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WASHINGTON, D. C.

OFFICE OF  
REGISTRATION AGENCY  
9460

AUG 26 1992

OFFICE OF  
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

**SUBJECT:** Regulatory Status of Printed Circuit Boards

**FROM:** Sylvia K. Lowrance, Director  
Office of Solid Waste

**TO:** Waste Management Division Directors,  
Regions I-X

Printed electronic circuit boards are major components of personal computers in widespread use in the U.S. today. As updated computer equipment becomes available, the older (but still usable) equipment is often placed into surplus, or is reclaimed/reused. The old equipment may be disassembled and the usable parts salvaged. Parts may also be scrapped and processed for metal values due to their obsolescence, even though they are still usable.

After the printed circuit boards themselves are disassembled, recovering usable components, the boards are often shredded or otherwise processed, and/or burned as part of the reclamation process. Later, base metals (lead, copper) or precious metals (e.g., gold, silver, or platinum) can be reclaimed through additional processing.

The International Precious Metals Institute (IPMI) has written to EPA and requested a determination under RCRA Subtitle C for the status of used printed circuit boards. The regulatory status of unused circuit boards (considered commercial chemical products) and by-product wastes from circuit board production are not affected by this memorandum. The Agency is planning to study the area of used printed circuit boards in more depth; however, our interim interpretation is discussed below.

The EPA believes that based upon the way in which used printed circuit boards are originally generated, these materials most clearly meet the definition of spent materials (§ 261.1(c)(1)). However, we have further examined whether these boards can also be classified as scrap metal under § 261.1(c)(6). Scrap metal is defined based in large part on the physical appearance of a secondary material, dependent on the presence of metal, and includes secondary materials that would otherwise be spent materials or by-products.

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As a matter of policy, the Agency has decided that unprocessed, spent (i.e., used) printed circuit boards are subject to regulation as scrap metal for the purposes of § 261.6(a)(3)(iv), and are therefore exempt from RCRA Subtitle C regulation when recycled. The Agency has made this determination largely because 1) metals can be recovered from the pieces of metal parts that are an integral part of these circuit boards, and 2) unprocessed circuit boards are in a physical state similar to the type of recycled materials the Agency intends to be exempted by providing examples in the scrap metal definition (e.g., "metal parts . . . which when worn or superfluous can be recycled"). The physical state of the unprocessed spent circuit boards limits the dispersion of metal constituents during the handling and transport of the spent printed circuit boards similar to the materials defined as scrap metal in the regulatory language. (Note that this determination is limited to spent circuit boards and does not apply to other spent materials.)

After the boards are processed (including shredding, grinding, burning or smelting), the resulting material (e.g., shredded pieces, sweeps/ash, fluff, or baghouse dust) may no longer be similar to the materials that meet the definition of a scrap metal. The Agency believes that certain materials generated from the processing of spent printed circuit boards may be in a physical state which is inherently different from the more "traditional" scrap metal materials, the latter of which includes bars, turnings, rods, sheets, wire, bolts, etc. Spent circuit board processing, particularly those reclamation steps that do not involve simple physical processing, may generate materials in a form which allows the dispersion of hazardous constituents during subsequent handling. Therefore, some of these materials may not meet the definition of, nor the intent of, the scrap metal definition (analogous to the fluff generated by the shredding of scrap automobiles). Thus, at this point, the processed material may no longer be exempt from regulation as scrap metal, and could be subject to regulation as a spent material (e.g. shredded boards derived from spent circuit boards), a by-product (e.g. sweeps/ash), or a sludge (e.g. baghouse dust).

The processor must determine whether the processed material is a solid waste, and if so, whether it exhibits a characteristic of a hazardous waste, and manage the material accordingly (assuming the material no longer meets the definition of scrap metal). If the generator/processor determines that a material meets the regulatory definition of solid waste but believes the processed (i.e., partially reclaimed) material should be classified as a product rather than a solid waste, an application can be made to the Regional Administrator or authorized State regulatory agency for a case-by-case variance under section 260.30(c) of RCRA. In addition, if the processed material is a hazardous waste that contains economically significant amounts of recoverable precious metals then the materials would be subject to reduced regulations

under Part 266, Subpart F.

This determination is limited to circuit boards. For further information about this interpretation, please contact Allen Maples or Ross Elliott of the Regulatory Development Branch at (202) 260-8551.

cc: RCRA Enforcement Branch Chiefs, Regions I-X  
NEIC  
OWPE  
OE  
IPMI

# federal register

Wednesday  
October 2, 1991

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## Part IV

### Environmental Protection Agency

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Guidance for the Use of the Terms  
"Recycled" and "Recyclable" and the  
Recycling Emblem in Environmental  
Marketing Claims; Notice of Public  
Meeting

**ENVIRONMENTAL PROTECTION AGENCY**

(EPA/OSW-PR-91-022; SWH-FRL-4019-3)

**Guidance for the Use of the Terms "Recycled" and "Recyclable" and the Recycling Emblem in Environmental Marketing Claims****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice of public meeting and request for comments.

**SUMMARY:** EPA plans to develop recommendations to the Federal Trade Commission on voluntary guidance for environmental claims promoting the use of recycled materials and recyclable materials. The Federal Trade Commission is considering such guidance in response to petitions from States and today's notice solicits comment on a number of options EPA is considering for the guidance. The notice also announces the time and location of a public meeting EPA will hold to hear oral comments from interested parties on the options outlined in this notice.

**DATES:** Comments on this notice must be received on or before December 31, 1991. The public meeting will be held on Wednesday, November 13, and Thursday, November 14, 1991 from 9:30 am to 4:30 pm at The Rosslyn Westpark Hotel, Arlington, VA. Requests to present oral testimony must be received on or before Monday, October 28, 1991. EPA requests that ten copies of the oral comments be submitted on or before Friday, November 8, 1991.

**ADDRESSES:** (1) Public Meeting—The Agency will hold a public meeting on Wednesday, November 13, and Thursday, November 14, 1991, to receive comments on the options and issues relating to the options. The meeting will consist of two days of testimony. Because of the limited amount of time available and the desire to hear a range of views, presenters will be grouped in appropriate panels and will be allotted a specified time for statements, which may be followed by questions from the panel. Groups with common perspectives on the questions raised by these options are urged to select a single representative.

Written requests to appear at the meeting should be submitted no later than Monday, October 28, 1991 to: Office of Solid Waste, Public Meeting Request/F-91-GPLP-FFFFF, OS-305, 401 M Street, SW., Washington, DC 20460. The notice of participation should contain the name, affiliation (if applicable), address, and telephone number of the participant and the individual presenter,

and a brief statement of the participant's interest in the matter, and the topic of presentation.

If the Agency determines that there will not be adequate time to hear from all those wishing to present comments, the Agency will select among those wishing to testify, in order to ensure that a range of viewpoints and interests is represented. As time allows, individuals may also sign up to present comments during registration time at the hearing.

The public meeting will be held at The Rosslyn Westpark Hotel, 1900 North Fort Myer Drive, Arlington, VA 22209 in the Rosslyn Ballroom.

(2) Written Comments—Written statements and additional information may be submitted at the public hearing for inclusion in the official record. Written comments of any length will be accepted. Commenters must send an original and two copies of their comments to: RCRA Docket Information Center, Office of Solid Waste (OS-305), U.S. Environmental Protection Agency Headquarters, 401 M Street SW., Washington, DC 20460. Comments must include the docket number F-91-GPLP-FFFFF. The public docket is located at EPA Headquarters, room M2427 and is available for viewing from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. The public must make an appointment to review docket materials. Call (202) 260-9327 for appointments. Copies cost \$15/page.

**FOR FURTHER INFORMATION CONTACT:** For general information, contact the RCRA/Superfund Hotline, Office of Solid Waste, U.S. Environmental Protection Agency (800) 424-9346 or (703) 920-5810, local in the Washington, DC metropolitan area.

For information on specific aspects of this notice, contact William MacLeod, Office of Solid Waste (OS-301), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 260-1002. 4627 8518 Dina Arrais

**SUPPLEMENTARY INFORMATION:** Copies of the following documents are available for viewing only in the RCRA Docket room:

The Green Report: Findings and Preliminary Recommendations for Responsible Environmental Advertising, State Attorneys General Task Force.

The Green Report II: Recommendations for Responsible Environmental Advertising, State Attorneys General Task Force.

Recycling Emblem Regulations, State of Rhode Island and Providence Plantations Regulations.

6 NYCRR Part 368 Recycling Emblems, New York State Regulations.

Regional Labeling Standards and Labeling Resolution, the Northeast Recycling Council.

Petition for Federal Trade Commission Guides from National Food Processing Association and other Petitioners.  
Petition for Federal Trade Commission Guides from the Cosmetic, Toiletry, and Fragrance Association and the Nonprescription Drug Manufacturers Association.

Open Remarks of F. Henry Habicht II, Deputy Administrator, U.S. Environmental Protection Agency before the Federal Trade Commission, Hearings on Environmental Labeling, July 17, 1991.

Workplan for the Interagency Task Force on Environmental Marketing Claims, U.S. Environmental Protection Agency, Federal Trade Commission, U.S. Office of Consumer Affairs, Description of Labeling Efforts, Draft EPA Report.

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## I. Introduction

## A. Overview

The American public is increasingly concerned about environmental issues.

and individuals are looking for ways to do their part to protect our nation's environment and resources. In the past few years, public understanding of the nature of environmental problems has become more sophisticated. Many people recognize that large environmental problems are created not only by the actions of large companies and organizations, but also by the seemingly small actions of millions of individuals, for example, the generation of municipal solid waste, or the generation of "greenhouse" gases that may contribute to global climate change.

Many individuals are responding by trying to lessen the impacts of their own behavior, by car-pooling to work, conserving water at home, and purchasing consumer products which in some way offer an environmental advantage: Energy-saving lighting fixtures and appliances, products which contain fewer hazardous constituents, or products containing recycled materials. Manufacturers and marketers are responding to the consumer demand for "environmentally oriented" products by attempting to make products which do not contribute to upper atmospheric ozone depletion, create less solid waste or fewer adverse impacts on water quality, etc. They are also advertising and otherwise highlighting both the real and desired, environmental benefits of these products for consumers.

The Environmental Protection Agency (EPA) views the increased desire for "environmentally oriented" products as an opportunity to find effective non-regulatory solutions to difficult environmental problems which may in some cases be solved more efficiently in the marketplace than through government regulations.

Environmentally informed consumers making purchasing decisions based upon accurate and reliable information about the environmental attributes of products would encourage manufacturers to produce goods which have fewer adverse environmental impacts.

