STATEMENT OF BASIS AND PURPOSE

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I. Background

A. The Green Guides

The Commission issued the Green Guides, 16 CFR Part 260, to help marketers avoid deceptive environmental claims under Section 5 of the FTC Act, 15 U.S.C. 45.[1] 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 guidance regarding many specific environmental benefit claims. The Guides explain how reasonable consumers likely interpret each such claim, describe the basic elements necessary to substantiate it, and present options for qualifying it to avoid deception.[2] Illustrative qualifications provide guidance for marketers who want assurance about how to make non-deceptive environmental claims, but are not the only permissible approaches to qualifying a claim. As discussed below, although the Guides assist marketers in making non-deceptive environmental claims, the Guides cannot always anticipate which specific claims will, or will

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[1] 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)). Throughout this document, the Commission refers to the 1998 version of the Guides as the "1998 Guides."

[2] The Guides, however, neither establish standards for environmental performance nor prescribe testing protocols.

not, be deceptive because of incomplete consumer perception evidence and because perception often depends on context.

The Guides advise marketers that they will often need "competent and reliable scientific evidence" to adequately substantiate environmental marketing claims.[3] The 1998 Guides defined 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."[4] Since issuing the 1998 Guides, the Commission has clarified this standard by stating that 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."[5] The final Guides include this clarified language.[6]

B. The Green Guides Review

The Commission initiated its current review in November 2007. As discussed in greater detail in the Commission's November 2007 Federal Register Notice, the Commission sought comment on a number of general issues, including the continuing need for, and economic impact

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[3] 16 CFR 260.2.

[4] 16 CFR 260.5.

[5] 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").

[6] Section 260.2 (Interpretation and Substantiation of Environmental Marketing Claims).

of, the Guides, as well as the Guides' effect on environmental claims.[7] The Commission also requested input on whether it should provide guidance on certain environmental claims not addressed in the 1998 Guides. To establish a more robust record, the Commission held three public workshops to address carbon offsets and renewable energy certificates;[8] green packaging claims;[9] and green building and textiles.[10]

Additionally, because the Guides are based on consumer understanding of environmental claims, consumer perception research provides the best evidence upon which to formulate guidance.[11] The Commission therefore conducted its own study in July and August of 2009.[12]

The study presented 3,777 participants with questions calculated to determine how they understood certain environmental claims. The first portion of the study examined general environmental benefit claims ("green" and "eco-friendly"),[13] as well as "sustainable," "made with renewable materials," "made with renewable energy," and "made with recycled materials" claims. To examine whether consumers' understanding of these claims differed depending on the product being advertised, the study tested the claims as they appeared on three different

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[7] 72 FR 66091 (Nov. 27, 2007).

[8] 72 FR 66094 (Nov. 27, 2007).

[9] 73 FR 11371 (Mar. 3, 2008).

[10] 73 FR 32662 (June 10, 2008).

[11] As discussed in the Commission's October 2010 Federal Register Notice announcing the Commission's proposed Guide revisions, few commenters submitted consumer perception research. See 75 FR 63552, 63554 (Oct. 15, 2010).

[12] The Commission's consumer perception study and additional detail on the study methodology is available at http://www.ftc.gov/green. To conduct the study, the FTC contracted with Harris Interactive, a consumer research firm with substantial experience surveying consumer opinions.

[13] 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 materials").

products: wrapping paper, a laundry basket, and kitchen flooring.[14] The second portion of the study tested carbon offset and carbon neutral claims.

In October 2010, the Commission published a Federal Register Notice ("October 2010 Notice") discussing its review of the public comments, workshops, and consumer perception evidence.[15] The October 2010 Notice proposed several modifications and additions to the Guides, and sought comment on all aspects of the proposed Guides. In response, the Commission received 340 non-duplicative comments.[16] After considering these comments, the Commission now amends the Guides. The Commission adopts the resulting Guides as final.

C. Outline of This Statement

Part II of this Statement discusses general issues, including industry compliance; harmonization of the Guides with international law or standards; modification of the Guides based on technology changes; and consumer perception issues, generally. Part III discusses life cycle-related issues. Part IV discusses issues relating to specific environmental marketing claims addressed in the Guides. Part V discusses claims not addressed in the Guides. Finally, Part VI contains the final Guides.

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[14] The study results support the 1998 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.

[15] 75 FR 63552 (Oct. 15, 2010).

[16] The Commission abbreviates commenters' names in this Statement. See the Appendix for a list of these abbreviations and the commenters' full names. The Commission received two mass comments, i.e., letters based on all or part of one generic form letter. First, the Commission received well over 5,000 comments from consumers requesting increased regulation of organic claims for cosmetic and personal care products. Second, the Commission received over 100 comments from vehicle recycling entities requesting revisions to examples in the recycled content guidance.

II. General Issues

A number of commenters addressed overarching issues, including: (1) whether, and to what degree, industry is complying with the Guides; (2) whether the Commission should modify the Guides due to changes in technology or economic conditions; (3) whether there are international laws or standards the FTC should consider as part of its review; (4) whether the Guides overlap or conflict with other federal, state, or local laws or regulations; (5) the Commission's reliance on its consumer perception study, generally; and (6) the Commission's review process. This section discusses these comments and provides the Commission's final analysis of these issues.

A. Industry Compliance

1. Proposed Revisions

In response to suggestions that compliance would increase if more businesses were aware that the Guides apply to marketing claims between businesses, the Commission proposed revising the Guides to emphasize their application to business-to-business transactions. Specifically, the proposed Guides stated that they apply to the marketing of products and services to "individuals, businesses, or other entities."[17] The proposed Guides also included a specific business-to-business transaction example.[18]

[17] 16 CFR 260.1.

[18] See Proposed Guides, Section 260.6, Example 4.

2. Comments

Commenters addressed two main issues relating to industry compliance: (1) whether the Guides should be revised to emphasize their application to business-to-business transactions; and (2) whether more robust enforcement in the environmental marketing arena would lead to better compliance.

First, several commenters focused on the Guides' treatment of business-to-business transactions. Many supported the Commission's decision to emphasize that the Guides apply to these transactions, and encouraged the Commission to further highlight this issue.[19] For example, the AA&FA suggested the Commission revise Section 260.1(c) by including additional business-to-business examples throughout the Guides.[20] Eastman suggested that the Commission expressly state that the Guides apply to "claims made between businesses about the products or services supplied (i.e., business-to-business claims)."[21]

Several commenters also asked the Commission to distinguish between individual consumers' and businesses' perceptions. Specifically, PMA recommended the Guides state that the Commission considers the audience's sophistication when evaluating the net impression of environmental claims.[22] PMA observed that the Commission's study examined ordinary

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[19] See AA&FA, Comment 233 at 2; AF&PA, Comment 171 at 2; Eastman, Comment 322 at 1; NatureWorks, Comment 274 at 2; NAIMA, Comment 210 at 2; PPC, Comment 221 at 3 (endorsing AF&PA's comment); PMA, Comment 262 at 2; SMART, Comment 234 at 2; Sierra Club et al., Comment 308 at 6.

[20] AA&FA, Comment 233 at 2; see also EarthJustice, Comment 353 at 3 (suggesting the Commission collect and analyze additional evidence focusing on business consumers' perceptions of environmental claims); Eastman, Comment 322 at 2; SMART, Comment 234 at 2.

[21] Eastman, Comment 322 at 2.

[22] PMA, Comment 262 at 2-3.

consumers rather than businesses.[23] According to PMA, businesses generally have a more complete understanding of certain environmental benefit terms and therefore may require fewer qualifications or disclosures than ordinary consumers.

Green Cleaning urged the Commission to include a specific example illustrating that the definition of "reasonable consumer" differs depending on whether the consumer is a professional commercial purchaser or a household consumer.[24] In particular, it asserted that commercial purchasers receive specific training on buying "green cleaning" products, and will spend days researching products, whereas the "typical" household consumer may spend less than five seconds making a purchasing decision.[25] Green Cleaning also observed that a commercial or institutional purchaser may rely on extensive materials, including websites, when making a purchasing decision, compared to a household consumer making a decision at the point of sale.[26]

Other commenters asked the Commission to clarify whether the Guides apply not only to manufacturers, but to others who directly or indirectly promote a certified product in an unfair or deceptive manner, including certifiers, auditors, and wholesale and retail sellers.[27] For example, some commenters suggested that, in the forestry context, the Guides should cover those that

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[23] Id.

[24] Green Cleaning, Comment 213 at 1-2.

[25] Id. at 1.

[26] Id. at 2; see also IPC, Comment 202 at 1 (asking the Commission to distinguish between an individual consumer and a commercial consumer "because the level of understanding of an environmental benefit is likely to be different").

[27] See, e.g., Sierra Club et al., Comment 308 at 5; P&G, Comment 159 at 2 (suggesting the Guides specify that they also cover third-party organizations that assign rankings to products based on a variety of environmental factors and communicate these rankings to consumers); FMI, Comment 299 at 3 (urging the Commission to clarify that purchasers of carbon offsets need not independently verify the scientific data behind their claims and may instead use information provided by seller as substantiation); Green Seal, Comment 280 at 3-4 (suggesting that Guides focus on claims made by carbon offset sellers, not by carbon offset purchasers).

"grow, harvest, extract, process, manufacture, distribute, and market 'certified' products, such as certified forest products."[28]

Second, several commenters indicated that more robust enforcement in the environmental marketing area would lead to better compliance.[29] For example, NAIMA urged the Commission to allocate sufficient enforcement resources to combat deceptive environmental claims.[30] Two commenters, however, expressed concern that the Commission's enforcement efforts may disproportionately impact small businesses, and suggested the Commission focus on promoting compliance through education and "warnings" rather than on "harsh enforcement and legal consequences" against small companies with limited resources.[31]

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[28] Sierra Club et al., Comment 308 at 5.

[29] NAIMA, Comment 210 at 2; Institute for Policy Integrity, Comment 241 at 2-3 (encouraging enforcement of deceptive claims); GPR, Comment 206 at 1.

[30] NAIMA, Comment 210 at 2; see also RILA, Comment 339 at 3 (suggesting the Commission explicitly describe its enforcement strategy, especially as it relates to manufacturers' versus retailers' liability); SCS, Comment 264 at 2 (recommending the Guides "explicitly address [the Commission's] commitment to steer marketers away from vague, ill-defined, or unsubstantiated claims and claims that focus on insignificant aspects while distracting consumers from more significant impacts").

[31] Green America, Comment 95 at 1-2; American Sustainable Business Council, 117 at 1-2; see also FSBA, Comment 270 at 2 (suggesting the Commission focus on business education); AZS Consulting, Comment 283 at 2 (arguing that more specific guidance on general environmental benefit claims would benefit small businesses who can substantiate a limited claim but who "cannot afford elaborate studies").

3. Analysis and Final Guidance

Section 5 of the FTC Act gives the Commission authority to prevent unfair or deceptive practices by a business where the immediate injured party is another business.[32] Therefore, as administrative interpretations of Section 5, the Guides apply to business-to-business marketing claims. To clarify this point, the Commission now includes the following language in Section 260.1(c) of the final Guides: "These guides apply to claims about the environmental attributes of a product, package, or service in connection with the marketing . . . of such item or service to individuals. These guides also apply to business-to-business transactions."[33] Moreover, the final Guides include the new example of a business-to-business transaction the Commission proposed in the October 2010 Notice.[34] The Commission, however, declines to include additional examples. Most of the Guides' examples are based on how individual consumers likely interpret environmental claims, and the Commission has crafted the examples to be consistent with these interpretations. As stated in the FTC Policy Statement on Deception ("Deception Policy Statement"), "[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

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[32] See, e.g., FTC Policy Statement on Unfairness at n.8 (1980) (specifying businesses as consumers protected under Section 5); S. Comm. on Commerce, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, S. Rep. No. 93-151, at 27 (1973); In re Verrazzano Trading Corp., 91 FTC 888 (1978) (stating that Section 5 does not tolerate deceptive practices by businesses merely because they are targeted to other businesses rather than directly to consumers); FTC v. Assoc. Record Distrib., No. 02-21754-cv-GRAHAM/GARBER (S.D. Fla., Stip. Final J. and Order for Perm. Inj. entered May 21, 2003).

[33] Section 260.1(c). Additionally, to bolster businesses' familiarity with the Guides, the Commission will continue its business education outreach efforts.

[34] Section 260.6, Example 5.

determining how reasonable consumers are likely to respond."[35] Marketers therefore must understand who their customers are, and how their advertisements will be interpreted by those customers. Marketers should be aware, however, that their claims may ultimately be passed down to individual consumers. Therefore, they should be careful not to provide other businesses with the means and instrumentalities to engage in deceptive conduct.[36]

Moreover, the Commission agrees that enforcement is a key component of greater compliance. Therefore, in recent years it has stepped up enforcement against companies making deceptive environmental claims. For example, the Commission sued a company for providing environmental certifications to any businesses willing to pay a fee without considering their products' environmental attributes.[37] Additionally, the Commission announced three actions charging marketers with making false and unsubstantiated claims that their products were biodegradable.[38] The Commission also charged four sellers of clothing and other textile products with deceptively labeling and advertising these items as made of bamboo fiber, manufactured using an environmentally friendly process, and/or biodegradable.[39] In another case, the

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[35] Appended to Cliffdale Assoc., Inc., 103 FTC 110, 174 (1984).

[36] See, e.g., FTC v. Int'l Research and Dev. Corp. of Nevada, No. 04C 6901 (N.D. Ill. Oct. 27, 2004).

[37] Nonprofit Mgmt. LLC, Docket No. C-4315 (Jan. 11, 2011).

[38] Dyna-E Int'l, Inc., Docket No. 9336 (Dec. 15, 2009); Kmart Corp., Docket No. C-4263 (July 15, 2009); Tender Corp., Docket No. C-4261 (July 13, 2009).

[39] CSE, Inc., Docket No. C-4276 (Dec. 15, 2009); Pure Bamboo, LLC, Docket No. C-4274 (Dec. 15, 2009); Sami Designs, LLC, Docket No. C-4275 (Dec. 15, 2009); The M Group, Inc., Docket No. 9340 (Apr. 2, 2010). 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, No. 09-CV-00386 (N.D. Ala. Mar. 2, 2009); United States v. Meyer Enters., LLC, 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 Enters., LLC, No. 09-141-FSH (D.N.J. Jan. 12, 2009); FTC v. Five Star Auto Club, Inc., No. 99-CIV-1963 (S.D.N.Y. Dec. 15, 2008); see also Long Fence & Home, LLLP, Docket No. C-4352 (Apr. 5, 2012); Serious Energy, Inc., Docket No. C-4359 (May 16, 2012); Gorell Enters., Inc., Docket No. C-4360 (May 16,

Commission sued a company offering "free" books purportedly showing consumers how to become "green millionaires," by, among other things, installing roof solar panels for free.[40] The Commission will continue to focus its enforcement efforts in the environmental area to ensure compliance with the Green Guides.

Regarding concerns that enforcement of the Guides will disproportionately impact small businesses, the Commission emphasizes that all marketers, regardless of their size, must comply with Section 5 of the FTC Act. The Commission recognizes, however, that occasionally small businesses may inadvertently violate the law. Depending on the particular circumstances, the FTC often gives such businesses the opportunity to come into compliance after informal counseling or a warning letter advising them of the need to revise claims to avoid deceiving consumers. If a company fails to respond, the Commission often follows up with investigations and law enforcement.[41]

Finally, several commenters asked the Commission to clarify whether the Guides apply to entities other than manufacturers. Depending on the circumstances, entities such as certifiers, auditors, and wholesale and retail sellers may be liable under Section 5. For example, outside the environmental area, courts have held advertising agencies, catalog marketers, retailers,

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2012); THV Holdings LLC, Docket No. C-4361 (May 16, 2012); Winchester Indus., Docket No. C-4362 (May 16, 2012).

[40] Consumers providing payment information for the book's shipping and handling learned nothing about free solar panel installation but were unknowingly enrolled in a costly negative option program. FTC v. Green Millionaire, LLC, No. 1:12-cv-01102-BEL (Apr. 16, 2012).

[41] For example, the Commission took legal action against five companies for allegedly violating the Appliance Labeling Rule after they failed to heed warning letters explaining the Rule's requirements and notifying them that they were not in compliance. P.C. Richard & Son, Inc., Docket No. C-4319 (Nov. 1, 2010); Abt Electronics, Inc., Docket No. C-4302 (Nov. 1, 2010); Pinnacle Marketing Group, Corp., Docket No. C-4304 (Nov. 1, 2010); Universal Appliances, Kitchens, and Baths, Inc., Docket No. C-9347 (Nov. 1, 2010); and ABB - Universal Computers and Electronics, Inc., Docket No. C-3867 (Nov. 1, 2010).

infomercial producers, and home shopping companies liable for their roles in making or disseminating deceptive claims.[42] In the environmental context, in one of the recent cases described above, the Commission alleged that, by furnishing businesses with certifications and other materials to promote their certified status, the company provided others with the means and instrumentalities to commit deceptive acts and practices.[43] The Commission will continue to bring actions as appropriate in all these areas to protect consumers.

B. Changes in Technology or Economic Conditions

1. Proposed Revisions

The Commission asked commenters to discuss what modifications, if any, it should make to the Guides to account for changes in technology or economic conditions. In response, many commenters and panelists observed that consumers increasingly use the Internet to check product claims and learn about products' environmental attributes. In its October 2010 Notice, the Commission recognized this fact.[44] It emphasized, however, that websites cannot be used to qualify otherwise misleading claims that appear at the point of sale.[45] Of course, if the point of

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[42] See, e.g., Standard Oil Co., 84 FTC 1401, 1475 (1974), aff'd and modified, 577 F.2d 653 (9th Cir. 1978) (an advertising agency may be liable for a deceptive advertisement if the agency was an active participant in the preparation of the advertisement and if it knew or should have known that the advertisement was deceptive); ITT Continental Baking Co., 83 F.T.C. 865, 967 (1973), aff'd and modified, 532 F.2d 207 (2d Cir. 1976) (same); Spiegel, Inc. v. FTC, 494 F.2d 59 (7th Cir. 1974) (upholding Commission order against catalog retailer to cease and desist engaging in deceptive practices).

[43] Nonprofit Mgmt. LLC, Docket No. C-4315 (Jan. 11, 2011).

[44] 75 FR 63552, 63557 (Oct. 15, 2010).

[45] Id.

sale is online, a marketer can make any necessary disclosure online, provided such disclosure is clear and conspicuous,[46] and in close proximity to the claim the marketer is qualifying.[47]

2. Comments

Commenters disagreed about whether it is appropriate to use the Internet to qualify claims appearing on labels or in other advertisements. Several agreed with the Commission's statements in the October 2010 Notice.[48] For example, NAIMA recommended that the Guides, like the FTC's R-Value Rule, specifically state that all qualifications be prominent and in close proximity to a claim.[49] NAIMA also stated that, while consumers increasingly access the Internet to verify product or service recommendations, this "does not translate into consumers routinely going on to the Internet to determine if claims have been qualified at a separate and remote source."[50] It further opined that allowing marketers to augment environmental claims with information on a remote website would be inconsistent with the FTC's Deception Policy Statement, the R-Value Rule, and common sense.[51]

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[46] See FTC's online advertising disclosure guidelines, Dot Com Disclosures: Information about Online Advertising (May 3, 2000), which provides guidance to businesses about how FTC law applies to online activities with a particular focus on the clarity and conspicuousness of online disclosures. In May 2011, the Commission sought public input for revising this guidance to reflect changes in the online marketplace. See http://www.ftc.gov/os/2011/05/ 110526dotcomecomments.pdf. The Commission also hosted a public workshop addressing this issue in May 2012. See http://www.ftc.gov/bcp/workshops/inshort/index.shtml.

[47] Deception Policy Statement, 103 FTC at 174.

[48] AWC, Comment 244 at 2 and AF&PA, Comment 171 at 2 (stating that allowing the use of website links or other references to additional information is appropriate but agreeing with the Commission that this information should not be used to qualify otherwise misleading claims that appear on labels or other advertisements); FSC-US, Comment 203 at 13-14; NAIMA, Comment 210 at 2; PPC, Comment 221 at 3 (endorsing AF&PA's comment); Weyerhaeuser, Comment 336 at 1.

[49] NAIMA, Comment 210 at 2.

[50] Id.

[51] Id.

Others expressed concern that companies would be unable to provide consumers with sufficient information on a package or advertisement, and urged the Commission to be more flexible. For example, while agreeing that a marketer should not be able to make a deceptive claim on a product label and qualify it on its website, FSC noted that, without the Internet, it would be unable to fully describe its standard's rigor or to convey the environmental value its label signifies.[52] FSC-US further noted that due to limited "real estate" on products, and because consumers often become familiar with logos and tag lines, certifiers should be able to use "short forms" of widely-recognized seals and certificates.[53]

Others similarly noted the difficulty of conveying information on limited packaging space, and maintained they should be permitted to direct consumers to a website with more detailed and specific information.[54] For example, NAHB asserted that most advertising media would not allow sufficient space to include the "detailed, often lengthy information that may be necessary to provide a full explanation of the claim that will be needed to make the qualification or disclosure clear and understandable."[55] Similarly, NAHB Research Center, which certifies

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[52] FSC, Comment 203 at 14.

[53] See Part C, infra, for a detailed discussion of certification issues.

[54] AF&PA, Comment 171 at 2 (stating that an Internet reference should not be used to qualify otherwise misleading claims, but marketers should be allowed to reference the Internet or other sources for additional information) and PPC, Comment 221 at 3 (endorsing AF&PA's comment); EPA, Comment 109 at 1 (stating that the Guides should note that the Internet may be a reasonable source of information if accessed prior to the point of purchase); FIJI Water, Comment 231 at 2 (agreeing that qualifications will help reduce consumer misinterpretation but, given the complexity of environmental issues, companies should be able to make simple, qualified claims in their advertising materials and provide additional details on their websites); REMA, Comment 251 at 3 (asking the Commission to clarify the proximity of any detailed information required to qualify renewable energy claims and assert that marketers be allowed to make a general disclosure statement near the claim and refer consumers to a website for more detailed information).

[55] NAHB, Comment 162 at 2 and NAHB Research Center, Comment 227 at 5 (noting the "tension between providing consumers with sufficient information to make an informed decision and overwhelming them with detailed information so that marketers cannot effectively market product features"); see also PFA, Comment 263 at 1 (stating that a reference to a website with further details of a product's benefits should not eliminate the need to

homes' environmental attributes, noted that it evaluates over 85 green building practices, including water, resource, energy efficiency improvements, and indoor air quality protection. It argued it would be impracticable to provide this detailed list at the point of sale, and therefore builders should be permitted to simply state their "certified green homes are built in compliance with the ANSI-approved ICC 700-2008 National Green Building Standard" and refer consumers to a website or a secondary set of marketing materials.[56]

In addition, FMI observed that, with the prevalence of portable, hand-held devices such as Blackberrys and iPhones, consumers have easier access to information at the point of sale.[57] Therefore, FMI urged the Commission to reflect this reality in its guidance by offering a more detailed description of when "the use of 'please see www.___.com' would be appropriate." It recognized, however, that claims on the package or advertisement cannot otherwise be misleading.[58]

3. Analysis and Final Guidance

The Internet is a valuable tool for providing consumers with useful environmental information, and the comments indicate consumers are increasingly accessing the Internet to

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qualify a general environmental benefit claim, but it should limit the extent and depth of the qualification required at the point of sale); 3Degrees, Comment 330 at 1 (noting that because many environmental claims "may use accounting methodology or data that needs explanation at a level of detail that is often unachievable within the spatial limitations of a marketing piece or product packaging," the Commission should allow disclosure language near an environmental claim to direct a consumer to a website with more detailed and specific information); ITIC, Comment 313 at 6 (asking the Commission to advise that including a website with additional information about a well-known and widely-recognized certification program is sufficient to avoid consumer deception); ATA, Comment 314 at 15-16; CSPA, Comment 242 at 4.

[56] NAHB Research Center, Comment 227 at 5-6 (also noting that consumers already expect to seek supplementary information from additional sources).

[57] FMI, Comment 299 at 2.

[58] Id.; see also FIJI Water, Comment 231 at 2 (stating that new portable technology provides consumers with ready access to the Internet and to qualifying information provided on websites at point of purchase); Boise, Comment 194 at 2.

obtain this information. The Commission reiterates, however, that websites cannot be used to qualify otherwise misleading claims appearing on labels or in other advertisements because many consumers would not see that information before their purchase. For example, many consumers buying household cleaners are unlikely to research those products' environmental qualities on the Internet prior to purchasing the products. While some consumers may use smartphones and other devices to access product information at the point of sale, there is no indication that the majority, much less the vast majority, of consumers currently consult these devices when making point-of-sale purchasing decisions.[59] Therefore, 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.[60] These principles, which already appear in the Guides,[61] help ensure that consumers notice, read, and understand disclosures to prevent deception.

Of course, marketers can provide valuable, supplemental information to consumers on their websites. For example, although Section 5 does not require marketers to make their claim substantiation public, marketers may wish to direct consumers to their website for information about the evidence supporting their claim, such as test results or certifications.

C. International Laws

Many commenters recommended that the Commission harmonize the Guides with the International Organization for Standardization ("ISO") 14021 environmental marketing

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[59] According to a May 2011 Pew Internet Project survey, only 35 percent of American adults own a smartphone.

[60] Deception Policy Statement, 103 FTC at 174.

[61] The Guides' General Principles section states: "[t]o make disclosures clear and prominent, marketers should . . . place disclosures in close proximity to the qualified claim . . . ." 16 CFR 260.3(a).

standards.[62] The Commission carefully considered these proposals and tried to harmonize the Guides with ISO where possible. For example, as discussed in Part IV.F, infra, the Commission revises the proposed free-of section so that it more closely aligns with ISO guidance.[63] As the Commission emphasized in its October 2010 Notice, however, the goals and purposes of ISO and the Green Guides are not always congruent.[64] The Commission publishes the Guides 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 cause less environmental stress.[65] Accordingly, the final Guides cannot always align with ISO standards. To avoid duplication and to provide context, the Commission discusses specific ISO standards in the following sections: Free-of Claims and Non-toxic Claims (Part IV.F) and Recyclable Claims (Part IV.H).

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[62] ISO is a non-governmental organization that 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).

[63] Section 260.9(c) allows for the possibility that marketers can make truthful free-of claims in some circumstances even when a product contains a trace amount of a substance. See ISO 14021:1999(E) at 5.4 (stating that "[a]n environmental claim of '. . . free' shall only be made when the level of the specified substance is no more than that which would be found as an acknowledged trace contaminant or background level").

[64] 75 FR 63552, 63558 (Oct. 15, 2010).

[65] 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).

D. Overlap with Federal, State, or Local Laws

1. Proposed Revisions

In its October 2010 Notice, the Commission stated that, 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. Therefore, the Commission did not propose any revisions addressing potential overlap or conflict.

2. Comments

Commenters discussed the proposed Guides' interaction with other laws in three contexts. First, some commenters asked the Commission to address apparent conflicts or overlap. Second, others asked the Commission to clarify that compliance with state or local laws constitutes compliance with the Green Guides. Finally, two commenters raised jurisdictional concerns.

Several commenters expressed concern that the proposed Guides conflict or overlap with specific laws. For example, as discussed in Part F, infra, EPA noted that the Commission's proposed guidance allowing free-of claims despite de minimis presence of a substance would permit claims EPA considers false or misleading.[66] Specifically, under EPA regulation, the presence of any dye or fragrance, even a de minimis amount, in antimicrobial pesticides carrying a free-of claim would render the claim false or misleading.[67]

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[66] EPA, Comment 288 at 8.

[67] EPA also suggested that the Commission's guidance on "non-toxic" claims may be inconsistent with EPA pesticides regulations. Specifically, proposed Example 3 in the free-of and non-toxic section suggested a marketer can make a non-toxic claim for a pesticide product, which would likely not be acceptable for pesticide products under current EPA regulations. EPA, Comment 288 at 8 (citing 260.9, Example 3); see also Eastman, Comment 322 at 4-5. See Part IV.F, infra.

Similarly, the San Francisco Department of the Environment and CAW explained that California law bans degradable claims for all plastic bags, cups, and food containers,[68] while the Green Guides appear to allow certain qualified degradable claims for these products. In addition, although not detailing how, RILA posited that Wisconsin's regulation requiring "free-of BPA" labels for certain products may be incompatible with the Commission's guidance on free-of claims.[69] It thus asked the Commission to clarify how marketers should respond to this apparent inconsistency.

Other commenters asked the Commission to clarify that compliance with state and local law constitutes compliance with the Guides. For example, HAVI Global Solutions asserted that the FTC should deem a marketer in compliance with the Guides' recyclable provisions if it complies with a county ordinance requiring paper bags labeled as "recyclable" to: (1) contain no old growth fiber; (2) be "100% recyclable"; and (3) contain at least 40 percent post-consumer content.[70] Similarly, AA&FA asked the Commission to clarify that a marketing claim based on adherence to federal or state guidelines or to ISO standards cannot be deceptive.[71]

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[68] See San Francisco Department of the Environment, Comment 319 at 1; CAW, Comment 3019 at 1 (also stating that these products can be labeled compostable only if they meet the ASTM D6400 standard).

[69] RILA, Comment 339 at 1; see also Old Mill, Comment 355 at 4-5 (raising concern that the Commission's proposed guidance on renewable energy claims may conflict with Virginia law; see Part IV.K, infra, for an analysis of this comment).

[70] HAVI, Comment 266 at 1; see also WM, Comment 138 at 2.

[71] AA&FA, Comment 233 at 6; but see Eastman, Comment 322 at 4-5 (recommending the Commission refrain entirely from providing guidance on non-toxic claims, in part because of already existing regulatory requirements). See Part IV.F, infra, for a further discussion of this issue.

Finally, two commenters raised jurisdictional issues. WI advised that the Guides overlap with the TTB's jurisdiction.[72] According to WI, TTB's regulations require promotional materials for alcohol beverages be truthful, accurate, and not misleading.[73] WI explained that TTB pre-approves all labels and encourages companies to informally submit advertising for review. Therefore, WI expressed concern that wine producers would face a secondary level of scrutiny from the Commission, often well after TTB has reviewed and approved an advertisement. Accordingly, it suggested the Commission coordinate with TTB to help limit overlapping enforcement for environmental claims.[74]

Moreover, ATA asked the Commission to expressly state that the airline industry is exempt from the Commission's statutory authority because Section 5 exempts air carriers.[75] Therefore, it asked the Commission to remove the Guides' references to airlines and flight ticket purchases.[76] ATA acknowledged, however, that the Commission may have jurisdiction over non-carrier third parties, such as those offering products claimed to offset carbon emissions related to air travel. In these cases, ATA suggested the Commission first consult with the DOT

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[72] WI, Comment 259 at 1.

[73] Id. at 2.

[74] WI, Comment 259 at 2-3 (stating, for example, that the Commission and TTB develop a protocol, such as currently exists between USDA and TTB on references to "organic" for environmental claims).

[75] ATA, Comment 314 at 4 (stating that, under Section 5, the "Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except [among others] common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49 . . . ." 15 U.S.C. § 45(a)(2) (2006) (emphasis added)).

[76] ATA, Comment 314 at 7-8 (citing the example relating to airline offset sales under the proposed guidance on carbon offsets (260.5, Example 1)).

and provide commercial air carriers with "appropriate input" before pursuing any policies or actions.[77]

3. Analysis and Final Guidance

The Commission makes some changes and several observations based on these comments. In response to ATA's comment, the Commission clarifies that the airline industry is exempt from Section 5 of the FTC Act, and has removed the Guides' references to airlines and flight ticket purchases from the carbon offset section. The Commission, however, has jurisdiction over non-carrier third parties, such as those offering products claimed to offset carbon emissions related to air travel. Accordingly, as discussed in Part IV.B, infra, the Commission retains the example cited by ATA but modifies it to refer to online travel agencies, rather than airlines.[78]

In response to EPA, the Commission revises proposed Example 3 in the non-toxic section so that it refers to a cleaning product rather than a pesticide.[79] As EPA explains, its labeling requirements prohibit non-toxic claims for pesticide products, rendering proposed Example 3 confusing and potentially contradictory. To avoid this confusion in other areas, the Commission reminds marketers always to follow the strictest labeling law or regulation applicable to their products. The Green Guides, as administrative interpretations of Section 5, are not enforceable

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[77] Id. at 11-12 (also requesting the Commission state that federal law preempts states from regulating airlines in this area, and therefore the Guides cannot be the basis of any state regulatory action).

[78] 260.5, Example 1 in final Guides.

[79] 260.10, Example 1 in final Guides.

regulations. They do not preempt other laws.[80] Thus, even if a claim is not deceptive under the Guides, a marketer should not make the claim if another law proscribes it.

On the other hand, a marketer may comply with a local or state law but, nevertheless, make deceptive claims under the Guides. For example, a marketer may meet a local ordinance's requirements for making an unqualified recyclable claim for a paper bag (i.e., its bag contains no old growth fiber, is entirely recyclable, and contains at least 40 percent post-consumer content), but not be able to substantiate that recycling facilities for the bag are available to a substantial majority of consumers or communities where the bag is sold.[81] Accordingly, the Commission retains Section 260.1 of the 1998 Guides, which emphasizes that "[c]ompliance with [federal, state, or local laws] will not necessarily preclude Commission law enforcement action under the FTC Act."[82]

Similarly, although the state or local laws described by some commenters differ from, or require more than, the Guides, the Commission clarifies that these differences do not necessarily present a conflict. For example, a marketer may follow the FTC's guidance on free-of claims and still comply with a state regulation requiring "free-of BPA labels."[83] Likewise, a company may follow the Guides' recyclability provisions (i.e., by qualifying a recyclability claim to avoid deceiving consumers about the limited availability of recycling programs and collection sites)

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[80] 16 CFR 260.1(b).

[81] See Part IV.H, infra.

[82] 16 CFR 260.1(b).

[83] The commenter raising this issue appears to be concerned that, while Wisconsin requires a "free-of BPA" label, the proposed revised Green Guides might discourage this "free-of" claim if BPA is not typically associated with a relevant product category. This does not present a conflict, however. As discussed in Part IV.F, infra, substances may become associated with product categories through media attention, even if the product category has never contained the substance at issue. In such a case, a free-of claim is non-deceptive. See Part IV.F, infra, for an analysis of this and other comments detailing potential conflicts involving free-of and non-toxic claims.

and still comply with a county ordinance's specific requirements that a bag labeled "recyclable" must meet certain requirements, such as containing no old growth fiber.

Finally, although there may be some overlapping jurisdiction among federal agencies, such as the TTB, the Commission seeks to avoid providing guidance that duplicates or is inconsistent with other agencies' guidance. If there were an actual conflict, the Commission has prosecutorial discretion to refrain from bringing an enforcement action against a marketer who makes a claim inconsistent with the Guides in order to comply with federal law.

E. Consumer Perception Evidence, Generally

1. Comments

A few commenters discussed the Commission's use of consumer perception data to formulate guidance. EPA, for example, supported the Commission's use of such data to determine whether marketing claims are unfair or deceptive, but emphasized that consumer perceptions can change over time. Therefore, it advised the Commission to remind marketers they may be able to substantiate claims with more current consumer perception evidence.[84]

Earthjustice urged the Commission to place increased weight on the perceptions of consumers who are more influenced by environmental labeling claims.[85] Specifically, it suggested the Commission re-analyze its survey results to evaluate environmental claims' effect

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[84] EPA, Comment 288 at 1 (also urging the Commission to educate the public regarding possible misuse and misappropriation of labels, slogans, or brands to reduce consumer deception and confusion); see also EHS Strategies, Comment 111 at 2 (suggesting the Commission continue to conduct and publish its own consumer perception studies and update the Guides with examples to provide guidance on what is a "reasonable interpretation").

[85] Earthjustice, Comment 353 at 2-3.

on the study's "green consumers."[86] Earthjustice opined that examining their responses may alter the Commission's conclusions, including its guidance on life cycle assessment.[87]

On the other hand, SCS advised the Commission not to rely solely on consumer perception to determine what is deceptive because consumers may have misperceptions about environmental claims due to "media reports, advertising messages, or other forces that may or may not reflect reality."[88] Because consumers, in SCS's view, are often ill-equipped to distinguish factual from deceptive environmental claims, it advised the Commission to balance "the test of consumer perception" against "the test of the veracity of claims themselves, sufficiently documented, and the context within which such claims are presented."[89] Similarly, AA&FA asserted the Commission should not base its guidance on incorrect consumer perception and that factual claims should trump consumer perception data.[90]

2. Analysis and Final Guidance

The Commission issued the Guides to help marketers avoid making deceptive claims under Section 5 of the FTC Act. Under Section 5, a claim is deceptive if it likely misleads reasonable consumers. Because the Guides are based on how consumers reasonably interpret

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[86] Such consumers included those who reported either having paid more or having made a special trip to get a product claimed as environmentally preferable, and those who claimed to have made six or more purchasing decisions based on claims appearing on product labels.

[87] Id. (noting that the Commission declined to advise marketers that broad environmental claims should be substantiated with life cycle analysis, in part, because only 15 percent of consumers thought of all four phases of a product's life cycle when viewing these claims and that the Commission should re-examine how "green consumers" evaluate these claims).

[88] SCS, Comment 264 at 1.

[89] Id.

[90] AA&FA, Comment 233 at 3-5 (expressing concern about relying on consumer perception relating to seals and certifications because some certification schemes are well known abroad and in the industry but not in the U.S., and American consumers might misperceive a seal's meaning even though the marketer has a "fully factual and substantiated basis to use that seal.").

claims, consumer perception data provides the best evidence upon which to formulate guidance.[91] As EPA observed, however, perceptions can change over time. The Guides, as administrative interpretations of Section 5, are inherently flexible and can accommodate evolving consumer perceptions. Thus, if a marketer can substantiate that consumers purchasing its product interpret a claim differently than what the Guides provide, its claims comply with the law.

Moreover, in response to comments recommending that the Commission focus on "green consumers," the Commission emphasizes that the Green Guides are based on marketing to a general audience. However, when a marketer targets a particular segment of consumers, such as those who are particularly knowledgeable about the environment, the Commission will examine how reasonable members of that group interpret the advertisement. The Commission adds language in Section 260.1(d) of the Guides to emphasize this point. Marketers, nevertheless, should be aware that more sophisticated consumers may not view claims differently than less sophisticated consumers. In fact, the Commission's study yielded comparable results for both groups. For example, not only those respondents indicating the most environmental concern, but also those indicating little environmental concern, believed that a general, unqualified "green" claim suggested specific, unstated environmental benefits, such as biodegradable and recyclable.[92]

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[91] Because the Guides focus on consumer interpretation rather than on scientific or technical definitions, a marketer may make a claim that meets a scientific standard but that still may deceive consumers (see, e.g., Part IV.E on biodegradable claims).

[92] See Part IV.A, infra.

F. The Commission's Review Process

1. Comments

Several commenters addressed the Commission's regulatory review process, suggesting the Commission review the Green Guides more frequently. For example, EPA suggested that more frequent reviews would help the Commission keep pace with the rapidly evolving use of environmental marketing terms and consumers' changing perceptions.[93] Similarly, Green Seal suggested the Commission develop a more streamlined process that will enable more frequent and quicker revisions.[94] Two other commenters, the Institute for Policy Integrity and UL, specifically recommended a three-year review cycle to keep pace with evolving science and technology.[95]

2. Analysis and Final Guidance

Given the comprehensive scope of the review process, the Commission cannot commit to conducting a full-scale review of the Guides more frequently than every ten years. The Commission, however, need not wait ten years to review particular sections of the Guides if it has reason to believe changes are appropriate. For example, the Commission can accelerate the scheduled review to address significant changes in the marketplace, such as a substantial change in consumer perception or emerging environmental claims. When that happens, interested

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[93] EPA, Comment 288 at 1.

[94] Green Seal, Comment 280 at 1.

[95] UL, Comment 192 at 4; Institute for Policy Integrity, Comment 241 at 1-2 (also recommending that the Commission collaborate with other agencies on environmental labeling issues); see also GreenBlue, Comment 328 at 3 (suggesting the Commission consider affiliating with "appropriate and credible organizations" to "substantiate the scientific basis for" environmental claims on an ongoing basis).

parties may contact the Commission or file petitions to modify the Guides pursuant to the Commission's general procedures.[96]

III. Life Cycle Issues

A. 1998 Guides

Life cycle assessment ("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."[97] The 1998 Green Guides stated that they do not provide guidance on life cycle claims because the Commission lacked "sufficient information on which to base guidance."[98]

B. October 2010 Notice Analysis

In 2010, based on its review of the comments and the results of its consumer perception study, the Commission again declined to propose guidance.[99] The Commission explained that it would continue to analyze life cycle claims appearing in marketing on a case-by-case basis because it lacked information about how consumers interpret these claims. It also stated that,

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[96] Information about petitioning the FTC may be found in the Commission's rules. See 16 CFR 1.6.

[97] The Commission uses the term "life cycle assessment," rather than "life cycle analysis" to be consistent with EPA documents and ISO 14040 standards. EPA defines LCA as a "technique to assess the environmental aspects and potential impacts associated with a product, process, or service by: Compiling an inventory of relevant energy and material inputs and environmental releases; Evaluating the potential environmental impacts associated with identified inputs and releases; and Interpreting the results to help you make a more informed decision." EPA National Risk Management Research Laboratory Life Cycle Assessment website. See www.epa.gov/nrmrl/std/lca/lca.html.

[98] 16 CFR 260.7 n.2.

[99] The Commission proposed deleting footnote 2 of the 1998 Guides, which states that the Guides do not address life cycle claims, to achieve consistency. While there are other claims the Guides do not address, they do not specifically identify them.

due to the complexity of these claims, general advice is unlikely to be useful in any particular case. Additionally, the Commission declined to advise marketers to conduct an LCA to substantiate environmental claims. Instead, the Commission stated that marketers may rely on the results of an LCA as all, or part, of their substantiation, as long as they ensure that the LCA constitutes competent and reliable scientific evidence to support their claims. Finally, the Commission stated that it had no basis for favoring one LCA methodology over others.

C. Comments

Several commenters addressed the Commission's decision not to propose guidance on life cycle claims. While some specifically addressed LCAs in marketing claims, most focused on LCAs as substantiation.

1. LCAs as Marketing Claims

Those supporting the Commission's proposal primarily stated this area is not ripe for guidance due to the complexity and variability of LCAs.[100] For example, NAIMA asserted that LCAs vary significantly in scope, depending, for example, on where the ultimate life cycle assessment begins and ends.[101] It suggested, however, that if the Commission ultimately provides LCA guidance, it should advise marketers to disclose "the uncertainty and variability of LCA science."[102]

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[100] NAIMA, Comment 210 at 3-4 (but noting that as complexities of LCA issues become less cumbersome and more familiar, it may be advisable for the FTC to provide additional guidance in the future); see also ACA, Comment 237 at 3; EEI, Comment 195 at 2; EPA, Comment 288 at 18.

[101] NAIMA, Comment 210 at 3-4.

[102] Id. at 4.

Others urged the Commission to provide guidance on presenting LCA information in marketing.[103] For example, Interface argued the Commission should advise marketers advertising LCA data to describe the LCA's scope, and indicate whether a third party verified the LCA.[104] In addition, GPR and Weyerhaeuser recommended the Guides advise marketers to use the term "life cycle assessment" only if they have performed and verified the LCA consistent with ISO Standard 14040 series or other equivalent internationally accepted standards.[105] Finally, FMI asked the Commission to provide examples of non-deceptive claims featuring LCAs.[106]

2. LCAs as Substantiation

Commenters also disagreed about whether the Commission should provide guidance on using LCAs as claim substantiation, and the adequacy of certain LCA standards and methodologies.

a. Comments Supporting the Commission's Approach

Several commenters supported the Commission's decision not to advise marketers that they should undertake an LCA before making environmental claims.[107] For example, DMA

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[103] See, e.g., Interface, Comment 310 at 1-2; GPR, Comment 206 at 3; Weyerhaeuser, Comment 336 at 1; FMI, Comment 299 at 4.

[104] Interface, Comment 310 at 1; see also UL, Comment 192 at 4 (recommending the Commission advise marketers to identify the assessor, the LCA's tools and "boundary conditions," and the included life cycle stages).

[105] GPR, Comment 206 at 3; Weyerhaeuser, Comment 336 at 1.

[106] FMI, Comment 299 at 4.

[107] See, e.g., EPA, Comment 288 at 18 (but suggesting the Commission work with EPA to establish a process and the appropriate criteria distinguishing between the requirements needed for environmental labels (ISO Type 1, multi-attribute label awarded by a third party, claims and ISO Type II, single-attribute label developed by a producer) and declarations (ISO Type III, eco-label based on a full life cycle assessment), which have different requirements under the ISO 14020 standards series); NAIMA, Comment 210 at 3-4; ACA, Comment 237 at 3; DMA, Comment 249 at 4; EEI, Comment 195 at 2; Interface, Comment 310 at 1.

noted that there is considerable debate over which factors to include in an LCA and how to weigh those factors.[108] DMA also expressed concern about the significant cost that LCAs could impose on companies, which could discourage them from providing useful information to consumers regarding the environmental benefits of their products and services.[109]

While supporting the Commission's decision not to advise marketers to conduct an LCA to substantiate claims, others asserted this guidance is contradicted by the proposed examples and the Commission's October 2010 Notice questions.[110] For example, ANA expressed concern that the Commission's request for comment about qualified general benefit claims where there are environmental trade-offs[111] implied the Commission may "infuse [an] LCA requirement into every qualified, general environmental claim."[112] ANA asked the Commission to clarify whether it will require an LCA for every single-attribute claim.[113] Further, some commenters supported the Commission not endorsing a particular LCA methodology.[114] For example, ACA contended

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[108] DMA, Comment 249 at 4; see also EEI, Comment 195 at 2 (stating that LCA still presents numerous challenges, inconsistent methodologies, complexity, and expense).

[109] DMA, Comment 249 at 4-5.

[110] See ANA, Comment 268 at 2; ACA, Comment 237 at 3-4; Scotts, Comment 320 at 4 and 6 (citing examples in the following sections: General Environmental Benefit Claims (260.4), Free-of and Non-Toxic Claims (260.9), and Ozone-Safe and Ozone-Friendly Claims (260.10)). See Parts IV.A, IV.F, and IV.G, infra, for a further discussion of these comments.

[111] In the October 2010 Notice, the Commission asked the following question: "Do consumers interpret general environmental benefit claims, when qualified by a particular attribute, to mean that the particular attribute provides the product with a net environmental benefit?" 75 FR 63552, 63597 (Oct. 15, 2010).

[112] ANA, Comment 268 at 2-3.

[113] Id.

[114] ACA, Comment 237 at 3; ARTA, Comment 34 at 1; Evergreen, Comment 188 at 1; EEI, Comment 195 at 2.

the current LCA standards are not sufficiently uniform "to provide meaning to marketing or substantiation efforts."[115]

Finally, while supporting the Commission's decision not to endorse particular methodologies, some suggested the Commission encourage the use of LCAs.[116] For example, ACLCA concurred that the Commission should not make "technical decisions" about how to conduct LCAs, but suggested the Guides acknowledge that LCA provides "unparalleled benefits in documenting the environmental performance of products."[117] Similarly, FMI opined that, notwithstanding the complexity of LCA issues, the Guides should recognize that marketers increasingly base their claims on LCAs; that several organizations have adopted LCA standards; and that companies are adopting their own LCA criteria to measure LCA accurately and reliably.[118]

b. Comments Disagreeing with the Commission's Approach

Several commenters disagreed with the Commission's decision not to provide guidance on the use of LCAs as substantiation for claims or to expressly endorse specific life cycle methodologies.

Two commenters recommended the Guides provide that only third-party audited LCAs be eligible as the basis for environmental marketing claims. Specifically, Bekaert asserted that if

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[115] ACA, Comment 237 at 3; USG, Comment 149 at 4 (stating that there are competing LCA methodologies, but that methodologies will become increasingly standardized and consumers will become increasingly knowledgeable, a process that will be "hastened and improved with active and strong encouragement from the FTC").

[116] ACLCA, Comment 140 at 1; FMI, Comment 299 at 4; USG, Comment 149 at 2.

[117] ACLCA, Comment 140 at 1.

[118] FMI, Comment 299 at 4; see also USG, Comment 149 at 2-3 (stating that several standard LCA methodologies and substantial databases are available to companies).

a third party does not audit an LCA, and the LCA is not eligible for a verified rating or formal certification, it should be used only as an internal, decision-making tool.[119] GreenBlue similarly stated that, as claims based on LCAs become more complex, it is particularly important for independent third parties to evaluate them.[120]

Additionally, several commenters asked the Commission to recommend the use of ISO 14040 standards as an appropriate means to substantiate LCA-based claims. Specifically, they suggested the Guides state that ISO standards provide the internationally-recognized bases upon which to approach LCAs.[121] Alternatively, they asked the Commission to reference these methods as examples of the "standards generally accepted in the relevant scientific fields."[122] For example, SCS stated that, while it is premature to recommend one LCA methodology over another, the Guides should establish ISO 14044 as the minimum level of assessment for LCA.[123] According to SCS, ISO 14044 is the only standardized assessment method by which companies can evaluate their products to confirm that they offer true environmental benefits without negative environmental trade-offs.[124]

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[119] Bekaert, Comment 307 at 1.

[120] GreenBlue, Comment 328 at 2-3.

[121] AWC, Comment 244 at 3; AF&PA, Comment 171 at 3; PPC, Comment 221 at 4 (endorsing AF&PA's comment); Weyerhaeuser, Comment 336 at 1; Evergreen, Comment 188 at 1.

[122] See, e.g., NatureWorks, Comment 274 at 3; see also SCS, Comment 264 at 4; GPR, Comment 206 at 3 (Guides should advise marketers to rely on a study conforming to ISO 14040 series and to make that study publicly available).

[123] SCS, Comment 264 at 4-5 (also stating that LCA costs have dropped significantly over the past 20 years and that data collection and analysis costs fall well within most companies' budgets).

[124] Id. (also asserting that the fact that few respondents (15 percent) in the Commission's study did not consider each of the life-cycle stages when presented with a claim reflects "the state of consumer education about the life cycle environmental impacts associated with products," and that the Commission should not diminish the importance of LCA analyses merely because consumers are new to this kind of thinking).

D. Analysis

The Commission does not provide guidance on the use of life cycle information in marketing. The Commission, however, clarifies its guidance on LCAs as substantiation. In certain contexts, marketers may have to evaluate the full environmental impact of their products to substantiate claims implying broad environmental superiority.

Some commenters urged the Commission to provide specific guidance regarding claims featuring LCAs. The Commission, however, cannot provide general advice on these claims because it has insufficient information on how consumers interpret them. Moreover, general guidance and examples would have limited utility given the complexity and variability of these claims. Marketers, nevertheless, are responsible for substantiating consumers' understanding of their claims in the context of their advertisements. Therefore, marketers featuring LCA data in an advertisement may need to copy test their claims to determine what material implied claims they convey.

While the Commission cannot provide guidance on how to make LCA claims in marketing, it clarifies that marketers may need to consider the significant environmental impacts of a product or service through its lifetime. Specifically, as discussed in Part IV.A, infra, depending on the context, a general environmental claim combined with a specific attribute claim may convey that a product is more environmentally beneficial overall because of the particular touted attribute. In such cases, marketers may have to analyze environmental trade-offs associated with that attribute to determine if they can substantiate this implied claim. Whether such a marketer should examine the complete life cycle of a product or conduct a more limited analysis depends on the context of the claim. For example, a marketer may reduce the weight of its plastic packaging and advertise this reduction as an "environmentally friendly

improvement." If the packaging is lighter with no other changes, then the marketer likely can analyze the impacts of the source reduction without evaluating environmental impacts throughout the packaging's life cycle. If, however, manufacturing the new packaging requires, for example, more energy or a different kind of plastic, then a more comprehensive analysis may be appropriate.

Finally, despite some commenters' recommendations, the Commission declines to advise marketers to follow a particular LCA methodology or to advise marketers that an independent third party must certify their LCA. Section 5 of the FTC Act gives marketers the flexibility to substantiate their claims with any competent and reliable scientific evidence that supports a reasonable basis for the claims. This may or may not, for example, include an LCA conducted pursuant to ISO 14040 standards or a third-party certified LCA.[125] Because the Guides interpret Section 5 as applied to environmental claims, the Guides cannot advise marketers to possess a particular form of substantiation that Section 5 does not require. Therefore, 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) is 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 marketer's claims is true.

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[125] See FTC Policy Statement Regarding Advertising Substantiation ("Substantiation Policy Statement"), appended to Thompson Medical Co., 104 FTC 648, 840 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986) (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"). Moreover, the Commission currently has no basis for choosing one LCA methodology over another.

IV. Specific Environmental Marketing Claims

The final Guides address the following claims: (1) general environmental benefit; (2) carbon offsets; (3) certifications and seals of approval; (4) compostable; (5) degradable; (6) free-of; (7) non-toxic; (8) ozone-safe and ozone-friendly; (9) recyclable; (10) recycled content; (11) refillable; (12) renewable energy; (13) renewable materials; and (14) source reduction. The following summarizes the 1998 guidance (for claims addressed by the 1998 Guides); the Commission's proposed revisions to the 1998 Guides; the comments; and the Commission's analysis and final guidance.[126]

A. General Environmental Benefit Claims

1. The 1998 Guides

The 1998 Guides stated that unqualified general environmental benefit claims (e.g., "environmentally friendly"):

> are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers . . . [and] may convey that the product, package, or service has specific and far-reaching environmental benefits.[127]

The Guides reminded 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 duty, they should

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[126] The Commission also proposed non-substantive changes to the current Green Guides to make the Guides easier to read and use, including simplifying language and reorganizing sections to make information easier to find. The Commission received no comments suggesting modifications to these proposed revisions, and, therefore, includes these changes in the final Guides.

[127] 16 CFR 260.7(a).

avoid, or qualify, claims "as necessary, to prevent deception about the specific nature of the environmental benefit being asserted."[128]

2. Proposed Revisions

In its October 2010 Notice, the Commission proposed advising marketers not to make unqualified general environmental benefit claims and emphasized that these claims are very difficult, if not impossible, to substantiate.[129] The proposed Guides also provided more prominent guidance on how to effectively qualify these general claims, focusing consumers on the specific environmental benefits that marketers could substantiate. The Commission expressed concern, however, that in some circumstances, even a qualified general claim may imply that the product has a net environmental benefit.[130] The Commission therefore requested comment on consumer interpretation of qualified general environmental benefit claims and on whether to include guidance concerning this issue. It also sought comment on whether it would be helpful to include an example in the Guides illustrating a qualified general claim that is, nevertheless, deceptive.[131] Finally, citing a finding in its consumer perception study that 27 percent of respondents interpreted the claims "green" and "eco-friendly" as suggesting that a

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[128] Id.

[129] 75 FR at 63563.

[130] In its analysis, the Commission described the following 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." 75 FR at 63564.

[131] Specifically, the Commission proposed the following 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." 75 FR at 63597.

product has no (rather than "some") negative impact, the Commission asked whether, viewing this finding alone, it would be deceptive for a marketer to make an unqualified general environmental benefit claim if the product had a negligible environmental impact.

