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Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims

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TAMING THE GREEN MARKETING MONSTER: NATIONAL STANDARDS FOR ENVIRONMENTAL MARKETING CLAIMS

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I. INTRODUCTION

Manufacturers[1] often advertise the superior environmental qualities of their products. For example, manufacturers advertise aluminum cans as recyclable and appliances as energy efficient. Many people refer to this technique as "green marketing." The number of products with green marketing claims on their labels more than doubled between 1989 and 1990.[2] During that same year, manufacturers' use of green marketing claims in television and print advertising more than quadrupled.[3] By 1995, products marketed with green claims could reach an annual sales figure of $8.8 billion.[4]

This rapid expansion of green marketing is a reaction by manufacturers to the proliferation of so-called "green consumers," who consider the environmental impact of a product when they make a purchasing decision. American consumers overwhelmingly have indicated not only that they prefer to buy environmentally "friendly" products, but that, in most cases, they are willing to pay more for those products.[5] American businesses have responded quickly to this

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[1] The term "manufacturer," as used in this Comment, refers to all of the businesses involved in the distribution of consumer products, including manufacturers, wholesalers, distributors, retailers and advertising agencies.

[2] *Selling Green*, CONSUMER REPORTS, Oct. 1991, at 687.

[3] *Id.*

[4] Hubert H. Humphrey III, *Making Sure Green Claims Aren't Gray*, ENVTL. F., Nov.–Dec. 1990, at 32.

[5] *See* 137 CONG. REC. S3034 (daily ed. Mar. 12, 1991) (statement of Sen. Lautenberg); Judann Dagnoli, *Green Buys Taking Root*, ADVERTISING AGE, Sept. 3, 1990, at 27; *Selling Green, supra* note 2, at 688.

consumer preference with new and improved products and with new green claims for existing products.[6]

Green marketing has a positive impact on the environment because it provides green consumers with the information they need to make environmentally sound purchasing decisions. Green marketing also raises the environmental awareness of non-green consumers and encourages manufacturers to produce more environmentally sound products. Green marketing loses much of its value, however, if consumers cannot readily distinguish between environmentally preferable products and those marketed with misleading or exaggerated green claims.[7] The free market system can have a positive effect on the environment only if manufacturers provide consumers with accurate information about the environmental impact of their purchasing decisions.[8]

Due to the current lack of standardization and regulation of green claims, manufacturers are tempted to make green marketing claims that are trivial, confusing, misleading, or even deceptive.[9] Because green marketing is a powerful, but easily misused, marketing tool, both government and private entities are likely to subject green claims to increasing legal scrutiny in the next few years.[10]

This scrutiny has already begun. In the spring of 1990, the National Association of Attorneys General adopted a resolution calling for national environmental marketing standards to guide them in enforcing their state deceptive trade practices laws.[11] In February 1991, a group of manufacturers and retailers submitted a petition to the Federal Trade Commission (FTC) requesting uniform guidelines for environmental claims.[12] Their aim was to promote competition among manufacturers to produce environmentally superior products

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[6] *See* 137 CONG. REC. S3034 (daily ed. Mar. 12, 1991) (statement of Sen. Lautenberg).

[7] *See id.*

[8] NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, AD HOC TASK FORCE ON ENVIRONMENTAL ADVERTISING, THE GREEN REPORT II: RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING, at v [hereinafter GREEN REPORT II]. *See also* 137 CONG. REC. S3035 (daily ed. Mar. 12, 1991) (statement of Sen. Lautenberg).

[9] *See* 137 CONG. REC. S3035 (daily ed. Mar. 12, 1991) (statement of Sen. Lautenberg); David J. Freeman, *Environmental Product Claims Invite New Scrutiny, Litigation*, NAT'L L.J., June 3, 1991, at 18.

[10] Freeman, *supra* note 9, at 18.

[11] *NAAG Urges National Strategy On Energy Shortages, Environmental Marketing Claims*, 58 Antitrust & Trade Reg. Rep. (BNA) 424 (Mar. 22, 1990).

[12] *Manufacturers, Retailers Petition FTC to Adopt Uniform Labeling Guidelines*, 60 Antitrust & Trade Reg. Rep. (BNA) 279 (Feb. 21, 1990).

instead of relying on imaginative green claims for existing products.[13] In July 1991, the FTC held public hearings to discuss the need for green marketing guidelines and the form that those guidelines should take.[14] In July of 1992, the FTC issued its green marketing guidelines.[15]

In March 1991, the attorneys general of New York and Minnesota joined environmental and consumer groups to support passage of the Federal Environmental Marketing Claims Act of 1991, which would establish a national regulatory scheme for environmental marketing claims.[16] This bill was introduced in the Senate but has not yet been acted upon. Despite agreement among many of the interested parties[17] that national uniform regulation of green marketing claims is necessary, the federal government has only just begun to effectuate this goal.[18]

This Comment analyzes the existing and proposed approaches that could be taken by federal, state, and private entities to regulate green marketing claims. Section II of this Comment examines the nature and impact of the problem that unregulated environmental marketing claims create. Section III discusses the traditional causes of action that federal, state, and private entities have brought to bear on this problem. In Section IV, this Comment focuses on new remedies designed specifically to address misleading green marketing claims. Finally, in Section V, this Comment analyzes the strengths and weaknesses of each of the existing and proposed schemes to regulate green marketing claims.

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[13] *Id.*

[14] 56 Fed. Reg. 24,969 (1991).

[15] Guides for the Use of Environmental Claims, 57 Fed. Reg. 36,363–68 (1992) (to be codified at 16 C.F.R. § 260) [hereinafter FTC Guides].

[16] The Environmental Marketing Claims Act of 1991 mandates minimum standards for products marketed with particular environmental claims, provides the means for developing and enforcing those standards, and establishes a consumer education program. S. 615, 102d Cong., 1st Sess. (1991).

[17] Parties that have expressed support for the Environmental Marketing Claims Act of 1991 include; the Minnesota and New York State Attorneys General, the Environmental Defense Fund, Environmental Action, Inc., the Natural Resources Defense Council and Consumers Union. 137 CONG. REC. S3038–39 (daily ed. Mar. 12, 1991). Parties that support FTC action to regulate environmental marketing claims include; the Minnesota and New York State Attorneys General, the National Food Processors Association, the Grocery Manufacturers Association, the Cosmetic, Toiletry and Fragrance association, the Environmental Defense Fund and the Green Cross Certification Company. *Hearings on Environmental Marketing Issues Before the Federal Trade Commission* at 30, 36, 66, 140, 169 [hereinafter *FTC Hearings*].

[18] *See* Felix Kent, *Advertising Law, Green Marketing*, N.Y.L.J., Feb. 22, 1991, at 3.

II. The Nature and Impact of Unregulated Green Marketing Claims

A. Nonsubstantive and Unsupported Claims

Nonsubstantive claims have become prevalent in green marketing.[19] Nonsubstantive green claims are technically accurate but misleading assertions that do not provide any real information about a product's environmental impact.[20] For example, a claim that a plastic product saves trees is true but misleading. A consumer might infer from this claim that because a plastic product saves trees it has no adverse impact on the environment. Plastic products do have an adverse environmental impact, however, because they are made from petroleum, which like trees is a scarce resource.[21]

Manufacturers make another type of nonsubstantive claim when they advertise a product's environmental virtue to create the perception that the manufacturer has recently modified or improved the product.[22] For example, a manufacturer makes a nonsubstantive claim by labeling paper cups as containing no chlorofluorocarbons (CFCs).[23] This claim is true but irrelevant because manufacturers' use of CFCs was never an issue in the production of paper cups.[24] Nonsubstantive claims allow manufacturers falsely to imply that their products benefit the environment by shrouding their claims in technically true statements.

Unsupported green claims are those that the advertiser cannot substantiate with adequate scientific evidence.[25] The problem of unsupported claims is not unique to green marketing. Both federal and state consumer protection laws require manufacturers to support all marketing claims with tests or studies that meet generally accepted scientific standards.[26] Although green claims present some special testing and substantiation problems,[27] existing consumer protection laws enable the government to enforce marketing claim substantia-

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[19] GREEN REPORT II, *supra* note 8, at 27.

[20] *See id.* at 27–28.

[21] *See id.* at 28.

[22] *Id.* at 5–6.

[23] Congress banned the use of chlorofluorocarbons (CFCs), the biggest culprits in the depletion of the ozone layer, in aerosol sprays in 1978 and they have since been eliminated from polystyrene foam products, like styrofoam cups, as well. *Selling Green*, *supra* note 2, at 690.

