Environmental Marketing: A Call for Legislative Action

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ENVIRONMENTAL MARKETING: A CALL FOR LEGISLATIVE ACTION*

I. Introduction

Environmental advertising and labeling are the latest responses to the recent concern and heightened awareness over environmental issues. As consumers become exceedingly aware of the importance of individual actions and social responsibility, they are looking for such concepts as "recyclable" and other "environmentally friendly" terminology on product labels when choosing products for personal use and consumption. A Gallup survey measured consumer attitudes towards products made with recycled paper products. It found that: 1) "Fifty-four percent of consumers are interested in buying products packaged in recycled paper containers," and 2) "when offered a choice between two products of comparable price and quality, one of which featured the recycled paper symbol, thirty-seven percent of consumers reported that they would be very likely, and thirty-three percent said that they would be fairly likely, to purchase the product packaged in recycled paper."

A more recent survey conducted for USA Today in 1990, indicated that eighty-three percent of all respondents said that they were concerned about the environment. Sixty-four percent felt that one person's effort can make a difference and fifty-seven percent said that they would pay fifteen percent more for groceries if packaged with recyclable materials. Fifty-two percent of the respondents claimed that they had stopped buying products made by companies they

3. Id.
5. Id.
6. Id.
thought were polluting the environment. Inevitably, businesses have taken advantage of this increased concern as an effective way of doing their part for the “green” cause. Unfortunately, while some companies have taken steps towards minimizing their products’ negative impact on the environment, many companies see the new wave of green consumerism as a means of increasing profits, and often do nothing more than change their product labels.

The absence of legal definitions and commonly understood meanings for terms such as “recyclable” and “biodegradable,” and even more vague terms such as “ozone friendly,” have led to increased consumer confusion. Many of the terms companies use in their product labeling and advertising have no standard meaning. Consequently, this labeling gives the consumer very little information. As a result, the need has arisen for information-based legislation to help consumers discern “green” products from those which merely purport to be “green.” This movement has been primarily instigated by the Federal Trade Commission [hereinafter FTC] in order to protect consumers’ concerns for truth in advertising. Regulation in this narrow subset of marketing involves a balance of competing concerns. In traditional advertising, the legislature’s primary concerns are the industry and the consumer. Environmental marketing introduces a new facet—environmental protection goals.

Environmentalists advocate truthful environmental marketing claims in order to better protect the environment. There is the possibility, however, that excessively


9. Id.

10. Id. at 788.


stringent legislation that is both costly and complicated will
deter environmentally conscious behavior. Environmentalists, while advocating strong legislation, do not want to go too
far because it could result in the loss of beneficial industrial
behavior. It becomes evident that environmental marketing
involves a delicate balance between various competing inter-
ests—consumers, environmentalists and businesses. Current-
ly, all concerns are not being adequately met by the FTC
whose primary responsibility is the interests of the consum-
ers, not the environment.\textsuperscript{14} The need for reform in this area
has prompted regulatory movements at both the federal and
state levels.

This comment first traces the evolution of various legisla-
tive efforts attempting to regulate environmental marketing,
beginning with the consumer protection laws.\textsuperscript{15} Second, the
comment offers an analysis of the efforts of the FTC, focusing
in particular on the question of whether environmental con-
cerns are adequately protected.\textsuperscript{16} The comment next explores
the possible effectiveness of national environmental informa-
tion-based regulations such as the use of seals of approval
and official emblems (as well as other government regulated
national efforts), to the most strict type of legislation—actu-
ally barring the use of any environmental terms on labels of
consumer goods.\textsuperscript{17} The comment then sets forth some of the
constitutional concerns regarding the level of First Amend-
ment protection afforded this type of commercial speech.\textsuperscript{18}
Finally, the comment offers a proposal of uniform federal leg-
islation that will most effectively address the concerns of the
parties involved: the business community, the consumer, and
the environment.\textsuperscript{19}

\textsuperscript{14} See infra text accompanying notes 19-159.
\textsuperscript{15} See infra text accompanying notes 160-168.
\textsuperscript{16} See infra text accompanying notes 169-175.
\textsuperscript{17} See infra text accompanying notes 176-182.
\textsuperscript{18} See infra text accompanying notes 183-186.
\textsuperscript{19} JAMES T. O'REILLY, STATE & LOCAL GOVERNMENT SOLID WASTE MANAGE-
MENT § 16:01 (1993).
II. BACKGROUND

In order to embark on a discussion about environmental advertising or marketing, it is essential to set forth some common terminology. First, marketing is the broad heading referring to “the total process of inducing consumer purchase of a product, including advertising, in-store displays, brochures, educational materials, and other forms of communication.” Advertising is as a subset of marketing. It is a much narrower concept that involves “the use of a selected medium of communication to send a directed message about the product to the viewers or readers of that medium.”

Studies have shown that the American public is increasingly concerned about various environmental issues such as pollution, municipal solid waste generation and disposal, and wildlife preservation. Polls also indicate that many Americans are willing to alter their purchasing behavior to reflect these environmentally conscious attitudes. For example, recent polls indicate that eighty percent of Americans are concerned about environmental problems, and between fifty-seven and seventy-five percent stated that they would be willing to pay for products and services made more expensive by environmental regulation. These poll results suggest the enormous power that the advertising community can wield by using “green” marketing schemes when promoting various products.

