Awash in Green: A Critical Perspective on Environmental Advertising

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I. INTRODUCTION

The Federal Trade Commission (FTC) first issued the FTC Guides for the Use of Environmental Marketing Claims (Green Guides) in 1992 to provide voluntary guidelines for advertisers making environmental claims about their products.[1] The Green Guides were subsequently updated in 1996 and 1998 to reflect FTC concern about consumer confusion arising from new issues and unclear terms in environmental advertising.[2] Recently, however, the potential for consumer confusion resulting from dubious environmental claims of products has skyrocketed.[3]

The FTC has not effectively responded to increased greenwashing in advertising and marketing. In November 2007, the FTC issued a request for public comment to update the Green Guides in response to changes in green marketing.[4] However, any changes made to the Green Guides will likely be ineffective because the Green Guides do not have

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1. Guides for the Use of Environmental Marketing Claims, 16 C.F.R § 260 (1992).
2. 61 Fed. Reg. 53,311 (Oct. 11, 1996); 63 Fed. Reg. 24,240 (May 1, 1998).
3. TERRACHOICE ENVTL. MKTG., THE SIX SINS OF GREENWASHING: A STUDY OF ENVIRONMENTAL CLAIMS IN NORTH AMERICAN CONSUMER MARKETS 1 (2007), *available at* http://www.terrachoice.com/files/6_sins.pdf.
4. 72 Fed. Reg. 66,091, 66,091 (Nov. 27, 2007).

the force of law and the FTC has made no effort to enforce them. Thus, there is little incentive for businesses to change their advertising and marketing efforts to comply with the Green Guides. This Comment discusses three possible solutions to the problem of products tainted with "greenwash," arguing specifically that the inadequacies of the Green Guides can be solved by a partnership between the FTC and the Environmental Protection Agency (EPA). The current greenwashing problem can be helped, or even solved, if the FTC allows the EPA to assist in developing realistic and enforceable environmental advertising and marketing standards. Until this type of interagency partnership is formed, customer confusion resulting from misleading environmental advertising is likely to continue.

II. OVERVIEW OF THE GREENWASHING PROBLEM

While the term "greenwash" may be relatively new, the concept it describes is not.[5] "Greenwash" is the "act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service."[6] "Greenwash" is not limited to consumer advertising and marketing: the Clear Skies Act enacted under the Bush Administration has drawn nationwide ire from environmental groups for weakening environmental protections despite being marketed as environmentally beneficial.[7] The main problem with greenwashing is that it misleads consumers into buying products based on the erroneous belief that the products have some environmental benefit.

The greenwashing problem is particularly pervasive in everyday consumer-driven advertising and marketing.[8] In 2007, Terrachoice Environmental Marketing, a firm that specializes in environmental marketing, consulting, and research, sent researchers into six "big-box" stores to observe and record every environmental claim related to a

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5. *See* Wendy Priesnitz, *Greenwash: When the Green Is Just Veneer*, NATURAL LIFE, May 1, 2008, at 14, 14, *available at* http://www.naturallifemagazine.com/0806/NaturalLife_Greenwashing.pdf (referring to former Madison Avenue advertising executive Jerry Mander, who called the concept of greenwashing "ecopornography" in a 1972 magazine article).

6. TERRACHOICE ENVTL. MKTG., *supra* note 3, at 1.

7. *Clear Skies Act of 2003: Hearing on S. 385 Before the Subcomm. on Clean Air, Climate Change, and Nuclear Safety of the S. Comm. on Environment and Public Works*, 108th Cong. 2 (2003) (statement of David Hawkins, Director of the Natural Resources Defense Council Climate Center). Mr. Hawkins testified in a report that the Clear Skies Act would "[a]llow power plant pollution to continue to inflict huge, avoidable health damages on the public[;] [r]epeal or interfere with major health and air quality safeguards in current law[;] and [w]orsen global warming by ignoring CO2 emissions from the power sector." *Id.*

8. *See* TERRACHOICE ENVTL. MKTG., *supra* note 3 (exemplifying the severity of the greenwashing problem in consumer goods).

consumer product (Terrachoice Study).[9] The researchers observed 1753 claims on 1018 products, and tested the claims against the best available practices in environmental marketing.[10] Terrachoice categorizes each false or misleading environmental claim into one of the "Six Sins," which includes the "Sin of the Hidden Trade-Off," the "Sin of No Proof," the "Sin of Vagueness," the "Sin of Irrelevance," the "Sin of Lesser of Two Evils," and the "Sin of Fibbing."[11] The "Sin of the Hidden Trade-Off," the most common of the "Six Sins,"[12] suggests that a "product is 'green' based on a single environmental attribute . . . or an unreasonably narrow set of attributes . . . without attention to other important, or perhaps more important, environmental issues."[13] The "Sin of No Proof" is committed when a claim "cannot be substantiated by easily accessible supporting information or by a reliable third-party certification."[14] The "Sin of Vagueness" is committed when claims are so poorly defined or broad that the real meaning is likely to be misinterpreted by consumers.[15] The "Sin of Irrelevance" describes an environmental claim that might be truthful but is unimportant, unhelpful, and distracting for consumers seeking truly "green products."[16] The Terrachoice Study found that all but one of the products observed committed at least one of the "Six Sins of Greenwashing."[17]

