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LEARNING FROM PAST MISTAKES: FUTURE REGULATION TO PREVENT GREENWASHING

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Abstract: The term “greenwashing” refers to false or misleading environmental claims in advertising. This Note gives an overview of various laws that may be applied to greenwashers and the “Green Guides,” the Federal Trade Commission’s nonbinding guidance covering the application of the Federal Trade Commission Act to environmental claims. This Note argues that greenwashing is a persistent problem for consumers and the environment and that existing laws are not sufficient to prevent it. It suggests that additional federal regulation is needed to curb greenwashing, and that regulation should specifically define terms and be uniform across the country. Unlike the Green Guides, future greenwashing regulation should be binding and enforceable.

INTRODUCTION

In 1991, Mobil Corporation agreed to stop advertising its Hefty brand plastic trash bags as biodegradable and pay twenty-five thousand dollars each to six states that had sued the company for making such claims.¹ The settlement marked the end of an advertising campaign that Mobil initiated in 1988, aimed at selling its products to environmentally conscious consumers.² By claiming that Hefty trash bags were degradable, Mobil had attempted to capitalize on a growing concern among consumers regarding the polluting effects of plastic waste disposal.³ It could not, however, provide proof of the environmental benefit of its products.⁴ Environmental groups publicly criticized the com-

* Articles Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2012–2013.

¹ *Mobil Settles on Hefty Bags*, N.Y. TIMES, June 28, 1991, at D4.

² Jed Greer, *Biodegradability Scam*, INTERNATIONAL PLASTICS TASK FORCE (1992), http://www.ecologycenter.org/iptf/plastic_types/bioscam.html.

³ *Id.*; see Jennifer Stoffel, *What’s New in Plastics; Polishing Their Image with Consumers, Even First Graders*, N.Y. TIMES, Mar. 5, 1989, at F13.

⁴ See *New Study Challenges ‘Biodegradable’ Claims*, N.Y. TIMES, Mar. 5, 1991, at C4.

pany for misleading consumers, and several states responded by bringing suit.⁵

Mobil was not alone in using green marketing to attract consumers.⁶ Heightened public attention to the environment in the late 1980s created a new breed of consumer who demanded environmentally responsible products.⁷ Almost overnight, green consumerism transformed the niche market for ecologically safe products into a mainstream industry.⁸ The business community responded with a wave of marketing campaigns directed at environmentally conscious purchasers.⁹ Like Mobil, however, many corporations advertised environmental benefits that could not be substantiated.¹⁰ Thus began the concern among environmental groups and lawmakers over false or misleading claims in green marketing, often referred to as greenwashing.¹¹

The controversy stirred by Mobil and other similar incidents of greenwashing drew the attention of the Federal Trade Commission (FTC) and state lawmakers.¹² Ten state attorneys general formed a task force to address the issue, reporting their findings and advice to the FTC in “The Green Report” and “The Green Report II.”¹³ The FTC responded by issuing the Guides for the Use of Environmental Marketing Claims (“Green Guides” or “Guides”) to assist marketers in avoiding deceptive advertising claims under the Federal Trade Commission Act (“FTC Act”).¹⁴

Not satisfied with the FTC’s nonbinding Green Guides, environmental groups called unsuccessfully for the EPA to promulgate specific

⁵ Carol Jouzaitis, *Mobil to Drop ‘Degradable’ Claim on Bags*, CHI. TRIB., Mar. 30, 1990, http://articles.chicagotribune.com/1990-03-30/business/9001260345_1_degradable-plastics-mobil-officials-hefty; Mobil Settles on Hefty Bags, supra note 1.

⁶ See Stoffel, *supra* note 3.

⁷ Connie Koennn, *To Market, to Market—With a Mission: Environment: Yesterday They Were Yuppies; Today They Are ‘Green Consumers’ Who Are Demanding Goods That Are Ecologically Safe*, L.A. TIMES, Mar. 15, 1990, http://articles.latimes.com/1990-03-15/news/vw-42_1_green-consumer.

⁸ See *id.*

⁹ CAL. ATTORNEY GEN., ET AL., THE GREEN REPORT: FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING I (1990) (calling green marketing “the marketing craze of the 1990’s”).

¹⁰ See *id.*

¹¹ See *id.*; Stuart Elliott, *CBS Accused of ‘Greenwashing,’* N.Y. TIMES (Apr. 14, 2011, 5:13 PM), <http://mediadecoder.blogs.nytimes.com/2011/04/14/cbs-accused-of-greenwashing>.

¹² Keith Schneider, *Guides on Environmental Ad Claims*, N.Y. TIMES, July 29, 1992, at D3.

¹³ CAL. ATTORNEY GEN., ET AL., THE GREEN REPORT II: RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING (1991) (an eleventh state, Tennessee, joined in The Green Report II); CAL. ATTORNEY GEN., ET AL., *supra* note 9.

¹⁴ 16 C.F.R. pt. 260 (2012).

regulations with the force of law.¹⁵ Despite calls for a national scheme of greenwashing prevention, Congress failed to authorize federal regulation of green marketing.¹⁶ Therefore, consumers and environmentalists must rely on the Green Guides and a patchwork of state and federal consumer protection statutes as their sole defense against greenwashing.¹⁷

This Note argues that existing laws inadequately protect consumers and the environment from the harmful effects of greenwashing. Part I describes the growth of greenwashing and its consequences.¹⁸ Part II provides an overview of existing regulations that are applied to the problem,¹⁹ and Part III discusses the Green Guides and their enforcement.²⁰ Part IV addresses the deficiencies in existing regulations and offers a framework for a potential solution.²¹ It proposes that Congress authorize the FTC and EPA to promulgate uniform and specific standards for environmental marketing.²² This Note further suggests giving environmentalists and consumers the ability to sue alleged greenwashers.²³

I. GREENWASHING: BACKGROUND

A. *The Rise of Environmental Marketing*

Increased media attention to environmental issues beginning in the late 1980s heightened environmental awareness among American consumers.²⁴ Surveys conducted in the early 1990s revealed a large majority of Americans worried about the environment and were willing to alter their purchasing behaviors to benefit environmental quality.²⁵ Rather than relying on government regulation as the sole means of en-

¹⁵ See Schneider, *supra* note 12.

¹⁶ See K. Alexandra McClure, Comment, *Environmental Marketing: A Call for Legislative Action*, 35 SANTA CLARA L. REV. 1351, 1361–62 (1995) (describing the Senate's failure to pass proposed legislation that would have given the EPA authority to regulate environmental marketing terminology).

¹⁷ See *infra* notes 73–195 and accompanying text. See generally Robert B. White, Note, *Preemption in Green Marketing: The Case for Uniform Federal Marketing Definitions*, 85 IND. L.J. 325 (2010) (discussing various laws that have been used against greenwashing).

¹⁸ See *infra* notes 24–72 and accompanying text.

¹⁹ See *infra* notes 73–131 and accompanying text.

²⁰ See *infra* notes 132–195 and accompanying text.

²¹ See *infra* notes 196–277 and accompanying text.

²² See *infra* notes 258–265 and accompanying text.

²³ See *infra* notes 266–269 and accompanying text.

²⁴ See U.S. EPA, ASSESSING THE ENVIRONMENTAL CONSUMER MARKET 3 (1991).

²⁵ *Id.*

vironmental protection, consumers began to believe that individuals could help the environment through their own actions.²⁶ Consequently, companies engaged in selling goods and services quickly capitalized on the rapidly growing marketplace for ecologically friendly products.²⁷

As a result, environmental marketing grew exponentially in the 1990s, as corporations injected environmental considerations into both their product development and advertising campaigns.²⁸ In the last twenty years, environmental marketing has only continued to grow.²⁹ The last few years have seen an especially dramatic jump in the quantity of products marketed to consumers under environmental claims.³⁰

Currently, advertisers use green marketing to sell a wide range of products in the United States, from “carbon-efficient” cars to “biodegradable” laundry detergent.³¹ Often, the premium that consumers pay to switch to the eco-friendly version of certain products is only a marginal price increase from one brand to another.³² The rise of green marketing thus creates competition among companies to raise the environmental standards of their production.³³ Additionally, it raises awareness among consumers who are increasingly exposed to environmental advertisements.³⁴ Early signs that consumer awareness had begun to affect industry practices included McDonalds’ switch from foam containers to paper wrapping and Heinz’s promise to avoid harm to dolphins during tuna fishing.³⁵

The willingness of consumers to adjust their purchasing decisions theoretically provides a significant avenue for improving the environ-

²⁶ *Id.* at 4.

²⁷ *Id.*

²⁸ *Id.* at 2.

²⁹ See Timothy C. Bradley, *Likelihood of Eco-Friendly Confusion*, LANDSLIDE, Sept.–Oct. 2011, at 39, 39.

³⁰ See TERRA CHOICE GRP. INC., THE SINS OF GREENWASHING: HOME AND FAMILY EDITION 6, 11 (2010), available at <http://sinsofgreenwashing.org/findings/greenwashing-report-2010> (finding the marketing of green products increased 79% from 2008 to 2009 and 73% from 2009 to 2010).

³¹ See Christopher A. Cole & Linda A. Goldstein, “Green” Is So Appealing, N.Y. L.J., Sept. 15, 2008, available at <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202424493387&slreturn=20130028170304>.

³² *Id.*

³³ Glenn Israel, Comment, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims*, 20 B.C. ENVTL. AFF. L. REV. 303, 304 (1993).

