

Vermont Origin Rule—FAQs¹ (Revised 7/7/06)

1. Q: Why did the Attorney General’s Office issue this rule?
A: The rule was issued to allow businesses to *pro-actively* avoid violating the Vermont Consumer Fraud Act’s ban on deceptive marketing, by defining what kinds of “Vermont” origin claims are allowable and what kinds are not. The rule also provides guidance to law enforcement personnel and to courts.
2. Q: Generally, what does the rule say?
A: In general, the rule prohibits the use of “Vermont” or similar terms in connection with the advertising or marketing (in the words of the rule, any “representation”) of certain “non-Vermont products” except that when a “Vermont” *company name* is used in close association with a product, specified disclosures may suffice.
3. Q: What **types of representations** of Vermont origin does the rule cover?
A: The rule covers four types of representations:
 - “Qualified representations,” where the connection to Vermont is spelled out (“made in Vermont” or “knitted in Vermont” or “made with Vermont apples”).
 - The use of a Vermont address.
 - “Unqualified representations,” where the connection to Vermont is *not* spelled out (such as “Vermont cheddar cheese” or “Vermont cider”).
 - “Vermont” company names (“Vermont Milk Company”).
4. Q: What is a “**representation**”?
A: A representation is any words or symbols made in connection with advertising, marketing or selling a good or service, such as on a product label. (Note, as explained below, that a “Vermont” *company name* must appear in “close association” with a product in order to be covered by the rule.)
5. If a representation is **not covered by the rule**, is it subject to any legal standards?
A: Yes. Any marketing claim that is not covered by the rule is still subject to the general prohibition on deception set out in the Vermont Consumer Fraud Act, which bans any material misrepresentation or omission that has the tendency to mislead reasonable consumers. This does not represent any change in existing law.
6. Q: What does the rule say about “**qualified representations**” of Vermont origin?
A: These claims must be true, and the qualifying language (“made in,” “knitted in,” “made with”) must be substantially as prominent as, and proximate to, the term “Vermont” that it modifies.
7. Q: What does “**made in Vermont**” mean?
A: This term means that the item was *last substantially transformed* in Vermont into something new and different, with a name, character or use distinct from its original form. For example, milk is not “made” in this sense, but yogurt is “made” from milk.

¹ Examples are set out in parentheses.

8. Q: What does the rule say about the use of **Vermont addresses**?

A: In order for a Vermont address to be used to describe the location of the seller, solicitor, producer or distributor of a good or service in connection with advertising, marketing or selling goods or services, the company must be “based in Vermont.” “Based in Vermont” means that the company currently discharges substantial functions in Vermont. Labels on food products regulated by the U.S. Food and Drug Administration need only follow FDA requirements as to address.

In determining whether a Vermont address is used to describe the location of a company, one must look at nature, prominence, placement and, most importantly, overall impression created by the address. A Vermont return address on the outer envelope of a marketing piece, or a letterhead on the solicitation-mailing itself, may well convey that the company is located at that address, whereas a Vermont address on an order form combined with out-of-state addresses or disclaimers in other parts of a mailing, or on a sales agent’s business card stating his or her in-state address may not.

In determining whether “substantial functions” are being discharged in Vermont, so as to justify the use of a Vermont address to describe company location in advertising, marketing or selling, one must likewise look at the totality of the company’s activities conducted in the state. An operating store is sufficient, as is manufacturing or a range of corporate activities. On the other hand, a company cannot claim to be discharging substantial functions in Vermont based only on past development of a product in the state, on in-state mail handling or banking, or on the mere fact that a sales agent is present in the state without substantial functions being undertaken here.

9. Q: What does the rule say about “unqualified representations” of Vermont origin and Vermont company names?

A: In order to explain these two provisions, we must first define “Vermont product.”

10. Q: How does the rule define a “**Vermont product**”?

A: A product—the reference here is to food products—is a “Vermont product” if—depending on the type of product—either two or three things are true, having to do with company, manufacture and ingredients:

- First, any company name that appears in connection with the product must be “based in Vermont” (as defined above).
- Second, if substantially transformed, the product must be made in Vermont.
- Third, the product’s primary or prominently identified ingredient must come from Vermont. However, this third requirement must be met only for three types of product: (a) products that do not undergo substantial transformation (milk or water); (b) products with one primary ingredient commonly known to consumers (cider and apples or cheese and milk); and (c) products 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*”).

