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## Defining "Green": Toward Regulation of Environmental Marketing Claims

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## DEFINING "GREEN": TOWARD REGULATION OF ENVIRONMENTAL MARKETING CLAIMS

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Roger D. Wynne\*

Americans are awakening environmentally. They are becoming increasingly aware of how they as a uniquely overconsumptive people affect the physical world around them.<sup>1</sup> As this awareness builds, Americans are readily considering themselves environmentalists. A 1988 survey found that more Americans described themselves as environmentalists than as either Republicans or Democrats.<sup>2</sup> A year later, a Gallup Poll reported that an overwhelming 76% of Americans consider themselves environmentalists.<sup>3</sup> But calling oneself an environmentalist is not enough for many Americans. They are seeking ways to improve their environment, to minimize their impact on it, or at least to assuage their guilt over past and present sins.

This awareness and desire to act have given rise to a phenomenon known as "green consumerism."<sup>4</sup> Environmentally conscious shoppers seek products that pose fewer

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1. See, e.g., ABT ASSOCS., INC., EPA CONTRACT NO. 68-D9-0169, ASSESSING THE ENVIRONMENTAL CONSUMER MARKET 1-4 (1990) [hereinafter ABT ASSOCS.]; U.S. EPA, PUB. NO. EPA 530-SW-89-066, PROMOTING SOURCE REDUCTION AND RECYCLABILITY IN THE MARKETPLACE: A STUDY OF CONSUMER AND INDUSTRY RESPONSE TO PROMOTION OF SOURCE REDUCED, RECYCLED, AND RECYCLABLE PRODUCTS AND PACKAGING 39-40 (1989) [hereinafter EPA, PROMOTING SOURCE REDUCTION AND RECYCLABILITY].

2. *DemoMemo*, AM. DEMOGRAPHICS, May 1988, at 58 (reporting the results of a survey conducted by Alert Publishing, Inc.). The survey found that 39% of those surveyed described themselves as environmentalists, while only 20% described themselves as Republicans and 31% as Democrats. *Id.*

3. Schwartz, *Earth Day Today*, AM. DEMOGRAPHICS, Apr. 1990, at 40-41 (citing the GALLUP REPORT, June 1989).

4. The growing wave of green consumerism is discussed in Koenenn, *To Market, to Market—With a Mission*, L.A. Times, Mar. 15, 1990, at E1, col. 2.; *Going for the Green: Taking Stock of the Green Consumer Movement*, ENVTL. ACTION, Nov./Dec. 1990, at 19-23 [hereinafter *Going for the Green*].

threats to the environment. They 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 or aggravate the nation's landfill crisis.<sup>5</sup> By purchasing such products, they can feel that they are doing the right thing, usually without reducing the rate of consumption to which they are accustomed.

Manufacturers and advertisers are rapidly heeding the call of the green consumer through a strategy best described as "green marketing."<sup>6</sup> Hundreds of products—representing more than nine percent of all new products introduced in the U.S. in the first half of 1990 alone—have poured into American markets in the past year emblazoned with some sort of label or claim directed at environmental concerns.<sup>7</sup> As a result, green marketing terms such as "environmentally friendly," "recyclable," and "biodegradable" are becoming household words. In the opinion of some marketing

5. For a popular explanation of the philosophy of green consumerism, see J. ELKINGTON, J. HAILES, & J. MAKOWER, *THE GREEN CONSUMER* 5-11 (1990). For a list of other books on green consumerism, see ABT ASSOCS., *supra* note 1, at 21-22.

The landfill crisis is addressed in OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, PUB. NO. OTA-O-424, *FACING AMERICA'S TRASH: WHAT NEXT FOR MUNICIPAL SOLID WASTE?* 271-75 (1989) [hereinafter OTA] (reporting the EPA's estimate that over 80% of the landfills operating in America in 1988 will close within the next 20 years).

6. See, e.g., Lublin, *States Make "Green" Marketing Tough Sell*, Wall St. J., Dec. 24, 1990, at 11, col. 1. The same strategy also is referred to as "environmental marketing," see Lawrence & Colford, *Green Guidelines Are the Next Step*, *ADVERTISING AGE*, Jan. 29, 1991, at 28, "environmental labeling," see Schorsch, *It's Not Easy Being Green: Can Our Economy Come Clean?*, COUNCIL ON ECON. PRIORITIES RES. REP., Apr. 1990, at 1, 3, or "green labeling," see Meier, *It's Green and Growing Fast, But Is It Good for the Earth?*, N.Y. Times, Apr. 21, 1990, at 48, col. 4. Although the phenomenon of green consumerism has become a force in American markets only recently, the concept is by no means new. See, e.g., Henion, *Ecological Marketing: Will the Normative Become Descriptive?*, in *CONSUMERISM: SEARCH FOR THE CONSUMER INTEREST* 280 (D. Aaker & G. Day 4th ed. 1982) (reprinting an essay published originally in 1979); Kinnear & Taylor, *The Effect of Ecological Concern on Brand Perceptions*, 10 J. *MARKETING RES.* 191 (1973).

7. *Going for the Green*, *supra* note 4, at 19-20 (citing statistics from Marketing Intelligence Service, Inc.). Such products promise to garner increasing shares of the U.S. marketplace; only one-half of one percent of all new products introduced in American markets in 1985 carried a green marketing claim. *Id.* at 20; see also *THE GREEN REPORT: FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING* 4-5 (1990) (authored by the attorneys general of ten states and available from the Minnesota Attorney General's Office) [hereinafter *THE GREEN REPORT*] (discussing other indicia of the growing green consumer market).

For specific examples of green-marketed products, see ABT ASSOCS., *supra* note 1, at 5-18; *1991 New Green Products and Companies*, *BUZZWORM*, Nov./Dec. 1991, at 41.

commentators, green marketing has attained the status of a "revolution."<sup>8</sup>

Without doubt, many companies have made sincere attempts to minimize their products' environmental impacts.<sup>9</sup> Many have found innovative ways to use recycled materials in their products.<sup>10</sup> Some manufacturers have begun to reduce excess packaging by redesigning containers and concentrating their products.<sup>11</sup> Others minimize their environmental impact simply by making products that are durable, reusable, repairable, and recyclable.<sup>12</sup> Retailers, too, attempt to meet the interests of increasingly environmentally conscious customers.<sup>13</sup>

Unfortunately, many companies pursue the "green" of increased revenue more eagerly than the "green" of a healthier environment. Such firms change their labels but little else. For them, the response to green consumerism "is not to market a new product or an innovation (the Japanese do that), but to be first with a [marketing] distinction."<sup>14</sup> They exaggerate or even fabricate the environmental qualities of their goods, letting their advertising rhetoric far outstrip their environmental contributions.<sup>15</sup>

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8. See *Special Issue: The Green Marketing Revolution*, ADVERTISING AGE, Jan. 29, 1991.

9. See, e.g., SEVENTH GENERATION, ENVIRONMENTAL PRODUCT GUIDE (Spring 1990) (a mail order catalogue offering products touted as less environmentally damaging) (available from Seventh Generation, Colchester, Vt.). See generally P. CARSON & J. MOULDEN, GREEN IS GOLD: BUSINESS TALKING TO BUSINESS ABOUT THE ENVIRONMENTAL REVOLUTION (1991) (a how-to guide for businesses wishing to "green" both their products and their images). But see Frankel, *The Trouble with Green Products*, BUZZWORM, Nov./Dec. 1991, at 37 (arguing that larger, more powerful companies simply sell "greened-up" products and unfairly hinder the efforts of smaller, independent suppliers of truly "deep-green" products).

10. See, e.g., EPA, PROMOTING SOURCE REDUCTION AND RECYCLABILITY, *supra* note 1, at 32 ("Generally speaking, the quality of products containing recycled materials has been vastly improved in the last twenty years.").

11. See, e.g., Schiller, *P&G Tries Hauling Itself Out of America's Trash Heap*, BUS. WK., Apr. 23, 1990, at 101 (describing the efforts of Proctor & Gamble).

12. Hayes, *Feeling Green About "Green,"* ADVERTISING AGE, Jan. 29, 1991, at 46.

13. See, e.g., Fisher, *Tending Wal-Mart's Green Policy*, ADVERTISING AGE, Jan. 29, 1991, at 20; Thayer, *10 Rules for Selling "Green" Products*, PROGRESSIVE GROCER, Aug. 1990, at 117.

14. Chase, *The Green Rush: Slowdown on Environmental Ties*, ADVERTISING AGE, May 28, 1990, at 25.

15. See Garfield, *Beware: Green Overkill*, ADVERTISING AGE, Jan. 29, 1991, at 26, 26 (lamenting that most "declarations of environmental righteousness [have] become a gimmick, a fad or a cynical device for exploiting the consumer"); Holusha, *Coming Clean on Products: Ecological Claims Faulted*, N.Y. Times, Mar. 12, 1991, at D1,

Left awash in this wave of green marketing are the increasing numbers of consumers who want to make “environmentally correct” purchasing decisions.<sup>16</sup> Yet because many of the terms companies use to make green marketing claims have no fixed meaning, labels featuring them provide consumers with little genuine information.<sup>17</sup> Consequently, consumers have scant help in distinguishing truly “green” products from those simply *claiming* to be “green.”

This Note joins a rising chorus calling for government regulation of green marketing claims.<sup>18</sup> It attempts to encourage and add a sense of urgency to a burgeoning regulatory movement<sup>19</sup> by highlighting some of the legal issues that such regulation entails. Part I identifies a gap in the law: the inability of current truth-in-advertising laws to clarify the legality of green marketing claims. Part II urges bridging that gap quickly; it examines the costs of continued nonregulation and describes some of the forms regulation is taking. Part III attempts to allay any fears that such regulations might be challenged on first amendment grounds. Part IV distinguishes the goals toward which green marketing regulations should strive from those that motivate so-called environmental seal of approval programs.

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col. 1 (stating that “many . . . companies are making changes in their packaging more on the basis of marketing studies than environmental findings”); Slaba, *When US Corporations Go “Green”—Watch Out*, *Christian Science Monitor*, May 18, 1990, at 19, col. 1 (asserting that “corporate marketing of the environment may be outstripping the deep-level commitment needed to alter the very way of doing business that created runaway environmental pollution in the first place”); see also Letto, *Madison Avenue Goes Green*, *BUZZWORM*, Sept./Oct. 1991, at 30; *Selling Green*, *CONSUMER REPORTS*, Oct. 1991, at 687.

16. For evidence of the expanding green consumer market, see ABT ASSOCS., *supra* note 1.

17. See *infra* Part I.B.

18. See, e.g., U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-88-208, *DEGRADABLE PLASTICS: STANDARDS, RESEARCH AND DEVELOPMENT 15-16* (1988) [hereinafter GAO]; Lautenberg, *Pulling the ‘Green’ Over Our Eyes*, *N.Y. Times*, Apr. 22, 1991, at A17, col. 1; EPA, *PROMOTING SOURCE REDUCTION AND RECYCLABILITY*, *supra* note 1, at 5; THE GREEN REPORT II: *RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING 1-4* (1991) (available from the Minnesota Attorney General’s Office) [hereinafter THE GREEN REPORT II].

19. For examples of legislation and regulations that have been enacted or are under consideration, see *infra* Part II.B.

