

**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/revisedgreenguides>) (and following the instructions on the web-based form). Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580, in the manner detailed in the Request for Comment part of the SUPPLEMENTARY INFORMATION section below.

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

**SUPPLEMENTARY INFORMATION:****I. Overview**

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

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

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

Periodic review ensures that the Guides keep pace with evolving consumer perceptions and new environmental claims. Since the FTC last revised them in 1998, the marketplace has been dynamic. As consumers have become increasingly concerned about the environmental impact of the products and services they use, marketers have expanded their promotion of the environmental attributes of their products and services. Some of these promotions have prompted enforcement action by the FTC, including cases challenging certain environmental benefit claims as false, such as “degradable” paper products or so-called “bamboo” textiles that are made with an “eco-friendly” manufacturing process.” And, an increasing number of environmental claims are new or were not common when the Guides were last reviewed and, therefore, are not addressed by the current Guides. Thus, beginning in 2007, the FTC sought public comments on the continuing effectiveness of the Guides, held public workshops on emerging green marketing issues, and conducted research on consumer perception of environmental claims. This review affirms that the Guides have benefitted consumers and businesses but suggests that the Guides should be updated.

The FTC, therefore, proposes several revisions to the Guides. Many of these revisions strengthen, add specificity to, or enhance the accessibility of the current guidance on general “green” claims and environmental seals, and claims such as compostable, degradable, and recyclable. Others propose new guidance regarding emerging claims not currently addressed in the Guides, such

as renewable materials, renewable energy, and carbon-offsets. The FTC also proposes non-substantive changes throughout the Guides to make them easier to read and use, including simplifying language and reorganizing sections to make information easier to find. The FTC is now seeking further public comment on each of these proposed modifications to the Guides.

First, the FTC proposes strengthening its guidance regarding general environmental benefit claims. The FTC’s consumer perception study confirms what the current Guides already state — unqualified claims that an item is “environmentally friendly” or “eco-friendly” are likely to convey that it has specific and far-reaching environmental benefits. Very few products, if any, have all of the attributes consumers seem to perceive from such claims. Therefore, these claims may be impossible to substantiate. Accordingly, the proposed guidance cautions marketers not to make unqualified general claims. Our study indicates, however, that marketers may be able to effectively qualify these claims to focus consumers on the specific environmental benefits that marketers could substantiate. Therefore, the proposed revised Guides provide more prominent guidance on how to adequately qualify general environmental claims.

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

The proposed revised Guides also suggest clarification for claims that a product is degradable, compostable, or “free of” a particular substance, and highlight guidance for recyclable claims. If a marketer claims, in certain cases, that a product is “degradable,” it should

decompose in a “reasonably short period of time”—no more than one year. Moreover, if a solid product is destined for a landfill, an incinerator, or a recycling facility, the marketer should not make unqualified degradable claims because the product will not degrade within a year. Similarly, when making an unqualified “compostable” claim, a marketer should be able to show that the product will break down into usable compost in a safe and timely manner—approximately the same time as the materials with which it is composted. The proposed Guides also clarify and expand guidance about claims that products are “free of” particular materials. Finally, the proposed Guides highlight advice in the current guides that the use of “recyclable” depends on how many consumers and communities have access to recycling facilities for the advertised product.

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

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

## II. Background

### A. The Green Guides

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

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

In order to adequately substantiate environmental marketing claims, the Guides advise marketers that they will often need “competent and reliable scientific evidence.”<sup>3</sup> The Guides currently define competent and reliable scientific evidence as “tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and

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

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

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

evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.<sup>4</sup> Since the last Green Guides review, the Commission has clarified this standard, stating that such evidence “should be sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that [a] representation is true.”<sup>5</sup>

### B. The Green Guides Review

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

Since the Commission last revised the Green Guides in 1998, both anecdotal evidence and empirical research indicate that consumers have a heightened awareness of environmental concerns and, therefore, place increased importance on buying products and services that will cause less harm to the environment.<sup>7</sup> Marketers, in turn, have responded by touting the environmental attributes of their products and services. Because of the proliferation of these environmental claims, the Commission began its decennial Guides review on November 26, 2007, one year before scheduled. The Commission’s

<sup>4</sup> *Id.*

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

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

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

November 2007 **Federal Register** Notice sought comment on a number of general issues, including the continuing need for and economic impact of the Guides, the effect of the Guides on the accuracy of environmental claims, and whether the Commission should provide guidance on certain environmental claims – such as carbon neutral, sustainable, and renewable – not currently addressed in the Guides.<sup>8</sup> The Commission received 75 written comments in response.

## 2. Workshops and Corresponding Requests for Public Comment

To establish a more robust record, the Commission also held three public workshops to explore emerging environmental marketing claims. Specifically, the workshops addressed carbon offsets and renewable energy certificates;<sup>9</sup> green packaging claims;<sup>10</sup> and green building and textiles.<sup>11</sup> The workshops brought together over 450 people representing industry, government, consumer groups, the academic community, and non-profit environmental organizations.<sup>12</sup> The Commission requested comment in connection with each workshop<sup>13</sup> and received an additional 125 written comments.<sup>14</sup>

## 3. Consumer Perception Evidence

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

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

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

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

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

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

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

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

the Commission's 2009 consumer perception study.

### a. Commenters' Submissions

Although the Notices solicited consumer perception evidence, few commenters submitted such research.<sup>15</sup> Rather, commenters submitted research concerning: (1) consumers' attitudes and beliefs about environmental claims;<sup>16</sup> (2) consumers' environmental concerns and interests;<sup>17</sup> and (3) consumers' behavior regarding environmental claims.<sup>18</sup> These surveys do not provide a basis upon which the Commission can formulate guidance on how to make truthful and nondeceptive environmental marketing claims. Accordingly, the Commission conducted its own consumer perception study in July and August of 2009.

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

To conduct the study, the FTC contracted with Harris Interactive, a

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

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

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

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

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

Harris presented participants with several questions aimed at determining how they understand certain environmental claims. The first portion of the study tested the following claims: "green," "eco-friendly," "sustainable," "made with renewable materials," "made with renewable energy," and "made with recycled materials." The questionnaire asked about both unqualified and qualified general environmental benefit claims (e.g., "green" vs. "green - made with recycled materials"), as well as specific-attribute claims alone (e.g., "made with recycled materials"). The study tested these claims against a non-environmental control claim (e.g., "new and improved"). Moreover, to examine whether consumers' understanding of the claims differed depending on the product being advertised, the study tested the claims as they appeared on three different products – wrapping paper, a laundry basket, and kitchen flooring.<sup>22</sup> Harris tested 16 different claims with each of the three different products, resulting in a total of 48 product-claim pairs. To avoid skewing an individual's answers by asking the same person essentially the same set of questions multiple times, and to limit the length of the survey presented to any individual, each participant was

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

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

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

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

asked questions regarding only two randomly-selected product-claim pairs.

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

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

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

#### C. Outline of This Notice

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

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

The Commission proposes three changes to make the Guides easier to read and use. First, wherever possible, the Commission has simplified the Guides' language to make it clearer and easier to understand. For example, the FTC has replaced its formal, legal

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

description of the Guides in Section 260.1 with a more reader-friendly version. Similarly, the Commission has removed unnecessary language and redundant examples from all sections of the Guides.<sup>24</sup>

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

Third, the Commission proposes deleting Sections 260.4 and 260.8. Section 260.4 states that the Commission reviews the Green Guides as part of its ongoing, periodic review program, and explains that parties may petition the Commission to amend the Guides in light of new evidence. This information is common to all of the Commission's guides, and it is unnecessary to repeat it in each one.<sup>25</sup> Section 260.8 contains the FTC's environmental assessment of the Guides pursuant to the National Environmental Policy Act. Because this information is contained in the **Federal Register** Notice that enacted the Guides and is not needed by marketers using the Guides, the Commission proposes deleting it from the Guides' text.<sup>26</sup> These deletions

<sup>24</sup> Among other things, the Commission proposes deleting from Section 260.5 a reference to the FTC's law enforcement actions in the green area and the telephone number to call to obtain copies of those cases. Case information may be found on the Commission's website, (<http://www.ftc.gov>). In addition, in Section 260.2, the Commission proposes deleting the explicit statement that the Guides apply to "marketing through digital or electronic means." The Commission added this reference in 1998, when Internet marketing was emerging and online advertisers were uncertain about the Guides' applicability. Because Internet marketing is now ubiquitous, the Commission proposes revising the Guides to state that they apply to marketing in any medium.

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

<sup>26</sup> As we did when issuing the Guides in 1992 and revising them in 1996 and 1998, the Commission concludes that the proposed revisions to the Guides would not have a significant impact on the environment and any such impact "would

will streamline the Guides, making them a more user-friendly document.

#### IV. General Issues

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

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

###### 1. Comments

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

be so uncertain that environmental analysis would be based on speculation." 16 C.F.R. 1.83(a).

<sup>27</sup> See, e.g., ACC, Comment 533431-00023 at 3-4; ATA, Comment 533431-00041 at 3, 9; American Forest & Paper Association ("AF&PA"), Comment 533431-00019 at 2; American Reusable Textile Association, Comment 534743-00038 at 4; Business for Social Responsibility ("BSR"), Comment 533431-00016 at 1; Carbonfund.org, Comment 533431-00056 at 2; Carpet and Rug Institute ("CRI"), Comment 533431-00026 at 3; Consumer Specialty Products Association ("CSPA"), Comment 533431-00049 at 1-2; Dow, Comment 533431-00010 at 3; EHS Strategies, Inc. ("EHS"), Comment 534743-00011 at 1; Fibre Box Association ("FBA"), Comment 533431-00015 at 1; Georgia-Pacific LLC ("Georgia-Pacific"), Comment 533431-00007 at 1-3; Graphic Arts Coalition, Comment 533431-00060 at 1; GreenBlue, Comment 533431-00058 at 1; Rebecca Hammer ("Hammer"), Comment 533431-00017 at 1-2; Alison C. Healey, *et al.* ("Healey"), Comment 533431-00048 at 1; International Paper, Comment 533431-00055 at 1; MeadWestvaco Corporation ("MeadWestvaco"), Comment 533431-00013 at 2; NAIMA, Comment 536013-00042 at 2-3; New York City Department of Consumer Affairs, Comment 533431-00018 at 2; P&G, Comment 533431-00070 at 1; Pratt Industries, Comment 533431-00081 at 1; Lynn Preston ("Preston"), Comment 533431-00021 at 2; Saint-Gobain, Comment 533431-00037 at 2-4; Seventh Generation, Comment 533431-00033 at 7; The Soap and Detergent Association ("SDA"), Comment 533431-00020 at 1, 5; The Society of the Plastics Industry, Inc. ("SPI"), Comment 533431-00036 at 13; U.S. Council for International Business, Comment 533431-00052 at 2; Weyerhaeuser, Comment 533431-00084 at 1.

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.<sup>28</sup> Moreover, many agreed that the Guides accomplish their goals without imposing an undue burden on industry.<sup>29</sup>

## 2. Analysis

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

### B. Industry Compliance

#### 1. Comments

In response to questions about industry compliance with the Guides, some commenters asserted that deceptive marketing claims have increased in the environmental area.<sup>30</sup> For example, TerraChoice Environmental Marketing, Inc. reported the results of its 2007 review of over 1,000 products and expressed concern that many marketers are using vague claims, such as “environmentally friendly” and “green,” without defining terms or providing evidence to support their claims.<sup>31</sup> It also noted that many marketers “highlight relatively

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

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

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

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

insignificant environmental benefits of a product while distracting consumers from much more significant impacts.”<sup>32</sup> Another commenter observed that companies are marketing the “environmentally friendly” nature of their products “through words or pictures while only minimally (if at all) qualifying such claims.”<sup>33</sup> In addition, other commenters noted increased instances of “greenwashing” by marketers using a “plethora of buzzwords like sustainable, environmentally friendly, carbon offsets, [and] green.”<sup>34</sup> Some commenters suggested that bringing more enforcement actions could help address this issue.<sup>35</sup>

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

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

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

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

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

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

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

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

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

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

## 2. Analysis

The Guides’ purpose is to help marketers avoid making unfair or deceptive environmental claims. For marketers who nevertheless violate the law, the Commission will continue its enforcement efforts. The Commission brought several recent actions involving false or unsubstantiated environmental claims. For example, last year, the Commission announced three actions charging marketers with making false and unsubstantiated claims that their products were biodegradable.<sup>42</sup> In addition, the Commission charged four sellers of clothing and other textile products with deceptively labeling and advertising these items as made of bamboo fiber, manufactured using an environmentally friendly process, and/or biodegradable.<sup>43</sup>

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

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

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

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

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

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

consumer marketing.<sup>44</sup> The proposed, revised section on the “Purpose, Scope, and Structure of the Guides” (260.1) explains that the Guides apply to the marketing of products and services to “individuals, businesses, or other entities.”

Moreover, the proposed, revised Guides include specific business-to-business transaction examples.<sup>45</sup> Additionally, to increase businesses’ familiarity with the revised Guides, the Commission plans to expand its outreach efforts.

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

##### 1. Comments

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

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

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

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

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

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

<sup>49</sup> *Id.*

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

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

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

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

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

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

<sup>54</sup> EHS, Comment 534743-00011 at 2; see also EnviroMedia Social Marketing, Comment 534743-00032 at 1 (stating that companies making claims about their carbon footprint should be required to list a website to substantiate those claims); TerraChoice, Green Packaging Workshop Tr. at 207 (noting that marketers should make claim substantiation available to consumers via websites and toll-free numbers).

websites are useful, they are likely not . . . investigated by the consumer at point of purchase. Insofar as possible, sufficient point of sale information should be made available to the consumer as to what the environmentally preferred attributes are.”<sup>55</sup>

##### 2. Analysis

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

#### D. International Laws

##### 1. Comments

The Commission also sought comment on whether it should consider international laws, regulations, or standards with respect to environmental marketing claims in its Guides review. In response, many commenters recommended that the Commission harmonize the Green Guides with the International Organization for Standardization (“ISO”) 14021 environmental marketing standards<sup>57</sup> or at least incorporate some of its provisions.<sup>58</sup>

For example, one commenter observed that because several countries are in the process of adopting ISO 14021, the FTC should either align the Guides with ISO standards or clarify whether products labeled according to

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

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

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

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

ISO 14021 comply with the Guides when there is a discrepancy.<sup>59</sup> Another commenter stressed the importance of “close alignment with global standards,” noting that the discrepancy in how the Green Guides and ISO treat recyclable claims<sup>60</sup> causes problems with transnational packaging.<sup>61</sup>

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

## 2. Analysis

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

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

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

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

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

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

the environment.<sup>64</sup> In part because of this difference, the proposed Guides do not necessarily align with the ISO standards. The Commission further discusses ISO standards and any inconsistencies with the proposed Guides in the relevant sections: (1) General Environmental Benefit Claims (Part IV.A); (2) Recyclable Claims (Part IV.E); (3) Recycled Content Claims (Part IV.F); and (4) Free-of and Non-toxic Claims (Part IV.H).

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

#### 1. Comments

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

Commenter Environmental Packaging International noted that the state of California has “more specific requirements than the Guides regarding the use of environmental marketing claims related to plastic packaging.”<sup>67</sup> For example, EPI stated that California requires that plastic bags and food and beverage containers labeled as “compostable,” “biodegradable,” or “degradable” or marketed using similar terms comply with the applicable ASTM International standard for the term used.<sup>68</sup> In contrast, the Green

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

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

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

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

<sup>68</sup> *Id.*, citing Cal. Pub. Res. Code §§ 42355-42357, 42359-42359.6. ASTM International (“ASTM”) is an international standards organization that develops

Guides do not refer to a particular industry standard.

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

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

#### 2. Analysis

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

One commenter recommended that the Commission coordinate with other federal agencies. The Commission actively consults with other agencies,

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

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

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

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

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

such as the EPA, the Department of Energy (“DOE”), and the Department of Agriculture (“USDA”), regarding their areas of expertise to ensure that the Commission does not issue guidance that duplicates or possibly conflicts with their regulations and programs. For example, as discussed below, the Commission does not propose specific guidance for organic claims about agricultural products that already are covered by the USDA’s regulations.<sup>73</sup>

#### F. Life Cycle Analysis

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

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

#### 1. Comments

Several commenters discussed whether and how the FTC should provide LCA guidance. Many noted that, since the last Guides review, LCA has become both a more accepted and

better defined process,<sup>78</sup> and marketers increasingly utilize LCA to assess the environmental effect of their products.<sup>79</sup> For example, Georgia-Pacific observed that the international expert community in life cycle assessment has developed and agreed on requirements for making environmental comparisons or assertions to the public, which the series of ISO 14040 and 14044 standards reflect.<sup>80</sup> Other panelists, however, asserted that LCA is still an emerging concept.<sup>81</sup>

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

##### a. LCAs as Marketing Claims

Because of the complexity of LCAs, several commenters asserted that life cycle analysis should be regarded as a decision-making tool to help improve environmental outcomes, rather than as a marketing claim.<sup>82</sup> A participant in the Green Packaging Workshop, Susan Selke, for example, viewed life cycle analysis as “the right philosophical approach” for making decisions, but discouraged its use for communicating information or making claims to consumers, on the grounds that one must “interpret LCA in context for it to be meaningful.”<sup>83</sup> Similarly, EHS Strategies, Inc., commented that terms such as “cradle to cradle” and “life cycle” are ill-defined, comprised of

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

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

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

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

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

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

multiple factors, and not amenable to understanding on a package label.<sup>84</sup>

In contrast, one commenter reported the results of a study finding that LCA information showing quantitative and specific environmental impact information in an advertisement positively influences consumers’ attitudes toward an advertisement, brand, company, and intention to purchase a product.<sup>85</sup> The commenter concluded that “LCA-based metrics” may be the best method for effective communication of environmental attributes.<sup>86</sup> Another commenter stated it would support the use of a standardized label conveying the results of an LCA to consumers, such as an approach akin to the Food and Drug Administration’s (“FDA”) Nutrition Facts Label.<sup>87</sup>

##### b. LCAs as Substantiation

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

Moreover, some commenters suggested that the Guides could help ensure that companies conducting LCAs do so in a manner that meets the FTC’s substantiation standards.<sup>89</sup> In particular, the Glass Packaging Institute suggested that the Guides expressly state that LCAs must meet the FTC’s substantiation standard for environmental claims, which requires that marketers have “competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so,

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

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

<sup>86</sup> *Id.*

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

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

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

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

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

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

<sup>76</sup> *Id.*

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

using procedures generally accepted in the profession to yield accurate and reliable results.”<sup>90</sup> Other commenters went further, noting that because life cycle analyses can vary in requirements and robustness, the Guides should indicate the LCA standards or methodologies that the Commission considers adequate.<sup>91</sup>

## 2. Consumer Perception Evidence

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

## 3. Analysis

After reviewing the comments and the results of its consumer perception study, the Commission has decided not to propose guidance about the use of life cycle information either in marketing or

as substantiation for environmental claims.<sup>94</sup> First, the Commission lacks information about how consumers interpret life cycle claims in marketing. Moreover, due to the complexity and variability of these claims, general advice is unlikely to be useful in any particular case. Therefore, the Commission will continue to analyze these claims on a case-by-case basis.

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

## V. Claims Addressed by the Current Green Guides

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

safe and ozone-friendly claims; (8) free-of and non-toxic claims; (9) source reduction claims; and (10) refillable claims.

### A. General Environmental Benefit Claims

#### 1. The Current Guides

The current Guides section on general environmental benefit claims (*e.g.*, “environmentally friendly”) states: “[u]nqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product, package, or service has specific and far-reaching environmental benefits.”<sup>95</sup> The Guides remind marketers that they have a duty to substantiate “every express and material implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product.” Unless marketers can meet this “substantiation duty,” they should avoid, or qualify, these claims “as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.”<sup>96</sup> The following addresses the comments discussing general environmental benefit claims, the Commission’s relevant consumer perception study findings, and the Commission’s proposed, revised guidance for such claims.

#### 2. Comments

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

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

Several commenters recommended that the Guides state that marketers making a general environmental claim have substantiation about the environmental impact of a product throughout its entire life cycle (see Part IV.F, *supra*, for a general discussion of comments regarding life cycle

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

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

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

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

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

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

<sup>96</sup> *Id.*

analysis).<sup>97</sup> For example, Unilever United States, Inc. asserted that marketers should review all aspects of the product's life cycle to substantiate "eco-friendly" claims because consumers reasonably interpret those claims to mean that the product as a whole offers a material environmental benefit and presents no significant environmental risk.<sup>98</sup> Similarly, EPA's Sustainable Products Network ("EPA-SPN") asserted that "general claims that imply overall superiority in environmental performance must be substantiated by information that addresses multiple environmental attributes over the product's life cycle."<sup>99</sup>

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

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

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

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

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

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

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

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

Several other commenters, however, argued that the FTC should not require marketers making general environmental claims to conduct a full LCA. According to the Business and Institutional Furniture Manufacturer's Association, while conducting an LCA is "an admirable aspiration," the science concerning LCA is not sufficiently well established to mandate such a requirement.<sup>103</sup> Similarly, the Formaldehyde Council, Inc. asserted that there is a debate regarding how various factors used in life cycle assessment are weighted in developing an overall assessment.<sup>104</sup> Other commenters similarly argued that life cycle assessment should not be the only tool available to marketers to substantiate general environmental claims, explaining that LCAs are complex, difficult to interpret, and costly.<sup>105</sup> Therefore, commenters noted that conducting an LCA may not be feasible even for large companies.<sup>106</sup>

#### b. Qualifying General Environmental Benefit Claims

Some commenters recommended that the Guides provide additional advice on how marketers can effectively qualify

14024 standard for Type 1 environmental labels; or 3) life cycle analyses that follow the requirements of the ISO 14040-series of standards for life cycle assessment." EPA-SPN, Comment 536013-00062 at 11; *see also* EPA-EPPP, Comment 533431-00038 at 6.

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

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

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

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

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

general environmental benefits. For example, one commenter suggested that the Guides should advise marketers on how to use more effective qualifiers. This commenter specifically advised the Commission to require that qualifications be "clear, understandable, prominently displayed, and indicate an actual environmental benefit."<sup>107</sup> This commenter also emphasized that a consumer evaluating an advertisement should be able to "quickly and easily tell that the environmental benefit that the product has is the specific environmental benefit indicated, not the wider general benefit included in the ad's message – *i.e.*, by such phrases as 'environmentally friendly.'"<sup>108</sup> Another commenter asserted that the FTC should provide examples of accompanying language that would be specific enough to allow the use of these types of claims.<sup>109</sup>

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

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

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

<sup>108</sup> *Id.*

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

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

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

According to GreenBlue, because such trade-offs are sufficiently common, the 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.”<sup>112</sup>

### 3. Consumer Perception Evidence

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

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

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

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

Averaging across the seven attributes, 52 percent of respondents viewing an unqualified “green” claim indicated that they believed that the product had a specific attribute about which the survey asked. In particular, responses for individual attributes ranged from 61 percent (product is made from recycled materials) to 40 percent (product is compostable). The responses concerning an unqualified “eco-friendly” claim were similar. Averaging across the seven attributes, 49 percent indicated that the claim suggested that the product had a particular attribute. Specifically, responses for individual attributes ranged from 56 percent (product is made from recycled materials) to 36 percent (product is made with renewable energy). When the general environmental claims were qualified, however, on average, 31 percent of consumers indicated that the claim implied specific environmental benefits in addition to the attribute stated.<sup>115</sup>

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

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

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

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

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

### 4. Analysis and Guidance

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

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

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

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

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

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

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

#### a. Unqualified General Environmental Benefit Claims

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

Given these findings, and because FTC law requires marketers to substantiate every express and implied environmental benefit that consumers reasonably could take from such a claim,<sup>124</sup> unqualified general environmental marketing claims remain very difficult, if not impossible, to substantiate. Very few products, if any, have all of the attributes consumers appear to perceive from general environmental benefit claims. In addition, given that all products have some environmental impact, it is doubtful that a marketer could

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

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

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

substantiate that a product has no or negligible negative environmental impact. The Commission, therefore, proposes revising the Guides to more directly caution marketers not to make unqualified general environmental benefit claims.

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

#### b. Qualified General Environmental Benefit Claims

The current Guides state that marketers may make broad environmental claims if they are "qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted."<sup>125</sup> Through examples, the Guides also advise marketers that qualifications should be sufficiently "clear and prominent" to convey the idea that the claim refers only to limited environmental benefits and that "no other deceptive implications are created by the context." The Commission's consumer perception study supports this advice by demonstrating that qualifying a general green claim reduces the number of respondents believing: (1) that a product has specific, unstated benefits; and (2) that a product has no negative environmental impact.

First, as discussed above, on average, approximately half of the respondents viewing a general, unqualified "green" claim believed that the claim suggested specific, unstated environmental benefits. When viewing a qualified "green" claim, on average, substantially fewer consumers (30 percent) believed that the claim suggested specific, unstated benefits.<sup>126</sup> For example, when

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

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

a "green" claim was qualified with the statement "made with recycled materials," 26 percent of respondents took away implied claims, a decrease of 26 percentage points. Similarly, when a "green" claim was qualified with the statement "made with renewable energy," 29 percent of respondents took away implied claims, a decrease of 22 percentage points.

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

Although the percentage of respondents believing that a product had specific, unstated benefits and had no negative impact significantly decreased, some respondents still saw implied claims. Specifically, 31 percent of respondents saw implied claims, and 17 percent believed a product had no negative impact. To determine the extent to which the general environmental claim (e.g., "green," "eco-friendly") contributed to these continuing perceptions, the Commission compared qualified-general claims to specific-attribute claims alone (e.g., "made with recycled materials"). Respondents viewing qualified-general claims were only eight percent more likely to see implied claims than those viewing the specific-attribute only claims.<sup>127</sup> Moreover, respondents viewing qualified-general claims were only approximately six percent more likely to state that the product had no negative environmental impact than those viewing specific-attribute claims alone.<sup>128</sup> Thus, when qualified, the use of a general green claim did not appear to significantly contribute to consumers' propensity to see implied claims or to believe a product had no negative environmental impact.

The results, therefore, suggest that qualifying a general environmental claim can focus consumers on the specific advertised benefit and significantly reduce misperceptions

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

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

about negative environmental impact. Based on these findings, the Commission proposes to emphasize the current Guides' advice on qualifying general environmental benefit claims. The proposed, revised section states that marketers must use clear and prominent qualifying language to convey to consumers that a general environmental claim refers only to a specific and limited environmental benefit. The section also cautions marketers that explanations of specific attributes, even when true and substantiated, will not adequately qualify a general environmental marketing claim if the advertisement's context implies other deceptive claims. Therefore, the proposed Guides remind marketers they should ensure that the advertising's context creates no deceptive implications.

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

Determining whether a general environmental claim is adequately qualified depends heavily on the claim's context.<sup>129</sup> To provide additional guidance on this point, the Commission proposes adding a new example to the Guides. In proposed Example 3, the marketer's claim that its packaging is now "Greener than our previous packaging" is likely deceptive even

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

though the marketer reduced the weight of its packaging, compared to previous packaging, by 15 percent. The example notes that consumers likely interpret "Greener" in this context to mean that other significant environmental aspects of the packaging have been improved. Proposed Example 3 suggests that the marketer qualify the claim by clearly stating that it reduced the weight of its packaging, compared to previous packaging, by 15 percent. If the advertisement's context does not imply other deceptive claims, this claim likely would not be deceptive.

