



RETAIL INDUSTRY LEADERS ASSOCIATION

99 M Street, SE
Suite 700
Washington, DC 20003

www.rila.org

Submitted via www.regulations.gov

June 13, 2023

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

Re: Examining Guides for the Use of Environmental Marketing Claims (RIN 3084-AB15), 88 Fed. Reg. 14092 (March 7, 2023)

The Retail Industry Leaders Association (RILA) appreciates the interest of the Federal Trade Commission ("the Commission" or "the FTC") in soliciting supplemental public comments on issues related to "recyclable" claims, following its Public Workshop Examining Guides for the Use of Environmental Marketing Claims held on May 23 – "Talking Trash at the FTC: Recyclable Claims and the Green Guides," as a part of the Commission's review of its "*Guides for the Use of Environmental Marketing Claims*" ("Green Guides" or "Guides").

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 \$1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

Background

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 unqualified and/or misleading marketing claims. As an organization, RILA shares in the FTC's mission of truthful and responsible environmental marketing. RILA is in favor of the Commission's review of the Guides in order to provide consistency, clear guidance, and uniform application so that companies are prohibited from making unqualified "recyclable" claims. Given the current state of recycling practices and recycling-related advertising in the U.S., the Guides are long overdue for updates. This includes more specific guidance to ensure consistency, uniform application of guidelines, legal certainty, and consumer understanding.

RILA previously submitted an April 24 comment letter¹ on the Commission's December 20, 2022, "Guides for the Use of Environmental Marketing Claims" notice with preliminary feedback related to the full complement of environmental marketing claims addressed in the Green Guides, including some initial input on the many nuances associated with "recyclable" claims. RILA appreciates the Commission providing stakeholders with additional opportunity to weigh in on considerations for updating its guidance on "recyclable" claims via its May 23 workshop, "Talking Trash at the FTC: Recyclable Claims and the Green Guides," and the opportunity for supplemental written comments.

RILA wishes to provide the following additional input related to recyclable claims. The Commission should:

- Provide clear guidance on how to substantiate the 60% "substantial majority" threshold, which should:
 - Avoid mandating any wholesale endorsement of any specific third-party framework or dataset; and instead identify a minimum set of criteria, that datasets and other sources of information should meet to substantiate recyclable claims to facilitate flexibility and not stifle innovation; and
 - Clarify that an array of collection methods, outside of traditional curbside recycling programs, count toward substantiating the 60% "substantial majority" threshold.
- Not require minimum post-consumer recycling rates to support recyclable claims.
- Include generation of materials and raw materials, including advanced recycling, in its definition of "recyclable."
- Permit but not mandate the use of digital labeling technology – e.g., QR Codes.
- Maintain guidance on the use of resin identification codes (RIC).

Each of these recommendations are discussed in more detail below.

Comments

RILA's input is based off of member companies' feedback and experience with the Green Guides. The comments below will address some of the key issues and nuances related to "recyclable" claims within the Guides, including input in response to comments and feedback provided by other stakeholders.

I. Verifying the 60% "Substantial Majority" Threshold for Unqualified "Recyclable Claims"

As RILA emphasized in our April 24 comments, RILA's members support the Commission maintaining, but not increasing, the 60% threshold currently used to define "substantial majority"

¹ See, [RILA Comments re: Guides for the Use of Environmental Marketing Claims \("Green Guides"\) \(April 24, 2023\); Docket ID: FTC-2022-0077-1326](#)

as it pertains to access to recycling mechanisms for consumers where an item is sold. RILA further requests that the Commission issue clear guidance on how "substantial majority" should be verified for recyclable claims. By doing so, the Commission would aid retailers, marketers, manufacturers, and other stakeholders in reaching a uniform understanding of how to apply the "substantial majority" threshold to inconsistent recycling programs nationwide.

RILA wishes to submit the following additional comments for the Commission to consider as it develops updated guidance to retailers/marketers for determining whether a recyclable claim meets the "substantial majority" threshold.

A. Vetting Databases and Other Sources of Information on Recycling Access Rates

RILA cautions the Commission against any wholesale endorsement of any specific third-party frameworks, criteria, and/or databases for substantiating the 60% threshold. Additionally, in issuing guidance, RILA urges the Commission against any regulations that would prevent flexibility with considering additional reliable resources or updated information as new information sources become available over time. RILA also cautions against the FTC listing in the Guides any specific sources of information unless it is qualified with "this list of resources is illustrative only" or "qualified sources for recycling rates data are not limited to this list" to recognize that new information sources may become available over time or have not yet been considered.

