Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising

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INTRODUCTION

More than ever before, manufacturers are promoting their goods and services with an eye toward environmental consciousness. Product labels proclaim that garbage bags are "biodegradable," that detergent containers are "recyclable" and that aerosol sprays are "safe for the ozone." However, because the federal government has yet to establish specific, enforceable criteria for such environmental claims, none of these so-called "green" labels holds much meaning. The absence of uniform standards harms both consumers and manufacturers. First, because environmental advertising is largely unregulated, consumers bear the burden of distinguishing accurate from inflated claims. Second, absent federal guidelines to define the permissible scope of environmental advertising practices, manufacturers face the prospect of litigation and liability under the largely inconsistent standards of individual states. Clearly, the time is ripe for federal intervention.

This comment discusses the role of the Federal Trade Commission (FTC) in overseeing the advertising aspects of the "green revolution." Part I discusses the origins of environmental marketing and the reactions of state and federal governments. Part II outlines the main sources of controversy — namely, the ambiguity of environmental slogans and the inadequacy of scientific knowledge. Finally, Part III explores the regulatory options available to the FTC as it attempts to guide industry, inform consumers, and protect the environment.

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I.
THE GREEN REVOLUTION

A. *Origins of Environmental Advertising*

Like the environmental movement itself, environmental advertising can be traced back to Earth Day, 1970. On that day, a coalition of environmental scientists and activists focused the attention of the world on the earth's diminishing supply of natural resources, and on the continued deterioration of land, air and water quality. The impact of Earth Day was far-reaching. Congress reacted with a volley of legislative reforms,[1] consumers responded by seeking out and purchasing items they perceived as safer for the environment, and, not surprisingly, manufacturers began to promote the secondary, or environmental, aspects of their products.

In light of their experience with secondary-trait advertising during the oil crisis of the 1970s and the health craze of the 1980s, the concept and practice of green sloganizing came naturally to advertisers. During the oil crisis, for instance, advertisers catered to consumers seeking energy efficient light bulbs, air conditioners, and automobiles.[2] Similarly, as Americans grew increasingly concerned about their health, advertisers began to market their foods as "lite," "low-fat," "low-cholesterol," or "natural."[3]

By 1990, the environment joined health and energy as one of the most visible and significant elements in "secondary marketing." One recent study, for example, disclosed that in 1990, green-labelled products comprised nine to ten percent of all new consumer items,[4] compared to just 0.5 percent in 1985.[5] Likewise, in another study of consumer buying patterns, fifty-one percent of those people

1. *See, e.g.*, Clean Air Act Amendments of 1970, 42 U.S.C. §§ 7401-7671 (1988); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, (1988); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988); Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1988).

2. *ABA Seminar Explores Regulation of Environmental Safety Claims*, 61 Antitrust & Trade Reg. Rep. (BNA) 459, 460 (Oct. 17, 1991) (summary of J. Thomas Rosch's historical overview of green claims) [hereinafter *ABA Environmental Seminar*].

3. ATTORNEYS GENERAL OF CALIFORNIA, FLORIDA, MASSACHUSETTS, MINNESOTA, MISSOURI, NEW YORK, TEXAS, UTAH, WASHINGTON, AND WISCONSIN, THE GREEN REPORT: FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING 6 (1990) [hereinafter GREEN I].

4. *FTC Conducts Two-Day Hearing on Need to Develop Environmental Marketing Guide*, 61 Antitrust & Trade Reg. Rep. (BNA) 117, 118 (July 25, 1991) [hereinafter *Summary of FTC Hearings*]; *see also* GREEN I, *supra* note 3, at 5 n.3.

5. GREEN I, *supra* note 3, at 5 n.3. In raw terms, an estimated 5700 new green products were introduced in 1989 alone. *Id.* at 5.

surveyed said they had made at least one environmentally-oriented purchase in the previous six months.[6] A separate study disclosed that fifty-six percent of respondents had rejected at least one consumer item based solely on environmental grounds.[7] Relying on such data, one mail order company specializing in the distribution of "environmentally sensitive" products predicted that its sales would increase 500 percent from 1989 to 1990 alone.[8]

Consumers not only seek products that are safer for the environment, they are also willing to pay a premium to acquire those products. For example, in a 1990 study, seventy-eight percent of consumers polled indicated that they would pay up to five percent more for "environmentally sound" containers; forty-seven percent revealed that would pay up to fifteen percent more.[9] Similarly, a second study disclosed that, on average, consumers were willing to pay 6.6 percent more for "green" products.[10]

The willingness of consumers to pay a green premium represents a tremendous source of potential revenue for manufacturers and trade groups. Accordingly, these groups have grown increasingly aggressive in their environmental advertising strategies. Debate no longer rages only between manufacturers of paper and plastic containers; rather, battles over the environmental effects of competing products now arise in many industrial sectors. For example, just prior to Earth Day 1990, the National Association of Diaper Services, whose members launder and deliver cloth diapers, released a report declaring that disposable diapers, used at the rate of eighteen billion per year, account for approximately two percent of all landfill waste.[11] In retort, Proctor & Gamble and other manufacturers of disposable diapers issued their own report claiming that, when one takes into account the life-cycle of both types of diapers (including water and fuel use), disposable diapers actually pose less danger to the environment than cloth diapers.[12]

As competition mounts, so does the tendency of advertisers to

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6. *Summary of FTC Hearings, supra* note 4, at 118 (survey by Aba Associates, Cambridge, MA).

7. Miryam Strassberg, *The Green Market: More Questions than Answers*, THE COUNSELOR, Jan. 1991, at 91, 92 (citing a survey by Gerstman & Meyers).

8. *Id.* at 12.

9. GREEN I, *supra* note 3, at 5 n.2 (surveys by Gerstman & Meyers, Inc. and the Roper Organization).

10. *Id.*

11. *Adam Smith's Money World: Green Marketing: Hype or Hope?*, WNET/Television broadcast, Apr. 12, 1991, transcript at 5 (transcript available from Journal Graphics, Inc., New York (212) 227-7323) [hereinafter *Adam Smith*].

12. *Id.*

make exaggerated or irrelevant claims. Many companies, for example, admit that "competitive pressure [takes] precedence over their concerns about whether the information contained in the environmental claim [is] useful and valuable to the consumer."[13] Aerosol sprays, for instance, often carry the label "No CFCs," meaning that the product contains no chlorofluorocarbons, an ozone-depleting substance banned since 1978.[14] Reacting to this labeling practice, New York City's Consumer Affairs Commissioner said:

> Big deal! The law doesn't allow them to have chlorofluorocarbons. They might as well say, "No cyanide, no thalidomide." But the problem is if once one company has that claim, then they all feel competitive pressure to have the same, albeit meaningless, claim.[15]

B. *Official Responses to Green Advertising*

In the late 1980s, state and federal officials began to express concern over the content of environmental advertising. Based on their extensive experience with nutritional labeling, these officials realized that, in the absence of industry standards, manufacturers and advertisers create an atmosphere ripe for consumer deception—especially where consumers had only limited access to the relevant scientific data.[16]

In March 1990, eight State Attorneys General took the initiative in addressing green advertising. Haling from California, Massachusetts, Minnesota, Missouri, New York, Texas, Washington, and Wisconsin, they formed an ad hoc Task Force (AG Task Force) and, together with the FTC, sponsored a public forum at which forty different organizations testified about potential national standards for environmental advertising. The AG Task Force published its findings in a report known as "The Green Report" or "Green I."[17] Specifically, the Task Force recommended that the FTC and the Environmental Protection Agency (EPA) issue national guidelines for environmental advertising[18] and suggested defi-

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13. GREEN I, *supra* note 3, at 12.

