



December 10, 2010

RE: "Proposed, Revised Green Guides, 16 CFR Part 260, Project No. P954501

I respectfully submit these comments regarding the Federal Trade Commission's proposed revisions to the *Guides for the Use of Environmental Marketing Claims* on behalf of the Information Technology Industry Council (ITI), a trade association representing 45 major high-tech and electronics manufacturers in the information and communications technology (ICT) sector. Our members are global leaders in all facets of ICT innovation, from hardware to services to software. ITI promotes policies that favor innovation, sustainability and open market competition. Through our Environmental Leadership Council, we also represent several dozen additional prominent manufacturers in the high-tech arena.

Our member companies have long been leaders in sustainability: including on environmental design and energy efficiency, and lead the way in product stewardship efforts. As a result, the Dow Jones Sustainability Index, the Financial Times Sustainability Index, and the Global 100 have consistently recognized numerous ITI members for their concrete environmental and sustainability achievements. In addition, *Newsweek* recently issued its 2010 Green Rankings of America's 500 largest corporations, based on their overall environmental performance, policies, and reputation. Our members occupy 4 of the top 5 positions, and 14 of the top 40. As such, our members have a direct interest in the revision of these Guides and believe they are essential for consumer protection. We have outlined our comments below. If you have any questions or comments please feel free to contact me directly.

## I. General Environmental Benefit Claims

ITI supports the Commission's proposal to allow marketers the flexibility to use general environmental benefit claims such as "eco-friendly" or "green" where such claims are properly qualified with information on the specific environmental benefits of the product. However, ITI requests that the Commission provide additional guidance, perhaps in the form of examples, on acceptable qualifying language and the placement of such language.

## II. "Free-Of" Claims

ITI supports the Commission's proposal to include new guidance on the use of "free-of" claims in environmental marketing, including the Commission's recognition that "free-of" claims for a particular substance may be appropriate even where a product, package, or service contains a "de minimis" amount of the substance. Legislation such as the European Union's Directive 2002/95/EC on the *restriction of use of certain hazardous substances in electrical and electronic equipment* (RoHS) has been a reference for determining what constitutes a de minimis amount when making "free of" claims.

ITI requests that the Commission clarify the meaning and significance of its statement in the preamble that even trace amounts of certain substances, such as mercury, may be "material" to consumers. ITI also requests that the Commission provide additional guidance on the methods that are acceptable for determining what constitutes a de minimis or trace amount, as well as what the Commission would consider appropriate substantiation for "free-of" claims. Finally, ITI requests that the Commission recognize that when legislation establishes the basis for "free-of" claims, materiality is addressed, as long as information on regulatory definitions is provided to the consumer; for example, identifying to the consumer, that mercury could be present at <0.1% by weight in homogeneous materials, in electrical or electronic equipment, according to the definition that is contained in the European Union RoHS directive.



#### A. Limitations on the Use of “Free-Of” Claims for Certain Substances

The preamble to the Commission’s proposed guidance states that even trace amounts of certain substances, such as mercury, may be “material” to consumers due to their perceived toxic and bioaccumulative properties.<sup>1</sup> This statement suggests that the Commission may consider certain substances to be inappropriate as the subject of a “free-of” claim unless the marketer can establish zero presence of the substance. However, commonly available test methods for determining the presence of substances in products cannot detect levels below a specified “method detection limit.”<sup>2</sup> Guidance advising marketers to establish that there is zero presence of certain substances when making “free-of” claims is in general not technically feasible. In addition, such guidance could impose a significant substantiation burden on marketers and may discourage them from striving to reduce the use of substances like mercury, since they would have limited ability to market “free-of” claims for these substances in a concise, understandable way to consumers. ITI requests that the Commission recognize the limitations of commonly available test methods, and based on this information, clarify whether it intends to advise that marketers establish zero presence of certain substances in order to make a “free-of” claim for that substance, and if so, that the Commission clearly identify these substances. If the Commission is not willing to identify other substances that it considers to be similar to mercury for the purposes of making “free-of” claims, ITI requests that it provide further guidance on how marketers are to identify these substances.

Alternatively, the statement suggests that de minimis amounts for certain substances should be established according to the perceived impact or materiality to the consumer. Unless there is legislation (e.g. the European Union’s RoHS directive) that can serve as the basis for providing “free-of” definitions to consumers, such an approach would be unworkable in practice, since marketers have no reliable way to translate a consumer’s perception of materiality into a quantitative de minimis threshold. Moreover, this approach could permit marketers to set a higher de minimis amount because consumers may be misinformed about the level of risk associated with the potential exposure to a particular substance. ITI supports an approach that is based on scientific understanding of what constitutes a de minimis amount and that is grounded in risk assessment, and recommends that the Commission avoid statements that, directly or by implication, would require marketers to quantify this threshold on the basis of consumer perception (or misperception). The Commission should avoid creating two “tiers” of substances for the purpose of making “free-of” claims.

#### B. Determination and Substantiation of De Minimis or Trace Amounts

ITI requests that the Commission provide additional guidance on acceptable methods for determining what constitutes a de minimis or trace amount, or alternatively, provide definitions for these terms. It is ITI’s position that “free-of” claims should take into account the fact that most materials will

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<sup>1</sup> 75 Fed. Reg. 63580.

