

“Green” Marketing Claims and Spray Polyurethane Foam

Spray polyurethane foam (SPF) is an exciting insulation product that is exploding in popularity for many reasons. Among its many outstanding attributes are several that could be understood by consumers to be “green” attributes - for example, some SPF is made in part with natural oils, giving the foam some renewable content. And because SPF is an outstanding insulator, it can contribute significantly to home and building energy efficiency and energy savings.

When these “green” attributes are described as part of product marketing – whether advertisements, promotional materials, sales claims, or labels – they are considered “green” claims. Green claims are the marketing response to consumers' increasing interest in protecting the environment. They can help consumers better understand the environmental attributes of a product or service and help inform purchasing decisions.

Who is a “marketer?”

Marketers include anyone who is making a promotional claim to sell a product or service.

Who is responsible for marketing claims about a SPF product or service?

The product manufacturer is responsible for claims about the product. For SPF, a finished package of all the components needed to mix and make the foam is typically marketed as a kit or “system.” The manufacturer of the SPF system is responsible for marketing claims about that system. If the SPF product is a product that is sold directly to consumers, such as a one component foam sold in a can, the manufacturer of that product is responsible for marketing claims about that product.

The provider of a service, such as a spray foam applicator, is responsible for claims about the service,

such as claims that the application will be made in a timely way, or that the premises will be cleaned up after the application is completed.

Are there restrictions on the kinds of environmental marketing claims that can be made?

Yes. Federal law prohibits deceptive acts or practices, including deceptive representations in advertising, labeling, product inserts, catalogs, and sales presentations. Some deception cases have involved representations or practices likely to mislead consumers; others have involved omissions of information.

What is a deceptive claim?

It is usually easy to see how an express misrepresentation of fact can be considered a deceptive claim. But it is also important to understand that omissions of information, and implied claims, can both be considered deceptive claims in certain circumstances. The Federal Trade Commission's (FTC) Policy Statement on Deception says that deception occurs when (1) there is a representation, omission, or practice that is likely to mislead the consumer; (2) the consumer is acting reasonably under the circumstances; and (3) the representation, omission, or practice is material. While express claims tend to speak for themselves (the representation itself establishes the meaning), for implied claims, FTC will consider “the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions.” FTC may also consider an omission deceptive if the representation creates “a reasonable expectation or belief among consumers which is misleading, absent the omitted disclosure.”

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Is there guidance to help explain how to make a “green claim?”

Yes. The Federal Trade Commission (FTC), together with the Environmental Protection Agency (EPA), developed guidelines for advertisers to ensure that their environmental marketing claims don't mislead consumers. These are called the “Green Guides,” and they explain how the FTC Act is enforced when it comes to environmental claims.

Analyzing any marketing claim is generally a two step process. First, ask what claims — express and implied — does the marketing or advertising convey to reasonable consumers? Second, ask whether there is “competent and reliable evidence” — which, depending on the claim, may require scientific evidence — to support each of the claims. The Green Guides helps marketers understand how to do this analysis.

What marketing claims do the Green Guides apply to?

The Green Guides apply to all forms of marketing for products and services: advertisements, labels, package inserts, promotional materials, words (including sales “pitches” at trade shows and conventions and one on one sales calls to buyers, consumers, or customers), symbols, logos, product brand names, and marketing through digital or electronic media (including Internet “YouTube” videos, blogs, web pages, social networking sites, Twitter, and email). They apply to any claim, express or implied, about the environmental attributes of a product, package or service in connection with the sale, offering for sale or marketing of the product, package or service for personal, family or household use, or for commercial, institutional or industrial use.

Is there difference between a green marketing claim and product use and application instructions?

Yes. A marketing claim often points out a particular product feature benefit; for example, a marketing claim may point out that a product is made using a renewable, plant-based resource. But a marketing claim should not be confused with instructions on how to safely use and apply the product. Application and Use Instructions should always be consulted, including the Material Safety Data Sheet (MSDS), manufacturer's instructions, and label instructions.

If I make an environmental marketing claim, do I have to be able to “back up” the claim?

Yes. This is called claims substantiation, and all marketers making express or implied claims about the attributes of their product, package or service must be able to substantiate the claim at the time they make it (in other words, that means there is a reasonable basis for making the claim). In the case of environmental marketing claims, such substantiation will often require competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

Example 1:

A spray polyurethane foam (SPF) product is advertised as containing “90% recycled content.” The SPF kit is sold with chemical mixtures pre-packaged in two “sides,” an “A” side and a “B” side, each side making up 50% of the kit. Twenty percent of the B side is made up of polyols, and the polyols have 90% recycled content. The A side and B side are mixed at the application site to create the finished foam. After the sides are mixed and the finished foam is produced, the ultimate recycled content in the SPF is only 9%. The “90% recycled content” claim for the finished foam is deceptive because consumers could reasonably believe that a majority of the finished spray polyurethane foam consists of recycled content. On the other hand, an appropriately qualified claim, e.g., “contains 9% recycled content in the finished foam,” addresses this issue. In addition, the claim should be able to be adequately substantiated, so further qualifying the claim, “as measured using ASTM D6866,” would be acceptable as it discloses the actual, substantiated percentage of recycled content in the finished foam.

