

STATE OF TENNESSEE

Office of the Attorney General



**JONATHAN SKRMETTI**  
ATTORNEY GENERAL AND REPORTER

P.O. BOX 20207, NASHVILLE, TN 37202  
TELEPHONE (615)741-3491  
FACSIMILE (615)741-2009

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**SUBMITTED ELECTRONICALLY  
VIA REGULATIONS.GOV**

The Honorable Lina M. Khan  
Chair  
Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, DC 20580

**RE: Public Workshop Examining Guides for the Use of Environmental Marketing  
Claims, Docket ID No. FTC-2023-0025, RIN 3084-AB15**

Dear Chair Khan:

The undersigned State Attorneys General respectfully submit the following comments in response to the recent Federal Trade Commission (FTC) Workshop, *Talking Trash at the FTC: Recyclable Claims and the Green Guides* and the decennial regulatory review of the FTC's Guides for the Use of Environmental Marketing Claims (Green Guides).

As you know, the FTC first issued the Green Guides in 1992 as part of recommendations from a Task Force of various state Attorneys General. *See* 57 Fed. Reg. 36,363–39 (Aug. 13, 1992). The stated purpose of the Green Guides is to “help marketers avoid deceptive environmental claims under Section 5 of the Federal Trade Commission Act (FTCA), 15 U.S.C. 45.” F.T.C., *The Green Guides, Statement of Basis and Purpose* 1 (Oct. 1, 2012), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf>.

And the Green Guides achieve that purpose. They have provided consumers with valuable information and have provided guidance to industry and marketers. At the same time, the fact the Green Guides constitute administrative interpretations of law—as opposed to regulations with the force and effect of law—permits States to craft innovative recycling programs and technologies that benefit all Americans.

Expanding the scope of the Green Guides and formalizing them as agency rules, as advocated by some commenters and workshop participants, is unnecessary and intrudes upon the environmental policymaking roles of other federal agencies and States. Such a significant change would undermine the efforts of many States to address important marketing and environmental issues, including encouraging the development of recycling technology. It is bad policy, unlawful, and warrants rejection.

### **I. The FTC lacks statutory authority to regulate the environment.**

The FTC is governed by Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. §45(a)(1). This law does not provide the FTC with the authority to regulate emerging technologies based on putative “environmental pollution” allegations that lack an appropriate scientific basis. The FTC is a consumer protection agency; it does not have environmental protection expertise.

But others have asked you to be an environmental agency. Sixteen attorneys general have suggested changing 16 C.F.R. §260.3(c) to require environmental marketing claims to “be underwritten or supported by an actual or demonstrable environmental benefit relevant to [or consistent with] the claim to avoid being deceptive. (The clause ‘relevant to the claim’ is important for when the product might have multiple environmental benefits.)” Letter from States of Cal., Conn., Del., Ill., Md., Mich., Minn., N.J., N.M., N.Y., Or., R.I., & Wis.; Commonwealths of Mass. & Pa.; and D.C., at 8 (Apr. 24, 2023) (emphases omitted) [hereinafter Cal. Letter]. That desire is especially pronounced—and problematic—as to recyclability claims. As the letter makes clear, those attorneys general want you to regulate recycling by permitting marketers to make recyclability claims only if a product is recycled in a certain way. *See id.* at 31–33 (providing the proposed text of the rule). Other reuses of plastic waste do not count under the proposal. *See id.* The proposal thus encourages the FTC to use its consumer protection authority to promote particular types of recycling. As set forth below, *see* Sections II and III, *infra*, that promotion has nothing to do with preventing consumer confusion and is indistinguishable from environmental regulation.

The FTC needs to point to more explicit authority than Section 5 before converting its consumer-protection mission into an environmental regulation regime. Agencies cannot use their “enabling legislation” to “add pages and change the plot line” of their regulatory authority. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quotations omitted). And a consumer-protection statute has little to do with what are basically environmental regulations. Indeed, that the FTC has “no comparative expertise” in making environmental determinations means “‘Congress presumably would not’ task it with doing so” in Section 5. *Id.* at 2612–13 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019)). That such a power is one “‘of vast economic and political significance,’” *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam) (quoting *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (quotations omitted)), and also alters decades of State regulatory primacy in this area strongly militates against finding it in the FTC Act. *See, e.g., West Virginia*, 142 S. Ct. at 2608; *id.* at 2620–22 (Gorsuch, J., concurring); *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489.

