



Institute for Policy Integrity

new york university school of law

December 10, 2010

Federal Trade Commission

Attn: Laura Koss, Bureau of Consumer Protection

Subject: Comments on Proposed, Revised Green Guides, 16 CFR Part 260, Project No. P954501

The Institute for Policy Integrity at New York University School of Law submits the following comments on the Federal Trade Commission's ("Commission") Proposed Revisions to the Green Guides.

The Institute for Policy Integrity is a non-partisan think-tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, cost-benefit analysis, and public policy.

The Commission last updated its Green Guides in 1998. Since that time there have been significant changes in the market with respect to what types of environmentally friendly marketing claims are made, and how they are presented to the public. The Commission's proposed updates are designed to help companies avoid making misleading claims. The updates revise guidance on claims that items carry a seal of approval, are "green," "eco-friendly," "degradable," "compostable," "recyclable," "ozone-friendly," "free of" something, or "non-toxic." The updates also add guidance on claims that an item is made with renewable materials or energy, and on proper accounting for carbon offsets. The Commission's updates to the Green Guides represent a step in the right direction—as long as it is not the only step.

The Green Guides should be updated more frequently in the future. When the Commission first issued the guides, it included a review provision: three years after publication, the Commission would solicit public comment on "whether and how the guides need to be modified in light of ensuing developments."¹ The Commission explained the reason for the review provision in its 1995 request for public comment: "[T]his three-year review is important to ensure that the guides are responsive to any changes over time, both in consumer knowledge and awareness of environmental issues and consumer perception of specific claims."² In addition, the Commission recognized that "science and technology in the environmental area [is] constantly changing. . . . This concern about evolving technology was one of the principle reasons the Commission chose to reexamine the guides three years after their issuance."³ The Commission's logic remains sound. As

¹ Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (Aug. 13, 1992) (codified at 16 C.F.R. pt. 260).

² Request for Comment Concerning Environmental Marketing Claims, 60 Fed. Reg. 38,978, 38,979 (Jul. 31, 1995).

³ *Id.* at 38,980.

the Commission notes in the current proposed update, “[p]eriodic review ensures that the Guides keep pace with evolving consumer perceptions and environmental claims.”⁴ To that end, the Commission should include a permanent three-year review provision in the latest edition of the Green Guides.

The periodic review process should draw from ongoing research into behavioral economics to better understand how consumers respond to information in the marketplace. The Commission should engage in such relevant research either independently or in collaboration with other federal agencies working on policies on environmental labeling.⁵

More generally, the Commission should consider collaborating with other agencies where their jurisdictions or concerns about environmental labeling might overlap.⁶ As the Environmental Protection Agency has noted, “[c]onsumers cannot know how to interpret and use the information they receive until consumers, manufacturers, and government speak a common language.”⁷ A consistent approach to labeling across federal agencies is essential to the overall effectiveness of all labeling systems. Several other federal agencies have begun to revise their policies on energy efficiency and environmental labeling of consumer products. For example, the Department of Energy proposed changes to the Energy Guide appliance labeling program; the Environmental Protection Agency and the National Highway Traffic Safety Administration published notice of additions to the motor vehicle fuel economy labels; and last year, the National Highway Traffic Safety Administration started a rulemaking on its tire fuel efficiency consumer information program. Creating an inter-agency panel on environmental labeling, perhaps under the direction of the Office of Information and Regulatory Affairs, could help coordinate these and other federal activities, and could lead to the formulation of best practices in the area. The Commission would benefit from encouraging the creation of this panel.

Meanwhile, the Commission should start reaching out to coordinate with relevant agencies. For example, the Commission could coordinate with the Department of Agriculture on the use of the term “organic,” with the Environmental Protection Agency regarding standards for carbon offset claims, with the Department of Energy and the Environmental Protection Agency regarding “life cycle” claims, and with the Environmental Protection Agency regarding the use of the term “sustainable.”

Finally, the Commission should continue to couple its revised guidance with adequate enforcement. The Commission’s recent renewed commitment to prosecuting companies that make false or

⁴ Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63,552 (Oct. 15, 2010) (to be codified at 16 C.F.R. pt. 260).

⁵ See attached Comments from Policy Integrity to EPA and NHTSA on Fuel Economy Labels (Nov. 22, 2010) (Docket No. EPA-HQ-OAR-2009-0865) for citations to the latest research and theoretical literature.

⁶ In its first review of the Green Guides, the Commission specifically requested comment on “the interaction of its guides with other regulation of environmental marketing at the federal, state and local level. The Commission is seeking comment on how federal, state and local laws and regulations governing environmental marketing relate to the guidance provided by the Commission.” *Id.* at 38,980.

⁷ Guidance for the Use of the Terms “Recycled” and “Recyclable” and the Recycling Emblem in Environmental Marketing Claims, 56 Fed. Reg. 49,992 (Oct. 2, 1991).

deceptive green claims is laudable.⁸ Simply put, the efficacy of the Green Guides depends on the likelihood that the Commission will initiate enforcement actions against violators. Inconsistent enforcement leads to industry confusion as to what constitutes misleading advertising, and fails to protect consumers from misleading claims. As the Commission noted in its 1996 update, enforcement can lead to better guidance.⁹ The Commission's recent progress on this front is promising, and it should continue moving in that direction.

Sincerely,
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⁸ See *Advertising Trends and Consumer Protection: Hearing Before the Subcomm. on Consumer Protection, Prod. Safety, and Ins. of the S. Comm. on Commerce, Sci., and Transp.*, 111th Cong. (2009) (statement of David Vladeck, Dir., Bureau of Consumer Prot., Fed. Trade Comm'n).

⁹ 60 Fed. Reg. at 38,981 ("The Commission is seeking comment on whether there are principles in these cases which are appropriate for incorporation into the guides.").