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

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

## B. Certifications and Seals of Approval

### 1. The Current Guides

Currently, the Guides do not contain a section devoted to certifications and seals of approval. However, one example notes that an environmental seal of approval ("seal") may imply that a product is environmentally superior to other products. Specifically, Example 5 in the general environmental benefit claims section provides: "A product label contains an environmental seal, either in the form of a globe icon, or a globe icon with only the text 'Earth Smart' around it. Either label is likely to convey to consumers that the product is environmentally superior to other

products. If the manufacturer cannot substantiate this broad claim, the claim would be deceptive."<sup>130</sup> Accordingly, the Guides instruct marketers who use environmental seals to accompany such claims with clear and prominent language limiting any environmental superiority representation to the particular product attribute or attributes it can substantiate.<sup>131</sup>

### 2. Comments

Several commenters and panelists identified the use of third-party certifications as a significant green marketing trend<sup>132</sup> and highlighted the benefits of such certifications to businesses and consumers.<sup>133</sup> For example, Green Seal, Inc. asserted that third-party certification provides marketers with independent and credible substantiation.<sup>134</sup>

Weyerhaeuser stated that third-party certifications are "useful in technical areas, where consumers face difficulty in understanding or directly measuring benefits."<sup>135</sup> Similarly, the U.S. Green Building Council observed that "when properly administered by certifying organizations truly independent of the product manufacturer and appropriately represented by marketers, . . . third-party certification takes the guesswork out of consumer purchases, providing an independent and expert assessment of

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

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

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

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

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

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

technical product claims that may be difficult for consumers to interpret or verify on their own.”<sup>136</sup> Cone LLC affirmed that consumers rely on certifications when evaluating environmental claims. Its opinion survey found that 80 percent of respondents believed that certification by third-party organizations is “important in providing oversight to ensure environmental messaging by companies is accurate.”<sup>137</sup>

One commenter, however, noted that consumers typically cannot verify third-party certifications. Therefore, there is a “heightened degree of trust involved, and there is a heightened degree of credibility that is at stake.”<sup>138</sup> Other commenters cautioned that seals and logos may communicate a general claim of environmental preferability with no means for the consumer to determine which environmental benefits form the basis for the claim.<sup>139</sup>

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

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

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

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

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

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

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

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

applicable principles and criteria.”<sup>141</sup> 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.<sup>142</sup> Another commenter suggested that marketers generally should not use “vague, undefined” environmental terms but should be able to incorporate such terms into certifications, as long as the marketer makes the method and terms of the certification publicly available and easily accessible.<sup>143</sup>

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

Commenters also recommended that the Guides address how marketers can avoid misleading consumers about the certifier’s independence.<sup>146</sup> For example, one commenter opined that self-certifications “can be misleading to consumers unless the company expressly discloses that the certification has not been conducted by an independent third-party.”<sup>147</sup> Another asserted that the Guides should address the financial relationship between the

certifying organization and the company being certified.<sup>148</sup>

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

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

Commenters also advised the FTC to address the use of third-party certifications to substantiate claims. Several urged the Commission not to require third-party certification as substantiation for an environmental claim.<sup>153</sup> Others recommended that the FTC revise the Guides to set forth the parameters of a third-party certification that would constitute adequate substantiation.<sup>154</sup> Some commenters

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>154</sup> *See, e.g.*, ACC, Comment 536013-00030 at 3-4; AF&PA, Comment 536013-00021 at 2-3; AZS Continued

and panelists stated that marketers relying on a third-party certification as substantiation must be able to show that the certifying party is truly independent from the advertiser and that the certifying party has professional expertise in the area that is being certified.<sup>155</sup> Thus, for example, some commenters proposed that the Guides reiterate, or at least cross-reference, the principles outlined in the Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guides”),<sup>156</sup> including that endorsements may not contain factual representations that would be deceptive or could not be substantiated if made directly by the advertiser<sup>157</sup> and that marketers should not rely on endorsements by entities that have a monetary or other relationship with the marketer.<sup>158</sup>

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

Consulting, Inc., Comment 536013-00024 at 1-2; Healey, Comment 533431-00048 at 2; Johns Manville, Comment 536013-00034 at 6; SDA, Comment 536013-00018 at 2; Skye Con, Comment 536013-00036 at 3; SPI, Comment 533431-00036 at 12; USGBC, Comment 536013-00029 at 4; Vinyl Institute, Comment 536013-00019 at 2-3; Weyerhaeuser, Comment 536013-00035 at 2.

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

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

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

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

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

<sup>160</sup> Vinyl Institute, Comment 536013-00019 at 2; see also ECM Biofilms, Inc. (“ECM Biofilms”),

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

### 3. Analysis and Guidance

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

Given the widespread use of certifications and seals and their potential for consumer confusion, the Commission proposes providing additional guidance, specifically in a new Guide section devoted to this subject.<sup>163</sup> This section emphasizes that third-party certifications and seals constitute endorsements covered by the Endorsement Guides.<sup>164</sup> This section also states that the use of a certification or seal by itself may imply a general environmental benefit claim. Because, as discussed above, such claims are so difficult to substantiate, this section further advises marketers not to use unqualified seals or certifications. Marketers should accompany seals or certifications with clear and prominent language limiting the general environmental benefit claim to the particular attribute or attributes for which they have substantiation. Finally, the section addresses the use of certifications as substantiation.

Comment 534743-00025 at 2 (commenting that to be an active member of ASTM and to author standards takes resources that are not available to many organizations, and “[a]s a result, standards are written to be beneficial to certain organizations”).

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

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

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

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

### a. Certifications and Seals as Endorsements

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

Rather than simply repeating the Endorsement Guides’ text, the proposed Green Guides section provides several examples of how the Endorsement Guides apply in the context of environmental claims. Proposed Example 1 addresses the use of a seal of approval created by the marketer itself, rather than bestowed by a third-party. In this example, the advertisement implies that an independent third-party certifier with appropriate expertise awarded the seal. The example notes that this unqualified claim would be deceptive because consumers would assume that an independent, third-party certifier

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

<sup>166</sup> *Id.*

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

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

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

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

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

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

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

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

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

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.

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

The current Green Guides state that unqualified certifications and seals of approval likely convey general environmental benefit claims. Specifically, Example 5 of the current general environmental benefit section states that a marketer using an unqualified seal of approval should be able to substantiate the broad claim that the product is environmentally superior to others.<sup>173</sup> If the marketer cannot, it should accompany the seal with "clear and prominent qualifying language limiting the environmental superiority representation to the particular product attribute or attributes for which they could be substantiated . . ."<sup>174</sup> No commenters challenged this approach. Therefore, the Commission continues to believe that consumers likely interpret unqualified seals and certifications similarly to general environmental benefit claims.<sup>175</sup>

As discussed in Part V.A, above, the Commission's consumer perception study shows that broad, general environmental benefit claims suggest that a product has specific, unstated green attributes, such as recyclability

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

<sup>174</sup> *Id.*

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

and biodegradability, and that the product has no negative environmental impact. The study results also reinforce the Guides' advice that marketers may be able to avoid making deceptive general environmental claims by qualifying those claims.

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

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

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

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

A marketer may rely on a third-party certification as all or part of its substantiation if the marketer ensures that the certification constitutes competent and reliable scientific evidence to support its claims. In other

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

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

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

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

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

Third, the Commission declines to propose guidance on the development of third-party certification programs. Experts in the field are in the best position in a dynamic marketplace to determine how to establish certification programs to assess the environmental

attributes of products. There may be multiple ways to develop standards that would constitute adequate substantiation, *i.e.*, substantiation that constitutes competent and reliable scientific evidence. Accordingly, the Commission will continue to evaluate the adequacy of a third-party certification as substantiation on a case-by-case basis.

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

#### C. Degradable Claims

##### 1. The Current Guides

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

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

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

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

their inability to degrade in the manner consumers expect.

##### 2. Comments

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

Although supporting the current guidance, commenters suggested four modifications. First, many stressed that typical solid waste disposal treatments inhibit degradation.<sup>185</sup> Procter & Gamble summed up these views, stating "[i]n the United States, solid waste is predominantly disposed of by incineration or in a landfill, where little or no degradation occurs."<sup>186</sup> Consequently, these commenters argued that unqualified biodegradable claims are inappropriate for items destined for landfills and incinerators.<sup>187</sup> Second, several commenters recommended that the Commission provide guidance on the "reasonably short" time period for complete decomposition. For example, the Biodegradable Products Institute ("BPI") urged that "[t]he FTC . . . cite a specific timeframe for the process."<sup>188</sup> Third, several commenters suggested that the Commission reference technical protocols that marketers could follow to adequately substantiate degradable claims. These commenters did not form

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

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

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

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

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

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

a consensus, however, regarding which specific protocol(s) the Commission should consider.<sup>189</sup> Finally, the EPA's Sustainable Products Network urged that the revised Guides address emerging "oxo-degradable" claims.<sup>190</sup>

### 3. Consumer Perception Evidence

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

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

### 4. Analysis and Guidance

In light of the comments and the APCO survey, as well as our own enforcement experience, the Commission proposes retaining its

guidance on degradable claims but adding clarity regarding degradable claims for solid waste.<sup>196</sup> Given the lack of information on the record about liquid waste, the Commission seeks comment on whether it should provide additional specificity concerning claims for such materials. The Commission declines to advise marketers that a particular test constitutes adequate substantiation for degradability claims. Finally, the Commission proposes addressing oxo-degradable claims in the Guides.

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

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

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

First, because the Guides do not currently illustrate a non-deceptive

unqualified degradable claim for a solid item, the Commission proposes adding an example. Specifically, proposed new Example 5 describes a plant pot that, when buried in soil, quickly decomposes. This example illustrates that an unqualified degradable claim can be made non-deceptively about a solid item if the item is customarily disposed of in a manner that promotes total and rapid decomposition.

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

#### b. Solid Waste – Substantiation

As discussed above, several commenters suggested that the Commission reference technical standards that marketers could follow to substantiate degradability claims.<sup>202</sup> Any technical protocol (or combination of protocols) must assure complete decomposition within one year and must replicate the physical conditions found in the relevant disposal environment (e.g., in landfills, where most trash is disposed). Commission staff has not identified testing protocols that satisfy these needs.<sup>203</sup> Accordingly, the Commission does not propose creating a safe harbor for any particular technical standard.

#### c. Liquid Waste

The Commission received no comments concerning decomposition of liquids (or dissolvable solids) in wastewater or aquatic environments, and is unaware of consumer perception evidence relating to such degradable claims. Therefore, the Commission lacks sufficient information to give more

<sup>189</sup> The following commenters favor some degree of reference to technical standards or testing protocols: ECM BioFilms, Comment 534743-00011 at 3 (ASTM D 5526 (plastics under accelerated landfill conditions)); EPA-SPN, Comment 536013-00062 at 12 (various harmonized tests accessible online from the EPA); EPI, Comment 533431-00063 at 4 ("the applicable [unspecified] ASTM or ISO standard"); Georgia-Pacific, Comment 533431-0007 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 8 ("existing [unspecified] ASTM standards"); *see also* Graphic Arts Coalition, Comment 533431-00060 at 1 ("The business community ... oftentimes seeks a specific test method to verify the claims. Inclusion in the guides of acceptable test methods might be an appropriate step."); Tandus, Comment 533431-00021 at 1 ("If a test method could be specified, it might help qualification of such claims").

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

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

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

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

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

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

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

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

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

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

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

<sup>201</sup> *Id.*

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

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

definitive guidance on the “reasonably short period of time” for degradability claims for liquids.<sup>204</sup> Accordingly, the Commission seeks consumer perception evidence regarding these degradable claims and requests comment on whether the Guides should specify a decomposition time period for liquid substances or dissolvable solids marketed without qualification.

#### d. Emerging Oxo-degradable Claims

The EPA’s Sustainable Products Network urged the Commission to include guidance concerning emerging degradable claims – “oxo-degradable” and “oxo-biodegradable.”<sup>205</sup> Claims relating to purported oxo-degradability have entered the marketplace in connection with some of the same disposable items, *e.g.*, bottles and bags, that have featured other degradable claims.<sup>206</sup> According to relevant trade associations, the technology behind these claims depends upon a catalyst, typically light or oxygen, to commence and sustain the decomposition process.<sup>207</sup> However, as discussed above, these elements are lacking in customary methods of disposal. Although commenters did not provide any consumer perception evidence relating to oxo-degradable claims, it is likely consumers would understand these claims similarly to other degradable claims.<sup>208</sup> Therefore, the

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

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

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

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

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

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

#### D. Compostable Claims

##### 1. The Current Guides

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

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

##### 2. Comments

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

NAD Press Release Regarding GP Plastics Corp.’s PolyGreen Plastic Bags (Mar. 9, 2009).

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

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

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

#### 3. Consumer Perception Evidence

As discussed above, the Biodegradable Products Institute submitted a consumer research study conducted by APCO concerning degradable and compostable claims. According to this study, 62 percent of consumers said they do not have access, and an additional 28 percent do not know if they have access, to large-scale composting facilities.<sup>212</sup> Nevertheless, 43 percent of consumers interpreted an unqualified compostable claim to mean that a large-scale composting facility is available in their area.<sup>213</sup> The study also found that 71 percent of consumers believed that a package labeled “compostable” would decompose in a home compost pile or device.<sup>214</sup>

#### 4. Analysis and Guidance

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

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

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

In light of the persistent scarcity of municipal facilities and many consumers’ mistaken belief about their availability, the Commission proposes retaining its advice that marketers qualify their compostable claims to avoid deception about the limited availability of composting facilities.<sup>217</sup>

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

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

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

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

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

<sup>217</sup> Example 4 in the current Guides suggests an effective qualification that would convey the

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

#### b. Substantiating Compostable Claims

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

ASTM created D 6400 and D 6868 in response to manufacturers’ increased production of plant-based plastic resins.<sup>220</sup> Marketers of these plant-based materials desired to contrast them with petroleum-based plastics and advertise them as “compostable.”<sup>221</sup> ASTM provides that a plastic item should be considered compostable if the item sufficiently converts to carbon dioxide under these protocols’ specific laboratory conditions.<sup>222</sup>

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

scarcity of large-scale facilities, e.g., “Appropriate facilities may not exist in your area.” 16 CFR 260.7(c), Example 4.

<sup>218</sup> *Id.*

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

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

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

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

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

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

It is unclear whether these “optimum conditions” reflect real world conditions. There are no comprehensive, mandatory operating requirements for large-scale composting facilities.<sup>225</sup> Instead, individual facilities appear to accept incoming plastic feedstock based upon a number of variables.<sup>226</sup> Such variables include operator assumptions concerning whether the plastic is petroleum-based and the length of time an operator feasibly can wait to complete composting.<sup>227</sup> Therefore, it is doubtful that there are typical large-scale composting practices consistent with the ASTM protocols, but more likely numerous and varied facility-specific restrictions on feedstock acceptance and processing.

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

#### c. Time Period for Composting

As discussed above, the Commission proposes adding specificity to the degradable guidance in connection with the “period of time” for solid waste decomposition.<sup>228</sup> Consistent with that advice, the Commission proposes to clarify the time period referenced in the

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

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

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

<sup>227</sup> *Id.*

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

compostable section (*i.e.*, “timely manner”).<sup>229</sup> Specifically, the Commission restates the position it articulated in its 1998 Green Guides review and proposes adding it to the compostable section.<sup>230</sup> That is, “timely manner” means that the product or package will break down in approximately the same time as the materials with which it is composted, *e.g.*, natural plant matter.

#### E. Recyclable Claims

##### 1. The Current Guides

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

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

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

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

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

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

population where programs are available to recycle the product.<sup>233</sup>

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

## 2. Comments

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

### a. The Substantial Majority Threshold

As discussed above, the Guides advise marketers to qualify recyclable claims when recycling facilities are not available to a “substantial majority” of consumers or communities where a product is sold. Commenters identified difficulties in substantiating recyclable claims pursuant to this guidance. They did not agree, however, on how to modify the guidance, suggesting that the Commission either: (1) lower the substantial majority threshold; (2) quantify the substantial majority threshold; or (3) permit more positive disclosures when marketers do not meet the substantial majority threshold.

### i. Lower the Substantial Majority Threshold

Several commenters urged the FTC to lower the Guides’ substantial majority threshold so that marketers could make an unqualified recyclable claim even when recycling facilities are not available to a substantial majority of consumers.<sup>236</sup> Environmental Packaging International (“EPI”) suggested that the FTC consider a “middle ground,” where recyclability is available to “20 to 60 percent” of communities.<sup>237</sup> According to EPI, in order to meet the substantial majority standard, marketers must send their packaging to numerous communities to determine whether they can be recycled. Thus, EPI opined that a more lenient threshold would reduce

this financial burden. An EPA staff member suggested that the substantial majority threshold may limit marketers’ ability to make recyclable claims for some products, which in turn may stifle efforts to develop recycling programs for those products.<sup>238</sup>

Other commenters suggested that the Commission consider adopting the ISO 14021 Environmental Labels and Declarations – Self-Declared Environmental Claims Standard.<sup>239</sup> In contrast to the Guides’ “substantial majority” threshold, ISO 14021 provides that marketers can make unqualified recyclable claims if recycling facilities are available to a “reasonable proportion” of consumers where the product is sold.<sup>240</sup> However, the ISO standard does not quantify its reasonable proportion threshold.<sup>241</sup>

### ii. Quantify the Substantial Majority Threshold

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

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

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

<sup>240</sup> ISO 14021 7.7.2:1999(E).

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

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

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

<sup>244</sup> EPI, Comment 533431-00063 at 3; *see also* AF&PA, Comment 534743-00031 at 2 (clarifying the definition of “substantial majority” would encourage the recovery of more materials that have

### iii. Permit Positive Disclosures for Recyclable Claims

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

### b. Use of the SPI Code

Developed by the Society of the Plastics Industry (“SPI”), the SPI code consists of a triangle composed of chasing arrows with a number in the middle that identifies the type of plastic resin from which a product is made. The Green Guides recognize that consumers may interpret the SPI code to mean that a package is recyclable because of its similarity to the universal recycling symbol, the three chasing arrows.<sup>247</sup> To address this problem, the Guides explain that the SPI code is not likely to convey a recyclability claim if inconspicuously placed on the bottom of a product.<sup>248</sup> In contrast, if the SPI code is displayed conspicuously, it is a “recyclable” claim necessitating disclosure of the limited availability of recycling programs for the product, if facilities are not available to a substantial majority of consumers.<sup>249</sup>

Several commenters observed that even inconspicuous use of the SPI code may cause consumer confusion.<sup>250</sup> The Glass Packaging Institute, for example, asserted that consumers believe the SPI code indicates the packaging can be

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

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

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

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

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

<sup>249</sup> *Id.*

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

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

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

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

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

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

recycled regardless of the consumer's geographic location.<sup>251</sup> Similarly, the American Beverage Association ("ABA") observed that consumers interpret the SPI code – regardless of where the code is located, or what number is inside the code – to mean the package is "recyclable."<sup>252</sup> The ABA argued that due to this incorrect belief, consumers discard non-recyclable packaging into recycling bins that then require extra sorting or ultimately result in contamination of the recycled plastic feedstock.<sup>253</sup> These commenters urged the FTC to revise the Guides to clarify that the SPI codes are, in fact, recyclability claims that must be properly qualified.<sup>254</sup>

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

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

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

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

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

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

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

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

industry and its customers who are complying with state law.<sup>259</sup>

### 3. Analysis and Guidance

The comments demonstrate the continuing importance of the recyclable section of the Guides. However, commenters suggested certain revisions to enhance the section's effectiveness for both businesses and consumers. The following analysis addresses these comments.<sup>260</sup>

#### a. The Substantial Majority Threshold

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

#### i. Retaining the Substantial Majority Threshold

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

Some commenters contended that the substantial majority threshold may stifle recycling efforts because it forces marketers to send their products or

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

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

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

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

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

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

#### ii. Quantifying the Substantial Majority Threshold

As noted by several commenters, the ambiguity of the substantial majority standard causes problems. One marketer might interpret 55 percent as a substantial majority and, thus, make an unqualified recyclable claim. A competitor might believe that substantial majority means 75 percent and, thus, decline to make the same claim. Commission staff, therefore, has informally interpreted substantial majority to mean at least 60 percent.<sup>263</sup>

<sup>263</sup> FTC Staff concluded that the 60 percent figure is an appropriate minimum threshold because it is consistent with the plain meaning of "substantial majority." The adjective "substantial" requires that there be something greater than a simple majority. Sixty percent is not so high that it permits unqualified claims only when nearly all communities have recycling facilities. Staff further found that this figure is consistent with previous Commission statements and court decisions. *See, e.g.*, 73 FR 51164, 51177 (Aug. 29, 2008) ("[A] substantial majority of consumers dislike telemarketing calls that deliver prerecorded messages. . . . [A]t least 65 to 85 percent of consumers do not wish to receive prerecorded telemarketing calls."); Report to Congress: Marketing Food to Children and Adolescents, at 3-4 (July 2008) ("In addition . . . , the companies accounted for 60% to 90% of U.S. sales. Therefore, the Commission believes that the companies that received and responded . . . were responsible for a substantial majority of expenditures for food and

Continued

The Commission proposes to advise marketers of this informal guidance in a footnote in the Guides. The Commission also requests comment on whether the Guides should formally quantify “substantial majority,” and, if so, what the appropriate minimum figure should be.

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

#### b. Use of Positive Disclosures

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

beverage marketing to children and adolescents during 2006.”); *Mihailovich v. Laatsch*, 359 F.3d 892, 909-10 (7th Cir. 2004) (75 percent is substantial majority); *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 39 (D.D.C. 2001) (59 percent is substantial majority).

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

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

guidance and withdrew its approval of those disclosures.<sup>266</sup>

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

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

#### c. Use of the SPI Code

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

#### F. Recycled Content Claims

##### 1. The Current Guides

The Guides provide that marketers may make a recycled content claim only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer) or after consumer use (post-consumer).<sup>267</sup> To make a pre-consumer recycled content claim, an advertiser must substantiate that the pre-consumer material would otherwise have entered the solid waste stream.<sup>268</sup> The Guides

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

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

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

do not advise marketers to distinguish between pre-consumer and post-consumer materials, but marketers may do so. Marketers must substantiate any express or implied claims about the specific amount of pre- or post-consumer content in their products.

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

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

#### 2. Comments

The commenters addressing recycled content claims discussed three main issues: (1) pre-consumer recycled content claims for textile products; (2) the distinction between pre- and post-consumer recycled content claims; and (3) the methods for calculating recycled content.

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

Several commenters stated that the Guides do not provide sufficient guidance regarding pre-consumer recycled content claims for textile products. For instance, the EPA’s Sustainable Products Network (“EPA-SPN”) stated that it would be helpful to have more specific guidance, including examples, to help determine whether certain materials qualify as pre-

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

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

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

consumer recycled content.<sup>272</sup> EPA-SPN noted that re-use of off-quality materials generated during the manufacturing process presents difficult questions and suggested that several factors may be relevant to determine whether such materials should be regarded as pre-consumer recycled content or as industrial scrap that is normally reused in the manufacturing process. EPA-SPN indicated that an important factor may be whether the material must undergo significant processing before it can be reused.<sup>273</sup>

Another commenter stated that the Guides do not account for innovation in the textile industry.<sup>274</sup> It noted that, for years, the textile industry has sought to prevent material from entering the solid waste stream and that “down cycling” (such as using waste yarn as fiber fill in toys) was common. The commenter said that more recent innovations seek to create high value raw materials from the waste product and provided examples of such developments. This commenter sought guidance on whether such material could be considered recycled content.<sup>275</sup>

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

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

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

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

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

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

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

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

Second, another commenter recommended that the Guides adopt the ISO 14021 approach to post-consumer material.<sup>278</sup> This commenter explained that ISO 14021 contains a more expansive definition of “post-consumer” material than the Guides because it includes “returns of material from the distribution chain.” The commenter argued that U.S. companies may be at a disadvantage relative to international companies that can claim a higher percentage of post-consumer recycled content under ISO 14021.<sup>279</sup> The commenter urged the FTC to adopt ISO’s definition, noting that federal law requires government agencies to use such voluntary standards when they are available.<sup>280</sup>

#### c. Calculating Recycled Content

The commenters had differing opinions regarding the appropriate methods to calculate recycled content. Several recommended that the Guides continue to use the annual weighted average.<sup>281</sup> Others recommended revising the Green Guides to permit alternative calculation methods.<sup>282</sup> For example, one commenter recommended that the Guides permit the use of the annual weighted average for the specific company’s business or the use of an industry sector annual weighted average.<sup>283</sup> Another argued that requiring each product to have a minimum percentage of recycled content may limit the ability of vertically-integrated manufacturers to use recycled content.<sup>284</sup> Yet another

materials. Tracy Artley, Comment 534743-00019 at 1.

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

<sup>279</sup> PRC, Comment 534743-00024 at 2.

<sup>280</sup> *Id.*

<sup>281</sup> Bailey, Comment 533431-00028 at 6; GreenBlue, Comment 533431-00058 at 8; NAIMA, Comment 533431-00042 at 15; SDA, Comment 533431-00020 at 3; Saint-Gobain, Comment 533431-00037 at 15; Stepan Company, Comment 533431-00011 at 3.

<sup>282</sup> AF&PA, Comment 533431-00083 at 2-3; Georgia-Pacific, Comment 533431-00007 at 9; MBDC, Comment 533431-00022 at 1-3; MeadWestvaco, Comment 533431-00013 at 2; Weyerhaeuser, Comment 533431-00084 at 6.

<sup>283</sup> Georgia-Pacific, Comment 533431-00007 at 9.

<sup>284</sup> MBDC, Comment 533431-00022 at 1-2. This commenter claimed that vertically-integrated manufacturers have difficulty achieving high per-product percentages because of challenges tracking materials in large operations, incorporating high percentages of recycled content in high-volume product lines, and using high percentages of recycled content in products without affecting their performance.

argued that the Commission should consider a “mass allocation” methodology that would permit recycled content “offsets.” Under this approach, a company could earn credits for using recycled content and allocate those credits to make claims for other products.<sup>285</sup> Some commenters, however, argued that these alternative approaches could mislead consumers by implying that individual products have a greater percentage of recycled content than they actually do.<sup>286</sup>

#### 3. Consumer Perception Evidence

The Commission’s consumer perception study tested respondents’ understanding of the phrase “made with recycled materials” as this claim appeared on three different products – wrapping paper, a laundry basket, and kitchen flooring. The study asked respondents whether a statement that a product is “made with recycled materials” suggests that all, most, or some of the materials were made with recycled material. The largest group, 35 percent, indicated that they would interpret the claim as meaning that “all” of the product was made with recycled materials, while 20 percent believed that “most” of the product was made with recycled materials.<sup>287</sup>

The study further explored which claims were implied by a product advertised as “made with recycled materials.” The responses to a closed-ended question indicated that 52 percent of respondents believe that a “made with recycled materials” claim suggests that the advertised product was recyclable.<sup>288</sup> The study also used an open-ended question to explore this same point. In response, only three percent said that the statement suggests the product is recyclable. Not surprisingly, a majority, 57 percent, stated that the advertised product was made of recycled content.

<sup>285</sup> Shaw Industries Group, Inc. (“Shaw”), Comment 533431-00050 at 1-3; *see also* Sappi, Comment 534743-00023 at 3-5 (recommending “credit system” for recycled content).

<sup>286</sup> Bailey, Comment 533431-00028 at 6; Stepan Company, Comment 533431-00011 at 3.

<sup>287</sup> Further, 26 percent stated that the claim means that “some” of the product was made with recycled materials; 15 percent stated that the claim does not suggest anything about how much of the product was made with recycled materials; and 5 percent stated they were not sure. These figures total 101 percent because of rounding. These percentages were derived by combining the responses to all claims that included the phrase “made with recycled materials” (*i.e.*, “made with recycled materials,” “green - made with recycled materials,” “eco-friendly - made with recycled materials,” and “sustainable - made with recycled materials”).

<sup>288</sup> This number is net of the non-environmental control claim.

#### 4. Analysis and Guidance

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

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

Although the Guides do not specifically address textiles, they provide advice concerning recycled content claims for all products, including textiles. To constitute pre-consumer recycled content, materials must have been “recovered or otherwise diverted from the solid waste stream ... during the manufacturing process (pre-consumer). . . .”<sup>289</sup> Examples 1-3 in the current Guides discuss factors relevant to determining whether the material was diverted from the solid waste stream – the amount of reprocessing needed before reuse and whether the material is normally reused in “the original manufacturing process.” Specifically, when spilled raw materials and scraps undergo only “a minimal amount of reprocessing” and are “normally reused in the original manufacturing process,” they are not diverted from the solid waste stream (and, therefore, do not qualify as recycled content).<sup>290</sup>

The commenters’ discussion of innovations in the textile industry highlights difficulties in using the existing guidance to determine whether a particular material qualifies as recycled content.<sup>291</sup> The commenters explain that the textile industry for many years has sought to reuse waste materials from the manufacturing process and that recent innovations have allowed manufacturers to put that material to higher use. These innovative

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

<sup>290</sup> See 16 CFR 260.7(e), Example 1; see also 16 CFR 260.7(e), Examples 2 and 3.

