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THE NEXT GENERATION OF GREENWASH: DIMINISHING CONSUMER CONFUSION THROUGH A NATIONAL ECO-LABELING PROGRAM

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Cover Page Footnote

I would like to thank Professor Susan Block-Lieb for her guidance and motivation. To my family, thank you for the continuing support throughout the years of my writing and many long nights of review. To Grandma, thank you for your strength and unwavering love. To Ben, you inspire me every day.

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*Jessica E. Fliegelman**

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INTRODUCTION

Green is the new black. Greenpeace declared: “Climate change is in. Global warming is hip. Pop stars are urging action. It seems not a day passes without another big business making a green pronouncement.”¹ In the 1990s, increasing public awareness of climate change prompted a consumer movement to address environmental concerns through selective product purchasing.² To capitalize on this consumer trend, manufacturers

1. *Climate Wash - It's the All New Greenwash*, GREENPEACE (July 27, 2007), <http://www.greenpeace.org/international/en/news/features/climatewash-greenwash-270707/>.

2. See Thomas C. Downs, “Environmentally Friendly” Product Advertising: Its Future Requires a New Regulatory Authority, 42 AM. U. L. REV. 155, 155 (1992) (“With this heightened environmental consciousness has come a greater recognition of the consumer’s ability to promote environmental protection through selective product purchasing.”); Paul H. Luehr, *Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising*, 10 UCLA J. ENVTL. L. & POL’Y 311, 313 (1992) (“Consumers not only seek products that are safer for the environment, they are also willing to pay a

created a “green revolution,” a marketing strategy touting the environmental attributes of a product.³ The movement grew rapidly and continues to expand; since 2006, green advertising has nearly tripled.⁴ The most current trend is to describe the carbon attributes of a product, coined a “tsunami” of green advertising, which reached a new peak with commercials for a “carbon-neutral Super Bowl” and “carbon-neutral Nascar races.”⁵ While manufacturers continue to advertise using traditional terminology, the focus has shifted to the carbon neutrality or sustainability of products.

Companies’ product sales support the overall rising popularity of “green” products. In 2008 alone, consumers spent five hundred billion dollars on “green” products and services and the market is expected to continue expanding.⁶ Major retailers, such as Target and Home Depot, still report strong sales in green goods despite the current economic climate and consumer polls indicate that consumers’ commitment to buying environmentally-friendly products has not been altered by the economy.⁷ For example, a survey found that sixty-eight percent of consumers would remain faithful to an environmentally-conscious brand and seven out of ten consumers would spend more for environmentally-friendly products even in a recession.⁸ As green advertising has increased companies’ profitability, rampant

premium to acquire those products.”); *Big Opportunities Remain for Green Products*, NIELSENWIRE (Mar. 3, 2009), <http://blog.nielsen.com/nielsenwire/consumer/big-opportunities-remain-for-green-products/>.

3. See Luehr, *supra* note 2 (discussing how consumer interest in green products created a “tremendous source of potential revenue” and “increasingly aggressive” marketing strategies); Deborah Majoras, Chairwoman, Fed. Trade Comm’n, Opening Remarks at the Fed. Trade Comm’n’s Workshop on Carbon Offsets and Renewable Energy Certificates 8 (Jan. 8, 2008), available at http://www.ftc.gov/bcp/workshops/carbonoffsets/transcript/opening_dpmajoras.pdf (“Businesses have taken notice, and in the past year there’s been a virtual explosion of green marketing.”).

4. TERRACHOICE ENVTL. MKTG., GREENWASHING REPORT 2009, at 4 (2009) [hereinafter TERRACHOICE, GREENWASHING REPORT 2009], available at <http://sinsofgreenwashing.org/findings/greenwashing-report-2009/>.

5. Jesse Ellison, *Save the Planet, Lose the Guilt*, NEWSWEEK, June 28, 2008, available at <http://www.newsweek.com/2008/06/28/save-the-planet-lose-the-guilt.html>.

6. *Consumer Spending on Green Will Double, Reach \$500 Billion in 2008*, ENVTL. LEADER (Sept. 28, 2007), <http://www.environmentalleader.com/2007/09/28/consumer-spending-on-green-will-double-reach-500-billion-in-2008/>. For example, Arm & Hammer Liquid Laundry Detergent is the only detergent with “renewable plant-based soaps to deliver powerful cleaning;” Brammo Motorsports advertises that its Enertia Brand motorcycle is the “world’s first production zero-emission battery powered plug-in electric motorcycle;” and Panasonic advertises its large-screen plasma display as “environmentally friendly.” *Id.*

7. Sara Fister Gale, *How to Get Green Goods Flying Off the Shelves*, GREENBIZ.COM (Feb. 27, 2009), <http://www.greenbiz.com/feature/2009/03/02/how-get-green-goods-flying-off-shelves>.

8. *Id.*

confusion has emerged among consumers about how to determine the truthfulness of environmental claims.⁹

Accurate advertising is critical for consumers trying to make product-purchasing decisions that have meaningful impacts on the environment. The largest contributors and populations most vulnerable to climate change are in urban locations.¹⁰ More than fifty percent of the world's population lives in cities and emits two-thirds of the total energy use worldwide.¹¹ Coastal cities are particularly vulnerable to rising sea levels, storm surges, and flooding; heat trapping in urban landscapes with buildings and pavement creates threats of rising temperatures, increased levels of precipitation, and lower air quality.¹² Because of these threats, city governments have created climate action plans to lower energy consumption, promote sustainability, and create energy efficiency.¹³ However, city governments face significant obstacles in affecting climate change because of the need for an effort involving not just governmental actors, but also a commitment from society to change.¹⁴

Individuals in urban communities, armed with the knowledge that they have both the greatest impact on climate change and the greatest opportunity to reduce its effects, can be motivated to make substantial changes in their personal lives. On an individual level, that dedication is particularly evidenced by their purchasing decisions. Thus, individual consumers must be assured that the products they purchase do, in fact, promote social change. Without the assurance of advertising accuracy, consumers could potentially distrust environmentally beneficial products and lose a powerful mechanism to positively impact climate change.

This Note will address the prominence of misleading and deceptive environmental claims that have prompted appeals for improved federal regula-

9. See Greg Zimmerman, *The Rise and Significance of Eco-Labels and Green Product Certifications*, FACILITIES NET (July 2005), <http://www.facilitiesnet.com/green/article/Certified-Green--3087>.

10. See *Cities and Climate Change: Key Message from the OECD*, ORGANISATION FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/dataoecd/41/12/44272199.pdf>.

11. *Cities and Climate Change*, C40 CITIES CLIMATE LEADERSHIP GROUP (2010), <http://www.c40cities.org/climatechange.jsp>.

12. *Id.*

13. See Michele M. Betsill, *Mitigating Climate Change in U.S. Cities: Opportunities and Obstacles*, 6 LOC. ENV'T 4, 393 (2001) (discussing the "Cities for Climate Protection" campaign, which promotes methods municipal governments can use to reduce greenhouse gas emissions); Martin LaMonica, *Cities Take Lead in Climate Change*, CNET NEWS (June 12, 2008), http://news.cnet.com/8301-11128_3-9963600-54.html.

14. Betsill, *supra* note 13, at 403.

tion.¹⁵ Specifically, the Note will focus on the emerging trend of carbon advertising and national and international models that provide guidance on preventing deception. Part I will convey the current status of environmental advertising and the necessary background principles for establishing regulations. Part II will detail major criticisms of the current environmental advertising guidelines and proposed models for restructuring environmental advertising regulations. Finally, Part III will propose a voluntary national eco-labeling program that will address the current criticisms and improve consumer confidence in environmentally-beneficial product purchases.

I. BACKGROUND PRINCIPLES OF ENVIRONMENTAL ADVERTISING

Part I conveys the historical, legal, and sociological framework for the current green marketing regulations. First, Part I will examine the sociological trend of increased demand from consumers for green products and the corresponding rise in deceptive environmental advertising practices.¹⁶ Part I will next address the governmental authority exercised by the Federal Trade Commission (FTC) to regulate deceptive advertising in general and discuss how advertising regulations can overcome First Amendment challenges. The current usage of environmental and energy advertising has been monitored through third-party product certifications and the FTC's voluntary guidelines on environmental labeling. Despite the FTC's authority in this area, one significant aspect of the debate is over which agency should ultimately be responsible for environmental labeling regulations. Part I thus examines whether the Environmental Protection Agency (EPA) has either express or implied authority to implement environmental advertising regulations, specifically a national eco-labeling program. Part I provides both national and international examples of labeling programs that have created effective regulatory frameworks to look to for guidance in modifying the current state of environmental labeling regulations. Finally, Part I will discuss the newly-emerging issues surrounding environmental advertising, specifically the increasing presence of carbon terminology, and how any regulatory changes should take into account the new technology and terminology to promote effective, accurate product labeling and ultimately increase consumer protection.

15. See Jennifer Woods, *Of Selling the Environment—Buyer Beware? An Evaluation of the Proposed F.T.C. Green Guides Revisions*, 21 LOY. CONSUMER L. REV. 75, 75-78 (2008).

16. See Luehr, *supra* note 2, at 313-14; Majoras, *supra* note 3 (“[C]onsumers are showing increasing interest in environmental issues and, importantly, this interest may be influencing their purchasing decisions.”).

A. The Rise of Green Consumerism and Greenwashing

The general public's increasing awareness of climate change created the purchasing phenomenon known as "green consumerism," in which environmentally-conscious shoppers purchase products that seemingly pose less of an environmental threat.¹⁷ A study conducted in 2009 by WPP Green Brands¹⁸ found that thirty-seven percent of consumers factored the environmental attributes of a product into their purchasing decisions, and seventy-seven percent of consumers considered a company's "environmentally-friendly" reputation to be significant.¹⁹ As a result, green advertising has the potential to produce environmental benefits through greater consumer awareness because it can aid consumers in making meaningful marketplace choices.²⁰

The ubiquity of green advertising claims generally increases consumer confidence that the claims have been substantiated, such that an individual consumer believes he need not worry about conducting independent research to verify the accuracy of green advertising claims.²¹ However, with respect to green advertising, the overwhelming presence of advertisements touting environmental benefits has failed to indicate to consumers that the claims are accurate.²² Many companies, more concerned with profitability than ensuring that products meet specific standards, will "exaggerate or even fabricate the environmental qualities of their goods, letting their advertising rhetoric far outstrip their environmental contributions."²³ These

17. Roger D. Wynne, *Defining Green: Toward Regulation of Environmental Marketing Claims*, 24 U. MICH. J.L. REFORM 785, 785-86 (1991). For example, "magazines like Vanity Fair have released green issues and retailers like Wal-Mart and Home Depot have launched green product lines." Majoras, *supra* note 3, at 8-9.

18. WPP is a leading advertising and marketing services group that analyzed the research of five marketing companies on critical green trends. *See About Us*, WPP (2010), <http://www.wpp.com/wpp/about/>.

19. Joe Fernandez, *Product Claims: The Poisons That Pollutes Your Marketing*, MARKETING WK., July 30, 2009, at 16, available at <http://www.marketingweek.co.uk/poisons-that-pollute-marketing/3002855>; Press Release, WPP, 2009 Green Brands Survey Published (July 22, 2009), available at <http://www.wpp.com/wpp/press/press/default.htm?guid={b983b1a9-ab92-4427-b75f-ab35f2565dad}#>.

20. *See* Downs, *supra* note 2, at 158.

21. Alan Levy, Senior Scientist, Food & Drug Admin., Remarks at the FTC's Workshop on Carbon Offsets and Renewable Energy Certificates 73 (Jan. 8, 2008).

22. Wynne, *supra* note 17, at 787-88.

23. *Id.* at 787; *see also* John M. Church, *A Market Solution to Green Marketing: Some Lessons From the Economics of Information*, 79 MINN. L. REV. 245, 246 (1994) ("[M]anufacturers, striving for greater profits, may have an incentive to inflate or even lie about the environmental attributes of their products."); Luehr, *supra* note 2, at 313-14 ("As competition mounts, so does the tendency of advertisers to make exaggerated or irrelevant

companies “often change their labels but little else.”²⁴ Advertisements also frequently employ vague, undefined terms like “eco-friendly” or “green,” which colloquially imply an environmental benefit, but when used in product labeling, “despite their ambiguity . . . imply that they are based upon objective scientific investigation.”²⁵ Yet, there is “no absolute measure of earth-friendliness.”²⁶ These claims are simply value judgments about the overall impact of the product.²⁷ Thus, one of the major critiques of corporate green advertising is that many are “reap[ing] the benefits of a green reputation” without “actually creat[ing] social good” through substantial changes to a company’s practices.²⁸

“Greenwashing”—the buzzword for deception in green advertising—is defined as the act of misleading consumers about the environmental practices of a company or the environmental benefits of a product.²⁹ Initially coined in the 1980s, the term was used by environmental activists to criticize a company’s portrayal of itself as environmentally responsible while engaging in harmful actions.³⁰ One of the significant risks of greenwashing is that consumers will become skeptical and cynical of environmentally-friendly products.³¹ Marketing experts agree that the “term green is too widespread to have any real marketing clout,” and “has become poisoned through overuse.”³²

To determine the extensiveness of greenwashing, TerraChoice, an environmental marketing firm, conducted studies evaluating thousands of prod-

claims.”); Mario Teisel, Professor of Econ., Univ. of Me., Remarks at the FTC’s Workshop on Carbon Offsets and Renewable Energy Certificates 175 (Jan. 8, 2008).

24. Wynne, *supra* note 17, at 787.

25. *Id.* at 792.

26. *Id.* at 811 (“Broad terms like ‘environmentally responsible,’ therefore possess little value; standing alone they are highly subjective, difficult to verify, and tend to create the misleading impression that the product poses no harm to the environment.”); *see also* Downs, *supra* note 2, at 168 (“[V]ague messages such as ‘environment-friendly’ and ‘earth safe’ that are unsupported by any claims of specific environmental benefits are also problematic.”).

27. *See* Downs, *supra* note 2, at 168 (discussing that vague green claims are widely criticized as meaningless and confusing to consumers); Luehr, *supra* note 2, at 320.

28. Jacob Vos, *Actions Speak Louder Than Words: Greenwashing in Corporate America*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 672, 681 (2009); *see also* Teisel, *supra* note 23 (discussing how companies adopt certification seals to improve their corporate image).

29. TERRACHOICE ENVTL. MKTG., GREENWASHING REPORT 2007, at 1 (2007) [hereinafter TERRACHOICE, GREENWASHING REPORT 2007], available at <http://sinsofgreenwashing.org/findings/greenwashing-report-2007/>.

30. Fernandez, *supra* note 19.

31. *Id.*

32. *Id.*

ucts and various types of environmental claims.³³ In 2007, TerraChoice evaluated over 1018 products and found that ninety-nine percent failed to “live up fully to their green boasts.”³⁴ Each product committed one of the “sins of greenwashing,”³⁵ indicating that the company’s product does not fully achieve its claimed environmental benefits.³⁶ In 2009, TerraChoice conducted a follow-up study of 2219 products making 4996 green claims and found that over ninety-eight percent committed at least one of the greenwashing sins.³⁷ An example of the “sin of the hidden trade-off” is when a company advertises that its paper towels are made from a sustainably harvested forest, while the manufacturer’s shipping to global markets causes extensive greenhouse gas emissions.³⁸ The “sin of fibbing” was found in numerous products falsely claiming to be Energy Star certified or certified by a private organization.³⁹ For example, in a House subcommittee hearing, Scot Case, Vice President of TerraChoice, described how one consumer purchased an LG Energy Star certified refrigerator in 2007, but in 2009, received a letter stating that his refrigerator did not qualify for Energy Star status and that the company had certified the product anyway.⁴⁰ The “sin” on the rise is “worshipping false labels,” where a product, either through words or images, gives an impression that it possesses beneficial environmental attributes or private certification where none exist.⁴¹ With increasing frequency, manufacturers are using the color green in a product’s packaging, such as a green bottle cap, an image of a tree, or a green thumbs-up to create a subliminal message.⁴²

33. See *About Us*, TERRACHOICE (2009), <http://www.terrachoice.com/Home/About%20Us>.

34. Bryan Walsh, *Eco Buyer Beware*, TIME, Sept. 22, 2008, at 71; see TERRACHOICE, GREENWASHING REPORT 2007, *supra* note 29; see also Woods, *supra* note 15, at 82.

35. According to TerraChoice, the “seven sins” are: (1) Sin of the Hidden Trade-off; (2) Sin of No Proof; (3) Sin of Vagueness; (4) Sin of Worshipping False Labels; (5) Sin of Irrelevance; (6) Sin of Lesser of Two Evils; and (7) Sin of Fibbing. See *The Seven Sins of Greenwashing*, TERRACHOICE (2010), <http://sinsofgreenwashing.org/findings/the-seven-sins/>; see also David Gibson, *Awash in Green: A Critical Perspective on Environmental Advertising*, 22 TUL. ENVTL. L.J. 423, 425 (2009).

36. Gibson, *supra* note 35, at 424.

37. TERRACHOICE, GREENWASHING REPORT 2009, *supra* note 4, at 3.

38. Walsh, *supra* note 34.

39. Karen Goldberg Goff, *Green with Honesty*, WASH. TIMES, Jan. 21, 2009, at B01.

40. *It’s Too Easy Being Green: Defining Fair Green Marketing Practices: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Prot. of the H. Comm. on Energy and Commerce*, 111th Cong. 9 (2009) (statement of Scot Case, Vice President, TerraChoice).

41. TERRACHOICE, GREENWASHING REPORT 2009, *supra* note 4, at 5.

42. *Id.* At the June 9, 2009 subcommittee hearings, Representative Gringrey echoed this sentiment, stating that simply using the color green on a product, even without “saying anything about being environmentally friendly,” gives consumers a “subliminal message.” *It’s*

Consumer education on the extensiveness of greenwashing has had a substantial impact. Sixty-eight percent of adults now believe that most companies are greenwashing their advertising claims.⁴³ One company, promoting the “Greenwashing Index,”⁴⁴ is encouraging consumers to play an active role in monitoring advertising claims by identifying instances of greenwashing.⁴⁵ One of the most notoriously criticized advertisements has been Fiji’s claim that it is the first bottled water company to go “carbon negative.”⁴⁶ According to Fiji, purchasing a bottle of water actually *reduces* carbon emissions.⁴⁷ Visitors of the Greenwashing Index have called the advertising campaign an “outright falsehood,” done simply to increase Fiji’s reputation.⁴⁸ General Electric global executive director of advertising and marketing, Judy Hu, admitted that reputation, rather than environmental benefit, is often a company’s main concern.⁴⁹ “It is about a business opportunity,” she said, “[g]reen is green as in the color of money.”⁵⁰

Going green may be trendy, but proponents of environmental change through selective purchasing have raised the concern that “the sudden ‘over-hyping’ by the media of going green twists its message and turns environmentalism into a marketing tag.”⁵¹ They argue that increasing familiarity with the prevalence of greenwashing will make it increasingly difficult to mislead consumers, who will “be able to see through the green fog that has been created.”⁵²

Too Easy Being Green: Defining Fair Green Marketing Practices: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Prot. of the H. Comm. on Energy and Commerce, 111th Cong. 5 (2009) (statement of Rep. Phil Gingrey, Member, H. Comm. on Energy and Commerce).

43. See Goff, *supra* note 39.

44. *Greenwashing Index*, ENVIROMEDIA SOCIAL MARKETING (2010), <http://www.greenwashingindex.com/>.

45. *The Ads*, ENVIROMEDIA SOCIAL MARKETING (2010), <http://www.greenwashingindex.com/ads.php>.

46. Kimberly Maul, *Fiji Water Has Its Consumers Seeing Green*, PR WK., May 5, 2008, at 7, available at <http://www.prweekus.com/Fiji-Water-has-its-consumers-seeing-green/article/109561/>.

47. *Fiji Green: Our Path to Sustainability*, FIJI (2009), <http://www.fijiwater.sg/Sustainability.aspx>. Fiji’s factories do not operate solely on renewable energy and they still use planes and trucks to transport their products. Their claim is based on a concept of “forward crediting,” by investing in carbon negative projects like reforestation and renewable energy initiatives. See Maul, *supra* note 46.

48. Walsh, *supra* note 34.

49. Gibson, *supra* note 35, at 426.

50. *Id.*

51. Purple Romero, *Beware of Green Marketing Warns Greenpeace Exec*, ABS-CBN NEWS, Sept. 17, 2008, at 1, available at <http://www.abs-cbnnews.com/special-report/09/16/08/beware-green-marketing-warns-greenpeace-exec>.

52. Goff, *supra* note 39.

B. Deceptive Advertising: Applying the FTC Framework to Green Advertising

Though many companies have honestly advertised the environmental attributes of their products, the threat of deceptive, misleading, and false advertisements by other companies continues to affect consumers.⁵³ The FTC is the federal agency tasked with tackling deceptive advertising generally, and enforcing green advertising violations specifically.⁵⁴

To address issues of consumer protection in the marketplace, Congress passed the Federal Trade Commission Act (FTCA),⁵⁵ which empowered the FTC to “prevent unfair methods of competition and unfair and deceptive acts or practices in or affecting commerce.”⁵⁶ To implement that mission, the FTCA permits the FTC to “prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices.”⁵⁷ “The FTC and the Courts have interpreted this power to include the authority to regulate false and misleading advertising and marketing claims.”⁵⁸ Section 5 of the FTCA specifically prohibits “unfair or deceptive acts or practices.”⁵⁹ A violation of a regulation passed under Section 5 constitutes an automatic violation that has corresponding consequences.⁶⁰ The FTC can also pass voluntary guidelines for an industry, but these require the FTC to prove on a case-by-case basis that the company’s practice would likely deceive consumers.⁶¹

Section 12 of the FTCA “prohibits false ads likely to induce the purchase of food, drugs, devices or cosmetics. Section 15 defines a false ad for purposes of Section 12 as one which is ‘misleading in a material re-

53. TERRACHOICE, GREENWASHING REPORT 2009, *supra* note 4, at 3.

54. *Sorting Out ‘Green’ Claims*, FED. TRADE COMMISSION (Apr. 1999), <http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen02.shtm>.

55. Federal Trade Commission Act, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (2006)).

56. *Legal Resources: Statutes Relating to Both Missions*, FED. TRADE COMMISSION (June 19, 2008), <http://www.ftc.gov/ogc/stat1.shtm>.

57. *Id.*

58. Glenn Israel, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims*, 20 B.C. ENVTL. AFF. L. REV. 303, 309-10 (1993).

59. Act of Mar. 21, 1938, ch. 49, sec. 3, 52 Stat. 111 (codified at 15 U.S.C. § 45(a)(1) (1994)).

60. *Id.*

61. *Appendix I—Laws Enforced by the FTC*, FED. TRADE COMMISSION (June 25, 2007), <http://www.ftc.gov/opp/gpra/append1.shtm>.

spect.”⁶² Congress did not provide a definition for “unfair” or “deceptive” in the FTCA which potentially could have clarified when an advertisement is misleading.⁶³ The FTC issued the FTC Policy Statement on Deception⁶⁴ (“Deception Policy”) which provides a broader explanation of the terms. The Deception Policy states three required elements for deception.⁶⁵ First, there must be a representation, omission, or practice likely to mislead the consumer.⁶⁶ Second, the practice must be examined from the perspective of a consumer acting reasonably under the circumstances.⁶⁷ Finally, the practice must be material, meaning it is likely to affect the consumer’s conduct or decision with regard to the product.⁶⁸

The Deception Policy was created in response to the decision in *In re Cliffdale Associates, Inc.*,⁶⁹ which struck down the long-standing definition that an advertisement was deceptive so long as it had a capacity or tendency to deceive.⁷⁰ The Deception Policy narrowed the definition by introducing a three-pronged test.⁷¹ Under the first element, actual, explicit deception is not necessary; rather, a deceptive claim can arise either expressly or

62. *Federal Trade Commission Policy Statement on Deception*, appended to *In re Cliffdale Assocs.*, 103 F.T.C. 110, 1984 FTC LEXIS 71, at *167 (1984) [hereinafter *Policy Statement on Deception*].

63. *Id.* at *167-68; see Church, *supra* note 23, at 296; Wynne, *supra* note 17, at 789.

64. *Policy Statement on Deception*, *supra* note 62.

65. See Church, *supra* note 23, at 298.

66. *In re Cliffdale Assocs.*, 103 F.T.C. 110, 1984 FTC LEXIS 71, at *79 (1984) (“It is well settled that any advertising representation that has the tendency and capacity to mislead or deceive a prospective purchaser is an unfair and deceptive practice which violated the Federal Trade Commission Act.”); see also *Chrysler Corp. v. Fed. Trade Comm’n*, 561 F.2d 357, 363 (D.C. Cir. 1977) (“[T]he Commission was entitled to conclude from the advertisements themselves and the stipulations of fact that the ads had a tendency and capacity to mislead consumers.”); Church, *supra* note 23, at 299.

67. *Policy Statement on Deception*, *supra* note 62, at *79 (“Determination as to whether an advertiser possessed and relied upon a ‘reasonable basis’ for believing a representation to be true requires evaluation of ‘both the reasonableness of an advertiser’s action and the adequacy of the evidence upon which such actions were based.’”).

68. See Church, *supra* note 23, at 298.

69. 1984 FTC LEXIS 71, at *104 (“[T]he Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.”).

70. See *Simeon v. Fed. Trade Comm’n*, 579 F.2d 1137, 1146 (9th Cir. 1978) (“[A]dvertisements capable of being interpreted in a misleading way should be construed against the advertiser.” (internal quotation marks omitted)); *Goodman v. Fed. Trade Comm’n*, 244 F.2d 584, 602 (9th Cir. 1957) (noting that one purpose of the FTCA is to eliminate business practices that could deceive consumers); Wynne, *supra* note 17, at 790.

71. See Wynne, *supra* note 17, at 790.

impliedly.⁷² Whether a claim is implicitly deceptive is determined by “evaluating the contents of the advertisement and the circumstances surrounding it.”⁷³ The second element of the FTC test is the advertisement’s ability to mislead consumers. This element considers the percentage of people who would view the advertisement as deceptive in order to determine whether a consumer acted reasonably under the circumstances.⁷⁴ Surveys of consumer perception are often the most important evidence in establishing this element.⁷⁵ If a claim meets the first and second elements, the court next looks to whether the representation is material.⁷⁶ Materiality requires that the claim affects consumers’ choices.⁷⁷ Both literally false and literally true but misleading advertisements can be actionable so long as the advertisement materially misleads consumers, meaning that the “consumer would perceive some important message that differs from the reality of the product.”⁷⁸

While misleading advertisements are actionable, they “must be distinguished from the non-actionable, vague, subjective assertions common in ads, known as puffery.”⁷⁹ The *Cliffdale* decision that found puffery inactionable has been reaffirmed in subsequent decisions in federal courts.⁸⁰

72. See Church, *supra* note 23, at 299 (noting that “express claims speak for themselves,” while implied claims are evaluated based on “the contents of the advertisement and the circumstances surrounding it”).

73. *Id.*

74. *Cliffdale*, 1984 FTC LEXIS 71, at *105; Church, *supra* note 23, at 300.

75. Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIMAL L. 25, 55 (2004). Surveys will be scrutinized based on whether:

[1] the population was properly chosen and defined; [2] the sample chosen was representative of that population; [3] the data gathered were accurately reported []; [4] the data were analyzed in accordance with accepted statistical principles . . . []; [5] the questions asked were clear and not leading; [6] the survey was conducted by qualified persons following proper interview procedures; and [7] the process was conducted so as to ensure objectivity (e.g., was the survey conducted in anticipation of litigation and by persons connected with the parties or counsel or aware of its purpose in the litigation?).

MANUAL FOR COMPLEX LITIGATION (THIRD) § 21.493 (1995).

76. *Cliffdale*, 1984 FTC LEXIS 71, at *107.

77. *In re Am. Home Prods.*, 98 F.T.C. 136, 1981 FTC LEXIS 1, at *14 (1973) (“[T]he existence of such a substantial question is a material fact, which, if known to consumers, would be likely to affect their consideration of whether or not to purchase such products.”); see Church, *supra* note 23, at 301.

78. Dillard, *supra* note 75, at 50-51. For example, “a package that was labeled ‘Potato Chips’ but in fact contained chips that were made from dried potato granules, as opposed to raw potatoes, was held to constitute false advertising.” *Id.* at 51.

79. *Id.* at 51.

80. See *In re Southwest Sunsites*, 105 F.T.C. 7, 1980 FTC LEXIS 86, at *324 (1985) (“The Commission stated in *Cliffdale* that an act or practice is deceptive if it consists of a

The concept asserts that a statement is “merely puffery,” rather than “deceptive,” if one “cannot refute the message with objective evidence.”⁸¹ Thus, questions for green advertising include: “When is a green marketing claim unlawful? [And] [h]ow far can manufacturers stretch the truth of vague terms like ‘environmentally friendly’ before they enter the realm of deceptiveness?”⁸²

C. Commercial Speech: First Amendment Challenges to Advertising Regulation

Manufacturers and industry groups have opposed advertising regulations specifically pertaining to product labeling on the grounds that it is a First Amendment violation of their commercial speech rights.⁸³ Interpretations of the First Amendment can therefore impact the creation of a national eco-labeling program, particularly one that contains specific definitions of environmental terms.⁸⁴

1. The Legal Precedent for Commercial Speech Regulations

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁸⁵ the Supreme Court held “for the first time that speech which does nothing more than propose a commercial transaction is entitled to First Amendment Protection.”⁸⁶ The Court reasoned that commercial advertising is a form of protected expression because it aids intelligent and informed choices by consumers.⁸⁷ The Court further clarified the meaning of “commercial speech” in *Cincinnati v. Discovery Network*,⁸⁸ by outlining factors that distinguish commercial speech.⁸⁹

representation, omission or practice that is both material and likely to mislead consumers acting reasonably under the circumstances.”); *see also* Wynne, *supra* note 17, at 790.

81. Dillard, *supra* note 75, at 51.

82. Wynne, *supra* note 17, at 803.

83. *Id.* at 813; *see also* Jamie Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG. 147, 183 (1993).

84. *See* Grodsky, *supra* note 83, at 184.

85. 425 U.S. 748 (1976).

86. David Hoch & Robert Franz, *Legal Developments: Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALB. L. REV. 441, 447 (1994) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

87. *Id.* (discussing *Va. State Bd. of Pharmacy*, 425 U.S. at 763-65, describing that society “may have a strong interest in the free flow of commercial information”).

88. 507 U.S. 410 (1993).

89. These factors include: (1) whether money is spent to project it; (2) whether the speech is carried in a publication sold for profit; (3) whether the speech solicits money; or (4) whether the speech is on a commercial subject. Peter J. Tarsney, Note, *Regulation of En-*

The Court established a four prong test to determine the constitutionality of restrictions on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁹⁰ There, the issue was whether New York's ban on promotional advertising by electric utilities violated the First Amendment.⁹¹ The Court held that for commercial speech to be protected by the First Amendment it must: first, "concern lawful activity and not be misleading;" second, the regulation must be supported by a substantial government interest; third, the law must directly advance the asserted government interest; and finally, the regulation cannot be more extensive than necessary to accomplish the government interest.⁹² In *Board of Trustees v. Fox*,⁹³ the Court diluted the fourth prong of the *Central Hudson* test by interpreting it to "employ not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective."⁹⁴ Despite the First Amendment protection that is granted to commercial speech, false or misleading commercial speech is excluded from any such protection.⁹⁵

The most recent challenge pitting environmental advertising regulations against commercial speech protection arose in *Association of National Advertisers, Inc. v. Lungren*.⁹⁶ In 1992, the Association of National Advertisers ("Association") filed a suit against the California Attorney General challenging a California statute⁹⁷ that defined several environmental terms and regulated their use in product advertising unless they met the statutory definition.⁹⁸ The Association claimed the statute violated its commercial

Environmental Marketing: Reassessing the Supreme Court's Protection of Commercial Speech, 69 NOTRE DAME L. REV. 533, 551-52 (1994); see also *Bd. of Tr. v. Fox*, 492 U.S. 469, 477 (1989); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (defining commercial speech as speech that does "no more than propose a commercial transaction").

90. 447 U.S. 557 (1980).

91. *Id.* at 560; Tarsney, *supra* note 89, at 548.

92. *Central Hudson*, 447 U.S. at 566.

93. 492 U.S. 469 (1989).

94. *Fox*, 492 U.S. at 480 ("What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends,—a fit that is not necessarily perfect, but reasonable." (internal citations omitted)); see also Brett B. Coffee, *Environmental Marketing After Association of National Advertisers v. Lungren: Still Searching For An Improved Regulatory Framework*, 6 FORDHAM ENVTL. L. REV. 297, 324-25 (1995); Tarsney, *supra* note 89, at 550.

95. Coffee, *supra* note 94, at 315 ("Commercial speech is entitled to First Amendment protection only if the speech is not misleading."); Rebecca Tushnet, *It Depends On What the Meaning of False Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227, 227 (2007) (citing *Central Hudson*, 447 U.S. at 566).

96. 44 F.3d 726 (9th Cir. 1994).

97. CAL. BUS. & PROF. CODE § 17508 (West 1995).

98. See *Ass'n of Nat'l Advertisers*, 44 F.3d at 727; Coffee, *supra* note 94, at 300-01.

speech rights under the First Amendment.⁹⁹ The Association argued that the statute “threw the regulatory requirements of national marketers into disorder and confusion” and created an “onerous burden on their ability to effectively communicate with the public.”¹⁰⁰ The Ninth Circuit evaluated the statute under the *Central Hudson* test and concluded that California’s interest in environmental and consumer protection was directly promoted by the statute.¹⁰¹ The State sought to protect against the legitimate concern of the “direct, predictable and ongoing result of green marketing—increased sales of goods as a result of potentially specious claims or ecological puffery about products with minimal environmental attributes.”¹⁰² Furthermore, the Court stated that “the statute increases consumer knowledge and awareness and discourages exploitation and deception”¹⁰³ because the monitoring provides a protective function that the average consumer cannot sufficiently perform.¹⁰⁴

2. Overcoming First Amendment Limitations

Based on the decision in *Association of National Advertisers v. California*, it is likely that the First Amendment would not pose a major obstacle to promulgating enforceable environmental advertising regulations.¹⁰⁵ The Supreme Court has upheld other labeling legislation, such as the Organic Food and Production Act and the Nutrition Labeling and Education Act, which suggests that “courts generally defer to regulatory limitations on commercial speech that fall short of comprehensive bans on advertising.”¹⁰⁶ In fact, the Supreme Court has even upheld federal labeling laws that *compel* commercial speech, such as provisions requiring manufacturers to provide explicit warnings to consumers.¹⁰⁷ These laws extend far

99. See *Ass’n of Nat’l Advertisers*, 44 F.3d at 728; Coffee, *supra* note 94, at 301.

100. Coffee, *supra* note 94, at 310-11.

101. See *Ass’n of Nat’l Advertisers*, 44 F.3d at 735.

102. *Id.*; see also Coffee, *supra* note 94, at 331.

