

**REGULATION OF ENVIRONMENTAL MARKETING CLAIMS**

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## **TABLE OF CONTENTS**

I.	Introduction.....	1
A.	Federal Trade Commission.....	1
B.	National Advertising Division of the Council of Better Business Bureaus .....	2
C.	Environmental Protection Agency and Department of Energy: The Energy Star Program.....	2
D.	State Enforcement.....	2
II.	The FTC’s Green Guides.....	3
A.	Introduction.....	3
B.	Claim Interpretation and Substantiation .....	4
C.	General Principles of Green Claims .....	5
D.	Specific Green Marketing Claims.....	8
E.	Third-Party Certifications .....	12
III.	Recent FTC and NAD Green Cases.....	13
A.	FTC .....	13
B.	NAD.....	16
IV.	FTC’s Proposed Revisions to the <i>Green Guides</i> .....	
A.	Background.....	20
B.	Overview of the Proposed Revisions.....	23
C.	General Environmental Benefit .....	24
D.	Certifications and Seals of Approval .....	25
E.	Degradable Claims.....	26
F.	Compostability.....	27
G.	Recyclable.....	27
H.	Recycled Content .....	28
I.	Ozone-Friendly .....	28
J.	“Free Of” and “Non-Toxic” .....	29
V.	New Additions to the Current <i>Green Guides</i> .....	29
A.	Three Proposed Additions to the <i>Green Guides</i> .....	29
B.	Made with Renewable Materials .....	30
C.	Made with Renewable Energy .....	30
D.	Carbon Offsets .....	31

VI.	What Was Not Included in the Proposed Revisions? .....	32
A.	Sustainability.....	32
B.	Organic and Natural.....	32
VII.	Other Green Marketing Guidance.....	33
A.	TerraChoice Report .....	33
VIII.	Conclusion .....	34

## **REGULATION OF ENVIRONMENTAL MARKETING CLAIMS**

### **I. Introduction**

#### **A. Federal Trade Commission**

1. The Federal Trade Commission (“FTC”) regulates environmental marketing claims (or “green claims”) under Section 5 of the FTC Act, 15 U.S.C. § 45(a), which empowers the FTC to prevent “unfair or deceptive acts or practices.”
2. To assist companies making green claims in voluntarily complying with Section 5, the FTC has promulgated Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260 [hereinafter *Green Guides*][Appendix A].
3. The *Green Guides* are not formal rules with the force and effect of law. 16 C.F.R. § 260.2. Rather, they are administrative interpretations of the application of Section 5 to green claims and provide safe harbors for complying with Section 5. *Id.* §§ 260.1, 260.3. Conduct inconsistent with the *Green Guides* may result in an FTC enforcement action only if the FTC determines that the conduct violates Section 5 after an investigation. *Id.* § 260.1.
4. The FTC has also issued additional guidance to assist companies in complying with the *Green Guides*. FED. TRADE COMM’N, COMPLYING WITH THE ENVIRONMENTAL MARKETING GUIDES (May 2000) [hereinafter *Complying with the Green Guides*].<sup>1</sup>
5. The FTC originally issued the *Green Guides* in 1992 and revised them in 1998. In November 2007, the FTC announced that it would undertake a review and revision of the *Green Guides* prior to the previously scheduled 2009 review. The FTC moved up the review to ensure the continued relevance of the *Green Guides* in light of the increasing prevalence of green claims. The FTC held three workshops in 2008 and has conducted its own study of consumers’ perceptions of green claims.
6. In October 2010, the FTC released its proposed revisions to the *Green Guides*.

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<sup>1</sup> <http://business.ftc.gov/documents/bus42-complying-environmental-marketing-guides>.

- B. National Advertising Division of the Council of Better Business Bureaus
1. The National Advertising Division of the Council of Better Business Bureaus (“NAD”) is the primary self-regulatory body of the U.S. advertising industry.
  2. NAD provides a forum for advertisers to challenge competitors’ advertising that they believe is false or misleading without resorting to litigation.
  3. NAD also monitors advertising and may initiate a case on its own.
  4. Participation in the self-regulatory process, as well as compliance with NAD decisions, is voluntary, but the failure of an advertiser to participate or comply with an NAD recommendation likely will result in NAD referring the matter to the FTC.
  5. When deciding green marketing cases, NAD generally follows the principles enunciated in the FTC’s *Green Guides* and *Complying with the Green Guides*. Because the FTC has brought relatively few green marketing cases, NAD decisions often provide guidance on specific issues where no FTC guidance may exist.
- C. Environmental Protection Agency and Department of Energy: The Energy Star Program
1. Neither the Environmental Protection Agency (“EPA”) nor the Department of Energy (“DOE”) has responsibility for regulating environmental marketing claims. They do, however, administer the Energy Star program, which assists consumers in identifying more energy efficient products from computers to household appliances.
- D. State Enforcement
1. Many states’ consumer protection laws mirror the FTC Act and follow the FTC’s and the court’s interpretation of that Act, either as the law of the State or as guidance for applying the State’s laws. *See, e.g.*, Fla. Stat. § 501.203 (2006) (providing that violations of Florida’s Deceptive and Unfair Trade Practice Act (“FDUTPA”) may be based on FTC rules and FTC unfairness and deception standards); *id.* § 501.204 (providing that in construing FDUTPA “due

consideration and great weight shall be given to the interpretations.”).

2. Some states do have specific statutes regulating green claims, which may codify the *Green Guides* into state law. *See, e.g.,* Cal. Bus. & Prof. Code § 17580.5(b) (2008) (making conformance with the *Green Guides* a defense to California’s prohibition on false or misleading green claims); R.I. Gen. Laws § 6-13.3-1 (2010) (“The uniform standards for environmental marketing claims, as contained in the FTC guidelines for environmental marketing claims are hereby adopted by the state of Rhode Island.”).
3. Because of their breadth and variation, state laws are not covered in this outline.

## **II. The FTC’s Green Guides**

### **A. Introduction**

1. There is no specific federal statute regulating environmental marketing claims. The FTC regulates green claims through its general authority under Section 5 of the FTC Act, 15 U.S.C. § 45(a) to prevent “unfair or deceptive acts or practices.”
2. With the emergence of recyclability and similar claims in the early 1990s, the business community sought uniform guidance on what substantiation would be required to support such claims. In response, the FTC issued the first set of *Green Guides* in 1992 and revised them in 1998.
3. The FTC issued the most recent set of proposed revisions to the *Green Guides* in October 2010.
4. The *Green Guides* are not legislative rules with the force and effect of law. 16 C.F.R. § 260.2. They are administrative interpretations of Section 5 as applied to green claims. *Id.* § 260.1. They provide safe harbors for marketers to comply with Section 5, but do not necessarily represent the only ways by which green marketers can achieve compliance. *Id.* § 260.3. The FTC cautions, however, that multiple guidelines may apply to a particular claim and that the overall context of the marketing materials or labeling will be considered to determine the appropriateness of the claim(s). *Id.*

5. As noted in the Overview, the FTC has also issued *Complying with the Green Guides*, which provides additional guidance for marketers making green claims.
6. The following sections discuss general FTC advertising principles and the guidance contained in the *Green Guides* and *Complying with the Green Guides*, with emphasis on product packaging claims and third-party certifications.

B. Claim Interpretation and Substantiation

1. The starting point for an analysis of a green claim is to determine what claims are being conveyed to consumers. *See generally* FTC, Policy Statement on Deception, 103 F.T.C. 110, 174 (1984).<sup>2</sup>
2. The FTC looks not only at express claims (i.e., the literal words of the claims), but also at any implied claims (i.e., what a reasonable consumer would understand was being promised). The FTC examines the entire context of the advertising to determine what claims may be implied by the advertising. Symbols (such as the triangular chasing arrows symbol for recycling) and other graphics (such as images of trees or wildlife, or the color green) can also convey green claims. Furthermore, an omission may make a claim deceptive if the omission is necessary to prevent the claim from being misleading.
3. Claims are examined from the perspective of a reasonable consumer. A claim is deceptive if it is likely to mislead a reasonable consumer under the circumstances. If the claim is targeted to a specific audience, the claim is evaluated from the perspective of a reasonable member of that audience.
4. To be deceptive the claim must be material or in other words, the claim must be likely to affect the consumer's choice of which product to purchase. Express claims are presumed to be material.
5. All express or implied claims must be substantiated. The marketer must have a reasonable basis supporting the claims before the claims are made. Certain types of claims, such as those related to health and safety, "require

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<sup>2</sup> <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

competent and reliable scientific evidence, defined as tests, analysis, 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.” Green claims will often require this rigorous level of substantiation. FTC, Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 648, 839 (1984)<sup>3</sup>; 16 C.F.R. § 260.5; *Complying with the Green Guides*, at 3.

#### C. General Principles of Green Claims

1. Claims of General Environmental Benefit Should Be Avoided (16 C.F.R. § 260.7(a); *Complying with the Green Guides*, at 4-5).
  - a) Unqualified general claims of environmental benefit may convey that the product or package has far-reaching environmental benefits. Such claims are very difficult to substantiate and likely to be deceptive.
  - b) *Example:* A box of candy states, “Eco-Friendly Box.” Without any qualification, such a claim will likely convey a wide range of environmental benefits to consumers, each of which must be substantiated. To avoid deception, the claim should be accompanied by a clear and conspicuous disclosure limiting the claim to a particular product attribute that can be substantiated. For example, “Eco-Friendly Box. Our new box is eco-friendly because it is made from 100% post-consumer material.” *See* 16 C.F.R. § 260.7(a) ex. 1.
  - c) *Example:* The plastic wrap around a case of bottled water states, “Environmentally Preferable Packaging.” Such a claim would likely convey to consumers that the plastic packaging is environmentally superior to all other bottled water packaging. This broad claim would be deceptive unless the advertiser could substantiate it. Again, the better option would be to limit this claim with an appropriate, substantiated qualification. For

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<sup>3</sup> <http://www.ftc.gov/bcp/guides/ad3subst.htm>.

example, “Environmentally Preferable Packaging because we use 50% less plastic than the closest competing bottled water.” *See* 16 C.F.R. § 260.7(a) ex. 6.

- d) *Example:* Consumers understand “non-toxic” claims to apply not only to human health, but also the environment. An unqualified “non-toxic” claim means that the product has no adverse environmental consequences. *See* 16 C.F.R. § 260.7(a) ex. 4; *Complying with the Green Guides*, at 5.

2. Qualifications and Disclosures (16 C.F.R. § 260.6(a); *Complying with the Green Guides*, at 3-4).

- a) Qualifications and disclosures, such as those described in the *Green Guides*, necessary to prevent claims from being deceptive must be clear and conspicuous.
- b) Relevant factors in determining whether a particular qualification or disclosure is clear and conspicuous include proximity to the claim being qualified, type size, and the presence of other claims contrary to the qualification being made.

3. Product vs. Packaging Claims (16 C.F.R. § 260.6(b); *Complying with the Green Guides*, at 3).

- a) A green marketing claim should make clear whether it relates to the product, the product’s packaging, or some part of the product or packaging.
- b) *Example:* A box of holiday cards is simply labeled “recyclable.” Unless there are other contextual factors indicating which part of the box of cards is recyclable, the claim is deceptive if any part of the package, the cards, or envelopes cannot be recycled. *See* 16 C.F.R. § 260.6(b) ex. 1.<sup>4</sup>
- c) If the claim applies to all but a minor, incidental component of the product or package, a qualified claim may not be necessary. This rule may not

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<sup>4</sup> Recyclability claims are addressed in more detail in section II.D.3 below.

apply in all circumstances. For example, if an incidental component severely limits the ability to recycle a product, an unqualified “recyclable claim would be deceptive.”

- d) *Example:* A plastic water bottle is labeled “recycled.” The bottle is made from recycled plastic, but the cap is made from virgin plastic. Because consumers would likely consider the cap to be a minor, incidental component, an unqualified “recycled” claim would not be deceptive. *See* 16 C.F.R. § 260.6(b) ex. 2.<sup>5</sup>

4. Overstating Environmental Attributes (16 C.F.R. § 260.6(c); *Complying with the Green Guides*, at 4).

- a) A green marketing claim should not expressly or implicitly overstate the environmental attribute or benefit, even if the claim is technically true.
- b) *Example:* A bottle of laundry detergent states, “This bottle is made with 50% more recycled content than before.” The bottle now contains 3% recycled content, whereas it previously contained 2% recycled content. Although technically true, this claim is deceptive because it will likely be interpreted to mean that the recycled content was increased significantly. The claim, “This bottle contains 3% recycled content, 50% more than before,” likely would not be deceptive because it states the basis of comparison. *See* 16 C.F.R. § 260.6(c) ex. 1.
- c) *Example:* A trash bag is labeled “recyclable.” This claim is deceptive because the fact that the trash bag is recyclable, even if true, provides no environmental benefit because trash bags are typically not separated out from other trash to be recycled. *See* 16 C.F.R. § 260.6(c) ex. 2.
- d) *Example:* A package of printer paper states, “This paper was made using a chlorine-free bleaching process.” Instead, the paper is bleached using another process that releases the same harmful

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<sup>5</sup> Recycled content claims are addressed in more detail in section II.D.4 below.

byproducts into the environment, but in lesser amounts. Because consumers would likely interpret this claim to mean that the printer paper eliminates the environmental harms of chlorine bleaching, the claim is deceptive. If substantiated, the claim “whitened with a process that reduces but does not eliminate harmful byproducts associated with chlorine bleaching” likely would not be deceptive. *See* 16 C.F.R. § 260.6(b) ex. 4.

5. Comparative Claims (16 C.F.R. § 260.6(d); *Complying with the Green Guides*, at 4).
  - a) Comparative green claims should make the basis of comparison sufficiently clear to avoid deception.
  - b) *Example:* A cereal box states, “Box made from 25% more recycled content.” Depending on the context, this could be a comparison to the advertiser’s previous cereal box or to a competitor’s cereal box. Unless the claim is revised to make the basis of comparison clear (e.g., “Box made from 25% more recycled content than before”), the advertiser must substantiate either interpretation. *See* 16 C.F.R. § 260.6(d) ex. 1.
  - c) As illustrated by the example in section II.C.4.b above, the difference in the attribute being compared must be significant. *See also* 16 C.F.R. § 260.6(d) ex. 2.
  - d) An advertiser should verify that the comparison remains active at circumstances that may affect the comparison, it should verify its continued accuracy. *See* 16 C.F.R. § 260.6(d) ex. 3.

#### D. Specific Green Marketing Claims

1. Degradable and Biodegradable Claims (16 C.F.R. § 260.7(b); *Complying with the Green Guides*, at 6-7).
  - a) “An unqualified claim that a product or package is degradable, biodegradable or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, i.e., decompose into elements found in

nature within a reasonable short period of time after customer disposal.” 16 C.F.R. § 260.7(b).

- b) Such claims should be qualified so that they accurately convey (i) the product’s or package’s ability to degrade under its customer circumstances of disposal, and (ii) the rate and extent of degradation. *Id.*
- c) In several recent cases, the FTC has indicated that degradable or biodegradable claims are virtually never appropriate for products or packages that are customarily disposed of in landfills. *See infra* § III.A.1.

2. Compostable (16 C.F.R. § 260.7(c); *Complying with the Green Guides*, at 7).

- a) “A claim that a product or package is compostable should be substantiated by competent and reliable scientific evidence that all the materials in the product or package will break down into, or otherwise become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or devise.” 16 C.F.R. § 260.7(c).
- b) Such claims should be qualified so that they accurately convey (i) the product’s or package’s ability to be composted in a home compost pile, (ii) the availability of municipal or institutional composting facilities, and (iii) the environmental benefit of disposing of the product or package in a landfill. *See id.*
- c) It is deceptive to make compostable claims for a product or package requiring a municipal or industrial composting facilities if such facilities “are not available to a substantial majority of consumers or communities where the [product] is sold.” *See id.* at ex. 4.

3. Recyclable (16 C.F.R. § 260.7(d); *Complying with the Green Guides*, at 7-9).

- a) “A product or package should not be marketed as recyclable unless it can be collected, separated or

otherwise recovered from the solid waste stream for reuse, or in the manufacture or assembly of another package or product, through an established recycling programs. 16 C.F.R. § 260.7(d).

- b) Unless recycling programs or facilities accepting the product or package are available to a substantial majority of consumers or communities, a recyclable claim should be qualified to convey the limited availability of recycling. *See* 16 C.F.R. §260.7(d) exs. 2, 4-6, & 8; *Complying with the Green Guides*, at 8.
- c) Unqualified recyclable claims are appropriate if the entire product or package excluding minor, incidental components is recyclable. Where necessary, recyclable claims should be adequately qualified to point out which components are recyclable. *See* 16 C.F.R. § 260.7(d) ex. 1; *see also infra* § II.C.3.
- d) *Example:* A product package contains recyclable and non-recyclable components that are bonded together. No recycling programs exist that can separate the recyclable and non-recyclable components. A recyclable claim would not be appropriate in these circumstances. *See* 16 C.F.R. § 260.7(d) ex. 7.
- e) The triangular chasing-arrows symbol conveys a recyclable (and a recycled) claim. A package with the phrase “Please Recycle” implies a recyclable claim. *See* 16 C.F.R. § 260.7(d) exs. 2 & 11; *Complying with the Green Guides*, at 9, 12-13.

4. Recycled Content (16 C.F.R. § 260.7(e); *Complying with the Green Guides*, at 10-12).

- a) “A recycled content claim may be made only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer). To the extent the source of recycled content includes pre-consumer material, the manufacturer or advertiser must have substantiation for concluding that the pre-consumer

material would otherwise have entered the solid waste stream.” 16 C.F.R. § 260.7(e).

- b) “Unqualified claims of recycled content may be made if the entire product or package, excluding minor, incidental components, is made from recycled material. For products or packages that are only partially made of recycled material, a recycled claim should be adequately qualified to avoid consumer deception about the amount, by weight, of recycled content in the finished product or package.” *Id.*
  - c) *Example:* A multi-component packaging consisting of a cardboard box and plastic shrink-wrap states, “Recycled Packaging.” The cardboard box is made of 100% recycled materials, but the plastic shrink-wrap is made from virgin material. The recycled content claim is deceptive. *See id.* at ex. 5.
  - d) Recycled content claims can distinguish between pre-consumer and post-consumer content.
  - e) *Example:* A frozen-dinner box is made from 25% post-consumer content and 15% pre-consumer content diverted from the waste stream. A claim that the box “contains 40% recycled content” is not deceptive. A claim that the box “contains 25% post-consumer content, and 15% pre-consumer content” is also not deceptive. *See id.* at ex 3; *Complying with the Green Guides*, at 10.
5. Source Reduction (16 C.F.R. § 260.7(f); *Complying with the Green Guides*, at 13).
- a) Advertisers cannot misrepresent the amount a product or package has been reduced in weight, volume, or toxicity.
  - b) Claims should be adequately qualified to avoid misrepresenting the magnitude of the source reduction or the basis of comparison.
6. Refillable (16 C.F.R. § 260.7(g); *Complying with the Green Guides*, at 14).
- a) An unqualified refillable claim is appropriate if (i) there is a system for collecting and returning the

package to the manufacture for refilling, or (ii) consumers can refill the package using a subsequently purchased product.

- E. Third-Party Certifications (*Complying with the Green Guides*, at 6).
1. Eco-seals, seals of approval, and other indicia of third-party certifications convey the message that the product bearing the seal is environmentally superior to other products.
  2. As discussed above, such broad claims of environmental benefit are difficult to substantiate and likely to be deceptive.
  3. Seals and third-party certifications should be accompanied by an explanation of the basis for awarding the seal or certification.
  4. Third-party certification programs “must be truly independent and must have professional expertise in the area being certified.”
  5. Third-party certifications do not absolve advertisers of liability for deceptive claims such certifications convey. Advertisers are responsible for verifying that the claims conveyed by the certification are substantiated.
  6. In a class action pending in the United States District Court for the Northern District of California, a putative class representative brought a suit under California consumer protection law alleging that S.C. Johnson & Son’s “Greenlist” label was deceptive because it looked like a third-party seal of approval.<sup>6</sup> In January 2010, the court denied S.C. Johnson’s motion to dismiss. *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-927 (Jan. 5, 2010).<sup>7</sup> The court found that the plaintiff’s allegation that he paid more for the product because the deceptive label led him to believe that it was environmentally superior was cognizable injury under the California statute. The court also ruled that the question of whether a reasonable consumer would

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<sup>6</sup> The complaint is available at [http://www.greenpatentblog.com/\\_oneclick\\_uploads/2009/04/koh\\_complaint.pdf](http://www.greenpatentblog.com/_oneclick_uploads/2009/04/koh_complaint.pdf).

<sup>7</sup> The court’s decision can be found at <http://rms3647.typepad.com/files/koh-v.-sc-johnson.pdf>.

be misled by the label was a question of fact that could not be resolved on a motion to dismiss.

7. In an October 20, 2009 letter of complaint to the FTC, the Coalition for Fair Forest Certification (the “Coalition”) alleged that the Forest Stewardship Council’s (“FSC”) sustainable forestry certifications were deceptive because of failings in the FSC’s certification system. Letter from Thomas C. Collier Jr., Steptoe & Johnson LLP, to FTC, at 2 (Oct. 20, 2009).<sup>8</sup> First, the Coalition alleged that the FSC’s certification labels were deceptive because they failed to identify under which of several different national and regional standards products are certified. *See id.* at 3-4. Second, the Coalition alleged that the FSC’s “Mixed Sources” label is misleading because products bearing that label do not meet the established standards. *See id.* at 4-5. Finally, the Coalition alleged that the FSC does not adequately audit certified products, and that its auditors are not truly independent. *See id.* at 7-9. We do not know what actions, if any, the FTC has taken in response to this complaint.

### III. Recent FTC and NAD Green Cases

#### A. FTC

##### 1. Biodegradable Claims

- a) In June 2009, the FTC filed administrative complaints alleging that Kmart,<sup>9</sup> Tender Corp.,<sup>10</sup> and Dyna-E<sup>11</sup> made false and unsubstantiated biodegradability claims for their American Fare paper plates, Fresh Bath Wipes, and Lightload Towels, respectively.
- b) The complaints indicate that the FTC is extremely skeptical of any biodegradability claims for consumer products because they usually end up in landfills, which do not present the conditions

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<sup>8</sup>[http://www.fairforestcertification.com/sitebuildercontent/sitebuilderfiles/coalition\\_letter\\_1.pdf](http://www.fairforestcertification.com/sitebuildercontent/sitebuilderfiles/coalition_letter_1.pdf).

<sup>9</sup> <http://www.ftc.gov/os/caselist/0823186/index.shtm>.

<sup>10</sup> <http://www.ftc.gov/os/caselist/0823188/index.shtm>.

<sup>11</sup> <http://www.ftc.gov/os/adjpro/d9366/index.shtm>.

necessary for such products to decompose into elements found in nature within a reasonably short period of time. *See supra* § II.D.2.

- c) All three companies entered into consent orders resolving the complaints against them. The consent orders are for settlement purposes only and are not admissions of wrongdoing or that the facts alleged in the complaints are true.

## 2. Bamboo Fibers

- a) In August 2009, the FTC filed administrative complaints against four companies -- Sami Designs, LLC (d/b/a Jonano)<sup>12</sup>; CSE, Inc. (d/b/a Mad Mod)<sup>13</sup>; Pure Bamboo, LLC<sup>14</sup>; and The M Group, Inc. (d/b/a Bamboosa)<sup>15</sup> -- alleging that these companies made false and misleading statements about their products being made from “bamboo fiber,” the environmentally friendly nature of the manufacturing process, and the products’ biodegradability, as well as violations of the Textile Act, 15 U.S.C. § 70 et seq., and Rules, 16 C.F.R. pt. 303.
- b) All four companies advertised that their textile products were made of bamboo or bamboo fiber. The FTC did not contest that bamboo was used as the raw material for the manufacture of the textiles used. The FTC alleged that despite this, the final product was not bamboo or bamboo fiber but rayon that happened to be produced from cellulose derived from bamboo.
- c) Thus, under the consent orders, the companies are allowed to state that the source of cellulose for their textile is bamboo as long as they also state the recognized generic name of the fiber, e.g., “rayon made from bamboo.”

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<sup>12</sup> <http://www.ftc.gov/os/caselist/0823194/index.shtm>.

<sup>13</sup> <http://www.ftc.gov/os/caselist/0823181/index.shtm>.

<sup>14</sup> <http://www.ftc.gov/os/caselist/0823193/index.shtm>.

<sup>15</sup> <http://www.ftc.gov/os/adjpro/d9340/index.shtm>.

- d) The FTC also objected to claims that their manufacturing processes were environmentally friendly when the processes used toxic chemicals and released hazardous air pollutants.
- e) Pure Bamboo and The M Group also made biodegradability claims about their products. Consistent with the enforcement actions discussed above, the FTC alleged that these claims are deceptive because textile products are usually disposed of by recycling or in a landfill, neither of which present conditions that will allow textiles to break down completely as required in the *Green Guides*.
- f) In 2010, the FTC sent letters to 78 companies warning them not to make the same mistakes that these four companies did. See Press Release, FTC, FTC Warns 78 Retailers, Including Wal-Mart, Target, and Kmart, to Stop Labeling and Advertising Rayon Textile Products as “Bamboo” (Feb. 3, 2010)<sup>16</sup>. If any of these companies is later found to have misrepresented bamboo products in a similar way, it could face civil penalties of up to \$16,000 per violation.

### 3. Third-Party Certifications

- a) In January of this year, the FTC entered into a consent agreement with Tested Green requiring the company to stop selling allegedly worthless environmental certifications when it neither tested nor otherwise investigated whether the recipient companies had environmentally friendly products. *In re Nonprofit Management LLC & Jeremy Ryan Claeys*, Agreement Containing Consent Order, F.T.C. Case No. 102 3064 (Jan. 11, 2011).<sup>17</sup>
- b) The FTC alleged that Tested Green falsely represented it was “the nation’s leading certification program for businesses that produce green products

<sup>16</sup> <http://www.ftc.gov/opa/2010/02/bamboo.shtm>. The model letter is available at <http://www.ftc.gov/os/2010/02/100203model-bamboo-letter.pdf>.

<sup>17</sup> <http://www.ftc.gov/os/caselist/1023064/110111testedgreenagree.pdf>. [remove hyperlink]

or use green processes in the manufacture of goods and services,” and sold “Tested Green” certifications without any testing or inquiry into applicants’ businesses. *In re Nonprofit Management LLC & Jeremy Ryan Claeys*, Complaint at \*2, F.T.C. Case No. 102 3064 (Jan. 11, 2011).

- c) Further, the FTC alleged Tested Green was endorsed by the National Green Business Association (“NGBA”) and the National Association of Government Contractors (“NAGC”), which were actually shell organizations owned and operated by Tested Green. *Id.*
- d) The FTC alleged these actions amounted to three violations of Section 5 of the FTC Act.
  - (1) First, Tested Green’s certification expressly or impliedly represented that the goods or services using it had been independently tested and evaluated, when they had not. *Id.* at 3. These actions furnished its customers with instrumentalities for the commission of deceptive acts and practices. *Id.* at 4.
  - (2) The FTC also alleged two counts of deception in regard to Tested Green’s endorsements by the NGBA and NAGC -- one for deception in use of endorsements and a second for deception in failure to disclose material facts in use of endorsements. *Id.*

## B. NAD

### 1. Biodegradable

- a) In December 2010, NAD opined on the level of substantiation needed to make a “biodegradable” claim. *See* Press Release, NAD News, NAD Recommends FP International Discontinue Certain Biodegradable Claims; Finds Advertiser Can Support Qualified “Green” Claims (Dec. 14, 2010).<sup>18</sup> NAD examined FP International’s claim

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<sup>18</sup> <http://www.narcpartners.org/DocView.aspx?DocumentID=8342&DocType=1>.

that the Biodegradable Super 8 Loosefill product was biodegradable and would “decompose completely within 9 to 60 months” [whether in a landfill (without air) or if littered elsewhere on the ground (with air)]. *Id.*

- b) NAD ultimately concluded that FP had not fully supported its biodegradable claims and recommended that FP discontinue them. *Id.*
- c) The issue with supporting biodegradable claims is whether anything can biodegrade in a reasonable amount of time in a landfill, the place most trash ends up and where typically there is no air or light. *Id.*
- d) FP asserted that its biodegradable claims were qualified, as it stated the peanuts would biodegrade “within 9 to 60 months in the presence of microorganisms, whether it is sent to a landfill or ends up as litter in the soil.” *Id.*
- e) NAD recommended discontinuing the qualified claims as it found the substantiation offered proving biodegradability in landfill conditions had been done on an additive and not on the product itself. *Id.*
- f) NAD also found that FP had made an unqualified claim by including “Biodegradable” in its trade name and an unqualified claim would mean it should biodegrade in a landfill within a year after disposal. NAD recommended discontinuing use of “Biodegradable” in its trade name. *Id.*

## 2. “Made with Wind Energy”

- a) In September 2010, NAD determined that S.C. Johnson & Son could support certain “made with wind energy” claims in its advertising for the company’s “Evolve” Ziploc brand storage bags, but recommended the company modify the advertisement to reflect that the product is made with a combination of wind and traditional energy sources. S.C. Johnson & Son, Case No. 5225 (Nat’l Advertising Division Sep. 27, 2010).
- b) NAD also determined that the company substantiated its related claims on the product’s

advertisement, “The new ultra light bag that is better for the environment” and “Made with 25% less plastic,” by demonstrating that the bag is made with a new resin and did, in fact, use at least 25% less plastic when compared to bags of equivalent size. *Id.*

3. “Natural” Household Cleaning Supplies

- a) In September 2010, NAD recommended Seventh Generation discontinue or modify certain advertising claims for the company’s household cleaning and laundry products after a challenge by Proctor & Gamble. Press Release, NAD News, NAD Recommends Seventh Generation Modify, Discontinue Certain Safety, “Natural” Claims for Certain Products (Sep. 8, 2010).
- b) Seventh Generation’s advertisement stated “People everywhere are saying no to hazardous chemicals . . . , and yes to a safe and naturally effective way to clean.” *Id.*
- c) NAD recommended that Seventh Generation discontinue any comparative safety claims after it found that there was no evidence that Seventh Generation products were safer than those made by its competitors. *Id.* Further, since Seventh Generation’s products contain hazardous materials, the company should avoid any express or implied claims that the products are free of such materials.
- d) While NAD noted that there is no regulatory definition or consensus on what constitutes “natural,” it recommended that Seventh Generation’s use of “natural” should be qualified as several key ingredients are only partially natural. *Id.*

4. Biodegradable vs. Compostable

- a) In October 2009, NAD issued a press release on its findings in a challenge brought by Method Products about advertising claims made by Clorox for its Green Works Natural Cleaning Wipes that described the wipes as “biodegradable” but qualified that claim on the back of the container with “biodegradability validated in typical compost

conditions.” Press Release, NAD News, NAD Examines Clorox “Green Works” Claims, Following Challenge by Method Products (Oct. 27, 2009).

- b) Thus, the issue before NAD was whether you can qualify a broader biodegradable claim to make it a narrower compostable claim. *Id.*
- c) Because Clorox stated that it was transitioning to only compostable claims, NAD did not resolve this issue, but appreciated Clorox’s decision to discontinue the qualified biodegradable claim. Even though Clorox had reliable evidence from testing showing that its product would degrade in a reasonable amount of time under certain condition, NAD noted that the original claim could cause consumer confusion. In particular, NAD pointed out that a compostable product may or may not be biodegradable as FTC defines that term. *Id.*
- d) *But see* In re Archer Daniels Midland Co., 117 F.T.C.403, 415 (1994) (consent order provision suggesting that under certain circumstances a biodegradability claim can be qualified to a compostable claim if it is clearly and conspicuously disclosed that the product will not degrade in a landfill).

## 5. Bamboo Content

- a) In July 2009, NAD announced resolution of a challenge brought by Dixie Consumer Products LLC against Solo Cup Company for claims that Solo’s Bare Disposable Plates were made from bamboo. Press Release, NAD News, Solo Voluntarily Discontinues Certain “Green” Claims for “Bare Disposable Plates” (July 9, 2009).
- b) Dixie presented laboratory testing results showing that only one sample of Solo’s plates contained any bamboo content (only 2.5%). *Id.*
- c) For its part, Solo presented laboratory results showing that all samples contained bamboo. Solo also provided evidence showing purchases of bamboo used in manufacturing its Bare Disposable

Plates. Solo argued that this evidence demonstrated that its plates contained at least 50% bamboo, an amount sufficient to substantiate its bamboo-content claims. *Id.*

- d) Solo ultimately voluntarily discontinued use of the bamboo content claims. NAD described this action as “necessary and proper given the evidence presented in the record.” *Id.*

6. “Green” Computers

- a) In June 2009, NAD announced resolution of a case in which Dell challenged Apple’s claims that Apple’s notebooks were “the world’s greenest.” Press Release, NAD News, NAD Finds Apple Can Support Certain “Green” Claims for MacBook, Recommends Company Modify World’s Greenest “Family” Claim (June 18, 2009).
- b) NAD suggested that Apple change its “world greenest family of notebooks” claim to clarify that the comparisons it was making were between MacBooks and competing notebook computers and not between competing product lines. *Id.*
- c) NAD also suggested that Apple stop using a “world’s greenest” claim because a Toshiba notebook fared better in the Electronic Product Environmental Assessment Tool Ratings on which Apple was relying. *Id.*

**IV. FTC’s Proposed Revisions to the *Green Guides***

A. Background

- 1. The FTC originally issued the *Green Guides* in 1992 and revised then in both 1996 and 1998.
- 2. In November 2007, the FTC announced that it would undertake a review and revision of the *Green Guides* prior to the previously scheduled 2009 review. The FTC moved up the review to ensure the continued relevance of the *Green Guides* in light of the increasing prevalence of green claims. See Press Release, Fed. Trade Comm’n, FTC

Reviews Environmental Marketing Guides, Announces Public Meetings (Nov. 26, 2007).<sup>19</sup>

3. As part of this review, the FTC hired a firm to conduct consumer perception research, conducted a broad review of Internet green advertising to understand what claims were being made and by which industry sectors in particular, solicited public comment regarding the effectiveness of and need to update the existing Guides, and held three workshops in 2008, listed below:
  - a) Carbon Offsets and Renewable Energy Certificates - Jan. 8, 2008.<sup>20</sup>
  - b) Green Packaging Claims - April 30, 2008.<sup>21</sup>
  - c) Green Building and Textiles - July 15, 2008.<sup>22</sup>
4. The consumer perception study<sup>23</sup> tested various terms including “green,” “eco-friendly,” “sustainable,” “made with renewable materials,” “made with renewable energy,” and “made with recycled materials,” as well as the method that such terms appeared in advertising. Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63552, 63552 (Oct. 15, 2010) (to be codified 16 C.F.R. pt. 260). The study also tested carbon offset and carbon neutral claims. *Id.*
  - a) Life Cycle (*Id.* at 63560) - Very few survey respondents viewed “green” claims (16%) or “eco-friendly” claims (14%) thought of all four stages of a product’s life cycle (i.e., production, transportation, use, and disposal) when viewing a claim.
  - b) General Environmental Benefit Claims (*Id.* at 63562) - About half of respondents of unqualified “green” or “eco-friendly” claims believed the claim

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<sup>19</sup> <http://www.ftc.gov/opa/2007/11/enviro.shtm>.

<sup>20</sup> <http://www.ftc.gov/bcp/workshops/carbonoffsets/index.shtml>.

<sup>21</sup> <http://www.ftc.gov/bcp/workshops/packaging/index.shtml>.

<sup>22</sup> <http://www.ftc.gov/bcp/workshops/buildingandtextiles/index.shtml>.

<sup>23</sup> <http://www.ftc.gov/bcp/edu/microsites/energy/green-consumer-perception-study.shtml>

suggested the product had a particular attribute (such as made from recycled materials or compostable), and 27% believed such claims suggested the product had no negative environmental impact.

- c) Sustainable (*Id.* at 63582) - Relatively few respondents believed that the term “sustainable” was related to any particular environmental benefit, and only 7% stated the term suggested a product was “good for,” “helps,” or “benefits” the environment. Respondents were less likely to believe that “sustainable” carried with it specific, unstated environmental benefits than respondents who viewed unqualified “green” or “eco-friendly” claims.
- d) “Made with Recycled Materials” (*Id.* at 63575) - Respondents’ beliefs about how much of a product was made with recycled materials when such a claim was asserted varied as 35% believed that such a claim indicated “all” of a product was made from recycled materials, 20% believed “most” of the product, and 26% believed “some.”
- e) “Made with Renewable Materials” (*Id.* at 63590) - Respondents generally believed that this claim probably suggested the product had other environmental benefits. Few respondents perceived the claim as marketers often intend, as only 10% stated the term suggested that the materials could be replenished, replaced, or regrown.
- f) Carbon Offsets (*Id.* at 63595) - While respondents demonstrated a general knowledge of carbon offsets when given a choice of descriptions, few could articulate a definition in their own words when only given an open-ended question.

5. FTC’s Green Marketing Surf<sup>24</sup>

- a) As part of the FTC’s review of the *Green Guides*, the staff conducted a review of Internet sites to

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<sup>24</sup> <http://www.ftc.gov/bcp/edu/microsites/energy/documents/ftc-staff-internet-surf.pdf>

investigate the nature and incidence of particular environmental marketing claims. FED. TRADE COMM’N’S DIV. OF ENFORCEMENT, GREEN MARKETING INTERNET SURF (2010).

- b) The surf focused on four types of claims: Carbon Reduction (e.g., “carbon neutral” or “carbon offsets”), Renewability (e.g., “renewable energy” or “renewable material”), Sustainability (e.g., “sustainable farming” or “sustainable technology”), General Environmental (e.g., “green” or “eco-friendly”). *Id.* at 2-3.
  - c) Of the 1,000 websites across a wide swath of industries reviewed, the greatest proportion of claims occurred in the Building, Home Improvement & Appliances industry (22% of all claims) and Utilities & Energy industry (12%). *Id.* at 5.
  - d) The surf revealed many general environmental claims co-occur with other, more specific claims, though the two claims may be unrelated. Of the pages with general environmental claims, 52% also had sustainability claims, 36% had renewability claims, and 36% had carbon claims. *Id.* at 12-13.
6. On October 6, 2010, the FTC announced the much anticipated proposed revisions to the *Green Guides*.

#### B. Overview of the Proposed Revisions

- 1. In the proposed revisions, the agency reaffirmed the need for the *Green Guides*, while acknowledging that substantive revisions were necessary. *Proposed Revisions to the Green Guides* (Appendix B)[hereinafter *Proposed Revisions*].<sup>25</sup>
- 2. The FTC Staff explained that as a general matter the *Green Guides* were maintained as they were, unless there was specific evidence suggesting that a change was in order. *Id.* at 15-17.

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<sup>25</sup> <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf>

3. The FTC clarified its position that the *Green Guides* apply to business-to-business claims, as well as to consumer claims. *Id.* at 19.
4. Many of the revisions strengthen or add more specificity to the current guidance on use of general environmental claims, as well as claims such as “compostable,” “biodegradable,” “recycled content” and “recyclable.” *Id.* at 66, 74, 80, 91.
5. Other revisions address new claims that have sprouted in the marketplace in recent years, including “renewable materials,” “renewable energy,” and “carbon offsets.” *Id.* at 140, 152, 166.
6. Some claims were not addressed by the existing *Green Guides*, or the proposed revisions, including terms such as “natural,” “organic,” or “sustainable.” *Id.* at 118.
7. While some commenters had urged the FTC to harmonize the *Green Guides* with international environmental standards and/or to adopt specific tests and standards needed to substantiate particular claims, the FTC Staff refrained from doing so. The FTC Staff has explained that its role is to prevent deception in the marketplace and not to set standards or set environmental policy. *Id.* at 25.
8. The proposed revisions gave more guidance than some expected but less than others had urged.

C. General Environmental Benefit (*Proposed Revisions*, at 35-50).

1. At the beginning, the proposed revisions include a strong warning to advertisers about general or broad environmental claims.
2. The current *Guides* section on general environmental benefit claims (e.g., environmentally friendly”) states: “[u]nqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product, package, or service has specific and far-reaching environmental benefits.” 16 C.F.R. 260.7(a).
3. The Commission’s consumer perception surveys confirmed that unqualified, blanket environmental claims such as “eco-friendly” or “environmentally friendly” are likely to

suggest wide-reaching environmental benefits that are nearly impossible to substantiate.

4. Over half of survey participants viewing a broad “environmentally friendly” claim believed that the product had a variety of specific green attributes that were not mentioned in the actual advertisement.
5. The proposed revisions go further than the existing *Guides*, cautioning advertisers to categorically avoid unqualified environmental claims altogether. *Proposed Revisions*, at 35-36.
6. The *Proposed Revisions* also raised concerns as to whether even qualified general claims can raise issues of deception.
  - a) *Example:* A marketer truthfully asserts that its product is “green” and qualifies that this means “made with 70% recycled content.” However, the marketer needs to import materials from a distant source, resulting in increased energy use which more than offsets the environmental benefit achieved by using recycled content. If consumers interpreted the claims to mean that the product has a net environmental benefit, the claim could be deceptive. *Proposed Revisions*, at 50. However, the FTC Staff considered whether a life-cycle assessment or overall environmental impact assessment must be made for any product including an environmental claim, and concluded this was not needed to comply with Section 5.

D. Certifications and Seals of Approval (*Proposed Revisions*, at 50-66).

1. The current *Guides* do not contain a specific section on this topic, rather a single example highlights potential issues.
2. The *Proposed Revisions* include an expanded section devoted exclusively to certifications and seals of approval. *Proposed Revisions*, at 50-66.
3. The *Proposed Revisions* note that certifications and seals of approval are becoming an increasingly popular method of conveying environmental benefits. *Id.* at 58.
4. The *Proposed Revisions* highlight the fact that third party certifications or seals of approval require adequate

substantiation, qualification and constitute endorsements that would also be covered by the FTC's Endorsement and Testimonial Guides ("Endorsement Guides"). *Id.* at 58-59.

5. The *Proposed Revisions* note that, pursuant to the Endorsement Guides, any connection between a marketer and body providing certification must be disclosed. Additionally, if an advertiser creates a self-certification program, a claim that the product has been certified must be qualified to clarify that the marketer created the certifying program.
6. Similarly, if a marketer is a member of an organization that provides certification to the product, the membership (or any relevant material connection) must be disclosed.
7. Finally, the *Proposed Revisions* emphasize that third-party certifications or seals of approval do not negate the need for all claims to have proper substantiation.
  - a) Obtaining a certification from a third party can serve as an adequate and scientifically reliable substantiation for a claim, but the marketer must ensure the certification constitutes competent and reliable scientific evidence to support its claims. *Id.* at 64.
8. The *Proposed Revisions* note that the use of some certifications and seals of approval with general names (e.g., certified by Green Dream) convey the type of general environmental benefit claim that the FTC views as problematic. *Id.* at 63.
9. The *Guides* advise that when using a symbol with a name that can convey a broad environmental benefit, marketers should include language explaining the basis for the award. *Id.*

E. Degradable Claims (*Proposed Revisions*, at 66-74).

1. Degradability claims account for the largest group of FTC environmental marketing cases to date.
2. This is due in part to the fact that these claims are difficult to substantiate because biodegradation requires air, light and water -- elements that are absent within most waste facilities.

3. The *Proposed Revisions* include a bright line rule that degradable claims for solid waste are deceptive for any products or packages destined for landfills, incinerators, or recycling facilities. *Proposed Revisions*, at 70-71.
4. An unqualified claim can be made only if complete decomposition of solid materials will occur within one year. *Id.* at 71-72.
5. This “one year” rule is based on the consumer perception studies the FTC conducted as to how long consumers believe it should take for a biodegradable product to decompose. *Id.*
6. The FTC noted that it did not receive any comments related to the decomposition of liquids or other “dissolvable solids.” Consequently, the proposed revisions do not propose a specific decomposition time for these substances when marketed without qualification, and the agency is soliciting comments and consumer perception data in this area. *Id.* at 72.

F. Compostability (*Proposed Revisions*, at 74-80).

1. The current *Guides* inform advertisers that substantiation requires evidence that the package or materials will break down into usable compost “in a safe and timely manner.” 16 C.F.R. 260.7(c).
2. The *Proposed Revisions* would define “timely manner” to mean that the product would break down in about the same amount of time as other materials with which it is composted (e.g., plant materials). *Proposed Revisions*, at 79-80.
3. For those products that will only decompose in a municipal facility, an unqualified claim can only be made when a substantial majority of consumers or communities have access to composting facilities. The FTC noted that municipal composting facilities remain uncommon and that most consumers likely do not have access to them. As a result, a significant percentage of these types of claims will require qualification. *Id.* at 76-77.

G. Recyclable (*Proposed Revisions*, at 80-91).

1. The current *Guides* advise that advertisers should only claim that product is recyclable if it can be “collected,

separated, or otherwise recovered from the solid waste stream for reuse, or in the manufacture of another product through an established recycling program.” 16 C.F.R. 260.7(d).

2. The *Proposed Revisions* dedicate a stand-alone section to recycling claims and address the issue of accessibility of recycling facilities. *Proposed Revisions*, at 80-91.
3. The agency is requesting comment on the current percentage of facilities in a marketer’s sales area that must recycle a given product before:
  - a) An unqualified recycling claim can be made;
  - b) A qualified claim may be made, such as “may not be recyclable”; and
  - c) Further qualified claims should be made (e.g., recyclable only in the few communities that have recycling programs. *Id.* at 81-91.
4. The agency has informally proposed that 60% be the cutoff for an unqualified claim, but is seeking input as to whether this figure should be formally adopted. *Id.* at 89.

H. Recycled Content (*Proposed Revisions*, at 91-104).

1. The current *Guides* provide that a recycled content claim is appropriate only for materials that have been recovered or diverted from the solid waste stream and can only be unqualified if the entire product and packaging is made from recycled content. 16 C.F.R. 260.7(e).
2. The FTC proposes to leave its guidance on recycled content claims largely as is, but raises a number of specific questions for public comment.

I. Ozone-Friendly (*Proposed Revisions*, at 104-107).

1. The current *Guides* employ four examples to illustrate that it is deceptive to misrepresent that a product is safe or “friendly” to the atmosphere. 16 C.F.R. 260.7(h).
2. The proposed revisions dedicate a section of the *Guides* for ozone-friendly claims, but make little change to the current *Guides*.

3. The agency notes that although CFCs have been banned for years, many consumers are unaware of this, and therefore does not propose advising marketers to avoid using no-CFCs claims. *Proposed Revisions*, at 106-107.
- J. “Free Of” and “Non-Toxic” (*Proposed Revisions*, at 107-117).
1. The *Proposed Revisions* include expanded guidance on the use of these types of claims, removing them from examples and providing a stand-alone section to discuss them. *Proposed Revisions*, at 107.
  2. Specifically, the agency states that “free of” claims “may be appropriate where a product contains a de minimis amount of a substance that would be inconsequential to consumers.” *Id.* at 114.
  3. What constitutes “de minimis” will depend on the substance at issue, and will require a case-by-case analysis. *Id.*
  4. Highly toxic ingredients, such as mercury, will always be material to consumers, and their presence, even if de minimis, will be important to consumers such that a “free of” claim will be deceptive if there are even trace amounts. *Id.*
  5. The revisions advise marketers that if a product removes one harmful substance, but replaces it with another that poses the same, or similar environmental risk, a “free of” claim would be inappropriate. *Id.* at 115.
  6. In addition, if a product never included a referenced ingredient, and no products in the same category include the ingredient, then a “free of” claim could be viewed as deceptive since it may imply that competing products might include the offending ingredient. *Id.*
  7. If two different categories of products compete and only one category is “free of” the substance, such a claim may be helpful to consumers. In terms of non-toxic claims, the *Proposed Revisions* maintain the original position that a product must be non-toxic to both people and the environment, or it must be qualified. *Id.*

## V. New Additions to the Current *Green Guides*

- A. Three New Additions to the *Green Guides*

1. The Commission requested that commentators address the use of environmental marketing claims that are either new or not common at the time of the last review. Commentators raised five types of claims:
    - a) Made with renewable materials;
    - b) Made with renewable energy;
    - c) Carbon offsets;
    - d) Sustainable; and
    - e) Organic/Natural. *Proposed Revisions*, at 118.
  2. Of these, the Commission included new additions on the following three claims: Made with renewable materials; Made with renewable energy; and Carbon Offsets.
- B. Made with Renewable Materials (*Proposed Revisions*, at 140-152).
1. The FTC discovered that the takeaway for consumers viewing renewable materials claims was different than the message marketers were attempting to convey. Marketers are often trying to illustrate that a product is made of materials that are growing or developing at a faster rate than they can be used. *Id.* at 149.
  2. Consumers, on the other hand, appear to take away a recyclable or recyclable content claim from these messages, which often cannot be substantiated. *Id.*
  3. As a result, the *Proposed Revisions* propose that marketers qualify a claim that a product was “made with renewable materials” with specific information about the material (i.e., what it is, how it is sourced and why it is renewable). *Id.*
  4. The *Proposed Revisions* recommend that advertisers qualify a renewable materials claim if a particular item does not contain 100 percent renewable materials. *Id.*
- C. Made with Renewable Energy (*Proposed Revisions*, at 152-166).
1. The *Proposed Revisions* note that the Commission’s evidence raised three main issues related to consumers’ perception of renewable energy claims:
    - a) The actual meaning of “renewable energy”;

- b) Claims implied by renewable energy advertisements;
  - c) Potentially overbroad renewable energy claims. *Id.* at 160.
2. In response, the *Proposed Revisions* state that marketers should be advised that unqualified claims are misleading if any part of the product was manufactured with energy derived from fossil fuels. *Id.*
  3. Second, the *Proposed Revisions* advise marketers to qualify claims, by specifying the source of renewable energy (e.g., solar or wind). *Id.* at 161.
  4. The Commission is seeking comment on whether specifying the source of renewable energy adequately qualifies a “made with renewable energy” claim. *Id.* at 162.
  5. Lastly, the *Proposed Revisions* caution marketers not to use unqualified “made with renewable energy” claims unless virtually all of the manufacturing process (but not necessarily all of the transportation costs to market post-production) used to make the product are powered by renewable energy, or conventionally produced energy that is offset by renewable energy credits. *Id.*
  6. Similarly, marketers that generate renewable energy, but sell renewable energy certificates (“RECs”) for all of the energy they generate, should not represent to consumers that they use renewable energy. *Id.* at 165.

D. Carbon Offsets (*Proposed Revisions*, at 166-186).

1. Given the fact that carbon offsets are relatively new claims in the green marketing field, the Commission opted to provide only limited guidance in the area. *Id.* at 182.
2. The agency also noted that advice on carbon offsets would be limited due to the limits of the FTC’s authority, the available consumer perception evidence, and the ongoing policy debate amongst experts in the field concerning appropriate tests to substantiate these types of claims. *Id.*
3. The FTC did, however, provide some guidance in the proposed revisions, including recommending that marketers use appropriate accounting methods to properly quantify

any greenhouse Gas emission reductions and ensure they are not selling reductions more than once. *Id.* at 184.

4. In the absence of any disclosure to the contrary, the agency will assume that the offset will fully take place in less than two years. *Id.* at 183-184.
5. Finally, while the FTC chose not to address the issue of additionality in the proposed revisions, there is a proposal that if the basis for a carbon offset is already required by law, that offset should not be advertised. *Id.* at 184-185.

## **VI. What Was Not Included in the Proposed Revisions?**

### **A. Sustainability (*Proposed Revisions*, at 118-128).**

1. The FTC noted that while sustainability claims may intend to convey an environmental benefit, existing consumer perception data shows consumers view sustainability claims differently than general environmental claims, sometimes taking away from the claim that a product is durable. *Id.* at 127-28.
2. The Commission concluded that it lacks a sufficient basis to provide meaningful guidance on these types of claims, because the term “sustainable,” in the mind of consumers, is not always associated with an environmental benefit, and often has other social connotations. *Id.*

### **B. Organic and Natural (*Proposed Revisions*, at 128-140).**

1. The FTC declined to add a section to the *Guides* to address organic and natural claims. *Id.* at 136.
2. While the agency emphasized that marketers are still required to have substantiation for any express or implied claims, any further guidance on these types of claims is likely better left to other agencies, such as the USDA and its National Organic Program, that specifically handle these types of claims. *Id.* at 136-37.
3. In terms of “natural” claims, which many thought the revisions would encompass, the FTC noted that it received no evidence indicating how consumers generally understand the term “natural.” As such, they had no basis upon which to provide guidance about these types of claims. *Id.* at 138-39.

4. The FTC did note, however, that if there is an implication that a product contains no artificial ingredients, the marketer must be able to substantiate that implied claim. *Id.* at 139.

## VII. Other Green Marketing Guidance

- A. TerraChoice Environmental Marketing's *The Sins of Greenwashing: Home and Family Edition* [Appendix C]
  1. One useful guide that takes *Green Guides* principles and applies them to real-world practices is TerraChoice Environmental Marketing's *The Sins of Greenwashing: Home and Family Edition* (Oct. 2010).<sup>26</sup>
  2. The TerraChoice report starts off by indicating that there have been both positive and negative developments in the past year, highlighting the fact that the amount of greenwashing has gone down slightly and "the number of 'greener' products has gone up by 73%."
  3. TerraChoice's methodology includes visiting the same locations and looking at the same products, comparing "green" claims from year to year. The problem is that while there are more green products available, 95% of "greener" products commit one of TerraChoice's seven "Sins of Greenwashing," which are described on page 10 of the report. Baby products, toys, household cleaners, construction materials, and consumer electronics were the product areas in which TerraChoice found the most greenwashing.
  4. Interestingly enough, the report also found that "big box" stores such as Wal-Mart and Target provide the broadest set of green products with legitimate environmental certifications. According to TerraChoice, these big box stores offer a higher percentage of products with legitimate green certifications, have more products that are free of greenwashing, and have a larger overall selection of green products.
  5. As part of its findings, the report offers companies tips on "good green marking":

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<sup>26</sup> <http://sinsofgreenwashing.org/findings/greenwashing-report-2010/>.

- a) Use honest statements to describe the total life-cycle impacts your product will have on the environment;
- b) Don't overstate your impact, as customers will be happy that you're taking steps in the right direction; and
- c) Ask your customers to support your green journey.

## VIII. Conclusion

- A. The comment period for the proposed revised *Green Guides* officially ended last month. The FTC received over 300 public comments. Many of the comments have focused on the FTC's position that general claims such as "green" or "environmentally friendly" cannot be used unless qualified. The proposed revised *Guides* strengthen the FTC's position based on consumer perception research that, unless qualified, such claims convey broad sweeping environmental benefits and cannot be used.
- B. While it will take the FTC Staff some time to review the many comments and consider whether and how to incorporate them into the revised *Green Guides*, it is likely that the final guides will be released sometime late this year.
- C. Following the release of the final guides, it is expected that there will be heightened FTC enforcement in the environmental marketing area.

# APPENDIX A

## **GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS**

Authority: 15 U.S.C. §§ 41-58

### **§ 260.1 Statement of purpose**

These guides represent administrative interpretations of laws administered by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. These guides specifically address the application of Section 5 of the FTC Act to environmental advertising and marketing practices. They provide the basis for voluntary compliance with such laws by members of industry. Conduct inconsistent with the positions articulated in these guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the behavior falls within the scope of conduct declared unlawful by the statute.

### **§ 260.2 Scope of guides**

These guides apply to environmental claims included in labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means, including marketing through digital or electronic means, such as the Internet or electronic mail. The guides apply to any claim about the environmental attributes of a product, package or service in connection with the sale, offering for sale, or marketing of such product, package or service for personal, family or household use, or for commercial, institutional or industrial use. Because the guides are not legislative rules under Section 18 of the FTC Act, they are not themselves enforceable regulations, nor do they have the force and effect of law. The guides themselves do not preempt regulation of other federal agencies or of state and local bodies governing the use of environmental marketing claims. Compliance with federal, state or local law and regulations concerning such claims, however, will not necessarily preclude Commission law enforcement action under Section 5.

### **§ 260.3 Structure of the guides**

The guides are composed of general principles and specific guidance on the use of environmental claims. These general principles and specific guidance are followed by examples that generally address a single deception concern. A given claim may raise issues that are addressed under more than one example and in more than one section of the guides. In many of the examples, one or more options are presented for qualifying a claim. These options are intended to provide a "safe harbor" for marketers who want certainty about how to make environmental claims. They do not represent the only permissible approaches to qualifying a claim. The examples do not illustrate all possible acceptable claims or disclosures that would be permissible under Section 5. In addition, some of the illustrative disclosures may be appropriate for use on labels but not in print or broadcast advertisements and vice versa. In some instances, the guides indicate within the example in what context or contexts a particular type of disclosure should be considered.

### **§ 260.4 Review procedure**

The Commission will review the guides as part of its general program of reviewing all industry guides on an ongoing basis. Parties may petition the Commission to alter or amend these guides in light of substantial new evidence regarding consumer interpretation of a claim or regarding substantiation of a claim. Following review of such a petition, the Commission will take such action, as it deems appropriate.

### **§ 260.5 Interpretation and substantiation of environmental marketing claims.**

Section 5 of the FTC Act makes unlawful deceptive acts and practices in or affecting commerce. The Commission's criteria for determining whether an express or implied claim has been made are enunciated in the Commission's Policy Statement on Deception. (1) In addition, any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product, package or service must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim. A reasonable basis consists of competent and reliable evidence. In the context 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. Further guidance on the reasonable basis standard is set forth in the Commission's 1983 Policy Statement on the Advertising Substantiation Doctrine. 49 Fed. Reg. 30999 (1984); appended to Thompson Medical Co., 104 F.T.C. 648 (1984). The Commission has also taken action in a number of cases involving alleged deceptive or unsubstantiated environmental advertising claims. A current list of environmental marketing cases and/or copies of individual cases can be obtained by calling the FTC Consumer Response Center at (202) 326-2222.

### **§ 260.6 General principles**

The following general principles apply to all environmental marketing claims, including, but not limited to, those described in § 260.7. In addition, § 260.7 contains specific guidance applicable to certain environmental marketing claims. Claims should comport with all relevant provisions of these guides, not simply the provision that seems most directly applicable. Qualifications and disclosures: The Commission traditionally has held that in order to be effective, any qualifications or disclosures such as those described in these guides should be sufficiently clear, prominent and understandable to prevent deception. Clarity of language, relative type size and proximity to the claim being qualified, and an absence of contrary claims that could undercut effectiveness, will maximize the likelihood that the qualifications and disclosures are appropriately clear and prominent.

(A) Distinction between benefits of product, package and service: An environmental marketing claim should be presented in a way that makes clear whether the environmental attribute or benefit being asserted refers to the product, the product's packaging, a service or to a portion or component of the product, package or service. In general, if the environmental attribute or benefit applies to all but minor, incidental components of a product or package, the claim need not be qualified to identify that fact. There may be exceptions to this general principle. For example, if an unqualified "recyclable" claim is made and the presence of the incidental component significantly limits the ability to recycle the product, then the claim would be deceptive.

#### **Example 1:**

A box of aluminum foil is labeled with the claim "recyclable," without further elaboration. Unless the type of product, surrounding language, or other context of the phrase establishes whether the claim refers to the foil or the box, the claim is deceptive if any part of either the box or the foil, other than minor, incidental components, cannot be recycled.

#### **Example 2:**

A soft drink bottle is labeled "recycled." The bottle is made entirely from recycled materials, but the bottle cap is not. Because reasonable consumers are likely to consider the bottle cap to be a minor, incidental component of the package, the claim is not deceptive. Similarly, it would not be deceptive to label a shopping bag "recycled" where the bag is made entirely of recycled material but the easily detachable handle, an incidental component, is not.

(B) Overstatement of environmental attribute: An environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication. Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible.

Example 1:

A package is labeled, "50% more recycled content than before." The manufacturer increased the recycled content of its package from 2 percent recycled material to 3 percent recycled material. Although the claim is technically true, it is likely to convey the false impression that the advertiser has increased significantly the use of recycled material.

Example 2:

A trash bag is labeled "recyclable" without qualification. Because trash bags will ordinarily not be separated out from other trash at the landfill or incinerator for recycling, they are highly unlikely to be used again for any purpose. Even if the bag is technically capable of being recycled, the claim is deceptive since it asserts an environmental benefit where no significant or meaningful benefit exists.

Example 3:

A paper grocery sack is labeled "reusable." The sack can be brought back to the store and reused for carrying groceries but will fall apart after two or three reuses, on average. Because reasonable consumers are unlikely to assume that a paper grocery sack is durable, the unqualified claim does not overstate the environmental benefit conveyed to consumers. The claim is not deceptive and does not need to be qualified to indicate the limited reuse of the sack.

Example 4:

A package of paper coffee filters is labeled "These filters were made with a chlorine-free bleaching process." The filters are bleached with a process that releases into the environment a reduced, but still significant, amount of the same harmful byproducts associated with chlorine bleaching. The claim is likely to overstate the product's benefits because it is likely to be interpreted by consumers to mean that the product's manufacture does not cause any of the environmental risks posed by chlorine bleaching. A claim, however, that the filters were "bleached with a process that substantially reduces, but does not eliminate harmful substances associated with chlorine bleaching" would not, if substantiated, overstate the product's benefits and is unlikely to be deceptive. (d) Comparative claims: Environmental marketing claims that include a comparative statement should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception. In addition, the advertiser should be able to substantiate the comparison.

Example 1:

An advertiser notes that its shampoo bottle contains "20% more recycled content." The claim in its context is ambiguous. Depending on contextual factors, it could be a comparison either to the advertiser's immediately preceding product or to a competitor's product. The advertiser should clarify the claim to make the basis for comparison clear, for example, by saying "20% more recycled content than our previous package." Otherwise, the advertiser should be prepared to substantiate whatever comparison is conveyed to reasonable consumers.

Example 2:

An advertiser claims, "Our plastic diaper liner has the most recycled content." The advertised diaper does have more recycled content, calculated as a percentage of weight, than any other on the market, although it is still well under 100% recycled. Provided the recycled content and the comparative difference between the product and those of competitors are significant and provided the specific comparison can be substantiated, the claim is not deceptive.

Example 3:

An ad claims that the advertiser's packaging creates "less waste than the leading national brand." The advertiser's source reduction was implemented sometime ago and is supported by a calculation comparing the relative solid waste contributions of the two packages. The advertiser should be able to substantiate that the comparison remains accurate.

### § 260.7 Environmental marketing claims

Guidance about the use of environmental marketing claims is set forth below. Each guide is followed by several examples that illustrate, but do not provide an exhaustive list of, claims that do and do not comport with the guides. In each case, the general principles set forth in § 260.6 should also be followed. (2) (a) General environmental benefit claims: It is deceptive to misrepresent, directly or by implication, that a product, package or service offers a general environmental benefit. Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product, package or service has specific and far-reaching environmental benefits. As explained in the Commission's Advertising Substantiation Statement, every express and material implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product or service must be substantiated. Unless this substantiation duty can be met, broad environmental claims should either be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.

Example 1:

A brand name like "Eco-Safe" would be deceptive if, in the context of the product so named, it leads consumers to believe that the product has environmental benefits which cannot be substantiated by the manufacturer. The claim would not be deceptive if "Eco-Safe" were followed by clear and prominent qualifying language limiting the safety representation to a particular product attribute for which it could be substantiated, and provided that no other deceptive implications were created by the context.

