



Council for Responsible Nutrition

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April 24, 2023

Via Electronic Submission

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex J)
Washington, DC 20580

Re: Green Guides Review (16 C.F.R. Part 260) (Matter No. P952501)

Dear Sir or Madam:

The Council for Responsible Nutrition (“CRN”)¹ welcomes the opportunity to provide comments regarding the Federal Trade Commission’s (“FTC” or “Commission”) review of its “Guides for the Use of Environmental Marketing Claims” (“Green Guides” or “Guides”).² CRN supports the FTC in continuing to provide guidance on environmental marketing claims as an important tool for both consumers and businesses seeking to use and create more sustainable products and packaging.

As the FTC reviews the current Green Guides, CRN encourages the Commission to recognize the need for flexible standards and to explore how updates can encourage state harmonization of environmental claim laws, regulations, and guidance. We are providing comments on the patchwork of state laws that have emerged since the last update to the Guides and the importance of maintaining flexible standards for terms that provide consumers with important responsible disposal information, such as recyclable and compostable.

Patchwork of Emerging State Laws Could Harm Sustainability Efforts

General Issue, Question 17 of the FTC’s request for comments asks whether the “Guides overlap or conflict with other federal, state, or local laws or regulations.”³ As we noted above, since the Guides

¹ The Council for Responsible Nutrition (“CRN”), founded in 1973 and based in Washington, D.C., is the leading trade association representing dietary supplement and functional food manufacturers, marketers and ingredient suppliers. CRN companies produce a large portion of the functional food ingredients and dietary supplements marketed in the United States and globally. Our member companies manufacture popular national brands as well as the store brands marketed by major supermarkets, drug stores, and discount chains. These products also include those marketed through natural food stores and mainstream direct selling companies. CRN represents more than 180 companies that manufacture dietary ingredients, dietary supplements and/or functional foods, or supply services to those suppliers and manufacturers. Our member companies are expected to comply with a host of federal and state regulations governing dietary supplements and food in the areas of manufacturing, marketing, quality control, and safety. Our supplier and manufacturer member companies also agree to adhere to additional voluntary guidelines as well as to CRN’s Code of Ethics. Learn more about us at www.crnusa.org.

² 16 C.F.R. § 260.

³ Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77766, 77768 (Dec. 20, 2022).

were last updated in 2012, several states have enacted laws regulating environmental claims that affect CRN's members and create significant compliance hurdles for uniform nationwide product sales. For example, California has enacted requirements for "recyclable" statements and the use of the chasing arrows symbol that differ from the current Green Guides standards and other states' laws in some instances.⁴

Differing state laws demonstrate the need for flexible standards from the FTC, absent a uniform federal framework. A state and federal patchwork of differing and conflicting environmental requirements and guidance could confuse consumers, create significant cost and compliance obligations for manufacturers that could discourage sustainability efforts, and potentially result in the opposite of the intended beneficial environmental impact.

For example, the recyclable and chasing arrows symbol discussed above may be stamped into plastic packaging or otherwise permanently affixed to packaging. Rigid standards from the FTC could cause companies to have to destroy and redesign packaging or risk not aligning with FTC guidance. Further, recyclable statements and symbols provide important disposal information to consumers, allowing them to understand if and when they may have the option to recycle a product or packaging. Too rigid standards could cause companies to forgo providing accurate and important instructions to consumers about features of the product or packaging that reduce its environmental impact.

CRN also would like to take this opportunity to advocate for harmonized federal legislation for certain environmental statements, like recyclable. We believe this is an important area where the Commission could have a significant impact by advocating for a federal framework and taking the lead to work with Congress to develop harmonized federal laws. If the Commission does advocate for federal laws in this area, CRN stresses the need for uniformity, preemption of differing state laws, and collaboration with other federal and state agencies with relevant technical expertise, like the Environmental Protection Agency. We believe comprehensive federal legislation that addresses these concerns is needed before the FTC engages in rulemaking, as we discuss in more detail below.

