

April 24, 2023

Ms. April Tabor
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave. NW
Suite CC-5610 (Annex J)
Washington, DC 20580

Re: Green Guides Review, Matter No. P954501

Dear Ms. Tabor:

This comment is submitted on behalf of Business Roundtable, an association of more than 200 chief executive officers (CEOs) of America's leading companies, representing every sector of the U.S. economy. Business Roundtable CEOs lead U.S.-based companies that support one in four American jobs and almost a quarter of U.S. GDP. Through CEO-led policy committees, Business Roundtable members develop and advocate directly for policies to promote a thriving U.S. economy and expanded opportunity for all Americans. We appreciate the opportunity to participate in the Federal Trade Commission's (the "Commission" or "FTC") request for public comment ("RFC") on potential revisions to its Guides for the Use of Environmental Marketing Claims ("Green Guides" or "Guides").

Business Roundtable supports the FTC's efforts to modernize the Guides and to ensure that marketers provide consumers with truthful and substantiated environmental marketing claims. The Guides have helped ensure that consumers receive accurate, responsible information about environmental marketing claims addressing a wide variety of issues. We support the FTC's important work to revise the Guides to account for evolving consumer perceptions about environmental issues.

However, the RFC raises a number of issues of concern, which we believe could impose significant costs and burden on businesses without meaningfully reducing consumer confusion. In submitting this comment, we urge the FTC to avoid implementing overly prescriptive requirements for environmental marketing claims that would raise compliance costs and would not help consumers obtain important and useful information. Additionally, the FTC should not use the Green Guides to define with specificity "sustainability" or similar broad environmental terms, particularly in areas where Congress and other regulators with more direct expertise have declined to do so, and to avoid conflict with international standards and industry norms whenever possible.

Business Roundtable members include some of the best in class when it comes to climate disclosure and reducing emissions. The Roundtable in 2020 announced support for the goals of the Paris Climate Agreement and released a suite of policies aimed at reducing net greenhouse-gas emissions. In the time since, we have called for efforts to enhance climate-related disclosure and expect voluntary disclosure on sustainability issues, including climate, to continue to increase and improve each year.

Nonetheless, our members have broad concerns that a prescriptive approach in the revised Guides would not give companies the flexibility needed to provide meaningful disclosures tailored to their particular businesses. This is particularly true with respect to climate change, where our understanding of the risks and the measures needed to address them continues to evolve and involves an inherent level of uncertainty. For example, with respect to marketing claims relating to sustainability, “net zero,” “carbon neutral” and similar claims, the FTC should not attempt to define these terms with specificity. The FTC, which lacks environmental science expertise, should not dictate how companies use and report carbon offsets in attempting to obtain “net zero” emissions, and should conform any requirements to industry norms while avoiding conflicts with international standards. In this respect, the existing FTC guidance has worked well by setting reasonable limits on the time frame that carbon offsets may be disclosed to consumers and by requiring that companies use competent and reliable scientific and accounting methods before claiming carbon offsets. The FTC also should not use the Green Guides to define specific terms on environmental issues when other regulators (with more direct expertise) have not done so. Additionally, new substantiation requirements that significantly increase companies’ exposure to legal risk could have a negative impact on the marketplace without any corresponding benefit to consumers. Such an approach would likely disincentivize companies from characterizing environmental performance claims for the market could even disincentive environmental performance improvements in the first place.

We identify and discuss below responses to some of the questions posed by the Commission and outline several areas of particular concern.

I. The Guides should permit marketers to use technology such as QR codes to provide additional information to consumers.

Question 16 of the RFC asks about potential modifications to the Guides to account for changes in relevant technology. Business Roundtable encourages the FTC to consider ways that marketers can use technology to improve consumer access to nuanced, detailed information of the type frequently required to qualify environmental marketing claims. For example, § 260.3 of the Guides requires marketers to qualify claims through clear, prominent and understandable disclosures in plain language and in “close proximity to the qualified claim.” These requirements often pose significant challenges to marketers who want to provide more information but may face constraints when packaging or advertising space is limited.

