



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Advertising Practices

March 13, 1995

Mr. **Peter M. Petit**, P.E.
Division of Solid Waste
New York State Department of Environmental Conservation
50 Wolf Road - Room 228
Albany, New York 12233-4015

Re: Revised Proposed Amendments to Part 368 of Title 6 NYCRR Relating to the Regulations of Official New York State Recycling Emblems

Dear Mr. Petit:

This letter responds to your December 12, 1994 solicitation for public comments on the above described revised proposal, as well as to the December 1994 Responsiveness Summary To Comments Made At July 1993 Workshops January 1994 Workshops March 1994 Public Hearing On Proposed Amendments To 6 NYCRR Part 368 Recycling Emblems ("Responsiveness Summary").(1) The revised proposed standards govern the use of official New York State recycling emblems and the use of the terms "recycled," "recyclable," and "reusable" in New York State. Although your solicitation requested comment by January 30, 1995, we understand that you may still consider our comment if it is received after that date.

As you know, on July 28, 1992, in order to help reduce consumer confusion and prevent the false or misleading use of environmental terms such as "recycled," "recyclable," and "reusable," the Federal Trade Commission issued its Guides for the Use of Environmental Marketing Claims ("Environmental Marketing Guides"), 16 C.F.R. Part 260. In these guides, the Commission presented guidance of how it may apply § 5 of the Federal Trade Commission Act, which generally prohibits unfair and deceptive advertising, to environmental advertising and labeling claims. We are enclosing a copy of the Environmental Marketing Guides.

The staff of the Bureau of Consumer Protection of the Federal Trade Commission offer the following comments for your consideration concerning issues raised by the proposed changes in Part 368 of Title 6 NYCRR. First, the proposed revision to the New York State recycled content emblem would replace the requirement of a total recycled content disclosure in favor of a disclosure of the minimum post-consumer material content. The resulting emblem would consist of a three chasing arrows symbol below which in large capital letters would be the word "RECYCLED" and below that would be a disclosure as to the amount of post-consumer recycled content. In § G.5 of the Environmental Marketing Guides, 16 C.F.R. § 260.7(e), the Commission states that unqualified claims of recycled content imply to consumers that a product or package is made entirely from recycled material (excluding minor incidental components). The relevant question, therefore, is whether the proposed regulation adequately qualifies the use of the word "recycled."

According to the Responsiveness Summary, one of the comments you received stated:

A label on a printing and writing paper stating the following:

RECYCLED PAPER
25% POST-CONSUMER FIBER

would be authorized under the regulations and would actually constitute two separate claims. The statement "Recycled Paper" is an unqualified claim implying that the paper is 100% recycled content. The statement "25% Post-Consumer Fiber" is a secondary claim which modifies, but does not define the first claim. An environmental claim made in this manner is misleading and in potential violation of the FTC guidelines.

The response to this comment was:

Part 368 has been modified to require that the post-consumer percentage be indicated. Our interpretation of the statement presented is that the paper only contains 25 percent post-consumer fiber and in the absence of any number, nothing else. With the post-consumer content identified we do not believe that there is an implication that the paper is 100% recycled.

Although we currently have no empirical evidence of how consumers perceive this claim, we too are concerned that the proposed revised recycled emblem with its disclosure might mislead consumers to believe that the product or package is made entirely of recycled material of which the specified percentage consists of post-consumer material.(2) In order to ensure that consumers will not be misled by the proposed revised recycled emblem, you may want to consider conducting consumer research to determine what message or messages are conveyed by the proposed revised recycled emblem. Such research also may assist in improving the communication of the emblem in this and other respects.(3)

A second concern is that the proposed regulations may be interpreted to mean that even a disclosure of post-consumer recycled content is not required when the term "recycled" is used independent of the emblem and when the product or package contains the specified minimum percentage of post-consumer material as described in section 368.4(a) of the regulations. Such an interpretation appears possible because section 368.2(l) of the proposed regulations states that "Recycled" means a package or product containing a specified minimum percentage by weight of post-consumer material as described in subdivision 368.4(a) of this Part, shown in Table 1, and approved by the commissioner.

As discussed above, in § G.5 of the Environmental Marketing Guides, 16 C.F.R. § 260.7(e), the Commission states that unqualified claims of recycled content imply to consumers that the product or package is made entirely from recycled material (excluding minor incidental components). We are concerned that the proposed regulation may therefore inadvertently sanction misleading "recycled" claims. While the Responsiveness Summary states that the amended regulations will require the display of post-consumer content with either the emblem or the term "recycled," we could not find any such requirement for the use of the term "recycled" in the amended regulation.(4)

A third concern involves the proposed authorization of a recyclable emblem for certain broad categories of products or packages, based on the recycling rate of the overall category. We believe it may be helpful to share the Commission's experience with you on this issue. In § G.4 of the Environmental Marketing Guides, 16 C.F.R. § 260.7(d), the Commission states that 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. In fact, this issue has been the subject of several Commission cases. Keyes Fibre Company, C-3512, August 2, 1994 and AJM Packaging Corp., C-3508, July 20, 1994 involved recyclable claims for paper plates. White Castle Systems, Inc., C-3477, January 13, 1994 and America's Favorite Chicken Co., C-3504, July 5, 1994 involved recyclable claims for paper fast food packaging. Even though the plates and fast food packaging are made from types of paper which might be recyclable in the few communities that recycle mixed paper, they are in fact seldom recycled because ordinary use renders them food-contaminated. We are enclosing the Commission complaints and consent agreements in these cases. Staff believes that similar issues may arise within some of the categories for which recyclable claim approval may be sought from New York.

We acknowledge that the request for authorization of section 368.4(b)(2) addresses this concern, and may do so adequately. You may wish, however, to consider revising the proposed regulation to clarify that approval will not be

granted to a product or package that falls within an approved material category if the product or package is not accepted in recycling programs because of its shape, size or some other attribute.

It also appears to us that section 368.5(a)(2) of the regulations may conflict with the authorization requirement of section 368.4(b)(2). Section 368.5(a)(2) states that, "An emblem may be used for the following purposes without having first received written approval from the department for such use: promotion of a package or product after the department has authorized the use of the emblem on or for that material." (emphasis added) By using the word "material," section 368.5(a)(2) could provide a means for products or packages that fall within the approved material types, but that are not in fact recyclable, to use the recyclable emblem. We recommend, therefore, that you consider replacing the word "material" with the phrase "package or product" in section 368.5(a)(2).

Finally, we note our support for the apparent purpose of the proposed revisions to Sections 368.1(a) and (b), to make clear that the regulation of usage applies only under specified conditions. However, we would suggest that the phrasing used to describe the regulations' application — "outside the context of a specific, clear, accurate and nonmisleading statement" — may raise questions about the intended coverage. Perhaps other terms would better define the coverage and promote the intended consistency between the New York regulation and the Federal Trade Commission's Environmental Marketing Guides.

We hope you find these comments useful.

Very truly yours,

C. Lee Peeler

Associate Director

Division of Advertising Practices

Enclosures

(1) The comments represent the views of the staff of the Bureau of the Consumer Protection of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commissioner.

(2) We would also be concerned by a similar claim made outside the context of the official New York State recycled emblem.

(3) If such research suggests that consumers may be deceived by the emblem as currently designed, you might want to consider modifying the emblem to also include a disclosure of the total recycled content.

(4) You may want to consider conducting consumer research prior to revising section 368.2(l) of the proposed regulations to ensure that the required disclosures address the possible deception concerns raised here and above.