3. Comments

As discussed below, most commenters supported the Commission's proposed guidance that marketers not make unqualified general environmental benefit claims. Others expressed concern that this guidance is unclear and would impose an unreasonable burden on advertisers. Additionally, while supporting the proposed guidance, many commenters requested further guidance on how to qualify general environmental benefit claims. Others argued that even qualified, general environmental benefit claims are misleading.

a. Unqualified General Environmental Benefit Claims

i. Comments Supporting Proposed Guidance that Marketers Not Make Unqualified Claims

The majority of commenters addressing this topic supported advising marketers not to make unqualified general environmental benefit claims.[132] Green Seal, for example, observed that some consumers may interpret general terms such as "environmentally friendly" to mean a

[132] Agion, Comment 139 at 1-2; AFPR, Comment 246 at 2 (but suggesting substituting the word "tangible" in place of "specific" in the guidance stating that general claims likely convey that the product has "specific and far-reaching environmental benefits"); AF&PA, Comment 171 at 3-4 and AWC, Comment 244 at 3 (agreeing the Guides should strongly discourage unqualified general benefit claims); CU, Comment 289 at 1 (suggesting the Commission expressly state that the word "green" is a general environmental benefit claim); EPA, Comment 288 at 3 (stating general claims on pesticide products imply these products are totally safe for humans and the environment); EHS Strategies, Comment 111 at 2-3; FPA, Comment 292 at 3 (stating that consumers frequently misunderstand these claims); GAC, Comment 232 at 2 (agreeing that unqualified claims convey far-reaching, as well as possibly misleading assumptions about environmental attributes of products); Green Seal, Comment 280 at 2; Huynh, Comment 40 at 1; Seventh Generation, Comment 207 at 2; Interface, Comment 310 at 1; IPC, Comment 202 at 1; GPR, Comment 206 at 3; NatureWorks, Comment 274 at 3; NAIMA, Comment 210 at 4; PPC, Comment 221 at 4-5 (endorsing AF&PA's comment); PFA, Comment 263 at 1; PRSA, Comment 155 at 4; SCS, Comment 264 at 14; Sierra Club et al., Comment 308 at 11; Weyerhaeuser, Comment 336 at 1.

product or service has no environmental impact, or is preferable in every possible aspect.[133] Agion stated that the Commission's proposed guidance will benefit consumers by lessening the number of confusing, unqualified claims in the marketplace.[134] Similarly, IPC asserted the Commission's proposed guidance is "critical to minimizing misleading claims," because general claims are too broad for consumers to understand and because defining these claims is extremely challenging.[135]

Many commenters supporting the Commission's proposed guidance, however, recommended clarification on how marketers can comply. For example, some suggested the Commission explain that certain images can constitute general environmental benefit claims.[136] Cone noted that images, such as polar bears and virgin forests, are the "visual equivalents" of general environmental benefit claims.[137] It thus urged the Commission to directly address the use of environmental imagery through examples showing a "juxtaposition of misleading imagery with qualified and unqualified claims and reinforcing the warning that the marketer will be held accountable for the consumer perceptions that result."[138] In addition, Seventh Generation suggested the Commission clarify that a brand name such as "Eco-friendly" should not be used

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[133] Green Seal, Comment 280 at 2-3 (but stating that there may be options in the future to allow a comparative claim, such as "environmentally preferable," if substantiated by certification to a "robust, life-cycle based standard").

[134] Agion, Comment 139 at 1.

[135] IPC, Comment 202 at 1.

[136] Cone, Comment 205 at 2; EnviroMedia Social Marketing, Comment 346 at 7-8 (stating the Guides should advise marketers not to mislead with images and graphics); Seventh Generation, Comment 207 at 2 (requesting guidance on images of plants, such as aloe, to express or imply a general environmental benefit claim).

[137] Cone, Comment 205 at 2.

[138] Id.; see also Seventh Generation, Comment 207 at 2.

under any circumstance because it cannot be appropriately qualified due to the prominence of brand names on most labels.[139]

In contrast, Scotts argued that requiring changes to trademarked brand names would likely lead to consumer confusion because it would be harder to differentiate products.[140] Additionally, RILA recommended the Guides clarify that marketers need not qualify a brand name containing general environmental language when it is used solely to reference the overall brand. It explained that each product under a brand may have unique environmental benefits.[141]

Several commenters specifically addressed whether it would be deceptive to advertise a product using an unqualified general environmental benefit claim if a product has a negligible environmental impact. For example, SCS stated that, although a general environmental benefit claim technically could be accurate if a product has only a negligible environmental impact, a marketer would still need to qualify this claim to avoid confusing consumers who see other implied claims.[142] Most others opined that the Commission should discourage general environmental benefit claims in all circumstances because virtually every product has more than a negligible environmental impact.[143] For example, UL stated that these claims would be

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[139] Seventh Generation, Comment 207 at 2.

[140] Scotts, Comment 320 at 4-5.

[141] RILA, Comment 339 at 2 (also requesting that Guides clarify that using unqualified general environmental benefits claims in headers and banners identifying product groups is appropriate provided the marketer can appropriately qualify claims related to individual products).

[142] SCS, Comment 264 at 14 (also stating that the only recognized methodology for substantiating such claims is life cycle assessment).

[143] UL, Comment 192 at 5; see also EHS Strategies, Comment 111 at 4 (stating that, because every product has some negative environmental impact, it is not feasible to define "negligible impact"); EnviroMedia Social Marketing, Comment 346 at 10 (stating that all products have environmental impact, even if steps have been or are being taken to lessen their impact); IoPP, Comment 142 at 2 (asserting that this claim, if not necessarily deceptive, would be unwise); Jason Pearson, Comment 285 at 5 (suggesting the Commission discourage all general benefit claims, whether qualified or not because virtually no product has a negligible environmental impact).

deceptive because they are dependent on the definition of "negligible," and there are no consistent definitions of this term.[144] CRS, however, asserted that a product "would be deserving of 'green' and 'eco-friendly' labeling" if credible scientific evidence demonstrates that an item's production and consumption have a negligible environmental impact.[145]

ii. Comments Disagreeing with Proposed Guidance that Marketers Not Make Unqualified General Claims

Some commenters disagreed with the Commission's proposed guidance. As discussed below, they asserted the proposed guidance is unclear, would impose an unreasonable burden on advertisers, and would chill truthful advertising.[146] They also asserted the Commission's study did not provide a basis for this proposed guidance. Others stated that some marketers can substantiate unqualified general claims.

Some commenters remarked that the Commission failed to provide "significant or clear guidance" on what constitutes a general environmental benefit claim. AAAA/AAF, for example, cautioned that because marketers themselves must determine what parts of their advertisements constitute a general claim, they may not be able to recognize when a qualification would be necessary.[147] These commenters questioned whether "the mere color of the packaging or the background color or design might be enough to meet the vague standard of a 'general environmental benefit claim,' and, as a result, be enough to create a deceptive environmental

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[144] UL, Comment 192 at 5 (also asserting such claims should reference legitimate environmental standards and identify who evaluated the product against the standard).

[145] CRS, Comment 224 at 11.

[146] See, e.g., AAAA/AAF, Comment 290 at 4-6; Scotts, Comment 320 at 2-3; WLF, Comment 335 at 2.

[147] AAAA/AAF, Comment 290 at 4-6.

benefit claim?"[148] They also expressed concern that the Commission's proposed guidance, which they characterized as a "strict ban," would chill truthful communication through words, colors, and imagery about the environment.[149] In addition, they argued the Commission lacked a basis for this guidance, which they argued was founded on a "single, limited consumer perception study, which did not account for 'real-world' context or cues."[150] Specifically, they asserted the finding that 52 percent of respondents thought an unqualified general environmental claim conveyed a broad range of environmental meanings was insufficient to justify the Commission's "strong and fundamental" revisions.[151]

Similarly, WLF argued the Commission's study did not support its conclusion that consumers attribute specific, unstated qualities to a product marketed as "green" or "eco-friendly."[152] WLF stated that it is "highly likely that respondents, in order not to sound uninformed about environmental issues, responded positively (when prompted) to the suggestion

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[148] AAAA/AAF, Comment 290 at 4; see also Scotts, Comment 320 at 3 (noting the FTC has not provided extensive guidance on precisely what constitutes a general environmental benefit claim and that marketers may conclude that "nearly anything referencing the environment or any illustrations resembling a nature scene . . . could be construed by consumers to be a general environmental benefit claim").

[149] AAAA/AAF, Comment 290 at 5; see also Scotts, Comment 320 at 2-3 (stating the Commission's proposal imposes a "rigid standard" "ban[ning]" general environmental benefit claims that would severely reduce truthful environmental marketing claims); WLF, Comment 335 at 7-8 (citing First Amendment concerns because proposed guidance "categorically prohibit[s]" unqualified claims, which may not be deceptive in all instances, and further arguing that consumers believe that unqualified general environmental claims are puffery that cannot be proven false).

[150] AAAA/AAF, Comment 290 at 5.

[151] Id. at 5-6; see also PMA, Comment 262 at 3 (arguing the Commission's "flat-out ban" on unqualified claims is overbroad and that the Commission has insufficient evidence to conclude that these claims necessarily are likely to convey implied benefits beyond those that can be substantiated).

[152] WLF, Comment 335 at 7.

that the hypothetical 'green' product possessed two or more of the six attributes."[153] It further asserted that, had the study not suggested the six potential attributes to respondents, "no more than a minute fraction" of them would have volunteered those attributes on their own.[154] WLF argued that reasonable consumers presented with the claim "green" or "eco-friendly" would conclude the product possesses at least one attribute making the product environmentally superior to a competing product with respect to that undefined attribute.[155]

Moreover, two commenters contended that, under certain circumstances, marketers would be able to substantiate a general benefit claim. Specifically, PMA asserted that a marketer could substantiate all reasonable interpretations of general claims if its product has a "positive benefit to the environment in all respects."[156] As an example, PMA described a local nursery selling "an organically grown, indigenous species of tree for local planting in an area in which tree cover has been depleted." PMA asserted the company should be able to make a general claim because it could substantiate that the product has "no known negative environmental impact."[157] Similarly, AHPA stated that an unqualified general environmental benefit claim may not be deceptive when a farm certifies that it is in compliance with USDA's National Organic Program; produces much or all of its needed energy through wind or solar power or through carbon offset purchases; uses only recycled materials for packaging or ships produce

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[153] Id.

[154] Id. at 7-8 (arguing the Commission's "new and improved" control was ineffective because, as long as respondents were sufficiently familiar with the six claims to know that they were somehow related to environmental issues, they were more likely to associate those attributes with a "green" product than with a "new and improved" product).

[155] Id. at 8.

[156] PMA, Comment 262 at 3.

[157] Id. at 3-4.

unpackaged; and is "engaged in other activities such that a consumer's expectation of what is meant by 'eco-friendly' is entirely realized."[158] Therefore, AHPA recommended the Commission revise this section by adding a similar example.[159]

b. Qualified General Environmental Benefit Claims

Commenters supporting the Commission's proposed guidance agreed that qualifying general environmental benefit claims would reduce consumer confusion but asked the Commission to provide further guidance on how to adequately qualify these claims. Others disagreed that qualifying general claims will prevent deception. Finally, some argued the proposed guidance contradicted the Commission's analysis of life cycle issues.

i. Comments Supporting Proposed Guidance that Marketers Qualify General Claims

Many commenters supported the Commission's guidance that marketers qualify general environmental benefit claims.[160] For example, DMA stated that encouraging qualifications, rather than fully prohibiting general environmental benefit claims, will give consumers more information and help them make "good purchasing decisions."[161] CRS provided a specific example and opined that qualifying a general environmental claim with the claim "manufactured

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[158] AHPA, Comment 211 at 1-2.

[159] Id. (also expressing concern that the Commission's proposed guidance would serve as a disincentive for marketers to invest in reducing the environmental impact of their products).

[160] See, e.g., CRS, Comment 224 at 11; CU, Comment 289 at 1; DMA, Comment 249 at 4; Eastman, Comment 322 at 2; Green Seal, Comment 280 at 2; Huynh, Comment 40 at 1; ITIC, Comment 313 at 1; Tandus Flooring, Comment 286 at 3; B&C, Comment 228 at 2; PRSA, Comment 155 at 4.

[161] DMA, Comment 249 at 4; Agion, Comment 139 at 1; AWC, Comment 244 at 3-4; Weyerhaeuser, Comment 336 at 1; AF&PA, Comment 171 at 3-4; PPC, Comment 221 at 4-5 (endorsing AF&PA's comment); PRSA, Comment 155 at 4.

with 100% renewable electricity" would effectively direct consumer attention to the environmental benefits of using renewable energy.[162]

Others supported the Commission's admonition that marketers consider the contexts in which they make a qualified claim to ensure their advertisements are not deceptive. These commenters, however, asked for further guidance on which contexts likely imply deceptive environmental claims and on how to make acceptable qualifications.[163] For example, PRSA expressed concern that the proposed revisions may result in "individual, subjective, and potentially spurious interpretations of the guidelines," and asked the Commission to provide relevant examples of appropriate, "clear and prominent" qualifications.[164]

Several others urged the Commission to include an example in the Guides illustrating a qualified general environmental benefit claim that is nevertheless deceptive, such as the Commission's proposed example involving "Eco-friendly sheets - made from bamboo."[165] SCS recommended several examples, including qualified claims relating to recycled content that do not consider impacts associated with transportation and reprocessing; qualified claims about

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[162] CRS, Comment 224 at 11.

[163] AWC, Comment 244 at 4; Weyerhaeuser, Comment 336 at 1; AF&PA, Comment 171 at 4; 4GreenPs, Comment 275 at 1; ITIC, Comment 313 at 1; MeadWestvaco, Comment 143 at 1; PPC, Comment 221 at 5 (endorsing AF&PA's comment); PRSA, Comment 155 at 4.

[164] PRSA, Comment 155 at 4; see also UL, Comment 192 at 5 (asking the Commission to provide additional examples of non-deceptive qualified claims).

[165] 75 FR 63552, 63597 (Oct. 15, 2010); CRS, Comment 224 at 11; Eastman, Comment 322 at 8; EnviroMedia Social Marketing, Comment 346 at 8; EHS Strategies, Comment 111 at 4 (stating that it would be helpful to offer this example, why it is deceptive, and how an appropriate claim can be communicated); EPI Environmental Products, Comment 173 at 1; Green Seal, Comment 280 at 7; Ruth Heil, Comment 4 at 1; IoPP, Comment 142 at 2; Tandus Flooring, Comment 286 at 3; Maverick Enterprises, Comment 281 at 1; PRSA, Comment 155 at 6; SCS, Comment 264 at 14; UL, Comment 192 at 5; but see B&C, Comment 228 at 3 (stating that the proposed bamboo example suggests that the claim is deceptive merely because it involves the use of chemicals).

biodegradability that do not consider "environmental build-up" and toxicity; and qualified claims that the product is "free-of" a substance that fail to account for substitute ingredients.[166]

Moreover, many commenters expressed concern that consumers may be misled by a qualified general environmental benefit claim if a particular attribute represents an environmental improvement in one area, but causes a more significant negative impact in another.[167] For example, UL contended that a marketer should not base environmental claims on a small number of environmental factors unless it can demonstrate that those attributes address the product's most significant environmental issues.[168] It therefore recommended the Commission advise marketers to rely on publicly available, life cycle and consensus-based, environmental standards, which weigh known environmental impacts.[169]

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[166] SCS, Comment 264 at 14.

[167] See ACC, Comment 318 at 2 (asking for a specific example on how to qualify general environmental benefit claims in this circumstance); AWC, Comment 244 at 3-4; AF&PA, Comment 171 at 3-4; Weyerhaeuser, Comment 336 at 1; Eastman, Comment 322 at 2; EnviroMedia Social Marketing, Comment 346 at 7 (listing examples of several advertisements reported by consumers to its GreenwashingIndex.com website that illustrate "'masking' - omitting or obscuring important information, making the green claim sound better than it is"); EPI, Comment 277 at 1-2 (asserting that, although it does not have quantitative consumer data, recent market research surveys indicate that most consumers lack a "sophisticated enough understanding of environmental issues to consider unstated upstream or downstream impacts such as energy or water consumption when reading specific-attribute claims"); Jason Pearson, Comment 285 at 4 (stating the Commission should discourage any claim that is clearly intended to communicate, as an environmental benefit, an attribute that simultaneously results in environmental damage that the marketer does not disclose); Foreman, Comment 174 at 1; PPC, Comment 221 at 4-5 (endorsing AF&PA's comment); PRSA, Comment 155 at 5 (stating that "a positive impact in one area is only as valuable and transparent in its benefits to consumers as the actual value of the sum of all of its benefits").

[168] UL, Comment 192 at 5 (suggesting that marketers identify these issues by reviewing the broad lifecycle impacts of those attributes); SCS, Comment 264 at 13 (stating that the Commission should prohibit all general claims, even when qualified, but if the Commission were to allow qualified general claims, it should advise marketers that a qualified general claim is deceptive if a particular attribute represents an environmental improvement in one area but causes negative impacts elsewhere unless the company fully explains all environmental trade-offs).

[169] Id.; see also PRSA, Comment 155 at 5 (stating the FTC should advise marketers to provide consumers with as much relevant information concerning the positive and negative environmental impacts of a product or service as reasonably possible).

Others suggested specific examples illustrating that a qualified claim may be deceptive if it implies benefits without disclosing adverse impact in other areas. For example, EPA described a marketer's assertion that its "biodegradable" package provides a benefit compared to non-biodegradable packaging without mentioning that landfill biodegradation produces methane, a negative environmental impact.[170]

GMA suggested the Commission provide guidance and examples clarifying the methodology marketers should use to determine which negative impacts they must disclose.[171] Conversely, P&G opined that the guidance currently provided in Sections 260.2 – 260.4 sufficiently advises marketers how to address claims when there are environmental trade-offs.[172]

ii. Comments Disagreeing that Qualifying General Claims Will Prevent Deception

Several commenters expressed concern that qualifying general environmental benefit claims may not reduce deception.[173] For example, AFPR asserted that consumers interpret general environmental claims, even when qualified by a particular attribute, as claiming a net

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[170] EPA, Comment 288 at 1; see also AWC, Comment 244 at 3; AF&PA, Comment 171 at 3-4; Weyerhaeuser, Comment 336 at 1; and PPC, Comment 221 at 4-5 (supporting the proposed guidance and describing marketers' claims that they are "saving trees" when the overall environmental benefit is less than that for products using trees); GPR, Comment 206 at 3 (suggesting the Commission restrict broad claims relating to saving natural resources, such as "trees saved," because the tools available to support these claims are not sufficiently accurate to avoid consumer deception). IPC, Comment 202 at 2; Eastman, Comment 322 at 2-3.

[171] GMA, Comment 272 at 3.

[172] P&G, Comment 159 at 1.

[173] AFPR, Comment 246 at 2; CU, Comment 289 at 3; EHS Strategies, Comment 111 at 3 (stating that marketers should avoid making general claims to a consumer audience, even when qualified, because of their strong first impression); Jason Pearson, Comment 285 at 2 and 4 (stating that marketers should state only a product's actual attributes because general claims, even combined with specific attributes can mislead consumers because they suggest that a specific attribute can be good for the environment); Ruth Heil, Comment 4 at 1; SCS, Comment 264 at 5-6.

environmental benefit, and therefore the Commission should not permit these claims.[174] SCS, likewise, opined that general claims, even when qualified, risk communicating environmental benefits beyond those marketers can substantiate and leave the often false impression that there are no negative environmental trade-offs. Moreover, it noted that, unless a company has conducted an LCA, it is unlikely it will have the information needed to adequately qualify such a claim. Accordingly, SCS urged the Commission to prohibit the use of general claims – qualified or not – unless a marketer conducts a full LCA and can substantiate that there are no environmental trade-offs.[175]

iii. Comments Stating Proposed Guidance on Qualifications Is Inconsistent with LCA Analysis

Other commenters expressed concern that the FTC's guidance for qualifying general environmental benefit claims is confusing and inconsistent with the Commission's analysis of LCA issues.[176] For example, ANA stated that, although the Commission did not propose advising marketers to conduct an LCA, Example 2 in the General Environmental Benefit

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[174] AFPR, Comment 246 at 2; see also EPI, Comment 277 at 1 (expressing concern that qualified general environmental benefit claims imply that a single attribute is equivalent to a general benefit); Cone, Comment 205 at 1 (arguing the Commission should "take a more definitive stance on general environmental benefit claims, perhaps even prohibiting the use of words such as 'sustainable' or 'earth friendly,'" or, alternatively, even more prominently and consistently caution marketers that they are responsible not just for express claims, but for the "expectations a reasonable consumer would have when observing this claim in context"); Jason Pearson, Comment 285 at 2-4 (arguing that marketers should never make general claims, even with qualifications and suggesting the Commission include a number of examples illustrating how specific attribute claims can be deceptive); Foreman, Comment 174 at 1.

[175] SCS, Comment 264 at 6 (also stating that, at a minimum, the Guides should discourage general environmental benefit claims, even when accompanied by a specific attribute qualifier, unless the company is willing to include a full explanation of environmental trade-offs).

[176] ANA, Comment 268 at 2, ACA, Comment 237 at 4; Scotts, Comment 320 at 4.

section[177] suggested that one is required. According to ANA, this example implied that, even when a marketer highlights a single attribute – a chlorine-free bleaching process – it still must substantiate that the product's production will have a net positive environmental impact.[178] Therefore, ANA asked the Commission "to clarify that it does not intend to infuse an LCA requirement into every qualified general environmental benefit claim."[179]

Moreover, ANA expressed concern about the Commission's statement in the October 2010 Notice that consumers may be misled if an attribute represents an environmental benefit in one area, but causes a negative impact elsewhere that makes the product less environmentally beneficial overall. ANA argued that the Commission's statement is inconsistent with its position that the Guides will not advise marketers to conduct an LCA to substantiate claims.[180]

Similarly, DMA stated that the Commission seems to suggest that marketers wanting to make a specific benefit claim may be seen as making a "broader and deceptive claim." According to DMA, this result seems inconsistent with the Commission's study results, which suggested that qualified green claims did not appear to significantly contribute to consumers'

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[177] Section 260.4, Example 2, 75 FR 63552, 63591 (Oct. 15, 2010).

[178] See also AAAA/AAF, Comment 290 at 6 (asserting the Guides provide insufficient guidance on how to properly qualify a general environmental benefit claim and also stating that Example 2 of 260.4 seemed to indicate that even when a marketer qualifies a general environmental claim by specifying exactly which attribute provides the basis for a green claim, qualification will often not be sufficient); Scotts, Comment 320 at 4 (stating that the guidance on qualifying general environmental benefit claims is confusing, especially since the only example on qualifying such claims, Example 2, indicated that qualification often will not be sufficient); FPA, Comment 292 at 4 (stating the guidance in Example 2 is ambiguous because it potentially applies to every man-made packaging product since all substances will leave some environmental footprint).

[179] ANA, Comment 268 at 2-3.

[180] 75 FR at 63564; ANA, Comment 268 at 2-3; ACA, Comment 237 at 4 (arguing that including this kind of example would contradict the Commission's decision to not require marketers to conduct an LCA in support of their claims because it would essentially require companies to conduct an "LCA-like analysis" when making a qualified general environmental benefit claim); see also AZC Consulting, Comment 235 at 2 (asking the Commission to clarify whether single attribute claims are permissible, and if not, to include more specific guidance on multiple attribute claims).

propensity to see implied claims or to believe a product had no environmental impact,[181] and with the Commission's decision not to require marketers to conduct an LCA to substantiate their claims.[182]

4. Analysis and Final Guidance

Based on the comments and the Commission's consumer perception study, the final Guides advise marketers not to make unqualified general environmental benefit claims.[183] To clarify this guidance, the final Guides include a new example illustrating how marketers may make general environmental benefit claims through the combination of images and text.

Furthermore, the final Guides state that marketers may be able to qualify general environmental benefit claims to focus consumers on the specific environmental benefits that they can substantiate. In doing so, marketers should use clear and prominent qualifying language to convey that a general environmental claim refers only to a specific and limited environmental benefit(s). In addition, this section cautions marketers that explanations of specific attributes, even when true and substantiated, will not adequately qualify general environmental marketing claims if the advertisements' context implies other deceptive claims. Therefore, the final Guides remind marketers they should ensure that the advertisements' context creates no deceptive implications.

Finally, the Commission provides additional guidance, including two new examples, on qualifying general claims. The final Guides advise marketers not to imply that any specific benefit is significant if it is, in fact, negligible. They also explain that qualified general claims

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[181] DMA, Comment 249 at 5.

[182] Id.

[183] See 16 CFR 260.4.

can convey that a product is more environmentally beneficial overall because of the particular touted attribute. The Guides therefore advise marketers to analyze environmental trade-offs resulting from the touted attribute to determine if they can substantiate their claim.

a. Unqualified General Environmental Benefit Claims

The Commission retains its proposed guidance that marketers not make unqualified general environmental benefit claims.

i. Unqualified Claims, Generally

The final Guides caution marketers not to make unqualified general environmental benefit claims. The evidence demonstrates that these claims remain difficult, if not impossible, to substantiate because few, if any, products have all of the attributes such claims convey. Commenters raised several concerns about this advice: (1) the Commission's proposed revisions are "fundamental"; (2) the Commission's consumer perception evidence does not support its proposed guidance; (3) this guidance is insufficient and therefore will chill truthful claims; and (4) the Guides lack an example illustrating that marketers can substantiate unqualified general claims in some circumstances. The Commission now addresses these concerns.

First, the Commission has not fundamentally revised its guidance on general environmental benefit claims. The 1998 Guides emphasized that unqualified general environmental benefit claims are likely to convey specific and far-reaching environmental benefits. Therefore, the Guides cautioned marketers that, unless they can 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," they should avoid, or qualify, these

claims "as necessary, to prevent deception about the specific nature of the environmental benefit being asserted."[184]

The Commission's study reaffirmed this advice. Specifically, on average, approximately half of the respondents viewing general, unqualified "green" and "eco-friendly" claims inferred specific, unstated environmental benefits. Moreover, 27 percent of respondents interpreted the unqualified claims "green" and "eco-friendly" as suggesting the product has no negative environmental impact.[185] In light of these findings, and because the FTC Act requires marketers to substantiate every express and implied environmental benefit that consumers reasonably could take from such a claim,[186] the Commission now strengthens the 1998 Guides' language to caution marketers not to make unqualified general environmental benefit claims. The proposed revisions are not a fundamental change but rather an extension of the advice already given.

Second, the Commission's consumer perception research supports the conclusion that consumers interpret a general environmental benefit claim as implying that a product has a variety of specific environmental attributes. The Commission designed its questionnaire to be as non-suggestive and non-leading as possible. Thus, before asking any closed-ended questions about specific environmental attributes, the study asked open-ended questions about what, if anything, a claim suggested or implied about a product. The responses to these non-suggestive, open-ended questions show that a large percentage of the participants took particular environmental attribute claims from an unqualified claim. Fifty-three percent of respondents

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[184] 16 CFR 260.7(a).

[185] These numbers are net of the non-environmental control claim (i.e., "new and improved").

[186] Substantiation Policy Statement, appended to Thompson Medical Co., 104 FTC 648, 839 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986).

indicated, in this unprompted format, that the product had one or more implied specific environmental characteristics. For example, of those who were told that the product was "Green" or "Eco-Friendly," 33 percent indicated that the claim suggested that the product was made with recycled materials.

Moreover, an examination of the responses of those who expressed the greatest concern about the environment also indicates that the findings were not the result of guessing or "yea-saying." This sub-group presumably was more likely to understand environmental terms and therefore less likely to guess about their meanings. For six of the seven possible implied claims included in the closed-ended questions, a higher percentage of this sub-group said that the green or eco-friendly claims implied that the product had the identified characteristic than did the other (non-concerned) respondents.[187]

Third, this guidance should not chill truthful speech. As administrative interpretations of Section 5, the Guides do not create an obligation that does not already exist under Section 5. Rather, they clarify this obligation, cautioning marketers that unqualified general environmental benefit claims are difficult, if not impossible, to substantiate and reminding marketers not to make claims they cannot substantiate.[188] Although some commenters argued that the Guides insufficiently detail how to identify a general environmental benefit claim, marketers already must determine the implied claims their advertisements convey to determine whether an

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[187] AAAA/AAF noted that the study did not test claims as they appeared in real advertisements. It is likely, however, that adding advertising cues would only add to respondents' perception that the described products were environmentally beneficial. The Commission notes that the Guides do not prevent marketers from conducting and relying on their own well-designed study to determine consumer interpretation of their advertising claims.

[188] Because the Guides are not an independent source of legal authority for the Commission, any law enforcement action must be based on a case-specific investigation. See Pac. Gas & Electric Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (general statement of policy is not binding and is "not finally determinative" of issues or rights); Nat'l Mining Ass'n v. Sec'y of Labor, Mine Safety & Health Admin., 589 F.3d 1368, 1371 (11th Cir. 2009).

advertisement is deceptive under Section 5. To identify any implied claims, a marketer must consider the advertisement as a whole by assessing the net impression conveyed by all elements of an advertisement, including the text, product names, and depictions.[189] While the Guides cannot specifically address every way that marketers might choose to tout their products' environmental attributes, marketers only benefit from having some guidance about which claims might lead to FTC law enforcement actions, rather than none at all.

Finally, although some commenters asked the Commission to include an example illustrating a non-deceptive, unqualified general environmental benefit claim, the Commission declines to do so. As discussed above, it is highly unlikely that marketers can substantiate all reasonable interpretations of such a claim. In fact, even the scenarios commenters described as meriting unqualified general environmental benefit claims illustrate the difficulty in substantiating such claims. For instance, one commenter suggested including an example about a local nursery selling organically grown, indigenous species of trees for local planting. Here, however, there may be negative environmental impacts depending on, among other things, the nursery's irrigation systems, waste disposal practices, and vehicle and machinery use. It also is highly unlikely that the nursery could substantiate all the specific claims reasonable consumers take away from a general "green" claim. For example, consumers may incorrectly assume that the nursery uses only renewable energy. Moreover, even if one could postulate an example where a product has no negative impact and has every implied environmental benefit, similar factual scenarios would be so rare that the example would have limited applicability and may lead to more confusion than benefit. Nevertheless, because the Guides are simply guidance, they

[189] See generally Deception Policy Statement, 103 FTC at 179.

do not foreclose the possibility that a marketer could create an advertisement for a particular product with general environmental claims that only implies claims the marketer can substantiate.

ii. Unqualified General Environmental Benefit Claims Through Imagery and Brand Names

Some commenters recommended the Commission emphasize that, depending on context, certain images and brand names constitute general environmental benefit claims. The 1998 Guides, however, already made clear that the Guides "apply to environmental claims . . . . whether asserted directly or by implication through words, . . . depictions, product brand names, or through any other means."[190] The Commission includes this language in the final Guides.[191] Moreover, the 1998 Guides and the proposed Guides included examples describing products with the brand names "Eco-Safe" and "Eco-Friendly," which convey a general environmental benefit.[192] The final Guides also include the "Eco-Friendly" example.[193]

To determine whether the use of images or brand names constitutes a general environmental claim, the Commission focuses on the net impression of an advertisement.[194] This analysis requires an examination of both the representation and the context in which it is presented. For example, depending on context, images of forests, the earth, or endangered

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[190] 16 CFR 260.2 of the 1998 Guides and Section 260.1(c) of the proposed Guides (emphasis added).

[191] Section 260.1(c).

[192] Section 260.7, Example 1 in the 1998 Guides, Section 260.4, Example 1 in the proposed Guides.

[193] Section 260.4, Example 1 in the final Guides.

[194] Deception Policy Statement, 103 FTC at 179. For cases regarding claims made through brand names, see FTC v. Enforma Natural Prods., Inc., 362 F.3d 1204 (9th Cir. 2004); Thompson Med. Co., Inc. v. FTC, 791 F.2d 189 (D.C. Cir. 1986); ABS Tech Sciences, Inc., 126 FTC 229 (1998).

animals may convey an environmental claim either by themselves or in conjunction with text or other images.

While the Commission cannot address every image and context, it adds a new example to the General Environmental Benefit Section, 16 CFR 260.4, to help clarify its guidance. Example 3 illustrates that a general environmental benefit claim may be made through the combination of images and text, and, therefore, should be qualified with a specific attribute. The example describes an advertisement featuring a laser printer in a bird's nest balancing on a tree branch, surrounded by a dense forest. In green type, the marketer states, "Buy our printer. Make a change." In this case, although there is no express representation that the product is environmentally beneficial, the net impression of the advertisement likely conveys a general environmental benefit claim.

A brand name in some contexts may also convey a general environmental benefit claim. Therefore, marketers choosing such a name should be careful not to mislead consumers about the environmental benefits of individual products or the product line as a whole. As with other general environmental benefit claims, because a brand name featured in any particular advertisement can be presented in varying contexts, the Commission will continue to determine whether a qualification effectively limits the implied general environmental benefit claim on a case-by-case basis.[195]

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[195] Similarly, the Commission will evaluate on a case-by-case basis whether a marketer can non-deceptively make an unqualified general environmental benefit claim through a product brand name in a header or banner identifying product groups, with a description of products below. See FTC staff working paper, Dot Com Disclosures: Information about Online Advertising (May 3, 2000), which provides guidance to businesses about how FTC law applies to online activities with a particular focus on the clarity and conspicuousness of online disclosures. In May 2011, the Commission sought public input on revising this guidance to reflect changes in the online marketplace and, in May 2012, hosted a public workshop addressing this issue. See http://www.ftc.gov/bcp/workshops/inshort/index.shtml; see also Part II.B, supra.

iii. Unqualified General Claim for Products with a "Negligible Environmental Impact"

The October 2010 Notice asked commenters whether marketers can non-deceptively make unqualified general environmental benefit claims for products with a "negligible" impact. In response, many commenters opined that most products have more than a negligible impact or that there is no consensus definition for "negligible."[196] The Commission agrees with these commenters. Even assuming a product with a "negligible" environmental impact exists, guidance indicating that marketers may make unqualified general claims for such products would have extremely limited applicability. Moreover, it is highly unlikely that a marketer could substantiate all the specific attribute claims reasonable consumers take away from such an unqualified general "green" claim. Therefore, the Commission affirms its guidance that marketers should not make any unqualified general environmental claims.

b. Qualified General Environmental Benefit Claims

The final Guides state that marketers likely are able to qualify general environmental benefit claims to focus consumers on specific, substantiated environmental benefits. They reiterate that marketers should use clear and prominent qualifying language to convey that a general environmental claim refers only to a specific and limited benefit. In addition, this section includes the proposed language cautioning 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 final Guides remind marketers to ensure that their advertising's context creates no deceptive

[196] See, e.g., SCS, Comment 264 at 14; UL, Comment 192 at 5; EHS Strategies, Comment 111 at 4; EnviroMedia Social Marketing, Comment 346 at 10; IoPP, Comment 142 at 2; Jason Pearson, Comment 285 at 5.

implications. As discussed below, to assist marketers, the final Guides include new clarifying language and examples.

Commenters did not provide any new consumer perception evidence on qualified, general claims. Absent such evidence, the Commission declines to advise marketers not to use such claims in any circumstance. Our research indicates that, when qualified, the use of a general green claim did not appear to significantly contribute to consumers' propensity to infer claims or to conclude a product had no negative environmental impact. To determine the extent to which a general environmental claim contributed to these continuing perceptions, the Commission compared qualified general claims (e.g., "green - made with recycled materials") 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.[197] Furthermore, 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.[198]

While it is difficult to provide general guidance in this area because such claims are necessarily context-dependent, the Commission adds two clarifying points to this section.[199] First, the final Guides emphasize that marketers should not make a claim about a specific attribute that provides only a negligible benefit. Marketers featuring a specific attribute along

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[197] On average, 31 percent of consumers viewing qualified general claims and 23 percent of consumers viewing specific-attribute claims saw implied claims.

[198] 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.

[199] The Commission has eliminated proposed Example 2 from this section because it raises issues more appropriately addressed in the new free-of section. See Part G, infra.

with a general claim likely imply that the highlighted attribute provides a significant benefit. Therefore, if a benefit is negligible, the claim would be misleading. This guidance echoes the Commission's admonition in Section 260.3(c) that marketers should not "overstate, directly or by implication, an environmental attribute or benefit," and that "[m]arketers should not state or imply environmental benefits if the benefits are negligible."

The Commission includes a new example to illustrate this point. In Example 4, a manufacturer states its gas-powered lawn mower is "Eco-Smart" because the manufacturer has improved its fuel efficiency. In reality, the manufacturer has improved the mower's fuel efficiency by only 1/10 of a percent. Therefore, while its express claim that it has improved fuel efficiency is literally true, the implied claim that the improvement is significant is not.

Second, the Commission explains that consumers are likely to interpret a general claim, combined with a specific attribute, to mean that a product is more environmentally beneficial overall because of the particular touted attribute. In those cases, marketers should analyze trade-offs resulting from the touted attribute to determine if they can substantiate this impression. For many attributes, this analysis may be straightforward. If the attribute provides significant environmental benefit while resulting in little environmental harm, then a qualified general environmental claim likely is not deceptive.

For other attributes, however, the analysis will be more complicated because the specific attribute provides a benefit with some consequential environmental impact. In these cases, marketers should weigh the environmental benefits of the attribute with its costs to determine whether a product has a net environmental benefit. For instance, if a marketer increases the percentage of recycled content in its product but must import these recycled materials from a distant source, the marketer should weigh the increased energy use and pollution against the

decreased use of virgin materials. Analyzing trade-offs may not require a complete life cycle evaluation. The Commission adds a new example to illustrate this point. In new Example 5, a marketer reduces the weight of its plastic beverage bottles and advertises this reduction as an "environmentally friendly improvement." The new plastic bottles are lighter but otherwise are no different from the old ones. In this case, the marketer can analyze the impacts of the source reduction without evaluating environmental impacts throughout the bottles' life cycle. If, however, manufacturing the new bottles requires, for example, more energy or a different kind of plastic, then a more comprehensive analysis may be appropriate.

Determining whether a qualified, general claim is deceptive necessarily will depend on the context of each advertisement and its audience. Because of the infinite contextual scenarios and the wide range of reasonable consumer interpretation, marketers may need to copy test their claims to determine what material implied claims they convey.

B. Carbon Offsets

In the October 2010 Notice, the Commission sought comment on proposed guidance for claims relating to carbon offsets. This section provides a brief background about offsets and associated advertising claims, summarizes the Commission's proposed guidance, describes the comments received, and discusses the Commission's final guidance.

1. Background

Carbon offsets are credits or certificates that represent reductions in greenhouse gas ("GHG") emissions. These reductions result from different types of activities, including methane captured from landfills or livestock feedlots, tree planting, and industrial gas

destruction.[200] Marketers quantify their GHG reductions from these projects and then sell carbon offsets based on those reductions. Purchasers of these offsets seek to meet their own environmental goals by reducing their "carbon footprints" or striving to make themselves "carbon neutral."[201] Offset purchasers include individual consumers, businesses, government agencies, and nonprofit organizations.[202]

Individual consumers generally purchase offsets to reduce, balance, or neutralize greenhouse gas emissions associated with their activities, such as automobile use or airplane travel.[203] Businesses purchase carbon offsets to balance the emissions associated with the production, sale, or use of their products and services. They often tout these offsets in advertisements for their products and services. For example, a potato chip seller that purchases 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.[204]

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[200] These activities occur around the globe, often in locations distant from offset purchasers. The location of an offset project does not affect greenhouse gas levels because these gases circulate evenly throughout the earth's atmosphere. See 75 FR 63551, 63592.

[201] No uniform definition for either term appears to exist. "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. See 75 FR 63551, 63593.

[202] 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. Id.

[203] Id. Some offset sellers advertise their products directly to individual consumers. For example, some online travel vendors have partnered with offset sellers to offer consumers offsets when they purchase airplane tickets.

[204] 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. Id.

2. Proposed Guidance

In its October 2010 Notice, the Commission proposed limited guidance regarding carbon offset claims,[205] despite comments urging detailed recommendations or extensive regulatory requirements. The Commission based the scope of its proposal on the extent of its authority, the low consumer awareness of these products, and the ongoing policy debates among experts concerning substantiation of offset claims.[206]

The Commission sought comments on three recommendations. First, given the complexities of carbon offsets, the proposed Guides advised marketers to employ competent and reliable scientific and accounting methods to properly quantify claimed emission reductions and to ensure the same reduction is sold only once. Second, the proposed guidance stated that marketers should disclose if the offset represents emission reductions that will not occur for two years or longer. Third, the guidance stated that 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.

3. Comments

a. General Issues

Most commenters supported the Commission's decision not to provide comprehensive guidance. Most agreed that more detailed guidance would place the Commission in the

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[205] 75 FR at 63601.

[206] The Commission declined to provide specific guidance on the definition of terms such as carbon offsets and additionality, the need for sellers to make certain disclosures about certain characteristics of offsets, and the use of renewable energy certificates for offsets.

inappropriate role of setting environmental policy.[207] One commenter, FIJI Water, added that detailed guidance could stifle innovation in this field.[208] Additionally, consistent with the Commission's consumer perception study, several commenters doubted consumers have a firm understanding of carbon offsets and therefore supported the Commission's limited guidance.[209]

Despite the general support, a few commenters recommended more detailed guidance.[210] They urged the Commission to use different terminology and to advise marketers to make specific disclosures.[211] For example, SCS recommended using a term broader than "carbon offset" to convey that carbon dioxide is not the only greenhouse gas.[212] In SCS's view, oversimplification of climate change-related terms has contributed to consumer confusion. Accordingly, it urged the Commission to consider more precise, alternative terms such as "climate change neutral."[213]

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[207] See, e.g., CRS, Comment 224 at 3; and FIJI Water, Comment 231 at 2.

[208] FIJI Water, Comment 231 at 2.

[209] See Foreman, Comment 174 at 2; Ruth Heil, Comment 4 at 2; Maverick Enterprises, Comment 281at 2; Masi, Comment 27 at 1; IoPP, Comment 142 at 5; EnviroMedia Social Marketing, Comment 346 at 18-19; and DLA, Comment 325 at 2; see also NAIMA, Comment 210 at 10, and Jason Pearson, Comment 283 at 5 ("Consumers are likely to understand the words 'offset' and 'neutral' in their conventional definitions.")

[210] See, e.g., AF&PA, Comment 171 at 16; FIJI Water, Comment 231 at 2; Mass. DPU, Comment 247 at 3; and AWC, Comment 244 at 9.

[211] As discussed in Part II.D, supra, ATA asked the Commission to expressly state that the airline industry is exempt from the Commission's statutory authority, and to remove the Guides' references to airlines and flight ticket purchases. ATA, Comment at 11-12. The final guidance on carbon offsets does not contain references to airlines and flight ticket purchases.

[212] SCS, Comment 264 at 13.

[213] See also EHS Strategies, Comment 111 at 7.

In addition, TerraPass argued that carbon offset marketers should disclose relevant project details underlying claims to avoid deception and consumer confusion.[214] It recommended that marketers disclose the standard used to create offsets so that consumers can gauge the additionality of those projects (i.e., whether the project produces emissions beyond those that would otherwise occur). Similarly, GAC recommended that the Guides direct marketers to identify details about emissions and aspects of the product's life (e.g., transportation, production, and sourcing) offset by the purchase.[215]

b. Substantiating Offset Claims

Most commenters agreed sellers should employ competent and reliable scientific and accounting methods to quantify claimed emission reductions and to ensure they do not sell the same reduction more than once.[216] However, some recommended that the Commission provide additional details about substantiation methods, and others argued the Guides should identify specific guidelines marketers must meet to substantiate their claims.

CRS, for example, suggested the Guides inform marketers they can use credible third-party certification programs and electronic registries to track ownership of emission reductions,[217] and third-party programs to guard against double selling. In addition, FPA suggested the Guides require offset marketers to obtain certification by professional engineers, maintain records, and

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[214] TerraPass, Comment 306 at 2.

[215] GAC, Comment 232 at 2. Jason Pearson, Comment 285 at 5 (arguing that "any claim of "offset" or "neutral" must make clear that the product itself is environmentally damaging").

[216] See, e.g., 3Degrees, Comment 330 at 2; Mass. DPU, Comment 247 at 3-4; WM, Comment 138 at 5; GAC, Comment 232 at 2.

[217] Similarly, EPA recommended that rigorous tracking methods should include the use of a registry. EPA, Comment 288 at 17.

use methodologies in the EPA's Mandatory Recordkeeping and Reporting Rule.[218] The FPA also urged the Commission to adopt EPA recommendations for Emission Reduction Credits ("ERC") developed for other pollutants.[219]

Other commenters argued that marketers should meet specific qualifications to substantiate offsets. For example, Green Seal recommended that marketers make carbon offset claims only if they have actively sought to reduce their own emissions.[220]

c. Timing of Emission Reductions

Most commenters agreed with the general guidance advising marketers not "to misrepresent, directly or by implication, that a carbon offset represents emission reductions that have already occurred or will occur in the immediate future."[221] However, commenters differed on whether to recommend affirmative disclosures for emission reductions expected to occur in two years or longer.

Several commenters supported the guidance.[222] For example, TerraPass argued that sellers should make appropriate disclosures to avoid misleading buyers when the reductions associated

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[218] FPA, Comment 292 at 10. FPA identified the EPA methodologies as those set forth in 40 CFR Part 98 (GHG Mandatory Recordkeeping and Reporting Rule).

[219] According to FPA, EPA recommends that: (1) the reductions underlying the credits must be permanent; (2) the reductions must be surplus (i.e., not otherwise required by law); (3) the reduction's quantification must be replicable by others; and (4) the reduction is "practically enforceable" by a citizen or a regulator. FPA, Comment 292 at 10.

[220] Green Seal, Comment 280 at 3-4; see also Grayrocks Packaging Group, Comment 29 at 1.

[221] See, e.g., 3Degrees, Comment 330 at 2; CRS, Comment 224 at 3.

[222] AF&PA, Comment 171 at 16-17; AWC, Comment 244 at 10; 3Degrees, Comment 330 at 2; CRS, Comment 224 at 3; Mass DPU, Comment 247 at 4; EnviroMedia Social Marketing, Comment 346 at 19; FMI, Comment 299 at 3; ACI, Comment 184 at 6; TerraPass, Comment 306 at 3.

with their offset claims will occur far in the future.[223] In its view, marketers should not imply that a future reduction is verified or otherwise equivalent to a current one. Similarly, CRS explained that the proposed two-year threshold is consistent with the timetables used by verification organizations, and will give sellers reasonable flexibility in sourcing and balancing inventory.

Some comments argued that the two-year period is too long. EPA, for example, asserted that if "the consumer is purchasing offsets credits, the emissions reductions or sequestration should have already occurred and been verified." However, EPA noted that more flexibility may be warranted for a company claiming it will offset its own emissions in the future.[224] Similarly, FPA argued that future carbon credit purchases should not form the basis for offset claims. Specifically, FPA asserted that claims associated with future offsets are fundamentally misleading because many events could prevent the reductions from occurring, such as new regulatory requirements that could jeopardize emission reductions planned for the future.[225]

In contrast, critics of the Commission's proposal questioned the FTC's consumer research, claimed the guidance may unfairly discourage certain types of offsets, and urged the Commission to recommend timing disclosures for all claims. Several commenters argued that the two year disclosure was not based on solid evidence or would discourage long-term future projects. First, Reserve questioned the FTC's consumer research on offset timing, asserting that the FTC's consumer perception study should have used different wording for the offset timing question.[226]

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[223] TerraPass, Comment 306 at 3.

[224] EPA, Comment 288 at 17.

[225] FPA, Comment 292 at 10.

[226] Reserve, Comment 135 at 2.

The question asked respondents to consider a carbon offset claim under two scenarios.[227] Under the first, the emission reductions underlying the claim would occur "within the next few months." Under the second, proceeds from the offset sale would fund future equipment installation which would, in turn, reduce emissions in "several years." In Reserve's view, because the second scenario involved equipment that had yet to be installed, the question gauged respondents' reaction to the uncertainty of the reduction and not necessarily its timing.[228] Reserve suggested the question may have yielded different results if, under the second scenario, the offset seller had already installed the equipment but did not plan to use it for several years. According to Reserve, some projects can achieve "highly certain" quantities of emission reduction over time. For example, a project that diverts organic waste from landfills will prevent emissions of methane for years to come. Reserve, therefore, suggested the Commission conduct additional consumer research on these questions before issuing the guidance.

Second, several commenters opposed any disclosures for future offset activities arguing that the guidance would lead to unfair treatment of certain types of activities.[229] NRG, for example, asserted that a disclosure obligation for an entire offset category (e.g., avoided deforestation, afforestation, and various land uses) would lead consumers to believe these

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[227] The question (Q830) explained that: "While the capture project has been designed, the equipment to capture the methane is not presently installed. The mining company is using the money raised from the sale of offsets to pay the cost of purchasing and installing the necessary equipment. It will be several years before the methane represented by the offsets will be captured and destroyed, because it will take that long to raise the necessary funds and install the equipment." See http://www.ftc.gov/bcp/edu/microsites/energy/green-consumer-perception- study.shtml.

[228] Reserve, Comment 135 at 2.

[229] See, e.g., PFA, Comment 263 at 4; CAR, Comment 135 at 2; NativeEnergy, Comment 12 at 3; FPA, Comment 292 at 10; and Tandus Flooring, Comment 286, at 3.

activities are lower in quality or less effective.[230] In NRG's view, consumers will eventually distinguish high quality offsets with real emission reductions from low quality offsets with uncertain reductions as they become increasingly familiar with different standards. NRG also warned that, under the proposed guidance, consumers will view even high quality forestry and land-use based offsets as low quality products.

Additionally, FIJI Water raised concerns that the guidance may confuse consumers by making long-term projects appear less valuable than short-term or completed projects.[231] FIJI Water argued that the proposed disclosure would lead consumers to misinterpret an offset's value, whether based on current or future activity. FIJI Water further warned that the guidance would discourage projects that take more time to realize, yet still provide substantial environmental benefits. In FIJI Water's view, the Commission should consider whether a project "can reasonably be expected to provide" the claimed environmental benefits, and not necessarily whether the project's emission reductions will occur sometime in the future. Additionally, some commenters viewed the two-year disclosure as onerous and unnecessary.[232]

Finally, NativeEnergy argued that marketers should disclose the timing for emission reductions regardless of when they occur.[233] In its view, consumers prefer to buy offsets that represent future reductions in GHG emissions instead of "already generated" offsets. It argued

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[230] NRG, Comment 248 at 3-4.

[231] FIJI Water, Comment 231 at 2-3.

[232] PFA, Comment 263 at 4. Similarly, Tandus Flooring indicated that it is not necessary "to disclose if the offset purchase funds emission reductions that will not occur for two years or longer." Tandus Flooring, Comment 286 at 3. PFA, for example, recommended that the Guides state that only general substantiation and qualification rules should apply to offset claims.

[233] NativeEnergy, Comment 12 at 3-4; see also EHS Strategies, Comment 111 at 7 (indicating that marketers must include the time period over which the offsets will occur in their claims).

that, as long as consumers have accurate information about offset timing, they can judge for themselves whether a reduction constitutes a valid offset.

d. Substantiating Carbon Offset Claims – Additionality

Most commenters supported the Commission's proposal to refrain from providing comprehensive additionality guidance.[234] Currently, offset sellers use a variety of additionality tests to address whether reductions associated with a carbon offset would have occurred without the offset sale. However, debate continues about which tests are most appropriate for various projects. For this reason, commenters generally urged the Commission to avoid entanglement in this evolving policy issue. For example, CRS suggested that comprehensive additionality guidance would place the Commission in the inappropriate role of setting environmental standards and policy, particularly given the lack of consensus about testing.[235]

Despite agreement on the Commission's general approach, commenters offered conflicting views on regulatory additionality.[236] The proposed guidance stated that offset sales are deceptive if existing legal requirements mandate the underlying emission reductions. Several commenters supported this advice and argued that such sales deceive consumers because the emission reductions will occur regardless of their purchase.[237] Others disagreed. For example, AF&PA and the AWC asserted that such guidance would inappropriately create environmental

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[234] EPA, Comment 288 at 17; Mass DPU, Comment 247 at 4; 3Degrees, Comment 330 at 2; CRS, Comment 224 at 17; WM, Comment 138 at 5; EEI, Comment at 4.

[235] CRS, Comment 224 at 17.

[236] A project and its associated emission reductions are not considered "additional" if the project is required by law.

[237] Mass DPU, Comment 247 at 4; 3Degrees, Comment 330 at 2; Tim Schloendorn, Comment 8; CRS, Comment 224 at 17.

policy.[238] PFA argued that claims derived from legally-required activities are acceptable because they "are factual and can be substantiated."[239] Additionally, the WLF stated that the motivations behind the reductions (e.g., whether to meet legal mandates or other reasons) should be irrelevant to whether a marketer can advertise an offset. AHPA urged the FTC to examine whether marketers can mitigate any potential deception associated with these claims by providing truthful disclosures that legally-required emission reductions underlie their offset products.[240]

e. Substantiating Carbon Offset Claims – Use of RECs

Commenters also offered varying views on the Commission's decision to forgo guidance on the use of Renewable Energy Certificates ("RECs")[241] to substantiate carbon offset claims.[242] Several agreed with the Commission's proposal because it avoids complicated, unresolved policy issues outside the Commission's purview.[243] However, others continued to recommend that the Commission provide specific guidance on RECs and offsets. For example, CEI and REMA urged the Commission to join other federal agencies in affirming that RECs can assist companies in reducing their "Scope II" emissions (i.e., indirect emissions from a company's use of electricity,

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[238] AF&PA, Comment 171 at 16; AWC, Comment 244 at 9.

[239] PFA, Comment 263 at 4; AHPA, Comment 211 at 2-3 (indicating that a company should be able to state that its factory is carbon neutral due to its purchase of offsets even if some stem from "renewable energy production in states that require its utilities to produce some portion of its energy by renewable means").

[240] AHPA, Comment 211 at 3 (noting that the Commission's guidance would call into question the use of state-mandated renewable energy production as a basis for carbon offset sales).

[241] RECs are "certificates" that represent the property rights to the environmental, social, and other nonpower qualities of renewable electricity generation. See Section IV.K, infra, for a more complete explanation.

[242] AF&PA, Comment 171 at 17; AWC, Comment 244 at 10; CRS, Comment 224 at 4-5.

[243] AF&PA, Comment 171 at 17; CRS, Comment 224 at 17; AWC, Comment 244 at 10.

heat, or cooling generated offsite).[244] Finally, one commenter urged the Commission to take a firm position against the use of RECs for carbon offset purposes.[245] Reserve, for example, explained that the same eligibility screens or methodological requirements used by certification programs for carbon offsets do not necessarily apply to RECs.[246] In addition, Reserve argued that REC sales are not necessarily the decisive factor in determining whether a renewable energy facility has reduced GHG emissions.

4. Analysis and Final Guidance

a. General Issues

The final Guides provide limited advice on carbon offsets. The Commission agrees with commenters that more detailed guidance would place the FTC in the inappropriate role of setting environmental policy. Additionally, more detailed guidance could quickly become obsolete given the rapidly changing nature of this market and the minimal understanding consumers appear to have about such issues. As described below, however, the Commission can provide some advice to marketers regarding substantiation, the timing of emission reductions, and additionality. As an initial matter, the Commission explains that the final Guides do not define specific terms such as carbon offsets or adopt alternative descriptors as suggested by some commenters. The Commission's mandate is to combat deceptive and unfair practices, not to create definitions or standards for environmental terms. The Commission's consumer perception study did not identify any pattern of confusion among respondents about what a carbon offset is. In addition,

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[244] CEI and REMA cited to Executive Order 13514, White House Council on Environmental Quality, and EPA's Green Power Partnership (5). CEI, Comment 260 at 5; REMA, Comment 251 at 7.

