

PROPOSED REVISIONS TO THE GREEN GUIDES
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FEDERAL REGISTER PAGINATION¹

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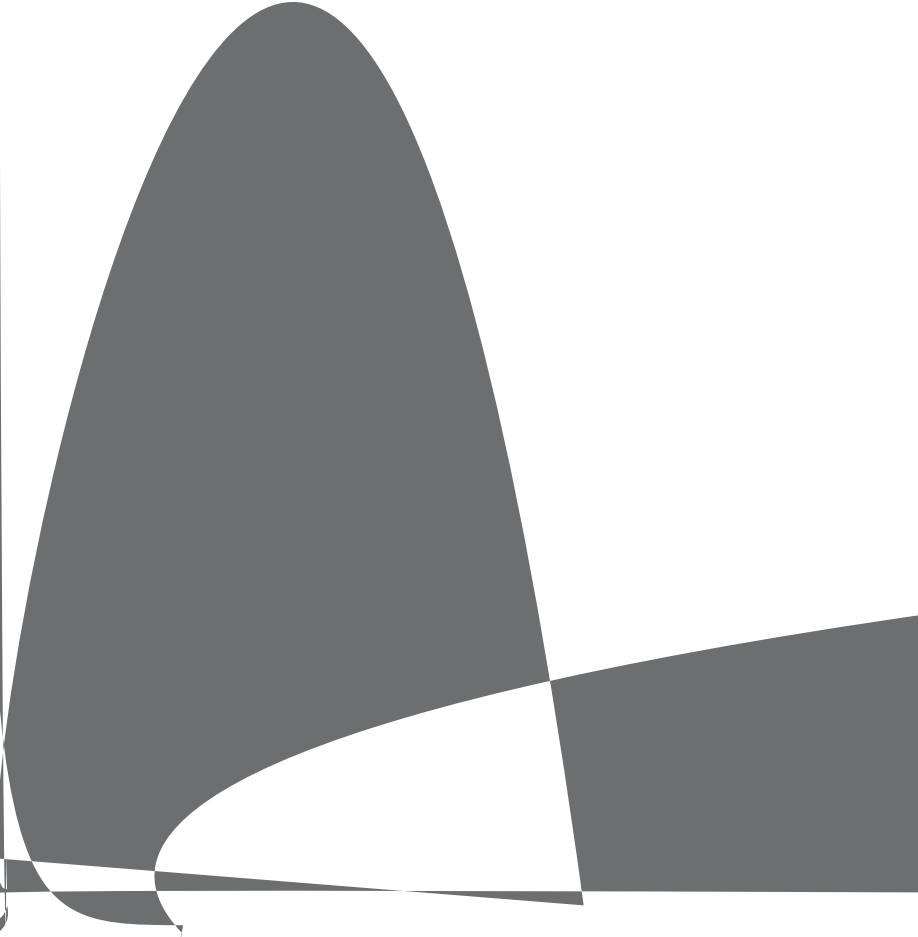
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FEDERAL TRADE COMMISSION

16 CFR Part 260

Guides for the Use of Environmental Marketing Claims

AGENCY: Federal Trade Commission. ACTION: Proposed revisions to guidelines.

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

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

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

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

SUPPLEMENTARY INFORMATION

I. *

Environmental marketing claims are useful sources of information for consumers, but only when they are true. Ensuring that such claims are truthful is particularly important because consumers often cannot determine for themselves whether a product, package,

or service actually possesses the advertised environmental attribute. Because there is a potential for consumer confusion about environmental claims, guidance from the FTC can benefit both businesses and consumers alike.

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

Periodic review ensures that the Guides keep pace with evolving consumer perceptions and new environmental claims. Since the FTC last revised them in 1998, the marketplace has been dynamic. As consumers have become increasingly concerned about the environmental impact of the products and services they use, marketers have expanded their promotion of the environmental attributes of their products and services. Some of these promotions have prompted enforcement action by the FTC, including cases challenging certain environmental benefit claims as false, such as degradable paper products or so-called bamboo textiles that are made with an...

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decompose in a reasonably short period of time no more than one year.

Moreover, if a solid product is destined for a landfill, an incinerator, or a recycling facility, the marketer should not make unqualified degradable claims because the product will not degrade within a year. Similarly, when making an unqualified compostable claim, a marketer should be able to show that the product will break down into usable compost in a safe and timely manner approximately the same time as the materials with which it is composted. The proposed Guides also clarify and expand guidance about claims that products are free of particular materials. Finally, the proposed Guides highlight advice in the current guides that the use of recyclable depends on how many consumers and communities have access to recycling facilities for the advertised product.

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

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

I. Background

A. The Green Guides

The Commission issued the Green Guides, 16 CFR Part 260, to help marketers avoid making environmental claims that are unfair or deceptive under Section 5 of the Federal Trade Commission Act (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 in violation of the law.

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⁴ *Id.*

⁵ See, e.g., *Indoor Tanning Ass'n*, Docket No. C-4290 (May 13, 2010) (consent order) also Dietary Supplements: An Advertising Guide for Industry FTC, Dietary Supplements: An Advertising Guide for Industry (2009), 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 Citations to comments identify the commenter, the particular Federal Register Notice to which the commenter responded (533431 Green Guides Review; 533254 Carbon Offsets and Renewable Energy Certificates Workshop; 534743 Green Packaging Workshop; or 536013 Green Building and Textiles Workshop), and the assigned comment number.

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

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)). The FTC administers several other environmental and energy-related rules and guides. See *Guide Concerning Fuel Economy Advertising for New Automobiles* (16 CFR Part 259), *Appliance Labeling Rule* (16 CFR Part 305), *Fuel Rating Rule* (16 CFR Part 306), *Alternative Fuels and Alternative Fueled Vehicles Rule* (16 CFR Part 309), *Recycled Oil Rule* (16 CFR Part 311), and *Labeling and Advertising of Home Insulation Rule* (16 CFR Part 460).

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

³ 16 CFR 260.5.

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

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

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

⁹ See 72 FR 66094 (Nov. 27, 2007).

¹⁰ See 73 FR 11371 (Mar. 3, 2008).

¹¹ See 73 FR 32662 (June 10, 2008).

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

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

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



commenters suggested the Guides were no longer needed.

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

2. Analysis

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

B. Industry Compliance

1. Comments

In response to questions about industry compliance with the Guides, some commenters asserted that deceptive marketing claims have increased in the environmental area. For example, TerraChoice Environmental Marketing, Inc. reported the results of its 2007 review of over 1,000 products and expressed concern that many marketers are using vague claims, such as environmentally friendly and green, without defining terms or providing evidence to support their claims.³¹ It also noted that many marketers highlight relatively

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

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

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

³¹ TerraChoice, Comment 533431-00040 at 3, 6.

insignificant environmental benefits of a product while distracting consumers from much more significant impacts. Another commenter observed that companies are marketing the environmentally friendly nature of their products through words or pictures while only minimally (if at all) qualifying such claims.³³ In addition, other commenters noted increased instances of greenwashing by marketers using a plethora of buzzwords like sustainable, environmentally friendly, carbon offsets, [and] green.³⁴ Some commenters suggested that bringing more enforcement actions could help address this issue.³⁵

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

Panelist NatureWorks LLC echoed this concern, noting that even industry members familiar with the Guides are not aware that they apply to business-

³² *Id.* at 1.

³³ Jim Krenn (Krenn), Comment 533431-00014 at 3.

³⁴ Phil Bailey (Bailey), Comment 533431-00028 at 3; see also Hammer, 533431-00017 at 4-5; Healey, Comment 533431-00048 at 2-5.

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

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

³⁷ Graphic Arts Coalition, Comment 533431-00060 at 1.

