



EHS Strategies, Inc.

[www.ehsstrategies.com](http://www.ehsstrategies.com)

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Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex B)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

submitted on [regulations.gov](http://regulations.gov)

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

The latest version of the Green Guides adds useful clarification for the primary standards environmental marketing claims that should adhere to:

- Claims need to be technically accurate and supported by scientific data.
- Claims should not be misleading to the consumer insofar as they imply environmental benefit that is not and/or cannot be substantiated.

EHS Strategies, Inc. supports FTC guidance in section 260.2 regarding technical accuracy, particularly the emphasis on generally accepted science:

“Marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims. ... In the context of environmental marketing claims, a reasonable basis often requires competent and reliable scientific evidence. Such evidence consists of tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and **are generally accepted in the profession to yield accurate and reliable results**. Such evidence should be sufficient in quality and quantity based on standards **generally accepted in the relevant scientific fields**, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that each of the marketing claims is true.”

The more difficult challenge is for determining what is misleading to “reasonable consumers” as described in section 260.1(d). Certainly it is unacceptable to intend to unfairly place a product in a better light than a competitor’s by taking advantage of customer misconceptions. However, FTC describes results of its consumer perception survey that are unexpected and frustrating; e.g., the very large percentage of respondents who thought a claim of recycled content implied that the

product was recyclable (p96). While the scientific realm has fairly standard approaches to providing substantiation, it may be more difficult with regard to predicting public perception. While it is unreasonable to expect all companies to perform detailed consumer perception surveys/research, it behooves marketers to generally be aware of how environmental claims are understood and misunderstood by their consumer populations and not to exploit any confusion. I believe that is the intent of section 260.2: *“Marketers must ensure that all **reasonable interpretations** of their claims are truthful, not misleading, and supported by a **reasonable basis** before they make the claims.”*

FTC should continue to conduct and publish its own consumer perception surveys and update the guides with examples of good and bad claims as a way to share what constitute “reasonable interpretations.”

**General Claims:** EHS Strategies, Inc. strongly supports sections 260.4 and 260.6 that would disallow use of general environmental claims and/or graphics, including unqualified logos. FTC sanction of 3<sup>rd</sup> party certification logos for product categories is borderline, however. While they have set criteria and documentation backing up the granting of the certification, the simple logo does not convey what those criteria are and their details are not going to be investigated by the average consumer. To avoid misconceptions, claims should only be appropriately qualified with specific attribute claims as described in the FTC guidance, particularly 260.6 Example 5.

**“Sustainable:”** EHS Strategies supports FTC withholding sanction for product-specific claims regarding sustainability, as explained in our previous comments.<sup>1</sup>

**Section 260.9:**

- Paragraph (a): “Non-toxic” should be addressed in a separate section of its own.

- Paragraph (b): EHS Strategies supports this guideline.

- Paragraph (c): “De minimis” is not necessarily the same as “inconsequential to the consumer,” given that consumer decides what is “consequential.” A better approach is to refer to background levels. Intentional use should not be allowed under a “free of” or “does-not-contain” claim, regardless of level. Presence as an impurity would not constitute intentional use; however, it may separately warrant disclosure if it contributes to adverse effects of the product as a whole. Suggested rewording of (c):

*Depending on the context, some no, free-of [see comment below, recommend deleting use of “free of”], or does-not-contain claims may be appropriate even where a product, package, or service contains ~~or uses~~ a de minimis amount of a substance **relative to typical background levels and has not been intentionally added.***

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<sup>1</sup> EHS Strategies, Inc. comments to FTC February 11, 2008.

- Paragraph (d): “Free of” claims are a negative claim against a competitor’s product containing the chemical by directly implying that the product is safer than the other and, therefore, the claim must be substantiated to show the relative risk compared to the chemical it is “free of” as noted in paragraph (d). In addition, the “free of” claim is misleading if it relies on misperceptions or risk by the public. Given the often controversial nature of risk allegations made against individual chemicals in the media (separate from FTC-regulated marketing claims), the FTC should strongly encourage use of the less assumption-laden, factual statement of “does not contain.” Paragraph (d) approaches this concept, but should be more clearly stated:

*A marketer that makes a no-~~free-of~~, or does-not-contain claim that reasonable consumers would interpret to convey additional environmental claims, including general environmental benefit claims or comparative ~~superiority~~ **chemical risk** claims, must have substantiation for each such claim.*

And as stated in 260.2, the substantiation should be “generally accepted in the relevant scientific fields.”

