Certified Green: The Law and Future of Environmental Labeling

Jamie A. Grodsky

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CERTIFIED GREEN:
THE LAW
AND FUTURE OF
ENVIRONMENTAL LABELING

Jamie A. Grodsky†

Environmental marketing has grown dramatically in response to consumer preferences for environmentally sensitive goods. The availability of adequate information on the environmental attributes of goods could enable consumers collectively, through their purchasing decisions, to persuade manufacturers to adopt environmentally superior product designs. In this Article, the author analyzes the legal and policy implications of contemporary environmental marketing and demonstrates how current statutes, nonbinding FTC guidelines, and common law remedies fail to ensure the accuracy and usefulness of environmental information in the marketplace. The Article also identifies pressures which could undermine the integrity of independent environmental certification programs. In addressing these issues, the author examines broad questions of administrative rulemaking and adjudication, federalism, commercial speech, and the interplay of common law, statutory, and market remedies. Ultimately, the author argues for federal legislation that would increase government oversight of environmental marketing, and for a coordinated approach to evaluating the environmental attributes of consumer goods.

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Green marketing is an international phenomenon of the 1990s. Recent surveys indicate that many U.S. consumers are willing to pay extra for products and packaging with reduced environmental costs. Green buying represents a way that citizens, on a personal level, can make a contribution to society. Polls show that when consumers choose products with environmental labels, they hope to minimize problems of air quality, water quality, and solid waste disposal. According to a founder of a new U.S. company that tests and...
certifies products for environmental attributes, “our [company’s] objective is to help American consumers vote with their pocketbooks on environmental issues.”

Green buying could potentially serve as an effective market-driven means of promoting genuine environmental improvements in product design. Two significant problems, however, jeopardize the future of the environmental consumer movement. First, the marketplace is responding to buyer preferences with a flurry of diverse and sometimes fraudulent green claims. The profitability of environmental marketing has prompted manufacturers to use arbitrarily terms such as “biodegradable,” “recyclable,” and “ozone friendly” in their product labeling and advertising. Broad, unsubstantiated claims of environmental friendliness are applied to products containing harmful ingredients or additives.

Shortcomings in the current legal and regulatory system have allowed manufacturers to make misleading and unsubstantiated claims with virtual impunity. Green marketing is more problematic than certain other forms of advertising because consumers generally cannot substantiate environmental claims on their own. Although people can compare the taste of Coke and Pepsi, and observe their laundry after washing with Tide or Cheer, they generally cannot verify recycled content claims or statements about the ozone layer. In the absence of regulations that would standardize the environmental marketing lexicon, consumers are unable to distinguish substance from hyperbole. The resulting consumer confusion can translate into apathy. Although the Federal Trade Commission (FTC) has issued general nonbinding guidelines that may help educate certain advertisers about the contours of permissible practices, stringent and legally binding regulations are the only route to effective industry compliance.

A second source of consumer confusion is that the advertised environmental

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5. Incentive-based, market-driven means of accomplishing environmental goals can serve as valuable supplements to traditional command-and-control regulatory programs. In addition to green buying, other consumer-pocketbook approaches that have gained momentum in the past decade include consumer boycotts and social investment funds. The Calvert Social Investment Fund, the Social Investment Forum, and the Socially Responsible Banking Fund of the Vermont National Bank represent such incentive-based programs. ASSESSING THE ENVIRONMENTAL CONSUMER MARKET, supra note 3, at 16-17.

6. A study by Marketing Intelligence Service, Ltd. concluded that “green” products constituted 9.2% of all new U.S. products introduced in the first half of 1990, compared to 0.5% in 1985. This represents an almost 20-fold increase in five years. 1990 Green Product Introductions Soar, GREEN MARKETALERT, Oct. 1992, at 8.

7. In a 1990 survey of 1,514 consumers conducted by Advertising Age and the Gallup Organization, 47% of respondents indicated they were “not confident” that environmental advertising provided accurate product information. Surveys Find Consumers Distrustful of Corporate Environmental Practices, GREEN MARKETALERT, Mar. 1991, at 5. A Good Housekeeping Institute/Roper Organization survey found that approximately 43% of consumers believed that most commercial environmental claims were invalid. Id.

8. See infra notes 114-40 and accompanying text.
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benefits of products are often undercut by undisclosed environmental harms. For example, fluorescent light bulbs consume less energy than incandescent bulbs, but contain toxic mercury. Cloth diapers generate less solid waste than do disposable diapers, but consume more water during their useful lifetime.

Complexities such as these suggest the potential value of third-party certification programs that test products for a number of environmental attributes. Government environmental certification programs are in the experimental phase in Europe, Canada, and Japan. Private organizations recently have initiated certification programs in the United States.

Third-party environmental certification, however, is fraught with problems of its own. Private operation of such programs may generate credibility problems. Proliferation of competing certification programs and product evaluation criteria could amplify consumer confusion, the very problem these programs were designed to combat.

Furthermore, some private environmental certifiers have articulated an interest in a comprehensive product evaluation technique known as “cradle-to-grave” or “life-cycle” analysis. Life-cycle assessments account for the energy and materials consumed, and the wastes released to the environment, in the

11. The use of the term “third-party” in this article refers to any neutral body that is independent of manufacturers, retailers, or other participants in the “stream of commerce.” Third-party certifiers can be private, governmental, or quasi-governmental. Companies that issue certification marks for environmental soundness are often referred to as environmental certifiers, environmental endorsers, third-party "seal-of-approval" organizations, or eco-labelers. The terms "endorsement" and "certification" are generally interchangeable in this context.
13. In 1989 and 1990, two private environmental certification companies were established in California. See infra notes 332-39 and accompanying text. Green Seal, Inc., is a non-profit organization that has developed a multiple-attribute product evaluation system similar to the evaluation system used under Canada’s program. Interview with Denis Hayes, former Chairman and Chief Executive Officer and current member of the Board of Directors of Green Seal, in Palo Alto, Cal. (Jan. 25, 1992); see generally GREEN SEAL, A PROPOSAL FOR SUPPORT OF A CONSUMER EDUCATION AND ENVIRONMENTAL CERTIFICATION PROGRAM (1990); Randolph B. Smith, Group to Award Environmental Seals of Approval, WALL ST. J., June 14, 1990, at B4. Another company, Scientific Certification Systems, Inc., originally Green Cross, certifies products for attributes such as recycled content and degradability, and has announced plans to undertake “product life-cycle inventories.” Marc Silver, SEALS FOR THE TIMES, U.S. NEWS & WORLD REP., Nov. 12, 1990, at 81.
15. For a discussion of the benefits and drawbacks of private operation of environmental certification programs, see infra notes 332-50 and accompanying text.
17. For a discussion of the possibilities and the limitations of life-cycle analysis, see infra notes 374-401 and accompanying text. For an account of the current status of the life-cycle methodology, see SOCIETY OF ENVIRONMENTAL TOXICOLOGISTS AND CHEMISTS (SETAC), A TECHNICAL FRAMEWORK FOR LIFE-CYCLE ASSESSMENT (1991) [hereinafter SETAC].
course of producing, using, and disposing of consumer goods. An ideal assessment would encompass the entire life cycle of a product, from the extraction and processing of raw materials through manufacturing, transportation, distribution, use, reuse, recycling, and final disposal.\textsuperscript{18} In theory, life-cycle analysis could be a highly effective tool for increasing citizen awareness of the ecological implications of consumption. Unfortunately, the current methodology is dependent upon assumptions and inadequately precise for making consistent and reliable interbrand product comparisons.\textsuperscript{19}

Part I of this Article surveys the shortcomings of the current U.S. legal and regulatory framework for environmental advertising.\textsuperscript{20} Because environmental advertising policy involves an intricate weave of environmental priorities and consumer protection principles, it raises complicated jurisdictional issues. Solutions to the green marketing problem implicate the missions of both the Environmental Protection Agency (EPA) and the FTC. Jurisdictional issues also arise between the federal government and the states. The two competing values of national uniformity and state autonomy pervade the discussion of environmental marketing regulation.

Part II calls for new federal legislation authorizing EPA to issue legally binding environmental marketing regulations to help correct the information inefficiencies in the green marketplace. The proposed statute would mandate enforcement assistance by the FTC. The concluding section of Part II rebuts advertisers’ First Amendment objections to mandatory definitions for environmental labeling terminology, and illustrates why a federal statute may be less vulnerable than state laws to constitutional challenges.

Part III analyzes the shortcomings of the current legal framework for environmental certification, highlighting the problems that will arise if certifiers fail to adopt separate product niches, coordinate their standards, and maintain equitable cost structures. The problem of developing credible certification programs differs from the environmental advertising problem discussed in Part II, and requires a different solution. First, in contrast to environmental advertising, in which hundreds of companies have been making green claims for several years, environmental certification is currently in its earliest growth phase, with only a few U.S. companies participating. Establishing a full-fledged program to regulate certification would therefore be premature. Due to the

\begin{itemize}
\item \textsuperscript{18} Id. at 1.
\item \textsuperscript{19} See infra notes 383-401 and accompanying text.
\item \textsuperscript{20} Regulating environmental claims made by manufacturers differs significantly from regulating third-party certification programs. Manufacturers make environmental claims on their own packaging and advertisements; third-party certifiers evaluate the products of many manufacturers. Third-party certifiers seek to reward only that fraction of a given industry that attains a designated level of environmental performance in product or packaging design. See infra text accompanying notes 320-24. To the extent that advertising and certification differ, structural or regulatory solutions to the problems they create must be developed independently.
\end{itemize}
limited number of participating firms, government guidelines and vigilant scrutiny by public interest groups could help promote accountability.

Part IV recommends measures to encourage uniformity and credibility among certifiers. Part V discusses the advantages and shortcomings of product evaluation methodologies currently used in environmental certification. If companies fail to maintain rigorous standards while simultaneously providing affordable prices, government oversight, funding, or a joint public-private program may become appropriate.

The goal of any new government measures should not be to discourage environmental advertising and certification, but to ensure the integrity of these enterprises. If American consumers are to vote with their pocketbooks, they need to be given an accurate assessment of the products they elect to buy.

I. Current Regulatory Framework for Environmental Marketing

A. Misrepresentation in the Marketplace: The FTC Act and Environmental Advertising

Section Five of the Federal Trade Commission Act (FTC Act), the principal federal vehicle for restraining deceptive advertising, prohibits "[u]nfair methods of competition" and "unfair or deceptive acts or practices in or affecting commerce."\(^2\) To bring an action under this section, the FTC need not show intent, reliance, actual injury, or damages. In spite of the colloquial reference to "false advertising," the FTC is not required to prove falsity or even actual consumer deception, but simply to prove the likelihood of deception.\(^2\) The potential class of deceived consumers includes those "acting reasonably under the circumstances."\(^3\) Any representation triggering FTC action must be "material," or likely to affect consumer choices.\(^4\) Section Five also authorizes the FTC to take action against unsubstantiated advertising claims, defined as claims

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\(^{22}\) JEFF I. RICHARDS, DECEPTIVE ADVERTISING: BEHAVIORAL STUDY OF A LEGAL CONCEPT 28 (1990). The term "deceptiveness" is best suited to convey the notion that actual deception need not be proven under the FTC Act. Id. at 13. This can be contrasted to the federal trademark statute, the Lanham Act, which requires proof of actual consumer confusion prior to prosecution. Lanham Trademark Act, §§ 1-66, 15 U.S.C. §§ 1051-1127 (1988).


\(^{24}\) American Home Products Corp., 98 F.T.C. 136, 168 (1981), aff'd, 695 F.2d 681 (3d Cir. 1982). The Tenth Circuit defined materiality in 1943: "It is sufficient to find that the natural and probable result of the challenged practices is to cause one to do that which he would not otherwise do." Bockenstette v. FTC, 134 F.2d 369, 371 (10th Cir. 1943). According to Cliffdale, "a material representation, omission, act or practice involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." 103 F.T.C. at 165.
made without a "reasonable basis." FTC enforcement activities can result in various remedial measures. The most commonly used enforcement tool in deceptive advertising cases is the cease and desist order, whereby the Commission may impose fines after a second offense.

Since the 1970s, the FTC has prosecuted misleading environmental advertising on a case-by-case basis. For example, in 1973, the Commission ordered Ex-Cell-O Corporation to cease and desist from making biodegradability claims on behalf of its plastic-lined Pure-Pak milk cartons. One year later, the agency took action against Standard Oil of California for exaggerating the capacity of a gasoline additive to reduce emissions. The FTC brought cases in the 1980s against air and water filter companies for overstating the purification capabilities of their products. More recently, Zipatone, Inc. was ordered to cease and desist from asserting that Zipatone Spray Cement contained "ecologically-safe" propellants. In 1991, the Commission enjoined Jerome Russell Cosmetics from representing that its hair sprays, which contained ozone-depleting chemicals, were "ozone safe." Later

27. When the FTC has reason to believe that an advertiser has violated § 5 and that Commission action would be in the public interest, it may issue a complaint and notice order. Before a complaint is issued, however, a party is generally given an opportunity to consent to a formal cease and desist order, or to agree informally to discontinue the practice. An expression of consent is a declaration that the advertiser will curb future practices. It is not an admission of a past violation. If the case is not settled by a consent order or informal agreement, the Commission issues a complaint, and a public adjudicative proceeding is held before an administrative law judge (ALJ). After receiving testimony, the ALJ submits an initial decision and order. If the ALJ determines that the act or practice in question has violated § 5, the advertiser may appeal the order to the full Commission and then to a U.S. Court of Appeals. If the order is not appealed, or if the Commission or court affirms, the initial decision becomes final 60 days after service. Misleading advertising practices generally are punishable by civil fines only upon violation of a cease and desist order. First violations are rarely punished, except where the Commission proves a violation of a binding rule, or a knowing violation of a cease and desist order that has been issued against another advertiser. DAVID G. EPSTEIN, CONSUMER PROTECTION 17-21 (1976).
28. For an outline of recent federal and state legal challenges to environmental advertising claims, see ABT ASSOCIATES, EVALUATION OF ENVIRONMENTAL MARKETING TERMS IN THE UNITED STATES 49-62 (draft of July 10, 1992) (prepared for the Environmental Protection Agency) [hereinafter EPA DRAFT REPORT BY ABT ASSOCIATES].
29. Ex-Cell-O Corp., 82 F.T.C. 36 (1973). The company had included the following statements in its advertising: "Pure-Pak cartons are completely biodegradable. We made sure of that. If they're incinerated, for instance, they go up as harmless carbon dioxide and water vapor. Or if they're used as land fill, they disintegrate. Even the plastic film breaks down." Id. at 38. Referring to these representations, the company concluded: "That's our story. We think it's a nice story, too. Because it...has a happy ending." Id.
30. Standard Oil Co. of Ca., 84 F.T.C. 1401 (1974), aff'd as modified, 577 F.2d 653 (9th Cir. 1978).
in 1991, the FTC signed a cease and desist order against American Enviro Products for advertising that Bunnies Disposable Diapers degraded rapidly in landfills.\textsuperscript{34} Without adequate substantiation, the manufacturer had informed consumers that the diapers would provide a net "landfill benefit" and would decompose within three to five years, "before your child grows up."\textsuperscript{35}

A central problem of this case-by-case approach is that it fails to demarcate clear boundaries between deceptive and permissible practices. Case-by-case adjudication by the FTC is selective, incremental, and highly contextual.\textsuperscript{36} Final orders cover only a limited number of acts and practices, and consent agreements provide little interpretive guidance for future cases, except in the rare instances when Commissioners provide concurring or dissenting opinions.\textsuperscript{37} The current surge of unsubstantiated and misleading green marketing claims has indicated that case-by-case enforcement is too unwieldy a club to provide ample deterrence of deceptive advertising.\textsuperscript{38}

An unintended consequence of the FTC's application of the reasonable consumer standard is that it has essentially granted immunity in the gray area


\textsuperscript{35} American Enviro Products was enjoined from making further claims and from advertising any environmental benefits without scientific documentation. American Enviro Products, Inc., F.T.C. No. C-3376, 1992 FTC Lexis 122, at compl. Exhibit A (Mar. 18, 1992). In early 1992, the FTC ordered First Brands Corporation to refrain only from making unsubstantiated biodegradability and photodegradability claims about plastic bags. The agency also prohibited the company from using general terms such as "environmentally friendly" unless the terms were prominently defined on product labels and supported by scientific evidence. First Brands Corp., F.T.C. No. C-3358, 1992 FTC Lexis 27 (Jan. 2, 1992). In 1992, the Commission issued a consent order against Tech Spray for advertising that its electronic equipment-cleaning products were "ozone friendly" when they contained ozone depleting substances. Tech Spray, Inc., F.T.C. No. C-3377, 1992 FTC Lexis 118 (Mar. 25, 1992). The FTC also issued a consent order against RMED International for claiming that its Tendercare disposable diapers would biodegrade in landfills, and for making an unsubstantiated claim of overall environmental benefit. RMED Int'l., Inc., F.T.C. No. C-3382, 1992 FTC Lexis 139 (May 14, 1992).

\textsuperscript{36} \textit{Hearings on Environmental Labeling: Hearings on S. 615 Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works, 102d Cong., 1st Sess. 14 (1991) (testimony of Deborah Becker, Vice President, Environmental Policy, Kraft General Foods, Inc.).

\textsuperscript{37} \textit{Id.} at 15. The pertinent testimony reads as follows:

\[\text{[T]he case-by-case approach does not always result in guidance that can be readily understood. The vast bulk of the Commission's administrative workload takes the form of consent agreements. In all such cases, there is no Commission opinion that can be relied upon to provide a thorough explanation of the underlying evidence, the legal theories that were pursued successfully or unsuccessfully, the remedies that were considered and accepted or rejected, and so on. Instead, there is a brief, sometimes cryptic, complaint, and a consent agreement. The analysis to aid public comment frequently does little more than recite the terms of the complaint and consent, and certainly will not disclose any of the nonpublic evidentiary information that may be critical to an understanding of the Commission's decision to proceed with the case and its interpretation of the law. Unless there is a dissenting or concurring opinion from a Commissioner, these consent agreements provide very little, if any, interpretive guidance to industry.}\]

\textit{Id.} at 14-15.


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cases. For example, manufacturers often make unqualified claims that their products are "recycled."\textsuperscript{39} Survey evidence indicates that when consumers purchase recycled products, they believe they are helping to mitigate the solid waste problem\textsuperscript{40} and therefore assume that "recycled" products contain a significant percentage of recycled materials.\textsuperscript{41} The FTC has thus been confronted with the onerous challenge of determining just how much recycled content should be present to avoid misleading the reasonable consumer.

Representations may also be misleading if they are true only in limited circumstances.\textsuperscript{42} For example, unqualified claims that suggest potentialities, such as "recyclable" or "compostable," may be misleading if undeveloped regional markets and infrastructure limit or prevent the use of these disposal options.\textsuperscript{43} Moreover, the benefits of degradability may be illusory where products are incinerated or disposed of in landfills.\textsuperscript{44} Modern landfills are designed to maintain anaerobic conditions that prevent degradation in order to reduce local groundwater contamination.\textsuperscript{45} To the extent that they decompose, degradable products may release toxic or other harmful additives.\textsuperscript{46}

As a result of its inability to draw appropriate lines in the adjudicative setting, the FTC has been limited to prosecuting only the most egregious violations. Evidentiary obstacles, combined with serious understaffing problems at the FTC,\textsuperscript{47} have generally limited enforcement actions to violations by a few highly visible companies.

\textsuperscript{39} The implicit message of a recycled content claim is that the recycled content is substantial. For a discussion of the possible deceptiveness of implicit messages, see RICHARDS, supra note 22, at 28 ("If the conveyed meaning differs from the actual product attribute, the result is deceptiveness. Deceptiveness, therefore, may be caused by message falsity or consumer miscomprehension or a combination of the two.").


\textsuperscript{41} See, e.g., Environmental Defense Fund Senate Testimony, supra note 3, at 13.

\textsuperscript{42} Id. at 16.

\textsuperscript{43} Id. at 14.

\textsuperscript{44} An EPA study indicated that 73\% of U.S. municipal solid waste was deposited in landfills in 1988. DEP'T. OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. EPA 530-SW-90-042, CHARACTERIZATION OF MUNICIPAL SOLID WASTE IN THE UNITED STATES: 1990 UPDATE 55 (1990).

\textsuperscript{45} ENVIRONMENTAL DEFENSE FUND, COMMENTS AND PROPOSED GUIDES OF THE ENVIRONMENTAL DEFENSE FUND IN RESPONSE TO A REQUEST FOR PUBLIC COMMENT ON ISSUES CONCERNING ENVIRONMENTAL MARKETING AND ADVERTISING CLAIMS 15, 16 (1991) (submitted to the Federal Trade Commission).

\textsuperscript{46} Id.

\textsuperscript{47} The FTC's Division of Advertising Practices, which is responsible for prosecuting all deceptive advertising cases, currently employs thirty attorneys. Telephone Interview with Vivian Clark, Director of Attorney Recruitment, Federal Trade Commission (Feb. 14, 1992).
1. **FTC Guidelines and Safe Harbors**

In July 1992, the FTC issued guidelines designed to educate advertisers about the contours of permissible environmental marketing practices. The guidelines help frame various issues associated with environmental advertising and identify possible catalysts for prosecutorial action. For example, they uniformly discourage the use of unqualified environmental claims. The guidelines also recognize the need to distinguish claims related to products from those related to packaging, and to discourage broad claims of general environmental benefit.

Although the FTC guidelines represent a praiseworthy achievement, serious shortcomings in their structure and substance will limit their ability to deter false and misleading environmental advertising practices. For example, one of the stated goals of the guidelines is to create a “safe harbor” for marketers who want “certainty about how to make environmental claims.” What the guidelines fail to create, however, is certainty for consumers. The guidelines

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49. For example, the FTC guideline addressing compostability states:

- It is deceptive to misrepresent, directly or by implication, that a product or package is compostable. An unqualified claim that a product or package is compostable should be substantiated by competent and reliable scientific evidence that all the materials in the product or package will break down into, or otherwise become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device. Claims of compostability should be qualified to the extent necessary to avoid consumer deception. An unqualified claim may be deceptive:
  1. If municipal composting facilities are not available to a substantial majority of consumers or communities where the package is sold;
  2. If the claim misleads consumers about the environmental benefit provided when the product is disposed of in a landfill; or
  3. If consumers misunderstand the claim to mean that the package can be safely composted in their home compost pile or device, when in fact it cannot.

Id. at 36,366. Likewise, the discussion of “refillable” discourages the unqualified use of the term:

- It is deceptive to misrepresent, directly or by implication, that a package is refillable. An unqualified refillable claim should not be asserted unless a system is provided for:
  1. The collection and return of the package for refill; or
  2. The later refill of the package by consumers with product subsequently sold in another package. A package should not be marketed with an unqualified refillable claim, if it is up to the consumer to find new ways to refill the package.

Id. at 36,368.

50. Id. at 36,364.

51. “Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meaning to consumers.” Id. at 36,365.

52. “The guides are composed of general principles and specific guidance on the use of environmental claims. These . . . are followed by examples that generally address a single deception concern . . . . 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.” Id. at 36,364.
provide safe harbors by presenting examples of how to qualify claims to avoid prosecution. These safe harbors are far broader than the typical safe harbor provisions found in the tax code and other federal statutes. Because the qualifications are open-ended and subject to wide ranges of interpretation, they do little to solve the FTC's traditional line-drawing problems. Put simply, the options for qualifying claims can swallow the guidelines. Unlike several stringent state environmental labeling laws and recently proposed federal legislation, the guidelines contain no quantitative requirements or minimum prerequisites for the use of environmental marketing terms. Nor do they unequivocally require disclosure of certain important facts, such as the percentage of recycled content in a product. Because of their generality, the

53. Id. For a discussion of ways that advertisers could potentially qualify their "recycled content" claims in a manner that technically comports with the guidelines yet circumvents the FTC's broader goals of preventing consumer deception, see discussion infra notes 155-59 and accompanying text.

