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The Greenwashing Deluge: Who Will Rise Above the Waters of Deceptive Advertising?

ELIZABETH K. COPPOLECCHIA†

We grew up founding our dreams on the infinite promise of American advertising. I still believe that one can learn to play the piano by mail and that mud will give you a perfect complexion.

—Zelda Fitzgerald

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I. INTRODUCTION

When asked to discuss their thoughts on the rising concern over “greenwashing,” most ordinary people would casually respond with a blank stare. Although businesses have engaged in the practice of greenwashing for the past two decades—causing legislatures, courts, and consumer organizations to concern themselves with this pervading issue—

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the general public still remains somewhat unmindful of the concept and unfamiliar with the term. Some scholars have defined greenwashing as “the advertising of a product as ‘environmentally friendly’ when some aspect of the product (or its distribution) has, in fact, deleterious effects on the environment.”¹ Others have more broadly defined greenwashing as a specific variant of “whitewashing” in which parties “attempt to cover up or excuse wrongdoing through false statements or the biased presentation of data.”² At a basic level, corporations greenwash consumers by making “subtle use of specific colors, images, typefaces,” and a seemingly genuine storyline—about how nature lovers should purchase these products to stay true to their eco-conscious selves—in order to market products.³

The recent surge in environmental marketing⁴ alongside significant consumer and governmental concerns over deceptive advertising warrant extensive discussion of the various means by which the legal community may address potential greenwashing claims. This article explores varying approaches to the issue of greenwashing claims and argues that the Federal Trade Commission’s upcoming release of its revised Guides for the Use of Environmental Marketing Claims, or “Green Guides,” in conjunction with the Federal Lanham Act is likely to heighten enforcement of greenwashing actions in the coming years. This article further argues that should the Federal Trade Commission (“FTC”) fail to actively enforce greenwashing claims subsequent to releasing its revised Green Guides, federal courts will unabashedly step in to fill the enforcement gap.

Part II provides context as to current concerns over environmental

1. David Hoch & Robert Franz, *Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALB. L. REV. 441, 441 (1994).

2. Robert Lamb, *How Greenwashing Works*, HOWSTUFFWORKS.COM, Jan. 25, 2008, <http://www.howstuffworks.com/greenwashing.htm>.

3. *Id.*

4. See FED. TRADE COMM’N, THE FTC IN 2010: FED. TRADE COMM’N ANNUAL REPORT 51 (2010), available at <http://www.ftc.gov/os/2010/04/2010ChairmansReport.pdf> [hereinafter FTC IN 2010] (explaining that “[c]onsumers are increasingly making purchasing decisions based on the environmental impact of products . . . [and so] marketers are making green claims about their products”); FED. TRADE COMM’N, THE FTC IN 2009: FED. TRADE COMM’N ANNUAL REPORT 76 (2009), available at <http://www.ftc.gov/os/2009/03/2009ftcrptpv.pdf> [hereinafter FTC IN 2009] (citing a “virtual tsunami of green marketing”); Lydia Parnes, Dir., Bureau of Consumer Prot., Fed. Trade Comm’n, Remarks at the 56th Annual Antitrust Spring Meeting 7–8 (Mar. 28, 2008), available at <http://www.ftc.gov/speeches/parnes/080328aba.pdf> [hereinafter Parnes Remarks 2008] (explaining how the FTC witnessed “a virtual explosion of green marketing” in 2007); David C. Vladeck, Dir., Bureau of Consumer Prot., Remarks Before Magazine Publishers of Am. 2 (Feb. 25, 2010), available at <http://www.ftc.gov/speeches/vladeck/100225mpaspeech.pdf> [hereinafter Vladeck Remarks 2010] (“In recent years, environmental marketing has proliferated.”); Matthew J. Parlow, *Greenwashed: Developers, Environmental Consciousness, and the Case of Playa Vista*, 35 B.C. ENVTL. AFF. L. REV. 513, 513–14 (2008).

marketing claims in categorical form. Part III emphasizes the cyclical nature of greenwashing claims, providing a chronology of FTC and state action toward greenwashing throughout the past two decades. Part IV examines the FTC's role as the primary enforcement agency for greenwashing claims, describing the intersection of the Green Guides to the traditional analysis of deceptive marketing practices, arguing that because deceptive environmental-marketing claims differ significantly from traditional deceptive claims, regulatory approaches should account for such distinctions.

Part V addresses a scenario in which the FTC fails to actively enforce greenwashing claims, arguing that the federal courts can and will likely play a role in greenwashing disputes by virtue of the Federal Lanham Act. Part VI questions the Supreme Court's failure to intervene with regards to environmental marketing claims, focusing on concerns over "patchwork" regulatory efforts. Part VII discusses current and potential disagreements arising from the need for regulations concerning environmental marketing.

II. TRENDS IN GREEN ADVERTISING LEAD TO MOUNTING CONCERNS

With the organic food industry reaping an overwhelming \$25 billion per year,⁵ it is no wonder that greater numbers of businesses have decided to market their products as "green."⁶ This article does not aim to disparage sincere efforts at promoting a more eco-friendly consumer culture, rather, this article applauds such advances and proceeds with the purpose of narrowly examining an alarmingly understated, though pervasive, challenge to eco-friendly consumerism—greenwashing.

Greenwashing does not occur in a vacuum. Instead, societal trends greatly affect greenwashing as environmental marketing peaks during certain periods, mirroring the economy and perceived public opinion respecting environmental issues.⁷ Consumers who purchase "green" products may be completely unaware that their desire to purchase such

5. Kim Severson, *Be It Ever So Hometown, There's Nothing Like Spin*, N.Y. TIMES, Jan. 3, 2007, at F1.

6. See FTC IN 2009, *supra* note 4, at 76; Parnes Remarks 2008, *supra* note 4, at 8; Marianne M. Jennings & John Entine, *Business With a Soul: A Reexamination of What Counts in Business Ethics*, 20 HAMLINE J. PUB. L. & POL'Y 1, 14–15 (1998).

7. Compare FED. TRADE COMM'N, THE FTC IN 2008: A FORCE FOR CONSUMERS AND COMPETITION 67 (2008), available at <http://www.ftc.gov/os/2008/03/ChairmansReport2008.pdf> [hereinafter FTC IN 2008] (promising a "continu[ing] public dialogue on green marketing claims as a response to "consumers becom[ing] more conscious of the impact consumption has on the . . . environment") with FED. TRADE COMM'N, FED. TRADE COMM'N 1994 ANNUAL REPORT 17 (1994), available at <http://www.ftc.gov/os/annualreports/ar1994.pdf> [hereinafter FTC IN 1994] ("Today's consumers are increasingly concerned with . . . the environmental implications of packaging and other product attributes.").

products is heavily influenced by a need to join the “group” of the moment, which currently happens to relate to socially conscious consumers,⁸ perhaps because “[g]uilt over the environment is at a historic high.”⁹

Still, the very acknowledgment of greenwashing as a problem can only arise in a context of flourishing social conscientiousness. Consumers and businesses alike are leaping forward into an era of unprecedented environmental awareness—and for that we should count ourselves fortunate to have come so far in the past fifty years.¹⁰ But we should temper any such celebration by the notion that too much of a good thing can at times lead to unforeseen and unwanted effects.

A. *The Collision Between Green Marketing and Greenwashing*

Businesses are particularly alert to the potential economic benefits that will likely accrue to them as a result of their entrance into the environmental marketing arena.¹¹ The AARP recently conducted a study, determining that “there are 40 million ‘green boomers’ in the United States today,” meaning that over half of the nation’s “baby boomers” currently consider themselves to be “environmentally conscious consumers.”¹² Businesses undoubtedly feel the pressure to fulfill their customers’ expectations and therefore have responded to consumers’ demands for “green” products.¹³

It is not simply that businesses are engaging in a greater amount of green marketing as of late, but rather that a greater amount of businesses

8. See Vladeck remarks, *supra* note 4, at 2 (explaining that businesses continue to environmentally market their products in response to “heightened consumer concern about the environmental impact of using certain products”); Severson, *supra* note 5.

9. Jesse Ellison, *Who Is the Greenest of Them All?*, NEWSWEEK INT’L, July 14, 2008, at A4.

10. See Derek E. Bambauer, *Cybersieves*, 59 DUKE L. J. 377, 440–41 (2008) (“Greenwashing . . . is in itself a partial victory: it occurs when companies recognize that reputation in an area such as environmental practices motivates economic decisions by consumers.”).

11. See Stuart D. Kaplow, *Does a Green Building Need a Green Lease*, 38 U. BALT. L. REV. 375, 396 (2009) (“companies are now further motivated to go ‘Green’ because of the marketing and public relations opportunities Green practices provide, as well as improved employee recruitment, retention, and increased worker productivity”); Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIMAL L. 25, 26–28 (2004).

12. Lamb, *supra* note 2. See also Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117, 124 (2009) (explaining that “environmentalist attitudes are now well-nigh omnipresent in American society”).

13. See Deborah Platt Majoras, Fed. Trade Cmm’n Chairman, Carbon Offset Workshop Opening Remarks 1 (Jan 8, 2008), available at http://www.ftc.gov/bcp/workshops/carbonoffsets/transcript/welcome_jkohm.pdf [hereinafter Majoras Remarks] (citing Patrick O’ Driscoll & Elizabeth Weise, *Green Living Takes Root, But Habits Die Hard*, USA TODAY, Apr. 19, 2007, at A1 for the proposition that “8 in 10 Americans said a company’s environmental record should be an important factor in deciding whether to buy its products”).

are attaching more significant environmental claims to a wider array of products.¹⁴ Such an evolution in green marketing claims suggests that the FTC may no longer want to sit back and wait for this issue to resolve itself.

In 2007, TerraChoice Environmental Marketing, a Canadian environmental organization,¹⁵ conducted a study concerning the presence of greenwashing in various product markets, concluding that out of 1018 consumer products and the 1753 environmental claims each of these products contained, every claim except one either misled or blatantly deceived the public.¹⁶ Through its study, TerraChoice categorized deceptive environmental claims into six distinct “sins of greenwashing.”¹⁷

TerraChoice determined that the first of these “sins,” that of the “hidden trade-off” is the most commonly committed.¹⁸ Businesses commit this sin by claiming that their product is “green,” despite the fact that the product may have just one “green” attribute, masking the more harmful effects the product has on the environment.¹⁹

As an example, consider Fiji Water’s claim that consumers who purchase their bottled water are assisting in the reduction of carbon levels released into the environment.²⁰ What Fiji has failed to inform consumers is that purchasing Fiji water is not in itself a means of reducing carbon emissions, but rather that Fiji, as a corporation, has begun purchasing carbon offsets in recent years.²¹ Many consumers would remain indifferent to this technicality, but that does not lessen the impact of the distinction itself on consumers who would prefer to purchase their bottled water in an environmentally friendly form, as opposed to purchasing their bottled water from a company that pays for the opportunity to not engage in “green” practices.²²

TerraChoice next found that twenty-six percent of environmental claims committed the “sin” of “no proof,” essentially including busi-

14. See Lamb, *supra* note 2.

15. Terrachoice describes itself as “North America’s premier environmental marketing agency A science-based marketing firm, . . . [that helps] clients convert genuine environmental leadership into winning strategy, communications and positioning”). See Terrachoice, <http://www.terrachoice.com/> (last visited May 30, 2010).

16. TERRACHOICE ENVTL. MKTG., THE “SIX SINS OF GREENWASHING” A STUDY OF ENVIRONMENTAL CLAIMS IN NORTH AMERICAN CONSUMER MARKETS I (2007), available at http://www.terrachoice.com/files/6_sins.pdf. See Ellison, *supra* note 9, at A4.

17. TERRACHOICE ENVTL. MKTG., *supra* note 16, at 2–4.

18. *Id.* at 2.

19. *Id.*

20. Ellison, *supra* note 9.

21. *Id.*

22. For a more lengthy discussion of carbon offsets, see *infra* Part IV.D.

nesses that made unsubstantiated environmental claims concerning their products while lacking a foundation in scientific evidence.²³ Such greenwashing claims in the automotive industry have become so common that some have coined the term “hollow hybrid” to refer to cars that automakers advertise as fuel-efficient, when in reality they are no more so than the non-hybrid versions of the same vehicle.²⁴ Roughly fifty percent of all cars marketed as hybrids are arguably “hollow” because they lack “a battery that boosts the combustion engine” as well as “the efficiency to warrant the designation.”²⁵

Businesses committed TerraChoice’s third greenwashing “sin” of “vagueness” in eleven percent of their environmental claims by ambiguously describing their products, referencing generic environmental causes in their products, and subtly depicting their products as eco-friendly.²⁶ For instance, standard greenwashed food products typically include on their packaging natural background settings, animals, “home-made” or “family-owned” types of labeling, references to environmental causes, and varied uses of environmentally evocative phrases, such as “organic.”²⁷ The United States Department of Agriculture (“USDA”) enforces standards for the labeling of certain products as “organic” pursuant to the Organic Foods Product Act (“OFPA”),²⁸ but the OFPA, however, does not aim to regulate all products labeled “organic.”²⁹

Finally, when it came to TerraChoice’s remaining three “sins” of greenwashing, businesses committed these far less frequently.³⁰ TerraChoice discovered that a mere seven percent of environmental claims committed the “sins” of “irrelevance,” which included providing accurate environmental information of no use to consumers; “lesser of two evils,” which comprised organic versions of considerably harmful products such as cigarettes; and “fibbing,” or providing blatantly false environmental claims.³¹ TerraChoice uncovered patent deception in a mere one percent of the products studied, suggesting that any developing regulatory framework should not operate under traditional deceptive-adver-

23. TERRACHOICE ENVTL. MKTG., *supra* note 16, at 3.

24. Ellison, *supra* note 9.

25. TERRACHOICE ENVTL. MKTG., *supra* note 16, at 3.

26. *Id.*

27. See Severson, *supra* note 5.

28. See 7 U.S.C. § 6501 (2006).

29. See 65 Fed. Reg. 80,548 (Dec. 21, 2000). For instance, the USDA does not regulate businesses that label personal care products as “organic.” See *All One God Faith, Inc. v. Hain Celestial Group, Inc.*, No. C 09-03517 JF (HRL), 2009 WL 4907433, at *2-4 (N.D. Cal. Dec. 14, 2009).

30. TERRACHOICE ENVTL. MKTG., *supra* note 16, at 2.

31. *Id.* at 4.

tising principles.³²

The downpour of “green” advertising is difficult to miss as consumers currently find themselves unable to escape “green” marketing in the most unexpected arenas.³³ Toymakers, such as Mattel, have recently begun advertising a new line of Barbie accessories, marketed toward eco-conscious girls.³⁴ The dilemma arises in that no matter how a child dresses her Barbie, in the end Barbie is still a *plastic* doll, and not particularly eco-friendly.³⁵ Before long “Cap’n Crunch [will] show [] up in a hemp jacket, raising money to save the manatees.”³⁶

Not only have advertisers hitched themselves to the “green” bandwagon, but the trend in “green” marketing has gone considerably further with even the Princeton Review adding a “green rating” to its annual guide for ranking colleges and universities.³⁷ In 2008, the Princeton Review conducted a survey of more than 10,000 college applicants only to find that sixty-three percent of these applicants considered “a college’s commitment to the environment” as a key factor in determining which school they would eventually attend.³⁸ As a result, greenwashing may soon exist on an entirely unprecedented scale with the Princeton Review granting universities higher ratings based on the effectiveness of a university’s “green” claims.³⁹

B. *Greenwashing’s Threat to Eco-friendly Consumerism*

Concerns over the means of regulating greenwashing have recently heightened mainly because “[g]reen marketing terms remain ill-defined, and no successful attempt has yet been made to codify what advertisers can or cannot say when trying to promote goods with environmental benefits.”⁴⁰ Governments, environmental organizations, and consumer organizations continually disagree over the means of addressing the issue, but they have reached some consensus as to the potential consequences of pervasive greenwashing, if left unchecked.⁴¹

32. *Id.*

33. See Majoras Remarks, *supra* note 13, at 1; Ellison, *supra* note 9.

34. See Dan Mitchell, *Bloggng Against Barbie*, N.Y. TIMES, May 10, 2008, at C5.

35. *Id.*

36. Severson, *supra* note 5

37. Kate Zemike, *Green, Greener, Greenest*, N.Y. TIMES, July 27, 2008, § 6 (Magazine), at 26.

38. *Id.*

39. *Id.*

40. *Green Marketing—Are Your Claims Sustainable?*, ENVTL. NEWS NETWORK, Sept. 2, 2008, http://www.enn.com/top_stories/article/38072.