Example 2:

A product wrapper is printed with the claim "Environmentally Friendly." Textual comments on the wrapper explain that the wrapper is "Environmentally Friendly because it was not chlorine bleached, a process that has been shown to create harmful substances." The wrapper was, in fact, not bleached with chlorine. However, the production of the wrapper now creates and releases to the environment significant quantities of other harmful substances. Since consumers are likely to interpret the "Environmentally Friendly" claim, in combination with the textual explanation, to mean that no significant harmful substances are currently released to the environment, the "Environmentally Friendly" claim would be deceptive.

Example 3:

A pump spray product is labeled "environmentally safe." Most of the product's active ingredients consist of volatile organic compounds (VOCs) that may cause smog by contributing to ground-level ozone formation. The claim is deceptive because, absent

further qualification, it is likely to convey to consumers that use of the product will not result in air pollution or other harm to the environment.

Example 4:

A lawn care pesticide is advertised as "essentially non-toxic" and "practically non-toxic." Consumers would likely interpret these claims in the context of such a product as applying not only to human health effects but also to the product's environmental effects. Since the claims would likely convey to consumers that the product does not pose any risk to humans or the environment, if the pesticide in fact poses a significant risk to humans or environment, the claims would be deceptive.

Example 5:

A product label contains an environmental seal, either in the form of a globe icon, or a globe icon with only the text "Earth Smart" around it. Either label is likely to convey to consumers that the product is environmentally superior to other products. If the manufacturer cannot substantiate this broad claim, the claim would be deceptive. The claims would not be deceptive if they were accompanied by clear and prominent qualifying language limiting the environmental superiority representation to the particular product attribute or attributes for which they could be substantiated, provided that no other deceptive implications were created by the context.

Example 6:

A product is advertised as "environmentally preferable." This claim is likely to convey to consumers that this product is environmentally superior to other products. If the manufacturer cannot substantiate this broad claim, the claim would be deceptive. The claim would not be deceptive if it were accompanied by clear and prominent qualifying language limiting the environmental superiority representation to the particular product attribute or attributes for which it could be substantiated, provided that no other deceptive implications were created by the context.

(b) Degradable/biodegradable/photodegradable: It is deceptive to misrepresent, directly or by implication, that a product or package is degradable, biodegradable or photodegradable. An unqualified claim that a product or package is degradable, biodegradable or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, i.e., decompose into elements found in nature within a reasonably short period of time after customary disposal. Claims of degradability, biodegradability or photo degradability should be qualified to the extent necessary to avoid consumer deception about: (1) the product or package's ability to degrade in the environment where it is customarily disposed; and (2) the rate and extent of degradation.

Example 1:

A trash bag is marketed as "degradable," with no qualification or other disclosure. The marketer relies on soil burial tests to show that the product will decompose in the presence of water and oxygen. The trash bags are customarily disposed of in incineration facilities or at sanitary landfills that are managed in a way that inhibits degradation by minimizing moisture and oxygen. Degradation will be irrelevant for those trash bags that are incinerated and, for those disposed of in landfills, the marketer does not possess adequate substantiation that the bags will degrade in a reasonably short period of time in a landfill. The claim is therefore deceptive.

Example 2:

A commercial agricultural plastic mulch film is advertised, as Photodegradable "and qualified with the phrase," Will break down into small pieces if left uncovered in sunlight." The claim is supported by competent and reliable scientific evidence that the product will break down in a reasonably short period of time after being exposed to sunlight and into sufficiently small pieces to become part of the soil. The qualified claim

is not deceptive. Because the claim is qualified to indicate the limited extent of breakdown, the advertiser need not meet the elements for an unqualified photodegradable claim, i.e., that the product will not only break down, but also will decompose into elements found in nature.

Example 3:

A soap or shampoo product is advertised as "biodegradable," with no qualification or other disclosure. The manufacturer has competent and reliable scientific evidence demonstrating that the product, which is customarily disposed of in sewage systems, will break down and decompose into elements found in nature in a short period of time. The claim is not deceptive.

Example 4:

A plastic six-pack ring carrier is marked with a small diamond. Many state laws require that plastic six-pack ring carriers degrade if littered, and several state laws also require that the carriers be marked with a small diamond symbol to indicate that they meet performance standards for degradability. The use of the diamond, by itself, does not constitute a claim of degradability.

(3) (c) Compostable: It is deceptive to misrepresent, directly or by implication, that a product or package is compostable. A claim that a product or package is compostable should be substantiated by competent and Reliable scientific evidence that all the materials in the product or package will break down into, or otherwise become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device. Claims of compostability should be qualified to the extent necessary to avoid consumer deception. An unqualified claim may be deceptive if: (1) the package cannot be safely composted in a home compost pile or device; or (2) the claim misleads consumers about the environmental benefit provided when the product is disposed of in a landfill. A claim that a product is compostable in a municipal or institutional composting facility may need to be qualified to the extent necessary to avoid deception about the limited availability of such composting facilities.

Example 1:

A manufacturer indicates that its unbleached coffee filter is compostable. The unqualified claim is not deceptive provided the manufacturer can substantiate that the filter can be converted safely to usable compost in a timely manner in a home compost pile or device. If this is the case, it is not relevant that no local municipal or institutional composting facilities exist.

Example 2:

A lawn and leaf bag is labeled as "Compostable in California Municipal Yard Trimmings Composting Facilities." The bag contains toxic ingredients that are released into the compost material as the bag breaks down. The claim is deceptive if the presence of these toxic ingredients prevents the compost from being usable.

Example 3:

A manufacturer makes an unqualified claim that its package is compostable. Although municipal or institutional composting facilities exist where the product is sold, the package will not break down into the manufacturer should disclose that the package is not suitable for home composting.

Example 4:

A nationally marketed lawn and leaf bag is labeled "compostable." Also printed on the bag is a disclosure that the bag is not designed for use in home compost piles. The bags are in fact composted in yard trimmings composting programs in many communities around the country, but such programs are not available to a substantial majority of consumers or communities where the bag is sold. The claim is deceptive

because reasonable consumers living in areas not served by yard trimmings programs may understand the reference to mean that composting facilities accepting the bags are available in their area. To avoid deception, the claim should be qualified to indicate the limited availability of such programs, for example, by stating, "Appropriate facilities may not exist in your area." Other examples of adequate qualification of the claim include providing the approximate percentage of communities or the population for which such programs are available.

Example 5:

A manufacturer sells a disposable diaper that bears the legend, "This diaper can be composted where solid waste composting facilities exist. There are currently [X number of] solid waste composting facilities across the country." The claim is not deceptive; assuming that composting facilities are available as claimed and the manufacturer can substantiate that the diaper can be converted safely to usable compost in solid waste composting facilities.

Example 6:

A manufacturer markets yard trimmings bags only to consumers residing in particular geographic areas served by county yard trimmings composting programs. The bags meet specifications for these programs and are labeled, "Compostable Yard Trimmings Bag for County Composting Programs." The claim is not deceptive. Because the bags are compostable where they are sold, no qualification is required to indicate the limited availability of composting facilities.

(d) Recyclable: It is deceptive to misrepresent, directly or by implication, that a product or package is recyclable. A product or package should not be marketed as recyclable unless it can be collected, separated or otherwise recovered from the solid waste stream for reuse, or in the manufacture or assembly of another package or product, through an established recycling program. Unqualified claims of recyclability for a product or package may be made if the entire product or package, excluding minor incidental components, is recyclable. For products or packages that are made of both recyclable and non-recyclable components, the recyclable claim should be adequately qualified to avoid consumer deception about which portions or components of the product or package are recyclable. Claims of recyclability should be qualified to the extent necessary to avoid consumer deception about any limited availability of recycling programs and collection sites. If an incidental component significantly limits the ability to recycle a product or package, a claim of recyclability would be deceptive. A product or package that is made from recyclable material, but, because of its shape, size or some other attribute, is not accepted in recycling programs for such material, should not be marketed as recyclable.(4)

Example 1:

A packaged product is labeled with an unqualified claim, "recyclable." It is unclear from the type of product and other context whether the claim refers to the product or its package. The unqualified claim is likely to convey to reasonable consumers that both the entire product and its packaging that remain after normal use of the product, except for minor, incidental components, can be recycled. Unless each such message can be substantiated, the claim should be qualified to indicate what portions are recyclable.

Example 2:

A nationally marketed 8 oz. plastic cottage-cheese container displays the Society of the Plastics Industry (SPI) code (which consists of a design of arrows in a triangular shape containing a number and abbreviation identifying the component plastic resin) on the front label of the container, in close proximity to the product name and logo. The manufacturer's conspicuous use of the SPI code in this manner constitutes a recyclability claim. Unless recycling facilities for this container are available to a

substantial majority of consumers or communities, the claim should be qualified to disclose the limited availability of recycling programs for the container. If the SPI code, without more, had been placed in an inconspicuous location on the container (e.g., embedded in the bottom of the container) it would not constitute a claim of recyclability.

Example 3:

A container can be burned in incinerator facilities to produce heat and power. It cannot, however, be recycled into another product or package. Any claim that the container is recyclable would be deceptive.

Example 4:

A nationally marketed bottle bears the unqualified statement that it is "recyclable." Collection sites for recycling the material in question are not available to a substantial majority of consumers or communities, although collection sites are established in a significant percentage of communities or available to a significant percentage of the population. The unqualified claim is deceptive because, unless evidence shows otherwise, reasonable consumers living in communities not served by programs may conclude that recycling programs for the material are available in their area. To avoid deception, the claim should be qualified to indicate the limited availability of programs, for example, by stating "This bottle may not be recyclable in your area," or "Recycling programs for this bottle may not exist in your area." Other examples of adequate qualifications of the claim include providing the approximate percentage of communities or the population to whom programs are available.

Example 5:

A paperboard package is marketed nationally and labeled, "Recyclable where facilities exist." Recycling programs for this package are available in a significant percentage of communities or to a significant percentage of the population, but are not available to a substantial majority of consumers. The claim is deceptive because, unless evidence shows otherwise, reasonable consumers living in communities not served by programs that recycle paperboard packaging may understand this phrase to mean that such programs are available in their area. To avoid deception, the claim should be further qualified to indicate the limited availability of programs, for example, by using any of the approaches set forth in Example 4 above.

Example 6:

A foam polystyrene cup is marketed as follows: "Recyclable in the few communities with facilities for foam polystyrene cups." Collection sites for recycling the cup have been established in a half-dozen major metropolitan areas. This disclosure illustrates one approach to qualifying a claim adequately to prevent deception about the limited availability of recycling programs where collection facilities are not established in a significant percentage of communities or available to a significant percentage of the population. Other examples of adequate qualification of the claim include providing the number of communities with programs, or the percentage of communities or the population to which programs are available.

Example 7:

A label claims that the package "includes some recyclable material." The package is composed of four layers of different materials, bonded together. One of the layers is made from the recyclable material, but the others are not. While programs for recycling this type of material are available to a substantial majority of consumers, only a few of those programs have the capability to separate the recyclable layer from the non-recyclable layers. Even though it is technologically possible to separate the layers, the claim is not adequately qualified to avoid consumer deception. An appropriately qualified claim would be, "includes material recyclable in the few communities that collect multi-layer products." Other examples of adequate qualification of the claim

include providing the number of communities with programs, or the percentage of communities or the population to which programs are available.

Example 8:

A product is marketed as having a "recyclable" container. The product is distributed and advertised only in Missouri. Collection sites for recycling the container are available to a substantial majority of Missouri residents, but are not yet available nationally. Because programs are generally available where the product is marketed, the unqualified claim does not deceive consumers about the limited availability of recycling programs.

Example 9:

A manufacturer of one-time use photographic cameras, with dealers in a substantial majority of communities, collects those cameras through all of its dealers. After the exposed film is removed for processing, the manufacturer reconditions the cameras for resale and labels them as follows: "Recyclable through our dealership network." This claim is not deceptive, even though the cameras are not recyclable through conventional curbside or drop off recycling programs.

Example 10:

A manufacturer of toner cartridges for laser printers has established a recycling program to recover its cartridges exclusively through its nationwide dealership network. The company advertises its cartridges nationally as "Recyclable. Contact your local dealer for details." The company's dealers participating in the recovery program are located in a significant number -- but not a substantial majority -- of communities. The "recyclable" claim is deceptive unless it contains one of the qualifiers set forth in Example 4. If participating dealers are located in only a few communities, the claim should be qualified as indicated in Example 6.

Example 11:

An aluminum beverage can bears the statement "Please Recycle." This statement is likely to convey to consumers that the package is recyclable. Because collection sites for recycling aluminum beverage cans are available to a substantial majority of consumers or communities, the claim does not need to be qualified to indicate the limited availability of recycling programs.

(e) Recycled content: A recycled content claim may be made only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer). To the extent the source of recycled content includes pre-consumer material, the manufacturer or advertiser

must have substantiation for concluding that the pre-consumer material would otherwise have entered the solid waste stream. In asserting a recycled content claim, distinctions may be made between pre-consumer and post-consumer materials. Where such distinctions are asserted, any express or implied claim about the specific pre-consumer or post-consumer content It is deceptive to misrepresent, directly or by implication, that a product or package is made of recycled material, which includes recycled raw material, as well as used, (5) reconditioned and remanufactured components. Unqualified claims of recycled content may be made if the entire product or package, excluding minor, incidental components, is made from recycled material. For products or packages that are only partially made of recycled material, a recycled claim should be adequately qualified to avoid consumer deception about the amount, by weight, of recycled content in the finished product or package. Additionally, for products that contain used, reconditioned or remanufactured components, a recycled claim should be adequately qualified to avoid consumer deception about the nature of such components. No such qualification would be necessary in cases where it would be clear

to consumers from the context that a product's recycled content consists of used, reconditioned or remanufactured components.

Example 1:

A manufacturer routinely collects spilled raw material and scraps left over from the original manufacturing process. After a minimal amount of reprocessing, the manufacturer combines the spills and scraps with virgin material for use in further production of the same product. A claim that the product contains recycled material is deceptive since the spills and scraps to which the claim refers are normally reused by industry within the original manufacturing process, and would not normally have entered the waste stream.

Example 2:

A manufacturer purchases material from a firm that collects discarded material from other manufacturers and resells it. All of the material was diverted from the solid waste stream and is not normally reused by industry within the original manufacturing process. The manufacturer includes the weight of this material in its calculations of the recycled content of its products. A claim of recycled content based on this calculation is not deceptive because, absent the purchase and reuse of this material, it would have entered the waste stream.

Example 3:

A greeting card is composed 30% by fiber weight of paper collected from consumers after use of a paper product, and 20% by fiber weight of paper that was generated after completion of the paper-making process, diverted from the solid waste stream, and otherwise would not normally have been reused in the original manufacturing process. The marketer of the card may claim either that the product "contains 50% recycled fiber," or may identify the specific pre-consumer and/or post-consumer content by stating, for example, that the product contains 50% total recycled fiber, including 30% post-consumer."

Example 4:

A paperboard package with 20% recycled fiber by weight is labeled as containing "20% recycled fiber." Some of the recycled content was composed of material collected from consumers after use of the original product. The rest was composed of overrun newspaper stock never sold to customers. The claim is not deceptive.

Example 5:

A product in a multi-component package, such as a paperboard box in a shrink-wrapped plastic cover, indicates that it has recycled packaging. The paperboard box is made entirely of recycled material, but the plastic cover is not. The claim is deceptive since, without qualification, it suggests that both components are recycled. A claim limited to the paperboard box would not be deceptive.

Example 6:

A package is made from layers of foil, plastic, and paper laminated together, although the layers are indistinguishable to consumers. The label claims, "One of the three layers of this package is made of recycled plastic." The plastic layer is made entirely of recycled plastic. The claim is not deceptive provided the recycled plastic layer constitutes a significant component of the entire package.

Example 7:

A paper product is labeled as containing "100% recycled fiber." The claim is not deceptive if the advertiser can substantiate the conclusion that 100% by weight of the fiber in the finished product is recycled.

Example 8:

A frozen dinner is marketed in a package composed of a cardboard box over a plastic tray. The package bears the legend, "package made from 30% recycled material." Each packaging component amounts to one-half the weight of the total

package. The box is 20% recycled content by weight, while the plastic tray is 40% recycled content by weight. The claim is not deceptive, since the average amount of recycled material is 30%.

Example 9:

A paper greeting card is labeled as containing 50% recycled fiber. The seller purchases paper stock from several sources and the amount of recycled fiber in the stock provided by each source varies. Because the 50% figure is based on the annual weighted average of recycled material purchased from the sources after accounting for fiber loss during the production process, the claim is permissible.

Example 10:

A packaged food product is labeled with a three-chasing-arrows symbol without any further explanatory text as to its meaning. By itself, the symbol is likely to convey that the packaging is both "recyclable" and is made entirely from recycled material. Unless both messages can be substantiated, the claim should be qualified as to whether it refers to the package's recyclability and/or its recycled content. If a "recyclable claim" is being made, the label may need to disclose the limited availability of recycling programs for the package. If a recycled content claim is being made and the packaging is not made entirely from recycled material, the label should disclose the percentage of recycled content.

Example 11:

A laser printer toner cartridge containing 25% recycled raw materials and 40% reconditioned parts is labeled "65% recycled content; 40% from reconditioned parts." This claim is not deceptive.

Example 12:

A store sells both new and used sporting goods. One of the items for sale in the store is a baseball helmet that, although used, is no different in appearance than a brand new item. The helmet bears an unqualified "Recycled" label. This claim is deceptive because, unless evidence shows otherwise, consumers could reasonably believe that the helmet is made of recycled raw materials, when it is in fact a used item. An acceptable claim would bear a disclosure clearly stating that the helmet is used.

Example 13:

A manufacturer of home electronics labels its videocassette recorders ("VCRs") as "40% recycled." In fact, each VCR contains 40% reconditioned parts. This claim is deceptive because consumers are unlikely to know that the VCR's recycled content consists of reconditioned parts.

Example 14:

A dealer of used automotive parts recovers a serviceable engine from a vehicle that has been totaled. Without repairing, rebuilding, remanufacturing, or in any way altering the engine or its components, the dealer attaches a "Recycled" label to the engine, and offers it for resale in its used auto parts store. In this situation, an unqualified recycled content claim is not likely to be deceptive because consumers are likely to understand that the engine is used and has not undergone any rebuilding.

Example 15:

An automobile parts dealer purchases a transmission that has been recovered from a junked vehicle. Eighty-five percent by weight of the transmission was rebuilt and 15% constitutes new materials. After rebuilding (6) the transmission in accordance with industry practices, the dealer packages it for resale in a box labeled "Rebuilt Transmission," or "Rebuilt Transmission (85% recycled content from rebuilt parts)," or "Recycled Transmission (85% recycled content from rebuilt parts)." These claims are not likely to be deceptive.

(f) Source reduction: It is deceptive to misrepresent, directly or by implication, that a product or package has been reduced or is lower in weight, volume or toxicity. Source reduction claims should be qualified to the extent necessary to avoid consumer deception about the amount of the source reduction and about the basis for any comparison asserted.

Example 1:

An ad claims that solid waste created by disposal of the advertiser's packaging is "now 10% less than our previous package." The claim is not deceptive if the advertiser has substantiation that shows that disposal of the current package contributes 10% less waste by weight or volume to the solid waste stream when compared with the immediately preceding version of the package.

Example 2:

An advertiser notes that disposal of its product generates "10% less waste." The claim is ambiguous. Depending on contextual factors, it could be a comparison either to the immediately preceding product or to a competitor's product. The "10% less waste" reference is deceptive unless the seller clarifies which comparison is intended and substantiates that comparison, or substantiates both possible interpretations of the claim.

(g) Refillable: It is deceptive to misrepresent, directly or by implication, that a package is refillable. An unqualified refillable claim should not be asserted unless a system is provided for: (1) the collection and return of the package for refill; or (2) the later refill of the package by consumers with product subsequently sold in another package. A package should not be marketed with an unqualified refillable claim, if it is up to the consumer to find new ways to refill the package.

Example 1:

A container is labeled "refillable x times." The manufacturer has the capability to refill returned containers and can show that the container will withstand being refilled at least x times. The manufacturer, however, has established no collection program. The unqualified claim is deceptive because there is no means for collection and return of the container to the manufacturer for refill.

Example 2:

A bottle of fabric softener states that it is in a "handy refillable container." The manufacturer also sells a large-sized container that indicates that the consumer is expected to use it to refill the smaller container. The manufacturer sells the large-sized container in the same market areas where it sells the small container. The claim is not deceptive because there is a means for consumers to refill the smaller container from larger containers of the same product.

(h) Ozone safe and ozone friendly: It is deceptive to misrepresent, directly or by implication, that a product is safe for or "friendly" to the ozone layer or the atmosphere. For example, a claim that a product does not harm the ozone layer is deceptive if the product contains an ozone-depleting substance.

Example 1:

A product is labeled "ozone friendly." The claim is deceptive if the product contains any ozone-depleting substance, including those substances listed as Class I or Class II chemicals in Title VI of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and others subsequently designated by EPA as ozone-depleting substances. Chemicals that have been listed or designated as Class I are chlorofluorocarbons (CFCs), halons, carbon tetrachloride, 1,1,1-trichloroethane, methyl bromide and hydrobromofluorocarbons (HBFCs). Chemicals that have been listed as Class II are hydrochlorofluorocarbons (HCFCs).

Example 2:

An aerosol air freshener is labeled "ozone friendly." Some of the product's ingredients are volatile organic compounds (VOCs) that may cause smog by contributing to ground-level ozone formation. The claim is likely to convey to consumers that the product is safe for the atmosphere as a whole, and is therefore, deceptive.

Example 3:

The seller of an aerosol product makes an unqualified claim that its product "Contains no CFCs." Although the product does not contain CFCs, it does contain HCFC-22, another ozone depleting ingredient. Because the claim "Contains no CFCs" may imply to reasonable consumers that the product does not harm the ozone layer, the claim is deceptive.

Example 4:

A product is labeled "This product is 95% less damaging to the ozone layer than past formulations that contained CFCs." The manufacturer has substituted HCFCs for CFC-12, and can substantiate that this substitution will result in 95% less ozone depletion. The qualified comparative claim is not likely to be deceptive.

§ 260.8 Environmental assessment

NATIONAL ENVIRONMENTAL POLICY ACT: In accordance with section 1.83 of the FTC's Procedures and Rules of Practice (7) and section 1501.3 of the Council on Environmental Quality's regulations for implementing the procedural provisions of National Environmental Policy Act, 42 U.S.C. 4321 et seq. (1969), (8) the Commission prepared an environmental assessment when the guides were issued in July 1992 for purposes of providing sufficient evidence and analysis to determine whether issuing the Guides for the Use of Environmental Marketing Claims required preparation of an environmental impact statement or a finding of no significant impact. After careful study, the Commission concluded that issuance of the Guides would not have a significant impact on the environment and that any such impact "would be so uncertain that environmental analysis would be based on speculation." (9) The Commission concluded that an environmental impact statement was therefore not required. The Commission based its conclusions on the findings in the environmental assessment that issuance of the guides would have no quantifiable environmental impact because the guides are voluntary in nature, do not preempt inconsistent state laws, are based on the FTC's deception policy, and, when used in conjunction with the Commission's policy of case-by-case enforcement, are intended to aid compliance with section 5(a) of the FTC Act as that Act applies to environmental marketing claims. The Commission has concluded that the modifications to the guides in this Notice will not have a significant effect on the environment, for the same reasons that the issuance of the original guides in 1992 and the modifications to the guides in 1996 were deemed not to have a significant effect on the environment. Therefore, the Commission concludes that an environmental impact statement is not required in conjunction with the issuance of the 1998 modifications to the Guides for the Use of Environmental Marketing Claims By direction of the Commission. Donald S. Clark, Secretary

# APPENDIX B

**PROPOSED REVISIONS TO THE GREEN GUIDES**  
**TABLE OF CONTENTS**

I.	<u>Overview.</u>	2
II.	<u>Background.</u>	6
A.	The Green Guides.	6
B.	The Green Guides Review.	7
1.	First Request for Public Comment.	7
2.	Workshops and Corresponding Requests for Public Comment.	8
3.	Consumer Perception Evidence.	9
a.	Commenters' Submissions.	10
b.	The Commission's Consumer Perception Study.	11
C.	Outline of This Notice.	13
III.	<u>Proposed Non-substantive Changes to the Current Green Guides.</u>	13
IV.	<u>General Issues.</u>	15
A.	Continuing Need for the Guides.	15
1.	Comments.	15
2.	Analysis.	16
B.	Industry Compliance.	17
1.	Comments.	17
2.	Analysis.	19
C.	Changes in Technology or Economic Conditions.	21
1.	Comments.	21
2.	Analysis.	23
D.	International Laws.	23
1.	Comments.	23
2.	Analysis.	25
E.	Overlap with Other Federal, State, or Local Laws.	26
1.	Comments.	26
2.	Analysis.	28
F.	Life Cycle Analysis.	29
1.	Comments.	30
a.	LCAs as Marketing Claims.	30
b.	LCAs as Substantiation.	32
2.	Consumer Perception Evidence.	33
3.	Analysis.	34
V.	<u>Claims Addressed by the Current Green Guides.</u>	35
A.	General Environmental Benefit Claims.	35
1.	The Current Guides.	35
2.	Comments.	36
a.	Substantiating General Environmental Benefit Claims – Life Cycle Considerations.	36

	b.	Qualifying General Environmental Benefit Claims.....	39
	c.	Prohibiting All General Environmental Benefit Claims. ....	40
3.		Consumer Perception Evidence.....	41
4.		Analysis and Guidance.....	44
	a.	Unqualified General Environmental Benefit Claims.....	44
	b.	Qualified General Environmental Benefit Claims.....	46
B.		Certifications and Seals of Approval.....	50
	1.	The Current Guides. ....	50
	2.	Comments. ....	51
	a.	Use of Certifications and Seals in Marketing. ....	53
	b.	Third-Party Certifications as Substantiation. ....	56
	3.	Analysis and Guidance.....	58
	a.	Certifications and Seals as Endorsements. ....	59
	b.	Certifications and Seals as General Environmental Benefit Claims. ....	62
	c.	Third-Party Certifications as Substantiation. ....	64
C.		Degradable Claims.....	66
	1.	The Current Guides. ....	66
	2.	Comments. ....	67
	3.	Consumer Perception Evidence.....	69
	4.	Analysis and Guidance.....	69
	a.	Solid Waste – Time Period for Degradation. ....	70
	b.	Solid Waste – Substantiation.....	71
	c.	Liquid Waste. ....	72
	d.	Emerging Oxo-degradable Claims.....	73
D.		Compostable Claims. ....	74
	1.	The Current Guides. ....	74
	2.	Comments. ....	75
	3.	Consumer Perception Evidence.....	75
	4.	Analysis and Guidance.....	76
	a.	Limited Availability of Composting Facilities. ....	76
	b.	Substantiating Compostable Claims. ....	77
	c.	Time Period for Composting.....	79
E.		Recyclable Claims. ....	80
	1.	The Current Guides. ....	80
	2.	Comments. ....	81
	a.	The Substantial Majority Threshold. ....	81
	i.	Lower the Substantial Majority Threshold. ....	82
	ii.	Quantify the Substantial Majority Threshold.....	83
	iii.	Permit Positive Disclosures for Recyclable Claims.....	84
	b.	Use of the SPI Code.....	84
	3.	Analysis and Guidance.....	86
	a.	The Substantial Majority Threshold. ....	87
	i.	Retaining the Substantial Majority Threshold.....	87
	ii.	Quantifying the Substantial Majority Threshold. ....	88
	b.	Use of Positive Disclosures.....	90

	c.	Use of the SPI Code.....	91
F.		Recycled Content Claims.....	91
	1.	The Current Guides.....	91
	2.	Comments.....	93
	a.	Pre-consumer Recycled Content Claims for Textiles.....	93
	b.	Distinction Between Pre- and Post-consumer Recycled Content.....	94
	c.	Calculating Recycled Content.....	95
	3.	Consumer Perception Evidence.....	96
	4.	Analysis and Guidance.....	97
	a.	Pre-consumer Recycled Content Claims for Textiles.....	97
	b.	Distinction Between Pre- and Post-consumer Recycled Content.....	99
	c.	Calculating Recycled Content.....	100
	d.	Unqualified Recycled Content Claims.....	102
	e.	Implied Claims.....	102
G.		Ozone-Safe and Ozone-Friendly Claims.....	104
	1.	The Current Guides.....	104
	2.	Comments.....	105
	3.	Analysis and Guidance.....	106
H.		Free-of and Non-toxic Claims.....	107
	1.	The Current Guides.....	107
	2.	Comments.....	109
	a.	Free-of Claims.....	109
	b.	Non-toxic Claims.....	112
	3.	Analysis and Guidance.....	113
	a.	Free-of Claims.....	113
	b.	Non-toxic Claims.....	116
I.		Source Reduction Claims.....	117
J.		Refillable Claims.....	117
VI.		<u>Claims Not Addressed by the Current Green Guides</u> .....	118
A.		Sustainable Claims.....	118
	1.	Comments.....	118
	2.	Consumer Perception Evidence.....	125
	3.	Analysis.....	127
B.		Organic and Natural Claims.....	128
	1.	Overview – Guidance from Other Agencies.....	129
	a.	Organic Claims.....	129
	b.	Natural Claims.....	130
	2.	Comments.....	131
	a.	Organic Claims.....	131
	b.	Natural Claims.....	134
	3.	Consumer Perception Evidence.....	135
	4.	Analysis.....	136
	a.	Organic Claims.....	136
	i.	Organic Claims for Agricultural Products.....	137
	ii.	Organic Claims for Non-agricultural Products.....	138

	b.	Natural Claims.....	138
C.		Renewable Materials Claims.....	140
	1.	Comments.....	140
	a.	Unqualified Renewable Claims.....	141
	b.	Elements of Renewable Materials Claims.....	141
	c.	Quantity of Renewable Materials.....	144
	d.	Substantiating Renewable Materials Claims.....	145
	e.	Confusion Between Renewable Materials Claims and Biodegradability.....	146
	2.	Consumer Perception Evidence.....	147
	3.	Analysis and Guidance.....	148
	a.	Qualifying Renewable Materials Claims.....	149
	b.	Quantity of Renewable Materials.....	150
	c.	Substantiating Renewable Materials Claims.....	150
	d.	Biobased Claims.....	151
D.		Renewable Energy Claims.....	152
	1.	Overview.....	152
	2.	Comments.....	154
	a.	Defining Renewable Energy and Interpreting Renewable Energy Claims.....	154
	b.	REC Disclosures.....	156
	c.	Double Counting.....	157
	3.	Consumer Perception Evidence.....	157
	4.	Analysis and Guidance.....	160
	a.	Consumer Interpretation of Renewable Energy Claims.....	160
	b.	REC Disclosures.....	163
	c.	Geographic Location of Renewable Energy Generation.....	164
	d.	Double Counting.....	165
E.		Carbon Offset Claims.....	166
	1.	Overview.....	166
	2.	Comments.....	168
	a.	Defining Carbon Offsets and Requiring Disclosures.....	168
	b.	Timing of Emission Reductions.....	170
	c.	Substantiating Carbon Offset Claims – Additionality.....	171
	d.	Substantiating Carbon Offset Claims – Use of RECs.....	176
	3.	Consumer Perception Evidence.....	178
	4.	Analysis and Guidance.....	181
	a.	Consumer Interpretation of Claims and Disclosures.....	182
	b.	Timing of Emission Reductions.....	183
	c.	Substantiating Carbon Offset Claims – Tracking Offsets.....	184
	d.	Substantiating Carbon Offset Claims – Additionality.....	184
	e.	Substantiating Carbon Offset Claims – Use of RECs.....	186
VII.		<u>Request for Comment</u> .....	186
VIII.		<u>Proposed, Revised Green Guides</u> .....	193

**FEDERAL TRADE COMMISSION**

**16 CFR Part 260**

**Guides for the Use of Environmental Marketing Claims**

**AGENCY:** Federal Trade Commission.

**ACTION:** Request for public comment on proposed, revised Guides for the Use of Environmental Marketing Claims.

**SUMMARY:** The Federal Trade Commission (“FTC” or “Commission”) conducted a comprehensive review of its Guides for the Use of Environmental Marketing Claims (“Green Guides” or “Guides”) and proposes retaining the Guides. After reviewing the public comments, the transcripts of three public workshops that explored emerging issues, and the results of its consumer perception research, the Commission proposes several modifications and additions to the Guides. These proposed revisions aim to respond to changes in the marketplace and help marketers avoid making unfair or deceptive environmental marketing claims. The Commission seeks comment on these proposed revisions and other issues raised in this Notice.

**DATES:** Comments must be received on or before December 10, 2010.

**ADDRESSES:** Interested parties are invited to submit written comments electronically or in paper form, by following the instructions in the Request for Comment part of the SUPPLEMENTARY INFORMATION section below. Comments in electronic form should be submitted at <https://ftcpublic.commentworks.com/ftc/revisedgreenguides> (and following the instructions on the web-based form). Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580, in the manner detailed in the Request for Comment part of the SUPPLEMENTARY INFORMATION section below.

**FOR FURTHER INFORMATION CONTACT:** Laura Koss, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 202-326-2890.

**SUPPLEMENTARY INFORMATION:**

**I. Overview**

Environmental marketing claims are useful sources of information for consumers, but only when they are true. Ensuring that such claims are truthful is particularly important because consumers often cannot determine for themselves whether a product, package, or service actually possesses the advertised environmental attribute. Because there is a potential for consumer confusion about environmental claims, guidance from the FTC can benefit both businesses and consumers alike.

To help marketers make truthful and substantiated environmental claims, the Federal Trade Commission issued the Guides for the Use of Environmental Marketing Claims (“Green Guides” or “Guides”) in 1992, and revised them in 1996 and 1998. The Guides help marketers avoid making deceptive claims by outlining general principles that apply to all environmental marketing claims and providing specific guidance about how reasonable consumers are likely to interpret particular claims, how marketers can substantiate them, and how they can qualify those claims to avoid consumer deception.

Periodic review ensures that the Guides keep pace with evolving consumer perceptions and new environmental claims. Since the FTC last revised them in 1998, the marketplace has been dynamic. As consumers have become increasingly concerned about the environmental impact of the products and services they use, marketers have expanded their promotion of the environmental attributes of their products and services. Some of these promotions have prompted enforcement action by the FTC, including cases challenging certain environmental

benefit claims as false, such as “degradable” paper products or so-called “bamboo” textiles that are made with an “eco-friendly manufacturing process.” And, an increasing number of environmental claims are new or were not common when the Guides were last reviewed and, therefore, are not addressed by the current Guides. Thus, beginning in 2007, the FTC sought public comments on the continuing effectiveness of the Guides, held public workshops on emerging green marketing issues, and conducted research on consumer perception of environmental claims. This review affirms that the Guides have benefitted consumers and businesses but suggests that the Guides should be updated.

The FTC, therefore, proposes several revisions to the Guides. Many of these revisions strengthen, add specificity to, or enhance the accessibility of the current guidance on general “green” claims and environmental seals, and claims such as compostable, degradable, and recyclable. Others propose new guidance regarding emerging claims not currently addressed in the Guides, such as renewable materials, renewable energy, and carbon-offsets. The FTC also proposes non-substantive changes throughout the Guides to make them easier to read and use, including simplifying language and reorganizing sections to make information easier to find. The FTC is now seeking further public comment on each of these proposed modifications to the Guides.

First, the FTC proposes strengthening its guidance regarding general environmental benefit claims. The FTC’s consumer perception study confirms what the current Guides already state – unqualified claims that an item is “environmentally friendly” or “eco-friendly” are likely to convey that it has specific and far-reaching environmental benefits. Very few products, if any, have all of the attributes consumers seem to perceive from such claims. Therefore, these claims may be impossible to substantiate. Accordingly, the proposed guidance cautions

marketers not to make unqualified general claims. Our study indicates, however, that marketers may be able to effectively qualify these claims to focus consumers on the specific environmental benefits that marketers could substantiate. Therefore, the proposed revised Guides provide more prominent guidance on how to adequately qualify general environmental claims.

Similarly, the proposed revised Guides include a new section devoted to certifications and seals of approval, which currently are addressed in a single example. The proposed new section gives more prominence to the current Guides' admonition that unqualified seals of approval and certifications likely constitute general environmental benefit claims. It also more directly cautions marketers not to use unqualified certifications or seals, i.e., certifications or seals that do not state the basis for the certification. The proposed section further advises marketers that qualifications should be clear and prominent and should convey that the certification or seal of approval refers only to specific and limited benefits. Moreover, this new section emphasizes that certifications and seals of approval constitute endorsements covered by the FTC's Endorsement Guides and includes examples explaining how those Guides apply to environmental claims.

The proposed revised Guides also suggest clarification for claims that a product is degradable, compostable, or "free of" a particular substance, and highlight guidance for recyclable claims. If a marketer claims, in certain cases, that a product is "degradable," it should decompose in a "reasonably short period of time" – no more than one year. Moreover, if a solid product is destined for a landfill, an incinerator, or a recycling facility, the marketer should not make unqualified degradable claims because the product will not degrade within a year. Similarly, when making an unqualified "compostable" claim, a marketer should be able to show that the product will break down into usable compost in a safe and timely manner –

approximately the same time as the materials with which it is composted. The proposed Guides also clarify and expand guidance about claims that products are “free of” particular materials. Finally, the proposed Guides highlight advice in the current guides that the use of “recyclable” depends on how many consumers and communities have access to recycling facilities for the advertised product.

The proposed revised Guides also include new sections for claims not addressed by the current Guides, such as claims about the use of “renewable materials” and “renewable energy.” The FTC’s consumer perception research suggests that these claims may be misleading because consumers interpret them differently than marketers intend. The proposed new sections advise marketers to provide context for these claims, in the form of specific information about the materials and energy used. Because the FTC’s study did not test the effect of qualifying these claims, however, the FTC specifically seeks comment on whether providing this, or other information, would reduce consumer confusion. The proposed revised Guides also provide advice about “carbon offset” claims: marketers should disclose if the offset purchase funds emission reductions that will not occur within 2 years, should make sure that they do not double count offsets, and should not advertise an offset if the activity that produces the offset is already required by law.

Environmental marketing presents complex, challenging issues. Despite the voluminous record established by this review, the FTC would benefit from additional input in many areas, including for the claims discussed above and also for “organic” and “made with recycled content” claims. Therefore, the FTC invites comment on all aspects of the proposed revised Guides, as well as on the specific questions it poses in this Notice. The FTC will take all suggestions into account as it works to finalize the revised Guides.

## **II. Background**

### **A. The Green Guides**

The Commission issued the Green Guides, 16 CFR Part 260, to help marketers avoid making environmental claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. 45.<sup>1</sup> Industry guides, such as these, are administrative interpretations of the law. Therefore, they do not have the force and effect of law and are not independently enforceable. The Commission, however, can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the Guides. In any such enforcement action, the Commission must prove that the challenged act or practice is unfair or deceptive.

The Green Guides outline general principles that apply to all environmental marketing claims and provide specific guidance regarding many environmental benefit claims. For each such claim, the Green Guides explain how reasonable consumers are likely to interpret the claim, describe the basic elements necessary to substantiate the claim, and present options for qualifying the claim to avoid deception.<sup>2</sup> The illustrative qualifications provide guidance for marketers who want assurance about how to make nondeceptive environmental claims, but do not represent the only permissible approaches to qualifying a claim. This guidance assists

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<sup>1</sup> The Commission issued the Green Guides in 1992 (57 FR 36363 (Aug. 13, 1992)), and subsequently revised them in 1996 (61 FR 53311 (Oct. 11, 1996)) and 1998 (63 FR 24240 (May 1, 1998)). The FTC administers several other environmental and energy-related rules and guides. See Guide Concerning Fuel Economy Advertising for New Automobiles (16 CFR Part 259), Appliance Labeling Rule (16 CFR Part 305), Fuel Rating Rule (16 CFR Part 306), Alternative Fuels and Alternative Fueled Vehicles Rule (16 CFR Part 309), Recycled Oil Rule (16 CFR Part 311), and Labeling and Advertising of Home Insulation Rule (16 CFR Part 460).

<sup>2</sup> The Guides, however, do not establish standards for environmental performance or prescribe testing protocols.

marketers in making truthful and substantiated statements about the environmental attributes of their products and services.

In order to adequately substantiate environmental marketing claims, the Guides advise marketers that they will often need “competent and reliable scientific evidence.”<sup>3</sup> The Guides currently define competent and reliable scientific evidence 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.”<sup>4</sup> Since the last Green Guides review, the Commission has clarified this standard, stating that such evidence “should be sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that [a] representation is true.”<sup>5</sup>

## **B. The Green Guides Review**

### **1. First Request for Public Comment<sup>6</sup>**

Since the Commission last revised the Green Guides in 1998, both anecdotal evidence and empirical research indicate that consumers have a heightened awareness of environmental

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<sup>3</sup> 16 CFR 260.5.

<sup>4</sup> Id.

<sup>5</sup> See, e.g., Indoor Tanning Ass’n, Docket No. C-4290 (May 13, 2010) (consent order); see also FTC, Dietary Supplements: An Advertising Guide for Industry (2001), available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus09.pdf> (stating that “the studies relied on by an advertiser would be largely consistent with the surrounding body of evidence”).

<sup>6</sup> Citations to comments identify the commenter, the particular Federal Register Notice to which the commenter responded (533431– Green Guides Review; 533254 – Carbon Offsets and Renewable Energy Certificates Workshop; 534743 – Green Packaging Workshop; or 536013 – Green Building and Textiles Workshop), and the assigned comment number.

concerns and, therefore, place increased importance on buying products and services that will cause less harm to the environment.<sup>7</sup> Marketers, in turn, have responded by touting the environmental attributes of their products and services. Because of the proliferation of these environmental claims, the Commission began its decennial Guides review on November 26, 2007, one year before scheduled. The Commission's November 2007 Federal Register Notice sought comment on a number of general issues, including the continuing need for and economic impact of the Guides, the effect of the Guides on the accuracy of environmental claims, and whether the Commission should provide guidance on certain environmental claims – such as carbon neutral, sustainable, and renewable – not currently addressed in the Guides.<sup>8</sup> The Commission received 75 written comments in response.

## **2. Workshops and Corresponding Requests for Public Comment**

To establish a more robust record, the Commission also held three public workshops to explore emerging environmental marketing claims. Specifically, the workshops addressed

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<sup>7</sup> See, e.g., American Chemistry Council (“ACC”), Comment 533431-00023 at 3 (citing a 2005 nationwide survey finding that 90 percent of consumers base their buying decisions, in part, on the effect their choices will have on the environment); Environmental Packaging International (“EPI”), Comment 533431-00063 at 8 (citing studies by the Natural Marketing Institute, Landor Associates, Datamonitor, Organic Consumers Association, and Global Marketing Insite); Saint-Gobain Corporation (“Saint-Gobain”), Comment 533431-00037 at 5-6 (citing studies by Consumers International, American Environics, EcoPinion); Seventh Generation, Comment 533431-00033 at 2 (citing 2007 Cone Consumer Environmental Survey); American Beverage Association (“ABA”), Comment 533431-00066 at 2-3; Dow Chemical Company (“Dow”), Comment 533431-00010 at 1; North American Insulation Manufacturers Association (“NAIMA”), Comment 536013-00017 at 5-6; Procter & Gamble Company (“P&G”), Comment 533431-00070 at 1; The Advertising Trade Associations (“ATA”), Comment 533431-00041 at 7.

<sup>8</sup> 72 FR 66091 (Nov. 27, 2007). This review has taken some time because, in order to provide as useful advice as possible, the Commission conducted a consumer perception study of certain environmental marketing claims. The Commission discusses this study in detail below.

carbon offsets and renewable energy certificates;<sup>9</sup> green packaging claims;<sup>10</sup> and green building and textiles.<sup>11</sup> The workshops brought together over 450 people representing industry, government, consumer groups, the academic community, and non-profit environmental organizations.<sup>12</sup> The Commission requested comment in connection with each workshop<sup>13</sup> and received an additional 125 written comments.<sup>14</sup>

### **3. Consumer Perception Evidence**

Because the Guides are based on consumer understanding of environmental claims, consumer perception research can provide the Commission with the best evidence upon which to formulate guidance. The following discusses commenters' submissions of consumer research and the Commission's 2009 consumer perception study.

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<sup>9</sup> See 72 FR 66094 (Nov. 27, 2007).

<sup>10</sup> See 73 FR 11371 (Mar. 3, 2008).

<sup>11</sup> See 73 FR 32662 (June 10, 2008).

<sup>12</sup> Citations to workshop transcripts or presentations identify the speaker's name and organization, the relevant workshop, and either the transcript page or the hyperlink to the speaker's presentation.

<sup>13</sup> Documents relating to the Green Guides review, including the public comments; workshop agendas, presentations, and transcripts; and the Commission's consumer perception study are available at <http://www.ftc.gov/green>.

<sup>14</sup> The Union of Concerned Scientists submitted a comment containing letters from over 16,000 individuals. Although approximately 1,300 of those letters vary in form, the substance of all the letters is the same. They urged the FTC to review the environmental marketing of corn-based ethanol as a "green" alternative to gasoline. The comments suggested that such marketing is not based on "sound science" because corn ethanol production could cause an increase in the production of global warming pollution over regular gasoline.

**a. Commenters' Submissions**

Although the Notices solicited consumer perception evidence, few commenters submitted such research.<sup>15</sup> Rather, commenters submitted research concerning: (1) consumers' attitudes and beliefs about environmental claims;<sup>16</sup> (2) consumers' environmental concerns and interests;<sup>17</sup> and (3) consumers' behavior regarding environmental claims.<sup>18</sup> These surveys do not provide a basis upon which the Commission can formulate guidance on how to make truthful

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<sup>15</sup> The Commission discusses the consumer perception research that commenters submitted in the substantive parts of this Notice.

<sup>16</sup> ACC, Comment 536013-00030 at 2 (citing a survey of consumer descriptions of a "green company"); Rick L. Cantrell, Sustainable Forestry Initiative, Inc. ("SFI"), Green Building and Textiles Workshop Presentation at <http://www.ftc.gov/bcp/workshops/buildingandtextiles/presentations/3rcantrell.pdf> (citing a survey regarding consumer concerns about "sustainable forestry"); P&G, Comment 533431-00070 at 1 (citing a study of consumer consideration of "sustainability factors" in purchasing decisions); Kelly Tullier, Grocery Manufacturers Association ("GMA"), Green Packaging Workshop Presentation at <http://www.ftc.gov/bcp/workshops/packaging/presentations/tullier.pdf> (same); U.S. Green Building Council ("USGBC"), Comment 536013-00029 at 2 (citing a study regarding consumer knowledge of green homebuilding).

<sup>17</sup> John Kalkowski, Packaging Digest ("Packaging Digest"), Green Packaging Workshop Tr. at 22-23 (citing a study concerning consumers' lack of interest in environmental activities); Patricia F. O'Leary, Cotton Incorporated ("Cotton Incorporated"), Green Building and Textiles Workshop Tr. at 28 (citing a study regarding consumers' reaction to apparel items that are not "environmentally friendly"); NAIMA, Comment 536013-00027 at 4-5 (citing a study regarding consumers' concern about global warming); Saint-Gobain, Comment 533431-00037 at 4-5 (same); Seventh Generation, Comment 533431-00033 at 2 (citing studies of consumers' interest in the environment).

<sup>18</sup> GMA, Green Packaging Workshop Tr. at 111 (citing a survey concerning consumer Internet use to get information about environmental initiatives and products); National Recycling Coalition ("NRC"), Comment 533431-00078 at 2 (discussing its research concerning consumers' recycling behavior); Sam Rashkin, Environmental Protection Agency, Green Building and Textiles Workshop Tr. at 178-179 (citing a survey concerning consumer awareness of the Energy Star name and logo); Kirsten Ritchie, Gensler ("Gensler"), Green Building and Textiles Workshop Tr. at 109 (same); Timothy Smith, University of Minnesota ("Univ. of Minnesota"), Comment 536013-00004 at 1 (citing a study examining life cycle information in advertising).

and nondeceptive environmental marketing claims. Accordingly, the Commission conducted its own consumer perception study in July and August of 2009.

**b. The Commission's Consumer Perception Study**

To conduct the study, the FTC contracted with Harris Interactive, a consumer research firm with substantial experience surveying consumer communications.<sup>19</sup> The study sampled members of the contractor's Internet panel, which consists of more than four million individuals recruited through a variety of convenience sampling procedures.<sup>20</sup> From this sample, Harris selected individuals who were invited to complete the survey. Participants were selected to correspond, as much as possible, with the known distribution of U.S. adults aged 18 and over in terms of age, gender, race and ethnicity, and geographic region. A total of 3,777 individuals completed the survey.<sup>21</sup>

Harris presented participants with several questions aimed at determining how they understand certain environmental claims. The first portion of the study tested the following claims: "green," "eco-friendly," "sustainable," "made with renewable materials," "made with renewable energy," and "made with recycled materials." The questionnaire asked about both unqualified and qualified general environmental benefit claims (e.g., "green" vs. "green - made with recycled materials"), as well as specific-attribute claims alone (e.g., "made with recycled

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<sup>19</sup> The Commission's consumer perception study is available at <http://www.ftc.gov/green>.

<sup>20</sup> The sample for this research, therefore, does not necessarily constitute a true, random sample of the adult U.S. population. However, because the study focused primarily on comparing responses across randomly assigned treatment groups, the Internet panel provided an appropriate sample frame.

<sup>21</sup> Additional detail on sample selection is available in the methodology report prepared by Harris which is available at <http://www.ftc.gov/green>.

materials”). The study tested these claims against a non-environmental control claim (e.g., “new and improved”). Moreover, to examine whether consumers’ understanding of the claims differed depending on the product being advertised, the study tested the claims as they appeared on three different products – wrapping paper, a laundry basket, and kitchen flooring.<sup>22</sup> Harris tested 16 different claims with each of the three different products, resulting in a total of 48 product-claim pairs. To avoid skewing an individual’s answers by asking the same person essentially the same set of questions multiple times, and to limit the length of the survey presented to any individual, each participant was asked questions regarding only two randomly-selected product-claim pairs.

The second portion of the study tested carbon offset and carbon neutral claims. The questionnaire asked half of the participants about carbon offsets and half about carbon neutral claims. An initial screening question gauged whether respondents understood these concepts by asking them to identify what a carbon offset was or what carbon neutral meant. Only those participants who demonstrated a general understanding of these terms continued with the remainder of the study.

Both portions of the study used a combination of open- and closed-ended questions exploring the same topic. The study questionnaire described the claims to participants, rather than presenting an actual advertisement. For example, a participant was asked: “Suppose you see some wrapping paper advertised or labeled as ‘green - made with recycled materials.’”

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<sup>22</sup> The study results support the current Guides’ approach of providing general, rather than product-specific, guidance because consumers generally viewed the tested claims similarly for the three tested products. Moreover, the results were comparable for respondents who indicated concern and interest in environmental issues and those who did not.

After the study's completion, Harris provided FTC staff with data summaries. The results of this study are discussed below in Parts IV.F, V, and VI of this Notice.<sup>23</sup>

### **C. Outline of This Notice**

After reviewing the public comments, the workshop proceedings, and the consumer perception evidence, the Commission proposes retaining the Green Guides and making several revisions. Part III of this Notice proposes three non-substantive changes to make the Guides easier to read and use. Part IV discusses comments on general issues, such as the continuing need for the Guides and general comments on life cycle analysis. Part V discusses issues relating to specific claims that already are addressed by the Guides. Part VI addresses environmental marketing claims not currently covered by the Guides. Part VII requests public comment on the issues raised in this Notice, including the proposed, revised Green Guides. Finally, Part VIII sets out the proposed, revised Guides.

### **III. Proposed Non-substantive Changes to the Current Green Guides**

The Commission proposes three changes to make the Guides easier to read and use. First, wherever possible, the Commission has simplified the Guides' language to make it clearer and easier to understand. For example, the FTC has replaced its formal, legal description of the Guides in Section 260.1 with a more reader-friendly version. Similarly, the Commission has removed unnecessary language and redundant examples from all sections of the Guides.<sup>24</sup>

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<sup>23</sup> The methodology used for this study may not be appropriate for testing consumer perception of a particular advertising claim. Among other differences, marketers must test the claim in the context of a specific advertisement, which was impossible here.

<sup>24</sup> Among other things, the Commission proposes deleting from Section 260.5 a reference to the FTC's law enforcement actions in the green area and the telephone number to call to obtain copies of those cases. Case information may be found on the Commission's website, <http://www.ftc.gov>. In addition, in Section 260.2, the Commission proposes deleting

Second, the Commission proposes reorganizing the Guides. Specifically, the proposed, revised Guides combine the first three sections into one section, which discusses the Guides’ purpose, scope, and structure. In addition, the Commission proposes splitting existing Section 260.7 (titled “Environmental Marketing Claims”) into multiple sections. Currently, Section 260.7 provides advice on eight different environmental claims, containing the bulk of the Commission’s guidance. To make the information easier to find, the Commission proposes moving each environmental claim into its own section, organized alphabetically, and dividing the guidance within each section into subparts (e.g., section 260.9(a), 260.9(b), etc.). Because of these organizational changes, the Commission has renumbered each Guide section.

Third, the Commission proposes deleting Sections 260.4 and 260.8. Section 260.4 states that the Commission reviews the Green Guides as part of its ongoing, periodic review program, and explains that parties may petition the Commission to amend the Guides in light of new evidence. This information is common to all of the Commission’s guides, and it is unnecessary to repeat it in each one.<sup>25</sup> Section 260.8 contains the FTC’s environmental assessment of the Guides pursuant to the National Environmental Policy Act. Because this information is contained in the Federal Register Notice that enacted the Guides and is not needed by marketers

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the explicit statement that the Guides apply to “marketing through digital or electronic means.” The Commission added this reference in 1998, when Internet marketing was emerging and online advertisers were uncertain about the Guides’ applicability. Because Internet marketing is now ubiquitous, the Commission proposes revising the Guides to state that they apply to marketing in any medium.

<sup>25</sup> Information about petitioning the FTC may be found in the Commission’s rules. See, e.g., 16 CFR 1.6.

using the Guides, the Commission proposes deleting it from the Guides' text.<sup>26</sup> These deletions will streamline the Guides, making them a more user-friendly document.

#### **IV. General Issues**

The Commission sought comment on several general issues, including: (1) whether there is a continuing need for the Guides; (2) whether, and to what degree, industry is complying with the Guides; (3) whether the Commission should modify the Guides due to changes in technology or economic conditions; (4) whether there are international laws or standards the FTC should consider as part of its review; and (5) whether the Guides overlap or conflict with other federal, state, or local laws or regulations. This section discusses the commenters' responses to these questions, as well as their views on life cycle analysis, and provides the Commission's analysis of the issues.

##### **A. Continuing Need for the Guides**

###### **1. Comments**

Several commenters affirmed that the Guides have benefitted consumers by stemming the tide of spurious environmental claims; bolstering consumer confidence; imposing clarity and consistency in environmental marketing claims; and increasing the flow of specific and accurate environmental information to consumers, enabling them to make informed purchasing decisions.<sup>27</sup> No commenters suggested the Guides were no longer needed.

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<sup>26</sup> As we did when issuing the Guides in 1992 and revising them in 1996 and 1998, the Commission concludes that the proposed revisions to the Guides would not have a significant impact on the environment and any such impact "would be so uncertain that environmental analysis would be based on speculation." 16 C.F.R. 1.83(a).

<sup>27</sup> See, e.g., ACC, Comment 533431-00023 at 3-4; ATA, Comment 533431-00041 at 3, 9; American Forest & Paper Association ("AF&PA"), Comment 533431-00019 at 2; American Reusable Textile Association, Comment 534743-00038 at 4; Business for Social Responsibility

Several commenters stated that the Guides help those seeking to make truthful and accurate environmental marketing claims, while providing a level playing field that benefits both consumers and compliant companies.<sup>28</sup> Moreover, many agreed that the Guides accomplish their goals without imposing an undue burden on industry.<sup>29</sup>

## **2. Analysis**

Based on the consensus that the Guides benefit both consumers and businesses, the Commission proposes to retain them. As discussed below, however, the Commission proposes several revisions to ensure that the Guides reflect consumer perception and new claims in the marketplace.

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(“BSR”), Comment 533431-00016 at 1; Carbonfund.org, Comment 533431-00056 at 2; Carpet and Rug Institute (“CRI”), Comment 533431-00026 at 3; Consumer Specialty Products Association (“CSPA”), Comment 533431-00049 at 1-2; Dow, Comment 533431-00010 at 3; EHS Strategies, Inc. (“EHS”), Comment 534743-00011 at 1; Fibre Box Association (“FBA”), Comment 533431-00015 at 1; Georgia-Pacific LLC (“Georgia-Pacific”), Comment 533431-00007 at 1-3; Graphic Arts Coalition, Comment 533431-00060 at 1; GreenBlue, Comment 533431-00058 at 1; Rebecca Hammer (“Hammer”), Comment 533431-00017 at 1-2; Alison C. Healey, *et al.* (“Healey”), Comment 533431-00048 at 1; International Paper, Comment 533431-00055 at 1; MeadWestvaco Corporation (“MeadWestvaco”), Comment 533431-00013 at 2; NAIMA, Comment 536013-00042 at 2-3; New York City Department of Consumer Affairs, Comment 533431-00018 at 2; P&G, Comment 533431-00070 at 1; Pratt Industries, Comment 533431-00081 at 1; Lynn Preston (“Preston”), Comment 533431-00021 at 2; Saint-Gobain, Comment 533431-00037 at 2-4; Seventh Generation, Comment 533431-00033 at 7; The Soap and Detergent Association (“SDA”), Comment 533431-00020 at 1, 5; The Society of the Plastics Industry, Inc. (“SPI”), Comment 533431-00036 at 13; U.S. Council for International Business, Comment 533431-00052 at 2; Weyerhaeuser, Comment 533431-00084 at 1.

<sup>28</sup> See, e.g., International Paper, Comment 533431-00055 at 2 (noting that the Guides level the playing field by standardizing terms and requiring factual bases for claims); AF&PA, Comment 533431-00083 at 2; CSPA, Comment 533431-00049 at 1-2; EPI, 533431-00063 at 2; MeadWestvaco, Comment 533431-00013 at 1; NAIMA, Comment 536013-00017 at 2.

<sup>29</sup> See, e.g., GreenBlue, Comment 533431-00058 at 3 (stating that the Guides’ assurance of accuracy and specificity actually reduces costs “by providing a more common, consistent framework for communicating product attributes”); AF&PA, Comment 533431-00083 at 2; ATA, Comment 533431-00041 at 7-9; Saint-Gobain, Comment 533431-00037 at 6-7.

## **B. Industry Compliance**

### **1. Comments**

In response to questions about industry compliance with the Guides, some commenters asserted that deceptive marketing claims have increased in the environmental area.<sup>30</sup> For example, TerraChoice Environmental Marketing, Inc. reported the results of its 2007 review of over 1,000 products and expressed concern that many marketers are using vague claims, such as “environmentally friendly” and “green,” without defining terms or providing evidence to support their claims.<sup>31</sup> It also noted that many marketers “highlight relatively insignificant environmental benefits of a product while distracting consumers from much more significant impacts.”<sup>32</sup> Another commenter observed that companies are marketing the “environmentally friendly” nature of their products “through words or pictures while only minimally (if at all) qualifying such claims.”<sup>33</sup> In addition, other commenters noted increased instances of “greenwashing” by marketers using a “plethora of buzzwords like sustainable, environmentally

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<sup>30</sup> See, e.g., MeadWestvaco, Comment 533431-00013 at 1 (noting that diligent companies are disadvantaged by those companies that ignore or do not understand the Guides and capitalize on growing interest in environmental issues); Saint-Gobain, Comment 533431-00037 at 3 (commenting that manufacturers continue to make deceptive claims, particularly in insulation and building industries); TerraChoice Environmental Marketing, Inc. (“TerraChoice”), Comment 533431-00040 at 1-4 (stating that the use of false or misleading claims is rampant); GreenBlue, Comment 533431-00058 at 4-6. But see ATA, Comment 533431-00041 at 3 (stating that no evidence suggests that consumers are being misled by claims); Georgia-Pacific, Comment 533431-00007 at 5 (commenting that there is a high degree of industry compliance).

<sup>31</sup> TerraChoice, Comment 533431-00040 at 3, 6.

<sup>32</sup> Id. at 1.

<sup>33</sup> Jim Krenn (“Krenn”), Comment 533431-00014 at 3.

friendly, carbon offsets, [and] green.”<sup>34</sup> Some commenters suggested that bringing more enforcement actions could help address this issue.<sup>35</sup>

Commenters also expressed concern that the Guides may not be effectively reaching industry because many businesses are unfamiliar with them or do not realize that they apply to business-to-business transactions.<sup>36</sup> For example, one commenter asserted that the Guides have provided no benefit to the small business community, stating that key players in the printing industry do not know about the Green Guides.<sup>37</sup> Packaging workshop panelist Environmental Packaging International described a visit to a recent packaging trade show and noted that, in its estimation, 20 percent of the exhibitors were making misleading claims about the environmentally preferable qualities of their packaging.<sup>38</sup>

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<sup>34</sup> Phil Bailey (“Bailey”), Comment 533431-00028 at 3; see also Hammer, 533431-00017 at 4-5; Healey, Comment 533431-00048 at 2-5.

<sup>35</sup> GreenBlue, Comment 533431-00058 at 4; International Paper, Comment 533431-00055 at 3; MeadWestvaco, Comment 533431-00013 at 2; Eric Nguyen, Comment 533431-00009 at 5-6; SDA, Comment 533431-00020 at 5; Seventh Generation, Comment 533431-00033 at 7.

<sup>36</sup> Joseph Cattaneo, Glass Packaging Institute (“GPI”), Green Packaging Workshop Tr. at 249, 251 (noting that marketers are not paying attention to the Guides when creating their campaigns); ACC, Comment 536013-00030 at 3; Cheryl Baldwin, Green Seal (“Green Seal”), Green Packaging Workshop Tr. at 192; Victor Bell, EPI (“EPI”), Green Packaging Workshop Tr. at 232-233; Michelle Harvey, Environmental Defense Fund (“EDF”), Green Packaging Workshop Tr. at 53; Packaging Digest, Green Packaging Workshop Tr. at 52. The Guides currently state that they apply to any environmental claim made “in connection with the sale, offering for sale or marketing of the product, package, or service . . . for commercial, institutional, or industrial use.” 16 CFR 260.2.

<sup>37</sup> Graphic Arts Coalition, Comment 533431-00060 at 1.

<sup>38</sup> EPI, Green Packaging Workshop Tr. at 232-233.

Panelist NatureWorks LLC echoed this concern, noting that even industry members familiar with the Guides are not aware that they apply to business-to-business transactions.<sup>39</sup> Workshop panelists, therefore, recommended that the Guides emphasize their application to business-to-business transactions and not just business-to-consumer marketing.<sup>40</sup> Environmental Packaging International proposed, for instance, that the Guides include specific examples of such business-to-business transactions.<sup>41</sup>

## **2. Analysis**

The Guides' purpose is to help marketers avoid making unfair or deceptive environmental claims. For marketers who nevertheless violate the law, the Commission will continue its enforcement efforts. The Commission brought several recent actions involving false or unsubstantiated environmental claims. For example, last year, the Commission announced three actions charging marketers with making false and unsubstantiated claims that their products were biodegradable.<sup>42</sup> In addition, the Commission charged four sellers of clothing and

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<sup>39</sup> See Snehal Desai, NatureWorks LLC ("NatureWorks"), Green Packaging Workshop Tr. at 246-247.

<sup>40</sup> See, e.g., Scot Case, TerraChoice ("TerraChoice"), Green Packaging Workshop Tr. at 244.

<sup>41</sup> EPI, Green Packaging Workshop Tr. at 252.

