American Coatings Association℠

ACA Guidance for Developing Zero-VOC, Emissions and Environment-Related Marketing Claims and Certifications

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As awareness about environmental and health effects of products has grown, manufacturers have developed safer and more environmentally responsible products, and employed labeling and advertising to convey health and environmental information to consumers. Out of concern that consumers may not fully understand statements and claims on labels, the U.S. Federal Trade Commission (FTC) applies its requirements related to consumer deception to claims related to health and/or environment. Marketers conveying such statements or certifications must evaluate messaging carefully using FTC's principles related to deception. These FTC principles affect statements related to VOC's (Volatile Organic Compounds) and emissions, including: "Zero Emissions," "Zero VOC," "Non-Toxic," "No Odor," "Baby Safe," "No Toxic Fumes / HAP's-free," "No reproductive toxins," "No chemical solvents," and others.

FTC's law and guidance provide a set of principles to assist in developing, evaluating and substantiating marketing claims and certifications. Application of principles may vary based on the claim and changes in consumer perception over time. Marketers should be aware that while requirements may not be clearly defined, they must have competent and reliable scientific evidence to support claims. FTC encourages companies to contact the agency with any questions prior to labeling a product, if there is a question as to whether a label could be interpreted as deceptive.

In this guide, ACA summarizes principles in law, guidance and consent orders that FTC may use to evaluate VOC, emissions and environment-related claims and certifications. Each substantive section (Sections II-V) includes a "Practice Note" box at the end, providing summary considerations for marketers.

DISCLAIMER

This guidance document is intended to assist members in understanding FTC's requirements for marketing claims related to health and environment. This information is not intended to represent an interpretation of FTC rules and regulations or constitute compliance or legal advice. The information contained in this document has been compiled from sources believed to be reliable and represent the best information on the subject as of March 1, 2019. The American Coatings Association, Inc., makes no warranty, guarantee, or representation as to the completeness, accuracy or sufficiency of any information herein, and the Association assumes no responsibility in connection therewith; nor can it be assumed that all necessary measures are contained in these documents, or that other or additional information or measures may not be required or desirable because of particular or exceptional conditions or circumstances, or because of applicable federal, state, or local law.

This guide is organized into the following sections:

I. Overview of FTC's Body of Law and Related Guidance

For the evaluation of marketing claims related to health or environment, FTC requires substantiation of any claims and certifications. The requirement applies to claims about emissions, VOC's or other environment or health benefits. This requirement is derived from Section 5 of the *FTC Act* (*Federal Trade Commission Act*), preventing deception, further detailed in FTC's *Green Guides* and *Endorsement Guides*.

In addition to the act and guides, FTC consent orders demonstrate how FTC applies its law against deception to VOC and emissions related claims. FTC issued two sets of consent orders related to paint companies, in 2013 ("the 2013 Consent Orders") and then again in 2018 ("the 2018 Consent Orders"). These orders reflect FTC's assessment of consumer understanding during their respective period.

In 2013, FTC established Zero VOC claim limits with qualifying language to justify claims that a paint is "VOC-Free" or "Zero VOC." These limits allowed substantiation using VOC content. FTC

also issued the FTC Enforcement Policy Statement Regarding VOC-Free Claims for Architectural Coatings, further detailing enforcement around "free-of" VOC claims, based on requirements established in the 2013 Consent Orders.

Then, with the 2018 Consent Orders, FTC requires companies to substantiate that *all emissions* are harmless within six hours of application, if a paint is labeled as "VOC-free," "Zero VOC," or with other similar claims. With publication of the 2018 Consent Orders, FTC rescinded the 2013 Enforcement Policy Statement, although the 2013 orders are still in effect.[1]

The body of law and guidance related to VOC, emissions and environment-related claims and certifications on paint labels are the *FTC Act*, the *Green Guides*, the *Endorsement Guides*, the 2013 Consent Orders and the 2018 Consent Orders. *FTC's Policy Statement on Deception* also provides useful interpretation of the *Green Guides*. FTC specifies that the *Green Guides* apply to business to business transactions as well as business to consumer transactions.[2]

II. *FTC Act*

FTC is authorized to prevent "unfair or deceptive acts or practices in or affecting commerce" under Section 5 of the Federal Trade Commission Act (15 U.S.C §45) including misleading or deceptive environmental claims. Companies developing environmental marketing programs and labelling - including statements related to VOC's and/or other emissions - must evaluate claims using FTC's criteria for deception.