Can I make a general claim that a product is “green”?

An unqualified general claim of environmental benefit may convey that the product has far-reaching environmental benefits, when it doesn't. The FTC may consider such an unqualified general claim to be

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deceptive. For example, a car manufacturer that made an unqualified general claim of a “green” car simply because it had eliminated VOCs in a paint formula (only one environmental attribute of many of the car) might be subject to challenge as making a deceptive claim.

Products generally advertised as “green” are likely to convey to consumers a broad range of environmental attributes. Under the Green Guides, such a claim would be less likely to be considered deceptive if it is accompanied by clear and prominent qualifying language that limits the green representation to the particular product attribute that can be substantiated, provided that the context doesn’t create any other deceptive implications.

What about claims that a product is “non-toxic”?

Consumers understand claims that a product is “non-toxic,” “essentially non-toxic,” or “practically non-toxic” to mean that the toxicity claims apply not only to human health effects, but also to environmental effects. The manufacturer of the product will determine whether a product can be called “non-toxic” based on its judgment after reviewing animal / environmental data, or human experience. Such classification may be used on toxicity / hazard information contained in Material Safety Data Sheets (MSDS), toxicity studies, and / or opinion from certified toxicologists or industrial hygiene (IH) professionals. A properly qualified “green” marketing claim about a particular product attribute, such as renewable content in a product, should never be confused with the toxicity profile of a product and never be solely relied upon for purposes of making a claim that a product is “non-toxic.”

Under the Federal Hazardous Substances Act (FHSA), a consumer product meeting the definition of hazardous household product (“hazardous substances”), must also bear cautionary labeling to alert consumers to the potential hazards that the product presents and to inform consumers of the measures they need to protect themselves from those hazards. Any consumer product that is toxic, corrosive, flammable or combustible, an irritant, a strong sensitizer, or that generates pressure through decomposition, heat, or other means requires labeling, if the product may cause substantial personal

injury or substantial illness during or as a proximate result of any customary or reasonable foreseeable handling or use, including reasonable foreseeable ingestion by children.

Are there special rules for claims about the energy efficiency of SPF?

Yes. FTC has a regulation called the “R Value Rule,” which applies to the labeling and advertising of home insulation products. 16 C.F.R. 460.

<http://www.ftc.gov/bcp/rulemaking/rvalue/16cfr460.shtm>.

The rule has very broad application, and applies not just to the manufacturers of insulation, but also to any member of the home insulation industry, including insulation installers and home builders. Any claims about the R-value (the measure of resistance to heat flow) or energy savings of SPF should be carefully scrutinized for compliance with the rule.

Can different claims be made about spray foam chemicals before they are mixed and applied, as opposed to the finished, cured foam?

The chemical hazard characteristics of the pre-mix, which has an “A” side and a “B” side of certain chemicals, are quite different than those of post-mix (reacted), finished and cured foam. Care should be taken to understand this distinction when making or interpreting marketing claims.

Example 2:

A spray polyurethane foam (SPF) brochure advertises the spray foam product as “safe and non-toxic.” The SPF is produced by reacting hazardous liquid chemicals that have certain toxicity characteristics according to the material safety data sheets, and require personal protective equipment when being handled. However, the manufacturer has determined that after the SPF chemicals are mixed and installed, that the finished, cured, solid SPF product is non-toxic (using industry accepted tests) 24 hours after installation. The general, unqualified claim made in the advertising brochure may be deceptive if it is likely to be interpreted by consumers to mean that SPF in any form does not present any toxicity risks, and can be handled in any manner. A properly qualified claim that distinguishes between the characteristics of the pre-mix

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chemicals and the fully cured foam, however, is unlikely to be considered deceptive, e.g., that “Liquid SPF chemicals are hazardous and must be handled and installed using personal protective equipment. The fully cured solid SPF product may not be considered non-toxic until 24 hours after installation.”

Sources of additional information:

FTC Act Section 5:

http://www.law.cornell.edu/uscode/15/usc__sec__15__00000045-000-.html

The Green Guides:

<http://www.ftc.gov/bcp/grnrule/guides980427.htm>

FTC Policy Statement on Deception:

<http://www.ftc.gov/bcp/policystmt/ad-decept.htm>

FTC Policy Statement on Unfairness:

<http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>

FTC Policy on Ad Substantiation:

<http://www.ftc.gov/bcp/guides/ad3subst.htm>

Federal Hazardous Substances Act:

<http://www.cpsc.gov/BUSINFO/fhsa.pdf>

For more information, visit:

The American Chemistry Council's Center for the Polyurethanes Industry

www.americanchemistry.com/polyurethane or
www.spraypolyurethane.com

Spray Polyurethane Foam Alliance

www.sprayfoam.org

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