

FTC Backs Off Green Guides Biodegradability Standard

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On October 20, 2015, the U.S. Federal Trade Commission (FTC) issued an [opinion and order](#) holding that ECM BioFilms, Inc., a manufacturer of plastic additives, had made false or misleading claims about the biodegradability of plastics containing the additive, but the opinion and order also appeared to retreat from Green Guides standards for biodegradability claims put in place in 2012. In October 2012, the Green Guides, which function as FTC's non-bonding enforcement guidance for environmental marketing claims, [underwent significant revisions](#), adding a statement that companies making unqualified "degradable" or "biodegradable" claims about a product should be able to substantiate that the entire product will break down after customary disposal within a "reasonably short period of time," which FTC defined as one year. In the order, however, FTC forbade ECM BioFilms from making unqualified biodegradable claims for plastics that would not break down within five years of customary disposal. Although the order does not amend the Green Guides, it may signal that FTC enforcement officials will be somewhat less likely to apply the one-year standard going forward.

Background: Green Guides on Biodegradability Claims

Prior to the October 2012 refresh, the Green Guides stated that companies making unqualified "degradable" or "biodegradable" claims about a product should be able to substantiate that the entire product will break down after customary disposal within a "reasonably short period of time," but did not specify a time period. In October 2012, the Green Guides were amended to define "reasonably short period of time" in this context as one year. In making this clarification, FTC cited a consumer perception survey in which 60 percent of respondents stated that they would expect a product carrying an unqualified "degradable" claim to break down in one year or less.

Since October 2012, FTC has announced enforcement actions based in whole or in part on allegedly improper degradable claims against a total of seven companies. All seven defendant companies except ECM BioFilms chose to settle with FTC rather than enter into administrative litigation.

ECM BioFilms Administrative Litigation

FTC first announced the enforcement action against ECM BioFilms in October 2013. The company manufactures a plastic additive that it claims gives plastic products containing the additive a certain

degree of biodegradability. According to FTC, ECM BioFilms claimed during certain time periods that “plastic products made with [its] additives will break down in approximately nine months to five years in nearly all landfills or wherever else they may end up” and at other time periods merely claimed that products containing its additives would degrade in some period greater than one year. FTC also brought enforcement actions against a number of manufacturers of “biodegradable” plastic products that contained the ECM BioFilms additive. Each of these other companies settled with FTC, but ECM Biofilms chose to enter into administrative litigation.

The Administrative Law Judge (ALJ) who heard the case issued an opinion in January 2015 stating that certain of ECM BioFilms’ claims were deceptive or misleading and therefore violated the Federal Trade Commission Act (FTC Act), but also calling into question the Green Guides one-year standard for unqualified degradable claims. Both FTC and ECM BioFilms appealed the ALJ decision to the five Commissioners of the FTC.

The October 20, 2015 opinion and order issued by the Commissioners included a *de novo* review of the substantiation ECM BioFilms presented for its claims and, like the ALJ, concluded that certain claims were false or misleading in contravention of the FTC Act. The order issued by the Commission is noteworthy for not requiring ECM BioFilms to follow the one-year standard for biodegradability claims contained in the Green Guides, instead stating that the company must substantiate unqualified biodegradability claims with evidence that products containing the additive will break down within five years of customary disposal. Neither the opinion nor the order issued by the Commission directly addresses whether other companies must follow the one-year standard going forward, but the opinion does question the consumer perception survey upon which the one-year standard was based in 2012.

Next Steps

Thus far, FTC has not stated whether it will consider amending the Green Guides’ one-year standard for biodegradability claims in response to the opinion and order. Even if no update is made, this development may make FTC enforcement officials less likely to rely on it going forward. ECM BioFilms have sixty days to appeal the opinion and order to the U.S. Circuit Court of Appeals.

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