I. EXISTING STATUTORY FRAMEWORK:  
THE LIMITS OF A GENERIC STANDARD

A. *The Federal Trade Commission Act*

The Federal Trade Commission Act<sup>20</sup> (FTC Act), the primary instrument of consumer protection at the federal level, evolved from an antitrust statute. Congress passed the FTC Act in 1914<sup>21</sup> to augment the Sherman<sup>22</sup> and Clayton Antitrust Acts.<sup>23</sup> The law created the Federal Trade Commission (FTC) and, in section 5, authorized the FTC to halt "unfair methods of competition."<sup>24</sup> In 1938, Congress amended section 5 to direct the FTC to prevent "unfair or deceptive acts or practices in commerce."<sup>25</sup> Noting the importance of this amendment, the Third Circuit stated that the FTC could "now center its attention on the direct *protection of the consumer* where formerly it could protect him only indirectly through the protection of the competitor."<sup>26</sup> Congress also amended section 12 of the FTC Act in 1938 to explicitly proscribe deceiving consumers through false advertising.<sup>27</sup>

The FTC Act contains no definition of "deceptive," leaving to the FTC itself the task of developing an interpretation of this standard on a case-by-case basis. Although the scope of this term and the vigor with which it has been enforced since 1938 has vacillated somewhat with the nation's changing political

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20. 15 U.S.C. §§ 41-77 (1988).

21. Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-77 (1988)).

22. 15 U.S.C. §§ 1-7 (1988).

23. *Id.* §§ 12-27; 29 U.S.C. §§ 52, 53 (1988); 18 U.S.C. § 412 (1988); 28 U.S.C. §§ 381-383, 386-390 (1988). For a brief overview of the historical background of the FTC Act, see P. AREEDA & L. KAPLOW, *ANTITRUST ANALYSIS* 59-60 (4th ed. 1988).

24. Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)(1) (1988)); see also Annotation, *What Constitutes "False Advertising" of Food Products or Cosmetics Within §§ 5 and 12 of the Federal Trade Commission Act*, 50 A.L.R. FED. 16, 25 (1980).

25. Pub. L. No. 75-447, § 5, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a)(1) (1988)).

26. *Pep Boys—Manny, Moe & Jack, Inc. v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941). The Supreme Court eventually lauded this development as "a significant amendment showing Congress' concern for consumers as well as for competitors." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384 (1965).

27. Pub. L. No. 75-447, § 12, 52 Stat. 111, 114 (1938) (codified as amended at 15 U.S.C. § 52 (1988)).

climate,<sup>28</sup> the malleability of “deceptive” became particularly controversial during the Reagan administration. In *In re Cliffdale Associates, Inc.*,<sup>29</sup> the FTC reined in the long-standing view that an advertisement is deceptive whenever it has a “capacity or tendency”<sup>30</sup> to deceive even “the ignorant, the unthinking and the credulous.”<sup>31</sup> The commission narrowed this definition of “deceptive” by introducing two pertinent requirements: 1) the representation must be likely to mislead consumers acting reasonably under the circumstances; and 2) the representation must be “material,” *i.e.*, likely to affect consumers’ choices.<sup>32</sup> Although this new standard engendered a flurry of comment and criticism,<sup>33</sup> it has been reaffirmed in subsequent FTC decisions and upheld in federal courts.<sup>34</sup>

A generic standard like “deceptive” poses both advantages and disadvantages as a check upon advertising. The FTC Act and the state consumer protection laws that emulate it<sup>35</sup> are

28. See 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) (offering an overview of the vicissitudes of the law of deception).

29. 103 F.T.C. 110 (1984).

30. *FTC v. Raladam Co.*, 316 U.S. 149, 151-52 (1942); see also *Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1146 n.11 (9th Cir. 1978); *Goodman v. FTC*, 244 F.2d 584, 602 (9th Cir. 1957).

31. *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942); see also *Standard Oil Co. v. FTC*, 577 F.2d 653, 657 (9th Cir. 1978) (recognizing the standard but refusing to apply it to a “patently absurd interpretation” of an advertisement); *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1314 (D.C. Cir. 1968).

32. *Cliffdale Assocs.*, 103 F.T.C. at 164-65.

33. The two FTC commissioners who dissented in *Cliffdale Associates* provided the most pointed criticism of the standard. See Bailey & Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U.L. REV. 849 (1984) (authored by the dissenters). For some other assessments, see Craswell, *Interpreting Deceptive Advertising*, 65 B.U.L. REV. 657 (1985); Karns, *The Federal Trade Commission’s Evolving Deception Policy*, 22 U. RICH. L. REV. 399 (1988); Schechter, *supra* note 28; Shafer, *Developing Rational Standards for an Advertising Substantiation Policy*, 55 U. CIN. L. REV. 1 (1986).

34. See, e.g., *In re Figgie Int’l, Inc.*, 107 F.T.C. 313, 373-74 (1986); *In re Southwest Sunsites, Inc.*, 105 F.T.C. 7, 147 (1985), *affd.*, 785 F.2d 1431 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986); *In re International Harvester Co.*, 104 F.T.C. 949, 1055-57 (1984); *In re Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *affd.*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

35. Many state truth-in-advertising laws are closely patterned after the FTC Act. See, e.g., *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 185 (Alaska 1980) (finding that Alaska’s law, ALASKA STAT. § 45.50.471, is “substantially similar” to the FTC Act); *Hageman v. Twin City Chrysler-Plymouth Inc.*, 681 F. Supp. 303, 305 (M.D.N.C. 1988) (stating that North Carolina’s law, N.C. GEN. STAT. § 75-1.1(a) (1988), was “reproduced verbatim from the [FTC] Act” (quoting *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 48 (4th Cir. 1983)), and was adopted “to parallel and

“useful for attacking a wide range of deceptive practices precisely because [such laws] are so general and can be adapted to address a broad range of conduct.”<sup>36</sup> Unfortunately, generic standards often fail to draw a discernable line between permissible and illegal practices in particular circumstances. Such is the case with most green marketing practices, where “one person’s deception is another person’s clever marketing scheme.”<sup>37</sup>

### B. The Deceptiveness of Green Marketing Claims

One can easily argue that many green marketing claims are deceptive, even under the narrower *Cliffdale*<sup>38</sup> standard. Recent surveys have concluded that consumers’ choices are materially affected by their concern over environmental issues, and that consumers are increasingly attracted to products and packaging that they believe minimize environmental impacts.<sup>39</sup> Ninety-six percent of the consumers questioned in one study reported that environmental factors play a very important role in their purchasing decisions.<sup>40</sup> According to another report, eighty-two percent of those surveyed said they have changed their purchasing decisions based on concerns

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supplement’” it (quoting *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981)); KAN. STAT. ANN. § 50-626(a) comment 1 (1983) (stating that the law is modeled after the FTC Act).

Many states simply adopt the FTC’s standard of “deceptive” as their own. See, e.g., ARIZ. REV. STAT. ANN. § 44-1522(B) (1987); CONN. GEN. STAT. § 42-110b(b) (1983); VT. STAT. ANN. tit. 9, § 2453(c) (1984). For a discussion of the Uniform Deceptive Trade Practices Act, see 17 AM. JUR. 2D *Consumer and Borrower Protection* § 282, at 217.

Although this Note focuses on the need for reform at the federal level, the analysis applies to any statutory scheme that attempts to use generic standards to regulate green marketing practices.

36. Letter from Julie A. Vergeront, Special Assistant Attorney General, Minnesota Attorney General’s Office, Consumer Division, to Roger D. Wynne 1 (Oct. 11, 1990) (on file with the *University of Michigan Journal of Law Reform*).

37. *Id.*

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

39. See generally ABT ASSOCS., *supra* note 1, at A-1 to A-4 (discussing recent consumer and public opinion polls); Dagnoli, *Green Buys Taking Root*, ADVERTISING AGE, Sept. 3, 1990, at 27 (describing the findings of an environmental marketing survey).

40. WARWICK BAKER & FIORE, INC., HOW CONCERNED ARE CONSUMERS OVER FACTORS AFFECTING THE ENVIRONMENT? 6 (1990).



about the environment.<sup>41</sup> Consumers are even willing to pay more for these products. Seventy-eight percent said they would pay five percent more for a product sold in "environmentally-sound" packaging, while forty-seven percent were willing to pay as much as fifteen percent more for such a product.<sup>42</sup>

Manufacturers often describe the environmental benefits of their products in the vaguest of terms: "environmentally responsible," "ozone friendly," "non-polluting," and even "lighter environmental formula."<sup>43</sup> Despite their ambiguity, these claims imply that they are based upon objective scientific investigation. Frequently, however, manufacturers have no reasonable factual bases for making vague, broad claims about a product's environmental "friendliness" or "responsibility," because such attributes are highly subjective. No absolute measure of "friendliness" exists; there are only varying degrees of impact, most of which cannot be measured or compared objectively. As long as one consumes *anything*, one is affecting the environment. If manufacturers cannot substantiate their apparently scientific claims, the FTC could find them guilty of deception.<sup>44</sup>

Because they play upon a matter of heightened public interest and concern, vague green marketing claims should come under particularly intense scrutiny for deceptiveness. Such was the finding of the FTC and the Ninth Circuit in *Standard Oil Co. v. FTC*.<sup>45</sup> The FTC took Standard Oil to task for television commercials the company ran in 1970. The advertisements promoted a gasoline additive that helped reduce the amount of visible emissions ("particulates") from

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41. Gerstman + Meyers Inc., News Release 1 (New York City, July 1990).

42. *Id.* at 3, 5.

43. For lists and discussions of some popular, vague, green marketing terms, see WARWICK BAKER & FIORE, INC., *supra* note 40, at 6-9; Smith, *Environmentalists, State Officers See Red as Firms Rush to Market "Green" Products*, Wall St. J., Mar. 13, 1990, at B1, col. 3.

44. See, e.g., *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1150-53 (9th Cir. 1984) (sustaining an FTC ruling that a claim was unsubstantiated by factual evidence), *cert. denied*, 470 U.S. 1084 (1985); see also Grady & Feinman, *Advertising and the FTC: How Much Can You "Puff" Until You're Legally Out of Breath?*, 36 ADMIN. L. REV. 399, 407-09 (1984) (discussing a line of cases in which the FTC found unsubstantiated claims deceptive); Preston, *The Federal Trade Commission's Identification of Implications as Constituting Deceptive Advertising*, 57 U. CIN. L. REV. 1243, 1259-70 (1989) (examining cases where the FTC required substantiation of claims that imply that they are based upon proof).

45. 577 F.2d 653 (9th Cir. 1978).

car exhausts, calling it a "major breakthrough to help solve one of today's critical problems."<sup>46</sup> The ads failed to point out that particulate matter is a minimal part of automotive emissions and that the additive had little effect upon more troublesome, invisible emissions.<sup>47</sup> The Ninth Circuit upheld the FTC's decision to enjoin the ads, in part because they played upon consumers' increased desire to do something about air pollution:

[C]ommercial messages might lead the average viewer, in his anxiety to help solve the pollution problem, to overreact even though upon careful reflection he might see for himself the limitations inherent in the advertiser's claim. . . . [I]t is appropriate for the [FTC] to consider this factor in determining whether the advertising is misleading or deceptive.<sup>48</sup>

A truly reasonable consumer might realize the deceptive nature of vague green marketing claims and be more skeptical of them. Yet many consumers, in their concern to be more environmentally responsible,<sup>49</sup> will be easily induced to choose a product bearing such a claim over an otherwise indistinguishable product without one.<sup>50</sup> In fact, most reasonable consumers do not fully understand technical environmental phrases and are therefore relatively more attracted by vague green marketing claims than by ones describing specific environmental attributes.<sup>51</sup>

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46. *Id.* at 657-58, 664. The commercials appeared as many Americans were first awakening to some of the environmental issues facing their nation and the globe. The same year witnessed, among other events, the first Earth Day, *see* Schwartz, *supra* note 3, at 40, and the enactment of the first comprehensive Clean Air Act amendments, Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended principally at 42 U.S.C. §§ 7401-7614 (1988)). Likewise, the emergence of current green marketing tactics coincides with the recent reawakening of American environmental consciousness. 1990, for example, saw the twentieth anniversary celebration of Earth Day, *see* Schwartz, *supra* note 3, at 40, and major revisions to the Clean Air Act, *see* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (to be codified in scattered sections of 42 U.S.C.). For historical perspectives on the American environmental movement between the two Earth Days, *see* Carpenter, *Living with Our Legacy*, U.S. NEWS & WORLD REP., Apr. 23, 1990, at 60; Fessler, *A Quarter-Century of Activism Erected a Bulwark of Laws*, CONG. Q., Jan. 20, 1990, at 153.