To affect a shift toward more environmentally benign products three things must occur: First, manufacturers need to produce products which are better for the environment; second, consumers need to be provided accurate, reliable, and meaningful information concerning the environmental attributes of these products; and, third, consumers need to preferentially purchase these products. We are starting to see manufacturers making products with fewer adverse environmental impacts. In many cases, however, consumers are not being

provided reliable and meaningful information about the advantages of these products, partially because of the lack of national consensus on the meaning and use of environmental terms in advertising and labeling. Consumers cannot know how to interpret and use the information they receive until consumers, manufacturers, and government speak a common language. Our failure to speak the same language in environmental marketing is creating problems both for manufacturers who are producing and attempting to market environmentally oriented products, and consumers who are seeking to purchase them.

Some manufacturers who have made legitimate attempts to improve their products by reducing their environmental impacts are unsure how to promote the environmental benefits of their products. They are concerned about criticism and liability for false or misleading advertising if they advertise environmental benefits in the absence of clear and uniform standards or, conversely, they face a potential loss of market share if they do not advertise environmental benefits and their competitors do.

Meanwhile, because manufacturers are making claims based upon differing standards, consumers often do not know what the claims mean, and this creates some consumer confusion and suspicion of environmental claims. Environmental claims are a special class of claims because consumers typically lack the scientific expertise to assess the validity of the claims that marketers are making. The increasing numbers of environmental claims bombarding consumers with information on competing environmental impacts, e.g., "source reduced" or "recyclable" versus "biodegradable," compounds these problems. Also, some highly aggressive marketers may make confusing and even misleading environmental claims, further adding to consumer confusion.

Initial attempts to address this situation have come from State governments; for example, several States, including New York, California, and Rhode Island, have passed legislation or issued regulations which provide standard definitions or guidelines for the use of the terms "recycled" and "recyclable" (and other terms). While individual State action has been part of an important first step to help define and shape the issue, as well as begin the initial consensus building process between government, industry, and consumers, the definitions and guidelines developed at the State government level are not necessarily

consistent and compatible with each other. As more States adopt regulations or pass laws to address the issue of environmental marketing, national marketers or distributors may find themselves in a situation where they will either have to target advertising for each State, which could be prohibitively expensive, or will stop advertising the environmental benefits of their products altogether.

Recognizing the limitations of an uncoordinated State-by-State response to the issue, some State organizations have begun to address the issue of environmental marketing at national and regional levels. A task force comprised of the Attorneys General from eleven States has formulated guidance for environmental marketing, which are contained in the Green Report II—Guidance for Responsible Environmental Advertising. This report not only contains guidance for environmental marketing, but also calls upon the Federal government to adopt national standards for environmental marketing claims used in the labeling, packaging, and promotion of consumer products. At the regional level, the Northeast Recycling Council, an organization comprised of State environmental officials from ten Northeastern States, has developed consensus guidelines for the use of the terms "reusable," "recycled content" and "recyclable" in product labeling. These consensus guidelines could be adopted by all ten of the member States in an effort to achieve regional coordination.

If national consensus over the use of these terms is not reached in the near future, we face the danger of losing a valuable tool for educating the public and influencing the production and use of more environmentally oriented products. Consumers may come to distrust or ignore all environmental claims, and national manufacturers and marketers may become so hamstrung by conflicting State standards that they avoid making these claims completely.

#### B. Federal Role

The U.S. EPA, the U.S. Office of Consumer Affairs (USOCA), and the Federal Trade Commission (FTC) recognize the opportunity presented by environmental marketing for improving the environment as well as the need to avoid misleading or deceptive environmental claims. They also understand the need for Federal involvement to address this issue at the national level. These three agencies have joined to form a Federal Task Force to provide a coordinated and

cohesive national response to the issue of environmental labeling and marketing claims. The members of the Task Force will work together to help ensure that consumer, advertising, and environmental issues are addressed through a coordinated national effort.

The Task Force is intended to enhance and coordinate, rather than supersede, environmental marketing activities currently taking place in each individual agency. Environmental marketing claims may potentially be addressed by one of a combination of several approaches: FTC industry guides, FTC case-by-case enforcement, EPA Guidance for specific terms, and more general guidance, issued by EPA or jointly by the Task Force, that applies to a category of claims. The Task Force will coordinate agency efforts so the appropriate mix of approaches is used to address the commonly used or most problematic claims.

As an initial step to address a key subject in this area, EPA is developing guidance for two terms related to recycling of materials from solid waste: "Recycled" and "recyclable," and for the use of the recycling emblem. This is a topic of much consumer and business interest, and these terms are two of the most frequently used environmental claims.

The FTC held hearings on July 17 and 18, 1991, to gather information to assist them in determining whether they should develop industry guides for the use of environmental marketing claims. If FTC should decide to go forward with developing industry guides in the future, EPA will share the information we are gathering with them, which may serve them in the development of the industry guides. EPA stands ready to assist FTC in any way possible to ensure that the environmental policy needs discussed in this notice are addressed in an effective and coordinated way by the guides. If FTC should decide not to develop industry guides, EPA will publish the recommendations as its guidance to industry and consumers.

#### C. Purpose of Today's Notice

Today's notice solicits comment on options for guidance to be used by marketers in product labeling and advertising promoting the use of recycled materials and recyclable materials. EPA will hold a public meeting to hear oral comment from interested parties on the options outlined in this notice.

#### D. Goals and Objectives of EPA Voluntary Environmental Claims Guidance

EPA has two overriding goals in addressing "recycled content" and "recyclable" claims: We want to encourage the trends toward (1) the increased use of recycled materials in products and (2) the increased recovery of materials for recycling. These goals will be advanced by facilitating the communication between consumers and marketers as to which products contain recycled materials content and which products are recyclable. By doing this we will help to restore consumer confidence in environmental marketing claims. (We recognize that improved labeling practices need to be supplemented by strong educational programs to help the general public understand and actively participate in recycling.) We also want to insure that all companies making "recycled content" and "recyclable" claims operate on a level playing field: One company should not be able to gain a market advantage over another company by promoting its product as something the product is not. This will help to ensure that companies making legitimate environmental improvements to their products will benefit from the increased consumer demand for environmentally oriented products, fostering the desire on the part of marketers to provide consumers with more environmentally oriented products.

#### II. Definitions

The following definitions are used in the notice. These definitions are intended to serve as guidance to marketers and to help educate consumers. In formulating these definitions, EPA has reviewed statutory and regulatory definitions from the Resource Conservation and Recovery Act (RCRA). However, the definitions stated here may not parallel those found in RCRA. For example, whereas the RCRA definition for "post-consumer material" is applicable primarily to paper and paper products, EPA has broadened that definition for purposes of this guidance so that it is applicable in more situations. In choosing the definitions to include in the notice, we have recognized that many of the RCRA definitions apply to government procurement of materials with recycled content, and procurement policy issues might differ from the issues we are addressing in this notice.

The term "home scrap" means those scrap materials, virgin content of a material, or by-products generated from

and commonly reused original manufacturing

The term "post-consumer" means those products generated by a business that have served their uses, and that have been or otherwise diverted from waste stream for the purpose of recycling.

The term "pre-consumer" means those materials any step in the product and that have been recycled or otherwise diverted from waste stream for the purpose of recycling. This does not include those materials of virgin content of a material that are generated from a process reused within an origin process.

The term "product" means commodities that are an end result of a manufacturing process. For the purpose of guidance, packaging is included in the definition.

The term "recycled material" means pre-consumer materials, consumer materials, and include home scrap.

The term "recyclables" means products or materials recovered from or otherwise diverted from the solid waste stream for the purpose of recycling.

The term "recycled content" means the portion of a material's weight that is composed of recycled consumer and post-consumer materials.

The term "recycle" means the activities, including collection, separation, and processing, of materials recovered from or otherwise diverted from the solid waste stream for the purpose of manufacturing new products or for use as fuel for producing heat or combustion.

The term "recycling rate" means the percentage by weight of a material category that is recycled.

We are soliciting comment on the definitions listed in this notice, and will, if adopted, result in less confusion for manufacturers, marketers, consumers concerning recycled and recyclable claims. We are soliciting comment on whether other terms should be included to help manufacturers, marketers, and consumers understand the recycled and recyclable materials.

### III. Options for Guidance for Recycled Content Claims

The number of Americans served by recycling collection programs has grown rapidly in the past several years. Over 30 million Americans are now served by curbside recycling collection programs, and this number is expected to continue to grow in the coming years. The success of these recycling programs depends upon their ability to collect materials and market those materials. While starting up collection can be the most difficult part of initiating a recycling program, successfully marketing the collected materials will determine the long-term sustainability of the program. For example, some programs that were previously collecting old newspapers stopped when market supply of old newspapers exceeded demand, and prices for the collected materials fell. Many Americans are realizing that collecting materials for recycling is only one element of successful recycling; products containing recycled materials also need to be purchased in order to ensure healthy market demand for materials collected by municipal and other recycling programs. This understanding, as well as a general desire to take positive action for the environment, has helped increase consumer demand for products made with recycled content.

Manufacturers are responding to consumer demand by making more products that use recycled materials, using increasing amounts of recycled materials in products, and developing new ways of utilizing recycled materials in products. Knowing that many consumers are seeking goods with recycled content, marketers are advertising their use of recycled content in more and more products in many different ways. EPA wants the trend towards using greater amounts of recycled materials to continue, and strongly believes that consumer demand for products with recycled content is essential for this to occur. The messages in product advertising concerning recycled content should supply the consumer with useful, accurate, and understandable information. Guidance to manufacturers, marketers, and consumers on such messages can help prevent consumers from becoming cynical and disillusioned about recycled content claims, and can help consumers identify products that use more recycled materials and create incentives for manufacturers to use more recycled materials. This guidance is intended to make "recycled content" claims more consistent and meaningful.

The two major concerns EPA has about "recycled content" claims are first, the types of materials which marketers are claiming as being "recycled," and second, the failure of some marketers to provide useful, accurate, and understandable information to consumers about the amount and sources of recycled material in products. The first problem is due in part to the lack of commonly accepted definitions for terms such as, "post-consumer materials," "recycled materials," etc. In the absence of commonly accepted definitions, some marketers have made dubious claims, for example, claiming that "home scrap" materials are "recycled," when, in fact, such "home scrap" materials are produced and reused within an original manufacturing process and never enter the waste stream.

In order to address this issue, EPA has included in this notice proposed definitions for the terms "recycled materials," "post-consumer materials," "pre-consumer materials," and others. These definitions can be used by marketers in their claims and to help educate consumers. The definitions we are considering are listed in the previous section.

The second potential problem with "recycled content" claims concerns statements that are vague, potentially misleading, and provide little information to consumers. Concerns have been expressed that broad statements on products such as "Made with recycled materials"; "Recycled Content;" or statements that use the "chasing arrows" recycling loop emblem and the term "Recycled," do not provide consumers with sufficient information for the statements to be meaningful. These statements could apply to products containing anywhere from 1% to 100% recycled content. If some consumers care about the use of recycled materials in a product, then it is a likely assumption that these consumers would also be concerned about the amount of recycled content and would generally prefer as much recycled content as feasible. To address these concerns, EPA is examining the following three options for recycled content claims guidance.