54. The vague language of the guidelines stands in sharp contrast to the safe harbor provisions of the federal tax laws and other statutes, which are narrow, precisely defined, and contain rigid minimum requirements which clearly delineate the boundaries of permissible behavior. For example, sections of the tax code dealing with business deductions establish rigid requirements for profit-making enterprises, which are accorded greater tax deductions than are nonprofit entities. Businesses that comply with the following requirements will not be prosecuted for tax evasion, creating a safe harbor within the confines of the narrow rule:


55. The guideline pertaining to biodegradability provides an example of a qualification "swallowing" the guideline. 57 Fed. Reg. at 36,365. The guideline requires unqualified claims of biodegradability to be substantiated by scientific evidence that the entire product or package will "completely break down" and decompose into "elements found in nature" within a reasonably short period of time after customary disposal. Id. An accompanying example implies, however, that if degradability claims are "adequately" qualified, the product may not be required to break down into "elements found in nature." Id. This essentially means that the product may contain artificial, perhaps even toxic, additives. According to the guideline, a product advertised as "photodegradable" is sufficiently qualified if it is accompanied by a substantiated claim that the product "will break down into small pieces if left uncovered in sunlight." Id. Although the claim may be deemed truthful under the guidelines, it may offer little or no environmental benefit.

56. See infra notes 143-49 and accompanying text.

57. For a discussion of "minimum threshold" standards, see infra notes 142-61 and accompanying text.

Illustrating the difference between the FTC approach and more stringent alternatives, the guidelines recommend that recyclability claims should be qualified "to the extent necessary to avoid consumer confusion about the limited availability of collection facilities and collection sites." For example, where recycling collection sites and facilities may not be available to a "substantial majority" of consumers or communities but have been established in a "significant percentage" of communities nationally, recyclability claims may be adequately "qualified" with the statement: "Check to see if recycling facilities exist in your area." 57 Fed. Reg. at 36,366. The guidelines should be contrasted to H.R. 3685, proposed in the 102d session of Congress, that would prevent advertisers from using recycling emblems and making recyclability claims unless the advertised product had achieved a minimum national recycling rate of thirty-five percent by the effective date of the guidelines. The proposed law would raise the minimum rate to sixty percent by the year 2000. H.R. 3685, 102d Cong., 2d Sess. § 403(a) (July 7, 1992).
guidelines will do little to reduce the FTC’s enforcement burdens.58

2. Limitations of Voluntary Measures

The second fundamental weakness of the FTC program is that it is nonbinding.59 Whereas a violation of a legally binding rule would constitute an automatic violation of Section Five,60 the new guidelines offer no substantial improvement on case-by-case adjudication. If an advertiser contests an enforcement action, the FTC must still prove that the practice in question would deceive the reasonable consumer and thus violate the FTC Act.61 This significant enforcement burden will cause the agency to continue to prosecute only the most visible and egregious violators, while those less visible are unlikely to be deterred.62

In addition to the need for narrowly drawn and legally binding definitions for environmental marketing terms, other shortcomings of the current regulatory structure hamper effective enforcement of the FTC Act. For example, although

58. The guidelines, however, may enable FTC staff attorneys to prove more easily to the Commission that a deceptive practice has occurred. Prior to prosecution, FTC staff attorneys are required to convince commissioners that a particular case merits the consumption of the agency’s resources. The process of FTC prosecution begins with an FTC staff attorney undertaking a preliminary investigation of the advertiser’s claims. Following this investigation, the attorney must be granted permission from the Director of the Bureau of Consumer Protection to negotiate a consent agreement. If permission is obtained, the attorney conducts a thorough investigation, hiring experts if necessary, which culminates in a 30 to 80-page report documenting the deceptive or unsubstantiated nature of the advertisement and recommending acceptance of the consent agreement. If a company refuses to consent, this report recommends the filing of an administrative complaint. The Bureau of Economics reviews the report and advises the Commission of the costs and benefits of the proposed consent agreement or complaint. If the consent agreement is authorized and the targeted company refuses to settle, a majority of commissioners must vote to permit prosecution. If this vote is obtained, the Commission will issue a complaint and a notice order against the advertiser, and litigation will follow. Telephone Interview with Ernest Eisenstadt, Office of the General Counsel, Federal Trade Commission (Sept. 16, 1991).

59. The guidelines state: “Because the guides are not legislative rules under § 18 of the FTC Act, they are not themselves enforceable regulations, nor do they have the force and effect of law.” 57 Fed. Reg. at 36,364.

60. See generally EPSTEIN, supra note 27, at 15-16.

61. For a discussion of the litigative efficiency of rules over voluntary guidelines, see infra notes 114-19 and accompanying text.

62. Some commentators have described the history of earlier FTC guidelines in other areas of commerce, and their recognized inability to deter “bad actors”:

[T]here was considerable dissatisfaction with the guide program as previously implemented by the Commission [in the 1950s and 1960s]. One of the major criticisms of the program was that the guides lacked sufficient force to compel the bad actors in the industry to comply with the standards set forth in the guides. The impact of the guides was further diminished by the necessity of introducing evidence in any enforcement action to support the conclusions reached in the guide. Those willing to risk noncompliance were least affected by the guides, hence the program merely disadvantaged the responsible businesses vis-à-vis their unscrupulous competitors. As a consequence, guides failed to protect consumers from the worst members of an industry—those businesses whose sharp practices do the most damage to consumer confidence in efficient market functioning. Thus compelled to find a more potent industrywide enforcement tool, the FTC established the legislative rulemaking program of trade regulation rules (footnotes omitted).

the false advertising codes of some states contain citizen suit provisions, \textsuperscript{63} the FTC Act does not give citizens a right to bring actions against advertisers or a right to compel the FTC to take enforcement action. \textsuperscript{64} Enforcement initiative and discretion is left entirely to the FTC. This arrangement is problematic, because the FTC is wary of taking actions that it considers to be in the realm of environmental policy, and therefore beyond its mandate to prevent consumer deception. \textsuperscript{65}

The result of inadequate federal regulatory capability is that consumers will continue to be confused by the growing array of green claims in the marketplace, and thus manufacturers making genuine improvements in their products will not be able to reap the potential rewards of their efforts. Because the FTC's guidelines cannot preempt state and local regulations, states and localities will continue to enact their own more stringent standards. \textsuperscript{66} Industry will confront an expanding constellation of conflicting local and regional requirements.

B. Shortcomings of Private Remedies

In theory, certain private alternatives could supplement FTC deterrence of misleading advertising practices. For example, on limited occasions, private parties have invoked antitrust statutes to discourage misleading advertising. The case law suggests, however, that such antitrust suits are rarely successful. \textsuperscript{67}

\begin{itemize}
  \item \textsuperscript{63} E.g., \textsc{Kenneth A. Plevan \& Miriam L. Siroky, Advertising Compliance Handbook} 344 (1988).
  \item \textsuperscript{64} Holloway v. Bristol Myers Corp., 327 F. Supp. 17 (D.D.C. 1971) (holding that plaintiffs claiming injury from false advertising by Excedrin had no private cause of action under the FTC Act). According to Holloway, "the Federal Trade Commission Act creates no private right of action." \textit{Id.} at 19.
  \item \textsuperscript{65} \textit{See infra} notes 141-59 and accompanying text.
  \item \textsuperscript{66} \textit{See infra} notes 85-95 and accompanying text.
  \item \textsuperscript{67} Although in 1980 the Eighth Circuit found antitrust liability to attach in an advertising case, the court emphasized the importance of advertising to the competitive process, and grounded its decision on the fact that the advertiser had undertaken a "full frontal attack" consisting of an intentional and pervasive campaign designed to eliminate competitors. International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255, 1266-68 (8th Cir. 1980), \textit{cert. denied}, 449 U.S. 1063 (1980). Because the antitrust laws are designed to promote competition, and because advertising is a cornerstone of the competitive process, the court recommended a conservative posture on antitrust liability for false and misleading advertising: "[B]ecause competition is the object sought to be preserved by the antitrust laws, we must be careful in drawing a line between fair competition, unfair competition and competition that is so unfair as to rise to the level of an unreasonable restraint of trade." \textit{Id.} at 1267. Before imposing liability, the court required proof that the competitor would have succeeded "but for" the antitrust violation. \textit{Id.} at 1272.
  \item In \textsc{National Assoc. of Pharmaceutical Mfrs., Inc. v. Ayerst Lab.}, 850 F.2d 904, 916 (2d Cir. 1988), the Second Circuit examined a putatively false and misleading letter stating that the product of a brand-name pharmaceuticals manufacturer was therapeutically superior to its competitor's generic drug. Although the court recognized the competitor's standing to sue under the Sherman Act, it emphasized its hesitancy to honor antitrust claims against false advertisers: "While [t]here is no redeeming virtue in deception, ... there is a social cost in litigation over it." \textit{Id.} at 916 (citing \textsc{Phillip Areeda \& Donald L. Turner, Antitrust Law} § 738(a) (1978)). The court, again quoting from \textsc{Areeda \& Turner}, further noted that "[t]here is no redeeming virtue in deception, ... there is a social cost in litigation over it." \textit{Id.} at 916.
\end{itemize}
Certified Green

Common law tort actions, such as negligent misrepresentation,\textsuperscript{68} could potentially provide consumers with a more appropriate vehicle for redressing harms caused by reliance on misleading advertising claims.\textsuperscript{69}

Proving damages, however, is a significant obstacle to recovery in actions for negligent misrepresentation. Courts are particularly reluctant to compensate for minor damages in tort.\textsuperscript{70} In most cases, damages from misleading advertising are nonphysical and minor. Individual buyers of products promoted for their environmental attributes would have little incentive to shoulder the expense of litigation unless they had suffered physical injuries or extensive property damage from use of the products. Even if such damage were to occur, problems in proving reliance and causation would likely be insurmountable for plaintiffs.\textsuperscript{71}

In negligent misrepresentation cases that result in economic loss,\textsuperscript{72} the plaintiff's burden is significantly higher than in cases of physical injury. The defendant must have a pecuniary interest in the transaction, and the plaintiff

\textsuperscript{68} For an account of the evolution of the tort of negligent misrepresentation, see Hale v. George A. Hormel & Co., 121 Cal. Rptr. 144 (Ct. App. 1975).

\textsuperscript{69} An action for intentional misrepresentation, or deceit, is also available, but the scienter requirement poses an additional burden on plaintiffs. For a discussion of the scienter element in the action for deceit, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 107 (5th ed. 1984).

\textsuperscript{70} Id. § 30.

\textsuperscript{71} Recovery under breach of warranty or strict liability misrepresentation theories is possible but equally unlikely. Damages are likely to be found de minimis, as in negligent misrepresentation suits. Strict liability misrepresentation actions would be more appropriate for physical injury cases. See id. at § 107.

\textsuperscript{72} Section 552 of the Second Restatement of Torts outlines the elements of negligent misrepresentation which causes economic loss:

§ 552. Information Negligently Supplied for the Guidance of Others:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to the loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

RESTATEMENT (SECOND) OF TORTS § 552 (1976).
must prove the defendant's objective to induce reliance. While the plaintiff in a physical injury case is merely required to show that reliance upon the misrepresentation was foreseeable, the plaintiff in an economic loss case must prove her membership in the limited class of persons for whose benefit the representation was supplied. In both instances, proving causation is difficult; the injured party must prove that reliance on the advertisement caused the damage. This is burdensome because the consumer may have bought the product for a variety of reasons independent of the alleged misrepresentation.

Because most consumer claims against environmental advertisers would involve only minor damages, effective recourse under the common law depends largely on the availability of a class action remedy. Some state courts have supported mechanisms for facilitating consumer class actions. These mechanisms include class funds for compensating plaintiffs and fluid recovery, a remedial process that involves a lower standard of proof for individual damages. Despite state efforts, claims procedures generally remain ill-suited to consumer cases in which class size is frequently extensive and damages per member are relatively small. The result is that consumer class actions are characterized by low claims rates. The burden of proving reliance is an additional deterrent to class actions for damages resulting from false or

73. Id.
74. Section 311 of the Restatement delineates this requirement:
§ 311. Negligent Misrepresentation Involving Risk of Physical Harm:
(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
(a) to the other, or
(b) to such third persons as the actor should expect to be put in peril by the action taken.
(2) Such negligence may consist of failure to exercise reasonable care
(a) in ascertaining the accuracy of the information, or
(b) in the manner in which it is communicated.

75. Id. § 552.
76. KEETON ET AL., supra note 69, § 108.
77. E.g., Vasquez v. Superior Court, 484 P.2d 964, 968 (1971) ("Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all.") (quoting Harry Kalven, Jr., and Maurice Rosenfeld, The Contemporary Function of the Class Suit, 8 U. CHI. L. REV. 684, 686 (1941)).
78. In California v. Levi Strauss & Co., the court described the fluid recovery process:
The implementation of fluid recovery involves three steps . . . . First, the defendant's total damage liability is paid over to a class fund. Second, individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof. Third, any residue remaining after individual claims have been paid is distributed by one of several practical procedures that have been developed by the courts.
80. For example, in Levi Strauss & Co., the class consisted of nearly seven million households with an average claims rate of two to three dollars per consumer. 715 P.2d at 573-74.
misleading advertising.

The federal courts are largely unsympathetic to consumer class actions. In *Snyder v. Harris*, the Supreme Court restricted the aggregation of small damage claims to reduce federal caseloads. *Eisen v. Carlisle & Jacquelin* established that class members identifiable through reasonable effort must receive personal notification, and also required plaintiffs to bear the costs of such notification. The amount-in-controversy threshold for diversity cases serves as an addition deterrent to consumer plaintiffs.

In sum, suits by individuals based on common law claims are unlikely to constrain deceptive environmental advertising because courts are likely to determine that damages are de minimis. In the absence of an environmental marketing statute authorizing citizen suits and statutory damages, class actions against environmental advertisers will be thwarted by difficulties in aggregating claims, notifying parties, and proving reliance. The FTC's permissive regulatory scheme, the patchwork nature of state laws, and the formidable barriers to private actions underscore the need for a cohesive and rigorous regulatory structure for environmental marketing.

II. Measures to Ensure Responsible Environmental Marketing

The examples in Part I suggest that the current legal and regulatory system is ill suited to prevent manufacturers from confusing consumers with misleading environmental terms. Inadequately protected by voluntary guidelines and the private litigation process, consumers need better mechanisms for policing environmental marketing and monitoring the enforcement of laws prohibiting deceptive advertising. To accomplish this goal, Congress should enact a new statute authorizing EPA to develop rigorous and legally binding standards defining and specifying the use of environmental marketing terms. Because this program would be prescriptive and include sanctions for noncompliance, I will refer to it as the "stick" approach. The second approach to enhancing the accuracy of consumer information about products in the marketplace is the "carrot" approach, which rewards manufacturers, by way of a certification, for

81. 394 U.S. 332 (1969). In *Holloway v. Bristol-Myers*, 327 F. Supp. 17 (D.D.C. 1971), the D.C. District Court refused to allow consumer plaintiffs to aggregate their claims to meet the 1969 federal jurisdictional requirement of $10,000: "This Court does not have jurisdiction of an action for damages as claimed here where the amount in controversy does not exceed $10,000... and jurisdiction may not be obtained by aggregating the claims of all other persons of the class whom plaintiff Holloway would represent." Id. at 22.

82. The Court allowed for aggregation "only (1) in cases in which a single plaintiff seeks to aggregate two or more of his own claims against a single defendant and (2) in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335.


designing products and packaging that are relatively environmentally benign. This approach will be discussed in Parts III, IV and V.

A. Contemporary Approaches to Environmental Advertising Regulation

Several states, including California, New York, Rhode Island, New Hampshire, and Maine, have enacted legally binding environmental advertising standards; other states currently are considering such measures. California's legislation requires products advertised as "ozone friendly," "biodegradable," "photodegradable," "recyclable," and "recycled" to satisfy statutory definitions of these terms. Rhode Island, New York, Connecticut, Wisconsin, and New Hampshire also define various terms, including "recycled," "recyclable," and "reusable," and regulate the use of recycling emblems.

Despite these commendable measures, the aforementioned consequence of the state by state approach is that it puts in place a patchwork of inconsistent standards that ultimately may thwart the attempts of advertisers to comply. As an example of interstate regulatory disparities, California, New York, and Rhode Island each define "recycled" differently. California requires all "recycled" products to contain a threshold percentage of post-consumer material. New York's legislation defines "recycled" on a product-by-product basis, establishing separate thresholds for twenty-three different product categories. Rhode Island's regulations do not specify a threshold percentage of recycled content, but simply require disclosure of relative amounts of pre-consumer and post-consumer material.

Recognizing the problems that could result from an expanding kaleidoscope of state standards, an array of groups have voiced support for nationwide definitions of environmental advertising terms. A task force of ten State


86. Massachusetts, Illinois, Iowa, Oregon, and Pennsylvania have introduced environmental marketing bills. EPA DRAFT REPORT BY ABT ASSOCIATES, supra note 28, at 74-77.

87. According to California's law, a product labeled "recycled" must contain "at least ten percent, by weight, post-consumer material . . . ." CAL. BUS. & PROF. CODE § 17508.5 (West 1992).

88. N.H. REV. STAT. ANN. § 149-N (1989); N.Y. COMP. CODES R. & REGS. tit. 6, § 368 (1990); Office of Environmental Coordination, RHODE ISLAND RECYCLING REGULATIONS, supra note 85 § 3 (1990); EPA DRAFT REPORT BY ABT ASSOCIATES, supra note 28, at 72-79.

89. CAL. BUS. & PROF. CODE § 17508.5(e) (West 1992).

90. For example, New York's law requires paper towels to contain 80% secondary material, including 40% post-consumer material, by 1994. Glass products are required to contain 50% secondary material, including 35% post-consumer material. N.Y. COMP. CODES R. & REGS. tit. 6, § 368.4 (1990).

Attorneys General endorsed a resolution urging the development of uniform national standards for environmental marketing claims. The Coalition of Northeastern Governors and the Northeastern Recycling Council developed model regulations to be adopted by individual states. Industry groups have also supported national uniformity, but several have urged voluntary rather than binding measures. For example, in 1990, the National Food Processors Association and a coalition of eleven trade associations filed a petition requesting that the FTC adopt a voluntary program.

The FTC guidelines do not resolve the problem of the growing diversity of standards. Because they are nonbinding, they cannot preempt state or local statutes or regulations:

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 the 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.

Although some states may embrace certain elements of the guidelines, most of the state regulations enacted to date are far more stringent than the FTC standards. Those states choosing to employ labeling requirements as a means of providing incentives for manufacturers to improve their products are unlikely to follow the more lenient FTC approach.

The first federal proposal for a national, rigorous, and legally binding structure for environmental marketing was the Environmental Marketing Claims Act of 1990, first introduced as S. 3218 by Senators Lautenberg of New Jersey and Lieberman of Connecticut and reintroduced as S. 615 in 1991. The bill would have withdrawn the FTC's authority to define environmental marketing terms and would have instead authorized EPA, with advice from an independent advisory board, to define and govern the use of the most commonly occurring terms, such as "recyclable," "recycled content," "degradable," "compostable," "ozone neutral," "source reduced," "refillable," "reusable," and "nontoxic."
The proposed statute would have established minimum threshold requirements for several of these terms. Manufacturers using regulated terms would have been required to certify that their claims comported with the Act. Violators of the law would have been liable for civil penalties, with criminal penalties for knowing or willful violations. Representative Sikorski of Minnesota introduced companion legislation in the House. Later in 1991, Representative Swift of Washington introduced H.R. 3865, which also called for EPA regulatory authority, but provided for enforcement by the FTC. A subsequent version of H.R. 3865, introduced in July 1992, contained rigorous minimum threshold definitions similar to S. 615. Like the Swift Bill, a recent Senate bill, S. 976, would have assigned regulatory authority to EPA with enforcement assistance by the FTC.

B. The Importance of Specificity

Any future environmental marketing legislation or regulations should provide definitions that are as specific as possible, directing advertisers to make precise claims about the ingredients or environmental effects of their products. Vague standards are inadequate for creating meaningful distinctions among product labels. The proposed Environmental Marketing Claims Act would have directed EPA to verify that each environmental marketing claim is related to a "specific" environmental impact to ensure that it is not false, misleading or deceptive, and that it has been scientifically substantiated.

To make requirements for increased specificity more effective, policymakers may need to devise ways to prevent manufacturers from using modified terminology to circumvent federally defined terms. The task force of State Attorneys General has recommended that any statute that defines words include within its scope "any variation or synonym of any of those words." Another approach was adopted in the Nutrition Labeling and Education Act of 1990, which authorizes the Food and Drug Administration (FDA) to establish new

99. Id.
100. Id. § 7(a).
101. Failure to comply with the regulations or a related administrative order, or the use of a mark without certification or for which certification was denied would result in civil penalties of up to $25,000 per day. Id. §§ 8, 9(a)(1).
102. Id. § 9(b).
106. S. 976, 102d Cong., 2d Sess. § 307(b) (1991). The bill was introduced by Senator Baucus.
108. Letter from the Task Force of State Attorneys General to Senator Lautenberg (June 29, 1990) (commenting on draft legislation regulating environmental marketing claims), in GREEN REPORT 1, supra note 92, app. H.
nutrition labeling regulations, develop minimum standards for health related claims, and define "descriptors" such as "free," "low," "lite," and "reduced." The new food labeling law prohibits the use of descriptors that have not been defined by the FDA and bars any health claims unless pre-approved by the agency. The law further provides that the FDA's regulations may cover "similar terms which are commonly understood to have the same meaning." Any person may petition the FDA for permission to use synonymous terms, which the agency may incorporate into its final regulations upon determining that they are not misleading.

C. The Need for Legally Binding Regulations

Federal environmental marketing standards embodied in legally binding regulations are superior to voluntary guidelines in several fundamental respects. First, they are more easily enforced. As noted above, a violation of a legally binding rule governing environmental advertising would constitute a violation of the statute under which the rule had been promulgated, either the FTC Act or some new environmental marketing legislation. Voluntary guidelines, however, serve merely to inform advertisers of the agency's potential statutory interpretation. Because a violation of an FTC guideline is not a de facto violation of the FTC Act, the enforcement agency must prove that the advertising alleged to have violated the guideline would have deceived the reasonable consumer. In other words, a guideline leaves the agency with the burden of proving in every contested case that a violation of the guideline is a violation of the law. This slows enforcement considerably and gives companies an advantage over competitors who are in compliance with the law.

114. See supra note 23 and accompanying text.
115. KANWIT, supra note 26, § 6.01. The D.C. Circuit acknowledged the enforcement efficiency of binding rules over guidelines in reaffirming the FTC's rulemaking authority in the context of octane posting standards in 1972:

"With the issues in Section 5 proceedings reduced by the existence of a rule delineating what is a violation of the statute or what presumptions the Commission proposes to rely upon, proceedings will be speeded up. For example, in an adjudication proceeding based on a violation of the octane rating rule at issue here, the central question to be decided will be whether or not pumps owned by a given refiner are properly marked. Without the rule, the Commission might well be obliged to prove and argue that the absence of the rating markers in each particular case was likely to have injurious and unfair effects on consumers or competition. Since this laborious process might well have to be repeated every time the Commission chose to proceed subsequently against another defendant on the same ground, the difference in administrative efficiency between the two kinds of proceedings is obvious."


For additional discussions of the efficiency of binding rules, see National Labor Relations Bd. v.
incentive to delay compliance by intentionally drawing out litigation. Under its system of voluntary guidelines, the notoriously understaffed FTC will continue to prosecute only blatant violations by the most visible firms.

Furthermore, because binding regulations are subject to extensive procedural requirements under the Administrative Procedure Act (APA), courts generally defer to agency discretion on substantive questions. Voluntary guidelines carry less authority in court.