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

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.<sup>292</sup> For instance, the comments did not address whether the Commission should eliminate the factors it currently uses to determine if material is diverted from the solid waste stream. In addition, it is unclear whether consumers interpret recycled content to mean more than diversion from the solid waste stream. For example, do they believe that any material that is significantly reprocessed and reused constitutes recycled content? If material is reused in place of virgin material, do consumers consider that material recycled content? If, over time, it becomes standard practice within an industry to reuse certain material, do consumers still regard that material as constituting recycled content? The Commission, therefore, declines to propose changes to its guidance at this time.<sup>293</sup> Instead, the Commission solicits comment on what changes, if any, it should make to its existing guidance on pre-consumer recycled content claims for all products. In particular, the Commission seeks evidence of consumer perception of pre-consumer recycled content claims.

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

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

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

<sup>293</sup> This guidance can now be found in 16 CFR 260.12.

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 discontinue using them.

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

##### c. Calculating Recycled Content

Currently, the Guides advise marketers that recycled content claims may be based on the annual weighted average of recycled content in an item.<sup>294</sup> Certain commenters suggested that the Guides allow for alternative calculation methods, such as the average amount of recycled content within a product line or across all product lines, or an offset-based approach.<sup>295</sup>

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

<sup>294</sup> 16 CFR 260.7(e), Example 9.

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

that contains no recycled content and commercial carpeting that contains 50 percent. If the marketer believes that individuals are more interested than businesses in recycled content, it could choose to average the amount of recycled content in both products and then make a 25 percent recycled content claim for its residential carpeting (even though this carpeting contains no recycled content).<sup>296</sup> Such a claim appears to be deceptive; therefore, without consumer perception evidence to the contrary, the Commission declines to sanction it.

The Commission, however, proposes retaining Example 9, which illustrates that using annual weighted average is not deceptive.<sup>297</sup> The Guides have included this example since 1992, and there is no evidence that consumers have been deceived by recycled content claims based on this type of calculation. Moreover, it does not appear that consumers would likely be deceived by a percentage recycled content claim for a single product because their chances of getting a product with a lower percentage of recycled content is roughly the same as their chances of getting one with a higher percentage. At least theoretically, however, using annual weighted average could lead to deception. For example, a company could use two manufacturing sites to make the same product – one using recycled content but selling to local consumers who give little weight to this fact, and another using no recycled content but selling to local consumers who place a premium on products containing recycled materials. In this circumstance, the company could use the annual weighted average to make recycled content claims to the second set of consumers, even though those consumers would never receive products with such content. The Commission, therefore, requests comment on whether recycled content claims based on annual weighted average are misleading, and, if so, whether these claims should be qualified.

#### d. Unqualified Recycled Content Claims

The Guides currently advise marketers to qualify recycled content claims unless the entire product or package, excluding minor, incidental components, is made with recycled content. Any needed qualifications should specify the percentage of recycled content in the item. The Commission's study indicates that this

guidance remains valid. Specifically, a significant minority of respondents (35 percent) indicated that an unqualified recycled content claim means that all of the product was made with recycled materials. The Commission, therefore, proposes retaining this guidance.

#### e. Implied Claims

The results of the Commission's consumer perception study suggest that some consumers understand a "made with recycled materials" claim to convey a recyclable claim. In response to a closed-ended question, 52 percent of respondents indicated that they believed that a "made with recycled materials" claim suggested that the product was recyclable. In response to an open-ended question, however, only three percent of respondents stated that they thought the advertised product was recyclable.

Although the responses to the closed-ended questions suggest that many consumers may perceive an implied recyclable claim, the Commission does not propose advising marketers that make unqualified recycled content claims to disclose if their product is not recyclable. Even if some consumers do perceive an implied recyclable claim, their understanding appears to be accurate. The Commission's study asked respondents only about an unqualified "made with recycled materials" claim. Assuming marketers are following the Guides, they make unqualified recycled content claims only where the products are made from 100 percent recycled materials. Products that are made of 100 percent recycled materials appear to be recyclable.<sup>298</sup> Assuming this is the case, marketers would be able to substantiate any implied claim that their product is recyclable. Therefore, the Commission does not propose advising marketers that make unqualified recycled content claims to disclose that the product is not recyclable. The Commission requests comment on this advice and seeks any additional consumer perception evidence addressing this issue.

The Commission also does not propose such guidance for marketers making qualified recycled materials claims, such as "made with 50 percent recycled materials." It is unclear whether consumers believe that a qualified recycled materials claim suggests that the product is also recyclable. Without such evidence, the Commission is hesitant to advise

marketers to make such disclosures. The Commission, nevertheless, requests comment on its proposal and, in particular, seeks any consumer perception evidence.

#### G. Ozone-Safe and Ozone-Friendly Claims

##### 1. The Current Guides

The current Guides state that it is deceptive to misrepresent, directly or by implication, that a product is safe for, or "friendly" to, the ozone layer or the atmosphere.<sup>299</sup> This section contains four examples.

Example 1 provides that an ozone friendly claim is deceptive if the product "contains any ozone-depleting substance, including those listed as Class I or Class II chemicals in Title VI of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and others subsequently designated by the EPA as ozone-depleting substances."<sup>300</sup>

Example 2 illustrates that an ozone friendly claim may be deceptive, even if the product does not contain ozone-depleting chemicals. In this example, an aerosol air freshener is labeled

"ozone friendly" but contains volatile organic compounds, which may cause smog. Even though the product does not contain ozone-depleting substances, the unqualified ozone friendly claim is deceptive because it inaccurately conveys that the product is safe for the atmosphere as a whole.

Example 3 discusses an unqualified claim that an aerosol product "contains no CFCs." Although the product does not contain CFCs, it contains HCFC-22, another ozone-depleting substance. Because the no-CFCs claim likely implies that the product does not harm the ozone layer, the claim is deceptive.

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

##### 2. Comments

Several commenters discussed the Guides' treatment of ozone-safe and no-CFCs claims. The EPA's Stratospheric

<sup>298</sup> 16 CFR 260.7(h).

<sup>299</sup> Example 1 also notes that Class I chemicals include chlorofluorocarbons (CFCs), halons, carbon tetrachloride, 1,1,1-trichloroethane, methyl bromide, and hydrobromofluorocarbons (HBFCs) and that Class II chemicals are hydrochlorofluorocarbons (HCFCs).

<sup>296</sup> For mathematical simplicity, the hypothetical assumes equal sales of each product.

<sup>297</sup> 16 CFR 260.7(e), Example 9.

Protection Division (“EPA-SPD”), which regulates ozone-depleting substances, stated that the Guides should continue to provide guidance concerning ozone-safe claims and allow marketers to use no-CFCs claims.<sup>301</sup> The EPA-SPD explained that no-CFCs claims may provide useful information to consumers because many consumers do not realize that CFCs are no longer used. Other commenters disagreed, and argued that the Guides should advise marketers not to make no-CFCs claims.<sup>302</sup> One commenter stated that because CFCs have been banned for almost 30 years, no-CFCs claims do not distinguish a marketer’s product from other CFC-free products.<sup>303</sup> Another similarly stated that “given the universal ban on ozone depleting substances,” ozone-safe claims imply that products without that claim contain ozone-depleting substances. Therefore, the commenter argued that “there really is no reason to continue use of this claim.”<sup>304</sup>

In addition to the general discussion regarding ozone-safe and no-CFCs claims, the EPA-SPD recommended several modifications to the examples in the Guides.<sup>305</sup> First, the EPA-SPD stated that the Commission should delete the references to HCFC-22 in Examples 3 and 4 because of EPA’s general prohibition on the use of newly produced ozone-depleting chemicals HCFC-22 and HCFC-14b. Second, the EPA-SPD recommended that the Commission provide guidance for air conditioning manufacturers that substitute non-ozone depleting refrigerants for the prohibited HCFCs. Specifically, EPA-SPD suggested advising marketers not to make unqualified “environmentally friendly” claims about their air-conditioning equipment. The EPA-SPD noted this equipment still may have adverse environmental effects because it uses large quantities of energy and because its refrigerants are greenhouse gases.<sup>306</sup>

<sup>301</sup> Letter from the EPA Stratospheric Protection Division, Mar. 18, 2010, available at (<http://www.ftc.gov/green>).

<sup>302</sup> Several commenters also mentioned no-CFCs claims, but only to provide context for their recommendation that the Commission provide guidance on free-of claims generally, which the Commission discusses in detail in Part V.H below. Eastman Chemical Company (“Eastman”), Comment 533431-00051 at 2; GPI, Comment 534743-00026 at 11; GreenBlue, Comment 533431-00058 at 4; SPI, Comment 533431-00036 at 10.

<sup>303</sup> TerraChoice, Comment 533431-00040 at 1, attached report “The Six Sins of Greenwashing” at 4.

<sup>304</sup> EHS, Comment 534743-00011 at 2.

<sup>305</sup> Letter from the EPA Stratospheric Protection Division.

<sup>306</sup> At least with respect to ozone-depletion claims for packaging, one commenter offered a

### 3. Analysis and Guidance

Based on the record, the Commission proposes retaining its guidance regarding ozone-safe claims.<sup>307</sup> Below, the Commission addresses the two specific issues raised by commenters: (1) the use of no-CFCs claims; and (2) modification to the Guides’ examples.

First, the Commission does not propose advising marketers to avoid using no-CFCs claims. Although CFCs have been banned for years, the Commission agrees with EPA-SPD that many consumers may not realize this is the case. Consumers may still associate CFCs with certain products, such as aerosol sprays. No-CFCs claims may provide valuable information to these consumers who might otherwise assume that certain products have the negative environmental effects associated with CFCs. This conclusion is consistent with the Commission’s proposed guidance concerning no or free-of claims generally, discussed below.<sup>308</sup> The Commission, however, seeks any consumer perception evidence concerning no-CFCs claims.

Second, the Commission proposes deleting current Examples 3 and 4 in the Guides, which both reference HCFC-22, in light of EPA’s general prohibition on its use. The Commission, however, proposes adding a new example, as recommended by the EPA-SPD, to illustrate that “environmentally friendly” claims by an air conditioning equipment manufacturer may be deceptive, even if the manufacturer has substituted non-ozone depleting refrigerants. This general environmental benefit claim likely would convey to consumers that the product has far reaching environmental benefits. Because currently available air conditioning equipment relies on refrigerants that are greenhouse gases and also consume a substantial amount of energy, this claim likely would be deceptive.

### *H. Free-of and Non-toxic Claims*

#### 1. The Current Guides

The current Guides do not contain a section that specifically addresses claims that products or services have no, are free of, or do not contain certain substances (“free-of claims”) or that they

different view, stating that ozone-related claims are no longer of significant relevance because of changes in packaging. GPI, Comment 534743-00026 at 11.

<sup>307</sup> This proposed guidance can be found in 16 CFR 260.10.

<sup>308</sup> Specifically, the Commission proposes that a claim that a product does not contain a substance may be deceptive if that substance has never been associated with the product category.

are non-toxic. The current Guides, however, include three examples that address such claims.

Example 4 in the “overstatement of environmental attribute” portion of Section 260.6 discusses a “chlorine-free bleaching process” claim for coffee filters.<sup>309</sup> The coffee filters are bleached without chlorine, but with a process that releases a reduced, but still significant, amount of the same harmful byproducts associated with chlorine bleaching. The claim, therefore, likely overstates the product’s benefits because consumers likely would interpret the claim to mean that the manufacturing process does not cause any of the environmental harm that chlorine bleaching does.<sup>310</sup>

Example 4 in the general environmental benefit claims section addresses claims that a lawn care pesticide is “essentially non-toxic” and “practically non-toxic.”<sup>311</sup> Consumers likely would interpret these claims to mean that the pesticide does not pose any risk to both human health and the environment. The example states that the claims would be deceptive if the pesticide poses a significant risk to either.

Finally, Example 3 in the ozone safe and ozone friendly section discusses an unqualified claim that an aerosol product “contains no CFCs.”<sup>312</sup> Although the product does not contain CFCs, it contains another ozone depleting substance. Because the no-CFCs claim likely implies that the product does not harm the ozone layer, the claim is deceptive.

#### 2. Comments

##### a. Free-of Claims

Numerous commenters recommended that the Commission provide further guidance regarding free-of claims. Several noted that the Guides address no-CFCs claims only in an example and suggested that the Commission address free-of claims generally.<sup>313</sup>

Several commenters discussed the appropriate standard for determining whether a product is free of a

<sup>309</sup> 16 CFR 260.6(c), Example 4.

<sup>310</sup> Example 4 provides a qualified claim – “bleached with a process that substantially reduces, but does not eliminate, harmful substances associated with chlorine bleaching” – that likely would not be deceptive.

<sup>311</sup> 16 CFR 260.7(a), Example 4.

<sup>312</sup> 16 CFR 260.7(h), Example 3.

<sup>313</sup> Eastman, Comment 533431-00051 at 2; GPI, Comment 534743-00026 at 11; GreenBlue, Comment 533431-00058 at 4; SPI, Comment 533431-00036 at 10. One commenter noted that because CFCs have been banned it is not clear whether the Guides’ treatment of no-CFCs claims would also apply to other substances. Eastman, Comment 533431-00051 at 2.

substance.<sup>314</sup> One argued that a product is not free of a substance if the substance is present at greater than background or regulated levels.<sup>315</sup> Similarly, one commenter noted that under the ISO 14021 standard, marketers can make free-of claims only if the “specified substance is no more than that which would be found as an acknowledged trace contaminant or background level.”<sup>316</sup> Finally, another contended that free-of claims should be substantiated by evidence that: “(1) none of the chemical was added during the manufacturing process, and (2) when tested, the product does not emit or off-gas levels of the chemical that are material to consumers, *i.e.*, in the context of health considerations, no more than background and applicable health-based standards for safe exposure.”<sup>317</sup>

Several commenters stated that truthful free-of claims may be misleading. For example, some commenters raised concerns that a truthful free-of claim could mislead consumers if the marketer does not disclose that the product contains other substances that may be harmful to the environment.<sup>318</sup> Others stated that a claim that a product is free of a substance may be deceptive if the substance is not typically associated with the product and competitors’ products do not typically contain the substance.<sup>319</sup> One commenter noted that the ISO 14021 standard does not permit free-of claims if the substance has never been associated with the product.<sup>320</sup> Another commenter illustrated this point with an “extreme hypothetical,” in which a marketer’s claim that its fruit juice does not contain cyanide could

mislead consumers by suggesting that other fruit juices do.<sup>321</sup>

Several commenters raised two concerns that unqualified free-of claims imply other environmental claims.<sup>322</sup> First, they stated that while a free-of claim explicitly conveys that a product does not contain a certain substance, it also implies that a product is superior to other products that contain the substance.<sup>323</sup> They argued that free-of claims should be qualified to inform consumers of the basis of the comparison, such as whether the free-of claim is relevant to the environmental or health risks or the performance of the product.<sup>324</sup> Second, they asserted that free-of claims are often general claims of environmental benefit, *i.e.*, claims that products without the specified substance are good for the environment.<sup>325</sup> They recommended that such claims not be permitted without qualifying language that substantiates both the express claim and all implied claims.<sup>326</sup>

Other commenters, however, stated that free-of claims may provide valuable information to consumers and do not necessarily imply additional comparative or general environmental benefit claims.<sup>327</sup> One commenter explained that these claims should be qualified only if they are susceptible to more than one interpretation by a non-insignificant portion of the target audience and at least one such interpretation is false, misleading, or unsubstantiated.<sup>328</sup> They recommended that the Commission not establish a bright-line rule requiring that marketers qualify all free-of claims.<sup>329</sup>

The National Advertising Review Council submitted comments summarizing the National Advertising Division (“NAD”) cases addressing environmental claims, including several cases that involved claims that products were free of, or did not contain, certain substances.<sup>330</sup> In one case, the NAD found that a manufacturer adequately substantiated a formaldehyde-free claim for insulation.<sup>331</sup> The NAD concluded

that it was appropriate for the advertiser to make a formaldehyde-free claim, even if the insulation emitted a *de minimis* amount of formaldehyde because it would be inconsequential to consumers. The NAD noted that the determination of whether an amount is *de minimis* depends on the substance at issue and requires a case-by-case analysis.

#### b. Non-toxic Claims

Commenters discussed several issues raised by non-toxic claims.<sup>332</sup> One commenter stated that a non-toxic claim is vague, noting that everything is toxic in sufficient doses.<sup>333</sup>

The EPA’s Sustainable Products Network (“EPA-SPN”) stated that, consistent with the example in the current Green Guides, consumers likely would interpret non-toxic claims broadly. Accordingly, the EPA-SPN stated that non-toxic claims should be supported by evidence that addresses health and environmental effects for all exposed populations.<sup>334</sup>

The EPA-SPN also noted that non-toxic claims based on regulatory definitions may mislead consumers.<sup>335</sup> The EPA-SPN stated that regulatory agencies typically set thresholds to identify moderate to high toxicity levels, and the fact that a substance does not exceed the regulatory standard does not necessarily mean that it is non-toxic.<sup>336</sup>

Addressing specific products, two commenters stated that insulation manufacturers make non-toxic claims but use toxic fire retardants.<sup>337</sup> These commenters recommend prohibiting non-toxic claims if the product contains toxic substances in amounts of 10 percent of weight or more.

#### 3. Analysis and Guidance

The Commission agrees with commenters that it should provide expanded guidance for free-of and non-toxic claims. Accordingly, the Commission proposes including a new Guides section to address these claims.<sup>338</sup> The Commission also proposes moving two of the three

comparative claims that, without proper support, raised doubts about the safety of competing products. *Id.*

<sup>314</sup> CSPA, Comment 533431-00049 at 4; EHS, Comment 533431-00057 at 1; Johns Manville, Comment 536013-00034 at 4. Several commenters stated that generic “chemical-free” claims are misleading because nothing is actually chemical-free. EHS, Comment 533431-00057 at 1; OMI, Comment 536013-00022 at 1; TerraChoice, Comment 533431-00040, attached report “The Six Sins of Greenwashing” at 3.

<sup>315</sup> EHS, Comment 533431-00057 at 1.

<sup>316</sup> CSPA, Comment 533431-00049 at 4 (quoting ISO 14021). Another commenter recommended that the Commission look to ISO 14021 for guidance on free-of claims. 3M Company, Comment 533431-00027 at 3.

<sup>317</sup> Johns Manville, Comment 536013-00034 at 2.

<sup>318</sup> See, *e.g.*, GPI, Comment 534743-00026 at 11; NAIMA, Comment 533431-00042 at 10-11; Saint-Gobain, Comment 533431-00037 at 9-10.

<sup>319</sup> CSPA, Comment 533431-00049 at 4; Johns Manville, Comment 536013-00034 at 2; NAIMA, Comment 533431-00042 at 10; Saint-Gobain, Comment 533431-00037 at 9-10; TerraChoice, Comment 533431-00040, attached report “The Six Sins of Greenwashing” at 4.

<sup>320</sup> CSPA, Comment 533431-00049 at 4.

<sup>321</sup> NAIMA, Comment 533431-00042 at 10.

<sup>322</sup> ACC, Comment 533431-00023 at 4; Formaldehyde Council, Comment 533431-00047 at 2-3; Vinyl Institute, Comment 533431-00046 at 2-3.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> Eastman, Comment 533431-00051 at 2-3; Johns Manville, Comment 536013-00034 at 3-5.

<sup>328</sup> Johns Manville, Comment 536013-00034 at 3.

<sup>329</sup> Eastman, Comment 533431-00051 at 2; Johns Manville, Comment 536013-00048 at 3-4.

<sup>330</sup> NAD, Comment 534743-00029 at 4.

<sup>331</sup> Although the NAD determined that the formaldehyde-free claim was appropriate, it also found that the manufacturer should discontinue

<sup>332</sup> EPA-SPN, Comment 536013-00062 at 4; Seventh Generation, Comment 533431-00033 at 6; TerraChoice, Comment 533431-00040, attached report “The Six Sins of Greenwashing” at 3.

<sup>333</sup> TerraChoice, Comment 533431-00040, attached report “The Six Sins of Greenwashing” at 3.

<sup>334</sup> EPA-SPN, Comment 536013-00062 at 4.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> NAIMA, Comment 533431-00042 at 8; Saint-Gobain, Comment 533431-00037 at 9.

<sup>338</sup> This proposed guidance can be found in 16 CFR 260.9.

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 determine how consumers likely would interpret such claims. Consistent with the NAD decision, discussed above, the Commission proposes advising that free-of claims may be appropriate where a product contains a *de minimis* amount of a substance that would be inconsequential to consumers. To illustrate this point, the Commission proposes adding a new example. In proposed Example 2, an insulation seller advertises its product as "formaldehyde-free." Although the seller does not use formaldehyde as a binding agent to produce the insulation, tests show that the insulation emits trace amounts of formaldehyde. The seller has substantiation that formaldehyde is produced both synthetically and at low levels by people, animals, and plants; that the substance is present in most indoor and (to a lesser extent) outdoor environments; and that its insulation emits lower levels of formaldehyde than are typically present in outdoor environments. In this context, the trace amount of formaldehyde likely would be inconsequential to consumers, and, as a result, a formaldehyde-free claim likely would not be deceptive.

However, as the NAD cautioned, the determination of what constitutes *de minimis* depends upon the substance at issue and, therefore, requires a case-by-case analysis. In some cases, consumers may view the presence of even trace amounts of a substance as material. For example, trace amounts of a substance such as mercury, which is toxic and may accumulate in the tissues of humans and other organisms, likely would be relevant to consumers.<sup>339</sup>

As suggested by several commenters, the Commission proposes cautioning marketers that an otherwise truthful free-of claim may nevertheless be deceptive. For example, it may be

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

deceptive if a marketer claims that its product is free of a particular substance but does not disclose that the product contains another substance that may cause environmental harm, particularly if it is the same type of harm caused by the absent substance. To illustrate this point, the Commission proposes moving the chlorine-free coffee filter example, discussed above, into the new proposed section.

The Commission also proposes advising marketers that an otherwise truthful claim that a product is free of a substance may be deceptive if the substance has never been associated with that product category. This proposed guidance is consistent with ISO 14021's free-of standards.<sup>340</sup> Such claims may deceive consumers by falsely suggesting that competing products contain the substance or that the marketer has "improved" the product by removing the substance. However, in some circumstances, these claims may provide useful information to consumers who are interested in knowing whether a particular substance is present in a product. This could be the case, for example, where products in one category contain a substance and products in a competing category do not. Marketers making such "free-of" claims can minimize the risk of deception if they clarify that the entire product category is free of the substance. The Commission solicits comment on what guidance it should give for "free-of" claims based on substances which have never been associated with a product category. The Commission also seeks consumer perception evidence regarding these claims.

The Commission also agrees with several commenters that free-of claims may, depending on the context, convey that the product has broad environmental benefits or is environmentally superior to competing products. Thus, a marketer who makes a free-of claim that reasonable consumers would interpret to convey additional environmental claims must have substantiation for all of those claims.<sup>341</sup> The Commission, however, declines to advise that all free-of claims be qualified. In the absence of evidence

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

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

that reasonable consumers would, no matter the context, perceive free-of claims as making implied general environmental benefit or comparative superiority claims, such guidance is not appropriate.

#### b. Non-toxic Claims

The Commission proposes moving its guidance concerning non-toxic claims from the existing example in current Section 260.7(a) to the proposed new Section 260.9.<sup>342</sup> This proposed section states that consumers likely think a non-toxic claim conveys that a product is non-toxic both for humans and for the environment. This section also advises marketers to qualify non-toxic claims to the extent necessary to avoid consumer deception.

Marketers should use caution when relying on regulatory standards as substantiation for claims that products are non-toxic. Reasonable consumers would likely interpret non-toxic claims to mean that a product is not harmful to humans or to the environment. Yet, as EPA-SPN noted, some regulatory thresholds allow moderately to highly toxic substances that do not meet these consumer expectations. Therefore, marketers should examine the scope and purpose of the regulatory standard to ensure that it substantiates a non-toxic claim in light of consumer expectations. For example, the standard for acute toxicity, which measures the effects of the substance from exposure during a short time period, may not provide an appropriate basis for non-toxic claims if the substance may be toxic to humans or the environment over a longer period of time.

#### I. Source Reduction Claims

Section 260.7(f) of the Guides states that it is deceptive to misrepresent that a product or package has been reduced in size or is lower in weight, volume, or toxicity. The Guides advise marketers to qualify source reduction claims to avoid deception about the amount of the reduction and the basis for any comparison. The Soap and Detergent Association agreed that marketers should qualify source reduction claims and "measure source reduction through a 'package weight per unit or use of the product' approach as well as physical reduction of packaging material."<sup>343</sup> No comments suggested modifying the guidance in this section. The Commission, therefore, proposes retaining this section without change.<sup>344</sup>

<sup>342</sup> The Commission also proposes moving the example into this new proposed section.

<sup>343</sup> SDA, Comment 534743-00028 at 2.

<sup>344</sup> This guidance can now be found in 16 CFR 260.16.

### J. Refillable Claims

Section 260.7(g) states that it is deceptive to misrepresent that a package is refillable. It advises marketers not to make an unqualified refillable claims unless: (1) they provide a system to collect and return the package for refill; or (2) consumers can refill the package with a separately purchased product. The Glass Packaging Institute stated that this guidance remains useful, and no other commenters recommended changes.<sup>345</sup> The Commission, therefore, proposes retaining this section.<sup>346</sup>

### VI. Claims Not Addressed by the Current Green Guides

The Commission asked commenters to discuss whether and how the Guides should be modified to address the use of environmental marketing claims that either are new or were not common during the last Guides review. Commenters discussed five types of claims: (1) sustainable; (2) organic/natural; (3) made with renewable materials; (4) made with renewable energy; and (5) carbon offsets. For each of these claims, the following summarizes the comments and the relevant workshop discussions, reviews the consumer perception evidence, and provides the Commission's analysis.

#### A. Sustainable Claims

##### 1. Comments

Many commenters and workshop panelists addressed whether the Commission should revise the Guides to address sustainable claims. Commenters disagreed on the meaning of sustainable and whether the term could even be defined. Some argued the claim should be banned, while others asserted it could be used properly in certain contexts. Others observed that the term may be used to convey information about a company's environmental philosophies, independent of specific product claims.

Many commenters observed that the term "sustainable" has become part of the national vernacular.<sup>347</sup> GMA, for example, cited a study finding that from September 2006 through December 2007, the use of the term on Internet blogs increased more than 100 percent.<sup>348</sup>

<sup>345</sup> GPI, Comment 534743-00026 at 8-9.

<sup>346</sup> This guidance can now be found in 16 CFR 260.13.

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

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

Several Packaging Workshop panelists noted that sustainable claims may embrace such diverse issues as child labor, community relations, economic development, and other non-environmental considerations.<sup>349</sup> For example, the Sustainable Packaging Coalition's "vision" for sustainable packaging includes the aspiration that the packaging "benefits individuals and communities throughout its life cycle."<sup>350</sup> Another commenter, the Center for Sustainable Innovation, broadly defined sustainability as "how an organization contributes, or aims to contribute in the future, to the improvement or deterioration of economic, environmental, and social conditions, developments, and trends at the local, regional, or global level."<sup>351</sup>

Several commenters asserted that there is no clear understanding of the term, not just for the typical consumer, but among experts and business managers.<sup>352</sup> These commenters, however, disagreed regarding whether the FTC should attempt to define the specific attributes of sustainability. For example, some urged the FTC "to avoid tackling the onerous and possibly unachievable task of defining the specific attributes of sustainability."<sup>353</sup> In contrast, others argued that the Guides should address the term.<sup>354</sup> The Environmental Packaging Institute, for example, suggested that the term "sustainable" warrants the addition of a new section "complete with guidance, specific criteria, and examples."<sup>355</sup>

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

<sup>350</sup> Anne Johnson, The Sustainable Packaging Coalition ("SPC"), Green Packaging Workshop Presentation at (<http://www.ftc.gov/bcp/workshops/packaging/presentations/johnson.pdf>). SPC remarked that this definition is an "aspirational vision" rather than a standard. This definition includes packaging that, among other things, "is sourced, manufactured, transported, and recycled using renewable energy"; "is made from renewable or recycled source materials"; and "is made from materials healthy in all probable end of life scenarios." See SPC, Green Packaging Workshop Tr. at 127, 131.

<sup>351</sup> Center for Sustainable Innovation, Comment 534743-00003 at 2.

