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Green Marketing: The Urgent Need for Federal Regulation

Lauren C. Avallone

Comments

Green Marketing: The Urgent Need for Federal Regulation

Lauren C. Avallone*

I. Introduction

Green marketing has been used with increasing frequency since the early 1990s. As a result there is an increased need for regulation. The Federal Trade Commission (FTC) publishes guidelines for the use of environmental marketing claims (hereinafter "the Guides").[1] There are

* J.D., The Dickinson School of Law of the Pennsylvania State University (2006); B.A. History, University of Pennsylvania (2003). The author would like to thank her parents and sister for their support throughout this process; and Jeff Conklin for his enduring patience and understanding over the past two years; and Trudy Cordora for her comments and suggestions.

1. 16 C.F.R. § 260 (1998). The guidelines were made pursuant to 15 U.S.C. § 45, which prohibits unfair methods of competition. The guidelines are to be applied specifically to environmental claims made in connection with sales or marketing of a product. They do no preempt state or federal law and do not have the force of administrative regulations.

The guides in this part represent administrative interpretations of laws administered by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. These guides specifically address the application of Section 5 of the FTC Act to environmental advertising and marketing practices. They provide the basis for voluntary compliance with such laws by members of industry. Conduct inconsistent with the positions articulated in these guides may result in

several problems associated with the Guides. First, the Guides are not enforceable regulations nor do they have the force and effect of law.[2] They do not preempt state law and only offer broad definitions, general principles, and few examples. Second, the Guides are utilized in a corrective manner on a case-by-case basis instead of providing bright line rules. Third, consumers have been confused by the use of unclear definitions for environmental terms. Fourth, a lack of clear standards prohibits manufacturers from profiting because if some manufacturers are getting away with deceptive advertising there will be less incentive for other manufacturers to be truthful in marketing their products. Furthermore, manufacturers find it difficult, if not impossible, to comply with differing state laws. Although many states have enacted their own laws on green marketing claims, these laws are not uniform and are therefore insufficient as they make it difficult for manufacturers to market their products nationwide and for lawmakers to effectively hold manufacturers to the same standards. Finally, the FTC is ill-equipped to promulgate such laws and the expertise of other federal agencies along with contributions from the states should be utilized in developing clear, uniform standards.

Clearly defined national standards that have the effect of law are necessary to combat the problems associated with green marketing. Relying on voluntary compliance with the Guides is insufficient to protect consumers from manufacturer deception and the potential for confusion. Furthermore, manufacturers are uncertain as to what assertions they may lawfully make about their products. This comment argues that since the FTC does not have the resources or expertise to set

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corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the behavior falls within the scope of conduct declared unlawful by the statute. *Id.* at § 260.1.

2. 16 C.F.R. § 260.2(b) (1998).

> (a) These guides apply to environmental claims included in labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means, including marketing through digital or electronic means, such as the Internet or electronic mail. The guides apply to any claim about the environmental attributes of a product, package or service in connection with the sale, offering for sale, or marketing of such product, package or service for personal, family or household use, or for commercial, institutional or industrial use.
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> (b) Because the guides are not legislative rules under Section 18 of the FTC Act, they are not themselves enforceable regulations, nor do they have the force and effect of law. The guides themselves do not preempt regulation of other federal agencies or of state and local bodies governing the use of environmental marketing claims. Compliance with federal, state or local law and regulations concerning such claims, however, will not necessarily preclude Commission law enforcement action under Section 5.

national green marketing standards, the Environmental Protection Agency (EPA) should have the responsibility for setting and enforcing such standards.

II. Background

In the early 1990s the public became more aware of and concerned with the environmental problems facing the world.[3] In response, there was a major increase in the use of environmental claims as a marketing technique.[4] Manufacturers began to make claims such as "environmentally friendly," "biodegradable," and "recyclable" in an effort to persuade consumers to purchase their products.[5] Although many manufacturers may have tried to distribute accurate information, others were merely trying to reap profits and were not candid in their claims. Indeed some manufacturers exaggerated or even fabricated the environmentally-friendly qualities of their goods.[6]

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3. California Attorney Gen. et al., The Green Report: Findings and Preliminary Recommendations For Responsible Envtl. Advertising 4-6 (1990) [hereinafter The Green Report]. The ten states participating were California, Florida, Massachusetts, Minnesota, Missouri, New York, Texas, Utah, Washington, and Wisconsin.

The Green Report specifically notes, that "by recommending a national regulatory scheme for environmental claims, the Task Force is not recommending that states be preempted from regulating the area. Indeed, the states would vigorously oppose any federal statute or regulation that would preempt states' rights in the area." This opposition to preemption is odd in that it conflicts with one of the stated reasons for enacting national legislation in the first place: preventing national retailers from having to comply with varying standards.

See also Environmental Advertisement Enforcement, FTC: WATCH (Wash. Regulatory Reporting Assoc., Washington, D.C.), July 29, 1991.

For discussions of the growing use of green claims, *see* Hearings on Environmental Marketing Issues Before the Federal Trade Comm'n 30-36 (1991) (statement of Hubert H. Humphrey, III, Attorney General of Minnesota).