#### A. Option 1: Disclosure of Recycled Materials Content

In order to make statements concerning the use of recycled materials more meaningful, EPA is considering recommending that marketers who advertise the use of recycled materials in a product prominently and clearly state the percentage by weight of recycled materials in the product. For

example, an aluminum can manufacturer that uses 50% recycled materials by weight to produce an aluminum can could advertise the recycled materials by making a statement such as "Recycled Aluminum contains 50% recycled materials." A minimum threshold for recycled content would be set or recommended under this option.

This option meets two needs. First, the consumer will be provided with useful and accurate information. By placing the percentage of recycled materials on the product, the consumer will be informed of the use of recycled materials, and the relative amount of recycled materials in the product. Second, this will provide consumers with the opportunity to choose products containing higher amounts of recycled material, thereby potentially creating competitive pressures to increase the amount of recycled materials contained in products in order to meet consumer demand.

One disadvantage to this option is that it relies heavily upon consumer knowledge of and demand for goods produced with recycled materials. If consumers do not understand the meaning of the terms used or the recycled content percentage, then the information could have little effect on the amount of recycled materials used. EPA requests comment on this issue and any data concerning consumer understanding of these terms.

#### B. Option 2: Minimum Content Standards

EPA is also considering a recommendation that marketers should promote the recycled content of a product or packaging only if the product or packaging meets a specified minimum percentage of recycled content. With this option, EPA would recommend either (1) a generic minimum content standard for all products (e.g., all products should meet a 25% minimum recycled content standard before being promoted as containing recycled content), or (2) a series of standards specific to materials or product categories (e.g., aluminum beverage containers should meet a 50% standard, newsprint should meet a 30% standard). EPA would then recommend that marketers meet these standards before promoting the use of recycled material.

This option has several advantages. If the standards were commonly adopted, it would provide consumers with the knowledge and assurance of a minimum threshold of recycled content when they see content claims. This option could increase the amount of recycled

materials used. If the minimum percentages were set sufficiently high that some manufacturers would need to increase the amount of recycled materials they put in products in order to meet the standards. The option would solve the major disadvantage of Option 1, because it does not rely as heavily on consumer knowledge of and demand for increased amounts of recycled materials use to determine recycled content levels, because these levels will be set by the Administrator.

EPA's Guidelines for Federal Procurement issued under section 6002 of RCRA provide recommended standards for government purchases of goods containing recovered materials. EPA could use these standards as a starting point for setting the standards under this option. (See, for example, 40 CFR part 250.) EPA is requesting comment on whether the "Procurement Guidelines" provide suitable minimum content standards for this guidance.

One disadvantage with this option is that it would not distinguish between products whose recycled content is barely above the standard and those products that are greatly exceeding the standard. Because marketers would not necessarily state the amount of recycled materials content, this option also would not provide consumers with information they could use to choose products with larger amounts of recycled materials content. This option would likely entail high standard setting costs to EPA, as well as the need for ongoing evaluation of the use of recycled materials in products, and periodic revision of the guidance in order to encourage greater use of recycled materials. Also, it is not clear that a commonly accepted, sound basis exists for setting content percentages across many products. Finally, industry could view the standard not only as the minimum level of recycled content, but also as the ceiling, resulting perhaps in less than desired recycled material use. This may occur because industries may have little incentive to go beyond the minimum standard.

#### C. Option 3: Minimum Content Standards and Disclosure

EPA is also considering recommending a combination of options 1 and 2 which would (1) discourage marketers from promoting the use of recycled materials content unless they meet or exceed a specified minimum content standard, and (2) state the percentage by weight of recycled materials in the product.

The advantage of this option is that consumers would be provided information concerning the percentage

of recycled materials used in a product, which would allow them to choose products with higher percentages of recycled material content, and they would be ensured a minimum threshold of recycled content. However, this option would have disadvantages similar to the previous option in regard to costs, the burden of ongoing evaluation, and the difficulty in establishing optimum minimum recycled content standards.

#### D. EPA's Preferred Option

EPA's preferred option for the use of "recycled content" claims is Option 1: Disclosure of Recycled Materials Content, whereby a marketer would prominently disclose the percentage recycled materials content as part of any "recycled content" claim.

Unlike the other two options which require EPA to establish standards, this option would offer low costs to government, would avoid the need for EPA to oversee development and implementation of minimum content standards, and would not set standards that could be viewed as a ceiling by industry or be considered as arbitrary by observers.

Marketers following this guidance would provide consumers with information on the percentage of recycled content in their products. Consumers can use this information as part of their purchasing decision, potentially creating competition among manufacturers to meet consumer demand for recycled content. EPA believes that many marketers could respond quickly to consumer demand, rapidly increasing their use of recycled materials.

#### E. General Issues Relating to "Recycled Content" Claims

In this section we will present two important issues which cut across all three of the options for guidance that EPA is considering. EPA is seeking comment on both of these critical issues. The first issue relates to the definitions of "recycled materials" and "recycled content." In the proposed definitions we have defined "recycled materials" as including both pre- and post-consumer materials. This approach was taken for three reasons. First, it is not clear whether consumers understand the difference between pre- and post-consumer materials. The broader, more inclusive definition may be simpler and thus more effective. Second, some pre-consumer wastes which are currently being disposed can be recovered. Efforts to recycle such materials through consumer marketing can help alleviate local disposal problems. Third, it is not

clear whether the distinction between pre- and post-consumer waste can be tracked efficiently by producers and brokers handling a variety of waste streams.

Other parties, however, have made the case that encouraging use of post-consumer materials is desirable, because post-consumer materials are relatively more difficult to collect, separate, and process than pre-consumer materials have been traditionally recycled more commonly. For these reasons, they argue that the recycling of post-consumer materials should be encouraged more aggressively than the recycling of pre-consumer materials, or, at the very least, the percentage of post-consumer material content should be specifically stated when communicating the use of recycled materials. Some examples of this position are the State of California's law which requires the use of 10% post-consumer material content before a claim of recycled content can be made the recommendation of the ad-hoc Committee on Environmental Advertising of the National Association of Attorneys General that marketers call pre-consumer materials "recycled," and the Northeast Recycling Council's recommendation that marketers separately label the percentages of pre and post-consumer materials along with any recycled content claim.

EPA would like to receive comment on whether defining "recycled content" to include both pre-consumer and post-consumer materials, or to include only post-consumer materials, will best promote increased consumer understanding regarding this issue. EPA would like to receive comment on whether a recommendation to state pre- and/or post-consumer materials content will lead to increased amounts of materials diverted from incinerators and landfills. Does information exist that demonstrates the effects on solid waste disposal of substituting post-consumer materials for pre-consumer materials? Will a preference for post-consumer materials result in the substitution of post-consumer materials for pre-consumer materials and not lead to a reduction in the total amount of materials destined for disposal? EPA also solicits comments on the feasibility and costs of differentiating and monitoring post-consumer materials content in various manufacturing processes.

The other issue for which EPA is seeking comment concerns the calculation of recycled content, another important issue which cuts across all three options. Several approaches to

calculating recycled content could be used, the difference between the approaches largely having to do with the amount of time over which the recycled materials use is counted. EPA's Procurement Guidelines for paper and paper products are very prescriptive in this regard, requiring that manufacturers meet the standards on a batch-by-batch basis, while EPA's Procurement Guideline for insulation products bases the calculation upon a monthly mass balance of recycled to virgin materials used. The State of New York calculates the percentage of recycled materials as being "that proportion of a package or product weight that is composed of recycled materials as demonstrated by an annual mass balance of all feedstocks and outputs of the manufacturing process." EPA is seeking comment as to what type of accounting system is most appropriate for consumer products claiming the use of recycled materials. Should we be recommending a batch-by-batch, monthly, or annual accounting? Are there other accounting issues that we should be considering?

#### IV. Options and Guidance for Recyclable Marketing Claims

As more and more Americans participate in recycling programs, the recyclability of products which they purchase is increasingly important. Many Americans want to participate in recycling programs and do their part to help reduce the amount of waste sent to landfills and waste combusters. In order to participate they need to know which materials are collected locally and how these materials need to be prepared for collection.

The most reliable source of information on what materials are collected locally is the local public or private organization sponsoring the program. These organizations, however, often do not have funds sufficient to allow them to mount a comprehensive public education campaign. As a result, consumers often look for information wherever they can find it, and some are looking to product labeling and advertising to learn whether a product can be recycled.

Unfortunately for consumers, recyclability claims are seldom of much assistance in helping them recycle in their own communities, because these claims are not typically based on community availability of recycling programs. Observers have noted that for many consumers, recyclability is determined by the availability of collection programs for the product in their community; however, marketers commonly make "recyclable" claims in order to inform the consumer that the

product, if collected, can technically be processed and used, without regard to whether an individual has reasonable access to programs that actually collect the product for use. Because of the mismatch between many consumers' understanding of "recyclable" claims and some marketers' use of "recyclable" claims, we face a situation where some consumers are losing confidence in the validity of "recyclable" claims and in environmental marketing claims in general.

Guidance can help marketers better communicate the recyclability of products to consumers, and can help avoid a loss of consumer confidence in the validity of "recyclable" claims. We believe that communication will be most facilitated by guidance that helps to qualify "recyclable" claims, so that such claims reflect the availability of collection and use programs for the product, and provide information that the consumer can use to recycle the product.

Guidance can also address the problem created by marketers making "recyclable" claims for products which are recycled at very low rates, creating a situation where companies that make commonly "recyclable" products compete with companies that do not do so. EPA supports the efforts of companies which have taken concrete and productive steps to improve the recyclability of their products by using materials that are commonly collected for recycling, eliminating materials incompatible with recycling processes, and supporting the development of recycling infrastructure. We would like to see companies who have made changes or who have supported recycling reap the benefits of their efforts through increased sales and profits in the marketplace. Ideally, guidance would facilitate fair competition between marketers that would increase the use of readily "recyclable" products.

The following sections outline the approaches EPA is considering in formulating guidance for the use of "recyclable" claims.

##### A. Option 1: Minimum Recycling Rate and Recycling Rate Disclosure

This option has two elements. EPA would recommend that marketers promote the recyclability of a product only when (1) the product is recycled at a minimum percentage nationally, and (2) the product prominently discloses the national recovery rate for the material or product.

The minimum recycling percentage rate would be set by the Administrator. The minimum recycling percentage rate

could be set either at a high level to aggressively promote recycling or at a lower level to provide a minimum threshold to prevent trivial recyclable claims by marketers of products that are not widely recycled. The minimum recycling percentage rate could either be set on a material-by-material basis (e.g., aluminum should meet a 30% standard) or a product-by-product basis (aluminum cans should meet a 50% standard). EPA is requesting comment on the most appropriate method for setting minimum recycling percentage rates. We are also requesting comment on criteria appropriate for setting a minimum recycling percentage rate.

For products that meet the minimum percentage, the recycling rate would be disclosed in product labeling and advertising in a statement along with the recyclable claim. For example, the statement could read: "Recyclable. Glass containers are recycled at a 20% rate nationally." EPA would like commenters to provide information concerning the availability of reliable, current national recycling rates for recycled materials and the feasibility of using this information on product labeling and advertising in a timely manner. Also, what role should EPA or others play in overseeing the determination and use of such rates?