For example, some commenters and workshop participants have recommended reliance on databases such as The Recycling Partnership's (TRP) National Recycling Database², to use as a reference for validation methods of the 60% "substantial majority" threshold. While TRP's National Recycling Database is a critical first step, there are currently some limitations and data gaps that should be addressed before relying on this dataset to fully substantiate the 60% substantial majority threshold. One of those limitations is the database's programs chat feature,³ which is currently oriented towards consumers determining if a package is recyclable within their local jurisdiction, rather than being set up for retailers and other marketers, to substantiate recycling access rates for the purposes of making "recyclable" claims. Additionally, at present, information published on TRP's National Recycling Database website regarding recycling access rates for different types of plastics, does not cite specific timeframes or years of the data collected – making it difficult to evaluate the value, current relevance, and completeness of the data.

To remain flexible to consider evolving information on recycling access, RILA recommends that the Commission propose objective minimum criteria in its anticipated proposed future Green

² See, "How the National Recycling Database Can Increase Consumer Confidence in Recycling," (April 18, 2023), available at <https://recyclingpartnership.org/how-the-national-recycling-database-can-increase-consumer-confidence-in-recycling/> (Last visited, June 3, 2023).

³ See, "What Can I Recycle? Let's Chat," available at <https://recyclingpartnership.org/what-can-i-recycle/> (Last visited, June 3, 2023).

Guides update, that data sets should meet for substantiating recyclable claims. RILA recommends that at a minimum⁴ the proposed criteria:

- Require transparency around how and when data was collected (*i.e.*, methodologies, timeframes etc.);
- Should be subjected to peer review, including retailers and other stakeholders;
- Allow marketers to run on-demand queries of databases to pull the most up-to-date set of information gathered;
- Ensure that resources and databases remain reflective of the recycling landscape via a reasonable and regular cadence for review and updating; and
- Require databases, tools, or information sources to be publicly available to all at no cost.

By specifying a "checklist" of minimum criteria that datasets and other resources should meet, including transparency around how and when data was collected, the Commission will leave room for current and future developed resources to serve as credible and accepted sources of information on the evolving status of consumer access to recycling.

B. Incorporating Array of Collection Methods in Determining Recycling Access

As emphasized in RILA's April 24 Green Guides comment letter, we wish to reiterate that given the wide variety of recyclable materials in the marketplace, it is critical that the Guides clarify that an array of collection methods outside of traditional curbside recycling programs count toward meeting the 60% "substantial majority" threshold. Curbside recycling is still unavailable in many areas of the country and is also limited by scope of accepted materials.⁵ Methods including, but not limited to, community recycling centers, in-store drop-off options, and take-back or mail-in programs, should all count towards meeting the 60% substantial majority threshold for unqualified recyclable claims.

II. Setting Post-Consumer Recycling Rate Thresholds for Making Recyclable Claims is Not Appropriate

RILA supports that consumer access to means and methods of recycling (*i.e.*, curbside, drop-off at local recycling facility, mail-back and in-store collection etc.) is intrinsic to any recyclable claim. Currently, the Green Guides do not base recyclable claims off post-consumer recycling rates, and RILA cautions the FTC against doing so in its future proposed update to the Green Guides. Recyclability claims should continue to be predicated on consumer access to means and methods of recycling and not whether a consumer chooses to avail themselves of the opportunity to recycle a particular consumer product or packaging material.

Some commenters and workshop participants suggested decision frameworks, that factor in thresholds for post-consumer recycling rates of packaging materials to serve as criteria for

⁴ RILA notes this list of recommended minimum criteria is not intended to be exhaustive.

⁵ See generally, The Recycling Partnership, "*The State of Curbside Recycling in the 2020*," (Feb. 13, 2020) available at <https://recyclingpartnership.org/stateofcurbside/> (Last visited, June 2, 2023).

making a recyclable claim.⁶ These tools and decision frameworks are a great resource and benchmarking tool for retailers, brands and their packaging design teams to utilize as they set goals and aspire toward greater circularity of packaging materials. However, meeting a particular recycling rate threshold should not be required to substantiate a recyclable claim.