4. The Green Report, *supra* note 3, at 4-6. Green claims have also been called "environmental marketing," S. 615, 102d Cong., 1st Sess. § 3(4) (1991) (The Environmental Marketing Claims Act of 1991); "green labeling," Barry Meier, *It's Green and Growing Fast, But Is It Good for the Earth?*, N.Y. TIMES, Apr. 21, 1990, Consumer's World section at 48; and "environmental labeling," Jonathan Schorsch, It's Not Easy Being Green: Can Our Economy Come Clean?, Council On Econ. Priorities Res. Rep., Apr. 1990, at 1, 3.

5. For an extensive list of examples of green marketing claims, *see* Bristol Voss, *The Green Marketplace*, SALES & MARKETING MGMT., July 1991, at 74, 75-76.

6. Roger D. Wynne, *Defining "Green": Toward Regulation of Environmental Marketing Claims*, 24 U. MICH. J. L. REF. 785, 787 (1991). A basic example of a deceptive green claim is a label on a plastic trash bag claiming the bag is biodegradable. The bag may very well degrade within a reasonable amount of time if it is exposed to sunlight. But many, maybe even most, such trash bags will be deposited in landfills. Since these landfills lack the sunlight and microorganisms needed to efficiently degrade such plastics, degradation can take 25, 30, or possibly even 50 years. Thus, while the bag is readily "degradable" in theory, this kind of claim is almost certainly deceptive. *See* Mobil Oil Corp., 116 F.T.C. 113 (1993) (consent order) (challenging "biodegradable"

In response to this trend, the Attorneys General of ten states formed an ad hoc Task Force to study the problem.[7] The Task Force issued "The Green Report" and called specifically for federal definitions of environmental marketing terms, such as biodegradable and recyclable, federal testing protocols for terms that have a technical basis, and strong federal involvement in the process of developing methods for conducting lifestyle assessments for product evaluation.[8] After the November 1989 issuing of The Green Report, the Task Force held follow-up hearings to allow industry, environmental groups, and consumers an opportunity to respond to their findings.[9] The Task Force, now consisting of eleven Attorneys General, reviewed these recommendations and issued "The Green Report II."[10]

After public hearings, and building on the findings in the two "Green Reports," the FTC issued Environmental Marketing Guides in 1992.[11] The Guides provide a framework for voluntary compliance with standards for environmental marketing.[12] They apply to "any claim about the environmental attributes of a product, package or service in connection with the sale, offering for sale, or marketing of such product, package or service for personal, family or household use, or for commercial, institutional or industrial use."[13] While this definition is comprehensive, it does little in regulating environmental claims on products because the Guides do not have the force of law and do not preempt state law.[14]

Section five of the FTC Act for prevention of unfair competition makes deceptive acts and practices in or affecting commerce unlawful.[15] The FTC requires that any manufacturer making an express or implied claim must possess and rely upon a reasonable basis substantiating the claim, where a reasonable basis consists of competent and reliable evidence.[16] This framework dictates that environmental marketing

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and landfill benefit claims for Hefty plastic trash bags).

7. California Attorney Gen. et al., The Green Report II: Recommendations For Responsible Envtl. Advertising 1 (1991) [hereinafter Green Report II]. Some changes were made to the original recommendations in light of some criticism that the original recommendations were "untenable, unfair, and ill-advised." Tennessee joined the original ten states in the Green Report II.

8. *Id.*

9. *Id.*

10. *Id.*

11. ADVERTISING AND UNFAIR COMPETITION: FEDERAL AND STATE ENFORCEMENT § IX (American Law Institute 2004). The Guides were revised in 1996 and 1998.

12. 16 C.F.R. § 260.1 (1998).

13. 16 C.F.R. § 260.2(a) (1998).

14. 16 C.F.R. § 260.2(b) (1998).

15. 15 U.S.C. § 45 (1994).

16. 16 C.F.R. § 260.5 (1998). Section 5 of the FTC Act makes unlawful deceptive

claims are reviewable on a case-by-case basis.[17]

Some states, dissatisfied with the FTC's relaxed guidelines, have enacted their own statutes regulating the use of environmental terms.[18] California's law is considered the most stringent because it establishes uniform definitions for environmental terms and forces manufacturers to substantiate their claims.[19] Other states have simply chosen to enforce

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acts and practices in or affecting commerce. The Commission's criteria for determining whether an express or implied claim has been made are enunciated in the Commission's Policy Statement on Deception. In addition, any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product, package or service must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim. A reasonable basis consists of competent and reliable evidence. In the context of environmental marketing claims, such substantiation will often require competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results. Further guidance on the reasonable basis standard is set forth in the Commission's 1983 Policy Statement on the Advertising Substantiation Doctrine. 49 FR 30999 (1984); appended to Thompson Medical Co., 104 F.T.C. 648 (1984). The Commission has also taken action in a number of cases involving alleged deceptive or unsubstantiated environmental advertising claims. A current list of environmental marketing cases and/or copies of individual cases can be obtained by calling the FTC Consumer Response Center at (202) 326-2222.

