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Bradley D. Medcalf

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Marketing Green To Grab Green: FTC More Aggressive In Pursuit of Unsubstantiated “Environmental” Marketing Claims

Bradley D. Medcalf

I. INTRODUCTION

The Federal Trade Commission (“FTC”) developed the *Guides For The Use of Environmental Marketing Claims* (“Green Guides”) in an effort to prevent companies from marketing their products in an unfair or deceptive manner.¹ Though the Green Guides were enacted in 1992, a need for the Green Guides rose, as the popularity of environmentally friendly or “green” products and packaging climbed to heights that make an effective “green” marketing approach imperative in today’s hyper-competitive market.²

Although the FTC has turned its attention to unsubstantiated “green” marketing claims, it seems it may take some time before punishments reach the level of severity with which other erroneous marketing claims are met.³ With cases pending, and other companies sure to be examined by the FTC for noncompliance with the Green Guides, lack of consistency in punishment for poor practice leaves companies to guess how Green Guides violations might

¹ 16 C.F.R. § 260 (1992).

² J. Joseph Cronin, Jr., *Green Marketing Strategies: An Examination of Stakeholders and the Opportunities They Present*, J. ACAD. MARKETING SCI. (2010) available at <http://library.constantcontact.com/download/get/file/1102608159425-399/2010+JAMS.pdf>.

³ See Leslie Fair, *A Light Bulb Moment For Marketers*, BUREAU OF CONSUMER PROTECTION BUSINESS CENTER, (February 20, 2014) available at <http://business.ftc.gov/blog/2014/02/light-bulb-moment-marketers> (A company marketing its light bulb as burning for longer than it did was fined twenty-one million dollars.); compare to *Federal Trade Commission v. AJM Packaging Corp.*, 1:13-cv-01510-BAH, Doc. 6 (D.D.C. 2013) (A company marketing its products as degradable, biodegradable, and photodegradable without any scientific basis to back these claims was fined four hundred and fifty thousand dollars.)

be handled. As marketers assess those FTC decisions, any decision interpreted as weak risks emboldened marketers advising their companies not to worry about Green Guide compliance where big money is the alternative.

The Green Guides are clear and contain many detailed examples to assist prospective “green” marketers.⁴ Additionally, the FTC produced concise supplemental materials intended to help get the information to marketers quickly, and leave marketers with little excuse if called before the FTC.⁵ An examination of the Green Guides, the materials meant to supplement them, and recent FTC decisions addressing this “green” marketing, will shine light on whether the Green Guides are, or could become, an effective way to protect consumers, and less directly, the environment those consumers think they are protecting when electing to purchase “green” products.

II. “GREEN” MARKETING IS POPULAR AND PROFITABLE

Consumers want products that are environmentally friendly, and companies are trying to satiate that desire.⁶ While some companies like Starbucks or GE might seem a natural fit for the green marketing movement, other less obvious business entities like McDonald’s and Goldman Sachs, are also major players.⁷ So, why are these corporations, which are perceived as “money-hungry,” expending their favorite resource [money] in an effort to be “green”?

The answer is simple, and it is still, not shockingly, money. Business firms worldwide have noticed the positive gains that can result from environmentally friendly marketing strategies and the potential pitfalls

⁴ 16 C.F.R. § 260 (2012).

⁵ *Environmental Claims: Summary of the Green Guides*, FEDERAL TRADE COMMISSION (October 2012), <https://www.ftc.gov/tips-advice/business-center/guidance/environmental-claims-summary-green-guides>.

⁶ *FTC Cracks Down on Misleading and Unsubstantiated Environmental Marketing Claims: Actions Challenge Deceptive Biodegradable Plastics Claims for the First Time*, FED. TRADE COMMISSION (Oct. 29, 2013), <http://www.ftc.gov/news-events/press-releases/2013/10/ftc-cracks-down-misleading-unsubstantiated-environmental>.