41. See TERRACHOICE ENVTL. MKTG., *supra* note 16, at 1. See also Fed. Trade Comm’n, *Green Packaging Claims Workshop 13* (Apr. 30, 2008), available at <http://www.ftc.gov/bcp/workshops/packaging/transcript.pdf> [hereinafter *Green Packaging Claims*] (explaining that “advertisers who are willing to stake their efforts and reputations in making claims about product

A British monitoring organization, the Advertising Standards Authority, recently determined that consumer complaints related to environmental advertising had risen in Britain from 117 complaints regarding 83 ads in 2006 to 561 complaints regarding 410 ads in 2007.⁴² A similar organization based across Europe, the European Advertising Standards Alliance, further concluded that similar trends have developed in Belgium and the Netherlands, especially in relation to the automotive industry.⁴³

But businesses consistently maintain that by making environmental claims concerning their products, they are actually benefiting consumers⁴⁴ by providing consumers with the ability to better “differentiate between products in the market.”⁴⁵ With this purchasing decision leverage, consumers can drive the market toward investing “in more sustainable environmental practices.”⁴⁶

Significant amounts of deceptive environmental advertising, however, may instead guide previously misled consumers to become wary of all environmental product claims.⁴⁷ A recent study found that forty-three

efficacy ought to be ensured that individuals who do not abide by these norms will not, in effect, pollute the marketplace for truthful information”).

42. *Green Marketing—Are Your Claims Sustainable?*, *supra* note 40.

43. *Id.*

44. Canadian Standards Ass’n, *PLUS 14021—Environmental Claims: A Guide for Industry and Advertisers*, June 23, 2008, <http://www.csa.ca/products/environment/Default.asp?articleID=9278&language=English>.

45. *Id.* See also Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market Based Environmental Regulation: The Case of Electricity Deregulation*, 26 *ECOLOGY L.Q.* 243, 317–18 (1999) (“Green marketing is premised on the idea that fully informed consumers will switch to less polluting and habitat-destroying products. As a consequence, it is believed, producers will shift their purchases away from environmentally destructive production processes and toward environmentally benign processes because environmental consciousness will be more profitable.”).

46. Canadian Standards Ass’n, *supra* note 44.

47. See *Green Packaging Claims*, *supra* note 41, at 13. Concerns over consumer trust are warranted as the Business for Social Responsibility has explained:

Whether real or perceived, when consumers see greenwashing, they are likely to punish companies with less sales. When NGOs see it, they are motivated to drive negative campaigns and press. And when regulators see it, they can determine that an environmental claim is a “deceptive practice” and fine companies. The problem should be a concern to all companies, because even if your company is not singled out, greenwashing by your competitors hurts your industry. The more companies are seen as greenwashing, the less likely customers are to trust environmental-related claims in general, and the more likely regulators are to step in and impose restrictions.

BUSINESS FOR SOCIAL RESPONSIBILITY & FUTERRA SUSTAINABILITY COMMUNICATIONS, UNDERSTANDING AND PREVENTING GREENWASH: A BUSINESS GUIDE 3 (2009), available at <https://mywebpace.wisc.edu/teggert/Sustainability%20Website/Understanding%20and%20Preventing%20Greenwash.pdf?uniq=-malmbw> [hereinafter GREENWASH: A BUSINESS GUIDE]. See also OGILVY EARTH, FROM GREENWASH TO GREAT 2 (2010), available at <http://assets.ogilvy.com/>

percent of consumers believe that products featuring environmental attributes are of a “higher quality” than other products,⁴⁸ suggesting that consumers—for the most part—still trust environmental marketing claims and may be basing their purchasing decisions on such claims. But such trust may be short-lived.

A national study, conducted by Shelton Group, an agency specializing in “energy efficiency and sustainability,” recently found that forty percent of people surveyed reacted negatively or indifferently to the media’s current coverage related to the environment.⁴⁹ The study further concluded that the average consumer is unaware of environmental concerns and lacks sufficient knowledge to competently assess products for their environmental merit.⁵⁰ When asked to define the components of an environmentally friendly cleaning product, consumers surveyed correctly identified that the product should not contain “toxic ingredients,” but simultaneously and incorrectly affirmed that the product’s packaging should be recyclable.⁵¹ This lack of knowledge concerning environmental claims was accompanied by a growing cynicism toward such claims, as forty-seven percent of consumers surveyed cited that most businesses were engaging in “green” practices for the sole purpose of creating a more favorable corporate image.⁵² The concern remains that cynicism toward environmental claims, along with scarcity of information may eventually deter consumers from purchasing “green” products.

III. THE RISE AND FALL OF GREENWASHING

History seems to be repeating itself when it comes to greenwashing, but that does not mean that past solutions are the most effective way to tackle the problem. The current situation and rise in “green” advertising closely parallels a similar trend that took place in the mid 1990s. In order to fully understand how legislatures, courts, or regulatory agencies

truffles_email/ogilvyearth/Greenwash_Digital.pdf (arguing that greenwashing “is insidious—eroding consumer trust, contaminating the credibility of all sustainability related marketing”).

48. SUSTAINCOMMWORLD, *THE GREEN OUTLOOK 3* (2009), available at http://www.sustaincommworld.com/pdfs/The_Green_Outlook_Brochure_Appleton.pdf. The study further found that despite the economic recession, slightly over forty percent of businesses planned to “increase spending on green marketing in 2009” while an overwhelming majority of consumers persisted in purchasing green products. *Id.*

49. Becky Ebenkamp, *Study: “Green” Products Leave Consumers Puzzled*, BRANDWEEK USA, July 15, 2008, <http://www.greenwashreport.org/article150708>.

50. *Id.*

51. *Id.* The FTC expects that a general environmental benefit claim, such as the claim that a product is environmentally friendly will suggest to consumers that the product does not release “significant harmful substances” into the environment. Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.7(a) (2009). There is no suggestion, however, that such a claim indicates a product’s level of recyclability.

52. Ebenkamp, *supra* note 49.

should address the current greenwashing movement, one must have a working knowledge of how these actors addressed the issue when it first manifested itself.

This part examines the structural and societal parallels between a period in the mid 1990s when greenwashing claims were prevalent and the current trend in greenwashing. Part II.A addresses the varying ways by which commentators have defined and redefined the term “greenwashing,” displaying the term’s evolution over the past two decades. Part II.B provides a chronology of FTC and state reactions to pervasive greenwashing in the 1990s, describing any interaction between regulatory frameworks. Part II.C chronicles the past decade of FTC dormancy in the midst of state action over environmental marketing claims.

A. Redefining “Greenwashing”—Evolution of the Term

The term “greenwash” has evolved considerably over the past two decades, eventually dropping the more sinister connotation held in this article’s initial definition of the term.⁵³ TerraChoice currently defines greenwashing as “the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service.”⁵⁴ Others have referred to greenwashing as “the increasingly common corporate practice of making dubious environmental claims that are more about marketing than saving the planet.”⁵⁵

Based on these definitions, one should note that the term has substantially evolved. The definition no longer assumes that the greenwashed product will harm the environment, but rather that the product may not offer the benefit to the environment that it claims to provide. The very fact that commentators⁵⁶ have chosen to no longer define

53. See discussion *supra* INTRODUCTION. See also June Camille Bush Raines, Note, *The Green Giant: Environmental Marketing Claims*, 45 OKLA. L. REV. 689, 689–92 (1992) (referring to greenwashing as “greenscam”); Hoch & Franz, *supra* note 1, at 441 (referring to greenwashing as “greensleeze” and “eco-pornography” because the greenwashed product may harm the environment); Roger D. Wynne, Note, *Defining Green: Toward Regulation of Environmental Marketing Claims*, 24 U. MICH. J. L. REFORM 785, 787 (1991) (explaining that some companies “fabricate the environmental qualities of their goods, letting their advertising rhetoric far outstrip their environmental contributions”); Thomas C. Downs, Comment, “*Environmentally Friendly*” Product Advertising: Its Future Requires a New Regulatory Authority, 42 AM. U. L. REV. 155, 164 (1992) (reasoning that “[s]ome green claims appear merely to take advantage of consumers’ environmental consciousness without offering any true environmental benefits”).

54. TERRA CHOICE ENVTL. MKTG., *supra* note 16, at 1.

55. Mitchell, *supra* note 34.

56. GREENWASH: A BUSINESS GUIDE, *supra* note 47, at 6 (2009) (defining “greenwash” as “doing more for the environment than you really are”); CORPWATCH, GREENWASH 101 FACT SHEET 1, (2010), available at http://s3.amazonaws.com/corppwatch.org/downloads/Greenwash%20101%20FactSheet_Jan2010_1.pdf (defining “greenwash” as “disinformation disseminated by an organization so as to present an environmentally responsible image”).

greenwashing in terms of intent may suggest that the FTC's design for enforcing environmental marketing claims⁵⁷ may be somewhat outdated. If society has chosen to redefine greenwashing as something broader than intentionally deceiving the consuming public into purchasing products that consumers believe to be environmentally friendly, but that fail to live up to those expectations, then the FTC needs to redefine its vision of environmental marketing enforcement actions as well.

B. *The First "Green" Wave Hits: 1990–1999*

In the 1990s, the problem of deceptive environmental labeling of products led consumers and businesses alike to look to the FTC for redress.⁵⁸ The FTC noted a growing consumer preoccupation with products' "green" qualities since the 1980s and leading into the 1990s.⁵⁹ The FTC, however, was not the only one to notice; businesses realized the growing consumer demand for environmentally friendly products and responded.⁶⁰

Not surprisingly, as businesses began making environmental claims about their products to meet consumer demand, the FTC became aware that such claims could be particularly misleading because their subject matter allowed for little consumer verifiability.⁶¹ For example, consumers cannot readily determine whether a product they are purchasing is "green" because "green" is a subjective, undefined term. In addition, determining whether an environmental claim is deceptive under traditional standards is no easy task because some businesses are making

57. 16 C.F.R. § 260 (2009).

58. See Hoch & Franz, *supra* note 1, at 443. See also Letter from Joan Z. Bernstein, Dir., Bureau of Consumer Prot., to Michael J. Machado, Assembly Member, Cal. Legislature, Apr. 7, 1997, available at www.ftc.gov/be/v9700003.shtm [hereinafter Letter to Machado] (explaining that in the early 1990s "business, industry, consumer groups, and the state Attorneys General . . . petitioned the Commission to provide national industry-wide guidance to reduce consumer deception and skepticism, in order to promote the use of truthful and substantiated environmental marketing claims").

59. See FED. TRADE COMM'N, FED. TRADE COMM'N 1995 ANNUAL REPORT 16–17 (1995), available at <http://www.ftc.gov/os/annualreports/ar1995.pdf> [hereinafter FTC IN 1995]; Roscoe B. Starek, III, Comm'r, Fed. Trade Comm'n, A Brief Review of the FTC's Environmental and Food Advertising Enforcement Programs (Oct. 13, 1995), available at <http://www.ftc.gov/speeches/starek/rbsgre.shtm> [hereinafter A Brief Review] (summarizing the results of consumer polls as finding three general trends: Consumers chose not to buy products they believed would harm the environment, consumers bought products "specifically because of environmental advertising or labeling," and consumers paid more for such products).

60. See FTC IN 1994, *supra* note 7, at 20 (explaining that "new product introductions have kept pace with" growing consumer eco-consciousness).

61. See FED. TRADE COMM'N, FED. TRADE COMM'N 1991 ANNUAL REPORT 2, 11 (1991), available at <http://www.ftc.gov/os/annualreports/ar1991.pdf> [hereinafter FTC IN 1991]; A Brief Review, *supra* note 59 ("[I]t seemed that many of the [environmental] claims were exaggerated" as consumers and environmental groups voiced their concerns that "there wasn't much truth in environmental advertising.").

long-term environmental claims, the effects of which consumers will not know for decades.⁶²

In 1991, the FTC brought its first two environmental marketing actions against businesses making unsubstantiated "ozone-safety claims" and obtained consent agreements in each case.⁶³ That same year the FTC, the Environmental Protection Agency ("EPA"), and the United States Office of Consumer Affairs formed, essentially, a greenwashing task force. Aware of the potential fallout to businesses from strict and inconsistent regulation of environmental marketing, the FTC sought to balance consumer empowerment with "protection of business from conflicting state regulations."⁶⁴ The FTC had realized that its enforcement actions were insufficient to tackle the greenwashing problem.⁶⁵ As the FTC grew more aware of the deceptive environmental marketing problem, so did certain state legislatures, which also attempted to address such claims.⁶⁶

What eventually resulted from mounting pressures⁶⁷ was a soft approach to regulating deceptive environmental advertising in the form of the FTC releasing its nonbinding "Guides for the Use of Environmental Marketing Claims," commonly referred to as the Green Guides.⁶⁸ The release aimed to prevent companies engaging in environmental marketing from unknowingly violating section 5 of the Federal Trade Commission Act through a deceptive environmental claim.⁶⁹

62. See Roscoe B. Starek, III, Comm'r, Fed. Trade Comm'n, Remarks Before the Alliance for Beverage Cartons and the Environment Symposium (Dec. 4, 1996), available at www.ftc.gov/speeches/starek/egstarek.shtml [hereinafter Starek Remarks].

63. See FTC IN 1991, *supra* note 61, at 2. See, e.g., Zipatone, Inc., 114 F.T.C. 376 (1991); Jerome Russell Cosmetics, U.S.A., 114 F.T.C. 514 (1991).

64. FTC IN 1991, *supra* note 61, at 11.

65. See A Brief Review, *supra* note 59.

66. See, e.g., CAL. BUS. & PROF. CODE § 17508.5 (West Supp. 1992); IND. CODE ANN. §§ 24-5-17-1 to -14 (Burns Supp. 1992); N.Y. ENVTL. CONSERV. LAW § 27-0717.2 (McKinney 1992).

67. Starek Remarks, *supra* note 62. (stating that in the early 1990s the FTC "began to hear reports of uncertainty by businesses and advertisers about the potential development of differing . . . standards [for environmental claims] on a state by state basis" along with reports from "state law enforcers and environmental groups [that] continued to express concern about preventing deceptive claims").

68. See 16 C.F.R. § 260 (1996); 57 Fed. Reg. 36,363 (Aug. 13, 1992). The FTC had three alternative means of regulating from which to choose—case by case prosecution under section 5 of the Federal Trade Commission Act, issuing interpretive guidelines, and issuing binding trade regulation rules. See 56 Fed. Reg. 24,968 (May 3, 1991). Of these, the FTC opted for the second alternative.

69. See FED TRADE COMM'N, FED TRADE COMM'N 1992 ANNUAL REPORT 1, 13 (1992), available at <http://www.ftc.gov/os/annualreports/ar1992.pdf> [hereinafter FTC IN 1992] (describing the Green Guides as nobly intended "to protect consumers and to bolster their confidence in environmental claims, and to reduce manufacturers' uncertainty about which claims might lead to Commission law enforcement actions, thereby encouraging marketers to produce and promote products that are less harmful to the environment"); Hoch & Franz, *supra* note 1, at

The FTC's Green Guides may be viewed as "the primary tool in federal regulation of green advertising."⁷⁰ The Green Guides apply to "environmental claims included in labeling, advertising, promotional materials and all other forms of marketing," a seemingly broad scope of reach for the Guides.⁷¹

Within its mission to protect consumers from "deceptive, unsubstantiated, or unfair advertising,"⁷² the FTC began consistently enforcing environmental marketing actions in 1993.⁷³ By 1994, the FTC considered such claims "rapidly evolving."⁷⁴ In response to the steady flow of environmental marketing, the FTC began its first official review of the Green Guides in 1996, eventually finding the Guides "effective in preventing deception and encouraging truthful claims."⁷⁵ The FTC specifically noted the Guides' success in terms of solicited comments:

[T]he guides benefit consumers by stemming the tide of spurious environmental claims; bolster consumer confidence; increase the flow of specific and accurate environmental information to consumers, enabling them to make informed purchasing decisions; and encourage manufacturers to improve the environment characteristics of their products and packaging. . . .

[T]he guides benefit industry by providing uniform, consistent guidance regarding the making of non-deceptive environmental claims; promoting national consistency in the treatment of environmental marketing claims; assisting advertisers in determining what claims would likely lead to Commission challenge; . . . and allowing flexibility for manufacturers to improve the environmental attributes of their products and to communicate those improvements to consumers.⁷⁶

444. In 1992, the FTC noted a correlation between consumer "concerns with the environment" and "deceptive [environmental] claims." FTC IN 1991, *supra* note 61, at 16. See also Starek Remarks, *supra* note 62. (explaining that the FTC expected to improve consumer purchasing power by providing businesses with safe harbors for their environmental marketing claims). The Guides' safe-harbor approach allows businesses to make objectively genuine environmental claims about their products without fear of repercussion. As a result, the market should take note of these consumer preferences. See *id.*

70. Gregory Bibler, *Making the Case for Your Green Marketing Claims*, MONDAQ BUS. BRIEFING, Sept. 22, 2008 at 2, available at 2008 WLNR 18283499.

71. 16 C.F.R. § 260.2 (2009). For a detailed discussion of the Green Guides, see *infra* Part IV.B.