³⁸ EPI, Green Packaging Workshop Tr. at 232-233.

to-business transactions.³⁹ Workshop panelists, therefore, recommended that the Guides emphasize their application to business-to-business transactions and not just business-to-consumer marketing.⁴⁰ Environmental Packaging International proposed, for instance, that the Guides include specific examples of such business-to-business transactions.⁴¹

2. Analysis

The Guides purpose is to help marketers avoid making unfair or deceptive environmental claims. For marketers who nevertheless violate the law, the Commission will continue its enforcement efforts. The Commission brought several recent actions involving false or unsubstantiated environmental claims. For example, last year, the Commission announced three actions charging marketers with making false and unsubstantiated claims that their products were biodegradable.⁴² In addition, the Commission 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.⁴³

The Commission proposes revising the Guides to state more clearly that they apply to business-to-business transactions and not just business-to-

³⁹ See Snehal Desai, NatureWorks LLC (NatureWorks), Green Packaging Workshop Tr. at 246-247.

⁴⁰ See, e.g., Scot Case, TerraChoice (TerraChoice), Green Packaging Workshop Tr. at 244.

⁴¹ EPI, Green Packaging Workshop Tr. at 252.

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

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

ISO 14021 comply with the Guides the environment. when there is a discrepancy. Another commenter stressed the importance of close alignment with global standards, noting that the discrepancy in how the Green Guides and ISO treat recyclable claims⁶⁰ causes problems with transnational packaging.

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

2. Analysis

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

⁵⁹AF&PA, Comment 533431-00019 at 8; also Georgia-Pacific, Comment 533431-00007 at 6.

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

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

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

⁶³NAIMA, Comment 533431-00042 at 12; Saint Gobain, Comment 533431-00037 at 11-12.

⁶⁴The 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).

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

⁶⁶NAIMA, Comment 533431-00042 at 11; Saint Gobain, Comment 533431-00031 at 11.

⁶⁷EPI, Comment 533431-00063 at 4.

⁶⁸Id., citing Cal. Pub. Res. Code §§ 42355-42357. ASTM International (ASTM) is an international standards organization that develops

and publishes voluntary consensus technical standards for a wide range of materials, products, systems, and services.

⁶⁹International Paper, Comment 533431-00055 at 3.

⁷⁰EPA-EPPP, Comment 533431-00038 at 7.

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

⁷²16 CFR 260.2.

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

⁷⁹See, e.g., GMA, Comment 533431-00083 at 10; PCPC, Comment 533431-00075 at 4; SDA, Comment 533431-00020 at 2; SPL, Comment 533431-00036 at 11.

⁸⁰Georgia-Pacific, Comment 533431-00007 at 7.

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

⁸²John Delfausse, EsteeLauder Companies (Estee Lauder), Green Packaging Workshop Tr. at 186; Michigan State Univ., Green Packaging Workshop Tr. at 186; see also ACC, Comment 533431-00023 at 5 (suggesting that LCA can be a useful tool in identifying marketing claims and

533431-00023 at 5 (suggesting that LCA can be a useful tool in identifying marketing claims and

⁷³See Part VLB, *infra*.

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

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

⁷⁶*Id.*

⁷⁷16 CFR 260.7 n.2.

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

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

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

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

According to GreenBlue, because such trade-offs are sufficiently common, Guides should discourage general environmental benefit claims, even when accompanied by a specific-attribute qualifier, unless a company is willing to include a full explanation of environmental trade-offs.

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

3. Consumer Perception Evidence

Only a few commenters submitted consumer perception evidence addressing general environmental benefit claims.¹¹³ Thus, the Commission's study focused on this issue. The study examined whether both unqualified and qualified general green claims suggested that the product has particular environmental benefits. Specifically, the study asked respondents whether these types of claims conveyed that the product had any of the following seven environmental attributes: made from

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

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

renewable materials, recyclable, made with renewable energy, biodegradable, non-toxic, and compostable. Thus, for example, would consumers viewing a green or an eco-friendly claim think that the advertised product had specific green attributes, such as being made with recycled materials or being recyclable? Additionally, if the general green claim were qualified with a specific environmental attribute, such as green - made with renewable materials, would consumers think the product had environmental benefits beyond the specific attribute mentioned?¹¹⁴

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

In addition to asking consumers about unqualified and qualified-general environmental benefit claims, the study asked consumers how they perceive certain specific-attribute claims alone (*i.e.*, claims that a product is made with recycled materials, made with renewable materials or made with renewable energy). This allowed the Commission to compare qualified-general claims to specific-attribute claims to determine the extent to which the general environmental claim,

¹¹⁴ The Commission tested the following qualified-general claims: green - made with renewable materials; green - made with renewable energy; green - made with recycled materials; eco-friendly - made with renewable materials; eco-friendly - made with renewable energy; and eco-friendly - made with recycled materials.

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

green, eco-friendly) contributed to consumer perceptions. On average, 23 percent of respondents viewing specific-attribute claims indicated that the claim implied specific benefits in addition to the attribute stated.

The study further examined whether consumers believe that environmental claims suggest anything about any negative environmental impact that may come from the product. Twenty-seven percent of respondents interpreted the unqualified claims green and eco-friendly as suggesting the product has no negative environmental impact.¹¹⁶ Sixteen percent of respondents viewing a qualified green claim and 17 percent of those viewing a qualified eco-friendly claim made the same inference, while only ten percent of respondents viewing a specific-attribute claim made this inference.

A. Analysis and Guidance

Both the comments¹¹⁷ and FTC staff's Internet surf¹¹⁸ indicate that general environmental claims are pervasive. Such general claims appear both alone¹¹⁹ and accompanied by specific claims.¹²⁰ To address their potential for consumer deception, and based on the comments and the Commission's consumer perception study, the Commission proposes advising marketers not to make unqualified general environmental benefit claims.¹²¹ The proposed, revised Guides also provide more prominent guidance on how to effectively qualify general environmental benefit claims.

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

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

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

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

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

¹²¹ This proposed guidance can be found in 16 CFR 260.4.

technical product claims that may be difficult for consumers to interpret or verify on their own.³⁶ Cone LLC affirmed that consumers rely on certifications when evaluating environmental claims. Its opinion survey found that 80 percent of respondents believed that certification by third-party organizations is important in providing oversight to ensure environmental messaging by companies is accurate.³⁷

One commenter, however, noted that consumers typically cannot verify third-party certifications. Therefore, there is a heightened degree of trust involved, and there is a heightened degree of credibility that is at stake.³⁸ Other commenters cautioned that seals and logos may communicate a general claim of environmental preferability with no means for the consumer to determine which environmental benefits form the basis for the claim.³⁹

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

a. Use of Certifications and Seals in Marketing

Several panelists and commenters suggested that the FTC provide additional guidance on when the display of certifications and seals is likely to mislead consumers.⁴⁰ For example, one commenter asserted that seals of approval and eco-labels that communicate a general environmentally friendly message to consumers should be treated as environmental claims within the scope of the guides and be subject to

applicable principles and criteria.⁴¹ This commenter suggested that the FTC more prominently feature its advice on the need to qualify certain types of seals that could connote general environmental benefits.⁴² Another commenter suggested that marketers generally should not use vague, undefined environmental terms but should be able to incorporate such terms into certifications, as long as the marketer makes the method and terms of the certification publicly available and easily accessible.⁴³

Several commenters recommended that the Guides include examples illustrating ways in which marketers could effectively qualify third-party certifications a 1 Tf 1.05368 0 TD 675.5 7.002 0 0 5.85 310.4062 TTD 549 Tm 8 Tw

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¹³⁶USGBC, Comment 534753-00027 at 3.

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

¹³⁸NAD, Green Packaging Workshop Tr. at 46.

¹³⁹CSPA, Comment 533431-00049 at 2-3; P&G, Comment 533431-00070 at 2; SDA, Comment 536013-00018 at 2; USGBC, Comment 536013-00029 at 6; Saint-Gobain, Comment 533431-00030 at 7-8.

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

¹⁴¹P&G, Comment 533431-00070 at 2; also USGBC, Comment 536013-00029 at 6 (stating that marketers should specify the attributes to which a seal refers in order to help consumers interpret the meaning); CSPA, Comment 533431-00049 at 3; Saint-Gobain, Comment 533431-00037 at 3. ¹⁴²P&G, Comment 533431-00070 at 2; CFR 260.7(a), Example 5.

¹⁴³Greenpeace USA, Comment 536013-00020 at 3.