This option would help to meet EPA's objectives of improving communications concerning environmental marketing claims. The option helps to ensure that marketers do not make misleading "recyclable" claims, by establishing a minimum threshold before such a claim could be made. It would also provide consumers with comparative information on national recycling rates which could be used as a basis for choosing products, and help foster competition between marketers to increase the use of highly recycled materials in products.

EPA acknowledges that unless the recycling rate threshold was set at a very high level, this option would not discourage marketers from labeling or advertising their products as recyclable in some communities where the product or material is not collected. Another drawback to this option, similar to that described in the "recycled" options, would be the difficulty in establishing a commonly accepted, sound basis for determining the appropriate recycling rate standard for any given material, and the high cost to the Agency of setting the standard.

##### B. Option 2: Qualified Claims

"Recyclable" claims are often made based upon differing definitions of

recycling. "Recycle" as EPA would define it in section II of this notice, means the series of activities, including collection, separation, and processing, by which products or other materials are recovered from the otherwise diverted from the solid waste stream for use in the form of raw materials in the manufacture of new products other than fuel for producing heat or power by combustion. Therefore, in order for a material to be considered fully "recyclable," it must be collected, separated, processed and used. If marketers were to link "recyclable" claims with information on access to collection and use programs, the linkage could eliminate much of the confusion relating to recyclability claims.

With this option, EPA would recommend that marketers make "recyclability" claims: (1) That do not lead consumers to assume that the product is recyclable everywhere; and (2) that provide consumers with information that helps them recycle the material. "Recyclable" claims meeting these criteria are claims that EPA considers to be "qualified."

An example of a qualified claim could be: "This bottle can be recycled in communities where collection facilities for colored HDPE bottles exist. For more information contact your local recycling coordinator." Examples of qualified claims currently exist in the marketplace. For example, a label on a plastic bottle claims: "This bottle is made with PETE. It is the same plastic used to make soft drink bottles and is the most commonly recycled plastic. If your community has a recycling program that collects all products with a [SPI code 1] symbol, please recycle this container. To get more information on how to encourage plastic recycling, write us at the following address: [Address]." Qualified claims help marketers communicate with consumers in a manner that would lead consumers interested in recycling products to take constructive steps to do so. The qualified claims could also avoid the current situation where "recyclable" claims often seem to have little meaning to many consumers because the claims appear to be nothing more than hollow advertising.

Use of qualified claims under this option would not, however, limit the claims to those marketers whose products are recycled at high rates. These claims, therefore, could be used by marketers of products that are recycled at very low rates and in a limited number of locations in the country. We see this as the major drawback to this option.

EPA is seeking comment on a number of issues related to this option. First of all, are the criteria we have set for a "qualified" claim appropriate and sufficient to provide useful information to consumers? What additional criteria, if any, should EPA include? Second, would use of these criteria reduce the number of misleading claims? Would they encourage recovery of recyclable materials?

#### *C. Option 3: Qualified Claims and Disclosure of National Recycling Rate*

This option would consist of two recommendations: marketers would make "qualified" claims, as described in Option 2, and also prominently disclose the national recycling rate of the product or material for which the claim of recyclability is being made. For example, a glass bottle could make the claim: "The bottle recycled in communities where collection facilities for colored glass bottles exist. For more information contact your local recycling coordinator. Glass bottles are recycled at a 20% rate nationally."

This option has all of the advantages of the previous option. The additional disclosure of the national recycling rate is designed to address the major concern we have with the previous option: Differentiating the claims of products commonly recycled from the claims of products that are not commonly recycled. While any marketer could make a qualified claim of recyclability under this option, it will encourage marketers who are considering making claims for a product that is minimally recycled to think twice about whether they want to make a claim that reveals how little of their product is actually recycled.

Aside from the issues related to the "qualified" claims and the disclosure of national recycling rate that we discussed in the previous options, EPA is seeking comment on whether a combination of these two options is appropriate and would accomplish EPA's objectives of helping marketers communicate the recyclability of products to consumers, avoiding a loss of consumer confidence in the validity of "recyclable" claims, and assisting companies who have made changes or who have supported recycling reap the benefits of their efforts through increased sales and profits in the marketplace.

#### *D. Option 4: Minimum Recycling Rate, Qualified Claims, and Disclosure of National Recycling Rate*

This option is a combination of major elements of Options 1 and 3: First, EPA would establish a minimum recycling

rate as described in Option 1. This minimum would be a relatively low level. Marketers would be encouraged not to make claims of recyclability for any products that did not meet this minimal level of recycling. Second, marketers whose products meet this recycling rate would be encouraged to meet the conditions outlined in Option 3.

This option would have the advantages of the previous option plus it would set a minimum threshold that would prevent the most trivial claims of recyclability from being made.

One disadvantage to this option is the difficulty that EPA could have in defining meaningful criteria to set a minimum recycling rate. We are requesting comment on the appropriate criteria for determining a minimum recycling rate in the context of this option. We are also requesting comment on this option in general, and in particular whether the use of several elements in the claim could be confusing to consumers or difficult for marketers to apply.

#### *E. EPA's Preferred Option*

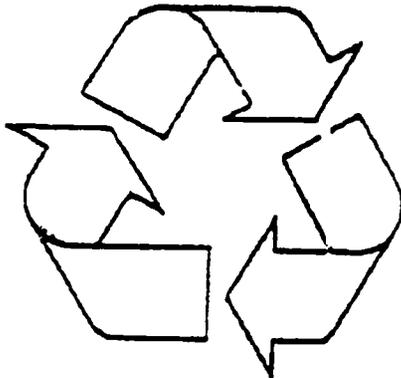
EPA's preferred option is Option 3: Qualified Claims and Disclosure of National Recycling Rate. We believe this option offers the best match between ease of implementation and meeting our objectives of improving communications of "recyclability," avoiding a loss of consumer confidence in the validity of "recyclable" claims, and assisting companies who have made changes or who have supported recycling reap the benefits of their efforts through increased sales and profits in the marketplace.

#### **V. General Guidance**

##### *A. Use of Recycling Emblem*

The familiar recycling emblem (See Figure 1) was developed in 1970 in a national contest conducted by a paper products manufacturer. After the contest the recycling emblem was placed in the public domain and is now commonly used by marketers to represent both recyclability and recycled content use. It is recognized by much of the public as relating generally to recycling. An immediately recognizable symbol like the recycling emblem can be a useful tool in drawing the attention of consumers to a product that contains recycled content or that is recyclable; however, more guidance on its proper use is needed in order to increase the effectiveness of its use and to ensure that consumers understand its meaning.

Figure 1: Recycling Emblem



The issue of when and how the recycling emblem should be used is being addressed by some States recommending that the emblem be used with recycled content and recyclable claims but the emblem be clearly identified to reflect whether it represents recycled content or recyclability. It is likely that more States will attempt to address this issue in the future. In order to provide a consistent national approach to the use of the recycling emblem, EPA is offering the following options for developing guidance. These options are offered as adjuncts to the guidance that EPA will develop for "recycled content" and "recyclable" claims. That is, EPA believes that the approach ultimately recommended for use of the recycling emblem should be used in conjunction with approaches ultimately recommended for the terms "recycled" and "recyclable," so that the emblem and surrounding message are viewed as a consistent claim providing necessary information.

**1. Option 1: Limit Use of Recycling Emblem to Certain Recycling Claims**

The use of the recycling emblem has expanded to environmental claims unrelated to the use of recycled content or recyclable materials. For example, some marketers have placed the recycling emblem on a package claiming "Environmentally friendly product and packaging," giving one the impression that the recycling emblem also signifies an overall "environmental goodness." While this practice is not yet widespread, we would not like to see it spread as it would dilute the meaning of the emblem. EPA is seeking comment on this position. Do commenters think that

this emblem should be used for other uses than signifying the use of recycled materials or recyclability?

Under this option, EPA would recommend that the use of the recycling emblem in product claims and advertising be restricted to claims involving the use of recycled content and recyclability. This option would limit the number of different messages that the recycling emblem would communicate to consumers, avoiding a situation where the emblem could be used for so many different environmental messages as to become virtually meaningless.

The recycling emblem is not used exclusively for environmental claims. For example, community recycling programs will often use the recycling emblem in brochures and advertising notifying the public of the time and location of recycling collection programs. Recycling collection companies use the recycling emblem on the sides of collection trucks. These uses of the recycling emblem are entirely appropriate, and we do not intend for the guidance to cover them.

Another use of the recycling emblem, albeit in a slightly modified form, is the Society of the Plastic Industry's rigid container plastic resin coding system. This coding system is meant to help differentiate between different resin types and encourage the recycling of plastic containers. Some form of the resin coding system is required by law in over 30 States. EPA does not intend that its guidance cover the use of the resin coding system, as long as the use of the coding is consistent with that of identification of resin and not an environmental claim. For example, a plastic bottle labeled with the code on the bottom of the bottle would not be covered under the guidance, but a plastic cup with the emblem displayed prominently on the side would be considered to be making an environmental claim, and the use of the emblem in that circumstance should be in accordance with EPA guidance.

EPA is seeking comment on whether other legitimate uses besides communicating "recycled content" and "recyclability" and those discussed above exist for the recycling emblem, what those uses are, and whether this option should be expanded to include those uses.

**2. Option 2: Use American Paper Institute Guidance**

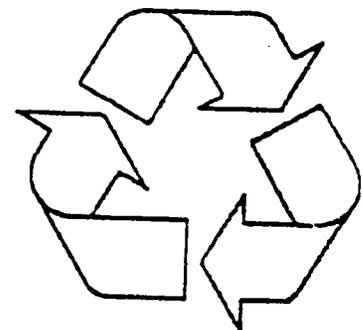
The American Paper Institute (API) distributes camera ready copy of the recycling emblem with the recommendation that manufacturers use

a version of the symbol consisting of solid arrows within a black circle to represent the use of recycled content (See Figure 2) and another version with the symbol appearing in outline form to signify recyclability. (See Figure 3.) With this option, EPA would recommend that marketers follow the API guidance and continue to use the two different versions of the recycling emblem.

Figure 2: API Recycled Content Emblem



Figure 3: API Recyclable Emblem



An advantage to adopting this option is that the guidance has been developed and used for a number of years, and we would be promoting consistency by not changing guidance and adding to the confusion. We must note, however, because the API guidance promotes the use of two nearly identical emblems that the guidance might not offer a solution to increasing consumer understanding of the recycling emblem. Consumers might not be readily able to recognize that one version of the emblem represents the use of recycled materials while the other represents recyclability.