<sup>42</sup> Dyna-E Int'l, Inc., et al., Docket No. 9336 (Dec. 15, 2009); Kmart Corp., Docket No. C-4263 (July 15, 2009); Tender Corp., Docket No. C-4261 (July 13, 2009). According to the FTC's complaints, the defendants' products typically are disposed in landfills, incinerators, or recycling facilities, where it is impossible for waste to biodegrade within a reasonably short time period.

other textile products with deceptively labeling and advertising these items as made of bamboo fiber, manufactured using an environmentally friendly process, and/or biodegradable.<sup>43</sup>

The Commission proposes revising the Guides to state more clearly that they apply to business-to-business transactions and not just business-to-consumer marketing.<sup>44</sup> The proposed, revised section on the “Purpose, Scope, and Structure of the Guides” (260.1) explains that the Guides apply to the marketing of products and services to “individuals, businesses, or other entities.” Moreover, the proposed, revised Guides include specific business-to-business transaction examples.<sup>45</sup> Additionally, to increase businesses’ familiarity with the revised Guides, the Commission plans to expand its outreach efforts.

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<sup>43</sup> CSE, Inc., et al., Docket No. C-4276 (Dec. 15, 2009); Pure Bamboo, LLC, et al., Docket No. C-4274 (Dec. 15, 2009); Sami Designs, LLC, et al., Docket No. C-4275 (Dec. 15, 2009); The M Group, Inc., et al., Docket No. 9340 (Apr. 2, 2010). According to the complaints, these products are made of rayon, manufactured through a process that uses toxic chemicals and releases hazardous air pollutants, and cannot biodegrade within a reasonably short time period. The Commission also brought five enforcement actions related to deceptive energy claims, involving exaggerated claims about home insulation and false claims about fuel-saving devices for motor vehicles. See United States v. Enviromate, LLC, et al., No. 09-CV-00386 (N.D. Ala. Mar. 2, 2009); United States v. Meyer Enterprises, LLC, et al., No. 09-CV-1074 (C.D. Ill. Mar. 2, 2009); United States v. Edward Sumpolec, No. 6:09-CV-379-ORL-35 (M.D. Fla. Feb. 26, 2009); FTC v. Dutchman Enterprises, LLC, et al., No. 09-141-FSH (D.N.J. Jan. 12, 2009); FTC v. Five Star Auto Club, Inc., et al., No. 99-CIV-1963 (S.D.N.Y. Dec. 15, 2008).

<sup>44</sup> A business consumer may interpret a marketer’s claims differently than an individual consumer. As stated in the FTC Policy Statement on Deception (“Deception Policy Statement”), appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984), “[w]hen representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group. In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond.” Marketers, therefore, must understand how their ads will be interpreted by their customers.

<sup>45</sup> See Section 260.6, Example 4; Section 260.12, Example 11.

## **C. Changes in Technology or Economic Conditions**

### **1. Comments**

The Notice asked commenters to discuss what modifications, if any, the Commission should make to the Guides to account for changes in relevant technology or economic conditions. In response, many commenters and workshop panelists observed that companies increasingly use the Internet to communicate with consumers about their environmental efforts,<sup>46</sup> and more consumers use the Internet to check on product claims and learn about products' environmental attributes.<sup>47</sup> The Soap and Detergent Association, for example, noted that the "quality and accessibility of online technology has greatly advanced" since the FTC released the Guides.<sup>48</sup> In its view, company websites have become an increasingly valuable and growing source of clarifying information for consumers about product benefits without the space limitations of packaging.<sup>49</sup>

Accordingly, some commenters suggested that the Guides specifically address the Internet and the opportunities it provides for increasing consumer access to product information. For example, the Soap and Detergent Association asked the FTC to determine appropriate circumstances in which information on a company website would be sufficient to explain an

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<sup>46</sup> See, e.g., GMA, Green Packaging Workshop Tr. at 111-115.

<sup>47</sup> See GMA, Green Packaging Workshop Tr. at 111 (discussing a 2008 online survey showing that 80 percent of the 6,000 consumers interviewed use the Internet to obtain information about environmental initiatives and products); GMA, Comment 533431-00045 at 4; see also Cone LLC, Comment 534743-00007 at 8 (noting that when seeking additional information about a product's environmental aspects, consumers examine the company's website, third-party websites, search engines, and the package).

<sup>48</sup> SDA, Comment 534743-00028 at 4.

<sup>49</sup> Id.

environmental claim.<sup>50</sup> Similarly, NatureWorks stated that the Guides should indicate that “it is acceptable to provide further levels of information on a website.”<sup>51</sup> The Society of the Plastics Industry suggested that the FTC consider allowing qualifiers that refer to websites, which would give companies a means of providing more accurate and detailed information about the availability of recycling facilities than can be provided on a typical package.<sup>52</sup> According to this commenter, encouraging consumers to visit a website for information on available recycling options would “both empower consumers to educate themselves about recycling options . . . and provide them the necessary roadmap by which to find recycling information quickly and readily, without a significant risk of prompting undesirable consumer behavior (e.g., putting an item that cannot be recycled locally into the curbside recycling bin . . . ).”<sup>53</sup>

Along these lines, EHS Strategies, Inc., noting the pervasiveness of general environmental benefit terms such as “eco” and “green” in marketing, suggested that the Guides recommend that package labeling include a website, telephone number, or address so that consumers can obtain a detailed explanation of a product’s environmental attributes.<sup>54</sup> However,

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<sup>50</sup> SDA, Comment 534743-00028 at 4. SDA, however, did not set forth these circumstances.

<sup>51</sup> NatureWorks, Green Packaging Workshop Tr. at 230; see also AF&PA, Comment 534743-00031 at 2 (stating that specific sectors should be able to develop focused definitions of sustainability that meet the needs of that sector and that references to websites should be sufficient to provide the necessary explanation).

<sup>52</sup> SPI, Comment 534743-00034 at 3; see also Brenda Platt, Institute for Local Self-Reliance (“ILSR”), Green Packaging Workshop Tr. at 148 (suggesting that consumers could search a website to identify composting facilities).

<sup>53</sup> SPI, Comment 534743-00034 at 4 (emphasis in original).

<sup>54</sup> EHS, Comment 534743-00011 at 2; see also EnviroMedia Social Marketing, Comment 534743-00032 at 1 (stating that companies making claims about their carbon footprint

this commenter cautioned that “[w]hile reference to third-party standards and websites are useful, they are likely not . . . investigated by the consumer at point of purchase. Insofar as possible, sufficient point of sale information should be made available to the consumer as to what the environmentally preferred attributes are.”<sup>55</sup>

## **2. Analysis**

Using the Internet, marketers can provide consumers with useful environmental information about products, packages, and services. However, websites cannot be used to qualify otherwise misleading claims that appear on labels or in other advertisements because consumers likely would not see that information before their purchase. Any disclosures needed to prevent an advertisement from being misleading must be clear and prominent and in close proximity to the claim the marketer is qualifying.<sup>56</sup> These requirements help ensure that consumers notice, read, and understand disclosures to prevent deception.

### **D. International Laws**

#### **1. Comments**

The Commission also sought comment on whether it should consider international laws, regulations, or standards with respect to environmental marketing claims in its Guides review. In response, many commenters recommended that the Commission harmonize the Green Guides

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should be required to list a website to substantiate those claims); TerraChoice, Green Packaging Workshop Tr. at 207 (noting that marketers should make claim substantiation available to consumers via websites and toll-free numbers).

<sup>55</sup> EHS, Comment 533431-00057 at 2.

<sup>56</sup> Deception Policy Statement, 103 F.T.C. at 174.

with the International Organization for Standardization (“ISO”) 14021 environmental marketing standards<sup>57</sup> or at least incorporate some of its provisions.<sup>58</sup>

For example, one commenter observed that because several countries are in the process of adopting ISO 14021, the FTC should either align the Guides with ISO standards or clarify whether products labeled according to ISO 14021 comply with the Guides when there is a discrepancy.<sup>59</sup> Another commenter stressed the importance of “close alignment with global standards,” noting that the discrepancy in how the Green Guides and ISO treat recyclable claims<sup>60</sup> causes problems with transnational packaging.<sup>61</sup>

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<sup>57</sup> ISO is a non-governmental organization which develops voluntary manufacturing and trade standards, including standards for self-declared environmental marketing claims. ISO 14021:1999(E) Environmental labels and declarations – Self-declared environmental claims (Type II environmental labeling).

<sup>58</sup> Dow, Comment 533431-00010 at 4 (noting, however, that the Commission should not follow 14021’s “outdated” prohibition on sustainability); AF&PA, Comment 533431-00019 at 3; CSPA, Comment 533431-00049 at 2; EPI, Comment 533431-00063 at 4; EPA Environmental Preferable Purchasing Program (“EPA-EPPP”), Comment 533431-00038 at 6; FBA, 533431-00015 at 2; Foodservice Packaging Institute (“FPI”), Comment 533431-00074 at 3; Georgia-Pacific, Comment 533431-00007 at 6; GreenBlue, Comment 533431-00058 at 6; MeadWestvaco, Comment 533431-00013 at 2; SDA, Comment 533431-00020 at 2-3.

<sup>59</sup> AF&PA, Comment 533431-00019 at 3; see also Georgia-Pacific, Comment 533431-00007 at 6.

<sup>60</sup> ISO states that marketers must qualify recyclable claims if recycling facilities are not conveniently available to a “reasonable proportion” of purchasers where the product is sold. ISO 14021 7.7.2:1999(E). In contrast, the Guides provide that marketers should qualify recyclable claims if recycling facilities are not available to a “substantial majority” of consumers or communities where the product is sold. See 16 CFR 260.7(d), Example 4.

<sup>61</sup> MeadWestvaco, Comment 533431-00013 at 3; see also Georgia-Pacific, Comment 533431-00007 at 6 (suggesting that the Commission address discrepancies such as the definition of “post-consumer” fiber, the references to access to recycling and composting facilities, and the treatment of the Möbius Loop); Paper Recycling Coalition (“PRC”), Comment 533431-00035 at 1 (noting that the Guides should incorporate ISO definitions of recycling and post-consumer recycled content because competing definitions currently cause consumer confusion).

In addition, several commenters suggested that the FTC look to ISO for guidance on how to conduct a life cycle analysis to ensure consistency in the increasing number of claims using life cycle assessments for substantiation.<sup>62</sup> Two commenters, however, urged the FTC not to fully harmonize the Green Guides with international standards because “the obstacles and barriers to maintaining, changing or modifying, updating, and revising the system may be enormous” and could cause “tremendous effort and delay.”<sup>63</sup>

## **2. Analysis**

Because the FTC tries to harmonize its guidance with international standards when appropriate, the Commission gave careful consideration to relevant ISO provisions during the course of its review. The goals and purposes of ISO and the Green Guides, however, are not necessarily congruent. The Guides’ purpose is to prevent the dissemination of misleading claims, not to encourage or discourage particular environmental claims or consumer behavior based on environmental policy concerns. ISO, in contrast, focuses not only on preventing misleading claims, but also on encouraging the demand for and supply of products that may cause less stress on the environment.<sup>64</sup> In part because of this difference, the proposed Guides do

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<sup>62</sup> Georgia-Pacific, Comment 533431-00007 at 3-4 (citing ISO 14040 and 14044); see also ACC, Comment 533431-00023 at 5; GreenBlue, Comment 533431-00058 at 6; P&G, Comment 533431-00070 at 3; Personal Care Products Council (“PCPC”), Comment 533431-00075 at 4; Preston, Comment 533431-00021 at 1; SDA, Comment 533431-00020 at 2-3.

<sup>63</sup> NAIMA, Comment 533431-00042 at 12; Saint-Gobain, Comment 533431-00037 at 11-12.

<sup>64</sup> The introduction to the ISO 14000 series describes the “Objective of environmental labels and declarations” as follows: “The overall goal of environmental labels and declarations is, through communication of verifiable and accurate information, that is not misleading, on environmental aspects of products and services, to encourage the demand for and supply of those products and services that cause less stress on the environment, thereby stimulating the potential for market-driven continuous environmental improvement.” ISO 14020 3:2000(E).

not necessarily align with the ISO standards. The Commission further discusses ISO standards and any inconsistencies with the proposed Guides in the relevant sections: (1) General Environmental Benefit Claims (Part IV.A); (2) Recyclable Claims (Part IV.E); (3) Recycled Content Claims (Part IV.F); and (4) Free-of and Non-toxic Claims (Part IV.H).

## **E. Overlap with Other Federal, State, or Local Laws**

### **1. Comments**

The Commission sought comment on whether the Guides overlap or conflict with other federal, state, or local laws or regulations, and if so, how. Most commenters did not identify any specific overlap or conflict. Two commenters, however, Saint-Gobain and the North American Insulation Manufacturers Association, expressed concern about the array of guidelines and standards emerging from local, state, and federal government agencies, noting that conflicting and competing guidelines vary in quality and, therefore, consumer utility.<sup>65</sup> Both commenters urged the FTC to “consider preempting state and local laws and regulations that are inconsistent with or frustrate the purposes of the Guides.”<sup>66</sup> Neither commenter, however, cited a specific law or regulation.

Commenter Environmental Packaging International noted that the state of California has “more specific requirements than the Guides regarding the use of environmental marketing claims related to plastic packaging.”<sup>67</sup> For example, EPI stated that California requires that

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<sup>65</sup> NAIMA, Comment 533431-00042 at 2, 11; Saint-Gobain, Comment 533431-00031 at 3,11.

<sup>66</sup> NAIMA, Comment 533431-00042 at 11; Saint-Gobain, Comment 533431-00031 at 11.

<sup>67</sup> EPI, Comment 533431-00063 at 4.

plastic bags and food and beverage containers labeled as “compostable,” “biodegradable,” or “degradable” or marketed using similar terms comply with the applicable ASTM International standard for the term used.<sup>68</sup> In contrast, the Green Guides do not refer to a particular industry standard.

International Paper observed that, although it is not aware of any specific conflicts with federal, state, and local laws, the Green Guides may conflict with nongovernmental and international voluntary standards, such as ASTM’s compostability standard.<sup>69</sup> It recommended that the FTC monitor these standards to try to eliminate any such issues. It also suggested that the FTC coordinate with other federal agencies. For example, it suggested that the FTC coordinate with the Environmental Protection Agency (“EPA”) in the recycling area to make policy and product labeling consistent with current marketplace reality.

Similarly, EPA’s Environmentally Preferable Purchasing Program suggested that the Guides specifically state that “environmentally preferable” claims “should follow established guidance in this area, such as EPA’s Guidance on Environmentally Preferable Purchasing, which emphasizes that such determinations should take into account multiple environmental attributes throughout the product’s life cycle.”<sup>70</sup>

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<sup>68</sup> *Id.*, citing Cal. Pub. Res. Code §§ 42355-42357, 42359-42359.6. ASTM International (“ASTM”) is an international standards organization that develops and publishes voluntary consensus technical standards for a wide range of materials, products, systems, and services.

<sup>69</sup> International Paper, Comment 533431-00055 at 3.

<sup>70</sup> EPA-EPPP, Comment 533431-00038 at 7.

## 2. Analysis

Based on a review of the comments, the Green Guides do not appear to significantly overlap or conflict with other federal, state, or local laws. Although some commenters discussed the potential for conflict, none cited any particular conflicting laws. State law may be different from the Green Guides, but such differences do not necessarily present a conflict. For example, a company may follow the Green Guides' provisions on biodegradability and compostability and still comply with California's specific requirements that plastic bags and containers labeled as "biodegradable" and "compostable" meet ASTM standards.<sup>71</sup> Additionally, although some commenters sought FTC preemption of state and local laws, the Green Guides are not enforceable regulations and, therefore, cannot be legally preemptive.<sup>72</sup>

One commenter recommended that the Commission coordinate with other federal agencies. The Commission actively consults with other agencies, such as the EPA, the Department of Energy ("DOE"), and the Department of Agriculture ("USDA"), regarding their areas of expertise to ensure that the Commission does not issue guidance that duplicates or possibly conflicts with their regulations and programs. For example, as discussed below, the Commission does not propose specific guidance for organic claims about agricultural products that already are covered by the USDA's regulations.<sup>73</sup>

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<sup>71</sup> Indeed, since 1996, California has required marketers to follow the Green Guides. See Cal. Bus. & Prof. Code § 17580-81.

<sup>72</sup> 16 CFR 260.2.

<sup>73</sup> See Part VI.B, infra.

## **F. Life Cycle Analysis**

Life cycle analysis (“LCA”) refers to the assessment of a product’s environmental impact through all the stages of its “life.” The EPA defines the term “life cycle” as “the major activities in the course of the product’s life-span from its manufacture, use, and maintenance, to its final disposal, including the raw material acquisition required to manufacture the product.”<sup>74</sup> As the EPA notes in its Final Guidance on Environmentally Preferable Purchasing, in the context of making purchasing decisions, the term “life cycle” has several interpretations: “[t]o some, it connotes an exhaustive, extremely time-consuming, and very expensive analysis. To others, a life cycle perspective is possible in an abbreviated process, in which a long list of potential environmental attributes and/or impacts is narrowed to a few, allowing for comparison across a particular product category.”<sup>75</sup> Accordingly, in its Final Guidance on Environmentally Preferable Purchasing, EPA states that it “promotes the use of a range of practices, from life cycle considerations to a more rigorous, scientifically defensible life cycle assessment methodology.”<sup>76</sup>

The current Green Guides do not provide guidance on life cycle claims. Instead, the Guides include a footnote indicating that the Guides do not address such claims because the Commission “lacks sufficient information on which to base guidance.”<sup>77</sup>

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<sup>74</sup> See <http://www.epa.gov/nrmrl/lcaccess/pdfs/600r06060.pdf>.

<sup>75</sup> See <http://www.epa.gov/epp/pubs/guidance/finalguidance.htm>.

<sup>76</sup> Id.

<sup>77</sup> 16 CFR 260.7 n.2.

## **1. Comments**

Several commenters discussed whether and how the FTC should provide LCA guidance. Many noted that, since the last Guides review, LCA has become both a more accepted and better defined process,<sup>78</sup> and marketers increasingly utilize LCA to assess the environmental effect of their products.<sup>79</sup> For example, Georgia-Pacific observed that the international expert community in life cycle assessment has developed and agreed on requirements for making environmental comparisons or assertions to the public, which the series of ISO 14040 and 14044 standards reflect.<sup>80</sup> Other panelists, however, asserted that LCA is still an emerging concept.<sup>81</sup>

In particular, commenters discussed: (1) whether marketers should refer directly to LCAs in marketing materials; and (2) whether marketers should substantiate certain claims with an LCA and, if so, whether the Guides should address LCA substantiation methodologies.

### **a. LCAs as Marketing Claims**

Because of the complexity of LCAs, several commenters asserted that life cycle analysis should be regarded as a decision-making tool to help improve environmental outcomes, rather

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<sup>78</sup> SDA, Comment 534743-00028 at 3 (noting that procedures for a life cycle analysis are now part of ISO environmental management standards found under ISO 14000); Susan Selke, Michigan State University (“Michigan State Univ.”), Green Packaging Workshop Tr. at 163 (stating that in addition to ISO, there are numerous LCA standards, including certain Canadian standards and standards collected on EPA’s website).

<sup>79</sup> See, e.g., GMA, Comment 533431-00083 at 10; PCPC, Comment 533431-00075 at 4; SDA, Comment 533431-00020 at 2; SPI, Comment 533431-00036 at 11.

<sup>80</sup> Georgia-Pacific, Comment 533431-00007 at 7.

<sup>81</sup> See, e.g., Michigan State Univ., Green Packaging Workshop Tr. at 188 (observing that LCA is not yet well understood by industry, academics, or consumers); Thomas R. Reardon, The Business and Institutional Furniture Manufacturer’s Association (“BIFMA”), Green Building and Textiles Workshop Tr. at 246-247.

than as a marketing claim.<sup>82</sup> A participant in the Green Packaging Workshop, Susan Selke, for example, viewed life cycle analysis as “the right philosophical approach” for making decisions, but discouraged its use for communicating information or making claims to consumers, on the grounds that one must “interpret LCA in context for it to be meaningful.”<sup>83</sup> Similarly, EHS Strategies, Inc., commented that terms such as “cradle to cradle” and “life cycle” are ill-defined, comprised of multiple factors, and not amenable to understanding on a package label.<sup>84</sup>

In contrast, one commenter reported the results of a study finding that LCA information showing quantitative and specific environmental impact information in an advertisement positively influences consumers’ attitudes toward an advertisement, brand, company, and intention to purchase a product.<sup>85</sup> The commenter concluded that “LCA-based metrics” may be the best method for effective communication of environmental attributes.<sup>86</sup> Another commenter stated it would support the use of a standardized label conveying the results of an LCA to

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<sup>82</sup> John Delfausse, Estée Lauder Companies (“Estée Lauder”), Green Packaging Workshop Tr. at 186; Michigan State Univ., Green Packaging Workshop Tr. at 186; see also ACC, Comment 533431-00023 at 5 (suggesting that LCA can be a useful tool in identifying marketing claims and what type of substantiation or qualification is necessary).

<sup>83</sup> Michigan State Univ., Green Packaging Workshop Tr. at 163 (asserting she would “never advocate trying to summarize LCA results on a package”).

<sup>84</sup> EHS, Comment 534743-000211 at 1; see also Estée Lauder, Green Packaging Workshop Tr. at 186 (noting that although consumers are interested in information pertaining to the life cycle and sustainability aspects of packaging, Estée Lauder does not recommend encouraging such claims in the Guides).

<sup>85</sup> Univ. of Minnesota, Comment 536013-00004 at 1.

<sup>86</sup> Id.

consumers, such as an approach akin to the Food and Drug Administration’s (“FDA”) Nutrition Facts Label.<sup>87</sup>

**b. LCAs as Substantiation**

Commenters also debated whether a full LCA should be required to substantiate environmental claims. While some commenters argued that marketers should be required to conduct a full LCA to support general environmental benefit claims, others argued that this would not be feasible due to inconsistent methodologies, complexity, and expense.<sup>88</sup>

Moreover, some commenters suggested that the Guides could help ensure that companies conducting LCAs do so in a manner that meets the FTC’s substantiation standards.<sup>89</sup> In particular, the Glass Packaging Institute suggested that the Guides expressly state that LCAs must meet the FTC’s substantiation standard for environmental claims, which requires that marketers have “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.”<sup>90</sup> Other commenters went further, noting that because life cycle analyses can vary in requirements and robustness, the

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<sup>87</sup> Estée Lauder, Green Packaging Workshop Tr. at 189 (noting that the Sustainable Packaging Coalition is working on a label concept, and stating that it is important to the industry to have some type of “nutritional” label that will be globally acceptable).

<sup>88</sup> See Part V.A, *infra*.

<sup>89</sup> See, e.g., Estée Lauder, Green Packaging Workshop Tr. at 176; GPI, Comment 534743-00026 at 10; SDA, Comment 534734-00026 at 3; Michigan State Univ., Green Packaging Workshop Tr. at 161.

<sup>90</sup> See, e.g., GPI, Comment 534743-00026 at 10 (citing 16 CFR 260.5).

Guides should indicate the LCA standards or methodologies that the Commission considers adequate.<sup>91</sup>

## **2. Consumer Perception Evidence**

The Commission's study examined whether consumers believe that environmental claims such as "green," "eco-friendly," or "made with recycled materials" suggest anything about the environmental impact of a product through its life cycle.<sup>92</sup> For consumers who do think about a product's life cycle, the study explored whether they think of more than one stage in that cycle and, if they do, which of the four specific stages (*i.e.*, production, transportation, use, and disposal). Only 16 percent of respondents viewing "green" claims and 14 percent of respondents viewing "eco-friendly" claims thought about each of the life cycle stages.<sup>93</sup>

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<sup>91</sup> ACC, Comment 536013-00030 at 4; NatureWorks, Green Packaging Workshop Tr. at 217-18; *see also* Georgia-Pacific, Comment 533431-00007 at 7 (noting that the Guides should provide that claims based on LCA studies be conducted with the full analysis required by ISO 14044); P&G, Comment 533431-00070 at 2 ("While not all claims require a full LCA, recognizing acceptable international standards for LCA will help ensure consistency in claims that do rely upon LCAs for substantiation."); SPI, Comment 533431-00036 at 12 (stating that the scope of the LCA may differ from advertiser to advertiser); USGBC, Comment 536013-00029 at 10-11 (suggesting that if the FTC addresses LCA, it should adopt a particular LCA approach, such as the National Renewable Energy Laboratory's Life Cycle Inventory Database Project, or set forth specific LCA parameters that standardize the relevant impact categories, life cycle stages, and service periods that are the basis of these assessments).

<sup>92</sup> The Commission did not test consumer perception of life cycle claims in marketing, *i.e.*, claims in which the environmental impacts of a product throughout a product's life cycle are featured in an advertisement or label. The University of Minnesota submitted a study that examined life cycle-based information in marketing. This study, however, focused on consumer perceptions toward the advertiser and the brand, as well as "message credibility," rather than consumer understanding of environmental claims. Comment 536013-00004 at 1.

<sup>93</sup> Taking an average across all 15 tested claims (net of control), only nine percent of respondents indicated they thought of all four stages of a product's life cycle when viewing a claim.

### 3. Analysis

After reviewing the comments and the results of its consumer perception study, the Commission has decided not to propose guidance about the use of life cycle information either in marketing or as substantiation for environmental claims.<sup>94</sup> First, the Commission lacks information about how consumers interpret life cycle claims in marketing. Moreover, due to the complexity and variability of these claims, general advice is unlikely to be useful in any particular case. Therefore, the Commission will continue to analyze these claims on a case-by-case basis.

Second, the Commission declines to propose advising marketers either to conduct an LCA to substantiate environmental claims or to follow a particular LCA methodology. Relatively few respondents viewing broad environmental claims (approximately 15 percent) considered each of the life cycle stages. Therefore, the results of the study do not provide a basis for advising marketers to conduct an LCA to substantiate environmental claims. Marketers may rely on the results of an LCA as all, or part of, their substantiation, as long as they ensure that the LCA results constitute competent and reliable scientific evidence to support their claims. The Commission has no basis for choosing one LCA methodology over another. Accordingly, the Commission will continue to apply its substantiation analysis to claims relying on an LCA to determine whether the assessment: (1) has been conducted and evaluated in an objective manner by qualified persons and is generally accepted in the profession to yield accurate and reliable results; and (2) the LCA is sufficient in quality and quantity based on standards generally

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<sup>94</sup> Footnote 2 of the Guides currently states that the Guides do not address LCA claims. 16 CFR 260.7 n.2. The Guides also do not address other environmental claims, but they do not specifically identify these claims. For consistency, the Commission proposes deleting this footnote.

accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that each of the marketer's claims is true.

## **V. Claims Addressed by the Current Green Guides**

The Commission requested comment on what changes, if any, it should make to its existing guidance on specific claims (currently, in Section 260.7). This part of the Notice summarizes the comments and relevant workshop discussions, reviews the consumer perception evidence, and provides the Commission's analysis of: (1) general environmental benefit claims; (2) certifications and seals of approval; (3) degradable claims; (4) compostable claims; (5) recyclable claims; (6) recycled content claims; (7) ozone-safe and ozone-friendly claims; (8) free-of and non-toxic claims; (9) source reduction claims; and (10) refillable claims.

### **A. General Environmental Benefit Claims**

#### **1. The Current Guides**

The current Guides section on general environmental benefit claims (e.g., “environmentally friendly”) states: “[u]nqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product, package, or service has specific and far-reaching environmental benefits.”<sup>95</sup> The Guides remind marketers that they have a duty to substantiate “every express and material implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product.” Unless marketers can meet this “substantiation duty,” they should avoid, or qualify, these claims

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<sup>95</sup> 16 CFR 260.7(a).

“as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.”<sup>96</sup> The following addresses the comments discussing general environmental benefit claims, the Commission’s relevant consumer perception study findings, and the Commission’s proposed, revised guidance for such claims.

## **2. Comments**

As discussed below, many commenters asserted that general environmental benefit claims may confuse consumers and that the Commission should provide additional guidance on use of these claims, including what type of substantiation supports them and how marketers can effectively qualify them. Other commenters asserted that the Green Guides should prohibit general environmental claims altogether.

### **a. Substantiating General Environmental Benefit Claims – Life Cycle Considerations**

Several commenters recommended that the Guides state that marketers making a general environmental claim have substantiation about the environmental impact of a product throughout its entire life cycle (see Part IV.F, supra, for a general discussion of comments regarding life cycle analysis).<sup>97</sup> For example, Unilever United States, Inc. asserted that marketers should review all aspects of the product’s life cycle to substantiate “eco-friendly” claims because consumers reasonably interpret those claims to mean that the product as a whole offers a

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<sup>96</sup> Id.

<sup>97</sup> See, e.g., Michigan State Univ., Green Packaging Workshop Tr. at 187 (“[I]t is precisely those broad claims that should never be made unless you can back them up and the only way you could back them up would be with a full blown life cycle analysis.”); Keith Christman, American Chemistry Council (“ACC”), Green Packaging Workshop Tr. at 210; GPI, Comment 534743-00026 at 9-10.

material environmental benefit and presents no significant environmental risk.<sup>98</sup> Similarly, EPA’s Sustainable Products Network (“EPA-SPN”) asserted that “general claims that imply overall superiority in environmental performance must be substantiated by information that addresses multiple environmental attributes over the product’s life cycle.”<sup>99</sup>

Although these commenters agreed about the importance of considering a product over its life cycle, they advocated different types and levels of substantiation. Unilever, for example, suggested that the FTC develop criteria under which marketers would have to address the major stages of a product’s life cycle – its production, packaging, formula/ingredients, and disposability.<sup>100</sup> Under Unilever’s framework, if a company can meet eligibility standards for three out of these four criteria, it could still make a general environmental benefit claim as long as that unmet criterion is clearly and accurately disclosed (e.g., “environmentally friendly, but not recyclable”).

EPA-SPN stated that a full quantitative life cycle assessment, “while highly desirable,” is not necessary. Instead, marketers should demonstrate that they have addressed “key attributes” from a life cycle perspective.<sup>101</sup> Georgia-Pacific also suggested that the FTC “recognize the use

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<sup>98</sup> Unilever United States, Inc. (“Unilever”), Comment 534743-00030 at 1.

<sup>99</sup> EPA-SPN, Comment 536013-00062 at 4; see also P&G, Comment 533431-00070 at 3 (stating that in the absence of a life cycle analysis, comparative environmental claims should be limited to specific and verifiable parameters regarding the sourcing of raw materials, manufacturing, transportation, or packaging); Georgia-Pacific, Comment 533431-00007 at 3.

<sup>100</sup> Unilever, Comment 534743-00030 at 1-2.

<sup>101</sup> Specifically, EPA-SPN recommended that the following types of information provide “adequate substantiation” for general environmental benefit claims: “1) certification under voluntary consensus standards that include multiple environmental attributes based on consideration of the product’s life cycle; 2) certification under multi-attribute, life cycle-based eco-labeling programs, such as labeling programs that follow the requirements of the ISO 14024

of the ISO 14040 series standards when comparing products and, in particular, the need to include the life cycle impact assessment phase of the LCA as one essential requirement in . . . comparing products.”<sup>102</sup>

Several other commenters, however, argued that the FTC should not require marketers making general environmental claims to conduct a full LCA. According to the Business and Institutional Furniture Manufacturer’s Association, while conducting an LCA is “an admirable aspiration,” the science concerning LCA is not sufficiently well established to mandate such a requirement.<sup>103</sup> Similarly, the Formaldehyde Council, Inc. asserted that there is a debate regarding how various factors used in life cycle assessment are weighted in developing an overall assessment.<sup>104</sup> Other commenters similarly argued that life cycle assessment should not be the only tool available to marketers to substantiate general environmental claims, explaining

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standard for Type 1 environmental labels; or 3) life cycle analyses that follow the requirements of the ISO 14040-series of standards for life cycle assessment.” EPA-SPN, Comment 536013-00062 at 11; see also EPA-EPPP, Comment 533431-00038 at 6.

<sup>102</sup> Georgia-Pacific, Comment 533431-00007 at 3.

<sup>103</sup> BIFMA, Green Building and Textiles Workshop Tr. at 246; Sophia Greenbaum, Sustainable Buildings Industry Council (“SBIC”), Green Building and Textiles Workshop Tr. at 246 (suggesting that there is no single methodology for establishing life cycle analysis); see also Green Seal, Green Building and Textiles Workshop Tr. at 247.

<sup>104</sup> Formaldehyde Council, Inc., Comment 533431-00047 at 3.

that LCAs are complex, difficult to interpret, and costly.<sup>105</sup> Therefore, commenters noted that conducting an LCA may not be feasible even for large companies.<sup>106</sup>

#### **b. Qualifying General Environmental Benefit Claims**

Some commenters recommended that the Guides provide additional advice on how marketers can effectively qualify general environmental benefits. For example, one commenter suggested that the Guides should advise marketers on how to use more effective qualifiers. This commenter specifically advised the Commission to require that qualifications be “clear, understandable, prominently displayed, and indicate an actual environmental benefit.”<sup>107</sup> This commenter also emphasized that a consumer evaluating an advertisement should be able to “quickly and easily tell that the environmental benefit that the product has is the specific environmental benefit indicated, not the wider general benefit included in the ad’s message – i.e., by such phrases as ‘environmentally friendly.’”<sup>108</sup> Another commenter asserted that the FTC

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<sup>105</sup> SDA, Comment 534734-00028 at 3 (stating the FTC should not require an LCA as substantiation for “properly qualified, well-supported claims” due to the cost such a requirement would impose on small businesses, but that the Guides, nevertheless, should encourage marketers to conduct a “sufficient inquiry to avoid the use of claims . . . that do not acknowledge other significant environmental impacts associated with a product’s formulation process or its use”); The Clorox Company (“Clorox”), Comment 534743-00017 at 1 (asserting that even when marketers are making general claims, they should not be required to conduct a life cycle assessment); see also ACC, Comment 533431-00023 at 5 (stating that LCA studies should not be a necessary precondition to making an environmental claim).

<sup>106</sup> Estée Lauder, Green Packaging Workshop Tr. at 176; Michigan State Univ., Green Packaging Workshop Tr. at 161.

<sup>107</sup> Krenn, Comment 533431-00014 at 5.

<sup>108</sup> Id.

should provide examples of accompanying language that would be specific enough to allow the use of these types of claims.<sup>109</sup>

**c. Prohibiting All General Environmental Benefit Claims**

Some commenters argued that by allowing general environmental benefit claims, even when qualified, the Guides facilitate deception.<sup>110</sup> These commenters, therefore, recommended that the Green Guides prohibit all general environmental claims. For example, GreenBlue argued that there is no single definition of general environmental benefit terms such as “green” or “environmentally friendly.” Therefore, their use only confuses consumers even if the terms are qualified with text that describes the specific attribute that contributes to their “green” status.<sup>111</sup> GreenBlue noted that “environmental excellence” in one attribute can result in trade-offs in another. For example, the increased use of recycled content may require less energy for material production, but may result in greater weight and, therefore, higher energy costs for transportation. According to GreenBlue, because such trade-offs are sufficiently common, the Guides should discourage general environmental benefit claims, even when accompanied by a

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<sup>109</sup> 3M Company, Comment 533431-00027 at 3; see also EHS, Comment 533431-00057 at 2 (suggesting that general claims should never appear without a clear statement of the product’s specific attributes and that “sufficient point of sale information should be made available to the consumer as to what the environmentally preferred attributes are”).

<sup>110</sup> Banning general environmental benefit claims would be consistent with ISO 14021, which prohibits general environmental claims. Specifically, ISO 14021 provides that “[a]n environmental claim that is vague or non-specific or which broadly implies that a product is environmentally beneficial or environmentally benign shall not be used. Therefore, environmental claims such as ‘environmentally safe,’ ‘environmentally friendly,’ ‘earth friendly,’ ‘non-polluting,’ ‘green,’ ‘nature’s friend,’ and ‘ozone friendly’ shall not be used.” ISO 14021 5.3:1999(E).

<sup>111</sup> GreenBlue, Comment 533431-00058 at 4-5.

specific-attribute qualifier, unless a company is willing to include a full explanation of environmental trade-offs.

Similarly, EPA-SPN provided an example of a potentially deceptive qualified claim. It noted that a product advertised as “Eco-safe because of low-VOC content” implies that VOC content is the most important factor in determining “overall environmental performance.” EPA-SPN cautioned that it is not possible to know if this is actually the case without information on other product attributes. EPA-SPN, therefore, suggested that marketers “state the claim in terms of the relevant attribute without implying broader environmental benefit, e.g., “100% post-consumer content” or “low VOC.” EPA-SPN also recommended that any further description be limited to a statement of environmental benefit directly related to the attribute. Thus, according to EPA-SPN, a claim such as “Low VOC – promotes cleaner air” would be proper because “VOC emissions have a clear relationship to air quality.”<sup>112</sup>

### **3. Consumer Perception Evidence**

Only a few commenters submitted consumer perception evidence addressing general environmental benefit claims.<sup>113</sup> Thus, the Commission’s study focused on this issue. The study

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<sup>112</sup> EPA-SPN, Comment 536013-00062 at 4-5; see also EPI, Comment 533431-00063 at 4 (suggesting that the Commission revise the Guides to make clear that information about specific product attributes will not necessarily qualify general environmental claims); Rebekah Lacey (“Lacey”), Comment 533431-00062 at 2 (“Manufacturers . . . should not be able to pick and choose the criteria they use to make general environmental benefit claims. Even if they disclose the criteria, they are still implying that the criteria are appropriate, which is inherently misleading if the criteria focus on a narrow aspect of the product’s life cycle environmental impact.”); USGBC, Comment 536013-00029 at 9 (noting that qualifying broad environmental claims based on a single product attribute may be misleading because it ignores the full impact of the product on the environment).

<sup>113</sup> See, e.g., Cone LLC, Comment 534743-00007 at 2 (describing its February 2008 online survey of over 1,000 consumers and noting that 48 percent of respondents believed a product marketed as “green” or “environmentally friendly” has a “positive, (i.e., beneficial)

examined whether both unqualified and qualified general green claims suggested that the product has particular environmental benefits. Specifically, the study asked respondents whether these types of claims conveyed that the product had any of the following seven environmental attributes: made from recycled materials, made with renewable materials, recyclable, made with renewable energy, biodegradable, non-toxic, and compostable. Thus, for example, would consumers viewing a “green” or an “eco-friendly” claim think that the advertised product had specific green attributes, such as being made with recycled materials or being recyclable? Additionally, if the general green claim were qualified with a specific environmental attribute, such as “green - made with renewable materials,” would consumers think the product had environmental benefits beyond the specific attribute mentioned?<sup>114</sup>

Averaging across the seven attributes, 52 percent of respondents viewing an unqualified “green” claim indicated that they believed that the product had a specific attribute about which the survey asked. In particular, responses for individual attributes ranged from 61 percent (product is made from recycled materials) to 40 percent (product is compostable). The responses concerning an unqualified “eco-friendly” claim were similar. Averaging across the seven attributes, 49 percent indicated that the claim suggested that the product had a particular attribute. Specifically, responses for individual attributes ranged from 56 percent (product is made from recycled materials) to 36 percent (product is made with renewable energy). When the general environmental claims were qualified, however, on average, 31 percent of consumers

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impact” on the environment).

<sup>114</sup> The Commission tested the following qualified-general claims: “green - made with renewable materials”; “green - made with renewable energy”; “green - made with recycled materials”; “eco-friendly - made with renewable materials”; “eco-friendly - made with renewable energy”; and “eco-friendly - made with recycled materials.”

indicated that the claim implied specific environmental benefits in addition to the attribute stated.<sup>115</sup>

In addition to asking consumers about unqualified and qualified-general environmental benefit claims, the study asked consumers how they perceive certain specific-attribute claims alone (i.e., claims that a product is “made with recycled materials,” “made with renewable materials,” or “made with renewable energy”). This allowed the Commission to compare qualified-general claims to specific-attribute claims to determine the extent to which the general environmental claim (e.g., “green,” “eco-friendly”) contributed to consumer perceptions. On average, 23 percent of respondents viewing specific-attribute claims indicated that the claim implied specific benefits in addition to the attribute stated.

The study further examined whether consumers believe that environmental claims suggest anything about any negative environmental impact that may come from the product. Twenty-seven percent of respondents interpreted the unqualified claims “green” and “eco-friendly” as suggesting the product has no negative environmental impact.<sup>116</sup> Sixteen percent of respondents viewing a qualified “green” claim and 17 percent of those viewing a qualified “eco-

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<sup>115</sup> This figure was derived by calculating an average of responses regarding six qualified-general claims (three of which qualified “green”; three of which qualified “eco-friendly”). When participants were asked to evaluate a claim that included one of the specific-attribute claims, such as “green - made with renewable materials,” we did not include responses regarding that attribute (“made with renewable materials”) in that calculation.

<sup>116</sup> This figure is based on the responses to a closed-ended question on what “green” or “eco-friendly” claims suggest or imply about any negative environmental impact resulting from the tested products. Responses to subsequent questions suggest that respondents were not all thinking about negative environmental impact in exactly the same way in answering this question.

friendly” claim made the same inference, while only ten percent of respondents viewing a specific-attribute claim made this inference.

#### **4. Analysis and Guidance**

Both the comments<sup>117</sup> and FTC staff’s Internet surf<sup>118</sup> indicate that general environmental claims are pervasive. Such general claims appear both alone<sup>119</sup> and accompanied by specific claims.<sup>120</sup> To address their potential for consumer deception, and based on the comments and the Commission’s consumer perception study, the Commission proposes advising marketers not to make unqualified general environmental benefit claims.<sup>121</sup> The proposed, revised Guides also provide more prominent guidance on how to effectively qualify general environmental benefit claims.

##### **a. Unqualified General Environmental Benefit Claims**

The consumer perception evidence and some comments reaffirm the current Guides’ advice that unqualified general environmental benefit claims convey a range of meanings. For

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<sup>117</sup> See, e.g., ACC, Comment 533431-00023 at 6; Clorox, Comment 534743-00017 at 1; 3M Company, Comment 533431-00027 at 3; Krenn, Comment 533431-00014 at 2; TerraChoice, Comment 533431-00040 at 3.

<sup>118</sup> In December 2008, FTC staff conducted a review of Internet sites to investigate the nature and incidence of certain environmental marketing claims. See Green Marketing Internet Surf, A Report by the FTC’s Division of Enforcement (“FTC Staff Internet Surf”).

<sup>119</sup> In the FTC Staff Internet Surf, an express “green” claim occurred in 49 percent of the 799 web pages containing general environmental claims, and eco-/earth-/environmentally “friendly” occurred in 41 percent of them.

<sup>120</sup> For example, in the FTC Staff Internet Surf, on the 799 web pages with general environmental claims, renewability claims co-occurred on 36 percent of the pages; carbon claims co-occurred on 35 percent of them; recycled content claims co-occurred on 18 percent; and biodegradability claims co-occurred on 12 percent.

<sup>121</sup> This proposed guidance can be found in 16 CFR 260.4.

example, the Commission’s consumer perception study found that 61 percent of respondents viewing an unqualified “green” claim believed the product is made from recycled materials; 59 percent believed the product is recyclable; 54 percent believed the product is made with renewable materials; 53 percent believed the product is biodegradable; 48 percent believed the product is made with renewable energy; 45 percent believed the product is non-toxic; and 40 percent believed the product is compostable.<sup>122</sup> Averaging across these seven attributes, 52 percent of respondents viewing an unqualified “green” claim stated that the claim definitely or probably suggested that the product had these specific green attributes. The percentages are similar for respondents viewing an “eco-friendly” claim.<sup>123</sup> Moreover, 27 percent of respondents interpreted the unqualified claims “green” and “eco-friendly” as suggesting the product has no negative environmental impact.

Given these findings, and because FTC law requires marketers to substantiate every express and implied environmental benefit that consumers reasonably could take from such a claim,<sup>124</sup> unqualified general environmental marketing claims remain very difficult, if not

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<sup>122</sup> As discussed above, the Commission tested the claims as they appeared on laundry baskets, kitchen flooring, and wrapping paper. The response rates for laundry baskets and kitchen flooring were very similar. A slightly larger percentage of respondents perceived wrapping paper to possess unstated environmental attributes. However, because the responses were interpreted net of a non-environmental control claim, the analysis largely eliminated this difference from the results.

<sup>123</sup> Of respondents viewing an “eco-friendly” claim, 57 percent believed the product is recyclable; 56 percent believed the product is made from recycled materials; 55 percent believed it is biodegradable; 51 percent believed it is made with renewable materials; 47 percent believed it is non-toxic; 43 percent believed it is compostable; and 36 percent believed it is made with renewable energy. The average value was 49 percent.

<sup>124</sup> FTC Policy Statement Regarding Advertising Substantiation (“Substantiation Policy Statement”), appended to Thompson Medical Co., 104 F.T.C. 648, 839 (1984), aff’d, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987).

impossible, to substantiate. Very few products, if any, have all of the attributes consumers appear to perceive from general environmental benefit claims. In addition, given that all products have some environmental impact, it is doubtful that a marketer could substantiate that a product has no or negligible negative environmental impact. The Commission, therefore, proposes revising the Guides to more directly caution marketers not to make unqualified general environmental benefit claims.

Because marketers should not make unqualified general environmental benefit claims, the Commission declines to adopt commenters' suggestions that the Guides delineate the particular substantiation needed to support such claims. Moreover, unlike the approach taken by ISO 14021, which prohibits general environmental claims, the Commission does not propose advising marketers to never use a general environmental benefit claim. As discussed below, marketers may be able to effectively qualify these claims to focus consumers on the specific environmental benefits that marketers could substantiate.

#### **b. Qualified General Environmental Benefit Claims**

The current Guides state that marketers may make broad environmental claims if they are “qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.”<sup>125</sup> Through examples, the Guides also advise marketers that qualifications should be sufficiently “clear and prominent” to convey the idea that the claim refers only to limited environmental benefits and that “no other deceptive implications are created by the context.” The Commission’s consumer perception study supports this advice by demonstrating that qualifying a general green claim reduces the number of respondents

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<sup>125</sup> 16 CFR 260.7(a).

believing: (1) that a product has specific, unstated benefits; and (2) that a product has no negative environmental impact.

First, as discussed above, on average, approximately half of the respondents viewing a general, unqualified “green” claim believed that the claim suggested specific, unstated environmental benefits. When viewing a qualified “green” claim, on average, substantially fewer consumers (30 percent) believed that the claim suggested specific, unstated benefits.<sup>126</sup> For example, when a “green” claim was qualified with the statement “made with recycled materials,” 26 percent of respondents took away implied claims, a decrease of 26 percentage points. Similarly, when a “green” claim was qualified with the statement “made with renewable energy,” 29 percent of respondents took away implied claims, a decrease of 22 percentage points.

Second, the survey results indicate that the qualification of a general claim reduces consumer misperception of a product’s overall environmental impact. While 27 percent of respondents stated that a product advertised with an unqualified “green” or “eco-friendly” claim had no environmental impact, only 16 percent of respondents viewing a qualified “green” claim, and 17 percent of those viewing a qualified “eco-friendly” claim, made the same inference.

Although the percentage of respondents believing that a product had specific, unstated benefits and had no negative impact significantly decreased, some respondents still saw implied claims. Specifically, 31 percent of respondents saw implied claims, and 17 percent believed a

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<sup>126</sup> To calculate this number, the Commission took an average across all three qualified-“green” claims: “green - made with renewable materials”; “green - made with renewable energy”; and “green - made with recycled materials.” The results are similar for qualified “eco-friendly” claims, where, on average, 32 percent of participants took away the specific, unstated attributes, compared to the 49 percent who took away specific, unstated attributes when presented with the unqualified “eco-friendly” claim.

product had no negative impact. To determine the extent to which the general environmental claim (e.g., “green,” “eco-friendly”) contributed to these continuing perceptions, the Commission compared qualified-general claims to specific-attribute claims alone (e.g., “made with recycled materials”). Respondents viewing qualified-general claims were only eight percent more likely to see implied claims than those viewing the specific-attribute only claims.<sup>127</sup> Moreover, respondents viewing qualified-general claims were only approximately six percent more likely to state that the product had no negative environmental impact than those viewing specific-attribute claims alone.<sup>128</sup> Thus, when qualified, the use of a general green claim did not appear to significantly contribute to consumers’ propensity to see implied claims or to believe a product had no negative environmental impact.

The results, therefore, suggest that qualifying a general environmental claim can focus consumers on the specific advertised benefit and significantly reduce misperceptions about negative environmental impact. Based on these findings, the Commission proposes to emphasize the current Guides’ advice on qualifying general environmental benefit claims. The proposed, revised section states that marketers must use clear and prominent qualifying language to convey to consumers that a general environmental claim refers only to a specific and limited environmental benefit. The section also cautions marketers that explanations of specific attributes, even when true and substantiated, will not adequately qualify a general environmental marketing claim if the advertisement’s context implies other deceptive claims. Therefore, the

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<sup>127</sup> On average, 31 percent of consumers viewing qualified-general claims and 23 percent of consumers viewing specific-attribute claims saw implied claims.

<sup>128</sup> On average, approximately 16 percent of consumers viewing qualified-general claims and 10 percent of consumers viewing specific-attribute claims believed the claims implied no negative environmental impact.

proposed Guides remind marketers they should ensure that the advertising's context creates no deceptive implications.

Marketers also should use caution with qualifications to ensure that they are not making additional claims they cannot substantiate. The Commission's study demonstrates that even some specific-attribute claims caused consumers to believe the advertised product had other, unstated environmental attributes. For example, 30 percent of respondents viewing a "made with renewable materials" claim believed the advertised product had environmental attributes not expressly mentioned in the claims. Therefore, marketers must substantiate additional claims conveyed by the qualification itself.

Determining whether a general environmental claim is adequately qualified depends heavily on the claim's context.<sup>129</sup> To provide additional guidance on this point, the Commission proposes adding a new example to the Guides. In proposed Example 3, the marketer's claim that its packaging is now "Greener than our previous packaging" is likely deceptive even though the marketer reduced the weight of its packaging, compared to previous packaging, by 15 percent. The example notes that consumers likely interpret "Greener" in this context to mean that other significant environmental aspects of the packaging have been improved. Proposed Example 3

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<sup>129</sup> In determining if reasonable consumers are likely to take an implied claim, the Commission looks at the net impression created by the advertisement as a whole. Deception Policy Statement, 103 F.T.C. at 179. Example 2 in the current and proposed Guides presents a scenario in which the context of the claim creates "deceptive implications." 16 CFR 260.7(a), Example 2. In this example, a product wrapper is printed with the claim "environmentally friendly." Text on the wrapper explains that the wrapper is environmentally friendly because it was "not chlorine bleached, a process that has been shown to create harmful substances." Although the wrapper was not bleached with chlorine, its production releases other harmful substances. Since consumers are likely to interpret the "environmentally friendly" claim, in combination with the textual explanation, to mean that no significant harmful substances are currently released into the environment, the "environmentally friendly" claim would be deceptive.

suggests that the marketer qualify the claim by clearly stating that it reduced the weight of its packaging, compared to previous packaging, by 15 percent. If the advertisement's context does not imply other deceptive claims, this claim likely would not be deceptive.

The Commission is concerned that a general environmental benefit claim, in combination with a particular attribute, may imply that the particular attribute provides the product with a net environmental benefit. If a particular attribute represents an environmental improvement in one area, but causes a negative impact elsewhere that makes the product less environmentally beneficial than the product otherwise would be, consumers may be misled. For example, a marketer that claims its product is "Green – Now contains 70 percent recycled content," needs to import more materials from a distant source, resulting in increased energy use which more than offsets the environmental benefit achieved by using recycled content. If consumers interpret the claim "Green – Now contains 70 percent recycled content" to mean that the product has a net environmental benefit, the claim would be deceptive. The Commission, therefore, requests comment on consumer interpretation of qualified-general environmental benefit claims and on whether to include guidance concerning this issue.

The following part on certifications and seals further discusses the issue of broad, unqualified green claims and includes additional examples of effective qualifications.

## **B. Certifications and Seals of Approval**

### **1. The Current Guides**

Currently, the Guides do not contain a section devoted to certifications and seals of approval. However, one example notes that an environmental seal of approval ("seal") may imply that a product is environmentally superior to other products. Specifically, Example 5 in the general environmental benefit claims section provides: "A product label contains an

environmental seal, either in the form of a globe icon, or a globe icon with only the text ‘Earth Smart’ around it. Either label is likely to convey to consumers that the product is environmentally superior to other products. If the manufacturer cannot substantiate this broad claim, the claim would be deceptive.”<sup>130</sup> Accordingly, the Guides instruct marketers who use environmental seals to accompany such claims with clear and prominent language limiting any environmental superiority representation to the particular product attribute or attributes it can substantiate.<sup>131</sup>

## **2. Comments**

Several commenters and panelists identified the use of third-party certifications as a significant green marketing trend<sup>132</sup> and highlighted the benefits of such certifications to businesses and consumers.<sup>133</sup> For example, Green Seal, Inc. asserted that third-party certification

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<sup>130</sup> 16 CFR 260.7(a), Example 5.

<sup>131</sup> *Id.* FTC staff’s brochure for businesses, “Complying with the Environmental Marketing Guides,” (“FTC Staff’s Business Brochure”) reiterates this guidance and states that third-party certification does not insulate an advertiser from Commission scrutiny or eliminate an advertiser’s obligation to ensure that it has substantiation for the claims communicated by the certification. In addition, the FTC Staff’s Business Brochure advises that if a seal of approval “implies that a third party has certified the product, the certifying party must be truly independent from the advertiser and must have professional expertise in the area that is being certified.” FTC Staff’s Business Brochure, *Complying with the Environmental Marketing Guides* at 6, available at <http://www.ftc.gov/bcp/edu/pubs/business/energy/bus42.pdf>.

<sup>132</sup> *See, e.g.*, Weyerhaeuser, Comment 534743-00033 at 2 (“The emergence of environmental seals and third-party certifications is one of the most important trends the FTC identified as posing potential problems for consumers.”); AF&PA, Comment 534743-00031 at 2; David Mallen, National Advertising Division, CBBB (“NAD”), Green Packaging Workshop Tr. at 46; USGBC, Comment 534743-00027 at 3.

<sup>133</sup> *See, e.g.*, USGBC, Comment 536013-00029 at 3-4 (noting that rating systems provide a consistent and quantifiable definition of “green building” for consumers and an expert, third-party assurance that technical claims are true); Clorox, Comment 534743-00017 at 1.

provides marketers with independent and credible substantiation.<sup>134</sup> Weyerhaeuser stated that third-party certifications are “useful in technical areas, where consumers face difficulty in understanding or directly measuring benefits.”<sup>135</sup> Similarly, the U.S. Green Building Council observed that “when properly administered by certifying organizations truly independent of the product manufacturer and appropriately represented by marketers, . . . third-party certification takes the guesswork out of consumer purchases, providing an independent and expert assessment of technical product claims that may be difficult for consumers to interpret or verify on their own.”<sup>136</sup> Cone LLC affirmed that consumers rely on certifications when evaluating environmental claims. Its opinion survey found that 80 percent of respondents believed that certification by third-party organizations is “important in providing oversight to ensure environmental messaging by companies is accurate.”<sup>137</sup>

One commenter, however, noted that consumers typically cannot verify third-party certifications. Therefore, there is a “heightened degree of trust involved, and there is a heightened degree of credibility that is at stake.”<sup>138</sup> Other commenters cautioned that seals and

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<sup>134</sup> Green Seal, Green Packaging Workshop Presentation at <http://www.ftc.gov/bcp/workshops/packaging/presentations/baldwin.pdf>.

<sup>135</sup> Weyerhaeuser, Comment 534743-00033 at 2; see also Clorox, Comment 534743-00017 at 1; Formaldehyde Council, Comment 533431-00047 at 6.

<sup>136</sup> USGBC, Comment 534753-00027 at 3.

<sup>137</sup> Cone LLC, Comment 534743-00007 at 9; see also Tandus, Comment 536013-00037 at 1 (“[I]ndependent, third party verification and certification provides extra credibility and assurance that the manufacturers’ claims are truthful and accurate.”).

<sup>138</sup> NAD, Green Packaging Workshop Tr. at 46.

logos may communicate a general claim of environmental preferability with no means for the consumer to determine which environmental benefits form the basis for the claim.<sup>139</sup>

Notwithstanding the benefits of third-party certifications, several panelists and commenters highlighted areas of potential consumer confusion and made various suggestions regarding how to address that confusion. The following discusses commenters' suggestions addressing the use of certifications and seals in marketing and when third-party certifications adequately substantiate environmental claims.

**a. Use of Certifications and Seals in Marketing**

Several panelists and commenters suggested that the FTC provide additional guidance on when the display of certifications and seals is likely to mislead consumers.<sup>140</sup> For example, one commenter asserted that seals of approval and “eco-labels” “that communicate a general ‘environmentally friendly’ message to consumers should be treated as environmental claims within the scope of the guides and be subject to applicable principles and criteria.”<sup>141</sup> This commenter suggested that the FTC more prominently feature its advice on the need to qualify

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<sup>139</sup> CSPA, Comment 533431-00049 at 2-3; P&G, Comment 533431-00070 at 2; SDA, Comment 536013-00018 at 2; USGBC, Comment 536013-00029 at 6; Saint-Gobain, Comment 533431-00037 at 7-8.

<sup>140</sup> See, e.g., ACC, Comment 536013-00030 at 3-4; CSPA, Comment 533431-00049 at 2-3; Johns Manville, Comment 536013-00034 at 6; Michelle Moore, USGBC, Green Building and Textiles Workshop Tr. at 197; SBIC, Green Building and Textiles Workshop Tr. at 224; SPI, Comment 533431-00036 at 11; USGBC, Comment 536013-00029 at 3.

<sup>141</sup> P&G, Comment 533431-00070 at 2; see also USGBC, Comment 536013-00029 at 6 (stating that marketers should specify the attributes to which a seal refers in order to help consumers interpret their meaning); CSPA, Comment 533431-00049 at 3; Saint-Gobain, Comment 533431-00037 at 3.

certain types of seals that could connote general environmental benefits.<sup>142</sup> Another commenter suggested that marketers generally should not use “vague, undefined” environmental terms but should be able to incorporate such terms into certifications, as long as the marketer makes the method and terms of the certification publicly available and easily accessible.<sup>143</sup>

Several commenters recommended that the Guides include examples illustrating ways in which marketers could effectively qualify third-party certifications and seals of approval.<sup>144</sup> In the building context, for example, commenters suggested the Guides include examples illustrating how marketers can qualify certifications to distinguish between building design features and performance and to clarify whether a certification applies to a product or whole building.<sup>145</sup>

Commenters also recommended that the Guides address how marketers can avoid misleading consumers about the certifier’s independence.<sup>146</sup> For example, one commenter opined that self-certifications “can be misleading to consumers unless the company expressly

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<sup>142</sup> P&G, Comment 533431-00070 at 2; see 16 CFR 260.7(a), Example 5.

<sup>143</sup> Greenpeace USA, Comment 536013-00020 at 3.

<sup>144</sup> See, e.g., GMA, Comment 533431-00045 at 4; SPI, Comment 533431-00036 at 8-9.

<sup>145</sup> See, e.g., ACC, Comment 536013-00030 at 1; Johns Manville, Comment 536013-00034 at 6; USGBC, Comment 536013-00029 at 4-5.

<sup>146</sup> ACC, Comment 536013-00030 at 3 (noting that marketers should distinguish seals based on voluntary consensus standards from other certifications and that the FTC should aid consumers in distinguishing among certification programs, including those that use life cycle assessment as the basis for certification); Frank Hurd, CRI (“CRI”), Green Building and Textile Workshop Tr. at 153; Johns Manville, Comment 536013-00034 at 7-8; NAIMA, Comment 536013-00017 at 9; USGBC, Comment 536013-00029 at 2-3.

discloses that the certification has not been conducted by an independent third-party.”<sup>147</sup>

Another asserted that the Guides should address the financial relationship between the certifying organization and the company being certified.<sup>148</sup>

In addition, commenters addressed how marketers can avoid misleading consumers about the basis for a certification. For example, because consumers may confuse a logo that simply indicates membership in an organization with one that certifies an aspect of a product’s environmental performance, a commenter recommended that marketers distinguish between the two.<sup>149</sup> Other commenters suggested that the FTC provide guidance to help avoid confusion about certifications that falsely appear to be bestowed by a government agency.<sup>150</sup> Finally, commenters observed that certification programs may address some, but not all, aspects of a product.<sup>151</sup> Therefore, they recommended guidance cautioning marketers not to indicate approval of an environmental attribute that the certifier did not evaluate.<sup>152</sup>

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<sup>147</sup> CRS, Comment 534743-00009 at 4-5; see also Gensler, Green Building and Textiles Workshop Tr. at 109 (highlighting the differences between self-certification; certification where there is a relationship between the certifying organization and marketer – e.g., marketer is a member of the certifying trade association; and certification by an independent third-party).

<sup>148</sup> Skye Con, Comment 536013-00036 at 3.

<sup>149</sup> SBIC, Green Building and Textile Workshop Tr. at 224; see also Gensler, Green Building and Textile Workshop Tr. at 135 (stating that marketers need to make sure that graphics do not imply more than is actually being delivered); OMI, Comment 536013-00022 at 3 (noting that advertisements must clearly state whether a logo refers to membership only or a “verifiable claim of certification”).

<sup>150</sup> ACC, Comment 536013-00030 at 4; NAIMA, Comment 536013-00017 at 8.

<sup>151</sup> USGBC, Comment 534743-00027 at 4; see also SDA, Comment 534743-00028 at 3.

<sup>152</sup> USGBC, Comment 534743-00027 at 4.

### **b. Third-Party Certifications as Substantiation**

Commenters also advised the FTC to address the use of third-party certifications to substantiate claims. Several urged the Commission not to require third-party certification as substantiation for an environmental claim.<sup>153</sup> Others recommended that the FTC revise the Guides to set forth the parameters of a third-party certification that would constitute adequate substantiation.<sup>154</sup> Some commenters and panelists stated that marketers relying on a third-party certification as substantiation must be able to show that the certifying party is truly independent from the advertiser and that the certifying party has professional expertise in the area that is being certified.<sup>155</sup> Thus, for example, some commenters proposed that the Guides reiterate, or at least cross-reference, the principles outlined in the Guides Concerning the Use of Endorsements

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<sup>153</sup> ATA, Comment 533431-00041 at 8 (stating that requiring third-party certification to substantiate claims “would impose unnecessary and impractical burdens on advertisers” and that those claims may already be adequately substantiated under the FTC Act); AF&PA, Comment 533431-00019 at 2; Sappi Fine Paper North America (“Sappi”), Comment 534743-00023 at 2; Skye Con, Comment 536013-00036 at 3; The Vinyl Institute (“Vinyl Institute”), Comment 533431-00046 at 4. But see Healey, Comment 533431-00048 at 7 (stating that FTC could prohibit broad claims unless they are certified by an independent party); Patagonia, Inc. (“Patagonia”), Comment 536013-00011 at 1 (noting that marketers making “safer” chemical use or water/energy conservation claims in textiles should substantiate claims with third-party certifications).

<sup>154</sup> See, e.g., ACC, Comment 536013-00030 at 3-4; AF&PA, Comment 536013-00021 at 2-3; AZS Consulting, Inc., Comment 536013-00024 at 1-2; Healey, Comment 533431-00048 at 2; Johns Manville, Comment 536013-00034 at 6; SDA, Comment 536013-00018 at 2; Skye Con, Comment 536013-00036 at 3; SPI, Comment 533431-00036 at 12; USGBC, Comment 536013-00029 at 4; Vinyl Institute, Comment 536013-00019 at 2-3; Weyerhaeuser, Comment 536013-00035 at 2.