³⁴ *Id.*

³⁵ U.S. EPA, *supra* note 24, at 4.

ment while avoiding additional government regulation.³⁶ Unfortunately, consumers rarely have the resources to verify marketers' environmental assertions.³⁷ Among the wash of green marketing claims, many are false, misleading, or unsubstantiated.³⁸ Green advertising is thus emerging as one of the most prominent concerns for groups that monitor the advertising industry.³⁹

B. Definition of Greenwashing

Rising concerns over environmental marketing claims going unsubstantiated led environmental advocates and media to coin the term "greenwashing."⁴⁰ The term refers to false or misleading representation that products, brands, or corporate practices are beneficial to the environment.⁴¹ Scholars and environmental organizations define a broad range of practices as greenwashing, including false assertions and claims that exaggerate, misdirect, or mislead consumers as to the environmental qualities of a product.⁴² These organizations even level accusations of greenwashing against companies that issue environmental claims that are simply too vague or ambiguous.⁴³

Under the most inclusive definition, greenwashing is nearly ubiquitous.⁴⁴ A 2010 study conducted by TerraChoice, a private environmental marketing firm, found that over ninety-five percent of the green products analyzed were guilty of some form of greenwashing.⁴⁵ The same study identified common greenwashing practices: the most fre-

³⁶ Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG. 147, 150 (1993).

³⁷ *Id.* ("Shortcomings in the current legal and regulatory system have allowed manufacturers to make misleading and unsubstantiated claims with virtual impunity.")

³⁸ *Id.*

³⁹ See Will Ashley-Cantello, *Advertising Watchdog Receives Record Complaints over Corporate 'Greenwash'*, GUARDIAN (London), May 1, 2008, <http://www.guardian.co.uk/environment/2008/may/01/corporatesocialresponsibility.ethicalliving> (citing report that "the number of complaints on advertiser's green claims became one of the two key emerging issues for consumers in 2007").

⁴⁰ Elliott, *supra* note 11.

⁴¹ *Id.*

⁴² See, e.g., TERRACHOICE GRP. INC., *supra* note 30, at 10 (listing the seven "Sins of Greenwashing").

⁴³ See, e.g., *id.*

⁴⁴ See *id.* at 16.

⁴⁵ *Id.* TerraChoice's analysis accounted for the Green Guides, the Canadian Competition Bureau Guidelines for Environmental Claims, and TerraChoice's "own understanding of global best practice." *Id.*

quent error advertisers committed in 2010 was the “sin of no proof,”⁴⁶ followed closely by that of vagueness.⁴⁷ The fastest-growing greenwashing trend found by TerraChoice was “giv[ing] the impression of third-party endorsement where no such endorsement actually exists.”⁴⁸

Since the rise of greenwashing, organizations like TerraChoice, Greenpeace, and the Center for Environmental Health have monitored the issue and brought it to the public’s attention.⁴⁹ In the process, greenwashing reports have singled out several high profile companies.⁵⁰ For example, in 2010 a blogger for Greenpeace accused Shell of seeking to open risky oil drilling locations while running an aggressive advertising campaign asserting their aim to be environmentally responsible and fuel-efficient.⁵¹ Similarly, Kimberly-Clark (the producer of Kleenex tissues) achieved notoriety in 2009 for cutting down two-hundred-year-old forests for their resources while taking credit for reducing carbon emissions.⁵²

Recently, CBS Corporation received accusations of greenwashing after it unveiled its “EcoAd” campaign.⁵³ The initiative encourages other companies to purchase advertisements through CBS media, with a portion of the proceeds devoted to local environmental causes.⁵⁴ For participating in the program, marketers accrue the added benefit of the EcoAd logo (the phrase “EcoAd” combined with a picture of green leaves) appearing on their advertisements.⁵⁵ The problem, environmental groups claim, is that any advertiser can participate in the EcoAd

⁴⁶ *Id.* at 10, 16 (categorizing the sin of no proof as “an environmental claim that cannot be substantiated by easily accessible supporting information or by a reliable third-party certification”).

⁴⁷ *Id.* (categorizing the sin of vagueness as a “claim that is so poorly defined or broad that its real meaning is likely to be misunderstood by the consumer”).

⁴⁸ TERRACHOICE GRP. INC., *supra* note 30, at 10, 16 (finding a rise from 23.3% of all products evaluated in 2009 to 30.9% in 2010).

⁴⁹ *Id.* at 5; Press Release, Ctr. for Envtl. Health, EcoAds Confuse Consumers, Promote Greenwashing, Groups Charge in FTC Complaint (Apr. 12, 2011), available at <http://www.ceh.org/making-news/press-releases/29-eliminating-toxics/516-consumer-and-environmental-watchdogs-charge-cbs-ecoad-program-with-deceptive-greenwashing>; GREENPEACE, <http://www.stopgreenwash.org> (last visited Jan. 16, 2013).

⁵⁰ See, e.g., Ariel Schwartz, *Kimberly Clark: Destroyer of Ancient Trees, Energy Star Partner of the Year?*, FAST COMPANY (Mar. 13, 2009, 1:00 PM), <http://www.fastcompany.com/1210785/kimberly-clark-destroyer-ancient-trees-energy-star-partner-year>; *Don't Be Fooled by Shell's Arctic Ads*, GREENPEACE (Nov. 15, 2010), <http://members.greenpeace.org/blog/greenwashing/2010/11/15/don-t-be-fooled-by-shell-s-arctic-ads>.

⁵¹ *Don't Be Fooled by Shell's Arctic Ads*, *supra* note 50.

⁵² Schwartz, *supra* note 50.

⁵³ Elliott, *supra* note 11.

⁵⁴ *Id.*

⁵⁵ *Id.*

program regardless of the quality of their environmental performance.⁵⁶ Thus, a company with an unfavorable environmental record may still obtain the goodwill of environmentally conscious viewers who are not aware of the program's details.⁵⁷

C. *Potential Consequences of Greenwashing and Private Efforts to Prevent It*

The negative effects of greenwashing on consumers and the environment are well documented.⁵⁸ Consumer awareness creates a market for environmentally sound products, which companies can tap into for their own profit.⁵⁹ Many commentators, however, recognize that the potential benefit of green marketing is undercut when accompanied by false or inaccurate information.⁶⁰ Thus, both governmental and private actors have sought to reduce false and misleading claims to maintain an efficient and truthful marketplace for green products.⁶¹

In addition to regulatory schemes that address greenwashing either directly or indirectly, some private organizations attempt to police greenwashers.⁶² Environmental watchdog organizations, for example, are helpful in reducing consumer confusion and holding greenwashers responsible for their claims.⁶³ When such groups successfully alert the public to acts of greenwashing, the perpetrators' costs of mitigating negative publicity often outweigh the green marketing benefits, providing a deterrent effect.⁶⁴

In addition to these limited means of prevention, third-party certification organizations provide a market-based incentive for companies to make only legitimate environmental claims.⁶⁵ Under these certification systems, third parties assess the environmental effects of compa-

⁵⁶ Press Release, Ctr. for Env'tl. Health, *supra* note 49.

⁵⁷ *See id.*

⁵⁸ *See* U.S. EPA, *supra* note 24, at 6 ("Overreaching product claims may have a profound negative impact on the longer-term growth of the environmental market.").

⁵⁹ *See id.*

⁶⁰ Israel, *supra* note 33 ("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.").

⁶¹ *See* Thomas C. Downs, Comment, "Environmentally Friendly" Product Advertising: Its Future Requires a New Regulatory Authority, 42 AM. U. L. REV. 155, 172-80 (1992).

⁶² *See id.*; *infra* notes 52-131 and accompanying text.

⁶³ *See, e.g.*, THE GREEN LIFE, DON'T BE FOOLED 2012: THE WORST GREENWASHERS (2012), available at <http://thegreenlifeblog.files.wordpress.com/2012/04/dbf-report.pdf> (describing the "rhetoric" versus the "reality" of ten environmental advertising campaigns).

⁶⁴ *See* Victoria Davis Lockard & Joshua L. Becker, *Green Is Good . . . Until "Eco-Friendly" Becomes "Eco-Fraud,"* FOR THE DEF., Feb. 2009, at 39, 42.

⁶⁵ *See* Downs, *supra* note 61, at 173.

nies that generally lack the incentive and expertise for self-evaluation.⁶⁶ In other countries, governmental and quasi-governmental accreditation programs have assumed this third-party role to keep consumers informed regarding the environmental impact of certain products.⁶⁷ The United States, however, does not have a comprehensive national labeling system.⁶⁸

In the United States, private organizations such as Green Seal and Scientific Certification Systems provide labeling programs that closely monitor their participants' environmental practices and reward businesses with labels that educate consumers and entice the environmentally conscious among them.⁶⁹ Currently, the most prominent government-backed program in the United States is the EPA's ENERGY STAR Program, which lends a stamp of approval to electronic products that achieve certain levels of energy efficiency.⁷⁰ ENERGY STAR is successful in helping consumers to identify energy-saving products that not only benefit consumers by lowering their utility bills, but ultimately benefit the environment through reduced greenhouse gas emissions.⁷¹ Although voluntary certification programs offer a carrot for ecologically friendly companies, they do not provide a stick to deter false claims.⁷²

II. REGULATION OF ENVIRONMENTAL MARKETING

Because of the broad scope of environmental marketing, greenwashing claims can fall under various laws and regulations. The Guides for the Use of Environmental Marketing Claims ("Green Guides" or "Guides"),⁷³ which directly address the application of the Federal Trade Commission Act ("FTC Act"),⁷⁴ to environmental claims, are discussed

⁶⁶ Grodsky, *supra* note 36, at 193.