In National Petroleum Refiners, the D.C. Circuit outlined the possibility for intentional delay in the absence of binding rules:

When delay in agency proceedings is minimized by using rules, those violating the statutory standard lose an opportunity to turn litigation into a profitable and lengthy game of postponing the effect of the rule on the current practice. As a result, substantive rules will protect the companies which willingly comply with the law against what amounts to the unfair competition of those who would profit from delayed enforcement as to them. This, too, will minimize useless litigation and is likely to assist the Commission in more effectively allocating its resources . . . . Recognition and use of rule-making by the Commission is linked to the goals of agency expedition, efficiency, and certainty of regulatory standards that loomed in the background of the 1914 passage of the Federal Trade Commission Act.

Section 553 of the APA states, in relevant part:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rulemaking proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

The required publication of service of a substantive rule shall be made not less than 30 days before its effective date . . . . 5 U.S.C. § 553 (1988).

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Chevron stands for the proposition that courts should uphold agency rules unless they are enacted in an arbitrary or capricious manner, or represent an abuse of agency discretion: “Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the [underlying] statute.” Id. at 844.

Courts generally give guidelines, or interpretive rules, some deference. See, e.g., Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that interpretive rules constitute “a body of experience and informed judgment to which courts and litigants may properly resort for guidance”). Nonbinding agency pronouncements, however, are given considerably less deference than substantive or legislative rules. E.g., Frank Diehl Farms v. Secretary of Labor, 696 F.2d 1325, 1329 (11th Cir. 1983); Shell Oil Co. v. Federal Power Comm'n, 491 F.2d 82, 88 (5th Cir. 1971).
Beyond the efficiency rationale, binding regulations would provide advertisers with greater notice of potential FTC action. Because courts do not consider voluntary guidelines to be final agency actions, judicial review is unavailable until the agency brings an enforcement action. Unlike guidelines, binding rules are considered ripe for review upon promulgation. Providing advertisers with superior notice would help prevent misleading practices, and thus reduce the transaction costs of redressing wrongs.

Industry representatives and others supporting voluntary guidelines have argued that guidelines are faster and easier to implement than regulations, and thus will help environmental standards keep pace with scientific understanding and technological change. In practice, however, this claimed advantage is illusory. Agencies generally subject proposed guidelines to comment procedures similar to those required for regulations. Moreover, agencies can promulgate regulations quickly when they are committed to doing so. Congress can assist by drafting legislation to prevent delays in the rulemaking process. For example, the Nutrition Labeling and Education Act of 1990 contains a hammer clause specifying that if the FDA has not issued final regulations within two years after the enactment of the statute, the agency's initial proposed regulations will automatically become final. This kind of provision can expedite administrative procedures and dissolve stalemates that may arise among interest groups. Congress can also place time limits on deliberations surrounding the enactment of amendments, allowing agencies to adapt binding

121. For a discussion of the greater notice offered by rules, see National Labor Relations Bd. v. Wyman-Gordon Co., 394 U.S. 759 (1969) (Douglas, J., dissenting) (rulemaking, unlike adjudication, "gives notice to an entire segment of society of those controls or regimentation that is forthcoming ... [and] an opportunity for persons affected to be heard"). For a scholarly discussion of the advantages of rules regarding notice, see David L. Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 HARV. L. REV. 921, 941-42, 947-58 (1965) ("[T]here are times when all concerned may suffer from an agency's decision, whether conscious or made from force of habit, to rely on means other than rulemaking for the development of policy. An informal statement, not subject to judicial review, may leave only uncertainty in its wake ... "). Another difference between rules and guidelines in terms of notice is that courts generally prevent agencies from diverging substantially from their established regulatory programs. See, e.g., Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry., 284 U.S. 370 (1932).
123. For example, a former Chief Counsel to the FDA estimated that a final rule could be promulgated in six months. Telephone Interview with Peter Barton Hutt II, former Chief Counsel, Food and Drug Administration (Aug. 19, 1991).
125. The Act states in pertinent part:
If the Secretary does not promulgate final regulations under paragraph (1)(B) upon the expiration of 24 months after the date of the enactment of this Act, the proposed regulations issued in accordance with paragraph (1)(A) shall be considered as the final regulations upon the expiration of such 24 months. There shall be promptly published in the Federal Register notice of the new status of the proposed regulations.
Id. § 3(b)(2).
standards quickly to changed circumstances. The ultimate advantage of mandatory rules is that they will maximize industry compliance. Misleading statements by even a small number of advertisers can generate substantial confusion among consumers, thereby depriving them of opportunities to reward those manufacturers that market environmentally superior products. If the marketplace were dominated by a few large firms, voluntary guidelines could conceivably promote adequate self-regulation. A wide array of firms, however, are currently making green claims on product labels, thus reducing the likelihood of universal compliance. The reduced transaction costs of enforcement under a binding rule would allow for more frequent prosecution and broader deterrence of noncompliant firms.

The FTC's environmental marketing guidelines differ from most other voluntary FTC programs in a key respect. Almost all of the agency's other nonbinding guidelines have applied to single industries. Voluntary guidelines may be effective for single industries because conscientious trade associations, or natural competitive pressures, can encourage vigilance by rival firms. The recent environmental marketing guidelines, by contrast, apply to several industries. Although five other FTC guideline programs apply to multiple industries, these programs are narrow in scope, pertaining either

126. Because federal prosecutors tend to pursue the most visible cases, see Richards, supra note 22, at 31, companies with smaller geographical reach or less pervasive advertising campaigns are rarely targets of federal enforcement actions, and therefore have few incentives to comply with warning guidelines. It is often easier for large firms to cooperate with governmental strictures because they can realize economies of scale with respect to the direct costs of compliance. As one commentator has noted:

One corollary of the proposition concerning costs of compliance is that usually larger firms will have a higher level of compliance since they can realize the economies of scale that typically exist with respect to the direct costs of compliance. Compliance typically involves some investment—for example, in legal resources for redrafting a standard form contract—and as the number of transactions affected by this investment increase, the cost per transaction will be less. Consistent with this reasoning is the common experience of administrators of consumer protection legislation that small firms have the highest levels of non-compliance. William C. Whitford, Structuring Consumer Protection Legislation to Maximize Effectiveness, 1981 Wis. L. Rev. 1018, 1025 (1981).

127. See EPA DRAFT REPORT BY ABT ASSOCIATES, supra note 28, at 42, tbl. 3.5. See also Maykuth, supra note 4, at A2.


to a single activity\textsuperscript{130} or to blatantly fraudulent practices. For example, the FTC guidelines pertaining to product endorsements are limited to clearly unethical practices, such as claims of expert endorsement in the absence of expert evaluation.\textsuperscript{131} One could infer from the narrowness of these multiple industry guidelines that the FTC's voluntary approach is ill-suited to address the broad subject matter and numerous linguistic subtleties of green marketing.

History indicates that legally binding rules are preferable to guidelines as a means of requiring companies to make affirmative disclosures. The FTC has issued several binding regulations requiring disclosures in the past, often under the direction of Congress. Most of this regulatory activity occurred during the 1960s, prior to the enactment of the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act, which formalized and restricted the FTC's rule-making power.\textsuperscript{132} The FTC promulgated binding rules requiring fiberglass manufacturers to warn of potential skin irritations,\textsuperscript{133} quick-freeze aerosol spray manufacturers to disclose the dangers of inhalation,\textsuperscript{134} and sellers of apparel to furnish instructions for care.\textsuperscript{135} Under the statutory instruction of Congress, the FTC issued binding regulations requiring gasoline sellers to indicate octane ratings on gasoline pumps,\textsuperscript{136} textile vendors to provide

\begin{itemize}
\item \textsuperscript{130} For example, the Guides Against Deceptive Pricing are limited to a specific type of fraudulent bargain in which normal retail prices are misrepresented. 16 C.F.R. § 233 (1992). The Guides Against Bait Advertising are directed to a single practice, "bait and switch," whereby a seller promises a customer one type of good and delivers another. 16 C.F.R. § 238 (1992).
\item \textsuperscript{131} 16 C.F.R. § 255 (1992). The endorsement guidelines also admonish against other blatantly unethical practices such as certifying products in the absence of certification expertise, and endorsing products in the absence of familiarity with the allegedly endorsed items. \textit{Id.} For a discussion of the endorsement guidelines in the context of third-party certification, see \textit{infra} notes 270-86 and accompanying text.
\item \textsuperscript{132} For a discussion of the formalization of the FTC's rulemaking process, see \textit{infra} notes 169-171 and accompanying text.
\item \textsuperscript{133} 16 C.F.R. § 13.6 (1992).
\item \textsuperscript{134} \textit{Id.} § 417.6.
\item \textsuperscript{135} \textit{Id.} § 423.1.
\item \textsuperscript{136} Octane Posting and Certification, 16 C.F.R. § 306.11 (1992). The extraordinary detail of the octane posting requirements illustrates the power that the FTC has to issue more comprehensive disclosure rules, pursuant to congressional prodding. These disclosure rules provide a stark contrast to the FTC's recent environmental labeling guidelines. Under the octane posting regulations, all octane labels must meet the following rigid specifications:
\begin{itemize}
\item \textit{Layout.} The label is 3" wide x 2 1/2" long. The illustrations appearing at the end of this rule are prototype labels that demonstrate the proper layout. Helvetica type is used throughout except for the octane rating number which is in Franklin Gothic type. Spacing of the label is 1/4" between the top border and the first line of text, 1/8" between the first and second line of text, 1/4" between the octane rating and the line of text above it. All text and numerals are centered within the interior borders.
\item \textit{Type size and setting.} The Helvetica series is used for all numbers and letters with the exception of the octane rating number. Helvetica is available in a variety of phototype setting systems and by linotype. The line "MINIMUM OCTANE RATING" is set in 12 point Helvetica Bold, all capitals, with letterspace set at 10 1/2 points. The line \textit{"(R+M)/2 METHOD"} is set in 10 point Helvetica Bold, all capitals, with letterspace set at 10 1/2 points. The octane number is set in 96 point Franklin Gothic condensed with 1/8" space between the numbers.
\item \textit{Colors.} The basic color on all labels is process yellow. All type is process black. All borders are process black. Both colors must be non-fade.
\end{itemize}
\end{itemize}
information on product labels, and appliance marketers to disclose energy efficiency data. The FTC adopted a legally binding program for cigarette labeling in 1964 after a voluntary program, initiated in 1955, proved ineffective. In fact, because of the lack of conclusive legal effect of voluntary measures in adjudicative hearings, the FTC declared many of its nonbinding guidelines obsolete in the 1970s.

D. A Call for EPA Regulatory Authority

Implementing effective environmental advertising policy is extremely challenging because it requires an intricate weaving of environmental policy and consumer protection principles. The convergence of these two policy areas presents the FTC with a significant regulatory dilemma. The fundamental problem for the FTC is that it may be impossible to prevent deceptive environmental advertising in a meaningful way without concurrently promoting environmental policy goals. Only the former goal is within the agency’s perceived mandate. The Director of the FTC’s Bureau of Consumer Protection has articulated the agency’s position on the scope of its authority:


140. See, e.g., 42 Fed. Reg. 12,171 (1977); 43 Fed. Reg. 44,483 (1978). The author of one of the leading FTC regulatory manuals has commented on the shortcomings of the Commission’s nonbinding trade practice rules and guides when compared to binding trade regulation rules:

In 1919 the FTC began the practice of encouraging “trade practice submittals,” which were an attempt to eliminate by common consent of those engaged in a given industry, practices which are unfair in the opinion of the industry as a whole [citation omitted]. In 1955, the agency began to issue industry “guides,” for the same purposes, that is, as advisory statements intended to promote voluntary compliance within a particular industry or with respect to common practices. It was not until 1962 that the commission abandoned the case-by-case approach and began to contemplate issuing trade regulation rules with the force of substantive law to regulate practices throughout an industry. . . .

[Unlike legally binding rules, the nonbinding] trade practice rules had no conclusive legal effect in adjudicative hearings; the FTC had to allege that the respondent violated § 5 of the Federal Trade Commission Act (15 U.S.C. § 45) or another statute administered by the agency, since a violation of the trade practice conference was not in and of itself illegal. Because of this, and with its increasing reliance on trade regulation rules which do have the force of substantive law, the FTC declared them obsolete. Many such [voluntary] rules were eliminated in 1976 and 1977 [citations omitted] and the commission officially rescinded 34 in the fall of 1978.

KANWIT, supra note 26, § 6.01.
In reviewing all types of green claims, we are interested in what those terms mean to consumers. These issues, however, also implicate environmental policy concerns, and may not be appropriately resolved solely by reference to FTC deception principles. 

There may be legitimate environmental policy reasons to favor one approach over another, but the Commission is expert in identifying and preventing deception, not in establishing environmental policy for solid waste disposal.

That is not to say that legislators, or agencies responsible for setting environmental policy, cannot legitimately establish standards that will force manufacturers to change the products in one way or another, but I am saying that I am not convinced that the FTC should have that function—or that the staff and the Commission have all the expertise needed for that function.\footnote{141}

The debate over minimum threshold requirements illustrates the FTC’s reluctance to become involved in environmental policy issues.\footnote{142} The primary issue is whether new standards for environmental advertising should incorporate minimum requirements to encourage improvements in manufacturing behavior, or whether they should simply require disclosure of existing percentages of component materials or other information. As an example, recycled content regulation can take various forms. Several state laws and proposed federal standards require a threshold level of recycled content to be met before a related advertising claim can be made.\footnote{143} Some state regulations require minimum threshold amounts of post-consumer material, to ensure that the recycled content is not simply waste swept from the shop floor,\footnote{144} or even waste traded among manufacturers,\footnote{145} but rather material collected from a consumer recycling

\footnote{141. Barry J. Cutler, Remarks Before the Soap and Detergent Association’s 64th Annual Meeting and Industry Convention 3-7 (Feb. 1, 1991).}

\footnote{142. It is important to distinguish between minimum threshold and minimum content requirements, because the terms are often inappropriately interchanged. “Minimum threshold” is the appropriate term to use in the advertising context. A minimum threshold provision requires a product to meet a designated threshold, i.e. of recycled materials, only if a manufacturer chooses to make an advertising claim relating to its content. Minimum content requirements, by contrast, are command-and-control type regulations requiring manufacturers to use specified amounts of recycled or other materials in their products.}

\footnote{143. E.g., CAL. BUS. & PROF. CODE § 17508.5(e) (West Supp. 1992); N.Y. COMP. CODES R. & REGS. tit. 6, § 368.4(a) (1990).}

\footnote{144. Shop waste or industrial scrap is routinely reused in the production process and therefore should not be factored into any recycled content claims. Industrial scrap refers to clean, uncontaminated by-products of a given process that can be, and regularly are, looped directly back into on-site manufacturing processes with minimal processing. In the paper industry, this is also known as “mill broke” or “waste paper.” See, e.g., EPA DRAFT REPORT BY ABT ASSOCIATES, supra note 28 at 98.}

\footnote{145. Some postcommercial industrial waste that would otherwise have been discarded is instead transported from one manufacturer or facility for reuse by another. Because the manufacturer has made an}
New and proposed laws also have established minimum threshold recycling rates for products advertised as recyclable, minimum durability requirements for allegedly reusable and refillable products, and minimum percentage waste reduction requirements for comparative claims. An FTC Commissioner described the problem that minimum threshold requirements present for FTC enforcement:

Writing guidelines to define “recycled” or “recyclable” might require the Commission to travel far beyond its traditional territory. The Commission usually judges whether a claim is deceptive by examining what consumers think the claim means. But some states have proposed minimum content standards for a “recycled” product claim. If the Commission followed that approach in advertising guidelines, we would no longer be deciding what the use of the term “recycled” means to consumers, but what “recycled” should mean.

Arguably, the FTC has overstated the degree to which more stringent standards would exceed its mandate. FTC deceptive advertising doctrines focus...
upon consumer perceptions of the meaning of manufacturers' claims. Studies indicate that when consumers choose to buy recycled products, many do so believing that they are helping to mitigate the solid waste problem. It follows that consumers expect a substantial percentage of any product or package bearing a recycled content label to be made from recycled material. Although minimum threshold regulations would promote environmental interests, they would also prevent deception by fulfilling justifiable consumer expectations.

Nonetheless, the FTC guidelines contain no explicit minimum threshold requirements for the use of environmental marketing terms. For example, the guidelines specify no thresholds for recycled content claims, but simply require that representations on products or packages containing small amounts of recycled material be "adequately" qualified to "avoid consumer deception about the amount, by weight, of recycled content." This imprecise qualification requirement could allow creative marketers to employ alternative marketing terms such as "partially recycled" or "mostly recycled" to avoid disclosure of specific amounts of recycled material. In addition, while the guidelines do state that products labeled "recycled" must include material diverted from the solid waste stream, they allow manufacturers to add together pre- and post-consumer waste in disclosing the percentage of a product that is recycled material. Although recycling of pre-consumer materials can be relatively energy efficient and should be encouraged, a definition such as this depresses the demand for post-consumer materials and reduces incentives for new consumer recycling programs.

151. Deception is . . . subjective and it leaves considerable room for doubt. It is a property of human beings. We look for it within the mind of the consumer, the person who is considering the object." Richards, supra note 22, at 29 (quoting I.L. Preston, The Great American Blow-up: Puffery in Advertising and Selling 8 (1975)).
152. E.g., Environmental Defense Fund Senate Testimony, supra note 3, at 11-13.
153. Id.
154. Id.
156. See supra notes 52-58 and accompanying text.
157. The guideline states:

A recycled content claim may be made only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process [pre-consumer], or after consumer use [post-consumer]. To the extent the source of recycled content includes pre-consumer material, the manufacturer or advertiser must have substantiation for concluding that the pre-consumer material would otherwise have entered the solid waste stream.

In asserting a recycled content claim, distinctions may be made between pre-consumer and post-consumer materials.

158. Id.
159. Because post-consumer wastes contain heterogenous contaminants and are more difficult and expensive to recycle than pre-consumer materials, incentives are needed to maintain post-consumer programs. A recent report by EPA has underscored the difficulty of recycling post-consumer wastes:

Although preconsumer materials can contain contaminants such as inks or adhesives, they generally come to reprocessing mills in large homogenous batches and are therefore easier and
In contrast to the FTC's lenient approach, California, New York, and New Hampshire's environmental labeling laws all require products to contain specific minimum percentages of post-consumer material before recycled content claims can be made. Several state and local government procurement policies also include post-consumer content standards as a means of stabilizing markets for such materials.

The most effective mechanism for establishing more rigorous standards for environmental claims would be for Congress to pass a new law authorizing EPA to promulgate regulations that would promote environmental improvement. For example, the proposed Environmental Marketing Claims Act would have directed EPA to ensure that new regulations reflect both "the best available use and the best available technology that will encourage higher performance levels in products and packaging" and "the most recent scientific and practical knowledge of technological advances and improvements in manufacturing techniques and waste management." In the absence of such legislative direction, EPA does not have the authority to promulgate binding regulations, and the FTC continues to be wary of overstepping its consumer protection mandate. Put simply, the agency with enforcement expertise lacks the appropriate mission, and the agency with the mission lacks enforcement authority.

If new regulations are to be in the form of bright-line rules rather than general nonbinding guidelines, the technical expertise of EPA will be essential more economical to reprocess in most instances than postconsumer materials. In contrast, postconsumer materials have reached consumers and, following their intended use, are recovered for recycling. They can contain a heterogenous assortment of contaminants, such as staples, rubberbands, adhesives, and inks, and are in most cases more difficult and expensive to recycle than preconsumer materials. While both types of secondary materials are technically recyclable, postconsumer materials often require more advanced reprocessing equipment than preconsumer materials, which have readily been recycled for decades.

EPA DRAFT REPORT BY ABT ASSOCIATES, supra note 28, at 96.

160. See supra note 88, 146.

161. EPA DRAFT REPORT BY ABT ASSOCIATES, supra note 28, at 96.

162. There are essentially four levels of rigor for environmental labeling regulations. The first, and least stringent approach, is the voluntary guideline approach. The second level would involve mandatory disclosure requirements, whereby companies would be required to report the percentages of recycled or other pertinent materials in their products. The problem with mere disclosure, however, is that consumers may not be able to discern the difference between meaningful and trivial percentages, or evaluate the degree to which the percentages achieved reflect actual technological capabilities. The third level involves establishing minimum threshold requirements to prevent consumer deception by assuring buyers that their expectations about environmentally labeled products are well-founded. The fourth level involves higher minimum thresholds designed to encourage improvements in product design, ratcheted up over time as technology advances.


for establishing standards and the accompanying testing protocols. EPA has already begun to develop testing protocols as part of its mandate under the Toxic Substances Control Act. The development of labeling standards will become less complex as this effort dovetails with the development of government and private procurement standards, minimum content requirements, and other environmental protection initiatives.

EPA has gained some labeling experience through its regulation of pesticides and products containing ozone-depleting substances. In the future, because the FTC traditionally has maintained an enforcement infrastructure for deceptive advertising, the most appropriate arrangement would be for EPA to set the standards for environmental advertising, with advice and enforcement assistance from the FTC. Congress could specify that any violation of EPA definitions would constitute an automatic violation of the FTC Act, so that the FTC’s burden of justification in enforcement actions would be eliminated. This structure would resemble the regulatory structure for food labeling, whereby the FTC attempts to engage in enforcement activities that are consistent with FDA standards.

EPA is better suited than the FTC to issue binding regulations because, unlike the FTC, EPA is not constrained by a rigid and over-formalized rulemaking process. Since the passage of the Magnuson-Moss Act in 1975, the FTC’s rulemaking ability has been hobbled by a series of restrictive requirements mandating the use of hybrid rulemaking procedures and extensive preliminary and final cost-benefit analyses of all new rules. It is not

165. Assessing product degradability and compostability, and determining equitable methods for measuring recycled content and defining recycling rates, for example, are highly technical enterprises. For an illustration of the debate over the measurement of the percentage of recycled content of paper, see EPA DRAFT REPORT BY ABT ASSOCIATES, supra note 28, at 97.


168. EPA recently issued a rule under the Clean Air Act Amendments of 1990 requiring that products manufactured with or containing class I substances (chlorofluorocarbons (CFCs), halons, carbon tetrachloride, methyl chloroform) and containers containing class I or class II substances (hydrochlorofluorocarbons (HCFCs)) bear a “clearly legible and conspicuous” warning statement. See Protection of Stratospheric Ozone, 58 Fed. Reg. 8136 (1993) (to be codified at 40 C.F.R. pt. 82). The rule also requires that products manufactured with or containing class II substances must contain warnings after May, 1993 if the EPA Administrator determines that safe alternatives are available, and that products manufactured with or containing class I or class II substances must be labeled after Jan. 1, 2015. Id. at § 82.102 (a)-(b). The warning statements may be included in supplemental printed materials as an alternative to labeling products directly, as long as the statements are conspicuous and clearly legible to consumers at the time of purchase. See EPA, Stratospheric Protection Division, Final Labeling Rule, Fact Sheet, Section 611 of the Clean Air Act Amendments of 1990 4 (Feb. 3, 1993).

169. EPA follows the informal rulemaking procedures specified under § 553 of the APA. See supra note 117.

surprising that the FTC has largely abandoned rulemaking since the 1970s\textsuperscript{71} and that the Commission has issued fewer than ten trade regulation rules in the past twelve years.

Detailed, binding rules are a prerequisite to establishing minimum threshold requirements and even to securing accurate affirmative disclosures. EPA’s environmental policy mandate, technical expertise, and regulatory experience make it well suited to set the standards for environmental marketing.

E. The Preemption Question: Two Competing Visions

As the FTC guidelines explicitly state, voluntary guidelines cannot preempt state or local environmental laws and regulations.\textsuperscript{72} By contrast, a binding statute would have preemptive power, if Congress so chooses.\textsuperscript{73} Therefore, one of the most important and challenging decisions for the authors of a new environmental marketing statute is whether and to what extent the new law should preempt the regulatory activities of states and localities.