⁷ *25 Big Companies That Are Going Green*, BUSINESS PUNDIT (July 29, 2008), <http://www.businesspundit.com/25-big-companies-that-are-going-green/>.

associated with failure to implement effective “green” marketing schemes.⁸ Many corporations have implemented a “triple-bottom line” performance evaluation system that accounts for performance on the basis of economic prosperity, environmental quality, and social justice.⁹ There is increasing awareness that subscribing to triple-bottom line practices can increase consumer demand.¹⁰ Although costs of such environmental and social consciousness can be substantial, improved performance in “green” marketing has been linked to greater financial performance, competitiveness, and innovation benefits.¹¹

The need for successful green marketing is vital to corporations because more than 75% of consumers routinely report they are “green”, or prefer environmentally friendly products.¹² Therefore, it is not surprising that relevant data shows organizations engaging in green practices may be able to benefit in multiple ways.¹³

With such a drastic percentage of the market identifying as “green,” it follows that firms with a green orientation are more likely to achieve greater financial gains and market share, high levels of employee commitment, increased firm performance, increased capabilities, and increased customer satisfaction which leads to an overall greater firm value.¹⁴

With all that and more to be gained from a successful “green” marketing campaign, corporations are eager to market products or the institution itself as “green.”¹⁵ Unfortunately, this might also incentivize lies and deceit. The FTC took, and continues to take, steps to help keep environmentally conscious consumers from being duped by baseless “green” marketing claims.¹⁶

⁸ Cronin, *supra* note 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *FTC Cracks Down*, *supra* note 6.

III. FTC'S GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS

Section Five of the FTC Act prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”¹⁷ Under the FTC Act, whenever the Commission has reason to believe any person, partnership, or corporation used any unfair method of competition or unfair deceptive act or practice in or affecting commerce, and the Commission feels a proceeding would be to the interest of the public, it shall issue a complaint stating its charges in that respect.¹⁸ Thus, Section 5 of the FTC Act is very broad, and is open to vast interpretation.

The Green Guides help marketers avoid making environmental claims that might be found unfair or deceptive under Section 5 of the FTC Act.¹⁹ The Green Guides do not confer any rights on any person.²⁰ They also do not operate to bind the FTC or the public.²¹ The Commission can, but is not required to take action under the FTC Act if a marketer makes an environmental claim inconsistent with the Green Guides.²² In other words, the Green Guides are there to help marketers understand how the agency is going to interpret the otherwise very broadly applicable statute in the specific context of “green” marketing. The Green Guides do not preempt federal, state, or local laws.²³ That being said, compliance with those laws will not necessarily preclude Commission law enforcement action under the FTC Act.²⁴

The Green Guides apply to claims about the environmental attributes of a product, package, or service.²⁵ Such claims can be made in a given

¹⁷ 15 U.S.C. § 45(a)(1) (2006).

¹⁸ 15 U.S.C. § 45(b) (2006).

¹⁹ 16 C.F.R. § 260.1 (2012).

²⁰ *Id.*

²¹ *Id.*

²² 16 C.F.R. § 260.1(a) (2012).

²³ 16 C.F.R. § 260.1(b) (2012).

²⁴ *Id.*

²⁵ 16 C.F.R. § 260.1(c) (2012).

product's labeling, advertising, promotional materials, and all other forms of marketing in any medium.²⁶

The Green Guides define a deceptive representation: "A representation, omission, or practice, is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers' decisions."²⁷ The Guides go on: "To determine if an advertisement is deceptive, marketers must identify all express and implied claims that the advertisement reasonably conveys."²⁸ After they have identified such claims, "marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claim."²⁹

The Green Guides also discuss how a claim might be properly substantiated through thorough testing: "A reasonable basis often requires competent and reliable scientific evidence, which might consist of tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results."³⁰ Further, "such evidence should be sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence."³¹

The Green Guides address many different scenarios where a marketer might wish to utilize "green" marketing to make a product more desirable to consumers: carbon offsets³², certifications and seals of approval,³³ "compostable" claims,³⁴ "degradable" claims,³⁵ "free-of" claims,³⁶ "non-

²⁶ *Id.*

²⁷ 16 C.F.R. § 260.2 (2012).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² 16 C.F.R. § 260.5 (2012).

³³ 16 C.F.R. § 260.6 (2012).

³⁴ 16 C.F.R. § 260.7 (2012).

³⁵ 16 C.F.R. § 260.8 (2012).

³⁶ 16 C.F.R. § 260.9 (2012).