14. *Adam Smith, supra* note 11, at 3.

15. *Id.* Additionally, the heightened focus on CFCs may divert consumers' attention from other ozone-depleting or harmful pollutants. *See, e.g.*, The Clean Air Act of 1990, 42 U.S.C. § 7412(b)(1) (listing other hazardous and ozone-depleting air pollutants).

16. GREEN I, *supra* note 3, at 6.

17. The report was authored primarily by the staff of Minnesota Attorney General, Hubert H. ("Skip") Humphrey III. The Attorneys General of Utah and Florida joined the Task Force in July, 1990 and joined the other Task Force members in issuing the report in November, 1990. GREEN I, *supra* note 3, at 2, 5 n.4, 10, 10 n. 9.

18. This recommendation was endorsed by the National Association of Attorneys

nitions for commonly used labeling terms. In December 1990, the AG Task Force held follow-up hearings and allowed environmental, consumer, and industrial interest groups to respond to the findings in Green I. Thereafter, the AG Task Force revised the proposed definitions and issued new recommendations in a publication called "The Green Report II."[19]

On the federal side, in 1989, FTC Chairman[20] Janet Steiger publicly announced that the FTC had begun investigating complaints regarding deceptive environmental advertisements. At the same time, Senator Lautenberg (D-NJ) introduced to Congress the "Environmental Marketing Claims Act of 1990" and called upon the EPA to issue regulations on labeling terms.[21] Inspired by the increased Congressional action and Green I and II's calls for national guidelines, the FTC and the EPA joined the U.S. Office of Consumer Affairs in January 1991 and formed the Federal Interagency Task Force on Environmental Labeling.[22] Then in July 1991, the FTC held its own extensive hearings on environmental advertising.[23]

In the meantime, case-by-case prosecution of deceptive advertising continued with fervor. The FTC combined with the AG Task Force in suing American Enviro Products for claiming that its "Bunnies" disposable diapers were "degradable" or "biodegradable."[24] The FTC also sued First Brands for claiming that its "Glad" trash bags would break down in landfills,[25] and Jerome Russell Cosmetics, Inc. and Zipatone Inc. for alleged inaccuracies in their ozone-related claims.[26] Recently, the FTC obtained separate consent agreements from all four companies stating that, henceforth, they would refrain from unsubstantiated environmental claims. Currently, the FTC has twenty-five other investigations

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General (NAAG) and by the National Association of Consumer Agency Administrators. *Id.* at 28.

19. ATTORNEYS GENERAL OF CALIFORNIA, FLORIDA, MASSACHUSETTS, MINNESOTA, MISSOURI, NEW YORK, TEXAS, UTAH, WASHINGTON AND WISCONSIN, THE GREEN REPORT II: RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING vi (May, 1991) [hereinafter GREEN II].

20. Commissioner Steiger prefers "Chairman" to "Chairwomen" or "Chairperson."

21. GREEN I, *supra* note 3, at 28. S. 3218, 101st Cong., 2d Sess. (1990).

22. GREEN II, *supra* note 19, at 3.

23. *Summary of FTC Hearings*, *supra* note 4, at 117.

24. *See* American Enviro Products, Inc., FTC File No. 902-3110 (July 23, 1991) (consent agreement).

25. First Brands Corp., FTC Docket No. C-3358 (Jan. 3, 1992).

26. Zipatone, Inc., FTC Docket No. C-3336 (July 9, 1991); Consent No. C-3336 (Aug. 6, 1991); Jerome Russell Cosmetics U.S.A., Inc., FTC Docket No. C-3341 (Aug. 21, 1991).

into environmental advertising underway.[27]

II.
SOURCES OF CONFUSION OVER GREEN LABELLING

Though government action regarding environmental advertising is now wide-spread, federal officials have not yet formulated a comprehensive policy on green advertising. In large part, this failure is due to the nature of the advertising itself. First, many commonly used slogans have no clear or inherent meaning. Second, the science of assessing the environmental impact of a product is complicated and ever evolving,[28] causing Mary Azcuenaga of the FTC to complain, "the Commission is trying to hit a moving target."[29]

A. *Imprecise Definitions*

To catch the attention of consumers, a green claim must convey its message concisely and quickly. Consequently, businesses utilize short, one or two word slogans to describe a product's environmental characteristics. However, as the following example illustrates, brevity is frequently achieved at the expense of clarity.

An attorney recently called the FTC's Los Angles Regional Office to discuss a client's plans to build a water bottling plant.[30] The client wanted to label his mountain spring water with the phrase "bottled at the source"; however, because the spring sat amidst rocky terrain, the client did not know how close to the spring his plant could be located. When staff attorneys were questioned regarding FTC precedent on the phrase "bottled at the source," the attorneys could only reference decisions regarding the purity of bottled water. No decisions were available to define the required geographic location. "Bottled at the source," it seemed, could have two distinct meanings: one related to the water's physical attributes and another related to its source.

This scenario demonstrates the confusion caused by an industry-specific phrase. As the following discussion reveals, confusion only

27. FTC NEWS RELEASE 2 (Nov. 21, 1991).

28. GREEN I, *supra* note 3, at 13 (also noting that changing disposal methods themselves exacerbate labeling problems).

29. Mary Azcuenaga, FTC Commissioner, Options for Helping the Market Work on Behalf of the Environment, Speech before the ABA Section of Antitrust Law, Trade Ass'n Committee, National Symposium on the "Greening" of Trade Regulation 12 (Oct. 9, 1991) (transcript on file with UCLA Journal of Environmental Law and Policy) [hereinafter Azcuenaga, ABA Speech].

30. This example is drawn from the author's personal experience as an extern at the FTC's Los Angeles Regional Office, during the Fall of 1991.

grows when one considers more general slogans like "biodegradable," "recycled," and "recyclable."

1. Biodegradable

Landfills handle over three-quarters of the country's garbage and remain the primary means of waste disposal in the United States.[31] However, landfill space is rapidly disappearing. As of 1991, approximately one-half of the country's landfills were closed to additional dumping, leaving only 3,300 landfills open to handle America's waste.[32]

Responding to consumer concerns over landfill space, many manufacturers claim that their products are biodegradable, photodegradable, degradable, or compostable. However, such terms are rife with problems and, not surprisingly, constitute the primary object of government prosecution. Suits against makers of "Glad" and "Hefty"[33] trash bags and "Bunnies," and "Luvs"[34] disposable diapers have all involved the deceptive use of the term "degradable." The Bunnies manufacturer, for example, asserted that its diapers would degrade into water and carbon dioxide in three to five years—a fraction of the 200 to 400 years reportedly needed to decompose normal disposable diapers.[35] Similarly, Proctor and Gamble ran an ad for its Luvs diapers showing a mound of soil, with the caption "90 days ago, this . . . was a disposable diaper."[36]

Significantly, both the claims of diaper manufacturers and the claims of trash bag producers are based on the properties of a cornstarch additive that purportedly enable plastic to break down in a landfill.[37] The claims fail to mention, however, that the plastic merely "honeycombs" or undergoes partial physical breakdown,

31. Strassberg, *supra* note 7, at 95. In 1989, the EPA estimated that 76 % of America's waste was disposed of in landfills, 13 % was converted into energy, and 11 % was recycled. *Id.*

32. *Id.*

33. Seven states have sued Mobil Chemical Co. for "degradable" claims related to its "Hefty" trash bags. GREEN I, *supra* note 3, at 7; *see also, e.g.*, Washington v. Mobil Chem. Co., No. 90-2-11787-1, 1991 WL 291286 (Wash. Super., July 11, 1991) (stipulated settlement agreement).