47. *Standard Oil*, 577 F.2d at 657-59.

48. *Id.* at 659.

49. For evidence of this concern, *see supra* notes 39-42 and accompanying text.

50. *See, e.g.,* Lawrence, *Mobil*, ADVERTISING AGE, Jan. 29, 1991, at 12 (discussing Hefty's loss of market share to degradable trash bags).

51. WARWICK BAKER & FIORE, INC., *supra* note 40, at 6-7, 12.

Like vague green marketing terms, specific ones also can be misleading. Terms such as "recycled," "recyclable," and "degradable" are likely to mislead even the most reasonable consumer in two ways. First, these claims can paint an unclear or false picture of the product's physical composition and its likely effect on the environment. Second, green marketing terms state or imply that the physical characteristics they purport to describe are somehow "good" for the environment when, in fact, they often provide dubious benefits.

The term "recycled" frequently fails to describe accurately a product's physical composition. Saying that a product is recycled does not mean that it has been made entirely from materials that have been used before.<sup>52</sup> Some paper stock, for example, is marketed as "recycled" when it contains only a fraction of recycled material.<sup>53</sup> Moreover, "recycled" is used loosely. Most people visualize recycled paper as being made entirely of postconsumer waste—the product of home or office paper that would otherwise have been thrown away. Instead, consumers often receive preconsumer waste, or mill broke—scraps from the papermaking process that manufacturers have traditionally reused.<sup>54</sup> Use of preconsumer material certainly minimizes waste and is therefore ecologically desirable, but to label mill broke paper "recycled" is like labeling baked goods "recycled" because bakers, instead of disposing of pieces of dough scrap, mix them back into the existing dough stock. Use of preconsumer waste is at best an internal recycling process that does not involve the consumer. Consumers who expect that they are buying products composed of the materials that they placed into a recycling program are therefore gravely misled by preconsumer recycled products.<sup>55</sup>

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52. For example, government regulations consider certain paper products recycled when the products contain minimum percentages of recycled material. *See, e.g.*, 40 C.F.R. § 250.21(2) & table 1 (1990); N.Y. COMP. CODES R. & REGS. tit. 6, § 368.4(a)(2) & table 1(2) (1990).

53. *See, e.g.* 40 C.F.R. § 250.21 (table 1) (recycled facial tissue may have as little as five percent postconsumer recovered materials).

54. *See* Davis & Kinsella, *Recycled Paper: Exploding the Myths*, GARBAGE, May/June 1990, at 48, 49-50; Smith, *Paper Chase*, CONSERVATION 90, Nov. 23, 1990, at 3, 4-5; THE GREEN REPORT, *supra* note 7, at 18-19.

55. This is not to say that manufacturers should not identify goods that contain preconsumer waste. They should simply not do so by using "recycled" standing alone. *See* THE GREEN REPORT II, *supra* note 18, at 8-10 (recommending use of the term "reprocessed [or recovered] industrial material").

"Recyclable" is also a problematic term. The fact that a product is capable of being recycled does not make it likely that the product will be recycled. Although Americans recycle paper and paperboard products, glass, aluminum, and other nonferrous metals, they only recycle a fraction of what they use.<sup>56</sup> Furthermore, many technical and economic constraints impede both the expansion of existing recycling programs and the creation of new programs for potentially recyclable materials, such as plastics, tires, and used oil.<sup>57</sup> A manufacturer that labels as "recyclable" a product for which prohibitively few recycling programs exist may therefore mislead consumers by giving them more hope than reality. Commenting on a polystyrene cup emblazoned with the term "recyclable," one critic noted, "There's no 'able' in saying polystyrene is 'recyclable' since the absence of a polystyrene recycling infrastructure means that few consumers have the 'ability' to recycle these plastics."<sup>58</sup>

"Degradability" is a particularly elusive and confusing concept. Although no established standard exists,<sup>59</sup> one might consider a material to have degraded when it has broken down into a chemical or structural form that is no longer recognizable as the original.<sup>60</sup> With this definition,

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56. The EPA estimates that, as a percentage (by weight) of each material generated in municipal solid waste, 25.6% of paper and paperboard products, 12.0% of glass, 31.7% of aluminum, and 65.1% of other nonferrous metals were separated from the waste stream for recycling in 1988. U.S. EPA, PUB. NO. EPA 530-SW-90-042, MUNICIPAL SOLID WASTE IN THE UNITED STATES: 1990 UPDATE 11 (1990) [hereinafter EPA, MUNICIPAL SOLID WASTE]. The high rate of recycling in the last category is attributable primarily to the recovery of lead from batteries. *See id.* at 19; *see also* NATIONAL SOLID WASTES MANAGEMENT ASS'N, SPECIAL REPORT: RECYCLING IN THE STATES (1990) (available from NSWMA, Washington, D.C.) (discussing the status of state legislative initiatives on recycling).

57. For a detailed discussion of the complex issues facing specific, individual recycling markets, *see* OTA, *supra* note 5, at 135-90. *See generally id.* at 194-202 (discussing barriers to increased recycling generally).

58. Wirka, "It's Not That Easy Being Green": Statement of Environmental Action Foundation for the State Attorneys General Environmental Claims Task Force Public Forum on Environmental Marketing 3 (Mar. 14, 1990); *see also* Holusha, *A Setback for Polystyrene*, N.Y. Times, Nov. 18, 1990, at 14, col. 1 (describing the uneasy future of the small polystyrene recycling industry); Holusha, *Drink-Box Makers Fighting Back*, N.Y. Times, Dec. 15, 1990, at 33, col. 3 (discussing the debate over the recyclability claims made by the manufacturers of aseptic packages, known more commonly as "drink boxes").

59. OTA, *supra* note 5, at 182.

60. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 335 (1989) [hereinafter WEBSTER'S] (*degradable*: "capable of being chemically degraded"; *degrade*: "to reduce the complexity of (a chemical compound)"; *degraded*: "characterized by degeneration of structure or function").

almost every material—including radioactive waste—is “degradable” under the proper conditions.<sup>61</sup> “Degradable” is actually a catch-all phrase encompassing specific types of degradation. Biodegradation occurs when living microorganisms (primarily bacteria and fungi) assimilate or consume material.<sup>62</sup> Photodegradation results from exposure to the ultraviolet portion of the spectrum of sun light (the same portion that causes sunburn).<sup>63</sup>

Some makers of plastic products and packaging tout their wares as “degradable.”<sup>64</sup> Polymers—long, stable chains of hydrocarbon molecules—account for the extremely useful qualities of plastics, among them lightness, durability, and strength.<sup>65</sup> By modifying the composition of certain plastics, manufacturers can make them more susceptible to photodegradation.<sup>66</sup> Such modifications allow ultraviolet radiation to help break the long polymer chains, sever the bonds between them, and greatly weaken the plastic.<sup>67</sup> Cornstarch additives provide another means by which plastics are rendered degradable.<sup>68</sup> In long polymer chains, starch is susceptible to photodegradation and biodegradation.<sup>69</sup> Yet only the starch additives degrade;<sup>70</sup> the synthetic polymers

61. See, e.g., Wald, *Wider Peril Found in Nuclear Waste from Bomb Making*, N.Y. Times, Mar. 28, 1991, § 1, at 1, col. 3 (“[M]uch of the radioactive materials in the special storage tanks naturally degrade into harmless minerals over about 300 years . . .”).

62. SOCIETY OF THE PLASTIC INDUS., INC., AN SPI OVERVIEW OF DEGRADABLE PLASTICS 4 (1987) (presented at the SPI Symposium on Degradable Plastics, Washington, D.C., June 10, 1987) [hereinafter SPI OVERVIEW]; OTA, *supra* note 5, at 180-81.

63. SPI OVERVIEW, *supra* note 62, at 4; OTA, *supra* note 5, at 181-82.

64. These products are clearly in the minority, as “degradable” plastics account for less than one percent of the plastics market. See Schorsch, *supra* note 6, at 1. Plastics manufacturers are not the only ones marketing their products as degradable. For example, many makers of paper products such as paper grocery bags also label their goods “degradable” or “biodegradable.” See, e.g., Collection of paper bags (on file with the *University of Michigan Journal of Law Reform*). Yet these claims also are misleading because conditions in modern sanitary landfills minimize degradation of all products—plastic, paper, or otherwise. See *infra* notes 72-77 and accompanying text.

65. SPI OVERVIEW, *supra* note 62, at 4; GAO, *supra* note 18, 8.

66. SPI OVERVIEW, *supra* note 62, at 4; OTA, *supra* note 5, 181-82.

67. SPI OVERVIEW, *supra* note 62, at 4; GAO, *supra* note 18, at 10.

68. SPI OVERVIEW, *supra* note 62, at 6; OTA, *supra* note 5, at 181.

69. SPI OVERVIEW, *supra* note 62, at 3-4.

70. See *New Study Challenges “Biodegradable” Claims*, N.Y. Times, Mar. 5, 1991, at C4, col. 5 (discussing L. Krupp, The Biodegradability of Modified Plastic Films in Controlled Biological Environments (Jan. 1991) (unpublished master’s thesis, Department of Agricultural Engineering, Cornell University)).

that make up the majority of corn starch plastics are almost exclusively nonbiodegradable.<sup>71</sup>

Even if a reasonable consumer could decipher and understand the physical concept of a "degradable" plastic product, she would most likely overlook the fact that the product is unlikely to degrade in the landfill in which it probably will be entombed.<sup>72</sup> Modern sanitary landfill design eliminates conditions conducive to both photo- and biodegradation.<sup>73</sup> Because new additions to these landfills are usually covered daily with a layer of soil,<sup>74</sup> light simply does not reach most municipal waste, and photodegradation is unlikely to occur. Once a landfill is closed, a final cover, usually of compacted soil, is placed over it specifically to reduce the amount of moisture reaching the waste, thereby minimizing the amount of harmful substances contaminating groundwater through a process known as leaching.<sup>75</sup> The resultant lack of moisture limits the amount of biodegradation in the landfill.<sup>76</sup> Most modern landfills are so effective at limiting biodegradation that landfill archaeologists have uncovered clearly biodegradable products (such as ears of corn and newspapers) almost fully preserved after decades of burial.<sup>77</sup>

Even if plastic products were to degrade as promised, the environmental benefits from their degradation could be negligible or, even worse, harmful.<sup>78</sup> Of all municipal solid waste discarded in the United States, plastics comprise only about nine percent by weight and twenty percent by volume.<sup>79</sup> Degradable plastics won't disappear. A recent study found

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71. SPI OVERVIEW, *supra* note 62, at 4; GAO, *supra* note 18, at 10-11. To maintain their desired strength, most synthetic/natural polymer blends can contain no more than six to ten percent natural polymers. *Id.* at 11.

72. Seventy-three percent (by weight) of municipal solid waste was disposed of in landfills in 1988, the latest year for which data is available. The remaining waste was either burned, recycled, or composted. EPA, MUNICIPAL SOLID WASTE, *supra* note 56, at 55 (table 26). For a general discussion of decomposition in landfills, see OTA, *supra* note 5, at 275-76.