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

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

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

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

¹⁴⁸Skye Con, Comment 536013-00036 at 3. ¹⁴⁹SBIC, Green Building and Textile Workshop Tr. at 224; also Gensler, Green Building and Textile Workshop Tr. at 135 (stating that marketers need to make sure that graphics do not imply more than is actually being delivered); OMI, Comment 536013-00022 at 3 (noting that advertisements must clearly state whether a logo refers to membership only or a verifiable claim of certification).

¹⁵⁰ACC, Comment 536013-00030 at 4; NAIMA, Comment 536013-00017 at 8.

¹⁵¹USGBC, Comment 534743-00027 at 4; also SDA, Comment 534743-00028 at 3.

¹⁵²USGBC, Comment 534743-00027 at 4.

¹⁵³ATA, Comment 533431-00041 at 8 (stating that requiring third-party certification to substantiate claims would impose unnecessary and impractical burdens on advertisers and that those claims may already be adequately substantiated under the FTC Act); AF&PA, Comment 533431-00019 at 2; Sappi Fine Paper North America (Sappi), Comment 534743-00022 at 2; The Vinyl Institute (Vinyl Institute), Comment 533431-00046 at 4.

¹⁵⁴See Healey, Comment 533431-00048 at 7 (stating that FTC could prohibit broad claims unless they are certified by an independent party); Patagonia, Inc. (Patagonia), Comment 536013-00011 at 1 (noting that marketers making a chemical use or water/energy conservation claims in textiles should substantiate claims with third-party certifications).

¹⁵⁴See, e.g., ACC, Comment 536013-00030 at 3-4; AF&PA, Comment 536013-00021 at 2-3; AZS

evaluated the product.¹⁷¹ The marketer could avoid deception by using clear and prominent qualifying language to alert consumers that it created the certifying program.

Proposed Example 2 involves a marketer who displays a seal of approval bestowed by a trade association in which the marketer is a member. In this case, the trade association evaluated the environmental attributes of the marketer's product. Because the seal of approval implies that a third-party evaluated and certified the product, consumers likely expect that the endorsing party is truly independent from the marketer. In this case, however, the certifier is not a truly independent entity because the marketer pays membership dues to the association. Under Section 5 of the FTC Act, as explained by the Endorsement Guides, marketers are required to disclose a material connection, or a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement.¹⁷² Accordingly, this example makes clear that the marketer's failure to disclose its material connection with the endorsing association, *i.e.*, that it is a dues-paying member of the endorsing association, is deceptive.

Proposed Example 3 similarly illustrates a failure to disclose a material connection and shows how the name of a certifying organization can be misleading. In this example, the marketer is a member of an industry trade association, the American Institute of Degradable Materials, that evaluates the biodegradability of its members' products. The association's name may lead consumers to believe that the association is an independent certifying organization. Consumers likely place different weight on a certification from an industry association than from an independent, third-party. Because this

advertisement does not disclose that the certifier is an industry trade association, the advertisement is likely to be deceptive. As shown in the example, the marketer could avoid this deception by disclosing that the American Institute of Degradable Materials is an industry trade association.

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

h. Certifications and Seals as General Environmental Benefit Claims
The current Green Guides state that unqualified certifications and seals of

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

¹⁷² 16 CFR 255.5.

¹⁷³ 16 CFR 260.7(a).

¹⁷⁴ *Id.*

¹⁷⁵ The Commission's study did not test consumer interpretation of seals of approval or certifications. Given the wide diversity of seal and certification designs, it would have been difficult to draw general consumer perception conclusions from testing a particular seal design. No comment submitted relevant consumer perception evidence and 6.

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

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

a consensus, however, regarding which specific protocol(s) the Commission should consider.¹⁸⁹ Finally, the EPA s

¹⁸⁹The following commenters favor some degree of reference to technical standards or testing protocols: ECM BioFilms, Comment 534743-00011 at 3 (ASTM D 5526 (plastics under accelerated landfill conditions)); EPA-SPN, Comment 536013-00062 at 12 (various harmonized tests accessible online from the EPA); EPI, Comment 533431-00063 at 4 (the applicable [unspecified] ASTM or ISO standard); Georgia-Pacific, Comment 533431-0007 at 9-10 (the British Standards Institution s EN 14327:2000 (requirements for packaging and packaging waste) and ISO 14855:1999 (aerobic biodegradability of plastics)); SPI, Comment 533431-00036 at 6 (existing [unspecified] ASTM standards); see also Graphic Arts Coalition, Comment 533431-00060 at 4 (The business community... oftentimes seeks a specific test method to verify the claims. Inclusion in the guides of acceptable test methods might be an appropriate step.); Tandus, Comment 533431-00021 at 1 (If a test method could be specified, it might help qualification of such claims).

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

¹⁹¹The Commission has placed this information on the public record.

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

¹⁹³See APCO, Biodegradable and Compostable Survey Topline at 2.

¹⁹⁴*Id.* at 1.

¹⁹⁵The Commission s consumer perception study did not specifically ask consumers about unqualified biodegradable claims.

¹⁹⁶This proposed guidance can be found in 16 CFR 260.8.

¹⁹⁷See 40 CFR Part 258.

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

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

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

²⁰¹*Id.*

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

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

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

²⁰⁵EPA-SPN, Comment 536013-00062 at 6, 12.

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

²⁰⁷OxoBiodegradable Plastics Institute, Frequently Asked Question 1 (<http://www.oxobio.org/faq.htm#q4>) (Heat and/or sunlight are required to initiate degradation and there has to be oxygen present); BPI, Background on Biodegradable Additives (Mar. 18, 2009) at 4 (oxo-biodegradables . . . theoretically foster oxidation and chain scission in plastics when exposed to heat, air and/or light).

²⁰⁸The root word, degradable, is identical; consequently, consumers' basic intuition about decomposition after customary disposal is likely to be the same, regardless of prefixes such as bio-, photo-, or oxo-. The National Advertising Division also found that oxo-biodegradable is similar to degradable. With respect to bags marketed as 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).

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

²¹⁰16 CFR 260.7(c).

²¹¹BPI, Comment 533431-00087 at 4; EPA-EPPP, Comment 533431-00038 at 8; EPA-SPN, Comment 536013-00062 at 12; also Earthcycle Packaging Ltd., Comment 534743-00005 at 1.

²¹²See APCO, Biodegradable and Compostable Survey Topline at 9.

²¹³*Id.* at 8.

²¹⁴*Id.* at 6.

²¹⁵This proposed guidance can be found in 16 CFR 260.7.

²¹⁶See *Food Composting Infrastructure*,

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

b. Substantiating Compostable Claims

Three commenters suggested that the Guides reference two laboratory protocols adopted by ASTM:

(1) Standard specification D 6400 for compostable plastics; and (2) Standard specification D 6868 for biodegradable plastics used as coatings. The

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composting systems vary, this procedure is not intended to simulate the environment of any particular composting system. However, it is expected to resemble the environment of a composting process operated under optimum conditions. One example of such an optimum condition is the testing of only a small piece of the subject material a two-centimeter scrap rather than full-size plastic feedstock waste items.

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

²²⁶See, e.g., Lisa McKinnon, *Compostable Controversy*, *Ventura County Star*, Mar. 16, 2009 (noting that a facility cannot convert plastics to compost in a commercially viable way within 90 days); Press Release, Ohio University, Aug. 24, 2009 available at (<http://www.ohio.edu/outlook/08-09/August/791.cfm>) (stating that a modern facility cannot process a brand of plastic dining utensils in a timely manner); Janice Sittom, *Consider's Guide to Compostables Collection at Events*, *BioCycle*, Aug. 2009, at 25 [P]roducts accepted for composting in one location may not be accepted for composting in another location. It all depends on the infrastructure and what a processor will accept as feedstock.); Rhodes Yepsen, *Operation Insights: Compostable Products*, *BioCycle*, June 2008 (Facilities may reject certain plastics because visually they are indistinguishable from conventional plastics and can be tricky to compost).

scarcity of large-scale facilities, appropriate facilities may not exist in your area. 46 CFR 260.7(c), Example 4.