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toxic” claims,³⁷ “ozone-safe” and “ozone friendly” claims,³⁸ “recyclable” claims,³⁹ “recycled content” claims,⁴⁰ “refillable” claims,⁴¹ “renewable energy” claims,⁴² “renewable materials” claims,⁴³ “source reduction” claims.⁴⁴

In each section, the Green Guides provide detailed and informative examples of how the guidelines stated might apply in a real world marketing situation.⁴⁵ One such example of how a corporation might wrongfully overstate an environmental attribute is as follows: “An area rug is labeled ‘50% more recycled content than before.’ The manufacturer increased the recycled content of its rug from 2% recycled fiber to 3%. Although the claim is technically true, it likely conveys the false impression that the manufacturer has increased significantly the use of recycled fiber.”⁴⁶

Thus, the Green Guides are thorough and informative. Recognizing that point, it is interesting to further consider how [in]effective they really are as non-binding suggestions open to subjective enforcement actions rather than fully and properly established objective legal rules.

IV. FEDERAL TRADE COMMISSION’S RECENT ACTION TO ENFORCE GREEN GUIDES

In 2013, the FTC brought multiple complaints against corporations marketing their products as “environmentally friendly.”⁴⁷ The FTC alleged these claims were being made without a reliable scientific basis for such

³⁷ 16 C.F.R. § 260.10 (2012).

³⁸ 16 C.F.R. § 260.11 (2012).

³⁹ 16 C.F.R. § 260.12 (2012).

⁴⁰ 16 C.F.R. § 260.13 (2012).

⁴¹ 16 C.F.R. § 260.14 (2012).

⁴² 16 C.F.R. § 260.15 (2012).

⁴³ 16 C.F.R. § 260.16 (2012).

⁴⁴ 16 C.F.R. § 260.17 (2012).

⁴⁵ 16 C.F.R. § 260 (2012).

⁴⁶ 16 C.F.R. § 260.3(c) (2012).

⁴⁷ *FTC Cracks Down*, *supra* note 6.

claims, and it appears the aggressive enforcement effort will continue into and throughout 2014.⁴⁸

A. *Environment Harmed: Small to No Penalty*

One of the most recent enforcement actions to apply the Green Guides against a deceptive company involves diapers.⁴⁹ The FTC brought this action against Down to Earth Designs (“gDiapers”), a Portland-based company, for making inaccurate or unqualified environmental claims.⁵⁰

The gDiaper includes a reusable outer shell and disposable inner liners.⁵¹ According to the advertisements, gDiapers were supposed to be “100% biodegradable” including when thrown away or flushed down the toilet.⁵² That claim has since proven at least partially untrue.⁵³ One reason is, only a portion of flushed gDiapers biodegrade.⁵⁴ Additionally, most solid waste that is disposed of using ordinary garbage receptacles is incinerated or dumped in a landfill rather than composted.⁵⁵

Despite gDiapers’ exposure, the FTC did not impose a large monetary fine on the company.⁵⁶ The Commission’s Order expressly stated a number of guidelines, in accordance with the Green Guides, which the company must now follow lest they face monetary penalties.⁵⁷ Since the Commission issued

⁴⁸ Andrew L. Ehrlich, Alexander F. Logemann, et. al., *2014 Hot Topics in Environmental Law*, FAEGREBD.COM (Dec. 19, 2013), <http://www.faegrebd.com/20973>.

⁴⁹ Leslie Fair, *FTC Says Diaper Claims Didn’t Pass the Smell Test*, FEDERAL TRADE COMMISSION, (Jan. 17, 2014) available at <http://business.ftc.gov/blog/2014/01/ftc-says-diaper-claims-didnt-pass-smell-test>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Down to Earth Designs, Inc. Settles FTC Charges That Its Environmental Claims for Diapers and Related Products Were Deceptive: Order Requires Company to Substantiate a Range of “Green” Claims for Its gDiapers Products*, FEDERAL TRADE COMMISSION (Jan. 17, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/01/down-earth-designs-inc-settles-ftc-charges-its-environmental>.