<sup>352</sup> EHS, Comment 534743-00011 at 1; EPI, Comment 533431-00063 at 4; GMA, Comment 533431-00045 at 9; Georgia-Pacific, Comment 533431-00007 at 8; GreenBlue, Comment 533431-00058 at 7; NAIMA, Comment 536013-00017 at 12-13; Saint-Gobain, Comment 533431-00037 at 12.

<sup>353</sup> NAIMA, Comment 536013-00017 at 12-13; Saint-Gobain, Comment 533431-00037 at 12.

<sup>354</sup> EPI, Comment 533431-00063 at 4; see also GMA, Comment 533431-00045 at 9 ("[T]he Guides should be updated to include a discussion of 'sustainable' claims and what constitutes a reasonable basis for substantiating such claims.").

<sup>355</sup> EPI, Comment 533431-00063 at 4.

Because of the claim's expansiveness, several commenters likened the term "sustainable" to general environmental benefit claims.<sup>356</sup> Thus, some of these commenters recommended that the Guides caution that the term "sustainable" be accompanied by language limiting its environmental superiority claim to the particular attribute, or attributes, that can be substantiated.<sup>357</sup> Others suggested that marketers making sustainable claims should demonstrate that all aspects of a product's life cycle meet the criteria for sustainability.<sup>358</sup> Some suggested that the FTC include new examples using the term "sustainable" in the general environmental benefit claim section of the Guides to clarify which sustainability claims may be deceptive.<sup>359</sup>

On the other hand, some commenters argued that the term "sustainable" simply should not be used as a marketing claim.<sup>360</sup> The Sustainable

<sup>356</sup> See 16 C.F.R. Part 260.7(a); see also BSR, Comment 533431-00016 at 1; P&G, Comment 533431-00070 at 2; SDA, Comment 534743-00028 at 1; SPI, Comment 533431-00036 at 5; Seventh Generation, Comment 533431-00033 at 5; Weyerhaeuser, Comment 533431-00086 at 1.

<sup>357</sup> SDA, Comment 534743-00028 at 1-2; see also GMA, Comment 533431-00045 at 8-9 (recognizing complexity of measuring sustainability, but arguing for allowing such claims when qualified with a statement identifying environmental product attributes); ACC, Comment 533431-00023 at 8-9; Dow, Comment 533431-00010 at 10; Formaldehyde Council, Comment 533431-00047 at 5; Georgia-Pacific, Comment 533431-00007 at 8; Hammer, Comment 533431-00017 at 9; P&G, Comment 533431-00070 at 3; Seventh Generation, Comment 533431-00033 at 5; Vinyl Institute, Comment 533431-00046 at 3.

<sup>358</sup> CSPA, Comment 533431-00049 at 3 (stating comparative sustainability claims "should have a clear basis for verification, such as certified life cycle assessment"); Rachel Chadderdon and Meghan Genovese, Comment 533431-00054 at 1 (arguing that, because no product can be fully sustainable unless all aspects of its life cycle meet the criteria for sustainability, marketers wishing to make environmental sustainability claims "must disclose exactly which components of the production cycle are and are not sustainable"); Stepan Company, Comment 533431-00011 at 2; Tandus, Comment 536013-00037 at 1.

<sup>359</sup> Eastman, Comment 533431-00051 at 1 (suggesting the Guides define sustainability for marketing purposes and provide categories of industry practices and product properties that support this definition); GMA, Green Packaging Workshop Tr. at 143 (recommending the Guides include examples on how to qualify sustainability claims to "put [them] in the proper context"); EPI, Green Packaging Workshop Tr. at 210; GPI, Comment 534743-00026 at 10; USGBC, Comment 534743-00027 at 3.

<sup>360</sup> See EHS, Comment 534743-00011 at 1 (stating that "sustainable" should not appear as a product or package descriptor because "[t]he term is ill-defined and made up of several factors, often specific to a particular product or manufacturer"); GreenBlue, Comment 533431-00058 at 7 ("We recommend strengthening the Guides to actively discourage companies from describing their products as ... 'sustainable.'"); William Mankin, Continued

Packaging Coalition (“SPC”), for example, stated that currently no accepted criteria with supporting test methods exists to qualify a package as sustainable.<sup>361</sup> According to SPC, the term “sustainable,” like the terms “green” or “environmentally friendly,” has no intrinsic meaning and confuses consumers, even if marketers qualified it with text that describes the specific attribute(s) that make their product sustainable.<sup>362</sup>

Some commenters noted that, because there are no definitive methods for measuring sustainability or confirming its accomplishment, the Green Guides should discourage statements claiming achievement of sustainability but permit general references to sustainability goals or processes.<sup>363</sup> ACC, for example, recommended that the Guides clarify that “claims of a product or process *being* ‘sustainable’ are more properly characterized as that [the] product or process *promotes* or *contributes to* sustainability and/or sustainable outcomes, since sustainability is a process or a goal.”<sup>364</sup> Weyerhaeuser noted that ISO 14021 prohibits claims of achieving sustainability, but that this prohibition does not apply to marketer’s statements about their “sustainability goals, processes, or aspirations.”<sup>365</sup>

Other commenters argued that the term “sustainable” can be used properly in specific contexts. The Sustainable Forestry Initiative (“SFI”), for example, stated that, in forestry, “sustainable” is a well-recognized concept that can be clearly and specifically defined.<sup>366</sup> SFI

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.

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

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

<sup>363</sup> See, e.g., CRI, Comment 533431-00026 at 1 (recommending the Guides distinguish between “sustainability (zero net impact) and environmental attributes (minimal net impact),” which contribute to sustainability); ACC, Comment 533431-00023 at 8; Weyerhaeuser, Comment 533431-00084 at 5-6.

<sup>364</sup> ACC, Comment 533431-00023 at 8 (emphasis in original).

<sup>365</sup> Weyerhaeuser, Comment 533431-00084 at 5. ISO 5.5 states that no claim of achieving sustainability shall be made because there are no definitive methods for measuring sustainability or confirming its accomplishment. ISO 14021 5.5:1999(E).

<sup>366</sup> SFI, Comment 534743-00010 at 3-4; see also AF&PA, Comment 534743-00031 at 2 (“A broad

explained that it has a specific forest certification standard, the “SFI Standard,” which defines “sustainable forestry,” sets forth performance measures and indicators, and confirms compliance with a third-party certification audit. Thus, SFI proposed that the Guides state that a forest certification label may properly claim compliance with a specific forest certification standard and that a third-party audit verifying conformance with the standard is adequate substantiation.<sup>367</sup>

In contrast, commenter William Mankin argued that sustainable claims should not be used in any particular context, including forestry.<sup>368</sup> In his view, it is difficult to attain sustainability in forests because forests are complex ecological systems. Moreover, he asserted that there is no widespread consensus on a definition of the term “sustainable,” particularly in fields involving the management of ecological systems and biological resources. He noted, for example, that in the field of forest management, some believe the term applies primarily to the ecological attributes of forests, while others believe it pertains more to social and economic concerns outside forests.<sup>369</sup>

Finally, some commenters observed that terms such as “sustainable” may be used independently from product claims to communicate important information about a company or organization’s mission and vision. For example, GMA referenced the following example of a company’s statement about its environmental efforts: “The General Mills Sustainability Initiative is a company-wide effort to responsibly manage the natural resource base our business depends on.”<sup>370</sup> GMA argued that this is a broad statement about corporate philosophy rather than a claim made for specific products or services, and, therefore, should be

definition of sustainability may be adopted by the FTC, but . . . specific sectors should be able to develop focused definitions that meet the needs of that sector.”); Weyerhaeuser, Comment 534743-00033 at 1 (stating that a claim of “sustainable forestry” in the context of a forest certification system “provides consumers with specific, factual information and is not a broad claim”).

<sup>367</sup> In support of its argument, SFI referenced the Canadian Competition Bureau’s analysis of ISO 140121, clause 5.5, “which prohibits general and undefined claims of sustainability, but permits claims that a seller conforms to a specific forest certification standard.” *Id.* at 5.

<sup>368</sup> William Mankin, Comment 534743-00020 at 1; see also Caroline Pufalt, Comment 534743-00021 at 1.

<sup>369</sup> *Id.*

<sup>370</sup> GMA, Green Packaging Workshop Presentation at (<http://www.ftc.gov/bcp/workshops/packaging/presentations/tullier.pdf>).

outside the scope of the Guides.<sup>371</sup> In addition, USGBC recommended that the FTC distinguish between “statements . . . which are used to convey broad organizational goals and should not require substantiation, and product claims, which make assertions about specific product attributes.”<sup>372</sup>

## 2. Consumer Perception Evidence

Commenters submitted limited consumer perception evidence regarding sustainable claims.

Weyerhaeuser cited findings from its 2006 focus groups in four U.S. cities indicating that consumers were unable to define the term.<sup>373</sup> Similarly, the National Cotton Council of America (“National Cotton Council”) described its own 2006 research, which found that only one third of consumers understand the term “sustainable” in the context of “sustainable agriculture.”<sup>374</sup> It also cited a 2007 study by the Hartman Group finding that just over half of consumers claim any familiarity with the term “sustainability,” and most cannot define it “appropriately” upon probing.<sup>375</sup> The National Cotton Council also provided the Commission with findings from a 2008 study indicating that 43 percent of respondents believed the term “sustainable” means “will last longer/good quality.”<sup>376</sup>

These results are consistent with the Commission’s consumer perception

<sup>371</sup> GMA, Comment 533431-00045 at 8 (citing as examples company website sections on environmental activities and discussions of activities in annual reports or other comparable communication vehicles); see also EHS, Comment 534743-00011 (asserting that companies should discuss their programs regarding sustainable development in a “full text document,” such as their website or in their “corporate sustainability report”); Georgia-Pacific, Comment 533431-00007 at 8 (recommending that the FTC discourage the unqualified use of “sustainable” for products and reserve it for “providing information about a company’s [environmental] indicators and overall improvement on those indicators in time”); PCPC, Comment 533431-00075 at 6 (recommending that the FTC maintain the Guides’ focus on products, packages, and services, not “general company practices”); SPI, Comment 533431-00036 at 4 (stating that businesses should be able to explain commitments and activities intended to advance “sustainability”).

<sup>372</sup> USGBC, Comment 534743-00027 at 3.

<sup>373</sup> Weyerhaeuser, Comment 533431-00086 at 1.

<sup>374</sup> National Cotton Council (“NCC”), Comment 536013-00027 at 4. This study is available at (<http://www.ftc.gov/green>). The NCC considered the following responses to be correct interpretations of “sustainable”: “minimum impact on environment” and “reuse or replenish land, use in future, doesn’t deplete.” E-mail from Cotton Incorporated (Mar. 11, 2010).

<sup>375</sup> NCC, Comment 536013-00027 at 52. The commenter did not indicate what the Hartman Group considers the “appropriate” meaning of sustainable.

<sup>376</sup> Cotton Incorporated, Lifestyle Monitor Survey, July 2008, available at (<http://www.ftc.gov/green>).

study. Specifically, in response to an open-ended question about the meaning of the term "sustainable," some respondents stated the term means nothing (13 percent) or that they do not know what the term means (eight percent). Many others stated that it suggests a product is "strong/durable" (19 percent) or long-lasting (16 percent). Relatively few respondents indicated that the term "sustainable" was related to any particular environmental benefit,<sup>377</sup> and only seven percent stated that the term suggested a product is "good for," "helps," or "benefits" the environment.<sup>378</sup>

In addition, responses to the closed-ended questions suggested that respondents did not view "sustainable" in the same way as a general environmental benefit claim. Specifically, respondents were less likely to believe that unqualified sustainable claims suggested specific, unstated environmental benefits than respondents who viewed "green" and "eco-friendly" claims. For example, while, on average, 52 percent of respondents viewing unqualified "green" claims, and 49 percent of respondents viewing "eco-friendly" claims, stated that these claims suggested that the product had several specific environmental attributes, only 17 percent of respondents viewing "sustainable" claims stated the product had these attributes.<sup>379</sup> Moreover, while qualifying general environmental claims with a specific environmental attribute made respondents less likely to believe those claims suggested other, unstated environmental attributes, qualifying a "sustainable" claim did not have the same effect. Sixteen percent of respondents viewing an unqualified "sustainable" claim saw unstated environmental attributes, compared to 24 percent of respondents who saw such attributes when the claim was qualified with a specific environmental attribute.

### 3. Analysis

While marketers making sustainable claims may intend to convey that a product has general and/or specific environmental benefits, the consumer

<sup>377</sup> Although 25 percent of respondents cited a specific environmental benefit, these responses were distributed over ten different environmental benefits (e.g., "made from recycled materials"; "recyclable"; "made with renewable materials"; "made from sustainable resources").

<sup>378</sup> In contrast, 27 percent of respondents viewing "green," and 15 percent of respondents viewing "eco-friendly," believed those claims suggested the product is "good for/helps/benefits the environment."

<sup>379</sup> These results were similar for all three tested products – kitchen flooring, laundry basket, and wrapping paper.

perception evidence indicates that the claim has no single environmental meaning to a significant number of consumers or that it conveys non-environmental characteristics (e.g., durable or long-lasting).<sup>380</sup> In addition, the evidence indicates that consumers view sustainable claims differently than general environmental benefit claims.<sup>381</sup>

The Commission, however, is unable to provide specific advice on sustainable as an environmental marketing claim. Unlike other claims we tested, the term contains no cue alerting consumers that it refers to the environment. If used in combination with environmental terms and images, consumers may perceive "sustainable" as an environmental claim. However, given the diversity of possible phrases and imagery, testing the claim in context was not practical. Therefore, the Commission lacks a sufficient basis to provide meaningful guidance on the use of sustainable as an environmental marketing term. Marketers, however, are responsible for substantiating consumers' understanding of this claim in the context of their advertisements.

Some commenters noted that, to the extent the term "sustainable" is used to communicate information about a company's environmental philosophy, such statements should be outside the scope of the Guides. Corporate image advertising raises First Amendment issues. The degree of constitutional protection provided to corporate image advertising is determined by the category of speech into which that expression falls. Therefore, as with all types of claims, the Commission evaluates each advertisement to determine whether it constitutes commercial speech. There is no clear standard for determining whether speech with elements of both commercial and non-commercial speech will be considered commercial, as opposed to non-commercial speech. Rather, the Supreme Court has assessed the totality of circumstances surrounding the expression to determine its character, including the content of the speech, whether the speaker's motivation is economic, the audience to whom and the manner in which the speech is directed, and

<sup>380</sup> Section 5 of the FTC Act does not require that an advertiser have intended to convey a deceptive claim. See *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 and n.5 (D.C. Cir. 1977); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963). Therefore, if, in the particular context in which it is presented, a sustainable claim implies to consumers that the product has non-environmental characteristics, marketers must substantiate this implied claim.

<sup>381</sup> Unlike the other tested claims, the term "sustainable," on its face, did not suggest that the advertised product had environmental attributes.

whether its commercial and non-commercial component parts are inextricably intertwined.<sup>382</sup> Because the determination of an advertisement's constitutional status must be conducted on a case-by-case basis, the issue is not appropriate for general guidance.

### B. Organic and Natural Claims

The current Guides do not specifically address claims that products, packages, or services are organic or natural. Several commenters discussed these claims and recommended that the Commission provide guidance regarding their use.<sup>383</sup> Below, the Commission discusses other federal agencies' guidance concerning the terms "organic" and "natural," summarizes the relevant comments, and analyzes the issues.

#### 1. Overview – Guidance from Other Agencies

Other government agencies have provided guidance on the appropriate scope of organic and, to a lesser extent, natural claims.

##### a. Organic Claims

The USDA's National Organic Program ("NOP") regulates the term "organic" for agricultural products.<sup>384</sup> Agricultural products that are sold, labeled, or represented as "100 percent organic," "organic," or "made with organic ingredients" must be produced and processed in accordance with NOP standards.<sup>385</sup> Under these standards, organic agricultural products must be produced and handled without using prohibited methods or synthetic substances, except as specifically authorized on the National List of Allowed and Prohibited Substances.<sup>386</sup> Operators who produce or handle such products must be certified by an NOP-accredited agent.<sup>387</sup> Products that qualify as "100 percent organic" or "organic" may use the USDA's organic seal on their packaging and in their advertisements.<sup>388</sup>

The USDA does not regulate organic claims for non-agricultural products. No other federal agencies provide specific guidance regarding organic claims for non-agricultural products.

<sup>382</sup> See generally *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795-96 (1988); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 67 n.14 (1983).

<sup>383</sup> EPA-EPPI, Comment 533431-00038 at 1, 5; SDA, Comment 533431-00020 at 3; Seventh Generation, Comment 533431-00033 at 3, 5; Terressentials, Comment 534743-00012 at 1-2.

<sup>384</sup> See 7 CFR Part 205.

<sup>385</sup> See 7 CFR 301.

<sup>386</sup> See 7 CFR 205.105; 205.601-606.

<sup>387</sup> See 7 CFR 205.100.

<sup>388</sup> See 7 CFR 205.311.

## b. Natural Claims

To the extent that federal agencies have defined, or administered statutes defining, “natural,” they have done so only in specific contexts. For example, the Textile Products Identification Act, which is administered by the Commission, defines “natural fiber” as “any fiber that exists as such in the natural state.” 15 U.S.C. § 70(c). The USDA has defined “natural” meat and poultry as “a product containing no artificial ingredient or added color” and which “is only minimally processed.”<sup>389</sup> The FDA has defined “natural flavor or natural flavorings” as substances containing the flavoring constituents derived from specified items, such as spices, fruits, vegetables, herbs, plant materials, meat, seafood, and eggs.<sup>390</sup> At least in part because of the difficulties in developing a definition of “natural” that would be appropriate in multiple contexts, both the FDA and the FTC have previously declined to establish a general definition.<sup>391</sup>

The FDA, however, has employed an informal policy regarding the term “natural.” Specifically, it:

has considered “natural” to mean that nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there. For example, the addition of beet juice to lemonade to make it pink would preclude the product being called “natural.”<sup>392</sup>

## 2. Comments

Several commenters stated that marketers increasingly employ organic and natural claims and recommended that the Commission provide guidance regarding their use.<sup>393</sup> Most commenters focused on the use of these terms to describe textiles.<sup>394</sup>

<sup>389</sup> USDA Food Safety and Inspection Service, Fact Sheet, Meat and Poultry Labeling Terms, available at ([http://www.fsis.usda.gov/Fact\\_Sheets/](http://www.fsis.usda.gov/Fact_Sheets/)). The fact sheet further notes that the “label must explain the use of the term ‘natural’ (such as - no added colorings or artificial ingredients; minimally processed.”)

<sup>390</sup> 21 CFR 101.22.

<sup>391</sup> See 58 FR 2407 (Jan. 6, 1993) (FDA declines to undertake rulemaking to define “natural”); 48 FR 23270 (May 24, 1983) (FTC terminates rulemaking that would have regulated natural food claims).

<sup>392</sup> 56 FR 60466 (Nov. 27, 1991).

<sup>393</sup> EPA-EPPP, Comment 533431-00038 at 1, 5; SDA, Comment 533431-00020 at 3; Seventh Generation, Comment 533431-00033 at 3, 5; Terressentials, Comment 534743-00012 at 1-2.

<sup>394</sup> In addition to textiles, one commenter asserted that many organic claims for personal care products may be misleading. Terressentials, Comment 534743-00012 at 1. That commenter stated that the USDA has issued a policy statement

## a. Organic Claims

Several commenters recommended that the Commission provide guidance for organically labeled textiles.<sup>395</sup> Some suggested that the Commission consult with the NOP to clarify guidance for organic claims for textiles.<sup>396</sup> Many of these commenters also recommended that the Guides adopt NOP’s production standards for organic raw fibers.<sup>397</sup> Other commenters suggested that marketers of products that contain any organic fiber should be able to make claims about the amount of organic fiber, as long as the organic content has been certified by a third party.<sup>398</sup>

Commenters noted that consumers may understand organic claims to refer to the manufacturing of the textile and not just its fabric content.<sup>399</sup> The commenters differed, however, in their views regarding how to address this issue. Several recommended that the Guides reference the Global Organic Textile Standard (“GOTS”) for the processing and manufacturing of organic textile products.<sup>400</sup> One

permitting companies selling personal care products to apply for organic certification under the NOP, but many companies are making organic claims for personal care products without obtaining certification. *Id.* The commenter argued that many consumers mistakenly believe that such products comply with NOP standards. *Id.* On March 12, 2010, Consumers Union and the Organic Consumers Association filed a petition raising this concern and asking the Commission to investigate the use of organic claims for personal care products. The Commission has placed the petition on the record.

<sup>395</sup> Better for Babies, Comment 536013-00033 at 1; ECOncious, Comment 536013-00023 at 1-2; International Sleep Products Association (“ISPA”), Comment 536013-00015 at 1; OMI, Comment 536013-00022 at 2-3; Organic Exchange, Comment 536013-00032 at 3-4; Organic Trade Association (“OTA”), Comment 536013-00016 at 1.

<sup>396</sup> Better for Babies, Comment 536013-00033 at 1-2; ECOncious, Comment 536013-00023 at 2; OTA, Comment 536013-00016 at 2.

<sup>397</sup> Better for Babies, Comment 536013-00033 at 1-2; ECOncious, Comment 536013-00023 at 1; OTA, Comment 536013-00016 at 1; Harmony Susalla (“Susalla”), Comment 536013-00028 at 1.

<sup>398</sup> Organic Exchange, Comment 536013-00032 at 3; Texas Organic Cotton Marketing Cooperative (“TOCMC”), Comment 536013-00014 at 2.

<sup>399</sup> See, e.g., OTA, Comment 536013-00016 at 2. The NOP standards apply only to the raw fibers; they do not cover the processing and manufacturing of textile products.

<sup>400</sup> Better for Babies, Comment 536013-00033 at 2; ECOncious, Comment 536013-00023 at 2; OMI, Comment 536013-00022 at 4; OTA, Comment 536013-00016 at 4; Susalla, Comment 536013-00028 at 1-2; TOCMC, Comment 536013-00014 at 2. One commenter recommended that the Guides consider GOTS, as well as other processing standards such as Oeko-Tex and Bluesign. Organic Exchange, Comment 536013-00032 at 4. That commenter asserted that third-party organic certification should be recognized as substantiation for an organic claim. *Id.* Another commenter, however, expressed concern that references to the Oeko-Tex certification process may be misleading if the marketer does not disclose which Oeko-Tex

commenter noted, however, that GOTS is a “process review standard” that “leaves too many opportunities for mistakes and fraud within the dyeing and finishing process for textiles.”<sup>401</sup> That commenter stated there is a need for analytical verification to determine the presence of various chemicals in textile products.<sup>402</sup> Another commenter recommended that marketers disclose a complete list of ingredients when they make organic claims.<sup>403</sup>

Several commenters discussed whether marketers should be permitted to claim that fibers are “transitional organic” fibers. The USDA requires that to be certified as organic, fibers must be grown without chemical fertilizers, defoliants, or pesticides for three years. The term “transitional organic” refers to fiber grown according to these guidelines that has not yet met the three-year requirement. One commenter noted that some retailers are selling products containing “transitional cotton,” despite the fact that USDA does not recognize that term.<sup>404</sup> Other commenters recommended that the Guides permit marketers to make “transitional organic” claims “to enable the organic fiber marketplace to grow while supporting the farmer during the three-year transition period.”<sup>405</sup>

One commenter indicated that numerous retailers appear to be marketing products made with conventional cotton as organic.<sup>406</sup> That commenter also reported that retailers are making claims that products are certified organic but are not providing information about the certification.<sup>407</sup> The commenter stated that research indicates consumers are confused about the meaning of organic claims and do not trust that products labeled as organic are, in fact, organic.<sup>408</sup>

## b. Natural Claims

Several commenters stated that the term “natural” does not have a clear

certification process it is using. Susalla, Comment 536013-00028 at 2.

<sup>401</sup> Oeko-Tex, Comment 536013-00013 at 4.

<sup>402</sup> *Id.*

<sup>403</sup> OMI, Comment 536013-00022 at 2.

<sup>404</sup> NCC, Comment 536013-00027 at 2.

<sup>405</sup> Organic Exchange, Comment 536013-00032 at 4; TOCMC, Comment 536013-00014 at 2. The Organic Exchange noted that the proof for a transitional claim would be that the farm has applied for organic certification, an initial on-site inspection has been conducted, and the farm has an organic system plan which includes the last date of use of prohibited substances. Organic Exchange, Comment 536013-00032 at 4.

<sup>406</sup> NCC, Comment 536013-00027 at 3.

<sup>407</sup> *Id.* The NOP regulations require that the products labeled as “100 percent organic” or “organic” must identify the agent that certified the products as organic. 7 CFR 205.303.

<sup>408</sup> *Id.* at 4.

meaning.<sup>409</sup> One commenter explained that natural claims for textiles are unclear because the products have “undergone significant transformation from the raw materials” they contain.<sup>410</sup> Another asserted that the term is meaningless and is used to exaggerate the environmental benefits of a product.<sup>411</sup> One commenter, however, stated that consumers may understand the term given the context in which it is used.<sup>412</sup>

The commenters discussed whether the Guides should address the term “natural.” Several recommended generally that the Guides address or define the term, but did not specify how the Guides should do so.<sup>413</sup> Some commenters suggested that natural may be appropriately used to distinguish between textiles derived from agricultural products and those derived from petrochemicals.<sup>414</sup> Another commenter recommended that the Guides advise marketers to substantiate natural claims with third-party verification or independent testing.<sup>415</sup>

Others recommended that the Guides not allow the use of the term. For example, one commenter stated that because the term lacks a clear meaning in the textile sector, the Commission should not allow marketers to use it.<sup>416</sup> Another suggested that the Guides not allow natural claims even for fibers

<sup>409</sup> ECOncious, Comment 536013-00023 at 1; OTA, Comment 536013-00016 at 2; Oeko-Tex, Comment 536013-00013 at 5; Susalla, Comment 536013-00028 at 1.

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

<sup>411</sup> Susalla, Comment 536013-00028 at 1.

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

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

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

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

<sup>416</sup> ECOncious, Comment 536013-00023 at 1.

grown agriculturally because agriculture can have a negative impact on the environment, such as water and air pollution and soil erosion.<sup>417</sup>

### 3. Consumer Perception Evidence

Only one commenter, the National Cotton Council, cited consumer perception evidence regarding organic claims. It asserted that its research indicates that consumers are confused about these claims, with more than two-thirds of respondents either believing, or not sure, if organic cotton textiles were made from recycled materials or contain soy.<sup>418</sup> The research also indicated that consumers do not trust that products labeled as organic are, in fact, organic.<sup>419</sup>

No commenters provided consumer perception evidence indicating how consumers understand the term “natural.”

### 4. Analysis

The Commission does not propose creating a new section of the Guides to address organic and natural claims. The explanation for this decision is discussed below separately for each claim.

Although the Commission is not proposing a new section for these claims, the general principles set forth in the Guides still apply. Marketers must have substantiation for their environmental benefit claims, including implied claims.<sup>420</sup> More specifically, to the extent that reasonable consumers perceive organic or natural claims as general environmental benefit claims or comparative claims, the marketer must be able to substantiate those claims and all other reasonably implied claims, as described in Part V.A.4 above.<sup>421</sup>

### a. Organic Claims

The Commission does not propose addressing organic claims for two reasons. First, the NOP already addresses organic claims for agricultural products. Second, for products that are outside the NOP’s jurisdiction, the current record is insufficient for the Commission to provide specific guidance.

<sup>417</sup> Todd Copeland, Patagonia, Comment 536013-00011 at 1; *see also* REI, Comment 536013-00031 at 1 (stating that the Commission should be mindful that agriculture can have a significant impact on the environment).

<sup>418</sup> NCC Comment 536013-00027 at 4 (citing 2003 and 2006 studies conducted jointly with the OTA).

<sup>419</sup> *Id.*

<sup>420</sup> 16 CFR 260.5.

<sup>421</sup> 16 CFR 260.6(d), 260.7(a).