[24] *See id.*

[25] *See* GREEN REPORT II, *supra* note 8, at 29.

[26] *Id.*; *see also* FTC Policy Statement Regarding Advertising Substantiation, *appended to* Thompson Medical Co., 104 FTC 648, 839–40 (1984).

[27] *See infra* notes 39–43 and accompanying text.

tion requirements without the need for new regulations specifically addressing green claims.

B. Vague Claims

In addition to nonsubstantive and unsupported claims, manufacturers often make vague environmental marketing claims that confuse consumers. For example, a vague term like "environmentally friendly" indicates that a product has some substantive environmental advantages. The term is not specific enough, however, to provide consumers with any meaningful information about those advantages.[28]

Similarly, manufacturers often use the term "recycled," which does not have a uniformly accepted definition, to refer to many different types of materials from which a product may be made.[29] Such vague terminology increases consumer confusion and limits the value of green consumerism.[30] Without accurate information, consumers cannot intelligently distinguish among products and cannot support manufacturers that produce environmentally sound products.[31] Additional varieties of vague and misleading green claims include claims that do not distinguish between the attributes of a product and its packaging,[32] and comparative claims, such as "better for the environment," that do not specify any basis for their comparison.[33] Because manufacturers often use vague terminology, many

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[28] GREEN REPORT II, *supra* note 8, at 4.

[29] Manufacturers use the term "recycled" to refer to products made from post-consumer waste, that is, household waste that has been removed from the waste stream and recycled by consumers. Manufacturers also use the term to refer to products made from pre-consumer waste, materials that have been removed from the waste stream and recycled by manufacturers. In addition, manufacturers use the term "recycled" to refer to "reclaimed" materials, which are factory scraps that are routinely recycled back into the manufacturing process. To further complicate matters, many recycled products contain a combination of all of these types of material. *See* GREEN REPORT II, *supra* note 8, at 8–11.

[30] *See* GREEN REPORT II, *supra* note 8, at 8–9.

[31] *See id.*

[32] A county recycling official testified at a public forum in Minnesota about an incident that illustrates what can happen when a manufacturer fails to distinguish the green claims it makes about a product from those it makes about the product's packaging. A consumer purchased a package of disposable diapers. The diapers were packed in a recyclable plastic bag bearing the label "RECYCLABLE—This plastic softpac is recyclable where plastic bag recycling facilities exist." The consumer, mistakenly assuming that the diapers as well as the packaging were recyclable, arrived at the local recycling center with a plastic bag full of dirty diapers. GREEN REPORT II, *supra* note 8, at 8.

[33] GREEN REPORT II, *supra* note 8, at 11.

consumers misunderstand even technically true green claims that provide them with some substantive information.[34]

C. The Impact of Limited Consumer Knowledge

A green claim that is technically true and clearly stated may still lead consumers to draw mistaken inferences because of the consumers' limited understanding of complex environmental issues.[35] Marketing claims such as "degradable" or "recyclable" are likely to promote the misconception that a product so labeled actually will degrade or be recycled. A product designed to degrade under controlled conditions will not necessarily do so under the conditions of a typical landfill.[36] Similarly, although almost any material can be recycled,[37] a given item's recyclability depends not on what its label says but on the technical and economic feasibility of providing collection, separation, and recycling facilities.[38]

Limited consumer knowledge also is a central issue in the debate over manufacturers' use of "product life-cycle analysis" to compare the environmental virtues of competing products. Life-cycle analysis attempts to quantify a product's total environmental impact, from the selection of raw materials through manufacturing, sale, use, and disposal.[39] Advocates of life-cycle-based green marketing assert that consumers who purchase products based on a single green marketing claim, such as "recycled," may not realize the full environmental impact of those purchases. For example, because of the process used in bleaching recycled paper, a facial tissue made from 100% recycled material actually may have more adverse environmental effects than one that contains some non-recycled material.[40]

On the other hand, opponents of life-cycle-based green claims caution that consumers should not rely upon these types of claims until scientists improve the accuracy of testing methods.[41] Two recent life-cycle studies, one commissioned by the disposable diaper industry and one by cloth diaper supporters, reached opposite conclusions as to which product has less overall impact on the environ-

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[34] *See* Freeman, *supra* note 9, at 18.

[35] *See* GREEN REPORT II, *supra* note 8, at 4.

[36] Freeman, *supra* note 9, at 18.

[37] *Id.*

[38] GREEN REPORT II, *supra* note 8, at 26 n.9.

[39] *Selling Green*, *supra* note 2, at 691.

[40] *Green Cross Seal of Approval to be Based on Life-Cycle Cost*, ENV'T TODAY, Oct. 1991, at 39.

[41] *See* GREEN REPORT II, *supra* note 8, at 11–12.

ment.[42] Even the experts do not agree on which, if any, of the current methods of analyzing product life-cycles is reliable.[43] As a result of this confusion, some groups are calling for a moratorium on the use of life-cycle claims in green marketing,[44] while other groups proclaim that life-cycle analysis is the only accurate method of determining a product's environmental impact.[45]

Because green marketing claims are loosely regulated, manufacturers make claims that often do not provide consumers with any useful information and sometimes are totally deceptive. This amalgam of fact and fiction already has led many consumers to dismiss green claims as pure advertising hype.[46] Lack of regulation decreases competition among manufacturers to produce better, more environmentally sound products and increases consumer confusion.[47] In the long run, if consumers cannot rely upon green marketing claims, these claims will cease to have any effect on consumers' purchasing decisions and manufacturers will stop making them.[48] This will greatly limit the positive effect of green consumerism on the environment.

Manufacturing, government, and public interest groups have suggested many schemes to avoid this decline in the credibility of green marketing. Some groups advocate the application of existing deceptive advertising regulations to green marketing, while other groups favor developing new laws to regulate green marketing claims.

III. THE APPLICATION OF EXISTING CAUSES OF ACTION TO GREEN CLAIMS

A. Federal Deceptive Trade Practice Laws

Through the Federal Trade Commission Act,[49] Congress has empowered the Federal Trade Commission (FTC) to prevent unfair methods of competition and unfair or deceptive acts in commerce. The FTC and the courts have interpreted this power to include the authority to regulate false and misleading advertising and marketing

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[42] Penelope Wang, *Going for the Green*, MONEY, Sept. 1991, at 101.

[43] *See id.* at 101–02; GREEN REPORT II, *supra* note 8, at 12 n.4.

[44] *See* GREEN REPORT II, *supra* note 8, at 11; *Selling Green*, *supra* note 2, at 691.

[45] *See Green Cross Seal of Approval to be Based on Life-Cycle Cost*, *supra* note 40, at 39.

[46] *It's Not Easy Being Green*, NEWSWEEK, Nov. 19, 1990, at 51.

[47] *See* Freeman, *supra* note 9, at 18.

[48] *See* Kent, *supra* note 18, at 3.

[49] 15 U.S.C. § 45(a)(6) (1988).

claims.[50] The FTC has developed three Policy Statements that provide advertisers and consumers with a guide to the Commission's analysis of claims of unfair competition through advertising. These Policy Statements, which are based on case precedent, divide false advertising claims into three categories: deceptive claims,[51] unsubstantiated claims,[52] and unfair methods of competition.[53]

A deceptive claim is one that is likely to mislead reasonable consumers to change their conduct with regard to a particular product or service.[54] A claim can be entirely true yet still be deceptive if it misleads the reasonable consumer to infer alternative meanings that are not true.[55] For example, in *American Home Products Corp. v. FTC*, the court found that an advertisement inviting consumers to see whether "medically-proven" Anacin would "work better" for them was deceptive.[56] The manufacturer had medically-proven that Anacin contained more aspirin than other nonprescription analgesics and that Anacin was as effective as the leading prescription analgesic.[57] The manufacturer, however, had never medically-proven that Anacin worked better than any other analgesic.[58] The court explained that although the advertisement was technically true and did not state specifically that Anacin was medically-proven to work better, the advertisement was deceptive because a reasonable consumer would be likely to infer that Anacin was medically-proven to work better.[59]

Manufacturers must substantiate all marketing claims, express or implied, that make objective assertions about a product or service.[60] To determine whether an advertiser has provided adequate substantiation for a claim, the FTC balances the burden on manufacturers of substantiating a claim against the harm to consumers that might

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[50] *See* FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937); Charles of The Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).

