



Friday
May 1, 1998

Part III

**Federal Trade
Commission**

16 CFR Part 260
Guides for the Use of Environmental
Marketing Claims; Final Rule

FEDERAL TRADE COMMISSION

16 CFR Part 260

Guides for the Use of Environmental Marketing Claims

AGENCY: Federal Trade Commission.

ACTION: Final revised guides.

SUMMARY: The Federal Trade Commission ("Commission") issued Guides for the Use of Environmental Marketing Claims ("guides") on July 28, 1992. The guides included a provision for public comment and review three years after adoption to determine whether there was a need for any modifications. In connection with this review, in July 1995 the Commission sought public comment on a variety of issues, and held a two day public workshop-conference on December 7 and 8, 1995. On October 11, 1996, the Commission issued revised guides, but advised that it had not yet completed its review of the Recyclable and Compostable guides because of ongoing relevant consumer research. One purpose of the research was to examine whether "recyclable" and "compostable" claims continue to imply that consumers can recycle or compost the marketed product in their own area. Further, the Commission decided to seek additional public comment on the issue of whether product parts that can be reconditioned and/or reused in the manufacture of new products could be considered "recyclable" under the guides and whether products made from such reconditioned and/or reused parts could qualify as "recycled" under the guides. The Commission has now completed its review of the above issues and is issuing further amendments to the guides, as discussed below.

The Compostable guide is amended to clarify that an unqualified compostable claim can be made if a product is compostable in a home compost pile or device, even if municipal or institutional composting facilities are not locally available. This is because consumers are likely to perceive claims of compostability to mean that a product may be composted in a home compost pile or device. The Recyclable guide is modified to allow the term "recyclable" to be used for a package or product that can be recovered from the solid waste stream for reuse or for the manufacture of another package or product, so long as the package or product can be collected through an established recycling program (thus including reused, reconditioned and remanufactured products). The guides retain the provision that, to make an

unqualified recyclable claim, recycling collection programs should be available to a substantial majority of consumers or communities, but the Commission is modifying the suggested qualifying statement for when an unqualified claim is not appropriate. Further, a new example illustrates that the phrase "Please Recycle" is considered equivalent to a "recyclable" claim. In addition, the Recycled Content guide is amended to clarify that recycled content may consist of used, reconditioned or remanufactured components, as well as raw materials. Finally, the Commission is amending the guides to clarify that they apply to all forms of marketing, including digital or electronic media, such as the Internet and electronic mail, and to the marketing of services, as well as products and packages.

EFFECTIVE DATE: May 1, 1998.**FOR FURTHER INFORMATION CONTACT:**

Janice Podoll Frankle, Attorney, (202) 326-3022, or Pablo Zylbergait, Attorney, (202) 326-3260, Division of Enforcement, Bureau of Consumer Protection, FTC, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION:**I. Background***A. Purpose of the Guides*

Like other industry guides issued by the Commission, the Environmental Marketing Guides "are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements." 16 CFR 1.5. The guides indicate how the Commission will apply Section 5 of the Federal Trade Commission Act ("FTC Act"), which prohibits unfair or deceptive acts or practices, in the area of environmental marketing claims. 15 U.S.C. 45. The guides apply to all forms of marketing of products and services to the public, whether through advertisements, labels, package inserts, promotional materials, or electronic media.

B. 1995 Federal Register Notice

When the Commission issued the guides in 1992, it included a provision that three years after adoption, it would seek public comment on "whether and how the guides need to be modified in light of ensuing developments." Pursuant to this provision, in a **Federal Register** Notice published on July 31, 1995 ("1995 Notice"), the Commission sought comment on a number of general issues relating to the guides' efficacy and the need, if any, to revise or update the guides. 60 FR 38978. The Commission also sought comment on

specific issues related to particular environmental claims addressed by the guides. In addition, the 1995 Notice announced that Commission staff would be conducting a public workshop-conference at the conclusion of the comment period to discuss issues raised by the written comments. The workshop was held on December 7 and 8, 1995.

The Commission received 99 comments in response to the 1995 Notice.¹ Some of those comments are relevant to the issues presented in the October 11, 1996 **Federal Register** Notice ("1996 Notice"), discussed below.²

C. 1996 Federal Register Notice

On October 11, 1996, the Commission published revised guides (1996 Notice), which included revisions to the prefatory sections, as well as the following sections: General Environmental Benefits, Degradable/Biodegradable/Photodegradable, Recycled Content, Source Reduction, Refillable, and Ozone Safe and Ozone Friendly. 61 FR 53311. At that time, the Commission advised that it was still in the process of reviewing the Recyclable and Compostable guides and wanted to evaluate the results of ongoing consumer research. The Commission also stated that it was seeking further public comment on the issue of whether product parts that can be reconditioned and/or reused in the manufacture of new products could be considered "recyclable" under the guides and whether products manufactured from such reconditioned and/or reused parts could qualify as "recycled" under the guides. In addition, the Commission reiterated its request for consumer

¹ The comments came from 45 trade associations or trade association coalitions; 28 manufacturers, distributors or retailers; 12 consumer, environmental or public advocacy organizations; 4 state government officials or bodies; 2 federal government agencies or officials; 2 certification organizations; 1 standards organization; 1 city government official; 1 individual; 1 educational institution; 1 consulting company; and 1 public-private recycling coalition.

² The comments are on the Commission's public record as Document Nos. B17512400001-B17512400099 for the 1995 Notice and B20818700001-B2081870227 for the 1996 Notice. The comments are cited in this Notice by the name of the commenter, reference to either the 1995 Notice or the 1996 Notice, depending on which notice(s) was responded to by the commenter, a shortened version of the comment number, and the relevant page(s) of the comment, e.g., Virginia Automotive Recyclers Ass'n, 1996 Notice, #1 at 1. The transcript of the public workshop is on the Commission's public record as Document No. P954501. A complete list of commenters, the comments, a transcript of the workshop proceedings, and consumer perception studies conducted are available for inspection and copying in the Consumer Response Center, Room 130, Federal Trade Commission, 6th & Pennsylvania Ave., N.W., Washington, D.C. 20580.

perception data for "recyclable" and "compostable" claims.³

In response to the 1996 Notice, 227 comments were received.⁴ Part II summarizes the comments on the 1996 Notice, and comments on the 1995 Notice that are relevant to the issues raised in the 1996 Notice.

