



## When Is Natural Unnatural? When It's Not: The Federal Trade Commission Takes Exception to "All Natural" Claims

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In the 1975 song, "Natural Mystic," legend Bob Marley sang "There's a natural mystic blowing through the air – I won't tell no lie." Channeling Marley, the Federal Trade Commission recently took enforcement action against four personal care product companies, which sold skincare products, shampoos, and sunscreens online, for claiming their products were "all natural" or "100% natural" when, in fact, they contained synthetic ingredients. The four companies agreed to proposed settlement orders, while the FTC has issued a complaint against a fifth.<sup>1</sup> The Commission said the companies cannot make similar misrepresentations in the future and must have "competent and reliable evidence" to substantiate any ingredient-related, environmental, or health claims. For some claims, the companies must have scientific evidence, such as tests, analyses, research, or studies that have been conducted and evaluated objectively by qualified individuals, using generally-acceptable procedures in the industry, which should lead to accurate and reliable results.

What the FTC is requiring of these companies is no different to the typical unfair competition law and false advertising principles that apply in the marketplace. Indeed, under the Lanham Act, a company may face liability in a suit brought by a competitor who has been damaged by the company's unsubstantiated product claims and advertisements. Any "claims" based advertising should have reasonable, industry-recognized support. Likewise, many state laws allow for aggrieved consumers to bring suit for false advertising (which often take the form of class action suits).

### AGG Observations

- The FTC action is yet another<sup>2</sup> recent enforcement action by a regulatory agency relating to truthful product advertising, particularly in the over-the-counter space.
- The FTC did not define "natural," although the Commission's Director of Consumer Protection said, "'All natural' or '100 percent natural' means just that – not artificial ingredients or chemicals."
- To the FTC, natural means natural, including for both active and inactive ingredients.
- While the FTC did not define, per se, the phrases "100% natural" or "all natural," companies might consider defining or explaining what they mean in the context of their respective industry if they use such terms in advertising. Full transparency and disclosure, not too dissimilar to recent court decisions relating to "truthful and not misleading" promotional claims (see Amarin<sup>3</sup> article), should minimize, even if not necessarily eliminate, deceptive advertising challenges. Furthermore, firms might conduct consumer perception studies to support users' understanding of the terms.
- Companies must also consider product liability and class action lawsuits. Plaintiffs' lawyers might use such public regulatory actions in lawsuits to sway a judge or jury or to pressure a company to settle for deceptive advertising practices.

<sup>1</sup> See e.g., [www.ftc.gov/news-events/blogs/business-blog/2016/04/are-your-all-natural-claims-all-accurate](http://www.ftc.gov/news-events/blogs/business-blog/2016/04/are-your-all-natural-claims-all-accurate)

<sup>2</sup> <http://www.agg.com/While-Not-Quite-a-Rash-of-Enforcement-FDA-Takes-Action-in-2015-Against-Cosmetic-Products-Making-Unapproved-Drug-Claims-01-11-2016/>

<sup>3</sup> <http://www.agg.com/another-one-bites-the-dust-fda-doesnt-like-the-fishy-smell-of-the-latest-court-decision-on-off-label-dissemination-08-19-2015/>

- Companies should be diligent about having their product labels, advertising, and the like passed through legal review to ensure that these types of high risk issues are flagged and resolved prior to commercial launch.
- Companies should re-review product labels using “natural” to evaluate whether it is appropriate to use such a term in particular product label, labeling, and advertising and whether qualifiers or disclosures should be added.
- FDA has also entered the “natural” fray, although in the food labeling area. It is now accepting comments on its historical interpretation, whether it is appropriate to define the term “natural,” and, if so, its use of the term on food labels. The comment period closes on May 10, 2016.<sup>4</sup>
- If there’s a natural label or promotional claim blowing through the wind, it better not be a lie.

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<sup>4</sup> See Docket No. FDA-2014-N-1207 (“Use of the Term ‘Natural’ in the Labeling of Human Food Products”).

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