⁵⁷ *Id.*

a consent order on a final basis in this case, it carries the force of law with respect to future actions.⁵⁸ Each violation of the Order after it is final may result in a civil penalty of up to Sixteen Thousand Dollars (\$16,000.00).⁵⁹

In a different case involving similarly baseless “green” claims, this time about a product’s plastic packaging, the FTC did actually enforce a monetary penalty against a corporation.⁶⁰ AJM Packaging Corporation (“AJM Corp.”)⁶¹ was violating a July 19, 1994, Commission Consent Order⁶² that barred it from representing that any product or package is degradable, biodegradable, or photodegradable unless it had competent and reliable scientific evidence to substantiate the claims.⁶³

Despite that order expressly barring them from doing so, AJM Corp. continued to make environmental claims for many of its most popular products without taking the time to substantiate these claims in compliance with the 1994 Order.⁶⁴ This defiance, though presumably lucrative, did not go unnoticed or unpunished by the FTC Commission, which responded by updating many of the terms of the 1994 order in addition to requiring AJM Corp. to pay a Four Hundred and Fifty Thousand Dollar (\$450,000.00) civil monetary penalty.⁶⁵

A primary reason the FTC wanted to vacate the terms of the 1994 Order in this case, was to ensure they were in line with the new Green Guides’ requirements and expectations.⁶⁶ The new order started by defining terms that might have otherwise been construed as ambiguous.⁶⁷ The terms

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *FTC Cracks Down*, *supra* note 6.

⁶¹ “AJM Corp. manufactures paper products, including paper plates, cups, bowls, napkins, and bags, for sale throughout the United States. Based in Bloomfield Hills, Michigan, the company touts itself as a ‘leading manufacturer of these products,’ and refers to its lunch bags and Green Label paper plates as national brand leaders.” *Id.*

⁶² *America's Favorite Chicken Co.*, 118 F.T.C. 1 (1994).

⁶³ *FTC Cracks Down*, *supra* note 6.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Fed. Trade Comm'n v. AJM Packaging Corp.*, No. 1:13-cv-1510 (D.D.C. Oct. 1, 2013).

“clearly and prominently,”⁶⁸ “close proximity,”⁶⁹ “commerce,”⁷⁰ “competent and reliable scientific evidence,”⁷¹ “customary disposal,”⁷² “degradable,”⁷³ “landfill,”⁷⁴ and “product or package,”⁷⁵ are all defined therein.⁷⁶

⁶⁸ *Id.* (“*Clearly and prominently* means (A) In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it; (B) In communications made through an electronic medium, the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through video or audio means through which communication is presented. In communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read and comprehend it; AND (C) Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.”).

⁶⁹ *Id.* (“*Close proximity* means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.”).

⁷⁰ *Id.* (“*Commerce* shall mean as defined in section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.”).

⁷¹ *Id.* at 5. (“*Competent and reliable scientific evidence* means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that representation is true.”).

⁷² *Id.* (“*Customary disposal* means any disposal method whereby respondent’s products ultimately will be disposed of in a landfill, in an incinerator, or in a recycling facility.”).

⁷³ *Id.* (“*Degradable* includes biodegradable, oxo-biodegradable, oxo-degradable, or photodegradable, or any variation thereof.”).

⁷⁴ *Id.* (“*Landfill* means a municipal solid waste landfill that receives household waste. *Landfill* does not include landfills that are operated as bioreactors or those that are actively managed to enhance decomposition.”).

⁷⁵ *Id.* (“*Product or package* means any product or package, including but not limited to bags and plates, that is offered for sale, sold, or distributed to the public by respondent

Part I of the New FTC Order lays out the requirements for a corporation to represent a product or package as “degradable.”⁷⁷ Part II of the New FTC Order presents the requirements for a corporation to represent a product or package as “compostable.”⁷⁸ Part III of the New FTC Order enumerates the different requirements for a corporation to represent a product or package as “recyclable.”⁷⁹ Part IV of the New FTC Order requires the following for a corporation to represent a product or package as offering any environmental benefit: “[The corporation must] possess and rely upon competent and reliable evidence at the time of making such representation, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.”⁸⁰ Part V of the New FTC Order sets out the terms of termination of the Order twenty (20) years from the date of its issuance, lest the Commission decide otherwise.⁸¹

The civil monetary penalty was entered pursuant to section 5(l) of the FTC Act, 15 U.S.C. § 45(l), and was required to be made by wire transfer within seven days of the Order.⁸²

Thus, neither company faced a harsh monetary penalty at this juncture despite having violated the Green Guides. While one got nothing more than a slap on the wrist, both got a harsh warning not to do this sort of thing again in the future. The effectiveness of the Green Guides might be undercut if corporations know that they will not be held accountable the first time they utilize baseless “green” marketing claims.

