

COMMENTS

“ENVIRONMENTALLY FRIENDLY” PRODUCT ADVERTISING: ITS FUTURE REQUIRES A NEW REGULATORY AUTHORITY

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INTRODUCTION

The 1990s have brought a significant increase in public awareness of the importance of environmental protection and particularly of the need to find safe methods for managing solid waste.¹ With this heightened environmental consciousness has come a greater recognition of the consumer's ability to promote environmental protection through selective product purchasing. Surveys indicate that shoppers are searching store shelves for recyclable, compostable, or otherwise “environmentally friendly” products.²

Industry has responded to this consumer demand by launching what has been described as a “green revolution,” a strategy of mar-

1. See REGULATORY INNOVATIONS STAFF, U.S. ENVTL. PROTECTION AGENCY, *ASSESSING THE ENVIRONMENTAL CONSUMER MARKET* 3 (1991) [hereinafter ENVIRONMENTAL CONSUMER MARKET] (disclosing survey data showing high levels of public support for recycling); John Holusha, *Mixed Benefits from Recycling*, N.Y. TIMES, July 26, 1991, at D2 (citing 1990 poll finding that 74% of Americans favored mandatory recycling); *Most Would Pay for Cleaner Environment*, USA TODAY, Apr. 13, 1990, at 10A (describing USA Today poll finding that 93% of respondents favor mandatory recycling of newspapers, bottles, and cans).

2. See ENVIRONMENTAL CONSUMER MARKET, *supra* note 1, at 3 (observing that Americans are increasingly willing to change purchasing behavior to mitigate environmental problems). Polls indicate that consumers are willing not only to choose consumer products on environmental grounds, but also to select a store for the same reasons. See Caroline E. Mayer, *Grocers Go Green; Moving to Address Environmental Issues*, WASH. POST, Apr. 17, 1991, at E1, E19 (noting survey found that 59% of shoppers would switch to new supermarket if it offered “environmentally friendly” products); see also *Many Say They'd Pay to Cut Waste*, CHI. TRIB., Apr. 20, 1991, at 1 (discussing survey that found 39% of respondents would pay premium of 10% for products in less wasteful packages); Ramon G. McLeod, *Environmental Worries Affect Shopping*, S.F. CHRON., July 3, 1990, at A1 (discussing consumer poll in which 70% of respondents said they had switched brands because of environmental concerns).

keting products through the use of environmental claims.³ One 1990 study found that products with "environmentally friendly" packaging claims are being introduced at a rate twenty to thirty times greater than that of other new types of packaged goods.⁴ Some green claims such as statements that encourage post-consumer recycling accurately describe product attributes that serve environmental goals.⁵ Other green claims can be deceptive, mis-

3. See *Environmental Marketing Claims Act of 1991 (S. 615): Hearings on S. 615 Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 102d Cong., 1st Sess. 2 (1991) [hereinafter *Environmental Marketing Claims Act Hearings*] (prepared statement of Hubert H. Humphrey III, Minnesota attorney general) (arguing that "Green Revolution" is not overstatement because environmental advertising is fundamentally different in scope and complexity than any previous marketing trend). Humphrey coined the phrase "green revolution" to describe the tremendous increase in the number of environmental claims disseminated in recent years. *Id.* at 2. For an example of how U.S. companies have responded to growing concerns about waste, see Terry Atlas, *McDonald's, Critic Take Aim at Trash*, CHI. TRIB., Aug. 2, 1990, § 3, at 1 (describing McDonald's plan to reduce waste materials in food packaging); Pat Wechsler, *Corporate Concern for Environment Grows*, NEWSDAY, Apr. 19, 1990, at 55 (describing actions of Kodak, Walt Disney, Shell, Inc., and other U.S. corporations in response to environmental concerns); Paul Wiseman, *Businesses Clean Up, Public Gets Angry; Firms Go Greener*, USA TODAY, Apr. 11, 1990, at B1-B2 (describing how public is holding companies responsible for their environmental record).

4. See ENVIRONMENTAL CONSUMER MARKET, *supra* note 1, at 2 (citing 1990 industry report describing phenomenal growth in environmental advertising); see also *Environmental Marketing Issues: Hearings Before the Federal Trade Comm'n* 106 (1991) [hereinafter *FTC Hearings*] (testimony of Walter Coddington, Persuasion Environmental Marketing) (reporting that number of "environmentally friendly" product advertisements in print and electronic media increased 400% between 1989-1990).

5. Recycling is widely considered to be a top priority in the management of post-consumer waste materials. An example of a highly beneficial green claim is the statement "recyclable aluminum" on a beverage can. This statement informs consumers of the product's material contents and that recycling can be readily accomplished. This is a valid claim as well because 55% of all aluminum cans are recycled. See OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, *FACING AMERICA'S TRASH: WHAT'S NEXT FOR MUNICIPAL SOLID WASTE?* 28 (1989) [hereinafter *FACING AMERICA'S TRASH*] (reporting post-consumer recycling rates for aluminum and other materials).

Some products bear labels accurately accounting for their percentage of recycled content, such as a plastic bottle stating, "Contains at least 60% recycled PET [polyethylene terephthalate] plastic," or stationery claiming, "Made with 100% recycled fibers." Statements of the percentage of recycled content enable shoppers to make informed purchasing decisions and, in the long run, promote markets for recyclable materials through their selections. The U.S. Environmental Protection Agency (EPA), as the federal agency with expertise in assessing solid waste management and overall environmental policy, has identified such recycled content claims as highly beneficial. See Guidance for the Use of the Terms "Recycled" and "Recyclable" and the Recycling Emblem in Environmental Marketing Claims, 56 Fed. Reg. 49,992, 49,996 (1991) [hereinafter *EPA Environmental Marketing Guidance*] (expressing preference for recycled content claims disclosing percentage of recycled content in product or packaging).

The EPA formulated the following definitions to serve as guidance to marketers and to help educate consumers on the recycling process:

The term "home scrap" means those materials, virgin content of a material, or by-products generated from, and commonly reused within, an original manufacturing process.

The term "post-consumer materials" means those products or other materials generated by a business or consumer that have served their intended end uses, and that have been recovered from or otherwise diverted from the solid waste stream for the purpose of recycling.

leading, or confusing to consumers, and several unsubstantiated claims have been removed after the Federal Trade Commission (FTC) filed complaints.⁶ Individual states are enacting laws to regulate green marketing in an attempt to eliminate false green claims.⁷

The term "pre-consumer materials" means those materials generated during any step in the production of a product and that have been recovered from or otherwise diverted from the solid waste stream for the purpose of recycling, but does not include those scrap materials, virgin content of material or by-products generated from, and commonly reused within, an original manufacturing process.

....

The term "recycled materials" means pre-consumer materials and post-consumer materials, and does not include home scrap.

The term "recyclables" means products or materials that can be recovered from or otherwise diverted from the solid waste stream for the purpose of recycling.

The term "recycle" means the series of activities, including collection, separation, and processing, by which products or other materials are recovered from or otherwise diverted from the solid waste stream for use in the manufacture of new products other than fuel for producing heat or power by combustion.

Id. at 49,994. The term "compostable" means that through a process of physical, chemical, thermal, and/or biological degradation in a solid waste composting facility, the product or package will be converted to soil-like material. *See* Petitions for Environmental Marketing and Advertising Guides; Public Hearings, 56 Fed. Reg. 24,968, 24,974-75 (to be codified at 16 C.F.R. ch. 1) (1991) [hereinafter Petitions for Marketing Guides] (proposing definitions for environmental claims).

6. *See, e.g.,* Tech Spray, Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment, 57 Fed. Reg. 2101, 2102 (1992) (eliminating false "ozone safe" claim on spray cleaner); RMED International, Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment, 57 Fed. Reg. 6608, 6609-10 (1992) (eliminating claim of "degradability" on diapers that erroneously suggested likelihood of accelerated decay in landfills); First Brands Corporation; Proposed Consent Agreement with Analysis to Aid Public Comment, 56 Fed. Reg. 54,863, 54,864-65 (1991) (ordering company to eliminate unsubstantiated "degradability" claim on plastic bags); American Enviro Products, Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment, 56 Fed. Reg. 46,184, 46,185-86 (1991) (ordering company to eliminate unsubstantiated "biodegradable" advertising from diapers); Jerome Russell Cosmetics U.S.A., Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment, 56 Fed. Reg. 26,827, 26,828 (1991) (prohibiting manufacturer from making deceptive "ozone safe" claim on hair and cosmetic products); Zipatone, Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment, 56 Fed. Reg. 19,865, 19,866 (1991) (prohibiting manufacturer from making unsubstantiated "ozone friendly" claim about spray cement product); *see also* Keith Schneider, *Can Shoppers Tell If Something Is Really Good for the Planet?*, N.Y. TIMES, July 14, 1991, § 4, at 6 (describing Mobil Corporation's decision to pay \$150,000 and remove claims asserting that its plastic bags degraded to dust after 90 days in response to Greenpeace's investigation and suits filed in six states alleging Mobil made false and misleading advertising claims).

7. *See, e.g.,* CAL. BUS. & PROF. CODE § 17508.5 (West Supp. 1992) (regulating use of environmental claims for consumer products sold in California); IND. CODE ANN. §§ 24-5-17-1 to -14 (Burns Supp. 1992) (establishing definitions for terms such as "ozone friendly," "biodegradable," and "compostable" and making it violation for any manufacturer to use terms to describe its consumer products if products do not meet definitions); N.Y. ENVTL. CONSERV. LAW § 27-0717.2 (McKinney 1992) (establishing New York's standards and definitions at N.Y. COMP. CODES R. & REGS. tit. 6, § 368 (1990) for use of terms "recycled," "recyclable," and "reusable"). In addition to New York, California, and Indiana, Rhode Island is also regulating green claims, and two state associations—the Northeast Recycling Council, comprised of officials from 10 northeastern states, and a task force of 11 state attorneys general—are developing guidelines as well. *See* EPA Environmental Marketing Guidance, *supra* note 5, at 49,993 (describing actions taken by states to regulate green marketing).

Several other states are currently reviewing proposed environmental advertising legislation. *See, e.g.,* S. Res. 14, 16th Leg., Reg. Sess. (Haw. 1992) (requiring truth in environmental mar-

Although there has been no legislative mandate from Congress concerning environmental marketing, federal agencies are monitoring the development and considering more aggressive regulation of green marketing claims under existing statutory authority.⁸

Inherent in the green marketing revolution is the potential for producing environmental improvements and greater consumer education. If truthful and consistent with sound environmental policy, green marketing can assist the consumer in coaxing both industry and government to generate new solutions to environmental problems. Given the importance of ensuring meaningful marketplace choices for the consumer and the high priority of environmental protection in the United States, an effective green claims regulatory program should recognize this positive potential and have as its primary goal the encouragement of meaningful environmental marketing, which enhances shoppers' ability to make informed environmental choices among products.

A regulatory scheme designed to eliminate unlawful green claims and allow useful green marketing to flourish must satisfy four principle criteria: (1) it must be capable of addressing the nationwide character of environmental marketing claims made through various advertising mediums;⁹ (2) it must confront relevant environmental policy and waste management technology issues by assessing the environmental effects of products and the validity of messages contained in green claims;¹⁰ (3) it must seek to eliminate deceptive and misleading advertisements before they are distributed, so that the advertisements' deleterious effects on consumers and the environ-

keting); A.B. 1067, 205th Leg., 1st Sess. (N.J. 1992) (requiring environmental claims to be substantiated); S.B. 920, 175th Gen. Ass., Reg. Sess. (Pa. 1991) (restricting unsubstantiated environmental advertising claims); H.R. 2678, 52d Leg., Reg. Sess. (Wash. 1991) (establishing rules for environmental marketing claims).

8. See generally *FTC Hearings*, *supra* note 4 (receiving public comment on deception in environmental marketing and on proposed guidelines to advise industry on green claims usage); EPA Environmental Marketing Guidance, *supra* note 5, at 49,992 (announcing public meetings led by EPA concerning use of terms "recycled" and "recyclable" and calling for public participation and comment).

9. See *FTC Hearings*, *supra* note 4, at 34 (testimony of Hubert H. Humphrey III, Minnesota attorney general) (stating that business community, state regulators, and consumer groups agree that green marketing guidelines must fit national consumer products marketplace); *id.* at 80 (testimony of Robert Gal, industry petitioner, Food Marketing Institute) (citing need for national uniformity in environmental labeling standards because retail goods are commonly distributed in interstate commerce).

10. See *FTC Hearings*, *supra* note 4, at 61 (testimony of Thomas C. Jorling, commissioner, New York State Department of Environmental Conservation) (claiming that waste management policy and technology considerations must be at forefront of potential green claims regulatory programs); *id.* at 11 (testimony of F. Henry Habicht II, deputy administrator, EPA) (stating EPA's belief that better knowledge about fate of consumer products in environment is needed before effective green claims regulation can occur).

ment may be prevented;¹¹ and (4) it must assist in consumer education to increase the public's confidence in truthful and appropriate green marketing campaigns and keep environmental issues at the forefront of consumers' interests.¹²

The current patchwork of inconsistent state regulation of environmental marketing combined with lax federal oversight in the absence of a congressional mandate is not discouraging deceptive green claims or encouraging valid environmental marketing.¹³ A new federal regulatory scheme for green marketing is warranted because our present system is not equipped to respond to such unique marketplace developments or to ensure a robust future for green marketing.¹⁴ Accordingly, a number of bills have been introduced in Congress to regulate green marketing claims.¹⁵ The bills offer two divergent approaches to the problem. The first approach divides the responsibility for green marketing regulation between the United States Environmental Protection Agency (EPA), the agency responsible for environmental policy, and the FTC, the agency responsible for enforcing laws against deceptive advertising.¹⁶ An advisory role is given to the EPA, while enforcement authority is left to

11. See Policy Statement Regarding Advertising Substantiation Program, 49 Fed. Reg. 30,999, 31,000 (1984) (explaining FTC requirement that advertisers must possess substantiating information before making claims). Stopping unlawful advertising practices in their infancy, and preventing their dissemination and resulting harm to consumers has been at the heart of FTC enforcement for nearly 80 years. *Id.*

12. See *FTC Hearings*, *supra* note 4, at 106 (testimony of Walter Coddington, Persuasion Environmental Marketing) (claiming that consumer surveys show that Americans are uninformed about issues at heart of green claims). There is agreement among industry representatives, environmentalists, and government officials that before green claims regulation programs will enable consumers to make meaningful choices among environmentally competitive products, greater education of shoppers is necessary. See *id.* at 76 (testimony of Robert Gal, industry petitioner, Food Marketing Institute) (observing that shoppers are seeking information on environmental issues related to packaging and that private sector promotional campaigns have not provided adequate information in this regard); *id.* at 111 (testimony of Brian Perkins, student, George Washington University) (arguing that legislation mandating standards for environmental labeling will be ineffective without consumer education).

13. See *supra* note 7 and accompanying text (describing efforts by states to regulate environmental advertising claims); see also ENVIRONMENTAL CONSUMER MARKET, *supra* note 1, at 2 (citing industry growth in environmental advertising); *FTC Hearings*, *supra* note 4, at 106 (testimony of Walter Coddington, Persuasion Environmental Marketing) (reporting increases in "environmentally friendly" product advertisements of over 400% between 1989-1990).

14. Cf. *FTC Hearings*, *supra* note 4, *passim* (testimony of state attorneys general, industry representatives, and environmentalists) (seeking federal regulation of environmental claims).

15. See H.R. 3865, 102d Cong., 1st Sess. (1991) (amending solid waste management law to include program for regulating environmental claims); H.R. 1408, 102d Cong., 1st Sess. (1991) (establishing EPA program to regulate environmental marketing claims); S. 976, 102d Cong., 1st Sess. (1991) (dividing, in second draft of bill, responsibility for regulating environmental marketing claims between EPA and FTC).

