



December 10, 2010

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:

1. Introduction

On October 15, 2010, the Federal Trade Commission (“FTC”) issued proposed revisions to its Guides for the Use of Environmental Marketing Claims (“Guides” or “Green Guides”), which are codified at 16 C.F.R. Part 260. *75 Fed. Reg. 63552*. These comments address how the FTC’s proposed revisions may impact the battery and cell phone recycling program (“Call2Recycle[®]”) operated by the Rechargeable Battery Recycling Corporation (“RBRC”), highlighting certain cases where the revisions may inadvertently frustrate some of our labeling practices that are required by Federal law and necessary to facilitate recycling.

2. Background

a. RBRC

RBRC is a non-profit public service organization dedicated to recycling used rechargeable batteries and cell phones. RBRC collects the Nickel Cadmium (Ni-Cd), Nickel Metal Hydride (Ni-MH), Lithium Ion (Li-ion), and Small Sealed Lead-Acid (“SSLA”) rechargeable batteries that power a variety of portable electronic products such as cellular and cordless phones, power tools, laptop computers, camcorders, two-way radios, and digital cameras. Through our national program, Call2Recycle[®], and with the help of our retail and community partners, consumers can now recycle covered batteries and cell phones for free through 50,519 convenient collection outlets located across the U.S.¹ More information on our program is available at www.call2recycle.com.

The Call2Recycle[®] program is probably the most successful industry-sponsored product stewardship program in the world. It has resulted in the recycling of 60 million pounds of

¹ The program also operates in Canada, through RBRC Canada.



rechargeable batteries and is the major reason that proponents of state product stewardship legislation have shifted their attention away from batteries and small battery-powered devices to other products.² The entire cost of the Call2Recycle[®] program is paid for by the fees RBRC collects from battery and battery-powered product manufacturers, who license the RBRC Seal for use on their batteries, products, and packaging. The seal itself is a circle consisting of a black outer border with the words “RECYCLE” and “1-800-8-BATTERY” superimposed in white. Within this outer border is an inner circle that contains three chasing arrows surrounding a battery, the acronym “RBRC,” and a chemistry symbol (Ni-Cd, Ni-MH, Li-ion or Pb), all on a background that varies in color by battery chemistry.

Under the license agreement with RBRC, manufacturers commit to print the RBRC Seal on their batteries, products, and packaging. This indicates participation in the Call2Recycle[®] program, advertises it, and conveys basic program information to consumers. RBRC also encourages licensees (*e.g.*, manufacturers) and retailers to use the RBRC Seal in informational, promotional, and display materials relating to batteries and products covered by the Call2Recycle[®] program.

b. Federal and State Mandates

At the Federal level, the “Mercury-Containing and Rechargeable Battery Management Act” (42 U.S.C. § 14301, *et seq.*) (“Battery Act”) sets forth labeling requirements for Ni-Cd and SSLA batteries. The current and proposed Guides provide blanket approval of these labels. Covered batteries must be labeled with: 1) the “three chasing arrows”; and 2) the words “Ni-Cd” and “BATTERY MUST BE RECYCLED OR DISPOSED OF PROPERLY”, or “Pb”, or the words “LEAD”, “RETURN” and “RECYCLE”, and the phrase “BATTERY MUST BE RECYCLED”, as appropriate. *See* 42 U.S.C. § 14322(b). The statute also gives EPA the authority to approve alternative labeling. EPA has certified the RBRC Seal as an alternative label for Ni-Cd and SSLA batteries, and thus the RBRC Seal on those batteries conforms to the FTC Guides. *See* 42 U.S.C. § 14322(b) and 63 *Fed. Reg.* 50569 (Sept. 22, 1998). As explained below, however, the RBRC Seal used on other types of rechargeable batteries (*e.g.*, Li-ion or Ni-MH batteries) may need to meet the standards established by the FTC.

Eight states and one city require manufacturers and/or sellers of rechargeable batteries and/or rechargeable battery-powered products to operate recycling programs. These jurisdictions are California, Florida, Iowa, Maine, Maryland, Minnesota, New Jersey, Vermont, and New York City. By supporting RBRC’s Call2Recycle[®] program, RBRC licensees meet these jurisdictions’ requirements.³ Despite the limited number and scope of these recycling laws,

² So far, the program has already collected over 6 million pounds of batteries in 2010 alone.

³ With the exception of California and New York City, the state recycling laws are limited to Ni-Cd and SSLA batteries. The California recycling law covers SSLA, Ni-Cd, Li-ion, and Ni-MH batteries, and New York City’s law covers all rechargeable batteries, regardless of chemistry. Both jurisdictions’ laws require manufacturers and retailers to educate or convey information to consumers about recycling program availability, which can be conveyed in part, through a battery or product label such as the RBRC Seal. They also require operation of retail collection programs for these rechargeable battery chemistries. *See* Cal. Pub. Res. Code § 42453(b)(1) and (2), and New York City Admin. Code § 16-405(a)(1) and (b)(3).



RBRC voluntarily operates a nationwide collection program for all rechargeable batteries. All battery chemistries are collected together, so the program is equally robust for all battery types.

In sum, the Call2Recycle[®] program and the RBRC Seal satisfy the labeling and collection obligations imposed by Federal law and the laws of several states, and allow operation of a consistent, national collection system.

3. Comments

a. Recyclable Claims

1. 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 percent of consumers or communities where the item is sold.

RBRC is concerned about the ambiguity of these statements and the resulting possibility that producer responsibility programs such as the Call2Recycle[®] program could be criticized for not meeting the “substantial majority” threshold for Li-ion and Ni-MH batteries.⁴ 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.⁵ Again, do mail-in programs meet the standard, or are drop-off or even curbside collection programs required?