- Paragraph (e): A “does-not-contain” claim does not necessarily imply the product has no toxic properties and is not deceptive if appropriate warning information is provided to the consumer along with the factual statement on content. A separate section on “non-toxic” claims would be preferable.

- Example 3: Pesticides are by definition toxic to a target environmental organism. Delete this sentence.

**Responses to the Request for Comment items is provided below by number in the FTC notice:**

*1. Do consumers interpret general environmental claims, when qualified by a particular attribute, to mean that the particular attribute provides the product with a net environmental benefit? ....*

General “green” claims should be avoided, regardless of the qualifications that may be made as a secondary comment. First impressions are critical, especially for the general consumer. Perhaps B2B sales are more amenable to considering all the information provided, but in that case the general claim is not needed. General statements presented in context on a website or in a brochure may be appropriate.

*2. Would it be helpful to include an example in the Guides illustrating a qualified general environmental claim that is nevertheless deceptive? For example, a marketer advertises its product as “Eco-friendly sheets - made from bamboo.” ....*

It would be helpful to offer this example of a deceptive claim, why it is deceptive and how an appropriate claim could be communicated according to the Guides.

*3. The Commission's consumer perception study found that 27 percent of respondents interpreted the claims "green" and "eco-friendly" as suggesting that a product has no (rather than "some") negative impact. ....*

These terms should not be used with regard to a single product as every product has some negative environmental impact. It is not feasible to define "negligible impact" for all potential environmental and health concerns. At best it may be a relative term ("greener") for a class of products with clear explanation of positive attributes and remaining issues or unknowns.

*4. If a marketer makes an unqualified degradable claim for a liquid substance (or dissolvable solid), how long do consumers believe the substance will take to completely degrade? ....*

The Example 3 provided in the guidance is appropriate since "biodegradation" is the route of degradation for liquids, if supported by competent and reliable scientific evidence that demonstrates that under typical sewage system treatment. Since there are several generally accepted test standards for biodegradation that manufacturers rely on, this guidance seems to be sufficient. However, these standards do not require showing 100% degradation, but rather >70% in 28 days or 90% within 6 months. However, it is not necessary for FTC to separately designate a specific time frame in the standard.

*5. The Commission proposes adopting a maximum period of one year for complete decomposition of solid materials marketed as degradable without time qualification. ....*

What kinds of disposal is this standard intended to cover? Guidance at 260.8 (c) refers to disposal other than landfill/incinerator/recycling. Presumably this is then when use constitutes disposal such as lawn treatments, outdoor painting, a plant pot, etc.? The assumption would therefore be that by the time of the next application, the previously used product would have degraded. Thus, a "reasonably short period of time" a time could be quite variable. It probably doesn't hurt to put in a maximum of one year, however.

*6. Should the Commission quantify the "substantial majority" threshold in the recyclable section of the Guides? If so, how? If not, why not?*

If the Commission staff relies on 60%, it should say so explicitly.

*7. Should the Commission quantify the "significant percentage" threshold in the recyclable section of the Guides? If so, how? If not, why not?*

If “substantial majority” means 60%, “significant percentage” is <60%. A reasonable minimum would be 30%, less than 30% should require identification of the typical %, so the customer can judge for himself whether it is “significant.”

*8. What changes, if any, should the Commission make to its guidance on pre-consumer recycled content claims? ...*

*a. If the Commission should retain its guidance that pre-consumer recycled materials be diverted from the solid waste stream: ....*

I don't think the typical consumer cares about pre- or post-consumer waste. They are more concerned with prevention of any volume of waste being disposed - whatever its source - and minimizing the use of virgin materials. Where customers do want this information, marketers will provide it.

*b. If materials have historically been diverted from the solid waste stream and reused for one purpose ... do consumers still consider that material to be recycled content even though the material was already being diverted from the solid waste stream?*

“Recycled” doesn't seem to be the right descriptor for this activity. There are probably more descriptive ways to talk about net energy savings or reduced use of virgin material feedstock. Further, it seems more appropriate for such information to be provided in detail for business customers or on a website, rather than a claim on a label.