103. *Ass’n of Nat’l Advertisers*, 44 F.3d at 733.

104. See Coffee, *supra* note 94, at 331.

105. Kimberly C. Cavanagh, *It’s A Lorax Kind of Market! But Is It A Sneetches Kind of Solution?: A Critical Review of Current Laissez-Faire Environmental Marketing Regulation*, 9 VILL. ENVTL. L.J. 133, 193-94 (1998); see also Grodsky, *supra* note 83, at 184-85 (“The First Amendment should not present a major barrier to environmental labeling statutes.”).

106. *Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989); Grodsky, *supra* note 83, at 185-86 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 569-70 (1980)).

107. This is known as mandatory, negative content labeling. See Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and Its Role in the “Greening” of World Trade*, 21 COLUM. J. ENVTL. L. 205, 211 (1996). A government man-

beyond the voluntary frameworks that have been suggested for environmental advertising.

Using the *Central Hudson* framework, an environmental labeling scheme is likely to meet the first prong because deceptive speech is not protected by the First Amendment.¹⁰⁸ Environmental advertising terms “implying general environmental benefits . . . are arguably deceptive per se.”¹⁰⁹ Furthermore, such regulations would encourage well-informed decisions in the marketplace because they are created to ensure accuracy and enhance “the market’s ability to serve as a mechanism not only of individual benefit to consumers and manufacturers, but also of environmental improvement.”¹¹⁰ Next, it is likely a court would give considerable deference to such advertising regulations because they concern potentially misleading speech.¹¹¹ Also, the government has a substantial interest in both protecting citizens from deceptive advertising, and promoting environmental policy.¹¹² Finally, environmental regulation is not only designed to achieve the government’s interest, but “[l]abeling laws that establish minimum thresholds . . . are far less restrictive than . . . laws that require manufacturers to meet or exceed” specific requirements.¹¹³ Manufacturers are only required to comply with the statute if they choose to make environmental claims for their products.¹¹⁴

D. The Current Framework for Environmental Advertising

1. Third Party Environmental Certification

Numerous private certification companies have emerged to fill the void created by the lack of government regulations.¹¹⁵ Private companies have put forth their own standards for what constitutes an “environmentally-friendly” product and award a certification seal of approval to a product that meets their specific standards.¹¹⁶ These seals are intended to provide

dated program requires product labeling prior to a sale that contains an environmentally harmful substance. *Id.* In the United States, the Clean Air Act requires products that contain chlorofluocarbons to have a warning label. *Id.*; see also Grodsky, *supra* note 83, at 185.

108. See *Central Hudson*, 447 U.S. at 566; Tushnet, *supra* note 95.

109. Grodsky, *supra* note 83, at 187.

110. Wynne, *supra* note 17, at 815.

111. See Grodsky, *supra* note 83, at 187.

112. See *id.* at 187-88.

113. *Id.* at 189.

114. See *id.* at 190.

115. See Downs, *supra* note 2, at 172.

116. See *id.* at 173.

verification to consumers that a product meets certain standards established by the organization.¹¹⁷

Because adopting an eco-seal is voluntary, a company's labeling initiative can indicate to consumers that the company is genuinely concerned with improving the environmental attributes of its products.¹¹⁸ As discussed above, with consumers' increased desire to make socially responsible choices in their purchases, private certification may increase consumer interest in the product.

Currently, there are two prominent eco-labeling programs that provide certification to companies and products with general environmental benefits.¹¹⁹ "Both seal programs attempt to provide accurate information to consumers about the environmental impact of products, while encouraging manufacturers to develop more environmentally sound products."¹²⁰ In 1989, Green Seal founded the first United States environmental seal of approval program.¹²¹ Green Seal is an independent, non-profit organization dedicated to "protecting the environment by promoting the manufacture and sale of environmentally responsible consumer products."¹²² Green Seal grants a certification mark to products satisfying predetermined environmental criteria.¹²³ Once a product is certified, a manufacturer pays a fee to Green Seal and can then use the seal of approval on their product.¹²⁴ The second company, Green Cross, now known as Scientific Certification Systems (SCS), issues an "Environmental Report Card," a content-neutral scheme that is designed solely to convey information about a product's environmental impact.¹²⁵ SCS determines which product categories to test and conducts an analysis to quantify a product's significant outputs during each stage of its life cycle.¹²⁶

While these certifications can provide information to a consumer, often they are a consumer's "only clue to the product's environmental impact"

117. See Zimmerman, *supra* note 9. Home Depot, for example, adopted a labeling initiative in 2007, transfixing an Eco Options brand label to approximately three thousand products. See Church, *supra* note 23, at 287-88 ("When consumers doubt a seller's claim, a third party evaluation or certification may . . . [have] the seller [rely] on the reputation of the third party evaluator.").

118. See Church, *supra* note 23, at 287.

119. See Downs, *supra* note 2, at 172.

120. Israel, *supra* note 58, at 322.

121. See Cavanagh, *supra* note 105, at 201-02.

122. *Id.* at 201.

123. See *id.* at 202.

124. See *id.*

125. Staffin, *supra* note 107, at 230-32.

126. See *id.* at 233.

prior to the purchase.¹²⁷ Though the FTC issues consumer guides to provide advice on environmental claims, about one in three consumers still assert that they do not know how to tell if green product claims are true.¹²⁸

2. *FTC's Framework: The Green Guides*

a. *History of the Green Guides*

Responding to public pressure to address the rise of deceptive environmental advertising, the FTC created the Guides for the Use of Environmental Claims ("Green Guides" or "Guides") in 1992.¹²⁹ The National Association of Attorney Generals (NAAG), a group of state attorney generals,¹³⁰ published the Green Report,¹³¹ which called "specifically for federal definitions of environmental marketing terms, federal testing protocols . . . and strong federal involvement."¹³² Even major corporations and manufacturers advocated for binding regulations and uniform standards to provide "national consistency" and "sufficient incentive for manufacturers to produce better products."¹³³

127. Downs, *supra* note 2, at 173.

128. *See id.* at 167 n.52.

129. Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (Aug. 13, 1992) (codified at 16 C.F.R. § 260 (1994), revised by 61 Fed. Reg. 53,311 (1996)); *see also* *FTC Chairman Steiger Announces National Guidelines to Prevent Misleading Environmental Marketing Claims*, Fed. Trade Comm'n, July 28, 1992, at 1 [hereinafter *FTC Chairman Steiger*], available at <http://www.p2pays.org/ref/32/31545.pdf>. The Green Guides were based on the FTC's review of data obtained from investigations, FTC hearings, and public comments. *Summary of FTC Environmental Marketing Guidelines*, Fed. Trade Comm'n, July 28, 1992, at 1 [hereinafter *Summary of Guidelines*], available at <http://www.p2pays.org/ref/32/31545.pdf>.

130. The NAAG was composed of eight State Attorney Generals who formed an ad hoc task force and sponsored a public forum where forty different organizations testified about standards for environmental advertising. *See* Luehr, *supra* note 2, at 314, 336 n.18.

131. CALIFORNIA ATTORNEY GENERAL ET AL., *THE GREEN REPORT: FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ADVERTISING* (1990) [hereinafter *THE GREEN REPORT*]. In May 1991, after holding additional hearings, the Task Force issued a second Green Report, which combined the findings. CALIFORNIA ATTORNEY GENERAL ET AL., *THE GREEN REPORT II: RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING* (1991) [hereinafter *THE GREEN REPORT II*]; *see also* Jeremy Abidiwan-Lupo, *The Green Marketing Machine: Tackling Green Advertising in the Automobile Industry*, 27 *TEMP. J. SCI. TECH. & ENVTL. L.* 359, 363-64 (2009).

132. *THE GREEN REPORT*, *supra* note 131, at iv; *see also* Israel, *supra* note 58, at 317-18; *Manufacturers, Retailers Petition FTC to Adopt Uniform Labeling Guidelines*, *ANTITRUST & TRADE REG. REP.*, Feb. 21, 1991, at 279.

133. Israel, *supra* note 58, at 318.

While the FTC considered developing environmental regulations,¹³⁴ environmentalists petitioned the EPA to develop scientific standards and definitions “capable of advancing a policy of environmental protection while preventing consumer deception.”¹³⁵ The EPA responded by announcing plans to formulate voluntary national guidelines.¹³⁶ The EPA proposed to: “(1) establish standards for the legitimate use of environmental claims; (2) determine the environmental benefits of various products; and (3) aid government officials and manufacturers in applying a life-cycle product assessment.”¹³⁷

Also during this period, two bills were proposed in the Senate authorizing the EPA to “create voluntary national guidelines for environmental marketing terminology.”¹³⁸ The bills required the EPA to set definitional standards and mandated a public education program to raise awareness of environmental marketing.¹³⁹ However, the bills did not garner enough congressional support and both died in the Senate.¹⁴⁰

Following congressional defeat of the bills, the FTC announced its publication of the Green Guides.¹⁴¹ The emergence of FTC Guides “squashed all attempts to put EPA at the helm of the environmental marketing movement.”¹⁴² In its announcement, the FTC “underscored the difference between its goals and those of the EPA,”¹⁴³ namely that “the Guides are neither based on nor intended to implement environmental policy.”¹⁴⁴ FTC Chairwoman Janet Steiger further stated that any environmental impact

134. The FTC held its own hearings in July 1991 on the issue of environmental marketing regulations. *See* Sunshine Act Meetings, Public Hearings Concerning Environmental Claims and Product Labeling and Marketing, 56 Fed. Reg. 32,472 (July 16, 1991). Following the publication of the Guides, the FTC sought public comment and the subsequent revisions were published on October 11, 1996.

135. Cavanagh, *supra* note 105, at 162.

136. *See id.*

137. *Id.*

138. *Id.* at 160; *see also* Grodsky, *supra* note 83, at 166 (“The proposed Environmental Marketing Claims Act would have directed the EPA to verify that each environmental marketing claim is related to a ‘specific’ environmental impact to ensure that it is not false, misleading or deceptive, and that it has been scientifically substantiated.”).

139. *See* Cavanagh, *supra* note 105, at 160-61.

140. *See id.* at 161.

141. *See* The Green Guides, *supra* note 129; *FTC Chairman Steiger, supra* note 129. The Green Guides were based on the FTC’s review of data obtained from investigations, FTC hearings, and public comments. *See* The Green Guides, *supra* note 129.

142. Cavanagh, *supra* note 105, at 142.

143. *Id.* at 163 (citing *Petitions for Environmental Marketing and Advertising Guides: Public Hearings*, 56 Fed. Reg. 24,968 (1991)).

144. *Relating to the Federal Trade Commission’s Guides for the Use of Environmental Marketing Claims*, Fed. Trade Comm’n, July 28, 1992, at 3, available at <http://www.p2pays.org/ref/32/31545.pdf>.

would be minimized because the Green Guides are simply voluntary guidelines.¹⁴⁵ Instead, they are merely intended to promote “voluntary compliance with such laws by members of industry.”¹⁴⁶ Because the guidelines are voluntary, environmental claims are evaluated under the same standard of typical deceptive trade practices and result in FTC action only if the practices directly violate enforceable statutory provisions.¹⁴⁷ By rejecting the EPA’s environmental expertise, “put simply, the agency with enforcement expertise lacks the appropriate mission, and the agency with the mission lacks enforcement authority.”¹⁴⁸

b. The Green Guides’ Requirements for Environmental Claims

The Green Guides state that “it is deceptive to misrepresent, directly or by implication, that a product, package, or service offers a general environmental benefit.”¹⁴⁹ Any environmental qualifications or disclosures for a product must be made “sufficiently clear and prominent,”¹⁵⁰ and manufacturers must clarify whether a claim applies to a product, its packaging, or a service.¹⁵¹ Furthermore, an environmental claim is not permitted to overstate a benefit and an advertisement comparing products is required to state a substantiated basis.¹⁵²

Additionally, the Guides elaborate on six categories pertaining to recycling, waste management, and depletion of the ozone layers,¹⁵³ which were the prominent environmental terms used in green advertising during the 1990s. The product categories provide obscure definitions for terms like “biodegradable,” “compostable,” “recyclable,” and “ozone friendly.”¹⁵⁴

145. *Id.* at 4; Abidiwan-Lupo, *supra* note 131, at 364 (“While the Guide uses a strong and commanding tone, the provisions contained therein are not enforceable and have no lawful force or effect.”).

146. Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.1 (1996); see also Jeremy Rosen, *Requirements for Environmental Marketing Claims Under the Federal Trade Commission’s Guidelines*, 4 ENVTL. LAW. 241, 243 (1997).

147. See 16 C.F.R. § 260.5 (1996).

148. Grodsky, *supra* note 83, at 176.

149. 16 C.F.R. § 260.7(a) (1996); see *Summary of Guidelines*, *supra* note 129, at 1-2.

150. *Summary of Guidelines*, *supra* note 129, at 1.

151. See 16 C.F.R. § 260.7(a) (1996); see also *Summary of Guidelines*, *supra* note 129, at 2.

152. See 16 C.F.R. § 260.6(d) (1996); see also Rosen, *supra* note 146, at 244; *Summary of Guidelines*, *supra* note 129, at 2.

153. See 16 C.F.R. § 260.7(a)-(h); see also Gregory Bibler et al., *Making the Case for Your Green Marketing Claims*, MONDAQ BUS. BRIEFING (Sept. 22, 2008), available at <http://www.mondaq.com/unitedstates/article.asp?articleid=66476> (describing the categories of claims discussed in the Guides).

154. 16 C.F.R. § 260.7(b)-(h).

The terms are intentionally vague because the definitions are not scientific, but instead are based on the FTC's belief of possible "reasonable interpretations" of the terms to consumers.¹⁵⁵ Broad claims are thus considered deceptive only when a claim cannot be substantiated at all by *any* scientific evidence.¹⁵⁶

E. The EPA's Authority to Regulate Environmental Advertising

Because environmental advertising regulations require an "intricate weaving of environmental policy and consumer protection principles," the question arises whether the EPA has the authority to implement advertising regulations and an eco-labeling program without overstepping its congressional mandate.¹⁵⁷

Currently, the EPA is the chief enforcement agency for five main areas,¹⁵⁸ and in each of these areas, the Agency has promulgated labeling regulations.¹⁵⁹ For example, the Solid Waste Disposal Act prompted a labeling directive requiring lubricating oil to bear a statement urging recycling to promote the minimization of hazardous waste.¹⁶⁰ The EPA also promulgated labeling regulations pertaining to ozone depletion in response to the Clean Air Act of 1990.¹⁶¹

One prominent EPA labeling program is ENERGY STAR ("Energy Star"), a voluntary labeling program that awards companies the label when they meet the established criteria for energy efficiency.¹⁶² Energy Star was established and is regulated jointly by the EPA and the United States Department of Energy (DOE) without congressional authorization.¹⁶³ The goals of Energy Star are to provide consumers with energy efficient prod-

155. Woods, *supra* note 15, at 78.

156. See 16 C.F.R. § 260.5 (1996); see also Policy Statement Regarding Advertising Substantiation Program, 49 Fed. Reg. 30,999-31,003 (Aug. 2, 1984); Woods, *supra* note 15, at 78 (stating that one commissioner explained that the Guides require acceptance of any and all reasonable interpretations).

157. Grodsky, *supra* note 83, at 172.

158. The five main areas are: (1) compliance with vehicle emissions standards; (2) placement of warning labels on ozone-detrimental products; (3) participation in the national recycling and emissions reduction program; (4) elimination of nonessential products containing chlorofluorocarbons; and (5) greenhouse gas emissions. See Cavanagh, *supra* note 105, at 164-65.

159. See *id.*

160. See *id.*

161. See 42 U.S.C. § 7671(j) (1998); Staffin, *supra* note 107, at 213.

162. See Stacey O'Neill, *Consuming for the Environment: A Proposal for Carbon Labels in the U.S.*, 39 CAL. W. INT'L L.J. 393, 406 (2009).

163. See *History of Energy Star*, ENERGY STAR, http://www.energystar.gov/index.cfm?c=about.ab_history (last visited Sept. 29, 2010).

ucts,¹⁶⁴ and to “identify and promote energy-efficient products to reduce greenhouse gas emissions.”¹⁶⁵ To implement these goals, the DOE sets minimum energy efficiency requirements for each product category.¹⁶⁶ The program then partners with manufacturers of the products that are eligible for Energy Star certification.¹⁶⁷ Manufacturers can seek Energy Star certification by making a set of commitments that their products meet the energy efficiency criteria.¹⁶⁸ The EPA signs a Memorandum of Understanding with the manufacturer that outlines the responsibilities of each party, provides the manufacturer with the Energy Star approval logo, and adds the manufacturer to a published list of certified products and companies.¹⁶⁹

To date, over twelve thousand private and public organizations have partnered with Energy Star.¹⁷⁰ Energy Star labels appear on over sixty product categories and thousands of products in the United States.¹⁷¹ The success of the program is apparent not only by the high participation in this voluntary program, but in the recorded cost savings of seventeen billion dollars in 2009 alone.¹⁷² An additional success is consumer recognition and awareness of the label: seventy-six percent of households now recognize the Energy Star label, and of that percentage, seventy-eight percent had a high or general understanding of the label’s purpose.¹⁷³ “By increasing consumer awareness and facilitating the purchase of energy efficient products, the Energy Star program has likely generated significant reductions in greenhouse gas emissions.”¹⁷⁴ The expansiveness of the Energy Star labeling program and its focus on energy efficiency through the reduc-

164. *See id.*

165. *Id.*

166. *See* Staffin, *supra* note 107, at 214-15. The list of appliances includes refrigerators, freezers, water heaters, air conditioners, heat pumps, washers, dishwashers, furnaces, lamps, showerheads, faucets, and water closets. *See Find Energy Star Products*, ENERGY STAR, http://www.energystar.gov/index.cfm?c=products.pr_find_es_products (last visited Sept. 29, 2010).

167. *See* Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVTL. L.J. 311, 328 (2007); *see also* Cavanagh, *supra* note 105, at 167.

168. *See* Livermore, *supra* note 167.

169. Cavanagh, *supra* note 105, at 167-68; *see also* Livermore, *supra* note 167.

170. O’Neill, *supra* note 162, at 416; *History of Energy Star*, *supra* note 163.

171. *History of Energy Star*, *supra* note 163.

172. *Id.*

173. ENVTL. PROTECTION AGENCY, NATIONAL AWARENESS OF ENERGY STAR FOR 2008: ANALYSIS OF CEE HOUSEHOLD SURVEY ES1 (Apr. 2009), *available at* http://www.energystar.gov/ia/partners/publications/pubdocs/National%20Awareness%20of%20ENERGY%20STAR%202008%20to%20EPA_4-9-09.pdf.

174. Livermore, *supra* note 167, at 329.

tion of greenhouse gas emissions implies that the EPA has the authority to implement a national labeling program to educate and incentivize consumers to reduce greenhouse gas emissions.

Despite its commitment to the Energy Star program, in *Massachusetts v. EPA*,¹⁷⁵ the EPA argued that the Clean Air Act¹⁷⁶ neither authorized the EPA to address climate change nor gave it the statutory authority to regulate greenhouse gas emissions from motor vehicles.¹⁷⁷ In this case, a group of states, local governments, and private organizations brought suit against the EPA for “abdicat[ing] its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide.”¹⁷⁸ The Clean Air Act provides that the EPA administrator should create standards for the emissions of any air pollutant from any class of new motor vehicles.¹⁷⁹ The Act defines “air pollutant” to include “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is admitted into or otherwise enters the ambient air.”¹⁸⁰ The EPA, however, denied that it had the authority to regulate carbon dioxide as an air pollutant because “carbon dioxide is not an air pollutant as that term is defined in § 7602.”¹⁸¹ The Supreme Court disagreed and found that that carbon dioxide was included in the “Clean Air Act’s sweeping definition of ‘air pollutant.’”¹⁸² The Court held that “[c]arbon dioxide . . . [is] without a doubt [a] ‘physical [and] chemical . . . substance which [is] emitted into . . . the ambient air.’ The statute is unambiguous.”¹⁸³ Accordingly, the Court held that “[b]ecause greenhouse gases fit well within the Clean Air Act’s capacious definition of ‘air pollutant’ . . . [the] EPA has the statutory authority to regulate the emission of greenhouse gases from new motor vehicles.”¹⁸⁴ Although the ruling in *Massachusetts v. EPA* specifically pertained to the regulation of new motor vehicles, it is significant to note that the Supreme

175. 549 U.S. 497 (2007).

176. “The Clean Air Act is the comprehensive federal law that regulates air emissions from stationary and mobile sources. . . . Section 112 of the Clean Air Act addresses emissions of hazardous air pollutants.” *Summary of the Clean Air Act*, ENVTL. PROTECTION AGENCY, Feb. 12, 2010, <http://www.epa.gov/lawsregs/laws/caa.html>.

177. *See Massachusetts v. EPA*, 549 U.S. at 505; O’Neill, *supra* note 162, at 427-28.

178. *Massachusetts v. EPA*, 549 U.S. at 505; O’Neill, *supra* note 162, at 427.

179. *See Massachusetts v. EPA*, 549 U.S. at 506 (citing the Clean Air Act, § 202 (a)(1), as added by Pub. L. 89-272, § 101(8), 79 Stat. 992 and amended by 84 Stat. 1690 and 91 Stat. 791, at 42 U.S.C. § 7521(a)(1)).

180. *Id.* (citing 42 U.S.C. § 7602(g)).

181. *Id.* at 528.

182. *Id.*; *see also* O’Neill, *supra* note 162, at 428.

183. *Massachusetts*, 549 U.S. at 529.

184. *Id.* at 532; *see also* O’Neill, *supra* note 162, at 428.

Court has recognized the EPA's authority to regulate greenhouse gases, including carbon emissions.¹⁸⁵ The EPA's initial reluctance to regulate carbon emissions, however, suggests that it may be equally reluctant to impose a voluntary nationwide eco-labeling effort in the United States,¹⁸⁶ particularly without a direct congressional mandate.

F. Eco-Labeling Experience: Current United States and International Frameworks

In considering the implementation of a carbon eco-labeling program, a closer look at other labeling models provides guidance. This section first examines the framework for "organic" labeled products in the United States, which has achieved national success with a non-binding voluntary labeling program that issued uniform definitions. Second, Germany's Blue Angel program is a prime example of how an eco-labeling program can integrate the public and private sector in addition to building credibility among consumers. Finally, the recent creation of the United Kingdom Carbon Trust shows a public-private hybrid model specifically pertaining to carbon labeling that is becoming increasingly successful over time.

1. *The Organic Foods Product Act: Organic Products Labeling*

In the early 1990s, organic farming became a practice that has maintained both its social popularity and continually increasing sales.¹⁸⁷ In 1990, sales of organic products in the United States were one billion dollars.¹⁸⁸ Between 1992 and 1997, organic cropland more than doubled.¹⁸⁹ Sales increased twenty percent annually from 1990 to 2000,¹⁹⁰ and in 2008, organic sales in the United States reached nearly twenty-three billion dol-

185. O' Neill, *supra* note 162, at 429; *see also* John C. Dernbach & Seema Kakade, *Climate Change Law: An Introduction*, 29 ENERGY L.J. 1, 25 (2008).

186. O' Neill, *supra* note 162, at 427.

187. CATHERINE R. GREENE, U.S. DEP'T OF AGRIC., U.S. ORGANIC FARMING EMERGES IN THE 1990S, ADOPTION OF CERTIFIED SYSTEMS 1 (2001), *available at* <http://www.ers.usda.gov/Publications/AIB770/> (stating that organic farming systems prohibit the use of synthetic chemicals in crop production and hormones in livestock).

188. ORGANIC TRADE ASS'N, 2007 OTA MANUFACTURER SURVEY, INDUSTRY STATISTICS AND PROJECTED GROWTH (2007), *available at* <http://www.ota.com/organic/mt/business.html> [hereinafter 2007 OTA MANUFACTURER SURVEY].

189. Lauren Zeichner, *Product v. Process: Two Labeling Regimes for Genetically Engineered Foods and How They Relate to Consumer Preference*, 27 ENVIRONS ENVTL. L. & POL'Y J. 467, 471 (2004); *see also* GREENE, *supra* note 187, at 7 tbl.4.

190. *See* GREENE, *supra* note 187, at 2-3; Zeichner, *supra* note 189;.

lars.¹⁹¹ Organic product sales are still anticipated to continue rising steadily, despite their premium prices in an economic recession.¹⁹²

Similar to consumer incentives with environmental labels, the average consumer's "willingness to pay a premium for products bearing the 'organic' label is based, in significant part, on the perception that he/she will receive a product with special attributes These attributes . . . create a brand image and justify the increased cost."¹⁹³ A recent 2009 study on United States families' organic attitudes and beliefs substantiated this claim.¹⁹⁴ The study found that seventy-three percent of families buy organic products at least occasionally, primarily because they believe organic products possess specialized and increased benefits.¹⁹⁵

Prior to 1990, there were no regulations governing organic standards or product labeling; instead, private companies created their own standards and certifications.¹⁹⁶ However, the proliferation of organic products caused confusion among consumers, who could not verify the authenticity of organic claims.¹⁹⁷ As a result, conflicting and misleading claims threatened to undermine consumer confidence in organic products.¹⁹⁸ In turn, consumers and retailers became reluctant to purchase organic products.¹⁹⁹ Consumers were unable to find organic food in major supermarkets because of "large food distributors' skepticism regarding organic claims and their inability to work directly with growers on certification."²⁰⁰

In response to the misleading claims, conflicting standards, and consumer confusion, Congress enacted the Organic Foods Production Act (OFPA) of 1990.²⁰¹ The OFPA has three main goals: (1) establish national standards governing the marketing of certain agricultural products as organically produced; (2) assure consumers that organically produced products met a con-

191. See ORGANIC TRADE ASS'N, 2009 ORGANIC INDUSTRY SURVEY 1 (May 2009), available at http://www.organicnewsroom.com/2009/05/organic_trade_association_rele_1.html.

192. See 2007 OTA MANUFACTURER SURVEY, *supra* note 188, at 2.

193. A. Bryan Endres, *An Awkward Adolescence in the Organics Industry: Coming to Terms With Big Organics and Other Legal Challenges for the Industry's Next Ten Years*, 12 DRAKE J. AGRIC. L. 17, 32 (2007).

194. See ORGANIC TRADE ASS'N, 2009 U.S. FAMILIES' ORGANIC ATTITUDES & BELIEFS STUDY 2 (2009).

195. See *id.*

196. See Zeichner, *supra* note 189.

197. See Maria Savasta-Kennedy, *The Newest Hybrid: Notes Toward Standardized Certification of Carbon Offsets*, 34 N.C. J. INT'L L. & COM. REG. 851, 872 (2009).

198. See *id.*; see also Tushnet, *supra* note 95, at 241.

199. See Savasta-Kennedy, *supra* note 197.

200. Endres, *supra* note 193, at 20; see also S. Rep. No. 101-357, at 267 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4944.

201. 7 U.S.C. §§ 6501-6515 (2004); see also Zeichner, *supra* note 189, at 472.

sistent standard; and (3) facilitate interstate commerce.²⁰² Accordingly, the OFPA provides “national standards for organic production so that farmers know the rules, so that consumers are sure to get what they pay for, and so national and international trade in organic foods may prosper.”²⁰³ The focus of the OFPA is not to promote the healthiness or nutritional quality of organic products,²⁰⁴ rather, it is a marketing-oriented statute designed to reduce consumer confusion.²⁰⁵

The OFPA delegated responsibility to the United States Department of Agriculture (USDA) to implement the statute by establishing uniform standards for organic products as well as a certification program.²⁰⁶ The Act created the National Organic Program (NOP) within the USDA to develop the details of the organic regulations.²⁰⁷ The NOP created standards with the input of the National Organics Standards Board, which was composed of farmers, handlers, retailers, consumers, environmentalists, and scientists appointed by the Secretary of Agriculture.²⁰⁸ The regulations also created USDA-accredited agents—largely private entities who grant certification if a product complies with established organic standards.²⁰⁹ The organic producers select their own accrediting agents to obtain organic certification.²¹⁰

2. *International Success: Germany’s Blue Angel Program*

Germany, “touted as the ‘pioneer’ of eco labels,”²¹¹ instituted the first government-sponsored certification in 1977 called the “Blue Angel Program.”²¹² The program relies on voluntary commitments from manufactur-

202. 7 U.S.C. § 6501; *see also* Zeichner, *supra* note 189, at 472.

203. Endres, *supra* note 193, at 20 (citing S. REP. NO. 101-357, at 267 (1990)); *see also* Tushnet, *supra* note 95, at 241 (citing Labels, Labeling, and Market Information, 7 C.F.R. § 205.300 (2007), which requires that organic products have at least ninety-five percent organic content and the remainder must be on an approved list of ingredients).

204. *See* Endres, *supra* note 193, at 20; *see also* Grading, Certification, and Verification, U.S. DEP’T OF AGRIC., <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateA&navID=GradingCertificationandVerification&leftNav=GradingCertificationandVerification&page=GradingCertificationAndVerification> (last modified May 29, 2009).

205. *See* Savasta-Kennedy, *supra* note 197, at 874.

206. *See* 7 U.S.C. § 6503(a) (2004); *see also* Zeichner, *supra* note 189, at 473.

207. *See* 7 U.S.C. § 6504 (2004).

208. *See* Zeichner, *supra* note 189, at 473.

209. *See* 7 U.S.C. §§ 6514-6515 (2004); Endres, *supra* note 193.

210. *See* 7 U.S.C. § 6515.

211. Cavanagh, *supra* note 105, at 194.

212. *Id.*; *see also* Abidiwan-Lupo, *supra* note 131, at 365 (“Germany does not have a particular statute prohibiting green advertising, but does have a government-sponsored national eco-labeling program called the Blue Angel program.”).

ers rather than a mandatory labeling program.²¹³ Germany's regulation is now a model replicated by other similar regulatory systems around the world.²¹⁴

The Blue Angel Program develops product categories and awards eco-labels to products that comply with the determined criteria.²¹⁵ The process for creating an eco-label category requires a proposal to the Federal Environmental Agency,²¹⁶ which reports to the Environmental Label Jury, an agency charged with reviewing and choosing categories for the program.²¹⁷ The Environmental Label Jury is composed of representatives from union, consumer, industrial, and environmental organizations.²¹⁸ The Environmental Label Jury examines public and governmental proposals²¹⁹ and decides which proposed categories should be tested by the Federal Environmental Institute.²²⁰ The Federal Environmental Agency then performs testing using a life cycle analysis to determine at what stage a product has the most significant environmental impact.²²¹ The Federal Environmental Agency drafts criteria for an approved product group and forwards it to the German Institute for Quality Assurance and Labeling ("Institute") for further review.²²² The Institute holds hearings where industry representatives, consumer and environmental organizations, scientists, and testing institutes ask questions and make comments on the proposed criteria.²²³ The Institute forwards its comments on the criteria to the Environmental Labeling Jury, which has the final authority to approve a new category for eco-labels.²²⁴

After a new category has been approved, manufacturers can submit their products to the Federal Environmental Agency to determine if they meet

213. See Abidiwan-Lupo, *supra* note 131, at 365.

214. See *id.*; see also Cavanaugh, *supra* note 105, at 198-200.

215. See Abidiwan-Lupo, *supra* note 131, at 365.

216. *The Blue Angel*, GREENLABELSPURCHASE (2006), <http://www.greenlabelspurchase.net/oe-blue-angel.html>; see also Abidiwan-Lupo, *supra* note 131, at 365-66.

217. See Staffin, *supra* note 107, at 225.

218. See Cavanaugh, *supra* note 105, at 194.

219. See *id.*

220. See Staffin, *supra* note 107, at 225.

221. *The Blue Angel*, GREENLABELSPURCHASE, *supra* note 216; see also Abidiwan-Lupo, *supra* note 131, at 366.

222. *The Blue Angel*, GREENLABELSPURCHASE, *supra* note 216; see also Abidiwan-Lupo, *supra* note 131, at 366.

223. See Abidiwan-Lupo, *supra* note 131, at 366.

224. See Staffin, *supra* note 107, at 225. Examples of final standards for a product category include: (1) minimum levels of energy consumption; (2) utilization of recycled materials; (3) product biodegradability; (4) prohibition of certain hazardous substances; and (5) reduced noise levels. See Cavanaugh, *supra* note 105, at 195.

the required criteria.²²⁵ “The manufacturer’s criteria are verified by evaluating ‘statements from the manufacturer, testing by independent facilities, and data and product information sheets.’”²²⁶ If the criteria are met, the Blue Angel Program enters into an agreement with the manufacturer which permits them to use the Blue Angel logo on that product’s packaging and direct product advertising for three years in exchange for a licensing fee.²²⁷ The agreement requires the manufacturer to pay an annual fee based on estimated annual sales of the products and a contribution to the advertising fund for the Blue Angel Program.²²⁸

Since 1993, the Blue Angel eco-label has appeared on over 3500 products in approximately seventy-five product categories.²²⁹ The Blue Angel eco-label is used by approximately 895 licensees for approximately 11,500 products.²³⁰ The label has a recognition rate of seventy-nine percent among consumers.²³¹ Its success has shown that over time, consumer awareness of a brand, understanding environmental issues, and trust in a label’s credibility can be accomplished.

3. UK Carbon Trust: A Carbon Eco-Labeling Model

In 2001, the British government created the Carbon Trust, an independent company, to work with private organizations to reduce their overall carbon emissions and develop low carbon technologies.²³² Carbon Trust provides “specialist support to business and the public sector to help cut carbon emissions, save energy and commercialise low carbon technologies.”²³³

Carbon Trust created the Carbon Trust Footprinting Company, which works with companies “to measure, reduce and communicate the lifecycle

225. See Staffin, *supra* note 107, at 225-26.

226. Abidwan-Lupo, *supra* note 131, at 366 (quoting *Environmental Labeling Issues, Policies, and Practices Worldwide*, EPA Doc. No. 742-R-98-009 app. B-49, U.S. ENVTL. PROT. AGENCY (1998), <http://www.epa.gov/epp/pubs.wwlabel3.php>).

227. See Staffin, *supra* note 107, at 225-26. Staffin notes that while there is some variation in the administrative structure of voluntary eco-labeling programs, most follow the same process of selecting of categories, testing, setting criteria, and awarding seals of approval. *Id.* at 224.

228. See Abidwan-Lupo, *supra* note 131, at 366.

229. *The Blue Angel in Numbers*, THE BLUE ANGEL, http://www.blauer-engel.de/en/blauer_engel/balance/index.php (last visited Sept. 29, 2010); see also Staffin, *supra* note 107, at 226.

230. *The Blue Angel in Numbers*, THE BLUE ANGEL, *supra* note 229.

231. *Id.*

232. See O’Neill, *supra* note 162, at 421.

233. *About the Carbon Trust: What We Do*, THE CARBON TRUST (2009), <http://www.carbontrust.co.uk/about-carbon-trust/what-we-do/pages/default.aspx>.

greenhouse gas (GHG) emissions of their products and services.”²³⁴ It attempts to address consumer needs by aiding individuals in making choices to lower their respective carbon footprints.²³⁵ In 2009, the Carbon Trust Footprinting Certification Company was established “to provide independent and impartial certification services for product carbon footprints.”²³⁶ The company applies a standard set of criteria to product categories measuring the carbon footprint of products and services.²³⁷ To calculate a company’s carbon footprint, the company itself uses Carbon Trust’s “Footprint Expert,” a toolkit that allows organizations to calculate their footprints as efficiently and cost-effectively as possible.²³⁸ If a company’s carbon footprint is in compliance with the certification requirements of the “Footprint Expert” within that product category, the Carbon Trust Footprinting Certification Company will provide certification to the company and their products.²³⁹ A company’s products and services can then display the Carbon Reduction Label, which shows the product’s carbon footprint throughout its lifecycle.²⁴⁰ A company that chooses to place the label on their product is signaling a commitment to consumers to reduce the carbon footprint of that product; if the company does not reduce their carbon footprint within two years, the label will be withdrawn.²⁴¹

Since the introduction of the Carbon Reduction Label,²⁴² “there are twenty companies with approximately seventy-five products” using the carbon labeling program.²⁴³ These include major companies, such as Boots (Europe’s leading pharmacy and beauty chain stores), PepsiCo, Tesco Su-

234. *About the Carbon Trust Footprinting Company*, THE CARBON TRUST (2009), <http://www.carbon-label.com/business/about.htm>.

235. *Id.*

236. *Id.*

237. *The Footprinting Process*, THE CARBON TRUST (2009), <http://www.carbon-label.com/business/footprintingProcess.htm>; see also O’Neill, *supra* note 162, at 423-24. The measurement process requires: (1) building a process map, including setting boundaries, understanding available data, and identifying sources; (2) collecting primary data from members of the supply chain and collating secondary data; (3) assessing materiality; and (4) building the carbon footprint. *The Footprinting Process*, *supra*.

238. *The Footprinting Process*, *supra* note 237.

239. *Independent Certification*, THE CARBON TRUST (2009), <http://www.carbon-label.com/business/certification.htm>.

240. See *The Carbon Reduction Label Explained*, THE CARBON TRUST (2009), <http://www.carbon-label.com/business/label.htm>.

241. See O’Neill, *supra* note 162, at 422.

242. *Carbon Trust Launches Carbon Reduction Label*, THE CARBON TRUST, at 1 (Mar. 16, 2007), <http://www.carbon-label.com/news/16.03.07.pdf>; see also O’Neill, *supra* note 162, at 424 (“Carbon labels were unveiled on shelves in the UK in April 2007.”).

243. O’Neill, *supra* note 162, at 424.

permarkets, Coca-Cola, Marshalls, and Kimberly Clark.²⁴⁴ While a majority of consumers still do not understand the meaning of carbon footprints, consumers still have “welcomed having environmental information on products.”²⁴⁵ A June 2009 Carbon Trust survey of one thousand consumers across the UK found that almost two-thirds of consumers were more likely to buy a product if they knew action was being taken to reduce its carbon footprint.²⁴⁶

G. The New Generation of Environmental Claims: Carbon Neutrality and Offsets

1. Current Review of the Green Guides

In 2007, the FTC acknowledged that new advertising terminology was becoming commonplace and began reevaluating its guidelines with a series of public workshops.²⁴⁷ “The FTC specifically asked whether the Green Guides should be modified to include guidance regarding . . . claims invoking the phrases ‘renewable energy’ and ‘carbon offset.’”²⁴⁸ At an April 2008 workshop, FTC Chairman William Kovacic stated that the FTC’s goal was to ensure that consumers maintain confidence in the truthfulness of advertising claims in an age of changing “social norms” and industry development.²⁴⁹ John Kalkowski noted that he is hearing more and more terms that were “not even in our lexicon a few years ago.”²⁵⁰ At a January 2008 workshop, the FTC specifically discussed the increasing focus of ad-

244. See Press Release, The Carbon Trust, High Street Failing on Footprinting, Say Consumers (June 2009), <http://www.carbon-label.com/news/16.06.09.pdf>; see also O’Neill, *supra* note 162, at 424 (explaining that the first product to display the Carbon Reduction Label was Walker’s Cheese and Onion Crisps).

245. James Murray, *Tesco Defends Carbon Label Scheme*, BUSINESSGREEN (May 21, 2008), <http://www.businessgreen.com/business-green/news/2217167/tesco-defends-carbon-label>.

246. See Press Release, The Carbon Trust, *supra* note 244.

247. See Savasta-Kennedy, *supra* note 197, at 869-70.

248. Gibson, *supra* note 35, at 430; see also Savasta-Kennedy, *supra* note 197, at 870 (stating that the FTC is now considering whether to amend the Green Guides to include carbon offsets).

249. William Kovacic, Chairman, Fed. Trade Comm’n, Opening Remarks at the Fed. Trade Comm’n’s Workshop on Green Packaging Claims 17 (Apr. 30, 2008), available at <http://www.ftc.gov/bcp/workshops/packaging/transcript.pdf>.

250. John Kalkowski, Editor, Packaging Digest Mag., Remarks at the Fed. Trade Comm’n’s Workshop on Green Packaging Claims 23 (Apr. 30, 2008), available at <http://www.ftc.gov/bcp/workshops/packaging/transcript.pdf>.

vertisement on a product's carbon footprint,²⁵¹ claims of carbon neutrality,²⁵² and carbon offset reduction.²⁵³

Although the revised Green Guides were supposed to be released in April 2009, the FTC still has not released any revisions or updates.²⁵⁴ The FTC released a notice that it is considering "conducting its own study related to consumer perception of environmental marketing claims"²⁵⁵ to "compare participant responses regarding the meaning of different environmental marketing claims."²⁵⁶ At the June 2009 House of Energy and Commerce subcommittee on Trade and Consumer Protection, Kohm explained that though the workshops resulted in useful information and response, the FTC obtained little information about how consumers understand certain claims.²⁵⁷ He stated that the FTC "plans to conduct its own research," but had no anticipated release date for the revisions.²⁵⁸

2. *The New Terminology: Carbon Neutrality and Carbon Offsets*

Carbon has become increasingly prominent both in product labeling and advertisements for consumers to purchase goods that offset individuals' carbon footprints.²⁵⁹ In the United States, sixty percent of an individual's carbon footprint is attributable to one's goods and services purchases; thus, the "impetus for carbon labels is that by providing consumers with information about the carbon content of a product, they will be able to make informed decisions about the goods they purchase and ultimately choose products with a smaller carbon footprint."²⁶⁰ Despite concerns of consum-

251. See *infra* notes 254-79 and accompanying text.

252. See *infra* notes 254-79 and accompanying text.

253. See *infra* notes 254-79 and accompanying text.

254. See generally *It's Too Easy Being Green: Defining Fair Green Marketing Practices: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 111th Cong. (2009) (statement of James Kohm, Dir. Enforcement Div., Fed. Trade Comm'n) [hereinafter *It's Too Easy Being Green*].

255. Agency Information Collection Activities, 74 Fed. Reg. 90,396 (Fed. Trade Comm'n May 11, 2009).

256. *Id.*

257. See *It's Too Easy Being Green*, *supra* note 254.

258. *Id.* at 4-5.

259. See Woods, *supra* note 15, at 83; see also Majoras, *supra* note 3, at 13 ("The term 'carbon neutral' has received a lot of attention."); O'Neill, *supra* note 162, at 422; Savast-Kennedy, *supra* note 197, at 851-52 ("Anyone who has booked online an airline flight, a hotel room, or rented a car in the last few years has had the opportunity to 'offset' the greenhouse gas (GHG) pollution . . . by investing in a carbon offset."); *Federal Trade Commission Webcast of Workshop Examining Market for Carbon Offsets*, ENVTL. EVALUATION ORG. (Jan. 14, 2008), <http://www.envirovaluation.org/index.php/2008/01/14/> [hereinafter *Webcast*].

260. O'Neill, *supra* note 162, at 396.

er confusion, “[t]he sale of carbon offsets . . . if marketed truthfully, can provide interested consumers the opportunity to participate in this market . . . that may reduce emissions.”²⁶¹

Many products bear a “carbon-neutral” label, which is accomplished by offsetting the carbon emissions.²⁶² A carbon offset displaces or sequesters greenhouse gas emissions in one location to compensate for the emissions that occur at another source location.²⁶³ The cost of a carbon offset program should be directed to “alternative energy development and sustainability initiatives.”²⁶⁴ Yet, most consumers lack real awareness of the actual definition of a carbon offset.²⁶⁵ For example, a survey conducted by the Shelton Group asked consumers to place a check next to any true statement about carbon dioxide and forty-nine percent incorrectly answered that carbon dioxide depletes the ozone layer.²⁶⁶ Furthermore, it is extremely difficult for consumers to verify purchases of carbon offsets because the offsetting generally occurs away from the consumers.²⁶⁷ According to the former FTC Chairman Deborah Majoras, “with this much uncertainty, there’s a heightened potential for deception.”²⁶⁸

The number of products labeled carbon neutral continues to expand rapidly. For example, the TESCO supermarket launched a program in April 2008 with carbon neutral labels on products such as potatoes, aiming to “footprint” five hundred products.²⁶⁹ In 2010, TESCO made headlines by opening its first “zero carbon store as part of its bid to be a carbon neutral

261. Majoras, *supra* note 3, at 13-14.

262. See Savasta-Kennedy, *supra* note 197, at 852 (noting that there are carbon neutral football games, baby showers, computer companies and a variety of other products).

263. See *Comments to the Federal Trade Commission Regarding Carbon Offset Workshop Comment Project No. P074207*, OFFSET QUALITY INITIATIVE, Jan. 25, 2008, at 3; see also Woods, *supra* note 15, at 85 (“Carbon offsets do just what their name suggests: They permit individuals or businesses to emit greenhouse gases at their current rates, but mitigate that pollution by paying to create or improve upon clean energy technology in other locations.”).

264. Woods, *supra* note 15, at 85.

265. Even more educated consumers may believe a manufacturer is producing less carbon emissions when there actually may be no on-site mitigation of the emissions; instead, off-site reduction provides a less costly way to reduce carbon emissions. See *id.* at 85-86.

266. *Green Consumers Worried About the Economy*, SUSTAINABLEBUSINESS.COM (Aug. 27, 2009), <http://www.sustainablebusiness.com/index.cfm/go/news.display/id/18776>.

267. See Majoras, *supra* note 3, at 14; Woods, *supra* note 15, at 85.

268. Majoras, *supra* note 3, at 15.

269. Alistair Driver, *Tesco’s New Carbon Footprint Label*, FARMERS GUARDIAN, Aug. 28, 2009, at 5.

company by 2050.”²⁷⁰ Other available carbon neutral products include carbon neutral clothing,²⁷¹ a carbon neutral cell phone,²⁷² carbon neutral printing equipment,²⁷³ carbon neutral quinoa,²⁷⁴ carbon neutral sugar,²⁷⁵ and even carbon negative bottled water.²⁷⁶

The carbon offsets themselves have similarly become prominent products in environmental advertising. Currently, major corporations such as Dell, Continental Airlines, General Electric, and Bank of America advertise to consumers that they can purchase carbon offsets for a variety of products to decrease their carbon footprints.²⁷⁷ Dell, for example, allows consumers to purchase offsets on computer purchases; Bank of America allows credit card reward points to be used towards a carbon offset purchase.²⁷⁸

More recently, voluntary offset markets have advertised carbon offsets for direct sale to individual consumers.²⁷⁹ Since 2002, the global market for voluntary offsets has increased over one hundred fifty percent.²⁸⁰ In

270. Julia Finch, *Tesco Opens Its First Zero Carbon Store*, GUARDIAN.CO.UK (Feb. 2, 2010), <http://www.guardian.co.uk/business/2010/feb/02/tesco-carbon-neutral-green-building>.

271. See *Carbon Neutral Clothing Certification Standards*, CARBON NEUTRAL CLOTHING, <http://www.carbonneutralclothing.com> (last visited Aug. 3, 2010).

272. See Press Release, Motorola, *Motorola Unveils First Mobile Phone Made Using Recycled Water Bottle Plastics* (Jan. 6, 2009), available at <http://mediacenter.motorola.com/Content/Detail.aspx?ReleaseID=10464&NewsAreaID=2>. The phone, called the “MOTO W233 Renew,” is considered “carbon-neutral” by Motorola because it “offsets the carbon dioxide required to manufacture, distribute and operate the phone through investments in renewable energy sources and reforestation.” *Id.*

273. See *New Zealand’s First Carbon Neutral Office Company*, RICOH, Aug. 3, 2009, at 1, available at http://www.ricoh.co.nz/about/environment/rnz_c0.pdf; *About Ricoh, “Plant a Tree in Africa Program.”* RICOH, 2007, at 1, available at http://www.ricoh.com/environment/report/pdf2007/11_12.pdf.

274. See Christina Clark, *Alter Eco Offers Fair Trade Goodies*, GREEN DAILY (Nov. 20, 2008), <http://webcache.googleusercontent.com/search?q=cache:gyCICXEjeMQJ:www.greendaily.com/tag/food/+christina+clark+green+daily+alter+eco&cd=6&hl=en&ct=clnk&gl=us&client=safari>.

275. See *Introducing Domino Sugar Carbon Free*, DOMINO SUGAR (2009), <http://www.dominosugar.com/carbonfree/>.

276. See Claudia H. Deutsch, *Fiji Water Vows to Go Carbon Negative*, N.Y. TIMES, Nov. 7, 2007, at Business 3.

277. See *Webcast*, *supra* note 259.

278. See *id.*

279. *What You Can Do: Go Carbon Neutral*, DAVID SUZUKI FOUNDATION, <http://www.davidsuzuki.org/what-you-can-do/reduce-your-carbon-footprint/go-carbon-neutral/> (last visited Sept. 9, 2010) [hereinafter DAVID SUZUKI FOUNDATION] (detailing a list of companies that provide carbon offsets for air travel, vehicles, home electricity, gas, and general vendors).

280. See Jackie Crosby & Karen Youso, *Can We Buy Our Way to a Greener World?*, STAR TRIBUNE, Apr. 2, 2007, at 1A, available at http://www.mepartnership.org/mep_pressroom.asp?new_id=2257.

2007 alone, corporations and individual consumers in the United States spent more than \$54 million dollars on carbon offsets to balance emissions created by their energy-producing activities.²⁸¹ “Trade in carbon offset credits is estimated to be more than \$100 million a year” and is expected to continue expanding.²⁸² “That number represents a threefold increase in value from 2006.”²⁸³ Consumers are experiencing difficulty interpreting express or implied claims about the environmental benefits of offsets as well as how to verify these purchases.²⁸⁴ Because these offsets are purchased in a voluntary market without any federal regulation, consumers should “[p]roceed with caution,” because without “more government oversight, it’s a case of buyer beware for consumers.”²⁸⁵

3. *The Carbon Offset Market in the United States*

Although there is no overarching federal regulatory program, there are two types of carbon markets in the United States: the Chicago Climate Exchange and the voluntary carbon market.²⁸⁶ The Chicago Climate Exchange is a cap-and-trade system where members voluntarily commit to reducing their emissions and can trade emissions or purchase offsets to achieve their emissions goals.²⁸⁷ In contrast, the voluntary carbon market is individuals and a wide range of companies purchasing carbon offsets without a formal exchange program.²⁸⁸ All retail transactions made by in-

281. See Lynn L. Bergeson, *Green Marketing Claims: FTC Enters the Fray*, BNP MEDIA, Nov. 1, 2008, at 15.

282. Tracy Heinzmand & Hugh Latimer, *Understanding the Carbon Footprint*, METROPOLITAN CORP. COUNS., Apr. 2008, at 1, available at <http://www.wileyrein.com/resources/documents/pu698.pdf>.