73. For a discussion of modern landfill design, see OTA, *supra* note 5, at 276-84.

74. J. CRAWFORD & P. SMITH, LANDFILL TECHNOLOGY 49-50 (1985); OTA, *supra* note 5, at 281.

75. See Hoeks & Ryhiner, *Surface Capping with Natural Liners*, in SANITARY LANDFILLING 311-22 (1989) (describing final covering); J. CRAWFORD & P. SMITH, *supra* note 74, at 86-113 (describing control measures of landfill leachate pollution). Leaching is analogous to water percolating through coffee grounds.

76. See OTA, *supra* note 5, at 275.

77. See OTA, *supra* note 5, at 275; Rathje, *Rubbish!*, ATLANTIC MONTHLY, Dec. 1989, at 99, 102.

78. See OTA, *supra* note 5, at 182-83.

79. EPA, MUNICIPAL SOLID WASTE, *supra* note 56, at 19-20, 27 (fig. 9), 86.

that they will not decompose into their natural, component elements, but, at best, may break into smaller pieces of plastic.<sup>80</sup> Although such break-up may reduce the overall space occupied by plastic products in a landfill, it will have no discernable effect upon our landfill capacity crisis; "decomposition rates [even] of organic materials in landfills are so slow that [decomposition's] space-saving benefits may not be important."<sup>81</sup> Furthermore, as "degradable" plastics break up, they might release toxic substances, such as cadmium, that are used to add color to the product.<sup>82</sup> Additives like cornstarch may "contaminate" otherwise potentially recyclable plastics.<sup>83</sup> Some critics argue that consumers will be more likely to litter "degradable" plastics, erroneously thinking that such products will simply disappear.<sup>84</sup>

On June 12, 1990, seven state attorneys general brought individual suits against Mobil Corporation, charging it with making false and deceptive claims on its Hefty "degradable" plastic bag line.<sup>85</sup> The box in which these bags were sold carried the following claims:

- New Hefty Degradable Bags contain a special ingredient that promotes their breakdown after exposure to elements like sun, wind and rain.

80. *New Study Challenges "Biodegradable" Claims*, *supra* note 70, at C4, col. 5 (describing a study at Cornell University).

81. OTA, *supra* note 5, at 275 (emphasis removed).

82. R. DENISON & J. WIRKA, *DEGRADABLE PLASTICS: THE WRONG ANSWER TO THE RIGHT QUESTION* 5-6 (1989) (available from the Environmental Defense Fund, Washington, D.C.); Glenn, *Degradables Tested in Compost Programs*, *BIOCYCLE*, Oct. 1989, at 28, 29. In this regard, non-degradable plastics may be more "environmentally friendly," because they are basically inert when placed in a landfill and probably do not release significant amounts of soluble by-products that could contaminate groundwater through leaching. See R. DENISON & J. WIRKA, *supra*, at 5-6; OTA, *supra* note 5, at 276. Scientific uncertainty shrouds our understanding of the toxicity and other environmental effects of the end products of degradable plastics. See GAO, *supra* note 18, at 18; Glenn, *supra*.

83. R. DENISON & J. WIRKA, *supra* note 82, at 4-5; *THE GREEN REPORT*, *supra* note 7, at 17.

84. [Plaintiff's] Reply Memorandum of Law in Further Support of the Verified Petition and Motion for a Preliminary Injunction at 25, *State v. Mobil Chem. Co.*, No. 43152/90 (N.Y. Sup. Ct., New York County) (Aug. 3, 1990) [hereinafter *N.Y. Reply Memo*]; R. DENISON & J. WIRKA, *supra* note 82, at 3; OTA, *supra* note 5, at 180. Mobil itself made this argument before it began marketing its degradable Hefty bag line. *MOBIL, PLASTICS AND THE ENVIRONMENT* [2] (undated) (photo. reprint on file with the *University of Michigan Journal of Law Reform*).

85. The states that brought these suits were California, Massachusetts, Minnesota, New York, Texas, Washington, and Wisconsin. *7 States Accuse Mobil on Plastic*, *N.Y. Times*, June 13, 1990, at D24, col. 6.

- This ingredient promotes degradation without harming the environment.
- Once the elements have triggered the process, these bags will continue to breakdown [sic] into harmless particles even after they are buried in a landfill.
- Hefty Degradable Bags—A step in our commitment to a better environment. . . . Hefty Helps!<sup>86</sup>

Mobil also used visual imagery to enhance its environmental claim. The front of the package featured an evergreen tree with an eagle bathed in streaming sunlight. The back contained a full trash bag and another tree, also awash in sunlight.<sup>87</sup>

Invoking state laws similar to the FTC Act, the attorneys general pressed arguments like those discussed above in an attempt to enjoin Mobil's green marketing tactic.<sup>88</sup> In addition, many accused Mobil of making its claims without sufficient scientific evidence<sup>89</sup> and with the full knowledge and purpose that their box would materially affect consumers' choices.<sup>90</sup>

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86. Complaint at 2-3, *State v. Mobil Chem. Co.*, No. C5-90-6843 (Minn. Dist. Ct., Ramsey County) (June 12, 1990) [hereinafter *Minn. Complaint*]; see also Lawrence, *supra* note 50, at 12, 13 (photograph).

87. *Minn. Complaint*, *supra* note 86, at 3; see also Lawrence, *supra* note 50, at 13.

88. Mobil actually announced in March 1990 that it would cease producing the boxes in question. Holusha, *Mobil Ends Environmental Claim*, N.Y. Times, Mar. 30, 1990, at D1, col. 3. The attorneys general persisted in an effort to make Mobil's pledge legally binding, to recover past damages, and to prevent Mobil from using its considerable existing stock of the boxes. See, e.g., [Plaintiff's] Memorandum in Support of Motion for Temporary Injunction at 14-18, *State v. Mobil Chem. Co., Inc.*, No. 90CV2408 (Wis. Cir. Ct., Dane County) (June 20, 1990).

Texas settled its suit against Mobil on June 26, 1990, with Mobil agreeing to discontinue making environmental claims on its plastic bag line after it depleted its existing supply of the boxes. See Letter of Agreement at 2, 3, *State v. Mobil Oil Corp.*, No. 90-06906 (Tex. Dist. Ct., Dallas County) (June 26, 1990) [hereinafter *Tex. Letter of Agreement*]. The remaining six states reached similar settlements with Mobil almost exactly one year later. See, e.g., Stipulated Settlement Order, *State v. Mobil Chem. Co.*, No. C5-90-6843 (Minn. Dist. Ct., Ramsey County June 26, 1991); Stipulated Settlement Order, *State v. Mobil Chem. Co.*, No. 90-2-11787-1 (Wash. Super. Ct., King County June 26, 1991); see also Sullivan, *Mobil Settles Suit over Claims Made for Its Hefty Bags*, Wall St. J., June 28, 1991, at A4, col. 4.

89. E.g., *Minn. Complaint*, *supra* note 86, at 10; N.Y. Reply Memo, *supra* note 84, at 12-13; Complaint for Injunctive and Additional Relief Under the Consumer Protection Act at 4, *State v. Mobil Chem. Co.*, No. 90-2-11787-1 (Wash. Super. Ct., King County) (June 12, 1990); [Plaintiff's] Brief in Support of Motion for Temporary Injunction at 27-33, *State v. Mobil Chem. Co., Inc.*, No. 90CV2408 (Wis. Cir. Ct., Dane County) (July 16, 1990) [hereinafter *Wis. Brief in Support*].

90. E.g., *Minn. Complaint*, *supra* note 86, at 3, 6-10; N.Y. Reply Memo, *supra* note 84, at 4-11; Plaintiff's Original Petition at 3-5, *State v. Mobil Oil Corp.*, No. 90-06906 (Tex. Dist. Ct., Dallas County) (June 12, 1990).



### C. *The Imprecision of a Generic Standard*

Even though certain green marketing claims may be highly deceptive, a generic "deceptive" standard nevertheless fails to delineate them clearly from valid claims. Because no law is tailored specifically to environmental terms, manufacturers are left without clear guidance as to the legality of their advertising, while law enforcement officials are left with an unwieldy weapon with which to prosecute potential transgressors. The imprecision of the generic standard is compounded by several considerations, all of which suggest that green marketing claims may not truly be legally "deceptive."

Stretching the truth is commonplace in advertising. Manufacturers may not need to substantiate factually<sup>91</sup> their vague or broad green marketing terms (like "environmentally friendly") if such claims are mere "puffery." Puffery is "an expression of opinion not made as a representation of fact"<sup>92</sup> or a claim that is "either vague or highly subjective"<sup>93</sup>—the essence of a term like "environmentally friendly." Consumers might view claims such as "lighter environmental formula" skeptically, just as they do claims that a product is "healthy." Simply put, truly reasonable consumers might not be deceived because they will know not to take vague green marketing claims literally.<sup>94</sup>

More specific green marketing terms may not deceive reasonable consumers either. Should consumers be misled by

91. *But see supra* note 44 and accompanying text (arguing that manufacturers need to substantiate their vague green marketing terms).

92. *Gulf Oil Corp. v. FTC*, 150 F.2d 106, 109 (5th Cir. 1945).

93. *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1150 (9th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Prosser and Keeton define the term more bluntly in the context of justifiable reliance: "The 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific . . ." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* § 109, at 757 (5th ed. 1984). A useful description of "puffery" may be found in Preston, *supra* note 44, at 1300-06.

94. This, of course, asserts a negative answer to what would be the decisive question in a puffery defense: whether the claim implies that it can be objectively proven so that a reasonable consumer *would* take it seriously. If the claim appears credible, the FTC may find that it is not mere puffery and that the advertiser must substantiate it. *E.g.*, *In re National Dynamics Corp.*, 82 F.T.C. 488, 558 (1973) (finding battery company's duration claims deceptive); *see also* Preston, *supra* note 44, at 1259-70 (discussing claims that imply that they are substantiated by proof and that have been found deceptive under the FTC Act).

a "recycled" product made purely from preconsumer waste<sup>95</sup> when the federal government itself includes such waste in its definition of "recycled material"? The EPA, in its guidelines for federal procurement of products that contain recycled material, states that such material may consist of "industrial scrap . . . and other items, all of which can be used in the manufacture of new products."<sup>96</sup> Furthermore, even though the term "recycled" may not disclose the exact details of what types of recycled materials a product contains or what percentages, are consumers who want to minimize environmental impacts misled when they purchase a product containing preconsumer waste instead of one that contains no reprocessed waste of any kind? Indeed, consumers may be properly led to demand products that help reduce the overall waste stream,<sup>97</sup> which certainly are better for the environment than products that contain no waste materials at all.<sup>98</sup>

Likewise, should the term "recyclable" mislead the consumer who reasonably considers the information imparted to her? The suffix "-able" simply means that a product is "capable of"<sup>99</sup> being recycled. The company does not actually claim that the product *will* be recycled. That duty is left to others. Even if no recycling infrastructure currently exists for that material, such labeling might create a demand for necessary

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95. See *supra* notes 52-55 and accompanying text for a discussion of the difference between preconsumer and postconsumer wastes.

96. 40 C.F.R. § 247.101(g) (1990); see also *id.* § 246.101(w) (defining recycled material as "material that is used in place of a primary, raw or virgin material in manufacturing a product").

The EPA is far from clear in this regard, however. For example, in its guidelines for federal procurement of paper and paper products containing recovered material (which is functionally the same as "recycled material" in this context), it *excludes* from its definition of such material that which is, in essence, preconsumer waste: "materials and by-products generated from, and commonly reused within, an original manufacturing process." *Id.* § 250.4(kk). Nevertheless, EPA goes on to explain that, in the case of paper and paper products, "recovered material" may *include* what is arguably preconsumer waste: "waste generated after completion of the papermaking process . . . [and] [f]inished paper and paperboard from obsolete inventories." *Id.* § 250.4(kk)(2)(i)-(ii).