The FTC should permit marketers to supplement or qualify certain claims through technology like QR codes, which have seen rapid adoption by consumers. The number of US smartphone users scanning a QR code is expected to increase to 99.5 million in 2025, up from 83.4 million in 2022. Since the COVID-19 pandemic, consumers have embraced the use of QR codes for contactless transactions and payments, and business use cases for QR codes have expanded to include a broad range of functionality. As a result, many consumers understand that QR codes on packaging offer more in-depth information about products, whether about ingredients, sustainability, sourcing, or other content. These technologies can be particularly effective for delivering product information for sustainability and recyclable claims, both of which can be nuanced and complicated. So long as the information in the QR code does not render the triggering claim misleading or otherwise obscure important information on the product package, the FTC should consider encouraging their use to provide relevant, truthful disclosures that might otherwise be difficult to communicate on physical packaging.

II. The FTC should avoid creating conflicts with international regulations.

Several of the RFC's questions ask about potential overlap or conflicts among the Guides and other federal, state, or local laws or regulations, as well as any international laws, regulations, or standards that the Commission should consider as it reviews the Guides. Business Roundtable does not believe the FTC should adopt any particular international standards for environmental marketing claims, and we urge the Commission to avoid creating conflicts that would raise compliance burdens for companies operating internationally and which would likely result in consumer confusion in the marketplace. For example, the FTC should not attempt to revise the Green Guides to mirror the European approach to environmental marketing claims, and we urge the FTC to consider the compliance burdens that could result from contradictory requirements in the Green Claims Code established by the UK's Competition and Markets Authority or the forthcoming proposal for a Directive on Green Claims from the European Commission.

III. The FTC should exclude general corporate and brand advertising from the Green Guides.

The FTC should explicitly state in the Green Guides that the Guides do not apply to general corporate and brand advertising. The Guides have always stated that they "apply to claims about the environmental attributes of a product, package, or service in connection with the marketing, offering for sale, or sale of such item or service to individuals." However, it has been suggested that general corporate and brand advertising claims about a company's environmental efforts can violate the FTC Act and other federal and state laws. The FTC thus should explicitly clarify that advertising claims about a company or brand but not tied to a particular product, package, or service are excluded from the Guides' coverage.

Applying the Guides to general corporate image and brand advertising would be counterproductive. In the last decade, corporate America has made massive investments and commitments to adopt practices that are more favorable for the environment. At the same time, businesses have helped contribute to and expand the public discourse around environmental issues. Extending the Guides to general corporate speech and image or brand advertising would chill organizations' speech about efforts they are taking to protect the environment and deter them from modeling and promoting environmental stewardship as a value that other companies and individuals could emulate. It would also create a disincentive for corporations to speak on environmental issues and participate in the public debate about them because of the mere risk of litigation, even if nothing they say is deceptive. Finally, it could conflict with SEC disclosure rules.

Applying the Green Guides to general corporate image and brand advertising would also raise serious First Amendment concerns because restricting a company's ability to describe its corporate vision and values with respect to the environment would be presumptively unconstitutional. The FTC also cannot regulate corporate communications about the environment that do not propose to sell particular goods or services. When a company advances a position on issues such as the environment, renewable energy, or climate change—even if it does so through an advertisement that may incidentally burnish the company's reputation—it is joining a national discussion on issues of great public concern and is protected by the First Amendment. We therefore urge the FTC to make clear that the Green Guides only apply to consumer-facing product advertisements that make objective product claims.

IV. The FTC should not require companies to perform burdensome compliance research on local waste infrastructure.

The FTC should also avoid adopting guidance that requires companies to perform onerous and unreasonable compliance monitoring and research on local sustainability infrastructure to ensure compliance. For example, the RFC asks whether the Guides should be revised to include guidance related to unqualified "recyclable" claims for items collected by recycling programs but ultimately not recycled due to market demand, budgetary constraints, and other factors, which could suggest that the FTC is considering incorporating California's "Chasing Arrows" legislation into the Green Guides. We urge the FTC not to take this approach.