A. State Legislative Efforts

Laws regulating environmental marketing have their origins in state unfair practices/consumer protection statutes. Presently, no uniform legislation exists at the federal level. Due to this lack of federal legislation, a patchwork of state environmental marketing legislation has emerged. Two main approaches have been taken by the states, best exemplified by California and New

20. Id.
22. Id.
25. O'REILLY, supra note 19, § 16:02.
27. N.Y. ENVTL. CONSERV. LAW § 27-0717 (Consol. 1993).
York. In addition, a few states such as Rhode Island have introduced individualized approaches.

On September 28, 1990, California became the first state to enact comprehensive legislation on this issue. California's law, the Environmental Advertising Claims Act, defines key environmental terms, and makes punishable as a misdemeanor the use of these environmental terms unless the products meet certain state definitions, or comply with the FTC's guidelines for terms such as "ozone friendly," "biodegradable," "photo-degradable," "recyclable," and "recycled."

New York's environmental marketing law exemplifies the second approach. New York's law consists of a series of emblems that have official status. A product must meet certain requirements in order to display the emblem on its labeling or in its advertising. The official emblems and standards are limited to the terms "recyclable," "recycled," and "reusable."

30. Id.
31. Id. § 17508.5(a).
32. Id. § 17508.5(b).
33. Id. § 17508.5(c).
34. Id. § 17508.5(d).
35. Id. § 17508.5(e). The statute provides that:
   It is unlawful for any person to represent that any consumer good which it manufactures or distributes is ozone friendly, or any like term which connotes that stratospheric ozone is not being depleted, biodegradable, photodegradable, recyclable, or recycled unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission.

Id. § 17508.5.

For example, the term recycled can only be used on products and packaging containing at least 10 percent post-consumer material. Id. § 17508.5(e). Indiana has also enacted legislation following the California model; it however, has an expanded definition for the term "recyclable." This definition is likely to survive constitutional scrutiny, unlike California's definition which was recently struck down by a California court in Association of Nat'l Advertisers, Inc. v. Lungren, 809 F. Supp. 747 (N.D. Cal. 1992). See infra text accompanying notes 169-184 for full discussion of Lungren and the regulation and constitutional protections of commercial speech.

37. See infra text accompanying notes 169-175 for a more thorough treatment of New York's approach and discussion of National Seal of Approval programs.
The most stringent approach, adopted by Rhode Island, simply bans the use of certain environmental marketing claims within the state. Terms such as "biodegradable," "photodegradable," degradable," or "environmentally safe," are prohibited for use on all retail promotional packaging, rather than supplying acceptable definitions for use as provided by California law.

In 1990, a task force of ten state attorney generals issued "The Green Report," in which it urged the federal government to enact some semblance of order amidst the disjointed approach taken by the states. This movement was motivated largely by the desire to protect the consumer from deceptive advertising practices, in addition to a concern for environmental efforts. The Task Force called specifically for "federal definitions of environmental marketing claims, federal testing protocols for terms that have a technical basis such as 'degradable,' and strong federal involvement in the process of developing methods for conducting lifecycle assessments for product evaluation."

After issuing the Green Report, the Task Force held hearings allowing various groups (industry, environmental and consumer groups) an opportunity to respond to the findings in the Green Report. The response was generally positive, with some strong criticisms. In May 1991, the Task Force issued the Green Report II, which incorporated some of the suggestions offered at the hearings, and somewhat revised its initial findings. The Green Report II was meant to provide some assistance to the business community in the interim, and "to provide a framework upon which more concrete definitions and standards [could] be developed." A summary of the Task Force recommendations are as follows:

41. Id. at 2.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id. at vii.
48. Id.
• Environmental Claims should be as specific as possible, not general, vague, incomplete or overly broad.
• Environmental Claims relating to the disposability or potential for recovery of a particular product (e.g., "compostable" or "recyclable") should be made in a manner that clearly discloses the general availability of the advertised option where the product is sold.
• Environmental claims should be substantive.
• Environmental claims should, of course, be supported by competent and reliable scientific evidence.49

B. Efforts at the Federal Level

Two major movements at the federal level have been undertaken. First, the issuance of the FTC's interpretive guidelines in response to the requests of the Attorney General's Task Force,50 and second, a movement led by Senator Frank H. Lautenberg of New Jersey, which supports granting the Environmental Protection Agency the authority to regulate environmental advertising.51

1. Guidance Offered by the Federal Trade Commission

In 1991, the FTC held hearings in response to petitions from the Attorney General's Task Force and a group of marketers, companies, and trade associations.52 The FTC sought comment on whether its then existing method of enforcing environmental claims on a case-by-case basis was lacking, and if so, what further guidance was needed.53 In July 1992, the FTC published official guidelines, the FTC Guides, for businesses to follow in order to avoid FTC enforcement action under section five of the FTC Act, 15 U.S.C. § 45, which "makes unlawful deceptive acts and practices in or affecting commerce."54

49. FTC Guides, supra note 11.
54. Id.
Section 260.2 of the FTC Guides states clearly that these guides have no force or effect of law. They serve merely as recommendations on how businesses are to avoid prosecution under the FTC Act. These guides, along with state legislation, are the only tools available to businesses and consumers for discerning how to use environmental marketing properly.