<sup>155</sup> See, e.g., GMA, Comment 533431-00045 at 6; see also Todd Copeland, Patagonia, Inc. (“Patagonia”), Green Building and Textiles Workshop Tr. at 81-82; EConscious, Comment 536013-00023 at 1-2; Grace Gershuny, Organic Trade Association (“OTA”), Green Building and Textiles Workshop Tr. at 62; Oeko-Tex Certification Body (USA) (“Oeko-Tex”), Comment 536013-00013 at 4; Skye Con, Comment 536013-00036 at 3.

and Testimonials in Advertising (“Endorsement Guides”),<sup>156</sup> including that endorsements may not contain factual representations that would be deceptive or could not be substantiated if made directly by the advertiser<sup>157</sup> and that marketers should not rely on endorsements by entities that have a monetary or other relationship with the marketer.<sup>158</sup>

Panelists and commenters also suggested the Guides provide that third-party certification programs be developed through an open, transparent and balanced process, such as programs accredited through the American National Standards Institute (“ANSI”).<sup>159</sup> Other commenters, however, observed that achieving openness and balance is difficult because not all parties may be given a voice in the proceedings, and those making the decisions on the standard may possess ideological views adverse to certain interests.<sup>160</sup>

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<sup>156</sup> 16 CFR Part 255.

<sup>157</sup> GMA, Comment 533431-00045 at 6; Johns Manville, Comment 536013-00034 at 6; Cassie Phillips, Weyerhaeuser (“Weyerhaeuser”), Green Packaging Workshop Tr. at 220-221; Weyerhaeuser, Comment 534743-00033 at 2.

<sup>158</sup> AF&PA, Comment 534743-00031 at 2; see also CRS, Comment 534743-00009 at 4 (stating that because consumers assume certifications have been conducted by independent third-parties, companies should expressly disclose when they have not); AF&PA, Comment 534743-00031 at 2; Green Seal, Green Packaging Workshop Tr. at 199-200; Healey, Comment 533431-00048 at 8.

<sup>159</sup> USGBC, Green Building and Textile Workshop Tr. at 134,160-61; USGBC, Comment 536013-00029 at 5; see also Oeko-Tex, Comment 536013-00013 at 6.

<sup>160</sup> Vinyl Institute, Comment 536013-00019 at 2; see also ECM Biofilms, Inc. (“ECM Biofilms”), Comment 534743-00025 at 2 (commenting that to be an active member of ASTM and to author standards takes resources that are not available to many organizations, and “[a]s a result, standards are written to be beneficial to certain organizations”).

In lieu of delineating general parameters, some panelists and commenters urged the FTC to establish particular standards that, for example, would establish a certification system.<sup>161</sup> Others, however, asserted this should not be the FTC's role.<sup>162</sup>

### **3. Analysis and Guidance**

Marketers across industry sectors increasingly use certifications and seals of approval to communicate environmental claims. These certifications vary from seals of approval issued by third-parties to logos developed internally pursuant to company-specific standards. Third-party certification programs include certification for single attributes (e.g., “recycled content”) and multiple attributes, which may incorporate environmental considerations throughout the life cycle of the product.

Given the widespread use of certifications and seals and their potential for consumer confusion, the Commission proposes providing additional guidance, specifically in a new Guide section devoted to this subject.<sup>163</sup> This section emphasizes that third-party certifications and seals constitute endorsements covered by the Endorsement Guides.<sup>164</sup> This section also states that the use of a certification or seal by itself may imply a general environmental benefit claim.

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<sup>161</sup> See, e.g., Builders Association of South Florida, Comment 536013-00010 at 1; Stephen Richard Sides, National Paint and Coatings Association, Inc. (“NPCA”), Green Building and Textiles Workshop Tr. at 128.

<sup>162</sup> See John Girman, EPA, Green Building and Textiles Workshop Tr. at 200-201; Carlos Martin, National Association of Home Builders (“NAHB”), Green Building and Textiles Workshop Tr. at 198-200.

<sup>163</sup> This proposed guidance can be found in 16 CFR 260.6.

<sup>164</sup> 16 CFR Part 255. The Endorsement Guides provide guidance on the non-deceptive use of endorsements in marketing and outline the parameters of endorsements that would be considered adequate substantiation for marketing claims.

Because, as discussed above, such claims are so difficult to substantiate, this section further advises marketers not to use unqualified seals or certifications. Marketers should accompany seals or certifications with clear and prominent language limiting the general environmental benefit claim to the particular attribute or attributes for which they have substantiation. Finally, the section addresses the use of certifications as substantiation.

**a. Certifications and Seals as Endorsements**

The proposed new section advises marketers that it is deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent, third-party organization. The proposed section states that third-party certifications are endorsements,<sup>165</sup> which should meet the criteria for endorsements set forth in the FTC's Endorsement Guides. In particular, the proposed section advises marketers to review the following Endorsement Guides sections: Definitions,<sup>166</sup> General Considerations,<sup>167</sup> Expert Endorsements,<sup>168</sup> Disclosure of Material Connections,<sup>169</sup> and Endorsements by Organizations.<sup>170</sup>

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<sup>165</sup> The Endorsement Guides define an endorsement as “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.” 16 CFR 255.0.

<sup>166</sup> Id.

<sup>167</sup> 16 CFR 255.1. This section provides, among other things, that “[e]ndorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser,” and that the endorsement “may not convey any express or implied representation that would be deceptive if made directly by the advertiser.”

<sup>168</sup> 16 CFR 255.3. An expert endorser is someone who, as a result of experience, study, or training, possesses knowledge of a particular subject that is superior to that generally acquired by ordinary individuals. 16 CFR 255.0(e). An expert endorser's qualification must, in fact, give him or her the expertise that he or she is represented as possessing with respect to the endorsement. 16 CFR 255.3(a). An expert endorsement must be supported by an actual exercise of expertise, and the expert's evaluation of the product must have been at least as extensive as

Rather than simply repeating the Endorsement Guides' text, the proposed Green Guides section provides several examples of how the Endorsement Guides apply in the context of environmental claims. Proposed Example 1 addresses the use of a seal of approval created by the marketer itself, rather than bestowed by a third-party. In this example, the advertisement implies that an independent third-party certifier with appropriate expertise awarded the seal. The example notes that this unqualified claim would be deceptive because consumers would assume that an independent, third-party certifier evaluated the product.<sup>171</sup> The marketer could avoid deception by using clear and prominent qualifying language to alert consumers that it created the certifying program.

Proposed Example 2 involves a marketer who displays a seal of approval bestowed by a trade association in which the marketer is a member. In this case, the trade association evaluated

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someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented. 16 CFR 255.3(b).

<sup>169</sup> 16 CFR 255.5. When there is a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed. 16 CFR 255.5.

<sup>170</sup> 16 CFR 255.4.

<sup>171</sup> See 16 CFR 255.0 (defining "endorsement" as a message which "consumers are likely to believe reflects the opinion . . . of a party other than the sponsoring advertiser") (emphasis added); 16 CFR 255.5 (stating that when there is a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement, such connection must be fully disclosed); see also Trade Advertising Assocs., Inc., 65 F.T.C. 650 (1964) (finding a newspaper's statement about "awards" it won, which were, in fact, created by the publisher, deceptive because consumers were misled into believing that an objective third-party had evaluated the newspaper); Revco D.S., Inc., 67 F.T.C. 1158 (1965) (finding an advertiser's creation and use of a "Consumer Protective Institute" seal on products was deceptive because the seal created the false impression that "an independent and disinterested organization . . . had approved these products").

the environmental attributes of the marketer's product. Because the seal of approval implies that a third-party evaluated and certified the product, consumers likely expect that the endorsing party is truly independent from the marketer. In this case, however, the certifier is not a truly independent entity because the marketer pays membership dues to the association. Under Section 5 of the FTC Act, as explained by the Endorsement Guides, marketers are required to disclose a "material connection," or a "connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement."<sup>172</sup> Accordingly, this example makes clear that the marketer's failure to disclose its material connection with the endorsing association, i.e., that it is a dues-paying member of the endorsing association, is deceptive.

Proposed Example 3 similarly illustrates a failure to disclose a material connection and shows how the name of a certifying organization can be misleading. In this example, the marketer is a member of an industry trade association, the American Institute of Degradable Materials, that evaluates the biodegradability of its members' products. The association's name may lead consumers to believe that the association is an independent certifying organization. Consumers likely place different weight on a certification from an industry association than from an independent, third-party. Because this advertisement does not disclose that the certifier is an industry trade association, the advertisement is likely to be deceptive. As shown in the example, the marketer could avoid this deception by disclosing that the American Institute of Degradable Materials is an industry trade association.

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<sup>172</sup> 16 CFR 255.5.

Unlike the examples above, proposed Example 4 addresses a situation in which a marketer touts its relationship with a third party that has neither evaluated nor endorsed the environmental attributes of its products. In this example, the marketer displays a seal to show that it is a member of the “U.S. EcoFriendly Building Association.” The proposed example makes clear that, in this circumstance, displaying the organization’s seal may cause consumers to mistakenly believe that the organization has evaluated and endorsed the product. In this example, the marketer could avoid deception by stating that the seal refers to the company’s membership only and that the association did not evaluate the product’s environmental attributes.

**b. Certifications and Seals as General Environmental Benefit Claims**

The current Green Guides state that unqualified certifications and seals of approval likely convey general environmental benefit claims. Specifically, Example 5 of the current general environmental benefit section states that a marketer using an unqualified seal of approval should be able to substantiate the broad claim that the product is environmentally superior to others.<sup>173</sup> If the marketer cannot, it should accompany the seal with “clear and prominent qualifying language limiting the environmental superiority representation to the particular product attribute or attributes for which they could be substantiated . . . .”<sup>174</sup> No commenters challenged this

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<sup>173</sup> 16 CFR 260.7(a).

<sup>174</sup> Id.

approach. Therefore, the Commission continues to believe that consumers likely interpret unqualified seals and certifications similarly to general environmental benefit claims.<sup>175</sup>

As discussed in Part V.A, above, the Commission's consumer perception study shows that broad, general environmental benefit claims suggest that a product has specific, unstated green attributes, such as recyclability and biodegradability, and that the product has no negative environmental impact. The study results also reinforce the Guides' advice that marketers may be able to avoid making deceptive general environmental claims by qualifying those claims.

The Commission proposes transferring a modified Example 5 into the new certification section<sup>176</sup> and moving the guidance from this example into this section. Specifically, the guidance cautions marketers that unqualified seals of approval and certifications likely constitute general environmental benefit claims and, because marketers are unlikely to be able to substantiate such claims, they should not use unqualified certifications or seals of approval. The guidance further states that marketers should qualify seals of approval or certifications to prevent deception. Qualifying language should be clear and prominent and should convey that the seal of approval or certification applies only to a specific and limited benefit.<sup>177</sup> The Commission

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<sup>175</sup> The Commission's study did not test consumer interpretation of seals of approval or certifications. Given the wide diversity of seal and certification designs, it would have been difficult to draw general consumer perception conclusions from testing a particular seal design. No commenter submitted relevant consumer perception evidence.

<sup>176</sup> This example is now Example 5 in the proposed new Section 260.6. The example now states that the environmental seal is likely to convey that the product has far-reaching environmental benefits and may also convey that it causes no negative environmental impact.

<sup>177</sup> It is possible for this qualifying language to be part of the certification or seal itself. For example, the name of a seal may constitute all or part of the qualification. See proposed Examples 2 and 6.

will consider whether the qualifying language successfully limits the general environmental benefit claim on a case-by-case basis.

In contrast, proposed Example 6 illustrates how a marketer can properly use a third-party certification for a single-attribute claim, e.g., “chlorine-free.” In this example, the name of the certifier (“No Chlorine Products Association”) conveys that the certification applies only to one environmental attribute, rather than to the overall environmental benefit of the product.

**c. Third-Party Certifications as Substantiation**

Third-party certification may constitute adequate substantiation. Therefore, the following describes the Commission’s proposed guidance on the use of certifications to substantiate environmental claims, as well as the topics the Commission declines to address.

A marketer may rely on a third-party certification as all or part of its substantiation if the marketer ensures that the certification constitutes competent and reliable scientific evidence to support its claims. In other words, a marketer relying on a certification as substantiation must ensure that the certification supports each of the marketer’s claims with tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.<sup>178</sup> This evidence should be sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that each of the claims is true. It is the marketer’s responsibility to ensure that the certification adequately substantiates its claims. The proposed Guides, therefore, remind marketers that simply possessing a third-party certification does not

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<sup>178</sup> 16 CFR 260.5.

eliminate their obligation to ensure that they have substantiation for their claims, including all claims communicated by the certification.

The Commission does not propose incorporating four suggestions raised by commenters. First, the Commission does not propose requiring marketers to obtain a third-party certification to substantiate their claims. Rather, Section 5 of the FTC Act gives marketers the flexibility to substantiate their claims with any competent and reliable scientific evidence.<sup>179</sup> Because the Guides interpret Section 5 as applied to environmental claims, requiring a third-party certification to substantiate claims is beyond the Guides' purview.

Second, the Commission does not propose establishing a particular certification system. The Green Guides do not establish environmental performance standards or identify environmentally preferable industry practices. Instead, the Guides' purpose is to provide advice regarding consumer interpretation of environmental marketing claims so that marketers can avoid making false or misleading claims.

Third, the Commission declines to propose guidance on the development of third-party certification programs. Experts in the field are in the best position in a dynamic marketplace to determine how to establish certification programs to assess the environmental attributes of products. There may be multiple ways to develop standards that would constitute adequate substantiation, i.e., substantiation that constitutes competent and reliable scientific evidence.

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<sup>179</sup> See Substantiation Policy Statement, 104 FTC at 840 (explaining that what constitutes a reasonable basis for claims depends on a number of factors); see also FTC, Dietary Supplements: An Advertising Guide for Industry (2001), available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus09.pdf> (stating that “[t]he FTC will consider all forms of competent and reliable scientific research when evaluating substantiation”).

Accordingly, the Commission will continue to evaluate the adequacy of a third-party certification as substantiation on a case-by-case basis.

Finally, the proposed, revised Guides do not provide that certifiers make their standards or any other criteria used to support their certifications public. Although Section 5 requires that marketers possess substantiation for their claims prior to making them, it does not require that marketers make their substantiation publicly available.

### **C. Degradable Claims**

#### **1. The Current Guides**

The Guides state that an unqualified degradable claim should be substantiated with competent and reliable scientific evidence that the entire product or package will completely break down and return to nature within a reasonably short period of time after customary disposal.<sup>180</sup> The Guides also provide that degradable claims should be qualified to avoid consumer deception about: (1) the product or package's ability to degrade in the environment where it is customarily disposed; and (2) the rate and extent of degradation. For example, the Guides discuss a trash bag labeled "degradable," without qualification. The marketer relies on tests showing that the bag will degrade in the presence of water and oxygen. Because trash bags are customarily incinerated or buried in landfills that inhibit degradation by minimizing moisture and oxygen, the marketer lacks substantiation that the bags will degrade in a reasonably short period of time. Thus, the claim is deceptive.<sup>181</sup>

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<sup>180</sup> 16 CFR 260.7(b).

<sup>181</sup> *Id.*, Example 1. The FTC Staff's Business Brochure provides additional guidance, noting that a "reasonably short period of time" depends on where the product is disposed. The brochure explains that in landfills, where most trash is taken, materials degrade very slowly and certain materials take decades to decompose. FTC Staff's Business Brochure at 7.

The Commission has challenged degradability claims more than any other specific claim addressed by the Green Guides.<sup>182</sup> These cases were not based on products' inability to degrade under any conditions, but rather on their inability to degrade in the manner consumers expect.

## **2. Comments**

Most commenters supported the Commission's degradable claims guidance.<sup>183</sup> For example, the Soap and Detergent Association supported the Guides' provision that "degradability claims should be qualified to the extent necessary to avoid consumer deception about the product's ability to degrade in the environment where, or in the manner in which, it is customarily disposed."<sup>184</sup>

Although supporting the current guidance, commenters suggested four modifications. First, many stressed that typical solid waste disposal treatments inhibit degradation.<sup>185</sup> Procter & Gamble summed up these views, stating "[i]n the United States, solid waste is predominantly disposed of by incineration or in a landfill, where little or no degradation occurs."<sup>186</sup>

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<sup>182</sup> See, e.g., Dyna-E Int'l, Inc., et al., FTC Docket No. D-9336 (Dec. 15, 2009) (viscose towels); Kmart Corp., FTC Docket No. C-4263 (July 15, 2009) (paper plates); Tender Corp., FTC Docket No. C-4261 (July 13, 2009) (moist wipes and plastic packaging).

<sup>183</sup> See, e.g., Biodegradable Products Institute ("BPI"), Comment 533431-00087 at 2 (supporting guidance, but proposing changes); EPA-EPPP, Comment 533431-00038 at 7; EPA-SPN, Comment 536013-00062 at 12; P&G, Comment 533431-00070 at 2.

<sup>184</sup> SDA, Comment 533431-00020 at 3; see also ACC, Comment 533431-00023 at 12.

<sup>185</sup> See CSPA, Comment 533431-00049 at 3 ("Very little, if any, degradation occurs when the product is incinerated or disposed of in a landfill."); Georgia-Pacific, Comment 533431-00007 at 9 ("[M]odern landfills are in fact entombment facilities where air, light and water are excluded by strict design. In those conditions, degradability time far exceeds 'the reasonable [sic] short period of time' of the Guides."); Tracy Artley, Comment 534743-00019 at 1; EHS, Comment 534743-00011 at 1; EPI, Comment 533431-00063 at 5; NAD, Comment 534743-00029 at 7; Tandus, Comment 533431-00021 at 1.

<sup>186</sup> P&G, Comment 533431-00070 at 2.

Consequently, these commenters argued that unqualified biodegradable claims are inappropriate for items destined for landfills and incinerators.<sup>187</sup> Second, several commenters recommended that the Commission provide guidance on the “reasonably short” time period for complete decomposition. For example, the Biodegradable Products Institute (“BPI”) urged that “[t]he FTC . . . cite a specific timeframe for the process.”<sup>188</sup> Third, several commenters suggested that the Commission reference technical protocols that marketers could follow to adequately substantiate degradable claims. These commenters did not form a consensus, however, regarding which specific protocol(s) the Commission should consider.<sup>189</sup> Finally, the EPA’s Sustainable Products Network urged that the revised Guides address emerging “oxo-degradable” claims.<sup>190</sup>

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<sup>187</sup> No commenters specifically addressed disposal of liquid waste into wastewater treatment systems or aquatic environments.

<sup>188</sup> BPI, Comment 533431-00087 at 3; see also GPI, Comment 534743-00026 at 7 (“[I]t is important that the Commission provide additional clarification regarding what constitutes a ‘reasonably short period of time.’”); Graphic Arts Coalition, Comment 533431-00060 at 1 (“The business community is now asking for a clearer definition of ‘short period of time.’”).

<sup>189</sup> The following commenters favor some degree of reference to technical standards or testing protocols: ECM BioFilms, Comment 534743-00011 at 3 (ASTM D 5526 (plastics under accelerated landfill conditions)); EPA-SPN, Comment 536013-00062 at 12 (various harmonized tests accessible online from the EPA); EPI, Comment 533431-00063 at 4 (“the applicable [unspecified] ASTM or ISO standard”); Georgia-Pacific, Comment 533431-00007 at 9-10 (the British Standards Institution’s EN 14327:2000 (requirements for packaging and packaging waste) and ISO 14855:1999 (aerobic biodegradability of plastics)); SPI, Comment 533431-00036 at 8 (“existing [unspecified] ASTM standards”); see also Graphic Arts Coalition, Comment 533431-00060 at 1 (“The business community . . . oftentimes seeks a specific test method to verify the claims. Inclusion in the guides of acceptable test methods might be an appropriate step.”); Tandus, Comment 533431-00021 at 1 (“If a test method could be specified, it might help qualification of such claims.”).

<sup>190</sup> EPA-SPN, Comment 536013-00062 at 12 (discussing degradable, biodegradable, oxo-degradable, and photodegradable claims).

### **3. Consumer Perception Evidence**

The Commission solicited from commenters evidence of consumer understanding of degradable claims. Only BPI referenced detailed research findings, which arose from a September 2006 survey conducted by the opinion research firm APCO Insight for the American Chemistry Council (“APCO survey”).

FTC staff has subsequently reviewed the underlying questionnaire and data from the APCO survey.<sup>191</sup> Using a widely-accepted methodology, the survey asked 1,000 Americans about unqualified biodegradable and compostable claims.<sup>192</sup> It found that 60 percent of consumers believed that a biodegradable package will disappear in one year or less.<sup>193</sup> Additionally, 83 percent of consumers believed a biodegradable item will decompose even when disposed in a landfill.<sup>194</sup> The Commission is unaware of additional consumer perception data on degradable claims.<sup>195</sup>

### **4. Analysis and Guidance**

In light of the comments and the APCO survey, as well as our own enforcement experience, the Commission proposes retaining its guidance on degradable claims but adding clarity regarding degradable claims for solid waste.<sup>196</sup> Given the lack of information on the

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<sup>191</sup> The Commission has placed this information on the public record.

<sup>192</sup> The study did not explore other types of degradable claims, such as photodegradable.

<sup>193</sup> See APCO, Biodegradable and Compostable Survey Topline at 2.

<sup>194</sup> Id. at 1.

<sup>195</sup> The Commission’s consumer perception study did not specifically ask consumers about unqualified biodegradable claims.

<sup>196</sup> This proposed guidance can be found in 16 CFR 260.8.

record about liquid waste, the Commission seeks comment on whether it should provide additional specificity concerning claims for such materials. The Commission declines to advise marketers that a particular test constitutes adequate substantiation for degradability claims. Finally, the Commission proposes addressing oxo-degradable claims in the Guides.

**a. Solid Waste – Time Period for Degradation**

The Commission proposes revising the Guides to clarify that unqualified degradable claims are deceptive for products or packages destined for landfills, incinerators, or recycling facilities. Federal environmental regulations require landfills to minimize interaction with water, oxygen, and light.<sup>197</sup> Absent a robust supply of these elements, decomposition is severely retarded.<sup>198</sup> Moreover, incinerators combust materials at extreme temperatures, thereby completely preventing decomposition.<sup>199</sup> Together, landfills and incinerators received 66 percent of municipal solid waste in 2008.<sup>200</sup> In addition, in 2008, another 24 percent of consumers' trash went to recycling facilities to be processed for reuse.<sup>201</sup> Thus, these materials also will not decompose. Accordingly, unqualified degradable claims for a vast majority of disposable solid

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<sup>197</sup> See 40 CFR Part 258.

<sup>198</sup> EPA, The Consumer's Handbook for Reducing Solid Waste, EPA Pub. 530-K-96-003, at 17 (1996); William Rathje and Cullen Murphy, Rubbish! The Archaeology of Garbage 112 (2001).

<sup>199</sup> See National Research Council of the National Academy of Sciences, Waste Incineration & Public Health 37 (2000).

<sup>200</sup> EPA, Municipal Solid Waste Generation, Recycling, and Disposal in the United States: Facts and Figures for 2008 at 2-3, available at <http://www.epa.gov/waste/nonhaz/municipal/pubs/msw2008rpt.pdf>.

<sup>201</sup> Id.

items are likely to be deceptive because the customary methods of disposal do not present conditions for decomposition in a reasonably short period of time.

For those solid waste products that are not disposed of in these traditional ways, some marketers seek more definite guidance regarding what constitutes a “reasonably short period of time.” The Commission, therefore, proposes the following two modifications to the Guides.

First, because the Guides do not currently illustrate a non-deceptive unqualified degradable claim for a solid item, the Commission proposes adding an example. Specifically, proposed new Example 5 describes a plant pot that, when buried in soil, quickly decomposes. This example illustrates that an unqualified degradable claim can be made non-deceptively about a solid item if the item is customarily disposed of in a manner that promotes total and rapid decomposition.

Second, the APCO survey found that 60 percent of consumers expect biodegradable solid waste to decompose in one year or less. Accordingly, the Commission proposes adopting a maximum period of one year for complete decomposition of solid materials marketed as degradable without time qualification. The Commission requests comment on whether this one-year period may lead to deceptive claims where consumers would expect a material to degrade in a much shorter time frame – e.g., a plant pot decomposing fully in a single growing season.

#### **b. Solid Waste – Substantiation**

As discussed above, several commenters suggested that the Commission reference technical standards that marketers could follow to substantiate degradability claims.<sup>202</sup> Any technical protocol (or combination of protocols) must assure complete decomposition within one

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<sup>202</sup> The comments discussed numerous different standards. While no single protocol attracted wide support, the standards published by ASTM garnered the most mention.

year and must replicate the physical conditions found in the relevant disposal environment (e.g., in landfills, where most trash is disposed). Commission staff has not identified testing protocols that satisfy these needs.<sup>203</sup> Accordingly, the Commission does not propose creating a safe harbor for any particular technical standard.

**c. Liquid Waste**

The Commission received no comments concerning decomposition of liquids (or dissolvable solids) in wastewater or aquatic environments, and is unaware of consumer perception evidence relating to such degradable claims. Therefore, the Commission lacks sufficient information to give more definitive guidance on the “reasonably short period of time” for degradability claims for liquids.<sup>204</sup> Accordingly, the Commission seeks consumer perception evidence regarding these degradable claims and requests comment on whether the Guides should specify a decomposition time period for liquid substances or dissolvable solids marketed without qualification.

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<sup>203</sup> Most trash is disposed in landfills, which have varied, highly compressed, heterogeneous zones. The moisture, temperature, and contact conditions in landfills differ from the laboratory protocols. ASTM D 5511, for example, mimics a rare disposal environment – a highly controlled anaerobic digester, such as may be found on farms or in sewage treatment systems – with consistent moisture, heat, and exposure to degradation catalysts.

<sup>204</sup> Although one group of testing protocols for biodegradability in water emphasizes a 28-day period for “ready biodegradability,” these tests do not appear to ensure the complete decomposition of the substance. EPA Office of Prevention, Pesticides and Toxic Substances, 835.3110 Ready Biodegradability Guideline, Pub. EPA 712-C-98-076 (1998), available at [http://www.epa.gov/opptsfrs/publications/OPPTS\\_Harmonized/835\\_Fate\\_Transport\\_and\\_Transformation\\_Test\\_Guidelines/Series/835-3110.pdf](http://www.epa.gov/opptsfrs/publications/OPPTS_Harmonized/835_Fate_Transport_and_Transformation_Test_Guidelines/Series/835-3110.pdf).

#### **d. Emerging Oxo-degradable Claims**

The EPA's Sustainable Products Network urged the Commission to include guidance concerning emerging degradable claims – “oxo-degradable” and “oxo-biodegradable.”<sup>205</sup> Claims relating to purported oxo-degradability have entered the marketplace in connection with some of the same disposable items, e.g., bottles and bags, that have featured other degradable claims.<sup>206</sup> According to relevant trade associations, the technology behind these claims depends upon a catalyst, typically light or oxygen, to commence and sustain the decomposition process.<sup>207</sup> However, as discussed above, these elements are lacking in customary methods of disposal. Although commenters did not provide any consumer perception evidence relating to oxo-degradable claims, it is likely consumers would understand these claims similarly to other

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<sup>205</sup> EPA-SPN, Comment 536013-00062 at 6, 12.

<sup>206</sup> See, e.g., The recession: packaging fights back, Packaging Today, Feb. 2009, at 32 (oxo-degradable bottle); Print Media: Footprints with a lighter touch, Marketing Week, Mar. 27, 2008, at 23 (oxo-biodegradable bag).

<sup>207</sup> OxoBiodegradable Plastics Institute, Frequently Asked Question 11, <http://www.oxobio.org/faq.htm#q4> (“Heat and/or sunlight are required to initiate degradation and there has to be oxygen present.”); BPI, Background on Biodegradable Additives (Mar. 18, 2009) at 1 (“Oxo-biodegradables . . . theoretically foster oxidation and chain scission in plastics when exposed to heat, air and/or light.”).

degradable claims.<sup>208</sup> Therefore, the Commission proposes treating oxo-degradable and oxo-biodegradable claims like all other degradable claims.<sup>209</sup>

## **D. Compostable Claims**

### **1. The Current Guides**

Currently, the Guides advise marketers to substantiate compostable claims with competent and reliable scientific evidence demonstrating that “all of the materials in the product or package will break down into, or otherwise become a part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device.”<sup>210</sup> Further, the Guides advise marketers to qualify compostable claims “to the extent necessary” to avoid consumer deception. For instance, they state: “A claim that a product is compostable in a municipal or institutional composting facility may need to be qualified” to alert consumers to any “limited availability of such composting facilities.”

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<sup>208</sup> The root word, degradable, is identical; consequently, consumers’ basic intuition about decomposition after customary disposal is likely to be the same, regardless of prefixes such as bio-, photo-, or oxo-. The National Advertising Division also found that oxo-biodegradable is similar to degradable. With respect to bags marketed as “100% oxo-biodegradable,” NAD recommended that the marketer discontinue the claim “and otherwise modify its advertising to avoid conveying the message that PolyGreen bags will quickly or completely biodegrade when disposed of through ‘ordinary channels,’ e.g., when placed in a landfill.” NAD Press Release Regarding GP Plastics Corp.’s PolyGreen Plastic Bags (Mar. 9, 2009).

<sup>209</sup> For the purposes of interpreting and applying revised Section 260.8, the FTC considers the term “degradable” to include all variants, such as biodegradable, photodegradable, oxo-degradable, and oxo-biodegradable. Thus, degradable claims include any and all of the foregoing.

<sup>210</sup> 16 CFR 260.7(c).

The Guides provide six examples illustrating this guidance, including several relating to the limited availability of large-scale composting facilities. For instance, Example 4 discusses a product designed to be composted only in yard trimmings composting programs but merely labeled “compostable.” Such yard trimmings programs are not available to a substantial majority of consumers or communities where that particular product is sold. Consequently, the claim is deceptive, but could be corrected with a clear and prominent disclosure indicating the limited availability of such programs.

## **2. Comments**

The comments on this issue were extremely limited. Some commenters suggested that the Guides state that two ASTM tests, specifications D 6400 and D 6868, constitute adequate substantiation for compostable claims.<sup>211</sup>

## **3. Consumer Perception Evidence**

As discussed above, the Biodegradable Products Institute submitted a consumer research study conducted by APCO concerning degradable and compostable claims. According to this study, 62 percent of consumers said they do not have access, and an additional 28 percent do not know if they have access, to large-scale composting facilities.<sup>212</sup> Nevertheless, 43 percent of consumers interpreted an unqualified compostable claim to mean that a large-scale composting

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<sup>211</sup> BPI, Comment 533431-00087 at 4; EPA-EPPP, Comment 533431-00038 at 8; EPA-SPN, Comment 536013-00062 at 13; see also Earthcycle Packaging Ltd., Comment 534743-00005 at 1.

<sup>212</sup> See APCO, Biodegradable and Compostable Survey Topline at 9.

facility is available in their area.<sup>213</sup> The study also found that 71 percent of consumers believed that a package labeled “compostable” would decompose in a home compost pile or device.<sup>214</sup>

#### **4. Analysis and Guidance**

The Commission’s current compostable guidance is consistent with consumer perception data from the APCO survey. As discussed below, the Commission does not propose adding references to ASTM’s compostability tests to the Guides but proposes including advice concerning the “timely manner” of compost production.<sup>215</sup>

##### **a. Limited Availability of Composting Facilities**

Large-scale composting facilities, particularly those taking feedstocks other than yard trimmings (e.g., leaves and grass), are still uncommon in the United States.<sup>216</sup> Unsurprisingly, 90 percent of consumers in the APCO survey reported having no access, or being unaware of access, to such facilities. Nevertheless, 43 percent interpreted an unqualified compostable claim to mean that such facilities are available in their area.

In light of the persistent scarcity of municipal facilities and many consumers’ mistaken belief about their availability, the Commission proposes retaining its advice that marketers qualify their compostable claims to avoid deception about the limited availability of composting

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<sup>213</sup> Id. at 8.

<sup>214</sup> Id. at 6.

<sup>215</sup> This proposed guidance can be found in 16 CFR 260.7.

<sup>216</sup> See Food Composting Infrastructure, BioCycle, Dec. 2008, at 30 (noting that in 2008, only 92 commercial composters and 39 municipal composters provided food waste composting); EPA, Municipal Solid Waste in the United States: 2007 Facts and Figures at 148, available at <http://www.epa.gov/epawaste/nonhaz/municipal/pubs/msw07-rpt.pdf> (“In 2007, there were 16 mixed waste composting facilities, two more than in 2006.”).

facilities.<sup>217</sup> Example 4 in the current Guides explains that this disclosure is needed when facilities “are not available to a substantial majority of consumers or communities.”<sup>218</sup> It does not, however, specify what proportion of consumers constitutes a substantial majority. As discussed below in the recyclable section, staff informally has interpreted “substantial majority” in the recycling context to mean at least 60 percent.<sup>219</sup>

#### **b. Substantiating Compostable Claims**

Three commenters suggested that the Guides reference two laboratory protocols adopted by ASTM: (1) Standard specification D 6400 for compostable plastics; and (2) Standard specification D 6868 for biodegradable plastics used as coatings. The commenters, however, did not explain why these protocols would substantiate compostable claims and thereby meet consumers’ expectations about compostable products. Based upon a review of the protocols’ methodology, the Commission does not propose referencing these protocols in the Guides.

ASTM created D 6400 and D 6868 in response to manufacturers’ increased production of plant-based plastic resins.<sup>220</sup> Marketers of these plant-based materials desired to contrast them with petroleum-based plastics and advertise them as “compostable.”<sup>221</sup> ASTM provides that a

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<sup>217</sup> Example 4 in the current Guides suggests an effective qualification that would convey the scarcity of large-scale facilities, e.g., “Appropriate facilities may not exist in your area.” 16 CFR 260.7(c), Example 4.

<sup>218</sup> Id.

<sup>219</sup> See Part V.E, infra.

<sup>220</sup> See Rhodes Yepsen, Compostable Products Go Mainstream, BioCycle, July 2009, at 25.

<sup>221</sup> See id.; Susan Moran, The New Bioplastics, More Than Just Forks, N.Y. Times, Mar. 7, 2007.

plastic item should be considered compostable if the item sufficiently converts to carbon dioxide under these protocols' specific laboratory conditions.<sup>222</sup>

These protocols, however, have significant limitations. As a threshold matter, they apply to materials discarded only in scarce large-scale composting facilities, not home compost piles or devices.<sup>223</sup> Moreover, the laboratory procedures ignore “wide variation” in actual composting facility operations, simulating instead “optimum conditions.”<sup>224</sup>

It is unclear whether these “optimum conditions” reflect real world conditions. There are no comprehensive, mandatory operating requirements for large-scale composting facilities.<sup>225</sup> Instead, individual facilities appear to accept incoming plastic feedstock based upon a number of variables.<sup>226</sup> Such variables include operator assumptions concerning whether the plastic is

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<sup>222</sup> See ASTM D 6400 – 04 at § 4; ASTM D 6868 – 03 at § 4. These two protocols incorporate a third ASTM protocol, D 5338, a detailed test method for plastics disposed of in large-scale composting facilities.

<sup>223</sup> See ASTM D 6400 at § 1.1; ASTM D 6868 at § 1.1.

<sup>224</sup> See ASTM D 5338 – 98 (Reapproved 2003) at § 5.2 (“Because there is a wide variation in the construction and operation of composting systems and because regulatory requirements for composting systems vary, this procedure is not intended to simulate the environment of any particular composting system. However, it is expected to resemble the environment of a composting process operated under optimum conditions.”). One example of such an optimum condition is the testing of only a small piece of the subject material – a two-centimeter scrap – rather than full-size plastic feedstock waste items.

<sup>225</sup> EPA regulations contain detailed minimum requirements for landfills (40 CFR Part 258) and guidelines for incinerators (40 CFR Part 240). However, compost facility operations are not nationally standardized, apart from certain requirements applying to end-product safety – e.g., maximum hazardous materials levels (40 CFR Part 503). States and localities range widely in their governance of these facilities.

<sup>226</sup> See, e.g., Lisa McKinnon, Compostable Controversy, Ventura County Star, Mar. 16, 2009 (noting that a facility cannot convert plastics to compost in a commercially viable way within 90 days); Press Release, Ohio University, Aug. 24, 2009, available at <http://www.ohio.edu/outlook/08-09/August/791.cfm> (stating that a modern facility cannot process a brand of plastic dining utensils in a timely manner); Janice Sitton, Insider's Guide to

petroleum-based and the length of time an operator feasibly can wait to complete composting.<sup>227</sup>

Therefore, it is doubtful that there are typical large-scale composting practices consistent with the ASTM protocols, but more likely numerous and varied facility-specific restrictions on feedstock acceptance and processing.

Given this uncertainty, it does not appear that the ASTM protocols substantiate compostable claims. Therefore, the Commission does not propose referencing the ASTM standards in the Guides.

### **c. Time Period for Composting**

As discussed above, the Commission proposes adding specificity to the degradable guidance in connection with the “period of time” for solid waste decomposition.<sup>228</sup> Consistent with that advice, the Commission proposes to clarify the time period referenced in the compostable section (*i.e.*, “timely manner”).<sup>229</sup> Specifically, the Commission restates the position it articulated in its 1998 Green Guides review and proposes adding it to the compostable section.<sup>230</sup> That is, “timely manner” means that the product or package will break down in

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Compostables Collection at Events, BioCycle, Aug. 2009, at 25 (“[P]roducts accepted for composting in one location may not be accepted for composting in another location. It all depends on the infrastructure and what a processor will accept as feedstock.”); Rhodes Yepsen, Operation Insights: Compostable Products, BioCycle, June 2008 (Facilities may reject certain plastics because visually they “are indistinguishable from conventional plastics” and can be “tricky to compost.”).

<sup>227</sup> Id.

<sup>228</sup> See Part V.C.4.a, supra.

<sup>229</sup> GPI requested clarification on the “timely manner” guidance. Comment 534743-00026 at 8.

<sup>230</sup> See 63 FR 24241 n.7 (May 1, 1998); FTC Staff’s Business Brochure at 7.

approximately the same time as the materials with which it is composted, e.g., natural plant matter.

## **E. Recyclable Claims**

### **1. The Current Guides**

The current Guides provide that marketers should not advertise a product or package as “recyclable” unless “it can be collected, separated, or otherwise recovered from the solid waste stream for reuse, or in the manufacture or assembly of another package or product, through an established recycling program.”<sup>231</sup> The Guides further state that marketers should qualify recyclability claims to the extent necessary to avoid deceiving consumers about the limited availability of recycling programs and collection sites.

The Guides provide additional advice about the need for these disclosures and suggest qualifications depending on the level of available recycling facilities. Specifically, the Guides provide a three-tiered disclosure approach. First, when recycling facilities are available to a “substantial majority” of consumers or communities where the item is sold, marketers can make unqualified recyclable claims. Second, when facilities are available to a “significant percentage” of the population or communities, but not to a substantial majority, the Guides suggest that marketers qualify their claims by stating “This product [package] may not be recyclable in your area” or “Recycling programs for this product [package] may not exist in your area” or by providing the approximate percentage of communities or the population to whom programs are available.<sup>232</sup> Third, when recycling facilities are available to less than a significant percentage of

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<sup>231</sup> 16 CFR 260.7(d).

<sup>232</sup> See id., Examples 4, 6, and 7.

communities or the population, the Guides recommend either disclosing that the product is recyclable only in the few communities with recycling facilities available for the particular product or stating the number of communities, the percentage of communities, or the percentage of the population where programs are available to recycle the product.<sup>233</sup>

The Guides further advise that the disclosure “recyclable where facilities exist” is not an adequate qualification where recycling facilities are not available to a substantial majority.<sup>234</sup> Similarly, the FTC Staff’s Business Brochure cautions that the phrase “check to see if recycling facilities exist in your area” is an inadequate qualification where recycling is not available to a substantial majority.<sup>235</sup>

## **2. Comments**

Recyclable claims garnered attention from many commenters. In particular, they addressed two issues: (1) the need for clarity regarding the “substantial majority” threshold; and (2) consumer confusion about the Society of the Plastics Industry code.

### **a. The Substantial Majority Threshold**

As discussed above, the Guides advise marketers to qualify recyclable claims when recycling facilities are not available to a “substantial majority” of consumers or communities where a product is sold. Commenters identified difficulties in substantiating recyclable claims pursuant to this guidance. They did not agree, however, on how to modify the guidance, suggesting that the Commission either: (1) lower the substantial majority threshold; (2) quantify

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<sup>233</sup> See id., Example 6.

<sup>234</sup> See id., Example 5.

<sup>235</sup> FTC Staff’s Business Brochure at 8.

the substantial majority threshold; or (3) permit more positive disclosures when marketers do not meet the substantial majority threshold.

**i. Lower the Substantial Majority Threshold**

Several commenters urged the FTC to lower the Guides’ substantial majority threshold so that marketers could make an unqualified recyclable claim even when recycling facilities are not available to a substantial majority of consumers.<sup>236</sup> Environmental Packaging International (“EPI”) suggested that the FTC consider a “middle ground,” where recyclability is available to “20 to 60 percent” of communities.<sup>237</sup> According to EPI, in order to meet the substantial majority standard, marketers must send their packaging to numerous communities to determine whether they can be recycled. Thus, EPI opined that a more lenient threshold would reduce this financial burden. An EPA staff member suggested that the substantial majority threshold may limit marketers’ ability to make recyclable claims for some products, which in turn may stifle efforts to develop recycling programs for those products.<sup>238</sup>

Other commenters suggested that the Commission consider adopting the ISO 14021 Environmental Labels and Declarations – Self-Declared Environmental Claims Standard.<sup>239</sup> In contrast to the Guides’ “substantial majority” threshold, ISO 14021 provides that marketers can make unqualified recyclable claims if recycling facilities are available to a “reasonable

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<sup>236</sup> Sara Hartwell, EPA (“EPA”), Green Packaging Workshop Tr. at 81, 92-93; Tetra Pak, Comment 536013-00012 at 2; Vinyl Institute, Comment 536013-00019 at 4-5.

<sup>237</sup> EPI, Green Packaging Workshop Tr. at 237-238.

<sup>238</sup> EPA, Green Packaging Workshop Tr. at 81, 92-93.

<sup>239</sup> MeadWestvaco, Comment 533431-00013 at 2; Tetra Pak, Comment 536013-00012 at 2; Vinyl Institute, Comment 536013-00019 at 4-5.

proportion” of consumers where the product is sold.<sup>240</sup> However, the ISO standard does not quantify its reasonable proportion threshold.<sup>241</sup>

## **ii. Quantify the Substantial Majority Threshold**

Several commenters indicated that complying with the recyclable guidance is difficult because the Guides do not quantify the substantial majority threshold. Although Commission staff has informally interpreted the substantial majority threshold to be “around 60 percent of consumers or communities,”<sup>242</sup> these commenters suggested that the Guides provide a specific percentage of consumers or communities that must have access to recycling to meet the threshold.<sup>243</sup> For example, EPI opined that while there have been estimates of what constitutes a substantial majority, “these are not evident to businesses consulting the published Guides and should be made explicit in the document.”<sup>244</sup>

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<sup>240</sup> ISO 14021 7.72:1999(E).

<sup>241</sup> Commenter MeadWestvaco explained that close alignment with global standards is critical to preventing market segmentation, yet because neither the Green Guides (with “substantial majority”) nor ISO (with “reasonable proportion”) has given numeric value to those terms, “confusion is commonplace.” Comment 533431-00013 at 2.

<sup>242</sup> See, e.g., Janice Frankle, Federal Trade Commission, Green Packaging Workshop Tr. at 100.

<sup>243</sup> AF&PA, Comment 534743-00031 at 2 (stating that it “would be helpful for the FTC to clarify definition of ‘substantial majority’”); EPA, Green Packaging Workshop Tr. at 100 (recommending the FTC provide a “quantitative” interpretation of “substantial majority”); GreenBlue, Comment 533431-00058 at 3; Kate Krebs, National Recycling Coalition (“NRC”), Green Packaging Workshop Tr. at 92; see also International Paper, Comment 533431-00055 at 4 (noting that the access to recycling test needs to be made more explicit).

<sup>244</sup> EPI, Comment 533431-00063 at 3; see also AF&PA, Comment 534743-00031 at 2 (clarifying the definition of “substantial majority” would encourage the recovery of more materials that have the capacity to be recycled). Commenters also suggested that the FTC, or another agency, compile data concerning consumers’ access to recycling facilities for specific materials and provide a “safe harbor” list of materials that the FTC considers recyclable to a “substantial majority.” See, e.g., EPA, Green Packaging Workshop Tr. at 79-80; EPI, Comment

### **iii. Permit Positive Disclosures for Recyclable Claims**

Several commenters recommended that the Guides permit “positive” disclosures for recyclable claims where recycling facilities are not available to a substantial majority of consumers or communities.<sup>245</sup> They contended that the Guides’ suggested disclosures (e.g., “this bottle may not be recyclable in your area”) do not provide any incentive for consumers to determine if the product may be recyclable. One commenter suggested that the Guides permit disclosures, such as “check to see if this product/package is recyclable.” According to that commenter, this disclosure would encourage consumers to inquire whether recycling facilities exist, perhaps by referring to websites.<sup>246</sup>

#### **b. Use of the SPI Code**

Developed by the Society of the Plastics Industry (“SPI”), the SPI code consists of a triangle composed of chasing arrows with a number in the middle that identifies the type of plastic resin from which a product is made. The Green Guides recognize that consumers may interpret the SPI code to mean that a package is recyclable because of its similarity to the universal recycling symbol, the three chasing arrows.<sup>247</sup> To address this problem, the Guides explain that the SPI code is not likely to convey a recyclability claim if inconspicuously placed on the bottom of a product.<sup>248</sup> In contrast, if the SPI code is displayed conspicuously, it is a

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533431-00063 at 3; Estée Lauder, Green Packaging Workshop Tr. at 183; NRC, Green Packaging Workshop Tr. at 92.

<sup>245</sup> See, e.g., Tetra Pak, Comment 536013-00012 at 2-3; Vinyl Institute, Comment 536013-00019 at 4-5.

<sup>246</sup> Tetra Pak, Comment 536013-00012 at 2-3.

<sup>247</sup> The three-chasing-arrows symbol is also known as the “Möbius Loop.”

<sup>248</sup> 16 CFR 260.7(d), Example 2.

“recyclable” claim necessitating disclosure of the limited availability of recycling programs for the product, if facilities are not available to a substantial majority of consumers.<sup>249</sup>

Several commenters observed that even inconspicuous use of the SPI code may cause consumer confusion.<sup>250</sup> The Glass Packaging Institute, for example, asserted that consumers believe the SPI code indicates the packaging can be recycled regardless of the consumer’s geographic location.<sup>251</sup> Similarly, the American Beverage Association (“ABA”) observed that consumers interpret the SPI code – regardless of where the code is located, or what number is inside the code – to mean the package is “recyclable.”<sup>252</sup> The ABA argued that due to this incorrect belief, consumers discard non-recyclable packaging into recycling bins that then require extra sorting or ultimately result in contamination of the recycled plastic feedstock.<sup>253</sup> These commenters urged the FTC to revise the Guides to clarify that the SPI codes are, in fact, recyclability claims that must be properly qualified.<sup>254</sup>

SPI countered that the Guides properly recognize that inconspicuous use of the SPI code is not a recyclability claim. It emphasized that the code was designed to help companies easily and quickly communicate the makeup of plastic packages to downstream consumers and

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<sup>249</sup> Id.

<sup>250</sup> ABA, Comment 533431-00066 at 2-3; GPI, Comment 534743-00026 at 7.

<sup>251</sup> GPI, Comment 534743-00026 at 7; see also ISLR, Green Packaging Workshop Tr. at 141-42 (noting that consumers confusing the SPI code on corn-based polylactic (“PLA”) bottles with the three-chasing-arrows are inadvertently contaminating the recycling stream with bioplastics since most recycling facilities do not accept PLA).

<sup>252</sup> ABA, Comment 533431-00066 at 2.

<sup>253</sup> Id. at 2-3.

<sup>254</sup> Id. at 3; GPI, Comment 534743-00026 at 7.

recyclers sorting these products into various recycling streams.<sup>255</sup> As such, SPI stated that it has guidelines, consistent with those mandated by state law, for the proper sizing and positioning of the code on containers and bottles.<sup>256</sup> For example, SPI noted that its guidelines provide that the code “should be molded, formed or imprinted” and should appear on the bottom of the container, as close to the center as feasible, so that it can be quickly located and easily identified.”<sup>257</sup> SPI’s guidelines also state that the code should “be applied where it will be inconspicuous to the consumer at the point of purchase so it does not influence the consumer’s buying decision,” and “[r]ecyclable’ and other environmental claims should not be made in close proximity to the code, even if such claims are properly qualified.”<sup>258</sup> According to SPI, if the FTC were to abandon its position that inconspicuous use of the SPI code is not an environmental claim, it would impose an undue burden on the plastics industry and its customers who are complying with state law.<sup>259</sup>

### **3. Analysis and Guidance**

The comments demonstrate the continuing importance of the recyclable section of the Guides. However, commenters suggested certain revisions to enhance the section’s

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<sup>255</sup> SPI, Comment 533431-00036 at 6; SPI, Comment 534743-00034 at 1.

<sup>256</sup> SPI, Comment 534743-00034 at 2.

<sup>257</sup> Id.

<sup>258</sup> Id.

<sup>259</sup> Id. at 3. According to SPI, 39 states have laws requiring use of the SPI code. SPI also commented that it is working to expand the resin identification code to address new types of plastics through an initiative with ASTM. SPI, Comment 533431-00036 at 7.

effectiveness for both businesses and consumers. The following analysis addresses these comments.<sup>260</sup>

**a. The Substantial Majority Threshold**

Commenters offered several recommendations regarding the substantial majority threshold for making unqualified recyclable claims, including lowering the threshold and quantifying the threshold. As explained below, the Commission does not believe that the record warrants lowering the threshold.<sup>261</sup> The Commission, however, requests comment on whether the Guides should formally quantify the threshold, and, if so, how.

**i. Retaining the Substantial Majority Threshold**

At the end of its 1998 Green Guides review, the Commission retained the substantial majority threshold, citing consumer perception research demonstrating that consumers are likely to perceive unqualified recyclable claims to mean that a product can be recycled in their community.<sup>262</sup> Several commenters in the current review disagreed with this decision and recommended that the Commission lower the threshold. No commenters, however, submitted consumer perception evidence that would warrant such a change.

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<sup>260</sup> In addition to the changes discussed below, the Commission proposes revising footnote 4 in the recyclable section of the Guides. 16 CFR 260.7(d) n.4. The existing footnote states the Commission deems batteries labeled in accordance with the Mercury-Containing and Rechargeable Battery Management Act to be in compliance with the Guides. This footnote describes the required labeling in detail, but does not explain that manufacturers may apply to EPA to use alternative labels. Rather than explaining each provision of the Act in this footnote, the Commission proposes to simplify the note to simply state that batteries labeled in accordance with the Act are deemed in compliance with the Guides.

<sup>261</sup> This proposed guidance can be found in 16 CFR 260.11.

<sup>262</sup> 63 FR 24240, 24243 (May 1, 1998).

Some commenters contended that the substantial majority threshold may stifle recycling efforts because it forces marketers to send their products or packaging to numerous communities to determine if they can satisfy the threshold. Even if true, however, this argument would not provide a sufficient basis to revise the threshold. The purpose of the Green Guides is not to promote recycling or to minimize costs for marketers making recycling claims. Rather, it is to ensure that marketers' claims are consistent with consumer perception and thereby prevent deception. Commenters did not submit any evidence demonstrating that consumers have altered their view that an unqualified recyclable claim means that recycling facilities are available in their area. As a result, the Commission does not have any evidence that would warrant changing its conclusion.

As noted above, several commenters recommended that the Commission consider replacing the substantial majority threshold with the ISO 14021 "reasonable proportion" threshold. The ISO 14021 reasonable proportion standard arguably permits unqualified recyclable claims where less than a majority of communities have access to recycling facilities for a given product or package. However, because consumers interpret unqualified recyclable claims to mean that facilities are available in their area, the Commission has no basis for adopting this standard.

## **ii. Quantifying the Substantial Majority Threshold**

As noted by several commenters, the ambiguity of the substantial majority standard causes problems. One marketer might interpret 55 percent as a substantial majority and, thus, make an unqualified recyclable claim. A competitor might believe that substantial majority means 75 percent and, thus, decline to make the same claim. Commission staff, therefore, has

informally interpreted substantial majority to mean at least 60 percent.<sup>263</sup> The Commission proposes to advise marketers of this informal guidance in a footnote in the Guides. The Commission also requests comment on whether the Guides should formally quantify “substantial majority,” and, if so, what the appropriate minimum figure should be.

The Commission also proposes to improve the readability of this section and to make clear in the text of the recyclable section that it is using a three-tiered analysis for qualifying recyclable claims. The appropriate qualifications vary depending upon whether recycling facilities are available to: (1) at least a substantial majority; (2) at least a significant percentage but not a substantial majority; or (3) less than a significant percentage of consumers or communities.<sup>264</sup> Currently, the recyclable section provides this guidance only in the examples. By highlighting this guidance in the text, the information should be more accessible.

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<sup>263</sup> FTC Staff concluded that the 60 percent figure is an appropriate minimum threshold because it is consistent with the plain meaning of “substantial majority.” The adjective “substantial” requires that there be something greater than a simple majority. Sixty percent is not so high that it permits unqualified claims only when nearly all communities have recycling facilities. Staff further found that this figure is consistent with previous Commission statements and court decisions. See, e.g., 73 FR 51164, 51177 (Aug. 29, 2008) (“[A] substantial majority of consumers dislike telemarketing calls that deliver prerecorded messages. . . . [A]t least 65 to 85 percent of consumers do not wish to receive prerecorded telemarketing calls.”); Report to Congress: Marketing Food to Children and Adolescents, at 3-4 (July 2008) (“In addition . . . , the companies accounted for 60% to 90% of U.S. sales. Therefore, the Commission believes that the companies that received and responded . . . were responsible for a substantial majority of expenditures for food and beverage marketing to children and adolescents during 2006.”); Mihailovich v. Laatsch, 359 F.3d 892, 909-10 (7<sup>th</sup> Cir. 2004) (75 percent is substantial majority); United States v. Alcoa, Inc., 152 F. Supp. 2d 37, 39 (D.D.C. 2001) (59 percent is substantial majority).

<sup>264</sup> The Commission does not propose quantifying a “significant percentage” at this time. The comments focused on the substantial majority threshold for making unqualified recyclable claims and did not discuss the significant percentage threshold for making certain qualified recyclable claims. It is unclear if providing guidance on this phrase would be useful for marketers. The Commission, therefore, requests comment on this issue.

## **b. Use of Positive Disclosures**

As noted above, several commenters recommended that the Guides permit positive disclosures where recycling facilities are not available to a substantial majority of communities or consumers (e.g., “check to see if facilities exist in your area”). The Commission previously determined that these types of positive disclosures, standing alone, are not sufficient to correct consumers’ misimpressions, and, in fact, may reinforce them. Prior to the 1998 revisions, the recyclable section expressly stated that “recyclable where facilities exist” was an appropriate disclosure. However, in 1998, the Commission highlighted consumer perception data suggesting that consumers interpreted this phrase and a similar phrase, “check to see if recycling facilities exist in your area,” to mean that recycling programs did, in fact, exist in their area.<sup>265</sup> Based on that data, the Commission changed its guidance and withdrew its approval of those disclosures.<sup>266</sup>

Commenters have provided no consumer perception evidence to alter this conclusion. The Commission, therefore, declines to include such disclosures in the Guides, and instead proposes to revise the Guides to make clear that, standing alone, “check to see” disclosures do not adequately qualify recyclable claims. The Commission proposes modifying existing Example 5 to illustrate that both disclosures – “recyclable where facilities exist” and “check to see if recycling facilities exist in your area” – are inadequate.

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<sup>265</sup> 63 FR 24244 (May 1, 1998).

<sup>266</sup> *Id.* The Commission included an example in the Guides demonstrating that the “recyclable where facilities exist” disclosure is inadequate. 16 CFR 260.7(d), Example 5. The FTC Staff’s Business Brochure included an example specifying that the “check to see” disclosure was inadequate. FTC Staff’s Business Brochure at 8.

Although the Commission retains its finding that “check to see” disclosures standing alone are insufficient, such positive disclosures, including those referring to websites or toll-free telephone numbers, may be appropriate in combination with the disclosures that the Commission has provided in its examples. Thus, a disclosure such as “Recyclable – recycling programs for this product may not exist. Call 1-800-XXX-XXXX” likely would not be deceptive.

**c. Use of the SPI Code**

Although some commenters asserted that consumers perceive even inconspicuously placed SPI codes as recyclable claims, they did not provide any consumer perception evidence to support their assertions. In the absence of consumer perception evidence, the Commission does not propose modifying Example 2 of the recyclable guide, which discusses the use of the SPI code.

**F. Recycled Content Claims**

**1. The Current Guides**

The Guides provide that marketers may make a recycled content claim only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer) or after consumer use (post-consumer).<sup>267</sup> To make a pre-consumer recycled content claim, an advertiser must substantiate that the pre-consumer material would otherwise have entered the solid waste stream.<sup>268</sup> The Guides do not advise marketers to distinguish between pre-consumer and post-consumer materials, but marketers may do so.

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<sup>267</sup> 16 CFR 260.7(e).

<sup>268</sup> As illustrated by Example 1, spills and scraps that are normally reused by industry within the original manufacturing process – and that, therefore, would not normally have entered the waste stream – do not constitute recycled content.

Marketers must substantiate any express or implied claims about the specific amount of pre- or post-consumer content in their products.

The Guides further advise marketers that consumers interpret unqualified recycled content claims to mean that the entire product or package, excluding minor, incidental components, is made from recycled material. For products or packages that are only partially made of recycled material, marketers should qualify a recycled content claim to avoid consumer deception.<sup>269</sup>

Example 9 of the Guides indicates that a claim about the percentage of recycled content may be based on the annual weighted average of the recycled content in a product.<sup>270</sup> The FTC Staff's Business Brochure, however, cautions marketers not to use such averaging if reasonable consumers interpret the recycled content claim to mean that each labeled item contains at least the described amount of recycled content.<sup>271</sup>

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<sup>269</sup> The Guides also provide that marketers should qualify a recycled content claim for products containing used, reconditioned, or remanufactured components. A claim need not be qualified where it is clear that the recycled content comes from used, reconditioned, or remanufactured components. 16 CFR 260.7(e). None of the commenters addressed the Commission's guidance on these issues.

<sup>270</sup> *Id.*, Example 9: "A paper greeting card is labeled as containing 50% recycled fiber. The seller purchases paper stock from several sources and the amount of recycled fiber in the stock provided by each source varies. Because the 50% figure is based on the annual weighted average of recycled material purchased from the sources after accounting for fiber loss during the production process, the claim is permissible."

<sup>271</sup> FTC Staff's Business Brochure at 11.

## **2. Comments**

The commenters addressing recycled content claims discussed three main issues:

(1) pre-consumer recycled content claims for textile products; (2) the distinction between pre- and post-consumer recycled content claims; and (3) the methods for calculating recycled content.

### **a. Pre-consumer Recycled Content Claims for Textiles**

Several commenters stated that the Guides do not provide sufficient guidance regarding pre-consumer recycled content claims for textile products. For instance, the EPA’s Sustainable Products Network (“EPA-SPN”) stated that it would be helpful to have more specific guidance, including examples, to help determine whether certain materials qualify as pre-consumer recycled content.<sup>272</sup> EPA-SPN noted that re-use of off-quality materials generated during the manufacturing process presents difficult questions and suggested that several factors may be relevant to determine whether such materials should be regarded as pre-consumer recycled content or as industrial scrap that is normally reused in the manufacturing process. EPA-SPN indicated that an important factor may be whether the material must undergo significant processing before it can be reused.<sup>273</sup>

Another commenter stated that the Guides do not account for innovation in the textile industry.<sup>274</sup> It noted that, for years, the textile industry has sought to prevent material from entering the solid waste stream and that “down cycling” (such as using waste yarn as fiber fill in toys) was common. The commenter said that more recent innovations seek to create high value

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<sup>272</sup> EPA-SPN, Comment 536013-00062 at 2.

<sup>273</sup> Id. at 2-3.

<sup>274</sup> Valdese Weavers, Comment 536013-0006 at 1.

raw materials from the waste product and provided examples of such developments. This commenter sought guidance on whether such material could be considered recycled content.<sup>275</sup>

**b. Distinction Between Pre- and Post-consumer Recycled Content**

The commenters raised two issues with respect to the Guides' distinction between pre-consumer and post-consumer recycled content. First, two commenters stated that the Guides should “eliminate the artificial distinction” between pre-consumer and post-consumer materials for recycled paper.<sup>276</sup> Although it is not entirely clear, it appears that these commenters believe the Guides should advise marketers not to distinguish between the amount of pre-consumer and post-consumer materials used in an item. Rather, marketers should make claims only about the total amount of recycled content (which combines both pre- and post-consumer material).<sup>277</sup>

Second, another commenter recommended that the Guides adopt the ISO 14021 approach to post-consumer material.<sup>278</sup> This commenter explained that ISO 14021 contains a more

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<sup>275</sup> Another commenter recommended that the Guides allow pre-consumer recycled content claims if synthetic polymers change in form, such as from a chip to fiber to yarn. DesignTex, Comment 533431-00024 at 1.

<sup>276</sup> AF&PA, Comment 533431-00083 at 1-2; FBA, Comment 533431-00015 at 2. They contend that the overwhelming majority of fibers recovered and recycled are post-consumer, and that the distinction between pre-consumer and post-consumer materials “is not meaningful to the consumer.” Id.

<sup>277</sup> Another commenter, however, recommended that the Guides continue to permit marketers to distinguish between pre-consumer and post-consumer materials. Amy Wilson, Comment 534743-00004 at 1. A different commenter recommended that the Guides should permit recycled content claims only for post-consumer materials. Tracy Artley, Comment 534743-00019 at 1.

<sup>278</sup> PRC, Comment 533431-00035 at 1-2, Comment 534743-00024 at 1-2, Comment 534743-00023 at 3. ISO 14021 defines post-consumer material as “[m]aterial generated by households or by commercial, industrial and institutional facilities in their role as end-users of the product which can no longer be used for its intended purpose. This includes returns of material from the distribution chain.” ISO 14021 7.8.1.1(a)(2):1999(E).

expansive definition of “post-consumer” material than the Guides because it includes “returns of material from the distribution chain.” The commenter argued that U.S. companies may be at a disadvantage relative to international companies that can claim a higher percentage of post-consumer recycled content under ISO 14021.<sup>279</sup> The commenter urged the FTC to adopt ISO’s definition, noting that federal law requires government agencies to use such voluntary standards when they are available.<sup>280</sup>

### **c. Calculating Recycled Content**

The commenters had differing opinions regarding the appropriate methods to calculate recycled content. Several recommended that the Guides continue to use the annual weighted average.<sup>281</sup> Others recommended revising the Green Guides to permit alternative calculation methods.<sup>282</sup> For example, one commenter recommended that the Guides permit the use of the annual weighted average for the specific company’s business or the use of an industry sector annual weighted average.<sup>283</sup> Another argued that requiring each product to have a minimum percentage of recycled content may limit the ability of vertically-integrated manufacturers to use

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<sup>279</sup> PRC, Comment 534743-00024 at 2.

<sup>280</sup> Id.

<sup>281</sup> Bailey, Comment 533431-00028 at 6; GreenBlue, Comment 533431-00058 at 8; NAIMA, Comment 533431-00042 at 15; SDA, Comment 533431-00020 at 3; Saint-Gobain, Comment 533431-00037 at 15; Stepan Company, Comment 533431-00011 at 3.

