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It's a Lorax Kind of Market - But Is It a Sneetches Kind of Solution: A Critical Review of Current Laissez-Faire Environmental Marketing Regulation

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IT'S A LORAX KIND OF MARKET! BUT IS IT A SNEETCHES KIND OF SOLUTION?: A CRITICAL REVIEW OF CURRENT LAISSEZ-FAIRE ENVIRONMENTAL MARKETING REGULATION

I. INTRODUCTION

Like a soldier marching to the beat of environmental protection, in struts the twenty-first century giving rise to increased consumer awareness and concern.[1] Consumers are finally grasping the importance that their individual actions and social responsibility have on the environment and are actively seeking products that

1. *See, e.g.*, U.S. EPA, ASSESSING THE ENVIRONMENTAL CONSUMER MARKET (EPA 21P-1003) (April 1991) [hereinafter U.S. EPA]. In a 1990 survey, 83% of respondents indicated that they were "concerned about the environment." *Id.* at A-2 (citing USA TODAY, Apr. 13, 1990 at 10A). Furthermore, 64% of consumers polled believed that the efforts of a single individual could effect a change in the environment and 57% polled would pay more money for a product packaged with recyclable materials. *See id.* Significantly, 52% of the respondents maintained that they had rejected companies using products that purportedly maltreated the environment. *See id. See generally* Dennis Chase & Therese Kauchak Smith, *Consumers Keen on Green But Marketers Don't Deliver: Survey Quizzes End-Users About Environmentally Responsible Companies but Comes Up Empty*, ADVERTISING AGE, June 29, 1992 (discussing results of surveys about environmentally responsible companies); Scott Donaton & Kate Fitzgerald, *Polls Show Ecological Concern is Strong*, ADVERTISING AGE, June 15, 1992 (discussing results of survey about environmentally conscious consumers); Roger D. Wynne, *Defining "Green:" Toward Regulation of Environmental Marketing Claims*, 24 U. MICH. J.L. REFORM 785 (1991) (quoting results from 1989 Gallup Report that 76% of Americans considered themselves to be environmentalists); U.S. EPA, EVALUATION OF ENVIRONMENTAL MARKETING TERMS IN THE UNITED STATES (EPA 741-R-92-003) at 7 (Feb. 1993) [hereinafter EPA ON ENVIRONMENTAL MARKETING TERMS] (quoting survey performed by Roper Organization that found public concern about environment as faster growing concern than any other national issue). For a general discussion of America's lure toward environmental conservation in consumer products, see Brett B. Coffee, *Environmental Marketing After Association of National Advertisers v. Lungren: Still Searching for an Improved Regulatory Framework*, 6 FORDHAM ENVTL. L.J. 297 (1995) (stating "[i]n the . . . early 1990's, mainstream America discovered the environment"). *See also* Casey Bukro, *Shopping for an Ideal: Consumers Hungry for 'Recyclable' or 'Biodegradable' are Finding Their Environmental Diet Heavy on Ambiguity* (Ecology Special Report 1991), CHI. TRIB., Nov. 17, 1991, at 24 (discussing consumers' confusion concerning advertising claims of environmental soundness in products).

Some commentators, however, advance the notion that consumer environmental concern is waning in light of many unregulated years of deceptive environmental advertising. *See* Coffee, *supra*, at 305 (noting environmental marketing craze has faded). *See generally* Nicholas Schoon, *Whatever Happened to the Green Market?*, THE INDEPENDENT – LONDON, Sept. 10, 1996 (arguing "[b]ut for the past six years the green consumer revolution has been either treading water or quietly retreating").

pose the fewest negative environmental effects.[2] Perhaps they have heard the "sawdusty sneeze" and delicate voice of the Lorax who "speaks for the trees."[3] Or perhaps the news broadcasts filled with

2. "Green marketing" is a general term connoting the way in which companies market products based on their environmental attributes. Other terms used throughout this paper include: environmental marketing, environmental advertising, and green advertising. The introduction to this article refers to the following terms: green mania, green revolution, green war, and green consumerism. These terms reflect the current consumer interest in environmentally safe products and the market-based efforts to meet this consumer demand. For a general discussion of green marketing, see Joanna L. Watman, Note, *Whose Grass is Greener? Green Marketing: Toward a Uniform Approach for Responsible Environmental Advertising*, 2 FORDHAM ENVTL. L. REP. 163, 163-68 (1992) (addressing advent of green marketing and consumer interest in environmentally benign products). *See also* Ciannat M. Howett, *The "Green Labeling" Phenomenon: Problems and Trends in the Regulation of Environmental Product Claims*, 11 VA. ENVTL. L.J. 401, 402-03 (1992) (discussing consumer confusion over legitimacy of environmental labels); Wynne, *supra* note 1, at 786 (pointing out consumers "want goods and packaging that use fewer resources and less energy to produce, whose production generates less pollution, and whose disposal will not contaminate the environment"); Roger D. Wynne, *The Emperor's New Eco-Logos?: A Critical Review of the Scientific Certification Systems Environmental Report Card and the Green Seal Certification Mark Programs*, 14 VA. ENVTL. L.J. 51, 51 n.2 (1994) (indicating socially responsible "green" consumer is not new phenomenon); EPA ON ENVIRONMENTAL MARKETING TERMS, *supra* note 1, at i (pointing out "[m]any American consumers, not only the most environmentally conscious, have sought to lessen the environmental impacts of personal purchasing decisions by buying and using products perceived to be less harmful to the environment").

3. THEODOR SEUSS GEISEL (DR. SEUSS), THE LORAX (Random House, Inc. 1971). Through vivid imagery and clever characters, Dr. Seuss describes the results of a local pollution problem and the community's growing awareness and concern. *See id.* He begins his tale with a disgruntled older gentleman called the Once-ler reminiscing about the good 'ole days:

> Way back in the days when the grass was still green
> and the pond was still wet
> and the clouds were still clean,
> and the song of the Swomee-Swans rang out in space . . .
> one morning, I came to this glorious place.

Id. The Once-ler then relates his part in the diminishment of our natural resources:

> In no time at all, I had built a small shop.
> Then I chopped down a Truffula Tree with one chop.
> And with great skillful skill and with great speedy speed,
> I took the soft tuft. And I knitted a Thneed!

Id. According to the Once-ler, the only creature voicing concern was the Lorax:

> "Mister!" he said with a sawdusty sneeze,
> "I am the Lorax. I speak for the trees.
> I speak for the trees, for the trees have no tongues.
> And I'm asking you, sir, at the top of my lungs" —
> he was very upset as he shouted and puffed —
> "*What's that* THING *you've made out of my Truffula tuft?*"

Id. Absorbed solely with potential riches, the Once-ler ignored the cries of the Lorax and continued on with business:

> "NOW . . . thanks to your hacking my trees to the ground,
> there's not enough Truffla Fruit to go 'round.
> And my poor Bar-ba-loots are all getting the crummies
> because they have gas, and no food, in their tummies! . . ."

overflowing landfills, contaminated waterways and smog-ridden cities have edified consumers and fostered a change in their purchasing and disposal habits. Businesses sense the dissemination of "green-mania" and correspondingly attempt to "out-green" their competition.[4] Unfortunately, the virtual inundation of "environmentally friendly" products makes consumer confusion inevitable and environmental protection questionable.[5] Today, manufactur-

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I, the Once-ler, felt sad
as I watched them all go.
BUT . . .
business is business!
And business must grow . . .

Id. The Once-ler realized his mistake after chopping the last Truffla tree:

Now all that was left 'neath the bad-smelling sky
was my big empty factory . . .
the Lorax . . .
and I.

Id. One may use Dr. Seuss imagery to describe the current consumer market. As described by numerous scholars, American consumers are becoming more environmentally conscientious, or "Loraxian." For a discussion about the onset of environmental consumerism, see *supra* notes 1-2 and *infra* notes 4-5 and accompanying text.

4. *See* David Hoch & Robert Franz, *Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALB. L. REV. 441, 441 (1994) (quoting Hubert H. Humphrey III, *Making Sure Green Claims Aren't Gray*, ENVTL. F., Nov.–Dec. 1990, at 32). *See also* U.S. EPA, *supra* note 1, at 2 (citing BOSTON GLOBE, Mar. 2, 1990, at 55, 59) (indicating marketers advertise green products with twenty to thirty times more frequency than other products). According to Roger D. Wynne, "green consumers are left awash in this tide of [environmentally beneficial] claims with little or no capacity to discern truly green products from those merely labeled as such." Wynne, *supra* note 2, at 54. *See generally* NAT'L ASS'N OF ATT'Y GEN., AD HOC TASK FORCE ON ENVIRONMENTAL ADVERTISING, THE GREEN REPORT: FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING (Nov. 1990) [hereinafter GREEN REPORT I] (explaining rapid growth in "environmentally friendly" product designations attests to need for marketing guidelines).

> [E]nvironmental problems facing the world today are largely the result of the way we do business. In order to reverse the pattern of widespread environmental degradation, substantial changes must be made in the way products are formulated, manufactured, used and disposed. Considering the magnitude of the problem facing the United States and the desire of consumers to support positive environmental improvements, it is disturbing to see a growing number of confusing and misleading claims that take advantage of consumers, and, in many cases, violate existing law.

Id. at 1-2. For a discussion of the initial recommendations of the National Association of Attorneys General (NAAG), see *infra* notes 16, 79 & 210 and accompanying text. For a discussion of NAAG's 1992 recommendations detailed in its Green Report II, see *infra* notes 115, 172-73 & 210 and accompanying text.

5. *See* David F. Welsh, Comment, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green"*, 81 CAL. L. REV. 991, 992 (1993) (noting survey finding that 96% of respondents thought they needed more environmental information to make sense out of claims already being made) (citing Judann Dagnoli, *Green Buys Taking Root*, ADVERTISING AGE, Sept. 3, 1990, at 27); Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10

ers resemble Sylvester McMonkey McBean with his Sneetches Star-On-Off machine;[6] claiming to be the "Fix-It-Up-Chappie," each exploits the current *laissez faire* attitude toward environmental marketing.[7] With preaching and promises, undercutting and guarantees, these companies perpetuate the "green revolution."[8] Regulators,

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YALE J. ON REG. 147, 150 (1993) (pointing out that green advertising is more problematic than other types of advertising because "consumers generally cannot substantiate environmental claims on their own" and noting that consumer confusion is likely to change into consumer apathy, and hence less environmentally concerned society).

6. *See* THEODOR SEUSS GEISEL (DR. SEUSS), THE SNEETCHES AND OTHER STORIES (Random House, Inc. 1961) (1953) (depicting manipulation and unawareness of consumers in an unregulated or under-regulated market).

7. *See id.* (analogizing Sneetch nation with America). Day in and day out, the Star-Belly Sneetches prance around convinced of their superiority over the Plain-Belly Sneetches. *See id.* Sylvester McMonkey McBean conveniently happens upon the Sneetches and preys on their social concerns:

"My friends," he announced in a voice clear and keen,
"My name is Sylvester McMonkey McBean.
And I've heard of your troubles. I've heard you're unhappy.
But I can fix that. I'm the Fix-it-Up Chappie.
I've come here to help you. I have what you need.
And my prices are low. And I work at great speed.
And my work is one hundred per cent guaranteed!"

Id. Like green consumers who desire to advance environmental policy, Plain-Belly Sneetches enter Mr. McBean's Star-On machine in hopes of securing equality. Both groups of consumers have social concerns that are exploited by opportunistic marketers:

All the rest of that day, on those wild screaming beaches,
The Fix-it-Up Chappie kept fixing up Sneetches.
Off again! On again!
In again! Out again!
Through the machines they raced round and about again,
Changing their stars every minute or two.
They kept paying money. They kept running through
Until neither the Plain nor the Star-Bellies knew
Whether this one was that one . . . or that one was this one
Or which one was what one . . . or what one was who.

Id. McBeanish marketers are successful because they capitalize on a consumer's inner social concerns. While Marvin McMonkey McBean *created* a product for socially-conscious consumers, manufacturers today *adapt* and *advertise* their products to take advantage of the green market. Regulators should take these concerns into consideration when crafting their legislation. Consumers want more than just non-deceptive advertising; they want truly greener products. Only a program that addresses both of these interests is worth undertaking. For manifestation of consumers' desire to purchase environmentally safer products, see *supra* notes 1-6 and accompanying text and *infra* notes 8-47 and accompanying text. The Federal Trade Commission's (FTC) environmental marketing guides are not sufficient because their focus is limited to deceptive marketing. For a discussion and the pertinent text of FTC's guidelines, see *infra* notes 9-21 & 80-101 and accompanying text. In light of FTC's laissez-faire case-by-case enforcement of its environmental marketing guidelines, it seems that Seuss' art depicts life. For further discussion and critique of FTC's case-by-case enforcement methods, see *infra* notes 12-16, 58-79, 155-66 & 288-98 and accompanying text.

8. *See* U.S. EPA, *supra* note 1 (using surveys to determine environmental con-

scholars and private crusaders sound reveille in an attempt to minimize consumer confusion and environmental degradation. Armed with non-binding guidelines,[9] third-party certification programs[10] and pre-existing inapplicable laws,[11] each group crafts individualized solutions to the "green war."

While federal agencies, states and private companies have all explored various environmental market control methods, most agree that the answer lies in uniform governmental standards for the labeling of environmentally-preferable products.[12] Parties seek-

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sciousness of consumers and to identify problems in environmental advertising). *See also* Bukro, *supra* note 1, at 24 (acknowledging rewards for companies deemed environmentally acceptable can be great, both in profits and loyalty); Norman Kangun & Michael Jay Polonsky, *Regulation of Environmental Marketing Claims: A Comparative Perspective*, 14 INT'L J. ADVERTISING Jan. 1, 1995, at 1, *available in* 1995 WL 12321755 (arguing consumer distrust of environmental marketing advertisements results from industry deception); GREEN REPORT I, supra note 4 (noting growing number of misleading environmental marketing claims and proposing solutions to resulting problems).

9. *See* Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (1992), *codified at* 16 C.F.R. § 260 (1994), *revised by* 61 Fed. Reg. 53,311, 53,316 (1996) [hereinafter FTC Guides II]. For the pertinent text of FTC Guides II, see *infra* notes 18-21 & 80-101 and accompanying text. For a discussion of FTC Guides I changes as reflected in FTC Guides II, see *infra* notes 90-101 and accompanying text.

10. *See Introduction to Green Seal* (last modified July 17, 1997) <http://greenseal.org/index.html> [hereinafter *Introduction to Green Seal*] (noting that under environmental product certification program, evaluator would set standards and award "seal of approval" to products meeting such standards). Green Seal, Inc. is an independent, non-profit organization often advertised as the most prominent third-party certification program in the United States today. *See id.* For an in-depth discussion of environmental certification programs and their impact on consumer purchases, see generally Wynne, *supra* note 2. For a discussion of the Green Seal Certification Mark and applicable certification criteria, see *infra* notes 260-61 & 263-66 and accompanying text. For a discussion of other environmental certification programs, see *infra* notes 239-59 & 267-70 and accompanying text. For a discussion of the implications of third-party certifiers, see *infra* notes 271-87. For a discussion of judicial actions applicable to third-party certifiers, see *infra* notes 288-98.

11. Courts have frequently addressed the viability of pleadings that include the following accusations: tort liability for negligent mislabeling of products; violations of deceptive advertising practices under The Trademark Act of 1946 (Lanham Act) §§ 1-46, 15 U.S.C. §§ 1051-1127 (1994); the fostering of anti-competitive or monopolistic practices according to Sherman Anti-Trust Act, 15 U.S.C. §§ 1-40 (1994); and mail fraud and wire fraud under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1995). These causes of action, however, do not adequately address the problems associated with environmental marketing. For a discussion of judicial and regulatory attempts to squeeze deceptive green marketing within such pre-existing causes of action, see *infra* notes 291-314 and accompanying text.

12. *See, e.g.*, Welsh, *supra* note 5, at 994-95 (concluding appropriate remedy is uniform nationwide regulation at federal agency level); Howett, *supra* note 2, at 403-04 (assessing various solutions and recognizing need for uniform standards). *See also* E. Howard Barnett, *Green With Envy: The FTC, the EPA, The States, and the*

ing relief typically look to the Federal Trade Commission (FTC or Commission) for guidance.[13] Hesitant to take an active role in reg-

Regulation of Environmental Marketing, 1 ENVTL. LAW. 491, 507-11 (1995) (calling for cooperative regulatory scheme involving both FTC and EPA); Grodsky, *supra* note 5, at 163-64 (promoting EPA-only determination of uniform regulatory standards); Wynne, *supra* note 1, at 803-13 (recognizing need for change in green marketing); Letter from Norman L. Dean, Green Seal, to the Secretary of Federal Trade Commission (Sept. 18, 1995) (on file with author) (denouncing FTC Guides I as insufficient and ineffective without further enforcement mechanisms); Letter from Hubert H. Humphrey, III et al., National Association of Attorneys General, to the Secretary of Federal Trade Commission (Sept. 28, 1995) (on file with author) (remarking FTC Guides I have "fallen short of eliminating all environmental marketing problems"); Letter from Harry Sullivan, Senior Vice President and General Counsel, Food Marketing Institute, to the Secretary of Federal Trade Commission (Sept. 29, 1995) (on file with author) (reminding FTC that Food Marketing Institute's primary reason for petitioning FTC was to promote consistency within industry); Letter from Ford Motor Company to the Secretary of Federal Trade Commission (Sept. 28, 1995) (on file with author) (suggesting FTC Guides I had imposed burdens and show few benefits); Letter from Donald R. Theissen, Ph.D., Director of 3M Corporate Product Responsibility, to the Secretary of Federal Trade Commission (Sept. 29, 1995) (on file with author) (arguing for harmonization of FTC Guides I with ISO's in progress environmental marketing guides); Letter from Walter J. Foley, General Manager, Federal Relations, Steel Recycling Institute to Secretary of Federal Trade Commission (Sept. 29, 1995) (on file with author) (advocating adoption of FTC Guides I by all 50 state governments); Letter from Daniel L. Jaffe and John J. Sarsen, Jr., Association of National Advertisers, Inc., to Secretary of Federal Trade Commission (Sept. 29, 1995) (on file with author) (advocating uniform, national and comprehensive environmental marketing standards).

13. For a discussion of the most current FTC guidelines, see *supra* note 9 and *infra* notes 17-21 & 96-105 and accompanying text. FTC is empowered under the Federal Trade Commission Act (FTCA) §§ 1-26, c. 311, 38 Stat. 717 (*codified as amended at* 15 U.S.C. §§ 41-58 (1994)) to prevent unfair or deceptive acts or practices and to issue trade regulation rules defining such acts or practices. *See* FTCA §§ 5, 18, 15 U.S.C. §§ 45, 58 (1994). For the pertinent language of FTCA, see *infra* notes 59 & 63 and accompanying text. For a more in-depth discussion of FTCA, see *infra* notes 58-64 and accompanying text. Since its inception, FTC's sole function has been consumer protection. *See* FTCA §§ 1-5, 15 U.S.C. §§ 41-45. It is therefore reasonable for consumers to look to FTC for protection and for businesses to look to FTC for compliance standards and guidance. In a recent report, FTC made the following acknowledgment: "[t]he Federal Trade Commission enforces statutes to preserve competitive markets for the benefit of consumers." FEDERAL TRADE COMMISSION REPORT TO CONGRESS PURSUANT TO THE FEDERAL TRADE COMMISSION ACT AMENDMENTS OF 1994 (Slip Copy, February 1995). FTC further observed that "[a]dvertising is a vital means by which consumers receive information about the relative merits of competing products and services." *Id.* Explaining their mission, FTC pointed out that "the Commission focuses its resources on investigating seemingly false, unsubstantiated or otherwise deceptive advertising claims that are likely to cause serious consumer injury." *Id.* FTC articulated the ways in which the Commission regulated deceptive advertising:

> Private quality and performance standards are routinely adopted and incorporated into regulations and codes issued by federal, state, and local governments. . . . Although such standards and seals of approval often may facilitate the efficient operation of the economy, at times, they may distort the market and result in more expensive, less efficient, unsafe or unreliable products. Standards development may be manipulated by es-

ulating environmental advertising, FTC prefers to handle such matters on a case-by-case basis.[14] The advent of "green consumerism" has done little to sway FTC from this position. Accordingly, the Commission's actions reflect its fervent belief that environmental marketing claims are merely a form of deceptive advertising, susceptible to the current provisions of the Federal Trade Commission Act (FTCA).[15] To combat growing criticism and assuage environmentalists, FTC formed the National Association of Attorneys General Task Force on Environmental Marketing (NAAG) in 1989,[16]

tablished firms at the expense of consumers or small innovative producers, to encourage dissemination of product information that may be deceptive to reasonable consumers.

Id.

14. *See* Petitions for Environmental Marketing and Advertising Guides: Public Hearings, 56 Fed. Reg. 24,968 (1991) [hereinafter Petitions FTC Guides I] (noting that Commission has begun to provide guidance via case-by-case enforcement). *See also* Request for Comment Concerning Environmental Marketing Guides, 60 Fed. Reg. 38,978 (1995) [hereinafter Request for Comment FTC Guides I] (asserting since adoption of Green Guides, Commission has used its case-by-case basis approach).

15. *See* 15 U.S.C. §§ 41-77 (1973) (deceptive advertising clauses found at §§ 45-55). Congress eliminated FTC's regulatory power with respect to unfair claims in the FTC Improvement Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (*codified as amended at* 15 U.S.C. § 57b-1 to b-4 (1994)) [herinafter FTC Improvement Act]. It is likely that the FTC Improvement Act and the time-consuming nature of rulemaking procedures has led FTC to embrace the concept of enforcement-action solutions for all deceptive marketing practices, including those in the environmental context. For a discussion of this theory, see Barnett, *supra* note 12, at 495. As a result, FTC resorts to a case-by-case enforcement method. For a discussion of FTCA, its historical background and the evolution of FTC's case-by-case enforcement approach, see Welsh, *supra* note 5, at 1005-11. *See generally* PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 59-60 (4th ed. 1988) (providing comprehensive study of deceptive advertising and FTC's case-by-case enforcement practice). For expression of FTC's aversion to rulemaking procedures, see FTC Improvement Act and Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691 (1994) (*codified at* 15 U.S.C. § 57b-5 (1994)). For a critique of FTC's case-by-case approach, see Welsh, *supra* note 5, at 1008-10 (analogizing slow-developing FTC nutritional label guidelines to environmental marketing). For explication of FTC's view that environmental marketing claims are merely a form of deceptive advertising susceptible to the current provisions of FTCA, see *infra* notes 58-105 and accompanying text.

16. *See* GREEN REPORT I, *supra* note 4 for a discussion of the initial proposals of the Attorneys General Task Force on Environmental Marketing. NAAG made the following conclusions in Green Report I:

> Environmental claims should be as specific as possible, not general, vague, incomplete or overly broad.
>
> Environmental claims relating to disposability (e.g., "degrad-able" or "recyclable") should not be made unless the advertised disposal option is *currently* available to consumers in the area in which the product is sold and the product complies with the requirements of the relevant waste disposal programs.
>
> Environmental claims should be substantive.

and promulgated non-binding regulatory guidelines (FTC Guides I) in 1992.[17] In December of 1996, FTC updated and expanded these guidelines (FTC Guides II).[18] Significantly, however, they remain non-obligatory.[19] According to the Commission, the purpose of FTC Guides I & II is to "help advertisers voluntarily comply with the law by indicating how FTC intends to apply section five of . . . [FTCA] to environmental claims."[20] In spite of the fact that the

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> Environmental claims should, of course, be supported by competent and reliable scientific evidence.

Id. at 3. NAAG further urged that "FTC and EPA work jointly with the states to develop uniform national standards for environmental marketing claims." *Id.* Likewise, NAAG requested that the federal government develop standards and define the necessary terms used in the standards and in the entire area of environmental advertising. *See id.* For a discussion of NAAG's findings as explained in Green Report II, see *infra* notes 113, 172-73 & 210 and accompanying text.

17. *See* Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (1992), *codified at* 16 C.F.R. § 260 (1994) [hereinafter FTC Guides I]. For a discussion of the implemented changes in FTC Guides II and the effect on FTC Guides I, see *infra* notes 90-105 and accompanying text.

18. *See* FTC Guides II, *supra* note 9. Examples of changes in FTC Guides II include: associating the "chasing arrow symbol" with the term "recycled;" providing examples of "ozone safe/friendly" deception; providing examples of "nontoxic" and "chlorine free;" suggesting expanded explanation of seals-of-approval and "environmentally preferable" claims. *See* Roscoe B. Starek, III, Commissioner, FTC, *F.T.C. 'Green Guides': A Consumer Success Story*, WEST'S LEGAL NEWS, Dec. 23, 1996, *available in* 1996 WL 730228.

19. *See* FTC Guides II, *supra* note 9, § 260.2 (explaining "guides are not legislative rules under Section 18 of the FTC Act [and] are not themselves enforceable regulations, nor do they have the force and effect of law").

20. Starek, *supra* note 18. FTC Chairman Janet D. Steiger assured that:

> [g]uidelines would not be the only answer to the problem that we face. As a law enforcement agency, we will continue vigorously to pursue cases of deceptive and false advertising of environmental claims. Likewise, you can anticipate that any guideline would draw heavily from the principles — both legal and economic — that are represented in Commission general case law and enforcement actions.

Janet D. Steiger, *Hot Issues in National Advertising: Environmental Advertising and Health Claims in Food Advertising*, 759 P.L.I./CORP. 359, 376 (1991). Steiger views national standards as the most efficient way to disarm the uncertainty surrounding green advertising. *See Steiger Suggests Quick Development of Environmental Claims Guidelines*, 61 ANTITRUST & TRADE REG. REP. (BNA) 398 (Oct. 3, 1991) [hereinafter *Steiger Supports Development of FTC Green Guides*]. FTC Commissioner Mary Azcuenaga's views sharply contrast those of Chairman Steiger and Commissioner Starek. She argues that FTC has no special expertise in the science underlying environmental claims and no mandate to establish or promote environmental policy. *See Azcuenaga Will Not Endorse FTC Role in Developing Guidelines For Green Claims*, 59 ANTITRUST & TRADE REG. REP. (BNA) 777 (Nov. 22, 1990) [hereinafter *Azcuenaga Will Not Endorse FTC Green Guides*] (explicating reasons why FTC should not develop environmental marketing guidelines). Commissioner Azcuenaga attached a dissenting statement to FTC Guides I. *See* FTC ENVIRONMENTAL CLAIMS: DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA CONCERNING ISSUANCE OF COMMISSION GUIDES ON ENVIRONMENTAL MARKETING CLAIMS (1992) [hereinafter AZCUENAGA DISSENTING STATEMENT]. This statement reads, in part, as follows:

guides counsel industry on potential FTCA infractions, critics fault their rigidity, failure to preempt state regulation and inability to force manufacturers to account for their deceptive practices.[21]

> I differ from the Commission in its decision not to place the guides on public record for a short period of time to enable the public to comment on them. Although we have sought to obtain accurate information and to consider the issues thoroughly, it is conceivable, nevertheless, that someone outside the agency might offer useful observations and suggestions for improvement. . . . [Such a period for comment] coincide[s] with the public comment period on the Environmental Assessment that is required under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, as amended.

Id. at 7.

21. *See* Barnett, *supra* note 12, at 500; Welsh, *supra* note 5, at 1009 (likening FTC's dilemma to "Catch-22:" to enforce the guides in FTC's desired case-by-case manner, there needs to be well-defined predictable standards set, and to set such standards, there needs to be significantly more case-by-case enforcement). "Catch-22" is a phrase coined by Joseph Heller in his 1955 novel. *See* JOSEPH HELLER, CATCH-22 (Dell Publishing Co., Inc. 1970) (1955). Heller uses the word in the following context:

> "Daneeka was telling the truth," ex-P.F.C. Wintergreen admitted. "Forty missions is all you have to fly as far as Twenty-seventh Air Force Headquarters is concerned."
>
> Yossarian was jubilant. "Then I can go home, right? I've got forty-eight."
>
> "No, you can't go home . . . Are you crazy or something?"
>
> "Why not?"
>
> "Catch-22."
>
> "Catch-22? . . . What . . . has Catch-22 got to do with it?"
>
> "Catch-22 . . . says you've always got to do what your commanding officer tells you to do."
>
> "But Twenty-seventh Air Force says I can go home with forty missions."
>
> "But they don't say you have to go home. And regulations do say you have to obey every order. That's the catch. Even if the colonel were disobeying a Twenty-seventh Air Force order by making you fly more missions, you'd still have to fly them, or you'd be guilty of disobeying an order of his. And then Twenty-seventh Air Force Headquarters would really jump on you."

Id. at 60. The circular logic outlined in Heller's piece is equally applicable to environmental marketing regulation by FTC. For further discussion of FTC's "Catch-22," see Welsh, *supra* note 5, at 1009. For a more complete discussion of the problems associated with FTC regulation of the environmental market, see *supra* notes 12-16 and accompanying text and *infra* notes 58-79, 155-66 & 288-98 and accompanying text.

Attorney General Humphrey recognized that with the magnitude of the green marketing issue "a case-by-case approach will be too slow and too cumbersome in developing boundaries for legitimate environmental claims." *Environmental Marketing: Hearings on Industry Guidelines Before the Federal Trade Commission*, at 5 (July 17, 1991) [hereinafter Hearings 1991]. Commentors on FTC Green Guides I indicated that they would prefer a trade regulation rule because it would have the force of law and preempt state laws regulating the use of environmental advertising claims. *See FTC's Revisions to Environmental Marketing Guides*, 71 ANTITRUST & TRADE REG. REP. (BNA) 345 (Oct. 10, 1996) [hereinafter *FTC Guides I Revisions*]. Others complained of undue restrictions placed on their ability to make environ-

Prior to FTC rulemaking, legislators proposed a framework for voluntary compliance within national environmental marketing guidelines.[22] The bills permitted the Environmental Protection Agency (EPA or Agency) to define the terminology, and ultimately, the standards to which marketers would adhere.[23] In both 1991 and 1992, Congress refused these legislative efforts.[24] The emergence of FTC Guides I squelched all attempts to put EPA at the helm of the environmental marketing movement.[25] To some ex-

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mental claims and the rigidity of the guides. *See id.* In addition, a few commentors observed that changes in FTC Guides I would impact on the developing global standards by the International Standards Organization (ISO) and various state measures. *See id.*

22. *See* National Waste Reduction, Recycling and Management Act, H.R. 3865, 102d Cong. (1992) (proposed by Rep. Al Swift); Environmental Marketing Claims Act of 1991, S. 615, 102d Cong. (1991) (reintroduction by Sen. Frank Lautenberg of Environmental Marketing Claims Act of 1991) (requiring EPA to establish definitions and standards governing use of environmental claims). Neither bill was enacted. For a discussion of the history of H.R. 3865 and S. 615, see I. Leo Motiuk & Diane M. Miller, *Giving the Green Light to Marketing*, 761 P.L.I./CORP. 729, 733-34 (1991). For further discussion concerning the history of H.R. 3865 and S. 615, see *infra* notes 106-112 and accompanying text. For a discussion of the pertinent text of H.R. 3865 and S. 615, see *infra* notes 107-11 and accompanying text.

23. *Hearings on Environmental Labeling: Hearing on S. 976 Before the Subcomm. on Environmental Protection of the Comm. on Environment and Public Works*, 102d Cong., 240 (1991).

> We need to provide incentives to make products and packages environmentally beneficial. We need to create a level playing field for manufacturers. We need to prevent [deceptive] claims . . . [a]nd establish standards by which consumers can measure these claims. In sum, we need to eliminate advertising pollution. That's what S. 615, the Environmental Claims Marketing Act, is intended to do.
>
> It requires EPA, the agency with the environmental expertise, to establish standards for environmental marketing claims.

Id. at 4 (statement of Sen. Frank Lautenberg). *See also* Alexandra McClure, *Environmental Marketing: A Call for Legislative Action*, 35 SANTA CLARA L. REV. 1351, 1361-62 (1995) (providing overview of early EPA efforts at marketing regulation); Guidance for the Use of the Terms "Recycled" and "Recyclable" and the Recycling Emblem in Environmental Marketing Claims, 56 Fed. Reg. 49,992 (1991) [hereinafter EPA Guidance on Recycle] (soliciting comments on options for guidance to be used by marketers in product labeling and advertising).

24. *See* McClure, *supra* note 23, at 1361 (discussing demise of H.R. 3865 and S. 615). For a discussion of the history of H.R. 3865 and S. 615, see *infra* notes 106-112 and accompanying text. For a discussion of the pertinent text of H.R. 3865 and S. 615, see *infra* notes 107-11.

25. *See* GREEN REPORT I, *supra* note 4, at 9-10 (discussing EPA early involvement in regulating environmental market). The Green Report I states:

> The EPA also had several divisions looking into issues relating to environmental advertising. In February 1990, the EPA submitted a comprehensive report to Congress entitled "Methods to Manage and Control Plastic Wastes." The report included a review of issues relating to the development of degradable plastics. The EPA had also commissioned a report on the feasibility of implementing a nationwide environmental "seal of approval" product labeling program in the United States, similar to pro-

tent, EPA still participates in the regulation of environmental marketing.[26] Although there is no statute explicitly granting authority to EPA, the Agency uses its implicit rulemaking ability to interject policy into certain circumscribed areas of environmental marketing.[27]

With EPA's limited authority and FTC's stronghold to a case-by-case framework, states have increasingly begun to statutorily define and delimit the encroaching environmental market.[28] By giv-

> grams already in place in Germany, Canada and Japan. Eager to draw on the EPA's environmental experience and expertise, [NAAG] invited the EPA staff to participate . . . in hosting [a public hearing on environmental marketing issues].

Id. at 9-10. Although EPA conducted considerable research on the issue of environmental marketing, Congress ultimately called on FTC to make the needed regulatory attempts. *See* Motiuk & Miller, *supra* note 22, at 733 (indicating that EPA "joined forces with the FTC and the White House Office of Consumer Affairs to develop national environmental labeling guidelines"). With the emergence of FTC Guides I, FTC took prominence in future regulatory attempts. *See id.* EPA indicates that "along with others interested in environmental marketing [the Agency] will continue to investigate developments . . . affect[ing] the U.S. marketplace and environmental quality." EPA ON ENVIRONMENTAL MARKETING TERMS, *supra* note 1, at vii (explaining EPA intention to "further public policy discussions regarding the role of environmental marketing in U.S.").

26. *See, e.g.*, Consumer Labeling Initiative; Notice of Project Initiation, 61 Fed. Reg. 12,012 (1996) [hereinafter CLI] (fostering pollution prevention, empowering consumer choice, and improving consumer understanding by clear and consistent product labels on safe use, environmental consequences and health risks); Guidance on Acquisition of Environmentally Preferable Products and Services; Solicitation of Comments, 60 Fed. Reg. 50,722 (1995) [hereinafter Environmentally Preferable Products] (providing guidance for Executive Agencies in identification and acquisition of environmentally preferable products); Agency Information Collection Activities; EPA's Energy Star Buildings Program, 60 Fed. Reg. 57,714 (1995) [hereinafter Comments on Energy Star Buildings Program] (implementing another arm of EPA's Energy Star Partnership program which allows participants to display EPA-endorsed logos on products); Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) §§ 2-31, Pub. L. No. 92-516, 86 Stat. 973 (1972) (*codified as amended at* 7 U.S.C. §§ 136-136y (1994)) (requiring registration of pesticides with copy of product's label and any proposed environmental benefits); Clean Air Act (CAA) §§ 101-618, Pub. L. No. 90-148, 77 Stat. 392 (1967) (*codified as amended at* 42 U.S.C. §§ 7401-7671q (1994)) (mandating proof of emission standards compliance by attachment of label to vehicle); Solid Waste Disposal Act §§ 1002-11012, Pub. L. No. 89-272, 79 Stat. 997, *as added* Pub. L. No. 94-580 (1976) (*codified as amended at* 42 U.S.C. §§ 6901-6992k (1988)) (requiring lubricating oils to bear statement urging recycling).

