

Recent FTC Enforcement of Green Guides Challenges Marketers Reliance on ASTM Test Data for Biodegradable Claim

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Having recently published its revised “Green Guides” to assist companies who make “green claims” in their product marketing, the Federal Trade Commission (FTC) recently announced six new enforcement actions that shed light on what the agency considers to be acceptable “biodegradable” claims for paper and plastic products.

Five of the cases involved test data using the American Society for Testing and Materials International (ASTM) D5511, Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions. The FTC discounted the companies’ reliance on that data and concluded there was insufficient support for the biodegradable claims.

The enforcement matter involving ECM Biofilms, Inc. (ECM) is illustrative. According to the FTC complaint, ECM claimed on its website to have spent “hundreds of thousands of dollars” on biodegradation research to support claims for its “MasterBatch Pellet.” These claims included:

- “[W]hen combined as a one-percent load to the most widely-used plastic resins, [the MasterBatch Pellet technology] renders the finished plastic products biodegradable while maintaining their other desired characteristics.”
- “The plastic products made with our additives will break down in approximately 9 months to 5 years in nearly all landfills or wherever else they may end up.”
- “Material treated with ECM has been tested and proved as biodegradable and safe for the environment by using the following: . . . ASTM 5511 [sic] ‘Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic Digestion Conditions.’”

ECM also offered a certificate of biodegradability to any customer “to validate [i]ts claims to the biodegradability and environmental safety of plastic products that it manufactures.”

According to the FTC complaint, the research touted by ECM is insufficient because:

- “92 percent of total municipal solid waste is disposed of either in landfills, incinerators, or recycling facilities,” which do not “present conditions that would allow ECM Plastics to completely break down and decompose into elements found in nature” within the timeframe claimed by ECM.

Published Articles (Cont.)

- The ASTM test method relied upon by ECM “does not assure complete decomposition of ECM Plastics in a reasonably short period of time or in [ECM’s] stated timeframes, e.g., nine months to five years, and do not replicate, i.e., simulate, the physical conditions of either landfills, where most trash is disposed, or other disposal facilities stated in the representations.”

The ECM case is scheduled for trial before an Administrative Law Judge in June 2014, at which ECM and the FTC will likely present evidence on the biodegradation nature of landfills and the suitability of the ASTM D5511 test method. The suitability of ECM’s marketing claims will hang in the balance.

The remaining five enforcement matters have been resolved through consent orders that prohibit biodegradability claims that are not true and supported by reliable and competent scientific evidence. The consent orders provide guidance that should also be considered by any company contemplating a biodegradability claim.

Biodegradability claims that do not disclose how long it will take or the conditions necessary for the product to biodegrade must be supported by evidence “that the entire plastic product will completely decompose into elements found in nature within one year after customary disposal.” The FTC refers to these as “unqualified claims.” Customary disposal is defined in the consent orders as a landfill, incinerator or recycling facility.

If a company opts for a “qualified claim,” it must disclose either the time required for complete biodegradation or the expected rate and extent of degradation. A company that lacks the data required to support a complete biodegradation claim, but which can support the “rate and extent” option, must also disclose that the product may not continue to decompose beyond the stated rate and condition.

Testing protocols relied upon for biodegradability claims must simulate the conditions found in landfills, the disposal environment near where the intended consumers live, or a disposal condition specified in the claim. ASTM D5511 data will not be considered sufficient for an unqualified claim, but can be used for qualified claims that do not exceed the parameters of the test.

Additional information on the FTC Green Guides is available in our April 2013 Client Alert. Please contact the author of this Alert, **Daniel Flynn** of our Environmental Department, with questions regarding the FTC guidelines or other product stewardship or environmental concerns