17. David F. Welsh, Comment, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green,"* 81 CAL. L. REV. 991, 1006 (1993).

18. These include California, Indiana, Maine, Michigan, and Rhode Island. *See* CAL. BUS. & PROF. CODE § 17580 (West 1997); IND. CODE § 24-5-17-1 (1989); ME. REV. STAT. ANN. 38, § 2142 (West 2004); MICH COMP. LAWS ANN. § 445.903 (West 2002); R.I. GEN. LAWS § 6-13.3-1 (1993). A few states incorporate the FTC Guides into their own statutes that constitute violations of the state's Unfair Trade Practice Act while other states choose to use their statutes to define complex environmental terms which lead to inconsistent standards across the nation. Indiana and Rhode Island are definitional in nature. California has the most extensive regulations. The California statute regulates the commercial use of five environmental terms: "ozone friendly," "biodegradable," "photodegradable," "recycled," and "recyclable." These terms may not be used to describe any consumer product unless the state's definition is met. Advertisers run the risk of criminal prosecution for violating the terms of this section.

The statute does provide a safe harbor for advertisers: if the consumer product does not meet the definitions the state has set forth in section 17508.5, but instead conforms to the "definitions established in trade rules adopted by the Federal Trade Commission . . .," the representation will not run afoul of the statute. While the safe harbor provision allows for conformance with FTC "rules," the FTC has issued "guidelines" instead of "rules." The FTC guidelines therefore do not fall within the safe harbor provision.

Two substantive differences set the Indiana statute apart from the California statute. First, the safe-harbor provision allowing qualifying language in the Indiana statute is broader. Whereas California exempts only representations conforming to the FTC rules, the Indiana statute exempts marketing practices that conform to either rules or guidelines set by the FTC. The second difference is that the Indiana statute provides for a private cause of action for anyone who suffers actual damages.

19. Peter J. Tarsney, Note, *Regulation of Environmental Marketing: Reassessing the*

the Guides as law.[20] A lack of enforceable federal laws and inconsistency across the states has also led independent organizations to identify and promote products that they find to be environmentally sound.[21] The use of the FTC's Guides for environmental marketing have led to inconsistent state laws and independent backing for certain products. The EPA and FTC need to work together to develop federal guidelines that have the force and effect of law to prevent further confusing, misleading, and deceptive advertising.

III. FTC Guides for Environmental Marketing Are Insufficient

The Guides for environmental marketing claims are insufficient for consumers, for manufacturers, and for law enforcement. The Guides are confusing to consumers because the environmental terms are not clearly defined. There are no direct costs to making false claims so manufacturers have little incentive to be truthful. Finally, the Guides are structurally unsound as they are not binding law and rely on case-by-case adjudication to prosecute offenders.

A. Structural Deficiencies in the Guides' Framework

The Guides do not provide a system for sufficient enforcement of environmental marketing claims. First and foremost, they are not

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Supreme Court's Protection of Commercial Speech, 69 NOTRE DAME L. REV. 533, 538 (1994).

20. These states include Maine, Michigan, and Rhode Island. All three states discourage deceptive advertising claims by reference to the FTC Guides.

21. Two such organizations are Green Seal and Scientific Certification Systems. Neither organization is certified by the Federal Government. They are both independently run organizations that claim to provide accurate information to consumers about green marketing.

Green Seal describes themselves as "an independent, non-profit organization that strives to achieve a healthier and cleaner environment by identifying and promoting products and services that cause less toxic pollution and waste, conserve resources and habitats, and minimize global warming and ozone depletion. Green Seal has no financial interest in the products that it certifies or recommends in any manufacturer or company. Green Seal's evaluations are based on state-of-the-art science and information using internationally recognized methods and procedures. Thus, Green Seal provides credible, objective, and unbiased information whose only purpose is to direct the purchaser to environmentally responsible products and services," http://www.greenseal.org.

Scientific Certification Systems describes itself as certifying "a wide variety of claims related to environmental achievement in product manufacturing. Specific product attributes, such as recycled content and biodegradability, are certified under the Environmental Claims Certification program. SCS also certifies Environmentally Preferable Products, which are products or services that can demonstrate a reduced or lessened environmental impact when compared to other products performing the same function. SCS's program is consistent with guidance established by the federal government for environmentally preferable purchasing, and established practices for Life Cycle Impact Assessment," http://www.scscertified.com.

binding law and instead only require voluntary compliance.[22] While some manufacturers may choose to comply with the Guides, others may choose not to, thereby giving those noncompliant manufacturers an unfair advantage. Furthermore, the Guides are utilized in a corrective manner on a case-by-case basis instead of providing bright line rules. Without bright line rules, it is difficult to regulate the vast amount of manufacturers making environmental claims, as few cases can be brought.

The Guides do provide general principles and specific guidance followed by examples that generally address a single deception concern.[23] The Guides also make clear that "the examples do not

22. 16 C.F.R. § 260.1; § 260.2(b) (1998).

