



RETAIL INDUSTRY LEADERS ASSOCIATION

99 M Street, SE
Suite 700
Washington, DC 20003

www.rila.org

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April 24, 2023

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

Re: *Guides for the Use of Environmental Marketing Claims (RIN 3084-AB15), 87 Fed. Reg. 77766 (Dec. 20, 2022)*

The Retail Industry Leaders Association ("RILA") appreciates the interest of the Federal Trade Commission ("The Commission" or "the FTC") in soliciting public comments on its Guides for the Use of Environmental Marketing Claims ("Green Guides" or "Guides"). RILA understands that the Commission is soliciting comments about the efficiency, costs, benefits, and regulatory impact of the Guides to determine whether to retain, modify, or rescind them.

RILA is the US trade association for leading retailers. We convene decision-makers, advocate for the industry, and promote operational excellence and innovation. Our aim is to elevate a dynamic industry by transforming the environment in which retailers operate.

RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$2.7 trillion in annual sales, millions of American jobs, and hundreds of thousands of stores, manufacturing facilities, and distribution centers domestically and abroad.

RILA and its member companies strongly support the mission and goals of the FTC to protect consumers by preventing deceptive and unfair business practices, including deceptive, misleading or false advertising and marketing of products, including green marketing claims. Given the highly evolving green marketing landscape, the Guides are due for much-needed refresh. The FTC is well within its authority to revisit and revise the Guides to ensure consistency and clarity, and mitigate the potential for misleading green claims in the marketplace.

RILA appreciates the opportunity to comment on the Green Guides. As an organization, RILA shares in the FTC's mission of truthful and responsible environmental marketing. RILA is in favor of updating the Green Guides in order for its members to have clearer guidance regarding environmental marketing claims. Updating the Green Guides will provide more certainty for companies seeking to innovate in a way that minimizes environmental impact in a transparent manner and promotes greater legal compliance.

Comments

RILA understands the FTC has requested comments within a nineteen-question framework on various issues. Specifically, the FTC seeks comments on a number of issues applicable to the Guides generally, including: 1) the need for the Guides; 2) their economic impact; 3) their effect on the accuracy of environmental claims; 4) their interaction with other environmental marketing regulations; 5) evidence of consumer perception of environmental claim; and 6) claims not currently covered by the Guides that the FTC should consider addressing in its update. RILA provides input on these areas in Part 1 of our comments below.

The FTC has also sought comments on several specific claim terms, including: 1) carbon offsets and climate change; 2) compostable; 3) degradable; 4) ozone-safe/ozone-friendly; 5) recyclable; 6) recycled content; 7) energy use and efficiency; 8) organic; and 9) sustainable. RILA provides input on these specific claims in Part 2 of our comments below.

RILA's input is based on members' familiarity with developing and substantiating environmental claims, as well as their extensive firsthand experience with the Green Guides (16 CFR Part 260).

Part 1. General Issues for Comment

The following comments from RILA address some of the general issues related to the Green Guides that the Commission requested comments on in its notice.

I. The Guides are Critically Important to Retailers

The Green Guides remain necessary and critically important. There is no doubt that sustainability is driving actions and commitments across all industries in recent years. This is especially true for RILA's members, who strive to lead in advancing sustainability across the retail industry. With this in mind, and greater consumer awareness on the topic of sustainability, the Guides are needed now more than ever. The retail market continues to grow and become more saturated with products that contain environmental claims, which are often based on highly complex calculations and data. This market trajectory reinforces the need for guidance to serve as a reputable benchmark and resource on accepted leading practices for making claims. Increasing globalization further underscores the need for guidance, as many retailers rely on the Guides when working with their vendors across the globe.

Having updated Guides in place, especially "must haves" defining the FTC's substantiation expectations and clearly articulated real-world examples, assists in mitigating deceptive and unsubstantiated claims, contributes to consistent messaging in the market, and enables retailers to share environmental information with credibility. Many of these examples in the current Green Guides describe what the advertiser "must have" for the claim to meet the standards. These "must haves" are specific enough to provide concrete guidance but not so specific that they cannot be applied broadly to various products. For instance, in an example describing a manufacturer advertising its product as "certified by the American Institute of Degradable Materials," the Guides state that the marketers "must meet standards that have been developed

and maintained by a voluntary consensus standard body."¹ The example also includes a relevant explanation for why this is the case, "because the advertisement does not mention that the American Institute of Degradable Materials . . . is an industry trade association, [thus] the certification likely conveys that it was awarded by an independent certifier."²

The Guides can also help facilitate harmonization across state laws and regulations and ensure that manufacturers and retailers are operating under the same set of definitions. Harmonization is important because it creates a level playing field in setting minimum standards that companies must follow in communicating and substantiating their green claims. The Guides not only help retailers ensure that they comply with federal regulations, but they also play an important role in guiding courts across the country.³

II. A formal rule would create added challenges for staying current with the environmental claims landscape.

RILA strongly urges the Commission to refrain from initiating a proceeding to consider rulemaking under the FTC Act related to deceptive or unfair environmental claims. A rule will be inflexible to an evolving landscape, and updating the rule will cause undue burdens on the FTC. The state, national, and international landscape, along with technology, material types and applications and infrastructure are quickly evolving and will continue to do so. If the Green Guides became a formal rule, protracted rulemaking procedures could further hinder the Guides' ability to remain current. It will also require significant time and resources to continue to update the rule to meet the needs of the day.