72. FTC IN 1994, *supra* note 7, at 19.

73. See FED. TRADE COMM'N, FED. TRADE COMM'N 1993 ANNUAL REPORT 13 (1993), available at <http://www.ftc.gov/os/annualreports/ar1993.pdf> [hereinafter FTC IN 1993] (describing that "many of the [FTC's] consent orders . . . involved environmental claims" in 1993).

74. FTC IN 1994, *supra* note 7, at 19.

75. FED. TRADE COMM'N, FED. TRADE COMM'N 1996 ANNUAL REPORT 19 (1996), available at <http://www.ftc.gov/os/annualreports/ar1994.pdf> [hereinafter FTC IN 1996].

76. 61 Fed. Reg. 53,311, 53,312 (Oct. 11, 1996).

A University of Utah study, conducted between the initial release of the Guides and the FTC's subsequent review of them, determined that businesses attached more environmental claims to their products between 1992 and 1994 than in previous years.⁷⁷ The study further found that since the release of the Guides businesses had "improved [the] quality" of their environmental claims through greater specificity and qualification.⁷⁸ In a sense this was a success for the FTC, which had chosen a soft regulatory approach to environmental marketing, fearing that a stricter regulatory framework would discourage businesses from designing green products despite consumer demand.⁷⁹ Such perceived success contributed to the FTC's decision to lightly revise the Guides in 1998 only to reflect "the emergence of new claims."⁸⁰

By choosing to strike with a subtle attack on greenwashing—determining the need for and means of regulation on a case-by-case basis—the FTC set up a pattern for how government agencies, as well as legislatures, would address later greenwashing concerns.⁸¹ Perhaps the FTC took a passive approach to enforcing environmental marketing actions because of the way in which society had then chosen to define greenwashing. With commentators in the mid 1990s taking the view that businesses were intentionally greenwashing consumers,⁸² the FTC may have reasoned that enforcement actions against businesses for deceptive environmental claims could easily taint a business's reputation indefinitely. Despite the safe harbors provided in the Guides, the FTC still managed to prosecute more than thirty environmental marketing claims—under the Federal Trade Commission Act—throughout the 1990s.⁸³

77. R.N. MAYER ET AL., TRENDS IN ENVIRONMENTAL MARKETING CLAIMS SINCE THE FTC GUIDES: TECHNICAL REPORT (1995) (the study audited product brands for two years and across sixteen geographically diverse grocery stores).

78. *Id.*

79. See Letter to Machado, *supra* note 58.

80. FED. TRADE COMM'N, FED. TRADE COMM'N 1997 ANNUAL REPORT 31 (1997), available at <http://www.ftc.gov/os/annualreports/ar1997.pdf> [hereinafter FTC IN 1997] (newly covered terms included "environmentally preferable," "nontoxic," and "chlorine-free").

81. *Id.*

82. See sources cited *supra* note 53.

83. See, e.g., Zipatone, Inc., 114 F.T.C. 376 (1991) (ozone-safety claims); Jerome Russell Cosmetics, U.S.A., 114 F.T.C. 514 (1991) (ozone-safety claims); First Brands Corp., 115 F.T.C. 1 (1992) (degradability claims); Am. Enviro Prods., Inc., 115 F.T.C. 399 (1992) (degradability claims); Tech Spray, Inc., 115 F.T.C. 433 (1992) (ozone-safety claims); RMed Int'l, Inc., 115 F.T.C. 572 (1992) (degradability claims); Mobil Oil Corp., 116 F.T.C. 113 (1993) (degradability claims); Perfectdata Corp., 116 F.T.C. 679 (1993) (ozone-safety claims); Demert & Dougherty, Inc., 116 F.T.C. 841 (1993) (general environmental-benefit claims); Nationwide Indus., Inc., 116 F.T.C. 853 (1993) (ozone-safety and general environmental-benefit claims); Texwipe Co., 116 F.T.C. 1169 (1993) (general environmental-benefit claims); G.C. Thorsen, Inc., 116 F.T.C. 1179 (1993) (ozone-safety claims); White Castle Sys., Inc., 117 F.T.C. 1 (1994) (recyclability claims); Redmond Prods., Inc., 117 F.T.C. 71 (1994) (general environmental-benefit claims); Mr. Coffee, Inc., 117 F.T.C. 156 (1994) (general environmental-benefit claims); Archer Daniels Midland Co.,

C. *A Decade of Dormancy for the FTC: 2000–2009*

Most likely in response to a hostile political climate, the FTC ceased active enforcement of environmental marketing claims by 2001. The decade witnessed, essentially, no FTC activity in the area of environmental marketing. Although the FTC need only review its Green Guides every ten years—meaning that a review was not officially due until 2009—the FTC had previously begun review of the Guides only three years after their initial release.⁸⁴

The reason behind such a period of FTC dormancy matters to the extent that consumers need a reliable means of enforcing deceptive environmental marketing claims, and businesses need some form of consistent regulatory guidance to keep pace with marketing trends and developments. If consumers can only rely on the FTC to enforce greenwashing claims within a certain political climate, then such a remedy is hardly viable. Similarly, businesses proceeding currently without any guidance as to their new environmental claims face great uncertainty should the FTC suddenly awaken with a series of enforcement actions based on these new claims. At the same time, state regulatory action in this field has varied, with a significant number of states incorporating the Green Guides into their own law by providing their state's attorney general with power to bring an action against a party violating the statute,⁸⁵ and further with Indiana providing a private cause of action for

117 F.T.C. 403 (1994) (degradability claims); Orkin Exterminating Co., Inc., 117 F.T.C. 747 (1994) (general environmental-benefit claims); Ams. Favorite Chicken Co., 118 F.T.C. 1 (1994) (general environmental-benefit and recyclability claims); Lepage's, Inc., 118 F.T.C. 31 (1994) (recyclability and degradability claims); Oak Hill Indus., Corp., 118 F.T.C. 44 (1994) (general environmental-benefit and recyclability claims); AJM Packaging Corp., 118 F.T.C. 56 (1994) (general environmental-benefit and recyclability claims); Keyes Fibre Co., 118 F.T.C. 150 (1994) (degradability and general environmental-benefit claims); Amoco Chem. Co., 118 F.T.C. 194 (1994) (recyclability and general environmental benefit claims); In re N. Am. Plastics Corp., 118 F.T.C. 632 (1994) (degradability claims); BPI Env'tl, Inc., 118 F.T.C. 930 (1994) (degradability claims); Chemopharm Laboratory, Inc., 118 F.T.C. 1195 (1994) (general environmental-benefit claims); Creative Aerosol Corp., 119 F.T.C. 13 (1995) (ozone-safety and recyclability claims); Mattel, Inc., 119 F.T.C. 969 (1995) (ozone-safety claims); Safe Brands Corp., 121 F.T.C. 379 (1996) (general environmental-benefit and recyclability claims); Amoco Oil Co., 121 F.T.C. 561 (1996) (general environmental-benefit claims); Benckiser Cons. Prods., Inc., 121 F.T.C. 644 (1996) (environmental donation claim); RBR Prods., Inc., C-3696 (Dec. 1996) (ozone-safety claims); Blue Coral, Inc., D-9280 (July 1997) (general environmental-benefit claims); Tradenet Mktg., Inc., X990063 (Apr. 1999) (general environmental-benefit claims); OneSource Worldwide Network, Inc., X990067 (July 1999) (general environmental-benefit claims).

84. See discussion *supra* Part III.B.

85. See, e.g., CAL. BUS. & PROF. CODE § 17580.5 (West 2010) (explicitly incorporating the Green Guides); CONN. GEN. STAT. § 22a-255c (2009) (adopting provisions regulating the recyclable nature and content of product packaging); FLA. STAT. § 403.7193 (2009) (adopting provisions for regulating environmental representations); IND. CODE § 24-5-17-2 (2009) (adopting provisions similar to those in the Green Guides); ME. REV. STAT. ANN. tit. 38, § 2142 (2010) (explicitly incorporating the Green Guides); 220 MASS. CODE REGS. § 11.06 (2010) (explicitly

deceptive environmental marketing claims.⁸⁶

After nearly a decade of inactivity, the FTC began revising the Green Guides in 2008, in response to the dramatic increase in green advertising⁸⁷ and the potential for numerous greenwashing claims.⁸⁸ According to the FTC, such revisions are warranted because businesses are currently making an ample number of claims over terms, such as “carbon offsets” and “sustainability,” left untouched by the current Green Guides.⁸⁹

incorporating the Green Guides in the context of electricity generation and supply); MICH. COMP. LAWS § 445.903(1)(dd)–(ee) (2009) (explicitly incorporating the Green Guides); MINN. STAT. § 325E.41 (2009) (explicitly incorporating the Green Guides); N.M. CODE R. § 12.2.5 (Weil 2010) (explicitly incorporating the Green Guides in the context of discussing why environmental marketing claims differ from standard deceptive-advertising claims); N.Y. ENVTL. CONSERV. LAW § 27-0717 (McKinney 2010) (adopting provisions regulating the recyclable nature and content of product packaging); R.I. GEN. LAWS § 6-13-3.1 (2009) (explicitly incorporating the Green Guides); 52 PA. CODE § 54.6 (2010) (explicitly incorporating the Green Guides in the context of electricity generation and supply).

86. See, e.g., IND. CODE § 24-5-17-14(b) (2009) (“A person who suffers actual damages from a violation of this act may bring an action to recover the actual damage.”). A concern arises that as states continue to regulate deceptive environmental-marketing, they may overly burden interstate commerce, implicating dormant commerce clause issues. Congress’s commerce clause power under Article 1, section 8, clause 3 of the Constitution does not explicitly restrict states from regulating particular spheres of commerce, but may prevent states from using certain means of regulating commerce. As the Supreme Court explained in *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 338 (2007): “Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.” Whether state statutes regulating deceptive environmental-marketing violate the dormant aspects of the commerce clause depends on whether such statutes facially discriminate against interstate commerce. *Id.* Assuming a court finds that these statutes are facially neutral, the court will uphold the statute “unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.” *Id.* at 346. Although dormant commerce clause concerns warrant discussion, this issue is outside the scope of this article.

87. See 73 Fed. Reg. 11,371, 11,373 (Mar. 3, 2008); *It’s Too Easy Being Green: Defining Fair Green Marketing Principles, Statement before the H.R. Sub. Comm. on Energy and Commerce* 111th Cong. 1 (2009) [hereinafter *It’s Too Easy Being Green*] (prepared statement of the FTC) (citing a “virtual tsunami of environmental marketing” over the last few years); Fed. Trade Comm’n, *Hearing before the S. Sub. Comm. on Fin. Servs. and General Gov’t Comm. on Appropriations* 110th Cong. 7 (2008) (prepared statement of the FTC) (citing a “virtual explosion of green marketing” in 2007).

88. See *It’s Too Easy Being Green*, *supra* note 87, at 1; Parnes Remarks 2008, *supra* note 4, at 8; Fed. Trade Comm’n, *FTC Reviews Environmental Marketing Guides, Announces Public Meetings*, FTC.gov, Nov. 28, 2007, <http://www.ftc.gov/opa/2007/11/enviro.shtml>; Ellison, *supra* note 9; Joseph J. Schwartz, Comment, *Thinking Green or Scheming Green?: How and Why the FTC Green Guides Should Address Corporate Claims of Environmental Sustainability*, 18 PENN. ST. ENVTL. L. REV. 95, 96–97 (2009).

89. See 72 Fed. Reg. 66,091, 66,092 (Nov. 27, 2007) (explaining that following the FTC’s 1998 revision of the Guides, businesses “increasingly have publicized the environmental attributes of certain products” and are also “making new green claims”); Parnes Remarks, *supra* note 4, at 8; Majoras Remarks, *supra* note 13, at 3 (noting that “consumers now have the option to purchase and use products that were unforeseen . . . when the FTC first developed the Guides, and

The FTC hosted its first of three Guides revision workshops on January 8, 2008, focusing on concerns over carbon offsets and renewable energy certificates.⁹⁰ Each revision workshop included panel discussions featuring industry players as well as environmental organizations. Through these workshops the FTC solicited proposals from interested parties and discussed the consequences of FTC-proposed revisions. The second workshop, held on April 30, 2008, focused on green packaging claims, while the final workshop, taking place roughly two months later, related to green building projects.⁹¹ Interested parties have submitted approximately 200 comments to the FTC over the course of its revision process, indicating both consumer and industry concern over the current lack of guidance.⁹²

While the FTC's recent decision to revise its Green Guides remains central to the growing concerns over greenwashing, the crux of this discussion rests in the connection between the FTC's revisions and FTC enforcement actions under the Federal Trade Commission Act. At the 2008 American Conference Institute's Regulatory Summit for Advertisers and Marketers, J. Thomas Rosch, an FTC Commissioner, described the FTC's new vision for the enforcement of deceptive environmental marketing claims.⁹³ Rosch began by explaining that although the FTC had witnessed significant amounts of environmental marketing strategies in the past, recent numbers were unprecedented with businesses introducing more than 300 "green" products in 2007, a five-percent increase from 2002.⁹⁴ Rosch went on to note that the U.S. Patent and Trademark Office had processed twice as many applications for "green" products in 2007, than in 2006.⁹⁵

However, plans for completing the revisions by early 2010 were suddenly halted toward the end of 2008, as revision workshops reached a standstill.⁹⁶ In mid 2009 the FTC announced that it would conduct its own study of "consumer perception of environmental marketing claims" before continuing with its revisions.⁹⁷ Somewhat ironically, despite halt-

consumer perceptions of old green claims may have evolved significantly over time"); Robert S. Huie, *Establishing Green Guides*, MIAMI DAILY BUS. REV., May 19, 2008, at 5.

90. See 73 Fed. Reg. 11,371, 11,373 (Mar. 3, 2008).

91. See 74 Fed. Reg. 22,396, 22,397 n.5 (May 12, 2009).

92. See *It's Too Easy Being Green*, *supra* note 87, at 4 (citing 72 Fed. Reg. 66,094 (Nov. 27, 2007), 73 Fed. Reg. 11,371 (Mar. 3, 2008), and 73 Fed. Reg. 32,662 (June 3, 2008)).

93. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Responsible Green Marketing (June 18, 2008) available at <http://www.ftc.gov/speeches/rosch/080618greenmarketing.pdf>.

94. *Id.* at 2.

95. *Id.*

96. Brenda H. Gotanda, *Corporate Sustainability Reporting: Capturing Benefits, Avoiding Pitfalls*, 240 LEGAL INTELLIGENCER 5 (2009), available at 2009 WLNR 21591827.

97. See 74 Fed. Reg. at 22,397 (The FTC plans to conduct an internet survey of 3,700 participants in order to better understand how consumers respond to general environmental-benefit

ing Green Guides revisions, the FTC reemerged in 2009 from its decade-long slumber, by bringing a handful of enforcement actions against businesses engaging in deceptive environmental marketing.⁹⁸

The FTC's activities during the summer of 2009 may provide a glimpse into what the future holds for the FTC. In a matter of months, the FTC brought three enforcement actions against Kmart, Dyna E, and Tender for their deceptive use of the term "biodegradable" to describe products ranging from paper plates to dry towels. In discovering that consumers routinely disposed of each of these products in "landfills," the FTC reasoned that such products were not biodegradable because they would not "biodegrade within a reasonably short time" when disposed of in such a way.⁹⁹ Earlier that year the FTC brought false advertising claims against two car manufacturers deceptively marketing the technology behind their hollow hybrids through statements "violat[ing] basic scientific principles."¹⁰⁰

Additionally, the FTC's view of environmental marketing is newly centering on the theory of the "life-cycle analysis,"—examining environmental claims by "looking at the entire lifespan of a product."¹⁰¹ To better understand this life-cycle analysis, consider it in the context of a hypothetical product, such as a newly designed laptop computer that makes an environmental claim. Manufacturers of this newly "green" laptop would likely promote the product as "green" because of a longer battery life. A laptop promising a longer battery life should result in a reduced consumption of batteries and therefore reduced disposal of such batteries. Using a life-cycle analysis to determine whether the manufacturers of this laptop are making an accurate environmental claim, the FTC would consider more than just the laptop's battery life, which is merely relevant to the latter part of the analysis relating to the product's disposal. Instead, the FTC would take into the account the use of "clean" technology in the laptop's manufacturing process, the laptop's packaging, the laptop's composition, and the laptop and battery disposal rates.

claims and certain specific environment claims, such as "sustainable" and "carbon neutral."); *It's Too Easy Being Green*, *supra* note 87, at 4 (explaining that the FTC is seeking this data to avoid "inadvertently chill[ing]" businesses from making "useful green claims").

98. See K-mart Corp., No. 082-3186 (June 9, 2009) (biodegradability claim); Tender Corp., No. 082-3188 (June 9, 2009) (biodegradability claim); Dyna-E Int'l, No. 9336 (June 9, 2009) (biodegradability claim).