27. *See* Barnett, *supra* note 12, at 500-03. For a list of measures EPA has taken in the area of environmental marketing, see *supra* note 26.

28. *See* Todd A. Rathe, Note, *The Gray Area of the Green Market: Is it Really Environmentally Friendly? Solutions to Confusion Caused by Environmental Advertising*, 17 J. CORP. L. 419, 434-39 (1992) (discussing how case-by-case adjudications through general state deceptive advertising laws are disadvantages of method); Glenn Israel, Comment, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims*, 20 B.C. ENVTL. AFF. L. REV. 303, 309-17 (discussing current application of state and federal deceptive trade practice laws, RICO and antitrust actions); Howett, *supra* note 2, at 436-43 (same); Thomas C. Downs, *"Envi-*

ing legal definitions to such vague terms as "environmentally friendly," states aim at the curtailment of deceptive advertising.[29] Not surprisingly, state practices have created a patchwork of laws and regulations: one state adopted FTC guidelines as law;[30] some states attempted to harmonize with FTC provisions;[31] one state announced legislation more stringent than did FTC;[32] and a few states focused their efforts on consumer education and state labeling of individual products.[33] The Ninth Circuit upheld California's rigor-

ronmentally Friendly" Product Advertising: Its Future Requires a New Regulatory Authority, 43 AM. U. L. REV. 155, 176 (1992) (indicating state initiatives alone will not solve green marketing problem).

29. *See, e.g.*, CAL. BUS. & PROF. CODE § 17508.5 (West 1995). This section provides:

> It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any term which connotes that stratospheric ozone is not being depleted, "bio-degradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission.

Id. The section goes on to define the relevant terms. *See id.* California's statutory scheme was once heralded as the most stringent of all state-enacted schemes. *See* Rathe, *supra* note 28, at 441-42. It is questionable whether the FTC compliance amendment will affect the rigor of California's statute. For further discussion of California's statutory scheme, see *infra* notes 174-75, 182-84 & 235-38 and accompanying text. Most states with environmental marketing regulations choose to define relevant environmental claims and invalidate the deceptive and vague claims. For a discussion of such state environmental marketing statutory schemes, see *infra* notes 174-204 and accompanying text.

30. *See* ME. REV. STAT. ANN. tit. 38, § 2142 (West 1996). The Maine statute reads in pertinent part:

> A person who labels, advertises or promotes a product in violation of guidelines for the use of environmental marketing claims published by the Federal Trade Commission in 16 Code of Federal Regulations, Part 260 (1993), as amended, commits a violation of the Maine Unfair Trade Practices Act.

Id. See Barnett, *supra* note 12, at 504-05 for a discussion of the patchwork of state environmental marketing laws. For an illustration of current state environmental marketing laws, see *infra* notes 174-204 and accompanying text.

31. *See, e.g.*, R.I. GEN. LAWS § 6-13.3-4 (1996). The Rhode Island statute reads in pertinent part:

> It shall be a defense to any suit brought under this chapter that the person's environmental marketing claims conform to the standards or are consistent with the examples contained in the guides for use of environmental marketing claims published by the [F]ederal [T]rade [C]ommission July 27, 1992.

Id. See also IND. CODE § 24-5-17-2 (1995); N.Y. ENVTL. CONSERV. LAW § 27-0717 (Consol. 1996); N.Y. COMP. CODES R. & REGS. tit. 6, § 368.1 (1996); MICH. STAT. ANN. § 19.418(3) (Law. Co-op. 1996); WIS. ADMIN. CODE § 137.01 (1997). For the pertinent text of the Indiana statute, see *infra* note 182. For the pertinent text of the New York statute, see *infra* note 188. For the pertinent text of the Michigan statute, see *infra* note 179.

32. *See* CAL. BUS. & PROF. CODE § 17508.5. For the pertinent text of this section of the California statute, see *supra* note 29.

33. *See, e.g.*, OHIO REV. CODE ANN. §§ 1502.01-11 (Banks-Baldwin 1996); VT.

ous environmental marketing statute despite its First Amendment implications.[34] Because the court found a substantial state interest in California's strict statute, it is likely that the decision deterred challenges to other states' statutes and ultimately preserved a lack of uniformity in environmental marketing.[35]

Throwing their hats into the ring, private U.S. companies and independent organizations have developed certification programs to test products for a broad range of environmental attributes.[36]

STAT. ANN. tit. 10, §§ 6619, 6621 (1995); N.H. REV. STAT. ANN. § 149-N:1 (1995); R.I. GEN. LAWS § 23-18.8-3 (1996); CONN. GEN. STAT. § 22a-225c (1994). For the pertinent text of the Ohio statute, see *infra* note 195. For the pertinent text of the Vermont statute and a discussion of Vermont's statutory scheme, see *infra* note 176.

34. *See* Association of Nat'l Adver., Inc. v. Lungren, 44 F.3d 726, 733 (9th Cir. 1994) (concluding "standardization of terms used in commercial representations about a product's environmental attributes is directly related to California's undisputedly substantial interests in truthful environmental advertising and conservation"). At the time *Lungren* was decided by the Ninth Circuit, California's statutory scheme was more demanding than FTC's non-binding guidelines. For a discussion and pertinent text of FTC Guides I and II, see *supra* notes 17-21 and *infra* notes 80-101 and accompanying text. For a discussion of California's rigorous statutory scheme, see *supra* notes 29 & 32 and *infra* notes 174-75, 182-84 & 235-38 and accompanying text. Subsequent to the *Lungren* decision, California amended its law to permit compliance with FTC Guides I. CAL. BUS. & PROF. CODE § 17508.5 (West 1995). For the pertinent text of the California statute, see *supra* note 29. For a discussion of the *Lungren* decision, see *infra* notes 235-38 and accompanying text.

35. *See Lungren*, 44 F.3d at 733. The biggest concern echoed by commentators is the lack of uniformity in state regulatory measures. *See* Welsh, *supra* note 5, at 1003 (calling state lack of uniformity "unacceptable"); Hoch & Franz, *supra* note 4, at 463 (predicting Supreme Court address of "this patchwork of dissimilar statutes"); Coffee, *supra* note 1, at 354 (aligning conflicting state statutes with current decline of environmental marketing); Barnett, *supra* note 12, at 506 (predicting lack of uniformity resulting from Ninth Circuit *Lungren* decision). For a catalogue of letters to FTC urging uniformity in the environmental marketing context, see *supra* note 12 and *infra* notes 89, 155 & 166. For a catalogue of statements from industry, regulators and scholars urging uniformity in the environmental marketing context, see *supra* note 12 and *infra* notes 89, 155-56, 166 & 198.

36. *See* U.S. EPA, DETERMINANTS OF EFFECTIVENESS FOR CERTIFICATION AND LABELING PROGRAMS (EPA 742-R-94-001) (April 1994) [hereinafter EPA ON CERTIFICATION AND LABELING PROGRAMS] (analyzing effectiveness of environmental labeling in United States and effects on consumer choice and industry marketing techniques). "Green Seal" and "Scientific Certification Systems" are two well-respected eco-label programs that have made a place for themselves in the environmental market. For a thorough analysis of the individual approaches of each group, see generally Wynne, *supra* note 2. For further discussion of Green Seal and Scientific Certification System's programs, see *infra* notes 260-87 and accompanying text. For an overview of Green Seal's methodology and a listing of current Green Seal-approved products, see generally *Introduction to Green Seal*, *supra* note 10. Because of the widespread embrace of eco-label solutions by the European community, the programs may succeed in America. For a discussion of the individual efforts by individual European communities, see *infra* notes 239-59 and accompanying text. *See generally* George Richards, Note, *Environmental Labeling of Consumer Products: The Need for International Harmonization of Standards Governing Third-Party Certification Programs*, 7 GEO. INT'L ENVTL. L. REV. 235 (1994) (advocating continued and

Certification programs set out both to provide incentives for manufacturers to develop products that do not harm the environment and to establish a system for evaluating environmental attributes.[37] These programs inundate consumers with information that will affect their final purchases by "raising consumers' awareness of environmental issues, educating them about the role of green consumerism, and directing their buying power toward the most environmentally benign products."[38] Focusing on the demand side of the economic market affords adequate protection for marketers' commercial speech and encourages interchanges of information between manufacturers and consumers.[39] Trademark restrictions

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expanded use of eco-labeling in United States). However, because of the diversity of approaches toward certification, it seems that eco-logo programs do more harm than good. *See generally* Richards, *supra* (outlining foreign eco-logo programs and positing effect in United States); Wynne, *supra* note 2 (same). The particular aim of eco-logo programs is consumer education. *Introduction to Green Seal*, *supra* note 10. Unfortunately, the current mass of conflicting standards and conflicting labels will not educate consumers. Since the labels may not aid the consumers choices nor enable them to discern environmentally preferable products, it is likely that they will have little effect on regulating the environmental market. For a discussion of the effectiveness of certification programs, see *infra* notes 271-87 and accompanying text. *See generally* Wynne, *supra* note 2; Richards, *supra*.

37. *See* EPA ON CERTIFICATION AND LABELING PROGRAMS, *supra* note 36. EPA explains:

> Environmental labeling programs attempt to offer a cost-effective means of using market forces to mitigate the environmental impacts, by both manufacturers and consumers, by shifting market shares among products toward those that are environmentally preferable and by providing incentives for (beneficial) product reformulation.

Id. at i. *See also*, Wynne, *supra* note 2 at 55-56 (explaining purpose and goals of environmental certification programs).

38. Wynne, *supra* note 2, at 55. *See also* Richards, *supra* note 36, at 246-52 (outlining pros and cons to adoption of eco-label programs). Noted benefits of third-party certification programs include: heightened consumer awareness; gains in efficiency; reduction in misleading advertisements; and reductions in environmental impacts. *See id.* Potential harms of third-party certification programs include: continued consumer confusion; lack of industry participation; reduction in ongoing innovation; loss of performance safety and a potential barrier to trade. *See id.*

39. *See* John M. Church, *A Market Solution to Green Marketing: Some Lessons From the Economics of Information*, 79 MINN. L. REV. 245 (1994) (presenting a consumer-focused approach to environmental market difficulties). Church points out that "recognition . . . [of the] market for information has very important policy implications." *Id.* at 273. He suggests that information is subject to the same supply and demand concepts inherent in economic markets. *See id.* Using these assumptions, Church relates the advantages of third-party evaluations and the disadvantages of consumer search and seller provision of information: "spread[ing] the cost of producing evaluations among large numbers of consumers, thereby lowering their cost to individual purchasers[;] . . . scal[ing] in the cost of testing[; and] . . . 'hav[ing] little incentive to distort the facts or steer the consumer to a particular product.'" *Id.* at 288 (quoting Howard Beales, et al., *Consumer Search and Public Policy*, 8 J. CONSUMER RES. 11, 16 (1981)). For further

and recurrent fairness concerns suggest that only neutral third parties implement these incentive-based environmental certification programs.[40]

In 1992, the United Nations held a conference on development and its effect on the environment. As a result, many international organizations have attempted to address environmental concerns.[41] The countries involved in the U.N. Conference came to an understanding, formerly known as the General Agreement on Tariffs and Trade (GATT), which advocated the establishment of a special committee to oversee the development of trade in the environmental market arena and to provide recommendations for checking any conflicts.[42] Similarly, the enactment of the North

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discussion of Church's market theory, see *infra* notes 271-72 and accompanying text.

40. *See* Grodsky, *supra* note 5, at 193. Because eco-logo programs seek to reward manufacturers who create environmentally exemplary products, the policy of protecting consumers from confusion, manufacturer deception and monopolies is implicated. *See id.* Ridding consumer confusion and manufacturer deception is also the chief aim of trademark regulation. *See* Lanham Act §§ 1-46, 15 U.S.C. §§ 1051-1127 (1994). A trademark is defined in the Lanham Act to include "any word, name, symbol, or devise, or any combination thereof — used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods." Lanham Act § 45, 15 U.S.C. § 1127. A certifier must use both a mark that indicates source of origin and standards that identify the evaluator. If not, consumers may confuse the implication of particular marks and garner no benefit from the information provided. For a more complete discussion of certification programs, see *infra* notes 239-87 and accompanying text. For a discussion of judicial processes applicable to third-party certifiers, see *infra* notes 288-314 and accompanying text. *See generally* Church, *supra* note 39 (promoting third-party certification programs over all other regulatory efforts). Relevant fairness concerns include restrictions on trade. Because the United States has signed numerous treaties regarding international trade, a government certifier must heed such relevant treaty implications. For a discussion about international trade restrictions on environmental certification programs, see *infra* notes 41-43, 273-87 & 340-41 and accompanying text.

41. *See, e.g.*, U.N. Commission on Sustainable Development, 32 I.L.M. 236, Draft Resolution IV U.N. DOC. A/C.2/47/L.16 (1993). *See also* Church, *supra* note 39, at 314-19 (outlining international efforts in area of eco-labeling); Richards, *supra* note 36, at 241-46 (same); Wynne, *supra* note 2, at 60-64 (same); Howett, *supra* note 2, at 455-59 (same); Grodsky, *supra* note 5, at 204-09 (same).

42. *See* Richards, *supra* note 36, at 244 (citing Peter Behr, *Environment Face Off*, WASH. POST, Mar. 23, 1994, at F1). For a comprehensive discussion of the General Agreement of Tariffs and Trade's (GATT) role in the development of voluntary international standards in the environmental arena, see Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L.Q. 479 (1995); Jennifer Schultz, *The GATT/WTO Committee on Trade and the Environment – Toward Environmental Reform*, 89 AM. J. INT'L L. 423 (1995). *See also* Roszell D. Hunter, *Standardization and the Environment*, 16 INT'L ENVTL. REP. (BNA) 5, 185 (Mar. 29, 1993) (explicating international approach to trade and environment). For further discussion about the effect international trade treaties have on environmental certification programs, see *supra* notes 41-43 and *infra* notes 273-87 & 340-41.

American Free Trade Agreement (NAFTA) brought environmental trade issues to the international forefront.[43] Private international groups, such as the International Standards Organization (ISO), have undertaken the burden of unifying international environmental markets.[44] ISO is in the process of developing voluntary standards.[45] Although these non-binding standards contemplate some of the same concerns as FTC Guides I and II, their scope is much more broad.[46] Through their review of third-party certification programs, first-party claims and basic principles of eco-labeling, ISO aims to "harmonize methodologies, terms, and principles for the various . . . [international responses to product] labeling."[47]

43. *See* North American Free Trade Agreement Between the Governments of the U.S., Can., and Mex. (NAFTA), Dec. 8 & 17, 1992, 32 I.L.M. 289, I-104 (1993). Any subsequent agreement preempts NAFTA to the extent of inconsistencies. *See id.* NAFTA permits the adoption of standards with respect to a variety of issues, including consumers and the environment. *See id.* The Clinton Administration negotiated an Environmental Side Agreement to NAFTA which reaffirmed each country's right to establish its own levels of environmental protection as originally established in NAFTA. North American Agreement on Environmental Cooperation (NAFTA Environmental Side Agreement), Sept. 9 & 14, 1993, 32 I.L.M. 1480 (1993).

44. *See generally* Hunter, *supra* note 42 (providing overview of ISO and its efforts to create internationally uniform environmental marketing standards); Roht-Arriaza, *supra* note 42 (same); Joseph DiMento & Francesco Bertolini, *Green Management and the Regulatory Process: For Mother Earth, Market Share and Modern Rule*, 9 TRANSNAT'L LAW. 121 (1996) (same); C. Foster Knight, Comment, *Voluntary Environmental Standards vs. Mandatory Environmental Regulations and Enforcement in the NAFTA Market*, 12 ARIZ. J. INT'L COMP. L. 619 (1995) (providing general explanation of ISO's international environmental standards); Henry R. Balikov & Patrick O. Cavanaugh, *What We Need to Know About ISO 14000*, 10-SPG NAT. RESOURCES & ENV'T 64 (1996) (same); Marc E. Gold, *ISO 14000: A New Global Business Benchmark*, 10 No. 12 ENVTL. COMPLIANCE & LITIG. STRATEGY 1 (1995) (same). For a discussion of ISO's standard-setting procedures, see *infra* notes 315-37 and accompanying text.

45. *See* INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, ISO/TC 207 (SC3/WG2/N56), *Environmental Labeling — Self Declaration Environmental Claims — Terms and Definitions*, Committee Draft (June 25, 1995) [hereinafter ISO SELF-DECLARATION] (on file with author) (stating "Self-Declaration Environmental Claims may be made by manufacturers, importers, distributors, retailers or anyone else likely to benefit commercially from such claims. For example, claims may take the form of statements, symbols or graphics on products or package labels, product literature, technical bulletins, advertising, publicity, telemarketing"). *See* Roht-Arriaza, *supra* note 42, at 512-15 for a complete discussion of ISO eco-labeling formal hierarchy and administrative procedures. For a comparison between FTC Green Guides II and ISO self-declaration standards, see *infra* notes 329-37 and accompanying text. For predictions and implications of ISO's efforts in the environmental marketing context, see *infra* notes 338-45 and accompanying text.

46. *See generally* ISO Self-Declaration, *supra* note 45. For a more complete discussion of ISO and its international draft standards, see *infra* notes 315-37 and accompanying text. For a discussion of FTC Guides II, see *supra* notes 17-21 and *infra* notes 81-101 and accompanying text. For a comparison between FTC Guides II and ISO's draft standards, see *infra* notes 329-37 and accompanying text.

47. Roht-Arriaza, *supra* note 42, at 512 (providing clear picture of ISO efforts

Part II of this Comment examines federal solutions to the evolving problem of environmentally deceptive marketing schemes.[48] Essentially, it addresses the rejection of EPA influence and the embrace of FTC's ineffective regulatory attempts.[49] Because any answer to the green marketing problem implicates jurisdictional issues, Part II also discusses EPA and FTC's battle for control.[50] Part III traces the evolution of state environmental marketing regulation and the ever-looming threat of federal preemption.[51] Furthermore, it reviews First Amendment challenges that manufacturers use as weapons against respective legislation.[52] Part IV identifies private attempts to elicit environmental awareness and compliance within a nationally recognized framework.[53] This part focuses on third-party certification programs and various private remedial and regulatory measures. Part V notes international endeavors to unify environmental marketing,[54] and questions whether certain legislation would withstand the scrutiny of NAFTA and GATT.[55] In addition, Part V likens ISO draft standards to FTC Green Guides.[56] Briefly summarizing ISO's framework in the environmental marketing arena, this part highlights relevant policies and programs implicating ISO designations. Finally, Part VI offers a proposal of uniform federal legislation that will most effectively address the concerns of all parties involved: marketers, consumers

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in environmental marketing arena and benefits and drawbacks to independent third-party guidelines). For a discussion of ISO's attempts to regulate the environmental market, see *infra* notes 315-45 and accompanying text.

48. For a discussion of FTC efforts toward regulating the environmental market, see *supra* notes 9-21 and *infra* notes 58-105 and accompanying text. For a discussion of EPA efforts towards regulating the environmental market, see *supra* notes 22-27 and *infra* notes 106-51 and accompanying text.

49. For a discussion of FTC and EPA positions in the area of environmental marketing regulation, see *infra* notes 152-66 and accompanying text.

50. For a discussion of FTC's and EPA's jurisdictional skirmish, see *infra* notes 152-66 and accompanying text.

51. For a discussion of current state environmental marketing legislation, see *supra* notes 28-35 and *infra* notes 167-201 and accompanying text. For a discussion about federal preemption of state environmental marketing schemes, see *infra* notes 202-33 and accompanying text.

52. For a discussion of First Amendment challenges to environmental regulatory attempts, see *infra* notes 234-38 and accompanying text.

53. For a discussion of private remedial and regulatory measures, see *supra* notes 36-40 and *infra* notes 239-314 and accompanying text.

54. For a discussion of international environmental regulatory schemes, see *supra* notes 41-47 and *infra* notes 239-59 & 315-45 and accompanying text.

55. For a discussion of NAFTA and GATT in the environmental marketing context, see *supra* notes 41-43 and *infra* notes 273-82 & 340-41 and accompanying text.

56. For a discussion of ISO's environmental marketing guidelines, see *infra* notes 315-45 and accompanying text.

and environmentalists.[57]

II. FEDERAL SOLUTIONS

A. FTC to the Rescue?

By enacting FTCA, Congress provided a federal vehicle for restraining deceptive advertising.[58] Section five of FTCA empowers FTC to prevent "[u]nfair methods of competition" and "unfair or deceptive acts or practices in or affecting commerce."[59] As determined jointly by FTC and the courts, FTCA anticipates the Commission's regulation of false, deceptive and misleading advertising.[60] Three approaches inhere in FTC's exercise of authority: (1) case-by-case prosecution;[61] (2) publication of interpretive guide

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57. For explication of the author's uniform regulatory proposal, see *infra* note 346 and accompanying text.

58. *See* FTCA §§ 1-26, c. 311, 38 Stat. 717 (*codified as amended in* 15 U.S.C. §§ 41-58 (1994)). For a general discussion of FTC's authority under FTCA and its ability to bring a civil action, see *Introduction to FTC* (last modified October 17, 1997) <http://ftc.gov.html> [hereinafter *Introduction to FTC*].

59. FTCA § 5, 15 U.S.C. § 45. For additional discussion of FTC's authority under FTCA, see *supra* notes 13 & 15 and *infra* notes 61-79 & 288-98 and accompanying text.

60. *See* FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937) (articulating "courts do not have a right to ignore the plain mandate of . . . [FTCA and t]he courts can't pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission"); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944) (finding trademark registration of deceptive term "does not prevent its use from falling within the prohibition of [FTCA]"); United States v. Reader's Digest Ass'n, 662 F.2d 955 (3d Cir. 1981) (pointing out "[c]ommensurate with . . . [FTCA's] duty [to prevent] . . . deceptive and misleading . . . advertising is the power to fashion broad remedial relief to prevent a company . . . from engaging in similarly deceptive practices in the future"); Unified Agenda of FTC: Statement of Regulatory Priorities, 61 Fed. Reg. 62211 (1996) (FTC articulation of duties under FTCA).

61. *See* FTCA § 5(b), 15 U.S.C. § 45(b). The pertinent provision of FTCA reads:

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such . . . [wrongdoer] a complaint stating its charges. . . . If . . . [after a] hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue . . . an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.

Id.

lines;[62] and (3) issuance of trade regulation rules.[63] To maintain a cause of action, FTCA does not require proof of intent, reliance, actual injury or damages; rather, it directs FTC to demonstrate only the likelihood of consumer deception.[64] Because FTCA lacked a

62. *See* FTCA § 18, 15 U.S.C. § 57a (a)(1)(A) (stating "the Commission may prescribe . . . interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title")). For an illustration of FTC interpretive guidelines, see FTC Guides I, *supra* note 17; FTC Guides II, *supra* note 9; Endorsement Guides, *infra* note 290. For a discussion of the provisions of FTC Guides I and II, see *supra* notes 14-21 and accompanying text and *infra* notes 80-101 and accompanying text. For a discussion of the provisions of Endorsement Guides, see *infra* notes 290-96 and accompanying text.

63. *See* FTCA § 18, 15 U.S.C. § 57a(a)(1)(B). The pertinent provision of FTCA reads:

> [T]he Commission may prescribe . . . rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certifications activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

Id.

64. *See* FTCA § 5(n), 15 U.S.C. § 45(n). The relevant language of this provision states:

> The Commission shall . . . declare unlawful an act or practice on the ground that such act or practice is unfair [if] the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. . . . The Commission may consider established public policies as evidence . . . [of unfair practice but s]uch public policy considerations may not serve as a primary basis for such determination.

Id. See also JEFF I. RICHARDS, DECEPTIVE ADVERTISING: BEHAVIORAL STUDY OF A LEGAL CONCEPT 28 (1990) (informing FTC need not show falsity or deception-in-fact under FTCA). *But cf.* Lanham Act §§ 1-46, 15 U.S.C. §§ 1051-1127 (1994) (requiring proof of *actual* consumer confusion prior to trademark infringement prosecution). Although no statutory definition of the term deceptive exists, use of the word *deceptiveness* alludes to the fact that actual deception need not be proven under the FTCA. *See* RICHARDS, *supra*, at 13. FTC will identify an act or practice as deceptive "if first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission or practice is material." In re Cliffdale Assoc. 103 F.T.C. 110, 164-65 n.4 (1984) (explicating when representation is deceptive under FTCA section five). For a discussion of the three elements contingent to a finding of deceptive advertising under FTCA (the *Cliffdale* standard), see Rathe, *supra* note 28, at 428-34. *See* Welsh, *supra* note 5, at 1006-08 (denouncing generality and flexibility of *Cliffdale* standard in context of green marketing regulation). For a discussion of the phrase "reasonable consumers likely to be deceived," see Grodsky, *supra* note 5, at 153 and Rathe *supra* note 28, at 430-31. For a discussion of the necessity of substantiated advertising claims, see Policy Statement Regarding Advertising Substantiation Program, 49 Fed. Reg. 30,999 (1984). *But see* Rathe, *supra*, at 431 (pointing out that substantiated claims may still mislead consumers). According to Rathe,

concrete definition of "deceptive practices," Congress sanctioned FTC's case-by-case demarcation and development of impermissible "deceptive marketing."[65] As such, FTC customarily chooses to enforce its Congressional mandate by execution of "cease and desist" orders, which warrant imposition of fines upon the second offense.[66]

FTC noted concern for "green" advertisements and began enforcement against claims of deceptive and misleading environmental marketing as early as 1973.[67] Instead of fashioning new rules,

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> because no intent to deceive on the part of the manufacturer is required and because a manufacturer is liable for a representation that conveys more than one meaning to a reasonable consumer, only one of which is false, good faith, substantiated claims for which no uniform definitions exist may also mislead reasonable consumers.

Id. (citations omitted). Lastly, *Cliffdale* explains a material representation, practice or omission as one "likely to affect [consumers'] choice of, or conduct regarding, a product . . . [and] likely to mislead consumers acting reasonably under the circumstances." 103 F.T.C. at 165 n.4.

65. *See* S. REP. NO. 221, 75th Cong., 1st Sess. 2 (1937) (advocating FTC case-by-case determination of deceptive behavior); Petitions FTC Guides I, *supra* note 14, at 24,968 (articulating lack of concrete definition of "deceptive practices" and case-by-case enforcement of FTCA); Request for Comment FTC Guides I, *supra* note 14, at 38,979 (same). Not surprisingly, changing times and political influences have resulted in several fluctuations of the "deceptive practices" standard since the inception of FTC. For a discussion of some of these changes and the accompanying problems, see Roger E. Schechter, *The Death of the Gullible Consumer: Towards a More Sensible Definition of Deception at the FTC*, 1989 U. ILL. L. REV. 571, 574-76 (1989). For a discussion of the invalidity of FTC's case-by-case approach, see Welsh, *supra* note 5, at 1008-09.

66. *See* FTCA § 5, 15 U.S.C. § 45(b)-(m) (1994). Remedial measures include: advisory opinions, consent orders, cease and desist orders, civil fines, restitution and damages (less frequently), and injunctions and corrective advertising (equitable relief). *Id.* For a brief synopsis of FTC cease and desist order procedure, see Grodsky, *supra* note 5, at 154 n.27 (citing DAVID G. EPSTEIN, CONSUMER PROTECTION 17-21 (1976)). For a more complete discussion of FTC enforcement procedures under FTCA, see STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION, REGULATORY MANUAL SERIES § 6.01 (1992). Since FTC has not yet developed binding guidelines for environmental marketing regulation, consumers must rely on Section 5 of FTCA for the policing and punishing of *all* deceptive advertising schemes. *See* Starek, *supra* note 18 (stating "Commission does not rely solely on Guides to promote compliance with the law. . . . [but] continue[s] to investigate individual instances of deceptive claims under Section 5 of the FTC Act"). *See also* Barnett, *supra* note 12, at 495 (suggesting why FTC has limited its regulatory efforts to case-by-case approach).

67. *See* In re Ex-Cell-O Corp., 82 F.T.C. 36 (1973) (forbidding company from using term "biodegradable" in its advertising); In re Standard Oil Co. of Cal., 84 F.T.C. 1401 (1974) (prohibiting representations of "pollution-free" exhaust); In re Crown Central Petroleum Corp., 84 F.T.C. 1493 (1974) (requiring scientific support for assertions that product reduces engine exhaust emissions and gives off "pollution-free" exhaust); In re Albano Enterprises, Inc., 89 F.T.C. 523 (1977) (same). For a more complete discussion of early FTC enforcement of deceptive environmental advertisements, see Carl F. Patka, *Of Diapers, Lawnbags, and Landfills: The Federal Trade Commission Cracks Down on False Advertising in the Environmen-*

the Commission attempted to manipulate green marketing into the already existing false advertising framework.[68] FTC garnered support for their position from FTCA,[69] case precedent[70] and agency policy statements,[71] which were designed to apprise marketers of FTC's position on unfair advertising. Unfortunately, without the needed guidance and enforcement mechanisms, marketers assumed their actions were proper.[72] The close of the 1980s, how-

tal Marketplace, 5 LOY. CONSUMER L. REP. 43, 44-45 (1993); Welsh, *supra* note 5, at 1005-11; Grodsky, *supra* note 5, at 153-56.

68. *See* Paul H. Luehr, Comment, *Guiding The Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising*, 10 UCLA J. ENVTL L. & POL'Y 311, 312-16 (1992) (noting that "case-by-case prosecution of deceptive [environmental] advertising continued with fervor"). FTC received consent orders from the following companies for alleged inaccuracies in environmental claims: American Environ Products (disposable diapers); First Brands (Glad trash bags); Jerome Russell Cosmetics, Inc. (ozone claims); Zipatone Inc. (ozone claims). *See id. See also* Barnett, *supra* note 12, at 495-99 (noting that FTC chiefly relies on case-by-case prosecution of misleading environmental claims). During these early years of environmental marketing regulation, FTC Commissioner Azcuenaga urged that injection of environmental policy was outside the scope of the Agency's congressional mandate. *See Azcuenaga Will Not Endorse FTC Green Guides*, *supra* note 20, at 777; AZCUENAGA DISSENTING STATEMENT, *supra* note 20, at 1-3. Azcuenaga felt that FTC should defer issuing environmental marketing regulations until the Agency can gather more insight through its current case-by-case prosecution. *Azcuenaga Will Not Endorse FTC Green Guides*, *supra* note 20, at 777. For further discussion of Azcuenaga's position, see *supra* note 20 and *infra* notes 113, 118 & 157 and accompanying text. Steiger and Starek both agree that FTC should regulate the environmental market. *See Steiger Supports Development of FTC Green Guides*, *supra* note 20, at 398; Starek *supra* note 18. For further discussion of Starek's and Steiger's opposing position, see *supra* notes 18-20 and *infra* notes 113, 118 & 157 and accompanying text.

69. FTCA § 5, 15 U.S.C. § 45 (1994). To view the pertinent language of FTCA, see *supra* notes 61 & 64 and accompanying text.

70. *See supra* notes 60 & 67 (discussing case precedent that supports FTC regulation of environmental marketing). *See also* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) (holding FTC judgment as to deceptive practice is accorded great weight by courts); Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1946) (granting FTC authority to determine what is necessary to eliminate deceptive or unfair marketing practice).

71. *See, e.g.*, Policy Statement on Deceptive Advertising, *appended to* Cliffdale Assocs. Inc., 103 F.T.C. 110, 174 (1984) (defining deceptive advertisement as one which is likely to misguide reasonable consumers and prompt them to adjust behavior with regard to advertised products); Policy Statement Regarding Advertising Unfairness, *appended to* International Harvester Co., 104 F.T.C. 949, 1072 (1984) (endorsing balancing test of burden on manufacturer and harm on consumer to aid determination of whether advertisement is unfair and injurious to consumers); Policy Statement Regarding Advertising Substantiation, 49 Fed. Reg. 30,999, 31,000 (1984) (endorsing balancing test of burden on manufacturer and harm on consumer to aid determination of whether advertisement is sufficiently substantiated). These provisions summarize the Commission's case holdings in particular areas and attempt to establish factual tests to judge advertising claims.

72. *See* Patricia P. Bailey & Michael Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U. L. REV. 849, 850-51 (1984) (written by two FTC Commissioners who dissented in *Cliffdale*) (noting "[t]he novel phrasing of this standard consti-

ever, brought industry outcry.[73] Arguing selective enforcement, businesses pointed to the unfairness in tarnishing a company's reputation and imposing FTC suit expenses where the Commission had failed to issue indispensable "compliance" guidelines.[74]

As the Loraxian[75] consumers grew, so grew the Marvin McMonkey McBean marketers.[76] Each passing year evidenced in-

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tutes a departure from nearly fifty years of essentially consistent federal jurisprudence and raises many questions and much uncertainty about the Commission's ability to prevent certain 'deceptive' trade practices"); Welsh, *supra* note 5, at 1007 (pointing out "[a]bsent uniform definitions of green marketing terms, compliance with a generic deceptive advertising clause will simply be a guessing game for manufacturers"). For a critique of FTC's case-by-case enforcement methodology and the Commission's involvement in the regulation of the environmental market, see *supra* notes 12-16 & 58-71 and *infra* notes 73-79, 155-60 & 288-98 and accompanying text.

73. *See* Barnett, *supra* note 12, at 497 (outlining chronological progression of environmental marketing regulation). *See also Manufacturers, Retailers Petition FTC to Adopt Uniform Labeling Guidelines*, 60 ANTITRUST & TRADE REG. REP. (BNA) 279 (Feb. 21, 1991) [hereinafter *Petitions for Green Labeling Guidelines*] (detailing initial steps in FTC guidelines development). Industry representatives exhibited the following concerns:

> [S]ome companies [were] misleading consumers with claims of "recyclable" or "reusable" . . . and asked [FTC] to make a level playing field. . . . [A representative of National Food Processors Association remarked that] "[d]espite the numerous benefits that flow from truthful environmental claims, there is a reluctance on the part of many members of industry to make such claims. . . . Many industry members are uncertain how the Commission would interpret unqualified statements that a product is 'recyclable,' or statements about the recycled content of a package."

Id.

74. *See* Barnett, *supra* 12, at 497 (articulating problems associated with lack of guidance from FTC); Jason W. Gray-Lee et al., *Review of Legal Standards for Environmental Marketing Claims*, J. PUB. POL'Y & MARKETING, 169 (1994) (reinforcing case-by-case approach failed to provide guidance in industry); *Hearings on Environmental Labeling: Hearings on S. 615 Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 102d Cong., 240, 13-15 (1991) (testimony of Deborah Becker, Vice President, Environmental Policy, Kraft General Foods, Inc.) (alluding to industry confusion accompanying selective enforcement and lack of uniform national standards); *FTC Conducts Two-day Hearing on Need to Develop Environmental Marketing Guide*, 61 ANTITRUST & TRADE REG. REP. (BNA) 117 (July 25, 1991) [hereinafter *Summary of Hearings 1991*] (explicating unfairness of FTC policy which required charging company with deceptive advertising practice before adjudicating its claim).