283. Savasta-Kennedy, *supra* note 197, at 852; see also Kate Hamilton, Carbon Project Manager, Ecosystem Marketplace, Remarks at the Fed. Trade Comm’n’s Workshop on Carbon Offsets and Renewable Energy Certificates 34 (Jan. 8, 2008), available at <http://www.ftc.gov/bcp/workshops/carbonoffsets/transcript/session1.pdf> (“Ecosystem Marketplace decided to start tracking this [carbon offset] market [T]he market grew rapidly between 2005 and 2006.”).

284. See K. Russell LaMotte, *Re: Carbon Offset Workshop*, CARBON OFFSET PROVIDERS COAL., Jan. 25, 2008, at 2.

285. Crosby & Youso, *supra* note 280.

286. See Hamilton, *supra* note 283, at 33; see also Savasta-Kennedy, *supra* note 197, at 861-62. For further discussion on voluntary markets, see ECOSYSTEM MARKETPLACE & NEW CARBON FINANCE, *FORGING A FRONTIER: STATE OF THE VOLUNTARY CARBON MARKETS 2008*, at 17-19 (2008).

287. See Hamilton, *supra* note 283, at 33.

288. See *id.*; Savasta-Kennedy, *supra* note 197, at 862 (discussing that participants in the voluntary carbon market include individuals and organizations interested in offsetting their carbon emissions and that the carbon market consists of a wide range of transactions).

dividuals in the United States take place in the voluntary market.²⁸⁹ Among carbon offset retailers, the most common method is using their own standard for determining carbon offsets, followed by use of the “Voluntary Carbon Standard.”²⁹⁰

Manufacturers and consumers have described the voluntary market for offsetting emissions as a means by which individuals can address climate change.²⁹¹ Industry representatives assert that it is “an easy to way to take responsibility for the greenhouse gas emissions we create”²⁹² A report by Standard Life Investments on carbon management and neutrality, however, warns that carbon offset programs “have the capacity to disguise the failure to achieve actual reductions in overall greenhouse gas emissions.”²⁹³ For example, Dell announced it had achieved carbon neutrality, but failed to include any specific information about its oil use, use of fuel for product shipping, or electricity needed to operate its product.²⁹⁴ Yet, “[c]onsumers looking to buy a computer might mistakenly conclude that Dell’s announced carbon neutrality means that buying a Dell computer will not contribute to climate change.”²⁹⁵

Currently, there are two main standards for calculating greenhouse gas emissions: the Voluntary Carbon Standard (VCS)²⁹⁶ and the PAS 2050.²⁹⁷ The PAS 2050 specifies requirements for assessing the life cycle greenhouse gas emissions of products from organizations that supply goods and services and calculate their carbon footprint.²⁹⁸ Similarly, the VCS sets standards for greenhouse gas emissions reductions using “verifiers” to conduct independent tests to determine emissions using a specified methodology.²⁹⁹

289. See LaMotte, *supra* note 284.

290. Hamilton, *supra* note 283, at 40.

291. See Savasta-Kennedy, *supra* note 197, at 853.

292. DAVID SUZUKI FOUNDATION, *supra* note 279.

293. *The Carbon Neutral Myth*, CARBON TRADE WATCH, Feb. 2007, at 6, available at http://www.carbontradewatch.org/pubs/carbon_neutral_myth.pdf (citing CARBON MANAGEMENT & CARBON NEUTRALITY, STANDARD LIFE INVESTMENTS, July 2006, available at <http://uk.standardlifeinvestments.com/content/pdf/sli/CO-CarbonNeutralityReport.pdf>).

294. See Savasta-Kennedy, *supra* note 197, at 854-55.

295. *Id.* at 855.

296. See *The Voluntary Carbon Standard*, VOLUNTARY CARBON STANDARD (2008), <http://v-c-s.org/>.

297. See *PAS 2050: Assessing the Life Cycle Greenhouse Gas Emissions of Goods and Services*, BRITISH STANDARDS INSTITUTION (2010), <http://www.bsigroup.com/en/Standards-and-Publications/How-we-can-help-you/Professional-Standards-Service/PAS-2050/>.

298. *PAS 2050*, BRITISH STANDARDS INSTITUTION (2009), <http://shop.bsigroup.com/en/Browse-by-Sector/Energy--Utilities/PAS-2050/>.

299. *Frequently Asked Questions*, VOLUNTARY CARBON STANDARD (2008), <http://v-c-s.org/faq.html#question11>.

Like general environmental third-party certification programs, there are private certification companies that provide certification and eco-labels specifically to carbon offset providers.³⁰⁰ However, a product bearing a green label does not necessarily inform a consumer what criteria the third-party company uses to determine certification. For example, a bottle may displaying an environmental seal for renewable energy because its product label was printed in a renewable-energy facility, not necessarily because that the bottle and its contents were separately manufactured using renewable energy.³⁰¹ Since consumers are already less knowledgeable about the meaning of carbon offsets,³⁰² the lack of information can further increase consumer confusion.

II. PROPOSALS FOR ENVIRONMENTAL ADVERTISING REGULATIONS

Part II explores potential proposals for improving environmental advertising regulations and who should take charge in their implementation. First, Part II will discuss the various criticisms of the Green Guides that have launched a movement for reform, both inside the FTC and from external sources. Next, it will examine the benefits and disadvantages of a pure, privately operated certification system, compared to those of a government model in which a federal agency would be primarily responsible for developing standards and providing certification. Finally, this section explores the possibility of a public-private hybrid model in which the government and private sector jointly collaborate to devise standards, create an eco-labeling program, and enforce advertising regulations.

A. Criticisms of the Green Guides

Since the adoption of the Green Guides in 1992, they have been subject to criticism and proposals for reform.³⁰³ Although modified in 1996, the revisions failed to address the major critiques of the Guides.³⁰⁴ The five most common criticism of the guides are: (1) the guidelines are voluntary and thus do not have the force of law; (2) the guidelines provide extremely vague definitions and lack the specificity needed for scientific terminology;

300. See Savasta-Kennedy, *supra* note 197, at 866.

301. *Green Packaging Workshop Comment Project No. P084200*, CTR. FOR RES. SOLUTIONS, Apr. 11, 2008, at 3.

302. See *supra* note 265 and accompanying text.

303. See Woods, *supra* note 15, at 81.

304. See Robert B. White, *Preemption in Green Marketing: The Case for Uniform Federal Marketing Definitions*, 85 IND. L.J. 325, 335-36 (2010); see also Lauren C. Avallone, *Green Marketing: The Urgent Need for Federal Regulation*, 14 PENN ST. ENVTL. L. REV. 685, 686 (2006).

(3) because the guidelines are voluntary, they do not preempt state regulations which prevents a uniform standard; (4) the guidelines have failed to provide effective monitoring and enforcement; and (5) the terminology is outdated and does not reflect current environmental marketing trends.³⁰⁵

1. Non-Binding Regulations

Although the FTC has the authority to promulgate binding guidelines under Section 5 of the FTCA, the Green Guides only put forth voluntary principles for “guidance of the public.”³⁰⁶ Proponents have argued that the Green Guides should be given the force of law to increase their effectiveness.³⁰⁷ Because the guidelines are voluntary, the FTC has failed to investigate many dubious environmental advertisements.³⁰⁸ For voluntary guidelines, the FTC is required to prove in each case that the practice in question would violate the standard provisions of the FTCA.³⁰⁹ As a result, the FTC must expend significant resources in each enforcement action and has thus prosecuted only the most visible and egregious violators.³¹⁰ If the guidelines were binding, any misleading advertisement would automatically constitute a violation.³¹¹ Binding regulations could potentially maximize industry compliance by providing greater information to manufacturers and holding them accountable to consistent standards.³¹² Companies would be cognizant that any misleading or deceptive advertisement would result in actual consequences.³¹³ Furthermore, it would reduce transaction costs, which would permit more frequent enforcement and, in turn, broader deterrence of misleading advertising.³¹⁴ Since misleading statements can generate substantial confusion among consumers thereby depriving them of opportunities to reward manufacturers marketing environmentally superior products, without binding regulations, universal compliance and self-regulation is unlikely.³¹⁵

305. See Avallone, *supra* note 304, at 686.

306. 16 C.F.R. § 260.1 (1996).

307. See Avallone, *supra* note 304, at 690-91; Gibson, *supra* note 35, at 434.

308. Heather Green, *How Green Is That Gizmo?*, BUS. WK., Dec. 20, 2007, at 36.

309. Grodsky, *supra* note 83, at 159; *Appendix 1—Laws Enforced by the FTC*, FED. TRADE COMM’N, *supra* note 61.

310. See Grodsky, *supra* note 83, at 159; Green, *supra* note 308.

311. See Gibson, *supra* note 35, at 434.

312. See *id.* (“Such automatic liability would provide a strong incentive to comply with the Green Guides.”).

313. See Grodsky, *supra* note 83, at 169; see also Gibson, *supra* note 35, at 434.

314. See Gibson, *supra* note 35, at 434.

315. See *id.*

2. *Vagueness in the Guidelines*

The standards and terminology defined in the Green Guides are vague primarily because they are not based on scientific technology,³¹⁶ but rather on how the FTC believes the advertisement will affect a consumer's decision making.³¹⁷ As a result, manufacturers have often complained that they fail to provide "clear rules on what they may or may not claim about their products. Instead, manufacturers are left to interpret the definitions and examples in assessing whether their claims are valid."³¹⁸

Since the current guidelines do not require specificity in advertising, manufacturers frequently use short slogans to characterize a product's environmental characteristics.³¹⁹ Such brevity is often "achieved at the expense of clarity."³²⁰ Vague claims, like "green" or "environmentally friendly" have become the common method of describing a product with some beneficial environmental aspect, but when used in product labeling, the terms often do not reflect the harmful effects or tradeoff a product may have or any scientific analysis.³²¹ Proponents of specific standards thus argue that any future environmental regulations should provide definitions that are as specific as possible, "directing advertisers to make precise claims about the ingredients or environmental effects of their products [because] [v]ague standards are inadequate for creating meaningful distinctions among product labels."³²²

The lack of specificity particularly impacts carbon product labeling. Currently, there is no industry consensus for baseline minimum standards to verify carbon offsets.³²³ There are ten certification standards in the United States that are specifically used for carbon certification.³²⁴ This has raised concerns of consumer confusion and the potential for fraud³²⁵ because each label has different standards or definitions.³²⁶ A consumer has

316. See Woods, *supra* note 15, at 78.

317. See *id.*

318. Avallone, *supra* note 304, at 692.

319. See Luehr, *supra* note 2, at 316.

320. *Id.*

321. See *id.* at 320-21; see also *supra* notes 25-27 and accompanying text.

322. Grodsky, *supra* note 83, at 166; see also Abidiwan-Lupo, *supra* note 131, at 377; Downs, *supra* note 2, at 168.

323. See Savasta-Kennedy, *supra* note 197, at 869.

324. See *id.* at 876; Eric Carlson, Executive Director, Carbonfund.org, Remarks at Federal Trade Comm'n's Workshop on Carbon Offsets and Renewable Energy Certificates 222 (Jan. 8, 2008) ("We don't have a lack of standards in the industry. We have a huge number of standards . . .").

325. See Savasta-Kennedy, *supra* note 197, at 869.

326. See *id.*

no say in which protocol is used and is likely unaware of the distinctions between certified protocols.³²⁷ Narrowing the field from ten diverse certifications to one uniform standard would create a way to verify a set group of offset attributes.³²⁸

The Carbon Offset Providers Coalition, comprised of leading companies in the carbon offset market,³²⁹ has recognized that the terminology's complexity is challenging the decision-making ability of consumers.³³⁰ The Coalition states that consumers have a "need to know and understand the 'content' of what they are buying," which is best accomplished by requiring that the relevant information be available.³³¹ While products claiming carbon-neutrality state that information may not be available at the point of sale, the Coalition suggests making the information available to consumers through a publicly-accessible registrar.³³² This could include specific components of a product as well as easily accessible definitions of the terms used in a product claim. Thus, the Coalition proposes that the FTC identify the information required by a consumer and have it compiled so consumers can more easily substantiate product claims.³³³ Pacific Gas and Electric Company, a private combination of natural gas and electric utilities in the United States, also submitted a comment to the FTC suggesting that the FTC establish "consistent parameters for voluntary carbon offset programs"³³⁴ Similarly, Consumers Union suggests that carbon offset and renewable energy terms made in advertising or product claims "require scope and specific definition provided by the FTC."³³⁵ Consumers Union argues that not only should the terminology have specific definitions, but also that companies should be required to provide disclosures on specific actions, such as whether the offsets are direct or indirect by specifying the type of offset action taken to reduce marketplace deception.³³⁶

327. *See id.*

328. *See id.* at 876.

329. *See* LaMotte, *supra* note 284, at Exhibit 1.

330. *See id.* at 4.

331. *Id.*

332. *See id.*

333. *See id.* at 4-5.

334. *Carbon Offset Workshop—Comment, Project No. P074207, PAC. GAS & ELEC. CO.*, Jan. 8, 2008, at 1.

335. Letter from Urvashi Rangan, Senior Scientist & Policy Analyst, Consumers Union, to Hampton Newsome, Fed. Trade Comm'n 1 (Jan. 25, 2008), available at <http://www.ftc.gov/os/comments/carbonworkshop/533254-00026.pdf>.

336. *See id.* at 1-2.

3. Federal Preemption of State Standards

Because the guidelines are non-binding, they do not preempt states' individual regulations.³³⁷ The result has been a lack of national uniformity in environmental regulations.³³⁸ Though several states have used the Guides as a model when enacting regulation, other states have created stricter standards and more precise definitions to combat the perceived leniency of the Green Guides.³³⁹ The standards and definitions, however, vary vastly among the states. For example, California, New York, and Rhode Island each define "recycled" differently.³⁴⁰

The current lack of uniformity, as a consequence of the state-by-state enforcement approach, has created difficulties both for lawmakers and manufacturers.³⁴¹ Federal lawmakers and the FTC have greater difficulty holding manufacturers accountable for violations.³⁴² The FTC cannot only consider whether a manufacturer has violated the Green Guides, but must also consider whether a manufacturer has violated the more specific requirements implemented by that state.³⁴³

Furthermore, manufacturers incur greater costs from this patchwork of standards, which can prevent advertiser compliance.³⁴⁴ These include direct costs like printing new labels for each state and indirect costs such as maintaining two or more product inventories and imposing separate distribution and record-keeping requirements for each state.³⁴⁵ Manufacturers must also monitor up to fifty independent standards, which requires substantial time and money to ensure awareness of and compliance with each state's current laws.³⁴⁶ This can particularly burden smaller companies who may lack the resources to monitor the variations.³⁴⁷ Companies may be unable to provide environmental information about their products without fearing legal repercussions based on a state's individual practice.³⁴⁸

337. See Woods, *supra* note 15, at 82.

338. See *id.*

339. See Avallone, *supra* note 304, at 689-90.

340. See Grodsky, *supra* note 83, at 164.

341. See Avallone, *supra* note 304, at 686.

342. See *id.*

343. See *id.*

344. See Grodsky, *supra* note 83, at 164.

345. See David F. Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green,"* 81 CALIF. L. REV. 991, 1003 (1993).

346. See *id.* ("Without uniform standards, the costs involved in marketing products to different states can make it virtually impossible for honest manufacturers to provide environmental information.").

347. See *id.* at 1003-04.

348. See *id.* at 1004.

Federal preemption of state regulations has been suggested to create national uniformity and remedy the issues created by the state-by-state approach.³⁴⁹ Proponents believe that “federal preemption is ultimately necessary to ensure that the law . . . is both clear and consistent.”³⁵⁰ For new technology, where the market is largely unregulated, the Offset Quality Initiative, a collaborative group of environmental non-profit organizations, actually “recommends the establishment of a centralized oversight and enforcement agency that would be tasked with ensuring the accuracy.”³⁵¹

Opponents of preemption argue that preempting state standards to create uniformity would inappropriately mix environmental and advertising policy.³⁵² They argue that the federal regulations fail to impose sufficiently strict regulations and federal preemption would be a “foolhardy” example of “paternal[ism].”³⁵³ States “have an incentive to go beyond any minimum federal standards because they want to be recognized as leaders in high profile fields like environmental regulation.”³⁵⁴ For example, “when FTC Commissioner Mary Azcuenaga asked a New York state official whether New York would change its ‘recyclable’ standard to meet FTC guidelines . . . [t]he officer stated that New York would certainly continue to ‘be creative’ with regulatory approaches if the federal government established merely a regulatory floor.”³⁵⁵

Specifically for carbon offsets, opponents advise against creating a uniform standard because there are substantial differences among professionals for carbon calculations, such as the underlying basis for measurement and verification.³⁵⁶ Others argue, however, that the proliferation of standards has caused consumer confusion and a uniform certification standard would address the issue of consumer protection.³⁵⁷ To compromise in the debate between federal and state powers, one suggestion has been to create a federal program that supplants state definitions, but allows states to

349. *See id.* at 1015.