34. Proctor & Gamble was prosecuted by New York City over advertisements for Luvs diapers. *Adam Smith, supra* note 11, at 3.

35. American Enviro, *supra* note 24, at 6.

36. *Adam Smith, supra* note 11, at 3.

37. *See id.*; GREEN I, *supra* note 3, at 17; American Enviro, *supra* note 24, at 6.

not complete organic decomposition.[38] Furthermore, the claims do not reveal that even the results of this breakdown are uncertain, and that such breakdown may emit toxic leachates or harmful methane gas—the very substances landfills are designed to minimize.[39] The claims also fail to convey that cornstarch additives actually interfere with plastic recycling technology.[40] Finally, "degradable" claims often do not reveal that landfills, by design, substantially retard the degradation of even organic material, much less man-made plastics.[41]

Recently, manufacturers have begun to concede that their "degradable" plastics will not break down under normal landfill conditions. Nonetheless, such manufacturers are provoking another controversy by asserting that their products at least are "compostable."[42] Significantly, however, few communities compost anything besides yard clippings and only ten states have formal composting facilities. Therefore, the notation that a product is "compostable" may be misleading to consumers whose community lacks the proper facilities.[43] Consequently, both Green I & II recommend that "compostable" claims be allowed only if "a significant amount of the product is currently being composted everywhere the product is sold."[44]

2. Recyclable

Likewise, the term "recyclable" may deceive consumers where there is no local capacity to recycle the labeled product. Thus, Green I recommended that the term be used only to describe products "currently recycled in a significant amount in the state in which the advertisement is made."[45] Manufacturers, however, criticize Green I, contending that consumers will push for local recycling only if they are informed about a product's recycling

38. *See Adam Smith, supra* note 11, at 3; Green I, *supra* note 3, at 17; American Enviro, *supra* note 24, at 6.

39. *See* GREEN I, *supra* note 3, at 16.

40. *Id.* at 17.

41. *Id.* at 16.

42. GREEN II, *supra* note 19, at 21-23.

43. GREEN II, *supra* note 19, at 23; *Adam Smith, supra* note 11, at 3.

44. GREEN II, *supra* note 19, at 23; GREEN I, *supra* note 3, at 40.

45. GREEN I, *supra* note 3, at 41-42. The AG task force modeled this recommendation on state laws like those in California that permit use of the term "recyclable" only when a product can be "conveniently recycled in every county . . . with a population of over 300,000 persons." CAL. BUS. & PROF. CODE §§ 17508.5(d) and 17580 (Deering 1991).

potential.[46] Barry Cutler, Director of the FTC's Bureau of Consumer Protection, summarized the debate, saying:

> On the one hand, there are people who will hold up a product that says recyclable, and question how it could be called recyclable, when in truth the nearest recycling plant is 1,000 miles away. On the other hand, it can cost $200 million to build a recycling plant. And a number of companies will come in and say, "Until we educate people about what products are recyclable. . . we can't condition the market . . . to have a stream of recyclable material that can be used." So it becomes sort of a chicken-and-egg situation.[47]

Bowing to industry pressure, the AG Task Force softened its initial recommendation and, in Green II, condoned use of the phrase "recyclable in many communities" by national advertisers, so long as the manufacturers established toll-free telephone numbers to inform consumers about local recycling facilities.[48] Not surprisingly, critics berate this revision for the expense it places on smaller businesses.[49]

3. Recycled

Closely related to the debate over the term "recyclable" is the controversy over the meaning of the term "recycled." Consumer advocates argue that a recycled product is one that contains only "*post*-consumer" waste, while many companies contend that "*pre*-consumer" or industrial waste also should be included within the definition.[50] However, the proposed distinctions may raise more questions than they answer. For instance, there is continued debate as to whether pre- and post-consumer waste can even be distinguished.[51] Reportedly, paper recyclers still have difficulty telling the two types of waste apart. Even Fort Howard Corp., the large recycler which coined the phrase "post-consumer waste," now argues against the distinction. As Fort Howard and many other paper companies indicate, a newspaper bought by a subscriber (post-consumer waste) must be recycled the same way as copy left on the printroom floor (pre-consumer waste). Moreover, the producers state, "There is no simple or inexpensive way for a recycling facility

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46. GREEN II, *supra* note 19, at 18.

47. *Adam Smith*, *supra* note 11, at 4.

48. GREEN II, *supra* note 19, at 25.

49. Azcuenaga, ABA Speech, *supra* note 29, at 15.

50. *See generally Summary of FTC Hearings*, *supra* note 4.

51. Prepared Statement of the FTC before the EPA, Public Meeting on Use of the Terms "Recycled" and "Recyclable" in *Environmental Marketing Claims* 5 (Nov. 13, 1991) (given by James Spear, FTC General Counsel) [hereinafter EPA Public Meeting].

to identify or test raw materials to decide whether they are pre-consumer or post-consumer."[52]

The decision whether or not to include pre-consumer waste in the definition of the term "recycled" implicates several basic environmental policies. For example, limiting the term to post-consumer waste would remove much of the incentive for industry to use more of its scrap material in the manufacturing process. On the other hand, the profits to be derived from greater efficiency should already provide industry with sufficient incentive to reprocess its own waste.[53]

Presently, most policy-makers define "recycled" in terms of some minimum percentage of *post*-consumer waste within a product. California law, for example, states that any product labeled "recycled" must contain at least ten percent post-consumer waste by weight.[54] Similarly, the AG Task Force recommends that only products with sufficient amounts of post-consumer waste be permitted to be advertised as "recycled." The Task Force's position stems largely from its belief that post-consumer waste is what consumers think about when they see the term "recycled."[55] Other government officials, notably FTC Commissioners, remain uncertain about consumer perception and, as a result, decline to take a position on the pre- versus post-consumer waste debate.[56]

B. *Scientific Uncertainty*

While terms like "biodegradable," "recyclable" and "recycled" present difficult questions of definition, other terms pose even more troubling scientific issues. Phrases like "environmentally friendly" or "safe for the environment" reflect value judgments about the overall environmental impact of a product. Although consumers generally welcome such broad proclamations, these claims present two distinct problems. First, such assertions do not reflect the fact that even the most benign consumer goods typically deplete raw materials and have some harmful environmental effects. Second, phrases like "environmentally friendly" do not reflect hard science but instead rely on "life-cycle" or "cradle-to-grave" analysis which,

52. *Summary of FTC Hearings, supra* note 4, at 120.

53. GREEN II, *supra* note 19, at 9-10.

54. CAL. BUS. & PROF. CODE § 17,508.5 (Deering 1991).

55. GREEN II, *supra* note 19, at 8 (revising GREEN I's recommendations and suggesting that products made from pre-consumer waste be labeled "reprocessed").

