

## Recent Changes to Green Guides and FTC Enforcement Actions

NFRC Fall Membership Meeting

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## FTC Enforcement Actions:

- In August 2012, the FTC issued written warnings to 14 window manufacturers and a glass manufacturer that they were making unsupported claims about the energy performance of their products (claims that window reduces cooling needs; claim of superior energy efficiency; superiority to other products).
- On September 14, 2015, the FTC issued warning letters to 5 providers of environmental certification labels or seals and 32 companies using those labels, stating that the seals did not conform to the FTC's Guides for the Use of Environmental Marketing, referred to as the "Green Guides" aimed at helping businesses avoid "unfair or deceptive" marketing.

# Overview of Revised FTC Green Guides

- The FTC has continued to revise its Green Guides which are aimed at helping businesses avoid “unfair or deceptive” environmental related marketing claims. The revised Green Guides would apply to window and glass companies who tout the energy performance of their products in their marketing materials.
- The FTC has stepped up enforcement in response to a “virtual tsunami” of deceptive marketing practices relating to environmental related performance claims.
- We are seeing more consumer suits and class actions relating to deceptive representations about product performance.

# Key Factors for Complying with the Revised Green Guides

- The Green Guides are not laws, but rather recommendations on how to market the environmental performance of products to consumers. However, compliance with these requirements reduces the risk of challenges to the fairness and propriety of a company's marketing claims.
- Three of the general principles in the Green Guides relating to performance claims are:
  - Marketing claims must be adequately specific.
  - The claims must be true and be substantiated.
  - The claims must be communicated in a clear, prominent and understandable manner.

# FTC Green Certification Examples

## Green Certification Examples

### Good Example



Biodegradable  
Recyclable  
Compostable

If this seal is accurate, it's **not deceptive** because it lists the specific attributes that form the basis for the product's certification.

In the FTC's Green Guides, Section 260.6, example 7, there is an example for when it is impractical to clearly list all applicable attributes adjacent to the seal itself.

### Bad Example



This seal **may be deceptive** because it does not convey the basis for the certification. It is highly unlikely that marketers can substantiate all the attributes implied by general environmental benefit claims. That's why marketers should only use environmental certifications or seals that convey the basis for the certification.

# NFRC Labels & the Green Guides Certification Requirements

- The NFRC certification program demonstrably meets these principles articulated in the Green Guides.
- NFRC's certification program and the labels providing certified ratings information do the following:
  - NFRC labels provide specific performance information that can be substantiated.
  - NFRC labels, when properly affixed in accordance with our labeling rules, provide clear and prominent information.
  - NFRC's labels are understandable by consumers (in part because our labels refer consumers to the NFRC website for more information on how to interpret the ratings on the label).

## Lessons Learned

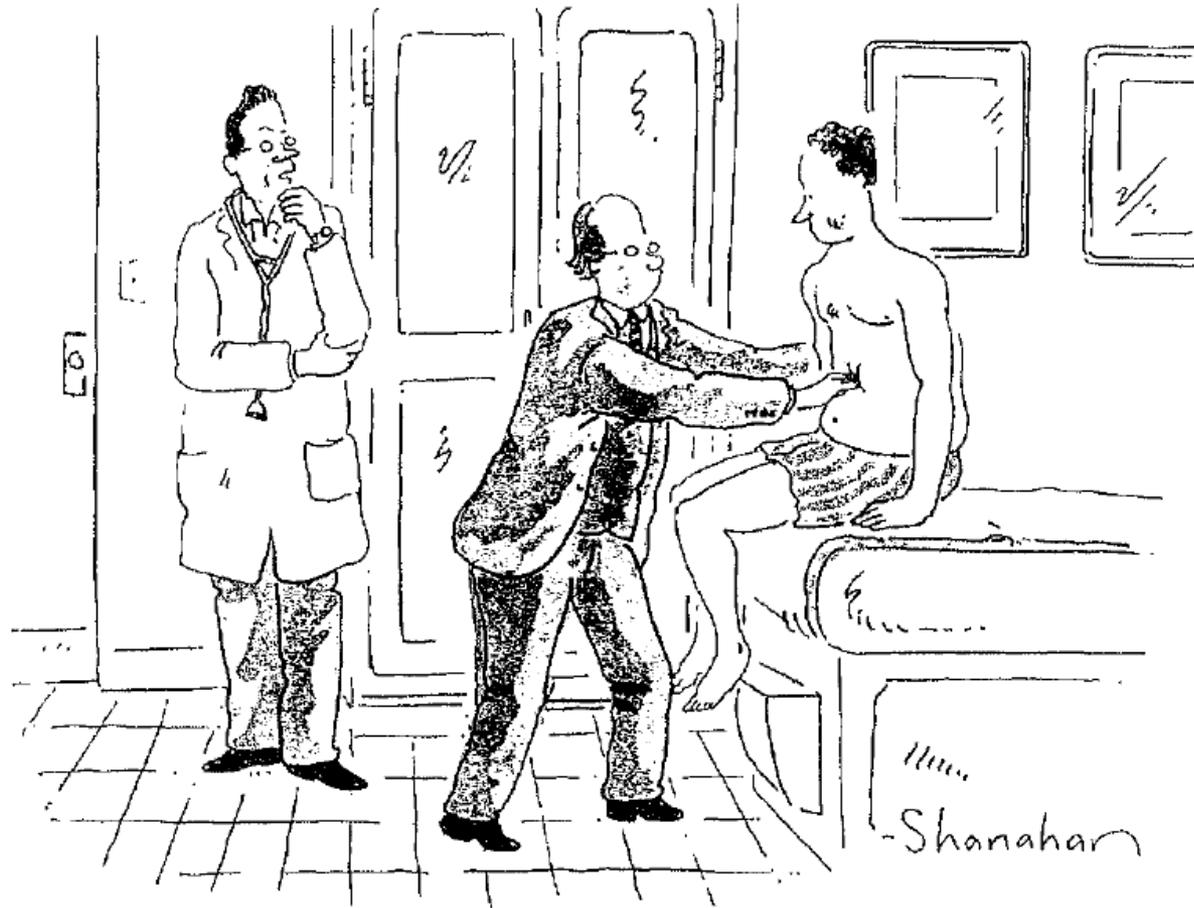
- Many consumer product industries seek to develop their own independent certification programs that can substantiate their product performance claims.
- But the FTC recognizes that some third party certifications may be contrived or improperly influenced by the makers of the products they certify.
- Here's an example from a recent lawsuit: a mattress manufacturer sold products with a label from an "independent" third party certification firm that certified some of the materials used in the product. The certification was in error and it was revealed that the certification firm had been formed by and was under the effective control of that manufacturer. The conclusion was that the product claims were untrue and deceptive and the manufacturer could not hide behind the alleged third party certification firm because it was not truly independent.