350. *Id.* at 994-95; *see also* Avallone, *supra* note 304, at 697.

351. Alexia Kelly, *Comments to the Federal Trade Commission Regarding Carbon Offset Workshop Comment, Project No. P074207*, OFFSET QUALITY INITIATIVE, Jan. 25, 2008, at 13, available at <http://www.ftc.gov/os/comments/carbonworkshop/533254-00047.pdf>.

352. *See* Church, *supra* note 23, at 322.

353. *Id.*

354. Welsh, *supra* note 345, at 1021.

355. *Id.* at 1021-22.

356. Wiley Barbour, Dir., Env'tl. Res. Trust, Remarks at Fed. Trade Comm'n's Workshop on Carbon Offsets and Renewable Energy Certificates (Jan. 8, 2008); *see also* Kelly, *supra* note 351, at 4 (describing the three most common methods for determining the additionality component of a carbon offset project).

357. *See* Savasta-Kennedy, *supra* note 197, at 867.

promulgate certain laws that go beyond the federally created minimum standards.³⁵⁸

4. *Lack of Enforcement of the Green Guides*

Since 2000, the FTC has brought only three enforcement actions for violation of the Green Guides.³⁵⁹ Each of these actions was announced the same day FTC Chairman James Kohm appeared before the House of Representatives in a subcommittee hearing on the problems in environmental advertising.³⁶⁰ Since then, the only FTC action taken against greenwashing has been a warning letter to seventy-eight businesses requiring them to alter advertising and label practices for bamboo-based clothing, traditionally considered eco-friendly, but in fact made from chemically processed rayon.³⁶¹ Even when companies are found to have violated the Green Guides, they are subject to limited sanctions, which generally amount to an agreement to discontinue the warning and a broad cease-and-desist order prohibiting future misleading claims.³⁶²

The lack of enforcement has been attributed to the FTC's case-by case enforcement approach.³⁶³ "Since the 1970s, the FTC has prosecuted misleading environmental advertising on a case-by-case basis."³⁶⁴ Prior to the adoption of the Green Guides, the NAAG, the EPA, and the National Advertising Division ("NAD") all criticized the ineffectiveness of the FTC's enforcement.³⁶⁵ The NAAG described it as "too ponderous to allow swift reaction to the emergence of new marketing strategies."³⁶⁶ A group of manufacturers also criticized the approach, "explaining that until the Commission issues national green marketing guidelines, the states will en-

358. See Welsh, *supra* note 345, at 1020-21.

359. News Release, Fed. Trade Comm'n, FTC Announces Actions Against Kmart, Target and Dyna-E Alleging Deceptive 'Biodegradable' Claims (June 9, 2009), available at www.ftc.gov/opa/2009/06/kmart.shtm.

360. See *id.*

361. See *FTC Warns Marketers Not to 'Bamboozle' Consumers with Misleading Biodegradable or Green Claims*, MONDAQ BUS. BRIEFING, Mar. 1, 2010, available at http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=220021209.

362. See Woods, *supra* note 15, at 81-82.

363. See Israel, *supra* note 58, at 318; Savasta-Kennedy, *supra* note 197, at 870 ("[G]iven the enforcement limitations of the Green Guides, FTC's involvement will not supplant the need for a uniform certification standard.").

364. Grodsky, *supra* note 83, at 154. Examples include actions against Ex-Cell-O Corporation in 1973, Standard Oil of California in 1974, cases in the 1980s against air and water filter companies, and American Enviro Products for advertising that Bunnies Disposable Diapers degraded rapidly in landfills. See *id.* at 154-55.

365. See Israel, *supra* note 58, at 318.

366. *Id.*

force the law in an inconsistent manner and manufacturers will not be certain that their green claims comply with the law.”³⁶⁷

Further contributing to the FTC’s lack of enforcement is the FTC’s unwillingness to pursue any action that might be seen as creating environmental policy.³⁶⁸ The FTC has been hesitant to take an active role, many scholars have been left “wondering ‘why shouldn’t environmental marketing claims be regulated like all others’”³⁶⁹ At the FTC’s January 2008 workshop, FTC Chairman Majoras stated that despite the Commission’s intent to explore these scientific issues, she “want[ed] to make clear that [the FTC] [does not] . . . have the authority or the technical expertise to address issues of environmental or energy regulation.”³⁷⁰ During recent congressional hearings in July 2009, James Kohm reiterated that any marketing modifications must avoid “set[ting] environmental standards or policy,” because the Commission’s only purpose is to “protect[] consumers from unfair or deceptive practices.”³⁷¹

A major problem with the case-by-case approach is that “it fails to demarcate clear boundaries between deceptive and permissible practices [because] [c]ase-by-case adjudication by the FTC is selective, incremental, and highly contextual.”³⁷² The continuing “surge of unsubstantiated and misleading green marketing claims” has proven that the case-by-case approach has not provided ample deterrence toward deceptive advertising practices.³⁷³

5. *Outdated Terminology: The Need for Current Environmental Regulation*

With the emergence of new technology and new terminology, the Green Guides have been criticized for being “simply out of touch with current environmental marketing realities.”³⁷⁴ FTC Chairman Majoras has admitted that the guides are outdated because, since their last revision in 1998, there has been increased use of environmental terminology and “terms like sustainable, bio-based, cradle to cradle, and carbon neutral” have been intro-

367. *Id.*

368. See News Release, Fed. Trade Comm’n, *supra* note 359.

369. Hoch & Franz, *supra* note 86, at 443; see also Steven W. Colford, *FTC Confronts Green Muddle*, *ADVERTISING AGE*, July 22, 1991, at 4.

370. Majoras, *supra* note 3, at 16.

371. News Release, Fed. Trade Comm’n, *supra* note 359 (discussing testimony presented by James Kohm, Dir. Enforcement Div., Fed. Trade Comm’n).

372. Grodsky, *supra* note 83, at 155.

373. See *id.*

374. Woods, *supra* note 15, at 83.

duced.³⁷⁵ “A decade-long drought in revisions means that more recent technologies and advertising terms are largely unregulated, including carbon offsets, renewable energy certificates, and green building products.”³⁷⁶

The terms “carbon-neutral” and “carbon offset” have become particularly prominent.³⁷⁷ For many consumers, buying a carbon neutral product is “more like a symbolic act than . . . an act of consumption” to show that a consumer’s buying power can make an environmental impact.³⁷⁸ General proponents of specific scientific definitions argue that whichever government agency takes the reins, the latest terminology of carbon neutrality needs to be addressed in any future updates or regulations. The Carbon Offset Providers Coalition similarly believes that the FTC or a governmental agency should establish guidelines for the use of certain terminology that is used in voluntary carbon markets.³⁷⁹

Proponents further argue that monitoring the effects of carbon offset projects, the responsible distribution of carbon offset funds, and continued monitoring of advertising claims should all play substantial roles in developing a regulatory scheme for the carbon offset market.³⁸⁰ However, the difficulty in enforcing the accuracy of such claims is determining whether the advertising claim has met the required substantiation, especially at a time when the very meaning of “carbon offset” is still very much open to debate.³⁸¹ If experts have not even reached a consensus on the means to define carbon neutrality and carbon offsets, the concern is that “consumers have no consistent information upon which to form opinions about carbon offsets.”³⁸² One proposal is that to facilitate the verifiability of these claims, companies claiming a product has certain attributes must keep a record of the data for substantiation.³⁸³

375. Majoras, *supra* note 3, at 11.

376. Woods, *supra* note 15, at 83.

377. *Id.* at 84. For example, the New Oxford American Dictionary added the word “carbon neutral” and named it the “2006 Word of the Year.” *Carbon Neutral: Oxford Word of the Year*, OUPBLOG (Nov. 13, 2006, 08:30 EST), http://blog.oup.com/2006/11/carbon_neutral/.

378. Levy, *supra* note 21, at 66; *see also* Savasta-Kennedy, *supra* note 197, at 853 (“Consumers of offsets . . . [are] voluntarily seeking to green up their act [They] are seemingly driven by a sense of environmental responsibility.”).

379. *See* LaMotte, *supra* note 284, at 5.

380. *See* Woods, *supra* note 15, at 86-87.

381. *Id.* at 86.

382. *Id.* at 87.

383. *See* Coffee, *supra* note 94, at 354.

B. Private Environmental Certifications

Under a purely private model, third-party certification programs would continue to be the sole method of certification for environmental labeling in the United States. Proponents of free market regulation advocate that an industry consensus will develop over time regarding the criteria for environmental seals.³⁸⁴ For example, in the carbon labeling market, the Voluntary Carbon Standard has emerged as the most frequently used certification methodology.³⁸⁵ Recently, Green-e Climate, a voluntary certification program based in the California, has created its own popular and independent carbon offset standards for emissions sold in the voluntary market.³⁸⁶ Despite their prominent use, there are still over ten carbon certification programs that are used in the United States alone, each with its own criteria, and Green-e Climate's popularity indicates that other standards will continue to emerge.³⁸⁷ Thus, at present, "market stakeholders have not yet reached consensus on a particular standard or protocol," and the varying standards can exacerbate consumer confusion.³⁸⁸

Advocates of self-regulation have highlighted the success of the NAD's industry enforcement program. One of the most effective means for consumers to combat false advertising has been by filing a complaint with the NAD of the Council of Better Business Bureaus.³⁸⁹ The NAD is the advertising industry's self regulating forum and provides for a formal adjudication of claims against false advertisers; it focuses on national cases involving consumer deception, maintains a strict confidentiality policy, and will not deal with cases that are pending or subject to federal agency action.³⁹⁰ The NAD process is voluntary; however, they have been aggressive in pursuing actions against false advertising regarding green products.³⁹¹ While participation in the process is technically voluntary, because of its reputa-

384. See Hamilton, *supra* note 283, at 40.

385. See Savasta-Kennedy, *supra* note 197, at 879.

386. Adam Stern, *TerraPass Comments to the Federal Trade Commission Re: Carbon Offset Workshop, Project No. P074207*, TERRAPASS, Jan. 25, 2008, at 6, available at <http://www.ftc.gov/os/comments/carbonworkshop/533254-00045.pdf>; *Green-e Climate Overview*, GREEN-E (2010), http://www.green-e.org/getcert_ghg_intro.shtml.

387. See *Who's Deciding What's Green*, ECO LABELING ORGANIZATION, http://thegreenpages.ca/portal/ca/2008/01/ecolabellingorg_whos_deciding.html (last visited Aug. 13, 2010).

388. Savasta-Kennedy, *supra* note 197, at 879.

389. See Dillard, *supra* note 75, at 33.

390. See *id.*

391. See Eric DeJong et al., *Green Policies: Understanding and Addressing Compliance Risks*, MONDAQ BUS. BRIEFING (Aug. 20, 2008), <http://www.mondaq.com/unitedstates/article.asp?articleid=84934>.

tion in the industry, “filing with this organization could be the most important part of any action against a false advertiser.”³⁹²

The benefit of third-party certification, proponents claim, is that these evaluations lower the cost of guaranteeing truthfulness in advertising.³⁹³ These high costs occur under a government model in which a federal agency must monitor and regulate the accuracy of all claims. The rationale is that the consumers will determine which products are best without the expense of governmental interference.³⁹⁴ Private certifiers can spread the cost of developing criteria, producing evaluations from consumers, and conducting large scale testing of products, all of which would amount to lower costs for consumers.³⁹⁵ Private program proponents believe that “the government should intervene in the market only when evidence of systematic market failure exists.”³⁹⁶ When deceptive advertising is unregulated, it can result in a misallocation of resources, but “market failure alone [should] not necessarily justify government intervention.”³⁹⁷

Critics of private regulation argue that the free market has created a system of environmental seals that are granted for monetary exchange, which “invite[s] the possibility of bribery or improper influence.”³⁹⁸ Manufacturers can choose from almost three-hundred environmental labels in order to place a green stamp of approval on their products, ten of which are specifically for carbon labeling.³⁹⁹ While many of these labels have standardized criteria and independent verification, some do not due to high cost and lack of manpower.⁴⁰⁰ Thus, critics argue that for carbon offsets especially, the “[c]ertification can only be as good as the standard is that it certifies by.”⁴⁰¹

Manufacturers are adopting differing standards for determining carbon offsets, often using their own methodology for the calculation.⁴⁰² As a result, carbon offset purchases are generally a “scattered range of transac-

392. Dillard, *supra* note 75, at 34.

393. See Church, *supra* note 23, at 287-88.

394. See *id.* at 287.

395. See *id.* at 288.

396. *Id.* at 320.

397. *Id.*

398. Downs, *supra* note 2, at 173.

399. See *Who's Deciding What's Green*, *supra* note 387.

400. See Gwendolyn Bounds, *As Eco Seals Proliferate, So Do Doubts*, WALL ST. J., Apr. 2, 2009, at D1.

401. Anja Kollmus, Carbon Markets Scientist, U.S. Center of the Stockholm Env't Inst., Remarks at the Fed. Trade Comm'n's Workshop on Carbon Offsets and Renewable Energy Certificates (Jan. 8, 2008), available at www.ftc.gov/bcp/workshops/carbonoffsets/agenda.pdf.

402. See Hamilton, *supra* note 283, at 40.

tions,” described as a “wild west” or “buyer beware market.”⁴⁰³ One concern with differing standards is, “what if [the] calculations or assumptions about environmental friendliness are wrong . . . ?”⁴⁰⁴ Though private, voluntary certification has the potential to create an effective eco-labeling system, the industry seemingly has failed to police itself.⁴⁰⁵ Instead, it has chosen to take advantage of the profitable trade-off of “green,” without sacrificing or changing current manufacturing practices.⁴⁰⁶ Despite attempts to establish awareness, education, and credibility, private certifications have instead become known for extensive greenwashing.⁴⁰⁷

C. The “Command and Control” Approach: A Purely Governmental Option

“Under a command and control regulatory approach,” a government agency alone would be responsible for developing and enforcing environmental advertising standards.⁴⁰⁸ Although the federal agency can delegate authority to a subcommittee within the agency or state agencies, the role of the private sector and general public is limited to self-reporting incidents.⁴⁰⁹

A strictly governmental program could “offer advantages . . . of credibility, accountability, and . . . technical expertise.”⁴¹⁰ For example, it would eliminate the multitude of private certification companies, as well as concerns of bribery or reduced standards during the certification process.⁴¹¹ However, a strictly government-operated program also poses several disadvantages. Maria Kennedy, a professor specializing in environmental law, advises that “[g]iven the unique nature of the carbon offset market, strict adherence to a traditional command and control approach with limited opportunities for stakeholder input in the creation of a uniform certification standard for offset projects is not ideal.”⁴¹² First, it would not allow for local solutions to address local problems because federal law would preempt

403. *Id.* at 34.

404. Rebecca Tushnet, Professor of Law, Georgetown Univ. Law Ctr., Remarks at Fed. Trade Comm’n’s Workshop on Carbon Offsets and Renewable Energy Certificates (Jan. 8, 2008), available at www.ftc.gov/bcp/workshops/carbonoffsets/agenda.pdf.

405. See *supra* notes 23-24, 34-37, 397-400 and accompanying text.

406. See *supra* notes 23-24, 48-50 and accompanying text.

407. See Goff, *supra* note 39.

408. Savasta-Kennedy, *supra* note 197, at 882.

409. See *id.* at 877 (“[T]he traditional command and control regulatory approach creates a very limited role for market participants . . .”).

410. Grodsky, *supra* note 83, at 206.

411. See *id.*

412. Savasta-Kennedy, *supra* note 197, at 878.

individual state practices.⁴¹³ Additionally, it would create huge administrative overhead costs to independently test products and provide certification to companies. Particularly in the area of carbon offsets, administrative delay would be particularly problematic because these “rely on timely certification in order to attract funding sources.”⁴¹⁴

D. A Joint Agency Framework

To combine the experience of the FTC and EPA, one suggestion is a joint agency approach in creating and enforcing environmental advertising regulations.⁴¹⁵ One prominent proposal is for the EPA to create the voluntary standards and technical definitions for the use of environmental marketing claims, which would then be enforced by both the FTC and the EPA.⁴¹⁶ While the guidelines are considered a “helpful addition,” many commentators believe the EPA should create the regulations because it “has more experience and qualifications.”⁴¹⁷ This would create a system with mandatory adherence to environmental marketing regulations and technical-based definitions to give guidance to manufacturers, and “may even encourage the development of more ecologically-minded production strategies and techniques that permit the company to boast even greater environmental benefits.”⁴¹⁸

III. WEIGHING THE COSTS AND BENEFITS OF CARBON ENVIRONMENTAL ADVERTISING REGULATIONS

Part III of this Note proposes instituting binding environmental advertising regulations and a voluntary carbon eco-labeling program that utilizes the advantages of both the government and private sector. This model should address the deficiencies in the Green Guides by creating a binding, uniform standard of regulations with definitions based on scientific expertise that still provide sufficient flexibility for rapidly evolving technology. It would also create a voluntary carbon eco-labeling program that would

413. See Coffee, *supra* note 94, at 346.

414. Savasta-Kennedy, *supra* note 197, at 883.

415. See Cavanagh, *supra* note 105, at 172-76; Coffee, *supra* note 94, at 346; Woods, *supra* note 15, at 90; see also Downs, *supra* note 2, at 182-83 (“MOUs intended to advance cooperative executive branch oversight and regulation of green marketing would surely be an improvement”); Gibson, *supra* note 35, at 437 (“The FTC and the EPA need each other in order to effectively reach their respective goals”).