\textsuperscript{71} The Commission to graft additional procedures onto the customary informal rulemaking procedures of §553 of the APA. See, e.g., Koch & Martin, supra note 62, at 279-91; see generally BARRY B. BOYER ET AL., TRADE REGULATION RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION: A REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1979). The FTCIA established a “hybrid rulemaking” procedure requiring the agency to incorporate trial-like elements into the rulemaking process. After publication of a final notice of proposed rulemaking, interested parties are allowed to request a right of cross-examination during the oral hearing stage of the proceeding. Other interested parties are allowed to offer rebuttal submissions. Koch & Martin, supra note 62, at 286-87. In 1980, Congress amended the FTCIA and further modified the FTC trade regulation rulemaking process. Federal Trade Commission Improvement Act of 1980, 15 U.S.C. §§ 57(a)(1), 57(b)(1)-(4), 57(c) (1988); Koch & Martin, supra note 62, at 287-91. The Act requires the FTC to prepare and publish a preliminary regulatory analysis of the proposed rule, and outline the perceived benefits and detriments of the rule for industry and the public. The Act also directs the Commission to delineate reasonable alternatives to the proposed rule. The analysis must include an explanation of the reasons the final alternative was chosen, a summary of the significant issues raised during the rulemaking proceeding, and the agency’s responses. Id. at 288. In addition to these required procedures, the scope of the review of FTCIA rulemaking is more stringent than that which is normally applied to §553 rulemaking under the APA. When examining an FTCIA rule, a reviewing court will apply a “substantial evidence,” rather than an “arbitrary and capricious,” standard of review. Id. at 287.

The only means of circumventing these procedures is for Congress to direct the FTC to issue particular rules following APA procedures. Congress recently directed the agency to follow APA rulemaking procedures to implement the Telephone Disclosure and Dispute Resolution Act of 1992, Pub. L. No. 102-556 (1992).

\textsuperscript{72} See supra note 140.

\textsuperscript{73} Federal legislation will preempt state law if the statute specifies preemption, or if preemption is implicit in the statute’s structure and purpose. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). In the absence of express preemptive language, congressional intent to preempt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to allow for a reasonable inference that Congress left no room for supplementary state regulation. Hillsborough County, Fla. v. Automated Medical Lab., Inc., 471 U.S. 707, 714 (1985). Where Congress has not completely displaced state regulation in a specific area, state law is nonetheless preempted to the extent that it actually conflicts with federal law. This may occur when compliance with both federal and state law is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. E.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
Strong arguments exist on both sides of the preemption issue. On the one hand, blanket federal preemption would provide a consistent regulatory structure for national and international manufacturers, arguably providing greater incentives for environmental labeling and ultimate improvements in product design. On the other hand, several states have been more active and innovative than the federal government in the area of environmental and consumer protection, and arguably should not be prevented from crafting more stringent environmental labeling regulations.

The problem is that the dual goals of national uniformity and state autonomy, while both laudable, are not entirely compatible. These two competing visions are regularly juxtaposed in the current discussion of environmental labeling regulation. For example, in 1991, a coalition of state prosecutors, led by the Task Force of State Attorneys General, issued a clarion call for a national regulatory structure for environmental labeling. At the same time, however, the Task Force stated that “[t]he states would...vigorously oppose any statute or regulation that proposes preemption of states’ rights in this area.”

Some states enjoy a significant advantage over federal regulators in terms of prosecutorial power. For example, while the false advertising laws of some states employ administrative cease and desist orders, requiring two adjudications prior to the imposition of penalties, the laws of other states allow for immediate civil sanctions. Unlike the federal FTC Act, several state consumer protection statutes authorize private rights of action, and some authorize class actions. Moreover, several state laws assert broader jurisdictional power than does the FTC Act, conceivably allowing these states to regulate nonprofit organizations. And several states hold manufacturers to a stricter standard of review for deceptiveness than is required at the federal level. For example, although the FTC in 1984 stated in Clifdale that a deceptive representation must be “likely” to mislead a “reasonable consumer,” certain states have

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174. See supra notes 85-88 and accompanying text.
176. Id. at 2. In testimony before the Senate Subcommittee on Environmental Protection, the Environmental Defense Fund argued in favor of state autonomy:
From the perspectives of both consumer protection and environmental regulation and policy, state authority to take actions that go beyond the “floor” established by federal agencies is critical to ensure full enforcement and to account for state and local needs and priorities which may vary from those perceived by or facing federal agencies.

Environmental Defense Fund Senate Testimony, supra note 3, at 17.
177. PLEVAN & SIROKY, supra note 63, at 352-53.
178. Id. at 344-45. These may provide for several forms of relief, including injunctions, damages, and attorneys’ fees.
179. Id. at 346-47.
nevertheless continued to use the earlier Aronberg standard, by which representations are judged deceptive if they have the "capacity or tendency" to deceive even "the ignorant, the unthinking and the credulous." 182

State prosecutors have recently mounted multistate attacks on deceptiveness in environmental advertising. These concerted efforts can pose a significant threat to manufacturers that are required to litigate on several fronts simultaneously. For example, ten states brought individual suits against American Enviro Products for its claims concerning the biodegradability of Bunnies diapers in 1990, a full year before the FTC took action against the company. 183 Also in 1990, the State of California sought to enjoin Mobil Chemical Company from knowingly asserting false biodegradability claims about Hefty trash bags. 184 Six other states ultimately joined in the suit. 185

Despite the advantages of state prosecution, a nationwide regulatory structure is essential to send a uniform message to advertisers and to provide minimum standards for those states with less active enforcement records. Various positions on preemption have begun to crystallize in proposed federal legislation. The Environmental Marketing Claims Act of 1991, S. 615, would not have preempted more stringent state environmental marketing standards:

Nothing in this act shall be construed so as to prohibit a State from enacting and enforcing a standard or requirement with respect to the use of an environmental marketing claim that is more stringent than a standard or requirement relating to an environmental marketing claim established or promulgated under this Act. 186

By contrast, the most recent House bill, H.R. 3865, would have explicitly preempted state standards for which a federal counterpart existed. 187

182. Telephone Interview with Albert Shelden, Deputy Attorney General, Consumer Law Section, State of California (Jan. 6, 1992). The FTC's pre-Cliffdale standard was enunciated in Aronberg v. Fed. Trade Comm'n, 132 F.2d 165, 167 (7th Cir. 1942) ("The law is not made for experts but to protect the public, that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions."). In Cliffdale, the Commission limited the relevant class of consumers from "that vast multitude which includes the ignorant, the unthinking and the credulous" to only those consumers "acting reasonably under the circumstances." 103 F.T.C. at 164-65. Cliffdale also required that the representation be "likely" to deceive consumers, id., replacing the earlier view that an advertisement need only have the "tendency or capacity" to deceive. See, e.g., Federal Trade Comm'n v. Raladam Co., 316 U.S. 149, 151 (1942).

183. See, for example, the Assurance of Discontinuance signed October 12, 1990 by American Enviro Products, Inc. and the Attorneys General for California and nine other states.


187. The bill reads in pertinent part:

Effective on the date of promulgation of such regulations, no State or political subdivision of a State may establish or continue in effect any standard, criteria, or definition with respect to a type of environmental marketing claim unless such standard, criteria, or definition is identical to the
Perhaps Congress could enact a statute that would establish a federal structure but leave some autonomy to the states. Here again, an example from the food labeling experience may be instructive. The Nutrition Labeling and Education Act of 1990 created an innovative structure that requires federal preemption but grants exemptions to petitioning states for regulations that “(1) would not cause any food to be in violation of any applicable requirement under Federal law, (2) would not unduly burden interstate commerce, and (3) [are] designed to address a particular need for information which need is not met by [federal requirements].” Because the FDA has not yet held an exemption proceeding, the efficacy of this structure is difficult to predict. If a similar structure is implemented for environmental labeling, it should designate or establish a reviewing body and develop an appropriate standard of review to ensure that petitioning states are afforded a genuine opportunity to receive an exemption.

One additional compromise between state and federal authority would be to refrain from issuing federal definitions for terms connoting potentialities or capabilities, such as “recyclable,” “degradable,” and “compostable,” and leave such definitions to the states, at least until such time as accurate data on national recycling rates become available. State environmental labeling laws currently employ diverse definitions of such terms. For example, New York regulations limit the use of the term “recyclable” to materials for which at least “seventy-five percent of the population of the State” has access to recycling facilities, and the “Statewide recycling rate” is at least fifty percent. New Jersey prohibits manufacturers from claiming that their beverage containers are recyclable unless the state determines that practical and economically feasible recycling systems for the containers are available. Because unqualified claims of “recyclable” and “compostable” are arguably misleading when consumers lack access to requisite facilities, such terms may require state-level...
specificity.\textsuperscript{192} Prior to the development of uniform national recycling markets and infrastructure, federal definitions may be insufficiently fine-tuned to provide accurate consumer information.\textsuperscript{193}

F. Enforcement

If new federal environmental marketing legislation is enacted, states should be authorized to share enforcement authority.\textsuperscript{194} Joint federal-state enforcement would have two significant advantages. The obvious advantage is that it would supplement the federal prosecutorial workforce. Another advantage is that it could indirectly prompt federal activity. The threat of multiple state litigation might induce manufacturers to urge federal agency action as a preferable alternative.\textsuperscript{195}

Any new federal statute should also contain a citizen suit provision. The current vehicle for prosecuting environmental advertising, the FTC Act, contains no provision for citizen enforcement.\textsuperscript{196} New legislation should fill this gap by allowing any person to commence a civil action against any person or entity alleged to be in violation of the rules, or against the appropriate federal agency to compel its administrator to carry out the duties assigned to the agency under the statute.\textsuperscript{197} A citizen suit provision could liberate class plaintiffs from amount-in-controversy thresholds, notification requirements, and other current

\textsuperscript{192} The Northeast Recycling Council has proposed local, state, and regional options for the use of a recycling emblem:
- AT POINT OF PURCHASE: a shelf emblem states that an approved recycling program exists for that material category in the community where the product is labeled;
- STATEWIDE EMBLEMS: manufacturer must meet at least one of the following criteria in at least five NERC [Northeast Recycling Council states that, taken together, represent at least 75 percent of the region’s population):
  1. 75 percent of the communities or 75 percent of the population in the state have approved recycling programs for this material category; or
  2. the material category has achieved a greater than 50 percent recycling rate state-wide; or
  3. the brand-specific package or product has achieved a statewide recycling rate of more than 50 percent (by weight) for that product or package.

\textsuperscript{193} As an example of the problems that could result from unqualified federal “recyclable” claims, the appearance of the term “recyclable” on materials not acceptable in one state’s program could lead consumers to place nonrecyclable material in local collection facilities, impeding an otherwise successful recycling program. Environmental Defense Fund Senate Testimony, supra note 3, at 18.

It should also be noted that environmental priorities will vary among states. For example, California has a strong interest in water conservation, Mississippi faces landfill leachate problems, and Oregon must resolve forest conservation issues.

\textsuperscript{194} The proposed Environmental Marketing Claims Act would have granted enforcement power to the states. S. 615, 102d Cong., 1st Sess. § 10 (1991).
\textsuperscript{195} See supra notes 183-185 and accompanying text.
\textsuperscript{196} See supra note 64.
\textsuperscript{197} The Environmental Marketing Claims Act would have provided a citizen suit provision. S. 615, 102d Cong., 1st Sess. § 11(a) (1991).
barriers to federal actions. A statutory damages provision could be enacted that would offset the current low-damages deterrent to recovery in negligent misrepresentation suits. An additional aspect of enforcement that should not be overlooked is the administrative verification of manufacturer compliance. The federal regulatory scheme should include testing protocols along with new standards. Although the proposed Environmental Marketing Claims Act would have required manufacturers to certify their claims to the EPA Administrator, it did not specify the mechanisms for such certification. One possible approach would be to advise manufacturers to hire third-party certifiers to verify that claims comport with legislated definitions. This could encourage greater accuracy than would self-certification by manufacturers.

G. First Amendment Advantages of a Federal Statute

Certain manufacturers and industry groups, particularly those opposed to the more stringent minimum-threshold labeling laws enacted by several states, have raised First Amendment defenses and statutory challenges. For example, Mobil Chemical Corporation raised First Amendment arguments in defense of its degradability claims concerning Hefty trash bags. In February 1992, a coalition of industry trade associations and the California and U.S. Chambers of Commerce brought a suit challenging California's environmental marketing statute, in part claiming that it restricted nondeceptive speech and was

198. The current amount-in-controversy requirement for diversity cases is $50,000. See supra note 84.
199. See supra notes 70-84 and accompanying text.
202. Somewhat ironically, four of these organizations, along with other trade groups, had petitioned the FTC in 1991 to issue guidance pertaining to deceptive environmental advertising. NATIONAL FOOD PROCESSORS ASS'N, supra note 94, at 1. In the 1991 petition, coalition members acknowledged that the use of the term "recycled" can be misleading unless a substantial portion of the product is made from recycled materials. Id. at 3. The coalition further acknowledged that unqualified "recyclability" claims can be deceptive if recycling facilities are largely unavailable. Id. at 6. The groups had expressed support for "industry guides", similar to those recently enacted by the FTC, for which compliance would be entirely voluntary. The groups opposed restrictions that would have the force of law.
203. Plaintiffs' Complaint for Declaratory and Injunctive Relief, Association of National Advertisers v. Lundgren (N.D. Cal. Feb. 5, 1992) (hereinafter Complaint) (co-petitioners included the Grocery Manufacturers of America, the Soap and Detergent Association, the National Food Processors Association, the Society of the Plastics Industry, the American Paper Institute, the California Chamber of Commerce, and the U.S. Chamber of Commerce).

Count One of the complaint stated, in part:

Section 17508.5 impermissibly restricts plaintiffs' members' non-commercial speech intended, inter alia, to educate consumers about the availability of recycling to control solid waste, to induce them to petition their governments to establish local recycling programs, and to otherwise speak on matters of disputed policy and public concern. In doing so the statute violates the First Amendment to the United States Constitution, as made applicable to the states through the Fourteenth Amendment.

Section 17508.5 impermissibly restricts plaintiffs' members' truthful and non-deceptive
unconstitutionally vague.\textsuperscript{204}

Interesting questions in the environmental labeling debate are whether, and to what extent, the First Amendment could have an impact on statutory definitions of environmental marketing terms, or on the penalties prescribed by statute for labeling violations. The profitability of green marketing suggests that advertisers may be more likely to bring First Amendment suits against environmental labeling laws than against other kinds of labeling regulations.\textsuperscript{205} Although precedent indicates that such First Amendment claims are unlikely to succeed, certain doctrines, such as the vagueness doctrine, are less settled and could affect certain aspects of the drafting of new statutes.\textsuperscript{206} The case law indicates that state laws may be more vulnerable to vagueness challenges than are federal laws. The statutes of states with the largest markets for environmentally sensitive products, such as California, are likely to attract more legal challenges than are those of other states.\textsuperscript{207} Although state labeling laws are likely to survive these challenges, First Amendment suits, whether well intentioned or designed merely to impede legislative efforts, may provide an additional incentive for enacting federal environmental labeling legislation.\textsuperscript{208}

\textsuperscript{204} See, e.g., Miranda Ewell, “Green Marketing” Law in Court, \textit{San Jose Mercury News}, Sept. 18, 1992, at 3B.

\textsuperscript{205} In the recent decision pertaining to California’s environmental labeling law, \textit{Association of Nat’l Advertisers v. Lundgren}, the U.S. District Court for the Northern District of California upheld the statute on First Amendment grounds but struck down one portion as unconstitutionally vague. No. 92-0660 MHP, slip. op. at 28-29 (N.D. Cal. Dec. 23, 1992). According to the court, the statutory definition of “recyclable,” which prohibited the use of claims unless a product could be “conveniently” recycled in every populous California county, did not provide fair notice to advertisers. \textit{Id.}

\textsuperscript{206} See \textit{infra} notes 255-58 and accompanying text.
1. **Labeling Laws and Legal Precedent**

Apart from the vagueness question, discussed below, the First Amendment should not present a major barrier to environmental labeling statutes at either the state or federal level. The durability of existing labeling rules suggests that courts generally defer to regulatory limitations on commercial speech that fall short of comprehensive bans on advertising.\(^{209}\)

The Nutrition Labeling and Education Act provides an example of a rigorous federal labeling law that contains more stringent restrictions than any yet proposed in the environmental advertising context.\(^{210}\) In some provisions, the Act essentially compels speech by requiring manufacturers who advertise certain health claims to disclose detrimental ingredients along with those claims.\(^{211}\) As discussed earlier, the Act also prohibits the use of "descriptors" such as "free," "low," and "lite," as well as other nutrient claims, unless the use comports with FDA definitions. Congress has further directed the agency to pre-approve any synonyms for these terms.\(^{213}\)

Other federal labeling requirements are similarly stringent. For example, the Department of Agriculture (USDA) maintains a longstanding practice of pre-approving all aspects of meat labels.\(^{214}\) USDA regulations prohibit use of the word "fresh" for products containing any sodium nitrate, potassium nitrate, potassium nitrite, or preservative salts.\(^{215}\) The agency has specified precise requirements for the use of "spring lamb" and other phrases describing meat products.\(^{216}\) The Organic Foods Production Act authorizes the USDA to enact mandatory production standards and pre-approve all foods labeled

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\(^{209}\) See supra notes 237-43 and accompanying text.


\(^{211}\) The Act prohibits claims of "low cholesterol" or high dietary fiber if a food contains high levels of fat, unless the label prominently discloses the level of the fat in immediate proximity to the low-cholesterol or high-dietary-fiber claim. Id. § 343(r)(2)(A)(iii). Notice of the fat content must be printed in no less than half the size of the cholesterol claim. Id. The Act also prohibits claims that a food is high in dietary fiber if the food is also high in total fat, unless the level of fat is prominently disclosed in immediate proximity to the dietary fiber claim. Id. § 343(r)(2)(A)(v).

\(^{212}\) Id. § 343(r)(2)(A)(i).

\(^{213}\) 56 Fed. Reg. 60,432 (1991). The Grocery Manufacturers of America is one group which has submitted a proposed list of synonyms for FDA approval. The proposed synonyms for "very low" included "dab," "dash," "touch," "smidgen," "tinge," and "pinch." Id. at 60,431-32. Interestingly, although the Grocery Manufacturers of America appears to be cooperating with the FDA's preapproval requirements for food labeling, it is among the industry groups that sued the State of California to challenge its environmental labeling law.

\(^{214}\) USDA regulations specify that "[n]o labeling shall be used on any product until it has been approved in its final form by the Administrator." 9 C.F.R. § 317.4(a) (1992).

\(^{215}\) Id. § 317.8(b)(6).

\(^{216}\) The agency prohibits the use of the terms "spring lamb" or "genuine spring lamb" unless animals have been slaughtered "during the period beginning in March and terminating not beyond the close of the week containing the first Monday in October." Id. § 317.8(b)(4).
"organic."\(^{217}\) The FTC prohibits the use of the term "re-refined," as well as synonyms, to describe motor oil, unless contaminants acquired through previous use have been removed by a refining process.\(^{218}\) The Magnuson-Moss Act requires detailed affirmative disclosures for product warranties,\(^{219}\) and the FDA extensively regulates all aspects of drug-labeling.\(^{220}\)

Since the Supreme Court first recognized some measure of First Amendment protection for commercial speech in 1976,\(^{221}\) the Court has repeatedly emphasized that this protection is more limited than the protection of non-commercial speech.\(^{222}\) Several aspects of traditional First Amendment doctrine

\(^{217}\) Organic Foods Production Act of 1990, 7 U.S.C. § 6501.\((1990).\) The law authorizes the Secretary of Agriculture to establish an organic certification program and permits the states to implement identical or more stringent programs, subject to USDA approval. In order to be sold or labeled as an organically produced agricultural product, the product: (1) must not have been produced or handled with synthetic chemicals; (2) must not be produced on land to which any prohibited substances, including synthetic chemicals, have been applied in the 3 years immediately preceding the harvest of the product; and (3) must be produced and handled in compliance with an organic plan agreed to by the producer and handler of such product and a USDA or federally-approved state certifying agent. Id. § 6504.

\(^{218}\) 16 C.F.R. § 406.3(c) (1991). The regulations also require that lubricating oil containers be labeled on their front face panel:

> In view of all the circumstances, the Commission concludes that in order for the disclosure required by this part to be clear and conspicuous, it should be placed on the front or face panel of each container. If the container has more than one panel similarly designed as a front or face panel the required disclosure should be placed on each such panel.

Id.

\(^{219}\) Regulations under Rule 701 of the Magnuson-Moss Act establish standards for disclosure of written warranty terms for consumer products costing more than $15, and require that such warranties clearly and conspicuously disclose the following items of information in a single document:

1. The identity of the party to whom the written warranty is extended ... .
2. A clear description and identification of products, or parts or characteristics ... covered ... [and] excluded by the warranty;
3. A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with the written warranty ... .
4. The point in time or event on which the warranty term commences, if different from the purchase date . . . .
5. A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation . . . .
6. Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor . . . .
7. Any limitations on the duration of implied warranties, ... accompanied by the statement: "Some States do not allow limitations on how long an implied warranty lasts, so the above limitations may not apply to you."
8. Any exclusions of or limitations on relief such as incidental or consequential damages, accompanied by the following statement: ... . "Some States do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you."
9. A statement in the following language: "This warranty gives you special rights, and you may also have others which vary from State to State."


\(^{222}\) For example, in Virginia State Bd. of Pharmacy, 425 U.S. at 748, the court noted: "Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper
may not apply in the commercial context. For example, courts have consistently excluded overbreadth analysis from commercial speech cases, and the doctrine of prior restraint has been held inapplicable as well.

Well-conceived environmental labeling regulations would likely meet the four part test established by the Supreme Court in Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n. of N.Y. First, Central Hudson and its progeny have established that deceptive commercial speech is beyond the reach of the First Amendment. Marketing terms implying general environmental benefits, such as "environmentally friendly," are arguably deceptive per se. All consumer goods incur environmental costs.

Second, the Court will give considerable deference to the regulation of potentially misleading speech. In a 1979 case, Friedman v. Rogers, the Supreme Court upheld a complete ban on the use of trade names in optometrists' advertisements because of the "possibilities for deception." A regulator's effort to draw the line between deceptive and nondeceptive advertising is part of a greater mission to prevent deceptive speech. Preventing such speech would regulate."

Id. at 771, n.24. Likewise, in Friedman v. Rogers, 440 U.S. 1 (1979), the Court emphasized the importance of regulating commercial activity in spite of speech-related components: "By definition, commercial speech is linked inextricably to commercial activity. . . . The State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." Id. at 10-11 n.9 (quoting Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 456 (1978)).

225. As the Court asserted in Friedman, 440 U.S. at 1: "Our decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area." Id. at 10 n.9.

226. In Bates v. State Bar of Arizona, the Court excluded the doctrine of overbreadth: "Since [the] overbreadth doctrine has been described by this Court as 'strong medicine,' which 'has been employed . . . sparingly and only as a last resort,' we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective." 433 U.S. 350, 381 (1977) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)); see also Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 504 n. 11 (1981); Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980); Friedman v. Rogers, 440 U.S. 1, 11 n. 9 (1979); Ohralik v. Ohio State Bar Association, 436 U.S. 447, 462 n. 20 (1978). The Court reaffirmed the Bates position on overbreadth in Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, stating that "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" 447 U.S. 557, 564 n.6 (1980).

227. Id. at 563. 447 U.S. at 557 (1980). The four-part test established in Central Hudson consists of the following: (1) commercial speech is unprotected if it is misleading or if it concerns unlawful activity: "The government may ban forms of communication more likely to deceive the public than to inform it," id. at 563 (citing Friedman v. Rogers, 440 U.S. 1, 13, 15-16 (1979)); (2) if the speech is not misleading, the regulation must be premised on a substantial governmental interest, id. at 566; (3) the regulation must "directly advance the governmental interest asserted"; and (4) be "not more extensive than is necessary to serve that interest," id.