99. *Advertising Trends and Consumer Protection: Statement Before the S. Comm. on Commerce, Science and Transportation*, 111th Cong. 15–16 (2009) (testimony of David Vladeck, Dir., Fed. Trade Comm'n) [hereinafter Vladeck Testimony].

100. *Id.* at 16 (citing *FTC v. Dutchman Enterprises, LLC, et al.*, No. 2:09-cv-00141-FSH (D. N.J. Jan. 14, 2009)).

101. Rosch, *supra* note 93, at 9.

Environmentally friendly disposal factors may no longer sufficiently counter environmentally harmful aspects of the manufacturing process.

Engaging in a life-cycle analysis would be a wide departure from the FTC's original purpose under the Green Guides, which directly notes that the Guides fail to "address claims based on a 'lifecycle' theory of environmental benefit."¹⁰² Such a departure by the FTC may imply a new focus for the agency.

The FTC's latest response to current greenwashing issues,¹⁰³—bringing actions against businesses engaged in deceptive environmental marketing, while stalling revisions to its Green Guides—may suggest that the FTC has not only realized the vast scope of the current greenwashing problem, but has also accepted that a laissez-faire approach to regulation provides little deterrent effect.¹⁰⁴ The concern remains, however, that the FTC's unexpected halt to its revision process may in fact be a signal to businesses that the FTC has further reassessed its position in the greenwashing scheme and found the Guides an inadequate means of addressing such a pervasive problem. Of course, a more practical explanation may be that the FTC has merely stalled revisions because greenwashing is hardly a priority during a time of stifling economic recession.

IV. AGENCY ENFORCEMENT

This part provides a comprehensive analysis of the FTC's role in responding to environmental-marketing claims. Part IV.A describes the basis for the FTC's involvement in deceptive environmental-marketing claims via the Federal Trade Commission Act. Part IV.B details the FTC's Green Guides, including a discussion of their nonbinding nature, basic provisions, upcoming revisions, and the expected consequences of such revisions. Part IV.C explains how environmental-benefit claims differ from traditional deceptive-advertising claims, while Part IV.D describes some potential consequences of the Guides' upcoming revisions.

A. *Claims Under the Federal Trade Commission Act*

Typically, plaintiffs can seek relief from deceptive advertising by

102. 16 C.F.R. § 260.7 (2009).

103. Vladeck Testimony, *supra* note 99, at 15–16; Gabriel Nelson, *FTC Moves May Signal Start of 'Greenwashing' Crackdown*, N.Y. TIMES, Feb. 3, 2010.

104. Vladeck Testimony, *supra* note 99, at 13 (stating that "the FTC has launched its own green initiative, including review of its Green Guides and law enforcement actions targeting false or deceptive claims"); Jennifer Woods, Note, *Of Selling the Environment—Buyer Beware? An Evaluation of the Proposed F.T.C. Green Guides Revisions*, 21 LOY. CONSUMER L. REV. 75, 81–82 (2008).

means of requesting an enforcement action from the FTC under section 5 of the Federal Trade Commission Act (“FTC Act”).¹⁰⁵ The FTC enforces deceptive-advertising actions related to food and most other consumer products.¹⁰⁶ Section 45 of the Federal Trade Commission Act specifically declares unlawful “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”¹⁰⁷

Authority for promulgation of rules lies in the FTC Act’s grant of power to the FTC to “define with specificity unfair or deceptive acts or practices in particular industries.”¹⁰⁸ However, the FTC has not addressed environmental-marketing claims through its rulemaking power, choosing instead to promulgate nonbinding guides in this area.¹⁰⁹ Where businesses act “inconsistent[ly] with the guides,” the FTC may bring an enforcement action under section 5 of the FTC Act, but only where the FTC reasonably believes the businesses’ actions are “deceptive” in terms of the FTC Act.¹¹⁰

Consumers may be disadvantaged by the FTC’s broad discretion whether to carry an enforcement action forward on behalf of a consumer.¹¹¹ This is further complicated by the fact that the FTC Act fails to define “deceptive acts,” leaving the FTC to make such determinations on an individual basis.¹¹² Generally, the FTC considers an act “deceptive” where the act is “likely to mislead reasonable consumers.”¹¹³ However, an advertisement’s “capacity to deceive” can qualify as deceptive under the FTC Act.¹¹⁴

Over the past two decades, the FTC has prosecuted many of its

105. Federal Trade Commission Act, 15 U.S.C. § 45 (2006).

106. *Id.*

107. *Id.*

108. 15 U.S.C. § 57a (2006).

109. 16 C.F.R. § 1.5 (2009).

110. 15 U.S.C. § 45(a) (2006). *See also* Majoras Remarks, *supra* note 13, at 2 (stating that the “Green Guides apply the FTC Act to environmental-advertising and marketing practices and offer marketers general principles on how to avoid making misleading claims”).

111. *See* 16 C.F.R. § 260.2 (2009).

112. *See* § 45.

113. *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

114. *See, e.g., Gulf Oil Corp. v. Fed. Trade Comm’n*, 150 F.2d 106, 109 (5th Cir. 1945) (in a case involving livestock-insecticide spray, the court noted that: “The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.”); *Charles of the Ritz Distribs. Corp. v. Fed. Trade Comm’n*, 143 F.2d 676 (2d Cir. 1944); *Perloff v. Fed. Trade Comm’n*, 150 F.2d 757 (3d Cir. 1945); *Progress Tailoring Co. v. Fed. Trade Comm’n*, 153 F.2d 103 (7th Cir. 1946); *Goodman v. Fed. Trade Comm’n*, 244 F.2d 584 (9th Cir. 1957); *Thiret v. Fed. Trade Comm’n*, 512 F.2d 176 (10th Cir. 1975).

environmental-marketing actions in terms of lack of substantiation.¹¹⁵ Because consumers cannot easily verify environmental claims, the FTC's preoccupation with substantiation actions is warranted. For a business to make a claim that the FTC does not deem deceptive, the business must possess a "reasonable basis" for the claim.¹¹⁶ For environmental claims, the FTC requires that businesses back up such claims with "competent and reliable scientific evidence."¹¹⁷

In deciding whether to bring an action against a party for "unfair or deceptive acts," the FTC will consider various factors; namely, the likelihood that a particular claim would "mislead" a "reasonable consumer," and the materiality of a particular claim.¹¹⁸ Even if a claim is literally true, the FTC may still bring an action for deceptive advertising against the business depending on what consumers infer from the claim. Consumers who read "please recycle" on the back of a paper plate may assume that the statement is an environmental claim, suggesting that the consumer can readily recycle the product. The FTC views such claims, if unqualified, as deceptive because although paper plates are objectively recyclable, the claim implies that consumers will be able to recycle them in their communities, when in fact most communities do not offer recycling facilities for paper products once contaminated by food.¹¹⁹

Businesses charged with deceptive advertising or marketing under section 5 may defend on the basis that their product claim was mere "puffery."¹²⁰ In a leading case, *Carlay Company*, makers of a weight-loss plan claimed that "removal of excess weight through the use of the product was easy."¹²¹ The FTC argued this claim was deceptive under section 5 because evidence suggested that weight loss through the product and use of the plan was not easy. The Seventh Circuit disagreed, determining that the "term [easy] is one of . . . relative connotation" and "justifiable[] under the circumstances, under those cases recognizing that such words 'easy,' 'perfect,' 'amazing,' 'prime,' 'wonderful,' 'excellent,' are regarded in law as mere puffing or dealer's talk upon

115. See discussion *supra* Part III.B.

116. See Starek Remarks, *supra* note 62.

117. *Id.* (the standard is that "any supporting test, analysis, research, study, or other evidence based on the expertise of professionals in the relevant area must be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results").

118. See *id.* (commonly prosecuted claims include instances where businesses have "implied too much" through an environmental claim or have "exaggerated the environmental benefits of their products").

119. See *id.*

120. Puffery is "an expression of opinion relating to value." *Vavricka v. Mid-Continent Co.*, 8 N.W.2d 674, 679 (Neb. 1943).

121. *Carlay Co. v. Fed. Trade Comm'n*, 153 F.2d 493, 494-95(1946).

which no charge of misrepresentation can be based.”¹²² Puffery defenses, specifically, may prove problematic in the context of environmental marketing claims.¹²³

B. *The Green Guides and their Connection to the FTC Act*

The FTC “employs a multi-tiered approach” to tackling deceptive environmental-marketing claims—creation and promulgation of the Green Guides to steer businesses in the right direction, enforcement actions against businesses engaged in deceptive environmental marketing, and publication of materials meant to alleviate consumer confusion.¹²⁴

First, there is no independent enforcement under the Green Guides, which are merely an administrative agency’s nonbinding interpretation of the law.¹²⁵ However, if the FTC finds that a business has made a claim that is at odds with the Green Guides, the FTC retains the option of prosecuting the business under section 5 of the Federal Trade Commission Act, “which prohibits unfair or deceptive practices.”¹²⁶

Although some might argue that the Green Guides are fatally flawed because of their nonbinding nature, such an interpretation ignores the current FTC posture, which describes the Green Guides as mere reflections of “the basic requirements that have been spelled out over the years in FTC statements and cases for *all* advertising claims.”¹²⁷ Under this approach, the Green Guides simply reiterate binding legal principles, applied to deceptive-advertising practices, in the specific context of environmental marketing.

Second, the FTC chose not to specifically define terms within its Green Guides, preferring instead to provide businesses with expansive categories in which they might safely advertise their product to consumers, without becoming entirely vulnerable to liability for deceptive advertising—so-called safe harbors.¹²⁸ The FTC’s failure to specifically define environmental terms in its Green Guides again reinforces the idea that the FTC viewed its role with regards to greenwashing claims as one

122. *Id.* at 496.

123. See discussion *infra* Part IV.C.

124. See *It’s Too Easy Being Green*, *supra* note 87, at 1.

125. See 16 C.F.R. § 260.1 (2009); Fed. Trade Comm’n, *The FTC’s Green Guides*, *supra* note 84; Lauren C. Avallone, Comment, *Green Marketing: The Urgent Need for Federal Regulation*, 14 PENN. ST. ENVTL. L. REV. 685, 686–87 (2006).

126. See 15 U.S.C. § 5 (2006); *It’s Too Easy Being Green*, *supra* note 87, at 2.

127. Rosch, *supra* note 93, at 6.

128. See 16 C.F.R. §§ 260.6–260.7 (2009). For a detailed discussion of these categories, including specific examples, see *infra* Part IV.B.2.

of an independent observer, attempting to regulate near the margins without actively interfering with the conduct of business.

However, it remains unclear whether the FTC's statements concerning its Green Guides¹²⁹ have paralleled the FTC's conduct concerning deceptive environmental claims. What appears more likely is that although the FTC has expressed its desire to treat greenwashing claims in much the same way as it addresses traditional deceptive-advertising claims, the FTC has not conducted itself in such a manner over the course of the past decade.¹³⁰

1. PRINCIPLES GUIDING ENVIRONMENTAL-MARKETING CLAIMS

The FTC based its Green Guides on five overarching principles. Businesses aiming to environmentally market their products in nondeceptive ways must consider that these five principles pervade every aspect of the Green Guides. Thus, where the Guides are currently deficient—as in cases of new environmental claims—businesses may still rely on these five principles for direction,¹³¹ although such direction is not nearly as clear as that provided in the Guides' safe-harbor provisions.

Primarily, the Green Guides provide that:

any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product, package or service must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim.¹³²

To understand the scope of a substantiation claim, consider the following example. In 1996, the FTC brought an enforcement action against Amoco Oil Company concerning Amoco Silver Gasoline ads, which the FTC found to be in violation of section 5(a) of the FTC Act.¹³³ Amoco's ads encouraged consumers to purchase Silver 89 octane gas for a "cleaner environment," a claim for which Amoco "did not possess and rely upon a reasonable basis" of evidence.¹³⁴ The FTC's order went on to explain that regardless of whether the representations were currently accurate, Amoco acted inappropriately in making such claims because they were unsubstantiated at the time when Amoco released the ads.¹³⁵

129. Rosch, *supra* note 93, at 6.

130. See discussion *supra* Part III.B.

131. This can be seen from the fact that TerraChoice's greenwashing sins—though pertaining to current environmental claims—directly correlate to these five principles. See discussion *supra* Part II.A.

132. 16 C.F.R. § 260.5.

133. Amoco Oil Co., 121 F.T.C. 561, 561 (1996).

134. *Id.* at 562.

135. *Id.* at 579.

By the terms of this consent order, businesses committing TerraChoice's "sin of no proof" would directly violate the principle of substantiation because they do not possess reliable evidence for the claims they are making.¹³⁶

The second of these principles—that of specificity—states that “any qualifications or disclosures . . . should be sufficiently clear, prominent and understandable to prevent deception.”¹³⁷ The FTC derived this principle from a decision in which a manufacturer claimed that its “device to be used on car engines would reduce gasoline consumption.”¹³⁸ The problem behind the statement was its lack of qualification. Consumers may broadly interpret such a phrase to mean that the device significantly reduces gas consumption, when in fact, the device did so only to a limited extent. This principle corresponds to claims that commit the “sin of vagueness” because such claims, without some kind of qualification, are easily misunderstood by consumers.¹³⁹

The third principle, relating to perceived lack of understanding on the part of consumers, declares that “[a]n environmental marketing claim should be presented in a way that makes clear whether the environmental attribute or benefit being asserted refers to the product, the product’s packaging, a service or to a portion or component of the product, package or service.”¹⁴⁰ Claims regarding a lack of understanding will vary widely, with some businesses’ claims causing far more confusion among consumers than others. In a case predating release of the Green Guides, the FTC brought a section 5(a) action against the Vons companies because Vons had advertised all of its food products as “pesticide-free,” when in fact only some of Vons’s products deserved such a classification. The FTC noted that Vons’s representations would mislead consumers into thinking all of Vons’s products were pesticide-free.¹⁴¹ The FTC brought this action based on general principles related to deceptive advertising and to this day the Green Guides do not directly address “pesticide-free” claims. This principle would most likely cover

136. TERRACHOICE ENVTL. MKTG., *supra* note 16, at 3. But the FTC does not currently require businesses to provide consumers with evidence of substantiation. Instead the FTC merely requires that such claims be substantiated. At the FTC’s revision workshop on green packaging, Scot Case, representing TerraChoice, suggested that the FTC has failed in this respect, arguing that the FTC should encourage businesses to make such information available to consumers via required certification, their websites, or even a toll-free informational hotline. *See* Green Packaging Claims, *supra* note 41, at 207. Case went on to say that “if the intent of the law is to actually facilitate marketplace environmentalism . . . consumers need information to verify the accuracy of the claims being made.” *Id.* at 208.

137. 16 C.F.R. § 260.6 (2009).

138. *Vacu-Matic Carburetor Co. v. Fed. Trade Comm’n*, 38 F.T.C. 704 (1944).

139. TERRACHOICE ENVTL. MKTG., *supra* note 16, at 3.

140. § 260.6

141. *Vons Cos.*, 113 F.T.C. 779, 779 (1990).

claims that commit the “sin of the hidden trade-off” because while these claims are not false per se, they “paint a greener picture of the product” than is warranted.¹⁴²

The FTC addressed exaggeration in its fourth principle, explaining that “[a]n environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication.”¹⁴³ Environmental marketing claims are particularly prone to overstatement, mainly because a business’s environmental claim can be entirely accurate on its face, while simultaneously misleading consumers.¹⁴⁴ This principle corresponds to claims that commit the “sin[s] of irrelevance” and “lesser of two evils” because such claims are basically truthful overstatements.¹⁴⁵

In its fifth and final principle, the Guides address comparative claims by stating that “[e]nvironmental marketing claims that include a comparative statement should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception.”¹⁴⁶ The FTC has traditionally enforced actions against companies that claim that their products are superior or that make any other kind of open-ended comparison, basing such enforcement actions on a 1958 action against Liggett & Myers Tobacco Company.¹⁴⁷ *Safe Brands Corp.*, provides an example of FTC application of this principle to environmental-marketing claims. Here, the FTC maintained that Safe Brands Corporation had violated the FTC Act by advertising its antifreeze as “safer for the environment” than comparable products. The FTC maintained that such a statement was deceptive under section 5 because the defendant could not substantiate that its antifreeze was safer for the “environment generally,” as opposed to being safer for certain aspects of the environment.¹⁴⁸

Why would the FTC design such guiding principles, actively enforce environmental marketing claims throughout the 1990s, and then lay dormant for nearly a decade? These principles correspond almost directly to the “six sins of greenwashing” that TerraChoice noted, demonstrating that the success of the Green Guides was somewhat short-lived. Standing alone the Guides may in fact provide responsible busi-

142. TERRACHOICE ENVTL. MKTG., *supra* note 16, at 2.

143. § 260.6.

144. A company may label its product as “biodegradable,” where the product may in fact biodegrade in time; however, the FTC may still consider this to be deceptive advertising if the product fails to biodegrade for several years.