⁶⁷ Downs, *supra* note 61, at 172–73 & n.73 (noting Germany's Blue Angel environmental certification program as the first of its kind); see U.S. EPA, ENVIRONMENTAL LABELING ISSUES, POLICIES, AND PRACTICES WORLDWIDE 15 (1998).

⁶⁸ U.S. EPA, *supra* note 67.

⁶⁹ Jennifer Woods, Comment, *Of Selling the Environment—Buyer Beware? An Evaluation of the Proposed F.T.C. Green Guides Revisions*, 21 LOY. CONSUMER L. REV. 75, 78–80 (2008); see GREEN SEAL, <http://greenseal.org> (last visited Jan. 16, 2013); SCIENTIFIC CERTIFICATION SYS., <http://scscertified.com> (last visited Jan. 16, 2013).

⁷⁰ U.S. EPA, ENERGY STAR AND OTHER CLIMATE PROTECTION PARTNERSHIPS ANNUAL REPORT 2 (2008).

⁷¹ *Id.*

⁷² See Downs, *supra* note 61, at 173 ("[P]rivate certification programs do not present the kind of comprehensive, reliable system for policing the advertising marketplace that is necessary to ensure trustworthy environmental advertising.").

⁷³ 16 C.F.R. pt. 260 (2012).

⁷⁴ 15 U.S.C. § 41 (2006).

in Part III of this Note. There are other statutes, however, which do not specifically address greenwashing, including the Organic Foods Production Act (OFPA)⁷⁵ and the Lanham Act,⁷⁶ which may also apply.

A. *The USDA's Organic Certification Standards*

Although companies can often use descriptive environmental terms like “sustainable,” “eco-friendly,” or “green” in advertising without drawing much scrutiny, the U.S. Department of Agriculture (USDA) strictly regulates the use of the word “organic.”⁷⁷ The OFPA specifically prohibits the marketing of domestic agricultural products as organically produced, except in conformity with the USDA’s national standards.⁷⁸ The law also limits the use of the USDA seal to products that meet the organic certification requirements.⁷⁹

The National Organic Program (NOP) lays out the USDA’s particular standards for organic certification.⁸⁰ The NOP contains detailed regulations regarding production and handling practices that agricultural producers must follow to maintain organic certification.⁸¹ Additionally, it prohibits the involvement of certain substances with products that will be marketed as organic.⁸² The NOP regulates products in four levels of organic content.⁸³ Products under the USDA’s jurisdiction, “sold, labeled, or represented as ‘100 percent organic’ must contain . . . 100 percent organically produced ingredients.”⁸⁴ The threshold for products represented as simply “organic” is 95% organic content.⁸⁵

⁷⁵ See 7 U.S.C. §§ 6501–6523 (2006).

⁷⁶ See 15 U.S.C. §§ 1052(a), 1125 (2006).

⁷⁷ See 7 U.S.C. § 6505. See generally Jennifer M. Hetu & Anessa Owen Kramer, *It's Not Easy Being Green: Use of the Terms "Organic," "Sustainable," and "Natural" in Trademarks and Advertising*, LANDSLIDE, Sept.–Oct. 2011, at 46, 47.

⁷⁸ 7 U.S.C. § 6505(a). Section (b) similarly prohibits selling or labeling imported agricultural products as organic unless they are certified under standards that are at least equivalent to the USDA's. *Id.* § 6505(b). Sections (c) and (d) create exemptions for certain processed foods and for products sold by small farmers. *Id.* § 6505 (c)–(d).

⁷⁹ *Id.* § 6505(a)(2).

⁸⁰ 7 C.F.R. pt. 205 (2012).

⁸¹ *Id.* §§ 205.200–290. For instance, the NOP mandates that “[p]roduction practices implemented in accordance with this subpart must maintain or improve the natural resources of the operation, including soil and water quality.” *Id.* § 205.200.

⁸² *Id.* § 205.105.

⁸³ *Id.* § 205.301.

⁸⁴ *Id.* § 205.301(a).

⁸⁵ *Id.* § 205.301(b) (“Any remaining product ingredients must be organically produced, unless not commercially available in organic form, or must be nonagricultural substances or nonorganically produced agricultural products produced consistent with the National List.”).

Products whose ingredients are at least 70% organically produced may be labeled as “made with organic [ingredients].”⁸⁶ Finally, marketing of products containing less than 70% approved organic components may not include the term organic except to indicate individual organic ingredients, and then only under certain limitations.⁸⁷

Agricultural producers wishing to gain organic certification under the NOP must plan for an organic production or handling system and submit to an initial inspection and subsequent annual inspections to ensure continued compliance.⁸⁸ The USDA may suspend or revoke certifications for noncompliance, and civil penalties can be imposed for knowingly marketing products as organic without meeting the legal requirements.⁸⁹ The OFPA provides for fines up to ten thousand dollars for such misrepresentation.⁹⁰

The OFPA is not without weaknesses.⁹¹ Though it creates a uniform set of standards for organic production, some critics recognize the ill effect that special interests have on limitations and exemptions in the regulations.⁹² Some commentators also accuse the NOP of being too lax in certain areas, thus lending credibility to producers who would otherwise be considered greenwashers.⁹³ Further, critics attack the USDA for its enforcement of the NOP as well as its oversight of imported organic products.⁹⁴

Still, the strict national standards set by the NOP are recognized as a contributing factor in the vast proliferation of organic farming practices in the United States and internationally since the OFPA’s enactment.⁹⁵ As companies have rushed to capitalize on growing demand for organic products, the NOP has facilitated informed consumers’ pur-

⁸⁶ 7 C.F.R. § 205.301(c) (2012).

⁸⁷ *Id.* §§ 205.304–.305.

⁸⁸ *Id.* §§ 205.401, .403.

⁸⁹ *Id.* § 205.662.

⁹⁰ 7 U.S.C. § 6519(a) (2006).

⁹¹ *See, e.g.*, Blake M. Mensing, *USDA Organic: Ecopornography or a Label Worth Searching For?*, SUSTAINABLE DEV. L. & POL’Y, Fall 2008, at 24, 24.

⁹² *See, e.g.*, Elizabeth Allen, *Food Regulations; Natural Selection?; Federal Rules Limit the ‘Organic’ Label, but Set Off Loophole Hunts*, SAN ANTONIO EXPRESS-NEWS, May 21, 2003, at 1E, available at 2003 WLNR 16739581.

⁹³ *See, e.g.*, Mensing, *supra* note 91 (criticizing the USDA for allowing certain synthetic substances, including nitrites and nitrates, in organic-labeled meat).

⁹⁴ Chenglin Liu, *Is “USDA ORGANIC” a Seal of Deceit? The Pitfalls of USDA Certified Organics Produced in the United States, China and Beyond*, 47 STAN. J. INT’L L. 333, 378 (2011).

⁹⁵ Donald T. Hornstein, *The Road Also Taken: Lessons from Organic Agriculture for Market- and Risk-Based Regulation*, 56 DUKE L.J. 1541, 1551 (2007).

chasing decisions by legitimizing the claims of certified producers.⁹⁶ The organic market's consistent growth, which held constant around twenty percent annually from 1990 to 2005, demonstrates that some consumers rely on organic labeling and are willing to pay the premium usually associated with organic goods.⁹⁷

B. *The Lanham Act and False Advertising*

Section 43(a) of the Lanham Act imposes civil liability for advertising that "misrepresents the nature, characteristics, qualities, or geographic origin of . . . goods, services, or commercial activities."⁹⁸ A successful claim generally proves five elements:

- 1) [T]he defendant has made false or misleading statements of fact concerning his own product or another's;
- 2) the statement . . . deceive[s] a substantial portion of the intended audience;
- 3) the statement . . . will likely influence the deceived consumer's purchasing decisions;
- 4) the advertisements were introduced into interstate commerce; and
- 5) there is some causal link between the challenged statements and harm to the plaintiff.⁹⁹

The Act, though it does not specifically address green marketing, has in some cases been an effective tool for companies in rooting out greenwashing by their competitors.¹⁰⁰ For example, Vermont Pure sued a competitor, Nestlé, owner of the Poland Spring bottled water brand, alleging violations of section 43(a) in 2006.¹⁰¹ In addition to questioning the source and purity of Poland Spring water, Vermont Pure accused Nestlé of contaminating ground and well water with its methods

⁹⁶ Kate L. Harrison, Comment, *Organic Plus: Regulating Beyond the Current Organic Standards*, 25 PACE ENVTL. L. REV. 211, 221 (2008) (noting that organic certification standards have "eliminated consumer confusion," but asserting that the NOP has failed to meet its objective).

⁹⁷ See JEAN M. RAWSON, CONG. RESEARCH SERV., RL 31595, ORGANIC AGRICULTURE IN THE U.S.: PROGRAM AND POLICY ISSUES 2 (2005).

⁹⁸ Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2006).

⁹⁹ Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 613 (6th Cir. 1999).

¹⁰⁰ White, *supra* note 17, at 330.

¹⁰¹ Vt. Pure Holdings, Ltd. v. Nestlé Waters N. Am., Inc., No. Civ.A.03-11465 DPW, 2006 WL 839486, at *2 (D. Mass. Mar. 28, 2006).

of production.¹⁰² Ultimately, Nestlé settled with its competitor, paying Vermont Pure \$750,000.¹⁰³

Static Control Components also raised a section 43(a) claim against a competitor, Lexmark, a printer supply company, alleging Lexmark's ink cartridge recycling program did not live up to its marketing.¹⁰⁴ Lexmark's "Environmental Program" allowed customers to return used cartridges to the company for recycling or reuse.¹⁰⁵ "Hundreds of thousands" of those cartridges, however, ended up being incinerated, a practice referred to by Lexmark as "thermal[] recycling."¹⁰⁶ The court denied summary judgment against Lexmark, allowing the jury to decide whether incineration qualified as recycling per the company's environmental marketing claims.¹⁰⁷

Although section 43(a) provides a mean for companies to police one another with regard to greenwashing, consumers generally cannot bring their own false advertising claims under the Lanham Act.¹⁰⁸ For the most part, only parties with commercial or competitive interests have standing under section 43(a), and thus consumers are excluded.¹⁰⁹ Therefore, except in rare cases, the provision is reserved as a tactic for business competitors, rather than providing direct relief for consumers who have been misled by greenwashing.¹¹⁰

C. Prohibition of Deceptive Trademarks

Similar to section 43(a)'s general prohibition of false and misleading advertising, section 2(a) bars the registration of deceptive trademarks with the U.S. Patent and Trademark Office (USPTO).¹¹¹ Before refusing registration of a mark under section 2(a), the USPTO or Trademark Trial and Appeal Board (TTAB) must make three inquiries:

¹⁰² *Id.*

¹⁰³ Cole & Goldstein, *supra* note 31.

¹⁰⁴ Static Control Components, Inc. v. Lexmark Int'l, Inc., 487 F. Supp. 2d 861, 885 (E.D. Ky. 2007).

¹⁰⁵ *Id.* at 871.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 887, 891 ("There appears to be significant factual disputes as to whether technically or effectively incineration [sic] would support a claim that Lexmark recycles its returned cartridges.").

¹⁰⁸ White, *supra* note 17, at 330.

¹⁰⁹ Tawnya Wojciechowski, Comment, *Letting Consumers Stand on Their Own: An Argument for Congressional Action Regarding Consumer Standing for False Advertising Under Lanham Act Section 43(a)*, 24 Sw. U. L. REV. 213, 215 (1994); see Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2006).

¹¹⁰ See Wojciechowski, *supra* note 109.

¹¹¹ See Lanham Act § 2(a), 15 U.S.C. § 1052(a).

- (1) Is the term misdescriptive of the character, quality, function, composition or use of the goods?
- (2) If so, are prospective purchasers likely to believe that the misdescription actually describes the goods?
- (3) If so, is the misdescription likely to affect the decision to purchase?¹¹²

Superior quality, health benefit, and conformance with social policy are examples of attributes the USPTO usually considers likely to affect purchasing decisions.¹¹³

The USPTO has generally treated environmental terms such as “organic,” “sustainable,” and “natural” as potentially deceptive when attributed to products that do not fit the bill.¹¹⁴ In *Bayer Aktiengesellschaft v. Stamatiou Mouratidis*, for example, Bayer opposed registration of the mark “Organic Aspirin” to identify a dietary supplement that was neither organic nor aspirin.¹¹⁵ The TTAB agreed that the mark was deceptive, and refused its registration.¹¹⁶ Similarly, in *Organik Technologies Inc.*, the TTAB found a clothing company’s mark, “Organik,” to be deceptive.¹¹⁷ The board found the mark would likely lead consumers to mistakenly believe that the company’s products were made of organically grown cotton, which some prefer over conventional cotton.¹¹⁸ Although its scope is limited to trademark registration, section 2(a) of the Lanham Act thus provides another potential obstacle to greenwashing for companies who are not otherwise prevented by specific USDA regulations or general false advertising laws.¹¹⁹

D. *The FTC Act*

The FTC Act is the primary source of protection for consumers against false advertising.¹²⁰ Section 5 of the Act gives the Federal Trade Commission (FTC) authority to take action against “[u]nfair methods

¹¹² *In re Budge Mfg. Co.*, 857 F.2d 773, 775 (Fed. Cir. 1988).

¹¹³ Hetu & Kramer, *supra* note 77.

¹¹⁴ *Id.*

¹¹⁵ No. 91185473, 2010 WL 2191893, at *3 (T.T.A.B. May 21, 2010) (not precedential).

¹¹⁶ *Id.* at *6. The TTAB also found the mark to be “deceptively misdescriptive under Section 2(e)(1).” *Id.*

¹¹⁷ 41 U.S.P.Q.2d (BNA) 1690, 1694 (T.T.A.B. 1997).

¹¹⁸ *Id.*

¹¹⁹ See Hetu & Kramer, *supra* note 77, at 49.

¹²⁰ Grodsky, *supra* note 30, at 160 (calling the FTC Act “the principal federal vehicle for restraining deceptive advertising”); see 15 U.S.C. § 45(a) (2006).

of competition . . . and unfair or deceptive acts or practices in or affecting commerce,"¹²¹ a broad scope of activities that includes deceptive advertising.¹²² To succeed in a claim against a deceptive advertiser, the FTC must prove the likelihood that a reasonable consumer would be misled, though it need not show actual deception.¹²³ Further, the misinformation must be material—that is, it must somehow affect the consumer's purchasing decisions.¹²⁴

The FTC generally prosecutes deceptive advertising claims on a case-by-case basis, and has asserted a number of claims involving environmental marketing.¹²⁵ In 1973, the FTC took action against Ex-Cell-O Corporation, which inaccurately marketed its plastic-lined milk cartons as "completely biodegradable."¹²⁶ The result was a consent order for Ex-Cell-O to cease and desist from misrepresenting the environmental characteristics of its milk cartons.¹²⁷ In 1991, the FTC entered a similar order against Zipatone, Inc. for advertising its spray cement product as environmentally safe when it contained a Class I ozone-depleting substance.¹²⁸

Like section 43(a) of the Lanham Act, the FTC Act is not available to consumers as a tool to prevent greenwashing.¹²⁹ Rather, only the FTC can bring section 5 deceptive advertising claims.¹³⁰ The FTC therefore assumes the role of watchdog over consumers' interests.¹³¹

III. THE FTC'S GREEN GUIDES

In response to the expanding prevalence of environmental marketing and the growing concern over greenwashing, a task force com-

¹²¹ FTC Act § 5, 15 U.S.C. § 45(a)(1).

¹²² E. Howard Barnett, *Green with Envy: The FTC, the EPA, the States, and the Regulation of Environmental Marketing*, 1 ENVTL. LAW. 491, 495 (1995) ("Through both Commission interpretation and judicial decree, the Commission's authority extends to the regulation of false, deceptive and misleading advertising claims.").

¹²³ Grodsky, *supra* note 36, at 153 (citing Cliffdale Assocs., Inc., 103 F.T.C. 110 (1984)).

¹²⁴ *Id.*

¹²⁵ *Id.* at 154; *see, e.g.*, Standard Oil Co. of Cal. v. Fed. Trade Comm'n, 577 F.2d 653, 655 (9th Cir. 1978) (affirming with modifications an FTC order enjoining gas company from exaggerating emissions reductions caused by its product); Jerome Russell Cosmetics, U.S.A., Inc., 114 F.T.C. 514, 521 (1991) (prohibiting company from marketing hairspray containing ozone-depleting substances as "ozone safe" or "ozone friendly").

¹²⁶ Ex-Cell-O Corp., 82 F.T.C. 36 (1973).

¹²⁷ *Id.* at 43–45.

¹²⁸ Zipatone, Inc., 114 F.T.C. 376 (1991).

¹²⁹ *See* FTC Act § 5, 15 U.S.C. § 45(a)(2) (2006); *supra* notes 98–110 and accompanying text.

¹³⁰ FTC Act § 5, 15 U.S.C. § 45(a)(2).

¹³¹ *See* Wojciechowski, *supra* note 109, at 229.

posed of states' attorneys general issued "The Green Report" in 1989, calling for federal oversight of the issue.¹³² In 1992, after a second issuance of the report and multiple public hearings, the Federal Trade Commission (FTC) released the FTC Guidelines for the Use of Environmental Marketing Claims ("Green Guides" or "Guides"), a manual for compliance with environmental marketing standards.¹³³

The Green Guides address "environmental marketing claims that are unfair or deceptive under Section 5 of the [Federal Trade Commission Act]."¹³⁴ Their coverage includes "labeling, advertising, promotional materials and all other forms of marketing in any medium," and "claims about the environmental attributes of a product, package or service."¹³⁵ The content of the Guides consists of a series of general principles applying to all environmental marketing,¹³⁶ and guidelines regarding specific terms, such as "biodegradable" or "recyclable."¹³⁷ Throughout, the Guides provide illustrative examples to help marketers conform to the FTC standards.¹³⁸

Although the Green Guides represent progress, they are merely administrative interpretations, and therefore do not have the force of law.¹³⁹ Still, the Guides can be influential in cases of greenwashing because courts often defer to them in litigation of environmental claims.¹⁴⁰ Some states have also used provisions from the Green Guides to draft their own consumer protection statutes.¹⁴¹

¹³² CAL. ATTORNEY GEN., ET AL., *supra* note 9; Lauren C. Avallone, Comment, *Green Marketing: The Urgent Need for Federal Regulation*, 14 PENN ST. ENVTL. L. REV. 685, 688 (2006).