56. EPA Public Meeting, *supra* note 51, at 9.

to date, remains unperfected.[57]

The diaper wars best exemplify how life-cycle analysis can confuse or mislead consumers. A cotton diaper comes from raw cotton that is cultivated, harvested, transported and milled— processes that all use fuel and water and emit pollutants. Linen services use gasoline-burning trucks to pick up used diapers once a week and to deliver the diapers to laundry facilities as far as fifty miles away. Once at a laundry facility, the diapers are cleaned in 900-pound-capacity washing machines and dried in natural-gas fired dryers. The diapers are then folded, sorted by hand, and re-delivered in a plastic bag by the linen truck. Each diaper is used about 100 times before being set aside as a rag.[58] It costs about fifteen dollars per week to use a linen service, and while money may be saved through home laundering, that practice increases both energy and water use.[59]

Disposable diapers, on the other hand, begin as crude oil and raw timber that are transported and processed into plastic resin and paper. Each of these steps uses energy and water and emits pollutants, as does the manufacture, packaging, and distribution of the disposable diapers themselves. Parents typically purchase the diapers on their weekly grocery shopping trips at a cost of about ten dollars per week. No laundering is required with disposable diapers, but a child will need as many as 6,000 disposable diapers versus only about forty reusable cloth diapers.[60] In the end, disposable diapers are hauled away by garbage trucks, dumped into a landfill, and left to sit for centuries.

In terms of aggregate environmental effects, disposable diapers create four to seven times more solid waste than cloth diapers, but cloth diapers consume one-half to six times more water.[61] At the same time, though cloth diapers discharge two to ten times more waste into the water supply, cloth supporters say that the water pollutants from disposables are more toxic.[62] In addition, cloth advocates assert that air emissions from cloth and disposable diapers are

57. GREEN I, *supra* note 3, at 22. John Ruston from the Environmental Defense Fund explains, "The objective of life cycle analysis is to try to add up [environmental] impacts. From a scientific standpoint, it's very difficult to do with a great amount of certainty and accuracy." *Adam Smith, supra* note 11, at 6.

58. *Adam Smith, supra* note 11, at 6-7.

59. *Id.* at 7. About three-quarters of families using cloth diapers wash them at home.

60. *Id.* at 6. These figures are based on the assumption that the average child needs five or six diaper changes per day for three years.

61. *Id.* at 7.

62. *Id.*

equal. However, producers of disposable diapers claim that emissions from cloth diapers are two to nine times higher.[63]

While these life-cycle comparisons may be interesting, consumers ultimately gain little from them. For example, when confronted by the competing claims regarding cloth and disposable diapers, the only conclusion one mother could draw was to toilet-train her child as soon as possible.[64] Similarly, one expert asserts, "The bottom line is that there are ambiguities, and that nobody can take a morally righteous platform and go out and regulate in this particular arena."[65]

In light of both the scientific and the definitional uncertainty posed by green claims, controversy broods within the FTC over its proper role in regulating environmental advertisements. The most basic issues are, first, whether the FTC should establish national standards, and second, if so, what form should such standards take.

III.
POLICY DIRECTIONS FOR THE FEDERAL TRADE COMMISSION

A. *The Need for National Standards*

Leading those in favor of FTC intervention, FTC Chairman Janet Steiger views national standards as the most efficient way to disarm the uncertainty currently surrounding green advertising.[66] Taking the opposite view, FTC Commissioner Mary Azcuenaga declares that, in light of the lack of consensus surrounding environmental labeling, the FTC must defer issuing regulations until it can gather more information through its current practice of case-by-

63. *Id.*

64. *Id.* at 8. A spokesperson for the Environmental Defense Fund similarly could only conclude that one's diaper choice may depend on where one lives. In Santa Barbara where water is scarce, disposables might make more sense. Conversely, in the Northeast where landfill space is diminishing, cloth diapers may be more appropriate. *Id.* at 7-8.

65. *Id.* at 7. Through its Office of Air Quality Planning and Standards, Office of Solid Waste, and Office of Research and Development, the EPA has formed the Consumer Product Comparative Risk Project to try to remove the ambiguities in life-cycle analysis. But until life-cycle standards are developed, the AG Task Force has recommended that companies not base claims on cradle-to-grave studies. It also has recommended that groups like Green Seal establish more specific criteria for certification, noting that Canada and Germany have dropped the phrase "environmentally friendly" from its national seal programs. GREEN I, *supra* note 3, at 22.

66. *Steiger Suggests Quick Development of Environmental Claims Guidelines*, 61 Antitrust & Trade Reg. Rep. (BNA) 398 (Oct. 3, 1991) [hereinafter *Steiger Suggests Quick Guidelines*].

case prosecution.[67] Azcuenaga also notes large gaps in environmental research and explains, "the FTC has no special expertise in the science underlying environmental claims and no mandate to establish or promote environmental policy."[68]

Several factors suggest that Chairman Steiger's position is the wiser of the two. Most notably, neither the market nor state legislatures have demonstrated the ability to regulate green advertising effectively. As a result, businesses now face erratic enforcement of environmental regulations, and consumers confront confusing product labels.

The private sector has attempted to simplify and regulate green advertising through private certification or "seal" programs. Some certification programs, including Green Cross, give their stamp of approval to products that meet minimum specifications for recycled content or biodegradability. Other programs, like Green Seal, use life-cycle analysis to identify the most environmentally safe items among competing products.[69]

While government-sponsored seal programs are tremendously successful in Canada, Germany, Japan, and Scandinavian countries,[70] the process of private certification presents considerable problems in the United States. First, the proliferation of competing seal programs may confuse consumers. Second, as indicated above,[71] certification based on life-cycle studies may be deceptive. Finally, depending on the nature and agenda of the individual seal organization, certification may be available only to those companies with high visibility or sufficient funds to pay the requisite certifica-

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67. Azcuenaga, ABA Speech, *supra* note 29, at 10; *Azcuenaga Will Not Endorse FTC Role in Developing Guidelines for Green Claims*, 59 Antitrust & Trade Reg. Rep. 777 (1990) (emphasizing that cases present green claims in a "much more narrow context") [hereinafter Azcuenaga, *Will Not Endorse Guidelines*].

Section 5 of the Federal Trade Commission (FTC) Act, 12 U.S.C. § 45, gives the FTC broad authority to sue companies or individuals for "unfair methods of competition . . . and unfair or deceptive acts or practices in commerce." The FTC may seek cease and desist orders in federal court or may bring administrative action for civil damages. *Id. See also* 15 U.S.C. § 52 *et seq.* (regarding the FTC's specific authority to sue for false advertisements).

68. Azcuenaga, ABA Speech, *supra* note 29, at 1. *See* Azcuenaga, *Will Not Endorse Guidelines*, *supra* note 67, at 777.

69. *Summary of FTC Hearings*, *supra* note 4, at 118; GREEN I, *supra* note 3, at 25. Other private certification programs include Good Housekeeping's "Good Earthkeeping" and Wal-Mart's in-house seal of approval. Strassberg, *supra* note 7, at 98; GREEN I, *supra* note 3, at 25.

70. GREEN II, *supra* note 19, at 13 (pointing out that a seal currently is under review for the European Community as a whole).

71. *See supra* note 65, and accompanying text.

tion "fees."[72]

Besides seal programs, industry panels also have failed to police environmental advertising adequately. Although industry is obviously well-situated to assess consumer perceptions of green advertising, existing business groups simply cannot oversee enough of the market to account for the many types of industries now making environmental claims.[73] In addition, private organizations lack the enforcement power of federal agencies or courts. Moreover, the very formation of private advertising standards may expose the participating companies to antitrust liability.[74]

In the absence of effective industry restraints on green advertising, state governments have tried to fill the void. Such efforts, however, have managed only to create a patchwork of conflicting laws. For instance, with regard to the term "recycled" alone, California, New Hampshire, New York, and Rhode Island all have differing requirements concerning the content or disclosure of pre- and post-consumer waste.[75] Unfortunately, the FTC has exacerbated these regulatory inconsistencies through its case-by-case approach and its "selective enforcement" of advertising laws.[76]

The obvious turmoil in the regulation of environmental market-

72. *See* GREEN I, *supra* note 3, at 26-27; GREEN II, *supra* note 19, at 13-15. *See also* Strassberg, *supra* note 7, at 98 (stating that Green Cross charges $1000 to $3000 to process an application).

One Proctor & Gamble executive complained that one of P & G's products received a seal without company approval. Expressing his concern he said, "I don't wish to have my products drafted for someone else's purposes." *ABA Environmental Seminar, supra* note 2, at 462.

73. *See* GREEN I, *supra* note 3, at 23. The exception may be the Better Business Bureau which has moved to address green claims of all kinds. *See also National Advertising Group Asks BBB for Environmental Labeling Guidelines*, 60 Antitrust & Trade Reg. Rep. (BNA) 243 (Feb. 14, 1991); *Better Business Bureau Initiates Campaign to Monitor Green Advertising*, 61 Antitrust & Trade Reg. Rep. (BNA) 81 (July 18, 1991).

74. A company that advocates the adoption of an industry standard to the exclusion of other companies may find itself liable under the holding of Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988). In that case, the Supreme Court found a steel conduit-maker guilty of anti-competitive behavior for blocking the addition of poly-vinyl chloride conduit to the National Electrical Code. The steel-maker argued that it should have immunity under the *Noerr-Pennington* doctrine since its actions really amounted to political solicitation. The Court, however, pointed out that even though the Code was adopted or recognized by numerous governmental bodies, it still was the original product of the National Fire Protection Association, a private, voluntary organization. Thus, the court concluded that because "the [steel company's] actions took place within the context of the standard-setting process of a private association," the company's actions did not constitute permissible exercise of its political power but impermissible exercise of its market power. *Id.* at 504, 507-10.

75. GREEN I, *supra* note 3, at 37 n.24; GREEN II, *supra* note 19, at 9 n.3.

76. *ABA Environmental Seminar, supra* note 2, at 460.

ing continues to stifle a practice that would otherwise pass useful environmental information to the consumer. Describing this "chilling effect" in vivid terms, one businessman proclaimed, "Specific claims about environmental attributes of products and brands is becoming the 'third rail' of advertising: Touch it and you die."[77] One manufacturer of "packing peanuts" exemplifies the fear associated with green marketing. Although the company's peanuts look like normal polystyrene packing material, they consist primarily of cornstarch, and as demonstrated at the FTC's July hearings, the peanuts readily dissolve in water. Still, the manufacturer refuses to advertise this trait because he worries about running afoul of state or local advertising regulations.[78]

The chilling effect not only affects industry, but consumers as well. As the AG Task Force described in Green I, the absence of a comprehensive federal policy on environmental advertising may cause consumers "to feel that companies are taking advantage of... [a] genuine [public] concern about environmental issues."[79] If so, then consumers may respond by completely ignoring the environmental attributes of competing products.[80]

Aware that dwindling consumer confidence may soon eliminate the marketplace as a powerful tool with which to improve the environment, Chairman Steiger continues to call for the speedy adoption of national standards on environmental advertising. At the same time, she emphasizes the "consistency of the reasoning across diverse groups" that support such standards.[81] Supporters of federal standards include coalitions ranging from the National Food Processors Association and the Paper Recycling Coalition to the Society of the Plastics Industry and the American Association of Advertising Agencies. Even certification organizations such as Green Cross and Green Seal seek federal intervention, as do various state officials and, of course, the AG Task Force.[82] Environmental groups like the Environmental Defense Fund and the Environmental Action Foundation also advocate national advertising standards, so long as those standards do not usurp the EPA's authority in setting environmental policy.[83] Finally, the FTC's own task force

77. *Summary of FTC Hearings, supra* note 4, at 122.

78. *Id.* at 120.

79. GREEN I, *supra* note 3, at 14.

80. *Id.*

81. *Steiger Suggests Quick Guidelines, supra* note 66 at 398; FTC NEWS RELEASE 1, Oct. 1, 1991.

82. *See generally Summary of FTC Hearings, supra* note 4.

83. An analyst with the Environmental Action Foundation explains, "The FTC can

partners—the Office of Consumer Affairs and the EPA—also advocate national standards. In fact, the EPA has threatened, "Should the FTC choose not to issue guidelines, we at EPA are prepared to move forward on our own. . . ."[84]

Based on the foregoing evidence, federal standards are both appropriate and necessary. First, federal standards would help discipline a market in which self-regulation and state regulation have failed, and second, such regulation would promote the communication of important environmental information. However, as Commissioner Azcuenaga points out, "if [standards] are written they should be written with care."[85]

IV.

THE FORM AND SUBSTANCE OF NATIONAL STANDARDS

Though the need for federal regulation is clear, both the form and the substance of such standards remain in question. Procedurally, the FTC may take one of two corrective actions: it may either promulgate formal trade "rules," or instead issue interpretive industry "guidelines."[86] Once it decides on a course of action, the Commission then must balance the competing substantive interests of consumers, industrialists, and environmentalists and form a coherent policy on environmental advertising. The following discussion outlines the author's recommendations on both aspects of this impending challenge. It begins with an analysis of why FTC guidelines offer a more effective solution than FTC rules and concludes with several substantive suggestions regarding the definitions of three troublesome terms: "recycled," "recyclable," and "environmentally friendly."

A. *Procedurally—The Advantage of "Guidelines" Over "Rules"*

1. FTC Trade Regulation Rules

Under section 18(a)(1)(B) of the Federal Trade Commission Act,[87] the Federal Trade Commission is empowered to issue "trade

decide whether or not a claim of degradability on a plastic product is strictly deceptive. But it's a question of environmental policy whether we should be promoting degradability in the first place." *FTC Conducts Two-Day Hearing on Need to Develop Environmental Marketing Guide*, 61 Antitrust & Trade Reg. Rep. (BNA) 118 (July 25, 1991).

84. *Id.*

85. Azcuenaga, ABA Speech, *supra* note 29, at 7.

86. 16 C.F.R. §§ 1.5-1.20 (1991).

87. 15 U.S.C. § 57a(a)(1)(B).

regulation rules which define with specificity acts or practices which are unfair or deceptive. . . ."[88] The FTC may establish such rules at anytime and on its own initiative.[89] The commission is encouraged to issue such rules when case-by-case adjudication would have wide-ranging consequences.[90]

Trade rules have several advantages over trade guidelines. First, lengthy rulemaking procedures ensure that interested parties have the opportunity both to shape and to review a proposed rule. For example, rulemaking begins with a three-stage notification process designed to make the public fully aware of FTC proposals.[91] Then, during the actual rulemaking proceedings, the FTC invites the public to help frame issues for discussion,[92] to testify at the hearings themselves,[93] and to critique the recommendations of the FTC staff and those of the officer presiding over the hearings.[94] Second, trade rules enjoy the full force of federal law. Any violation of a rule constitutes a statutory breach of FTC Act section 5(a)(1) on unfair and deceptive practices.[95] Moreover, many courts assign FTC trade rules pre-emptive power over state law.[96] Therefore, through the institution of federal rules, the FTC could eliminate the need for state labelling laws and introduce consistency into the regulation of green advertising.

