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Dawn Goulet

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OF SELLING THE ENVIRONMENT— BUYER BEWARE? AN EVALUATION OF THE PROPOSED F.T.C. GREEN GUIDES REVISIONS

*Jennifer Woods**

I. INTRODUCTION

Consumer interest in all things “green,” a trend dating back to the 1970s and the advent of Earth Day, has gained momentum in recent years, leading to a surge in the availability of products purporting to be environmentally friendly. As consumers increasingly found themselves lost in a thicket of environmental advertising claims on television, in print, and on packaging, the need for consumer protection in this area grew as well. In response, the Federal Trade Commission (FTC) established the Green Guides (Guides) in 1992 to assist companies in determining appropriate means for making claims about the environmental benefits of their products.¹ The Guides were revised in 1996 and 1998² in response to consumer research and new developments in companies’ marketing strategies.³ The Green Guides are currently under review, as the FTC determines

* J.D. Candidate, May 2010, Loyola University Chicago School of Law.

¹ Complying with the Environmental Marketing Guides, <http://www.ftc.gov/bcp/conline/pubs/buspubs/greenguides.shtm> (last visited May 15, 2008), ¶ 2.

² Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260 (1998), 72 Fed. Reg. 66,091 (Nov. 27, 2007) at 2.

³ Roscoe B. Starek, III, Commissioner, Fed. Trade Comm’n, Prepared Remarks Before the Alliance for Beverage Cartons and the Environmental Symposium: The Federal Trade Commission’s Green Guides: A Success Story (Dec. 4, 1996) at ¶ 27.

whether to retain, modify or rescind them.⁴

As the Federal Trade Commission solicits comments for revisions to the Green Guides, a number of questions about the Guides' efficacy present themselves: How successful have the Guides been in promoting accurate environmental advertising claims? Is there a more effective way of formulating the Guides to promote consumers' environmental interests? Would consumers and companies benefit from a partnership between the Environmental Protection Agency (EPA) and the FTC? Should the Guides be abandoned altogether in favor of an alternative regulatory strategy, such as eco-labeling?

This comment takes into account these questions in examining the effectiveness of the Guides in preventing companies from using false and misleading environmental advertising. Part II traces the development of the Guides and their regulatory goals. Part III evaluates the extent to which the Guides have met those goals. Part IV suggests alternative approaches that promote the goals of the Guides in a manner more likely to induce compliance and create predictability for consumers and manufacturers while encouraging companies to adopt increasingly stringent environmental standards for their products.

II. THE GREEN GUIDES' ORIGINS

Since the advent of products with "environmentally friendly" qualities, determining a course of action in regulating environmental claims has been a complicated process requiring a considerable measure of compromise.⁵ After two decades of

⁴ 72 Fed. Reg. 66,091, *supra* note 2, at 4. Among other things, the Commission is seeking to identify whether there is an ongoing need for the Guides, what benefits consumers derive from them, what impact the Guides have had on the flow of accurate advertising information, what costs consumers bear as a result of the Guides, whether consumer perceptions or interests have changed with regards to environmental claims, there has been substantial industry compliance with the Guides, whether there is overlap with other federal, state, or local regulations, and whether international standards should be considered in the FTC's review of the Guides.

⁵ The quest to curtail deceptive environmental claims dates back to the early 1970s, when the Federal Trade Commission worked with industry to create an agreement on phosphate and degradability claims. At that early stage, FTC cases challenged deceptive environmental advertising claims in several areas, including air pollution claims made by gasoline manufacturers. (See *FTC v. Standard Oil Co. of California* as cited in Starek, *supra* note 3).

investigating claims of misleading and deceptive environmental advertising on a case-by-case basis, the FTC responded to state and consumer concerns by creating the Guides in 1992.⁶ Motivated in part by a desire to avoid the perceived problems of discordant state legislation, the FTC intended that the Guides provide a uniform means of regulating manufacturers' environmental marketing and advertising practices.⁷ The Guides' stated purpose is to "provide the basis for voluntary compliance with such laws [Section 5 of the FTC Act] by members of industry."⁸ They "are not themselves enforceable regulations, nor do they have the force and effect of law", but companies found to be in violation of their recommendations may be subject to sanctions under Section 5 of the FTC Act.⁹

The Guides include general principles that apply to all environmental advertising as well as guidance in crafting specific environmental claims.¹⁰ They contain explanations about how reasonable consumers are likely to interpret a number of statements that fall into eight categories: general environmental benefit claims; degradable claims; compostable claims; recyclable claims; recycled content claims; source reduction claims; refillable claims; and ozone safe/ozone friendly claims.¹¹ Each of the categories includes examples designed to aid companies in determining how to appropriately qualify their environmental claims.¹² These examples are intended to provide a non-exclusive

Increases in consumer concerns about the environment in the 1980s led not only to increases in the number of manufacturers' environmental claims, but also to an FTC investigation into violations of the FTC Act's Section 5, which regulates false and deceptive advertising. Starek, *supra* note 3, at ¶¶ 4-5.

⁶ *Id.* at ¶ 7.

⁷ *Id.*; 16 C.F.R. § 260.1.

⁸ 16 C.F.R. § 260.1.

⁹ 72 Fed. Reg. 66,091, *supra* note 2, at 3; 16 C.F.R. § 260.2.