### i. Organic Claims for Agricultural Products

As described above, the NOP provides a comprehensive regulatory framework governing organic claims for agricultural products. Because of this framework and the NOP’s ongoing work in this area, the Commission does not want to propose duplicative or possibly inconsistent advice. Therefore, the Commission declines to address organic claims covered by NOP standards in the Guides.<sup>422</sup>

For the same reason, the Commission does not propose addressing standards for processing organic textiles. The USDA has indicated that organic claims for finished textile products fall within its jurisdiction. Following the Commission’s Green Building and Textiles Workshop, the NOP released a new fact sheet, “Labeling of Textiles Under National Organic Program (NOP) Regulations,” which discussed organic claims regarding textiles.<sup>423</sup> Therefore, rather than proposing duplicative or potentially inconsistent advice, Commission staff will continue to consult with NOP staff to ensure that marketers have sufficient guidance regarding organic claims for textile products.

### ii. Organic Claims for Non-agricultural Products

Although the NOP’s regulatory framework governs organic claims for agricultural products, it does not apply to organic claims for non-agricultural products. Therefore, within a particular category (e.g., cosmetics), some products are covered by NOP standards and other products are not, depending on their ingredients.<sup>424</sup> Yet, both products could be advertised as organic. It is unclear how consumers understand organic

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

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

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

claims that describe non-agricultural products, and how marketers of those products substantiate their claims.

No commenters submitted consumer perception evidence on this issue. The Commission, therefore, lacks a basis to provide guidance on the use of organic claims for products outside NOP's jurisdiction. Accordingly, the Commission requests comment on what guidance, if any, it should provide regarding the use of organic claims to describe non-agricultural products.

#### b. Natural Claims

The Commission also does not propose addressing natural claims. As discussed above, the role of the Guides is to prevent consumer deception, so definitions for terms such as natural must be based on what consumers understand those terms to mean. However, no commenters provided consumer perception evidence indicating how consumers understand the term "natural." In addition, natural may be used in numerous contexts and may convey different meanings depending on that context.<sup>425</sup> Thus, the Commission does not have a basis to provide general guidance on the use of the term.

Some commenters recommended that the Guides prohibit the use of natural claims. In evaluating whether a representation is misleading, the Commission examines not only the claim itself, but the net impression of the entire advertisement.<sup>426</sup> Thus, in order to state that marketers should never use the term "natural," the Commission would have to conclude that the use of the term is deceptive in every context and that no reasonable qualification is sufficient to prevent that deception. In the absence of evidence demonstrating that natural is always deceptive and that its use could not be qualified to avoid such deception, the Commission cannot prohibit marketers from using the term. Moreover, as noted above, several agencies, including the FTC, the FDA, and the USDA, acknowledge that natural may be an appropriate descriptor in some contexts.<sup>427</sup>

<sup>425</sup> As noted above, the FTC and the FDA have previously declined to adopt a wide-ranging, formal definition of "natural."

<sup>426</sup> Deception Policy Statement, 103 F.T.C. at 179 (when evaluating representations under a deception analysis, one looks at the complete advertisement and formulates opinions "on the basis of the net general impression conveyed by them and not on isolated excerpts"). Depending on the specific circumstances, qualifying disclosures may or may not cure otherwise deceptive messages. *Id.* at 180-81.

<sup>427</sup> See Part VI.B.1.b, *supra*.

Marketers that are using terms such as natural must ensure that they can substantiate whatever claims they are conveying to reasonable consumers. If reasonable consumers could interpret a natural claim as representing that a product contains no artificial ingredients, then the marketer must be able to substantiate that fact. Similarly, if, in a given context, a natural claim is perceived by reasonable consumers as a general environmental benefit claim or as a comparative claim (e.g., that the product is superior to a product with synthetic ingredients), then the marketer must be able to substantiate that claim and all attendant reasonably implied claims.<sup>428</sup>

#### C. Renewable Materials Claims

Although the Commission solicited comments on whether the Guides should be revised generally to include renewable claims, the vast majority of commenters addressed this term in the context of "renewable materials"<sup>429</sup> or "renewable energy."<sup>430</sup> Therefore, the Commission has focused on these two types of renewable claims. This part discusses comments, relevant consumer perception evidence, and the Commission's proposed guidance for renewable materials claims. Part VI.D, below, addresses renewable energy claims.

#### 1. Comments

Comments addressed the following issues: (1) use of an unqualified renewable claim; (2) the elements of a renewable materials claim, including the time frame under which material must be renewed; (3) the quantity of renewable materials in a product or package marked "made with renewable materials"; (4) the specific substantiation for a renewable materials claim; and (5) consumer confusion between renewable materials claims and biodegradability.

#### a. Unqualified Renewable Claims

Two commenters recommended that the Guides clarify that "the characteristic of 'renewable' must be ascribed to a material or fuel," and not to the product or package itself.<sup>431</sup>

<sup>428</sup> See Part V.A.4, *supra*.

<sup>429</sup> Although commenters also referred to "renewable resources," the Commission uses the term "materials" for consistency.

<sup>430</sup> According to the FTC Staff Internet Surf, among renewability claims, the phrases "renewable energy" and "renewable resource" occurred most frequently. "Renewable energy" occurred in 46 percent of the 387 web pages containing renewable claims, and "renewable resource" occurred in 37 percent.

<sup>431</sup> FBA, Comment 533431-00015 at 4; Georgia-Pacific, Comment 533431-00007 at 8.

According to these commenters, "it is not proper to ask if [a product] is renewable but rather if the material composing it in a majority by weight is renewable."<sup>432</sup> A third commenter asserted that a product labeled with an unqualified renewable claim is deceptive because it does not provide consumers with information that can be used to evaluate the claim.<sup>433</sup>

#### b. Elements of Renewable Materials Claims

Most commenters did not offer evidence or views on how consumers perceive renewable materials claims.<sup>434</sup> Rather, they suggested definitions for the term. For example, two commenters defined renewable materials as materials having "the capacity of being regenerated either through natural processes or with human assistance, for example, through replanting with nursery seedlings or natural reseeding."<sup>435</sup> Another stated that renewable materials are "capable of being replaced by natural ecological cycles or sound management practices."<sup>436</sup>

Commenters, however, argued that there is an ongoing debate regarding the definition of "renewable" and strongly urged the Commission to "approach renewability broadly and recognize that there is no consensus on what should be treated as a renewable resource."<sup>437</sup> Moreover, although some commenters observed that renewable materials include biobased products,<sup>438</sup> one commenter remarked that defining renewable materials to include only agriculturally based materials is too limiting.<sup>439</sup> According to this commenter, although not agriculturally based, sand is a renewable resource because deposits are increased daily "by the normal, ongoing geological processes that generate new deposits of sand in the hundreds of millions of tons each year."<sup>440</sup>

Another commenter provided a more detailed definition. According to this

<sup>432</sup> *Id.*

<sup>433</sup> ACC, Comment 533431-00023 at 11 (suggesting that a product labeled, for example, "uses 20% renewable feedstock" would not be deceptive).

<sup>434</sup> In fact, only one commenter, the National Cotton Council, cited consumer perception evidence. NCC, Comment 536013-00027 at 4; *See Part VI.C.2, infra*.

<sup>435</sup> AF&PA, Comment 533431-00083 at 4; *see also* FBA, Comment 533431-00015 at 4.

<sup>436</sup> NCC, Comment 536013-00027 at 1.

<sup>437</sup> NAIMA, Comment 536013-00017 at 14; Saint-Gobain, Comment 533431-00037 at 13.

<sup>438</sup> *See, e.g.*, Dow, Comment 533431-00010 at 15; GreenBlue, Comment 533431-00058 at 7.

<sup>439</sup> NAIMA, Comment 536013-00017 at 14.

<sup>440</sup> *Id.*; *see also* FBA, Comment 533431-00015 at 4; Georgia-Pacific, Comment 533431-00007 at 8.

commenter, a material is renewable if: (1) the rate of the material's replenishment matches the rate of consumption; (2) the sourcing of the material does not harm the ecosystem or negatively impact "sustainability"; (3) sourcing of the material reduces consumption of non-renewable resources; and (4) use of the renewable material does not "significantly increase the product's environmental footprint in other relevant indicators (e.g., water, waste, energy, etc.)".<sup>441</sup> Along these lines, other commenters stated that renewability claims may deceive consumers if the beneficial attributes associated with the renewable materials do not account for every environmental trade-off, after analyzing the entire life cycle of the source.<sup>442</sup>

Other commenters suggested that renewable materials claims may convey some broader environmental benefit.<sup>443</sup> In particular, one commenter cautioned that advertisers should be careful not to equate such claims with an overall environmental benefit, observing, for example, that although ethanol may be renewable, its overall environmental benefit is debated because of "the large amount of energy needed to create it (and the carbon emissions that its creation entails)."<sup>444</sup>

In contrast, another commenter stated that consumers understand renewability to refer to only one attribute (*i.e.*, the biological properties of a material) and do not interpret renewability claims to imply that "there are no other environmental issues."<sup>445</sup> Thus, this commenter urged the FTC not to expand renewability "beyond a simple biological claim."<sup>446</sup>

Some commenters specifically addressed whether and how the Guides should address time frames for renewability. One commenter, for example, suggested that the Guides provide that the time frame within which a resource is renewed is "commensurate with the rate of its use and that the appropriate management practices are used to ensure a material's renewability."<sup>447</sup> This commenter explained that the term "begs the question 'On what time scale?' The argument can be made that everything is

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

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

<sup>443</sup> SPI, Comment 533431-00036 at 6.

<sup>444</sup> Hammer, Comment 533431-00017 at 9.

<sup>445</sup> Weyerhaeuser, Comment 533431-00084 at 6.

<sup>446</sup> *Id.*

<sup>447</sup> GreenBlue, Comment 533431-00058 at 7.

renewable in geologic time or that products are renewable if fossilization is included in the life cycle."<sup>448</sup> Others similarly asked the FTC to provide specific time frames for renewability.<sup>449</sup>

#### c. Quantity of Renewable Materials

Several commenters addressed the question of how much of a product should be renewable for a marketer to make an unqualified "made with renewable materials" claim. Some recommended that the FTC use its current guidance on recyclability and recycled content as a model, *i.e.*, a renewable claim could be made only if an entire product or package, excluding minor incidental components, is made of renewable materials.<sup>450</sup> Otherwise, the marketer should qualify the renewability claim by stating the percentage of renewable materials.

Other commenters presented slightly differing views. The Biodegradable Products Institute ("BPI,") for example, recommended a more specific cut-off, asserting that marketers make unqualified "made with renewable materials" claims only for products that have greater than 95 percent non-petroleum resources.<sup>451</sup> In contrast, two commenters argued that marketers should be able to make an unqualified claim if a "majority" of the product consists of renewable materials.<sup>452</sup>

In addition to recommending a threshold for an unqualified claim, some commenters suggested that marketers' promotional materials should provide specific information about the renewable material, such as the exact percentage of renewable materials in a product<sup>453</sup> or the source of specific raw materials used.<sup>454</sup>

<sup>448</sup> *Id.*

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

<sup>450</sup> ACC, Comment 533431-00023 at 11; *see also* SPI, Comment 533431-00036 at 6 (recommending that the FTC address situations where less than 100 percent of contents are "renewable"; could take approach similar to guidance on products containing less than 100 percent recycled content); Stepan Company, Comment 533431-00011 at 3.

<sup>451</sup> Steve Mojo, Biodegradable Products Institute ("BPI"), Green Packaging Workshop Presentation at (<http://www.ftc.gov/bcp/workshops/packaging/presentations/mojo.pdf>) (recommending that products containing less than 95 percent renewable content should state that percentage).

<sup>452</sup> FBA, Comment 533431-00015 at 4; Georgia-Pacific, Comment 533431-00007 at 6, 8.

<sup>453</sup> ACC, Comment 533431-00023 at 11; *see also* Hammer, Comment 533431-00017 at 8 (stating marketers should specify the percentage of the total product that is renewable).

<sup>454</sup> SPI, Comment 533431-00036 at 6.

#### d. Substantiating Renewable Materials Claims

Some commenters suggested that the Guides specifically address the procedures needed to substantiate renewable and biobased claims. For example, one commenter suggested that the Guides recommend either self-certification with publicly available documentation using EPA definitions or a third-party certification.<sup>455</sup> Others opined that the Green Guides specify the methods used to determine biocontent.<sup>456</sup> For example, some commenters suggested ASTM D 6866<sup>457</sup> could be used to accurately determine the percentage of the product that comes from renewable resources.<sup>458</sup>

#### e. Confusion Between Renewable Materials Claims and Biodegradability

Two commenters noted that consumers may mistakenly believe that products labeled "made with renewable materials" are also biodegradable.<sup>459</sup> Specifically, BPI cited a study conducted by APCO Insight in 2006 finding that 80 percent of consumers believe that a package made from natural materials, such as corn-based plastics, were more likely to be biodegradable than a package made from synthetic materials.<sup>460</sup> However, some biobased products, such as products made from sugar cane, contain non-degradable polymers.<sup>461</sup> Moreover, according to the Institute for Local Self-Reliance, some of the plastics on the market that meet biodegradability standards contain no plant matter.<sup>462</sup> To address this confusion, BPI recommended that the Guides make clear that naturally based materials may, or may not, be compostable or biodegradable.<sup>463</sup>

<sup>455</sup> CRI, Comment 533431-00026 at 2.

<sup>456</sup> BPI, Green Packaging Workshop Tr. at 90-91; Georgia-Pacific, Comment 533431-00007 at 8; ILSR, Green Packaging Workshop Tr. at 136-138; Stepan Company, Comment 533431-00011 at 2.

<sup>457</sup> ASTM D 6866 "Standard Test Methods for Determining the Biobased Content of Natural Range Materials Using Radiocarbon and Isotope Ratio Mass Spectrometry Analysis."

<sup>458</sup> BPI, Green Packaging Workshop Tr. at 83; Georgia-Pacific, Comment 533431-00007 at 8; ILSR, Green Packaging Workshop Tr. at 136-138.

<sup>459</sup> BPI, Green Packaging Workshop Tr. at 89 and (<http://www.ftc.gov/bcp/workshops/packaging/presentations/mojo.pdf>).

<sup>460</sup> See APCO, Biodegradable and Compostable Survey Topline at 4.

<sup>461</sup> *Id.*; ILSR, Green Packaging Workshop Tr. at 137-138.

<sup>462</sup> ILSR, Green Packaging Workshop Tr. at 137-138.

<sup>463</sup> BPI, Green Packaging Workshop Tr. at 102-103.

## 2. Consumer Perception Evidence

As noted above, one commenter, the National Cotton Council, described a finding from its 2006 telephone/Internet study that “only one third of consumers correctly understand the term ‘renewable’ when referring to cotton.”<sup>464</sup>

The Commission’s consumer perception study tested respondents’ understanding of the phrase “made with renewable materials” as this claim appeared on three different products – wrapping paper, a laundry basket, and kitchen flooring. The study results indicated that, for all products, respondents thought this claim definitely or probably suggested that the product had other environmental attributes. For example, 53 percent believed that this phrase suggested that the product was recyclable.<sup>465</sup> In addition, 45 percent believed the phrase suggested that the product was made from recycled materials. Fewer, but still a significant number, believed that a “made with renewable materials” claim suggested that the product was biodegradable (28 percent), compostable (24 percent), and made with renewable energy (23 percent).

Responses to the open-ended question “[w]hat, if anything, does this statement suggest or imply to you about the product,” confirmed these results. For all three tested products, a significant number said that the product was made from recycled materials (31 percent) or materials that can be recycled (17 percent).

A smaller number of respondents answering the open-ended questions perceived the claim in the same way as marketers appear to intend. Specifically, 10 percent stated the term implied that materials could be replenished, replaced, or regrown; 4 percent stated the materials were derived from plant matter; 0.4 percent suggested the materials were non-petroleum based; and 0.6 percent indicated the materials could be grown quickly.<sup>466</sup>

The study further tested what a “made with renewable materials” claim conveyed about the percentage of renewable materials in a product. Specifically, the study asked

<sup>464</sup> NCC, Comment 536013-00017 at 4. This study, which Cotton Incorporated conducted, is available at (<http://www.ftc.gov/green>). The NCC counted the terms “recycled,” “reused/regrown,” and “sustainable for environment” as “correct” interpretations of the term. E-mail from Cotton Incorporated (Mar. 11, 2010).

<sup>465</sup> This and the following numbers are net of the non-environmental control claim.

<sup>466</sup> These findings are based on FTC staff’s more detailed analysis of the open-ended responses rather than Harris’ general findings.

respondents whether a statement that a product is “made with renewable materials” suggests that all, most, or some of the materials were renewable. In response, 37 percent indicated that they would interpret the claim to mean that “all” of the materials were renewable, and an additional 20 percent believed that the claim meant “most.”<sup>467</sup>

## 3. Analysis and Guidance

To avoid deception, the Commission proposes advising marketers to qualify a “made with renewable materials” claim with specific information about the material.<sup>468</sup> In addition, marketers should qualify this claim for products containing less than 100 percent renewable materials, excluding minor, incidental components. The Commission does not propose defining the term or endorsing any particular test to substantiate such claims.

### a. Qualifying Renewable Materials Claims

Rather than providing a technical or scientific definition for environmental claims, the Guides state what consumers understand the claims to mean. The results of the Commission’s consumer perception study suggest there is a disconnect between consumer understanding of “made with renewable materials” claims and what marketers appear to intend to convey. Marketers, for example, may intend to communicate that a product is made from a material that can be replenished at the same rate, or faster, than consumption.<sup>469</sup> Consumers, however, likely believe the product has other specific environmental benefits, such as being made with recycled content, recyclable material, and biodegradable material. The Commission, therefore, proposes advising marketers to qualify “made with renewable materials” claims to avoid misleading consumers.

While the Commission did not test particular qualifiers, it nevertheless believes that providing specific information about the renewable material may correct consumers’ misimpressions about this claim. For

<sup>467</sup> Further, 26 percent stated that “some” of the product was made with renewable materials; 13 percent stated that the claim does not suggest anything about how much of the product was made with renewable materials; and six percent stated that they were not sure. The figures total 102 percent because of rounding. These percentages were derived by combining the responses to all claims that included “made with renewable materials” (*i.e.*, “made with renewable materials,” “green - made with renewable materials,” “eco-friendly - made with renewable materials,” and “sustainable - made with renewable materials”).

<sup>468</sup> This proposed guidance can be found in 16 CFR 260.15.

<sup>469</sup> See, *e.g.*, P&G, Comment 533431-00070 at 3.

example, providing information regarding which renewable materials were used, how the materials were sourced, and why the materials are renewable may align consumer perception with what marketers are trying to convey. Accordingly, in proposed Example 1, the Commission states that a “made with renewable materials” claim is unlikely to be deceptive if the marketer provides specific information about the material it uses (bamboo), how it sources the material (it grows the bamboo), and why it is renewable (the bamboo grows at a rate comparable or faster than its use). Providing this information should reduce confusion by providing context for the claim. The Commission seeks comment on whether providing this information, as in proposed Example 1, adequately qualifies a “made with renewable materials” claim.

### b. Quantity of Renewable Materials

As noted above, a significant percentage of respondents (37 percent) indicated that they would interpret a “made with renewable materials” claim to mean that “all” of the materials in a product are renewable. Based on this result, the Commission proposes that, unless the entire product or package, excluding minor, incidental components, is made from renewable materials, marketers need to qualify the claim to specify the amount of renewable materials in a product or package. Thus, as illustrated in proposed Example 2, a marketer’s “made with renewable materials” claim would not be deceptive if it clearly states that its product, made from a blend of 50 percent petroleum-based plastic and 50 percent plant-based plastic, contains 50 percent renewable material. This proposed guidance is consistent with many of the commenters’ views and is modeled on the Commission’s current recycled content guidance.<sup>470</sup>

### c. Substantiating Renewable Materials Claims

As discussed above, several commenters suggested that the Commission reference ASTM Method D 6866 as a means to substantiate “made with renewable material” claims. Although this protocol may determine the biobased content of natural

<sup>470</sup> The Guides currently provide that unqualified claims of recycled content may be made if the entire product or package (excluding minor, incidental components) is made from recycled content. 16 CFR 260.7(e). The recyclable section of the current Guides also contains similar language: “Unqualified claims of recyclability for a product or package may be made if the entire product or package, excluding minor incidental components, is recyclable.” 16 CFR 260.7(d).

materials, it does not necessarily substantiate all claims that consumers reasonably infer. Therefore, the Commission declines to reference it in the Guides as acceptable substantiation for renewable materials claims.

Proposed Example 3 illustrates this point. In this example, although the marketer used test results to determine that its product consists entirely of biological material, the marketer cannot substantiate other consumer interpretations of its unqualified “made with renewable materials” claim, including that the product is recyclable, made with recycled content, or biodegradable.

#### d. Biobased Claims

Some commenters used the term “biobased” interchangeably with the phrase “renewable material.”<sup>471</sup> It is not clear whether consumers interpret this claim in the same way as “renewable.” At this time, the Commission does not propose addressing biobased claims in the Guides because the USDA is conducting its own consumer perception study of biobased claims as part of its proposed voluntary labeling program for biobased products.<sup>472</sup> In developing this program, USDA has sought public comment on a proposed “USDA Certified Biobased Product” logo, which will include a statement that identifies the biobased<sup>473</sup> content of the product and that indicates whether the label applies to the product or packaging (e.g., “Product: 57% biobased; Packaging: 90% biobased”). The USDA proposes that marketers determine biobased content by testing products pursuant to the ASTM Method D 6866 standard. Given USDA’s ongoing work in this area, the Commission does not want to propose duplicative or potentially inconsistent advice. Therefore, the Commission has decided not to address this issue in the Guides at this time.

#### D. Renewable Energy Claims

This section discusses claims about the sale of renewable energy as well as claims that a product is “made with renewable energy.” Specifically, the Commission discusses the ways renewable energy is sold, comments

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

<sup>472</sup> 74 FR 38295, 38298 (July 31, 2009).

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

addressing renewable energy claims, relevant consumer perception research, and the Commission’s analysis of the issues.

#### 1. Overview

Renewable energy generally refers to electricity derived from constantly replenished sources (e.g., wind power).<sup>474</sup> Once renewable electricity is introduced into the grid, it is physically indistinguishable from electricity generated from conventional sources. Consumers, therefore, cannot determine for themselves the source of the electricity flowing into their homes. Because electricity transactions can be tracked, however, retail customers can “buy” renewable power by either: (1) purchasing renewable energy certificates (RECs)<sup>475</sup>; or (2) purchasing renewable power through contracts with their utility.

Under the REC method, a renewable electricity generator splits its output into two components: (1) the electricity itself; and (2) certificates representing the renewable attributes of that electricity.<sup>476</sup> Specifically, generators that produce renewable electricity sell their electricity at market prices for conventionally produced power and then sell the renewable attributes of that electricity through separate certificates.<sup>477</sup> Organizations purchase RECs to characterize all or a portion of their electricity usage as “renewable” by matching the certificates with the conventionally produced electricity they normally purchase.<sup>478</sup>

Under the contract method, consumers and businesses purchase

<sup>474</sup> See ([http://www.nrel.gov/learning/re\\_basics.html](http://www.nrel.gov/learning/re_basics.html)).

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

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

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

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

renewable energy through traditional electricity contracts with their local utility or power provider.<sup>479</sup> Energy sold through these “green power pricing” programs generally costs more than conventional energy. Utilities (or other electricity retailers) can obtain the renewable energy they sell through different means. Some generate renewable energy themselves and sell it to their customers. Others contract with renewable energy generators to purchase electricity, which utilities then sell to their customers. Additionally, some utilities purchase RECs to match their own conventionally produced energy so that they can characterize the energy they sell as renewable.<sup>480</sup>

Many businesses tout their renewable energy purchases to market their products or services.<sup>481</sup> For example, a clothing company may claim that its garments are “made with renewable energy,” or a snack food manufacturer may claim that it “buys green energy credits to match 100% of the electricity needed to produce” its snacks.<sup>482</sup> By purchasing such products, consumers can indirectly support renewable energy.

#### 2. Comments

The comments discussing renewable energy focused on three issues: (1) the definition of “renewable energy” and guidance on “made with renewable energy” claims; (2) whether utilities must disclose that the renewable energy they sell is based on RECs; and (3) the types of practices and advertising claims that should be considered “double counting.”

##### a. Defining Renewable Energy and Interpreting Renewable Energy Claims

Several comments discussed the definition and scope of the term “renewable energy.” One recommended that the Commission clearly state what qualifies as renewable energy.<sup>483</sup>

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

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

<sup>481</sup> NREL, Carbon Offsets Workshop Tr. at 48-49. Businesses also may purchase RECs to facilitate compliance with regulatory requirements. The FTC’s focus is not on these sales.

<sup>482</sup> See, e.g., Rob Schasel, PepsiCo, Carbon Offsets Workshop Tr. at 207.

<sup>483</sup> P&G, Comment 533431-00020 at 3 (stating that an energy source is renewable if the rate of replenishment matches the rate of its consumption, the sourcing and use of the energy does not harm

Continued

Another asserted consumers may not have a clear understanding of the term,<sup>484</sup> but a different commenter believed that consumers understand it to mean energy generated from sources other than fossil fuels or nuclear power.<sup>485</sup> Another commenter stated that there is no uniform definition of “renewable energy.”<sup>486</sup>

Some commenters recommended that the Commission include guidance about the scope of renewable energy claims and the possible need to qualify them.<sup>487</sup> One commenter provided examples of potentially broad, implied claims and suggested that the Commission include these examples in the Guides.<sup>488</sup> For instance, consumers may interpret a “made with renewable energy” claim on a product label as applying to the product, its packaging, and the label itself.<sup>489</sup> Several commenters also cautioned that consumers may interpret the claim “manufactured with renewable energy” to mean that the product was made entirely with renewable energy.<sup>490</sup> In these commenters’ view, marketers should not make an unqualified “made with renewable energy” claim if less than 100 percent of the electricity used comes from renewable sources.<sup>491</sup>

#### b. REC Disclosures

Some commenters discussed whether utilities or other electricity retailers

the ecosystem or increase the product’s environmental footprint, and the sourcing of the energy reduces consumption of non-renewable resources). Another commenter stated that a federal Executive Order defines renewable energy, and others noted that many states have different definitions of what constitutes renewable energy. Dow, Comment 533431-00010 at 13; *see also* Edison Electric Institute, Comment 533254-00055 at 4-5; Exelon Corp., Comment 533431-00059 at 5.

<sup>484</sup> Tandus, Comment 536013-00037 at 1.

<sup>485</sup> CRS, Comment 533254-00049 at 4.

<sup>486</sup> Edison Electric Institute, Comment 533254-00055 at 4-5.

<sup>487</sup> Cameron Brooks, Renewable Choice Energy (“Renewable Choice”), Carbon Offsets Workshop Tr. at 214 (encouraging the FTC to provide guidance on making more precise claims); CRS, Comment 533254-00049 at 4-14; SDA, Comment 534743-00028 at 2 (suggesting that the Commission provide guidance on which environmentally beneficial attributes are associated with the use of renewable energy, such as reductions in greenhouse gases); David A. Zonana, California Department of Justice, Carbon Offsets Workshop Tr. at 219 (stating that it generally is easier for marketers to substantiate more precise marketing claims).

<sup>488</sup> CRS, Comment 533254-00049 at 4-14.

<sup>489</sup> *Id.* at 10; CRS, Comment 534743-00009 at 2.

<sup>490</sup> CRS, Comment 533254-00049 at 10; CRS,

Comment 533431-00061 at 6; Jennifer Martin, CRS (“CRS”), Carbon Offsets Workshop Tr. at 194-195; Sharp Electronics Corporation, Solar Energy Solutions Group (“Sharp Electronics”), Comment 533254-00036 at 1; *see also* Dow, Comment 533431-00010 at 13 (recommending that marketers specify the percentage of renewable energy used).

<sup>491</sup> *Id.*

must disclose that the renewable energy they sell is based on their purchase of RECs.<sup>492</sup> Some argued that sellers should disclose this fact so consumers will not believe mistakenly that the utility either generated the renewable power itself or purchased it through electricity contracts.<sup>493</sup> As one commenter explained, consumers may believe that the renewable energy they purchase is generated in their geographic location, when, in fact, the utility may have purchased RECs generated in a distant location.<sup>494</sup> These commenters, therefore, argued that without a disclosure, consumers might be misled. The Renewable Energy Marketers Association disagreed, maintaining that a disclosure about the source of the renewable energy is unnecessary because there is no difference in the environmental benefits of REC-based renewable energy and contract-based renewable energy.<sup>495</sup>

#### c. Double Counting

Commenters also discussed the problem of “double counting.” Double counting generally occurs when an entity sells the same REC to more than one purchaser or when multiple parties make claims based on the same REC. Although some instances of double counting are straightforward,<sup>496</sup> the commenters discussed more subtle variations. Some argued a company should not generate renewable power onsite (*e.g.*, by using solar panels on store roofs), sell RECs based on the renewable attributes of that same power, and then advertise that they use renewable energy (*e.g.*, “our stores are

<sup>492</sup> *See, e.g.*, Ecology Center, Comment 533254-00020 at 1; Sol Metz (“Metz”), Comment 533254-00023 at 1; REMA, Comment 533254-00028 at 3-4; James Svensson (“Svensson”), Comment 533254-00021 at 1; Weyerhaeuser, Comment 533431-00084 at 13.