75. *See* GEISEL (DR. SEUSS), *supra* note 3. In THE LORAX, Dr. Seuss wove the social message of environmental conscientiousness into his rhyming storyline. The Lorax serves as the social conscience of both the manufacturing Once-ler and of the consuming public at large. Loraxian consumers, therefore, signify environmentally conscious purchasers. For a discussion of Dr. Seuss' literary depiction of the developing "green" consumer, see *supra* note 3 and accompanying text.

76. *See* GEISEL (DR. SEUSS), *supra* note 6 (reflecting social undertones). In THE SNEETCHES, to sell his star-on/star-off service, Marvin McMonkey McBean preys on the social concerns of the Sneetch consumers. *See id.* Such manufacturers do more than read their market. They take advantage of the insecurities and

creasing fervor for federal regulation.[77] Initially, states filled a perceived void by enacting new legislation and by enforcing state consumer protection laws.[78] NAAG, recognizing the import of unifying state statutory schemes, entreated FTC to promulgate green advertising and labeling guidelines.[79] Because of the technical complexity and scientific uncertainty surrounding many environmental claims and the increase in their use, FTC requested comments on the proposed environmental marketing and advertising guidelines.[80] Finally, in July 1992, FTC Guides for the Use of Environmental Marketing Claims (FTC Guides I) was born.[81]

FTC Guides I, as its name suggests, has no force of law.[82] It was adopted merely to enlighten marketers and explain how FTC will enforce section five of FTCA in the environmental marketing and advertising context.[83] FTC aimed to regulate the environmental

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concerns of respective consumers. For Dr. Seuss' illustration of an underregulated market and an unchecked marketer, see *supra* notes 6-7 and accompanying text.

77. *See* Bukro, *supra* note 1, at 24 (divulging 400% more environmental marketing advertisements were unleashed in 1991 than in 1989). For further discussion of the "green mania" characterizing the early 1990s, see Coffee, *supra* note 1, at 298; Wynne, *supra* note 2, at 51; Chase & Smith, *supra* note 1, at S-2; Donaton & Fitzgerald, *supra* note 1, at 49; U.S. EPA, *supra* note 1; Wynne, *supra* note 1, at 785; Howett, *supra* note 2, at 401-03.

78. For a discussion of the myriad of state resolutions, see *supra* notes 28-35 and *infra* notes 167-204 and accompanying text.

79. For a discussion of NAAG initial regulatory suggestions, see GREEN REPORT I, *supra* note 4. *See also NAAG Urges National Strategy on Energy Shortages, Environmental Marketing Claims*, 58 ANTITRUST & TRADE REG. REP. (BNA) 424 (Mar. 22, 1990) (articulating NAAG's proposal); *Petitions for Green Labeling Guidelines*, *supra* note 73 (same). The following words sum up NAAG's position on the regulation of the environmental market:

> [NAAG's] ultimate goal is to prompt the development of specific and concrete definitions for terms commonly used in environmental advertising and standards for applying those definitions. Based on . . . testimony and written comments . . . and [NAAG's] . . . ongoing investigation of environmental claims, [NAAG] has developed . . . preliminary recommendations to provide guidance to businesses desiring to make environmental claims until such standards are enacted.

GREEN REPORT I, *supra* note 4, at 47. For further discussion of NAAG's position, see *supra* notes 4 & 16 and *infra* notes 113, 172-73 & 210 and accompanying text.

80. *See* Request for Comments FTC Guides I, *supra* note 1.

81. FTC Guides I, *supra* note 17. For an overview of FTC Guides I, see *supra* notes 14-21 and accompanying text and *infra* notes 79-89 and accompanying text. For a general discussion of FTC Guides II, see *infra* notes 90-105 and accompanying text. For a discussion of the changes in FTC Guides I that are implemented in FTC Guides II, see *infra* notes 96-101 and accompanying text.

82. *See* FTC Guides I § 260.2 (stating "[t]he guides themselves do not preempt regulation of other federal agencies or of state and local bodies governing the use of environmental marketing claims").

83. *See id.* § 260.1 (stating "[t]hese guides represent administrative interpretations of laws by the [FTC] for the guidance of the public in conducting its affairs in conformity with legal requirements . . . [and] specifically address the application

market by framing its approach in terms of voluntary compliance,[84] and agreed to shelter those marketers heeding Guide examples.[85] In conjunction with the issuance of FTC Guides I, the Commission established a three-year review period in which public comment would be sought to determine whether and how the guidelines should be modified in light of experience.[86] Because FTC desired to make the guides responsive to changes in consumer understanding and developments in environmental technology, the Commission solicited comments with the intention of implementing any needed changes.[87] According to FTC, comments received from industry, environmental groups, and federal and state authorities confirmed that industry had done a good job of voluntarily complying with FTC Guides I and that the most egregious claims had disappeared.[88] However, scholars, federal agencies, individual businesses, trade associations and environmental groups suggest otherwise.[89]

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of section 5 of the FTC Act (15 U.S.C. § 45) to environmental advertising and marketing practices").

84. *See id.*

85. *See id.* § 260.3 (stating "[t]he guides are composed of general principles and specific guidance . . . and are followed by examples that generally address a single deception concern . . . [and] options . . . for qualifying a claim. These options are intended to provide a 'safe harbor' for marketers who want certainty about how to make environmental claims").

86. *See id.* § 260.4 (stating "[t]hree years after the date of adoption of these guides, the Commission will seek public comment on whether and how the guides need to be modified in light of ensuing developments. . . . Following review of [party] petition[s], the Commission will take such action as it deems appropriate").

87. *See* FTC Guides I § 260.4 (requesting comments from industry and regulators alike); Request for Comments FTC Guides I, *supra* note 14 (same). *See also* Starek, *supra* note 18 (addressing comments received from those implementing, encountering and adhering to FTC Guides I).

88. *See* Starek, *supra* note 18; Ira Teinowitz, *FTC Stands by Regs for 'Green' Ad Claims No Big Revisions Made in Rules Though Guide Gets More Specific*, ADVERTISING AGE, Oct. 7, 1996, at 61 (alluding to FTC Guides I's intended changes). "The commission is gratified that the guides received such broad appeal during this review process . . . [and so] only those changes necessary to further protect consumers from misleading claims and to provide guidance to manufacturers on how to advertise truthfully the environmental benefits of their products were made." Teinowitz, *supra*, at 61 (quoting Jodie Bernstein, director of the Bureau of Consumer Protection).

89. *See EPA, Packagers and Others Comment on FTC Green Guides*, 4 FOOD LABELING NEWS 4 (1995) (responding to industry claims of "recyclability," "compostability" and "degradability," EPA disputed FTC Guides I effect on marketers). Specifically, the Agency praised FTC's laudatory attempts at promoting national consistency for environmental marketing claims, but "'strongly oppose[d] allowing [the] unqualified use of [such terms at this time].'" *Id.* at 4. Because the Agency espoused life-cycle assessment methodology of products and felt that such methodology should be used in conjunction with environmental marketing claims,

On October 4, 1996, FTC announced an updated version of the guidelines which evinces relatively minor changes and the same non-binding repercussions.[90] A few noteworthy revisions include: a redraft of recycling provisions to address changing consumer perceptions with respect to the chasing arrow symbol;[91] explication of the term "ozone-friendly" and its designation as a per se deceptive advertisement;[92] the inclusion of additional examples for previously defined environmental claims;[93] and a substantiation requirement

EPA opposed FTC's use of unqualified terms. *See* Letter from Julie W. Lynch, Environmental Protection Agency, to the Secretary of the Federal Trade Commission (Sept. 26, 1996) (on file with author) (qualifying use of environmental marketing guidelines with use of terminology defined by EPA). In addition to emphasizing strong need for continued usage of environmental marketing guidelines, EPA pointed out that FTC Guides I proved useful in EPA program activities. For a discussion of the effectiveness of FTC Guides I from the perspective of regulators, scholars, industries, and trade organizations, see ENVIRONMENTAL GUIDELINE REVIEW, MEETING BEFORE THE COMMISSION, Docket No.: P954501 (Dec. 7, 1995) [hereinafter HEARINGS 1995]. Mr. Bud Colden of the National Recycling Coalition observed that "there has been a steady growth in recycling since the guides went into effect . . . [but] I think that [the growth is] largely . . . a result of public policies that were established prior to the guides." *Id.* at 19-20. According to Mr. Barry Meyer of the Aluminum Association, "recycling is, first and foremost, a business. It is all a matter of economics and what you can afford to do. . . . No amount of education, no amount of recyclable claim standards are going to do away with [the problem]." *Id.* at 84-85. Mr. Hal Shoup with American Association of Advertising Agencies implied that there was less of a need for national environmental marketing guidelines because marketers no longer focused on a product's environmental attributes and consumers no longer needed environmental sensitivity training. *See id.* at 41-42. While a number of organizations congratulated FTC on their efforts, few felt FTC Guides I were sufficient. *See generally id.* For further discussion of the disputed success of FTC Guides I, see *supra* notes 12-16 & 58-79 and *infra* notes 155-60 & 288-98 and accompanying text.

90. FTC Guides II, *supra* note 9. For a discussion of the changes in FTC Guides I that are reflected in FTC Guides II, see *supra* notes 18-21 and *infra* notes 96-101 and accompanying text.

91. *See id.* § 260.7(e) (ex.10) (stating "[b]y itself the [three chasing arrows] symbol is likely to convey that the packaging is both 'recyclable' and is made entirely from recycled material. Unless both messages can be substantiated, the claim should be qualified").

92. *See id.* § 260.7(h) (noting "[i]t is deceptive to misrepresent, directly or by implication, that a product is safe for or 'friendly' to the ozone layer or atmosphere"). The examples help flesh out situations in which claiming a product is "ozone safe" or "ozone friendly" is a deceptive form of advertising. *See, e.g., id* § 260.7(h) (ex. 2). The pertinent provision reads:

> An aerosol air freshener is labeled "ozone friendy." Some of the product's ingredients are volatile organic compounds (VOCs) that may cause smog by contributing to ground-level ozone formation. The claim is likely to convey to consumers that the product is safe for the atmosphere as a whole, and is therefore, deceptive.

Id.

93. *See id.* § 260.7. One of the examples reads:

> A brand name like "Eco-Safe" would be deceptive if, in the context of the product so named, it leads consumers to believe that the product has environmental benefits which cannot be substantiated by the manufac-

for both general "environmentally preferable" product assertions and environmental seals of approval.[94] Significantly, instead of altering its unsatisfactory[95] recyclable and compostable guides, FTC decided to "await the results of ongoing consumer research."[96]

Both sets of guidelines represent a step in the right direction, but they are simply not adequate. Although many hoped FTC Guides I would provide the basis for a uniform, national environmental marketing scheme,[97] the issuance of FTC Guides II trounced such optimism.[98] Uniformity in the environmental mar-

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turer. The claim would not be deceptive if "Eco-Safe" were followed by clear and prominent qualifying language limiting the safety representation to a particular product attribute for which it could be substantiated, and provided that no other deceptive implications were created by the context.

Id. § 260.7(a) (ex.1).

94. *See* FTC Guides II, *supra* note 9, §§ 260.7(a) (ex.5), (ex.6) (stating "[i]t is deceptive to misrepresent, directly or by implication, that a product or package offers a general environmental benefit. Unqualified general claims of environmental benefit . . . [a]s explained in the Commission's Ad Substantiation Statement . . . must be substantiated").

95. *See* Starek, *supra* note 18 (admitting that FTC Guides I needed revising). For an in-depth critique of the recyclable and compostable guides, see HEARINGS 1995, *supra* note 89. For a general discussion of FTC Guides' I effectiveness, see *supra* notes 12-16 & 58-79 and *infra* notes 155-60 & 288-98 and accompanying text.

96. Starek, *supra* note 18 (elaborating on revisions to FTC Guides I and on FTC's position to forestall revisions to "recycling" and "compostable" guides). *See generally* Teinowitz, *supra* note 88 (same). To view FTC's compostable and reyclable guides, see FTC Guides I, *supra* note 17, §§ 260.7(c), (d).

97. *See Summary of Hearings 1991*, *supra* note 74, at 118 (quoting National Food Processors Association: "[a]lthough a guide will not preempt states, the secondary effects of guides will be a positive force in shaping national uniformity"); Hearings 1991, *supra* note 21, at 30, 66, 140, & 169 (recording support for FTC Guides I from NAAG; The Grocery Manufacturers Association; the Cosmetic, Toiletry and Fragrance Association; the Environmental Defense Fund; Green Cross Certification Company); EPA ON ENVIRONMENTAL MARKETING TERMS, *supra* note 1, at 110-13 (pointing out "advocates of strong governmental regulation of environmental advertising . . . want to see regulations go beyond truth-in-advertising laws"). EPA noted the following:

> Advocates for greater governmental involvement argue that environmental claims inherently affect environmental policy by affecting consumer purchasing decisions, and should therefore be allowed only on products that have meaningful environmental benefits. They also point out that misleading or deceptive claims not only harm consumers, they can undermine broader environmental policy goals, such as encouraging recycling and responsible solid waste management.

EPA ON ENVIRONMENTAL MARKETING TERMS, *supra* note 1, at 111.

98. *See FTC Guides I Revisions*, *supra* note 21 (pointing out much criticism and lack of uniformity in environmental marketing context existed although three years had passed since issuance of FTC Guides I). For a discussion of the effects of FTC's issuance of non-binding FTC Guides II, see *supra* notes 17-21 & 88-97 and *infra* notes 99-101 and accompanying text. For a discussion of FTC's efforts in regulating the environmental market, see *supra* notes 9-21 and *infra* notes 58-105, 288-98 & 329-37 and accompanying text.

keting context is a "pipe dream," only to be realized in FTC's typical leisurely fashion.[99] Like the original version, FTC Guides II merely mandates that marketers provide "substantiated," "clear and prominent" and "not overstated" professions of environmental merit.[100] Even coupled with explanatory examples, such amorphous standards do not provide the guidance needed to unify green marketing. Moreover, states are not required to harmonize their legislation with FTC efforts.[101] While a few have conformed their laws to FTC Guides I,[102] many states have not taken FTC enactments into consideration when drafting their green marketing laws.[103] An updated non-binding set of guidelines will not advance

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99. *See* Welsh, *supra* note 5, at 1008 (denoting FTC case-by-case enforcement regulator methods as laggard and suggesting "[o]ne need only look at how long it has taken the FTC to establish a clear definition of 'deceptive' through the case-by-case method [to determine that such an approach is ineffective]"). For a critique of FTC's half-hearted regulatory attempts, see *id.* at 1005-11. For further discussion of FTC's case-by-case enforcement regulatory methodology, see *supra* notes 12-16 & 58-79 and *infra* notes 155-60 & 288-98 and accompanying text.

100. FTC Guides II, *supra* note 9, §§ 260.6(a), (c). The pertinent provision reads:

> The Commission traditionally has held that in order to be effective, any qualifications or disclosures such as those described in the guides in this part should be sufficiently clear and prominent to prevent deception. Clarity of language, relative type size and proximity to the claim being qualified, and an absence of contrary claims that could undercut effectiveness, will maximize the likelihood that the qualifications and disclosures are appropriately clear and prominent.

Id. § 260.6(a). Section 260.6(c) reads in pertinent part:

> An environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication. Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible.

Id. § 260.6(c).

101. *See id.* § 260.2. The text of this provisions is identical in FTC Guides I and II. For the pertinent text of § 260.2 in FTC Guides I, see *supra* note 82.

102. For a discussion of the states conforming their laws to FTC Guides I, see *supra* notes 30-31 and *infra* notes 177-87 and accompanying text.

103. *See* Barnett, *supra* note 12, at 504-07 (explicating states' role in environmental marketing and explaining that many states legislated green marketing without regard to FTC guidelines). Presently, all states with environmental marketing laws permit, as a statutory defense, conformance with FTC Guides I. For a discussion of state environmental marketing laws, see *supra* notes 28-34 and accompanying text and *infra* notes 167-204 and accompanying text. One state has even adopted FTC Guides I into law. *See* ME. REV. STAT. ANN. tit. 38, § 2142 (West 1996). For the pertinent text of the Maine statute, see *supra* note 30. The same states conforming their laws with FTC Guides I have not yet updated their laws to allow conformance with FTC Guides II as a defense to deceptive environmental advertising. For a discussion of likely implications of issuance of non-binding FTC Guides II, see *supra* notes 98-102 and *infra* notes 105 & 338-46 and accompanying text. Because most states have yet to enact any green marketing law, one may view the impact of FTC regulatory guidelines as insignificant. It is clearly not. For a discussion concerning why FTC's regulatory attempts are not insignificant, see Bar-

the goal of nationalizing environmental advertising. FTC's unfamiliarity with complex environmental claims and technical terminology has served to hinder the Commission's work in its main area of expertise: unfair marketing regulation.[104] Thus, sufficient management of the environmental market may only be accomplished through the joint endeavors of EPA and FTC.[105]

B. EPA or Bust?

Before the issuance of FTC Guides I, Congress considered two bills which granted EPA the power to create voluntary national guidelines for environmental marketing terminology.[106] Emphasizing uniform definitional standards and rejecting a national seal of approval program, both bills set minimum standards to which EPA must adhere.[107] Most importantly, both schemes mandated a pub-

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nett, *supra* note 12, at 504-507. *See also infra* notes 105, 209-23, & 338-46 and accompanying text.

104. *See* Welsh, *supra* note 5 at 1009-11 (using FTC's nutritional label failure to demonstrate why Commission should not be involved in environmental marketing regulation). For further discussion of the nutritional labels guidelines, see *infra* notes 114, 156, 159-61, 209 & 219-20 and accompanying text. For further discussion of FTC's inability to adequately regulate the environmental market, see *supra* notes 12-16 & 58-79 and *infra* notes 155-60 & 288-98 and accompanying text.

105. For a discussion concerning the reasons why joint EPA and FTC efforts are needed, see *supra* notes 9-27 & 58-104 and *infra* notes 152-66 & 346 and accompanying text. For a discussion of other joint-Agency regulatory plans, see *supra* notes 104 and *infra* notes 114, 156, 159-61, 209 & 219-20 and accompanying text. For an explanation of the author's joint EPA/FTC proposal, see *infra* note 346 and accompanying text.

106. *See* National Waste Reduction, Recycling, and Management Act, H.R. 3865, 102d Cong. (1992) (proposed by Rep. Al Swift); Environmental Marketing Claims Act of 1991, S. 615, 102d Cong. (1991) (reintroduction by Sen. Frank Lautenberg of Environmental Marketing Claims Act of 1990, S. 3218, 101st Cong. (1990)). *See also* Environmental Marketing Claims Act of 1991, H.R. 1408, 102d Cong. (1991) (companion bill to Senate Bill 615 introduced in the House by Rep. Gerry Sikorski); National Recycling Markets Act of 1991, H.R. 2746, 102d Cong. (1991) (containing cursory legislative efforts to regulate environmental market); National Recycling Markets Act of 1992, S. 2363, 102d Cong. (1991) (same). A few earlier bills touched on environmental marketing regulation. *See, e.g.*, National Recyclable Commodities Act of 1989, S. 1884, 101st Cong. (1989) (introduced by then Sen. Albert Gore); National Recyclable Commodities Act of 1990, H.R. 4942, 101st Cong. (1990) (introduced by Rep. Gerry Sikorski); Materials Recycling Enhancement Act of 1991, S. 1473, 102d Cong. (1991). For the pertinent text of Senate Bill 615 and House Bill 3865, see *infra* notes 107-11 and accompanying text.

107. *See* S. 615, §§ 6-7; H.R. 3865, § 501. Both bills attach arbitrary percentage thresholds to which marketers must adhere. *See, e.g.*, S. 615 § 6(b)(7). Critics of Senate Bill 615 argued that such thresholds are akin to rulemaking and not appropriate for environmental marketing guidelines. *See Hearings on Environmental Labeling: Hearing on S. 976 Before Subcomm. on Environmental Protection of the Comm. on Environment and Public Works*, 102d Cong. 240, 87-88 (1991) (prepared statement of American Paper Institute). Richard A. Denison, Environmental Defense Fund, supported Senate Bill 615 but argued for limitations on FTC's role. *See id.* at 52-61

lic education campaign to raise consumer awareness of the types of claims covered and the manner in which EPA would regulate claims.[108] The chief purposes of the proposed legislation were to "encourage both consumers and industry to adopt habits and practices that favor natural resource conservation and environmental protection" and to protect consumers from deceptive advertising claims.[109] Purporting to engender national uniformity, one bill[110] allowed states to enact more stringent regulation while the other[111] permitted regulation of green claims to which EPA had not spoken. Not garnering enough Congressional votes, both bills died in the Senate.[112]

Meanwhile, FTC's hesitancy in distinguishing "green claims" from other deceptive advertising practices incited requests for assistance.[113] Environmentalists petitioned EPA to develop "techni-

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(stating "[to] fully address[ ] the question of . . . environmental marketing . . . claims will clearly need the expertise of EPA").

108. *See* S. 615, §§ 11-12; H.R. 3865, § 501. *See, e.g.*, S. 615 § 12 (establishing public information campaign). Richard H. Seibert, of the National Association of Manufacturers, indicated support for the use of voluntary labels and a public education campaign. *See Hearings on Environmental Labeling: Hearing on S. 976 Before Subcomm. on Environmental Protection of the Comm. on Environment and Public Works*, 102d Cong. 240, 89-90 (1991) (alluding to commerce clause implications stemming from adoption of binding regulatory rules).

109. S. 615, § 2; H.R. 3865, § 501.

110. *See* S. 615, § 13(c).

111. *See* H.R. 3865, § 501. For a discussion of the variations between Lautenberg and Swift's proposals, see Howett, *supra* note 2, at 427-28. The differences between Swift's bill and Lautenberg's bill including: (1) "authoriz[ation for] the EPA . . . to formulate the environmental claims regulations, . . . [and] to enforce violations of these regulations;" (2) a requirement that persons who intend to use an environmental claim file a certification that their claim meets the Act; (3) a "require[ment that] environmental claims . . . relate to a specific environmental impact or attribute;" and (4) authorization of claims referring to the absence of a characteristic (such as "CFC free") only if the characteristic is usually present in that type of product or if it would aid consumers' purchases. *See id.*

112. *See* McClure, *supra* note 23, at 1361-62 (insinuating bills' failure resulted from emergence of FTC Guides). For further discussion of the demise of Congressional attempts to put EPA at the helm of the environmental marketing regulatory movement, see *supra* notes 22-25 and accompanying text.

113. *See* FTCA § 5, 15 U.S.C. § 45 (1994) (indicating that present federal laws are capable of restricting deceptive advertising). Since labeling is specifically excluded from the definition of false advertising, FTCA can not sufficiently address the problems associated with the ever-growing green market. FTC Commissioner Azcuenaga recognized the link between green claims regulation and environmental policy and expressed a reluctance to set environmental policy. *See Azcuenaga Will Not Endorse FTC Green Guides*, *supra* note 20, at 777 (cautioning FTC not to define specific green marketing terms without input and guidance from EPA, manufacturers and other experts). For further discussion of Commissioner Azcuenaga's position, see *supra* notes 20 & 68 and *infra* notes 117-18 & 157 and accompanying text. Commissioner Starek and Chairman Steiger both encouraged FTC's promulgation of environmental marketing guidelines. *See Steiger Supports the*

cally-based standards and definitions capable of advancing a policy of environmental protection while preventing consumer deception."[114] Showing a willingness to take on this task, EPA announced its plans to formulate voluntary national guidelines.[115] Accordingly, the Agency proposed to: (1) establish standards for the legitimate use of environmental claims; (2) determine the environmental benefits of various products; and (3) aid government officials and manufacturers in applying a *life-cycle* product assessment (LCA).[116]

Development of FTC Green Guides, supra note 20, at 398; Starek, *supra* note 18. For further discussion of Commissioner Starek's and Chairman Steiger's contrasting positions on this issue, see *supra* notes 18-20 & 68 and *infra* notes 117-18 & 157 and accompanying text. NAAG explains the pressing need for environmental advertising standards:

> In "The Green Report," [NAAG] called upon the federal government to adopt national standards for environmental marketing claims used in labeling, packaging and promotion of consumer products. The Task Force now reaffirms its initial recommendation. . . . [I]ndustry groups have . . . come forward recently and called for the federal government to develop uniform marketing standards. . . . In addition, separate petitions calling for environmental guidelines have been filed with FTC by several individual companies and trade associations.

AD HOC TASK FORCE ON ENVIRONMENTAL ADVERTISING, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, THE GREEN REPORT II: RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING (May 1991) at 1-2 [hereinafter GREEN REPORT II].

114. Howett, *supra* note 2, at 423 (citing Mr. Richard A. Denison, Environmental Defense Fund, *Remarks at the FTC Public Hearings on Environmental Marketing and Advertising Guides* (July 17, 1991) at 4-5. *See also* Richards, *supra* note 36, at 264. From the start, the Environmental Defense Fund espoused a joint regulatory plan that made use of both EPA and FTC authority. *See Hearings on Environmental Labeling: Hearing on S. 976 Before the Subcomm. on Environmental Protection of the Comm. on Environment and Public Works,* 102d Cong. 240, 56 (1991) (statement of Mr. Richard A. Denison, Environmental Defense Fund) (comparing joint efforts of FTC and EPA to "already established division of authority between the FTC and FDA under the Food, Drug & Cosmetic Act"). Ms. Deborah Becker, Vice President, Environmental Affairs, Kraft General Foods, Inc., voiced that "EPA authority over environmental marketing claims is inappropriate." *Id.* at 15. Ms. Becker feels that positive environmental change will come through industry efforts and not prescriptive regulation. *Id.* Accordingly, Ms. Becker stresses that stringent regulation will "stifle innovation" instead of promoting environmental policy. *Id.* For a discussion of the author's joint regulatory plan, see *infra* note 346 and accompanying text. For a comparison between nutritional and environmental labeling guidelines, see *supra* note 104 and *infra* notes 156, 159-61, 209 & 219-20 and accompanying text. For further discussion of advocates of non-binding legislation, see *supra* notes 20, 68, 108 & 113 and *infra* notes 117-18 & 157 and accompanying text. *See also supra* notes 12 & 89 and *infra* notes 155-56, 166 & 198 and accompanying text (cataloguing comments of supporters and advocates of FTC Guides I).

115. *See* Howett, *supra* note 2, at 423-24 (citing U.S. EPA, LIFE-CYCLE ASSESSMENT METHODOLOGY DEVELOPMENT, PROJECT UPDATE, NO. 2 (Summer 1991)).

116. *See id.* at 424. Howett explains EPA's efforts in developing life-cycle assessment methodology and emphasizes the significance of life-cycle product assessments:

> In order to produce a guidance document on the application of the life-cycle assessment method, the EPA has put together a project team from EPA's Offices of Air and Radiation, Pollution Prevention and Evaluation,

However, upon the promulgation of FTC Guides I, EPA took a back-seat and assisted the Commission from its position on the Interagency Task Force on Environmental Marketing Claims.[117] FTC underscored the difference between its goals and those of the EPA by stating that: "[t]he Commission does not have a statutory mandate to set environmental policy. . . . [A]ny Commission cases, rules or guides would be designed to address how such terms may be used in a non-deceptive fashion in light of consumer understanding of the terms."[118]

Numerous pre-existing environmental statutes sanction EPA's injection of policy into the "green market."[119] For example, the

> Research and Development, and Solid Waste. This intra-agency team is charged with developing a comprehensive life-cycle assessment methodology that can be used by industry, government officials and consumers to evaluate a product's effect on the environment from the extraction of raw materials to its final disposal and reuse. The EPA has also created a seventeen-member technical advisory panel. . . . Additionally, the agency has undertaken a review of international programs involving life-cycle assessments and environmental labeling. . . . Finally, in August 1990, the EPA cosponsored a workshop organized by the Society of Environmental Toxicology and Chemistry (SETAC) that had as its objective the identification of state-of-the-art in life-cycle assessments so that methodology could be applied in a uniform and consistent manner.

Id. at 411 n.57 (citing U.S. EPA, LIFE-CYCLE ASSESSMENT METHODOLOGY DEVELOPMENT, PROJECT UPDATE No. 1, at 1-2 (1991)). For a discussion of cradle to grave life-cycle product analysis, see *infra* notes 131-32, 165-66, 203, 239-88, 315-28 & 330 and accompanying text. For the definition of life-cycle assessments, see *infra* note 241. For a complete discussion of eco-labels and life-cycle assessments, *see generally* Wynne, *supra* note 2.

117. *See* Richards, *supra* note 36, at 264 (explaining EPA, FTC and White House together promulgated environmental marketing guidelines "under the aegis of the FTC"); *Public Commentators Give Recommendations on EPA's Proposed Green Marketing Terms*, 61 ANTITRUST & TRADE REG. REP. (BNA) No. 1541, 600 (Nov. 14, 1991) (summarizing comments of C. Bowdoin Train, EPA Deputy Assistant Administrator of Solid Waste and Emergency Response, that if FTC issues guidelines, EPA will assist from the Task Force); *FTC Commissioners, Industry Plan to Meet About Guidelines on Environmental Labeling*, 23 ENVTL. REP. (BNA) 11 (May 1, 1992) (explaining FTC Chairman Steiger pushed Agency to promptly issue green marketing guidelines); *Steiger Supports the Development of FTC Green Guides, supra* note 20, at 398 (same). For further discussion of Chairman Steiger's position on FTC environmental guidelines, see *supra* notes 68 & 113 and *infra* notes 118 & 157 and accompanying text.

118. Petitions FTC Guides I, *supra* note 14, at 24,968. *See also Azcuenaga Will Not Endorse FTC Green Guides, supra* note 20, at 777 (articulating Commissioner Azcuenaga's position that FTC does not have authority to regulate environmental policy). For further discussion of Commissioner Azcuenaga's position, see *supra* notes 20, 68 & 113 and *infra* note 157 and accompanying text. *See also supra* note 107 (discussing views of non-binding guidelines advocate). *But see supra* notes 12 & 89 and *infra* notes 155-56, 166 & 198 (cataloguing various viewpoints of myriad interest groups).

119. For a list of the environmental statutes sanctioning EPA's injection of policy and a discussion of EPA's authority to regulate environmental labeling, see *supra* note 26 and *infra* notes 120-51 and accompanying text.

Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) grants EPA broad authority to regulate labeling of pesticides.[120] After analyzing the application, product label and attestations of product superiority, EPA may oblige a registrant to substantiate any claims.[121] General avowals of "environmental friendliness" and other such marketing incentives fall within EPA's rulemaking authority.[122] Likewise, the Clean Air Act substantially delimits marketers' ability to tout the "greenness" of their products.[123] EPA remains the chief enforcement agency for the following mandates: (1) compliance with vehicle emission standards;[124] (2) placement of warning labels

120. Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) §§ 2-31, 7 U.S.C. §§ 136a-136y (1994). *See also* U.S. EPA, STATUS REPORT ON THE USE OF ENVIRONMENTAL LABELS WORLDWIDE (EPA 742-R-9-93-001) (Sept. 1993) [hereinafter EPA ON GLOBAL LABELS] (providing succinct overview of FIFRA pesticide labeling program). Those who support EPA regulation of environmental marketing claims often refer to EPA's labeling expertise as evidenced by FIFRA. *See, e.g.*, Barnett, *supra* note 12, at 500-03. It may be argued, however, that EPA's expertise extends to disclosure labeling of harmful and dangerous products, and that FTC is best able to regulate deceptive environmental advertisements. *See* FIFRA §§ 2-31, 7 U.S.C. §§ 136a-136y. Environmental marketing invokes both environmental policy and deceptive advertising. As such, a joint-agency plan would best resolve green marketing concerns. For a discussion of the intermingling of environmental and consumer deception issues, see *supra* notes 12, 89 & 104-05 and *infra* notes 152-66, 202-23, 289-98 & 346 and accompanying text. For a discussion of the author's joint-agency plan, see *infra* note 346 and accompanying text.

121. *See* FIFRA § 3(c)(1), 7 U.S.C. § 136a(c)(1). The pertinent text of FIFRA reads as follows:

> Each applicant for registration of a pesticide shall file . . . a statement which includes . . . a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use . . . and except as otherwise provided . . . a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator.

Id. §§ 136a(c)(1)(C), (F).

122. *See* FIFRA § 25(c), 7 U.S.C. § 136w(c) (granting EPA broad authorization to regulate environmental claims on pesticides). According to FIFRA, "[t]he Administrator, after notice and opportunity for hearing, is authorized . . . to establish standards . . . with respect to the package, container, or wrapping in which a pesticide or devise is enclosed for use or consumption, in order to protect children and adults from serious injury or illness." *Id.* § 25w(c)(3). If the product bears false or misleading statements on its label or its graphic representation, businesses will be subject to both civil and criminal penalties. *See id.* § 136*l*.

123. *See* Clean Air Act (CAA) §§ 101-618, 42 U.S.C. §§ 7401-7671q (1994).

124. *See id.* § 7541(c)(3)(C). The pertinent text of CAA reads:

> Effective with respect to vehicles and engines manufactured during model years beginning more than 60 days after December 31, 1970 . . . the manufacturer shall by means of a label or tag permanently affixed to such vehicle or engine that such vehicle or engine is covered by a certificate of conformity issued for the purpose of assuring achievement of emissions standards prescribed under section 7521 of this title. Such label or tag shall contain such other information relating to control of motor vehicle emissions as the Administrator shall prescribe by regulation.

on "ozone detrimental" goods;[125] (3) participation in the national recycling and emission reduction program for ozone-depleting substances;[126] (4) education and certification for servicers of automobile air conditioners;[127] and (5) elimination of nonessential products containing chloroflurocarbons (CFCs).[128] The Solid Waste Disposal Act also includes an environmental marketing directive.[129] By requiring lubricating oil to bear a statement urging recycling, EPA helps promote the minimization of hazardous waste.[130] Finally, through its Office of Pollution Prevention and Toxics, EPA has published numerous studies and issued guidance on environmental labeling.[131]

Id. Likewise, the statute makes it unlawful "for any manufacture of a new motor vehicle engine . . . to sell or lease any such vehicle or engine unless . . . a label or tag is affixed to such vehicle or engine in accordance with section 7541(c)(3) of this title." *Id.* § 7522(a)(4)(A).

125. *See* CAA § 202, 42 U.S.C. § 7671j(a) (stating "[t]he Administrator shall promulgate regulations to implement the[se] labeling requirements").

126. *See* CAA § 608, 42 U.S.C. § 7671g(a)(1) (permitting EPA to "promulgate regulations establishing standards and requirements regarding the use and disposal of class I substances during the . . . disposal of appliances and industrial process refrigeration").

127. *See* CAA § 609, 42 U.S.C. § 7671h(d)(1). The pertinent text of CAA reads:

> Each person performing service on motor vehicle air conditioners for consideration shall certify to the Administrator either . . . that such person has acquired, and is properly using, approved refrigerant recycling equipment . . . and that each individual authorized by such person to perform such service is trained and certified; or . . . that such person is performing such service at an entity which serviced fewer than 100 motor vehicle air conditioners in 1991.

Id.

128. *See* CAA § 619, 42 U.S.C. § 7671i(b) (stating "[t]he regulations under this section shall identify nonessential products that release class I substances into the environment . . . and prohibit any person from selling or distributing any such product, or offering any such product for sale or distribution in interstate commerce").

129. *See* Solid Waste Disposal Act §§ 1002-1012, 42 U.S.C. §§ 6901-6992k (1988).