¹⁰ 72 Fed. Reg. 66,091, *supra* note 2, at 3. The Guides require "that qualifications and disclosures be sufficiently clear and prominent to prevent deception based on "clarity of language, relative type size and proximity to the claim being qualified, and an absence of contrary claims that could undercut effectiveness"; that marketers make clear whether their claims apply to the product, the package, or a component of either; that claims to not overstate an environmental attribute or benefit, expressly or by implication; and that marketers present comparative claims in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception." 16 C.F.R. § 260.6.

¹¹ *Id.* at 4.

¹² *Id.* For example, under the general principle that environmental claims should not be overstated, a trash bag labeled "recyclable" without qualification is misleading. Although the claim may be technically accurate, the fact that

list of "safe harbors" that companies can rely on in order to ensure that they will not draw the FTC's attention.¹³

Significantly, the Guides' standards are not based on technical distinctions between and rigid definitions of environmental terms, but rather on what the FTC believes those terms mean to consumers.¹⁴ In the words of one commissioner, the Guides require that "any and all reasonable interpretations that are likely to affect consumers' conduct or decisions regarding a product or service must be substantiated, whether or not the advertiser intended to make those claims."¹⁵ Advertisers must therefore answer to the FTC not just for intended claims that can be substantiated, but also any implied claims in which the consumer may reasonably believe, regardless of whether there is a technical connection between the claim and interpretation.¹⁶ The current contemplated revisions are partly targeted at ensuring that consumer perception is accounted for, because "science and technology in the environmental area are constantly changing and new developments might affect consumer perception."¹⁷

Meanwhile, states have not refrained entirely from regulating in this area, despite the possibility of federal preemption. Private companies and independent organizations such as Green Seal have also sprung up to fill voids in product regulation.¹⁸ Because the Guides do not have the force of law,

trash bags are usually not separated out for recycling means that the claim has no practical value, and it "asserts an environmental benefit where no significant or meaningful benefit exists." The Guides suggest that other claims making overly broad statements of environmental benefit be qualified as much as possible to ensure that the claim cannot possibly cause confusion. For example, a product package labeled "environmentally friendly because it was not chlorine bleached, a process that has been shown to create harmful substances" can still be deceptive, and requires additional qualification if the product's manufacturing process does harm to the environment in some other way. 16 C.F.R. § 260.2(c). Similarly, the Ice Mountain commercial touting the environmental benefit of its water bottles which use "30 percent less plastic" is misleading under FTC guidelines because it does not indicate whether it uses 30 percent less plastic than it did previously in its water bottles, or 30 percent less plastic than its competitors use. 16 C.F.R. § 260.2(d).

¹³ *Id.*

¹⁴ Starek, *supra* note 3, at ¶ 14.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 72 Fed. Reg. 66,091, *supra* note 2, at 5.

¹⁸ Kimberly C. Cavanagh, *It's a Lorax Kind of Market! But is it a Sneeches Kind of Solution?: a Critical Review of Current Laissez-Faire Environmental Marketing Regulation*, 9 VA. ENVTL L.J. 133, 145 (1998). An

they cannot preempt regulations created by other federal agencies, or state and local governments.¹⁹ The result is a wide variation of state and local regulation.²⁰ Some states have attempted to follow the Guides, several have shifted their focus to consumer education and state-based product labeling programs, and at least one, California, has enacted more stringent measures.²¹ The Ninth Circuit's 1994 decision in *Association of Nat'l Advertisers, Inc. v. Lungren*²² upheld a stringent California regulation likely ensuring that this patchwork state approach to environmental advertising regulation will continue unless preempted by federal legislation.²³ Attempting to capitalize on gaps in state and federal regulations, independent organizations and private companies like the Scientific Certification Systems' "Environmental Report Card" have formed to provide more extensive product information for consumers.²⁴ These programs typically combine attempts to establish a rating or certification

additional layer of environmental oversight exists at the international level, through both the United Nations and less geographically extensive treaty organizations such as the GATT and NAFTA. Private international groups like the International Standards Organization (ISO) fill a role similar to private groups in the United States by seeking to create and encourage compliance with voluntary standards in an attempt to "harmonize methodologies, terms and principles" at the international level. As with domestic systems, international standards by government-like entities have combined with private groups to create a multi-tiered and overlapping system of regulations and certification programs which currently rely on weak or questionable enforcement mechanisms. *Id.* at 139-48.

¹⁹ 16 C.F.R. § 260.2.

²⁰ Cavanagh, *supra* note 18, at 144.

²¹ *Id.* Cavanagh provides an extensive discussion about the variety of state-run programs and their relation to the Green Guides, and ultimately concludes that federal legislation will be necessary to preempt the plethora of state-run programs that currently exist which severely limit the predictability of effective advertising for marketers and which the FTC is powerless to curtail. *Id.* at 177-84, 189-90.

²² 44 F.3d 726 (9th Cir. 1994).

²³ Cavanagh, *supra* note 18 at 144-45. This decision involved a challenge to California's Environmental Marketing Act, and the Court's opinion classified environmental advertising claims as commercial speech rather than political speech, removing it from the protection of the First Amendment and making it an open issue for state and federal regulation. In addition, because the court found that a substantial state interest existed in California's environmental marketing statute, this precedent makes it likely that an appropriately worded federal statute would be found constitutional. *Id.* at 192-94.