16. See H.R. 3865, 102d Cong., 1st Sess. (1991) (establishing program in which EPA defines environmental terms and FTC polices nonconforming claims); S. 976, 102d Cong., 1st Sess. (1991) (requiring EPA to develop definitions for environmental terms and FTC to enforce law).

the FTC.¹⁷ The second approach empowers the EPA with exclusive regulatory authority over green claims¹⁸ and provides a certification process for any person or corporation wanting to market a product with an environmental claim. The EPA, after promulgating definitions of different claims, determines whether the product claim fits those definitions.¹⁹

The first approach described above has received the most attention during the 1992 session of Congress and may be enacted as part of an overall rewriting of the nation's solid waste disposal law.²⁰ Given the absence of a meaningful regulatory role assigned to the EPA and case-by-case enforcement by the FTC, however, such a measure would do little to change the existing green claims regulatory framework. Should Congress approve this provision it would be yielding a rare opportunity to adopt an aggressive regulatory program connected to environmental policy along the lines of that recommended in this Comment.

Part I of this Comment examines the growth of environmental awareness among consumers and the associated increase in green marketing. Part II evaluates governmental regulation of green marketing claims at the state and federal levels. Part III assesses possible means of regulating green marketing by federal agencies without a legislative mandate by Congress and concludes that none of the approaches provides for an effective program of regulation. Part IV proposes a new program of green claims regulation under the jurisdiction of the EPA, the regulatory agency with expertise in waste management and other environmental issues. The Comment concludes that legislation linking green claims regulation to comprehensive environmental policy is the best means of eliminating unlawful green claims, encouraging truthful green marketing by

17. See *supra* note 16 (describing proposed legislation for regulating environmental claims).

18. See H.R. 1408, 102d Cong., 1st Sess. (1991) (proposing that EPA certify environmental marketing claims before claims are disseminated to consumers).

19. *Id.*

20. See *supra* note 16 (noting House and Senate bills requiring establishment of uniform definitions for environmental advertising terms). The solid waste legislation passed by the House of Representatives and Senate committees in 1992 contains a green marketing claims program along the lines of this first approach. H.R. 3865, 102d Cong., 1st Sess. (1991); S. 976, 102d Cong., 1st Sess. (1991). Both versions of the solid waste legislation authorize continued enforcement by the FTC, while authorizing the EPA to develop definitions for a range of environmental terms, H.R. 3865 § 403; S. 976 § 307, an activity that the EPA is currently engaged in under the Resource Conservation and Recovery Act of 1976 (RCRA). See, e.g., 42 U.S.C. § 6921 (1988) (requiring EPA Administrator to develop criteria for identifying characteristics of hazardous waste); 42 U.S.C. § 6922 (establishing that EPA Administrator will set standards applicable to generators of hazardous waste); 42 U.S.C. § 6944 (mandating that EPA Administrator provide criteria for classification of sanitary landfills).

industry, and advancing the overall cause of environmental protection.

I. ENVIRONMENTAL CONSUMERISM AND GREEN LABELING

Before analyzing the specifics of green marketing claims and evaluating current and proposed forms of regulation in this area, it is useful to examine the origins of green marketing. In examining the development of this phenomenon, one must first take account of the relationship between industry and the consumer. It is apparent that green marketing is the consumer product industry's response to growing demands by consumers for environmental improvements in the products they routinely purchase.²¹

A. *The Underlying Solid Waste Crisis*

Public support for solid waste recycling appears to be at the heart of the green marketing revolution.²² Increased generation of municipal solid waste²³ has presented communities across the country with difficult choices over the past decade. While landfilling currently manages about eighty percent of the nation's solid waste, many areas will soon be forced to implement alternative waste management systems due to lack of landfill capacity.²⁴ New landfills are generally not being sited.²⁵ Surveys show broad public support for

21. See *FTC Hearings*, *supra* note 4, at 76 (testimony of Robert Gal, industry petitioner, Food Marketing Institute) (discussing consumer pressure for changes in packaging and other environmental issues); *Earth Day '91: Recycling Sinks Its Roots Deeper; Environmental Action Replaces Last Year's Hoopla*, ATL. CONST., Apr. 22, 1991, at A1 (describing corporate response to consumer preference for environmentally sensitive products); Mayer, *supra* note 2, at E1 (noting that survey found that 59% of respondents would switch supermarkets if new market offered "environmentally-safe" products).

22. See *supra* note 1 (disclosing data regarding public support for recycling).

23. See *Resource Conservation and Recovery Act Reauthorization: Hearing on H.R. 3735, H.R. 3736 and H.R. 3737 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 254 (1990) (testimony of Donald R. Clay, assistant administrator, Office of Solid Waste and Emergency Response, EPA) (stating that in 1960s Americans generated about 87 million tons of solid waste annually, whereas analogous figure was approximately 160 million tons by 1980s and is projected to be 190 million tons by year 2000).

24. See *FACING AMERICA'S TRASH*, *supra* note 5, at 3 (noting that approximately 80% of municipal solid waste is deposited in landfills, 10% is recycled, and 10% to 15% is incinerated). The current dependency on landfills as the United States primary waste management resource will soon be forced to end. Recycling and composting are favored not just because they are more popular among consumers than burying solid waste, but because they are an essential waste management option to consider in place of landfills, which are rapidly closing. See *REGULATORY INNOVATIONS STAFF, U.S. ENVTL. PROTECTION AGENCY, PROMOTING SOURCE REDUCTION AND RECYCLABILITY IN THE MARKETPLACE* 8, 10 (1989) [hereinafter *PROMOTING RECYCLABILITY*] (predicting that at current disposal rates, one-third of nation's existing landfills will reach capacity and close by 1995 and New York State, as one example, will have no remaining landfill capacity); *FACING AMERICA'S TRASH*, *supra* note 5, at 3 (estimating that in 20 years 80% of nation's existing landfills will close).

25. See *PROMOTING RECYCLABILITY*, *supra* note 24, at 8 (noting that proposals for new

adopting environmentally sound solid waste management methods such as recycling and composting.²⁶ This sentiment reflects a growing concern among a majority of Americans about waste disposal and the perceived deterioration in environmental quality in general.²⁷ Recognition that the individual has a pivotal role to play in solving the solid waste crisis through purchase and disposal decisions has brought about an unprecedented era of environmental consumerism.

B. The Environmental Labeling Boom and Consumer Confusion

Surveys reveal that consumers are now frequently selecting products based on advertised environmental benefits.²⁸ The implications of this trend are significant for the multi-billion dollar consumer product advertising industry.²⁹ In response to this consumer interest, the voluntary use of environmental claims by consumer product manufacturers, distributors, and advertisers has increased markedly.³⁰ This marketing development appears almost certain to continue. One recent study found that seventy percent of advertising executives believe environmental advertising is the most important issue in retailing today, and eighty-two percent believe green marketing will dominate the marketplace over the next five

landfills and incinerators face considerable public opposition due to real or perceived health and environmental threats); *FACING AMERICA'S TRASH*, *supra* note 5, at 3 (noting that opposition to new landfills is due to their history of ineffectiveness, concerns over human health and environment, "not-in-my-backyard" attitudes, and failure of local planners to involve public in early phases of decisionmaking).

26. See ENVIRONMENTAL CONSUMER MARKET, *supra* note 1, at 3 (citing 1990 Gallup poll showing 82% of respondents reported they recycle some materials); *id.* at A-1 (reporting 65% of consumers surveyed say recyclability affects decision to buy products and citing survey by research director of National Gardening Association indicating that between 1987 and 1989, number of households with backyard composting bins increased 133%, and number of households using compost material in gardening increased 57%).

27. See ENVIRONMENTAL CONSUMER MARKET, *supra* note 1, at A-1 (reporting 1990 poll indicating 84% of Americans believe pollution is serious national problem); *id.* at A-2 (reporting survey published in 1990 showing Americans rank clean environment second only to happy family life in terms of "indispensability").

28. See ENVIRONMENTAL CONSUMER MARKET, *supra* note 1, at A-1 (noting that 51% of adults surveyed in September 1990 had purchased or avoided purchasing product for environmental reasons); *PROMOTING RECYCLABILITY*, *supra* note 24, at 3 (finding that 50% of Americans would change purchasing habits to buy foods and beverages sold in recycled or recyclable containers); *id.* at A-14 (reporting supermarket survey showed that 93% of shoppers favored recycled paperboard packaging and 83% believed products should include amount of recycled content on labels).

29. See Janet Steiger, *Misleading Ads Can Have Negative Health Effects*, *ROLL CALL*, Sept. 12, 1991, at 43 (reporting that in 1990, American companies spent \$19 billion on consumer advertising).

30. See *supra* note 4 and accompanying text (reporting growth in environmental advertising providing evidence that green marketing trend is saturating consumer product marketplace).

years.³¹ The media has devoted considerable coverage to green marketing and the confusion about the meaning of green claims.³² In fact, the green marketing revolution has become an international development.³³ Several industrialized nations far ahead of the United States in developing progressive waste management systems such as recycling and composting—notably Japan and Germany—have already moved to confront the green marketing revolution by enacting standards and definitions for environmental claims.³⁴ Furthermore, Norway, Sweden, Finland, France, Portugal, Austria, and New Zealand have all announced plans to issue environmental labels to identify acceptable products.³⁵

Consumers exercise great influence on product manufacturers

31. See *FTC Hearings*, *supra* note 4, at 106 (testimony of Walter Coddington, Persuasion Environmental Marketing) (reporting that executives in food, drug, and mass merchandising fields predict outstanding future prospects for environmental advertising).

32. See, e.g., Judann Dagnoli, *Whose Job Is It to Define 'Green'?*, *ADVERTISING AGE*, Feb. 4, 1991, at 13 (reporting lack of clear responsibility for regulating growing number of green claims); John Holusha, *So, What Is 'Environmentally Friendly'?*, *N.Y. TIMES*, Jan. 26, 1991, at 50 (explaining causes for confusion in meaning of green claims on products); Jim Salzman, *Green Labels for Consumers*, *OECD OBSERVER*, Apr./May 1991, at 28-30 (discussing environmental labeling of products worldwide); Terri Shaw, *The Selling of 'Green,'* *WASH. POST*, Feb. 28, 1991, (Washington Home Section) at 9-11 (reporting shopper confusion over meaning of green labels); Randolph B. Smith, *Rush to Endorse 'Environmental' Goods Sparks Worry About Shopper Confusion*, *WALL ST. J.*, Apr. 16, 1990, at B1, B3 (surveying state and government officials regarding meaning of green advertising).

Press coverage that is critical of environmental marketing was greatly accelerated by corporate advertising campaigns centered on Earth Day 1990. See, e.g., Kenneth Clark, *Earth Day Calling . . . Help!*, *CHI. TRIB.*, Apr. 22, 1990, § 13, at 4, 8 (questioning whether environmental consciousness of Earth Day could last beyond that one day); Paul Farhi & Martha Hamilton, *Companies Climb Aboard Earth Day Bandwagon*, *WASH. POST*, Apr. 6, 1990, at D1, D3 (reporting that major American companies with histories of environmental problems advertised products emphasizing Earth Day 1990); Kirkpatrick Sale, *The Trouble With Earth Day*, *NATION*, Apr. 30, 1990, at 594-98 (arguing that despite "ballyhoo" and good intentions, Earth Day 1990 resolved none of key questions of environmental policy); Joel Sappell, *My Real Concern Isn't Earth Day But Earth Tomorrow*, *L.A. TIMES*, Apr. 22, 1990, at A34 (criticizing "corporate hype and mind-numbing media overload" focused on Earth Day 1990).

33. See Harold Gilliam, *'Green Seal' of Approval*, *S.F. CHRON.*, June 10, 1990, (This World Magazine) at 19 (describing environmental labeling systems of Germany, Japan, and Canada); Julia Hailes, *The Environment: Shopping for a Euro-label to Help Consumers*, *INDEPENDENT*, Sept. 10, 1991, at 14 (describing European Community plans to launch eco-labels to provide consumers with accurate product information); Salzman, *supra* note 32, at 28 (discussing global aspects of green labeling program).

34. See *FACING AMERICA'S TRASH*, *supra* note 5, at 203 (noting that Japan is far ahead of other countries in conserving scarce land and resources in that it recycles up to 50% of its garbage); *id.* at 312 (noting Federal Republic of Germany has one of most advanced approaches to waste management); see also Gilliam, *supra* note 33, at 19 (describing environmental labeling programs of Germany, Japan, and Canada); Salzman, *supra* note 32, at 28 (discussing environmental labeling worldwide). As the European Community establishes common regulations covering a variety of commercial practices, green claims regulation is seen as an important area in which to attain regional consistency. See Hailes, *supra* note 33, at 14 (noting European Community is moving toward continent-wide system of regulating environmental labeling, with Great Britain at forefront of drive).

35. See Salzman, *supra* note 32, at 28 (listing countries that plan to develop "eco-labels"); see also Gilliam, *supra* note 33, at 19 (noting additional country, Australia, has similar plans).

and distributors, as has been demonstrated in the environmental arena by such movements as the successful boycott of tuna caught using "dolphin-unsafe" fishing methods.³⁶ While some green marketing claims respond accurately and informatively to shoppers' increased environmental consciousness, others can be false, deceptive, misleading, or unfair to consumers.³⁷ Some green claims appear merely to take advantage of consumers' environmental consciousness without offering any true environmental benefits.³⁸ Surveys indicate that although consumers are seeking environmentally responsible products, most shoppers have recently become distrustful of all environmental claims.³⁹ This is due to the increased use of such poorly defined terms as "recyclable," "compostable," and "biodegradable," and of such hopelessly vague terms as "environment-friendly" and "earth-safe."⁴⁰

Given the proliferation of potentially false, deceptive, and misleading green claims as well as consumers' increasing distrust of environmental labels on products, the future of environmental consumerism is at present very uncertain. In order to bring stability to green marketing, industry, environmentalists, and government

36. See ENVIRONMENTAL CONSUMER MARKET, *supra* note 1, at 19-20 (reporting that after consumer boycott and letter-writing campaign, companies representing 70% of canned tuna producers agreed to stop selling tuna caught using fishing methods that accidentally kill dolphins and other nontarget marine species); see also Philip Shabecoff, *Three Companies to Stop Selling Tuna Netted with Dolphins*, N.Y. TIMES, Apr. 13, 1990, at A1 (reporting tuna companies' decisions to respond to consumer pressure).

37. See *supra* note 6 (listing six green claims that have been judged deceptive and therefore outlawed by FTC).

38. See Charles Campbell, *Benefits Claimed by Some 'Green' Products Seen as Dubious; Consumerism: Many Environmentally Conscious Shoppers Are Confused About Marketing Claims—With Good Reason*, L.A. TIMES, Dec. 16, 1990, at D20 (describing deceptive green advertising); Schneider, *supra* note 6, at 6 (detailing FTC investigations into deceptive environmental advertising); *supra* note 6 (noting FTC consent agreements with companies whose products proclaimed environmental benefits that were not supported by factual evidence).

39. See *FTC Hearings*, *supra* note 4, at 9 (testimony of F. Henry Habicht II, deputy administrator, EPA) (conveying EPA's concern that although vast majority of Americans are aware of issues involving product consumption and 65% are aware of green claims, very small percentage believe such claims); see also Cheryl Wetzstein, *Ecology Seen Going Downhill, Poll Finds*, WASH. TIMES, Aug. 15, 1990, at C10 (reporting national poll that found 68% of respondents would rely on environmental group scientist if given conflicting viewpoints on issue, whereas only 6% of respondents would trust corporate scientist's opinion). But see *FTC Hearings*, *supra* note 4, at 104-06 (testimony of Walter Coddington, Persuasion Environmental Marketing) (noting that marketing surveys show that consumers do believe environmental claims but are confused about meaning of terms "recyclable" and "biodegradable," and arguing that cause of confusion is lack of consumer education, not deceptive advertising).