23. 16 C.F.R. § 260.3 (1998). The guides are composed of general principles and specific guidance on the use of environmental claims. These general principles and specific guidance are followed by examples that generally address a single deception concern. A given claim may raise issues that are addressed under more than one example and in more than one section of the guides. In many of the examples, one or more options are presented for qualifying a claim. These options are intended to provide a "safe harbor" for marketers who want certainty about how to make environmental claims. They do not represent the only permissible approaches to qualifying a claim. The examples do not illustrate all possible acceptable claims or disclosures that would be permissible under Section 5. In addition, some of the illustrative disclosures may be appropriate for use on labels but not in print or broadcast advertisements and vice versa. In some instances, the guides indicate within the example in what context or contexts a particular type of disclosure should be considered.

> 16 C.F.R. § 260.6 (1998). The section provides the following general guide:
> Overstatement of Environmental Attribute. An environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication. Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible.

Id. § 260.6(c). The sub-section continues:

> Example 1: A package is labeled, "50% more recycled content than before." The manufacturer increased the recycled content of its package from 2 percent [sic] recycled material to 3 percent [sic] recycled material. Although the claim is technically true, it is likely to convey the false impression that the advertiser has increased significantly the use of recycled material.

Id. 16 C.F.R. § 260.7 (1998). The examples take various factual situations and interpret the situations in light of the guidelines. *Id.* This allows manufacturers a chance to see how the guidelines operate in a substantive situation. For example:

> a) General Environmental Benefit Claims. It is deceptive to misrepresent, directly or by implication, that a product or package offers a general environmental benefit. Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product or package has specific and far-reaching environmental benefits. As explained in the Commission's Ad Substantiation Statement, every express and material, implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product must be substantiated. Unless this substantiation duty can be met, broad environmental claims should either be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.

illustrate all possible acceptable claims or disclosures that would be permissible."[24] However, this format still fails to provide manufacturers with clear rules on what they may or may not claim about their products. Instead, manufacturers are left to interpret the definitions and examples in assessing whether their claims are valid. Bright line rules describing acceptable claims would eliminate this guesswork.

Moreover, the FTC is ill-equipped to handle the responsibility of providing such guidelines or laws because it does not have the appropriate scientific resources available. The FTC relied on its general deceptive advertising law in promulgating the Guides which has led to haphazard enforcement and unclear standards that undermine the interests sought to be protected by the regulations.[25] Terms such as "recyclable," "ozone safe," "ozone friendly," and "biodegradable" often have complex scientific definitions in this context that require expert knowledge. A joint effort of the FTC and EPA would lead to more clearly defined terms, allowing manufacturers and their product designers great incentive and opportunity to comply with the Guides or laws.

The EPA is better informed and equipped to handle defining such terms. Its mission is to protect human health and the environment.[26]

Id. The following example relates to the general guide stated above:

> Example 1: A brand name like "Eco-Safe" would be deceptive if, in the context of the product so named, it leads consumers to believe that the product has environmental benefits which cannot be substantiated by the manufacturer. The claim would not be deceptive if "Eco-Safe" were followed by clear and prominent qualifying language limiting the safety representation to a particular product attribute for which it could be substantiated, and provided that no other deceptive implications were created by the context.

24. *Id.*

25. Welsh, *supra* note 17, at 1001.

26. Environmental Protection Agency, http://www.epa.gov/epahome/aboutepa.htm. EPA leads the nation's environmental science, research, education and assessment efforts. Below are some of the activities the EPA does:

> Develop and enforce regulations: EPA works to develop and enforce regulations that implement environmental laws enacted by Congress. EPA is responsible for researching and setting national standards for a variety of environmental programs, and delegates to states and tribes the responsibility for issuing permits and for monitoring and enforcing compliance. Where national standards are not met, EPA can issue sanctions and take other steps to assist the states and tribes in reaching the desired levels of environmental quality.
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> Offer financial assistance: In recent years, between 40 and 50 percent of EPA's enacted budgets have provided direct support through grants to State environmental programs. EPA grants to States, non-profits and educational institutions support high-quality research that will improve the scientific basis for decisions on national environmental issues and help EPA achieve its goals.
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> Perform environmental research: At laboratories located throughout the nation, the Agency works to assess environmental conditions and to identify, understand, and solve current and future environmental problems; integrate the work of scientific partners such

Furthermore, the EPA employs 18,000 people across the country, including its headquarters offices in Washington, DC, ten regional offices, and more than a dozen labs.[27] The EPA's staff members are highly educated and technically trained; more than half are engineers, scientists, and policy analysts.[28] In addition, a large number of employees are legal, public affairs, financial, information management and computer specialists.[29] The EPA is already responsible for researching and setting national standards for a variety of environmental programs, and delegates to states the responsibility for issuing permits and for monitoring and enforcing compliance.[30] Therefore, the EPA has the personnel, the facilities, and the experience to develop a federal system to regulate environmental marketing.

Similarly, the objective test for determining when a claim is deceptive is insufficient. The Guides specify that anyone making a claim must possess and rely upon a "reasonable basis" substantiating the claim, that reasonable basis consisting of "competent and reliable evidence."[31] The Guides go further explaining that

> such substantiation will often require competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.[32]

Manufacturers should be required to provide this type of evidence

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as nations, private sector organizations, academia and other agencies; and provide leadership in addressing emerging environmental issues and in advancing the science and technology of risk assessment and risk management.