[51] Federal Trade Commission Policy Statement on Deception, *appended to* Cliffdale Assocs., Inc., 103 FTC 110, 174 (1984).

[52] Federal Trade Commission Statement Regarding Advertising Substantiation, *appended to* Thompson Medical Co., 104 FTC 648, 839 (1984).

[53] Federal Trade Commission Unfairness Policy Statement, *appended to* International Harvester Co., 104 FTC 949 (1984).

[54] 56 Fed. Reg. 24,968 (1991); *see also* Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1435 (9th Cir. 1986).

[55] American Home Prod. Corp. v. FTC, 695 F.2d 681, 687 (3d Cir. 1982).

[56] 695 F.2d 681, 690 (1982).

[57] *Id.* at 689.

[58] *Id.*

[59] *Id.* at 690.

[60] 56 Fed. Reg. 24,968 (1991).

result from a false claim.[61] The FTC considers six factors when deciding whether a manufacturer has adequately substantiated a marketing claim: the type of claim, the type of product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable.[62]

In addition to prohibiting deceptive and unsubstantiated claims, the FTC Act also prohibits marketing claims that are unfair.[63] To determine whether a claim is unfair, the FTC considers whether the claim has caused a consumer to suffer a substantial detriment—such as an economic loss or the purchase of a poor quality product—that the consumer could not have reasonably avoided. The FTC then balances the consumer's injury against any benefit to the marketplace that the claim generates.[64] These three categories of false advertising claims enable the FTC to act proactively against deceptive or unsubstantiated claims that have not yet caused any injury to consumers, as well as retroactively against unfair claims that have caused consumer injury.

The FTC has three methods by which it may exercise its authority to prohibit false advertising claims.[65] The Commission may prosecute purveyors of false advertising on a case-by-case basis.[66] The FTC also may issue interpretive guidelines that suggest how to avoid running afoul of the FTC Act, but are not enforceable.[67] Finally, the FTC may issue enforceable "trade regulation rules," codifying their interpretation of the FTC Act.[68]

In addressing false advertising claims, the FTC prefers to enforce the FTC Act on a case-by-case basis.[69] When it learns of a false advertising claim, the Commission formally charges the manufacturer making the false claim and settles the matter either by entering into a consent agreement with the manufacturer or by issuing a cease and desist order which the manufacturer may appeal in federal court.[70] To date, enforcement actions targeting misleading environmental marketing claims have resulted in a number of consent agree-

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[61] *See* 56 Fed. Reg. 24,969 (1991).
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] 56 Fed. Reg. 24,968 (1991).
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] 56 Fed. Reg. 24,969 (1991).
[70] *See id.*

ments in which manufacturers have promised to modify their advertising to comply with the FTC's suggestions but have admitted no liability or wrongdoing.[71]

For example, in late 1990 and early 1991, the FTC charged Zipatone, Inc., an artists' materials manufacturer, and Jerome Russell Cosmetics U.S.A., Inc., a cosmetics manufacturer, with making false claims about the environmental safety of their aerosol products.[72] Both manufacturers claimed that their aerosol products contained propellants that were safe for the environment.[73] Although neither manufacturer's product contained CFCs—no great accomplishment given that Congress banned the use of CFCs in aerosols in 1978[74]—the products did contain other ozone-depleting ingredients.[75] Zipatone and Jerome Russell each agreed not to make any further claims of environmental safety for any product that contains an ozone-depleting substance without prior substantiation of the claim, but neither manufacturer admitted any liability or wrongdoing.[76]

B. State Deceptive Trade Practices Laws

Most states have enacted deceptive trade practices statutes modeled after the FTC Act.[77] These "little FTC acts" allow states to obtain injunctions, civil fines, and criminal penalties against purveyors of misleading advertising.[78] Some of these statutes also allow misled consumers to proceed directly against manufacturers to recover damages and attorneys' fees.[79]

In mid-1990, the state attorneys general began to enforce their little FTC acts vigorously against misleading green claims. Most likely, this enforcement was a reaction to the FTC's heightened

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[71] *See* 56 Fed. Reg. 24,969 & n.9 (1991). *See generally* Stephen Gardner, *How Green Were My Values: Regulation of Environmental Advertising Claims*, 23 U. TOL. L. REV. 31 (1991).

[72] Gardner, *supra* note 71, at 51.

[73] *See Id.*

[74] *See supra* note 23 and accompanying text.

[75] Gardner, *supra* note 71, at 51.

[76] *See id.*

[77] *See, e.g.*, CAL. BUS. & PROF. CODE § 17500–09 (West 1987); MASS. GEN. LAWS ch. 93A, § 2 (1987); N.Y. EXEC. LAW § 63(12) (McKinney Supp. 1992); N.Y. GEN. BUS. LAW § 349–50 (McKinney 1988 & Supp. 1992); TEX. BUS. & COM. CODE ANN. § 17.41–17.826 (West 1987 & Supp. 1992).

[78] *See, e.g.*, CAL. BUS. & PROF. CODE § § 17535, 17535.5, 17536 (West 1987); MASS. GEN. LAWS. ch. 93A, § 4 (1990); N.Y. GEN. BUS. LAW § 350d (McKinney Supp.1992); TEX. BUS. & COM. CODE § 17.47 (West 1987).

[79] *See, e.g.*, MASS. GEN. LAWS ch. 93A, § 9 (1990); N.Y. GEN. BUS. LAWS § 350(e) (McKinney Supp. 1992); TEX. BUS. & COM. CODE § 17.49 (West 1987).

interest in misleading green claims.[80] Some manufacturers, however, suggest that political aspirations,[81] or a desire to dictate national policy[82] motivated the state attorneys general to take action against green claims.

Unlike the FTC Act, which the Commission enforces through uniform national trade regulations and guidelines, little FTC acts are interpreted and enforced independently by each state. Many state statutes, however, track the language of the FTC Act and defer to the Commission's interpretation of the FTC Act for guidance.[83] In the past, when a number of state attorneys general have sensed the need for additional guidance to deal with a particular deceptive trade practice, the National Association of Attorneys General (NAAG) has produced multistate guidelines for the enforcement of little FTC acts.[84] The NAAG has developed multistate guidelines for green marketing that enable manufacturers and state attorneys general to determine whether a green claim violates state deceptive trade practices laws.[85]

In May 1991, the NAAG published its green marketing guidelines in the *Green Report II*.[86] The report contains general recommendations calling for environmental claims to be specific, substantive and well supported, along with explicit recommendations for the appropriate use of terms such as "recycled," "compostable," and "degradable."[87] The guidelines facilitate the uniform application of state deceptive trade practices laws by attorneys general in all states. They also provide guidance to manufacturers that distribute products in a wide geographic area and want to ensure that their green claims do not violate state laws.

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[80] *See* Gardner *supra* note 71, at 35; Don J. DeBenedictis, *Protecting Consumers*, ABA J., Oct. 1990, at 38.

[81] Jerry Taylor, *Bossy States Censor Green Ads*, WALL ST. J., Aug. 8, 1991, at A12.

[82] *Protecting Consumers*, *supra* note 80, at 38.

[83] *See, e.g.*, MASS. GEN. LAWS ch. 93A, § 2(b) (West 1990); TEX. BUS. & COM. CODE § 17.46(c)(1) (West 1987).

[84] Gardner, *supra* note 71, at 54.

[85] In November of 1989, the Attorneys General of California, Florida, Massachusetts, Minnesota, Missouri, New York, Tennessee, Texas, Utah, Washington and Wisconsin formed an ad hoc task force to study the problem of unregulated green marketing claims. In November of 1991 the task force issued *The Green Report: Findings and Preliminary Recommendations for Responsible Environmental Advertising*. After input from manufacturers, consumers and environmental groups, *The Green Report* was modified by the task force and re-released in May of 1991 as *The Green Report II: Recommendations for Responsible Environmental Advertising*. *See* GREEN REPORT II, *supra* note 8, at v–vii.

[86] *See id.*

[87] *See id.* at 4–30.