<sup>493</sup> Ecology Center, Comment 533254-00020 at 1; Metz, Comment 533254-00023 at 1; Svensson, Comment 533254-00021 at 1.

<sup>494</sup> Climate Clean, Comment 533254-00039 at 3 n.7 (stating that claims such as “made with green energy” are “misleading insofar as they may imply on-site generation, not the market purchase (possibly well out of market) of environmental attributes of renewable energy production”). Another commenter stated that marketers advertise products as “produced with wind power” and questioned whether consumers understand that the wind power may be generated in a distant location. The commenter stated that many marketers include disclaimers that explain they use power from the grid. Weyerhaeuser, Comment 533431-00084 at 3.

<sup>495</sup> REMA, Comment 533254-00028 at 3-4; *see also* CRS, Comment 533254-00049 at 2-3 (explaining that in neither case “is the consumer directly receiving actual electrons generated by the renewable energy facility, which is physically impossible”).

<sup>496</sup> A marketer, for example, may knowingly sell the same REC multiple times.

100% solar-powered”).<sup>497</sup> In their view, such practices constitute double counting and are misleading. Some commenters suggested, however, that it would not constitute double counting if those companies simply claimed that they “host” a renewable energy facility.<sup>498</sup>

#### 3. Consumer Perception Evidence

No commenters submitted research exploring how consumers perceive renewable energy claims. The Commission’s study, however, explored respondents’ understanding of such claims.

The study asked respondents to describe, in their own words, what a “made with renewable energy” claim means. In response to this open-ended question, 16 percent referenced a particular form of renewable energy, such as solar or wind power. Five percent stated that the product was made with energy that is not derived from fossil fuels; four percent stated the product was made with “alternative” or “clean” energy; and one percent stated that it was made with energy that is readily replenished. Seventeen percent did not understand the claim’s meaning or stated that it meant nothing to them, and another 17 percent stated that the product was made from recycled materials.<sup>499</sup>

Through a closed-ended question, the study also explored what claims respondents thought were implied by a product advertised as “made with renewable energy.” The study provided seven possible claims from which respondents could choose. In response, 28 percent thought the claim implied the product was made with renewable materials, 21 percent thought the product was made from recycled materials, and 18 percent thought the product was recyclable.<sup>500</sup>

In addition, the study asked respondents whether a statement that a product is “made with renewable

<sup>497</sup> Matthew Clouse, EPA Green Power Partnership (“Green Power Partnership”), Carbon Offsets Workshop Tr. at 221; CRS, Comment 533254-00049 at 6; REMA, Comment 533254-00028 at 10; Sharp Electronics, Comment 533254-00036 at 1-2.

<sup>498</sup> CRS, Comment 533254-00049 at 6; REMA, Comment 533254-00028 at 10; Sharp Electronics, Comment 533254-00036 at 1-2.

<sup>499</sup> In addition to these responses, 11 percent stated that the product was made with renewable energy without elaborating on what the term “renewable energy” meant. Respondents provided numerous other unique answers in response to this open-ended question. All reported findings are based on FTC staff’s more detailed analysis of responses rather than Harris’ general findings.

<sup>500</sup> Because consumers could choose one or more claims, or no claims, the responses provided do not add up to 100 percent.

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.<sup>501</sup>

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

#### 4. Analysis and Guidance

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

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

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

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

<sup>504</sup> This proposed guidance can be found in 16 CFR 260.14.

#### a. Consumer Interpretation of Renewable Energy Claims

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

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

The second issue is the extent to which renewable energy claims require qualification. The Commission's study suggests that some consumers believe that a "made with renewable energy" claim implies that the advertised product is also made with renewable materials (28 percent of respondents) or made from recycled materials (21 percent).<sup>506</sup> The cause of these consumers' confusion is not entirely apparent. Although some renewable energy is itself made from renewable or recycled materials (e.g., biomass), not all products made with renewable energy are necessarily made with such materials.

When a claim misleads a small, but significant, minority of consumers, the Commission generally advises marketers to qualify the claim to prevent deception.<sup>507</sup> Although the Commission

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

<sup>506</sup> The open-ended responses are consistent with these closed-ended results.

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

did not test any specific qualifiers, it proposes that marketers disclose the type or source of the renewable energy (e.g., solar or wind). Similar to the proposal to qualify renewable materials claims, discussed above, the Commission believes that providing context for renewable energy claims may help reduce consumers' misperception. If consumers are armed with a better understanding of renewable energy, they may be less likely to draw inferences that are unrelated to the claim.

The Commission does not propose advising marketers to qualify renewable energy claims by specifically stating that the product does not contain renewable or recycled materials. Qualifiers such as "not made with renewable materials" or "does not contain recycled materials" bear no relation to a renewable energy claim and, therefore, could cause more consumer confusion than the qualifier alleviates. The Commission, however, requests comment on whether specifying the source of the renewable energy adequately qualifies a "made with renewable energy" claim.

Third, as with other environmental claims, marketers should be cautious that they do not overstate their renewable energy claims. For example, a vehicle manufacturer should not state that its product is made with renewable energy when the claim applies only to certain components of the vehicle. Section 260.6(b) of the Guides already advises marketers to specify whether the advertised environmental attributes apply to the product, its packaging, or only a component of the product or packaging. This guidance applies equally to renewable energy claims. The Commission proposes including new guidance about whether consumers interpret a "made with renewable energy" claim to mean the product was made entirely using renewable energy. In the Commission's research, 36 percent of respondents interpreted a "made with renewable energy" claim to mean that "all" of the product was made with renewable energy.<sup>508</sup> This result is consistent with several commenters' views, as well as the Commission's existing guidance regarding "made with recycled content" claims.<sup>509</sup>

The Commission does not have evidence, however, regarding exactly how consumers interpret the term "all"

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

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

<sup>509</sup> 16 CFR 260.7(e).

in this context or how broadly consumers interpret “made with renewable energy” claims. For example, for a product advertised as “made with renewable energy,” it is unclear whether consumers would expect that all product components are made with renewable energy. This ambiguity, however, does not prevent the Commission from providing some guidance. Specifically, based on its research, the commenters’ views, and its own judgment, the Commission proposes advising marketers not to use unqualified “made with renewable energy” claims unless all, or virtually all, of the significant manufacturing processes used to make the product are powered by renewable energy or powered by conventionally produced energy that is offset by RECs.<sup>510</sup> For example, it would be deceptive for a toy manufacturer to make an unqualified renewable energy claim if it did not purchase renewable energy to power all of the significant processes used to manufactured its toys. Determining whether that same manufacturer could make an unqualified claim if its plant were powered with renewable energy, but its delivery trucks used fossil fuels, would require further consumer perception research. The Commission requests comment on this proposed advice and seeks any additional consumer perception evidence addressing this issue.

#### b. REC Disclosures

The Commission also considered whether specific disclosures are necessary for renewable energy claims based on the purchase of RECs, rather than the purchase through contracts. As discussed earlier, the commenters held different opinions on this issue. Some argued that sellers must inform consumers when their renewable energy sales are based on RECs because consumers would otherwise assume that the marketer either generated the renewable energy itself or purchased it through contracts. The commenters, however, did not submit consumer perception evidence to support this view.

Even assuming that consumers thought renewable energy claims were based on contractual purchases (rather than REC purchases), there is no reason to believe that this fact would be material to consumers. No evidence on the record suggests that a contract-based system more reliably tracks renewable

<sup>510</sup> The Commission also applies the “all or virtually all” standard to unqualified “Made in USA” claims. *See* Enforcement Policy Statement on U.S. Origin Claims, 62 FR 63760, 63755 (Dec. 2, 1997).

energy than a well-designed REC-based system. Accordingly, the Commission does not have a sufficient basis to advise marketers to disclose that their renewable energy claims are based on RECs.

#### c. Geographic Location of Renewable Energy Generation

Regardless of whether the marketer purchases renewable energy through RECs or contracts, the energy may have been generated in a distant geographic location. It is unclear whether consumers interpret renewable energy claims to mean that the energy was generated in their location and, thus, yields local benefits. As discussed above, marketers must have substantiation for all reasonably implied interpretations of their claims. Therefore, marketers must evaluate the net impression of their advertisements and, when needed, obtain consumer research to determine if their advertisements imply that the renewable energy was generated locally. If a particular advertisement implies that renewable energy yields local benefits, marketers should inform consumers that this is not the case to prevent deception. Because the need for such disclosures will depend on the specific advertisement in question, the Commission does not propose adding guidance on this issue to the Guides. Nevertheless, marketers should be mindful of this issue to avoid misleading consumers.

#### d. Double Counting

Double counting can occur as a result of fraud or inadequate accounting, as well as in more subtle ways.<sup>511</sup> Fraudulent activity, such as knowingly selling the same offset to multiple purchasers, is best addressed through law enforcement actions rather than Commission guidance. The Commission’s Guides are intended for those marketers seeking to comply with the law.

Aside from outright fraud, the written comments provide examples of more

<sup>511</sup> CRS, Comment 533254-00049 at 5-6; *see also* Holt, Carbon Offsets Workshop Tr. at 153; NREL, Carbon Offsets Workshop Tr. at 51. Because REC sales often involve multiple transactions and a large number of entities, businesses must track RECs through the market. Therefore, inadequate accounting or tracking practices can lead marketers to sell multiple certificates based on the same renewable energy activity. Accurate, well-designed registries or tracking systems can help to minimize this problem. For example, several regional tracking systems, covering more than 30 states, use metered generation data for the issuance of RECs. CRS, Comment 533254-00049 at 3 n.3; REMA, Comment 533254-00028 at 4-5; *see also* Holt, Carbon Offsets Workshop Tr. at 153; NREL, Carbon Offsets Workshop Tr. at 51.

subtle methods of double counting. Guidance for these types of practices may be useful. The Commission agrees with commenters that companies should not sell RECs for renewable energy they generate onsite (e.g., by using solar panels on store roofs) and then tout their renewable energy facilities or equipment in advertising (e.g., “this store is 100% solar powered”). By selling RECs, the company has transferred the right to characterize its electricity as renewable. Therefore, even if the company technically uses the electricity from its onsite solar panels, an advertising claim about the renewable aspects of this energy is misleading. The Commission, therefore, proposes to include this example in the Guides.

Some commenters suggested companies in these circumstances should be able to claim that they “host a renewable energy facility.” The Commission’s study, therefore, tested this claim, and 62 percent of respondents stated that the company used solar/wind power to make its products.<sup>512</sup> The Commission, therefore, proposes advising marketers that the phrase “hosts a renewable energy facility” is likely to mislead consumers if, in fact, the company has sold its rights to claim credit for the renewable energy.

#### E. Carbon Offset Claims

Carbon offsets, relatively new products in the green marketing field, received significant attention in the comments. To provide background on the consumer protection issues involved with these products, the following describes offsets and the advertising claims associated with them. It then discusses the comments addressing this topic, relevant consumer perception research, and the Commission’s analysis of the issues.

##### 1. Overview

Carbon offsets are credits or certificates that represent reductions in greenhouse gas (“GHG”) emissions. These reductions stem from different types of projects, such as methane capture from landfills or livestock feedlots, tree planting, and industrial gas destruction.<sup>513</sup> Marketers quantify

<sup>512</sup> As discussed in note 503, using a control claim yields similar results. Net of control, 50 percent of respondents believe the company used solar/wind power to make its products.

<sup>513</sup> These projects occur around the globe, often in locations removed from offset purchasers. The location of an offset project is immaterial to its impact on greenhouse gas levels because these gases circulate evenly throughout the earth’s atmosphere. Katherine Hamilton, Ecosystem Marketplace (“Ecosystem”), Carbon Offsets Workshop Tr. at 31.

their GHG reductions and then sell carbon offsets to purchasers seeking to meet their own environmental goals by reducing their “carbon footprints” or by striving to make themselves “carbon neutral.”<sup>514</sup> Offset purchasers include individual consumers, businesses, government agencies, and non-profit organizations.<sup>515</sup>

Individual consumers, for example, generally purchase offsets to reduce, balance, or neutralize greenhouse gas emissions associated with their own activities, such as automobile use or airplane travel. In these instances, offset sellers advertise their products directly to individual consumers. For example, some online travel vendors have partnered with offset sellers to allow consumers to buy offsets when they purchase airplane tickets.<sup>516</sup>

Businesses purchase carbon offsets to balance the emissions associated with the production, sale, or use of their own products and services. They often tout these offsets in advertisements for their products and services. For example, a potato chip seller that purchases offsets to match its GHG emissions might advertise its chips as “carbon neutral.” Marketers make similar claims for a wide range of products and services, from clothing to paper goods.<sup>517</sup>

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

<sup>515</sup> Ecosystem, Carbon Offsets Workshop Tr. at 37-38 and (<http://www.ftc.gov/bcp/workshops/carbonoffsets/presentations/khamilton.pdf>). The vast majority (80 percent) of offset purchasers in the international voluntary market are businesses. Across the globe, offset sales generally occur in two types of markets: (1) those that facilitate compliance with regulatory targets (so-called “mandatory” or “compliance” markets); and (2) those unrelated to existing regulatory programs (so-called “voluntary” markets). This discussion addresses offsets in the voluntary market.

<sup>516</sup> Matthew Kotchen, University of California, Santa Barbara, Carbon Offsets Workshop Tr. at 92.

<sup>517</sup> See generally EcoSecurities, Comment 533254-00044 at 4-5. Although many businesses purchase offsets to make advertising claims for individual products, others do so to prepare for future mandatory carbon markets, to help their corporate image more generally, or to promote corporate responsibility efforts. See, e.g., Ecosystem, Carbon Offsets Workshop Tr. at 40-41; Mario Teisl, University of Maine, Carbon Offsets Workshop Tr. at 175. The Commission has not identified any data addressing the volume of purchases attributable to these various activities.

## 2. Comments

### a. Defining Carbon Offsets and Requiring Disclosures

The comments differed in the degree and extent the FTC should be involved in regulating carbon offset marketing. Several commenters called on the Commission to provide detailed guidance or create a regulatory framework for offsets.<sup>518</sup> For example, some suggested that the FTC define or clarify the meaning of certain terms, such as “carbon neutral.”<sup>519</sup> Another asked the FTC to establish a list of allowable offset projects and mandate uniform calculation methods for emission reductions.<sup>520</sup> Others urged mandatory disclosures about the type of activity (e.g., reforestation) that forms the basis for carbon offsets.<sup>521</sup> In addition, Consumers Union called for an annual FTC statement about the amount of global carbon production to help consumers compare the offset impacts in a global context.<sup>522</sup>

While some commenters called for regulatory requirements, others urged the FTC to avoid setting standards.<sup>523</sup> For example, Exelon Corporation stated that the FTC lacks the technical expertise and authority to set standards in this area.<sup>524</sup> Walmart indicated that,

<sup>518</sup> See Climate Clean, Comment 533254-00039 at 5; Consumers Union, Comment 533254-00026 at 1-2; NativeEnergy, Inc., Comment 533431-00044 at 2; State of New Jersey, Department of Environmental Protection (“NJ DEP”), Comment 533431-00082 at 1; Pacific Gas & Electric Company, Comment 533254-00041 at 1; Seventh Generation, Comment 533431-00033 at 6.

<sup>519</sup> See, e.g., Urvashi Rangan, Consumers Union (“Consumers Union”), Carbon Offsets Workshop Tr. at 210 (“I think clarification of terminology out there is really important. Things like carbon-free, carbon neutral, carbon offset, carbon negative . . . are really confusing to consumers.”); International Paper, Comment 533431-00006 at 2; Kim Sheehan, Comment 533431-00004 at 1.

<sup>520</sup> NJ DEP, Comment 533431-00082 at 2.

<sup>521</sup> Consumers Union, Comment 533254-00026 at 2 (recommending disclosure of offset type); Hydrodec North America LLC (“Hydrodec”), Comment 533254-00046 at 8 (same); NJ DEP, Comment 533431-00082 at 2 (recommending disclosure of the name, owner, and location of the project that produced the emission reductions, among other things); 3M Company, Comment 533431-00027 at 2 (recommending disclosure of the source of and methodology used to calculate the carbon offsets); see also Carbon Offset Providers Coalition (“COPC”), Comment 533254-00032 at 4 (recommending that the FTC promote “clarity and transparency”).

<sup>522</sup> Consumers Union, Comment 533254-00026 at 1-2. Consumers Union also recommended that sellers disclose the benefits that the product yields beyond the baseline impacts (i.e., the emissions that would have occurred in the absence of the offset project).

<sup>523</sup> See, e.g., Constellation Energy Group, Inc. (“Constellation”), Comment 533254-00029 at 4-5; Hydrodec, Comment 533254-00046 at 5; Wal-Mart Stores, Inc. (“Wal-Mart”), Comment 533254-00040 at 3-4.

<sup>524</sup> Exelon Corp., Comment 533431-00059 at 2.

while the FTC should insist that marketers have a reasonable basis for their claims, the agency should not mandate one reasonable approach over another.<sup>525</sup> In addition, Constellation Energy Group noted that, given the relative youth of these products, “market-driven solutions are being and will continue to be developed to address consumer confidence or credibility concerns.”<sup>526</sup> Finally, commenters warned that any FTC action in this area might negatively impact ongoing policy debates at the federal and state levels.<sup>527</sup>

### b. Timing of Emission Reductions

The comments also raised concerns about the timing of the actual GHG emission reductions associated with carbon offsets. Some reductions occur prior to the sale of offsets and others occur after. For example, offsets generated from methane capture activities are typically sold after the methane reductions occur. Other sellers, however, use offset proceeds to fund future projects (such as constructing renewable energy facilities) that are expected to create emission reductions at a later date.

Many commenters stated that offsets should be based on prior emission reductions because those reductions are verifiable.<sup>528</sup> The commenters disagreed, however, about the propriety of selling offsets based on future GHG reductions. One commenter preferred such offsets because, in its view, consumers are concerned with future GHG emissions.<sup>529</sup> Another suggested that consumers implicitly understand that reductions from activities such as tree-planting do not happen immediately but rather “incrementally and over a longer time horizon.”<sup>530</sup> Others disagreed and argued that consumers do not necessarily understand that emission reductions funded by their purchase have not yet

<sup>525</sup> Wal-Mart, Comment 533254-00040 at 3-4.

<sup>526</sup> Constellation, Comment 533254-00029 at 2.

<sup>527</sup> See Exelon Corp., Comment 533431-00059 at 2; Wal-Mart, Comment 533254-00040 at 3-4.

<sup>528</sup> See, e.g., Edison Electric Institute, Comment 533254-00055 at 10; Michael Gillenwater (“Gillenwater”), Comment 533254-00005 at 3; The Fertilizer Institute, Comment 533254-00052 at 4. One commenter, however, noted that such sellers cannot show that the offset purchase *caused* an emission reduction. NativeEnergy, Inc., Comment 533431-00044 at 3 (“As one cannot change the past, it is impossible for the purchase of a previously generated reduction to be the cause of that reduction.”)

<sup>529</sup> NativeEnergy, Inc., Comment 533431-00044 at 3.

<sup>530</sup> Edison Electric Institute, Comment 533254-00055 at 17 (stating that as long as the offset is substantiated, timing should not be an issue).

occurred.<sup>531</sup> In one commenter's view, sellers should disclose prominently that the reductions caused by their products will occur in the future.<sup>532</sup>

In addition to concerns about consumer understanding, many commenters raised concerns about the certainty of future projects.<sup>533</sup> With forestry-based offsets, for instance, events such as fire or insect infestation may damage trees and release carbon stored within them.<sup>534</sup> Because of these uncertainties, one commenter stated that offsets for unverified emission reductions should not be allowed.<sup>535</sup> Others suggested that offset sellers take steps to account for such uncertainties, such as using accounting practices to reflect the risks associated with future projects.<sup>536</sup>

#### c. Substantiating Carbon Offset Claims – Additionality

One of the most contentious issues surrounding the substantiation of carbon offset claims is the concept of "additionality," specifically, whether reductions associated with a carbon offset product would have occurred without the offset sale.<sup>537</sup> Both the workshop participants and comments discussed this issue at length, with most agreeing that offset sellers have a duty to demonstrate that their underlying GHG reduction projects are additional.<sup>538</sup> Without such a showing,

<sup>531</sup> See, e.g., AgRefresh, Comment 533254-00004 at 1, 6; TerraPass, Inc. ("TerraPass"), Comment 533254-00045 at 5.

<sup>532</sup> AgRefresh, Comment 533254-00004 at 1, 6.

<sup>533</sup> Climate Clean, Comment 533254-00039 at 5; see Wiley Barbour, Environmental Resources Trust, Inc. ("ERT"), Carbon Offsets Workshop Tr. at 216 ("There are real differences of opinion about whether or not a forestry project, which is going to take fifty years to grow, ... should be counted as a reduction today.").

<sup>534</sup> Offset Quality Initiative, Comment 533254-00047 at 8.

<sup>535</sup> AgRefresh, Comment 533254-00004 at 6.

<sup>536</sup> For example, one commenter stated that "[s]elling emission offsets before they are created is not inherently problematic .... However, forward crediting should be done transparently and provisions made for failure of delivery." Gillenwater, Comment 533254-00005 at 3.

<sup>537</sup> Some commenters noted that it is difficult to define additionality, and FTC staff have set forth merely one variation (examining whether the emission reduction project would have gone forward without the additional revenue stream associated with the sale of carbon offsets). Another variation examines whether the project causes emissions beyond what is required by law or beyond "business as usual." See, e.g., Anadarko Petroleum Corp. ("Anadarko"), Comment 533254-00058 at 4. The Commission discusses these differences in more detail below.

<sup>538</sup> See, e.g., Anadarko, Comment 533254-00058 at 3; Derik Broekhoff, World Resources Institute ("WRI"), Carbon Offsets Workshop Tr. at 123-125, 165; COPC, Comment 533254-00032 at 5; CRS, Comment 533254-00049 at 11; EcoSecurities, Comment 533254-00044 at 4; Gillenwater, Comment 533254-00005 at 3; Hydrodec, Comment

the underlying projects do not produce meaningful GHG reductions.<sup>539</sup>

The concept of additionality raises difficult technical and policy challenges, which have generated substantial disagreement among experts. In particular, the commenters did not form a consensus regarding which tests industry members should use to determine whether an offset project is additional. In fact, according to various commenters, industry members rely on numerous, different tests, alone or in combination. Examples of these various tests include:<sup>540</sup>

- *Regulatory/Legal Test:* Addresses whether the project, and, thus, the emissions reductions, are required by law. If they are required by law, the project is not additional.

- *Investment Test:* Addresses whether the revenue from carbon offset sales was a decisive factor in the project's implementation or whether the project would have yielded a lower than acceptable rate of return without offset revenue. If either is true, the project is additional.

- *Common Practice Test:* Addresses whether the project involves widely-used technologies and is merely a "business as usual" project. If so, the project is not additional.

- *Technology Test:* Addresses whether the project involves a technology that is not considered "business as usual" or whether the primary benefit yielded by the technology is a reduction in emissions. If so, the project is additional.

- *Timing Test:* Addresses whether the project began after a specific date. This test eliminates older projects which could not have been implemented with the intent of reducing emissions. If the project began after the established date, it is additional.

- *Barriers Test:* Addresses whether there are barriers, such as local opposition or lack of knowledge, that

533254-00046 at 6; Offset Quality Initiative, Comment 533254-00047 at 4; TerraPass, Comment 533254-00045 at 5.

<sup>539</sup> See, e.g., TerraPass, Comment 533254-00045 at 5.

<sup>540</sup> See Anadarko, Comment 533254-00058 at 4; EcoSecurities, Comment 533254-00044 at 9; Gillenwater, Comment 533254-00006 at 8; Green Power Partnership, Carbon Offsets Workshop Tr. at 241-242; Holt, Carbon Offsets Workshop Tr. at 154-155; Hydrodec, Comment 533254-00046 at 4-5; Maurice LeFranc, EPA ("LeFranc EPA"), Carbon Offsets Workshop Tr. at 143; Offset Quality Initiative, Comment 533254-00047 at 4-8; WRI, Carbon Offsets Workshop Tr. at 123-125; Mark Trexler, Derik Broekhoff, and Laura Kosloff, *A Statistically-Driven Approach to Offset-Based GHG Additionality Determinations: What Can We Learn?*, Sustainable Development Law and Policy (Winter 2006) at 30, available at (<http://conserveonline.org/workspaces/climate.change/carbonmarkets/AdditionalityOffset>).

must be overcome to implement the project. If the project succeeds in overcoming unusual barriers such as these, the project is additional.

- *Performance Test:* Addresses whether the project achieves a level of performance (e.g., an emission rate, a technology standard, or a practice standard) with respect to emission reductions and/or removals that is significantly better than "business as usual." If so, the project is additional.<sup>541</sup>

The commenters variously criticized these tests as vague, subjective, and likely to yield undesirable outcomes. For example, one commenter noted that the investment test requires "subjective analyses of the intent of the project developer or the sufficiency of a project's investment return ... [and ignores] market realities as they relate to capital formation and the tenure of commercial arrangements which make private activity projects feasible."<sup>542</sup> Such subjective criteria encourage "gaming" and usually result in increased costs.<sup>543</sup> Another criticized the common practice, technology, and barrier tests because they all involve "complex counter-factual questions of what constitutes the baseline scenario ... and how the offset project differs."<sup>544</sup> Still another noted that the timing test may create incentives to delay much-needed investments until an offset system is established.<sup>545</sup> Some workshop participants, however, supported the regulatory additionality test because it offers an objective standard (i.e., if the law requires the project, one cannot sell offsets from it).<sup>546</sup> But even this approach drew criticism when one panelist explained that multiple regulations can apply to a project, making it difficult to determine whether regulations actually require a particular technology investment.<sup>547</sup>

<sup>541</sup> The EPA Climate Leaders program recommends this approach for use in evaluating offsets by its partners. See (<http://www.epa.gov/stately/>); LeFranc EPA, Carbon Offsets Workshop Tr. at 143.

<sup>542</sup> COPC, Comment 533254-00032 at 3. Another commenter explained that the investment test is subjective because there are no industry-specific metrics on whether an internal rate of return is "attractive" or not to project developers. Anadarko, Comment 533254-00058 at 6.

<sup>543</sup> COPC, Comment 533254-00032 at 3. A workshop participant also noted that it may be difficult to determine which source of funding "made a difference." Green Power Partnership, Carbon Offsets Workshop Tr. at 242.

<sup>544</sup> Anadarko, Comment 533254-00058 at 6.

<sup>545</sup> Hydrodec, Comment 533254-00046 at 5.

<sup>546</sup> Anadarko, Comment 533431-00032 at 4; Renewable Choice, Carbon Offsets Workshop Tr. at 262; see also LeFranc EPA, Carbon Offsets Workshop Tr. at 143.

<sup>547</sup> ERT, Carbon Offsets Workshop Tr. at 254-256; see also Anja Kollmus, Stockholm Environmental

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

#### d. Substantiating Carbon Offset Claims – Use of RECs

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

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

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

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

<sup>549</sup> Anadarko, Comment 533254-00058 at 2.

<sup>550</sup> Hydrodec, Comment 533254-00046 at 6.

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

<sup>552</sup> Adam Stern, TerraPass (“TerraPass”), Carbon Offsets Workshop Tr. at 227-228 (stating that there are reputable organizations such as “the World Resources Institute, The Union of Concerned Scientists, Natural Resources Defense Council, that have all indicated a support for using RECs as an offset value”); Eric Carlson, Carbonfund.org, Carbon Offsets Workshop Tr. at 229-230; CRS, Comment 533254-00049 at 9; Edison Electric Institute, Comment 533254-00055 at 6.