[245] Reserve, Comment 135 at 2.

[246] Id.

there is no information about how consumers would interpret alternative descriptors. Detailed guidance could, therefore, unnecessarily constrain claims or create unintended distinctions between offset activities.

Likewise, the Guides do not advise marketers to make specific disclosures about the carbon offsets they are selling, such as the standards applied or specific emissions involved. Although some commenters suggested such disclosures, the Commission lacks evidence that they are necessary to cure deception.[247]

b. Substantiating Offset Claims – Tracking Offsets

The final Guides advise that "given the complexities of carbon offsets, sellers should employ competent and reliable scientific and accounting methods to properly quantify claimed emission reductions to ensure that they do not sell the same reduction more than one time." Some commenters suggested that the final Guides specify offset criteria, recordkeeping requirements, verification procedures, or particular qualifications. Although such information could help marketers substantiate their claims or guide potential purchasers, there is no evidence that any particular substantiation method is necessary to prevent deception. The FTC Act gives marketers the flexibility to choose the substantiation method they prefer as long as it meets the basic standards under the Act. Thus the final Guides do not provide more detailed guidance on tracking offsets. Nevertheless, the Commission reminds marketers that it has the authority to take law enforcement action if they do not have adequate substantiation for their carbon offset claims.

[247] As explained in the October 2010 Notice (75 FR 63552), under the FTC Act, advertisers must disclose information that is necessary to prevent consumers from being misled – not all information that consumers may deem useful. FTC Deception Policy Statement, 103 FTC at 165.

c. Timing of Emission Reductions

The final Guides state it is deceptive to misrepresent that a carbon offset represents emission reductions that have already occurred, or will occur in the near future if, in fact, they will occur at a significantly later date. To provide further guidance on such timing-related claims, the final Guides advise marketers to disclose when emission reductions underlying their carbon offsets will not occur for two years or more. If a marketer, however, has evidence that emission reductions occurring at a significantly later date do not deceive consumers (e.g., that timing of emission reductions is immaterial to consumers), then the recommended disclosure is not necessary.

As explained in the October 2010 Notice, the Commission based this guidance on evidence that the failure to disclose the timing of emission reductions in the distant future can deceive consumers. In the FTC's consumer perception study, 43 percent of respondents found unqualified offset claims misleading where emission reductions would not occur for several years. The results did not reveal the same level of concern where emission reductions had already occurred.[248] Commenters did not identify research contradicting these results.

The Commission disagrees with Reserve that further consumer research is necessary to support this guidance. The timing-related question in the Commission's study adequately gauged respondents' perception of the timing, not the uncertainty of emission reductions. Nothing in the question specifically stated that the emission reductions activities were uncertain. In fact, the question stated that both of the projects under consideration would create emission reductions.[249]

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[248] See 75 FR 63352, 63596.

[249] The question stated: "Both projects result in reduced emissions of greenhouse gases. However, the timing of the reductions differs."

Furthermore, the Commission declines to advise against all offset sales based on future emission reductions. The record does not demonstrate that all sales based on future activity are deceptive, particularly when marketers adequately qualify such claims. Similarly, the Commission declines to impose timing-related disclosures for all offsets, regardless of when such reductions occur. The Commission's consumer research did not suggest that such disclosures are necessary in all cases to prevent deception.

The final Guides' advice regarding timing disclosures should help marketers avoid deceptive claims without generating an unfair perception of future offset activities. In fact, one commenter noted that consumers actually prefer offsets based on future activity.[250] For these consumers, the proposed disclosure should make the offset more attractive. Moreover, the Commission has no evidence that the proposed disclosures would detract from consumers' perception of a future offset.

The final Guides do not mandate specific language for the disclosure because this information could be communicated in a variety of ways. The Commission does not want to limit marketers from communicating in the manner they find most effective for their product, as long as their advertisements are not deceptive.

d. Substantiating Carbon Offset Claims – Additionality

The final Guides address the specific issue of regulatory additionality but do not endorse a detailed, comprehensive set of additionality tests. As most commenters pointed out, many aspects of the ongoing additionality debate raise unresolved technical and environmental policy issues. Given continued developments in this field, comprehensive Commission guidance is

[250] 75 FR 63551, 63593 (discussing Native Energy's comment).

likely to become obsolete quickly, providing marginal benefit to marketers or even hurting their efforts to make claims.

The final Guides, however, can address the specific issue of regulatory additionality without implicating these concerns. The final Guides, therefore, advise that it is deceptive to claim directly or by implication that a carbon offset represents additional emission reductions if the underlying activity was or is required by law (e.g., legally-mandated methane capture at a landfill). The record indicates that deception is likely because consumers expect their purchase to generate emission reductions that would not necessarily occur otherwise.[251] Where legally-mandated activities undergird the transaction, such consumer-generated reductions do not occur. Indeed, the relevant reductions will occur whether or not the offset consumer pays for them. Accordingly, the seller cannot accurately characterize the transaction as an "offset" because the consumer's purchase makes no difference in overall emission levels and, as a result, their purchase cannot cancel (i.e., "offset") emissions elsewhere. Instead, in these situations, the consumer is merely funding the seller's regulatory compliance efforts.

e. Substantiating Carbon Offset Claims – Use of RECs

The final Guides do not address the use of RECs for offset claims. Commenters did not identify any compelling reason or evidence to depart from the approach outlined in the October 2010 Notice. Moreover, given the evolving nature of this field, the Commission is concerned that any detailed guidance would quickly become obsolete. Nevertheless, as with other environmental claims, marketers must substantiate their offset claims. Given the complexity of the issues related

[251] 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"); see also Mass DPU, Comment 247 at 4; and CRS, Comment 224 at 17. The Commission does not dispute commenter assertions that the emission reductions from regulated activity are real. However, the relevant question is whether the reductions would occur but for a consumer's purchase.

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 emission reductions are not double-counted.

C. Certifications and Seals of Approval

1. The 1998 Guides

The 1998 Guides did not contain a section devoted to environmental certifications and seals of approval ("certifications" and "seals"). However, one example noted that an environmental seal of approval may imply a product is environmentally superior to other products. Specifically, Example 5 in the general environmental benefit claims section stated: "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."[252] Accordingly, the 1998 Guides instructed marketers to accompany such claims with clear and prominent language limiting any environmental superiority representation to the particular product attribute(s) it can substantiate.[253]

2. Proposed Revisions

Given the widespread use of certifications and seals and their potential for deception, the Commission proposed a new section devoted to this issue.[254] The proposed section provided that it is deceptive to misrepresent, directly or by implication, that a product, package, or service has

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[252] 16 CFR 260.7(a), Example 5.

[253] Id.

[254] 16 CFR 260.6, 75 FR at 63601.

been endorsed or certified by an independent third party.[255] The proposed section also emphasized that third-party certifications and seals constitute endorsements covered by the Endorsement Guides,[256] and provided several examples illustrating how the Endorsement Guides apply in the context of environmental claims. This section also cautioned 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 such seals without qualification. Finally, the proposed guidance stated marketers should qualify these seals and certifications with clear and prominent language that conveys that the seal or certification applies only to specific and limited benefits.

3. Comments

Numerous commenters addressed the Commission's proposed guidance for certifications. In particular, they discussed: (1) how to define terms referenced in the Guides; (2) how to apply the Endorsement Guides in the context of environmental claims; and (3) how the Guides should address certifications from, or appearing to be from, government bodies. The commenters also suggested the Commission reconsider its decisions not to advise marketers to obtain a third-party certification to substantiate their claims, not to propose establishing a particular certification system, and not to propose guidance on the development of third-party certification programs.

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[255] 16 CFR 260.6(a).

[256] 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. 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.

a. Comments Defining Guidance Terms

Some commenters suggested the Commission clarify the meaning of terms frequently used in the certification context. For example, Sierra Club et al. suggested the Commission clarify the identities of the various parties involved in third-party certification, such as a "first party," "second party," and "third party."[257] Similarly, MSC asked the Commission to define "independent, third-party certification," suggesting the Commission base guidance on ISO provisions, and specify that a third-party certification or endorsement is "independent of all parties concerned in the production, supply, sale, and demand of the product in question, including independent of the standard-setting organization itself."[258]

Others urged the Commission to clarify what constitutes a "certification." For example, RBRC expressed concern that certain organizations' seals, such as the one used by RBRC, may inappropriately be considered "certifications." According to RBRC, its seal promotes participation in its recycling program and, in some cases, the seal is required by federal law. Therefore, RBRC requested that the Commission clarify third-party certifications or seals do not include licensed seals required for participation in a bona fide recycling program, provided the

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[257] Sierra Club et al., Comment 308 at 12 (stating that, in the context of forest products, "first party" refers to the company itself; "second party" means the party has a direct relationship with and an interest in the company, such as a trading partner or trade association; and "third party" means a qualified and independent organization has conducted an audit to determine a company's conformance with standards); see also EPA, Comment 288 at 3 (noting that the seller is the "first party"; the buyer is the "second party"; the "third-party" certifier is an entirely separate entity; and that additional parties beyond the certification body, such as testing laboratories, may also be involved in product evaluation).

[258] MSC, Comment 304 at 2; see also SFI, Comment 151 at 1-3 (recommending the Guides provide that standard developers and third-party certification bodies should be separate organizations according to international protocol established by ISO and the IAF); see also ACC, Comment 318 at 3 (suggesting the Commission provide guidance on what consumers perceive to be third parties, including that third parties should be "established as financially, operationally, and organizationally independent – and actually operate that way.").

recycling program does not claim, directly or by implication, to be a third-party certification or approval organization, or approved by one.[259]

On the other hand, Armstrong stated the proposed guidance appears to apply to the names, logos, and seals of only third-party "certifiers," and not all organizations that allow members to use their seals. Accordingly, it advised the Commission to modify Section 260.6(b) as follows: "A marketer's use of the name, logo, or seal of approval of a third-party certifier or organization is an endorsement . . . ."[260]

b. Certifications and Seals as Endorsements

Several commenters discussed how the Commission should apply the Endorsement Guides to environmental claims. Some addressed the Endorsement Guides generally. Others discussed self-certification. Most, however, focused on the proposed examples that involved a "material connection" between the marketer and the certifier.[261]

i. Certifications and Seals as Endorsements, Generally

While commenters generally supported the Commission's proposed guidance, some asked the Commission to clarify the interplay between the Green Guides and the Endorsement Guides. EPA stressed that consumers may not perceive certifications and seals as "endorsements," but

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[259] RBRC, Comment 287 at 5-6 (also noting that, unlike the examples in the proposed Guides, such as "GreenLogo" and "Earth Smart," no words in the RBRC Seal suggest a general environmental benefit, and the seal's direction to "RECYCLE," the battery graphic and chemistry symbols showing what consumers can recycle, and the 1-800-8-BATTERY information line where consumers can obtain collection site locations constitute adequate qualification of any claim that consumers might otherwise perceive); see also SMART, Comment 234 at 3 (arguing that it does not offer or claim to offer any kind of seal or certification and is concerned that the proposed guidance may prevent its members from making simple statements about their industry affiliation because they believe a consumer could "potentially conjure up some imaginary certification or endorsement status").

[260] Armstrong, Comment 363 at 1 (emphasis in original).

[261] See Proposed 16 CFR 260.6, Examples 2 and 3; see, e.g., AAAA/AAF, Comment 290 at 7; Green Seal, Comment 280 at 3; GMA, Comment 272 at 2; GPR, Comment 206 at 4; Weyerhaeuser, Comment 336 at 1; NPA, Comment 257 at 2; NAIMA, Comment 210 at 4; PMA, Comment 262 at 8; SCS, Comment 264 at 6.

rather as an indication that a product's attributes have been verified against a particular standard or criteria.[262] Specifically, EPA described its Design for the Environment (DfE) program, which allows pesticide products meeting specific criteria to display a logo and related statements. EPA stated it does not consider use of this logo to indicate an EPA endorsement, but rather that the product has met certain standards. It further suggested a consumer perception study would clarify whether consumers believe all seals and certifications reflect a certifier's recommendation or whether consumers distinguish among different types of seals and certifications.[263]

Additionally, SFI and MeadWestvaco recommended the Guides clarify that third-party certifications should not constitute "endorsements" when "there is a clear separation between the standards-setting organization and independent certification bodies, and a marketer is not using the name, logo, or seal of approval of the third-party certifier."[264]

Finally, UL suggested the Green Guides stress that the Endorsement Guides prohibit any organization from endorsing a product or service unless the organization possesses the relevant scientific and technical expertise to evaluate the product or service. Specifically, UL distinguished between environmental organizations raising consumer awareness and organizations applying their expertise to scientifically evaluate a product or service's

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[262] EPA, Comment 288 at 2.

[263] Id.; see also ANA, Comment 268 at 4-5 (arguing the Commission should not presume that every seal is an endorsement but rather should look at the net impression of the seal and its incorporation on the packaging or product to determine whether an endorsement is stated or implied).

[264] SFI, Comment 151 at 1-3 (explaining it develops, promulgates, and periodically revises its standard, but that independently accredited certification bodies, not SFI, certify organizations as conforming to the standard following international protocol established by ISO and the IAF, which require a clear separation between the standards developer and the certification body conducting the audit); MeadWestvaco, Comment 143 at 1.

environmental impacts.[265] UL also recommended the Commission clarify that a marketer featuring a standard-based certification by an environmental conformity assessment body, such as UL Environment and EcoLogo, could make an appropriate disclosure by accompanying the certification with a reference to the standard used to evaluate the product.[266]

ii. Self-Certification

Commenters uniformly supported the Commission's proposed guidance that a marketer should disclose if it bestows its own seal of approval.[267] Green Seal praised the Commission for identifying these seals as potentially misleading and recommended the FTC clarify that when using a self-certification, the company must include its name with the statement indicating it is the company's own program (e.g., "Meets Our Own Company Z Green Promise Program"). CRS opined that consumers likely assume that all certifications have been conducted by an independent, third party with expertise in evaluating the environmental attributes of the product. Therefore, CRS supported the proposed guidance, and asked the Commission to clarify that it applies to all logos that resemble certification marks or purport to demonstrate a product or service's environmental performance, not just self-certifications that say "certified."[268] Agion also supported this guidance and suggested the Commission maintain a list of "approved" third-

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[265] UL, Comment 192 at 3.

[266] Id. at 2 (further suggesting the Commission require marketers claiming their products meet a publicly available standard to identify which certifier validated the claim so consumers can evaluate both the standard's and certifier's quality).

[267] Agion, Comment 139 at 1; Green Seal, Comment 280 at 4-5; CRS, Comment 224 at 7; CU, Comment 289 at 1.

[268] CRS, Comment 224 at 7.

party certifications to "ensure the integrity of proper certifications" and "weed out the use of 'self-made' seals of approval."[269]

iii. Material Connection

Numerous commenters discussed the Commission's proposed guidance on disclosing "material connections" between marketers and certifiers. As discussed below, many supported this guidance. Others urged the Commission to clarify how it would apply in certain situations. Still others disagreed that there is a "material connection" whenever a marketer is a dues-paying member of a trade association.

FSC agreed with the Commission's proposed guidance that marketers disclose when products are certified by an industry trade association, and cited research finding that consumers' main concern when evaluating a certification label "is whether they can trust the independence and unbiased nature of the certification program, since most consumers are not familiar with the criteria for certification."[270] In particular, FSC-US emphasized the finding that, among potential certifiers, the wood products industry is the entity consumers least trust to certify forest products. According to FSC-US, "[t]his evidence supports the Commission's intuition that '[c]onsumers

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[269] Agion, Comment 139 at 1; but see ACA, Comment 237 at 5 (stating that market-created certification programs are valuable because marketers are best qualified to "appropriately differentiate" their products' environmental attributes).

[270] FSC-US, Comment 203 at 2 (citing Mario F. Teisl, et al., Consumer Reactions to Environmental Labels for Forest Products: A Preliminary Look, 52 Forest Prod. J. 44, 48-49 (2002) ("Credibility of the endorsing entity was, by and large, a central issue in each focus group."); Lucie K. Ozanne & Richard P. Vlosky, Certification from the U.S. Consumer Perspective: A Comparison from 1995 and 2000, 53 Forest Prods. J. 13, 16, 18 (2003) ("the wood products industry is still not trusted to certify itself"); Kimberly L. Jensen, et al., Consumers' Willingness to Pay for Eco-Certified Wood Products, J. of Agricultural and App. Econ. 617, 622 (2004) (finding about 30 percent of consumers are willing to pay a premium for eco-certified products); Roy C. Anderson & Eric N. Hansen, The Impact of Environmental Certification on Preferences for Wood Furniture: A Conjoint Analysis Approach, 54 Forest Prod. J. 42, 49 (2004) (stating that a target group of consumers was willing to pay at least a five percent premium for certified forest products); Francisco X. Aguilar & Richard P. Vlosky, Consumer Willingness to Pay Price Premiums for Environmentally Certified Wood Products in the U.S., 9 Forest Policy & Econ. 1100, 1110-1111 (2007) (consumers with incomes greater than $39,999 per year were willing to pay at least a 10 percent premium for certified products); see also CU, Comment 289 at 1.

likely place different weight on a certification from an industry association than from an independent, third party.'"[271] Green Seal also agreed and asserted that trade associations have an "inherent conflict-of-interest because they are dedicated to promoting their industry and all of their members and members' products, and, therefore should identify themselves as trade associations on product labeling."[272]

Others suggested the Commission clarify how its guidance on disclosure of a material connection would apply in certain situations. For example, CRS asked the Commission to expressly state that this guidance does not apply to third-party certifiers.[273] Specifically, CRS stated that non-profit, third-party certifiers are overseen by fiduciary boards, develop their policies in an open, transparent process, and – in contrast to membership-based industry groups – do not determine whether to certify an individual company by a vote of other members.[274]

Still others recommended the Commission clarify whether marketers should disclose a material connection when paying a fee to a certifier.[275] ACC recommended the Commission state

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[271] FSC, Comment 203 at 2; see also CU, Comment 289 at 1; 3Degrees, Comment 330 at 2-3; ACC, Comment 318 at 2 (recommending the Commission import the Endorsement Guides' brief discussion of the definition of "material connection" into the Green Guides); ISEAL, Comment 204 at 3 (stating the Guides should reference ISO:IEC 17021, Guide 65, as examples of best practice, which stresses the impartiality and independence of verification); REMA, Comment 251 at 2; Sierra Club et al., Comment 308 at 5, 20.

[272] Green Seal, Comment 280 at 4-5 (approving of Example 4 and stating that marketers should state their paid membership to the organization by, for example, stating "Trade Association X Green Certified and Paying Member"); see also PMA, Comment 262 at 8.

[273] CRS, Comment 224 at 5.

[274] Id. at 5-6; see also Seventh Generation, Comment 207 at 2 (asking the Commission to provide additional guidance regarding the extent to and manner in which marketers should disclose partnerships and material connections with non-profit organizations).

[275] ACC, Comment 318 at 3; see also P&G, Comment 159 at 2 (recommending the Commission specifically state whether payment of any kind for a seal is a material connection, and if not, what types of payments would be excluded).

that a material connection exists in all cases where an applicant pays a fee to a certifier, including application or review fees.[276]

In contrast, several commenters urged the Commission to clarify that a marketer need not disclose payment for certification if the marketer paid the fee to an independent, third-party certifier. 3Degrees, for example, observed that, "[u]nlike a certification mark from a marketer's trade-association, a marketer, one of many stakeholders purchasing a service from an independent, third-party certification organization, has no more financial ownership or advisory role over the certifying organization than any other stakeholder."[277] Accordingly, 3Degrees asserted that reasonable consumers understand that a certification organization cannot provide its services for free and that it must recoup its cost through certification fees.[278]

Additionally, some suggested the Commission further clarify its guidance on the "material connection" disclosure.[279] For example, PFA asserted the proposed revisions create uncertainty because they distinguish between "independent certifying organization[s]" and "industry group[s]" without defining these groups or identifying a basis for their distinction.[280] PFA,

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[276] ACC, Comment 318 at 3 (also stating a marketer's financial donation or a donation in kind to a non-profit certifying entity should be disclosed).

[277] 3Degrees, Comment 330 at 2-3.

[278] Id.; see also CRS, Comment 224 at 5 (stating that it is not deceptive to display a legitimate certification mark without disclosing that the certifier charged a fee because the public expects that certifiers charge fees for their services); AHAM, Comment 258 at 4 (stating that the fact that fees are charged by third-party certifier does not bias or improperly influence testing or results); AZS Consulting, Comment 283 at 3; Eastman, Comment 322 at 3; FSC, Comment 203 at 2-3; PMA, Comment 262 at 8; REMA, Comment 251 at 2 and 4; RILA, Comment 339 at 2.

[279] FSC-US, Comment 203 at 3; NAHB, Comment 162 at 3-4; Seventh Generation, Comment 207 at 2; NPA, Comment 257 at 2 (requesting further clarification on appropriate methods for disclosing material connections between trade association certifications and member companies).

[280] PFA, Comment 263 at 2 (stating it is unclear how to classify a certifier that: (1) is an independent corporation established by a trade group; (2) is not controlled by the trade group but shares board members with the corporation; or (3) relies on independent testing laboratories for testing purposes); see also P&G, Comment 159 at 2 (observing that company representatives commonly serve on committees that advise third-party seal organizations

therefore, recommended the Commission remove all references to an "independent certifying organization [or] industry group" and, instead, directly track the language in the Endorsement Guides, which requires marketers to disclose any "connection . . . that might materially affect the weight or credibility of the endorsement."[281]

Other commenters advised the Commission to clarify there may be circumstances in which membership in, or financial support of, an organization does not constitute a material connection. For example, FSC argued marketers should not need to disclose membership in an association when that association develops a certification program and sets the program's standards, but an independent third party evaluates and certifies participating products.[282] In addition, NAHB argued there is no material connection when a marketer is a dues-paying member of an association, but the association forms a subsidiary or spin-off organization that independently certifies products using appropriate standards.[283] NAHB described a hypothetical product advertised as "Certified by the American Institute of Degradable Materials." According to NAHB, another entity, the American Degradable Material Association, formed this "independent" certification body, which uses "standards developed by industry experts and

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on seal criteria, and, therefore, the Commission should consider clarifying whether this type of relationship constitutes a material connection).

[281] Id. at 2 (also stating that, should the FTC retain the distinction between an "independent certifying organization [and an] industry group," the FTC should explicitly define these terms, including the criteria necessary for a certifying organization to be "independent").

[282] FSC-US, Comment 203 at 4.

[283] NAHB, Comment 162 at 3-4; see also NAHB Research Center, Comment 227 at 4 (concurring that trade associations issuing certifications to members have a material connection but noting that trade associations may use "autonomous subsidiaries that operate completely independent of the parent association" for certifications); but see FSC-US, Comment 203 at 2-3 (stating that companies may avoid having a material connection by setting up a certification program as a non-member organization; providing substantial funding early in its existence; and then spinning off the organization but still continuing to control the organization; and arguing that, in such a situation, although there is no financial or membership relationship, the marketer should be required to alert consumers that it created the certifying program).

suitable for evaluating degradable materials." NAHB reasoned that, even if the marketer is a member of the American Degradable Materials Association, it should not have to disclose any connection with the American Institute of Degradable Materials.

Furthermore, many criticized the Commission's proposed Examples 2 and 3.[284] These examples indicated that there is a "material connection" whenever a marketer is a dues-paying member of a trade association. ASAE and AHAM argued that trade associations' certifications frequently meet the same standards as independent, third-party certifications, and are no less accurate or reliable.[285] ASAE and AHAM explained that associations commonly contract out certifications to "credentialed and independent third-party entities" and then help manage the program without influencing the testing of specific products.[286] Similarly, AF&PA, AWC, and Weyerhaeuser stressed that trade associations and non-profit organizations may establish programs to determine if members' and non-members' products meet particular attributes based on "specific, impartial criteria," and frequently use independently accredited auditing bodies to perform the certification evaluations.[287] Thus, they argued that, where certifications are based on

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[284] 16 CFR 260.6.

[285] ASAE, Comment 134 at 2; AHAM, Comment 258 at 3; see also ALSC, Comment 250 at 4 (stating that, in the ALSC setting, both industry trade associations and for-profit agencies provide oversight, and there is no distinction in the rigor with which industry trade associations and for-profit agencies undertake their duties. Thus, ALSC asked the Commission to state that the disclosure of trade association membership by a marketer and the fact that a group certifying to a particular standard is a trade association are neither helpful nor appropriate in many settings).

[286] ASAE, Comment 134 at 2; see also AHAM, Comment 258 at 3; ISSA, Comment 229 at 2.

[287] AF&PA, Comment 171 at 5; AWC, Comment 244 at 5-6; Weyerhaeuser, Comment 336 at 1; see also AAAA/AAF, Comment 290 at 7-8; ASAE, Comment 134 at 2; DMA, Comment 249 at 6-7 (stating that the relevant question to ask about a certification is whether the certification is valid and sufficient to substantiate any claims conveyed by certification); AAMA, Comment 144 at 1 (stating that the Guides should not advise marketers to disclose a material connection if the certification program complies with the requirements of International Organization for Standardization ("ISO")/IEC Guide 65); ANA, Comment 268 at 5 (questioning whether there is adequate evidence on the record to conclude that a dues-paying membership is a material connection); CPA, Comment 261 at 2 (stating that associations impose objective and readily verifiable requirements on their members;

"public and peer-reviewed criteria, are enforced by accredited third parties, and/or are available to both members and non-members," connections to an association or non-profit are not "material."

Therefore, commenters argued that proposed Examples 2 and 3 unfairly discriminate against certifications created by industry associations in favor of strictly third-party programs.[288] ASAE contended the proposed guidance would mislead consumers to believe that association certifications and seals are somehow inferior to similar programs managed by private entities and would be impractical, given the "extremely limited space available on packaging and products for elaborate disclaimers about corporate association membership."[289] AA&FA also warned that this "disclosure burden" may, in fact, mislead consumers by suggesting an inappropriate relationship where none exists.[290]

Furthermore, AHAM expressed concern that this guidance would discourage industry from creating and maintaining credible self-governance efforts, noting these efforts benefit

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its certification program does not require candidates to be members; and CPA membership does not ensure certification of a member's products); MeadWestvaco, Comment 143 at 1 (stating that marketers should disclose connections unless the criteria upon which the certification or seal are based were developed in a recognized, consensus-based approach open to public review and comment); PPC, Comment 221 at 6 (endorsing AF&PA's comment); SMART, Comment 234 at 2.

[288] ASAE, Comment 134 at 1-2; AHAM, Comment 258 at 3-4; SPI, Comment 181 at 16 (arguing that universally requiring a disclosure where an association seal is used would be discriminatory); NALFA, Comment 254 at 1-2; ISSA, Comment 229 at 1-2.

[289] ASAE, Comment 134 at 2; AHAM, Comment 258 at 3; see also ALSC, Comment 250 at 4 (stating that disclosing trade association membership would be a significant problem for lumber manufacturers because individual pieces of lumber already are stamped with marks so that builders can readily determine the grade and species of wood, and there is no room for additional information; also noting that ALSC regulations prohibit "extraneous information" from being included in or within six inches of the mark); Pella, Comment 219 at (stating that many associations offer third-party certification programs and requiring disclosure of memberships in these associations could "diminish and disadvantage the ability of American manufacturers to market products, especially when certifications like U.S. Green Building Council's LEED rating and others may be required by federal, state, and or local codes); ISSA, Comment 229 at 3.

[290] AA&FA, Comment 233 at 4 (stating that "the more relevant information is what steps the seals, certification, and endorsements take to back up the claims they make").

consumers by "bringing together the technical expertise of the industry with the product information the consumer needs to make an informed product choice."[291] Moreover, they noted that the underlying assumption of Example 2, that no economic disclosure is needed if a program is developed and managed by an "independent" third-party laboratory, is based on the false premise that just because a trade association, rather than the manufacturer, employs the third-party laboratory, the results of such certification/verification programs are less credible.[292] In either circumstance, they argued, the laboratory's revenues are based on its customers' fees, and whether a manufacturer or trade association pays does not influence the testing or its results.[293] Accordingly, they concluded that marketers need not disclose any relationship when a program is developed and managed by a trade association contracting with a third party to conduct its testing, and the trade association and its members have no influence on that testing or its results.[294] ANA also expressed concern that, in cases where a trade association makes its certification program available to both non-members and members, only the members would have to include a disclosure.[295]

In addition, DMA asserted that third-party certifiers may be "independent" but not necessarily impartial because they generate all their income from certification fees. DMA stated that, in contrast, industry trade associations are less likely to depend on their certification

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[291] AHAM, Comment 258 at 3; see also ASAE, Comment 134 at 2; NALFA, Comment 254 at 1; ISSA, Comment 229 at 2; AZS Consulting, Comment 283 at 3.

[292] AHAM, Comment 258 at 3; ASAE, Comment 134 at 2.

[293] Id.; see also ISSA, Comment 229 at 3.

[294] Id.

[295] ANA, Comment 268 at 5.

programs for funding because they generate revenue from a wide variety of member services.[296] Similarly, ISSA asserted that many third-party certifiers charge substantial fees in exchange for review and certification, some even charging fees based on certified products' sales. Therefore, ISSA contended that third-party certifiers maintain a direct financial interest in an underlying product or service's success.[297] ISSA questioned why the FTC did not propose that marketers disclose the exchange of fees and financial interest in sales of certified products by third parties as a material connection.[298]

c. Certifications and Seals as General Environmental Benefit Claims

Most commenters supported the Commission's proposed guidance cautioning marketers that unqualified seals of approval and certifications likely constitute general environmental benefit claims and therefore should be qualified.[299] Green Seal, for example, explained that its certification program requires marketers featuring the Green Seal mark to provide, in conjunction

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[296] DMA, Comment 249 at 7.

[297] ISSA, Comment 229 at 2; see also DMA, Comment 249 at 5-6 (stating that the fact that many third-party seal programs require marketers to pay for the use of a seal to cover the costs of running and verifying the program may be just as material to consumers as the fact that an advertiser who uses a trade association's seal of approval is a dues-paying member of that association).

[298] Id.; see also CPA, Comment 261 at 2 (stating that the Commission's guidance reflects an unfounded assumption that industry trade associations treat their certification customers differently than do for-profit companies; also noting that payment for certification services is inherent in the nature of any certification service).

[299] AWC, Comment 244 at 5; AF&PA, Comment 171 at 4; Weyerhaeuser, Comment 336 at 1; and PPC, Comment 221 at 5 (stating that unqualified certifications and seals are no different than unqualified general environmental claims and, thus, should be discouraged); 3Degrees, Comment 330 at 3; Agion, Comment 139 at 1; CRS, 224 at 6; NAHB Research Center, Comment 227 at 2; EHS Strategies, Comment 111 at 2 (but arguing that the FTC should not allow marketers to use a mere logo for a product category as a qualification because a logo will not convey a certifier's criteria); FPA, Comment 292 at 4; Green Seal, Comment 280 at 3; NPA, Comment 257 at 2; NAIMA, Comment 210 at 4; Oceana, Comment 169 at 2; SCS, Comment 264 at 6; Sierra Club et al., Comment 308 at 11; WLF, Comment 335 at 1; Evergreen, Comment 188 at 2.

with the mark, a statement of basis for the mark's award, and that this approach has worked well in the marketplace.[300]

In contrast, ANA argued that the record does not support the Commission's "broad and general mandate" that marketers provide additional language in advertising and labeling any time they use a globe icon or the prefix "eco," as proposed Example 5.[301] ANA further asserted that there is no evidence of "widespread abuse or deception perpetrated by the misuse of certain icons or artwork," and that the proposed Guides do not provide sufficient guidance on which visual depictions may be deceptive. ANA concluded that context is critical in determining whether seals and logos can be deceptive, and, therefore, recommended the Commission address this issue on a case-by-case basis rather than creating "broad and ambiguous" guidance that may be challenged on First Amendment grounds.

Several commenters supporting the Commission's proposed guidance requested additional information on how to comply, including specifics on when a certification constitutes a general environmental claim and how marketers can make effective disclosures. For example, CPDA cautioned the Commission could, in certain circumstances, incorrectly conclude that a third-party certification or seal communicates an implied general environmental claim. Specifically, CPDA noted that a product featuring the word "certified" and an acronym for a trade association may be construed as an implied environmental claim if made in the context of green colors and

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[300] Green Seal, Comment 280 at 3.

[301] ANA, Comment 268 at 5-6.

"agricultural or rural graphics." CSPA requested further guidance on acceptable qualifying language and how to ensure the language is "clear and prominent."[302]

Others expressed concern about the limited space on labels. ACA observed that, due to other federal and state regulatory requirements, there is increasingly less space for disclosures on product labels, and some small products will not have sufficient space for both a certification or seal of approval and the appropriate qualification.[303] Similarly, PMA acknowledged that marketers should qualify seals that convey a broader environmental benefit, but stressed that marketers are concerned about the space needed for qualifying language. PMA, therefore, recommended the Guides permit marketers to feature a certification logo accompanied by a "clear and succinct statement of the basis for the certification," or by a reference to a website that clearly explains the certification criteria.[304]

In addition, some commenters addressed the proposed guidance's impact on multi-attribute certifications. For example, EPA noted that there are several credible "life-cycle oriented multi-attribute standards and eco-labeling standards" and suggested the Guides encourage marketers to use those standards.[305] EPA also suggested the FTC add the following

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[302] CSPA, Comment 242 at 3.

[303] ACA, Comment 237 at 5.

[304] PMA, Comment 262 at 9 (also stating that requiring certifiers to modify their trademarked logos would be a time-consuming and expensive process and could cause some to lose their trademark protection).

[305] EPA, Comment 288 at 2-3; see also Green Seal, Comment 280 at 3 (stating that, while its standards and certifications attempt to capture all life-cycle impacts of a product and service, it avoids using the term "environmentally preferable" in its certifications because some consumers might interpret this phrase to mean that the product or service has no environmental impact or is preferable in every possible aspect and also recommending the Commission consider allowing a comparative claim that a product is environmentally superior if clearly substantiated by certification to a "robust, life-cycle-based standard").

example to provide guidance on how to qualify seals and certifications based on complex, multi-attribute standards:

> **Example 7**: A product label contains an environmental seal, either in the form of a globe icon or a globe icon with the text "EarthSteward." EarthSteward is an independent, third-party certifier that uses broad-based, lifecycle-oriented standards developed through a Voluntary Consensus Process. All available scientific evidence has been used in the standard development process to ensure the criteria in the standard address all major environmental issues if meaningful, testable distinctions can be made for those issues. Either seal likely conveys that the product has far-reaching environmental benefits, and that EarthSteward certified the product for all of these benefits. Since independent, third-party verification can substantiate these claims, the use of the seal would not be deceptive. The marketer would not be required to include language limiting the general environmental benefit claim, provided the advertisement's context does not imply other deceptive claims. If, however, the marketer wishes to include such language, the marketer could state next to the globe icon: 'EarthSteward certifies that this product meets a meaningful, broad, life-cycle based environmental standard.'[306]

Other commenters expressed doubt that, in the context of a multi-attribute certification program, marketers could realistically explain the basis for an award. For example, FMI observed that, because many seals and certifying programs incorporate a number of diverse environmental factors in their evaluation process, it would be challenging to fully explain the process on a label or advertisement's limited space.[307] Accordingly, FMI urged the Commission

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[306] EPA, Comment 288 at 2-3.

[307] FMI, Comment 299 at 2 (also stating that consumers may receive more information that they can reasonably use); see also Green Seal, Comment 280 at 2 (asking the Commission to clarify how service providers such as hotels and restaurants can make credible claims regarding their environmental practices, and noting that its certification program for services takes a life cycle approach that requires "implementation of green practices across the business").

to allow marketers to use multi-attribute seals and logos with a brief, general description, and provide additional information via website.[308]

Finally, Good Housekeeping expressed concern that the proposed guidance would signal that "being environmentally responsible in one area is sufficient, and [would diminish] other areas in which the product or company may (or may not) be taking significant environmental steps."[309] Therefore, while agreeing that the FTC's proposed guidance may make sense for most products, Good Housekeeping argued it should not apply to multi-attribute seals and certifications such as the "Green Good Housekeeping Seal," which encompass a broad range of environmental factors. Instead, Good Housekeeping recommended that the final Green Guides advise marketers featuring a multi-attribute label or certification logo to state the product meets the certifier's definition of "Green" and refer to the certifier's website.[310]

d. Certifications From, or Appearing to Be From, Government Entities

Several commenters asked the Commission to provide additional guidance regarding certifications bestowed by, or appearing to be bestowed by, government agencies.[311] ANA argued

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[308] FMI, Comment 299 at 2; ITIC, Comment at 6 (stating it would be extremely cumbersome to qualify any multi-attribute logo or seal on electronic product packaging with all of the specific and limited benefits associated with that program and that independent certification programs often place strict limitations on marketers' ability to display or modify the logo for the programs, which may limit the ability of marketers to clearly and prominently qualify the seal or certification).

[309] Good Housekeeping, Comment 78 at 2.

[310] Id. (noting that Good Housekeeping's program evaluates a broad range of categories, including materials, ingredients and composition of a product, energy usage, water usage, waste generation from manufacturing process, and packaging and distribution); GAC, Comment 232 at 2 (stating that it would be unrealistic for multi-attribute certification programs to list every aspect of their certification and that such programs should be able to state that the certification is multi-attribute and direct the consumer to a website or other resource for more information).

[311] See, e.g., EPA, Comment 288 at 2.

the proposed Guides do not adequately address situations where consumers might perceive a connection with the U.S. Government, which could include any program that uses "U.S." in the name.[312] Relatedly, SPI suggested the Commission revise proposed Example 4 (certification by the "U.S. EcoFriendly Building Association") to address its concern that the use of "U.S." in conjunction with an environmental seal may imply an association with the U.S. government.[313]

In addition, NAIMA urged the Commission to state that any representation that a government body has certified or approved a particular product must be truthful, as the Commission did in its Home Insulation Rule, which specifically prohibits making false or misleading references to government standards approval.[314] According to NAIMA, claims that a product is certified, approved, or endorsed by a government agency are most likely per se false and misleading because government agencies typically do not endorse, approve, or certify commercial products. NAIMA noted that the fact that agencies implement specific guidelines on purchasing environmentally preferable products and services does not mean they have certified, approved, or endorsed a particular product.[315]

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[312] ANA, Comment 268 at 5; see also Terressentials, Comment 296 at 3-4 (recommending the Commission bring enforcement actions against companies featuring a logo or seal resembling USDA's National Organic Program logo).

[313] SPI, Comment 181 at 16.

[314] NAIMA, Comment 210 at 5, citing 16 CFR 460.21 ("Do not say or imply that a government agency uses, certifies, recommends, or otherwise favors your product unless it is true. Do not say or imply that your insulation complies with a government standard or specification unless it is true.").

[315] Id. at 5 (also noting that product regulation, such as the Consumer Product Safety Commission's fire threat regulations, is different from approval, endorsement, or certification); see also JM, Comment 305 at 8-9 (stating that consumers may mistakenly believe a product emission certification conveys the certifier's standards are consistent with state and federal environmental and health agencies standards and exposure recommendations, and, therefore, recommending the Commission consider misleading any claims conveying the impression that product emission certification levels are adequately health protective or consistent with environmental or health agency exposure recommendations, or, alternatively, require certifiers in such cases to prominently inform consumers that its certification levels are not intended to be adequately health-protective for the home or meet current state and federal health and environmental agency standards or exposure recommendations).

Others sought clarity on whether and how the Guides apply to government certifications. For example, CSPA requested the Commission explain whether it views certifications or seals awarded by government agencies differently than those issued by third-party or private entities.[316] Alternatively, Green Seal asked the Commission to clarify that the Guides are equally applicable to government-sponsored labels addressing environmental claims.[317] In particular, Green Seal argued that certain government-sponsored labels, such as the Energy Star logo, lack clear explanatory text providing the basis for the logo.[318] In contrast, ITIC opined that, as well-known certifications, neither EPA's Energy Star nor EPEAT logos imply general environmental benefits, and, therefore, need not be qualified.[319] ITIC further asserted that manufacturers using the EPEAT logo on packaging would have little space to list the various specific benefits associated with that multi-attribute program. It therefore recommended the Commission state that, for well-known and widely-recognized certification programs, manufacturers can refer consumers to a website where they can find additional program information.[320]

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[316] CSPA, Comment 242 at 3; see also Seventh Generation, Comment 207 at 2 (recommending clarifying how the FTC views government agency certifications).

[317] Green Seal, Comment 280 at 1.

[318] Id. (arguing that, although widely recognized by consumers, the Energy Star logo may be misleading because it is unqualified, and the basis for the Energy Star logo varies from category to category; for example, consumers may interpret the logo to mean a product is the most efficient in a category, when, in fact, it is may be 10 percent more efficient than non-qualified models (the requirement for room air conditioners) or 30 percent more efficient than non-qualified models (the requirement for clothes washers)).

[319] ITIC, Comment 313 at 5-6.

[320] Id. at 6 (also stating that if the Commission clarifies that these seals should be qualified with language referring to the specific and limited benefits associated with those programs, it should provide an example of how to appropriately qualify those seals); see also FSC, Comment 203 at 14 (stating that, due to limited "real estate" on products, and because consumers often become familiar with logos and tag lines, widely-recognized seals and certificates should be able to use "short forms" of their logos).

e. Third-Party Certifications as Substantiation

Several commenters addressed the Commission's proposed guidance on using third-party certifications as substantiation. Specifically, they discussed three issues: (1) the proposed guidance reminding marketers that possessing a third-party certification does not eliminate their obligation to ensure that they have substantiation for their claims; (2) whether the Commission should require marketers to obtain a third-party certification to substantiate their claims; and (3) whether the Commission should establish a particular certification system or provide guidance on the development of third-party certification programs.

i. Ensuring Certification Adequately Substantiates Claims

FPA and CRS agreed that having a third-party certification does not eliminate a marketer's obligation to ensure that it has substantiation for all claims reasonably communicated by the certification.[321] RILA, however, recommended the Guides provide the acceptable level of research marketers should perform on certification programs before they may rely on those certifications as substantiation.[322] On the other hand, LBA asserted it would be impracticable for homebuilders, who lack technical expertise, to independently verify information provided by design professionals, product manufacturers, and third-party certifiers.[323] LBA also stated that requiring homebuilders to independently verify claims may lessen builders' willingness to communicate valuable information.[324]

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[321] FPA, Comment 292 at 5; CRS, Comment 224 at 6.

[322] RILA, Comment 339 at 2.

[323] LBA, Comment 293 at 4-6.

[324] Id. (also asking the FTC to include a safe harbor in the Guides for the construction industry, which would permit homebuilders to use government energy conservation data in their marketing materials).

Additionally, JM recommended the Guides caution marketers to ensure that certifications are based on appropriate tests. Specifically, JM recommended the Guides advise that certifications are misleading unless substantiated by tests and models that match conditions actually encountered by consumers.[325] For example, it explained that some product emission certifiers may fail to account for the lower ventilation rates typically present in new homes, and, consequently, underestimate indoor concentrations from product emissions.[326]

ii. Third-Party Certification Not Required To Substantiate Claims

Most commenters agreed that marketers should not be required to obtain a third-party certification to substantiate an environmental claim.[327] Others, however, suggested the Guides require marketers to have certifications in certain circumstances.[328] As discussed in Part III, supra, GreenBlue and Bekaert argued third parties should certify claims based on life cycle assessments.[329] RILA asserted marketers should obtain certifications to substantiate single-attribute claims because products featuring such claims may not be environmentally preferable due to life cycle trade-offs. [330]

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[325] JM, Comment 305 at 5.

[326] Id. at 5-6; see also NAIMA, Comment 210 at 5.

[327] AAAA/AAF, Comment 290 at 7; AWC, Comment 244 at 5; AF&PA, Comment 171 at 4; Weyerhaeuser, Comment 336 at 1; PPC, Comment 221 at 5 (endorsing AF&PA's comment); NPA, Comment 257 at 3; Evergreen, Comment 188 at 2. These commenters did not provide reasons for their support.

[328] See, e.g., Bekaert, Comment 307 at 1; GreenBlue, Comment 328 at 2-3; RILA, Comment 339 at 3-4.

[329] GreenBlue, Comment 328 at 2-3; Bekaert, Comment 307 at 1.

[330] RILA, Comment 339 at 3-4.

iii. Guidance on Certification Programs

Many commenters agreed the Commission should not establish a particular certification system or provide guidance on the development of a third-party certification program.[331] For example, EPA explained "the FTC is not in a position to specify the specific process for, or content of, programs that award seals and certifications," and, thus, the Commission should review certifications on a case-by-case basis.[332] Other commenters concurred with the Commission's analysis in this area but, nevertheless, suggested the Guides expressly recommend the use of "true consensus-based standards, such as those under ISO and the ANSI-accredited standards organizations . . . that have followed criteria and attributes found in credible certification programs."[333]

On the other hand, several commenters argued the Commission should provide guidance on the use of third-party certifications as substantiation. For example, Sierra Club et al. recommended the Guides clearly identify the criteria by which marketers can make "certification" claims and the standards by which the Commission will judge and enforce their veracity.[334] They also expressed concern that the Commission failed to consider that, under some certification

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[331] See, e.g., EPA, Comment 288 at 2; AWC, Comment 244 at 5; AF&PA, Comment 171 at 5; Weyerhaeuser, Comment 336 at 1; PPC, Comment 221 at 6 (endorsing AF&PA's comment); Evergreen, Comment 188 at 2.

[332] EPA, Comment 288 at 2.

[333] AWC, Comment 244 at 5; AF&PA, Comment 171 at 5; Weyerhaeuser, Comment 336 at 1; PPC, Comment 221 at 6 (endorsing AF&PA's comment); Evergreen, Comment 188 at 2; see also ISEAL at 3 (suggesting the Guides reference international best practices for the setting, management, and use of third-party certification programs and labels to underscore that only standard systems that are transparent, consistent, and open are credible, specifically referencing the ISEAL's Code of Good Practice for Assessing the Impacts of Social and Environmental Standards Systems as an example of best practice for claim substantiation); CRS, Comment 224 at 6; RILA, Comment 339 at 2.

[334] Sierra Club et al., Comment 308 at 3 and 4 (also stating that the "competent and reliable scientific evidence" substantiation standard fails to take into account that many certification systems use "management systems," not actual numeric standards, which are not amenable to expert measurement or quantification).

systems, the experts conducting the "tests, analysis, and research" are employed by companies with a strong financial interest in maintaining the certification standard. Therefore, they suggested the Commission advise against certifications in the following circumstances: (1) when an industry-founded and -governed "certification" entity portrays itself as "independent," "charitable," or "third-party" but, in fact, is substantially dependent on industry group or participant financing and has strong ties to industry-created associations;[335] (2) when an entity adopts "vague, ambiguous, heavily-qualified and patently unenforceable environmental 'standards' that, in fact, allow practices that can result in environmental injury"; or (3) when the entity's "standards-setting process is convened, substantially financed, and dominated by industry interest."[336]

Finally, several commenters disagreed with the Commission's position that certifiers need not make their standard or other criteria public. SCS argued that this "lack of transparency" is inconsistent with international accreditation guidelines for certifiers, such as ISO-14065, and, therefore, consumers lack "a clear basis upon which to invest their trust."[337] Similarly, NAHB asked the Commission to specify that information regarding performance criteria, third-party verification, internal quality controls, and certification processes should be easily accessible to

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[335] Id. at 21-25 (specifically suggesting the Guides provide that a certification entity cannot claim it is "independent" if it is either heavily reliant on or receives substantial financial support from the persons or companies whose products it certifies and stating that an "independent" or "third-party" certifier must be able to must be able to affirmatively demonstrate that its governance structure is genuinely independent).

[336] Id. (also stating that "off-product," website qualifications, such as "X is principally funded by the industries whose products it certifies," are ineffective because most consumers would "rely heavily on the 'feeling' and context of the on-product certification seal" and would not check the website for additional information).

[337] SCS, Comment 264 at 6.

any interested party.[338] According to NAHB, this information will help consumers "best evaluate the veracity and credibility of certifications being offered."[339] NAHB also recommended the Commission advise that any certification based on confidential calculations is not supported by competent and reliable scientific evidence and, therefore, is unsubstantiated.[340]

4. Analysis and Final Guidance

The final Guides include a new section devoted to certifications and seals.[341] This section clarifies that whether the use of the name, logo, or seal of approval of a third party is an endorsement depends on the context of the advertisement. The Commission also emphasizes, through revised and new examples, that a certification or seal can deceptively imply that the certifier has evaluated a product or service using independently-developed and objectively-applied standards. The fact that a certifier receives funds from a certified entity, however, does not, in and of itself, necessarily mean there is a material connection that must be disclosed.

In addition, the final Guides advise that the use of a certification or seal by itself may imply a general environmental benefit claim. In such cases, marketers should accompany those certifications or seals with clear and prominent language that effectively conveys that the certifications or seals refer only to specific and limited benefits. Finally, based on the comments,

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[338] The NAHB Research Center, Comment 227 at 3; see also GPR, Comment 206 at 3 (stating that when relying on third-party certifications, marketers should make publicly available the status of certifications and methodology used for awarding the certification); Weyerhaeuser, Comment 336 at 1; UL, Comment 192 at 2 (stating that the Commission should require certifiers who validate or qualify product claims not based on a published, consensus-based standard to make publicly available the criteria used to support their certification); GreenBlue, Comment 328 at 3 (suggesting the FTC set up a public clearinghouse where consumers could review claim substantiation).

[339] NAHB Research Center, Comment 227 at 3.

[340] JM, Comment 305 at 11.

[341] See 16 CFR 260.6.

the Commission adds an example illustrating how marketers can effectively qualify certifications based on comprehensive, multi-attribute standards.

a. Certifications and Seals as Endorsements, Generally

As discussed above, several commenters requested additional guidance on when a marketer's use of a third party's name, logo, or seal of approval[342] constitutes an endorsement. As with all advertising claims, consumer interpretation of a seal depends on the net impression of the advertisement.

The Commission's experience suggests that consumers likely believe that a seal appearing to be from an entity other than the manufacturer is an endorsement. Moreover, as one commenter observed, consumers may interpret a seal as an endorsement even if the seal does not use words such as "certified," "certification," "endorsement," or "approved." This point is illustrated through final Example 5, where the marketer's industry sales brochure for overhead lighting featured a seal with the name "EcoFriendly Building Association." Although the marketer intended this seal to show that it is a member of that organization, the seal did not indicate that it referred only to membership. Because consumers likely would believe that the EcoFriendly Building Association evaluated and endorsed the product, the example explains that the marketer should disclose that the organization did not evaluate the product's environmental attributes and that the seal refers only to membership.

On the other hand, a seal or its accompanying language may make clear that it does not represent a third party's endorsement. Accordingly, to clarify that the determination of whether use of a seal constitutes an endorsement is context-specific, the Commission modifies the

[342] To avoid repetition, the Commission uses the word "seal" to refer collectively to names, logos, and seals of approval.

language in Section 260.6(b).[343] The revised language states that "[a] marketer's use of the name, logo, or seal of approval of a third-party certifier or organization may be an endorsement."[344] For example, consumers may not perceive a seal to be an endorsement if the seal or its context clearly reflects the marketer's participation in a recycling program. The Commission adds the words "or organization" because, as one commenter observed, marketers may feature seals from third-party organizations that are not certifiers, and, depending on the context, consumers may infer these seals reflect those organizations' endorsements.

b. Material Connection

The proposed certification section advised marketers to follow the Endorsement Guides, which require marketers to disclose "material connections." The Endorsement Guides provide that a marketer must disclose "connection[s] 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)."[345] In the October 2010 Notice, the Commission explained that consumers likely place different weight on a certification from an industry association than from an independent, third party. It also proposed two examples illustrating when marketers should disclose a material connection, both involving seals of approval by a trade association of which the marketer is a member. The Commission explained that consumers likely expect that an endorser is truly independent from the marketer and that the

[343] The proposed Guides stated that "[a] marketer's use of the name, logo, or seal of approval of a third-party certifier is an endorsement." 16 CFR 260.6(b) (emphasis added).

[344] 16 CFR 260.6(b) (emphasis added).

[345] 16 CFR 255.5.

trade association certifiers in the examples are not truly independent because the marketer pays membership dues to the association.

Some commenters criticized the Commission's analysis and the proposed examples. Among other things, they argued that many industry certifiers use independent parties to develop and apply their certification standards. Therefore, an inference that a trade association certification is based on weak standards or poorly applied standards may be inaccurate. They also asserted the Commission erroneously assumed that trade association certifiers are not independent because they receive dues from their members. They explained that non-industry certifiers also receive compensation for their services and, therefore, have the same connection. Conversely, some commenters urged the Commission to clarify that a marketer need not disclose payment for certification if the marketer paid a fee to an independent, third-party certifier.

The Commission agrees that the proposed examples were overbroad and thus revises its guidance. As an initial matter, the Commission clarifies that marketers featuring certifications from third-party certifiers need not disclose their payment of a reasonable certification fee if that is their only connection to the certifier. Consumers likely expect that certifiers charge a reasonable fee for their services and, therefore, doing so does not create a material connection.[346] Thus, the Commission revises Example 8 (proposed Example 6) to clarify this point.[347] Example 8 describes a seal of approval from a non-profit, third-party association. While the proposed example concluded without explanation that "there are no material connections between" the

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[346] In contrast, consumers are unlikely to expect, for example, that the certifier receives a percentage of gross product sales in return for its service. This fact would likely materially affect the credibility that consumers attach to the endorsement. See Section 255.5 of the Endorsement Guides, Example 4.

[347] As noted in footnote 1 of 16 CFR 260.6, the examples in this section assume that the certifiers' endorsements meet the criteria provided in the Expert Endorsements (255.3) and Endorsements by Organizations (255.4) sections of the Endorsement Guides.

certifier and the marketer, the final example now clarifies that payment of a reasonable fee alone does not create a material connection.

There may be a material connection when a certification conveys that the certifier is independent but there are ties between the certifier and marketer, such as when the certifier is a trade association of which the marketer is a member or when a marketer's officer sits on the certifier's board. Whether there is a material connection in such cases depends on whether these ties affect the weight or credibility of the certification. If, for example, an independent certifier administers an industry trade association certification program by objectively applying a voluntary consensus standard (i.e., a standard that has been developed and maintained by a voluntary consensus standard body), then the connection between the industry group and the marketer would not likely be material.[348] Specifically, the bias that consumers reasonably expect to permeate, or at least leak into, the process from such a relationship is no longer extant when the standards are created through an open, balanced process and applied objectively by an independent auditor.

Even when marketers do not have a material connection to a certifier, such as when a trade association uses voluntary consensus-developed standards that are applied by an independent auditor, or when a marketer's only tie to a certifier is reasonable compensation for its certification services, marketers should still ensure they have adequate substantiation for

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[348] Voluntary consensus standard bodies are "organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. . . . A voluntary consensus standards body is defined by the following attributes: (i) openness, (ii) balance of interest, (iii) due process, (iv) an appeals process, (v) consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus members are given an opportunity to change their votes after reviewing the comments." Circular No. A-119 Revised, Office of Management and Budget at www.whitehouse.gov/omb/circulars_a119.

reasonable consumer understanding of their claims.[349] A voluntary consensus standard-development process does not necessarily result in standards that constitute adequate substantiation for a particular claim.[350]

Marketers need not employ this material connection analysis when the advertisement, through the seal itself or otherwise, does not convey that the certifier is independent. For example, when a seal clearly and prominently features an industry name (e.g., The X Products Industry Association Seal Program), then it does not imply that the certifier is independent. To determine whether a seal conveys that the certifier is independent, marketers should examine the net impression of the advertisement.