²¹⁸*Id.*

²¹⁹See Part V.E, *infra*.

²²⁰See Rhodes Yepsen, *Compostable Products Go Mainstream*, *BioCycle*, July 2009, at 25.

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

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

²²³See ASTM D 6400 at § 1.1; ASTM D 6868 at § 1.1.

²²⁴See ASTM D 5338-98 (Reapproved 2003) at § 5.2 (Because there is a wide variation in the construction and operation of composting systems and because regulatory requirements for

²²⁷*Id.*

²²⁸See Part V.C.4, *supra*.

²²⁹GPI requested clarification on the timely manner guidance. Comment 534743-00026 at 8.

²³⁰See 63 FR 24241 n.7 (May 1, 1998); FTC Staff's Business Brochure at 7.

²³¹16 CFR 260.7(d).

²³²See *id.*, Examples 4, 6, and 7.

population where programs are available to recycle the products

The Guides further advise that the disclosure recyclable where facilities exist is not an adequate qual

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²³⁸EPA, Green Packaging Workshop Tr. at 81, 92-93.

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

²⁴⁰ISO 14021 7.72:1999(E).

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

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

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

²⁴⁴EPI, Comment 533431-00063 at 2 (clarifying the definition of substantial majority would encourage the recovery of more materials that have

the capacity to be recycled). Commenters also suggested that the FTC, or another agency, compile data concerning consumers' access to recycling facilities for specific materials and provide a harbor list of materials that the FTC considers recyclable to a substantial majority. See, e.g., EPA, Green Packaging Workshop Tr. at 79-80; EPI, Comment 533431-00063 at 3; Ekster, Green Packaging Workshop Tr. at 183; NRC, Green Packaging Workshop Tr. at 92.

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

²⁴⁶Tetra Pak, Comment 536013-00012 at 2-3.

²⁴⁷The three-chasing-arrows symbol is also known as the Möbius Loop.

²⁴⁸16 CFR 260.7(d), Example 2.

²⁴⁹Id.

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

²³³See *id.*, Example 6.

²³⁴See *id.*, Example 5.

²³⁵FTC Staff's Business Brochure at 8.

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

²³⁷EPI, Green Packaging Workshop Tr. at 237-238.

beverage marketing to children and adolescents during 2006); *Mihailovich v. Laatsch*, 359 F.3d 892, 909-10 (9th 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).

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

4. Analysis and Guidance

The comments sought additional guidance concerning recycled content claims, focusing mainly on pre-consumer recycled content claims for textiles, the distinction between pre- and post-consumer recycled content, and the appropriate methods for calculating recycled content. The Commission analyzes these issues as well as issues raised by its consumer perception study below.

a. Pre-consumer Recycled Content Claims for Textiles

Although the Guides do not specifically address textiles, they provide advice concerning recycled content claims for all products, including textiles. To constitute pre-consumer recycled content, materials must have been recovered or otherwise diverted from the solid waste stream ... during the manufacturing process (pre-consumer) . . . 289 Examples 1-3 in the current Guides discuss factors relevant to determining whether the material was diverted from the solid waste stream the amount of reprocessing needed before reuse and whether the material is normally reused in the original manufacturing process. Specifically, when spilled raw materials and scraps undergo only minimal amount of reprocessing and are normally reused in the original manufacturing process they are not diverted from the solid waste stream (and, therefore, do not qualify as recycled content).90

The commenters discussion of innovations in the textile industry highlights difficulties in using the existing guidance to determine whether a particular material qualifies as recycled content.91 The commenters explain that the textile industry for many years has sought to reuse waste materials from the manufacturing process and that recent innovations have allowed manufacturers to put that material to higher use. These innovative

289 16 CFR 260.7(e). The Guides further specify that the advertiser must have substantiation that the material would otherwise have entered the solid waste stream.

290 See 16 CFR 260.7(e), Example 3; also 16 CFR 260.7(e), Examples 2 and 3.

291 The difficulty in determining whether material qualifies as pre-consumer recycled content is not exclusive to the textile industry. One commenter from the lumber industry expressed concern about the pre-consumer recycled content claims of its competitors. Weyerhaeuser, Comment 533431-00084 at 6. It asserted that some companies interpret recycled content to include chips produced by sawmills as a byproduct of lumber production. Weyerhaeuser stated that it did not believe that this was a common interpretation of recycled content and did not treat such materials as recycled content.

processes likely do not divert the waste material from the solid waste stream because the material already was being reused (albeit in a lower value form). Despite the fact that these higher-use processes do not satisfy the Commission s guidance on recycled content (diversion from the solid waste stream), they satisfy the two factors the Commission considers in determining if waste is diverted from the solid waste stream. Specifically, the innovations may involve significant reprocessing before the material can be reused, and the material may be reused in something different from the original manufacturing process. These innovations, therefore, reveal some ambiguity in the Commission s current guidance.

The comments, however, did not address the broader issue of whether the Commission should revise its guidance for pre-consumer recycled materials generally, and, if so, what changes it should make.92 For instance, the comments did not address whether the Commission should eliminate the factors it currently uses to determine if material is diverted from the solid waste stream. In addition, it is unclear whether consumers interpret recycled content to mean more than diversion from the solid waste stream. For example, do they believe that any material that is significantly reprocessed and reused constitutes recycled content? If material is reused in place of virgin material, do consumers consider that material recycled content? If, over time, it becomes standard practice within an industry to reuse certain material, do consumers still regard that material as constituting recycled content? The Commission, therefore, declines to propose changes to its guidance at this time.93 Instead, the Commission solicits comment on what changes, if any, it should make to its existing guidance on pre-consumer recycled content claims for all products. In particular, the Commission seeks evidence of consumer perception of pre-consumer recycled content claims.

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

Some commenters recommended that the Guides advise marketers to make claims only for the total amount of recycled content in an item, and not to

292 One textile industry member suggested that recycled content claims hinge on whether there has been a change in form (e.g., from chip to fiber to yarn). In the Commission s judgment, it is unlikely that consumers would perceive material as recycled content merely because of a change in form.

293 This guidance can now be found in 16 CFR 260.12.

distinguish between the amount of pre-consumer and post-consumer materials used in that item. The Commission does not propose adding this advice to the Guides. Currently, marketers making recycled content claims have the option to disclose whether the recycled content is pre-consumer or post-consumer. The Commission has no evidence that specific claims about the type of recycled content mislead consumers. In the absence of evidence that these terms are deceptive, the Commission declines to advise marketers that they should continue using them.

The Commission also does not propose incorporating the ISO 14021 definition of post-consumer material into the Guides. As discussed above, material returned from the distribution chain (e.g., overstock magazines) qualifies as post-consumer recycled material under ISO 14021. It is unlikely, however, that consumers would interpret such material as post-consumer recycled content because the material never actually reaches consumers. The commenters did not provide any consumer perception evidence to the contrary. Under the Guides, therefore, marketers may claim that this material constitutes recycled content, but not post-consumer recycled content.

c. Calculating Recycled Content

Currently, the Guides advise marketers that recycled content claims may be based on the annual weighted average of recycled content in an item.94 Certain commenters suggested that the Guides allow for alternative calculation methods, such as the average amount of recycled content within a product line or across all product lines, or an offset-based approach.95

The Commission does not propose making the suggested changes. As some commenters cautioned, claims based on these alternative calculation methods could mislead consumers by implying that products contain more recycled content than they actually do. Indeed, these approaches could permit marketers to make recycled content claims for products that do not contain any such material. For example, a marketer may sell residential carpeting

294 16 CFR 260.7(e), Example 9.

295 As noted above, one commenter argued that requiring products to have a minimum percentage of recycled content may constrain the ability of vertically-integrated manufacturers to use recycled content. The Guides do not specify minimum recycled content levels for products. The Guides permit marketers to make recycled content claims for products with only a small percentage of recycled content, as long as the claims are adequately qualified.

²⁹⁸Although relatively few products are made from 100 percent recycled materials, those that are

²⁹⁶For mathematical simplicity, the hypothetical assumes equal sales of each product.

²⁹⁷16 CFR 260.7(e), Example 9.