¹³³ Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (Aug. 13, 1992) (codified at 16 C.F.R. pt. 260); Avallone, *supra* note 132.

¹³⁴ 16 C.F.R. § 260.1(a) (2012).

¹³⁵ *Id.* § 260.1(c).

¹³⁶ *Id.* § 260.3.

¹³⁷ *E.g., id.* § 260.12 (Recyclable Claims).

¹³⁸ *Id.* § 260.1(d) ("The examples provide the Commission's views on how reasonable consumers likely interpret certain claims.").

¹³⁹ *Id.* § 260.1(a) ("[The Guides] do not confer any rights on any person and do not operate to bind the FTC or the public.").

¹⁴⁰ Tom Redick, *Regulatory Update—FTC Seeks Input on Green Marketing Guides*, AGRIC. L. UPDATE, Aug. 2009, at 1, 4.

¹⁴¹ Greg Northen, *Greenwashing the Organic Label: Abusive Green Marketing in an Increasingly Eco-Friendly Marketplace*, 7 J. FOOD L. & POL'Y 101, 111 (2011); see *infra* notes 162–184 and accompanying text.

A. 1998 Version of the Green Guides

After introducing the Green Guides in 1992, the FTC revised the Guides in 1996 and 1998.¹⁴² Following these revisions, the Green Guides included four general principles for green marketing.¹⁴³ The first stated that all qualifications and disclosures “should be sufficiently clear, prominent and understandable to prevent deception.”¹⁴⁴ Second, the Guides dictated that environmental marketing claims should be clear as to what they refer, whether it is a product, a specific component of the product, or just the packaging of the product.¹⁴⁵ The third principle advised against the overstatement of a product’s environmental benefits.¹⁴⁶ Finally, the fourth principle stated that comparative environmental claims should clearly indicate the basis for comparison.¹⁴⁷

Section 260.7(a) of the 1998 revision warned against making broad claims of environmental benefit that the company may not be able to substantiate.¹⁴⁸ For example, the Guides advised businesses against using language such as “Environmentally Friendly” or “Earth Smart” without qualification if they cannot substantiate the implied message to consumers that the associated product is environmentally superior to competing products.¹⁴⁹ Section 260.7 identified seven specific environmental terms that should not be used deceptively, including “degradable,”¹⁵⁰ “compostable,” and “recyclable.”¹⁵¹

¹⁴² Bradley, *supra* note 23, at 40. Two years after the FTC proposed further updates, another revision to the Guides was finally published on October 11, 2012. Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62,122 (Oct. 11, 2012) (codified at 16 C.F.R. pt. 260); *see infra* notes 185–195 and accompanying text.

¹⁴³ 16 C.F.R. § 260.6 (2011) (updated by Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. at 62,122). Although the Guides have been updated, the general principles have not changed significantly from the 1998 version. *See* 16 C.F.R. § 260.3 (2012); *infra* notes 185–195 and accompanying text.

¹⁴⁴ 16 C.F.R. § 260.6(a) (2011).

¹⁴⁵ *Id.* § 260.6(b).

¹⁴⁶ *Id.* § 260.6(c).

¹⁴⁷ *Id.* § 260.6(d) (noting the preference of “20% more recycled content than our previous package” over “20% more recycled content,” for example).

¹⁴⁸ *Id.* § 260.7(a).

¹⁴⁹ *Id.*

¹⁵⁰ 16 C.F.R. § 260.7(b) (2011) (“An unqualified claim that a product or package is degradable, biodegradable or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature . . .”).

¹⁵¹ *Id.* § 260.7(b)–(h). The remaining four terms were “recycled content,” “source reduction,” “refillable,” and “ozone safe/friendly.” *Id.* § 260.7(e)–(h). The 2012 update retains these seven terms, while adding five more. 16 C.F.R. §§ 260.5–.17 (2012).

B. Green Guides Enforcement

After publishing the Green Guides in 1992, the FTC proceeded to prosecute numerous greenwashers under the FTC Act, using the Guides' principles to support each claim.¹⁵² Defendants in these cases touted dubious environmental characteristics of products such as "plastic trash bags, disposable diapers, paper and plastic grocery store bags, other paper products, a snow-melting chemical, and various aerosol sprays."¹⁵³ In total, the FTC brought thirty-seven claims against alleged greenwashers in the 1990s.¹⁵⁴ During the presidency of George W. Bush, however, from 2000 to 2009, that number dropped to zero.¹⁵⁵

Since the change in administration, the FTC has become more willing to crack down on invalid green marketing again.¹⁵⁶ In the past few years, the FTC brought a number of actions against greenwashers under the FTC Act, using the Green Guides as a framework.¹⁵⁷ Adhering to the Guides' provision on biodegradable claims, the FTC pursued three companies—Kmart, Tender Corporation, and Dyna-E International—for deceptively marketing their products with the word "biodegradable."¹⁵⁸ According to the FTC, the defendants failed to qualify their claims with the caveat that the products in question were unlikely to break down completely when disposed of normally.¹⁵⁹ Regarding the disposable disinfectant wipes marketed by Tender Corporation, the FTC relied on the second general principle set forth in the Green Guides, alleging Tender was not clear whether the "placement of the term "biodegradable" on the product packaging referenced "the product, its packaging, or a portion or component of the product or packaging."¹⁶⁰ In all three cases, the defendants ultimately agreed to discontinue their deceptive marketing schemes.¹⁶¹

¹⁵² See Roscoe B. Starek, III, Comm'r, FTC, A Brief Review of the FTC's Environmental and Food Advertising Enforcement Programs (Oct. 13, 1995), available at <http://www.ftc.gov/speeches/starek/rbsgre.shtm>.

¹⁵³ *Id.*

¹⁵⁴ Redick, *supra* note 140.

¹⁵⁵ *Id.*

¹⁵⁶ See Bradley, *supra* note 29, at 41.

¹⁵⁷ See *id.*

¹⁵⁸ *Id.* (citing Kmart Corp., No. C-4263, 2009 FTC LEXIS 144 (F.T.C. July 15, 2009); Tender Corp., No. C-4261, 2009 FTC LEXIS 146 (F.T.C. July 13, 2009); Dyna-E Int'l, Inc., No. 9336, 2009 FTC LEXIS 229 (F.T.C. Dec. 15, 2009)).

¹⁵⁹ Bradley, *supra* note 29, at 41.

¹⁶⁰ Complaint at 1, Tender Corp., 2009 FTC LEXIS 146 (No. C-4261), 2009 FTC LEXIS 148, at *2.

¹⁶¹ See Kmart Corp., 2009 FTC LEXIS 144, at *3-4; Tender Corp., 2009 FTC LEXIS 146, at *6; Dyna-E Int'l, Inc., 2009 FTC LEXIS 229, at *3-4.

C. State Law Incorporating the Green Guides

Consumers have further means of protection from greenwashing on the state level. Every state has its own consumer protection laws, including “little FTC Acts,” which mirror the federal law against deceptive advertising.¹⁶² While only the FTC can bring claims under the federal statute, many of these corresponding state laws provide the advantage of consumer standing.¹⁶³ Additionally, several states have enacted laws specifically aimed at misleading environmental marketing.¹⁶⁴ Each green marketing law on the state level in some way incorporates the FTC’s Green Guides.¹⁶⁵

Minnesota, for example, explicitly references the Green Guides in its own environmental marketing law.¹⁶⁶ The statute thus creates enforceable state law out of the FTC’s interpretive guidelines.¹⁶⁷ Further, under the Minnesota statute, injured consumers have standing to bring private actions to enforce the Green Guides’ standards.¹⁶⁸ Similarly, Maine’s Unfair Trade Practices Act requires conformity with the Green Guides to avoid violation.¹⁶⁹

Other states, like New York and California, incorporate the Green Guides within their own specific environmental marketing statutes.¹⁷⁰ New York law creates a voluntary emblem system, enabling companies to market their products using a state-certified emblem only after meeting strict standards based on the product and the type of environmental claim.¹⁷¹ Those that do not choose to apply for the emblem still must adhere to the Green Guides whenever they use the words “recycled,” “recyclable,” and “reusable.”¹⁷² California’s environmental mar-

¹⁶² White, *supra* note 17, at 331; *see, e.g.*, CAL. BUS. & PROF. CODE § 17580.5 (West 2008); ME. REV. STAT. ANN. tit. 38, § 2142 (2001); MINN. STAT. § 325E.41 (2010); N.Y. COMP. CODES R. & REGS. tit. 6, § 368.1 (2002).

¹⁶³ White, *supra* note 17, at 331.

¹⁶⁴ *Id.* at 332.

¹⁶⁵ *Id.* at 335; *see* CAL. BUS. & PROF. CODE § 17580.5; ME. REV. STAT. ANN. tit. 38, § 2142; MINN. STAT. § 325E.41; N.Y. COMP. CODES R. & REGS. tit. 6, § 368.1.

¹⁶⁶ MINN. STAT. § 325E.41 (“Environmental marketing claims . . . must conform to the standards or be consistent with the examples contained in [the Green Guides].”).

¹⁶⁷ *See id.*

¹⁶⁸ MINN. STAT. § 8.31 (2010).

¹⁶⁹ ME. REV. STAT. ANN. tit. 38, § 2142 (2001).

¹⁷⁰ White, *supra* note 17, at 334; *see* N.Y. COMP. CODES R. & REGS. tit. 6, § 368.1 (2002); CAL. BUS. & PROF. CODE § 17580.5 (West 2008).