EPA is soliciting comment on whether adopting the API guidance would

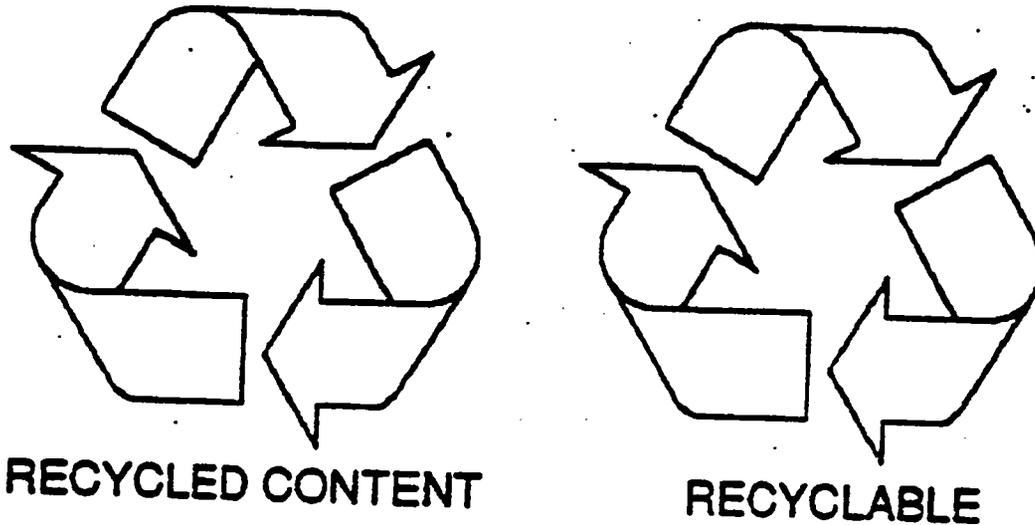
receive the problems of consumer understanding of the meaning of the recycling emblem. EPA is also soliciting information that marketers might have concerning consumer understanding of the recycling emblem as currently used.

**3. Option 3: Clearly Label the Recycling Emblem**

Under this option, EPA would recommend that marketers clearly label the emblem with "recycled content" or "recyclable," depending on the claim

they are making. An example of this can be seen in Figure 4. This option is an attempt to address the concerns we discussed in the previous section concerning the ability of consumers to differentiate between the two different API emblems.

**Figure 4: Clearly Labeled Recycling Emblems**



EPA is soliciting comment on whether, in fact, this option would solve the problem of consumer differentiation of the two different claims. We are also seeking copies of guidance that organizations have developed to address this issue.

**4. EPA's Preferred Options for the Use of the Recycling Emblem**

EPA's currently preferred options for the use of the recycling emblem are a combination of Options 1 and 3. Our preference would be that marketers use the recycling emblem only for "recycled content" or "recyclable" claims, and that they clearly label the emblem as

pertaining to "recycled content" or "recyclable" claims.

This option will help to promote consumer understanding of the meaning of the recycling emblem by encouraging that the use of the recycling emblem be limited to recycling claims, and by helping to eliminate the confusion that consumers are facing in determining the difference between the "recycled content" and "recyclable" emblems.

**B. Separating Claims of Packaging and Product**

The labeling and advertising practices of some marketers do not always differentiate between claims made about the packaging and the product

contained within the package. Because of this, consumers are not able to tell when recycled content claims refer to the packaging and when they refer to the product. EPA is considering recommending that marketers clearly differentiate between recycled content and the recyclability claims made about the product and the packaging in order to help reduce consumer confusion. We request comment on this issue as well.

Dated: September 22, 1991.

Don R. Clay,

Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 91-23709 Filed 10-1-91; 8:45 am]

BILLING CODE 4820-02-01

REVISIONS TO MINIMUM ENROUTE IFR ALTITUDES & CHANGEOVER POINTS—AMENDMENT 371 EFFECTIVE DATE, AUGUST 20, 1992—Continued

From	To	MEA
§ 95.8338 VOR Federal Airway 238 is Amended to Read in Part		
Ober, O FIX	Jackson, WY VOR/DME	1400
*13100-MCA Jackson VOR/DME, W BND		
Julesburg, WY VOR/DME	Roswell, WY FIX	**14000
*11000-MCA Roswell FIX, W BND **12500-MOCA		
§ 95.8332 VOR Federal Airway 252 is Amended to Read in Part		
Houston, ME VOR/DME	U.S. Canadian Border	2000
§ 95.8358 VOR Federal Airway 358 is Amended to Read in Part		
San Antonio, TX VORTAC	Guada, TX FIX	*4000
*2500-MOCA		
§ 95.8354 VOR Federal Airway 354 is Amended to Read in Part		
U.S. Mexican Border	Laredo, TX VORTAC	*3000
*2400-MOCA		
§ 95.8407 VOR Federal Airway 407 is Amended to Read in Part		
Jones, TX FIX	Jerry, TX FIX	*4000
**1300-MOCA		
Parsons, TX VORTAC	Humble, TX VORTAC	2500
Lincoln, LA FIX	Shreveport, LA VORTAC	3000

REVISIONS TO MINIMUM ENROUTE IFR ALTITUDES & CHANGEOVER POINTS—AMENDMENT 371 EFFECTIVE DATE, AUGUST 20, 1992—Continued

From	To	MEA
§ 95.8431 VOR Federal Airway 431 is Amended by Adding		
Sisters Island, AK VORTAC	Lynn, AK FIX	**3000
*3000-MRA *5000-MOCA		
Lynn, AK FIX	Storis Island, AK VORTAC	5000
§ 95.8437 VOR Federal Airway 437 is Amended to Read in Part		
Jessie, FL FIX	Stary, GA FIX	10000
*5000-MRA		
§ 95.8412 VOR Federal Airway 512 is Amended to Read in Part		
Proctor City, IN VORTAC	Hotter, IN FIX	2500
*2300-MRA		
§ 95.8528 VOR Federal Airway 528 is Amended to Read in Part		
Ober, OH VORTAC	Chardon, OH VORTAC	3000
Chardon, OH VORTAC	Youngstown, OH VORTAC	3000
§ 95.8550 VOR Federal Airway 550 is Amended to Read in Part		
Cosita, TX VORTAC	Miles, TX FIX	2500
Ceres, TX FIX	Cecil, TX FIX	**3400
*2500-MRA **2800-MOCA		

REVISIONS TO MINIMUM ENROUTE IFR ALTITUDES & CHANGEOVER POINTS—AMENDMENT 371 EFFECTIVE DATE, AUGUST 20, 1992—Continued

From	To	MEA
§ 95.8468 VOR Federal Airway 548 is Amended to Read in Part		
Junction, TX VORTAC	Snowden, TX VORTAC	*4000
*3000-MOCA		
§ 95.8488 VOR Federal Airway 588 is Amended to Read in Part		
San Antonio, TX VORTAC	Guada, TX FIX	*4000
*2500-MOCA		
Guada, TX FIX	Snowden, TX VORTAC	*4000
*2000-MOCA		
Snowden, TX VORTAC	Llano, TX VORTAC	*4000
*2100-MOCA		

From	To	MEA	MAA
§ 95.7207 JAR Route No. 207 is Amended to Delete:			
MIAMI, FL VORTAC	Wahala, FL FIX	18000	45000
WAHAA, FL FIX	Savannah, GA VORTAC	24000	45000

§ 95.8003 VOR FEDERAL AIRWAYS CHANGEOVER POINTS

Airway Segment	Changeover points	
	From	To
V-186 is Amended to Delete: Van Nuys, CA VOR/DME	Paradise, CA VORTAC	22 Van Nuys

[FR Doc. 92-19105 Filed 8-12-92 8:45 am]

BILLING CODE 4910-13-8

FEDERAL TRADE COMMISSION

16 CFR Part 260

Guides for the Use of Environmental Marketing Claims

AGENCY: Federal Trade Commission.

ACTION: Publication of final guides.

**SUMMARY:** The Federal Trade Commission has adopted guides for the use of environmental claims in marketing and advertising. The guides address the applicability of section 5 of the FTC Act to environmental advertising and labeling claims. Public hearings on these issues were held on July 17-18, 1991, along with a 90-day public comment period. In addition to the guides themselves, the Commission is publishing in this notice a summary of an environmental assessment of the guides, including a finding of no significant impact, concluding that an environmental impact statement is not required under applicable law.

EFFECTIVE DATE: July 23, 1992.

**ADDRESSES:** Copies of the environmental assessment are available from the Public Reference Branch, room 130, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Mary Koelbel Engle (Attorney), (202) 325-3187.

**SUPPLEMENTARY INFORMATION:** On Friday, May 31, 1991, the Federal Trade Commission published in the Federal Register a request for public comment on issues concerning environmental marketing and advertising claims, and a notice that it would hold public hearings. 58 FR 24988, May 31, 1991. Public hearings on these issues were held on July 17-18, 1991, along with a 90-day public comment period. On August 2, 1991, the Commission published in the Federal Register a notice extending the comment period. 58 FR 37023, Aug. 2, 1991. The Commission has now adopted guides for the use of environmental claims in marketing and advertising. The guides address the applicability of

section 5 of the FTC Act to environmental advertising and labeling claims. In addition to the guides themselves, the Commission is publishing in this notice a summary of an environmental assessment of the guides, including a finding of no significant impact, concluding that an environmental impact statement is not required under applicable law.

List of Subjects in 16 CFR Part 260

Advertising, Environmental claims. Labeling, and Trade practices.

For the reasons set forth in the preamble, 16 CFR ch. I is amended by adding part 260 to read as follows:

PART 260—GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS

- Sec. 260.1 Statement of purpose.
- 260.2 Scope of guides.
- 260.3 Structure of the guides.
- 260.4 Review procedure.
- 260.5 Interpretation and substantiation of environmental marketing claims.
- 260.6 General principles.

Sec.  
200.7 Environmental marketing claims.  
200.8 Environmental Assessment.  
Authority: 15 U.S.C. §§ 41-58.

§ 200.1 Statement of purpose.

These guides represent administrative interpretations of laws administered by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. These guides specifically address the application of section 5 of the FTC Act (15 U.S.C. 45) to environmental advertising and marketing practices. They provide the basis for voluntary compliance with such laws by members of industry. Conduct inconsistent with the positions articulated in these guides may result in corrective action by the Commission under section 5 if, after investigation, the Commission has reason to believe that the behavior falls within the scope of conduct declared unlawful by the statute.

§ 200.2 Scope of Guides.

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

§ 200.3 Structure of the guides.

The guides are composed of general principles and specific guidance on the use of environmental claims. These general principles and specific guidance are followed by examples that generally address a single deception concern. A given claim may raise issues that are addressed under more than one example and in more than one section of the guides. In many of the examples, one or more options are presented for

qualifying a claim. These options are intended to provide a "safe harbor" for marketers who want certainty about how to make environmental claims.<sup>1</sup> They do not represent the only permissible approaches to qualifying a claim. The examples do not illustrate all possible acceptable claims or disclosures that would be permissible under section 5. In addition, some of the illustrative disclosures may be appropriate for use on labels but not in print or broadcast advertisements and vice versa. In some instances, the guides indicate within the example in what context or contexts a particular type of disclosure should be considered.