³⁰¹Letter from the EPA Stratospheric Protection Division, Mar. 18, 2010,

examples in the current Guides, cited above, into this section, and adding an additional example.

a. Free-of Claims

Marketers can always substantiate free-of claims by confirming that their products are, in fact, completely free of the relevant substance. As noted above, however, commenters raised a more difficult issue: whether marketers should be able to make free-of claims if their products contain background levels or trace amounts of a substance. No commenters provided evidence regarding how consumers interpret free-of claims. Accordingly, the Commission must apply its own expertise to

³⁴⁰ISO 14021 states that free-of claims should not be based on the absence of ingredients or features which have never been associated with the product category. ISO 14021 5.7(p):1999(See also Environmental Claims: A Guide for Industry and Advertisers, Competition Bureau Canada, Canadian Standards Association, June 25, 2008, Clause 5.17.

³³⁹See 75 FR 41696, 41715 (July 10, 2010) (requiring that labels for compact fluorescent light bulbs disclose that the bulbs contain mercury).

³⁴¹If reasonable consumers would interpret a particular free-of claim as making a general environmental claim, then the marketer should comply with the guidance in revised Section 260.4 regarding general environmental benefit claims.

³⁴²The Commission also proposes moving the example into this new proposed section.

³⁴³SDA, Comment 534743-00028 at 2.

³⁴⁴This guidance can now be found in 16 CFR 260.16.

³⁴⁹See, e.g., Dow, Comment 533431-00010 at 8; FPI, Comment 533431-00074 at 2; GMA, Green Packaging Workshop Presentation <http://www.ftc.gov/bcp/workshops/packaging/presentations/tullier.pdf>; International Paper, Comment 533431-00055 at 8.

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³⁴⁵GPI, Comment 534743-00026 at 8-9.

³⁴⁶This guidance can now be found in 16 CFR 260.13.

³⁴⁷See, e.g., Eastman, Comment 533431-00051 at 1 (stating that sustainable and green are the most significant new additions to the vocabulary describing the environmental benefits of products); Dow, Comment 533431-00010 at 9.

³⁴⁸GMA, Green Packaging Workshop Tr. at 112; see also ACC, Green Packaging Workshop Tr. at 241; Weyerhaeuser, Comment 533431-00084 at 2.

Comment 534743-00020 at 1 (stating that the FTC should prohibit use of the term **sustainable** and any claims related to the sustainability of a product in all on-product or off-product labels or claims); ILSR, Green Packaging Workshop Tr. at 144.

³⁶¹ SPC, Green Packaging Workshop Presentation at (<http://www.ftc.gov/bcp/workshops/packaging/presentations/johnson.pdf>).

³⁶² *Id.* But see ACC, Comment 533431-00023 at 9 (asserting the Guides should cover sustainability claims because they can be appropriately qualified); AF&PA, Comment 533431-00083 at 3-4 (recommending the Guides allow use of **sustainable**, provided the marketer transparently communicates a reasonable basis for the claim; also noting that ISO is expecting to amend its current prohibition of the term due to growing experience and new consumer attitudes).

³⁶³ See, e.g.

³⁷⁷Although 25 percent of respondents cited a specific environmental benefit, these responses were distributed over ten different environmental benefits (

³⁸⁹USDA Food Safety and Inspection Service, Fact Sheet, Meat and Poultry Labeling Terms, available at (http://www.fsis.usda.gov/Fact_Sheets/). The fact sheet further notes that ~~the~~ label must explain the use of the term natural (such as - no

meaning.⁴⁰⁹ One commenter explained that natural claims for textiles are unclear because the products have undergone significant transformation from the raw material they contain.¹⁰ Another asserted that the term is meaningless and is used to exaggerate the environmental benefits of a product.¹¹ One commenter, however, stated that consumers may understand the term given the context in which it is used.¹²

⁴⁰⁹ EOnscious, Comment 536013-00023 at 1; OTA, Comment 536013-00016 at 2; Oeko-Tex, Comment 536013-00013 at 5; Susalla, Comment 536013-00028 at 1.

⁴¹⁰ OTA, Comment 536013-00016 at 2 (stating also that the term natural has only rarely been used as a term of art by any U.S. regulatory agency).

⁴¹¹ Susalla, Comment 536013-00028 at 1.

⁴¹² Tetra Pak, Comment 536013-00012 at 3. The commenter provided an example of the use of natural in context. It stated that claiming a product is made from trees, a natural and renewable resource, would not be deceptive if the product is made entirely using that material.

⁴¹³ ISPA, Comment 536013-00015 at 1 (proposing that the Commission establish objective criteria regarding when natural may be used as well as documentation required to substantiate the claim); SDA, Comment 536013-00018 at 1 (stating that natural claims for all products should be specific and verifiable); Susalla, Comment 536013-00028 at 1; Tandus, Comment 536013-00037 at 1; Tetra Pak, Comment 536013-00012 at 3.

⁴¹⁴ Better for Babies, Comment 536013-00033 at 2; NCC, Comment 536013-00027 at 2; OTA, Comment 536013-00016 at 2.

⁴¹⁵ TOCMC, Comment 536013-00014 at 3 (stating that also OMI, Comment 536013-00022 at 3 (stating that if the Commission decides to address natural claims, a clear definition is required); Oeko-Tex, Comment 536013-00013 at 5 (stating that marketers should substantiate natural claims with specific, science-based definitions); Susalla, Comment 536013-00028 at 1 (stating that the Cotton Incorporated green message is deceptive because although U.S. cotton is grown on less land and with fewer chemicals, this is not the case with farms around the world).

⁴¹⁶ EOnscious, Comment 536013-00023 at 1.

⁴¹⁷ Todd Copeland, Patagonia, Comment 536013-00011 at 1 (stating that the Commission should be mindful that agriculture can have a significant impact on the environment).

⁴¹⁸ NCC Comment 536013-00027 at 4 (citing 2006 and 2006 studies conducted jointly with the OTA).

⁴¹⁹ *Id.*

⁴²⁰ 16 CFR 260.5.

⁴²¹ 16 CFR 260.6(d), 260.7(a).

⁴²² Although some commenters recommended that the Guides endorse transitional organic claims for fibers, it is unlikely consumers would understand the meaning of this term and the issue is more appropriately addressed by the NOP.

⁴²³ USDA Labeling of Textiles Under National Organic Program (NOP) Regulations Fact Sheet, July 2008, available at (<http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5070818&acct=nopgeninfo>).

⁴²⁴ Cosmetics, body care products, and personal care products illustrate this difference. The USDA has stated that if these products contain agricultural ingredients and can satisfy NOP organic production, handling, processing, and labeling standards, they are eligible for certification under NOP regulations. However, the USDA has stated that it does not have authority over the production and labeling of such products if they do not contain agricultural ingredients or do not make any claim that they meet USDA organic standards. USDA Cosmetics, Body Care Products and Personal Care Products Fact Sheet, April 2008, available at (<http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5068442&acct=nopgeninfo>).

⁴⁴⁸*Id.*

⁴⁴⁹CRI, Comment 533431-00026 at 2 (stating that the FTC should define applicable time frames but not recommending specific time frames); Georgia-Pacific, Comment 533431-00007 at 4 (same); Tandus, Comment 536013-00037 at 1 (suggesting, as an example, a 10-year time frame).

⁴⁵⁰ACC, Comment 533431-00023 at 4, also SPI, Comment 533431-00036 at 6 (recommending that the FTC address situations where less than 100 percent of contents are renewable; could take approach similar to guidance on products containing less than 100 percent recycled content); Stepan Company, Comment 533431-00011 at 3.

⁴⁵¹Steve Mojo, Biodegradable Products Institute (BPI), Green Packaging Workshop Presentation at (<http://www.ftc.gov/bcp/workshops/packaging/presentations/mojo.pdf>).

⁴⁴¹P&G, Comment 533431-00070 at 3. This commenter's remarks also applied to renewable energy.

⁴⁴²Seventh Generation, Comment 533431-00033 at 5 (stating the attribute should cover the entire life cycle of the source so as to account for any trade-off); SDA, Comment 533431-00020 at 4.