40. See *FTC Hearings*, *supra* note 4, at 106 (testimony of Walter Coddington, Persuasion Environmental Marketing) (reporting 400% increase in number of "environmentally friendly" product advertisements between 1989-1990); *id.* at 76 (testimony of Robert Gal, industry petitioner, Food Marketing Institute) (observing that due to lack of standards and definitions, shoppers are confused about meanings of environmental claims and product manufacturers and distributors are reluctant to use environmental labels).

officials are calling for federal regulation.⁴¹ Regulation at the national level is appropriate given the nationwide marketing and distribution of consumer products.⁴²

1. *Green claims address complex waste management issues*

Given the variety of waste management policy and technology issues inevitably raised by green marketing claims, the substance of each claim needs to be carefully assessed. Although a few labels deal with the ozone layer and other global environmental issues, most green claims relate to concerns about waste management issues such as packaging reduction, reuse, recycling, composting, incineration, and landfilling.⁴³ A review of some of the more common green claims and the issues they present highlights the complexity of regulating green marketing and explains why it is necessary for green claims regulators to possess expertise in environmental issues.

The first green claims to receive attention by state regulators related to recycling.⁴⁴ From an environmental policy perspective, use of the claims "recycled" and "recycled content" raises questions concerning the percentage of recycled material in a product and the relation of that percentage to the general recycling rate for the specific material.⁴⁵ For example, a breakfast cereal box that entices shoppers with the statement, "package contains recycled box-

41. See *FTC Hearings*, *supra* note 4, *passim* (presenting testimony received from consumer product industry, advertisers, environmental groups, and government officials supporting various forms of green claims regulation).

42. See *FTC Hearings*, *supra* note 4, at 80 (testimony of Robert Gal, industry petitioner, Food Marketing Institute) (claiming that because wholesale and retail grocery industry warehouses commonly service several states, national uniformity of green claims regulation is desirable). In addition to consumer product distribution systems that cross state lines, television and magazine advertising of products can create instant nationwide dissemination of marketing claims.

43. See *FTC Hearings*, *supra* note 4, at 135 (testimony of Jeanne Wirka, solid waste research analyst, Environmental Action Foundation) (noting that except for general terms like "environmentally friendly," most environmental claims relate to waste management).

44. See CAL. BUS. & PROF. CODE § 17508.5 (West Supp. 1992) (defining and regulating use of "recycled" and other key green terms on products in California); IND. CODE ANN. §§ 24-5-17-1 to -14 (Burns Supp. 1992) (establishing definitions for environmental advertising); N.Y. ENVTL. CONSERV. LAW § 27-07172 (McKinney 1992) (establishing New York's program to define "recycled" and other environmental advertising terms and regulate terms' use by manufacturers of consumer goods). For a review of pending environmental marketing legislation in four other states, see *supra* note 7.

45. See, e.g., EPA Environmental Marketing Guidance, *supra* note 5, at 49,995-97 (claiming that major issues surrounding "recycled" claims concern amount of recycled material in product or packaging and desirability of distinguishing between incorporation of post-consumer recycled material and reuse of scrap from internal manufacturing process); H.R. 4942, 101st Cong., 2d Sess. (1990) (calling for regulations governing use of term "recycled"); *FTC Hearings*, *supra* note 4, at 39-40 (testimony of Thomas C. Jorling, commissioner, New York State Department of Environmental Conservation) (stating that product should not be al-

board," may present a misleading claim if the amount of recycled content is only one percent of the container.⁴⁶ Regulators should consider requiring that such a claim state the percentage of recycled content.

Use of the claim "recyclable" raises questions about the prevalence of operational post-consumer recycling programs for the particular product versus the mere theoretical feasibility of recycling.⁴⁷ An example of deception might be found where a label states "recyclable HDPE [high density polyethylene] plastic" on a product for which no collection or recycling facilities exist or for which only a minuscule amount of recycling is actually occurring.⁴⁸ An effective program of green claims regulation would require information on labels about where to deliver recyclable materials.

The most controversial of all environmental claims are those relating to package "degradability."⁴⁹ Biodegradable and photodegradable plastics advertised in such products as disposable

lowed to claim that it has recycled content if only one percent is recycled or if recycled content is less than minimum percentage established by state's recycling policy).

Examples of products advertising recycled content are common, notably among products containing paper and cardboard. See ENVIRONMENTAL CONSUMER MARKET, *supra* note 1, at 10-11 (describing expansion in marketing of 100% recycled tissue products by Fort Howard paper products company, and 100% annual sales growth for recycled paper products marketed by Earth Care Paper). As a current example of recycled content claims, Giant Foods, Inc. markets a variety of its Giant brand products in boxes claiming unspecified recycled boxboard content. Future green marketing regulations might require such products to state an estimate of the percentage of recycled content on the label.

46. See Petitions for Marketing Guides, *supra* note 5, at 24,973 (describing deceptive advertising in which product's label misrepresents amount of packaging's recycled content).

47. See EPA Environmental Marketing Guidance, *supra* note 5, at 49,998 (asserting EPA's view that "recyclable" claims should be accompanied by information that explains how consumers may recycle product and notes availability of recycling for product). But see *FTC Hearings*, *supra* note 4, at 78 (testimony of Robert Gal, industry petitioner, Food Marketing Institute) (expressing opposition to any mandate that term "recyclable" be prohibited where product fails to achieve certain minimum recycling percentage or where recycling system for product is not in place). Requiring an accounting for regional variations in recycling or other waste management activities in green claims might prove burdensome on industry. A Bush administration official has cautioned that "providing consumers with community specific recyclability options pose[s] a prohibitive cost on business which would inevitably be passed on to consumers or, worse yet, may abolish the use of those terms all together." See *FTC Hearings*, *supra* note 4, at 18 (testimony of Clayton S. Fong, U.S. Office of Consumer Affairs) (expressing White House concerns regarding stringent green claims regulation).

As an example of an ambiguous recyclable claim, Sally Foster brand gift wrap is sold in a flexible plastic bag displaying the claim, "This Bag is Recyclable," beneath the "chasing arrows" recycling symbol—the standard symbol showing three bent arrows pointing clockwise in a circle to suggest recycling. There is no further information on the package. Future green claims regulation might require such a label to add information explaining how such plastic packaging may actually be recycled.

48. See Petitions for Marketing Guides, *supra* note 5, at 24,974, 24,980 (finding advertising that represents product as recyclable when no recycling facilities exist for material composing product to be deceptive).

49. See *infra* notes 52-53 and accompanying text (discussing conflicting opinions regarding whether there is any validity to marketing claims of degradability).

diapers, garbage bags, and beverage six-pack rings attracted attention in the 1980s by offering a potential solution to litter and marine animal entanglement problems.⁵⁰ There is currently only limited interest among waste managers and environmentalists in promoting degradability.⁵¹ This is because there is no agreement as to how a degradable product decays in a landfill, whether degradable plastics are compatible with recycling processes, and whether degradable plastics are compostable.⁵² Not surprisingly, degradability claims have been attacked by the FTC in its initial efforts to eliminate deceptive green claims.⁵³ Effective green claims regulation would require an explanation on product labels of how degradation of the packaging is to be achieved, whether by composting, simple moistening, and so on, and would also require that manufacturers substantiate all degradability claims.

Another area of green claims that has proven to be troublesome relates to air pollution and the ozone layer. Although ozone-deplet-

50. See, e.g., H.R. 5000, *Recyclable Materials: Plastics in the Environment: Hearing Before the Subcomm. on Natural Resources, Agriculture Research and Environment, House Comm. on Science, Space and Technology*, 100th Cong., 2d Sess. (1988) (containing testimony from members of Congress, industry, and environmentalists on usefulness of degradable plastics in solid waste management); see also Act of Oct. 28, 1988, Pub. L. No. 100-556, § 102, 102 Stat. 2779, 2779-80 (codified as amended at 42 U.S.C. § 6914(b) (1988)) (mandating nationwide use of photodegradable plastic six-pack rings for beverage products as measure to protect marine mammals from strangulation in discarded plastic rings).

51. See U.S. ENVTL. PROTECTION AGENCY, *METHODS TO MANAGE PLASTIC WASTES* 82 (1989) (discussing data that downplays degradable plastics capabilities as viable waste management strategy).

52. See, e.g., *id.* (stating that current data does not indicate that degradable plastics facilitate any existing waste management strategy); *FTC Hearings*, *supra* note 4, at 138 (testimony of Jeanne Wirka, solid waste research analyst, Environmental Action Foundation) (claiming that term "degradable," when applied to plastics, is inherently misleading). But see *Environmental Labeling of Consumer Products: Hearing Before the Subcomm. on the Consumer, Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 90 (1990) [hereinafter *Environmental Labeling*] (testimony of Ramani Narayan, senior scientist, Michigan Biotechnology Institute) (stating that degradable plastics technology is in infancy, that emerging degradable plastics technologies can address waste management issues, and that Federal Government should not stifle plastics research due to misconceptions and myths about degradability).

Degradability claims have been among the most common of green claims employed by industry. See *FTC Hearings*, *supra* note 4, at 99-100 (testimony of Andrew Stoeckle, environmental analyst, ABT Associates) (noting market survey showed degradability claims represented one-third of all green claims used by manufacturers); cf. *id.* at 104-05 (testimony of Walter Coddington, Persuasion Environmental Marketing) (reporting marketing survey showed one-third of consumers do not know meaning of term "biodegradable").

53. See, e.g., RMED International, Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment, 57 Fed. Reg. 6608, 6609-10 (1992) (eliminating claim of "degradability" on diapers that erroneously suggested likelihood of accelerated decay in landfill); First Brands Corporation; Proposed Consent Agreement with Analysis to Aid Public Comment, 56 Fed. Reg. 54,863, 54,864-65 (1991) (eliminating degradability claim on plastic garbage bags); American Enviro Products, Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment, 56 Fed. Reg. 46,184, 46,185-86 (1991) (eliminating degradability claim on diapers). The confusion among shoppers that is engendered by the questionable validity of degradability claims may offer the best argument for linking waste management policy with regulation of environmental terminology in labeling.

ing substances were removed from many aerosol products in the late 1970s, some hazardous substances continue to be used. Claims that certain aerosol sprays are "ozone-safe" have been determined to be false or deceptive by the FTC.⁵⁴ Future green claims regulation might consider eliminating such environmental claims where a product offers no true benefits to the earth's atmosphere.

Similarly, vague messages such as "environment-friendly" and "earth-safe" that are unsupported by any claims of specific environmental benefits are also problematic. For example, Glad trash bags proclaim, "Safe for the Environment," on the front panel of the trash bag package, while the back panel states that the product is photodegradable, inert in a landfill, and aids incineration. Certainly elaboration can take the vagueness out of an environmentally friendly claim, but none of these qualifications clearly supports the green claim on the front panel. Vague green claims are widely criticized as meaningless, confusing to consumers, and in some cases deceptive.⁵⁵ Controversy is likely to arise over whether to outlaw these types of claims or merely to discourage them.⁵⁶ Effective green claims regulation would require such claims to include definitions of what environmental problems and solutions the product addresses and would also require that such claims be substantiated by manufacturers.⁵⁷

54. See Tech Spray, Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment, 57 Fed. Reg. 2101, 2102 (1992) (eliminating false "ozone safe" claim on spray cleaner); Jerome Russell Cosmetics U.S.A., Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment, 56 Fed. Reg. 26,827, 26,828 (1991) (eliminating false "ozone safe" claim on hair spray); Zipatone, Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment, 56 Fed. Reg. 19,865, 19,866 (1991) (eliminating erroneous "ozone friendly" claim on spray cement product).

Aside from patently false claims, controversy also centers on the use of the "ozone friendly" label on products that do not harm the stratospheric ozone layer but do pollute the atmosphere in other ways. This is an example of a promotional statement that might not technically be false, but is nevertheless at odds with environmental policy. See *FTC Hearings*, *supra* note 4, at 45-46 (testimony of Michael Alcamo, special assistant, New York City Department of Consumer Affairs) (describing New York City's efforts to eliminate "ozone friendly" claims on products contributing to smog because smog harms persons with sensitive respiratory systems). But see *id.* at 84-85 (testimony of James H. Skiles, industry petitioner, Cosmetic, Toiletory, and Fragrance Association) (asserting aerosol product industry's view that "ozone friendly" claim should be permitted for products having adverse impacts on air quality other than stratospheric ozone layer depletion).

55. See Petitions for Marketing Guides, *supra* note 5, at 24,976, 24,982 (presenting for public comment petitions by industry, environmental groups, and government officials unanimously critical of vague green terms such as "environmentally friendly").

56. See, e.g., *FTC Hearings*, *supra* note 4, at 86 (testimony of Robert Gal, industry petitioner, Food Marketing Institute) (arguing that vague "environmentally friendly" claims should be banned because they confuse shoppers). But see Petitions for Marketing Guides, *supra* note 5, at 24,976 (publishing industry petition arguing that some vague green claims constitute "mere puffery" and should require no substantiation).

57. See *FTC Hearings*, *supra* note 4, at 13 (testimony of F. Henry Habicht II, deputy administrator, EPA) (expressing EPA's concern about prevalence of vague environmental claims

Some green messages are not expressly competitive or assertive of a product's attributes, but merely advocate environmentally sound practices by consumers.⁵⁸ Common examples of this type of green message are "don't pollute," "dispose of properly," and "support recycling." Because these messages suggest that a product's manufacturer cares about the environment, they could motivate an environmentally conscious shopper to choose the product. Messages of environmental advocacy that advance legitimate environmental objectives and educate consumers should be encouraged by green claims regulators.

Vague messages of environmental advocacy, however, may create deception or unfairness to consumers.⁵⁹ These types of messages may increase sales for products that do not benefit the environment, or they may be used by a company with a record of environmental problems. Worst of all, from a policy standpoint, these messages may advocate a method of product handling or disposal that is at odds with established waste management policy and technology.⁶⁰ In the absence of an express claim about a product's environmental effects, however, merely inappropriate messages of environmental advocacy would be difficult to eliminate through regulation.⁶¹

and its support for requiring specificity in environmental labels to avoid confusing consumers); *id.* at 17 (testimony of Clayton S. Fong, U.S. Office of Consumer Affairs) (stating Bush administration's disapproval of vague environmental claims such as "environmentally friendly" and its support for use of terms allowing for meaningful product comparisons).

58. As examples of claims of environmental advocacy, 16-ounce bottles of Coca-Cola state "please recycle" on the plastic outer wrappings, with no further information about recycling. "All" brand liquid laundry detergent states on the front of its plastic bottle, "support plastics recycling." The back panel explains that the company is willing to use recycled materials, but community programs must first be supported. Neither of these packages claims any environmental benefits.

59. *Cf. FTC Hearings*, *supra* note 4, at 129 (testimony of Andrew Stoeckle, environmental analyst, ABT Associates) (arguing that detergent bottle stating "please recycle" with no claim of recycled content or other relevant information should be declared unlawful).

60. *See, e.g., NATIONAL ASS'N OF ATTYS. GEN., THE GREEN REPORT II: RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING* 18 (1991) [hereinafter *GREEN REPORT II*] (arguing in report produced by group of state attorneys general that green claims should reflect current waste management options). For example, claims of "safe for incineration" might be substantiated, and at the same time advance goals contrary to a federal policy that ranks incineration at the bottom of the hierarchy of waste management priorities. *See H.R. 300, 102d Cong., 1st Sess. § 2(a)(4)* (1991) (noting that waste incineration is low on list of waste management techniques).

61. *See Letter from James C. Miller III, chairman, Federal Trade Commission, to John D. Dingell, chairman, House Committee on Energy and Commerce* 18 (Oct. 14, 1983) (on file with FTC) (discussing FTC's policy of only eliminating marketing practices that create actual consumer injury through deception). It might prove difficult to show actual injury to a consumer resulting from use of a vague message of environmental advocacy such as "please recycle" or "don't pollute." Therefore, under existing regulations, environmental advocacy claims would probably survive FTC scrutiny even though the product might actually be environmentally hazardous or sold by a company with a record of environmental problems.