<sup>282</sup> AF&PA, Comment 533431-00083 at 2-3; Georgia-Pacific, Comment 533431-00007 at 9; MBDC, Comment 533431-00022 at 1-3; MeadWestvaco, Comment 533431-00013 at 2; Weyerhaeuser, Comment 533431-00084 at 6.

<sup>283</sup> Georgia-Pacific, Comment 533431-00007 at 9.

recycled content.<sup>284</sup> Yet another argued that the Commission should consider a “mass allocation” methodology that would permit recycled content “offsets.” Under this approach, a company could earn credits for using recycled content and allocate those credits to make claims for other products.<sup>285</sup> Some commenters, however, argued that these alternative approaches could mislead consumers by implying that individual products have a greater percentage of recycled content than they actually do.<sup>286</sup>

### **3. Consumer Perception Evidence**

The Commission’s consumer perception study tested respondents’ understanding of the phrase “made with recycled materials” as this claim appeared on three different products – wrapping paper, a laundry basket, and kitchen flooring. The study asked respondents whether a statement that a product is “made with recycled materials” suggests that all, most, or some of the materials were made with recycled material. The largest group, 35 percent, indicated that they would interpret the claim as meaning that “all” of the product was made with recycled materials, while 20 percent believed that “most” of the product was made with recycled materials.<sup>287</sup>

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<sup>284</sup> MBDC, Comment 533431-00022 at 1-2. This commenter claimed that vertically-integrated manufacturers have difficulty achieving high per-product percentages because of challenges tracking materials in large operations, incorporating high percentages of recycled content in high-volume product lines, and using high percentages of recycled content in products without affecting their performance.

<sup>285</sup> Shaw Industries Group, Inc. (“Shaw”), Comment 533431-00050 at 1-3; see also Sappi, Comment 534743-00023 at 3-5 (recommending “credit system” for recycled content).

<sup>286</sup> Bailey, Comment 533431-00028 at 6; Stepan Company, Comment 533431-00011 at 3.

<sup>287</sup> Further, 26 percent stated that the claim means that “some” of the product was made with recycled materials; 15 percent stated that the claim does not suggest anything about how much of the product was made with recycled materials; and 5 percent stated they were not sure. These figures total 101 percent because of rounding. These percentages were derived by combining the responses to all claims that included the phrase “made with recycled materials”

The study further explored which claims were implied by a product advertised as “made with recycled materials.” The responses to a closed-ended question indicated that 52 percent of respondents believe that a “made with recycled materials” claim suggests that the advertised product was recyclable.<sup>288</sup> The study also used an open-ended question to explore this same point. In response, only three percent said that the statement suggests the product is recyclable. Not surprisingly, a majority, 57 percent, stated that the advertised product was made of recycled content.

#### **4. Analysis and Guidance**

The comments sought additional guidance concerning recycled content claims, focusing mainly on pre-consumer recycled content claims for textiles, the distinction between pre- and post-consumer recycled content, and the appropriate methods for calculating recycled content. The Commission analyzes these issues as well as issues raised by its consumer perception study below.

##### **a. Pre-consumer Recycled Content Claims for Textiles**

Although the Guides do not specifically address textiles, they provide advice concerning recycled content claims for all products, including textiles. To constitute pre-consumer recycled content, materials must have been “recovered or otherwise diverted from the solid waste stream . . . during the manufacturing process (pre-consumer) . . . .”<sup>289</sup> Examples 1-3 in the current

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(i.e., “made with recycled materials,” “green - made with recycled materials,” “eco-friendly - made with recycled materials,” and “sustainable - made with recycled materials”).

<sup>288</sup> This number is net of the non-environmental control claim.

<sup>289</sup> 16 CFR 260.7(e). The Guides further specify that the advertiser must have substantiation that the material would otherwise have entered the solid waste stream.

Guides discuss factors relevant to determining whether the material was diverted from the solid waste stream – the amount of reprocessing needed before reuse and whether the material is normally reused in “the original manufacturing process.” Specifically, when spilled raw materials and scraps undergo only “a minimal amount of reprocessing” and are “normally reused in the original manufacturing process,” they are not diverted from the solid waste stream (and, therefore, do not qualify as recycled content).<sup>290</sup>

The commenters’ discussion of innovations in the textile industry highlights difficulties in using the existing guidance to determine whether a particular material qualifies as recycled content.<sup>291</sup> The commenters explain that the textile industry for many years has sought to reuse waste materials from the manufacturing process and that recent innovations have allowed manufacturers to put that material to higher use. These innovative processes likely do not divert the waste material from the solid waste stream because the material already was being reused (albeit in a lower value form). Despite the fact that these higher-use processes do not satisfy the Commission’s guidance on recycled content (diversion from the solid waste stream), they satisfy the two factors the Commission considers in determining if waste is diverted from the solid waste stream. Specifically, the innovations may involve significant reprocessing before the material can be reused, and the material may be reused in something different from the original

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<sup>290</sup> See 16 CFR 260.7(e), Example 1; see also 16 CFR 260.7(e), Examples 2 and 3.

<sup>291</sup> The difficulty in determining whether material qualifies as pre-consumer recycled content is not exclusive to the textile industry. One commenter from the lumber industry expressed concern about the pre-consumer recycled content claims of its competitors. Weyerhaeuser, Comment 533431-00084 at 6. It asserted that some companies interpret recycled content to include chips produced by sawmills as a byproduct of lumber production. Weyerhaeuser stated that it did not believe that this was a common interpretation of recycled content and did not treat such materials as recycled content. Id.

manufacturing process. These innovations, therefore, reveal some ambiguity in the Commission's current guidance.

The comments, however, did not address the broader issue of whether the Commission should revise its guidance for pre-consumer recycled materials generally, and, if so, what changes it should make.<sup>292</sup> For instance, the comments did not address whether the Commission should eliminate the factors it currently uses to determine if material is diverted from the solid waste stream. In addition, it is unclear whether consumers interpret recycled content to mean more than diversion from the solid waste stream. For example, do they believe that any material that is significantly reprocessed and reused constitutes recycled content? If material is reused in place of virgin material, do consumers consider that material recycled content? If, over time, it becomes standard practice within an industry to reuse certain material, do consumers still regard that material as constituting recycled content? The Commission, therefore, declines to propose changes to its guidance at this time.<sup>293</sup> Instead, the Commission solicits comment on what changes, if any, it should make to its existing guidance on pre-consumer recycled content claims for all products. In particular, the Commission seeks evidence of consumer perception of pre-consumer recycled content claims.

#### **b. Distinction Between Pre- and Post-consumer Recycled Content**

Some commenters recommended that the Guides advise marketers to make claims only for the total amount of recycled content in an item, and not to distinguish between the amount of

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<sup>292</sup> One textile industry member suggested that recycled content claims hinge on whether there has been a change in form (e.g., from chip to fiber to yarn). In the Commission's judgment, it is unlikely that consumers would perceive material as recycled content merely because of a change in form.

<sup>293</sup> This guidance can now be found in 16 CFR 260.12.

pre-consumer and post-consumer materials used in that item. The Commission does not propose adding this advice to the Guides. Currently, marketers making recycled content claims have the option to disclose whether the recycled content is pre-consumer or post-consumer. The Commission has no evidence that specific claims about the type of recycled content mislead consumers. In the absence of evidence that these terms are deceptive, the Commission declines to advise marketers that they should discontinue using them.

The Commission also does not propose incorporating the ISO 14021 definition of “post-consumer” material into the Guides. As discussed above, material returned from the distribution chain (e.g., overstock magazines) qualifies as “post-consumer” recycled material under ISO 14021. It is unlikely, however, that consumers would interpret such material as “post-consumer” recycled content because the material never actually reaches consumers. The commenters did not provide any consumer perception evidence to the contrary. Under the Guides, therefore, marketers may claim that this material constitutes recycled content, but not “post-consumer” recycled content.

### **c. Calculating Recycled Content**

Currently, the Guides advise marketers that recycled content claims may be based on the annual weighted average of recycled content in an item.<sup>294</sup> Certain commenters suggested that the Guides allow for alternative calculation methods, such as the average amount of recycled content within a product line or across all product lines, or an offset-based approach.<sup>295</sup>

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<sup>294</sup> 16 CFR 260.7(e), Example 9.

<sup>295</sup> As noted above, one commenter argued that requiring products to have a minimum percentage of recycled content may constrain the ability of vertically-integrated manufacturers to use recycled content. The Guides do not specify minimum recycled content levels for products. The Guides permit marketers to make recycled content claims for products with only a small

The Commission does not propose making the suggested changes. As some commenters cautioned, claims based on these alternative calculation methods could mislead consumers by implying that products contain more recycled content than they actually do. Indeed, these approaches could permit marketers to make recycled content claims for products that do not contain any such material. For example, a marketer may sell residential carpeting that contains no recycled content and commercial carpeting that contains 50 percent. If the marketer believes that individuals are more interested than businesses in recycled content, it could choose to average the amount of recycled content in both products and then make a 25 percent recycled content claim for its residential carpeting (even though this carpeting contains no recycled content).<sup>296</sup> Such a claim appears to be deceptive; therefore, without consumer perception evidence to the contrary, the Commission declines to sanction it.

The Commission, however, proposes retaining Example 9, which illustrates that using annual weighted average is not deceptive.<sup>297</sup> The Guides have included this example since 1992, and there is no evidence that consumers have been deceived by recycled content claims based on this type of calculation. Moreover, it does not appear that consumers would likely be deceived by a percentage recycled content claim for a single product because their chances of getting a product with a lower percentage of recycled content is roughly the same as their chances of getting one with a higher percentage. At least theoretically, however, using annual weighted average could lead to deception. For example, a company could use two manufacturing sites to

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percentage of recycled content, as long as the claims are adequately qualified.

<sup>296</sup> For mathematical simplicity, the hypothetical assumes equal sales of each product.

<sup>297</sup> 16 CFR 260.7(e), Example 9.

make the same product – one using recycled content but selling to local consumers who give little weight to this fact, and another using no recycled content but selling to local consumers who place a premium on products containing recycled materials. In this circumstance, the company could use the annual weighted average to make recycled content claims to the second set of consumers, even though those consumers would never receive products with such content. The Commission, therefore, requests comment on whether recycled content claims based on annual weighted average are misleading, and, if so, whether these claims should be qualified.

**d. Unqualified Recycled Content Claims**

The Guides currently advise marketers to qualify recycled content claims unless the entire product or package, excluding minor, incidental components, is made with recycled content. Any needed qualifications should specify the percentage of recycled content in the item. The Commission’s study indicates that this guidance remains valid. Specifically, a significant minority of respondents (35 percent) indicated that an unqualified recycled content claim means that all of the product was made with recycled materials. The Commission, therefore, proposes retaining this guidance.

**e. Implied Claims**

The results of the Commission’s consumer perception study suggest that some consumers understand a “made with recycled materials” claim to convey a recyclable claim. In response to a closed-ended question, 52 percent of respondents indicated that they believed that a “made with recycled materials” claim suggested that the product was recyclable. In response to an open-ended question, however, only three percent of respondents stated that they thought the advertised product was recyclable.

Although the responses to the closed-ended questions suggest that many consumers may perceive an implied recyclable claim, the Commission does not propose advising marketers that make unqualified recycled content claims to disclose if their product is not recyclable. Even if some consumers do perceive an implied recyclable claim, their understanding appears to be accurate. The Commission’s study asked respondents only about an unqualified “made with recycled materials” claim. Assuming marketers are following the Guides, they make unqualified recycled content claims only where the products are made from 100 percent recycled materials. Products that are made of 100 percent recycled materials appear to be recyclable.<sup>298</sup> Assuming this is the case, marketers would be able to substantiate any implied claim that their product is recyclable. Therefore, the Commission does not propose advising marketers that make unqualified recycled content claims to disclose that the product is not recyclable. The Commission requests comment on this advice and seeks any additional consumer perception evidence addressing this issue.

The Commission also does not propose such guidance for marketers making qualified recycled materials claims, such as “made with 50 percent recycled materials.” It is unclear whether consumers believe that a qualified recycled materials claim suggests that the product is also recyclable. Without such evidence, the Commission is hesitant to advise marketers to make such disclosures. The Commission, nevertheless, requests comment on its proposal and, in particular, seeks any consumer perception evidence.

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<sup>298</sup> Although relatively few products are made from 100 percent recycled materials, those that are – including some paper products and some glass products – appear to be recyclable. See, e.g., <http://www.epa.gov/wastes/conserve/materials/paper/faqs.htm>.

## **G. Ozone-Safe and Ozone-Friendly Claims**

### **1. The Current Guides**

The current Guides state that it is deceptive to misrepresent, directly or by implication, that a product is safe for, or “friendly” to, the ozone layer or the atmosphere.<sup>299</sup> This section contains four examples.

Example 1 provides that an ozone friendly claim is deceptive if the product “contains any ozone-depleting substance, including those listed as Class I or Class II chemicals in Title VI of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and others subsequently designated by the EPA as ozone-depleting substances.”<sup>300</sup>

Example 2 illustrates that an ozone friendly claim may be deceptive, even if the product does not contain ozone-depleting chemicals. In this example, an aerosol air freshener is labeled “ozone friendly” but contains volatile organic compounds, which may cause smog. Even though the product does not contain ozone-depleting substances, the unqualified ozone friendly claim is deceptive because it inaccurately conveys that the product is safe for the atmosphere as a whole.

Example 3 discusses an unqualified claim that an aerosol product “contains no CFCs.” Although the product does not contain CFCs, it contains HCFC-22, another ozone-depleting substance. Because the no-CFCs claim likely implies that the product does not harm the ozone layer, the claim is deceptive.

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<sup>299</sup> 16 CFR 260.7(h).

<sup>300</sup> Example 1 also notes that Class I chemicals include chlorofluorocarbons (CFCs), halons, carbon tetrachloride, 1,1,1-trichloroethane, methyl bromide, and hydrobromofluorocarbons (HBFCs) and that Class II chemicals are hydrochlorofluorocarbons (HCFCs).

Finally, Example 4 illustrates a qualified comparative ozone-related claim that is unlikely to be deceptive. This example states that a product is labeled “95% less damaging to the ozone layer than past formulations that contained CFCs,” and explains that the manufacturer has substituted HCFCs for CFC-12. If the marketer can substantiate the decrease in ozone depletion, this qualified comparative claim is not likely to be deceptive.

## **2. Comments**

Several commenters discussed the Guides’ treatment of ozone-safe and no-CFCs claims. The EPA’s Stratospheric Protection Division (“EPA-SPD”), which regulates ozone-depleting substances, stated that the Guides should continue to provide guidance concerning ozone-safe claims and allow marketers to use no-CFCs claims.<sup>301</sup> The EPA-SPD explained that no-CFCs claims may provide useful information to consumers because many consumers do not realize that CFCs are no longer used. Other commenters disagreed, and argued that the Guides should advise marketers not to make no-CFCs claims.<sup>302</sup> One commenter stated that because CFCs have been banned for almost 30 years, no-CFCs claims do not distinguish a marketer’s product from other CFC-free products.<sup>303</sup> Another similarly stated that “given the universal ban on ozone depleting substances,” ozone-safe claims imply that products without that claim

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<sup>301</sup> Letter from the EPA Stratospheric Protection Division, Mar. 18, 2010, [available at http://www.ftc.gov/green](http://www.ftc.gov/green).

<sup>302</sup> Several commenters also mentioned no-CFCs claims, but only to provide context for their recommendation that the Commission provide guidance on free-of claims generally, which the Commission discusses in detail in Part V.H below. Eastman Chemical Company (“Eastman”), Comment 533431-00051 at 2; GPI, Comment 534743-00026 at 11; GreenBlue, Comment 533431-00058 at 4; SPI, Comment 533431-00036 at 10.

<sup>303</sup> TerraChoice, Comment 533431-00040 at 1, attached report “The Six Sins of Greenwashing” at 4.

contain ozone-depleting substances. Therefore, the commenter argued that “there really is no reason to continue use of this claim.”<sup>304</sup>

In addition to the general discussion regarding ozone-safe and no-CFCs claims, the EPA-SPD recommended several modifications to the examples in the Guides.<sup>305</sup> First, the EPA-SPD stated that the Commission should delete the references to HCFC-22 in Examples 3 and 4 because of EPA’s general prohibition on the use of newly produced ozone-depleting chemicals HCFC-22 and HCFC-14b. Second, the EPA-SPD recommended that the Commission provide guidance for air conditioning manufacturers that substitute non-ozone depleting refrigerants for the prohibited HCFCs. Specifically, EPA-SPD suggested advising marketers not to make unqualified “environmentally friendly” claims about their air-conditioning equipment. The EPA-SPD noted this equipment still may have adverse environmental effects because it uses large quantities of energy and because its refrigerants are greenhouse gases.<sup>306</sup>

### **3. Analysis and Guidance**

Based on the record, the Commission proposes retaining its guidance regarding ozone-safe claims.<sup>307</sup> Below, the Commission addresses the two specific issues raised by commenters: (1) the use of no-CFCs claims; and (2) modification to the Guides’ examples.

First, the Commission does not propose advising marketers to avoid using no-CFCs claims. Although CFCs have been banned for years, the Commission agrees with EPA-SPD that

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<sup>304</sup> EHS, Comment 534743-00011 at 2.

<sup>305</sup> Letter from the EPA Stratospheric Protection Division.

<sup>306</sup> At least with respect to ozone-depletion claims for packaging, one commenter offered a different view, stating that ozone-related claims are no longer of significant relevance because of changes in packaging. GPI, Comment 534743-00026 at 11.

<sup>307</sup> This proposed guidance can be found in 16 CFR 260.10.

many consumers may not realize this is the case. Consumers may still associate CFCs with certain products, such as aerosol sprays. No-CFCs claims may provide valuable information to these consumers who might otherwise assume that certain products have the negative environmental effects associated with CFCs. This conclusion is consistent with the Commission's proposed guidance concerning no or free-of claims generally, discussed below.<sup>308</sup> The Commission, however, seeks any consumer perception evidence concerning no-CFCs claims.

Second, the Commission proposes deleting current Examples 3 and 4 in the Guides, which both reference HCFC-22, in light of EPA's general prohibition on its use. The Commission, however, proposes adding a new example, as recommended by the EPA-SPD, to illustrate that "environmentally friendly" claims by an air conditioning equipment manufacturer may be deceptive, even if the manufacturer has substituted non-ozone depleting refrigerants. This general environmental benefit claim likely would convey to consumers that the product has far reaching environmental benefits. Because currently available air conditioning equipment relies on refrigerants that are greenhouse gases and also consume a substantial amount of energy, this claim likely would be deceptive.

## **H. Free-of and Non-toxic Claims**

### **1. The Current Guides**

The current Guides do not contain a section that specifically addresses claims that products or services have no, are free of, or do not contain certain substances ("free-of claims")

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<sup>308</sup> Specifically, the Commission proposes that a claim that a product does not contain a substance may be deceptive if that substance has never been associated with the product category.

or that they are non-toxic. The current Guides, however, include three examples that address such claims.

Example 4 in the “overstatement of environmental attribute” portion of Section 260.6 discusses a “chlorine-free bleaching process” claim for coffee filters.<sup>309</sup> The coffee filters are bleached without chlorine, but with a process that releases a reduced, but still significant, amount of the same harmful byproducts associated with chlorine bleaching. The claim, therefore, likely overstates the product’s benefits because consumers likely would interpret the claim to mean that the manufacturing process does not cause any of the environmental harm that chlorine bleaching does.<sup>310</sup>

Example 4 in the general environmental benefit claims section addresses claims that a lawn care pesticide is “essentially non-toxic” and “practically non-toxic.”<sup>311</sup> Consumers likely would interpret these claims to mean that the pesticide does not pose any risk to both human health and the environment. The example states that the claims would be deceptive if the pesticide poses a significant risk to either.

Finally, Example 3 in the ozone safe and ozone friendly section discusses an unqualified claim that an aerosol product “contains no CFCs.”<sup>312</sup> Although the product does not contain CFCs, it contains another ozone depleting substance. Because the no-CFCs claim likely implies that the product does not harm the ozone layer, the claim is deceptive.

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<sup>309</sup> 16 CFR 260.6(c), Example 4.

<sup>310</sup> Example 4 provides a qualified claim – “bleached with a process that substantially reduces, but does not eliminate, harmful substances associated with chlorine bleaching” – that likely would not be deceptive.

<sup>311</sup> 16 CFR 260.7(a), Example 4.

<sup>312</sup> 16 CFR 260.7(h), Example 3.

## **2. Comments**

### **a. Free-of Claims**

Numerous commenters recommended that the Commission provide further guidance regarding free-of claims. Several noted that the Guides address no-CFCs claims only in an example and suggested that the Commission address free-of claims generally.<sup>313</sup>

Several commenters discussed the appropriate standard for determining whether a product is free of a substance.<sup>314</sup> One argued that a product is not free of a substance if the substance is present at greater than background or regulated levels.<sup>315</sup> Similarly, one commenter noted that under the ISO 14021 standard, marketers can make free-of claims only if the “specified substance is no more than that which would be found as an acknowledged trace contaminant or background level.”<sup>316</sup> Finally, another contended that free-of claims should be substantiated by evidence that: “(1) none of the chemical was added during the manufacturing process, and (2) when tested, the product does not emit or off-gas levels of the chemical that are

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<sup>313</sup> Eastman, Comment 533431-00051 at 2; GPI, Comment 534743-00026 at 11; GreenBlue, Comment 533431-00058 at 4; SPI, Comment 533431-00036 at 10. One commenter noted that because CFCs have been banned it is not clear whether the Guides’ treatment of no-CFCs claims would also apply to other substances. Eastman, Comment 533431-00051 at 2.

<sup>314</sup> CSPA, Comment 533431-00049 at 4; EHS, Comment 533431-00057 at 1; Johns Manville, Comment 536013-00034 at 4. Several commenters stated that generic “chemical-free” claims are misleading because nothing is actually chemical-free. EHS, Comment 533431-00057 at 1; OMI, Comment 536013-00022 at 1; TerraChoice, Comment 533431-00040, attached report “The Six Sins of Greenwashing” at 3.

<sup>315</sup> EHS, Comment 533431-00057 at 1.

<sup>316</sup> CSPA, Comment 533431-00049 at 4 (quoting ISO 14021). Another commenter recommended that the Commission look to ISO 14021 for guidance on free-of claims. 3M Company, Comment 533431-00027 at 3.

material to consumers, i.e., in the context of health considerations, no more than background and applicable health-based standards for safe exposure.”<sup>317</sup>

Several commenters stated that truthful free-of claims may be misleading. For example, some commenters raised concerns that a truthful free-of claim could mislead consumers if the marketer does not disclose that the product contains other substances that may be harmful to the environment.<sup>318</sup> Others stated that a claim that a product is free of a substance may be deceptive if the substance is not typically associated with the product and competitors’ products do not typically contain the substance.<sup>319</sup> One commenter noted that the ISO 14021 standard does not permit free-of claims if the substance has never been associated with the product.<sup>320</sup> Another commenter illustrated this point with an “extreme hypothetical,” in which a marketer’s claim that its fruit juice does not contain cyanide could mislead consumers by suggesting that other fruit juices do.<sup>321</sup>

Several commenters raised two concerns that unqualified free-of claims imply other environmental claims.<sup>322</sup> First, they stated that while a free-of claim explicitly conveys that a product does not contain a certain substance, it also implies that a product is superior to other

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<sup>317</sup> Johns Manville, Comment 536013-00034 at 2.

<sup>318</sup> See, e.g., GPI, Comment 534743-00026 at 11; NAIMA, Comment 533431-00042 at 10-11; Saint-Gobain, Comment 533431-00037 at 9-10.

<sup>319</sup> CSPA, Comment 533431-00049 at 4; Johns Manville, Comment 536013-00034 at 2; NAIMA, Comment 533431-00042 at 10; Saint-Gobain, Comment 533431-00037 at 9-10; TerraChoice, Comment 533431-00040, attached report “The Six Sins of Greenwashing” at 4.

<sup>320</sup> CSPA, Comment 533431-00049 at 4.

<sup>321</sup> NAIMA, Comment 533431-00042 at 10.

<sup>322</sup> ACC, Comment 533431-00023 at 4; Formaldehyde Council, Comment 533431-00047 at 2-3; Vinyl Institute, Comment 533431-00046 at 2-3.

products that contain the substance.<sup>323</sup> They argued that free-of claims should be qualified to inform consumers of the basis of the comparison, such as whether the free-of claim is relevant to the environmental or health risks or the performance of the product.<sup>324</sup> Second, they asserted that free-of claims are often general claims of environmental benefit, i.e., claims that products without the specified substance are good for the environment.<sup>325</sup> They recommended that such claims not be permitted without qualifying language that substantiates both the express claim and all implied claims.<sup>326</sup>

Other commenters, however, stated that free-of claims may provide valuable information to consumers and do not necessarily imply additional comparative or general environmental benefit claims.<sup>327</sup> One commenter explained that these claims should be qualified only if they are susceptible to more than one interpretation by a non-insignificant portion of the target audience and at least one such interpretation is false, misleading, or unsubstantiated.<sup>328</sup> They recommended that the Commission not establish a bright-line rule requiring that marketers qualify all free-of claims.<sup>329</sup>

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<sup>323</sup> Id.

<sup>324</sup> Id.

<sup>325</sup> Id.

<sup>326</sup> Id.

<sup>327</sup> Eastman, Comment 533431-00051 at 2-3; Johns Manville, Comment 536013-00034 at 3-5.

<sup>328</sup> Johns Manville, Comment 536013-00034 at 3.

<sup>329</sup> Eastman, Comment 533431-00051 at 2; Johns Manville, Comment 536013-00048 at 3-4.

The National Advertising Review Council submitted comments summarizing the National Advertising Division (“NAD”) cases addressing environmental claims, including several cases that involved claims that products were free of, or did not contain, certain substances.<sup>330</sup> In one case, the NAD found that a manufacturer adequately substantiated a formaldehyde-free claim for insulation.<sup>331</sup> The NAD concluded that it was appropriate for the advertiser to make a formaldehyde-free claim, even if the insulation emitted a de minimis amount of formaldehyde because it would be inconsequential to consumers. The NAD noted that the determination of whether an amount is de minimis depends on the substance at issue and requires a case-by-case analysis.

**b. Non-toxic Claims**

Commenters discussed several issues raised by non-toxic claims.<sup>332</sup> One commenter stated that a non-toxic claim is vague, noting that everything is toxic in sufficient doses.<sup>333</sup>

The EPA’s Sustainable Products Network (“EPA-SPN”) stated that, consistent with the example in the current Green Guides, consumers likely would interpret non-toxic claims

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<sup>330</sup> NAD, Comment 534743-00029 at 4.

<sup>331</sup> Although the NAD determined that the formaldehyde-free claim was appropriate, it also found that the manufacturer should discontinue comparative claims that, without proper support, raised doubts about the safety of competing products. Id.

<sup>332</sup> EPA-SPN, Comment 536013-00062 at 4; Seventh Generation, Comment 533431-00033 at 6; TerraChoice, Comment 533431-00040, attached report “The Six Sins of Greenwashing” at 3.

<sup>333</sup> TerraChoice, Comment 533431-00040, attached report “The Six Sins of Greenwashing” at 3.

broadly. Accordingly, the EPA-SPN stated that non-toxic claims should be supported by evidence that addresses health and environmental effects for all exposed populations.<sup>334</sup>

The EPA-SPN also noted that non-toxic claims based on regulatory definitions may mislead consumers.<sup>335</sup> The EPA-SPN stated that regulatory agencies typically set thresholds to identify moderate to high toxicity levels, and the fact that a substance does not exceed the regulatory standard does not necessarily mean that it is non-toxic.<sup>336</sup>

Addressing specific products, two commenters stated that insulation manufacturers make non-toxic claims but use toxic fire retardants.<sup>337</sup> These commenters recommend prohibiting non-toxic claims if the product contains toxic substances in amounts of 10 percent of weight or more.

### **3. Analysis and Guidance**

The Commission agrees with commenters that it should provide expanded guidance for free-of and non-toxic claims. Accordingly, the Commission proposes including a new Guides section to address these claims.<sup>338</sup> The Commission also proposes moving two of the three examples in the current Guides, cited above, into this section, and adding an additional example.

#### **a. Free-of Claims**

Marketers can always substantiate free-of claims by confirming that their products are, in fact, completely free of the relevant substance. As noted above, however, commenters raised a more difficult issue: whether marketers should be able to make free-of claims if their products

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<sup>334</sup> EPA-SPN, Comment 536013-00062 at 4.

<sup>335</sup> Id.

<sup>336</sup> Id.

<sup>337</sup> NAIMA, Comment 533431-00042 at 8; Saint-Gobain, Comment 533431-00037 at 9.

<sup>338</sup> This proposed guidance can be found in 16 CFR 260.9.

contain background levels or trace amounts of a substance. No commenters provided evidence regarding how consumers interpret free-of claims. Accordingly, the Commission must apply its own expertise to determine how consumers likely would interpret such claims. Consistent with the NAD decision, discussed above, the Commission proposes advising that free-of claims may be appropriate where a product contains a de minimis amount of a substance that would be inconsequential to consumers. To illustrate this point, the Commission proposes adding a new example. In proposed Example 2, an insulation seller advertises its product as “formaldehyde-free.” Although the seller does not use formaldehyde as a binding agent to produce the insulation, tests show that the insulation emits trace amounts of formaldehyde. The seller has substantiation that formaldehyde is produced both synthetically and at low levels by people, animals, and plants; that the substance is present in most indoor and (to a lesser extent) outdoor environments; and that its insulation emits lower levels of formaldehyde than are typically present in outdoor environments. In this context, the trace amount of formaldehyde likely would be inconsequential to consumers, and, as a result, a formaldehyde-free claim likely would not be deceptive.

However, as the NAD cautioned, the determination of what constitutes de minimis depends upon the substance at issue and, therefore, requires a case-by-case analysis. In some cases, consumers may view the presence of even trace amounts of a substance as material. For example, trace amounts of a substance such as mercury, which is toxic and may accumulate in the tissues of humans and other organisms, likely would be relevant to consumers.<sup>339</sup>

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<sup>339</sup> See 75 FR 41696, 41715 (July 10, 2010) (requiring that labels for compact fluorescent light bulbs disclose that the bulbs contain mercury).

As suggested by several commenters, the Commission proposes cautioning marketers that an otherwise truthful free-of claim may nevertheless be deceptive. For example, it may be deceptive if a marketer claims that its product is free of a particular substance but does not disclose that the product contains another substance that may cause environmental harm, particularly if it is the same type of harm caused by the absent substance. To illustrate this point, the Commission proposes moving the chlorine-free coffee filter example, discussed above, into the new proposed section.

The Commission also proposes advising marketers that an otherwise truthful claim that a product is free of a substance may be deceptive if the substance has never been associated with that product category. This proposed guidance is consistent with ISO 14021's free-of standards.<sup>340</sup> Such claims may deceive consumers by falsely suggesting that competing products contain the substance or that the marketer has “improved” the product by removing the substance. However, in some circumstances, these claims may provide useful information to consumers who are interested in knowing whether a particular substance is present in a product. This could be the case, for example, where products in one category contain a substance and products in a competing category do not. Marketers making such “free-of” claims can minimize the risk of deception if they clarify that the entire product category is free of the substance. The Commission solicits comment on what guidance it should give for “free-of” claims based on substances which have never been associated with a product category. The Commission also seeks consumer perception evidence regarding these claims.

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<sup>340</sup> ISO 14021 states that free-of claims should not be based on “the absence of ingredients or features which have never been associated with the product category.” ISO 14021 5.7(p):1999(E). See also Environmental Claims: A Guide for Industry and Advertisers, Competition Bureau Canada, Canadian Standards Association, June 25, 2008, Clause 5.17.

The Commission also agrees with several commenters that free-of claims may, depending on the context, convey that the product has broad environmental benefits or is environmentally superior to competing products. Thus, a marketer who makes a free-of claim that reasonable consumers would interpret to convey additional environmental claims must have substantiation for all of those claims.<sup>341</sup> The Commission, however, declines to advise that all free-of claims be qualified. In the absence of evidence that reasonable consumers would, no matter the context, perceive free-of claims as making implied general environmental benefit or comparative superiority claims, such guidance is not appropriate.

**b. Non-toxic Claims**

The Commission proposes moving its guidance concerning non-toxic claims from the existing example in current Section 260.7(a) to the proposed new Section 260.9.<sup>342</sup> This proposed section states that consumers likely think a non-toxic claim conveys that a product is non-toxic both for humans and for the environment. This section also advises marketers to qualify non-toxic claims to the extent necessary to avoid consumer deception.

Marketers should use caution when relying on regulatory standards as substantiation for claims that products are non-toxic. Reasonable consumers would likely interpret non-toxic claims to mean that a product is not harmful to humans or to the environment. Yet, as EPA-SPN noted, some regulatory thresholds allow moderately to highly toxic substances that do not meet these consumer expectations. Therefore, marketers should examine the scope and purpose of the

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<sup>341</sup> If reasonable consumers would interpret a particular free-of claim as making a general environmental claim, then the marketer should comply with the guidance in revised Section 260.4 regarding general environmental benefit claims.

<sup>342</sup> The Commission also proposes moving the example into this new proposed section.

regulatory standard to ensure that it substantiates a non-toxic claim in light of consumer expectations. For example, the standard for acute toxicity, which measures the effects of the substance from exposure during a short time period, may not provide an appropriate basis for non-toxic claims if the substance may be toxic to humans or the environment over a longer period of time.

#### **I. Source Reduction Claims**

Section 260.7(f) of the Guides states that it is deceptive to misrepresent that a product or package has been reduced in size or is lower in weight, volume, or toxicity. The Guides advise marketers to qualify source reduction claims to avoid deception about the amount of the reduction and the basis for any comparison. The Soap and Detergent Association agreed that marketers should qualify source reduction claims and “measure source reduction through a ‘package weight per unit or use of the product’ approach as well as physical reduction of packaging material.”<sup>343</sup> No comments suggested modifying the guidance in this section. The Commission, therefore, proposes retaining this section without change.<sup>344</sup>

#### **J. Refillable Claims**

Section 260.7(g) states that it is deceptive to misrepresent that a package is refillable. It advises marketers not to make an unqualified refillable claims unless: (1) they provide a system to collect and return the package for refill; or (2) consumers can refill the package with a separately purchased product. The Glass Packaging Institute stated that this guidance remains

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<sup>343</sup> SDA, Comment 534743-00028 at 2.

<sup>344</sup> This guidance can now be found in 16 CFR 260.16.

useful, and no other commenters recommended changes.<sup>345</sup> The Commission, therefore, proposes retaining this section.<sup>346</sup>

## **VI. Claims Not Addressed by the Current Green Guides**

The Commission asked commenters to discuss whether and how the Guides should be modified to address the use of environmental marketing claims that either are new or were not common during the last Guides review. Commenters discussed five types of claims:

(1) sustainable; (2) organic/natural; (3) made with renewable materials; (4) made with renewable energy; and (5) carbon offsets. For each of these claims, the following summarizes the comments and the relevant workshop discussions, reviews the consumer perception evidence, and provides the Commission's analysis.

### **A. Sustainable Claims**

#### **1. Comments**

Many commenters and workshop panelists addressed whether the Commission should revise the Guides to address sustainable claims. Commenters disagreed on the meaning of sustainable and whether the term could even be defined. Some argued the claim should be banned, while others asserted it could be used properly in certain contexts. Others observed that the term may be used to convey information about a company's environmental philosophies, independent of specific product claims.

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<sup>345</sup> GPI, Comment 534743-00026 at 8-9.

<sup>346</sup> This guidance can now be found in 16 CFR 260.13.

Many commenters observed that the term “sustainable” has become part of the national vernacular.<sup>347</sup> GMA, for example, cited a study finding that from September 2006 through December 2007, the use of the term on Internet blogs increased more than 100 percent.<sup>348</sup>

Several Packaging Workshop panelists noted that sustainable claims may embrace such diverse issues as child labor, community relations, economic development, and other non-environmental considerations.<sup>349</sup> For example, the Sustainable Packaging Coalition’s “vision” for sustainable packaging includes the aspiration that the packaging “benefits individuals and communities throughout its life cycle.”<sup>350</sup> Another commenter, the Center for Sustainable Innovation, broadly defined sustainability as “how an organization contributes, or aims to contribute in the future, to the improvement or deterioration of economic, environmental, and social conditions, developments, and trends at the local, regional, or global level.”<sup>351</sup>

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<sup>347</sup> See, e.g., Eastman, Comment 533431-00051 at 1 (stating that “sustainable” and “green” are the most “significant new additions” to the vocabulary describing the environmental benefits of products); Dow, Comment 533431-00010 at 9.

<sup>348</sup> GMA, Green Packaging Workshop Tr. at 112; see also ACC, Green Packaging Workshop Tr. at 241; Weyerhaeuser, Comment 533431-00084 at 2.

<sup>349</sup> See, e.g., Dow, Comment 533431-00010 at 8; FPI, Comment 533431-00074 at 2; GMA, Green Packaging Workshop Presentation at <http://www.ftc.gov/bcp/workshops/packaging/presentations/tullier.pdf>; International Paper, Comment 533431-00055 at 8.

<sup>350</sup> Anne Johnson, The Sustainable Packaging Coalition (“SPC”), Green Packaging Workshop Presentation at <http://www.ftc.gov/bcp/workshops/packaging/presentations/johnson.pdf>. SPC remarked that this definition is an “aspirational vision” rather than a standard. This definition includes packaging that, among other things, “is sourced, manufactured, transported, and recycled using renewable energy”; “is made from renewable or recycled source materials”; and “is made from materials healthy in all probable end of life scenarios.” See SPC, Green Packaging Workshop Tr. at 127, 131.

<sup>351</sup> Center for Sustainable Innovation, Comment 534743-00003 at 2.

Several commenters asserted that there is no clear understanding of the term, not just for the typical consumer, but among experts and business managers.<sup>352</sup> These commenters, however, disagreed regarding whether the FTC should attempt to define the specific attributes of sustainability. For example, some urged the FTC “to avoid tackling the onerous and possibly unachievable task of defining the specific attributes of sustainability.”<sup>353</sup> In contrast, others argued that the Guides should address the term.<sup>354</sup> The Environmental Packaging Institute, for example, suggested that the term “sustainable” warrants the addition of a new section “complete with guidance, specific criteria, and examples.”<sup>355</sup>

Because of the claim’s expansiveness, several commenters likened the term “sustainable” to general environmental benefit claims.<sup>356</sup> Thus, some of these commenters recommended that the Guides caution that the term “sustainable” be accompanied by language limiting its environmental superiority claim to the particular attribute, or attributes, that can be

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<sup>352</sup> EHS, Comment 534743-00011 at 1; EPI, Comment 533431-00063 at 4; GMA, Comment 533431-00045 at 9; Georgia-Pacific, Comment 533431-00007 at 8; GreenBlue, Comment 533431-00058 at 7; NAIMA, Comment 536013-00017 at 12-13; Saint-Gobain, Comment 533431-00037 at 12.

<sup>353</sup> NAIMA, Comment 536013-00017 at 12-13; Saint-Gobain, Comment 533431-00037 at 12.

<sup>354</sup> EPI, Comment 533431-00063 at 4; see also GMA, Comment 533431-00045 at 9 (“[T]he Guides should be updated to include a discussion of ‘sustainable’ claims and what constitutes a reasonable basis for substantiating such claims.”).

<sup>355</sup> EPI, Comment 533431-00063 at 4.

<sup>356</sup> See 16 C.F.R. Part 260.7(a); see also BSR, Comment 533431-00016 at 1; P&G, Comment 533431-00070 at 2; SDA, Comment 534743-00028 at 1; SPI, Comment 533431-00036 at 5; Seventh Generation, Comment 533431-00033 at 5; Weyerhaeuser, Comment 533431-00086 at 1.

substantiated.<sup>357</sup> Others suggested that marketers making sustainable claims should demonstrate that all aspects of a product’s life cycle meet the criteria for sustainability.<sup>358</sup> Some suggested that the FTC include new examples using the term “sustainable” in the general environmental benefit claim section of the Guides to clarify which sustainability claims may be deceptive.<sup>359</sup>

On the other hand, some commenters argued that the term “sustainable” simply should not be used as a marketing claim.<sup>360</sup> The Sustainable Packaging Coalition (“SPC”), for example, stated that currently no accepted criteria with supporting test methods exists to qualify a package

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<sup>357</sup> SDA, Comment 534743-00028 at 1-2; see also GMA, Comment 533431-00045 at 8-9 (recognizing complexity of measuring sustainability, but arguing for allowing such claims when qualified with a statement identifying environmental product attributes); ACC, Comment 533431-00023 at 8-9; Dow, Comment 533431-00010 at 10; Formaldehyde Council, Comment 533431-00047 at 5; Georgia-Pacific, Comment 533431-00007 at 8; Hammer, Comment 533431-00017 at 9; P&G, Comment 533431-00070 at 3; Seventh Generation, Comment 533431-00033 at 5; Vinyl Institute, Comment 533431-00046 at 3.

<sup>358</sup> CSPA, Comment 533431-00049 at 3 (stating comparative sustainability claims “should have a clear basis for verification, such as certified life cycle assessment”); Rachel Chadderdon and Meghan Genovese, Comment 533431-00054 at 1 (arguing that, because no product can be fully sustainable unless all aspects of its life cycle meet the criteria for sustainability, marketers wishing to make environmental sustainability claims “must disclose exactly which components of the production cycle are and are not sustainable”); Stepan Company, Comment 533431-00011 at 2; Tandus, Comment 536013-00037 at 1.

<sup>359</sup> Eastman, Comment 533431-00051 at 1 (suggesting the Guides define sustainability for marketing purposes and provide categories of industry practices and product properties that support this definition); GMA, Green Packaging Workshop Tr. at 143 (recommending the Guides include examples on how to qualify sustainability claims to “put [them] in the proper context”); EPI, Green Packaging Workshop Tr. at 210; GPI, Comment 534743-00026 at 10; USGBC, Comment 534743-00027 at 3.

<sup>360</sup> See EHS, Comment 534743-00011 at 1 (stating that “sustainable” should not appear as a product or package descriptor because “[t]he term is ill-defined and made up of several factors, often specific to a particular product or manufacturer”); GreenBlue, Comment 533431-00058 at 7 (“We recommend strengthening the Guides to actively discourage companies from describing their products as . . . ‘sustainable.’”); William Mankin, Comment 534743-00020 at 1 (stating that the FTC should prohibit use of the term “sustainable” and any claims related to the sustainability of a product in all on-product or off-product labels or claims); ILSR, Green Packaging Workshop Tr. at 144.

as sustainable.<sup>361</sup> According to SPC, the term “sustainable,” like the terms “green” or “environmentally friendly,” has no intrinsic meaning and confuses consumers, even if marketers qualified it with text that describes the specific attribute(s) that make their product sustainable.<sup>362</sup>

Some commenters noted that, because there are no definitive methods for measuring sustainability or confirming its accomplishment, the Green Guides should discourage statements claiming achievement of sustainability but permit general references to sustainability goals or processes.<sup>363</sup> ACC, for example, recommended that the Guides clarify that “claims of a product or process being ‘sustainable’ are more properly characterized as that [the] product or process promotes or contributes to sustainability and/or sustainable outcomes, since sustainability is a process or a goal.”<sup>364</sup> Weyerhaeuser noted that ISO 14021 prohibits claims of achieving sustainability, but that this prohibition does not apply to marketer’s statements about their “sustainability goals, processes, or aspirations.”<sup>365</sup>

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<sup>361</sup> SPC, Green Packaging Workshop Presentation at <http://www.ftc.gov/bcp/workshops/packaging/presentations/johnson.pdf>.

<sup>362</sup> Id. But see ACC, Comment 533431-00023 at 9 (asserting the Guides should cover sustainability claims because they can be appropriately qualified); AF&PA, Comment 533431-00083 at 3-4 (recommending the Guides allow use of “sustainable,” provided the marketer transparently communicates a reasonable basis for the claim; also noting that ISO is expecting to amend its current prohibition of the term due to growing experience and new consumer attitudes).

<sup>363</sup> See, e.g., CRI, Comment 533431-00026 at 1 (recommending the Guides distinguish between “sustainability (zero net impact) and environmental attributes (minimal net impact),” which contribute to sustainability); ACC, Comment 533431-00023 at 8; Weyerhaeuser, Comment 533431-00084 at 5-6.

<sup>364</sup> ACC, Comment 533431-00023 at 8 (emphasis in original).

<sup>365</sup> Weyerhaeuser, Comment 533431-00084 at 5. ISO 5.5 states that no claim of achieving sustainability shall be made because there are no definitive methods for measuring sustainability or confirming its accomplishment. ISO 14021 5.5:1999(E).

Other commenters argued that the term “sustainable” can be used properly in specific contexts. The Sustainable Forestry Initiative (“SFI”), for example, stated that, in forestry, “sustainable” is a well-recognized concept that can be clearly and specifically defined.<sup>366</sup> SFI explained that it has a specific forest certification standard, the “SFI Standard,” which defines “sustainable forestry,” sets forth performance measures and indicators, and confirms compliance with a third-party certification audit. Thus, SFI proposed that the Guides state that a forest certification label may properly claim compliance with a specific forest certification standard and that a third-party audit verifying conformance with the standard is adequate substantiation.<sup>367</sup>

In contrast, commenter William Mankin argued that sustainable claims should not be used in any particular context, including forestry.<sup>368</sup> In his view, it is difficult to attain sustainability in forests because forests are complex ecological systems. Moreover, he asserted that there is no widespread consensus on a definition of the term “sustainable,” particularly in fields involving the management of ecological systems and biological resources. He noted, for example, that in the field of forest management, some believe the term applies primarily to the

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<sup>366</sup> SFI, Comment 534743-00010 at 3-4; see also AF&PA, Comment 534743-00031 at 2 (“A broad definition of sustainability may be adopted by the FTC, but . . . specific sectors should be able to develop focused definitions that meet the needs of that sector.”); Weyerhaeuser, Comment 534743-00033 at 1 (stating that a claim of “sustainable forestry” in the context of a forest certification system “provides consumers with specific, factual information and is not a broad claim”).

<sup>367</sup> In support of its argument, SFI referenced the Canadian Competition Bureau’s analysis of ISO 140121, clause 5.5, “which prohibits general and undefined claims of sustainability, but permits claims that a seller conforms to a specific forest certification standard.” Id. at 5.

<sup>368</sup> William Mankin, Comment 534743-00020 at 1; see also Caroline Pufalt, Comment 534743-00021 at 1.

ecological attributes of forests, while others believe it pertains more to social and economic concerns outside forests.<sup>369</sup>

Finally, some commenters observed that terms such as “sustainable” may be used independently from product claims to communicate important information about a company or organization’s mission and vision. For example, GMA referenced the following example of a company’s statement about its environmental efforts: “The General Mills Sustainability Initiative is a company-wide effort to responsibly manage the natural resource base our business depends on.”<sup>370</sup> GMA argued that this is a broad statement about corporate philosophy rather than a claim made for specific products or services, and, therefore, should be outside the scope of the Guides.<sup>371</sup> In addition, USGBC recommended that the FTC distinguish between “statements . . . which are used to convey broad organizational goals and should not require substantiation, and product claims, which make assertions about specific product attributes.”<sup>372</sup>

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<sup>369</sup> Id.

<sup>370</sup> GMA, Green Packaging Workshop Presentation at <http://www.ftc.gov/bcp/workshops/packaging/presentations/tullier.pdf>.

<sup>371</sup> GMA, Comment 533431-00045 at 8 (citing as examples company website sections on environmental activities and discussions of activities in annual reports or other comparable communication vehicles); see also EHS, Comment 534743-00011 (asserting that companies should discuss their programs regarding sustainable development in a “full text document,” such as their website or in their “corporate sustainability report”); Georgia-Pacific, Comment 533431-00007 at 8 (recommending that the FTC discourage the unqualified use of “sustainable” for products and reserve it for “providing information about a company’s [environmental] indicators and overall improvement on those indicators in time”); PCPC, Comment 533431-00075 at 6 (recommending that the FTC maintain the Guides’ focus on products, packages, and services, not “general company practices”); SPI, Comment 533431-00036 at 4 (stating that businesses should be able to explain commitments and activities intended to advance “sustainability”).

<sup>372</sup> USGBC, Comment 534743-00027 at 3.

## 2. Consumer Perception Evidence

Commenters submitted limited consumer perception evidence regarding sustainable claims. Weyerhaeuser cited findings from its 2006 focus groups in four U.S. cities indicating that consumers were unable to define the term.<sup>373</sup> Similarly, the National Cotton Council of America (“National Cotton Council”) described its own 2006 research, which found that only one third of consumers understand the term “sustainable” in the context of “sustainable agriculture.”<sup>374</sup> It also cited a 2007 study by the Hartman Group finding that just over half of consumers claim any familiarity with the term “sustainability,” and most cannot define it “appropriately” upon probing.<sup>375</sup> The National Cotton Council also provided the Commission with findings from a 2008 study indicating that 43 percent of respondents believed the term “sustainable” means “will last longer/good quality.”<sup>376</sup>

These results are consistent with the Commission’s consumer perception study. Specifically, in response to an open-ended question about the meaning of the term “sustainable,” some respondents stated the term means nothing (13 percent) or that they do not know what the term means (eight percent). Many others stated that it suggests a product is “strong/durable” (19 percent) or long-lasting (16 percent). Relatively few respondents indicated that the term

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<sup>373</sup> Weyerhaeuser, Comment 533431-00086 at 1.

<sup>374</sup> National Cotton Council (“NCC”), Comment 536013-00027 at 4. This study is available at <http://www.ftc.gov/green>. The NCC considered the following responses to be correct interpretations of “sustainable”: “minimum impact on environment” and “reuse or replenish land, use in future, doesn’t deplete.” E-mail from Cotton Incorporated (Mar. 11, 2010).

<sup>375</sup> NCC, Comment 536013-00027 at 52. The commenter did not indicate what the Hartman Group considers the “appropriate” meaning of sustainable.

<sup>376</sup> Cotton Incorporated, Lifestyle Monitor Survey, July 2008, available at <http://www.ftc.gov/green>.

“sustainable” was related to any particular environmental benefit,<sup>377</sup> and only seven percent stated that the term suggested a product is “good for,” “helps,” or “benefits” the environment.”<sup>378</sup>

In addition, responses to the closed-ended questions suggested that respondents did not view “sustainable” in the same way as a general environmental benefit claim. Specifically, respondents were less likely to believe that unqualified sustainable claims suggested specific, unstated environmental benefits than respondents who viewed “green” and “eco-friendly” claims. For example, while, on average, 52 percent of respondents viewing unqualified “green” claims, and 49 percent of respondents viewing “eco-friendly” claims, stated that these claims suggested that the product had several specific environmental attributes, only 17 percent of respondents viewing “sustainable” claims stated the product had these attributes.<sup>379</sup> Moreover, while qualifying general environmental claims with a specific environmental attribute made respondents less likely to believe those claims suggested other, unstated environmental attributes, qualifying a “sustainable” claim did not have the same effect. Sixteen percent of respondents viewing an unqualified “sustainable” claim saw unstated environmental attributes, compared to 24 percent of respondents who saw such attributes when the claim was qualified with a specific environmental attribute.

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<sup>377</sup> Although 25 percent of respondents cited a specific environmental benefit, these responses were distributed over ten different environmental benefits (e.g., “made from recycled materials”; “recyclable”; “made with renewable materials”; “made from sustainable resources”).

<sup>378</sup> In contrast, 27 percent of respondents viewing “green,” and 15 percent of respondents viewing “eco-friendly,” believed those claims suggested the product is “good for/helps/benefits the environment.”

<sup>379</sup> These results were similar for all three tested products – kitchen flooring, laundry basket, and wrapping paper.

### 3. Analysis

While marketers making sustainable claims may intend to convey that a product has general and/or specific environmental benefits, the consumer perception evidence indicates that the claim has no single environmental meaning to a significant number of consumers or that it conveys non-environmental characteristics (e.g., durable or long-lasting).<sup>380</sup> In addition, the evidence indicates that consumers view sustainable claims differently than general environmental benefit claims.<sup>381</sup>

The Commission, however, is unable to provide specific advice on sustainable as an environmental marketing claim. Unlike other claims we tested, the term contains no cue alerting consumers that it refers to the environment. If used in combination with environmental terms and images, consumers may perceive “sustainable” as an environmental claim. However, given the diversity of possible phrases and imagery, testing the claim in context was not practical. Therefore, the Commission lacks a sufficient basis to provide meaningful guidance on the use of sustainable as an environmental marketing term. Marketers, however, are responsible for substantiating consumers’ understanding of this claim in the context of their advertisements.

Some commenters noted that, to the extent the term “sustainable” is used to communicate information about a company’s environmental philosophy, such statements should be outside the scope of the Guides. Corporate image advertising raises First Amendment issues. The degree of

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<sup>380</sup> Section 5 of the FTC Act does not require that an advertiser have intended to convey a deceptive claim. See *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 and n.5 (D.C. Cir. 1977); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963). Therefore, if, in the particular context in which it is presented, a sustainable claim implies to consumers that the product has non-environmental characteristics, marketers must substantiate this implied claim.

<sup>381</sup> Unlike the other tested claims, the term “sustainable,” on its face, did not suggest that the advertised product had environmental attributes.

constitutional protection provided to corporate image advertising is determined by the category of speech into which that expression falls. Therefore, as with all types of claims, the Commission evaluates each advertisement to determine whether it constitutes commercial speech. There is no clear standard for determining whether speech with elements of both commercial and non-commercial speech will be considered commercial, as opposed to non-commercial speech. Rather, the Supreme Court has assessed the totality of circumstances surrounding the expression to determine its character, including the content of the speech, whether the speaker's motivation is economic, the audience to whom and the manner in which the speech is directed, and whether its commercial and non-commercial component parts are inextricably intertwined.<sup>382</sup> Because the determination of an advertisement's constitutional status must be conducted on a case-by-case basis, the issue is not appropriate for general guidance.

## **B. Organic and Natural Claims**

The current Guides do not specifically address claims that products, packages, or services are organic or natural. Several commenters discussed these claims and recommended that the Commission provide guidance regarding their use.<sup>383</sup> Below, the Commission discusses other federal agencies' guidance concerning the terms "organic" and "natural," summarizes the relevant comments, and analyzes the issues.

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<sup>382</sup> See generally Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795-96 (1988); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 67 n.14 (1983).

<sup>383</sup> EPA-EPPP, Comment 533431-00038 at 1, 5; SDA, Comment 533431-00020 at 3; Seventh Generation, Comment 533431-00033 at 3, 5; Terressentials, Comment 534743-00012 at 1-2.

## **1. Overview – Guidance from Other Agencies**

Other government agencies have provided guidance on the appropriate scope of organic and, to a lesser extent, natural claims.

### **a. Organic Claims**

The USDA’s National Organic Program (“NOP”) regulates the term “organic” for agricultural products.<sup>384</sup> Agricultural products that are sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic ingredients” must be produced and processed in accordance with NOP standards.<sup>385</sup> Under these standards, organic agricultural products must be produced and handled without using prohibited methods or synthetic substances, except as specifically authorized on the National List of Allowed and Prohibited Substances.<sup>386</sup> Operators who produce or handle such products must be certified by an NOP-accredited agent.<sup>387</sup> Products that qualify as “100 percent organic” or “organic” may use the USDA’s organic seal on their packaging and in their advertisements.<sup>388</sup>

The USDA does not regulate organic claims for non-agricultural products. No other federal agencies provide specific guidance regarding organic claims for non-agricultural products.

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<sup>384</sup> See 7 CFR Part 205.

<sup>385</sup> See 7 CFR 301.

<sup>386</sup> See 7 CFR 205.105; 205.601-606.

<sup>387</sup> See 7 CFR 205.100.

<sup>388</sup> See 7 CFR 205.311.

## **b. Natural Claims**

To the extent that federal agencies have defined, or administered statutes defining, “natural,” they have done so only in specific contexts. For example, the Textile Products Identification Act, which is administered by the Commission, defines “natural fiber” as “any fiber that exists as such in the natural state.” 15 U.S.C. § 70(c). The USDA has defined “natural” meat and poultry as “a product containing no artificial ingredient or added color” and which “is only minimally processed.”<sup>389</sup> The FDA has defined “natural flavor or natural flavorings” as substances containing the flavoring constituents derived from specified items, such as spices, fruits, vegetables, herbs, plant materials, meat, seafood, and eggs.<sup>390</sup> At least in part because of the difficulties in developing a definition of “natural” that would be appropriate in multiple contexts, both the FDA and the FTC have previously declined to establish a general definition.<sup>391</sup>

The FDA, however, has employed an informal policy regarding the term “natural.” Specifically, it:

has considered “natural” to mean that nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there. For example, the addition of beet

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<sup>389</sup> USDA Food Safety and Inspection Service, Fact Sheet, Meat and Poultry Labeling Terms, available at [http://www.fsis.usda.gov/Fact\\_Sheets/](http://www.fsis.usda.gov/Fact_Sheets/). The fact sheet further notes that the “label must explain the use of the term ‘natural’ (such as - no added colorings or artificial ingredients; minimally processed).”

<sup>390</sup> 21 CFR 101.22.

<sup>391</sup> See 58 FR 2407 (Jan. 6, 1993) (FDA declines to undertake rulemaking to define “natural”); 48 FR 23270 (May 24, 1983) (FTC terminates rulemaking that would have regulated natural food claims).

juice to lemonade to make it pink would preclude the product being called “natural.”<sup>392</sup>

## **2. Comments**

Several commenters stated that marketers increasingly employ organic and natural claims and recommended that the Commission provide guidance regarding their use.<sup>393</sup> Most commenters focused on the use of these terms to describe textiles.<sup>394</sup>

### **a. Organic Claims**

Several commenters recommended that the Commission provide guidance for organically labeled textiles.<sup>395</sup> Some suggested that the Commission consult with the NOP to clarify guidance for organic claims for textiles.<sup>396</sup> Many of these commenters also recommended that

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<sup>392</sup> 56 FR 60466 (Nov. 27, 1991).

<sup>393</sup> EPA-EPPP, Comment 533431-00038 at 1, 5; SDA, Comment 533431-00020 at 3; Seventh Generation, Comment 533431-00033 at 3, 5; Terressentials, Comment 534743-00012 at 1-2.

<sup>394</sup> In addition to textiles, one commenter asserted that many organic claims for personal care products may be misleading. Terressentials, Comment 534743-00012 at 1. That commenter stated that the USDA has issued a policy statement permitting companies selling personal care products to apply for organic certification under the NOP, but many companies are making organic claims for personal care products without obtaining certification. *Id.* The commenter argued that many consumers mistakenly believe that such products comply with NOP standards. *Id.* On March 12, 2010, Consumers Union and the Organic Consumers Association filed a petition raising this concern and asking the Commission to investigate the use of organic claims for personal care products. The Commission has placed the petition on the record.

<sup>395</sup> Better for Babies, Comment 536013-00033 at 1; EOnscious, Comment 536013-00023 at 1-2; International Sleep Products Association (“ISPA”), Comment 536013-00015 at 1; OMI, Comment 536013-00022 at 2-3; Organic Exchange, Comment 536013-00032 at 3-4; Organic Trade Association (“OTA”), Comment 536013-00016 at 1.

<sup>396</sup> Better for Babies, Comment 536013-00033 at 1-2; EOnscious, Comment 536013-00023 at 2; OTA, Comment 536013-00016 at 2.

the Guides adopt NOP’s production standards for organic raw fibers.<sup>397</sup> Other commenters suggested that marketers of products that contain any organic fiber should be able to make claims about the amount of organic fiber, as long as the organic content has been certified by a third party.<sup>398</sup>

Commenters noted that consumers may understand organic claims to refer to the manufacturing of the textile and not just its fabric content.<sup>399</sup> The commenters differed, however, in their views regarding how to address this issue. Several recommended that the Guides reference the Global Organic Textile Standard (“GOTS”) for the processing and manufacturing of organic textile products.<sup>400</sup> One commenter noted, however, that GOTS is a “process review standard” that “leaves too many opportunities for mistakes and fraud within the dyeing and finishing process for textiles.”<sup>401</sup> That commenter stated there is a need for analytical

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<sup>397</sup> Better for Babies, Comment 536013-00033 at 1-2; EConscious, Comment 536013-00023 at 1; OTA, Comment 536013-00016 at 1; Harmony Susalla (“Susalla”), Comment 536013-00028 at 1.

<sup>398</sup> Organic Exchange, Comment 536013-00032 at 3; Texas Organic Cotton Marketing Cooperative (“TOCMC”), Comment 536013-00014 at 2.

<sup>399</sup> See, e.g., OTA, Comment 536013-00016 at 2. The NOP standards apply only to the raw fibers; they do not cover the processing and manufacturing of textile products.

<sup>400</sup> Better for Babies, Comment 536013-00033 at 2; EConscious, Comment 536013-00023 at 2; OMI, Comment 536013-00022 at 4; OTA, Comment 536013-00016 at 4; Susalla, Comment 536013-00028 at 1-2; TOCMC, Comment 536013-00014 at 2. One commenter recommended that the Guides consider GOTS, as well as other processing standards such as Oeko-Tex and Bluesign. Organic Exchange, Comment 536013-00032 at 4. That commenter asserted that third-party organic certification should be recognized as substantiation for an organic claim. Id. Another commenter, however, expressed concern that references to the Oeko-Tex certification process may be misleading if the marketer does not disclose which Oeko-Tex certification process it is using. Susalla, Comment 536013-00028 at 2.

<sup>401</sup> Oeko-Tex, Comment 536013-00013 at 4.

verification to determine the presence of various chemicals in textile products.<sup>402</sup> Another commenter recommended that marketers disclose a complete list of ingredients when they make organic claims.<sup>403</sup>

Several commenters discussed whether marketers should be permitted to claim that fibers are “transitional organic” fibers. The USDA requires that to be certified as organic, fibers must be grown without chemical fertilizers, defoliants, or pesticides for three years. The term “transitional organic” refers to fiber grown according to these guidelines that has not yet met the three-year requirement. One commenter noted that some retailers are selling products containing “transitional cotton,” despite the fact that USDA does not recognize that term.<sup>404</sup> Other commenters recommended that the Guides permit marketers to make “transitional organic” claims “to enable the organic fiber marketplace to grow while supporting the farmer during the three-year transition period.”<sup>405</sup>

One commenter indicated that numerous retailers appear to be marketing products made with conventional cotton as organic.<sup>406</sup> That commenter also reported that retailers are making claims that products are certified organic but are not providing information about the

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<sup>402</sup> Id.

<sup>403</sup> OMI, Comment 536013-00022 at 2.

<sup>404</sup> NCC, Comment 536013-00027 at 2.

<sup>405</sup> Organic Exchange, Comment 536013-00032 at 4; TOCMC, Comment 536013-00014 at 2. The Organic Exchange noted that the proof for a transitional claim would be that the farm has applied for organic certification, an initial on-site inspection has been conducted, and the farm has an organic system plan which includes the last date of use of prohibited substances. Organic Exchange, Comment 536013-00032 at 4.

<sup>406</sup> NCC, Comment 536013-00027 at 3.

certification.<sup>407</sup> The commenter stated that research indicates consumers are confused about the meaning of organic claims and do not trust that products labeled as organic are, in fact, organic.<sup>408</sup>

## **b. Natural Claims**

Several commenters stated that the term “natural” does not have a clear meaning.<sup>409</sup> One commenter explained that natural claims for textiles are unclear because the products have “undergone significant transformation from the raw materials” they contain.<sup>410</sup> Another asserted that the term is meaningless and is used to exaggerate the environmental benefits of a product.<sup>411</sup> One commenter, however, stated that consumers may understand the term given the context in which it is used.<sup>412</sup>

The commenters discussed whether the Guides should address the term “natural.” Several recommended generally that the Guides address or define the term, but did not specify how the Guides should do so.<sup>413</sup> Some commenters suggested that natural may be appropriately

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<sup>407</sup> Id. The NOP regulations require that the products labeled as “100 percent organic” or “organic” must identify the agent that certified the products as organic. 7 CFR 205.303.