B. Directly Affected Consumers: Large Penalty

While the Four Hundred and Fifty Thousand Dollar (\$450,000.00) penalty that AJM Corp. received may not seem like much, that one example

and any such product or package sold or distributed to the public by third parties that is manufactured by respondent.”).

⁷⁶ *Id.* at 4-5.

⁷⁷ *Id.* at 5-6.

⁷⁸ *Id.* at 6-7.

⁷⁹ *Id.* at 7.

⁸⁰ *Id.*

⁸¹ *Id.* at 8.

⁸² *Id.* at 2.

is not indicative of universal weakness of the FTC when enforcing Section 5 of the FTC Act.

In a more recent decision, the FTC charged Lights of America, a California-based company, and its two owners with overstating the light output and life expectancy of their LED bulbs and falsely comparing their brightness to other bulbs.⁸³ Those charges resulted in a ruling that included an order exceeding Twenty-One Million Dollars (\$21,000,000.00) mandating refunds for consumers.⁸⁴

Does this suggest that the FTC cares more about baseless marketing claims when the victim is a consumer than when the victim is the environment? It may. The way in which the much larger financial remedy was decided in Lights of America was different than in the AJM Corp. case. In Lights of America, the company's gross revenue was considered a proper measure for monetary liability and any supposed value received by the consumer was not deducted from that figure.⁸⁵ Further, the court permitted an award of "equitable disgorgement," which the court defined as "gross revenues from its illegal conduct in advertising and selling its products with unsubstantiated claims."⁸⁶ The appropriate amount of equitable relief under both restitution and disgorgement were found to be the same: defendants' gross revenues from the deceptively advertised products.⁸⁷

Thus, in a case where consumers were directly affected by false or baseless marketing claims, the deceptive company was made to repay every cent which it made on every product housing the false advertisement. The message to marketers was clear in Lights of America: "If you make objective product claims, you must have appropriate scientific or technical evidence in hand before you start selling."⁸⁸

⁸³ Leslie Fair, *supra* note 3.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

In contrast, the committee in AJM Corp. did not apply an objective monetary penalty based on number of units fraudulently sold, but rather seemed to assert an arbitrary amount. This could be because the consumers in AJM Corp. got all they bargained for out of the plastic plate which they purchased, and it is only subsequently that the earth will suffer, unbeknownst to the consumer, as the plate takes longer than expected to decompose. With the light bulb, the consumer purchased it to last for the period of time which it advertised. If the bulb goes out in five years instead of seven, disregarding variables like ability to purchase a new bulb, that consumer is left to struggle without light for two years. The impact is much more direct and recognizable in the light bulb situation, but the FTC should not enforce Section 5 of the FTC Act in such drastically inconsistent ways based on who or what the deception most directly affects.

Thus, the FTC needs to formally codify the Green Guides, rather than leaving them as informal agency interpretive documents. Codification of the Green Guides would serve to place all marketers on fair notice that compliance is necessary. Then the FTC could ensure the monetary punishment was determined through the same objective “units fraudulently sold” consideration in all cases.

C. Pending Case: Clarity Through Codification of the Green Guides

The incredible difference in the penalties applied above leaves interested companies to speculate as to the real ramifications that might accompany a decision to defy, or choice to ignore, the Green Guides.

Another company facing a similar FTC complaint is ECM Biofilms, Inc. (“ECM Inc.”).⁸⁹ ECM Inc. is based in Ohio and markets its additives, which the company alleges make plastic products biodegradable, under the trade name MasterBatch Pellets.⁹⁰ The Commission’s complaint charged that ECM Inc. violated the FTC Act by misrepresenting that plastics made with ECM Inc. additives are: (i) biodegradable and will completely break down within a reasonably short period of time; (ii) biodegradable in a landfill; (iii)

⁸⁹ *FTC Cracks Down*, *supra* note 6.

⁹⁰ *Id.*

biodegradable in a stated qualified timeframe; and iv) supported by scientific tests.⁹¹

This case presents an interesting blend of the issues ruled upon in the two enforcement actions above. ECM Inc. made claims that will not directly affect the average consumer, who will merely use the product as intended and dispose of it. At the same time, ECM Inc. marketed their product to corporate consumers with faulty claims and certifications similar to what Lights of America did.

