Any person who has requested for personal examination a record stored at the Federal Records Center will be notified when the record will be made available.

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which may be demanded in a single request. While every reasonable effort will be made to comply fully with each request as promptly as possible on a first-come, first-served basis, work done to search for, collect and appropriately examine records in response to a request for a large number of records will be contingent upon the availability of processing personnel in accordance with an equitable allocation of time to all members of the public who have requested or wish to request records.

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components within the ASC having substantial subject-matter interest herein.

(b) *Effective date of action.* Whenever it is provided in this subpart that an acknowledgement or response to a request will be given by specific times, deposit in the mails of such acknowledgement or response by that time, addressed to the person making the request, will be deemed full compliance.

(c) *Records in use by a member of the ASC or its staff.* Although every effort will be made to make a record in use by a member of the ASC or its staff available when requested, it may occasionally be necessary to delay making such a record available when doing so at the time the request is made would seriously interfere with the work of the ASC or its staff.

(d) *Missing or lost records.* Any person who has requested a record or a copy of a record pertaining to him or her will be notified if the record sought cannot be found. If the person so requests, he or she will be notified if the record subsequently is found.

(e) *Oral requests; misdirected written requests—(1) Telephone and other oral requests.* Before responding to any request by an individual for information concerning whether records maintained by the ASC in a system of records pertain to the individual or to any request for access to records by an individual, such request must be in writing and signed by the individual making the request. The Executive Director will not entertain any appeal from an alleged denial of failure to comply with an oral request. Any person who has made an oral request for information or access to records who believes that the request has been improperly denied should resubmit the request in appropriate written form to obtain proper consideration and, if need be, administrative review.

(2) *Misdirected written requests.* The ASC cannot assure that a timely or satisfactory response will be given to written requests for information, access or amendment by an individual with respect to records pertaining to him or her that are directed to the ASC other than in a manner prescribed in §§ 1102.103(a), 1102.106(a), 1102.108(a)(2), and 1102.110 of this subpart. Any staff member who receives a written request for information, access or amendment should promptly forward the request to the Privacy Act Officer. Misdirected requests for records will be considered to have been received by the ASC only when they have been actually received by the Privacy Act Officer in cases under § 1102.108(a)(2). The Executive Director will not entertain any appeal from an alleged denial or failure to comply with a misdirected request, unless it is clearly shown that the request was in fact received by the Privacy Act Officer.

§ 1102.109 Fees.

(a) There will be no charge assessed to the individual for the ASC's expense involved in searching for or reviewing the record. Copies of the ASC's records will be provided by a commercial copier at rates established by a contract between the copier and the ASC or by the ASC at the rates in § 1101.4(b)(5)(ii) of 12 CFR part 1101.

(b) *Waiver or reduction of fees.* Whenever the Executive Director of the ASC determines that good cause exists to grant a request for reduction or waiver of fees for copying documents, he or she may reduce or waive any such fees.

§ 1102.110 Penalties.

Title 18 U.S.C. 1001 makes it a criminal offense, subject to a maximum fine of $10,000, or imprisonment for not more than 5 years or both, to knowingly and willingly make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States. 5 U.S.C. 552a(i) makes it a misdemeanor punishable by a fine of not more than $5,000 for any person knowingly and willfully to request or obtain any record concerning an individual from the ASC under false pretenses. 5 U.S.C. 552a(i) (1) and (2) provide criminal penalties for certain violations of the Privacy Act by officers and employees of the ASC.

By the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

Dated: August 7, 1992.

Fred D. Finke,

Chairman.

[FR Doc. 92-19233 Filed 8-12-92; 8:45 am]

BILLING CODE 6210-01

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 26941; Amdt. No. 371]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. These regulatory actions are needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

EFFECTIVE DATE: 0901 GMT, August 20, 1992.

FOR FURTHER INFORMATION CONTACT: Paul J. Best, Flight Procedures Standards Branch (AFS-420), Technical Programs Division, Flight Standards Service Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-8277.

SUPPLEMENTARY INFORMATION: This amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends suspends, or revokes IFR altitudes governing the operation of all aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95. The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances which create the need for

this amendment involve matters of flight safety, operational efficiency in the National Airspace System, and are related to published aeronautical charts that are essential to the user and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next schedule charting and publication date of the flight information to assure its timely availability of the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment are unnecessary, impracticable, and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 95

Aircraft, Airspace.

Issued in Washington, DC on July 30, 1992.

Thomas C. Accardi,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows effective at 0901 GMT, August 20, 1992:

1. The authority citation for part 95 continues to read as follows:

Authority: 49 U.S.C. 1348, 1354, and 1510; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 14 CFR 11.49(b)(2).

2. Part 95 is amended to read as follows:

REVISIONS TO MINIMUM ENROUTE IFR ALTITUDES & CHANGEOVER POINTS—AMENDMENT 371 EFFECTIVE DATE, AUGUST 20, 1992

From	To	MEA
§ 95.6004 VOR Federal Airway 4 is Amended to Read in Part		
Lambs, IN FIX	*Apalo, IN FIX	**3000
*4500–MRA		
**2400–MOCA		
Apalo, IN FIX	Downs, KY FIX	*3000
*2400–MOCA		
§ 95.6013 VOR Federal Airway 13 is Amended to Read in Part		
McAllen, TX VOR/DME	Harlingen, TX VOR/DME.	2000
Raymo, TX FIX	Ascot, TX FIX	*4000
*1500–MOCA		
Humble, TX VORTAC	Cleep, TX FIX	2000
Cleep, TX FIX	Legge, TX FIX	*5000
*2000–MOCA		
Lufkin, TX VORTAC	Carth, TX FIX	*3800
*2000–MOCA		
§ 95.6017 VOR Federal Airway 17 is Amended to Read in Part		
Harlingen, TX VOR/DME.	McAllen, TX VOR/DME	2000
Laredo, TX VORTAC	*Kahan, TX FIX	2400
*5000–MRA		
Kahan, TX FIX	Cotulla, TX VORTAC	*2400
*1800–MOCA		
Cotulla, TX VORTAC	Milet, TX FIX	2500
§ 95.6020 VOR Federal Airway 20 is Amended to Read in Part		
Boint, TX FIX	Palacios, TX VORTAC	1700
§ 95.6047 VOR Federal Airway 47 is Amended to Read in Part		
Pocket City, IN VORTAC.	*Holan, IN FIX	2500
*2600–MRA		
Sacko, IN FIX	Heals, IN FIX	*3500
*2200–MOCA		
§ 95.6052 VOR Federal Airway 52 is Amended to Read in Part		
Quincy, IL VORTAC	*Rivrs, IL FIX	2600
*6000–MRA		
§ 95.6056 VOR Federal Airway 56 is Amended to Read in Part		
Colliers, SC VORTAC	Columbia, SC VORTAC	*2100
*2100–MOCA		
§ 95.6062 VOR Federal Airway 62 is Amended to Read in Part		
Lubbock, TX VORTAC	*Rotan, TX FIX	**6000
*4500–MRA		
**5000–MOCA		
§ 95.6063 VOR Federal Airway 63 is Amended to Read in Part		
Springfield, MO VORTAC.	*Roach, MO FIX	4000
*4000–MRA		
§ 95.6070 VOR Federal Airway 70 is Amended to Read in Part		
U.S. Mexican Border	Brownsville, TX VORTAC.	*5000
*1500–MOCA		
Raymo, TX FIX	Jimie, TX FIX	*4000
*1500–MOCA		
Jimie, TX FIX	Jetty, TX FIX	*4000
*1300–MOCA		
Boint, TX FIX	Palacios, TX VORTAC	1700
§ 95.6157 VOR Federal Airway 157 is Amended by Adding		
Florence, SC VORTAC	Fayetteville, NC VOR/DME.	2200

REVISIONS TO MINIMUM ENROUTE IFR ALTITUDES & CHANGEOVER POINTS—AMENDMENT 371 EFFECTIVE DATE, AUGUST 20, 1992—Continued

From	To	MEA
Fayetteville, NC VOR/DME.	Kinston, NC VORTAC	2000
§ 95.6161 VOR Federal Airway 161 is Amended to Read in Part		
Duffa, TX FIX	Polka, TX FIX	*3400
*2500–MOCA		
§ 95.6163 VOR Federal Airway 163 is Amended to Read in Part		
U.S. Mexican Border	Brownsville, TX VORTAC.	*2000
*1400–MOCA		
Manny, TX FIX	Ascot, TX FIX	*4000
*1500–MOCA		
San Antonio, TX VORTAC.	Lampasas, TX VORTAC.	*3500
*2900–MOCA		
Lampasas, TX VORTAC.	Acton, TX VORTAC	*3000
*2000–MOCA		
Acton, TX VORTAC	Bridgeport, TX VORTAC.	3000
§ 95.6171 VOR Federal Airway 171 is Amended to Read in Part		
Lexington, KY VORTAC	McFee, KY FIX	5000
§ 95.6186 VOR Federal Airway 186 is Amended by Adding		
Paradise, CA VORTAC	Tannr, CA FIX	5500
Tannr, CA FIX	Poggi, CA VORTAC	5000
Is Amended to Read in Part		
Van Nuys, CA VOR/DME.	Tifni, CA FIX	5000
Tifni, CA FIX	Paradise, CA VORTAC	4000
§ 95.6222 VOR Federal Airway 222 is Amended to Read in Part		
Junction, TX VORTAC	Stonewall, TX VORTAC	*4000
*3300–MOCA		
§ 95.6245 VOR Federal Airway 245 is Amended to Read in Part		
Jackson, MS VORTAC	*Haron, MS FIX	2400 MAA–7000
*2700–MRA		
§ 95.6267 VOR Federal Airway 267 is Amended to Read in Part		
Craig, FL VORTAC	*Baxly, GA FIX	**3000
*3000–MRA		
**2500–MOCA		
§ 95.6269 VOR Federal Airway 269 is Amended to Read in Part		
Cobur, OR FIX	*Eugene, OR VORTAC	
	NE BND	
	SW BND	
*3800–MCA Eugene VORTAC, NE BND		
§ 95.6292 VOR Federal Airway 29 is Amended to Read in Part		
Barnes, MA VORTAC	Glyde, MA FIX	*7000
*3000–MOCA		
Glyde, MA FIX	Boston, MA VORTAC	*4000
*3000–MOCA		
§ 95.6305 VOR Federal Airway 305 is Amended to Read in Part		
Pocket City, IN VORTAC.	*Augus, IN FIX	240000
*2600–MRA		

REVISIONS TO MINIMUM ENROUTE IFR ALTITUDES & CHANGEOVER POINTS—AMENDMENT 371 EFFECTIVE DATE, AUGUST 20, 1992—Continued

From	To	MEA
§ 95.6330 VOR Federal Airway 330 is Amended to Read in Part		
Osity, ID FIX	*Jackson, WY VOR/DME.	14000
*13100-MCA Jackson VOR/DME, W BND		
DuNoir, WY VOR/DME	*Rowey, WY FIX	**14000
*11000-MCA Rowey FIX, W BND		
**13500-MOCA		
§ 95.6352 VOR Federal Airway 352 is Amended to Read in Part		
Houlton, ME VOR/DME	U.S. Canadian Border	2000
§ 95.6358 VOR Federal Airway 358 is Amended to Read in Part		
San Antonio, TX VORTAC.	Guada, TX FIX	*4000
*2500-MOCA		
§ 95.6359 VOR Federal Airway 359 is Amended to Read in Part		
U.S. Mexican Border	Laredo, TX VORTAC	*3000
*2400-MOCA		
§ 95.6407 VOR Federal Airway 407 is Amended to Read in Part		
Jimie, TX FIX	Jerry, TX FIX	*4000
*1300-MOCA		
Palacios, TX VORTAC	Humble, TX VORTAC	2500
Linen, LA FIX	Shreveport, LA VORTAC.	3000

REVISIONS TO MINIMUM ENROUTE IFR ALTITUDES & CHANGEOVER POINTS—AMENDMENT 371 EFFECTIVE DATE, AUGUST 20, 1992—Continued

From	To	MEA
§ 95.6431 VOR Federal Airway 431 is Amended by Adding		
Sisters Island, AK VORTAC.	*Lyric, AK FIX	**8000
*8000-MRA		
**5800-MOCA		
Lyric, AK FIX	Biorka Island, AK VORTAC.	5000
§ 95.6437 VOR Federal Airway 437 is Amended to Read in Part		
Jetso, FL FIX	*Stary, GA FIX	10000
*5000-MRA		
§ 95.6512 VOR Federal Airway 512 is Amended to Read in Part		
Pocket City, IN VORTAC.	*Holan, IN FIX	2500
*2600-MRA		
§ 95.6526 VOR Federal Airway 526 is Amended to Read in Part		
Dryer, OH VORTAC	Chardon, OH VORTAC	3000
Chardon, OH VORTAC	Youngstown, OH VORTAC.	3000
§ 95.6550 VOR Federal Airway 550 is Amended to Read in Part		
Cotulla, TX VORTAC	Millet, TX FIX	2500
Dents, TX FIX	*Cedil, TX FIX	**3400
*3500-MRA		
**2600-MOCA		

REVISIONS TO MINIMUM ENROUTE IFR ALTITUDES & CHANGEOVER POINTS—AMENDMENT 371 EFFECTIVE DATE, AUGUST 20, 1992—Continued

From	To	MEA
§ 95.6556 VOR Federal Airway 556 is Amended to Read in Part		
Junction, TX VORTAC	Stonewall, TX VORTAC	*4000
*3300-MOCA		
§ 95.6566 VOR Federal Airway 566 is Amended to Read in Part		
San Antonio, TX VORTAC.	Guada, TX FIX	*4000
*2500-MOCA		
Guada, TX FIX	Stonewall, TX VORTAC	*4000
*3200-MOCA		
Stonewall, TX VORTAC	Llano, TX VORTAC	*4000
*3100-MOCA		

From	To	MEA	MAA
§ 95.7207 Jet Route No. 207 is Amended to Delete:			
MIAMI, FL VORTAC.	Wahaa, FL FIX	18000	45000
WAHAA, FL FIX.	Savannah, GA VORTAC.	24000	45000

§ 95.8003 VOR FEDERAL AIRWAYS CHANGEOVER POINTS

Airway Segment		Changeover points	
From	To	Distance	From
V-186 is Amended to Delete:			
Van Nuys, CA VOR/DME	Paradise, CA VORTAC	22	Van Nuys.

[FR Doc. 92-19105 Filed 8-12-92; 8:45 am]

BILLING CODE 4910-13-M

FEDERAL TRADE COMMISSION

16 CFR Part 260

Guides for the Use of Environmental Marketing Claims

AGENCY: Federal Trade Commission.

ACTION: Publication of final guides.

SUMMARY: The Federal Trade Commission has adopted guides for the use of environmental claims in marketing and advertising. The guides address the applicability of section 5 of the FTC Act to environmental advertising and labeling claims. Public hearings on these issues were held on July 17-18, 1991, along with a 90-day public comment period. In addition to the guides themselves, the Commission is publishing in this notice a summary of an environmental assessment of the guides, including a finding of no significant impact, concluding that an environmental impact statement is not required under applicable law.

EFFECTIVE DATE: July 28, 1992.

ADDRESSES: Copies of the environmental assessment are available from the Public Reference Branch, room 130, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Mary Koelbel Engle (Attorney), (202) 326-3161.

SUPPLEMENTARY INFORMATION: On Friday, May 31, 1991, the Federal Trade Commission published in the **Federal Register** a request for public comment on issues concerning environmental marketing and advertising claims, and a notice that it would hold public hearings. 56 FR 24968, May 31, 1991. Public hearings on these issues were held on July 17-18, 1991, along with a 90-day public comment period. On August 2, 1991, the Commission published in the **Federal Register** a notice extending the comment period. 56 FR 37026, Aug. 2, 1991. The Commission has now adopted guides for the use of environmental claims in marketing and advertising. The guides address the applicability of section 5 of the FTC Act to environmental advertising and labeling claims. In addition to the guides themselves, the Commission is publishing in this notice a summary of an environmental assessment of the guides, including a finding of no significant impact, concluding that an environmental impact statement is not required under applicable law.

List of Subjects in 16 CFR Part 260

Advertising, Environmental claims, Labeling, and Trade practices.

For the reasons set forth in the preamble, 16 CFR ch. I is amended by adding part 260 to read as follows:

PART 260—GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS

Sec.

Sec.
260.7 Environmental marketing claims.
260.8 Environmental Assessment.

Authority: 15 U.S.C. §§ 41–58.

§ 260.1 Statement of purpose.

These guides represent administrative interpretations of laws administered by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. These guides specifically address the application of section 5 of the FTC Act (15 U.S.C. 45) to environmental advertising and marketing practices. They provide the basis for voluntary compliance with such laws by members of industry. Conduct inconsistent with the positions articulated in these guides may result in corrective action by the Commission under section 5 if, after investigation, the Commission has reason to believe that the behavior falls within the scope of conduct declared unlawful by the statute.

§ 260.2 Scope of Guides.

These guides apply to environmental claims included in labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means. The guides apply to any claim about the environmental attributes of a product or package in connection with the sales, offering for sale, or marketing of such product or package for personal, family or household use, or for commercial, institutional or industrial use. Because the guides are not legislative rules under section 18 of the FTC Act, they are not themselves enforceable regulations, nor do they have the force and effect of law. The guides themselves do not preempt regulation of other federal agencies or of state and local bodies governing the use of environmental marketing claims. Compliance with federal, state or local law and regulations concerning such claims, however, will not necessarily preclude Commission law enforcement action under section 5.

§ 260.3 Structure of the guides.

The guides are composed of general principles and specific guidance on the use of environmental claims. These general principles and specific guidance are followed by examples that generally address a single deception concern. A given claim may raise issues that are addressed under more than one example and in more than one section of the guides. In many of the examples, one or more options are presented for qualifying a claim. These options are intended to provide a "safe harbor" for marketers who want certainty about how to make environmental claims. They do not represent the only permissible approaches to qualifying a claim. The examples do not illustrate all possible acceptable claims or disclosures that would be permissible under section 5. In addition, some of the illustrative disclosures may be appropriate for use on labels but not in print or broadcast advertisements and vice versa. In some instances, the guides indicate within the example in what context or contexts a particular type of disclosure should be considered.

§ 260.4 Review procedure.

Three years after the date of adoption of these guides, the Commission will seek public comment on whether and how the guides need to be modified in light of ensuing developments. Parties may petition the Commission to alter or amend these guides in light of substantial new evidence regarding consumer interpretation of a claim or regarding substantiation of a claim. Following review of such a petition, the Commission will take such action as it deems appropriate.

§ 260.5 Interpretation and substantiation of environmental marketing claims.

Section 5 of the FTC Act makes unlawful deceptive acts and practices in or affecting commerce. The Commission's criteria for determining whether an express or implied claim has been made are enunciated in the Commission's Policy Statement on Deception.[1] In addition, any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product or package must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim. A reasonable basis consists of competent and reliable evidence. In the context of environmental marketing claims, such substantiation will often require competent and reliable scientific evidence. For any test, analysis, research, study or other evidence to be "competent and reliable" for purposes of these guides, it must be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results. Further guidance on the reasonable basis standard is set forth in the Commission's 1983 Policy Statement on the Advertising Substantiation Doctrine. 49 FR 30,999 (1984); appended to Thompson Medical Co., 104 F.T.C. 648 (1984). These guides, therefore, attempt to preview Commission policy in a relatively new context—that of environmental claims.

[1] *Cliffdale Associates, Inc.*, 103 F.T.C. 110, at 176, 176 n.7, n.8, appendix, reprinting letter dated Oct. 14, 1983, from the Commission to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (1984) ("Deception Statement").

§ 260.6 General principles.

The following general principles apply to all environmental marketing claims, including, but not limited to, those described in § 260.7. In addition, § 260.7 contains specific guidance applicable to certain environmental marketing claims. Claims should comport with all relevant provisions of these guides, not simply the provision that seems most directly applicable.

(a) *Qualifications and Disclosures.* The Commission traditionally has held that in order to be effective, any qualifications or disclosures such as those described in these guides should be sufficiently clear and prominent to prevent deception. Clarity of language, relative type size and proximity to the claim being qualified, and an absence of contrary claims that could undercut effectiveness, will maximize the likelihood that the qualifications and disclosures are appropriately clear and prominent.

(b) *Distinction Between Benefits of Product and Package.* An environmental marketing claim should be presented in a way that makes clear whether the environmental attribute or benefit being asserted refers to the product, the product's packaging or to a portion or component of the product or packaging. In general, if the environmental attribute or benefit applies to all but minor, incidental components of a product or package, the claim need not be qualified to identify that fact. There may be exceptions to this general principle. For example, if an unqualified "recyclable" claim is made and the presence of the incidental component significantly limits the ability to recycle the product, then the claim would be deceptive.

Example 1: A box of aluminum foil is labeled with the claim "recyclable," without further elaboration. Unless the type of product, surrounding language, or other context of the phrase establishes whether the claim refers to the foil or the box, the claim is deceptive if any part of either the box or the foil, other than minor, incidental components, cannot be recycled.

Example 2: A soft drink bottle is labeled "recycled." The bottle is made entirely from recycled materials, but the bottle cap is not. Because reasonable consumers are likely to consider the bottle cap to be a minor, incidental component of the package, the

claim is not deceptive. Similarly, it would not be deceptive to label a shopping bag "recycled" where the bag is made entirely of recycled material but the easily detachable handle, an incidental component, is not.

(c) *Overstatement of Environmental Attribute.* An environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication. Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible.

Example 1: A package is labeled, "50% more recycled content than before." The manufacturer increased the recycled content of its package from 2 percent recycled material to 3 percent recycled material. Although the claim is technically true, it is likely to convey the false impression that the advertiser has increased significantly the use of recycled material.

Example 2: A trash bag is labeled "recyclable" without qualification. Because trash bags will ordinarily not be separated out from other trash at the landfill or incinerator for recycling, they are highly unlikely to be used again for any purpose. Even if the bag is technically capable of being recycled, the claim is deceptive since it asserts an environmental benefit where no significant or meaningful benefit exists.

Example 3: A paper grocery sack is labeled "reusable." The sack can be brought back to the store and reused for carrying groceries but will fall apart after two or three reuses, on average. Because reasonable consumers are unlikely to assume that a paper grocery sack is durable, the unqualified claim does not overstate the environmental benefit conveyed to consumers. The claim is not deceptive and does not need to be qualified to indicate the limited reuse of the sack.

(d) *Comparative Claims.* Environmental marketing claims that include a comparative statement should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception. In addition, the advertiser should be able to substantiate the comparison.

Example 1: An advertiser notes that its shampoo bottle contains "20% more recycled content." The claim in its context is ambiguous. Depending on contextual factors, it could be a comparison either to the advertiser's immediately preceding product or to a competitor's product. The advertiser should clarify the claim to make the basis for comparison clear, for example, by saying "20% more recycled content than our previous package." Otherwise, the advertiser should be prepared to substantiate whatever comparison is conveyed to reasonable consumers.

Example 2: An advertiser claims that "our plastic diaper liner has the most recycled content." The advertised diaper does have more recycled content, calculated as a percentage of weight, than any other on the market, although it is still well under 100% recycled. Provided the recycled content and the comparative difference between the product and those of competitors are significant and provided the specific comparison can be substantiated, the claim is not deceptive.

Example 3: An ad claims that the advertiser's packaging creates "less waste than the leading national brand." The advertiser's source reduction was implemented sometime ago and is supported by a calculation comparing the relative solid waste contributions of the two packages. The advertiser should be able to substantiate that the comparison remains accurate.

§ 260.7 Environmental marketing claims.

Guidance about the use of environmental marketing claims is set forth below. Each guide is followed by several examples that illustrate, but do not provide an exhaustive list of, claims that do and do not comport with the guides. In each case, the general principles set forth in § 260.6 should also be followed.[2]

(a) *General Environmental Benefit Claims.* It is deceptive to misrepresent, directly or by implication, that a product or package offers a general environmental benefit. Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product or package has specific and far-reaching environmental benefits. As explained in the Commission's Ad Substantiation Statement, every express and material, implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product must be substantiated. Unless this substantiation duty can be met, broad environmental claims should either be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.

Example 1: A brand name like "Eco-Safe" would be deceptive if, in the context of the product so named, it leads consumers to believe that the product has environmental benefits which cannot be substantiated by the manufacturer. The claim would not be deceptive if "Eco-Safe" were followed by clear and prominent qualifying language limiting the safety representation to a particular product attribute for which it could be substantiated, and provided that no other deceptive implications were created by the context.

Example 2: A product wrapper is printed with the claim "Environmentally Friendly." Textual comments on the wrapper explain that the wrapper is "Environmentally Friendly because it was not chlorine bleached, a process that has been shown to create harmful substances." The wrapper was, in fact, not bleached with chlorine. However, the production of the wrapper now creates and releases to the environment significant quantities of other harmful substances. Since consumers are likely to interpret the "Environmentally Friendly" claim, in combination with the textual explanation, to mean that no significant harmful substances are currently released to the environment, the "Environmentally Friendly" claim would be deceptive.

Example 3: A pump spray product is labeled "environmentally safe." Most of the product's active ingredients consist of volatile organic compounds (VOCs) that may cause smog by contributing to ground-level ozone formation. The claim is deceptive because, absent further qualification, it is likely to convey to consumers that use of the product will not result in air pollution or other harm to the environment.

(b) *Degradable/Biodegradable/Photodegradable.* It is deceptive to misrepresent, directly or by implication, that a product or package is degradable, biodegradable or photodegradable. An unqualified claim that a product or package is degradable, biodegradable or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, *i.e.*, decompose into elements found in nature within reasonable short period of time after customary disposal. Claims of degradability, biodegradability or photodegradability should be qualified to the extent necessary to avoid consumer deception about:

(1) The product or package's ability to degrade in the environment where it is customarily disposed; and

(2) The rate and extent of degradation.

Example 1: A trash bag is marketed as "degradable," which no qualification or other disclosure. The marketer relies on soil burial tests to show that the product will decompose in the presence of water and oxygen. The trash bags are customarily disposed of in incineration facilities or at sanitary landfills that are managed in a way that inhibits degradation by minimizing moisture and oxygen. Degradation will be irrelevant for those trash bags that are incinerated and, for those disposed of in landfills, the marketer does not possess adequate substantiation that the bags will degrade in a reasonably short period of time in a landfill. The claim is therefore deceptive.

Example 2: A commercial agricultural plastic mulch film is advertised as "Photodegradable" and qualified with the phrase, "Will break down into small pieces if left uncovered in sunlight." The claim is supported by competent and reliable scientific evidence that the product will break down in a reasonably short period of time after being exposed to sunlight and into

[2] These guides do not address claims based on a "lifecycle" theory of environmental benefit. Such analyses are still in their infancy and thus the Commission lacks sufficient information on which to base guidance at this time.

sufficiently small pieces to become part of the soil. The qualified claim is not deceptive. Because the claim is qualified to indicate the limited extent of breakdown, the advertiser need not meet the elements for an unqualified photodegradable claim, *i.e.*, that the product will not only break down, but also will decompose into elements found in nature.

Example 3: A soap or shampoo product is advertised as "biodegradeable," with no qualification or other disclosure. The manufacturer has competent and reliable scientific evidence demonstrating that the product, which is customarily disposed of in sewage systems, will break down and decompose into elements found in nature in a short period of time. The claim is not deceptive.

(c) *Compostable.* It is deceptive to misrepresent, directly or by implication, that a product or package is compostable. An unqualified claim that a product or package is compostable should be substantiated by competent and reliable scientific evidence that all the materials in the product or package will break down into, or otherwise become part of, usable compost (*e.g.*, soil-conditioning material, mulch) in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device. Claims of compostability should be qualified to the extent necessary to avoid consumer deception. An unqualified claim may be deceptive.

(1) If municipal composting facilities are not available to a substantial majority of consumers or communities where the package is sold;

(2) If the claim misleads consumers about the environmental benefit provided when the product is disposed of in a landfill; or

(3) If consumers misunderstand the claim to mean that the package can be safely composted in their home compost pile or device, when in fact it cannot.

Example 1: A manufacturer indicates that its unbleached coffee filter is compostable. The unqualified claim is not deceptive provided the manufacturer can substantiate that the filter can be converted safely to usable compost in a timely manner in a home compost pile or device, as well as in an appropriate composting program or facility.

Example 2: A lawn and leaf bag is labeled as "Compostable in California Municipal Yard Waste Composting Facilities." The bag contains toxic ingredients that are released into the compost material as the bag breaks down. The claim is deceptive if the presence of these toxic ingredients prevents the compost from being usable.

Example 3: A manufacturer indicates that its paper plate is suitable for home composting. If the manufacturer possesses substantiation for claiming that the paper plate can be converted safely to usable compost in a home compost pile or device, this claim is not deceptive even if no municipal composting facilities exist.

Example 4: A manufacturer makes an unqualified claim that its package is compostable. Although municipal composting facilities exist where the product is sold, the package will not break down into usable compost in a home compost pile or device. To avoid deception, the manufacturer should disclose that the package is not suitable for home composting.

Example 5: A nationally marketed lawn and leaf bag is labeled "compostable." Also printed on the bag is a disclosure that the bag is not designed for use in home compost piles. The bags are in fact composted in municipal yard waste composting programs in many communities around the country, but such programs are not available to a substantial majority of consumers where the bag is sold. The claim is deceptive since reasonable consumers living in areas not served by municipal yard waste programs may understand the reference to mean that composting facilities accepting the bags are available in their area. To avoid deception, the claim should be qualified to indicate the limited availability of such programs, for example, by stating, "Appropriate facilities may not exist in your area." Other examples of adequate qualification of the claim include providing the approximate percentage of communities or the population for which such programs are available.

Example 6: A manufacturer sells a disposable diaper that bears the legend, "This diaper can be composted where municipal solid waste composting facilities exist. There are currently [X number of] municipal solid waste composting facilities across the country." The claim is not deceptive, assuming that composting facilities are available as claimed and the manufacturer can substantiate that the diaper can be converted safely to usable compost in municipal solid waste composting facilities.

Example 7: A manufacturer markets yard waste bags only to consumers residing in particular geographic areas served by county yard waste composting programs. The bags meet specifications for these programs and are labeled, "Compostable Yard Waste Bag for County Composting Programs." The claim is not deceptive. Because the bags are compostable where they are sold, no qualification is required to indicate the limited availability of composting facilities.

(d) *Recyclable.* It is deceptive to misrepresent, directly or by implication, that a product or package is recyclable. A product or package should not be marketed as recyclable unless it can be collected, separated or otherwise recovered from the solid waste stream for use in the form of raw materials, in the manufacture or assembly of a new package or product. Unqualified claims of recyclability for a product or package may be made if the entire product or package, excluding minor incidental components, is recyclable. For products or packages that are made of both recyclable and non-recyclable components, the recyclable claim should be adequately qualified to avoid consumer deception about which portions or components of the product or package are recyclable. Claims of recyclability should be qualified to the extent necessary to avoid consumer deception about any limited availability of recycling programs and collection sites. If an incidental component significantly limits the ability to recycle the product, the claim would be deceptive. 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.

Example 1: A packaged product is labeled with an unqualified claim, "recyclable." It is unclear from the type of product and other context whether the claim refers to the product or its package. The unqualified claim is likely to convey to reasonable consumers that all of both the product and its packaging that remain after normal use of the product, exempt for minor, incidental components, can be recycled. Unless each such message can be substantiated, the claim should be qualified to indicate what portions are recyclable.

Example 2: A plastic package is labeled on the bottom with the Society of the Plastics Industry (SPI) code, consisting of a design of arrows in a triangular shape containing a number and abbreviation identifying the component plastic resin. Without more, the use of the SPI symbol (or similar industry codes) on the bottom of the package, or in a similarly inconspicuous location, does not constitute a claim of recyclability.

Example 3: A container can be burned in incinerator facilities to produce heat and power. It cannot, however, be recycled into new products or packaging. Any claim that the container is recyclable would be deceptive.

Example 4: A nationally marketed bottle bears the unqualified statement that it is "recyclable." Collection sites for recycling the material in question are not available to a substantial majority of consumers or communities, although collection sites are established in a significant percentage of communities or available to a significant percentage of the population. The unqualified claim is deceptive since, unless evidence shows otherwise, reasonable consumers living in communities not served by programs may conclude that recycling programs for the material are available in their area. To avoid deception, the claim should be qualified to indicate the limited availability of programs, for example, by stating, "Check to see if recycling facilities exist in your area." Other examples of adequate qualifications of the claim include providing the approximate percentage of communities or the population to whom programs are available.

Example 5: A soda bottle is marketed nationally and labeled, "Recyclable where facilities exist." Recycling programs for material of this type and size are available in a significant percentage of communities or to a significant percentage of the population, but are not available to a substantial majority of

consumers. The claim is deceptive since, unless evidence shows otherwise, reasonable consumers living in communities not served by programs may understand this phrase to mean that programs are available in their area. To avoid deception, the claim should be further qualified to indicate the limited availability of programs, for example, by using any of the approaches set forth in Example 4 above.

Example 6: A plastic detergent bottle is marketed as follows: "Recyclable in the few communities with facilities for colored HDPE bottles." Collection sites for recycling the container have been established in a half-dozen major metropolitan areas. This disclosure illustrates one approach to qualifying a claim adequately to prevent deception about the limited availability of recycling programs where collection facilities are not established in a significant percentage of communities or available to a significant percentage of the population. Other examples of adequate qualification of the claim include providing the number of communities with programs, or the percentage of communities or the population to which programs are available.

Example 7: A label claims that the package "includes some recyclable material." The package is composed of four layers of different materials, bonded together. One of the layers is made from the recyclable material, but the others are not. While programs for recycling this type of material are available to a substantial majority of consumers, only a few of those programs have the capability to separate out the recyclable layer. Even though it is technologically possible to separate the layers, the claim is not adequately qualified to avoid consumer deception. An appropriately qualified claim would be, "includes material recyclable in the few communities that collect multi-layer products." Other examples of adequate qualification of the claim include providing the number of communities with programs, or the percentage of communities or the population to which programs are available.

Example 8: A product is marketed as having a "recyclable" container. The product is distributed and advertised only in Missouri. Collection sites for recycling the container are available to a substantial majority of Missouri residents, but are not yet available nationally. Because programs are generally available where the product is marketed, the unqualified claim does not deceive consumers about the limited availability of recycling programs.

(e) *Recycled Content.* A recycled content claim may be made only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer). To the extent the source of recycled content includes pre-consumer material, the manufacturer or advertiser must have substantiation for concluding that the pre-consumer material would otherwise have entered the solid waste stream. In asserting a recycled content claim, distinctions may be made between pre-consumer and post-consumer materials. Where such distinctions are asserted, any express or implied claim about the specific pre-consumer or post-consumer content of a product or package must be substantiated. It is deceptive to misrepresent, directly or by implication, that a product or package is made of recycled material. Unqualified claims of recycled content may be made only if the entire product or package, excluding minor, incidental components, is made from recycled material. For products or packages that are only partially made of recycled material, a recycled claim should be adequately qualified to avoid consumer deception about the amount, by weight, of recycled content in the finished product or package.

Example 1: A manufacturer routinely collects spilled raw material and scraps from trimming finished products. After a minimal amount of reprocessing, the manufacturer combines the spills and scraps with virgin material for use in further production of the same product. A claim that the product contains recycled material is deceptive since the spills and scraps to which the claim refers are normally reused by industry within the original manufacturing process, and would not normally have entered the waste stream.

Example 2: A manufacturer purchases material from a firm that collects discarded material from other manufacturers and resells it. All of the material was diverted from the solid waste stream and is not normally reused by industry within the original manufacturing process. The manufacturer includes the weight of this material in its calculations of the recycled content of its products. A claim of recycled content based on this calculation is not deceptive because, absent the purchase and reuse of this material, it would have entered the waste stream.

Example 3: A greeting card is composed 30% by weight of paper collected from consumers after use of a paper product, and 20% by weight of paper that was generated after completion of the paper-making process, diverted from the solid waste stream, and otherwise would not normally have been reused in the original manufacturing process. The marketer of the card may claim either that the product "contains 50% recycled material," or may identify the specific pre-consumer and/or post-consumer content by stating, for example, that the product "contains 50% total recycled material, 30% of which is post-consumer material."

Example 4: A package with 20% recycled content by weight is labeled as containing "20% recycled paper." Some of the recycled content was composed of material collected from consumers after use of the original product. The rest was composed of overrun newspaper stock never sold to customers. The claim is not deceptive.

Example 5: A product in a multi-component package, such as a paperboard box in a shrink-wrapped plastic cover, indicates that it has recycled packaging. The paperboard box is made entirely of recycled material, but the plastic cover is not. The claim is deceptive since, without qualification, it suggests that both components are recycled. A claim limited to the paperboard box would not be deceptive.

Example 6: A package is made from layers of foil, plastic, and paper laminated together, although the layers are indistinguishable to consumers. The label claims that "one of the three layers of this package is made of recycled plastic." The plastic layer is made entirely of recycled plastic. The claim is not deceptive provided the recycled plastic layer constitutes a significant component of the entire package.

Example 7: A paper product is labeled as containing "100% recycled fiber." The claim is not deceptive if the advertiser can substantiate the conclusion that 100% by weight of the fiber in the finished product is recycled.

Example 8: A frozen dinner is marketed in a package composed of a cardboard box over a plastic tray. The package bears the legend, "package made from 30% recycled material." Each packaging component amounts to one-half the weight of the total package. The box is 20% recycled content by weight, while the plastic tray is 40% recycled content by weight. The claim is not deceptive, since the average amount of recycled material is 30%.

Example 9: A paper greeting card is labeled as containing 50% by weight recycled content. The seller purchases paper stock from several sources and the amount of recycled material in the stock provided by each source varies. Because the 50% figure is based on the annual weighted average of recycled material purchased from the sources after accounting for fiber loss during the production process, the claim is permissible.

(f) *Source Reduction.* It is deceptive to misrepresent, directly or by implication, that a product or package has been reduced or is lower in weight, volume or toxicity. Source reduction claims should be qualified to the extent necessary to avoid consumer deception about the amount of the source reduction and about the basis for any comparison asserted.

Example 1: An ad claims that solid waste created by disposal of the advertiser's packaging is "now 10% less than our previous package." The claim is not deceptive if the advertiser has substantiation that shows that disposal of the current package contributes 10% less waste by weight or volume to the solid waste stream when compared with the immediately preceding version of the package.

Example 2: An advertiser notes that disposal of its product generates "10% less waste." The claim is ambiguous. Depending on contextual factors, it could be a comparison either to the immediately preceding product or to a competitor's product. The "10% less waste" reference is deceptive unless the seller clarifies which comparison is intended and substantiates that comparison, or substantiates both possible interpretations of the claim.

(g) *Refillable.* It is deceptive to misrepresent, directly or by implication, that a package is refillable. An unqualified refillable claim should not be asserted unless a system is provided for:

(1) The collection and return of the package for refill; or

(2) The later refill of the package by consumers with product subsequently sold in another package.

A package should not be marketed with an unqualified refillable claim, if it is up to the consumer to find new ways to refill the package.

Example 1: A container is labeled "refillable x times." The manufacturer has the capability to refill returned containers and can show that the container will withstand being refilled at least x times. The manufacturer, however, has established no collection program. The unqualified claim is deceptive because there is no means for collection and return of the container to the manufacturer for refill.

Example 2: A bottle of fabric softener states that it is in a "handy refillable container." The manufacturer also sells a large-sized container that indicates that the consumer is expected to use it to refill the smaller container. The manufacturer sells the large-sized container in the same market areas where it sells the small container. The claim is not deceptive because there is a means for consumers to refill the smaller container from larger containers of the same product.

(h) *Ozone Safe and Ozone Friendly.* It is deceptive to misrepresent, directly or by implication, that a product is safe for or "friendly" to the ozone layer. A claim that a product does not harm the ozone layer is deceptive if the product contains an ozone-depleting substance.

Example 1: A product is labeled "ozone friendly." The claim is deceptive if the product contains any ozone-depleting substance, including those substances listed as Class I or Class II chemicals in title VI of the Clean Air Act Amendments of 1990, Public Law No. 101–549, or others subsequently designated by EPA as ozone-depleting substances. Class I chemicals currently listed in title VI are chlorofluorocarbons (CFCs), halons, carbon tetrachloride and 1,1,1-trichloroethane. Class II chemicals currently listed in title VI are hydrochlorofluorocarbons (HCFCs).

Example 2: The seller of an aerosol product makes an unqualified claim that its product "Contains no CFCs." Although the product does not contain CFCs, it does contain HCFC–22, another ozone depleting ingredient. Because the claim "Contains no CFCs" may imply to reasonable consumers that the product does not harm the ozone layer, the claim is deceptive.

Example 3: A product is labeled "This product is 95% less damaging to the ozone layer than past formulations that contained CFCs." The manufacturer has substituted HCFCs for CFC–12, and can substantiate that this substitution will result in 95% less ozone depletion. The qualified comparative claim is not likely to be deceptive.

§ 260.8 Environmental assessment.

National Environmental Policy Act. In accordance with § 1.83 of the FTC's Procedures and Rules of Practice [3] and § 1501.3 of the Council on Environmental Quality's regulations for implementing the procedural provisions of National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (1969),[4] the Commission has prepared an environmental assessment for purposes of providing sufficient evidence and analysis to determine whether issuing the Guides for the Use of Environmental Marketing Claims requires preparation of an environmental impact statement or a finding of no significant impact. After careful study, the Commission concludes that issuance of the Guides will not have a significant impact on the environment and that any such impact "would be so uncertain that environmental analysis would be based on speculation." [5] An environmental impact statement is therefore not required. This conclusion is based on the findings in the environmental assessment that issuance of the guides would have no quantifiable environmental impact because the guides are voluntary in nature, do not preempt inconsistent state laws, are based on the FTC's deception policy, and, when used in conjunction with the Commission's policy of case-by-case enforcement, are intended to aid compliance with section 5(a) of the FTC Act as that Act applies to environmental marketing claims. Furthermore, the guides are neither motivated by nor intended to influence environmental policy decisions. The guides also do not impose standards on manufacturing or waste disposal methods. Consumer behavior as a result of the issuance of guides may change but any such change cannot be quantified, or even reasonably estimated, since those decisions would be influenced by many other variables, in addition to advertising claims. Industry response to the guides, beyond modification of environmental marketing claims, is also impossible to predict or quantify. The alternatives to Commission guides described in the environmental assessment, both within and without the Commission, would also have, at most, only an indirect and highly speculative impact on the environment.

[3] 16 CFR 1.83 (revised as of January 1, 1991).

[4] 40 CFR 1501.3 (1991).

[5] 16 CFR 1.83(a).

By direction of the Commission, Commissioner Azcuenaga dissenting.

Donald S. Clark,

Secretary.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA CONCERNING ISSUANCE OF COMMISSION GUIDES ON ENVIRONMENTAL MARKETING CLAIMS

Today, the Commission issues guides on environmental marketing claims. The guides should prove useful to the business and law enforcement communities and to consumers, that is, to all those who make, analyze or rely on environmental claims in the advertising and marketing of goods and services. In an area that seems always to prove more difficult than initial impressions suggest, the Commission should be commended for producing a clear, careful and balanced document.

It has been my pleasure to work with my colleagues and Commission staff in this important and difficult endeavor and with the government agencies and other concerned groups and individuals who have participated so generously and constructively in this process. With regret, I nevertheless find I must dissent.

Basic to the exercise of the responsibility of my office is the obligation to act within the authority conferred on that office and, as I understand that obligation, it is not satisfied by forecasting that a challenge is unlikely or by deferring to the courts to decide on review whether the exercise lies within the bounds of the authority, but rather is my obligation to decide in the first instance and without regard to the prevailing political climate in which that decision will be received. As I read the law, the Commission has no authority to issue these guides, as written, without first employing the rulemaking procedures of section 18(b)(1) of the FTC Act, which it has not done.

Section 18(a)(1) of the FTC Act, 15 U.S.C. 57a(a)(1), provides that the Commission may prescribe:

(A) interpretative rules and general statements of policy with respect to unfair or deceptive acts or practices * * *, and

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices * * *.

Section 18(b)(1) directs that "[w]hen prescribing a rule under subsection (a)(1)(B)," the Commission is to proceed in accordance with the notice and comment requirements of section 553 of the Administrative Procedure Act and shall also follow the more extensive procedures set forth in section 18 that often are referred to as "Magnuson-Moss rulemaking."

As the guides expressly state, the majority of the Commission does not view its guides as having the force and effect of law but as explanations of existing statutory terms and obligations. Under the Administrative Procedure Act, 5 U.S.C 553, and under section 18 of the FTC Act, therefore, the Commission apparently would categorize its guides as "interpretive" (or "interpretative") rules or policy statements rather than "legislative" rules or "rules which define with specificity

* * * deceptive acts or practices." I cannot agree.

By stating definitively, for example, that a particular act "is deceptive" or that particular conduct "would be deceptive," or that under specified circumstances, firms "must" or "should" act in a particular way, language that appears throughout the document,[1] I believe that the document has "defined with specificity" a deceptive act or practice as set forth in section 18(a)(1)(B). Since the enactment of the Magnuson-Moss Act in 1975, the Commission has been empowered to take such an action only if it first adheres to Magnuson-Moss rulemaking procedures.

If the Commission in issuing its guides were relying on a body of past precedent, I might be persuaded that my colleagues were correct in their assessment, and that the decisive "guidance" in the document simply explicates existing Commission case law and policy. In issuing its Deception Statement in 1983, for example, the Commission reviewed decided cases to synthesize principles, but that is not the case here. The Commission's case law on environmental claims consists almost entirely of consent agreements and orders issued without adjudicative records or admissions of liability. These agreements and orders may convey to the public some sense of what the Commission is likely to do in other similar situations, but they are not binding precedent.

Were I entirely alone in my concern over the need to distinguish between interpretive and legislative rules in issuing some form of guidance on environmental claims, I might be inclined to accede to the position of the majority. Again, this is not the case. Although the courts, particularly in the District of Columbia Circuit, have not instructed agencies unambiguously on how they should distinguish interpretive and legislative rules, recent decisions suggest that my concern is not without validity. At the least, they reflect judicial concern that agencies attend to this question with care in reaching their regulatory decisions and judicial unwillingness blindly to acquiesce in agencies' characterizations of their actions. In short, saying that these are guides and not rules does not make it so.

Even in the presence of express language disavowing agency intent to bind either itself or the public, courts in this circuit have considered whether allegedly interpretive rules are sufficiently mandatory and definitive to render them legislative in nature. See *Community Nutrition Institute* v. *Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (noting that it is appropriate to "give some, 'albeit not overwhelming' deference to an agency's characterization of its statement" and refusing to sustain FDA rules because the agency failed to follow the appropriate rulemaking process); *Arrow Air, Inc.* v. *Dole*, 784 F.2d 1118, 1122 (D.C. Cir. 1986) (listing agency intent as only one among other factors differentiating interpretive and legislative rules); *General Motors Corp.* v. *Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1074 (1985) (upholding agency's interpretation but finding agency's own label relevant but not dispositive).[2]

The likelihood, in whatever degree, that what the Commission calls guides are in fact rules under section 18(a)(1)(B) could easily have been avoided without diminishing the basic guidance the Commission seeks to offer. The Horizontal Merger Guidelines recently issued by the Commission and the Department of Justice, for example, refrain from definitive conclusions about what does or does not violate the law in various ways, one of which is by using the qualifier "likely." For example, in discussing the significance of post-merger market concentration measured by the Herfindahl-Hirschman Index ("HHI"), the Merger Guidelines say, "Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise." 1992 CCH Trade Cas. ¶ 13,104 at 20,573–6 (emphasis added).[3]

A similar approach could be used here. Instead of saying that a particular claim "is" or "is not" deceptive, the environmental guides could have said that a particular claim "is likely" or "is unlikely" to be deceptive. Although adding the qualifiers "likely" or "unlikely" sounds more tentative, if that language were used throughout the document, the basic message of the guides, which is to indicate the Commission's likely response in various hypothetical situations, would remain. If the Commission prefers the more definitive language because indeed it wants to be definitive about what is or is not deceptive, then it seems to me that the Commission runs squarely into the problem that it is in fact issuing rules rather than guides. I confess some puzzlement about whether the Commission intends to be definitive (and issue rules) or to indicate what it is likely to do (and issue guides), but, even more than that, I regret that the Commission has not seen fit to make this single change, which would have enabled me to joint in making this a unanimous document.

Second, I differ from the Commission in its decision not to place the guides on the public record for a short period of time to enable the public to comment on them. Although we have sought to obtain accurate information and to consider the issues thoroughly, it is conceivable, nevertheless, that someone outside the agency might offer useful observations and suggestions for improvement. The Commission has obtained comment on the merits of issuing guidance and on the issues that such guides should address, but it has not provided to those affected by the guides an opportunity to assess the economic benefits and costs of the actual provisions or to call to our attention provisions that may cause unintended effects. A short, appropriately focused comment period on the guides could have coincided with the public comment period on the Environmental Assessment that is required under the National Environmental Policy Act of 1969, 42 U.S.C. 4321, as amended.

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[1] Guides and trade practice rules issued before the enactment of section 18 and before the judicial decisions discussed below contain similarly didactic language.

[2] Although, as already noted, the law of the circuit is not settled, there is a serious possibility, and in my opinion likelihood, that the Court of Appeals for the District of Columbia Circuit, at least, would find that portions, if not all, of the guides just issued are legislative rules rather than interpretive rules or policy statements. Compare the Fertilizer Institute v. EPA, 935 F.2d 1303, 1307–08 (D.C. Cir. 1991), quoting General Motors Corp. v. Ruckelshaus, *supra*, and Citizens To Save Spencer County v. EPA, 600 F.2d 844, 876 and n. 153 (D.C. Cir. 1979) (distinction between interpretive and legislative rules depends on whether document "simply states what the administrative agency thinks the statute means, and only 'reminds' affected parties of existing duties" or demonstrates that "the agency intends to create new law, rights or duties"), with Alaska v. DOT, 868 F.2d 441, 446–47 (D.C. Cir. 1989), and Community Nutrition Institute v. Young, *supra* at 947–49, (distinction depends on several factors including use of mandatory language, inclusion of exception process, practical application and limitations placed on agency discretion).

[3] Magnuson-Moss rulemaking procedures do not apply to antitrust rules, but the notice and comment rulemaking requirements in the Administrative Procedure Act ("APA") apply and presumably would have precluded the Commission and the Department from issuing the merger guidelines had they purported to bind the government or the public by requiring or prescribing particular conduct without first providing for public notice and comment. When it recently issued revisions to the so-called Fred Meyer Guides (Guides for Advertising Allowances and Other Merchandising Payments and Services, 55 FR 33 651 (Aug. 17, 1990)), under the antitrust laws, the Commission employed the appropriate APA rulemaking procedures.

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 30 and 32

Offer and Sale of Foreign Exchange-Traded Options, and Foreign Exchange-Traded Futures Contracts Based on Foreign Stock Indexes and Foreign Government Debt, to Persons Located Outside the United States

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

SUMMARY: Pursuant to its authority under sections 2(a)(1)(B), 4(b) and 4c(b) [1] of the Commodity Exchange Act ("CEA" or "Act") and rules 32.11 and 30.3(a),[2] and its determination that granting relief would not be inconsistent with the Act or the public interest, the Commodity Futures Trading Commission ("Commission") is providing relief to permit:

(1) Futures commission merchants ("FCMs") to solicit and accept orders and funds for foreign exchange-traded

[1] Sections 2(a)(1)(B), 4(b) and 4c(b), 7 U.S.C. 2a, 6(b) and 6c(b).

[2] 17 CFR 32.11 and 30.3(a)(1992).