145. TERRACHOICE ENVTL. MKTG., *supra* note 16, at 4.

146. § 260.6.

147. *See* Liggett & Meyers Tobacco Co., 55 F.T.C. 354 (1958).

148. *Safe Brands Corp.*, 121 F.T.C. 379, 379, 385 (1996).

nesses with a means of safely marketing their products to environmentally-conscious consumers, but without the threat of FTC enforcement lurking in the background, why should businesses continue to follow the Guides' directives?

2. CATEGORIES OF ENVIRONMENTAL-MARKETING CLAIMS

The Green Guides address eight categories of environmental-marketing claims, providing businesses with safe harbors in each category.¹⁴⁹ Although the FTC does not enforce deceptive environmental-marketing claims by direct reference to a business's failure to comply with the Green Guides' safe harbors, the vast majority of these enforcement actions correlate to principles addressed in the Green Guides as well as the Guides' specific categories.

The first of these categories is based on claims that a product provides a "general environmental benefit," explaining that "[u]nless [the] substantiation duty can be met, broad environmental claims should either be avoided or qualified . . . to prevent deception about the specific nature of the environmental benefit being asserted." The FTC has viewed general-benefit claims as including terms such as "environmentally-friendly," "environmentally-preferable," and "nontoxic."¹⁵⁰ This category is of particular significance because it best demonstrates the reason why environmental marketing claims differ from standard deceptive-advertising claims and why the FTC is best equipped to tackle such claims.¹⁵¹

The remaining seven categories address specific environmental-marketing claims—"degradable/biodegradable/photodegradable,"¹⁵²

149. § 260.7.

150. § 260.7(a). *See, e.g.*, Creative Aerosol Corp., 119 F.T.C. 13 (1995) (prohibiting a soap manufacturer from marketing its products as "environmentally safe" unless such a claim is substantiated); Demert & Dougherty, Inc., 116 F.T.C. 841 (1993) (prohibiting a hair-care product manufacturer from marketing its product as "environmentally safe" unless such claim is substantiated).

151. For a detailed discussion see *infra* Part IV.C.

152. § 260.7(b). *See, e.g.*, First Brands Corp., 115 F.T.C. 1 (1992) (prohibiting the manufacturer of plastic trash bags from further marketing its product as degradable where such manufacturer could not substantiate its claim, but providing that the manufacturer would not violate section 5 of the FTC Act if it qualified such claims via language closely paralleling language found in section 260.7 (b)); Am. Enviro Prods., Inc., 115 F.T.C. 399 (1992) (same, where the claim arose over disposable diapers); RMED Int'l, Inc., 115 F.T.C. 572 (1992) (same, where the claim arose over disposable diapers).

“compostable,”¹⁵³ “recyclable,”¹⁵⁴ “recycled content,”¹⁵⁵ “source reduction,”¹⁵⁶ “refillable,”¹⁵⁷ and “ozone safe/ozone friendly”¹⁵⁸—providing businesses with numerous, nonexhaustive safe harbors for compliance within each category.

Businesses making new environmental claims, such as claims that their products are “sustainable” or “green,” cannot rely on the Guides for safe harbors because the Guides are simply outdated at this point. As in the early 1990s—leading up the FTC’s release of the Green Guides—environmental marketing is on the rise, businesses are lacking guidance, and environmental groups are claiming that consumers are being deceived.¹⁵⁹ History suggests that the combination of these factors should lead to FTC action; but although the FTC proclaims its desire to regulate such issues, businesses continue to widely advertise their less-than-environmentally-friendly products as “green,” with little interference from the FTC.

C. *Differentiating Greenwash from Traditional Deceptive Marketing*

One should not underestimate the role of the Green Guides in setting environmental-marketing claims apart from traditional deceptive-marketing claims. In some respect, it seems desirable to treat environmental-marketing claims as an undifferentiated subset of traditional deceptive-advertising claims prosecuted under section 5. But such treatment ignores a basic distinction: General environmental-benefit claims may constitute mere puffery under traditional section 5 analysis, and

153. § 260.7(c). *See, e.g.*, Keyes Fibre Co., 118 F.T.C. 150 (1994) (prohibiting paper-plate manufacturer from marketing its product as “compostable” where “only a few municipal solid waste composting facilities” exist across the nation).

154. § 260.7(d). *See, e.g.*, White Castle Sys., Inc., 117 F.T.C. 1 (1994) (prohibiting a fast-food chain from claiming the recyclability of its paper packaging where “there are virtually no collection facilities that accept food contaminated paper for recycling”); *Ams. Favorite Chicken Co.*, 118 F.T.C. 1 (1994) (same); *Oak Hill Indus. Corp.*, 118 F.T.C. 44 (1994) (prohibiting manufacturer of “plastic plates, bowls, and utensils” from same).

155. § 260.7(e). *See, e.g.*, AJM Packaging Corp., 118 F.T.C. 56 (1994) (prohibiting disposable-plate manufacturer from claiming that its products were 100% recyclable, unless manufacturer could substantiate).

156. § 260.7(f). *See, e.g.*, The Vons Cos., 113 F.T.C. 779 (1990) (prohibiting pesticide manufacturer from claiming reduced toxicity of its products unless manufacturer could substantiate).

157. § 260.7(g).

158. § 260.7(h). *See, e.g.*, Zipatone, 114 F.T.C. 376 (1991) (prohibiting spray manufacturer from marketing its product as an “ecologically safe propellant” where such product contains “ozone depleting substances”); *Jerome Russell Cosmetics, U.S.A, Inc.*, 114 F.T.C. 514 (1991) (prohibiting spray manufacturer from marketing its product as “ozone friendly” where such product contains “ozone depleting substances”).

159. *See* discussion *supra* Part III.B.

much like consumers, courts lack the expertise needed to determine whether general environmental-benefit claims are deceptive.

Puffery is excusable conduct, and the FTC may not bring a cease-and-desist order against a company for mere puffery. In *Gulf Oil Corp. v. Federal Trade Commission*, the Fifth Circuit defined “puffing” as “an expression of opinion not made as a representation of fact.”¹⁶⁰ But while the court simplistically defined the term, its scope is not so obvious. Some insight may be found in the Ninth Circuit’s reasoning in *Kirchner v. Federal Trade Commission*, where the court upheld the FTC’s cease-and-desist order, noting that “[t]he problem presented . . . is not a problem of puffing . . . which, at worst, [has] no dangerous potential. If a nonswimmer . . . equipped with a Swim-Ezy should ‘swim as far as you please,’ as one of the . . . advertisements invited him to do, he might never get back.”¹⁶¹ At the same time, the Seventh Circuit has added that words of “relative connotation” such as “easy” and “prime” constitute mere puffing.¹⁶²

Under this framework, courts are likely to view general nonfactual claims as puffery so long as any lack of veracity behind such claims is not harmful. The Green Guides do not currently address the term “green,” for instance. If the makers of a newly designed laptop computer market their product as “green,” regardless of any environmental benefit, a court following the traditional deceptive-marketing analysis may find such marketing to constitute nonactionable puffing for three reasons.

First, “green” is a nonfactual claim—the term is undefined. The laptop manufacturer is therefore not making an untrue statement when describing its product as “green” because no one can really say what qualifies as “green.” Second, “green” is a term of “relative connotation”; it is defined only in terms of comparison. The laptop may be “green” as compared to another laptop, even if it does not benefit the environment in a way that consumers believe a “green” laptop should. Lastly, even if the laptop provides minimal environmental benefit, consumer reliance on the laptop’s alleged “green” attributes will not necessarily harm the consumer in any identifiable way—except for some pocket injury if the consumer paid more than he or she would have paid for a non-“green” laptop.

For example, in 2006, the EPA advised DuPont and certain other companies to discontinue their use of a carcinogen known as Perfluorooctanoic acid (“PFOA”), which these businesses were using to

160. 150 F.2d 106, 109 (5th Cir. 1945).

161. *Kirchner v. Fed. Trade Comm’n*, 337 F.2d 751, 753 (9th Cir. 1964).

162. See *supra* notes 121–22 and accompanying text.

make Teflon and various forms of food packaging.¹⁶³ As a response to the EPA's warnings, DuPont and its fellow companies claimed the creation of a new and markedly improved "green" version of the food packaging coating.¹⁶⁴

But not everyone is convinced that DuPont's claim is accurate, arguing instead that because the new coating is made from the same typically carcinogenic chemicals as PFOA, the new coating should be equally harmful, despite the "green" claim that DuPont attached.¹⁶⁵ Investigations have determined that the only known difference between the two chemicals at issue is that numerous studies have been performed on PFOA, revealing its harmful effects, while there is no actual scientific data concerning the new "greener" version of the product.¹⁶⁶ One should consider this a form of "[greenwashing—claiming environmental benefits for a product that's little better than its replacement—at its worst."¹⁶⁷

The Green Guides acknowledge such a concern by including a category for general environmental-benefit claims. The Guides call for qualification or avoidance of such claims in order to comply with the FTC Act.¹⁶⁸ The FTC may revise this portion of the Guides to include terms such as "green."

Whereas the FTC, as a regulatory agency specializing in consumer protection, has expertise to determine whether a general environmental-benefit claim is deceptive, courts are far less able to do so. Courts do not traditionally deal in elusive concepts like general environmental-benefit claims, but are accustomed to traditional deceptive-advertising analysis, with its focus on definable terms and verifiable claims. General environmental-benefit claims simply are not verifiable to any extent.

D. *Potential Consequences of the FTC's Upcoming Green Guides Revisions*

As the FTC potentially focuses on further regulation within its Green Guides, one has to consider the possible consequences associated with any changes made. In relation to carbon offsets, it is likely that FTC regulation will have a detrimental effect by limiting the number of

163. Organic Consumers Ass'n, *Credibility Gap: Toxic Chemicals in Food Packaging and DuPont's Greenwashing*, ENVTL. NEWS NETWORK, June 20, 2008, <http://www.enn.com/pollution/article/37458>.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. See 16 C.F.R. § 260.7(a) (2009).

projects that businesses currently claim as producing offsets.¹⁶⁹ Offsets pose a complex problem for regulators because any measure of veracity is speculative. To prove the validity of an offset claim, regulators must “measure[] the reductions achieved through an offset project against a projected baseline of what would have occurred in its absence.”¹⁷⁰ The Government Accountability Office (“GAO”) has explained that “credible offsets” must possess four qualities: (1) additionality—that each offset must reduce greenhouse gases to some extent under the projected baseline test; (2) regulators must be able to “measure” such reductions; (3) regulators must be able to “verif[y]” such reductions; and (4) such reductions must be “permanent.”¹⁷¹ Offsets present a large-scale concern as well because U.S.–produced offsets have increased by nearly seventy percent in the past three years with approximately 600 businesses and organizations currently involved in the market.¹⁷²

If the FTC provides a narrow safe harbor for carbon offsets, perhaps as a newly added specific category in the Guides, businesses may worry that the projects they have been supporting through offset purchases will no longer qualify under the Guides, exposing them to liability under the FTC Act.¹⁷³ But there is no reason to think that the

169. See U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONG. REQUESTERS: CARBON OFFSETS 8 (2008), available at <http://www.gao.gov/new.items/d081048.pdf> [hereinafter GAO REPORT] (explaining that “federal oversight” of the carbon offset market “would likely increase costs to providers,” and suggesting that such oversight could eventually “stifle innovation”). Carbon offsets are defined as “measurable reduction[s] of greenhouse gas emissions from an activity or project in one location that is used to compensate for emissions occurring elsewhere.” *Id.* at 1. Currently, the U.S. provides a voluntary market for carbon offsets. *Id.* at 4. Businesses often use carbon offsets as a means of claiming that their product reduces greenhouse gas emissions. The claim is not that the product itself reduces emissions, but that proceeds from the product’s sale will fund the business’s purchase of carbon offsets—certificates that “purportedly represent measurable reductions in greenhouse emissions accomplished through activities such as methane capture or tree planting.” Majoras Remarks, *supra* note 13, at 3–4.

170. GAO REPORT, *supra* note 169, at 2.

171. *Id.* at 2–3.

172. *Id.* at 9. Although the FTC and EPA have addressed some concerns over the carbon offset market, such attempts have been limited in scope, and currently “[n]o single regulatory body overseas the market.” *Id.* Instead, “state fraud and consumer protection laws,” as enforced by states’ attorneys general comprise a significant area of regulation in this field. *Id.* at 19.

173. See, e.g., Comment of Wal-Mart Stores, Inc. on the Guides for the Use of Environmental Marketing Claims 3–4 (Jan 25, 2008) (stating that the FTC “should resist the temptation to define what constitutes an eligible offset Doing so would require the Commission to resolve highly technical environmental debates that are beyond its expertise”); Comment of Hydrodec N. Am. LLC on the Guides for the Use of Environmental Marketing Claims 1 (Jan. 25, 2008) (noting that “the FTC should not prescribe a policy straight-jacket for additionality,” but should instead focus on an approach that “maintain[s] the incentives for new technology and other innovations that offsets can provide”); Comment of Georgia-Pacific on the Guides for the Use of Environmental Marketing Claims 4 (Jan. 22, 2008) (explaining that “the FTC must be very careful if this proposal is made a rule because the dynamics of the market and technology. It could disrupt valid and credible programs and not avoid any fraudulent activity”).

FTC will create a narrow safe harbor for carbon offsets. In the case of carbon offsets, a particular concern relates to substantiation.¹⁷⁴ The specific projects may not matter as much as whether the projects supported actually reduce carbon emissions. If the business purchasing offsets can substantiate the claim through reliable evidence, then that should be sufficient. Further, FTC regulation of carbon offsets may in fact positively affect offset buyers, by providing them with greater certainty that an offset is credible.¹⁷⁵

The fact that the FTC's Green Guides revisions might directly interfere with significant aspects of particular industry practice may determine whether the FTC remains inactive in prosecuting deceptive environmental claims. The question is over the benefits of self-regulation. The FTC, in light of its concern over achieving a balance between protecting consumers and providing businesses with flexible standards, will likely defer to business concerns in its revisions. Otherwise, the revisions may affect the carbon offset market in an unwanted manner.

FTC regulation on advertising and packaging of products may produce even stronger shockwaves.¹⁷⁶ FTC regulation will have far more immediate effects in this area because businesses and consumers have recently expressed significant concern over the issue of "sustainable packaging."¹⁷⁷ The FTC is leaning toward a requirement that would leave products that have been certified by third parties¹⁷⁸ as "green" vulnerable to FTC enforcement actions, which is likely to leave advertisers and businesses making environmental claims with a strong feeling of uncertainty toward their product.¹⁷⁹ If the FTC includes this proposal in its new Guides, businesses relying on third-party certifications will have a new concern—does the certification standard meet the FTC's new life-cycle approach to packaging?¹⁸⁰ Certifiers may adapt to meet these revisions, but such adaptation may prove both costly and time-consuming,¹⁸¹ leaving businesses in a bind.

174. See GAO REPORT, *supra* note 169, at 8. As part of its study, the GAO surveyed thirty-three carbon offset retailers based in the U.S. and found that "the information they provided about the offsets varied considerably and offered limited assurance of credibility." *Id.*

175. *Id.* at 31–32.

176. *Id.*

177. Green Packaging Claims, *supra* note 41, at 20 (remarks by John Kalkowski, Ed., Packaging Digest Magazine).

178. Third-party certification is "an independent evaluation . . . which substantiate[s] information that is being communicated." *Id.* at 165–66 (remarks by Cheryl Baldwin, Vice President of Science & Standards, Green Seal).

179. *Id.* at 2.

180. *Id.* at 175–76. (remarks by John Delfausse, Vice President of Global Packaging Dev., Aveda Clinique).

181. *Id.* at 176. (explaining that conducting a "full life-cycle analysis" can cost a business between \$30,000 and \$60,000 for each product).

A further concern exists in that any addition of newly defined terms may prove futile as businesses seek out new, undefined terms to describe the environmental attributes of their products. As Jim Hanna, Starbuck's Director of Environmental Impact, explained during the FTC's second Guides revision workshop:

[Y]ou know we as marketers, and we as consumer companies, we are the ones creating these words and defining them. For FTC to continue to really try to put boundaries and guidelines around words is really a reactionary way of doing things. I would rather [the FTC] put some stakes in the ground and develop some general concepts that we can look at and deal with [I]f [the FTC] put[s] these guidelines around existing words, we are just going to create a new set of words and a new lexicon out there [the FTC] ha[s] to react to again in five or ten years.¹⁸²

Another potential legal fallout here exists because several states, such as California and Indiana, have incorporated portions of the Green Guides into their own laws,¹⁸³ giving them binding force for the first time. For instance, California state law provides for civil as well as criminal penalties imposed on those who engage in false advertising, as defined by the Green Guides.¹⁸⁴ Regardless of the FTC's current posture toward enforcement of environmental claims, certain states will actively enforce the FTC's revisions of its Green Guides, perhaps to an even greater extent should the FTC remain dormant in this field. Essentially, "[t]he FTC's revisions will effect a change, overnight, in the law of California and other states."¹⁸⁵ This is the case because states like California

182. *Id.* at 212–13.