130. *See id.* § 6914a (stating "[f]or purposes of any provision of law which requires the labeling of commodities, lubricating oil shall be treated as lawfully labeled only if it bears the following statement, prominently displayed: 'DON'T POLLUTE—CONSERVE RESOURCES; RETURN USED OIL TO COLLECTION CENTERS'").

131. *See generally* EPA ON ENVIRONMENTAL MARKETING TERMS, *supra* note 1 (discussing effects of environmental marketing terminology on consumers); Environmentally Preferable Products, *supra* note 26 (guiding Executive Agencies in identification and acquisition of environmentally preferable products); EPA Guidance on Recycle, *supra* note 23 (guiding legislators on use of terms "recycle" and "recyclable" and recycling emblem in environmental marketing claims); U.S. EPA, *supra* note 1 (discussing effects of environmental marketing terminology on consumers); EPA ON CERTIFICATION AND LABELING PROGRAMS, *supra* note 36 (discussing life-cycle assessment methodology and its effectiveness in environmental

From the start, EPA urged the implementation of a Life Cycle Assessment (LCA) program.[132] The Agency most recently set forth an approach to aid consumers with the identification and acquisition of environmentally friendly products.[133] Although its stated

certification programs); U.S. EPA, THE USE OF LIFE CYCLE ASSESSMENT IN ENVIRONMENTAL LABELING (EPA 742-R-93-003) (Sept. 1993) [hereinafter EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY] (discussing conceptual framework for life-cycle impact analysis); EPA ON GLOBAL LABELS, *supra* note 120 (compiling factual statement as to all environmental labeling programs initiated by both government and private entities); CLI, *supra* note 26 (initiating labeling project to foster pollution prevention, empower consumer choice, and improve consumer understanding of environmental labels).

132. *See* EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 3 (stating "[i]n the last three years a major effort nationally and internationally has been undertaken by . . . [EPA] . . . to develop the tool of [life-cycle assessment]"). For a general discussion of EPA's implementation and use of life-cycle product assessments, see *supra* notes 115-16 & 131 and *infra* notes 156-66 & 203 and accompanying text. For a discussion of life-cycle product assessments in the context of eco-labeling, see *infra* notes 239-88. For a general discussion of ISO's implementation and use of life-cycle product assessments, see *infra* notes 315-28 & 330 and accompanying text. For a definition of life-cycle assessment methodology, see *infra* note 241. *See also* Howett, *supra* note 2, at 411-14 (discussing EPA stronghold on life-cycle assessment); Grodsky, *supra* note 5, at 218-24 (touting life-cycle analyses as holistic view of environmental effects of products). *See generally* Wynne, *supra* note 2 (weighing pros and cons of environmental certification marks and critiquing various applications of life-cycle analyses). Wynne points out that "because [life-cycle assessments] have suffered from a lack of methodological consistency, several initiatives — led most notably by the Society of Environmental Toxicology and Chemistry (SETAC) [have been proposed for the purpose of] harmoniz[ing life-cycle assessment] methodology." *Id.* at 66. Accordingly, Wynne notes the three key components to a life-cycle assessment: (1) inventory; (2) impact; and (3) improvement. *See id.*

> The first "I," life-cycle inventory (LCI), attempts to quantify the amounts of resources consumed and emissions and wastes released throughout the life-cycle of a given product or process. The second is impact analysis, which seeks to identify, characterize, and value the potential environmental and health impacts associated with the quantities calculated in the LCI. The third "I," improvement analysis, employs the information generated from either or both of the first two components to design system changes that reduce the environmental burdens throughout the life-cycle.

Id.

133. *See* Environmentally Preferable Products, *supra* note 26 and accompanying text. From a life-cycle perspective, this guidance implicates seven guiding principles that must be addressed by purchasers. *See id.* at 50,728-729. These principles are as follows: (1) environmental preferability considerations should begin right from initial acquisition of the product; (2) environmental preferability is a function of many attributes; (3) "environmental preferability should reflect life-cycle considerations of products and services;" (4) "environmental preferability should involve the weighing of various environmental impacts among products;" (5) environmental preferability should be tailored to local conditions where appropriate; (6) "environmental objectives of products or services should be a factor in competition among vendors where appropriate;" and (7) agencies need to examine product attribute claims carefully, taking into consideration who made the claim and how the information was derived. *Id.*

purpose is to provide background research for executive agencies, the report evidences EPA's intention to take a more active and influential role in environmental marketing regulation.[134]

EPA's Office of Air and Radiation created an environmental marketing and labeling program to foster energy conservation.[135] Under its Energy Star Program, EPA teams up with manufacturers willing to meet EPA standards for the purpose of promoting the production and use of energy-efficient equipment.[136] As a general rule, EPA signs a Memorandum of Understanding (MOU) with its Energy Star partner outlining the responsibilities of each party.[137]

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134. *See id.* at 50,722-23. The following excerpt indicates EPA's intention to take a more active role in environmental marketing regulation:

> EPA intends this proposed guidance to serve as a broad framework for acquisitions involving environmentally preferable products or services. Following the issuance of this broad, umbrella guidance, EPA intends to issue more specific guidance on certain product categories. Product categories could include not just common supplies but also services, facilities and/or systems. . . . EPA plans to use a public process to develop the product category-specific guidances.

Id. at 50,723. For a listing of areas in which EPA is authorized to regulate the environmental market, see *supra* note 26. For a listing of EPA studies on environmental labeling, see *supra* note 131. For an in-depth discussion of EPA environmental labeling programs, see *supra* notes 22-27 & 106-33 and *infra* notes 135-52 and accompanying text. For further discussion of EPA's eagerness to take a more operative role in environmental marketing, see *supra* notes 22-27 & 108-18 and accompanying text.

135. *See* Chuck Payne, U.S. EPA Energy Star Programs and Products (last modified Sept. 17, 1997) <http://www.epa.gov/energystar.html> (outlining basics of EPA's Energy Star Programs). With the induction of its Energy Star Partnership progam, EPA has taken a huge step into the environmental marketing regulation arena. Like other environmental certification groups, EPA has approved the use of a seal-of-approval. *See* Payne, *supra.* For the purpose of preventing consumer confusion between its logo and those of other certifiers, EPA has federally registered its Energy Star logo according to the terms of the Lanham Act. *See id. See also* Barnett, *supra* note 12, at n.86. The logo may be described as follows: "a half-sun, under which is the word 'energy' in script and then a star." Barnett, *supra* note 12, at n.85. For further discussion of EPA's logo, see also U.S. EPA, ENERGY STAR OFFICE EQUIPMENT: INTRODUCING ENERGY STAR LABELED OFFICE EQUIPMENT (EPA 430-F-95-129) (February 1997) [hereinafter ENERGY STAR OFFICE EQUIPMENT] (describing Energy Star eco-logo). Underneath the sun and star appear the words "EPA Pollution Preventer." *See id.*

136. *See* Payne, *supra* note 135; *EPA, Computer Manufacturers Launch Program to Introduce Energy-Efficient Personal Computers* (EPA 92-R-125) ENVTL. NEWS June 17, 1992, *available in* 1992 WL 192408; Exec. Order No. 12,845, 48 C.F.R. 1523.7000-01 (1996), *reprinted in* 42 U.S.C. § 8262g (1994 & Supp. 1997) (stating "[t]he Administrator of General Services, the Secretary of Defense, and the Director of the Defense Logistics agency, each shall undertake a program to include energy efficient products in carrying out their procurement and supply functions"); ENERGY STAR OFFICE EQUIPMENT, *supra* note 135.

137. *See* Payne, *supra* note 135; EPA ON GLOBAL LABELS, *supra* note 120, at 136-38 (providing detailed summary of EPA's Energy Star Computers Program). Under a Memorandum of Understanding (MOU), "each participating company has agreed to introduce computers, monitors, or printers that switch to a low

EPA stamps complying partner businesses with its Energy Star approval logo and, soon thereafter, publishes a list of certified products and companies.[138] To keep industry and consumers abreast of modernization processes, the Agency provides access to compliance manuals and publications and prepares promotional materials for circulation.[139]

One type of voluntary Energy Star partnership program, Green Lights, encourages businesses to switch to energy-efficient lighting.[140] Under this program, private sector partners agree to upgrade the energy efficiency of ninety percent of its lighted square footage within five years.[141] Similarly, makers of energy-efficient computers may display an EPA-endorsed logo if they participate in the Energy Star Office Products Program and provide EPA with the results of a self-test.[142] EPA's Buildings Program promotes cost-effective, energy-efficient improvements in existing commercial and industrial buildings.[143] Partners agree to reduce utility-generated

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power state when left idle." *Id.* at 136. As of February 1997, EPA boasts signed partnership agreements with industry-leading manufacturers representing 85-95% of the office equipment market. *See* ENERGY STAR OFFICE EQUIPMENT, *supra* note 135; Barnett, *supra* note 12, at 503-04 & n.84 (summarizing Energy Star Office Equipment Program).

138. *See* Payne, *supra* note 135. *See, e.g.*, EPA ON GLOBAL LABELS, *supra* note 120, at 136-38 (providing detailed summary of EPA's Energy Star Computers Program and stating "[c]ompanies that market qualifying products may use the EPA Energy Star logo to identify those products. EPA emphasizes that the purpose of the Energy Star logo is to promote energy efficiency only, and that EPA does not endorse any particular product").

139. *See* Payne, *supra* note 135.

140. *See* U.S. EPA, GREEN LIGHTS PROGRAM: THE GREEN LIGHTS PROGRAM (EPA-430-F-97-042) (March 1997) [hereinafter GREEN LIGHTS]. As of March 1997, the program had 2,400 participants. *See id.* The following groups from all over the country have joined forces with EPA to use energy-efficient lighting: "corporations of all sizes, small businesses, nonprofit organizations . . . federal, state, and local government agencies, [h]ealth care facilities, universities and colleges, and restaurant and hotel chains." *Id. See also* Barnett, *supra* note 12, at 503-04 & n.84 (summarizing Green Lights Program); Payne, *supra* note 135 (introducing internet users to EPA's Green Lights Program).

141. *See* Payne, *supra* note 135. *See also* GREEN LIGHTS, *supra* note 140 (providing overview of EPA Green Lights Program). Green Lights participants "agree to appoint an implementation manager to oversee [the participants'] progress in the program, and to report at least annually to EPA on their upgrade progress." *Id.*

142. *See* Payne, *supra* note 135. For a discussion of EPA's Energy Star Office Products Program, see *supra* notes 135-39 and accompanying text. For a description of the Energy Star logo, see *supra* notes 135.

143. *See* U.S. EPA, ENERGY STAR BUILDINGS: INTRODUCING THE ENERGY STAR BUILDINGS PROGRAM (EPA 430-F-97-042) (March 1997) [hereinafter ENERGY STAR BUILDINGS]; Comments on Energy Star Buildings Program, *supra* note 26 (describing new Energy Star Program and soliciting comments). EPA asks participants to upgrade their buildings according to a 5-stage implementation strategy that takes advantage of system interactions and enables owners to achieve additional energy

emissions by reducing the energy consumed in designated buildings.[144] Other EPA Energy Star programs include: Homes; Residential Heating, Ventilating and Air Conditioning (HVAC); Exit Signs; Small Businesses Program; and Transformers.[145]

"Reinvention" is EPA's newest philosophy for carrying out its mission.[146] From this modern vision sprang the Consumer Labeling Initiative (CLI), a pilot project focusing on three principle product categories: (1) indoor insecticides; (2) outdoor lawn and garden pesticides; and (3) household hard surface cleaners.[147] In March 1996, EPA began working cooperatively with a task force, made up of federal and state agencies, industry partners and other interested groups, to discover consumers' problems and dissatisfactions with current labels and to improve labeling techniques.[148]

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savings while lowering capital expenditures. *See* ENERGY STAR BUILDINGS, *supra.* The five stages are as follows: (1) Green Lights; (2) Building Tune-Up; (3) Heating, Ventilating, and Air Conditioner (HVAC) Load Reductions; (4) Fan System Upgrades; and (5) HVAC Plant Improvements. *See id.*

144. *See* Comments on Energy Star Buildings Program *supra* note 26, at 55,715; ENERGY STAR BUILDINGS, *supra* note 143; Payne, *supra* note 135. In July 1995, 24 companies completed the five-step program. *See* ENERGY STAR BUILDINGS, *supra* note 143 (stating "[t]he completed buildings averaged 28% energy savings, 27% cost savings and prevented 33,000 tons of [carbon dioxide, sulphur dioxide, and nitrogen dioxide], pollutants that contribute to acid rain, smog, and global time change").

145. *See* Payne, *supra* note 135 (noting Residential HVAC Program involves manufacturers who "agree to manufacture and market high efficiency heating, cooling and control products"). Use of the Energy Star label will help consumers differentiate between standard efficiency and high efficiency products. *See id.* Through the Energy Star Transformer Program, electric utilities sign agreements to "purchase cost-effective, high-efficiency transformers for their distribution systems, . . . and manufacturers agree to produce and market Energy Star Transformers to electric utilities." *Id.*

146. *Consumer Labeling Initiative, What is the CLI?* (last modified Oct. 29, 1997) <http://www.epa.gov/opptintr/labeling/readme1.html> [hereinafter *What is the CLI?*]. Under its reinvention philosophy, EPA proposes to: focus on improved environmental results while allowing flexibility in how results are achieved; share information and decision-making with all stakeholders; create incentives for compliance with environmental requirements; and lessen the burden of complying with environmental requirements. *See id.*

147. *See id.* For a general discussion of EPA's CLI project, see also CLI, *supra* note 26. EPA emphasizes that it does not intend to "duplicate the efforts of the Consumer Product Safety Commission (CPSC)" but does intend to add CPSC to the CLI Task Force. *Id.* "Specifically, EPA is not planning to propose regulatory changes to non-pesticide household product labeling which is already under the purview of [other agencies]." *Id.* (referencing FTC Green Guides).

148. *See* CLI, *supra* note 26 (noting Members of Task Force include representatives from: CPSC, FTC, Food and Drug Administration, Vermont Agency of Natural Resources, California Office of Environmental Health and Hazard Assessment, American Association of Pest Control Officials, and Forum of State Tribal Toxic Actions). The Task Force will assist EPA in: (1) gathering and dissecting input from diverse stakeholders; (2) probing consumers to aid in the improvement of current environmental, health and safe use labels; and (3) reviewing current litera-

EPA indicated that such research would aid the Agency's Administrator in implementing necessary label changes.[149] During the summer of 1996, Agency representatives conducted a literature review and carried out primary qualitative research.[150] According to EPA predictions, interim label improvements and additional research on major issues will continue throughout 1998.[151]

C. After the Chips Have All Fallen, Who Will Remain?

Little by little, EPA has chipped away at FTC control of environmental marketing regulation.[152] Since the inception of FTC

ture and expanding current understanding of consumer-related product labeling. *See id. See generally What is the CLI?*, *supra* note 146.

149. *See generally* CLI, *supra* note 26; *What is the CLI?*, *supra* note 146.

150. *See What is the CLI?*, *supra* note 146. For a complete discussion of the initial findings of the CLI project, see CONSUMER LABELING INITITATIVE PHASE I REPORT (EPA/IAG DW-75937254-01-2) (Sept. 30, 1996) [hereinafter CLI PHASE I REPORT]. A summary of EPA findings in the CLI Phase I Report includes the following:

> Consumers interviewed . . . tended to use product labels on an as-needed basis. Three factors appeared to influence label usage overall. One factor was familiarity with a product. The more familiar the respondents were with a product, the less likely they were to read the label. . . . A second factor that affected label usage was the perception of risk of the product to the user, children, pets or the environment, which depended on the product risk. If a product was considered to be potentially harmful if used improperly, the respondents were more likely to look at the label before using it than if they did not perceive the product to be particularly toxic. A third factor that appears to affect label usage is the perceived ease or difficulty in using the product, regardless of the type of product. . . . Certain parts of the label tend to be read more often than others. Since the front panel of the label . . . is displayed on the market shelf, it is the first thing consumers see, and the first information customers refer to. . . . The storage and disposal section was the least read of all the label sections. Correct storage was considered common sense and in most cases the product was disposed of in the trash without wrapping or recycl[ing].

Id. at 79-80. The CLI Phase I Report indicates that even despite the growing social concern and environment awareness, "consumers are not very knowledgeable about basic environmental facts." *Id.* at 80. In addition, the CLI Phase I Report suggests that regardless of the fact that misuse of products is the leading cause of injury, consumers perceive little or no threat from use and disposal of household products. *See id.* EPA recommendations for future environmental marketing regulation include: (1) further research; (2) label improvements; (3) consumer education of environmental labeling; and (4) policy procedural improvements for environmental label regulation. *See id.* at 87.

151. *See generally What is the CLI?*, *supra* note 146; CLI, *supra* note 26; CLI PHASE I REPORT, *supra* note 150.

152. *See* Barnett, *supra* note 12, at 500-03 (outlining EPA's emerging role in environmental marketing activities); Environmentally Preferable Products, *supra* note 26 (defining and distinguishing terms set out in FTC Guides I); CLI, *supra* note 26 (continuing attempts to improve consumer understanding of environmental consumer product labels); Payne, *supra* note 135 (discussing Energy Star Program in which EPA creates and awards its own certification logo to energy efficient

Guides I and the advent of the Clinton Administration, FTC has held firm to its case-by-case enforcement procedures and non-binding policies,[153] and EPA has sought to educate consumers, monitor marketers and protect the environment through its new "reinvention" vision.[154] In light of the response to current environmental marketing regulatory approaches, there is little doubt that most affected parties advocate uniform regulations or guidelines.[155] While

manufacturers); EPA ON GLOBAL LABELS, *supra* note 120 (providing comprehensive outline of all EPA environmental labeling programs). For a discussion of current EPA efforts to regulate the environmental market, see *supra* notes 22-27 & 105-51 and accompanying text. For a listing of EPA studies on environmental marketing and labeling, see *supra* note 131 and accompanying text.

153. For a discussion of FTC's adoption of and stronghold on case-by-case enforcement procedures, see *supra* notes 12-16 & 58-79 and *infra* notes 155-66 & 288-98 and accompanying text.

154. For a discussion of EPA's efforts to regulate the environmental market, see *supra* notes 22-27 & 105-51 and accompanying text. For a listing of studies EPA has conducted on environmental labeling, see *supra* note 131.

155. *See* HEARINGS 1995, *supra* note 89. According to Mr. Bud Colden of the National Recycling Coalition, "a significant number of consumers are mistrustful of environmental marketing claims . . . [a]nd [regulators and marketers] need . . . to maximize the elimination . . . of that mistrust of the consuming people or these environmental marketing claims [will self-destruct]." *Id.* at 65. Ms. Mary Griffin from the Attorneys General Task Force advocated a partnership program between regulators and manufacturers making environmental marketing claims "to provide specific information that will foster the local programs . . . [and] allow people to make reasonable environmental decisions." *Id.* at 70. Mr. Richard Denison of Environmental Defense Fund stated: "I still see, on numerous products, totally unqualified claims of recyclability and, in fact, rarely do I see claims that use the kinds of terms that are outlined in the [FTC G]uides [I]. . . . [T]here needs to be information provided to the consumer that is actionable." *Id.* at 87-88. Mr. Mark Murray with Californians Against Waste felt that, at least with respect to qualified environmental claims, "FTC guidelines [I] are too open-ended." *Id.* at 104. Mr. Peter Bunten of American Forest and Paper Association stated that "any significant changes in [FTC Guides I] . . . would likely [cause us to] find ourselves back at a number of disparate proposals within each state to do their own thing once again." *Id.* at 106. Mr. Kevin Duke from Ford Motor Company indicated support for national guidelines, but cautioned against inflexible application. *See id.* at 116, 231, 298 (referencing inconsistencies in "recycling" definitions and standards across United States). Moreover, Mr. Chris Taylor from OSPIRG advocates national standards that carry the "force of law." *Id.* at 126 (pointing out that six states may enact local legislation as a result of lack of strong federal standards).

In response to requests for comments on FTC Guides I, FTC received a myriad of responses. *See, e.g.*, Letter from Daniel L. Jaffee, Association of National Advertisers, Inc., to the Secretary of the Federal Trade Commission (Sept. 28, 1995) (on file with author) (advocating uniform, national, comprehensive environmental marketing standards); Letter from John F. Waski, Managing Director, The New Consumer Institute, to the Secretary of the Federal Trade Commission (Sept. 8, 1995) (on file with author) (suggesting FTC guidelines adopt life-cycle analysis and harmonize with ISO efforts); Letter from Donald R. Theissen, Ph.D., Director, 3M Corporate Product Responsibility, to the Secretary of the Federal Trade Commission (Sep. 29, 1995) (on file with author) (same); Letter from Walter J. Foley, General Manager, Federal Relations, Steel Recycling Institute, to the Secretary of the Federal Trade Commission (Sept. 29, 1995) (on file with author)

it is unclear which agency will prevail as victor of this jurisdictional "war," it is indisputable that compromise must come before unity.

Environmental advertising policymakers need expertise in the dissimilar fields of environmental and consumer protection. Because no one agency is proficient in both fields, current regulatory attempts have proven ineffective.[156] FTC, perceiving environmental policy beyond the scope of its rulemaking power, has focused efforts on the prevention of deceptive environmental marketing.[157]

(urging adoption of FTC Guides I at state government level); Letter from Hubert H. Humphrey, III, Attorney General of Minnesota, Representing National Association of Attorneys General, to the Secretary of the Federal Trade Commission (Sept. 28, 1995) (on file with author) (pointing out FTC Guides I have fallen short of eliminating all environmental marketing problems and articulating definitional changes); Letter from Ford Motor Company, to the Secretary of the Federal Trade Commission (Sept. 28, 1995) (on file with author) (suggesting voluntary guidelines and definitions will more likely foster industry self-regulation of environmental claims); Letter from Harry Sullivan, Senior Vice President and General Counsel, Food Marketing Institute, to the Secretary of the Federal Trade Commission (Sept. 29, 1995) (on file with author) (arguing FTC Guides I have promoted national consistency in environmental marketing arena); Letter from Norman L. Dean, Green Seal, to the Secretary of the Federal Trade Commission (Sept. 18, 1995) (on file with author) (suggesting FTC Guides I without force of law are insufficient to prevent misleading environmental claims); Letter from Charles R. McDuff, Ecolab Inc., to the Secretary of the Federal Trade Commission (Sept. 21, 1995) (on file with author) (arguing FTC Guides I are effective in current format); Letter from J.A. Bailey, Occidental Chemical Corporation, to the Secretary of the Federal Trade Commission (Sep. 22, 1995) (on file with author) (same).

156. *See* HEARINGS 1995 *supra* note 89, at 246 (statement of Mr. Richard Denison of Environmental Defense Fund) (arguing that he "do[es] believe that a nice, clean line can be drawn between the consumer deception aspect of this issue and the environmental policy or benefit aspect. They are intimately intertwined and cannot be disentangled"). *See also* Grodsky, *supra* note 5, at 172-78 (describing FTC's solo approach as impotent); Barnett, *supra* note 12, at 507-10 (suggesting joint EPA and FTC endeavors are more likely to succeed than individual efforts); McClure, *supra* note 23, at 1375-76 (stating FTC should not regulate environmental market because it does not have " 'teeth' in terms of an environmentally conscious enforcement strategy"); Welsh, *supra* note 5, at 1022-27 (noting United States' need for uniform regulations and FTC's inability to promote national harmony).

157. *See, e.g.*, Petitions FTC Guides I, *supra* note 14; FTC Guides I, *supra* note 17; FTC Guides II, *supra* note 9. *See also* Federal Trade Commission, Statement of Regulatory Priorities, 61 Fed. Reg. 62,211 (Nov. 29, 1996) (discussing role of FTC and its participation in regulating environmental marketing). FTC suggests that

> [it] is an independent agency charged with protecting American consumers from 'unfair methods of competition' and 'unfair or deceptive acts or practices' in the marketplace. The Commission strives to ensure that consumers benefit from a vigorously competitive marketplace; it does not seek to supplant competition with regulation. . . . The Commission is, first and foremost, a law enforcement agency.

Id. Since FTC's first attempts at regulating the environmental market, FTC Commissioner Azcuenaga articulated that such efforts were outside the scope of the Commission's congressional mandate. *See Azcuenaga Will Not Endorse FTC Green Guides*, *supra* note 20, at 777. FTC Chairman Janet Steiger and Commissioner Roscoe B. Starek, III, both have fervently prompted FTC into regulating the environ-

However, it is unlikely that FTC can act without concurrently promoting environmental policy goals. Why, then, has FTC continued to shoulder this burden alone? Despite an arguable lack of general statutory mandate in the green marketing arena, EPA has attempted to influence green marketing and consumer labeling agendas.[158] Although the Agency has direct authority over federal environmental policy and a great deal of expertise in defining technical environmental terms, its mission is not to manage advertising claims.[159] Thus, a cooperative regulatory scheme that involves both agencies will best suit the effective regulation of green marketing.

Detailed binding rules are a prerequisite to establishing "minimum threshold requirements" and to "securing affirmative disclosures."[160] As such, EPA and FTC should develop a joint

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mental market. *See id.* For further discussion of Azcuenaga, Starek and Steiger's positions, see *supra* notes 20, 68, 113 & 117-18 and accompanying text.

158. For a discussion of the areas in which EPA has attempted to influence environmental marketing regulation, see *supra* notes 22-27 & 105-51 and accompanying text. For a listing of environmental labeling studies conducted by EPA, see *supra* note 131. *See, e.g.*, EPA Guidance on Recycle, *supra* note 23 (discussing EPA task force attempts to define FTC Guides I environmental terminology). Although EPA is limited to a consultative role regarding general environmental labeling issues until such time as Congress expands EPA's jurisdiction in this area, EPA has chosen not to sit idle and wait for Congressional mandate. *See id. See also* CLI, *supra* note 26 (discussing EPA efforts to study effect of product labels on pollution prevention, consumer choice, and consumer understanding of environmental consequences and health risks); Payne, *supra* note 135 (discussing contracting with public sector and reduction of energy inefficiencies for environmental advertising benefits). For a discussion of EPA efforts to define environmental marketing terms, see *supra* notes 26, 113-16 & 131-34 and accompanying text. For further discussion of CLI, see *supra* notes 146-51 and accompanying text. For further discussion of EPA's Energy Star Programs, see *supra* notes 135-45 and accompanying text. For a listing of EPA guidance reports on environmental marketing and labeling, see *supra* note 131 and accompanying text.

159. *See* FTCA §§ 1-26, 15 U.S.C. §§ 41-58 (1994) (granting to FTC authority to regulate deceptive advertising claims). EPA, however, has direct authority over environmental policy. *See* HEARINGS 1995, *supra* note 89 (outlining argument of Mr. Richard Denison of Environmental Defense Fund that EPA's technical expertise is necessary in setting green marketing standards); *Hearings on Environmental Labeling: Hearing on S. 976 Before Subcomm. on Environmental Protection of the Comm. on Environment and Public Works*, 102d Cong. 240, 56 (1991) (statement of Mr. Richard A. Denison, Environmental Defense Fund); Carol W. Browner, *Introduction to EPA* (last modified Oct. 17, 1997) <http://www.epa.gov/epahome.epa.html> (outlining EPA's authority and mission). Aptly put, "the agency with enforcement expertise lacks the appropriate mission, and the agency with the mission lacks enforcement authority." Grodsky, *supra* note 5, at 176.

160. Grodsky, *supra* note 5, at 173. Grodsky points out that "[t]he debate over minimum threshold requirements illustrates the FTC's reluctance to become involved in environmental policy issues." *Id.* The following discussion clarifies the current minimum threshold debate:

> The primary issue is whether new standards for environmental advertising should incorporate minimum requirements to encourage improvements in manufacturing behavior, or whether they should simply require

program.[161] In view of its environmental policy mandate, technical expertise and regulatory experience, EPA should spearhead these joint efforts by setting standards and defining terms based on current scientific evidence.[162] Moreover, FTC should incorporate EPA's determinations into interpretive rules under the rulemaking procedures of section eighteen of FTCA.[163] Although the Magnuson-Moss Act has hardened the Commission against such

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> disclosure of existing percentages of component materials or other information. . . . Several state laws and proposed federal standards require a threshold level of recycled content to be met before a related advertising claim can be made. . . . New and proposed laws also have established minimum threshold recycling rates for products advertised as recyclable, minimum durability requirements for allegedly reusable and refillable products, and minimum percentage waste reduction requirements for comparative claims.

Id. at 173-74. FTC Green Guides do not contain minimum threshold requirements. *See* FTC Guides I, *supra* note 17; FTC Guides II, *supra* note 9. For a discussion of EPA's view on minimum content standards, see EPA Guidance on Recycle, *supra* note 23, at 49,995 - 996. Between FTC's case-by-case enforcement and voluntary guidelines, it will take an extremely long time to secure affirmative environmental claims. For a critique of FTC's case-by-case enforcement approach, see Welsh, *supra* note 5, at 1007-11. Without detailed binding rules, deceptive green marketing will likely continue. For an in-depth discussion of minimum threshold requirements, see HEARINGS 1995, *supra* note 89, at 59, 79, & 82-113.

161. *See Hearings on Environmental Labeling: Hearing on S. 976 Before the Subcomm. on Environmental Protection of the Comm. on Environment and Public Works*, 102d Cong. 240, 56-57 (1991) (statement of Mr. Richard A. Denison, Environmental Defense Fund) (discussing similar context in which FTC and FDA teamed up to develop guidelines for nutritional and health labels). For further discussion of the FTC/FDA joint-agency program, see *supra* notes 104 & 159-60 and *infra* notes 209 & 219-20 and accompanying text. The problem with the development of nutritional labels was that FTC spearheaded the efforts. FTC was without technical expertise and relied on case-by-case enforcement of its guidelines. *See* Welsh, *supra* note 5, at 1011. If FTC promulgated binding trade rules and EPA defined the necessary terms, joint effort in the environmental marketing context should prove successful. For a discussion of the author's joint-agency proposal, see *infra* note 346 and accompanying text.

162. *See* Environmentally Preferable Products, *supra* note 26, at 50,722 (discussing Executive Order 12873 and its requirement that EPA make determinations on environmentally preferable products); EPA Guidance on Recycle, *supra* note 23, at 49,994 (discussing Resource Conservation and Recovery Act (RCRA) definitions and why they are applicable to environmental marketing context); Browner, *supra* note 159 (articulating directives of EPA). EPA Administrator Carol W. Browner explains EPA's mission as follows: "In December of 1970, the . . . [EPA] was created to solve the nation's urgent environmental problems and to protect the public health." Browner, *supra* note 159. See *also* Barnett, *supra* note 12, at 507-10 (arguing for joint EPA and FTC program with EPA at helm).

163. *See* FTCA § 18(a)(1), 15 U.S.C. § 57a(a)(1)(1994). For the pertinent text of FTCA, see *supra* notes 62-63. This provision grants FTC the authority to issue interpretative rules and general statements of policy with respect to unfair or deceptive acts or practices. *See id.* For a complete discussion of FTC trade regulation rules, *see generally* Richards, *supra* note 36.

procedures, interpretive rules are key to providing fair notice to the regulated community.[164]

FTC's use of EPA technical standards to scrutinize deceptive or unsubstantiated claims, along with its reliance on EPA expert advice, will facilitate and hasten Commission enforcement. With access to EPA's LCA analyses of regulated products, the Commission

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164. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (FTCIA), 15 U.S.C. §§ 45-48 (1994). FTCIA endorses FTC's legislative rulemaking authority but directs FTC to follow additional procedural safeguards. *See id.* Such safeguard procedures include preparing and publishing regulatory analyses of proposed rules, delineating reasonable alternatives to proposed rules, and reviewing FTCIA rulemaking efforts carefully. Grodsky, *supra* note 5, at n.170 (citing BARRY B. BOYER ET AL., TRADE REGULATION RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION: A REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1979)). FTCIA amendments were likely instrumental in FTC's eventual abdication of trade regulation rules. *See* Grodsky, *supra* note 5, at 177-78 & n.170 (noting "hybrid rulemaking procedures and extensive preliminary and final cost-benefit analyses [mandate]" has led to downturn in trade regulation rules since 1970s). For a comprehensive discussion of FTC rulemaking procedure in light of the FTCIA, *see* Patka, *supra* note 67, at 47. Patka considered whether FTC Green Guides "are actually binding legislative rules that the FTC issued unlawfully [in an attempt to sidestep] Magnuson-Moss Act rulemaking requirements." *Id.* at 47. Patka explains:

> [T]he courts determine as a matter of law whether a particular rule is voluntary or binding. Thus, the green marketing standards may constitute mandatory regulations even though the FTC itself claims that they are only voluntary guidelines. . . . [I]f the agency creates new law, rights, or duties, the agency pronouncement is a legislative rule. . . . The FTC surely possesses the authority to offer voluntary guidance on what manufacturers should do to comply with existing false advertising proscriptions. . . . [However,] the mandatory language employed by the FTC in the guidelines clearly indicates that the agency has defined specific acts as false advertising and imposed new duties upon industry in the realm of environmental marketing . . . without following the stringent Magnuson-Moss Act rulemaking procedures.

Id. at 49. Patka concludes that FTC Green guides are, therefore, susceptible to legal challenge. *See id.* Patka's observations find support in Commissioner Azcuenaga's Dissenting Statement to FTC Guides I:

> Basic to the exercise of the responsibility of my office is the obligation to act within the authority conferred on that office and, as I understand that obligation, it is not satisfied by forecasting that a challenge is unlikely or by deferring to the courts to decide or review whether the exercise lies within the bounds of the authority. . . . [M]y obligation is to decide in the first instance and without regard to prevailing political climate in which that decision will be received. As I read the law, the Commission has no authority to issue these guides, as written, without first employing the rulemaking procedures of Section 18(b)(1) of the FTC Act, which it has not done.

AZCUENAGA DISSENTING STATEMENT, *supra* note 20, at 1-2. Commissioner Azcuenaga suggests that if "the Commission prefers the more definitive language because it wants to be definitive about what is or is not deceptive, then it . . . runs squarely into the problem that it is in fact issuing rules rather than guides." *Id.* at 6. It seems that FTC's non-binding green marketing *guidelines* have engendered confusion in regulators as well as consumers.

may more readily determine the deceptiveness of a marketing scheme.[165] EPA's embrace and FTC's implementation of this painstaking *life-cycle* inquiry will positively enhance the reliability and consumer comprehension of "green" claims.[166] As a result, the regulated community will benefit from a national policy and an integrated regulatory program.

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165. For a discussion of life-cycle product assessment methodology and its significance in the environmental marketing context, see *supra* notes 115-16 & 131-32 and *infra* notes 166, 203, 239-88, 315-28 & 330 and accompanying text. For a more complete discussion of life-cycle product assessment methodology, see EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131; EPA ON CERTIFICATION AND LABELING PROGRAMS, *supra* note 36. For explication of cradle to grave life-cycle product assessment, see *infra* notes 239-88 and accompanying text. For further discussion of the applicability of life-cycle product assessment methodology in green marketing, see Wynne, *supra* note 2, at 64-94; Grodsky, *supra* note 5, at 218-24; Howett, *supra* note 2, at 411-13, 423-26; Richards, *supra* note 36, at 235. For a definition of life-cycle product assessment, see *infra* note 241.

166. *See* HEARINGS 1995, *supra* note 89, at 409-46. Mr. Norman L. Dean of Green Seal remarked:

> The rest of the world and the . . . [EPA] are all moving toward the multiple attribute life cycle approach as reflected in the environmentally preferable product draft guidance that recently came out. This is the future, these multi-attribute claims, because they provide more information to consumers and because the evidence from 20 years of experience in Europe is that these programs which use a life cycle prospective on the world can help improve the environment.