²⁴ *Id.* at 145-46, 201.

system for environmental attributes of products with incentives for companies that develop more environmentally friendly products.²⁵

III. THE GREEN GUIDES: A SUCCESS STORY?

A. *The Guides as a Regulatory Achievement*

Many feel the Guides have been an important step towards the FTC's goal of creating predictable environmental advertising standards for both businesses and consumers. In a 1996 speech in Belgium, Roscoe Starek III, then FTC commissioner, framed the Guides as a nearly unqualified success story.²⁶ In casting consumers as a group that "can easily be fooled," he lauded the FTC for creating a framework of voluntary compliance to prevent consumers from spending money on "the wrong products or services, injuring both the consumer and more honest competitors."²⁷ He indicated that providing companies with an idea of the evidence they should have to support their environmental claims allowed the FTC to "encourage advertisers to make genuine environmental improvements with the incentive of being able confidently to advertise those improvements to the public."²⁸

Others see the most recent round of Guides revisions as the FTC taking a hardline stance on those marketers "seeking to turn green advertising claims into gold."²⁹ For those marketers who feel that having "green" credentials is necessary in order to improve sales with today's consumers, understanding the likely consumer interpretations of their advertising claims is paramount.³⁰ Although companies may feel increasing pressure to tout their products' green attributes, marketers should exercise caution in making claims until the FTC unveils its new recommendations because marketers cannot necessarily predict

²⁵ *Id.*

²⁶ Starek, *supra* note 3, at ¶ 1.

²⁷ *Id.* at ¶ 2, 3. The Guides, then, arose to combat "confusion about environmental claims [that] simultaneously kept useful information from reaching consumers and left them distrustful about the information they did receive." *Id.* at ¶ 7.

²⁸ *Id.* at ¶ 9.

²⁹ Wendy Melillo, *POV: It's Not Easy Being Green*, ADWEEK, Jan. 15, 2008, available at www.adweek.com (click on "news," click on "strategy," scroll down to locate article), ¶ 1.

³⁰ *Id.* at ¶ 9.

how the FTC will respond to changing consumer perception.³¹ Believing that it is in the best interests of both consumers and marketers to understand environmental claims and how to make them accurate, one article warns that “this is not the time for marketers to play in the green marketing arena if they don’t understand the game.”³² The clear implication is that, regardless of how the FTC has dealt with violations of its suggestions in the past, companies should anticipate and pay close attention to changes that the FTC will unveil at the end of the Green Guide revision process. Although companies do not have to fear strict penalties for Guide violations, they can nevertheless avoid the hassle of an FTC investigation, a potential Section 5 sanction, and negative media and consumer attention by exercising caution in environmental advertising until the new Guides are published.³³

B. The Green Guides’ Enforcement Downside

Not all observers have been as cheerfully optimistic about the Green Guides’ success as former FTC Commissioner Starek. A number of authors and studies have noted the FTC’s failure to investigate companies’ questionable advertising claims,³⁴ and some seriously doubt the Guides’ effectiveness in affecting companies’ environmental advertising.³⁵ Worse still, some believe that the FTC’s steadfast belief that deceptive environmental advertising is “merely” a form of misleading advertising that belongs only within the purview of the Federal Trade Commission Act (Act) forecloses a number of possible regulatory strategies that are better suited for use with environmental marketing issues.³⁶ Moreover, companies whose products are found to violate the Guides’ recommendations are subject to only limited sanctions under Section 5 of the Act, which has usually resulted in the FTC signing consent agreements with the offending company.³⁷ Generally, this

³¹ *Id.* at ¶ 8, 11.

³² *Id.* at ¶ 7, 8.

³³ See 72 Fed. Reg. 66,091, *supra* note 2, at 5, 7.

³⁴ Heather Green, *How Green is That Gizmo?*, BUSINESS WEEK, Dec. 20, 2007, available at http://www.businessweek.com/magazine/content/07_53/b4065036215848.htm, ¶ 5.

³⁵ Cavanagh, *supra* note 18, at 156 n.89.

³⁶ *Id.* at 139.

³⁷ *Id.* at ¶ 12.

amounts to little more than a cooperative and effectively voluntary sanction, with companies agreeing to discontinue the deceptive advertising and the FTC placing them under a broad cease and desist order prohibiting future misleading claims.³⁸

A recent investigation by TerraChoice Environmental Marketing revealed that false and misleading claims are slipping past the FTC at alarming rates.³⁹ TerraChoice reviewed the environmental claims made for about 1,018 widely sold goods and determined that all but one made a false or misleading claim under FTC guidelines.⁴⁰ The majority of claims fell into three categories of transgressions: "Sin of the Hidden Trade-Off," "Sin of No Proof," and "Sin of Irrelevance."⁴¹ TerraChoice defined the "Hidden Trade-Off" category to include touting one environmental benefit of a product without mentioning the same product's economic downside, "No Proof" includes products which have not certified their claims, and "Irrelevance" includes claiming an environmental benefit that the law already requires, such as marketing a product as having "no chlorofluorocarbons" when CFCs were banned three decades ago.⁴² Although given different names by the Green Guides, all three categories constitute deceptive advertising that should subject the offending companies to Section 5 investigations.

TerraChoice also commented on the proliferation of innovative environmental claims that do not yet fall under the Guides, including carbon offsets and renewable energy certificates.⁴³

With so much media and consumer attention given to earth-friendly products, it is not surprising that some manufacturers are trying to capitalize unscrupulously on the green movement. One observer notes that "there is a great abuse of green marketing going on"⁴⁴ with "a real lack of authenticity to a lot of the ads that is really disingenuous with the problem we have in the environment."⁴⁵ Companies have a valuable

³⁸ *Id.*

³⁹ Green, *supra* note 34 at ¶ 3.

⁴⁰ *Id.*

⁴¹ *Id.* at ¶ 4.

⁴² *Id.*

⁴³ *Id.* at ¶ 5.

⁴⁴ Andrea Billups, *FTC Review Rules to Keep Advertisers True "Green,"* THE WASH. TIMES, March 4, 2008, available at <http://www.washingtontimes.com/apps/pbcs.dll/article?AID=/20080304/NATION/160089433/1001>, ¶ 9.

⁴⁵ *Id.*

incentive to follow that path: Research shows that companies that do not embrace environmental issues may lose their consumer base, and a 2007 consumer survey found that eighty-five percent of people surveyed would switch brands or products if a company had poor corporate responsibility practices.⁴⁶

An additional problem with the Guides is the seemingly arbitrary distinctions that result from its attempts to mold subjective assessments of consumer confidence into a set of objective recommendations for marketers. An example of this is the set of regulations related to the “chasing arrows” symbol⁴⁷. Conspicuous display of the symbol creates a recyclability claim subject to the Guides’ suggestions, while discrete placement of the symbol, such as on the bottom of the package, does not.⁴⁸ Given that a substantial number of products display the symbol on the bottom of the container, it is reasonable to believe that consumers not only expect to find the symbol there, but rely on it just as heavily to determine the product’s recyclability as they would if the symbol were displayed on the product’s label. Seeming discrepancies like these make it difficult to determine the degree to which the Guides’ recommendations truly accord with the consumer perceptions they are supposed to authenticate.

C. *Errors of Omission: The Changing Face of “Green”*

Critics make a compelling argument that the Guides, in addition to being under-enforced and arbitrary, are simply out of touch with current environmental marketing realities. A decade-long drought in revisions means that more recent technologies and advertising strategies are largely unregulated, including carbon offsets, renewable energy certificates, and green building products.⁴⁹ In some cases, this failure to articulate standards has

⁴⁶ *Id.* at ¶ 19.

⁴⁷ See 16 C.F.R. § 260.7(d), Example 2.

⁴⁸ 16 C.F.R. § 260.7(d).

⁴⁹ See David A. Fahrenthold, *Value of U.S. House’s Carbon Offsets is Murky*, WASH. POST, Jan. 15, 1990, at A1. See also *FTC Examines Green Building, New Green Guides ‘Definitely’ in 2009*, Environmental Leader, July 16, 2008, <http://www.environmentalleader.com/2008/07/16/ftc-examines-green-building-new-green-guides-definitely-in-2009/>. Although this article does not address it as a separate consumer issue, the FTC has held meetings in order to determine whether new developments in green building advertising should fall within the purview of the revised 2009 Green Guides. Despite the fact that green building advertising has not been specifically regulated in the past, the issues related to green building advertising largely mirror the concerns about

created an almost complete lack of reliable consumer information.⁵⁰ Even more problematic is the debate over just what claims these products are making and what the businesses that provide and purchase them should be required to show as proof of legitimate advertising.

One particular area of concern is the voluntary carbon offset and renewable energy certificate market, which has sprung up in recent years and quickly surged in popularity. Corporations and consumers in the United States spent more than \$54 million on voluntary carbon offsets in 2007 alone,⁵¹ and the total value of the 2006 voluntary carbon exchange market is estimated to have been around \$91 million.⁵² Even the United States government has gotten involved, with the House of Representatives spending \$89,000 on carbon offsets in 2007.⁵³ Events ranging from the Super Bowl to the Academy Awards have touted themselves as “carbon-neutral” and carbon offset promotional offers abound in the marketplace.⁵⁴ Companies from Dell to Volkswagen to Delta Airlines now all offer some form of carbon offset, either as part of a purchase or as an independent product offered for sale.⁵⁵

green advertising as a whole.

⁵⁰ See *id.*

⁵¹ Louise Story, *F.T.C. Asks if Carbon-Offset Money is Well Spent*, N.Y. TIMES, Jan. 9, 2008, available at http://www.nytimes.com/2008/01/09/business/09offsets.html?_r=1&oref=slogin. Many of these offsets are traded on open markets the Chicago Climate Exchange, but they can also be purchased directly from and managed by companies like Carbonfund.org and the Conservation Fund.

⁵² Jeffrey Ball and Ian Talley, *Scrutiny Rises Over Carbon-Offset Sales Process*, WALL ST. J., Jan. 8, 2008 at A13. According to the World Bank, the global market for regulated-emissions permits reached \$30 billion in 2006. Although many companies anticipate that the United States government will impose caps on global warming emissions, the government has yet to do so, making carbon offsets an optional, and currently unregulated, expense. Countries trading carbon offset permits under the Kyoto Protocol are regulated by a panel of United Nations-sanctioned officials.

⁵³ Fahrenthold, *supra* note 49, at A1.

⁵⁴ Story, *supra* note 51.

