

**FEDERAL TRADE COMMISSION
16 CFR Part 18**

Guides for the Nursery Industry

AGENCY: Federal Trade Commission.

ACTION: Proposed Rescission of Guides.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”), following its initial review of the Guides for the Nursery Industry (“Nursery Guides” or “Guides”), proposes to rescind the Guides.

DATES: Written comments must be received on or before November 5, 2018.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write “Nursery Guides (Matter No. P994248)” on your comment, and file your comment online at <https://ftcpublic.commentworks.com/ftc/nurseryguides>, by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex A), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610, Washington, DC 20024.

FOR FURTHER INFORMATION, CONTACT: Hampton Newsome, (202) 326-2889, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Room CC-9541, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission issued the Guides for the Nursery Industry in 1979.¹ These Guides address various sales claims for outdoor plants, including representations regarding quantity, size, grade, kind, species, age, maturity, condition, vigor, hardiness, growth ability, price, and origin or place where grown. The Commission amended the Guides in 1994 to update legal terminology, and again in 2007 to make a technical correction.²

The Commission reviews its rules and guides periodically to seek information about their costs and benefits to consumers and businesses, regulatory and economic impact, and general effectiveness in protecting consumers and helping industry avoid deceptive claims. These reviews assist the Commission in identifying rules and guides that may warrant modification or rescission.

On February 22, 2018, the Commission initiated its scheduled regulatory review of the Guides and solicited public comment on several issues.³ Specifically, the Commission sought input on, among other things, the continuing need for the Guides; their economic impact; possible conflict between the Guides and state, local, federal, or international laws; and the effect of any technological, economic, environmental, or other industry changes. The Commission also

¹ The Commission issued the Guides in 1979 (44 FR 11176 (Feb. 27, 1979)) to replace trade practice rules for the nursery industry (16 C.F.R. Part 34) first promulgated in the 1950's (23 FR 4803 (June 28, 1958)). The Guides help marketers avoid making claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. 45. Industry guides, such as the Nursery Guides, are administrative interpretations of laws administered by the Commission. They do not have the force of law and are not independently enforceable. Failure to follow industry guides may result, however, in enforcement action under the FTC Act, 15 U.S.C. 45. In any such action, the Commission must prove that the act or practice at issue is unfair or deceptive in violation of Section 5 of the FTC Act.

² See 59 FR 64546 (Dec. 14, 1994); 72 FR 901 (Jan. 9, 2007).

³ See 83 FR 7643 (Feb. 22, 2018).

solicited comment on issues specific to the Guides, such as whether the Commission should update plant name classification references. The Commission received one comment, discussed below.

II. Comment Received

The sole commenter, the National Federation of Independent Business (“NFIB”), urged the Commission to rescind the Guides as an unnecessary federal regulatory burden. NFIB asserted that most nursery businesses are small businesses and “a significant portion of the industry is predominantly intrastate rather than interstate in practical character.” Therefore, they contend that regulation or guidance concerning the nursery business is more properly conducted at the state, rather than federal, level. NFIB, however, did not address any of the Commission’s specific questions.

III. Proposed Rescission of the Guides

The Commission proposes to rescind the Guides because, as discussed below, they no longer appear necessary, and thus serve little purpose to industry or consumers. In proposing this approach, the Commission has considered the prevalence of practices covered by the Guides, industry use of the Guides, and the Commission’s ability to address deceptive practices through enforcement actions or issuance of other educational materials in the Guides’ absence.

First, the types of practices detailed in the Guides do not appear to be prevalent in the nursery industry. The Guides focus on misrepresentations about species, size, rate of growth, and other plant characteristics. Recent FTC complaints related to nurseries and outdoor plant sales, however, suggest that current consumer concerns have little to do with these types of practices. Indeed, nearly all recent complaints received by the Commission regarding plant sales

involve online plant orders that were either dormant or dead upon arrival, incomplete, not delivered in the time promised (or at all), or not refunded upon request.⁴

Furthermore, the Commission lacks evidence that industry members currently use the Guides to help avoid deceptive practices. For example, FTC staff found no mention of the Guides on websites for industry associations, nurseries, or other industry entities. Additionally, the Commission is unaware of any unique, pervasive consumer protection issues currently associated with the advertising or labeling of outdoor plants. The sole comment submitted to the Commission argued that there was no continuing need for special guidance in the nursery industry. The absence of comments from nursery-related entities in response to the February 2018 notice reinforces the conclusion that the Guides have limited utility or significance to the industry in today's market.

Finally, the Guides' rescission will have no impact on the FTC's ability to address unfair and deceptive practices in the nursery industry. If the Commission determines that certain practices in the sale of outdoor plants are materially misleading, it can address such practices through enforcement actions under Section 5 of the FTC Act.⁵ Should industry members desire continued guidance, FTC staff can provide informal guidance through business education materials (*e.g.*, FAQ's) posted on the Commission's website.

⁴ The Guides address some of the practices identified in the complaints indirectly or in limited ways. For instance, section 18.1(c)(2) states it is deceptive to represent "[t]hat industry products are healthy . . . when such is not the fact." In addition, some complaints involve incorrect orders, which are covered by section 18.1(a). However, the Commission sees no need to maintain the Guides simply to preserve such limited, self-evident guidance.

⁵ Section 5 of the FTC Act, 15 U.S.C. Section 45(a)(1), prohibits unfair or deceptive acts or practices in or affecting commerce.

IV. Request for Comment

The Commission seeks comments on all aspects of the proposed rescission. Among other things, commenters should address any continuing need for the Guides, the impacts of their rescission on industry members and consumers, and other measures the Commission should consider in their place (*e.g.*, business education materials).

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before November 5, 2018. Write “Nursery Guides (Matter No. P994248)” on your comment. Your comment – including your name and your state – will be placed on the public record of this proceeding, including, to the extent practicable, on the public FTC Website, at <https://www.ftc.gov/policy/public-comments>.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublic.commentworks.com/ftc/nurseryguides>, by following the instruction on the web-based form. If this Notice appears at <http://www.regulations.gov>, you also may file a comment through that website.

If you file your comment on paper, write “Nursery Guides (Matter No. P994248)” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex A), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610, Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible FTC Website at www.ftc.gov, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which is . . . privileged or confidential" – as provided by section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2) – including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC Website – as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment from the FTC Website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website to read this NPRM and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before November 5, 2018. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, *see* <https://www.ftc.gov/site-information/privacy-policy>.

List of Subjects in 16 CFR Part 18

Advertising, Nursery, Trade practices.

For the reasons stated in the preamble, the Federal Trade Commission proposes to remove 16 CFR part 18.

PART 18-[REMOVED]

By direction of the Commission.

Donald S. Clark,
Secretary.