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

April 24, 2023

Re: Guides for the Use of Environmental Marketing Claims
Green Guides Review, Matter No. P954501
Docket No. FTC-2022-0077
87 Federal Register 77,766 (December 20, 2022)

The American Gas Association (“AGA”), American Public Gas Association (“APGA”), and National Propane Gas Association (“NPGA”) (collectively, “Commenters”) appreciate the opportunity to comment on the U.S. Federal Trade Commission’s (“FTC” or “Commission”) Request for Public Comment on its Guides for the Use of Environmental Marketing Claims (“Green Guides” or “Guides”).¹ The Commission “seeks comments about the efficiency, costs, benefits, and regulatory impact of the Guides to determine whether to retain, modify or rescind them.”²

AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 77

¹ The FTC issued Green Guides in 1992, with subsequent updates in 1996 and 1998, and in 2012. These comments refer to the current Guides as the “2012 Guides.”

² 87 Fed Reg. 77,766 (Dec. 20, 2022).

million residential, commercial, and industrial natural gas customers in the U.S., of which 95 percent — more than 73 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today, natural gas meets more than one third of the United States' energy needs.³

AGA members are regulated utilities subject to comprehensive state and federal regulatory schemes with long established and strong ties to the communities they serve. Residential, commercial, and industrial customers depend on AGA members to be honest brokers of information related to the generation, distribution, and use of energy. Therefore, they are strong proponents of truthful communications in any forum.

APGA is the trade association for more than 730 communities across the U.S. that own and operate their retail natural gas distribution entities. They include not-for-profit gas distribution systems owned by municipalities and other local government entities, all accountable to the citizens they serve. Public gas systems focus on providing safe, reliable, and affordable energy to their customers and support their communities by delivering fuel to be used for cooking, clothes drying, and space and water heating, as well as for various commercial and industrial applications.⁴

NPGA is the national trade association of the propane industry with a membership of about 2,500 companies, and 36 state and regional associations that represent members in all 50 states. NPGA members include retail marketers of propane gas who deliver the fuel to the end user, propane producers, transporters and wholesalers, and manufacturers and distributors of equipment, containers, and appliances. Propane gas fuels millions of installations nationwide for home and commercial heating and cooking, in agriculture, industrial processing, and as a clean air alternative engine fuel for both over-the-road vehicles and industrial lift trucks. Approximately 75% of NPGA's members are small businesses with fewer than 100 employees.

³ For more information, please visit www.aga.org.

⁴ For more information, please visit www.apga.org.

Commenters will focus these comments on the Commission’s authority to address false and misleading statements in commercial speech, the standard of judicial review of commercial speech, and the need to permit ongoing public discourse on environmental issues. As an initial matter, however, Commentors note that the Request for Public Comment is a solicitation for the public’s input on a number of highly general and wide-ranging topics. If the Commission chooses to revise the Green Guides, Commentors request that it proceed by first issuing proposed revisions for public comment, as was done when the 2012 Guides were promulgated.⁵

The Commission has a Mandate to Address False and Misleading Commercial Speech

The Federal Trade Commission Act (“FTC Act” or “Act”), enacted in 1914 declared “unfair methods of competition in or affecting commerce unlawful.”⁶ The Act largely left the definition of “unfair methods of competition” and “unfair or deceptive acts” for the Commission and the courts to sort out. The Act’s § 5 authorizes the Commission to *prevent* unfair and deceptive practices. To that end, the statute specifically gives the Commission administrative authority to order companies to halt problematic practices and to seek injunctive relief to enforce those orders through the courts. It further gives the Commission authority to promulgate rules proscribing unfair conduct and authority to seek civil monetary penalties and injunctions for failure to follow those rules and orders.

There is a strong need for the Commission to exercise its authority under § 5 to enforce the Act against marketers that make false and misleading statement to induce a commercial transaction. This may include statements that are false and deceptive regarding an environmental benefit or attribute of an underlying product or service. Commercial statements made in the public marketplace making quantitative claims about products or services, whether they are environmentally based or not, should be truthful, substantiated and have a reasonable basis.⁷

⁵ See Proposed Revisions to Guidelines, Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63552 (Oct. 15, 2010).

⁶ 15 U.S.C. § 45.

⁷ 16 C.F.R. § 260.2 (2013) (citing FTC Policy Statement Regarding Advertising Substantiation, 104 FTC 839 (1984)).

Under long standing guidance, the Commission “will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in circumstances, to the consumer’s detriment.”⁸ The alleged deception is viewed from the “perspective of a consumer acting reasonably in the circumstances” and must be “material” or “likely to affect the consumer’s conduct or decision with regard to a product or service.”⁹ Additionally, the misrepresentation must be “an express or implied statement contrary to fact.”¹⁰ Facts are proven or disproven by quantifiable evidence. If the commercial statement is not an express or implied fact intended to induce a commercial transaction, then it is something more than commercial speech and must be reviewed under a different standard.

Basic truth in advertising principles apply to all commercial speech. Businesses must have reliable evidence to substantiate all express and implied claims.