<sup>408</sup> Id. at 4.

<sup>409</sup> EConscious, Comment 536013-00023 at 1; OTA, Comment 536013-00016 at 2; Oeko-Tex, Comment 536013-00013 at 5; Susalla, Comment 536013-00028 at 1.

<sup>410</sup> OTA, Comment 536013-00016 at 2 (stating also that the term “natural” “has only rarely been used as a term of art . . . by any U.S. regulatory agency”).

<sup>411</sup> Susalla, Comment 536013-00028 at 1.

<sup>412</sup> Tetra Pak, Comment 536013-00012 at 3. The commenter provided an example of the use of natural in context. It stated that claiming a product is “made from trees, a natural and renewable resource,” would not be deceptive if the product is made entirely using that material.

<sup>413</sup> ISPA, Comment 536013-00015 at 1 (proposing that the Commission establish objective criteria regarding when natural may be used as well as documentation required to

used to distinguish between textiles derived from agricultural products and those derived from petrochemicals.<sup>414</sup> Another commenter recommended that the Guides advise marketers to substantiate natural claims with third-party verification or independent testing.<sup>415</sup>

Others recommended that the Guides not allow the use of the term. For example, one commenter stated that because the term lacks a clear meaning in the textile sector, the Commission should not allow marketers to use it.<sup>416</sup> Another suggested that the Guides not allow natural claims even for fibers grown agriculturally because agriculture can have a negative impact on the environment, such as water and air pollution and soil erosion.<sup>417</sup>

### **3. Consumer Perception Evidence**

Only one commenter, the National Cotton Council, cited consumer perception evidence regarding organic claims. It asserted that its research indicates that consumers are confused about these claims, with more than two-thirds of respondents either believing, or not sure, if

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substantiate the claim); SDA, Comment 536013-00018 at 1 (stating that natural claims for all products should be specific and verifiable); Susalla, Comment 536013-00028 at 1; Tandus, Comment 536013-00037 at 1; Tetra Pak, Comment 536013-00012 at 3.

<sup>414</sup> Better for Babies, Comment 536013-00033 at 2; NCC, Comment 536013-00027 at 2; OTA, Comment 536013-00016 at 2.

<sup>415</sup> TOCMC, Comment 536013-00014 at 1; see also OMI, Comment 536013-00022 at 3 (stating that if the Commission decides to address natural claims, a clear definition is required); Oeko-Tex, Comment 536013-00013 at 5 (stating that marketers should substantiate natural claims with specific, science-based definitions); Susalla, Comment 536013-00028 at 1 (stating that the Cotton Incorporated “green” message is deceptive because although U.S. cotton is grown on less land and with fewer chemicals, this is not the case with farms around the world).

<sup>416</sup> EConscious, Comment 536013-00023 at 1.

<sup>417</sup> Todd Copeland, Patagonia, Comment 536013-00011 at 1; see also REI, Comment 536013-00031 at 1 (stating that the Commission should be mindful that agriculture can have a significant impact on the environment).

organic cotton textiles were made from recycled materials or contain soy.<sup>418</sup> The research also indicated that consumers do not trust that products labeled as organic are, in fact, organic.<sup>419</sup>

No commenters provided consumer perception evidence indicating how consumers understand the term “natural.”

#### **4. Analysis**

The Commission does not propose creating a new section of the Guides to address organic and natural claims. The explanation for this decision is discussed below separately for each claim.

Although the Commission is not proposing a new section for these claims, the general principles set forth in the Guides still apply. Marketers must have substantiation for their environmental benefit claims, including implied claims.<sup>420</sup> More specifically, to the extent that reasonable consumers perceive organic or natural claims as general environmental benefit claims or comparative claims, the marketer must be able to substantiate those claims and all other reasonably implied claims, as described in Part V.A.4 above.<sup>421</sup>

##### **a. Organic Claims**

The Commission does not propose addressing organic claims for two reasons. First, the NOP already addresses organic claims for agricultural products. Second, for products that are

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<sup>418</sup> NCC Comment 536013-00027 at 4 (citing 2003 and 2006 studies conducted jointly with the OTA).

<sup>419</sup> Id.

<sup>420</sup> 16 CFR 260.5.

<sup>421</sup> 16 CFR 260.6(d), 260.7(a).

outside the NOP’s jurisdiction, the current record is insufficient for the Commission to provide specific guidance.

**i. Organic Claims for Agricultural Products**

As described above, the NOP provides a comprehensive regulatory framework governing organic claims for agricultural products. Because of this framework and the NOP’s ongoing work in this area, the Commission does not want to propose duplicative or possibly inconsistent advice. Therefore, the Commission declines to address organic claims covered by NOP standards in the Guides.<sup>422</sup>

For the same reason, the Commission does not propose addressing standards for processing organic textiles. The USDA has indicated that organic claims for finished textile products fall within its jurisdiction. Following the Commission’s Green Building and Textiles Workshop, the NOP released a new fact sheet, “Labeling of Textiles Under National Organic Program (NOP) Regulations,” which discussed organic claims regarding textiles.<sup>423</sup> Therefore, rather than proposing duplicative or potentially inconsistent advice, Commission staff will continue to consult with NOP staff to ensure that marketers have sufficient guidance regarding organic claims for textile products.

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<sup>422</sup> Although some commenters recommended that the Guides endorse “transitional organic” claims for fibers, it is unlikely consumers would understand the meaning of this term and the issue is more appropriately addressed by the NOP.

<sup>423</sup> USDA Labeling of Textiles Under National Organic Program (NOP) Regulations Fact Sheet, July 2008, available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5070818&acct=nopgeninfo>.

## **ii. Organic Claims for Non-agricultural Products**

Although the NOP's regulatory framework governs organic claims for agricultural products, it does not apply to organic claims for non-agricultural products. Therefore, within a particular category (e.g., cosmetics), some products are covered by NOP standards and other products are not, depending on their ingredients.<sup>424</sup> Yet, both products could be advertised as organic. It is unclear how consumers understand organic claims that describe non-agricultural products, and how marketers of those products substantiate their claims.

No commenters submitted consumer perception evidence on this issue. The Commission, therefore, lacks a basis to provide guidance on the use of organic claims for products outside NOP's jurisdiction. Accordingly, the Commission requests comment on what guidance, if any, it should provide regarding the use of organic claims to describe non-agricultural products.

### **b. Natural Claims**

The Commission also does not propose addressing natural claims. As discussed above, the role of the Guides is to prevent consumer deception, so definitions for terms such as natural must be based on what consumers understand those terms to mean. However, no commenters provided consumer perception evidence indicating how consumers understand the term

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<sup>424</sup> Cosmetics, body care products, and personal care products illustrate this difference. The USDA has stated that if these products contain agricultural ingredients and can satisfy NOP organic production, handling, processing, and labeling standards, they are eligible for certification under NOP regulations. However, the USDA has stated that it does not have authority over the production and labeling of such products if they do not contain agricultural ingredients or do not make any claim that they meet USDA organic standards. USDA Cosmetics, Body Care Products and Personal Care Products Fact Sheet, April 2008, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5068442&acct=nopgeninfo>.

“natural.” In addition, natural may be used in numerous contexts and may convey different meanings depending on that context.<sup>425</sup> Thus, the Commission does not have a basis to provide general guidance on the use of the term.

Some commenters recommended that the Guides prohibit the use of natural claims. In evaluating whether a representation is misleading, the Commission examines not only the claim itself, but the net impression of the entire advertisement.<sup>426</sup> Thus, in order to state that marketers should never use the term “natural,” the Commission would have to conclude that the use of the term is deceptive in every context and that no reasonable qualification is sufficient to prevent that deception. In the absence of evidence demonstrating that natural is always deceptive and that its use could not be qualified to avoid such deception, the Commission cannot prohibit marketers from using the term. Moreover, as noted above, several agencies, including the FTC, the FDA, and the USDA, acknowledge that natural may be an appropriate descriptor in some contexts.<sup>427</sup>

Marketers that are using terms such as natural must ensure that they can substantiate whatever claims they are conveying to reasonable consumers. If reasonable consumers could interpret a natural claim as representing that a product contains no artificial ingredients, then the marketer must be able to substantiate that fact. Similarly, if, in a given context, a natural claim

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<sup>425</sup> As noted above, the FTC and the FDA have previously declined to adopt a wide-ranging, formal definition of “natural.”

<sup>426</sup> Deception Policy Statement, 103 F.T.C. at 179 (when evaluating representations under a deception analysis, one looks at the complete advertisement and formulates opinions “on the basis of the net general impression conveyed by them and not on isolated excerpts”). Depending on the specific circumstances, qualifying disclosures may or may not cure otherwise deceptive messages. *Id.* at 180-81.

<sup>427</sup> See Part VI.B.1.b, *supra*.

is perceived by reasonable consumers as a general environmental benefit claim or as a comparative claim (e.g., that the product is superior to a product with synthetic ingredients), then the marketer must be able to substantiate that claim and all attendant reasonably implied claims.<sup>428</sup>

### **C. Renewable Materials Claims**

Although the Commission solicited comments on whether the Guides should be revised generally to include renewable claims, the vast majority of commenters addressed this term in the context of “renewable materials”<sup>429</sup> or “renewable energy.”<sup>430</sup> Therefore, the Commission has focused on these two types of renewable claims. This part discusses comments, relevant consumer perception evidence, and the Commission’s proposed guidance for renewable materials claims. Part VI.D, below, addresses renewable energy claims.

#### **1. Comments**

Comments addressed the following issues: (1) use of an unqualified renewable claim; (2) the elements of a renewable materials claim, including the time frame under which material must be renewed; (3) the quantity of renewable materials in a product or package marked “made with renewable materials”; (4) the specific substantiation for a renewable materials claim; and (5) consumer confusion between renewable materials claims and biodegradability.

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<sup>428</sup> See Part V.A.4, supra.

<sup>429</sup> Although commenters also referred to “renewable resources,” the Commission uses the term “materials” for consistency.

<sup>430</sup> According to the FTC Staff Internet Surf, among renewability claims, the phrases “renewable energy” and “renewable resource” occurred most frequently. “Renewable energy” occurred in 46 percent of the 387 web pages containing renewable claims, and “renewable resource” occurred in 37 percent.

**a. Unqualified Renewable Claims**

Two commenters recommended that the Guides clarify that “the characteristic of ‘renewable’ must be ascribed to a material or fuel,” and not to the product or package itself.<sup>431</sup> According to these commenters, “it is not proper to ask if [a product] is renewable but rather if the material composing it in a majority by weight is renewable.”<sup>432</sup> A third commenter asserted that a product labeled with an unqualified renewable claim is deceptive because it does not provide consumers with information that can be used to evaluate the claim.<sup>433</sup>

**b. Elements of Renewable Materials Claims**

Most commenters did not offer evidence or views on how consumers perceive renewable materials claims.<sup>434</sup> Rather, they suggested definitions for the term. For example, two commenters defined renewable materials as materials having “the capacity of being regenerated either through natural processes or with human assistance, for example, through replanting with nursery seedlings or natural reseeding.”<sup>435</sup> Another stated that renewable materials are “capable of being replaced by natural ecological cycles or sound management practices.”<sup>436</sup>

Commenters, however, argued that there is an ongoing debate regarding the definition of “renewable” and strongly urged the Commission to “approach renewability broadly and

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<sup>431</sup> FBA, Comment 533431-00015 at 4; Georgia-Pacific, Comment 533431-00007 at 8.

<sup>432</sup> Id.

<sup>433</sup> ACC, Comment 533431-00023 at 11 (suggesting that a product labeled, for example, “uses 20% renewable feedstock” would not be deceptive).

<sup>434</sup> In fact, only one commenter, the National Cotton Council, cited consumer perception evidence. NCC, Comment 536013-00027 at 4; See Part VI.C.2, infra.

<sup>435</sup> AF&PA, Comment 533431-00083 at 4; see also FBA, Comment 533431-00015 at 4.

<sup>436</sup> NCC, Comment 536013-00027 at 1.

recognize that there is no consensus on what should be treated as a renewable resource.”<sup>437</sup>

Moreover, although some commenters observed that renewable materials include biobased products,<sup>438</sup> one commenter remarked that defining renewable materials to include only agriculturally based materials is too limiting.<sup>439</sup> According to this commenter, although not agriculturally based, sand is a renewable resource because deposits are increased daily “by the normal, ongoing geological processes that generate new deposits of sand in the hundreds of millions of tons each year.”<sup>440</sup>

Another commenter provided a more detailed definition. According to this commenter, a material is renewable if: (1) the rate of the material’s replenishment matches the rate of consumption; (2) the sourcing of the material does not harm the ecosystem or negatively impact “sustainability”; (3) sourcing of the material reduces consumption of non-renewable resources; and (4) use of the renewable material does not “significantly increase the product’s environmental footprint in other relevant indicators (e.g., water, waste, energy, etc.).”<sup>441</sup> Along these lines, other commenters stated that renewability claims may deceive consumers if the

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<sup>437</sup> NAIMA, Comment 536013-00017 at 14; Saint-Gobain, Comment 533431-00037 at 13.

<sup>438</sup> See, e.g., Dow, Comment 533431-00010 at 15; GreenBlue, Comment 533431-00058 at 7.

<sup>439</sup> NAIMA, Comment 536013-00017 at 14.

<sup>440</sup> Id.; see also FBA, Comment 533431-00015 at 4; Georgia-Pacific, Comment 533431-00007 at 8.

<sup>441</sup> P&G, Comment 533431-00070 at 3. This commenter’s remarks also applied to renewable energy.

beneficial attributes associated with the renewable materials do not account for every environmental trade-off, after analyzing the entire life cycle of the source.<sup>442</sup>

Other commenters suggested that renewable materials claims may convey some broader environmental benefit.<sup>443</sup> In particular, one commenter cautioned that advertisers should be careful not to equate such claims with an overall environmental benefit, observing, for example, that although ethanol may be renewable, its overall environmental benefit is debated because of “the large amount of energy needed to create it (and the carbon emissions that its creation entails).”<sup>444</sup>

In contrast, another commenter stated that consumers understand renewability to refer to only one attribute (i.e., the biological properties of a material) and do not interpret renewability claims to imply that “there are no other environmental issues.”<sup>445</sup> Thus, this commenter urged the FTC not to expand renewability “beyond a simple biological claim.”<sup>446</sup>

Some commenters specifically addressed whether and how the Guides should address time frames for renewability. One commenter, for example, suggested that the Guides provide that the time frame within which a resource is renewed is “commensurate with the rate of its use and that the appropriate management practices are used to ensure a material’s renewability.”<sup>447</sup>

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<sup>442</sup> Seventh Generation, Comment 533431-00033 at 5 (stating the attribute should cover the entire life cycle of the source so as to account for any trade-off); SDA, Comment 533431-00020 at 4.

<sup>443</sup> SPI, Comment 533431-00036 at 6.

<sup>444</sup> Hammer, Comment 533431-00017 at 9.

<sup>445</sup> Weyerhaeuser, Comment 533431-00084 at 6.

<sup>446</sup> Id.

<sup>447</sup> GreenBlue, Comment 533431-00058 at 7.

This commenter explained that the term “begs the question ‘On what time scale?’ The argument can be made that everything is renewable in geologic time or that products are renewable if fossilization is included in the life cycle.”<sup>448</sup> Others similarly asked the FTC to provide specific time frames for renewability.<sup>449</sup>

### **c. Quantity of Renewable Materials**

Several commenters addressed the question of how much of a product should be renewable for a marketer to make an unqualified “made with renewable materials” claim. Some recommended that the FTC use its current guidance on recyclability and recycled content as a model, *i.e.*, a renewable claim could be made only if an entire product or package, excluding minor incidental components, is made of renewable materials.<sup>450</sup> Otherwise, the marketer should qualify the renewability claim by stating the percentage of renewable materials.

Other commenters presented slightly differing views. The Biodegradable Products Institute (“BPI,”) for example, recommended a more specific cut-off, asserting that marketers make unqualified “made with renewable materials” claims only for products that have greater than 95 percent non-petroleum resources.<sup>451</sup> In contrast, two commenters argued that marketers

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<sup>448</sup> Id.

<sup>449</sup> CRI, Comment 533431-00026 at 2 (stating that the FTC should define applicable time frames but not recommending specific time frames); Georgia-Pacific, Comment 533431-00007 at 4 (same); Tandus, Comment 536013-00037 at 1 (suggesting, as an example, a 10-year time frame).

<sup>450</sup> ACC, Comment 533431-00023 at 11; see also SPI, Comment 533431-00036 at 6 (recommending that the FTC address situations where less than 100 percent of contents are “renewable”; could take approach similar to guidance on products containing less than 100 percent recycled content); Stepan Company, Comment 533431-00011 at 3.

<sup>451</sup> Steve Mojo, Biodegradable Products Institute (“BPI”), Green Packaging Workshop Presentation at <http://www.ftc.gov/bcp/workshops/packaging/presentations/mojo.pdf> (recommending that products containing less than 95 percent renewable content should state that

should be able to make an unqualified claim if a “majority” of the product consists of renewable materials.<sup>452</sup>

In addition to recommending a threshold for an unqualified claim, some commenters suggested that marketers’ promotional materials should provide specific information about the renewable material, such as the exact percentage of renewable materials in a product<sup>453</sup> or the source of specific raw materials used.<sup>454</sup>

#### **d. Substantiating Renewable Materials Claims**

Some commenters suggested that the Guides specifically address the procedures needed to substantiate renewable and biobased claims. For example, one commenter suggested that the Guides recommend either self-certification with publicly available documentation using EPA definitions or a third-party certification.<sup>455</sup> Others opined that the Green Guides specify the methods used to determine biocontent.<sup>456</sup> For example, some commenters suggested ASTM

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percentage).

<sup>452</sup> FBA, Comment 533431-00015 at 4; Georgia-Pacific, Comment 533431-00007 at 6, 8.

<sup>453</sup> ACC, Comment 533431-00023 at 11; see also Hammer, Comment 533431-00017 at 8 (stating marketers should specify the percentage of the total product that is renewable).

<sup>454</sup> SPI, Comment 533431-00036 at 6.

<sup>455</sup> CRI, Comment 533431-00026 at 2.

<sup>456</sup> BPI, Green Packaging Workshop Tr. at 90-91; Georgia-Pacific, Comment 533431-00007 at 8; ILSR, Green Packaging Workshop Tr. at 136-138; Stepan Company, Comment 533431-00011 at 2.

D 6866<sup>457</sup> could be used to accurately determine the percentage of the product that comes from renewable resources.<sup>458</sup>

**e. Confusion Between Renewable Materials Claims and Biodegradability**

Two commenters noted that consumers may mistakenly believe that products labeled “made with renewable materials” are also biodegradable.<sup>459</sup> Specifically, BPI cited a study conducted by APCO Insight in 2006 finding that 80 percent of consumers believe that a package made from natural materials, such as corn-based plastics, were more likely to be biodegradable than a package made from synthetic materials.<sup>460</sup> However, some biobased products, such as products made from sugar cane, contain non-degradable polymers.<sup>461</sup> Moreover, according to the Institute for Local Self-Reliance, some of the plastics on the market that meet biodegradability standards contain no plant matter.<sup>462</sup> To address this confusion, BPI recommended that the Guides make clear that naturally based materials may, or may not, be compostable or biodegradable.<sup>463</sup>

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<sup>457</sup> ASTM D 6866 “Standard Test Methods for Determining the Biobased Content of Natural Range Materials Using Radiocarbon and Isotope Ratio Mass Spectrometry Analysis.”

<sup>458</sup> BPI, Green Packaging Workshop Tr. at 83; Georgia-Pacific, Comment 533431-00007 at 8; ILSR, Green Packaging Workshop Tr. at 136-138.

<sup>459</sup> BPI, Green Packaging Workshop Tr. at 89 and <http://www.ftc.gov/bcp/workshops/packaging/presentations/mojo.pdf>.

<sup>460</sup> See APCO, Biodegradable and Compostable Survey Topline at 4.

<sup>461</sup> *Id.*; ILSR, Green Packaging Workshop Tr. at 137-138.

<sup>462</sup> ILSR, Green Packaging Workshop Tr. at 137-138.

<sup>463</sup> BPI, Green Packaging Workshop Tr. at 102-103.

## 2. Consumer Perception Evidence

As noted above, one commenter, the National Cotton Council, described a finding from its 2006 telephone/Internet study that “only one third of consumers correctly understand the term . . . ‘renewable’” when referring to cotton.<sup>464</sup>

The Commission’s consumer perception study tested respondents’ understanding of the phrase “made with renewable materials” as this claim appeared on three different products – wrapping paper, a laundry basket, and kitchen flooring. The study results indicated that, for all products, respondents thought this claim definitely or probably suggested that the product had other environmental attributes. For example, 53 percent believed that this phrase suggested that the product was recyclable.<sup>465</sup> In addition, 45 percent believed the phrase suggested that the product was made from recycled materials. Fewer, but still a significant number, believed that a “made with renewable materials” claim suggested that the product was biodegradable (28 percent), compostable (24 percent), and made with renewable energy (23 percent).

Responses to the open-ended question “[w]hat, if anything, does this statement suggest or imply to you about the product,” confirmed these results. For all three tested products, a significant number said that the product was made from recycled materials (31 percent) or materials that can be recycled (17 percent).

A smaller number of respondents answering the open-ended questions perceived the claim in the same way as marketers appear to intend. Specifically, 10 percent stated the term

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<sup>464</sup> NCC, Comment 536013-00017 at 4. This study, which Cotton Incorporated conducted, is available at <http://www.ftc.gov/green>. The NCC counted the terms “recycled,” “reused/regrown,” and “sustainable for environment” as “correct” interpretations of the term. E-mail from Cotton Incorporated (Mar. 11, 2010).

<sup>465</sup> This and the following numbers are net of the non-environmental control claim.

implied that materials could be replenished, replaced, or regrown; 4 percent stated the materials were derived from plant matter; 0.4 percent suggested the materials were non-petroleum based; and 0.6 percent indicated the materials could be grown quickly.<sup>466</sup>

The study further tested what a “made with renewable materials” claim conveyed about the percentage of renewable materials in a product. Specifically, the study asked respondents whether a statement that a product is “made with renewable materials” suggests that all, most, or some of the materials were renewable. In response, 37 percent indicated that they would interpret the claim to mean that “all” of the materials were renewable, and an additional 20 percent believed that the claim meant “most.”<sup>467</sup>

### **3. Analysis and Guidance**

To avoid deception, the Commission proposes advising marketers to qualify a “made with renewable materials” claim with specific information about the material.<sup>468</sup> In addition, marketers should qualify this claim for products containing less than 100 percent renewable materials, excluding minor, incidental components. The Commission does not propose defining the term or endorsing any particular test to substantiate such claims.

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<sup>466</sup> These findings are based on FTC staff’s more detailed analysis of the open-ended responses rather than Harris’ general findings.

<sup>467</sup> Further, 26 percent stated that “some” of the product was made with renewable materials; 13 percent stated that the claim does not suggest anything about how much of the product was made with renewable materials; and six percent stated that they were not sure. The figures total 102 percent because of rounding. These percentages were derived by combining the responses to all claims that included “made with renewable materials” (i.e., “made with renewable materials,” “green - made with renewable materials,” “eco-friendly - made with renewable materials,” and “sustainable - made with renewable materials”).

<sup>468</sup> This proposed guidance can be found in 16 CFR 260.15.

**a. Qualifying Renewable Materials Claims**

Rather than providing a technical or scientific definition for environmental claims, the Guides state what consumers understand the claims to mean. The results of the Commission’s consumer perception study suggest there is a disconnect between consumer understanding of “made with renewable materials” claims and what marketers appear to intend to convey. Marketers, for example, may intend to communicate that a product is made from a material that can be replenished at the same rate, or faster, than consumption.<sup>469</sup> Consumers, however, likely believe the product has other specific environmental benefits, such as being made with recycled content, recyclable material, and biodegradable material. The Commission, therefore, proposes advising marketers to qualify “made with renewable materials” claims to avoid misleading consumers.

While the Commission did not test particular qualifiers, it nevertheless believes that providing specific information about the renewable material may correct consumers’ misimpressions about this claim. For example, providing information regarding which renewable materials were used, how the materials were sourced, and why the materials are renewable may align consumer perception with what marketers are trying to convey. Accordingly, in proposed Example 1, the Commission states that a “made with renewable materials” claim is unlikely to be deceptive if the marketer provides specific information about the material it uses (bamboo), how it sources the material (it grows the bamboo), and why it is renewable (the bamboo grows at a rate comparable or faster than its use). Providing this information should reduce confusion by providing context for the claim. The Commission seeks

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<sup>469</sup> See, e.g., P&G, Comment 533431-00070 at 3.

comment on whether providing this information, as in proposed Example 1, adequately qualifies a “made with renewable materials” claim.

**b. Quantity of Renewable Materials**

As noted above, a significant percentage of respondents (37 percent) indicated that they would interpret a “made with renewable materials” claim to mean that “all” of the materials in a product are renewable. Based on this result, the Commission proposes that, unless the entire product or package, excluding minor, incidental components, is made from renewable materials, marketers need to qualify the claim to specify the amount of renewable materials in a product or package. Thus, as illustrated in proposed Example 2, a marketer’s “made with renewable materials” claim would not be deceptive if it clearly states that its product, made from a blend of 50 percent petroleum-based plastic and 50 percent plant-based plastic, contains 50 percent renewable material. This proposed guidance is consistent with many of the commenters’ views and is modeled on the Commission’s current recycled content guidance.<sup>470</sup>

**c. Substantiating Renewable Materials Claims**

As discussed above, several commenters suggested that the Commission reference ASTM Method D 6866 as a means to substantiate “made with renewable material” claims. Although this protocol may determine the biobased content of natural materials, it does not necessarily substantiate all claims that consumers reasonably infer. Therefore, the Commission declines to reference it in the Guides as acceptable substantiation for renewable materials claims.

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<sup>470</sup> The Guides currently provide that unqualified claims of recycled content may be made if the entire product or package (excluding minor, incidental components) is made from recycled content. 16 CFR 260.7(e). The recyclable section of the current Guides also contains similar language: “Unqualified claims of recyclability for a product or package may be made if the entire product or package, excluding minor incidental components, is recyclable.” 16 CFR 260.7(d).

Proposed Example 3 illustrates this point. In this example, although the marketer used test results to determine that its product consists entirely of biological material, the marketer cannot substantiate other consumer interpretations of its unqualified “made with renewable materials” claim, including that the product is recyclable, made with recycled content, or biodegradable.

#### **d. Biobased Claims**

Some commenters used the term “biobased” interchangeably with the phrase “renewable material.”<sup>471</sup> It is not clear whether consumers interpret this claim in the same way as “renewable.” At this time, the Commission does not propose addressing biobased claims in the Guides because the USDA is conducting its own consumer perception study of biobased claims as part of its proposed voluntary labeling program for biobased products.<sup>472</sup> In developing this program, USDA has sought public comment on a proposed “USDA Certified Biobased Product” logo, which will include a statement that identifies the biobased<sup>473</sup> content of the product and that indicates whether the label applies to the product or packaging (e.g., “Product: 57% biobased; Packaging: 90% biobased”). The USDA proposes that marketers determine biobased content by testing products pursuant to the ASTM Method D 6866 standard. Given USDA’s ongoing work in this area, the Commission does not want to propose duplicative or potentially inconsistent

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<sup>471</sup> See, e.g., BPI, Green Packaging Workshop Tr. at 89; ILSR, Green Packaging Workshop Tr. at 137-138; SDA, Comment 533431-00020 at 4.

<sup>472</sup> 74 FR 38295, 38298 (July 31, 2009).

<sup>473</sup> The USDA defines “biobased product” as a “product determined by the Secretary to be a commercial or industrial product (other than food or feed) that is (A) composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or (B) an intermediate ingredient or feedstock.” Id.

advice. Therefore, the Commission has decided not to address this issue in the Guides at this time.

## **D. Renewable Energy Claims**

This section discusses claims about the sale of renewable energy as well as claims that a product is “made with renewable energy.” Specifically, the Commission discusses the ways renewable energy is sold, comments addressing renewable energy claims, relevant consumer perception research, and the Commission’s analysis of the issues.

### **1. Overview**

Renewable energy generally refers to electricity derived from constantly replenished sources (e.g., wind power).<sup>474</sup> Once renewable electricity is introduced into the grid, it is physically indistinguishable from electricity generated from conventional sources. Consumers, therefore, cannot determine for themselves the source of the electricity flowing into their homes. Because electricity transactions can be tracked, however, retail customers can “buy” renewable power by either: (1) purchasing renewable energy certificates (RECs)<sup>475</sup>; or (2) purchasing renewable power through contracts with their utility.

Under the REC method, a renewable electricity generator splits its output into two components: (1) the electricity itself; and (2) certificates representing the renewable attributes of that electricity.<sup>476</sup> Specifically, generators that produce renewable electricity sell their electricity

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<sup>474</sup> See [http://www.nrel.gov/learning/re\\_basics.html](http://www.nrel.gov/learning/re_basics.html).

<sup>475</sup> RECs are also known as green certificates, green tags, or tradable renewable certificates. Lori Bird, National Renewable Energy Laboratory (“NREL”), Carbon Offsets Workshop Tr. at 42.

<sup>476</sup> Although one REC generally represents the right to describe one megawatt hour of electricity as “renewable,” a REC’s precise attributes continue to be a matter of debate. NREL,

at market prices for conventionally produced power and then sell the renewable attributes of that electricity through separate certificates.<sup>477</sup> Organizations purchase RECs to characterize all or a portion of their electricity usage as “renewable” by matching the certificates with the conventionally produced electricity they normally purchase.<sup>478</sup>

Under the contract method, consumers and businesses purchase renewable energy through traditional electricity contracts with their local utility or power provider.<sup>479</sup> Energy sold through these “green power pricing” programs generally costs more than conventional energy. Utilities (or other electricity retailers) can obtain the renewable energy they sell through different means. Some generate renewable energy themselves and sell it to their customers. Others contract with renewable energy generators to purchase electricity, which utilities then sell to

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Carbon Offsets Workshop Tr. at 42, 52. Moreover, no single, national standard dictates whether a REC also represents other environmental attributes that may stem from renewable energy generation, such as a reduction in air pollution. *Id.*; Ed Holt, Ed Holt & Associates (“Holt”), Carbon Offsets Workshop Tr. at 151.

<sup>477</sup> See NREL, Carbon Offsets Workshop Tr. at 45; NREL, Carbon Offsets Workshop Presentation at <http://www.ftc.gov/bcp/workshops/carbonoffsets/presentations/lbird.pdf>; CRS, Comment 533254-00049 at 3; Lori Bird, Claire Kreycik, and Barry Friedman, Green Power Marketing in the United States: A Status Report, National Renewable Energy Laboratory (Sept. 2009) (“NREL Green Power Marketing Report”), available at <http://www.nrel.gov/docs/fy09osti/46581.pdf> at 14.

<sup>478</sup> Businesses and organizations purchase nearly 100 percent of these unbundled RECs. See Renewable Energy Marketers Association (“REMA”), Comment 533254-00028 at 2; NREL Green Power Marketing Report at 18.

<sup>479</sup> CRS, Comment 533254-00049 at 2-3. Renewable energy is not sold in all areas of the country. However, in the U.S., more than 50 percent of consumers can purchase green power directly from their utility or electricity provider. NREL, Carbon Offsets Workshop Presentation at <http://www.ftc.gov/bcp/workshops/carbonoffsets/presentations/lbird.pdf>.

their customers. Additionally, some utilities purchase RECs to match their own conventionally produced energy so that they can characterize the energy they sell as renewable.<sup>480</sup>

Many businesses tout their renewable energy purchases to market their products or services.<sup>481</sup> For example, a clothing company may claim that its garments are “made with renewable energy,” or a snack food manufacturer may claim that it “buys green energy credits to match 100% of the electricity needed to produce” its snacks.<sup>482</sup> By purchasing such products, consumers can indirectly support renewable energy.

## **2. Comments**

The comments discussing renewable energy focused on three issues: (1) the definition of “renewable energy” and guidance on “made with renewable energy” claims; (2) whether utilities must disclose that the renewable energy they sell is based on RECs; and (3) the types of practices and advertising claims that should be considered “double counting.”

### **a. Defining Renewable Energy and Interpreting Renewable Energy Claims**

Several comments discussed the definition and scope of the term “renewable energy.” One recommended that the Commission clearly state what qualifies as renewable energy.<sup>483</sup>

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<sup>480</sup> CRS, Comment 533254-00049 at 3; NREL, Carbon Offsets Workshop Tr. at 45; NREL Green Power Marketing Report at 14.

<sup>481</sup> NREL, Carbon Offsets Workshop Tr. at 48-49. Businesses also may purchase RECs to facilitate compliance with regulatory requirements. The FTC’s focus is not on these sales.

<sup>482</sup> See, e.g., Rob Schasel, PepsiCo, Carbon Offsets Workshop Tr. at 207.

<sup>483</sup> P&G, Comment 533431-00070 at 3 (stating that an energy source is renewable if the rate of replenishment matches the rate of its consumption, the sourcing and use of the energy does not harm the ecosystem or increase the product’s environmental footprint, and the sourcing of the energy reduces consumption of non-renewable resources). Another commenter stated that a federal Executive Order defines renewable energy, and others noted that many states have different definitions of what constitutes renewable energy. Dow, Comment 533431-00010 at 13;

Another asserted consumers may not have a clear understanding of the term,<sup>484</sup> but a different commenter believed that consumers understand it to mean energy generated from sources other than fossil fuels or nuclear power.<sup>485</sup> Another commenter stated that there is no uniform definition of “renewable energy.”<sup>486</sup>

Some commenters recommended that the Commission include guidance about the scope of renewable energy claims and the possible need to qualify them.<sup>487</sup> One commenter provided examples of potentially broad, implied claims and suggested that the Commission include these examples in the Guides.<sup>488</sup> For instance, consumers may interpret a “made with renewable energy” claim on a product label as applying to the product, its packaging, and the label itself.<sup>489</sup> Several commenters also cautioned that consumers may interpret the claim “manufactured with renewable energy” to mean that the product was made entirely with renewable energy.<sup>490</sup> In

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see also Edison Electric Institute, Comment 533254-00055 at 4-5; Exelon Corp., Comment 533431-00059 at 5.

<sup>484</sup> Tandus, Comment 536013-00037 at 1.

<sup>485</sup> CRS, Comment 533254-00049 at 4.

<sup>486</sup> Edison Electric Institute, Comment 533254-00055 at 4-5.

<sup>487</sup> Cameron Brooks, Renewable Choice Energy (“Renewable Choice”), Carbon Offsets Workshop Tr. at 214 (encouraging the FTC to provide guidance on making more precise claims); CRS, Comment 533254-00049 at 4-14; SDA, Comment 534743-00028 at 2 (suggesting that the Commission provide guidance on which environmentally beneficial attributes are associated with the use of renewable energy, such as reductions in greenhouse gases); David A. Zonana, California Department of Justice, Carbon Offsets Workshop Tr. at 219 (stating that it generally is easier for marketers to substantiate more precise marketing claims).

<sup>488</sup> CRS, Comment 533254-00049 at 4-14.

<sup>489</sup> Id. at 10; CRS, Comment 534743-00009 at 2.

<sup>490</sup> CRS, Comment 533254-00049 at 10; CRS, Comment 533431-00061 at 6; Jennifer Martin, CRS (“CRS”), Carbon Offsets Workshop Tr. at 194-195; Sharp Electronics Corporation,

these commenters' view, marketers should not make an unqualified "made with renewable energy" claim if less than 100 percent of the electricity used comes from renewable sources.<sup>491</sup>

**b. REC Disclosures**

Some commenters discussed whether utilities or other electricity retailers must disclose that the renewable energy they sell is based on their purchase of RECs.<sup>492</sup> Some argued that sellers should disclose this fact so consumers will not believe mistakenly that the utility either generated the renewable power itself or purchased it through electricity contracts.<sup>493</sup> As one commenter explained, consumers may believe that the renewable energy they purchase is generated in their geographic location, when, in fact, the utility may have purchased RECs generated in a distant location.<sup>494</sup> These commenters, therefore, argued that without a disclosure, consumers might be misled. The Renewable Energy Marketers Association disagreed, maintaining that a disclosure about the source of the renewable energy is unnecessary because

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Solar Energy Solutions Group ("Sharp Electronics"), Comment 533254-00036 at 1; see also Dow, Comment 533431-00010 at 13 (recommending that marketers specify the percentage of renewable energy used).

<sup>491</sup> Id.

<sup>492</sup> See, e.g., Ecology Center, Comment 533254-00020 at 1; Sol Metz ("Metz"), Comment 533254-00023 at 1; REMA, Comment 533254-00028 at 3-4; James Svensson ("Svensson"), Comment 533254-00021 at 1; Weyerhaeuser, Comment 533431-00084 at 13.

<sup>493</sup> Ecology Center, Comment 533254-00020 at 1; Metz, Comment 533254-00023 at 1; Svensson, Comment 533254-00021 at 1.

<sup>494</sup> Climate Clean, Comment 533254-00039 at 3 n.7 (stating that claims such as "made with green energy" are "misleading insofar as they may imply on-site generation, not the market purchase (possibly well out of market) of environmental attributes of renewable energy production"). Another commenter stated that marketers advertise products as "produced with wind power" and questioned whether consumers understand that the wind power may be generated in a distant location. The commenter stated that many marketers include disclaimers that explain they use power from the grid. Weyerhaeuser, Comment 533431-00084 at 3.

there is no difference in the environmental benefits of REC-based renewable energy and contract-based renewable energy.<sup>495</sup>

### **c. Double Counting**

Commenters also discussed the problem of “double counting.” Double counting generally occurs when an entity sells the same REC to more than one purchaser or when multiple parties make claims based on the same REC. Although some instances of double counting are straightforward,<sup>496</sup> the commenters discussed more subtle variations. Some argued a company should not generate renewable power onsite (e.g., by using solar panels on store roofs), sell RECs based on the renewable attributes of that same power, and then advertise that they use renewable energy (e.g., “our stores are 100% solar-powered”).<sup>497</sup> In their view, such practices constitute double counting and are misleading. Some commenters suggested, however, that it would not constitute double counting if those companies simply claimed that they “host” a renewable energy facility.<sup>498</sup>

## **3. Consumer Perception Evidence**

No commenters submitted research exploring how consumers perceive renewable energy claims. The Commission’s study, however, explored respondents’ understanding of such claims.

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<sup>495</sup> REMA, Comment 533254-00028 at 3-4; see also CRS, Comment 533254-00049 at 2-3 (explaining that in neither case “is the consumer directly receiving actual electrons generated by the renewable energy facility, which is physically impossible”).

<sup>496</sup> A marketer, for example, may knowingly sell the same REC multiple times.

<sup>497</sup> Matthew Clouse, EPA Green Power Partnership (“Green Power Partnership”), Carbon Offsets Workshop Tr. at 221; CRS, Comment 533254-00049 at 6; REMA, Comment 533254-00028 at 10; Sharp Electronics, Comment 533254-00036 at 1-2.

<sup>498</sup> CRS, Comment 533254-00049 at 6; REMA, Comment 533254-00028 at 10; Sharp Electronics, Comment 533254-00036 at 1-2.

The study asked respondents to describe, in their own words, what a “made with renewable energy” claim means. In response to this open-ended question, 16 percent referenced a particular form of renewable energy, such as solar or wind power. Five percent stated that the product was made with energy that is not derived from fossil fuels; four percent stated the product was made with “alternative” or “clean” energy; and one percent stated that it was made with energy that is readily replenished. Seventeen percent did not understand the claim’s meaning or stated that it meant nothing to them, and another 17 percent stated that the product was made from recycled materials.<sup>499</sup>

Through a closed-ended question, the study also explored what claims respondents thought were implied by a product advertised as “made with renewable energy.” The study provided seven possible claims from which respondents could choose. In response, 28 percent thought the claim implied the product was made with renewable materials, 21 percent thought the product was made from recycled materials, and 18 percent thought the product was recyclable.<sup>500</sup>

In addition, the study asked respondents whether a statement that a product is “made with renewable energy” suggests that all, most, or some of the product was made with renewable energy. The largest group, 36 percent, indicated that they interpret the claim as meaning that

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<sup>499</sup> In addition to these responses, 11 percent stated that the product was made with renewable energy without elaborating on what the term “renewable energy” meant. Respondents provided numerous other unique answers in response to this open-ended question. All reported findings are based on FTC staff’s more detailed analysis of responses rather than Harris’ general findings.

<sup>500</sup> Because consumers could choose one or more claims, or no claims, the responses provided do not add up to 100 percent.

“all” of the product was made with renewable energy and 17 percent believed that “most” of it was made with renewable energy.<sup>501</sup>

Finally, the study asked about a product advertisement that included the statement “our manufacturing plant hosts a solar [or wind] power facility.”<sup>502</sup> The study asked which, if any, of the following three claims were implied by the statement: (1) there is a solar/wind power facility on the company’s premises; (2) solar/wind power is used in making the company’s products; and (3) the company hosts a solar/wind power conference meeting in its manufacturing plants. Respondents could choose more than one answer. Eighty-five percent stated that there is a solar/wind power facility on the company’s premises, 62 percent stated that solar/wind power is used in making the company’s products, and 12 percent stated that the company hosts a solar/wind power conference meeting in its manufacturing plants.<sup>503</sup>

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<sup>501</sup> Further, 23 percent stated that “some” of the product was made with renewable energy, 18 percent stated that the claim does not suggest anything about how much of the product was made with renewable energy, and seven percent stated that they were not sure. The provided figures total 101 percent because of rounding. These percentages were derived by combining the responses to all claims that included “made with renewable energy” (*i.e.*, “made with renewable energy,” “green - made with renewable energy,” “eco-friendly - made with renewable energy,” and “sustainable - made with renewable energy”).

<sup>502</sup> The survey asked half of the respondents about solar power facilities and the other half about wind power facilities. Because there were no meaningful differences between the responses of these two groups, we discuss the combined results.

<sup>503</sup> The results also were calculated using one response (that the company hosts a meeting in its plant) as a control claim to roughly adjust for guessing. The results net of the control are: 73 percent of respondents stated there is a solar/wind power facility on the company’s premises, and 50 percent stated that solar/wind power is used in making the company’s products.

#### **4. Analysis and Guidance**

Based on the record, the Commission proposes new guidance concerning renewable energy claims.<sup>504</sup> The following discusses this guidance and addresses the issues raised by commenters concerning consumer interpretation of renewable energy claims, REC disclosures, geographic location disclosures, and claims that could constitute “double counting.”

##### **a. Consumer Interpretation of Renewable Energy Claims**

The commenters and the Commission’s study raise three main issues related to consumer interpretation of renewable energy claims: (1) the meaning of “renewable energy”; (2) claims implied by renewable energy advertisements; and (3) potentially overbroad renewable energy claims.

First, the term “renewable energy” has an emerging meaning. Industry does not appear to have a uniform definition of the term, and commenters discussed different energy sources that they believe are “renewable.” There appears to be a consensus, however, that renewable energy excludes fossil fuels. The results of the Commission’s study suggests that a significant minority of consumers have a similar, general understanding of renewable energy; specifically, it is not derived from fossil fuels.<sup>505</sup> Based on both this information and the comments, the Commission proposes advising marketers not to make an unqualified “made with renewable energy” claim if an item was manufactured with energy produced using fossil fuels. Given the available

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<sup>504</sup> This proposed guidance can be found in 16 CFR 260.14.

<sup>505</sup> Responding to open-ended questions, 16 percent of respondents explained the term by referring to a particular energy source (e.g., the sun, wind, biomass, and other non-fossil fuel sources), and five percent expressly stated that the energy was not derived from fossil fuels.

information, however, the Commission does not propose further guidance on which specific energy sources consumers consider to be renewable.

The second issue is the extent to which renewable energy claims require qualification. The Commission's study suggests that some consumers believe that a "made with renewable energy" claim implies that the advertised product is also made with renewable materials (28 percent of respondents) or made from recycled materials (21 percent).<sup>506</sup> The cause of these consumers' confusion is not entirely apparent. Although some renewable energy is itself made from renewable or recycled materials (e.g., biomass), not all products made with renewable energy are necessarily made with such materials.

When a claim misleads a small, but significant, minority of consumers, the Commission generally advises marketers to qualify the claim to prevent deception.<sup>507</sup> Although the Commission did not test any specific qualifiers, it proposes that marketers disclose the type or source of the renewable energy (e.g., solar or wind). Similar to the proposal to qualify renewable materials claims, discussed above, the Commission believes that providing context for renewable energy claims may help reduce consumers' misperception. If consumers are armed with a better understanding of renewable energy, they may be less likely to draw inferences that are unrelated to the claim.

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<sup>506</sup> The open-ended responses are consistent with these closed-ended results.

<sup>507</sup> For example, as discussed in the general environmental benefit claims section (Part V.A, supra), the Commission's consumer perception study indicated that 27 percent of respondents interpreted the claims "green" and "eco-friendly" as suggesting a product has no negative environmental impact. Based in part on these findings, the Commission proposes to advise marketers to qualify general environmental benefit claims.

The Commission does not propose advising marketers to qualify renewable energy claims by specifically stating that the product does not contain renewable or recycled materials. Qualifiers such as “not made with renewable materials” or “does not contain recycled materials” bear no relation to a renewable energy claim and, therefore, could cause more consumer confusion than the qualifier alleviates. The Commission, however, requests comment on whether specifying the source of the renewable energy adequately qualifies a “made with renewable energy” claim.

Third, as with other environmental claims, marketers should be cautious that they do not overstate their renewable energy claims. For example, a vehicle manufacturer should not state that its product is made with renewable energy when the claim applies only to certain components of the vehicle. Section 260.6(b) of the Guides already advises marketers to specify whether the advertised environmental attributes apply to the product, its packaging, or only a component of the product or packaging. This guidance applies equally to renewable energy claims. The Commission proposes including new guidance about whether consumers interpret a “made with renewable energy” claim to mean the product was made entirely using renewable energy. In the Commission’s research, 36 percent of respondents interpreted a “made with renewable energy” claim to mean that “all” of the product was made with renewable energy.<sup>508</sup> This result is consistent with several commenters’ views, as well as the Commission’s existing guidance regarding “made with recycled content” claims.<sup>509</sup>

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<sup>508</sup> In addition, 17 percent stated that most of the product was made with renewable energy.

<sup>509</sup> 16 CFR 260.7(e).

The Commission does not have evidence, however, regarding exactly how consumers interpret the term “all” in this context or how broadly consumers interpret “made with renewable energy” claims. For example, for a product advertised as “made with renewable energy,” it is unclear whether consumers would expect that all product components are made with renewable energy. This ambiguity, however, does not prevent the Commission from providing some guidance. Specifically, based on its research, the commenters’ views, and its own judgment, the Commission proposes advising marketers not to use unqualified “made with renewable energy” claims unless all, or virtually all, of the significant manufacturing processes used to make the product are powered by renewable energy or powered by conventionally produced energy that is offset by RECs.<sup>510</sup> For example, it would be deceptive for a toy manufacturer to make an unqualified renewable energy claim if it did not purchase renewable energy to power all of the significant processes used to manufacture its toys. Determining whether that same manufacturer could make an unqualified claim if its plant were powered with renewable energy, but its delivery trucks used fossil fuels, would require further consumer perception research. The Commission requests comment on this proposed advice and seeks any additional consumer perception evidence addressing this issue.

#### **b. REC Disclosures**

The Commission also considered whether specific disclosures are necessary for renewable energy claims based on the purchase of RECs, rather than the purchase through contracts. As discussed earlier, the commenters held different opinions on this issue. Some

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<sup>510</sup> The Commission also applies the “all or virtually all” standard to unqualified “Made in USA” claims. See Enforcement Policy Statement on U.S. Origin Claims, 62 FR 63760, 63755 (Dec. 2, 1997).

argued that sellers must inform consumers when their renewable energy sales are based on RECs because consumers would otherwise assume that the marketer either generated the renewable energy itself or purchased it through contracts. The commenters, however, did not submit consumer perception evidence to support this view.

Even assuming that consumers thought renewable energy claims were based on contractual purchases (rather than REC purchases), there is no reason to believe that this fact would be material to consumers. No evidence on the record suggests that a contract-based system more reliably tracks renewable energy than a well-designed REC-based system. Accordingly, the Commission does not have a sufficient basis to advise marketers to disclose that their renewable energy claims are based on RECs.

**c. Geographic Location of Renewable Energy Generation**

Regardless of whether the marketer purchases renewable energy through RECs or contracts, the energy may have been generated in a distant geographic location. It is unclear whether consumers interpret renewable energy claims to mean that the energy was generated in their location and, thus, yields local benefits. As discussed above, marketers must have substantiation for all reasonably implied interpretations of their claims. Therefore, marketers must evaluate the net impression of their advertisements and, when needed, obtain consumer research to determine if their advertisements imply that the renewable energy was generated locally. If a particular advertisement implies that renewable energy yields local benefits, marketers should inform consumers that this is not the case to prevent deception. Because the need for such disclosures will depend on the specific advertisement in question, the Commission does not propose adding guidance on this issue to the Guides. Nevertheless, marketers should be mindful of this issue to avoid misleading consumers.

#### **d. Double Counting**

Double counting can occur as a result of fraud or inadequate accounting, as well as in more subtle ways.<sup>511</sup> Fraudulent activity, such as knowingly selling the same offset to multiple purchasers, is best addressed through law enforcement actions rather than Commission guidance. The Commission's Guides are intended for those marketers seeking to comply with the law.

Aside from outright fraud, the written comments provide examples of more subtle methods of double counting. Guidance for these types of practices may be useful. The Commission agrees with commenters that companies should not sell RECs for renewable energy they generate onsite (e.g., by using solar panels on store roofs) and then tout their renewable energy facilities or equipment in advertising (e.g., "this store is 100% solar powered"). By selling RECs, the company has transferred the right to characterize its electricity as renewable. Therefore, even if the company technically uses the electricity from its onsite solar panels, an advertising claim about the renewable aspects of this energy is misleading. The Commission, therefore, proposes to include this example in the Guides.

Some commenters suggested companies in these circumstances should be able to claim that they "host a renewable energy facility." The Commission's study, therefore, tested this claim, and 62 percent of respondents stated that the company used solar/wind power to make its

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<sup>511</sup> CRS, Comment 533254-00049 at 5-6; see also Holt, Carbon Offsets Workshop Tr. at 153; NREL, Carbon Offsets Workshop Tr. at 51. Because REC sales often involve multiple transactions and a large number of entities, businesses must track RECs through the market. Therefore, inadequate accounting or tracking practices can lead marketers to sell multiple certificates based on the same renewable energy activity. Accurate, well-designed registries or tracking systems can help to minimize this problem. For example, several regional tracking systems, covering more than 30 states, use metered generation data for the issuance of RECs. CRS, Comment 533254-00049 at 3 n.3; REMA, Comment 533254-00028 at 4-5; see also Holt, Carbon Offsets Workshop Tr. at 153; NREL, Carbon Offsets Workshop Tr. at 51.

products.<sup>512</sup> The Commission, therefore, proposes advising marketers that the phrase “hosts a renewable energy facility” is likely to mislead consumers if, in fact, the company has sold its rights to claim credit for the renewable energy.

## **E. Carbon Offset Claims**

Carbon offsets, relatively new products in the green marketing field, received significant attention in the comments. To provide background on the consumer protection issues involved with these products, the following describes offsets and the advertising claims associated with them. It then discusses the comments addressing this topic, relevant consumer perception research, and the Commission’s analysis of the issues.

### **1. Overview**

Carbon offsets are credits or certificates that represent reductions in greenhouse gas (“GHG”) emissions. These reductions stem from different types of projects, such as methane capture from landfills or livestock feedlots, tree planting, and industrial gas destruction.<sup>513</sup> Marketers quantify their GHG reductions and then sell carbon offsets to purchasers seeking to meet their own environmental goals by reducing their “carbon footprints” or by striving to make

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<sup>512</sup> As discussed in note 503, using a control claim yields similar results. Net of control, 50 percent of respondents believe the company used solar/wind power to make its products.

<sup>513</sup> These projects occur around the globe, often in locations removed from offset purchasers. The location of an offset project is immaterial to its impact on greenhouse gas levels because these gases circulate evenly throughout the earth’s atmosphere. Katherine Hamilton, Ecosystem Marketplace (“Ecosystem”), Carbon Offsets Workshop Tr. at 31.

themselves “carbon neutral.”<sup>514</sup> Offset purchasers include individual consumers, businesses, government agencies, and non-profit organizations.<sup>515</sup>

Individual consumers, for example, generally purchase offsets to reduce, balance, or neutralize greenhouse gas emissions associated with their own activities, such as automobile use or airplane travel. In these instances, offset sellers advertise their products directly to individual consumers. For example, some online travel vendors have partnered with offset sellers to allow consumers to buy offsets when they purchase airplane tickets.<sup>516</sup>

Businesses purchase carbon offsets to balance the emissions associated with the production, sale, or use of their own products and services. They often tout these offsets in advertisements for their products and services. For example, a potato chip seller that purchases

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<sup>514</sup> No uniform definition for either term appears to exist. See, e.g., Exelon Corp., Comment 533431-00059 at 4 (stating that there is no clear consensus as to what the term “carbon footprint” includes); Carbon Claims and the Trade Practices Act, Australian Competition & Consumer Commission (June 2008) at 7, available at <http://www.accc.gov.au/content/index.phtml/itemId/833279> (discussing “carbon neutrality”). “Carbon footprint” generally refers to the net greenhouse gas emissions caused by the activities of an individual, business, or organization. “Carbon neutral” generally describes an entity whose greenhouse gas emissions net to zero.

<sup>515</sup> Ecosystem, Carbon Offsets Workshop Tr. at 37-38 and <http://www.ftc.gov/bcp/workshops/carbonoffsets/presentations/khamilton.pdf>. The vast majority (80 percent) of offset purchasers in the international voluntary market are businesses. Across the globe, offset sales generally occur in two types of markets: (1) those that facilitate compliance with regulatory targets (so-called “mandatory” or “compliance” markets); and (2) those unrelated to existing regulatory programs (so-called “voluntary” markets). This discussion addresses offsets in the voluntary market.

<sup>516</sup> Matthew Kotchen, University of California, Santa Barbara, Carbon Offsets Workshop Tr. at 92.

offsets to match its GHG emissions might advertise its chips as “carbon neutral.” Marketers make similar claims for a wide range of products and services, from clothing to paper goods.<sup>517</sup>

## **2. Comments**

### **a. Defining Carbon Offsets and Requiring Disclosures**

The comments differed in the degree and extent the FTC should be involved in regulating carbon offset marketing. Several commenters called on the Commission to provide detailed guidance or create a regulatory framework for offsets.<sup>518</sup> For example, some suggested that the FTC define or clarify the meaning of certain terms, such as “carbon neutral.”<sup>519</sup> Another asked the FTC to establish a list of allowable offset projects and mandate uniform calculation methods for emission reductions.<sup>520</sup> Others urged mandatory disclosures about the type of activity (e.g.,

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<sup>517</sup> See generally EcoSecurities, Comment 533254-00044 at 4-5. Although many businesses purchase offsets to make advertising claims for individual products, others do so to prepare for future mandatory carbon markets, to help their corporate image more generally, or to promote corporate responsibility efforts. See, e.g., Ecosystem, Carbon Offsets Workshop Tr. at 40-41; Mario Teisl, University of Maine, Carbon Offsets Workshop Tr. at 175. The Commission has not identified any data addressing the volume of purchases attributable to these various activities.

<sup>518</sup> See Climate Clean, Comment 533254-00039 at 5; Consumers Union, Comment 533254-00026 at 1-2; NativeEnergy, Inc., Comment 533431-00044 at 2; State of New Jersey, Department of Environmental Protection (“NJ DEP”), Comment 533431-00082 at 1; Pacific Gas & Electric Company, Comment 533254-00041 at 1; Seventh Generation, Comment 533431-00033 at 6.

<sup>519</sup> See, e.g., Urvashi Rangan, Consumers Union (“Consumers Union”), Carbon Offsets Workshop Tr. at 210 (“I think clarification of terminology out there is really important. Things like carbon-free, carbon neutral, carbon offset, carbon negative . . . are really confusing to consumers.”); International Paper, Comment 533431-00006 at 2; Kim Sheehan, Comment 533431-00004 at 1.

<sup>520</sup> NJ DEP, Comment 533431-00082 at 2.

reforestation) that forms the basis for carbon offsets.<sup>521</sup> In addition, Consumers Union called for an annual FTC statement about the amount of global carbon production to help consumers compare the offset impacts in a global context.<sup>522</sup>

While some commenters called for regulatory requirements, others urged the FTC to avoid setting standards.<sup>523</sup> For example, Exelon Corporation stated that the FTC lacks the technical expertise and authority to set standards in this area.<sup>524</sup> Walmart indicated that, while the FTC should insist that marketers have a reasonable basis for their claims, the agency should not mandate one reasonable approach over another.<sup>525</sup> In addition, Constellation Energy Group noted that, given the relative youth of these products, “market-driven solutions are being and will continue to be developed to address consumer confidence or credibility concerns.”<sup>526</sup> Finally,

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<sup>521</sup> Consumers Union, Comment 533254-00026 at 2 (recommending disclosure of offset type); Hydrodec North America LLC (“Hydrodec”), Comment 533254-00046 at 8 (same); NJ DEP, Comment 533431-00082 at 2 (recommending disclosure of the name, owner, and location of the project that produced the emission reductions, among other things); 3M Company, Comment 533431-00027 at 2 (recommending disclosure of the source of and methodology used to calculate the carbon offsets); see also Carbon Offset Providers Coalition (“COPC”), Comment 533254-00032 at 4 (recommending that the FTC promote “clarity and transparency”).

<sup>522</sup> Consumers Union, Comment 533254-00026 at 1-2. Consumers Union also recommended that sellers disclose the benefits that the product yields beyond the baseline impacts (i.e., the emissions that would have occurred in the absence of the offset project).

<sup>523</sup> See, e.g., Constellation Energy Group, Inc. (“Constellation”), Comment 533254-00029 at 4-5; Hydrodec, Comment 533254-00046 at 5; Wal-Mart Stores, Inc. (“Wal-Mart”), Comment 533254-00040 at 3-4.

<sup>524</sup> Exelon Corp., Comment 533431-00059 at 2.

<sup>525</sup> Wal-Mart, Comment 533254-00040 at 3-4.

<sup>526</sup> Constellation, Comment 533254-00029 at 2.

commenters warned that any FTC action in this area might negatively impact ongoing policy debates at the federal and state levels.<sup>527</sup>

#### **b. Timing of Emission Reductions**

The comments also raised concerns about the timing of the actual GHG emission reductions associated with carbon offsets. Some reductions occur prior to the sale of offsets and others occur after. For example, offsets generated from methane capture activities are typically sold after the methane reductions occur. Other sellers, however, use offset proceeds to fund future projects (such as constructing renewable energy facilities) that are expected to create emission reductions at a later date.

Many commenters stated that offsets should be based on prior emission reductions because those reductions are verifiable.<sup>528</sup> The commenters disagreed, however, about the propriety of selling offsets based on future GHG reductions. One commenter preferred such offsets because, in its view, consumers are concerned with future GHG emissions.<sup>529</sup> Another suggested that consumers implicitly understand that reductions from activities such as tree-planting do not happen immediately but rather “incrementally and over a longer time horizon.”<sup>530</sup>

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<sup>527</sup> See Exelon Corp., Comment 533431-00059 at 2; Wal-Mart, Comment 533254-00040 at 3-4.

<sup>528</sup> See, e.g., Edison Electric Institute, Comment 533254-00055 at 10; Michael Gillenwater (“Gillenwater”), Comment 533254-00005 at 3; The Fertilizer Institute, Comment 533254-00052 at 4. One commenter, however, noted that such sellers cannot show that the offset purchase caused an emission reduction. NativeEnergy, Inc., Comment 533431-00044 at 3 (“As one cannot change the past, it is impossible for the purchase of a previously generated reduction to be the cause of that reduction.”)

<sup>529</sup> NativeEnergy, Inc., Comment 533431-00044 at 3.

<sup>530</sup> Edison Electric Institute, Comment 533254-00055 at 17 (stating that as long as the offset is substantiated, timing should not be an issue).

Others disagreed and argued that consumers do not necessarily understand that emission reductions funded by their purchase have not yet occurred.<sup>531</sup> In one commenter’s view, sellers should disclose prominently that the reductions caused by their products will occur in the future.<sup>532</sup>

In addition to concerns about consumer understanding, many commenters raised concerns about the certainty of future projects.<sup>533</sup> With forestry-based offsets, for instance, events such as fire or insect infestation may damage trees and release carbon stored within them.<sup>534</sup> Because of these uncertainties, one commenter stated that offsets for unverified emission reductions should not be allowed.<sup>535</sup> Others suggested that offset sellers take steps to account for such uncertainties, such as using accounting practices to reflect the risks associated with future projects.<sup>536</sup>

### **c. Substantiating Carbon Offset Claims – Additionality**

One of the most contentious issues surrounding the substantiation of carbon offset claims is the concept of “additionality,” specifically, whether reductions associated with a carbon offset

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<sup>531</sup> See, e.g., AgRefresh, Comment 533254-00004 at 1, 6; TerraPass, Inc. (“TerraPass”), Comment 533254-00045 at 5.

<sup>532</sup> AgRefresh, Comment 533254-00004 at 1, 6.

<sup>533</sup> Climate Clean, Comment 533254-00039 at 5; see Wiley Barbour, Environmental Resources Trust, Inc. (“ERT”), Carbon Offsets Workshop Tr. at 216 (“There are real differences of opinion about whether or not a forestry project, which is going to take fifty years to grow, . . . should be counted as a reduction today.”).

<sup>534</sup> Offset Quality Initiative, Comment 533254-00047 at 8.

<sup>535</sup> AgRefresh, Comment 533254-00004 at 6.

<sup>536</sup> For example, one commenter stated that “[s]elling emission offsets before they are created is not inherently problematic . . . . However, forward crediting should be done transparently and provisions made for failure of delivery.” Gillenwater, Comment 533254-00005 at 3.

product would have occurred without the offset sale.<sup>537</sup> Both the workshop participants and comments discussed this issue at length, with most agreeing that offset sellers have a duty to demonstrate that their underlying GHG reduction projects are additional.<sup>538</sup> Without such a showing, the underlying projects do not produce meaningful GHG reductions.<sup>539</sup>

The concept of additionality raises difficult technical and policy challenges, which have generated substantial disagreement among experts. In particular, the commenters did not form a consensus regarding which tests industry members should use to determine whether an offset project is additional. In fact, according to various commenters, industry members rely on numerous, different tests, alone or in combination. Examples of these various tests include:<sup>540</sup>

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<sup>537</sup> Some commenters noted that it is difficult to define additionality, and FTC staff have set forth merely one variation (examining whether the emission reduction project would have gone forward without the additional revenue stream associated with the sale of carbon offsets). Another variation examines whether the project causes emissions beyond what is required by law or beyond “business as usual.” See, e.g., Anadarko Petroleum Corp. (“Anadarko”), Comment 533254-00058 at 4. The Commission discusses these differences in more detail below.

