



December 10, 2010

VIA ELECTRONIC FILING

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex)
600 Pennsylvania Avenue, NW
Washington, DC 20580

**Re: Proposed Revisions to the Guides for the Use of Environmental Marketing Claims,
75 Fed. Reg. 63552 (Oct. 15, 2010)**

Dear Secretary Clark:

The Battery Council International (BCI) is pleased to submit the following comments on the October 15, 2010 proposal to revise the FTC's Guides for the Use of Environmental Marketing Claims, codified at 16 C.F.R. Part 260. 75 Fed. Reg. 63552. These comments address certain proposed revisions to the Guides that BCI believes could inadvertently frustrate the longstanding and highly successful industry endorsed and promoted collection and recycling system for vehicular and industrial (motive power and stationary reserve power) lead-acid batteries.¹

Background

BCI is a non-profit trade association whose members are engaged in the manufacture, distribution and reclamation of lead batteries. BCI members account for over 98% of the U.S. lead battery production and over 80% of its recycling capacity (*i.e.*, secondary lead smelting). Our industry promotes lead acid battery recycling in the U.S. by collecting and recycling lead batteries, encouraging the enactment of mandatory recycling laws and supporting ongoing consumer education efforts, including labeling batteries with a voluntary, industry-developed recycling logo. Spanning 2004 to 2008, the U.S. recycling rate for lead from lead-acid batteries was 96.0%, which is consistent with the results of prior studies of lead-acid battery recycling.²

With BCI's strong support, thirty-nine states have enacted laws that assure "cradle to grave" stewardship of lead batteries. These laws prohibit municipal solid waste landfill or

¹ Comments addressing the recycling program for consumer type small, sealed lead-acid batteries and certain other rechargeable batteries are being submitted by the Rechargeable Battery Recycling Corporation and PRBA – The Rechargeable Battery Association.

² See Smith, Bucklin and Associates, Inc., BCI National Recycling Rate Study (August 2009).

incinerator disposal of used batteries and require battery retailers to accept used batteries from customers, and assure that the batteries are transferred back through the distribution chain for recycling.³ Battery manufacturers and distributors, in turn, must accept the used batteries from retailers and transport them to recycling facilities at their own expense. The reverse distribution system that industry has devised to satisfy these legal requirements prevents used batteries from accumulating at retail stores and other businesses – an unsafe situation that contributed to the creation of many early Superfund sites. It also assures that batteries are recycled at very high levels regardless of the price of lead.

Recycling used batteries also has significant environmental benefits. On average, a car battery contains 21 pounds of lead and a boat battery 30 pounds of lead. Thus, each car or boat battery that is recycled means 20-30 fewer pounds of lead in the waste stream and reduced environmental impacts from mining and processing virgin lead. Because the plastic in the battery cases is reclaimed during the recycling process, lead-acid battery recycling also reduces plastic waste and production. With over 100 million lead-acid car batteries and nearly 7 million lead-acid boat batteries sold into the U.S. each year, ensuring that they are recycled and not disposed of is of no small consequence to the environment.

Over twenty years ago, to promote recycling, the lead battery industry adopted a voluntary label for use on lead-acid batteries that consists of the words “LEAD-RETURN-RECYCLE” surrounding the three-chasing arrows. The Federal Mercury Containing and Rechargeable Battery Management Act enacted in 1996 (42 U.S.C. § 14301, *et seq.*) endorses the display of this label.⁴ Several of the state laws mentioned above similarly require that battery labels and/or retail signs bear the three chasing arrows symbol to indicate the recyclability of the product.

Specific Comments

1. Battery Act Labels

As mentioned above, the FTC’s current Green Guides contain a footnote (footnote 4) stating that “Batteries labeled in accordance with the Battery Act are deemed to be in compliance with these guides.” This same footnote is carried over, without substantive revision,⁵ to the proposed Green Guides (as footnote 3). BCI supports this revision.

2. Qualifying Three-Chasing-Arrows Symbols

Example 9 to Section 260.12 states that use of the three-chasing-arrows recycling symbol without explanation is likely to convey that the labeled product is both recyclable and recycled.

³ An additional 5 states have more narrow laws that strictly prohibit municipal solid waste disposal.

⁴ The referenced federal statute requires that certain small, sealed lead-acid batteries (*i.e.*, non-vehicular and non-industrial) be labeled with the words “LEAD-RETURN-RECYCLE” or “Pb” and the phrase “BATTERY MUST BE RECYCLED”, or use an EPA-approved alternative label.

⁵ The proposal carries over approval of the Battery Act labels, but it removes the specific label content descriptions.