It is also important to note the practical implications of enforcement dates for regulatory compliance with a rule for companies that have product and product packaging development timelines that are 1 to 1.5 years in advance of the materials entering the market. A formal rule could also drive additional litigation challenges for companies if a material that is "recyclable" is ultimately not recycled due to shifts in municipality infrastructure, budget constraints, recycling revenue and/or consumer disposal behavior.

III. The Green Guides have played a vital role in promoting the flow of truthful information to consumers by setting key standards on which consumers and sellers can rely on.

The Guides have provided standards that manufacturers, sellers, and consumers can rely on. The Guides have helped marketers to avoid making environmental claims that may inadvertently mislead consumers, as they have increasingly looked to purchase products based on

¹ *Guides for the Use of Environmental Marketing Claims* at 62127.

² *Id.*

³ See, e.g., *Rawson v. ALDI, Inc.*, No. 21-CV-2811, 2022 WL 1556395 at *3 (N.D. Ill., 2022); *Downing v. Keurig Green Mountain, Inc.*, No. 1:20-cv-11673-IT (D. Mass. Sep. 9, 2020); *Duchimaza v. Niagara Bottling, LLC*, — F. Supp. 3d. —, 2022 WL 3139898 (S.D.N.Y. Aug. 5, 2022); *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-00927 RMW, 2010 WL 94265 (N.D. Cal. Jan. 6, 2010).

environmental impact.⁴ RILA members and other sellers rely on the Guides to assure customers that the products bearing environmental marketing claims are indeed sustainable and responsible. Likewise, the Guides have provided clarity for consumers when buying environmentally responsible products. Specifically, the Guides provide consumers with greater clarity and stronger reassurance that when something is sold as green, it actually is green. This in turn helps consumers make more informed choices about their purchase of environment-friendly products and services.

As the principal source of guidance, the Green Guides continue to play a critical role in the flow of truth information to consumers.

The Green Guides are widely regarded as the principal source of guidance on environmental marketing in the United States and have helped to mitigate misinformation in the marketplace by providing guidance through clear examples on what is considered a deceptive claim. Environmental benefit claims are often subjective, complex in nature, and difficult for the average consumer to decipher. Consumers today are met with environmental benefit claims on a daily basis, including the use of terms like "sustainable", "natural", and "organic", as they shop online or in stores. The lack of clear and uniform guidance can leave openings for misinformation and inconsistent use of terms in ways that can potentially be perceived as misleading.

RILA encourages the FTC to revise and update the Guides to maintain consistent and clear guidelines that companies may reference when labeling their products and services and to which they may be held accountable. Effective use of the updated Green Guides will drive uniformity amongst companies, improve transparency for the consumers in their buying choices, and increase clarity and consumer understanding around material source and end-of-life/waste management.

The updated Green Guides should include more practical examples.

The examples provided in the current Green Guides provide practical advice from which businesses can glean guidance when developing advertising claims and help consumers understand what these advertising claims mean. Providing more practical examples on a wider array of phrases such as "natural", "clean", and "sustainable", and across a range of consumer products and services, would both assist sellers in ensuring their claims are accurate and increase consumer understanding as to the meaning of these claims. RILA's comments herein address several enhancements to the Guides that will improve their overall utility and value for both consumers and sellers alike.

IV. The evidence shows that consumers have developed an increasing interest in environmental claims.

⁴ The FTC's website states that "American consumers are looking to buy environmentally friendly, 'green' products, from recycled paper to biodegradable trash bags... [and the Green Guides] are designed to help marketers avoid making environmental claims that mislead consumers." *available at* www.ftc.gov/news-events/topics/truth-advertising/green-guides; see also, news.bloomberglaw.com/bloomberg-law-analysis/analysis-green-product-claims-face-growing-consumer-scrutiny (Nearly 80% of millennials and over 60% of Gen Z and Gen X are willing to pay more for sustainable products.) (Last visited, April 13, 2023).

Customers are increasingly looking to purchase products based on environmental impact. Since the Guides were last updated in 2012, consumer demand has been on the rise for more transparency in marketing and verifiable information on environmental impact. A 2023 joint study, by McKinsey & Company and NielsenIQ, examined sales growth for products that claim to be environmentally and socially responsible (*i.e.*, environmental, social, and governance (ESG) claims).⁵ According to the study, "when consumers are asked if they care about buying environmentally and ethically sustainable products, they overwhelmingly answer yes . . . [and] more than 60 percent of respondents said they'd pay more for a product with sustainable packaging."⁶ The study also found that living a sustainable lifestyle was important to 78 percent of US consumers. A review of five years of US sales data (2017 – 2022) that spanned over 600,000 individual products across 32 categories "reveal[ed], in many categories, a clear and material link between ESG-related claims and consumer spending."⁷ This demonstrated a growth in sales of consumer products making ESG claims underscores the importance of ensuring the accuracy of these claims.