## II. “Advanced Recycling” of plastic is properly termed “recycling” because it transforms plastic waste into beneficial new substances and products.

The FTC should not exclude Advanced Recycling processes from the definition of “recycling” or say that those processes do not constitute “a recycling program or reconstituting plastic waste into a new or recycled product.” Cal. Letter, *supra*, at 32. The term “Advanced Recycling” involves three main processes—pyrolysis,<sup>1</sup> gasification,<sup>2</sup> and depolymerization<sup>3</sup>—that convert used plastics into new, higher-value plastics that can be used in various applications again and again.

That is clearly recycling. Those processes “extract[] and reus[e] useful substances found in waste.” See Am. Heritage Dictionary, *Recycling* (5th ed. 2022). That they have a role to play in reducing plastic waste is plain from the fact that many States, Tennessee included, have growing Advanced Recycling marketplaces. See Alexander H. Tullo, *Eastman Will Build a \$250 Million Plastics Recycling Plant*, Chemical & Engineering News (Feb. 1, 2021), <https://cen.acs.org/environment/recycling/Eastman-build-250-million-plastics/99/web/2021/02>; Bradley Jackson, Opinion, *Tennessee Tackles Plastic Waste with Innovation, Advanced Technology*, The Tennessean (Nov. 11, 2020), <https://www.tennessean.com/story/opinion/2020/11/11/tennessee-tackles-plastic-waste-innovation-advanced-technology/6242457002/>. Similarly, Advanced Recycling was discussed as a solution to plastic waste at the Department of Energy’s Bioenergy Technologies Office 2019 workshop “Plastics for a Circular Economy” in 2019. Dep’t of Energy, *Plastics for a Circular Economy Workshop: Summary Report* 8, 23, 25–26 (2019). Excluding Advanced Recycling from any definition of “recycling” or treating those processes as not being part of a “recycling program” is counterintuitive and wrong.

Yet some commenters advocated for just that. They argue that “the revised Green Guides should ... clarify that ‘recycling’ of post-consumer plastic is confined to the mechanical processing of plastic waste into a new product or into plastic resin that can be used as feedstock for making a new plastic product.” Cal. Letter, *supra*, at 30. Advanced Recycling is, to be sure, a new and developing technology. But there is no reason to use the Green Guides—and the FTC’s rulemaking authority—to lock in current recycling methods and ignore effective technologies that are currently being developed. Moreover, requiring any definition of recycling to be limited to mechanical separation technologies would slow or curtail investment in new Advanced Recycling technologies. The current definition and FTC’s salutary decision to treat the Green Guides as interpretive guidance instead of binding rules provides flexibility for future development in this area and so encourages the growth of technologies that reduce waste and promote environmental conservation.

Moreover, there is “legitimate reliance” on the current paradigm that must be carefully considered, *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996), and that ultimately militates strongly against any sudden change. Plastic makers have invested billions of dollars in research

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<sup>1</sup> Pyrolysis is not incineration of plastic, but the use of thermal decomposition to condense used plastic into valuable material.

<sup>2</sup> During gasification, plastics are converted into syngas through the application of heat and then converted into valuable materials.

<sup>3</sup> Depolymerization is the process of breaking used plastics down into smaller molecules that are used to make multiple valuable products.

and development of Advanced Recycling, and States have established statutory and regulatory frameworks to allow those developments. *See* Tullo, *supra*; Jackson, *supra*; Tenn. Code Ann. §§68-211-401, -402. Revising the Green Guides as suggested by some commenters would undermine those efforts.

**III. The plain meaning of “recyclable” is that the item can be recycled, and artificially restricting the word’s meaning will result in consumer confusion.**

Nor is there any reason for the FTC to depart from the plain, ordinarily understood meaning of “recyclable.” *See* Exec. Order No. 13,563 §1, 76 Fed. Reg. 3,821 3,821 (Jan. 18, 2011) (The regulatory system “must ensure that regulations are accessible, consistent, written in plain language, and easy to understand.”). Stating that a product is “recyclable” simply means that an item *can be recycled*. *See* *Curtis v. 7-Eleven*, 2022 WL 4182384, at \*13 (N.D. Ill. Sept. 13, 2022) (“‘Recyclable’ simply means that the product is capable of being recycled. It is about the product itself, meaning its intrinsic character.”). By contrast, a theory of liability that hinges on the limited incidence of recycling does not easily align with the plain meaning of recyclability as “capable of being recycled.” *Duchimaza v. Niagra Bottling, LLC*, 619 F. Supp. 3d 395, 413 (S.D.N.Y. 2022).

It follows that the current definition of “recyclable” does not confuse consumers. “A reasonable consumer would understand that making an object recyclable is just the first step in the process of converting waste into reusable material, and not a guarantee that the process will be completed.” *Swartz v. Coca-Cola Co.*, 2022 WL 17881771, at \*2 (N.D. Cal. Nov. 18, 2022). And it further follows that defining “recyclable” to refer to only certain recycling processes, and requiring marketers to attempt to quantify whether the material is sufficiently recycled, is confusing to consumers.

Yet some have suggested that the existing “straightforward” definition of recyclable should be changed to make it more uncertain and confusing. They argue that the term “recyclable” should not be used unless the item is “currently being recycled in a significant amount everywhere the product is sold.” Cal. Letter, *supra*, at 26–27 (emphases omitted). The FTC has rightfully never adopted this suggestion. That definition is more complicated and more burdensome. It is also less reliable; a manufacturer can more easily determine whether a product can be recycled than if third parties are engaged in recycling the product. Such a definition would also pose significant challenges to marketers who often sell products nationally. Moving away from the current approach would likely result in greater variance among marketers and increase consumer confusion overall. Marketplace dynamics are transient and variable. Basing the standard of recyclability on whether a third-party marketplace exists for recyclables is an uncertain proposition at best and almost impossible to implement. The FTC could help stabilize understanding and demand for recycled plastic—and not set environmental policy against plastics—by rejecting the proposal to alter the current, indisputably true definition of “recyclable.”

## CONCLUSION

Ultimately, those three points overlap and reinforce each other. Promulgating a definition of “recyclable” that confuses consumers is directly contrary to the FTC’s *raison d’etre* of ending

“deceptive acts or practices.” 15 U.S.C. §45(a)(1). That suggests that such a regulation is something besides a consumer protection rule—it suggests it is an environmental regulation.

Similarly, a rule that preferences existing forms of recycling over Advanced Recycling is an implicit judgment about the merits, both technological and environmental, of Advanced Recycling. But that judgment again strays far from consumer protection, and so is not one the FTC can codify in a regulation. The consumer confusion and scientific judgments that the FTC would be required to make to implement these proposals are so far from the core of the agency’s mission—and thus so far from its area of expertise—that they show the request is contrary to the FTC Act and arbitrary and capricious. The FTC should reject the request.

Sincerely,



Jonathan Skrmetti  
Tennessee Attorney General and Reporter



Steve Marshall  
Alabama Attorney General



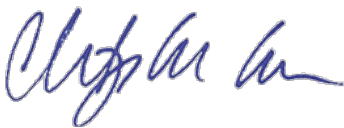
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Mississippi Attorney General



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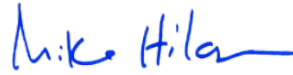
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Georgia Attorney General



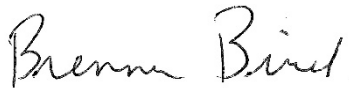
Austin Knudsen  
Montana Attorney General



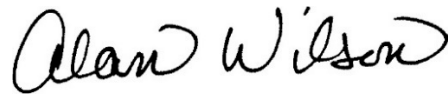
Todd Rokita  
Indiana Attorney General



Mike Hilgers  
Nebraska Attorney General



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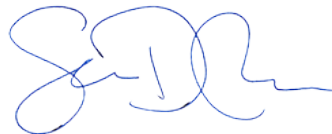
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Kansas Attorney General



John Scott  
Provisional Attorney General of Texas



Daniel Cameron  
Kentucky Attorney General



Sean Reyes  
Utah Attorney General



Jeff Landry  
Louisiana Attorney General