

RIN 3084-AB15
Docket No. FTC-2022-0077

BEFORE

THE UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

COMMENTS OF THE

AMERICAN HERBAL PRODUCTS ASSOCIATION

ON THE

GREEN GUIDES REVIEW,
Matter No. P954501

April 24, 2023

Prefatory remarks

The American Herbal Products Association (AHPA) is the national trade association and voice of the herbal products industry. AHPA members include domestic and foreign companies doing business as growers, importers, processors, manufacturers, and marketers of herbs and herbal products. AHPA serves its members by promoting the responsible commerce of products that contain herbs, including conventional human foods, dietary supplements, health and beauty products, animal products, and other products.

The Federal Trade Commission (FTC or the Commission) issued its Guides for the Use of Environmental Marketing Claims (the Green Guides) on July 28, 1992, codified at 16 C.F.R. part 260¹. The Green Guides provide guidance on how the Commission would apply Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive advertising claims, to a variety of specific claims used in marketing that relate to the environment. The Green Guides have been subject to ongoing and periodic review and revision by FTC. FTC announced the most recent review in a Federal Register notice issued on December 20, 2022² (the Notice) and further extended the deadline for comment on this review on February 6, 2023.³ The Notice requests comment on several questions regarding the general utility of the Green Guides and potential revisions thereto, and the Notice also asks for specific comment on the regulation of specific claim types, such as energy efficiency claims or claims of product recyclability.

AHPA includes in its membership companies that make, or that may make, environmental marketing claims. AHPA therefore has an interest in FTC's revision of the Green Guides and offers the following comments. AHPA's comments address specific questions in the Notice of particular relevance to AHPA's members. The absence of comments on other claim types, questions, or comment requests does not indicate a specific position.

There is a continued need for the Green Guides

The Notice requests, in part, comment on whether there is a continuing need for the Green Guides, whether they conflict with other state laws, and if they should be

¹ 57 Fed. Reg. 36,363 (Aug. 13, 1992).

² 87 Fed. Reg. 77,766 (Dec. 20, 2022).

³ 88 Fed. Reg. 7,656 (Feb. 6, 2023).

modified to address such conflicts.⁴ AHPA strongly supports the continuation and upkeep of the Green Guides to reflect the growing scope of environmental marketing claims. The need for an FTC standard for such claims is particularly important in light of the emergence of states' regulation of a growing number of environmental marketing practices. At present, multiple states have introduced or codified legislation regarding environmental marketing claims, particularly with regard to manufacturing and packaging elements. Absent a federal standard, these state-by-state provisions are likely to introduce consumer confusion and increase compliance costs.

A consistent, federally regulated set of standards for environmental marketing claims will ensure a more efficient marketplace. In turn, a well-enforced standard for these claims will continue to build a common consumer understanding of the environmental practices covered by terms addressed in the Green Guides, and will build consumer confidence in those practices. AHPA therefore encourages FTC to continue to maintain the Green Guides and to update these regulations to ensure national conformity in environmental marketing claims.

Format standards for qualifying statements should be specific

In its general principles for the use of environmental claims, the Green Guides state that qualifications and disclosures should be “clear, prominent, and understandable.”⁵ In explaining these terms, these regulations states that “marketers should use plain language and sufficiently large type, should place disclosures in close proximity to the qualified claim, and should avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosure.”⁶ AHPA strongly believes that this language is insufficient to guard against consumer deception and that it is within the capacity of the Commission to provide a stronger and more specific standard for, in particular, the format of qualifying statements. FTC should develop a standard for what type size and form is minimally sufficient in qualifying statements as well as provide related examples of qualifying statement language or placement that would not be considered clear, prominent, and understandable. In developing such a standard for the use of qualifications in environmental claims, FTC should also consider the potential benefit of establishing general standards for clarity, prominence, and understandability applicable to other marketing claim types and media.

⁴ Questions A1, A17b, A17c.

⁵ 16 C.F.R. § 260.3(a).

⁶ *Id.*

The Commission does not need to invent such standards out of whole cloth; numerous federal agencies with authority over labeling and other marketing materials have already conducted consumer research and articulated specific standards for the use of claims in product marketing materials. For example, the U.S. Food and Drug Administration has articulated standards for the placement and formatting of disclosure statements required in the labeling of nutrient content claims under some circumstances.⁷ These regulations include minimum type sizes applicable to different product package types as well as the requirement that any qualifying statement appear immediately adjacent to the associated nutrient content claim, subject to limited and fully specified exceptions where intervening material is required by another regulation. In particular, AHPA encourages FTC to adopt this latter element and require that there be no intervening material between environmental marketing claims and qualifying statements.

