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Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

**Re: COMMENTS SUBMITTED FOR THE FTC GREEN GUIDES REGULATORY
REVIEW, 16 CFR 250, PROJECT NO. P954501**

To Whom It May Concern:

We submit these comments on behalf of the Leading Builders of America (“LBA”). LBA appreciates the opportunity to offer comments to the Federal Trade Commission (“FTC”) regarding the FTC’s Guides Concerning the Use of Environmental Marketing Claims (the “Green Guides”).¹ Leading Builders of America wholeheartedly supports both the goals of the FTC in providing cross-industry guidance in marketing and advertising “green” and the FTC’s periodic review of current regulations and guides.

However, for the reasons set forth below, LBA urges that any final changes made by the FTC to the current Green Guides clarify that homebuilders not be required to independently substantiate certifications and/or energy saving data for each product incorporated into a home. The reason for the requested safe harbor is that imposition of any new requirements may adversely affect a homebuilder’s ability to communicate important energy conservation information to consumers, particularly where the energy conservation data has been provided to homebuilders by the Environmental Protection Agency (“EPA”) and/or the Department of Energy (“DOE”).

By way of background, LBA was formed in 2009. Members of the LBA include many of the largest homebuilding companies in North America. They provide over 400,000 jobs in the construction industry. Members of the LBA include both publicly traded companies whose shares are traded on the New York Stock Exchange as well as

¹6 C.F.R. § 260 (2007).

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privately held companies. In each of these segments, LBA members are leaders in construction quality, energy efficiency, design and the efficient use of land.

One of the goals of the LBA is to preserve home affordability for American families in an unstable economic climate. The LBA does this by carefully evaluating the public policy dialogue at the federal and state level and by becoming actively engaged in issues that have the potential to impact home affordability. LBA member companies develop communities across the residential spectrum, ranging from the first time and move-up buyer market to the luxury and active-adult housing markets. Many of its members are active in both the urban multi-family markets, as well as the traditional and neo-traditional suburban communities. LBA member companies also operate a range of subsidiaries that complement their core homebuilding business including mortgage lending and title insurance. More information about LBA can be found at www.lba.org.

LBA believes the current Green Guides are beneficial to advertisers and consumers alike and are effective in ensuring the truth and accuracy of environmental marketing claims without imposing unnecessary burdens on the building industry and its advertisers. Further, LBA believes that certain proposed changes to the current Green Guides, particularly those changes which impose additional verification of energy conservation data provided by recognized experts and governmental agencies may have unintended consequences and may prove burdensome, if not impossible to implement.

The LBA therefore respectfully requests that the FTC permit the homebuilding industry to rely upon and utilize information provided by governmental or governmental-sponsored agencies when making environmental marketing claims. These agencies include, without limitation, the EPA and the DOE. For example, the EPA provides extensive information regarding green building and in fact, states that its "green home Website" is an "umbrella" Website for EPA and other federal agency information relating to residential environmental issues.²

² See, www.epa.gov/greenhomes/overview.htm.

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It is also significant to note many homebuilders' energy savings claims are developed in connection with programs connected with the EPA and DOE, including the Home Energy Rating System ("HERS Index") developed by the Residential Energy Services Network ("RESNET").³

By way of background, in April 1995, the National Association of State Energy Officials and Energy Rated Homes of America founded RESNET to develop a national market for home energy rating systems and energy efficient mortgages. RESNET's standards are officially recognized by the Federal Government for verification of building energy performance for such programs as federal tax incentives, the Environmental Protection Agency's Energy Star program and the U.S. Department of Energy's Building America Program. RESNET standards are also recognized by the U.S. mortgage industry for capitalizing a building's energy performance in the mortgage loan, and certification of "White Tags" for private financial investors.

More recently, on November 9, 2010, Vice President Biden announced the launch of the U.S. Department of Energy's Home Energy Score pilot program. The Home Energy Score will offer homeowners a straightforward survey about their homes' energy efficiency. A report provides consumers with a home energy score between 1 and 10, and shows them how their home compares to others in their region. The report also includes recommendations that will help to reduce their energy costs and improve the comfort of their homes.

The Home Energy Score is not a Home Energy Rating. It is rather a tool for a home energy inspector to provide a quick and simple overall assessment of a home's energy efficiency. A RESNET Home Energy Survey Professional ("HESP") will use this new assessment tool to undertake a basic energy survey of a home. The Home Energy Score will provide a more sophisticated resource developed by the federal government to present to a homeowner over the current checklist. The U.S. Department of Energy will require that persons that will be trained to generate the Home Energy Score must be certified by RESNET. These programs continue to evolve and provide useful

³ See, www.resnet.us/blog/doe-new-energy-score/.