With many companies looking to market their products as “green,” the ECM Inc. additive product has been purchased and used by companies like American Plastic Manufacturing and CHAMP, who now also face FTC scrutiny.⁹² ECM Inc. has intensified the effects of their allegedly unsubstantiated claims by offering their customers “Certificates of Biodegradability of Plastic Products.”⁹³ This misled those customers who blindly relied on the validity of such a certificate to where they are now also facing FTC action.⁹⁴

While there is not yet a definitive answer as to how this will turn out for ECM Inc., one can look to the penalties faced by AJM Corp. and speculate as to what might happen. One interesting issue likely to arise is whether to punish the companies that were assured use of ECM Inc.’s product would make their products biodegradable. One would assume that judgment will be based on the reasonableness of each individual corporation’s decision to rely upon ECM Inc.’s claims. An interesting question implicated by this issue is whether the FTC will punish ECM Inc. with civil monetary penalties for each violation committed by the corporations that ECM Inc. duped.

If the FTC decision abides by the same objective formula utilized in Lights of America, then each violation will carry a monetary penalty. If the FTC acts in line with the paper products decision, then ECM Inc. is likely

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

facing little to no monetary penalty. Though the Green Guides are not yet codified, had ECM Inc. taken the time to comply with the recommendations presented in them or their accompanying supplement materials, the company could have avoided these costly proceedings altogether.

V. FTC PROVIDES RESOURCES TO AID BUSINESSES IN GREEN MARKETING

The materials provided by the FTC to clarify the Green Guides appear easily accessible and informative. “The FTC recently released several business and consumer education resources designed to help users understand its Green Guides and environmental marketing in general.”⁹⁵ One such document is titled “Environmental Claims: Summary of the Green Guides,” and it consolidates the thirty-six page Green Guides into four pages without excluding any section.⁹⁶

Application of the “Summary of the Green Guides” to the facts surrounding the pending ECM Inc. case would have been helpful for ECM Inc. In that case, recall ECM Inc. was marketing additives that were supposed to render plastic products biodegradable if used as directed, and providing those that purchased the product with a certification of such upon use of the product.⁹⁷

The “Summary of the Green Guides,” like the actual Green Guides, has a section concerning making environmental claims, another on certifications and seals of approval, and yet another on what it means to be degradable.⁹⁸

In the first section on the first page, ECM Inc. could have located the “General Environmental Benefit Claims” section of the summary.⁹⁹ In that section, businesses are warned against broad claims, since they are difficult, if not impossible, to substantiate.¹⁰⁰ That section goes on to inform readers

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *Environmental Claims: Summary of the Green Guides*, *supra* note 5.

⁹⁹ *Id.* at 1.

¹⁰⁰ *Id.*

that general claims can be made if they are qualified with specific environmental benefits which are clear, prominent, and specific.¹⁰¹ It then provides a simple example of a potential pitfall: “Claiming ‘Green, made with recycled content’ may be deceptive if the environmental costs of using recycled content outweigh the environmental benefits of using it.”¹⁰²

Just reading this first section might have saved ECM Inc. a legal headache. To claim that something will simply be biodegradable without any further explanation is exactly what this section warns against.

Regarding ECM Inc.’s “certification,” if ECM Inc. would have looked at the first page of the summary, the corporation would have also seen the section on “Certifications and Seals of Approval.”¹⁰³ This would have afforded ECM Inc. the knowledge that the corporation should have disclosed any material connections to the certifying organization.¹⁰⁴

Without doubt, this would have raised a red flag for ECM Inc., who was operating as the certifying organization for its own product with only their hollow words as a basis for the certification.¹⁰⁵ Thus, the corporation would have realized this material connection and realized it should stop this practice or made it appropriately clear the certifying organization was the same one selling the product.

Also, in the “Certifications and Seals of Approval” section, the summary would have alerted ECM Inc. it should not use environmental certifications or seals that do not clearly convey the basis for the certification, because the seals or certifications are likely to convey general environmental benefits.¹⁰⁶ ECM Inc. further would have been informed if the corporation still wanted to provide customers with a certification without a basis for such,

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (Defining a “material connection” as “one that could affect the credibility of the endorsement.”)

¹⁰⁵ *FTC Cracks Down*, *supra* note 6.