Id. at 414-15. An alternate view was expressed by Mr. Pat Layton of American Forest and Paper Association:

> I think, therefore, that in the international standards community and in our minds at AFPA, we recognize the value of the life cycle inventory to basically be an accounting, a mass energy balance accounting process, to give you information about a cradle to grave aspect of a product. It has very good usefulness in product design and helping you understand how your product can be made better . . . but it is not ready for I think the kind of advertising [aspects associated with eco seals].

Id. at 420-21. Mr. Keith Scarborough with the Association of National Advertisers pointed out that if FTC employed life-cycle analyses, they would be outside their congressional mandate and injecting environmental policy into the marketplace. *See id.* at 422. Ms. Eun-Sook Goidel explained EPA's consensus on how life-cycle analyses should be performed and expressed her views on FTC Guides I. "I think the FTC can and should provide some guidance on how [life-cycle] claims [by manufacturers] should be made. I think the challenge is how to do this in such a way so that the consumers are not misled, but also without being too restrictive so that it shuts the door on the whole evolution of this tool that has I think a lot of promise." *Id.* at 430-31. Mr. Arthur Graham of Free Flow Packaging Corporation proposed that manufacturers be banned from making life-cycle claims "until such time as some Government body has established the standards." *Id.* at 433. *See also* Letter from Norman L. Dean, Green Seal, to the Secretary of Federal Trade Commission (Sept. 18, 1995) (on file with author) (suggesting one of FTC Guides I failures is rejection of life-cycle analyses). According to Mr. Dean, "Green Seal believes that [FTC Guides I] do not address a potentially misleading aspect of claims. . . . We refer here to claims for single attributes of products . . . where such claims are not based on a life-cycle approach identifying the product's key environmental attributes." *Id.*

III. STATE RESOLUTIONS

A. California, New York, Washington and Maine: It's a Hard Enough Life, for Us

To help combat deceptive trade practices, most states have enacted their own versions of FTCA.[167] These measures are collectively referred to as "little FTC acts."[168] Like FTCA, state statutes aim at the curtailment of misleading advertising through such enforcement mechanisms as injunctions, civil fines and criminal penalties.[169] Some state laws even permit consumers to proceed directly against manufacturers to recover damages and attorneys' fees.[170] Since the accession of green consumerism and FTC's heightened interest in pursuing deceptive advertisers, state attorneys general have increasingly employed their respective states' statutes to environmental claims.[171] NAAG compiled and published

167. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 17500-09 (West 1997); MASS. GEN. LAWS ch. 93A, § 2 (1997); N.Y. EXEC. LAW § 63 (12) (McKinney 1997); N.Y. GEN. BUS. LAW §§ 349-50 (McKinney 1997); TEX. BUS. & COM. CODE ANN. §§ 17.41-.826 (West 1997).

168. *See* Israel, *supra* note 28 (referring to state deceptive advertising statutes as "little FTC Acts").

169. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 17535, 17535.5, 17536; MASS. GEN. LAWS ch. 93A § 4; N.Y. GEN. BUS. LAWS § 350d; TEX. BUS. & COM. CODE § 17.47. Massachusetts' statute is a good example of a state deceptive advertising statutory scheme:

> Whenever the attorney general . . . believe[s] that any person is using or is about to use any method, act, or practice declared by section two to be [unfair], and that proceedings would be in the public interest, he may bring an action in the name of the commonwealth against such person to restrain by temporary restraining order or preliminary or permanent injunction the use of such method, act or practice. . . . Any person who violates the terms of an injunction or other order issued under this section shall forfeit and pay to the commonwealth a civil penalty.

MASS. GEN. LAWS ch. 93A § 4.

170. *See, e.g.*, MASS. GEN. LAWS ch. 93A §§ 9-11; N.Y. GEN. BUS. LAWS § 350(e); TEX. BUS. & COM. CODE § 17.50. The Texas statute reads, in pertinent part:

> In a[n unfair competition] suit . . . each consumer who prevails may obtain: (1) the amount of economic damages found by the trier of fact. . . . (2) an order enjoining such acts or failure to act; (3) orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter; and (4) any other relief which the court deems proper. . . . Costs and fees [and] other relief shall be assessed against the defendant.

TEX. BUS. & COM. CODE § 17.50 (b).

171. *See generally* Stephen Gardner, *How Green Were My Values: Regulation of Environmental Marketing Claims*, 23 U. TOL. L. REV. 31, 35 (1991) (discussing state practice of environmental marketing regulation); Don J. DeBenedictis, *Protecting Consumers*, A.B.A. J., Oct. 1990, at 38 (discussing new green marketing phenomenon and state regulatory attempts). Gardner discusses numerous early cases in which states attempted to regulate deceptive environmental marketing according to their own deceptive advertising laws. *See* Gardner, *supra*. In an attempt to

multistate guidelines for the enforcement of "little FTC acts" in its Green Report II.[172] Responding to perceived inaction by federal regulators, the report inspired individual state approaches to environmental marketing regulation.[173]

The medley of state legislation varies both in scope and rigorousness. While a majority of states have continued to address green claims under their unfair competition acts,[174] a few have abandoned this truth-in-advertising approach for one more market-ori-

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demonstrate the extent of public protection against deceptive environmental advertising in 1990, Gardner discusses Mobil Oil's marketing of Hefty trash bags, American Enviro Products, Inc.'s "biodegradable" disposable diapers, Chelsea Industries, Inc.'s plastic trash bag advertisements, Alberto-Culver Company's "ozone-friendly" aerosol products, Tetra-Pak, Inc's drink boxes, Bristol-Myers Squibb Company's "ozone-safe" aerosol products, and Procter & Gamble Company's "compostable" disposable diapers. *See id.* at 46-50.

172. *See* GREEN REPORT II, *supra* note 113, at 4-24. In November 1989, the Attorneys General of California, Florida, Massachusetts, Minnesota, Missouri, New York, Texas, Utah, Washington and Wisconsin formed an ad hoc task force to study the problems of unregulated green marketing claims. For a discussion of NAAG's mission, see GREEN REPORT I, *supra* note 4 and accompanying text. In November 1990, the task force issued The Green Report: Findings and Preliminary Recommendations for Responsible Environmental Advertising. *See id.* After input from manufacturers, consumers and environmental groups, the task force, joined by Tennessee's Attorney General, modified Green Report I and released a set of revised guidelines in May of 1991. *See* GREEN REPORT II, *supra* note 113.

173. *See* GREEN REPORT II, *supra* note 113 (discussing individual state regulatory approaches to environmental marketing). The report contains both general recommendations calling for specific, substantive and well supported environmental claims, and explicit recommendations for the appropriate use of terms such as "recycled," "compostable" and "degradable." *See id.* These guidelines are meant to facilitate the uniform application of state deceptive trade practices laws by attorneys general in all states, and to provide guidance to manufacturers distributing products in a wide geographic area who want to ensure that their green claims do not violate any state's law. *See id.* The following is NAAG's guideline concerning use of the term "recyclable":

> Unqualified recyclability claims should not be made for products sold nationally unless a significant amount of the product is being recycled everywhere the product is sold. Where a product is being recycled in many areas of the country, a qualified recyclability claim can be made. If consumers have little or no opportunity to recycle a product, recyclability claims should not be made.

Id. at 25. The task force also recommended that "companies desiring to promote their products' recyclability set up 800 numbers so that consumers can find out if recycling facilities exist near them." *Id.* For further discussion of NAAG's findings in its Green Reports, see *supra* notes 4, 16, 80, 115 & 210 and accompanying text.

174. *See, e.g.*, ME. REV. STAT. ANN. tit. 38, § 2142 (West 1996); MICH. COMP. LAWS § 19.418(3)(1)(dd) (1996); WIS. STAT. § 100.295 (1997); WIS. ADMIN. CODE § 137.01 (1997). Three other states have enacted environmental marketing statutes with the intention of regulating green claims in a truth-in-advertising manner: CAL. BUS. & PROF. CODE § 17580.5 (West 1997); IND. CODE § 24-5-17-2 (1996); R.I. GEN. LAWS § 6-13.3-4 (1996). For a discussion of the states' application of their "little FTC acts" to green marketing, see *supra* notes 170-73 and accompanying text. For a more complete discussion of the application of state deceptive advertising laws to green marketing, see Gardner, *supra* note 171, at 45-51.

ented.[175] These few favor the use of logos to reward salutary manufacturing efforts, monitor misleading advertising and bolster consumer awareness.[176] Hoping to eliminate the trade-disrupting aspect of conflicting state laws, legislators aligned their truth-in-ad-

175. *See, e.g.*, ARIZ. REV. STAT. § 49-833 (1996) (implementing public education program and official recycling emblem); CONN. GEN. STAT. § 22a-255c (1994) (adopting official state recycling symbol for use in conjunction with consumer products); 415 ILL. COMP. STAT. 20/6a (West 1996) (developing nationally recognized recyclable logo and public education and awareness campaign); LA. REV. STAT. ANN. § 2525 (West 1997) (focusing on education awareness and litter control); NEV. REV. STAT. § 444A.110 (1995) (developing public education program to "increase public awareness of the individual responsibility of properly disposing of solid waste and encouraging public participation in recycling, refuse and waste reduction"); N.H. REV. STAT. ANN. §§ 149-N:1-6 (1995) (adopting international three-arrow recycling emblem); N.Y. ENVTL. CONSERV. LAW §§ 27-0401, 27-0717 (McKinney 1996) (implementing consumer education program and establishing official state recycling emblem); N.Y. COMP. CODES R. & REGS. tit. 6, § 368.1 (1996) (same); OHIO REV. CODE ANN. §§ 1502.01-11 (Banks-Baldwin 1996) (adopting consumer education and awareness program); VT. STAT. ANN. tit. 10, §§ 6619, 6621 (1995) (requiring marketers to supply state government with information concerning recyclability of products and packaging); WASH. REV. CODE § 43.21A.520 (1996) (developing "environmental excellence awards program that recognizes products that are produced, labeled, or packaged in a manner . . . ensur[ing] environmental protection").

176. For examples of state statutes following a more market oriented approach, see *supra* note 175. *See also* EPA ON GLOBAL LABELS, *supra* note 120 (summarizing Vermont's Household Hazardous Product Shelf Labeling Program). EPA reports:

> The . . . [Vermont Household Hazardous Product Shelf Labeling Program's] purpose is to promote toxic use reduction and pollution prevention by educating consumers about the dangers of household hazardous products, and encouraging them to consider alternatives. . . . By prompting consumers to avoid purchasing such products, the program's goal is to send a signal to manufacturers to produce less hazardous products. This in turn would result in a cleaner environment and less costly waste disposal bills for the state.

Id. at 168. The program has three components: retailer "shelf-talker" cards identifying hazardous products and products free of certain hazardous materials, retailer training, and informational posters and brochures containing background information on products. *See id.* The pertinent text of the Vermont statute is as follows:

> To the extent funds are available, the secretary of natural resources shall, in consultation with Vermont retailers . . . establish a program to:
>
> (1) provide information to retailers with respect to the hazardous products . . . and alternatives to those products;
>
> (2) approve labels for retail use with respect to the hazardous products.
>
> (3) provide pamphlets for consumers, to be made available by retailers at the point of sale, describing the toxicity of these hazardous products and alternative products;
>
> (4) require that retail establishments have these labels in place on shelves, or in the immediate vicinity of hazardous products, within nine months of the establishment of the program.

VT. STAT. ANN. tit. 10, § 6621.

vertising ordinances with FTC Guides I.[177] As evidenced by the enactment of FTC Guides II, it is the Commission's malleable definitions that stand in the way of nationally uniform guidelines.[178]

Viewing environmental marketing as a branch of unfair trade practice law, Michigan and Wisconsin identify environmental claims as potentially false or misleading advertising.[179] Both states use the definitions in FTC Guides I to determine which marketers have acted deceptively.[180] Similarly, Maine replaced its waste reduction, recycling and labeling statute with one faulting marketers who do not couch their environmental claims within FTC Guides I examples.[181] Three other states extensively define environmental marketing terms, but permit adherence to FTC Guides I as a defense.[182] The state of California, for example, requires substantia-

177. *See* Letter from Harry Sullivan, Senior Vice President and General Counsel, Food Marketing Institute, to the Secretary of Federal Trade Commission (Sept. 29, 1995) (on file with author). No state has yet updated its laws to comport with FTC Guides II. For a discussion about the states' alignment of their environmental marketing statutes with FTC Guides I, see *supra* notes 28-33 & 140-76 and *infra* notes 178-87 and accompanying text.

178. *See, e.g., supra* notes 34-35 and *infra* notes 183-84 & 235-38 and accompanying text (discussing California's strict statutory scheme). All states with statutes in conflict with FTC Guides I conformed their laws to the guidelines. As such, the 1996 amendments to FTC Guides I placed conforming states out of step with the Commission. It is likely that many states adapted their laws on the belief that FTC would soon issue binding interpretive rules. Since FTC has kept its green guides non-binding, states may now feel free to regulate. Furthermore, because Congress has not preempted the area of environmental marketing, states may decide to independently issue stricter statutes or enforce their current ones more rigorously.

179. *See* MICH. COMP. LAWS § 19.418(30)(1)(dd) (1996). The pertinent provision reads:

> Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:
>
> . . . .
>
> (dd) . . . representations by the manufacturer of a product or package that the product or package is . . . recycled, recyclable, degradable, or is of a certain recycled content, in violation of [FTC Guides I] for the use of environmental marketing claims published by the [F]ederal [T]rade [C]ommission.

Id. See also WIS. ADMIN. CODE § 137.01 (1997).

180. *See* MICH. COMP. LAWS § 19.418(30)(1)(dd) (employing FTC Guides I definitions to determine which environmental marketing schemes are deceptive); WIS. ADMIN. CODE § 137.01 (same). For the pertinent text of the Michigan statute, see *supra* note 179. For a discussion of other states conforming their environmental marketing laws to FTC Guides I, see *supra* notes 28-33, 140-76 & 178-80 and *infra* notes 182-87 and accompanying text.

181. *See* ME. REV. STAT. ANN. tit. 38, § 2142 (West 1996). For the pertinent text of the Maine statute, see *supra* note 30.

182. *See, e.g.* CAL. BUS. & PROF. CODE § 17580.5 (West 1997); IND. CODE § 24-5-17-2 (1996); R.I. GEN. LAWS § 6-13.3-4 (1996). The Indiana statute reads:

tion of such terms as "environmental choice," "ecologically friendly," "environmentally lite" and "green product."[183] Federal conformance, however, will have little effect on California's environmental regulatory scheme, because FTC Guides I & II are limited to a few common terms.[184] On the other hand, the recently-enacted FTC Guides I defense will significantly affect Rhode Island's statutory ban of such terms as "degradable," "biodegradable," "photodegradable" and "environmentally-safe."[185] The safe-harbor provision in Indiana's environmental marketing statute sweeps broadly.[186] By sanctioning environmental representations that harmonize with *any* enforceable federal agency regulation, Indiana reduces the inflexibility associated with controlling environmental marketing.[187] Unlike other truth-in-advertising measures, this provision leaves enough room for federal developments and simultaneously promotes national uniformity.

> It is a violation of this chapter for any person to represent that any consumer good which the person manufacturers or distributes or its package is "ozone friendly," "biodegradable," "compostable," "photodegradable," "recyclable," or "recycled" unless that consumer good or its package meets the definitions contained in this chapter or meets definitions established in trade regulations or guides adopted *by the Federal Trade Commission or* in enforceable regulations adopted *by another federal agency* expressly for the purpose of establishing standards for environmental advertising or representations.

IND. CODE § 24-5-17-2(b) (emphasis added). Significantly, Indiana harmonizes its law with not only FTC, but also any other federal agency that garners jurisdiction to regulate the environmental market. *Id.* Such a flexible statute will withstand any changes Congress may make with regard to regulation of environmental marketing. For further discussion of Indiana's statutory scheme, see *infra* notes 186-87 and accompanying text.

183. CAL. BUS. & PROF. CODE § 17850.5. For the pertinent text of the California statute, see *supra* note 29. For further discussion of California's statutory scheme, see *supra* notes 34-35 and *infra* notes 184 & 235-38 and accompanying text.

184. *See* FTC Guides I, *supra* note 17; FTC Guides II, *supra* note 9. For the pertinent text of FTC Guides I and II, see *supra* notes 14-21 & 80-105 and accompanying text. *See also* Coffee, *supra* note 1, at 306-11 (providing close look at California's environmental marketing framework); Barnett, *supra* note 12, at 506 (considering breadth of California's statute and *Lungren*'s effect on other environmental marketing statutes).

185. *See* R.I. GEN. LAWS §§ 6-13.3-4 (1996). FTC Guides I & II permit environmental claims as long as such claims comport with predetermined Guide examples or are substantiated by empirical data. *See* FTC Guides I, *supra* note 17; FTC Guides II, *supra* note 9. By allowing FTC conformance as a defense, Rhode Island permits some claims that were previously banned by the state. *See* R.I. GEN. LAWS §§ 6-13.3-4. For further discussion of FTC Guides' affect on Rhode Island's environmental marketing scheme, see Barnett, *supra* note 12, at 506.

186. *See* IND. CODE § 24-5-17-2. For the pertinent text of the Indiana statute, see *supra* note 182.

187. *See* IND. CODE § 24-5-17-2. For the pertinent text of the Indiana statute, see *supra* note 182.

Recognizing the growing public awareness and concern for the environment, many states choose to regulate the demand for green products by educating consumers and labeling merchandise.[188] Although New Hampshire adopts the "international three arrow recycling emblem"[189] and Rhode Island mandates creation of a distinctive recycling logo,[190] both states identify unauthorized use of their marks as per se unfair and deceptive trade practices.[191] Likewise, Connecticut endorses a state-sponsored logo that denotes recycled and recyclable materials.[192] Numerous states couple their official "recycle" emblems with programs that enhance consumer awareness.[193] Leading the way, New York allows manufacturers to use the "international chasing arrows symbol" in conformance with the examples set forth in FTC Guides I.[194] While neither Vermont nor Ohio officially adopts state labels, they set forth comprehensive training programs for waste reduction, consumer education and

188. For a list of states regulating green advertising through consumer education programs, see *supra* note 175. New York's consumer education scheme includes the following:

> [T]he bureau [of waste reduction and recycling] shall establish an official state recycling emblem and conduct a consumer awareness program. . . . Such emblem shall be of a design to include terms or symbols for "New York State", and "recyclable" and/or "recycled" and/or "reuseable." . . .The bureau shall implement and conduct a program of public education and information to inform the public and private sectors of the state as to the merits of the use of secondary materials and for consumers to actively seek consumer products which contain secondary materials or which are easily recycled or reused.

N.Y. ENVTL. CONSERV. LAW § 27-0717 (McKinney 1996).

189. *See* N.H. REV. STAT. ANN. § 149-N:1 (1995).

190. *See* R.I. GEN. LAWS § 23-18.8-3(a) (1996).

191. *See* R.I. GEN. LAWS § 23-18.8-3(c); N.H. REV. STAT. ANN. § 149-N:3.

192. *See* CONN. GEN. STAT. § 22a-255c (1994).

193. *See, e.g.*, ARIZ. REV. STAT. § 49-833 (1996); 415 ILL. COMP. STAT. 20/6a (1996); LA. REV. STAT. ANN. § 2525 (West 1996); NEV. REV. STAT. § 444A.110 (1995); N.Y. ENVTL. CONSERV. LAW §§ 27-0401, 27-0717 (McKinney 1996). For the pertinent text of New York's statutory scheme, see *supra* note 188. For further examples of states following a more market-oriented approach, see *supra* notes 188-201 & *infra* notes 194-98 and accompanying text. Arizona's statute reads as follows:

> [T]he department . . . [of Solid Waste Management] shall implement and conduct a program of public education and provide information to increase awareness of individual responsibility for properly reducing and disposing of solid waste and to encourage participation in recycling, reuse and source reduction. The program shall communicate the importance of conserving natural resources, of avoiding harm to the environment or public health and of promoting resource conservation, recovery and reuse by industry, this state, municipalities and counties.

ARIZ. REV. STAT. § 49-833.

194. See N.Y. ENVTL. CONSERV. LAW § 27-0717; N.Y. COMP. CODES R. & REGS. tit. 6, § 368.1 (1996). For the pertinent text of the New York consumer education statute, see *supra* note 188.

market development.[195] New Mexico, Virginia and Texas have limited their labeling regulation to organic products, but Florida permits substantiated environmental claims to appear on product labels.[196]

Washington, alone, has implemented an "environmental excellence awards program" that "recognizes products . . . produced, labeled, or packaged in a manner that helps ensure environmental protection."[197] State logo programs have the advantages of administrative flexibility and increased federalism.[198] However, placing product certification in the hands of local government muddies the waters for all affected parties: consumers, manufacturers and regulators.[199] While Washington's certification program is meritorious

195. *See* VT. STAT. ANN. tit. 10, §§ 6619, 6621 (1995); OHIO REV. CODE ANN. §§ 1502.01-11 (Banks-Baldwin 1996). For a discussion and the pertinent text of the Vermont statute, see *supra* note 176. According to the Ohio statute, "[t]he chief of recycling and litter prevention shall establish and implement statewide waste reduction, recycling, recycling market development, and litter prevention programs that include . . . the following: . . . [e]ducation and training concerning recycling and products manufactured with recyclables; [and p]ublic awareness campaigns to promote recycling." OHIO REV. CODE ANN. § 1502.03.

196. *See* N.M. STAT. ANN. §§ 76-22-1-27 (Michie 1996); TEX. AGRIC. CODE ANN. §§ 18.001-10 (West 1996); VA. CODE ANN. § 3.1-385.1-8 (Michie 1996); FLA. STAT. ch. 403.7193 (1996). The Florida statute reads in pertinent part:

> Any person who represents in advertising or on the label or container of a consumer product that . . . [it] is not harmful to, or is beneficial to, the environment through the use of such terms as "environmentally friendly," "ecologically sound," "environmentally safe," "recyclable," "recycled," "biodegradable," "photodegradable," "ozone friendly," or any other like term must maintain records documenting and supporting the validity of such representation.

FLA. STAT. ch. 403.7193.

197. *See* WASH. REV. CODE § 43.21A.520 (1996).

198. *See* HEARINGS 1995, *supra* note 89, at 447-523 (discussing eco-logo programs in general); EPA ON GLOBAL LABELS, *supra* note 120 (summarizing bulk of environmental labeling programs); EPA ON CERTIFICATION AND LABELING PROGRAMS, *supra* note 36 (discussing effectiveness of implemented programs). State logo programs have the advantages of flexibility and increased federalism. Since the state itself crafts the standards against which it evaluates green products, it may adopt provisions that are tailored to local problems existing within its borders. By distributing power to the states, regulation of environmental claims may more readily meet local demands. There are no FTC guidelines or binding rules to restrict such state efforts. *See generally* FTC Guides I, *supra* note 17; FTC Guides II, *supra* note 9. State programs may, however, prove problematic. Consider the comments of Mr. Lewis Freeman of SPI: "The interesting dilemma with eco seals is that if you take it to its logical conclusion, I think you could actually end up denying the public certain kinds of information because ultimately judgements would be made for the public, and they could lead to being misled in perhaps an unintended way, but nonetheless misled." HEARINGS 1995, *supra* note 89, at 488. The very confusion Mr. Freeman is talking about may result from inconsistent, individual state programs.

199. For a discussion of why uniformity is necessary in the environmental marketing context, see *supra* notes 1-47, 97-105 & 152-66 and *infra* notes 209, 289-

on its face, it may ultimately prove problematic for marketers desiring a national advertising scheme. The cost, hassle and potential consumer confusion associated with meeting different state standards may pose a serious obstacle to environmental marketing.[200] Other concerns include: (1) the interplay between Washington's standards and FTC's definitions and examples;[201] (2) potential restrictions on the flow of interstate commerce;[202] (3) product "excellence" discrepancies as a result of ISO's and EPA's use of LCA analyses;[203] and (4) product comparisons.[204]

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98 & 329-46 and accompanying text. *See generally* Welsh, *supra* note 5 (advocating federal preemption for environmental marketing regulation); Barnett, *supra* note 12 (supporting joint-agency program with EPA and FTC at helm).

200. For a discussion of the problems associated with meeting many states standards, see *supra* notes 1-47, 97-105 & 152-66 and *infra* notes 209, 289-98 & 329-46 and accompanying text.

201. *See* WASH. REV. CODE § 43.21A.520. Washington's statute does not reproduce standards against which it measures its products. It may prove problematic if Washington's standards are vastly different from those discussed in FTC Guides II. For a discussion of FTC Guides II examples and definitions, see *supra* notes 14-21 & 80-105 and accompanying text.

202. *See* U.S. CONST. art. I § 8 (stating "Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). The Supreme Court established that this grant of power to Congress does not preclude all state regulation that affects such commerce. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 302-05 (1851). Even though there is no provision explicitly prohibiting states from burdening interstate commerce, the Court viewed the negative implication of Article I's grant of commerce power as a constitutional basis for invalidating certain state legislation. *See id.* at 318. Washington should, therefore, keep a close eye on potential restrictions to the flow of interstate commerce that result from its statutory scheme. If its environmental excellence awards program prevents or inhibits the dissemination of non-Washington products, the Supreme Court may strike the statute as violative of the dormant commerce clause. This principle is equally applicable to any statutory scheme whose terms favor in-state manufacturers and marketers.

203. *See* HEARINGS 1995, *supra* note 89, at 409-46 (discussing life-cycle analysis methodology). For a summary of the comments made at FTC Hearings 1995 on life-cycle analysis methodology, see *supra* note 166 and accompanying text. For further discussion of life-cycle assessments, see *supra* notes 115-16, 131-32 & 165-66 and *infra* notes 239-88, 315-28 & 330 and accompanying text. Although Washington does not list its product assessment standards in its statute, one may assume that Washington chose not to implement life-cycle analyses. Life-cycle analysis methodology is a new phenomenon unexplored by most states. Currently, ISO is developing product assessment standards that take into account the entire life-cycle of a product. *See generally* Knight, *supra* note 44 (providing general explanation of ISO's international environmental standards). EPA has likewise adopted life-cycle assessment methodology. *See* Environmentally Preferable Products, *supra* note 26, at 50,722 (advocating life-cycle product assessment as means of determining environmentally preferable products). Since Washington's environmental excellence labels will likely not reflect life-cycle analyses, consumers may confuse the underlying meaning of state labels and those based on life-cycle testing. As such, Washington, EPA and ISO may not honor the same two products. Instead of aiding consumers, multiple labels will ultimately confuse and frustrate them. For a list of representatives supporting harmonization of FTC Guides I with EPA and

B. Federal Preemption is the Only Answer

The United States Constitution establishes a limited federal government, vesting all residual authority not contained within one of the enumerated powers in the states. *Gibbons v. Ogden* and the Supremacy Clause of Article VI make clear that when state and federal laws conflict, the valid federal law prevails.[205] Likewise, if a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the federal government has the power to preempt it.[206] Because the non-binding guidelines issued by FTC do not merit preemptive status, federal interests are undermined.[207] The only way to achieve national uniformity, reduce consumer confusion and encourage product improvements is by codifying rules that circumscribe all environmental marketing.[208]

ISO life-cycle assessment methodology, see *supra* notes 12 & 166 and accompanying text.

204. It is important to keep in mind how products compare to one another. Is Washington awarding its environmental excellence labels on an individual basis? Or is it comparing products and honoring the "best in class"? It is unclear from the statutory language. *See* WASH. REV. CODE § 43.21A.520 (1996). The assessment standards are key in determining the significance of a label. Consumers need such information to help them make sound purchases. Washington's statute does not provide the needed guidance. *See id.*

205. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). "[S]tates may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the [C]onstitution. . . . Should this collision exist, it will be immaterial whether those laws were passed in virtue of concurrent power . . . or, in virtue of a power to regulate their domestic trade and police. In [both] case[s] . . . the acts . . . must yield to the law of Congress." *Id.* at 210. According to Article VI, "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. CONST. art. VI § 2.

206. Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

207. *See* FTC Guides I, *supra* note 17, § 260.2; FTC Guides II, *supra* note 9, § 260.2. Both FTC Guides I and FTC Guides II are non-binding. As a result, federal interests in uniformity of environmental marketing laws and ease of trade are sacrificed. States may now determine for themselves which standards to adopt, and companies need only fear the unlikelihood of an FTC cease and desist order. For a discussion of the impacts of non-binding FTC guidelines, see *supra* notes 12-21, 58-79, 113, 117-18 & 155-60 and accompanying text and *infra* notes 288-98 & 346 and accompanying text.

208. *See* Jones, 430 U.S. at 519 (noting that Congress may legislate through its enumerated powers to *preempt* state laws). The most successful means of doing this is to announce one uniform law that is to be followed throughout the country. Because green marketing regulation would almost certainly effect interstate commerce within the broad meaning of the Commerce Clause, Congress necessarily has the power to preempt state laws that regulate green marketing. The question, then, is not whether Congress *can* preempt state laws dealing with green marketing, but whether it *should* do so. For a discussion of the Commerce Clause and preemption doctrines, see generally Paul Wolfson, *Preemption and Federalism: The*

Strong arguments exist on both sides of the preemption issue. Many argue that federal preemption is justified given FTC's laborious case-by-case enforcement, and that without the state attorneys' general push, environmental marketing may only be checked by FTCA.[209] On the other hand, the active and resourceful roles of California, New York and the New England states has proven instrumental in achieving their state missions.[210] Considering that state autonomy includes the enforcement of individual policies and value judgments, it is arguable that the federal government should not hamper the crafting of more stringent environmental labeling standards. The difficulty with this argument is that the dual goals

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Missing Link, 16 HASTINGS CONST. L.Q. 69 (1988). For a discussion of preemption by administrative agencies, see generally Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607 (1985).

209. *See* Welsh, *supra* note 5, at 1005-11 (noting ineffectiveness of FTC's case-by-case enforcement); Barnett, *supra* note 12, at 500 (criticizing FTC Guides I for failure to preempt state regulation and inability to force manufacturers to account for deceptive practices); *FTC Guides I Revisions*, *supra* note 21 (indicating commenters on FTC Guides I prefer trade regulation rule to non-binding guidelines); *Hearings on Environmental Labeling: Hearing on S. 976 Before Subcomm. on Environmental Protection of the Comm. on Environment and Public Works*, 102d Cong. 240, 56 (statement of Mr. Richard A. Denison, Environmental Defense Fund). *See also* Welsh, *supra* note 5, at 1009 (analogizing FTC dilemma to "Catch 22"). Howett, on the other hand, feels that "[t]he formation of national guidelines by the FTC will probably help solve the problem of consumer deception by environmental claims." Howett, *supra* note 2, at 461. Howett qualifies his opinion with the following statement: "[i]f the new environmentalism among American consumers is more than a passing fad, it will be the consumers themselves that force manufacturers not only to tell them the truth about products, but also to provide consumers with the truly environmentally-sound products they desire." *Id.* For a discussion of FTC's stronghold on case-by-case enforcement, see *supra* notes 12-21, 58-79 & 155-60 and *infra* notes 288-98 and accompanying text. For a critique of FTC case-by-case enforcement, see *supra* notes 12-16, 58-79 & 155-60 and *infra* notes 288-98 & 329-37 and accompanying text. For a discussion of FTC's "Catch-22," see *supra* note 21 and accompanying text.

210. For a discussion of the legislative efforts of California, New York and the New England states in the context of green marketing, see *supra* notes 28-34 & 167-201 and accompanying text. Some states have significant expertise in drafting environmental terms and developing comprehensive green standards. *See, e.g.*, CAL. BUS. & PROF. CODE § 17850.5 (West 1997); N.Y. ENVTL. CONSERV. LAW § 27-0717 (McKinney 1996). Many individuals feel that, given such noble state efforts, federal preemption is inappropriate. Others believe that the two levels will work better together if the federal government preempts the area of environmental marketing. *See* Welsh, *supra* note 5, at 1018-19 (discussing these two views and recommending state expertise be harnessed). "States can still play a significant, influential advisory role by actively commenting on federally proposed definitions and suggesting improvements in those definitions." *Id.* at 1019. NAAG's Green Reports evidence the ability and willingness of states to cooperate in this manner. *See* GREEN REPORT I, *supra* note 4 (providing summary of environmental marketing problems and guidance to future regulators); GREEN REPORT II, *supra* note 113 (providing guidance to future regulators). For further discussion of NAAG's findings, see *supra* notes 4, 16, 79, 113 & 172-73.

of national uniformity and state autonomy, while both laudable, are not entirely compatible.[211] After balancing all relevant interests, the need for domestic uniform regulation overcomes any state objection to preemption.

While state objections are justifiable, countervailing federal arguments suggest such reasoning is not dispositive. First, uniformity assures industry that compliance is a realistic goal.[212] The costly and time-consuming adjustments that manufacturers must implement in their marketing strategies to meet the myriad of states' laws often deter companies from becoming environmentally-conscientious.[213] State statutes ultimately end deceptive advertisements but do little to promote environmental policy.[214] Second, a nationwide regulatory structure furnishes an entire legislative framework for states with few resources and less-active enforcement records.[215] With such a structure in place, states remain free to exact compliance with the green marketing laws in their independent ways.

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211. *See* Pierce, *supra* note 208, at 609-13 (discussing dual goals of national uniformity and state autonomy and opining way in which federal legislation can serve two disparate interests). For an extensive discussion of federalism and the values protecting state autonomy, see Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). Welsh suggests that compromise is the most appropriate way to further national uniformity and state autonomy interests. *See* Welsh, *supra* note 5, at 1016 (arguing for state "implement[ation of federal] green marketing regulations and encourage[ment of] state input in the development of green marketing standards").

212. *See* McClure, *supra* note 23, at 1377 (pointing out myriad state laws discourage marketers from implementing national marketing schemes and from manufacturing safer products). McClure notes that unless federal legislation preempts state environmental marketing laws "states enacting excessively restrictive legislation will hamper industry from taking strides toward environmentally conscious behavior." *Id.* McClure further explains that industry will view compliance as a realistic goal if there is not the "fear of violating a myriad of states' laws which use different definitions for the word 'recyclable.' " *Id.*

213. *See id.*; Barnett, *supra* note 12, at 507 (citing Schlossberg, *Effect of FTC Green Guidelines Still Doubtful for Some Marketers*, MARKETING NEWS TM, Feb. 1, 1993, at 1).

214. *See* Barnett, *supra* note 12, at 507-08 (suggesting state statutes are too focused on regulating deceptive advertising and do not adequately address environmental policy goals).

215. *See generally* Merritt, *supra* note 211. Funding normally available to state environmental agencies is gravely deficient, given their responsibilities. *See id.* The fact that few states have environmental marketing legislation may be due, in part, to financial constraints. States are on a strict budget, and must allocate funds to only those programs crucial to the advancement of state objectives. *See id.* Because the monitoring and enforcement of deceptive environmental advertising will require more than just the passing of a law, many will opt for other social programs. A uniform national plan will correct such problems. For a discussion of the author's uniform national plan, see *infra* note 346 and accompanying text. For a discussion of current state environmental marketing measures, see *supra* notes 28-35 & 167-204 and accompanying text.