228. 440 U.S. at 13; see also Young v. American Mini Theatres, Inc., 427 U.S. 50, 68 (1976) ("If regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive."). According to Virginia State Bd. of Pharmacy, "much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the streams of commercial information flow cleanly as well as freely." 425 U.S. at 771-72 (citations omitted).
clearly qualify as a substantial governmental interest. If a legislature assigns
the line-drawing task to an executive agency, the holding in *Chevron U.S.A.
Inc. v. Natural Resources Defense Council, Inc.* indicates that the courts would
deer to the agency and its expertise. 229

Third, labeling laws that explicitly aim to promote environmental policy are
likely to withstand First Amendment challenges. 230 According to *Central
Hudson*, the government may regulate commercial speech for purposes other
than limiting false or misleading information as long as the interest is sub-
stantial. 231 The Supreme Court has refused to strike down commercial speech
regulation on the grounds of insubstantial governmental interest, 232 and has
shown considerable deference to a wide range of legislative goals. 233 In a
1989 case, *Board of Trustees v. Fox*, 234 the Court held that curbing speech
to accomplish a legitimate governmental goal is permissible as long as the
regulator can show a reasonable connection between the law and its stated
purpose. 235 *Fox* established that the means-end fit requirement of *Central
Hudson*, though somewhat more than a rationality test, does not require a direct
advancement of the governmental interests asserted. 236

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230. For example, the Environmental Marketing Claims Act of 1991 represented an effort to promote
environmental policy. The stated goals of the bill were to prevent the use of “fraudulent, deceptive, and
misleading environmental marketing claims” as well as to “encourage both consumers and industry to adopt
habits and practices that favor natural resource conservation and environmental protection.” S. 615, 102d
Cong., 1st Sess. § 2(b)(5) (1991). Likewise, the FDA’s goals in regulating nutrition claims went beyond
the prevention of consumer deception. According to FDA Commissioner David Kessler:

The goal is simple; a label the public can understand and count on—that would bring them
up-to-date with today’s health concerns. It is a goal with three objectives: First, to clear up
confusion; second, to help us make healthy choices; and third, to encourage product innovation,
so that companies are more interested in tinkering with the food in the package, not the words
on the label.

FOOD AND DRUG ADMINISTRATION, FDA BACKGROUNDER 1 (Nov. 1991).

231. 447 U.S. at 564.
232. The Court has generally based invalidations on grounds of inadequate means-end fit between
regulations and governmental goals. Even this requirement, however, has been substantially limited by
Board of Trustees, University of New York v. Fox, 492 U.S. 469 (1986). See infra note 236.
233. For example, in *Posadas de Puerto Rico Ass’n v. Tourism Co. of Puerto Rico*, 478 U.S. 328
(1986), the Court upheld a complete ban on casino advertising aimed at Puerto Rican residents without
challenging the legislature’s stated interest in protecting Puerto Rican citizens from pecuniary losses. Id.
at 344. The Court dismissed the challengers’ argument that the legislature could have promulgated
additional speech designed to discourage gambling, stating that “it is up to the legislature to decide whether
or not such a ‘counterspeech’ policy would be as effective.” Id. In *San Francisco Arts & Athletics, Inc.
v. United States Olympic Comm.*, 483 U.S. 522 (1987), the Court deferred to a legislative interest in
promoting U.S. Olympic Committee activities, upholding a statute banning the unauthorized use of the term
“Olympic” to promote athletic events. Id. at 539.

235. According to *Fox*, the regulation must provide more than ineffective or remote support for the
determined that, as long as the fit is reasonable, it will defer to the legislature’s choice of the measure
to be employed. Id. at 79.
236. The Court described the test as follows:

What our decisions require is a “fit” between the legislature’s ends and the means chosen to
accomplish those ends—a fit that is not necessary perfect, but reasonable; that represents not
necessarily the single best disposition but one whose scope is “in proportion to the interest
Finally, environmental labeling restrictions are clearly a "less restrictive means" of achieving an explicit governmental interest. According to Central Hudson, commercial speech regulations must be "no more extensive than necessary" to serve the government interests asserted.237 Fox made it clear that "least restrictive" alternatives are not required in commercial speech cases.238 Where the Court has overturned regulations restricting speech in the past, these regulations generally have banned certain forms of advertising entirely. For example, in Virginia Pharmacy Board v. Virginia Citizens Consumer Council, the Court struck down a law prohibiting all pharmacists from advertising the prices of prescription drugs.239 In Central Hudson, the Court struck down an outright ban on all advertising by an electric utility.240 In so doing, however, the Court recommended several intrusive alternatives which it considered to be "no more extensive than necessary" for accomplishing the government's purpose of promoting energy conservation. One "less restrictive" option was a system of prescreening and pre-approval of advertising campaigns.241 Other suggestions included imposing format and content restrictions on electric utility advertisements and compelling certain disclosures.242 The intrusiveness of these alternatives suggests that the Court is likely to tolerate significant regulatory incursions into commercial speech.

Labeling laws that establish minimum thresholds for recycled material in products labeled "recycled" are far less restrictive than command-and-control minimum content laws that require manufacturers to meet or exceed designated percentages of recycled material in their products.243 A number of states already have examples of such command-and-control laws on their books. California imposes certain minimum content requirements for various materials such as glass,244 newsprint,245 plastic containers,246 and fiberglass.247

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242. For example, the Court recommended regulations requiring "that the advertisements include information about the relative efficiency and expense of the offered service, both under the current conditions and for the foreseeable future." Id. at 571.
243. See supra note 142 for a brief description of the difference between minimum content and minimum threshold laws.
245. Id. § 42756.
Unlike minimum content laws, labeling laws encourage, but do not force, changes in manufacturing behavior. Manufacturers are required to comply with labeling requirements only if they choose to make environmental claims for their products. Therefore, although labeling requirements are a less direct means of achieving environmental goals than are minimum content requirements, they are far less restrictive and possess a sufficient nexus between goals and means to pass constitutional muster.

2. The Specificity-Vagueness Paradox

One of the practical problems posed by drafting environmental labeling regulations is that the regulatory program may become more susceptible to facial vagueness challenges as definitions become more specific. The reason for this is that, to prevent advertisers from circumventing requirements by using synonyms for regulated terms, drafters may need to incorporate general language that will encompass like terms not specifically defined in the regulations. For example, as noted earlier, the FDA’s Nutrition Labeling and Education Act of 1990 specifies that regulated terms may include “similar terms which are commonly understood to have the same meaning” as those described in the statute. Courts should be aware that labeling laws may need to include general language such as this to be effective. Otherwise, drafters of environmental labeling regulations could face a dilemma whereby any rigorous definitions could be evaded by advertisers using synonymous terms, and any blanket language would be met by vagueness challenges. The rationale behind vagueness claims is that the wording of an ambiguous statute does not provide fair notice of potential legal action. Vagueness challenges to statutes authorizing the imposition of criminal sanctions receive closer scrutiny than those authorizing civil sanctions because the consequences

246. Id. § 41970.
247. Id. § 19500.
248. See supra note 204 for an account of the vagueness claims in the lawsuit against California’s environmental labeling statute.
250. In Ass’n. of Nat’l Advertisers v. Lundgren, No. 92-0660 MHP, slip. op. (N.D. Cal. Dec. 23, 1992), the district court adopted a reasonable position on this issue. Although the court struck one portion of California’s statute on vagueness grounds, it rejected plaintiffs’ other vagueness claim regarding the statute’s prohibition on the unqualified use of “‘ozone friendly’... ‘or any like term’... ‘which connotes that the stratospheric ozone is not being depleted.’” Id. at 28 (emphasis added). According to the decision, the definition of “‘ozone friendly’ is comprehensible on its face. The phrase ‘or any like term’ is not ambiguous; it clearly refers to the modifying phrase ‘which connotes that the stratospheric ozone is not being depleted.’” Id. at 28.
251. The case law pertaining to noncommercial speech indicates that a statute is unconstitutionally vague when “men of common intelligence must necessarily guess at its meaning.” Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973) (citing Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). However, the chilling effect caused by an overly vague statute must be both real and substantial before a court will set it aside. See Young v. American Mini Theatres, 427 U.S. 50 (1976).
of ambiguity are more severe.\textsuperscript{252}

The status of the vagueness doctrine is unsettled in the commercial speech context. The Supreme Court has indicated that the judicial test for vagueness is at its most lenient when purely economic regulations are challenged.\textsuperscript{253} The Court applies a more stringent test for regulations that could threaten a constitutionally protected right, such as free speech.\textsuperscript{254} Because commercial speech falls somewhere between an economic activity and a fully protected fundamental right, the appropriate vagueness analysis is uncertain.

Precedent suggests that a federal environmental labeling statute may be less vulnerable to vagueness challenges than would state laws. Federal courts generally defer to Congress as a "co-equal branch"\textsuperscript{255} by narrowly construing federal statutes in an effort to uphold their constitutionality.\textsuperscript{256} Recent case law indicates that a similar narrowing construction may not be required for state statutes.\textsuperscript{257} Also, federal legislation generally is accompanied by a substantial body of legislative history which could serve to clarify ambiguous statutory

\textsuperscript{252} See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982); see also Kolender v. Lawson, 461 U.S. 352, 357 (1982) (stating that a statute which provides for criminal penalties must "define the criminal offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"); United States v. Harris, 347 U.S. 612, 617 (1954) ("[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."). In Ass'n of Nat'l Advertisers v. Lundgren, the court based its vagueness ruling largely on the fact that the California labeling law provided immediate criminal penalties for violations: "Due to the potential for criminal sanctions, including incarceration, the absence of any standard for 'conveniently recycled' wrecks this portion of section 17508.5 on the shoals of vagueness." No. 92-0660 MHP, slip. op. at 29 (N.D. Cal. Dec. 23, 1992).

\textsuperscript{253} According to Hoffman Estates, "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." 455 U.S. at 498 (footnotes omitted).

\textsuperscript{254} "Perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." Id. at 499.

\textsuperscript{255} The Supreme Court has declared that "[w]hen we are required to pass on the constitutionality of an Act of Congress, we assume, the gravest and most delicate duty that this Court is called on to perform, ... yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch ... ." Fullilove v. Klutznick, 448 U.S. 448, 472 (1979) (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1923)).

\textsuperscript{256} See, e.g., St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1980) ("A statute is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality"); United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1970) ("On the other hand, we must remember that when the validity of an act of the Congress is drawn in question ... it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)); Screws v. United States, 325 U.S. 91, 98 (1944) ("This Court has consistently favored that interpretation which supports [a federal statute's] constitutionality.").

\textsuperscript{257} For example, in Boos v. Barry, 486 U.S. 312 (1988), the Court noted that "[a]lthough in some cases courts may be required to consider the constitutionality of a state statute unless such a construction is reasonable and readily apparent ... . It is well settled that federal courts have the power to adopt narrowing constructions of federal legislation." Id. at 330-31.
The ultimate effect of vagueness challenges at the state level may depend on the nature of state severability rules. Where severability is applied, if a statute can stand alone in the absence of unconstitutional portions, reviewing courts will remove those portions without striking down the statute as a whole.

Although most labeling laws are likely to withstand vagueness challenges, drafters can take precautions by favoring civil over criminal sanctions, and more specifically, by avoiding criminal sanctions for first offenses or unknowing violations. The judicial practice of adopting narrowing constructions for federal statutes suggests that a federal labeling law would be less susceptible to time-consuming First Amendment suits than would state laws. This factor could serve as an additional incentive to enact a new federal environmental labeling statute.

III. Current Statutory and Legal Framework for Third-Party Environmental Certification

Parts I and II discussed one problem currently confronting consumers in the green marketplace: manufacturers are making misleading claims about recycled content, degradability, and other environmental attributes of their products and packaging. Federal legally binding standards are needed to give meaning to environmental advertising claims. Only accurate information will allow consumer choice to stimulate genuine environmental improvements in product design, manufacture, and packaging. I have characterized the necessary regulatory program as the "stick" approach.

Parts III, IV, and V address a second problem that erodes consumer confidence in assessing the environmental compatibility of products: the value of information about benign product attributes is frequently undercut by the nondisclosure of harmful tradeoffs. For example, even if an advertiser truthfully

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258. In Ass'n of Nat'l Advertisers v. Lundgren, the court noted the lack of legislative history accompanying California's environmental marketing statute as one factor in its determination that the term "conveniently recycled" was unconstitutionally vague: 

[The statute offers no guidance as to what recycling programs satisfy the 'conveniently recycled' requirement. Section 17508.5(d) refers to section 40810 of the Public Resources Code which unambiguously defines 'recycled.' However, an equally lucid explication of 'conveniently' is wanting. Nor is there any legislative history extant to provide the court with guidance. No. 92-0660 MHP, slip. op. at 28-29 (N.D. Cal. Dec. 23, 1992).]

259. For example, in California, a portion of a statute may be severed from the rest of the statute if the remainder "is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute." Santa Barbara School District v. Superior Court, 530 P.2d 605, 618 (1975) (quoting In re Bell, 122 P.2d 22, 28 (Cal. 1942)). In Ass'n of Nat'l Advertisers v. Lundgren, the court severed the unconstitutional phrase while upholding the statute as a whole. No. 92-0660 MHP, slip. op. at 30 (N.D. Cal. Dec. 23, 1992).
certified green asserts that a package is made from 30% post-consumer recycled material, the package may nevertheless be made with chlorinated bleaches or contain toxic additives. Consumers are unable to evaluate the multiple environmental impacts of the goods they purchase.

Because manufacturers are unlikely to possess the motivation or expertise to assess the full environmental implications of their products, certain foreign governments and private U.S. companies have developed certification programs that test products for a broad range of environmental attributes. If operated effectively, these programs could provide incentives for manufacturers to develop products that excel in a number of different areas. Ultimately, these certification programs could also provide a systematic format for prioritizing and evaluating the relative significance of positive and negative environmental attributes. Because this type of program aims to reward manufacturers who develop environmentally exemplary products, I have referred to this as the "carrot" approach. Due to trademark registration restrictions and fairness considerations, incentive-based environmental certification programs should be implemented by neutral third parties, that is to say, parties independent of manufacturers, retailers, and any other organizations in the traditional stream of commerce.

Part III illustrates that the current legal and regulatory framework for environmental certification is inadequate to ensure that certifiers will develop credible programs and maintain rigorous standards. Solutions to the problem of developing effective certification programs, however, are different from the solutions to the environmental advertising problems discussed in Parts I and II. First, in contrast to environmental advertising, environmental certification is currently in its earliest growth phase, with only a few U.S. companies participating. The introduction of a comprehensive regulatory program would therefore be premature and perhaps ultimately unnecessary if the number of certification firms remains small. Second, because a certification program might reward only a small fraction of manufacturers of a given product, industry pressure could ultimately reduce the strength of any governmental product evaluation standards.

Nevertheless, certain steps should be taken to ensure credibility and rigor in certification programs. As a result of shortcomings in the current regulatory framework, citizen watchdog groups should be vigilant and private certifiers should self-regulate. Voluntary guidelines, industry self-regulation, and scrutiny by public interest groups could be more effective in third party certification programs.
than in the advertising context. If the above measures fail to ensure that private certifiers develop credible programs, however, government oversight or a joint government-private program may become appropriate.

In addition to the need for new mechanisms to encourage openness and integrity in standard-setting and comparative evaluation techniques, two of the greatest challenges at the present time are selecting an optimal ownership and organizational structure and developing an appropriate methodology for product evaluation. Part IV examines alternative structures and recommends certain procedural safeguards for enhancing the effectiveness of U.S. certification firms. Part V examines the value and limitations of life-cycle analysis, and illustrates certain practical constraints that make the current technique too dependent upon assumptions to serve as an accurate and reliable basis for consumer product comparisons. The concluding section of Part V describes a more circumscribed and practical approach to product evaluation for environmental certification.

A. Evaluating the Evaluators: Certifier Liability and the FTC Act

Because third-party environmental certification is in an embryonic phase, the FTC has not intervened in its activities. The agency has occasionally monitored other kinds of third-party certification organizations. Jurisdictional questions and the limits of the agency’s mandate, however, may deter the FTC from ensuring that certifiers maintain rigorous product evaluation standards.

1. Good Housekeeping, Bad Certification

An early case against a non-environmental third-party certifier illustrates that the FTC is capable of influencing certain aspects of certifier behavior. In 1941, the FTC issued a cease and desist order against Good Housekeeping for failing to back its seal of approval with adequate product testing. The Commission also alleged that the wording of the consumer guaranty stated in Good Housekeeping wrongfully caused consumers to believe that the guaranty was unlimited. The FTC required that any limitations on the guaranties be “explicitly stated in immediate conjunction with all such representation of guaranty.” Since 1941, Good Housekeeping has narrowed its promises to avoid

261. See infra notes 374-401 and accompanying text.
262. In re Hearst Magazines, Inc., 32 F.T.C. 1440 (1941). The agency ordered the company to refrain from using seals connoting product evaluation, unless testing actually had occurred. “In truth and in fact, all the articles advertised in Good Housekeeping magazine, and all the articles carrying the various seals authorized by Good Housekeeping magazine, have not been tested and approved by any scientific laboratory...” Id. at 1448.
263. Id. at 1457.
264. Id. at 1463.
legal and regulatory action. The *Good Housekeeping* seal is now a shadow of its former self; it has become a limited warranty, promising nothing more than a consumer refund for defective products.\(^{265}\)

The FTC’s vigilance over *Good Housekeeping* may have limited relevance for environmental certifiers, however, particularly if certifiers are organized on a nonprofit basis. The FTC does not have clear authority to regulate nonprofit organizations.\(^{266}\) As the certification industry grows, companies are likely to

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265. As a result of the FTC’s 1941 cease and desist order, the seal of approval’s “Tested and Approved” language was replaced by a “Guaranty Seal” which made no reference to testing, but promised instead “Replacement or Refund of Money . . . if Not as Advertised Therein.” *See Frank Luther Mott, A History of American Magazines Volume V: Sketches of 21 Magazines 1905-1930* 137-43 (1968); *Celebrating 80 Years of the Good Housekeeping Seal*, *Good Housekeeping*, Feb. 1990, at 8. By 1962, the guaranty had narrowed still further: “If Product or Performance Defective, Replacement or Refund to Consumer.” *Id.* at 10. In response to the Magnuson-Moss Warranty Legislation of 1975, which required companies to disclose the limitations of warranties, *Good Housekeeping* modified its seal to read: “A Limited Warranty to Consumers, Replacement or Refund if Defective.” *Id.*

266. The FTC Act’s original mandate was to protect against unfair methods of competition “in commerce.” *See*, e.g., *Epstein, supra* note 27, at 13. The law was later amended to apply to activities “in or affecting interstate commerce.” *Magnuson-Moss Warranty-Federal Trade Commission Improvement Act*, 15 U.S.C. §§ 45-48 (1988); *see also Chamber of Commerce of Minneapolis v. Federal Trade Comm’n*, 13 F.2d 673, 684 (8th Cir. 1926) (extending FTC jurisdiction to a nonprofit organization that affects interstate commerce). Although it can be argued that this definition could include some nonprofit activities, the definition of “corporation” in Section 4 seems to exclude nonprofits:

> “Corporation” shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.


FTC jurisdictional determinations are made on an ad hoc basis: “Congress did not intend to provide a blanket exclusion from FTC jurisdiction of all nonprofit corporations, for it was also aware that corporations ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members.” *Community Blood Bank of the Kansas City Area v. Federal Trade Comm’n*, 405 F.2d 1011, 1017 (8th Cir. 1969). “The limiting language of § 4 indicates an intention that the question of the jurisdiction over the corporations or other associations involved should be determined on an ad hoc basis.” *Id.* at 1018.

The case law leaves little guidance as to what level of profit-making activity would subject an organization to the statute. In *Community Blood Bank*, the Eighth Circuit held that a hospital association and a blood bank association were solely charitable enterprises and thus were exempt from the FTC Act. *Id.* at 1022.

In *Federal Trade Comm’n v. National Comm’n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976), the Seventh Circuit upheld the FTC’s determination that a not-for-profit corporation which was organized to promote the interests of the egg industry came within the jurisdiction of the FTC Act: “[T]here is sufficient evidence to support the District Court’s finding that [the National Council for Egg Nutrition] was organized for the profit of the egg industry, even though it pursues that profit indirectly.” *Id.* at 488. Among the factors the FTC examined were: the stated purpose of the organization, sources of funding, nature of publications, relationships with profit-oriented groups, and character of membership. *National Comm’n on Egg Nutrition*, 88 F.T.C. 89, 177 (1976). In 1980, the Second Circuit affirmed the FTC’s ruling that jurisdiction could be asserted over “nonprofit organizations whose activities engender a pecuniary benefit to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity.” *American Medical Ass’n*, 94 F.T.C. 701, 983 (1979), *aff’d, modified and enforced*, 638 F.2d 443 (2d Cir. 1980), *aff’d by an equally divided Court*, 455 U.S. 676 (1982). The FTC has further stated that “an organization may come within the coverage of Commission jurisdiction even though it only indirectly or partially promotes profit for its members.” *Michigan State Medical Soc’y*, 101 F.T.C. 191, 284 (1983). Nevertheless, it appears from these cases that to fall within the gambit of FTC jurisdiction, the nonprofit corporation must be engaged in
Adopt nonprofit status. To register their certification marks under the federal trademark statute, private environmental certifiers will need to establish that they do not participate in the production or sale of certified products. Because nonprofit organizations are more likely to qualify for trademark registration and are less vulnerable to credibility challenges, nonprofit status is recommended.

Even if environmental certifiers are covered by the FTC Act or certain state advertising laws that apply to nonprofit organizations, it is unlikely that any regulatory body could monitor multivariate certification effectively. The widespread use by certifiers of multiple product evaluation criteria would make governmental verification considerably more difficult than it already is in the context of single-variable claims. It would be difficult for monitoring bodies to detect overstatements without having an intimate understanding of, and opportunity to observe, the multiple tests involved. The FTC took action against Good Housekeeping to address a general failure to test guaranteed products. Compliance-monitoring bodies in the future will have to make considerably more subtle and technical determinations concerning the adequacy of the many tests employed by environmental certifiers.

2. FTC Endorsement Guidelines

There is some additional precedent for FTC monitoring of third-party endorsement organizations. During the late 1970s and early 1980s, the FTC issued guidelines for the use of endorsements and testimonials in advertising.
These guidelines cover endorsements by experts, organizations, and celebrities. Although some U.S. environmental certifiers consider the guidelines a vehicle for promoting certifier integrity,271 close analysis suggests that the guidelines will do little to ensure that certifiers maintain rigorous standards.

The guidelines provide a general command that endorsements must “always reflect the honest opinions, findings, beliefs, or experience of the endorser.”272 Commercial connections between the endorsers and the sellers of advertised products must be disclosed.273 The case law is limited and no formal rules of liability have been enunciated. Most reported cases have concerned celebrity and consumer endorsements rather than endorsements by experts.274 In each reported case, the endorsers were required to refrain from making representations unless “reasonable inquiries” had been made into their accuracy.275

The guidelines hold experts and organizations to somewhat higher standards than they do individuals, such as actors and athletes, but the standards are not stringent enough to ensure that certifiers will maintain rigorous evaluation criteria. For example, the guidelines concerning organizational endorsements merely require that endorsements are reached by a process “sufficient to ensure that the endorsement fairly reflects the collective judgement of the organization.”276 Such a requirement addresses situations in which only a few members of a group are independently granting endorsements that are not representative of the thinking of the organization as a whole.277 If an organization tests products and is represented as an expert in the field of testing, it must use qualified experts and “standards previously adopted by the organization and suitable for judging the relevant merits of such products.”278 Expert endorsements must be supported by an examination of the product “at least as exten-
sive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented. These vague requirements afford no meaningful basis for differentiating between rigorous and lenient certification standards.