"Sins" like the ones detailed in the Terrachoice Study exemplify the greenwashing problem. These deceptive advertising tactics confuse consumers about whether a company is really "green." Environmentally conscious consumers are likely to be confused by companies like Ford Motor Company. A 2004 Ford advertisement in *National Geographic* read, "Green Vehicles. Cleaner Factories. It's the right road for our company, and we're well underway."[18] That same year, however, Ford,

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9. *Id.* at 1.

10. *Id.* at 2. Terrachoice used standards from the International Organization for Standardization, the FTC, the EPA, the Consumers Union, and the Canadian Consumer Affairs Branch. *Id.*

11. *Id.*

12. *Id.* at 3. The "Sin of the Hidden Trade-Off" was committed by fifty-seven percent of all environmental claims studied by Terrachoice. *Id.*

13. *Id.* at 2.

14. *Id.* at 3.

15. *Id.*

16. *Id.* at 4.

17. *Id.* Terrachoice categorizes each false or misleading environmental claim into one of the "Six Sins," which include the "Sin of the Hidden Trade-Off," the "Sin of No Proof," the "Sin of Vagueness," the "Sin of Irrelevance," the "Sin of Lesser of Two Evils," and the "Sin of Fibbing." *Id.* at 1.

18. Priesnitz, *supra* note 5, at 15.

along with other automakers, sued to block a California law that would limit greenhouse gas emissions.[19]

While Ford's marketing of itself as an environmentally conscious company is troubling, it is certainly less confusing than the odd pairing of the Clorox Company and the Sierra Club. The Sierra Club, one of the largest and most respected environmental groups in the world, agreed to allow Clorox, recently named the "most chemically dangerous" company in the United States, to use the Sierra Club's logo to market a line of nonchlorinated cleaning products.[20] While the Sierra Club may not explicitly endorse Clorox products outside of the chlorine-free line bearing its logo, the implication is that a well-respected environmental group approves of products made by America's "most chemically dangerous" company, and Clorox surely benefits from this implication.[21]

Consumers, described by former FTC Commissioner Roscoe Starek as a group that can "easily be fooled,"[22] are especially susceptible to being hoodwinked by advertisers and marketers making dubious environmental claims because "the environment" is something in which consumers have a demonstrable interest.[23] A 1993 survey by a New York consulting firm found that seventy-eight percent of consumers were influenced by a company's environmental reputation.[24] Another study determined that eighty percent of consumers were willing to pay more for an environmentally friendly product and sixty percent of consumers would avoid products for environmental reasons on a regular basis.[25]

Ideally, manufacturers would provide consumers with environmentally friendly products, and thus be able to advertise them as such. In reality, however, there is a lack of confluence between consumer and manufacturer interests. Many manufacturers find it easier or more economically efficient to market their goods and services as being environmentally friendly, despite their products' hidden environmental

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19. *Id.*
20. *Id.* at 16.
21. *Id.* Incidentally, the Sierra Club may have irreparably harmed its own reputation through its partnership with Clorox. The Sierra Club's national board received widespread criticism from its own members, and, after especially heavy criticism from leaders of its Florida chapter, the national board suspended the chapter for four years and removed its leaders. *Id.*
22. Jennifer Woods, Comment, *Of Selling the Environment—Buyer Beware? An Evaluation of the Proposed F.T.C. Green Guides Revisions*, 21 LOY. CONSUMER L. REV. 75, 80 (2008).
23. E. Howard Barnett, *Green with Envy: The FTC, the EPA, the States, and the Regulation of Environmental Marketing*, 1 ENVTL. LAW. 491, 493 (1995).
24. *Id.*
25. *Id.* at 493-94.

trade-offs, without substantiating the claims made about the products.[26] As the emphasis on going green has become increasingly commonplace, evidence suggests that marketers have aggressively pursued their agendas, while the FTC has been slow to curb the misleading advertisements.[27] False green advertising and marketing claims are more problematic than other types of deceptive advertising because "consumers generally cannot substantiate environmental claims on their own."[28] The government owes people a duty to regulate deceptive or misleading claims that individuals cannot themselves easily substantiate.[29]

The problem is that the FTC has not been effectively protecting consumers from deceptive environmental claims in advertising and marketing. Rather, since 1998, the FTC has stood idly by without updating the Green Guides.[30] Further, without specific FTC determinations to explain how environmental terms may be used to promote products and services, advertisers and marketers may invent and abuse new language to the detriment of consumers. Despite the Green Guides' shortcomings, however, the FTC has been unresponsive to calls for the FTC to partner with the EPA to form workable environmental advertising and marketing standards.[31] The lack of effective environmental regulation in advertising and marketing leads to one certain conclusion: buyer beware.