<sup>538</sup> See, e.g., Anadarko, Comment 533254-00058 at 3; Derik Broekhoff, World Resources Institute (“WRI”), Carbon Offsets Workshop Tr. at 123-125, 165; COPC, Comment 533254-00032 at 5; CRS, Comment 533254-00049 at 11; EcoSecurities, Comment 533254-00044 at 4; Gillenwater, Comment 533254-00005 at 3; Hydrodec, Comment 533254-00046 at 6; Offset Quality Initiative, Comment 533254-00047 at 4; TerraPass, Comment 533254-00045 at 5.

<sup>539</sup> See, e.g., TerraPass, Comment 533254-00045 at 5.

<sup>540</sup> See Anadarko, Comment 533254-00058 at 4; EcoSecurities, Comment 533254-00044 at 9; Gillenwater, Comment 533254-00006 at 8; Green Power Partnership, Carbon Offsets Workshop Tr. at 241-242; Holt, Carbon Offsets Workshop Tr. at 154-155; Hydrodec, Comment 533254-00046 at 4-5; Maurice LeFranc, EPA (“LeFranc EPA”), Carbon Offsets Workshop Tr. at 143; Offset Quality Initiative, Comment 533254-00047 at 4-8; WRI, Carbon Offsets Workshop Tr. at 123-125; Mark Trexler, Derik Broekhoff, and Laura Kosloff, A Statistically-Driven Approach to Offset-Based GHG Additionality Determinations: What Can We Learn?, Sustainable Development Law and Policy (Winter 2006) at 30, available at <http://conserveonline.org/workspaces/climate.change/carbonmarkets/AdditionalityOffset>.

- Regulatory/Legal Test: Addresses whether the project, and, thus, the emissions reductions, are required by law. If they are required by law, the project is not additional.
- Investment Test: Addresses whether the revenue from carbon offset sales was a decisive factor in the project's implementation or whether the project would have yielded a lower than acceptable rate of return without offset revenue. If either is true, the project is additional.
- Common Practice Test: Addresses whether the project involves widely-used technologies and is merely a "business as usual" project. If so, the project is not additional.
- Technology Test: Addresses whether the project involves a technology that is not considered "business as usual" or whether the primary benefit yielded by the technology is a reduction in emissions. If so, the project is additional.
- Timing Test: Addresses whether the project began after a specific date. This test eliminates older projects which could not have been implemented with the intent of reducing emissions. If the project began after the established date, it is additional.
- Barriers Test: Addresses whether there are barriers, such as local opposition or lack of knowledge, that must be overcome to implement the project. If the project succeeds in overcoming unusual barriers such as these, the project is additional.
- Performance Test: Addresses whether the project achieves a level of performance (e.g., an emission rate, a technology standard, or a practice standard) with respect

to emission reductions and/or removals that is significantly better than “business as usual.” If so, the project is additional.<sup>541</sup>

The commenters variously criticized these tests as vague, subjective, and likely to yield undesirable outcomes. For example, one commenter noted that the investment test requires “subjective analyses of the intent of the project developer or the sufficiency of a project’s investment return . . . [and ignores] market realities as they relate to capital formation and the tenure of commercial arrangements which make private activity projects feasible.”<sup>542</sup> Such subjective criteria encourage “gaming” and usually result in increased costs.<sup>543</sup> Another criticized the common practice, technology, and barrier tests because they all involve “complex counter-factual questions of what constitutes the baseline scenario . . . and how the offset project differs.”<sup>544</sup> Still another noted that the timing test may create incentives to delay much-needed investments until an offset system is established.<sup>545</sup> Some workshop participants, however, supported the regulatory additionality test because it offers an objective standard (i.e., if the law

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<sup>541</sup> The EPA Climate Leaders program recommends this approach for use in evaluating offsets by its partners. See <http://www.epa.gov/stateply/>; LeFranc EPA, Carbon Offsets Workshop Tr. at 143.

<sup>542</sup> COPC, Comment 533254-00032 at 3. Another commenter explained that the investment test is subjective because there are no industry-specific metrics on whether an internal rate of return is “‘attractive’ or not to project developers.” Anadarko, Comment 533254-00058 at 6.

<sup>543</sup> COPC, Comment 533254-00032 at 3. A workshop participant also noted that it may be difficult to determine which source of funding “made a difference.” Green Power Partnership, Carbon Offsets Workshop Tr. at 242.

<sup>544</sup> Anadarko, Comment 533254-00058 at 6.

<sup>545</sup> Hydrodec, Comment 533254-00046 at 5.

requires the project, one cannot sell offsets from it).<sup>546</sup> But even this approach drew criticism when one panelist explained that multiple regulations can apply to a project, making it difficult to determine whether regulations actually require a particular technology investment.<sup>547</sup>

Many commenters urged the FTC to refrain from issuing guidelines that address additionality. They suggested that a combination of legislative action, efforts by agencies with greater expertise, and evolving market practices are the best means for addressing these questions.<sup>548</sup> For example, one commenter warned that the “FTC risks becoming entangled in highly complex policy issues at the core of ongoing discussions concerning the design of market-based mechanisms addressing climate change.”<sup>549</sup> Another argued that, because pending legislation would assign the role of addressing additionality standards to agencies other than the FTC, it would be neither “appropriate nor productive for the FTC to take a stance on the issue” at this time.<sup>550</sup>

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<sup>546</sup> Anadarko, Comment 533431-00032 at 4; Renewable Choice, Carbon Offsets Workshop Tr. at 262; see also LeFranc EPA, Carbon Offsets Workshop Tr. at 143.

<sup>547</sup> ERT, Carbon Offsets Workshop Tr. at 254-256; see also Anja Kollmus, Stockholm Environmental Institute (“SEI”), Carbon Offsets Workshop Tr. at 258-259.

<sup>548</sup> AF&PA, Comment 533254-00042 at 2-3; Anadarko, Comment 533254-00058 at 2; Clean Air Conservancy, Comment 533254-00027 at 1; COPC, Comment 533254-00032 at 3; Edison Electric Institute, Comment 533254-00055 at 11-13; Exelon Corp., Comment 533431-00059 at 2-3; Hydrodec, Comment 533254-00046 at 5-6; REMA, Comment 533254-00028 at 12; The Fertilizer Institute, Comment 533254-00052 at 5; Weyerhaeuser, Comment 533431-00084 at 2.

<sup>549</sup> Anadarko, Comment 533254-00058 at 2.

<sup>550</sup> Hydrodec, Comment 533254-00046 at 6.

**d. Substantiating Carbon Offset Claims – Use of RECs**

Some carbon offsets are based on the purchase of renewable energy certificates (“RECs”). The practice of using RECs to create carbon offsets is controversial and garnered significant attention at the workshop and in the comments.<sup>551</sup>

Some workshop panelists and commenters approved of using RECs to substantiate offset claims.<sup>552</sup> In their view, renewable energy generation (represented by RECs) creates emission reductions by causing fossil fuel-fired facilities to produce less energy and, therefore, fewer emissions.<sup>553</sup>

Others argued that RECs should not be used for offsets because the two are distinctive commodities and conflating them could mislead consumers.<sup>554</sup> They provided three main

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<sup>551</sup> Carbon Offsets Workshop participant Edward Holt provided an overview of the issues involved in using RECs to form the basis for carbon offset claims. Holt, Carbon Offsets Workshop Tr. at 150-158.

<sup>552</sup> Adam Stern, TerraPass (“TerraPass”), Carbon Offsets Workshop Tr. at 227-228 (stating that there are reputable organizations such as “the World Resources Institute, The Union of Concerned Scientists, Natural Resources Defense Council, that have all indicated a support for using RECs as an offset value”); Eric Carlson, Carbonfund.org, Carbon Offsets Workshop Tr. at 229-230; CRS, Comment 533254-0049 at 9; Edison Electric Institute, Comment 533254-00055 at 6.

<sup>553</sup> Carbonfund.org, Carbon Offsets Workshop Tr. at 229-230; CRS, Comment 533254-00049 at 4; Edison Electric Institute, Comment 533254-00055 at 6. One commenter argued that it “is universally accepted that the generation of renewable energy can displace and reduce the emission of carbon and other greenhouse gases” from conventional facilities. The commenter further stated that the practice is recognized by international offset programs including the United Nations’ Clean Development Mechanism of the Kyoto Protocol, the Gold Standard, and the Voluntary Carbon Standard. CRS, Comment 533254-00049 at 11. Some of these commenters, however, cautioned that RECs do not always equate to reduced emissions from conventional facilities, and offset sellers must demonstrate that the reduced emissions are additional. COPC, Comment 533254-00032 at 2-3; CRS, Comment 533254-0049 at 3-7; Offset Quality Initiative, Comment 533254-00047 at 11.

<sup>554</sup> Climate Clean, Comments 533254-00038 at 1-3, 533254-00039 at 3 (stating that use of RECs as offsets is a “uniquely American practice”); Gillenwater, Comment 533254-00006 at

arguments to support their position. First, they argued that there is little or no evidence that renewable energy generation always reduces traditional power generation<sup>555</sup> because the actual emission reductions associated with grid power vary considerably across the United States, and there are no uniform standards for calculating the emissions displaced by renewable energy.<sup>556</sup> Second, even if such displacement occurs, sellers cannot prove that renewable energy generation, and any associated GHG emission reductions, are additional.<sup>557</sup> Some argued that RECs merely subsidize existing projects and do not contribute sufficiently to a project's income stream to create a market for new renewable energy generation.<sup>558</sup> Third, the critics questioned whether the renewable energy generators can take credit for the emission reductions that occur at fossil fuel-fired facilities.<sup>559</sup> There is currently no mechanism to establish who owns such emission reductions – the renewable energy generator or the fossil fuel-fired generator.<sup>560</sup> Therefore, the

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15-16; 533254-00007 at 5 (stating that there is an incentive to rely on RECs as a source of offsets because RECs are generally less expensive than most offset projects); SEI, Carbon Offsets Workshop Tr. at 226-227.

<sup>555</sup> Gillenwater, Comment 533254-00006 at 16 (stating that “the effect of an input of electricity from a renewable generator on other grid-connected generators [e.g., fossil fuel plants] is difficult to quantify”); EcoSecurities, Comment 533254-00044 at 3-4.

<sup>556</sup> Id.

<sup>557</sup> EcoSecurities, Comment 533254-00044 at 4 (stating that RECs “are subject to no . . . additionality testing requirements, and require no reference to whether or not the REC market was instrumental in the development of the project”); Climate Clean, Comments 533254-00038 at 2, 533254-00039 at 2-3; see also NREL, Carbon Offsets Workshop Tr. at 75-76 (explaining the concept of additionality for RECs).

<sup>558</sup> Id.

<sup>559</sup> ERT, Carbon Offsets Workshop Tr. at 225 (“[W]hat you’re saying is [that] you own a reduction on someone else’s property.”); see also Gillenwater, Comment 533254-00006 at 14.

<sup>560</sup> Holt, Carbon Offsets Workshop Tr. at 151-152. In contrast, other emission reduction projects have a clear owner who can take credit for the reductions or sell the reductions.

comments raised concerns about double counting if both generators take credit for the same emission reduction.<sup>561</sup>

### **3. Consumer Perception Evidence**

Some commenters emphasized the need to research consumer understanding of specific terms and claims in carbon offset advertisements.<sup>562</sup> The commenters, however, did not identify existing consumer perception data in this area.<sup>563</sup> Therefore, the Commission tested certain issues related to carbon offset claims in its consumer research. The study split respondents into two groups – asking one about carbon offsets and the other about carbon neutrality. The research explored respondents’ understanding of these terms, whether respondents had seen advertisements for carbon offsets or for products or services described as carbon neutral, and whether they had ever purchased such items.

A significant percentage of respondents demonstrated a general understanding of carbon offsets when they chose from a list of possible descriptions, but a much smaller percentage could

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<sup>561</sup> EcoSecurities, Comment 533254-00044 at 10. For example, a renewable energy generator might claim that its RECs represent a reduction in traditional electricity generation and a corresponding reduction in emissions. However, these reductions actually occur at the fossil fuel plant. The fossil fuel plant could argue that, because it produced less energy, it caused the reduction in emissions. The fossil fuel plant could sell offsets that represent the same emission reduction as the RECs.

<sup>562</sup> Vermont Office of Attorney General (“Vermont AG”), Comment 553254-00051 at 5 (writing on behalf of the Offices of the Attorneys General of Arkansas, California, Connecticut, Delaware, Illinois, Maine, Mississippi, New Hampshire, Oklahoma, and Vermont).

<sup>563</sup> See Georgia-Pacific, Comment 553254-00059 at 2 (“We do not know of specific, credible surveys or even market sensing studies on this matter.”); Rebecca Tushnet, Georgetown University Law Center, Carbon Offsets Workshop Tr. at 82-83 (stating that companies’ consumer research is likely to be part of a marketing initiative and, therefore, proprietary). In considering potential consumer research, some noted that consumer interpretation of claims may change over time. *Id.*; Alan Levy, FDA, Carbon Offsets Workshop Tr. at 80; GE AES Greenhouse Gas Services LLC, Comment 533254-00043 at 2.

describe a carbon offset in their own words. Specifically, in response to a closed-ended question, 41 percent identified a carbon offset as “a way of reducing carbon dioxide and other greenhouse gases,” while 35 percent stated that they were not sure what a carbon offset was.<sup>564</sup> When asked to describe a carbon offset in their own words, only 18 percent provided an answer which communicated a general understanding of the term, while 58 percent stated that they did not know or provided no response to the question.<sup>565</sup> A much smaller number (11 percent) reported seeing an advertisement for an offset and only two percent actually recalled purchasing a carbon offset.<sup>566</sup>

In a closed-ended question, the study also asked respondents to identify what it meant to be “carbon neutral.” Thirty-nine percent of respondents answered that greenhouse gases, such as carbon dioxide, were offset. Twenty-five percent were not sure what “carbon neutral” meant.<sup>567</sup> When asked to describe the term in their own words, 22 percent provided an answer that demonstrated a general understanding of the term, and 35 percent stated that they did not know or

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<sup>564</sup> The other responses were: a way of eliminating all pollution that results from using a product or service; a method for replacing scarce carbon resources; a way of reducing chemical pollutants in water; a way of making carbonated beverages; a laundry additive for removing pencil and ink stains from clothing; and none of the above.

<sup>565</sup> These figures are based on FTC staff’s more detailed analysis of responses rather than Harris’ general findings. Examples of responses that indicate an understanding of the term include: “A way to reduce greenhouse gases”; “Trees are planted or other environmental restoration is performed to supposedly make up for environmental damage being caused by other activities”; and “A credit on the amount of carbon used in manufacturing process.”

<sup>566</sup> Of those few who purchased an offset, 21 percent stated that they were offsetting airline travel, 15 percent automobile travel, and 15 percent lighting.

<sup>567</sup> The other responses were: no pollution was generated in making the product; carbon resources were not used in making the product; water pollutants were reduced to improve water quality; clothing that resists pencil and ink stains; soft drinks that were made without carbonation; and none of the above.

provided no answer.<sup>568</sup> Similar to the carbon offset results, few respondents (only 10 percent) recalled seeing an advertisement for carbon neutral products or services, and only four percent stated that they had purchased a product or service at least partly because it was advertised or labeled carbon neutral.

For the subset of respondents who generally understood that carbon offsets were a way to reduce greenhouse gas emissions, the study attempted to gauge their understanding about the timing of greenhouse gas emission reductions.<sup>569</sup> The study asked each respondent to consider an airline advertisement that states: “For every flight you take with us, we will buy carbon offsets to offset the greenhouse gas emissions from your flight.” The study explained that the offsets in question involve capturing and destroying methane. It then described two methane projects that both result in reduced emissions, but in different timeframes. The study attempted to gauge respondents’ views on whether the timing of the emission reductions was material. For each project, the study asked whether respondents agreed or disagreed with the airline’s statement that it offsets the emissions from their flight. When the methane was to be captured “within the next few months,” 53 percent of respondents agreed that the airline was offsetting emissions from the

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<sup>568</sup> These findings are based on FTC staff’s more detailed analysis of responses rather than Harris’ general findings. Examples of responses that indicate an understanding of the term “carbon neutral” include: “The amount of carbon created in producing the product is offset by other means that eliminates carbon”; “doesn’t have a negative impact in terms of carbon emissions”; and “does not leave a carbon footprint.”

<sup>569</sup> As mentioned above, the study asked approximately half of all respondents about carbon offsets (and the remainder about carbon neutral claims). Of the 1,879 respondents who answered carbon offset questions, 770 generally understood carbon offsets. Only these 770 respondents answered questions about the timing of emission reductions.

flight and 20 percent disagreed.<sup>570</sup> But when the equipment used to capture methane had not yet been installed and the methane was not to be captured “for several years,” only 28 percent of respondents agreed that the airline was offsetting emissions from the flight, while 43 percent disagreed.<sup>571</sup>

#### **4. Analysis and Guidance**

The Commission proposes to provide only limited guidance regarding carbon offsets in the Guides.<sup>572</sup> Although many commenters urged the Commission to provide detailed advice or extensive regulatory requirements, such an approach is not appropriate at this time given the extent of the Commission’s authority, the available consumer perception evidence, and the ongoing policy debates among experts in the field concerning the appropriate tests to substantiate offset claims. However, it is appropriate for the Commission to provide advice to marketers regarding some aspects of carbon offset marketing and we discuss these below. Regardless of the Guides’ scope, the Commission may take law enforcement action to stop deceptive practices involving carbon offset marketing pursuant to Section 5 of the FTC Act. For example, clearly deceptive activity, such as knowingly selling the same offset to multiple purchasers, does not need to be addressed in the Guides and, indeed, is best addressed through enforcement actions.

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<sup>570</sup> Additionally, 16 percent stated that they neither agreed or disagreed and 11 percent stated that they were not sure.

<sup>571</sup> Additionally, 16 percent stated that they neither agreed or disagreed and 12 percent stated they were not sure. These figures add up to 99 percent because of rounding.

<sup>572</sup> This proposed guidance can be found in 16 CFR 260.5.

**a. Consumer Interpretation of Claims and Disclosures**

Some commenters asked the Commission to define terms such as carbon offsets and require sellers to disclose to consumers certain characteristics of their offsets. As previously discussed, under the FTC Act, the Commission has authority to combat deceptive and unfair practices. It does not have authority to develop environmental policies or regulations. Accordingly, the Commission does not create definitions or standards for environmental terms. Rather, it provides guidance to marketers on how consumers understand those terms. The Commission's study suggests that some consumers have a general understanding of carbon offsets and products advertised as carbon neutral, but few reported seeing advertisements for such items, and even fewer have actually purchased them. The study did not identify any pattern of confusion among respondents about what a carbon offset is that would warrant any general FTC guidance. The Commission, therefore, does not believe a discussion about consumer understanding of these terms in the Guides would be useful to marketers. In addition, any such guidance could become obsolete quickly given this rapidly evolving market.

Marketers also requested more detailed FTC guidance with respect to the identification of allowable offset projects and the establishment of uniform methodologies for calculating emission reductions. Such guidance, however, would place the Commission in the role of setting environmental policy, which is outside the agency's authority. The Commission, therefore, declines to do so.

Except as described below, the Commission does not propose advising offset sellers to make certain disclosures, such as the type of projects funded by the offset sales. Although such disclosures may provide helpful information to potential purchasers, there is no evidence on the record to conclude that they are necessary to prevent consumer deception. This distinction is

critical under FTC law. Pursuant to the FTC Act, advertisers must disclose information that is necessary to prevent consumers from being misled – not all information that consumers may deem useful.<sup>573</sup> Therefore, the Commission declines to advise marketers to provide such information in every offset advertisement.<sup>574</sup>

#### **b. Timing of Emission Reductions**

Some commenters suggested that the Commission advise marketers to disclose the fact that their offsets reflect emission reductions scheduled to occur in the future. The Commission's study, therefore, explored respondents' views on the timing of emission reductions. The results suggest that this timing is important to consumers.<sup>575</sup> Specifically, when emission reductions did not occur for several years, 43 percent of respondents indicated that the carbon offset claim was misleading.<sup>576</sup> Accordingly, marketers may need to qualify their offset claims to avoid deceiving consumers. Absent evidence that consumers view their claims differently, the Commission proposes advising marketers to disclose if the offset purchase funds emission reductions that will

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<sup>573</sup> FTC Deception Policy Statement, 103 F.T.C. at 165.

<sup>574</sup> In some contexts, sellers may nevertheless wish to disclose this information to differentiate their offsets.

<sup>575</sup> As discussed above, this finding is based on the subset of respondents who generally understood carbon offsets. Despite the smaller sample size, the Commission relies on these findings because they provide the only available consumer perception evidence upon which to base guidance.

<sup>576</sup> The study asked respondents about an airline's statement that it would buy carbon offsets to offset the greenhouse gas emissions from their flight.

not occur for two years or longer.<sup>577</sup> The Commission, however, requests comment on this proposed disclosure.

**c. Substantiating Carbon Offset Claims – Tracking Offsets**

Like all marketers, carbon offset marketers must ensure that their advertising claims are truthful, not misleading, and substantiated. Section 260.2 of the proposed, revised Guides explains that substantiation for environmental marketing claims often requires competent and reliable scientific evidence. Carbon offset sellers – particularly those new to the market – must pay special attention to this substantiation requirement given the complexities of substantiating offsets. For example, marketers must employ sophisticated accounting protocols to properly quantify the GHG emission reductions that result from a project, as well as rigorous tracking methods to ensure that the reductions are not sold more than once. Although savvy carbon offset marketers likely have these procedures in place already, the Commission proposes adding this point to the Guides to ensure that new market participants are fully informed of their responsibilities.

**d. Substantiating Carbon Offset Claims – Additionality**

Many aspects of the additionality debate raise unresolved technical and environmental policy issues. Because the Commission does not set environmental standards or policy, establishing a specific additionality test or tests appears to be outside of the FTC’s purview. However, in accordance with its responsibility to ensure that consumers are not misled, the Commission proposes issuing guidance regarding regulatory additionality.

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<sup>577</sup> Additionally, the Commission proposes advising offset marketers that they should not state or imply that their products have already reduced emissions or will do so in the near future if, in fact, the reductions will occur at a significantly later date.

When consumers purchase carbon offsets, they expect that they are supporting a reduction in greenhouse gas emissions. If the law mandates a particular emission reduction, however, that reduction will occur whether or not someone buys an offset for the activity. In other words, if a company sells an offset based on a mandatory emission reduction, the purchaser is essentially funding that company's regulatory compliance activities.<sup>578</sup> Therefore, in such situations, the proposed Guides advise marketers that offset sales are deceptive.<sup>579</sup>

The Commission does not propose promulgating guidance on which specific additionality tests sellers must meet to substantiate offset claims. Even if consumers have a vague expectation of "additionality," it is still unclear which test is appropriate to substantiate that interpretation.<sup>580</sup> In addition, there is no consensus among experts in the field about which tests are appropriate. Of course, marketers are free to provide consumers with information about how and why their offset products are additional. While such disclosures may, or may not, be required to prevent deception, depending on the context, they may aid consumers in differentiating various offsets on the market.

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<sup>578</sup> See Anadarko, Comment 533254-00058 at 5 (stating that it is reasonable for consumers to assume, absent any disclaimers to the contrary, that the GHG reduction was not taken to meet regulatory requirements).

<sup>579</sup> The Commission notes that this guidance represents its interpretation of the FTC Act. In the future, other agencies may issue comprehensive carbon offset regulations that address these issues more specifically.

<sup>580</sup> See Holt, Carbon Offsets Workshop Tr. at 165 (stating that consumers expect their carbon offset purchase to "make a difference," and that "making a difference means that it's additional to what would have happened otherwise," but noting that there is still a debate about how to determine what is additional); WRI, Carbon Offsets Workshop Tr. at 166.

**e. Substantiating Carbon Offset Claims – Use of RECs**

Similar to additionality, the use of RECs as a basis for offset claims involves unresolved technical and policy issues. These issues include the methods marketers should use to demonstrate that the RECs they purchase cause the claimed GHG reductions and which additionality tests they should apply. Further, it is unclear which entity owns the GHG reductions – the renewable energy generator or the fossil fuel-fired facility. Because of this uncertainty, there is a risk of double counting the emission reductions.

It is unlikely that the Commission can provide general guidance on these issues without setting environmental policy, which is beyond the agency's purview. Nevertheless, as with other environmental claims, marketers must substantiate their offset claims. Given the complexity of the issues related to the use of RECs as a basis for offsets, marketers should be cautious that they possess competent and reliable scientific evidence to substantiate their claims and ensure that the emission reductions are not double counted.

**VII. Request for Comment**

The Commission invites comment on all issues raised in this Notice, including all aspects of the proposed, revised Green Guides. In addition, the Commission requests responses to the following specific questions:

1. Do consumers interpret general environmental claims, when qualified by a particular attribute, to mean that the particular attribute provides the product with a net environmental benefit? Please provide any relevant consumer perception evidence.  
  
Should the Commission advise marketers that a qualified-general environmental claim is deceptive if a particular attribute represents an environmental improvement in one area,

- but causes a negative impact elsewhere that makes the product less environmentally beneficial than the product otherwise would be? Why or why not?
2. Would it be helpful to include an example in the Guides illustrating a qualified general environmental claim that is nevertheless deceptive? For example, a marketer advertises its product as “Eco-friendly sheets - made from bamboo.” Consumers would likely interpret this claim to mean that the sheets are made from a natural fiber, using a process that is similar to that used for other natural fibers. The sheets, however, are actually a man-made fiber, rayon. Although bamboo can be used to make rayon, rayon is manufactured through a process that uses toxic chemicals and releases hazardous air pollutants. In this instance, the advertisement is deceptive.
  3. The Commission’s consumer perception study found that 27 percent of respondents interpreted the claims “green” and “eco-friendly” as suggesting that a product has no (rather than “some”) negative impact. Viewing this finding alone, would it be deceptive for a product to be advertised with an unqualified general environmental benefit claim if the product had a negligible environmental impact? Please provide any relevant consumer perception evidence.
  4. If a marketer makes an unqualified degradable claim for a liquid substance (or dissolvable solid), how long do consumers believe the substance will take to completely degrade? Please provide any relevant consumer perception evidence. Should the Commission provide guidance concerning this time period in the Guides? Why or why not?
  5. The Commission proposes adopting a maximum period of one year for complete decomposition of solid materials marketed as degradable without time qualification.

Would this guidance lead to deceptive claims in circumstances where consumers would expect a material to degrade in less than one year?

6. Should the Commission quantify the “substantial majority” threshold in the recyclable section of the Guides? If so, how? If not, why not?
7. Should the Commission quantify the “significant percentage” threshold in the recyclable section of the Guides? If so, how? If not, why not?
8. What changes, if any, should the Commission make to its guidance on pre-consumer recycled content claims? How do consumers interpret such claims? Please provide any relevant consumer perception evidence.
  - a. If the Commission should retain its guidance that pre-consumer recycled materials be diverted from the solid waste stream: (1) should the Commission continue to consider “reuse in the original manufacturing process” and “significant reprocessing” to determine if material is diverted from the solid waste stream; (2) what factors should the Commission consider to determine whether material was diverted from the solid waste stream; and (3) when processes that divert material from the waste stream become standard practice in an industry, do consumers continue to consider that material recycled content?
  - b. If materials have historically been diverted from the solid waste stream and reused for one purpose (e.g., fiber fill in toys), but now may be reused for other higher purposes (e.g., as raw fiber for textiles), do consumers still consider that material to be recycled content even though the material was already being diverted from the solid waste stream?

9. Do consumers understand the difference between pre-consumer and post-consumer recycled content? Please provide any relevant consumer perception evidence.
10. Should the Commission continue to advise marketers that recycled content claims may be based on the annual weighted average of recycled content in an item? If so, why? If not, why not? Are recycled content claims based on this method likely to mislead consumers? Would qualifying the claim avoid that deception? If so, please describe what the disclosure should be, and why. Please also provide any relevant consumer perception evidence.
11. If a product is advertised as “made with recycled materials,” either in whole or in part, should the Commission advise marketers to qualify that claim to indicate that the product is not recyclable if it is not? Why or why not? If a disclosure is needed, please describe what the disclosure should be, and why.
12. Are consumers aware that manufacturers are no longer permitted to use CFCs in their products? Do no-CFCs claims imply that other products still contain CFCs? Please provide any relevant consumer perception evidence.
13. What guidance, if any, should the Commission provide concerning free-of claims based on substances which have never been associated with a product category? How do consumers understand such claims? Please provide any relevant consumer perception evidence.
14. What guidance, if any, should the Commission provide concerning organic claims about non-agricultural products? How do consumers interpret organic claims for non-agricultural products? Do consumers understand such claims as referring to the products’

- ingredients, manufacturing, or processing, or all three? Please provide any relevant consumer perception evidence.
15. How should marketers qualify “made with renewable materials” claims, if at all, to avoid deception? Does disclosing the type of material, how the material was sourced, and the reason the material is renewable adequately qualify the claim? Why or why not? Are there other disclosures that would adequately qualify a “made with renewable materials” claim? Please describe such disclosures. Please also provide any relevant consumer perception evidence.
16. How, and under what circumstances, should marketers qualify “made with renewable energy” claims to avoid deception?
- a. Does disclosing the source of the renewable energy adequately qualify the claim and prevent deceptive implications that the advertised product is made with renewable or recycled materials? Why or why not? Are there other disclosures that would adequately qualify a “made with renewable energy” claim? Please describe such disclosures. Please also provide any relevant consumer perception evidence.
- b. Should the Commission advise marketers to qualify a “made with renewable energy” claim if the advertised product is not made entirely with renewable energy? If so, should marketers qualify such claims if all or virtually all significant processes used in making a product are powered by renewable energy? Why or why not? Please provide any relevant consumer perception evidence.

17. How do consumers understand “carbon offset” and “carbon neutral” claims? Is there any evidence of consumer confusion concerning the use of these claims? Please provide any relevant consumer perception evidence.
18. How should marketers qualify carbon offset claims, if at all, to avoid deception about the timing of emission reductions? Should marketers disclose if their offsets reflect emission reductions that are not scheduled to occur in two years? Should marketers make a disclosure if emission reductions are not scheduled to occur in some other time period? If so, what time period, and why? Would such a disclosure adequately qualify an offset claim to avoid deception? Please provide any relevant consumer perception evidence about this issue or on carbon offsets, generally.

Interested parties are invited to submit written comments electronically or in paper form.

Comments should state “Proposed, Revised Green Guides, 16 CFR Part 260, Project No. P954501” in the text and, if applicable, on the envelope.

The FTC will place your comment -- including your name and your state -- on the public record of this proceeding, and to the extent practicable, will make it available to the public on the FTC website at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission endeavors to remove individuals’ home contact information from the comments before placing them on its website. Because comments will be made public, they should not include: (1) any sensitive personal information, such as any individual’s Social Security number, date of birth, driver’s license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number; (2) any sensitive health information, such as medical records or other individually identifiable health information; or (3) any trade secret or any commercial or financial information which is

privileged or confidential, as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).<sup>581</sup>

Because postal mail addressed to the FTC is subject to delay due to heightened security screening, if possible, please submit your comments in electronic form or send them by courier or overnight service. To ensure that the Commission considers an electronic comment, you must file it at <https://ftcpublic.commentworks.com/ftc/revisedgreenguides> by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov/search/Regs/home.html#home>, you may also file a comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at <http://www.ftc.gov> to read the Notice and the news release describing it.

A comment filed in paper form should include the reference “Proposed, Revised Green Guides, 16 CFR Part 260, Project No. P954501” in the text of the comment and, if applicable, on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580.

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<sup>581</sup> The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The FTC’s General Counsel will grant or deny the request consistent with applicable law and the public interest. See FTC Rule 4.9(c), 16 CFR 4.9(c).

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive comments it receives. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy at <http://www.ftc.gov/ftc/privacy.shtm>.

## **VIII. Proposed, Revised Green Guides**

List of Subjects in 16 CFR Part 260

Advertising, Environmental protection, Labeling, Trade practices.

For the reasons set forth in the preamble, the Federal Trade Commission is proposing to amend 16 CFR Part 260 as follows:

### **PART 260– GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS**

Sec.	260.1	Purpose, Scope, and Structure of the Guides.
	260.2	Interpretation and Substantiation of Environmental Marketing Claims.
	260.3	General Principles.
	260.4	General Environmental Benefit Claims.
	260.5	Carbon Offsets.
	260.6	Certifications and Seals of Approval.
	260.7	Compostable Claims.
	260.8	Degradable Claims.
	260.9	Free-of and Non-Toxic Claims.
	260.10	Ozone-Safe and Ozone-Friendly Claims.
	260.11	Recyclable Claims.
	260.12	Recycled Content Claims.

- 260.13 Refillable Claims.
- 260.14 Renewable Energy Claims.
- 260.15 Renewable Materials Claims.
- 260.16 Source Reduction Claims.

Authority: 15 U.S.C. 41-58.

### **§ 260.1 Purpose, Scope, and Structure of the Guides.**

- (a) These guides set forth the Federal Trade Commission's current thinking about environmental claims. The guides help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45. They do not confer any rights on any person and do not operate to bind the FTC or the public. The Commission, however, can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the guides. In any such enforcement action, the Commission must prove that the challenged act or practice is unfair or deceptive in violation of Section 5 of the FTC Act.
- (b) These guides do not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act.
- (c) These guides apply to claims about the environmental attributes of a product, package, or service in connection with the marketing, offering for sale, or sale of such item or service to individuals, businesses, or other entities. The guides apply to environmental claims in labeling, advertising, promotional materials, and all other forms of marketing in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names, or any other means.

(d) The guides consist of general principles, specific guidance on the use of particular environmental claims, and examples. Claims may raise issues that are addressed by more than one example and in more than one section of the guides. The examples provide the Commission's views on how reasonable consumers likely interpret certain claims. Marketers can use an alternative approach if the approach satisfies the requirements of Section 5 of the FTC Act. Whether a particular claim is deceptive will depend on the net impression of the advertisement, label, or other promotional material at issue. In addition, although many examples present specific claims and options for qualifying claims, the examples do not illustrate all permissible claims or qualifications under Section 5 of the FTC Act.

#### **§ 260.2 Interpretation and Substantiation of Environmental Marketing Claims.**

Section 5 of the FTC Act prohibits deceptive acts and practices in or affecting commerce. A representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers' decisions. See FTC Policy Statement on Deception, 103 F.T.C. 174 (1983). To determine if an advertisement is deceptive, marketers must identify all express and implied claims that the advertisement reasonably conveys. Marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims. See FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984). In the context of environmental marketing claims, a reasonable basis often requires competent and reliable scientific evidence. Such evidence consists of tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results. Such evidence should be sufficient in

quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that each of the marketing claims is true.

### **§ 260.3           General Principles.**

The following general principles apply to all environmental marketing claims, including those described in §§ 260.4 - 16. Claims should comport with all relevant provisions of these guides.

- (a)     **Qualifications and disclosures:** To prevent deceptive claims, qualifications and disclosures should be clear, prominent, and understandable. To make disclosures clear and prominent, marketers should use plain language and sufficiently large type, should place disclosures in close proximity to the qualified claim, and should avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosure.
- (b)     **Distinction between benefits of product, package, and service:** Unless it is clear from the context, an environmental marketing claim should specify whether it refers to the product, the product's packaging, a service, or just to a portion of the product, package, or service. In general, if the environmental attribute applies to all but minor, incidental components of a product or package, the marketer need not qualify the claim to identify that fact. However, there may be exceptions to this general principle. For example, if a marketer makes an unqualified recyclable claim, and the presence of the incidental component significantly limits the ability to recycle the product, the claim would be deceptive.

**Example 1:** A plastic package containing a new shower curtain is labeled "recyclable" without further elaboration. Because the context of the claim does not make clear whether

it refers to the plastic package or the shower curtain, the claim is deceptive if any part of either the package or the curtain, other than minor, incidental components, cannot be recycled.

**Example 2:** A soft drink bottle is labeled “recycled.” The bottle is made entirely from recycled materials, but the bottle cap is not. Because the bottle cap is a minor, incidental component of the package, the claim is not deceptive.

(c) **Overstatement of environmental attribute:** An environmental marketing claim should not overstate, directly or by implication, an environmental attribute or benefit. Marketers should not state or imply environmental benefits if the benefits are negligible.

**Example 1:** An area rug is labeled “50% more recycled content than before.” The manufacturer increased the recycled content of its rug from 2% recycled fiber to 3%. Although the claim is technically true, it likely conveys the false impression that the manufacturer has increased significantly the use of recycled fiber.

**Example 2:** A trash bag is labeled “recyclable” without qualification. Because trash bags ordinarily are not separated from other trash at the landfill or incinerator for recycling, they are highly unlikely to be used again for any purpose. Even if the bag is technically capable of being recycled, the claim is deceptive since it asserts an environmental benefit where no meaningful benefit exists.

(d) **Comparative claims:** Comparative environmental marketing claims should be clear to avoid consumer confusion about the comparison. Marketers should have substantiation for the comparison.

**Example 1:** An advertiser notes that its glass bathroom tiles contain “20% more recycled content.” Depending on the context, the claim could be a comparison either to the

advertiser's immediately preceding product or to its competitors' products. The advertiser should have substantiation for both interpretations. Otherwise, the advertiser should make the basis for comparison clear, for example, by saying "20% more recycled content than our previous bathroom tiles."

**Example 2:** An advertiser claims that "our plastic diaper liner has the most recycled content." The diaper liner has more recycled content, calculated as a percentage of weight, than any other on the market, although it is still well under 100%. The claim likely conveys that the product contains a significant percentage of recycled content and has significantly more recycled content than its competitors. If the advertiser cannot substantiate these messages, the claim would be deceptive.

**Example 3:** An advertiser claims that its packaging creates "less waste than the leading national brand." The advertiser implemented the source reduction several years ago and supported the claim by calculating the relative solid waste contributions of the two packages. The advertiser should have substantiation that the comparison remains accurate.

**Example 4:** A product is advertised as "environmentally preferable." This claim likely conveys that the product is environmentally superior to other products. Because it is highly unlikely that the marketer can substantiate the messages conveyed by this statement, this claim is deceptive. The claim would not be deceptive if the marketer accompanied it with clear and prominent language limiting the environmental superiority representation to the particular attributes for which the marketer has substantiation, provided the advertisement's context does not imply other deceptive claims. For example,

the claim “Environmentally preferable: contains 50% recycled content compared to 20% for the leading brand” would not be deceptive.

#### **§ 260.4 General Environmental Benefit Claims.**

- (a) It is deceptive to misrepresent, directly or by implication, that a product, package, or service offers a general environmental benefit.
- (b) Unqualified general environmental benefit claims are difficult to interpret and likely convey a wide range of meanings. In many cases, such claims likely convey that the product, package, or service has specific and far-reaching environmental benefits and may convey that the item or service has no negative environmental impact. Because it is highly unlikely that marketers can substantiate all reasonable interpretations of these claims, marketers should not make unqualified general environmental benefit claims.
- (c) Marketers can qualify general environmental benefit claims to prevent deception about the nature of the environmental benefit being asserted. To avoid deception, marketers should use clear and prominent qualifying language that limits the claim to a specific benefit.
- (d) Even if a marketer explains, and has substantiation for, the product’s specific environmental attributes, this explanation will not adequately qualify a general environmental benefit claim if the advertisement otherwise implies deceptive claims. Therefore, marketers should ensure that the advertisement’s context does not imply deceptive environmental claims.

**Example 1:** The brand name “Eco-friendly” likely conveys that the product has far-reaching environmental benefits and may convey that the product has no negative environmental impact. Because it is highly unlikely that the marketer can substantiate these claims, the use of such a brand name is deceptive. A claim, such as “Eco-friendly:

made with recycled materials,” would not be deceptive if the statement “made with recycled materials” is clear and prominent; the marketer has substantiation for the statement; and provided that the advertisement’s context does not imply other deceptive claims.

**Example 2:** A product wrapper bears the claim “Environmentally Friendly.” Text on the wrapper explains that it is environmentally friendly because it was “not chlorine bleached, a process that has been shown to create harmful substances.” Although the wrapper was not bleached with chlorine, its production releases into the environment other harmful substances. Since reasonable consumers likely would interpret the “Environmentally Friendly” claim, in combination with the explanation, to mean that no significant harmful substances are released into the environment, the “Environmentally Friendly” claim is deceptive.

**Example 3:** A marketer states that its packaging is now “Greener than our previous packaging.” The packaging weighs 15% less than previous packaging, but it is not recyclable nor has it been improved in any other material respect. The claim is deceptive because reasonable consumers likely would interpret “Greener” in this context to mean that other significant environmental aspects of the packaging also are improved over previous packaging. A claim stating “Greener than our previous packaging” accompanied by clear and prominent language such as, “We’ve reduced the weight of our packaging by 15%,” would not be deceptive, provided that the advertisement’s context does not imply other deceptive claims.

**§ 260.5 Carbon Offsets.**

- (a) Given the complexities of carbon offsets, sellers should employ competent and reliable scientific and accounting methods to properly quantify claimed emission reductions and to ensure that they do not sell the same reduction more than one time.
- (b) It is deceptive to misrepresent, directly or by implication, that a carbon offset represents emission reductions that have already occurred or will occur in the immediate future. To avoid deception, marketers should clearly and prominently disclose if the carbon offset represents emission reductions that will not occur for two years or longer.
- (c) It is deceptive to claim, directly or by implication, that a carbon offset represents an emission reduction if the reduction, or the activity that caused the reduction, was required by law.

**Example 1:** On its website, an airline invites consumers to purchase offsets to “neutralize the carbon emissions from your flight.” The proceeds from the offset sales fund future projects that will not reduce greenhouse gas emissions for two years. The claim likely conveys that the emission reductions either already have occurred or will occur in the near future. Therefore, the advertisement is deceptive. It would not be deceptive if the airline’s website stated “Offset the carbon emissions from your flight by funding new projects that will begin reducing emissions in two years.”

**Example 2:** An offset provider claims that its product “will offset your own ‘dirty’ driving habits.” The offset is based on methane capture at a landfill facility. State law requires this facility to capture all methane emitted from the landfill. The claim is deceptive because the emission reduction would have occurred regardless of whether consumers purchased the offsets.

## **§ 260.6          Certifications and Seals of Approval.**

- (a) It is deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent third-party.
- (b) A marketer's use of the name, logo, or seal of approval of a third-party certifier is an endorsement, which should meet the criteria for endorsements provided in the FTC's Endorsement Guides, 16 C.F.R. Part 255, including Definitions (§ 255.0), General Considerations (§ 255.1), Expert Endorsements (§ 255.3), Endorsements by Organizations (§ 255.4), and Disclosure of Material Connections (§ 255.5).
- (c) Third-party certification does not eliminate a marketer's obligation to ensure that it has substantiation for all claims reasonably communicated by the certification.
- (d) A marketer's use of an unqualified environmental certification or seal of approval (i.e., one that does not state the basis for the certification) likely conveys a general environmental benefit claim (addressed in § 260.4). Because it is highly unlikely that marketers can substantiate such claims, marketers should not use unqualified certifications or seals of approval.
- (e) To avoid deception, language qualifying a certification or seal of approval should be clear and prominent and should clearly convey that the certification or seal of approval refers only to specific and limited benefits. This qualifying language may be part of the certification or seal itself.

**Example 1:** An advertisement for paint features a “GreenLogo” seal and the statement “GreenLogo for Environmental Excellence.” This advertisement likely conveys that:

- (1) the GreenLogo seal is awarded by an independent, third-party certifier with expertise in evaluating the environmental attributes of paint; and (2) the product has far-reaching environmental benefits. If the paint manufacturer placed the GreenLogo seal in its

advertisement, and no independent, third-party certifier evaluated the paint, the claim would be deceptive. The claim would not be deceptive if the marketer accompanied the seal with clear and prominent language: (1) indicating that the marketer itself created the GreenLogo seal; and (2) limiting the general environmental benefit representation to the particular product attributes for which the marketer has substantiation, provided that the advertisement's context does not imply other deceptive claims.

**Example 2:** A product advertisement includes a seal with the text "Certified by the Renewable Energy Association." The product manufacturer is a dues-paying member of that association. Even if the association certified that the manufacturer uses only renewable energy, the use of the seal is deceptive because it likely conveys that the association is independent from the product manufacturer. To avoid deception, the manufacturer should accompany the seal with clear and prominent language disclosing the material connection.

**Example 3:** A manufacturer advertises its product as "certified by the American Institute of Degradable Materials." The advertisement does not mention that the American Institute of Degradable Materials is an industry trade association. Regardless of whether the manufacturer is a member, this advertisement is deceptive because it likely conveys that the product is certified by an independent certifying organization, not an industry group. The advertisement would not be deceptive if the manufacturer accompanies its statement that the product is "certified by the American Institute of Degradable Materials" with clear and prominent language indicating that the Institute is an industry trade association, and if the manufacturer otherwise complies with § 260.8 of the Guides.

**Example 4:** A marketer's industry sales brochure for overhead lighting features a seal with the text "U.S. EcoFriendly Building Association" to show that the marketer is a member of that organization. Although the lighting manufacturer is, in fact, a member, this association has not evaluated the environmental attributes of the company's product. This advertisement would be deceptive because it likely conveys that the U.S. EcoFriendly Building Association evaluated the product through testing or other objective standards. It also is likely to convey that the lighting has far-reaching environmental benefits. The use of the seal would not be deceptive if the manufacturer accompanies it with clear and prominent qualifying language: (1) indicating that the seal refers to the company's membership only and that the association did not evaluate the product's environmental attributes, and (2) limiting the general environmental benefit representation to the particular product attributes for which the marketer has substantiation, provided that the advertisement's context does not imply other deceptive claims. For example, the marketer could state, "Although we are a member of the U.S. EcoFriendly Building Association, it has not evaluated this product. Our lighting is made from 100 percent recycled metal and uses energy efficient LED technology."

**Example 5:** A product label contains an environmental seal, either in the form of a globe icon or a globe icon with the text "EarthSmart." EarthSmart is an independent, third-party certifier that uses standards previously adopted by EarthSmart and suitable for evaluating products' chemical emissions. While the marketer meets EarthSmart's standards for reduced chemical emissions during product usage, the product has no other specific environmental benefits. Either seal likely conveys that the product has far-reaching environmental benefits, and that Earth Smart certified the product for all of these benefits.

If the marketer cannot substantiate these claims, the use of the seal would be deceptive.

The seal would not be deceptive if the marketer accompanied it with clear and prominent language limiting the general environmental benefit claim to the particular product attributes for which the manufacturer has substantiation, provided that the advertisement's context does not imply other deceptive claims. For example, the marketer could state next to the globe icon: "EarthSmart certifies that this product meets EarthSmart standards for reduced chemical emissions during product usage." Alternatively, the claim would not be deceptive if the EarthSmart environmental seal itself stated: "EarthSmart Certified for reduced chemical emissions during product usage."

**Example 6:** Great Paper Company sells photocopy paper with packaging that has a seal of approval from the No Chlorine Products Association, a non-profit third-party association. There are no material connections between Great Paper Company and the No Chlorine Products Association. Using standards widely recognized by industry experts, the No Chlorine Products Association certifies that products are chlorine-free. Moreover, the Association's endorsement was reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the Association. The claim would not be deceptive.

#### **§ 260.7 Compostable Claims.**

- (a) It is deceptive to misrepresent, directly or by implication, that a product or package is compostable.
- (b) A marketer claiming that an item is compostable should have competent and reliable scientific evidence that all the materials in the item will break down into, or otherwise become

part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner (i.e., in approximately the same time as the materials with which it is composted) in an appropriate composting program or facility or in a home compost pile or device.

(c) A marketer should clearly and prominently qualify compostable claims to the extent necessary to avoid deception if: (1) the item cannot be composted safely or in a timely manner in a home compost pile or device; or (2) the claim misleads reasonable consumers about the environmental benefit provided when the item is disposed of in a landfill.

(d) To avoid deception about the limited availability of municipal or institutional composting facilities, a marketer should clearly and prominently qualify compostable claims if such facilities are not available to a substantial majority of consumers or communities where the item is sold.

**Example 1:** A manufacturer indicates that its unbleached coffee filter is compostable.

The unqualified claim is not deceptive, provided the manufacturer has substantiation that the filter can be converted safely to usable compost in a timely manner in a home compost pile or device. If so, the extent of local municipal or institutional composting facilities is irrelevant.

**Example 2:** A garden center sells grass clipping bags labeled as “Compostable in California Municipal Yard Trimmings Composting Facilities.” When the bags break down, however, they release toxins into the compost. The claim is deceptive if the presence of these toxins prevents the compost from being usable.

**Example 3:** An electronics manufacturer makes an unqualified claim that its package is compostable. Although municipal or institutional composting facilities exist where the product is sold, the package will not break down into usable compost in a home compost

pile or device. To avoid deception, the manufacturer should clearly and prominently disclose that the package is not suitable for home composting.

**Example 4:** Nationally marketed lawn and leaf bags state “compostable” on each bag.

The bags also feature text disclosing that the bag is not designed for use in home compost piles. Yard trimmings programs in many communities compost these bags, but such programs are not available to a substantial majority of consumers or communities where the bag is sold. The claim is deceptive because it likely conveys that composting facilities are available to a substantial majority of consumers or communities. To avoid deception, the marketer should clearly and prominently indicate the limited availability of such programs. A marketer could state “Appropriate facilities may not exist in your area,” or provide the approximate percentage of communities or consumers for which such programs are available.

**Example 5:** A manufacturer sells a disposable diaper that states, “This diaper can be composted if your community is one of the 50 that have composting facilities.” The claim is not deceptive if composting facilities are available as claimed and the manufacturer has substantiation that the diaper can be converted safely to usable compost in solid waste composting facilities.

**Example 6:** A manufacturer markets yard trimmings bags only to consumers residing in particular geographic areas served by county yard trimmings composting programs. The bags meet specifications for these programs and are labeled, “Compostable Yard Trimmings Bag for County Composting Programs.” The claim is not deceptive. Because the bags are compostable where they are sold, a qualification is not needed to indicate the limited availability of composting facilities.

## **§ 260.8 Degradable Claims.**

- (a) It is deceptive to misrepresent, directly or by implication, that a product or package is degradable, biodegradable, oxo-degradable, oxo-biodegradable, or photodegradable. The following guidance for degradable claims also applies to biodegradable, oxo-degradable, oxo-biodegradable, or photodegradable claims.
- (b) A marketer making an unqualified degradable claim should have competent and reliable scientific evidence that the entire item will completely break down and return to nature (i.e., decompose into elements found in nature) within a reasonably short period of time after customary disposal.
- (c) It is deceptive to make an unqualified degradable claim for solid items if the items do not completely decompose within one year after customary disposal. Unqualified degradable claims for items that are customarily disposed in landfills, incinerators, and recycling facilities are deceptive because these locations do not present conditions in which complete decomposition will occur within one year.
- (d) Degradable claims should be qualified clearly and prominently to the extent necessary to avoid deception about: (1) the product or package's ability to degrade in the environment where it is customarily disposed; and (2) the rate and extent of degradation.

**Example 1:** A marketer advertises its trash bags using an unqualified “degradable” claim. The marketer relies on soil burial tests to show that the product will decompose in the presence of water and oxygen. Consumers, however, customarily dispose of trash bags in incineration facilities or landfills where they will not degrade within one year. The claim is, therefore, deceptive.

**Example 2:** A marketer advertises a commercial agricultural plastic mulch film with the claim “Photodegradable,” and clearly and prominently qualifies the term with the phrase “Will break down into small pieces if left uncovered in sunlight.” The advertiser possesses competent and reliable scientific evidence that within one year, the product will break down after being exposed to sunlight and into sufficiently small pieces to become part of the soil. Thus, the qualified claim is not deceptive. Because the claim is qualified to indicate the limited extent of breakdown, the advertiser need not meet the consumer expectations for an unqualified photodegradable claim, i.e., that the product will not only break down, but also will decompose into elements found in nature.

**Example 3:** A marketer advertises its shampoo as “biodegradable” without qualification. The advertisement makes clear that only the shampoo, and not the bottle, is biodegradable. The marketer has competent and reliable scientific evidence demonstrating that the shampoo, which is customarily disposed in sewage systems, will break down and decompose into elements found in nature in a reasonably short period of time in the sewage system environment. Therefore, the claim is not deceptive.

**Example 4:** A plastic six-pack ring carrier is marked with a small diamond. Several state laws require that the carriers be marked with this symbol to indicate that they meet certain degradability standards if the carriers are littered. The use of the diamond, by itself, does not constitute a degradable claim.<sup>582</sup>

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<sup>582</sup> The guides’ treatment of unqualified degradable claims is intended to help prevent deception and is not intended to establish performance standards to ensure the degradability of products when littered.

**Example 5:** A fiber pot containing a plant is labeled “biodegradable.” The pot is customarily buried in the soil along with the plant. Once buried, the pot fully decomposes during the growing season, allowing the roots of the plant to grow into the surrounding soil. The unqualified claim is not deceptive.

**§ 260.9 Free-of and Non-Toxic Claims.**

(a) It is deceptive to misrepresent, directly or by implication, that a product, package, or service is free of, or does not contain or use, a substance or that a product, package, or service is non-toxic. Such claims should be clearly and prominently qualified to the extent necessary to avoid deception.

(b) A truthful claim that a product, package, or service is free of, or does not contain or use, a substance may nevertheless be deceptive if: (1) the product, package, or service contains or uses substances that pose the same or similar environmental risks as the substance that is not present; or (2) the substance has never been associated with the product category.

(c) Depending on the context, some no, free-of, or does-not-contain claims may be appropriate even where a product, package, or service contains or uses a de minimis amount of a substance.

(d) A marketer that makes a no, free-of, or does-not-contain claim that reasonable consumers would interpret to convey additional environmental claims, including general environmental benefit claims or comparative superiority claims, must have substantiation for each such claim.

(e) A non-toxic claim likely conveys that a product, package, or service is non-toxic both for humans and for the environment generally. Therefore, marketers making non-toxic claims should have competent and reliable scientific evidence that the product, package, or service is non-toxic

for humans and for the environment or should clearly and prominently qualify their claims to avoid deception.

**Example 1:** A package of t-shirts is labeled “Shirts made with a chlorine-free bleaching process.” The shirts, however, are bleached with a process that releases a reduced, but still significant, amount of the same harmful byproducts associated with chlorine bleaching. The claim overstates the product’s benefits because reasonable consumers likely would interpret it to mean that the product’s manufacture does not cause any of the environmental risks posed by chlorine bleaching. A claim, however, that the shirts were “bleached with a process that substantially reduces harmful substances associated with chlorine bleaching” would not be deceptive, if substantiated.

**Example 2:** A manufacturer advertises its insulation as “formaldehyde free.” Although the manufacturer does not use formaldehyde as a binding agent to produce the insulation, tests show that the insulation still emits trace amounts of formaldehyde. The seller has substantiation that formaldehyde is present in trace amounts in virtually all indoor and (to a lesser extent) outdoor environments and that its insulation emits less formaldehyde than is typically present in outdoor environments. In this context, the trace levels of formaldehyde emissions likely are inconsequential to consumers. Therefore, the seller’s free-of claim would not be deceptive.

**Example 3:** A marketer advertises a lawn care product as “essentially non-toxic” and “practically non-toxic.” The advertisement likely conveys that the product does not pose any risk to humans or the environment. If the pesticide poses no risk to humans but is toxic to the environment, the claims would be deceptive.

**§ 260.10      Ozone-Safe and Ozone-Friendly Claims.**

It is deceptive to misrepresent, directly or by implication, that a product, package, or service is safe for, or friendly to, the ozone layer or the atmosphere.

**Example 1:** A product is labeled “ozone friendly.” The claim is deceptive if the product contains any ozone-depleting substance, including those substances listed as Class I or Class II chemicals in Title VI of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and others subsequently designated by EPA as ozone-depleting substances. These chemicals include chlorofluorocarbons (CFCs), halons, carbon tetrachloride, 1,1,1-trichloroethane, methyl bromide, hydrobromofluorocarbons, and hydrochlorofluorocarbons (HCFCs).

**Example 2:** An aerosol air freshener is labeled “ozone friendly.” Some of the product’s ingredients are volatile organic compounds (VOCs) that may cause smog by contributing to ground-level ozone formation. The claim likely conveys that the product is safe for the atmosphere as a whole, and, therefore, is deceptive.

**Example 3:** A manufacturer has substituted non-ozone-depleting refrigerants for the ozone-depleting substances in its residential air conditioning equipment. The manufacturer advertises its equipment as “environmentally friendly.” This general environmental benefit claim likely conveys that the product has far reaching environmental benefits. However, the manufacturer’s air conditioning equipment consumes a substantial amount of energy and relies on refrigerants that are greenhouse gases. Accordingly, this claim is deceptive.

## **§ 260.11      Recyclable Claims.**

(a)      It is deceptive to misrepresent, directly or by implication, that a product or package is recyclable. A product or package should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the solid waste stream through an established recycling program for reuse or use in manufacturing or assembling another item.

(b)      Marketers should clearly and prominently qualify recyclable claims to the extent necessary to avoid deception about the availability of recycling programs and collection sites to consumers.

(1)      When recycling facilities are available to a substantial majority<sup>583</sup> of consumers or communities where the item is sold, marketers can make unqualified recyclable claims.

(2)      When recycling facilities are available to a significant percentage of consumers or communities where the item is sold, but not to a substantial majority, marketers should clearly and prominently qualify their recyclable claims. Suggested qualifications are: “This product [package] may not be recyclable in your area,” “Recycling programs for this product [package] may not exist in your area,” or a statement of the percentage of communities or the population that have programs where the item can be recycled.

(3)      When recycling facilities are available to less than a significant percentage of consumers or communities where the item is sold, marketers should clearly and prominently qualify their recyclable claims. Suggested qualifications are: “This product [package] is recyclable only in the few communities that have recycling programs,” or a

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<sup>583</sup> Commission staff has informally interpreted the term “substantial majority,” as used in this context, to mean at least 60 percent.

statement of the percentage of communities or the population that have programs where the item can be recycled.

(c) Marketers can make unqualified recyclable claims for a product or package if the entire product or package, excluding minor incidental components, is recyclable. For items that are partially made of recyclable components, marketers should clearly and prominently qualify the recyclable claim to avoid deception about which portions are recyclable.

(d) If any component significantly limits the ability to recycle the item, any recyclable claim would be deceptive. An item that is made from recyclable material, but, because of its shape, size, or some other attribute, is not accepted in recycling programs, should not be marketed as recyclable.<sup>584</sup>

**Example 1:** A packaged product is labeled with an unqualified claim, “recyclable.” It is unclear from the type of product and other context whether the claim refers to the product or its package. The unqualified claim likely conveys that both the product and its packaging, except for minor, incidental components, can be recycled. Unless the manufacturer has substantiation for both messages, it should clearly and prominently qualify the claim to indicate which portions are recyclable.

**Example 2:** A nationally marketed plastic yogurt container displays the Society of the Plastics Industry (SPI) code (which consists of a design of arrows in a triangular shape containing a number in the center and an abbreviation identifying the component plastic resin) on the front label of the container, in close proximity to the product name and logo.

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<sup>584</sup> Batteries labeled in accordance with the Mercury-Containing and Rechargeable Battery Management Act, 42 U.S.C. § 14322(b), are deemed to be in compliance with these Guides.

This conspicuous use of the SPI code constitutes a recyclable claim. Unless recycling facilities for this container are available to a substantial majority of consumers or communities, the manufacturer should qualify the claim to disclose the limited availability of recycling programs. If the manufacturer places the SPI code, without more, in an inconspicuous location on the container (e.g., embedded in the bottom of the container), it would not constitute a recyclable claim.

**Example 3:** A container can be burned in incinerator facilities to produce heat and power. It cannot, however, be recycled into another product or package. Any claim that the container is recyclable would be deceptive.

**Example 4:** A paperboard package is marketed nationally and labeled either “Recyclable where facilities exist” or “Recyclable – Check to see if recycling facilities exist in your area.” Recycling programs for these packages are available to a significant percentage of the population, but not to a substantial majority of consumers nationwide. Both claims are deceptive because they do not adequately disclose the limited availability of recycling programs. To avoid deception, the marketer should use a clearer qualification, such as those suggested in § 260.11(b)(2).

**Example 5:** Foam polystyrene cups are advertised as “Recyclable in the few communities with facilities for foam polystyrene cups.” A half-dozen major metropolitan areas have established collection sites for recycling those cups. The claim is not deceptive because it clearly discloses the limited availability of recycling programs.

**Example 6:** A package is labeled “Includes some recyclable material.” The package is composed of four layers of different materials, bonded together. One of the layers is made from recyclable material, but the others are not. While programs for recycling this type of

package are available to a substantial majority of consumers, only a few of those programs have the capability to separate the recyclable layer from the non-recyclable layers. Even though it is technologically possible to separate the layers, the claim is deceptive. An appropriately qualified claim would be “Includes material recyclable in the few communities that can process multi-layer products.”

**Example 7:** A product container is labeled “recyclable.” The marketer advertises and distributes the product only in Missouri. Collection sites for recycling the container are available to a substantial majority of Missouri residents but are not yet available nationally. Because programs are generally available where the product is sold, the unqualified claim is not deceptive.

**Example 8:** A manufacturer of one-time use cameras, with dealers in a substantial majority of communities, operates a take-back program that collects those cameras through all of its dealers. The manufacturer reconditions the cameras for resale and labels them “Recyclable through our dealership network.” This claim is not deceptive, even though the cameras are not recyclable through conventional curbside or drop off recycling programs.

**Example 9:** A manufacturer advertises its toner cartridges for computer printers as “Recyclable. Contact your local dealer for details.” Although all of the company’s dealers recycle cartridges, the dealers are not located in a substantial majority of communities where cartridges are sold. Therefore, the claim is deceptive. If dealers are located in a significant number of communities, the manufacturer should qualify its claim as suggested in § 260.11(b)(2). If participating dealers are located in only a few communities, the manufacturer should qualify the claim as suggested in § 260.11(b)(3).

**Example 10:** An aluminum can is labeled “Please Recycle.” This statement likely conveys that the can is recyclable. If collection sites for recycling these cans are available to a substantial majority of consumers or communities, the marketer does not need to qualify the claim.

#### **§ 260.12 Recycled Content Claims.**

- (a) It is deceptive to misrepresent, directly or by implication, that a product or package is made of recycled content. Recycled content includes recycled raw material, as well as used,<sup>585</sup> reconditioned, and re-manufactured components.
- (b) It is deceptive to represent, directly or by implication, that an item contains recycled content unless it is composed of materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer). If the source of recycled content includes pre-consumer material, the advertiser should have substantiation that the pre-consumer material would otherwise have entered the solid waste stream. Recycled content claims may – but do not have to – distinguish between pre-consumer and post-consumer materials. Where a marketer distinguishes between pre-consumer and post-consumer materials, it should have substantiation for any express or implied claim about the percentage of pre-consumer or post-consumer content in an item.
- (c) Marketers can make unqualified claims of recycled content if the entire product or package, excluding minor, incidental components, is made from recycled material. For items that are partially made of recycled material, the marketer should clearly and prominently qualify the

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<sup>585</sup> The term “used” refers to parts that are not new and that have not undergone any re-manufacturing or reconditioning.

claim to avoid deception about the amount or percentage, by weight, of recycled content in the finished product or package.

(d) For products that contain used, reconditioned, or re-manufactured components, the marketer should clearly and prominently qualify the recycled content claim to avoid deception about the nature of such components. No such qualification is necessary where it is clear to reasonable consumers from context that a product's recycled content consists of used, reconditioned, or re-manufactured components.

**Example 1:** A manufacturer collects spilled raw material and scraps from the original manufacturing process. After a minimal amount of reprocessing, the manufacturer combines the spills and scraps with virgin material for use in production of the same product. A recycled content claim is deceptive since the spills and scraps are normally reused by industry within the original manufacturing process and would not normally have entered the waste stream.

