

April 24, 2023

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RIN 3084-AB15/Green Guides Review Matter No. P954501

Federal Trade Commission

Office of the Secretary

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**Re: Guides for the Use of Environmental Marketing Claims: 87 Fed. Reg. 77,766
(Dec. 20, 2022); 88 Fed. Reg. 7,657 (Feb. 6, 2023)**

Dear Mr. Newsome and Ms. Ensor,

The Flexible Packaging Association appreciates this opportunity to submit its thoughts and suggestions on the issues and environmental claims on which the Commission solicited comments in its December 2022 Notice initiating the FTC's review of the 2012 Green Guides, 16 CFR Part 260.¹ In addition to requesting comment regarding the efficacy, costs, and benefits of the 2012 Green Guides and whether to retain, modify, or rescind them, the Notice also requests input on specific types of environmental claims – many of which were not discussed in the 2012 Guides or which have evolved significantly over the past decade. Importantly, the Commission also requests the public's views on whether the Commission should consider codifying the Green Guides into enforceable federal regulations.

The Flexible Packaging Association was established in 1950 and is a national trade association comprised of manufacturers and suppliers of flexible packaging. The industry produces packaging for food, healthcare, and industrial products using coating and lamination of paper, film, foil, or any combination of these materials to manufacture bags, pouches, labels, liners, wraps, rollstock, and tamper-evident packaging for food and medicine. Flexible packaging, a \$34.8 billion industry, employs roughly 79,000 people in the United States and is the second largest and fastest growing segment of the U.S. packaging market. FPA also commented on the FTC's review and 2012 update of the Green Guides. We pointed out that FPA's members have no control over the representations of their customers with regard to environmental claims for their products, including but not limited to whether communities in which the product is sold have recycling or composting availability, and we uphold this observation today.

¹ 77 FR 62122 (Oct. 11, 2012)

I. FPA believes that the Green Guides are Effective and Beneficial to the Public (and Manufacturers) and Should be Updated to Reflect New Information Regarding Environmental Concerns and Issues.

The December 2022 FTC Notice requests comment on three general issues: (1) the need for the Green Guides, (2) the benefits they provide to consumers and (3) modifications, if any, that should be made to the Guides to increase their benefits to consumers. 87 Fed. Reg. at 77766.

From FPA's perspective, the 2012 Green Guides are necessary; they have been tremendously successful in calling the public's attention to significant environmental claims and issues, as well as sensitizing them to how advertisers can misappropriate such claims. The greatest success of the Guides, however, is that have provided an avenue for the public to steward environmentally sustainable resources, not just in sales, but in homes, schools, and big institutions. The Guides help by providing a simple method for an individual or group of individuals to understand the information at hand and dispose of waste properly. They provide schools and youth groups with educational materials that can be used immediately and to collect trash and harvest recyclable resources. We do not believe it to be an exaggeration to assert that the Green Guides are potentially one of the most important tools of the Environmental Movement.

The December Notice requests data regarding the value of the Green Guides.

FPA does not have statistical data to offer, but one need only go grocery shopping to see the value of the Guides. It is not at all unusual during a trip to the grocery store to see shoppers turning packaging over to view a company's recycling claims. FPA also adds that the 2012 Guides also were particularly helpful in educating the public about the unfortunate lack of recycling and composting facilities in many regions of the United States, and they contributed to progress in many communities with regard to the availability of recycling, if not composting. The admonition that marketers must take greater care in denoting the limitations of recycling in many areas that offer less than "substantial" recycling sources is critical, and will remain critical, even if the responsibility shifts to the user to identify if recycling is available there. *(FPA addresses some suggested revisions to the use of the Mobius Loop below in our recommendations, below, on "specific claims.")*

The Notice also requests ways to modify the green guides to increase the value of the guides to consumers, and requests.

One universal recommendation that FPA has for increasing the value of the Green Guides is for the FTC to make the guides more generally available to consumers. We do not believe that the Green Guides should be placed on the "the legal resources page of the FTC website. We also believe it would be beneficial for the FTC to publicize the Guides by condensing their information into pamphlets for grocery stores or coloring books for kids. FPA wishes to emphasize that the information on and size of a label is of critical importance: too much information will not allow the consumer to focus on what is of critical importance, and in worst cases will allow hiding or misrepresentation of the claim. FPA does not have a specific recommendation on the use of "asterisks," to provide

additional information, except to say they are useful and to recommend that their use be addressed somewhere in the Guides.