§ 200.4 Review procedure.

Three years after the date of adoption of these guides, the Commission will seek public comment on whether and how the guides need to be modified in light of ensuing developments. Parties may petition the Commission to alter or amend these guides in light of substantial new evidence regarding consumer interpretation of a claim or regarding substantiation of a claim. Following review of such a petition, the Commission will take such action as it deems appropriate.

§ 200.5 Interpretation and substantiation of environmental marketing claims.

Section 5 of the FTC Act makes unlawful deceptive acts and practices in or affecting commerce. The Commission's criteria for determining whether an express or implied claim has been made are enunciated in the Commission's Policy Statement on Deception.<sup>2</sup> In addition, any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product or package must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim. A reasonable basis consists of competent and reliable evidence. In the context of environmental marketing claims, such substantiation will often require competent and reliable scientific evidence. For any test, analysis, research, study or other evidence to be "competent and reliable" for purposes of these guides, it must be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results. Further guidance on the

reasonable basis standard is set forth in the Commission's 1983 Policy Statement on the Advertising Substantiation Doctrine, 49 FR 30,699 (1984); appended to Thompson Medical Co., 104 F.T.C. 348 (1984). These guides, therefore, attempt to preview Commission policy in a relatively new context—that of environmental claims.

§ 200.6 General principles.

The following general principles apply to all environmental marketing claims, including, but not limited to, those described in § 200.7. In addition, § 200.7 contains specific guidance applicable to certain environmental marketing claims. Claims should comport with all relevant provisions of these guides, not simply the provision that seems most directly applicable.

(a) *Qualifications and Disclosures.* The Commission traditionally has held that in order to be effective, any qualifications or disclosures such as those described in these guides should be sufficiently clear and prominent to prevent deception. Clarity of language, relative type size and proximity to the claim being qualified, and an absence of contrary claims that could undercut effectiveness, will maximize the likelihood that the qualifications and disclosures are appropriately clear and prominent.

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

*Example 1:* A box of aluminum foil is labeled with the claim "recyclable," without further elaboration. Unless the type of product, surrounding language, or other context of the phrase establishes whether the claim refers to the foil or the box, the claim is deceptive if any part of either the box or the foil, other than minor, incidental components, cannot be recycled.

*Example 2:* A soft drink bottle is labeled "recycled." The bottle is made entirely from recycled materials, but the bottle cap is not. Because reasonable consumers are likely to consider the bottle cap to be a minor, incidental component of the package, the

<sup>1</sup> *Cliffdale Associates, Inc.*, 103 F.T.C. 110, at 178, 179 n.7, n.8, appendix, reprinting letter dated Oct. 14, 1982, from the Commission to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (1984) ("Deception Statement").

claim is not deceptive. Similarly, it would not be deceptive to label a shopping bag "recycled" where the bag is made entirely of recycled material but the easily detachable handle, an incidental component, is not.

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

**Example 1:** A package is labeled, "50% more recycled content than before." The manufacturer increased the recycled content of its package from 2 percent recycled material to 3 percent recycled material. Although the claim is technically true, it is likely to convey the false impression that the advertiser has increased significantly the use of recycled material.

**Example 2:** A trash bag is labeled "recyclable" without qualification. Because trash bags will ordinarily not be separated out from other trash at the landfill or incinerator for recycling, they are highly unlikely to be used again for any purpose. Even if the bag is technically capable of being recycled, the claim is deceptive since it asserts an environmental benefit where no significant or meaningful benefit exists.

**Example 3:** A paper grocery sack is labeled "reusable." The sack can be brought back to the store and reused for carrying groceries but will fall apart after two or three reuses, on average. Because reasonable consumers are unlikely to assume that a paper grocery sack is durable, the unqualified claim does not overstate the environmental benefit conveyed to consumers. The claim is not deceptive and does not need to be qualified to indicate the limited reuse of the sack.

(d) **Comparative Claims.** Environmental marketing claims that include a comparative statement should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception. In addition, the advertiser should be able to substantiate the comparison.

**Example 1:** An advertiser notes that its shampoo bottle contains "20% more recycled content." The claim in its context is ambiguous. Depending on contextual factors, it could be a comparison either to the advertiser's immediately preceding product or to a competitor's product. The advertiser should clarify the claim to make the basis for comparison clear, for example, by saying "20% more recycled content than our previous package." Otherwise, the advertiser should be prepared to substantiate whatever comparison is conveyed to reasonable consumers.

**Example 2:** An advertiser claims that "our plastic diaper liner has the most recycled content." The advertised diaper does have more recycled content, calculated as a percentage of weight, than any other on the market, although it is still well under 100% recycled. Provided the recycled content and the comparative difference between the

product and those of competitors are significant and provided the specific comparison can be substantiated, the claim is not deceptive.

**Example 3:** An ad claims that the advertiser's packaging creates "less waste than the leading national brand." The advertiser's source reduction was implemented sometime ago and is supported by a calculation comparing the relative solid waste contributions of the two packages. The advertiser should be able to substantiate that the comparison remains accurate.

#### § 250.7 Environmental marketing claims.

Guidance about the use of environmental marketing claims is set forth below. Each guide is followed by several examples that illustrate, but do not provide an exhaustive list of, claims that do and do not comport with the guides. In each case, the general principles set forth in § 250.5 should also be followed.<sup>3</sup>

(a) **General Environmental Benefit Claims.** It is deceptive to misrepresent, directly or by implication, that a product or package offers a general environmental benefit. Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product or package has specific and far-reaching environmental benefits. As explained in the Commission's Ad Substantiation Statement, every express and material, implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product must be substantiated. Unless this substantiation duty can be met, broad environmental claims should either be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.

**Example 1:** A brand name like "Eco-Safe" would be deceptive if, in the context of the product so named, it leads consumers to believe that the product has environmental benefits which cannot be substantiated by the manufacturer. The claim would not be deceptive if "Eco-Safe" were followed by clear and prominent qualifying language limiting the safety representation to a particular product attribute for which it could be substantiated, and provided that no other deceptive implications were created by the context.

**Example 2:** A product wrapper is printed with the claim "Environmentally Friendly." Textual comments on the wrapper explain that the wrapper is "Environmentally

<sup>3</sup> These guides do not address claims based on a "recycle" theory of environmental benefit. Such analyses are still in their infancy and thus the Commission lacks sufficient information on which to base guidance at this time.

Friendly" because it was not chlorine bleached, a process that has been shown to create harmful substances.<sup>4</sup> The wrapper was, in fact, not bleached with chlorine. However, the production of the wrapper now creates and releases to the environment significant quantities of other harmful substances. Since consumers are likely to interpret the "Environmentally Friendly" claim in combination with the textual explanation, to mean that no significant harmful substances are currently released to the environment, the "Environmentally Friendly" claim would be deceptive.

**Example 3:** A pump spray product is labeled "environmentally safe." Most of the product's active ingredients consist of volatile organic compounds (VOCs) that may cause smog by contributing to ground-level ozone formation. The claim is deceptive because, absent further qualification, it is likely to convey to consumers that use of the product will not result in air pollution or other harm to the environment.

(b) **Degradable/Biodegradable/Photodegradable.** It is deceptive to misrepresent, directly or by implication, that a product or package is degradable, biodegradable or photodegradable. An unqualified claim that a product or package is degradable, biodegradable or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, i.e., decompose into elements found in nature within reasonable short period of time after customary disposal. Claims of degradability, biodegradability or photodegradability should be qualified to the extent necessary to avoid consumer deception about:

(1) The product or package's ability to degrade in the environment where it is customarily disposed; and

(2) The rate and extent of degradation.

**Example 1:** A trash bag is marketed as "degradable," which no qualification or other disclosure. The marketer relies on soil burial tests to show that the product will decompose in the presence of water and oxygen. The trash bags are customarily disposed of in incineration facilities or at sanitary landfills that are managed in a way that inhibits degradation by minimizing moisture and oxygen. Degradation will be irrelevant for those trash bags that are incinerated and, for those disposed of in landfills, the marketer does not possess adequate substantiation that the bags will degrade in a reasonably short period of time in a landfill. The claim is therefore deceptive.

**Example 2:** A commercial agricultural plastic mulch film is advertised as "Photodegradable" and qualified with the phrase, "Will break down into small pieces if left uncovered in sunlight." The claim is supported by competent and reliable scientific evidence that the product will break down in a reasonably short period of time after being exposed to sunlight and into

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

**Example 2:** A soap or shampoo product is advertised as "biodegradable," with no qualification or other disclosure. The manufacturer has competent and reliable scientific evidence demonstrating that the product, which is customarily disposed of in sewage systems, will break down and decompose into elements found in nature in a short period of time. The claim is not deceptive.

(c) **Compostable.** It is deceptive to misrepresent, directly or by implication, that a product or package is compostable. An unqualified claim that a product or package is compostable should be substantiated by competent and reliable scientific evidence that all the materials in the product or package will break down into, or otherwise become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner, in an appropriate composting program or facility, or in a home compost pile or device. Claims of compostability should be qualified to the extent necessary to avoid consumer deception. An unqualified claim may be deceptive.

(1) If municipal composting facilities are not available to a substantial majority of consumers or communities where the package is sold;

(2) If the claim misleads consumers about the environmental benefit provided when the product is disposed of in a landfill; or

(3) If consumers misunderstand the claim to mean that the package can be safely composted in their home compost pile or device, when in fact it cannot.

**Example 1:** A manufacturer indicates that its unbleached coffee filter is compostable. The unqualified claim is not deceptive provided the manufacturer can substantiate that the filter can be converted safely to usable compost in a timely manner in a home compost pile or device, as well as in an appropriate composting program or facility.

**Example 2:** A lawn and leaf bag is labeled as "Compostable in California Municipal Yard Waste Composting Facilities." The bag contains toxic ingredients that are released into the compost material as the bag breaks down. The claim is deceptive if the presence of these toxic ingredients prevents the compost from being usable.

**Example 3:** A manufacturer indicates that its paper plate is suitable for home composting. If the manufacturer possesses substantiation for claiming that the paper plate can be converted safely to usable compost in a home compost pile or device, this claim is not deceptive even if no municipal composting facilities exist.

**Example 4:** A manufacturer makes an unqualified claim that its package is compostable. Although municipal composting facilities exist where the product is sold, the package will not break down into usable compost in a home compost pile or device. To avoid deception, the manufacturer should disclose that the package is not suitable for home composting.

**Example 5:** A nationally marketed lawn and leaf bag is labeled "compostable." Also printed on the bag is a disclosure that the bag is not designed for use in home compost piles. The bags are in fact composted in municipal yard waste composting programs in many communities around the country, but such programs are not available to a substantial majority of consumers where the bag is sold. The claim is deceptive since reasonable consumers living in areas not served by municipal yard waste programs may understand the reference to mean that composting facilities accepting the bags are available in their area. To avoid deception, the claim should be qualified to indicate the limited availability of such programs, for example, by stating, "Appropriate facilities may not exist in your area." Other examples of adequate qualification of the claim include providing the approximate percentage of communities or the population for which such programs are available.