In its "Policy Statement on Deception," FTC provides general principles to evaluate alleged deception. FTC's analysis hinges on three factors:

- FTC must identify a representation, omission or practice that is likely to mislead a consumer;
- FTC evaluates the claim from the perspective of a "reasonable consumer," including from the perspective of a specific group if a representation effects that group or is primarily targeted at that group; and
- FTC must determine the representation, omission or practice is *material* in a manner that affects consumer choice.

The following further explains these three principles:

a) Representations, Omissions or Practice

The first consideration in FTC's analysis requires identification of an allegedly deceptive representation, omission or practice. FTC will evaluate the entire advertisement, transaction or course of dealing, including any express or implied representations that might influence consumer perception. A company can convey an implied representation by juxtaposition of

[1] FTC has stated it will modify those orders to harmonize with the 2018 orders.
[2] *See* 16 CFR 260.1(c).

phrases, the nature of a claim or the nature of the transaction. For example, FTC determined that Listerine deceptively claimed its mouthwash could cure colds by placing the phrase, "Kills Germs by Millions on Contact" directly preceding the phrase "For General Oral Hygiene Bad Breath, Colds and Resultant Sore Throats." In addition, FTC will also consider omitted information that leads to a consumer's false belief about a product.

b) Reasonable Consumer

As a second consideration in its analysis, FTC will consider whether an interpretation of a claim is reasonable from the perspective of a *reasonable consumer*. If a representation could affect a certain group or is targeted at a group, then FTC considers how a reasonable member of that group would interpret the representation. A minority interpretation or understanding of a claim may be reasonable.[3] When evaluating reasonability, FTC considers all relevant communication, including visual imagery, text, placement of claims, qualifying disclosures, etc. FTC may also consider consumer focus groups, surveys and expert testimony.

FTC's analysis may include the following types of inquiries:

- How clear is the representation?
- How conspicuous is any qualifying information?
- How important is any omitted information?
- Do other sources for the omitted information exist?
- How familiar is the public with the product or service?
- What is the overall impression of a reasonable consumer?

c) "Materiality"

FTC's third consideration in its analysis is that the representation must be *material* by influencing a consumer's choice. The representation must be important to consumers. FTC

[3] The Commission provides guidance about reasonable interpretations in the case *In the Matter of Heinz W. Kirchner*, 63 F.T.C. 1282 (1963). The commission explains, "A representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of person to whome (sic) the representation is addressed. If, however, advertising is aimed at a specially (sic) susceptible group of people (e.g. children), its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed." In reaching its conclusions, the commission considered possible harm to product users and product test results, both based on expert testimony. The case related to a swimming aid device consisting of an inflatable rubber receptacle and plastic tube. A user must wear the rubber receptacle under a swim suit or swimming trunks and inflate by blowing in the tube. The manufacturer advertised the product as an invisible swim aid that allows non-swimmers to swim instantly. The commission concluded the claim of invisibility is not deceptive, since consumers would reasonably understand the claim to mean the product is inconspicuous and not actually invisible or bodiless. The commission found expert testimony about noticeable bulges to users' body shapes unconvincing as evidence of deception. However, the Commission found that marketers deceptively claimed the product renders the user unsinkable while allowing the user to perform like a champion swimmer.

assumes any environment or health related claim is material. It also assumes any express claim is material. Consequently, FTC assumes virtually everything conveyed in an advertisement affects consumer choice.

Section 5(n) of the *FTC Act* requires an injury in cases of deception.[4] According to FTC, an injury in this context may be as simple as the consumer choosing differently because of the marketing claim. FTC assumes a material representation causes an injury to the consumer.