Consistent with this analysis, the Commission eliminates proposed Example 2. This Example stated that a marketer who is a dues-paying member of the "Renewable Market Association" should necessarily disclose that fact because its use of the seal likely conveyed that the association is independent from the product manufacturer. This example, however, failed to take into account whether the dues paid to the certifier affected the certifier's independence.

The Commission also revises proposed Example 3 and adds two new examples to illustrate that marketers conveying that their products have been endorsed by an independent third party, and who have a connection beyond payment of a reasonable certification fee, must ensure

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[349] 16 CFR 260.6(c).

[350] This analysis addresses only whether a material connection exists. The Commission does not mean to suggest that only a voluntary consensus standard-development process could result in standards that constitute adequate substantiation.

the certifier objectively applies standards that are developed and maintained by a voluntary consensus standard body or disclose the material connection that likely exists.[351]

New Example 2 (proposed Example 3) describes a manufacturer that advertises its product as "certified by the American Institute of Degradable Material" ("AIDM"). AIDM is an industry trade association with appropriate expertise to evaluate products' biodegradability. To be certified, marketers must meet standards that have been developed and maintained by a voluntary consensus standard body. AIDM hires a third-party independent auditor who applies these standards objectively. The revised example explains that this advertisement likely is not deceptive.

New Example 3 describes a marketer touting a seal of approval from "The Forest Products Industry Association." Because it is clear from the certifier's name that the product has been certified by an industry group, the certification likely does not convey that it was awarded by an independent certifier. Therefore, the marketer need not make a material connection disclosure.

In new Example 4, a marketer's package features a certification with the text "Certified Non-Toxic." This certification likely conveys that the product is certified by an independent organization. The certifier standards are developed by a voluntary consensus standard body. Although non-industry members comprise a majority of the certifier's board, an industry veto

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[351] The Commission also slightly revises proposed Example 1 (Example 1 in the final Guides), which described a "GreenLogo" seal created by the manufacturer to convey its paint meets the manufacturer's own standards. The example cautions marketers that consumers likely would believe that an independent, third party with appropriate expertise awarded the seal, not the manufacturer itself. Therefore, it advises marketers to accompany the seal with clear and prominent language indicating that the marketer awarded the seal to its own product. The Commission retains this guidance but revises the example to clarify that the manufacturer also should disclose if an independent, third-party certifier applies the manufacturer's own standards. Specifically, the example now states that use of the GreenLogo seal would be deceptive if "no independent, third-party certifier objectively evaluated the paint using independent standards." (emphasis added). Consumers are likely to consider the certifier's use of the marketer's own standards to be material.

could override any proposed changes to the standards. Therefore, the certifier is not independent, and the claim would be deceptive.

c. Certifications and Seals as General Environmental Benefit Claims

The vast majority of commenters supported the Commission's guidance that marketers not use "unqualified" environmental certifications and seals, which likely convey general environmental benefit claims. No commenter submitted new consumer perception evidence addressing this issue.[352] Therefore, the Commission retains its guidance and the accompanying examples.[353] Some commenters, however, questioned when a certification conveys a general environmental benefit claim and therefore should be qualified. In response to these comments, the final Guides clarify that an environmental certification or seal of approval likely conveys a general environmental benefit claim when it does not clearly convey, either through its name or other means, the basis for the certification. Because it is highly unlikely that marketers can substantiate such a generalized claim, they should not use environmental certifications or seals that do not convey the basis for the certification. The final Guides further state that marketers can qualify general environmental benefit claims conveyed by environmental certifications and seals of approval by using clear and prominent language that effectively conveys that the certification or seal refers only to specific and limited benefits.

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[352] The Commission's study did not test consumer interpretation of seals of approval or certifications. Given the diversity of seal and certification designs, it would have been difficult to draw general consumer perception conclusions from testing one particular design.

[353] As discussed above, the Commission modifies some of these examples to clarify when a material connection may exist. It does not modify the Commission's advice on qualifying a certification implying a general environmental benefit claim.

The Guides provide some examples of when a certification conveys a general environmental benefit claim and therefore should be qualified. For instance, the Commission's examples advise that an environmental seal featuring a globe icon, a globe icon with the text "EarthSmart,"[354] and a seal called "GreenLogo for Environmental Excellence"[355] likely convey that an advertised product has far-reaching environmental benefits.[356] These examples suggest appropriate qualifications. In contrast, in other examples, the Commission suggests that products described as "certified by the American Institute of Degradable Materials,"[357] and "Certified Non-Toxic,"[358] and a product featuring a seal from the "No Chlorine Products Association"[359] do not convey a general environmental benefit. The names of these certifications effectively convey that the featured certifications apply only to specific environmental attributes (i.e., degradability, non-toxicity, and no chlorine, respectively) rather than to the overall environmental benefit of the products.

When a certification does convey a general environmental benefit, the Guides' examples illustrate a few, but not the only, effective ways to qualify that claim clearly and succinctly. For example, the Commission states that a marketer featuring the EarthSmart logo could effectively

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[354] Example 6, formerly Example 5.

[355] Example 1.

[356] One commenter questioned whether marketers must qualify any seal featuring a globe icon or the prefix "eco." Globe images often convey broad environmental benefits and should be qualified accordingly. In certain contexts, however, a globe image may not convey an environmental claim at all. For example, an advertisement for a travel agent featuring a globe without environmental cues likely does not imply that its service is environmentally beneficial. In contrast, the use of the prefix "eco" likely conveys general environmental benefits in all contexts. Marketers should therefore qualify seals featuring globe images or the prefix "eco" as necessary depending on the context of the advertisement.

[357] Example 2.

[358] Example 4.

[359] Example 8.

qualify its general environmental benefit claim by accompanying the seal with clear and prominent language stating that "EarthSmart certifies that the product meets EarthSmart standards for reduced chemical emissions during product usage." Alternatively, the seal itself could state "EarthSmart Certified for reduced chemical emissions during product usage." Similarly, a marketer could qualify the general claim conveyed by "EcoFriendly Building Association" seal by accompanying the seal with a clear and prominent statement that the product is "made from 100 percent recycled metal and uses energy efficient LED technology." Ultimately, however, context is critical in determining whether a particular seal is deceptive, and this determination necessarily must be done on a case-by-case basis.

Certifications based on broad-based, multi-attribute standards pose a unique challenge when they convey a general environmental benefit claim.[360] In some cases, the number of attributes evaluated by a certifier is so great that it is impracticable to effectively communicate all evaluated attributes. To address this situation, the Commission adds new Example 7. In this example, a one-quart bottle of window cleaner features a seal with the text "Environment Approved." An independent, third-party certifier with appropriate expertise granted this seal after evaluating 35 environmental attributes. The seal clearly and prominently states that "[v]irtually all products impact the environment. For details on which attributes we evaluated, go to [a website that discusses this product]." This statement likely prevents consumers from inferring that a product has no negative impact even though the name of the seal conveys a general environmental benefit claim. It also signals that the certified product may not have every attribute consumers appear to perceive from an unqualified, general environmental benefit

[360] Multi-attribute claims are those that make claims about multiple environmental benefits, not multiple attributes for a single claim (e.g., recyclable).

claim.[361] Because this statement ameliorates deception before the consumer views the referenced website, the marketer's reference to a website for additional information is appropriate. Having made reference to a website, however, the marketer must also ensure that the website actually provides the referenced information and that this information is truthful and accurate.

Moreover, as explained in Part II.B., supra, while websites can provide useful, additional information regarding a certification, the Commission reminds marketers that they cannot use websites to qualify otherwise misleading claims appearing on labels or in other advertisements. Marketers must state all qualifiers clearly and conspicuously with the claims.

Finally, the Commission reminds marketers that a certifier's criteria must be relevant and sufficiently rigorous to substantiate all claims reasonably communicated by the certification.

d. Certifications From, or Appearing To Be From, Government Bodies

Several commenters expressed concern that marketers may deceptively claim, either expressly or by implication, that a government agency has certified their product. The Guides already address this concern by stating it is deceptive to misrepresent that a product, package, or service has been endorsed or certified by any "independent third party," including a government agency.[362]

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[361] The Commission does not advise marketers to use this type of qualification where a marketer makes a non-certified general environmental benefit claim based on attributes that are too numerous to be effectively communicated. The record does not indicate that this is a significant issue.

[362] 16 CFR 260.6(a). Moreover, if a certification falsely conveys that it has been granted by a government agency, this may constitute fraud, which is best addressed through law enforcement actions rather than Commission guidance. Outside the environmental context, the Commission has pursued companies and individuals misrepresenting their affiliation with government agencies and will continue to be vigilant in this area. See, e.g., FTC v. Fed. Loan Modification Law Center, LLP, Civil Action No. SA-CV-09-401-CJC (MLGx) (C.D. Cal. Apr. 6, 2009); FTC v. http://bailout.hud-gov.us and http://bailout.dohgov.us, and Thomas Ryan, Civ. No. 1:09-cv-00535-HHK (D.D.C. Apr. 6, 2009).

The Commission, however, modifies proposed Example 4 (now Example 5), which referred to the "U.S. EcoFriendly Building Association." A commenter expressed concern that the use of "U.S." in conjunction with an environmental seal may indicate an affiliation with the U.S. government. To eliminate any confusion, the Commission removes the "U.S." reference, which is not central to the guidance in the example.[363]

In addition, several commenters asked the Commission to clarify whether its guidance applies when marketers feature federal government agencies' certifications. In response, the Commission clarifies that marketers are responsible for substantiating claims conveyed by any certification, including government certifications. The Commission, however, has never brought an enforcement action against a marketer that legitimately qualifies for an agency's certification and advertises that certification consistent with the agency's requirements. The Commission does not want to put marketers in a position of trying to comply with potentially contradictory advice from two federal agencies. To avoid such problems, the Commission actively collaborates with other agencies, such as EPA, Department of Energy, and USDA, to address such issues.

e. Substantiation

The final Guides caution marketers that "[t]hird-party certification does not eliminate a marketer's obligation to ensure that it has substantiation for all claims reasonably communicated by the certification."[364] Although one commenter expressed concern that it would be burdensome for marketers to independently verify information provided by manufacturers and third-party

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[363] This example makes clear that displaying the organization's seal may cause consumers mistakenly to believe that the organization has evaluated and endorsed the product. 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.

[364] 16 CFR 260.6(c).

certifiers, the Guides do not impose specific substantiation techniques or standards beyond that which Section 5 already requires.

As one commenter noted, marketers advertising certifications should ensure that the certifier's research is not only methodologically sound, but also relevant to the specific product promoted and its advertised benefit. Therefore, a certifier's tests and models should replicate the conditions consumers reasonably encounter. Significant discrepancies between the test conditions and real-life use likely mean the marketer does not actually possess the required substantiation. Thus, marketers should evaluate whether it is appropriate to extrapolate from the tests to the claimed benefit. For example, as one commenter noted, a certifier evaluating chemical emissions in a new residence may not be able to rely on tests designed to gauge emissions in a classroom or commercial office.

Most commenters supported the Commission's decision not to establish a particular certification system or to provide guidance on the development of third-party certification programs. There may be multiple ways to develop standards that would constitute competent and reliable scientific evidence. 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. The Commission will continue to evaluate the adequacy of third-party certifications as substantiation on a case-by-case basis.

The Commission also declines to maintain a list of "approved" third-party certifiers. Section 5 of the FTC Act gives marketers the flexibility to substantiate their claims with any

competent and reliable scientific evidence.[365] Marketers can choose for themselves whether they want to rely on a third-party certification as all or part of their substantiation, and, if so, whom they select as a certifier.

Finally, despite some commenters' suggestions that the Guides require certifiers to make their standards public, the Commission cannot include this guidance. While 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. The Guides, as administrative interpretations of Section 5, cannot advise marketers to do what the law does not require. However, the Commission notes that in some circumstances greater transparency may be helpful to consumers.

D. Compostable Claims

1. The 1998 Guides

The 1998 Guides stated that marketers should substantiate compostable claims with competent and reliable scientific evidence demonstrating that "all 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."[366] Additionally, the Guides advised marketers to qualify compostable claims "to the extent necessary" to avoid consumer deception.[367] For

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[365] 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").

[366] 16 CFR 260.7(c)(1).

[367] Id.

instance, the Guides stated an unqualified claim "may be deceptive if [the item] cannot be safely composted in a home compost pile or device."[368] Further, they stated: "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."[369]

2. Proposed Revisions

In its October 2010 Notice, the Commission proposed retaining its advice on compostable claims, based on evidence of the continued scarcity of large-scale composting facilities and consumer perception evidence.[370] Specifically, in a survey commissioned by ACC, 62 percent of respondents said they do not have access to, and an additional 28 percent do not know if they have access to, large-scale composting facilities.[371] Nevertheless, 43 percent of respondents interpreted an unqualified compostable claim to mean that such a facility is actually available in their area.[372] The survey also found that 71 percent of respondents believed that an item labeled "compostable" would decompose in a home compost pile or device.[373]

Additionally, the Commission addressed a comment regarding the time in which an item should break down into safe, usable compost. The Commission proposed restating the position it

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[368] Id.

[369] Id. at 260.7(c)(2).

[370] 75 FR 63570-71. Large-scale composting facilities that accept feedstocks other than yard trimmings remain uncommon in the United States. 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/wastes/nonhaz/municipal/pubs/msw07-rpt.pdf ("In 2007, there were 16 mixed waste composting facilities, two more than in 2006.").

[371] See APCO, Biodegradable and Compostable Survey Topline at 9.

[372] Id.

[373] Id. at 6.

articulated in 1998: "timely manner" means in "approximately the same time as the materials with which [the item] is composted, e.g., natural plant matter."[374]

3. Comments

Most commenters generally supported the Commission's proposed guidance.[375] For example, GPI stated that "[b]y clarifying that [products making] compostable claims must safely break down within the same period of time as those materials with which [they are] composted, the FTC will protect consumers from misleading and deceptive product promotion."[376] Additionally, NAPCOR referred to the proposed guidance as "important" and gave its "full support."[377]

A few commenters, however, repeated assertions that the Commission should adopt two ASTM standards, D6400 and D6868, which purport to validate a plastic material's ability to convert to compost in large-scale facilities.[378] According to the USCC, for example, while these standards have flaws, they are scientific and produce consistent results.[379]

4. Analysis and Final Guidance

The Commission considered ASTM D6400 and D6868 in its October 2010 Notice and found that those protocols likely do not typify compost facility operations nationwide. Rather,

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[374] 75 FR 63571.

[375] See, e.g., ACC, Comment 318 at 4; AF&PA, Comment 171 at 6; GPI, Comment 269 at 3; Green Seal, Comment 280 at 5; NAPCOR, Comment 187 at 3; PPC, Comment 221 at 7 (endorsing AF&PA's comment).

[376] GPI, Comment 269 at 3.

[377] NAPCOR, Comment 187 at 3.

[378] See, e.g., BASF, Comment 276 at 1; OWS, Comment 333 at 1; USCC, Comment 147 at 1; see also 75 FR 63571.

[379] USCC, Comment 147 at 1-2.

they reflect "optimum [operating] conditions" and ignore "wide variation" in actual facility operations.[380] Commenters supplied no evidence to the contrary. In fact, a prominent report cited by one supporter of the standards emphasizes the wide variation in facility operations, i.e., that each facility sets its own parameters concerning permissible feedstocks, feedstock size reduction, composting method, feasible composting time, etc.[381] Because of these variations, the ASTM protocols likely do not replicate typical compost facility environments. Therefore, consumers whose local facility operates differently than the ASTM's assumptions would be deceived if their item were incapable of being composted. Thus, these protocols alone do not substantiate unqualified compostable claims for widely-marketed items.[382]

Accordingly, based upon the paucity of large-scale compost facilities and the available consumer perception evidence, the final Guides adopt the Commission's proposed guidance without change.[383] The Guides state that a compostable claim should be substantiated by competent and reliable scientific evidence that the entire item will break down into, or otherwise become part of, usable compost 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 facility or a home compost pile. The Guides also state that compostable claims should be clearly qualified if, for

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[380] 75 FR 63571.

[381] BASF, Comment 276 at 2 (citing Compostable Packaging: The Reality on the Ground, Blue Green Institute 2010); see Compostable Packaging at 7-8 ("The variability of composting facilities cannot be stressed enough. No two are the same when looking at the operating systems, feedstock sources, state regulations, markets for compost, etc."), available at http://legis.wisconsin.gov/lc/committees/study/2010/SUP/files/SPC_Compostable_Packaging_final.pdf.

[382] A widely-followed industry standard may violate the FTC Act if it harms consumers through deception or unfairness. See, e.g., Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957 (D.C. Cir. 1985); Harry & Bryant Co. v. FTC, 726 F.2d 993 (4th Cir. 1984).

[383] See 16 CFR 260.7.

example, an item cannot be composted safely or in a timely manner at home, or if necessary large-scale facilities are not available to a substantial majority of consumers.

E. Degradable Claims

1. The 1998 Guides

The 1998 Guides stated 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.[384] They also provided that marketers should qualify degradable claims 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.[385]

2. Proposed Revisions

In its October 2010 Notice, the Commission proposed clarifying its guidance on degradable claims for items entering the solid waste stream, but declined to adopt a particular substantiation test.[386] The proposed Guides advised marketers to qualify claims if a solid waste item will not fully decompose within one year of customary disposal.[387] The Commission based its proposed guidance on a consumer perception survey and evidence of customary solid waste disposal methods. In the survey, 60 percent of respondents stated they would expect an item labeled biodegradable without qualification to decompose in one year or less. Such waste, however, customarily ends up in landfills, incinerators, and recycling centers, which dramatically

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[384] 16 CFR 260.7(b).

[385] Id.

[386] 75 FR 63569-70.

[387] Id. at 63569.

inhibit or altogether preclude total decomposition.[388] Because of the minute chance that any item disposed of using these customary methods would totally decompose in one year, the Commission proposed that marketers qualify all degradable claims for such items. The Commission also declined to adopt any particular substantiation protocol for solid waste items because the suggested protocols did not replicate the heterogeneous conditions found in landfills, the most common disposal environment.[389]

In its October 2010 Notice, the Commission also sought comment on whether the one-year threshold could lead to deception where consumers expect an item to degrade more quickly – e.g., a plant pot decomposing rapidly in soil. Finally, given the lack of information on the record about liquid waste decomposition, the Commission sought consumer perception evidence concerning these claims.

3. Comments

As discussed below, many commenters supported the Commission's proposed guidance, including addressing oxo-degradable claims like other degradable claims. A few, however, disagreed, suggesting the guidance was too restrictive. Additionally, two commenters suggested the Commission adopt methods to substantiate biodegradable claims for substances entering the liquid waste stream.

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[388] EPA, Municipal Solid Waste Generation, Recycling, and Disposal in the United States: Facts and Figures for 2010 at 1-2, available at http://www.epa.gov/wastes/nonhaz/municipal/pubs/msw_2010_rev_factsheet.pdf.

[389] 75 FR 63569.

a. Comments Supporting the Commission's Analysis

Several commenters supported the Commission's proposed guidance.[390] For example, the AFPR stated: "[G]iven the attributes of a modern landfill, a claim of degradable may well be misleading and qualification should be required. When disposed of in a manner that promotes and/or allows degradation, AFPR believes the one-year period for degradability to be reasonable."[391] ACC commented: "We support the Commission's proposal to treat oxo-degradable and oxo-biodegradable claims, and any other claim including the root word 'degradable,' like all other degradable claims" because they "are interchangeable in terms of consumer perception."[392]

b. Comments Disagreeing with the Commission's Approach

A few commenters disagreed with the Commission's proposed guidance. For example, EcoLogic posited that the one-year guideline for solid waste items was shorter than what consumers may expect for complete decomposition.[393] In support, the company submitted a consumer perception study conducted by Synovate.[394] After showing respondents numerous statements about landfills, including that "traditional plastics" take "hundreds of years to decompose," Synovate asked respondents to select from a group of answers about how long a

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[390] See, e.g., AFPR, Comment 246 at 2; ACC, Comment 318 at 3-4; CU, Comment 289 at 1; GPI, Comment 269 at 3; NAPCOR, Comment 187 at 3; Webster Industries, Comment 161.

[391] AFPR, Comment 246 at 2-3.

[392] ACC, Comment 318 at 3-4; see also GPR, Comment 206 at 2; CAW, Comment 309 at 1.

[393] EcoLogic, Comment 245 at 4, 6.

[394] Id. at 8-28.

biodegradable plastic package would take to decompose in a landfill.[395] Twenty-five percent of respondents answered less than one year, and an additional 45 percent responded less than five years. Because the two groups together comprise 70 percent of respondents, EcoLogic recommended the Commission raise its one-year guideline to five years.[396]

In addition, WLF asserted the proposed guidance would burden advertisers "far more than . . . is permissible under the First Amendment . . . [by requiring a] lengthy explanation regarding the ability of the product to degrade when disposed of in the most customary manner."[397] WLF stated a marketer should be able to label a package simply as "degradable" if it will fully decompose quickly when littered – even though it is disposed customarily in a landfill where decomposition will be severely inhibited.[398]

Finally, a few commenters proposed that the Commission adopt a particular testing standard, such as ASTM D 5511, as substantiation for unqualified degradable claims.[399] While acknowledging that such standards may not strictly "mimic the conditions found in a landfill,"[400] these commenters suggested adoption of these standards because they "foster consistency and comparability of claims."[401]

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[395] Id. at 18, 21, 23.

[396] EcoLogic is a manufacturer of "biodegradable plastic additives." Other such manufacturers also urged a guideline greater than one year, but no commenter other than EcoLogic submitted consumer perception evidence.

[397] WLF, Comment 335 at 11.

[398] Id.

[399] See, e.g., Northeast Laboratories, Comment 230 at 1; PEC, Comment 167 at 5.

[400] Northeast Laboratories, Comment 230 at 1.

[401] SPI, Comment 181 at 5-7; Northeast Laboratories, Comment 230 at 1.

c. Comments Addressing Separate Issues

The Commission also requested comment on whether the one-year guidance may mislead consumers who expect much more rapid decomposition. No commenter provided evidence that consumers expect solid items to degrade in much less than one year. The Commission also requested comment regarding how long consumers expect it will take a liquid (or dissolvable solids) labeled degradable without qualification to fully decompose. No commenter supplied evidence of such timeframe. However, two commenters proposed adoption of complex EPA standards used to assess "ready biodegradability" in liquids.[402] Specifically, they asserted that these protocols have gained "world-wide acceptance" for assessing biodegradability in water.[403] In contrast, EPA and P&G posited that these protocols (and similar OECD protocols) are accepted only for testing single chemicals, not mixtures.[404] EPA noted that it "is not aware of data demonstrating that existing methods could support a claim of biodegradation in a reasonably short period of time" because "negative synergies between chemicals [in a mixture] might impact the rate of degradation."[405] Additionally, P&G asserted that "low . . . , but nonetheless significant, levels of non-biodegradable ingredients in complex mixtures like cleaning products" can go undetected by these methods.[406]

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[402] ACI, Comment 160 at 4; CSPA, Comment 242 at 4.

[403] Id.

[404] EPA, Comment 288 at 5; P&G, Comment 159 at 3. Nearly all commercial products that enter the liquid waste stream are mixtures, not single-chemical products.

[405] EPA, Comment 288 at 5.

[406] P&G, Comment 159 at 3.

4. Analysis and Final Guidance

The final Guides state that an unqualified degradable claim for items entering the solid waste stream should be substantiated with competent and reliable scientific evidence that the entire item will fully decompose within one year after customary disposal.[407] Furthermore, the final guidance treats oxo-degradable claims like other degradable claims.

a. One-Year Guideline for Unqualified Claims on Solid Waste

As discussed above, some commenters challenged the proposed one-year guideline for unqualified degradable claims. The available consumer perception evidence, however, supports this guidance. As discussed in the October 2010 Notice, in a survey by APCO Insight, 60 percent of respondents expected that an item marketed as degradable without qualification will fully decompose in less than one year.[408] The Commission concludes that this survey is a more reliable indicator of consumer perception than the Synovate study in which only 25 percent of respondents had the same expectation.[409]

Unlike the APCO survey, the Synovate study results suggest that respondents' answers may have been not only biased, but also influenced by a tendency to avoid extreme answers. As a result, reliable real-world conclusions cannot be drawn from the Synovate study. First, some respondents' answers to the question about decomposition timing likely were biased by framing from several previous statements and questions. For example, respondents were told that the

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[407] See 16 CFR 260.8.

[408] 75 FR 63569. More specifically, 34 percent of respondents stated they expect full decomposition in under six months, and an additional 26 percent stated they expect the same in less than one year. APCO, Biodegradable and Compostable Survey Topline at 2 (available at http://www.ftc.gov/bcp/edu/microsites/energy/documents/APCO-Survey.pdf).

[409] Both studies may be faulted for lacking control groups and presenting the timeframe questions with closed-ended, rather than open-ended, answers, but they nevertheless are the only studies in the record.

study was paid for by a company that creates products designed to "be helpful to the environment and [] improve the ways that plastic products are disposed."[410] Additionally, respondents were informed that "non-biodegradable plastic products take hundreds of years to decompose."[411] Such statements are absent from most marketing contexts, and did not appear in the APCO questionnaire.

Second, the Synovate study indicates that some respondents were influenced by an aversion to extreme responses. When asking about decomposition timing, Synovate provided respondents with choices including "less than 1 year," and five much longer time periods. Unlike the APCO questionnaire, the Synovate questionnaire did not provide respondents with multiple options of time periods less than one year. While 25 percent of Synovate's respondents selected the initial option, a much larger subset chose the next available option.[412] This pattern of responses, together with the absence of choices in the range of less than one year, suggests that some respondents were avoiding an extreme response.[413] By contrast, the APCO survey offered respondents multiple options of less than one year and more than one year, and the pattern of answers was not clustered next to an extreme.[414] Thus, the Commission concludes that the proportion of consumers expecting full decomposition in under one year would be closer to 60 percent rather than 25 percent.

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[410] EcoLogic, Comment 245 at 18.

[411] EcoLogic, Comment 245 at 21.

[412] Forty-five percent chose the next available option "less than 5 years." Id. at 23.

[413] See generally Itamar Simonson & Amos Tversky, Choice in Context: Tradeoff Contrast and Extremeness Aversion, 29 J. Mktg. Research 281 (1992).

[414] Nineteen percent of APCO's respondents selected the initial option "one month or less," and seven percent chose the second available option "three months or less," indicating no extremeness aversion. Biodegradable and Compostable Survey Topline at 2.

Furthermore, the one-year guidance should not chill truthful speech. The Guides are administrative interpretations of the FTC Act. They do not create an obligation that does not already exist under Section 5. Rather, they clarify marketers' existing obligations under the law. The Guides advise it is deceptive to make an unqualified degradable claim on solid waste items unless the items completely decompose within one year of customary disposal. This advice is based on evidence that customary solid waste disposal methods severely inhibit decomposition and that consumers expect an item labeled biodegradable without qualification to decompose in one year or less. Notwithstanding this advice, neither Section 5 nor the Guides can prohibit a marketer from making an unqualified degradable claim if it has substantiation for all reasonable interpretations of such claim.[415]

b. Substantiation

Some commenters recommended that the Commission create a safe harbor for a scientific protocol(s) that could be used to substantiate degradable claims for items entering the solid waste stream. As discussed in the October 2010 Notice, the Commission declined to adopt a particular substantiation protocol because the suggested protocols do not replicate actual, highly variable landfill conditions, such as the size of the disposed item, its compression, and levels of moisture and temperature.[416] Since that time, no commenter identified any standard that does so. Therefore, the Commission does not create a safe harbor for any particular testing protocol.

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[415] Because the Guides are not an independent source of legal authority for the Commission, any law enforcement action must be based on a case-specific investigation. See Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (general statement of policy is not binding and is "not finally determinative" of issues or rights); Nat'l Mining Ass'n v. Sec'y of Labor, Mine Safety & Health Admin., 589 F.3d 1368, 1371 (11th Cir. 2009).

[416] 75 FR 63569; "[T]here are no 'standard' landfill conditions in the United States, as moisture and temperature levels can vary greatly by region and climate." Northeast Laboratories, Comment 230 at 1.

c. Oxo-Degradable Claims Guidance

As discussed above, commenters supported the Commission's proposal to treat variants of the claim "degradable" like other degradable claims. Consumers likely interpret "oxo-" variants of degradable claims like other degradable claims. 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-. Accordingly, the final Guides specify that the guidance for degradable claims applies to biodegradable, oxo-degradable, oxo-biodegradable, and photodegradable claims.[417]

d. No Additional Guidance

Given the record, the final Guides do not specify how to qualify degradable claims for solid items that consumers may expect to fully decompose in less than one year. Additionally, because the record contains no evidence regarding how quickly consumers would expect a substance disposed of in the liquid waste stream to fully decompose, the final Guides also do not provide general guidance on this issue. Further, although two commenters suggested the Commission adopt "ready biodegradability" liquid waste protocols as substantiation, the Commission declines to do so. EPA notes that existing methods do not necessarily ensure complete decomposition of chemical mixtures in water in a reasonably short period of time. Because nearly all consumer products are mixtures, the Commission declines to adopt these

[417] 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).

protocols. Accordingly, absent further consumer perception research, marketers must possess substantiation for all claims conveyed by the net impression of the advertisement.[418]

F. Free-Of and Non-Toxic Claims

1. The 1998 Guides

The 1998 Guides did not contain a section addressing claims that products or services are free of certain substances or non-toxic. They did, however, include three examples that addressed such claims.

Example 4 in Section 260.6 stated a marketer made an unqualified claim that the bleaching process for its coffee filters was "chlorine-free."[419] The coffee filters were, in fact, bleached without chlorine. However, to do so the manufacturer used a process that released a reduced, but still significant, amount of the same harmful byproducts associated with chlorine bleaching. The chlorine-free claim, therefore, likely overstated the product's benefits because consumers likely would interpret it to mean the process did not cause the environmental harms associated with chlorine bleaching.[420]

Example 4 in the general environmental benefit claims section addressed claims that a lawn care pesticide was "essentially non-toxic" and "practically non-toxic."[421] Consumers would likely interpret these claims to mean the pesticide posed no risk either to human health or to the

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[418] The final Guides clarify in Example 1 that consumers' solid waste customarily terminates in incinerators and landfills, although individual consumers typically do not take their trash there directly. Additionally, in Example 4, the Guides explain more fully that use of an inconspicuous diamond symbol, by itself, in accordance with state law does not constitute an unqualified degradable claim.

[419] 16 CFR 260.6(c), Example 4.

[420] Example 4 provided 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.

[421] 16 CFR 260.7(a), Example 4.

environment. The example stated that the claims would be deceptive if the pesticide posed a significant risk to either.

Finally, Example 3 in the ozone safe and ozone friendly section discussed an unqualified claim that an aerosol product contained no CFCs. Although the product did not contain CFCs, it contained another ozone depleting substance. Because the no-CFCs claim likely implied the product did not harm the ozone layer, the claim was deceptive.

2. Proposed Revisions

The Commission proposed creating a new section with expanded guidance addressing both free-of and non-toxic claims. The proposed section included two of the three examples discussed above, as well as a new example.[422]

a. Free-Of Claims

The proposed section advised that free-of claims may be appropriate where a product contains a de minimis amount of a substance that would be inconsequential to consumers, and included a new proposed example to illustrate this point.[423]

Additionally, the proposed section cautioned marketers that a truthful free-of claim may nevertheless deceive consumers in certain circumstances. For example, it may be deceptive to claim a product is free of one substance, while failing to disclose it contains another substance

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[422] In The October 2010 Notice, the Commission proposed deleting Example 3 to the ozone safe and ozone friendly section, which referenced HCFC-22, in light of EPA's general prohibition on HCFC-22's use.

[423] The Commission emphasized that the determination of what constitutes de minimis depends upon the substance at issue and, therefore, requires a case-by-case analysis. See 75 FR 63551, 63580 (Oct. 15, 2010). 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.

that causes environmental harm, particularly if that harm is the same type of harm caused by the absent substance. To illustrate this point, the Commission proposed moving the chlorine-free coffee filter example, discussed above, into the new section.

The proposed section also stated 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. The Commission solicited comment on what guidance it should give for these claims, and sought related consumer perception evidence.

b. Non-Toxic Claims

The Commission proposed moving its guidance on non-toxic claims from the existing example in the 1998 Guides' Section 260.7(a) to the new Free-Of and Non-Toxic section. This proposed section stated consumers likely think a non-toxic claim conveys that a product is non-toxic both for humans and for the environment. It also advised marketers to qualify non-toxic claims to the extent necessary to avoid deception.

3. Final Guides Structure

As a threshold matter, EHS Strategies and the EPA recommended the Commission divide the guidance into two sections to clarify that the analysis for free-of and non-toxic claims differs.[424] The Commission agrees, and therefore addresses these claims separately below, and in Sections 260.9 (free-of) and 260.10 (non-toxic) of the final Guides.[425]

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[424] EHS Strategies, Comment 111 at 2; EPA, Comment 288 at 8 (explaining that a free-of claim implies nothing about the toxicity of the product).

[425] The Commission renumbers the subsequent Guides sections as follows: Recyclable Claims (260.12); Recycled Content Claims (260.13); Refillable Claims (260.14); Renewable Energy Claims (260.15); Renewable Materials Claims (260.16); and Source Reduction Claims (260.17).

4. Comments Regarding Free-Of Claims

Commenters focused on free-of claims arising in three contexts. First, several analyzed free-of claims for products containing a de minimis amount of a substance. Second, some addressed free-of claims for products containing substances that pose the same or a similar environmental risk to the substance that was removed. Third, others responded to the Commission's question about how consumers understand, and what guidance the Commission should provide on, free-of claims for substances that have never been associated with a particular product category.

a. De Minimis Amount of a Substance

Numerous commenters addressed whether a marketer could make a truthful free-of claim for a product that contains a de minimis amount of that substance. Assuming marketers can make such claims non-deceptively, commenters also discussed how marketers should substantiate that a substance is present at a level that is not material to consumers.

i. General Comments About Allowing Free-Of Claims Despite De Minimis Presence of a Substance

Several commenters agreed with the Commission that in some instances marketers can make non-deceptive free-of claims for products that still contain a de minimis amount of a substance.[426] These commenters did not analyze the circumstances in which such claims might be appropriate.

[426] AFPR, Comment 246 at 3; AAFA, Comment 233 at 5; AF&PA, Comment 171 at 9; AWC, Comment 244 at 6 (agreeing with AF&PA); Evergreen, Comment 188 at 3; ITI, Comment 313 at 1 (pointing to EU Directive 2002/95/EC as a reference for determining what constitutes a de minimis amount for free-of claims); PPC, Comment 221 at 10 (endorsing AF&PA's comment).

Others, however, expressed concern that this guidance might lead to deceptive claims.[427] Commenters presented several reasons for this concern, including: (1) it is very difficult to quantify or measure a de minimis quantity;[428] (2) what constitutes "inconsequential to consumers" is difficult, if not impossible, to determine;[429] and (3) de minimis presences of certain substances may still adversely impact populations with heightened chemical sensitivities.[430]

Still others suggested that a descriptor other than "free-of" would be more accurate for a product containing a de minimis amount of a substance. For example, SCS recommended using the term "no-added."[431]

Finally, although the EPA did not disagree with the FTC's approach, it suggested that a de minimis allowance in free-of claims may conflict with existing federal regulations.[432] For example, EPA explained a dye- or fragrance-free claim for an antimicrobial pesticide that

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[427] GAC, Comment 232 at 2; Green America, Comment 95 at 2; Green America and the American Sustainable Business Council, Comment 117 at 2; FSBA, Comment 270 at 1; NRDC, Comment 214 at 3 (expressing specific concern about formaldehyde free claims, and pointing out that some chemicals can have "devastating" effects even in de minimis or trace amounts); Tandus Flooring, Comment 286 at 2; see also Carpet and Rug Institute, Comment 282 (arguing that the term "de minimis" is inherently ambiguous and should be avoided "in all circumstances").

[428] GAC, Comment 232 at 2 (arguing that allowing de minimis amounts is troublesome without a definition or numeric limit for what constitutes a de minimis amount).

[429] Tandus Flooring, Comment 286 at 2 (explaining that a free-of claim should not be made unless the substance is completely absent from the material, and that it is "difficult, if not impossible, without exhaustive, definitive, scientific evidence to determine if the substance is inconsequential to consumers").

[430] FSBA, Comment 270 at 1.

[431] SCS, Comment 264 at 12.

[432] EPA, Comment 288 at 8.

contains even a de minimis amount of dye or fragrance would be false or misleading under 40 CFR 156.10(a)(5).[433]

ii. Substantiating Free-Of Claims for Products that Contain a De Minimis Amount of the Substance

Several commenters requested that the Guides recommend a methodology for substantiating free-of claims for products containing de minimis amounts of a substance.[434] One commenter contended that marketers need more guidance because determining the acceptable thresholds for specific chemicals is "[o]ne of the most contentious issues facing the scientific community today."[435]

Some commenters suggested advising marketers they could substantiate free-of claims by obtaining evidence that: (1) the substance is present in the product at a level that is less than, or equal to, background levels of the substance in the environment; and (2) the marketer did not intentionally add the substance to the product.[436] However, ITI cautioned against this approach because: (1) some substances occur in the environment "at levels that exceed what customers

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[433] Id. (explaining that EPA recently established a pilot program to allow antimicrobial pesticide products that contain no dye or no fragrance to make free-of assertions on pesticide labels as long as the confidential statement of formula supports the claim).

[434] ACI, Comment 160 at 5; ANA, Comment 268 at 4 (also requesting guidance on what constitutes a "trace amount" that might be material); ITI, Comment 313 at 2-3 (same); PFA, Comment 263 at 3 (agreeing that the FTC should define the standard to determine what is de minimis or, alternatively, allow companies to rely upon permissible levels of chemicals established by federal or state regulatory bodies as de minimis amounts for marketing purposes).

[435] Armstrong, Comment 363 at 2.

[436] Armstrong, Comment 363 at 2 (recommending that the FTC delete 260.9(c) and replace with the statement: "Free of claims must be consistent with ISO 14021; however the acknowledged trace contaminant or background level must be identified"); EHS Strategies, Comment 111 at 2 (also arguing that "de minimis" is not necessarily the same as "inconsequential to the consumer"); Seventh Generation, Comment 207 at 5.

would expect to find in a product that is marketed as 'free-of' such substances;" and (2) it could "lead to significant concerns with establishing an appropriate level of substantiation."[437]

Others recommended the Guides incorporate language generally describing standards marketers may rely on for substantiation. For example, commenters suggested the Commission advise marketers to substantiate a substance's de minimis presence based on: (1) "qualified testing and trade practice;"[438] (2) methodologies "generally accepted in the relevant scientific fields;"[439] (3) testing using "validated detection methods with limits of detections that are within the range of currently established human exposures;"[440] or (4) case-by-case analysis focusing on consumer exposure, using appropriate models.[441]

b. Substitute Substance Poses Similar Risks

Some commenters agreed that free-of claims for products containing substitute substances that pose similar risks to those posed by the removed substance may be deceptive.[442] Several others, however, expressed concern that this guidance might be inconsistent with the

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[437] ITI, Comment 313 at 1, 3.

[438] ACA, Comment 237 at 10-11; AF&PA, Comment 171 at 9 (arguing that the acceptable levels of safe exposure should be analyzed based on "methods approved by the appropriate agency"); AWC, Comment 244 at 6 (agreeing with AF&PA); PPC, Comment 221 at 10 (endorsing AF&PA's comment).

[439] EHS Strategies, Inc., Comment 111 at 3.

[440] NRDC, Comment 214 at 4 (arguing that test results should guide determination of whether a de minimis concentration is present, as unintentionally introduced chemicals or contaminations should render products ineligible for free-of claims).

[441] JM, Comment 305 at 3.

[442] GPI, Comment 269 at 4; NRDC, Comment 214 at 2-3 (urging the Commission to clarify that a truthful free-of claim will be considered deceptive if the product contains or uses substances that pose any health or environmental risk); RILA, Comment 339 at 2 (requesting clarification of "similar environmental risk" and "under certain circumstances").

Commission's general guidance on life cycle analysis.[443] These commenters argued that the examples in the free-of section suggest a marketer can never make a free-of claim if there is any other aspect of the product's manufacture or use that has a negative environmental impact.[444] They therefore argued that the section seems to "require the very same life cycle analysis that the FTC explicitly rejected."[445]

In contrast, some commenters suggested the Commission require a broader trade-off analysis or life cycle assessment to substantiate free-of claims. Armstrong, for example, urged the Commission to clarify that "free-of [claims] must be based on the entire supply chain."[446] Similarly, the NRDC requested clarification that to make free-of claims, marketers must have substantiation that the product is completely free of health and environmental risks.[447] Jason Pearson agreed that the Commission should discourage marketers from misleading consumers by implying a product is "likely to make a significant difference in an area of genuine environmental impact."[448]

Finally, ITI suggested the Commission's proposed guidance requiring marketers to disclose whether replacement substances present the same type of harm as the original is

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[443] See 70 FR at 63559-60.

[444] AAAA/AAF, Comment 290 at 8-9 (arguing advertisers making a truthful free-of claim should not have to account for every other possible environmental effect of the product, and that this example stifles "real and beneficial [environmental] progress"); ANA, Comment 268 at 2 (asking whether the FTC intends to "require a broad LCA for every single-attribute claim"); Scotts, Comment 320 at 5-6 (arguing that the guidance could stifle advancements, as companies may no longer be able to advertise the fact that they removed one or more (but not all) environmentally harmful substances).

[445] AAAA/AAF, Comment 290 at 8-9; see also ANA, Comment 268 at 2; Scotts, Comment 320 at 5-6.

[446] Armstrong, Comment 363 at 2 (suggesting an example to clarify).

[447] NRDC, Comment 214 at 2 (expressing concern that the section, as drafted, encourages "risk trading").

[448] Jason Pearson, Comment 285 at 5.

impractical. Specifically, ITI argued that following this advice would require "a measure of precision in alternatives assessment that simply may not exist for many substances."[449] ITI recommended instead stating: "if a marketer has affirmative evidence that the environmental, human health and safety risks of an alternative are greater than the substance eliminated, the marketer must disclose that information to a consumer in a footnote or a [Material Safety Data Sheet]."[450]

c. Substance Never Associated with Product Category

Several commenters agreed that free-of claims for substances not typically associated with the relevant product category may be deceptive.[451] Some, however, argued that the Commission should broadly construe the phrase "associated with the product category." For example, the IBWA explained that, in some instances, free-of claims should be permitted when media reports have linked a substance to a product category and created a public mis-perception that the category contains the substance, e.g., the public perception that Polyethylene Terephthalate ("PET") water bottles always contain BPA.[452]

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[449] ITI, Comment 313 at 3-4 (also arguing that if a government or regulatory body restricts use of a substance, "x," then the marketer should be able to claim that a product meeting the regulatory requirements is "x free" without qualification regarding risks of the alternative substances).

[450] Id.

[451] AFPR, Comment 246 at 3-4; CU, Comment 289 at 1; EHS Strategies, Comment 111 at 2; Foreman, Comment 174 at 2; NAIMA, Comment 210 at 9-10; Ruth Heil, Comment 4 at 2; Tandus Flooring, Comment 286 at 2; see also ACC, Comment 318 at 6 (recommending that the Guides state that any free-of claim for a substance never associated with the product category will be "carefully analyzed for its implied claims, and that such claims [should] be qualified where appropriate").

[452] IBWA, Comment 337 at 3-4; see also SPI, Comment 181 at 14 (generally agreeing with IBWA's comment, and arguing the Commission should harmonize its free-of claims analysis with its related guidance on CFC-free claims where "the FTC suggests that a CFC-free claim may be acceptable if consumers might believe the chemical is or was associated with the product or product category").

GPI also recommended broadly defining "product category."[453] According to GPI, "product category" should include "all products that are alternatives for uses in that category" in order to avoid "inadvertently limiting provision of truthful and useful information to consumers and customers."[454] GPI further explained that alternative products should be considered members of the same "product category" because consumers might want to know whether alternative or substitute products are free of a substance presenting potential health or environmental concerns.[455]

Finally, one more commenter recommended a change to this section. Specifically, GAC suggested clarifying that free-of claims are categorically misleading if a law forbids the inclusion of the substance.[456]

d. Miscellaneous Issues

A few commenters raised additional issues. First, two argued that all free-of claims should be qualified. SPI explained that free-of claims are likely deceptive "absent clear qualifying language that substantiates both the express and implied claims."[457] GAC agreed,

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[453] GPI, Comment 269 at 9-10.

[454] Id. (arguing all food and beverage packaging should fall in the same product category).

[455] Id. (stating, for example, that glass bottles compete with plastic containers; while plastic containers may contain BPA, glass containers do not; if consumers wish to identify alternative BPA-free packaging, glass bottle makers should be allowed to inform consumers that the products do not contain BPA); see also GMA, Comment 272 at 3-4 (agreeing that "product category" is ambiguous and suggesting an explanatory example).

[456] GAC, Comment 232 at 3.

[457] SPI, Comment 181 at 13 (arguing that the Commission should analyze "whether free-of claims expressly state or are intended to imply that the advertised product is both safer for human use or the environment than those without the claim, whether they are an inherently comparative claim, and whether they are also intended to be a general claim of environmental benefit").

asserting that "free-of claims are possibly the single most violated marketing concept" in business-to-business marketing.[458]

Second, some commenters recommended changes to proposed Example 2. As proposed, Example 2 stated that a formaldehyde-free claim likely is not deceptive if a seller has substantiation that its insulation emits lower levels of formaldehyde than are typically present outdoors. SCS suggested that because in this example the insulation still contains some formaldehyde, it would be preferable for the example to encourage marketers to make "no-added" formaldehyde claims, rather than formaldehyde-free claims.[459] JM recommended incorporating the 2005 NAD decision discussed in the October 2010 Notice.[460] This decision held that JM's formaldehyde-free claim for fiberglass insulation was substantiated because JM did not add formaldehyde to its insulation, and, when tested, the product did not emit formaldehyde in quantities of concern to consumers.[461]

Finally, two commenters encouraged the FTC to expand its guidance to include claims other than "free-of." For example, EHS suggested editing paragraph (d) to focus on "does not contain" claims versus the "assumption-laden" "free-of" claim.[462] Armstrong urged the

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[458] GAC, Comment 232 at 2.

[459] SCS, Comment 264 at 12 (also stating that urea- and phenol-formaldehyde should be distinguished).

[460] JM, Comment 305 at 2, 4.

[461] Id.

[462] EHS Strategies, Comment 111 at 3.

Commission to expand the list of "free-of" claims to include "no, are free of and do not contain certain substances."[463]

5. Free-Of Claims Analysis

To address commenters' concerns, the Commission makes several clarifications regarding free-of claims, including changes to proposed Section 260.9(c) and proposed Example 2. As a threshold matter, the Commission reiterates that marketers can always substantiate unqualified free-of claims by confirming that their products are, in fact, completely free of the relevant substance. Furthermore, the Commission clarifies that a free-of claim may, in some circumstances, be non-deceptive even if the product contains a "trace amount" of the substance. The Commission introduces a three-part test to aid this analysis, and, in the context of this advice, reminds marketers they should always avoid making free-of claims proscribed by law. The Commission also provides guidance on determining whether a substance has been associated with a product category, and on analyzing whether a substitute substance poses risks similar to those of the removed substance. Finally, the Commission discusses Example 2, which deals with a "formaldehyde free" claim.

a. Trace Amounts of a Substance

The Commission revises proposed Section 260.9(c) to more closely align with ISO 14021[464] and Canada's PLUS 14021.[465] Specifically, subsection (c) deletes the phrase "de

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[463] Armstrong, Comment 363 at 2.

[464] See ISO 14021:1999(E), "Environmental labels and declarations – Self-declared environmental claims" at 5.4 (stating that "[a]n environmental claim of '. . . free' shall only be made when the level of the specified substance is no more than that which would be found as an acknowledged trace contaminant or background level").

[465] Canadian Standards Association, PLUS 14021, "Environmental claims: A guide for industry and advertisers" 10-11 (2d ed. 2008), available at http://www.csa.ca/documents/publications/PLUS-14021-EN-2419216.pdf.

minimis," and states a free-of claim may be appropriate even for a product that still contains some amount of that substance if: (1) the level of the specified substance is no more than that which would be found as an acknowledged trace contaminant or background level,[466] (2) the substance's presence does not cause material harm that consumers typically associate with that substance, and (3) the substance has not been added intentionally to the product. The first prong of this test reflects the ISO 14021 standard for claims of "free," and some of the Canada PLUS 14021 notes on that standard. As several commenters stated,[467] it also reflects consumers' likely expectations that: (1) products with "free-of" claims contain no more than trace amounts of the relevant substance that occur naturally in the environment or in product ingredients; and (2) products with free-of claims include no intentionally-added amount of the substance, even if that intentionally-added amount is less than a typical background level amount of the substance.[468]

More important, the second prong of this test clarifies that it is deceptive to make a free-of claim if the product contains any amount of the substance that causes material harm that consumers typically associate with that substance, no matter how small. This prong recognizes that the presence of some substances may be inherently harmful and therefore likely important to

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[466] "Trace contaminant" and "background level" are flexible terms. As the Commission previously explained, what constitutes a trace amount or background level depends on the substance at issue, and requires a case-by-case analysis.

[467] See, e.g., Armstrong, Comment 363 at 2; EHS Strategies, Comment 111 at 2; Seventh Generation, Comment 207 at 5.

[468] The Commission understands commenter concerns regarding the impact of background levels of some substances on chemically sensitive consumers. However, unless chemically sensitive consumers are a significant portion of the manufacturer's target audience, the Commission declines to advise companies to refrain from making free-of claims unless the substance levels fall below typical background levels.

consumers.[469] For example, consumers may want to know if a product contains a trace amount of a substance such as mercury, which is toxic and may accumulate over time in the tissues of humans and other organisms.[470]

Finally, the Commission reminds marketers that even if a free-of claim is not deceptive under this three-part test, the marketer must comply with the strictest law or regulation applicable to the product. The Green Guides, as administrative interpretations of Section 5, are not enforceable regulations. They do not preempt other laws.[471]

b. Same or Similar Risk and Not Associated with the Product Category

The final Guides include proposed Section 260.9(b). The Commission, however, clarifies its guidance providing that otherwise truthful free-of claims may still be deceptive if: (1) the

[469] In this context, the Commission reminds marketers that although the Guides provide information on making truthful environmental claims, marketers should be cognizant that consumers may seek out free-of claims for non-environmental reasons. For example, as multiple commenters stated, chemically sensitive consumers may be particularly likely to seek out products with free-of claims, and risk the most grievous injury from deceptive claims.

[470] See 16 CFR 305.15 and 75 FR 41696, 41715 (July 10, 2010) (requiring that labels for compact fluorescent light bulbs disclose that the bulbs contain mercury); see also Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 107, 115 n.6 (2d Cir. 2001) (finding that a Vermont statute requiring manufacturers of some mercury-containing products to state on labels that the products contained mercury and should be recycled or disposed of as hazardous waste was based on Vermont's substantial interest in "protecting human health and the environment from mercury poisoning" and rationally related to the state's goal of reducing mercury contamination).

[471] 16 CFR 260.1.

product contains or uses substances that pose the same or similar environmental risk as the substance that is not present;[472] or (2) the substance is not associated with the product category.[473]

Some commenters expressed concern about the scope of analysis necessary to determine whether substitute substances cause the "same or similar risks." Specifically, marketers asked whether they should conduct a full LCA to determine whether a substitute substance causes any environmental risk that might offset environmental improvements, or, alternatively, whether they could conduct a more limited analysis to weigh whether substitute substances pose the "same or similar" risks as those removed.

Marketers need not weigh every environmental risk posed by a substitute substance. Instead, marketers may be able to conduct a more limited trade-off analysis to support their free-of claims.[474] An environmental free-of claim implicitly conveys that the product does not cause the environmental harm typically associated with that substance. Therefore, a marketer should identify the environmental harm that consumers typically associate with the removed substance,

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[472] The Commission revises Example 1 to provide an example of a non-deceptive qualification to a chlorine-free bleaching claim where a marketer uses an alternative process that still releases a significant amount of the harmful byproducts associated with chlorine. The new qualification, that the product was "bleached with a process that releases 50% less of the harmful byproducts associated with chlorine bleaching," makes clearer to consumers that although the new process is chlorine-free, that process still releases more than a trace amount of the relevant byproducts.

[473] The Commission also slightly revises the text of Section 260.9(b) by replacing "never" with "not" before the phrase "associated with the product category." In this situation, whether a claim is deceptive depends on consumers' present understanding of whether a substance is associated with a product category, not whether it ever has been associated in the past.

[474] To eliminate possible confusion about the scope of the trade-off analysis likely needed to substantiate free-of claims not combined with general environmental benefit claims, the Commission eliminates proposed subsection (d) to the Free-Of claims section, which implied that a more comprehensive analysis was necessary.

and then analyze whether the final product still causes that same harm or one closely related to it.[475]

If, however, a marketer combines a claim that a product is free of a substance with a general environmental benefit claim, such as "Environmentally friendly: chlorine free," consumers would likely believe the product is more environmentally beneficial overall because the product is free of that substance. In such a case, marketers should analyze trade-offs resulting from the absence of the substance to determine if they can substantiate this takeaway.[476]

Additionally, in response to several comments, the Commission restates and clarifies that otherwise truthful free-of claims for substances not associated with a product category may carry deceptive implied claims.[477] Specifically, depending on context, these claims may convey that: (1) competing products contain the substance, or (2) the marketer has "improved" the product by removing the substance.[478] The Commission reminds marketers they are responsible for substantiating their express and implied claims. Therefore, if, in context, a free-of claim implies that competing products contain the substance, the marketer should not make the claim unless it can substantiate that takeaway. Similarly, if consumers interpret a claim as conveying that the marketer removed a particular substance from the product, even though the product never contained the substance, then the claim is deceptive.

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[475] The Commission has some concern that this guidance may chill non-environmental claims, e.g., where a free-of claim is made for the benefit of chemically sensitive consumers and not for environmental purposes. To avoid this issue, marketers seeking to make a non-environmental free-of claim should make it clear from the context of the claim that they are not touting an environmental attribute. For example, the marketer could precede the non-environmental free-of claim with language such as "Allergy Alert."

[476] See Section 260.4 and discussion at Part IV.A.4, supra.

[477] The Commission notes that substances may become "associated" with a product category through various means, including through media attention.

[478] 70 FR 63552, 63580 (Oct. 15, 2010).

The Commission emphasizes that free-of claims are highly context-specific. For that reason, the Commission declines to advise, as one commenter suggested, that otherwise truthful free-of claims categorically deceive consumers if a law forbids inclusion of the substance. Such claims may continue to aid consumers, for example, if consumers continue to associate the substance with the product category.

c. Example 2: Formaldehyde Free

The final Guides adopt proposed Example 2, with one change. Example 2 states that a "formaldehyde free" claim is not deceptive where insulation emits only trace amounts of formaldehyde, but the manufacturer used no formaldehyde in the manufacturing process. In the example, the Commission explains that, because the amount of formaldehyde emitted is less than that typically present in outdoor environments, the trace emissions levels likely are inconsequential to consumers. To clarify how this analysis relates to the new three-part test discussed above, the Commission adds a sentence explaining that the insulation's trace formaldehyde emissions do not cause material harm that consumers typically associate with formaldehyde.

Although commenters argued that "no added formaldehyde" is an appropriate alternative, non-deceptive claim, the Commission declines to amend the example. Commenters may well be correct that, in some circumstances, a "no added formaldehyde" claim "communicates more accurately and narrowly to consumers."[479] The FTC Act, however, does not require marketers to make the most accurate claims in all instances. Rather, it requires marketers to make non-deceptive claims. Accordingly, the Guides represent the Commission's view of the minimum

[479] SCS, Comment 264 at 12.

steps marketers should take to avoid deceptive environmental marketing claims. Marketers always may make more precise claims than the law requires. Because commenters submitted no consumer perception evidence showing "formaldehyde free" is deceptive, the Commission declines to change the example.

6. Comments Regarding Non-Toxic Claims

Most commenters supported the Commission's proposed guidance on non-toxic claims. However, some recommended clarifications to address how marketers should: (1) substantiate non-toxic claims; (2) reconcile the guidance with other regulatory standards governing product toxicity; and (3) apply the guidance to products clearly designated for human use.

a. Substantiating a Non-Toxic Claim

A number of commenters discussed the difficulties inherent in substantiating non-toxic claims and requested further guidance.[480] These commenters suggested two basic approaches. First, some recommended discouraging non-toxic claims entirely. EPA explained that marketers will "rarely, if ever, be able to adequately qualify and substantiate such a claim of 'non-toxic' in a manner that will be clearly understood by consumers."[481] Similarly, CU suggested that because "non-toxic" claims are so difficult to substantiate and for consumers to verify, the marketplace would be better served with "specific claims of how a product contains less toxic or no toxic materials rather than using a 'non-toxic' claim."[482]

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[480] NAIMA, Comment 210 at 10 (arguing that marketers can make non-toxic claims for some products with de minimis toxicity, but marketers need more guidance); Seventh Generation, Comment 207 at 5 (suggesting additional examples providing guidance on how to qualify claims, and stating that compliance with this section seems to require a high level of qualification specificity).

[481] EPA, Comment 288 at 8.

[482] CU, Comment 297 at 1 (further recommending that the FTC consider "non-toxic" a general claim, and discourage its use in favor of more specific claims).

Second, commenters suggested advising marketers to rely on scientific benchmarks or data to substantiate non-toxic claims.[483] Some of these commenters argued the guidance should require marketers to conduct qualifying assessments that consider the "Globally Harmonized System of Classification and Labeling of Chemicals" criteria.[484]

b. Overlap with Other Laws or Standards

Commenters also argued that compliance with laws or regulations that govern toxicity levels should substantiate non-toxic claims. For example, AAFA suggested a safe harbor for non-toxic claims based on compliance with ISO standards or other federal or state toxicity guidelines.[485]

Similarly, ACC stated that instead of advising marketers to use caution "when relying on regulatory standards as substantiation for claims that products are non-toxic," the Guides should allow or even encourage marketers to rely on regulatory standards.[486] NAIMA agreed the FTC should defer to regulations that govern toxicity, arguing that the Guides should recognize as

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[483] AFPR, Comment 246 at 3-4 (commenting that because all substances are toxic at some level, the FTC should reference some scientific benchmark); AF&PA, Comment 171 at 10 (agreeing that qualification should rely upon "scientifically defensible data, and exposure & risk assessment methodologies"); MWV, Comment 143 at 2 (same).

[484] AF&PA, Comment 171 at 10 (stating that the "GHS is a worldwide initiative to promote standard criteria for classifying chemicals according to their health, physical and environmental hazards [that] . . . provides a helpful framework of criteria for evaluating and classifying the potential human and environmental effects of chemical substances . . ." and arguing that chemicals identified in conjunction with a non-toxic claim should be labeled consistent with the GHS program); AWC, Comment 244 at 7 (agreeing with AF&PA); MWV, Comment 143 at 2; PPC, Comment 221 at 11 (endorsing AF&PA's comment).

[485] AAFA, Comment 233 at 6.

[486] ACC, Comment 318 at 6.

inherently deceptive non-toxic claims for products containing substances regulated as toxic or hazardous environmental substances in amounts of one percent by weight or higher.[487]

Alternatively, Eastman suggested removing the proposed guidance on non-toxic claims entirely because these claims are so highly regulated by other entities.[488] Eastman argued that because regulations already require manufacturers to evaluate their products' human and environmental toxicity, and because the substantiation needed to support non-toxic claims is complex and scientific, the Guides should not address these claims.[489]

c. Products Designated for Human Use

Some commenters raised concerns about the impact of the proposed guidance on marketing products designated for human use that, while not toxic to humans, may have an adverse impact on the environment. For example, ACMI highlighted the AP Seal, which often appears on children's art materials accompanied by the qualifiers "non-toxic" and "conforms to ASTM D4236."[490] According to ACMI, there is widespread recognition that "non-toxic" in the art materials industry refers to human health; therefore, the AP Seal with a non-toxic claim is not deceptive, and does not refer to environmental hazards.[491] ACMI suggested revising proposed Example 3 accordingly.[492]

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[487] NAIMA, Comment 210 at 9.

[488] Eastman, Comment 322 at 4-5.

[489] Id. (acknowledging, however, that manufacturers making non-toxic claims of course remain subject to the general provisions of the Guides and the FTC Act).

[490] ACMI, Comment 273 at 3-4.

[491] Id.

[492] Id. at 4 (suggesting the Commission add a sentence to the example stating: "If the term 'non-toxic' is appropriately qualified, the claim is not deceptive.").

ACA similarly argued that, because virtually all materials are "toxic" at some level, the proposed guidance unduly burdens marketers wishing to tout their products as safe for human consumption.[493] Referencing table salt as an example of a substance that, while designated "non-toxic" for human use, is toxic to fish and plant life, ACA argued that marketers should be permitted to make unqualified non-toxic claims for products that meet regulatory guidelines for human toxicity.[494]

d. Miscellaneous Issues

A few other commenters raised miscellaneous questions or concerns. For example, Sunshine Makers requested that the Commission clarify whether the term "environment" refers to "all flora, fauna and physical states of an ecosystem."[495]

Additionally, two commenters suggested changes to proposed Example 3. This example described a pesticide advertised as "essentially non-toxic" and "practically non-toxic" that, while non-toxic to humans, was toxic to the environment. EHS Strategies recommended editing the example to reflect that pesticides are, by definition, toxic to a target environmental organism.[496] EPA stated it "considers 'non-toxic' claims on pesticide products to be 'claims as to the safety of

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[493] ACA, Comment 237 at 10.

[494] Id. (further explaining that "toxic" and "highly toxic" are defined in federal regulations for hazard and precautionary labeling, and the criteria in these regulations recognize that virtually all materials are "toxic" at some level, but some levels of the substance may be considered "non-toxic," nonetheless).

[495] Sunshine Makers, Comment 51 (also asking whether the term is intended to apply only to living organisms).

[496] EHS Strategies, Comment 111 at 3.

a product' that are false or misleading," and, therefore, the FTC should revise Example 3 to refer to a different product.[497]

7. Non-Toxic Claims Analysis

Without consumer perception evidence supporting changes or a consensus among commenters that changes are necessary, the Commission largely adopts the proposed guidance on non-toxic claims. In this section, the Commission discusses the difficulties inherent in substantiating unqualified non-toxic claims. It also distinguishes the guidance for non-toxic claims from the guidance on free-of claims, and clarifies that there is no allowance for trace toxicity. Finally, the Commission changes the example in this section so that it pertains to a cleaning product rather than a pesticide.

a. Substantiating Unqualified Claims

Depending on context, unqualified non-toxic claims may convey broad express and implied messages. For example, an unqualified non-toxic claim likely conveys that a product is not toxic to both humans and the environment.[498] However, as EPA explained, substantiating this claim by testing for a broad array of endpoints across a variety of species is likely costly and challenging.[499] Additionally, EPA suggested that consumers interpret "non-toxic" as an implied claim about an intrinsic property of the material, instead of a statement regarding the safety of the

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[497] EPA, Comment 288 at 9 (stating that the claims in the example would be unacceptable for pesticide products under current EPA regulations).

[498] The Commission notes that "the environment" includes pets and domestic animals.

[499] See EPA, Comment 288 at 8-10.

material when the product is used according to the instructions on its packaging.[500] According to EPA, this inference might prevent consumers from taking necessary precautions in handling a product.[501] Because no commenter provided consumer perception evidence on this topic, the Commission cannot advise marketers to avoid all unqualified non-toxic claims. However, given the potential that consumers interpret unqualified claims in this manner, the Commission cautions marketers to qualify non-toxic claims carefully, unless they can substantiate all express and implied messages inherent in an unqualified claim.

While there are difficulties inherent in substantiating non-toxic claims, the Commission declines to adopt any specific standards. Commenters submitted no consumer perception evidence showing that consumers equate any particular scientific benchmark with a harmless level of toxicity. Nor did they provide evidence showing that experts in a relevant field believe that a toxicity level below a certain benchmark substantiates a non-toxic claim.[502] Furthermore, even if a commenter were to present evidence showing that toxicity levels below a particular benchmark could substantiate a non-toxic claim, the law would still allow marketers to substantiate non-toxic claims in other ways. As discussed previously, Section 5 of the FTC Act

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[500] Id. (stating that "EPA is aware of a specific instance where a manufacturer advertised its product as non-hazardous, and yet a user was harmed. A user of this chemical did not use it according to the manufacturer's instructions; the user then 'reported unusual fatigue and headaches and developed arthralgias, visual disturbances (difficulty focusing), paresthesias, and muscular twitching' and was referred to an emergency department by his physician").

[501] Id.

[502] As explained in the FTC Policy Statement Regarding Advertising Substantiation, the Commission looks to a number of factors to determine the level of substantiation required for a claim, including: (1) the type of claim; (2) the product; (3) the consequences of a false claim; (4) the benefits of a truthful claim; (5) the cost of developing substantiation for the claim; and (6) the amount of substantiation experts in the field believe is reasonable. See FTC Policy Statement Regarding Advertising Substantiation, appended to In re Thompson Med. Co., 104 FTC 648, 839 (1984); see also FTC v. QT, Inc., 448 F. Supp. 2d 908, 959 (N.D. Ill. 2006).

gives marketers the flexibility to substantiate their claims with any competent and reliable scientific evidence.

Similarly, the Commission reiterates its long-standing advice to use caution when relying on regulatory standards as substantiation for non-toxic claims. As explained above, reasonable consumers likely interpret non-toxic claims to mean that a product does not harm humans or the environment. Some regulations governing toxicity, however, may not deem a product "toxic," even though it contains moderately to highly toxic substances that consumers would not expect to be in a product labeled "non-toxic."[503] Therefore, marketers should examine the scope and purpose of the regulatory standard to ensure that it substantiates a non-toxic claim in light of consumer expectations.

As discussed in the context of free-of claims, marketers must always adhere to the strictest applicable law. That is, even if a marketer can substantiate a non-toxic claim under the Guides, if another law or regulation proscribes non-toxic claims for that particular product, the marketer must follow that law or regulation.

b. Minimal Toxicity

Some commenters requested specific guidance on making non-toxic claims for products that contain substances that are intrinsically toxic, but are not harmful at the levels in a particular product. In response, the Commission clarifies that there is no allowance for "de minimis" or "trace" toxicity. However, a non-toxic product could contain a toxic substance at a level that is not harmful to humans or the environment. For example, apple seeds contain cyanide. Although a marketer could not claim that cyanide itself is non-toxic, the amount in an apple is so low that it

[503] See, e.g., OSHA, Hazard Communication Standard, 29 CFR 1910.1200 (setting forth OSHA's guidance on hazardous and toxic substances); EPA, Criteria for Listing Hazardous Waste, 40 C.F.R. 261.11.

is not harmful to humans or the environment, and so the marketer could claim the apple is non-toxic.

c. Revisions to Example 1

In response to several comments, and in light of special pesticide labeling requirements, the Commission changes the product in Example 1 from a pesticide to a cleaning product.[504] As proposed, the example suggested that marketers could appropriately make non-toxic claims for a pesticide, despite EPA requirements to the contrary. The Green Guides, as administrative interpretations of Section 5, are not enforceable regulations. They do not preempt other laws.[505] Furthermore, consumers likely interpret environmental marketing claims to make implied claims that all representations comply with relevant environmental regulations. Accordingly, a non-toxic claim that is not deceptive under the Guides, but is nonetheless proscribed by another environmental law or regulation, may independently violate Section 5. Thus, the Commission removes the reference to pesticide from this example.

G. Ozone-Safe and Ozone-Friendly Claims

1. The 1998 Guides

The 1998 Guides stated that it was deceptive to misrepresent, directly or by implication, that a product was safe for, or "friendly" to, the ozone layer or the atmosphere.[506] To illustrate this advice, this section contained four examples.

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[504] Proposed Example 3 in the Proposed Free-of and Non-Toxic Claims section is now Example 1 to the Non-Toxic Claims section.

[505] 16 CFR 260.2.

[506] 16 CFR 260.7(h).

Example 1 provided that an ozone-friendly claim was 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."[507]

Example 2 illustrated that an ozone-friendly claim could be deceptive, even if the product did not contain ozone-depleting chemicals. In that example, an aerosol air freshener was labeled "ozone-friendly," but contained volatile organic compounds, which may cause smog. Even though the product did not contain ozone-depleting substances, the unqualified ozone-friendly claim was deceptive because it inaccurately conveyed that the product was safe for the atmosphere as a whole.

Example 3 discussed an unqualified claim that an aerosol product contained no CFCs. Although literally true, the product contained HCFC-22, another ozone-depleting substance. Because the no-CFCs claim likely implied that the product did not harm the ozone layer, the claim was deceptive.

Finally, Example 4 illustrated a qualified comparative ozone-related claim that was unlikely to be deceptive. In that example a product was labeled "95% less damaging to the ozone layer than past formulations that contained CFCs," and explained that the manufacturer substituted HCFCs for CFC-12. If the marketer could substantiate the decrease in ozone depletion, this qualified comparative claim was not likely to be deceptive.

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[507] 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).

2. Proposed Revisions

The Commission proposed retaining its guidance regarding ozone-safe claims, but deleting current Examples 3 and 4, which both referenced ozone-depleting chemicals that the EPA now bans. Additionally, the Commission proposed adding a new example to illustrate that "environmentally friendly" claims by an air conditioning equipment manufacturer could be deceptive, even if the manufacturer had substituted non-ozone depleting refrigerants. The Commission explained that this general environmental benefit claim likely would convey to consumers that the product had far reaching environmental benefits. Because currently available air conditioning equipment relies on refrigerants that emit greenhouse gases and also consumes a substantial amount of energy, this claim was deceptive. Additionally, although the Commission did not propose advising marketers to avoid using no-CFCs claims, it sought comment on whether consumers are aware that manufacturers no longer use CFCs in their products and whether no-CFCs claims imply that other products still contain CFCs.

3. Comments

Only a few commenters addressed ozone-safe and ozone-friendly claims, and none submitted consumer perception evidence. The comments focused on two issues: (1) the utility of the proposed "environmentally friendly" example; and (2) how consumers currently understand "No-CFCs" claims.

a. "Environmentally Friendly" Example

Three commenters addressed proposed Example 3. The example illustrates that an air conditioning equipment manufacturer's "environmentally friendly" claims may be deceptive if the equipment "consumes a substantial amount of energy and relies on refrigerants that are

greenhouse gases," even if the manufacturer has substituted non-ozone depleting refrigerants.[508] Commenters expressed concern about the example's implications. None, however, analyzed the example in detail or submitted consumer perception evidence.

Two commenters discussed whether Example 3 requires marketers to conduct a life cycle assessment ("LCA"). ANA argued that, by taking into account energy usage, Example 3 appears to require an LCA.[509] ANA suggested that this seems inconsistent with other Guides sections where "the Commission appears to have rejected the need for an LCA and has expressly permitted a single-attribute claim even in instances where the product itself clearly has a significant environmental net impact."[510] In ANA's view, in light of the example's potentially far-reaching implications, the Commission should either "delete or substantially clarify" it.[511]

Seventh Generation, on the other hand, expressed concern that Example 3 does not require marketers to consider that manufacturing processes may use or emit harmful substances.[512] Therefore, it urged the Commission to include an example specifying that "ozone-safe" or "ozone-friendly" claims for products that use ozone-depleting substances during the manufacturing process or other stages of the product's life cycle are deceptive.[513]

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[508] See Example 3 to the October 2010 Notice, Section 260.10.

[509] ANA, Comment 268 at 3-4.

[510] Id.

[511] Id. at 4 (arguing that the example is "unnecessary because of the guidance on general environmental claims elsewhere in the Green Guides" and recommending, in the alternative, that the Commission "modify the penultimate sentence to more clearly explain that the reason the advertising is problematic is because it is an unqualified general environmental claim).

[512] Seventh Generation, Comment 207 at 5-6.

[513] Id.

Finally, Eastman requested examples of qualifiers a marketer could add to the "environmentally friendly" claim in Example 3 to alleviate consumer deception.[514]

b. No-CFCs Claims

Commenters disagreed about how consumers understand, and the ongoing utility of, no-CFCs claims. Some argued that consumers know that manufacturers no longer use CFCs in their products.[515] These commenters generally concluded that "no-CFCs" claims cause more deception than they alleviate by suggesting that competing products still contain CFCs.[516] Other commenters argued that consumers still believe that certain aerosol products harm the ozone layer, and, as a result, "ozone-safe," "ozone-friendly," or "no-CFCs" claims remain useful.[517] The EPA did not opine on current consumer understanding of these claims, but recommended that the Commission publish all three examples in this section as proposed.[518]

4. Analysis and Final Guidance

In response to the comments, the Commission removes proposed Example 3, but otherwise publishes the guidance on Ozone-Safe and Ozone-Friendly claims as proposed in the October 2010 Notice.

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[514] Eastman, Comment 322 at 5.

[515] AFPR, Comment 246 at 3.

[516] Enviromedia Social Marketing, Comment 346 at 15; Foreman, Comment 174 at 2; Ruth Heil, Comment 4 at 2; SCS, Comment 264 at 20.

[517] CMI, Comment 137; CSPA, Comment 242 at 5 (stating that "a recent survey showed that 7 out of 10 people thought CFCs were still used in the products," but not providing a citation to the study); SCS, Comment 264 at 20; UL, Comment 192 at 6 (citing to the TerraChoice Seven Sins of Greenwashing study, which found continuing consumer confusion and recommending a claim with a qualification such as "Contains no CFCs, which are prohibited by federal law").

[518] EPA, Comment 288 at 6 (stating that for pesticide products, the EPA has regularly limited these types of claims to specific statements such as "Contains no CFC's or other ozone-depleting substances. Federal regulations prohibit CFC propellants in aerosols.").

a. Proposed Example 3

To alleviate confusion and streamline its guidance on Ozone-Safe and Ozone-Friendly claims, the Commission eliminates proposed Example 3 in the final Guides. As discussed above, commenters argued that Example 3 potentially conflicts with guidance given in other Guides sections, raising questions about the need for life cycle assessments. Because the proposed example resided in the Ozone-Safe and Ozone-Friendly Claims section rather than the General Environmental Benefit Claims section, commenters suggested it implied there might be special rules for substantiating general environmental benefit claims where those claims are based on a manufacturer's elimination of ozone-depleting substances.

In response, the Commission clarifies that there are no special rules for substantiating general environmental benefit claims when those claims are based on a manufacturer's elimination of ozone-depleting substances. For these claims, as with any other general environmental benefit claim, marketers should refer to the guidance and examples in the General Environmental Benefit Claims section.[519] Accordingly, in the interest of streamlining and clarifying the section, the Commission declines to include proposed Example 3 in the final guidance.

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[519] As Section 260.4 makes clear, marketers should not make unqualified general environmental benefit claims. Rather, marketers should qualify general environmental benefit claims to focus consumers on specific, substantiated environmental benefits. If, however, a marketer's qualified, general environmental benefit claim conveys that a product is more environmentally beneficial overall because of the particular touted attribute, the marketer must analyze the costs resulting from the touted attribute to ensure there is substantiation for the implied claim that the product is more environmentally beneficial overall. For many attributes, this analysis may be straightforward. In other cases, the analysis will be more complicated, and marketers should weigh the environmental benefits of the attribute with its costs.

b. No-CFCs Claims

Because commenters disagreed whether consumers know that manufacturers no longer use CFCs in their products, and commenters submitted no evidence regarding how consumers understand "no-CFCs" claims, the Commission declines to issue new guidance on this topic. As the Commission previously explained, and as several commenters argued, although CFCs have been banned for years, consumers may not realize this is the case. The Commission declines to advise marketers not to make claims that consumers still find useful. Therefore, the Commission does not issue new guidance regarding "no-CFCs" claims at this time.

H. Recyclable Claims

1. The 1998 Guides

The 1998 Guides provided 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."[520] They further explained that marketers should qualify recyclability claims to the extent necessary to avoid deception about recycling program and collection site availability.

The 1998 Guides introduced a three-tiered approach to making recyclability claims depending on recycling facility availability. First, when recycling facilities were available to a "substantial majority" of consumers or communities where the item was sold, marketers could make unqualified recyclable claims. Second, when facilities were available to a "significant percentage" of the population or communities, but not to a substantial majority, marketers could

[520] 16 CFR 260.7(d).

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 were available.[521] Third, when recycling facilities were available to less than a significant percentage of communities or the population, marketers could either disclose that the product was recyclable only in the few communities with recycling facilities available for the particular product or state the number of communities, the percentage of communities, or the percentage of the population where programs were available to recycle the product.[522]

The 1998 Guides further advised that the disclosure "recyclable where facilities exist" was an inadequate qualification where recycling facilities were not available to a substantial majority of consumers.[523] Similarly, the FTC Staff's Business Brochure cautioned that the phrase "check to see if recycling facilities exist in your area" also was an inadequate qualification where recycling was not available to a substantial majority.[524]

2. Proposed Revisions

In the October 2010 Notice, the Commission proposed largely retaining its previous guidance on recyclable claims, only adding a footnote containing staff's informal advice that "substantial majority" means at least 60 percent.[525] Additionally, the Commission requested

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[521] See id., Examples 4, 6, and 7.

[522] See id., Example 6.

[523] See id., Example 5.

[524] FTC Staff's Business Brochure at 8.

[525] FTC Staff concluded that 60 percent 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 prohibits unqualified claims unless nearly all communities

comment on whether the Guides should formally quantify the "substantial majority" and "significant percentage" thresholds, and, if so, what the minimum figures should be.

3. Comments

Most commenters supported the proposed guidance. Those that critiqued the proposal addressed the three-tiered approach to disclosing recycling facility availability, and, in particular, discussed the substantial majority and significant percentage thresholds. Commenters also discussed discrete issues relating to multi-material or multi-layer packages and confusion surrounding the SPI code. This section summarizes the primary issues raised in the comments.

a. Substantial Majority Threshold

Although a few commenters criticized the three-tiered approach, most supported it and the "substantial majority" threshold for making unqualified claims.[526] Many commenters expressed general support for defining "substantial majority" but did not suggest a numerical threshold.[527] Others agreed with the Commission's decision to quantify the substantial majority threshold at 60

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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 percent to 90 percent 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 (7th 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).

[526] CMI, Comment 137; Earth911, Comment 196 at 2; EPI, Comment 277 at 4 (recommending the FTC consider the Waste & Resources Action Programme's three-tiered recycling label); GreenBlue, Comment 328 at 1; KAB, Comment 223 at 2; WM, Comment 138 at 2; see also RILA, Comment 339 at 3 (expressing general support, but recommending flexibility to "encourage more diversion and recycling of common materials").

[527] GPR, Comment 206 at 2; IBWA, Comment 337 at 2 (requesting further guidance how to substantiate that the 60 percent threshold has been met); MWV, Comment 143 at 2; PRC, Comment 338 at 1; RILA, Comment 339 at 3; Tandus Flooring, Comment 286 at 1; see also ANA, Comment 268 at 6 (stating it lacked sufficient information regarding the factual basis used to establish the 60 percent threshold to comment on the merits of quantification).

percent.[528] Both commenters that addressed the location of the 60 percent guidance in a footnote recommended the Commission place this threshold "in the document itself."[529]

Several others disagreed that 60 percent availability was the proper threshold.[530] One commenter, WM, recommended a higher threshold for unqualified claims.[531] According to WM, a 75 percent threshold would lead to more truthful claims and better account for the often limited availability of recycling facilities to residents of multi-family dwelling units.[532]

In contrast, three commenters recommended a lower threshold, permitting unqualified claims for items where a simple majority of consumers have access to recycling facilities.[533] For example, NAIMA posited that a lower threshold would encourage recycling program expansion, and that the FTC gradually could adjust the threshold upward to 60 percent as more programs and collection sites become available.[534]

Four commenters recommended changing the standard for unqualified recyclable claims entirely. First, Enviromedia Social Marketing argued that unqualified recyclability claims are non-deceptive only where the product is accepted by 100 percent of curbside recycling programs

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[528] AFPR, Comment 246 at 3; CAW, Comment 309 at 2; CMI, Comment 137; Earth911, Comment 196 at 1; EPI, Comment 277 at 4; EPA, Comment 288 at 6; GAC, Comment 232 at 4 (stating, however, that a different threshold might apply for business-to-business transactions); GreenBlue, Comment 328 at 1; ITI, Comment 313 at 4 (urging the FTC to clarify that mail-back programs are included); Interface, Comment 310 at 1.

[529] PRC, Comment 338 at 1-2; see also EHS Strategies, Comment 111 at 4 (expressing no opinion regarding whether or not 60 percent is the correct threshold for unqualified recyclable claims, but stating that, if 60 percent is the threshold, the FTC should explicitly state that it is a hard threshold).

[530] See, e.g., SPI, Comment 181 at 9-10 (stating that a 60 percent threshold is at odds with statistics that indicate only 48 percent of the U.S. population was served by curbside programs in 2006).

[531] WM, Comment 138 at 2-3.

[532] Id.

[533] Green Seal, Comment 280 at 7; L'Oréal USA, Comment 158 at 5; NAIMA, Comment 210 at 7.

[534] NAIMA, Comment 210 at 7.

in major metropolitan areas, defined as the top 100 cities by population.[535] Alternatively, three commenters recommended the FTC refrain from defining "substantial majority," and instead consider unqualified claims on a case-by-case basis.[536]

b. Significant Percentage Threshold

Fewer commenters addressed the significant percentage threshold. While some supported quantification, others argued it was inappropriate. One commenter refrained from drawing conclusions, but argued that any effort to quantify should be consistent with global and EPA guidance on this topic.[537]

Several commenters encouraged the Commission to quantify the significant percentage threshold.[538] PRC, for example, expressed concern that including the term without a definition would confuse consumers and marketers and could open the door to abuse by less conscientious marketers.[539]

A few commenters suggested possible thresholds. Of these, GreenBlue proposed the lowest, arguing that "significant percentage" should be quantified at 20 percent and renamed to "limited percentage" or "moderate percentage" to avoid confusion.[540] EHS Strategies suggested a slightly higher 30 percent threshold, arguing that, if facilities are available to less than 30 percent

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[535] Enviromedia Social Marketing, Comment 346 at 12.

[536] BCI, Comment 284 at 3; PRBA, Comment 317 at 6; RBRC, Comment 287 at 3.

[537] Green Seal, Comment 280 at 7.

[538] GAC, Comment 232 at 4; ITI, Comment 313 at 4; PFA, Comment 263 at 3; RILA, Comment 339 at 3; Seventh Generation, Comment 207 at 6.

[539] PRC, Comment 338 at 2.

[540] GreenBlue, Comment 328 at 1.

of the population, the marketer should disclose the percentage of the population with access and allow the "customer [to] judge for himself whether it is 'significant.'"[541] WM proposed the highest threshold – 50-74 percent – given the low availability of recycling programs to residents of multi-family dwellings.[542]

On the other hand, some commenters argued against quantification.[543] For example, SPI argued it was too difficult to quantify the "significant percentage" threshold because "less than a majority of American consumers and communities have access to curbside recycling."[544] Given the difficulties inherent in quantifying "significant percentage," SPI urged the FTC to disclose the basis and rationale for its figure if it chose to adopt a threshold.[545]

c. Less Than a Significant Percentage

Very few commenters addressed the "less than a significant percentage" tier. Only one proposed a threshold. Specifically, WM suggested that items recyclable by 49 percent or less of consumers or communities should carry the heightened disclosures proposed for this tier.[546]

d. Substantiation

A number of commenters requested further guidance on determining whether recycling facilities are available to consumers or communities and on substantiating recyclable claims under the three-tiered framework. Six commenters raised questions about how to interpret the

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[541] EHS Strategies, Comment 111 at 5.

[542] WM, Comment 138 at 3.

[543] See, e.g., AFPR, Comment 246 at 3; ACC, Comment 318 at 4.

[544] SPI, Comment 181 at 11.

[545] Id.

[546] WM, Comment 138 at 3.

phrase "consumers or communities." They sought feedback on whether marketers should consider the relevant "communities" or "consumers" to be in a city where the item is sold, in a state, or across the entire United States.[547] Additionally, they discussed how to substantiate that a recycling program is "established" or "available" in a community, asking: (1) whether marketers may include mail-back and drop-off programs in the analysis; and (2) how close each facility must be before consumers consider it locally "available."[548]

Other commenters argued that local availability of private or commercial recycling programs, in addition to community recycling programs, should substantiate claims for certain products. ACC and RILA commented that marketers should consider "all established recycling programs" available to recycle a particular product, including private sector recycling programs.[549] Additionally, as PFA explained, special recycling programs might be available for some products; for example, products where commercial entities, rather than individuals, are the relevant consumers.[550] For those products, marketers should consider whether special commercial recycling programs, in addition to municipal facilities, are available locally.[551] To encourage marketers to consider alternative programs where appropriate, FPA suggested

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[547] BCI, Comment 284 at 3; PRBA, Comment 317 at 5; RBRC, Comment 287 at 3; GAC, Comment 232 at 3 (further identifying problems in defining "community" in a business-to-business transaction); see also ACC, Comment 318 at 4 (asking whether "community" applies only to urban communities); Eastman, Comment 322 at 5.

[548] BCI, Comment 284 at 3; PRBA, Comment 317 at 5; RBRC, Comment 287 at 3; GAC, Comment 232 at 3.

[549] ACC, Comment 318 at 4; RILA, Comment 339 at 3.

[550] PFA, Comment 263 at 3.

[551] Id.

amending the guidance to include "businesses" in addition to "consumers or communities" as relevant stakeholders.[552]

Finally, some comments focused on the need for Commission-approved, publicly-accessible resources to help marketers determine which products meet the "substantial majority" threshold. For example, IBWA suggested "simply declaring that certain materials, such as PET plastic, . . . meet the 'substantial majority' threshold" to avoid confusion.[553] KAB similarly commented that a national registry or information resource listing package and product materials that always meet the "substantial majority" threshold would be helpful.[554]

e. Qualifications

Several commenters discussed how best to qualify recyclable claims. Some asked the FTC to opine on the sufficiency of qualifications that differ from the specific qualifying statements proposed by the Commission.[555] Others suggested changes to the proposed qualifications. Seventh Generation, for example, recommended shorter statements and visuals, like the proposed Sustainable Packaging Coalition labeling system.[556]

Two commenters objected that the Commission's consumer perception evidence is outdated, and requested that the FTC revisit and reassess current consumer perceptions of positive

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[552] FPA, Comment 292 at 7 (also urging the FTC to recognize pre-consumer recycling through internal recovery, business partnerships, and industrial take-back programs and suggesting an example).

[553] IBWA, Comment 337 at 1.

[554] KAB, Comment 223 at 2.

[555] AFPR, Comment 246 at 3 (proposing the disclaimer "may not be recyclable in your area"); SPI, Comment 181 at 12 (proposing the disclaimers "Not recyclable everywhere yet," "Recyclable only where facilities exist," or "Recyclable in 30 states. Are facilities available near you?" possibly used in conjunction with "To find out visit [insert URL or toll-free number]").

[556] Seventh Generation, Comment 207 at 6 (citing to http://www.sustainablepackaging.org/content/?type=5&id=labeling-for-recovery).

disclosures for recyclability.[557] These commenters suggested that, given current levels of consumer education, "Recyclable – check to see if recycling is available in your area" should acceptably qualify claims on products that fall into the "significant percentage" tier.[558]

f. No Three-Tiered Analysis for Qualification

A handful of commenters suggested that the Commission abandon the three-tiered analysis. Some advocated retaining requirements for qualifying recyclable claims but changing the Commission's approach, and others argued that there should be no requirement to qualify truthful recyclable claims, regardless of consumer access to proper facilities.

Two commenters generally agreed that recyclable claims should be qualified where necessary to prevent consumer deception, but recommended changes to the Commission's analytical framework. Seventh Generation argued that the three-tiered system is unduly complex and suggested the Commission collapse the analysis into two tiers.[559] Under its proposal, marketers could make unqualified recyclable claims when at least 60 percent of consumers or communities have access to proper recycling facilities.[560] In cases where facilities are available to fewer consumers or communities, however, a marketer must disclose the limited availability of

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[557] ACI, Comment 160 at 4-5; P&G, Comment 159 at 4.

[558] Id. GreenBlue similarly recommended that the Commission consider allowing positive disclosures because the Guides' focus on negative language to qualify recyclability claims could discourage recyclability labeling. GreenBlue, Comment 328 at 1 (suggesting, for example "may be recyclable" or "check locally"); see also Earth911, Comment 196 at 2 (suggesting a safe harbor disclaimer in "less than a significant percentage" circumstances such as "Recyclable in limited areas, call 1-800-xxx-xxxx or visit www.—.com").

[559] Seventh Generation, Comment 207 at 6 (also referencing Canadian regulations adopting the ISO 14020 standard "with an added definition of 'reasonable proportion' meaning 50 percent").

[560] Id.

recycling.[561] SCS agreed that marketers should qualify claims, but argued that the proposed Guides do not go far enough because, in SCS's experience, "recyclable" as a stand-alone environmental claim usually confuses consumers.[562]

Other commenters expressed concern that any qualifications based on facility availability would chill useful environmental claims and thereby hamper environmental progress.[563] For example, AFPR and GMA argued that qualification requirements based on consumer access to facilities could disadvantage difficult-to-recycle materials, deter environmental improvements, and slow recycling growth.[564] Similarly, L'Oréal USA stated that it is the government's "responsibility to encourage all Americans to recycle any and all waste that can be recycled," and that requiring qualifications on recyclable claims would interfere with this goal.[565]

Still others argued that requiring any qualifications to truthful recyclable claims places an undue burden on marketers. According to these commenters, it is infeasible for, and unfair to expect, marketers to anticipate where items would be sold and determine the local availability of recycling facilities.[566] As an alternative, two commenters suggested that the burden be placed on

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[561] Id.

[562] SCS, Comment 264 at 10, 17 (explaining that stand-alone recyclable claims are problematic because consumers are confused about the difference between "'recycled,' an accomplished fact, and 'recyclable,' a potential fact" and also arguing that marketers should specify the percentage of the product that is recyclable, if less than 100 percent, and identify recyclable components, if not all are recyclable).

[563] ACA, Comment 237 at 5-6.

[564] AFPR, Comment 246 at 3; GMA, Comment 272 at 4.

[565] L'Oréal USA, Comment 158 at 5.

[566] Pella, Comment 219 at 1; Symphony, Comment 150 at 2-3.

consumers, who already know, particularly for commonly recycled materials such as glass and PET, whether recycling facilities are available in their communities.[567]

Finally, the Carpet and Rug Institute suggested it would be more effective to consider "a combination of the supplier's activities, policy, and public resources" when analyzing whether a claim of recyclability is justified.[568] According to the Carpet and Rug Institute, this broader approach would lead to more truthful claims than simply analyzing a "static percentage of population reached by recycling activities."[569]

g. Multi-Layered and Multi-Material Packages

Some commenters requested further guidance on how to label multi-layered and multi-material packages. One asked whether multi-material containers where all materials can be mechanically separated in existing recycling infrastructure may be labeled as "recyclable."[570] Another argued that marketers should disclose the availability of facilities that can handle multi-layer packages and state which individual layers are recyclable or made from recycled content.[571] Still others stated that marketers should never make recyclable claims for these packages unless all components are, in fact, recyclable, and the item is recyclable in its entirety.[572]

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[567] AHPA, Comment 211 at 4-5; Ruth Heil, Comment 4 (concurring that the burden should be on the consumer to locate proper facilities, although a publicly available compendium of recycling facilities would be helpful to consumers engaged in this endeavor).

[568] Carpet and Rug Institute, Comment 282.

[569] Id.

[570] ACI, Comment 160 at 5.

[571] GPI, Comment 269 at 4; see also CMI, Comment 137 (suggesting quantifying the proposed qualified claim "Includes material recyclable in the few communities that can process multi-layer products" to clarify "how much of the package is recyclable or what percentage of the package that recyclable material makes up").

[572] Enviromedia Social Marketing, Comment 346 at 12; GPI, Comment 269 at 3.

h. SPI Code

Several commenters addressed whether the SPI code confuses consumers.[573] Commenters generally agreed that conspicuous use of the SPI code constitutes a recyclable claim requiring clarification.[574] Further, some commenters stated that the SPI code may be fundamentally misleading.[575] GreenBlue recommended that the code eliminate the use of chasing arrows entirely.[576]

Two commenters thought that marketers could alleviate confusion by adding disclaimers whenever the SPI code is used. NatureWorks proposed several qualifications.[577] WM agreed that the SPI code should be used only in conjunction with qualifiers, but did not suggest any.[578]

On the other hand, CU argued that the SPI label's utility in informing consumers of the type of plastic used and its corresponding recyclability outweighed confusion arising from the

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[573] The SPI code features a triangle composed of chasing arrows with a number in the middle identifying the type of plastic resin used.

[574] See, e.g., GPI, Comment 269 at 4.

[575] GreenBlue, Comment 328 at 2 (also noting problems arising because local governments seek to educate on recyclability by actively encouraging consumers to look for SPI codes); Mary Ann Moxon, Comment 22; WM, Comment 138 at 3.

[576] GreenBlue, Comment 328 at 2.

[577] NatureWorks, Comment 274 at 11 (proposing: "Recyclable - compatible with existing recycling facilities"; "Recyclable only where facilities exist, please confirm with your local recycler"; and "Recyclable in 30 states. Are facilities available near you?" Any of these proposed qualifications could be followed by: "To find out visit [insert URL or toll-free number]").

[578] WM, Comment 138 at 3-4 (also stating that consumer confusion about the recyclability of items with SPI codes leads to extra work for recycling facilities).

chasing arrows.[579] Therefore, CU urged the FTC to encourage increased use of the SPI code on products and packaging.[580]

Without expressing an opinion on potential deception arising from the code, SPI commented that the adoption of an international standard for resin identification through ASTM rendered the term "SPI code" inaccurate.[581] Accordingly, SPI recommended the Commission change references to the "SPI code" in Example 2 to "Resin Identification Code" (RIC), and include a footnote in the Guides that states: "The RIC, formerly known as the Society of the Plastics Industry, Inc. (SPI) code, is now covered by ASTM D 7611."[582]

i. Miscellaneous Issues

Commenters discussed various other issues.[583] Some requested the FTC address recyclable claims for packages that are collected through recycling programs, but that do not meet the reclaimer's criteria for recycling and may be discarded.[584] To highlight the problem, two

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[579] CU, Comment 289 at 3.

[580] Id.; see also L'Oréal USA, Comment 158 at 6.

[581] SPI, Comment 181 at 4-5.

[582] Id. (explaining that "ASTM D7611, adopted in September 2010, now establishes a national third-party consensus standard governing the RIC").

[583] In addition to the comments discussed in this section, a representative of the premium alcoholic beverage industry requested that the FTC confirm that it is non-deceptive for beverage companies to place the statement "Please Recycle" on products. See Diageo, Comment 191 (arguing that this constitutes an "encouraging reminder" rather than an environmental claim).

[584] APR, Comment 165 at 1-2; Eastman, Comment 322 at 5; NAPCOR, Comment 187 at 1; NatureWorks, Comment 274 at 7-10.

commenters proposed examples stating that recyclable claims for materials excluded by the reclaiming industry's criteria deceive consumers.[585]

Additionally, GAC asked whether consumers equate "reused" with "recycled," explaining that the Commission's view of how consumers perceive these terms is unclear.[586] GAC suggested Example 8 in the Recyclable section and Examples 11 and 12 in the Recycled Content section inconsistently treat reused items.[587] GAC further identified a possible conflict with EPA guidance on recycling, noting that, although the Guides suggest that in some instances consumers equate reuse with recycling, EPA never considers "reuse" a form of recycling.[588]

Finally, one commenter expressed strong disagreement with the FTC's decision not to harmonize with ISO 14021.[589]

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[585] APR, Comment 165 at 1-2 ("A package with a certain component is claimed to be recyclable without qualification. The reclaiming industry processing that type of package has published guidance which excludes packages containing that certain component unless specific testing shows a manufacturer's offering of the certain component meets stated criteria developed by the reclaiming industry. The claim of recyclable is deceptive if the certain component fails to meet the reclaiming industry's stated criteria."); NAPCOR, Comment 187 at 3 ("A package is labeled as recyclable, but it is a package specifically excluded in the material purchasing specifications used by a representative portion of the U.S. reclamation industry for that material. The recycling claim on this package would be deceptive assuming that the reclamation industry can substantiate its material specification exclusion as essential to successful reprocessing of that material and/or end-product manufacture from it (substantiation as defined in revised Guides Section 260.2).").

[586] GAC, Comment 232 at 3-4.

[587] Example 8 of the Recyclable section states that a camera collected for conditioning and reuse may be labeled "recyclable," although the camera is not recyclable through conventional recycling programs. Similarly, Example 12 in the Recycled Content section concludes that a "Recycled" label on a recovered automobile engine that has not been repaired, rebuilt, or manufactured is not deceptive. However, Example 11 in the Recycled Content section describes an unqualified "Recycled" label on a used baseball helmet in a sporting goods store as deceptive. Id.

[588] Id.; see also David Bruce, Comment 20 (requesting more space in the recyclable section devoted to the concept of "reusable" products).

[589] GPR, Comment 206 at 2 (stating that harmonization with this standard is critical for products that cross international borders).

4. Analysis and Final Guidance

Based on the comments and the lack of additional consumer perception evidence, the Commission issues the majority of the guidance on recyclable claims as previously proposed. This section explains the Commission's clarifications and new guidance.

First, the Commission clarifies that the threshold for unqualified recyclable claims is 60 percent facility availability. As discussed below, claims for products that do not meet this threshold would be deceptive absent a qualifying statement. Second, the Commission explains that the term "community" is intended as a proxy for consumer access to recycling facilities, and that the definition of "community" may differ depending on the relevant geographic region. Finally, in response to the comments, the Commission revises Example 2 pertaining to the SPI Code, discusses recyclable claims for products that are collected but do not meet criteria for recycling, addresses claims for multi-layered and multi-material packages, and explains why the FTC has chosen not to adopt ISO standards.

a. The Tiered Analytical Framework and Claim Thresholds

Because most commenters supported the Commission's tiered analysis, the Commission issues the final guidance without major substantive changes. Absent evidence that the FTC's guidance fails to remedy deception in this area, the Commission declines to make changes beyond those discussed below.[590]

[590] In addition to the changes discussed in this section, in recognition of the fact that there is also a liquid waste stream, the Commission removes the word "solid" from the guidance, and now refers only to the "waste stream." The Commission does not address reuse in this section because the FTC has received no specific evidence regarding how consumers understand the term. For some discussion of reuse, see Section 260.13, Recycled Content Claims.

As a threshold matter, the Commission confirms that marketers may make unqualified recyclable claims for products when recycling facilities are available to a substantial majority – 60 percent – of consumers or communities where the item is marketed or sold.[591] To provide greater clarity, the FTC moves its guidance regarding the substantial majority threshold out of a footnote and into the text. Moving the 60 percent threshold to the text clearly places marketers on notice of the threshold Commission staff uses when analyzing unqualified recyclable claims.[592] No commenters disagreed with this change or advocated leaving the threshold in the footnote.

Marketers should qualify all recyclable claims for products that do not meet the 60 percent facility availability threshold. The Commission's prior research indicates that consumers infer from unqualified claims that a product can be recycled in their community.[593] No commenters submitted evidence showing that consumer perceptions have changed or that these qualifications are no longer necessary.

However, the Commission deletes the "significant percentage" threshold because commenters suggested it confused marketers and consumers.[594] As a result, the recyclable claims analysis now consists of two, not three, tiers. The Commission advises marketers may either:

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[591] The Commission changes the phrase "generally available where the product is sold" to "available to a substantial majority of consumers where the product is sold" in Example 7 to clarify that the unqualified claim in that example meets the substantial majority threshold.

[592] In response to requests that the Commission lower the threshold or eliminate the requirement for marketers to qualify claims when a significant majority of consumers or communities do not have access to facilities, the Commission reminds marketers that the FTC's role is to prevent consumer deception, not to encourage environmental claims or recycling.

[593] 63 FR 24240, 24243 (May 1, 1998).

[594] See, e.g., PRC, Comment 338 at 2.

make unqualified claims for products that at least 60 percent of consumers or communities can recycle, or make qualified claims for products that do not meet the 60 percent threshold.[595]

Despite deleting the "significant percentage" threshold, the Commission agrees with commenters supporting the analytical underpinnings of the three-tiered framework. That is, the lower the levels of access to appropriate facilities, the more strongly the marketer should emphasize the limited availability of recycling for the product. For example, a claim for a product for which recycling facilities are widely available, but not quite widely enough to meet the 60 percent threshold, may be qualified with language such as: "This product [package] may not be recyclable in your area;" or "Recycling programs for this product [package] may not exist in your area." A claim for a product that may be recycled by only a few consumers, however, needs stronger qualifying language, such as "This product [package] is recyclable only in the few communities that have appropriate recycling programs."[596] Alternatively, marketers may qualify claims by stating the actual percentage of consumers or communities that have access to programs that recycle the item.

The Commission declines to set numerical thresholds for when availability levels dictate the need for specific qualifications. As commenters noted, the need for qualification depends on context and, therefore, cannot be addressed through general guidance. The Commission will analyze qualifications regarding access to facilities on a case-by-case basis. Copy testing always

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[595] The Commission accordingly slightly revises Examples 4 and 9 to dispense with the "significant percentage" terminology.

[596] As proposed, this qualification read: "This product [package] is recyclable only in the few communities that have recycling programs." The Commission inserts the word "appropriate" to convey more clearly that a marketer should confirm that locally available recycling facilities actually will process its product. Absent evidence that consumer perception has changed, the Commission makes no further changes to the qualifications in the examples.

can help ensure the qualifications accurately convey the level of consumer access to recycling facilities.

A few commenters expressed confusion about the use of the term "community."[597] The Commission, therefore, provides the following clarification. As used in the Guides, a "community" is an area within a reasonable distance of where the consumers to whom the product is advertised live, work, and shop. The boundaries of this area will vary depending on consumers' perspective and geographical region. For example, a consumer's "community" may be a much smaller geographical area in a dense city than in a rural area where consumers are more accustomed to driving longer distances to perform everyday tasks.

The FTC notes that AF&PA, in its 2010 Community Survey, and the American Beverage Association ("ABA"), in its 2008 Community Survey, each developed an extensive database of "communities" based on U.S. Census Bureau data.[598] "Communities," for the purposes of those studies, were defined as: (1) incorporated municipalities with their own governing bodies typically responsible for recycling (or, in some states, Minor Civil Divisions); (2) unincorporated "Census Designated Places" ("CDP") with no local governing body that fall under the domain of the county in which they reside; and (3) "remaining areas" containing all remaining population

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[597] The term "community" is used in the Guides because the Guides always have recognized that an unqualified recyclable claim conveys that proper recycling facilities are locally available. The Commission based its guidance, in part, on a July 1997 consumer perception study funded by American University that reported the results of research conducted by Professors Manoj Hastak and Michael Mazis.

[598] See AF&PA, 2010 AF&PA Community Survey (December 2010), at Appendix A; and American Beverage Association, 2008 ABA Community Survey (September 2009), at Appendix A.

not located in an incorporated municipality or CDP.[599] The Commission points to this approach as a reasonable example without suggesting that it is the only way to define communities.[600]

Furthermore, the Commission explains that, in some instances, local circumstances may support a more expansive definition of "community." For example, a PET bottle manufacturer is trying to determine whether a particular town is a community with access to appropriate recycling facilities. The community in question, Town X, has no curbside collection or drop-off program for these bottles within town limits. Nonetheless, there is a PET drop-off facility located en route to City Y, where the majority of adult residents in Town X work, do their shopping, and attend entertainment events. Under these circumstances, the Commission would consider residents of Town X to have access to a PET recycling facility. If, however, most residents of Town X work in, shop in, and regularly visit only Town X, and consumers in Town X would have to drive miles out of their way to access the facility in Town Y, Town X would not be a community with access to a PET recycling facility.

b. Example 2 (SPI Code)

In response to SPI's comment, the Commission modifies proposed Example 2 of Section 260.12.[601] As discussed above, SPI explained that the adoption of an international standard for resin identification through ASTM renders the term "SPI code" inaccurate. Accordingly, the Commission changes all references to the SPI code in proposed Example 2 to "Resin Identification Code" ("RIC"), and, for clarity, includes a footnote in the Guides that states: "The

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[599] Id.

[600] Marketers need only calculate facility availability in areas where their product is marketed or sold. If the product is marketed or sold via the Internet, marketers should assume for substantiation purposes that the product is marketed or sold nationwide.

[601] Section 260.11 in the October 2010 proposal.

RIC, formerly known as the Society of the Plastics Industry, Inc. (SPI) code, is now covered by ASTM D 7611."[602]

Several commenters argued that the RIC on plastic containers may deceive consumers. The Green Guides have long recognized that consumers may interpret the RIC to mean a package is recyclable because of its similarity to the universal recycling symbol. To limit that possibility, the Guides advise marketers to place the code in an inconspicuous location. Because no commenters provided perception evidence showing that these inconspicuously-placed codes deceive consumers, and because most states require marketers to use RICs,[603] the FTC retains its current guidance. Specifically, "the RIC, without more, in an inconspicuous location on the container (e.g., embedded in the bottom of the container), . . . would not constitute a recyclable claim."[604] The Commission, however, encourages the relevant stakeholders to consider changing the RIC's appearance to further decrease the potential for deception.

c. Packages Collected for Public Policy Reasons but Not Recycled

The Commission agrees that unqualified recyclable claims for categories of products that municipal recycling programs collect, but do not actually recycle, may be deceptive.[605] To make a non-deceptive unqualified claim, a marketer should substantiate that a substantial majority of consumers or communities have access to facilities that will actually recycle, not accept and

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[602] See SPI, Comment 181 at 4-5.

[603] See SPI, "SPI Policy Statement on the Resin Identification Code" (Sept. 17, 2010), available at http://www.plasticsindustry.org/NationalBoard/Policies/gncontent.cfm?ItemNumber=875&navItemNumber=2866 (explaining that the RIC has been "adopted by 39 states and [is] recognized internationally").

[604] See 260.12, Example 2.

[605] See, e.g., APR, Comment 165 at 1-2; (further suggesting that the FTC conduct a study regarding consumer expectations for what happens to items collected through recycling programs and how consumers define "recyclable"); Eastman, Comment 322 at 5; NAPCOR, Comment 187 at 1; NatureWorks, Comment 274 at 7-10.

ultimately discard, the product. As part of this analysis, a marketer should not assume that consumers or communities have access to a particular recycling program merely because the program will accept a product.

d. Multi-Layered and Multi-Material Packages

Some commenters requested clarification of the Commission's advice regarding recyclable claims for multi-layered and multi-material packages. Example 6 provides such clarification. In that example, a package is composed of four layers of bonded materials. Only one of the layers is made from material that is recyclable for a substantial majority of consumers or communities. The marketer could substantiate an unqualified recyclable claim for the recyclable layer if it were marketed alone. However, additional qualifications are necessary when the recyclable layer is bonded to other materials, and only a few programs can separate the recyclable layer from the non-recyclable layers. In that situation, two implied claims are false: that the entire package is recyclable; and that a substantial majority of consumers or communities have access to facilities that will recycle the package. The Commission adds a new sentence to Example 6 to clarify that recyclable claims for such products should specify the portion of the product made from recyclable materials, and disclose the availability of facilities that can separate and process multi-layer and multi-material products.

e. Alignment with ISO

Because the FTC tries to harmonize its guidance with international standards whenever possible, 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 always aligned. The Guides' purpose is to prevent the dissemination of misleading claims. ISO, in

contrast, focuses not only on preventing deception, but also on encouraging the demand for, and supply of, products that cause less stress on the environment.[606] Because of this difference, as well as the possibility that non-U.S. consumers perceive claims differently from U.S. consumers, the Guides do not align perfectly with the ISO standards. For example, as noted above, some commenters recommended that the Commission replace the substantial majority threshold with ISO 14021's "reasonable proportion" standard. While this standard might encourage more recycling than that adopted in the final Guides, it arguably permits unqualified recyclable claims where less than a majority of communities have access to recycling facilities for a given product or package. The Commission therefore declines to adopt the ISO standard because consumers interpret unqualified recyclable claims to mean that facilities are available in their area.

I. Recycled Content Claims

1. The 1998 Guides

The 1998 Guides stated that marketers should make recycled content claims only for materials that were recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer) or after consumer use (post-consumer).[607] Although the 1998 Guides did not advise marketers to distinguish between pre-consumer and post-consumer materials, marketers could do so. If they chose to distinguish, the Commission advised marketers to have substantiation for claims about the specific amounts of pre- or post-consumer content in their products.

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[606] The introduction to the ISO 14000 series describes the "[o]bjective 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).

[607] 16 CFR 260.7(e).

To make a pre-consumer recycled content claim, the 1998 Guides advised marketers they should be able to substantiate that the material otherwise would have entered the solid waste stream. Examples 1-3 in the 1998 Guides discussed recycled content claims for pre-consumer materials. Most relevant, Example 1 explained that when spilled raw materials and scraps underwent only a "minimal amount of reprocessing" and were "normally reused in the original manufacturing process," they were not diverted from the solid waste stream, and, therefore, did not constitute recycled content.[608]

The 1998 Guides further advised that consumers interpret unqualified recycled content claims to mean that the entire product or package, excluding minor, incidental components, is made from recycled material. Therefore, the Commission instructed marketers to qualify claims for products or packages only partially made of recycled material.[609]

Finally, Example 9 illustrated that marketers could calculate recycled content based on the annual weighted average of the recycled content in a product.

2. Proposed Revisions

In the October 2010 Notice, the Commission proposed no changes. It did, however, recognize that new, relevant consumer perception evidence might support revisions. Thus, the Commission asked several questions about how consumers understand recycled content claims.

Additionally, the Commission asked whether recycled content claims based on annual weighted average are misleading, and, if so, whether marketers should qualify them. Finally,

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[608] See 16 CFR 260.7(e), Example 1; see also 16 CFR 260.7(e), Examples 2 and 3.

[609] The 1998 Guides also provided that marketers should qualify a recycled content claim for products containing used, reconditioned, or remanufactured components unless it was clear from context that the recycled content came from such components. 16 CFR 260.7(e).

given the Commission's study results suggesting some consumers understand a "made with recycled materials" claim to convey recyclability, the Commission asked whether it should advise marketers to qualify their claims if the product is not recyclable.

