February 21, 2023

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

Subject: Green Guides Review, Matter No. P954501

Douglas Hileman Consulting LLC (DHC) is pleased to submit comments on FTC's Green Guides, published in the December 20, 2022 Federal Register. DHC believes the Green Guides should play an important part in guiding companies towards truthful claims; this has the additional benefit of actually improving environmental performance. The Guides – and the Commission's enforcement – should also provide confidence to consumers in the growing world of eco-friendly, or "green" products and services. Commenter uses "environmental" throughout. "Sustainability" and "ESG" – Environmental, Social and Governance – are also popular to convey some societal benefit. Any / all comments expressed throughout have broader applicability.

In the last decade – since the Green Guides were last revised – there has been an exponential increase in the demand for relevant, valid, decision-useful reporting and disclosures on sustainability/ ESG from the capital markets. The Sustainability Accounting Standards Board (SASB) was founded only in 2011. SASB launched standards in 2018. SASB achieved considerable success, as did similar standards and frameworks. In a move towards consistency and comparability, SASB was merged into the Value Reporting Foundation in November 2021, which, in turn, was merged into the newly-created International Sustainability Standards Board less than a year later.

"Materiality" is a core concept in reporting and disclosures to capital markets. SASB's original basis was to use the definition of "materiality" as determined by the U.S. Supreme Court. Information is material is there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available[1]." In other words, the fact need not be the deciding factor – it only matters if the [prospective] investor would want to consider it in the overall mix of making [an investment] decision. In this case, the reporting / disclosure is in financial filings of an entity that publicly trades financial instruments. These companies have resources to prepare and submit other financial reports and disclosures. They should be very familiar with internal controls, including the COSO Internal Control Integrated Framework. The

[1] As found in the FinReg Blog, sponsored by Duke Financial Economics Center, January 6, 2022; https://sites.duke.edu/thefinregblog/2022/01/06/on-the-real-effects-of-changes-in-definitions-of-materiality/#:~:text=The%20U.S.%20Supreme%20Court%20defines,as%20the%20legal%20standard%20of; accessed February 20, 2023.

interest lies with the [existing or prospective] investor, regardless of the extent of investment. The responsibility lies with the disclosing party, regardless of their market capitalization or profitability. The SEC and securities law provide powerful incentives for reporting entities to comply. Shareholders have the option of launching proxy filings for any number of reasons, including for sustainability (or "green") commitments, actions, goals, or improved reporting and disclosures.

These mechanisms are not available to the lowly individual consumer, despite the fact that, in the aggregate, consumer spending is the majority of the economy. Whether "green" products and services comprise 1% or 10% of the total economy, it is a substantial number. Individual purchasing decisions, however, are a miniscule part of the aggregate; they are not material in the eyes of those marketing the product or service. Individual purchasers do not have the authority, power, or resources of the SEC to inspire confidence in green claims, assertions, or labels. This imbalance between vendors and [actual or prospective] consumers of green products or services highlights the importance for stronger actions by the FTC, including rulemaking and substantially enhanced enforcement.

Q1: Continuing need for the guide?

DHC believes there is a continuing need for the Green Guides. In fact, the need is greater than when the Green Guides were initially published, or most recently revised. By any measure, consumer interest in "green" (or environmental, or eco, or sustainability-related) goods and services has soared.

"Green products" often command a price premium over standard-fare products [or services]. This is part of the appeal for green claims and labels. It also presents the incentive to commit fraud by incomplete, misleading or downright false statements, claims, or assertions. Reasonable costs to ensure truthful, supportable claims, assertions or labels is an entry barrier that should discourage unethical actors. Companies are in a better position to incur these costs than the customers they are seeking to cultivate. Customers cannot be expected to incur costs (in time or money) to evaluate environmental claims, assertions or labels as they make purchasing decisions. It falls to the FTC to provide safeguards, with the Green Guides as one mechanism.

Q2: What benefits, and evidence of asserted benefits?

The benefits of the Green Guides should be two-fold. First, the Guides should provide clarity to entities that would market products or services, with claims that they have distinctive attributes or environmental benefits.