The FTC's endorsement guidelines may be helpful in situations involving clear-cut ethical breaches. For example, they can be applied to cases in which individual consumers or celebrities endorse products about which they have no knowledge. In addition, they may be relevant to situations in which certification is issued in the complete absence of any testing or evaluation. For example, in a recent case, National Ass'n of Scuba Diving Schools, the FTC entered into a consent agreement with the National Association of Scuba Diving Schools for issuing seals of approval that bore the words "integrity," "safety," "instruction," and the association's name, to scuba diving products in the absence of testing or evaluation. Finally, the guidelines may apply when manufacturers or advertisers inaccurately claim that their products have been endorsed by organizations that are expert in the relevant field. For example, the FTC recently determined that Black & Decker's statement that its iron was endorsed by the National Fire Safety Council was misleading because the putative endorsing organization did not have the expertise to test for appliance safety.

The FTC guidelines would be of little use against certifiers, however, unless certifiers claim to be certifying when they are not, lack relevant experts on their staffs, or unless a few members of a certification firm misrepresent the position of the firm as a whole. Most bona fide certifiers, propelled by their own business interests, presumably will undertake at least reasonable inquiries into the truthfulness of their endorsements. Furthermore, the endorsement guidelines will not apply to certifiers that the courts determine to be nonprofit organizations. Finally, the endorsement guidelines are simply that—guidelines. They are not regulations and do not have the force of law. An endorsement can be found deceptive only if the FTC can establish that it is "an unfair or dece-

279. 6 C.F.R. § 255.3(b) (1991).
281. Id.
282. Black & Decker (U.S.), Inc., 5 Trade Reg. Rep. (CCH) ¶ 22,755 (Jan. 10, 1990); see also Biopractic Group, Inc., 104 F.T.C. 845 (1984) (concerning company's assertion in advertisement that "Ice Therapy" was praised by doctors, physical therapists, health organizations, professional athletic teams, and Olympic track teams); Bristol-Myers Co., 102 F.T.C. 21 (1983), aff'd, 738 F.2d 554 (2d Cir. 1984) (concerning advertisement asserting that doctors recommend Bufferin more than other pain relievers). It is also a misrepresentation to advertise approval by a government agency when such approval has not been given. See, e.g., Estee Corp., 102 F.T.C. 1804 (1983) (concerning an alleged FDA recommendation of fructose-based foods).
283. See supra note 266 and accompanying text.
284. For a discussion of the shortcomings of guidelines, rather than regulations, in the endorsement context, see Washburn, supra note 270, at 736-37.
Arguably, nonbinding guidelines such as these may be more effective for third-party certification than for environmental advertising, because, as mentioned above, there are currently only a few firms conducting environmental certification. Nevertheless, the endorsement guidelines will be of little use in promoting effective practices among environmental certification firms unless the FTC drafts new sections specifically tailored to these enterprises.

B. The Antitrust Issue in Standard-Setting and Certification

In the absence of intentional efforts to exclude particular certification applicants or competitors, successful antitrust cases against environmental certifiers are likely to be rare. Courts generally have denied antitrust claims against product evaluators, such as safety certifiers, unless the standards are overtly discriminatory or the conduct of the evaluator is highly unreasonable. For example, in *Ecos Electronics Corp. v. Underwriters Lab.*, the Seventh Circuit denied an antitrust claim against Underwriters Laboratories, stating that to assert a successful claim a plaintiff “must show either that it was barred from obtaining approval of its products on a discriminatory basis from its competitors, or that the conduct as a whole was manifestly anticompetitive and unreasonable.”

The Supreme Court has occasionally found antitrust liability in the traditional standard-setting context. For example, in *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.*, the Court reinstated a gas burner producer’s antitrust complaint of wrongful refusal of certification where the refusal effectively excluded the plaintiff’s gas burners from the market, and the certifier’s tests were conducted “arbitrarily and capriciously” and under the influence of competing companies. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, a manufacturer of plastic electrical conduits brought a Sherman antitrust action against the National Fire Protection Association for allegedly

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286. Recommendations for third-party environmental certification that could be translated into FTC requirements are discussed in *infra* notes 367-68 and accompanying text. State enforcement agencies will be needed to supplement any federal activities.
287. It should be noted that the Lanham Act, the trademark statute, provides for cancellation of a certification mark if the certifier arbitrarily discriminates against products that meet the criteria established for licensing under the mark. 15 U.S.C. § 1064(e) (1988).
conspiring with a producer of steel conduits to exclude plastic conduits from its fire safety standards. Although the Supreme Court held the standard-setting organization liable, the Court acknowledged the procompetitive advantages of standard-setting in the absence of collusion: "It is this potential for procompetitive benefits that has led most lower courts to apply rule of reason analysis to product standard-setting by private associations."  

Environmental certification can be contrasted to traditional standard-setting and to safety certification in that environmental certification of a product is not a prerequisite to market entry. The market effects of environmental certification are likely to be difficult to ascertain. In addition, because uncertified products will not be excluded from the market, manifestly anti-competitive harm will be difficult to prove. It is possible that anticompetitive effects could become more pronounced in the future, however, if corporate and government procurement policies and state and federal regulations incorporate the environmental standards established by certifiers.  

C. Limitations of Tort Remedies: Negligent Misrepresentation and Third-Party Certifiers  

In theory, consumers and other parties could challenge environmental certifiers for misrepresenting product performance, and competitors or public interest groups could challenge certifiers for making endorsements based on incomplete or inappropriate testing procedures. Although there is no case law on negligent misrepresentation in the environmental certification context, cases involving safety certifiers and general quality certifiers may indicate how courts would treat such claims. These cases provide only a partial analogy, however, because they involve physical injuries, an unlikely consequence of environmental advertising or certification.

292. "Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products." *Id.* at 500.
293. *Id.* at 501.
296. The Court's holding in *Allied Tube* was based largely on the fact that the National Fire Protection Association's standards for electrical equipment safety were regularly adopted by state and local governments, private safety certifiers, insurers, and contractors:

A substantial number of state and local governments routinely adopt the Code into law with little or no change; private certification laboratories, such as Underwriters Laboratories, normally will not list and label an electrical product that does not meet Code standards; many underwriters will refuse to insure structures that are not built in conformity with the Code; and many electrical inspectors, contractors, and distributors will not use a product that falls outside the Code.

297. Consumers would be unlikely to have sufficient knowledge of certification methodologies to raise negligence claims for inadequate testing procedures.
For example, in *Hempstead v. General Fire Extinguisher Corp.*, a federal district court applied Virginia law to hold Underwriters Laboratories liable for certifying a fire extinguisher that exploded upon use. In *Hanberry v. Hearst Corp.*, the plaintiff filed suit against the publishers of *Good Housekeeping* over an injury allegedly caused by a defective pair of shoes which bore *Good Housekeeping*’s “Consumer Guaranty Seal.” The magazine backed the seal with the following statement: “We have satisfied ourselves that the products and services advertised in *Good Housekeeping* are good ones and the advertising claims made for them in our magazine are truthful.” The California Court of Appeals rejected causes of action for breach of warranty and strict liability, but held *Good Housekeeping* liable in negligent misrepresentation. According to the *Hanberry* court: “Implicit in the seal and certification is the representation [that] respondent has taken reasonable steps to make an independent examination of the product.” The court stated

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299. *Id.* at 118.
300. 81 Cal. Rptr. 519 (Ct. App. 1969).
301. *Id*.
302. The court reserved warranty and strict liability actions for manufacturers and suppliers: “[L]iability for individually defective items should be limited to those directly involved in the manufacturing and supplying process, and should not be extended through warranty or strict liability to a general endorser who makes no representation it has examined or tested each item marketed.” *Id.* at 524. Although strict liability is common in defective product cases, it is far less common in cases involving services. A fundamental difference between defective product and defective certification cases is that certifiers test only for class defects or attributes. As a result, certifiers generally test samples of products and are not responsible for the integrity of individual items. Charles F. Rechlin, *Note, Liability of Certifiers of Products for Personal Injuries to the User or Consumer*, 56 CORNELL L. REV. 132, 137 (1970). Efficiency concerns may prevent courts from holding third-party environmental certifiers strictly liable. Manufacturers are better cost-avoiders than third-party certifiers because manufacturers possess greater control over production processes. *Id.* at 141, 143. Although certifiers that address consumer audiences ultimately hope to influence production, they have only an attenuated connection to actual production decisions. Cost-avoiding behavior is also more efficient for manufacturers because they are responsible only for their own product lines, while certifiers may be responsible for hundreds of different product lines.

At least one court, however, has been willing to reconsider the *Hanberry* approach to strict liability. *Kasel v. Remington Arms Co.*, 101 Cal. Rptr. 314 (Ct. App. 1972). In *Kasel*, the court dispensed with negligence theory and held a company strictly liable for improperly granting its trademark to a foreign manufacturer. *Id.* at 323. Although the trademark licensee was neither manufacturer nor seller, the court reasoned that it was a “link in the marketing enterprise which placed a defective product within the stream of commerce,” and thus should be held liable. *Id.* (emphasis added). The court suggested that *Hanberry*’s rationale should be reevaluated: “Where it can be established that defendant by its avowed testing was the responsible inducement for the purchase by plaintiff, we see no reason to hold that defendant was not a necessary instrument in the stream of commerce.” *Id.* at 323-24.

Although this decision may reflect a growing tendency to apply strict liability to all parties playing a significant marketing role, strict liability is less suited to environmental certifiers than to manufacturers or safety certifiers because environmental certifiers have a less immediate impact on product design. Because society recognizes that third-party certifiers can play a valuable role in providing objective information to consumers, courts will be unlikely to apply strict liability to any kinds of certifiers on a regular basis. For a discussion of the important role of third-party evaluators in providing objective information to consumers, see Thomas L. Eovaldi, *The Market for Consumer Product Evaluations: An Analysis and a Proposal*, 79 NW. U. L. REV. 1235, 1239 (1985).

303. 81 Cal. Rptr. at 521.
304. *Id.* at 522. “Since the very purpose of respondent’s seal and certification is to induce consumers to purchase products so endorsed, it is foreseeable certain consumers will do so...” *Id.*
that it was influenced more by public policy than by whether the cause of action could be "comfortably fitted into one of the law's traditional categories of liability." Arguably, the court would have been less sympathetic to the plaintiff in the absence of physical injury.

Parties raising negligent misrepresentation claims against environmental certifiers would face the same causation, damages, and reliance problems as plaintiffs face in misrepresentation suits against advertisers, as discussed in Part I. Plaintiffs would often need to prove that the representation was general enough to constitute a broad affirmation of quality, rather than a more limited environmental endorsement. Suits against third-party certifiers, however, would face more obstacles than would suits against manufacturers. In cases of economic loss, plaintiffs would need to prove membership in the limited class for whom defendants intended reliance. This is not a simple determination; states have adopted highly divergent views on third-party liability in cases of economic loss. Additionally, plaintiffs would need to show that the certifier

305. Id. at 521.
306. See supra notes 70-76 and accompanying text.
307. A helpful way to understand the characteristics of third-party environmental certifiers is to contrast them with safety certifiers such as Underwriters Laboratories (UL). The UL safety guarantee is more vulnerable to successful misrepresentation actions. UL's direct influence on product manufacturing makes it more susceptible to "stream of commerce" arguments than environmental certifiers, whose logos are directed to consumers. See Justin T. Beck, Hamberry v. Hearst Corp.: Liability of Product Certifiers, 5 U.S.F. L. REV. 137, 143 (1970) (explaining that marketing of fire extinguishers is virtually impossible without UL certification). Manufacturers are often required by federal, state, and local regulators to design their products to meet UL specifications. The Public Gives UL its Seal of Approval, BUS. WK., Sept. 18, 1965, at 92. Insurance companies often refuse to insure products without the UL logo. Id. By contrast, the Good Housekeeping Seal or an environmental logo might help manufacturers boost their sales but is not a production requisite. Finally, since the UL seal is a safety seal, misuse of the logo is more likely to lead to physical injuries than misuse of an environmental logo. Consumer actions challenging safety labels are therefore likely to be more successful than those challenging environmental labels; harm is arguably more foreseeable and causation of injuries more direct.

Other factors, however, may increase the potential exposure of environmental endorsers relative to safety certifiers. First, in cases involving safety certification, the lower burdens of proof might cause an injured plaintiff to pursue a strict liability action against a manufacturer or seller rather than a negligence action against a product certifier or endorser. In cases involving environmental certification, attention is likely to shift to the endorser in the absence of a product defect. Also, safety certifiers such as UL test for a single criterion, safety, and tests are either passed or failed. As one commentator remarked: "When [UL] puts its stamp on a product, it is saying just one thing. The product is safe. The label does not guarantee high quality." Id. By contrast, if an environmental certifier fails to accompany its logo with specific statements documenting the nature of the tests undertaken, the seal could be construed to represent the all-encompassing claim: "This is an environmentally sound product." Such an interpretation could open the endorser to greater potential liability.

308. See supra note 72.

Historically, privity between parties was a requirement for a successful action against certifiers of quality. In the landmark English case of Winterbottom v. Wright, 10 M&W 109, 152 Eng. Rep. 402 (Ex. 1842), the court held that a defendant coach inspector who had represented the safety of vehicles was not
Certified Green

had a pecuniary interest in the transaction, a showing that could perhaps be difficult to make, particularly if the certifier were a nonprofit organization. Another consideration is that certifiers would be likely to accompany their logos with specific statements (for example, "made from 50% recycled material" and "this product uses no chlorinated bleaches") to clarify the basis for the endorsement and to reduce potential tort liability.

IV. Toward a Reliable Environmental Certification Program

Part III provided examples of jurisdictional and technical impediments to FTC monitoring of private environmental certifiers, and outlined various obstacles that consumers and competitors would face in litigation against certification firms.

Because of the shortcomings in the legal and regulatory framework, environmental certifiers must proceed with care. This Part highlights the problems that responsible to an injured third party. In 1922, Judge Cardozo broke with precedent in Glanzer v. Shepard, 135 N.E. 275 (N.Y. 1922), extending the tort of negligent misrepresentation to a weigher of beans whose faulty calculations resulted in economic loss to the known plaintiff, despite the absence of privity of contract. This case is distinguishable from Ultramas v. Touche, 174 N.E. 441 (N.Y. 1931), where Judge Cardozo denied liability because the plaintiff was among an "indeterminate class of persons" and therefore the firm had not induced reliance. Id.

Most of the recent literature on third-party liability of service providers for economic loss pertains to accountants. Similar principles, however, can be applied to other service providers such as certifiers. According to one commentator, there are four dominant judicial positions on accountants' negligence liability to third parties. The first is the near equivalence of a privity requirement enunciated in Glanzer and Ultramas, whereby an accountant will be liable for negligence only to parties who are in a "contractual relationship or its equivalent." Id. at 543. The second is the standard of the RESTATEMENT (SECOND) OF TORTS, supra note 72, § 552, under which a service provider will be liable if the misrepresentation is relied upon by persons whose reliance is actually foreseen or who are members of a limited class for whose benefit the accountant knows the information was intended. Id.; see Rusch Factors Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968); Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969). The third is the "reasonably foreseeable third party" rule of Rosenblum v. Adler, 461 A.2d 138 (N.J. 1983), and International Mortgage Co. v. John P. Butler Accountancy Corp., 223 Cal. Rptr. 218 (Cal. Ct. App. 1986). This approach reflects the more traditional view of negligence liability as enunciated in Patsgraf v. Long Island Railroad Co., 162 N.E. 99 (N.Y. 1928). The final approach is the foreseeable injury standard of Citizens State Bank v. Timm, Schmidt & Co., 335 N.W.2d 325 (Wis. 1983), whereby liability will attach for foreseeable injuries resulting from accountants' negligent acts unless substantial public policy reasons dictate otherwise. See Hagen, supra, at 183-201.

310. See supra note 74.

311. The fact that Good Housekeeping Magazine benefitted financially from its endorsements influenced the Hanberry court to find liability, even though this finding was unnecessary in a physical injury case. See RESTATEMENT (SECOND) OF TORTS, supra note 74, § 311.

312. The Hanberry court chose, however, to ignore words on the Good Housekeeping Seal that limited the promise to a refund for defective products. Despite the words, the overall effect of the seal was to mislead: "Respondent cannot successfully contend appellant failed to state a cause of action in tort for personal injury because it has limited its liability by inserting in its seal the words, 'If the product or performance is defective, Good Housekeeping guarantees replacement or refund to consumer.'" Hanberry v. Hearst, 81 Cal. Rptr. 519, 521 (Cl. App. 1969). The court determined that the breached promise was not the promise to replace defective shoes, but the general claim that the shoes were "good ones." Id. The court therefore found that the seal was an overall quality seal, guaranteeing safety as well as other attributes. Good Housekeeping could not avoid liability for its general guarantee by a statement purporting to limit the amount of damages.
will arise if private certifiers fail to adopt separate product niches, coordinate their standards, and maintain affordable prices. It also examines alternative organizational structures and recommends certain strategies that could help certifiers surmount existing barriers to effective operation. If private certifiers fail to take the necessary precautions, and if private certification is nevertheless considered to be effective in promoting product improvements, governmental guidance or a joint public-private certification program may be desirable in the future.

A. Alternative Structures for Environmental Certification

If environmental certification proves to be an effective catalyst for innovation in product design, U.S. policymakers will need to decide whether to develop a governmental program, or whether to let private organizations run certification programs as they do now. A third alternative is a public-

313. An outline of selected options for the structure of a third-party environmental certification program is presented below:

Model 1 - A government or quasi-governmental seal of approval program based on Germany’s Blue Angel or Canada’s Environmental Choice model. The governmental body would select product categories and develop evaluation standards.

**Benefits**
- a) Government involvement would lend credibility to the program and allow for uniformity in standards.
- b) Governmental funding could help compensate for high start-up costs, creating lower testing and licensing fees for manufacturers.
- c) A centralized governmental program could help lay the groundwork for an international labeling effort.

**Drawbacks**
- a) Governmental agencies may be subject to industry influence or “capture,” which could affect the standard-setting process.
- b) Implementing standards via the cumbersome federal regulatory machinery could thwart efforts to keep pace with technological change. (Standards should evolve every few years to adapt to new markets and technological capabilities.)
- c) Program support would fluctuate with political tides.
- d) A government-run program based on multiple-attribute evaluations could be an over-centralized mechanism for influencing private production decisions. For this reason, the government’s role might be more effective in the context of warning labels rather than positive seals of approval.

Model 2 - Unregulated private programs. (This is the present structure of environmental certification in the United States.)

**Benefits**
- Competition between environmental certification organizations could stimulate innovative approaches and techniques.

**Drawbacks**
- a) Proliferation of organizations and standards could result in consumer confusion and discourage participation by manufacturers.
- b) High start-up and compliance monitoring costs could translate into high fees for participants, which could discriminate against small firms. Alternatively, certifiers might compensate for high costs through lowering of standards and overzealous certification.
- c) Harassment suits by manufacturers denied certification could further reduce scarce financial resources.

Model 3 - Government regulation or endorsement of private programs.

**Benefits**
- Regulation could help promote credibility, while private management could enhance operational
private hybrid organization, which would involve seed funding by a government agency, most likely EPA, combined with private management and independent selection of product evaluation standards.

1. Governmental Programs

Governmental or quasi-governmental environmental certification programs are currently operating in the European Community, Canada, Japan, and Scandinavia. West Germany initiated the world’s first program with the Blue Angel seal in 1978. Canada launched the Environmental Choice program in 1988, featuring the EcoLogo. Canada’s Environmental Choice program has served as a model for at least one U.S. program. Japan unveiled the Eco-
Mark in 1989, and Australia initiated the Green Spot in 1990. Norway, Sweden, Finland, and Iceland are planning a coordinated Scandinavian effort that will use common symbols and labeling criteria. The European Community is similarly planning a unified effort.

A governmental program in the U.S. would offer advantages over a private program in terms of credibility, accountability, and, in some areas, technical expertise. The requirements of the APA would ensure public observation, review and comment on proposed standards and procedures. Government centralization would eliminate the problems associated with certifier proliferation and would allow for focused improvement of designated product evaluation techniques. Centralized government control could also facilitate the development of an international certification program. Perhaps most importantly, government appropriations would compensate for the high start-up and compliance monitoring costs that characterize environmental certification. This would allow for lower prices and thus encourage greater participation by small manufacturers.

Inherent in the APA's procedural requirements, however, is a trade-off that may compel further experimentation with nongovernmental structures. Although the notice and comment procedures of the APA are invaluable to democratic participation in a variety of contexts, and should be roughly imitated by private certifiers, they could serve to lower standards in environmental certification. Certification programs aim to reward a limited number of product brands for exceptional environmental performance in a variety of areas. It would be extremely difficult for a governmental program, bound by formal review and comment procedures, to withstand industry opposition to selection criteria that could deny certification to a high percentage of products in a given industry. A "carrot" program should supplement and exceed the baseline
requirements of any "stick" program. Arguably, governmental bodies are best equipped to develop minimum standards and less suited to designing multiple-attribute, incentive based certification standards.

Beyond these standard-setting concerns, a governmental evaluation program could be vulnerable to erosion or disbanding in the wake of shifting political currents. In an age of budget constraints, a full-scale environmental certification program may represent an unacceptable expenditure of government resources. Some existing foreign governmental programs have begun to experiment with increased private involvement.\(^\text{322}\) Norway's new labeling program will be managed by an independent non-profit organization,\(^\text{323}\) and Sweden has proposed a similar independent management structure for its program.\(^\text{324}\)

A governmental environmental certification program is not expected to be implemented in the United States in the near future. In 1990, EPA staff members drafted a pollution prevention bill that would establish a governmental program based on the Canadian model, but the bill was never introduced into Congress.\(^\text{325}\) An early version of S. 615, the "Eco Label Act of 1990,"\(^\text{326}\) proposed an EPA certification program, but the program was not re-introduced in the subsequent bill. A California bill that proposed a state-run labeling program was also unsuccessful.\(^\text{327}\)

2. The Public-Private Hybrid Model

An alternative model is a public-private hybrid program. Such a program might involve government seed funding and government participation in the selection of a board of directors, coupled with private standard-setting and management. Public-private hybrid organizations in the United States include the National Academy of Sciences, the National Safety Council, the Office of Legal Services, and the Corporation for Public Broadcasting. In Canada, this

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322. Partially as a result of governmental delay and blockage of proposed standards, Canada's Environmental Choice Board has considered new arrangements that would involve private management. See, e.g., Peter McGowan, manuscript prepared for the Environmental Choice Program (1991) (unpublished) (on file with author). Government officials, however, recently decided to maintain governmental control over the program. Telephone Interview with David Cohen, Executive Committee, Environmental Choice Program (May 5, 1991).

323. CARSWELL & LANFGET, supra note 12, at 18.

324. Id. at 19.


327. A.B. 3030, Cal. Assembly, 1989-90 Reg. Sess. (1990). Assemblywoman Beverly Hansen's legislation designated the California Integrated Waste Management Board to manage the program. In conjunction with an advisory committee, the Board would design the label, set appropriate standards, and manage licenses. License fees were to be set on a sliding scale, based on annual gross sales of evaluated products.
organizational form is common.\textsuperscript{328} A public-private hybrid program could help subsidize certification start-up costs while leaving the product evaluation responsibilities and management decisions to a nongovernmental body. In the United States, such an institution would initially be chartered by Congress, with the authorizing legislation incorporating a public mandate.\textsuperscript{329} The statute could direct a government agency such as EPA to appoint several or all members of the new program’s board of directors.\textsuperscript{330} A government appointed board would offer the program a measure of credibility, public visibility, and an implicit government endorsement. Beyond selecting the board, the governmental role would be limited to providing funds and technical expertise. An independent private entity, either a new certification organization or an existing one, would develop testing criteria and manage the certification program.