97. The EPA's Recycling Advisory Council has recently adopted a definition of "recycling" that focuses on waste-stream reduction and could accommodate preconsumer wastes. See *Food and Drug Administration Allows First Use of Recycled Plastic for Soft Drink Containers*, 21 Env't Rep. (BNA) 1703 (Jan. 25, 1991).

98. This argument, however, discounts the value to consumers and the environment of being able to choose *among* recycled products containing different types and amounts of waste materials.

99. WEBSTER'S, *supra* note 60, at 45 (emphasis added).

recycling services.<sup>100</sup> When recycling infrastructures are created, "recyclable" labels will enable consumers to identify those products that can be consigned to them. Many states have therefore passed laws requiring codes on plastic containers to identify the type of resin from which they are made so that recycling industries can sort them readily.<sup>101</sup>

Marketing a plastic product as "degradable" may not be inherently misleading because degradable plastics provide tangible benefits in many applications. Specialty plastics allow physicians to employ biodegradable sutures, which the body absorbs, in medical procedures.<sup>102</sup> Degradable plastic mulching film, used for a variety of agricultural purposes, could eliminate the cost of removing nondegradable film.<sup>103</sup> Six-packs of beverages are commonly bound together by plastic "yokes." These yokes are frequently discarded as litter and have proven deadly to animals, especially marine species, that consume them or become entangled in them.<sup>104</sup> Numerous states have mandated specifically that these yokes be made from degradable plastics.<sup>105</sup>

Even those degradable plastics destined for landfills may provide benefits, at least in the eyes of many lawmakers. Many state legislatures have endorsed degradable plastics.<sup>106</sup>

100. Holusha, "Recyclable" Claims Are Debated, *N.Y. Times*, Jan. 8, 1991, at D1, col. 3; Meier, *States Seek to Control Environmental Claims*, *N.Y. Times*, Nov. 8, 1990, at C5, col. 3.

101. *E.g.*, FLA. STAT. § 403.708(9) (1989); ME. REV. STAT. ANN. tit. 32, §§ 1721-1726 (Supp. 1990); N.D. CENT. CODE § 23-32-03 (Supp. 1989); OHIO REV. CODE ANN. § 3734.60 (Anderson Supp. 1990). These laws were passed without substantial plastic recycling infrastructures in place. *Cf.* EPA, MUNICIPAL SOLID WASTE, *supra* note 56, at 48 (stating that, with the exception of plastic soft drink bottles, recycling of plastic containers after consumer use in the U.S. has been very slight thus far).

102. SPI OVERVIEW, *supra* note 62, at 3; *see also* Beiser & Kanat, *Biodegradable Internal Fixation*, *J. AM. PODIATRIC MED. A.*, Feb. 1990, at 72 (reviewing the literature on, and describing the benefits of, biodegradable sutures and other means of internal fixation in podiatric applications).

103. GAO, *supra* note 18, at 12-13.

104. For a discussion of the harmful effects of yokes and other plastic debris on marine species, *see* Weisskopf, *Plastic Reaps a Grim Harvest in the Oceans of the World*, *SMITHSONIAN*, Mar. 1988, at 58.

105. *E.g.*, ALASKA STAT. § 46.06.090(b) (1991); HAW. REV. STAT. § 339-22 (Supp. 1990); MICH. COMP. LAWS ANN. § 445.582 (West Supp. 1991); N.J. STAT. ANN. § 13:1E-99.4 (West Supp. 1991); OR. REV. STAT. § 459.850(5) (1989); VT. STAT. ANN. tit. 10, § 1525(a)(2) (1984 & Supp. 1991).

106. *See, e.g.*, 1988 Minn. Laws c. 688, art. 17, § 1, subdvs. 3-4 (repealed 1990). Legislators are not necessarily the arbiters of environmental truth. *See, e.g., infra* notes 110-11 and accompanying text (illustrating confusion in the Minnesota legislature over the issue of "degradable" plastics).

Some require or authorize state agencies to use degradable plastic products,<sup>107</sup> while others have enacted legislation banning the sale of non-degradable plastic products throughout the state.<sup>108</sup> In what appeared to be the most compelling portion of its answer to the Minnesota Attorney General's complaint against its degradable Hefty bag line, Mobil pointed to a recently enacted Minnesota law that would have forbidden any public agency—including the Attorney General's office—from buying or using nondegradable plastic garbage bags.<sup>109</sup> Thus, some laws not only embrace the benefits of degradable plastics, but also require the use of degradable plastic products that consumers could not identify *but for* the existence of the allegedly misleading term "degradable" on the label.

## II. A CALL FOR REFORM

When is a green marketing claim unlawful? How far can manufacturers stretch the truth of vague terms like "environmentally friendly" before they enter the realm of deceptiveness? How much postconsumer waste must a product contain before it can honestly be called "recycled"? What exactly must a discarded product become if it is to be labeled "degradable"? In short, how green must a "green" product be?

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107. *E.g.*, ILL. ANN. STAT. ch. 111 1/2, para. 7905 (Smith-Hurd Supp. 1991) (requiring agency use of degradable or recyclable plastic products when available at reasonable cost and in an appropriate quantity and quality); IND. CODE ANN. § 4-13.4-4-6(g) (West 1991) (requiring agencies to use degradable products if certain conditions are met); LA. REV. STAT. ANN. § 30:2038(B) (West Supp. 1991) (requesting and authorizing agency use of "degradable or recyclable plastic materials in those instances when it is appropriate and economically feasible").

108. *E.g.*, FLA. STAT. § 403.708(10)(a) (1989) ("[N]o plastic bag shall be provided at any retail outlet . . . unless the bag is composed of material which is degradable within 120 days . . ."); S.D. CODIFIED LAWS ANN. § 34A-7-5.2 (Supp. 1991) ("No plastic garbage bag or plastic garbage can liner may be offered for sale in this state after July 1, 1995, if the bag or can liner is not constructed from starch-based plastic or is not biodegradable, photodegradable or otherwise degradable.").

109. Answer at 2, *State v. Mobil Chem. Co.*, No. C5-90-6843 (Minn. Dist. Ct., Ramsey County) (July 2, 1990) [hereinafter Mobil's Minn. Answer] (referring to 1988 Minn. Laws c. 688, art. 17, § 1, subdvs. 3-4 (repealed 1990)). Unfortunately for Mobil, Minnesota repealed that law before it became effective, nearly two months before Mobil filed its answer. See 1990 Minn. Laws c. 597, § 73 (signed May 3, 1990); 1990 Minn. Laws c. 604, art. 10, § 32 (signed May 7, 1990).

Unfortunately, a generic "deceptive" standard fails to answer such questions clearly. As a result, confusion is often the only certainty within the current regulatory scheme. Even state legislatures appear confused. For instance, Minnesota's legislature, which had mandated that all state agencies use degradable plastic garbage bags, repealed that law before it took effect.<sup>110</sup> It relied on a state committee's report that revealed the dubious benefits of "degradable" plastics in standard waste-disposal systems, raised concerns over the safety of degraded end-products, and described the detrimental effects that promoting degradable plastics could have on recycling, consumer education, and litter reduction efforts.<sup>111</sup>

A ten-state task force of attorneys general (the "Task Force") conducted a public forum on environmental marketing in St. Paul, Minnesota in March of 1990 and concluded that all parties involved in this issue—manufacturers, consumer and environmental groups, legislators, and enforcement and administrative officials—agree that the existing regulatory framework is in need of reform.<sup>112</sup> In essence, the report issued by the Task Force found that the costs of *not* regulating are simply too great.<sup>113</sup>

### A. *The Costs of Not Regulating*

Without regulation, three costs will mount: manufacturers will continue to make questionable environmental claims, consumers will become disillusioned, and the consumer market will fail to serve as a mechanism of genuine environmental innovation and improvement. First, manufacturers will continue to be tempted and pressured into making dubious environmental claims. Given the choice between avoiding

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110. 1990 Minn. Laws c. 597, § 73; 1990 Minn. Laws c. 604, art. 10, § 32 (both of these sections repeal the earlier law).

111. THE GREEN REPORT, *supra* note 7, at 31 n.21.

112. See THE GREEN REPORT, *supra* note 7, at 15-16. The Task Force held subsequent hearings the following December to solicit comments on the preliminary report and presented its revised recommendations in a May 1991 report. See THE GREEN REPORT II, *supra* note 18.

The GAO and EPA have made similar calls for reform in the fields of degradable plastics and recyclability, respectively. See GAO, *supra* note 18, at 15-16; EPA, PROMOTING SOURCE REDUCTION AND RECYCLABILITY, *supra* note 1, at 5, 35.

113. See THE GREEN REPORT, *supra* note 7, at 12-14.

technical and legal uncertainty on the one hand and protecting market share and increasing profits on the other, an increasing number of manufacturers not surprisingly choose the latter.<sup>114</sup>

The case of Mobil and its "degradable" Hefty bag line provides an illustrative example.<sup>115</sup> Before Mobil had introduced these products, it published a pamphlet entitled "Plastics and the Environment," which attempted to dispel the myth of degradable plastics and their alleged environmental benefits.<sup>116</sup> It explained that bio- and photodegradation cannot take place in landfills quickly enough to provide any tangible benefits and that "[i]n fact, biodegradation may not be desirable in landfills" because of leachate and other problems.<sup>117</sup> The pamphlet concluded that the solution to solid waste management does not lie in degradable materials, but in a combination of source reduction, recycling, incineration, and landfilling.<sup>118</sup>

Nevertheless, Mobil introduced its "degradable" Hefty bag line in 1989. The company felt pressured to promote a product it knew to be of little or no value to landfill problems. Mobil officials explained:

Mobil has concluded that biodegradable plastics will not help solve the solid waste problem . . . . We do, however, see that there are some short-term public relations gains in switching to a photodegradable plastic . . . bag . . . . And it's that public relations value that has to be considered as opposed to real solutions to the problem.<sup>119</sup>

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114. See generally EPA, PROMOTING SOURCE REDUCTION AND RECYCLABILITY, *supra* note 1, at 40-42 (noting that "[c]ertain industry leaders have recognized this social trend and have declared that environmental . . . concerns hold promising opportunities for marketers").

One advertising firm encouraged manufacturers to concentrate more on public relations than scientific fact, see WARWICK BAKER & FIORE, INC., *supra* note 40, at 10 ("[s]hare of mind' has to do more with publicity than reality."), and to exploit previously unexploited markets, see *id.* at 15 ("[N]o one company has yet established itself as being environmentally aware in the minds of consumers. A large opportunity exists for companies to be among the first to establish themselves in these terms.").

For a discussion of the growth of green marketing tactics, see *Going for the Green*, *supra* note 4, at 19-20.

115. The case is described from Mobil's point of view in Lawrence, *supra* note 50.

116. MOBIL, PLASTICS AND THE ENVIRONMENT, *supra* note 84.

117. *Id.* at [2] (emphasis removed). For a discussion of leachate issues in landfills, see OTA, *supra* note 5, at 276-81.

118. MOBIL, PLASTICS AND THE ENVIRONMENT, *supra* note 84, at [4].

119. Lawrence, *supra* note 50, at 12 (quoting Robert Barrett, General Manager, Mobil Solid Waste Management Solutions Group); see also Wis. Brief in Support, *supra* note 89, at 25 (quoting same).