Third, the gradual globalization of our economy necessitates an acute eye toward international accord on environmental matters.[216] Increasingly, ISO efforts and treaty agreements have influenced United States trade regulation.[217] The federal government is in the best position to monitor progress and implement necessary policy. Finally, as enforcer of national policy, the federal government is able to alleviate problems, such as environmental marketing, that affect the United States as a whole.[218] States inject policy through a very narrow lens. Violations often unworthy of a state's time and resources significantly impact the nation as a whole and merit federal attention.

Drawing on the Nutrition Labeling and Education Act, many scholars and regulators propose plans which would allow states to legislate where the federal government has not specifically spo-

216. *See generally* Richards, *supra* note 36 (addressing international implications of environmental marketing regulatory measures). Richards observes that:

> Just as collaboration between trade and the environment was advocated at the domestic level, so should it be promoted at the international level. Concurrent authority between national governments would partially alleviate the concerns that major western nations have with reducing their environmental standards in order to reach international consensus. The dialogue between governments will be necessary, and therefore any program in the U.S. must have the endorsement of the federal government. . . . [I]f consumer and government demand continues to call for environmentally friendly products, then the marketplace will outpace international regulations, which will, in turn, force the negotiators to reach some form of consensus on the issue.

Id. at 264-65. One may make the comparison between environmental marketing regulation and copyright protection for digitized information and computer databases. *See* J. H. Reichman and Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 95-112 (1997) (discussing necessity of United States implementation of international agreement provisions into federal law). The United States has dragged its feet in legislating exclusive copyrights for digitized information and computer databases. *See id.* As a result of the Berne Convention, however, the United States must implement treaty standards into federal law. *See id.* at 110-11. In the event no binding rules are issued in the environmental marketing context, the United States could be faced with a similar game of legislative "catch-up."

217. *See supra* note 216 for a discussion of the effect of the Berne Convention Treaty on trade regulation. For a discussion of ISO efforts in light of NAFTA and GATT and ISO's influence on the environmental market, see *supra* notes 43-46 and *infra* notes 315-45 and accompanying text.

218. *See* Welsh, *supra* note 5, at 1020. In his explanation, Welsh provides the following example:

> For instance, a company which inappropriately labels its product "biodegradable" may distribute that product in relatively small numbers in any given state, but its distribution area could be all fifty states. Thus, the problem may not be worth individual state's time and resources to deal with. But when federal regulators see that an otherwise minor problem is actually occurring in all fifty states, it might be more inclined to address the situation.

Id.

ken.[219] Others look to current environmental statutes and advocate preemption of state laws that are less strict than federal guidelines.[220] Perhaps such minimum regulatory floors are successful where environmental, health and safety problems remain wholly in-state; states do not feel cheated out of their autonomy, and federal standards provide the assurance that social policy is not hindered by a manufacturer's business.[221] The federal government must,

219. *See* Grodsky, *supra* note 5, at 181 (quoting 21 U.S.C. § 343-1(b) (1992)). The Nutritional Labeling and Education Act's innovative structure requires preemption but grants exemptions to petitioning states for regulations that: "(1) would not cause any food to be in violation of any applicable requirement under Federal law, (2) would not unduly burden interstate commerce, and (3) [are] designed to address a particular need for information which need is not met by [federal requirements]." *Id.* For an in-depth comparison between environmental marketing guidelines and nutritional labels, see Coffee, *supra* note 1, at 346-55. Coffee looks at stylistic and content requirements. He finds two reasons for crafting an "environmental facts" label that is reminiscent of the nutritional label: "first, the structure and design of the label have already been created and their user-friendliness has already been tested; and second, the approach is capable of meeting the [oft-emphasized] goals [of environmental labeling]." *Id.* at 351. These goals include:

> achieving truthful and accurate environmental marketing; creating an atmosphere that provides a continuing incentive for companies to improve the environmental characteristics of their products; securing consumer confidence in environmental marketing claims; ensuring consumers' ability to easily understand environmental marketing claims and discern between competing products; providing consumer access to the environmental characteristics of products; increasing the consumers' ability to recycle products or packaging and their access to related information; promoting products that are less harmful to the environment; and, easing the strain of regulatory and prosecutorial agencies.

Id. at 350-51. For further discussion of the Nutritional Labeling and Education Act's impact on environmental marketing regulation, see *Hearings on Environmental Labeling: Hearing on S. 976 Before the Subcomm. on Environmental Protection of the Comm. on Environment and Public Works*, 102d Cong. 240, 56 (1991). For a discussion of the affinity between regulation of environmental marketing and of nutritional labeling, see *supra* notes 104, 156, 159-61 & 209 and *infra* note 220 and accompanying text.

220. *See, e.g.*, CAA § 112, 42 U.S.C. § 7412(d)(7) (1995); Comprehensive Environmental Response Compensation and Liability Act (CERCLA) § 114, 42 U.S.C. § 9614(a) (1995). CAA reads, in pertinent part:

> No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title, part C or D of this subchapter, or other authority of this chapter or a standard issued under State authority.

CAA § 112, 42 U.S.C. § 7412(d)(7). CERCLA suggests that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." CERCLA § 114, 42 U.S.C. § 9614(a).

221. *See* Welsh, *supra* note 5, at 1020 (discussing impact of statutes with minimum regulatory floors). In federal statutes containing minimum standards, violations can be quantitatively measured. *See id.* at 1021 (referencing CAA §§ 307(a),

however, entirely preempt state action in the green marketing context. Individual state approaches have greatly retarded environmental policy goals, leaving the door open to consumer confusion and international trade disputes.[222] Because of the difficulty in determining what constitutes a law less stringent than the federally-enacted standard or what policies federal enforcers have addressed, the federal government alone should regulate environmental marketing. Without additional federal action, state legislation will continue to fragment a solid national plan, as well as reignite legislative uniformity concerns.[223]

C. Hurdling the First Amendment

The First Amendment's simple mandate that "Congress shall make no law . . . abridging the freedom of speech" leaves wide latitude for interpretation.[224] Since Justice Holmes pronounced "free trade in ideas" as the theoretical foundation for freedom of speech, a marketplace metaphor has dominated Supreme Court analyses.[225] Given the Court's expansive view of the First Amendment, some have argued that environmental advertising is a form of protected speech.[226] The inherent remunerative nature of green mar-

516, 33 U.S.C. §§ 1317(a)(2), 1375 (1988)). *See also* Grodsky, *supra* note 5, at 178-82 for a discussion of minimum regulatory floors. For further discussion of minimum regulatory floors, see *supra* notes 160-61 and accompanying text.

222. For a discussion of the effect of a myriad of states legislating the environmental market, see *supra* notes 28-35 & 167-204 and accompanying text. For a discussion of international trade disputes resulting from lack of uniform national environmental marketing standards, see *supra* notes 41-43 and *infra* notes 273-82 & 340-41 and accompanying text.

223. For a discussion of why uniform national environmental marketing regulations are necessary, see *supra* notes 12-21, 58-79, 155-60, 209 & 219-20 and *infra* notes 288-98 & 328-37 and accompanying text.

224. U.S. CONST. amend. I, cl. 2.

225. Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting). According to Justice Holmes:

> [T]he ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Id. at 630.

226. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942). Traditionally, the Supreme Court viewed purely commercial advertising as not entitled to any First Amendment protection. The Court has changed its view and now maintains that most types of commercial speech are entitled to some protection. *See, e.g.*, Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980). For a more complete discussion of commercial speech in the environmental marketing context, see *infra* notes 224-38. For a discussion of the *Central Hudson* standard for First Amendment protection of commercial speech, see *infra* notes 232-34. McClure argues that:

keting implies that marketers and manufacturers will increasingly bring First Amendment suits to safeguard their right to manipulate environmentally-conscious consumers.[227]

In the landmark case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[228] the Supreme Court relaxed its inquiry into regulations affecting commercial speech.[229] As an example of this relaxed inquiry, the Court held the overbreadth analysis and the doctrine of prior restraint inapplicable to commercial speech cases.[230] The Court further noted that it "fores[aw] no obstacle to a State's dealing effectively with this problem [of deceptive or misleading speech]."[231] Although the Court no longer abso-

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> truthful environmental advertising . . . is sure to fulfill the purpose articulated repeatedly in First Amendment cases. . . . [And, i]f dissemination of ideas is to be the cornerstone of democracy, it can be argued that this type of advertising is a particularly beneficial mechanism for informing the public and fostering environmentally sound practices and values.

McClure, *supra* note 23, at 1374.

227. For a discussion of the inherent remunerative nature of environmental marketing, see *supra* notes 1-8, 12, 89, 155-56, 166 & 198 and accompanying text. For a discussion of the effectiveness of First Amendment suits in the environmental marketing context, see *infra* notes 224-38 and accompanying text. For Dr. Seuss' literary depiction of the encroaching environmental market, see *supra* note 3. For Dr. Seuss' literary depiction of manipulated consumers, see *supra* notes 6-7 and accompanying text.

228. 425 U.S. 748 (1976).

229. *See id.* In a suit brought by consumers alleging advertisement of prescription drugs as unprofessional conduct, Virginia State Board of Pharmacy argued that commercial speech is not wholly outside the protection of the First Amendment. *See id.* at 748. The Court supported the Virginia State Board of Pharmacy's position. *See id.* Observing that "between the dangers of suppressing information, and the dangers of its misuse . . . the First Amendment makes [the choice] for us," the Court permitted competing pharmacists to advertise the terms of their service. *Id.* at 770. "What is at issue is concededly whether a State may completely suppress the dissemination of truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. . . . [W]e conclude that the answer to this one is in the negative." *Id.* at 773.

230. *See* Grodsky, *supra* note 5, at 187 & n.224-25 (tracing Supreme Court's rejection of doctrines of overbreadth and prior restraint in commercial speech context). Grodsky relates that:

> [s]ince the Supreme Court first recognized some measure of First Amendment protection for commercial speech in 1976, the Court has repeatedly emphasized that this protection is more limited than the protection of non-commercial speech. . . . [C]ourts have consistently excluded overbreadth analysis from commercial speech cases, and the doctrine of prior restraint has been held inapplicable as well.

Id. at 186-87. The Court in *Virginia Pharmacy* articulated that the resilience of commercial speech "may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker . . . [and] may also make inapplicable the prohibition against prior restraints." *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24.

231. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771. For a summary of the Supreme Court's opinion in *Virginia State Bd. of Pharmacy*, see *supra* notes 229-30 and accompanying text.

lutely excluded commercial speech from First Amendment protection, it left open the possible justification of content-based restrictions. Four years later the Court again spoke. According to *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[232] states may now regulate truthful or non-deceptive commercial speech.[233] Well-conceived environmental labeling will likely meet the Supreme Court's new four prong test, which asks whether: (1) the utterance is protected by the First Amendment; (2) the government interest is substantial; (3) the government interest is directly advanced by the regulation in question; and (4) the regulation of commercial speech is "no more extensive than necessary to serve the government interests asserted."[234]

In a recent challenge to California's Environmental Marketing Act, the Ninth Circuit classified the plaintiff advertiser's green representations as commercial rather than political speech.[235] With

232. 447 U.S. 557 (1980).

233. *Id.* at 565-73. The Court in *Central Hudson* stressed that "if the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest." *Id.* at 565. The Court further held that "[t]o the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and must be invalidated." *Id.* at 570. For explication of the test adopted by the *Central Hudson* Court, see *infra* note 234 and accompanying text.

234. *Central Hudson Gas & Electric*, 447 U.S. at 566. When discussing the first prong, the Court emphasized that deceptive commercial speech is beyond the reach of the First Amendment. *See id.*

235. *See* Association of Nat'l Advertisers, Inc. v. Lungren, 44 F.3d 726 (9th Cir. 1994). The following trade associations brought an action against the Attorney General of California: Grocery Manufacturers of America, Inc., Soap and Detergent Association, National Food Processors Association, The Society of the Plastics Industry, Inc., The American Paper and Forest Association, The American Advertising Federation, The American Association of Advertising Agencies, The California Chamber of Commerce, and The Chamber of Commerce of the United States. *See id.* These trade groups "sought a declaration that section 17508.5 impermissibly restricts both commercial and non-commercial speech and is unconstitutionally vague." *Id.* at 728. The court found that:

> California *ha[d]* asserted an interest in preventing commercial harms, and the distinction between commercial and non-commercial speech is directly related to that interest. . . . As the district court concluded, merchants' commercial representations about the environmental attributes of their wares are far more likely to mislead consumers than their editorial commentary opposing the statute or encouraging recycling and use of biodegradable materials.

Id. at 731. For a discussion of the court's holding in *Lungren*, see Christine Gower Mooney, Casebrief, *Association of National Advertisers, Inc. v. Lungren: Green Marketing and Its First Amendment Implications: An Honest Approach*, 6 VILL. ENVTL. L.J. 435 (1995). For an in-depth discussion of California's environmental marketing statute, see Coffee, *supra* note 1. For a discussion of First Amendment implications of

the exception of the "recyclable" definition, the statute was upheld.[236] The Ninth Circuit emphasized an enfeebled fourth *Central Hudson* prong by insinuating that the Supreme Court did not contemplate "the least restrictive means" when it fashioned the requirement of "no more restrictive than necessary to further the state's interest."[237] Ultimately, the Circuit Court forestalled potential constitutional challengers. "Although state labeling laws are likely to survive [future First Amendment attacks, such lawsuits,] whether well intentioned or designed merely to impede legislative efforts, may provide an additional incentive for enacting federal environmental labeling legislation."[238] In light of the *Lungren* decision, a

environmental marketing, see Hoch & Franz, *supra* note 4. For the pertinent text of California's statute, see *supra* note 29 and accompanying text.

236. *See Lungren*, 44 F.3d at 737-38. The Ninth Circuit applied the *Central Hudson* test and found that California's statutory scheme was not restricted by First Amendment commercial speech protections. *See generally id.* "[T]he thresholds drawn do not appear unduly prohibitive and leave considerable room for both more privileged editorial commentary and . . . alternative expressions conveying . . . information about the modest environmental attributes of products not measuring up under section 17508.5." *Id.* at 736. Coffee disagrees with the court's application of the *Central Hudson* test. *See* Coffee, *supra* note 2, at 333-36 (stating "[t]he decision in *National Advertisers* ignores the Statute's actual effect upon the environment and green advertising. The actual effects . . . defeat many of the state's goals and violate the theme of flexibility inherent in the *Central Hudson* test"). Coffee suggests that the fit required between the third and fourth prongs of *Central Hudson* was not met. *See id.* at 336. The Ninth Circuit agreed with the district court and held that California's recyclable definition was unconstitutionally vague. *See Lungren*, 44 F.3d at 738. For a discussion of the lower court's opinion in *Lungren* and predicted effects of the *Lungren* decision, see Hoch & Franz, *supra* note 4, at 454-64.

237. *Lungren*, 44 F.3d at 735. In 1989, the Supreme Court clarified that "least restrictive" alternatives are not required in commercial speech cases. *See* Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (applying intermediate scrutiny to commercial speech unless non-commercial messages are inextricably linked with commercial speech). "Applying the *Fox* test for severability of commercial and non-commercial speech, the district court reasonably concluded that editorializing was not essential to product advertising." *Lungren*, 44 F.3d at 730. For a more complete discussion of the weakening of the "less restrictive means" test as applied to commercial speech, see Grodsky, *supra* note 5, at 189-90 & n.238. For a discussion of Coffee's criticism of the Ninth Circuit's application of *Central Hudson* to California's environmental marketing scheme, see *supra* note 236.

238. Grodsky, *supra* note 5, at 184 (discussing effect of future challengers to environment marketing statutes). In light of the *Lungren* decision and the development of green marketing regulation, there is a chance that the Supreme Court will modify its initial rejection of vagueness challenges for commercial speech. For a discussion of the specificity-vagueness paradox, see Grodsky, *supra* note 5, at 190-92. "The rationale behind vagueness claims is that the wording of an ambiguous statute does not provide fair notice of potential legal action." *Id.* at 190. "Because commercial speech falls somewhere between an economic activity and a fully protected fundamental right, the appropriate vagueness analysis is uncertain." *Id.* at 191. The Trade Associations attempted to use the criminal nature of California's Environmental Marketing Statute to bolster their vagueness argument. *See Lungren*, 44 F.3d at 728 n.1. Rationalizing that the high price of non-compliance in

carefully constructed federal statute will likely mount the First Amendment hurdle. This is all the more reason for constructing uniform national environmental marketing rules.

IV. PRIVATE CONCLUSIONS

A. Evolution of Third-Party Certification Programs

Touted as the "pioneer" of eco-labels, Germany instituted the first environmental seal of approval program in 1977.[239] Under its scheme, representatives from union, consumer, industrial and environmental organizations comprise an Environmental Label Jury (ELJ), which scrutinizes public and governmental proposals and develops "green" criteria from meritorious suggestions.[240] As part of the criteria development, the Federal Environmental Agency (FEA) employs a "cradle-to-grave" LCA of each product to determine which stages result in the most significant environmental im-

criminal cases requires a more demanding standard of certainty, the district court in *Lungren* invalidated California's "recyclable" definition. *See id.* The court felt that California did not meet the requisite heightened standard. *See id.* "The judicial practice of adopting narrowing constructions for federal statutes suggests that a federal labeling law would be less susceptible to time-consuming First Amendment suits than would state laws." Grodsky, *supra* note 5, at 192.

239. *See generally* EPA ON CERTIFICATION AND LABELING PROGRAMS, *supra* note 36 (determining effectiveness of environmental certification and labeling programs); EPA ON GLOBAL LABELS, *supra* note 120 (summarizing governmental and private eco-logo programs); EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131 (exploring use of life-cycle methodology in eco-logo programs); Wynne, *supra* note 2 (discussing Germany's environmental labeling scheme). *See also* Ray V. Hartwell, III & Lucas Bergkamp, *Eco-Labeling in Europe: New Market-Related Risks?*, 15 INT'L ENV'T REP. No. 19 at 623 (Sept. 23, 1992) (discussing Germany's environmental labeling scheme); Elliot B. Staffin, *Trade Barrier or Trade Boom? A Critical Evaluation of Environmental Labeling and Its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205 (1996) (summarizing foreign eco-logo programs); Wynne, *supra* note 2, at 60-64 (explaining roots of eco-label programs); Richards, *supra* note 37, at 241 (endorsing international harmonization in environmental certification context).

240. *See* EPA ON GLOBAL LABELS, *supra* note 120, at 44. The Environmental Labeling Jury (ELJ) is one of three institutions participating in the development involved in the four-stage award procedure. *See id.* at 44-45. The other two groups are "The German Institute of Quality Assurance and Labeling" (RAL) and "Umweltbundesamt." *See id.* RAL consists of representatives from 140 private-sector associations. *See id.* at 44. The role of the Federal Environmental Agency (FEA), is "to make the initial decision as to whether a new ecolabel proposal should be pursued, and if the ecolabel has been approved for further development by the Label Jury, to carry out the necessary testing and to draft an award criteria proposal." *Id.* at 45. *See also,* EPA ON CERTIFICATION AND LABELING PROGRAMS, *supra* note 36 (discussing effectiveness of environmental labeling programs); Hartwell & Bergkamp, *supra* note 239, at 632 (noting that "key decisions are made by [the] independent jury [called Environmental Label Jury (ELJ)]"); EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 17 (outlining role of ELJ).

pacts.[241] Examples of final standards include: (1) minimum levels of energy consumption; (2) utilization of recycled materials; (3) product biodegradability; (4) prohibition of certain hazardous substances; and (5) reduced noise levels.[242] Applying criteria to product, ELJ ultimately determines which manufacturers may display the "Blue Angel" logo.[243] Since the German government charges a

241. *See* EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 18. Germany's Blue Angel Program employs more than 75 criteria to each product assessed. *See id.* "While a product's entire life cycle is examined initially in a life cycle matrix . . . award criteria cannot be practically based on every attribute that a product possesses." *See* EPA ON GLOBAL LABELS, *supra* note 120, at 46. The purpose of Germany's life-cycle assessments is to define the scope of the product categories, identify the stages of the life cycle, and distinguish the most significant environmental impacts. EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 19. For an overview of "cradle-to-grave" life-cycle analyses, see Wynne, *supra* note 2, at 64-72. As Wynne explains, "an LCA is an attempt to evaluate holistically the environmental effects of a product, package, or process throughout its entire life, 'beginning with raw materials acquisition, continuing through processing, materials manufacture, product fabrication, and use, and concluding with any of a variety of waste management options.'" *Id.* at 65 (quoting U.S. EPA, Office of Research and Development, LIFE-CYCLE ASSESSMENT: INVENTORY GUIDELINES AND PRINCIPLES (EPA/600/R-92/245) 98-99 (Feb. 1993)). For a more complete discussion of the history and breadth of life-cycle analyses, see Mary Ann Curran, *Broad-Based Environmental Life Cycle Assessment*, 27 ENVTL. SCI. & TECH. 430 (1993). Although many evaluators embrace and implement life-cycle product anaylses, few employ a methodological consistency. *See generally id.* (arguing for methodological consistency). As such, product evaluators need to coordinate their efforts and find a single framework that directs consumers to the same green products. For a discussion of current attempts at harmonizing life-cycle analyses, see Wynne, *supra* note 2, at 66-72. For a critique of current uses of LCAs, see HEARINGS 1995, *supra* note 89, at 409-46. *See also* Letter from Norman L. Dean, Green Seal, to the Secretary of the Federal Trade Commission, (Sept. 18, 1995) (on file with author) (suggesting that one failure of FTC Guides I is rejection of life-cycle analyses). For further discussion of life-cycle product assessments, see *supra* notes 115-16, 131-32 & 165-66 and *infra* notes 242-88, 315-28 & 330. For a definition of life-cycle assessment, see *supra* note 203.

242. *See* Wynne, *supra* note 2, at 60 & n.16.

243. *See* EPA ON GLOBAL LABELS, *supra* note 120, at 46. For a complete explanation about the manner in which ELJ and FEA certify products, see Staffin, *supra* note 239, at 225-27. *See also* EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131 (detailing certification procedure step-by-step); Hartwell & Bergkamp, *supra* note 239, at 624 (outlining process for awarding Blue Angel). EPA's new Energy Star Program functions in a similar way as Germany's Blue Angel Program. Teaming up with the private sector, EPA secures environmentally preferrable products for the consumers in exchange for a compliance stamp of approval. *See* Payne, *supra* note 135. The Energy Star logo is a valuable marketing tool and serves as the perfect incentive for environmentally-conscientious manufacturing. The Energy Star Program, however, evaluates only products and services that fit under certain defined categories, such as computers and lighting. *See id.* Germany's Blue Angel Program serves all consumer products. *See* EPA ON GLOBAL LABELS, *supra* note 120, at 45. For a complete discussion of EPA Energy Star Programs, see *supra* notes 134-43 and accompanying text. For a synopsis of Germany's Blue Angel Program, see *supra* notes 239-42 and *infra* notes 244-45 and accompanying text.

fee to marketers who desire to exploit green consumerism through product certification, critics argue that FEA's professed LCA is merely propaganda.[244] Many still hold the program in high regard even though it remains unclear whether the government monitors *a few* or *all* enviromental impacts from creation to disposal.[245]

Both the success of Germany's "Blue Angel" logo and growing consumer environmental awareness have prompted many European nations to develop their own certification schemes.[246] Fearing economic chaos, the European Union (EU) sought to unify conflicting criteria and facilitate product marketing throughout the continent.[247] On March 23, 1992, EU ratified Regulation No. 880/

244. *See* Wynne, *supra* note 2, at 60 (explaining imposition of fees); Hartwell & Bergkamp, *supra* note 239, at 626-27 (discussing critics complaints). A prominent argument against Germany's Blue Angel Program is that the life-cycle product assessments are tainted. Specifically, some suggest that since Germany chooses the product attributes on which to focus and since Germany charges fees for its product certifications, there is great chance for manipulation of product analyses. At this point in time, such criticisms are unfounded.

245. Hartwell & Bergkamp, *supra* note 239, at 626-27 (using examples to show that Germany is not employing life-cycle analyses to all impacts). A key complaint is described as follows:

> One major complaint voiced by consumer and producers' organizations is that the product requirements often include no more than one or two criteria, although the program is supposed to take the full life cycle of the product into account. Consumer organizations have also criticized the product definitions, which they feel do not pay due regard to consumer's needs and decision-making, but are focused on product-related technical aspects.

Id. Germany's Blue Angel Program does not require manufacturers to meet a national environmental standard that deals with the production process. *See* EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 19. Germany provides two reasons for omitting the production process from life-cycle assessments: "(1) analytic methods are frequently unavailable to separate the impacts of products being considered from the whole manufacturing facility's impacts; and (2) such manufacturing standards would penalize countries with less stringent environmental standards and may constitute a trade barrier contrary to GATT regulations." *Id.*

246. *See* Wynne, *supra* note 2, at 60-61. For a general discussion of international environmental labeling programs, see *supra* notes 239-45 and *infra* notes 247-88 & 315-45 and accompanying text. For a list of countries not addressed in this article that have environmental labeling programs, see text accompanying *infra* note 259.

247. *See* Wynne, *supra* note 2, at 61. The following is a brief synopsis of the European Union's (EU) environmental labeling program:

> The . . . [EU] Eco-labelling program operates through official environmental labelling bodies in the member states and an approval process by the . . . [EU] Commission, the governing political body of the . . . [EU]. Proposals for product categories and criteria are made by member states to the Commission, which engages in consultation with a Consultation Forum of interest groups in choosing categories. A category is assigned to the participating Competent Body in a member state, which drafts criteria for certification. The draft criteria are sent back to the Commission, which consults with the Consultation Forum, and then sends them to the

92, creating a continentally harmonious eco-labeling scheme.[248] The objectives of the program are to promote the design, production, marketing and use of products which have a reduced environmental impact during their entire life cycle, and provide consumers with better information on the environmental impact of products.[249] Delegates from consumer, industrial and environmental organizations survey the proposed criteria and submit any needed changes to the EU Council for a final verdict.[250] While individual Member States are responsible for evaluating products and awarding certification, all EU members must enforce the program in their own territories.[251]

> Committee of Member States for approval. If approved, they are adopted by the Commission.

EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 11. For further discussion of the EU environmental labeling program, see EPA ON GLOBAL LABELS, *supra* note 120, at 98-102; Hartwell & Bergkamp, *supra* note 239, at 623; Richards, *supra* note 36, at 242; Staffin, *supra* note 239, at 227.

248. *See* Hartwell & Bergkamp, *supra* note 239, at 623 (citing Council Regulation No. 880/92 of March 23, 1992, on a Community eco-label award scheme, O.J. L 99/1 (Apr. 11, 1992)).

249. *See* Staffin, *supra* note 239, at 227 (quoting Commission Regulation 880/92, O.J. L 99/1, 2 (Apr. 11, 1992)). Specifically excluded from the regulations are food, drink and pharmaceutical products. *See id.* Because the EU does not have the power to preempt local legislation, member states may adopt national eco-labeling initiatives. *See* Hartwell & Bergkamp, *supra* note 239, at 623. Different life-cycle assessment methodology approaches have been used by EU countries. *See* EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 12-17. The United Kingdom performs a "streamlined LCA." *See id.* at 12.

> The "streamlined LCA" methodology does not attempt to quantify every output from every stage of life cycle, but instead incorporates a screening step in which "impacts" from certain stages of the life cycle are estimated or ignored based upon information obtained and judgment by the study practitioner.

Id. at 12-13. The Danish Environmental Protection Agency conducts "quantitative and qualitative" life-cycle assessments. *See id.* at 14. "The Danish methodology differs . . . in its inclusion of the concept of 'hurdles' and 'points'. . . . 'Hurdles' are specific criteria that must be met for the award of a label. . . . The 'point' system assigns scores to certain environmental attributes . . . and sets a maximum total number of points as a criterion for labelling." *Id.* at 14. France employs an "Ecobalance," which examines "life-cycle inventories for every product category for which labelling criteria are developed." *Id.* at 16.

250. *See* EPA ON GLOBAL LABELS, *supra* note 120, at 98-102; EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 11; Hartwell & Bergkamp, *supra* note 239, at 623. Collectively, such delegates are referred to as "The Consultation Forum." *See* EPA ON GLOBAL LABELS, *supra* note 120, at 98. "The [EU] Commission consults the [Consultation] Forum members before submitting the draft criteria to the Regulatory Committee of Member States for final approval." *Id.* For a summary of the EU environmental labeling program, see *supra* note 247. For a thorough narration of certification programs under the EU system, see Staffin, *supra* note 239, at 227-30.

251. *See* EPA ON GLOBAL LABELS, *supra* note 239, at 98. Since the EU program does not preempt individual programs, it is likely that multiple logos will confuse consumers and dissuade manufacturers from producing environmentally prefera-

Germany's environmental seal of approval program sparked legislation in other areas of the world. In 1988, Canada launched a voluntary "Environmental Choice" program under the auspices of its Environmental Protection Act.[252] Since Canada emulates Germany's LCAs and qualitative product assessments, its Environmental Choice program is subject to many of the same problems and concerns as the "Blue Angel."[253] Japan similarly introduced its

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ble products. For a discussion about the problems associated with multiple logos, see *supra* notes 174-223. For a discussion of the EU program, see Wynne, *supra* note 2, at 61; Hartwell & Bergkamp, *supra* note 239, at 624; Staffin, *supra* note 239, at 227; Richards, *supra* note 36, at 242. Some commentators remonstrate the vague product-assessment criteria of EU's environmental labeling program. *See* Hartwell & Bergkamp, *supra* note 239, at 624 (stating regulation does not indicate how considerations of waste relevance, soil pollution, air and water contamination, and resource consumption are to be weighted or quantified). According to Hartwell & Bergkamp, regulation does not define concepts of "clean technology" or "high level of environmental protection," nor does it indicate how these criteria are to be applied to specific products. *Id. See also Environment: U.S. Proposes Expanding Public Role in National Programs on Eco-Labeling*, 13 INT'L TRADE REP. 1445 (BNA) (Sept. 18, 1996) [hereinafter *Protectionism and Eco-Labeling* (paraphrasing Elizabeth H. A. Seiler, Director of Governmental Affairs for Grocery Manufacturers of America, who suggests that eco-labeling programs, like EU program, "purport[ing] to judge the environmental effects of products and packaging, often favor local manufacturers over foreign competitors"). Such favoritism, suggests Seiler, will lead to increased trade disputes. *See id.*

252. For a brief discussion of Canada's Program, see Staffin, *supra* note 239, at n.137; EPA ON GLOBAL LABELS, *supra* note 120, at 50; EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 27; Wynne, *supra* note 2, at 62; Richards, *supra* note 36, at 241-42; Centre for Environmental Labeling, (visited Oct. 17, 1997) <http://www.interchg.ubc.ca/ecolab/canada.html>. For a catalogue of other environmental certification programs, see Wynne, *supra* note 2, at n.20-n.21. Canada's Environmental Choice Program is a voluntary eco-labeling program which creates market incentives for manufacturers and suppliers to reduce the burden on the environment of their products or services. EPA ON GLOBAL LABELS, *supra* note 120, at 50.

> Scientifically-based criteria are established in order to define good environmental performance and set benchmarks for identifying environmental leaders and innovators in a specific market segment. Scientific, technical and industrial experts contribute to the development of criteria which form the basis of [Canada's Environmental Choice Program] technical guidelines and panel certification. Testing, verification and surveillance procedures ensure that these criteria are met and adhered to by licensed companies. As the marketplace changes and new technologies and products emerge, a process of review is in place to revise criteria accordingly.

Centre for Environmental Labeling, *supra.* The following four steps describe the process in which a product or service is certified and its relevant company licensed under an established Environmental Choice guideline: "(1) Completion of an Application; (2) Verification and Testing of the product or service; (3) executing of a License Agreement; (4) Payment of Annual License Fees." *Id.*

253. *See* Staffin, *supra* note 239, at n.137. Critics of Germany's program chiefly focus on the implementation of life-cycle assessment methodology. *See* Hartwell & Bergkamp, *supra* note 239, at 627. Since Germany often uses only a few environmental attributes when it analyzes a product, critics suggest that evaluators

"EcoMark" logo in 1989.[254] Its program may be distinguished from all others. Foremost, no LCAs are performed; instead, certifiers award the EcoMark to products which are "inherently environmental."[255] Such products are not judged according to their environmental impacts, but whether they form "part of an 'ecological lifestyle.'"[256] The employment of generalized criteria has ultimately expedited the administrative process: more manufacturers submit applications; more marks are conferred; and more fees are collected.[257] While New Zealand's independently-run "Environ-

are not conducting true life-cycle assessments. *See id.* For further discussion of Germany's environmental labeling program and its drawbacks, see *supra* notes 239-45.

254. *See* EPA ON GLOBAL LABELS, *supra* note 120, at 56. For a brief discussion of Japan's program, see EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 34; Staffin, *supra* note 239, at 227; Richards, *supra* note 36, at 242; Wynne, *supra* note 2, at 62. Japan's program may be summarized as follows:

> The program is operated by the Japan Environmental Association (JEA), a non-governmental organization operating under the guidance of the National Environment Agency.
>
> Two Committees operate within the JEA: the Promotion Committee and the Expert Committee. The Promotion Committee is responsible for selecting product categories for labelling and for developing labelling criteria in consultation with the Expert Committee. It is a representative committee with members from academia, local governments, manufacturers and distributers, the Environment Agency, and the National Institute for Environmental Studies.
>
> The Expert Committee determines whether products qualify for the label. This committee is more technically based, including representatives from consumer organizations, local governments, environmental researchers, and technical experts from the Environment Agency and the National Institute for Environmental Studies. Manufacturers apply to the Expert Committee submitting relevant information, and the Committee may request testing by a third party. There is no public comment process for the setting of criteria or the award of the label to the particular products.

EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 34 (citations omitted).

255. EPA ON GLOBAL LABELS, *supra* note 120, at 56. Japanese certifiers do not distinguish the manufacturing processes within a particular product category. *See id.* "In this way the logo is used to call attention to products that are part of 'an ecological lifestyle,' more than to weigh the relative impacts of general consumer products." *Id.* The following basic principles are used to define products worthy of a Japanese EcoMark: "(1) incur a minimal environmental burden when used; (2) improve the environment when used; (3) incur a minimal environmental burden when discarded after use; and (4) contribute to environmental preservation in other ways." *Id.*

256. *Id.*

257. *See* Wynne, *supra* note 2, at 62-63. In summarizing Japan's environmental labeling program, EPA noted:

> Members of the committees do not receive a salary. The government's Environment Agency acts only to "supervise" the JEA, to advise on both committees and give "guidance" for the nomination of committee members. Although start-up costs were paid by the government, the program

mental Choice" program certifies products that are environmentally preferable, the Australian government recognizes products free of misleading environmental claims.[258] Other countries subsidizing green consumerism include: Austria, Belgium, France, Italy, Luxembourg, the Netherlands, Denmark, Ireland, the United Kingdom, Greece, Spain, Portugal, Iceland, Norway, Sweden, Finland, South Korea, India, Singapore and Thailand.[259]

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is now self-financed from the fees assessed to licensees. It is the only government-related environmental certification program to be self-financed.

EPA ON GLOBAL LABELS, *supra* note 120, at 57.