As explained above, the voluntary industry recycling logo for vehicular and industrial-type lead-acid batteries incorporates the three-chasing-arrows recycling symbol. It is placed on batteries that are recyclable, but BCI members cannot be assured of recycled content – even though it is typically present in most types of lead batteries. To qualify that the claim is a recyclable claim and not a recycled content claim, the industry logo adds the directive to “RETURN” and “RECYCLE” the battery. Due to this clear qualification, we believe there is no claim or implication that the battery contains recycled content. If for any reason the Commission disagrees, we request that it explain that disagreement in the final guidelines or the explanatory text accompanying it.

3. Substantial Majority

Section 260.11 of the proposed Guides states that an unqualified recyclable claim can be made only when recycling facilities are available to “a substantial majority” of consumers or communities where the item is sold. A new footnote 2 of the proposed Guides states that “Commission staff has informally interpreted the term ‘substantial majority,’ as used in this context, to mean at least 60 percent.” Thus, the Guides appear to signal that an unqualified recyclable claim can be made only when recycling facilities are available to at least 60% of consumers or communities where the item is sold.

BCI believes that the reverse distribution collection program for lead-acid batteries would satisfy any “substantial majority” test applied to it with little difficulty. As described above, 39 states prohibit disposal of lead-acid batteries and require retailer and distributor/manufacturer collection. Thus, it is industry practice in the U.S., even in the states with no laws, to collect used batteries from consumers wherever new batteries are sold. Battery manufacturers and distributors in turn collect used batteries from retailers for delivery to a recycler, often at the same time they drop off new batteries. This program has a proven track record, as confirmed by BCI’s periodic recycling rate study that when last conducted yielded a recycle rate of 96%. See footnote 2 of these comments above.

Nonetheless, BCI is concerned about the ambiguity of the statement in the new footnote. Among our concerns are these: (1) Does the proposed standard require a program to be available to “at least 60 percent of consumers in any city where the item is sold,” or to “at least 60 percent of consumers in any state where the item is sold,” or to “at least 60 percent of consumers anywhere in the U.S.”?; (2) What does it mean for a collection program to be “available to consumers?”; (3) Do consumer mail-in programs meet the standard, or are drop-off or even curbside collection programs required?; and (4) How close in proximity must each collection site be, and to what must they be close to?

Similar concerns exist with regard to the “at least 60 percent of communities” threshold. Does this mean a recycling facility must be available to “at least 60 percent of communities in the city where the item is sold,” or to “at least 60 percent of communities in the state where the item is sold, or to “at least 60 percent of communities in the U.S.”? Moreover, the term “community” is not defined in the rule, nor does Merriam-Webster’s dictionary offer any

definitions that are meaningful in the context of the Guides.⁶ Again, do mail-in programs meet the standard, or are drop-off or even curbside collection programs required?

We do not believe that providing further examples or text as to the meaning of these phrases is likely to be helpful. To the contrary, BCI urges that “substantial majority” is best left undefined (as in the current Guides), with interpretation left to the discretion of reasonable program operators and the FTC on a case-by-case basis. We do not believe a one size fits all definition of “substantial majority” can be fairly applied to all recycling programs. Therefore, BCI recommends that the FTC decline to explicitly adopt such a definition in the Guides. We also do not believe that the FTC is the most appropriate agency to develop detailed standards for recycling programs, which is what fleshing out the definition of “substantial majority” would entail.

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BCI appreciates this opportunity to provide comments on the FTC’s proposed revisions to the Guides for the Use of Environmental Marketing Claims. If you have questions about this submittal, please contact BCI’s consultant on this matter, Ms. Saskia Mooney, Senior Regulatory Analyst, Wiley Rein LLP, at 202-719-4107 or smooney@wileyrein.com.

Respectfully submitted,

TL SM

Timothy Lafond, P.E.
Chair, Environmental Committee

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⁶ The Merriam-Webster dictionary contains the following definition for “community” (plural communities):
1: a unified body of individuals: as *a* : state, commonwealth *b* : the people with common interests living in a particular area; *broadly* : the area itself <the problems of a large *community*> *c* : an interacting population of various kinds of individuals (as species) in a common location *d* : a group of people with a common characteristic or interest living together within a larger society <a *community* of retired persons> *e* : a group linked by a common policy *f* : a body of persons or nations having a common history or common social, economic, and political interests <the international *community*> *g* : a body of persons of common and especially professional interests scattered through a larger society <the academic *community*>
2: society at large
3 *a* : joint ownership or participation <*community* of goods> *b* : common character : likeness <*community* of interests> *c* : social activity : fellowship *d* : a social state or condition
Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/community> (last visited Dec. 8, 2010).