To date, state attorneys general have brought virtually all deceptive green claims enforcement actions as multistate, cooperative actions.[88] Most of these actions have resulted in settlements rather than orders or judgments.[89] For example, multistate investigations of Mobil Oil Corporation's claim that their Hefty trash bags were degradable and Procter and Gamble Company's claim that their Pampers and Luvs disposable diapers were compostable each resulted in a settlement agreement.[90] Both manufacturers agreed not to make environmental marketing claims for their products without prior substantiation and to reimburse the states for the cost of conducting the investigation.[91]

Cooperative prosecution of misleading green claims is necessary because the national scope of many green marketing campaigns, combined with the size and vast resources of the manufacturers involved, makes independent state-by-state prosecution very inefficient.[92] Moreover, cooperative prosecution is simply a natural extension of the cooperative preparation of the *Green Report II*.[93] So far, manufacturers have treated the settlement of state deceptive trade practices suits as part of the cost of doing business, but it may be only a matter of time before a manufacturer mounts a vigorous defense.[94]

C. Civil RICO Suits by Citizen Plaintiffs

Chapter 96, Racketeer Influenced and Corrupt Organizations (RICO), of the United States Code makes it illegal for any person to conduct an enterprise that affects interstate commerce through a pattern of racketeering activity,[95] or to invest racketeering income in a business that affects interstate commerce.[96] The RICO statute includes a list of crimes that constitute racketeering activities.[97] The crimes that are relevant to deceptive green marketing claimants are

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[88] Gardner, *supra* note 71, at 46–49.

[89] *See id.*

[90] *Id.*

[91] *Id.*

[92] *See* Wayne E. Green, *Lawyers Give Deceptive-Trade Statutes New Day in Court, Wider Interpretations*, WALL ST. J., Jan. 24, 1990, at B1.

[93] Telephone interview with Andrea C. Levine, Assistant Attorney General, New York Attorney General's Office (Jan. 8, 1992).

[94] *See* Gary Taylor, *AGs Police Environmental Ads*, NAT'L L.J., Jan. 28, 1991, at 3.

[95] 18 U.S.C § 1962(c) (1988).

[96] 18 U.S.C. § 1962(a) (1988).

[97] 18 U.S.C. § 1961 (1988).

mail fraud[98] and wire fraud.[99] The United States can bring a criminal action under RICO,[100] or any person whose business or property has been injured by a RICO violation can bring a civil RICO action.[101] The remedies available to a civil RICO plaintiff include injunctions,[102] treble damages, and reasonable attorneys' fees.[103]

RICO's stated purpose is to eradicate organized crime by providing new methods to deal with unlawful activities.[104] The United States Supreme Court adopted a broad view of RICO's applicability when it decided *Sedima, S.P.R.L. v. Imrex Co., Inc.* in 1985.[105] In *Sedima* the plaintiff, one party in a joint business venture, alleged that the other party in the joint venture had violated RICO by systematically overbilling for services it rendered to the plaintiff.[106] The United States district court dismissed the case and construed the RICO statute to permit civil actions only in cases where the defendant had already been convicted of some criminal activity.[107] The court of appeals upheld the district court's decision.[108] The Supreme Court reversed, and condoned an unbridled application of RICO by civil plaintiffs, noting that only Congress could limit the broad language of the statute.[109]

In a typical application of RICO to deceptive advertising, the plaintiff claims that the advertiser committed mail or wire fraud by deceptively advertising a product.[110] This activity is alleged to violate RICO for one of two reasons: because the advertising itself constitutes conducting a business that affects interstate commerce through a pattern of racketeering activity; or because the reinvestment of the profits from the sale of the advertised product constitutes an investment of racketeering income in a business that affects inter-

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[98] *See* 18 U.S.C. § 1341 (1988).
[99] *See* 18 U.S.C. § 1343 (1988).
[100] 18 U.S.C. § 1963 (1988).
[101] 18 U.S.C. § 1964(c) (1988).
[102] 18 U.S.C. § 1964(a) (1988).
[103] 18 U.S.C. § 1964(c) (1988).
[104] Organized Crime Control Act of 1970, Pub. L. No. 91–452, 84 Stat. 922 (1970).
[105] *See* 473 U.S. 479, 499 (1985).
[106] *Id.* at 484.
[107] *Id.*
[108] *Id.* at 485.
[109] *Id.* at 499.
[110] *See, e.g.*, Bauder v. Ralston Purina Co., Nos. Civ. A. 89-6513, 89-6591, 1989 WL 143283 at *1–4 (E.D. Pa., Nov. 22, 1989); Westinghouse Elec. Corp. v. Carolina Power & Light Co., 1990 WL 107428 at *14 (W.D. Pa.); Long Island Lighting Co. v. General Elec. Co., 712 F. Supp. 292, 297 (E.D.N.Y. 1989).

state commerce.[111] For example, in *Bauder v. Ralston Purina Co.*,[112] the plaintiff alleged that the Ralston Purina Company had violated RICO by making false claims in advertisements for its Puppy Chow dog food, and then investing the profits from the sale of Puppy Chow in the ongoing operation of the company.[113] After surviving Ralston Purina's motion to dismiss his RICO claim, the plaintiff agreed to a settlement.[114]

The majority of the federal circuit courts have rejected the reinvestment argument made by the plaintiff in *Bauder*.[115] These courts require civil RICO plaintiffs to prove that they suffered a "special injury," directly caused by the defendant's investment of racketeering income in a business that affects interstate commerce.[116] This requirement makes it very difficult for plaintiffs to succeed in civil RICO suits based on false advertising.

Similarly, to prove a violation of RICO based on conduct of a business through a pattern of racketeering activity, the vast majority of the federal circuit courts require plaintiffs to show that the person conducting the business is a separate entity from the business itself.[117] This is also a serious obstacle to false advertising RICO suits because the manufacturer, its parent company, and its advertising agency are often deemed by the courts to have acted as one entity.[118]

So far, citizen attempts to prosecute false advertising[119] and deceptive green claims[120] under RICO have not resulted in any judgments for the plaintiffs. Despite the Supreme Court's broad reading of RICO, the lower federal courts have been reluctant to allow civil RICO actions to proliferate in these non-traditional areas.[121]

The stigma associated with a RICO conviction coupled with the availability of injunctive relief, treble damages, and attorneys' fees makes RICO a potentially powerful weapon in the fight against

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[111] *See, e.g.*, Bauder, 1989 WL 143283 at *1–4; Westinghouse, 1990 WL at *14; Long Island Lighting, 712 F. Supp. at 297.

[112] 1989 WL 143283.

[113] *Id.* at *2–4.

[114] Felix H. Kent, *Advertising Law, Roundup of 1990*, N.Y.L.J., Dec. 28, 1990 at 3.

[115] Felix H. Kent, *Advertising Law, RICO Revisited*, N.Y.L.J., Aug. 16, 1991, at 3.

[116] *See, e.g.*, Kehr Packages, Inc. v. Fidelcor, 926 F.2d 1406, 1411 (3rd Cir. 1991); Ouakine v. McFarlane, 897 F.2d 75, 82 (2d Cir. 1990); Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1149 (10th Cir. 1989).

[117] *See* B.F. Hirsch v. Enright Refining Co., Inc., 751 F.2d 628, 633 (3rd Cir. 1984); R.R. Brittingham v. Mobil Corp., 943 F.2d 297, 301–02 (3d Cir. 1991).

[118] *See Hirsch*, 751 F.2d at 633; *R.R. Brittingham*, 943 F.2d at 301–02.

[119] *See* Bauder, 1989 WL 143283 (E.D. Pa.).

[120] *See* R.R. Brittingham, 943 F.2d at 305.

[121] *See* Kent, *supra* note 115, at 3.

deceptive green claims. Citizen plaintiffs, however, have yet to realize RICO's potential.

IV. The Development of New Methods of Regulating Green Claims

A. FTC Guidelines

The FTC regulates deceptive advertising primarily through case-by-case enforcement of the FTC Act.[122] The Commission also has the authority to issue interpretive guidelines, which are non-binding definitions of conduct that conforms with the FTC Act.[123] The Commission usually bases these guidelines on case precedent,[124] but they did not follow this pattern in regulating green claims.[125] The FTC brought a number of enforcement actions against purveyors of deceptive green claims before holding public hearings and issuing guidelines.[126] The FTC did not establish any case precedent, however, because all of the enforcement actions were settled by consent decree.[127]

In March 1990, the NAAG adopted a resolution asking the FTC to work together with the United States Environmental Protection Agency (EPA) and the White House Office of Consumer Affairs (OCA) to develop national guidelines for green marketing claims.[128] This resolution, together with petitions from four industry groups, spurred the FTC to hold public hearings in July, 1991 to discuss the need for green marketing guidelines and the form that these guidelines should take.[129] The hearings produced a wide range of proposals.

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[122] 56 Fed. Reg. 24,969 (1991).