The FTC Guides consist of four general principles: 1) Qualifications and Disclosures; 2) Distinction Between Benefits of Product and Package; 3) Overstatement of Environmental Attribute; and 4) Comparative Claims. The first principle mostly concerns the clarity of language, such that the qualifications and disclosures are appropriately clear and prominent. The second principle suggests that any environmental claims made on product labeling should clearly state whether the environmental benefit is associated with the labeling, the actual contents, or a component of the product itself. The third general principle is fairly self-explanatory. Environmental attributes may not be overstated or exaggerated, either expressly or by implication. The fourth general principle suggests that the advertiser ought to make comparative statements with sufficient clarity so as to avoid consumer deception. For example, a statement such as “20% more recycled content” is ambiguous. It is unclear whether this claim refers to more recycled content than before, or more recycled content than a competitor's product. The FTC Guides state that “[t]he advertiser should clarify the claim to make the basis for comparison clear, for example, by saying ‘20% more recycled content than our previous package.’” Advertisers must also be able to substantiate com-

55. Id.
56. Id.
57. Id.
58. Id. The Guides give the following example: If a box of aluminum foil simply states “recyclable” without further explanation, yet some part of the box is not recyclable (besides minor or incidental components), then the claim is deceptive. Id. An example of a minor or incidental part of a product would be a bottle cap. Id. A soda bottle for example, can claim to be recyclable without having to state that the cap is not. Id.
59. Id.
60. Id.
61. Id. at 36,365.
62. Id. at 36,364.
63. Id.
64. Id.
parative claims. If a claim can be substantiated, then it is not deceptive.

These four principles are further broken down into eight categories of specific environmental marketing claims. The eight claims are: a) General Environmental Benefit Claims; b) Degradable/ Biodegradable/Photodegradable; c) Compostable; d) Recyclable; e) Recycled Content; f) Source Reduction; g) Refillable; and h) Ozone Safe and Ozone Friendly. Following the general categories are several examples of acceptable and unacceptable uses which, "do not represent the only permissible approaches to qualifying a claim." These groupings are "intended to provide a 'safe harbor' for marketers who want certainty about how to make environmental claims." The FTC Guides state that it is deceptive to misrepresent, directly or impliedly, that the product has a particular environmental attribute without proper substantiation and qualification.

The FTC's main approach in enforcing violations of the Act involves selecting claims for enforcement on a case-by-case basis. A typical FTC enforcement action alleges violations of section 5 of the FTC Act, charging deceptive or unfair trade practices. This ad-hoc approach has been criticized as slow and cumbersome, as well as prolonging industry uncertainty over FTC standards. Some industry groups suggested trade regulations to provide more uniformity. These rules would have preempted all state and local efforts at regulating in this area.

Although the FTC Guides are very recent, it is important to note that the history of FTC concern and enforcement of deceptive environmental marketing claims dates back to the

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65. Id. at 36,365.
66. Id.
67. Id. at 36,364.
68. Id.
69. Id.
70. Sellers, supra note 52, at 442 (citing L. Ross Love, Comments Presented to the Federal Trade Commission Public Hearing on Environmental Labeling and Advertising (July 18, 1991)).
71. Id. (citing Hubert H. Humphrey III, Comments Presented to the Federal Trade Commission Public Hearing on Environmental Labeling and Advertising 5 (July 17, 1991)).
72. FTC Petitions, supra note 51, at 24,969.
73. Id.
early seventies. Two decisions, in particular, exemplify the
approach taken by the FTC in its enforcement actions. The
earliest case was a complaint and consent order against the
Ex-Cell-O Corp. The company advertised that its plastic
coated paper milk cartons were "completely biodegradable." The
FTC challenged these claims on the grounds that the
plastic coating did not disintegrate, and the biodegration took
a great deal longer than the advertisement indicated. The
FTC forbade the company from using the word "biodegradable" in its advertising, and further ordered Ex-Cell-O to re-
veal that the carton's coating was not biodegradable and that
the rate of the disintegration was entirely dependent upon
the surrounding conditions.

The second early FTC enforcement action charged Stan-
dard Oil of California with misrepresenting to the public the
benefits that could be achieved from using its gasoline additive known as F-310. The FTC found that they had "broadcast advertising that was false, misleading and deceptive, in
violation of section 5 of the Federal Trade Commission Act,
15 U.S.C. § 45." The advertisement in question displayed a
large clear balloon attached to an idling automobile's exhaust
pipe filling with clear air when the car used Standard Oil's
gas, and filling with black vapor when using another company's gasoline. The announcer in the commercial stated
that the balloon was "filling with dirty exhaust emissions that go into the air and waste mileage." The FTC prohib-
ited the company from representing, either implicitly or ex-
licitly, that the use of its gasoline would produce pollution-
free exhaust. The Commission expressed its concern that
"the public is acutely aware of the air pollution problem and
that it is a matter of public importance for advertisements
which play upon this concern to be accurate and precise."

75. Id. at 38.
76. Id. at 40.
77. Id. at 44.
78. In re Standard Oil Co. of Cal., 84 F.T.C. 1401 (1974).
79. Standard Oil Co. of Cal. v. Federal Trade Comm'n, 577 F.2d 653, 655
(9th Cir. 1978).
80. Id.
81. Id.
82. Id. at 658.
83. Id. at 655.
84. Standard Oil Co. of Cal. v. Federal Trade Commission, 577 F.2d 653,
662 (9th Cir. 1978).
The FTC further issued a cease and desist order. The Ninth Circuit Court of Appeals affirmed the finding of a violation of the Act, but agreed with appellants that the cease and desist order was unwarranted. 85