II. FPA Submits that the Green Guides Should Be Retained and Revised, but They Should Not Be “Swapped Out” for Federal Regulations. *Id.* at 77,767

Part II of the Notice requests input on the continuing need for the Guides, their economic impact, and their effect on the accuracy of various environmental claims, as well as their interaction with other environmental marketing regulations, and finally, whether the FTC should consider rulemaking to establish enforceable requirements related to unfair and deceptive claims.

FPA submits that the Guides have a positive impact on the accuracy of various environmental claims, which has been bolstered by the Commission’s selective enforcement of 16 CFR Part 260, especially against large manufacturers that affect broad groups of consumers of items such as vehicles, paints, and bamboo sheets. The advisory nature of the Guides allows them to be enforceable and impactful while standing apart from volumes and volumes of federal and state environmental regulations. FPA believes the Guides are much more effective than EPA’s Safer Product labels, which tend to lack clarity and simplicity in analysis that makes them accessible to consumers, and they rise above a “safer product” seal by allowing a person to interact and weigh a claim on their own, rather than wonder “safer than what.” On the other hand, the Green Guides likely are not relied on as much by the public as are the Department of Energy’s Energy Efficiency Standards, because of their technical basis and financial consequences for appliance owners. As suggested above, FPA thinks the Green Guides would be more “useful,” when they are revised and the real audience for their use, the public, has better access to the Guides if they want to consult them.

The FTC also seeks input on whether the Green Guides Continue to Be Needed. *Id.* at 77,767.

From FPA’s view, the Green Guides continue to be needed, and they urgently need to be revised to address new information and the claims that new information engenders.

For example, “carbon-neutral” and “offset,” are now understood to inherently be misleading marketing without some supporting information based on the origin of the “offset,” its elasticity, its duration, and many other factors including how it was calculated. Consumers are asked if they want to buy offsets when they buy their airplane tickets, which may make people feel good, until they realize the offsets were for trees or conservation easements that were sold multiple times to multiple parties or represent forests in the Amazon that no longer exist or have been clear cut in the U.S. or another country. Consumers are the first to admit that they easily fall into these traps, and the FTC is the agency that has the tools to counter them. Therefore, we support retaining and revising the Guides, without worrying too much about other branches of government and the basis for their labels on energy or Safer Products.”

The Commission also requested feedback on whether making the Green Guides enforceable “federal regulations,” would enhance their value and use.

FPA believes that making the Guides into regulations would not enhance their value. In fact, making regulatory language out of the green guides, which already - for the most part - are written in plain language that is understandable, would dampen their use. Public perception cannot be defined with regulatory mandates like “shall” and “shall not,” “intended” or “not intended,” etc. While FPA understands in the long run, it may be more efficient for the FTC to sharpen its regulatory tools with actual regulatory language, we do not believe that the Guides, which are intended to improve consumer understanding, are the appropriate avenue for regulatory involvement. It is also worth noting the economic and political cost of converting the Guides into regulation, the judicial challenges to those regulations, the time that would take, and whether the audience for the Green Guides would still absorb and appreciate them.

III. FPA’s Comments on Specific Claims

Part III of the Notice seeks critical comment on revising a list of claims, *id.* at 77,768-769, in light of “new understandings, the existence or likelihood of misleading claims,” and guidance that FTC could render that would avert deceptive claims. FPA would like to respond with respect to the following issues:

1. “Compostable” (16 CFR §260.7)

FPA believes that industrial composability access should be established separately to recycled content. Composting and recycling are two separate waste management systems that require different methods of collection, sortation, and processing. Composting access is not able to be measured based on how much ends up at a composting facility, because sortation is not possible within a composting system. Compostable packaging is utilized as a vessel to help divert food waste to become compost; it is transported alongside food waste to disintegrate and biodegrade together. Additionally, composting access is highly local, and using national access rates for collection programs would be difficult to qualify and would not reflect the realities of collection across the U.S.

2. “Degradable” (16 CFR §260.8)

FPA believes the Commission should maintain its guidance to not allow any unqualified claim indicating a product or package is degradable, biodegradable, oxo-degradable, oxo-biodegradable, or photodegradable unless competent and reliable scientific evidence meets the current published guidance.

6. “Recyclable,” (16 CFR §260.12)

FPA asks the Commission to consider whether more attention is needed to educate consumers regarding the use of the Mobius Loop. Successful recycling is largely dependent on resin type, which is required to be printed in most states in the chasing arrows of the Mobius Loop, so that some types of resins can be “sorted out.” FPA encourages an emphasis on the Mobius Loop as a reminder that the public generally misperceives the Mobius Loop to mean recyclability, which slows down sorting and increases human resources needed for recycling.

