about environmental claims? Can they encourage uniform regulatory efforts at the state and local levels? Can such guidelines reasonably predict FTC enforcement action? Can they be sufficiently flexible to provide useful -- and, I might add, nondeceptive -- guidance over a period of years?

I do not mean to suggest final answers to any of these questions. It is certainly worth the considerable effort, however, to try to formulate guidelines that meet these goals.

Thank you.