2. *Green claims take several forms*

Environmental claims used in consumer advertising take several general forms. An analysis of the different forms reveals the complexity of green claims' effects on consumer behavior. Furthermore, the analysis highlights the need for a comprehensive regulatory program to identify improper green claims by evaluating their detrimental consequences on consumers and industrial competitors.

One form of green marketing is the comparative claim, which asserts that a product is environmentally superior to other products or that other products are more harmful to the environment than that product. Meaningful comparisons among competing products should be encouraged if such advertising is to contribute to product improvements and consumer awareness. Competitive advertising based on false or misleading information, however, or presenting vague comparative claims, serves only to confuse shoppers. A claim of "safer for the environment than brand X," without any further explanation, is confusing to consumers and should be eliminated.⁶²

Another form of green marketing is the descriptive claim, which asserts that a product has a characteristic or quality that is beneficial to the environment. Most commonly, a descriptive green claim will advertise qualities that are relatively harmless due to a product's lack of toxicity or suitability for recycling, composting, or some other non-threatening waste management scheme.⁶³ While such a claim may not appear competitive on its face, it usually implies qualities superior to those of other products. Where environmental claims on products have no basis in fact, regulators should take action to eliminate them. Furthermore, where descriptive claims promote unsound environmental practices, regulators should eliminate them to remove a source of confusion for shoppers. For example, a claim that a product "aids in solid waste incineration" may be substantiated, but the claim promotes a disfavored waste management method and thus is unhelpful to consumers.⁶⁴

Brand names are more powerful sales generators than are collat-

62. See GREEN REPORT II, *supra* note 60, at 11 (arguing that comparative claims such as "better for the environment" should be used only if further description of comparison is included on label).

63. As an example of a descriptive claim, Natural Brew Basket Style Coffee Filters, produced by Rockline, Inc., claims, "No bleach added." The back panel of the filter package explains that because the use of chemicals to bleach filter paper "bothered" Rockline's president, he developed a brown filter that has not been bleached. Although primarily descriptive, the product's claim implies that bleached coffee filters are the product of environmentally harmful manufacturing processes.

64. See FACING AMERICA'S TRASH, *supra* note 5, at 36 (noting that waste incineration method for solid waste disposal is least preferred technique because of concerns about presence of undesired metals and chemicals in emissions and in ash residues).

eral labels on products, and the two types of advertising messages may merit different analyses by regulators of their effects on consumers. A product with "environment" in its brand name is likely to catch the environmental shopper's attention more quickly than a traditional brand name product that merely has a collateral label stating "environmentally friendly." Environmental brand names are now appearing on store shelves.⁶⁵ For example, Ampad Company sells note paper under the brand name "American Recycled Paper," and Peoples Drug Stores market a line of health and beauty aids under the brand name "Today's Choice Environment Friendly."

Given the marketing power of a product's name, there is a special potential for deception in the adoption of green brand names.⁶⁶ By the same token, considering the importance of brand names to advertisers, the Supreme Court has held that brand names are deserving of protection against unreasonable governmental intrusion.⁶⁷ Thus, regulators analyzing green marketing claims must carefully balance the need to guard against deceptive environmental brand names and the necessity of avoiding unfairly burdensome regulation.

A distinction can also be drawn between products that are represented as environmentally beneficial in their entirety and those in which only components are depicted as such.⁶⁸ An example would

65. See *Environmental Marketing Claims Act Hearings*, *supra* note 3, at 2 (testimony of Hubert H. Humphrey III, Minnesota attorney general) (noting increased number of products containing green claims on store shelves); Campbell, *supra* note 38, at D20 (discussing consumer confusion due to increased number of green claim products in stores).

66. Cf. *Friedman v. Rogers*, 440 U.S. 1, 12-13 (1979) (observing that introduction of trade name conveying information may be used to deceive shoppers, as trade name conveys no real information until used over time to allow public to associate name with product characteristics).

67. See *FTC v. Royal Milling Co.*, 288 U.S. 212, 217 (1933) (affirming that while Federal Government has authority to revoke trade names, it should refrain from doing so if less drastic means are available to mitigate deceptive practices because trade names are very valuable business assets). Nevertheless, regulatory agencies do not consider product brand names immune from regulation. In the Food and Drug Administration's (FDA) implementation of the Nutrition Labeling and Education Act, 21 U.S.C. § 343(r) (Supp. 1990), the agency is acting to eliminate brand names that include inappropriate nutritional claims. See Marian Burros, *F.D.A. Plans to Take the Fantasy Out of Food Labels*, N.Y. TIMES, Sept. 18, 1991, at C1 (discussing FDA commissioner's defense of actions to eliminate inappropriate brand names, including claims such as "fresh," "light," and "free").

68. See *Petitions for Marketing Guides*, *supra* note 5, at 24,974 (noting that certain product labels and packaging materials claiming recyclability mislead consumers into thinking that all portions of product are recyclable). An example of a part-green claim is Micatin Antifungal Spray Powder, which is sold in a can covered by a plastic top stating, "Recyclable HDPE cap," with chasing arrows indicating recycling. The product contains no information about whether HDPE caps are actually being recycled. There is no indication that the can is recyclable, and the back panel states that the fluid content is highly flammable and toxic to humans. A consumer might select this product on the basis of the recycling message on the cap, yet the product as a whole has dubious benefits for the environment.

be a nonrecyclable bottle with a recyclable aluminum cap bearing a bold recycling claim. Products that advertise environmental benefits for only a small portion of the overall package might unfairly convince shoppers that the product as a whole is harmless to the environment.

For the foregoing reasons, the specific content and form in which green claims are presented to consumers should be carefully scrutinized by environmental claims regulators. Green claims concern not only a product's composition and its use by the consumer, but also how the product's manufacture, use, and disposal affects the environment. Given the complexity of green claims' guises, an understanding of appropriate environmental policy objectives is essential to eliminate meaningless or deceptive claims from the marketplace.

II. CURRENT REGULATION OF GREEN CLAIMS

Efforts have been made by states, federal agencies, and the private sector to provide regulation or oversight of environmental advertising claims.⁶⁹ A review of efforts to regulate green claims reveals that the goal of systematically regulating these nationwide claims, while taking into account appropriate waste management policy and bolstering consumer confidence in environmental marketing through reliable information, is not being met.⁷⁰ It is therefore understandable that the United States Congress is debating whether or not to authorize more aggressive federal regulation of green claims.⁷¹

A. *Private Environmental Certification Programs*

In an effort to make sense of the green marketing revolution and provide for accreditation of environmentally preferable products, some private groups, notably Green Seal and Green Cross, offer their environmental seals of approval for products deemed positive in their overall effects on the environment.⁷² This trend originated

69. See Petitions for Marketing Guides, *supra* note 5, at 24,969 (explaining attempts by entities besides FTC to provide environmental marketing guidance).

70. See *supra* notes 9-12 and accompanying text (discussing four criteria necessary to achieve effective program for regulating environmental claims).

71. See S. 615, 102d Cong., 1st Sess. (1991) (proposing that regulations be adopted to prevent use of misleading environmental claims); H.R. 1408, 102d Cong., 1st Sess. (1991) (containing similar language to S. 615). These bills are currently under consideration in both the Senate and the House of Representatives.

72. See Petitions for Marketing Guides, *supra* note 5, at 24,969 (noting that two voluntary environmental certification programs have been initiated in the United States, Green Seal and Green Cross, and that American Society for Testing and Materials is developing standards for paper recycling and degradability of plastic products). Private third-party certification pro-

in Germany with the Blue Angel seal for environmentally sound products.⁷³ Official environmental accreditation programs for consumer products have been implemented in a number of other countries as well.⁷⁴

Certification of a product's environmental credentials is an appealing concept. For shoppers who are too hurried to read all labeling information prior to purchasing products, a seal of approval could be their only clue to the product's environmental impact. Greater use of seals of approval might also increase shoppers' interest in the environmental effects of their purchases, thereby enhancing consumer attraction to green marketing campaigns. Additionally, certification seals can offer industry a tangible reward for making environmental improvements in products.⁷⁵

Existing private certification programs in the United States may be well intentioned, highly professional, and even staffed by environmentalists.⁷⁶ Indeed, in the absence of substantial Federal Government involvement in evaluating green claims, the programs help to fill a void. By providing green claims analysis only through contracts with interested companies, however, private certification programs do not present the kind of comprehensive, reliable system for policing the advertising marketplace that is necessary to ensure trustworthy environmental advertising. Private certification programs provide no sanctions against environmentally unsound products, and the seals of approval offered for sale to industry merely serve as an advertising bonus for products.⁷⁷ By offering a seal of approval in return for money, these unregulated programs invite the possibility of bribery or improper influence. Finally, private cer-

grams have received mixed reviews. See *FTC Hearings*, *supra* note 4, at 153 (testimony of Craig Merrilees, National Toxics Campaign) (arguing for highly critical evaluation of third-party seals of approval because they are based on dubious "cradle to grave" analysis that does not reveal true environmental life cycle of products); *Environmental Labeling*, *supra* note 52, at 12 (testimony of Barry Cutler, director, Bureau of Consumer Protection, FTC) (vowing that FTC will individually evaluate all private certification claims on products to ensure claims do not mislead consumers).

73. See Salzman, *supra* note 32, at 28 (reporting that Germany's Blue Angel certification program began in 1978, years before any other environmental labeling program).

74. See Salzman, *supra* note 32, at 28 (noting that official environmental labeling programs for consumer products have been implemented in Canada, Japan, Norway, Sweden, Finland, France, Portugal, Austria, and New Zealand).

75. See Denis Hayes, *Look for the Green Seal of Approval*, ROLL CALL, Feb. 18, 1991, at 24 (suggesting that as consumers become increasingly environmentally active those products that earn "green" seals of approval will be in greater demand).

76. See *id.* (describing creation of Green Seal, private certification program staffed by environmentalists). The *Roll Call* article's author and chief executive officer of Green Seal is Denis Hayes, an organizer of Earth Day 1970 and chairman of Earth Day 1990. *Id.*

77. See Hayes, *supra* note 75, at 24 (implying that companies that pay for review services and receive approval gain beneficial advertising without potential for discreditation).

tification programs tend to replace the consumer's evaluation of a product's effects on the environment with a simple stamp of environmental approval and therefore do not enhance the consumer's decisionmaking ability.⁷⁸ Thus, private certification programs fail to achieve the basic objectives of green claims regulation, which are to eliminate false environmental claims and increase consumer information.

Some form of reliable, independent seal of approval could be helpful to shoppers as a supplement to their own understanding of a product's environmental effects. As consumers' awareness and education about the environmental effects of their product purchases increase, regulators may better understand the usefulness of seals. For the foreseeable future it does not appear, however, that environmental accreditation programs operated by industry will be successful.⁷⁹

B. State Regulation

To confront the increased use of suspect green claims by consumer product industries, states are enacting laws defining claims such as "recycled" and "biodegradable."⁸⁰ At least one state has also authorized official seals of approval for products that satisfy waste management policy objectives such as increased recyclability.⁸¹ The result is a growing patchwork of differing green marketing regulations across the country. Acknowledging the ineffectiveness of state regulation in dealing with a nationwide concern, officials from states that have passed green claims laws are now calling for national regulation of environmental marketing.⁸²

The National Association of Attorneys General has formed a working group to attack false green claims and build a framework

78. See Martha M. Hamilton, *Giving the Green Stamp of Approval: Two Groups Compete to Label Environmentally Friendly Products*, WASH. POST, Oct. 3, 1991, at B11 (discussing detrimental effects of seals of approval on autonomy of consumer decisionmaking).

79. See *id.* (noting product manufacturer's skepticism of private accreditation programs because consumers may rely solely on seals of approval rather than other characteristics of products).

80. See Petitions for Marketing Guides, *supra* note 5, at 24,969 (noting that some states have enacted laws defining green terms such as "recycled" and "ozone friendly" and that 22 states regulate degradability claims).

81. See N.Y. ENVTL. CONSERV. LAW § 27-0717.2 (McKinney 1992) (establishing official New York State recycling emblems for which sellers may apply by petition).

82. See, e.g., *FTC Hearings*, *supra* note 4, at 35 (testimony of Hubert H. Humphrey III, Minnesota attorney general) (arguing that federal regulation is needed to confront marketplace that is national in scope and to put end to inconsistent state laws on green claims); *id.* at 42 (testimony of Thomas C. Jorling, commissioner, New York State Department of Environmental Conservation) (stating that while New York intends to continue its program of reviewing green claims, state recognizes need for nationwide uniformity in definition and usage of environmental terms).

for a national environmental advertising program.⁸³ There has been evidence of this organization's effectiveness. Six members of the association initiated a lawsuit attacking green claims, which resulted in a settlement in June 1991 wherein Mobil Chemical Company agreed to cease its use of a false "degradability" claim on trash bags and to pay each complaining state \$25,000 in damages.⁸⁴

A potential obstacle in formulating a federal green claims regulatory program is the issue of federal preemption of state regulation of green claims. Federal preemption, where a law enacted by Congress or a regulatory action taken by a federal agency impinges on a state enactment, is allowed under the Supremacy Clause of the United States Constitution.⁸⁵ Indeed, several federal environmental statutes contain provisions broadly preempting any state enactment that might overlap with federal law or regulations.⁸⁶ More common, however, is the provision for a quasi-preemption, reserving to states limited authority to adopt rules in a given area of environmental affairs so long as federal laws and regulations are respected.⁸⁷ Various views have already been expressed regarding the desirability of federal preemption of state law in the area of green claims regulation, and the consensus supports some form of limited preemption.⁸⁸ If federal green claims regulation were silent

83. See GREEN REPORT II, *supra* note 60, at v-ix (defining views shared by 11 state attorneys general concerning extent of problems associated with green revolution in marketing, and offering recommendations for government and industry to address abuses in green advertising).

84. See *Mobil Settles on Hefty Bags*, N.Y. TIMES, June 28, 1991, at D4 (reporting settlement between Mobil Chemical Company and six states).

85. U.S. CONST. art. VI (designating Constitution and federal congressional enactments as supreme law of land).

86. See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v(b) (1988) (preempting states from regulating labels and packaging associated with specified chemicals); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1416(d) (1988) (preempting states from regulating any activity having to do with dumping material into ocean waters); Clean Water Act, 33 U.S.C. § 1322(f)(1) (1988) (preempting states from regulating marine sanitation devices in any way); Clean Air Act, 42 U.S.C. § 7543(a) (1988) (preempting states from adopting any regulation concerning motor vehicle emission standards).

87. See, e.g., Endangered Species Act, 16 U.S.C. § 1535(f) (1988) (permitting states to adopt measures if "more restrictive" than federal legislation of activities affecting protected species); Safe Drinking Water Act, 42 U.S.C. § 300g-3(e) (1988) (permitting states to regulate drinking water so long as all requirements of federal act are met); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6929 (1988) (prohibiting states from adopting measures less stringent than those authorized by Act); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9614(a) (1988) (allowing states to adopt regulations providing for additional polluter liability or more stringent requirements governing release of hazardous substances within state borders).

88. See, e.g., S. 615, 102d Cong., 1st Sess. § 13(c) (1991) (permitting states to establish standards or requirements for green claims that are more stringent than federal standards or requirements); *FTC Hearings*, *supra* note 4, at 56 (statement of Hubert H. Humphrey III, Minnesota attorney general) (arguing that strength of national marketplace lies in its regional diversity, and in establishing uniform system, federal government should not preempt all state

on the preemption issue, courts might well uphold the authority of states to pursue their own systems of green claims regulation.⁸⁹

Continued state regulation of green claims, like other forms of environmental regulation at the state level, is appropriate to respond to regional variations in green marketing. Considering the national character of consumer products advertising, however, state regulation without coherent federal guidance will fail to provide for the elimination of false green claims across the nation and through the variety of advertising mediums. It will also fail to provide for the incorporation of consumer education and appropriate environmental policy analysis into effective green claims regulation.

C. *Regulation of Product Claims by the FTC*

For most of this century, the Federal Government has regulated the content of advertising claims under authority of section 45 of the Federal Trade Commission Act.⁹⁰ The Act gives the FTC broad authority to take action against a company where it reasonably suspects an advertising claim violates applicable regulations.⁹¹ This authority may be asserted by the FTC over conflicting state regulations even where there exists no explicit congressional authorization to override state law.⁹² The FTC enforces its rules on a case-by-case

regulation of green marketing); *id.* at 59-61 (testimony of Thomas C. Jorling, commissioner, New York State Department of Environmental Conservation) (supporting federal preemption of less stringent nonfederal green claims regulations to prevent industry from seeking governmental forum of least resistance); *id.* at 168 (FTC Commissioner Deborah K. Owen questioning panel of environmentalists) (confirming support of Environmental Defense Fund, Environmental Action Coalition, and National Toxics Campaign for federal preemption of less stringent state regulation of green claims and allowance for states to adopt more stringent standards); *see also id.* at 24 (statement of F. Henry Habicht II, deputy administrator, EPA) (expressing EPA's view that issue of preempting states should await assessment of effects of federal green claims regulation on activity in marketplace and in various states). *But see id.* at 201 (testimony of Penni Jones, Independent Cosmetic Manufacturers and Distributors) (expressing support of cosmetics manufacturers for broad federal preemption of state, local, and private standards covering green claims); *id.* at 80 (testimony of Robert Gal, industry petitioner, Food Marketing Institute) (stating grocery industry support for national uniformity of green claims regulation and preemption of conflicting state laws).

89. *See Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 712-23 (1985) (upholding local ordinance where federal regulations did not preempt nonfederal rulemaking, and finding that intent to preempt may not be inferred merely from comprehensiveness of federal regulation).

90. *See* 15 U.S.C. § 45 (1988) (setting out FTC authority to eliminate deceptive, misleading, unfair, and unsubstantiated advertising practices). The Federal Trade Commission Act states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.* § 45(a)(1).

91. 15 U.S.C. § 45 (1988); *see also* *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (upholding FTC's broad power to determine whether practice is unfair method of competition or deceptive, and not just whether practice violates letter or spirit of law); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (affirming power of FTC to halt incipient trade practice without proof that it violates law).

92. *See City of New York v. FTC*, 486 U.S. 57, 63-64 (1988) (holding that under

basis⁹³ under the aegis of its advertising deception, unfairness, and substantiation policies.⁹⁴ Furthermore, the FTC has recently issued "guides" giving notice to industry about permissible and impermissible commercial practices.⁹⁵

The FTC's policy on deception in advertising is intended to eliminate any representation, omission, or practice that is likely to mislead a consumer, acting reasonably, to the consumer's detriment.⁹⁶ The goal of the deception ban is to ensure that consumers will not make market choices on the basis of misleading information.⁹⁷ The FTC's ad hoc enforcement of its rules against deception in advertising has consistently been upheld by the courts.⁹⁸

The FTC has determined that unfairness exists where a form of advertising unreasonably interferes with free decisionmaking by consumers.⁹⁹ The ban on unfair competition prevents exclusionary

Supremacy Clause of Constitution federal agency may preempt states without congressional authorization where federal regulations conflict with state law); *see also* *Fidelity Fed. Sav. & Loan Assoc. v. De La Cuesta*, 458 U.S. 141, 152-54 (1982) (holding that intent of federal authority to supersede state law may be express or implied, and agency regulations are equivalent to federal law in preemptive effect).

93. *See* Petitions for Marketing Guides, *supra* note 5, at 24,970 (noting FTC's case-by-case law enforcement method).

94. *See infra* notes 96-103 and accompanying text (discussing FTC's policies for dealing with deceptive, unfair, and unsubstantiated advertising practices).

95. Petitions for Marketing Guides, *supra* note 5, at 24,971 (explaining rationale behind FTC's use of guides as means to encourage industry to voluntarily abandon unlawful advertising practices). In issuing an order based on a finding of an individual unlawful advertising practice, the FTC may also warn other companies similarly situated about the possibility of future enforcement actions. *See also* *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) (affirming FTC's ability to frame order to discourage practices similar, but not necessarily identical, to that found unlawful); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (clarifying that FTC orders are not intended to punish individual bad acts, but to prevent future illegal practices).

96. *See* Letter from James C. Miller III, chairman, Federal Trade Commission, to John D. Dingell, chairman, House Committee on Energy and Commerce 19 (Oct. 14, 1983) (on file with FTC) (outlining FTC policy against deceptive acts or practices). The "detriment" resulting from deceptive practices is usually economic harm to the consumer, although harmful deception might also be found in the unfair diversion of a shopper from purchasing a preferred product. *See id.* at 18 (discussing various forms of injury caused by deceptive advertising). Furthermore, because deception in advertising harms not only consumers but also competitors, the FTC seeks to eliminate practices causing injury to any party. *See id.* at 18 n.58 (explaining that FTC makes no distinction between injury to consumer and injury to competitor caused by deceptive practice).

97. *See id.* at 18-19 (explaining objectives of rule against deceptive advertising practices).

98. *See* *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) (declaring that FTC judgment as to what constitutes deceptive practice is to be accorded great weight by courts). Courts also defer to the FTC regarding the Commission's choice of means for preventing unlawful advertising practices. *See* *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946) (according wide latitude to FTC as expert body in determining what is necessary to eliminate deceptive or unfair marketing practices, and admonishing courts not to disturb FTC order unless remedy chosen has no reasonable relation to unlawful practice found).

99. *See* Letter from FTC Commissioners to Wendell H. Ford, Chairman, Senate Consumer Subcommittee, and John C. Danforth, Ranking Minority Member, Senate Consumer Subcommittee 7 (Dec. 17, 1980) (on file with FTC) (explaining that FTC takes action against

or anticompetitive behavior and the withholding of important information, and helps preserve a variety of marketplace options for consumers.¹⁰⁰ Actions taken by the FTC under its unfairness policy have long been upheld by courts.¹⁰¹

The FTC's advertising substantiation policy requires that advertisers have a reasonable basis for claims before the claims are disseminated to consumers.¹⁰² A company's failure to possess and rely on a reasonable basis for a claim may constitute an unfair or deceptive act.¹⁰³

In response to petitions filed by state attorneys general, consumer product industries, and environmental groups, the FTC has recently begun to address the problem of regulating deceptive or unfair green claims.¹⁰⁴ The Commission has held several hearings to gather public comment on the regulation of green marketing,¹⁰⁵ and its staff is relying on the staff of the EPA and the United States Office of Consumer Affairs for informal advice on policy and technical matters while pursuing case-by-case evaluation of green claims.¹⁰⁶ In six individual enforcement actions to date, the FTC has ordered the removal of deceptive or misleading green claims.¹⁰⁷ Three of these actions involved false "ozone-safe" labels,¹⁰⁸ and the

unfair advertising not to second-guess wisdom of particular consumer decision, but rather to eliminate seller behavior that creates or takes advantage of obstacle to free consumer choice).

100. *Id.* at 8.

101. *See, e.g.*, *FTC v. National Lead Co.*, 352 U.S. 419, 430 (1957) (acknowledging that FTC order based on finding of unfairness may include restraint against individual corporation to prevent continuation of unfair practice); *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 314 (1934) (assigning great weight to FTC determination of unfairness and asserting that such determination should be sustained by courts when based on clear, specific, and comprehensive findings supported by evidence).

102. *See* Policy Statement Regarding Advertising Substantiation Program, 49 Fed. Reg. 30,999, 31,000 (1984) (defining FTC policy requiring advertisers to possess information substantiating all claims before marketing products based on those claims).

103. *See id.* at 31,000 (explaining that violation of advertising substantiation requirements constitutes violation of Federal Trade Commission Act, 15 U.S.C. § 45 (1988)).

104. *See* Petitions for Marketing Guides, *supra* note 5, at 24,968-82 (outlining proposed industry guides concerning environmental advertising claims and calling for public comment on such guides).

105. *See* *FTC Hearings*, *supra* note 4, at 4-7 (gathering views of government officials, industry representatives, and environmentalists on proposed FTC guides concerning environmental claims); *see also* *Environmental Labeling*, *supra* note 52, at 15 (prepared statement of FTC) (noting that FTC participated in field hearings on environmental labeling issues in March 1990).

106. *See* Petitions for Marketing Guides, *supra* note 5, at 24,968 (noting that FTC has formed task force with EPA and U.S. Office of Consumer Affairs to address green claims issues).

107. *See* *supra* note 6 and accompanying text (identifying six FTC enforcement actions against companies that used false green claims).

108. *See* *Tech Spray, Inc.*; Proposed Consent Agreement with Analysis to Aid Public Comment, 57 Fed. Reg. 2101, 2102 (1992) (prohibiting spray cleaner manufacturer from using "ozone safe" claim); *Jerome Russell Cosmetics U.S.A., Inc.*; Proposed Consent Agreement with Analysis to Aid Public Comment, 56 Fed. Reg. 26,827, 26,828 (1991) (prohibiting manu-

other three involved unsubstantiated "degradable" claims.¹⁰⁹

Despite the reported introduction of green claims covering all types of consumer products, the FTC is continuing to examine each claim on an individual, case-by-case basis. It is increasingly apparent that the FTC has neither the training nor the resources to confront this revolutionary new marketing development.

D. Congressional Activity

In response to public concern over waste management and related environmental issues, both houses of Congress have for several years been considering amendments to the nation's primary solid waste law, the Resource Conservation and Recovery Act of 1976 (RCRA).¹¹⁰ A host of free-standing bills designed to increase recycling and composting of solid waste have also been debated.¹¹¹

facturer of hair spray containing ozone depleting substances from using "ozone safe" or "ozone friendly" statement to describe product); Zipatone, Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment, 56 Fed. Reg. 19,865, 19,866 (1991) (prohibiting manufacturer of spray cement containing ozone depleting substances from claiming environmental benefits of product).

109. See RMED Int'l, Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment, 57 Fed. Reg. 6608, 6609 (1992) (ordering elimination of unsubstantiated degradability claims on diapers); First Brands Corp.; Proposed Consent Agreement with Analysis to Aid Public Comment, 56 Fed. Reg. 54,863, 54,864 (1991) (ordering elimination of unsubstantiated degradability claims on trash bags); American Enviro Prod., Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment, 56 Fed. Reg. 46,184, 46,185 (1991) (ordering elimination of diaper manufacturer's unsubstantiated claim that product would decay in landfill within three to five years).

110. See 42 U.S.C. §§ 6901-6992K (1988) (codifying federal policies on solid waste disposal). Reauthorization of RCRA has consumed considerable debate in Congress for several years. See generally *Resource Conservation and Recovery Act Amendments of 1991: Hearings on S. 976 Before the Subcomm. on Environmental Protection of the Senate Comm. on Env't and Public Works*, 102d Cong., 1st Sess. (1991) (presenting testimony given on RCRA reauthorization legislation) [hereinafter *Resource Conversation Hearings*]; *Resource Conservation and Recovery Act Reauthorization: Hearings on H.R. 3735, H.R. 3736, H.R. 3737 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990) (gathering public comment on comprehensive RCRA amendments intended to discourage unsafe disposal and increase recycling rates); *Recycling of Municipal Solid Waste: Hearings on H.R. 1593, H.R. 1810, H.R. 2648, H.R. 2845, H.R. 2853 Before the Subcomm. on Transportation and Hazardous Materials, House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989) (reviewing five bills amending RCRA to promote solid waste recycling); *Amending the Solid Waste Disposal Act: Hearing on S. 113 Before the Subcomm. on Environmental Protection of the Senate Comm. on Env't and Public Works*, 101st Cong., 1st Sess. (1989) (containing testimony on legislation reauthorizing RCRA). While these hearings have focused on several legislative proposals to amend RCRA, the common theme of the congressional inquiries has been an examination of efforts to recycle post-consumer materials and to reduce solid waste and pollution at the source. Neither the House of Representatives nor the Senate has voted on any of these RCRA reauthorization bills, however.

111. See, e.g., H.R. 300, 102d Cong., 1st Sess. (1991) (advocating comprehensive program for increasing recycling rates nationwide for post-consumer materials); H.R. 828, 102d Cong., 1st Sess. (1991) (establishing system of grants for innovative recycling programs); H.R. 2095, 102d Cong., 1st Sess. (1991) (requiring federal agencies to recycle solid waste from offices); S. 1318, 102d Cong., 1st Sess. (1991) (creating national beverage bottle deposit and recycling program); H.R. 5197, 101st Cong., 2d Sess. (1990) (providing tax credit for recycling activi-

At this point, no major solid waste recycling legislation has passed either the House or Senate and the President has not proposed legislation to encourage recycling.

Committee hearings have been held in the United States House of Representatives and Senate to examine environmental marketing issues, and several bills have been introduced in the 101st and 102nd Congresses dealing specifically with the green marketing phenomenon.¹¹² Legislation that cleared a Senate committee in 1990 would have required the Commerce Department to define allowable applications of the terms "recyclable" and "recycled."¹¹³ During the 102nd Congress, the House and Senate considered legislation to authorize the EPA to define environmental terms and eliminate false green claims.¹¹⁴ In addition, other legislation would authorize federal agencies to issue seals of approval or would require negative labels for products failing to achieve specified environmental goals.¹¹⁵ None of these bills has been voted on by either body of Congress, however.

III. POSSIBLE REGULATORY APPROACHES TO GREEN MARKETING

In assessing the future for green marketing in the 1990s and beyond, it is useful to evaluate the means now available to the Federal Government for preventing abuses and promoting meaningful green marketing on a nationwide scale. Such an evaluation will indicate the prospects for effective green claims regulation in the event that Congress does not intervene. There are several regulatory approaches that could be tested at the federal level in the absence of new legislative authorization from Congress.

ties); S. 1763, 101st Cong., 1st Sess. (1989) (mandating recycling of newsprint); H.R. 1652, 101st Cong., 1st Sess. (1989) (establishing federal clearinghouse for information on recycling). None of these proposed measures has been voted on by the House or Senate.

112. See *infra* notes 113-15 and accompanying text (listing bills that deal with regulating environmental marketing claims).

113. See S. 1884, 101st Cong., 2d Sess. (1990) (proposing Commerce Department program of monitoring national recycling rates and regulating use of recycling claims on consumer products); see also H.R. 4942, 101st Cong., 2d Sess. (1990) (proposing program for Commerce Department to regulate recyclability claims on consumer goods).

114. See H.R. 1408, 102d Cong., 1st Sess. (1991) (proposing program for EPA to regulate environmental claims on consumer products and educate consumers on waste management); S. 615, 102d Cong., 1st Sess. (1991) (developing program to advise EPA on regulation of environmental marketing claims).

115. See, e.g., H.R. 300, 102d Cong., 1st Sess. § 7 (1991) (calling for federal seals of approval to be issued by Secretary of Commerce for products with valid claims of recycled content and recyclability); H.R. 4942, 101st Cong., 2d Sess. § 8(h) (1990) (authorizing creation of national recyclability seal for products determined by Secretary of Commerce to be recyclable); see also H.R. 4942, 101st Cong., 2d Sess. § 8(d)(2) (1990) (requiring "nonrecyclable" label to be displayed on products failing to satisfy minimum recycling standards as determined by Secretary of Commerce).

First, the FTC could continue its present case-by-case enforcement against deceptive, unfair, and unsubstantiated green claims, with advice on environmental and consumer issues from the EPA and the Office of Consumer Affairs.¹¹⁶ In fact, the FTC's enforcement program is expected to continue without major change unless a readjustment in agency responsibilities transpires.¹¹⁷ The FTC's ad hoc enforcement method, however, has not proven to be an effective federal response to the green marketing revolution.¹¹⁸ Despite the FTC's best efforts, its case-by-case approach is unable to satisfy the goal of eliminating unlawful green claims before they are disseminated to the public.¹¹⁹ Although the FTC's jurisdictional reach is nationwide, its regulatory tools are inadequate considering that green marketing is expected to dominate the marketplace for years to come and will involve a multitude of environmental claims made through a variety of advertising mediums.¹²⁰ Furthermore, the FTC's regulation cannot confront the environmental policy considerations associated with green claims given its lack of expertise in the area.¹²¹ Finally, the FTC cannot satisfy the goal of educating the public about green claims because Congress has not given the FTC such a mandate.¹²² Thus, continued ad hoc regulation by the FTC will meet none of the principle criteria for effective green claims regulation.

Second, the FTC has issued guides to consumer product industries, putting the industries on notice of its concerns about particular types of green claims.¹²³ These guides help to inform companies

116. See *supra* notes 96-103 and accompanying text (discussing FTC's current policies for dealing with deceptive green claims).

117. See *FTC Should "Rise to the Green Claims Challenge," Chairman Steiger Says in Announcing Her Support for Environmental Guides Approach*, FTC News (FTC, Washington, D.C.), Oct. 1, 1991, at 1 [hereinafter *FTC News*] (stating FTC has "heavy load" of ongoing green claims investigations and will continue to "vigorously pursue" such claims on case-by-case basis).

118. See *FTC Hearings*, *supra* note 4, at 34 (testimony of Hubert H. Humphrey III, Minnesota attorney general) (commenting that FTC's case-by-case enforcement of deceptive green claims is inadequate).

119. See *supra* note 6 (describing FTC actions against green claims). In all actions to date, the FTC has only addressed products already on store shelves. In no case has the Commission eliminated a green claim before its dissemination in the marketplace.

120. But see *FTC Hearings*, *supra* note 4, at 70 (testimony of Calvin Collier, industry petitioner, National Food Processors Association, Grocery Manufacturers Association, Frozen Food Institute, Can Manufacturers Association, and Steel Can Recycling Institute) (expressing industry position that FTC case-by-case enforcement process is designed to eliminate all unlawful claims and that green claims should not be regulated differently).

121. See *Petitions for Marketing Guides*, *supra* note 5, at 24,968 (acknowledging that FTC has received no mandate from Congress in environmental policy area).

122. *Petitions for Marketing Guides*, *supra* note 5, at 24,968.

123. See *Petitions for Marketing Guides*, *supra* note 5, at 24,970-71 (outlining process for issuing guides to alert industry to FTC's concerns in particular area of marketing practices). The strong interest and support for the issuance of guides by the FTC over the last year made it likely that this approach would be adopted. See *FTC News*, *supra* note 117, at 1 (announcing

across the country about how to conduct good faith advertising, and industry is welcoming such guidance.¹²⁴ This rulemaking effort has helped to meet the goal of addressing the nationwide character of environmental marketing.

There is a legitimate policy concern, however, about allowing the FTC, an agency without any environmental mandate or any history of expertise in evaluating environmental issues, to take the lead in developing national guidelines for environmental marketing claims.¹²⁵ Such a program does not fulfill the objective of creating a green claims regulatory program associated with environmental policy.¹²⁶ Even though the FTC has issued these guides, the Commission will continue to enforce its rules on a case-by-case basis as complaints about individual green claims are received.¹²⁷ While the guides may help to forewarn companies of unacceptable green marketing practices, the FTC's enforcement program cannot systematically eliminate green claims before they are used in marketing campaigns. Furthermore, the issuance of these guides has not satisfied the goal of educating consumers about green marketing.¹²⁸

Another approach providing for broader regulatory oversight would be for the FTC to sign voluntary memorandums of under-

FTC Chairman's support for issuance of environmental marketing guides); see also *FTC Hearings*, *supra* note 4, at 4-5 (receiving testimony from representatives of industry, government, and environmental groups unanimously supporting issuance of FTC environmental marketing guides).

124. Indeed, before the FTC issued these guidelines there was strong support from the consumer product industry for FTC issuance of such guides. See, e.g., *Petitions for Marketing Guides*, *supra* note 5, at 24,972 (publishing model FTC environmental marketing guide recommended by alliance of food producers, packagers, and marketers); *id.* at 24,976 (publishing model FTC environmental marketing guide recommended by association of cosmetic, drug, toiletry, and perfume industries); *FTC Hearings*, *supra* note 4, at 77 (testimony of Robert Gal, industry petitioner, Food Marketing Institute) (stating Food Marketing Institute's view that issuance of guides covering green claims would be best method for FTC to exercise authority under Federal Trade Commission Act, 15 U.S.C. § 45 (1988)).

125. See, e.g., *Petitions for Marketing Guides*, *supra* note 5, at 24,968 (acknowledging that FTC has no statutory authority to set environmental policy or to require environmentally sound characteristics in products); *FTC News*, *supra* note 117, at 2 (stating that factor complicating process of drafting guides is FTC's concern that it will be drawn into setting environmental policy, a role appropriately left to Congress and EPA). But see *FTC Hearings*, *supra* note 4, at 70 (testimony of Calvin Collier, industry petitioner, National Food Processors Association, Grocery Manufacturers Association, Frozen Food Institute, Can Manufacturers Association, and Steel Can Recycling Institute) (expressing consumer product industry coalition's position that notwithstanding lack of policy mandate, FTC is appropriate agency to be regulating environmental marketing claims).

126. See *supra* note 10 and accompanying text (discussing need to coordinate green claims regulatory scheme with overall environmental policy).

127. See *Petitions for Marketing Guides*, *supra* note 5, at 24,971 (stipulating that if green claim were determined to be inconsistent with FTC guide, cease and desist order could issue only after full determination by FTC that individual claim is unlawful under Federal Trade Commission Act, 15 U.S.C. § 45 (1988)).

128. See *supra* note 12 and accompanying text (discussing need to include consumer education program in green claims regulatory scheme).

standing (MOU) with other appropriate agencies concerning green claims regulation.¹²⁹ MOUs intended to advance cooperative executive branch oversight and regulation of green marketing would surely be an improvement on the FTC's initial regulatory program, in which the Commission worked alone without the benefit of other agencies' expertise.¹³⁰ Such a cooperative approach could further the goal of providing for a nationwide program of green claims regulation by clarifying the roles of agencies with nationwide jurisdiction and agency field offices in all regions of the country. MOUs could also help to associate policy concerns with oversight of green marketing by involving the EPA in a more formal role. Furthermore, MOUs in the green marketing arena would be consistent with existing statutory authority. RCRA, for example, delegates authority to federal agencies to conduct extensive information sharing regarding solid waste issues.¹³¹ MOUs would fall short of advancing any enforcement goal, however, because as a rulemaking device the memorandums are generally limited to information sharing and may not exceed the agencies' regulatory authority delegated by Congress.¹³² Promulgation of MOUs would therefore fail to achieve the goal of eliminating false green claims through more aggressive enforcement.

129. MOUs are formal written agreements signed jointly by two or more executive branch agencies that clarify each agency's role in the joint mission. See Administrative Procedure Act, 5 U.S.C. §§ 551(4)-(5) (1988) (defining federal agency rulemaking). MOUs have been interpreted as constituting rules promulgated by federal agencies. See *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 669 (4th Cir. 1977) (explaining that as federal rule, MOU must be subject to notice and opportunity for public comment in accordance with 5 U.S.C. § 553 if rule will have substantive impact on rights and duties of persons subject to regulation), *cert. denied*, 435 U.S. 995 (1978).

130. Only since 1991 has the FTC benefited from EPA technical guidance regarding green claims. See *supra* note 5 and accompanying text (documenting EPA's efforts to define terms relating to recycling).

131. See 42 U.S.C. § 6912(a) (1988) (authorizing EPA to consult and exchange information with other agencies as necessary to address solid waste problems).

Although no MOU concerning green claims has yet been promulgated, a certain amount of interagency information sharing regarding green claims is currently taking place. A joint FTC-EPA-Office of Consumer Affairs green claims task force has reportedly been formed to provide federal agency leadership and cooperation to resolve confusion in green marketing. See *Petitions for Marketing Guides*, *supra* note 5, at 24,968 (describing federal interagency task force created to address environmental marketing issues). This resembles a relationship akin to that created by a MOU. No formal interagency agreement has been published, however, and there is no evidence that the agencies are conducting any joint working sessions on green marketing issues.

132. See 5 U.S.C. § 553(b)(e) (1988) (defining requirements of substantive agency rulemaking process). As substantive agency rules, MOUs concerning green claims regulation would be permissible if a reasonable nexus were found to exist between the MOU and the authority delegated by Congress through legislation to the agencies involved. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02, 304 (1979) (holding that substantive agency rule is valid if permitted by legislative authority and not arbitrary and capricious under Administrative Procedure Act, 5 U.S.C. § 706 (1988)).

As an additional administrative effort to address green marketing, the President could issue an Executive order calling on agencies of the executive branch to more effectively regulate environmental claims.¹³³ An Executive order issued by the White House and published in the Federal Register acts as a directive to compel executive branch agencies to perform specific assignments and resembles an act of Congress.¹³⁴ For example, President Bush has signed an Executive order designed to increase federal agency procurement of recycled materials and to encourage recycling and composting of trash generated by federal facilities.¹³⁵ Given this new willingness to order regulation within the executive branch, perhaps an Executive order offering a federal policy focused on green claims is a possibility during the current administration.

An Executive order that is normally accorded the force and effect of law¹³⁶ would certainly carry more weight than other administrative proclamations. It is conceivable, however, that if an agency were to take enforcement action under the direction of an Executive order that lacked clear statutory authority, the action could be challenged in court by a company targeted by the enforcement action.¹³⁷ Therefore, while Executive orders might advance the same goals as would issuance of MOUs—that is, a national environmental marketing program, environmental policy analysis, and consumer education—the orders would fall short of providing comprehensive

133. Such an approach assumes that there exists legislative authority for the President to issue such an order. *See, e.g.,* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (holding that Executive order will be sustained where it stems from act of Congress or from Constitution). It is likely that an Executive order relating to green claims could find justification under RCRA. *See* 42 U.S.C. § 6911(b) (1988) (authorizing interagency coordination to confront solid waste disposal issues).

134. *See* *Association for Women in Science v. Califano*, 566 F.2d 339, 344 (D.C. Cir. 1977) (holding that Executive order based on statutory authority delegated to President carries force and effect of law); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 & n.1 (5th Cir.) (concluding that Executive orders based on statutory authority have force and effect of acts of Congress), *cert. denied*, 389 U.S. 977 (1967).

135. *See* Federal Agency Recycling and the Council on Federal Recycling and Procurement Policy, Exec. Order No. 12,780, 3 C.F.R. 369, 370 (1992) (to be reprinted in 42 U.S.C. § 6961) (exercising President's administrative authority under RCRA to encourage maximum procurement of recyclable materials by federal facilities, to promote recycling and composting of materials discarded at federal facilities, and to establish interagency council led by EPA to coordinate relevant activities).

136. *See supra* note 134 (citing cases holding that Executive orders may carry force and effect of law).

137. *See* *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979) (holding that Executive order unsupported by grant of legislative authority has no binding legal effect). Were an Executive order to be issued based on unclear statutory authority, its fate in a court challenge would be uncertain. *See* *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (holding that Executive order may have force of law even in absence of statutory authority if it involves unbroken and long-standing executive practice long known to Congress).

regulation of green marketing because they would not result in the elimination of unlawful claims.

Upon review of the major avenues of regulatory action presently available, it is clear that the current authority and resources of federal and state agencies are insufficient to meet the objectives of effective green claims regulation.¹³⁸ The continued patchwork of inconsistent state regulation and case-by-case enforcement by the FTC will fail to integrate green claims regulation with the nation's environmental policy and will not eliminate unlawful claims before they are made. Furthermore, the present system will provide no guidance to consumers bewildered by the proliferation of green claims.

IV. RECOMMENDATION

A. New Federal Statutory Authority Is Required

The FTC, an agency with no environmental mandate and a limited case-by-case enforcement method, is incapable of overseeing the dramatic growth in the number of consumer product green claims used across the United States.¹³⁹ Despite the FTC's apparent good-faith handling of the problem, the Commission has issued orders outlawing deceptive environmental claims for just six products and shows no signs of accelerating its pace of enforcement.¹⁴⁰ Furthermore, the FTC's staff is insufficient to handle the task of regulating green claims and its resources will not likely be substantially increased in the near future.¹⁴¹ While the issuance of FTC guides may aid in deterring future environmental advertising violations, individual enforcement for each suspect claim, occurring *after* the claim has already been disseminated, will continue to be the only

138. See *supra* notes 80-82, 118-22 and accompanying text (discussing inability of states and FTC to effectively govern green claims).

139. See *supra* note 4 and accompanying text (documenting growing volume of green claims in United States).

140. See *supra* notes 108-09 and accompanying text (discussing six FTC green claims enforcement actions); *supra* note 117 and accompanying text (explaining that FTC's case-by-case approach will continue without change).

141. The staff of the Office of Advertising Practices, within the FTC's Bureau of Consumer Protection, is responsible for the case-by-case review of suspect marketing claims. Telephone interview with James S. Burruss, Jr., information officer, FTC Bureau of Consumer Protection (Nov. 20, 1991). Staff attorneys make recommendations to the FTC commissioners for enforcement actions against individual claims believed to be unlawful. *Id.* As the following table indicates, the staff in this office is not substantial and, based on the recent employment pattern, is not likely to experience significant growth in the near future. *Id.* (In the table below, "planned" staffing level refers to the number of personnel the FTC expected to employ during the particular calendar year, while "actual" refers to the number of personnel actually employed that year.)

method of regulation by the Commission.¹⁴² This framework has proven satisfactory in regulating some areas of marketing.¹⁴³ It is increasingly apparent, however, that the FTC is unprepared to adequately respond to the green marketing revolution.¹⁴⁴

Nevertheless, there is a consensus among consumer product industries supporting the continued regulation of green claims through the machinery of the FTC's advertising deception, unfairness, and substantiation policies.¹⁴⁵ Considering that the FTC's case-by-case enforcement process has been in place for nearly eighty years,¹⁴⁶ it is understandable that companies would prefer to work with such a familiar system than be subject to potentially more vigorous regulation by the EPA. From a policy standpoint, however, there is considerable merit in reorganizing responsibilities within the executive branch. In addition to the inadequacy of the FTC's green claims enforcement mechanisms, it is fundamentally unsound to assign the important environmental task of regulating the green marketing revolution to an agency with no environmental mandate

FTC Office of Advertising Practices
Staffing Levels 1988-1992

Staff	1988	1989	1990	1991	1992
planned	34.0	32.0	31.0	41.0	41.0
actual	32.7	31.2	30.6	39.0	NA
attorneys	18.5	18.6	18.5	26.1	NA

Id.

142. See Petitions for Marketing Guides, *supra* note 5, at 24,971 (explaining that although advertising practice may appear inconsistent with broad FTC environmental marketing guide, case-by-case determination of unlawfulness will still be required before enforcement action is taken by FTC).

143. See Petitions for Marketing Guides, *supra* note 5, at 24,970 (explaining that FTC has traditionally handled misleading claims on case-by-case basis).

144. See, e.g., *FTC Hearings*, *supra* note 4, at 34 (testimony of Hubert H. Humphrey III, Minnesota attorney general) (arguing that FTC's case-by-case enforcement is inadequate in context of green marketing revolution); *id.* at 38 (testimony of Thomas C. Jorling, commissioner, New York State Department of Environmental Conservation) (claiming that traditional FTC regulation is insufficient to solve nation's solid waste crisis); *id.* at 139-40 (testimony of Jeanne Wirka, solid waste research analyst, Environmental Action Foundation) (claiming that FTC's lack of technical expertise hampers its effectiveness in evaluating green claims and asserting that issuance of FTC environmental marketing guides will not go far enough to remedy problem).

145. See *FTC Hearings*, *supra* note 4, at 69-71 (testimony of Calvin Collier, industry petitioner, National Food Processors Association, Grocery Manufacturers Association, Frozen Food Institute, Can Manufacturers Association, and Steel Can Recycling Institute) (expressing food industry's support for continued FTC regulation of green claims); *id.* at 74 (testimony of James H. Skiles, industry petitioner, Cosmetic, Toiletry, and Fragrance Association) (stating support of Fragrance Association for continued FTC regulation of green claims and issuance of environmental marketing guides); *id.* at 77-80 (statement of Robert Gal, industry petitioner, Food Marketing Institute) (expressing strong support of Food Marketing Institute for development and vigorous enforcement of FTC environmental marketing guidelines).