258. For a brief discussion of New Zealand's program, see EPA ON GLOBAL LABELS, *supra* note 120, at 82-84; EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 37-38; Wynne, *supra* note 2, at 62. New Zealand's Environmental Choice Program is administered by Telarc, the New Zealand Accreditation Authority for Quality Assurance, Laboratory Testing, and Industrial Design. *See* EPA ON GLOBAL LABELS, *supra* note 120, at 82. "The Telarc Council . . . establishes the criteria for product labelling after receiving recommendations from its Environmental Choice Management Advisory Committee (ECMAC)." EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 37. ECMAC is comprised of the following representatives: "persons with expertise in environmental science, consumer interests, manufacturing, wholesaling, retailing, environmental policy, and environmental improvement." *Id.*

> ECMAC selects product categories for evaluation, and Task Groups consisting of experts of different interests in the relevant field are set up to develop product criteria. The Task Groups present a draft of criteria to the ECMAC, which is released to the public, and a public comment period is held. The Task Group then revises the criteria based upon the comments and presents the revised criteria to the ECMAC for approval.

Id. For a brief discussion of Australia's program, see EPA ON GLOBAL LABELS, *supra* note 120, at 132-34; Wynne, *supra* note 2, at 62. The goals of Australia's Environmental Choice Program are "to ensure that 'environmental claims made about products and services are both meaningful and truthful,' and that 'consumers and the providers of products and services are educated and informed on the environmental impacts of products and services.' " EPA ON GLOBAL LABELS, *supra* note 120, at 132.

> Environmental Choice Australia is a voluntary program that gives government approval to those product environmental claims that can be tested and quantified. If a manufacturer and its product pass the required tests, the product may display the Environmental Choice logo. . . . Environmental Choice has categoried possible claims as follows:
>
> 1) claims that can be quantified;
> 2) claims dependent upon common understanding of terms used;
> 3) meaningless claims;
> 4) misleading claims.

Id. at 133.

259. *See* Staffin, *supra* note 239, at 220. For a comprehensive summary of these countries' programs, see EPA ON GLOBAL LABELS, *supra* note 120, at 64-113. For a discussion on the effectiveness of certification and labeling programs, see EPA ON CERTIFICATION AND LABELING PROGRAMS, *supra* note 36. For an overview of life-cycle assessment methodology as applied to environmental certification programs, see Wynne, *supra* note 2, at 64-71. For a complete discussion of life-cycle assessment methodology, see EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131. For further discussion of life-cycle product assessments, see *supra* notes 115-16, 131-32, 165-66 & 239-58 and *infra* notes 260-88, 315-28 & 330.

Eco-logo fever has caught on in the United States as well. Although it has shown no desire to initiate a voluntary federal eco-labeling program, the United States does enjoy the presence of two major, privately operated, multi-criteria labeling schemes. In 1989, Green Seal founded the first United States environmental seal of approval program.[260] Keeping in step with Germany's "Blue Angel" scheme, Green Seal stamps a certification mark on those products satisfying predetermined environmental criteria.[261] Scientific Certification Systems' (SCS) "Environmental Report Card" is fundamentally different from all existing eco-logo programs. It quantifies the environmental attributes of each product from "cradle to grave," thus enabling consumers to make their own decisions about environmental superiority.[262]

Green Seal is an independent, non-profit organization dedicated to "protecting the environment by promoting the manufacture and sale of environmentally responsible consumer products."[263] Like government-sponsored eco-labeling systems, Green Seal accepts proposals from a myriad of interested parties,

260. For a brief discussion of Green Seal's environmental labeling program, see *Introduction to Green Seal*, *supra* note 10; EPA ON GLOBAL LABELS, *supra* note 120, at 72-75; EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 30-33; Grodsky, *supra* note 5, at 208; Wynne, *supra* note 2, at 73; Howett, *supra* note 2, at 448. Green Seal is a non-profit environmental labeling organization that awards the "Green Seal of Approval" to products that cause less harm to the environment than other similar products. *See Introduction to Green Seal*, *supra* note 10. "According to the Green Seal organization, the program 'helps identify environmentally preferable products in order to encourage and enable consumers to purchase such products and reduce their impacts on the Earth.' " EPA ON GLOBAL LABELS, *supra* note 120, at 72. The awarding of the Green Seal gives manufacturers an incentive "to improve the environmental attributes of their products." *Id.*

261. *See Introduction to Green Seal*, *supra* note 10. "Before a product gets the Green Seal, it must pass rigorous tests and meet . . . [Green Seal's] stringent environmental standards." *Id.* For a discussion of Germany's Blue Angel Program, see *supra* notes 239-45 and accompanying text. For a discussion of Green Seal's environmental labeling criteria, see *supra* notes 10 & 36-40 and *infra* notes 263-66 & 271-87 and accompanying text.

262. For a brief discussion of Scientific Certification Systems' (SCS) Environmental Report Card, see EPA ON GLOBAL LABELS, *supra* note 120, at 144-49; Wynne, *supra* note 2, at 73; Howett, *supra* note 2, at 448; Grodsky, *supra* note 5, at 208. Initiated in 1989, SCS' long term program goals are to:

> (1) support consumers' efforts to optimize their product choices with 'coherent comprehensive environmental information'; (2) provide companies with independent feedback about the environmental ramifications of their products; (3) encourage manufacturers' efforts to meet the highest environmental standards in product design and production; (4) build a consensus on what constitutes a significant environmental claim; and (5) help policy makers to set down effective environmental policy.

EPA ON GLOBAL LABELS, *supra* note 120, at 144.

263. *Introduction to Green Seal*, *supra* note 10.

conducts LCAs and sets standards.[264] Underwriters Laboratories, Inc., under contract to Green Seal, applies the criteria to manufacturer-applicants' products and contemplates whether the product is deserving of a certification mark.[265] After required fees are paid and the product is certified, manufacturers may sport the Green "seal of approval" on their products and capitalize on the marketing benefits.[266]

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264. *See* EPA ON GLOBAL LABELS, *supra* note 120, at 72-75. The development of Green Seal's environmental criteria involves technical evaluation of the product category "by Green Seal staff or by outside consultants." EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 30. Before a draft criteria is adopted, it undergoes careful review and a period of comments and revisions. *See id.* "The testing of products and the monitoring of compliance with certification standards for those products and manufacturers that apply for and receive the Green Seal is performed generally by Underwriters Laboratories, Inc. under contract with Green Seal." *Id.* Green Seal does not perform life-cycle analyses, per se. *See id.* Because of the cost involved and lack of consensus for correct application, Green Seal performs environmental impact evaluations. *See* EPA ON GLOBAL LABELS, *supra* note 120, at 73. Environmental impact evaluations "attempt[ ] to identify the most significant environmental impacts in each stage of the product's life cycle." EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 30. The purpose of environmental impact evaluations is to "reduce to the extent technologically and economically feasible, the environmental impacts associated with the manufacture, use, and disposal of products." *Id.*

265. *See* EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 30.

266. *See Introduction to Green Seal*, *supra* note 10. Green includes certain explanatory clauses in every published standard. The clause explaining Green Seal's certification process reads as follows:

> These Environmental Standards and Criteria contain the basic requirements for certain products to be certified by Green Seal, and for their manufacturers to receive authorization to use the Green Seal Certification Mark on products and their packaging, and in product advertising. The requirements are based on an assessment of the environmental impacts of product manufacture, use, and disposal and reflect information and advice obtained from industry, trade associations, users, government officials, environmental and other public interest organizations, and others with relevant expertise. These requirements are subject to revisions as further experience and investigation may show is necessary or desirable. Green Seal solicits information and advice on issues associated with these Standards and Criteria.

Id. Other clauses found in the Standard's Criteria deal with: compliance with the Standards and Criteria; compliance with government rules; limitations on purpose of Standard; substantially equivalent products; unanticipated environmental impacts; certification agreement and Green Seal rules; disclaimer of liability; care in testing; referenced standards; and labeling requirements. *See id.* The following example is a Green Seal Standard for reusable utility bags (GS-16):

1). Product-Specific Performance and Environmental Requirements
   1. The product must be made of strong and durable material, which may be reinforced by rivets or other strengthening parts;
   2. The product must have a minimum lifetime of 300 uses carrying typical loads under wet conditions, as tested by performance tests of the Canadian Environmental Choice Program where applicable.

2). Labeling Requirements

In contrast, SCS' "Environmental Report Card" is a content-neutral scheme designed solely to convey information to the consumer about a product's significant environmental impacts.[267] Rather than comparing similar products, SCS seeks to provide the environmental equivalent of nutritional labels.[268] Endorsement of a product results from the following procedure: (1) industry, governmental and environmental groups' proposals metamorphose into testing categories; (2) SCS conducts a life-cycle "inventory analysis;" (3) testers assign numerical values to each environmental burden and exhibit the results in a bar graph format; and (4) manufacturers pay a fee for product testing, but not for certification mark licensing.[269] SCS requires annual renewal for continued

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1. The Green Seal Certification Mark may appear on the packaging and the product itself.
2. Whenever the Green Seal Certification Mark appears on a package or product, the product or package must contain a description of the basis for certification. The description shall be in a location, style, and typeface that are easily readable by the consumer.

Id. Compare FTC Guides II, *supra* note 9 (providing guidance on recyclability claims).

267. *See* EPA ON GLOBAL LABELS, *supra* note 120, at 144-49. "The Environmental Report Card approach to environmental labeling involves the categorization and inventory of environmental burdens (such as carbon dioxide emissions or the amount of hazardous solid waste generated) associated with the life-cycle of an industrial system related to a specific consumer product." *Id.* at 144. SCS' Environmental Report Card conveys information to consumers in the following format: "[t]he report card lists these burdens directly, and also provides a bar graph representation of these burdens on an exponential scale." *Id.* The report card also provides information on the potential range of burdens for all consumer products, "enabling the reader to compare products not only within the same category, but across other categories as well." *Id.* Instead of stamping a certification mark of approval on evaluated products, SCS's report card allows consumers to evaluate which criteria are important to them and to purchase products accordingly. A similar scheme exists in the area of nutritional labels. For a discussion of the applicability of nutritional labels to the green marketing context, see *supra* notes 104, 156, 159-61, 209 & 219-20 and accompanying text.

268. *See* EPA ON GLOBAL LABELS, *supra* note 120, at 145. SCS ranks each tested product in approximately 20 categories, which follow the mandates of CAA, Clean Water Act, and RCRA regulations. *Id.* "SCS selected the report card approach over the seal approach in order to 'ensure that environmental trade-offs were not overlooked . . . and to find a mechanism capable of representing the full spectrum of environmental performance in products.' " *Id.* Critics of SCS' Report Card argue that the resulting label is too complex for the average shopper and may confuse them into believing that the label constitutes an endorsement of the product. *See id.* Although the Report Card has the added benefit of comparing labels of different products, this necessitates that SCS' Report Card be affixed to many products within one product category. *See id.* at 145-46.

269. *Id.* at 146-49. SCS' Report Card involves a "cradle-to-grave evaluation of the environmental burdens (resource depletion, energy consumption, air and water emissions, and solid wastes) associated with the raw material extraction, manufacture, transportation, use, and disposal of a product." *Id.* at 144-45. For a com-

use of its endorsement mark.[270]

B. The Straight Scoop on Eco-Labeling and Third-Party Certifiers

Whether the United States should adopt a universally accepted emblem or seal of approval program leads to a number of questions. Is the private or public sector better equipped to enforce such a program? Should the analyses be content-neutral or focus on product characteristics? How shall the new scheme fit in with the preexisting programs? Should certifiers be mindful of the encroaching global economy? Scholars, regulators and industry representatives continue to grapple with these same questions.

As a market-based initiative, the eco-label is an attempt to harness and utilize the engine of demand to drive changes in supply.[271] Studies indicate that consumers increasingly purchase products according to environmental implications, and that eco-logo programs

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prehensive discussion of life-cycle assessment methodology, see Curran, *supra* note 241. For a discussion of life-cycle assessment methodology in the context of environmental labeling programs, see EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131. For further discussion of life-cycle analyses, see *supra* notes 115-16, 131-32, 165-66 & 239-68 and *infra* notes 270-88, 315-28 & 330 and accompanying text. For a listing of comments regarding the use of life-cycle product assessments in conjunction with FTC Guides I, see *supra* notes 152 & 203.

270. *See* EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131, at 147-49. For an in-depth probe into third party certification programs, see *supra* notes 239-69 and *infra* notes 271-314 and accompanying text. For a comparison between Green Seal and SCS' environmental labeling programs, see *infra* notes 271-87 and accompanying text.

271. *See* Peter S. Menell, Symposium, *Structuring A Market-Oriented Federal Eco-Information Policy*, 54 MD. L. REV. 1435 (1995) (presenting benefits on international eco-information programs). "The principal policy effort addressing environmental degradation has been focused on the supply side of markets. . . . Promoting green consumerism can complement the vast array of environmental laws and regulations by altering the demand for products." *Id.* at 1435-36. *See also* Church, *supra* note 39 (providing market-solution for environmental marketing regulatory concerns).

> Because the market appears to function efficiently, those who favor additional regulation bear the burden of proving that government intervention will leave consumers in a better position. . . . Consumers have become better informed about the environmental attributes of products without government regulation and have a large amount of information available to evaluate environmental choices. . . . Deceiving consumers under the guise of advertising policy is completely inconsistent with the underpinnings of consumer protection and should be avoided.

Id. at 323-24. Church prefers to leave environmental marketing regulation to the market. "[T]he number of consumers considering environmental impacts in their purchasing decisions remains substantial." *Id.* at 254. As such, some commentators support allowing "consumers to consider environmental attributes in their purchasing decisions as a way to use market forces to influence manufacturers' environmental decisions." *Id.*

encourage green awareness.[272] By educating consumers, marketers will hopefully espouse fewer misleading and deceptive advertisements. Moreover, companies choosing to market their products' environmental certifications must first meet certain standards.[273] The pride and enthusiasm associated with meeting these standards can translate into technological innovation and, ultimately, into long-term profitability.[274] It is likely that demand shifts will incite competitive suppliers and manufacturers to raise the level of environmental quality in their products.[275]

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272. *See generally* Church, *supra* note 39 (suggesting regulators leave environmental market alone). For further discussion of lassiez-faire environmental marketing regulation, see *supra* notes 12-21, 58-79 & 155-60 and *infra* notes 288-98 & 328-37 and accompanying text. For a critique of lassiez-faire environmental marketing regulation, see *supra* notes 12-16, 58-79 & 155-60 and *infra* notes 288-98 & 328-37 and accompanying text. For a discussion of the encroaching environmental consumer market, see *supra* notes 1-12 and accompanying text. *See also* Kangun & Polonsky, *supra* note 8 (discussing problems associated with encroaching green market). "The changing nature and growing complexity of environmental marketing claims has served to build distrust among consumers." *Id.*

273. *See* EPA ON GLOBAL LABELS, *supra* note 120 (providing comprehensive study of environmental certification programs and discussing criteria inherent in evaluations); EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131 (discussing environmental labeling standards' criteria as applied through vehicle of life-cycle analyses); EPA ON CERTIFICATION AND LABELING PROGRAMS, *supra* note 36 (discussing effectiveness of certification programs); Hartwell & Bergkamp, *supra* note 239 (exploring European environmental certification programs and applicable evaluation processes); Wynne, *supra* note 2, at 59-63 (exploring global environmental certification programs and applicable evaluation processes); Staffin, *supra* note 239 (summarizing foreign eco-logo programs); Richards, *supra* note 36, at 241-43 (summarizing foreign eco-logo programs).

274. *See* Richards, *supra* note 36, at 247-48 (outlining advantages and disadvantages of eco-label programs). *See also* Bukro, *supra* note 1, at C24 (noting problems accompanying use of eco-logos).

275. EPA ON GLOBAL LABELS, *supra* note 239, at 12, 29.

> In this age of global marketing, the operation of environmental certification programs in domestic and international markets may have far-reaching effects. Two key issues stand out as being important. First, there is an underlying assumption that a voluntary and positive environmental certification program will be effective in changing the behavior of producers and/or consumers, leading to specified environmental benefits. . . . Second, with the proliferation of [environmental certification programs] in many countries worldwide, there is the concern that they may act as intentional or incidental barriers to international trade. Interest in the "harmonization" of program standards and procedures is rising as more programs become active and the activity of existing programs increases.

Id. at 29. It is important to note that, although consumer behavior is the most accurate way to assess the effectiveness of certification programs, it is the most difficult to measure. *See* EPA ON CERTIFICATION AND LABELING PROGRAMS, *supra* note 36, at 5. As discussed by EPA, the processes used to evaluate the effectiveness of environmental labeling programs include: "(1) consumer awareness of labels; (2) consumer acceptance of labels (credibility and understanding); (3) changes in consumer behavior; (4) changes in manufacturer behavior; and (5) improvement of environmental quality." *Id.* EPA points out that changes in manufacturer be-

Unless the United States amalgamates its two existing certification programs into one which coordinates its definitions with those already in effect, consumer confusion may result.[276] Life-cycle assessments may also confound consumers because there is no generally accepted technique for conducting the calculation.[277] Since participation in eco-logo programs is voluntary, costs and misconceptions may discourage industry support.[278] In addition, innovations may be reduced to achieving only the required minimum standards, and environmental gains may come at the expense of performance or safety.[279] There is also a chance that eco-label requirements will violate NAFTA and GATT, which prohibit all "tech-

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havior may be the result of consumer demand *or* an attempt on the part of the manufacturer to enhance public, stockholder and employee relations. *See id.*

276. *See* Richards, *supra* note 36, at 249-50. Application of multiple eco-labels on the same product may confuse consumers because of the difficulty comprehending relevant programs and the difference between respective eco-labels. For a discussion of the implications inherent in use of multiple eco-labels in the context of Washington's environmental certification program, see *supra* notes 197-204 and accompanying text.

277. *See* Richards, *supra* note 36, at 249-50. For a discussion of life-cycle methodology in the context of environmental labeling, see EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131. For a comprehensive explanation of life-cycle assessment methodology, *see generally* Curran, *supra* note 241. For a discussion of life-cycle assessment methodology as applied to the environmental labeling programs of Germany, European Union, Canada, Japan, New Zealand and Australia, see *supra* notes 239-59 and accompanying text. For a discussion concerning the lack of consensus in application of life-cycle assessment methodology, see HEARINGS 1995, *supra* note 89, at 406-46. *See also supra* notes 166 & 203 (cataloguing comments about use of life-cycle methodology).

278. *See* Richards, *supra* note 36, at 250-51. Richards explains:

> The cost of obtaining an eco-label may be prohibitive to small and mid-sized firms, and competing labels and regulatory schemes may make companies wary of obtaining a label. . . . [In addition] price considerations will overcome any environmental benefits in the final product decisions by consumers. . . . Lack of participation in the German Blue Angel Program illustrates this problem.

Id. at 250.

279. *See id.* at 250-51. "Eco-labels may simply force companies to create sufficiently innovative technology to meet the criteria threshold, and no more." *Id.* at 251. Mandatory review and updating of criteria may prevent this situation from occurring. *See, e.g.*, EPA ON GLOBAL LABELS, *supra* note 120, at 98 (discussing European Union's mandated periodic review). Updating comprehensive programs such as the program undertaken by the European Union, however, will prove an arduous task. *See* Richards, *supra* note 36, at 251 (alluding to time-consuming nature of updating program criteria). For a discussion of European Union environmental labeling program, see *supra* notes 246-51 and accompanying text. "Just as in the case of price, consumers may be willing to give up some level of safety or performance for lessened environmental impact, but there will be a threshold beyond which the price of lessened environmental impact will be too great for consumers to bear." Richards, *supra* note 36, at 251. *See also* Hartwell & Bergkamp, *supra* note 239, at 630 (discussing loss of performance and safety concerns).

nical barriers to trade."[280] A well-known environmental marketing initiative found to infract GATT is the United States proscription on the importation of tuna products where manufacturers engaged in "unsafe dolphin" processes.[281]

Third-party eco-labeling schemes are lauded for their ability to facilitate consumer awareness and acceptance.[282] Unfortunately, the current lack of uniformity indicates potential consumer confusion: too many labels spoil environmental appreciation.[283] One

280. EPA ON GLOBAL LABELS, *supra* note 120, at 29. Noting the myriad of eco-label programs throughout the world, EPA discusses international trade concerns as follows:

> Included in countries with active or planned programs are some of the major trading nations of the world. These programs differ in some fundamental ways, such as methods of operation, selection of products, how much public review is involved, and stringency of the award criteria. Consequently, there is some concern that the proliferation of . . . [environmental certification programs], both domestic and foreign, could cause consumer confusion and, although voluntary, may act as barriers to trade.

Id. at 33. Adoption of harmonization programs may encourage trade among nations, or at least eliminate the potential barriers to trade inherent in the programs. *See id. See also* Richards, *supra* note 36, at 251-52 (characterizing eco-logo programs as problematic in light of NAFTA and GATT treaties).

281. *See* United States-Restrictions on Import of Tuna, GATT DOC. DS21/R (Sept. 1991) (noting that United States embargo on Mexican tuna was found to violate GATT, regardless of fact United States was enforcing federal environmental policy legislation). Restrictive laws in the environmental marketing context may likewise be viewed as technical barriers to trade. *See* Ramesh Jaura, *Trade: Developing Countries Urge Help to Fulfill Eco-Standards*, INTER PRESS SERV., Mar. 22, 1996, *available in* 1996 WL 9809565 (discussing effect of eco-labels on developing countries); John Zarocostas, *"Eco-Labeling" is a Sticky Issue, Say Developing Nations at WTO Talks*, J. COM., Aug. 20, 1996, at 2A (discussing eco-label concerns of developing countries); *Protectionism and Eco-Labeling, supra* note 251 (quoting Elizabeth H.A. Seiler, Director of Governmental Affairs for Grocery Manufacturers of America, who charges eco-label programs with protectionism and technical barriers to trade); William H. Lash, III, *Protectionism in Green*, J. COM., Dec. 16, 1996, at 7A (explaining that "[c]ountries can craft eco-standards designed to favor domestic producers at the expense of exporters. After all, standards for eco-labels are developed in consultation with domestic firms and reflect a bias against imports").

282. *See* Richards, *supra* note 36, at 253 (stating "[t]hrough heightened awareness of impacts of their decisions and knowledge of expert assessment techniques used by third-party labeling programs, consumers' waning confidence will be restored"). Other noted benefits include "consumer endorsement because it is *not* affiliated with the government; reduction in costs; quick turnover of information to consumers; and elimination of the paternalistic regulatory approach, leaving more independence in the hands of consumers." *See id.* at 253-54.

283. *See generally* EPA ON GLOBAL LABELS, *supra* note 120; EFFECTIVENESS OF CERTIFICATION PROGRAMS, *supra* note 36. *See also* Richards, *supra* note 36, at 255-56 (discussing potential for consumer confusion with use of multiple eco-labels). For a discussion of the consumer confusion that accompanies the current lack of uniformity in environmental marketing, see *supra* notes 12-21, 58-79 & 155-66 and *infra* notes 288-98 & 328-37 and accompanying text. For a discussion of the lack of uniformity in environmental certification programs, see *supra* notes 271-82 and *infra* notes 284-87 and accompanying text.

generally presumes that the non-governmental association of private certifiers will lessen the potential for economic pressure to influence the certification process.[284] If private firms assume the financial burden, the government may then focus its attention on national and international harmony in the environmental marketing arena. While noteworthy, these benefits have yet to be proven. Companies do not like following government-imposed standards, and will likely view private mandates as even more distasteful.[285] The direct costs may inhibit smaller manufacturer participation.[286]

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284. *See* Richards, *supra* note 36, at 254-55. "If one eliminates Congressional oversight, there will be less chance for industry to use political pressure to receive a label. . . . [A]ny program which shows a modicum of independence from direct Congressional or executive oversight will gain greater credibility." *Id.* at 254. Richards recommends that eco-labeling programs not declare complete independence from government regulation, but that the government take on a more lassiez-faire attitude. *See id.* He feels that FTC Guides I provided consumers with the assurance that manufacturers will not unduly influence third-party certifiers. *See id.* "Government oversight, therefore, should attempt to take on a broader, more hands-off approach, allowing market forces to dictate the parameters of any eco-labeling program." *Id.* at 254-55. For a discussion and critique of lassiez-faire market regulation, see *supra* notes 12-21, 58-79 & 155-66 and *infra* notes 288-98, 328-37 & 346 and accompanying text. For an argument in support of eco-label programs as chief force in regulation of environmental market, see Kangun & Polansky, *supra* note 8.

285. *See* Richards, *supra* note 36, at 256. *See also* EPA ON CERTIFICATION AND LABELING PROGRAMS, *supra* note 36, at 48-50 (listing factors influencing effectiveness of non-governmental environmental labeling programs); EPA ON GLOBAL LABELS, *supra* note 120, at 9-26 (summarizing international and domestic environmental labeling initiatives). EPA explains:

> Certification programs commonly rely on the incentive of increased sales (or the threat of decreased sales) to prompt company involvement with their programs. [Certifiers] . . . are most successful in this regard, however, when the interest of manufacturers . . . corresponds with the goals of the program. . . . Because of product liability concerns, companies are motivated to seek out labeling programs to avoid financial risk and to protect corporate reputation.

EPA ON CERTIFICATION AND LABELING PROGRAMS, *supra* note 36, at 49. EPA further suggests that "participation in environmental certification programs is voluntary, and certification by an . . . [environmental certification program] is intended to be a positive selling point, encouraging the sales of products bearing the certification." EPA ON GLOBAL LABELS, *supra* note 120, at 9. Although intended as encouragement, manufacturers may feel pressured into changing their behavior and do so begrudgingly. Innovation may be reduced to achieving only the required minimum standards, and environmental gains may come at the expense of performance or safety. For further discussion of these concerns, see *supra* note 279. Richards assures that "if the private labels must meet minimum international standards and there is some limited form of government oversight, industry will be more likely to allow the issuers of private labels to dictate the terms under which industry must operate." Richards, *supra* note 36, at 256.

286. *See* Richards, *supra* note 36, at 256-57. Richards' asset-based solution to this problem may be summarized as follows:

> Asset based fees are assessed based upon the asset size of the company. This fee structure could alleviate some of the concerns small companies

Regardless of programmatic benefits, industry will always disfavor voluntary disclosure because of the potential for criminal and civil penalties.[287]

C. Regulation of Deception

1. FTCA Applies to Third-party Certifiers

According to FTCA, the Commission may use its deceptiveness, unfairness and substantiation doctrines to regulate third-party certification along with environmental advertisements.[288] FTC made use of this mandate by preventing Good Housekeeping from implementing its seal-of-approval.[289] To warn marketers as to how FTC

> have over cost because fees for small and mid-sized firms will be commensurate with their size. Moreover, a cap and floor on the level of the fee will prevent large firms from citing cost as a prohibitive factor to themselves or an unfair advantage to the smaller firms. The third-party certifiers may also want a floor in order to prevent having to provide a service for less than its cost.

Id. at 256.

287. *See id.* at 256 & n.137 (citing Christopher L. Bell & James L. Connaughton, *New Global Standards May Guide Industry on Environmental Issues*, NAT'L L.J., Sept. 6, 1993, at S2). For a list of industry comments regarding the prohibitive effect of looming civil and criminal penalties, see HEARINGS 1995, *supra* note 89, at 409-524.

288. FTCA § 5, 15 U.S.C. § 45 (1994). The pertinent text of FTCA reads:

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it [is empowered to act].

Id. §§ 45(a)(2), (b). For further discussion of FTCA and its application in the environmental marketing context, see *supra* notes 15 & 58-105 and accompanying text. For a discussion of FTC's deceptiveness, unfairness and substantiation doctrines, see *supra* notes 64-74 and accompanying text.

289. *See* Grodsky, *supra* note 5, at 194-96 (evaluating proficiency and effectiveness of evaluators). One early example of FTC regulation of product certifiers is Hearst Magazines, 32 F.T.C. 1440, 1461-63 (1941). In *Hearst*, FTC issued a cease and desist order against Good Housekeeping for failing to back its seal-of-approval with adequate product testing. *See id.* Referencing its findings in *Hearst*, FTC

> reiterate[d] the basic principle that unscrupulous sellers and advertisers may not make misrepresentations that are material in inducing purchases. [The Commission further admonished that i]t is not enough for sellers to refrain from misrepresenting the merits of their wares; the law prohibits them from making any material misrepresentations designed to influence the public in choosing what, or what not, to buy.

Colgate-Palmolive Co. and Ted Bates & Co., Inc., 62 F.T.C. 1269, 1274 (1963). Because of an over-inclusive guarantee and under-inclusive set of product tests, FTC determined that Good Housekeeping's seal-of-approval was a misrepresentation and misleading to consumers. *See Hearst*, 32 F.T.C. at 1463. "In truth and in fact, all the articles advertised in Good Housekeeping magazine, and all the articles carrying the various seals authorized by Good Housekeeping magazine have not been tested and approved by any scientific laboratory." *Id.* at 1448. FTC fur-

would pursue enforcement against product certifiers, FTC issued Guides Concerning Use of Endorsements and Testimonials in Advertising (Endorsement Guides).[290] Like FTC Guides I & II, the Endorsement Guides transcribe broad policy statements and examples of safe harbor compliance.[291] Such policies may provide additional guidance as to when FTC will pursue enforcement actions against environmental certifiers.

The Endorsement Guides require that testimonials "always reflect the honest opinions, findings, beliefs or experiences of the endorser."[292] For example, a certifier must disclose any mercantile

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ther refused as a defense the fact that the product meets all the standards required for that seal. *See id.* As a result, FTC mandates certifiers to explain what they guarantee and explicitly state what they do not. *See id.* at 1463.

FTC has not yet attempted to regulate environmental certifiers. The Commission's ability and desire to do so remains in question. Grodsky posits "[e]ven if environmental certifiers are covered by the FTC Act or . . . it is unlikely that any regulatory body could monitor multivariate certification effectively. . . . It would be difficult for monitoring bodies to detect overstatements without having an intimate understanding of, and opportunity to observe, the multiple tests involved." Grodsky, *supra* note 5, at 196. In contrast, FTC did not probe Good Housekeeping's testing procedures. It merely admonished the certifier's failure to test products before awarding a seal-of-approval. *See id.* For a complete discussion of the Good Housekeeping Seal-of-Approval, see EPA ON CERTIFICATION AND LABELING PROGRAMS, *supra* note 36, at 53. Noted benefits of the Good Housekeeping Seal of Approval include: "increased consumer trust of marketers and increased marketer accountability." *Id.* at 56. These benefits are two of the most important goals of environmental labeling programs. For a discussion of the benefits and criticisms of current environmental certification programs, see *supra* notes 239-88 and accompanying text.

290. *See* Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §§ 255.0-255.5 (1994) [hereinafter Endorsement Guides]. These guidelines cover endorsements by experts, organizations and celebrities. It is questionable whether FTC will stretch the guidelines to cover the action of environmental certifiers. For an in-depth discussion of the endorsement guides and a prediction as to how they will fit in with environmental marketing regulation, see Grodsky, *supra* note 5, at 197-99 (noting that guides are not adequate, as written, and will not engender more effectual environmental certification).

291. *See* Endorsement Guides, *supra* note 290. At the outset, FTC asserted that "[t]he Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term 'endorsements' is therefore generally used hereinafter to cover both terms and situations." *Id.* § 255.0(a). The following is one of a series of examples found scattered throughout the guides:

> A film critic's review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement since it is viewed by readers as a statement of the critic's own opinions and not those of the film producer, distributor or exhibitor. Therefore, any alteration in or quotation from the text of the review which does not fairly reflect its substance would be a violation of the standards set by this part.

Id. § 255.0 (example 1). *See also*, FTC Guides II, *supra* note 9. For a discussion of underlying environmental policy in FTC Guides II, see *supra* notes 20, 68, 113, 117-18 & 157 and accompanying text.

292. 16 C.F.R. § 255.1(a) (1994).

connection between itself and the seller of certified products,[293] and marketers may not script reactions to products, nor use an endorser's findings out of context.[294] Where an organization holds itself out as an expert in the field of testing, it must use qualified experts or "standards previously adopted by the organization and suitable for judging the relevant merits of such producers."[295] In addition, the organization must come to its conclusion "by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization."[296] Although the Endorsement Guides have deterred some false or misleading advertisers, case-by-case enforcement indicates that real developments will evolve in FTC's typical leisurely fashion.[297] Up until now, the

293. *See id.* § 255.5. The pertinent text reads:

> When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorser . . . such connection must be fully disclosed. . . . [W]hen the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reasons to know or to believe that if the endorsement favors the advertised product some benefit . . . would be extended to the endorser.

Id.

294. *See id.* §§ 255.1, 2. The Guides require "[a]dvertisements presenting endorsements by what are represented, directly or by implication, to be 'actual consumers' . . . [to] utilize actual consumers, in both the audio and video or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised products." *Id.* § 255.2(b). While FTC permits "endorsement messages . . . not . . . in the exact words of the endorser, unless the advertisement affirmatively so represents," the Commission disallows "endorsement[s] . . . presented out of context [ ] or reworded so as to distort in any way the endorser's opinion or experience with the product." *Id.* § 255.1(b).

295. *Id.* § 255.4. According to the guides, an expert's endorsement

> must be supported by an actual exercise of his expertise in evaluating product features or characteristics with respect to which he is expert and which are both relevant to an ordinary consumer's use of or experience with the product and also are available to the ordinary consumer. The evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement.

Id. § 255.3(b).

296. *Id.* § 255.4.

297. For a critique of FTC's case-by-case approach, see *supra* notes 12-16, 8-79, 155-66 & 288-96 and *infra* notes 329-37 and accompanying text. Since the inception of its Endorsement Guides, FTC has attempted enforcement on a case-by-case basis. *See, e.g.*, Splitfire, Inc., File No. 952-3029 (1997) (consent order in which Splitfire agreed to cease and desist advertising effectiveness of vehicles' fuel economy, level of emissions, horsepower or cost savings without substantiating claims with proper scientific testing and endorsement); Beverly Hills Weight Loss Clinics Int'l, Inc., File No. 912-3248 (1993) (consent order in which Beverly Hills Weight

guides have failed to inject environmental policy into the regulation of certification programs, and hence have permitted subjective, environmentally uninformed judgments to withstand scrutiny.[298]

2. *Unfair Competition Doctrine Spells Relief*

The law of unfair competition is primarily comprised of torts that cause an economic injury to business through a deceptive or wrongful business practice.[299] What constitutes an "unfair" act var-

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Loss Clinics agreed to cease and desist from advertising support of clients without securing proper endorsement); Bristol-Meyers Co., 102 F.T.C. 21 (1983), *aff'd*, 738 F.2d 554 (2d. Cir. 1984) (ordering drug manufacturer to cease and desist advertising its product as free-from-side-effects without proper endorsements); In re Cliffdale Assoc., 103 F.T.C. 110 (1984) (requiring manufacturer to cease and desist using endorsements to advertise product without proper authorizations); Cooga Mooga, Inc., 92 F.T.C. 310 (1978), 98 F.T.C. 814 (1981) (ordering acne skin care manufacturer to cease and desist advertising its product through misleading endorsements); Amstar Corp., et al., 83 F.T.C. 659 (1973) (preventing use of false endorsements and nutritional claims by sugar manufacturer). Only once amended, the Endorsement Guides have *slowly* injected policy into the advertising arena and brought marketers into conformance. For further discussion of FTC's gradual regulatory attempts in the area of nutrition labels, see *supra* notes 104, 156, 159-61, 209 & 219-20 and accompanying text. It is unlikely that, if applied, the FTC Guides I & II will shape the way environmental product certifiers conduct their evaluations. Given the fact that FTC does not intend to inject environmental policy into its guidelines, the likelihood of non-deceptive environmental marketing strategies is slim. *See* FTC Guides II, *supra* note 9. For a discussion of FTC's intention not to inject environmental policy into its environmental marketing guides, see *supra* notes 82-87, 97 & 103-05 and accompanying text.

