

SUBJECT: CONSUMER PROTECTION – REPRESENTATIONS OF VERMONT ORIGIN
ATTORNEY GENERAL – PUBLIC PROTECTION UNIT
ADOPTED PURSUANT TO 9 V.S.A. § 2453(c)

RULE CP 120
Effective Date: 1/5/06

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CP 120.01 Definitions

(a) "Based in Vermont" means, with reference to a company, that the company currently discharges substantial functions in Vermont. For this purpose, "substantial functions" do not include such activities as the original development of the goods or services, mail handling or banking, or the presence of sales, distribution or similar staff alone.

(b) "Clear and conspicuous" means that required disclosures are presented in such a manner, given their language, syntax, graphics, size, color, contrast and proximity to any related information, as to be readily noticed and understood by consumers. A disclosure is not clear and conspicuous if, among other things, it is ambiguous or it is obscured by the background against which it appears, or by its location within a lengthy disclosure of non-material information. If this rule requires a disclosure to be made in a clear and conspicuous manner, then, in addition to the above, the disclosure must appear

(i) for the purpose of labeling, in proximity to the representation that it qualifies and in typeface that is at least 5 percent of the height of the label, or 3/16 of an inch high, whichever is larger (one disclosure on the front panel of the label is sufficient for this purpose), except that the disclosure need not be any larger than the largest representation of "Vermont" on the label; or

(ii) at point of sale (including on the Internet or in a catalog), sufficiently prominent as not to be missed by reasonable consumers before they make their purchase.

(c) A company name is used in "close association" with a food product when the name appears on the product's label or packaging or otherwise refers specifically to the product, *provided that* a company name that appears in small type other than on the front panel and for purposes of compliance with another law or regulation is not "in close association" with the product.

(d) "Company name" means two or more words that clearly indicate a business entity or facility (whether registered with the government or not), through the use of words such as "incorporated," "company," "cooperative," "Farms," "Cannery," or "of Vermont" (as in "John's of Vermont").

(e) "Food product" includes any food, whether processed or not.

(f) "Front panel" means the front or primary panel or section of a product container or package.

(g) "Made in Vermont" means that the item in question was last substantially transformed in Vermont into a new and different item, with a name, character or use distinct from that of the ingredients or components from which it was transformed.

(h) "Person" includes any natural person, corporation, partnership, unincorporated association and other business entity.

(i) "Primary ingredient" means:

(i) one or more ingredients that each constitute a major portion of the quantity, volume or value of a food product; or

(ii) an ingredient that is prominently identified in connection with a food product other than in a company name;

except that an ingredient is not "primary" if it is not indigenous to Vermont (such as cocoa or sugar). For this purpose, "indigenous" means commonly grown or raised in Vermont, though not necessarily in substantial commercial quantities.

(j) "Producer" means a person or company that grows, manufactures or otherwise creates something that is offered or sold.

(k) "Qualified representation of Vermont origin" means a representation containing the word "Vermont" or a substantially similar term that states in what respect a good or service is connected to Vermont (such as "made in Vermont" or "contains Vermont tomatoes").

(l) "Representation" and "represent" refer to any words, symbols or other graphic device made in connection with the advertising, marketing or sale of a good or service. Representations may appear, without limitation, in print media, on broadcast media, by electronic means (such as e-mail or the Internet), and on labels, signs and displays.

(m) "Unqualified representation of Vermont origin" means a representation containing the word "Vermont" or a substantially similar term that appears in connection with a food product or ingredient without stating how the product or ingredient is connected to Vermont (such as "Vermont cheddar cheese").

(n) A food product is a "Vermont product" if:

(i) any company whose name appears in connection with the product is based in Vermont;

(ii) the product, if substantially transformed, was made in Vermont; and

(iii) its primary or prominently identified ingredient comes from Vermont, *provided that* this requirement must be met only with respect to (A) a product that does not undergo substantial transformation (such as milk or water); (B) a product with one primary ingredient commonly known to consumers (such as cider and apples or cheese and milk); and (C) a product for which the word "Vermont" or a substantially similar term, other than in a company name, is proximately used to describe a specific ingredient (such as "Vermont blueberry jam").

CP 120.02 Scope of the Rule

(a) The provisions of this rule on unqualified representations and company names apply only to the offer or sale of a food product (as defined in CP 120.01(e)).

(b) The remainder of this rule applies to all goods and services wherever offered or sold.

CP 120.03 General Provisions

(a) It is an unfair and deceptive trade act or practice in commerce under 9 V.S.A. § 2453(a) for any person to make a representation that does not comply with this rule, excepting only violations of this rule that are *de minimis* or the result of accident beyond the producer's control, as long as the producer both had systems or procedures in place to ensure compliance with the rule and took reasonable steps to minimize the extent of the non-compliance.