- a. Q: And how does the rule define “**primary ingredient**”?
- A: A “primary ingredient” is an ingredient that constitutes a major portion of the quantity, volume or value of a product, *or* an ingredient that is prominently identified in connection with a product other than in a company name (“Vermont blueberry jam”). However, an ingredient is not “primary” if it is not indigenous to Vermont (cocoa or sugar).
- b. Q: What does “**indigenous**” mean?
- A: “Indigenous” means commonly grown or raised in Vermont in modern times—though not necessarily in substantial commercial quantities. Thus, apples are indigenous to Vermont, even though the supply of them may be smaller than Vermont companies need to process apples to make other products.
- c. Q: What is a **food product**?
- A: The rule does not expressly define “food product,” but a common meaning is intended. By way of guidance, the federal Food Drug and Cosmetic Act defines “food” to include articles used for food or drink for people or animals, and ingredients used in any such article.

11. Q: Getting back to “**unqualified representations**” of Vermont origin (“Vermont cheddar cheese”), what does the rule say about that kind of claim?

A: One must first determine whether the product is a “Vermont product” under the above definition. If not, then an unqualified representation of Vermont origin simply cannot be used in connection with that product. (Tomato sauce made in Vermont from out-of-state tomatoes may not be marketed as “Vermont Tomato Sauce.”) On the other hand, a prohibited unqualified representation can be changed to an acceptable qualified representation (in the tomato sauce example, “Made in Vermont”).

12. Q: And what does the rule say about “Vermont” **company names**?

A: The rule’s provision on company names is a little more complex than its other sections. This is because, in recognition of the greater economic stake that companies have in their names, the rule permits Vermont company names to be used in close association with non-Vermont products *if* they are accompanied by *specified disclosures*, so that consumers understand what they are buying.

We must first define two terms: “company name” and “in close association.” A “company name” means two or more words that clearly indicate a business entity or facility, through the use of words such as “incorporated,” “company,” “cooperative,” “Farms,” “Cannery,” or “of Vermont” (as in “John’s of Vermont”). This definition is designed to meet consumer expectations as to whether the reference is to a company and does not hinge on whether the name is registered with the government.

A company name is used “**in close association**” with a product when the name appears on the product’s *label or packaging* or otherwise refers specifically to the product. However, a company name that appears in small type other than on the front panel of a product and for purposes of compliance with another law or regulation (such as an FDA requirement) is not considered to be “in close association” with the product. An example of a company name that does *not* appear in close association with a product is a company name on a store or factory building, or on a tote bag.

The rule prohibits the use of a company name that includes the word “Vermont” or any substantially similar term in close association with a product that is not a Vermont product unless the following clear and conspicuous disclosures also appear:

- If the company is not based in Vermont, then information sufficient to communicate that fact must be disclosed somewhere on the product.
- 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 (“Made in Ohio,” “Product of New England”).
- 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 that 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 (“Made from New England apples” or “Northeast blend syrup”).

a. Q: What does “**clear and conspicuous**” mean?

A: On product labels, a disclosure required by the rule must appear in typeface that is at least 5% of the height of the label, or 3/16 of an inch high, whichever is larger. (One disclosure on the front section of the label is sufficient for this purpose.). However, the disclosure need not be any larger than the largest representation of “Vermont” on the label. In addition, disclosures must be presented in such a way, given their language, syntax, graphics, size, color, contrast and proximity to any related information, as to be readily noticed and understood by consumers. Finally, 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 in a lengthy disclosure of other information.

b. Q: Must all disclosures required by the rule be made on the product label?

A: No. In situations where the producer or seller *controls* the information provided to consumers at the *point of sale*, the rule permits disclosures to be made in other ways, as long as they are sufficiently prominent as not to be missed by reasonable consumers before they make their purchase. For example, a store that sells its own private-label products with a “Vermont” company name on the label may prominently mark its shelves according to product origin (“All jams made in Pennsylvania.”). Likewise, a “Vermont” company that sells its products on the Internet or in a catalog may prominently set out the disclosures required by the rule on the order screen or page, if consumers must go there to buy an item.

c. Q: When may a disclosure like “**Made in USA**” be used?

A: If a product is made in a number of states (over a reasonable period of time), such that a claim of national manufacture (“Made in USA”) is accurate, then that term may be used (clearly and conspicuously). A product that is made only in one state would not be accurately described as “Made in USA,” even if other products from the same company are made in other states. Of course, “Made in USA”—like any origin claim—must comply with any other applicable legal standards, such as the Federal Trade Commission’s policy on “Made in USA” claims.

