



The Voice of Small Business.

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Washington, DC 20004

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February 23, 2018

Maureen K. Ohlhausen, Acting Chair
Federal Trade Commission
c/o Office of the Secretary
Dkt. Nursery Guides P994248
600 Pennsylvania Ave. NW
Suite CC-5610 (Annex A)
Washington, DC 20580

Dear Madam Chair:

RE: Comments on Notice titled "Guides for the Nursery Industry," Docket
"Nursery Guides P994248," 83 *Fed. Reg.* 7643 (February 22, 2018)

This letter presents the comments of the National Federation of Independent Business (NFIB) on the Federal Trade Commission (FTC) notice titled "Guides for the Nursery Industry" and published in the Federal Register of February 22, 2018. NFIB recommends that the FTC revoke its Guides for the Nursery Industry (Part 18 of Title 16 of the Code of Federal Regulations), to eliminate an unnecessary federal regulatory burden and to respect the role of the states in consumer protection.

NFIB is an incorporated nonprofit association with about 300,000 small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. According to a National Agricultural Statistics Service survey of 17 states, more than half of those states' producers of nursery crops that had gross annual sales of at least \$10,000 had gross annual sales that did not exceed \$100,000.¹ Therefore, a substantial portion of the nursery industry consists of small businesses.

Large and small businesses alike in the industry must pay attention to the FTC's Guides for the Nursery Industry, along with the blizzard of other federal, state, and local laws, regulations, and guidance that apply to the industry. FTC regulations state:

¹ National Agricultural Statistics Service, U.S. Department of Agriculture, "Nursery Crops 2006 Summary" (September 2007), p. 6 (3,966 producers with gross sales between \$10,000 and \$100,000, of a total of 7,292 producers that have gross sales of \$10,000 or more, in 17 states), available at <http://usda.mannlib.cornell.edu/usda/current/NursProd/NursProd-09-26-2007.pdf> (visited 2/22/2018). The 17 states were Alabama, California, Connecticut, Florida, Georgia, Illinois, Michigan, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, and Washington. *Id.* at 5.

Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions. Guides may relate to a practice common to many industries or to specific practices of a particular industry.²

Section 1.5 puts businesses of all sizes on notice that failure to follow FTC guides may result in the FTC taking corrective action against them. Although large businesses may be able to afford attorneys and other advisers to monitor federal, state, and local governments and help ensure compliance with the laws, regulations, and guidance those governments impose, small businesses cannot afford to hire professional assistance to find and understand all the laws, regulations, and guidance created by federal, state, and local governments. Any steps the FTC takes to ease the regulatory burden, such as revoking the Guides for the Nursery Industry, would be welcome.

The nursery business is tied directly to the land more than most businesses. Therefore a significant portion of the industry is predominantly intrastate rather than interstate in practical character. While the FTC may have the authority to reach the nursery industry as a part of interstate commerce under the broad modern interpretation of the Constitution's commerce clause,³ as a practical matter the industry is better suited for regulation at the state level.

States now have consumer protection laws and consumer protection offices that enforce them. Also, many states grant to individuals a private right of action to enforce their consumer rights in court against errant businesses. Thus, consumers have appropriate avenues for redress at the state level. Therefore, FTC revocation of its Guides for the Nursery Industry would not leave consumers bereft of remedies.

For the foregoing reasons, NFIB recommends that the FTC revoke its Guides for the Nursery Industry.

Sincerely,

David S. Addington

Senior Vice President and General Counsel

² 16 CFR 1.5. In *State of Wisconsin v. Amoco Oil Co.*, 97 Wis. 2d 226, 242 (1980), the Wisconsin Supreme Court said that "[a]lthough FTC Guides may be relied upon by the FTC and may be given great weight in prosecutions under 15 U.S.C. 45, the Guides are interpretive. . . . Guides, unlike substantive rules, do not have the force and effect of law; the Guides are not the equivalent of the statute." But, whatever the precise legal force of the Guides, the FTC has stated in section 1.5 that "[f]ailure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions."

³ *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) ("[E]ven if appellee's activity be local, and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . .").