



## **FEDERAL TRADE COMMISSION**

### **16 CFR Part 18**

#### **Guides for the Nursery Industry**

**AGENCY:** Federal Trade Commission

**ACTION:** Regulatory review; request for public comment.

**SUMMARY:** The Federal Trade Commission (“FTC” or “Commission”) requests public comments on its Guides for the Nursery Industry (“Nursery Guides” or “Guides”). The Commission is soliciting the comments as part of the Commission’s systematic review of all current Commission regulations and guides.

**DATES:** Comments must be received by April 20, 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, 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 610, Washington, DC 20024.

**FOR FURTHER INFORMATION, CONTACT:** Megan Gray, (202) 326-3408, [mgray@ftc.gov](mailto:mgray@ftc.gov), 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.<sup>1</sup> These Guides address numerous sales practices for outdoor plants, including deceptive claims regarding quantity, size, grade, kind, species, age, maturity, condition, vigor, hardiness, growth ability, price, and origin or place where grown. As part of its periodic regulatory review, the Commission substantively amended the Nursery Guides in 1994 and adopted a technical amendment to the Guides in 2007.<sup>2</sup>

### **II. Regulatory Review Program**

The Commission periodically reviews all Commission rules and guides. These reviews seek information about the costs and benefits of the Commission's rules and guides and their economic impact. The information obtained assists the Commission in identifying rules and guides that warrant modification or rescission. Therefore, the Commission solicits comment on, among other things, the economic impact of and the continuing need for its Nursery Guides; possible conflict between the Guides and state, local, federal, or international laws; and the effect of any technological, economic, environmental, or other industry changes on the Guides.

### **III. Request for Comment**

The Commission is particularly interested in comments and supporting data on the following questions. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted. In their replies to each of these questions, commenters should provide any available evidence and data, such as empirical data, consumer perception studies, or consumer complaints, that support the

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<sup>1</sup> Industry guides are administrative interpretations of laws administered by the Commission. 16 CFR 1.5.

<sup>2</sup> See 59 FR 64546 (December 14, 1994); 72 FR 902 (January 9, 2007).

commenter's asserted position.

- (1) Is there a continuing need for the Nursery Guides as currently promulgated?
- (2) Are any specific provisions of the Guides no longer necessary?
- (3) Are the deceptive or unfair practices addressed by the Guides prevalent in the marketplace? Are the Guides effective in addressing those practices? Are there deceptive or unfair practices in the selling of plants that are not covered by the Guides, such as vegetable plants marketed to consumers? Should the Guides be extended to cover other types of plants that consumers purchase? Are there alternatives, such as individual enforcement actions under the FTC Act, that would be more effective or equally effective in addressing those practices?
- (4) Have covered businesses adopted the Nursery Guides as part of their routine business practice? What is the degree of compliance with the Guides? How, and what effect, if any, does this have on the continuing need for the Guides? Do covered businesses self-regulate or have voluntary standards or guidance, such as through trade associations, that overlap with the Guides?
- (5) What benefits, if any, have the Nursery Guides provided to consumers of the products affected by the Guides? Do the Guides impose any significant costs on consumers?
- (6) What impact, if any, have the Guides had on the flow of truthful or deceptive information to consumers?
- (7) What changes, if any, should be made to the Nursery Guides to increase their benefits to consumers or reduce their costs to businesses? How would these changes affect consumer benefits or business costs?

- (8) What burdens or costs, including costs of compliance, have the Guides imposed on covered businesses? What burdens or costs have the Guides imposed on small businesses in particular? Have the Guides provided benefits to businesses? If so, what benefits?
- (9) What changes, if any, should be made to the Guides to reduce the burdens or costs imposed on businesses? In particular, should the Commission eliminate Section 18.7 (Misrepresentation as to character of business)? Does this section imply that occupational licensing is a prerequisite for covered businesses? How would these changes affect the benefits provided by the Guides?
- (10) Is it necessary to include reference works in the Note to Section 18.2? Are the reference works in the Note to Section 18.2 authoritative and readily and freely available to the public? If not, are there updated editions that are more authoritative and readily and freely available? Are there other works in the public domain that the Commission should consider in determining whether claims made for a covered plant's quality, size, grade, kind, species, age, maturity, condition, etc. are truthful and non-misleading? For example, do federal or state agricultural authorities provide guidance sufficient for the Commission, consumers, and covered businesses to determine whether claims made for covered products are truthful and non-misleading?
- (11) Is it necessary to include the mention in the Note to Section 18.2 of "plant name lists periodically published by the plant societies and the horticultural organizations selected as international and national cultivar registration authorities as enumerated in Appendix of Naming and Registering New Cultivars?" Is the plant name list

- sufficiently specific to be useful to consumers or businesses? Can more specificity be provided as to which international and national cultivar registration authorities are relevant, and how to locate the Appendix of Naming and Registering New Cultivars?
- (12) Should the Commission remove mentions of “industry recommendation” and “industry consensus” from the Notes to Sections 18.2 and 18.4? Should the Commission include in the Guides only its own views, consistent with the Guide’s purpose of furthering the public interest in preventing deception?
- (13) Do the Guides overlap or conflict with federal, state, or local laws or regulations? Do the Guides overlap or conflict with any international laws or regulations?
- (14) Have consumer perceptions changed since the Guides were issued and, if so, do these changes warrant revising the Guides?
- (15) Since the Guides were issued, what effects, if any, have changes in relevant technological, economic, or environmental conditions had on the need for or usefulness of the Guides?

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before April 20, 2018. Write “Nursery Guides, 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 Commission 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 ensure 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, P994248” on your comment and on the envelope, and mail it 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 <https://www.ftc.gov>, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as your or anyone’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 ensuring 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 “[t]rade secret or any commercial or financial information which . . . is privileged or confidential” – as provided in 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 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 Notice 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 April 20, 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>.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

**BILLING CODE 6750-01S**

[FR Doc. 2018-03569 Filed: 2/21/2018 8:45 am; Publication Date: 2/22/2018]