The dual structure of the public-private hybrid model offers several advantages. Private authority over the standard selection and product evaluation process could help insulate the program from excessive industry pressure. Government subsidization would facilitate sliding scale fee structures for small firms, while obviating the need for concomitant overcharging of larger participants. Norway’s program, run by an independent nonprofit organization, resembles this model in many respects.\textsuperscript{331}

3. Private Organizations

U.S. environmental certification programs are currently concentrated in the private sector.\textsuperscript{332} Green Seal, launched in 1990, is a nonprofit organization that, like Canada’s Environmental Choice program, awards a seal to products that meet threshold standards for multiple environmental attributes.\textsuperscript{333} Green Seal has contracted with an independent laboratory to test products and monitor production facilities.\textsuperscript{334} Companies awarded the seal pay a license fee based on costs of certification and monitoring.\textsuperscript{335} Another organization is Scientific

\textsuperscript{328} Such corporations, which number in the hundreds in Canada, include Air Canada, the Bank of Canada, the Canadian Broadcasting Corporation, the Farm Credit Corporation, and the Export Development Corporation. J. ROBERT & S. PRITCHARD, CROWN CORPORATIONS IN CANADA: THE CALCULUS OF INSTRUMENT CHOICE 41 (1983).

\textsuperscript{329} A report prepared for EPA recommended this as one possible approach. CARSWELL & LANGELO, supra note 12, at 53-54.

\textsuperscript{330} Id. at 50.

\textsuperscript{331} Many of the members of the Norwegian program’s board and technical council are government officials.

\textsuperscript{332} Maykuth, supra note 4, at A2.

\textsuperscript{333} Interview with Denis Hayes, former Chairman and Chief Executive Officer and current Director of Green Seal, Inc., in Palo Alto, Cal. (Nov. 12, 1991); see also Maykuth, supra note 4, at A2.

\textsuperscript{334} GREEN SEAL/UL ALLIANCE FACT SHEET 1 (undated). Green Seal has issued evaluation standards for six product categories, including tissue paper, writing paper, compact fluorescent lamps, re-refined engine oil, and water-efficient plumbing fixtures.

\textsuperscript{335} Interview with Denis Hayes, supra note 333.
Certified Green Certification Systems, formerly Green Cross, which initiated an environmental labeling program in 1989.³³⁶ The company verifies manufacturers' claims pertaining to single attributes, including recycled content and biodegradability, and has begun to undertake "product life-cycle inventories."³³⁷ Although the program has established certain standards for evaluating single environmental claims, the recent emphasis is on "product informational labeling," which consists of documenting comparative results of life-cycle inventories in charts presented on product labels, in lieu of setting threshold standards for environmental attributes.³³⁸ In addition to Green Seal and Scientific Certification Systems, various retail grocery store chains have attempted to develop their own programs for environmental evaluation and product promotion.³³⁹

B. Recommendations for Private Management

Those private U.S. organizations that are genuinely independent of the companies they certify should continue to research, develop and implement environmental certification programs unless it becomes clear that proliferation of standards, improper selection of product categories or inadequate conduct of testing procedures will subvert the integrity of the enterprise. It is possible that market forces will naturally limit the number of private programs. If proliferation of groups and standards creates credibility problems, manufacturers may become unwilling to pay testing and licensing fees and the market will be unable to support multiple players. Vigilant scrutiny by the media and environmental groups³⁴⁰ could help maintain the credibility of remaining programs.

On the other hand, market forces could instead serve to undermine the quality of environmental certification. Certification is characterized by high start-up and monitoring costs, and private certifiers could elect to relax their evaluation criteria or award unwarranted licenses as a means of covering these costs. Some manufacturers may be willing to pay for negligent or even

³³⁸. Id.
³³⁹. For example, Wal-Mart Stores, Inc. and Loblaw Companies, Ltd. have developed their own programs. GREEN REPORT I, supra note 92, at 25.
fraudulent certification in order to enhance the sales of their products. Such problems may be difficult to correct because consumers are unlikely to discern changes in product evaluation criteria, and statutory and common law consumer protection is presently inadequate.

1. Potential Pitfalls: The HeartGuide Lesson

In the health field, some of the possible pitfalls of private certification became manifest in the American Heart Association's (AHA) effort to create a HeartGuide seal of approval program. In 1989, the AHA unveiled plans to award its HeartGuide seal to brands of foods judged comparatively low in fats, saturated fats, cholesterol, and sodium. The first five product categories that the AHA chose for comparative testing included margarines, spreads, shortenings, and oils.

The program rapidly encountered opposition. Seven state Attorneys General expressed disapproval of the concept, and the USDA announced that it would bar the inclusion of meats in the program. The central concern was that the HeartGuide seal could be attached to products that, although healthier than similar products of other brands, were nonetheless promoters of heart disease. Awarding the seal to a brand of margarine, it was feared, could send the false message to consumers that the margarine was healthier than an unlabeled product such as yogurt. The simplicity of the logo, a red heat

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341. See supra notes 262-96 and accompanying text.
342. See supra notes 297-312 and accompanying text.
344. In a letter to James Benson, then Acting Commissioner of the FDA, the Attorneys General stated:

   We agree with you that the Heartguide program has laudable goals, but that in its implement-
   ation it presents more problems for consumers than solutions. It could very well lead to an
   increase in deceptive health claim advertising by those manufacturers who have paid the AHA
   the $15,000 to $600,000 required to participate in the program . . . .

   We will be monitoring closely those advertisements by manufacturers who use the seal to
   insure that their advertisements do not deceptively claim or imply that use of the product will
   improve the health of the consumer or that because their product has the HeartGuide seal it is
   somehow superior to identical products produced by other manufacturers who are not paying to
   participate in the AHA program.

Letter from Attorneys General of California, Iowa, Massachusetts, Minnesota, Missouri, New York, and Texas, to James S. Benson, Acting Commissioner of Food and Drugs, Food and Drug Administration (Feb. 2, 1990).
346. In a letter to the President of the AHA, the Acting Commissioner of the FDA applauded the objectives but disapproved of the means of the HeartGuide program: "Third party endorsement programs are not in the best interests of consumers . . . . They create the implication that an endorsed product is somehow superior to an unendorsed product which may or may not in fact be the case." Attachment to letter from James S. Benson, Acting Commissioner of Food and Drugs, FDA, to Myron L. Weisfeldt, President, AHA 2 (Jan. 24, 1990).
347. AHA President Myron L. Weisfeldt felt this was an untenable argument: "Very few people that we have contacted think that . . . you can drink a bottle of safflower oil and be healthy, or take a quarter
Certified Green

embellished with a white check mark, could incorrectly imply that products bearing seals were recommended over other types of foods. Trade associations and public interest groups objected to the label's cost, possibly prohibitive for small companies, and to the AHA's refusal to disclose its evaluation criteria. Eventually, the AHA succumbed to concerted pressure from the FDA and other groups and terminated the project.

Environmental certification programs could confront similar hurdles. For example, a particular brand of vacuum cleaner might receive an endorsement due to relative energy efficiency and low noise, while brooms and low-tech carpet sweepers could fall outside the categories of products tested.

The potential for proliferation of overlapping programs, a major concern in the area of environmental certification, was realized in the health field. The American College of Nutrition, the American Medical Women's Association, and the National Center for Cardiac Information had all developed different seals of approval for "heart wise" food products.

2. The Road to Credibility

If private environmental certification is to succeed in the United States, it must obtain the confidence of manufacturers and the public. Moreover, even if certifiers can develop a high level of public credibility, they must actively seek to avoid proliferation of standards. In the event that several groups develop successful programs, one of the following three scenarios should occur: (1) environmental certification organizations should coordinate their standards and evaluation criteria; (2) certifiers should exploit different product or functional niches; or (3) one group should prevail over the others and become the dominant environmental certifier. In addition, certifiers must find appropriate ways to maintain rigorous product evaluation standards while providing fair prices or sliding fee scales to accommodate small firms applying for certification.

Certain potential problems of private environmental certifiers, such as the failure to disclose procedures or to effectively control the use of certification marks, could be mitigated through voluntary precautionary measures and

pound of margarine, peel off the wrapper and eat it like a banana." Sugarman, supra note 345, at A3.

348. Id. The AHA responded that if it disclosed the criteria, food companies would avoid the fee by advertising that they were in compliance with the AHA guidelines, even though they had never applied for the seal. Id.

349. The program's standards also conflicted with FDA nutritional guidelines--the FDA at the time was on the verge of launching its own major labeling effort. Natalie Angier, Heart Association Cancels Its Program to Rate Foods, N.Y. TIMES, Apr. 3, 1990, at A1. The HeartGuide program subsequently struggled to find ways to salvage its $4 million investment, including a health education and advertising program. Janet Meyers, HeartGuide Legacy: FDA May Shoot Down Other Seal Programs, ADVERTISING AGE, May 2, 1990, at 60.

monitoring by the FTC, EPA, and state enforcement agencies. The problems of standards coordination and cost control are inherently more complex and problematic, and may create the need for a greater governmental commitment in the future.

Underwriters Laboratories, Good Housekeeping, and Consumers Union are private product endorsers that have gained credibility over the years. Certain factors arguably distinguish these organizations, however, from environmental certification programs as presently planned. For example, Underwriters Laboratories was initially funded by the insurance industry in 1893, shortly after Edison's new electric light bulb allegedly set fire to Chicago's Columbian Exhibition.\textsuperscript{351} Governments at all levels subsequently endorsed Underwriters Laboratories standards,\textsuperscript{352} which were soon woven into industrial and building codes.\textsuperscript{353} Like Underwriters Laboratories, Good Housekeeping also benefitted from governmental ties at the outset.\textsuperscript{354}

Both the Good Housekeeping Institute and Consumers Union developed in conjunction with popular magazines.\textsuperscript{355} Consumers Union derives its income from its magazine, \textit{Consumer Reports}, and noncommercial grants, accepting no license fees.\textsuperscript{356} The Consumers Union philosophy is quite different from that of environmental certification programs; its policy against commercialization enjoins manufacturers from using the magazine's ratings in advertisements. Consumers Union disavows any commercial connection with its rated products in a disclaimer in each issue of \textit{Consumer Reports}.\textsuperscript{357} Loyal to this stated policy, Consumers Union has sued manufacturers that have used its ratings for advertising purposes.\textsuperscript{358}

\begin{itemize}
\item \textsuperscript{351} One of UL's first sponsors was the National Board of Fire Underwriters. \textit{The Public Gives UL its Seal of Approval}, BUS. WK., Sept. 18, 1965, at 92.
\item \textsuperscript{352} Id.
\item \textsuperscript{353} For example, Virginia's Fire Safety Regulations accepted UL as one of several "nationally recognized testing laboratories" for evaluating equipment suitability. Hempstead v. General Fire Extinguisher Corp., 269 F. Supp. 109, 117 n.7 (D. Del. 1967).
\item \textsuperscript{354} For example, Harvey W. Wiley, former Chief of the U.S. Bureau of Chemistry (precursor to the FDA), later became the Director of the Good Housekeeping Institute's Bureau of Food, Sanitation and Health. Telephone Interview with Peter Barton Hutt II, former Chief Counsel, FDA (Nov. 11, 1991).
\item \textsuperscript{355} For a historical account of Consumers Union, see NORMAN ISAAC SILBER, TEST AND PROTEST: THE INFLUENCE OF CONSUMERS UNION (1983). The multivariate aspect of environmental certification could be well-suited to presentation in a magazine-type format similar to \textit{Consumer Reports}. This option should be carefully considered.
\item \textsuperscript{356} Telephone Interview with Betsy Hamilton, Librarian and Archivist, Consumers Union (May 8, 1991); Telephone Interview with Geoff Martin, Senior Project Leader, Environmental Products Division, Consumers Union (May 8, 1991).
\item \textsuperscript{357} The Consumers Union disclaimer states that "[n]either the Ratings nor the reports may be used in advertising or for any other commercial purpose," and that Consumers Union "will take all steps open to it to prevent commercial use of its materials, its name, or the name of Consumer Reports." \textit{About Consumers Union}, CONSUMER REP., Mar. 1991, at 139.
\item \textsuperscript{358} Consumers Union has generally been successful against companies that misrepresent its reports and unsuccessful against companies who honestly mention favorable reviews. \textit{Compare Consumers Union of United States v. General Signal Corp.}, 724 F.2d 1044 (2d. Cir. 1983) (reversing a preliminary injunction against an advertiser that sought to use valid quotes from \textit{Consumer Reports} with Amana Refrigeration
\end{itemize}
In the environmental certification context, commercialization is central. Manufacturers place environmental certification logos and emblems directly on products to enhance sales. Environmental certifiers therefore are dependent on manufacturers' decisions to participate in their programs. This dependence arguably creates incentives to lower certification standards as a means of increasing industry participation.

One way to combat market pressure to relax product evaluation criteria is to require certifiers to disclose their finances, evaluation criteria, and standard-setting and monitoring procedures. By doing this, certifiers will adopt procedures similar to those that agencies must use under the APA, but as private operators they will be able to make final standard-setting decisions independently. Certifiers should also commit to periodic review of evaluation criteria to ensure that those criteria will adapt to technological advances.

Obtaining nonprofit corporate status and tax exempt status could enhance certifier credibility. Nonprofit status would require documentation of financial relationships and disclosure of certain reports for public inspection, thus reducing real or apparent conflicts of interest.

Another important requirement is that environmental certification standards should meet or exceed threshold standards for environmental advertising. If a new federal environmental marketing statute were enacted in the future, as recommended in Part II, it should specify that threshold standards for advertisers should serve merely as baseline requirements in the certification context. For example, H.R. 3865, a federal bill that would have authorized EPA to develop a legally binding regulatory framework for environmental advertising, discussed the relationship between standards for advertisers and those for third-party certifiers: "No person may issue environmental certification and seals of approval unless such certifications or seals are awarded according to criteria and standards at least as stringent as the criteria and standards contained in [the advertising] regulations promulgated under this section." The preemption issue, discussed earlier in the context of the regulation of advertising terms, is relevant here. If a new federal environmental marketing statute were passed that did not preempt state laws, a decision would have to be made as to whether private certification standards should exceed those state standards that are more stringent than their federal counterparts.

Co. v. Consumers Union of United States, 431 F. Supp. 324 (N.D. Iowa 1977) (holding that Amana infringed Consumers Union's copyright when it misleadingly quoted from one article while ignoring an unfavorable follow-up piece). See also Advertisers Sideswipe CU's Road-Test Reports, CONSUMER REP., Mar. 1991, at 142 (reporting two cases in which commercials made false references to Consumers Union's evaluations of automobiles).

360. See, e.g., id. at 38.
361. See, e.g., id. at 39.
363. See supra notes 172-93 and accompanying text.
Also, certifiers should carefully monitor the use of their certification marks. Under the Lanham Act, certification marks are to be denied initial registration or canceled at any time if the certifier "does not control the use of the mark" or "permits the use of the certification mark for purposes other than to certify." Thus certifiers should withdraw, from manufacturers, licenses to use certification marks on products that no longer meet required standards and take aggressive action against companies that make unauthorized use of marks. Preventing the misuse of marks by companies whose products do not merit certification will reduce consumer deception and help certifiers capture their costs.

Beyond this, manufacturers or sellers of goods should not be in the certification business. The Lanham Act denies initial registration of certification marks and cancels current marks of registrants that produce or market "any goods or services to which the certification mark is applied." Unregistered certification marks can be freely imitated, thus losing credibility in the public eye. This means that grocery and other retail stores that have begun to certify products as environmentally compatible should discontinue their programs.

Finally, certifiers will need to coordinate their standards, or, alternatively, specialize in different product markets or different functional niches. One example of a functional niche is the area of compliance monitoring. If federal regulations are enacted in the future to standardize manufacturers' advertising claims, as discussed in Part II, manufacturers might employ third-party groups to document their compliance with the new regulations. Alternatively, government monitoring bodies could contract with private certifiers to verify such compliance.

To arrive at credible business operating procedures for certifiers, such as greater openness in the standard-setting process and careful trademark practices, several alternative or complementary steps could be taken. The lowest-cost

364. 15 U.S.C. § 1064(5)(D) (1988). The statute also provides for denial of registration or cancellation if a certifier "discriminatorily refuses to certify or to continue to certify the goods or services of any person who maintains the standards or conditions which such mark certifies." Id.

365. The Environmental Defense Fund's critique of Scientific Certification Systems identified examples of misleading uses of certification logos by manufacturers. The report pointed to a specific occurrence in which a manufacturer had used characteristics of the Green Cross motif to imply certification of environmental attributes beyond those actually certified:

The association between all of the environmental claims and the Green Cross logo is reinforced by the design of the package, in which a green border enclosing a list of environmental claims is the same shape as, and is linked to, the green border surrounding the Green Cross logo.

The intimate association of the Green Cross mark and a list of environmental claims suggests strongly to the casual observer that Green Cross has certified all of these claims, which is not the case. AT CROSS PURPOSES, supra note 340, at 18. For a follow up on the initial evaluation of the certification company, see ENVIRONMENTAL DEFENSE FUND, REQUEST FOR CLARIFICATION OF GREEN CROSS’S CONFORMANCE WITH EDF’S RECOMMENDATIONS FOR ENVIRONMENTAL CERTIFICATION PROGRAMS (1992).

option is industry self-regulation combined with vigilant scrutiny by the media and public interest groups. Due to the limited number of U.S. certifiers, self-regulation could be more effective in controlling certifier behavior than in controlling the numerous and diverse firms involved in environmental advertising. If a binding regulatory structure is unnecessary or premature, narrowly-tailored nonbinding guidelines could provide some measure of potency in the certification context.

Monitoring basic operating procedures for environmental certifiers would fall squarely within the FTC's dual mandate of preventing consumer deception and promoting fair competition. New amendments to the FTC's endorsement guidelines or environmental advertising guidelines could recommend that certifiers disclose their finances, standards, and standard-setting and verification procedures. Overseeing certifier control of certification marks would similarly fall within the FTC's authority. The Federal Trademark Statute explicitly authorizes the FTC to bring actions to cancel registration of certification marks when registrants fail to follow specified procedures.\textsuperscript{367} State enforcement agencies should also assume an active role in monitoring certifier behavior.

Although the FTC's jurisdiction over nonprofit organizations is not universal, it would nonetheless be appropriate to provide for environmental certification in FTC guidelines. First, some certifiers might not elect nonprofit status. Second, courts could determine on a case-by-case basis that some nonprofit or not-for-profit organizations are in fact corporations subject to the FTC Act.\textsuperscript{368} Finally, FTC guidelines could serve as models to be incorporated into those state consumer protection statutes covering nonprofit organizations. If private certifiers were to adopt uniformly procedures placing them beyond FTC jurisdiction, state agencies would need to assume a greater share of the policymaking and enforcement responsibility.

\textbf{C. Persistent Obstacles in the Private Path}

Even if several of the above issues are resolved, other fundamental obstacles confront the successful development of private certification programs. These obstacles include market failure conditions and barriers to the effective coordination of standards. Ultimately these issues could prompt greater EPA involvement through regulation, funding, formal approval of product evaluation methods, or a joint public-private program.

\textsuperscript{367} 15 U.S.C. § 1064(5).
1. **Coordinating Normative Standards**

Environmental certifiers are distinguishable from more traditional standard-setting organizations that typically draw their standards from the customary practices of industry. Most standards, such as those used in construction, originate with trade associations and are eventually written into governmental rules such as municipal building codes. By contrast, the development of environmental standards requires a more subjective identification of the environmental attributes that most benefit society. This is arguably more controversial than, for example, identifying the appropriate size beam for making a ceiling structurally sound. Furthermore, as mentioned above, environmental certifiers may choose to select standards that can be met only by a small fraction of products in a given industry. Such standards are more likely to stimulate innovation than those embodying minimum performance requirements that all products are expected and able to meet.\(^{369}\) Therefore, although environmental certifiers should incorporate industry expertise and concerns into standard-setting decisions, they must also maintain a good measure of autonomy.

Many traditional standard-setting organizations belong to accreditation bodies such as the American National Standards Institute (ANSI). Such accreditation bodies generally make decisions based on consensus. ANSI’s due process procedures give all interested parties a right to participate equally in the accreditation process.\(^{370}\) Such procedures make it unlikely that industry’s voice will be subordinated to broader social goals. If environmental certifiers have a mutual interest in the coordination of standards, they may need to develop a new organization or new procedures for accomplishing this goal, either in conjunction with, or independently of, existing accreditation organizations.

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\(^{369}\) For example, the Canadian Environmental Choice Program’s revised environmental mandate, although making several concessions to industry, nevertheless proposed to set initial criteria so that only the environmental leaders in a given industry will be able to meet the standard. *Mandate Statement*, supra note 321, at 2.

\(^{370}\) ANSI defines due process as follows: “Due process means that any person (organization, company, government agency, individual, and the like) with a direct and material interest has a right to participate by: (1) expressing a position and its basis, (2) having that position considered, and (3) appealing if adversely affected. Due process allows for equity and fair play.” *American National Standards Institute, Procedures for the Development of and Coordination of American National Standards* § 1.2 (Sept. 9, 1987) [hereinafter ANSI Procedures]. Consideration must be given to representatives from “producer,” “user,” and “general interest” categories. *Id.* § 1.2.3. Other interests to be represented, where appropriate, are those of the following: consumer, directly affected public, distributor and retailer, industrial/commercial entity, insurance company, labor, manufacturer, professional society, regulatory agency, testing laboratory, and trade association. *Id.* § 1.2.3 n.1.
2. Cost Control and Market Failure

Environmental certification is characterized by high start-up and compliance monitoring costs. Because private environmental certifiers plan to be self-supporting, cost control will be one of the most challenging hurdles to viability. Annual license fees for participants in Norway's privately managed program illustrate the high prices that private programs must charge to recover their costs. For example, in 1990, Norway's annual license fee for a company with $5 million in annual product sales was $20,000, compared to a fee of $4,310 for a Canadian (governmental) EcoLogo license.\(^{371}\)

The information generated by an environmental certifier has many of the qualities of a public good. If a private certifier were to maintain reasonable prices, much of the value of its work could go uncompensated. Indeed, some economic analysis suggests that evaluation of consumer products by third parties is undersupplied by the market.\(^{372}\) Consumers who do not buy certified products nevertheless eventually receive benefits from the information printed on product labels. Those who provide the information might not be reimbursed for the environmental benefits that would ultimately ensue if their programs were successful.

To account for this market failure, certifiers that are unable to recover costs may be compelled to increase revenues by reducing evaluation standards, or to reduce costs by eliminating critical components of effective certification, such as compliance monitoring. Unfortunately, consumers are unlikely to discern decreases in certification standards, and generally will be unable to ascertain quality gradations among certifiers. A government subsidy could therefore help ensure more rigorous certification and follow-up procedures.

3. Allocation Problems

Considerations of equity and allocation may also justify some form of government subsidy for environmental certification programs. The high license fees characteristic of private certification may otherwise discourage small companies from participating. Norway's pricing structure reflects a disparity that may result when an independent program attempts to maintain a sliding-fee scale for small companies. For example, in order for Norway's program to maintain a $400 ceiling on its annual license fee for small firms in 1990, the program was required to charge a $26,000 fee to companies with annual sales above $6.5 million.\(^{373}\) A subsidy could allow certifiers to reduce license fees for

\(^{371}\) OECD REPORT, supra note 318, at 25.


\(^{373}\) OECD REPORT, supra note 318, at 25.
small firms without requiring a corresponding increase in annual fees for large companies.

4. Future EPA Role

Increased governmental participation, possibly in the form of a government-private hybrid organization, may be appropriate in the future if private certifiers fail to develop credible programs, offer affordable prices, and maintain rigorous evaluation standards. Government subsidies could help ensure more conscientious certification and follow-up procedures. Private management could provide the independence necessary for maintaining a multivariate, incentive-based program in the face of industry pressures. Even if EPA does not establish the product evaluation criteria for environmental certification, it could nevertheless share its technical expertise with private certifiers. As an alternative to a joint program, Congress could authorize EPA to develop a formal approval program for product evaluation methods used by private programs, thus adopting the role of certifying the certifiers. EPA has already begun to coordinate research on environmental certification techniques as discussed in Part V.

If EPA plans to participate in environmental certification in the future, it should prepare for such involvement by collecting data on the effects of consumer buying patterns on manufacturing behavior. Such data will be necessary to justify the investment that any future government involvement would require.

V. Developing an Appropriate Certification Methodology

In addition to determining the appropriate ownership structure and business operating procedures for environmental certifiers, a critical prerequisite to meaningful certification is the definition and adoption of an effective product evaluation methodology. Only through the development of a feasible and reliable methodology will producers and consumers begin to gain a more holistic portrait of the environmental effects of products and production processes.