183. See CAL. BUS. & PROF. CODE § 17580.5 (West 2010); IND. CODE § 24-5-17-2 (2009). See also discussion *supra* Part III.C.

184. See CAL. BUS. & PROF. CODE § 17580.5(a) ("It is unlawful for any person to make any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied. For the purpose of this section, 'environmental marketing claim' shall include any claim contained in the 'Guides for the Use of Environmental Marketing Claims' published by the Federal Trade Commission."). California's legislature enacted the first version of this provision in 1992, in immediate response to the FTC's release of the Green Guides. Just this year, a California district court denied a motion to dismiss a consumer class action, brought against S.C. Johnson & Son for greenwashing. See *Koh v. S.C. Johnson & Son, Inc.*, No c-09-00927 RMW, 2010 WL 94265, at *3 (N.D. Cal. Jan. 6, 2010). The action surrounds allegations that S.C. Johnson's use of its "Greenlist" label on Windex Products is unlawful greenwashing under California law because S.C. Johnson designed the label "to look like a third party seal of approval, which it is not, and [the label] falsely represents that the products are environmentally friendly." *Id.* at *1. The plaintiff claimed standing because had he known that a third party had not environmentally-certified the product, he would not have purchased the product for a "premium price." *Id.* The court found such an argument viable and relied directly on the Green Guides to conclude that "a product label containing an environmental seal . . . is likely to convey to consumers that the product is environmentally superior . . . and would be deceptive if the manufacturer cannot substantiate this broad claim." *Id.* at *2.

185. Huie, *supra* note 89.

have directly incorporated the entire Green Guides into their state law.¹⁸⁶ The concern is less pronounced in states that have incorporated portions of the Guides,¹⁸⁷ because only revisions to such portions of the Guides will alter state law automatically. Similarly, revisions to the Guides will not alter the laws of states that have created environmental marketing laws similar in substance to the Guides, without directly referencing the Guides in these laws.¹⁸⁸

Commentators also note a growing concern that the release of the FTC's revised Green Guides will lead to a flood of new litigation.¹⁸⁹ When the FTC released its Green Guides in 1992 and 1998, the release of the Guides also brought active FTC enforcement actions along with them, albeit resulting in a far less proactive approach by the year 2000.¹⁹⁰ It is extremely plausible that the FTC will revive its interest in pursuing greenwashing claims with the upcoming release of its revised Green Guides, particularly in light of the recent enforcement actions brought after a decade of dormancy.¹⁹¹ "[T]he relative lack of enforcement actions taken by the FTC during the last eight years against deceptive environmental marketing claims may mean that, in the eyes of plaintiffs' lawyers, the marketplace is ready for a thorough scrubbing."¹⁹² Due to this alarming sentiment, the concern remains that although the FTC will target blatant greenwashers, other firms, acting in good faith, may be caught in the crossfire.

Finally, where the FTC has remained dormant, the National Advertising Division of the Council of Better Business Bureau ("NAD") has been actively working to interpret and adjudicate matters related to the Green Guides as well as state environmental-marketing laws.¹⁹³ The NAD is not a regulatory body like the FTC, but its link to the FTC is vital. Both consumers and competitors may bring their claims before the NAD, which "reviews national advertising for truthfulness and accu-

186. See also IND. CODE § 24-5-17-2 (2009); R.I. GEN. LAWS § 6-13-3.1 (2009).

187. ME. REV. STAT. ANN. tit. 38, § 2142 (2010); 220 MASS. CODE REGS. § 11.06 (2010); MICH. COMP. LAWS § 445.903(1)(dd)-(ee) (2009); MINN. STAT. § 325E.41 (2009); N.M. CODE R. § 12.2.5 (Weil 2010); 52 PA. CODE § 54.6 (2010).

188. CONN. GEN. STAT. § 22a-255c (2009); FLA. STAT. § 403.7193 (2009); N.Y. ENVTL. CONSERV. LAW § 27-0717 (McKinney 2010).

189. See Bibler, *supra* note 70, at 6; William Sarni, *Greenwash Hits the Courtroom: Why the Green Wave Now Includes Litigation*, EARTH & INDUSTRY, Sept. 29, 2009, <http://earthandindustry.com/2009/09/greenwash-hits-the-courtroom-why-the-green-wave-now-includes-litigation/>; Heidi Goldstein & Emily Huggins Jones, *How to Avoid Litigation Risks From Greening Your Products*, GREENBIZ, May 5, 2010, <http://www.greenbiz.com/blog/2010/05/05/how-avoid-litigation-risks-greening-your-products?page=full>.

190. See discussion *supra* Part III.B.

191. See discussion *supra* Part III.C.

192. Huie, *supra* note 89.

193. Bibler, *supra* note 70, at 7.

racy.”¹⁹⁴ If an advertiser chooses to ignore the NAD’s suggestions, the NAD may then refer the case to the FTC for enforcement.¹⁹⁵ The NAD came into existence in the early 1970s, a time when the FTC exercised lesser regulatory power in the area of consumer protection and when “private actions brought under the Lanham Act were not as ubiquitous as they are now.”¹⁹⁶

In a 2007 dispute between Sony and Panasonic, the NAD issued a compliance order advising Panasonic to cease advertising its plasma televisions as “environmentally friendly.”¹⁹⁷ Similarly, in 2008, Proctor & Gamble brought an action against the makers of Arm & Hammer Essentials Liquid Laundry Detergent, with the NAD holding that the company could not refer to its product as “natural.”¹⁹⁸ The question remains as to who will fill the enforcement void if the FTC fails to rise above the waters of this current greenwashing deluge, if the recent surge in greenwashing enforcement activity trickles away as quickly as it materialized.¹⁹⁹ It is important to note that the FTC has not delegated, and cannot delegate any power to the NAD. Even if the NAD resolves a dispute, the FTC may still investigate the parties involved.²⁰⁰ But revisions to the Guides without accompanying enforcement actions may simply lead more parties to turn to self-regulatory bodies, such as the NAD.

V. FEDERAL COURT INVOLVEMENT VIA THE LANHAM ACT

Closely related to these issues of government enforcement concern-

194. See Nat’l Adver. Div., <http://www.nadreview.org/start.aspx> (last visited May 26, 2010).

195. See ABA SECTION OF ANTITRUST LAW, *FTC PRACTICE AND PROCEDURE MANUAL* 155 (2007). “NAD is the advertising industry’s self-regulatory body for resolving disputes over truth and accuracy in national advertising. . . . Though . . . NAD lacks the ability to enforce decisions, it generally refers any noncompliance to the Commission, which may choose to investigate the alleged deceptive advertising practices.” *Id.* at 155–56.

196. J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, *Self-Regulation and Consumer Protection: A Complement to Federal Law Enforcement*, Remarks Before the NAD Annual Conference 2 (Sept. 23, 2008), available at <http://www.ftc.gov/speeches/rosch/080923Rosch-NADSpeech.pdf> [hereinafter *A Complement to Federal Law*].

197. Bibler, *supra* note 70, at 7.

198. *Id.*

199. The FTC has explained that self-regulation, via bodies such as the NAD, has its advantages. The FTC, unlike the NAD, is susceptible to first amendment challenges based on its regulation of commercial speech, as Commissioner Rosch explained: “I think constitutional issues might also be raised in the context of ‘green marketing and advertising’” See *A Complement to Federal Law*, *supra* note 196, at 4–5. The FTC also faces pressure from the political branches. *Id.* at 10–11. Similarly, parties bringing disputes to the NAD will have such disputes resolved within a maximum of sixty days—a quick result as compared to private litigation under section 43(a) of the Lanham Act. *Id.* at 12. Finally, self-regulation allows for dispute resolution by a capable, expert body within the particular field. *Id.*

200. See *id.* at 15.

ing greenwashing is section 43(a) of the Lanham Act,²⁰¹ which, in pertinent part, states:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . [] in commercial advertising or promotion, *misrepresents the nature, characteristics, qualities, or geographic origin* of his or her or another person's goods, services, or commercial activities, *shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.*²⁰²

Section 43(a) provides a cause of action to individuals claiming damages resulting from a business's false advertising or marketing of a product.²⁰³ Commentators argue that application of section 43(a) in the context of environmental marketing and misrepresentation could provide private plaintiffs with a readily accessible cause of action for their seemingly remediless greenwashing claims.²⁰⁴ This article maintains that while such arguments are persuasive, application of the Lanham Act is improper for particular kinds of greenwashing claims—those involving general environmental-benefit claims.

In an era where green marketing is at an all-time high,²⁰⁵ making greenwashing all the more likely, and where the FTC has minimized its enforcement actions,²⁰⁶ it is not unreasonable to suggest that consumers need to find a new kind of remedy for cases where their interests are sufficiently harmed. Although litigants have not yet invoked the Lanham Act to resolve a dispute over greenwashing, it is only a matter of time before litigants realize the potential benefits of bringing their greenwashing claims under the provisions of section 43(a). Whether such a shift in Lanham Act jurisprudence is advisable remains to be determined.

Section 43(a) of the Lanham Act²⁰⁷ is best viewed as an amalgam and culmination of various federal laws related to unfair competition.²⁰⁸

201. Lanham Act, 15 U.S.C. § 1125 (2006).

202. 15 U.S.C. § 1125(a)(1) (emphasis added).

203. *See id.*

204. *See* Bibler, *supra* note 70; Robert White, Note, *Preemption in Green Marketing: The Case for Uniform Federal Marketing Definitions*, 85 IND. L.J. 325, 330–31 (2010); Jacob Vos, Note, *Actions Speak Louder Than Words: Greenwashing in Corporate America*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 673, 692–93 (2009); Susan J. Sadler, *Environmental Law: Got Green?*, 88 MICH. BAR J. 38, 39 (2009).

205. *See* discussion *supra* Part II.

206. *See* discussion *supra* Part III.C.

207. § 1125(a)(1)(B).

208. S. REP. NO. 100-515, at 5603 (1988). For a clear discussion of Congress's purpose behind

Courts typically view the Lanham Act as a remedial statute, broadly interpreting its provisions.²⁰⁹ Such a history and purpose argue in favor of further expanding the Lanham Act's scope to include claims for deceptive "green" marketing, despite the potential collision with FTC enforcement actions.

This part addresses a scenario in which the FTC chooses to remain inactive with regards to environmental-marketing claims, proposing that federal courts may step in by virtue of the Lanham Act. Part V.A describes a primary concern over Lanham Act application to greenwashing claims—categorization—and argues that general environmental-benefit claims are ill-suited for Lanham Act analysis. Part V.B examines a limitation on Lanham Act claims—competing interpretations of the Lanham Act's standing provision. Part V.C concludes by presenting arguments as to why the courts should remain uninvolved with regards to deceptive general environmental-benefit claims.

A. *Concerns over General Application of the Lanham Act*

Most relevantly section 43(a) of the Lanham Act prohibits "false or misleading description of fact . . . [or] representation of fact, which . . . []in commercial advertising or promotion, *misrepresents the nature, characteristics, qualities* . . . of [a] person's goods, services, or commercial activities"²¹⁰ Originally, Congress did not anticipate the wide array of applications available to the Lanham Act, and courts were reluctant to apply the cause of action to claims related to false advertising.²¹¹ Courts have interpreted the Lanham Act as a means of regulating commercial speech where such speech leads to a "misleading representation of fact."²¹² Whoever commits such a wrong "shall be liable in a civil

section 43(a) see *L'Aiglon Apparel v. Lana Lobell, Inc.*, 214 F.2d 649, 651 (3d Cir. 1954), stating that:

It seems to us that Congress has defined a statutory civil wrong of false representation of goods in commerce and has *given a broad class of suitors* injured or likely to be injured by such wrong the *right to relief in the federal courts*. . . . Perhaps this statutory tort bears closest resemblance to the already noted tort of false advertising to the detriment of a competitor But however similar to or different from pre-existing law, here is a provision of a federal statute which, with clarity and precision adequate for judicial administration, creates and defines rights and duties and provides for their vindication in the federal courts. (emphasis added).

Id.

209. See *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 546 (2d Cir. 1956).

210. § 1125(a)(1) (emphasis added).

211. *Proctor & Gamble v. Chesebrough-Pond's Inc.*, 588 F. Supp. 1082, 1092 (S.D.N.Y. 1984).

212. *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1032, 1056 (D. Kan. 2006) (citing § 1125(a)(1)).

action by any person who believes that he or she is or is likely to be damaged by such act.”²¹³

1. ELEMENTS TO A SECTION 43(a) CAUSE OF ACTION

In *United Industries Corp. v. Clorox Co.*, a case involving advertising claims that United Industries made concerning its “roach bait insecticide,” United Industries, a Clorox competitor in the roach-insecticide market, sought a declaratory judgment that it was not in violation of section 43(a). Clorox counterclaimed, seeking to enjoin United Industries from advertising that its product “Kill[ed] Roaches in 24 Hours.”²¹⁴ The Eighth Circuit explained:

To establish a claim under the false or deceptive advertising prong of the Lanham Act [section 43(a)], a plaintiff must prove: (1) a false statement of fact by the defendant in a commercial advertisement about its own or another’s product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products.²¹⁵

A plaintiff seeking to recover damages under section 43(a) must additionally prove that the defendant’s advertising, in violation of section 43(a) caused the plaintiff to suffer “actual damages.”²¹⁶ Finding the district court’s literal interpretation of the advertisement was warranted, the court upheld the denial of Clorox’s motion.²¹⁷

The remedial nature of the Lanham Act, as well as the courts’ typically broad interpretation of section 43(a), imply that the courts should be fairly willing to entertain a claim for deceptive green marketing that a plaintiff chooses to bring under the provisions of the Lanham Act. Although the courts will make these determinations on a case-by-case basis, in general, standard greenwashing claims should at least meet the minimal requirements to establish a cause of action under the Lanham Act.²¹⁸

213. *Id.*

214. 140 F.3d 1175, 1178 (8th Cir. 1998).

215. *Id.* at 1180. *See, e.g.*, *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); *Johnson & Johnson Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*, 19 F.3d 125, 129 (3d Cir. 1994); *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 (D.C. Cir. 1990).

216. *Rhone-Poulenc*, 93 F.3d at 515.

217. *United Indus.*, 140 F.3d at 1183.

218. *Sunlight Saunas, Inc.*, 427 F. Supp. 2d at 1056.

In the context of most greenwashing claims, the defending party will have “made a false or misleading representation” concerning its product, which is “in commerce.”²¹⁹ Plaintiffs may have a difficult time establishing this first element where a business has not made a patently false claim, but has instead claimed that its product provides some general environmental benefit.²²⁰

The misrepresentation will either “cause confusion” as to “approval of the product” by claiming that the product has been independently certified as green, or as to the inherent “characteristics” of the product by claiming that the product is 100 percent recyclable, for instance.²²¹ Finally, the plaintiff in a greenwashing case will have likely been harmed either as a competing business, meaning the plaintiff will have to prove a diversion of sales, or as an interested party, in which case the plaintiff must show some kind of reputational damage.²²²

2. CATEGORIZING FALSITY

In determining whether a plaintiff has met the first element of a section 43(a) claim, courts have categorized false statements into three general categories: “literally false claims,” “implicitly false or misleading claims,” and puffery.²²³ Puffery—“vague and highly subjective representations of product superiority” or “exaggerated advertising . . . upon which no reasonable buyer would rely”—is not actionable conduct under section 43(a).²²⁴

This categorization is particularly relevant in the greenwashing context. If a court categorizes a claim as literally false, the plaintiff need not establish actual consumer confusion to succeed under section 43(a); instead the court will assume that the plaintiff has met the second ele-

219. *Id.*

220. See discussion *infra* Part V.A.2.

221. *Sunlight Saunas, Inc.*, 427 F. Supp. 2d at 1056.

222. *Id.*; see discussion *infra* Part V.B.

223. See, e.g., *Sunlight Saunas, Inc.*, 427 F. Supp. 2d at 1180–82 (describing how section 43(a) applies to “commercial claims that are literally false as a factual matter,” along with “claims that may be literally true or ambiguous but which implicitly convey a false impression, are misleading in context, or likely to deceive consumers”); *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 943, 946 (3d Cir. 1993) (stating that section 43(a) provides two causes of action—one for “an advertisement that may be false on its face” and for an “advertisement [that] may be literally true, but . . . is likely to mislead and confuse consumers”); *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 13 (7th Cir. 1992) (explaining that section 43(a) applies to “literally false” statements and “statements, which while literally true or ambiguous, convey a false impression or are misleading in context, as demonstrated by actual consumer confusion”); *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 855 (2d Cir. 1997) (noting that section 43(a) applies to “advertising [that] is literally false as a factual matter” and “advertis[ing that] is literally true, [but] . . . is likely to deceive or confuse customers”).