⁵⁵ *Id.* Dell, for example, offers carbon offsets for sale on its website, ranging from \$2 for three years of laptop use to \$99 for a consumer's total annual emissions. For a limited time, Volkswagen incorporated a carbon offset program into each vehicle purchase, promising to plant trees in its “VW Forest” in Mississippi. Delta has balked at including the charge in their fares, due to the especially price-sensitive nature of airline fares, but they offer carbon offsets as an optional additional charge. Major rewards credit cards have also gotten into the game, offering to exchange points for carbon offsets.

Carbon offsets do just what their name suggests: They permit individuals or businesses to emit greenhouse gases at their current rates, but mitigate that pollution by paying to create or improve upon clean energy technology in other locations.⁵⁶ The idea is that, after exhausting possible changes to reduce a company's greenhouse gas emissions, the company can further reduce its environmental impact by funding outside environmental programs.⁵⁷ Each carbon offset is supposed to equate to one metric ton of carbon dioxide that is prevented from entering the atmosphere.⁵⁸ Money paid to a carbon offset program is directed to alternative energy development and sustainability initiatives throughout the country, including solar and wind energy installments, reforestation programs,⁵⁹ and agricultural practice improvements.⁶⁰ Contracts for similar "carbon credit" programs are currently being traded on the Chicago Climate Exchange, which lists 400 members, including Sony, DuPont, Bank of America, the state of Illinois, and the city of Berkeley, California.⁶¹ These contracts are legally binding and subject to audits and a verification process,⁶² but there is no mandatory government oversight.⁶³

While voluntary carbon offsets have become increasingly popular as a means of bolstering corporate green credentials and assuaging individual environmental guilt, their near total lack of regulation makes them ripe for exploitation. A fundamental concern is what a "carbon offset" really represents. Although in theory an offset should mitigate carbon dioxide produced by one company through subsidies or other incentives designed to

⁵⁶ Dean Scott, *F.T.C. Moves Toward Revision of Green Guides to Cover Marketing Claims of Carbon Offsets*, 38 ENVTL. REP. CURRENT DEV. (BNA) 2557 (2007).

⁵⁷ Amy Rinard, *Farmers Cashing In On Carbon Credits*, MILWAUKEE J. SENTINEL, Feb. 5, 2008, <http://www.jsonline.com/story/index.aspx?id=714488>.

⁵⁸ Ball, *supra* note 52, at A13.

⁵⁹ Story, *supra* note 51.

⁶⁰ Rinard, *supra* note 57.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Fahrentholt, *supra* note 49, at A1. For a discussion of recently withdrawn California Assembly bill AB 1851 that would have imposed regulations on that state's voluntary carbon offset market, see Jeremy Schiffer, *Voluntary Carbon Offset Market Escapes California's Regulation Attempt*, Sept. 2, 2008, available at <http://climateintel.com/2008/09/02/voluntary-carbon-offset-market-escapes-californias-regulation-attempt/> (last accessed Oct. 19, 2008).

increase sustainable practices or renewable energy production elsewhere, in practice they appear to achieve much less.⁶⁴ Rather than funding new developments in sustainable farming or wind energy, for example, carbon offsets often provide a bonus to people already engaged in environmentally-friendly practices by allowing them to receive financial assistance, which is intended to encourage conversion to such practices, to support techniques they already use.⁶⁵ While beneficial to those running environmental initiatives, this practice of rewarding those already practicing environmentally friendly techniques does not necessarily equate to an increase in the amount of renewable energy or no-till farmland available. “Additionality,” the idea that a carbon offset should cause a new reduction in emissions that would not have happened without the credit, is widely considered by environmental groups to be absolutely essential to the value of carbon credits.⁶⁶ Current voluntary carbon offsets do not even guarantee that consumer funds will support active projects, let alone those that meet the additionality requirement. For example, one of the projects funded by the House of Representatives carbon offsets ended a full year before the credits were purchased⁶⁷

Closely related to the problem of additionality is the issue of substantiation, which impacts businesses and consumers alike. Adequate substantiation for claims of “carbon neutral” status should require “competent and reliable scientific evidence,” but the meaning of this phrase is still very much open to debate.⁶⁸ Merely determining whether a project benefits the environment poses a formidable scientific and administrative challenge. But a number of additional concerns must also be addressed.⁶⁹ The effects of the projects on the environment, the responsible distribution of carbon offset funds and the continued monitoring of advertising claims also will play substantial roles in any plan to

⁶⁴ Rinard, *supra* note 57.

⁶⁵ *Id.*

⁶⁶ Fahrenthold, *supra* note 49, at A1.

⁶⁷ *Id.* Carbon offsets carry an additional risk even where they provide additionality and a tangible environmental benefit: Companies may manipulate their pollution levels in order to take advantage of carbon credits, undermining the offset market and mitigating environmental benefits.

⁶⁸ Tracy Heinzman and Hugh Latimer, *Understanding the Carbon Footprint—New Green Advertising Claims Under Scrutiny Despite Lack of FTC Guidelines*, METRO. CORP. COUNS., April 2008, at 29, <http://www.metrocorp.counsel.com/pdf/2008/April/29A.pdf>.

⁶⁹ *Id.*

regulate the carbon offset market.⁷⁰ At the same time, consumers have no consistent information upon which to form opinions about carbon offsets.⁷¹ Even experts have not reached a consensus about the appropriate means by which to market carbon credits,⁷² making it impossible for consumers to do so.