Sponsor voluntary partnerships and programs: The Agency works through its headquarters and regional offices with over 10,000 industries, businesses, non-profit organizations, and state and local governments, on over 40 voluntary pollution prevention programs and energy conservation efforts. Partners set voluntary pollution-management goals; examples include conserving water and energy, minimizing greenhouse gases, slashing toxic emissions, re-using solid waste, controlling indoor air pollution, and getting a handle on pesticide risks. In return, EPA provides incentives like vital public recognition and access to emerging information.

Further environmental education: EPA advances educational efforts to develop an environmentally conscious and responsible public, and to inspire personal responsibility in caring for the environment.

Publish information: Through written materials and its Web site, EPA informs the public about its activities.

27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. 16 C.F.R. § 260.5.
32. *Id.*

whenever making an environmental claim, not just when defending their actions. Although the test provides a basis for determining if a deceptive claim has been made, it will often go unused as the FTC only takes action on a case-by-case basis.

Ideally, the case-by-case method of prosecution should develop reliable green marketing standards over time; however, this has not occurred.[33] First, case-by-case adjudication is time consuming.34 It may take the FTC many years to bring enough suits to develop clear definitions and standards. Second, there is evidence that the case-by-case approach is ineffective. The law is developing slowly because the FTC brings so few prosecutions to enforce the standards.35 Finally, as mentioned, the FTC does not have the technical or scientific expertise to define complex environmental terms used in green marketing claims.36 Given the FTC's lack of expertise, successful adjudications that develop clear standards have been and will continue to be unlikely.

B. Consumer Confusion

Consumers are increasingly willing to base purchase decisions upon a manufacturer's environmental reputation and environmental claims.37 It is therefore crucial that consumers receive accurate information upon which to base their decisions. It follows that only truthful claims should be made. If manufacturers are allowed to make unsubstantiated or false claims, they will unfairly profit from consumers' environmental sympathies.[38] If unsubstantiated claims are allowed to flood the marketplace, consumers will soon become disillusioned and ignore all environmental claims.[39]

Furthermore, unclear and inconsistent standards lead to confusion for consumers.[40] The FTC's definitions are not consumer-friendly, making it difficult for an average consumer to understand whether a product is as environmentally sound as claimed.

Moreover, the free flow of commerce among the states should be maintained.[41] If each state has different standards consumers will be confused as to the meaning of the various environmental claims

33. Welsh, *supra* note 17, at 1007-08.
34. *Id.*
35. *Id.* at 1008.
36. *Id.* at 1009.
37. I. LEO MOTIUK & DIANE M. MILLER, GIVING THE GREEN LIGHT TO GREEN MARKETING 731-32 (Practicing Law Institute, 1991).
38. Welsh, *supra* note 17, at 996.
39. Tarsney, *supra* note 19, at 537.
40. *Id.*
41. MOTIUK & MILLER, *supra* note 37, at 732.

manufacturers make. Consumers also may not have access to a variety of products because they do not meet the standards of their home state. A uniform national standard would allow environmentally sound products to flow among the states giving consumers access to as many products as possible and keeping prices low because of competition.[42]

Finally, independent organizations have begun identifying and promoting products that they find to be environmentally sound due to the lack of federal laws and inconsistency among state laws.[43] These organizations are not governmentally sanctioned and consumers cannot be sure they are providing correct information. A uniform Federal law is needed to prevent consumers from being misled.

C. Lack of Manufacturer Incentive

The lack of clear, uniform standards also negatively affects manufacturers. If consumers purchase products on an environmental basis and there are no direct costs associated with making dishonest claims, by default, manufacturers will have an incentive to make false environmental claims.[44] Furthermore, if the standards are unclear and the penalties for making false claims severe, manufacturers will be deterred from providing any environmental information. Incentives for manufacturers to make substantial investments in more environmentally sound manufacturing processes and new products would be lost if false claims by competing manufacturers are permitted.[45] Manufacturers may even cease researching and producing environmentally sound products.[46] This could prevent some manufacturers from capitalizing on the potential profit created by the increased public awareness of environmental issues.

Most significantly, the lack of uniform national standards prevents manufacturers from marketing their environmentally sound products across state borders.[47] States have different standards, making it difficult for manufacturers to easily comply with the standards of each state.[48] This would severely limit a manufacturer's ability to profit from their investment in producing an environmentally sound product. Moreover, if independent organizations endorse certain products but not others, manufacturers who cannot secure such an endorsement may suffer financially.

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42. Welsh, *supra* note 17, at 996.
43. *See supra* note 21.
44. Welsh, *supra* note 17, at 998.
45. Tarsney, *supra* note 19, at 537.
46. *Id.*
47. *Id.*
48. *See supra* note 18.

IV. Environmental Marketing Should Be Governed by National, Binding Standards of Federal Law

Although many states have developed their own environmental marketing laws, these are insufficient to regulate such a broad area.[49] Most state laws provide for citizen suits but such suits have little chance of success.[50] Moreover, it is difficult for national manufacturers to comply with each state's differing laws.51 Therefore, federal preemption of state law is necessary to provide consistency in the area of environmental marketing. The FTC lacks the expertise to promulgate such law and therefore the EPA, the states, and the Food and Drug Administration (FDA) should collaborate to develop a national standard.

A. State-Developed Laws are Inconsistent and Lead to Confusion

Many States have developed their own laws in regulating green marketing.[52] All fifty states and the District of Columbia have adopted some form of the Uniform Trade Practices and Consumer Protection Act.[53] Most of these laws provide for citizen suits.[54] These are effective as a supplement to governmental action.[55] Nonetheless, variations in enforcement are inevitable.

Consumers or competitors may bring suit against sellers for false, misleading, or deceptive advertising.[56] However, these actions may be of limited usefulness in the area of green marketing claims. Although consumers may prevail in common law tort actions such as negligent misrepresentation, they have little chance of succeeding on a cause of action for deceit because of the difficult task of proving scienter, or the intent to deceive.[57] Proving reliance and causation may also be insurmountable tasks for consumers bringing negligence actions.[58] Moreover, the pecuniary loss to a single consumer would be so insignificant and the costs of litigation so high, that many consumers would be prevented from bringing suit. Clear federal laws would remove the necessity for consumers to bring such actions. Manufacturers would

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49. *Id.*
50. John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information*, 79 MINN. L. REV. 245, 304 (1994).
51. *Id.*
52. *See supra* note 18.
53. Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 DICK. L. REV. 373, 376 n.11 (1990).
54. *Id.*
55. Church, *supra* note 50, at 304.
56. *Id.* at 307.
57. *Id.*
58. *Id.* at 308.

be held to the uniform standard and the federal government would be responsible for bringing suit against deceptive advertisers.

This is not to say that states should not be involved in promulgating environmental marketing laws. An approach that allows states to have input would benefit everyone, as local solutions would be taken into account to solve specific problems.[59] Moreover, some states have significant expertise in defining environmental terms and developing green standards,[60] and this expertise should not be ignored. States can play an influential advisory role by commenting on proposed federal regulations and by providing knowledge and resources in developing such regulations. States could also be responsible for enforcing the federal standards just as they do under the Clean Air Act.

B. Need for Federal Preemption of Environmental Marketing Regulation

In light of the deficiencies with the current Guides on environmental marketing, federal preemption of state laws governing environmental claims is necessary. Under the Supremacy Clause of the United States Constitution, federal law trumps state laws.[61] A predominant function of preemption is to invalidate state laws that frustrate the development of necessary, uniform federal laws.[62] Preemption can also act as a means to stop states from interfering with the free flow of goods across state

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59. Brett B. Coffee, *Environmental Marketing After Association of National Advertisers v. Lungren: Still Searching for an Improved Regulatory Framework*, 6 FORDHAM ENVTL. L.J. 297, 346 (1995).

60. Welsh, *supra* note 17, at 1018.

61. U.S. CONST. ART. VI, cl. 2; U.S. CONST. ART. I § 8, cl. 3; Gibbons v. Ogden, 22 U.S. 1, 210-211 (1824). Through its enumerated powers, Congress may legislate in such a way as to "preempt" state laws, i.e., to announce one uniform law to be followed throughout the country. The Supremacy Clause guarantees that state laws in conflict with such a federal law will be preempted. The areas of green marketing regulation would almost certainly affect interstate commerce within the broad meaning of the Commerce Clause. Thus, Congress has the power to preempt state laws that regulate green marketing. The question then is not whether Congress can preempt state laws dealing with green marketing, but whether it should do so. For a discussion of the Commerce Clause and preemption doctrines, *see* Susan Bartlett Foote, SMR Forum: Changing Regulatory Strategies—What Managers Should know About Federal Preemption, Sloan Mgmt. Rev. (MIT), Fall 1984, at 69, 69-70.

Congress can also grant an agency power to promulgate preemptive laws, either at the time the agency is created or at some later point. For instance, the FTC was not given preemptive power when it was established. Therefore, the FTC can pass a preemptive administrative rule only if Congress passes a law expressly preempting a given area of regulation and giving the FTC power to replace the state laws that have been preempted. For a discussion of preemption by administrative agencies, *see* Richard J. Pierce, Jr., Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation, 46 U. PITT. L. REV. 607 (1985).

62. Welsh, *supra* note 17, at 1014.

lines.[63] However, federal preemption in the area of environmental marketing would deprive states of substantial power over these regulations. States have an interest in preserving their autonomy and in implementing their own policies and value judgments concerning how to best protect consumers and the environment within their borders.[64] Nevertheless, the need for uniform federal regulations in the area of environmental marketing outweighs these concerns. State concerns can be addressed during the drafting of the federal law.