Beyond sales growth for products bearing ESG claims, consumer surveys also demonstrate increased interest in an array of environmental issues over the last decade. Recently, consumers have listed recycling and reusing; reducing single-use plastics; and air pollution among their top three concerns.⁸ Consumers have also shown growing interest in specific environmental issues. For example, in 2022, more than two-thirds of American reported that they are now concerned about climate change, and more than 50 percent expect their fellow Americans to be willing to change their consumption habits as a result.⁹ Consumer spending patterns also reinforce consumers' interest in brands' carbon reduction efforts.¹⁰

⁵ See, "Consumers care about sustainability—and back it up with their wallets," (Feb. 6, 2023), *available at* www.mckinsey.com/industries/consumer-packaged-goods/our-insights/consumers-care-about-sustainability-and-back-it-up-with-their-wallets (Last visited, April 24, 2023).

⁶ *Id.*

⁷ *Id.*

⁸ See, "Driving Accountable Sustainability in the consumer industry," (June 9, 2022), *available at* www2.deloitte.com/us/en/insights/industry/retail-distribution/accountable-sustainability-consumer-industry.html; See also, "Majority of Americans Want Cleaner Energy From Renewable Sources," (Oct. 29, 2018), *available at* [www.consumerreports.org/alternative-energy/majority-of-americans-want-cleaner-energy-from-renewable-sources/\(showing consumers are interested in renewable sources of energy\)](http://www.consumerreports.org/alternative-energy/majority-of-americans-want-cleaner-energy-from-renewable-sources/(showing%20consumers%20are%20interested%20in%20renewable%20sources%20of%20energy)) (Last visited, April 24, 2023).

⁹ See, "Changes in Consumers' Habits Related to Climate Change May Require New Marketing and Business Models," (Oct. 26, 2022), *available at* www.conference-board.org/topics/consumers-attitudes-sustainability/changes-in-consumer-habits-related-to-climate-change#:~:text=HOME-Changes%20in%20Consumers%20Habits%20Related%20to%20Climate%20Change%20May,New%20Marketing%20and%20Business%20Models&text=More%20than%20two%2Dthirds%20of,consumption%20habits%20as%20a%20result. (Last visited, April 24, 2023).

¹⁰ See, "Climate Change Plays Leading Role in Consumer Spending," (March 4, 2021), *available at* www.jpmorgan.com/insights/research/climate-change-consumer-spending (Last visited, April 24, 2023).

The COVID-19 pandemic has also factored significantly into consumer attitudes toward environmental issues. According to a study conducted by MasterCard, changes in consumer attitudes and actions have increased more rapidly as a direct result of the pandemic.¹¹ The global study across 24 countries (including the U.S.) revealed that consumers are calling on companies and brands to act in more environmentally conscious ways.¹² More specifically, consumers revealed that they want companies and brands to focus on reducing waste (37%), reducing air and water pollution (35%), and tackling the issue of plastic pollution in packaging and products (35%).¹³ Greater awareness of environmental impacts of purchases is also one of the top changes that people will make as a result from COVID-19 (42%).¹⁴ Researchers attributed the increased awareness about environmental challenges and climate change to the fact that consumers had more time during the pandemic lockdown, when there was a period of reduced travel, to reflect on the effect they had on the planet.¹⁵ Additionally, during pandemic lockdowns, social media platforms reported increased usage, which led to the rise of sustainability focused educational content on social media.¹⁶ Other digital marketing media played a role in educating and shifting consumer sentiments about environmental issues too.¹⁷

Consumers demonstrated interest in products with ESG claims coupled with corresponding sales growth of these products sales reinforce the need for the Green Guides to play a critical role in strengthening accuracy and transparency of environmental marketing claims.

V. RILA recommends the following modifications to the Green Guides to increase its benefits for businesses

RILA appreciates the FTC's request for input on how the Guides could be revised to increase their benefits for businesses. Businesses across various industries, including small businesses, have relied on the Green Guides to determine what they can and cannot say about their products and/or brands. The Guides benefit all businesses, regardless of size, by providing greater clarity on the "must haves" they need to develop and substantiate environmental claims. By defining key terms and claims' substantiation standards, the Guides have historically saved businesses time and costs. This is true not only for national and mass brands, but also small brands, marketers, and legal teams across various industries. The Guides have and continue to be an important tool

¹¹ See, "How the COVID-19 Pandemic has Impacted Consumer Attitudes About the Environment," (March 2021), *available at* www.mastercard.com/news/media/qdvnaedh/consumer-attitudes-to-the-environment-2021.pdf (Last visited, April 24, 2023).

¹² See, "Consumer passion for the environment grows as a result of the pandemic," (April 12, 2021), *available at* www.mastercard.com/news/insights/2021/consumer-attitudes-environment/ (Last visited, April 24, 2023).

¹³ See *supra*, footnote 10 (Last visited, April 24, 2023).

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ *Id.* at 15-16.