In addition to being driven by consumer behavior, tracking recycling rates for a particular material, and determining one threshold that would apply across a variety of materials and products, presents significant challenges. Consumer recycling rates are merely a snapshot in time. Supply chain timelines often can take several months, from product and packaging development and production, including the labeling of the product/packaging, until the final packaged product makes its way to store shelves or online shopping product listings. Recycling rates are dynamic and may change from the time a manufacturer makes a recyclable claim labeling decision for a product and/or packaging, to the time it's actually available for purchase. Therefore, recycling rate-driven labeling decisions could quickly become outdated, and this metric would not be consistent nor reliable for determining recyclability claims.

In another example – one commenter's recyclability tool defines a package to be recyclable at scale if "post-consumer recycling rates for that package reach 30% in either the U.S. market and/or multiple regions representing at least 400 million inhabitants."⁷ At the present time, plastic water or soda bottles, items widely accepted at materials recovery facilities (MRFs), fall significantly short of meeting a 30 percent post-consumer recycling rate. According to a 2022 Greenpeace report⁸ on its comprehensive survey of MRFs, the recycling rates for polyethylene terephthalate #1 (PET#1) and high-density polyethylene #2 (HDPE#2) plastic bottles and jugs were recorded at recycling rates of 20.9% for PET#1 and 10.3% for HDPE#2 in 2022. Setting such an unattainable and restrictive definition based off of post-consumer recycling rates for determining recyclability would prevent the most commonly and widely recyclable products from being labeled as recyclable. Setting a required post-consumer recycling rate threshold to make a recycle claim could additionally have the unintended consequence of discouraging consumers to recycle.

Consumer behavior research findings and decision frameworks tied to recycling rates remain important for tackling product and packaging waste challenges. RILA urges the Commission to not set recycling rate threshold requirements for recyclable claims in its Green Guides update.

⁶ See e.g., [The Recycling Partnership Comments re: Guides for the Use of Environmental Marketing Claims \("Green Guides"\) \(April 19, 2023\); Docket ID: FTC-2022-0077-0795](#) discussing, The Recycling Partnership, "Design for Circularity," available at <https://recyclingpartnership.org/circular-economy/> (Last visited, June 2, 2023).

⁷ The Recycling Partnership, "Circular Packaging Assessment Tool" at page 5, available at https://recyclingpartnership.org/wp-content/uploads/dlm_uploads/2023/02/Circular-Packaging-Assessment-Tool-1.pdf (Last visited, June 3, 2023).

⁸ Greenpeace, "Circular Claims Fall Flat Again 2022 Update," at page 10, available at https://www.greenpeace.org/usa/wp-content/uploads/2022/10/GPUS_FinalReport_2022.pdf (Last accessed, June 3, 2023).

III. The Definition of "Recyclable" Should Include Generation of Materials and Raw Materials, Including Advanced Recycling

One way that the FTC can ensure equal application and consistency, is through an expanded definition of "recyclable." RILA recommends the Commission include material-to-material advanced recycling in the definition of "recycling."

Advanced recycling (also known as "chemical recycling" or "molecular recycling") is the process of breaking plastic back down to its molecular state, in order to be able to be reused in the creation of new plastic or other materials including textiles, electronics and any other products that include plastic parts. Material-to-material advanced recycling is a good first step to driving a global circular economy, excluding it from the definition now would only pose more challenges for stakeholders until the Guides are next reviewed.

The expanded definition of "recyclable" proposed by the Household & Commercial Products Association (HCPA) in its comments⁹ is a good start. The definition reinforces that recycling does not include the generation of energy from material and clarifies that the ability to make a raw material from the recycling output is acceptable. RILA recommends striking "manufacturing of fuels" from HCPA's proposed definition, in order to accommodate the inclusion of advanced (chemical) recycling processes that might be helpful in recovering difficult to recycle plastic materials.

HCPA's proposed language for an updated definition of "recyclable" with RILA's suggested edit (see *strikethrough*) is as follows:

"It is deceptive to misrepresent, directly or by implication, that a product or package is recyclable. A product or package should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in the manufacture of a material, raw material or assembling another item. Recycling does not include use in the generation of energy ~~or the manufacture of fuels~~¹⁰."

IV. The Guides Should Permit the Use of Digital Labeling

Given that technology has substantially changed since the Guides were last updated in 2012, the updated Guides should continue to allow for use of digital labeling and labeling technology (e.g., QR Codes), including for "recyclable claims." RILA recommends that the FTC should revise the Guides in a manner that permits, but does not require, the use of digital labels such as QR codes.