- d. Q: If a product with a “Vermont” company name is made outside Vermont from **non-Vermont ingredients**, what kind of disclosure is required?
A: Information sufficient to disclose those facts must be disclosed. “Product of [state or region] will suffice for that purpose, but the disclosure must be on the *front* panel.
- e. Q: If a product with a Vermont company name is made in Vermont from non-Vermont ingredients, or made outside Vermont with in-state ingredients, what kind of disclosure is required?
A: In these cases of “**split origin**,” the Vermont connection may be disclosed on the front panel and the non-Vermont connection on the back panel. For example, a cheese made in Vermont from non-Vermont milk may state “Made in Vermont” on the front panel, as long as there is a clear and conspicuous disclosure on the back panel that the milk is not from Vermont (“Made with Northeast Milk”).
13. Q: CF 120.06(a) states that if a “Vermont” company name is used in close association with a non-Vermont product and the company is not based in Vermont, then “information sufficient to communicate that fact must be disclosed somewhere on the product.” Assuming that disclosure of out-of-state product origin (manufacture and/or ingredients) is required on the label under CF 120.06(b)-(d), must there be still another disclosure as to the company’s out-of-state location?
A: If a disclosure of out-of-state product origin appears on the label as required by CF 120.06(b)-(d), that disclosure will suffice to meet the company-disclosure requirement of CF 120.06(a). Thus, “Product of Ohio” on the front panel is itself sufficient to indicate that the company is not based in Vermont.
14. Q: If disclosures of out-of-state manufacture *and* out-of-state ingredients are both required under CF 120.06, is there any *single* disclosure that would suffice?
A: Yes. The words “Product of _____” (as in “Product of Maine”) would sufficiently convey the product’s out-of-state origin to meet the requirement of the rule.
15. Q: If a Vermont company makes a product in Vermont (with Vermont ingredients, if the rule requires those in order for the product to be considered a “Vermont product”), may the product bear the name of a non-Vermont company, as in a “private labeling” situation?
A: Yes, as long as the name of the in-state producer of the product *also* appears somewhere on the label. This is because the definition of a “Vermont product,” CF 120.01(n)(i), requires that a company whose name appears in connection with the product be based in Vermont.
16. Q: In order for a primary ingredient to be considered to come from Vermont, must *all* of that ingredient come from Vermont?
A: No, the **threshold is 75%**, as measured over a one-year period. In addition, the rule contains exceptions for deviations from the 75% standard that are either “de minimis” (very minor), or the result of accident beyond the producer’s control (as long as the producer had systems or procedures in place to ensure compliance with the rule and took reasonable steps to minimize the extent of the non-compliance).

17. Q: Why does the rule focus on having the company based in Vermont, the product made in Vermont, and, for some products, the ingredients come from Vermont?
A: At the request of a number of interested parties, the Attorney General’s Office commissioned the University of Vermont to **survey** in-state and out-of-state consumers on what they understand the word “Vermont” to mean on product labels. For all of the labels presented, many consumers said that they thought the company was based in Vermont, and that the product was made in Vermont. Except in the case of more highly processed, multi-ingredient products, they also thought that the primary ingredients came from Vermont.
18. Q: What **kinds of products** does the rule cover?
A: The provisions on *qualified representations* of Vermont origin (“made in Vermont”) and *company location* apply to *all goods and services*, whether sold in, into or from Vermont. The provisions on *unqualified representations* (“Vermont cheddar cheese”) and company name apply to *food products*, whether sold in, into or from Vermont.
19. Q: In what circumstances must there be **equal prominence** of information on labels?
A: The qualifying language in a qualified representation (“*Made in Vermont*,” “*Made with Vermont strawberries*”) must be as prominent as the word “Vermont” that it modifies. Otherwise, disclosures required by the rule—which are required for “Vermont” company names in close association with a non-Vermont product—must meet the “clear and conspicuous” standard.
20. Q: What does the rule say about **slogans** that use the word “Vermont” (“A Taste of Ol’ Vermont”)?
A: The rule does not specifically address slogans, which would therefore be measured against the existing statutory standard for deception.
21. Q: What does the rule say about using “Vermont” in connection with a **process**, like “Vermont smoked”?
A: Such a representation would be a “qualified representation” under the rule, so the process described must be accurate, and it must be both substantially as prominent as, and proximate to, the word “Vermont” that it modifies.
22. Q: What **proof of product origin** must a producer have to demonstrate compliance with the rule?
A: The producer must have prior reasonable factual substantiation for any origin claim.
23. Q: What is the effect of **other “origin” laws or regulations**, such as the Agency of Agriculture’s Maple Rule?
A: If another law or regulation is *more stringent* than this rule (that is, more protective of consumers), the other law or regulation is considered to be part of the Attorney General’s rule. If the other law or regulation is less stringent than this rule, this rule prevails.

24. Q: What is the **effective date** of the rule?

A: The rule will take effect on January 5, 2006. However, companies have a grace period of one year from that date or the time it takes to use up marketing materials, including product labels and packaging, in stock at the time the rule takes effect, whichever is shorter, to bring product labels or packaging into compliance with the sections of the rule on unqualified representations and company names.

25. Q: What happens **if a company violates the rule**?

A: Violation of the rule is “prima facie” evidence of a violation of the Vermont Consumer Fraud Act. Under the Act, the Attorney General can recover civil penalties of up to \$10,000 per violation, reimbursement for consumers, and attorney’s fees and costs.