¹⁰⁶ *See Environmental Claims: Summary of the Green Guides*, *supra* note 5.

then the corporation needed to clearly and prominently identify the specific environmental benefits of its product.¹⁰⁷

ECM Inc. fell short of providing a basis for its certification or identifying the specific environmental benefits of its product that it was certifying. ECM Inc. could have known this was not okay, and rectified or ceased the practice by quickly referencing this easily accessible summary. If ECM Inc. felt there was insufficient room on the product to list the required attributes, the summary provides a means of satisfying this requirement, eliminating that potential excuse.¹⁰⁸

Finally, ECM Inc. faced heat from the Committee for claiming biodegradability.¹⁰⁹ The second page of the “Summary of the Green Guides” houses a section titled “Degradable.”¹¹⁰ If ECM Inc. wanted to learn about making a degradability claim, then this would be a place to start.

“Had ECM Inc. referenced the ‘Degradable’ section, the corporation would have learned it could make an unqualified degradable claim only if it could prove the entire product or package would completely break down and return to nature within a reasonably short time period after customary disposal.”¹¹¹ The section goes on to inform readers a “reasonably short period of time” for complete decomposition of solid waste products is one year.¹¹² It further clarifies items destined for landfills, incinerators, or recycling facilities will not be able to degrade within a year, so unqualified biodegradable claims should not be made for them.¹¹³

Ultimately, ECM Inc. would have been well informed as to many necessary changes after reading the first few sections, but this one prevents ECM Inc., and companies like it, from saying they were unsure about what

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (“Marketers can qualify certifications based on attributes that are too numerous to disclose by saying, “Virtually all products that impact the environment. For details on which attributes we evaluated, go to [a website that discusses this product].”)

¹⁰⁹ *FTC Cracks Down*, *supra* note 6.

¹¹⁰ *See Environmental Claims: Summary of the Green Guides*, *supra* note 5.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

an acceptable degradability claim constitutes. A corporation now knows it either ran the tests to determine a rate of degradability within a year, or it did not. Had ECM Inc. read this section, it would have been well informed as to the necessary test to make such a claim.

Thus, after just the first couple pages of one supplemental Green Guide source, “Environmental Claims: Summary of the Green Guides,” the FTC provided corporations with enough clear and concise information to avoid sanctions or penalties.¹¹⁴ Even if a business did not want to take the time to read and analyze the Green Guides in their entirety before marketing their product or it’s packaging as “green”, the FTC has largely already done this.

The materials available to businesses looking to market their products as green are easily navigated and sufficiently informative, so this leads to the question of whether it is worth businesses’ time to utilize them. Since the Green Guides are allegedly not binding on the FTC or marketers, one wonders if it is even worth it to read them. The only way in which the Green Guides and accompanying materials are going to leave businesses uninformed is if the businesses choose to disregard them all together. Thus, it would appear, the clear answer to whether businesses should use the materials is “yes”. Liability is eliminated where a business is in absolute compliance.

Unfortunately, under the current structure, things become less certain and obvious because businesses are left to guess at the severity of liability they are opening themselves up to in deciding not to comply with the Green Guides. It is universally accepted that an effort to deter is severely undermined where punishment is loose or unpredictable. It is hard not to think, “my business will be the one to get the light sentence, or none at all” when that is a plausible option.

That being said, if marketers are aware that the Green Guides exist, and choose not to review them, it becomes more plausible for a court to penalize companies for violating the Green Guides whether or not they are codified

¹¹⁴ *FTC Cracks Down*, *supra* note 6.

law. At that point, marketers have opened themselves to the argument that they were willfully ignorant to the means of compliance suggested in the Green Guides.

VI. RISK V. REWARD: IS PENALTY ENOUGH TO DETER?

The Commission authorizes the filing of a complaint when it has reason to believe that the law has been or is being violated, and it appears to the Commission a proceeding is in the public interest.¹¹⁵ But it might be too late at that point. In the case of “green” marketing claims, the FTC’s efforts to deter consumers from purchasing products at an increased rate under the false pretense they are helping the environment is undermined where marketers do not fear harsh ramifications for Green Guide defiance. If the Green Guides are spineless, then not only is the environment going to suffer, but all the government resources that went into the creation of the Green Guides and their accompanying supplemental materials were a waste.