⁴ We would have the same concerns regarding Ni-Cd and Pb batteries if the FTC had not granted blanket approval in the proposed Guides to use the RBRC Seal on these battery types.

⁵ 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



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, RBRC 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, RBRC 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.

That said, we believe that RBRC’s Call2Recycle® program would satisfy any “substantial majority” test applied to it with little difficulty. The program is open to retail establishments, institutions (e.g., corporate and government sites), counties and municipalities, and consumers nationwide. Specifically, battery collection sites are available everywhere UPS ground service is provided, which includes all 50 states and Puerto Rico. 31,076 retail sites in the US currently participate in the RBRC box collection program, including companies such as Radio Shack, Lowe’s and Sears, as well as hundreds of independent businesses and municipalities across the country. To become a participating collection establishment and receive a collection box, an interested entity need only be located in the U.S. and contact RBRC. Consumers can easily find the nearest battery collection site by calling the telephone numbers listed on the RBRC Seal (1-800-8-BATTERY and 1-800-822-8837). Alternatively, consumers can get the addresses for the most convenient collection sites by inputting their zip codes on RBRC’s website.

Two highly-populated jurisdictions – California and New York City – mandate that all rechargeable battery retailers collect used batteries, and most of these retailers do so through the RBRC program. Another seven states mandate that manufacturers establish robust recycling programs; in those states, most manufacturers participate in the RBRC program.

RBRC also works hard to ensure that its national collection coverage is continuously growing. When a used collection box is returned to RBRC for batteries to be recycled, a new collection box is automatically sent out. RBRC promotes its program through a sophisticated consumer education campaign and ongoing efforts to recruit new licensees and collection sites. Licensee and retailer use of RBRC promotional materials in advertising and product displays also promotes growth of the program.

Despite the breadth of its program, RBRC is unclear how it would quantify that it meets the 60% “substantial majority” standard. The FTC has not presented, nor could it develop, a

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).



viable and fair formula or other means to make such a determination. RBRC thus again recommends excluding proposed footnote 2 from the Guides altogether.

2. 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,⁶ to the proposed Green Guides (as footnote 3). RBRC supports this revision.

3. 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. As explained above, the RBRC Seal incorporates the three-chasing-arrows symbol. It is placed on batteries that are recyclable, but RBRC cannot be assured of recycled content. To qualify that the claim is a recyclable claim and not a recycled content claim, RBRC adds the directive "RECYCLE" to the seal, a battery graphic and chemistry symbol showing what is to be recycled, and the number "1-800-8-BATTERY" to call for recycling program information, including collection site locations. RBRC's website also makes it abundantly clear that the seal is advertising a recycling program, not recycled content.

The EPA-approved Ni-Cd and SSLA RBRC Seals are deemed, by virtue of the portion of the Guides referenced above, to be in compliance with the current and proposed Guides, but use of the seal with the three-chasing-arrows on Li-ion and Ni-MH batteries may require qualification. RBRC believes that the qualifications described above are more than adequate to convey that its seal, when used on Li-ion and Ni-MH batteries, means the battery is recyclable and not necessarily made of recycled materials. We urge the FTC to confirm that fact.

b. Certifications and Seals of Approval

The FTC is proposing (under a new Section 260.6) that it be considered deceptive or misleading to misrepresent, directly or by implication, that a product, package or service has been endorsed or certified by an independent third-party. The proposed revisions to the Guides further require that "certifications or seals of approval" be qualified to avoid conveying a general environmental benefit claim. RBRC is concerned that the FTC has not sufficiently clarified what constitutes a third-party certification claim or "certifications or seals of approval," and that, therefore, the RBRC Seal may inappropriately be subsumed in this prohibition. To avoid this result, RBRC requests that the FTC add an example to the Guides which shows that third-party certifications or seals of approval do not include use of a licensed seal required for participation in a *bona fide* recycling program, provided the program makes no claims, directly or by implication, that it is a third-party certification or approval organization, or that it is approved by one.

⁶ The proposal carries over approval of the Battery Act labels, but it removes the specific label content descriptions.



The RBRC Seal in no way represents or implies that associated batteries, battery-powered products, or the RBRC program have been endorsed or certified by an independent third-party. RBRC similarly makes no separate claims to be a third-party certification organization, or to have been approved by one. RBRC, which requires its licensees to use the RBRC Seal on licensed batteries and products containing them, is an organization strictly dedicated to operating and promoting its rechargeable battery recycling program. RBRC's activities are limited to administering and operating the RBRC public education, battery collection, and recycling programs, and licensing and administering the RBRC Seal to raise funds for public education, battery collection, and recycling.

The use of the RBRC Seal thus would be a good example to include in the Guides as a mark that does not constitute a third-party certification claim or a seal of approval requiring qualification. The RBRC Seal is used to promote recycling program participation and, in the case of Ni-Cd and SSLA batteries, to comply with Federal law. Unlike the examples in the proposed Guides, such as "GreenLogo" and "Earth Smart," no words in the RBRC Seal are used to suggest a general environmental benefit. Moreover, the direction incorporated in the seal to "RECYCLE", the battery graphic and chemistry symbols showing what is to be recycled, and the 1-800-8-BATTERY information line where collection site locations can be obtained, constitute adequate qualification of any claim that might otherwise be perceived.

V. Conclusion

RBRC hopes that the FTC will fairly address the concerns described in these comments. If you have any questions, please contact RBRC's legal counsel, David B. Weinberg, at 202-719-4042 or dweinberg@wileyrein.com.

Sincerely,

/s/

Carl E. Smith, LEED® AP
President and CEO