146. Federal Trade Commission Act of 1914, ch. 311, § 5, 38 Stat. 717, 719-21 (codified as amended at 15 U.S.C. § 45 (1988)).

or relevant technical expertise.¹⁴⁷

One method of guaranteeing a consistent, long-term federal commitment to the regulation of green claims is to assign such regulatory duties by statute to the EPA.¹⁴⁸ Congress has repeatedly called on the EPA to assume regulatory responsibility to ensure protection of the environment and natural resources.¹⁴⁹ This trend began in 1970 with the creation of the EPA and the consolidation of many federal environmental regulatory activities under the new authority of the EPA.¹⁵⁰ Since the agency's creation, Congress has frequently allocated regulatory responsibilities to the EPA rather than to other agencies with overlapping jurisdiction. For example, despite the Department of Commerce's jurisdiction over coastal, maritime, and fisheries programs,¹⁵¹ Congress gave the EPA broad powers to provide for "swimmable" and "fishable" waters under the Clean Water Act.¹⁵² Although the Department of Health and Human Services

147. See Petitions for Marketing Guides, *supra* note 5, at 24,968 (acknowledging that FTC has no statutory mandate to set environmental policy). While the FTC Chairman has accepted responsibility for green claims regulation, she has also hinted that there is a limit to the Commission's interest in exploring the environmental issues associated with such claims. See FTC NEWS, *supra* note 117, at 1-2 (expressing FTC Chairman Steiger's desire not to be drawn into environmental policy debate).

148. Legislation calling for EPA review of environmental claims might be included under the existing Fair Packaging and Labeling Act. See 15 U.S.C. §§ 1451-1461 (1988) (setting federal policy on packaging and labeling procedures employed by industry to ensure fairness and prohibit unfair practices). Regardless of whether the legislation providing for EPA review of green claims is included under an existing act, the legislation still remains consistent with a comprehensive legislative program aimed at promoting waste reduction and recycling.

149. The EPA's regulatory responsibilities encompass a variety of policy contexts where federal agencies have overlapping jurisdiction and compelling environmental concerns are involved. See, e.g., *infra* notes 152-62 and accompanying text (listing statutes authorizing EPA regulation in areas traditionally managed by other agencies).

150. See Reorganization Plan No. 3 of 1970, 3 C.F.R. 1072, 1072-74 (1966-1970), *reprinted in* 5 U.S.C.S. § 903 note (Law. Co-op. 1980), and in 84 Stat. 2086, 2087-89 (1970) (establishing Environmental Protection Agency). President Nixon ordered the creation of the EPA at a time when environmental issues were receiving a great deal of public attention. See President's Message to Congress Upon Transmitting Reorganization Plans to Establish the Two Agencies, 6 WEEKLY COMP. PRES. DOC. 908, 908 (July 9, 1970) (explaining that President Nixon created EPA as concern with condition of environment intensified). The EPA was delegated a variety of tasks previously assigned by statute to other departments of the federal government.

The Reorganization Plan, for instance, transferred responsibility for the following functions to the EPA: the protection of water quality, previously regulated by the Department of the Interior; the regulation of air quality, solid waste management, water hygiene, and radiological health, previously governed by the Department of Health and Human Services; and regulatory control over pesticides, previously vested in the Department of Agriculture. Reorganization Plan No. 3 of 1970, 3 C.F.R. 1072, 1072-74 (1966-1970), *reprinted in* 5 U.S.C.S. § 903 note (Law. Co-op. 1980), and in 84 Stat. 2086, 2087-89 (1970).

151. See Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1988) (authorizing Department of Commerce to manage nation's coastal systems); Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1988) (authorizing Department of Commerce to manage and preserve nation's fisheries).

152. See Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988) (setting federal policy on discharge of pollutants into U.S. waters and strengthening regulatory powers of

and the Food and Drug Administration (FDA) are responsible for protecting the public against unsafe food and beverages,¹⁵³ Congress assigned the EPA regulatory responsibility over drinking water.¹⁵⁴ Notwithstanding the jurisdiction of the Department of Housing and Urban Development over housing matters¹⁵⁵ and of the Department of Education over problems facing educational institutions,¹⁵⁶ Congress gave the EPA regulatory control over the removal of cancer-causing asbestos and radon gas from the nation's schools and residences.¹⁵⁷ Although the Department of Agriculture has long held regulatory authority over agricultural practices,¹⁵⁸ Congress allocated to the EPA responsibility for regulating pesticides and other chemicals used in farming.¹⁵⁹ Finally, while the Department of Energy has jurisdiction over fuel conservation policy¹⁶⁰ and the Department of Transportation has responsibility for ensuring the safe operation of automobiles,¹⁶¹ Congress sought to protect the environment and conserve natural resources by assigning to the EPA the task of devising measurements of automobile fuel efficiency.¹⁶²

In each of these policy areas, Congress recognized the superior role of the EPA over other agencies in providing for environmental protection.¹⁶³ In the context of green marketing claims, where con-

EPA). Enacted two years after EPA's creation, the Federal Water Pollution Control Act increased the Agency's funding authorization to meet the congressional goal of ending pollution of oceans and fresh water. *Id.* §§ 1251, 1254(u).

153. See Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-393 (1988) (authorizing Department of Health and Human Services and Food and Drug Administration to remove dangerous and adulterated food from market).

154. See Safe Drinking Water Act, 21 U.S.C. § 349 (1988) (authorizing EPA to regulate drinking water).

155. See National Housing Act, 12 U.S.C. § 1701c (1988) (empowering Department of Housing and Urban Development to regulate housing).

156. See Department of Education Organization Act, 20 U.S.C. § 3402 (1988) (establishing Department of Education to promote improvements in U.S. educational system).

157. See Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2641 (1988) (authorizing EPA to regulate removal of asbestos from schools); 15 U.S.C. § 2661 (1988) (authorizing EPA to set standards for protecting against exposure to radon in residences).

158. See 7 U.S.C. § 2201 (1988) (establishing Department of Agriculture to regulate agricultural practices).

159. See Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1988) (authorizing EPA to ensure safe use of pesticides through enforcement of stringent regulatory guidelines).

160. See Energy Policy and Conservation Act, 42 U.S.C. § 6201 (1988) (authorizing Department of Energy to promote energy efficiency and encourage energy conservation).

161. See National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 (1988) (authorizing Department of Transportation to institute policies aimed at increasing motor vehicle safety and reducing traffic accidents).

162. See Automobile Fuel Efficiency Act of 1980, 15 U.S.C. § 2003 (1988) (requiring EPA to calculate average fuel economy in automobiles in order to promote conservation of gasoline).

163. See *supra* notes 152-62 and accompanying text (listing powers Congress delegated to EPA that ordinarily would fall under jurisdiction of another federal agency).

sumers are seeking environmental improvements in the products they regularly purchase and use in their homes, Congress should once again consider authorizing the EPA to ensure the development and application of effective environmental standards and regulations. This would be a logical readjustment in executive agency responsibilities.

While the EPA has not advocated a role for itself in green claims regulation, the Agency is developing expertise in evaluating environmental marketing claims.¹⁶⁴ For over twenty years, the Agency has been the principal source of environmental expertise at the national level.¹⁶⁵ Furthermore, since 1976, the Agency has been charged with providing guidance concerning solid waste management to the general public and to other federal agencies under RCRA.¹⁶⁶ It is therefore sensible policy for Congress to assign the complicated task of green claims regulation to the expert environmental agency—the EPA.

Consumer product industries will almost certainly argue that aggressive regulation of green marketing by the EPA is unwarranted.¹⁶⁷ Nevertheless, Congress should consider such a scheme because there is evidence that it would enjoy support among non-industry groups.¹⁶⁸ Furthermore, it has already been established

164. See EPA Environmental Marketing Guidance, *supra* note 5, at 49,994 (seeking public comment on proposed EPA definitions for certain green advertising claims). The EPA has published materials relating to the green marketing revolution. See ENVIRONMENTAL CONSUMER MARKET, *supra* note 1, at 22-23 (interpreting implications of increase in consumer demand for "environmentally friendly" products and industry's use of green claims); PROMOTING RECYCLABILITY, *supra* note 24, at 10-11, 56-59 (assessing trends in waste management and environmental consumerism, and offering guidance for voluntary programs to reduce and recycle waste).

165. See Reorganization Plan No. 3 of 1970, 3 C.F.R. 1072, 1072-74 (1966-1970), *reprinted in* 5 U.S.C.S. § 903 note (Law. Co-op. 1980), *and in* 84 Stat. 2086, 2087-89 (1970) (consolidating environmental regulatory responsibilities in newly created EPA).

166. See 42 U.S.C. §§ 6907, 6911 (1988) (establishing EPA as lead federal agency in national solid waste policy matters). RCRA provides that the EPA "shall, in cooperation with appropriate Federal, State, municipal, and intermunicipal agencies, and in consultation with other interested persons, and after public hearings, develop and publish suggested guidelines for solid waste management." *Id.* § 6907(a). The statute also created a new division of the Agency to be solely responsible for solid waste management policy. *Id.* § 6911(a) (establishing Office of Solid Waste within EPA to spearhead federal waste management efforts).

167. See, e.g., *Resource Conservation Hearings*, *supra* note 110, at 15 (statement of Deborah A. Becker, vice president, Environmental Affairs, Kraft General Foods, Inc.) (expressing food industry's opposition to idea of transferring green claims regulation to EPA, given FTC's experience in handling consumer deception issues); *id.* at 29 (statement of Melinda Sweet, assistant general counsel, Unilever, and director of Environmental Affairs for Lever Brothers) (expressing grocery manufacturing industry's belief that green claims regulation should remain under FTC and should not be transferred to EPA as proposed in legislation).

168. See *FTC Hearings*, *supra* note 4, at 98-99, 118 (testimony of Andrew Stoeckle, ABT Associates) (supporting EPA involvement in green claims regulation); *id.* at 139 (testimony of Jeanne Wirkka, solid waste research analyst, Environmental Action Foundation) (advocating that EPA set standards and definitions for green claims under new congressional authorization); *id.* at 40 (testimony of Thomas C. Jorling, commissioner, New York State Department of

that industry enjoys only limited exemption from governmental interference with product advertising.¹⁶⁹ The Supreme Court determined that "commercial speech," including consumer product marketing, is deserving of only moderate First Amendment protection, and that the Federal Government may act freely to curb advertising practices it deems unlawful.¹⁷⁰

B. Statutory Precedent

In drafting green claims legislation, Congress can benefit from its recent experience in writing similar consumer product labeling laws. The tendency has been for Congress to assign regulatory responsibilities to the agency with jurisdiction in the underlying policy area. This experience shows that a green claims law charging EPA with regulatory responsibilities is consistent with existing statutory programs to regulate specific areas of product labeling.

One relevant example is the Nutrition Labeling and Education Act of 1990.¹⁷¹ This statute was enacted in response to consumer demand for sound nutritional information on food products in a marketplace where unfounded health claims were being made and the FDA had little authority to eliminate the claims.¹⁷² As in the case of green marketing claims, consumers had little ability to verify the nutritional statements made on food packaging. No coherent set of standards or definitions applied to health claims on food products, just as there is no consensus on the meaning of various

Environmental Conservation) (supporting new statutory authorization for joint EPA and FTC regulation of green claims regulation).

169. See *infra* note 170 and accompanying text (describing extent of First Amendment protection accorded to commercial speech).

170. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980) (ruling that Constitution accords less protection to commercial speech than to other forms of expression). The Court in *Central Hudson* applied the following four-part analysis of commercial speech under the First Amendment, inquiring: (1) whether the speech relates to lawful activity and is not misleading; (2) whether the governmental interest in regulating the speech is substantial; (3) whether the form of regulation selected directly advances the governmental interest; and (4) whether the regulation is not more extensive than is necessary to serve the governmental interest. *Id.* at 566. The Court has placed considerable emphasis on the informational value of commercial speech. This emphasis suggests that both sellers and buyers are entitled to meaningful and informative commercial speech. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (explaining that because First Amendment's protection of commercial speech relates only to its informational function, government may suppress advertisements that do not inform accurately about lawful activity); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (stating that First Amendment applied to advertising as speech protects both seller's right to advertise and consumer's reciprocal right to receive advertising).

171. 21 U.S.C. § 343 (Supp. 1990).

172. See H.R. REP. NO. 538, 101st Cong., 2d Sess. 8-9 (1990), reprinted in 1990 U.S.C.A.N. 3336, 3338-39 (describing need for legislation to provide for improved regulation of nutritional claims).

green claims.¹⁷³ To provide consumers with reliable nutritional information on packaging, the Nutrition Labeling and Education Act authorized an aggressive program of labeling regulation under the agency with appropriate expertise and a policy mandate in the subject area—the FDA.¹⁷⁴

As in the case of federal green marketing regulatory proposals, nutritional labeling legislation was originally opposed by the affected consumer product industries.¹⁷⁵ Notwithstanding this opposition, Congress recognized the need for legislation. Now that the Nutritional Labeling and Education Act is law, the Bush administration is emphasizing the importance of an aggressive federal role in regulating nutritional claims under the FDA.¹⁷⁶

Other examples of federal labeling regulation being assigned to an agency with an appropriate policy mandate can be found in the law providing for regulation of “organic” food labeling by the U.S. Department of Agriculture (USDA) and in other food product label-

173. See *id.* (explaining that new legislation is needed to avoid marketplace confusion concerning nutritional labeling); EPA Environmental Marketing Guidance, *supra* note 5, at 49,993 (explaining that EPA intends to define certain green marketing terms in order to standardize use and meaning of these terms in environmental advertising).

174. See H.R. REP. NO. 538, *supra* note 172, at 7-8, *reprinted in* 1990 U.S.C.C.A.N. at 3337 (defining purpose and scope of Nutrition Labeling and Education Act). According to the legislative history, the nutritional labeling statute is intended “to clarify and to strengthen the Food and Drug Administration’s legal authority to require nutritional labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods.” *Id.* Insofar as the nutritional labeling law will mandate the use of nutritional claims on certain food products, it offers a considerably more aggressive plan than the program recommended by this Comment, which would only regulate green claims voluntarily used by consumer products industries and would not mandate labeling. See *id.* (explaining that Nutrition Labeling and Education Act requires that food product labels disclose precise nutritional value of product). Nevertheless, the issues involved with nutritional labeling regulation offer useful points of reference for the green claims debate.

175. See *Nutrition Labeling and Education Act of 1989: Hearing on S. 1425 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 119-21, 138-43, 148 (1989) (expressing food, drug and grocery industries’ concerns about mandatory nutritional labeling requirements, while supporting nationally uniform regulation). Industry’s original hostility to congressional proposals for a program of regulating nutritional claims under authority of the FDA is similar to the hostility that has been expressed toward proposals to regulate green claims under the authority of the EPA. See *supra* note 167 and accompanying text (providing examples of industry opposition to transference of green claim regulation from FTC to EPA). Not surprisingly, consumer and health advocates favored vigorous enforcement of nutritional labeling rules. *Id.* at 66-68, 78, 89, 99, 104-05 (expressing support of public interest groups for more aggressive regulation of nutritional claims under authority of FDA, given Agency’s relevant policy mandate).