¹⁷ *Id.* at 15-16.

that enable companies to make authentic product claims that support the foundation to a circular economy in the future.

A. *Defining Key Terms*

RILA recommends that the updated Green Guides address advertising claims related to carbon reduction, renewable energy, natural and clean terms. We urge the Commission to provide clear and concise examples on appropriate, deceptive, and/or misleading claims for these specific topics. RILA encourages the FTC to provide examples rather than definitions for these claims to maximize the relevancy and appropriateness of the guidance for the years to come. More specifically, providing examples of what are considered deceptive claims is particularly helpful for retailers earnestly trying to avoid making deceptive claims.

Since the last Green Guides update, there have been significant shifts in scientific developments, technology, and consumer sentiments that have rendered some of the current guidance less helpful. Providing definitions for advertising claims that are forecasted to be a continual issue creates the risk of having a definition become outdated, especially when researchers forecast continued exponential growth of technological advances in the years to come.¹⁸

B. *Claims Substantiation via Internal Certification Processes*

RILA also requests guidance on the development and use of substantiating claims, through a company's internal certification process rather than through an independent third party. Many leading retailers have in-house expertise capable of conducting audits and verification of claims. Internal certifications and verification are practices recognized by FTC's treatment of claims in other contexts outside the Green Guides (e.g., Made in the USA etc.). RILA recommends that the Commission provide guidance on the parameters of an internal certification program that would be deemed adequate to substantiate environmental marketing claims. Also, the Commission should consider providing examples on when a specific label relied on by a company and its internal certification process may be considered deceptive or misleading.

C. *Independent Third-Party Certification*

The Guides should also include more guidance on when an independent third-party certification meets the standards that have been developed and maintained by a voluntary consensus standard body. RILA recommends that the Guides defer to industry practices in identifying what certificates are appropriate under certain green claims. Many retailers use certificates to verify other "green" claims, so this is a familiar practice to many of them. For retailers attempting to make claims about "sustainable partnerships," the Guides should provide guidance, including claims supported by companies like Better Cotton or Textile Exchange.

D. *Well-established Consensus-based Standards and Methodologies*

¹⁸ See e.g., "How Fast is Technology Advancing (2023): Growing, Evolving, and Accelerating at Exponential Rates," (Jan. 11, 2023), available at www.zippia.com/advice/how-fast-is-technology-advancing/ (Last Visited, April 24, 2023).

There has also been a significant growth in key areas related to environmental claims. One of these is growth in the number of industry methods and voluntary consensus standards used to calculate and show progress on environmental performance. For the Green Guides' requirements pertaining to 'qualifications and disclosure,' the Commission should accept referencing such established methodologies and standards for a claim. This is particularly important when the claim is based on complex analysis or calculations. For example, a company might disclose that their greenhouse gas emissions claims are based on the methodologies outlined in ISO 14040 (*Environmental management — Life cycle assessment — Principles and framework*) and ISO 14044 (*Environmental management — Life cycle assessment — Requirements and guidelines*) as assurance that an accepted approach was used.

E. *Emergence of Eco-ratings*

There has been significant growth and proliferation of ecolabeling, as evidenced by the growing list tracked by the Ecolabel Index.¹⁹ A new aspect of environmental claims are eco-ratings, such as marketing materials that indicate a product has achieved a status of X under ecolabel program Y. Ecolabel programs should publicly disclose their methodologies for determining the eco-rating and should be based on meaningful and viable environmental achievements. This disclosure should not be a responsibility that falls to the participants in the program.

VI. **Leading Retailers Invest Significant Resources to Comply with the Green Guides**

In the hypercompetitive retail industry, earning and maintaining consumer trust and confidence is critically important. Once consumer trust is lost, it is very difficult to win back. As a result, retailers expend significant resources to ensure the claims on the products they sell are accurate and verifiable. The primary expenditures are third-party assurance costs and subscription services for data validation. For example, recycled content claims must meet certain percentage requirements. Executing with accuracy at scale across a large volume of unique products is rigorous and complex and a significant cost for large retailers. Thus, as the FTC embarks on updating the Guides, RILA urges striking a balance that avoids sweeping changes to standards that would require a significant amount of resources to revise established third-party assurance and subscription services.

Retailers are also faced with complying with state, federal, and international laws that may vary in their requirements for substantiation and environmental claims. While the Guides set standards on a federal level, retailers are still tasked with complying with different state laws and international standards. The lack of uniformity and/or inconsistent requirements can increase costs significantly for businesses with complex supply chains and a nationwide footprint.

These costs become more significant barriers to resource-strapped small and medium sized retailers. Thus, RILA urges the Commission to also consider the impact of the Green Guides on

¹⁹ See, Ecolabel Index, *available at* www.ecolabelindex.com/ecolabels/?st=country,us. (Last visited, April 24, 2023).

smaller retailers. As discussed in more detail below, the FTC could provide free or low-cost compliance resources geared toward small to medium sized businesses that are trying to ensure that their environmental claims are compliant.