[123] 56 Fed. Reg. 24,968 (1991).

[124] *Degree of Cooperation Among Federal and State Enforcers Should Expand in 1991*, 60 Antitrust & Trade Reg. Rep. (BNA) 103, 105 (Jan. 24, 1991).

[125] Dissenting Statement of Commissioner Mary L. Azcuenaga Concerning Issuance of Commission Guidelines on Environmental Marketing Claims, 57 Fed. Reg. 36,368–69 [hereinafter Dissenting Statement]; *Azcuenaga Will Not Endorse FTC Role in Developing Guidelines for Green Claims*, 59 Antitrust & Trade Reg. Rep. (BNA) at 777 (Nov. 22, 1990).

[126] *See* 56 Fed. Reg. 24,968–72 (1991); Gardner *supra* note 71, at 44–45.

[127] Dissenting Statement, *supra* note 125, at 36,368–69; *Azcuenaga Will Not Endorse FTC Role in Developing Guidelines for Green Claims*, *supra* note 125, at 777.

[128] *Manufacturers, Retailers Petition FTC to Adopt Uniform Labeling Guidelines*, 60 Antitrust & Trade Reg. Rep. (BNA) 279 (Feb. 21, 1991); *NAAG Urges National Strategy on Energy Shortages, Environmental Marketing Claims*, 58 Antitrust & Trade Reg. Rep. (BNA) 424 (Mar. 22, 1990).

[129] 56 Fed. Reg. 24,969 (1991).

At the FTC hearings, the NAAG called for national green marketing guidelines to guide state attorneys general in enforcing state deceptive trade practices laws.[130] According to the NAAG, the FTC's case-by-case approach was too ponderous to allow swift reaction to the emergence of new marketing strategies, such as green marketing.[131] The NAAG proposed that the FTC adopt the association's proposed guidelines as set forth in the *Green Report II*.[132]

A group of manufacturers also criticized the FTC's case-by-case approach, explaining that until the Commission issues national green marketing guidelines, the states will enforce their little FTC acts in an inconsistent manner and manufacturers will not be certain that their green claims comply with the law.[133] The manufacturers' group proposed its own guidelines, which are less strict than the *Green Report II* guidelines, and encouraged the FTC to consider adopting them.[134] The EPA and OCA also encouraged the FTC to promulgate national green marketing guidelines, stating that guidelines would provide the consistency and direction that consumers and manufacturers need to decide whether a green claim is deceptive.[135]

One manufacturer testified at the FTC hearings that green marketing guidelines, because they would not preempt state laws or be binding, would provide neither sufficient national consistency nor sufficient incentive for manufacturers to produce better products.[136] That manufacturer asked the FTC to promulgate enforceable trade regulation rules: binding regulations that preempt state law.[137]

Another participant in the FTC hearings, a public policy think tank called the Reason Foundation, defended the case-by-case approach.[138] The Reason Foundation suggested that environmental claims regulation and environmental policy are inexorably linked.[139] For example, an FTC definition of the term "recyclable" might imply to consumers that the FTC encourages recycling of all products labeled in conformity with that definition. Recycling all products that are recyclable is not sound environmental policy, however, because

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[130] *FTC Hearings*, *supra* note 17, at 33–34.
[131] *Id.*
[132] 56 Fed. Reg. 24,976–82 (1991).
[133] *FTC Hearings*, *supra* note 17 at 68–69.
[134] 56 Fed. Reg. 24,972–76 (1991).
[135] *FTC Hearings*, *supra* note 17, at 8–17.
[136] *Id.* at 383–84 (statement of Mr. Rajeev Bal, Webster Industries).
[137] *Id.*
[138] *FTC Hearings*, *supra* note 17, at 388–94.
[139] *Id.*

some recyclable products would, based on a life-cycle analysis, do less harm to the environment if they were not recycled.[140] Because of the link between green marketing regulation and environmental policy, the Reason Foundation suggested that any FTC program regulating green claims must be flexible, in order to keep up with developing technology, and contextual, in order to consider the facts and circumstances surrounding each green claim.[141] The Reason Foundation concluded that the most flexible and contextual approach currently available to the FTC is the case-by-case approach.[142]

In November 1991, FTC Commissioner Mary Azcuenaga recognized the link between green claims regulation and environmental policy and expressed a reluctance to set environmental policy.[143] Commissioner Azcuenaga encouraged the FTC to limit its role to regulating manufacturers' use of environmental marketing terms based on consumer understanding of those terms.[144] Commissioner Azcuenaga cautioned the FTC not to define specific green marketing terms without input and guidance from the EPA, manufacturers, and other experts.[145]

In October 1991, FTC Chairperson Janet Steiger stated that the FTC should rise to the green claims challenge and promptly issue green marketing guidelines.[146] On July 28, 1992 the FTC issued its environmental marketing guidelines.[147] The FTC guidelines contain general principles that apply to all environmental marketing claims.[148] The guidelines also contain specific guidance with regard to eight commonly used environmental terms.[149] The format of the FTC guidelines is similar to the format of the NAAG's *Green Report II*, but the FTC guidelines are considerably less stringent than those proposed by the NAAG. For example, the *Green Report II* states that manufacturers must disclose the percentage of pre-consumer

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[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] 56 Fed. Reg. 24,968 (1991); *Azcuenaga Will Not Endorse FTC Role in Developing Guidelines for Green Claims*, *supra* note 125, at 777.

[144] *Azcuenaga Will Not Endorse FTC Role in Developing Guidelines for Green Claims*, *supra* note 125 at 777.

[145] *Id.*

[146] *FTC Commissioners, Industry Plan to Meet About Guidelines on Environmental Labeling*, 23 Env't. Rep. (BNA) 11 (May 1, 1992).

[147] FTC Guides, *supra* note 15, at 36,363–68.

[148] *Id.* at 36,364–65.

[149] *Id.* at 36,365–68.

and post-consumer waste contained in products marked "recycled,"[150] while the FTC guidelines merely state that if manufacturers choose to provide this information, it must be substantiated.[151]

B. State Environmental Advertising Statutes

Most states rely on their "little FTC acts" to control deceptive advertising claims.[152] Many of these states defer to the FTC for guidance in enforcing their little FTC acts.[153] In the past, when the FTC has failed to address a particular type of deceptive trade practice some states have enacted statutes specifically regulating that conduct. For example, the state of California has statutes that regulate deceptive conduct by auto mechanics[154] and dance studios.[155] During 1990 and 1991, many states and municipalities became tired of waiting for the FTC's green marketing guidelines and implemented their own environmental advertising statutes.[156] A number of states passed laws dealing with overly broad claims[157] and with the use of specific terms like "recycled"[158] or "degradable."[159] The states that currently have laws regulating environmental advertising claims include New York, California, Indiana, New Hampshire, Rhode Island, and Maine.[160]

The California environmental advertising statute, enacted in 1990, is one of the oldest and most stringent.[161] California's definition of the term "recyclable" is so restrictive that it virtually prohibits

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[150] GREEN REPORT II, *supra* note 8, at 8.

[151] FTC Guides § 260.7(d), *supra* note 15, at 36,367.

[152] *See supra* notes 77–79 and accompanying text.

[153] *See supra* note 83 and accompanying text.

[154] CAL. BUS. & PROF. CODE §§ 9880–9889.20 (West 1975).

[155] CAL. CIV. CODE §§ 1812.5–1812.67 (West Supp. 1992).

[156] *See* Gardner, *supra* note 71, at 52–53.

[157] *See, e.g.*, IND. CODE ANN. §§ 24-5-17-2(a), 24-5-17-12 (Burns Supp. 1991); CAL. BUS. & PROF. CODE § 17580 (West Supp. 1992) (these statutes require documentation of the validity of claims such as "environmentally friendly" or "green product").

[158] N.Y. COMP. CODES R. & REGS. tit. 6, § 368.2 (1986) (these regulations set standards for use of the terms "recycled," "recyclable," and "reusable"); IND. CODE ANN. §§ 24-5-17-3, 24-5-17-10 (Burns Supp. 1992); CAL. BUS. & PROF. CODE § 17508.5 (West Supp. 1992) (these statutes set standards which products must meet before they can be labeled with terms such as "recycled," "biodegradable," or "ozone friendly").

[159] R.I. GEN. LAWS §§ 23-18.14-1–23-18.14-5 (1991 Supp.) (this statute prohibits manufacturers from labeling retail packaging materials with terms like "degradable" or "environmentally safe" and prohibits the sale of "degradable" plastics).