A. History of the Green Guides

In 1914, Congress enacted the Federal Trade Commission Act (FTC Act) to prevent unfair trade practices.[32] The FTC Act was created "primarily to provide future guidance, rather than to remedy offenses that had occurred in the past."[33] Section 5 of the FTC Act prohibits "unfair or

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26. TERRACHOICE ENVTL. MKTG., *supra* note 3, at 2-3.

27. *See id.* (citing evidence that misleading marketing practices are prevalent in consumer goods).

28. Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG., 147, 150 (1993).

29. *See* 15 U.S.C. § 45 (2006) ("[U]nfair or deceptive acts or practices . . . are hereby declared unlawful.").

30. 63 Fed. Reg. 24,240 (May 1, 1998).

31. Kimberly C. Cavanagh, *It's a Lorax Kind of Market! But Is It a Sneetches Kind of Solution?: A Critical View of Current Laissez-Faire Environmental Marketing Regulation*, 9 VILL. ENVTL. L.J. 133, 160-70 (1998); Lauren C. Avallone, Comment, *Green Marketing: The Urgent Need for Federal Regulation*, 14 PENN ST. ENVTL. L. REV. 685, 686-87 (2006).

32. 15 U.S.C. § 41.

33. *Hearing on Federal Civil Remedies for Antitrust Offenses Before the Antitrust Modernization Commission*, 109th Cong. 1 (2005) [hereinafter *Hearing*] (statement of Thomas B. Leary, Commissioner, FTC).

deceptive acts and practices."[34] The FTC Act has three basic rules for advertising: advertisers (1) must tell the truth and not mislead consumers; (2) must substantiate product claims before making them; and (3) must not engage in unfair practices or advertising that causes "substantial, unavoidable consumer injury without offsetting benefits to competition or consumers."[35] The FTC has found that an action is deceptive if there is "a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment."[36] The standard the FTC uses to review potentially deceptive advertising determines whether a reasonable consumer will be misled by the advertising.[37] The FTC requires advertisers to substantiate product claims with reasonable evidence.[38] To determine whether an advertiser has a reasonable basis for making a claim, the FTC considers the six "Pfizer" factors, which include the consumer benefit if the claim is true and the seriousness of harm if the claim is false.[39]

In 1973, the FTC began to respond to deceptive and misleading environmental advertising claims.[40] Initially, the FTC used its existing rules to regulate environmental marketing claims.[41] During the early 1980s, however, environmental marketing experienced a surge in popularity and the complexity of environmental marketing issues proved too complex for the existing rules to adequately address.[42] Until that point, the FTC had not seriously considered the possibility that businesses would benefit from misleading consumers about the environmental impact of a product or its packaging.[43] Adding to the quagmire was the existing FTC enforcement mechanism. Throughout the 1980s, the FTC prosecuted misleading environmental claims on a case-by-case basis, which protected consumers from individual deceptive claims but did not provide overarching consumer protection in the form of industry guidance.[44] The lack of industry guidance left advertisers in a

34. 15 U.S.C. § 45.

35. Terry Calvani, *Advertising and Unfair Competition: Other Views*, *in* AMERICAN LAW INSTITUTE—AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION 573, 582 (2001).

36. *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 183 (1984).

37. Calvani, *supra* note 35, at 582.

38. *Id.* at 583.

39. *Id.* at 584. The six factors the FTC uses are: (1) the type of product being advertised, (2) the type of claim, (3) the consumer benefit if the claim is true, (4) the seriousness of the harm if the claim is false, (5) the cost of substantiating the claim, and (6) how much substantiation is reasonable according to experts in the field. *In re* Pfizer, Inc., 81 F.T.C. 23 (1992).

40. Barnett, *supra* note 23, at 495-96.

41. *Id.*

42. *Id.* at 496.

43. *Id.*

44. *Id.*

state of flux when trying to determine whether particular environmental marketing strategies would be acceptable to the FTC or susceptible to FTC prosecution.[45]

As consumer demand for the regulation of environmental advertising reached a fever pitch in the late 1980s, states began to enact advertising regulations and enforce existing consumer protection laws to protect against an onslaught of environmental marketing claims.[46] Finally, after being lobbied by the National Association of Attorneys General and industry leaders, in 1991 the FTC conducted hearings to create environmental marketing and advertising guidelines.[47] In the summer of 1992,[48] the Green Guides were published.[49] The Green Guides address how section 5 of the FTC Act will apply to environmental advertising and are meant to ensure that such judgments are made in a manner similar to other advertising claims.[50] The FTC intended for the Green Guides to provide advertisers with a basis for voluntary compliance by offering them "safe harbors" in the form of examples and potential qualifying claims.[51] By following these examples, advertisers can theoretically avoid FTC scrutiny. The first Green Guides focused on terms such as "biodegradable," "compostable," "recyclable," and "ozone-friendly."[52] The FTC intended that businesses look to examples provided in the Green Guides to differentiate between acceptable and unacceptable uses of the terms.[53] The FTC's policy has been to review the Green Guides periodically to ensure their efficacy and decide whether they should be retained, rescinded, or modified.[54] The FTC used its review power to update the Green Guides in 1996 and 1998.[55]