IV. ALTERNATIVES ABOUND

A. *The Power of an Educated Public*

As the Guides now stand, the only way for a company to use an environmental claim and avoid the FTC's attention is to immediately follow the claim with a small paragraph qualifying every word of the claim such that the public has no doubt as to the product's environmental impact.⁷³ Such an approach is necessary, the FTC argues, in order to protect an unsuspecting public that is likely to believe miraculous things about nearly any product carrying an environmentally friendly-sounding package, sticker, or ad campaign.⁷⁴ While this may be true, the most effective response may not be dumbing down and endlessly qualifying the claims themselves, or constantly chasing the public's perception of terms' meaning and then changing the standards of acceptable advertising accordingly. Such a system lacks predictability for companies and the public, and does not serve the environmental interests of either. Even worse, from an environmental standpoint, is the fact that the companies doing the marketing always have the upper hand, as they have the freedom to create increasingly nebulous and meaningless yet sweet-smelling claims while the FTC sits by and waits to accumulate research on the public's perceptions of the claim before negotiating the terms' qualifications.⁷⁵

Rather than continuing to mold companies' environmental claims to meet the public's "standard" perceptions, as the FTC has done, perhaps the solution to effective and accurate advertising lies in educating and molding

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See generally 16 C.F.R. §§ 260.6, 260.7 (providing specific examples of environmental claims and the descriptive language that must be included on a product in order to substantiate the claim).

⁷⁴ Starek, *supra* note 3, at ¶ 3.

⁷⁵ See 72 Fed. Reg. 66,091, *supra* note 2, at 5.

the public understanding of the technical meaning behind standard claims made by companies. Permitting companies to use standard claims with objective requirements, perhaps along the lines of the EPA's Energy Star program, would create a uniform, predictable system that the public could easily learn and understand.⁷⁶ At least one commentator has proposed this solution, arguing that the creation of uniform regulations would be supported by most involved parties and would allow the FTC to "more readily determine the deceptiveness" of a company's marketing scheme.⁷⁷ A program designed along these lines would have the added benefit of encouraging consumers to take an active role in ensuring companies' compliance by providing them with an objective set of standards by which to measure companies' advertising claims, and to report businesses not living up to applicable standards.

Although it may pose administrative problems initially, creating uniform standards would likely be of particular benefit to consumers who purchase carbon credits. Having a nationally recognized program to certify carbon offset projects and monitor compliance with regulatory standards would remove much of the confusion that plagues the carbon offset market. By defining appropriate projects and setting consistent requirements, businesses and consumers alike would be assured that their contributions to greenhouse gas emissions reductions reach their intended targets. This would effectively guarantee reliable and accurate advertising claims by businesses while encouraging businesses to take an active interest in the projects that their carbon offset money supports and their advertising dollars publicize.⁷⁸

Obviously, such an ambitious undertaking would require a massive initial investment into researching not only what constitutes an environmentally beneficial project, but also in how best to effectuate compliance in an area of environmental advocacy that is likely to continue to innovate at a rapid rate. Even following successful establishment, a regulatory program

⁷⁶ Cavanagh, *supra* note 18, at 175-76.

⁷⁷ *Id.*

⁷⁸ See Story, *supra* note 51. Some companies, like Gaiam, a yoga equipment company, have already begun to take an active role in substantiating the environmental credentials of projects they fund through carbon credits. In Gaiam's case, when the company decided to sell offsets for shipping to consumers, the general manager personally visited one of the project's sites to verify the accuracy of its environmental claims.

with uniform standards would face a challenge that the EPA's Energy Star program does not: Constant need for oversight to ensure continued compliance with program standards. While the EPA can award an Energy Star rating to an individual product once and be confident that the product's qualities will remain consistent until replaced with a new product requiring certification, ongoing and continuous monitoring would be required for a number of carbon offset programs, such as eco-friendly agriculture and reforestation, that do not function on such discrete terms.

B. EPA Partnership Potential

While the FTC has gone to great lengths to tout the effectiveness of its non-mandatory, case-by-case approach to molding companies' environmental advertising claims to meet the likely perception of such claims by the masses,⁷⁹ the problems with such an approach are self-evident. Although a non-mandatory set of guidelines can indeed provide "safe harbors" for companies seeking to promote the environmentally friendly nature of their products,⁸⁰ the repercussions for companies seeking to evade such restrictions are minimal.⁸¹ Virtually no barrier exists to prevent a company from manufacturing its own environmentally conscious-sounding terms that the FTC simply has not gotten around to regulating yet and marketing them until the FTC manages to define voluntary standards for the "misleading" term. This is likely to prove especially true in the carbon offset industry, where studies demonstrating the legitimate environmental benefits from new energy and agricultural technology are outpaced by creative new experiments.⁸² Few barriers would exist to prevent businesses from buying or selling carbon offsets supporting projects of questionable environmental value while still touting the business' environmental commitment.

Although admittedly pessimistic toward industry, such a view highlights one of the Guides' inherent problems: As long as companies profit from making environmental advertising claims, they will continue to do so, and likely without resorting to the costly expenditures necessary to truly improve the products they

⁷⁹ See generally Starek, *supra* note 3.

⁸⁰ 16 C.F.R. § 260.3.

⁸¹ See *id.* at ¶ 12.

