



Flexible Packaging Association

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By electronic transmission

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Federal Trade Commission,
Office of the Secretary, Room H-135(Annex J),
600 Pennsylvania Avenue, NW,
Washington, DC 20580
Attn. Laura Koss, Esq.

Re: 16 CFR Part 260: Proposed Guides for the Use of Environmental Marketing Claims; Proposed Rule: 75 Fed. Reg. 63552 (Oct. 15, 2010).

Dear Sir/Madam:

The Flexible Packaging Association (FPA) appreciates the opportunity to comment on the Federal Trade Commission's (FTC's) proposed revisions to its existing Green Guides. 75 Fed. Reg. 63552 (Oct. 15, 2010). Our membership, which produces packaging for food, healthcare, and industrial products using paper, film, foil, and combinations of these materials, is faced with increasing demands from customers and from national distribution chains to provide "sustainable" packaging and to place claims and other information regarding recyclability, biodegradability, and other indicia of "environmental friendliness" including but not limited to "seals" on packaging manufactured by the industry. These proposed updates to the "Green Guides" are therefore timely and needed.

Green marketing poses challenges to converters, including the flexible packaging industry. Because the proposed Green Guides do not specifically address "sustainability" and other "green" claims that have become prominent in marketing, we support the Commission's continuing work to amend the Green Guides in coming years. Also, since other federal agencies including the U.S. Environmental Protection Agency (EPA) and Department of Energy (DOE) are working on metrics related to sustainability and Life Cycle Analysis, as well as metrics related to recycling and renewable materials, it appears there will be other potential impetus to update the Commission's Green Guides in light of other regulatory directives. FPA looks forward to being part of these future discussions.

FPA's comments below address issues raised in the guidance and related questions that FTC may be able to help clarify.

The Flexible Packaging Association - FPA was established in 1950 and is a national trade association comprised of converters that manufacture and supply flexible packaging. Examples of flexible packaging include rollstock, bags, pouches, labels, liners, wraps, and tamper-evident packaging for food and medicine. Flexible packaging, a \$26.4 billion industry, employs approximately 80,000 people in the United States and is now the second largest segment of the U.S. packaging market, estimated at \$143 billion annually.

DISCUSSION

Background – FTC is proposing revisions to 5 U.S.C. §45, its "Green Guides" to address the explosion of environmental claims in the marketplace. The Green Guides are not enforceable regulations, but FTC explains in the Preamble to the Proposal that the Commission has and will continue to take enforcement action on deceptive marketing claims, which are addressed by the Guides. In addition to general environmental claims, the proposed Green Guides discuss more specific environmental claims, including:

- The use of certifications and seals of approval, including trade association and third party certifications and standards;
- Claims that a product or package is "degradable;"
- Claims that a product or package is "compostable;"
- Claims that a product or package is "recyclable"
- Claims that a product of package is made from "renewable materials"
- Claims that a product of package is "ozone-safe" or "ozone-friendly"
- Claims that a product of package is "free-of and/.or non-toxic"
- Claims with regard to a package being refillable
- Claims related to "source reduction" with regard to a product or package; and
- Claims that a product or package is made from "renewable energy" or related to the purchase of "Renewable Energy Certificates (RECs)" and/or carbon offsets.

A. General Discussion of New Environmental Claims including Environmental Sustainability Claims

The preamble of the October 15, 2010 Notice of Proposed Rulemaking ("NPRM" or "Notice") discusses the likelihood that consumers generally will misunderstand or conflate product claims related to "sustainability," organic and natural products, and "made with renewable energy" with the ability of a product or package to biodegrade or be recycled. The Notice also discusses critically misleading advertising and marketing practices related to "carbon neutrality" and "ozone credits" when such product or packaging attributes are not voluntary but rather are either required by law, occurred in the past, or will not occur far into the future. These are cutting-edge marketing issues, and hence important to

discuss. We were therefore somewhat disappointed that the Green Guides presently do not take on other significant marketing issues confronting FPA's members, including claims related to sustainability. That being said, we agree with the Commission's observations that "sustainability" is nuanced and difficult concept to define with precision. However, because many manufacturers are under pressure from consumers and from distribution chains to produce sustainable products, we urge the Commission to consider issuing further guidance on the issue.¹

1. FTC Rightly Cautions Against The Use Of General Sustainability And Environmentally Friendly Claims Without Further Qualification.

Based on consumer research, the Commission concluded that general "green" and earth friendly claims, including it appears, sustainability claims, are misleading and should not be made. *Id.*, at 63581. FPA endorses the predicate in the proposed Green Guides that consumers are apt to be confused by the proliferation of green claims in the marketplace, including the use of terms such as sustainability and environmentally-friendly. FTC Marketing Survey work done by Harris Interactive in 2009 found that 61% of survey respondents associate the term "green" products with recycled materials; 56% associate the term "eco-friendly" products with recycled materials. While we believe that our members are in the forefront of manufacturing "sustainable" packaging as that phrase has been defined by our customers and their distributors in Score Cards and other technical standards,² FPA agrees that the phrases can be easily misunderstood by the general public. We encourage the Commission, however, to take up this issue in further guidance.

2. Distinction between benefits of product, package, and service

FPA was particularly grateful that the Commission underscores in §260.3(b) of the "General Principles" that environmental marketing claims should specify whether an environmental claim refers to the product, the product's packaging, a service, or just to a portion of the product, package, or service. Flexible packaging companies cannot confirm many claims printed on product packaging and like other packaging converters, would be unwilling to accept responsibility for substantiation or gathering evidence that a claim has been substantiated for a product. Yet increasingly, because of consumers and other retail pressure, the types and numbers of environmental claims are ballooning. Therefore FPA agrees that environmental claims, like other marketing claims,

¹ FPA does not disagree with the American Forest and Paper Association's comment referred to in footnote 51, 75 Fed. Reg. 63557, that specific sectors should be able to develop focused definitions of sustainability that meet the needs of that sector, but we do think that the term is commonly misunderstood by the public and the Commission should continue to examine it.

² See e.g., <http://www.pgssupplier.com/environmental-sustainability-scorecard>; <http://walmartstores.com/Sustainability/9292.aspx>

must be required to clearly specify if they are made with regard to the product, the packaging, or service, or a portion of the product, package, or service.

FPA also appreciates the Commission's inclusion of Example 2 in section 260.3 regarding a soft drink bottle that is labeled "recycled."³ In the example, the bottle is made entirely from recycled materials, but the bottle cap is not. Because the bottle cap is a minor, incidental component of the package, the Commission concludes that the claim is not deceptive. While the term "minor incidental component" may be ambiguous in certain contexts, this example is very helpful for the packaging industry to understand.

On the other hand, FPA is troubled by the Commission's inclusion in proposed § 260.4, of Example 2,⁴ which refers to a product wrapper that bears the claim "environmentally friendly" and also is qualified by an explanation that it (the wrapper) was "not chlorine bleached, a process that has been shown to create harmful substances." The proposed guide states that although the wrapper was not bleached with chlorine, "its production releases into the environment other harmful substances, and therefore the "environmentally friendly" claim is deceptive." This guidance may itself be ambiguous because it would appear to potentially apply to every man-made packaging substrate or product. We suggest that this example should be removed from the final Green Guides or refined. Certainly all substrates, even those made with renewable wind or water resources or new less toxic chemicals substitutes, will leave some environmental footprint. In the above example, it is unclear whether FTC means to convey that all packaging is bad because it is manmade, or just that chlorine substitutes such as ozone bleaching are bad. Is there a way to re-write the example so that it would not, in FTC's view, be unacceptable?

B. Use of Seals and Third Party Certifications

At § 260.6, the proposed Green Guides advise that third party certifications and seals constitute general environmentally beneficial claims and/or endorsements, and thus they are viewed as general environmental claims and would be generally viewed as misleading⁵ and may constitute endorsement, subject to FTC's Endorsement Guides⁶, requiring the relationship of the marketer with the organization to be disclosed and whether the seal or certification organization is a trade or business association to which the marketer pays dues. Further, the Commission's revised Green Guides remind manufacturers that third-party certification does not eliminate the manufacturer's obligation to have substantiation for all such claims. Since many consumers will understand that the seal or the third party certificate means that the product may *not* have an impact on the environment or only a minimum impact, FPA supports this

³ Id., at 63600, col.2.

⁴ Id., at 63601, col. 1.

⁵ Id., at 63601, col.2-3.

⁶ (16 C.F.R. Part 255)

Guidance. We are concerned by the proliferation of the prominence of new seals and certifications that manufacturers want to place on packaging, and the Green Guides confirm that the manufacturers (and not packaging manufacturers) must have a basis to substantiate the use of such certifications and seals of approval. See §260.6(c).

C. Claims Regarding Compostable Packaging and Products (proposed 260.7)

FPA believes the Commission's proposed guidance on compostable claims should recognize the relevant ASTM standards as appropriate science-based methods to test for "compost ability" and should be deemed adequate to substantiate compostable claims. In particular, ASTM D6400, ASTM D6868, or EN 13432 each provide the basis for scientific substantiation of compostable in aerobic environments. In marine environments, ASTM D7081 provides scientific methodology for adequately substantiating marine degradability claims. Therefore, FPA urges FTC to confirm the ASTM standards for substantiating compostable or marine degradability should be recognized as the scientific tests for marketers to use for adequately substantiate their claims.

D. Claims Regarding Degradable Packaging and Products (proposed 260.8)

Consistent with its recent enforcement actions, the Commission's proposed Green Guides state that unqualified claims regarding the ability of a product or package to degrade should not be made if a product or package is likely to be disposed in a landfill or an incinerator. The proposed Green Guides also would clarify:

"It is deceptive to make an unqualified degradable claim for solid items if the items do not completely decompose within one year after customary disposal. Unqualified degradable claims for items that are customarily disposed in landfills, incinerators, and recycling facilities are deceptive because these locations do not present conditions in which complete decomposition will occur within one year."

Proposed §260.8(c).

The NPRM requests comment on its proposed guide on claims involving biodegradable products and packaging. In particular, the Commission asks for comment on whether adopting a maximum period of one year for complete decomposition of solid materials marketed as degradable can be made without further qualification.^{7 8}

⁷ Id., at 63569.

1. FPA Supports the Notion that Products and Packaging are Not Degradable if They Will Be Landfilled or Incinerated.

FPA agrees that a general claim that a package is degradable will be misleading because most solid waste in this country is destined for landfills and incinerators, unless it is recycled or composted. Since landfills are required to be designed to be inert, they discourage aerobic or anaerobic degradation microbial pathways as a way of eliminating pathways for environmental contamination. Alternatively, many municipalities use incineration for solid waste disposal, which certainly does not allow products or packaging to biodegrade.

2. FPA Does Not Support the Use of a One-Year Period for Complete Decomposition of Solid Materials Marked as Degradable

Currently there are no appropriate scientific standards for substantiating degradation of solid materials in a landfill or an incinerator. In addition, by allowing a one-year period for complete degradation, the Commission supports the notion that landfill degradation has an environmental benefit, whereas that is not necessarily the case. The U.S. EPA has published scientific studies documenting the extent at which methane emissions arising from landfills contribute to global warming potentials.⁹ Consequently, the FPA does not believe the Commission should allow any claims of degradability in a landfill until such scientific methodology exists that claims can be substantiated and that the resulting degradation represents an environmental benefit.

D. Recyclable Claims (Proposed § 260.11)

1. Availability of recycling facilities:

Like the current Green Guides, the proposed revisions warn against claims that a product or package can be recycled unless the packaging or product can be collected, separated, or otherwise recovered from the solid waste stream for reuse through an established recycling program. The current Guides suggest that unqualified recyclable claims are possible only if the manufacturer determines affirmatively that recycling facilities are generally available to the "substantial majority" of consumers where the item is sold, which would be defined formally now by the Commission to be more than 60 percent of

⁸ Id.

⁹ Methane emissions have a much higher global warming potential according to EPA than carbon dioxide emissions. 40 CFR Part 98, Table A-1 to Subpart A of Part 98—Global Warming Potentials

consumers.¹⁰ Otherwise, FTC directs that the label qualify the claim by noting that recycling programs for this pack or product may not exist in your area. FTC seeks comment on whether the "substantial" threshold should be maintained for unqualified claims.

FPA urges FTC to recognize that a significant amount of recycling occurs with pre-consumer materials through internal recovery, business partnerships and industrial take-back programs. While example 8 in §260.11 discusses a take-back program for disposable cameras, the FPA recommends that the FTC consider an additional example where a company establishes a take-back program for pre-consumer material and that providing instructions for collecting and returning the pre-consumer material constitutes sufficient qualification. In addition, the FPA recommends that the FTC expand the list of stakeholders from "consumers or communities" to "consumers, businesses, or communities" to recognize the important role of business-to-business closed loop recycling programs.

E. Recycled Content Claims

The October FTC Notice discusses three broad issues that are raised by claims involving recycled content: (1) whether pre-consumer recycled content should be allowed to be claimed; (2) the distinction between pre- and post consumer recycled content, and (3) how recycled content is calculated.

1. Pre-consumer/Post-consumer Recycled Content.

In the Commission's discussion of consumers' understanding of waste that is recycled, two issues concerning the use of recycled materials are discussed. First, some manufacturers' make a distinction between the use of materials that are recovered either during the manufacturing process (pre-consumer or after consumer use (post-consumer)). FPA agrees that so long as a manufacturer can substantiate that the materials were diverted from the solid waste stream and not normally reused during the manufacturing process, it is not necessary for manufacturers to distinguish between pre-consumer and post-consumer recycled contents in marketing materials because consumers do not necessarily understand or value the difference between the use of the two materials.

The proposed Green Guides make clear that if a package is labeled with an unqualified claim that it is made of "recyclable, " content that consumers are

¹⁰ Id. at 63573, FN 263: "FTC Staff concluded that the 60 percent figure is an appropriate minimum threshold because it is consistent with the plain meaning of "substantial majority." The adjective "substantial" requires that there be something greater than a simple majority. Sixty percent is not so high that it permits unqualified claims only when nearly all communities have recycling facilities. Staff further found that this figure is consistent with previous Commission statements and court decisions."

likely to understand that both the product and its packaging is recyclable and would be deceptive if such claim were not able to substantiated. FPA agrees that packaging should therefore be clearly and prominently qualified if the entire package is not recyclable to avoid consumer misperception that the entire product can be recycled. We agree that few communities have the capability to separate the packaging content.

2. Calculation and Threshold for Recycled Content Claims.

The proposed Green Guide would allow marketers to make unqualified recyclable claims for a product or package if the entire product or packaging, "excluding minor incidental components," is composed of recycled materials. Otherwise, the Commission advises, manufacturers must indicate by percentage or weight the recycled content in the finished product or package.

FPA believes that Example 6 under §260.12 is confusing because it lacks an operative definition of the word "significant." In the example a manufacturer makes a packager from laminated layers of foil, plastic and paper. The label claims that one of the three layers of this package is made of recycled plastic. FTC finds that the claim is not deceptive provided that the recycled plastic layer constitutes a "significant component" of the entire package. The FPA recommends that the FTC clarify this example by defining the term "significant" as more than 50% of the packaging by weight.

F. Renewable Materials Claims.

The FPA believes that consumers are likely to conflate claims that a product or package is made with renewable materials as being made with recycled content, and/or that the item is recyclable or biodegradable. Some of this confusion will be relieved if manufacturers prominently qualify their renewable materials claims by specifying the material used, but FPA thinks that it is unnecessary to avoid deception to also indicate on the package how the material is sourced, and why the material is renewable, as would be prescribed by § 260.15 (b). We do not have any problems with the examples in this section of the proposed Green Guides that are related to bio-plastics or bamboo. However, the examples do not seem to go to the problems articulated in the preamble of the proposal related to recent enforcement actions where the renewable material is subject to a chemical synthesis process. Therefore, FPA suggests that the Commission should add an example based on its recent enforcement experience where bamboo was chemically processed to produce rayon to avoid such future claims.

J. Source Reduction Claims.

The Guide states at §260.7 (f) that it is deceptive to misrepresent that a product or package has been reduced in size or is lower in weight, volume or

toxicity unless such claims are qualified by the amount of reduction and the basis for any comparison. FPA agrees and has no suggestions about modifying this section of the current Guide.

FPA's members have significant experience with source reduction claims, which are motivated not only because of consumers but also the interests of large distributors in the economic chain. We agree that claims that a product or package has been reduced or is lower in weight, volume, or toxicity must be qualified by information that clearly identifies information that is the basis so that the consumer can be fully informed of its nature.

K. FPA Submits that Market Claims Based on Carbon Offsets Are Problematic and that a Tougher Approach May Be Required for Such Claims Than Has Been Proposed.

The proposed Guides caution the use of claims related to carbon offsets "because of the complexities of carbon offsets." FPA agrees that there are many problems with substantiating offsets, and consumers are quite possibly misled by many of these claims. Among the problems is lack of a nationally consistent certification program for quantifying emission reductions and, as the Commission notes, considerable disagreement among the experts on the quantification of carbon credits. More important, perhaps, is that it is almost impossible to guarantee the permanence of a carbon reduction. For instance, because the demand for many products that create Greenhouse Gases is elastic, some carbon reductions are not permanent – either they are offset by increased production someplace else or they are not based on output-based metrics. Third, at least thirteen states already require CO₂ reductions and the federal government is inching towards regulations requiring carbon reductions from many large categories of emitters. This situation makes it problematic to allow manufacturers who by benefit of their geography can currently claim that they are not required to reduce carbon.

1. The Commission should consider adopting EPA's principles for claiming emission reduction credits for regulated air pollutants.

These problems which exist with other emission reduction credits led EPA to adopt the following four part test to establish the legitimacy of emission reduction credits (ERCs) for other pollutants: (a) the ERC must be permanent; (b) it must be "surplus," meaning that it is not otherwise required by law; (3) the quantification of the ERC must be able to be replicated by others; and (4) the reduction is "practically enforceable" by a citizen or regulator.¹¹ (The same legal principles apply to trading sulfur on nitrogen oxide allowances under EPA's acid

¹¹ These principles were first established in EPA's 1986 Emissions Trading Policy. 51 Fed. Reg. 43814, December 4, 1986).

rain program, 42 USC Subchapter IV-A (1990). The Commission might consider anchoring its guidance to a similar approach.

2. FPA Does Not Think That Products and Packaging Should Be Advertised on the Basis of Future Carbon Credit Purchases.

For similar reasons, FPA believes that claims associated with carbon offsets that will occur in the future is fundamentally misleading, even if a time period is associated with the claim, whether that period is two or three years in the future. First, there are many business circumstances that can prevent such claims from being actualized. Second, if customers want to buy into carbon credit funds, there are better ways to do it. Three, we expect that many reductions of CO2 and other Greenhouse Gases from airlines and other entities that generate power will be required by Congress or EPA within the near future.

3. FPA Does Support Limited Claims for Carbon Offsets.

With these caveats in mind, FPA supports companies who invest in emission reductions that may benefit the climate and believes that such companies should be able to market themselves if they have produced permanent and surplus carbon offsets. Other ideas that the Commission might also consider including in its final action include requiring (1) EPA's GHG quantification methodologies set forth in 40 CFR Part 98 ("GHG Mandatory Recordkeeping and Reporting Rule") are used so carbon offsets are comparable; (2) a professional engineer has certified the offset; and (3) the manufacturer keeps records certifying that the credit only was or will be used once.

Conclusion - FPA appreciates this opportunity to submit these comments and hopes that if you have any questions regarding their content that you will not hesitate to contact me.

Sincerely,
Ram Singhal
VP Technology & Environmental Strategy
Flexible Packaging Association