298. *See* Grodsky, *supra* note 5, at 198 (pointing to selective enforcement, understaffing and evidentiary obstacles as impediments to Endorsement Guides utility). One must also keep in mind that the Endorsements Guides have not been enacted into law and merely serve as a compliance guideline. Until some binding law is enacted, it is improbable that certifiers or marketers will effectively change their practices. For a complete discussion of third-party certification programs and their effectiveness, see *supra* notes 239-88 and accompanying text.

299. *See* DEE PRIGDEN, CONSUMER PROTECTION AND THE LAW § 2.08 (1992). Initially, common law tort actions, such as negligent misrepresentation or deceit, provided relief for wronged consumers. *See id. See, e.g.*, Hanberry v. Hearst Corp., 81 Cal. Rptr. 519 (Ct. App. 1969) (stating plaintiff had cause of action for physical injuries against Good Housekeeping after slipping while wearing shoes that bore its seal-of-approval). Consumers had little chance of prevailing on a cause of action for deceit because of the extremely difficult task of proving scienter. *See* RESTATEMENT (SECOND) OF TORTS § 552 cmt. h (1977). When establishing a negligent misrepresentation claim under the Restatement (Second) of Torts formulation, a cause of action lies with the group of persons for whose benefit the information is provided. *Id.* § 552(1). In its earliest stages, unfair competition consisted solely of a cause of action against misrepresentations about the source of goods or services. *See* PRIGDEN, *supra*. *See, e.g.*, International News Serv. v. Associated Press, 248 U.S. 215 (1918) (creating tort of misrepresentation). Eventually, courts identified causes of action for a vendor's misrepresentations about the nature or characteristics of its own goods or services. *See id.* Courts required, however, proof of resulting harm to plaintiff's business goodwill. *See id. See, e.g.*,

ies with the context of the business, the action under examination and the facts of the individual case. The common law tort of false advertising rectifies a competitor's misrepresentations about the nature or characteristics of its own goods or services when the plaintiff can demonstrate resulting harm to his business' goodwill.[300] The common law commercial disparagement tort redresses a defendant's misrepresentations about the nature or character of the plaintiff's goods or services.[301] As a general rule, the law of unfair competition is governed by state common law or by virtue of state codification or modernization of the original common law version.[302]

Judicial interpretation of section 43(a) of the Lanham Act establishes a federal cause of action paralleling the common law torts of "passing off," "false advertisement" and "commercial disparagement."[303] Pursuant to section 43(a) of the Lanham Act, competi-

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National Basketball Assoc. v. Motorola, Inc. Nos. 96-7975, 96-7983 (CON), 96-9123 (XAP) (2d Cir. 1997) (denying recovery because no damages were shown as result of defendant's actions). The American Law Institute has expanded its treatise on the law of unfair competition and issued a set of guidelines directly on this topic. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 1-46 (1995). Section 4 describes misrepresentation as follows:

> One is subject to liability to another . . . [for deceptive marketing] if, in connection with the marketing of goods or services, the actor makes a representation likely to deceive or mislead prospective purchasers by causing the mistaken belief that the actor's business is the business of the other, or that the actor is the agent, affiliate, or associate of the other, or that the goods or services that the actor markets are produced, sponsored, or approved by the other.

Id. § 4.

300. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 5. The provision reads in pertinent part:

> One is subject to liability . . . if, in marketing goods or services manufactured, produced, or supplied by the other, the actor makes a representation likely to deceive or mislead prospective purchasers by causing the mistaken belief that the actor or a third person is the manufacturer, producer, or supplier of the goods or services if the representation is to the likely detriment of the other.

Id.

301. *See id.* § 6. The pertinent text of § 6 reads as follows:

> One is subject to liability to another for [commercial disparagement] if, in marketing goods or services of which the other is truthfully identified as the manufacturer, producer, or supplier, the actor makes a representation relating to the goods or services that is likely to deceive or mislead prospective purchasers to the likely commercial detriment of the other.

Id.

302. *See* PRIGDEN, *supra* note 299.

303. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (1994). Under this section, there is liability for any "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." *Id.*

tors and consumers may sue manufacturers who instate deceptive environmental marketing schemes.[304] Current interpretation of the common law false advertising tort no longer requires a plaintiff to demonstrate direct, actual loss of customers resulting from a defendant's allegedly false advertisement. Although admittedly broadening the tort, courts refuse to presume a likelihood of injury and causation from the falsity of the advertisement and the fact that the parties compete.[305] Because of its flexibility and reach, plaintiffs typically employ section 43(a) both as an alternate cause of action and as protection of private interests omitted from the scope of other intellectual property doctrines.[306] In the event plaintiffs make use of section 43(a), the Lanham Act may serve as a litigative push toward federal environmental marketing regulation and preemption.

3. Recovery According to RICO

Under the Racketeer Influenced and Corrupt Organizations Act (RICO),[307] plaintiffs may bring private actions against defendants falsely or deceptively claiming environmental benefits. RICO makes it illegal for any person to conduct an enterprise that affects interstate commerce through a pattern of racketeering activity, or to invest racketeering income in a business that affects interstate commerce.[308] Within RICO's catalogue of requisite racketeering activities, the only crimes applicable to green marketers are mail

304. *See id.* Lanham Act confers a private right of action on "any person who believes that he or she is or is likely to be damaged." *Id.* This includes competitor and consumer suits. *See, e.g.*, L'Aiglon Apparel, Inc. v. Lana Lovell, Inc., 214 F.2d 649, 651 (3d Cir. 1954) (rejecting theory in which cause of action under § 43(a) requires passing off and finding nothing new to indicate "that this section is merely declarative of existing law"). There are no prohibitions to consumer or competitor suits in the context of environmental marketing.

305. For in-depth treatment of Lanham Act § 43(a), *see generally* 1 J.T. MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (3rd ed. 1992); R. CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES (L. Altman 4th ed. 1981 & Supp.).

306. *See* MCCARTHY, *supra* note 305 and accompanying text, at §§ 10.02-10.06. *See, e.g.*, Two Pesos, Inc. v. Taco Cabana, Inc., 112 S. Ct. 2753 (1992) (permitting action for trade dress infringement where determined not registrable under Lanham Act). The Supreme Court stretched § 43(a) of Lanham Act to fit actions not covered by Lanham Act. The author purports that this case leaves the door open to claims of deceptive environmental advertisements.

307. 18 U.S.C. §§ 1300-2000 (1994).

308. *Id.* §§ 1962(a), (c). According to RICO,

> [i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any inter-

fraud and wire fraud.[309] Both the federal government and private parties may bring a RICO suit against environmental advertisers.[310] Although the United States may only seek criminal punishment for violators, successful private civil plaintiffs enjoy a wide array of remedies.[311] Civil relief includes not only injunctions and reasonable attorneys' fees, but also treble damages.[312] In the event a RICO claimant triumphs in court, he will likely reap substantial remuneration.[313] Furthermore, current RICO litigation suggests that the stigma of conviction fashions the statute into a potentially powerful weapon against deceptive green advertisers.[314]

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est in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id. § 1962(a). RICO also makes it a crime "for any person employed by or associated with any enterprise engaged in . . . a pattern of racketeering activity or collection of unlawful debt." *Id.* § 1962(c).

309. *See id.* §§ 1341, 1343. Mail fraud, according to RICO, includes:

> [use of postal services by persons who] devise[ ] or intend[ ] to devise any scheme or artifice to defraud, or . . . obtain[ ] money by means of false or fraudulent pretenses, representations, or promise[ ], or . . . sell, dispose of, loan, exchange,. . . give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article.

Id. § 1341. RICO describes a person engaged in fraud by wire, radio and television, as

> [one who] devise[s] or intend[s] to devise any scheme or artifice to defraud, or . . . obtain[s] money or property by means of false or fraudulent pretenses, representations, or promises [and] transmits or causes to be transmitted by means of wire, radio, or television communications in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme.

Id. § 1343.

310. *See* 18 U.S.C. §§ 1963, 1964. RICO does not limit the initiation of lawsuits to the federal government. It grants jurisdiction to the United States District Courts and allows the Attorney General to institute proceedings. *See id.* §§ 1964(a), (b). RICO also explicitly permits "*[a]ny person* injured in his business or property . . . [to] sue." *Id.* § 1964(c) (emphasis added). Federal courts have heard RICO cases brought by both the United States government and private litigants. *See, e.g.*, R.R. Brittingham v. Mobil Corp., 943 F.2d 297 (3d Cir. 1991) (suit commenced by private individuals); B.F. Hirsch v. Enright Refining Co., 751 F.2d 628 (3d Cir. 1984) (suit commenced by federal government). For a discussion of the remedies available to successful litigants, see *infra* notes 311-12 and accompanying text.

311. *See* 18 U.S.C. §§ 1963, 1964. Criminal proceedings may only be brought by the federal Attorney General's Office. *See id.* § 1963. Only private litigants enjoy civil remedies. *See id.* § 1964.

312. *See id.* § 1964(c) (noting that private RICO litigants "shall recover threefold the damages [they] sustain[ ] and the cost of the suit, including a reasonable attorney's fee").

313. *See id.*

314. *See* Appletree Square I, Ltd. v. W.R. Grace & Co., 29 F.3d 1283 (8th Cir. 1994) (dismissing RICO claim because of lack of showing of detrimental reliance on fraudulent environmental representations); *Brittingham*, 943 F.2d at 297 (granting defendant's summary judgment motion because plaintiff failed to link racke-

V. INTERNATIONAL ORGANIZATION FOR STANDARDIZATION

A. ISO Assesses Green Marketing

Founded in 1946, the International Organization for Standardization (ISO) is a worldwide federation of national standards bodies representing more than 100 countries.[315] The existence of non-harmonized standards for similar technologies in different countries or regions can contribute to so-called "technical barriers to trade."[316] Export-minded industries have long sensed the need to agree on world standards to help rationalize the international trading process. This was the origin of ISO.[317]

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teering activities and ultimate injury); Prudential Ins. Co. v. United States Gypsum Co., 828 F. Supp. 287 (D.N.J. 1993) (denying defendant's motions to dismiss RICO claim and holding that actual detrimental reasonable reliance is not necessary element of environmental advertising under RICO); Petro-Tech Inc. v. Western Co. of N. Am., 824 F.2d 1349 (3rd Cir. 1987) (dismissing RICO claim and holding that corporate "enterprise" cannot be held vicariously liable for its own employees' RICO violations under theory of respondeat superior); *B.F. Goodrich*, 751 F.2d at 628 (dismissing RICO claim and holding that statute applies only when defendant charged with RICO violation is distinct from enterprise).

315. *See Introduction to ISO* (last updated Jan. 27, 1997) <http://www.ico.ch/infoe/intro.html> [hereinafter *Introduction to ISO*]. *See also* Roht-Arriaza, *supra* note 42, at 489 (laying foundation for current ISO standard-setting effort); U.S. EPA, ISO 14000: INTERNATIONAL ENVIRONMENTAL MANAGEMENT STANDARDS (EPA 742-F-95-006) (1995) [hereinafter EPA ON ISO] (discussing basic structure of ISO 14000); Balikov & Cavanaugh, *supra* note 44 (same); Gold, *supra* note 44 (same). ISO's non-governmental mission "is to promote the development of standardization and related activities in the world with a view to facilitating the international exchange of goods and services and to developing cooperation in the spheres of intellectual, scientific, technological, and economic activity." *Introduction to ISO, supra.*

316. Staffin, *supra* note 239, at 281 (lamenting need for harmonization in eco-labeling arena). "[D]eveloping countries have complained that the proliferation of different eco-labeling schemes in recent years can function as a trade barrier by making it increasingly more costly to enter North markets." *Id. See also Introduction to ISO, supra* note 315. For further discussion of potential "technical barriers to trade" and the need for harmonization in the eco-labeling arena, see *supra* notes 41-47 & 279-81 and *infra* notes 340-41 and accompanying text.

317. *See Introduction to ISO, supra* note 315. A member body of ISO is the national body "most representative of standardization in its country." Roht-Arriaza, *supra* note 42, at 489 (quoting INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, MOMENTO 3 (1993)). "Each national committee determines its composition; while some national committees are almost entirely composed of private interests, others have substantial governmental representation." *Id.* A majority of the ISO member bodies are governmental organizations or organizations incorporated by public laws. *See id.* The United States' official member is the American National Standards Institute (ANSI). *See* U.S. EPA, ROLE OF VOLUNTARY STANDARDS (EPA 742-F-95-005) (1995) [hereinafter EPA ON VOLUNTARY STANDARDS]. It follows that only one member body is accepted for membership. The member bodies have four principle tasks:

> (1) informing potentially interested parties in their country of relevant international standardization opportunities and initiatives; (2) organizing so that a concerted view of the country's interest is presented during in-

From the outset, ISO concentrated its scrutiny and guidelines on the technical aspects of production.[318] In the last decade, however, it has evinced a broader focus: the environmental arena. Instrumental in the development of environmental standards was the enthusiastic espousal of ISO 9000 quality management and assurance principles by industry, scholars and regulators.[319] Heeding the manifold eco-labeling schemes and the corresponding clamor

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ternational negotiations leading to standards agreements; (3) ensuring that a secretariat is provided for those ISO technical committees [TCs] and subcommittees [SCs] in which the country has an interest; and (4) providing their country's share of financial support for the central operations of ISO through payment of membership dues.

INTRODUCTION TO ISO, *supra* note 315.

The technical work of ISO is highly decentralized, and is carried out in a hierarchy of some 2,700 TCs, SCs and working groups (WGs). *See id.* "In these committees, [highly] qualified representatives of industry, research institutes, governmental authorities, consumer bodies and international organizations from all over the world come together as equal partners in the resolution of global standardization problems." *Id.* ISO's work products are known as International Standards. *See id.* Exhausting all standardization fields except electrical engineering, an ISO initiative may range from a mere four-page document to a 1000-page volume. *See id.* The need for a standard is usually expressed by an industry sector to a national member body, which, in turn, proposes the item to ISO. *See id.*

To be adopted, an International Standard must brave a rigorous three-phase process. "[T]he first phase involves defini[ning] . . . the technical scope of the future standard." *Id.* The second phase, called the consensus-building stage, entails the negotiation of detailed specifications within the standard. *See id.* The third and final stage embodies the formal approval procedures of the resulting draft International Standard. *See id. See also* Roht-Arriaza, *supra* note 42, at 489-90 (outlining chronological processing of ISO standards). The procedure of the resulting draft international is as follows: first, TCs are formed by ISO Council; second, TC members delegate work to SCs and WGs; third, SCs and WGs negotiate the proposals into a committee draft (CD); finally, the CD is scrutinized by TCs and approved by consensus. *See Introduction to ISO, supra* note 315 (discussing three-step process under which ISO standards evolve); Roht-Arriaza, *supra* note 42, at 489-90 (same). Acceptance criteria for an ISO standard stipulate approval by two-thirds of ISO members that have participated actively in the standard's development process, and approval by 75% of all members that vote. *See Introduction to ISO, supra* note 315. Upon garnering the requisite votes, the agreed text is published as an ISO International Standard. *See id.*

318. *See* Gold, *supra* note 44; Roht-Arriaza, *supra* note 42; *Introduction to ISO, supra* note 315; Balikov & Cavanaugh, *supra* note 44, EPA ON ISO, *supra* note 315. EPA notes that "ISO has promulgated more than 8,000 internationally accepted standards for everything from paper size to film speeds." EPA ON ISO, *supra* note 315.

319. *See Introduction to ISO, supra* note 315. For a discussion of the five events that cleared the path for environmental standards, see Roht-Arriaza, *supra* note 42, at 490-91. These events include: (1) new EU technical regulation producing competitive effects on global economy; (2) GATT's Uruguay Round negotiations; (3) fragmented environmental marketing regulation; (4) success of ISO 9000; (5) delegates at Nations Conference on Environment and Development solicited exploration into "sustainable development." *Id. See also* Balikov & Cavanaugh, *supra* note 44 (discussing events clearing path for ISO development of international environmental standards).

for uniformity, ISO began crafting a series of voluntary environmental management standards.[320] Many "expect [the standards] to become the worldwide benchmark for environmental improvement."[321]

Once ISO resolved to draft and implement voluntary environmental guidelines, it erected Technical Committee 207 which was divided into various subcommittees.[322] ISO designed a cluster of subcommittees, including the environmental labeling subcommittee (SC3), to focus its attention more on product evaluation than on actual production procedures.[323] After identifying three categories of product labels, SC3 assembled working groups for the purpose of "develop[ing] and harmoniz[ing] methodologies, terms

320. *See generally* Genevieve Mullett, Note, *ISO 14000: Harmonizing Environmental Standards and Certification Procedures Worldwide*, 6 MINN. J. GLOBAL TRADE 379 (1997) (suggesting that "[w]hile the harmonization of standards under ISO 14000 . . . [may] not produce a level playing field in the global trade context, it will reduce conflicts between national and regional environmental programs thereby allowing organizations to avoid duplication of effort and save time and money"). For a discussion of the many eco-labeling programs espoused by various countries and private organizations, see *supra* notes 239-87 & 315-19 and *infra* notes 320-45 and accompanying text. For a discussion of the eco-labeling programs in the United States, see *supra* notes 260-87 and accompanying text. For a discussion about the need for uniformity in the eco-labeling arena, see *supra* notes 271-87 and *infra* note 346 and accompanying text.

321. Balikov & Cavanaugh, *supra* note 44; Gold, *supra* note 44. For a discussion of ISO standards not becoming the benchmark for environmental improvement, see Mullett, *supra* note 320, at 400. According to Mullett,

> the . . . [ISO] has taken a great step toward this goal of harmonization; however, actual harmonization is not likely to occur in the near future. . . . While the ISO standards may alleviate some of the costs and difficulties faced by organizations doing business multinationally, organizations should be cautious. Implementing the standards will be costly and it is not yet clear how widely accepted the standards will be. . . . While ISO 14000 is likely to have great impact in certain industries, it is not likely to have a major impact on the overall trade versus the environment dispute.

Id.

322. *See Introduction to ISO*, *supra* note 315. ISO erected TC 207 for the purpose of developing environmental management standards. *See* EPA ON VOLUNTARY STANDARDS, *supra* note 315. TC 207 subdivided into various SCs. *See Introduction to ISO*, *supra* note 315. "The subcommittees constitute two functional groups: those focused on production processes, and those focused on products themselves. . . . The second group involves the subcommittees on environmental labelling, life-cycle analysis, and environmental aspects of product standards." Roht-Arriaza, *supra* note 42, at 503.

323. *See* Roht-Arriaza, *supra* note 42, at 503 & 510. For a discussion of the structure of ISO, see *supra* notes 315-21 and accompanying text. For a discussion of the procedure involved in the development of standards, see *supra* notes 317 & 322 and *infra* notes 324-28 and accompanying text. For a discussion of the work of ISO's environmental labeling subcommittee SC3, see *supra* note 317 and accompanying text.

and principles."[324] The environmental labeling subcommittee designated independent third-party certification as type one labels.[325] Within this classification, certifiers recognize the best environmental performers in numerous product categories. Type two labels encompass self-declared environmental claims by manufacturers about their products.[326] Like SCS' Environmental Report Card, type three labels provide information on the possible environmental impacts of a product.[327] Instead of weighing products against each other, these labels reserve all judgments for consumers.[328]

FTC boasts affinity between FTC Guides I & II and ISO's draft standard on "Self Declaration Environmental Claims."[329] Although

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324. Roht-Arriaza, *supra* note 42, at 512; *Introduction to ISO, supra* note 315.

> The labelling subcommittee and its various working groups aim to develop and harmonize methodologies, terms, and principles for the various types of labelling. The subcommittee is not attempting to create a single labelling standard. Rather, it hopes to produce draft goals, principles, and specific guidance documents for the development and operation of different types of labels.

Roht-Arriaza, *supra* note 42, at 312. *See Eco-Labelling Tops ISO Agendas,* ENVT'L BUS., May 22, 1996, *available in* 1996 WL 8692533 (discussing agenda of TC 207). "Experts are now working vigorously on draft standards dealing with ecolabelling, lifecycle analysis, and environmental performance evaluation." *Id.*

325. *See Standards Council of Canada, Eco-Labels Stick to the Facts with ISO 14020* (last modified Jan. 27, 1997) <http://www.ico.ch/infoe/canada.html> [hereinafter *Canada on ISO*]. "Labels from independent third parties who award them to the best environmental performers in various product categories. For example, Canada's Environmental Choice program awards a graphic logo of three doves intertwined to form a stylized maple leaf, for use on top of environmentally responsible products." *Id.* For a discussion of Canada's environmental labeling program, see *supra* notes 252-53 and accompanying text. United States supports two third-party environmental labeling programs: Green Seal and SCS. Green Seal, alone, recognizes the best environmental performers in certain enumerated categories. For a discussion of Green Seal's environmental labeling program, see *supra* notes 10, 36-40, 263-66 & 271-87 and accompanying text. For a discussion of SCS' Report Card, see *supra* notes 10, 36-40 & 267-87 and accompanying text.

326. *See Canada on ISO, supra* note 325.

327. *See id.* For a discussion of SCS' Report Card, see *supra* notes 10, 36-40 & 267-87 and accompanying text.

328. *See Canada on ISO, supra* note 325. If ISO certifications are used in conjunction with state and federal programs, there is a good chance consumers will become confused. Too many labels certainly spoil the significance. The programs will only work if there are attempts at integration and a willingness to work together. Otherwise, consumers will receive mixed messages. It is likely that frustrated consumers will either submit to the product with the most labels or will scrap their environmentally conscientious purchasing altogether.

329. *See* Starek, *supra* note 18. "On the international level, the International Standards Organization . . . draft standard on 'Self-Declaration Environmental Claims' . . . is quite consistent with the Commission's Green Guides; in fact it adopts many of the same principles almost verbatim." *Id. See also* ISO SELF-DECLARATION, *supra* note 45; FTC Guides I, *supra* note 17; FTC Guides II, *supra* note 9. For a discussion and the pertinent text of ISO's draft standard on environmental labeling, see *infra* notes 330-37 and accompanying text. For a discussion and the

it is conceivable that ISO began its version with FTC guidelines, the Organization is not pursuing the same path as the Commission. First, FTC rejects the life-cycle analysis theory of environmental benefits, while ISO embraces it.[330] Because ISO has the assistance of many research organizations and governmental bodies, it is in a better position to forge a unified LCA and to implement it internationally.[331] Had Congress empowered EPA to issue interpretive guidelines and definitions, United States green marketing regulation might more easily harmonize with ISO efforts. Second, the objectives of the two guidelines differ. While FTC limits its application to deceptive and misleading advertising, ISO endeavors "to contribute to a reduction in the environmental burdens . . . and to harmonize the use of environmental claims."[332] For ISO, non-deceptive environmental representations are merely incidental perks.[333] Third, ISO bans the use of general environmental claims, but FTC permits them upon proper substantiation.[334] Fourth, in-

pertinent text of FTC Guides II, see *supra* notes 9-21 & 82-105 and accompanying text.

330. *See* FTC Guides II, *supra* note 9, § 260.7 n.2; *Introduction* to ISO SELF-DECLARATION, *supra* note 45 (stating in pertinent part: "[t]he proliferation of environmental claims created a need for environmental labelling standards which require that, where appropriate, life-cycle considerations be taken into account when such claims are developed"). FTC Guides II reads: "[t]hese guides do not currently address claims based on a 'lifecycle' theory of environmental benefit. The Commission lacks sufficient information on which to base such claims." FTC Guides II, *supra* note 9, § 260.7 n.2. For a compilation of industry's, agency's, and private environmentalists' views on life-cycle assessment methodology, see HEARINGS 1995, *supra* note 89, at 409-46. For an in-depth discussion of life-cycle assessment analyses, *see generally* Curran, *supra* note 241; EPA ON LIFE CYCLE ASSESSMENT METHODOLOGY, *supra* note 131; EPA ON GLOBAL LABELS, *supra* note 120; EPA ON CERTIFICATION AND LABELING PROGRAMS, *supra* note 36; Wynne, *supra* note 2, at 64-90; *supra* notes 115-16, 131-32, 165-66, 239-88 & 315-29 and *infra* notes 331-28 & 330 and accompanying text.

331. *See Introduction to ISO*, *supra* note 315 (explicating myriad of governmental, private and research organizations affiliated with ISO).

332. ISO SELF-DECLARATION, *supra* note 45, § 1.1. *See also* FTC Guides II, *supra* note 9, § 260.1.

333. *See* ISO SELF-DECLARATION, *supra* note 45, § 1.1. The anticipated benefits of ISO's standards are as follows:

> (a) accurate, verifiable, nondeceptive environmental claims;
> (b) increased potential for market forces to stimulate environmental improvements product, processes and service delivery;
> (c) to better enable purchasers to make informed choices;
> (d) prevention or minimization of unwarranted claims;
> (e) a reduction in marketplace confusion; and
> (f) a reduction of restrictions and barriers to international trade.

Id.

334. *See id.* § 6. The pertinent text of the ISO guideline reads:

> An environmental claim that is vague or non-specific or which broadly implies that a product is environmentally . . . benign shall not be used. Environmental claims which should not be made include: "environmen-

stead of contriving "safe harbor" examples, ISO delimits exploitation of *specific* environmental terms.[335] Also, it identifies and defines terms seen consistently in trade that FTC has not yet considered.[336] Finally, ISO's comprehensive scheme incorporates all three chief environmental label types.[337] With FTC's sole emphasis on truth-in-advertising, there is little chance for consumer education, product innovation or favorable environmental consequences.

B. Implications and Predictions

Despite the fact that compliance is voluntary, ISO standards have the potential of precipitating far-reaching effects. For example, companies contemplating the environmental repercussions of their actions may modernize their products or distinguish between subcontractors and agents on the basis of environmental prac-

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tally safe," "environmentally friendly," "environmentally friendlier," "earth friendly," "non-polluting," "green," "dolphin friendly," "nature's friend" and "ozone friendly." This list is illustrative and not exhaustive.

Id. *Compare* FTC Guides II, *supra* note 9, § 260.5. The pertinent text of FTC Guides II reads: "any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product or package, must at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim." FTC Guides II, *supra* note 9, § 260.5.

335. *See* ISO SELF-DECLARATION, *supra* note 45, § 7.1. The pertinent text of the ISO standard reads:

> This clause provides definitions and usage restrictions for selected terms commonly used in environmental claims. The requirements in this clause supplement, but do not replace the requirements in other clauses of this standard. The onus on a claimant to follow the principles set out in clause 7 shall not be diminished by substituting like terms.

Id. *Compare* FTC Guides II, *supra* note 9, §§ 260.3, 260.6, 260.7. The pertinent text of FTC Guides II reads: "[i]n many of the examples, one or more options are presented for a qualifying claim. These options are intended to provide a 'safe harbor' for marketers who want certainty about how to make environmental claims." FTC Guides II, *supra* note 9, § 260.3.

336. *See* Starek, *supra* note 18 (admitting ISO covers more specific terms than FTC Guides). *See, e.g.*, ISO SELF-DECLARATION, *supra* note 45, §§ 7.4, 7.8, 7.9, 7.10, 7.12 and 7.13 (defining and delimiting use of following terms: energy recovery material, energy-efficient, energy-conserving, energy-saving, reduced resource use, water-conserving manufacturing, disassembly and sponsorship). The pertinent text of ISO defines disassembly as "[a] claim associated with a product which is designed to be disassembled at the end of its useful life into identifiable categories of recyclable and/or reusable materials." *Id.* § 7.12.1.

337. For a discussion of the three chief environmental label types, see *supra* notes 325-28 and accompanying text. For a discussion of Canada's environmental choice program which supports type one environmental labeling scheme, see *supra* notes 340-41 and accompanying text. For a discussion of SCS' Report Card, a type three program, see *supra* notes 10, 36-40 & 268-87 and accompanying text. For a discussion of the advantages associated with addressing all three types of environmental labeling programs, see *supra* notes 239-88 & 315-36 and *infra* notes 337-45 and accompanying text.

tices.[338] As already evidenced, consumers vote with their dollars and purchasing products from greener manufacturers.[339] Because of GATT's sweeping scope, ISO drafters must word standards carefully so as to avoid potential trade barriers.[340] A violation of the trade agreement, however, will result only if a member body statutorily binds manufacturers through the codification of ISO guidelines into national law.[341] Key characteristics of ISO meetings, such as the domination of industrial countries and lack of input from developing countries, may lead to geographically biased standards.[342] Correspondingly, the exhorbitant cost of attending such functions inhibits underprivileged nations' participation, and ultimately impacts on the adequacy of ISO initiatives.[343] There is also the likelihood that drafters will eliminate disputed points, leaving a "least-common-denominator standard with few teeth."[344] While all coun-

338. *See* Roht-Arriaza, *supra* note 42, at 515-18 (suggesting ISO standards may help shift consumers and manufacturers to pollution preventers). For a discussion of the benefits and drawbacks to eco-label programs, see *supra* notes 239-88 and accompanying text.

339. For a discussion of the advent of green consumerism, see *supra* note 2 and accompanying text.

340. *See* Final Act Embodying the Results of the Urguary Round of Multilateral Trade Negotiations, Agreement on Technical Barriers to Trade, Apr. 15, 1994, art. 2.4, *reprinted in* H.R. Doc. No. 316, 103d Cong., 2d Sess. 1428 (1994) [hereinafter Technical Barriers to Trade]. Because GATT prevents countries from forging technical barriers to trade, violations only arise when the government statutorily enforces the action. *See id.* Third-party certifiers are, therefore, safe from GATT and NAFTA implications. Since voluntary guidelines are not enforceable government actions, they do not violate the relevant international treaties. For further discussion of technical barriers to trade in the environmental labeling context, see *supra* notes 41-43 & 273-82 and *infra* note 341 and accompanying text.

341. *See* Technical Barrriers to Trade, *supra* note 340.

342. *See* Roht-Arriaza, *supra* note 42, at 523-29 (relying heavily on such process-related concerns as part of analysis). TC 207 in particular "is heavily concentrated in large global industry and industry-related government standard-setting bodies." *Id.* Roht-Arriaza's suggestion is that only a few countries will craft the standards to which all abiding countries must adhere. *See id.* The result of ISO standards will be a set of rigorous standards which developing countries cannot feasibly meet, but must meet to maintain its position in global trade. The situation is like a "Catch-22." The livelihood of developing countries is their exports. To export, there must be compliance with ISO guidelines. However, compliance with the guidelines requires capital. Without the exports, developing countries may not adequately adopt ISO provisions into their manufacturing. For a discussion of FTC's "Catch-22," see *supra* notes 21 & 209 and accompanying text.

343. *See* Roht-Arriaza, *supra* note 42, at 525 (pointing out "costs of participation" further paralyze potential involvement by underdeveloped nations).

344. *Id.* at 529. "Although the ISO rules do not require absolute consensus, representatives make a sincere attempt to win the approval of all major participants. The danger, of course, is that disputed points will simply be omitted." *Id.* FTC Guides II are representative of this concern. The non-binding status and safe harbor examples provide a regulatory tool without many teeth. For a discussion of FTC Guides II and pertinent text, see *supra* notes 9-21, 82-105 & 288-98 and accom-

tries may easily comply, the standards will not inject needed environmental policy into the global trade arena. Likewise, because compliance is merely voluntary, many may opt not to expend the time and effort to improve production procedures.[345] Clearly, ISO alone will not effectuate environmentally preferable products; nevertheless, its standards remain a good point of departure for regulators.

VI. Proposal of Uniform Federal Legislation

Has laissez-faire economics drowned out the cries of the Lorax? Are marketers still following in the footsteps of slick Sylvester McMonkey McBean? Is the environmental awareness of consumers peaking or waning? Contemporary fragmented approaches to green marketing management are ineffective. As a result, consumers, manufacturers and regulators alike have turned a blind eye on the real issue: environmental education, appreciation and protection.

Uniformity is needed at the federal level.[346] Elimination of misleading and deceptive advertisements and implementation of environmentally sound trade practices are the twin goals of envi-

panying text. For a comparison between FTC Guides II and ISO draft standards, see *supra* notes 329-37. For a catalogue of voiced criticisms on FTC Guides I, see generally Hearings 1995, *supra* note 89. For a discussion of the author's solutions to the problems associated with environmental marketing, see *infra* note 346 and accompanying text.

345. *See* Roht-Arriaza, *supra* note 42, at 531. For a discussion of the concerns associated with voluntary compliance of environmental guidelines or eco-labels, see *supra* notes 12-21, 58-105, 155-66, 239-87 & 315-44 and accompanying text.

346. Part VI of this Comment contains the author's proposals for regulating the environmental market. The author's findings are supported by the materials contained in Parts I-V. For a critique of FTC's case-by-case enforcement methodology, see *supra* notes 12-16, 58-79, 155-66, 288-98 & 328-37 and accompanying text. For a discussion of EPA efforts in regulating the environmental market, see *supra* notes 22-27 & 106-51 and accompanying text. For a discussion of the necessity of a joint regulatory plan, see *supra* notes 153-66, 209 & 219-20. For a discussion of the myriad of state environmental marketing laws and the applicable difficulties associated with non-conforming regulatory schemes, see *supra* notes 167-223 and accompanying text. For a discussion of first amendment implications of requisite environmental marketing restrictions, see *supra* notes 224-38 and accompanying text. For a discussion of international and national eco-label programs, see *supra* notes 239-88 and accompanying text. For a discussion of life-cycle product assessments, see *supra* notes 115-16, 131-32, 165-66, 239-88, 315-28 & 330 and accompanying text. For a discussion of ISO's environmental marketing guidelines, see *supra* notes 315-45 and accompanying text. For a discussion of potential barriers to trade that are associated with regulation of environmental marketing, see *supra* notes 41-43, 273-82 & 340-41 and accompanying text. To further support the author's joint-agency regulatory plan, it is necessary to review FTC's Nutritional Labeling guidelines. For a discussion of the Nutritional Labeling guidelines, see *supra* notes 104, 156, 159-61, 209 & 219-20 and accompanying text.

ronmental labeling. Legislators will easily fulfill these objectives through the joint efforts of FTC and EPA. On account of EPA's technical expertise, environmental policy mandate and regulatory experience, it should define terminology and promulgate guidelines. FTC should incorporate EPA's determinations into interpretive rules and scrutinize advertisers' representations in light of Agency findings. To promote global harmony, EPA should liken its life-cycle analysis to that of ISO. Furthermore, the federal government must entirely preempt state action in the green marketing context. Otherwise, states enacting excessively restrictive legislation will hamper industry from taking strides toward environmentally-conscientious behavior. Green Seal's and SCS' schemes must collapse into a single federally-run environmental certification program. Keeping a sharp eye on technical barriers to trade, EPA should expand its "Energy Star Program" to envelop all consumer products and services. To facilitate consumer cognizance, the same EPA standards must govern both the truth-in-advertising and consumer-education arms of the environmental labeling program. Finally, drafters should try to coordinate their standards with those of ISO, so as to dodge GATT and NAFTA implications. In view of these treaties, the United States government may not enact guidelines that geographically bias the free flow of trade in the global market.

Because environmental awareness in the marketplace turns on the legislative schemes proposed, regulators have a difficult task ahead of them. Right now, it is unclear in which direction United States' reformers are headed. With the power of reform in its hands, FTC has chosen to slowly arrest the deceptive practices of manufacturers and dismiss the pleas of environmentalists. Such actions make one wonder whether regulators will ever heed the Loraxian warning. Perhaps only time will tell.

Kimberly C. Cavanagh