However, several political obstacles make trade rules impractical. First, formal regulations of any kind are under attack from the present presidential administration. President Bush made this clear in his recent call for "a 90-day moratorium on any new Federal regu-

88. 16 C.F.R. § 1.8 (1991). *See generally* 16 C.F.R. §§ 1.7-1.20 (1991) (describing FTC rulemaking procedures in full).

89. 16 C.F.R. § 1.9 (1991).

90. JULIAN O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION, § 125.01 (Matthew Bender 1992). Over thirty rules have been established since 1963, covering items ranging from leather belts to used cars. *See id.* at § 125.06.

91. 16 C.F.R. §§ 1.10-1.12 (1991).

92. 16 C.F.R. § 1.13(b) (1991).

93. 16 C.F.R. § 1.13(d) (1991).

94. 16 C.F.R. § 1.13(h) (1991).

95. 16 C.F.R. § 1.8 (1991).

96. No statutory provision explicitly addresses the question, but several courts have held that trade rules pre-empt state law. *See* American Fin. Ass'n Serv. v. FTC, 767 F.2d 957, 989-90 (D.C. Cir. 1985) (holding that FTC rules can preempt conflicting state law) *cert. denied*, 475 U.S. 1011 (1986); Harry and Bryant Co. v. FTC, 726 F.2d 993, 999 (4th Cir.) (permitting FTC rulemaking in areas already controlled and monitored by state regulation) *cert. denied*, 469 U.S. 820 (1984); Katharine Gibbs Sch., (Inc.) v. FTC, 612 F.2d 658, 667 (2d Cir. 1979) ("Where an explicitly formulated federal statute or regulation is in conflict with state law, preemption of state law follows inevitably from the supremacy clause of the [U.S.] Constitution.").

lations that could hinder [economic] growth."[97] Moreover, FTC rules, in particular, have encountered considerable opposition since 1980. At that time Congress grew alarmed over severe restrictions that the FTC had proposed for children's advertising. As a result, Congress substantially curbed the agency's rule-making authority by passing the Federal Trade Commission Improvements Act of 1980.[98] The Act not only limited ex-parte communications between the FTC staff and Commissioners,[99] but also prohibited inquiry into certain industries altogether.[100] Demonstrating the waning popularity of trade rules is the fact that the FTC has promulgated only four rules since 1980 and none since 1984. In contrast, the Commission had issued seventeen rules between 1970 and 1980.[101]

Besides encountering possible resistance from the President and from Congress, trade rules would face certain opposition from individual states. The AG Task Force has explicitly called for "Industry Guides" rather than trade rules and has explained:

> It is essential that any federal programs developed to govern environmental marketing claims be enforceable not only by federal regulators, but also by the states. Enforcement of consumer protection and false advertising laws is an essential function of the states' general police powers. The federal regulatory scheme therefore should supplement, rather than supplant, existing state law governing false advertising and deceptive practices. . . . The states would, accordingly, vigorously oppose any statue or regulation that proposes preemption of states' rights in this area.[102]

Although many political obstacles confront FTC trade rules, by far the largest problem with such rules is the time needed to pro-

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97. Address Before a Joint Session of Congress on the State of the Union, 28 WEEKLY COMP. PRES. DOC. 170, 172 (Jan. 28, 1992).

98. Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified at 15 U.S.C. §§ 45, 46, 50, 57a, 57b-1 to 57b-4, 57c) (1988). For legislative history, see H.R. CONF. REP. No. 917, 96th Cong., 2d Sess. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. (Legis. History) 1143.

99. Federal Trade Commission Improvements Act of 1980 § 12, 94 Stat. at 379-80 (amending 15 U.S.C. § 57a (1976)).

100. The Act prohibited investigation of children's advertising, *id.* at § 11, 94 Stat. at 378-79 (amending 15 U.S.C. § 57a (1976)), the funeral industry, *id.* § 19, 94 Stat. at 391-92, and agricultural marketing orders, *id.* § 20(b), 94 Stat. at 393. The Act also limited the FTC's ability to regulate banks, *id.* § 16, 94 Stat. at 375. Finally the Act temporarily barred the FTC from revoking trademarks, *id.* § 18, 94 Stat. at 391. Congress also tried to give itself veto power over any new rules, but courts found this provision unconstitutional. *See* Consumers Union of the U.S., Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc), *aff'd sub. nom.* United States Senate v. FTC, 463 U.S. 1216 (1983).

101. VON KALINOWSKI, *supra* note 90, at § 125.06 (listing all FTC rules and their dates of issuance).

102. GREEN II, *supra* note 19, at 2.

mulgate them. The rule-making process requires years to complete. For example, almost eight years elapsed between the initial notice and the final issuance of the Used Car Rule.[103] Likewise it took nine years to promulgate the Credit Practices Rule,[104] three and a half years to pass the Funeral Rule,[105] and four years to issue the Mail Order Rule.[106]

Such a delay in establishing national standards on environmental advertising would seriously erode any hope of legitimizing green marketing. As noted above,[107] consumers already voice skepticism over the validity of green claims. Therefore, the FTC must act quickly before consumer confidence evaporates and destroys the marketplace as a means to improve the environment.[108]

2. FTC Guidelines

Industry guidelines are an attractive alternative to trade rules because guidelines would enable the FTC to establish national standards quickly and with less political opposition. Guidelines do not require the lengthy procedures associated with rule-making.[109] According to internal Commission regulations, the FTC may issue guidelines:

> [anytime] it appears to the Commission that guidance as to the legal requirements applicable to particular practices would be beneficial in the public interest and would serve to bring about more widespread and equitable observance of laws administered by the Commission.[110]

Though guidelines require no public input, the FTC could still ensure that they reflect the diverse interests of consumers, businesspersons, and environmentalists. Primarily, it could do so by drawing upon the voluminous information already available from two AG Task Force hearings, Green I and Green II, and the FTC's own extensive hearings held in July, 1991. Literally dozens of groups participated in the AG and FTC hearings and many more

103. *See* 49 Fed. Reg. 45,725 (1984) (giving a procedural history of the rule); 16 C.F.R. § 455 (1991).

104. *See* 49 Fed. Reg. 7789 (1984) (giving the procedural history of the rule); 16 C.F.R. § 444 (1991).

105. *See* 47 Fed. Reg. 42,299 (1982) (giving the procedural history of the rule); 16 C.F.R. § 453 (1991).

106. *See* 40 Fed. Reg. 49,492 (1975) (giving procedural history of the rule); 16 C.F.R. § 435 (1991).

107. *See supra* note 80 and accompanying text.

108. *Steiger Suggests Quick Guidelines, supra* note 66 at 398; FTC NEWS RELEASE 1, Oct. 1, 1991.

109. *Compare* 16 C.F.R. §§ 1.5-1.6 (1991) *with* 16 C.F.R. §§ 1.10-1.19 (1991).