Judicial Review of Commercial Speech

For purposes of First Amendment analysis, “commercial speech” is identified as communication that principally “proposes a commercial transaction.”¹¹ The communication relates “solely to the economic interests of the speaker and its audience.”¹² “The First Amendment’s concern for commercial speech is the informational functions” of these communications.¹³

The Commission’s authority to regulate commercial speech is limited to its mission to quash anticompetitive practices. False or deceptive/misleading commercial speech is defined as factually false statements or claims. Whether express or implied, factually false claims should be prohibited and should be pursued by the Commission under its enforcement powers.

⁸ *Cliffdale Assocs.*, 103 F.T.C. 110, 155 (1984) (FTC Policy Statement on Deception).

⁹ *Id.*

¹⁰ *Id.* at 175 n. 4.

¹¹ *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989) (quoting *Virginia State Board of Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

¹² *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557, 561 (1980).

¹³ *Id.* at 563.

Non-commercial speech that provides commentary on the political issues of the day, expresses ideas, communicates opinions, or disseminates views or positions that are in flux, receives the highest First Amendment protection. Commercial speech is extended marginally less protection.¹⁴ The Supreme Court has “made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.”¹⁵

The Commission Must Avoid Using the FTC Act to Engage in Environmental Public Policy Making

The Green Guides have two intended purposes. First, they are intended to “protect consumers and to bolster their confidence in environmental claims.”¹⁶ Second, they are intended “to reduce manufacturers’ uncertainty about which claims might lead to Commission law enforcement actions.”¹⁷ The Green Guides attempt to explain how reasonable consumers likely interpret environmental claims and describe the basic elements necessary for the Commission to deem those claims substantiated.¹⁸

This purpose was reiterated in the Commission’s 2012 revised Green Guides.¹⁹ The Guides are designed to help “marketers avoid making environmental claims that are unfair or deceptive under section 5 of the FTC Act.”²⁰ The Green Guides are intended to prevent consumer deception, rather than set environmental policy, since the FTC is not an environmental regulatory agency.

The Commission itself has consistently stated its lack of authority over environmental policy.

In the 2010 Green Guides proposed by the Commission, the Commission noted, that “the purpose of the guides is to prevent the dissemination of misleading

¹⁴ Id. at 562-3.

¹⁵ *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002).

¹⁶ Fed. Trade Comm’n FTC Annual Report 13 (1992).

¹⁷ Id.

¹⁸ Fed. Trade Comm’n, *The Green Guides: Statement of Basis and Purpose 1* (2012).

¹⁹ *Guides for the Use of Environmental Marketing Claims*, 77 Fed. Reg. 62,122 (Oct 11, 2012).

²⁰ 16 C.F.R. § 260.16(c) (2013).

claims, not to encourage or discourage particular environmental claims or consumer behavior based on environmental policy concerns.”²¹

Yet again, in issuing 2012 Guides the FTC clearly noted that the FTC should not put itself “in the inappropriate role of setting environmental policy.”²²

Similarly, the Commission has repeatedly noted “the Guides are based on how consumers reasonably interpret claims, not technical or scientific definitions.”²³ Further, it noted that even “detailed guidance” may “place the FTC in the inappropriate role of setting environmental policy” as its “mandate is to combat deceptive and unfair practices, not to create definitions or standards for environmental terms.”²⁴ The Commission also noted that such guidance “could quickly become obsolete given the rapidly changing nature of” markets.²⁵

The FTC Act does not permit the Commission to intervene in particular markets to favor or disfavor specific consumer behavior, or to favor or disfavor specific products, services, technologies or energy sources. This would infringe on a person’s (marketer or consumer) right to form their own independent beliefs, ideas, opinion, or conclusions.

The Commission must recognize that any new guidance or proposed rules must avoid creating environmental policy and not indicate a policy preference for products competing against each other in the public marketplace.

Conclusion

Commenters urge the Commission to continue the prudent exercise of its authority under the FTC Act and provide guidance that helps facilitate the truthful exchange of information and ideas. If the Commission determines a revision or rulemaking is merited, Commenters urge that any revision of the Green Guides or

²¹ Guides for the Use of Environmental Marketing Claims, 75 Fed Reg. 63552, 63558 (Oct. 15, 2010).

²² 77 Fed. Reg. 62,112 (Oct. 11, 2012).

²³ Fed. Trade Comm’n, The Green Guides: Statement of Basis and Purpose 1 at 218 (2012), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf> [hereinafter, Statement of Basis and Purpose].

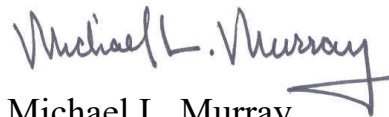
²⁴ Statement of Basis and Purpose, at 70.

²⁵ Id.

proposed rules be drafted to be consistent with the authority given to the Commission under the Act and in accord with the First Amendment.

We hope you find our comments helpful and welcome any further dialog on any of these issues.

Respectfully submitted,



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