We've got to be, you know, market driven. I guess that's the easiest way to say it. You're not going to beat them, so you better join them.<sup>120</sup>

As increasing numbers of manufacturers are pressured or tempted to join the green marketing bandwagon, the second major cost of nonregulation—consumer disillusionment—will mount.<sup>121</sup> Questionable or misleading claims will certainly come to light, rendering consumers less likely to believe other green marketing claims—even valid ones—or to channel their increasing environmental consciousness into purchasing decisions. As an official in EPA's Office of Pollution Prevention has explained: "The fear is that if consumers get consistently confused, they may get cynical and tune out, and we will lose our chance to push environmental changes."<sup>122</sup>

The third cost of not regulating green marketing terms is the logical economic outgrowth of the first two: failure of the market to serve as a mechanism of genuine environmental innovation and improvement. Ideally, enhanced environmental consciousness among consumers should create a demand for less environmentally damaging products. Consumers could use their purchasing power to reward firms that produce such goods, thereby creating incentives for other firms to follow suit.<sup>123</sup> The current regulatory framework, however, undermines this process. Consumers are clearly demanding "greener" goods, but a dearth of reliable information prevents them from directing their demand consistently toward products that offer genuine environmental improvements. Furthermore, manufacturers that produce truly less harmful products are unable to reap the rewards of their innovations

120. Wis. Brief in Support, *supra* note 89, at 25 (quoting the trial transcript); see also Posthearing Brief of Mobil Co. at 9-10, *State v. Mobil Chem. Co., Inc.*, No. 90CV2408 (Wis. Cir. Ct., Dane County) (July 31, 1990) (expanding on the market pressures to offer a degradable plastic bag); Lawrence, *supra* note 50, at 12-13 (explaining the rationale behind Mobil's decision to market a degradable plastic bag).

121. See THE GREEN REPORT, *supra* note 7, at 14.

122. Chute, *No EPA "Green" Labels Planned*, SUPERMARKET NEWS, Oct. 8, 1990, at 1, 29 (quoting Sharon Stahl, the acting chief of the policy analysis branch of EPA's Office of Pollution Prevention); see also Meier, *supra* note 6, at 48, col. 4 ("The result of all this is that people are going to assume that they can't do anything right . . . . We are going to guilt-trip them into lethargy.") (quoting Linda Lisper, a legislative counsel for Consumers Union).

123. For a brief discussion of the prospects for consumers to affect a "greening" of industrial and corporate America, see Hannum & Juniper, *Shades of Green: Consumer Shopping as If the Earth Counted*, BUZZWORM, Jan./Feb. 1990, at 36.

and investments.<sup>124</sup> Because green marketing terms tend to be vague, broad, and oversimplified, manufacturers who offer nothing more than meaningless, "feel good" sentiment are able to make essentially the same claims as those who make substantial investments in products and manufacturing processes that limit environmental impacts.

### B. The Forms of New Regulations

Various governmental bodies have taken steps toward enacting and implementing legislation and regulations regarding green marketing claims. In September of 1990, the California legislature approved the Environmental Advertising Claims Act, which defines certain specific terms used to make environmental claims and requires that manufacturers substantiate vague ones.<sup>125</sup> One month later, Senator Frank Lautenberg proposed the federal Environmental Marketing Claims Act of 1990,<sup>126</sup> a bill that he reintroduced as S. 615 during the following session of Congress.<sup>127</sup> The bill calls upon the EPA (with the aid of an independent advisory board) to define green marketing terms and to create a certification program through which manufacturers must seek permission to use them.<sup>128</sup> The New York State Department of Environmental Conservation has defined "recyclable," "recycled," and "reusable" and has promulgated regulations for an official recycling emblem.<sup>129</sup> In November of 1990, the Northeast

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124. See THE GREEN REPORT, *supra* note 7, at 14; Garfield, *Lever Bros. Paints Wink a Suspicious Shade of Green*, ADVERTISING AGE, Oct. 22, 1990, at 62.

125. 1990 Cal. Legis. Serv. ch. 1413 (West) (codified at CAL. BUS. & PROF. CODE §§ 17508.5, 17580-17581 (West Supp. 1991)).

126. S. 3218, 101st Cong., 2d Sess., 136 CONG. REC. S16019-22 (daily ed. Oct. 18, 1990).

127. S. 615, 102d Cong., 1st Sess., 137 CONG. REC. S3034-39 (daily ed. Mar. 12, 1991). Representative Sikorski introduced the House companion bill, H.R. 1408, 102d Cong., 1st Sess., 137 CONG. REC. H1669, E898-99 (daily ed. Mar. 12, 1991).

128. S. 615, *supra* note 127, § 6, 137 CONG. REC. S3036. The bill, as introduced, places authority to promulgate regulations and grant certification solely in the EPA; it does not mention the FTC. Section 5 of the bill describes the composition and function of the independent advisory board. See S. 615, *supra* note 127, § 5, 137 CONG. REC. S3036.

129. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 368.1-6 (1990). These regulations were issued under the authority of N.Y. ENVTL. CONSERV. LAW § 27-0717(2) (McKinney Supp. 1991).



Recycling Council (NERC) adopted model labeling standards for claims of reusability, recyclability, and recycled content.<sup>130</sup>

The purpose of this Note is not necessarily to critique these various initiatives, but to lend a sense of urgency and some clarity to the efforts behind them. The preceding sections of this Note attempted to instill a sense of urgency. In pursuit of clarity, this section outlines the most common aspects of these regulations.

1. *Definitions and standards for specific terms*—Relatively specific green marketing terms can now be misused so readily because no accepted definitions of them exist. Terms like “recycled” possess degrees of truth; a “recycled” product may contain 10% preconsumer waste, or 95% postconsumer waste.<sup>131</sup> Hence, the term “recycled” does not alone impart sufficient information to shoppers.

Definitions attempt to link the words to some specific environmental attribute of the product. Some definitions are purely descriptive and read like dictionary text. California’s Environmental Advertising Claims Act, for example, defines “biodegradable” as “the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.”<sup>132</sup> Although it is unlikely that many consumers will become familiar with the technical aspects of such definitions, the definitions may prove invaluable in weeding out claims that are “less true” than others.

Other definitions take the form of some minimum standard that the product must attain before a manufacturer may apply a given term. New York’s detailed standards list the minimum percentages of preconsumer and postconsumer materials that certain products must contain before each can be labeled

130. Northeast Recycling Council Regional Labeling Standards (Nov. 27, 1990) [hereinafter NERC Standards] (available from NERC, Brattleboro, Vt.). NERC is comprised of officials and legislators representing Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. Memo from William Ferretti, Vice-Chair of NERC, to Members of NERC and Other Interested Parties Regarding Regional Labeling Standards and Labeling Resolution (Dec. 10, 1990).

131. For a discussion of preconsumer and postconsumer wastes, see *supra* notes 52-55 and accompanying text.

132. CAL. BUS. & PROF. CODE § 17508.5(b) (West Supp. 1991). The Act also lists definitions for “ozone friendly,” “photodegradable,” “recyclable,” and “recycled.” *Id.* § 17508.5(a), (c), (d), (e).

"recycled."<sup>133</sup> If standards are strict enough, some believe manufacturers will develop innovations in product design and composition to meet them.<sup>134</sup>

Still other definitions require a reasonable possibility that the advertised environmental benefit will actually be realized.<sup>135</sup> S. 615, which proposes a federal environmental marketing claims act, would not allow manufacturers to use certain terms, even though the terms may be technically true, unless the attribute they describe has a realistic chance of occurring. For example, a manufacturer could not describe a product or package as "recyclable" or "compostable" without proving that at least twenty-five percent of the product will be recycled or composted.<sup>136</sup> Likewise, a manufacturer could not label its product as "reusable" without showing that it is actually reused for its original purpose an average of five times or more.<sup>137</sup> New Jersey already has enacted a less restrictive definition of "recyclable" for beverage containers, stating that no beverage container may carry the term unless the state "determines that a convenient and economically feasible recycling system for that specific container is available."<sup>138</sup>

2. *Government preapproval or registration for use of defined terms*—To ensure compliance and reduce policing efforts, regulations may require that manufacturers first demonstrate to the government that they plan to use defined terms properly. New York's elaborate recycling emblem program, for example, prohibits manufacturers from using an official recycling emblem without obtaining prior authorization from

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133. N.Y. COMP. CODES R. & REGS. tit. 6, § 368.4(a) (1990).

134. See Environmental Defense Fund, Comments on New York State Department of Environmental Conservation Recycling Emblems Regulations 1-3 (Mar. 1990); see also S. 615, *supra* note 127, § 2(b)(4), 137 CONG. REC. S3035 (stating that a purpose of the Act is to "encourage the development of innovative technologies and practices").

135. See generally THE GREEN REPORT II, *supra* note 18, at 18-27; THE GREEN REPORT, *supra* note 7, at 38-42.

136. S. 615, *supra* note 127, §§ 6(b)(7)(B), (D), 137 CONG. REC. S3036. The bill does not state if this recycling or composting rate would have to be achieved nationwide, or if it is only a marketwide requirement. These sections would mandate that after the year 2000 the minimum rate would increase to 50%. *Id.* Subsection D further requires that the compostability of the product be a desirable attribute and that no toxic materials be released from it. *Id.* § 6(b)(7)(D), 137 CONG. REC. S3036.

137. *Id.* § 6(b)(7)(C), 137 CONG. REC. S3036; see also NERC Standards, *supra* note 130, at 1.

138. N.J. STAT. ANN. § 13:1E-99.18(a) (West Supp. 1991). This definition was enacted as part of New Jersey's 1987 Mandatory Statewide Recycling Program Act. See 1987 N.J. Sess. Law Serv. 359, 367 (West).

the state Department of Environmental Conservation.<sup>139</sup> Likewise, S. 615 would require a manufacturer wishing to use a term defined under the Act to certify to the EPA that its environmental marketing claim comports with the Act.<sup>140</sup>

This type of regulation raises the issue of administrative competence. Lawmakers considering legislation to authorize such regulation should query the wisdom of placing full enforcement power in the hands of an environmental agency. S. 615, for example, specifically empowers only the EPA to implement the Federal Environmental Marketing Claims Act; it does not mention the FTC.<sup>141</sup> One should bear in mind that green marketing, after all, consists of two components: "green" (which relates to environmental impacts) and "marketing" (which relates to advertising). Although the EPA is particularly well-suited to address the "green" component, it may not be as adept at implementing the "marketing" component. The FTC, on the other hand, with its Bureau of Consumer Protection, is experienced at policing potentially deceptive marketing practices. Legislators therefore should consider means of explicitly drawing upon the collective expertise of both agencies to implement green marketing legislation at both the rulemaking and enforcement stages.<sup>142</sup>

3. *Disclosure and substantiation requirements*—Some regulations may require manufacturers using green marketing terms to explain their claims affirmatively, or at least to be prepared to substantiate them. Specific terms might still be

139. N.Y. COMP. CODES R. & REGS. tit. 6, § 368.5(d) (1990).

140. S. 615, *supra* note 127, § 7(a), 137 CONG. REC. S3037. The EPA would be allowed to disapprove the certification at any time. *Id.* § 7(b), 137 CONG. REC. S3037.

141. *See* S. 615, *supra* note 127.