110. 16 C.F.R. § 1.6 (1991).

submitted written comments.[111] Besides drawing on these sources, the FTC could ensure public input by holding additional hearings once it drafted preliminary guidelines.

Technically, green guidelines would not have the force of law enjoyed by administrative rules; instead, guidelines would constitute only administrative interpretations of the FTC Act and form the basis for voluntary compliance.[112] However, the guidelines could acquire *de facto* force of law through FTC prosecutions. In an acknowledged two-phase procedure, the FTC would first educate the advertising industry to secure "voluntary cooperation in bringing about compliance with both the letter and the spirit of the Guide."[113] Then, after a year, the FTC would institute civil suits against those companies not in compliance.[114]

Although guidelines would be backed by strong federal enforcement, they would not preempt current state laws.[115] Consequently, state officials are likely to support rather than resist FTC guidelines.[116] Already the Attorney General primarily responsible for the Green Reports, Minnesota's Hubert H. Humphrey III, has testified before the FTC and vowed that states will conform their own standards to any guidelines proposed by the FTC.[117] Thus, as the National Food Processors Association writes, "[a]lthough a guide will not preempt states, the secondary effects of guides will be a positive force in shaping national uniformity."[118]

B. *Substantively—The Meaning of "Recycled," "Recyclable" and "Environmentally Friendly"*

By issuing industry guidelines, the FTC can help bring swift corrective action to green advertising. However, it will be the content

111. At the AG hearings held in March, 1990, over forty organizations testified and more than sixty other organizations attended. GREEN I, *supra* note 3, at 10, Appendix F. Similarly, the FTC's hearings drew over forty witnesses and more than one hundred written submissions. EPA Public Meeting, *supra* note 51, at 4 (FTC General Counsel reporting on the FTC hearings).

112. 16 C.F.R. § 1.5 (1991).

113. VON KALINOWSKI, *supra* note 90, at § 126.03[1] n.6 (1991) (citing FTC NEWS RELEASE, Dec. 16, 1969).

114. *Id.*

115. *Summary of FTC Hearings, supra* note 4, at 120, 123 (describing Azcuenaga's reservations over guidelines and those of Lynn Scarlett from the Reason Foundation); *Steiger Suggests Quick Guidelines, supra* note 66, at 398.

116. GREEN II, *supra* note 19, at 1-2; GREEN I, *supra* note 3, at 28.

117. *See Summary of FTC Hearings, supra* note 4, at 117. *See also id.* at 118 (General Counsel of Kraft expressing pleasure over the states' willingness to abide by FTC guidelines).

118. *Id.* at 118.

of the guidelines that eventually will determine their true effectiveness.

The FTC has considerable experience in drafting administrative guidelines,[119] but as Commissioner Azcuenaga notes, the agency has no expertise in constructing environmental policy.[120] Therefore, any guidelines regarding the use of environmental terms should be written in close consultation with the EPA. Such collaboration would ensure that the FTC's notions of fair advertising coincide with the EPA's ideas about appropriate environmental reform. Such cooperation also would prevent any rift between the agencies.[121]

In drafting its guidelines, the FTC should pay particular attention to three phrases: "recycled", "recyclable", and "environmentally friendly." The first two terms account for almost half of the written comments submitted to the FTC after its initial summer hearings,[122] while the third phrase sweeps more broadly than any other commonly-used green slogan and poses the greatest danger of misleading consumers.

1. Recycled—Emphasizing Post-Consumer Waste

Use of the term "recycled" should be permitted only where the named product contains more than fifty percent post-consumer waste by weight. Although a couple of states already invoke such a fifty percent standard for product labels or government procurements,[123] many states require that "recycled" items contain only ten percent post-consumer waste.[124] Others specify no minimum

119. The FTC has issued thirty-five guidelines since 1959. *See, e.g.*, 16 C.F.R. § 251 (1991); Fuel Economy Advertising for New Automobiles, 16 C.F.R. § 259 (1991); Advertising of Warranties and Guarantees, 16 C.F.R. § 239 (1991).

120. Azcuenaga, ABA Speech, *supra* note 29, at 1. *See* Azcuenaga, *Will Not Endorse Guidelines*, *supra* note 67, at 777.

121. The need for inter-agency cooperation has been highlighted recently by the growing tension between the FDA and the FTC over food labeling. The controversy stems from the fact that the Nutrition Labeling and Education Act (NLEA) now before Congress requires food advertising to conform to FDA as opposed to FTC regulations. Chairman Steiger has called the legislation pre-mature, but lobbyists have only pushed further, demanding the rescission of a 37-year-old agreement giving FTC authority over food labeling and advertising. *See Consumer Group Wants FDA, FTC to Alter Memo Dealing with Health Claims in Foods*, 61 Antitrust & Trade Reg. Rep. (BNA) 178 (1991); FTC NEWS RELEASE 1-2, Nov. 21, 1991.

122. EPA Public Meeting, *supra* note 51, at 4.

123. *See* N.H. REV. STAT. ANN. § 149-N:2 (1990); VT. STAT. ANN. tit. 3 app. ch. 7, Executive Order 24-86 (Supp. 1991).

124. *See* CAL. BUS. & PROF. CODE § 17,508.5 (West Supp. 1992); IND. CODE ANN. § 24-5-17-10 (Burns Supp. 1991); IOWA CODE ANN. § 18.18 (West 1989 & Supp. 1991);

percentage at all.[125] Consequently, in those states with thresholds below fifty percent, consumers might misconstrue the environmental benefit of their purchases. In contrast, under the recommended fifty percent guideline, consumers can rest assured that *most* of a "recycled" product comes from reconstituted waste.

Not only will the recommended guideline reduce consumer confusion by requiring that more waste be in a "recycled" product, but also the proposed standard will reduce confusion by defining a "recycled" product exclusively in terms of *post*-consumer rather than *pre*-consumer waste. As stated by the AG Task Force, "[r]ealistically, when consumers think about recycling, they are thinking only about *post*-consumer waste—the trash they leave at the curb."[126]

To be sure, pre-consumer or industrial waste is still a problem. Industrial waste, in fact, far exceeds household garbage in the United States.[127] However, businesses can promote reuse of pre-consumer waste through less confusing terms. For example, the AG Task Force suggests that the label " 'reprocessed [or recovered] industrial material' " would more accurately reflect a product made from factory scrap.[128]

Furthermore, though some businesses complain that they are unable to distinguish between pre- and post-consumer waste,[129] the market can easily eliminate this problem. For example, most commodities—corn, soybeans, oranges, etc.—trade based on the origin or quality of the product. The market, therefore, creates an economic incentive to identify and to track these traits.[130] Moreover, despite claims to the contrary, the paper industry already distinguishes between pre- and post-consumer waste in order to meet the

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MO. ANN. STAT. § 34.031 (Vernon Supp. 1992) (requiring 10% post-consumer waste in 1991-92 but requiring 60% by 2000). *See also* R.I. GEN. LAWS § 42-11-2.3 (1988) (requiring 25% post-consumer waste in "recycled" products).

125. These states tend to follow the EPA's guidelines recommending, for example, that "recycled" paper contain at least 50% post-consumer waste or "secondary material," without specifying a minimum amount of either. Affirmative Procurement Program, 40 C.F.R. § 250.21 (Table 1) (1991). For similar state standards, *see* NEV. REV. STAT. § 333.4603 (Michie Supp. 1991); COLO. REV. STAT. S 8-19.7-102 (West Supp. 1991).