2. Proposed Federal Legislation

Before the issuance of the FTC Guides, federal legislation had been proposed, which grants the EPA the power to create voluntary national guidelines for environmental marketing terminology. 86 This movement was effectively eliminated by the emergence of the FTC Guides. The EPA approach emphasized uniform definitional standards and rejected the national seal of approval program. 87 As a result of the issuance of the FTC Guides, the EPA plan was abandoned. In both 1990 and 1991, efforts to pass legislation in the Senate failed. The purpose of the proposed legislation was to grant the EPA the authority to promulgate national standards and definitions for use in environmental marketing. 88 It was intended to protect consumers from deceptive environmental marketing claims, establish some uniformity, and enable consumers to make informed decisions regarding environmental claims as well as “encourage both consumers and industry to adopt habits and practices that favor natural resource conservation and environmental protection.” 89 The bill would have vested the EPA (with the help of an advisory board comprised of consumer advocates, industry members, and environmental officials) with the power to define key environmental marketing terms 90 and establish a certification program. 91 Industry would have been required to obtain certification in order to use environmental marketing claims in product promotion and labeling. 92 Violation of the proposed regulation would result in civil fines of up to $25,000. 93 For “knowingly or willfully” violating the law, criminal sanctions

85. See supra note 50.
86. See infra text accompanying notes 100-119 for a discussion of National Seal of Approval programs.
89. Id. § 6.
90. Id. § 6-7.
91. Id. § 7.
92. Id. § 9(a).
93. Id. § 9(b).
would have been imposed of up to one year imprisonment, $25,000 in criminal fines, or both.94 The proposed legislation, while providing national uniformity, would not have pre-empted the states from enacting more stringent regulations.95 In addition, citizen suit provisions allowed for any individual to bring a suit provided that the alleged violator was given sixty days notice of such an action.96 These bills failed to pass the Senate, however, most likely due to the emergence of the FTC Guides.

C. National Seals of Approval/Emblem Certification Programs

Another major approach that has been taken by some states, as well as by individual private organizations, is the use of "recycling emblems" which effectively place a rubber stamp of approval upon a certain product, thereby giving that product's environmental claims more credibility. This approach promises to be extremely effective as indicated by several of the countries where such programs exist.97 There are three variations to this type of an approach: national seals of approval,98 emblems given to products via private organizations,99 and emblems given to products as part of an individual state's regulatory program.100

1. National Seals of Approval

National seals of approval, also known as "eco-labeling,"101 are prevalent in several foreign countries. Japan, Germany, and recently, Canada, have adopted government sponsored seals of approval.102 All of these international

94. Id. § 13(c).
96. See infra text accompanying notes 100-119.
97. See infra text accompanying notes 100-119.
98. See infra text accompanying notes 120-128.
99. See infra text accompanying notes 129-135.
101. Id.
102. Id.
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movements are rooted in the German “Blue Angel” program, which was established in 1978 by the Federal Environment Agency.103

The Blue Angel program is run by a government agency and provides for an independent advisory board and involvement of the consumer public in approving certain products. More than 3,100 products in fifty-seven categories have been awarded Blue Angel seals of approval.104 The program has been immensely successful. According to the German government, the imposition of the seal of approval program has reduced solvents from household paints entering the waste stream by 40,000 tons.105 Today, paints that have been approved and display the Blue Angel seal have a thirty percent share of the market, as opposed to a mere five percent before the Blue Angel program was instituted.106

Japan’s program, modeled after Germany’s, is called “Eco-Mark” and was launched in 1989.107 Its symbol consists of a letter “e” shaped into arms and hands holding the earth.108 The program has granted over 850 labels to 31 different kinds of products. Japan’s program boasts that its approval rate of products is much faster and does not require that companies pay a fee to apply.109 The alacrity with which approvals are given to products, however, raises questions as to the thoroughness of the product evaluation process.110

Canada’s program, “Environmental Choice,” is the most recent and was put into effect in 1990.111 Its “Eco-Logo” emblem is a maple leaf composed of three doves, representing consumers, business and government all working together.112 “Environmental Choice” awards labels to products in ten product categories, with plans to add six more.113 This ap-

103. Id.
104. Id.
105. Denis Hayes, Harnessing Market Forces to Protect the Earth, ISSUES IN SCI. AND TECH., Winter 1990-91, at 47.
106. Id. at 48.
107. Id.
110. Id.
111. Id.
112. Id.
113. Id. Initially the Canada plan was intended to award points to a product for each stage of its “life-cycle.” Id. This idea was quickly abandoned as too rigid and wasteful of resources because it often focused on stages in the prod-
A "multiple-criteria, cradle-to-grave approach." Although Canada's program has not been in place long enough to report an informed evaluation, a recent independent report suggested that the response to the new program has been generally positive. Norway represents one of the few countries that has instituted a uniform emblem program which is free from government involvement. There, an independent non-profit organization administers the labeling program. Similar to Canada's program, it is too early to determine the effectiveness of the system, although the response has been positive. Despite the success of these movements, there is currently no federal environmental labeling program in the United States. The EPA has considered the idea, however, and in 1989, commissioned a report on the possibility of implementing a national environmental labeling program. The report did not suggest a legislative federal movement; rather, it suggested a non-profit organization, similar to the one found in Norway, as the preferred approach.

2. Private Certification Programs

An example of a private certification program is "Green Seal," a program founded by a private, non-profit organization in the United States. Green Seal is similar to the government-run programs of other nations, but without government involvement. The group states that its mission is the promotion of environmentally sound consumer buying practices. Denis Hayes, the founder and CEO of the California based organization, states: "The Green Seal of environmental approval helps guide people out of this green marketing morass and leads consumers to products that are less harmful to..."
the Earth."  The basic philosophy is that an informed consumer population can only lead to beneficial results for the environment. The "Green-Seal" is awarded to products that meet environmental standards on a category-by-category-basis. The organization promises to keep up with technological advances in order to ensure that the applicable standards are not outmoded, which has been a frequent criticism of some of the international, government-involved efforts such as Germany's program.