Federal Trade Commission Request for Comment on Rulemaking

General Issue, Question 19 requested feedback on whether "the Commission [should] initiate a proceeding to consider a rulemaking under the FTC Act related to deceptive or unfair environmental claims."⁵ We do not believe the Commission should initiate rulemaking at this time, as the FTC's current guidance approach to regulating environmental claims provides benefits to both consumers and the environment, and is the best approach in light of changing and differing state laws and standards. Guidance allows the FTC to be both flexible and nimble to address changes in technology, innovation, consumer perception, the patchwork of state laws and standards, and the market for sustainable goods and recycled material. Guidance can be updated more quickly and easily than codified rules to address these issues. Further, as we note above, without a harmonized federal framework, FTC rules could quickly become out-of-date or conflict with state and local rules, limiting companies' ability to convey truthful information to consumers about environmental benefits or ways to use products and packaging that reduce environmental impact. We do not believe that the FTC should enact rules where they will

⁴ See Cal. Bus. & Prof. Code § 17580, Cal. Pub. Res. Code § 42355.51.

⁵ 87 Fed. Reg. 77768.

not have a preemptive effect on state laws and instead support federal legislation that is more likely to have this effect. Rather than initiate rulemaking, CRN believes that the FTC's policy goals would be better served by reviewing and considering updates to the Guides more often than every ten years, as has been the FTC's current review schedule.

However, should the Commission pursue rulemaking, CRN encourages the FTC to limit these actions to claims for which the FTC has already provided clear, well-established guidance. Guidance related to "compostable" claims for example, may not be appropriate for rulemaking, given the definition of "substantial majority" is subject to multiple interpretations and current technology limitations may make it difficult to define.⁶ CRN does not support the FTC pursuing rulemaking for claims that contain vague terms or that may be open to multiple reasonable interpretations.

Refraining from rulemaking or limiting its scope is paramount to not curb innovation. Seeking rulemaking for terms that are not clearly defined will chill truthful communications in evolving areas and dissuade companies from investing in innovation that cannot be shared with consumers without potentially triggering significant liability. Consumers are increasingly interested in purchasing products from manufacturers that consider the environmental impact when developing their goods. Responsible companies want to accurately describe company efforts to limit the environmental impact of product development and other company practices to these consumers. However, faced with trade regulations that could trigger civil penalties, companies may be dissuaded from investing in product innovations that they cannot communicate confidently without creating potential liability for the company. For this reason, if the FTC pursues rulemaking, CRN recommends against rulemaking with respect to environmental marketing claims that have not been well-defined (e.g., "compostable" or "sustainable") as such rulemaking would, in turn, harm consumers by curbing speech and innovation.

Commission Request for Comments Regarding Specific Claims: CRN Position on Recyclable, Compostable, Recycled Content, and Sustainable Claims

Recyclable Claims: Specific Claims, Question 5 asks about the standards for recyclable claims.⁷ CRN supports the FTC's current guidance on these claims, which explains that an unqualified recyclable claim on a product or its packaging is appropriate if:

- (1) "it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item";
- (2) recycling facilities are available to at least 60% of consumers or communities (a "substantial majority") where the product is sold;
- (3) the entire product or its packaging "excluding minor incidental components, is recyclable"; and
- (4) no component of the product or its packaging, such as its shape or size, "significantly limits the ability to recycle the item."⁸

⁶ See 16 C.F.R. § 260.7.

⁷ 87 Fed. Reg. 77768-77769.

⁸ 16 C.F.R. § 260.12.

The FTC also asks, under Question 6, if the Guides should be “revised to include guidance related to unqualified ‘recyclable’ claims for items collected by recycling programs for a substantial majority of consumers or communities but not ultimately recycled due to market demand, budgetary constraints, or other factors.”⁹ CRN does not support expanding guidance on “recyclable” claims to include consideration of whether a product is ultimately recycled.

Determining whether a product or packaging is “recyclable” should be limited to factors that a company can readily determine. Neither the FTC nor marketers implementing the FTC’s guidance are in a position to undergo an extensive, nationwide study of local recycling programs to determine which materials are actually being recycled in that community. Indeed, if such an exercise were conducted, given the frequent developments in the recycling space, it is likely that any results would become outdated in short order, and would therefore unnecessarily limit companies from informing consumers about how they may properly dispose of their products or packaging.

Though CRN is concerned about the patchwork of laws emerging dictating when a product or its packaging can be advertised as “recyclable,” CRN also recognizes that states and municipalities are in the best position to provide guidance to companies about what materials can actually be recycled in their public facilities. For example, SB 343 in California requires that California’s Department of Resources Recycling and Recovery (“CalRecycle”) publish a study that determines what material types may be advertised as “recyclable” in the state, taking into account whether the material is actually recycled within the state.¹⁰ The FTC should not revise its guidance without, similarly, establishing a clear method for marketers to confirm what products qualify as recyclable.

The FTC’s current guidance provides marketers flexibility to adapt to changing technologies while still truthfully communicating with consumers about the recyclability of their products. CRN encourages the FTC to preserve its current guidance on “recyclable” claims.

Compostable Claims: Specific Claims, Question 2 asks about the current standard for compostable and whether “this guidance [should] be revised to define ‘substantial majority’ consistent with the ‘recyclable’ section.”¹¹ CRN does not believe that the FTC should define “substantial majority” as it refers to compostable in the same manner it defines this term for recyclable claims. Compared with recycling, there are significant differences in the composting process, access to composting facilities, and consumer engagement with composting that the FTC should consider when determining standards for compostable.

Like “recyclable” statements, however, alerting consumers that packaging has the capacity to be composted provides important information to consumers on sustainable disposable options. Rather than tie compostable claims to standards better suited to other forms of sustainable technology, CRN recommends that the FTC continue to maintain flexible standards that do not limit the dissemination of truthful information or stifle emerging environmental technology.

⁹ 87 Fed. Reg. 77769.

¹⁰ Cal. Pub. Res. Code § 42355.51(d).

¹¹ 87 Fed. Reg. 77768.

Recycled Content Claims: Specific Claims, Question 8 asks whether “the Guides [should] be revised to provide guidance on making ‘recycled content’ claims based on alternative method(s), *e.g.*, mass balance calculations, certificate (*i.e.*, credit or tagging) systems or other methods.”¹² CRN supports the FTC providing clarity on additional methods that can be used to support “recycled content” claims, such as mass balance. Mass balance accounting provides an accurate way to quantify the amount of recycled content or use of other sustainable materials in a product or its packaging, and is also a practical way to accommodate the realities of supply chain and traceability challenges. Businesses and consumers would benefit from the FTC providing guidance on the appropriate use of this method to substantiate “recycled content” claims.

We also encourage the FTC to carefully review other methods available to substantiate “recycled content” claims that may not have been available, as prevalent, or as established when the Guides were last updated in 2012, and to provide guidance as to how new technology can be used to support truthful claims. Other methods for which a “recycled content” claim could be based include “advanced” and “chemical” recycling methods. These methods are important for driving sustainability for products regulated by the Food and Drug Administration (FDA), like packaging for dietary supplements, as they aid in the recycling and incorporation of recycled content into packaging that helps the industry comply with regulatory requirements and meet other product-specific needs.

Sustainable Claims: In Specific Claims, Question 12, the FTC asks if it should revisit its prior determination to not provide guidance on “sustainable” claims.¹³ Should FTC create guidance for “sustainable” claims, CRN encourages the FTC to adopt guidance for such claims that is similar to current guidance on general environmental claims laid out in 16 C.F.R. § 260.4. This guidance advises that marketers should qualify these claims to clearly limit the claim to a specific, non-negligible benefit because such claims can reasonably convey a wide range of meanings, including that the product has far-reaching environmental benefits and no negative environmental impacts.¹⁴ The FTC advises that it is highly unlikely that a marketer can substantiate such a broad message, and encourages marketers to qualify such claims.¹⁵ Taking a similar approach with “sustainable” claims would provide marketers the flexibility to advertise the environmental benefits of their products or packaging, but would also require that they specify what these environmental benefits are, which can only assist consumers making purchasing decisions.

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¹² *Id.* at 77769.

¹³ *Id.*

¹⁴ 16 C.F.R. § 260.4.

¹⁵ *Id.*

CRN Green Guides Comments

April 24, 2023

Page | 6

We again thank the Commission for the opportunity to provide feedback on its Green Guides and look forward to continuing to engage with the FTC on this process.

Sincerely,

A handwritten signature in black ink, appearing to read "Megan Olsen", written over a horizontal line.

Megan Olsen

Senior Vice President & General Counsel