224. *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998).

ment of the section 43(a) cause of action.²²⁵ But if a court categorizes a claim as implicitly false, the plaintiff must meet a higher burden by presenting sufficient evidence that the “advertising actually conveyed the implied message and thereby deceived a significant portion of the recipients.”²²⁶

As expressed earlier in this article, general environmental-benefit claims, by their very nature, are not literally false.²²⁷ Even aside from these claims, TerraChoice found that merely one percent of greenwashing claims involved patent deception.²²⁸ Assuming this is the case, then courts will classify the vast majority of deceptive environmental-marketing claims as implicitly false or misleading, heightening the burden that greenwashing plaintiffs face.²²⁹ Further, the puffing concern plaguing general environmental-benefit claims remains visible, and is in fact heightened in a section 43(a) context where the FTC has not brought the particular action, and where FTC expertise is lacking.

The courts themselves are not unaware of this concern, as displayed in *Proctor & Gamble v. Chesebrough-Pond's*.²³⁰ The case involved a claim made by a hand-lotion manufacturer that “no leading lotion beat[]” its product along with a claim by another hand-lotion manufacturer that its product was “superior to all other lotions.”²³¹ The court noted that in such a situation it was clear that “at least one of the advertising claims must be logically wrong.”²³² Recognizing the slow development of section 43(a) jurisprudence in the context of comparative advertising, the court acknowledged the parties’ demand for a further expansion of this jurisprudence: “[T]he parties attempt to go a significant step further by attacking advertisements that are not obviously false but that rest upon tests whose efficacy is questioned.”²³³

In refusing to take such a leap where the parties’ had provided complex testing results as to their products’ qualitative value, the court explained:

[We] however, listened for more than seven days to the testimony of

225. *See id.* at 1180–81.

226. *Id.* at 1182–83.

227. *See discussion supra* Part IV.D.

228. *See TERRACHOICE ENVTL. MKTG.*, *supra* note 16, at 6.

229. Plaintiffs will need to conduct and present evidence of consumer surveys in order to meet this burden. *See Johnson & Johnson Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*, 19 F.3d 125, 129–30 (3d Cir. 1994); *Coca Cola Co. v. Tropicana Prods, Inc.*, 690 F.2d 312, 317 (2d Cir. 1982); *United Indus.*, 140 F.3d at 1183 (“[S]uccess of the claim usually turns on the persuasiveness of a consumer survey.”).

230. *Proctor & Gamble v. Chesebrough-Pond's Inc.*, 588 F. Supp. 1082, 1093 (S.D.N.Y. 1984).

231. *Id.* at 1084–85.

232. *Id.* at 1085.

233. *Id.* 1092–93.

more than a dozen expert witnesses—statisticians, dermatologists, chemists, and physicists—and found that much of their testimony was incomprehensible. Indeed, it is doubtful that there are many, if any, trial judges who could fully comprehend the testimony. *Courts generally lack the expertise of the Federal Trade Commission when it comes to evaluating advertising practices. . . .*

Courts are not always able to determine whether an advertising claim is true or false, and where this occurs, the only possible conclusion is that the moving party has failed to prove by a preponderance of the evidence that the advertising claim is false. . . .

While there are those who believe that for every wrong there must be a remedy and that *courts should intervene where the executive branch and the legislature have not*, there are substantial constitutional objections to judicial policy-making under our form of government. . . .

[T]he role that these parties ask the judiciary to play exceeds that which the judiciary has the power to accept under our form of government. We are dealing with rough tests that have *no certifiable standards* and that rest upon nothing more than *subjective evaluations*²³⁴

Courts may rely on such reasoning as they approach the question of whether they should permit plaintiffs to bring greenwashing claims under section 43(a).

As the court in *Proctor & Gamble* explained, courts are simply not as well-equipped as the FTC to understand and address whether subjective marketing claims are false. At best, courts can address literally false claims under section 43(a), but claims that are impliedly false, ambiguous, or simply lack objective veracity by their very nature pose ample risk. Not only do general environmental-benefit claims precisely meet these categories,²³⁵ but the FTC also holds greater expertise and can devote more time and resources to prosecuting such actions. Whereas the FTC may solicit public comment and conduct its own consumer surveys to determine whether a general environmental-benefit claim is

234. *Id.* at 1093–94.

235. See discussion *supra* Part IV.C. See also *All One God Faith, Inc. v. Hain Celestial Group, Inc.*, No. C 09-03517 JF (HRL), 2009 WL 4907433, at *8 (N.D. Cal. Dec. 14, 2009) (explaining that “a Lanham Act claim may not be maintained if evaluating the alleged falsity or misleading nature of the representation at issue would require a court to interpret and apply statutory or regulatory provisions that fall under the exclusive jurisdiction of a federal government agency”). In a case involving the labeling of cosmetic products as “organic,” the court in *All One God* further expressed its concern over “whether the false advertising involves a fact that can be easily verified without requiring the truth of the fact to be determined” *Id.* at *8–9. See *Green Packaging Claims*, *supra* note 41, at 23–24 (remarks of John Kalkowski) (explaining the difficulty of defining a term like “green,” and arguing that “[g]reen could be less damage to the environment. It could imply that the packaging materials include renewable resources. It could imply that they are designing the products to be environmentally sustainable”).

deceptive, a court cannot. Instead, the court must rely on the parties for such evidence, while subsequently forced to scrutinize such evidence.

B. *Concerns over Standing: A Flood of Consumer Claims under Lanham?*

This article argues that while section 43(a) may not be particularly useful in the context of general environmental-benefit claims, the courts may be sufficiently equipped to address other kinds of deceptive environmental marketing claims under section 43(a). A subsequent concern, however, is one of standing.

A literal reading of section 43(a) notes that “any person” may bring a claim under the Lanham Act, while the remaining section specifically defines “person” as including both “natural” persons and “juristic” persons,²³⁶ leading various courts to conclude that persons other than competitors may bring a claim under the Lanham Act.²³⁷ Legislative history points to a desire to protect both competitors and consumers from deceptive advertising practices.²³⁸ According to the Lanham Act, an action may be brought

by *any person doing business* in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by *any person* who believes that he is or is likely to be damaged by the use of any such false description or representation.²³⁹

As a remedial statute, the courts should broadly interpret the Lanham Act. Despite the language of the statute itself, the circuits are split as to whether only competitors may bring claims under section 43(a), or whether the courts should permit consumers and other noncompetitors to bring such claims as well.²⁴⁰

The leading case finding that only business competitors have stand-

236. 15 U.S.C. § 1127 (2006).

237. *Arnesen v. Raymond Lee Org., Inc.*, 333 F. Supp. 116, 120 (C.D. Cal. 1971).

238. *Id.*

239. 15 U.S.C. § 1125(a) (2006) (emphasis added).

240. There is a three-way split among the Circuits currently. First, three Circuits have held that only direct competitors have standing to bring a claim under section 43(a). *See* *L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993); *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1037 (9th Cir. 2005); *Stanfield v. Osborne Indus.*, 52 F.3d 867, 873 (10th Cir. 1995). Second, three Circuits have applied a five-factor test to determine whether a plaintiff has standing under section 43(a), making it possible for a consumer to proceed under section 43(a) depending on the balance of these factors. *See* *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998); *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 561–62 (5th Cir. 2001); *Phoenix of Broward, Inc. v. McDonald’s Corp.*, 489 F.3d 1156, 1163–64 (11th Cir. 2007). Lastly, two circuits interpret standing under section 43(a) to include non-competitors, but only within a commercial context. *See* *Camel Hair & Cashmere Institute of Am., Inc. v. Assoc. Dry Goods Corp.*, 799 F.2d 6, 11 (1st Cir. 1986); *Colligan v. Activities Club of N.Y., LTD.*, 422 F.2d 686, 693 (2d Cir. 1971).

ing to bring a claim under section 43(a) is *Colligan v. Activities Club of New York, LTD.*, which the Second Circuit decided. The case involved a group of parents who had enrolled their children in a weekend-long ski program, expecting a complete package and receiving far less than the ski company had previously advertised.²⁴¹ The court in *Colligan* specifically noted that the plaintiffs wished to be in federal court but could not meet the requirements necessary to achieve diversity jurisdiction and had therefore “imaginatively”²⁴² filed an action under the Lanham Act.²⁴³

While the court in *Colligan* began its analysis of consumer standing through the plain language of the statute, the court continued, arguing that the public policy behind the Lanham Act would never allow for consumer standing.²⁴⁴ The court conceded that the legislative history was silent as to the issue and chose to decide the question as a matter of policy, reasoning that “the question of consumer standing and that of the creation of wholly new federal common law of consumer protection under § 43(a)” could not be “disentwined.”²⁴⁵ In the court’s opinion, consumer standing would lead to a flood of Lanham Act claims in federal court, when in reality the states were responsible for providing consumer protection.²⁴⁶

Following the decision in *Colligan*, those who argue that Congress intended only business competitors to have standing to bring a claim under the Lanham Act base their reasoning on the idea that the consuming public has other remedies available to it, specifically consumers have the option of requesting an enforcement action from the FTC.²⁴⁷ The court in *Arnesen v. Raymond Lee Organization, Inc.* refused²⁴⁸ to accept such an argument on the grounds that “[n]othing in the Lanham Act requires the Federal Trade Commission to be the sole agent for consumers.”²⁴⁹

In the greenwashing context, consumers do not necessarily have other viable remedies available to them. In recent years, the FTC has

241. 442 F.2d 686, 687 (2d Cir. 1971).

242. The court also noted that such a question of consumer standing under the Lanham Act was “one of first impression” for all the federal courts. *Id.*

243. *Id.* at 688.

244. *Id.* at 689.

245. *Id.* at 693.

246. *Id.*

247. *Arnesen v. Raymond Lee Org., Inc.*, 333 F. Supp. 116, 120 (C.D. Cal. 1971).

248. The court in *Arnesen* rejected the defendant’s argument that the judiciary had no place in protecting consumers where the FTC was involved, reasoning that in the absence of contrary “legislative intent,” Congress must have known that consumers would be within the class of persons meant “to be protected by the Act.” *Id.*

249. *Id.*

brought a limited number of enforcement actions against businesses engaging in deceptive environmental marketing, the Green Guides are currently outdated, and, even if the Guides were current, they remain nonbinding.²⁵⁰ Similarly, states' incorporation of the Green Guides into their own law provides consumers with yet another insufficient remedy—state attorneys general can bring such enforcement actions, but injured parties, namely consumers, cannot bring such actions on their own.²⁵¹ At a time of severe economic recession, where states are struggling to meet budgetary needs, there is no guarantee that states will make the prosecution of greenwashing actions a priority. Common sense, in fact, suggests otherwise.

The Third Circuit, taking on a broad approach to section 43(a) standing in *Thorn v. Reliance Van Co.*, recognized that the plain language of section 43(a) mentioned “two distinct classes of persons entitled to sue.”²⁵² The court noted that these classes included “competitors” and “non-competitors,” which the defendant’s misrepresentations have injured in some respect.²⁵³ The court further relied on general theories of statutory construction to conclude that the Lanham Act granted standing to noncompetitors as well as competitors.²⁵⁴ Where the language of a statute is ambiguous, courts may turn to legislative intent in order to properly construe the statute; however, where the language of the statute is unambiguous, as in the case of section 43(a), courts “have no occasion to ‘look beyond the plain language of the federal statute.’”²⁵⁵

As the court described in *Thorn*, courts may settle the standing dispute by choosing to grant standing to plaintiffs who have “a reasonable interest to be protected against false advertising.”²⁵⁶ This distinction is beneficial to the system generally because it “would eliminate frivolous claims and prevent flooding the federal courts with Lanham Act claims

250. See discussion *supra* Parts III.A–B.

251. See discussion *supra* Part III.B.

252. 736 F.2d 929, 931 (3d Cir. 1984).

253. *Id.* at 932.

254. *Id.*

255. *Id.*

256. See, e.g., *id.* at 933 (finding that an investor and officer of a delivery company had a reasonable interest in bringing a Lanham Act claim against the delivery company because its other officers had driven the company to bankruptcy through false advertising); *Smith v. Montoro*, 648 F.2d 602, 605 (9th Cir. 1981) (finding that an actor had a reasonable interest—in terms of reputational value—in bringing a Lanham Act claim against film distributors for removing the actor’s name from film credits and promotional materials); *Camel Hair & Cashmere Institute of Am., Inc. v. Assoc. Dry Goods Corp.*, 799 F.2d 6, 11–12 (1st Cir. 1986) (finding that “manufacturers and vendors of fabric and clothing containing cashmere” had a reasonable interest—in terms of reputational value—in bringing a Lanham Act claim against retailers deceptively representing the cashmere content of their products).

contrary to the type envisioned by Congress.”²⁵⁷ But although this standing test seems to balance competing interests in a practical manner, the courts have not directly defined what constitutes a reasonable interest.

The court in *Smith v. Montoro* settled on this view by examining the plain language of the Lanham Act and addressing the Second Circuit’s narrow interpretation of standing.²⁵⁸ The court noted that, although the Second Circuit had ruled that section 43(a) permitted only competitor standing, the Second Circuit’s view had since been “sharply criticized.”²⁵⁹

However, recent decisions concerning section 43(a) of the Lanham Act suggest that the Third, Fifth, and Eleventh Circuits will not broadly recognize consumer standing based on the precise language of section 43(a), in conjunction with the reasonable interest test.²⁶⁰ Instead, these circuits have chosen to apply a five-factor standing test²⁶¹ that the Supreme Court created in the context of a federal antitrust case.²⁶² The Third Circuit interpreted the five-factor standing test to encompass the “nature of the plaintiff’s injury,” the injury’s “directness,” the party’s “proximity” to the “injurious conduct,” the “speculativeness of the damages claim,” and the “risk of duplicative damages.”²⁶³ Although the Third Circuit determined in *Conte Bros. Automotive v. Quaker State-Slick 50 Inc.*, that it would adhere to the five-factor standing test to determine what constitutes a sufficient reasonable interest,²⁶⁴ the court did not overturn its earlier decision in *Thorn*, which provides an arguable basis for consumer standing.²⁶⁵

In practice, the *Conte Bros.* five-factor standing test should allow for a broad array of plaintiffs, including retailers stocking greenwashed products who may claim reputational damage. Advertisers—a magazine, for instance—may also have standing to bring a section 43(a) claim against businesses that advertise greenwashed products within their pages, once again basing their claim on reputational damage.

257. *Thorn*, 736 F.2d at 933.

258. *Smith*, 648 F.2d at 607.

259. *Id.* at 608.

260. See *Phoenix of Broward, Inc. v. McDonald’s Corp.*, 489 F.3d 1156, 1156 (11th Cir. 2007); *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 539 (5th Cir. 2001); *Conte Bros. Auto. v. Quaker State-Slick 50 Inc.*, 165 F.3d 221, 221 (3d Cir. 1998).

261. See *Associated Gen. Contractors of Cal. v. Cal. State. Council of Carpenters*, 459 U.S. 519, 519 (1983).

262. See Gregory Apgar, Note, *Prudential Standing Limitations on Lanham Act False Advertising Claims*, 76 *FORDHAM L. REV.* 2389, 2411 (2008), Diane Taing, Comment, *Competition for Standing: Defining the Commercial Plaintiff Under Section 43(a) of the Lanham Act*, 16 *GEORGE MASON L. REV.* 493, 502–07 (2009).

263. *Conte Bros.*, 165 F.3d at 233.

264. *Id.*

265. *Thorn v. Reliance Van Co.*, 736 F.2d 929, 933 (3d Cir. 1984).

This is not to say that the courts should utterly transform the Lanham Act into a vehicle for consumer rights, but rather that the courts can address the current trend in greenwashing by providing this alternative means of enforcement and regulation. Deceptive advertising may harm consumers because consumers will pay more for a product because they believe the product possesses a more valuable characteristic than the product actually does.²⁶⁶ A consumer will not necessarily have standing to bring a section 43(a) claim in courts following the five-factor standing test simply because of their pocket injury; the five-factor test thus will likely filter out these potential plaintiffs. However, at the very least, competitors may find an invaluable remedy in terms of section 43(a) because deceptive environmental advertising can potentially harm competing businesses, by causing them to lose sales²⁶⁷ to businesses who greenwash their customers. The idea that businesses that engage in greenwashing are gaining the upper hand over their less deceptive competitors²⁶⁸ arguably brings greenwashing claims under the reach of the Lanham Act, which specifically targets instances of unfair competition.²⁶⁹

C. *Concerns over Judicial Involvement*

Extending section 43(a)'s reach into the realm of general environmental-benefit claims may go too far, pushing courts into the executive branch's area of governance by requiring the courts to comprehend "complex arguments relating to the truth and falsity of advertising claims."²⁷⁰ The counter point is that there can be no right without a remedy, and, therefore, if the legislature or the executive fails to provide a remedy, it is in the public's interest for the judiciary to step in.²⁷¹ Consumers and competitors appear to lack a clear remedy in the greenwashing context. First, they can seek redress from the FTC, which may not choose to bring an enforcement action against an alleged greenwasher, depending on the political climate or surrounding circumstances. Second, they may seek redress via state incorporation of the Green Guides, but once again, a state's attorney general need not bring any enforcement action.²⁷² Third, they may choose to bring the dispute

266. See Gary S. Marx, *Section 43(a) of the Lanham Act: A Statutory Cause of Action for False Advertising*, 40 WASH. & LEE L. REV. 383, 384 (1983). See also Raines, *supra* note 53, at 689 (explaining that consumers are "willing to spend more money for products which are recyclable and are not harmful to the environment").