VII. Safe harbor provisions and no cost/open source resources will reduce burdens on the industry.

RILA recommends that the Commission should include safe harbor provisions in the updated Green Guides for companies who comply with recognized international standards (such as ISO 14021 for recycled content). For example, if a retailer received a certificate from a supplier certifying a component used to manufacture its product as compliant with a recognized international standard, and that certification is updated annually, that should satisfy the retailer's obligation to substantiate and otherwise qualify its claim creating a safe harbor.

RILA recommends that the Commission should also provide free or open-sourced resources available through the FTC's website. These types of resources would enable businesses to measure environmental impacts and get assurance for product claims before they hit the larger retailers' shelves and/or online marketplaces. These resources could also help spur further innovation and creativity in bringing new sustainable products to the marketplace. For example, similar to the U.S. Consumer Product Safety Commission's small business ombudsman,²⁰ the FTC could designate a point person who serves as a liaison between small businesses and agency staff addressing any problems and/or questions regarding compliance with the Green Guides. Further, the Commission could provide and facilitate training and outreach events for small businesses.

VIII. Environmental marketing claims that should be added to the Guides

The FTC has requested input on any claims currently not included in the Guides that could be potentially deceptive or misleading. To that end, RILA encourages the FTC to include guidance in the updated Green Guides on the following claims and labels that are not explicitly covered in the current version:

- **"Reusable" claims** – RILA requests guidance on the number of times a product or material must be reused in order to properly substantiate a reusable claim. Durability is a critical enabler of sustainability and further guidance can promote the development, marketing and purchase of more durable products and packaging.
- **"Regenerative" agriculture claims** – RILA requests guidance on the use of this claim which is generally understood to refer to farming practices that improve soil health. However, there is currently no widely accepted criteria for substantiating a "regenerative"

²⁰ See e.g., Small Business Ombudsman Mission (Oct. 2014), available at [blk_pdf_SBOmissionFinal3.pdf](#) (cpsc.gov) at 1 (Last visited, April 24, 2023).

claim.²¹ Providing examples of when its use is acceptable and when it can be deceptive or misleading will help clarify FTC expectations.

- **Plastic sources or diverted from oceans.** Ocean cleanup initiatives and diversion of plastics from ocean-bound waste disposal have led to popular marketing claims that products contain "ocean-bound plastics", "ocean-diverted plastics", or "ocean-sourced plastics". It would be beneficial for the FTC to implement definitions for each of these terms to ensure they are not used interchangeably, and also to provide the most accurate information to the consumer as to how the plastic was sourced.

IX. The updated Green Guides should take a "forward-looking" approach in considering advanced technologies and economic conditions.

The Green Guides should be updated to reflect the technological changes that have occurred since 2012. The 2012 Guides only provided a handful of examples that reference the internet. RILA requests more .com and e-commerce examples. Device capabilities have evolved tremendously since 2012, and so examples that consider how marketing reaches consumers through digital platforms is also important. RILA also encourages the FTC to consider more evolving technologies like virtual reality platforms that have created new and different e-commerce channels.

Severe supply chain disruptions during the pandemic forced a number of enterprises to revisit how they can make their supply chains more resilient and dependable. In fact, the impacts of the supply chain disruptions were felt as late as last year with many companies still reporting slowdowns and shortages.²² Companies experiencing these supply chain issues have turned to new suppliers both internationally and nationally to ensure that they are meeting consumer demands. The pandemic has also accelerated the advancement of digital and autonomous supply chains, which will likely have a very different environmental impact than more traditional supply chain models.²³ Another post-pandemic supply chain trend is relying more on domestic manufacturing, but that too brings its own challenges.²⁴ For instance, growing the U.S.' industrial commons by importing more raw materials will take significant time and resources.²⁵

The instability of where and how retailers will source materials and the forthcoming changes to how supply chain models operate, makes substantiating environmental claims incredibly

²¹ See, P. Newton et. al, "What Is Regenerative Agriculture? A Review of Scholar and Practitioner Definitions Based on Processes and Outcomes," (Oct. 26, 2020), *available at* www.frontiersin.org/articles/10.3389/fsufs.2020.577723/full (Last visited, April 24, 2023).

²² See, "How COVID-19 impacted supply chains and what comes next," (Jan. 6, 2023), *available at* www.ey.com/en_us/supply-chain/how-covid-19-impacted-supply-chains-and-what-comes-next (Last visited, April 24, 2023).

²³ *Id.*

²⁴ See, Harvard Business Review (HBR), "Global Supply Chains in a Post-Pandemic World," (Sept.- Oct. 2020), *available at* hbr.org/2020/09/global-supply-chains-in-a-post-pandemic-world (Last visited, April 24, 2023).

²⁵ See, HBR, "The Challenge of Rebuilding U.S. Domestic Supply Chains," (May 6, 2021), *available at* hbr.org/2021/05/the-challenge-of-rebuilding-u-s-domestic-supply-chains (Last visited, April 24, 2023).

challenging. Given supply chain dynamics and uncertainties, and anticipated future changes, the FTC should take a flexible approach in its updates to the Guides with guidelines related to supply chain claim qualifications and required substantiation.