126. GREEN II, *supra* note 19, at 9; GREEN I, *supra* note 3, at 36 (emphasis added).

127. GREEN II, *supra* note 19, at 9.

128. *Id.* at 10.

129. *See, e.g., Summary of FTC Hearings, supra* note 4, at 120 (citing Red Cavaney, President of the American Paper Institute).

130. Most corn, for example, trades on the basis of U.S. yellow #2 specifications. For the trading specifications of most major commodities *see* generally WALLSTREET J., *Cash Prices, Commodities,* in *Money & Investing* section.

demand for different blends of recycled paper. For instance, the Sierra Club (to the slight dismay of its members) demands only pre-consumer stock for its calendars because four-color scenes do not print well on post-consumer paper.[131]

Several policy reasons also support the need to recover post-consumer waste over pre-consumer waste. First, post-consumer garbage contributes heavily to the pressing landfill problem.[132] In fact, the largest manufacturer of "recycled" paper products admits that "95 % of everything in landfills is post-consumer waste."[133] Consequently, by requiring "recycled" products to contain post-consumer rather than pre-consumer waste, federal guidelines would help ease the present constraints on landfill space.[134]

Second, post-consumer waste suffers from a greater problem of "collective action" than does pre-consumer waste. Whereas a few companies may easily pool resources to reprocess substantial amounts of industrial waste, consumers generally are too numerous and too widely scattered to pool resources for community recycling projects. By defining the term "recycled" in terms of post-consumer waste, federal guidelines would create incentives for businesses to advertise for the recyclable products that they need. In turn, these new market forces would help foster greater consumer demand for facilities that recycle household garbage.[135]

Finally, post-consumer material, unlike industrial waste, is not subject to the internal cost controls of a business. As the AG Task Force explains:

> [I]ndustry does not need to rely on advertising to stimulate the routine recycling of factory scraps back into the manufacturing process. Industry already has a strong financial incentive to recycle this type of

131. Strassberg, *supra* note 7, at 135. Strassberg discusses several companies supplying various blends of recycled paper. Barton Nelson offers products made from 100% "recycled" paper fibers, 10 % of which is post-consumer stock. Letts of London, Ltd. sells diary planners with biodegradable covers, made from 70 % "recycled" papers, 40 % of which is post-consumer stock. And finally Good Nature Designs makes notecards, posters, and stationery from 50 % post-consumer stock and soybean ink. *Id.* at 99, 135-36.

132. GREEN II, *supra* note 19, at 9.

133. *Summary of FTC Hearings*, *supra* note 4, at 121 (quoting Jeffrey Eves, Vice President of Fort Howard Corp.).

134. GREEN II, *supra* note 19, at 9.

135. The labels presently on Lever Brothers' Wisk bottles exemplify how market forces can be used to encourage recycling of post-consumer waste. The front label reads, "Help Support Plastic Recycling." The back label states, "Please help. We're now using technology that can include recycled plastic in our bottles at levels between 25 and 35 percent. But to do so consistently, we need more recycled plastic. So please encourage recycling in your community." *Adam Smith*, *supra* note 11, at 4.

material. When industry recycles its own by-products, it makes more internally-efficient use of raw materials and, presumably, becomes more cost efficient because it has conserved both natural materials and reduced its own internal disposal costs.[136]

In short, by focusing on post-consumer rather than pre-consumer waste, the recommended definition for the term "recycled" not only reduces labeling confusion, it also helps to alleviate many of the problems presently associated with the recycling of household garbage.

2. Recyclable—Identifying Access to Recycling Centers on a State-by-State Basis

While the term "recycled" reflects a company's actual on-going environmental activity, the term "recyclable" suggests only the possibility of such environmental action. Accordingly, the term "recyclable" is subject to a larger degree of manipulation. Therefore, local advertisers should be permitted to use the term "recyclable" only in states where fifty percent of the population has access to a county recycling facility for the product in question. Alternatively, where a product has nationwide distribution, advertisers should be required to identify, on the product label, those states that meet the fifty-percent test just described.[137]

This proposed definition of the term "recyclable" reduces consumer confusion by striking an important balance between the *potential* and the *reality* that a product will be recycled. On the one hand, the definition does not require a company to investigate actual recycling rates in every *local* market it enters, as required under the Green I proposal.[138] Rather, businesses may make broader state-by-state findings and claims.[139] On the other hand, however, companies must supply more than a toll-free number and a statement about the mere potential for a product's recycling, as allowed under the Green II proposal.[140] Instead, businesses must make actual findings regarding the existence of county facilities where most (over fifty percent) of a state's population lives.

The proposed state-by-state approach not only conveys balanced information about a product, but also encourages local political ac-

136. GREEN II, *supra* note 19, at 9-10.

137. A similar definition might be appropriate for the term "compostable."

138. GREEN I, *supra* note 3, at 41-42.

139. This state-by-state approach conforms with the current disclosure of redemption values on most beverage containers.

140. GREEN II, *supra* note 19, at 25.

tion. For example, if a consumer sees her own state omitted on a label for a "recyclable" product, she might be inspired to use her consumer and political power to encourage the construction of more recycling plants within her state. Additionally, her push for political action may intensify as the product becomes listed as "recyclable" in neighboring states, but not in hers.

3. Environmentally Friendly—Prohibiting Claims of General Product Fitness Until Better Scientific Methods Are Developed

Although "recycled" and "recyclable" can be thoughtfully defined, more general terms such as "environmentally friendly" defy easy description. Thus, until the EPA develops standard cradle-to-grave methods for product testing and evaluation, broad labels like "environmentally friendly" should not be permitted.

This restrictive view echoes the perspective of the AG Task Force which believes that the term "environmentally friendly" "should be avoided altogether. . . ."[141] It also reflects the view of national seal programs in Canada and other countries that have dropped the slogan "environmentally friendly" from their campaigns.[142]

Private seal programs in this country are likely to feel the brunt of this recommendation. Yet, such programs can avoid liability and maintain their important role in the market if they make more specific disclosures about their selection processes. For instance, each seal of approval should indicate whether fees are paid for its use.[143] In addition, the seal should disclose the areas of environmental impact reviewed (eg. phosphate levels among detergents, or ozone-depleting propellants among deodorant sprays). Finally, the seal should disclose top-ranked products evaluated under the same criteria. Such disclosure would not only encourage consumers to comparison shop but would also foster competition among manufacturers over the environmental qualities of their products.

CONCLUSION

The new "green revolution" is upon us, and the explosion of environmental advertising has begun to take its toll on the nation. Consumers can no longer distinguish valid claims from exaggerated hype; businesses can no longer conform competitive demands to er-

141. GREEN I, *supra* note 3, at 32.
142. *Id.* at 33 n.22.
143. GREEN II, *supra* note 19, at 16.

ratic government regulations and environmentalists can no longer reconcile green advertisements with sound environmental policy.

Both private organizations and state officials have fought unsuccessfully to restore order to the market. Consequently, the FTC has received numerous calls for federal intervention. The FTC must now heed those calls and act swiftly to adopt industry guidelines such as those suggested in this comment. Only then will American companies clarify product labels, and only then will government officials harmonize advertising regulations. Most importantly, only under new FTC guidelines will the market work to promote a cleaner, healthier environment.