267. Marx, *supra* note 266, at 385.

268. Raines, *supra* note 53, at 690.

269. Zerpel Corp. v. DMP Corp., 561 F. Supp. 404, 415 (E.D. Pa. 1983).

270. Proctor & Gamble v. Chesebrough-Pond's Inc., 588 F. Supp. 1082, 1094 (S.D.N.Y. 1984).

271. *Id.*

272. As described earlier this remedy is not available in all states, and varies considerably

before the NAD, but any resolution will not bind the parties.²⁷³ All that remains for greenwashed parties is to bring a section 43(a) claim before the courts.

Before determining that the lack of a guaranteed remedy warrants judicial interference in this area, one should balance the surrounding circumstances. The courts, unlike federal agencies, are unable to hold public hearings to determine what the public sentiment is concerning a particular issue, especially issues where the public at large is specifically concerned.²⁷⁴ Separation of powers has granted these enforcement actions typically to agencies like the FTC, but the judiciary has become much more involved as of late. “[T]he proliferation of cases like these is changing the nature of courts from that of a judicial body to that of a bureaucratic model.”²⁷⁵ Courts have gone on to say that “one does not have to oppose judicial activism to recognize that the role that these parties ask the judiciary to play exceeds that which the judiciary has the power to accept under our form of government.”²⁷⁶

One way to resolve the issue is to distinguish general environmental-benefit claims from specific environmental-benefit claims—in much the same way that the Green Guides distinguishes the two.²⁷⁷ In cases involving specific environmental claims, such as claims involving the validity of third-party certifications, or claims over terms defined in the Green Guides, greenwashed parties should not hesitate to bring an action under section 43(a). The Green Guides define the terms at issue, providing courts with objective standards by which they can determine whether a particular use of the term “recyclable,” for instance, is deceptive.

Even ignoring the guidance provided by the FTC, the courts can still arguably resolve such disputes, despite their limited expertise, because such disputes are similar in nature to traditional deceptive-advertising disputes. In *Rainbow Play Systems, Inc. v. Backyard Adventure, Inc.*, a South Dakota district court faced a section 43(a) dispute concerning the manufacturers of wooden playgrounds.²⁷⁸ The action centered on each party’s use of the term “cedar” to describe the material they had used to build their products. Each party argued that the other deceptively described its product as made from cedar, forcing the court to scrutinize various definitions of the term, along with expert testimony

between states. Consumers and competitors have a private right of action in Indiana. See discussion *supra* Part III.C.

273. See discussion *supra* Part IV.D.

274. *Proctor & Gamble*, 588 F. Supp. at 1094.

275. *Id.*

276. *Id.*

277. Compare 16 C.F.R. § 260.7(a) (2009) with § 260.7(b)–(h).

278. No. CIV. 06-4166, 2009 WL 3150984, at *1 (D. S.D. Sept. 28, 2009).

as to consumer understanding of the term.²⁷⁹

Similarly, a court facing a greenwashing action over a specific environmental claim will engage in this traditional analysis. For example, assume that a manufacturer of an independently certified biodegradable shampoo brings a section 43(a) action against the maker of a competing shampoo, which labels its product as “biodegradable” with a self-imposed seal, closely resembling a third-party certification label. The court may turn to objective definitions of the term “biodegradable,” as well as expert testimony over whether the self-imposed seal would mislead a reasonable consumer to believe that the product was independently certified as biodegradable.

But courts should not adjudicate general environmental-benefit claims under section 43(a). As explained earlier,²⁸⁰ traditional deceptive-advertising analysis does not adequately account for the nuance present in such actions. Here, courts lack expertise and cannot simply rely on expert testimony or objective criteria to determine whether a claim is deceptive because such criteria does not exist. Judicial interference here would place an unreasonable burden on businesses engaging in environmental marketing because judicial interpretation of vague terms such as “green,” or “eco-friendly” will undoubtedly vary. The risks here simply outweigh the potential benefits of the remedy.

VI. A LACK OF GUIDANCE: CONCERNS OVER A PATCHWORK SYSTEM

As a result of such powerful questions and unending controversy, commentators and those in the legal practice alike must inevitably question the Supreme Court’s failure to intervene to some extent and provide some form of guidance or stability regarding appropriate enforcement measures for greenwashing claims. In *Ass’n of National Advertisers, Inc. v. Lungren*,²⁸¹ a federal court “confirmed the state’s power to regulate environmental marketing terms when such terms are potentially confusing and when the means of regulation used are reasonably straightforward.”²⁸² As a result of this decision, commentators in the mid 1990s believed that because the FTC had failed to provide binding guidelines concerning greenwashing, states would continue to develop their own statutes defining environmental terms, leading to a “patchwork” of definitions throughout the United States and a system through which few companies could navigate.²⁸³

279. *See id.* at *3–6.

280. *See* discussion *supra* Part V.A.2.

281. 809 F. Supp. 747 (N.D. Cal. 1992).

282. Hoch & Franz, *supra* note 1, at 458.

283. *Id.* at 463.

Understandably, commentators predicted that the Supreme Court would resolve this issue while it was most heated, by granting certiorari in *Ass'n of National Advertisers*. Instead the Supreme Court hesitated at the opportunity and denied certiorari,²⁸⁴ allowing the controversy to linger.

But despite such worries, the current state of greenwashing jurisprudence is not particularly inconsistent because numerous states have incorporated the Guides or portions thereof into their own law. Businesses following the Guides' safe harbors can rest assured that they are not in violation of state laws concerning deceptive environmental marketing claims.²⁸⁵ Granting greenwashed parties the right to bring actions concerning general environmental-benefit claims under section 43(a) however, would only revive the "patchwork" problem.²⁸⁶

Concerns over inconsistent regulation arise today only in cases where businesses use terms that the Green Guides do not address. In these instances, a "patchwork" approach to regulation may in fact exist as self-regulating bodies, state legislatures, state courts, and the FTC interpret such terms through dispute resolution, state statutes, adjudication, and enforcement actions. In the early 1990s, similar concerns resulted in promulgation of the Green Guides and active FTC enforcement.²⁸⁷ The FTC successfully addressed concerns over "patchwork" regulation by occupying the field of play to a great extent. The Green Guides were flexible enough to allow for state incorporation, without worry that such incorporation would utterly change the law of those states.

But now, the FTC must start over. The "patchwork" concern appears cyclical. If the FTC revises its Guides simply to address new terminology, adding more specific categories and safe harbors, the FTC will likely succeed in addressing this concern for the time being. But it is only a matter of time before "patchwork" regulation reemerges. Businesses will develop new terminology, left untouched by the revised Guides, and self-regulatory bodies, state legislatures, and courts will likely inconsistently interpret these terms. Is this kind of regulation practical?

Perhaps the FTC should redesign the Guides to exclude specific categories, focusing instead on the creation of new, broad principles. By excluding specific categories, businesses can no longer argue that the Guides fail to cover a new term, because essentially the Guides will

284. 516 U.S. 812 (1995).

285. See discussion *supra* Part III.C.

286. See discussion *supra* Part V.D.

287. See discussion *supra* Part III.B.

cover any environmental marketing term. Similarly, the Guides are superfluous in cases of specific environmental claims because courts may examine such claims under traditional deceptive-advertising analysis. The Guides are of great necessity in resolving disputes over general environmental-benefit claims, and so the FTC should revise its Guides in such a manner. Whether such revisions are politically viable is an issue outside the scope of this article.

VII. THE NEED FOR REGULATIONS: DISAGREEMENTS

An abiding concern remains that limited regulation and enforcement by the FTC will result in blatantly deceptive advertising in the context of environmental claims. With the FTC providing nonbinding guidelines and its shifting degrees of enforcement actions, businesses may be willing to push the boundaries in a system that may casually overlook a deceptive “green” advertising claim at a particular point in time. As a result, some have argued that “[c]ertified green standards would help hold companies accountable while shining a bright green light on choices that are actually as eco-friendly as they claim to be.”²⁸⁸

A competing concern, however, is that attempts at green marketing should not be made completely vulnerable to liability and unsubstantiated claims.²⁸⁹ The fact that businesses are marketing their products as “green” should be viewed as a sign that businesses are moving in the right direction, towards sustainability.²⁹⁰ If regulation becomes overly burdensome, businesses will slow down their efforts and progress will cease.²⁹¹

As an indication that the concern over blatantly deceptive advertising has been exaggerated in the greenwashing context, opponents of strong regulation insist that most greenwashing claims currently relate to poor information on the part of the businesses, rather than intentionally deceptive advertising.²⁹² “[A]lmost any kind of green claim can be debunked, because, inevitably, business operations do have at least some kind of environmental impact.”²⁹³ At the same time however, “[a]lmost any green claim can be substantiated to a certain degree as well, depending on how one defines ‘environmental improvement.’”²⁹⁴ Once again,

288. Big Green Purse, *We Need Sustainable Standards so Consumers Know What To Buy*, ENVTL. NEWS NETWORK, Aug. 22, 2008, http://www.enn.com/top_stories/article/37996.

289. See Shannon Arvizu, *Is Greenwashing Good?*, ENVTL. NEWS NETWORK, July 15, 2008, http://www.enn.com/top_stories/article/37664.

290. *Id.*

291. *Id.* See discussion *supra* Part IV.D.

292. See discussion *supra* Part II.

293. Arvizu, *supra* note 289.

294. *Id.*

such statements suggest that courts are not competent to resolve section 43(a) disputes over general environmental-benefit claims because courts are unable to determine whether such claims are deceptive under any kind of objective criteria.

VIII. CONCLUSION

Although, superficially it would seem that consumers have numerous avenues to enforce greenwashing claims, the lack of uniformity alongside issues of separation of powers has left consumers remediless to a large extent. Consumers can petition the FTC to enforce their greenwashing claims and consumers may find solace in the FTC's recent interest in revising its Green Guides along with its recent enforcement actions; nonetheless consumers have no guarantee that the FTC will enforce their claims, while the Green Guides remain nonbinding regulations.

Certain states provide remedies where businesses that engage in greenwashing have harmed consumers, but only Indiana provides a private cause of action for deceptive environmental claims. Consumers in states that have incorporated the Green Guides must rely on the state's attorney general to bring such a claim. Either way, consumers may wish to have a federal remedy available to them as well, especially in states that have not incorporated the Green Guides into their law, or have incorporated limited portions of the Guides. Section 43(a) of the Lanham Act provides a reasonable alternative for these consumers, as well as for injured businesses, but practical considerations remain.

Courts cannot adequately address disputes concerning general environmental-benefit claims because they lack the FTC's expertise in this area and, an attempt to resolve such claims will likely qualify as an intrusion into the executive's realm of power to enforce. Because of this concern, courts should restrict the scope of section 43(a) to include only actions derived from allegedly deceptive specific environmental-benefit claims. Secondly, courts are also concerned that a flood of litigation would result from a further expansion of section 43(a)'s scope. Such a concern is reasonable, but limiting principles can dissuade potential litigants, and, until either the FTC steps into its own role of protecting consumers, other means of protection need to be examined, especially in the face of thriving greenwash campaigns. One should consider three possible scenarios that may result from growing disputes over environmental marketing claims in a time where greenwashing appears prevalent.

The first of these scenarios involves an active FTC in the wake of a changing political climate. It is entirely possible that the FTC will no

longer turn a blind eye toward environmental marketing claims as a result of its latest revisions to its Green Guides. While the Green Guides remain nonbinding, an active FTC, having revised the Guides to encompass a greater variety of potential claims, need only bring a small number of relatively high-profile enforcement actions in order to achieve some sort of equilibrium. Such enforcement actions would clearly inform businesses that the FTC will no longer tolerate blatant greenwashing, while simultaneously restoring the confidence of the consuming public in the FTC's ability and willingness to resume its role in consumer protection.

However, there is no guarantee that an active FTC will provide the optimal solution to long-term concerns over greenwashing. While active FTC enforcement may restore consumer confidence, it may be less successful at deterring greenwashing efforts by businesses. The FTC, like any enforcement agency, will not likely have the resources at its disposal to consistently bring enforcement actions against businesses that greenwash. Similarly, it would be highly impractical for the FTC to continuously revise its Green Guides, and yet without constant revision, the Guides will almost certainly remain incomplete and outdated. Businesses will quickly identify the Guides' loopholes and shift their marketing efforts in a new direction. The FTC will inevitably find itself trotting along at the heels of greenwashers, but ultimately unable to overtake them.

A second scenario hinges on the FTC's revised Green Guides as well, but within the context of the states. If the FTC were to remain inactive following its broad revision of the Green Guides, states may fulfill the FTC's obligations to protect consumers by providing adequate remedies for greenwashing claims in their court systems by incorporating the revised Green Guides into their own binding state laws. Consumers and competitors harmed by deceptive environmental marketing could then present their claims to state attorneys general, rather than having to rely on the FTC's intermittent enforcement actions.

This scenario seems particularly likely, but it is not without its own drawbacks. Not all states will choose to incorporate the revised Green Guides into their own laws, resulting in varying degrees of regulation by state. Consumers will still have no practical federal remedy available to them and consumers in certain states—those that do not incorporate the revised Green Guides—may have no actual remedy at all. Furthermore, the current economic climate suggests that states will simply not focus their attention and resources on deceptive environmental claims. Additionally, if a significant number of states choose not to incorporate the revised Green Guides, but rather devise their own system for deceptive

environmental marketing claims, consumers and businesses alike would face great degrees of uncertainty in this area. Such inconsistent regulation occurred in the early 1990s, leading the FTC to promulgate the Guides, so it is likely that this scenario would again lead the FTC toward another set of revisions to its Guides, or simply the creation of new and clearer standards.

Lastly, there remains the possibility that if the FTC remains inactive, the courts will begin to recognize greenwashing claims within the context of the Lanham Act. This scenario is further complicated by the controversy over section 43(a)'s standing requirement, resulting in two possible outcomes. First, if the courts choose to allow for broad standing, consumers will finally have a federal cause of action available to them to bring forward their greenwashing claims.

Such an outcome is particularly problematic if courts attempt to resolve disputes over general environmental-benefit claims. Federal courts would likely find themselves flooded with environmental-marketing claims, with little experience in the field that would aid the courts in differentiating between viable and frivolous suits. Unlike traditional claims over deceptive advertising, general environmental-benefit claims are not objectively verifiable and therefore courts would not be able to determine the viability of such claims in the early stages of litigation. Furthermore, litigants would likely continue to bring greenwashing claims in the courts of those states that have incorporated the Green Guides into their law. This could potentially pose a problem for uniformity of interpretation because the federal courts may choose to examine greenwashing claims under general deceptive-advertising principles, while state courts will be examining nearly identical greenwashing claims under their interpretation of the FTC's Green Guides. But more likely, federal courts, interpreting specific environmental-benefit claims, will turn to the Green Guides for assistance, making the concern over lack of uniformity irrelevant.

Second, the courts may instead settle on granting competitor standing in the context of greenwashing claims under section 43(a) in which case consumers remain without a viable federal remedy. This outcome is far less problematic because consumers could no longer flood the federal courts with greenwashing claims, but competitors would retain their federal cause of action against fellow greenwashing businesses. It is likely that competitor standing would result in a focus on higher-profile claims with stronger chances of success, leading to a more useful development of the law in this area. One could even argue that the interests of consumers would still be served through competitor standing because these

actions would have a stronger deterrent effect on greenwashing businesses as they face a higher level of scrutiny in the federal court system.

Although each of these scenarios has its distinct benefits as well as drawbacks, there is a strong divergence between which scenario is most likely and which is preferable. The benefits of providing a remedy for deceptive specific environmental-benefit claims through competitor standing under section 43(a) of the Lanham Act seem to clearly outweigh potential concerns; it remains unclear as to whether the judiciary will take on such an active role in the realm of greenwashing. It seems considerably more likely that the states will embrace their traditional role of protecting consumer interests and expand this role by incorporating the newly revised Green Guides into their own statutes, giving binding effect to the Guides within state courts, but that does not mean the states will use their resources to bring any actions. The results currently hinge greatly on future actions by the FTC, including enforcement actions and any substantial changes to the Green Guides, alleviating potential “patchwork” concerns. At this point it may be unreasonable to expect any significant changes in the Guides, but an active FTC is not entirely unlikely.