D. Consumer Survey Evidence

The consumer perception survey evidence received by the Commission is relevant to the issues raised in the 1996 Notice. The Council on Packaging in the Environment ("COPE") conducted a national telephone survey in April 1996, providing evidence on whether consumers consider products made from reconditioned parts to be "recycled." COPE surveys from March 1993, September 1993, and December 1994 provide empirical data concerning consumers' interpretations of "recyclable" and "Please Recycle" claims. A Roper Starch Worldwide, Inc. ("Roper Starch") survey of consumers conducted through personal, in-home interviews during December 1996, provides information on how recyclable claims are interpreted. Research performed by professors from American University, through mall-intercept interviews, provides empirical data on consumer interpretation of recyclable claims and certain disclosures.⁵

³For example, the 1995 Notice requested any empirical data relevant to whether consumers perceive that products made from reconditioned parts that would otherwise have been discarded should qualify as "recycled" products. Further, the 1995 Notice sought comment on certain issues relating to the Recyclable and Compostable guides and requested any empirical data regarding whether an unqualified recyclable or an unqualified compostable claim conveys a claim concerning local availability of recycling or composting programs and whether any evidence indicates that those guides should be modified, and if so, in what manner. In addition, the 1995 Notice stated that the available evidence suggested that certain qualifying disclosures outlined in the Recyclable and Compostable guides may be more effective than others in conveying to consumers that facilities may not be available in their community to recycle or compost the product. Thus, the Commission asked for any evidence indicating that certain of those qualifying disclosures should be modified, and if so, in what manner.

⁴These came from 201 automotive parts dealers, "automotive recyclers," automotive salvage companies, dismantlers, wreckers and rebuilders; 17 trade associations (11 of which represent "automotive recyclers," rebuilders, and dismantlers); 2 manufacturers; 1 federal government agency; 1 public-private recycling hotline; 1 municipal recycling and solid waste commission; 1 association of recycling managers; 1 state office of environmental assistance; 1 non-profit public service corporation; and 1 individual.

⁵Although the revised guides are effective immediately, the Commission will take into consideration the date when materials were authorized to be printed in conformance with the former guides.

II. Summary of Comments and Modifications to the Guides

A. The Compostable Guide

1. Summary of Comments Regarding the Compostable Guide

Only a few comments directly addressed the Compostable guide, which states that an unqualified compostable claim might be deceptive unless a product can be safely composted at home and in a municipal composting facility. The Society of the Plastics Industry, Inc. ("SPI") stated that home composting appears to be the primary means of composting practiced by consumers and thus asked the Commission to clarify that an unqualified compostable claim can be made for an item that can be safely composted in a home compost pile or device.⁶ SPI stated that it was unaware of any data indicating that a product compostable in a home compost pile or device would not be compostable in a municipal composting facility. SPI stated further that the lack of municipal composting facilities near the consumer is irrelevant to the validity of an unqualified compostable claim. SPI noted, however, that if a product is only compostable in a municipal facility, then that fact should be disclosed and a qualifier regarding local availability should be used. Another commenter recommended modifying the definition of "compostable" to indicate that the advertised product "must break down in approximately the same time as the materials it is generally composted with."⁷

2. Modifications to the Compostable Guide

Because there are fewer than 20 municipal solid waste composting facilities in the United States, the Commission now believes that few consumers are likely to know about and associate a compostable claim with municipal solid waste composting facilities.⁸ Moreover, the Commission

⁶SPI, 1995 Notice, #53 at 25; 1996 Notice, #70 at 2.

⁷Mobil Chemical Co. ("Mobil"), 1995 Notice, #38 at 4. The guide currently states that a compostable claim means that a product will break down in a "safe and timely manner." The Commission interprets the "timely manner" language to mean that the product or package will break down in approximately the same time as the materials with which it is composted.

⁸This view is supported by a 1991 University of Illinois study about consumer perceptions of such terms as "degradable/biodegradable," "compostable," "recyclable," and "environmentally friendly." When consumers were asked the open-ended question, "What does the term compostable mean?," 44.2% of respondents defined compostable in terms of a home compost pile. The study reported that consumers did not mention municipal

agrees with SPI that a product technically capable of being composted in a home compost pile or device would also be compostable in a municipal composting facility. Thus, the Compostable guide and Example 1 have been revised to clarify that an unqualified compostable claim can be made if a product is compostable in a home compost pile or device even if municipal or institutional⁹ composting facilities are not locally available.¹⁰ The guide still states, however, that if a claim is made that a product is compostable in a municipal or institutional composting facility, then the claim may need to be qualified to the extent necessary to avoid deception about the limited availability of composting facilities.

B. The Recyclable and Recycled Content Guides

1. Claims Regarding Local Availability of Recycling Facilities

a. Background. The Recyclable guide states that consumers are likely to interpret unqualified recyclable claims to imply that facilities are available in their community to recycle the product, and that if facilities are not available to a substantial majority of consumers or in a substantial majority of communities, then such claims should be qualified. An important issue that arose in the review of the Recyclable guide concerned whether this interpretation of an unqualified claim is still correct. Closely related to this issue is how consumers interpret the increasing number of claims such as "Please Recycle" in the marketplace, and if these claims also need qualification when available facilities are limited.

b. Summary of Comments Regarding the Local Availability Standard and "Please Recycle" Claims. The issue of how consumers interpret unqualified recyclable claims and whether the term implies anything about the availability of local recycling facilities provoked a wide range of comments. A few commenters contended that no qualifications about limited availability were necessary.¹¹ Most of the

composting programs in their definitions of "compostable."

⁹The word "institutional" has been added because there are also privately operated composting facilities.

¹⁰Example 3 has been deleted because revised Example 1 now illustrates the same concept. In addition, references to "yard waste" have been changed to "yard trimmings" because the Environmental Protection Agency ("EPA") advised that the latter term is becoming more prevalent.

¹¹International Dairy Foods Ass'n ("IDFA"), 1995 Notice, #13 at 2-3; American Bakers Ass'n, 1995

Continued

approximately 40 commenters who specifically discussed recyclable claims, however, only favored a less restrictive approach to when the term "recyclable" should be qualified. One commenter stated that the assertion that some consumers may not understand that "recyclable" means that the package is recyclable only if there is a recycling program in the community, seems to unnecessarily question the intelligence of consumers.¹² Another commenter recommended that the Commission indicate that only claims of recyclability that imply availability of programs (rather than recyclable claims in general) may require qualification to the extent necessary to avoid consumer deception about limited availability of recycling programs and collection sites.¹³ Another commenter stated that the Commission would promote dissemination of information and spur demand for increased recycling facilities by modifying the recyclability standards to allow claims of recyclability where a material can be recycled by an accepted, practical method, whether or not facilities to do so are widely available.¹⁴

Commenters also recommended that the threshold for making unqualified "recyclable" claims be lowered to permit such claims if facilities are available to a significant percentage of the population nationwide, or to a reasonable portion of the population (rather than the current threshold of substantial majority).¹⁵ Several commenters suggested that the Commission harmonize its guides with the draft standards being developed within the International Organization for Standardization ("ISO"), which would require that collection facilities be available to a "reasonable portion" of the population.¹⁶ One commenter contended that the "reasonable portion" language is more manageable than the

"substantial majority" wording in the guides and would require less cumbersome data collection.¹⁷

In contrast, several commenters urged the Commission to retain the current recyclable qualifications.¹⁸ EPA stated that claims of recyclability need to be qualified as recommended in the guides because there is no real benefit to consumers in being informed that a product or package is technically recyclable if a program is not available enabling them to recycle the material after use.¹⁹ EPA also stated that it would strongly oppose allowing the unqualified use of the term "recyclable" unless it can be definitely proven that such usage would not contribute to the placement of improper materials into recycling bins.