X. Harmonization Between the Green Guides, Federal, State, and Local Laws or Regulations Are Necessary

Harmony and consistency among federal, state, and international laws will promote compliance and help consumers. In recent years, some states have taken more of an interest in protecting consumers from deceptive environmental claims. For example, in October 2021, California Governor Newsom signed into law some of the strictest labeling laws related to recyclable and compostable claims. California SB 343²⁶ (Truth in Labeling for Recyclable Materials) requires that products and packaging meet new and stricter specifications before claiming that the product or package is recyclable and before featuring the chasing arrows symbol. Similarly, California AB 1201²⁷ (*i.e.*, truth in labeling for compostable or biodegradable materials) requires that products and packaging meet new and stricter specifications before they can be labeled compostable.

Retailers face potential risks inherent in pursuing compliance with different, overlapping, and at times contradictory guidelines. As such, RILA strongly encourages the Commission to harmonize with the state, federal, and international guidelines and standards that regulate environmental claims by providing a starting point that focuses on flexibility and general uniformity. RILA recommends that the Commission permits companies to use standard claims with objective requirements as a starting point in creating predictable environmental advertising standards for businesses and consumers. The updated Guides should also provide safe harbor provisions to protect businesses who, in good faith, make a concerted effort to comply with other laws that may conflict with the Guides.

XI. Better Harmonization requires the Green Guides to consider international laws, regulations, or standards with respect to environmental marketing claims.

The Green Guides should take into consideration international laws, regulations, or standards with respect to environmental marketing claims as a starting point to creating a level playing field. Both the European Union (EU) and individual member states have actively taken recent steps to address environmental marketing claims. For example, significant attention has been given to the circular economy in the EU where the government has published an action plan in 2020. In November 2022, the EU proposed new rules on packaging with labelling to promote reuse and recycling and calls for a transition to bio-based, biodegradable, and compostable plastics. While U.S. EPA has posted some guidance on what it is doing to support a circular economy,²⁸ global brands with sales in the EU and the US would clearly benefit from a common

²⁶ SB 343 available at <https://legiscan.com/CA/bill/SB343/2021> (Last visited, April 24, 2023).

²⁷ AB 1201 available at <https://legiscan.com/CA/bill/AB1201/2021> (Last visited, April 24, 2023).

²⁸ See generally, U.S. ENVTL. PROTECTION AGENCY, "What is a Circular Economy," available at <https://www.epa.gov/recyclingstrategy/what-circular-economy> (Last visited, April 24, 2023).

nomenclature and set of expectations around the use of the term circular economy as they describe their business objectives and brand accomplishments in this regard.

RILA strongly urges the Commission to be mindful of international standards and requirements retailers and manufacturers already have to comply with. Better harmonization is needed to reconcile conflicting standards. The Commission should also provide safe harbor if a company complies with a well-accepted international standard.

2. Part 2 - Specific Claims

The following comments from RILA address some of the specific claims the Commission requested comments on in its notice.

I. Carbon Offsets and Climate Change

RILA is in alignment with the current guidelines on carbon offsets and climate change but requests some expansion of the guidance. Previously, the Guides advised marketers to have competent and reliable scientific evidence to support their carbon offset claims, including using appropriate accounting methods to ensure they are properly quantifying emission reductions and not selling those reductions more than once.

RILA suggests that the Commission provides clearer definitions for widely used terms such as "climate change", "carbon neutral", and "net zero", as consistency and substantiation of these types of claims is increasingly important. Providing definitions will not only benefit retailers but also consumers who will better understand what these claims mean. Internationally recognized standards are now available or are in the final stages of development (e.g., PAS 2060, ISO 14068) and companies should align their claims with standards from the following organizations as applicable: International Standards Organization (ISO), Task Force on Climate-Related Financial Disclosures (TCFD), International Sustainability Standards Board (ISSB), United States Environmental Protection Agency (EPA), and Science Based Targets (SBTi). To further encourage transparency and minimize consumer confusion, the Commission should provide examples of potentially deceptive climate/carbon offset claims.

II. Compostable

RILA requests additional context and clarity around what "compostable" means and how it can be used appropriately in the industrial and the residential settings. RILA strongly urges the Commission to refrain from issuing a specific numerical threshold to define whether a product is truly compostable. A specific numerical threshold will be onerous and nearly impossible to calculate especially in areas where access to compost services vary tremendously both in the industrial and residential spaces. With composting across most communities still in its infancy, and a wide array of types of composting solutions in the marketplace (i.e., backyard composting to a large-scale industrial facility), RILA cautions the FTC against requiring a threshold without fully understanding the current landscape.

RILA recommends that the Commission require the term "compostable" to be used through proper third-party verification, such as the US Composting Council, BPI Environmental Risk

assessment, or the EU's bio-waste mark. This will provide context and clarity without imposing additional stringent standards that are not realistic to that industry.