**Example 6:** A manufacturer sells a disposable diaper mat bears the legend, "This diaper can be composted where municipal solid waste composting facilities exist. There are currently [X number of] municipal solid waste composting facilities across the country." The claim is not deceptive, assuming that composting facilities are available as claimed and the manufacturer can substantiate that the diaper can be converted safely to usable compost in municipal solid waste composting facilities.

**Example 7:** A manufacturer markets yard waste bags only to consumers residing in particular geographic areas served by county yard waste composting programs. The bags meet specifications for these programs and are labeled, "Compostable Yard Waste Bag for County Composting Programs." The claim is not deceptive, because the bags are compostable where they are sold, so qualification is required to indicate the limited availability of composting facilities.

(d) **Recyclable.** It is deceptive to misrepresent, directly or by implication, that a product or package is recyclable. A product or package should not be marketed as recyclable unless it can be collected, separated or otherwise recovered from the solid waste stream for use in the form of raw materials, in the manufacture or assembly of a new package or product. Unqualified claims of recyclability for a product or package may be made if the entire product or package, excluding minor incidental components, is recyclable. For products or packages that are made of both recyclable and non-recyclable components, the recyclable claim should be adequately qualified to avoid consumer deception about which

portions or components of the product or package are recyclable. Claims of recyclability should be qualified to the extent necessary to avoid consumer deception about any limited availability of recycling programs and collection sites, if an incidental component significantly limits the ability to recycle the product, the claim would be deceptive. A product or package that is made from recyclable material, but because of its shape, size or some other attribute, is not accepted in recycling programs for such material, should not be marketed as recyclable.

**Example 1:** A packaged product is labeled with an unqualified claim, "recyclable." It is unclear from the type of product and other context whether the claim refers to the product or its package. The unqualified claim is likely to convey to reasonable consumers that all of both the product and its packaging that remain after normal use of the product, except for minor, incidental components, can be recycled. Unless such a message can be substantiated, the claim should be qualified to indicate what portions are recyclable.

**Example 2:** A plastic package is labeled on the bottom with the Society of the Plastic Industry (SPI) code, consisting of a design of arrows in a triangular shape containing a number and abbreviation identifying the component plastic resin. Without more, the use of the SPI symbol for similar industry codes on the bottom of the package, or in a similarly inconspicuous location, does not constitute a claim of recyclability.

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

**Example 4:** A nationally marketed bottle bears the unqualified statement that it is "recyclable." Collection sites for recycling the material in question are not available to a substantial majority of consumers or communities, although collection sites are established in a significant percentage of communities or available to a significant percentage of the population. The unqualified claim is deceptive since, unless evidence shows otherwise, reasonable consumers living in communities not served by programs may conclude that recycling programs for the material are available in their area. To avoid deception, the claim should be qualified to indicate the limited availability of programs, for example, by stating, "Check to see if recycling facilities exist in your area." Other examples of adequate qualifications of the claim include providing the approximate percentage of communities or the population to whom programs are available.

**Example 5:** A soda bottle is marketed nationally and labeled, "Recyclable where facilities exist." Recycling programs for material of this type and size are available in a significant percentage of communities or to a significant percentage of the population, but are not available to a substantial majority of

consumers. The claim is deceptive since, unless evidence shows otherwise, reasonable consumers living in communities not served by programs may understand this phrase to mean that programs are available in their area. To avoid deception, the claim should be further qualified to indicate the limited availability of programs, for example, by using any of the approaches set forth in Example 4 above.

**Example 4:** A plastic detergent bottle is marketed as follows: "Recyclable in the few communities with facilities for colored HDPE bottles." Collection sites for recycling the container have been established in a half-dozen major metropolitan areas. This disclosure illustrates one approach to qualifying a claim adequately to prevent deception about the limited availability of recycling programs where collection facilities are not established in a significant percentage of communities or available to a significant percentage of the population.

Other examples of adequate qualification of the claim include providing the number of communities with programs, or the percentage of communities or the population to which programs are available.

**Example 7:** A label claims that the package "includes some recyclable material." The package is composed of four layers of different materials, bonded together. One of the layers is made from the recyclable material, but the others are not. While programs for recycling this type of material are available to a substantial majority of consumers, only a few of those programs have the capability to separate out the recyclable layer. Even though it is technologically possible to separate the layers, the claim is not adequately qualified to avoid consumer deception. An appropriately qualified claim would be, "includes material recyclable in the few communities that collect multi-layer products." Other examples of adequate qualification of the claim include providing the number of communities with programs, or the percentage of communities or the population to which programs are available.

**Example 8:** A product is marketed as having a "recyclable" container. The product is distributed and advertised only in Missouri. Collection sites for recycling the container are available to a substantial majority of Missouri residents, but are not yet available nationally. Because programs are generally available where the product is marketed, the unqualified claim does not deceive consumers about the limited availability of recycling programs.

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

distinctions may be made between pre-consumer and post-consumer materials. Where such distinctions are asserted, any express or implied claim about the specific pre-consumer or post-consumer content of a product or package must be substantiated. It is deceptive to misrepresent, directly or by implication, that a product or package is made of recycled material. Unqualified claims of recycled content may be made only if the entire product or package, excluding minor, incidental components, is made from recycled material. For products or packages that are only partially made of recycled material, a recycled claim should be adequately qualified to avoid consumer deception about the amount by weight of recycled content in the finished product or package.

**Example 1:** A manufacturer routinely collects spilled raw material and scraps from remaining finished products. After a minimal amount of reprocessing, the manufacturer combines the spills and scraps with virgin material for use in further production of the same product. A claim that the product contains recycled material is deceptive since the spills and scraps to which the claim refers are normally reused by industry within the original manufacturing process, and would not normally have entered the waste stream.

**Example 2:** A manufacturer purchases material from a firm that collects discarded material from other manufacturers and resells it. All of the material was diverted from the solid waste stream and is not normally reused by industry within the original manufacturing process. The manufacturer includes the weight of this material in its calculations of the recycled content of its products. A claim of recycled content based on this calculation is not deceptive because, absent the purchase and reuse of this material, it would have entered the waste stream.

**Example 3:** A greeting card is composed 30% by weight of paper collected from consumers after use of a paper product, and 30% by weight of paper that was generated after completion of the paper-making process, diverted from the solid waste stream, and otherwise would not normally have been reused in the original manufacturing process. The marketer of the card may claim either that the product "contains 50% recycled material" or may identify the specific pre-consumer and/or post-consumer content by stating, for example, that the product "contains 50% total recycled material, 30% of which is post-consumer material."

**Example 4:** A package with 20% recycled content by weight is labeled as containing "20% recycled paper." Some of the recycled content was composed of material collected from consumers after use of the original product. The rest was composed of overrun newspaper stock never sold to customers. The claim is not deceptive.

**Example 5:** A product in a multi-component package, such as a paperboard box in a shrink-wrapped plastic cover, indicates that it has recycled packaging. The paperboard box is made entirely of recycled material, but

the plastic cover is not. The claim is deceptive since, without qualification, it suggests that both components are recycled. A claim limited to the paperboard box would not be deceptive.

**Example 6:** A package is made from layers of foil, plastic and paper laminated together, although the layers are indistinguishable to consumers. The label claims 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 paper product is labeled as containing "100% recycled fiber." The claim is not deceptive if the advertiser can substantiate the conclusion that 100% by weight of the fiber in the finished product is recycled.

**Example 8:** A frozen dinner is marketed in a package composed of a cardboard box over a plastic tray. The package bears the legend, "Package made from 30% recycled material." Each packaging component amounts to one-half the weight of the total package. The box is 20% recycled content by weight, while the plastic tray is 40% recycled content by weight. The claim is not deceptive since the average amount of recycled material is 30%.

**Example 9:** A paper greeting card is labeled as containing 50% by weight recycled content. The seller purchases paper stock from several sources and the amount of recycled material 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.

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

**Example 1:** An ad claims that solid waste created by disposal of the advertiser's packaging is "now 10% less than our previous package." The claim is not deceptive if the advertiser has substantiation that shows that disposal of the current package contributes 10% less waste by weight or volume to the solid waste stream when compared with the immediately preceding version of the package.

**Example 2:** An advertiser notes that disposal of its product generates "10% less waste." The claim is ambiguous. Depending on contextual factors, it could be a comparison either to the immediately preceding product or to a competitor's product. The "10% less waste" reference is deceptive unless the seller clarifies which comparison is intended and substantiates that comparison or substantiates both possible interpretations of the claim.

(g) *Refillable*. It is deceptive to misrepresent, directly or by implication, that a package is refillable. An unqualified refillable claim should not be asserted unless a system is provided for:

- (1) The collection and return of the package for refill; or
  - (2) The later refill of the package by consumers with product subsequently sold in another package.
- A package should not be marketed with an unqualified refillable claim, if it is up to the consumer to find new ways to refill the package.

**Example 1:** A container is labeled "refillable x times." The manufacturer has the capability to refill returned containers and can show that the container will withstand being refilled at least x times. The manufacturer, however, has established no collection program. The unqualified claim is deceptive because there is no means for collection and return of the container to the manufacturer for refill.

**Example 2:** A bottle of fabric softener states that it is in a "handy refillable container." The manufacturer also sells a large-sized container that indicates that the consumer is expected to use it to refill the smaller container. The manufacturer sells the large-sized container in the same market areas where it sells the small container. The claim is not deceptive because there is a means for consumers to refill the smaller container from larger containers of the same product.

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

**Example 1:** A product is labeled "ozone friendly." The claim is deceptive if the product contains any ozone-depleting substance, including those substances listed as Class I or Class II chemicals in title VI of the Clean Air Act Amendments of 1990, Public Law No. 101-549, or others subsequently designated by EPA as ozone-depleting substances. Class I chemicals currently listed in title VI are chlorofluorocarbons (CFCs), halons, carbon tetrachloride and 1,1,1-trichloroethane. Class II chemicals currently listed in title VI are hydrochlorofluorocarbons (HCFCs).

**Example 2:** The seller of an aerosol product makes an unqualified claim that its product "Contains no CFCs." Although the product does not contain CFCs, it does contain HCFC-22, another ozone depleting ingredient. Because the claim "Contains no CFCs" may imply to reasonable consumers that the product does not harm the ozone layer, the claim is deceptive.

**Example 3:** A product is labeled "This product is 55% less damaging to the ozone layer than past formulations that contained CFCs." The manufacturer has substituted HCFCs for CFC-12, and can substantiate that

this substitution will result in 55% less ozone depletion. The qualified comparative claim is not likely to be deceptive.