Another non-profit organization called Scientific Certification Systems, Inc. of Oakland, California (formerly "Green Cross"), engages in a similar type of activity, although it extends its analysis further. It examines the entire manufacturing process from start to finish before allowing its Green Cross Seal of Approval to be used in the promotion of a product. Green Seal differs in that it awards its seal on the basis of the total environmental impact of the product itself.

3. State Certification Programs

In addition to non-profit organizations such as Green Seal and Green Cross, several states including New York, Rhode Island, Maine, and New Hampshire have either adopted, or have considered adopting, regulatory approaches involving emblems or seals of approval. The first state to enact such a system was New York, whose program establishes recycling emblems and definitions. For example, "recyclable" can only be used if recycling centers exist for 75% of the state's population. The statute applies to any-

123. Green Seal Questions and Answers at 2.
124. Id.
125. Jones, supra note 100, at E1.
126. Id.
127. Id.
128. Id.
one wanting to use the terms "recyclable," "recycled" or "reusable," as well as anyone wanting to use an emblem on product labeling, advertising or packaging.\textsuperscript{136}

D. The Regulation of Commercial Speech

To engage in a discussion about the regulation of environmental marketing, it is essential to understand the history and treatment of commercial speech in the context of First Amendment jurisprudence. The landmark case of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,\textsuperscript{137} held that commercial speech, speech that "does 'no more than propose a commercial transaction,'" is entitled to First Amendment protection.\textsuperscript{138} At issue in the case was a Virginia statute that declared it unprofessional conduct for a pharmacist to advertise the price of prescription drugs.\textsuperscript{139} The Court held that although the advertiser's interest was purely economic, that did not disqualify him from First Amendment protection.\textsuperscript{140} The Court reasoned that both the individual consumer and society may have strong interests in the free flow of commercial information in order to make important economic decisions.\textsuperscript{141}

Although the Supreme Court has asserted its preference for the "free flow of commercial information"\textsuperscript{142} in order to ensure a smoothly functioning capitalist society, the protection afforded to commercial speech is limited: "Regulations affecting commercial speech . . . invite a more relaxed inquiry."\textsuperscript{143} The Court emphasized that although entitled to First Amendment protection, commercial speech was not exempt from regulation. For example, the Court pointed out that it has consistently held that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or

\begin{itemize}
  \item 136. 425 U.S. 748 (1976).
  \item 137. \textit{Id. at} 762 (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)).
  \item 139. \textit{Id. at} 762.
  \item 140. \textit{Id. at} 763-65.
  \item 142. \textit{Id. at} 751.
\end{itemize}
even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem."144

Even truthful, or non-deceptive commercial speech may be regulated according to a more recent Supreme Court case, *Central Hudson Gas & Electric Corporation v. Public Service Commission*.145 In that case, the Court articulated a four prong test.146 First, the Court must determine whether the expression is protected by the First Amendment.147 To be protected, commercial speech must concern lawful activity and not be misleading.148 Second, the government interest in regulating that speech must be substantial.149 Third, if both of the above inquiries yield affirmative answers, then the court must determine whether the regulation directly advances the governmental interest.150 Finally, if it does, it must not be more extensive than necessary to serve the governmental interest.151

The First Amendment has become a popular weapon used by industry in its attempts to eliminate regulations in the area of environmental marketing. At the state level, California's Environmental Marketing Act was recently challenged on First Amendment grounds by a group of advertisers in *Association of National Advertisers, Inc. v. Lungren*.152 The law was upheld with one exception—the definition of the term "recyclable" was found unconstitutionally overbroad and vague. The court followed the four-prong test as set forth in *Central Hudson* and first determined that contrary to petitioners' contention, the speech in question was commercial as opposed to political speech.153 This classification was crucial because less First Amendment protection is afforded to commercial speech.154 The court had little trouble satisfying the

144. 447 U.S. 557 (1980).
145. *Id.* at 566.
146. *Id.*
147. *Id.*
148. *Id.*
150. *Id.*
152. *Id.* at 754-59.
153. *Id.* at 754.
154. *Id.* at 756-57.
second and third prongs of the Central Hudson test, determining that a sufficiently important state interest was involved and that the statute in question "directly advanced" the state interest.\textsuperscript{155} Applying the fourth prong: "no more restrictive than necessary to further the state's interest," the Court reiterated that this prong had not been interpreted by the Court to require the least restrictive means.\textsuperscript{156}

The statute was therefore upheld with the exception of the term "recyclable," which was held to be unconstitutionally vague.\textsuperscript{157} The term recyclable was originally defined in the Act as an article that can be "conveniently recycled . . . in every county in California with a population of over 300,000 persons."\textsuperscript{158} The court found this term was unconstitutionally vague since the statute "offers no guidance as to what recycling programs satisfy the 'conveniently recycled' requirement."\textsuperscript{159} This term is currently being redefined as material that is recovered in more than 65% of statewide recycling programs or accepted for recycling wherever it is sold.\textsuperscript{160} This new definition is certain to withstand any constitutional challenges.