142. The FTC has stressed the importance of close coordination between the FTC and the EPA in this matter. *Environmental Labeling of Consumer Products: Hearing Before the Subcomm. on the Consumer of the [Senate] Comm. on Commerce, Science, and Transp.*, 101st Cong., 2d Sess. 19-20 (1990) (prepared statement of Barry Cutler, Director of the FTC's Bureau of Consumer Protection). Although S. 615 does not explicitly integrate the FTC into the regulatory scheme the bill would create, it does not purport to diminish the FTC's existing authority either. *See id.* § 13(b), 137 CONG. REC. S3038. Indeed, the FTC is considering its own regulations even in the absence of an express congressional mandate. *See Industry, EPA, States Urge FTC to Issue National Labeling Guidelines*, 22 *Env't Rep. (BNA)* 646-47 (July 19, 1991) (describing hearings held by FTC on this issue). Furthermore, the FTC, the EPA, and the U.S. Office of Consumer Affairs "have joined to form a Federal Task Force to provide a coordinated and cohesive national response to the issue of environmental labeling and marketing claims." 56 *Fed. Reg.* 49,992, 49,993-94 (1991) (soliciting "comment on options for guidance to be used by marketers in product labeling and advertising promoting the use of recycled materials and recyclable materials").

used for substandard products. S. 615, for example, would allow a manufacturer to label its product "recycled," even if the product did not conform to the standard definitions, as long as it clearly listed the percentages of preconsumer and postconsumer materials on the label.<sup>143</sup> Other state regulations on vague terms simply call for the manufacturer to be prepared to back up its claims. For example, California mandates that those who use broad green marketing terms like "environmentally friendly" maintain information and documentation supporting the validity of the claim and furnish it to the public upon request.<sup>144</sup>

4. *Prohibiting overly vague terms*—Green marketing regulation ultimately seeks to place useful information in the hands of consumers so that the market may serve as an agent of environmental improvement.<sup>145</sup> Broad terms like "environmentally responsible," therefore, possess little value; standing alone, they are highly subjective, difficult to verify, and tend to create the misleading impression that the product poses no harm to the environment.<sup>146</sup> S. 615 may pave the way to abolish such terms. It calls upon the EPA, in its role as lexicographer, to "ensure that an environmental marketing claim shall be related to a *specific* environmental impact or attribute in such a manner as to ensure that [it] is not false, misleading, or deceptive," and that it has been substantiated scientifically.<sup>147</sup>

5. *A search for uniformity*—For various bodies to promulgate different definitions and standards for green marketing terms would severely undermine the goal of providing reliable information. Varying definitions would confuse consumers and, more critically, would leave manufacturers who sell their products in different jurisdictions facing conflicting regulations. Actions of large states such as California and New York and regional efforts like NERC's may provide models for the rest of the nation, but uniform, national standards are clearly

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143. S. 615, *supra* note 127, § 6(b)(7)(A)(ii), 137 CONG. REC. S3036. NERC suggests that all "recycled" emblems identify preconsumer and postconsumer composition (by weight) of the product. NERC Standards, *supra* note 130, at 3.

144. CAL. BUS. & PROF. CODE § 17580 (West Supp. 1991); *see also* THE GREEN REPORT II, *supra* note 18, at 29-30; THE GREEN REPORT, *supra* note 7, at 44-45.

145. *See* Hannum & Juniper, *supra* note 123.

146. *See* THE GREEN REPORT II, *supra* note 18, at 5; THE GREEN REPORT, *supra* note 7, at 31-33; *supra* notes 43-51 and accompanying text.

147. S. 615, *supra* note 127, § 6(b)(2)-(3), 137 CONG. REC. S3036 (emphasis added).

needed.<sup>148</sup> S. 615 attempts to meet that need, even though it would allow states to adopt standards more stringent than federal ones.<sup>149</sup>

The search for uniformity raises an important question: Who will be involved in setting these uniform standards? At first blush, this appears to be a purely administrative function, because legislatures may not have the expertise to handle the relevant technical issues.<sup>150</sup> But even if the process of establishing standards is a technical function, it remains an inherently political one as well. Manufacturers will engage in line-drawing battles with environmentalists and consumer advocates.<sup>151</sup> For example, should a paperboard product be deemed "recycled" if it contains no less than 10% postconsumer

148. See, e.g., Holusha, "Recyclable" Claims Are Debated, *supra* note 100, at D1, col. 3; Lublin, *supra* note 6, at 11, col. 1. National standards have been anticipated in various legal fora. See, e.g., CAL. BUS. & PROF. CODE § 17508.5 (West Supp. 1991) (allowing manufacturers to comply with definitions that may be established by the FTC in lieu of state ones); Tex. Letter of Agreement, *supra* note 88, at 2 (allowing Mobil to reinstate its "degradability" claim in its Hefty bag line if it complies with any "uniform national standards" that might be promulgated).

149. S. 615, *supra* note 127, § 13(c), 137 CONG. REC. S3038. The bill also would permit states to bring suit for violations of the federal regulations. *Id.* § 10, 137 CONG. REC. S3038. In suggesting that federal regulations not preempt more stringent state ones, the bill's author may have been responding to the concerns of the Attorneys General Environmental Marketing Task Force, which felt that states should be allowed to protect their own citizens and environment through tougher standards, should they see fit. See Letter from Hubert H. Humphrey, III, John K. Van de Kamp, James M. Shannon, Robert Abrams, Jim Mattox, & Don J. Hanaway to Sen. Lautenberg 9-10 (June 29, 1990), reprinted in THE GREEN REPORT, *supra* note 7, app. H.

This does not imply that the Task Force opposes federal legislation. Minnesota State Attorney General Hubert H. Humphrey, III, whose office spearheads the Task Force, has stated: "We must begin that process [of setting national definitions and standards] now . . . Without federal action, state and local lawmakers will have no choice but to piece together their own solutions, as best they can." Lawrence & Colford, *supra* note 6, at 28, 28-30.

150. *But see* CAL. BUS. & PROF. CODE § 17508.5 (West Supp. 1991) (California legislature itself defining certain terms). One might wonder how readily such legislatively defined terms might be amended to comport with future innovations and circumstances.

151. These groups have already clashed over this and related issues. See Holusha, *U.S. Guidelines Sought for Environmental Ads*, N.Y. Times, Feb. 15, 1991, at C2, col. 5 (nat'l ed.) (stating that environmental groups are likely to oppose guidelines on the use of terms like "recycled" and "recyclable" that a trade association proposed to the FTC) (a shortened version of this article appeared as Holusha, *Industry Seeks U.S. Rules Covering Environmental Ads*, N.Y. Times, Feb. 15, 1991, at D6, col. 2 (late ed.)); Holusha, *Environmental Coalition Split*, N.Y. Times, Feb. 4, 1991, at D2, col. 4 (describing why environmental and consumer groups withdrew from the Source Reduction Council of the Coalition of Northeastern Governors).

material,<sup>152</sup> or no less than 35% postconsumer material?<sup>153</sup> Purely "technical" answers to such questions do not exist. Rather, these questions should be addressed in consultation with those most likely to be affected by the answers. Law-makers considering a standard-setting process, therefore, need to consider carefully how to incorporate the various points of view involved without turning the process into a free-for-all.<sup>154</sup>

### III. GREEN MARKETING CLAIMS: UNLIKELY CANDIDATES FOR FIRST AMENDMENT PROTECTION

Those who would oppose the regulation of green marketing claims might challenge such proposals on constitutional grounds, arguing that the regulations violate their first amendment right to free speech. Mobil, for example, raised first amendment defenses when several state attorneys general attempted to enjoin its "degradable" claims on its Hefty bag line.<sup>155</sup> Yet first amendment challenges, even to the most restrictive regulations,<sup>156</sup> probably would not get very far.

Traditionally, the Supreme Court had ruled that commercial speech lay outside the reach of first amendment protection.<sup>157</sup>

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152. CAL. BUS. & PROF. CODE § 17508.5(e) (West Supp. 1991).

153. N.Y. COMP. CODES R. & REGS. tit. 6, § 368.4 (table 1(2)(v)) (1990).

154. The Lautenberg bill attempts to strike such a balance. S. 615, *supra* note 127 § 5, 137 CONG. REC. S3036 (creating an advisory board consisting of consumer advocates and representatives from the business community, environmental organizations, state and local governments, and the National Institute of Standards and Technology, but placing final administrative power in the hands of EPA). The operations of this board also will have to comport with the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15 (1988) (creating standards and uniform procedures to govern the establishment, operation, administration, and duration of such bodies) and the Government in the Sunshine Act, 5 U.S.C. § 552b (1988) (amending and supplementing the Advisory Committee Act to mandate access to advisory committee meetings).

155. See, e.g., Mobil's Minn. Answer, *supra* note 109, at 4; Answer and Affirmative Defenses at 4, *State v. Mobil Chem. Co., Inc.*, No. 90-2-11787-1 (Wash. Super. Ct., King County) (July 2, 1990); see also *supra* notes 85-90 and accompanying text (discussing the state suits).

156. Regulating green marketing claims would certainly limit what manufacturers and advertisers could say about their products. The extent of restrictions on this speech would depend upon the regulatory approach employed. Banning certain terms would restrict speech more than would establishing standardized definitions of terms. Both of these approaches, in turn, would be more restrictive than requiring manufacturers to substantiate their environmental claims.

157. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (sustaining a ban of a handbill advertisement); see also *Recent Development—Trends in First Amendment*

Yet in the last fifteen years, the Court has extended limited protection to commercial speech,<sup>158</sup> the bounds of which have been a topic of lively scholarly debate.<sup>159</sup> Nevertheless, throughout this period, the Court has maintained that commercial speech does not warrant the same degree of constitutional protection as most types of speech.<sup>160</sup>

Two Court decisions are particularly important to this issue. The Court welcomed commercial free speech back into the fold of constitutional protection in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>161</sup> In this decision, the Court professed a belief that the strong public interest in the free flow of commercial information should not be impinged upon blithely.<sup>162</sup> In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>163</sup> the Court described when government restrictions may be permissible. To merit constitutional protection, the speech at issue must "concern lawful activity and not be misleading."<sup>164</sup> A restriction on such commercial speech, the Court continued, is valid only if it directly furthers a substantial governmental interest and is no more extensive than necessary to achieve that interest.<sup>165</sup>

*Protection of Commercial Speech*, 41 VAND. L. REV. 173, 176-79 (1988) (authored by Mary Nutt).

158. See, e.g., *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 560-66, 571 (1980) (striking a state commission's order that prevented utilities from promoting the use of energy); *Bates v. State Bar*, 433 U.S. 350, 363-64, 384 (1977) (invalidating a rule that prohibited attorneys from advertising the price and availability of legal services); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (striking a regulation that prevented pharmacists from advertising the prices of prescription drugs); see also *Recent Development*, *supra* note 157, at 180-202.

159. See, e.g., Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1 (1977); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289 (1987); *Symposium: Commercial Speech and the First Amendment*, 56 U. CIN. L. REV. 1165 (1988) (containing several articles); Comment, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359 (1990) (authored by David F. McGowan); Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976) (authored by Thomas W. Merrill).

160. G. GUNTHER, *INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW* 795 (4th ed. 1986).

161. 425 U.S. 748, 758-62 (1976).

162. *Id.* at 765 ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.")

163. 447 U.S. 557 (1980).

164. *Id.* at 566.

165. *Id.*

Well-crafted government regulations of green marketing terms are likely to pass constitutional muster for four reasons. First, such regulations will achieve the *Virginia Pharmacy* goal of promoting well-informed decisions in the marketplace.<sup>166</sup> One could readily argue that keeping commercial speech free from regulation enhances the flow of "information and opinion about competing commercial products and services [that] undoubtedly aid the individual in making countless life-affecting decisions."<sup>167</sup> This reasoning, however, *supports* restrictions on commercial speech in the green marketing context, where the information currently being imparted is lost in ambiguity and possible deception. As one commentator asserts, "[e]nforcement and regulatory actions, which are carefully crafted to insure the free flow of *accurate* commercial information, are of vital importance to a free market system."<sup>168</sup> Green marketing regulations are intended to ensure such accuracy,<sup>169</sup> thereby enhancing the market's ability to serve as a mechanism not only of individual benefit to consumers and manufacturers, but also of environmental improvement.

Second, claims that tend to be deceptive deserve less constitutional protection in the face of compelling government

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166. 425 U.S. at 765. Two critics have argued that this goal is anomalous in first amendment jurisprudence because commercial advertising is irrelevant to the traditional reasons for invoking freedom of speech: enhancing individual self-fulfillment through free expression and contributing to political decision making in a representative democracy. Jackson & Jeffries, *supra* note 159, at 25. Indeed, *Virginia Pharmacy* introduced an element of "economic liberty" into the first amendment, harkening back to the now discredited doctrine of *Lochner v. New York*, 198 U.S. 45 (1905). See Jackson & Jeffries, *supra* 159, at 30-33; *id.* at 31 n.108 ("*Lochner* has come to be regarded as the symbol of an era when the Court struck down legislation solely because it interfered with economic liberty.").