A. The Possibilities and Liabilities of Life-Cycle Analysis

Recent attention has focused on a methodology called cradle-to-grave or life-cycle analysis, a technique developed from global resource modeling studies
An ideal life-cycle analysis would account for the energy and materials consumed and wastes created during all phases of a product's life: extraction through manufacturing, use, reuse, recycling, and disposal. Several European environmental certification programs have explored the use of this technique as a basis for product evaluation. One U.S. group has initiated a product-evaluation program based on life-cycle analysis.

Although the life-cycle approach is extremely important conceptually, the methodology is too dependent upon assumptions to be used as the sole basis for making interbrand product comparisons. A more limited multiple-attribute form of product evaluation relying on predetermined, easily verifiable standards is a more practical alternative to the life-cycle approach.

1. Valuable Paradigm

The aim of the life-cycle technique is to identify and quantify the energy and materials used and the wastes released to the environment in the course of producing and using a product, and then to calculate the cumulative environmental impacts of these inputs and outputs over the life of the product. Since 1990, the Society for Environmental Toxicology and Chemistry (SETAC), a professional society, has contributed the development of the life-cycle methodology and its applications. In a recent report, SETAC has outlined the three components of a full life-cycle assessment. The most important of

374. Life-cycle analysis was not originally intended to be used in product marketing. It was an outgrowth of the global modeling studies of the late 1960s that developed in response to concerns over diminishing raw material and energy resources. SETAC, supra note 17, at 3-4. The energy crisis of the 1970s spawned fuel cycle studies that evaluated the costs and implications of alternative energy sources. Id. at 3. Concerns over solid waste disposal prompted a renewed interest in raw material use in the 1980s. Id. at 4. Paralleling developments in Europe, a precursor to life-cycle analysis in the United States was the "Resource and Environmental Profile Analysis" (REPA) developed by Franklin Associates, Inc. and Arthur D. Little. Id. EPA is currently conducting research on life-cycle analysis, see infra note 380, as are research institutes and consulting firms in the United States and Europe, including Franklin Associates, Battelle Labs, Arthur D. Little, Roy Weston, Inc., Tellus Institute, and Chem Systems, Inc. Telephone Interview with Dr. James A. Fava, Roy Weston, Inc. (Jan. 5, 1992).

375. This would include an assessment of impacts as well as a quantification of inputs and outputs.


378. SETAC, supra note 17, at 1-2. SETAC is a non-profit professional society representing environmental toxicologists, chemists, hazard assessors, and engineers. See id. at xii. SETAC has formed a life-cycle assessment (LCA) advisory group to identify the issues associated with conducting LCAs and to help coordinate and guide the development of the LCA concept and methodology. See ENVIRONMENTAL PROTECTION AGENCY, LIFE-CYCLE ASSESSMENT METHODOLOGY DEVELOPMENT PROJECT UPDATE (Oct. 219
these components for product evaluation purposes are the inventory analysis and the impact analysis. The inventory analysis identifies the inputs and outputs associated with a product or manufacturing process. The impact analysis evaluates the toxicity and risk associated with the wastes, as well as the general environmental consequences of the inputs and outputs. EPA has developed guidelines pertaining to certain components of the life-cycle methodology.

Although there are weaknesses in the current state of life-cycle methodology, the life-cycle concept is extremely important and should be promoted. Only by way of this temporal perspective, encompassing production, use, and disposal, will citizens obtain a full understanding of the environmental costs associated with production and economic growth. Life-cycle thinking essentially represents a paradigm shift that could have a tremendous impact on how growth-based societies define a “healthy” economy.

In addition to the power of the concept, the life-cycle methodology can have immediate applications in industry. Because companies can impose consistency in their data-gathering techniques, managers are in a better position to employ the life-cycle methodology than are independent analysts attempting to make interbrand product comparisons. Producers’ assessments of the inputs and outputs associated with their companies’ own products can aid in the design of products with reduced environmental impacts. Rising costs of toxic waste cleanup, escalating landfill disposal fees, and stringent emission regulations will continue to provide companies with economic incentives to take preventive measures.

Because of the conceptual value and potential industrial use of life-cycle assessment, EPA and the private and academic groups that are currently researching the methodology should continue their studies. As the methodology develops and standardizes, and as peer review mechanisms formalize, life-cycle applications could broaden in the future. In the interim, however, serious data-gathering and valuation problems make life-cycle analysis, at least in its broadest application, an inappropriate tool for third-party product evaluation and advertising purposes.

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379. SETAC, supra note 17, at 119-21. The final phase of SETAC’s approach, not as relevant for product evaluation purposes, is an “improvement analysis,” which would recommend new industrial processes that would consume fewer resources and produce less waste. Id. at 2.

380. Since 1990, as part of its pollution prevention mandate, EPA has been developing technical guidelines for standardizing life-cycle assessments. EPA’s life-cycle assessment program is a joint effort of the Office of Air Quality Planning and Standards, the Office of Pollution Prevention and Evaluation, the Office of Solid Waste, and the Office of Research and Development. EPA has created a peer review group consisting of representatives from state and federal agencies, consumer groups, environmental organizations, industry, academia, and professional groups. Telephone Interview with Timothy Mohin, Office of Air Quality Planning and Standards, Environmental Protection Agency (Jan. 23, 1992).

381. See infra notes 383-401 and accompanying text.

382. Telephone Interview with Frank Consoli, Manager of Packaging Technology, Scott Paper Company (January 2, 1992).
2. **Limited Tool**

The inventory analysis is the only phase of the life-cycle assessment that has already undergone significant development. Nevertheless, the following problems make it too dependent upon assumptions for making consistent and reliable interbrand product comparisons.

*Boundary Definition.* Defining the boundaries of the life-cycle inventory is a difficult and highly subjective process, and modifying these boundaries can dramatically affect the results of a study. In theory, a life-cycle assessment could incorporate full inventories for every component of each machine used in a given manufacturing process, including the environmental effects of transporting the components to the place of manufacturing. For example, if parts are delivered by truck to a manufacturing facility, the analyst must decide whether the inventory should include the inputs and outputs associated with the manufacture and use of the truck, such as those related to the harvesting of rubber for the wheels or the extraction of petroleum for fuel. As another example, in constructing an inventory for cloth diapers, the analyst would need to decide whether to include the energy required to produce the fertilizer used to grow the cotton, and if so, whether to assume hydroelectric or coal-based power. The analyst must make hundreds of such screening decisions during the course of an inventory, weighing accuracy against cost and practicality.

*Data Gaps.* Life-cycle inventories are necessarily dependent upon data bases that vary greatly in detail and sophistication. Data gaps are often caused by the reluctance of manufacturers to release plant-specific information. The trade secret problem is especially pronounced in industries that are not vertically integrated, in which several different companies may be involved in the production of a single consumer product. But even highly integrated companies face data gaps because producers generally do not collect data from all processes. While an analyst may have access to primary data for one process of one company, she may need to use highly generalized, publicly-available data for another. Government data generally are not site-specific, but are based on industry averages, and are not updated frequently enough to reflect adequately a world of changing technology. Complicating the picture

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384. SETAC, *supra* note 17, at 46.

385. Telephone Interview with Bruce Vignon, Senior Research Scientist, Battelle (Feb. 18, 1992).


387. Telephone Interview with Bruce Vignon, Senior Research Scientist, Battelle (Jan. 8, 1992).

388. *Id.* For a brief discussion of certain shortcomings of government data, see EPA LIFE-CYCLE INVENTORY GUIDELINES, *supra* note 386, at 30-33.
further, emissions data are unavailable or incomplete for unregulated pollutants.\textsuperscript{389} For example, carbon dioxide, a greenhouse gas suspected as a primary agent in global warming, is unregulated and is therefore rarely included in emissions reports.\textsuperscript{390}

\textit{Equivalency of Use.} In order to compare products on a life-cycle basis, ratios must be developed to account for varying consumer usage patterns. These are called "functional equivalency" or "equivalent use" ratios.\textsuperscript{391} For example, if a researcher is to compare a solid, tallow-based bar soap to a liquid, petroleum-based hand soap, she must equate the two products on the basis of numbers of hand washings.\textsuperscript{392} Equivalent use ratios, however, are rarely accurate in practice. For example, even though a manufacturer may concentrate a brand of soap, a consumer will often use more of the concentrated product than a predetermined calculation would indicate.

The comparison of cloth to disposable diapers poses another illustration of the equivalent usage problem. The logical comparison would be between equal numbers of diaperings over a certain period of time. One study argues, however, that cloth diapers are typically changed more frequently than disposable diapers and they are often doubled.\textsuperscript{393} Because diapering practice varies among parents, an accurate usage equivalency value cannot adequately be encapsulated in a single ratio but rather should be represented by a range of numbers.

\textit{Multiple Product Allocation.} An additional problem emerges in allocating resource use and wastes among different products that may be produced as part of a single manufacturing or production process.\textsuperscript{394} Frequently, a manufacturing process generates multiple secondary products or co-products.\textsuperscript{395} Extended production sequences may involve hundreds of component processes. Because it would be expensive and burdensome to install meters and record energy and

\begin{itemize}
\item \textsuperscript{389} LCA Update, supra note 378, at 1.
\item \textsuperscript{390} E.g., EPA Life-Cycle Inventory Guidelines, supra note 386, at 65.
\item \textsuperscript{391} Id.
\item \textsuperscript{392} EPA's recent report, prepared by Battelle and Franklin Associates, provides the following example of techniques for assigning usage equivalency ratios to liquid and solid soaps:

Because one soap is a solid and the other is a liquid, each with different densities and cleansing abilities per unit amount, it would not make sense to compare them based on equal weights or volumes. The key factor is how much of each is used in one hand-washing to provide an equivalent level of function or service. An acceptable basis for comparison might be equal numbers of hand-washings. Because these two products may be used at different rates, it would be important to find data that give an equivalent usage ratio. For example, a research lab study may show that 5 mm\textsuperscript{3} of bar soap and 10 mm\textsuperscript{3} of liquid soap are used per hand-washing. If the basis for comparison were chosen at 1,000 hand-washings, 5,000 mm\textsuperscript{3} of bar soap would be compared to 10,000 mm\textsuperscript{3} of liquid hand soap. Thus the equivalent use ratio is 1 to 2.

EPA Life-Cycle Inventory Guidelines, supra note 386, at 2.
\item \textsuperscript{393} For one comparison of the usage ratios of children's diapers, see Franklin Associates Ltd., Energy and Environmental Profile Analysis of Children's Disposable and Cloth Diapers, supra note 10, at 1-2.
\item \textsuperscript{394} SETAC, supra note 17, at 39.
\item \textsuperscript{395} E.g., EPA Life-Cycle Inventory Guidelines, supra note 386, at 56-59.
\end{itemize}
resource use for every machine, companies generally maintain data on a per-facility basis, rather than for single product lines. An analyst conducting a life-cycle inventory for a particular product must apportion the aggregated data among these smaller components.\textsuperscript{396}

The difficulty of assigning the relative proportions of waste and energy data to co-products is compounded when the product is one that a firm has little economic incentive to produce. For example, co-products of beef include tallow, cowhide, and bonemeal. When conducting a life-cycle inventory for tallow-based soap, an analyst would need to find a method for partitioning the inputs and outputs associated with tallow production from those of beef production.\textsuperscript{397}

\textit{Accounting for Recycled Materials.} Accounting for the resource usage and environmental releases associated with recycling activities is complicated by the fact that there are multiple sources and routes for recycled materials, and statistical information on new recycling activities is generally limited.\textsuperscript{398} The problem is illustrated by a comparison of closed-loop and open-loop recycling. In a closed-loop system, a product is recycled into a similar product (plastic bottle to plastic bottle). In an open-loop system, a product may be recycled into one of several alternative products (bottle to carpet, insulation, or even park bench).\textsuperscript{399} Due to economics and market demand, product fluctuation between closed-loop and open-loop recycling makes it extremely difficult to undertake a relevant life-cycle assessment. An additional problem is that the life-cycle inventory method may not accurately reflect recent innovations in recycling. Even if a manufacturer produces a recyclable product, factors beyond that manufacturer’s control, such as the unavailability of local infrastructure or the lack of consumer cooperation, can lower the product’s recycling rate.

\textit{Beyond the Inventory: Impact Assessment.} In theory, the impact phase of a life-cycle assessment measures the environmental and public health consequences of all the inputs and outputs of the inventory. Unfortunately, this phase of life-cycle assessment remains in its infancy.\textsuperscript{400} To determine the environmental and human health effects of a multitude of environmental wastes, an analyst would need to confront the numerous problems associated with risk and hazard assessment. Some of these problems include estimating toxicity and dose

\textsuperscript{396} Id.
\textsuperscript{397} Telephone Interview with Bruce Vigon, Senior Research Scientist, Battelle (Feb. 18, 1992).
\textsuperscript{398} SETAC, supra note 17, at 72, 84.
\textsuperscript{399} For a discussion of closed-loop and open-loop recycling, see EPA LIFE-CYCLE INVENTORY GUIDELINES, supra note 386, at 89-91.
\textsuperscript{400} An engineer from SETAC’s LCA Advisory Group testified before the FTC about the undeveloped status of the life-cycle impact assessment: “Most, if not all, life-cycle studies conducted to date have focused on the inventory component, and . . . commonly accepted methodologies and peer-review mechanisms do not yet exist for either inventories or impact assessments . . . .” DR. JAMES A. FAVA, WRITTEN TESTIMONY OF DR. JAMES A. FAVA, SOCIETY OF ENVIRONMENTAL TOXICOLOGY AND CHEMISTRY, BEFORE THE FEDERAL TRADE COMMISSION 5 (July 17, 1991).
responses, accounting for latent health effects, and adjusting for variability among sites and subpopulations. The analyst may also face boundary setting problems in determining whether to assess local, regional, or even global impacts. In some cases, this determination may have political dimensions. Assigning weights to various environmental effects introduces an additional subjective element to the assessment process.

B. Limited Multiple-Attribute Analysis: A Practical Alternative

Although a complete summation and evaluation of environmental inputs and outputs is not technically feasible, it is nevertheless possible to reward manufacturers for environmental innovations in product design. A more limited multiple-attribute assessment based on a number of predetermined, independently verifiable tests is a practical alternative to a full life-cycle analysis.

A product must surpass threshold levels established for several environmental criteria in order to obtain certification. This methodology is analogous to a doctor establishing physical health thresholds for a patient's heart rate, cholesterol level, blood pressure, reflexes, vision, and hearing. These criteria are relatively easy to measure. A patient passing the designated threshold in every tested area could receive a certificate. Similarly, in product evaluation, a product meeting pre-established thresholds for designated environmental attributes would be certified. The certification logo would not necessarily denote an environmentally ideal product, but it would at least indicate that the manufacturer had reduced several of the negative environmental impacts associated with the product. Canada has adopted the limited multiple-attribute method and one U.S. environmental certifier.

401. Those dimensions are apparent, for example, when the analyst must decide how to weigh environmental costs that occur in other countries.

402. For example, the Canadian Environmental Choice Program’s Draft Revised Standard for automotive engine oil outlines several product-specific criteria that must be met before a producer can receive a license for an EcoLogo.

Section 4. Product Specific Requirements

To be authorized to carry the EcoLogo the automotive engine oil must:
(a) satisfy the requirements of [the American Petroleum Institute’s] service classification "SG";
(b) [satisfy the Society of American Engineers’ energy conservation standard for passenger cars, vans, and light-duty trucks];
(c) [comply with the viscosity requirements of the Society of Automotive Engineers];
(d) when measured using a weighted average over a one-month period, be manufactured using a minimum of 75% re-refined oil in the base stock by volume, if either 5W or 10W grade, or a minimum of 50% re-refined oil in the base stock by volume, if either 20W, 30W, or 40W grade; and
(e) be packaged in a container which contains:
   (i) prior to January 1, 1995, at least 25% recycled material by weight and a minimum of 10% post-consumer material by total weight of the container.
   (ii) on or after January 1, 1995, at least 25% recycled material by weight and a minimum of 10% post-consumer material by total weight of the container.
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employs a similar method.\textsuperscript{403} The limited multiple-attribute approach is not without shortcomings, however. The principal concern is whether the standards selected will accurately reflect those areas with the most significant environment impacts and potential for mitigation by manufacturers. In other words, the question is whether the

\begin{enumerate}
\item The Base stock must:
\begin{enumerate}
\item comply with Canadian General Standards Board requirements;
\item not be manufactured using a process that generates sulfuric acid sludge as a by-product;
\item meet the consistency requirements of the Lubricant Review Institute’s military specifications;
\item contain less than 5 ppm each of benzo(a)pyrene and benzo(a)anthracene [as determined using EPA’s electron capture detection technique for evaluating solid wastes].
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\end{enumerate}


Canada reviews and revises its environmental standards every three years to account for scientific progress, technological advances, and market developments. ENVIRONMENTAL CHOICE PROGRAMS, DESIGN STATEMENT 12 (Jan. 1993).

403. Green Seal’s Environmental Standard for Tissue Paper requires the following criteria to be met before products can be certified:

4. Product Specific Environmental Requirements
4.1 Recovered Paper Requirement.
4.1.1 The fiber in certified bathroom tissue shall contain 100% recovered paper material including at least 20% post-consumer material.
4.1.2 The fiber in certified facial tissue shall contain 100% recovered paper material including at least 10% post-consumer material.
4.1.3 The post-consumer material content of a product shall be determined by measuring the average product fiber utilization over a period of no longer than three months.
4.2 De-inking of recovered paper. The recovered paper used to manufacture the product shall not be de-inked using a solvent:
4.2.1 containing the element chlorine; or
4.2.2 listed by the Administrator of the Environmental Protection Agency under Section 313 of the Emergency Planning and Community Right to Know Act.
4.3 Bleaching.
4.3.1 If a bleaching agent is used that includes chlorine or any of its derivatives (such as hypochlorite and chlorine dioxide), the adsorbable organic halogen (AOX) content of the effluent from the production location shall not exceed 1.0 kilogram per air-dried metric ton (ADMT) of pulp.
4.3.2 On or after January 1, 1996, the recovered paper used in making a certified product shall not be bleached using chlorine or any of its derivatives (such as hypochlorite and chlorine dioxide).
4.4 Additional Ingredients. The product (not including packaging) shall not contain any added pigments, inks, dyes, or fragrances.
5. Packaging Requirements
5.1 The core of a roll of toilet tissue or the box used to package facial tissues must be manufactured from 100% recovered fiber.
5.2 A consumer package of bathroom tissue must contain at least four rolls unless the outer wrapper has been manufactured from 100% recycled materials.
5.3 Toxics in Packaging.
5.3.1 Packaging must not contain inks, dyes, pigments, stabilizers, or any other additives to which any lead, cadmium, mercury or hexavalent chromium has been intentionally introduced.
5.3.2 The sum of the concentration levels of lead, cadmium, mercury, and hexavalent chromium present in any package or packaging component must not exceed 600 parts per million by weight.
5.3.3 Effective January 1, 1993, the sum of the concentration levels of lead, cadmium, mercury, and hexavalent chromium present in any package or packaging component must not exceed 250 parts per million by weight.
5.3.4 Effective January 1, 1994, the sum of the concentration levels of lead, cadmium, mercury, and hexavalent chromium present in any package or packaging component must not exceed 100 parts per million by weight.”

GREEN SEAL, ENVIRONMENTAL STANDARD FOR TISSUE PAPER 6-8 (Feb. 12, 1992).
selected criteria will be sufficiently comprehensive to capture the notion of environmental quality.

To increase objectivity in the selection of product evaluation criteria, the process should be highly visible and draw upon the expertise of government, industry, and the public interest community. The independent verifiability of each tested criterion could make the limited multiple-attribute approach less dependent upon assumptions than other evaluation techniques available at this time. Testing procedures under such a program could be designed to be straightforward and comprehensible, opening the certification process to public scrutiny and comment. To enhance clarity for consumers, certified companies should present brief synopses of the selected evaluation criteria on their product labels. Such summaries would help consumers understand the limitations, as well as the breadth, of the environmental certification program.

Conclusion

Green buying can be an effective means of promoting genuine environmental improvements in the design of consumer products and packaging. Before buying power will influence manufacturers’ production decisions, however, consumers need accurate information about the products that confront them in the marketplace.

Two separate but interwoven problems currently jeopardize the ability of consumers to vote with their pocketbooks. First, as discussed in Parts I and II, the tendency of manufacturers to make misleading advertising claims prevents buyers from distinguishing environmental superiority from marketing rhetoric. Some firms have changed their labels but not their products, and the FTC guidelines lack the precision and legal muscle to curb this trend effectively. The current legal and regulatory framework fails to deter manufacturers from

404. Another advantage of this method is that it can incorporate product performance standards. For example, Green Seal’s Environmental Standard for Tissue Paper requires that certified tissue products meet the following performance criteria:

Section 3. Product Specific Performance Requirements

3.1 The product must be made in accordance with reasonable industry practice with respect to holes, tears, wrinkles, cleanliness, and foreign materials or dirt. It must have no disagreeable odor, either wet or dry, in accordance with reasonable industry practice. Edges must be cleanly cut and not ragged. The tissue must dispense properly from the box or fixture.

3.2 Each roll of bathroom tissue must contain at least 40 square feet of product (equivalent to approximately 300-4.5 x 4.4 inch sheets). Each box of facial tissue must contain at least 70 square feet of product (equivalent to approximately 175-8.0 x 8.0 inch sheets).

GREEN SEAL, ENVIRONMENTAL STANDARD FOR TISSUE PAPER 6 (Feb. 12, 1992).

405. For example, the Green Seal Environmental Standard For Tissue Paper includes several labeling requirements, one of which mandates that licensed tissue products bear legible descriptions of the basis for their certifications. The standard provides the following example:

"This product contains 100% recovered paper fiber and XX post consumer materials, and meets Green Seal environmental standards for bleaching, deinking and packaging. It contains no added inks, dyes, or fragrances. [where XX is the certified level of post-consumer materials]."

Id. at 8.
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making misleading claims.

Second, information about benign product attributes is frequently undercut by competing information about harmful tradeoffs. The inability of consumers to evaluate products on a multidimensional basis has spawned the development of independent certification companies that award their logos to products with several favorable environmental attributes. The current legal and regulatory regime is ill-suited to protect against unmerited product endorsements by these third-party certifiers.

A two-tiered approach is necessary to promote accountability in environmental advertising and certification in the United States. First, Congress should enact new legislation authorizing EPA to define terms and establish testing protocols for environmental advertising. EPA expertise is essential because current advertising practices implicate environmental policy concerns. The new statute should include citizen and state enforcement mechanisms that would bolster federal efforts. The law should also incorporate innovative procedures, such as petition processes, that would further encourage state vigilance over environmental advertisers.

The second step is to select an appropriate organizational structure and develop a credible methodology for environmental certification. If operated with integrity and openness, private certification enterprises may be able to insulate the standard-setting process from undue industry pressure. This Article, however, extends a cautionary note: problems will inevitably arise if private certifiers fail to publicize their procedures, to specialize in different product or functional niches, or to create new structures for coordinating standards.

Developing an accurate and rigorous product evaluation methodology is perhaps the greatest challenge to the future of environmental certification. Life-cycle analysis, already embraced by some certifiers, is presently inappropriate for use as a comprehensive consumer product evaluation tool. Data gaps and boundary definition problems make the technique inadequately fine-tuned for making consistent and reliable interbrand comparisons. An alternative technique that employs a discrete number of independently verifiable testing criteria is more practical. If private certification companies prove unable to maintain uniform and rigorous standards, governmental oversight or direct participation may become appropriate.

Environmental advertising and certification can be valuable services if they honestly reflect the attributes of products and production processes. If consumers are to select environmentally superior products, they will need confidence that the information on which they rely is accurate. Adoption of the strategies called for in this Article will help make consumers an informed electorate when they vote green with their pocketbooks.