Second, they should result in clarity for consumers interested in making purchasing decisions based on distinctive attributes or environmental benefits. Consumer confidence in the truthfulness and efficacy of the claims, assertions, or labels associated with products and services.

The Guides – and enforcement thereof – should have the benefit of reducing the noise of greenwash. In response to another question posed by FTC, DHC advocates rulemaking to strengthen the basis for enforcement and the penalties that can be imposed.

Q4: What impact have Guides had on the flow of truthful and deceptive information?

DHC suggests the FTC research, collect, evaluate and publish data on this topic. At a minimum, begin with data and resources cited in the Comments submitted for this regulatory review.

Q6: What modifications should the Commission make to Guides to reduce costs imposed on consumers?

DHC suggests a deeper understanding of how, where, and how much cost is imposed on consumers. Companies also incur costs to pursue voluntary certifications or labels. DHC suggests the costs associated with the latter are far greater than costs associated with Green Guides.

Green standards, certifications and labels have proliferated. One leading group tracks over 450 eco-labels used worldwide. Ecolabel Index claims to be the largest global directory of ecolabels, tracking 456 ecolabels in 199 countries and 25 industry sectors – from AB to Zque. Even if only half are used in the United States – either direct buyers, or to differentiate companies in the supply chain for B2B procurement - as the world's largest single consumer market, this provides confusion. Even so, certifications and labels are an attempt to provide consistency to the consumer, reducing or eliminating inventive statements that are [too often] made without basis. Some eco-labels are for specific products or services, such as cut flowers or environmental impact of tourism. As such, they help differentiate options for buyers who are set on buying these products. Eco-labels have the benefit of consistency across specific products or services, reducing the need for reputable companies seeking eco-advantage to develop their own criteria and controls.

Q10: What modifications, if any should be made to Guides to increase benefits to businesses? (with evidence)

DHC suggests three modifications:

1) Include climate as a topic.
2) Address eco-labels;
3) Include services in scope.

Climate

Climate Change is the ESG issue of our time. Indeed, the Financial Stability Board has determined climate change poses a risk to global economic stability. Hence, the development of the Task Force for Climate-related Disclosures (TCFD) guidelines. The SEC proposed a rule for disclosure of climate-related risk in March 2022, attracting 14,000 comment letters. A final rule is anticipated in the coming weeks. On the global front, the International Sustainability Standards Board (ISSB) published two exposure drafts in 2022: one for climate-related disclosures, and one for everything else. Release of final rules is anticipated for June 2023.

The rules noted above are designed as safeguards to improve reporting and transparency to capital markets, as they make decisions on allocating capital. Interest in climate change, and efforts to mitigate it, are universal – including to consumers. Commenter has seen advertisements of products made "in a carbon-neutral factory." As investor-oriented safeguards come into effect, companies will increase their reporting, disclosure and communications around climate change. This will extend to marketing and communications directed at consumers.

FTC should establish a new category – as recyclable, biodegradable, etc. – for climate related claims or assertions associated with products and services.

Ecolabels

There is a proliferation of certifications and ecolabels on products and services. These would not be provided if the sellers did not believe they would influence prospective purchasers. These environmental/ green/ "eco" standards, frameworks and labels are likely to have a wide range of applicability and rigor. There is no convenient way for the prospective purchaser to access comparable, decision-useful information on the objectives, scope, reliability or efficacy of the eco-label.

The sheer number of ecolabels [and standards, etc.]]is overwhelming. The criteria for the labels cannot be provided on the product. DHC suggests guidance – or requirement – of a public/private partnership model to provide such information to prospective purchasers. Technology has advanced substantially since the last edition of the Green Guides. QR codes, image recognition, and other technology can enable prospective purchasers to access data in seconds. DHC suggests a model regarding eco-labels or insignia on consumer products that includes features such as those listed below.

The ecolabel must have a dedicated website, with a name that bears reasonable resemblance to the name or title of the ecolabel itself. For example, a designation of "ecofriendly" cannot be supported by a website www.betterforourplanet.com [fictitious example].

The ecolabel's website should include content regarding factors such as those listed below, to enable prospective consumers to develop their own degree of confidence in the ecolabel.