Nevertheless, one should not be sidetracked by such criticisms. The goal of freeing commercial information from restraints makes a certain degree of practical sense, if not complete constitutional sense. See Pridgen & Preston, *Enhancing the Flow of Information in the Marketplace: From Caveat Emptor to Virginia Pharmacy and Beyond at the Federal Trade Commission*, 14 GA. L. REV. 635, 667-70 (1980) (arguing for the enhancement of the flow of commercial information). More importantly, in terms of defending the constitutionality of green marketing regulations, *Virginia Pharmacy* is still valid law.

167. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 630 (1982).

168. McKenzie, *Ambiguity, Commercial Speech and the First Amendment*, 56 U. CIN. L. REV. 1295, 1308 (1988) (emphasis added).

169. See, e.g., S. 615, *supra* note 127, § 2(b)(2), 137 CONG. REC. S3035 (stating that one purpose of the proposed law is to "empower consumers with reliable and consistent guidance to facilitate value comparisons with respect to environmental marketing claims").



interests than do nondeceptive ones. The *Central Hudson*<sup>170</sup> Court determined that “the government may ban forms of communication more likely to deceive the public than to inform it.”<sup>171</sup> In a later decision, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*,<sup>172</sup> the Court asserted that the validity of a government’s regulation of commercial speech is enhanced “[w]hen the possibility of deception is . . . self-evident.”<sup>173</sup> Many potentially misleading green marketing claims may be lawful under the FTC’s *Cliffdale*<sup>174</sup> standard, which interprets the FTC Act to hold unlawful only those material claims that are *likely* to mislead reasonable consumers.<sup>175</sup> This does not necessarily mean that such claims are immune from regulation, however; the government can make a strong case that particular terms do not clear the Court’s “self-evident possibility of deception” standard,<sup>176</sup> thereby weakening any pleas for first amendment protection from definitions or prohibitions on the use of such terms.

Third, the government can easily demonstrate substantial interests in these regulations<sup>177</sup> and show that the regulations “directly advance[] the governmental interest[s] asserted.”<sup>178</sup> The government has long had an interest in protecting citizens from potentially deceptive advertising in general.<sup>179</sup> More specifically, the government has a valid interest in promoting

170. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980).

171. *Id.* at 563.

172. 471 U.S. 626 (1985).

173. *Id.* at 652-53. Some critics have assailed this “self-evident” standard as too vague a rationale by which to determine when commercial speech deserves protection. See Schmidt & Burns, *Proof or Consequences: False Advertising and the Doctrine of Commercial Speech*, 56 U. CIN. L. REV. 1273, 1286 (1988).

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

175. *Id.* at 164-65. For a discussion of the limitations of the FTC Act and the *Cliffdale* standard in regulating green marketing claims, see *supra* Part I.

176. See *Zauderer*, 471 U.S. at 652-53. To prove this case in the context of prohibiting the use of overly vague terms, the government would first have to counter claims that such terms are mere “puffery.” See *supra* notes 91-94 and accompanying text.

177. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980) (“The State must assert a substantial interest to be achieved by restrictions on commercial speech.”).

178. *Id.* at 566.

179. See *supra* notes 25-27 and accompanying text (describing the purpose of the 1938 amendments to the FTC Act).

means to diminish adverse impacts on the environment.<sup>180</sup> Regulated, truthful green marketing claims—ones related to specific environmental attributes likely to be realized—further this goal by allowing consumers to reward manufacturers that produce less environmentally damaging goods.<sup>181</sup>

Finally, green marketing regulations are tailored specifically to achieve the government's interests. The types of regulations discussed above are not like those invalidated in *Virginia Pharmacy* or *Central Hudson*. In *Virginia Pharmacy*, the Court struck down a Virginia law that effectively forbade pharmacists from advertising the prices of prescription drugs.<sup>182</sup> The Court looked skeptically upon the state's proffered justifications, "for on close inspection . . . the State's protectiveness of its citizens rests in large measure on . . . their being kept in ignorance."<sup>183</sup> The goals of green marketing regulation, on the contrary, rest on keeping citizens *informed*. Definitions and standards will lend meaning to otherwise ambiguous terms and will proscribe only those terms that cannot be substantiated objectively.

Although banning particular terms may appear heavy-handed, it does not approach the draconian measures invalidated in *Central Hudson*. There the Court struck down a state commission's complete ban on advertising by an electric utility to promote the use of electricity.<sup>184</sup> Although the Court recognized the state's interest in energy conservation,<sup>185</sup> it held that a ban on *all* promotional advertising was overly broad.<sup>186</sup> By contrast, bans on particular green marketing terms—ones that might mislead consumers and cannot be defined with any precision—are tailored specifically to achieve the government's interests in protecting consumers and in helping the market serve as a mechanism of environmental improvement. Manufacturers will still be able to describe the environmental attributes of their products. They will simply have to use specific, uniformly defined terms to do so.

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180. See, e.g., the congressional declaration of purpose for the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1988). *But cf.* Coase, *supra* note 159, at 5 (asserting that "regulation makes things worse or, at the best, makes very little difference").

181. See Hannum & Juniper, *supra* note 123 (discussing how the green consumer market might ideally serve as a mechanism for environmental improvement).

182. *Virginia Pharmacy*, 425 U.S. at 749-52.

183. *Id.* at 769.

184. *Central Hudson*, 447 U.S. at 558-61.

185. *Id.* at 568.

186. *Id.* at 569-71.

#### IV. THE GOALS IN PERSPECTIVE: DISTINGUISHING ENVIRONMENTAL SEALS OF APPROVAL

The goal of green marketing regulation is to put information in the hands of consumers. Regulations will ensure that information pertaining to the environmental attributes of products and packaging is as specific, accurate, and truthful as possible. With such information, consumers can act in greater confidence that their decisions will have the promised effect. Similarly, such information will enable manufacturers to make the requisite investments in less environmentally damaging products and processes with the assurance that others will not be rewarded solely for slick advertising.

Is there danger, however, in too much information? Perhaps government-established definitions of green marketing terms will be too complex or technical for consumers to understand. Maybe consumers should simply be told, by an entity that can be trusted to weigh the technical and complex issues involved, which products are less environmentally harmful than others. In very rough terms, the quasi-governmental environmental seal of approval programs in Germany, Canada, and Japan attempt to do just this.<sup>187</sup> Private groups like Green Seal and Green Cross would like to do the same in the United States.<sup>188</sup> These groups would charge manufacturers a fee for testing a product against a variety of criteria. Green Seal would employ criteria that involve a "life-cycle" or "cradle-to-grave" analysis of the product, factoring in how many resources were used in its production, how much pollution was generated and energy consumed in its production and use, and what is likely to happen to it (whether it will be reused, recycled, or discarded) once it has been used for its original purpose.<sup>189</sup>

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187. For a discussion of labeling programs in these and other nations, see APPLIED DECISION ANALYSIS, INC., ADA-89-2085, ENVIRONMENTAL LABELING IN THE UNITED STATES—BACKGROUND RESEARCH, ISSUES, AND RECOMMENDATIONS 1-18 (Draft 1989) (available from Office of Pollution Prevention, EPA, Washington, D.C.).

188. See Freeman, *Ecology Seals Vie for Approval*, ADVERTISING AGE, Jan. 29, 1991, at 30 (mentioning also that the Hearst Corporation's *Good Housekeeping* is considering developing its own environmental seal of approval). Other groups have already developed environmental "ratings" scales. See Schorsch, *supra* note 6, at 5 (briefly describing the "Earthwise Standards for Environmental Evaluation of Consumer Products" and "Ecoscale").

189. See Meier, *Life-Cycle Studies: Imperfect Science*, N.Y. Times, Sept. 22, 1990, at 29, col. 1 (taking a critical look at the "life-cycle" analysis approach). The EPA,

Green Cross has begun using a much narrower set of criteria, one that certifies the high recycled content of certain products.<sup>190</sup> Green Cross, however, also has decided to develop its own "life-cycle" analysis program, one which could compete with Green Seal's.<sup>191</sup> Products meeting the respective testing organization's criteria would be allowed to display its seal of approval, directing environmentally conscious consumers toward the product.

One should not confuse the goals behind the regulation of green marketing claims, as discussed in this Note, with those behind seal of approval programs. Regulation of green marketing claims would attempt to put information in the hands of consumers, even at the risk of overwhelming them with too much information. Seals of approval, on the other hand, would attempt to distill highly technical information about value-laden issues into a relatively simple yes-or-no decision. Subjectivity is at the core of many green consumer choices. For example, is a good made from 100% postconsumer material, which nevertheless employs toxic bleaches and dyes in its production, less environmentally damaging than a nonrecycled good whose production involves no toxic byproducts? A seal of approval would help to make an otherwise difficult choice easier, yet precise terms on a label would allow consumers to exercise their own discretion, weighing for themselves what environmental attributes of a product are most desirable.

Regulation of environmental claims and seals of approval are by no means incompatible,<sup>192</sup> but seals of approval will not obviate the need for effective regulation. Seal of approval programs would place faith in centralized decision-makers, while regulated green marketing terms would place ultimate faith in individual, ecologically conscious consumers. Having both seals of approval and regulated terms on a label might give consumers some added flexibility; the seal could alert

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while not proposing to institute its own seal of approval program, plans to research methodology for making environmental "life-cycle" assessments. Chute, *supra* note 122, at 1.

190. Freeman, *Eco-Approval: First Marketers Get Green Cross*, ADVERTISING AGE, Sept. 3, 1990, at 54.

191. Freeman, *supra* note 188, at 30.

192. See, e.g., S. 615, *supra* note 127, § 6(b)(2), 137 CONG. REC. S3036 (allowing seal of approval programs to operate within the context of regulated green marketing claims if the EPA "determines that such seals are awarded according to objective criteria that promote environmentally preferable products and packages").

them to a product that is somehow environmentally “good,” while terms could help to explain why. Consumers could then check their own intuitions against those of the seal-givers. Yet having only seals would defeat the purpose of fostering true environmental consciousness, because consumers would make choices based purely upon a *desire* to do good, not upon a working *knowledge* of what “good” implies. Unless people become aware of the complex ecological implications of their consumptive habits, green consumerism, as an agent of environmental improvement, might be doomed to the status of a superficial fad.

## V. CONCLUSION

It is too easy to become cynical about the green consumer movement. At one level, even its title is an oxymoron; the more we consume, the more we affect the environment and the less “green” we become. The greenest path, therefore, is to consume *less*, not simply to consume the same amount *differently*. Yet because this notion is anathema to American marketing, and because altering manufacturing processes to minimize environmental impacts is often very expensive, many manufacturers have resorted to telling little green lies in the hope of attracting green consumers. As these half-truths proliferate, consumers will not know who to believe and may even stop believing anyone. One can hardly blame consumers for becoming disillusioned and cynical when everything from french fry packages, to wooden pencils, to shaving cream is marketed in some ecologically benign shade of green.

Nevertheless, we should resist this cynicism and preserve the green consumer movement. No matter how much we reduce our consumption, we always need to consume. When we do, we make choices that entail different effects, both in type and degree, on the environment we want to protect. Green consumerism holds the promise of reducing these effects marketwide by allowing consumers to demand products that pose less environmental harm than others. We must therefore prevent little green lies from derailing this movement. Only by inhibiting the ability of manufacturers to stretch the truth can we restore a degree of faith in a movement presently threatened by misinformation, disillusionment, and cynicism. Only when our choices are informed accurately and truthfully can we hope to become a society of “greener” consumers.