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45. *Id.* at 497.
46. *Id.* at 497-98.
47. *Id.*
48. *Id.* at 498.
49. Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260 (1992).
50. *Id.* § 260.1.
51. Barnett, *supra* note 23, at 499.
52. 16 C.F.R. § 260.
53. *Id.*
54. 60 Fed. Reg. 38,978, 38,979 (July 31, 1995).
55. In 1996, the FTC modified the Green Guides to include guidance on the terms "environmentally preferable," "essentially" or "practically," "non-toxic," "chlorine free," and "ozone safe," and the use of the "3 chasing arrows" recycling symbol. 61 Fed. Reg. 53,311, 53,313-14 (Oct. 11, 1996). In 1998, the FTC modified the Green Guides by expanding the definition of the terms "recyclable," "recycled," and "compostable" to reflect changing consumer perceptions of the terms. 63 Fed. Reg. 24,240, 24,240-41 (May 1, 1998). The 1998 modifications also clarified that the Green Guides apply to *all* forms of marketing, including marketing on the Internet. *Id.* at 24,240.

Most recently, in November 2007, the FTC issued a request for public comment on the Green Guides in the federal register and announced public meetings on the developments in environmental and "green-energy related" marketing.[56] The FTC noted that since the last revision of the Green Guides in 1998, advertisers and marketers have increasingly publicized the environmental attributes of products and manufacturing processes while also using terms not covered in the Green Guides.[57] The FTC specifically asked whether the Green Guides should be modified to include guidance regarding the terms "renewable" and "sustainable," and claims invoking the phrases "renewable energy" and "carbon offset."[58] While the FTC's efforts to stay atop the complex field of environmental marketing is commendable,[59] serious questions remain about the usefulness of the Green Guides as currently constructed.

B. Current Enforcement of the Green Guides

In many ways, the Green Guides have been a success. The Green Guides require businesses that use "green" advertising to substantiate and qualify their claims,[60] which advances the FTC goal of minimizing consumer confusion. Similarly, because the government has not yet specified what is and is not acceptable with regard to "carbon offsets" and "renewable energy," advertisers may use these terms more carefully for fear of being penalized for their improper use.[61] Perhaps most importantly, as former FTC Commissioner Roscoe Starek said, the Green Guides "'encourage advertisers to make genuine environmental improvements'" so that advertisers can alert the public of their accomplishments.[62]

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56. 72 Fed. Reg. 66,091 (Nov. 27 2007).
57. *Id.*
58. *Id.*
59. *See* Cavanagh, *supra* note 31, at 156 n.89 (showing that the EPA "lauded" FTC attempts to create a national standard for environmental marketing and advertising).
60. *See* Calvani, *supra* note 35, at 583 (claiming that one of the basic FTC rules is that advertisers must not mislead consumers).
61. Wendy Melillo, *POV: It's Not Easy Being Green*, ADWEEK, Jan. 15, 2008, http://www.adweek.com/aw/content_display/news/strategy/e3:635f8e379eb85f3284c0f9cb43cf2a2d.
62. Woods, *supra* note 22, at 80 (quoting Roscoe B. Starek, III, Commissioner, FTC, Prepared Remarks Before the Alliance for Beverage Cartons and the Environmental Symposium: The Federal Trade Commission's Green Guides: A Success Story, ¶ 9 (Dec. 4, 1996)).

C. Current Liability

The current liability for advertisers and marketers who violate the Green Guides is fairly limited.[63] If the FTC finds that an advertiser violated section 5, then it will typically invoke its congressionally mandated authority and issue a cease and desist order to the violator.[64] If the violator does not stop the restricted conduct, the FTC may issue the violator a fine of up to $10,000.[65] The FTC Act also establishes criminal liability if the violation is committed with the intent to defraud or mislead.[66] The maximum penalty for a criminal violation of the FTC Act is a $10,000 fine or up to one year in prison.[67]

While the Green Guides do not inherently have the force of law, they have the de facto force of law if the FTC enforces them.[68] The results of the Terrachoice Study, however, suggest that the Green Guides are not being properly enforced.[69] While the original FTC goal was to address problems prospectively rather than focus on events in the past,[70] FTC policy does not appear to be one of vigorous activism. Speaking before Congress, then-FTC Commissioner Thomas P. Leary asserted that FTC consumer protection prosecutors must "have a full appreciation of the economics of a market system and, particularly, the merits of consumer sovereignty. Without this appreciation, there may be a strong temptation for the FTC to favor its own judgements about what is good for consumers over the judgements of consumers themselves."[71] This reasoning is well intentioned, but misguided. Commissioner Leary's perspective improperly credits collective consumer intelligence in light of former FTC Commissioner Roscoe Starek's view that consumers are a group that can "easily be fooled."[72]