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information to consumers, and if the homebuilding industry cannot communicate this information to homebuyers, without engaging in potentially extensive and costly independent substantiation, some information may not be communicated at all.

Additionally, the LBA urges that the FTC continue to carefully consider the ramifications and unintended consequences of modifying the current Green Guides in a way that would impose burdensome and impracticable obligations for homebuilders to independently verify information provided by others, including design professionals, product manufacturers, and third-party certifiers and rating systems. This is especially true given that there are and will be different opinions among scientific experts and third-party certifiers about green standards and the factual information supporting them.

While there is an increasing amount of media coverage and publicity surrounding environmental claims, LBA urges that the FTC not take any action that would stifle the ability or the interest of a company to make positive steps in improving the environment or that would restrict a company's ability to market and communicate its activities in this area. As such, it is not in the interest of the advertising industry or of consumers for the FTC to mandate environmental certification or to set comprehensive environmental regulations. Instead, the FTC should continue to exercise its powers under Section 5 of the Federal Trade Commission Act to prevent false and deceptive environmental marketing claims by direct enforcement action.

Member companies are expanding their environmental messages, publicizing not only the environmental attributes of certain products, but also communicating numerous "green" attributes of a new home, including efforts to address the overall carbon footprint of a home. One fact is clear, namely that there is an absence of any broad consensus as to how these new green attributes should be properly defined or described. As such, it is imperative that any new Green Guides permit more latitude in these matters. Also, while the Green Guides are not regulations, they are followed closely by the marketing community operating under the premise that non-compliance could result in an adverse FTC action or be the basis of a private civil right of action. In light of the FTC's already existing authority to prevent deceptive and unsupported claims through Section 5, it is unnecessary to significantly revise the Green Guides to

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prevent or restrict certain types of environmental marketing claims.

In addition to the FTC's authority to challenge false and deceptive environmental marketing claims, many states have adopted similar laws and regulations, which state Attorneys General have successfully used to bring enforcement actions for false, deceptive and/or unsubstantiated claims. These state laws and actions reflect and reinforce the principles of the Green Guides by ensuring that environmental claims are adequately substantiated. Thus, in addition to the FTC's Green Guides, state actions and private actions already promote the principles of the Green Guides by requiring environmental marketing claims to be adequately substantiated and by providing additional remedies for unsupported claims.

It is an ongoing process for the LBA's member companies to improve their environmental business practices, including the energy efficiency of new homes offered to the home-buying public. It is also a goal to communicate those efforts to homebuyers. There are a growing number of consumers who believe the environmental practices of a company and the environmental impact of a product is important to their purchasing decision. Since the home-buying public has many options, it is naturally in every company's interest to be as accurate as possible when making environmental marketing claims because, not only is it responsible marketing, it also is a good business practice.

Consequently, changes to the Green Guides that require further independent verification of "green" claims made by homebuilders' trade partners by homebuilders lacking the in-house technical expertise to provide further verification may dampen the communication of valuable information that is important to consumers in making their home-buying decisions.

The existing Green Guides do not impose specific substantiation techniques or standards beyond those required for any other objective advertising claim, and do not impose the requirement of any type of third party certification for environmental marketing claims. The Guides grant advertisers the flexibility to create environmental marketing messages that reflect the specific issues raised by each product claim, and to substantiate those messages in a manner that is best determined by the advertiser itself.

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In sum, there appears to be little justification to require environmental marketing claims to be subject to a different standard of substantiation from all other objective marketing assertions. For the reasons set forth above, the LBA respectfully suggests that the FTC new Green Guides; (1) do not impose specific substantiation techniques or standards beyond those required for any other objective advertising claim; and (2) that the FTC consider including a safe harbor or a carve-out in the new Green Guides for the struggling construction industry which would permit homebuilders to utilize energy conservation data provided by governmental or governmental-sponsored agencies in its marketing materials.

Thank you for taking into consideration the comments submitted by the Leading Builders of America regarding the FTC's proposed new Guides concerning the use of Environmental Marketing Claims.

Very truly yours,

✓ Kathleen F. Carpenter

of

Luce, Forward, Hamilton & Scripps LLP