Some commentators have argued that the federal government is too distant from the constituencies that will be affected by the regulations and thus states are better equipped to promulgate such regulations.[65] Although their concern is legitimate, it is not dispositive for several reasons. First, the federal government can develop a system that allows independent state enforcement of the federal environmental marketing laws.[66] Second, federal regulation would allow states the means necessary to enforce such laws, despite its lack of funds.[67] Third, federal government involvement allows the use of the federal, state, and administrative court systems to pursue deceptive manufacturers.[68] Finally, the federal government is better equipped to handle problems that affect all the states jointly.[69]

C. Setting Green Marketing Standards

In setting green marketing standards, three interested groups should be taken into account: consumers, manufacturers, and the government agencies that regulate deceptive advertising.[70] The EPA and the states should develop a framework that strives to meet numerous goals:

> [A]chieving truthful and accurate environmental marketing; creating an atmosphere that provides a continuing incentive for companies to improve the environmental characteristics of their products; securing consumer confidence in environmental marketing claims; ensuring consumers' ability to easily understand environmental marketing claims and discern between competing products; providing consumer access to the environmental characteristics of products; increasing the consumers' ability to recycle products or packaging and their access to related information; promoting products that are less harmful to the

63. *Id.*
64. *Id.* at 1015.
65. *Id.* at 1019.
66. *Id.* at 1020.
67. *Id.*
68. Welsh, *supra* note 17, at 1014.
69. *Id.*
70. Coffee, *supra* note 56, at 350.

environment; and, easing the strain of regulatory and prosecutorial agencies.[71]

If these goals are achieved consumers would be provided with the necessary information to make product choices, manufacturers would be held to the same standards and would be less likely to mislead the public, and enforcement of such laws would be attainable.

1. The EPA's Role

The EPA should assume the lead role in defining the uniform federal standards to regulate environmental marketing claims. The FTC has little technical expertise regarding environmental matters. In fact, "while the FTC has enforced regulations in technical areas once the relevant definitions were articulated, the FTC has never been in charge of setting definitional or policy guidelines in technical areas."[72] Rather, the main function of the FTC has been to prosecute deceptive or unfair trade practice claims and the agency should not depart from this role in the area of environmental marketing.[73]

In contrast, the EPA has direct authority over federal environmental policy and a great deal of expertise in defining technical environmental terms.[74] The FTC should play a role in enforcing the green marketing laws once established. However, it should be left to the EPA to define the terms and set the national standards that manufactures must follow.

2. The States' Role

States should also have an influential role in defining green marketing terms and in setting national standards for environmental claims. Some states have environmental expertise comparable to that of the EPA.[75] States should be guaranteed the opportunity to contribute to the green marketing standards and to voice their concerns and make suggestions directly to the EPA. The accumulated contributions from individual states may be extremely helpful to the EPA in promulgating the regulations.

States should be given the opportunity to contribute to the development of EPA regulations during the formal notice and comment period.[76] However, states should not be limited to participation in this

71. *Id.* at 350-51.
72. Welsh, *supra* note 17, at 1023.
73. *Id.*
74. *Id.* at 1024.
75. *Id.*
76. *Id.*

formal proceeding. By the time the notice and comment stage is reached, an agency may already have invested considerable time and resources in a particular standard or approach.[77] Therefore, states should be given this opportunity to contribute at an early stage in the process to assure their input will be meaningful and utilized by the EPA.[78] The federal government has already demonstrated its willingness to consider input from the states prior to the formal notice and comment period in other instances and this approach should be used in the environmental marketing area as well.[79]

3. The FDA's Role

Marketing regulations have been enacted which affect the American food industry and the type of information that consumers are given.[80] These new regulations were mandated by the Nutritional Labeling and Education Act of 1990[81] and were issued by the FDA.[82] The new labeling regulations are the most far-reaching attempt to regulate what information manufactures can place on their products.[83] Therefore, it will be useful to analyze the FDA regulations as well as have the FDA assist in promulgating new regulations in the area of environmental marketing.[84]

The FDA regulations require food labels to provide specific nutritional information in various categories.[85] Similar labeling could

77. *Id.* at 1025.

78. Welsh, *supra* note 17, at 1024.

79. *Id.*

80. Coffee, *supra* note 56, at 347. John Schwartz, *Read It and (Maybe) Eat; FDA Promotes New Food Label Format as Major 'Health Opportunity,'* WASH. POST, May 3, 1994, at A8; Carole Sugarman, *How Do You Label a Kumquat?*, WASH. POST, Mar. 14, 1990, Food at 1; Carole Sugarman, *Lord of the Label; Commissioner Kessler Launches His New Idea*, WASH. POST, May 4, 1994, (Food), at 1; *Truth in Eating; New Labeling Will Be A Start On Avoiding Health Risks*, SAN JOSE MERCURY NEWS, Dec. 4, 1992, at 10B.

81. 21 U.S.C. § 343 (West Supp. 1994).

82. *Id. See* Colman McCarthy, *Junk Food and Label Literacy*, WASH. POST, May 17, 1994, at C10.

83. Coffee, *supra* note 56, at 347.

84. *Id. See* Ken Miller, *'Green' Label Buying Still a Multiple Choice*, HOUSTON POST, Nov. 28, 1993, at A30.