Another view of the recent proliferation of greenwashing has lulled a regulation-shy government into "shirking [its] duty because the corporate sector appears to be self-regulating."[73] Given the voluntary nature of the guidelines and the fact that advertisers and marketers rarely

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63. 15 U.S.C. § 45 (2006).
64. *Id.*
65. *Id.*
66. *Id.* § 54.
67. *Id.*
68. 72 Fed. Reg. 66,091, 66,092 (Nov. 27, 2007).
69. *See* TERRACHOICE ENVTL. MKTG., *supra* note 3, at 8.
70. *Hearing*, *supra* note 33, at 1 (statement of Thomas B. Leary).
71. *Id.* at 11.
72. Woods, *supra* note 22, at 80.
73. Priesnitz, *supra* note 5, at 16.

tell blatant lies,[74] the FTC may believe that consumers are sufficiently protected.

This belief, however, is unfounded. As the Terrachoice Study illuminates, outright lies only comprise a small portion of faulty environmental claims.[75] The "Sin of the Hidden Trade-Off" is exemplified by advertisements for paper and lumber products that often promote their recycled content without addressing the impact their manufacture has on air and water emissions.[76] Examples of the "Sin of No Proof" include advertisements for energy-efficient light bulbs and advertisements for paper towels that boast of a high percentage of postconsumer recycled content without any substantiation of those claims.[77] To show examples of the "Sin of Irrelevance," Terrachoice points to numerous advertisements for aerosol products that tout the claim of being "CFC-free," despite the fact that CFCs have been outlawed for approximately thirty years.[78]

The Green Guides discourage the use of generalized environmental benefit claims (the "Sin of Vagueness"), such as "environmentally safe" and "environmentally friendly," because they can have broad meaning but may convey to consumers some specific and far-reaching benefits that cannot be substantiated.[79] The Green Guides' discussion of the term "degradable" states that claims that a package or product is degradable "should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature . . . within a reasonably short period of time."[80] The Green Guides then provide an example of a "deceptive" claim in which a trash bag is labeled "degradable" without any qualification or disclosure.[81] In the example, the trash bag has been tested and found to be degradable in soil burial tests with the presence of water and oxygen, but the typical manner of consumer disposal is through incineration or into landfills without the presence of water and oxygen.[82] The Green Guides find this claim of degradability "deceptive" because the marketer did not have

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74. *See* TERRACHOICE ENVTL. MKTG., *supra* note 3, at 4-5 (claiming that the Terrachoice Study found very few instances of outright lies).
75. *Id.* at 2, 4.
76. *Id.*
77. *Id.* at 3.
78. *Id.*
79. 16 C.F.R. § 260.7(a) (1998).
80. *Id.* § 260.7(b).
81. *Id.*
82. *Id.* § 260.7(b)(2) ex. 1.

"adequate substantiation that the bags will degrade in a reasonably short period of time."[83]

Claims can also be characterized as committing more than one sin. The claim that the bag is degradable is substantially similar to the aforementioned "Sin of No Proof" because there is inadequate proof that in a natural setting the bag would be degradable.[84] It is also comparable to the "Sin of Irrelevance," because while the bag will degrade in optimal settings, unless the bag sees those rare conditions, the bag's relative degradability is irrelevant.[85]

Many of the "Six Sins" have been contemplated by the FTC as issues that should be addressed.[86] However, some believe there has been little FTC investigation of questionable environmental advertising and that proper enforcement demands deeper questioning of these types of claims.[87] The FTC has seemingly avoided the field of environmental marketing because of its unfamiliarity with environmental claims and technology, and because it removes focus from its primary area of expertise—unfair marketing regulation.[88] Whatever the reason, the lack of enforcement has led to a marketplace inundated with "greenwash."[89]

D. Potential Solutions

The greenwashing problem does not emerge from the Green Guides' content or the potential accompanying liabilities per se. Greenwashing is the result of a failure to enforce the Green Guides. The FTC has chosen a "case-by-case" approach to enforcement despite the wishes of politicians, environmentalists, and industry heads.[90] In 1991, even before the first version of the Green Guides was developed, Hubert Humphrey, Attorney General of Minnesota, stated that "a case-by-case approach [to regulation] will be too slow and too cumbersome in

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83. *Id.*
84. *Id.*
85. *Id.*
86. For an example very similar to the "Sin of No Proof" and the "Sin of Irrelevance," see *id.* (finding that advertising a bag's degradability without disclosing the necessary conditions the bag needs to degrade constitutes a violation of the Green Guides).
87. Heather Green, *How Green Is That Gizmo?*, BUS. WK., Dec. 20, 2007, http://www.businessweek.com/magazine/content/07_53/b4065036215848.htm.
88. See Cavanagh, *supra* note 31, at 160-63, for a discussion of FTC unfamiliarity with complexities in environmental advertising.
89. *See* Priesnitz, *supra* note 5 (discussing the prevalence of greenwashing in the consumer marketplace).
90. David Hoch & Robert Franz, *Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALB. L. REV. 441, 443 (1994).

developing the boundaries for legitimate environmental claims."[91] One study has shown that producers, consumers, environmental groups, and state law enforcement officials believe that a national regulatory scheme governing environmental advertising claims would be optimal.[92] The question becomes, "How do we get there?"