- Governance documents, such as the organization's charter, mission statement, code of ethics/ code of conduct, organizational structure, and composition of the board
- The objectives and scope of the program
- The criteria for evaluating the product/ service to obtain a label (or not), or grade
- Whether products are independently verified for adherence to the criteria
- Whether the verification activity is one-time or recurring; if recurring, a description of the frequency
- Governance provisions to ensure independence of the verifier
- Funding sources for the ecolabel's organization. The types of funding sources should include amounts received by the "regulated" industry or products, and the model for this funding [e.g., general endowment; annual dues; fees for verification; etc.]
- Meaningful data on the pass/ fail rate of products submitted for consideration
- Processes for customers to provide comments or grievances
- Data regarding investigations, recalls, or revocation of ecolabels

<u>Services</u>

Services are simply intangible products. Services are using environmental claims in marketing materials to gain competitive advantage. For example, conferences and events are touted as being eco-friendly or carbon neutral. Services from spas to dry cleaners are doing the same. Given the proportion of the consumer economy derived from services, DHC believes the FTC should not ignore it.

Q14: Claims no longer needed? Provide supporting evidence.

All signs indicate that the number, types, and extent of green claims are increasing, and will continue to do so. The term "greenwash" has entered the lexicon since the 2012 edition of the Green Guides. This indicates the need for consumer protection.

Q16: What modifications, if any, made to account for changes in technology or economic conditions? Evidence?

Social Media: Influence, Applicability, Scope and Enforcement

Social media: Social media has exploded in the last decade. Green claims are no longer limited to corporations selling their products and services. "Influencer" has taken on an entirely different meaning. Whether on established platforms (E-Bay, Instagram) or less formal channels, influencers monetize their reach by selling, endorsing, or describing products. Instagram influencers can earn money from sponsored content, affiliate links, selling products or merchandise, and featuring and discussing products or services. Using "all natural" or "eco-friendly" or "socially responsible" can make a difference to the target market. It may be tempting to dismiss this communications and sales channel as being insignificant. Some influencers may earn only hundreds of dollars per year; others earn millions. DHC does not offer data on the aggregate size of this market, but notes that it is pervasive in a broad, younger, and important demographic. It should be within the mission and scope of the FTC to include this demographic in the next Green Guides. It should also be an increased priority to monitor this channel, and use appropriate authority to restore and maintain trust in products offered via these channels.

Websites, QR Codes and related technology: As noted elsewhere in comments, developments in technology have made vast amounts of data and information instantly accessible. Substantiation for environmental claims, assertions or ecolabels can be enabled by requiring sponsoring companies or organizations to make supporting data and information readily available, via QR codes or internet search.

Question: Should the Commission initiate a proceeding to consider a rulemaking under TFC Act related to deceptive or unfair env claims?

DHC supports the FTC initiating proceedings to consider rulemaking. In the last five years, FTC has achieved only four (4) settlements that included financial penalties, totaling less than $30 million. The subjects have been whether a bath product is "certified organic" or not; whether bamboo is eco-friendly (or whether it is rayon); and – achieving the largest settlement – the actual brightness of an LED light bulb. This bears little resemblance to the landscape of green claims and assertions, and the economic dollars that sellers derive from claims and assertions. Producers and sellers have little incentive to ensure their claims and assertions are supportable. In fact, in the absence of risk of enforcement, there is more incentive to out-claim competitors than to be truthful.

Question B. Specific Claims

See answer to Q10 for comments on climate change.

Carbon offsets and climate change. Deceptive claims re: climate change in the market? Net zero, carbon neutral, low carbon or carbon negative. If evidence of deception exists, what specific guidance should the FC provide to help marketers avoid deceptive claims?

Other Comment

Financial risk from enforcement is negligible. FTC settlements have totaled less than $30 million in the last five years. Two-thirds of that amount was for one case, involving LED bulbs claiming to be brighter than they were. Other settlements that included payment involved a “certified organic” claim for bath products, whether a bamboo product was “ecofriendly”. These are not the claims that capture consumer attention today.

Respectfully submitted,

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