416. See Avallone, *supra* note 304, at 692-93 (“[T]he FTC is ill-equipped to handle the responsibility The EPA is better informed and equipped to handle defining terms.”); Cavanagh, *supra* note 105, at 173-74.

417. Coffee, *supra* note 94, at 345-46.

418. Woods, *supra* note 15, at 90-91.

issue certification to private companies. The program should be designed by the EPA in conjunction with outside experts and jointly enforced by the EPA, the FTC, and state authorities. Part III advances the position that the substantial rise in greenwashing and inadequate self-regulation by third-party private certification programs requires a new and effective system of regulations operated by the federal government to maintain consumer confidence.

A. Creating a Carbon Advertising Framework

In the early 1990s, lack of consumer understanding about the ozone layer and biodegradability created a market ripe for consumer exploitation.⁴¹⁹ Since the 1990s, consumer awareness of those terms has increased, but the lexicon of “green” terminology continues to grow and the market for various products containing new advertising claims is still expanding.⁴²⁰ Voluntary carbon offsets fall within this category.⁴²¹

As demonstrated by their advertising presence and sales success, carbon neutral products and carbon offsets have gained considerable popularity.⁴²² However, the utter lack of regulation combined with minimal consumer understanding of carbon offsets raises significant concerns that manufacturers will exploit the new terminology by using deceptive or misleading claims. Although greenwashing may be commonplace in the general consumer purchasing market,⁴²³ the government can prevent the rise of deception in carbon advertising by issuing changes before consumer confidence in carbon purchasing is severely affected.

The creation of a new regulatory framework for green marketing should focus on balancing the interests of consumers, manufacturers, and government agencies. The goals of such regulations should be to achieve “truthful and accurate . . . marketing,” to provide “a continuing incentive for companies to improve the environmental characteristics of their products,” to promote “consumer confidence in environmental marketing claims,” and to improve the regulation of deceptive or misleading claims.⁴²⁴

The most effective means of meeting these objectives is instituting a voluntary eco-labeling program and binding regulations for green advertising that create uniform and specific standards. Such a program should address the current deficiencies in the Green Guides.

419. *See supra* notes 2-3 and accompanying text.

420. *See supra* notes 4-7, 246-52, 280-83 and accompanying text.

421. *See supra* notes 280-83 and accompanying text.

422. *See supra* notes 280-83 and accompanying text.

423. *See supra* notes 33-42 and accompanying text.

424. Coffee, *supra* note 94, at 350-51.

Any carbon-related environmental advertising regulation will implicate environmental policy and thus veer into the regulatory territory of the EPA. As the FTC has repeatedly insisted, it is not the agency to devise environmental policy,⁴²⁵ rather, the EPA, whose mandate *is* to promote environmental protection, should take the lead in carbon advertising regulations.⁴²⁶

The most efficient means of creating a new program would be for Congress to enact legislation authorizing the EPA to both promulgate regulations for carbon environmental advertising and to devise a national eco-labeling program.⁴²⁷ However, even without specific congressional authorization, *Massachusetts v. EPA* emphasized the EPA's responsibility to address greenhouse gas emissions;⁴²⁸ as a result, the EPA would have the specific authority to create a program focusing exclusively on carbon labeling. Moreover, the EPA has significant expertise in environmental labeling programs, as evidenced by its success with Energy Star, a program implemented without any congressional authorization.⁴²⁹

The EPA should issue two types of carbon environmental advertising regulation. First, it should provide scientific definitions for environmental terminology so that manufacturers are not permitted to utilize those terms in advertisements without complying with their definitions. Second, while the EPA could implement a general eco-labeling program, the EPA should devise a specific carbon eco-labeling program.

B. A Uniform Standard for Environmental Advertising

To improve environmental advertising regulations, the EPA should issue technical definitions, based on scientific expertise, that are commonly used in environmental advertising. The EPA has already issued definitions and guidelines for many of these terms.⁴³⁰ The EPA can use those definitions or create definitions specifically for this program, but it must provide precise definitions for new terminology, such as "sustainable," "renewable," and "carbon neutral." The EPA can look to the Voluntary Carbon Standard or the PAS 2050, both internationally used standards that provide definitions of key terms utilized by manufacturers.⁴³¹ By creating federally

425. See *supra* notes 368-71 and accompanying text.

426. See *supra* notes 417-18 and accompanying text.

427. See Abidiwan-Lupo, *supra* note 131, at 378-79 ("If solving green advertising is the main concern, in addition to the seal program, the government could also . . . limit the use of 'environmentally friendly' terms.").

428. See *supra* notes 182-85 and accompanying text.

429. See *supra* notes 162-74 and accompanying text.

430. See *supra* notes 134-37 and accompanying text.

431. See *supra* notes 296-99 and accompanying text.

preemptive regulations based on scientific standards, the EPA program can correct the major deficiencies in current environmental advertising regulations.⁴³²

These regulations containing definitions would be binding federal law, which would eliminate concerns created by voluntary guidelines that merely suggest definitions. The FTC could thus no longer avoid taking action against the voluminous number of misleading advertisements, which would automatically constitute a federal violation. Binding regulations would also give advertisers greater notice of potential FTC action and could help reduce misleading practices. The regulations would also decrease consumer confusion and provide consumers an opportunity to make social choices that genuinely reward manufacturers producing goods that address carbon emissions.⁴³³ The FTC could additionally monitor whether a company is using national carbon seals without proper certification. By utilizing a joint agency approach, the EPA would have a substantial role in monitoring and enforcing regulations.

Because the eco-labeling program would be federal law, it would preempt state environmental marketing laws and state statutory definitions, such as those in New York and California.⁴³⁴ It is primarily the lack of uniformity in state regulations that has created difficulties for manufacturers.⁴³⁵ Advertisers would not have the same costs that are associated with monitoring fifty independent standards,⁴³⁶ nor would they have the direct costs of adapting their advertisements to each state's regulations. In the specific context of carbon labeling, where there are at least ten diverse certifications,⁴³⁷ uniformity would provide guidance to advertisers as well as consumers.

Next, the regulations would address the Green Guides' lack of specificity by creating clear, scientific definitions, not those based on what a scientific term "might" mean to a consumer.⁴³⁸ The FTC does not currently have more specific definitions because it is concerned it would be making environmental policy. But if the EPA were to create the definitions, it would clearly fall within its realm of authority. One of the fundamental concerns expressed by carbon offset industry representatives is that there is

432. *See generally supra* notes 308-73 and accompanying text.

433. *See supra* notes 17-20, 118, 377 and accompanying text.

434. *See supra* note 340 and accompanying text.

435. *See supra* notes 346-48 and accompanying text.

436. *See supra* notes 346-48 and accompanying text.

437. *See supra* note 328 and accompanying text.

438. *See supra* notes 155-56 and accompanying text.

no clear definition of a “carbon offset.”⁴³⁹ The most controversial aspect of the definition is the concept of “additionality,”⁴⁴⁰ which requires that the carbon offset truly reduce emissions that would not have happened without the offset credit and should be incorporated into the EPA’s definition of a carbon offset.⁴⁴¹ Current offsets do not guarantee that a product has met that additionality standard or even that consumer funds will support active projects. Creating a standard for carbon offsets that includes a requirement of additionality will continue incentivizing consumers to make purchases and avoid future skepticism.

Finally, the regulations administered by the EPA would correct the Green Guides’ inadequacies of outdated terminology and lack of scientific substantiation.⁴⁴² The new standards must include definitions for more recent terminology utilized in advertising strategies, such as “carbon offsets,” “carbon footprint,” “carbon neutral,” and “sustainability.” Once the EPA has created the definitions, the FTC should rigorously enforce its deceptive advertising policy in regulating advertisements containing these terms so that regulation can be enforced from the beginning of the trend, not once it has already caused substantial consumer confusion and deterred purchasing decisions.

C. A National Eco-Labeling Program: A Carbon Certification Seal

The EPA would also be responsible for establishing and issuing a carbon certification seal that would be granted to private manufacturing companies. Because the carbon offset market is still relatively new,⁴⁴³ the number of private certification programs is not nearly as expansive compared to general environmental certification programs. Furthermore, many carbon offset providers have called for definitions and regulations to enhance consumer confidence.⁴⁴⁴ Because a carbon certification seal would be voluntary, those opposed to the EPA’s program could simply elect not to submit their products for certification. While eliminating other carbon certifica-

439. See *supra* notes 381-83 and accompanying text.

440. See Stern, *supra* note 386, at 5-6; David Owens, *Re: Carbon Offset Workshop-Comment*, ANADARKO PETROLEUM CORPORATION, at 2-3 (Jan. 24, 2008), available at <http://www.ftc.gov/os/comments/carbonworkshop/533254-00058.pdf>; Rangan, *supra* note 335, at 2.

441. See Randall S. Abate & Todd A. Wright, *A Green Solution to Climate Change*, 20 DUKE ENVTL. L. & POL’Y F. 87, 104 (2010); see also *Determining the Additionality of Greenhouse Gas Reduction Projects*, THE CLIMATE TRUST (2007), at 5-6, available at http://www.climatetrust.org/pdfs/Climate_Trust_Additionality.pdf.

442. See *supra* notes 374-83 and accompanying text.

443. See *supra* notes 269, 279-83, 375-76 and accompanying text.

444. See *supra* notes 329-36 and accompanying text.

tion seals might reduce the risk of confusion among consumers, this approach would likely be considered a ban on commercial speech and would not be upheld by the courts.⁴⁴⁵ However, the goal of a *voluntary* government-sponsored carbon seal would be to create consumer awareness and confidence that a product has met certain standards. The government could help achieve this objective by utilizing an advertising campaign that raises awareness of the label and touts the legitimacy of the government seal over private certifications.

The program for a carbon certification seal should be a public-private hybrid model that follows the procedures exhibited in the organic framework and international examples.⁴⁴⁶ First, the EPA would create a national seal that would be applied to products indicating they have met certain criteria. Though the seal may not initially gain national recognition, over time, like the Energy Star label and Germany's Blue Angel logo, consumers will associate the environmental seal with the EPA and greater credibility.⁴⁴⁷ Like Blue Angel and the UK Carbon Trust program, the EPA should create product categories that are eligible for a national carbon certification.⁴⁴⁸ To eliminate many of the delays and transaction costs, the EPA should have the authority to directly determine product categories eligible for the seal. While it could still seek and review public comments from third parties, it would be too time consuming and inefficient to have a continuous back and forth between numerous panels and the EPA. To generally calculate the greenhouse gas emissions of product categories, the EPA or a third-party agency monitored by the EPA should test products within those categories. Because product testing is one of the most expensive areas, the EPA has traditionally left testing to the manufacturers themselves, which has created issues in substantiating product claims. One means of lowering costs is for the EPA to rely on the extensive product category testing that has been conducted by Germany, the United Kingdom, and other European countries.

Once the product categories are selected, the EPA must establish a process for testing individual products that are submitted by manufacturers to determine if they meet the carbon seal requirements. While the EPA could devise its own standard for calculating the carbon emissions of a product, it could easily adopt the widely accepted Voluntary Carbon Standard or PAS 2050 standards, which calculate the greenhouse gas emissions

445. *See supra* notes 105-14 and accompanying text.

446. *See supra* notes 206-10, 211-28, 232-40 and accompanying text.

447. *See supra* notes 170-73, 229-31 and accompanying text.

448. *See supra* notes 222-24, 237-39 and accompanying text.

of a product throughout its life cycle.⁴⁴⁹ An advisory board composed of scientists, consumers, retailers, manufacturers, environmentalists, and carbon offset providers should be formed to determine which testing criteria should be adopted.⁴⁵⁰ They should have an opportunity to advocate or critique either of these methods or propose an entirely new method for calculating emissions without utilizing the resources of the EPA.

The advisory board would also make comments and suggestions on standards for determining how products in each category would be deemed certifiable.⁴⁵¹ Under the Blue Angel program, manufacturers submit their own data, which creates issues of falsification because companies could doctor information to ensure their products are eligible for the seal.⁴⁵² The UK's Carbon Trust Footprint Company also permits companies to calculate their own carbon footprints to determine if they meet the certification requirements.⁴⁵³ One solution would be for the EPA to partner with a privately operated testing facility which could either test individual products or analyze data submitted by manufacturers to ensure its accuracy. Although individual testing may be costly, if the EPA is committed to displaying accurate carbon information, it may be necessary to at least initially conduct such testing to demonstrate to manufacturers that deceptive information will not be tolerated. This would lend greater credibility to the carbon certification program. Based on the input of the advisory board, the EPA would then adopt criteria for greenhouse gas calculations and testing procedures for submitted products.

Once a product complies with the EPA criteria, the EPA would provide the company with a certification seal to place on the product or use in product advertising. The carbon seal would indicate to consumers that the product has met government-established criteria and consumers could seek out the seal to reduce confusion in their decision making. Additionally, like the UK Carbon Trust program, the seal would indicate to consumers that the company is making an environmentally conscious commitment to lowering its carbon emissions.⁴⁵⁴ When "the same term[] in a similar system of presentation or format [is used] to convey information, it signals to consumers that there is a consensus or maybe even a supervising entity in-

449. *See supra* notes 296-99 and accompanying text.

450. *See supra* notes 207-08, 222-23 and accompanying text.

451. *See supra* notes 207-08, 222-23 and accompanying text.

452. *See supra* notes 225-27 and accompanying text.

453. *See supra* notes 237-39 and accompanying text.

454. *See supra* notes 233-35, 241 and accompanying text.

volved.⁴⁵⁵ Thus, as the seal became more widely used, consumers would gain greater confidence in the seal's credibility.⁴⁵⁶

The advisory board should determine just how much information should be contained in the carbon certification seal. It could simply provide a logo to be placed on products or it could provide consumers with more information about the carbon footprint of a particular product. If the EPA opts to use simply a logo, as it does with the Energy Star program, the standards for calculating the greenhouse gas emissions should be freely available to the public on its website. To offset some costs of the program, the EPA should require a fee in exchange for this advertising licensing agreement.⁴⁵⁷

The final step in creating a national carbon seal is the process of certification. The United States Energy Star and Organic Foods programs both have faced criticism that their certifications are unreliable and lack governmental oversight.⁴⁵⁸ The major problem under the OFPA is that, while the regulations create USDA accredited agents, organic producers have the option to select their own certifying agent.⁴⁵⁹ The Energy Star program does not even require a certifying agent, but relies solely on the manufacturer's claim that their product has met the criteria before being granted the Energy Star logo.⁴⁶⁰ The result can be minimal enforcement and a downward drive toward minimum standards.

There are two proposed methods of combating the risks associated with the certifying process. The government agency could either be chiefly responsible for the certification or the EPA could implement changes to address the risks associated with third-party certification. One proposal to reduce risk is to adopt the suggested model where manufacturers seeking certification pay into a general fund administered by the government or a third-party partner of the government, which then randomly assigns a certifier to a project and pays the certifier from the general fund.⁴⁶¹ This could potentially resolve the problem of companies self-selecting accrediting

455. Levy, *supra* note 21. Levy cites to the consistent style and format of nutrition fact panels as one of the main reasons they have gained consumer confidence. *Id.*

456. *See id.*

457. *See supra* notes 123-24, 227-28 and accompanying text.

458. *See Energy Star Has Lost Some Luster*, CONSUMER REP., Oct. 2008, at 24-25, available at <http://www.consumerreports.org/cro/home-garden/resource-center/energy-star-has-lost-some-luster/overview/energy-star-ov.htm>; Paula Lavigne, *Firm Accused of Selling Regular Beans as Organic*, DALLAS MORNING NEWS, Aug. 19 2006, at 3A ("A Texas company that sold regular beans as organic to customers all over the nation has been cited for breaking several federal rules and could face criminal charges.").

459. *See* Endres, *supra* note 193, at 32-33.

460. *See supra* note 449 and accompanying text.

461. *See* Savasta-Kennedy, *supra* note 197, at 888.

agents because they are aware that particular agents have lower standards than others for accreditation. Testing products or requiring research protocols that are independently verified could also help correct the lack of government oversight that currently exists in U.S. labeling programs.

The final component of an eco-labeling program is establishing a method of enforcement. Although the EPA should be primarily responsible for developing the standards and evaluating a product's criteria for certification, the FTC and state governments should play a crucial role in enforcing the regulations. States are currently responsible for enforcing laws under the Clean Air Act, and if a carbon-focused eco-labeling program was promulgated under the Act, states could implement such changes in their continued enforcement. The enforcement would also be more effective and better utilize resources if it supplemented a solely federal enforcement system because the threat of both federal and state litigation could induce greater compliance from manufacturers.

CONCLUSION

Though greenwashing is a significant obstacle to increasing consumer understanding of environmental claims, a nationwide eco-labeling program would reduce consumer confusion over time. Carbon labeling is an innovative way to encourage consumers, manufacturers, and government agencies to stay apprised of the latest technology and reduce greenhouse gas emissions. A carbon labeling program would provide consumers with the information necessary to make environmentally conscious decisions and encourage manufacturers to reduce the negative environmental impact of the goods they produce.