1. Codify the Green Guides

One solution is to codify the Green Guides. The Green Guides are "industry guides," or "administrative interpretations of laws administered by the [FTC] for the guidance of the public in conducting its affairs in conformity with legal requirements."[93] As such, they "are not independently enforceable."[94] There would, however, be many benefits to giving the Green Guides the force of law. If the Green Guides were independently enforceable, then violators would be subject to automatic liability for breaching FTC Act section 5, which prohibits unfair and deceptive trade practices. Such automatic liability would provide a strong incentive to comply with the Green Guides and would likely encourage advertisers and marketers not to play so "close to the edge" of questionable environmental advertising and marketing practices. Advertisers and marketers would be much more likely to qualify and substantiate their claims if the threat of penalties loomed as a consequence for violations. Giving the Green Guides the force of law might also introduce nationwide consistency into green advertising and marketing, because businesses that choose to use green advertising and marketing tactics should at this point be familiar (if not in compliance) with the Green Guides. FTC rulemaking, on the other hand, requires more formal advance notice, written testimony, and oral testimony.[95] This lengthy, deliberative process allows for a true consideration of all relevant viewpoints which may lead to less debate and controversy down the road.

Challenges to this proposition will likely include the relative efficiency of industry guides, which allow the FTC to ensure a relatively high level of compliance at a relatively low cost.[96] States might also take issue with the preemption of their general police powers if the Green Guides were given the force of law. In May 1991, before the first Green

91. *Id.* at 444.
92. *Id.* at 443.
93. 16 C.F.R. § 1.5 (2001).
94. 72 Fed. Reg. 66,091, 66,092 (Nov. 27, 2007).
95. FTC Advance Notice of Proposed Rulemaking, 16 C.F.R. § 1.10 (1985); FTC Rulemaking Proceeding, *id.* § 1.13.
96. Lydia B. Parnes & Carol J. Jennings, *Through the Looking Glass: A Perspective on Regulatory Reform at the Federal Trade Commission*, 49 ADMIN. L. REV. 989, 993 (1997).

Guides were published, the Attorney General Task Force requested that the Green Guides be industry guides rather than "trade rules" so that they may also be enforced by the states.[97] Another criticism of a formal, rule-based approach to the Green Guides is that it takes significant time to promulgate formal rules.[98] This type of rulemaking has fallen out of fashion, however, and the FTC has largely moved away from using its federal rulemaking authority since the 1980s.[99] Since the Magnusson-Moss Warranty Act in 1975, formal rulemaking has become much more complex, time-consuming, and difficult.[100] Rulemaking is now largely seen as "costly and resource-intensive, controversial and divisive," thus it is usually undertaken in response to specific congressional directives.[101] In statutory rulemaking, the FTC does not have to conduct independent research on the prevalence of the troubling conduct that warrants the rulemaking, because Congress has already determined that the conduct is a problem that must be dealt with by agency action.[102] The agency can then follow the easier, less time-consuming notice and comment procedures outlined in the Administrative Procedure Act rather than the more cumbersome FTC requirements.[103] Critics have also noted that it took the FTC nine years to promulgate the Credit Practices Rule and eight years to promulgate the Used Car Rule.[104] In 1992, critics asserted that this type of lengthy delay "in establishing national standards on environmental advertising would seriously erode any hope of legitimizing green marketing."[105] Given the numerous challenges to codifying the Green Guides, this solution, while seemingly a natural transition, remains unlikely.

2. EPA Partnership

Given the FTC's lack of experience in dealing with complex environmental terms and issues and the EPA's abundant expertise in the field, it seems only natural that the two agencies should work together to

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97. Paul H. Luehr, Comment, *Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising*, 10 UCLA J. ENVTL. L. & POL'Y 311, 328 (1992).

98. *Id.* at 328-29.

99. *See* Parnes & Jennings, *supra* note 96, at 993-97 (explaining the reasons for the downfall of FTC formal rulemaking in the 1980s).

100. *See* Cavanagh, *supra* note 31, at 174-75 n.164 (discussing the complexities of rulemaking under the Magnusson-Moss Act).

101. Parnes & Jennings, *supra* note 96, at 996.

102. *Id.*

103. *See* 16 C.F.R. § 1.13 (1989) (describing rulemaking proceedings under the FTC Act).

104. Luehr, *supra* note 97, at 329.

105. *Id.*

develop marketing and advertising standards acceptable to both consumers and businesses.