85. Coffee, *supra* note 56, at 348. These specific labeling requirements are beyond the scope of this Comment. For detailed analysis of the Nutrition Labeling and Education Act of 1990, *see* Edward Dunkelberger & Sarah E. Taylor, *The NLEA, Health Claims, and the First Amendment*, 48 FOOD & DRUG L.J. 631 (1993); Eric F. Greenberg, *The Changing Food Label: The Nutrition Labeling and Education Act of 1990*, 3 LOY. CONSUMER L. REP. 10 (1990); Geoffrey M. Levitt, *FDA Enforcement Under the Nutrition Labeling and Education Act*, 48 FOOD & DRUG L.J. 119 (1993); Jean Lyons & Martha Rumore, *Food Labeling—Then and Now*, 2 J. PHARMACY & L. 171 (1994); John McCutcheon, *Nutrition Labeling Initiative*, 49 FOOD & DRUG L.J. 409 (1994); James M.

help to eliminate the problems associated with environmental marketing as discussed above.[86] The FDA labeling system also distinguishes between general requirements for virtually all products and specific requirements for those products that require more detailed descriptions.[87] The regulations also define the use of terms such as "good source," "high," "more," "fortified," and "light." These terms parallel terms used in environmental marketing such as "environmentally-friendly," "safe for the environment," or "better for the environment."[88] Therefore, the EPA, states, and the FDA would have a sufficient guide on how to comprise the new environmental marketing regulations.

The use of labeling in the environmental marketing setting would lead to clear standards for manufacturers. Requirements such as those promulgated by the FDA would ensure the legibility and clarity of the information provided.[89] This would lead to less confusion for consumers and clear standard for manufacturers. The creation of an "Environmental Facts" label similar to the "Nutrition Facts" label mandated by the FDA Regulations would solve many of the problems associated with the Guides.[90] "This solution has two attractive features: first, the structure and design of the label have already been created and their user-friendliness has already been tested; and second, the approach is capable of meeting the goals enunciated above."[91]

Environmental labels would allow consumers to compare products and to make informed decisions.[92] "Since many consumers report their willingness to pay more for a product with better environmental credentials,[93] this would be an especially important breakthrough and would allow comparison of different products on both their cost and

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Serafino, *Developing Standards for Health Claims—The FDA and the FTC*, 47 FOOD & DRUG L.J. 335 (1992); Fred R. Shank, *The Nutrition Labeling and Education Act of 1990*, 47 FOOD & DRUG L.J. 247 (1992); Roseann B. Termini, *The Prevention of Misbranded Food Labeling: The Nutrition Labeling and Education Act of 1990 and Alternative Enforcement Mechanisms*, 18 OHIO N.U. L. REV. 77 (1991); John M. Blim, Comment, *Free Speech and Health Claims Under The Nutrition Labeling and Education Act of 1990: Applying a Rehabilitated Central Hudson Test for Commercial Speech*, 88 NW. U. L. REV. 733 (1994).

86. *Id.* The categories include calories, calories from fat, total fat, saturated fat, cholesterol, sodium, total carbohydrates, dietary fiber, sugars, protein, and various vitamins and minerals. *See also supra* section III.

87. Coffee, *supra* note 56, at 349.

88. *Id.* 21 C.F.R. §§ 101.54-101.56; *see also* Carole Sugarman, *Truth in Labeling, But What About Advertising?; Controversy Over FTC's Plans to Keep Product Claims Consistent With FDA's New Labels*, WASH. POST, May 31, 1994, at Z16.

89. Coffee, *supra* note 56, at 350.

90. *Id.* at 351.

91. *Id.*

92. *Id.* at 352.

93. *See supra* note 37.

environmental qualifications."[94]

D. Enforcement of the Regulations

Similar to the cooperative effort of federal and state authorities in promulgating the uniform national standards, both the federal and state governments should play an active role in enforcing the new laws. The federal government will naturally have more extensive resources and a broader national perspective so it will play a primary role in enforcement. However, states have no guarantee that the federal agencies will seriously attempt to enforce such laws and therefore, states should maintain a significant role in enforcement as well.[95] Moreover, state officials have local knowledge of particular deceptive advertising issues in their states and may supplement federal enforcement to correct such issues. States will also be permitted to bring suits against manufacturers in federal court.

The combined efforts of the EPA with its environmental expertise, the FTC with its power and responsibility to prosecute deceptive advertising claims, the FDA's precedent, along with the resources of the states, offers the most comprehensive means of regulating environmental marketing claims.

V. Conclusion

The FTC Guidelines that currently regulate environmental marketing claims are insufficient. Consumers are often confused and misled by claims manufacturers make about their products. Furthermore, because the Guides do not have the force and effect of law and only require voluntary compliance, many manufacturers get away with deceptive advertising practices. This may lead to manufacturers ceasing to develop and market environmentally sound products because there is no incentive to be truthful.

National uniform laws need to be developed in the area of environmental marketing. The EPA should take the lead role in promulgating such laws. However, both the FTC and the states should have the opportunity to offer their input and expertise. Furthermore, such national uniform laws need to preempt state law in order to avoid confusion and dissimilar standards among the states.

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94. Coffee, *supra* note 56, at 352.
95. *Id.*