⁹ See, [Household & Commercial Products Association Comments re: Guides for Use of Environmental Marketing Claims \("Green Guides"\) \(April 24, 2023\); Docket ID: FTC-2022-0077-1286](#)

¹⁰ See, [Household & Commercial Products Association Comments re: Guides for Use of Environmental Marketing Claims \("Green Guides"\) \(April 24, 2023\); Docket ID: FTC-2022-0077-1286](#)

Permitting the use of digital labeling would allow consumers to gain access to localized, real time recycling information within seconds, allowing them to avoid deceptive or unqualified recyclable claims. Additionally, digital labeling technology carries other benefits, including reducing labeling waste and significantly aiding in decarbonization efforts, which would result in the elimination of at least 343,000 MT of CO₂e from the supply chain. Furthermore, other benefits of using digital labeling technologies include ensuring the product's recyclability information remains available for consumers throughout a product's lifecycle, as well as increased legibility in multiple languages and in-depth real time information.

Digital labeling should remain voluntary. Mandating the use of digital labels for consumers to gain access to recyclability information could pose an accessibility issue for many consumer demographics. While many consumers are familiar with and have experience using QR codes, not all consumers will be able to make use of smart technology in order to access localized recyclability information. Mandated use of QR codes would exclude those consumers that are not as familiar with technology, or do not have access to updated cellular devices with internet capabilities, as well as consumers who simply do not prefer to access information via smart devices.

Additionally, RILA recommends that the FTC not require the use of digital labels at this time as there are not sufficient studies that provide insight into the cost benefit analysis or consumer behavior impacts of digital labeling. Having to update all products with digital labels would be a very costly endeavor for brand owners, including small businesses, without quantified benefits.

V. Maintain Current Guidance on Use of Resin Identification Codes (RIC)

RILA encourages the Commission to maintain the language in the Green Guides that states that if a RIC is placed in an inconspicuous location on a product, it does not constitute a "recyclable" claim.¹¹ RICs play a crucial role within the recycling process and should not be eliminated. The symbol of chasing arrows with a RIC number in the middle has long been recognized by consumers as a signal that a product is recyclable. RIC is intended to determine whether an item can be recycled at a given MRF and was never meant for consumer education.

However, RILA recognizes that there is some consumer confusion that a chasing arrows symbol with a RIC number in the middle is a signal that the products can be readily recycled by consumers (*i.e.*, deposited in a curbside bin). To reduce potential for confusion, swapping the chasing arrows symbol for an equilateral triangle or a different shape entirely may reduce association of RICs as guidance to consumers on the recyclability of an item or packaging material. Any updated symbol should be paired with robust consumer education efforts.

Furthermore, RILA urges the Commission to support industry, in navigating existing, conflicting legislation across U.S. States regarding the use of chasing arrows and RIC. As retailers and other stakeholders currently face potential risks inherent to pursuing compliance with different,

¹¹ *Guides for the Use of Environmental Marketing Claims*, 77 Fed. Reg. 62129-62130 (Oct 11, 2013).

overlapping, and sometimes contradictory guidelines, RILA reiterates our previous recommendation¹² that the Commission include a safe harbor provision within the Guides to protect retailers and other business stakeholders who, in good faith, make a concerted effort to comply with other laws and regulations that may conflict with the regulations and standards set out by the Commission's Green Guides.

Closing

RILA and its members thank the Commission for the opportunity to provide input on considerations for its update to guidance surrounding "recyclable" claims within the Green Guides. RILA commends the FTC for its efforts to ensure truthful and responsible environmental marketing so that consumers may make informed choices. RILA and its members look forward to continued engagement and dialogue with the Commission on these important topics.

If you have any questions, or need any additional information, please contact Luisa Lobo at Luisa.Lobo@rila.org and Susan Kirsch at Susan.Kirsch@rila.org.

Sincerely,



Luisa Lobo
Manager, Legal & Regulatory Affairs
RILA



Susan Kirsch
Vice President, Regulatory Affairs
RILA

¹² See [RILA Comments re: Guides for the Use of Environmental Marketing Claims \("Green Guides"\) \(April 24, 2023\); Docket ID: FTC-2022-0077-1326](#)