<sup>2</sup> For example, the U.S. Environmental Protection Agency defines the method detection limit for water as “the minimum concentration of a substance that can be measured and reported with 99% confidence that the analyte concentration is greater than zero and is determined from analysis of a sample in a given matrix containing the analyte.” Environmental Measurement, Glossary of Terms (January 11, 2010), *available at* [http://www.epa.gov/fem/pdfs/Env\\_Measurement\\_Glossary\\_Final\\_Jan\\_2010.pdf](http://www.epa.gov/fem/pdfs/Env_Measurement_Glossary_Final_Jan_2010.pdf).



contain trace amounts and background levels of chemicals, and that current testing methods are unable to detect “no presence” of a particular substance.

The Commission’s proposal includes an example of a “formaldehyde-free” claim that the Commission concludes would not be deceptive, in part because the marketer established that formaldehyde was present in virtually all indoor environments and that the product emitted less formaldehyde than is “typically present” in outdoor environments. Presumably, the FTC considered this to be appropriate substantiation for a formaldehyde-free claim. ITI cautions against an approach that would base a determination of what constitutes substantiation for a de minimis or trace amount based on “typically present” ambient or background levels in the surrounding environment, since this could lead to significant concerns with establishing an appropriate level of substantiation. In addition, certain substances may appear in these environments at levels that exceed what customers would expect to find in a product that is marketed as “free-of” such substances.

ITI also notes that the Commission appears to use the terms “de minimis”, “trace amount”, and “background level” interchangeably in the preamble and proposed guidance. ITI requests that the Commission clarify whether it considers these terms to be distinct, and if so, provide guidance on the meaning of these terms. ITI supports an understanding of these terms that distinguishes between background or ambient levels in the environment and “trace” or “de minimis” amounts, based on commonly available test methods.

#### C. Use of Alternative Substances and Other Environmental Benefits for “Free of” Claims

Finally, in the context of “free of” claims, ITI disagrees with the Commission’s proposed approach on the use of alternative substances and claims implying additional environmental benefits. On page 115 of the FRN, the Commission states:

“As suggested by several commenters, the Commission proposes cautioning marketers that an otherwise truthful free-of claim may nevertheless be deceptive. For example, it may be deceptive if a marketer claims that its product is free of a particular substance but does not disclose that the product contains another substance that may cause environmental harm, particularly if it is the same type of harm caused by the absent substance.”

Additionally, on page 116 of the FRN, the Commission states:

“The Commission also agrees with several commenters that free-of claims may, depending on the context, convey that the product has broad environmental benefits or is environmentally superior to competing products. Thus, a marketer who makes a free-of claim that reasonable consumers would interpret to convey additional environmental claims must have substantiation for all of those claims.”

International laws have restricted the use of certain substances, such as lead, in electronic products to an allowable maximum concentration values as defined in these regulations, and manufacturers have spent millions of dollars to comply with these regulations. However, it is difficult to ascertain with any precision whether the substances that are being used as replacements for the restricted substances provide any additional health or environmental benefit over the original substances. There are trade-offs associated with the use of any substance, and the requirement that marketers disclose whether replacement substances present “the same type of harm” as the original substance would require a measure of precision in alternatives assessment that simply may not exist for many substances. Accordingly, ITI recommends that the Commission remove this guidance and advise instead that if a



marketer has affirmative evidence that the environmental, human health and safety risks of an alternative are greater than the substance eliminated, the marketer must disclose that information to a consumer in a footnote or a MSDS.

Under The Commission’s proposed approach, a “lead free” claim could be considered deceptive unless the marketer also discloses that there may be some health or environmental risks from the use of a replacement material in manufacturing, which would only result in greater consumer confusion. Additionally, it appears that the FTC could consider a “lead free” claim to imply other environmental benefits and require marketers to substantiate that the product is safer because it does not contain lead. Whether or not a “free-of” claim implies that a product has broad environmental benefits is a very subjective analysis, and guidance requiring marketers to undergo this analysis will likely yield inconsistent results and prove unworkable in practice.

Instead of the approach in the proposed Guides, we urge the FTC to state that if a government or regulatory body restricts the use of a substance, “x,” then a marketer should be able to claim that a product meeting the regulatory requirements is “x free” without qualification as to the potential risks or without requiring additional substantiation as to the environmental or health benefits. It may not be possible to substantiate that the removal of substances of concern creates “broad environmental benefits”, yet it is essential that manufacturers be able to make claims that products do not contain those substances based on the definitions that are found in the legislation.

Moreover, the FTC claims that its approach to “free of” claims is merely further clarification of an already existing requirement. We believe, however, that the FTC is proposing significant new restrictions on the ability to market in this area. We believe that the FTC should strive to remove any inconsistencies between what is required from environmental regulators, including regulators from other jurisdictions, and the claims that the FTC will allow based upon those regulations.