III. Analysis

A. Analysis of the Effectiveness of the FTC Guides

Due to the recent emergence of the FTC Guides, it is unclear what approach will be taken by the FTC in deciding whether or not to prosecute alleged violators. An analysis of early FTC enforcement actions provides insight into the approach most likely taken by the FTC in future cases.\textsuperscript{161} Standard Oil Company of California v. Federal Trade Commission\textsuperscript{162} established two principles that could be important in

\textsuperscript{155} Id.
\textsuperscript{157} Id. at 761 (citing CAL. BUS. & PROF. CODE § 17508.5(d) (West 1987 & Supp. 1995)).
\textsuperscript{158} Lungren, 809 F. Supp. at 762.
\textsuperscript{159} SELMI & MANASTER, supra note 1, at 19-54 & n.29.
\textsuperscript{160} See supra text accompanying notes 51-84 for a discussion of the FTC Guides.
\textsuperscript{161} Standard Oil Co. of Cal. v. Federal Trade Comm'n, 577 F.2d 653 (1978). See supra text accompanying notes 78-84.
\textsuperscript{162} William Randolph Smith, It's Not Easy Being Green, THE RECORDER, June 17, 1992, at 12.
future cases. First, the FTC appeared to be holding environmental claims to a higher standard than normal advertising standards: "[I]t is incumbent upon advertisers who seek to advance their own interests in even partial reliance on such serious consumer concerns [about the environment] to exercise an extra measure of caution in order to be certain that their representations to consumers will not deceive or mislead."164

Secondly, the Commission placed particular emphasis on what it perceived to be the ad's broad message. The Standard Oil ad never explicitly stated that the clear balloon contained no pollutants, nor did it state that using the gas would help eliminate pollution. Nevertheless, the FTC held that the ads were deceptive because the commercials conveyed that message with no scientific evidence to substantiate such a claim.166 Thus, it is evident that the FTC in its enforcement actions, will look to the advertisements in their totality, not solely at specific claims made in the ads. The court of appeals, in affirming this decision, placed significant weight on the fact that environmental claims are particularly sensitive.167 Consumers are more likely to be misled out of a concern for the environment and a desire to purchase products which minimize air pollution. Thus, this early enforcement action suggests that in the cases pursued by the FTC, the environment will be a significant consideration. Despite this fact, there are substantial problems with regulations of this type remaining exclusively within the purview of the FTC.

The FTC Guides are deficient as an effective means of controlling the problem of deceptive environmental advertising for several reasons. First, the Guides are merely suggestions. There are no sanctions for failure to comply. The FTC may choose to enforce the Federal Trade Commission Act on certain advertisements, while ignoring others. Second, because they are only guides, the states are free to adopt programs with any level of stringency, leaving businesses and consumers utterly confused. While it is true that many of the state laws use the definitions set forth in the Guides, signifi-

163. Id.
164. Id.
165. Id.
166. Id.
167. See supra note 13.
cant confusion remains, as does a lack of uniformity in the standards and definitions offered by the states' laws. Third, courts decide FTC enforcement cases ad hoc without strong precedent. This lack of clear guidelines leads to confusion for industry. Fourth, and most importantly, the FTC does not have the protection of our environment as its major priority. The FTC’s fundamental purpose, as stated previously, is to regulate trade and protect consumers.\textsuperscript{168} Therefore, while at first blush the protection of the consumer through prevention of deceptive “green marketing” would seem to simultaneously promote environmental protection goals, this belief may be unfounded. It remains to be seen whether the FTC proceeds consistently on these cases. With its focus on consumer protection, it may not have the resources or the motivation to make decisions aimed at protection of the environment.

The problems with the FTC Guides reflect the difficulty of balancing competing interests. It is essential that industry members are afforded some level of predictability in their actions, but there must also be consequences for telling “little green lies” in order to cash in on the wave of environmental consumerism.\textsuperscript{169} As a result of the feeling shared by many environmentalists that the FTC, while a good place to start, is not the right place for this type of regulation, other national movements have surfaced. Some, such as national seals of approval or emblems, have been so successful as to merit close analysis and consideration.

B. Effectiveness of Seals of Approval/Emblem Certification Programs

Clearly, as with the definition-based approach, no uniform system for the use of emblems or official seals currently exists in the United States. The success of these emblem-based methods of regulation hinges upon widespread uniformity. In order for an emblem to have significant meaning, it must be automatically recognizable, familiar, and trustworthy. With such an array of varying emblems and symbols, consumers are again left confused and unsure of whom to trust. The success of Germany’s Blue Angel program can be demonstrated by the fact that a survey of 3,000 households in

\begin{footnotesize}
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\item[168.] Wynne, \textit{supra} note 8, at 820.
\item[169.] Hayes, \textit{supra} note 105, at 47.
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1987 showed that 78.9% were familiar with the Blue Angel label.\textsuperscript{170} In the United States, no familiar symbol exists, other than the revolving arrow indicating recyclable, which has acquired a universally accepted meaning and credibility. A system such as Germany's, which allows its seal to be used to cover a vast array of different products, could be successful in the United States. One commentator cautions, however, that an emblem program, while beneficial, cannot preclude the need for definition-based approaches as well:

Seal of approval programs would place faith in centralized decision-makers, while regulated green marketing terms would place ultimate faith in individual, ecologically conscious consumers. Having both seals of approval and regulated terms on a label might give consumers some added flexibility; the seal could alert them to a product that is somehow environmentally 'good,' while terms could help to explain why.\textsuperscript{171}

In sum, it seems that the exclusive use of one type of scheme would not be the most effective regulatory method. The use of two different types, the emblem-based as well as the definition-based, would be the most expansive and complete regulatory approach.

1. \textit{The Inadequacy of Private and State-Sponsored Programs}

The proposal that the United States adopt a universally accepted emblem or seal of approval program raises the logical question of whether such an effort should originate in the private or public sector. Independent non-profit organizational efforts seem, at first glance, to be the most attractive solution. Keeping government out of the program would make this approach more popular in a time of soaring budget deficits and mounting popular concern about bureaucratic waste. The difficulty, however, with placing such a system in the private sector is that there seems to be a basic obstacle—lack of cooperation among the various environmental groups—preventing non-profit efforts from taking off in a widespread fashion. This problem can be seen in many other areas of the environmentalist movement. For example,

\textsuperscript{170} Wynne, supra note 8, at 819-20.