As an initial matter, our member companies believe that the current framework for "recyclable" claims, which permits unqualified claims when recycling facilities are available to a substantial majority of consumers or communities where an item is sold, works well and should continue to be the operating standard. However, should the Commission determine it needs to change its guidance, it should work to avoid conflicts with state regulations, such as those that require companies to conform products and packaging to statewide recycling criteria. Different states have different infrastructure and conflicting definitions about what is "recyclable" could result in further consumer confusion.

The FTC should not incorporate these requirements into nationwide guidance. It would be unreasonably costly and burdensome to require manufacturers to perform rigorous analyses of the waste infrastructure of state or local municipalities in order to avoid deceptive or misleading “recyclable” claims. Such a requirement would be impossible to administer and would likely result in significant consumer confusion when products are deemed “recyclable” in one community but not another based solely on the availability of local infrastructure. It would also impose compliance burdens due to the need to develop different packaging for different states and localities, potentially complicating or disrupting distribution chains as a result of changes to local recycling infrastructure in particular states.

V. The Commission should not initiate a rulemaking to codify the Green Guides into regulations.

Lastly, the FTC should not initiate a rulemaking to codify the Green Guides into regulations, as it would be premature and a waste of Commission resources. The Guides have operated effectively since 1992 to provide companies with guidance on making truthful environmental marketing claims and have had a significant impact on companies’ marketing practices over the years. Courts have found the Guides, as written, to be instructive in evaluating claims of false or misleading advertising in litigation. The Guides have also been broadly influential, as many states have adopted laws that restrict the use of environmental marketing claims and specifically incorporate portions of the Guides. For example, in Maine, “[a] person who labels, advertises or promotes a product in violation of guidelines for the use of environmental marketing claims established by the Federal Trade Commission in 16 Code of Federal Regulation, Part 260 (1993), as amended, commits a violation of the Maine Unfair Trade Practices Act.” In California, compliance with the Green Guides can be used as a defense to alleged violations of the state’s own deceptive environmental marketing statute. Because many states are already regulating deceptive environmental claims that have the practical effect of making the Green Guides’ recommendations legally enforceable, there is no need for additional federal regulation. Additionally, while the FTC has brought a number of enforcement actions to stop deceptive marketing claims relating to energy efficiency, organic claims, biodegradable claims, and certain other portions of the Guides, many aspects of the Guides, including the FTC’s guidance on carbon offsets, have never been adjudicated (or addressed as part of an FTC settlement). The lack of enforcement actions against many of the impermissible environmental claims in the Guides indicates that those claims are not so prevalent in the marketplace to justify transformation of the Guides’ recommendations into legislative rules with attendant penalties for violations. The FTC should not devote limited resources to an unnecessary rulemaking initiative under the burdensome and time-consuming requirements of the Magnuson-Moss Act.

The FTC's proposed revisions to the Green Guides are likely to be substantial and we therefore request that the Commission provide for additional opportunities for notice and comment before proceeding with revisions of the Guides, whether via rulemaking or agency guidance. The Guides affect large and important sectors of the economy and, despite its best efforts, the FTC acting alone is likely to miss critical facts or factors in adopting revisions to the Guides. The FTC should allow additional opportunities for comments, and reply comments, to give a full opportunity for all interested parties, including regulated entities and experts in the field, to provide valuable information to the FTC and ensure, as much as possible, that the agency has before it all the evidence pertinent to the issues it might address. Notice and comment gives the agency a chance to avoid errors and make a more informed decision.

VI. Conclusion

Business Roundtable supports the FTC's efforts to update the Green Guides to reflect current marketing practices and changes in consumer perception, but we urge the FTC to avoid discarding much of the framework that has worked well since 1992. We appreciate the opportunity to provide our input during this process. We would be happy to discuss these comments or any other matters you may find helpful.

Sincerely,

Matt Sonnesyn
Vice President, Energy and Environment
Business Roundtable