⁴⁴³SPI, Comment 533431-00036 at 6.

⁴⁴⁴Hammer, Comment 533431-00017 at 9.

⁴⁴⁵Weyerhaeuser, Comment 533431-00084 at 6.

⁴⁴⁶*Id.*

⁴⁴⁷GreenBlue, Comment 533431-00058 at 7.

⁴⁶⁴NCC, Comment 536013-00017 at 4. This

⁴⁷⁴See (http://www.nrel.gov/learning/re_basics.html).

⁴⁷⁵RECs are also known as green certificates, green tags, or tradable renewable certificates. Lori Bird, National Renewable Energy Laboratory (NREL), Carbon Offsets Workshop Tr. at 42.

⁴⁷⁶Although one REC generally represents the right to describe one megawatt hour of electricity as renewable, a REC s precise attributes continue to be a matter of debate. NREL, Carbon Offsets Workshop Tr. at 42, 52. Moreover, no single, national standard dictates whether a REC also represents other environmental attributes that may stem from renewable energy generation, such as reduction in air pollution.*Id.*; Ed Holt, Ed Holt & Associates (Holt), Carbon Offsets Workshop Tr. at 151.

⁴⁷⁷See NREL, Carbon Offsets Workshop Tr. at 45; NREL, Carbon Offsets Workshop Presentation at (<http://www.ftc.gov/bcp/workshops/carbonoffsets/presentations/lbird.pdf>); CRS, Comment 533254-00049 at 3; Lori Bird, Claire Kreycik, and Barry Friedman, *Green Power Marketing in the United States: A Status Report*, National Renewable Energy Laboratory (Sept. 2009) NREL Green Power Marketing Report, available at (<http://www.nrel.gov/docs/fy09osti/46581.pdf>) at 14.

⁴⁷⁸Businesses and organizations purchase nearly 100 percent of these unbundled RECs. Renewable Energy Marketers Association (REMA), Comment 533254-00028 at 2; NREL Green Power Marketing Report at 18.

⁴⁷⁹CRS, Comment 533254-00049 at 2-3. Renewable energy is not sold in all areas of the country. However, in the U.S., more than 50 percent of consumers can purchase green power directly from their utility or electricity provider. NREL, Carbon Offsets Workshop Presentation at (<http://www.ftc.gov/bcp/workshops/carbonoffsets/presentations/lbird.pdf>).

⁴⁸⁰CRS, Comment 533254-00049 at 3; NREL, Carbon Offsets Workshop Tr. at 45; NREL Green Power Marketing Report at 14.

⁴⁸¹NREL, Carbon Offsets Workshop Tr. at 48-49. Businesses also may purchase RECs to facilitate comp830Tj /F1 1 n withblegul(Sept.requ)T3254/F7TT* (cou

⁴⁷¹See, e.g., BPI, Green Packaging Workshop Tr. at 89; ILSR, Green Packaging Workshop Tr. at 137-138; SDA, Comment 533431-00020 at 4.

⁴⁷²74 FR 38295, 38298 (July 31, 2009).

⁴⁷³The USDA defines biobased products as a product determined by the Secretary to be a commercial or industrial product (other than food or feed) that is (A) composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or (B) an intermediate ingredient or feedstock.*Id.*

the ecosystem or increase the product s environmental footprint, and the sourcing of the energy reduces consumption of non-renewable resources). Another commenter stated that a federal Executive Order defines renewable energy, and others noted that many states have different definitions of what constitutes renewable energy. Dow, Comment 533431-00010 ~~also~~ Edison Electric Institute, Comment 533254-00055 at 4-5; Exelon Corp., Comment 533431-00059 at 5.

⁴⁸⁴Tandus, Comment 536013-00037 at 1.

⁴⁸⁵CRS, Comment 533254-00049 at 4.

⁴⁸⁶Edison Electric Institute, Comment 533254-00055 at 4-5.

⁴⁸⁷Cameron Brooks, Renewable Choice Energy (Renewable Choice

energy suggests that all, most, or some of the product was made with renewable energy. The largest group, 36 percent, indicated that they interpret the claim as meaning that all of the product was made with renewable energy and 17 percent believed that most of it was made with renewable energy.⁵⁰¹

Finally, the study asked about a product advertisement that included the statement our manufacturing plant hosts a solar [or wind] power facility.⁵⁰² The study asked which, if any, of the following three claims were implied by the statement: (1) there is a solar/wind power facility on the company's premises; (2) solar/wind power is used in making the company's products; and (3) the company hosts a solar/wind power conference meeting in its manufacturing plants. Respondents could choose more than one answer. Eighty-five percent stated that there is a solar/wind power facility on the company's premises, 62 percent stated that solar/wind power is used in making the company's products, and 12 percent stated that the company hosts a solar/wind power conference meeting in its manufacturing plants.⁵⁰³

4. Analysis and Guidance

Based on the record, the Commission proposes new guidance concerning renewable energy claims.⁵⁰⁴ The following discusses this guidance and addresses the issues raised by commenters concerning consumer interpretation of renewable energy claims, REC disclosures, geographic location disclosures, and claims that could constitute double counting.

⁵⁰¹Further, 23 percent stated that some of the product was made with renewable energy, 18 percent stated that the claim does not suggest anything about how much of the product was made with renewable energy, and seven percent stated that they were not sure. The provided figures total 101 percent because of rounding. These percentages were derived by combining the responses to all claims that included made with renewable energy (i.e., made with renewable energy, green - made with renewable energy, eco-friendly - made with renewable energy, and sustainable - made with renewable energy).

⁵⁰²The survey asked half of the respondents about solar power facilities and the other half about wind power facilities. Because there were no meaningful differences between the responses of these two groups, we discuss the combined results.

⁵⁰³The results also were calculated using one response (that the company hosts a meeting in its plant) as a control claim to roughly adjust for guessing. The results net of the control are: 73 percent of respondents stated there is a solar/wind power facility on the company's premises, and 50 percent stated that solar/wind power is used in making the company's products.

⁵⁰⁴This proposed guidance can be found in 16 CFR 260.14.

Consumer Interpretation of Renewable Energy Claims
The commenters and the Commission's study raise three main issues related to consumer interpretation of renewable energy claims: (1) the meaning of renewable energy; (2) claims implied by renewable energy advertisements; and (3) potentially overbroad renewable energy claims.

First, the term renewable energy has an emerging meaning. Industry does not appear to have a uniform definition of the term, and commenters discussed different energy sources that they believe are renewable. There appears to be a consensus, however, that renewable energy excludes fossil fuels. The results of the Commission's study suggests that a significant minority of consumers have a similar, general understanding of renewable energy; specifically, it is not derived from fossil fuels.⁵⁰⁵ Based on both this information and the comments, the Commission proposes advising marketers not to make an unqualified claim if an item was manufactured with energy produced using fossil fuels. Given the available information, however, the Commission does not propose further guidance on which specific energy sources consumers consider to be renewable.

The second issue is the extent to which renewable energy claims require qualification. The Commission's study suggests that some consumers believe that a made with renewable energy

⁵⁰⁵Responding to open-ended questions, 16 percent of respondents explained the term by referring to a particular energy source (the sun, wind, biomass, and other non-fossil fuel sources), and five percent expressly stated that the energy was not derived from fossil fuels.

⁵⁰⁶The open-ended responses are consistent with these closed-ended results.

⁵⁰⁷For example, as discussed in the general environmental benefit claims section (Part V.A, *supra*), the Commission's consumer perception study indicated that 27 percent of respondents

interpreted the claim green and eco-friendly as suggesting a product has no negative environmental impact. Based in part on these findings, the Commission proposes to advise marketers to qualify general environmental benefit claims.

⁵⁰⁸In addition, 17 percent stated that most of the product was made with renewable energy.

⁵⁰⁹16 CFR 260.7(e).