[160] Miriam L. Siroky and Phillip D. Reed, *Using 'Green' Claims in Advertising and Packaging*, N.Y.L.J., Oct. 21, 1991, at 1.

[161] John A. Donovan and Miriam L. Siroky, *Bills Will Make 'Greening' Tougher to Show*, L.A. DAILY J., Sept. 6, 1991 at 7.

manufacturers from using the term to market their products.[162] Before a manufacturer can claim that its product is recyclable, the California statute requires that the product be "conveniently" recyclable in every county in California with a population of over 300,000 people.[163] The severity of the California statute has prompted a number of trade associations to sue the California Attorney General.[164] The plaintiffs contend that the California statute deprives them of their first amendment right to educate the public about environmental issues.[165]

C. Scientific Certification of Green Claims

The governments of Germany, Japan, and Canada each sponsor programs that award seals of approval to environmentally superior products.[166] The Federal Republic of Germany issued the first environmental seal in 1978.[167] Japan and Canada each began issuing seals in 1988.[168] Norway, Sweden, Finland, Austria, Portugal, and France all have fledgling environmental seal programs as well.[169] These governments intend environmental seals to indicate that a product with a seal has less adverse impact on the environment than competing products.[170]

All of the government programs use a similar procedure when considering products for an environmental seal. A government agency or an independent testing laboratory working under government supervision identifies product categories that will be eligible for a seal[171]—some popular categories are paper products, paints, construction materials, and laundry detergents.[172] Then the agency establishes the criteria that a product must meet to qualify for a seal in each category.[173] The agency chooses criteria that will best mea-

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[162] *Id.*

[163] CAL. BUS. & PROF. CODE § 17508.5(d) (West Supp. 1992).

[164] Felix H. Kent, *Advertising Law, Addressing the Environment*, N.Y.L.J., May 22, 1992, at 3.

[165] *Id.*

[166] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ENVIRONMENTAL LABELLING IN OECD COUNTRIES 13 (1991) [hereinafter OECD REPORT].

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.* at 12.

[171] *Id.* at 14.

[172] *Id.* at 71–73.

[173] *Id.*

sure the environmental impact of products in the category.[174] Many government seal programs include public participation and comment in the category and criteria selection process.[175]

Once a government has established categories and criteria for awarding environmental seals, manufacturers may submit products for consideration in a particular category. If a product meets all of the criteria, the manufacturer may use the environmental seal when packaging and advertising that product. Although the award of an environmental seal is roughly based on a product's total environmental impact, the evaluation process is not a true life-cycle analysis.[176]

Governments employ environmental seal programs to educate consumers, to encourage manufacturers to develop more environmentally friendly products, and to improve the environment.[177] In Germany, where an environmental seal program has existed since 1978, statistical evidence indicates that such programs help to further all of these goals.[178]

In the United States, two private organizations have begun issuing environmental seals.[179] Both seal programs attempt to provide accurate information to consumers about the environmental impact of products, while encouraging manufacturers to develop more environmentally sound products.[180] Both organizations support themselves by charging manufacturers a fee to test and certify their products.[181] Green Seal, based in Palo Alto, California, patterns its category and criteria selection methods after the German, Canadian and Japanese programs.[182] Green Seal will soon issue criteria for its first two product categories, tissue products and re-refined motor oil.[183] Any products that demonstrate their low environmental impact by meeting all of the criteria in one of these categories may bear the Green Seal.

Green Cross, of Oakland, California, began its corporate life by taking a completely different approach to environmental seals. Green

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[174] *Id.* at 20–21.

[175] *Id.*

[176] *See supra* note 39 and accompanying text.

[177] OECD REPORT, *supra* note 166, at 28.

[178] *Id.* at 29–30.

[179] *Green Cross vs. Green Seal: Dueling Eco-Labels*, CONSUMER REPORTS, Oct. 1991, at 689.

[180] *FTC hearings*, *supra* note 17, at 175, 178.

[181] *Id.*

[182] *Id.*

[183] *Id.*

Cross decided that certification of single attribute environmental claims—such as "this product contains twenty percent post consumer recycled material"—would be useful and expedient.[184] Manufacturers that engage Green Cross to certify the accuracy of their green claims for a particular product are entitled to use the Green Cross on that product. To date, Green Cross has certified the accuracy of approximately four hundred specific green marketing claims for eighty different manufacturers.[185]

In 1991, Green Cross announced that, like Green Seal, it will offer an environmental seal based on a product's overall environmental impact.[186] Rather than following the criteria-based method that other environmental seal programs use, however, Green Cross has chosen to use a comprehensive life-cycle analysis model.[187] This comprehensive approach is designed to take into account all of the resources used, energy consumed, wastes created, and emissions produced by the manufacture, distribution, use and disposal of a product.[188] There are many comprehensive life-cycle analysis models in existence. Experts are not convinced, however, that any of the models, including the one chosen by Green Cross, is completely accurate.[189]

D. Federal Legislation

Congress is considering two bills that would regulate environmental marketing claims. The Environmental Marketing Claims Act of 1991 (the Lautenberg Act),[190] introduced by Senator Frank Lautenberg, and the Environmental Marketing Claims section of the National Waste Reduction, Recycling, and Management Act,[191] (the Swift Act) proposed by Representative Al Swift, contain many common elements. Both of these proposed regulatory schemes would attack the misleading green claims problem by requiring the EPA to issue regulations defining the attributes that a product must have

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[184] *Id.*

[185] *Green Cross Seal of Approval to be Based on Life Cycle Cost, supra* note 40 at 39.

[186] *Id.*

[187] *Id.* The life-cycle analysis model chosen by Green Cross was developed about 20 years ago by Dr. Ian Boustead, an English engineering professor known as the father of product life cycle assessment. *Id.*

[188] *Id. See supra* note 39 and accompanying text.

[189] *See* GREEN REPORT II, *supra* note 8, at 11–12; *FTC Hearings*, *supra* note 17, at 169–89; *see also supra* notes 41–43 and accompanying text.

[190] S. 615, 102d Cong., 1st Sess. (1991).

[191] H.R. 3865, 102d Cong., 2d Sess. (1992).

for its manufacturer to make a particular green claim.[192] Both schemes would set minimum standards that the EPA must follow.[193] For example, the Swift Act would require that the EPA regulations permit the use of the term "recycled" only on products or packaging that contain at least 25% post-consumer materials.[194] Both schemes also would call for the EPA to conduct a public education campaign to raise consumer awareness of the types of claims that would be regulated by the act, the way the act would regulate those claims and the benefits of environmental consumerism.[195]

The Lautenberg Act and the Swift Act do differ, however, in their methods of enforcement and the extent to which they would preempt state law. The Lautenberg Act would empower the EPA to impose civil fines on violators.[196] It also would allow for enforcement by states or individual citizens,[197] and would award attorneys' fees to successful citizen plaintiffs.[198] The Swift Act, on the other hand, would categorize any violation of its provisions as an unfair and deceptive trade practice in violation of the FTC Act, and would rely on the FTC to prosecute these violations.[199] State attorneys general and individual citizens also presumably could pursue misleading green claims that violate the Swift Act by invoking their states' little FTC acts.

In addressing preemption, the Lautenberg Act explicitly would grant the states the power to promulgate standards for green claims that are stricter than those set forth in the proposed EPA regulations.[200] The Swift Act, on the other hand, would allow the states to promulgate standards only for those green claims that the EPA had not already regulated.[201]

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[192] S. 615, 102d Cong., 1st Sess. § 6(b)(1) (1991); H.R. 3865, 102d Cong., 2d Sess. § 4403(a) (1992).

[193] S. 615, 102d Cong., 1st Sess. § 6(b)(7) (1991); H.R. 3865, 102d Cong., 2d Sess. § 4403(e) (1992).

[194] H.R. 3865, 102d Cong., 2d Sess. § 4403(e)(1)(A)(i)(II) (1992).

[195] S. 615, 102d Cong., 1st Sess. § 12 (1991); H.R. 3865, 102d Cong., 2d Sess. § 4403(h) (1992).

[196] S. 615, 102d Cong., 1st Sess. § 9(a)(2)(A) (1991).

[197] S. 615, 102d Cong., 1st Sess. § § 10, 11 (1991).

[198] S. 615, 102d Cong., 1st Sess. § 11(e) (1991).

[199] H.R. 3865, 102d Cong., 2d Sess. § 4403(c) (1992). *See supra* notes 49–53 and accompanying text.