**Example 2:** A manufacturer purchases material from a firm that collects discarded material from other manufacturers and resells it. All of the material was diverted from the solid waste stream and is not normally reused by industry within the original manufacturing process. The manufacturer includes the weight of this material in its calculations of the recycled content of its products. It would not be deceptive for the manufacturer to advertise the amount of recycled content in its product because, absent the purchase and reuse of this material, it would have entered the solid waste stream.

**Example 3:** Fifty percent (50%) of a greeting card's fiber weight is composed from paper that was diverted from the solid waste stream. Of this material, 30% is post-consumer and 20% is pre-consumer. It would not be deceptive if the marketer claimed that the card

either “contains 50% recycled fiber” or “contains 50% total recycled fiber, including 30% post-consumer fiber.”

**Example 4:** A paperboard package with 20% recycled fiber by weight is labeled “20% post-consumer recycled fiber.” The recycled content was composed of overrun newspaper stock never sold to customers. Because the newspapers never reached consumers, the claim is deceptive.

**Example 5:** A product in a multi-component package, such as a paperboard box in a shrink-wrapped plastic cover, indicates that it has recycled packaging. The paperboard box is made entirely of recycled material, but the plastic cover is not. The claim is deceptive because, without qualification, it suggests that both components are recycled. A claim limited to the paperboard box would not be deceptive.

**Example 6:** A manufacturer makes a package from laminated layers of foil, plastic, and paper, although the layers are indistinguishable to consumers. The label claims that “one of the three layers of this package is made of recycled plastic.” The plastic layer is made entirely of recycled plastic. The claim is not deceptive, provided the recycled plastic layer constitutes a significant component of the entire package.

**Example 7:** A frozen dinner package is composed of a plastic tray inside a cardboard box. It states “package made from 30% recycled material.” Each packaging component is one-half the weight of the total package. The box is 20% recycled content by weight, while the plastic tray is 40% recycled content by weight. The claim is not deceptive, since the average amount of recycled material is 30%.

**Example 8:** A manufacturer labels a paper greeting card “50% recycled fiber.” The manufacturer purchases paper stock from several sources, and the amount of recycled

fiber in the stock provided by each source varies. If the 50% figure is based on the annual weighted average of recycled material purchased from the sources after accounting for fiber loss during the production process, the claim is not deceptive.

**Example 9:** A packaged food product is labeled with a three-chasing-arrows symbol (a Möbius loop) without explanation. By itself, the symbol likely conveys that the packaging is both recyclable and made entirely from recycled material. Unless the marketer has substantiation for both messages, the claim should be qualified. The claim may need to be further qualified, to the extent necessary, to disclose the limited availability of recycling programs and/or the percentage of recycled content used to make the package.

**Example 10:** In an office supply catalog, a manufacturer advertises its printer toner cartridges “65% recycled.” The cartridges contain 25% recycled raw materials and 40% reconditioned parts. The claim is deceptive because reasonable consumers likely would not know or expect that a cartridge’s recycled content consists of reconditioned parts. It would not be deceptive if the manufacturer claimed “65% recycled content; including 40% from reconditioned parts.”

**Example 11:** A store sells both new and used sporting goods. One of the items for sale in the store is a baseball helmet that, although used, is no different in appearance than a brand new item. The helmet bears an unqualified “Recycled” label. This claim is deceptive because reasonable consumers likely would believe that the helmet is made of recycled raw materials, when it is, in fact, a used item. An acceptable claim would bear a disclosure clearly and prominently stating that the helmet is used.

**Example 12:** An automotive dealer recovers a serviceable engine from a wrecked vehicle. Without repairing, rebuilding, re-manufacturing, or in any way altering the engine or its components, the dealer attaches a “Recycled” label to the engine, and offers it for sale in its used auto parts store. In this situation, an unqualified recycled content claim likely is not deceptive because reasonable consumers likely would understand that the engine is used and has not undergone any rebuilding.

**Example 13:** An automobile parts dealer purchases a transmission that has been recovered from a junked vehicle. Eighty-five percent of the transmission, by weight, was rebuilt and 15% constitutes new materials. After rebuilding<sup>586</sup> the transmission in accordance with industry practices, the dealer packages it for resale in a box labeled “Rebuilt Transmission,” or “Rebuilt Transmission (85% recycled content from rebuilt parts),” or “Recycled Transmission (85% recycled content from rebuilt parts).” These claims are not deceptive.

### **§ 260.13 Refillable Claims.**

It is deceptive to misrepresent, directly or by implication, that a package is refillable. A marketer should not make an unqualified refillable claim unless the marketer provides the means for refilling the package. The marketer may either provide a system for the collection and refill

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<sup>586</sup> The term “rebuilding” means that the dealer dismantled and reconstructed the transmission as necessary, cleaned all of its internal and external parts and eliminated rust and corrosion, restored all impaired, defective or substantially worn parts to a sound condition (or replaced them if necessary), and performed any operations required to put the transmission in sound working condition.

of the package, or offer for sale a product that consumers can purchase to refill the original package.

**Example 1:** A container is labeled “refillable three times.” The manufacturer has the capability to refill returned containers and can show that the container will withstand being refilled at least three times. The manufacturer, however, has established no collection program. The unqualified claim is deceptive because there is no means to return the container to the manufacturer for refill.

**Example 2:** A small bottle of fabric softener states that it is in a “handy refillable container.” In the same market area, the manufacturer also sells a large-sized bottle that consumers use to refill the smaller bottles. The claim is not deceptive because there is a reasonable means for the consumer to refill the smaller container.

#### **§ 260.14 Renewable Energy Claims.**

- (a) It is deceptive to misrepresent, directly or by implication, that a product or package is made with renewable energy or that a service uses renewable energy. Marketers should not make unqualified renewable energy claims, directly or by implication, if power derived from fossil fuels is used to manufacture any part of the advertised item or is used to power any part of the advertised service.
- (b) Research suggests that reasonable consumers may interpret renewable energy claims differently than marketers may intend. Unless marketers have substantiation for all their express and reasonably implied claims, they should clearly and prominently qualify their renewable energy claims by specifying the source of the renewable energy (e.g., wind or solar energy).

(c) It is deceptive to make an unqualified “made with renewable energy” claim unless all or virtually all of the significant manufacturing processes involved in making the product or package are powered with renewable energy or conventional energy offset by renewable energy certificates.

(d) If a marketer generates renewable electricity but sells renewable energy certificates for all of that electricity, it would be deceptive for the marketer to represent, directly or by implication, that it uses renewable energy.

**Example 1:** A marketer advertises its clothing line as “made with wind power.” The marketer buys renewable energy certificates to match only 50% of the energy it uses. The marketer’s claim is deceptive because reasonable consumers likely interpret the claim to mean that the power was composed entirely of renewable energy. If the marketer stated “we purchase wind energy for half of our manufacturing facilities,” the claim would not be deceptive.

**Example 2:** A company places solar panels on its store roof to generate power and advertises that its store is “100% solar-powered.” The company, however, sells renewable energy certificates based on the renewable attributes of all the power it generates. Even if the company uses the electricity generated by the solar panels, it has, by selling renewable energy certificates, transferred the right to characterize that electricity as renewable. The company’s claim is therefore deceptive. It also would be deceptive for this company to advertise that it “hosts a renewable power facility” because reasonable consumers likely would interpret this claim to mean that the company uses renewable energy.

**§ 260.15 Renewable Materials Claims.**

- (a) It is deceptive to misrepresent, directly or by implication, that a product or package is made with renewable materials.
- (b) Research suggests that reasonable consumers may interpret renewable materials claims differently than marketers may intend. For example, reasonable consumers may believe an item advertised as being “made with renewable materials” is made with recycled content, recyclable, and biodegradable. Unless marketers have substantiation for all their express and reasonably implied claims, they should clearly and prominently qualify their renewable materials claims by specifying the material used, how the material is sourced, and why the material is renewable.
- (c) It is deceptive to make an unqualified “made with renewable materials” claim unless the product or package (excluding minor, incidental components) is made entirely with renewable materials.

**Example 1:** A marketer makes the unqualified claim that its flooring is “made with renewable materials.” Reasonable consumers likely interpret this claim to mean that the flooring also is made with recycled content, recyclable, and biodegradable. Unless the marketer has substantiation for these implied claims, the unqualified “made with renewable materials” claim is deceptive. The marketer could qualify the claim by stating, clearly and prominently, “Our flooring is made from 100% bamboo, a fast-growing plant, which we cultivate at the same rate, or faster, than we use it.”

**Example 2:** A marketer’s packaging states that “Our packaging is made from 50% plant-based renewable materials. Because we turn fast-growing plants into bio-plastics, only half of our product is made from petroleum-based materials.” If substantiated, this claim is unlikely to be deceptive.

**Example 3:** Through testing, a marketer can establish that its product is composed entirely of biological material. It markets its product as “made with 100% renewable materials.” This claim, without further explanation, likely conveys that the product has other environmental benefits, including that it is recyclable, made with recycled content, or biodegradable. If the marketer cannot substantiate these messages, the claim would be deceptive.

**§ 260.16 Source Reduction Claims.**

It is deceptive to misrepresent, directly or by implication, that a product or package has been reduced or is lower in weight, volume, or toxicity. Marketers should clearly and prominently qualify source reduction claims to the extent necessary to avoid deception about the amount of the source reduction and the basis for any comparison.

**Example 1:** An advertiser claims that disposal of its product generates “10% less waste.” Because this claim could be a comparison to the advertiser’s immediately preceding product or to its competitors’ products, the advertiser should have substantiation for both interpretations. Otherwise, the advertiser should clarify which comparison it intends and have substantiation for that comparison. A claim of “10% less waste than our previous product” would not be deceptive if the advertiser has substantiation that shows that the current product’s disposal contributes 10% less waste by weight or volume to the solid waste stream when compared with the immediately preceding version of the product.

By direction of the Commission.

Donald S. Clark  
Secretary

# APPENDIX C



**terrachoice**  
PART OF THE UL GLOBAL NETWORK

# THE SINS OF GREENWASHING HOME AND FAMILY EDITION 2010

A REPORT ON ENVIRONMENTAL CLAIMS MADE  
IN THE NORTH AMERICAN CONSUMER MARKET



## COMPANY OVERVIEW

At TerraChoice, we help grow the world's most sustainable companies. By combining expertise in science and business, we help genuine leaders build market share and accelerate progress towards sustainability.

Our clients are Fortune 500 consumer packaged goods companies, energy conglomerates, green entrepreneurs, and everything in between. The common thread is their genuine legitimate leadership in environmental sustainability.

For more information, visit [www.terrachoice.com](http://www.terrachoice.com)



## COMPANY OVERVIEW

Operating around the globe, the UL family of companies is one of the world's largest independent testing and certification organizations. UL has been testing products and writing Standards for Safety for more than a century. UL evaluates more than 19,000 types of products, components, materials and systems from more than 66,000 manufacturers each year. More than 20 billion UL Marks appear on products yearly worldwide. UL's global family of companies and network of service providers – including Underwriters Laboratories of Canada Inc. and ULC Standards – is composed of 68 laboratory, testing and certification facilities serving customers in 102 countries. UL also specializes in providing environmental services, verification services, life and health safety testing, and educational training services through its various business units. By becoming one of the UL family of companies, TerraChoice can leverage the expertise and reach of UL Environment, a full-service environmental solutions company and one of UL's fastest growing businesses. For more information, visit: [www.ul.com/newsroom](http://www.ul.com/newsroom) or [www.ulenvironment.com](http://www.ulenvironment.com).



## CONTENTS

5	EXECUTIVE SUMMARY
8	INTRODUCTION
11	A GREENER RETAIL WORLD
12	GENTLE GREEN GIANTS
14	GREENWASHING IS A PERSISTENT PROBLEM
17	COMPANIES IMPROVE WITH PRACTICE
19	ECO-LABELING: PROBLEM + SOLUTION
21	TOYS + BABY PRODUCTS
23	HOUSEHOLD CLEANING PRODUCTS
25	DIY BUILDING & CONSTRUCTION PRODUCTS
27	CONSUMER ELECTRONICS
29	APPENDICES



## EXECUTIVE SUMMARY

Since the first “Sins of Greenwashing” study was published in 2007, the world has re-awakened to the issue of false and misleading environmental claims. Although we at TerraChoice have been pleased by these developments, we hope to see more reporting that is encouraging of business. Scrutiny of environmental claims will be positive *only as long as it manages to discourage greenwashing while simultaneously encouraging more and more green product innovation and commercialization.*

With that in mind, we launched this edition of the Sins of Greenwashing research to update the state of knowledge of environmental claims, to focus particular attention on home and family products, and to add a constructive perspective to the debate.

What we found is fascinating and telling, and includes both good news and bad.

# Since 2009, the number of “greener” products has gone up by 73%

Consumers are offering companies both a carrot and a stick. They reward green product innovation, and they scold greenwashing. And it appears to be working. There are more green products than ever before, there's a little less greenwashing, and there is good evidence that companies – and big retailers – are learning with experience. Consumers are creating a gradually greener retail world.

## WHAT WE FOUND

- **CONSUMERS ARE CHANGING THE WORLD FOR THE BETTER:** There are many more “green” home and family products and there's a little less greenwashing. In the 24 stores we visited in both 2009 and 2010 (same brand, same location, same size), the number of “greener” products (products claiming to be green) increased by 73%. And, although greenwashing is still a significant problem (this year we have found that over 95% of “greener” products commit one or more of the seven “Sins of Greenwashing”), there is evidence that it is improving. The proportion of sin-free products appears to have doubled in each of the last two years, from less than 1% in 2007 to approximately 2% in 2009, and to almost 4.5% in 2010.
- **COMPANIES IMPROVE WITH PRACTICE:** Categories of products that have more experience with “greening” have less greenwashing, more reliable “green” certification, and continued “green” growth.
- **BIG BOX STORES ARE GENTLE GREEN GIANTS:** With less greenwashing, more “green” product selection, and more use of legitimate certification we find that consumers can trust big box stores to provide the best selection and integrity of “greener” product claims.

Categories  
that have  
more  
experience  
with  
“greening”  
have 5  
times more  
“sin-free”  
products

## WHAT WE FOUND (CONTINUED)

- **ECO-LABELING IS AN IMPORTANT SOLUTION**, and sometimes part of the problem. Of products certified by an ISO 14024-based program, more than 30% were sin-free (compared to the 4.4% study-wide result). Clearly, good eco-labeling helps prevent (but doesn't eliminate) greenwashing. Unfortunately, the use of fake labels (a sin we first identified in 2009 and dubbed the “Sin of Worshiping False Labels”) has increased dramatically.
- **BPA + PHTHALATE-RELATED CLAIMS ARE SKYROCKETING.** The percentage of products making BPA-free claims has increased by 577%, and those making phthalate-free claims increased in 2550%! Two-thirds of these claims appear on toys and baby products.




“GREEN” IS A DIFFICULT WORD. IT’S EVOCATIVE AND POWERFUL.

Consumers and companies alike are attracted to it. But it’s vague, and can mean something different to everyone that uses or hears it. Cautiously (and only in quotation marks), we use “green” and “greener” to describe the products in this study. We mean simply products that claim to offer an environmental benefit.

## INTRODUCTION

Since the first “Sins of Greenwashing” study was published in 2007, the world has re-awakened to the issue of false and misleading environmental claims. Regulators have become re-engaged (the Canadian Competition Bureau re-published its environmental claims guidelines in 2008, and the U.S. Federal Trade Commission appears poised to re-publish its Green Guides in 2010 or 2011). The popular press has reported the issue widely. And, various movements – grassroots, legislative, and advocacy – are developing solutions.

Although we at TerraChoice have been pleased that the Sins of Greenwashing research has contributed to this awareness, we hope to see more balance in media coverage to encourage business to do better. Scrutiny of environmental claims *will be positive only as long as it manages to discourage greenwashing while simultaneously encouraging more and more green product innovation and commercialization.*



Striking this balance is the essence of what we do at TerraChoice: combine great science and great marketing to help market and sell genuinely “greener” products.

What customers demand, companies will do their best to provide. And as they compete for the attention of consumers and for profit, they will innovate and leapfrog one another in that pursuit. So, as consumers demand greener products, and companies race to meet that demand, they will advance the cause of environmental sustainability dramatically; perhaps more rapidly and efficiently than any governmental intervention ever has or could produce.

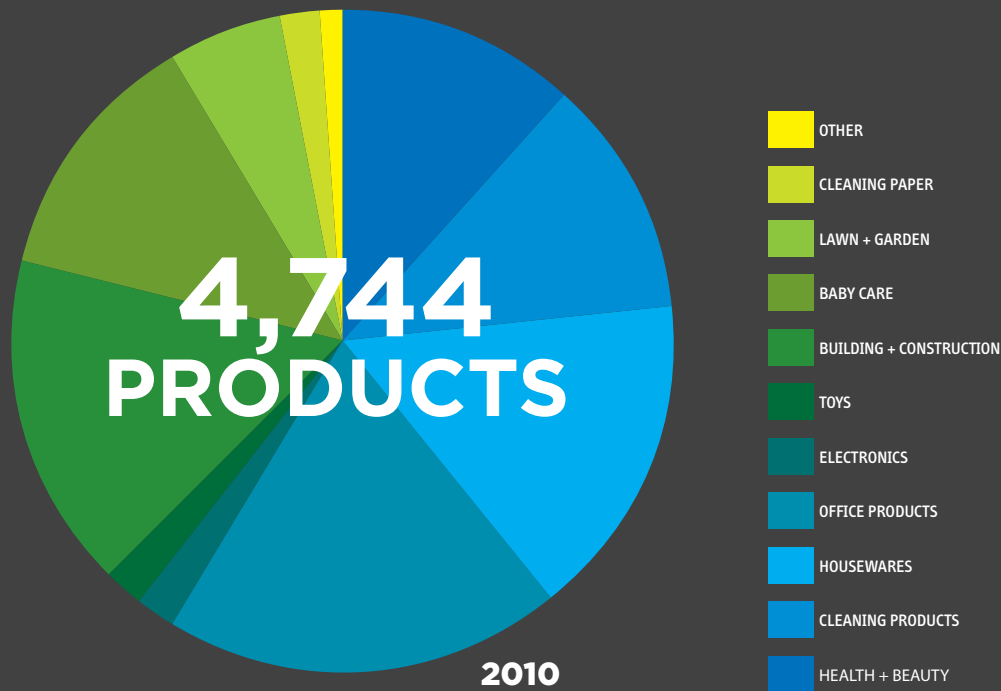
But competition and free markets need good information if consumer demand is to have anything but superficial effect. With that in mind, in this edition of the Sins of Greenwashing research (the methodology is described in Appendix 1), we set out to do two different things:

- 1. FOCUS ON THE HOME AND FAMILY**, since these are the products that give consumers a daily opportunity to use their purchasing to make a “greener” world; and,
- 2. FOCUS ON THE CONSTRUCTIVE FINDINGS** and implications of the research (notwithstanding the general conclusion that greenwashing is, still, a significant problem).

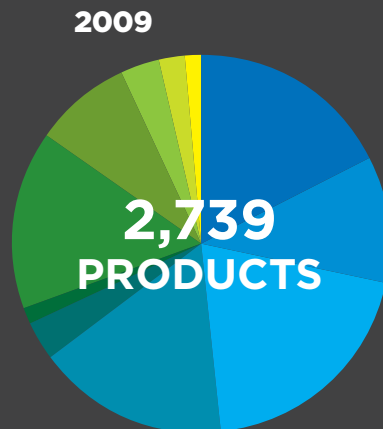
# THE 7 SINS OF GREEN- WASHING



- 1 SIN OF THE HIDDEN TRADE-OFF:** committed by suggesting a product is “green” based on an unreasonably narrow set of attributes without attention to other important environmental issues. Paper, for example, is not necessarily environmentally-preferable just because it comes from a sustainably-harvested forest. Other important environmental issues in the paper-making process, including energy, greenhouse gas emissions, and water and air pollution, may be equally or more significant.
- 2 SIN OF NO PROOF:** committed by an environmental claim that cannot be substantiated by easily accessible supporting information or by a reliable third-party certification. Common examples are tissue products that claim various percentages of post-consumer recycled content without providing any evidence.
- 3 SIN OF VAGUENESS:** committed by every claim that is so poorly defined or broad that its real meaning is likely to be misunderstood by the consumer. “All-natural” is an example. Arsenic, uranium, mercury, and formaldehyde are all naturally occurring, and poisonous. “All natural” isn’t necessarily “green”.
- 4 SIN OF IRRELEVANCE:** committed by making an environmental claim that may be truthful but is unimportant or unhelpful for consumers seeking environmentally preferable products. “CFC-free” is a common example, since it is a frequent claim despite the fact that CFCs are banned by law.
- 5 SIN OF LESSER OF TWO EVILS:** committed by claims that may be true within the product category, but that risk distracting the consumer from the greater environmental impacts of the category as a whole. Organic cigarettes might be an example of this category, as might be fuel-efficient sport-utility vehicles.
- 6 SIN OF FIBBING:** the least frequent Sin, is committed by making environmental claims that are simply false. The most common examples were products falsely claiming to be Energy Star certified or registered.
- 7 SIN OF WORSHIPING FALSE LABELS:** The Sin of Worshiping False Labels is committed by a product that, through either words or images, gives the impression of third-party endorsement where no such endorsement actually exists; fake labels, in other words.



**73%**  
INCREASE  
IN GREENER  
PRODUCT  
OFFERINGS



## A GREENER RETAIL WORLD

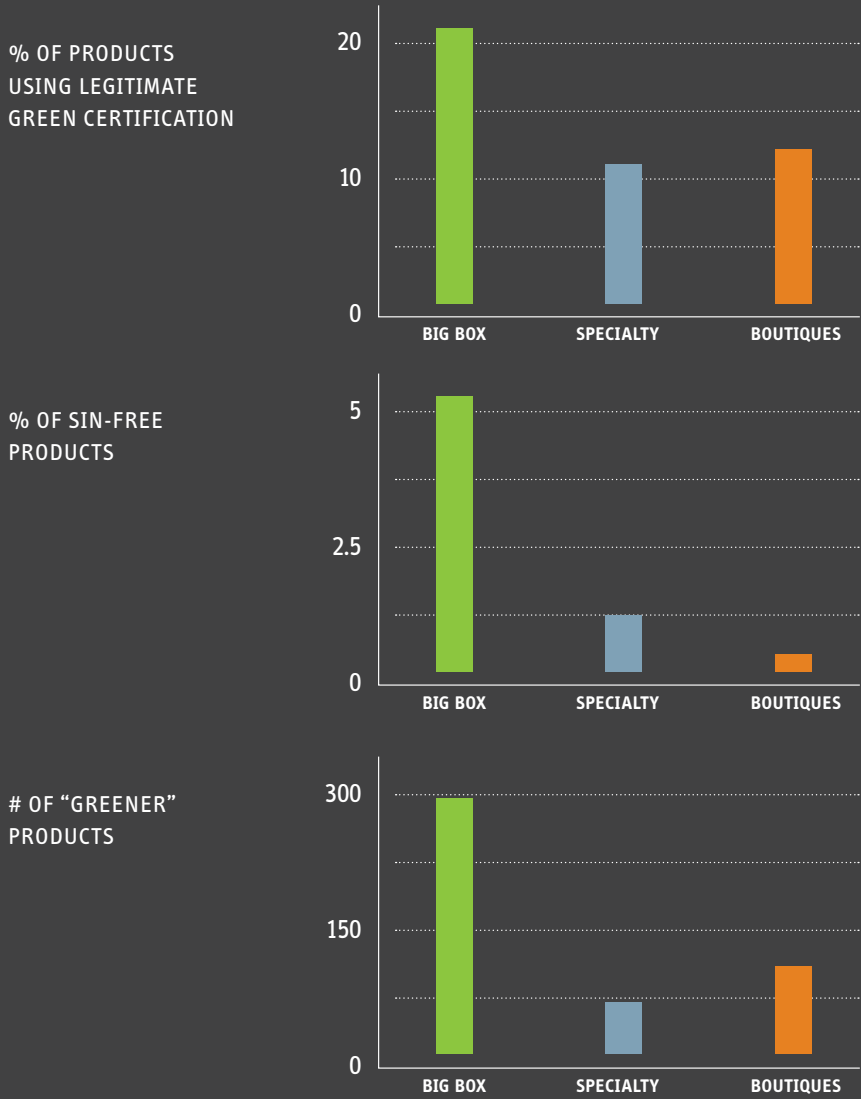
*It's easier than ever to find "greener" products for our homes and families.*

In the last edition of the Sins of Greenwashing study, we found that "greener" product offerings had grown by 79% between 2008 and 2009. Green markets were strong and growing.

That trend continues in 2010. At the two dozen stores we visited both in 2009 and again for this year's study, "greener" product offerings increased by a total of 73%, from 2,739 products in 2009 to 4,744 products in 2010. More specifically:

- In nine repeat-visit stores, the number of "greener" products increased by more than 200%. All of these stores are very large and well-known brands.
- Of all 24 repeat-visit stores, only four showed a decline in their "greener" product offering between 2009 and 2010. Three of these showed "greener" product declines of between 10 and 20%. One showed a decline of almost 61%.
- In three repeat-visit stores there were at least 500% more "greener" products than there had been in 2009.

Big box stores offered a much higher percentage (22.8%) of home and family products with legitimate green certifications than either specialty (11.5%) or green boutiques (12.8%)



## GENTLE GREEN GIANTS

*Big box stores are the best providers of trustworthy “greener” products.*

It has recently been popular to question the motives and legitimacy of “greening” at large corporate retailers. We were interested, consequently, in whether or not a meaningful difference could be found in the number and quality of “greener” claims on home and family product offerings at three different categories of retailers: big box stores with large footprints and multiple unrelated product categories (we visited thirteen such stores); specialty retailers which focus on one product category or multiple, related product categories (we visited eleven of these stores); and, green boutiques - smaller stores that self-identify as offering only “greener” products (we visited five of these).

Taken together these findings suggest – perhaps counter-intuitively, and whatever the motives of the retailers – that consumers can trust big box stores to provide the best selection

## CASE STUDY

### RONA & RESPONSIBLE RETAILING

The largest Canadian distributor and retailer of hardware, home renovation and gardening products is also a leader in “green” retailing. With close to 700 stores, nearly 30,000 employees, and a market share of more than 17.5%, RONA is paving the way to responsible retailing.

In the 2010 Sins study, TerraChoice found a 245% increase in the number of green product offerings at an Ottawa RONA location between 2009 and 2010. Normand Dumont, Executive Vice-President of Merchandising at RONA, explains this rise as a function of the company’s solid environmental platform and critical buy-in from CEO Robert Dutton. This support bolstered sustainable development’s place in RONA’s four-year strategic plan, which includes introducing 442 of RONA’s ECO brand of products over four years. At year three, they are at 98% of this goal. They are also introducing 1,673 products designated as “Eco-responsible” choices by a credible third-party and have already reached 84% of their target ending in 2011.

Behind marketing efforts including in-store signage for both RONA ECO and Eco Responsible products, RONA is taking a third-party approach to environmental product assessment. Founding their choices and own brand on life cycle analysis (LCA) principles developed in partnership with the International Chair in life cycle assessment of l’École polytechnique de Montréal, RONA works to assure consumers that they are not greenwashing.

In the fall of 2010, RONA is poised to launch its Responsible Procurement Policy. “We want to make a real and lasting impact,” says Dumont. “We want to focus on the product that has the most significant impact on our footprint.” Look for an even deeper emphasis on the social side of products to ensure they are responsible to the planet and people, too.

For more information, visit [www.eco.rona.ca](http://www.eco.rona.ca).

and integrity of “greener” product claims. (Here’s one possible explanation: The combination of the scrutiny they receive and their power over their supply chains puts large retailers in a better position than smaller retailers to demand progress on greenwashing.)

## WHAT WE FOUND

- **BIG BOX STORES OFFERED A MUCH HIGHER PERCENTAGE** (22.8%) of home and family products with legitimate “green” certifications than either specialty retailers (11.5%) or green boutiques (12.8%).
- **BIG BOX STORES HAVE MORE PRODUCTS THAT ARE FREE OF GREENWASHING** (5.6%) than either specialty retailers (1.7%) or green boutiques (0.5%).
- **THERE ARE MORE “GREENER” PRODUCTS, ON AVERAGE, AT BIG BOX STORES** (293 per store) than at either green boutiques (109) or specialty retailers (85).

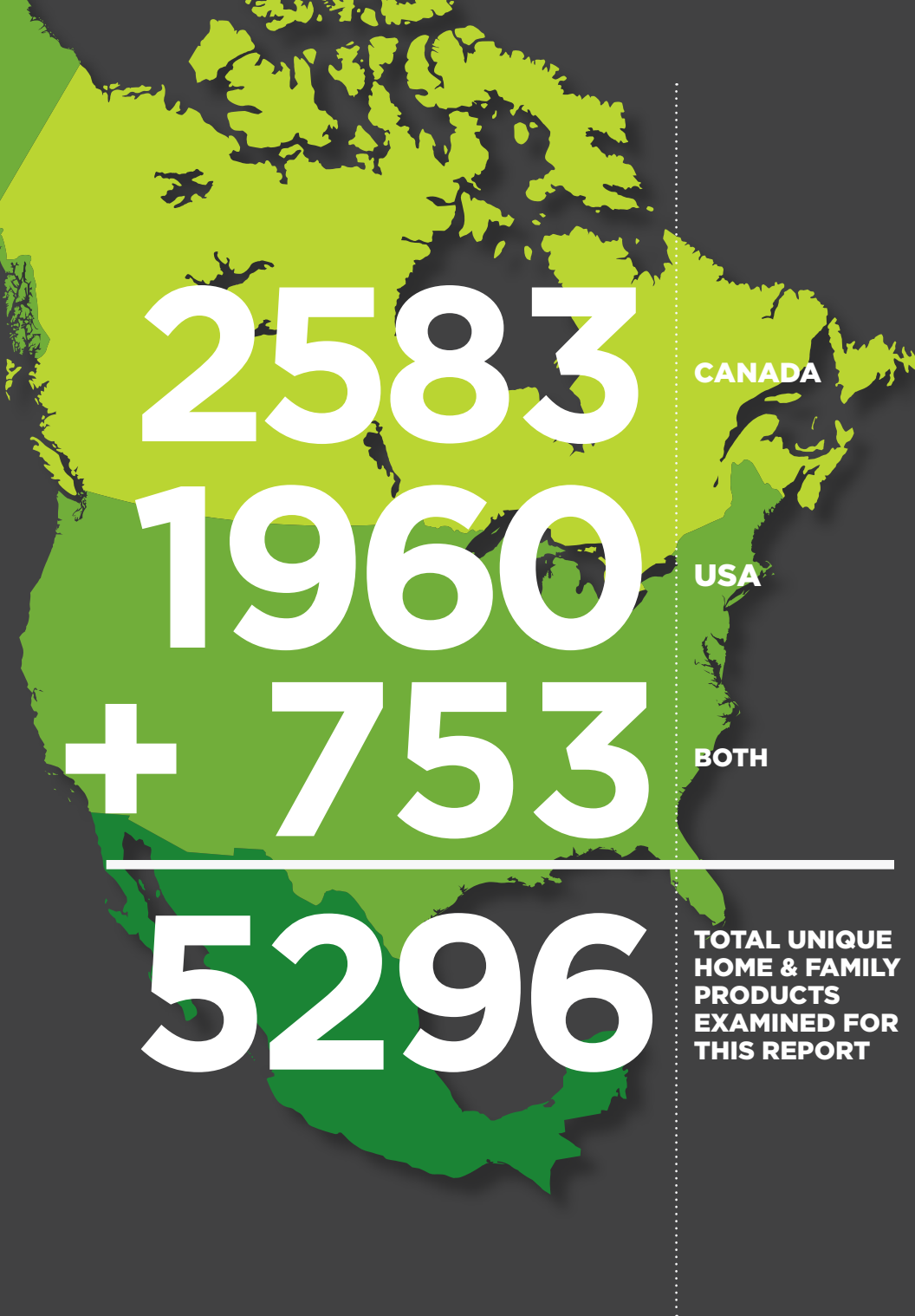


## GREENWASHING IS A PERSISTENT PROBLEM

*Green claims on home and family products are getting better, but the vast majority is still misleading.*

Consumer demand for greener products is changing the world. As they compete for the attention of “green” consumers and for profit, companies are innovating and leapfrogging one another in that pursuit. As evidence of this, the “Sins of Greenwashing” research has found – for two years in a row – that the number of “greener” products on offer has increased by more than 70%.

But if “green” demand is to create genuinely “greener” products, the environmental claims of those products must be true and transparent. This is why greenwashing is such a significant impediment to continued progress.



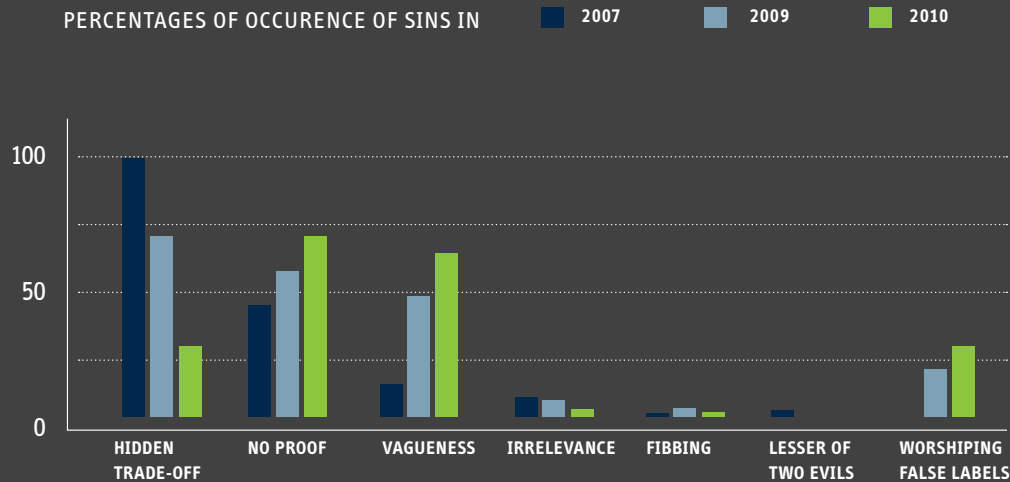
In this year's Sins of Greenwashing research, we examined 5,296 unique home and family consumer products. This sample was made up of:

- 2,583 products found in Canada.
- 1,960 products found in the United States.
- 753 found in both countries.
- Visits to 19 stores in Canada, and 15 stores in the U.S.

These 5,296 home and family products made a total of 12,061 "green" claims.

(continued on next page)

PERCENTAGES OF OCCURENCE OF SINS IN



## WHAT WE FOUND

- GREENWASHING IS STILL A SIGNIFICANT PROBLEM.** Applying the same tests as we have in past years - tests based on the FTC Green Guides, the Canadian Competition Bureau Guidelines for Environmental Claims, ISO 14021, and our own understanding of global best practice - we find that over 95% of “greener” products commit one or more of the seven Sins of Greenwashing.
- BUT, GREENWASHING IS DECLINING.** Although the numbers are very small the proportion of “sin-free” products is increasing at a rate that is statistically significant. In fact, the number of sin-free products appears to have doubled in each of the last two years, from approximately 1% in 2007 to less than 2% in 2009, and to almost 4.5% in 2010. We need to be cautious in our interpretation of such small numbers, but we believe they’re early evidence of good news.
- AND, GREENWASHING IS CHANGING.** There are several noteworthy patterns in the evolution of greenwashing this year. The “Sin of the Hidden Trade-off” declined sharply from 2009 (71.3% of all products) to 2010 (27.4%). This is at least partially a result of the variation between the way we defined and applied this sin between 2009 and 2010. The “Sin of No Proof” increased from 56.4% of all products to 70.1%, much of which was related to BPA-free (and related) claims on toys and baby products. And, the “Sin of Worshiping False Labels” increased from 23.3% to 30.9%. The “sins” themselves are described in detail on page 10.





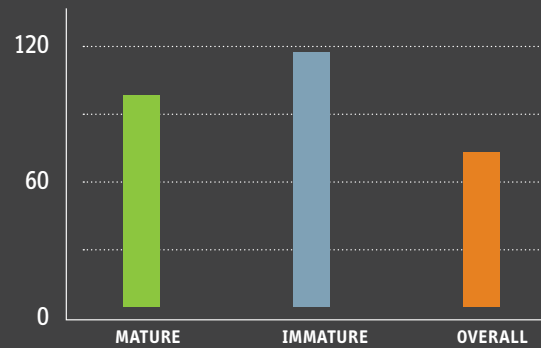
## COMPANIES IMPROVE WITH PRACTICE

*With experience in green marketing greenwashing declines, certification grows, and real green growth continues.*

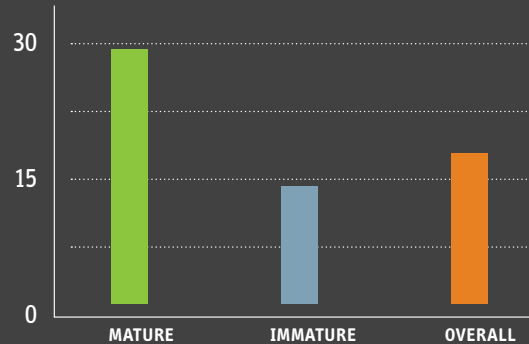
“Green” is newer to some home and family product categories than others. It’s older in building and construction products and much newer to toys and baby products. (The latter has yet to see a well-organized movement or standard emerge, although an environmental standard is currently being developed by the EcoLogo™ Program.)

To examine whether or not “green” maturity makes a difference to the claims in a sector, we constructed two clusters of product categories, representing their relative experience with “greening”. In the “mature greening” category we included building/construction products, office products, cleaning chemicals, and tissue products. In the “immature greening” category we included toys, baby products, and consumer electronics.

PERCENTAGE OF  
GREEN GROWTH  
2009 - 2010



PERCENTAGE  
USE OF LEGITIMATE  
CERTIFICATION



## GOOD GREEN MARKETING 101

- **BE SELF-HONEST ABOUT THE WHOLE**, lifecycle-based, environmental impacts of your product. Acknowledge them and address them one step at a time.
- **MAKE, CLAIM**, and ask your customers to support stepwise progress (they will). But don't overstate your progress; there's no such thing (yet) as a truly "green" or "environmentally-friendly" product.
- **ASK YOUR CUSTOMERS TO JOIN YOU ON A JOURNEY** to ever more sustainable products. This is the most honest message, (and it makes for great and long-lasting customer relationships).

## WHAT WE FOUND

- **GROWTH CONTINUES IN THE LONG-TERM.** Although the building/construction, office, cleaning and tissue categories have been "greening" for a number of years, they have all continued higher-than-average rates of growth in the last twelve months. Compared to the study wide growth rate of 73%, "greener" product offerings in mature categories increased by an average of 104.3% (building/construction - 108%, office - 126%, cleaning chemicals - 106%, tissue - 77%).
- **USE OF LEGITIMATE CERTIFICATION INCREASES WITH MATURITY.** There is considerably more use of legitimate certification in the more mature "green" categories. With an average frequency of 28.8% (and a narrow range of between 24% and 32%) legitimate labeling was considerably more common than the study wide result (19.8%) and much more frequent than it was in the less mature categories (13.8%).
- **GREENWASHING DECLINES WITH EXPERIENCE.** Perhaps most significantly (and notwithstanding our overall observation that greenwashing is still far too common in all categories), the proportion of "sin-free" products is more than five times greater in mature (5.1%) than in immature (0.3%) categories and is greater than the study-wide result of 4.4%. Companies get better with experience (thanks to continued consumer scrutiny). (Tissue products are an outlier in this finding. With a sin-free rate of only 0.8%, it showed considerably more greenwashing than any of its "mature" counterparts and more even than the study-wide sin-free result of 4.4%.)



## ECO-LABELING: PROBLEM + SOLUTION

The last three years have seen more growth in “greener” home and family products than has ever been seen before. As green claims have soared so has consumer scrutiny, the demand for better evidence of claims and – consequently – the demand for third-party endorsement. Environmental standards and certification (“eco-labels”, more commonly) emerged as one protection against greenwashing in the 1980’s wave of green product launches. In fact, the International Organization for Standards (ISO) established best practice for eco-labeling more than a decade ago, in ISO 14024.

Environmental standards and certification will be essential to continuing progress in “greener” products. Ironically, the potential importance of eco-labels has led to a proliferation of them, and to a multitude of types and degrees of meaningfulness and integrity. In last year’s Sins of Greenwashing study, we recognized this problem as a new sin: the “Sin of Worshiping False Labels”.



WE BOUGHT THIS  
“CERTIFICATION”  
MARK ONLINE FOR \$15.  
IT’S JUST ONE EXAMPLE  
OF AN ALMOST COMICAL  
VARIETY OF FALSE  
LABELS ON THE MARKET

## WHAT WE FOUND

- **LEGITIMATE GREEN STANDARDS HELP FIGHT GREENWASHING.** Of products certified by an ISO 14024-based program (EcoLogo, Green Seal, and Nordic Swan were the three that we found in this study) more than 30% were sin-free (compared to the 4.4% study-wide result). In other words, good eco-labeling helps prevent (but doesn’t eliminate) greenwashing.
- **FALSE ECO-LABELING IS INCREASING.** The use of fake labels (a sin we first identified in 2009 and dubbed the “Sin of Worshiping False Labels”) is increasing. More than 32% of “greener” products found in this study carried such a fake label, compared to the 26.8% in 2009.
- **FALSE LABELS ARE A DIME A DOZEN.** Ease of access to false, completely meaningless eco-labels has become almost comical. By searching “certified green” at many stock image websites, we were offered meaningless false eco-labels downloadable for only a few dollars.



## WHAT'S A GREEN MOM TO DO?

- 1. SUPPORT “GREEN” PRODUCTS WHENEVER YOU CAN,**  
even if you suspect greenwashing. Since most greenwashing is exaggeration rather than falsehood, you’re probably choosing a “greener” product (it’s probably not as “green” as it claims). And, every time you choose a “greener” product, the market hears you say: “I like this. I want more green products. Please keep trying.” (And the market will.)
- 2. CHOOSE THE GREEN PRODUCT THAT OFFERS THE BEST PROOF.**  
Choose EcoLogo or other reliable standards and certifications when you see them, and choose more information over less information. When you do, you’re more likely to wind up with the “greenest” choice and, you tell the market “I want more information!” (And it will hear you again).

## TOYS & BABY PRODUCTS

*Parents care, and companies are trying, but greenwashing is rampant.*

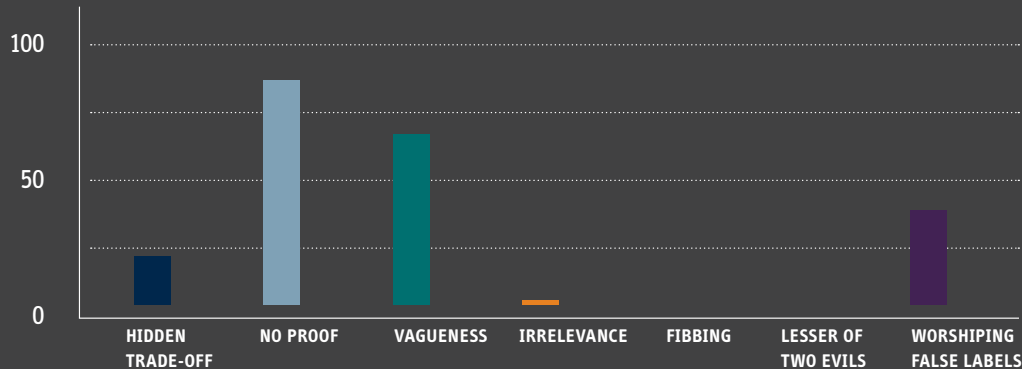
Despite the adage that few consumers are more attentive to health and environment than new parents, wide scale “greening” of toy and baby products is only a recent phenomenon. Now, finally, it is growing rapidly.

We found a total of 168 toys and 706 baby products that made a total of 2,073 “greener” claims. In addition to multi-category retailers, our field work included six specialty toy/baby stores of various sizes and brands.

### BPA AND PHTHALATE-RELATED CLAIMS ARE SKYROCKETING

- More than any other single claim that we observed, “BPA-free” and “phthalate-free” (and variations on the theme) have become more frequent in the last year. The percentage of products making BPA-free claims increased by 577%, and those making phthalate-free claims increased by 2,550%!
- Two-thirds of these claims appear on toys and baby products.
- An extraordinary 44% of all “green” baby products include a BPA-free (or similar claim), and 10% include a phthalate-free claim. Only 5% of “green” toys make either a BPA- or phthalate-free claim.

TOYS & BABY PRODUCTS.  
PERCENTAGE OF PRODUCTS COMMITTING EACH SIN



## KEY LESSONS FOR GREAT GREEN CLAIMS TOYS & BABY PRODUCTS

- 1. TRANSPARENCY AND PROOF.** It's not good enough that you are confident that your product is free of BPA (or phthalates, lead, mercury, PVC and so on). Parents deserve proof. Get the studies, make them available, and build a dialogue of open transparency with your customers. They will reward you for it.
- 2. LEARN FROM THE LESSONS OF OTHERS.** Pay attention to the experiences of those categories that have preceded you through "greener" product innovation. Observe the pitfalls (vagueness, false labels, hidden trade-offs, most notably) and avoid them.
- 3. QUICKLY BUILD OR ADOPT A CERTIFICATION SYSTEM.** The scrutiny is imminent and the winners will be the first to build unequivocal trust with customers. Unanimous agreement that the health of children was non-negotiable led quickly to the demand for third-party certification of green claims. The same needs to happen for toys and baby products.

## WHAT WE FOUND

- VERY HIGH RATES OF GROWTH OF "GREENER" PRODUCT OFFERINGS.** Since 2009 "greener" toy offerings have increased by 150%, and "green" baby products by 194%. At stores that specialize in this category, the rates of growth in "greener" products are even greater, ranging from 191% to 375% and averaging 289%. Compare these to the all-product "greener" product growth rate of 73%.
- MORE GREENWASHING.** As compared to the study-wide finding of 4.4%, less than 1% of the "greener" toys and baby products are free of the Sins of Greenwashing. We did not find a single "green" toy (0.00%) that was free of greenwashing, and only 0.8% (only 6 of 706 products) of baby products were "sin-free". (The only other category in which we found zero "sin-free" products was consumer electronics.)
- LACK OF EVIDENCE.** The "Sin of No Proof" is the most frequent greenwashing "sin" on toys and baby products. And, with 89% of all "greener" toys and baby products committing this sin, it is a more pervasive problem than in other categories (the overall frequency in other categories is 64%.)
- BPA AND PHTHALATES.** More than two-thirds of all of the BPA-free claims (and similar variations) in this study were found on toys and baby products, as were more than half of all of the phthalate-free claims. In fact, 44% of all "green" baby products made a BPA-free or similar claim.



## KEY LESSONS FOR GREAT GREEN CLAIMS ON CLEANING PRODUCTS

- 1. EXPLAIN THE CLAIM.** “Environmentally-friendly” (or the hundreds of variations on the theme) isn’t in itself the problem. It’s the not explaining yourself that gets you in trouble. Since no product is actually (yet) “friendly” to the environment, and since recycled fiber (or sustainable harvesting, or low toxicity) isn’t the only environmental impact of a product, loose language like “green”, “eco”, “earth” can only mislead. Be honest with yourself, and then with your customers, about what you mean by these terms.
- 2. KEEP LEANING ON LEGITIMATE STANDARDS.** This is a category that is already comfortable with legitimate certification. Whether it’s EcoLogo, FSC, or another, these are programs with deep experience in cleaning chemistry and tissue products. Look for certification cost efficiencies between your B2B and B2C brands. Lean on your manufacturers or private labelers to deliver certification through extended licenses. Partner with certifiers to explain this advantage to customers. And partner with retailers and certified products in other categories to deepen the value and competitive advantage.

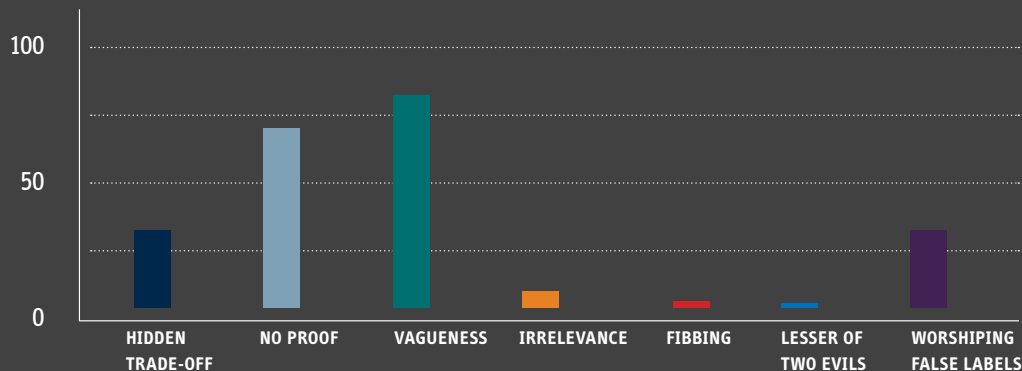
## HOUSEHOLD CLEANING PRODUCTS

*Green cleaning claims are getting better, but vagueness is still a problem.*

Once a niche category and the territory of small (even anti-establishment) brands, green cleaning has hit the mainstream. With recent green product launches, acquisitions, and campaigns from some of the world’s largest consumer packaged goods companies, green cleaning has entered the big leagues.

By “cleaning products”, we mean both cleaning chemistry (such as detergents, window cleaners, and general purpose cleaning liquids), and tissue products (such as toilet paper, paper towels and so on). In this study, we examined 605 cleaning chemistry products, and 120 tissue products which we found in a variety of retailers including grocers, DIY construction outlets, and houseware specialty retailers. They made a combined total of 2,001 “green” claims.

CLEANING PRODUCTS.  
PERCENTAGE OF PRODUCTS COMMITTING EACH SIN



## WHAT WE FOUND

- **DIFFERENT RATES OF GROWTH.** While the rate of “green” inventory growth in this category (101%) is greater than the overall study result (73%), this is largely accounted for by “green” cleaning chemicals (105%). Tissue products show a much more typical rate of growth (77%). This is consistent with the much longer presence of environmental scrutiny in the paper industry. In particular, claims related to recycled fiber content have been common for decades.
- **GREENWASHING VARIES.** Although the overall rate of greenwashing in this category is fairly typical (a sin-free rate of 3.73% as compared to the all-study result of 4.4%), this varies significantly by sub-category. Whereas the rate of sin-free products in cleaning chemicals is average, 4.3% as compared to the overall study result of 4.4%, tissue products have a much higher rate of greenwashing (only 0.8% were sin-free).
- **VAGUENESS IS THE MOST COMMON PROBLEM.** The Sin of Vagueness is the most frequent problem (committed by 77.4% of products) in this category, and was more frequent than the all-study result (67.3% of products). Some frequent examples include unelaborated uses of: 1 Eco-friendly 2 Environmentally-friendly 3 Earth-friendly 4 Environment safe 5 Harnessing nature 6 Eco-chemistry
- **GOOD USE OF LEGITIMATE CERTIFICATION.** 32% of cleaning products displayed certification by a legitimate eco-label, as compared to only 19.8% in the study-wide sample. (Principally, these certifications were EcoLogo™ and Green Seal™). We speculate that this is a reflection of the importance of eco-labeling in the professional janitorial/sanitation industry. In that space, procurement demand for greener and healthier products has been accompanied by a demand for certification to just a few recognized standards. Just as the formulation experience and economies of scale have spilled over from professional to consumer markets, so has the importance and use of legitimate certifications.



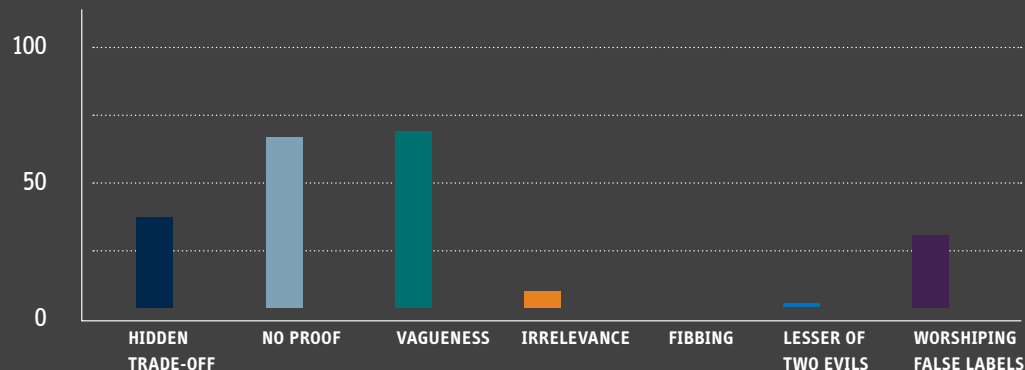
## DIY BUILDING/ CONSTRUCTION PRODUCTS

*Home DIY is getting greener, now claims need to get better.*

Since North Americans spend most of their time indoors, it's small wonder that the green building movement has been so strong in recent years. Families increasingly understand that indoor environments impact our health (and especially the health of more vulnerable people like kids, seniors and patients). And we know that the way we build, power, and heat our homes, offices and other buildings has significant impacts on the external environment.

In this study we examined a total of 729 building and construction products, the kind that are found at typical big box DIY retailers. These products made a total of 1,726 “green” claims. Our field work included five specialty stores in this category, all of which were large big-box retailers.

DIY BUILDING/CONSTRUCTION.  
PERCENTAGE OF PRODUCTS COMMITTING EACH SIN



## KEY LESSONS FOR GREAT GREEN CLAIMS ON DIY BUILDING/CONSTRUCTION

1. **ENOUGH ALREADY WITH THE EXAGGERATION.** The most unique problem in this category is the “Sin of the Hidden Trade-off”: starting with one good environmental thing, and claiming to be “green” on the strength of it. “Green” is a ladder, and a long one. Water, energy, toxics, recycled contents are each just rungs. Be proud of each step, and expect your customers to reward you (they will), but don’t mistake a rung for the top. (And invite your customers to join you on the climb, which builds long-lasting relationships.)
2. **KEEP CERTIFYING.** Certification schemes are rapidly maturing in this category. They will become easier to access, more standards will be available (UL Environment is developing a number of standards in this space), and you can expect greater leverage through retailers and non-competitive partners.

## WHAT WE FOUND

- **VERY STRONG “GREEN” GROWTH.** With 108% more green products in 2010 than in 2009, building and construction products are being greened more quickly than the rest of the marketplace (a study-wide increase of 73%). At the five DIY specialty stores we re-visited this year, the average increase in green product offerings was almost 138%. At the two stores we have now studied three years in a row, the three year increase in green product offerings averages 410%.
- **LESS GREENWASHING.** At just over 6%, the proportion of “sin-free” products in this category is slightly but meaningfully higher than the all-product study result of 4.4%.
- **“HIDDEN TRADE-OFFS” ARE UNUSUALLY COMMON.** Compared to a study-wide frequency of 27.4%, almost 40% of building and construction products were found to commit the “Sin of the Hidden Trade-off”. The most common of these single-benefit claims included: air quality (100 products); energy (61 products); and, recycled content (41 products).
- **IMPROVED USE OF LEGITIMATE STANDARDS.** Although the study-wide result showed a decline in the use of legitimate eco-labeling from 23.4% in 2009 to 19.8% in 2010, the reverse was true in this category. Perhaps because of their greater maturity of “green” attention in this space, 31.7% of products turned to legitimate eco-labels. The most credible certifications include ENERGY STAR, GREENGUARD, UL Environment and EcoLogo.



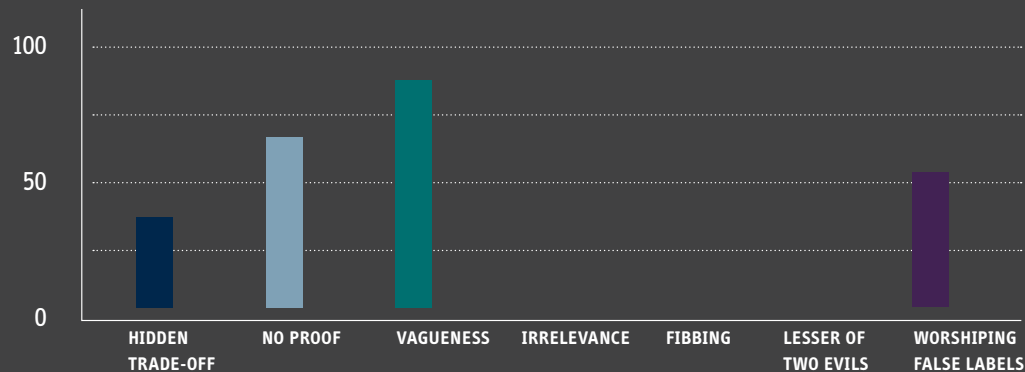
## CONSUMER ELECTRONICS

*Consumer electronics are new to green, and it shows.*

In some circles – policymakers and professional purchasers, notably – attention to the environmental consequences of electronic products has been growing for several decades. (This is particularly true in relation to energy efficiency and end-of-life management, but electronics have also been associated with issues manufacturing, toxicity, resource extraction and depletion, landfill contamination, and packaging waste.) For consumers, however, “greener” electronics is a relatively new concept. As interest and scrutiny spills over from B2B to B2C markets, consumer electronics are poised for rapid “greening”.

We examined a total of 85 consumer electronic products, which made a total of 204 “green” claims. All of these products were found at general product retailers, rather than electronic specialty retailers. Their claims related to toxicity of components, energy efficiency, packaging-related benefits such as recycled content and biodegradability, as well as frequent use of very vague environmental jargon.

CONSUMER ELECTRONICS  
PERCENTAGE OF PRODUCTS COMMITTING EACH SIN.



## KEY LESSONS FOR GREAT GREEN CLAIMS ON CONSUMER ELECTRONICS

- 1. DON'T HESITATE.** “Green” growth in consumer electronics was relatively slow between 2009 and 2010, but - judging by the experience of other sectors - business and institutional demand will soon and suddenly spill over into consumer markets. Brands that are first to build reputation as genuine “green” leaders will win important first mover advantage in this category.
- 2. EMPHASIZE PROOF.** With such a high rate of greenwashing (not a single “sin-free” product), and rampant false labeling, this category will be well-served by consumer-facing claim endorsements. Multi-attribute standards such as IEEE 1680, and single-attribute verifications such as UL Environment’s Environmental Claim Validation, will both be valuable to serious green marketers in this category.

## WHAT WE FOUND

- **STILL RELATIVELY SLOW GREEN GROWTH.** Whereas the overall number of “greener” products increased by 73% between 2009 and 2010, in consumer electronics we found an increase of only 13%.
- **HIGH RATE OF GREENWASHING.** Not a single “green” electronic product was found to be free of greenwashing. (The only other category in which this is true is toys, another relative newcomer to “green”).
- **FALSE LABELS A PARTICULAR PROBLEM.** More than half (51.8%) of the “green” products in this category committed the “Sin of Worshiping False Labels”. In all product categories, the rate of false labels was only 31%. Almost all of these “false labels” appeared to be self-generated and intended to create the *appearance* of third-party endorsement. Most (34 of 45) were simply seal-like icons with variations of “eco”, “environment”, “environmentally-friendly”, and so on.

# APPENDICES

## APPENDIX 1: METHODOLOGY

### Overview

Between March and May of 2010, our researchers visited 19 retail stores in Canada and 15 in the United States. These researchers had instructions to inventory and record the details of every product that made an environmental claim. They recorded a total of 5,296 products which made a total of 12,061 “green” claims. We then tested those claims against best practice, notably against guidelines provided by the U.S. Federal Trade Commission, the Competition Bureau of Canada, and the ISO 14021 standard for environmental labeling. We used the “Sins of Greenwashing” framework from our previous studies to organize the findings, and we looked for other patterns in the results.

### Store selection

In order to mitigate regional bias, data was collected from multiple regions in both Canada and the United States (Philadelphia, Ottawa, Toronto, Miami and Niagara). All told, the sampling occurred at retailers that collectively have more than 40,000 stores distributed across North America.

In addition, and to address a criticism we received in past years, we included both big box and large specialty retailers as well as a sample of boutique green specialty stores.

To facilitate longitudinal analysis, we visited a total of twenty-four locations that had also been included in previous “Sins of Greenwashing” research.

### Analysis & Interpretation

To mitigate the risk of inconsistent interpretations by different researchers, each product’s data was independently evaluated by two analysts. Specifically:

- Each claim was independently tested against the Seven Sins of Greenwashing criteria, the U.S. Federal Trade Commission, Competition Bureau of Canada, and the ISO 14021 standard for environmental labeling.
- If a product offered further information in accompanying literature, that information was accepted as part of the claim.

- If a product suggested that further information could be located at a product website, or through a customer service hotline, the researchers investigated these sources for further detail.
- Claims that may be absolved of committing any of the Sins of Greenwashing by way of certification that the product carried were measured against the attributes which are verified by the certifying standards.
- Products for which there was a diverging opinion among analysts were flagged, and the dispute was resolved by the project lead.
- All analysts met at regular intervals to discuss trends and systemic issues that arose during their analysis.

### Quality Control & Quality Assurance

Consistency in methods of data collection and analysis was maximized in several ways:

- Researchers in all locations received instruction and training in collection methodologies from the same principal researcher.
- Data collection sheets, guidelines and analysis procedures were standardized and tested in advance.
- Trial collections and analyses were undertaken to further assist standardization.
- A randomly selected 5% of the product analyses were scrutinized by the principal researcher for consistency and conformity with analysis guidelines.

APPENDIX 2: LEGITIMATE ENVIRONMENTAL STANDARDS & CERTIFICATIONS



EcoLogo is an ISO-14024 Type 1 environmental standard and certification program. It was founded in 1988, and today certifies thousands of products against more than 70 standards. The two variations of the certification mark are for Canadian and international markets.

For more information, visit [www.ecologo.org](http://www.ecologo.org)



UL Environment (ULE) offers a number of environmental endorsement programs. The ULE Energy Efficiency Certification program tests and certifies products for their compliance to a variety of energy efficiency requirements, including those of Natural Resources Canada, California Energy Commission, and Energy Star. The Environmental Claim Validation program tests and verifies specific environmental claims such as recycled content, VOC emissions, bio-based content, and water efficiency. The ULE Sustainable Products Certification program will certify products against ISO 14024-type standards.

For more information, visit [www.ulenvironment.com](http://www.ulenvironment.com)

In our view, best-in-class environmental standards and certifications are those that are consistent with ISO 14024. These programs are transparent, life-cycle based, leadership-focused, and third-party verified. In North America, EcoLogo and Green Seal are the only two such programs commercially available today. UL Environment is currently developing standards that also will meet these conditions.

Nevertheless, a number of other environmental standards and certifications deliver enough credibility that we recognized them as “legitimate” in this research (principally for the purpose of screening products against the “Sin of Worshiping False Labels”). These are the standards and certifications that we recognized as “legitimate” for this purpose:

LEGITIMATE ENVIRONMENTAL STANDARDS AND CERTIFICATIONS	
Biodegradable Products Institute	Natural Products Association
CFPA	Nordic Swan
CRI Green Label	PEFC
EcoCert	Rainforest Alliance
EcoLogo	SCS
ENERGY STAR	SFI
OKO-TEX	Skal EKO
Fair Trade Certified	Soil Association
FSC	UL Environment Environmental Claim Validation
Green-E	UL Environment Energy Efficiency Verification
GREENGUARD	USDA Organic
Green Seal	Water Sense

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