### III. Recyclable Claims

ITI supports the Commission’s proposal to clarify and enhance its existing guidance on recyclable claims, including the Commission’s proposal to quantify the threshold for determining whether a “substantial majority” of consumers have access to recycling facilities. However, ITI requests that the Commission provide additional guidance to clarify that mail-back programs may be included in the 60 percent figure. ITI also requests that the Commission quantify the threshold for “significant percentage” and provide additional guidance on the meaning of “minor incidental components” in the context of recyclable claims.

#### A. Availability of Recycling Programs

ITI supports the Commission’s proposal to quantify the threshold for determining whether a “substantial majority” of consumers have access to recycling facilities, and considers the 60 percent figure to be an appropriate threshold. However, ITI requests that the Commission clarify that mail-back programs may be included in the 60 percent figure. While the proposed guidance includes an example stating that a recyclable claim based on a collection program would not be misleading, the guidance does not specifically address mail-back programs and does not state whether such programs are included in the Commission’s proposed 60 percent threshold for “substantial majority.” Because a number of ITI’s members offer mail-back programs to supplement conventional curbside or drop off recycling programs, ITI requests that the Commission clarify that mail-back and collection programs “count” toward the 60 percent minimum threshold for unqualified recyclable claims.



ITI recommends that the Commission also establish guidance quantifying the threshold for determining when customers have access to a “significant percentage” of recycling facilities. As the Commission noted in its discussion of the “substantial majority” threshold in the preamble, ambiguity of the substantial majority standard causes problems. The Commission further noted that one marketer may interpret substantial majority to mean 55 percent and make an unqualified claim, while a competitor may interpret substantial majority to mean 75 percent and decline to make the same claim. These considerations apply with equal force to the quantification of “significant percentage,” since marketers may interpret this threshold differently and qualify the same claim with different disclosures. Accordingly, ITI recommends that the Commission provide a percentage-based threshold for determining whether consumers have access to a “significant percentage” of recycling facilities.

#### B. Definition of “Minor Incidental Components”

ITI supports the Commission’s proposal to allow the use of recyclable claims even where some components are not recyclable. However, ITI requests that the Commission clarify the meaning of “minor incidental components” in the context of recyclable claims. If the Commission intends “minor” or “incidental” to mean that the components must not have a critical function or purpose in a product, this may not be an appropriate measure for the electronics industry. Many electronic products have thousands of components that are small but important to the operation of the system. A definition of “minor incidental components” that is focused on the function of the components may limit the ability of some electronics manufacturers to make recyclable claims, despite having a very small percentage of non-recyclable components. ITI therefore supports a definition of “minor incidental components” that is based on size or weight, rather than function.

#### IV. Renewable Energy Certificates

ITI supports the FTC’s approach stating that the use of renewable energy certificates (RECs) is not material to consumers and does not need to be disclosed when making renewable energy claims. The Commission states on page 164 of the Federal Register Notice (FRN) the following:

“Even assuming that consumers thought renewable energy claims were based on contractual purchases (rather than REC purchases), there is no reason to believe that this fact would be material to consumers. No evidence on the record suggests that a contract-based system more reliably tracks renewable energy than a well-designed REC-based system. Accordingly, the Commission does not have a sufficient basis to advise marketers to disclose that their renewable energy claims are based on RECs.”

We agree with the FTC that it is not important to consumers whether renewable power is generated independently or purchased separately. The FTC’s proposed policy also will encourage companies to continue to take advantage of RECs by being able to make these environmental benefits claims.

#### V. Environmental Seals and Certifications

ITI supports the Commission’s proposal to include new guidance on the use of environmental seals and certifications, but requests additional guidance on the use of certain well-known environmental seals. For example, certification programs such as ENERGY STAR and EPEAT are widely used in the electronics industry and have become well-established household names. The proposed guidance, however, suggests that the Commission considers all unqualified environmental certifications or seals likely to convey general environmental benefit claims, irrespective of consumer familiarity with such programs. ITI believes that well-known and widely-recognized environmental certifications and seals



including ENERGY STAR and EPEAT do not imply general environmental benefits and therefore should not require qualification. Accordingly, ITI requests that the Commission provide additional guidance on whether such seals must be qualified with language that refers to the specific and limited benefits associated with those programs.

If the Commission advises that well-known environmental seals and certifications such as ENERGY STAR<sup>®</sup> and EPEAT<sup>®</sup> should be qualified, ITI requests that the Commission provide an example of how to appropriately qualify these seals. If a manufacturer decides to use the EPEAT logo, for example, on product packaging there is often little space nearby to list the various environmental metrics of the program.<sup>3</sup> It would be extremely cumbersome to qualify any multi-attribute logo or seal on electronic product packaging with all of the specific and limited benefits associated with that program. Moreover, independent certification programs often place strict limitations on marketers' ability to display or modify the logo for the programs, which may in turn limit the ability of marketers to "clearly and prominently" qualify the seal or certification. Accordingly, ITI requests that the Commission issue guidance advising that including a website on which additional information about the program can be found near the environmental seal or certification for a well-known and widely-recognized certification program is sufficient to avoid consumer deception.

We thank you for the opportunity to submit the above comments.

Best Regards,

Colleen Pickford  
Director, Environment and Sustainability





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