(b) Terms such as "Green Mountain," "Lake Champlain," local town names and other similar geographic descriptors are not covered by this rule.

(c) For the purpose of this rule:

(i) a primary ingredient or other component shall be considered to come from Vermont if at least 75 percent of the ingredient or component comes from Vermont, *except that* fresh produce shall be considered to come from Vermont only if 100 percent of the produce is grown in Vermont; and

(ii) an item shall be considered to be made in Vermont if at least 75 percent of the items sold in Vermont are made in Vermont.

All percentages under this subsection may be calculated in the aggregate over as long as a consecutive twelve-month period.

(d) A representation that is not covered by this rule is still subject to the prohibition on unfair and deceptive trade acts or practices in commerce under 9 V.S.A. § 2453(a).

CP 120.04 Unqualified Representations of Vermont Origin

No person shall make an unqualified representation of Vermont origin in connection with a food product that is not a Vermont product.

CP 120.05 Qualified Representations of Vermont Origin

No person shall make a qualified representation of Vermont origin unless:

(a) the qualifying language is accurate; and

(b) the qualifying language is proximate to, and substantially as prominent as, the term "Vermont" that it modifies.

CP 120.06 Company Names

No person shall represent a company name that includes the word "Vermont" or any substantially similar term in close association with a food product that is not a Vermont product unless the representation is accompanied by the following clear and conspicuous disclosures in the manner described in this section or at the point of sale as described in CP 120.01(b)(ii):

(a) If the company is not based in Vermont, then information sufficient to communicate that fact must be disclosed somewhere on the product.

(b) If the product was not made in Vermont, then information sufficient to indicate the geographic area where the product was made must be disclosed on the front panel (such as "Made in Ohio," "Product of New England," or "Made in USA").

(c) If the product is one that, under the definition of "Vermont product," is required to have a primary ingredient that comes from Vermont, but in fact such ingredient comes from outside of Vermont, then information sufficient to indicate the geographic area where the ingredient comes from must be disclosed on the front panel (such as "Made from New England apples" or "Northeast blend syrup").

(d) Notwithstanding the above, the requirements of subsections (b) and (c) of this section are satisfied if *either* the product was made in Vermont *or* a primary ingredient comes from Vermont, *provided that*:

there is a disclosure on the front panel that the product was made in Vermont, or that a primary ingredient comes from Vermont, as the case may be; and

there is a disclosure, not necessarily on the front panel, that the product was made outside of Vermont, or that a primary ingredient comes from outside of Vermont, as the case may be.

CP 120.07 Company Location

(a) No person shall use a Vermont address in any representation to describe the location of the seller, solicitor, producer, distributor or other person associated with a good or service unless the company is based in Vermont, *except that* the label on an item regulated by the U.S. Food and Drug Administration (FDA) need only conform to applicable FDA address requirements.

(b) Notwithstanding subsection (a), a company whose business it is to ship, distribute, or similarly process goods or provide services may use a Vermont address to describe the location of its own facilities in Vermont. The company may also use, and permit the use of, its own name and Vermont address, as long as the company also discloses the name and out-of-state address of its client to identify where payments, returns, customer service inquiries, or similar transactions should be directed, and, when shipping goods, may use the name of the out-of-state client without that client's address as long as the out-of-state address is provided within a reasonably short period of time, such as on an invoice. A shipper or fulfillment house may not use, or permit the use of, a Vermont address to describe the location of its out-of-state client in connection with the advertising, marketing, or selling of the client's goods or services.

CP 120.08 Requirement of Substantiation

In addition to any other requirement of this rule, a person who makes a representation covered by this rule must, at the time the representation is made, possess reasonable factual substantiation for the representation.

CP 120.09 Effect on, and of, Other Provisions of Vermont Law

(a) Nothing in this rule shall limit the rights or remedies available to the State of Vermont or to consumers with respect to representations not covered by this rule, or under any other provision of Vermont law.

(b) If a statute or another rule of an agency of the State of Vermont contains a standard that is more stringent with respect to any representation of Vermont origin covered by this rule, the more stringent standard shall prevail over the corresponding standard in this rule and shall be incorporated herein by reference.

CP 120.10 Effective Date

(a) This rule shall become effective 90 days after its adoption and shall apply to all food products, or to all goods and services, as applicable, that are placed into the stream of commerce after the effective date of the rule.

(b) Notwithstanding subsection (a) of this section, a person that sells or markets a good or service subject to this rule shall have one year from the effective date of this rule, or the time it takes to use up marketing materials in stock at the time the rule is adopted, whichever is shorter, to bring product labels or packaging into compliance with the sections of the rule on unqualified representations and company names, *provided that* this grace period does not apply to qualified representations.