**§ 260.3 Environmental assessment.**

National Environmental Policy Act. In accordance with § 1.83 of the FTC's Procedures and Rules of Practice<sup>1</sup> and § 1501.3 of the Council on Environmental Quality's regulations for implementing the procedural provisions of National Environmental Policy Act, 42 U.S.C. 4321 et seq. (1969),<sup>2</sup> the Commission has prepared an environmental assessment for purposes of providing sufficient evidence and analysis to determine whether issuing the Guides for the Use of Environmental Marketing Claims requires preparation of an environmental impact statement or a finding of no significant impact. After careful study, the Commission concludes that issuance of the Guides will not have a significant impact on the environment and that any such impact "would be so uncertain that environmental analysis would be based on speculation."<sup>3</sup> An environmental impact statement is therefore not required. This conclusion is based on the findings in the environmental assessment that issuance of the guides would have no quantifiable environmental impact because the guides are voluntary in nature, do not preempt inconsistent state laws, are based on the FTC's deception policy, and, when used in conjunction with the Commission's policy of case-by-case enforcement, are intended to aid compliance with section 5(a) of the FTC Act as that Act applies to environmental marketing claims. Furthermore, the guides are neither motivated by nor intended to influence environmental policy decisions. The guides also do not impose standards on manufacturing or waste disposal methods. Consumer behavior as a result of the issuance of guides may change but any such change cannot be quantified, or even reasonably estimated, since those decisions would be influenced by many other variables, in addition to advertising claims. Industry response to the guides, beyond modification of environmental marketing claims, is also impossible to predict or quantify. The alternatives to Commission guides described in the environmental assessment, both within and without the Commission, would also have, at most, only an indirect and highly speculative impact on the environment.

<sup>1</sup> 16 CFR 1.83 (revised as of January 1, 1991).  
<sup>2</sup> 40 CFR 1501.3 (1991).  
<sup>3</sup> 16 CFR 1.83(a).

By direction of the Commission,  
Commissioner, Azcuenaga dissenting.  
Donald J. Clark,  
Secretary.

**DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUEENAGA CONCERNING ISSUANCE OF COMMISSION GUIDES ON ENVIRONMENTAL MARKETING CLAIMS**

Today the Commission issues guides on environmental marketing claims. The guides should prove useful to the business and law enforcement communities and to consumers, that is, to all those who make, analyze or rely on environmental claims in the advertising and marketing of goods and services. In an area that seems always to prove more difficult than initial impressions suggest, the Commission should be commended for producing a clear, careful and balanced document.

It has been my pleasure to work with my colleagues and Commission staff in this important and difficult endeavor and with the government agencies and other concerned groups and individuals who have participated so generously and constructively in this process. With regret, I nevertheless find I must dissent.

Basic to the exercise of the responsibility of my office is the obligation to act within the authority conferred on that office and, as I understand that obligation, it is not satisfied by forecasting that a challenge is unlikely or by deferring to the courts to decide on review whether the exercise lies within the bounds of the authority, but rather is my obligation to decide in the first instance and without regard to the prevailing political climate in which that decision will be received. As I read the law, the Commission has no authority to issue these guides, as written, without first employing the rulemaking procedures of section 18(b)(1) of the FTC Act, which it has not done.

Section 18(a)(1) of the FTC Act, 15 U.S.C. 57(a)(1), provides that the Commission may prescribe:

- (A) interpretative rules and general statements of policy with respect to unfair or deceptive acts or practices . . . and
- (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices.

Section 18(b)(1) directs that "when prescribing a rule under subsection (a)(1)(B), the Commission is to proceed in accordance with the notice and comment requirements of section 553 of the Administrative Procedure Act and shall also follow the more extensive procedures set forth in section 18 that often are referred to as 'Magnuson-Moss rulemaking.'"

As the guides expressly state, the majority of the Commission does not view its guides as having the force and effect of law but as explanations of existing statutory terms and obligations. Under the Administrative Procedure Act, 5 U.S.C. 553, and under section 18 of the FTC Act, therefore, the Commission apparently would categorize its guides as "interpretive" (or "interpretative") rules or policy statements rather than "legislative" rules or "rules which define with specificity

deceptive acts or practices." I cannot agree. By stating definitively, for example, that a particular act "is deceptive" or that particular conduct "would be deceptive," or that under specified circumstances, firms "must" or "should" act in a particular way, language that appears throughout the document, I believe that the document has "defined with specificity" a deceptive act or practice as set forth in section 18(a)(1)(B). Since the enactment of the Magnuson-Moss Act in 1973, the Commission has been empowered to take such an action only if it first adheres to Magnuson-Moss rulemaking procedures.

If the Commission in issuing its guides were relying on a body of past precedent, I might be persuaded that my colleagues were correct in their assessment and that the decisive "guidances" in the document simply explicate existing Commission case law and policy. In issuing its Deception Statement in 1981, for example, the Commission reviewed decided cases to synthesize principles, but that is not the case here. The Commission's case law on environmental claims consists almost entirely of consent agreements and orders issued without adjudicative records or admissions of liability. These agreements and orders may convey to the public some sense of what the Commission is likely to do in other similar situations, but they are not binding precedent.

Were I entirely alone in my concern over the need to distinguish between interpretive and legislative rules in issuing some form of guidance on environmental claims, I might be inclined to accede to the position of the majority. Again, this is not the case. Although the courts, particularly in the District of Columbia Circuit, have not instructed agencies unambiguously on how they should distinguish interpretive and legislative rules, recent decisions suggest that my concern is not without validity. At the least, they reflect judicial concern that agencies attend to this question with care in reaching their regulatory decisions and judicial unwillingness blindly to acquiesce in agencies' characterizations of their actions. In short, saying that these are guides and not rules does not make it so.

Even in the presence of express language disavowing agency intent to bind either itself or the public, courts in this circuit have considered whether allegedly interpretive rules are sufficiently mandatory and definitive to render them legislative in nature. See *Community Nutrition Institute v. Young*, 813 F.2d 943, 948 (D.C. Cir. 1987) (noting that it is appropriate to "give some, albeit not overwhelming, deference to an agency's characterization of its statement" and refusing to sustain FDA rules because the agency failed to follow the appropriate rulemaking process); *Arrow Air, Inc. v. Dale*, 784 F.2d 1118, 1122 (D.C. Cir. 1986) (listing agency intent as only one among other factors differentiating interpretive and legislative rules); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1587, 1585 (D.C. Cir.

<sup>1</sup> Guides and trade practice rules issued before the enactment of section 18 and before the judicial decisions discussed below contain similarly defective language.

1984) (*en banc*), cert. denied, 471 U.S. 1074 (1985) (upholding agency's interpretation but finding agency's own label relevant but not dispositive).

The likelihood, in whatever degree, that what the Commission calls guides are in fact rules under section 18(a)(1)(B) could easily have been avoided without diminishing the basic guidance the Commission seeks to offer. The Horizontal Merger Guidelines recently issued by the Commission and the Department of Justice, for example, refrain from definitive conclusions about what does or does not violate the law in various ways, one of which is by using the qualifier "likely." For example, in discussing the significance of post-merger market concentration measured by the Herfindahl-Hirschman Index ("HHI"), the Merger Guidelines say, "Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise." 1982 CCH Trade Cas. ¶ 13,104 at 20,577-8 (emphasis added).

A similar approach could be used here. Instead of saying that a particular claim "is" or "is not" deceptive, the environmental guides could have said that a particular claim "is likely" or "is unlikely" to be deceptive. Although adding the qualifiers "likely" or "unlikely" sounds more tentative, if that language were used throughout the document, the basic message of the guides, which is to indicate the Commission's likely response in various hypothetical situations, would remain. If the Commission prefers the more definitive language because indeed it wants to be definitive about what is or is not

<sup>2</sup> Although, as already noted, the law of the circuit is not settled, there is a serious possibility, and in my opinion likelihood, that the Court of Appeals for the District of Columbia Circuit, at least, would find that portions, if not all, of the guides just issued are legislative rules rather than interpretive rules or policy statements. Compare the *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1987), quoting *General Motors Corp. v. Ruckelshaus*, *supra*, and *Citizens To Save Spencer County v. EPA*, 400 F.2d 844, 873 and n. 153 (D.C. Cir. 1979) (distinction between interpretive and legislative rules depends on whether document "simply states what the administrative agency thinks the statute means, and only 'reminds' affected parties of existing duties" or demonstrates that "the agency intends to create new law, rights or duties"), with *Alaska v. DOT*, 366 F.2d 441, 446-47 (D.C. Cir. 1969), and *Community Nutrition Institute v. Young*, *supra* at 947-49, (distinction depends on several factors including use of mandatory language, inclusion of exception process, practical application and limitations placed on agency discretion).

<sup>3</sup> Magnuson-Moss rulemaking procedures do not apply to antitrust rules, but the notice and comment rulemaking requirements in the Administrative Procedure Act ("APA") apply and presumably would have precluded the Commission and the Department from issuing the merger guidelines had they purported to bind the government or the public by requiring or prescribing particular conduct without first providing for public notice and comment. When it recently issued revisions to the so-called *Prod Meyer Guides* (Guides for Advertising Allowances and Other Merchandising Payments and Services), 55 FR 23 6517 (Aug. 17, 1990), under the antitrust laws, the Commission employed the appropriate APA rulemaking procedures.

deceptive, then it seems to me that the Commission runs squarely into the problem that it is fact-levelling rules rather than guidelines—confess some puzzlement about whether the Commission intends to be definitive (and issue rules) or to indicate what it is likely to do (and issue guides), but even more than that, I regret that the Commission has not seen fit to make this single change, which would have enabled me to join in making this a unanimous document.

Second, I differ from the Commission in its decision not to place the guides on the public record for a short period of time to enable the public to comment on them. Although we have sought to obtain accurate information and to consider the issues thoroughly, it is conceivable, nevertheless, that someone outside the agency might offer useful observations and suggestions for improvement. The Commission has obtained comment on the merits of issuing guidance and on the issues that such guides should address, but it has not provided to those affected by the guides an opportunity to assess the economic benefits and costs of the actual provisions or to call to our attention provisions that may cause unintended effects. A short, appropriately focused comment period on the guides could have coincided with the public comment period on the Environmental Assessment that is required under the National Environmental Policy Act of 1969, 42 U.S.C. 4321, as amended.

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### COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 30 and 32

Offer and Sale of Foreign Exchange-Traded Options, and Foreign Exchange-Traded Futures Contracts Based on Foreign Stock Indices and Foreign Government Debt, to Persons Located Outside the United States

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

**SUMMARY:** Pursuant to its authority under sections 2(a)(1)(B), 4(b) and 4c(b) of the Commodity Exchange Act ("CEA" or "Act") and rules 32.11 and 30.2(a), and its determination that granting relief would not be inconsistent with the Act or the public interest, the Commodity Futures Trading Commission ("Commission") is providing relief to permit:

- (1) Futures commission merchants ("FCMs") to solicit and accept orders and funds for foreign exchange-traded

<sup>1</sup> Sections 2(a)(1)(B), 4(b) and 4c(b) of U.S.C. 229(b) and 6c(b).  
<sup>2</sup> 17 CFR 32.11 and 30.2(a) (1982).