In the absence of a national definition of “recyclable”, we encourage the Commission to maintain its 60% access threshold for recyclable claims. If a higher percentage is adopted, many packaging types may no longer be eligible for an unqualified “recyclable” claim, which would likely confuse consumers and lead them to not recycle the packaging. Similarly, FPA recommends that the Green Guides keep “check locally” claims for packaging with less than 60% recycling rate, because without this language consumers will likely assume the packaging is not recyclable in their area.

We also encourage the Commission to include molecular (advanced) recycling under the definition of recycling to support a broad range of rapidly innovating recycling technologies. Additionally, we encourage the Commission to recognize the mass balance approach (MBA) to account for recycled content in products made from molecular recycling along with third-party certifications to substantiate recycled content claims. Limiting or restricting molecular recycling may result in less recycling of packaging overall, as well as less recycled material available to incorporate recycled content into new packaging. This is especially the case with direct food contact packaging where, molecular recycling is currently the only viable solution. FPA offers the below example to illustrate the inclusion of MBA:

“A manufacturer uses feedstocks in its manufacturing process that were created through the processing of plastic waste that would have normally entered the waste stream, and such plastic waste feedstocks are tracked using a mass balance approach. A recycled content claim (e.g., comprised of recycled content) is not deceptive for the manufacturer’s products in amounts equivalent to the plastic waste input into the manufacturing process tracked using a mass balance approach.”

FPA would like to call attention to a few other issues within the current definition of recyclable, which has a tendency to focus on consumer-facing downstream recycling programs that are not within the control of industry marketers. First, because the guidance refers only to the substantial availability of recycling facilities available to “consumers and communities” where the product is sold, use of the term is effectively reduced to those who market consumer-facing products.

Second, the guides do not define in any detailed sense what is meant by the substantial majority of consumers or communities having access to recycling programs which accept the product in question. This requires companies to perform nationwide surveys of the post-use availability of certain services controlled by third parties and governments that shift and change over time in order to validate a claim. The unfeasibility of such a task has resulted in many companies restricting their recyclability claims with respect to their products.

Third, consumers are often confused when plastic producers cannot make claims of recyclability because raw material plastic pellets are not suitable for curbside collection yet the product these materials make are often suitable for curbside collection. We encourage the Commission to consider adding language where raw materials that can be substantially

transformed into articles that meet the recyclability threshold or definition should also be considered recyclable for unqualified recyclable claims. This will help plastic manufacturers make such claims even though plastic pellets themselves are not suitable for curbside collection. Below is an example to help illustrate the benefits of including such language.

A manufacturer uses aluminum ingots in its process and transforms them into aluminum cans. Aluminum ingots themselves are not suitable for curbside collection because sorting systems are not designed to sort and process industrial raw material feedstocks. Aluminum cans are produced through the transformation of the aluminum ingots and are considered recyclable because they do meet definition and threshold requirements. A recyclability claim by an aluminum ingot manufacturer is not deceptive as aluminum ingots can be recycled or remanufactured through industrial systems and products that the aluminum ingots are transformed meet the recyclable definition and threshold requirements.

FPA believes guidance related to whether waste is not ultimately recycled because of market demand, budgetary constraints, or other factors, would be irrelevant because it would not be available information to a consumer. Further, Recyclability should not be measured on how much actually gets recycled by consumers, because manufacturers cannot control or influence these rates. Such guidance may influence perception in a way that inadvertently results in less packaging being recycled and more ending up in a landfill.

7. “Recycled Content” (16 CFR §260.13)

FPA believes that the recycled content provision of the Green Guides should be expanded to include emerging technologies such as molecular recycling. We encourage the Commission to provide guidance on how these emerging technologies can be considered in the context of recyclable and recycled content. Since the molecular recycling process is significantly different from traditional mechanical recycling where percentage or credit calculations are the primary method to qualify, we again encourage the Green Guides to utilize mass balance as a measurement method.

12. “Sustainable”

The Commission specifically sought input on the application of the term “sustainable”, noting “In 2012, The Commission determined it lacks a basis to give specific guidance on how consumers interpret “sustainable” claims.” We support this determination and encourage the Commission to continue to exclude it from the Green Guides.

In conclusion, FPA appreciates the opportunity to submit these comments from the perspective of the flexible packaging industry in response to the FTC's Request for Public Comment as it solicits feedback on the impact of the Green Guides. Should any further questions arise, please do not hesitate to reach out.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Abigail Trumpy', written in a cursive style.

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