III. Degradable

RILA requests that the Commission provides more clarity on the term "degradable." The FTC's current definition of "degradable" is unclear and retailers could benefit from a more objective definition as well as guidelines around what constitutes proper substantiation for this type of claim. One way to define "degradable" is to look to the International Standard for Standardization (ISO) standards. Alternatively, the FTC's ECM Biofilms decision²⁹ provides measurable standards around what constitutes degradability of plastic that could also be instructive here. For instance, the final order requires the defendant to ensure that all claims relating to biodegradability of plastic products meet one of two criteria:

Either: 1) the plastic item bearing the claim will completely decompose into elements found in nature within five years after customary disposal; or 2) the claim is clearly and prominently qualified by either the time for complete decomposition or the type of non-customary disposal required and the availability of such disposal facilities.

These types of clear metrics will provide much needed guidance to retailers intending to use the claim compliantly. Consumers would also benefit from education about the difference between what "degradable" and "compostable" mean. In parallel to revising the Guides, the FTC should further increase public awareness through its various media platforms (*i.e.*, website, consumer alerts, social media etc.) to educate consumers on the meaning and differences between these claims.

With regard to substantiation, the phrase "competent and reliable scientific evidence" is undefined and confusing. Instead, RILA recommends that the Commission consider lab testing degradability from a disinterested, third-party as sufficient for making a substantiated claim.

IV. Ozone-Safe/Ozone-Friendly

RILA supports the current guidance in place related to "ozone-safe" and "ozone-friendly" claims. Namely, that it is deceptive to misrepresent, directly or by implication, that a product, package, or service is safe for, or friendly to, the ozone layer or the atmosphere.

V. Recyclable

A. *Consistency across various jurisdictions, defining "recyclable", and providing further clarity through examples.*

As mentioned above, RILA urges the Commission to strive for consistency between state and federal laws with recyclability claims and any other changes that it makes to the updated Guides. For instance, we recommend that the Guides consider that some federal regulations and import standards require certain industries, like the consumer electronics industry, to have specific resin

²⁹ *In re ECM BioFilms, Inc.*, F.T.C. Docket No. 9358, Final Order (Oct. 11, 2015).

code labels (with chasing arrows), WEEE labels,³⁰ and other labels on consumer electronic devices and packaging. The placement of these labels on products and packaging should not be deemed "deceptive" under state law if they are required under federal regulations or import standards.

In addition, RILA suggests expanding the definition of "recyclable" to include creation of an input material— not solely another consumer product. Broadening the definition will likely encourage retailers to embrace the practice, which will ultimately benefit the environment. Additionally, given the wide variation of products and packaging in the marketplace, "recyclable" should continue to include a range of types of recycling programs and collection methods, such as community recycling centers, in-store drop-off options, and take-back or mail-in programs, and not be limited to only curbside recycling. Curbside recycling is not an option for some communities and can be limited in the scope of accepted materials (*i.e.*, some do not accept glass or certain plastics).³¹

Lastly, confusion persists around the products claiming recycled content and claims of recyclability. Providing examples of what each claim includes and does not, and what the Commission considers deceptive in each scenario, would be beneficial to manufacturers, retailers, and consumers. For instance, since recyclability claims may include collection via store drop-off locations (*e.g.*, LDPE film), we recommend that it should be stated as an illustrative example in the updated Guides. As with other claims that have generated confusion (*e.g.*, compostable vs. degradable), the FTC should engage in raising consumer awareness of the meaning of "recyclable" via its various communication platforms.

B. *Locality-based qualifications and the 60% threshold*

RILA supports the continued use of "substantial majority" at the 60% threshold, but requests clearer guidance on how this calculation should be made to ensure uniform application by companies with similar packaging materials. Alternatively, the Commission could produce an agency market study for retailers to reference.

RILA also supports maintaining, or at least not increasing, the 60% threshold, which could potentially push some items out of the "recyclable" category. Increasing the percentage requirement could lead to an increased litigation related to packaging that is already printed with a different understanding of recyclability.

The Commission should consider adding more resources to the Guides that allow retailers to understand what materials/structure fall within the 60% threshold. New entrants to the industry are not aware of where and how to learn about what qualifies as recycled content and what does not.

³⁰ Waste of electronic and electrical equipment (WEEE).

³¹ See *generally*, The Recycling Partnership, "The State of Curbside Recycling in the 2020," (Feb. 13, 2020) available at <https://recyclingpartnership.org/stateofcurbside/> (Last visited, April 24, 2023).

VI. Recycled Content

A. *Substantiation of recycled content based on per-product or annual weight averages.*

RILA encourages the Commission to provide additional guidelines regarding substantiation of recycled content. Additionally, it would also be helpful for the FTC to provide additional recycled content guidance related to mass balance allocation (similar to renewable energy), if the packaging or product does not actually include the recycled content material/fibers. For example, at any given time, the amount of post-consumer recycled content (PCR) used in the paper packaging industry fluctuates. Therefore, it is difficult to control how much PCR is in the final product on a day-to-day basis, and PCR is routinely under-reported due to this fluctuation.

Lastly, RILA requests the Commission include context in updated Guides related to diverted manufacturing waste and when it should and should not be counted as recycled material. This example falls under Example 1 in the current Guides, but there is often confusion on what constitutes diverted manufacturing waste. Further clarification is needed on diverted manufacturing waste including clear and concise examples.