⁸² Ball, *supra* note 52, at A13.

advertise. As noted, this trend by companies to resort to “greenwashing” has already been well-documented by environmentalists and industry insiders alike.⁸³ Without an ability to enforce its recommendations, the FTC is likely to remain several steps behind greenwashers, unable to predict their next moves and equally unable to respond with appropriate standards and effective enforcement without another complicated and lengthy Guides review process.

One possible solution would be for the FTC to join forces with the EPA and create a comprehensive regulatory system to oversee all aspects of manufacturers’ interactions with the environment, which Kimberly Cavanagh argued is the only way to create effective management of environmental claims.⁸⁴ She suggested that the EPA’s proposal to create voluntary national standards for the use of environmental claims and determining products’ environmental benefits, shelved with the creation of the Guides, should be resurrected and implemented through the EPA’s lawmaking mandate with the help of the FTC.⁸⁵ She also indicated that an additional step should be taken by implementing the EPA’s Life Cycle Assessment program.⁸⁶ This program evaluates the environmental impacts of the process that a product goes through, from cultivation of the raw materials to completed product to the used product’s end.⁸⁷ This step, combined with a collective effort on the part of the FTC and EPA “will positively enhance the reliability and consumer comprehension of ‘green’ claims,” thus achieving the primary objectives of the Guides revision.⁸⁸

There would likely be drawbacks to an EPA-FTC

⁸³ *Green Marketing and the Menace of Greenwashing*, ICMR CASE STUDIES AND MANAGEMENT RESOURCES, available at <http://www.icmrindia.org/business%20Updates/micro%20casesstudies/Marketing/MCMKoo25.htm> (last accessed May 15, 2008), ¶ 1-3. The recently created Greenwashing Index, announced at the 2007 UN Climate Change Conference in Bali, Indonesia, allows consumers to rate product claims based on their tendency to mislead through words or visuals, vague language, exaggerations, and omissions. In addition to the public’s role in exposing greenwashing, the news media and several watchdog organizations have worked to expose companies’ attempts to brighten their corporate image through greenwashing. *Id.* at ¶ 5, 22.

⁸⁴ Cavanagh, *supra* note 18, at 172-76.

⁸⁵ *Id.* at 173-74.

⁸⁶ Renate Gertz, *Eco-Labeling—A Case for Deregulation?* 4 LAW, PROBABILITY, & RISK, 127, 132 (2007); Cavanagh, *supra* note 19, at 175.

⁸⁷ Cavanagh, *supra* note 18, at 166-67.

⁸⁸ *Id.* at 176.

partnership system. It would need to be centralized, would not allow for a great amount of flexibility, and the regulations would likely be litigated.⁸⁹ But it would likely further the overall goals of predictability and consistent regulation. The current system of voluntary adherence to FTC suggestions begs companies to concoct creative claims because there is little or no economic loss in the event that they are caught.⁹⁰ A system with stronger penalties and mandatory adherence to more comprehensive, technically based definitions would force companies to take a hard look at their advertising strategies, and may even encourage the development of more ecologically-minded production strategies and techniques that permit the company to boast even greater environmental benefits.

C. Eco-labeling

Another possibility to increase predictability and accountability in environmental advertising claims would be to embrace eco-labeling on a broad scale, which the United States has been hesitant to do, with the exception of the EPA's Energy Star program.⁹¹ The European system of eco-labeling, pioneered in Germany and later adopted with a different name and symbol by the European Union, is intended to provide consumers with information when shopping.⁹² Unlike similar American initiatives such as the Energy Star program, however, the European system is predominantly deregulated.⁹³ The idea behind eco-labeling is to encourage the desired behavior, here accurate advertising claims, through financial incentives rather than government-imposed legal coercion.⁹⁴ By setting standards for obtaining the eco-label at a level high enough that few manufacturers qualify, the hope is that other companies will work to obtain the heightened level of environmental benefit in order to use the label, thus translating into an incentivized method of improving product manufacturing standards.⁹⁵ Through incentive-based eco-labeling programs, companies are encouraged not just to use accurate claims when marketing

⁸⁹ Gertz, *supra* note 86, at 129.

⁹⁰ See Starek, *supra* note 3, at ¶ 12.

⁹¹ Cavanagh, *supra* note 18, at 167-68.

⁹² Gertz, *supra* note 86, at 128.

⁹³ *Id.* at 129.

⁹⁴ *Id.*

⁹⁵ *Id.* at 133.

products, but also to develop more environmentally-friendly production methods.⁹⁶

This method allows companies to pay a private agency for the right to display a label indicating their relative environmental friendliness, which is then supposed to translate into an increased market share for their products over those that do not carry the label.⁹⁷ In this way, eco-labeling's success is based on manufacturers' abilities to produce ecologically-conscious items that respond to consumer demand.⁹⁸ This system is particularly attractive for manufacturers, who may see increased profits as a result of their participation in the program.⁹⁹ Without increasingly stringent standards, however, it is unlikely that such a program will encourage considerable improvement in environmentally conscious production strategies, because the incentive does not extend past the requirements a company must meet to obtain the preferred labeling.¹⁰⁰

Where used in the United States under the auspices of the EPA's Energy Star program, eco-labeling has had noticeable

⁹⁶ Gertz, *supra* note 86, at 129. Eco-labeling systems follow three steps: establishing product categories; examining the harm products cause to the environment throughout their lifecycles; and determining standards that the products must meet to be eligible for the eco-label. *Id.* at 132-33.