Another commenter maintained that the substantial increase in curbside collection programs over the past few years does not obviate the problem because the availability of curbside collection can itself mislead consumers about the recycling properties of certain materials.²⁰ A recycling association noted that false claims of recyclability waste consumers' time both in preparing materials to be recycled and in sorting through material not picked up because of contamination with non-recyclables.²¹ The commenter stated, for example, that its members had to explain to consumers why the recycling crew did not take the corrugated takeout pizza boxes labeled "recyclable," but which, in fact, were not recycled in the community where the pizza was sold.

Another commenter urged the Commission to modify the guides to limit the use of the unqualified claim "recyclable" to only those products and materials that are accepted for recycling in the majority of curbside recycling programs across the country or in the communities where the product is sold or distributed, or are accepted for recycling at the point of purchase or distribution, or have demonstrated a recycling rate of 50% or better nationally or in the communities where the product is sold or distributed.²² The Environmental Defense Fund ("EDF") stated that, to avoid consumer deception at the point of purchase, the qualifying

language accompanying a claim should explicitly state the current extent of availability of facilities and programs required to fulfill the claim, and therefore avoid placing the burden on consumers to determine local availability.²³ Two university professors who conducted research on recycling claims also suggested stronger qualifications.²⁴

The comments on statements such as "Please Recycle" also were mixed. Several industry commenters stated that statements like "Please Recycle" are exhortations to encourage consumers to recycle and not claims about whether a particular product is widely recyclable.²⁵ NSDA explained that in the soft drink industry, the three-chasing-arrows logo is almost always displayed in conjunction with the "Please Recycle" message, and the industry does not want any special meaning to be attached to the logo or the adjoining "Please Recycle" phrase, which simply asks the consumer to consider recycling.²⁶

In contrast, EPA stated that it viewed "Please Recycle" as similar to an unqualified claim of recyclability.²⁷ EPA also expressed concern that the phrase "Please Recycle" accompanied by the chasing-arrows symbol may simply be an effort by marketers to display that symbol without having to make a qualified recyclable claim. EPA stated that such messages are so similar to a claim of recyclability that when unqualified, they may be deceptive. University researchers Mayer & Cude suggested revising the guides to clarify that the phrase "Please Recycle" is not adequate to inform consumers about a product's recyclability.²⁸ Several Attorneys General recommended modifying the guides to state that the exhortation to recycle be expressly qualified whenever collection facilities are limited for the material in question by stating the percentage of the population that cannot recycle the material, followed by information on how to find out whether the material is recyclable in the consumer's area.²⁹

Notice, #23 at 1-2; Paperboard Packaging Council ("PPC"), 1995 Notice, #67 at 1-6.

¹² IDFA, 1995 Notice, #13 at 2.

¹³ Grocery Manufacturers of America ("GMA"), 1995 Notice, #59 at 10, 20.

¹⁴ Soap and Detergent Ass'n ("SDA"), 1995 Notice, #65 at 9. See also Paper Recycling Coalition ("PRC"), 1995 Notice, #91 at 6 (the Commission's recyclable standard may hinder the growth of recycling markets by limiting the recovery of materials for which there is a demand, but for which the threshold to use an unqualified "recyclable" claim has not been met).

¹⁵ 3M, U.S. Sub-TAG to ISO, National Ass'n of Manufacturers, Chemical Manufacturers Ass'n ("3M"), 1995 Notice, #32 at 2 (reasonable portion); Eastman Kodak Co. ("Kodak"), 1995 Notice, #42 at 3 (reasonable portion); American Plastics Council, 1995 Notice, #64 at 15 (significant portion); National Ass'n of Photographic Manufacturers, Inc. ("NAPM"), 1995 Notice, #83 at 2 (reasonable portion).

¹⁶ 3M, 1995 Notice, #32 at 2; Kodak, 1995 Notice, #42 at 3; NAPM, 1995 Notice, #83 at 2.

¹⁷ Kodak, 1995 Notice, #42 at 3.

¹⁸ Helene Curtis, Inc., 1995 Notice #8 at 3; National Recycling Coalition Inc., 1995 Notice, #73 at 1.

¹⁹ EPA, 1995 Notice, #22 at 2, 5; 1996 Notice, #215 at 1-2.

²⁰ Aluminum Ass'n, Inc., 1995 Notice, #66 at 3-5.

²¹ Ass'n of Recycling Managers, Inc., 1995 Notice, #77 at 2, 5.

²² Californians Against Waste Foundation, 1995 Notice, #81 at 3.

²³ EDF, 1995 Notice, #93 at 4.

²⁴ Professors Robert N. Mayer and Brenda J. Cude ("Mayer & Cude"), 1995 Notice, #20 at 3.

²⁵ GMA, 1995 Notice, #59 at 19 (such claims energize consumers to recycle items that can be recycled; curbing the use of "Please Recycle" might threaten upward trend of recycling rates); National Soft Drink Ass'n ("NSDA"), 1995 Notice, #62 at 6; SDA, 1995 Notice, #65 at 9; Chemical Specialties Manufacturers Ass'n, 1995 Notice, #72 at 15.

²⁶ NSDA, 1995 Notice, #62 at 6.

²⁷ EPA, 1995 Notice, #22 at 2.

²⁸ Mayer & Cude, 1995 Notice, #20 at 5.

²⁹ Attorneys General of the States of Arizona, California, Connecticut, Florida, Massachusetts, Minnesota, Missouri, New York, Pennsylvania,

c. *Consumer Perception Data Regarding the Local Availability Standard and "Please Recycle" Claims.* In the December 1994 COPE survey, respondents were asked if a "Please Recycle" claim on a package meant that collection programs existed in their community to recycle that package. Approximately one-third of consumers stated that the "Please Recycle" label meant that they could recycle the product in their community. When consumers were asked if the "Please Recycle" label on a package meant that the package can be recycled by consumers in all, most, some, a few or no communities, over one-half responded that the claim meant that the product could be recycled by consumers in "all" or "most" communities nationwide.

One question in the Roper Starch survey asked consumers if the claim of "recyclable package" on a cereal box meant that there *definitely* is a recycling facility for such packages in the consumers' communities. Of the respondents, 37% thought that the "recyclable" claim meant that there definitely was a recycling facility in their community, while 50% thought that there definitely was not a recycling facility in their community.

Although the research described above provides some consumer survey data regarding "Please Recycle" and local availability claims, in the 1996 Notice the Commission stated that it also wanted to evaluate the results of ongoing consumer research related to the Recyclable and Compostable guides. In July 1997, the Commission received the results of that research, which was conducted by Professors Manoj Hastak and Michael Mazis and funded by American University. Using a mall-intercept approach, respondents were exposed to one of two product packages (cardboard milk carton or plastic petroleum jelly jar) with one of three different labels on the package ("Recyclable," "Please Recycle," or no environmental claim).

