

## LAND USE & ENVIRONMENTAL LAW

### FTC Provides Primer On 'Green' Paint Marketing

COMPANIES WARNED ABOUT MISLEADING CLAIMS REGARDING VOLATILE COMPOUNDS

By **EMILEE MOONEY SCOTT**

A quick spin around, a home improvement or baby supply store reveals a number of products proclaiming that they are free of particular ingredients (BPA-free bottles! VOC-free paint!). The Federal Trade Commission issued guidance in October 2012 explaining when such "free-of" claims would be considered deceptive. In recent settlements concerning paints marketed as VOC-free, the FTC showed that it will focus on consumer desires and expectations specific to the product type in question in assessing environmental marketing claims.

#### Low-VOC Products

Volatile organic compounds, commonly called VOCs, are carbon-containing compounds that are gaseous at room temperature. Some VOCs occur naturally—most odors are caused by VOCs—while others are generated by human activity. VOCs may be present

in a variety of products, including furniture polish, hair spray, and paint among other architectural coatings. Exposure to high levels of VOCs may cause dizziness, eye and respiratory irritation and other health impacts.

While the U.S. Environmental Protection Agency and various state and local entities regulate the VOC content of a wide range of products, a growing market exists for products with VOC levels well below mandated thresholds. In particular, the market for low-VOC and VOC-free building materials and architectural coatings is growing due to an increased focus on green building and concerns over indoor air quality. As consumers increasingly demand products low in (or even free of) VOCs and other substances thought to be harmful, producers will increasingly focus on such attributes in their marketing.

#### Green Guides

The Federal Trade Commission is charged with protecting consumers from deceptive marketing and other trade practices, including claims related to environmental attributes. "The Guides for the Use of Environmental Marketing Claims"

(the Green Guides) provide guidance on the types of environmental marketing claims that the FTC will consider deceptive. While the Green Guides themselves are not directly enforceable, they illustrate the marketing practices that the commission considers deceptive under the Federal Trade Commission Act. Entities engaging in such deceptive conduct may face injunctions and monetary penalties.

In October 2012, the FTC released a major revision of the Green Guides, which had last been revised in 1998. The revised Green Guides added or refined guidance on a number of green marketing practices, including claims that products are free of a particular substance thought to be harmful (called "free-of" claims in the Guides).

It is considered deceptive to "misrepresent, directly or by implication" that a



Emily Mooney Scott

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*Emilee Mooney Scott is an associate in the Environmental and Utilities Practice Group of Robinson & Cole LLP. She works in the Hartford office.*

product is free of a substance of concern like formaldehyde or chlorine. Even if the product is actually free of the substance, it is deceptive to highlight that fact if it uses an alternative substance with similar environmental impacts. For example, it is considered deceptive to tout the use of a non-chlorine bleaching agent when it causes the same harms as chlorine bleach.

On the other hand, FTC allows products to be marketed as “free of” a substance even if a “trace amount” of the substance is present if the following conditions are met:

- The level of the specified substance is no more than what would be found as an acknowledged trace contaminant or at background level.
- The substance’s presence does not cause material harm that consumers typically associate with that substance.
- The substance has not been added intentionally to the product.

The FTC notes that the terms “trace contaminant” and “background level” are imprecise, subject to a case-by-case analysis depending upon the substance at issue. The FTC further emphasizes that application of the test should vary depending on the circumstances by using the words “depending on the context” to introduce the test.

### **Deceptive Marketing**

The FTC recently entered two final consent orders interpreting the expanded “free-of” guidance for the first time. Both matters concerned the marketing of paint as VOC-free. PPG Architectural Finishes, Inc. called its Pure Performance paint “green’ in any color” and free of VOCs. The Sherwin-Williams Company prominently featured children in marketing for

its Dutch Boy Refresh paint, saying that “little noses won’t be bothered” by its zero VOC formulation. Both companies used plain white base paints that were indeed VOC-free. Once the base paint had been tinted to a “Bird Song Blue” or an “Eclectic Plum,” however, the finished paint contained VOCs.

In both instances, the FTC alleged that the VOC-free claims were false or misleading, and that the companies had provided distributors with the means and instrumentalities to disseminate the misleading claims. While the Dutch Boy paint cans and other promotional materials contained an inconspicuous statement that “[s]ome colors may not be Zero VOC after tinting with conventional colorants,” the FTC nonetheless concluded that “any reasonable consumer... would likely be deceived” about the paint’s true VOC content.

While no monetary penalties were included in the consent orders, the FTC directed both companies to discontinue the deceptive marketing. Both consent orders provide that unqualified VOC-free representations are only permissible if the final, tinted paint is actually VOC-free or contains only a “trace level” of VOCs, with “trace level” defined through a tailored test discussed below. Otherwise, the VOC-free representation must be joined by a disclosure that the paint’s VOC level may increase with the color choice. If the VOC content in the tinted paint reaches or exceeds a specified level, the disclosure must state that the VOC level may increase “significantly” or “up to [insert: the highest possible VOC level after tinting];” depending on the color choice. The consent orders also provide that any representations concerning VOC levels

or other environmental attributes must be backed up by “competent and reliable scientific evidence that substantiates the representation.”

As noted above, FTC’s three part “trace amount” test is meant to be tailored to the specific product in question. The FTC’s tailoring of the test to the VOC-free paint issue shows the commission’s focus on consumer expectations. First, FTC omitted the “acknowledged trace contaminant” concept from the first prong of the test, so that only background levels of VOCs are permissible in paints marketed as VOC-free. This is in line with consumer concerns about ambient air quality and expectations that the use of a “zero VOC” paint would not raise the VOC levels in the air that they are breathing. Where the substance in question is not normally present at background levels in the environment (as VOCs are), we might instead expect an analysis of the substance as a “trace contaminant.”

Further, in the “material harm” prong, the FTC specifically referenced harms “including but not limited to, harm to the environment or human health.” As the commission noted in an Enforcement Statement following the Orders, “consumers find both the environmental and health effects of VOCs material in evaluating VOC-free claims for architectural coatings.” For products that raise only environmental concerns, or perhaps additional concerns, we may expect to see the concept of “material harm” modified accordingly.

As the FTC continues to apply the “trace amount” test to other industries, we can expect it to take on a different shade depending on the specifics of the products in question. ■