AHPA supports a national standard for recyclable claims

The Notice requests comment on whether the Commission should update its current guidance on “recyclable” claims.⁸ At present, the Green Guides permit the use of an unqualified “recyclable” claim when recycling facilities are available to a substantial majority of consumers or communities where the item is sold, defined as 60 percent. The Notice further requests comment on whether this percentage threshold should be updated and whether it should include guidance related to items collected by recycling programs for a majority of consumers or communities that are ultimately not recycled.

AHPA believes that the phrase “consumers or communities” makes it unclear what marketers should measure to substantiate the 60% “substantial majority” required for this standard. AHPA also believes that, when a substantial majority of an item in an area is ultimately recycled, such a product is clearly recyclable and may bear or be promoted with such claims. Toward this end, AHPA proposes the following revised version of 16 C.F.R. § 260.12(b)(1) below:

Marketers can make unqualified recyclable claims when recycling facilities for an item are available to a substantial majority of consumers in the state or territory where the item is sold or when a substantial majority of the item is recycled in the state or territory where the item is sold. The term “substantial majority,” as used in this context, means at least 60 percent.

⁷ 21 C.F.R. § 101.13(h)(4)(i).

⁸ Question B5.

AHPA believes this standard will provide greater clarity regarding the scope and definition of “substantial majority” by maintaining the current 60 percent standard and explicitly locating that standard at the state or territory level. This approach also permits unqualified recyclability claims for substances with high final recycling rates, facilitating a gradual shift to the direct monitoring of actual recycling practices as opposed to facility availability. AHPA encourages FTC to consider revisiting the “substantial majority” percentage as appropriate in future reviews.

FTC’s position on “organic” claims should support existing USDA authority

The Notice requests comment on whether the Commission should issue guidance on the use of “organic” claims for non-agricultural products.⁹

In 2012, FTC declined to regulate “organic” claims in non-agricultural products, such as mattresses, or services, such as dry cleaning, stating that it “lack[ed] sufficient evidence on which to base general guidance.”¹⁰ As previously observed by FTC,¹¹ the United States Department of Agriculture (USDA) National Organic Program (NOP) regulates “organic” claims for agricultural products pursuant to its authority under the Organic Foods Production Act of 1990. In the period following its 2012 review, FTC has at times taken action against companies that make claims for products in violation of existing USDA NOP organic standards. As FTC evaluates the application of its authority regarding the marketplace’s use of the term “organic,” it should continue to avoid introducing consumer confusion by applying standards that conflict with those enforced by USDA NOP for agricultural products.

As a related matter of interest to the herbal products community, dietary supplements are defined as a category of “food” under the Federal Food, Drug, and Cosmetic Act.¹² AHPA notes that USDA NOP’s “organic” claim authority applies to dietary supplement products consisting of or containing botanical or other agricultural products and that USDA NOP should enforce the “organic” requirements against dietary supplements in the same manner it does for other foods. AHPA encourages FTC to revise the Green

⁹ Question B11.

¹⁰ 77 Fed. Reg. 62,121, 62,124 (Oct. 11, 2012).

¹¹ *E.g.*, 75 Fed. Reg. 63,551, 63,585 (Oct. 15, 2010).

¹² 21 U.S.C. § 321(ff) (“Except for purposes of paragraph (g) and section 350f of this title, a dietary supplement shall be deemed to be a food within the meaning of this chapter.”).

Guides or to otherwise communicate USDA NOP's authority to enforce organic regulations on all agricultural product categories.

“Compostable” items should not cause pollution

Regarding the standard to substantiate a “compostable” claim, the Green Guides state that the marketer must have evidence that “...all the materials in the item will break down into, or otherwise become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner...”¹³ Similarly, example 2 in this section describes a product that releases toxins when it breaks down in the composting process. The example states that “[t]he claim is deceptive if the presence of these toxins prevents the compost from being usable.”¹⁴

AHPA believes that a useability standard for the final product of composting (e.g., mulch) is insufficient to prevent consumer deception. In particular, some synthetic potential soil contaminants used in product coating or packaging may persist in compost, such as per- and polyfluoroalkyl substances (PFAS) or microplastics. Even where not immediately hazardous such that the composted material may remain “usable,” such materials may result in longer-term environmental contamination, either where the composting occurs or where the composted material is used. Consumers are unlikely to regard items including materials that persist in this manner as truly “compostable.” AHPA encourages revisions to this section and associated examples to state that, for a product to bear or be promoted with a nondeceptive “compostable” claim, such undesirable contaminants should not persist in the resulting compost under the conditions of composting provided or implied in such a claim.