\textsuperscript{171} Green Cross Certification Under Fire; Environmentalists Call Labels Misleading, 22 \textit{The Env't. Rep.}, Oct. 11, 1991, at 1537.
Green Cross has recently been under attack from, surprisingly, environmental groups such as the Environmental Defense Fund [hereinafter EDF]. The EDF report, in addition to a general attack on Green Cross' "life-cycle" approach, alleges that the Green Cross group has been awarding too many products with its symbol, casting doubt on the validity of its processes. These criticisms, however, were complicated by politics. At the heart of these allegations seems to be competition between the Green Seal and Green Cross groups. Green Cross' and Green Seal's conflict is indicative of a greater problem.

While all sides concerned have worthwhile and similar goals of protecting and preserving the environment, each group feels that only its approach can actually bring about the intended changes. Uniting these groups would increase the strength and credibility of the movement. In addition, consumer confusion would decrease, which was the original objective of these movements. Unfortunately, this fundamental objective seems to have gotten lost amidst the individual efforts of the competing groups.

In addition to the lack of cooperation among these non-profit efforts, is the recurring problem of a lack of uniformity with respect to the standards applied in determining whether a particular product is environmentally beneficial or detrimental. The groups award their respective seals or emblems based on differing sets of criteria. As previously discussed, some organizations examine the manufacturing process, while others focus only on the product. Further, different standards are used, even in the examination of the product itself. Therefore, the same product could conceivably be considered worthy of an emblem by one organization, while not by the other, leaving the consumer hopelessly confused.

172. Id. at 1537-38. "Life-cycle analysis is a method by which consumers and industry purportedly can determine a product's effects on the environment from manufacture to disposal." Id. at 1537.

173. Id. EDF was accused of bias after its attack on Green Cross because its executive director and a member of its board of trustees sit on the board of directors of Green Seal. Stanley Rhodes, president and chief executive officer of Green Cross, stated: "Environmental groups, which have traditionally operated with complete independence, run a grave risk of losing their neutrality if they align themselves too closely with any private sector initiative." Id.

174. See supra text accompanying notes 120-128 for a discussion of Green Seal and Green Cross.

175. See supra note 108.
These concerns and criticisms apply with equal force to state-sponsored programs. Again, the primary problem with leaving this type of regulation in the hands of the states is a lack of uniformity.

An additional problem with private emblem programs is that they often involve substantial cost. In order to obtain a seal or cross, businesses must pay a fee. It is arguable that businesses will therefore simply avoid the process altogether, deeming it too costly and not worthwhile. A government funded, centralized program would eliminate this problem, as well as the conflict and competition discussed above. This type of program would effectuate the goal of one universal system, which can be easily followed and interpreted by industry and consumers alike. After examining the pitfalls and benefits of the major movements and approaches taken in the area of "green marketing," it is essential to discuss one final aspect of the proposal of federal legislation: the United States Constitution.

C. First Amendment Concerns

In order to propose legislation, it is essential to understand the possible effects of First Amendment jurisprudence concerning commercial speech. While commercial speech was not historically afforded constitutional protection, Virginia Pharmacy held that commercial speech is protected by the United States Constitution. The Supreme Court's treatment of commercial speech is critical to an inquiry into proposed regulation of environmental advertising. After examining the history of the protection of this kind of speech, it can be confidently asserted that a carefully drafted federal

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177. Wynne, supra note 8, at 815 (arguing that "regulations of green marketing terms are likely to pass constitutional muster").
legislative scheme handling green marketing should certainly withstand any constitutional attack.\textsuperscript{178}

First, truthful environmental advertising, which has such far-reaching implications as the future of this planet, is sure to fulfill the purpose articulated repeatedly in First Amendment cases of maintaining and fostering a "marketplace of ideas."\textsuperscript{179} If dissemination of ideas is to be the cornerstone of democracy, it can be argued that this type of advertising is a particularly beneficial mechanism for informing the public and fostering environmentally sound practices and values. This characterizes advertising as speech which invokes thought and discussion, rather than the traditional one-dimensional view of advertising as solely a means to sell a product. Concededly, not all advertising can be categorized in this way, but environmental marketing has particular characteristics which liken it to political speech.

Second, and perhaps most importantly, as discussed in the \textit{Lungren} case, deceptive or false speech is rarely, if ever, afforded constitutional protection. The concern with commercial speech receiving any constitutional protection is based upon the "informational function of advertising."\textsuperscript{180} False or misleading advertising undermines this very notion. The Supreme Court has stated that "[T]he Constitution does not prevent prohibitions on commercial messages which are

\begin{footnotesize}
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\item[179.] \textit{Id.} at 754-55 (citing \textit{Central Hudson}, 447 U.S. at 563).
\item[180.] \textit{Id.} at 754-55 (citing \textit{Central Hudson}, 447 U.S. at 563).
\end{enumerate}
\end{footnotesize}
'more likely to deceive the public than to inform it.'

Third, in accordance with the Hudson test, the federal government, as expressed by the California court in Lungren, clearly has a substantial interest "in ensuring truthful environmental advertising and encouraging recycling and environmentally sound packaging..." A carefully designed statute which is not overly stringent will likely pass muster because it will be "no more extensive than necessary to further the [federal government's] interest."