B. *Post-industrial (or pre-consumer) vs post-consumer recycled content claims.*

The current Guides allow recycled content claims to include both post-industrial recycled (PIR) content (a/k/a pre-consumer) and post-consumer recycled (PCR) content. Any updates to the Guides should reaffirm that *both* PCR and PIR can qualify as recycled content. A circular model is about reducing dependencies on virgin raw materials. Both PCR and PIR keep materials in use, reducing the depletion of natural resources and diverting more material from landfills. PCR and PIR both align with the commitment to the success of plastic recycling supporting opportunities to accelerate the plastics circular economy and reduce dependency on non-renewable resources. PIR plastic resins even have a lower carbon footprint than PCR resin due to the collection process and processing needed to achieve purity levels necessary to repurpose PCR resin.

If updates to the Guides eliminated PIR (pre-consumer) content as recycled content, it would significantly reduce the amount of eligible recycled content in the market. This could drive the price of recycled materials much higher as demand for recycled content continues to grow globally. Current ISO recycling standards and other countries' laws also support the continued use of PIR (pre-consumer) content.³²

³² See, ISO 14021, which is the international standard on environmental claims allows for post-industrial/pre-consumer content claims, even in its most recent review in 2021; The UK implemented a plastic packaging tax on 4/1/22 for plastic packaging that doesn't include a minimum of 30% recycled content. (available at <https://www.gov.uk/guidance/work-out-which-packaging-is-subject-to-plastic-packaging-tax>). The definition of "recycled content" is not limited to post-consumer recycled material. Article L.541-1-1 of new French environmental decree reads very similar to the ISO standard in defining what recycled content can mean, keeping the door open to waste recovery from any operation. (available at <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000045726094>; and https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042176087).

As PIR is a term commonly used interchangeably with "pre-consumer" recycled content, RILA also recommends the Commission update the Guides to note that "pre-consumer" is also commonly referred to as "post-industrial" to avoid any confusion surrounding those terms.

VII. Energy Use/Energy Efficiency

To provide guidance and clarity but avoid creating an unnecessary burden for the Commission, RILA suggests incorporating or referencing the Department of Energy and U.S. EPA's ENERGY STAR® program standards. RILA is not suggesting that the Green Guides limit which program standards are acceptable. Instead, RILA encourages the FTC to formally acknowledge that utilizing any of the established government programs when calculating energy use or energy efficiency is appropriate. Further, RILA suggests that the use of a single rating to represent a complex set of performance factors (e.g., an ENERGY STAR score from the US EPA, or GOLD SEP Certification from US DOES) should be an acceptable methodology if the score is disclosed.

Allowing retailers to utilize a standard that is well established benefits the FTC, consumers, manufacturers and retailers. By relying on established standards, the Commission maintains consistency and uniformity between the agencies while also providing flexibility for the retailer to choose their program standard. Consumers and retailers will benefit from having a familiar, clear, and well-established standard to reference.

VIII. Organic

RILA believes that the Commission should continue to avoid providing advice that is duplicative, inconsistent, or confusing with the USDA's National Organic Program, which provides a comprehensive regulatory framework governing organic claims for agricultural products. To the extent the guidelines for the term "organic" are not in conflict with one another, the FTC could also reference the Textile Exchange standards and the Global Organic Textile Standards.

IX. Sustainable

RILA strongly urges the Commission to refrain from defining "sustainable" or "sustainability." Crafting a single definition that is specific enough to be helpful, but not so specific as to make the word impractical to apply across different contexts and materials, will be challenging, if not impossible. There is also a lack of uniformity in what these words mean to the average consumer.³³

Instead, RILA suggests that the Commission treat "sustainable" claims as a general environmental benefit claim. Marketers should not be permitted to make a general unqualified environmental benefit claim like "sustainable" standing alone without qualification. Marketers should explain what aspect of the product they believe is sustainable and why (e.g., shipped with electric vehicles, made from recycled plastic bottles, etc.). In addition, the Guides should provide examples of what is not sustainable and what would be considered deceptive. By issuing

³³ See e.g., "Google searches suggest people are still confused by the meaning of 'sustainability,'" (Sept. 28, 2022), available at <https://www.eco-business.com/news/google-searches-suggest-people-are-still-confused-by-the-meaning-of-sustainability/> (Last visited, April 24, 2023).

sustainable claims guidance, the Commission can set forth a meaningful standard and provide necessary clarity to retailers and consumers going forward.

Conclusion

RILA thanks the Commission for the opportunity to comment on the FTC's *Guides for the Use of Environmental Marketing Claims* and applauds the Commission undertaking this important effort to revisit and revise this critical resource for ensuring environmental claims are accurate, consistent, and transparent, and allowed consumers to make informed choices about the goods and services they buy. RILA and its members look forward to continued engagement and dialogue on these important topics, including during the upcoming May 23, 2023, workshop on recyclable claims.

If you have any questions, or need any additional information, please contact me at susan.kirsch@rila.org or (202) 866-7477.

Sincerely,



Susan Kirsch
Vice President, Regulatory Affairs
RILA