Practice Note:

Marketers may take note of FTC's three-step analysis to evaluate advertising, claims and/or statements that could be deceptive:

1. FTC must identify a representation, omission or practice that is likely to mislead a consumer;
2. FTC evaluates the claim from the perspective of a "reasonable consumer," including from the perspective of a specific group if a representation affects that group or is primarily targeted at that group. This could include allergy and asthma sufferers, children, the elderly, etc.

   To that end, FTC's analysis may pose the following questions:

   - How clear is the representation?
   - How conspicuous is any qualifying information?
   - How important is the omitted information?
   - Do other sources for the omitted information exist?
   - How familiar is the public with the product or service?
   - What is the overall impression of a "reasonable consumer"?
3. FTC must determine the representation, omission or practice is material in a manner that effects consumer choice. FTC assumes environment or health related claims are material.

[4] Section 5(n), *FTC Act* 15 U.S.C §45(n), of the *FTC Act* requires, "The Commission shall have no authority under this section or Section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is *likely to cause substantial injury to consumers* which is not reasonably avoidable by consumers themselves and *not outweighed by countervailing benefits to consumers or to competition*. In determining whether an act or practice is unfair, the Commission *may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.*" (Emphasis added)

III. *Green Guides*

To address concerns about consumer understanding of environmental marketing claims, FTC issued the *Green Guides* in 1992, and revisions in 1996, 1998 and 2012. The guides describe principles related to environmental claims to avoid deception. The guides apply to claims about "environmental attributes of a product, package, or service in connection with the marketing, offering for sale, or sale of such item or service to individuals."[5] The guides apply to both business-to-consumer and business-to-business transactions.[6]

The *Green Guides* provide FTC's administrative interpretation and guidance, and do not *create* a legal obligation. However, companies should be cautious if developing environmental claims that vary from the *Green Guides*. FTC will scrutinize such claims carefully.

The *Green Guides* do not pre-empt state or local law, but compliance with those laws would not preclude an enforcement action under the *FTC Act*. Consequently, complying with a local VOC regulation does not mean that a claim is not "deceptive," according to FTC.

The *Green Guides* provide principles related to:

1) Environmental marketing claims;
2) Consumer perception of environmental marketing claims
3) Substantiation of environmental marketing claims; and
4) Qualifying claims to a reasonable scope

The most recent *Green Guides* revision in 2012 added guidance about certifications and seals of approval, claims related to materials and energy sources that are "renewable," and "carbon offset" claims.

a) General Principles for Environmental Claims

The *Green Guides* provide four general principles for environmental claims at 16 CFR 260.3. First, any qualifications and disclosures providing specificity to a claim, necessary to avoid deception, must be clear, prominent and understandable. Companies must use clear, plain language, in an easily readable font size. Any disclosures must be in proximity to a qualified claim. The label must not include inconsistent statements or elements that distract from the qualification or disclosure.

Second, the claim must convey whether it applies to the product, package or a service. Where the attribute would not apply to the product or package in its entirety, qualifying language must be used. For example, a claim that a package is recyclable may be considered deceptive if the package contains a component that limits its recyclability.

[5] 16 CFR 260.1(c)
[6] 16 CFR 260.1(c)

Third, a statement of environmental attribute must be precise without overstating a benefit. Overstatement can be direct or implied. For example, a rug labeled as having "50% more recycled content" may be considered deceptively labeled if the manufacturer increased recycled content from 2% to 3%. Although technically true, the claim implicitly overstates the recycled content.

Fourth, comparative claims must be written clearly to convey the environmental benefit and the object of comparison. For example, a marketer may intend to compare an improved product to an old version of the same product or a competitor's product. Any such comparisons must be clear on their face. A marketer must also be able to substantiate such claims.

b) Interpretation and Substantiation of Environmental Claims

In general, FTC requires a "reasonable basis" for claims. To demonstrate a reasonable basis, environmental claims often require a "competent and reliable scientific basis" as specified in the *Green Guides* at 16 CFR 260.2, "Interpretation and substantiation of environmental marketing claims." As discussed further herein, although the FTC does not provide a specific testing requirement, marketers must provide a "competent and reliable scientific basis" for VOC and emissions related claims.