176. See HHS News, P91-28 (U.S. Department of Health and Human Services, Washington, D.C.), Nov. 6, 1991, at 1 (announcing Bush administration’s program of extensive labeling regulation, in accordance with Nutritional Labeling and Education Act, to ensure accurate and reliable nutritional information is available to consumers). Although regulation under the nutritional labeling law is just beginning, it has already brought about interagency cooperation and enforcement under the FDA’s leadership. See *Food Labeling Reform: A Progress Report*, FDA BACKGROUNDER, BG 91-4.2 (Food and Drug Administration, Washington, D.C.), Nov. 1991, at 1 (describing “major effort to improve the format and content of food labels” led by FDA with assistance of USDA).

ing regulations promulgated by the USDA.¹⁷⁷ In these cases, Congress recognized that when marketing claims relate primarily to agricultural commerce, the USDA is the appropriate agency to oversee any problems that might arise.¹⁷⁸ These examples bolster the notion that regulation of green claims should be assigned to the agency with expertise in the relevant policy area—the EPA.

C. Provisions of New Legislation

1. Congressional policy and agency standard setting

To meet one of the principal criteria of effective green claims regulation, the new environmental claims review process should be part of a national solid waste management policy established by Congress.¹⁷⁹ Such a policy should recognize a general waste management hierarchy that provides for the elimination of toxic materials, source reduction of waste, reuse, recycling, and composting of post-consumer materials.¹⁸⁰ This general hierarchy will serve the goal of integrating green claims regulation with appropriate waste management policy. This policy mandate could be incorporated into the statement of purpose contained in the new legislation.

The new green claims regulation should also require the EPA to find ways to encourage responsible use of meaningful environmental claims by industry. The agency's task under the new statute would not be simply to reject imperfect claims, but rather to suggest modifications to improve proposed green labels. The development of an EPA seal of approval program for environmentally improved products would provide the context for such EPA-suggested label

177. See Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501-6522 (Supp. II 1990) (authorizing USDA to establish organic produce labeling requirements); see also STANDARDS AND LABELING DIV., UNITED STATES DEP'T OF AGRIC., STANDARDS AND LABELING POLICY BOOK (1991) (setting federal policy and promulgating regulations to ensure truth in advertising of meat, poultry, dairy, and other agricultural products).

178. See *supra* note 177 (describing USDA authority to regulate marketing and labeling of certain agricultural products).

179. Cf. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6929k (1988) (promoting development of national solid waste management plan).

180. See, e.g., H.R. 300, 102d Cong., 1st Sess. § 2(a)(4) (1991) (proposing hierarchy of waste treatment methodologies, in following order of priority, highest priority first: (1) waste reduction, (2) reuse, (3) recycling, (4) composting, and (5) landfilling or incineration); *National Recyclable Commodities Act: Hearing on H.R. 4942 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 112 (1990) (testimony of Cristian R. Holmes, principal deputy assistant administrator, Office of Solid Waste and Emergency Response, EPA) (acknowledging that EPA's hierarchy of priorities in solid waste management places waste reduction and recycling above incineration and landfilling). But see *FACING AMERICA'S TRASH*, *supra* note 5, at 9 & n.8 (arguing that while recycling and composting are preferable to incineration and landfilling, "hierarchy" of waste management techniques should not be implemented "because it suggests a rigid, linear approach to decisionmaking").

modifications. Moreover, an EPA seal of approval program would offer industry incentives to make environmental innovations and would provide shoppers with an additional source of environmental information on labels. A seal of approval program would thus meet a major goal of the legislation: to have industry welcome EPA's certification of green claims as an affirmative boost to marketing efforts and to avoid creating an adversarial relationship between the regulator and the regulated party.

The terms used in EPA seals and other green labels would not, however, be defined in the text of the new statute.¹⁸¹ Instead, this task would be left to the EPA, which would be given power to review all existing green claims and to require that new claims be certified prior to their use in marketing.¹⁸² The standard-setting process should be a flexible one, designed to accommodate technological advances and product improvements.¹⁸³ In many cases, companies using green claims would be required to present more complete descriptions of each claim, along with information explaining how consumers could learn more about promoting sound waste management. This kind of regulatory program would satisfy the goal of nationwide regulation of green claims before the claims are disseminated and would promote consumer education on waste management by increasing the amount of information on labels.

The EPA standard-setting process would also benefit from requiring the Commerce Department to maintain national statistics on rates of recycling, composting, and other waste management practices. This Commerce Department program should be given spe-

181. As an example of possible green claims definitions, EPA might decide that for a widely recycled material such as aluminum, the claim "recyclable aluminum" is sufficient without more information on the label. In such a case, recycling might be sufficiently common that shoppers need no further information to begin the recycling process. For a product that is merely technically capable of being recycled but for which no recycling systems exists, such as household batteries or polystyrene cups, however, the EPA might require a qualifying statement to accompany any such green claim, such as "feasible for recycling—contact your retail store for more information." Clearly, the use of a green claim on such a product will require a commitment by industry to support recycling programs for the material.

182. See, e.g., S. 615, 102d Cong., 1st Sess. § 7 (1991) (establishing procedure for EPA certification of green claims).

183. See *FTC Hearings*, *supra* note 4, at 57 (testimony of Hubert H. Humphrey III, Minnesota attorney general) (supporting flexibility on green claims regulation); *id.* at 82-83 (testimony of Calvin Collier, industry petitioner, National Food Processors Association, Grocery Manufacturers Association, Frozen Food Institute, Can Manufacturers Association, and Steel Can Recycling Institute) (suggesting that direct correlation exists between degree of rigidity in federal green claim requirements and vulnerability of such regulations to obsolescence and obstruction of product developments); *id.* at 130 (testimony of Walter Coddington, Persuasion Environmental Marketing) (claiming that non-specific definitions for green terms are necessary for effective regulation). A flexible standard-setting process, designed to allow for consideration of product improvements and changes in waste management technology, must be a basic feature of the new legislation.

cific legislative authorization in the text of the legislation.¹⁸⁴ Such a program would assist in the evaluation of green claims by adding the perspective of national trends in materials usage and recycling rates.

2. *A continued role for states*

A provision for shared authority in green claims law enforcement between federal and state governments would respect the traditional role of local and state government in addressing solid waste management issues and would be consistent with the major role provided states under RCRA.¹⁸⁵ Congress should direct the EPA to establish uniform national labeling standards and definitions for environmental advertising. At the same time, Congress should allow the states to set their own standards where federal law and regulations are silent and where state laws are not inconsistent with federal environmental policy. This approach would be consistent with the provisions according enforcement powers to states under the Nutritional Labeling and Education Act.¹⁸⁶ Furthermore, states should be authorized to enforce EPA's green claims guidelines within their borders.¹⁸⁷

In light of limited federal budget allocations for advertising regulation, continued vigilance by the states against unlawful green claims will aid in the overall regulatory effort.¹⁸⁸ Therefore, a non-preemptive approach is essential to the success of the new green claims statute. This approach will allow states to fill the gaps in federal green claims regulation, accommodate regional variations in environmental marketing, and through EPA coordination, help avoid a nationwide patchwork of inconsistent state regulation.

184. See, e.g., H.R. 300, 102d Cong., 1st Sess. (1991) (requiring Commerce Department to track statistics on waste generation and management); H.R. 4942, 101st Cong., 2d Sess. (1990) (requiring Commerce Department investigation and analysis of markets for recycled materials).

The Commerce Department has an existing authorization under RCRA to promote recycling. See 42 U.S.C. §§ 6951-6956 (1988) (authorizing Commerce Department to develop specifications for recyclable materials, promote markets for recyclable materials, and evaluate recycling technologies). Because the Department has not provided leadership in this area, however, new statutory direction is warranted.

185. 42 U.S.C. §§ 6901-6992k (1988) (authorizing each state to develop solid waste management plan consistent with EPA guidelines).

186. 21 U.S.C. § 334 (Supp. II 1990) (establishing that states may only regulate nutritional labeling after giving FDA notice of intention to bring enforcement action).

187. See, e.g., S. 615, 102d Cong., 1st Sess. § 10 (1991) (enabling states to initiate proceedings against unlawful green claims after notifying EPA of apparent violation).

188. See GREEN REPORT II, *supra* note 60, at 2 (arguing for continued state enforcement of green claims under future federal regulatory scheme).

3. *Public education*

One of the key goals of effective green claims regulation is to improve public understanding of waste management priorities and of the role of consumers in facilitating recycling.¹⁸⁹ A program of consumer awareness and education would be vital to the success of the new legislation. A program of this type would assist in eliminating the confusion that exists among shoppers concerning green labels and would prepare the public for greater consumer involvement in an era of reliable green marketing.¹⁹⁰ The objective of the consumer education program would be to complement legitimate environmental advertising campaigns by industry. Such a program should be spearheaded by the EPA with the cooperation of the Department of Education and the consumer products industry.

Public education efforts relating to waste management policy and green marketing claims should include the dissemination of supermarket posters and brochures, primary and secondary classroom materials, and television and print advertisements designed to inform consumers of the new green claims law. Furthermore, the EPA office responsible for green claims regulation could establish a public reference center and toll free telephone line to distribute environmental information to interested consumers. These measures will serve the objectives of increasing consumers' environmental education and reducing confusion about the meaning of environmental claims.

4. *Green claims advisory groups*

Given the complexity of analyzing green claims in light of policy objectives and changing technology, the EPA would benefit from the creation of advisory committees that would offer expert advice during the implementation of this proposed legislation. In enacting statutes, Congress has occasionally authorized advisory groups whose expertise enhances the ability of the agency with jurisdiction to set policy and promulgate regulations.¹⁹¹ The authority to con-

189. See *supra* note 12 and accompanying text (discussing need to include consumer education in green claims regulatory scheme).

190. See *supra* notes 39-40 and accompanying text (reporting consumer confusion and doubts about meaning of green claims); see also H.R. 300, 102d Cong., 1st Sess. § 4 (1991) (establishing educational program relating to waste management and recycling as part of comprehensive waste management legislation). A parallel example to this proposed green claims legislation is the Nutrition Labeling and Education Act of 1990, which includes a program to encourage public and private sector consumer education efforts in order to increase awareness of the importance of nutritional information. See 21 U.S.C. § 343 (1990) (authorizing Department of Health and Human Services consumer education program to disseminate nutritional information).

191. See, e.g., Energy Policy and Conservation Act, 42 U.S.C. § 6273 (1988) (authorizing

vene green claims advisory committees should be delegated to the EPA through the new statute.

To marshal the expertise of other federal agencies in evaluating green claims, in promulgating labeling rules, and in enforcing the new law, the EPA should be directed to lead an interagency working group whose members would include representatives from other federal agencies.¹⁹² This interagency group would share pertinent information to ensure cooperation in carrying out the mandates of the new statute. This cooperation would ensure the consistency of green claims regulation with other pertinent federal policies and programs. It would also bring appropriate governmental expertise to bear on the oversight of green claims.

To provide the EPA with useful information from a broad cross section of society, the legislation would also authorize the creation of an independent green marketing advisory committee. The committee's membership would include representatives of state and local governments, industry, technical experts, and the public.¹⁹³ The

Department of Energy to establish advisory committees to counsel government in setting energy policy); Intermodal Surface Transportation Efficiency Act, Pub. L. No. 102-240, § 6011, 105 Stat. 1914, 2179 (1991) (to be codified at 23 U.S.C. § 307) (establishing independent surface transportation research committee to advise Department of Transportation on federal highway issues); Act of Oct. 27, 1972, Pub. L. No. 92-583, § 311, 86 Stat. 1280, 1287 (establishing Coastal Zone Management Advisory Committee to assist Commerce Department in formulating policy concerning coastal zones), *repealed by* Coastal Zone Management Reauthorization Act of 1985, Pub. L. No. 99-272, § 6045, 100 Stat. 82, 127 (1986).

192. *See, e.g.*, H.R. 4942, 101st Cong., 2d Sess. § 14 (1990) (establishing interagency working group to assist Commerce Department in developing regulations and guidelines and collecting data related to recycling). The inclusion of a provision authorizing a federal advisory group led by the EPA would be consistent with the authorization in RCRA for interagency work groups. *See* 42 U.S.C. § 6911(b) (1988) (establishing interagency coordinating committee to harmonize federal agency activities relating to solid waste management); *id.* § 6913 (directing EPA to form personnel teams to assist other agencies and state and local governments with solid waste management issues).

The interagency work group on green claims to be authorized by this proposed legislation should be chaired by EPA personnel and should include representatives from some or all of the following offices: the Council on Environmental Quality (the White House environmental office); the Office of Consumer Affairs (the White House consumer issues office); the Federal Trade Commission (currently the lead agency in regulating green claims, with a history of evaluating advertising messages); the Commerce Department (responsible for overseeing industrial behavior and to be charged under this act with keeping waste management statistics); the Department of Justice (the executive branch's chief law enforcement agency); the Department of Agriculture (charged with regulating agricultural food product claims); the Food and Drug Administration (responsible for implementing the Nutrition Labeling and Education Act); the Department of Education (with expertise in educational techniques); the Federal Communications Commission (knowledgeable in evaluating electronic messages); the National Academy of Sciences (with knowledge of technical areas useful in assessing trends in consumer product manufacturing and waste management technologies); the National Institute of Standards and Technology (with expertise in setting industrial standards); and the American Society for Testing and Materials (currently involved in examining issues of package degradability and paper recycling standards).

193. *See, e.g.*, S. 615, 102d Cong., 1st Sess. § 5 (1991) (creating independent advisory board to advise EPA on regulation of green marketing claims). Inclusion of such a provision

committee would counsel the EPA and Congress on the implementation of the statute. In particular, it would seek to advance the goals of consumer education and accommodation of technological advancements aiding the regulation of green claims by the EPA.

CONCLUSION

Enactment of a federal statute establishing a program of green claims regulation and consumer education under the EPA, with assistance from the FTC and other appropriate agencies, should relate to a national policy on waste management. Comprehensive legislation could create a regulatory system that encompasses nationwide green claims marketing development and addresses the complexity of the solid waste management issues involved. It could also serve to eliminate deceptive green claims and assist consumers in becoming more effective advocates for environmental improvements.

A comprehensive federal green claims program would serve the interests of consumers desirous of reliable environmental information, industries wishing to develop a lucrative green marketing program, and the overall cause of environmental protection. In the long run, the influence of educated consumers on industry under the new program may provide an extraordinarily effective and inexpensive means of producing positive environmental change.¹⁹⁴

in green claims legislation would be consistent with RCRA. See 42 U.S.C. § 6912(a)(4) (1988) (directing EPA to consult with representatives of science, industry, agriculture, labor, and environmental protection and consumer groups).

The EPA advisory committee on green claims to be established under this statute should include representatives of some or all of the following organizations: the National Governor's Association (to represent the states); the National Association of Attorneys General (whose members have taken the lead in advocating green claims regulation); local governments (traditionally responsible for waste management); municipal solid waste managers (with technical knowledge about waste management infrastructure); food, drug, cosmetic, and packaging industries (groups intending to use green claims on products); private recycling and composting companies (which assist municipalities in managing solid waste); glass, plastics, paper, and metals producers (which provide materials to product manufacturers and are involved in recycling); environmental and consumer interest groups (which have been involved in solid waste issues and have worked to promote public education regarding these issues); toxicologists (capable of addressing technical issues involving toxicity reduction); microbiologists (knowledgeable about composting processes); chemical and structural engineers (knowledgeable about design and construction of both consumer products and waste management systems); and experts in assessing consumer and market behavior (capable of conducting surveys to measure the effects of green claims regulation and consumer education).

This nonfederal advisory committee would evaluate existing state and foreign labeling programs and assess the international trade implications of advertising policy. The committee could be divided into subcommittees based on committee members' areas of expertise and focus on individual green claims and categories of claims. The subcommittees would also consider advertising influences through various marketing mediums, including package labeling, print and electronic advertising, and direct-mail solicitation.

194. See EPA Environmental Marketing Guidance, *supra* note 5, at 49,993 (speculating that

increase in consumer demand for environmentally sound products may precipitate marketplace solutions to environmental problems more efficiently than changes brought about through traditional government regulation); *see also* *FTC Hearings*, *supra* note 4, at 142 (testimony of Richard A. Denison, Ph.D., Environmental Defense Fund) (arguing that "strict control over environmental claims provides one of the least intrusive ways that government can induce manufacturers to make environmental improvements in their production processes and their products").