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

Others argued that RECs should not be used for offsets because the two are distinctive commodities and conflating them could mislead consumers.<sup>554</sup> They provided three main arguments to support their position. First, they argued that there is little or no evidence that renewable energy generation always reduces traditional power generation<sup>555</sup> because the actual emission reductions associated with grid power vary considerably across the United States, and there are no uniform standards for calculating the emissions displaced by renewable energy.<sup>556</sup> Second, even if such displacement occurs, sellers cannot prove that renewable energy generation, and any associated GHG emission reductions, are additional.<sup>557</sup> Some argued that RECs merely subsidize existing projects and do not contribute sufficiently to a project’s income stream to create a market for new renewable energy generation.<sup>558</sup> Third, the critics questioned whether the renewable energy generators can take credit for the emission reductions that occur at fossil fuel-fired facilities.<sup>559</sup> There is currently no mechanism to establish who owns such emission reductions – the renewable energy generator or the fossil fuel-fired

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

<sup>554</sup> Climate Clean, Comments 533254-00038 at 1-3, 533254-00039 at 3 (stating that use of RECs as offsets is a “uniquely American practice”); Gillenwater, Comment 533254-00006 at 15-16; 533254-00007 at 5 (stating that there is an incentive to rely on RECs as a source of offsets because RECs are generally less expensive than most offset projects); SEI, Carbon Offsets Workshop Tr. at 226-227.

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

<sup>556</sup> *Id.*

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

<sup>558</sup> *Id.*

<sup>559</sup> ERT, Carbon Offsets Workshop Tr. at 225 (“[W]hat you’re saying is [that] you own a reduction on someone else’s property.”); *see also* Gillenwater, Comment 533254-00006 at 14.

generator.<sup>560</sup> Therefore, the comments raised concerns about double counting if both generators take credit for the same emission reduction.<sup>561</sup>

#### 3. Consumer Perception Evidence

Some commenters emphasized the need to research consumer understanding of specific terms and claims in carbon offset advertisements.<sup>562</sup> The commenters, however, did not identify existing consumer perception data in this area.<sup>563</sup> Therefore, the Commission tested certain issues related to carbon offset claims in its consumer research. The study split respondents into two groups – asking one about carbon offsets and the other about carbon neutrality. The research explored respondents’ understanding of these terms, whether respondents had seen advertisements for carbon offsets or for products or services described as carbon neutral, and whether they had ever purchased such items.

A significant percentage of respondents demonstrated a general understanding of carbon offsets when they chose from a list of possible descriptions, but a much smaller percentage could 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

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

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

<sup>562</sup> Vermont Office of Attorney General (“Vermont AG”), Comment 553254-00051 at 5 (writing on behalf of the Offices of the Attorneys General of Arkansas, California, Connecticut, Delaware, Illinois, Maine, Mississippi, New Hampshire, Oklahoma, and Vermont).

<sup>563</sup> See Georgia-Pacific, Comment 553254-00059 at 2 (“We do not know of specific, credible surveys or even market sensing studies on this matter.”); Rebecca Tushnet, Georgetown University Law Center, Carbon Offsets Workshop Tr. at 82-83 (stating that companies’ consumer research is likely to be part of a marketing initiative and, therefore, proprietary). In considering potential consumer research, some noted that consumer interpretation of claims may change over time. *Id.*; Alan Levy, FDA, Carbon Offsets Workshop Tr. at 80; GE AES Greenhouse Gas Services LLC, Comment 533254-00043 at 2.

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

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

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

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

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

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

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

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

greenhouse gas emission reductions.<sup>569</sup> The study asked each respondent to consider an airline advertisement that states: “For every flight you take with us, we will buy carbon offsets to offset the greenhouse gas emissions from your flight.” The study explained that the offsets in question involve capturing and destroying methane. It then described two methane projects that both result in reduced emissions, but in different timeframes. The study attempted to gauge respondents' views on whether the timing of the emission reductions was material. For each project, the study asked whether respondents agreed or disagreed with the airline's statement that it offsets the emissions from their flight. When the methane was to be captured “within the next few months,” 53 percent of respondents agreed that the airline was offsetting emissions from the flight and 20 percent disagreed.<sup>570</sup> But when the equipment used to capture methane had not yet been installed and the methane was not to be captured “for several years,” only 28 percent of respondents agreed that the airline was offsetting emissions from the flight, while 43 percent disagreed.<sup>571</sup>

#### 4. Analysis and Guidance

The Commission proposes to provide only limited guidance regarding carbon offsets in the Guides.<sup>572</sup> Although many commenters urged the Commission to provide detailed advice or extensive regulatory requirements, such an approach is not appropriate at this time given the extent of the Commission's authority, the available consumer perception evidence, and the ongoing policy debates among experts in the field concerning the appropriate tests to substantiate offset claims. However, it is appropriate for the Commission to provide advice to marketers regarding some aspects of carbon offset marketing and we discuss these below. Regardless of the Guides' scope, the Commission may take law enforcement action to stop deceptive practices involving carbon offset marketing pursuant to Section 5 of

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

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

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

<sup>572</sup> This proposed guidance can be found in 16 CFR 260.5.

the FTC Act. For example, clearly deceptive activity, such as knowingly selling the same offset to multiple purchasers, does not need to be addressed in the Guides and, indeed, is best addressed through enforcement actions.

##### a. Consumer Interpretation of Claims and Disclosures

Some commenters asked the Commission to define terms such as carbon offsets and require sellers to disclose to consumers certain characteristics of their offsets. As previously discussed, under the FTC Act, the Commission has authority to combat deceptive and unfair practices. It does not have authority to develop environmental policies or regulations. Accordingly, the Commission does not create definitions or standards for environmental terms. Rather, it provides guidance to marketers on how consumers understand those terms. The Commission's study suggests that some consumers have a general understanding of carbon offsets and products advertised as carbon neutral, but few reported seeing advertisements for such items, and even fewer have actually purchased them. The study did not identify any pattern of confusion among respondents about what a carbon offset is that would warrant any general FTC guidance. The Commission, therefore, does not believe a discussion about consumer understanding of these terms in the Guides would be useful to marketers. In addition, any such guidance could become obsolete quickly given this rapidly evolving market.

Marketers also requested more detailed FTC guidance with respect to the identification of allowable offset projects and the establishment of uniform methodologies for calculating emission reductions. Such guidance, however, would place the Commission in the role of setting environmental policy, which is outside the agency's authority. The Commission, therefore, declines to do so.

Except as described below, the Commission does not propose advising offset sellers to make certain disclosures, such as the type of projects funded by the offset sales. Although such disclosures may provide helpful information to potential purchasers, there is no evidence on the record to conclude that they are necessary to prevent consumer deception. This distinction is critical under FTC law. Pursuant to the FTC Act, advertisers must disclose information that is necessary to prevent consumers from being misled – not all information that

consumers may deem useful.<sup>573</sup> Therefore, the Commission declines to advise marketers to provide such information in every offset advertisement.<sup>574</sup>

#### b. Timing of Emission Reductions

Some commenters suggested that the Commission advise marketers to disclose the fact that their offsets reflect emission reductions scheduled to occur in the future. The Commission's study, therefore, explored respondents' views on the timing of emission reductions. The results suggest that this timing is important to consumers.<sup>575</sup> Specifically, when emission reductions did not occur for several years, 43 percent of respondents indicated that the carbon offset claim was misleading.<sup>576</sup> Accordingly, marketers may need to qualify their offset claims to avoid deceiving consumers. Absent evidence that consumers view their claims differently, the Commission proposes advising marketers to disclose if the offset purchase funds emission reductions that will not occur for two years or longer.<sup>577</sup> The Commission, however, requests comment on this proposed disclosure.

#### c. Substantiating Carbon Offset Claims – Tracking Offsets

Like all marketers, carbon offset marketers must ensure that their advertising claims are truthful, not misleading, and substantiated. Section 260.2 of the proposed, revised Guides explains that substantiation for environmental marketing claims often requires competent and reliable scientific evidence. Carbon offset sellers – particularly those new to the market – must pay special attention to this substantiation requirement given the complexities of substantiating offsets. For example, marketers must employ sophisticated accounting protocols to properly quantify the GHG emission reductions that result from a project, as

<sup>573</sup> FTC Deception Policy Statement, 103 F.T.C. at 165.

<sup>574</sup> In some contexts, sellers may nevertheless wish to disclose this information to differentiate their offsets.

<sup>575</sup> As discussed above, this finding is based on the subset of respondents who generally understood carbon offsets. Despite the smaller sample size, the Commission relies on these findings because they provide the only available consumer perception evidence upon which to base guidance.

<sup>576</sup> The study asked respondents about an airline's statement that it would buy carbon offsets to offset the greenhouse gas emissions from their flight.

<sup>577</sup> Additionally, the Commission proposes advising offset marketers that they should not state or imply that their products have already reduced emissions or will do so in the near future if, in fact, the reductions will occur at a significantly later date.

well as rigorous tracking methods to ensure that the reductions are not sold more than once. Although savvy carbon offset marketers likely have these procedures in place already, the Commission proposes adding this point to the Guides to ensure that new market participants are fully informed of their responsibilities.

#### d. Substantiating Carbon Offset Claims – Additionality

Many aspects of the additionality debate raise unresolved technical and environmental policy issues. Because the Commission does not set environmental standards or policy, establishing a specific additionality test or tests appears to be outside of the FTC's purview. However, in accordance with its responsibility to ensure that consumers are not misled, the Commission proposes issuing guidance regarding regulatory additionality.

When consumers purchase carbon offsets, they expect that they are supporting a reduction in greenhouse gas emissions. If the law mandates a particular emission reduction, however, that reduction will occur whether or not someone buys an offset for the activity. In other words, if a company sells an offset based on a mandatory emission reduction, the purchaser is essentially funding that company's regulatory compliance activities.<sup>578</sup> Therefore, in such situations, the proposed Guides advise marketers that offset sales are deceptive.<sup>579</sup>

The Commission does not propose promulgating guidance on which specific additionality tests sellers must meet to substantiate offset claims. Even if consumers have a vague expectation of "additionality," it is still unclear which test is appropriate to substantiate that interpretation.<sup>580</sup> In addition, there is no consensus among experts in the field about which tests are appropriate. Of course, marketers are free to provide consumers with information about how and why their offset products are additional. While such disclosures may,

<sup>578</sup> See Anadarko, Comment 533254-00058 at 5 (stating that it is reasonable for consumers to assume, absent any disclaimers to the contrary, that the GHG reduction was not taken to meet regulatory requirements).

<sup>579</sup> The Commission notes that this guidance represents its interpretation of the FTC Act. In the future, other agencies may issue comprehensive carbon offset regulations that address these issues more specifically.

<sup>580</sup> See Holt, Carbon Offsets Workshop Tr. at 165 (stating that consumers expect their carbon offset purchase to "make a difference," and that "making a difference means that it's additional to what would have happened otherwise," but noting that there is still a debate about how to determine what is additional); WRI, Carbon Offsets Workshop Tr. at 166.

or may not, be required to prevent deception, depending on the context, they may aid consumers in differentiating various offsets on the market.

#### e. Substantiating Carbon Offset Claims – Use of RECs

Similar to additionality, the use of RECs as a basis for offset claims involves unresolved technical and policy issues. These issues include the methods marketers should use to demonstrate that the RECs they purchase cause the claimed GHG reductions and which additionality tests they should apply. Further, it is unclear which entity owns the GHG reductions – the renewable energy generator or the fossil fuel-fired facility. Because of this uncertainty, there is a risk of double counting the emission reductions.

It is unlikely that the Commission can provide general guidance on these issues without setting environmental policy, which is beyond the agency's purview. Nevertheless, as with other environmental claims, marketers must substantiate their offset claims. Given the complexity of the issues related to the use of RECs as a basis for offsets, marketers should be cautious that they possess competent and reliable scientific evidence to substantiate their claims and ensure that the emission reductions are not double counted.

### VII. Request for Comment

The Commission invites comment on all issues raised in this Notice, including all aspects of the proposed, revised Green Guides. In addition, the Commission requests responses to the following specific questions:

1. Do consumers interpret general environmental claims, when qualified by a particular attribute, to mean that the particular attribute provides the product with a net environmental benefit? Please provide any relevant consumer perception evidence. Should the Commission advise marketers that a qualified-general environmental claim is deceptive if a particular attribute represents an environmental improvement in one area, but causes a negative impact elsewhere that makes the product less environmentally beneficial than the product otherwise would be? Why or why not?

2. Would it be helpful to include an example in the Guides illustrating a qualified general environmental claim that is nevertheless deceptive? For example, a marketer advertises its product as "Eco-friendly sheets - made from bamboo." Consumers would likely interpret this claim to mean

that the sheets are made from a natural fiber, using a process that is similar to that used for other natural fibers. The sheets, however, are actually a man-made fiber, rayon. Although bamboo can be used to make rayon, rayon is manufactured through a process that uses toxic chemicals and releases hazardous air pollutants. In this instance, the advertisement is deceptive.

3. The Commission's consumer perception study found that 27 percent of respondents interpreted the claims "green" and "eco-friendly" as suggesting that a product has no (rather than "some") negative impact. Viewing this finding alone, would it be deceptive for a product to be advertised with an unqualified general environmental benefit claim if the product had a negligible environmental impact? Please provide any relevant consumer perception evidence.

4. If a marketer makes an unqualified degradable claim for a liquid substance (or dissolvable solid), how long do consumers believe the substance will take to completely degrade? Please provide any relevant consumer perception evidence. Should the Commission provide guidance concerning this time period in the Guides? Why or why not?

5. The Commission proposes adopting a maximum period of one year for complete decomposition of solid materials marketed as degradable without time qualification. Would this guidance lead to deceptive claims in circumstances where consumers would expect a material to degrade in less than one year?

6. Should the Commission quantify the "substantial majority" threshold in the recyclable section of the Guides? If so, how? If not, why not?

7. Should the Commission quantify the "significant percentage" threshold in the recyclable section of the Guides? If so, how? If not, why not?

8. What changes, if any, should the Commission make to its guidance on pre-consumer recycled content claims? How do consumers interpret such claims? Please provide any relevant consumer perception evidence.

a. If the Commission should retain its guidance that pre-consumer recycled materials be diverted from the solid waste stream: (1) should the Commission continue to consider "reuse in the original manufacturing process" and "significant reprocessing" to determine if material is diverted from the solid waste stream; (2) what factors should the Commission consider to determine whether material was diverted from the solid waste stream; and (3) when processes that divert material from the waste stream become standard practice in an industry, do consumers continue to consider that material recycled content?

b. If materials have historically been diverted from the solid waste stream and reused for one purpose (e.g., fiber fill in toys), but now may be reused for other higher purposes (e.g., as raw fiber for textiles), do consumers still consider that material to be recycled content even though the material was already being diverted from the solid waste stream?

9. Do consumers understand the difference between pre-consumer and post-consumer recycled content? Please provide any relevant consumer perception evidence.

10. Should the Commission continue to advise marketers that recycled content claims may be based on the annual weighted average of recycled content in an item? If so, why? If not, why not? Are recycled content claims based on this method likely to mislead consumers? Would qualifying the claim avoid that deception? If so, please describe what the disclosure should be, and why. Please also provide any relevant consumer perception evidence.

11. If a product is advertised as "made with recycled materials," either in whole or in part, should the Commission advise marketers to qualify that claim to indicate that the product is not recyclable if it is not? Why or why not? If a disclosure is needed, please describe what the disclosure should be, and why.

12. Are consumers aware that manufacturers are no longer permitted to use CFCs in their products? Do no-CFCs claims imply that other products still contain CFCs? Please provide any relevant consumer perception evidence.

13. What guidance, if any, should the Commission provide concerning free-of claims based on substances which have never been associated with a product category? How do consumers understand such claims? Please provide any relevant consumer perception evidence.

14. What guidance, if any, should the Commission provide concerning organic claims about non-agricultural products? How do consumers interpret organic claims for non-agricultural products? Do consumers understand such claims as referring to the products' ingredients, manufacturing, or processing, or all three? Please provide any relevant consumer perception evidence.

15. How should marketers qualify "made with renewable materials" claims, if at all, to avoid deception? Does disclosing the type of material, how the material was sourced, and the reason the material is renewable adequately qualify the claim? Why or why not? Are there other disclosures that would adequately qualify a "made with renewable materials" claim? Please describe such disclosures. Please also provide any relevant consumer perception evidence.

16. How, and under what circumstances, should marketers qualify "made with renewable energy" claims to avoid deception?

a. Does disclosing the source of the renewable energy adequately qualify the claim and prevent deceptive implications that the advertised product is made with renewable or recycled materials? Why or why not? Are there other disclosures that would adequately qualify a "made with renewable energy" claim? Please describe such disclosures. Please also provide any relevant consumer perception evidence.

b. Should the Commission advise marketers to qualify a "made with renewable energy" claim if the advertised product is not made entirely with renewable energy? If so, should marketers qualify such claims if all or virtually all significant processes used in making a product are powered by renewable energy? Why or why not? Please provide any relevant consumer perception evidence.

17. How do consumers understand "carbon offset" and "carbon neutral" claims? Is there any evidence of consumer confusion concerning the use of these claims? Please provide any relevant consumer perception evidence.

18. How should marketers qualify carbon offset claims, if at all, to avoid deception about the timing of emission reductions? Should marketers disclose if their offsets reflect emission reductions that are not scheduled to occur in two years? Should marketers make a disclosure if emission reductions are not scheduled to occur in some other time period? If so, what time period, and why? Would such a disclosure adequately qualify an offset claim to

avoid deception? Please provide any relevant consumer perception evidence about this issue or on carbon offsets, generally.

Interested parties are invited to submit written comments electronically or in paper form. Comments should state “Proposed, Revised Green Guides, 16 CFR Part 260, Project No. P954501” in the text and, if applicable, on the envelope.

The FTC will place your comment — including your name and your state — on the public record of this proceeding, and to the extent practicable, will make it available to the public on the FTC website at (<http://www.ftc.gov/os/publiccomments.shtm>). As a matter of discretion, the Commission endeavors to remove individuals’ home contact information from the comments before placing them on its website. Because comments will be made public, they should not include: (1) any sensitive personal information, such as any individual’s Social Security number, date of birth, driver’s license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number; (2) any sensitive health information, such as medical records or other individually identifiable health information; or (3) any trade secret or any commercial or financial information which is privileged or confidential, as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).<sup>581</sup>

Because postal mail addressed to the FTC is subject to delay due to heightened security screening, if possible, please submit your comments in electronic form or send them by courier or overnight service. To ensure that the Commission considers an electronic comment, you must file it at (<https://ftcpublic.commentworks.com/ftc/revisedgreenguides>) by following the instructions on the web-based form. If this Notice appears at (<http://www.regulations.gov/search/Regs/home.html#home>), you may also file a comment through that website. The Commission will consider all comments

<sup>581</sup> The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The FTC’s General Counsel will grant or deny the request consistent with applicable law and the public interest. See FTC Rule 4.9(c), 16 CFR 4.9(c).

that regulations.gov forwards to it. You may also visit the FTC website at (<http://www.ftc.gov>) to read the Notice and the news release describing it.

A comment filed in paper form should include the reference “Proposed, Revised Green Guides, 16 CFR Part 260, Project No. P954501” in the text of the comment and, if applicable, on the envelope, and should be mailed or delivered to the following address:

Federal Trade Commission, Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive comments it receives. More information, including routine uses permitted by the Privacy Act, may be found in the FTC’s privacy policy at (<http://www.ftc.gov/ftc/privacy.shtm>).

## VIII. Proposed, Revised Green Guides

### List of Subjects in 16 CFR Part 260

Advertising, Environmental protection, Labeling, Trade practices.

For the reasons set forth in the preamble, the Federal Trade Commission is proposing to revise 16 CFR Part 260 to read as follows:

## PART 260—GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS

Sec.

- 260.1 Purpose, scope, and structure of the guides.
- 260.2 Interpretation and substantiation of environmental marketing claims.
- 260.3 General principles.
- 260.4 General environmental benefit claims.
- 260.5 Carbon offsets.
- 260.6 Certifications and seals of approval.
- 260.7 Compostable claims.
- 260.8 Degradable claims.
- 260.9 Free-of and non-toxic claims.
- 260.10 Ozone-safe and ozone-friendly claims.
- 260.11 Recyclable claims.
- 260.12 Recycled content claims.
- 260.13 Refillable claims.
- 260.14 Renewable energy claims.
- 260.15 Renewable materials claims.
- 260.16 Source reduction claims.

**Authority:** 15 U.S.C. 41-58.

### § 260.1 Purpose, scope, and structure of the guides.

(a) These guides set forth the Federal Trade Commission’s current thinking about environmental claims. The guides help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of

the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45. They do not confer any rights on any person and do not operate to bind the FTC or the public. The Commission, however, can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the guides. In any such enforcement action, the Commission must prove that the challenged act or practice is unfair or deceptive in violation of Section 5 of the FTC Act.

(b) These guides do not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act.

(c) These guides apply to claims about the environmental attributes of a product, package, or service in connection with the marketing, offering for sale, or sale of such item or service to individuals, businesses, or other entities. The guides apply to environmental claims in labeling, advertising, promotional materials, and all other forms of marketing in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names, or any other means.

(d) The guides consist of general principles, specific guidance on the use of particular environmental claims, and examples. Claims may raise issues that are addressed by more than one example and in more than one section of the guides. The examples provide the Commission’s views on how reasonable consumers likely interpret certain claims. Marketers can use an alternative approach if the approach satisfies the requirements of Section 5 of the FTC Act. Whether a particular claim is deceptive will depend on the net impression of the advertisement, label, or other promotional material at issue. In addition, although many examples present specific claims and options for qualifying claims, the examples do not illustrate all permissible claims or qualifications under Section 5 of the FTC Act.

### § 260.2 Interpretation and substantiation of environmental marketing claims.

Section 5 of the FTC Act prohibits deceptive acts and practices in or affecting commerce. A representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers’ decisions. See FTC Policy Statement on Deception, 103 F.T.C. 174 (1983). To determine if an advertisement is deceptive, marketers must identify all express and implied claims that the advertisement

reasonably conveys. Marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims. See FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984). In the context of environmental marketing claims, a reasonable basis often requires competent and reliable scientific evidence. Such evidence consists of tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results. Such evidence should be sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that each of the marketing claims is true.

#### **§ 260.3 General principles.**

The following general principles apply to all environmental marketing claims, including those described in §§ 260.4 through 260.16. Claims should comport with all relevant provisions of these guides.

(a) **Qualifications and disclosures:** To prevent deceptive claims, qualifications and disclosures should be clear, prominent, and understandable. To make disclosures clear and prominent, marketers should use plain language and sufficiently large type, should place disclosures in close proximity to the qualified claim, and should avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosure.

(b) **Distinction between benefits of product, package, and service:** Unless it is clear from the context, an environmental marketing claim should specify whether it refers to the product, the product's packaging, a service, or just to a portion of the product, package, or service. In general, if the environmental attribute applies to all but minor, incidental components of a product or package, the marketer need not qualify the claim to identify that fact. However, there may be exceptions to this general principle. For example, if a marketer makes an unqualified recyclable claim, and the presence of the incidental component significantly limits the ability to recycle the product, the claim would be deceptive.

**Example 1:** A plastic package containing a new shower curtain is labeled "recyclable" without further elaboration. Because the context of

the claim does not make clear whether it refers to the plastic package or the shower curtain, the claim is deceptive if any part of either the package or the curtain, other than minor, incidental components, cannot be recycled.

**Example 2:** A soft drink bottle is labeled "recycled." The bottle is made entirely from recycled materials, but the bottle cap is not. Because the bottle cap is a minor, incidental component of the package, the claim is not deceptive.

(c) **Overstatement of environmental attribute:** An environmental marketing claim should not overstate, directly or by implication, an environmental attribute or benefit. Marketers should not state or imply environmental benefits if the benefits are negligible.

**Example 1:** An area rug is labeled "50% more recycled content than before." The manufacturer increased the recycled content of its rug from 2% recycled fiber to 3%. Although the claim is technically true, it likely conveys the false impression that the manufacturer has increased significantly the use of recycled fiber.

**Example 2:** A trash bag is labeled "recyclable" without qualification. Because trash bags ordinarily are not separated from other trash at the landfill or incinerator for recycling, they are highly unlikely to be used again for any purpose. Even if the bag is technically capable of being recycled, the claim is deceptive since it asserts an environmental benefit where no meaningful benefit exists.

(d) **Comparative claims:** Comparative environmental marketing claims should be clear to avoid consumer confusion about the comparison. Marketers should have substantiation for the comparison.

**Example 1:** An advertiser notes that its glass bathroom tiles contain "20% more recycled content." Depending on the context, the claim could be a comparison either to the advertiser's immediately preceding product or to its competitors' products. The advertiser should have substantiation for both interpretations. Otherwise, the advertiser should make the basis for comparison clear, for example, by saying "20% more recycled content than our previous bathroom tiles."

**Example 2:** An advertiser claims that "our plastic diaper liner has the most recycled content." The diaper liner has more recycled content, calculated as a percentage of weight, than any other on the market, although it is still well under 100%. The claim likely conveys that the product contains a

significant percentage of recycled content and has significantly more recycled content than its competitors. If the advertiser cannot substantiate these messages, the claim would be deceptive.

**Example 3:** An advertiser claims that its packaging creates "less waste than the leading national brand." The advertiser implemented the source reduction several years ago and supported the claim by calculating the relative solid waste contributions of the two packages. The advertiser should have substantiation that the comparison remains accurate.

**Example 4:** A product is advertised as "environmentally preferable." This claim likely conveys that the product is environmentally superior to other products. Because it is highly unlikely that the marketer can substantiate the messages conveyed by this statement, this claim is deceptive. The claim would not be deceptive if the marketer accompanied it with clear and prominent language limiting the environmental superiority representation to the particular attributes for which the marketer has substantiation, provided the advertisement's context does not imply other deceptive claims. For example, the claim "Environmentally preferable: contains 50% recycled content compared to 20% for the leading brand" would not be deceptive.

#### **§ 260.4 General environmental benefit claims.**

(a) It is deceptive to misrepresent, directly or by implication, that a product, package, or service offers a general environmental benefit.

(b) Unqualified general environmental benefit claims are difficult to interpret and likely convey a wide range of meanings. In many cases, such claims likely convey that the product, package, or service has specific and far-reaching environmental benefits and may convey that the item or service has no negative environmental impact. Because it is highly unlikely that marketers can substantiate all reasonable interpretations of these claims, marketers should not make unqualified general environmental benefit claims.

(c) Marketers can qualify general environmental benefit claims to prevent deception about the nature of the environmental benefit being asserted. To avoid deception, marketers should use clear and prominent qualifying language that limits the claim to a specific benefit.

(d) Even if a marketer explains, and has substantiation for, the product's specific environmental attributes, this explanation will not adequately qualify a general environmental benefit claim if the advertisement otherwise implies deceptive claims. Therefore, marketers should ensure that the advertisement's context does not imply deceptive environmental claims.

**Example 1:** The brand name "Eco-friendly" likely conveys that the product has far-reaching environmental benefits and may convey that the product has no negative environmental impact. Because it is highly unlikely that the marketer can substantiate these claims, the use of such a brand name is deceptive. A claim, such as "Eco-friendly: made with recycled materials," would not be deceptive if the statement "made with recycled materials" is clear and prominent; the marketer has substantiation for the statement; and provided that the advertisement's context does not imply other deceptive claims.

**Example 2:** A product wrapper bears the claim "Environmentally Friendly." Text on the wrapper explains that it is environmentally friendly because it was "not chlorine bleached, a process that has been shown to create harmful substances." Although the wrapper was not bleached with chlorine, its production releases into the environment other harmful substances. Since reasonable consumers likely would interpret the "Environmentally Friendly" claim, in combination with the explanation, to mean that no significant harmful substances are released into the environment, the "Environmentally Friendly" claim is deceptive.

**Example 3:** A marketer states that its packaging is now "Greener than our previous packaging." The packaging weighs 15% less than previous packaging, but it is not recyclable nor has it been improved in any other material respect. The claim is deceptive because reasonable consumers likely would interpret "Greener" in this context to mean that other significant environmental aspects of the packaging also are improved over previous packaging. A claim stating "Greener than our previous packaging" accompanied by clear and prominent language such as, "We've reduced the weight of our packaging by 15%," would not be deceptive, provided that the advertisement's context does not imply other deceptive claims.