⁹⁷ *Id.* at 130-31.

⁹⁸ *Id.* at 131.

⁹⁹ *See id.* at Table 1, Table 2. An evaluation of European Flower and Blue Angel eco-labeling programs has produced mixed results as to improvements in customer response and product sales following display of the eco-label. *Id.* Where more than half of companies indicated that the statement "use of eco-label has produced positive customer response" applied completely or mostly, only ten percent of companies agreed that their product sales noticeably increased because of the eco-label. *Id.*

¹⁰⁰ *See id.* at 133. As Gertz notes, current eco-labeling programs generally set environmental requirements at a level where only a few products qualify to bear the label. *Id.* In addition, some programs require that products have the potential to make a substantial improvement in market share because of the label in order to create further economic incentives for manufacturers. *Id.* However, no eco-labeling program has yet to set standards high enough that all current products would have to improve their environmental credentials in order to qualify for the label. *Id.* Although problematic for other reasons, including its potential inability to attract companies willing to make substantial product changes in exchange for nothing more than the contractual right to bear an eco-label, such a program would at least encourage green product improvement to a greater degree than current eco-labeling programs. A labeling program with increasingly stringent requirements, though possibly unpredictable for companies, would resolve the failure of current systems to encourage ongoing product improvement.

success,¹⁰¹ and at least two private organizations have sprung up to provide the American equivalent of the German and European deregulated labeling systems.¹⁰² One of these programs, Green Seal, mimics the "Blue Angel" labeling program, which has seen considerable success in Germany, by using a product's environmental attributes from start to finish creating quantitative data which consumers can use to make decisions about that product's environmental superiority.¹⁰³ Products certified under the program must meet certain criteria, after which they receive a seal to display on the product, and marketers can then capitalize on the seal's environmental endorsement.¹⁰⁴ A second American eco-labeling program, the "Environmental Report Card," offers a unique approach.¹⁰⁵ This program, a content-neutral scheme, is intended only to give consumers information about a product's main environmental impacts in the same way that a nutrition label provides information about a product's fat and sodium content.¹⁰⁶

Combining a program like the "Environmental Report Card," Green Seal, or Energy Star with enforceable EPA and FTC regulations would likely provide an incentive for manufacturers and marketers not only to create effective advertising for environmentally beneficial products, but also to make those products increasingly green.¹⁰⁷ The objective, technical standards required to obtain the label solve the current problem of unpredictability by removing the always-shifting customer perception-based "safe harbors" and substituting easily tested product attributes.¹⁰⁸ Although early reports do not show much financial gain for products using European eco-labels,¹⁰⁹ thus raising questions about their ability to provide a financial incentive for companies to pursue environmentally beneficial products, allowing such programs to continue in tandem with enforceable federal environmental regulations permits market forces to aid in regulating companies' behavior, much as they do under the Guides. These products would also relieve the FTC of

¹⁰¹ Cavanagh, *supra* note 18, at 168-69.

¹⁰² *Id.* at 201.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Cavanagh, *supra* note 18, at 203.

¹⁰⁷ *Id.* at 173-74.

¹⁰⁸ Gertz, *supra* note 86, at 133.

¹⁰⁹ *Id.* at Table 1, Table 2.

much of the burden of research and regulation by focusing its attention on the limited number of programs rather than hundreds of individual companies and thousands of products.

V. CONCLUSION: THE NEXT GENERATION OF GREEN REGULATION

In a time when only one product out of a thousand carries an accurate description of its environmental credentials,¹¹⁰ the FTC appears to be drowning in deceptive advertising it is powerless to stop. The battle over the current Guides revision is nothing less than a battle over consumer confidence in the environmental credentials of industry. In the absence of effective regulation, the movement toward environmentally conscious products is likely to take a serious hit, as consumers will be unable to discern legitimately environmentally friendly products produced with actual "green" manufacturing techniques from those who make grandiose claims with little substantiation.¹¹¹

Although options for reforming the Green Guides are plentiful, a partnership with the EPA, whose mandate includes a number of areas the FTC also seeks to regulate, may provide the desired combination of predictability and enforceability that will ensure the quality of "green" products in the future. When combined with deregulated eco-labeling programs, such regulations can provide a "carrot-and-stick" approach to curtailing deceptive environmental advertising claims that is likely to encourage manufacturer and marketer compliance with a minimum of legal coercion. The combination approach has the added benefit of encouraging increasingly stringent environmental standards for products, which the Green Guides cannot provide in their current form.

As long as the "green" movement continues, manufacturers will seek to capitalize on it through creative marketing strategies. Under the current Guides, which are unwieldy, unpredictable, and lack the force of law, it is likely that marketers will concern themselves with consumers' reasonable inferences about their environmental advertising claims, many of which are likely to attribute additional benefits to a product with even a modest claim. There is simply no incentive for businesses to curtail potentially deceptive advertising. While the Guides do

¹¹⁰ Green, *supra* note 34, at ¶ 1.

¹¹¹ Melillo, *supra* note 29, at ¶ 13.

not necessarily need to be rescinded, the incorporation of EPA regulations, perhaps in tandem with private eco-labeling programs and certainly with the continued use of the Energy Star label, can resolve their shortcomings while simultaneously encouraging the development of more environmentally-friendly production techniques and inspiring consumers to become increasingly educated about the environmental impacts of the products they buy.