After examining one package (either milk or petroleum jelly), respondents were asked a series of questions designed to measure their perceptions of the package's recyclability. Consumers were asked how likely or unlikely it is that the package can be recycled in their community.³⁰ Of the respondents

exposed to the package without any environmental claim, between 46% and 54% (for milk and petroleum jelly, respectively) indicated that it was likely or extremely likely that the package was recyclable in their community. Over 72% of the respondents exposed to the "recyclable" label indicated that it was likely or extremely likely that the package was recyclable in their community. Over 75% of the respondents who were shown the "Please Recycle" label indicated that it was likely or extremely likely that the package was recyclable in their community.

Then, the respondents were asked how likely or unlikely it is that the package can be recycled in most communities in the United States. Of the respondents exposed to the package without any environmental claim, between 40% and 46% (for milk and petroleum jelly, respectively) indicated that it was likely or extremely likely that the package can be recycled in most communities in the United States. Approximately 70% of the respondents who were shown the "recyclable" or "Please Recycle" label indicated that it was likely or extremely likely that the package can be recycled in most communities in the United States.

d. *Retention of the Local Availability Standard; Amendment of the Recyclable Guide Regarding "Please Recycle" Claims.* As discussed above, recent survey data confirm that the presence of either the "recyclable" claim or the "Please Recycle" claim significantly increased the percentage of consumers who believed the package to be recyclable in their community and in most communities in the United States. The large increase in responses to the "recyclable" and "Please Recycle" labels over where no claim is made shows that the claims make a difference in consumer perception of the availability of recycling facilities in their communities and in most United States communities. Further, there were no statistically significant differences in response to the two questions between the "recyclable" and "Please Recycle" groups. The Commission concludes that these results indicate that a local availability claim is conveyed to consumers by an unqualified "recyclable" claim.³¹ The study further

indicates that packages with the claim "Please Recycle" are just as likely to be perceived as recyclable as packages with the claim "recyclable," and also to convey a local availability claim.

Further, some commenters indicated that unqualified claims of recyclability where there is no local availability of recycling programs, mislead consumers into placing improper materials into recycling bins and thus the claims can increase the costs of recycling programs. It also was pointed out that while a product may be technically recyclable, if a program is not available allowing consumers to recycle the product, there is no real value to consumers. Thus, the Commission has decided to retain the current disclosure system for "recyclable" claims. Unqualified "recyclable" claims should only be made when a package or product is recyclable for a substantial majority of consumers or communities; in all other instances, an appropriate disclosure should accompany such claims.³²

In addition, recent survey data reveal that a significant majority of consumers equate the claim "Please Recycle" with unqualified "recyclable" claims. Accordingly, new Example 11 to the Recyclable guide illustrates that the phrase "Please Recycle" is equivalent to a "recyclable" claim and, thus, that unqualified usage should be limited to products that can be recycled locally by a substantial majority of consumers or communities.

2. Safe Harbor Disclosures for Products or Packages That Are Not Recyclable in a Substantial Majority of Communities

a. *Summary of Comments Regarding Disclosures.* Under the Recyclable guide, the Commission adopted a three-tiered disclaimer approach, depending on the availability of recycling facilities for a package or product. The first tier is when recycling facilities are available to a substantial majority of consumers or communities nationwide; in such cases,

in part, to the survey's emphasis on the word "definitely."

³²The Commission is cognizant that ISO's "reasonable portion" environmental labeling standard went out in April 1998 for comments and balloting and will go out for final balloting toward the end of 1998. The Trade Agreements Act of 1979 states that any federal agency must, in developing standards, "take into consideration international standards and shall, if appropriate, base the standards on international standards." Trade Agreements Act of 1979, title IV, section 402, 93 Stat. 242 (1979) (codified as amended at 19 U.S.C. 2532(2)(A) (Supp. 1995)). Since the reasonable portion standard has not been formally adopted (or defined) by ISO, the Commission believes that it would be premature to contemplate revising the substantial majority standard at this time. Of course, at any time the Commission may alter or revise the guides based on international developments or other relevant changes.

Tennessee, Washington, and Wisconsin ("Attorneys General"), 1995 Notice, #45 at 3.

³⁰The communities that were selected for this study were chosen because neither of the product packages used in the study could be recycled curbside in these areas; there were no known drop off facilities in these communities that would accept either the milk carton or the petroleum jelly

jar; and the brand names of the products were not sold locally.

³¹This conclusion is also supported by the December 1994 COPE survey. The Roper Starch data also shows that a significant percentage of consumers take a local availability claim from an unqualified "recyclable" claim, although a greater percentage did not. This result may be due, at least

unqualified recyclable claims can be made. The second tier is when facilities are available to a significant percentage of the population or communities, but not yet to a substantial majority of consumers or communities. In that situation, a suggested qualification is "Check to see if recycling facilities exist in your area." The third tier is when facilities are available to less than a significant percentage of communities or the population. Then, a recommended disclosure would be to state that the product is only recyclable in a few communities nationwide. Also, the guide provides that an alternative approach to qualifications would be to disclose the approximate percentage of communities or the population to whom recycling programs are available for the product.

Almost half of the commenters on recyclable claims urged the Commission to adopt different qualifiers, contending that the current "check to see" qualifier is too stringent. Several commenters suggested that the Commission revise the guides to allow for the qualifier "recyclable—where facilities exist," in addition to the "Check to see if recycling facilities exist in your area" qualifier.³³ Several commenters stated that the qualifier "recyclable where facilities exist" was sufficient to advise a consumer that the product might not be recyclable in the consumer's area.³⁴ Commenters also favored claims such as "recyclable through participating photofinishers" and "recyclable through participating dealers."³⁵ Another commenter urged the Commission to streamline the lengthy qualifications for "recyclable" claims offered as examples in the guides.³⁶

³³ Foodservice & Packaging Institute, Inc., 1995 Notice, #63 at 8–9 (if the claims are qualified in a positive manner, the consumer may be encouraged to seek out recycling opportunities that exist in the community, or by requesting information, create demand for expansion of recycling programs); Amoco Chemical Co., 1995 Notice, #35 at 2–3 (it is necessary to balance the need to inform the consumer about recyclable products with the need to avoid overstating the consumer's ability to recycle those products); Mobil, 1995 Notice, #38 at 3–4 (negative qualifiers such as "recycling programs may not exist in your area" are counterproductive, while positive qualifiers encourage the consumer to seek out recycling opportunities).

³⁴ Washington Legal Foundation, 1995 Notice, #84 at 3 (manufacturers may reasonably conclude that exhorting consumers to "check to see if recycling facilities exist in your area" is a misuse of label and advertising space); SPI, 1996 Notice, #70 at 3.

³⁵ Kodak, 1995 Notice, #42 at 3; NAPM, 1995 Notice, #83 at 2.

³⁶ American Frozen Foods Institute, 1995 Notice, #85 at 3 (suggesting that manufacturers must be confident that qualifications that use fewer words and provide less detailed information than the Commission has suggested may be viewed as appropriate by the agency).

The Ford Motor Company ("Ford") contended that the current guides do not adequately address the recyclability of durable goods such as automobiles, because the guides' contemplate situations involving only curbside or drop off recycling programs.³⁷ Ford noted that vehicle owners have no difficulty availing themselves of various automotive disposal and recycling services, and therefore, recommended that automobile manufacturers be permitted to make unqualified claims of recyclability, even though their collection sites are not those contemplated by the guides.

The U.S. Environmental Recycling Hotline ("Hotline") suggested that product labels using its 1–800–CLEANUP telephone number in conjunction with a "recyclable" claim could be a "safe harbor," if used appropriately.³⁸ Another commenter maintained that companies using such terms as "recyclable," "compostable," "degradable," and "refillable" should be required to print a telephone number near the claim so that confused consumers can have their questions answered.³⁹

Several State Attorneys General stated that the "check to see" qualifier incorrectly implies that the most likely problem with an unqualified recyclable claim is the possibility of there not being *any recycling facilities in the consumer's locality*.⁴⁰ The Attorneys General suggested that the problem consumers are more likely to encounter is that the recycling facilities do not collect the material in question. They suggested that a clear, easily understood qualification be used when collection sites for the material in question are available to some but not all consumers or communities, for instance, "Not recyclable in 75% of U.S. communities. Check to see if recyclable in your area."

b. Consumer Perception Data Regarding Recyclable Disclosures. In the March 1993 COPE survey, half of those interviewed were asked whether an unqualified "recyclable" claim meant that collection programs existed in their community to recycle the product, and the other half were asked the same question with the qualified "Recyclable—check to see if recycling facilities exist in your area" disclosure. In each case, more than 40% of

³⁷ Ford, 1995 Comment, #29 at 4–5.

³⁸ Hotline, 1996 Notice, #216 at 2. The Hotline explained that its telephone number provides recycling drop off center location information and community-specific recycling education information in all 50 states.

³⁹ California Integrated Waste Management Board, 1995 Notice, #74 at 2.

⁴⁰ Attorneys General, 1995 Notice, #45 at 4.

respondents answered "yes" (i.e., the claim meant that collection programs existed in their community to recycle the product), regardless of whether they were exposed to the unqualified or qualified claim. There was no statistically significant difference between the two responses (46% for the unqualified claim; 43% for the qualified claim). The Commission believes that these results indicate that the "check to see" disclosure may not be effective in conveying to consumers that local facilities may not be available to recycle the product.

In the September 1993 survey, COPE tested a qualification similar to that recommended in the Compostable guide when facilities are available to a significant percentage, but not a substantial majority of the population (i.e., "Appropriate facilities may not exist in your area"). Half of those questioned were asked whether an unqualified "recyclable" claim meant that recycling programs for the product existed in their community and the other half were asked the same question when exposed to the claim:

"Recyclable—recycling programs for this bottle may not exist in your area." Of those exposed to the unqualified claim, 45% responded that the claim meant that facilities existed in their area, and 48% responded that it did not. Of consumers exposed to the qualified claim, "Recyclable—recycling programs for this bottle may not exist in your area," 29% responded that it meant that recycling programs for that bottle existed in their area, and 59% responded that the claim did not mean that recycling programs existed in their area. The Commission believes that these results indicate that the more cautionary disclosure, i.e., "Recycling programs [for this product] may not exist in your area," is more successful in conveying to consumers that facilities may not be available locally, than the "Check to see if recycling facilities exist in your area" disclosure.

c. Amendments Regarding Safe Harbor Recyclable Disclosures. Based on the comments and the consumer perception data discussed above that found that the "check to see" qualification did not significantly change consumers' perceptions of local availability of collection sites when compared with an unqualified "recyclable" claim, the Commission is withdrawing the safe harbor "Check to see if recycling facilities exist in your area." The Commission also concludes that the alternatives suggested by some commenters, such as "recyclable where facilities exist" would be inadequate to change consumer perception. In

particular, this alternative would suffer from the problem identified by the Attorneys General in that such a claim could imply that if any facility exists in a consumer's community, then the item is recyclable, when, in fact, that facility may not recycle the product. Example 4 of the Recyclable guide (where this issue is presented) has been revised to suggest the following types of disclosures: "Recycling programs for this bottle [product or packaging] may not exist in your area" or "This bottle [product or packaging] may not be recyclable in your area."⁴¹ Because the new safe harbors are tied to the marketed product as opposed to recycling programs generally, they reduce the possibility that consumers may infer that because a recycling program exists in their area, that any product represented as "recyclable" can, in fact, be recycled in their local program.

3. Reused and/or Reconditioned Parts Marketed as "Recycled" or "Recyclable"

a. Background. In the 1995 Notice, the Commission specifically sought comment as to whether consumers perceive that products made from reconditioned parts that would otherwise have been thrown away are "recycled" products, and what modifications, if any, should be made to the guides to address these consumer perceptions. The Commission received no empirical evidence in response to that request, but did receive several comments that discussed the issue. In the 1996 Notice, the Commission stated that it had determined to give further consideration to the question, as well as to the related issue of whether product parts that can be reconditioned and/or reused in the manufacture of new products should be considered "recyclable" if adequate infrastructures for collecting the parts are available.

At that time, the Recycled Content guide defined "recycled content" as material that a marketer can substantiate has been recovered or otherwise diverted from the waste stream. This definition could be interpreted to include products made from reconditioned and/or reused parts, as well as products made from products converted into raw materials, such as steel made from melted down cans. The 1996 Notice pointed out, however, that the Recyclable guide stated that for something to be recyclable it must be diverted from the solid waste stream for use as "raw materials in the

manufacture or assembly of a new product or package." Thus, the 1996 Notice concluded that product parts that are capable of being reconditioned and/or reused in the manufacture of new products are not considered "recyclable" under the guides, because the parts are not actually reprocessed into raw materials before reuse.

b. Summary of Comments Regarding Reused and/or Reconditioned Parts as "Recycled" or "Recyclable". There was a consensus among those commenting that reused and/or reconditioned automotive parts should be permitted to be called "recycled." Approximately 207 comments to the 1996 Notice were patterned after, or similar to, a form letter from the Automotive Recyclers Association ("ARA"), a trade association representing automotive parts dealers, "automotive recyclers," automotive salvage companies, dismantlers, and wreckers.⁴² These commenters stated that the automotive recycling industry has been a pioneer in the recycling movement for over 50 years and that the products they sell have been and must continue to be described as "recycled." They contended that by using viable parts removed from vehicles bound for the waste stream, their products are reintroduced into commerce without wasting additional natural resources. The used automotive parts dealers, dismantlers, and salvage companies commented that they consider themselves to be "professional automotive recyclers"⁴³ and one stated that "recycled" was the automotive industry's term first, before everyone else "jumped on the environmental bandwagon."⁴⁴

Several commenters said that customers are not confused when they buy a "recycled" automotive part because they realize that they are getting a used part for less money, i.e., used automotive parts cost 30–90% of the price of new parts.⁴⁵ Other commenters

⁴² Attached to many of these letters were petitions containing the names and addresses of customers who stated: "[I] support reused parts being described as 'recycled.' I understand the quality of the product I am buying when it is advertised as 'recycled' and believe the service this company provides should continue to be recognized as recycling." Approximately 2,190 names of customers were on the petitions. See, e.g., Branch Auto Parts, 1996 Notice, #38 at 2; Alliance Auto Parts Inc., 1996 Notice, #48 at 2.

⁴³ See, e.g., B & K Auto Salvage, 1996 Notice, #124 at 1; Greensboro Auto Parts Co., Inc., 1996 Notice, #128 at 1; EL & M Auto Recycling, Inc., 1996 Notice, #161 at 1; Automotive Parts Rebuilders Ass'n ("APRA"), 1996 Notice, #102 at 4 (noting also that many used automotive parts dealers have the word "recycling," or some variation of it, in their names).

⁴⁴ BIG Truck Salvage, Inc., 1996 Notice, #77 at 1.

⁴⁵ Georgia Automotive Recyclers Ass'n, 1996 Notice, #117 at 1; Bliss Auto Wreckers, 1996 Notice,

said recycled parts give consumers an alternative repair option and help reduce the unnecessary production of new parts.⁴⁶ Some commenters noted that recycling automotive parts also helps keep vehicle insurance affordable because automotive recyclers buy damaged vehicles from insurance companies and resell the recycled parts (indirectly) to insurance companies to repair other damaged vehicles.⁴⁷ Another commenter suggested that the sale of many used parts as component assemblies, such as complete engine assemblies, reduces installation time and thus saves labor costs.⁴⁸ That commenter also pointed out that the automotive dismantler may be the only source of parts for the consumer who owns an older vehicle.

ARA stated that the Commission should consider the impact on the used automotive parts industry if it does not permit reused parts to be labeled as "recycled," and suggested that failure to do so would provide an unfair competitive advantage for products made from recycled raw materials.⁴⁹ ARA therefore recommended revising the Recyclable guide to incorporate reused automotive components as a qualifying use for the term "recyclable."⁵⁰ ARA further suggested that reused automotive parts should be included in the guidance regarding the Recycled Content guide.

In contrast, PRC expressed concern that any expansion of the term "recycling" would confuse consumers because they would have no means of distinguishing between used or remanufactured products and newly manufactured products made from raw

#118 at 1. See also Michael W. Gibson, Ft. Worth, TX, Controller of the following companies: AAA Small Car World, Auto Recyclers of Houston, Budget American & Import Auto Parts, All Auto Recyclers of San Antonio, Auto Recyclers of Austin and Auto Recyclers of Ft. Worth ("Michael W. Gibson"), 1996 Notice, #78 at 1 (customers are not generally confused when products are described as "recycled," because they are almost always referred to as "recycled used parts"; these parts cost 50% or less, of the cost of a new or rebuilt/remanufactured part); Palmer's Auto Salvage ("Palmer's"), 1996 Notice, #43 at 3 (30–60%); Arizona Automotive Recyclers Ass'n ("Arizona Recyclers"), 1996 Notice, #99 at 2 (50%).

⁴⁶ See, e.g., Midway Auto Parts, 1996 Notice, #2 at 1; Autosalvage of Ithaca Inc., 1996 Notice, #40 at 1; Cousineau Auto Inc., 1996 Notice, #85 at 1.

⁴⁷ Route 19 Auto Salvage Inc., 1996 Notice, #39 at 1; Lynnwood Auto Wreckers Incorporated, 1996 Notice, #59 at 1. See also Pennsylvania Automotive Recycling Trade Society, 1996 Notice, #15 at 1; Palmer's, 1996 Notice, #43 at 11; Don's Automotive Mall, Inc. ("Don's"), 1996 Notice, #92 at 10; Arizona Recyclers, 1996 Notice, #99 at 2.

⁴⁸ Don's, 1996 Notice, #92 at 4.

⁴⁹ ARA, 1996 Notice, #101 at 8.

⁵⁰ ARA, 1995 Notice, #71 at 2, 6. See also ARA, 1996 Notice, #101 at 1–9.

⁴¹ The new qualifications also are consistent with the one suggested in the Compostable guide: "Appropriate facilities may not exist in your area."

materials.⁵¹ Similarly, Pitney Bowes, while favoring an expansion of the use of "recycled" and "recyclable," urged the Commission to distinguish among products that are made from reconditioned parts, reused parts, and remanufactured parts because they differ in specifications, product disclosures to the consumer, warranties, and manufacturing processes.⁵² Ford pointed out that in the automotive industry, the use of the term "recycled" generally means that a part has been removed from a scrap vehicle and resold with little or no work performed on it.⁵³ A "remanufactured" part, in contrast, has undergone substantial cleaning, repair and reworking and under industry practice this part would not be considered "recycled." Because restoration work has been performed on rebuilt and remanufactured parts, while recycled vehicle parts are often sold "as is," APRA noted that some rebuilders may not desire to use the term "recycled," but they should not be precluded from doing so.⁵⁴

Several commenters urged the Commission to allow the application of "recycled" and "recyclable" to other remanufactured and reused products that are not broken down to raw materials before being reused. These commenters noted that reused, reconditioned and remanufactured parts are important components of many products, such as office copiers, one-time use cameras and mailing machines.⁵⁵ Kodak noted that it has developed a reuse program for its one-time use cameras in which it reconditions and reuses, or breaks down into raw materials, 86% of a used camera by weight for use in the manufacture of new one-time use cameras.⁵⁶ Kodak contended that because collection of this sort of reused material diverts products from the waste stream, those products should qualify as "recyclable."⁵⁷

ARA pointed out that many states, including New Jersey, Missouri,

Minnesota, Maine, Louisiana, Kentucky, Georgia, and Florida, have acknowledged in their statutes that recycling encompasses all efforts, including reuse, to remove solid waste from the waste stream.⁵⁸ ARA stated that the Commission should provide incentives for all methods of recycling, as long as the goal of conserving natural resources and diverting waste is achieved. Other commenters noted that the draft ISO standard allows products that are diverted from the waste stream and returned to use in the form of raw materials or products to be considered "recyclable," and urged the Commission to adopt a similar approach.⁵⁹

c. Quality Standards for Reused and Remanufactured Parts. The 1996 Notice asked whether consumers generally perceive that the term "recycled" conveys information about the quality of a product, and whether consumers' concerns about product quality differ depending on whether a product is made from reconditioned and/or reused parts recovered from the solid waste stream versus from materials recovered from the solid waste stream and converted into raw materials. The 1996 Notice also asked if consumer perception about whether a product is or is not "recycled" would be affected if marketers of products made from reconditioned and/or reused parts could prove that those products are "substantially equivalent" in quality to comparable products made from recycled raw materials. The notice further asked what evidence should be required to show "substantial equivalency," and if consumers are likely to be deceived about the quality of products made from reconditioned and/or reused parts if they are advertised as "recycled."

Several commenters discussed the quality of reused or reconditioned products as it relates to recyclability and recycled content.⁶⁰ SPI suggested that substantial quality equivalency should be required, and that reliance on applicable government or industry standards for such products might be a way to demonstrate such equivalency.

By contrast, APRA noted that the sections of the guides relating to recyclability and recycled content currently do not mention quality and stated there is no reason why a product should have to demonstrate a particular quality, much less a comparability to new products, before being allowed to

use the designation "recycled" or "recyclable."⁶¹ APRA contended that those designations describe environmental attributes and not the quality of a product, and should not be used to denote quality. APRA noted that quality standards for rebuilt and remanufactured motor vehicle parts are already reflected in the Commission's Guides for the Rebuilt, Reconditioned and Other Used Automotive Parts Industry, 16 CFR Part 20. Kodak suggested that any concerns about product quality could be addressed through the responsible use of product warranties extended by manufacturers.⁶²

d. Consumer Perception Data Regarding Reconditioned Products as "Recycled". The 1995 Notice requested empirical evidence addressing the issue of whether consumers perceive that products made from reconditioned parts that would otherwise have been discarded should qualify as "recycled" products. In the April 1996 COPE survey, consumers were asked whether they considered products made from certain materials to be "recycled." Seventy-one percent stated that a television set made from reconditioned parts taken from used televisions is "recycled," while 25% said the reconditioned television set was "not recycled." The Commission believes that these results suggest that a large majority of consumers consider reconditioning to be a form of "recycling."

e. Expansion of the Recyclable Guide to Include Reused and/or Reconditioned Products. The majority of those commenting on the Recyclable guide supported its relaxation, and it was pointed out that such relaxation would be consistent with the laws of various states. Commenters pointed out that because the breakdown of a product into raw materials consumes more energy than reuse of that product, reused, reconditioned and remanufactured components diverted from the solid waste stream are even more beneficial to the environment than diverted components that are broken down into raw materials.

The Commission has therefore expanded the "recyclable" definition to include any package or product that can be collected, separated or otherwise recovered from the solid waste stream for "reuse," or for the manufacture or assembly of "another" (not necessarily new) package or product, so long as the package or product can be collected "through an established recycling program." The phrase "through an

⁵¹ PRC, 1996 Notice, #100 at 1-2.

⁵² Pitney Bowes, 1996 Notice, #218 at 3.

⁵³ Ford, 1995 Notice, #29 at 6. See also Michael W. Gibson, 1996 Notice, #78 at 1 (a recycled part is a used part placed back in service, but rebuilt or remanufactured parts are not referred to as "recycled" in the automotive industry).

⁵⁴ APRA, 1996 Notice, #102 at 7.

⁵⁵ Kodak, 1995 Notice, #42 at 2; 1996 Notice, #95 at 2; Pitney Bowes, 1996 Notice, #218 at 4-7.

⁵⁶ Kodak, 1995 Notice, #42 at 2. Kodak stated that statistics show that at least half of all cameras it distributes are returned to the company for this recycling. See also Kodak, 1996 Notice, #95 at 2.

⁵⁷ Kodak, 1995 Notice, #42 at 2. See also Kodak, 1996 Notice, #95 at 2 (noting that other products, such as the so-called "end of life" office equipment products, are also recovered and converted into equivalent salable products).

⁵⁸ ARA, 1996 Notice, #101 at 8.

⁵⁹ 3M, 1995 Notice, # 32 at 9; Kodak, 1995 Notice, #42 at 3.

⁶⁰ See, e.g., SPI, 1996 Notice, #70 at 3; APRA, 1996 Notice, #102 at 3-5.

⁶¹ APRA, 1996 Notice, #102 at 3-5.

⁶² Kodak, 1996 Notice, #95 at 3.

established recycling program" has been added to the recyclable definition to indicate that the expanded definition does not encompass all goods with a potential for reuse of any kind. For a product to be called "recyclable," there must be an established recycling program, municipal or private, through which the product will be converted into, or used in, another product or package.

New Examples 9 and 10 illustrate the expansion of the Recyclable guide. Example 9 deals with manufacturers or retailers that collect and recycle their own products. The example allows a "recyclable" claim, even if no municipal recycling program exists, if the manufacturer or retailer: (a) sets up a collection and recycling program for that product, and (b) explains that the product is recyclable through that non-municipal (or private) program. Example 10 indicates that the disclosure requirements regarding local availability of municipal recycling facilities also apply to non-municipal recycling programs.

f. *Clarification of the Term "Recycled Content"*. The 1996 Notice explained that the term "recycled content" referred to material that a marketer can substantiate has been recovered or otherwise diverted from the waste stream. Although this could be interpreted to include products made from reconditioned and/or reused parts, as well as products made from products converted into raw materials, such as steel from melted down cans, the Commission did not endorse this interpretation because the Recyclable guide unambiguously stated that for something to be "recyclable" it must be diverted from the solid waste stream and actually reprocessed into raw materials before reuse. This has now been changed.

For the reasons discussed in this section, the Recycled Content guide has been clarified to expressly encompass used, reconditioned, and remanufactured components, as well as raw materials. The revised Recycled Content guide now also states that manufacturers and retailers must disclose the nature of the recycled content, unless such content consists solely of raw materials, or it would be clear to consumers from the context that a product contains used, reconditioned, or remanufactured components. The Commission believes that whether the product being purchased is new (including a product made from recycled raw materials) or is made from used, reconditioned, or remanufactured components is a fact material to consumers' purchasing decisions. In

certain instances, it will be evident to consumers that the product is not new (e.g., if the product is purchased from a secondhand store, or if the product is an automotive part that has been purchased from an automotive dismantler). In those cases, no disclosure of the used nature of the product's recycled content would be necessary because it is clear from the context of the claim that the recycled content consists of used, reconditioned, or remanufactured components. In cases where it is not apparent from the context that the product is not new, however, to avoid consumer deception, the marketer should disclose the used, reconditioned, or remanufactured nature of the product's recycled content. Although the prior use of a product might be less important to consumers' purchasing decisions where substantial equivalency to a new item or an item made from recycled raw materials could be established, at the present time the record does not contain evidence that objective standards for determining substantial equivalency exist for many products. Moreover, in certain cases, there may not even be a comparable item made from recycled raw materials.

New Example 11 illustrates the use of an appropriate qualifier for a product that contains both recycled raw materials and reconditioned parts. Under that example, the percentage of materials composed of reconditioned parts should be disclosed. A consumer could then correctly assume that the remaining percentage consists of recycled raw materials.

New Example 12 deals with the use of a "recycled" label when it would not be clear to a consumer that the product at issue was used. In such a case, the product should be labeled to convey to a consumer that the product was used in order to avoid consumer deception.

New Example 13 illustrates the deceptive use of a "recycled" label when it would not be clear to a consumer that the product at issue contains recycled reconditioned parts. Such a label should clearly convey that the product contains recycled reconditioned parts to avoid deceiving consumers about the nature of that product's recycled content.

New Examples 14 and 15 concern the automotive parts market. As discussed above, in the used automotive parts market, consumers understand that certain recycled automotive parts are used parts that have not undergone any type of repair, rebuilding, or remanufacturing. Example 14, which involves a used automotive part, illustrates that in such a situation the unqualified use of the word "recycled"

would not be deceptive. Example 15 deals with rebuilt, reconditioned, or remanufactured automotive parts that are labeled as "recycled." Some commenters pointed out that because reconditioned, rebuilt, and remanufactured parts have had restorative work performed on them, some dealers may not want to use the "recycled" label (as it connotes to some consumers that the part is used and has not undergone any restoration). The Commission believes that dealers of reconditioned, rebuilt, and remanufactured parts should nevertheless be permitted to use the "recycled" label if they so desire. Example 15 illustrates the types of disclosures that are appropriate for use with those parts that bear a "recycled" label.

4. Additional Amendments to the Recyclable Guide

a. *The Mercury-Containing and Rechargeable Battery Management Act*. The Mercury-Containing and Rechargeable Battery Management Act of 1996 ("Battery Act") establishes uniform national labeling requirements regarding rechargeable nickel-cadmium and some lead-acid batteries, to aid in battery collection recycling. 42 U.S.C. 14301 et seq. Under the Battery Act, rechargeable nickel-cadmium and some lead-acid rechargeable batteries must be labeled with the three-chasing-arrows symbol or a comparable symbol. Additionally, rechargeable nickel-cadmium batteries must contain the phrase: "BATTERY MUST BE RECYCLED OR DISPOSED OF PROPERLY." 42 U.S.C. 14322(b). Each regulated lead-acid battery must contain the words: "LEAD," "RETURN," and "RECYCLE." If the regulated battery is sealed, it must contain the phrase: "BATTERY MUST BE RECYCLED." 42 U.S.C. 14322(b). The Commission believes that batteries labeled in accordance with the statute's requirements satisfy the guides' disclosure provisions and therefore the Recyclable guide now includes a footnote stating that batteries labeled in accordance with the Battery Act are deemed to be in compliance with the guides.

b. *Example Regarding Use of the SPI Code*. Example 2 of the Recyclable guide states that the placement of the SPI code in an inconspicuous part of a package or product does not constitute a recyclability claim. That example has been clarified to emphasize that the placement of an SPI code in a conspicuous location may constitute a claim of recyclability, and thus, may have to be qualified to disclose the

limited availability of recycling programs for that package or product.

c. Update of Examples 5 and 6.

Examples 5 and 6 have been updated by including products that better illustrate the current level of local recyclability described in each example.

C. Clarification Regarding Applicability of the Guides to the Marketing of Services, and to All Forms of Electronic Advertising

The Commission has determined to make minor amendments to the language in Sections 260.2, 260.5, 260.6(b) and 260.7(a) to clarify that the guides apply to the marketing of services because environmental claims also are being made in the marketing of services and there is no reason to limit the applicability of the guides to only products or packages. Furthermore, the Commission has made a minor amendment to Section 260.2 to clarify that the guides apply to all forms of electronic advertising, including marketing through digital or electronic means, such as the Internet or electronic mail.

III. Text of Modified Guides

List of Subjects in 16 CFR Part 260

Advertising, Environmental claims, Labeling, Trade practices.

For the reasons set forth in the preamble, 16 CFR Part 260 is amended as follows:

PART 260—GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS

1. The authority citation for Part 260 continues to read as follows:

Authority: 15 U.S.C. 41–58.

2. Section 260.2 is revised to read as follows:

§ 260.2 Scope of guides.

(a) 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.

(b) 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.

3. Section 260.5 is revised to read as follows:

§ 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 FR 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.

¹ *Cliffdale Associates, Inc.*, 103 F.T.C. 110, at 176, 176 n.7, n.8, Appendix, *reprinting* letter dated Oct. 14, 1983, from the Commission to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (1984) ("Deception Statement").

4. Section 260.6 is amended by revising paragraphs (a) and (b) (the examples are unchanged) to read as follows:

§ 260.6 General principles.

* * * * *

(a) *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.

(b) *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.

* * * * *

5. Footnotes 4, 5 and 6 of § 260.8 are redesignated as footnotes 7, 8 and 9 and § 260.7 is amended by revising the introductory text, paragraph (a) (the examples are unchanged), paragraphs (c) and (d), and paragraph (e) and its example 10, and by adding examples 11 through 15 for paragraph (e), to read as follows:

§ 260.7 Environmental marketing claims.

Guidance about the use of environmental marketing claims is set forth in this section. 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

² These guides do not currently address claims based on a "lifecycle" theory of environmental benefit. The Commission lacks sufficient information on which to base guidance on such claims.

(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.

* * * * *

(c) *Compostable.* (1) 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:

- (i) The package cannot be safely composted in a home compost pile or device; or
- (ii) The claim misleads consumers about the environmental benefit provided when the product is disposed of in a landfill.

(2) 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 usable compost in a home compost pile or device. To avoid deception, 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 all of both the 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

⁴ The Mercury-Containing and Rechargeable Battery Management Act establishes uniform national labeling requirements regarding certain types of nickel-cadmium rechargeable and small lead-acid rechargeable batteries to aid in battery collection and recycling. The Battery Act requires, in general, that the batteries must be labeled with the three-chasing-arrows symbol or a comparable recycling symbol, and the statement "Battery Must Be Recycled Or Disposed Of Properly." 42 U.S.C. 14322(b). Batteries labeled in accordance with this federal statute are deemed to be in compliance with these guides.

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.* (1) 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 of a product or package must be substantiated.

(2) 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 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.

⁵The term "used" refers to parts that are not new and that have not undergone any type of remanufacturing and/or reconditioning.

Example 13: A manufacturer of home electronics labels its video cassette 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 rebuilding⁶ 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

⁶The 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.

(85% recycled content from rebuilt parts)." These claims are not likely to be deceptive.

* * * * *

6. Section 260.8 is revised to read as follows:

§ 260.8 Environmental assessment.

(a) National Environmental Policy Act. In accordance with section 1.83 of the FTC's Procedures and Rules of Practice⁷ 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

⁷ 16 CFR 1.83.

⁸ 40 CFR 1501.3.

⁹ 16 CFR 1.83(a).

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.

(b) The Commission has concluded that the modifications to the guides in this part 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.

[FR Doc. 98-11455 Filed 4-30-98; 8:45 am]

BILLING CODE 6750-01-P