A companion benefit can be achieved if the legislation is drafted so as not to be too restrictive of speech. Businesses will be able to easily comply, and be less apt to view the federal legislation as too burdensome for it to promote environmentally sound products and make environmental changes. This will help industry to promote goals of natural resource preservation while ensuring that the federal legislation cannot be successfully challenged on constitutional grounds. Thus, considering the recent California Supreme Court decision in Lungren, as well as a thorough analysis of commercial speech jurisprudence, it seems clear that a carefully constructed federal regulation should be able to pass the First Amendment hurdle.

V. Proposal

Because of the current fragmented approach to environmental marketing, and in order for all interests to be fairly represented, uniformity is needed at the federal level. There is no doubt that national, uniform regulation or guidelines are advocated by all affected parties in this inquiry. Among the Green Report's findings was the discovery that nearly every organization testifying at a Public Forum (which included leaders of government, business and environmental groups), "urged the development of standards, guidelines or definitions to guide businesses in making environmental claims and to help consumers understand the claims made." The issuance of the FTC Guides responds to this call. While clearly on the right track, the FTC is not the ap-

181. Id. at 756.
182. Id. at 757 (citing Central Hudson, 447 U.S. at 569-70 1980)).
183. GREEN REPORT I, supra note 7, at 2.
184. See supra text accompanying notes 29-39 for a discussion of the definition-based and emblem-based approaches.
propriate agency to handle these claims. The FTC simply does not have enough “teeth” in terms of an environmentally conscious enforcement strategy.

This comment therefore proposes the enactment of federal regulations, promulgated by the EPA, that would represent both consumer protection and environmentalist goals. This would be welcomed by industry groups as well because the guesswork could effectively be removed from marketing decisions. The ideal regulatory approach would combine the use of the definition-based approach with the national emblem or seal of approval approach.¹⁸⁵ There would be one easily recognizable emblem indicating that a product has passed certain tests based on criteria which have been set by the EPA. A one dimensional approach focusing only on recyclability, for example, would be too limited. The proposed system, modeled after Germany’s but with the characteristics of the Green Seal program, would be government-backed. The administration of the system should be left to an independent advisory board comprised of industry members, environmentalists, and consumer experts. In order to finance this advisory board within the EPA, similar to the FDA, businesses would be required to pay a small fee in order to have the benefit of government testing and the ability to display the emblem. In addition, individual industries may choose not to display the emblem, opting instead make environmental claims in advertising or on labels. In that case, the words used would have to conform to definitions contained within the regulations set forth in the proposed federal legislation promulgated by the EPA.

This new legislation would incorporate certain restrictive aspects of the Rhode Island regulations. In order for a federal system of regulations to be practical and understood, it must remain somewhat simple. If we set out to describe, define and set standards for every potential word that may be used to entice consumers to buy products that are “green,” the law will eventually be eviscerated by numerous definitions and amendments. Therefore, this comment proposes that a limited set of vague environmental claims be outlawed altogether. For example, “environmentally friendly” is a term that is overly broad and does not clearly indicate whether it

¹⁸⁵. See Hayes, supra note 105, at 50-51.
ENVIRONMENTAL MARKETING refers to the contents of the product or the packaging. This comment advocates a prohibition on such vague terms, and favors the establishment of a definition-based approach using specific environmental claims that can be scientifically backed.

Finally, the federal legislation should preempt state environmental marketing laws. Otherwise, states enacting excessively restrictive legislation will hamper industry from taking strides toward environmentally conscious behavior. Another reason for advocating preemption is to enable industry to feel that compliance is a realistic goal. For example, without preemption, an advertiser would be unable to run a national campaign without fear of violating a myriad of states’ laws which use different definitions for the word “recyclable.”

In summary, this comment proposes: 1) Federal uniform regulations promulgated by the EPA, which would preempt state law; 2) The use of a definitional approach, in that key environmental claims would set definitions that are to be followed by all of the states; 3) A system of emblems, should businesses elect to display them on product labeling, that is simple, easily recognizable, and trusted by the consumer population; 4) Lastly, a ban on certain terms, rather than offering definitions for them, due to the fact that certain terms are inherently overbroad allowing for great danger of abuse.

VI. CONCLUSION

This comment, while unquestionably having an environmentalist slant, recognizes that only with the cooperation of the various competing interests will any sort of environmental change and improvement be actualized. A narrow view or over-zealousness on the part of any of the interests involved benefits no one. Regulations that are too lackadaisical in their approach do not help the consumer and certainly do not protect the environment. In contrast, the method a traditional environmentalist might advocate, laws of the utmost stringency, may be well-intentioned, but will not serve their intended purpose. Industry may simply decide that the expense and threat of potential liability for use of environmental claims is not worth the trouble and money. Therefore, the optimal approach is a moderate regulatory effort which has uniformity and consistency as its basic themes, and provides
consumers with a clear message regarding the products they ought to be purchasing. Regulation of this type will assure businesses that compliance is a realistic and, even, profitable goal. Consumer awareness will be raised, thereby improving our environment.

One commentator has noted an interesting paradox in the promotion of green consumerism. The only sure way to actually improve this earth and the quality of life for future generations is through the promotion of less consumption altogether. Denis Hayes, the founder of Green Seal, stated: “Green consumption is still consumption. When the goal is to stop consumer use of a whole class of unnecessary products—such as electric can openers—or reduce the amount of consumption of goods in whole categories—such as fossil fuels—a Green Seal will be of little help.” While this is undoubtedly true, it is quickly apparent that significantly decreasing the rate of consumption is nearly impossible. If we cannot change people’s rate of consumption, then perhaps we can attempt to change their style of consumption. Through the use of a uniform federal legislative effort that brings all interests into a partnership, we will be able to work towards the increasingly urgent goal of the survival of our planet.

K. Alexandra McClure

186. Id.

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