⁵¹⁴No uniform definition for either term appears to exist. See, e.g., Exelon Corp., Comment 533431-00059 at 4 (stating that there is no clear consensus as to what the term carbon footprint includes); *Carbon Claims and the Trade Practices Act*, Australian Competition & Consumer Commission (June 2008) at 7 available at (<http://www.accc.gov.au/content/index.phtml/itemId/833279>) (discussing carbon neutrality). Carbon footprint generally refers to the net greenhouse gas emissions caused by the activities of an individual,

Many commenters urged the FTC to refrain from issuing guidelines that address additionality. They suggested that a combination of legislative action efforts by agencies with greater expertise, and evolving market practices are the best means for addressing these questions.⁵⁴⁸ For example, one commenter warned that the FTC risks becoming entangled in highly complex policy issues at the core of ongoing discussions concerning the design of market-based mechanisms addressing climate change.⁵⁴⁹ Another argued that, because pending legislation would assign the role of addressing additionality standards to agencies other than the FTC, it would be neither appropriate nor productive for the FTC to take a stance on the issue at this time.⁵⁵⁰

d. Substantiating Carbon Offset Claims Use of RECs

Some carbon offsets are based on the purchase of renewable energy certificates (RECs). The practice of using RECs to create carbon offsets is controversial and garnered significant attention at the workshop and in the comments.⁵⁵¹

Some workshop panelists and commenters approved of using RECs to substantiate offset claims.⁵⁵² In their view, renewable energy generation (represented by RECs) creates emission reductions by causing fossil fuel-fired facilities to produce less energy and, therefore, fewer emissions.⁵⁵³

Institute (SEI), Carbon Offsets Workshop Tr. at 258-259.

⁵⁴⁸AF&PA, Comment 533254-00042 at 2-3; Anadarko, Comment 533254-00058 at 2; Clean Air Conservancy, Comment 533254-00027 at 1; COPC, Comment 533254-00032 at 3; Edison Electric Institute, Comment 533254-00055 at 11-13; Exelon Corp., Comment 533431-00059 at 2-3; Hydrodec, Comment 533254-00046 at 5-6; REMA, Comment 533254-00028 at 12; The Fertilizer Institute, Comment 533254-00052 at 2; Weyerhaeuser, Comment 533431-00084 at 5.

⁵⁴⁹Anadarko, Comment 533254-00058 at 2.

⁵⁵⁰Hydrodec, Comment 533254-00046 at 6.

⁵⁵¹Carbon Offsets Workshop participant Edward Holt provided an overview of the issues involved in using RECs to form the basis for carbon offset claims. Holt, Carbon Offsets Workshop Tr. at 150-158.

⁵⁵²Adam Stern, TerraPass/TerraPass, Carbon Offsets Workshop Tr. at 227-228 (stating that there are reputable organizations such as the World Resources Institute, The Union of Concerned Scientists, Natural Resources Defense Council, that have all indicated a support for using RECs as an offset value); Eric Carlson, Carbonfund.org, Carbon Offsets Workshop Tr. at 229-230; CRS, Comment 533254-0049 at 9; Edison Electric Institute, Comment 533254-00055 at 6.

⁵⁵³Carbonfund.org, Carbon Offsets Workshop Tr. at 229-230; CRS, Comment 533254-00049 at 4; Edison Electric Institute, Comment 533254-00055 at 6. One commenter argued that universally accepted that the generation of renewable energy can displace and reduce the emission of carbon and

Others argued that RECs should not be used for offsets because the two are distinctive commodities and conflating them could mislead consumers.⁵⁵⁴ They provided three main arguments to support their position. First, they argued that there is little or no evidence that renewable energy generation always reduces traditional power generation because the actual emission reductions associated with grid power vary considerably across the United States, and there are no uniform standards for calculating the emissions displaced by renewable energy.⁵⁵⁵ Second, even if such displacement occurs, sellers cannot prove that renewable energy generation, and any associated GHG emission reductions, are additional.⁵⁵⁶ Some argued that RECs merely subsidize existing projects and do not contribute sufficiently to a project's income stream to create a market for new renewable energy generation.⁵⁵⁷ Third, the critics questioned whether the renewable energy generators can take credit for the emission reductions that occur at fossil fuel-fired facilities.⁵⁵⁹ There is currently no mechanism to establish who owns such emission reductions—the renewable energy generator or the fossil fuel-fired

other greenhouse gas from conventional facilities. The commenter further stated that the practice is recognized by international offset programs including the United Nations Clean Development Mechanism of the Kyoto Protocol, the Gold Standard, and the Voluntary Carbon Standard. CRS, Comment 533254-00049 at 11. Some of the commenters, however, cautioned that RECs do not always equate to reduced emissions from conventional facilities, and offset sellers must demonstrate that the reduced emissions are additional. COPC, Comment 533254-00032 at 2-3; CRS, Comment 533254-0049 at 3-7; Offset Quality Initiative, Comment 533254-00047 at 11.

⁵⁵⁴Climate Clean, Comments 533254-00038 at 3; 533254-00039 at 3 (stating that use of RECs as offsets is uniquely American practice); Gillenwater, Comment 533254-00006 at 15-16; 533254-00007 at 5 (stating that there is an incentive to rely on RECs as a source of offsets because RECs are generally less expensive than most offset projects); SEI, Carbon Offsets Workshop Tr. at 227.

⁵⁵⁵Gillenwater, Comment 533254-00006 at 16 (stating that the effect of an input of electricity from a renewable generator on other grid-connected generators [e.g., fossil fuel plants] is difficult to quantify); EcoSecurities, Comment 533254-00044 at 3-4.

⁵⁵⁶Id. ⁵⁵⁷EcoSecurities, Comment 533254-00044 at 4 (stating that RECs are subject to no. additionality testing requirements, and require no reference to whether or not the REC market was instrumental in the development of the project). Climate Clean, Comments 533254-00038 at 2, 533254-00039 at 3; see also NREL, Carbon Offsets Workshop Tr. at 75-76 (explaining the concept of additionality for RECs).

⁵⁵⁸Id. ⁵⁵⁹ERT, Carbon Offsets Workshop Tr. at 225 ([W]hat you're saying is [that] you own a reduction in someone else's property. see also Gillenwater, Comment 533254-00006 at 14.

generator.⁶⁰ Therefore, the comments raised concerns about double counting if both generators take credit for the same emission reduction.⁶¹

3. Consumer Perception Evidence

Some commenters emphasized the need to research consumer understanding of specific terms and claims in carbon offset advertisements.⁶² The commenters, however, did not identify existing consumer perception data in this area.⁶³ Therefore, the Commission tested certain issues related to carbon offset claims in its consumer research. The study split respondents into two groups—asking one about carbon offsets and the other about carbon neutrality. The research explored respondents' understanding of these terms, whether respondents had seen advertisements for carbon offsets or for products or services described as carbon neutral, and whether they had ever purchased such items.

A significant percentage of respondents demonstrated a general understanding of carbon offsets when they chose from a list of possible descriptions, but a much smaller percentage could describe a carbon offset in their own words. Specifically, in response to a closed-ended question, 41 percent identified a carbon offset as a way of reducing carbon dioxide and other greenhouse gases while 35 percent stated that they were not sure

⁵⁶⁰Holt, Carbon Offsets Workshop Tr. at 151-152. In contrast, other emission reduction projects have a clear owner who can take credit for the reductions or sell the reductions.

⁵⁶¹EcoSecurities, Comment 533254-00044 at 10. For example, a renewable energy generator might claim that its RECs represent a reduction in traditional electricity generation and a corresponding reduction in emissions. However, these reductions actually occur at the fossil fuel plant. The fossil fuel plant could argue that because it produced less energy, it caused the reduction in emissions. The fossil fuel plant could sell offsets that represent the same emission reduction as the RECs.

⁵⁶²Vermont Office of Attorney General (Vermont AG), Comment 533254-00051 at 5 (writing on behalf of the Offices of the Attorneys General of Arkansas, California, Connecticut, Delaware, Illinois, Maine, Mississippi, New Hampshire, Oklahoma, and Vermont).