## Disclosure of relationship with certification body

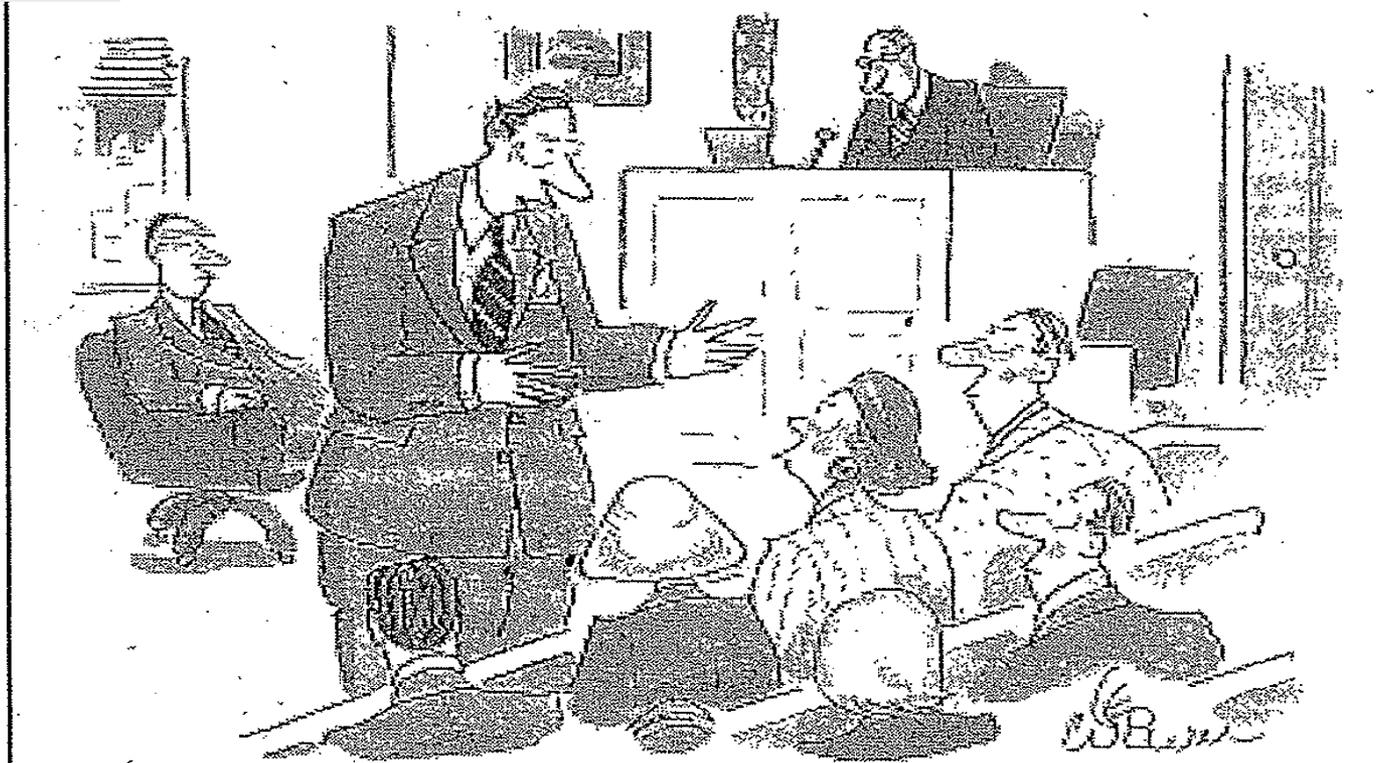
- In recognition of the potential abuse of product certifications, the Green Guides were recently revised to provide that it is a deceptive trade practice to represent that a product's performance has been verified by an third party who is not truly independent.
- Therefore, in some cases a company should disclose to the consumer if it has a "material relationship" with the certification party that might effect the "weight" or "credibility" of that certification.
- However, the mere payment of fees by the manufacturer to the certification body does not require disclosure because a consumer should reasonably expect that.
- But what about a trade association or similar organization that runs its own certification program for its members? Is that a material relationship that must be disclosed?

## NFRC meets independence requirements

- The Green Guides suggest that those circumstances alone do not effect the credibility of that certification if the certification body is applying standards developed and maintained by a voluntary consensus process that is open and objective.
- NFRC comfortably meets that requirement because we have a deliberate and open development process that is inclusive and technically sound.
- That position is further enhanced by a governance structure that mandates that NFRC's board of directors include members affiliated with a wide range of interested stakeholders so that no one group has voting control of the organization.



*"Does it hurt when my attorney does this?"*



*"My client is an enigma...an innocent man,  
who, according to the facts of the case,  
appears to be absolutely guilty."*



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