3. Comments

Most commenters supported retaining the Commission's longstanding guidance. A few disagreed or suggested changes, but none submitted consumer perception data to support their positions. More specifically, some commenters discussed factors marketers could use to substantiate claims for pre-consumer materials, and the distinction between pre- and post-consumer recycled content. Others asked the Commission to endorse methods other than annual weighted average for calculating recycled content. Finally, some commenters discussed possible confusion between recyclable and recycled content claims, and others requested clarification on how to make claims for reused materials.

a. Pre-Consumer Recycled Content Claims

In this section, the Commission first discusses comments regarding whether the final Guides should advise marketers to consider "reuse in the original manufacturing process" and "significant reprocessing" to determine whether materials are diverted from the solid waste stream. Next, the Commission summarizes comments about whether consumers infer that: (1) materials diverted from the solid waste stream through processes that are standard practice in an industry constitute recycled content; and (2) historically diverted materials that are now used for a higher purpose[610] constitute recycled content.

[610] A "higher" purpose or use is an alternative use where the producer is willing to pay more for the input.

i. Factors to Determine Whether Materials Were Diverted from the Solid Waste Stream

The Commission invited comment on factors marketers could use to substantiate that pre-consumer materials were diverted from the waste stream. Specifically, the Commission asked whether normal reuse in the original manufacturing process and significant reprocessing were helpful proxies for pre-consumer waste stream diversion.

Some commenters agreed that manufacturers should be able to substantiate recycled content claims for pre-consumer materials by analyzing the degree to which: (1) industry normally reuses the material in the original manufacturing process; and (2) the material underwent reprocessing in order to produce the new product.[611] Others agreed that considering these two factors would aid the waste stream diversion analysis, but disagreed about how to weigh them. For example, Unifi argued that marketers should primarily analyze the degree of reprocessing the material has undergone.[612] Others suggested that marketers should focus on whether the industry normally reuses the material in the original manufacturing process.[613] Finally, Enviromedia Social Marketing argued that marketers making pre-consumer recycled content claims should substantiate both that the material underwent significant reprocessing, and that the industry did not normally reuse the material within the original manufacturing process.[614]

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[611] AF&PA, Comment 171 at 9; Martex, Comment 225 at 1; PPC, Comment 221 at 10 (endorsing AF&PA's comment); SCS, Comment 264 at 11.

[612] Unifi, Comment 163 at 2 (recommending defining "significant reprocessing" as "any mechanical or chemical process, such as grinding, melting, and/or reformulating of materials that have/have not been diverted from the solid waste stream").

[613] See, e.g., ACC, Comment 318 at 4-5; Armstrong, Comment 363 at 2; JM, Comment 305 at 11 (asking how narrowly marketers should interpret "original manufacturing process").

[614] Enviromedia Social Marketing, Comment 346 at 13.

EPA also generally agreed that analyzing these factors may help manufacturers determine whether they have diverted pre-consumer materials from the waste stream. However, EPA argued that reprocessing only becomes relevant if the manufacturing process is viewed as consisting of at least two pre-consumer stages.[615] EPA explained that, in many instances, the original manufacturing process produces an unfinished product or material. In a subsequent manufacturing stage, that material undergoes further processing or "converting" to prepare it for use as a consumer item.[616] According to EPA, scraps generated within the first step of the manufacturing process, i.e., production of the unfinished product, do not constitute recycled content, regardless of the extent of reprocessing necessary to reuse them. EPA differentiated these scraps from those generated in subsequent processes to convert the material to a finished consumer product, which, if significantly reprocessed, would constitute recycled content.[617]

A few commenters, mostly from the textile industry, recommended slightly different factors. These commenters argued that marketers should compare a company's actions to those of its competitors, and consider whether they "use[] scrap materials that might have been discarded or sold by another manufacturing or producing entity."[618]

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[615] EPA, Comment 288 at 6-7 (distinguishing between "materials generated in an original manufacturing process [e.g., papermaking] (not considered recycled materials) and materials generated in subsequent processes to make a finished consumer item [e.g., trimming the paper into a finished product] (considered pre- or post-consumer materials)").

[616] Id.

[617] Id.

[618] AAFA, Comment 233 at 5 (asking whether the FTC would recognize as waste stream diversion a "closed loop example" where one company generates scraps that become inputs for another company and vice-versa, and arguing that failing to do so would penalize companies for environmental/recycling innovation); SMART, Comment 234 at 3; Nan Ya Plastics, Comment 238 at 1 (arguing that "by-products/waste recovered in [textile] manufacturing processes and reprocessed into products of equal or greater value than intended original products [should] be considered 'recycled'").

ii. Standard Practice and Higher Use Waste Stream Diversion

Several commenters considered: (1) whether marketers can make non-deceptive recycled content claims for materials that an industry diverts from the waste stream as a standard practice; and, if not, (2) whether marketers can reintroduce recycled content claims for materials diverted as a standard practice and historically reused for one purpose that now may be used for a higher purpose. More commenters addressed the first point, generally agreeing that standard diversion of a material from the waste stream does not render a recycled content claim deceptive.[619] These commenters argued that restricting recycled content claims for these materials would unfairly penalize long-time recyclers, and that consumers do not consider standard waste stream diversion to be material.[620] Only PMA disagreed, arguing that when "current, prevailing industry practice" is to use the materials, reuse does not constitute waste stream diversion, and, therefore, a recycled content claim for that material would be deceptive.[621]

Because most commenters thought marketers could make non-deceptive recycled content claims for materials diverted from the waste stream as standard industry practice, very few considered whether a marketer could make claims based on a "higher use" for an already diverted material. Three commenters stated marketers should be able to make claims on any materials

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[619] B&C, Comment 228 at 1-2; Ruth Heil, Comment 4 at 1; Tandus Flooring, Comment 286 at 1-2; Unifi, Comment 163 at 2; see also SCS, Comment 264 at 18-19.

[620] Id.

[621] PMA, Comment 262 at 8 (arguing that "a product contains 'pre-consumer recycled material' if manufacturing scraps are re-added to the process where current, prevailing industry practice would be to discard those scraps into the solid waste stream").

diverted from the solid waste stream, regardless of use.[622] EHS Strategies, however, suggested marketers could more accurately describe "higher use" in terms of "net energy savings" or "reduced use of virgin material feedstock."[623]

b. Distinction Between Pre- and Post-Consumer Recycled Content

Commenters presented differing views on whether marketers should distinguish between pre- and post-consumer recycled content. Several argued that the breakdown of pre- and post-consumer content is: (1) irrelevant to consumers;[624] (2) not understood by consumers;[625] or (3) misleading in terms of environmental benefits.[626] Others conversely argued it is deceptive not to disclose pre- versus post-consumer content.[627] Because they saw utility in distinguishing between the two, some of these commenters recommended adopting definitions that could help marketers determine when to use each term.[628]

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[622] SCS, Comment 264 at 19; Unifi, Comment 163 at 4; see also Enviromedia Social Marketing, Comment 346 at 13 (explaining that "this new use diverts material from the solid waste stream either indirectly or directly").

[623] EHS Strategies, Comment 111 at 5.

[624] SCS, Comment 264 at 19; see also MWV, Comment 143 at 2 (arguing that the distinction is "not significant").

[625] AFPR, Comment 246 at 3; ACA, Comment 237 at 6; EHS Strategies, Comment 111 at 5; FPA, Comment 292; NAIMA, Comment 210 at 7; Unifi, Comment 163 at 4.

[626] AF&PA, Comment 171 at 7; Domtar, Comment 240 at 2; PPC, Comment 221 at 8 (endorsing AF&PA's comment).

[627] Aluminum Association, Comment 216 at 1-2; EPI, Comment 277 at 3; FSC-US, Comment 203 at 10-11; JM, Comment 305 at 11-12; SCS, Comment 264 at 11; Seventh Generation, 207 at 6-7; Tandus Flooring, Comment 286 at 1.

[628] Aluminum Association, Comment 216 at 2; SCS, Comment 264 at 11; O'Mara, Comment 108 at 1-3 (seeking clarification of definitions of pre- versus post-consumer recycled content from PET bottles); see also UL, Comment 192 at 3-4 (expressing no opinion on whether marketers should make the distinction, but proposing definitions).

Several who argued that marketers should distinguish between pre- and post-consumer recycled content recommended adopting ISO 14021's definitions.[629] ISO 14021 defines pre-consumer material as: "Material diverted from the waste stream during a manufacturing process. Excluded is reutilization of materials such as rework, regrind or scrap generated in a process and capable of being reclaimed within the same process that generated it."[630] By contrast, ISO 14021 defines post-consumer material as: "Material 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."[631]

c. Calculating and Substantiating Recycled Content Claims

This section first compiles responses to the Commission's question about whether the Guides should continue to advise marketers that they may non-deceptively substantiate recycled content claims using calculations based on annual weighted average. Second, it summarizes comments regarding how to calculate recycled content when a product contains a certain percentage of additives, e.g., preservatives or fire retardants.

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[629] Aluminum Association, Comment 216 at 1; Tandus Flooring, Comment 286 at 1; see also commenters that favor advising marketers not to distinguish between pre- and post-consumer content but, in the alternative, advocate ISO 14021: AF&PA, Comment 171 at 7; MWV, Comment 143 at 2, PPC, Comment 221 at 8 (endorsing AF&PA's comment). One commenter that favored requiring differentiation urged the Commission not to adopt ISO 14201. See FSC-US, Comment 203 at 8, 10-11 (raising concerns about calling unsold magazines and newspapers, trim from envelope manufacturers, and similar used paper "post-consumer").

[630] See ISO 14021:1999(E), Environmental labels and declarations – Self-declared environmental claims (Type II environmental labelling), at 7.8.1.1(a) (Sept. 15, 2009).

[631] Id.

i. The Annual Weighted Average Calculation Method

Most commenters agreed that marketers may non-deceptively base recycled content claims on either a per-product or an annual weighted average[632] calculation.[633] Others generally agreed that weighted average can substantiate claims, but stated that certain clarifications to the guidance would help ensure claims comport with consumer expectations. For example, Boise suggested emphasizing that manufacturers should limit averaging to single manufacturing runs.[634] Alternatively, AFPR argued that consumer deception could be minimized if weighted averages were restricted to six-month, rather than one-year, calculation periods.[635]

Other commenters argued that the Commission should retain its guidance, but clarify that alternative calculation methods may adequately substantiate claims.[636] FSC-US, for example, suggested advising that any accurate, non-deceptive calculation adequately substantiates a

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[632] A "weighted average" differs from a standard average because some data points contribute more to the final average than others.

[633] Aluminum Association, Comment 216 at 2; ACC, Comment 318 at 5; ACI, Comment 160 at 5; Californians Against Waste, Comment 309 at 2; Carpet and Rug Institute, Comment 282; EHS Strategies, Comment 111 at 5; Enviromedia Social Marketing, Comment 346 at 14; EPI, Comment 277 at 3; GPI, Comment 269 at 3 (recommending the qualification "on average"); IBWA, Comment 337 at 2-3; JM, Comment 305 at 12 (generally agreeing but stating that claims may be misleading if a consumer is not informed about the averaging); NAIMA, Comment 210 at 7-8; P&G, Comment 159 at 4; SCS, Comment 264 at 11, 19-20 (also supporting qualifications that explain calculations are based on a weighted average); Tandus Flooring, Comment 286 at 1; Unifi, Comment 163 at 4.

[634] Boise, Comment 194 at 2 (stating that averaging beyond these single runs is "a material deviation from what a reasonable consumer would expect").

[635] AFPR, Comment 246 at 2.

[636] AF&PA, Comment 171 at 7-8 (recommending the "offset-based" approach or volume credit system); AWC, Comment 244 at 4; FSC-US, Comment 203 at 12-13; MWV, Comment 143 at 2; PPC, Comment 221 at 8-9 (endorsing AF&PA's comment); Shaw, Comment 220 at 6-7; SFI, Comment 151 at 2-3 (arguing that offset-based or credit methods are, in some instances, the only practical ways to account for certified forest content); see also Crown, Comment 303 at 1 (arguing that this section is inconsistent with the guidance on renewable energy).

claim.[637] EPA agreed that alternative calculation methods may, in some instances, be appropriate and non-deceptive, if limited to a specific product line or stock-keeping unit ("SKU").[638]

Two commenters, however, argued that claims based on annual weighted averages may categorically mislead consumers.[639] Cone suggested that any "sample of a product that claims to use 'X percent recycled materials' should be required to actually contain that percentage."[640] Interface, Inc. agreed, and argued that "a per product calculation methodology . . . will provide much greater transparency to consumers . . . ."[641]

ii. Recycled Content Claims for Products Containing Additives

Some commenters sought guidance on making non-deceptive recycled content claims for products that contain, sometimes contrary to consumer expectations, additives such as preservatives, colorants, or fire retardants. For example, Boise suggested that although paper products must always contain precipitated calcium carbonate ("PCC"), consumers understand claims for these products to refer only to pulp fibers.[642] Therefore, Boise suggested clarifying that

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[637] FSC-US, Comment 203 at 12-13; see also Shaw, Comment 220 at 6-7 (recommending an example to state that a "manufacturer can make a recycled content claim . . . using an alternative calculation method as long as it is adequately qualified . . . [with] a brief statement explaining the process along with a disclaimer that the consumer's product component contains an amount of actual recycled content that will vary from the stated percentage").

[638] EPA, Comment 288 at 7 (explaining that if the manufacturer uses an alternative method, the manufacturer should substantiate by mass balance calculations how much secondary material was received by each plant, state what the overall average recycled content is for the product line, and explain that the content of the product purchased may vary from the average).

[639] Cone, Comment 205 at 2; Interface, Comment 310 at 1.

[640] Cone, Comment 205 at 2.

[641] Interface, Comment 310 at 1.

[642] Boise, Comment 194 at 2-3.

recycled content calculations that exclude PCC for paper products are not deceptive because they comport with consumer expectations.[643]

Webster Industries, a plastic garbage can liner manufacturer, also asked how marketers should account for additives when calculating recycled content.[644] According to Webster, no garbage can liner contains more than 90 percent plastic because they all consist of at least 10 percent additives and colorants. Webster's liners contain 75 percent plastic. To account for the additives and colorants, they label their liners "made from 75 percent recycled content."[645] To eliminate confusion, Webster suggested either requiring others to label their products similarly, or clarifying that marketers may non-deceptively calculate recycled content without accounting for additives.[646]

Additionally, NAIMA commented that it continues to question competitors' claims that their insulation products are "made from 100 percent recycled newspaper," when toxic chemical fire retardant actually constitutes 20 to 25 percent of the product.[647] Accordingly, NAIMA requested that the FTC reinstate deleted Example 7 to this section, which, NAIMA explained, continues to help them challenge deceptive claims.[648]

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[643] Id.

[644] Webster Industries, Comment 161.

[645] Id.

[646] Id.

[647] NAIMA, Comment 210 at 8.

[648] Id. 1998 Green Guides Section 260.7(e) Example 7 reads: "A paper product is labeled as containing '100 percent recycled fiber.' The claim is not deceptive if the advertiser can substantiate the conclusion that 100 percent by weight of the fiber in the finished product is recycled."

d. Qualifying Recycled Content Claims

Commenters had mixed views on when and how to qualify recycled content claims. Some agreed with the Commission's guidance that marketers should make unqualified recycled content claims only if their products contain 100 percent recycled content; otherwise, marketers should qualify claims by listing the amount of actual recycled content in the product.[649] Others recommended the Commission add guidance addressing where a qualification could alleviate consumer deception. Some argued that the Commission should require marketers to qualify recycled content claims with a description of the calculation methodology whenever marketers do not calculate per-product.[650] Alternatively, some suggested "mandat[ing] disclosure language when a product links recycled content to environmental benefits,"[651] in order to alert the consumer that environmental benefits could be derived from various attributes in addition to recycled content.[652]

e. Implied Recyclable Claims

Because the Commission's consumer copy test indicated that some consumers may infer a recyclable claim from a recycled content claim, the FTC asked whether marketers should qualify "recycled content" claims for non-recyclable products. Most commenters argued that marketers

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[649] ACA, Comment 237 at 7-8; Karen Fiedler, Comment 92 (also stating that, in some cases, it may be appropriate to provide a range); GPI, Comment 269 at 3.

[650] WM, Comment 138 at 3; Interface, Inc., Comment 310 at 1.

[651] NAIMA, Comment 210 at 8; see also Darman Mfg., Comment 218; RILA, Comment 339 at 3-4 (suggesting lifecycle analysis to alleviate deception); Mike Cowan, Comment 25 (arguing that recycled content claims on "environmentally friendly" polypropylene tote bags are misleading).

[652] NAIMA, Comment 210 at 8.

making bona fide "recycled" claims need not address recyclability.[653] Others stated that marketers should clearly qualify claims if the product is not recyclable.[654]

Some commenters suggested ways to avoid possible deception. For example, one proposed amending the guidance to state: "marketers [are] cautioned that a 100 percent recycled content claim may nonetheless require qualification with respect to the recyclability of the product."[655] EPA suggested cautioning marketers to "be careful to avoid creating confusion in this area."[656]

GPI, however, recommended a wholesale change to the guidance in this area, arguing that recycled content claims imply that products are recyclable in all instances.[657] Therefore, GPI asked the FTC to clarify that all marketers making recycled content claims should have evidence to support "second use recyclability."[658]

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[653] Aluminum Association, Comment 216 at 2; ACI, Comment 160 at 5 & 8; AF&PA, Comment 171 at 8; Enviromedia Social Marketing, Comment 346 at 15; NAIMA, Comment 210 at 8; PPC, Comment 221 at 9 (endorsing AF&PA's comment); see also P&G, Comment 159 at 4 (requesting that the FTC do further consumer research before requiring qualifications); Unifi, Comment 163 at 4.

[654] AFPR, Comment 246 at 3; CMI, Comment 137; Cone, Comment 205 at 2 (citing to their 2008 Green Gap Survey, which found notable consumer confusion about the phrase "contains recycled content"); FPA, Comment 282 at 7-8; IBWA, Comment 337 at 3-4 (also requesting clarification on whether a marketer can use a Mobius loop and a "please recycle" message on bottles not made from recycled material); see also Joan Schnee, Comment 28; UL, Comment 192 at 6 (proposing the disclaimer "Made with Recycled Content, but is not recyclable").

[655] ACC, Comment 318 at 5.

[656] EPA, Comment 288 at 7-8; see also SCS, Comment 264 at 10 (agreeing that these claims continue to confuse consumers, and encouraging the Commission to conduct further research).

[657] GPI, Comment 269 at 8-9 (stating, conversely, that marketers can make truthful claims about recyclability, and "such claims do not imply and are separate and independent of whether particular products made from that material contain any recycled content"). The Commission also received comments agreeing that recyclable claims do not imply recycled content, particularly when coupled with the directive to "RETURN" and "RECYCLE." See BCI, Comment 284 at 2-3; PRBA, Comment 317 at 7; RBRC, Comment 287 at 5.

[658] GPI, Comment 269 at 8-9.

f. "Reused" or "Refurbished" Materials

Some commenters asked how to make non-deceptive claims for reused materials. Two raised specific concerns about Examples 11 and 12.[659] In Example 11, a store selling new and used sporting goods sells a baseball helmet that, while used, looks like a new item. The example concludes that an unqualified "Recycled" claim on the helmet is deceptive because consumers would likely believe that the helmet is made from recycled raw materials. In Example 12, a used auto parts store sells a serviceable engine that it recovered from a wrecked vehicle with an unqualified "Recycled" label. The example concludes that the unqualified recycled content claim is not deceptive because reasonable consumers likely would understand that the engine is used, and has not undergone any rebuilding.

GAC argued that these two examples appear to give conflicting guidance on whether marketers may non-deceptively equate "reused" with "recycled."[660] Seventh Generation agreed, and suggested distinguishing "between recycled, used, remanufactured, and reconditioned rather than allow these terms to be used interchangeably."[661]

Additionally, several vehicle recycling entities submitted a form comment requesting amendments to Examples 12 and 13, which address "recycled" claims for auto parts. LKQ argued that the language "automotive dealer" and "automobile parts dealer" in these examples is "limiting in scope," and may confuse marketers by suggesting that these two types of entities are

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[659] GAC, Comment 232 at 4; Seventh Generation, Comment 207 at 7.

[660] GAC, Comment 232 at 4.

[661] Seventh Generation, Comment 207 at 7; see also Tandus Flooring, Comment 286 at 1 (recommending distinguishing recycled materials from reused and refurbished materials).

the only ones qualified to perform such functions.[662] Thus, the form comment argued that the two examples should specifically reference "automobile recycler or other qualified entity" because these entities also recover auto parts for recycling.[663] Some commenters suggested further amending Example 13 to refer to a transmission recovered from a "salvaged or end-of life vehicle," rather than one from a "junked vehicle," to be more consistent with language used in state statutes governing these processes.[664]

4. Analysis and Final Guidance

Most commenters agreed that the Commission should not revise its longstanding guidance, particularly its advice that marketers make recycled content claims only for materials recovered or otherwise diverted from the waste stream.[665] Those that recommended changes did not agree on which changes were necessary, and did not submit consumer perception evidence supporting their positions. Thus, although the Commission has some continuing concerns and actively seeks new evidence regarding how consumers understand recycled content claims, the final Guides retain most of the 1998 guidance without modification. This section describes some slight changes, and addresses confusion surrounding pre-consumer recycled content claims, substantiation, qualifications, implied recyclable claims, and reuse.

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[662] LKQ, Comment 349 at 1.

[663] See, e.g., All Car and Truck Recycling, Comment 312; B&B Auto Parts, Comment 350; Intermountain Auto Recycling, Inc., Comment 200; John's Auto Parts, Comment 345; Liberty Auto Parts and Salvage, Comment 347; PARTS, Comment 199; Subway Truck Parts, Comment 351; Vince's U Pull It Auto Parts & Recycling, Comment 359; Westwood Auto and Truck Parts, Comment 352; and others.

[664] Automotive Recyclers of Michigan, Comment 324; South Windsor Auto Parts, Comment 329; SCADA, Comment 331; Texas Automotive Recycling Association, Comment 326; Weller Auto Parts, Comment 327; and others.

[665] In recognition of the fact that there is also a liquid waste stream, the Commission removes the word "solid" from the guidance, and now refers only to the "waste stream."

a. Pre-Consumer Recycled Content Claims

Although the Commission asked questions pertaining to recycled content claims for pre-consumer materials, few commenters made recommendations, and none provided supporting consumer perception evidence. As a result, the Commission does not substantively amend its guidance. This section explains the Commission's reasoning. It also clarifies that a new, higher use for a pre-consumer input would not, by itself, substantiate a recycled content claim.

i. Factors to Determine Whether Materials Were Diverted from the Waste Stream

The record does not demonstrate that the longstanding advice on recycled content claims based on pre-consumer materials leads to deceptive claims. To remove potential ambiguity, however, the Commission deletes Example 2, but otherwise issues its guidance without change.

In the October 2010 Notice, the Commission proposed retaining its guidance that it is deceptive to base a recycled content claim on pre-consumer content unless it is composed of materials that have been recovered or otherwise diverted from the waste stream during the manufacturing process. The Commission, however, acknowledged difficulties in using the existing guidance to determine whether pre-consumer materials qualify as recycled content. The October 2010 Notice, therefore, solicited evidence of consumer perception of pre-consumer recycled content claims, and asked what, if any, changes the Commission should make to its guidance. Additionally, the Commission invited commenters to propose factors it could use to determine whether pre-consumer material was diverted from the waste stream.

Most commenters agreed in principle that it is deceptive to claim pre-consumer materials are recycled unless the marketer can demonstrate they were diverted from the waste stream. Some, however, expressed confusion about how this guidance works in practice. For instance,

Example 1 stated that when spilled raw materials and scraps undergo a "minimal amount of reprocessing" and are "normally reused in the original manufacturing process," they are not diverted from the waste stream and, therefore, do not qualify as recycled content. The guidance, however, did not specify the factors that would determine when pre-consumer inputs were diverted from the waste stream.

Recognizing this ambiguity, the Commission solicited comment on whether a manufacturer could show it diverted material from the waste stream by demonstrating that it must significantly reprocess the material before reusing it in the manufacturing process. Some commenters agreed that significantly reprocessing before reuse likely indicates that the manufacturer diverted the material from the waste stream. Others, however, argued that "significant reprocessing" alone was not a proxy for waste stream diversion.

EPA provided a practical example regarding scraps generated in the papermaking process that helped the Commission understand the relevance of reprocessing to waste stream diversion. Papermaking consists of two manufacturing processes. In the initial process, pulped fiber goes through a series of steps that results in a finished roll of paper. In a secondary process, those finished rolls are converted into consumer products such as envelopes or newspapers.[666] Scraps such as trimmings or faulty paper created during the initial process are called "mill broke," and are typically re-pulped and reintegrated into the initial papermaking process. Although mill broke must be reprocessed, according to EPA it is not recycled content because it never left the first manufacturing plant and was never converted to a consumer product.

[666] EPA, Comment 288 at 7-8.

After considering this example and the record as a whole, the Commission concludes that "significant reprocessing" is not a proxy for waste stream diversion. As the example makes clear, the amount of reprocessing needed before reuse does not, by itself, definitively indicate whether the material would have entered the waste stream. Although it might follow that material that requires additional expense and processing before reuse would typically have been discarded, the record does not demonstrate that this is always the case. The Commission therefore declines to adopt "significant reprocessing" as a proxy for determining whether pre-consumer materials constitute recycled content.

Given the complexity of the issues and the lack of consumer perception evidence, the Commission remains concerned about the potential for deceptive recycled content claims for pre-consumer materials. However, there is neither evidence that the Commission's longstanding guidance has been ineffective at preventing consumer deception, nor the record to support a new approach. Accordingly, the final Guides do not provide specific factors for determining what constitutes waste stream diversion in the pre-consumer context. Example 2 could be read as providing such a factor (i.e., not normally reused within the original manufacturing process).[667] Therefore, to eliminate confusion on this point, the final Guides do not include Example 2.[668] Instead, they retain only Example 1, which illustrates that a material that undergoes minimal reprocessing and is normally reused by industry within the original manufacturing process is not recycled content. The Commission notes that consumer perception of recycled content claims for

[667] Furthermore, the guidance presented in Example 2 was circular. Although it provided at the outset that the materials discussed therein were diverted from the waste stream, it concluded that the material constituted recycled content because "absent [its] purchase and reuse . . . , it would have entered the waste stream."

[668] The Commission re-numbers the examples in this section accordingly.

pre-consumer materials is an area ripe for testing and encourages stakeholders to submit new evidence when available.

ii. New, Higher Use for a Pre-Consumer Input

The Commission requested comment on whether consumers consider pre-consumer materials historically used for one purpose, but now used for another, higher purpose to be recycled content.[669] Because few commenters responded, and none submitted consumer perception evidence, the Commission declines to include guidance on this point. However, the Commission clarifies that innovative, higher use of a material not otherwise destined for the waste stream does not, by itself, render a material recycled content. The same guidance applies to claims for these materials as all other recycled content claims: if the pre-consumer materials were not destined for the waste stream, it would be deceptive to call them recycled content, regardless of end use.[670]

b. Calculating and Substantiating Recycled Content Claims

Several commenters discussed how best to calculate recycled content and substantiate recycled content claims. Commenters generally supported the Commission's current approach,

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[669] The Commission also asked whether consumers consider material recycled content when processes that divert it from the waste stream become standard practice in an industry. Because comments addressing this question were closely linked to those addressing claims for materials put to new, higher uses, the Commission does not address it separately.

[670] For example, a plastic bottle manufacturer's longstanding practice is to use leftover PET byproduct from the waste stream as plastic pellets to fill bean-bag toys. Recently, the manufacturer has found a new way to spin the leftover PET byproduct into textile fibers. To make a recycled content claim for the textile fibers made from PET byproduct, the manufacturer must be able to substantiate that the byproduct would have otherwise entered the waste stream. It may be that reprocessed PET byproduct used in a secondary manufacturing process would always constitute recycled content if the manufacturer can substantiate that the byproduct would otherwise be destined for the waste stream. This is likely the case if the material was appropriately considered recycled content in the first use. If, however, the PET byproduct did not constitute recycled content when used as filler for a bean-bag toy, the mere fact that the manufacturer has discovered a "higher use" for the PET byproducts does not, by itself, render the recycled content claim for this material non-deceptive.

and none submitted evidence to suggest changes are necessary. Therefore, the Commission makes no major adjustments to its guidance. It does, however, clarify several points.

The Commission asked commenters whether it should continue to advise marketers that recycled content claims may be based on the annual weighted average of recycled content in an item. Commenters generally supported this approach when per-product calculations are infeasible. Therefore, the Commission continues to advise marketers that, in that circumstance, they may non-deceptively calculate recycled content based on the annual weighted average method.

Some commenters expressed confusion about whether, and in what circumstances, marketers could use alternative calculations. Accordingly, the Commission clarifies that the per-product and annual weighted average methods are not the only means marketers can use to calculate and substantiate a product's recycled content.[671] Instead, as the examples make clear, these two methods likely lead to non-deceptive claims that do not require additional disclosures regarding calculation method. There is no evidence in the record about how consumers interpret recycled content claims based on alternative calculation methods. The Commission therefore cannot provide guidance on when the use of alternative methods may lead to non-deceptive claims, and recommends copy testing before using them.

Several commenters also requested advice on how to calculate recycled content when some percentage of the final product consists of additives. These commenters questioned whether consumers – who may not realize that the product contains substances other than the recycled material – would be deceived if recycled content calculations omitted these additives.

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[671] Consumers may be deceived if marketers calculate weighted averages across multiple product lines. Unless they have consumer perception evidence to the contrary, marketers should calculate annual weighted averages with respect to single product lines.

For example, the Commission received a comment regarding plastic garbage bag liners from Webster Industries. Webster Industries explained that only 75 percent of a liner in their product line is made from plastic; the other 25 percent consists of additives and colorants.[672] Assuming the 75 percent that consists of plastic is made from 100 percent recycled plastic, because 25 percent of the product is made from other virgin material, and 25 percent could not reasonably be considered "minor" or "incidental," such a company would properly label its liners as "75 percent recycled content."

In general, marketers may make unqualified recycled content claims if the entire product, excluding minor, incidental components, is made from recycled material. Otherwise, marketers should qualify claims to avoid deception about the amount or percentage of recycled content in the finished item. This guidance also applies when the product contains additives. In the plastic garbage can liner example, an unqualified recycled content claim would likely imply that 100 percent of all contents in the liner are recycled, and would not properly account for the 25 percent of the product that is not. Therefore, as described above, it would be proper to qualify the claims by stating the percentage of all the ingredients in its liners that consists of recycled content.

c. Qualifications

Several commenters requested additional guidance on when and how recycled content claims should be qualified. Without new evidence to support changes, however, the Commission issues its guidance as proposed. Recycled content claims, like all marketing claims, should be qualified to the extent necessary to alleviate consumer deception. Marketers should qualify recycled content claims with the amount or percentage, by weight, of recycled content in the

[672] Webster Industries, Comment 161.

finished product or package, unless the entire product or package, excluding minor, incidental components, is made from recycled content. In the Commission's study, a significant minority of respondents (35 percent) inferred that an unqualified recycled content claim meant that the entire product was made from recycled materials. Because these findings indicate that consumers may be deceived by unqualified claims for products that contain less than 100 percent recycled content, qualifications remain necessary. Without further evidence, the Commission declines to specify other situations where recycled content claims should be qualified, but reminds marketers that they are responsible for substantiating all express and reasonably implied claims.

d. Implied Recyclable Claims

Although the Commission's consumer perception study suggested that "made with recycled materials" claims imply recyclable claims to some consumers,[673] the Commission declines to require marketers to qualify recycled content claims to address recyclability in all circumstances. In the October 2010 Notice, the Commission requested comment on this issue. Although some commenters expressed general views regarding consumer confusion between the terms "recycled" and "recyclable," very few addressed this particular issue. None submitted evidence suggesting that qualifications are needed or helpful, and some argued that such qualifications could create more confusion than they would alleviate.

For many commonly recycled materials, such as glass and aluminum, the implied recyclable claim would be true. Moreover, "recycled" is a mature claim that has been prevalent in the market for some time. Therefore, without a more robust record, the Commission declines to introduce new guidance on this topic.

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[673] 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.

e. Reuse (Examples 10-11)

Some commenters requested further guidance on how to reconcile the guidance in Examples 10 and 11, which deal with "recycled" claims for reused items.[674] The Commission does not agree that these examples conflict. It clarifies, however, that Example 11 applies specifically to the auto industry, whereas Example 10 provides general guidance to all marketers.

In Example 10, a store that sells both new and used sporting equipment labels a used helmet "recycled" without qualification. As the example explains, the claim appears on a used helmet that is indistinguishable from a new one. This claim is deceptive because consumers likely interpret it to mean that the helmet is new, but made from recycled raw materials. In this case, neither the helmet's appearance, nor the context in which the helmet is sold – a store that sells both used and new equipment – clarifies what is meant by "recycled." Although consumers might seek out helmets made from recycled raw materials, safety concerns might deter them from purchasing "used" helmets. Accordingly, whether the helmet is used or made from recycled materials is likely material to consumers. Therefore, an unqualified "recycled" claim would be deceptive, and the example explains that the marketer should add a clear and prominent disclosure explaining that the helmet is used. Marketers should follow this example for general guidance on making non-deceptive "recycled" claims for reused items.

In contrast, Example 11 applies solely to the automotive parts industry, which previously demonstrated that "recycled" is an industry term of art with special meaning to consumers. In 1998, the Commission added Examples 11 and 12 based on evidence that consumers understand that certain automotive parts labeled "recycled" are used parts that have not undergone any type

[674] In the October 2010 Notice, these examples were Examples 11 and 12. Because the final Guides do not include Proposed Example 2, the examples discussed in this section have been renumbered to Examples 10 and 11.

of repair, rebuilding, or remanufacturing.[675] Commenters explained that consumers understand that a "recycled" automobile engine sold in a used auto parts store is "reused." Therefore, a "recycled" label in this context does not deceive consumers. No commenters provided evidence that consumer understanding of claims in this context has changed. As a result, the final Guides retain Examples 11 and 12.[676]

f. Revisions to Examples 11 and 12

Numerous vehicle recycling entities submitted a form comment suggesting that Examples 11 and 12 should refer to an "automobile recycler or other qualified entity," in addition to an "automotive dealer" or "automobile parts dealer."[677] These commenters expressed concern that the failure to specify certain types of vehicle recyclers could imply that those entities should not make "recycled" claims for reused parts. In the automotive context, however, a "recycled" claim for reused parts is true regardless of the type of recycler who sells them. Therefore, to eliminate this confusion, the Commission makes the requested changes to Examples 11 and 12, and reminds marketers that Examples 11 and 12 should be read very narrowly to apply only to the automobile industry.[678]

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[675] See 63 FR 24245-46 (May 1, 1998) (explaining that the examples were added in response to approximately 207 comments to the 1996 Federal Register Notice, which were patterned after, or similar to, a form letter from the Automotive Recyclers Association).

[676] The Commission adds language to Examples 11 and 12 to clarify that they apply only to the automotive parts industry.

[677] In the October 2010 Notice, these examples were numbered 12 and 13.

[678] At commenters' request, the Commission also changes the reference to "junked vehicle" in Example 12 to "salvaged or end-of-life vehicle."

J. Refillable Claims

Section 260.7(g) of the 1998 Guides stated that it is deceptive to misrepresent that a package is refillable. It also advised marketers not to make 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. In its October 2010 Notice, the Commission proposed retaining this section unchanged.[679] The two commenters addressing this guidance agreed.[680] Accordingly, the Commission does not modify this section.[681]

K. Renewable Energy Claims

1. Proposed Guidance

The Commission proposed guidance on four issues related to renewable energy.[682] First, it advised marketers not to make unqualified "made with renewable energy" claims if the power used to manufacture the item was derived from fossil fuel. Second, the proposed guidance advised marketers to disclose the type or source of the renewable energy underlying their renewable energy claims. Third, the Commission cautioned against making unqualified "made with renewable energy" claims unless all, or virtually all,[683] of the significant manufacturing processes used to make the product were powered by renewable energy or by non-renewable

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[679] 16 CFR 260.13, 75 FR at 63581.

[680] ACA, Comment 237 at 11; GPI, Comment 269 at 3.

[681] See 16 CFR 260.14 of final Guides.

[682] See 16 CFR 260.14. This section is renumbered 16 CFR 260.15 in the final Guides. Citations to 16 CFR 260.14 refer to the proposed section on renewable energy claims; citations to 16 CFR 260.15 refer to the final Guides.

[683] 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).

energy that is matched by renewable energy certificates (or "RECs").[684] Finally, the proposed guidance advised marketers that own renewable energy facilities not to claim they "host" a facility if, in fact, they have sold the renewable attributes of that energy (e.g., through RECs). The Commission sought comment on this proposed guidance, as well as relevant consumer perception data.

2. Comments

Commenters focused primarily on four areas: (1) the meaning of "renewable energy;" (2) qualifying "made with renewable energy" claims; (3) the proposed "hosting" guidance; and (4) two additional issues.

a. The Meaning of Renewable Energy

Many commenters supported the Commission's admonition against using unqualified claims for items produced in whole, or in part, by energy derived from fossil fuel.[685] Some, however, discussed the Commission's use of the terms "renewable energy" and "power," and its decision not to identify specific energy sources as renewable.

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[684] RECs are "certificates" that represent the property rights to the environmental, social, and other nonpower qualities of renewable electricity generation. See http://www.epa.gov/greenpower/gpmarket/rec.htm. A REC, and the attributes and benefits it represents, can be "unbundled" from the underlying renewable electricity and sold separately. If the physical electricity and the associated RECs are sold to separate buyers, the electricity is no longer considered renewable. See http://www.epa.gov/greenpower/gpmarket/rec.htm ("The REC product is what conveys the attributes and benefits of the renewable electricity, not the electricity itself."). All renewable energy is based on RECs, even when the marketer purchased renewable energy directly from a utility or other provider. EPA requested the Commission emphasize that RECs are integral to any renewable energy claim. EPA, Comment 288 at 10. ("Even if a consumer purchases renewable power from a utility (or competitive electric service provider), if the sale does not include RECs (or the retirement of RECs on behalf of the customer), no environmental claim should be allowed.").

[685] EEI, Comment 195 at 2-3; Mass DPU, Comment 247 at 3; Aluminum Association, Comment 216 at 2-3; EPA, Comment 288 at 12; TerraPass, Comment 306 at 1-2.

Three commenters agreed with the Commission's proposed guidance.[686] EEI supported the Commission's proposal to avoid a detailed definition of renewable energy.[687] Mass DPU explained that this guidance "reflects the consensus of the energy regulatory community."[688] The Aluminum Association concurred that the general understanding of renewable energy is that "it is not derived from fossil fuel."[689]

Some, however, asked the Commission to modify its guidance.[690] Two commenters sought clarification on whether the admonition against claims based on "power" derived from fossil fuels refers only to electricity or to any form of energy derived from fossil fuels (e.g., natural gas for heating or operating manufacturing equipment, or transportation fuels used to move goods).[691] CRS advocated that the admonition apply to electricity only,[692] while TerraPass suggested the Commission apply it to all forms of fossil fuel-derived energy.[693]

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[686] EEI, Comment 195 at 2-3; Mass DPU, Comment 247, at 3; Aluminum Association, Comment 216, at 2-3.

[687] EEI, Comment 195 at 2-3 (noting there is "no uniform or consensus definition of renewable energy").

[688] Mass DPU, Comment 247 at 3.

[689] Aluminum Association, Comment 216 at 2-3.

[690] CRS, Comment 224 at 8; SCS, Comment 264 at 19; TerraPass, Comment 306 at 1-2; L'Oreal USA, Comment 158 at 6; AF&PA, Comment 171 at 14; PPC, Comment 221 at 15 (endorsing AF&PA's comment); Domtar, Comment 240 at 2; EPA, Comment 288 at 12-13; Aluminum Association, Comment 216 at 3-4; Biomass Accountability Project, Comment 311 at 4-8; EnviroMedia Social Marketing, Comment 346 at 18.

[691] CRS, Comment 224 at 8; TerraPass, Comment 306 at 1-2.

[692] CRS, Comment 224 at 8 (seeming to favor guidance that marketers may make unqualified claims about renewable electricity-powered manufacturing processes, even when they use fossil fuel in other processes such as heating and operating manufacturing equipment, or transporting goods).

[693] TerraPass, Comment 306 at 1-2.

Several commenters requested the Commission explicitly include or exclude certain energy sources.[694] The Aluminum Association, for example, urged the Commission to recognize biomass, hydrogen, geothermal, hydropower, and ocean energy as renewable.[695] Others requested clarification that nuclear,[696] biomass combustion,[697] and "clean coal"[698] are not renewable. SCS argued the Commission should not consider any category of energy as renewable "without considering site-specific circumstances."[699] SCS stated that a specific power source should qualify as renewable only if it is replenished at a rate at least equal to that at which it is used to generate electricity.[700]

Additionally, four commenters identified inconsistencies between proposed Sections 260.14(a) and 260.14(c).[701] Proposed Section 260.14(a) advised against making unqualified renewable energy claims based on the use of fossil fuel. This section did not, however, address

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[694] Aluminum Association, Comment 216 at 3-4; EPA, Comment 288 at 12-13; Biomass Accountability Project, Comment 311 at 4-8; EnviroMedia Social Marketing, Comment 346 at 18.

[695] The Aluminum Association agreed with the Commission's study results indicating consumers understand renewable energy is not derived from fossil fuel. Aluminum Association, Comment 216 at 3-4.

[696] EPA, Comment 288 at 12-13 (emphasizing that "[w]hether nuclear energy is renewable is a scientific question" and that the Energy Information Administration groups uranium and fossil fuels as "non-renewable energy sources"); CRS, Comment 224 at 8 ("Uranium is not a renewable resource and to imply otherwise is deceptive.").

[697] Biomass Accountability Project, Comment 311 at 4-8 (asserting that the burning of biomass features no automatic constant replenishment).

[698] EnviroMedia Social Marketing, Comment 346 at 18 (stating that 60 percent of consumers know coal is not renewable, but not submitting underlying data).

[699] SCS, Comment 264 at 12 (arguing that, even for certain categories of energy considered by some renewable, renewability varies across sites).

[700] Id. at 12-13. A few other commenters, including EPA, stated that renewable energy typically means energy sources that are replenished at a rate equal to or faster than they are used. EPA, Comment 288 at 12; Aluminum Association, Comment 216 at 2; Crown, Comment 303 at 3.

[701] L'Oreal USA, Comment 158, at 6; AF&PA, Comment 171 at 14; PPC, Comment 221 at 15 (endorsing AF&PA's comment); Domtar, Comment 240 at 2.

whether marketers may make such claims when they purchase RECs to match their energy use. In contrast, proposed Section 260.14(c) advised that marketers may make unqualified renewable energy claims based on non-renewable energy, e.g., fossil fuel, as long as they have purchased RECs to match that energy use. To resolve this apparent inconsistency, L'Oreal USA suggested the Commission specify in both sections that marketers may make unqualified claims based on non-renewable energy matched by RECs.[702] Lastly, a few commenters asked the Commission to modify proposed Section 260.14(a) to allow unqualified renewable energy claims when fossil fuel is used to manufacture or power less than "all or virtually all" of the advertised item.[703]

b. Qualifying "Made with Renewable Energy" Claims

Commenters raised three main issues regarding qualification of "made with renewable energy" claims: (1) whether and how to disclose the source of renewable energy; (2) how to qualify claims regarding renewable energy use in manufacturing; and (3) whether to disclose the purchase of unbundled RECs.

i. Disclosing the Source of Renewable Energy

Several commenters supported advising marketers to clearly and prominently qualify renewable energy claims by specifying the renewable energy source.[704] Others, however, raised

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[702] L'Oreal USA, Comment 158 at 6.

[703] AF&PA, Comment 171 at 14; PPC, Comment 221 at 15 (endorsing AF&PA's comment); Domtar, Comment 240 at 2.

[704] EEI, Comment 195 at 3; Aluminum Association, Comment 216 at 3; Mass. DPU, Comment 247 at 3-4; CEI, Comment 260 at 2; Constellation, Comment 271 at 3-4; EnviroMedia Social Marketing, Comment 346 at 17-18; IoPP, Comment 142 at 5.

concerns about the burden and effectiveness of such guidance.[705] None provided consumer perception evidence in support of its position.

In support of the proposed guidance, CEI, for example, stated that consumers are interested in the source of renewable energy and have preferences among renewable energy technologies.[706] Similarly, Constellation noted that some consumers may find value in, and assume they are purchasing, products made with renewable energy or RECs from certain sources.[707] EnviroMedia Social Marketing emphasized the particular importance of transparency about the type of power utilities sell to consumers.[708]

Several commenters disagreed, raising two main arguments. First, many argued disclosure would overly burden marketers that buy RECs from a renewable energy portfolio comprised of varying energy types and proportions.[709] EPA asserted that, in such cases, while it may be possible to identify renewable energy sources from each certificate after the fact, "it may be difficult to state ex-ante precisely what those sources are."[710] Therefore, EPA suggested that,

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[705] See, e.g., Tandus Flooring, Comment 286 at 3 (opposing the proposed guidance, without specifying why); Tennessee Valley Authority, Comment 265 ("As long as sufficient RECs are retired for a renewables claim, it is not necessary for a disclosure stating the source of the RECs.").

[706] CEI, Comment 260 at 2.

[707] Constellation, Comment 271 at 3-4 (adding that specification of the source "provides a necessary clarification that helps a consumer's understanding").

[708] EnviroMedia Social Marketing, Comment 346 at 17-18.

[709] EPA, Comment 288 at 14; CRS, Comment 224 at 8-9; REMA, Comment 251 at 4; 3Degrees, Comment 330 at 3-4 (asserting that requiring source disclosure "has the potential to drive up the cost of procurement for the end corporate REC buyer by requiring them to limit their renewable energy purchases to a specific type(s) of renewable energy or make burdensome disclosures").

[710] EPA, Comment 288 at 14 (citing two examples: (1) a REC marketer might specify to a supplier that it must have RECs certified by a certain third party, but the source of these RECs may vary during the year; (2) a marketer might propose to sell a product that is 60 percent wind and 40 percent hydro, but because the wind does not blow as expected, or the rainwater or snowmelt does not accumulate as predicted, the mix may vary).

if the final Guides advise source disclosure, they allow flexibility for changes to a marketer's renewable energy mix over time.[711]

Second, some commenters argued source disclosure would not prevent deception.[712] EPA, for example, stated the Commission's study did not identify confusion about the specific type of renewable energy used, and therefore, source disclosure "does not really address the source of confusion."[713] Similarly, 3Degrees argued that "neither [source disclosure] nor other qualifiers were tested on consumers," and therefore the significant burden they impose on marketers is unwarranted.[714] Additionally, REMA posited that knowing the source "provides [consumers] little confidence in the product compared to third-party validation, certification, and reputable marketers."[715] Lastly, SCS maintained source disclosure would not adequately prevent deception because some source categories typically considered renewable are not actually renewable.[716]

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[711] EPA, Comment 288 at 14. Additionally, AF&PA and PPC argued that identifying renewable energy sources is difficult, if not impossible, because definitions of RECs vary across the country. AF&PA, Comment 171 at 13-14; PPC, Comment 221 at 14-15 (endorsing AF&PA's comment).

[712] EPA, Comment 288 at 14; AF&PA, Comment 171 at 13-14; PPC, Comment 221 at 14-15 (endorsing AF&PA's comment); REMA, Comment 251 at 4; 3Degrees, Comment 330 at 3-4; SCS, Comment 171 at 19, 12-13.

[713] EPA, Comment 288 at 14 (positing that consumers would be "better served by more general education rather than by burdening companies making claims with the strong advice to state the type of energy resource").

[714] 3Degrees, Comment 330 at 3-4 (requesting, in the alternative, that the Commission require marketers to specify only an example of the type, "rather than the exact type of renewable energy purchased").

[715] REMA, Comment 251 at 4 ("pledg[ing] to work through its education and outreach activities and industry networks to better inform consumers and stakeholders to help differentiate between claims of made with renewable materials versus renewable energy . . . [to] alleviate any potential confusion without prohibitively constraining the type of renewable energy that could be provided").

[716] SCS, Comment 171 at 12-13, 19 (asserting that renewability depends on site-specific circumstances, so characterizing source categories as renewable is imprecise and can be deceptive). SCS asked the Commission to require marketers to provide, and make public, documentation that the specific power sources in question "are replenished at a rate at least equal to the rate at which they are used to generate electricity."

ii. Qualifying Claims About Manufacturing Powered with Renewable Energy

Most commenters supported guidance that an unqualified "made with renewable energy" claim is deceptive unless all, or virtually all, of the product's significant manufacturing processes are powered with renewable energy or non-renewable energy matched with RECs. A few of these commenters, however, asked the Commission to make small modifications.

Those that agreed with the Commission's general guidance focused on consumer expectations.[717] For example, REMA stated "consumers believe that an otherwise unqualified claim of 'renewably powered' means 100 percent of electrical consumption is met with a renewable source or combination of renewable sources."[718] Most of these commenters also agreed that disclosing the percentage of renewable energy appropriately qualifies claims when it powers less than all, or virtually all, of the significant manufacturing processes.[719]

Several commenters generally agreed, but requested the Commission modify the proposed guidance to: (1) specifically allow marketers to make unqualified claims about discrete stages of manufacturing;[720] (2) allow claims based on an annual average of energy purchased or generated

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[717] See, e.g., Mass. DPU, Comment 247 at 2; EEI, Comment 195 at 3; Tennessee Valley Authority, Comment 265; EnviroMedia Social Marketing, Comment 346 at 18; Tandus Flooring, Comment 286 at 3 (stating that a marketer should be able to make a "made with renewable energy" claim if it is qualified, e.g., a percentage-based disclosure); IoPP, Comment 142 at 5.

[718] REMA, Comment 251 at 5 (stating that creating a threshold for disclosure below 100 percent "would inject unnecessary customer confusion and permit renewable energy purchasers to take advantage of prevailing public perceptions of 'renewably powered'").

[719] Id. at 4-5; 3Degrees, Comment 330 at 4; Foreman, Comment 174 at 2; Tandus Flooring, Comment 286 at 3.

[720] CRS, Comment 224 at 9; REMA, Comment 251 at 4-5; CEI, Comment 260 at 2-3; Foreman, Comment 174 at 2; EHS Strategies, Comment 111 at 7.

from renewable resources for the manufacturing facility;[721] or (3) exempt the air transport industry.[722]

Several commenters asked the Commission to provide further direction regarding "made with renewable energy" claims, given the complex realities of modern manufacturing. Specifically, as REMA noted, manufacturing often involves multiple processes, some or all of which could be powered by renewable energy.[723] Therefore, commenters requested the Commission explicitly advise marketers how to make renewable energy claims about particular steps in the manufacturing process.[724] Some asked the Commission to provide guidance on specific phrases referring to discrete production processes (e.g., "assembled with" renewable energy).[725]

Additionally, EHS Strategies recommended the Commission allow claims based on an annual average of energy purchased or generated from renewable resources for the manufacturing facility (e.g., "made at a facility using x percent renewable energy").[726]

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[721] EHS Strategies, Comment 111 at 7.

[722] ATA, Comment 314 at 13.

[723] See, e.g., REMA, Comment 251 at 5 (citing, for example, "modern manufacturing's geographically diverse assembly and supply chain components").

[724] CRS, Comment 224 at 9; REMA, Comment 251 at 4-5; CEI, Comment 260 at 2-3; Foreman, Comment 174 at 2 (recommending that "marketers qualify 'made with renewable energy' claims by stating which phase of the product's or service's life cycle is made with (x percent) renewable energy").

[725] CRS, Comment 224 at 9 (requesting that the Commission specifically allow use of the phrases "assembled with 100 percent electricity" or "manufactured with 100 percent renewable electricity" for products that have been produced using 100 percent renewable electricity in the manufacturing or assembly stage of production, respectfully); REMA, Comment 251 at 4-5 (asking the Commission to conduct additional consumer perception research to consider which phrases would most accurately advise marketers in distinguishing which part of a product's manufacturing was powered by renewable energy); CEI, Comment 260 at 2-3 (same).

[726] EHS Strategies, Comment 111 at 7 (asserting that the renewable energy context is similar to recycled content, and that an unqualified "made with renewable energy" claim implies renewable energy powered every step of a product's manufacture, "which isn't likely").

Lastly, ATA opposed the proposed guidance as "inappropriate for commercial aviation."[727] ATA stated that, because technical specifications and safety limitations prevent airlines from offering flights powered entirely by renewable energy, the proposed guidance would disproportionately impact the airline industry and may dampen renewable energy development by reducing incentives for its use.[728]

iii. Disclosing the Purchase of Unbundled RECs

Most commenters supported the Commission's proposal not to advise marketers to disclose that their renewable energy claims are based on unbundled RECs (i.e., RECs that have been severed from the underlying renewable energy, and sold separately).[729] Two disagreed, however, raising concerns that unqualified claims based on unbundled RECs are deceptive.[730] Most commenters supported the Commission's proposed guidance.[731] For example, REMA emphasized that the customer receives the same environmental benefits whether the product is electricity bundled with RECs, or unbundled RECs.[732] Moreover, three commenters echoed the Commission's reasoning that whether renewable energy claims are based on unbundled RECs is

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[727] ATA, Comment 314 at 13. ATA asserted this as an alternative to its primary argument that common carriers are exempt from the FTC Act.

[728] Id. (contending that, for commercial airlines, "any increase in the concentration of alternative fuels would constitute a noteworthy environmental improvement that in turn may justify appropriate marketing claims").

[729] EPA, Comment 288 at 10-12; REMA, Comment 251 at 6; ITI, Comment 313 at 5; AF&PA, Comment 171 at 13-14; PPC, Comment 221 at 14-15 (endorsing AF&PA's comment). See Part D.1 for a discussion of RECs.

[730] Green Seal, Comment 280 at 5; Old Mill, Comment 355 at 10-12.

[731] REMA, Comment 251 at 6; ITI, Comment 313 at 5; AF&PA, Comment 171 at 13-14; PPC, Comment 221 at 14-15 (endorsing AF&PA's comment); EPA, Comment 288 at 10-12.

[732] REMA, Comment 251 at 6 (agreeing with the Commission that no evidence in the record suggests that purchasing renewable electricity bundled with RECs more reliably tracks renewable energy than a well-designed REC-based system).

not material to consumers.[733] A few commenters also noted that the REC market is well established and that the sale of RECs is a long-standing industry practice.[734]

In contrast, two commenters opposed the Commission's proposed guidance. Green Seal appeared to argue that whether RECs are bundled or not, a marketer should not make unqualified claims unless the marketer directly uses renewable energy to make its product.[735]

Old Mill argued that unbundled RECs can never legitimately support a renewable energy claim. It asserted that there are differences between unbundled RECs and renewable energy that consumers would consider material.[736] First, it argued that renewable energy typically offers a "rate stabilization benefit," resulting from its relatively stable cost compared to fossil fuels.[737] Old Mill posited that many consumers who purchase RECs along with non-renewable energy do not receive that rate stabilization benefit because many power providers charge consumers for both RECs and the non-renewable energy. According to Old Mill, the price these REC purchasers pay for power remains tied to volatile non-renewable energy sources, thereby depriving them of the rate stabilization benefit.[738] Second, Old Mill asserted that unbundled REC

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[733] ITI, Comment 313 at 5 (adding that the proposed guidance "will encourage companies to continue to take advantage of RECs by being able to make these environmental benefits claims"); AF&PA, Comment 171 at 13-14 (asking the Commission, however, to clarify that "generally one REC is equivalent to one megawatt hour of electricity"); PPC, Comment 221 at 14-15 (endorsing AF&PA's comment).

[734] REMA, Comment 251 at 6; EPA, Comment 288 at 10, CEI, Comment 260 at 2.

[735] Green Seal, Comment 280 at 5.

[736] Old Mill, Comment 355 at 4-8 (arguing that these differences are material also to renewable energy suppliers).

[737] Id. at 4-5 (attributing the rate stabilization benefit to various aspects of renewable energy, including that it is often "free-for-the-harvesting" (e.g., solar, wind, hydraulic), and often lower-cost and subject to less price volatility than fossil fuels).

[738] Old Mill noted, however, that some utilities' green power programs exempt consumers from charges for fossil and nuclear fuels not attributable to the consumers' renewable energy purchase. Id. at 5.

purchasers do not receive their expected "moral" benefit. Old Mill argued that when a customer buys energy directly from a renewable energy producer, all of his or her money goes to the renewable energy producer, resulting in a "moral" benefit to the customer. In contrast, when a customer buys non-renewable power plus unbundled RECs, a smaller portion of his or her money goes to the renewable energy producer because some money goes to the non-renewable power provider. Old Mill contended if consumers knew these differences, they would prefer to purchase renewable energy directly.[739]

Old Mill also argued the proposed guidance presents a conflict with Virginia State Corporate Commission ("VA SCC") orders approving REC-based energy tariffs. These orders hold that "RECs are not 'electric energy'" under Virginia law.[740] Old Mill expressed concern that a marketer could purchase RECs under tariff programs that the VA SCC has ruled are not technically "renewable energy" tariffs, while making unqualified renewable energy claims under the Green Guides.[741]

c. "Hosting" Claims

Most commenters agreed that it would be deceptive for a marketer to represent that it uses renewable energy if it sold all the renewable attributes of the energy it uses.[742] Most who

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[739] Id. at 7.

[740] See Application of Virginia Electric and Power Company for Approval of Its Renewable Energy Tariff, Case No. PUE-2008-00044 (Dec. 3, 2008) at 10-11; Application of Appalachian Power Company for Approval of Its Renewable Power Rider, Case No. PUE-2008-00057 (Dec. 3, 2008) at 8-9 (approving REC-based tariff programs, but holding they are not "tariff[s] for electric energy provided from 100 percent from renewable energy" under Virginia Code § 56.577, governing retail competition for the purchase and sale of electric energy).

[741] Old Mill, Comment 355 at 3-4.

[742] See, e.g., Constellation, Comment 271 at 5; 3Degrees, Comment 330 at 4; AF&PA, Comment 171 at 15; PPC, Comment 221 at 16 (endorsing AF&PA's comment); EEI, Comment 195 at 3; Antares Group, Comment 215 at 2; Domtar, Comment 240 at 2; CRS, Comment 224 at 9; NRG, Comment 248 at 2 (agreeing that, by selling RECs, a company transfers the right to make "made with renewable energy" claims).

addressed this issue, however, disagreed with the Commission's proposed guidance. They argued that, even when a firm sells RECs, it should be able to market its role in generating renewable energy.[743]

Commenters urged the Commission to: (1) allow "hosting" claims, as long as firms making them refrain from "made with renewable energy" claims;[744] (2) clarify that marketers may make "hosting" claims as long as they are properly qualified;[745] or (3) allow firms to claim they "produce" or "develop" renewable energy.[746] Additionally, two commenters asked the Commission to issue special guidance for firms that generate renewable energy as a substantial portion of their business, and that sell "null electricity" (e.g., electricity stripped of its environmental attributes) to one party and RECs to another.[747]

Two commenters recommended the Commission allow firms that generate renewable energy and sell its renewable attributes to make "hosting" claims, as long as they do not claim

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[743] CEI, Comment 260 at 3-4; Constellation, Comment 271 at 5; AF&PA, Comment 171 at 15-16; PPC, Comment 221 at 16-17 (endorsing AF&PA's comment); EEI, Comment 195 at 3; Antares Group, Comment 215 at 2; Domtar, Comment 240, at 2; CRS, Comment 224 at 9; NRG, Comment 248 at 2; REMA, Comment 251 at 5-6; Tennessee Valley Authority, Comment 265; WM, Comment 138, at 4. These commenters appear not to have understood that the Commission's proposed advice applied to "hosting" claims and not to all generation claims.

[744] NRG, Comment 248 at 2-3; CEI, Comment 260 at 3-4.

[745] Antares Group, Comment 215 at 1-4; Constellation, Comment 271 at 5-6; CRS, Comment 224 at 9-10; REMA, Comment 251 at 5; Tennessee Valley Authority, Comment 265.

[746] EEI, Comment 195 at 3; WM, Comment 138 at 4; NSWMA, Comment 212 at 1-2; AF&PA, Comment 171 at 16; PPC, Comment 221 at 17 (endorsing AF&PA's comment); Domtar, Comment 240 at 2.

[747] CRS, Comment 224 at 10; 3Degrees, Comment 330 at 4-5.

they are powered by that renewable energy.[748] CEI, for example, asserted that disallowing "hosting" claims would leave such companies no way to communicate their role.[749]

Several commenters advocated that "hosting" claims be permitted, as long as they are properly qualified.[750] These commenters recommended several qualifications, including: disclosing the sale of RECs and that the "hosting" facility does not use the renewable energy;[751] disclosing information about which party owns the renewable energy generated at the marketer's site, and how it is used;[752] and disclosing the percentage used by the "hosting" facility and the recipient of the remaining renewable energy.[753]

Some commenters recommended the Commission allow "producing" or "developing" renewable energy claims from companies that generate renewable energy on their premises but sell the energy's renewable attributes. EEI, for example, asserted it would be "excessively punitive" to disallow such companies to make any form of claim.[754] WM argued that "the sale of RECs or the electricity itself should not preclude a renewable energy producer from describing

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[748] CEI, Comment 260 at 3-4; NRG, Comment 248 at 2-3 (also requesting that the Commission not view as double counting such firms' dissemination of "factual information (e.g., public company SEC filings or investor presentations) regarding the development of, operation of, or investment in renewable energy producing facilities").

[749] CEI, Comment 260 at 3 (positing that, the proposed guidance "would artificially constrain ordinary site descriptions and impact renewable energy marketing beyond simply 'hosting'").

[750] Antares Group, Comment 215 at 1-4; Constellation, Comment 271 at 5-6; CRS, Comment 224 at 9-10; REMA, Comment 251 at 5; Tennessee Valley Authority, Comment 265.

[751] REMA, Comment 251 at 5 (recommending marketers qualify "hosting" claims by "disclosing the sale of RECs and not claiming to be renewable generated"); CRS, Comment 224 at 9-10 (suggesting marketers provide information that the RECs have been sold and that the "host" does not use renewable energy).

[752] Antares Group, Comment 215 at 1-4 (offering various examples to illustrate).

[753] Tennessee Valley Authority, Comment 265. Constellation urged the Commission to allow qualified "hosting" claims, but did not recommend particular ways to qualify such claims. Constellation, Comment 271 at 5-6.

[754] EEI, Comment 195 at 3 (advocating that companies should be permitted to express that their facilities "produce" or "develop" renewable energy or power).

itself as a renewable energy producer."[755] Additionally, NSWMA requested the Commission allow facilities that generate, but sell the renewable attributes of, renewable energy to describe themselves as "renewable energy producers," because consumers will "not be deceived by this simple statement of fact."[756] Finally, AF&PA, PPC, and Domtar argued that, while a manufacturer that sells RECs cannot claim it uses self-generated renewable electricity, selling RECs "does not detract in any way from the manufacturer being able to make claims about the other renewable energy it is generating and using."[757]

Lastly, CRS and 3Degrees asked the Commission to issue guidance for firms that generate renewable energy as a substantial part of their business and sell "null electricity" to one party and RECs to another.[758] CRS expressed concern that such generators' customers may mistakenly believe the electricity they purchase is renewable. Therefore, CRS and 3Degrees recommended the Commission advise such firms to qualify claims about energy generation by explaining the electricity provided to the customer is not renewable and does not contain RECs.[759]

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[755] WM, Comment 138 at 4 (emphasizing that marketers can qualify such claims with "descriptions of their production of renewable energy and their sale of electricity and/or sale of RECs").

[756] NSWMA, Comment 212 at 1-2 (adding that it is "only fair" that such companies receive recognition for their GHG reductions and social responsibility initiatives).

[757] AF&PA, Comment 171 at 16; PPC, Comment 221 at 17 (endorsing AF&PA's comment); Domtar, Comment 240 at 2.

[758] CRS, Comment 224 at 10 (defining "null electricity" as "electricity that has been stripped of its environmental attributes"); 3Degrees, Comment 330 at 4-5.

[759] CRS, Comment 224 at 10; 3Degrees, Comment 330 at 4-5 (also asking the Commission to require the generator to disclose that it sold the RECs to a another party).

d. Additional Topics

A few commenters addressed two additional topics: claims about legally-required renewable energy, and the geographic location of generation.

i. Claims About Legally-Required Renewable Energy

Three commenters requested the Commission prohibit claims based on renewable energy that providers purchased or generated merely to satisfy legal requirements.[760] Mass DPU asserted that consumers expect their renewable energy purchases make a unique environmental contribution, above and beyond what would have occurred in the absence of their purchases.[761] Therefore, it suggested the Commission add the following language to the Guides: "It is deceptive to claim, directly, or by implication that renewable energy represents a voluntary purchase of additional renewable energy if the purchase, or the activity that caused the purchase, was required by law."[762] REMA and CEI also advised that marketers only be allowed to make claims based on renewable energy purchases above and beyond legal requirements.[763]

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[760] REMA, Comment 251 at 5; CEI, Comment 260 at 3; Mass DPU, Comment 247 at 4-5. State Renewable Portfolio Standards ("RPS") require electricity suppliers or utilities to obtain renewable energy for a certain percentage of the electricity they provide to their customers.

[761] Mass DPU, Comment 247 at 4-5 (explaining, for instance, that "a consumer may perceive that its individual participation in a [utility's] green power program will result in the voluntary purchase of renewable energy, rather than merely facilitating the utility's compliance with the law").

[762] Id. at 5.

[763] REMA, Comment 251 at 5 ("Companies that are doing nothing more than satisfying their locality's required standards for renewable energy consumption, such as meeting an RPS, should not be able to claim that they are using green, renewable energy."); CEI, Comment 260 at 3 (same).

ii. Geographic Location of Renewable Energy Generation

All commenters agreed that marketers should disclose the location of the renewable energy generation if their claims imply local benefits.[764] Most of these commenters argued the Commission should not provide additional guidance because it is unclear whether consumers infer local benefits from renewable energy claims, and because the need for location disclosures may depend on the specific advertisement in question.[765] One commenter, however, posited that consumers infer a local benefit from all their renewable energy purchases, "unless they are told the renewable generation is not local to them."[766] Therefore, CEI suggested that marketers disclose the generation source if the underlying RECs come from projects outside a customer's power pool.[767]

3. Analysis and Final Guidance

The following analysis addresses commenters' four major areas of concern. First, the final Guides continue to advise marketers not to make unqualified renewable energy claims based on energy derived from fossil fuels.[768] The Guides, however, clarify that marketers may make

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[764] See EPA, Comment 288 at 11 ("If consumers assume that all renewable energy purchases (electricity bundled with RECs or unbundled RECs) come from local generators, then disclosure of location may be appropriate, but both unbundled RECs and electricity bundled with RECs could be generated in a distant location and imported."); AF&PA, Comment 171 at 15; PPC, Comment 221 at 16 (endorsing AF&PA's comment); REMA, Comment 251 at 6; Tennessee Valley Authority, Comment 265 ("If local benefits are claimed by the renewable energy user, then the energy must be generated within the designated local area.").

[765] See, e.g., EPA, Comment 288 at 12 ("The Commission does not propose to advise guidance on the geographic location of renewable energy generation, and we support this conclusion."); see also AF&PA, Comment 171 at 15; PPC, Comment 221 at 16 (endorsing AF&PA's comment); REMA, Comment 251 at 6.

[766] CEI, Comment 260 at 5 (citing no consumer perception evidence, but rather "CEI's ten years of renewable energy marketing experience," to support this conclusion).

[767] CEI, Comment 260 at 4-5.

[768] 16 CFR 260.15(a).

such claims if they purchase RECs to match their energy use.[769] Second, the Guides advise marketers that specifying the renewable energy source is one, but not the only, way marketers may qualify claims to minimize the risk of deception.[770] The Guides also advise against making unqualified claims unless all, or virtually all, of the significant manufacturing processes involved in making a product are powered with renewable energy or non-renewable energy matched with RECs.[771] To illustrate how marketers can qualify such claims, the Guides include new examples. Third, the Guides adopt the proposed advice that "hosting" claims are deceptive when the marketer has sold the renewable attributes,[772] but clarify that not all generation claims by such marketers are deceptive. Finally, the Commission addresses claims based on legally-required renewable energy and disclosure of geographic location of generation.

a. The Meaning of Renewable Energy

The Commission's study suggests that a significant minority of consumers understand renewable energy to exclude fossil fuels.[773] The vast majority of commenters agreed with the Commission's advice, and no one provided additional consumer perception evidence. Therefore, the Commission advises marketers not to make unqualified "made with renewable energy" claims based on fossil fuel.

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[769] Id.

[770] 16 CFR 260.15(b).

[771] 16 CFR 260.15(c).

[772] 16 CFR 260.15(d).

[773] Responding to open-ended questions, 20 percent of respondents explained the term renewable energy by referring to a particular energy source (e.g., the sun, wind, biomass, and other non-fossil fuel sources), or by expressly stating that the energy was not derived from fossil fuels.

Several commenters, however, indicated that the Guides were unclear about whether unqualified renewable energy claims can be based on non-renewable energy matched with RECs. These commenters suggested there is at least an apparent inconsistency between proposed Sections 260.14(a) and 260.14(c) because the former did not expressly mention RECs. Non-renewable energy matched with renewable energy certificates likely meets consumer expectations created by a renewable energy claim. Therefore, the Commission now revises this guidance to advise that marketers may make unqualified claims when they purchase RECs to match their use of non-renewable energy.[774]

Additionally, although several commenters recommended that the Guides define "renewable energy," the Commission cannot do so. Under Section 5, a claim is deceptive if it likely misleads reasonable consumers. Therefore, the Guides are based on how consumers reasonably interpret claims, not on technical or scientific definitions. The Commission lacks sufficient evidence demonstrating how consumers perceive the term "renewable energy" to provide further general guidance. Apparently responding to this analysis, EPA asserted that consumers likely would understand renewable energy to mean "energy resources that are naturally replenished at a rate equal to or faster than they are used."[775] While this statement seems reasonable, the Commission declines to include this guidance without corroborating consumer perception evidence. Marketers nevertheless must substantiate all reasonable interpretations of renewable energy claims in the context presented. Thus, the Commission

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[774] The final Guides include the phrase non-renewable energy "matched" with (rather than "offset by") RECs, because it more clearly describes the function of RECs.

[775] EPA, Comment 288 at 12. SCS, the Aluminum Association, and Crown offered similar characterizations of renewable energy. SCS, Comment 264 at 12; Aluminum Association, Comment 216 at 2-3; Crown, Comment 303 at 3-4.

advises marketers to be cautious and to test consumer perception in the context of their advertisements.

Lastly, in response to comments, the Commission revises its proposed guidance advising against renewable energy claims based on "power" derived from fossil fuel. Commenters noted that the use of the term "power" in proposed Section 260.14(a) was confusing because it was unclear whether it referred only to electricity or to other energy inputs as well (e.g., natural gas for heating facilities or operating manufacturing equipment, or transportation fuels to move goods).[776] The Commission based the proposed guidance on its study results indicating that consumers understand renewable energy to exclude fossil fuels. It received no evidence that consumers understand "power" as being limited to electricity. Therefore, the Commission clarifies that the guidance in final Section 260.15(a) applies to electricity and to other energy inputs derived from fossil fuel. The final Guides advise marketers not to make unqualified renewable energy claims if they use either "fossil fuel or electricity derived from fossil fuel" to manufacture any part of the advertised item or power any part of the advertised service.

b. Qualifying "Made with Renewable Energy" Claims

The final Guides advise marketers to specify their renewable energy source, and include new guidance addressing renewable energy portfolios. The Guides also advise that 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 the marketer has purchased RECs to match its non-renewable energy use.

[776] CRS, Comment 224 at 8.

Lastly, the Guides advise that "hosting" claims are deceptive, but include a revised example clarifying this guidance.

i. Disclosing the Source of Renewable Energy

Based on consumer perception, the Guides attempt to distinguish between deceptive and non-deceptive claims. In this case, however, the Commission has insufficient information to clearly draw these boundaries. The Commission's survey indicates that consumers confuse "made with renewable energy" claims with "made with renewable materials"[777] and "made with recycled content" claims.[778] To prevent renewable energy claims from being misleading, the Commission proposed marketers disclose the renewable energy source. Because the Commission did not expect this result when it conducted its study, it did not test any qualifying language, including providing the energy's source. Commenters disagreed about whether source disclosure would prevent deception, and none provided supporting consumer perception evidence.

Accordingly, final Guides Section 260.15(b) no longer advises marketers that the only way to qualify their renewable energy claims is specifying the source of the renewable energy. Instead, the final Guides explain that reasonable consumers may interpret these claims differently than marketers intend. Therefore, marketers should qualify these claims unless they can substantiate all express and reasonably implied claims. Nevertheless, the Commission thinks it is important to provide some specific guidance because consumer perception contrasts so starkly with what marketers appear to intend. Therefore, the final Guides further state that source disclosure is one, but not the only, way marketers may minimize the risk of deception.

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[777] Twenty-eight percent of respondents took away this meaning.

[778] Twenty-one percent of respondents took away this meaning. The open-ended responses are consistent with these closed-ended results.

The Commission recognizes, as some commenters emphasized, that source disclosure poses a unique challenge for marketers that purchase renewable energy from an energy portfolio with a mix of renewable sources. Because of limited consumer perception evidence, the Commission cannot give generally applicable guidance in this area. However, the Commission can provide an example of one non-deceptive way marketers may provide source disclosure in the portfolio context. The Commission therefore adds Example 2, which clarifies that marketers may: (1) disclose all renewable energy sources; or (2) state, "made from a mix of renewable energy sources," and specify the renewable energy source that makes up the greatest percentage of the portfolio for that product. Marketers may determine which source meets this criteria by calculating on an annual basis.

Both options should help correct consumers' mis-impressions about renewable energy claims by providing context. Specifically, disclosing the energy source should signal that the claim does not relate to renewable materials or recycled content, preventing the confusion identified in the Commission's survey. Further, the disclosure provides information to prevent deceptive claims based on the use of one negligible source. This new guidance also should ease the burden on marketers concerned about identifying sources in a dynamic portfolio and making disclosures in limited advertising space. The Commission notes, however, that there may be other ways to qualify renewable energy claims to address the consumer confusion identified in the Commission's study. Should marketers choose not to disclose the renewable energy source, the Commission recommends that marketers test consumer perception of their claims in the context of their advertisements.

ii. Qualifying Claims About Manufacturing Powered with Renewable Energy

The final Guides advise marketers that 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 non-renewable energy offset by RECs.[779] The Commission's consumer perception research supports this guidance. In its study, 36 percent of respondents interpreted a "made with renewable energy" claim to mean "all" of the product was made with renewable energy.[780]

When renewable energy powers less than all, or virtually all, of a manufacturer's significant manufacturing processes, marketers may qualify their claims in a variety of ways. To illustrate, the final Guides retain the proposed example showing that marketers may state the percentage of manufacturing that is powered with renewable energy. Additionally, several commenters requested guidance on making renewable energy claims about discrete parts of products or particular production processes. The Commission adds two examples providing such guidance. Example 3 illustrates that a marketer may make a renewable energy claim based on a part of a product (e.g., "The seats of our cars are made with renewable energy"), even when other parts are not made with renewable energy. Example 4 illustrates that a marketer may claim a particular production process is powered with renewable energy (e.g., "assembled using renewable energy"), even when other processes are not.

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[779] The Commission has provided similar guidance regarding "Made in USA" claims. See Enforcement Policy Statement on U.S. Origin Claims, 62 FR 63760, 63755 (Dec. 2, 1997).

[780] An additional 17 percent stated that most of the product was made with renewable energy.

iii. Disclosing the Purchase of Unbundled RECs

The final Guides do not advise marketers to disclose when renewable energy claims are based on the purchase of unbundled RECs. The vast majority of commenters agreed with this outcome.[781] Most of these commenters also agreed that the disclosure of unbundled RECs likely would not be material to consumers. Rather, consumers likely care about whether their purchase supports renewable energy. There is no evidence that unbundled RECs accomplish this goal any less than direct purchases of renewable energy.

Two commenters, however, disagreed. One appeared to argue that an unqualified claim would be deceptive if the marketer itself did not use renewable energy in producing its product. The other asserted that unbundled RECs do not convey the same benefits of renewable energy and that this fact would be material to consumers.[782] Neither commenter, however, provided consumer perception evidence to support their contentions. In the absence of evidence showing that consumers interpret claims consistent with these comments, the Commission does not advise marketers to disclose when claims are based on the purchase of unbundled RECs. The dearth of consumer perception evidence, however, makes this issue ripe for research. Absent additional evidence, marketers making claims in this area should use caution.

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[781] Two commenters, AF&PA and PPC, asked the Commission to clarify that one REC equals one megawatt hour. The Commission declines to do so. It is not within the Commission's purview to define a REC, and these commenters did not submit data indicating consumer confusion on this point.

[782] Old Mill also argued that the proposed guidance presents a conflict of law. The Commission disagrees. In fact, the Commission agrees with the VA SCC decisions Old Mill cited, holding that RECs are not technically renewable energy. The Commission's guidance, however, is based on the conclusion that this fact would not be material to consumers, which Virginia law does not address. Moreover, the Virginia Code elsewhere (e.g., Section 56-585.2) recognizes RECs meet the definition of "renewable energy" for the sale of electricity from renewable sources through a Renewable Portfolio Standard. Additionally, the VA SCC approved the tariff programs at issue, emphasizing that the tariff is "for a customer 'who contracts with the Company for the purchase and retirement of renewable energy attributes.'" See Application of Virginia Electric and Power Company for Approval of Its Renewable Energy Tariff, Case No. PUE-2008-00044 (Dec. 3, 2008), at 10.

c. "Hosting" Claims

The final Guides advise that the claim "hosts a renewable energy facility" is likely to mislead consumers if the company has sold its rights to claim credit for the renewable energy. This guidance is based on the Commission's study in which 62 percent of respondents read a "hosting" claim to imply that the company used renewable energy to make its product.[783] No commenters submitted consumer perception evidence regarding this claim.

Several commenters disagreed with the Commission's proposed guidance. Their analysis, however, did not address the consumer perception evidence. Instead, these commenters expressed concern that they could not make any claim about their role in generating renewable energy. This result, however, is not what the Commission intended.

The Commission's survey demonstrates that using the term "hosting" implies that the company uses renewable energy. Therefore, such claims likely are deceptive when the company sold the RECs based on the renewable power it generated. The final Guides, however, clarify that this result does not mean that all generation claims are deceptive. To illustrate, the Commission adds an example showing how marketers may make claims describing their role in generating renewable energy, while still alerting consumers that they have sold the renewable aspects of that generation. Specifically, in Example 5, a marketer generates and uses renewable energy, but sells RECs based on 100% of this renewable energy. The marketer can state, "We generate renewable energy, but sell all of it to others." This represents one, but not the only, way such marketers may non-deceptively communicate a renewable energy generation claim when they have sold the renewable attributes of all their energy.

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[783] Using a control claim yielded similar results. Net of control, 50 percent of respondents believed the company used solar/wind power to make its products.

At least one commenter sought guidance on generation claims by power producers who generate renewable energy as a substantial portion of their business.[784] As discussed above, the Commission tested "hosting" claims by a manufacturer and found such claims imply that its product was made with renewable energy. It is possible that consumers are less likely to be confused when a firm simply sells power and no other product. The Commission, however, lacks consumer perception data regarding such claims. Moreover, it did not solicit comment on this issue. Therefore, the Commission declines to include specific guidance at this time. Nevertheless, power providers that sell null electricity to their customers, but sell RECs based on that electricity to another party, should keep in mind that their customers may mistakenly believe the electricity they purchase is renewable. Accordingly, the Commission advises such generators to exercise caution and qualify claims about their generation by disclosing that their electricity is not renewable.

d. Additional Topics

Lastly, the Commission declines to include guidance about claims based on legally-required renewable energy or geographic location.

i. Claims About Legally-Required Renewable Energy

As discussed above, a few commenters asserted that consumers expect their renewable energy purchases to support renewable energy beyond the energy that would have been generated in the absence of their purchases. These commenters argued that, to prevent deception in this area, the Guides should prohibit claims based on renewable energy that was obtained to satisfy legal requirements (e.g., renewable portfolio standards).

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[784] CRS, Comment 224 at 10.

The Commission shares the concern that claims based on legally-required renewable energy may deceive consumers. Consumers very well may expect their renewable energy purchases to support renewable energy generation beyond legal requirements. However, the Commission neither tested this proposition nor received relevant consumer perception data. Moreover, the Commission did not solicit comments on whether to advise against claims based on legally-required renewable energy. Therefore, the current record does not provide a basis for general guidance on claims in this area. The Commission, however, will continue to monitor the issue. If members of the public have relevant information, the Commission welcomes that information. Specifically, the Commission is particularly interested in (1) whether marketers make claims based on legally-required renewable energy; (2) whether consumers infer that their renewable energy purchases support renewable energy above that which is legally required; and (3) whether Commission guidance is needed.

e. Geographic Location of Renewable Energy Generation

The final Guides do not advise marketers to disclose the geographic location of renewable energy generation in all circumstances. The vast majority of commenters supported this position,[785] and no commenter submitted consumer perception evidence to the contrary. Without more evidence, the Commission cannot foreclose the possibility that using geographically unqualified claims may be non-deceptive. The Commission, however, advises caution in this area. The net impression of some advertisements could easily imply local benefits. For example, an icon depicting a blue sky over the St. Louis Gateway Arch, accompanied by a message, "Clean Air, Better Future" likely would convey a local benefit claim to consumers in the St. Louis area.

[785] See, e.g., EPA, Comment 288 at 12 ("The Commission does not propose to advise guidance on the geographic location of renewable energy generation, and we support this conclusion."); see also AF&PA, Comment 171 at 15; PPC, Comment 221 at 16 (endorsing AF&PA's comment); REMA, Comment 251 at 6.

In such instances, marketers should disclose that a renewable energy purchase will not yield local benefits.

L. Renewable Materials Claims

1. Proposed Guidance

The Commission's consumer perception study suggested that consumers interpret renewable material claims differently than marketers intend. Marketers, for example, appear to communicate that a product is made from a material that can be replenished at the same rate, or faster, than consumption. Study respondents, in contrast, stated that the claim conveys specific environmental benefits, such as being made with recycled content, recyclable material, and biodegradable material. The Commission opined that providing context for this claim in the form of qualifications would minimize consumer deception resulting from these unintended implied claims. Specifically, the Commission proposed advising marketers to qualify a "made with renewable materials" claim by specifying the renewable material used, how the materials were sourced, and why they are renewable.[786] Additionally, the Commission proposed that marketers further qualify this claim for products containing less than 100 percent renewable materials, excluding minor, incidental components. The Commission declined to define renewable materials or endorse a particular substantiation test. Finally, the Commission declined to address biobased claims to avoid providing advice that could duplicate or conflict with USDA's voluntary labeling program for biobased products.[787]

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[786] 16 CFR 260.15(b).

[787] USDA defines a "biobased product" as a "product determined by the Secretary to be a commercial or industrial product (other than food or feed) that is: (1) Composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or (2) An intermediate ingredient or feedstock." 7 CFR 2904.2.

2. Comments

A few commenters supported all aspects of the proposed guidance on "made with renewable materials" claims.[788] As discussed below, however, most recommended changes, including: (1) prohibiting this claim; (2) defining "renewable materials"; (3) changing or excluding one or more of the proposed qualifications; (4) specifying a substantiation method; and (5) addressing biobased claims. No commenters submitted new consumer perception evidence.

a. Prohibiting "Renewable Materials" Claims

Some commenters urged the Commission to advise against making "renewable materials" claims. For example, Enviromedia Social Marketing asserted that, because consumers know very little about renewable materials, marketers should avoid the phrase entirely and instead merely identify the type of material sourced.[789] EHS Strategies stated that this phrase is "not ripe for general market advertising" and the meaning of "renewable materials" is still under extensive debate.[790] This commenter suggested marketers instead state a product is "made with non-petroleum based materials," which it believed would address consumers' primary concern.[791]

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[788] EPI, Comment 277 at 3-4; Foreman, Comment 174 at 2; NAIMA, Comment 210 at 10; Tandus Flooring, Comment 286 at 3.

[789] Enviromedia Social Marketing, Comment 346 at 17 (also stating that marketers should help educate consumers about types of materials that are renewable and why); see also Glen Raven, Comment 42 at 1 (stating that "renewable" does not mean a product is environmentally preferable and that the definition of renewable is unclear in regard to many materials, including some textile fiber types).

[790] EHS Strategies, Comment 111 at 6.

[791] Id.

b. Defining "Renewable Materials"

Some commenters supported the Commission's decision not to define "renewable materials."[792] AF&PA, for example, asserted that, if the Commission were to define "renewable" or endorse a particular test as substantiation, it would inappropriately be setting environmental standards or policy.[793] NAIMA agreed, noting there is ongoing debate regarding its definition.[794]

Other commenters, however, urged the Commission to provide more guidance. For example, EPA suggested the Commission provide the "proper meaning" of the term, which it explained is "anything that grows and thus can renew itself," such as wood fiber and fish stocks, in contrast to iron and copper.[795] EPA further emphasized that "renewable natural resources" are "resources from renewable natural stocks that, after exploitation, can return to their previous stock levels by natural processes of growth or replenishment."[796] Therefore, EPA suggested that

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[792] AF&PA, Comment 171 at 11; NAIMA, Comment 210 at 10; Evergreen, Comment 188 at 3; IBWA, Comment 337 at 4.

[793] AF&PA, Comment 171 at 11.

[794] NAIMA, Comment 210 at 10; see also Evergreen, Comment 188 at 3 (supporting proposal not to define the term "renewable" or to endorse any particular test to substantiate such claims); IBWA, Comment 337 at 4 (supporting the Commission's decision not to define the claim or to endorse any particular test to substantiate such claims because narrowly defining claim might stifle innovation).

[795] EPA, Comment 288 at 9; see also GAC, Comment 232 at 4 (stating that marketers should not be required to change the meaning of common terms because of the perception of a select group of consumers and that, instead of "perpetuating an incorrect definition of the term, the FTC should clarify that renewable materials claims do not relate to end of life issues of a product such as recyclability or biodegradability or to recycled content").

[796] EPA, Comment 288 at 9-10 (stating that the Organization for Economic Cooperation and Development (OECD) provides the "authoritative definition" of "renewable" and "non-renewable" and noting that this definition includes the concept of "conditionally renewable resources," which are those whose "exploitation eventually reaches a level beyond which regeneration will become impossible" and defines "non-renewable natural resources" as resources that are "exhaustible natural resources . . . whose natural stocks cannot be regenerated after exploitation or that can only be regenerated or replenished by natural cycles that are relatively slow at human scale"); see also GAC, Comment 232 at 4 (referring to the Merriam-Webster definition of renewable: "[c]apable of being replaced by natural ecological cycles or sound management practices").

marketers not describe a product as "renewable" when the "natural resource base (e.g., the forest or the stock of fish) has been so severely exploited or damaged that it can't renew itself."[797]

Similarly, SCS recommended the Commission state that renewable products must not only have the ability to naturally replenish themselves over a reasonable timeframe, but must be managed to do so. SCS opined that consumers would likely feel deceived if they knew they had purchased "renewable wood" from a poorly managed forest.[798] Therefore, it urged the Commission to specify that marketers making this claim possess evidence demonstrating a material has been responsibly managed under a nationally or internationally recognized standard.

Additionally, GPI asked the Commission to clearly define "renewable" so that marketers know how to properly qualify the claim.[799] Specifically, GPI stated that materials are "renewable" only if they can be endlessly produced or reprocessed without depleting the environment of non-regenerative materials and without causing the material's quality or performance to degrade.[800]

Others asked the Commission to clarify whether marketers should "match the rate of harvest of the renewable material used to manufacture a product with the particular product that is being sold."[801] Specifically, these commenters observed that the qualification proposed in Example 1 stating the marketer "cultivate[s] [bamboo] at the same rate, or faster, than we use

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[797] EPA, Comment 288 at 9.

[798] SCS, Comment 264 at 12.

[799] GPI, Comment 269 at 10 (noting that glass is completely renewable because it does not lose its quality or performance through repeated processing and is endlessly recyclable without depleting nonrenewable resources, while other materials may not have these qualities).

[800] Id.

[801] AWC, Comment 244 at 8; AF&PA, Comment 171 at 11-12; PPC, Comment 221 at 12-13 (endorsing AF&PA's comment); Weyerhaeuser, Comment 336 at 1.

it"[802] would significantly burden manufacturers if marketers were advised to match the rate of harvest of the renewable material used to manufacture a product with the particular product being sold. According to these commenters, such a qualification is unnecessary in the case of wood products, for example, because they clearly are made from renewable materials.[803]

Pella suggested the Guides provide a specific timeframe for renewability.[804] FPA recommended the Guides include a new example that outlines a scenario similar to the Commission's enforcement actions involving bamboo chemically processed to produce rayon.[805]

Finally, GAC asserted the Commission perpetuates an incorrect definition by stating that reasonable consumers assume this claim relates to recyclability, biodegradability, or recycled content.[806] It therefore suggested the Commission remove references to these three attributes from the text of the guidance and from Example 1.[807]

c. Comments on Proposed Qualifications – Specific Information About the Material

Several commenters addressed the Commission's proposed guidance advising marketers to qualify made with renewable materials claims with specific information about the material.

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[802] 16 CFR 260.15, Example 1.

[803] AWC, Comment 244 at 8; AF&PA, Comment 171 at 11-12; PPC, Comment 221 at 12-13 (endorsing AF&PA's comment); Weyerhaeuser, Comment 336 at 1; Evergreen, Comment 188 at 4; Domtar, Comment 240 at 2.

[804] Pella, Comment 219 at 1.

[805] FPA, Comment 292 at 8.

[806] GAC, Comment 232 at 4-5.

[807] Id. (noting that proposed 260.15(b) and Example 1 stated that reasonable consumers may believe an item advertised as being "made with renewable materials" is made with recycled content, recyclable, and biodegradable); see also AF&PA, Comment 171 at 11-12; MWV, Comment 143 at 2; Evergreen, Comment 188 at 4 (expressing concern that language regarding recyclability, recycled content, and biodegradable claims would only further lead consumers into conflating these claims with renewable materials claims).

Two commenters expressly supported the proposed qualifications.[808] As discussed below, however, most suggested the Commission revise this guidance by: (1) not advising marketers to qualify these claims; (2) stating that some proposed qualifications are unnecessary for certain categories of materials; (3) suggesting that marketers provide only some of the suggested information or different qualifying information; or (4) suggesting that marketers provide additional information along with the proposed qualifications. No commenters submitted consumer perception evidence on this issue.

i. Comments Stating the Guides Should Not Advise Marketers to Qualify Claims

Two commenters, AAAA/AAF and Scotts, argued the Commission's proposed guidance on qualifying made with renewable materials claims would chill truthful advertising.[809] Specifically, they asserted that the Commission's guidance essentially treats these claims as impermissible unqualified general environmental benefit claims. They also suggested the Commission's "rather limited consumer perception study" is insufficient to support the need for the proposed qualifications.[810] Finally, they argued that advising marketers to qualify their renewable materials claims with specific information about the material and its sourcing directly contradicts the guidance in proposed 260.15(c), which suggests that marketers may make unqualified made with renewable materials claims if the product or package . . . is made entirely with renewable materials."[811] Accordingly, these commenters suggested that, rather than always

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[808] SCS, Comment 264 at 12; NAIMA, Comment 210 at 10.

[809] AAAA/AAF, Comment 290 at 10; Scotts, Comment 320 at 6-7.

[810] Id.

[811] Id.

assuming marketers should qualify these claims, the Commission should instruct marketers to qualify a claim only when an advertisement's context communicates far-reaching benefits. They also noted that marketers might choose to avoid this claim altogether because of the difficulty of providing these disclosures in limited space.[812]

Similarly, P&G argued the proposed guidance on renewable materials "seems to establish an unusually high bar for qualifications," which the Guides do not establish for other types of claims, such as "recyclable."[813] P&G also stated that space constraints might prevent marketers from making these qualifications. As a result, marketers might make fewer such claims, and consumers might be denied relevant information.[814] Additionally, P&G opined that, although disclosing the type of material may help consumer understanding, providing consumers with complex information about how the material is sourced and why it is considered renewable could add to consumer confusion.[815] For example, it observed that the same material class could have very different impacts depending on its specific supply chain, and that trying to communicate this information to consumers via a disclaimer would be difficult and likely confusing. Accordingly, P&G suggested the Commission test "made with renewable materials" claims both with, and without, the proposed qualifications to see what impact, if any, the qualifications have on consumer understanding.[816]

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[812] Id.

[813] P&G, Comment 159 at 4 (erroneously comparing study results for "recyclable" with those for "made with renewable materials"). The study did not test the claim "recyclable."

[814] Id.

[815] Id.

[816] Id. at 4-5.

ii. Comments Suggesting Qualifications Are Unnecessary for Certain Materials

Some commenters contended that marketers need not make the three proposed qualifications (i.e., the materials used, how the materials were sourced, and why they are renewable) for certain categories of materials. Specifically, these commenters suggested that qualifications are unnecessary for "products readily considered renewable, such as trees and cotton."[817]

iii. Comments Suggesting Not all Qualifications Are Necessary

Other commenters stated that not all of the proposed qualifications for renewable materials are necessary. As described below, most of these commenters asserted that disclosing the type of renewable material would most effectively minimize confusion. Additionally, one commenter suggested marketers state why the material is renewable, and another recommended the Guides provide the flexibility to use one or more of these qualifiers depending on the claim's context.

The majority of commenters agreed that marketers should qualify "made with renewable materials" claims with disclosure of the type of renewable material used.[818] Further, they posited that if consumers understand the type of material used, the other two disclosures would be unnecessary. For example, ANA stated that sourcing information and the reason an item is renewable may be obvious if, from the advertisement's context, the consumer can identify the

[817] MWV, Comment 143 at 2; AF&PA, Comment 171 at 11-12; PPC, Comment 221 at 12-13 (endorsing AF&PA's comment); Boise, Comment 194 at 3-4; GAC, Comment 232 at 4-5.

[818] ANA, Comment 268 at 6; GMA, Comment 272 at 4; FPA, Comment 292 at 8; P&G, Comment 159 at 4-5; Stonyfield Farm, Comment 176 at 1.

type of renewable material.[819] For instance, ANA explained that it may be clear from the context of an advertisement that the material is an organic substance, such as a crop, and naturally renewable.[820] Therefore, ANA suggested the Commission reevaluate proposed 260.15(b) and Example 1 to allow for briefer disclosures to the extent the context makes it clear what the renewable material is and why it is renewable.[821]

Additionally, GMA stated that disclosing the type of renewable material may help consumers understand these claims.[822] However, GMA opined that disclosures on how the materials were sourced and why the materials are renewable are not necessary to avoid deception. It further suggested these additional disclosures "may be counterproductive in many cases where there is no consumer perception evidence suggesting that these facts would be material to consumers or necessary to dispel a misimpression."[823]

Stonyfield Farm similarly suggested the Guides advise marketers to identify the type of source material. Further, it recommended the Guides allow marketers to refer to a website for more detailed information about the renewable material. Specifically, it recommended the following language: "'Renewable packaging made from plants.' Elsewhere on the package:

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[819] ANA, Comment 268 at 6.

[820] Id.

[821] Id.

[822] See also Eastman, Comment 322 at 6 (recommending that marketers need only identify the type of renewable material).

[823] GMA, Comment 272 at 4; P&G, Comment 159 at 4 (stating that disclosing the type of material may help consumer understanding, but that marketers need not disclose how the material is sourced and why the material is renewable); AAMA, Comment 145 at 1 (stating that companies should not be penalized on the basis of a "gross misinterpretation and misconception by end users" and that this section is inconsistent with other Guide sections, such as the recycled content section, which does not require that marketers claiming products to be "made with recycled content" also substantiate that a product is recyclable, made with renewable content, or biodegradable).

'Learn more at [company website address].'"[824] Stonyfield Farm also asked the Commission to provide examples of qualifying language manufacturers could use on packaging and on referenced websites.[825]

Two other commenters had differing views on which of the three qualifications were necessary. GAC stated that disclosing why the material is renewable would be most helpful.[826] CSPA said marketers should have the flexibility to use one or more of the suggested qualifiers depending on the claim's context.[827]

iv. Comments Suggesting Additional or Different Qualifications

A number of commenters suggested marketers make additional or different qualifications for "made with renewable materials" claims. For example, EPA suggested marketers qualify their claims with information explaining why the renewable material is environmentally beneficial in a particular instance. EPA explained that it is not always clear whether a renewable material provides an environmental benefit over a non-renewable material.[828] Like other commenters, EPA expressed skepticism that marketers would have sufficient space to include all of the proposed qualifications.[829]

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[824] Stonyfield Farm, Comment 176 at 1.

[825] Id.; see also Part II.B., supra, for a discussion of the Internet and qualifications.

[826] GAC, Comment 232 at 5 (also stating that information explaining how the material is sourced would not be useful).

[827] CSPA, Comment 242 at 4 (not providing examples).

[828] EPA, Comment 288 at 9.

[829] Id.

Seventh Generation recommended that marketers clarify that their renewable product is not necessarily biodegradable or recyclable.[830] EPI suggested that marketers disclose whether the material is from a well-managed source, and argued that marketers using material grown in a manner leading to rainforest or old-growth forest destruction, or a similar negative environmental outcome, should disclose this impact or refrain from labeling their products "renewable."[831]

d. Comments on Proposed Qualifications – Quantity of Renewable Materials

Commenters addressing the Commission's proposed guidance that marketers qualify claims for products containing less than 100 percent renewable materials uniformly supported it.[832] For example, AAAA/AAF stated this guidance would help advertisers and ensure consistency in the marketplace.[833] Ramani Narayan, however, noted that the Commission provides no guidance on how to measure the percentage of renewable material.[834]

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[830] Seventh Generation, Comment 207 at 6.

[831] EPI, Comment 277 at 4-5; see also Symphony, Comment 150 at 4-5 (stating that it would be deceptive to describe a "bioplastic" as renewable because while corn or plastic-derived crops can be continuously grown, manufacturing plastic from crops uses significant non-renewable fossil fuel energy and produces green house gases).

[832] AAAA/AAF, Comment 290 at 9-10; Eastman, Comment 322 at 6; SPI, Comment 181 at 14; AWC, Comment 244 at 8-9; ACC, Comment 318 at 7; AF&PA, Comment 171 at 11-12; PPC, Comment 221 at 12-13 (endorsing AF&PA's comment); Weyerhaeuser, Comment 336 at 1; Green Seal, Comment 280 at 5 (stating that "natural/biobased" claims are interpreted by consumers to mean 95 percent or more of the product/package is natural/biobased); Tandus Flooring, Comment 286 at 3; NatureWorks, Comment 274 at 12; USDA, Comment 193 at 2 (noting that the USDA Certified Biobased Product label identifies a qualifying product's biobased content level by percent).

[833] AAAA/AAF, Comment 290 at 9-10.

[834] Ramani Narayan, Comment 334 at 1; see also P&G, Comment 159 at 5 (recommending the Commission specify whether the percentage of renewable material should be measured on a mass or volume basis).

e. Substantiating Renewable Materials Claims

A few commenters addressed the Commission's proposal not to endorse any particular substantiation test. IBWA and Evergreen supported this decision.[835] Others, however, recommended that the Guides reference ASTM standards.[836] For example, USDA suggested the Guides recognize that ASTM Method D6866, which forms the basis for USDA's BioPreferred program, "substantiates the amount of renewable material content in a product accurately and verifiably."[837] While Narayan agreed that ASTM substantiates the amount of renewable material content, he acknowledged this test does not substantiate all claims that consumers might reasonably infer from a renewable materials claim.[838]

f. Comments on Biobased Claims

Finally, several commenters addressed the absence of guidance on biobased claims. USDA supported the Commission's decision not to issue guidance on these claims and stated that it would continue working with biobased vendors to accurately communicate information to consumers on products USDA certifies as "biobased." It also asserted it would continue to work closely with the FTC to both monitor and address environmental claims about biobased products.[839]

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[835] IBWA, Comment 337 at 4; Evergreen, Comment 188 at 3.

[836] ASTM, Comment 235 at 1; USDA, Comment 193 at 2; Ramani Narayan, Comment 334 at 1.

[837] USDA, Comment 193 at 2.

[838] Ramani Narayan, Comment 334 at 1 (citing ASTM D6866 - 10 "Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis").

[839] USDA, Comment 193 at 1 (also noting that its definition of "biobased" encompasses both biologically-based and renewable products).

Several commenters, however, urged the Commission to provide guidance on biobased claims.[840] For example, EHS Strategies stated marketers should not make this "ill-defined" claim, because even petroleum is biobased.[841] Another commenter suggested the Commission state that certain biobased claims are per se misleading, such as when spray foam insulation is marketed as "biobased" despite having a very small percentage of biologically-based content.[842]

Some commenters discussed how the Guides should address USDA's BioPreferred labeling program.[843] For example, DLA suggested the Commission use USDA's definition of "biobased" rather than "renewable materials" because the BioPreferred Program already covers the concept of renewability.[844] Other commenters expressed concern that USDA's program may lead to consumer confusion and asked the Commission to address claims conveyed by the BioPreferred label.[845]

3. Analysis and Final Guidance

The final Guides neither prohibit nor define "made with renewable materials" claims. Instead, they advise marketers that consumers may interpret renewable materials differently than

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[840] See, e.g., Green Seal, Comment 280 at 5; EHS Strategies, Comment 111 at 6-7; JM, Comment 305 at 13; AWC, Comment 244 at 9; AF&PA, Comment 171 at 12; Weyerhaeuser, Comment 336 at 1.

[841] EHS Strategies, Comment 111 at 6-7.

[842] JM, Comment 305 at 13.

[843] Under this voluntary labeling program, USDA allows products it certifies as "biobased" to carry a "USDA Certified Biobased Product" label.

[844] DLA, Comment 325 at 1; see also SPI, Comment 181 at 15 (noting that the term "biobased" is used interchangeably with the term "renewable").

[845] Green Cleaning Network, Comment 213 at 2; Green Seal, Comment 280 at 6; AWC, Comment 244 at 9; AF&PA, Comment 171 at 12; MeadWestvaco, Comment 143 at 2-3; Weyerhaeuser, Comment 336 at 1; see also Ramani Narayan, Comment 334 at 1 (stating that the Guides allow marketers to advertise certain products as "made with renewable materials" even though those products would not qualify for USDA's BioPreferred label).

marketers may intend.[846] To alleviate this problem, the Guides suggest one way marketers may minimize the likelihood of unintended implied claims. Specifically, marketers can identify the material used and why it is renewable.[847] Additionally, the Guides state that marketers should further qualify these claims for products containing less than 100 percent renewable materials, excluding minor, incidental components. Finally, the Commission declines to endorse a particular substantiation test and does not issue guidance on the term "biobased." The Commission explains these decisions below.

a. Renewable Materials Claims Not Prohibited or Defined

While some commenters recommended the Guides prohibit the use of "made with renewable materials" claims, the Commission declines to do so. In evaluating whether a representation is misleading, the Commission examines not only the claim itself, but the net impression of the entire advertisement.[848] Advising against all renewable materials claims would be inappropriate unless the Commission concluded the term is deceptive in every context and that no reasonable qualification could prevent that deception. Because the Commission lacks evidence demonstrating this is true, the FTC cannot advise against making the claim.

Moreover, although several commenters recommended that the Guides define "renewable" according to scientific or technical definitions,[849] the Commission cannot do so. Under Section 5, a claim is deceptive if it likely misleads reasonable consumers. Therefore, the

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[846] 16 CFR 260.16(b).

[847] Id.

[848] Deception Policy Statement, 103 FTC 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.

[849] Some comments, however, asserted that there is no consensus definition for "renewable."

Guides are based on how consumers reasonably interpret claims, not on technical or scientific definitions.[850] The results of the Commission's consumer perception study suggest there is a disconnect between these definitions and consumer understanding. For example, EPA's suggested definition states, in part, that a renewable material has the capacity to grow and thus renew itself. The consumer perception evidence, however, indicates that consumers likely believe the product has other specific environmental benefits (e.g., that the product is made with recycled content, recyclable material, and biodegradable material). Therefore, because the Commission's mandate is not to change consumer perception, but rather to ensure that marketers substantiate all reasonable interpretations of their claims, the final Guides cannot define "renewable materials" simply by using technical or scientific definitions.

b. Qualifying Renewable Materials Claims

Based on consumer perception, the Guides attempt to distinguish between deceptive and non-deceptive claims. In this case, however, the Commission has insufficient information to clearly draw these boundaries. The Commission's consumer perception study did not comprehensively test consumers' understanding of "renewable,"[851] and no commenter submitted relevant consumer perception evidence. The Commission lacks data, for example, on whether

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[850] Because the Guides focus on consumer interpretation rather than on scientific or technical definitions, a marketer may make a claim that meets a scientific standard but that still may deceive consumers (see, e.g., Part E on biodegradable claims).

[851] The study included one closed-ended question and one open-ended question regarding this claim. The closed-ended question examined whether consumers believe this claim suggested other claims (e.g., made from recycled materials, recyclable). The open-ended question asked respondents, "[w]hat, if anything, does [made with renewable materials] suggest or imply to you about the product." A significant number of respondents said that the product was made from recycled materials (31 percent) or materials that can be recycled (17 percent). Additionally, 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 implied that materials could be replenished, replaced, or regrown; 4 percent stated the materials were derived from plant matter; 0.4 percent suggested that the materials were non-petroleum based; and 0.6 percent indicated the materials could be grown quickly. These findings are based on FTC staff's more detailed analysis of the open-ended responses rather than Harris' general findings.

consumers think the term "renewable" implies that a material regenerates within a certain timeframe, or whether it conveys anything about whether a material is managed responsibly. Moreover, neither the Commission nor the commenters tested the Commission's proposed qualifications. Therefore, "made with renewable materials" claims are ripe for further testing.

Despite the need for additional data, it is important to provide guidance for these claims. Consumer perception contrasts starkly with what marketers intend to convey and with technical and scientific definitions, leaving marketers with a Hobson's choice: try to substantiate far-reaching claims that they never intended; or forgo conveying important information about their products. Accordingly, the final Guides provide an example of one way, albeit not the only way, marketers can minimize the likelihood of unintended implied claims. Specifically, the Guides suggest that marketers may specify the material used and why the material is renewable.[852]

Example 1 illustrates how the Commission's suggested qualifications may help correct consumers' mis-impressions about renewable materials claims. This example states: "Our flooring is made from 100 percent bamboo, which grows at the same rate, or faster, than we use it." These qualifications alert consumers to the type of material (i.e., bamboo) and why it considers the product renewable (i.e., bamboo is replenished as fast, or faster, than the marketer uses it). Providing both types of information should minimize confusion between renewability and claims of recyclability, recycled content, and biodegradability by alerting consumers that marketers are referring to growth or replenishment. The Guides suggest that by disclosing the

[852] Advising marketers to provide these two pieces of information, rather than all three of the qualifications originally proposed in 260.15(b), should help marketers concerned about making disclosures in the limited real estate available.

material used and why it is renewable, marketers can minimize this confusion by aligning consumer perception with the messages marketers are trying to convey.[853]

In contrast, a marketer identifying the material, but not the reason why it is renewable, may not provide consumers with sufficient information about what the marketer means by growth or replenishment. For example, a marketer states its product is "renewable – made from pine trees." If consumers believe this claim conveys that the rate of the material's replenishment matches the rate of consumption, and this is not the case, consumers may be deceived. If, however, the marketer also clarifies that it re-plants a new tree for every tree cut down, consumers have adequate information to assess whether the marketer's definition of renewable aligns with their own. One commenter argued it would be too difficult to communicate why a material is renewable in a disclosure because of the different impacts a material could have depending on its specific supply chain. The purpose of the suggested qualifications, however, is not to explain comprehensively why the material is renewable but rather to minimize the risk of unintended implied claims. Therefore, as Example 1 illustrates, marketers need not make a lengthy disclosure.

The Commission emphasizes that the qualifications suggested in 260.16(b) and in Example 1 are not necessarily the only way to qualify this claim to minimize confusion. Marketers making different qualifications, however, should test claims because the risk of deception in this area is high.

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[853] One commenter recommended the Guides advise marketers to refer to the Internet for qualifying information. As discussed in Part II.B., supra, websites cannot be used to qualify otherwise misleading claims appearing on labels or other advertisements because consumers likely would not see that information before purchase.

Even if marketers remove the unintended, implied claims found in the Commission study, however, they still must substantiate all remaining reasonable interpretations of their claims. For example, depending on context, some consumers may view a renewable claim as indicating only that the relevant material has the ability to naturally replenish itself, while others may understand such claims to also mean that the marketer has used appropriate management practices to ensure continued renewability. Because the Commission lacks evidence about how consumers understand these claims, it cannot provide additional guidance at this time beyond the suggested qualifications.

The final Guides also advise marketers to further qualify a "made with renewable materials" claim by specifying the amount of renewable material in a product or package. That is, unless the entire product or package (excluding minor, incidental components) is made from renewable materials, the marketer should disclose the amount of renewable materials in the product or package. Both the majority of the comments and the Commission's study[854] support this guidance.

One commenter, however, argued that this guidance is inconsistent with proposed Section 260.15(b). This section advises marketers to always qualify renewable materials claims with specific information, which the commenter found inconsistent with the advice to only qualify the amount of renewable material in a product and package if it contains less than 100 percent renewable content. To alleviate any confusion, the Commission clarifies that marketers may need to make two kinds of qualifications. First, they should ensure they are making claims they can substantiate by, for example, following the Commission's suggested qualifications (type of

[854] The Commission's study found that a significant percentage of respondents (37 percent) indicated that they would interpret an unqualified "made with renewable materials" claim to mean that "all" of the materials in a product are renewable.

material, why the material is renewable). Second, as the final guidance provides, "[m]arketers also should qualify any "made with renewable materials" claim unless the product or package (excluding minor, incidental components) is made entirely with renewable materials."[855]

In addition, two commenters asked the Commission to specify how to calculate the percentage of renewable material in products. They referenced the ASTM carbon test and a test calculating renewable content based on total biomass weight as two possible calculation methods. These tests, however, may lead to different results. Specifically, the ASTM test calculates the "biobased" or "new"[856] carbon content in a product by considering only a material's total organic carbon, excluding oxygen, hydrogen, and nitrogen. In contrast, a test calculating biobased content by biomass weight includes these elements. Although these commenters requested that the Commission specify how marketers should calculate renewable content, the Commission lacks sufficient information about these, and other, methods and about how consumers understand "made with renewable materials" claims to do so. Therefore, the Commission declines to endorse either of these methods or to foreclose other potentially valid methods.