⁵⁶³See Georgia-Pacific, Comment 533254-00059 at 2 (We do not know of specific, credible surveys or even market sensing studies on this matter. Rebecca Tushnet, Georgetown University Law Center, Carbon Offsets Workshop Tr. at 82-83 (stating that companies' consumer research is likely to be part of a marketing initiative and, therefore, proprietary). In considering potential consumer research, some noted that consumer interpretation of claims may change over time.; Alan Levy, EPA, Carbon Offsets Workshop Tr. at 80; GE AES Greenhouse Gas Services LLC, Comment 533254-00043 at 2.

what a carbon offset was.⁵⁶⁴When asked to describe a carbon offset in their own words, only 18 percent provided an answer which communicated a general understanding of the term, while 58 percent stated that they did not know or provided no response to the question.⁵⁶⁵ A much smaller number (11 percent) reported seeing an advertisement for an offset and only two percent actually recalled purchasing a carbon offset.⁵⁶⁶

In a closed-ended question, the study also asked respondents to identify what it meant to be carbon neutral. Thirty-nine percent of respondents answered that greenhouse gases, such as carbon dioxide, were offset. Twenty-five percent were not sure what carbon neutral meant.⁵⁶⁷When asked to describe the term in their own words, 22 percent provided an answer that demonstrated a general understanding of the term, and 35 percent stated that they did not know or provided no answer.⁵⁶⁸Similar to the carbon offset results, few respondents (only 10 percent) recalled seeing an advertisement for carbon neutral products or services, and only four percent stated that they had purchased a product or service at least partly because it was advertised or labeled carbon neutral.

For the subset of respondents who generally understood that carbon offsets were a way to reduce greenhouse gas emissions, the study attempted to gauge their understanding about the timing of

⁵⁶⁴The other responses were: a way of eliminating all pollution that results from using a product or service; a method for replacing scarce carbon resources; a way of reducing chemical pollutants in water; a way of making carbonated beverages; a laundry additive for removing pencil and ink stains from clothing; and none of the above.

⁵⁶⁵These figures are based on FTC staff's more detailed analysis of responses rather than Harris' general findings. Examples of responses that indicate an understanding of the term include: way to reduce greenhouse gases; trees are planted or other environmental restoration is performed to supposedly make up for environmental damage being caused by other activities; and A credit on the amount of carbon used in manufacturing process.

⁵⁶⁶Of those few who purchased an offset, 21 percent stated that they were offsetting airline travel, 15 percent automobile travel, and 15 percent lighting.

⁵⁶⁷The other responses were: no pollution was generated in making the product; carbon resources were not used in making the product; water pollutants were reduced to improve water quality; clothing that resists pencil and ink stains; soft drinks that were made without carbonation; and none of the above.

⁵⁶⁸These findings are based on FTC staff's more detailed analysis of responses rather than Harris' general findings. Examples of responses that indicate an understanding of the term carbon neutral include: The amount of carbon created in producing the product is offset by other means that eliminates carbon doesn't have a negative impact in terms of carbon emissions and does not leave a carbon footprint.

⁵⁶⁹As mentioned above, the study asked approximately half of all respondents about carbon offsets (and the remainder about carbon neutral claims). Of the 1,879 respondents who answered carbon offset questions, 770 generally understood carbon offsets. Only these 770 respondents answered questions about the timing of emission reductions.

⁵⁷⁰Additionally, 16 percent stated that they neither agreed or disagreed and 11 percent stated that they were not sure.

⁵⁷¹Additionally, 16 percent stated that they neither agreed or disagreed and 12 percent stated they were not sure. These figures add up to 99 percent because of rounding.

⁵⁷²This proposed guidance can be found in 16 CFR 260.5.

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,

Example 3: A manufacturer advertises its product as “certified by the American Institute of Degradable Materials.” The advertisement does not mention that the American Institute of Degradable Materials is an industry trade association. Regardless of whether the manufacturer is a member, this advertisement is deceptive because it likely conveys that the product is certified by an independent certifying organization, not an industry group. The advertisement would not be deceptive if the manufacturer accompanies its statement that the product is “certified by the American Institute of Degradable Materials” with clear and prominent language indicating that the Institute is an industry trade association, and if the manufacturer otherwise complies with § 260.8 of the Guides.

Example 4: A marketer’s industry sales brochure for overhead lighting features a seal with the textng

chlorine bleaching. The claim overstates the product's benefits because reasonable consumers likely would interpret it to mean that the product's manufacture does not cause any of the environmental risks posed by chlorine bleaching. A claim, however, that the shirts were "bleached with a process that substantially reduces harmful substances associated with chlorine bleaching" would not be deceptive, if substantiated.

Example 2: A manufacturer advertises its insulation as "formaldehyde free."

² Commission staff has informally interpreted the term "substantial majority," as used in this context, to mean at least 60 percent.

³ 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.

inconspicuous location on the container (e.g., embedded in the bottom of the container), it would not constitute a recyclable claim.

Example 3: A container can be burned in incinerator facilities to produce heat and power. It cannot, however, be recycled into another product or package. Any claim that the container is recyclable would be deceptive.

Example 4: A paperboard package is marketed nationally and labeled either "Recyclable where facilities exist" or "Recyclable – Check to see if recycling facilities exist in your area. " Recycling programs for these packages are available to a significant percentage of the population, but not to a substantial majority of consumers nationwide. Both claims are deceptive because they do not adequately disclose the limited availability of recycling programs. To avoid deception, the marketer should use a clearer qualification, such as those suggested in § 260.11(b)(2).

Example 5: Foam polystyrene cups are advertised as "Recyclable in the few communities with facilities for foam polystyrene cups. " A half-dozen major metropolitan areas have established collection sites for recycling those cups. The claim is not deceptive because it clearly discloses the limited availability of recycling programs.

Example 6: A package is labeled "Includes some recyclable material. " The package is composed of four layers of different materials, bonded together. One of the layers is made from recyclable material, but the others are not. While programs for recycling this type of package are available to a substantial majority of consumers, only a few of those programs have the capability to separate the recyclable layer from the non-recyclable layers. Even though it is technologically possible to separate the layers, the claim is deceptive. An appropriately qualified claim would be "Includes material recyclable in the few communities that can process multi-layer products. "

Example 7: A product container is labeled "recyclable." The marketer advertises and distributes the product only in Missouri. Collection sites for recycling the container are available

in Missouri only. The claim is deceptive because it does not disclose that the product is only available in Missouri.

⁴ The term "used" refers to parts that are not new and that have not undergone any re-manufacturing or reconditioning.

composed from paper that was diverted from the solid waste stream. Of this material, 30% is post-consumer and 20% is pre-consumer. It would not be deceptive if the marketer claimed that the card either "contains 50% recycled fiber" or "contains 50% total recycled fiber, including 30% post-consumer fiber."

Example 4: A paperboard package with 20% recycled fiber by weight is labeled "20% post-consumer recycled fiber." The recycled content was composed of overrun newspaper stock never sold to customers. Because the newspapers never reached consumers, the claim is deceptive.

Example 5: A product in a multi-component package, such as a paperboard box in a shrink-wrapped plastic cover, indicates that it has recycled packaging. The paperboard box is made entirely of recycled material, but the plastic cover is not. The claim is deceptive because, without qualification, it suggests that both components are recycled. A claim limited to the paperboard box would not be deceptive.

Example 6: A manufacturer makes a package from laminated layers of foil, plastic, and paper, although the layers are indistinguishable to consumers. The label claims that "one of the three layers of this package is made of recycled plastic." The plastic layer is made entirely of recycled plastic. The claim is not deceptive, provided the recycled plastic layer constitutes a significant component of the entire package.

Example 7: A frozen dinner package is composed of a plastic tray inside a cardboard box. It states "package made from 30% recycled material." Each packaging component is one-half

⁵ 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.

clearly and prominently qualify their renewable energy claims by specifying the source of the renewable energy (e.g., wind or solar energy).

(c) It is deceptive to make an unqualified “made with renewable energy” claim unless all or virtually all of the significant manufacturing processes involved in making the product or package are powered with renewable energy or conventional energy offset by renewable energy certificates.

(d) If a marketer generates renewable electricity but sells renewable energy certificates for all of that electricity, it would be deceptive for the marketer to represent, directly or by implication, that it uses renewable energy.

Example 1: