

This rule was filed as 1 NMAC 2.5.

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 2 CONSUMER PROTECTION
PART 5 REQUIREMENTS FOR ENVIRONMENTAL MARKETING CLAIMS

12.2.5.1 ISSUING AGENCY: Office of the New Mexico Attorney General, Consumer Protection Division, Post Office Drawer 1508, Santa Fe, New Mexico 87504-1508
[5/1/98; Recompiled 10/15/01]

12.2.5.2 SCOPE: Marketers and advertisers.
[5/1/98; Recompiled 10/15/01]

12.2.5.3 STATUTORY AUTHORITY: New Mexico Unfair Practices Act, Section 57-12-1 NMSA 1978 et seq. and New Mexico False Advertising Act, Section 57-15-1 NMSA 1978 et seq.
[5/1/98; Recompiled 10/15/01]

12.2.5.4 DURATION: Permanent.
[5/1/98; Recompiled 10/15/01]

12.2.5.5 EFFECTIVE DATE: Re-promulgated and reformatted in NMAC format effective as of May 1, 1998 unless a later date is cited at the end of a section or paragraph.
[5/1/98; Recompiled 10/15/01]
[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

12.2.5.6 OBJECTIVE:

A. These regulations are intended to accomplish two principal objectives. The first is to deter unfair and deceptive practices that result in economic harm to consumers. The second is to encourage fair competition by providing clear legal standards for environmental marketing claims to facilitate compliance with and enforcement of the law.

B. In recent years consumers have increasingly made purchasing decisions based upon their perception of the environmental attributes and benefits of various products and packaging. Similarly, persons marketing products and packaging have increasingly made reference to the environmental attributes and benefits of their products and packaging in advertising and sales presentations.

C. Unlike some other kinds of advertising, environmental marketing claims are difficult, if not impossible, for consumers to evaluate on their own. Scientific testing is normally required to determine whether an environmental marketing claim is true. Consumers are not in a position to make independent evaluations of such claims. Regulations are needed to ensure that advertising and sales practices are not unfair or deceptive, that such practices conform to legitimate consumer expectations and that all marketers and advertisers are placed on an equal competitive footing. The attorney general has therefore concluded that regulation of environmental marketing claims is in the public interest and will promote the health, safety and general welfare of the citizens of New Mexico.

D. These regulations provide a basis for evaluating environmental marketing claims. They reflect provisions of New Mexico law, but do not necessarily cover every possible deceptive marketing practice. Therefore, it is not intended that literal compliance with these regulations be an absolute protection against liability for deceptive environmental marketing claims. Marketers and advertisers must review their environmental marketing claims in light of the purpose of the regulations.

E. The federal trade commission has promulgated Guides for the Use of Environmental Marketing Claims. See, 16 C.F.R. 260. These guides apply to such claims in or affecting commerce. To the extent possible, these regulations follow the federal trade commission's guides both out of deference to the legislative directive that interpretation of the Unfair Practices Act be guided by the commission's interpretations and to reduce the burden on business by avoiding conflicting regulatory requirements.

F. Before promulgating these regulations, notice of the proposed action was published on January 15, 1994 in the New Mexico Register, Volume V, No. 1, pursuant to AG 92-3-1.3(A) [now 12.2.1.9 NMAC], and a

public hearing was held on March 2, 1994 in Santa Fe. All comments received during the hearing were considered in the revision of the regulations finally promulgated. Representatives of the New Mexico grocers association, the general services department of the state of New Mexico, New Mexico PIRG, the New Mexico environment department and the owner of a diaper service testified at the hearing. This office also solicited written comments on the regulations. Twelve written comments were received reflecting the views of a variety of business interests, government agencies and New Mexico PIRG. All comments received were considered.
[5/1/98; Recompiled 10/15/01]

12.2.5.7 DEFINITIONS:

A. As used in these regulations, the term “environmental marketing claim” means any representation about the environmental attributes of a product or a package made in connection with the advertising, marketing, offer for sale or sale of such product or package.

B. As used in these regulations, the term “prior reasonable basis” means such competent and reliable evidence as would satisfy a reasonable and prudent businessperson, acting in good faith, that the environmental marketing claim is true. In general, environmental marketing claims must be supported by competent and reliable scientific evidence, and the prior reasonable basis for an environmental marketing claim must be based on such evidence. For any test, analysis, research, study or other evidence to be “competent and reliable” for the purposes of these regulations, 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.
[5/1/98; Recompiled 10/15/01]

12.2.5.8 FALSE AND MISLEADING CLAIMS PROHIBITED: It is an unfair or deceptive trade practice for any person to make an environmental marketing claim that is false or misleading.
[5/1/98; Recompiled 10/15/01]

12.2.5.9 PRIOR REASONABLE BASIS REQUIRED: It is an unfair or deceptive trade practice for any person to make an environmental marketing claim unless prior to making the claim:

A. the person has and relies upon a prior reasonable basis from which to conclude that the claim is true; and

B. the person possesses documents that evidence the prior reasonable basis for the claim.
[5/1/98; Recompiled 10/15/01]

12.2.5.10 RECORD-KEEPING REQUIREMENTS:

A. Any person who makes an environmental marketing claim must retain any and all documents evidencing the prior reasonable basis for the claim for a period of at least two years after the last date on which the claim is made. It is an unfair or deceptive trade practice for any person who makes an environmental marketing claim to fail to retain any and all documents evidencing the prior reasonable basis for the claim for a period of not less than two years after the last date on which the claim is made.

B. Any person who makes an environmental marketing claim must provide the attorney general with any and all documents evidencing the prior reasonable basis for such claim upon ten days written notice. It is an unfair or deceptive trade practice to fail to provide the attorney general with any and all documents evidencing the prior reasonable basis for an environmental marketing claim upon ten days written notice.
[5/1/98; Recompiled 10/15/01]

12.2.5.11 QUALIFICATIONS AND DISCLOSURES:

A. It is an unfair or deceptive trade practice for any person to obscure or make misleading any material fact in any environmental marketing claim by the use of layout, headlines, illustrations, footnotes, style, sound, length of time, lighting, color or type size.

B. It is an unfair or deceptive trade practice for any person to use any disclosure or disclaimer in an environmental marketing claim unless the disclosure or disclaimer is clear and conspicuous and in close proximity to the terms it modifies.

C. It is an unfair or deceptive trade practice for any person to make a televised environmental marketing claim with disclosures that are in such fine print or appear on the screen so briefly that they cannot be easily read.

D. Comment: To be effective, any qualifications and disclosures must 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.
[5/1/98; Recompiled 10/15/01]

12.2.5.12 DISTINCTION BETWEEN BENEFITS OF PRODUCT AND PACKAGE: It is an unfair or deceptive trade practice to make an environmental marketing claim in a way that fails to make 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.
[5/1/98; Recompiled 10/15/01]

12.2.5.13 OVERSTATEMENT OF ENVIRONMENTAL BENEFITS: It is an unfair or deceptive trade practice to make an environmental marketing claims in a manner that overstates the environmental attribute or benefit, expressly or by implication. Marketers must avoid implications of significant environmental benefits if the benefits are in fact negligible.
[5/1/98; Recompiled 10/15/01]

12.2.5.14 COMPARATIVE CLAIMS: It is an unfair or deceptive trade practice to make an environmental marketing claim that includes a comparative statement unless:

- A. the claim is presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception; and
- B. the marketer is able to substantiate the comparison.

[5/1/98; Recompiled 10/15/01]

12.2.5.15 GENERAL ENVIRONMENTAL BENEFIT CLAIMS:

- A. It is an unfair or deceptive trade practice to misrepresent directly or by implication that a product or package offers a general environmental benefit.
- B. Comment: Unqualified general claims of environmental benefit are difficult to interpret and, depending on their context, may have a wide range of meanings to consumers. Such claims may convey that a product or package has specific and far-reaching environmental benefits when it does not. Every express and material implied claim that a general assertion conveys to reasonable consumers about an objective quality must be substantiated. Unless this substantiation duty can be met, broad environmental claims must either be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.
[5/1/98; Recompiled 10/15/01]

12.2.5.16 DEGRADABLE, BIODEGRADABLE AND PHOTODEGRADABLE: It is an unfair or deceptive act or practice 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 must 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 a reasonably short period of time after customary disposal. Claims of degradability, biodegradability or photodegradability must be qualified to the extent necessary to avoid consumer deception about:

- A. the product's or package's ability to degrade in the environment where it is customarily disposed; and
- B. the rate and extent of degradation.

[5/1/98; Recompiled 10/15/01]

12.2.5.17 COMPOSTABLE:

- A. It is an unfair or deceptive trade practice to misrepresent, directly or by implication, that a product or package is compostable.
- B. It is an unfair or deceptive trade practice to make an unqualified claim that a product or package is compostable unless the claim is 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.

C. Claims of compostability must be qualified to the extent necessary to avoid consumer deception. An unqualified claim may be deceptive if:

- (1) municipal composting facilities are not available to a substantial majority of consumers or communities where the product is sold;
- (2) the claim misleads consumers about the environmental benefit provided when the product or package is disposed of in a landfill; or
- (3) consumers misunderstand the claim to mean that the product or package can be safely composted in their home compost pile or device, when in fact it cannot.

[5/1/98; Recompiled 10/15/01]

12.2.5.18 RECYCLABLE:

A. It is an unfair or deceptive trade practice 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 product or package.

B. Unqualified claims of recyclability may be made only 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 must be adequately qualified to avoid consumer deception about which portions or components of the product or package are recyclable. Claims of recyclability must be qualified to the extent necessary to avoid consumer deception about any limited availability of recycling programs or collection sites. If an incidental component significantly limits the ability to recycle the product or package, the claim would be deceptive. A product or package that is made of recyclable material, but because of its shape, size or some other attribute, is not accepted in recycling programs should not be marketed as recyclable. Qualification may be necessary to avoid consumer deception about the limited availability of recycling programs and collection sites if recycling collection sites are not available to a substantial majority of consumers or communities.

[5/1/98; Recompiled 10/15/01]

12.2.5.19 RECYCLED CONTENT:

A. It is an unfair or deceptive trade practice to make a recycled content claim unless the materials for which the claim is made 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 that 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.

B. It is an unfair or deceptive trade practice 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 must be adequately qualified to avoid consumer deception about amount, by weight, of recycled content in the finished product or package.

[5/1/98; Recompiled 10/15/01]

12.2.5.20 SOURCE REDUCTION: It is an unfair or deceptive trade practice 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 must be qualified to the extent necessary to avoid consumer deception about the amount of the source reduction and the basis for any comparison asserted.

[5/1/98; Recompiled 10/15/01]

12.2.5.21 REFILLABLE:

A. It is an unfair or deceptive trade practice 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.
B. It is an unfair or deceptive trade practice to market a package with an unqualified refillable claim if it is up to consumers to find new ways to refill the package.
[5/1/98; Recompiled 10/15/01]

12.2.5.22 OZONE SAFE AND OZONE FRIENDLY: It is an unfair or deceptive trade practice to misrepresent, directly or by implication, that a product is safe for or “friendly” to the ozone layer. A direct or implicit claim that a product does not harm the ozone layer is deceptive if the product contains an ozone-depleting substance.
[5/1/98; Recompiled 10/15/01]

12.2.5.23 SEVERABILITY: If any part of these regulations is held invalid, the remainder and the application thereof shall not be affected.
[5/1/98; Recompiled 10/15/01]

12.2.5.24 SIGNATURE:
Original Adoption and Promulgation
Tom Udall
Attorney General
Date: 11/1/94

Readoption and Repromulgation
Tom Udall
Attorney General
Date: 4/9/98

Tom Udall
Attorney General
[5/1/98; Recompiled 10/15/01]

HISTORY OFF 12.2.5 NMAC:

Pre-NMAC Regulatory Filing History. The material in this part is derived from that previously filed with the State Records Center and Archives under:
AG 94-1, Regulations for Environmental Marketing Claims Issued Pursuant to the Unfair Practices Act and False Advertising Act, filed 11/2/94.

History of Repealed Material: [RESERVED]