*9. Do consumers understand the difference between pre-consumer and post-consumer recycled content? Please provide any relevant consumer perception evidence.*

See 8a response.

*10. Should the Commission continue to advise marketers that recycled content claims may be based on the annual weighted average of recycled content in an item? ....*

Annual weighted average is the most practical and reasonable representation of recycled content. It is not feasible to label each individual product for specific content as lots will vary. Consumers should not have to look at each unit of product every time they buy the same thing to note such differences. Typical values are expected and reasonable. Use of the product name with the recycled claim is perhaps clearer (“XXX Wipes contain \_% recycled fiber”), but unnecessary.

*11. If a product is advertised as “made with recycled materials,” either in whole or in part, should the Commission advise marketers to qualify that claim to indicate that the product is not recyclable if it is not? ....*

This appears to be a misunderstanding by a large percentage of consumers about the difference between raw material that may have been recycled from numerous different sources (which may or may not include the product) and whether the product can be recycled and by whom. These consumers would be making two assumptions

that a recycled content product can be 1) recycled and 2) recycled by the consumer. Marketers would have to potentially make a qualified disclaimer such as “not recyclable in [most] communities.” But this would be true of products with no recycled content as well. Since those products would not have to have the disclaimer, the more environmentally conscious company is penalized by having to place a negative statement on his product.

A better way to handle it may be clarification of the “made with recycled materials” claim to indicate whether those recycled materials come from recycled product per se. Arguably, the use of the term “materials” should distinguish them from “products”, but apparently not. FTC could encourage marketers to indicate the % of recycled materials that derive from post-consumer recycled products, e.g.: “made with recycled materials, including [x%] recycled products” but to do so would require a qualification of whether or not the typical consumer can recycle the product, so that the claim becomes a cumbersome:

“Made with [x%] recycled materials, including [y%] recycled products. [insert appropriate 260.11(b)(2) claim here].”

Alternatively, FTC could sponsor education programs to help distinguish recycled content from recyclability.

*12. Are consumers aware that manufacturers are no longer permitted to use CFCs in their products? ....*

Defer to aerosol companies who have data.

*13. What guidance, if any, should the Commission provide concerning free-of claims based on substances which have never been associated with a product category? ....*

Except where there is data to support that a majority of targeted consumers erroneously believe the product class contains a chemical, such claims should not be allowed. As noted earlier, the claim should be “does-not-contain” as opposed to “Free.”

*14. What guidance, if any, should the Commission provide concerning organic claims about non-agricultural products? ....*

“Organic” makes no sense for non-agricultural products and should be disallowed. It is equivalent to a claim of “eco-friendly” or “green” and unsupportable.

*15. How should marketers qualify “made with renewable materials” claims, if at all, to avoid deception? ....*

The term “renewable materials” is still under extensive debate and is not ripe for general market advertising. The clearest, factual claim may be “made with non-petroleum based materials,” which seems to be consumers’ primary concern about non-renewability. (Likewise, “bio-base” is still ill-defined since petroleum is also

bio-based.)

*16. How, and under what circumstances, should marketers qualify “made with renewable energy” claims to avoid deception?.....*

An unqualified claim of “made with renewable energy” implies all energy involved with every step of the manufacture of a product was from renewable resources. This is not very likely. As with recycled material content, it may be possible to use an annual average of energy purchased (or generated) from renewable resources for the facility where the product is manufactured. An appropriate claim could be “made at facility using x% renewable energy.”

*17. How do consumers understand “carbon offset” and “carbon neutral” claims? ....*

These terms remain non-standardized and controversial and should be disallowed for individual products.

*18. How should marketers qualify carbon offset claims, if at all, to avoid deception about the timing of emission reductions? ....*

Companies may discuss programs they have in place to address its carbon emissions, but this cannot be done in a brief label. The nature of the program, including the time period over which the offsets will occur, need to be described clearly.

EHS Strategies, Inc. would be pleased to further discuss these comments with the Commission.

Sincerely,

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