Relatedly, the final Guides do not endorse the ASTM carbon test or any other protocol as substantiation for renewable materials claims. Although the ASTM test determines the amount of biobased carbon in a material or product, it does not necessarily substantiate a renewable materials claim after unintended claims, such as biodegradability and recyclability, have been removed. For example, a product made wholly from old-growth forest trees is biobased, but not

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[855] 260.16(c) (emphasis added).

[856] The ASTM carbon dating test determines which carbon in a product is "biobased" and which carbon is fossilized, i.e., carbon that is 62,000 or more years old.

necessarily made from renewable materials if consumers interpret that to mean the material is replenished at the same rate at which it is used.[857]

c. Biobased Claims

Finally, the Guides do not address biobased claims. As the lead federal agency implementing the BioPreferred voluntary labeling program, USDA defines, certifies, and provides guidance on labeling biobased products. The Commission does not want to make marketers subject to potentially duplicative or contradictory advice from two federal agencies. Accordingly, the Commission declines to give advice for biobased claims within the scope of USDA's program.

The Commission also declines to provide guidance for biobased claims outside of USDA's program because it lacks evidence on how consumers perceive them. Marketers, nevertheless, are responsible for substantiating consumers' reasonable understanding of "biobased," and other similar claims, such as "plant-based," in the context of their advertisements. Therefore, to the extent these claims are deceptive in the context in which they are presented, the Commission may take action pursuant to Section 5 of the FTC Act. The Commission will continue to work closely with USDA in this area to address any environmental marketing claims beyond the scope of USDA's program.

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[857] The Commission declines to include proposed Example 3 in the final Guides because the point it addressed – that consumers likely interpret unqualified renewable materials claims to mean that a product also is made with recycled content, recyclable, and biodegradable – already is made in Example 1. Moreover, this example improperly suggested a marketer could substantiate the amount of renewable materials based solely on test results determining a product's biological content.

M. Source Reduction Claims

1. The 1998 Guides

Section 260.7(f) of the 1998 Guides stated that it is deceptive to misrepresent that a product or package has been reduced in size or is lower in weight, volume, or toxicity. This section also advised marketers to qualify source reduction claims to avoid deception about the amount of the reduction and the basis for any comparison. The Commission proposed retaining this section without change.[858]

2. Comments

Few commenters addressed this section. Of those that did, some agreed the Commission should not modify this guidance.[859] Others, however, recommended revisions. SCS suggested marketers claiming a source reduction consider how that reduction affects the product's functionality. It therefore stated marketers should examine the "full range of life cycle impacts that may be increased as a product is used more frequently or more of a product is used to perform the same function."[860] SCS pointed out, for example, that thinner trash bags may need to be double-bagged. Similarly, Eastman recommended the Guides state that a truthful source reduction claim may nevertheless be deceptive if the source reduction creates an unstated negative impact on the product's performance or safety, or on the environment.[861]

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[858] 16 CFR 260.16, 75 FR at 63580.

[859] ACA, Comment 237 at 11; AF&PA, Comment 171 at 10; PPC, Comment 221 at 11 (endorsing AF&PA's comment); FPA, Comment 299 at 8-9.

[860] SCS, Comment 264 at 10.

[861] Eastman, Comment 322 at 6.

Seventh Generation expressed concern that inclusion of toxicity in this section is confusing because the relationship "between health/environmental safety and source reduction is distantly related at best."[862] Accordingly, it suggested the Commission address environmental safety improvements such as toxicity reductions separately.

3. Analysis and Final Guidance

The Commission retains its 1998 guidance for source reduction claims but modifies one example to clarify that marketers making a source reduction claim without also making a general environmental benefit claim need not substantiate that the source reduction results in a net environmental benefit.

In its October 2010 Notice, the Commission stated that it was not proposing changes to this claim because no commenter suggested revisions.[863] Commenters responding to the October 2010 Notice, however, expressed concerns about unstated negative impacts resulting from a source reduction. The Commission agrees this is an issue when marketers make a source reduction claim in conjunction with a general environmental benefit claim. For example, a marketer may state that its packaging is "greener" because it uses less plastic. In such cases, in addition to substantiating the source reduction claim, marketers should determine if the advertisement conveys that its product is more beneficial overall because of the source reduction.[864] If so, marketers should analyze trade-offs resulting from the source reduction to determine if they can substantiate the net benefit claim.

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[862] Seventh Generation, Comment 207 at 6.

[863] 75 FR at 63580.

[864] See Part IV.A, supra.

To illustrate this point, the Commission revises Example 1 in the source reduction section to distinguish it from Example 6 in the general environmental benefit section.[865] Example 1 advised that a claim that a package generates "10% less waste than our previous product" would not be deceptive if the advertiser can substantiate that its product's disposal contributes 10 percent less waste when compared with the immediately preceding version of the product. New Example 6 in the General Environmental Benefit section describes a similar source reduction claim, but one that is combined with a general environmental benefit claim ("Environmentally-friendly improvement. 25% less plastic than our previous packaging.").[866] The General Environmental Benefit section advises marketers to substantiate not only that the product is made with 25 percent less plastic than previously, but also states that the marketer should substantiate that its bottles are more environmentally beneficial overall because of the source reduction. To distinguish these two examples, the Commission revises Example 1 in the source reduction section to clarify that the marketer did not make a general environmental benefit claim. Therefore, that marketer need only substantiate the source reduction claim but not a net environmental benefit claim.[867]

V. Claims Not Addressed by the Final Guides

The final Guides do not address sustainable or organic/natural claims. For these claims, this section summarizes the comments and the Commission's analysis.

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[865] 16 CFR 260.17.

[866] 16 CFR 260.4.

[867] Additionally, in response to one commenter's concern about the inclusion of "toxicity" in the source reduction section, the record does not suggest that the guidance not to misrepresent that a product has been reduced or is lower in toxicity is confusing to marketers. Accordingly, the Guides continue to refer to reduction or lowering in toxicity claims.

A. Sustainable Claims

1. October 2010 Notice Analysis

In its October 2010 Notice, the Commission stated that it lacked a sufficient basis to provide specific advice on using "sustainable" as an environmental marketing claim.[868] Specifically, the Commission cited consumer perception evidence indicating that the claim has no single meaning to a significant number of consumers, and to some it conveys non-environmental characteristics (e.g., durable or long-lasting). The Commission, however, emphasized that marketers are responsible for substantiating consumers' reasonable understanding of this claim based on the context of their advertisements.[869]

2. Comments

Commenters disagreed about whether the Commission should provide guidance on sustainable claims. No commenter, however, submitted consumer perception evidence.

a. Comments Supporting the Commission's Analysis

Several commenters supported the Commission's decision not to provide guidance on "sustainable" claims.[870] For example, AWC agreed there is no consensus definition of sustainable, and "certainly none that the average consumer would know and understand automatically."[871] Similarly, GMA stated the term can include a variety of economic, social, and environmental

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[868] 75 FR at 63583.

[869] Id.

[870] ACC, Comment 318 at 7; AWC, Comment 244 at 7; Weyerhaeuser, Comment 336 at 1; AF&PA, Comment 171 at 10; AA&FA, Comment 233 at 6; EEI, Comment 195 at 2; EHS Strategies, Comment 111 at 2; GMA, Comment 272 at 2; NAIMA, Comment 210 at 9-10; PPC, Comment 221 at 11 (endorsing AF&PA's comment).

[871] AWC, Comment 244 at 7; Weyerhaeuser, Comment 336 at 1; see also AA&FA, Comment 233 at 6 (stating that there is an insufficient consensus for the Guides to provide useful guidance).

considerations, which would make it difficult for the Commission to provide meaningful guidance on its use as an environmental marketing term.[872] In addition, NAIMA contended that defining the specific attributes of sustainability is "possibly unachievable" because "sustainability is anything that fosters the general welfare of the entire planet . . . encompass[ing] not just the environment, but the economy, public health, and every other facet of life."[873] NAIMA also argued, however, that, if objective and meaningful criteria have been developed for certain specific types of products, such as with sustainable agriculture, then marketers can, and should, use those criteria to substantiate their claims.[874]

While agreeing the Commission should not issue guidance at this time, some commenters encouraged the Commission to monitor the term and consider issuing future guidance. For example, ACC opined that consumers eventually may understand "sustainable" to refer to environmental attributes or to mean that a product "produces fewer impacts" throughout its life cycle.[875] Similarly, EnviroMedia Social Marketing acknowledged the Commission's reluctance to provide guidance on "sustainable" "due to a lack of clear standards," but stressed that marketers will increasingly use this term. Therefore, it recommended the Commission work closely with the Department of Energy and EPA to develop future guidance.[876]

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[872] GMA, Comment 272 at 2.

[873] NAIMA, Comment 210 at 9.

[874] Id.; see also JM, Comment 305 at 12-13 (stating that there are now certain, well-developed principles of sustainable agriculture); PMA, Comment 262 at 4 (stating that when the term is well-defined in the context of a specific industry, such as forestry and paper products, the FTC should make clear that marketers can substantiate the claim by complying with well-accepted industry standards).

[875] ACC, Comment 318 at 7.

[876] EnviroMedia Social Marketing, Comment 346 at 4; see also FPA, Comment 292 at 3.

b. Comments Suggesting the Commission Provide Guidance

In contrast, some commenters recommended the Commission clarify that marketers should never use "sustainable" to describe products or services. Others suggested the Commission allow marketers to make this claim, but advise them to use qualifiers or have certain substantiation. Finally, some suggested the Commission simply define the term.

i. Comments Suggesting the Commission Prohibit "Sustainable" Claims

EPA suggested cautioning marketers not to use the term "sustainable" as a marketing claim for products or services. It explained that "sustainable" refers to a "characteristic of systems . . . the quality of being able to continue in their present state and mode of operation indefinitely."[877] Accordingly, EPA asserted that there is no such thing as a "sustainable product, although some products will have greater effects than others on the sustainability of natural systems."[878] Although EPA acknowledged the difficulty of providing specific guidance on sustainable claims, it asserted that these claims are rapidly proliferating and that the absence of guidance will increase consumer confusion.[879]

Similarly, the Sierra Club et al. suggested the Commission prohibit marketers from using the terms "sustainable" and "sustainability" unless they use them only to describe "general goals

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[877] EPA, Comment 288 at 18.

[878] Id.; see also Interface, Comment 310 at 1 (recommending the Guides advise that the term "sustainable" should not be used to describe or define a particular product and instead could be used to describe a company's overall goals); Jason Pearson, Comment 285 at 3 (stating "sustainable" is too ambiguous and broad to have any meaning in relation to products but may be appropriate to use in the context of "sustainable development," i.e., development that can be sustained without compromising the feasibility of future development).

[879] EPA, Comment 288 at 18 (also stating that it would likely consider this term to be misleading on product labels and that "at the very least," marketers should accompany the term with an explanation of what they mean in their advertisement's context).

or aspirations."[880] According to these commenters, to be truly sustainable, a product must be able to be "perpetuate[d] . . . indefinitely with no serious adverse environmental or social consequences," a standard difficult to achieve or verify because there is no consensus on a standard for verifying sustainability's achievement."[881] In their view, the lack of guidance for sustainable claims relieves marketers of their responsibility to possess substantiation for these claims.[882] Therefore, they urged the Commission to "act proactively to protect consumers and not wait until it deems that appreciable segments of the public are being deceived or confused."[883]

GreenBlue asserted that, like the claims "green" or "environmentally friendly," the claim "sustainable" has no intrinsic meaning and confuses consumers. Moreover, it argued that qualifying this claim with a specific attribute would not minimize that confusion. Accordingly, GreenBlue recommended the FTC align its guidance with Canada's by stating "'[t]he concepts involved in sustainability are highly complex and still under study. At this time there are no definitive methods for measuring sustainability or confirming its accomplishment. Therefore, no claim of achieving sustainability shall be made.'"[884] Additionally, GreenBlue disagreed with the Commission's conclusion that it lacks a sufficient basis to provide meaningful guidance on

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[880] Sierra Club et al., Comment 308 at 2-3 and 6 (alternatively requesting the Commission require that such claims be substantiated with "irrefutable evidence of levels of environmental performance far superior to that required by existing state and federal laws and current forest certification systems" and that are "solidly grounded on well-accepted science-based definitions," and that "have achieved broad consensus among all relevant stakeholder groups," but acknowledging that that these standards have yet to be developed and that the Commission may not be "equipped to develop, or view its mission as being to referee, the development of such specific guidelines").

[881] Id. at 3.

[882] Id. at 7-8.

[883] Id. at 7.

[884] GreenBlue, Comment 328 at 3.

"sustainable" as an environmental marketing term. GreenBlue contended that the Commission's consumer perception evidence clearly demonstrates consumer confusion.[885]

ii. Comments Suggesting the Guides Should Advise Marketers to Qualify and/or Have Specific Substantiation for Sustainable Claims

Other commenters argued qualified sustainable claims can be made non-deceptively. For example, Oceana opined that consumers may perceive the term "sustainable" as an environmental claim when used in combination with environmental terms and images. In such cases, Oceana recommended the Guides provide that marketers specifically define how they are using the term.[886]

Likewise, GPR asserted that sustainable claims should be qualified in the same manner as general environmental superiority claims.[887] GPR also suggested that "sustainable" claims referring to specific, registered management systems or standards would be acceptable if verified and not based on a product's single attribute. For example, GPR explained a marketer could state that its "wood comes from a forest that was certified to a sustainable forest management standard," if it identifies the specific standard. On the other hand, a marketer should not claim its wood is "sustainable," because, even if the wood came from a certified forest, it is not necessarily true that the entire wood product is sustainable.

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[885] Id. (but not specifically citing data to support its assertion); see also PRC, Comment 338 at 2 (urging that the Commission reconsider its interpretation of its study results and stating that the lack of guidance will result in increased use of the term and further consumer confusion; it did not, however, offer its own interpretation of the study results or suggest guidance).

[886] Oceana, Comment 169 at 2-3.

[887] GPR, Comment 206 at 2-3; see also Hunyh, Comment 40 at 1; Weyerhaeuser, Comment 336 at 1.

P&G similarly asserted that the unqualified use of the term "sustainable" is equivalent to terms such as "eco-friendly" and "green." It, therefore, recommended the Guides include the following example:

> A shoe polish manufacturer changes from metal to plastic containers. As a result, its products are labeled "Now, in a more environmentally sustainable package." In the absence of data on the comparative environmental burdens associated with the manufacture and disposal of these packages, and the consequent packaging operations, this claim is not verifiable, and is therefore deceptive. In the absence of these data, only a factual claim, such as "now packaged in a lighter weight package," is acceptable.[888]

Moreover, SCS asserted that, because these claims encompass a full spectrum of environmental, social, and economic considerations, the Guides should discourage sustainable claims unless marketers can: (1) confirm they have addressed three areas (environmental, social, and economic); (2) identify a specific "sustainability performance" standard, developed under an open, transparent process in conjunction with the claim; and (3) provide and make publicly available supporting documentation.[889] In addition, SCS suggested the Guides advise marketers to further qualify the claim if it is focused only on "environmental sustainability."[890]

Finally, PMA recommended the Guides advise marketers to clarify whether the term "sustainable" applies to: (1) the product or service; (2) the process used to make the product or deliver the service; or (3) the marketer's operations generally, "whether now or as a future goal."[891]

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[888] P&G, Comment 159 at 1-2.

[889] SCS, Comment 264 at 11.

[890] Id.

[891] PMA, Comment 262 at 6.

iii. Comments Suggesting the Commission Adopt a Specific "Sustainable" Definition

Some commenters urged the Commission to adopt a specific definition of "sustainable." For example, FSC-US suggested the definition adopted by the United Nations Report of the World Commission on Environment and Development, and recommended the Guides include the following language:

> Sustainability (when accompanied by cues indicating it is used as an environmental claim): It is deceptive to misrepresent, directly or by implication, that a product or product attribute is sustainable or supports the sustainability of a biological system or is renewable, unless the system (e.g., forests, wetlands) has the capacity to maintain or support itself and endure, remaining biologically diverse and productive over time, without compromising future generations considering environmental, social, and economic demands.[892]

FSC-US also asserted that, at a minimum, the Commission should clarify that "sustainable" is an environmental superiority claim, which marketers must substantiate even if consumers do not understand how the product is superior.[893] In support, FSC-US cited the Commission's consumer perception study where 32 percent of respondents presented with this claim recognized a general or specific environmental benefit.[894] Moreover, FSC-US stated that the number of respondents attributing an environmental benefit claim would likely have been even higher if environmental

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[892] FSC-US, Comment 203 at 5-6 (citing the definition of sustainability set forth in the Report of the World Commission on Environment and Development: Our Common Future, G.A. Res. 42/187, U.N. Doc A/42/427 (December 11, 1987), available at http://www.un-documents.net/wced-ocf.htm ("Bruntland Commission Report") ("Sustainable development is development that meets the needs of the present without compromising the ability of further generations to meet their own needs."); see also Maverick Enterprises, Comment 281 at 1 (stating the Guides should define sustainable as "meet[ing] the needs of the present without compromising the ability of future generations to meet their own needs").

[893] Id.

[894] FSC-US, Comment 203 at 6 (citing 75 FR 63552, 63583 and n. 377 (Oct. 15, 2010)).

cues were present.[895] FSC-US further cautioned that marketers may assume the Commission considers this term "meaningless" because of its statement that "sustainable" has "no single environmental meaning to a significant number of consumers."[896] FSC-US therefore urged the Commission to provide guidance to deter unscrupulous marketers from using "sustainable" to describe products without environmental benefits, or, at a minimum, to emphasize that marketers do not have a "safe haven" to deceive consumers. In particular, it suggested the Guides expressly state, as the Commission did in the October 2010 Notice, that "'[m]arketers are responsible for substantiating consumers' understanding of [any sustainable] claim in the context of their advertisements.'"[897]

Other commenters suggested the Guides refer to dictionary definitions for sustainable, such as "capable of being continued with minimal long-term effect on the environment,"[898] or "a method of harvesting or using a resource so that the resource is not depleted or permanently damaged."[899]

3. Analysis

The comments suggest that use of the claim "sustainable" continues to proliferate. Marketers use this claim in numerous contexts, and depending on context, "sustainable" may

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[895] Id. (noting that 35 percent of respondents attributed a "strong/durable" or "long-lasting" claim to the term "sustainable"; also citing TerraChoice's 2009 Environmental Marketing survey of "professional purchasers" as evidence that when "sustainable" is used in the context of environmental cues, consumers understand this term to mean a "positive environmental impact." In this study, 80 percent of respondents stated that a factor that motivated their organization to implement "green" purchasing guides was their organization's "commitment to sustainability").

[896] FSC-US, Comment 203 at 7 (citing 75 FR 63552, 63583 (Oct. 15, 2010)).

[897] Id.

[898] Mark Eisen, Comment 132 at 1 (citing the American Heritage Dictionary).

[899] PMA, Comment 262 at 5 (citing Merriam Webster and the United Nations' Brundtland Commission Report).

convey a wide range of meanings. In addition to environmental attributes, as commenters noted, and as the Commission's study suggests, "sustainable" claims also may imply non-environmental attributes such as durability or longevity.[900] They also may convey social and economic messages regarding, for instance, fair trade and community development.[901] Despite commenters' requests that the Commission define this term, the Commission does not have the legal authority to do so. To prevent "deceptive acts and practices" pursuant to Section 5, the Commission provides information regarding how consumers perceive terms. Here, given the wide range of meanings of "sustainable," the Commission lacks a basis for providing this guidance.

This lack of guidance, however, does not mean unscrupulous marketers are free to deceive consumers. Marketers still are responsible for substantiating consumers' reasonable understanding of these claims. For example, if in context reasonable consumers perceive a sustainable claim as a general environmental benefit claim, the marketer must be able to substantiate that claim and all attendant reasonably implied claims. Given the potential for confusion, this area is ripe for further consumer perception research and one that the Commission will continue to monitor. In the meantime, marketers who use "sustainable" claims should test those claims in the context of their advertisements to ensure they can substantiate them.

Marketers also should be aware that, depending on consumer interpretation, this claim presents substantiation challenges. For example, some commenters suggested that consumers perceive "sustainable" to mean that a product can be produced " . . . indefinitely with no serious adverse environmental or social consequences." This claim may be extremely difficult to verify.

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[900] Nineteen percent of respondents in the Commission's study stated that sustainable suggests a product is "strong/durable," and 16 percent stated it suggests a product is "long-lasting."

[901] The Commission's study did not examine these aspects.

Furthermore, as several commenters noted, no consensus appears to exist on how to measure or confirm that sustainability has been achieved.

B. Organic and Natural Claims

1. October 2010 Notice

The October 2010 Notice did not include proposed guidance on organic claims for two reasons. First, the Commission wanted to avoid proposing advice duplicative of, or inconsistent with, the USDA's National Organic Program ("NOP"). Second, although the NOP does not apply to non-agricultural products, the Commission lacked consumer perception evidence relating to claims for these products. Therefore, the October 2010 Notice requested comment on how consumers interpret organic claims for non-agricultural products.

The October 2010 Notice also did not include proposed guidance on natural claims because it lacked consumer perception evidence indicating how consumers understand "natural." The Commission noted that the term may be used in numerous contexts, and may convey different meanings depending on context.

However, the October 2010 Notice emphasized that the Guides' general principles apply to these claims. Specifically, marketers must have substantiation for any environmental benefit claims they make, including implied claims.[902]

[902] See 75 FR 63552, 63585-63586 (Oct. 15, 2010).

2. Comments

The majority of commenters, including a mass consumer comment on organic claims, recommended adopting new guidance. Though some commenters discussed organic and natural claims generally,[903] others addressed each claim individually.

a. Commenters Addressing Organic Claims

Some commenters agreed that the Commission should not provide specific guidance on organic claims.[904] The majority, however, argued that organic claims confuse consumers.[905] Accordingly, several urged the Commission to provide guidance.

For example, some commenters suggested creating a Guides section devoted to organic claims. One argued the section should simply "advise marketers to substantiate all 'organic' claims in their marketing."[906] Another similarly requested that the section contain a statement explaining that substantiation requirements apply to organic claims.[907]

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[903] See, e.g., 4GreenPs, Comment 275 (urging the Commission to issue guidance because restrictions on unqualified "eco friendly" and "environmentally friendly" claims – without similar restrictions on "sustainable," "natural," and "organic" claims – may encourage unscrupulous marketers to substitute the latter terms for the former); AAFA, Comment 233 at 6 (arguing that the final Guides should not include specific guidance); ACI, Comment 160 at 5 (arguing that the "absence of uniform guidelines creates uncertainty for marketers and the potential for consumer confusion"); Daniel, Comment 115 (urging the Commission to adopt guidance); Dworzecki, Comment 60 (same); PFA, Comment 263 at 4 (same).

[904] AHPA, Comment 211 at 6; CPDA, Comment 209 at 3-4; GMA, Comment 272 at 2; Tandus Flooring, Comment 286 at 2-3.

[905] See, e.g., OCA, Comment 295 at 11; PRC, Comment 338 at 2 (requesting that the FTC define "organic").

[906] Enviromedia Social Marketing, Comment 346 at 17.

[907] OTA, Comment 197 at 2 (requesting that the Guides state it is deceptive to make an organic claim to imply a green or environmentally benign character if a non-agricultural product does not include a certified organic product as an ingredient).

Other commenters recommended issuing specific guidance addressing claims for non-agricultural products.[908] Many argued that consumers expect all products labeled "organic," including non-agricultural products, to comply with USDA organic standards.[909] Accordingly, numerous commenters,[910] including a standardized comment from more than 5,000 consumers,[911] suggested stating that unqualified organic claims for non-agricultural products are deceptive.

Another commenter argued that the Guides should identify certain organic claims that categorically deceive consumers. Specifically, JM urged the Commission to address organic claims for plant-based fiber in fiberglass insulation, which it views as per se deceptive.[912]

Finally, some suggested the FTC coordinate with other entities and agencies if it develops guidance on organic claims. Specifically, Green Seal stated that any FTC guidance should be

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[908] See e.g., Cara L. Campbell, Comment 253; Blake Kessel, Comment 154; Jack Lanum, Comment 198; JA Lueck, Comment 177; Ann Marie Nelsen, Comment 64; Sara Perron, Comment 279; Perrie'Lee Prouty, Comment 90; Maja Ramirez, Comment 99; Lenore Rauch, Comment 72; Tim Rice, Comment 109; Carol Ring, Comment 62; Rick Roberson, Comment 75; Wayne Robey, Comment 89; Dianne Sommers, Comment 80; Michele Thyne, Comment 74; Den Mark Wichar, Comment 182; Winokur, Comment 65; David Wolfson, Comment 85.

[909] See, e.g., 4GreenPs, Comment 275; bee, Comment 114; E Bromley, Comment 180; Gillian Browne, Comment 189; OCA, Comment 295 at 1; Julianne Rogers, Comment 164.

[910] AFPR, Comment 246 at 4; EHS Strategies, Comment 111 at 6; Foreman, Comment 74 at 2; OTA, Comment 197 at 2; see also commenters requesting that the FTC declare deceptive organic claims for personal care products made with petrochemical or synthetic ingredients. Burt Bittner Jr., Comment 129; Burke, Comment 57; K Culler, Comment 186; Gladwyn d'Souza, Comment 69; Durham, Comment 81; Jin Emerson-Cobb, Comment 106; LaVerne Held, Comment 170; Diane Suhm, Comment 70.

[911] J. Capozzelli, Comment 107 at 1-2; Jan Hiltner, Comment 344; Christopher Lish, Comment 185; Jennifer Murphy, Comment 178; Amanda Wedow, Comment 73; and over 5,000 others.

[912] JM, Comment 305 at 14.

consistent with USDA's NOP;[913] Joyan recommended partnering with the Environmental Working Group;[914] and WI suggested coordinating with the TTB.[915]

b. Commenters Addressing Natural Claims

Some commenters agreed that the final Guides should not address natural claims.[916] However, the majority argued that these claims deceive consumers. To demonstrate, three commenters provided limited perception data they argued shows ongoing consumer confusion.[917]

Some commenters asked the Commission to define "natural" without suggesting language.[918] Others recommended specific guidance. For example, one proposed advising marketers that natural and other plant-based claims imply general environmental benefits, and therefore always require qualification.[919] Alternatively, several commenters suggested advising

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[913] Green Seal, Comment 280 at 7-8.

[914] Joyan, Comment 243 (also recommending "set[ting] up an organic board" to certify organic claims on cosmetic products).

[915] WI, Comment 259 at 2-3. See Part II.D.

[916] CPDA, Comment 209 at 4; NPA, Comment 257 at 2.

[917] CU, Comment 289 at 4 (citing research finding 86 percent of consumers expect "natural" means foods do not contain any artificial ingredients); OTA, Comment 197 at 4-5 (describing a study regarding consumer interpretations of "natural" food claims); P&G, Comment 159 at 5 (referencing a study showing that, net of controls, 57.4 percent of consumers believed all ingredients in a product labeled "natural" were natural, 47.5 percent believed none were chemically altered or processed, and 54.1 percent believed all ingredients were biodegradable).

[918] Green Seal, Comment 280 at 7; PMA, Comment 262 at 7 (arguing that the lack of a formal definition creates uncertainty for companies making natural claims and may result in conflicting standards).

[919] GPR, Comment 206 at 3 (recommending that marketers disclose impacts related to natural ingredients, percentage of natural ingredients, and percentage of the finished product made of natural ingredients); see also Arkema, Comment 236 at 1 (requesting the FTC address refrigerants making "natural" claims, as these claims could be interpreted as "environmentally friendly" claims).

marketers not to make natural claims on products derived from genetically modified organisms,[920] and one urged the FTC to declare natural claims on food products categorically deceptive.[921]

3. Analysis

For the reasons described below, the final Guides do not include specific guidance on organic or natural claims. Nonetheless, the Commission reminds marketers that, as discussed in the October 2010 Notice, the Guides' general principles apply to organic and natural claims. More specifically, to the extent that reasonable consumers perceive organic or natural claims as general environmental benefit claims, marketers must be able to substantiate those claims and all other reasonably implied claims, as described in Section 260.4.

a. Organic Claims

The final Guides do not include a section on organic claims for two reasons. First, the USDA's NOP already addresses organic claims for agricultural products. Second, the Commission continues to lack sufficient evidence upon which to base generally applicable guidance for organic claims.

As discussed in the October 2010 Notice, the NOP provides a comprehensive regulatory framework governing organic claims for agricultural products. Given this framework and the NOP's ongoing work on these claims, the Commission is concerned about adopting duplicative or inconsistent advice. Further, no commenters provided justifications why the Commission should not defer to the NOP in this area. Therefore, the final Guides do not address organic claims covered by NOP standards.

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[920] Linda Clewell, Comment 131; Cole, Comment 125; Stephen Johnson, Comment 267; Katherine Mayhugh, Comment 124; OTA, Comment 197 at 5; Parris, Comment 123; Val Peterson, Comment 127; Ginger Shamblin, Comment 119; Aida Shirley, Comment 112.

[921] Veritable Vegetable, Comment 93.

The Commission also declines to issue general guidance on claims for products outside the NOP's jurisdiction. The record is simply too thin to support general guidance. Moreover, any advice the Commission promulgated for non-agricultural products could lead to general confusion or a perceived conflict with current or future NOP guidelines. In response to commenters concerned that the absence of guidance may result in fraud, the Commission reminds marketers they remain subject to the FTC Act's general proscriptions against unfair or deceptive marketing. As with any deceptive marketing claim, the Commission may bring an enforcement action against a marketer for deceptive organic claims.

Finally, some commenters requested a definition for "organic." The Commission, however, does not define terms. Instead, it examines how consumers interpret claims. At this time, the Commission lacks sufficient evidence regarding how consumers perceive organic claims to provide generally applicable advice.

b. Natural Claims

The Commission declines to introduce guidance on natural claims, largely for the reasons discussed in the October 2010 Notice. Specifically, the Commission continues to lack a basis to provide generally applicable guidance on these claims, which may be used in numerous ways and convey widely different meanings depending on context.

The Commission received only limited evidence regarding how consumers perceive natural claims. P&G provided a 2010 online survey of 317 consumers showing that consumers interpreted an unqualified natural claim as conveying a variety of messages.[922] In this survey, consumers viewed a single hypothetical product described as "natural." Of the consumers surveyed, 57.4

[922] P&G, Comment 159 at 5.

percent "believed that all ingredients in the product were natural, 47.5 percent believed that none of its ingredients were chemically altered or processed, and 54.1 percent believed that all of its ingredients were biodegradable."[923] Based on these results, P&G urged the FTC to provide an "additional perspective on what constitutes 'natural' for consumer products," but did not suggest specific guidance.[924]

Because natural claims may convey such a variety of environmental and non-environmental meanings, context is particularly important.[925] P&G's study, however, does not take into account the context-specific nature of these claims.[926] Therefore, the Commission cannot provide general guidance based on the study.[927] At this time, the Commission continues to seek consumer perception evidence that would support generally applicable guidance.

The Commission reminds marketers that although the final Guides do not include general advice on natural claims, they remain subject to Section 5 of the FTC Act. Thus, marketers must qualify claims appropriately to avoid consumer deception, and must ensure they can substantiate any reasonable interpretation of their claims in the context of the entire advertisement. As

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[923] Id. Percentages reported are net of controls.

[924] Id.

[925] As noted in the October 2010 Notice, to the extent that federal agencies have defined, or administered statutes defining, "natural," they have done so only in specific contexts. Furthermore, both the FDA and the FTC previously have declined to establish definitions for "natural," at least in part because of the difficulties in developing a definition that would be appropriate in multiple contexts. 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).

[926] Another limitation of the study is its exclusive reliance on close-ended questions.

[927] To avoid potential duplication or conflicts with USDA or FDA programs and regulations, the FTC declines to address studies on natural foods claims referenced by CU and OTA. See CU, Comment 289 at 4 (stating 86 percent of consumers expect "natural" means foods do not contain any artificial ingredients); OTA, Comment 197 at 4-5 (referencing a survey conducted in conjunction with KIWI Magazine finding over one-third of consumers may be misled by natural claims on foods).

discussed in the October 2010 Notice, for example, if reasonable consumers interpret a natural claim as conveying that a product contains no artificial ingredients, then the marketer must be able to substantiate that impression. Similarly, if reasonable consumers perceive a natural claim as a general environmental benefit or 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.[928]

[928] See Section 260.4 (General Environmental Benefit Claims).

VI. Revised Green Guides

PART 260– GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING 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 views 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. These guides also apply to business-to-business transactions. 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. The guides are based on marketing to a general audience. However, when a marketer targets a particular segment of consumers, the Commission will examine how reasonable members of that group interpret the advertisement. 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. Nor do they illustrate the

only ways to comply with the guides. Marketers can use an alternative approach if the approach satisfies the requirements of Section 5 of the FTC Act. All examples assume that the described claims otherwise comply with Section 5. Where particularly useful, the Guides incorporate a reminder to this effect.

§ 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 FTC 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 FTC 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 or benefits. Marketers should not imply that any specific benefit is significant if it is, in fact, negligible. If a qualified general claim conveys that a product is more environmentally beneficial overall because of the particular touted benefit(s), marketers should analyze trade-offs resulting from the benefit(s) to determine if they can substantiate this claim.

(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: (1) the statement "made with recycled materials" is clear and prominent; (2) the marketer can substantiate that the entire product or package, excluding minor, incidental components, is made from recycled material; (3) making the product with recycled materials makes the product more environmentally beneficial overall; and (4) the advertisement's context does not imply other deceptive claims.

Example 2: 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 reducing the packaging's weight makes the product more environmentally beneficial overall and the advertisement's context does not imply other deceptive claims.

Example 3: A marketer's advertisement features a picture of a laser printer in a bird's nest balancing on a tree branch, surrounded by a dense forest. In green type, the marketer states, "Buy our printer. Make a change." Although the advertisement does not expressly claim that the product has environmental benefits, the featured images, in combination with the text, likely convey 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, this advertisement is deceptive.

Example 4: A manufacturer's website states, "Eco-smart gas-powered lawn mower with improved fuel efficiency!" The manufacturer increased the fuel efficiency by 1/10 of a percent. Although the manufacturer's claim that it has improved its fuel efficiency technically is true, it likely conveys the false impression that the manufacturer has significantly increased the mower's fuel efficiency.

Example 5: A marketer reduces the weight of its plastic beverage bottles. The bottles' labels state: "Environmentally-friendly improvement. 25% less plastic than our previous packaging." The plastic bottles are 25 percent lighter but otherwise are no different. The advertisement conveys that the bottles are more environmentally beneficial overall because of the source reduction. To substantiate this claim, the marketer likely can analyze the impacts of the source reduction without evaluating environmental impacts throughout the packaging's life cycle. If, however, manufacturing the new bottles significantly alters environmental attributes earlier or later in the bottles' life cycle, i.e., manufacturing the bottles requires more energy or a different kind of plastic, then a more comprehensive analysis may be appropriate.

§ 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 online travel agency 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 agency'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 or organization may be 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).[929]

(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 environmental certification or seal of approval likely conveys that the product offers a general environmental benefit (see § 260.4) if the certification or seal does not convey the basis for the certification or seal, either through the name or some other means. Because it is highly unlikely that marketers can substantiate general environmental benefit claims, marketers should not use environmental certifications or seals that do not convey the basis for the certification.

(e) Marketers can qualify general environmental benefit claims conveyed by environmental certifications and seals of approval to prevent deception about the nature of the environmental benefit being asserted. To avoid deception, marketers should use clear and prominent qualifying language that clearly conveys that the certification or seal refers only to specific and limited benefits.

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 appropriate expertise in evaluating the environmental attributes of paint; and (2) the product has far-reaching environmental benefits. If the paint manufacturer awarded the seal to its own product, and no independent, third-party certifier objectively evaluated the paint using

[929] The examples in this section assume that the certifiers' endorsements meet the criteria provided in the Expert Endorsements (255.3) and Endorsements by Organizations (255.4) sections of the Endorsement Guides.

independent standards, 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 awarded the GreenLogo seal to its own product; and (2) clearly conveying that the award refers only to specific and limited benefits.

Example 2: A manufacturer advertises its product as "certified by the American Institute of Degradable Materials." Because the advertisement does not mention that the American Institute of Degradable Materials ("AIDM") is an industry trade association, the certification likely conveys that it was awarded by an independent certifier. To be certified, marketers must meet standards that have been developed and maintained by a voluntary consensus standard body.[930] An independent auditor applies these standards objectively. This advertisement likely is not deceptive if the manufacturer complies with § 260.8 of the Guides (Degradable Claims) because the certification is based on independently-developed and -maintained standards and an independent auditor applies the standards objectively.

Example 3: A product features a seal of approval from "The Forest Products Industry Association," an industry certifier with appropriate expertise in evaluating the environmental attributes of paper products. Because it is clear from the certifier's name that the product has been certified by an industry certifier, the certification likely does not

[930] Voluntary consensus standard bodies are "organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. . . . A voluntary consensus standards body is defined by the following attributes: (i) openness, (ii) balance of interest, (iii) due process, (iv) an appeals process, (v) consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus members are given an opportunity to change their votes after reviewing the comments." Memorandum for Heads of Executive Departments and Agencies on Federal Participation in the Development and Use of Voluntary Consensus Assessment Activities, February 10, 1998, Circular No. A-119 Revised, Office of Management and Budget at www.whitehouse.gov/omb/circulars_a119.

convey that it was awarded by an independent certifier. The use of the seal likely is not deceptive provided that the advertisement does not imply other deceptive claims.

Example 4: A marketer's package features a seal of approval with the text "Certified Non-Toxic." The seal is awarded by a certifier with appropriate expertise in evaluating ingredient safety and potential toxicity. It applies standards developed by a voluntary consensus standard body. Although non-industry members comprise a majority of the certifier's board, an industry veto could override any proposed changes to the standards. This certification likely conveys that the product is certified by an independent organization. This claim would be deceptive because industry members can veto any proposed changes to the standards.

Example 5: A marketer's industry sales brochure for overhead lighting features a seal with the text "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 marketer's product. This advertisement would be deceptive because it likely conveys that the 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 representations, both express and implied, to the particular product attributes for which the marketer has substantiation. For example, the marketer could state: "Although we are a member of the 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 6: 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 with appropriate expertise in evaluating chemical emissions of products. 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 EarthSmart 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 clearly conveying that the certification refers only to specific and limited benefits. 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 7: A one-quart bottle of window cleaner features a seal with the text "Environment Approved," granted by an independent, third-party certifier with appropriate expertise. The certifier granted the seal after evaluating 35 environmental attributes. This seal likely conveys that the product has far-reaching environmental benefits and that Environment Approved certified the product for all of these benefits and therefore is likely deceptive. The seal would likely not be deceptive if the marketer accompanied it with clear and prominent language clearly conveying that the seal refers only to specific and

limited benefits. For example, the seal could state: "Virtually all products impact the environment. For details on which attributes we evaluated, go to [a website that discusses this product]." The referenced webpage provides a detailed summary of the examined environmental attributes. A reference to a website is appropriate because the additional information provided on the website is not necessary to prevent the advertisement from being misleading. As always, the marketer also should ensure that the advertisement does not imply other deceptive claims, and that the certifier's criteria are sufficiently rigorous to substantiate all material claims reasonably communicated by the certification.

Example 8: 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. Great Paper Company paid the No Chlorine Products Association a reasonable fee for the certification. Consumers would reasonably expect that marketers have to pay for certification. Therefore, there are no material connections between Great Paper Company and the No Chlorine Products 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 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: 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 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, and 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 items entering the solid waste stream 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's 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, place trash bags into the solid waste stream, which customarily terminates 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, 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, in an inconspicuous location, does not constitute a degradable claim. Consumers are unlikely to interpret an inconspicuous diamond symbol, without more, as an unqualified photodegradable claim.[931]

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.

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[931] 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.

§ 260.9 Free-Of 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. 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 not been associated with the product category.

(c) Depending on the context, a free-of or does-not-contain claim is appropriate even for a product, package, or service that contains or uses a trace amount of a substance if: (1) the level of the specified substance is no more than that which would be found as an acknowledged trace contaminant or background level;[932] (2) the substance's presence does not cause material harm that consumers typically associate with that substance; and (3) the substance has not been added intentionally to the product.

> **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 substantiated claim, however, that the shirts were

[932] "Trace contaminant" and "background level" are imprecise terms, although allowable manufacturing "trace contaminants" may be defined according to the product area concerned. What constitutes a trace amount or background level depends on the substance at issue, and requires a case-by-case analysis.

"bleached with a process that releases 50% less of the harmful byproducts associated with chlorine bleaching" would not be deceptive.

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. Further, the seller has substantiation that the trace amounts of formaldehyde emitted by the insulation do not cause material harm that consumers typically associate with formaldehyde. 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.

§ 260.10 Non-Toxic Claims.

(a) It is deceptive to misrepresent, directly or by implication, that a product, package, or service is non-toxic. Non-toxic claims should be clearly and prominently qualified to the extent necessary to avoid deception.

(b) 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 marketer advertises a cleaning 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, including household pets. If the cleaning product poses no risk to humans but is toxic to the environment, the claims would be deceptive.

§ 260.11 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.

§ 260.12 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 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 of consumers or communities where the item is sold, marketers can make unqualified recyclable claims. The term "substantial majority," as used in this context, means at least 60 percent.

(2) When recycling facilities are available to less than a substantial majority of consumers or communities where the item is sold, marketers should qualify all recyclable claims. Marketers may always qualify recyclable claims by stating the percentage of consumers or communities that have access to facilities that recycle the item. Alternatively, marketers may use qualifications that vary in strength depending on facility availability. The lower the level of access to an appropriate facility is, the more strongly the marketer should emphasize the limited availability of recycling for the product. For example, if recycling facilities are available to slightly less than a substantial majority of consumers or communities where the item is sold, a marketer may qualify a recyclable claim by stating: "This product [package] may not be recyclable in your area," or "Recycling facilities for this product [package] may not exist in your area." If recycling facilities are available only to a few consumers, marketers should use stronger clarifications. For example, a marketer in this situation may qualify its recyclable claim by stating: "This product [package] is recyclable only in the few communities that have appropriate recycling facilities."

(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.[933]

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 Resin Identification Code (RIC)[934] (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. This conspicuous use of the RIC 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 RIC, without more, in an inconspicuous location

[933] 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.

[934] The RIC, formerly known as the Society of the Plastics Industry, Inc. (SPI) code, is now covered by ASTM D 7611.

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 some consumers, but not available 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 one suggested in § 260.12(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 the 25 percent of the package that consists of recyclable 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. The claim is deceptive for two reasons. First, it does not specify the portion of the product that is recyclable. Second, it does not

disclose the limited availability of facilities that can process multi-layer products or materials. An appropriately qualified claim would be "25 percent of the material in this package is 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 available to a substantial majority of consumers 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. The manufacturer should qualify its claim consistent with § 260.11(b)(2).

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.

§ 260.13 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,[935] 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 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 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 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

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[935] The term "used" refers to parts that are not new and that have not undergone any re-manufacturing or reconditioning.

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: Fifty percent of a greeting card's fiber weight is composed from paper that was diverted from the 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 3: 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 4: 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 5: 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 6: 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 7: 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 papermaking production process, the claim is not deceptive.

Example 8: 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 9: 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 10: 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 11: An automotive dealer, automobile recycler, or other qualified entity 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 in the automotive context likely would understand that the engine is used and has not undergone any rebuilding.

Example 12: An automobile parts dealer, automobile recycler, or other qualified entity purchases a transmission that has been recovered from a salvaged or end-of-life vehicle. Eighty-five percent of the transmission, by weight, was rebuilt and 15% constitutes new

materials. After rebuilding[936] 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)." Given consumer perception in the automotive context, these claims are not deceptive.

§ 260.14 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 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.

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[936] 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.

§ 260.15 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. A marketer should not make unqualified renewable energy claims, directly or by implication, if fossil fuel, or electricity derived from fossil fuel, is used to manufacture any part of the advertised item or is used to power any part of the advertised service, unless the marketer has matched such non-renewable energy use with renewable energy certificates.

(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. For instance, marketers may minimize the risk of deception 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 non-renewable energy matched by renewable energy certificates. When this is not the case, marketers should clearly and prominently specify the percentage of renewable energy that powered the significant manufacturing processes involved in making the product or package.

(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 wind energy for 50% of the energy it uses to make the clothing in its line.

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 purchases renewable energy from a portfolio of sources that includes a mix of solar, wind, and other renewable energy sources in combinations and proportions that vary over time. The company uses renewable energy from that portfolio to power all of the significant manufacturing processes involved in making its product. The company advertises its product as "made with renewable energy." The claim would not be deceptive if the marketer clearly and prominently disclosed all renewable energy sources. Alternatively, the claim would not be deceptive if the marketer clearly and prominently stated, "made from a mix of renewable energy sources," and specified the renewable source that makes up the greatest percentage of the portfolio. The company may calculate which renewable energy source makes up the greatest percentage of the portfolio on an annual basis.

Example 3: An automobile company uses 100% non-renewable energy to produce its cars. The company purchases renewable energy certificates to match the non-renewable energy that powers all of the significant manufacturing processes for the seats, but no other parts, of its cars. If the company states, "The seats of our cars are made with renewable energy," the claim would not be deceptive, as long as the company clearly and prominently qualifies the claim such as by specifying the renewable energy source.

Example 4: A company uses 100% non-renewable energy to manufacturer all parts of its product, but powers the assembly process entirely with renewable energy. If the marketer

advertised its product as "assembled using renewable energy," the claim would not be deceptive.

Example 5: A toy manufacturer places solar panels on the roof of its plant to generate power, and advertises that its plant is "100% solar-powered." The manufacturer, however, sells renewable energy certificates based on the renewable attributes of all the power it generates. Even if the manufacturer 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 manufacturer's claim is therefore deceptive. It also would be deceptive for this manufacturer to advertise that it "hosts" a renewable power facility because reasonable consumers likely interpret this claim to mean that the manufacturer uses renewable energy. It would not be deceptive, however, for the manufacturer to advertise, "We generate renewable energy, but sell all of it to others."

§ 260.16 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. Unless marketers have substantiation for all their express and reasonably implied claims, they should clearly and prominently qualify their renewable materials claims. For example, marketers may minimize the risk of unintended implied claims by identifying the material used and explaining why the material is renewable.

(c) Marketers should also qualify any "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 percent bamboo, which grows at the same rate, or faster, than we use it." The marketer still is responsible for substantiating all remaining express and reasonably implied claims.

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." By identifying the material used and explaining why the material is renewable, the marketer has minimized the risk of unintended claims that the product is made with recycled content, recyclable, and biodegradable. The marketer has adequately qualified the amount of renewable materials in the product.

§ 260.17 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." The marketer does not accompany this claim with a general environmental benefit claim. 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 A: ABBREVIATIONS

Abbreviation	Organization/Company Name	Comment #
3Degrees	3 Degrees Group, Inc.	330
3M	3M Company	208
AAAA/AAF	American Association of Advertising Agencies, American Advertising Federation	290
AAFA	American Apparel and Footwear Association	233
ACA	American Coatings Association	237
ACC	American Chemistry Council	318
ACI	American Cleaning Institute	160
ACLCA	American Center for Life Cycle Assessment	140
ACMI	The Art & Creative Materials Institute, Inc.	273
AF&PA	American Forest & Paper Association	171
AFPR	Alliance of Foam Packaging Recyclers	246
Agion	Agion Technologies	139
AHAM	Association of Home Appliance Manufacturers	258
AHPA	American Herbal Products Association	211
Albermarle	Albemarle Corporation	217
ALSC	American Lumber Standard Committee	250
ANA	Association of National Advertisers	268
Antares Group	Antares Group, Inc.	215
APR	Association of Postconsumer Plastic Recyclers	165
ARA	Automotive Recyclers Association	357
Arkema	Arkema, Inc.	236
Armstrong	Armstrong World Industries	363
ARTA	American Reusable Textile Association	343
ASAE	American Society of Association Executives	134
ASTM	ASTM International	235
ATA	Air Transport Association of America, Inc.	314
AWC	American Wood Council	244
AZS Consulting	AZS Consulting, Inc.	283
B&C	Bergeson & Campbell, P.C.	228

Abbreviation	Organization/Company Name	Comment #
BC	BASF Corporation	276
BCI	Battery Council International	284
Benjamin Moore	Benjamin Moore & Co.	340
Boise	Boise, Inc.	194
BSF	Bekaert Specialty Films, LLC	307
CAW	Californians Against Waste	309
CBIA	California Building Industry Association (re-sbumitting LBA's comment)	300
CEI	Community Energy, Inc.	260
CMI	Can Manufacturers Institute	137
CNE and CEPS, collectively Constellation	Constellation NewEnergy, Inc. and Constellation Energy Projects & Services Group, Inc.	271
Cone	Cone LLC	205
CPA	Composite Panel Association	261
CPDA	Chemical Producers & Distributors Association	209
CPSC	Consumer Product Safety Commission	
Crown	Crown Holdings, Inc.	303
CRS	Center for Resource Solutions	224
CSPA	Consumer Specialty Products Association	242
CU	Consumers Union	289, 297
Darman Mfg.	Darman Mfg. Co., Inc	218
DfE	Design-For-Environment	
DLA	Defense Logistics Agency	325
DMA	Direct Marketing Association	249
DOE	Department of Energy	
Domtar	Domtar Corporation	240
DOT	Department of Transportation	
Earth911	Earth911, Inc.	196
Eastman	Eastman Chemical Co.	322
ECM BioFilms	ECM BioFilms, Inc.	316

Abbreviation	Organization/Company Name	Comment #
Ecohabitat	Ecohabitat, LLC (submitted by William Seeger)	53
EcoLogic	EcoLogic, LLC	245
EDS Group	EDS Group, Inc.	321
EEI	Edison Electric Institute	195
EHS Strategies	EHS Strategies, Inc.	111
ENSO	Enso Plastics, LLC	315
EPA	Environmental Protection Agency	288
EPI	Environmental Packaging International	277
EPI Environmental Products	EPI Environmental Products Inc.	173
ESP	Ecosmartplastics (submitted by Terry Feinberg)	17
Evergreen	Evergreen Packaging	188
FIJI Water	FIJI Water Company LLC	231
FMI	Food Marketing Institute	299
FPA	Flexible Packaging Association	292
FSBA	Foresight Sustainable Business Alliance	270
FSC-US	Forest Stewardship Council -- United States	203
GAC	Graphic Arts Coalition	232
Glen Raven	Glen Raven, Inc.	42
GMA	Grocery Manufacturers Association	272
Good Housekeeping	Good Housekeeping Research Institute	78
GPI	Glass Packaging Institute	269
GPR	The Keystone Center, Green Products Roundtable	206
Green Seal	Green Seal, Inc.	280
GreenBlue	Green Blue Institute	328
Hohenstein Institutes America	Hohenstein Institutes America, Inc.	222
IAF	International Accreditation Forum	
IBWA	International Bottled Water Association	337
Institute for Policy Integrity	Institute for Policy Integrity at New York University School of Law	241

Abbreviation	Organization/Company Name	Comment #
Interface	Interface, Inc.	310
Intermountain Auto Recycling	Intermountain Auto Recycling, Inc.	200
IoPP	Institute of Packaging Professionals	142
IPC	IPC--Association Connecting Electronics Industries	202
ISEAL	ISEAL Alliance	204
ISO	International Organization for Standardization	
ITI	Information Technology Industry Council	313
JM	Johns Manville	305
KAB	Keep America Beautiful	223
Kadinger's	Kadinger's Inc.	358
KCMA	Kitchen Cabinet Manufacturers Association	362
LBA	Leading Builders of America	293
Leber Jeweler	Leber Jeweler Inc.	179
Letica	Letica Corporation	146
Liberty Auto Parts and Salvage	Liberty Auto Parts and Salvage Company	347
LKQ	LKQ Corporation	141, 349
Martex	Martex Fiber Southern Corp	225
Mass DPU	Massachusetts Department of Public Utilities	247
MSC	Marine Stewardship Council	304
MWV	MeadWestvaco	143
NAD	National Advertising Division	
NAHB	National Association of Home Builders	162
NAIMA	North American Insulation Manufacturers Association	210
NALFA	North American Laminate Flooring Association	254
Nan Ya Plastics	Nan Ya Plastics Corporation, America	238
NAPCOR	National Association for PET Container Resources	187
NativeEnergy	NativeEnergy, Inc.	12
Natural Burial	Natural Burial Company	113
NatureWorks	NatureWorks LLC	274

Abbreviation	Organization/Company Name	Comment #
NGC	New NGC, Inc.--d/b/a National Gypsum Company	136
NOP	National Organic Program	
Northeast Laboratories	Northeast Laboratories, Inc.	230
NPA	Natural Products Association	257
NRDC	Natural Resources Defense Council	214
NRG	NRG Energy, Inc.	248
NSWMA	National Solid Wastes Management Association	212
OCA	Organic Consumers Association	295
Old Mill	Old Mill Power Company	355
O'Mara	O'Mara Incorporated	108
OSHA	Occupational Safety and Health Admistration	
OTA	Organic Trade Association	197
OWS	O.W.S. Inc.	333
Oxo Alliance	OxoBiodegradable Plastic Alliance	256
P&G	Proctor & Gamble	159
Paramount Farms	Paramount Farms, Inc.	298
PARTS	Pennsylvania Automotive Recycling Trade Society	199
PEC	Plastics Environmental Council	166, 167, 168
Pella	Pella Corporation	219
PFA	Polyuerethane Foam Association	263
PMA	Promotion Marketing Association, Inc.	262
PPC	Paperboard Packaging Council	221
PRBA	PRBA-The Rechargeable Battery Association, Inc.	317
PRC	Paper Recycling Coalition	338
PRSA	Public Relations Society of America	155
RBRC	Rechargeable Battery Recycling Corporation	287
REC	Renewable Energy Certificate	
REMA	Renewable Energy Markets Association	251
Reserve	Climate Action Reserve	135

Abbreviation	Organization/Company Name	Comment #
RILA	Retail Industry Leaders Association	339
SCADA	State of California Auto Dismantlers Association	331
Scotts	Scotts Company LLC	320
SCS	Scientific Certification Systems	264
Seventh Generation	Seventh Generation, Inc.	207
SFI	Sustainable Forestry Initiative, Inc.	151
Shaw	Shaw Industries Group, Inc.	220
Sierra Club et al.	Sierra Club, ForestEthics, and Dogwood Alliance	308
SMART	Secondary Materials and Recycled Textiles Association	234
South Windsor Auto Parts	South Windsor Auto Parts, Inc.	329
SPI	Society of the Plastics Industry, Inc.	181
Subway Truck Parts	Subway Truck Parts, Inc.	351
Sunshine Makers	Sunshine Makers, Inc.	51
Symphony	Symphony Environmental Technologies PLC	150
Terressentials	Terressentials LLC	296
The Inner Sunset Group	The Inner Sunset Group, Inc.	13
TTB	Alcohol and Tobacco Tax and Trade Bureau	
UL	Underwriters Laboratories	192
Unifi	Unifi, Inc.	163
USCC	US Composting Council	147
USDA	United States Department of Agriculture	193
USG	USG Corporation	149
Veritable Vegetable	Veritable Vegetable Inc. (submitted by Peggy da Silva)	93
Vince's U Pull It Auto Parts & Recycling	Vince's U Pull It Auto Parts & Recycling Inc.	359
Weyerhaeuser	Weyerhaeuser Company	336
WI	Wine Institute	259
WLF	Washington Legal Foundation	335
WM	Waste Management	138