#### **§ 260.5 Carbon offsets.**

(a) Given the complexities of carbon offsets, sellers should employ competent and reliable scientific and accounting methods to properly quantify claimed emission reductions and to ensure that they do not sell the same reduction more than one time.

(b) It is deceptive to misrepresent, directly or by implication, that a carbon offset represents emission reductions that have already occurred or will occur in the immediate future. To avoid deception, marketers should clearly and prominently disclose if the carbon offset represents emission reductions that will not occur for two years or longer.

(c) It is deceptive to claim, directly or by implication, that a carbon offset represents an emission reduction if the reduction, or the activity that caused the reduction, was required by law.

**Example 1:** On its website, an airline invites consumers to purchase offsets to "neutralize the carbon emissions from your flight." The proceeds from the offset sales fund future projects that will not reduce greenhouse gas emissions for two years. The claim likely conveys that the emission reductions either already have occurred or will occur in the near future. Therefore, the advertisement is deceptive. It would not be deceptive if the airline's website stated "Offset the carbon emissions from your flight by funding new projects that will begin reducing emissions in two years."

**Example 2:** An offset provider claims that its product "will offset your own 'dirty' driving habits." The offset is based on methane capture at a landfill facility. State law requires this facility to capture all methane emitted from the landfill. The claim is deceptive because the emission reduction would have occurred regardless of whether consumers purchased the offsets.

#### **§ 260.6 Certifications and seals of approval.**

(a) It is deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent third-party.

(b) A marketer's use of the name, logo, or seal of approval of a third-party certifier is an endorsement, which should meet the criteria for endorsements provided in the FTC's Endorsement Guides, 16 CFR Part 255, including Definitions (§ 255.0), General Considerations (§ 255.1), Expert Endorsements (§ 255.3), Endorsements by Organizations (§ 255.4), and

Disclosure of Material Connections (§ 255.5).

(c) Third-party certification does not eliminate a marketer's obligation to ensure that it has substantiation for all claims reasonably communicated by the certification.

(d) A marketer's use of an unqualified environmental certification or seal of approval (*i.e.*, one that does not state the basis for the certification) likely conveys a general environmental benefit claim (addressed in § 260.4). Because it is highly unlikely that marketers can substantiate such claims, marketers should not use unqualified certifications or seals of approval.

(e) To avoid deception, language qualifying a certification or seal of approval should be clear and prominent and should clearly convey that the certification or seal of approval refers only to specific and limited benefits. This qualifying language may be part of the certification or seal itself.

**Example 1:** An advertisement for paint features a "GreenLogo" seal and the statement "GreenLogo for Environmental Excellence." This advertisement likely conveys that: the GreenLogo seal is awarded by an independent, third-party certifier with expertise in evaluating the environmental attributes of paint; and the product has far-reaching environmental benefits. If the paint manufacturer placed the GreenLogo seal in its advertisement, and no independent, third-party certifier evaluated the paint, the claim would be deceptive. The claim would not be deceptive if the marketer accompanied the seal with clear and prominent language: indicating that the marketer itself created the GreenLogo seal; and limiting the general environmental benefit representation to the particular product attributes for which the marketer has substantiation, provided that the advertisement's context does not imply other deceptive claims.

**Example 2:** A product advertisement includes a seal with the text "Certified by the Renewable Energy Association." The product manufacturer is a dues-paying member of that association. Even if the association certified that the manufacturer uses only renewable energy, the use of the seal is deceptive because it likely conveys that the association is independent from the product manufacturer. To avoid deception, the manufacturer should accompany the seal with clear and prominent language disclosing the material connection.

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

**Example 4:** A marketer’s industry sales brochure for overhead lighting features a seal with the text “U.S. EcoFriendly Building Association” to show that the marketer is a member of that organization. Although the lighting manufacturer is, in fact, a member, this association has not evaluated the environmental attributes of the company’s product. This advertisement would be deceptive because it likely conveys that the U.S. EcoFriendly Building Association evaluated the product through testing or other objective standards. It also is likely to convey that the lighting has far-reaching environmental benefits. The use of the seal would not be deceptive if the manufacturer accompanies it with clear and prominent qualifying language: indicating that the seal refers to the company’s membership only and that the association did not evaluate the product’s environmental attributes, and limiting the general environmental benefit representation to the particular product attributes for which the marketer has substantiation, provided that the advertisement’s context does not imply other deceptive claims. For example, the marketer could state, “Although we are a member of the U.S. EcoFriendly Building Association, it has not evaluated this product. Our lighting is made from 100 percent recycled metal and uses energy efficient LED technology.”

**Example 5:** A product label contains an environmental seal, either in the form of a globe icon or a globe icon with the text “EarthSmart.” EarthSmart is an independent, third-party certifier that uses standards

previously adopted by EarthSmart and suitable for evaluating products’ chemical emissions. While the marketer meets EarthSmart’s standards for reduced chemical emissions during product usage, the product has no other specific environmental benefits. Either seal likely conveys that the product has far-reaching environmental benefits, and that Earth Smart certified the product for all of these benefits. If the marketer cannot substantiate these claims, the use of the seal would be deceptive. The seal would not be deceptive if the marketer accompanied it with clear and prominent language limiting the general environmental benefit claim to the particular product attributes for which the manufacturer has substantiation, provided that the advertisement’s context does not imply other deceptive claims. For example, the marketer could state next to the globe icon: “EarthSmart certifies that this product meets EarthSmart standards for reduced chemical emissions during product usage.” Alternatively, the claim would not be deceptive if the EarthSmart environmental seal itself stated: “EarthSmart Certified for reduced chemical emissions during product usage.”

**Example 6:** Great Paper Company sells photocopy paper with packaging that has a seal of approval from the No Chlorine Products Association, a non-profit third-party association. There are no material connections between Great Paper Company and the No Chlorine Products Association. Using standards widely recognized by industry experts, the No Chlorine Products Association certifies that products are chlorine-free. Moreover, the Association’s endorsement was reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the Association. The claim would not be deceptive.

#### § 260.7 Compostable claims.

(a) It is deceptive to misrepresent, directly or by implication, that a product or package is compostable.

(b) A marketer claiming that an item is compostable should have competent and reliable scientific evidence that all the materials in the item will break down into, or otherwise become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner (i.e., in approximately the same time as the materials with which it is

composted) in an appropriate composting program or facility or in a home compost pile or device.

(c) A marketer should clearly and prominently qualify compostable claims to the extent necessary to avoid deception if: the item cannot be composted safely or in a timely manner in a home compost pile or device; or the claim misleads reasonable consumers about the environmental benefit provided when the item is disposed of in a landfill.

(d) To avoid deception about the limited availability of municipal or institutional composting facilities, a marketer should clearly and prominently qualify compostable claims if such facilities are not available to a substantial majority of consumers or communities where the item is sold.

**Example 1:** A manufacturer indicates that its unbleached coffee filter is compostable. The unqualified claim is not deceptive, provided the manufacturer has substantiation that the filter can be converted safely to usable compost in a timely manner in a home compost pile or device. If so, the extent of local municipal or institutional composting facilities is irrelevant.

**Example 2:** A garden center sells grass clipping bags labeled as “Compostable in California Municipal Yard Trimmings Composting Facilities.” When the bags break down, however, they release toxins into the compost. The claim is deceptive if the presence of these toxins prevents the compost from being usable.

**Example 3:** An electronics manufacturer makes an unqualified claim that its package is compostable. Although municipal or institutional composting facilities exist where the product is sold, the package will not break down into usable compost in a home compost pile or device. To avoid deception, the manufacturer should clearly and prominently disclose that the package is not suitable for home composting.

**Example 4:** Nationally marketed lawn and leaf bags state “compostable” on each bag. The bags also feature text disclosing that the bag is not designed for use in home compost piles. Yard trimmings programs in many communities compost these bags, but such programs are not available to a substantial majority of consumers or communities where the bag is sold. The claim is deceptive because it likely conveys that composting facilities are available to a substantial

majority of consumers or communities. To avoid deception, the marketer should clearly and prominently indicate the limited availability of such programs. A marketer could state “Appropriate facilities may not exist in your area,” or provide the approximate percentage of communities or consumers for which such programs are available.

**Example 5:** A manufacturer sells a disposable diaper that states, “This diaper can be composted if your community is one of the 50 that have composting facilities.” The claim is not deceptive if composting facilities are available as claimed and the manufacturer has substantiation that the diaper can be converted safely to usable compost in solid waste composting facilities.

**Example 6:** A manufacturer markets yard trimmings bags only to consumers residing in particular geographic areas served by county yard trimmings composting programs. The bags meet specifications for these programs and are labeled, “Compostable Yard Trimmings Bag for County Composting Programs.” The claim is not deceptive. Because the bags are compostable where they are sold, a qualification is not needed to indicate the limited availability of composting facilities.

#### § 260.8 Degradable claims.

(a) It is deceptive to misrepresent, directly or by implication, that a product or package is degradable, biodegradable, oxo-degradable, oxo-biodegradable, or photodegradable. The following guidance for degradable claims also applies to biodegradable, oxo-degradable, oxo-biodegradable, or photodegradable claims.

(b) A marketer making an unqualified degradable claim should have competent and reliable scientific evidence that the entire item will completely break down and return to nature (*i.e.*, decompose into elements found in nature) within a reasonably short period of time after customary disposal.

(c) It is deceptive to make an unqualified degradable claim for solid items if the items do not completely decompose within one year after customary disposal. Unqualified degradable claims for items that are customarily disposed in landfills, incinerators, and recycling facilities are deceptive because these locations do not present conditions in which complete decomposition will occur within one year.

(d) Degradable claims should be qualified clearly and prominently to the extent necessary to avoid deception about: the product or package’s ability to degrade in the environment where it is customarily disposed; and the rate and extent of degradation.

**Example 1:** A marketer advertises its trash bags using an unqualified “degradable” claim. The marketer relies on soil burial tests to show that the product will decompose in the presence of water and oxygen. Consumers, however, customarily dispose of trash bags in incineration facilities or landfills where they will not degrade within one year. The claim is, therefore, deceptive.

**Example 2:** A marketer advertises a commercial agricultural plastic mulch film with the claim “Photodegradable,” and clearly and prominently qualifies the term with the phrase “Will break down into small pieces if left uncovered in sunlight.” The advertiser possesses competent and reliable scientific evidence that within one year, the product will break down after being exposed to sunlight and into sufficiently small pieces to become part of the soil. Thus, the qualified claim is not deceptive. Because the claim is qualified to indicate the limited extent of breakdown, the advertiser need not meet the consumer expectations for an unqualified photodegradable claim, *i.e.*, that the product will not only break down, but also will decompose into elements found in nature.

**Example 3:** A marketer advertises its shampoo as “biodegradable” without qualification. The advertisement makes clear that only the shampoo, and not the bottle, is biodegradable. The marketer has competent and reliable scientific evidence demonstrating that the shampoo, which is customarily disposed in sewage systems, will break down and decompose into elements found in nature in a reasonably short period of time in the sewage system environment. Therefore, the claim is not deceptive.

**Example 4:** A plastic six-pack ring carrier is marked with a small diamond. Several state laws require that the carriers be marked with this symbol to indicate that they meet certain degradability standards if the carriers are littered. The use of the

diamond, by itself, does not constitute a degradable claim.<sup>1</sup>

**Example 5:** A fiber pot containing a plant is labeled “biodegradable.” The pot is customarily buried in the soil along with the plant. Once buried, the pot fully decomposes during the growing season, allowing the roots of the plant to grow into the surrounding soil. The unqualified claim is not deceptive.

#### § 260.9 Free-of and non-toxic claims.

(a) It is deceptive to misrepresent, directly or by implication, that a product, package, or service is free of, or does not contain or use, a substance or that a product, package, or service is non-toxic. Such claims should be clearly and prominently qualified to the extent necessary to avoid deception.

(b) A truthful claim that a product, package, or service is free of, or does not contain or use, a substance may nevertheless be deceptive if: the product, package, or service contains or uses substances that pose the same or similar environmental risks as the substance that is not present; or the substance has never been associated with the product category.

(c) Depending on the context, some no, free-of, or does-not-contain claims may be appropriate even where a product, package, or service contains or uses a *de minimis* amount of a substance.

(d) A marketer that makes a no, free-of, or does-not-contain claim that reasonable consumers would interpret to convey additional environmental claims, including general environmental benefit claims or comparative superiority claims, must have substantiation for each such claim.

(e) A non-toxic claim likely conveys that a product, package, or service is non-toxic both for humans and for the environment generally. Therefore, marketers making non-toxic claims should have competent and reliable scientific evidence that the product, package, or service is non-toxic for humans and for the environment or should clearly and prominently qualify their claims to avoid deception.

**Example 1:** A package of t-shirts is labeled “Shirts made with a chlorine-free bleaching process.” The shirts, however, are bleached with a process that releases a reduced, but still significant, amount of the same harmful byproducts associated with

<sup>1</sup> The guides’ treatment of unqualified degradable claims is intended to help prevent deception and is not intended to establish performance standards to ensure the degradability of products when littered.

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

**Example 2:** A manufacturer advertises its insulation as "formaldehyde free." Although the manufacturer does not use formaldehyde as a binding agent to produce the insulation, tests show that the insulation still emits trace amounts of formaldehyde. The seller has substantiation that formaldehyde is present in trace amounts in virtually all indoor and (to a lesser extent) outdoor environments and that its insulation emits less formaldehyde than is typically present in outdoor environments. In this context, the trace levels of formaldehyde emissions likely are inconsequential to consumers. Therefore, the seller's free-of claim would not be deceptive.

**Example 3:** A marketer advertises a lawn care product as "essentially non-toxic" and "practically non-toxic." The advertisement likely conveys that the product does not pose any risk to humans or the environment. If the pesticide poses no risk to humans but is toxic to the environment, the claims would be deceptive.

#### § 260.10 Ozone-safe and ozone-friendly claims.

It is deceptive to misrepresent, directly or by implication, that a product, package, or service is safe for, or friendly to, the ozone layer or the atmosphere.

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

**Example 2:** An aerosol air freshener is labeled "ozone friendly." Some of the

product's ingredients are volatile organic compounds (VOCs) that may cause smog by contributing to ground-level ozone formation. The claim likely conveys that the product is safe for the atmosphere as a whole, and, therefore, is deceptive.

**Example 3:** A manufacturer has substituted non-ozone-depleting refrigerants for the ozone-depleting substances in its residential air conditioning equipment. The manufacturer advertises its equipment as "environmentally friendly." This general environmental benefit claim likely conveys that the product has far reaching environmental benefits. However, the manufacturer's air conditioning equipment consumes a substantial amount of energy and relies on refrigerants that are greenhouse gases. Accordingly, this claim is deceptive.

#### § 260.11 Recyclable claims.

(a) It is deceptive to misrepresent, directly or by implication, that a product or package is recyclable. A product or package should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the solid waste stream through an established recycling program for reuse or use in manufacturing or assembling another item.

(b) Marketers should clearly and prominently qualify recyclable claims to the extent necessary to avoid deception about the availability of recycling programs and collection sites to consumers.

(1) When recycling facilities are available to a substantial majority<sup>2</sup> of consumers or communities where the item is sold, marketers can make unqualified recyclable claims.

(2) When recycling facilities are available to a significant percentage of consumers or communities where the item is sold, but not to a substantial majority, marketers should clearly and prominently qualify their recyclable claims. Suggested qualifications are: "This product [package] may not be recyclable in your area," "Recycling programs for this product [package] may not exist in your area," or a statement of the percentage of communities or the population that have programs where the item can be recycled.

(3) When recycling facilities are available to less than a significant percentage of consumers or communities where the item is sold,

marketers should clearly and prominently qualify their recyclable claims. Suggested qualifications are: "This product [package] is recyclable only in the few communities that have recycling programs," or a statement of the percentage of communities or the population that have programs where the item can be recycled.

(c) Marketers can make unqualified recyclable claims for a product or package if the entire product or package, excluding minor incidental components, is recyclable. For items that are partially made of recyclable components, marketers should clearly and prominently qualify the recyclable claim to avoid deception about which portions are recyclable.

(d) If any component significantly limits the ability to recycle the item, any recyclable claim would be deceptive. An item that is made from recyclable material, but, because of its shape, size, or some other attribute, is not accepted in recycling programs, should not be marketed as recyclable.<sup>3</sup>

**Example 1:** A packaged product is labeled with an unqualified claim, "recyclable." It is unclear from the type of product and other context whether the claim refers to the product or its package. The unqualified claim likely conveys that both the product and its packaging, except for minor, incidental components, can be recycled. Unless the manufacturer has substantiation for both messages, it should clearly and prominently qualify the claim to indicate which portions are recyclable.

**Example 2:** A nationally marketed plastic yogurt container displays the Society of the Plastics Industry (SPI) code (which consists of a design of arrows in a triangular shape containing a number in the center and an abbreviation identifying the component plastic resin) on the front label of the container, in close proximity to the product name and logo. This conspicuous use of the SPI code constitutes a recyclable claim. Unless recycling facilities for this container are available to a substantial majority of consumers or communities, the manufacturer should qualify the claim to disclose the limited availability of recycling programs. If the manufacturer places the SPI code, without more, in an

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

<sup>3</sup> Batteries labeled in accordance with the Mercury-Containing and Rechargeable Battery Management Act, 42 U.S.C. § 14322(b), are deemed to be in compliance with these Guides.

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

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

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

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

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

**Example 7:** A product container is labeled “recyclable.” The marketer advertises and distributes the product only in Missouri. Collection sites for recycling the container are available to a substantial majority of Missouri residents but are not yet available nationally. Because programs are generally available where the product

is sold, the unqualified claim is not deceptive.

**Example 8:** A manufacturer of one-time use cameras, with dealers in a substantial majority of communities, operates a take-back program that collects those cameras through all of its dealers. The manufacturer reconditions the cameras for resale and labels them “Recyclable through our dealership network.” This claim is not deceptive, even though the cameras are not recyclable through conventional curbside or drop off recycling programs.

**Example 9:** A manufacturer advertises its toner cartridges for computer printers as “Recyclable. Contact your local dealer for details.” Although all of the company’s dealers recycle cartridges, the dealers are not located in a substantial majority of communities where cartridges are sold. Therefore, the claim is deceptive. If dealers are located in a significant number of communities, the manufacturer should qualify its claim as suggested in § 260.11(b)(2). If participating dealers are located in only a few communities, the manufacturer should qualify the claim as suggested in § 260.11(b)(3).

**Example 10:** An aluminum can is labeled “Please Recycle.” This statement likely conveys that the can is recyclable. If collection sites for recycling these cans are available to a substantial majority of consumers or communities, the marketer does not need to qualify the claim.

#### § 260.12 Recycled content claims.

(a) It is deceptive to misrepresent, directly or by implication, that a product or package is made of recycled content. Recycled content includes recycled raw material, as well as used,<sup>4</sup> reconditioned, and re-manufactured components.

(b) It is deceptive to represent, directly or by implication, that an item contains recycled content unless it is composed of materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer). If the source of recycled content includes pre-consumer material, the advertiser should have substantiation that the pre-consumer material would otherwise have entered the solid waste stream. Recycled content claims may

but do not have to – distinguish between pre-consumer and post-consumer materials. Where a marketer distinguishes between pre-consumer and post-consumer materials, it should have substantiation for any express or implied claim about the percentage of pre-consumer or post-consumer content in an item.

(c) Marketers can make unqualified claims of recycled content if the entire product or package, excluding minor, incidental components, is made from recycled material. For items that are partially made of recycled material, the marketer should clearly and prominently qualify the claim to avoid deception about the amount or percentage, by weight, of recycled content in the finished product or package.

(d) For products that contain used, reconditioned, or re-manufactured components, the marketer should clearly and prominently qualify the recycled content claim to avoid deception about the nature of such components. No such qualification is necessary where it is clear to reasonable consumers from context that a product’s recycled content consists of used, reconditioned, or re-manufactured components.

**Example 1:** A manufacturer collects spilled raw material and scraps from the original manufacturing process. After a minimal amount of reprocessing, the manufacturer combines the spills and scraps with virgin material for use in production of the same product. A recycled content claim is deceptive since the spills and scraps are normally reused by industry within the original manufacturing process and would not normally have entered the waste stream.

**Example 2:** A manufacturer purchases material from a firm that collects discarded material from other manufacturers and resells it. All of the material was diverted from the solid waste stream and is not normally reused by industry within the original manufacturing process. The manufacturer includes the weight of this material in its calculations of the recycled content of its products. It would not be deceptive for the manufacturer to advertise the amount of recycled content in its product because, absent the purchase and reuse of this material, it would have entered the solid waste stream.

**Example 3:** Fifty percent (50%) of a greeting card’s fiber weight is

<sup>4</sup> 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 the weight of the total package. The box is 20% recycled content by weight, while the plastic tray is 40% recycled content by weight. The claim is not deceptive, since the average amount of recycled material is 30%.

**Example 8:** A manufacturer labels a paper greeting card “50% recycled fiber.” The manufacturer purchases paper stock from several sources, and the amount of recycled fiber in the stock provided by each source varies. If the 50% figure is based on the annual weighted average of recycled material purchased from the sources after accounting for fiber loss during the production process, the claim is not deceptive.

**Example 9:** A packaged food product is labeled with a three-chasing-arrows symbol (a Möbius loop) without explanation. By itself, the symbol likely conveys that the packaging is both recyclable and made entirely from recycled material. Unless the marketer has substantiation for both messages, the claim should be qualified. The claim may need to be further qualified, to the extent necessary, to disclose the limited availability of recycling programs and/or the percentage of recycled content used to make the package.

**Example 10:** In an office supply catalog, a manufacturer advertises its printer toner cartridges “65% recycled.” The cartridges contain 25% recycled raw materials and 40% reconditioned parts. The claim is deceptive because reasonable consumers likely would not know or expect that a cartridge’s recycled content consists of reconditioned parts. It would not be deceptive if the manufacturer claimed “65% recycled content; including 40% from reconditioned parts.”

**Example 11:** A store sells both new and used sporting goods. One of the items for sale in the store is a baseball helmet that, although used, is no different in appearance than a brand new item. The helmet bears an unqualified “Recycled” label. This claim is deceptive because reasonable consumers likely would believe that the helmet is made of recycled raw materials, when it is, in fact, a used item. An acceptable claim would bear a disclosure clearly and prominently stating that the helmet is used.

**Example 12:** An automotive dealer recovers a serviceable engine from a wrecked vehicle. Without repairing, rebuilding, re-manufacturing, or in any way altering the engine or its components, the dealer attaches a “Recycled” label to the engine, and offers it for sale in its used auto parts store. In this situation, an unqualified recycled content claim likely is not deceptive because reasonable consumers likely would understand that the engine is used and has not undergone any rebuilding.

**Example 13:** An automobile parts dealer purchases a transmission that has been recovered from a junked vehicle. Eighty-five percent of the transmission, by weight, was rebuilt and 15% constitutes new materials. After rebuilding<sup>5</sup> the transmission in

accordance with industry practices, the dealer packages it for resale in a box labeled “Rebuilt Transmission,” or “Rebuilt Transmission (85% recycled content from rebuilt parts),” or “Recycled Transmission (85% recycled content from rebuilt parts).” These claims are not deceptive.

#### **§ 260.13 Refillable claims.**

It is deceptive to misrepresent, directly or by implication, that a package is refillable. A marketer should not make an unqualified refillable claim unless the marketer provides the means for refilling the package. The marketer may either provide a system for the collection and refill of the package, or offer for sale a product that consumers can purchase to refill the original package.

**Example 1:** A container is labeled “refillable three times.” The manufacturer has the capability to refill returned containers and can show that the container will withstand being refilled at least three times. The manufacturer, however, has established no collection program. The unqualified claim is deceptive because there is no means to return the container to the manufacturer for refill.

**Example 2:** A small bottle of fabric softener states that it is in a “handy refillable container.” In the same market area, the manufacturer also sells a large-sized bottle that consumers use to refill the smaller bottles. The claim is not deceptive because there is a reasonable means for the consumer to refill the smaller container.

#### **§ 260.14 Renewable energy claims.**

(a) It is deceptive to misrepresent, directly or by implication, that a product or package is made with renewable energy or that a service uses renewable energy. Marketers should not make unqualified renewable energy claims, directly or by implication, if power derived from fossil fuels is used to manufacture any part of the advertised item or is used to power any part of the advertised service.

(b) Research suggests that reasonable consumers may interpret renewable energy claims differently than marketers may intend. Unless marketers have substantiation for all their express and reasonably implied claims, they should

<sup>5</sup> The term “rebuilding” means that the dealer dismantled and reconstructed the transmission as necessary, cleaned all of its internal and external parts and eliminated rust and corrosion, restored all impaired, defective or substantially worn parts to a sound condition (or replaced them if necessary), and performed any operations required to put the transmission in sound working condition.

<sup>5</sup> The term “rebuilding” means that the dealer dismantled and reconstructed the transmission as

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

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

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

**Example 1:** A marketer advertises its clothing line as “made with wind power.” The marketer buys renewable energy certificates to match only 50% of the energy it uses. The marketer’s claim is deceptive because reasonable consumers likely interpret the claim to mean that the power was composed entirely of renewable energy. If the marketer stated “we purchase wind energy for half of our manufacturing facilities,” the claim would not be deceptive.

**Example 2:** A company places solar panels on its store roof to generate power and advertises that its store is “100% solar-powered.” The company, however, sells renewable energy certificates based on the renewable attributes of all the power it generates. Even if the company uses the electricity generated by the solar panels, it has, by selling renewable energy certificates, transferred the right to characterize that electricity as renewable. The company’s claim is therefore deceptive. It also would be deceptive for this company to advertise that it “hosts a renewable power facility” because reasonable consumers likely would interpret this claim to mean that the company uses renewable energy.

#### **§ 260.15 Renewable materials claims.**

(a) It is deceptive to misrepresent, directly or by implication, that a product or package is made with renewable materials.

(b) Research suggests that reasonable consumers may interpret renewable materials claims differently than marketers may intend. For example, reasonable consumers may believe an item advertised as being “made with renewable materials” is made with recycled content, recyclable, and biodegradable. Unless marketers have substantiation for all their express and reasonably implied claims, they should clearly and prominently qualify their renewable materials claims by specifying the material used, how the material is sourced, and why the material is renewable.

(c) It is deceptive to make an unqualified “made with renewable materials” claim unless the product or package (excluding minor, incidental components) is made entirely with renewable materials.

**Example 1:** A marketer makes the unqualified claim that its flooring is “made with renewable materials.” Reasonable consumers likely interpret this claim to mean that the flooring also is made with recycled content, recyclable, and biodegradable. Unless the marketer has substantiation for these implied claims, the unqualified “made with renewable materials” claim is deceptive. The marketer could qualify the claim by stating, clearly and prominently, “Our flooring is made from 100% bamboo, a fast-growing plant, which we cultivate at the same rate, or faster, than we use it.”

**Example 2:** A marketer’s packaging states that “Our packaging is made from 50% plant-based renewable materials. Because we turn fast-growing plants into bio-plastics, only half of our product is made from petroleum-based materials.” If substantiated, this claim is unlikely to be deceptive.

**Example 3:** Through testing, a marketer can establish that its product is composed entirely of biological material. It markets its product as “made with 100% renewable materials.” This claim, without further explanation, likely conveys that the product has other environmental benefits, including that it is recyclable, made with recycled content, or biodegradable. If the marketer cannot substantiate these messages, the claim would be deceptive.

#### **§ 260.16 Source reduction claims.**

It is deceptive to misrepresent, directly or by implication, that a product or package has been reduced or is lower in weight, volume, or toxicity. Marketers should clearly and prominently qualify source reduction claims to the extent necessary to avoid deception about the amount of the source reduction and the basis for any comparison.

**Example 1:** An advertiser claims that disposal of its product generates “10% less waste.” Because this claim could be a comparison to the advertiser’s immediately preceding product or to its competitors’ products, the advertiser should have substantiation for both interpretations. Otherwise, the advertiser should clarify which comparison it intends and have substantiation for that comparison. A claim of “10% less waste than our previous product” would not be deceptive if the advertiser has substantiation that shows that the current product’s disposal contributes 10% less waste by weight or volume to the solid waste stream when compared with the immediately preceding version of the product.

By direction of the Commission.

**Donald S. Clark**

*Secretary*

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