In the *Green Guides*, the FTC provides a general definition of "competent and reliable scientific evidence." Companies must use evidence consisting of tests, analysis, research or studies conducted and evaluated objectively by qualified individuals. Methods must be generally accepted in the field to yield accurate results. FTC further specifies that the quantity and quality of evidence must be sufficient based on generally accepted scientific standards in the field, considering the entire body of relevant evidence available. In effect, companies cannot selectively use studies to support a position not generally supported when considering the entire body of evidence available.

In FTC's 2018 Consent Orders related to VOC and emissions claims, FTC applied principles for substantiating environmental claims from the *Green Guides*. Rather than prescribing test methods, FTC drafted substantiation principles intending to provide companies with flexibility when substantiating claims. Companies must develop methods tailored to a specific claim.

c) Free-of Claims

The *Green Guides* related to "free-of" claims establish principles for labelling a product "Zero VOC," "VOC free," "emissions free," and for similar statements, as explained in the *Green Guides* at 16 CFR 260.9.

As with any environmental marketing claim, a "free-of" claim must be limited in scope. Marketers can use qualifying statements to this effect. The statement must be tailored to

convey an accurate understanding of chemical components and relevant trace amounts. A claim that a product is "free-of" a chemical is deceptive if:

- The product contains another chemical that poses similar environmental risks; or
- The substance typically is not found in or associated with the product category.

Depending on context and consumer understanding, a company can use a "free-of" claim even with trace amounts in a product. The 2018 consent orders provide guidance on acceptable trace levels of VOC and other emissions during coatings application. Under the *Green Guides*, generally such claims are not deceptive if all three of the following are met:

- The level of the substance in the product is not more than an acknowledged trace contaminant or background level;
- The substance in the product does not cause material harm typically associated with that substance; and
- The substance has not been added intentionally to the product.

FTC further notes that "trace contaminant" and "background level" are undefined terms. In some cases, industry may specify a "trace contaminant" level for a product. FTC does not specify whether it would recognize such a level in every context. Rather it encourages evaluation of acceptable trace levels on a case-by-case basis. Regarding trace levels of emissions from coatings, companies must refer to FTC's consent orders, described in Section IV.

Practice Note:

The Green Guides provide interpretive guidance about environmental marketing claims. Marketers can apply principles described in the guides to evaluate environmental claims. FTC does not prescribe test methods. Instead, FTC requires companies demonstrate a "reasonable basis" for claims, often requiring "competent and reliable scientific evidence." Companies must develop a substantiation method tailored to a specific claim.

In addition to substantiation of claims, marketers can evaluate claims using four general principles:

1. A statement of environmental attribute must be precise without overstating the benefit. Marketers must only convey those claims with adequate substantiating evidence.
2. Marketers can limit the scope of a claim with appropriate qualifications and disclosures. These must be clear, prominent, proximate and understandable.
3. Marketers must clearly convey if the claimed benefit applies to the product, package or service.
4. Comparative claims must be written clearly to convey the environmental benefit and that to which the product is being compared.

IV. FTC Consent Orders Related to VOC and Emissions Related Claims

In 2013 and 2018, FTC evaluated "free-of" claims on coatings, resulting in two sets of consent orders. FTC applied principles in the *FTC Act* and *Green Guides* to VOC and emissions-related statements and advertising. In the 2013 Consent Orders, FTC allowed paint companies to substantiate claims based on VOC levels. The 2018 Consent Orders, however, include language requiring paint companies substantiate claims by testing for overall emissions, including VOC and other emissions, after application. Details are provided here, starting with the 2018 Consent Orders. They are the most recent guidance, as of publication of this ACA guidance.

a) 2018 Consent Orders

The 2018 orders interpret marketing claims made by respondents in four cases. In those cases, respondents' advertising included statements of, "Zero Emissions," "Zero VOC," "Non-Toxic," "No Odor," "Baby Safe," "No Toxic Fumes / HAP's-free," "No reproductive toxins," and "No chemical solvents or other stinky stuff." FTC determined that a reasonable consumer understands these statements as being about *all* emissions and not just VOCs. FTC also considered potential harm to susceptible populations such as babies, pregnant women, and allergy and asthma sufferers.

Under the 2018 Consent Orders, emissions-related statements can be substantiated by: 1) demonstrating the paint contains zero VOCs, and emits and produces zero chemicals at all times, beginning at application; or 2) alternatively, satisfying the "trace level of emission" test within six hours after application.

In defining "trace level of emission," FTC modified the definition of "trace level of VOC's" from the prior 2013 Consent Orders and in the FTC Enforcement Policy Statement to include emissions generally, rather than VOC's only. In the 2018 Consent Orders, "trace level of emission" means:

1) Not due to intentional addition of VOC's;
2) Emissions do not cause harm to the environment, human health or other material harm; and
3) Emissions do not result in more than harmless concentrations of any compound higher than would be found without the interior architectural coating.

FTC defines an "emission" as "any compound that is emitted or produced during application, curing, or exposure of a covered product," where a "covered product," is "any architectural coating applied to stationary structures, portable structures, and their appurtenances."

FTC defines a "VOC" as "any compound of carbon that participates in atmospheric photochemical reactions, but excludes carbon monoxide, carbon dioxide, carbonic acid,

metallic carbides or carbonates, ammonium carbonate, and specific compounds that the EPA has determined are of negligible photochemical reactivity, which are listed at 40 C.F.R. Section 51.100(s)."

FTC does not specify a testing requirement for emissions. Substantiation must have a "reasonable basis" based on a "competent and reliable scientific evidence," as specified in the *Green Guides* at 16 CFR 260.2 (section titled, "Interpretation and Substantiation of Environmental Marketing Claims"). As noted in the *Green Guides* and explained in Section III above, a marketer can substantiate claims with a sufficient amount of evidence developed and evaluated by qualified individuals, using generally accepted methods in their area of expertise, considering the totality of relevant evidence available.

FTC further specifies a marketer may substantiate VOC and emissions related claims with evidence demonstrating the paint has trace levels of emissions within six hours or less after application, and it contains no substance that could cause material harm to the health of the average adult (or specific population, if marketed to that segment) under normal anticipated use.

In a letter dated April 24, 2018, responding to comment filed by ACA, FTC notes this six-hour window while referencing existing methods of hazard identification:

> The Commission recognizes that marketers may rely on other approaches to comply with Section 5 of the *FTC Act* 15 U.S.C §45(a). Accordingly, the Commission has determined that marketers may substantiate "zero VOC" claims with evidence demonstrating that the paint has trace level of emission at six hours or less after paint application (and thereafter), and contains no substance that could cause material harm to the health of the average adult (or specific population, if marketed to that segment) under normal anticipated use. The content determination can rely upon, for example, a thorough constituent review, such as the one conducted in connection with the chemical hazard classification process required by state and federal regulatory bodies.

b) 2013 Consent Orders

The 2018 Consent Orders reflect FTC's recent interpretation of consumer perception and expectations. Prior to this, in 2013, FTC issued consent orders with two paint companies that required substantiating VOC-related claims by meeting thresholds for VOC content, rather than evaluating emissions. FTC limited substantiation to VOC's only, whereas the 2018 Consent Orders require companies to consider emissions generally including emissions from non-VOC chemicals. Notably, FTC has not rescinded the 2013 orders. The 2013 orders and the 2018 orders are effective to the involved respondents to those orders only. Although the 2018 orders provide FTC's current approach to evaluating claims.

In the 2013 orders, FTC specified "zero-VOC" claims were justified when:

1) VOC levels after tinting is zero or only at trace levels;
2) After tinting, VOC levels are less than 50 g/L with a representation that this level applies only to the base paint and levels may increase with additional colorants; *or*
3) The marketing claim is accompanied by a disclosure that the claim only applies to the base paint and VOC levels may increase "significantly" or up to a specified level, being the highest possible level after tinting.

FTC defines "tinting" as "achieving a particular color through the use of any foreseeably available colorant. *Provided however*, that if respondent clearly and prominently discloses that a representation regarding a covered product applies only if the product is tinted with specified colorant(s), the definition of 'tinting' shall be limited to the use of those colorants."

In the 2013 orders, FTC specifies requirements for "trace level of VOCs" as:

1) VOCs have not been intentionally added to the product;
2) The presence of VOCs at that level does not cause material harm that consumers typically associate with VOCs, including but not limited to, harm to the environment or human health; and
3) The presence of VOCs at that level does not result in concentrations higher than would be found at background levels in the ambient air.

c) Considerations for Companies Updating Existing Marketing Materials or Creating New Advertising Based on 2018 Consent Orders

Marketers evaluating or generating new labels based on the 2018 Consent Orders as compared to the 2013 Consent Orders should consider these differences:

- Substantiation of Emissions – Companies have always been required to substantiate VOC-free and related claims. With the 2018 orders, FTC changed the type of evidence required to substantiate such claims, as compared to the 2013 orders. Companies must now substantiate a trace level of *emissions* with a competent and reliable scientific basis. Prior to 2018, marketers could choose to meet the test for "trace levels of VOC's" or meet VOC content requirements while providing qualifying statements in marketing materials. Now companies must evaluate any compound that is emitted or produced during application, curing, or exposure of a covered product.
- Intentional Addition of VOCs – Both the 2018 Consent Orders and the 2013 Consent Orders specify that companies seeking to meet the "trace level" requirement must not intentionally add VOC's to paints. But the 2013 Consent Orders gave companies

the option to comply with VOC content limits instead of the "trace level" test. With the 2018 Consent Orders, no such option exists. Companies must now demonstrate emissions are actually zero or at a "trace level," requiring no "intentional addition" of VOCs.

- Harm – In demonstrating trace levels, both the 2018 Consent Orders and the 2013 Consent Orders require companies demonstrate their products do not harm the environment, human health or cause other "material harm."
- Normal conditions - The trace level tests, in the 2018 Consent Orders and the 2013 Consent Orders, require an evaluation of effect on air quality after application as compared to air quality under normal conditions without the coating. Under the 2018 Consent Orders, companies must show that emissions are at harmless amounts that could be present without the coating, not more than six hours after application. In the 2013 Consent Orders, FTC similarly required VOC concentration was not more than normal background levels in ambient air.
- Susceptible populations – Marketers must adequately substantiate any claims that could affect or target susceptible populations such as infants, children, pregnant women or allergy and asthma sufferers. FTC evaluates such claims considering the understanding of a reasonable consumer that is a member of the susceptible population (or their representative in the case of infants or children).

d) ACA Comment to FTC about the 2018 Consent Orders

During the comment period for the draft 2018 Consent Orders ending on Sept. 11, 2017, ACA argued that orders of this magnitude have a far-reaching effect and are appropriately made by consulting with industry experts through a rule making process, rather than through a consent decree process. In addition, ACA maintained that FTC's vague guidance about environmental and health claims provides a disincentive to continue current trends toward environmentally safe products in the paint and coatings industry. ACA contended that failure to engage in a transparent process – that includes meaningful participation of the entire industry, other experts and stakeholders – results in an uneven competitive playing field where companies in the industry understand FTC enforcement positions differently.

FTC responded to ACA's comments in a letter dated April 24, 2018, indicating that its new position reflects changes in the marketplace, including changes in the content of tints and low-cost emissions testing. FTC emphasized the 2018 Consent Orders reflect consumer understanding of "zero-VOC." According to FTC, consumers are likely to understand zero-VOC claims as applying to all emissions, at all times. To address ACA's concerns about lack of industry engagement, FTC responded that it is available to provide guidance to any coatings company about its "zero VOC" claims.

e) FTC Recommendations for Distinguishing EPA VOC Labeling Requirements for Architectural Coatings

Marketers making VOC related claims should be aware of U.S. Environmental Protection Agency (EPA), state and local labeling requirements for Architectural Industrial Maintenance Coatings, including interior and exterior paints and several other types of paints and coatings. For example, EPA specifies VOC content limits by coating type at 40 CFR Part 59, Table1 to Subpart D. In a letter responding to ACA comment, FTC recommended marketers qualify or separate any EPA-required language so that consumers do not interpret it as a "no harmful emission" claim. By doing so, companies can comply simultaneously with FTC and EPA requirements.

At 40 CFR 59.405, EPA specifies that a manufacturer must label an architectural coating with the following:

- Date of manufacture
- Manufacturer's recommendation related to thinning
- VOC content
- For Industrial Maintenance coatings - one of four statements describing use (e.g. "For industrial use only," "For professional use only," "Not for Residential Use," or "Not Intended for Residential Use," etc.)

EPA further specifies that companies should calculate VOC content by subtracting water content, exempt solvents and colorants added to a base paint, using EPA Test Method 24 of Appendix A of 40 CFR 60. State and local requirements sometimes include additional specifications when calculating VOC content. State and local laws may also include related specifications.

Practice Note:

FTC provides additional guidance about substantiating emissions related claims in two sets of consent orders, in the 2013 Consent Orders and the 2018 Consent Orders. The 2018 Consent Orders describe FTC's current perspective (at publication of this ACA guidance). Marketers should use FTC's 2018 criteria to evaluate emissions-related marketing statements. With the 2018 Consent Orders, companies can substantiate zero VOC or zero emissions claims by showing actual zero emissions or "trace levels" of emissions within six hours of application.

Effective April 2018, "trace levels" means not due to intentional addition of VOCs, emissions do not harm environment, human health or other material harm, and emissions do not result in more than harmless concentrations compared to normal background levels. As such, marketers must consider not only VOC's, but any emissions from application.

Noting the differences in Consent Orders' approach from 2013 to 2018, a marketer evaluating or updating a label must give special consideration to the following:

- Approach to substantiating emissions
- Intentional addition of VOCs
- Harm from emissions and/or VOCs after application
- Normal background conditions
- Susceptible populations (children, allergy and asthma sufferers, etc.)

FTC also recommends distinguishing emissions-related marketing claims from EPA-required label statements related to VOC content for architectural coatings.

V. Certification Requirements

In the 2018 Consent Orders, FTC emphasized requirements related to endorsements and certifications, specified in the *Green Guides on Certifications and Approvals* (16 CFR 260.6) and *Endorsement Guides* (16 CFR 255). The guides include the following principles:

- Endorsements must be the endorser's honest opinion;
- A marketer remains liable for deceptive representations of an endorser;
- Substantiation is required for all conveyed claims;
- A marketer must disclose any material connection with an endorser; and
- Endorsements of an organization must reflect its collective judgment.

A summary of the *Green Guides on Certifications and Approvals* and the *Endorsement Guides* follows:

a) *Green Guides on Certifications and Approvals*

In this section of the *Green Guides* at 16 CFR 260.6, the FTC specifies that use of a name, logo or third-party seal of approval often meets the criteria for an endorsement. Companies using

certifications must adhere to principles in the *Endorsement Guides*. Like marketing claims, deception with certification can be direct or implied. Marketers must substantiate all claims reasonably communicated by the certification. A marketer must convey a basis for certification or approval to prevent the mark from communicating a general environmental benefit that it cannot substantiate. Marketers can also use qualifying language to specify environmental benefits and limitations of a certification or approval that may otherwise appear to convey a general environmental benefit.

The *Green Guides* include eight useful examples of these principles. In Example 1, a paint company's product has a label with a "Green Logo" seal and the statement, "Green Logo for Environmental Excellence." FTC explains the logo deceptively conveys an award by an independent third party and a general, far-reaching environmental benefit, unless the paint company includes qualifying language. Qualifying language must explain: 1) the marketer awarded the Green Logo seal to its own product; and 2) provide statements of specific and limited environmental benefits.

In Example 7, the FTC further examines appropriate qualifying statements for certifications of general environmental benefit. In that example, a cleaning agent is marked with the text "Environment Approved," from a third-party certifier, after evaluating the product for 35 environmental attributes. FTC explains the claim is deceptive without qualifying language specifying limited environmental benefits. In this case, FTC recommends listing evaluative criteria on a website, while including the following language on the label, "Virtually all products impact the environment. For details on which attributes we evaluated, go to [Website address]."

b) *Endorsement Guides*

FTC's *Endorsement Guides* at 16 CFR 255 provide principles to avoid deception in expert endorsements, endorsements by an organization and consumer endorsements. Because FTC defines an "endorsement" broadly, it generally considers environmental certifications as endorsements. An endorsement includes any advertising message, including the name or seal of an organization, reflecting the opinions, findings, experience or beliefs other than the sponsoring advertiser.

As general considerations, FTC notes a deceptive endorsement of product characteristics can be express or implied. FTC does not require an endorsement be the exact words of the endorser, but any rewording must not explicitly or implicitly distort the opinions or beliefs of the endorser.

FTC also specifies that advertisers remain liable for false or unsubstantiated statements in an endorsement or for failing to disclose material connections between themselves and an endorser. Endorsers may also be liable for statements made in an endorsement. Regarding disclosure of material connection, FTC explains that claims by a drug company citing a third-

party study of its product are deceptive, if the company does not disclose it financed the study, even if the drug company was not involved in developing study methods or conclusions.

FTC's guidance for expert endorsements at 16 CFR 255.3 may apply to third-party environmental certifications. An expert must have qualifications that give the endorser the claimed expertise. The expert's opinion must be supported by an actual exercise of that expertise, although the expert can consider product characteristics beyond his/her expertise. The expert's opinion must be based on an examination or testing as extensive as normally accepted within the field of expertise to support the opinion.

FTC's guidance for endorsements by organizations at 16 CFR 255.4 is also relevant to environmental certifications. FTC assumes that an organization operates under a collective experience exceeding experience of individual members and the subjectivity of individual opinions. An organization's endorsement must be reached through a process that reflects the collective judgement of the organization. If an organization is represented as an expert, it must develop its opinion with a qualified expert or experts.

Practice Note:

Marketers must evaluate any third-party symbols, names, logos or other indicators of third-party approval for deception using FTC's recommendations for certifications and endorsements. These can be found in the Green Guides' section on Certifications and Approvals at 16 CFR 260.6 and in the Endorsement Guides at 16 CFR 255. The Green Guides focus on evaluating a message conveyed in a certification. The Endorsement Guides provide principles dealing with clarity, accuracy and independence of an endorser's opinion.

A marketer must be able to substantiate all claims conveyed by a certification. Marketers must avoid broad claims of general environmental benefit. FTC generally deems such claims too broad to adequately substantiate. Marketers must convey a basis for certification or approval and/or qualifying language limiting scope of a certification.

FTC considers environmental certifications as endorsements subject to principles outlined in the Endorsement Guides. The guides include the following principles:

- Endorsements must be the endorser's honest opinion;
- A marketer remains liable for deceptive representations of an endorser;
- Substantiation is required for all conveyed claims;
- A marketer must disclose any material connection with an endorser; and
- Endorsements of an organization must reflect its collective judgment.

VI. Conclusion

In the 2018 Consent Orders, FTC reflects its understanding of current consumer perspectives of VOC-free claims as encompassing all emissions. Companies must substantiate such claims by showing actual zero emissions or a trace level of emissions within six hours of application. FTC has also stated it will compile a guide about the current state of the law, from existing sources. As summarized in this guidance document, those sources are: the *FTC Act* as interpreted in *FTC's Policy Statement on Deception*, the *Green Guides*, the *Endorsement Guides*, the 2013 orders and the 2018 orders.

This body of law describes a set of principles FTC uses to gauge ever-changing consumer perception. Companies making environmental claims and particularly emissions and VOC related claims, should carefully substantiate claims with competent and reliable scientific evidence, while tailoring claims to convey only those characteristics supported by evidence. Companies can use disclosures and qualifying statements, making claims specific and accurate. Similarly, companies using environmental certifications to communicate environmental benefit, must confirm certification conveys a clear and specific environmental benefit supportable by competent and reliable scientific evidence. Here, companies can also use qualifying statements or references to certification criteria to enhance accuracy, while disclosing any material connection to the certification body.

Consumer understanding of emissions and environmental qualities of products are rapidly evolving, as technology also changes, allowing product designers and marketers to more clearly understand environmental hazards and benefits of products. In an area of rapid change, consumer understanding of today's environmental marketing claims is likely to change, requiring re-assessment and possible additional substantiation of claims. Marketers are encouraged to use this ACA guidance to assist in developing methods to evaluate, periodically review and update marketing claims.