“Substantial majority” for “compostable” claims should be 60%

The Green Guides currently advise marketers claiming products are “compostable” in municipal or institutional facilities to qualify such claims if appropriate facilities are not available to a substantial majority of consumers or communities where the item is sold. In the Notice, FTC asks whether it should revise the regulation to define “substantial majority” in a manner consistent with the use of the term in the “recyclable” section (i.e., 60 percent).¹⁵

¹³ 16 C.F.R. § 260.7(b).

¹⁴ 16 C.F.R. § 260.7 (Example 2).

¹⁵ Question B2.

In addressing both “recyclable” and “compostable” claims, the Green Guides use the term “substantial majority.” AHPA believes that there is value in the use of consistently defined terminology across these regulations. However, institutional and municipal composting facilities are far less consistently available across the United States than recycling facilities, and information about the availability and capacity of such facilities to handle specific materials is similarly limited.¹⁶ In light of these limitations, AHPA suggests that FTC expand the Green Guides’ attention to “compostable” to articulate in greater detail how a marketer may determine and communicate the availability of composting facilities that may accept their products, both for the use of unqualified and qualified claims.

As a related matter, AHPA notes that Example 5 in 16 C.F.R. § 260.7 provides an example of a non-deceptive qualified claim about institutional composting facility availability that states the exact number of facilities that may compost the particular item. Where qualifications are needed to reflect the limited availability of municipal or institutional composting facilities for an item, such qualifications should not burden marketers without associated benefit to consumers. While such a qualifying statement should, per the current language in this section, “clearly and prominently qualify compostable claims,” a statement of exactly how many facilities exist nationally or in a given state or territory would require significantly increased monitoring and revision burdens on manufacturers that do not change how consumers interact with the promoted product. AHPA encourages revisions to Example 5 to avoid any perception that such specificity is required, potentially in alignment with the parallel Example 5 at 16 C.F.R. § 260.12, which FTC explains appropriately qualifies a recyclability claim with a reference to the “few communities with facilities for” the promoted item.

FTC should provide guidance on “sustainable” claims

In the Notice, FTC asks whether it should revisit its 2012 decision that it lacked a basis to give specific guidance on the interpretation of “sustainable” claims.¹⁷ Sustainability claims have become ubiquitous in commerce across many product and service categories. The unregulated status of these claims encourages their further use and misuse, particularly as other environmental terms fall under clearer standards. As such, AHPA believes that FTC must offer guidance to industry regarding how

¹⁶ See, e.g., Olga Kachook. March 2020. Composting Facilities in the United States. Data accessed April 24, 2023 at

<https://public.tableau.com/app/profile/olga2630/viz/CompostingFacilitiesintheUnitedStates/>.

¹⁷ Question B12.

sustainability claims are interpreted, as well as how non-deceptive claims may be substantiated and/or qualified.

In its 2012 review, FTC acknowledged that “consumers view sustainable claims differently than general environmental benefit claims,” indicating that such claims were ripe for regulation.¹⁸ Because the meaning and commercial status of the term is context-dependent, however, FTC took the position that determining consumer perception requires a case-by-case analysis, making the publication of a general standard on the subject untenable. However, since the 2012 review, numerous authorities have developed public standards for the use of sustainability concepts and principles, including publications informing the interpretation of sustainability claims in different contexts. For example, the International Trade Centre and United Nations Environment Programme released Guidelines for Providing Product Sustainability Information in 2017, and organizations such as the World Business Council for Sustainable Development have published subsequent materials building upon the Guidelines that apply to specific product and packaging categories. AHPA encourages FTC to review and make use of such resources in developing guidance on “sustainable” claims.

¹⁸ 75 Fed. Reg. at 63,583.

Conclusion

AHPA greatly appreciates the opportunity to present comments to FTC on the regulatory review of its guides for the use of environmental marketing claims. AHPA staff and counsel will make themselves available at any mutually convenient time to further address any of the topics addressed herein. If FTC requires clarification or additional discussion on any of the items raised in these comments, please feel free to contact us.

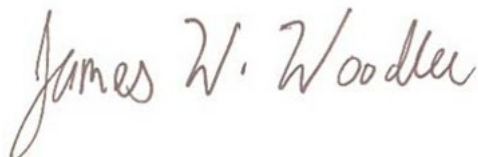
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