¹⁷¹ White, *supra* note 17, at 334 (citing N.Y. COMP. CODES R. & REGS. tit. 6, §§ 368.1–.7).

¹⁷² N.Y. COMP. CODES R. & REGS. tit. 6, § 368.1 (“The use of the terms ‘recycled’, ‘recyclable’, and ‘reusable’ independent of the emblem must be in conformance with the [Green Guides].”).

keting statute similarly requires conformity to the Green Guides, but extends regulation to more general terms, such as “environmental choice” and “ecologically friendly.”¹⁷³ Like many states, California allows compliance with the Green Guides to serve as a defense against any suit brought under the state’s environmental marketing statute.¹⁷⁴

California’s use of the Green Guides came into play in *Hill v. Roll International Corp.*, in which a California consumer brought an action against the bottled water company Fiji for placing a green drop logo on its labels, giving the impression that its business practices were environmentally sound.¹⁷⁵ In fact, Fiji’s production process was environmentally inferior to most bottling companies.¹⁷⁶ Hill brought suit under the California consumer protection law that incorporates the FTC’s greenwashing standards and invoked the “general environmental benefit” principle of the Green Guides.¹⁷⁷ The California Court of Appeal found, however, that Hill had not satisfied the reasonable consumer standard, also set out in the Guides.¹⁷⁸ According to the court, the green drop logo on Fiji bottles does not “convey to a reasonable consumer in the circumstances that the product is endorsed for environmental superiority.”¹⁷⁹

In *Koh v. S.C. Johnson & Son, Inc.*, a consumer brought suit in the U.S. District Court for the Northern District of California under the same statute against the manufacturer of several household cleaning products for displaying a Greenlist label on its products.¹⁸⁰ The label consisted of a drawing of two leaves and the words “Greenlist™ Ingredients.”¹⁸¹ The logo was accompanied by language on the back of the packaging stating: “Greenlist™ is a rating system that promotes the use of environmentally responsible ingredients”¹⁸² The plaintiff claimed that the Greenlist emblem’s presentation on the bottles implied a third-party seal of approval, despite the fact that it was created

¹⁷³ CAL. BUS. & PROF. CODE §§ 17580(a), 17580.5 (also listing “‘earth friendly,’ ‘environmentally friendly,’ ‘ecologically sound,’ ‘environmentally sound,’ ‘environmentally safe,’ ‘ecologically safe,’ ‘environmentally lite,’ ‘green product,’ or any other like term”).

¹⁷⁴ *Id.* § 17580.5(b). *See, e.g.*, IND. CODE ANN. § 24-5-17-2 (West 2006).

¹⁷⁵ 128 Cal. Rptr. 3d 109, 111 (Ct. App. 2011).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 114–15 (quoting 16 C.F.R. § 260.7(a) (2011)) (“It is deceptive to misrepresent, directly or by implication, that a product, package or service offers a general environmental benefit.”).

¹⁷⁸ *Id.* at 115; *see* 16 C.F.R. § 260.1(d) (2012).

¹⁷⁹ *Hill*, 128 Cal Rptr. 3d at 116.

¹⁸⁰ *See* No. C-09-00927 RMW, 2010 WL 94265, at *1 (N.D. Cal. Jan. 6, 2010).

¹⁸¹ *Id.*

¹⁸² *Id.*

by the manufacturer.¹⁸³ In denying the defendant's motion to dismiss, the court concluded that it was plausible that a reasonable consumer viewing the label in context would interpret it as originating from a third party.¹⁸⁴

D. 2012 Update to the Green Guides

In 2007, the FTC began the process of updating the Green Guides in response to changes in environmental marketing trends.¹⁸⁵ After conducting several workshops and a study on consumer perception, the FTC published proposed revisions to the Guides in 2010.¹⁸⁶ The FTC adopted those revisions as a final rule on October 11, 2012.¹⁸⁷

The update covers a wider range of claims than the previous iteration of the Guides, while leaving the general principles intact.¹⁸⁸ In response to issues like those in cases like *Hill* and *Koh*, the revision includes an additional section addressing environmental certifications and seals of approval.¹⁸⁹ In addition to warning against false or unqualified claims of third-party approval, the revisions stress that third-party seals fall under the FTC's Endorsement Guidelines.¹⁹⁰ Also, although the earlier version of the Guides allowed marketers to assert general environmental benefits as long as they were substantiated, the update advises against such general, unqualified claims.¹⁹¹

The update retains the seven terms defined in the previous version of the Guides and adds five new types of claims: "renewable materials," "renewable energy," "non-toxic," "carbon offset," and "free-of" claims.¹⁹² Observing evidence of consumer confusion regarding the

¹⁸³ *Id.*

¹⁸⁴ *Id.* at *2.

¹⁸⁵ Guides for the Use of Environmental Marketing Claims, 72 Fed. Reg. 66,091, 66,091 (proposed Nov. 27, 2007) (requesting comments and announcing public meetings regarding the Green Guides); Cole & Goldstein, *supra* note 31.

¹⁸⁶ Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63,552, 63,552 (proposed Oct. 15, 2010) (codified at 16 C.F.R. pt. 260) (proposing modifications and additions to the Guides).

¹⁸⁷ Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62,122 (Oct. 11, 2012) (codified at 16 C.F.R. pt. 260).

¹⁸⁸ Cole & Goldstein, *supra* note 31; *see* Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. at 62,126–32; *supra* notes 143–149 and accompanying text.

¹⁸⁹ 16 C.F.R. § 260.6 (2012).

¹⁹⁰ *Id.* § 260.6(b); *see id.* § 255 (providing guidance on the FTC Act's application to third-party endorsements in advertising).

¹⁹¹ *Id.* § 260.4(b) ("Because it is highly unlikely that marketers can substantiate all reasonable interpretations of these claims, marketers should not make unqualified general environmental benefit claims.").

¹⁹² *Id.* §§ 260.5–.17.

phrase “made with renewable materials,” the FTC suggests that advertisers qualify this claim with specific information about the materials used.¹⁹³ Similarly, the FTC cited the evolving definition of “renewable energy,” and consumers’ association of the phrase with the absence of fossil fuels, in advising marketers to qualify such claims unless the use of fossil fuels is completely avoided in the production process.¹⁹⁴ The update’s added section on carbon offsets is limited, but warns against deceptively advertising offsets that will not occur within two years or which are already required by law.¹⁹⁵

IV. INADEQUACIES OF CURRENT GREENWASHING REGULATION AND POTENTIAL SOLUTIONS

A. *Greenwashing Is a Serious Threat That Is Inadequately Addressed by Current Regulations*

Greenwashing primarily hurts consumers who make purchasing decisions based on inaccurate environmental claims. Marketers who make unsubstantiated environmental claims can easily dupe consumers willing to pay a premium for ecologically beneficial products.¹⁹⁶ Profiting from misleading or false assertions of environmental benefit is unfair to consumers.¹⁹⁷ Ultimately, continued greenwashing will cause consumers to become disillusioned and distrustful, as they grow accustomed to treating green advertisements with suspicion.¹⁹⁸

Greenwashing also undermines the potential environmental benefits that the market for environmentally sound products creates.¹⁹⁹ If companies are not held accountable for greenwashing, they will have little incentive to live up to the environmental claims asserted by their marketing departments.²⁰⁰ Rather than investing in the development of

¹⁹³ *Id.* § 260.16; see Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63,552, 63,588 (proposed Oct. 15, 2010) (codified at 16 C.F.R. pt. 260).

¹⁹⁴ Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. at 63,591 (stating that “the term ‘renewable energy’ has an emerging meaning,” but that “[t]here appears to be a consensus, however, that renewable energy excludes fossil fuels”); Northen, *supra* note 141, at 117; see 16 C.F.R. § 260.16.

¹⁹⁵ 16 C.F.R. § 260.5 (2012); Northen, *supra* note 141, at 117.

¹⁹⁶ See *supra* notes 18–66 and accompanying text.

¹⁹⁷ See Avallone, *supra* note 132, at 694.

¹⁹⁸ See Peter J. Tarsney, Note, *Regulation of Environmental Marketing: Reassessing the Supreme Court’s Protection of Commercial Speech*, 69 NOTRE DAME L. REV. 533, 537 (1994).

¹⁹⁹ See Israel, *supra* note 33 (“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.”).

²⁰⁰ See Avallone, *supra* note 132, at 695.

environmentally safe products and methods, companies will compete for the green-market share solely through advertising and promotion.²⁰¹ Consumers' zeal for the environment is a potentially valuable resource; in the presence of unrestrained greenwashing, it would be wasted.²⁰² Regulation is therefore necessary to deter companies that might attempt to capture the benefit of environmental marketing without investing in the environment itself.

Regulatory efforts from the private sector can only go so far in reducing consumer confusion and holding companies accountable.²⁰³ Environmental watchdogs do their part by educating consumers and making it more difficult for companies to mislead consumers without losing goodwill.²⁰⁴ Their actions, however, lack the uniformity and enforceability of government regulations.²⁰⁵ Third-party certification programs similarly lack the force of government-issued standards, and because they are not immune from private interests, their legitimacy is questionable.²⁰⁶ Although regulation by state and federal lawmakers begins to supplement the efforts by private efforts to curb greenwashing, it falls short of creating a comprehensive and effective system of prevention.²⁰⁷

Among the various laws that apply to greenwashing, the Organic Foods Production Act (OFPA) and its accompanying National Organic Program (NOP) provide the strictest standards and enforcement, albeit with a very narrow scope.²⁰⁸ The NOP's specifically defined regulations create a uniform national standard, providing clear notice to producers and importers so that they may choose whether or not to comply and receive organic certification.²⁰⁹ Further, by requiring periodic inspections, the OFPA actively polices farmers who claim to maintain organic

²⁰¹ See Tarsney, *supra* note 198.