[200] S. 615, 102d Cong., 1st Sess. § 13(c) (1991).

[201] H.R. 3865, 102d Cong., 2d Sess. § 4403(i) (1992).

VI. Analysis of Existing and Proposed Methods of Regulating Green Claims

A. Federal Legislation

Federal legislation that sets national standards for environmental marketing claims is the best way to insure the future of green marketing. Both of the proposed federal green marketing regulatory schemes—the Lautenberg Act and the Swift Act—would create uniform national standards for green marketing claims.[202] In addition, both proposals would set minimum standards for products marketed with green claims and would direct the EPA to develop regulations to enforce those standards.[203] This direct congressional mandate would encourage manufacturers to improve the environmental attributes of their products and would eliminate the FTC's concern over which agency has the power to set environmental policy through the regulation of green marketing claims.[204]

The Lautenberg Act and the Swift Act also would establish a consumer education program. This program would inform consumers of the types of green marketing claims regulated, the method of regulation, and the benefits of green consumerism.[205] Such an educational program would reach all consumers and most likely would result in the growth of green consumerism.

In addition, both the Lautenberg Act and the Swift Act contain a method for periodic review and revision of the EPA's green marketing regulations.[206] This would insure that federal green marketing standards will continue to reflect the latest environmental technology and will encourage manufacturers to employ this technology to lessen the environmental impact of their products.

The Lautenberg Act and the Swift Act share one major disadvantage. The process of creating new laws generally takes much longer than the FTC's guideline creation process. Manufacturers pressured the FTC to issue green marketing guidelines in part because of their recent experience with federal nutritional claims legislation.[207] The development and passage of the Federal Nutrition Labeling and

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[202] *See supra* notes 193–95 and accompanying text.

[203] *Id.*

[204] *See supra* notes 140–47 and accompanying text.

[205] *See supra* note 196 and accompanying text.

[206] S. 615, 102d Cong., 1st Sess. § 6(c) (1991); H.R. 3865, 102d Cong., 2d Sess. § 4403(f) (1992).

[207] John Holusha, *Industry Seeks U.S. Rules Covering Environment Ads*, N.Y. Times, Feb. 15, 1991, D6.

Education Act of 1990[208]—a bill designed to set standards for nutritional marketing claims—engendered two-and-a-half years of congressional debate and a number of lawsuits.[209] Congress must develop national green marketing guidelines quickly in order to avoid further marketplace confusion.

The enforcement and preemption provisions of the Swift Act make it a better solution to the green marketing problem than the Lautenberg Act. The Lautenberg Act would charge the EPA with the task of enforcing green claims regulations.[210] While the EPA is best equipped to make the environmental policy and scientific decisions necessary to the development of green claims standards, the FTC has far more expertise in enforcing deceptive advertising regulations. The Swift Act's enforcement scheme, which would use existing FTC and state deceptive trade practices enforcement procedures,[211] would be more effective and efficient than the Lautenberg Act.

The Lautenberg Act also would permit states to promulgate green marketing regulations that are stricter than the federal regulations.[212] One argument against the development of national green marketing guidelines has been that they would not be responsive to local conditions and concerns.[213] For example, a national standard for the use of the term "recyclable" would not address the local availability of recycling options in any particular city or state. The benefits of nationally uniform standards, however, outweigh the benefits of localized standards. If states vigorously enforce a multiplicity of local green marketing standards, manufacturers most likely will refrain from making green claims at all. Pursuit of the ideal green marketing standard must stop short of making green marketing economically unfeasible.

Furthermore, if Congress intends to set national environmental policy through the promulgation of minimum green marketing standards, then the uniformity of its regulatory scheme should not be destroyed by allowing independent state regulation. The Swift Act would generate uniform green marketing standards because it would preempt state regulation of all green marketing claims that are covered by the EPA regulations.[214] While both the Swift Act and

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[208] 21 U.S.C. 343(q) (1988 & Supp. II 1990).

[209] Holusha, *supra* note 207, at D6; DeBenedictis, *supra* note 80, at 38.

[210] *See supra* note 197 and accompanying text.

[211] *See supra* note 200 and accompanying text.

[212] *See supra* note 201 and accompanying text.

[213] *See supra* notes 138–42 and accompanying text.

[214] *See supra* note 201 and accompanying text.

the Lautenberg Act contain many good ideas, the Swift Act is the best proposal for federal regulation of green marketing because of its enforcement and preemption provisions.

B. FTC Guidelines

Almost all of the manufacturers, environmentalists, and politicians who attended the FTC's hearings on environmental marketing issues asked the FTC to promulgate green marketing guidelines as quickly as possible.[215] To its credit, the FTC acted quickly to promulgate those guidelines. The FTC guidelines are a good first step towards insuring the continued credibility of green marketing claims, but they are not a complete solution.

The FTC guidelines reduce the problem of undefined green marketing terms, which is the primary obstacle to case-by-case enforcement of the FTC Act against misleading green claims. The guidelines, however, are handicapped by the fact that the FTC has been careful not to set national environmental policy. The FTC guidelines contain only broad suggestions for the use of common green marketing terms such as "compostable" and "recycled."[216] The Swift Amendment would empower the EPA to set specific standards for the use of these terms.

The FTC guidelines will increase the national uniformity of green claims regulation because most states follow FTC guidelines when enforcing their little FTC acts. Furthermore, when state enforcement actions follow the FTC guidelines, manufacturers may be less likely to challenge the state enforcement as being preempted or unconstitutional. The FTC guidelines, however, will not provide absolute national uniformity because they are non-binding and do not preempt state laws. The Swift Act would provide a "safe harbor" for manufacturers that is lacking in the FTC guidelines.

C. Case-by-Case Enforcement of Federal Deceptive Trade Regulations

The current FTC policy of regulating misleading advertising through case-by-case enforcement of the FTC Act is already familiar to manufacturers and consumers and is well suited to regulating misleading green claims. The FTC has regulated false advertising

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[215] *See supra* notes 128–37 and accompanying text.

[216] FTC Guides § 260.7, *supra* note 15, at 36365–68.

for many years,[217] and has pursued misleading green claims for nearly twenty years.[218] The FTC's experience regulating false advertising on a case-by-case basis has produced a relatively efficient bureaucracy, and its interpretive guidelines and trade regulations have streamlined its activities even further.

The FTC's case-by-case approach to regulating misleading advertising has the advantage of being proactive as well as retroactive. The Commission does not have to show harm to consumers before it can censure misleading advertising claims. A deceptive advertising claim is illegal simply because it is likely to mislead the reasonable consumer. Alternatively, the FTC may choose to wait until it receives a consumer complaint before it acts, because an unfair advertising claim—one that already has caused a consumer injury—is illegal as well.

Another advantage of the case-by-case enforcement approach is its built-in system of checks and balances. If the FTC chooses not to enforce the FTC Act against a particular type of misleading advertising claim, states are free to enforce their little FTC acts. Conversely, if the FTC is overzealous in enforcing the FTC Act, manufacturers can appeal the FTC's cease and desist orders to the United States district courts.

The major obstacle to the FTC's use of case-by-case enforcement of the FTC Act against green claims is the difficulty in applying the FTC standards for deception, substantiation, and unfairness to green claims without first defining the terms used in making those green claims. For example, it is impossible for the FTC to classify a product's claim of being made from recycled material as deceptive until it has decided how to define the term "recycled."[219] The FTC has said that it will not define green marketing terms because by doing so the Commission would be setting environmental policy which is not within its power.[220] The Commission's decision to promulgate environmental marketing guidelines without specifically defining green marketing terms, however, ignores the fact that poorly defined green marketing terms are a principal cause of misleading green marketing. Until federal legislation requires specific definitions for green marketing terms, the Commission's case-by-case enforcement efforts cannot be fully effective or consistent. The FTC's environ-

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[217] *See* Charles of The Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).

[218] *See* Ex-Cell-O Corp., 82 FTC 36 (1973).

[219] *See supra* note 29 and accompanying text.

[220] *See supra* notes 143–45 and accompanying text.

mental marketing guidelines are a step in this direction but they are not specific enough to provide the needed consistency.

D. Case-by-Case Enforcement of State Deceptive Trade Regulations

Most of the states' little FTC acts defer to FTC interpretations of conduct that is deceptive or unfair. In this way, little FTC acts add a second layer of enforcement to the FTC Act. When state attorneys general or individual citizens enforce a state's little FTC act they are guided by the principles of the federal act.

In areas such as green claims, however, where there is little federal guidance, states are free to consider local conditions and concerns when interpreting the law. State attorneys general need not be concerned with the national consumer understanding of the term "recycled" or the national availability of a recycling program for a particular product when they apply their little FTC acts to a misleading green claim. State attorneys general can reduce the task of regulating misleading green claims to manageable proportions because they only need to consider consumers in their own states.

The flexibility of state little FTC acts, however, is both an advantage and a shortcoming. Independent regulation of green claims by each state will lead to a multiplicity of standards, which may have a chilling effect on the use of green marketing claims by manufacturers who distribute their products over a wide geographic area. Furthermore, in implementing a case-by-case enforcement approach to green claims regulation, the states face the same problem of undefined green marketing terms that hinders the FTC's case-by-case enforcement efforts. The FTC's environmental advertising guidelines have reduced this problem somewhat, but federal legislation is needed to provide specific definitions for green marketing terms.

In addition, states waste resources when they enforce their little FTC acts against misleading green claims made by national manufacturers. The standards for deception, substantiation, and unfairness contained in most of the little FTC acts are the same as those used by the FTC. A nationwide FTC censure of a misleading green claim is much more efficient than individual enforcement efforts in each state. Similarly, each individual state has less ability to influence the behavior of large national manufacturers than the FTC.

Case-by-case enforcement of state little FTC acts has had some success in curtailing misleading green marketing claims. Because of its shortcomings, however, state case-by-case enforcement is most

effective when used in conjunction with federal enforcement. In addition, state case-by-case enforcement of deceptive trade practices laws, like FTC case-by-case enforcement of the FTC Act, is most effective and consistent when it is based on specific definitions of green marketing terms.

E. State Environmental Advertising Statutes

State environmental advertising statutes have most of the same advantages and most of the same shortcomings as state little FTC acts. States that enact their own green marketing laws can tailor those laws to state environmental policies and local concerns. The resulting multiplicity of state green marketing standards, however, may have a chilling effect on national green marketing campaigns. The Swift Act offers a solution to this problem. Under the Swift Act, states would be prohibited from regulating any of the green marketing terms regulated by the EPA, but would be free to regulate all other green marketing claims. This would provide national uniformity while still allowing states to regulate matters of purely local concern.

F. RICO

So far, plaintiffs who have brought civil RICO suits against manufacturers for making misleading marketing claims have not succeeded.[221] Although the United States Supreme Court has encouraged a very broad application of RICO's civil liability provisions, the lower courts are not receptive to creative new uses for RICO.[222] Still, the possibility that a plaintiff could prevail in a civil RICO claim concerning an egregious case of false advertising is something for manufacturers to keep in mind.

Civil RICO suits by citizen plaintiffs can have a significant deterrent effect on deceptive green marketing claims. RICO's civil liability provisions empower individual citizens to enforce their rights in a way that will make manufacturers take them seriously. A group of plaintiffs seeking treble damages and attorneys' fees in a class action civil RICO suit can motivate a manufacturer to take action to address their grievances.

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[221] *See supra* notes 115–20 and accompanying text.

[222] *Id.*

G. Environmental Seal Programs

The two independent environmental seal organizations in the United States, Green Cross and Green Seal, share the same objectives. Both seal programs attempt to provide accurate information to consumers about the environmental impact of products, while encouraging manufacturers to develop more environmentally sound products.[223] Nonetheless, federal regulation of green claims, which also shares these objectives, protects consumers more effectively.

Environmental seals that certify the truthfulness of specific green claims attempt to provide accurate information to consumers, but because most misleading green claims are technically true,[224] independent certification of a green claim's truthfulness is of little value to consumers. Green Seal, which does not certify specific green claims, and the NAAG have both concluded that independently certified green claims, because they appear reliable, may have more potential to mislead consumers than uncertified claims.[225]

Life-cycle[226] and criteria-based[227] environmental seal programs encourage manufacturers to develop better products in order to earn a seal. When a product earns an environmental seal by performing well in a life-cycle analysis or by meeting all of the criteria in a particular product category, the manufacturer may use that seal in marketing the product. These seal programs effectively encourage competition among manufacturers but do not always provide consumers with accurate information.

The scientific uncertainty of the life-cycle method of analysis may mislead consumers. Experts do not agree on which, if any, of the methods of life-cycle analysis produce accurate results.[228] Furthermore, life-cycle-based green claims are of little use to consumers because consumers cannot compare competing claims bearing different environmental seals unless the organizations granting the seals have used the same method of life-cycle analysis.

Criteria-based methods of analysis face similar problems. In order for criteria-based seals to have any value, the criteria must accurately reflect a product's impact on the environment and the organizations granting the seals must update their criteria regularly to

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[223] *See supra* note 180 and accompanying text.
[224] *See supra* notes 19–34 and accompanying text.
[225] GREEN REPORT II, *supra* note 8, at 15; *FTC Hearings*, *supra* note 17, at 179–80.
[226] *See supra* notes 39–40 and accompanying text.
[227] *See supra* notes 171–75 and accompanying text.
[228] GREEN REPORT II, *supra* note 8, at 11–12.

incorporate changing technology. Consumers cannot choose intelligently between products with seals and those without them unless they know the criteria used in considering a product for a seal and the validity of those criteria. Unfortunately, consumers cannot easily determine the validity of environmental impact criteria. Consumers might judge the validity of a given set of criteria by how well a criteria analysis and a comprehensive life-cycle analysis of the same product agree, but one of the reasons criteria analysis exists is the lack of an accepted standard for comprehensive life-cycle analysis.

An environmental seal organization's selection of product categories also has the potential to cause misleading results. The German government's aerosol deodorant category illustrates this problem. The German government established the aerosol deodorant category to reward those products that caused the least damage to the environment, but roll-on deodorants, which as a category cause less environmental harm than aerosols, were not eligible for a seal.[229] Aerosol deodorants with environmental seals might appear in stores next to roll-on deodorants without seals, misleading consumers to infer that the aerosols are better for the environment.

Similar confusion may result from the fact that manufacturers must pay an independent certification organization a fee to test their products before the manufacturers can use that organization's environmental seal.[230] Small manufacturers or those with a limited market for their product may not be able to afford the expense of certification. When consumers compare a product with a seal with a competing product without a seal, they are likely to overlook these economic considerations and simply assume that the product with the seal is better for the environment.

A related problem is the danger that consumers will overestimate the value of an environmental seal. Although the purpose of environmental seals is simply to identify products that cause the least environmental harm, consumers might assume that any product bearing an environmental seal causes no harm to the environment, or that such a product is actually beneficial to the environment. In addition, there is the danger that consumers will see environmental seals as a panacea. Consumers might reason that by shopping carefully they have done their part for the environment, and stop doing things such as recycling and waste reduction which can have an even greater impact on the environment. In sum, life-cycle and criteria-

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[229] Hannah Holmes, *Seals to Watch*, GARBAGE, Sep.–Oct. 1991, at 49.

[230] *See supra* note 181 and accompanying text.

based environmental seals do provide some information to consumers about the environmental impact of products, but they also have great potential to mislead.

Environmental seal programs are more a part of the green marketing problem than a part of the solution. Manufacturers can use environmental seals on their products as a means of making misleading green claims. The presence of an environmental seal on a product does not assure consumers of the merit of the green claims made about that product because of the faults inherent in the specific claims, life-cycle, and criteria-based certification methods. Until scientists develop an accurate method of life-cycle analysis, environmental seals can provide valuable information to consumers only if they are regulated by the same standards as all other green claims.

VII. CONCLUSION

Green marketing has a positive effect on the environment because it provides consumers with the information they need to make environmentally sound purchasing decisions. The marketplace can have this positive effect on the environment, however, only if manufacturers' green claims are legitimate and consistent. The only way to insure that manufacturers' green marketing claims provide useful information to consumers is through uniform national regulation of those claims.

The FTC and the state attorneys general are committed to stopping the flow of misleading green claims. The independent seal programs, Green Cross and Green Seal, are ready to substantiate and certify legitimate green claims. Without specific definitions for commonly used green terms such as "recycled" or "degradable," however, the efforts of these organizations can not be fully effective. The FTC environmental marketing guidelines are a good start, but we need federal legislation that sets minimum standards for products marketed with green claims and preempts state laws.

The governments of Germany, Japan, and Canada all have programs that set minimum environmental standards for products marketed with green claims. The United States should act quickly to join these nations that are using their free market systems to improve the environment.