EPA involvement in consumer protection is not unprecedented.[106] Before the first Green Guides were issued in 1992, Congress considered two bills that would have empowered the EPA to create its own voluntary national guidelines for terminology in environmental marketing.[107] Both bills required a public education campaign to advise consumers about environmental claims and which types the bills would cover.[108] The purpose of these bills was to encourage consumer and industry habits that favored resource preservation and to protect consumers from deceptive environmental advertising and marketing.[109] Neither bill garnered enough votes for passage in the Senate, but the EPA was still open to establishing guidelines for the legitimate use of environmental claims.[110] Nevertheless, the EPA was relegated to an advisory role upon promulgation of the first Green Guides as a member of the Interagency Task Force on Marketing Claims.[111]

Although Congress rejected bills that would have allowed the EPA to create national guidelines for environmental marketing terminology, some authors have asserted that the EPA still plays a role in regulating environmental advertising.[112] In keeping with the educational purpose of the failed bills, acts such as the Consumer Labeling Initiative, in which the EPA "foster[s] pollution prevention, empower[s] consumer choice, and improv[es] consumer understanding by clear and consistent product labels on safe use, environmental consequences, and health risks,"[113] have kept the EPA active in consumer protection.[114] For example, the Fungicide and Rodenticide Act grants the EPA power to oblige manufacturers to substantiate environmental claims made on the product packaging.[115] No matter how much the EPA tries to push its own policies and agenda into the regulation of advertising and marketing, however, it will likely be met with resistance from the FTC, which has taken the position that it is not statutorily allowed to set environmental policy and that FTC guides will be designed "to address how [environmental] terms

106. Cavanagh, *supra* note 31, at 160.
107. *Id.*
108. *Id.* at 160-61.
109. *Id.* at 161.
110. *Id.* at 161-62.
111. *Id.* at 163.
112. *Id.* at 142-43.
113. *Id.* at 143 n.26.
114. *Id.* at 142-43.
115. *Id.* at 164; *see also id.* at 163-70 (providing a more detailed discussion of the EPA's involvement in product labeling and substantiation of claims).

may be used in a non-deceptive fashion in light of consumer understanding of the terms."[116]

In light of the FTC's unwillingness to change this policy, several authors have called for the FTC and the EPA to work together in the regulation of environmental advertising and marketing.[117] The FTC and the EPA need each other in order to effectively reach their respective goals: the FTC needs the EPA's expertise in establishing proper standards to protect consumers against unfair and deceptive claims, and the EPA needs the FTC to effectively curb the manufacture and dissemination of environmentally unfriendly products masquerading as "green."[118] At least one author has suggested that, despite a lack of statutory mandate, the EPA should spearhead a joint program with the FTC by formulating regulatory environmental marketing standards and defining terms based on the best available scientific evidence.[119] The FTC then could use its experience in enforcing advertising and marketing rules to ensure compliance with the new regulations.

Despite the consumer benefits that would likely result from cooperation between the two agencies, the FTC and the EPA appear to be at loggerheads when it comes to the imposition of environmental marketing standards. While both agencies have substantially the same goal of stopping dubious environmental claims in advertising and marketing, their motives for that goal seem to be different. The FTC has stated that it is not interested in being involved with the formation of environmental policy—only in how to stop environmental claims from deceiving consumers.[120] From its refusal to work with the EPA to formulate workable environmental marketing standards, definitions, and guides, it appears that perhaps the FTC believes the EPA is incapable of assisting the FTC without injecting environmental policy. From the EPA's perspective, it fulfills its purpose to protect the environment[121] when consumers make the most environmentally friendly choices and thus has an incentive to restrict advertising and marketing in a way that benefits environmentally friendly businesses to the detriment of environmentally unfriendly businesses. Evidence shows that many consumers are willing to pay a premium to support businesses they view

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116. *Id.* at 163.
117. *Id.* at 173-74; Avallone, *supra* note 31, at 696; Woods, *supra* note 22, at 94.
118. Cavanagh, *supra* note 31, at 172.
119. *Id.* at 173-74.
120. *Id.* at 163.
121. EPA, 2006-2011 EPA STRATEGIC PLAN 5 (Sept. 30, 2006), http://www.epa.gov/ocfo/plan/2006/entire_report.pdf.

as "environmentally friendly."[122] The FTC, on the other hand, is concerned primarily with preventing consumer deception and may see the injection of environmental policy into its rules or guidelines as stepping outside its congressional mandate. However, unless the FTC can find another way to stop the rising tide of "greenwash," a partnership with the EPA is the best option.

Some commentators have proposed injecting yet another federal agency, the Food and Drug Administration (FDA), into environmental marketing regulation.[123] One observer suggested that in order to help consumers more easily determine the environmental friendliness of a product, an environmental version of the FDA-mandated "Nutrition Facts" found on the side of food packaging should be included on products that claim to be environmentally friendly.[124] This approach is viewed favorably for two reasons: (1) the design and structure of the label is well-known and has proven to be consumer-friendly,[125] and (2) the label secures consumer confidence in environmental marketing claims in a consumer friendly way which inherently promotes environmentally friendly products.[126] This three-agency approach to environmental marketing would combine the environmental expertise of the EPA, the consumer protection goals and expertise of the FTC, and the labeling experience of the FDA. Coordinating this tripartite scheme, however, seems daunting in its complexity, and moreover, the political will to establish this structure does not seem to be available.[127]

3. State Involvement

Given the confusion surrounding federal regulation of environmental advertising and marketing, it is no surprise that states have begun to promulgate their own regulations. The combination of state and federal regulation efforts has led to a "crazy quilt of laws and regulations."[128] California had its own environmental marketing statute before the advent of the Green Guides and adopted parts of the Green Guides in the mid-1990s.[129] In 1990, California enacted the

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122. Barnett, *supra* note 23, at 494.

123. Avallone, *supra* note 31, at 700-02; Brett B. Coffee, *Environmental Marketing After* Association of National Advertisers v. Lundgren*: Still Searching for an Improved Regulatory Framework*, 6 FORDHAM ENVTL. L.J. 297, 351 (1995).

124. Coffee, *supra* note 123, at 351.

125. *Id.*

126. *Id.* at 350-51.

127. *Id.* at 351.

128. Barnett, *supra* note 23, at 505.

129. CAL. BUS. & PROF. CODE § 17508.5 (repealed 1995).

Environmental Advertising Claims Act (EACA).[130] The EACA's first section defined five environmental product characteristics and declared it unlawful to misrepresent that a product met the definition provided in the statute.[131] The EACA defined a "recyclable" item as "an article [that] can be conveniently recycled . . . in every county in California with a population over 300,000."[132] Trade groups attacked the statute as unconstitutionally vague and a violation of First Amendment rights, but the United States Court of Appeals for the Ninth Circuit upheld a district court ruling that the statute was constitutional except for its definition of "recyclable."[133] California abandoned its definitional section in 1995, however, and adopted the terminology of the Green Guides.[134]

Part two of the EACA, which governs vague terms such as "environmentally sound" and "ecologically safe," has remained mostly intact.[135] Part two requires businesses that use such terms "in advertising or on the label or container of a consumer good" to keep detailed information and documentation of the reasons for the belief.[136] The business must also disclose whether the representation meets the Green Guides definition.[137]

Those supporting state involvement point to the success that California, New York, and states in New England have had in implementing environmental advertising standards.[138] Supporters of state regulations also argue that because state autonomy includes the enforcement of individual policies, the federal government should not interfere with stricter state policies.[139] While the states have good intentions and valid interests in the protection of their citizens, a regulatory scheme providing for federal preemption is probably the most effective way to protect consumers.

A uniform federal system may not address a state's needs as directly as the state may like, but it has many benefits. For example, a uniform system of regulation makes it easier to obtain compliance from businesses,[140] and further, a patchwork system whose requirements differ

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130. *Id.*
131. *Id.*
132. *Id.*
133. Ass'n of Nat'l Advertisers, Inc. v. Lundgren, 809 F. Supp. 747 (N.D. Cal. 1992), *aff'd*, 44 F.3d 726 (9th Cir. 1994).
134. 1995 CAL. LEGIS. SERV. ch. 642 (S.B. 426) (West).
135. CAL. BUS. & PROF. CODE § 17580.
136. *Id.*
137. *Id.*
138. Cavanagh, *supra* note 31, at 186 n.210.
139. *Id.* at 186.
140. *Id.* at 187 n.212.

from state to state may raise complaints and Commerce Clause issues. A uniform federal system would also furnish a regulatory framework for states without sufficient resources to run and enforce their own environmental advertising and marketing regulations.[141] Moreover, while states tend to narrowly focus their regulations, a system of federal regulations can help propagate national policy concerns and problems.[142] Thus state regulations should be preempted because the federal government is in the best position to deal with "greenwash" in advertising.

III. Conclusion

The current Green Guides do not adequately regulate the increasing problem of "greenwash" in advertising. To effectively deal with greenwash, the federal government should make a hard decision and mandate that the FTC and the EPA work together to solve this problem. While codifying the Green Guides, pushing the FTC to use its enforcement power more thoroughly, and putting neat environmental "nutrition guides" on the side of consumer products all sound intriguing, they also seem unrealistic. Given past statements on FTC policy,[143] it is unlikely that the FTC will take it upon itself to dive into the greenwashing problem in environmental advertising.

The FTC must realize that its job of protecting consumers from greenwashing through effective regulation is inextricably tied to environmental policy decisions. Thus, the FTC should allow the EPA to help it define what does and does not constitute deceptive environmental marketing. With the environmental expertise of the EPA and the consumer knowledge of the FTC, the two agencies could ably protect consumers from deception in advertising and marketing, provide businesses with workable guidelines within which they must work, and ultimately, protect the environment by enabling consumers to choose truly green products and services.

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141. *Id.* at 187.
142. *Id.*
143. *Id.* at 165.