²⁰² See U.S. EPA, *supra* note 24, at 4.

²⁰³ See Downs, *supra* note 61, at 174 (noting weaknesses of private certification programs).

²⁰⁴ Lockard & Becker, *supra* note 64.

²⁰⁵ See Grodsky, *supra* note 36, at 167 (suggesting the need for legally binding standards).

²⁰⁶ See Downs, *supra* note 61, at 173 (“[U]nregulated programs invite the possibility of bribery or improper influence.”).

²⁰⁷ See White, *supra* note 17, at 335 (“[T]he current regulatory framework lacks both identifiable federal green-marketing standards and national uniformity.”).

²⁰⁸ See 7 U.S.C. §§ 6501–6523 (2006); 7 C.F.R. pt. 205 (2012).

²⁰⁹ See 7 C.F.R. pt. 205; RAWSON, *supra* note 97, at 3 (noting that Congress passed the OFPA in response to the agricultural industry's failure to reach internal consensus regarding organic standards).

practices.²¹⁰ Combining effective enforcement with well-defined requirements makes it prohibitively costly for companies to advertise with the word “organic” without adhering to the U.S. Department of Agriculture’s (USDA) organic standards. Thus, consumer confusion as to which producers are in compliance is largely eliminated.²¹¹ Additionally, the USDA’s organic seal lends a level of legitimacy to the compliant products that can rarely be achieved under nongovernmental programs.²¹² The NOP thus supplies both a carrot and a stick to encourage organic practices and ensure accurate marketing claims.

Finite USDA resources and ability to enforce the OFPA limit the NOP’s strict regulation of organic products.²¹³ Critics would like to see the USDA increase regulation in certain areas within the organic realm, such as foreign imports²¹⁴ and synthetic additives,²¹⁵ however the main provisions of the NOP largely prevent misuse of the term.²¹⁶ Although the USDA effectively curbs false or inaccurate organic claims through the NOP, “organic” is the only term directly related to greenwashing that it oversees.²¹⁷ Regulation of the wide range of environmental advertising that remains is left to state and federal consumer protection and unfair competition laws.

Although the Lanham Act and the Federal Trade Commission Act (“FTC Act”) include broad provisions regarding misleading advertisements, both lack sufficient specificity and enforceability. Section 2(a) of the Lanham Act, for example, only prevents the registration of deceptive trademarks—a significant but incomplete roadblock for potential greenwashers.²¹⁸ Companies barred under section 2(a) are denied the benefits of trademark registration, but their marketing strategies are not otherwise affected.²¹⁹

Section 43(a) of the Lanham Act poses a more viable threat to greenwashers because of the potential imposition of damages or injunctive relief.²²⁰ Similarly, prosecution under section 5 of the FTC Act

²¹⁰ See 7 U.S.C. § 6506(a)(5).

²¹¹ See Harrison, *supra* note 96.

²¹² See Avallone, *supra* note 132, at 695 (suggesting consumers cannot always trust certifications that are not government sanctioned).

²¹³ See Liu, *supra* note 94 (stating that, due to its limited resources, the USDA fails to adequately supervise independent certification agents).

²¹⁴ *E.g., id.*

²¹⁵ *E.g.,* Mensing, *supra* note 91.

²¹⁶ See 7 C.F.R. pt. 205 (2012).

²¹⁷ See 7 U.S.C. §§ 6501–6523 (2006).

²¹⁸ See Lanham Act § 2(a), 15 U.S.C. § 1052(a) (2006).

²¹⁹ See *id.*

²²⁰ See *id.* § 43(a), 15 U.S.C. § 1125(a) (imposing civil liability on false advertisers).

can result in a fine or a cease-and-desist order.²²¹ The inability of injured consumers, however, to bring suits against greenwashers hampers consumer protection through section 43(a) and the FTC Act.²²² Despite language in the Lanham Act that confers jurisdiction to “any person who believes that he or she is or is likely to be damaged by such [false advertising],” courts consistently deny standing to consumers under section 43(a).²²³ At the same time, standing under section 5 of the FTC Act is only granted to the Federal Trade Commission (FTC), and not private citizens.²²⁴

The failure of either statute to provide consumer standing severely limits their effectiveness and fails to provide adequate protection to consumers.²²⁵ Without standing to sue, a consumer must wait for the FTC to act or for a competing business to bring claims against an alleged greenwasher.²²⁶ The FTC, however, is often slow to respond to the rapidly changing landscape of environmental marketing.²²⁷ FTC enforcement of green marketing standards is also subject to shifts in politics, as evidenced by the contrast in the quantity of FTC Guides for the Use of Environmental Marketing Claims (“Green Guides” or “Guides”) claims brought during the past three administrations.²²⁸ Moreover, there is no guarantee that competitors asserting section 43(a) claims are protecting consumer interests by doing so.²²⁹ It is dangerous to assume that consumers can rely on corporations to police one another regarding deceptive marketing.²³⁰

Additionally, both the Lanham Act and the FTC Act lack the specificity and detail to adequately police environmental claims.²³¹ Section 43(a) in particular does not provide any specifics relating to environ-

²²¹ See FTC Act § 5, 15 U.S.C. § 45(m)(1)(A)–(B) (2006).

²²² See White, *supra* note 17, at 330.

²²³ 15 U.S.C. § 1125(a)(1)(B); Wojciechowski, *supra* note 109 (“[C]onsumers have been denied standing on the basis that the section 43(a) provision was enacted to provide relief to competitive or commercial interests, and not consumer interests.”).

²²⁴ See 15 U.S.C. § 45(a)(2) (“The Commission is hereby empowered and directed to prevent persons . . . from using unfair or deceptive acts or practices.”).

²²⁵ See generally Wojciechowski, *supra* note 109 (arguing for consumer standing in false advertising claims under the Lanham Act).

²²⁶ See *id.*

²²⁷ *Id.* at 231 (using environmental marketing as an example of the FTC’s ineffectiveness).

²²⁸ See Bradley, *supra* note 29, at 41 (noting several FTC actions based on the Green Guides since 2009, compared to zero such actions in the previous ten years); Redick, *supra* note 140.

²²⁹ Wojciechowski, *supra* note 109, at 216.

²³⁰ See *id.* at 241.

²³¹ See White, *supra* note 17, at 330; Grodsky, *supra* note 36, at 155–56.

mental marketing; thus, judges and jurors must make subjective determinations based on common sense or consumer surveys.²³² Similarly, despite the existence of the Green Guides, courts often impose a reasonable consumer standard for deceptive advertising under the FTC Act.²³³

The negative consequences of subjective standards are twofold. First, the lack of clearly defined parameters causes uncertainty among companies engaged in green marketing as to what could be considered deceptive.²³⁴ Risk-averse companies may therefore choose to avoid green marketing altogether, even when their products are environmentally superior. Second, appealing to the perspective of the reasonable consumer rather than carefully defined regulations creates a lax standard for greenwashing.²³⁵ The lack of consensus and clear definition in the realm of environmental marketing allows many marketers to slip through the reasonable consumer inquiry despite falsely suggesting or implying an environmental benefit.²³⁶ At the very least, parties who challenge greenwashers in court often face the difficult task of proving commonly accepted meanings of terms like “eco-friendly” or “sustainable.”²³⁷

Finally, the FTC is limited to one-by-one pursuit of greenwashers because legislation restricts its ability to promulgate rules addressing specific issues related to deceptive advertising.²³⁸ This ad hoc enforcement is discretionary and sporadic, and thus establishes little precedential case law.²³⁹ This approach adds further to the uncertainty of marketers and makes enforcement susceptible to the fluctuations of the nation’s political climate.²⁴⁰

²³² See Lanham Act § 43(a), 15 U.S.C. § 1125 (2006); *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 487 F. Supp. 2d 861, 890 (E.D. Ky. 2007).

²³³ See, e.g., *Cliffdale Assocs.*, 103 F.T.C. 110 (1984).

²³⁴ See Grodsky, *supra* note 36, at 155.

²³⁵ See *id.* at 155–56 (“An unintended consequence of the FTC’s application of the reasonable consumer standard is that it has essentially granted immunity in the gray area cases.”).

²³⁶ See, e.g., *Hill v. Roll Int’l Corp.*, 128 Cal. Rptr. 3d 109 (Ct. App. 2011).

²³⁷ See Redick, *supra* note 140, at 3 (noting that “sustainable” had no universally agreed upon definition according to a case in the United Kingdom regarding cotton advertisements).

²³⁸ Barnett, *supra* note 122; see 15 U.S.C. § 57a(a)(2) (2006).

²³⁹ See Grodsky, *supra* note 36, at 155 (calling case-by-case enforcement “selective, incremental, and highly contextual”).

²⁴⁰ See *id.*; Roger D. Wynne, Note, *Defining “Green”: Toward Regulation of Environmental Marketing Claims*, 24 U. MICH. J.L. REFORM 785, 789–90 (1991).

The need for clarity and consistency in false advertising regulations is what spurred the FTC to publish the Green Guides to aid businesses in engaging in lawful green marketing.²⁴¹ The Guides provide increased specificity to greenwashing regulation, but lack enforceability.²⁴² They are a step in the right direction and the recent update adds further clarity, although it is too soon to tell to what extent the revision will aid enforcement.²⁴³ Apart from reducing the uncertainty of marketers, however, the Guides do little to alleviate the deficiencies of the FTC Act.²⁴⁴ Because they are not binding law, the Guides do not instill any new powers in the FTC to prosecute greenwashing claims more aggressively.²⁴⁵ Further, the fact that the new definitions of environmental terms are not positive law means that courts continue to apply the traditional reasonable consumer standard, using the Green Guides only as a reference.²⁴⁶

Although the range of environmental terms is expansive, the Green Guides only define a select few.²⁴⁷ Even after the additions in the recent update, the collection of words and symbols left out remains daunting. Moreover, the revision of the Guides does not completely cure the pitfall of generality.²⁴⁸ While the updated Guides provide clearer definitions of what it means for claims to be “substantiated” or “deceptive,” companies cannot predict exactly how the FTC will interpret these standards, because few cases have been prosecuted under either form of the Guides.²⁴⁹ Thus, the Green Guides fail to rescue companies and consumers alike from uncertainty.²⁵⁰

State consumer protection laws incorporating the Green Guides combine the Guides’ framework of specifically defined terms with legal

²⁴¹ See Barnett, *supra* note 122, at 498.

²⁴² 16 C.F.R. § 260.1 (2012).

²⁴³ See Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63,552–607 (proposed Oct. 15, 2010) (codified at 16 C.F.R. pt. 260).

²⁴⁴ See Woods, *supra* note 69, at 81–83.

²⁴⁵ See 16 C.F.R. § 260.1(a).

²⁴⁶ *E.g., Hill*, 128 Cal. Rptr. 3d at 115 (referring to the reasonable consumer standard stated in the Guides but ultimately derived from state consumer law and the FTC Act); see White, *supra* note 17, at 328.

²⁴⁷ See 16 C.F.R. §§ 260.5–.17.

²⁴⁸ See 16 C.F.R. pt. 260 (2012); White, *supra* note 17, at 336.

²⁴⁹ 16 C.F.R. § 260.2 (aiding marketers in determining what practices are deceptive and advising that “relevant and reliable scientific evidence” should be used to substantiate environmental claims); see White, *supra* note 17, at 336 (stating, with regard to the 1998 version of the Guides, that “the FTC would need to prosecute a significant number of various deceptive green-marketing claims to give the *Green Guides* sufficient context and provide marketers with well defined, predictable standards of what it considers ‘deceptive.’”).

²⁵⁰ See White, *supra* note 17, at 336.

enforceability and, in some states, the opportunity for consumer standing.²⁵¹ Although these laws are often the most effective weapons for consumers against greenwashing, the variation from state to state creates new problems of inconsistency and inefficiency.²⁵² Because of the lack of uniformity, national companies must be aware of and comply with fifty potentially unique standards.²⁵³ Even when states have adopted the same language from the Green Guides, in some cases the lack of precise definitions will result in varying interpretations.²⁵⁴ The prospect of applying a new standard in each state that a company operates in may raise expected costs prohibitively, so that some companies will choose to abstain from environmental marketing.²⁵⁵ This provides little incentive for companies to improve their environmental records.

B. *Learning from Existing Regulations to Effectively Prevent Greenwashing*

Moving forward, a new regulatory framework is required to adequately address greenwashing. A new model should be developed after consideration of the advantages and shortcomings of the various laws previously discussed in this Note.²⁵⁶ The goal of this endeavor is to minimize consumer confusion and susceptibility to misleading advertising, and to allow consumers' environmental awareness to power the market toward innovation and investment in beneficial environmental practices.²⁵⁷

First, it is important for the federal government to create uniform national standards to avoid the confusion and elevated costs of compliance associated with state-by-state regulation.²⁵⁸ Next, a feasible and effective level of specificity must be achieved. The existing statutes impose standards at various levels of precision.²⁵⁹ The USDA's organic regime provides the most detailed requirements for the use of an environmental term,²⁶⁰ while provisions in the Lanham Act and FTC Act present the broadest standards.²⁶¹ The discussion above suggests that the USDA's detailed approach is the most effective; however, regulation

²⁵¹ *Id.* at 331.

²⁵² *See id.* at 337.

²⁵³ *See* Avallone, *supra* note 132, at 696.

²⁵⁴ White, *supra* note 17, at 337.

²⁵⁵ *See id.*

²⁵⁶ *See supra* notes 73–195 and accompanying text.

²⁵⁷ *See* Avallone, *supra* note 132, at 694–95.

²⁵⁸ *See id.*

²⁵⁹ *See* 7 U.S.C. §§ 6501–6523 (2006); 15 U.S.C. §§ 45(a), 1125(a) (2006).

²⁶⁰ *See* 7 U.S.C. §§ 6501–6523; 7 C.F.R. pt. 205 (2012).

²⁶¹ *See* 15 U.S.C. §§ 45(a), 1125(a).

of a wide array of environmental terms with the precision currently accorded to the single word “organic” is unrealistic.²⁶² Instead, the level of specificity in the Green Guides is the most feasible and appropriate choice for future regulations.²⁶³

Unlike the Green Guides, however, these standards must be binding law to effectively reduce confusion and hold companies accountable for their claims.²⁶⁴ A new regulatory scheme that includes binding standards as specific as those contained in the Guides would encourage the development of common practices in the business community for the benefit of the environment.²⁶⁵ Additionally, enforceable standards would help industry and the public agree on universally accepted definitions for covered terms, thereby providing consumers with more accurate purchasing information.

Future regulation of green marketing should also include consumer standing as a safety valve for agencies that may be unresponsive to developing trends or lack the political will to enforce standards.²⁶⁶ In fact, the likely benefits of giving consumers the power to bring claims far outweigh the potential negative effects.²⁶⁷ Consumer standing could be used by individuals and environmental groups to assert the environmental causes they feel most strongly about.²⁶⁸ Even unsuccessful consumer lawsuits can create a beneficial outcome by bringing issues into the public eye.²⁶⁹

Scholars debate which governmental entity should take responsibility for regulating environmental marketing.²⁷⁰ Those who suggest a combined effort of the FTC and EPA present the strongest argument.²⁷¹ Because the FTC and EPA have already collaborated on the creation of the Green Guides, the framework for this option is already

²⁶² See 7 C.F.R. §§ 205.300–.311.

²⁶³ See 16 C.F.R. pt. 260 (2012).

²⁶⁴ Cf. *id.* pt. 260 (noting that the Green Guides are nonbinding).

²⁶⁵ See *id.* § 260.1.

²⁶⁶ See Wojciechowski, *supra* note 109, at 231.

²⁶⁷ See generally *id.* Potential ill effects of consumer standing could include a slew of meritless consumer claims, and a resulting burden on the court system.

²⁶⁸ See Lockard & Becker, *supra* note 64.

²⁶⁹ See *id.*

²⁷⁰ See Barnett, *supra* note 122, at 508 (noting other commentators’ suggestions of EPA or FTC responsibility); see also Avallone, *supra* note 132, at 699–700 (suggesting a role for individual states, the EPA, and the FDA).

²⁷¹ See, e.g., Barnett, *supra* note 122, at 508–09 (proposing a joint effort in which the “EPA would set standards and define terms based on current scientific evidence and FTC would incorporate these measures into interpretive rules”).

in place.²⁷² A collective regulatory effort would benefit from the EPA's environmental expertise, while minimizing costs of transitioning from the current Green Guides to an enforceable standard.²⁷³

A potential solution to the growing problem of greenwashing would therefore take the form of a federal statute authorizing the FTC and EPA to promulgate binding standards for environmental marketing.²⁷⁴ Ideally, the regulations would give specific terms—such as compostable and degradable—bright line definitions, akin to the percentage requirements in the NOP.²⁷⁵ They would also enforce the prohibitions against vague, general assertions and third-party seals that are already established in the Green Guides.²⁷⁶ Finally, the new statute should include a consumer standing provision to allow consumers and environmentalists to pursue the alleged greenwashers they recognize as the most egregious.²⁷⁷

CONCLUSION

Since emerging as a major trend in the late 1980s, environmental marketing has only continued to grow, and with it, the practice of greenwashing. Despite the Mobil controversy and the warnings of The Green Report, Congress has done little to curb the growing problem of deceptive environmental marketing. Existing laws are insufficient; uniform and specific federal regulations that provide consumer standing are necessary to adequately curb greenwashing. Such a scheme would protect consumers from unfairly paying for illusory environmental benefits. Moreover, it would allow environmentally conscious consumers to efficiently make their purchasing power felt, to the ultimate benefit of the environment.

²⁷² See Guides for the Use of Environmental Marketing Claims, 61 Fed. Reg. 53,311, 53,316 (Oct. 11, 1996) (codified at 16 C.F.R. pt. 260) (incorporating the EPA's designations of ozone-depleting chemicals into the Green Guides).

²⁷³ See Grodsky, *supra* note 36, at 176–77 (“If new regulations are to be in the form of bright-line rules rather than general nonbinding guidelines, the technical expertise of EPA will be essential for establishing standards and the accompanying testing protocols.”).

²⁷⁴ See Barnett, *supra* note 122, at 508–09.

²⁷⁵ See 7 C.F.R. § 205.301 (2012).

²⁷⁶ See 16 C.F.R. §§ 260.4, .2606 (2012).

²⁷⁷ See generally Wojciechowski, *supra* note 109.