The gDiapers corporation is small, with an annual estimated revenue between Five Hundred Thousand (\$500,000.00) and One Million Dollars (\$1,000,000.00) annually.¹¹⁶ If the FTC would have hit this corporation with a monetary penalty, even as small as the one enforced against AJM Corp., it is likely gDiapers would have ceased to exist. The fact that the finality of the Commission’s Order leaves large monetary sanctions looming for any future misstep should serve as an effective deterrent in this case.

On the other hand, an institution like AJM Corp., blatantly violating the Green Guides, was saddled with a Four-Hundred and Fifty Thousand Dollar (\$450,000.00) fine and informed of an updated set of rules to follow.¹¹⁷ While that might seem like a hefty sum, everything is relative, and a closer look at AJM Corp.’s books reveals a corporation with Seventy Million Dollars (\$70,000,000.00) in revenue in the last fiscal year.¹¹⁸ It does

¹¹⁵ *FTC Cracks Down*, *supra* note 6.

¹¹⁶ MANTA MEDIA INC., (Jun. 3, 2013) <http://www.manta.com/c/mm8k1bz/g-diapers>.

¹¹⁷ *FTC Cracks Down*, *supra* note 6.

¹¹⁸ *Directoy*, INSIDE VIEW, INC., (2014) <http://www.insideview.com/directory/ajm-packaging-corporation>.

not take an expert mathematician to understand that a corporation of that magnitude would barely notice the money was gone.

Does that mean the Green Guides, no matter how well drafted and supplemented by the FTC, will be in vain until the FTC delivers a serious blow? Is this fair to other small diaper corporations trying to establish a market share without violating the law that one corporation was allowed a free pass and the ability to grab the attention of the profitable “Green” market? Should it be left to the FTC to protect the environment in addition to American consumers? Does it seem the FTC really desires such responsibilities?

These are all worthwhile questions that could easily be satisfied if the Green Guides were codified as statutes as opposed to being presented as the suggested, but non-binding, way to conduct one’s “green” marketing. Notice would no longer be an issue. Ignorance is no defense against breaking the law. Ignorance is apparently an effective defense against informal agency interpretive documents, as the Green Guides currently stand.

Until the FTC codifies the Green Guides, Section 5 of the FTC Act will continue to be inconsistently enforced. As displayed herein, one variety of a Section 5 violation will be harshly and objectively punished under an established formula, while another sort will hardly be reprimanded with an arbitrary punishment. This inconsistency encourages mistrust of the system, and emboldens marketers to find solace in willful ignorance. From the mistrust stems speculation, such as presented herein, that the FTC focuses on protection of consumers more than protection of the environment.

Thus, if “green” marketing is as necessary and profitable as a number of modern sources suggest, the reward of noncompliance with the Green Guides during these early stages of tame, though increasingly frequent, FTC enforcement actions far outweighs the risk of isolating oneself from the “green” marketplace.

VII. CONCLUSION

It is evident the biggest concern for the FTC in calculating penalties to be enforced against companies under the FTC Act’s Section 5, whether

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green or otherwise, should be consistency. A company making unsubstantiated claims should not be tolerated when they affect the environment any more than when the victim is directly the consumer. Crucial to the FTC attaining consistency will be codification of the Green Guides to where they can be enforced more rigorously on a more objective basis without notice being a valid concern for violators. With the helpful resources the FTC has made available to companies, there should be far less leeway provided when a company choosing to market its product or packaging as “green” fails to have a factual basis for such claims. Until the FTC treats, or is able to treat, violations affecting the environment just as seriously as those affecting consumers, it will not matter how magnificently the Green Guides were drafted.

A diaper that is not actually going to biodegrade after being flushed should be treated the same as a light bulb that burns for a period of time less than advertised. Whether the consumer is left in the dark literally when the bulb goes out earlier than expected, or left in the dark figuratively when they never realize the water company pulled chunks of their child’s diaper from the sewage, a company should have to pay back every cent they made selling that product under false pretenses. That is the only just way to ensure compliance with the Green Guides, and it should not matter if it results in some companies going under. If a company does not want to face such harsh penalty, then it merely has to comply with the Green Guides. Left to operate under the current structure, the guides as pseudo-enforceable behavioral suggestions, irony will arise in the form of a deteriorated environment affecting the more heavily protected general consumer. Codification of the Green Guides is essential to ensuring that this long-term adversity is never realized.

