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Ashley Lorange

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*An Assessment of U.S. Responses to Greenwashing
and Proposals to Improve Enforcement*

By: Ashley Lorange

I. Introduction

Consumers are conscious of their ability to impact the environment through their spending power. As buying “green” has become increasingly mainstream, greenwashing, or the practice of companies disingenuously spinning their products as environmentally friendly, has become a problem. The Federal Trade Commission (FTC), in its Green Guides, takes on the problem of greenwashing. However, its enforcement of violations of the Guides has been minimal.

This paper will assess the current U.S. response to greenwashing in general, and specifically, FTC enforcement of the Green Guides. Based on this assessment, the paper will make proposals for the FTC to strengthen enforcement of greenwashing violations, including the adoption of international standards into the Green Guides and the provision of citizen suit enforcement of Section 5 of the Federal Trade Commission Act.

II. The Problem of Greenwashing

Consumers, aware of their power to impact the environment through the power of the purse, are generally motivated to buy more environmentally-friendly products.¹ This is true even in the face of increased prices for such products.² Starting in the late 1980s and early 1990s,

¹ Robert B. White, Note, *Preemption in Green Marketing: The Case for Uniform Federal Marketing Definitions*, 85 IND. L.J. 325, 325 (2010).

² *Id.* White cites studies which show that a majority of consumers are willing to pay five percent more for environmentally-friendly products. *Id.* (citing David F. Welsh, Comment, *Environmental Marketing and Federal Preemption of State Law: Eliminating the “Gray” Behind the “Green,”* 81 CAL. L. REV. 991, 992 (1993) (“Recent surveys have found that eighty-two percent of American consumers would pay at least five percent extra for environmentally friendly products”); Press Release, Performics, Performics Survey Finds 60 Percent of Online Consumers Consider Environmental Consciousness an Important Company Trait (Apr. 8, 2008), <http://www.performics.com/news-room/press-releases/research-consumer-opinions-on-green-marketing/674> (“Eighty-three percent [of consumers] indicated they are extremely or very

manufacturers responded to this growing demand by increasingly using green marketing claims, or marketing information regarding the positive environmental attributes of their products.³

However, these claims often contained false or misleading information about the environmental attributes of a company's goods or services,⁴ a practice that has become known as "greenwashing."⁵ In fact, a 2007 environmental marketing survey found that out of 1,018 consumer products with environmental claims, all but one had made false or misleading claims.⁶ The most common deceptive trick found in the study, representing 57% of the deceptive claims, involved a hidden trade-off, or suggesting a product is "green" based on a single attribute that is unsupported by a more complete environmental analysis of the product.⁷

Greenwashing is difficult for consumers to recognize for multiple reasons. It is often difficult for consumers to detect because they lack the ability to confirm the claim.⁸ Consumers also do not have sophisticated knowledge about certain environmental attributes, such as carbon footprints, and may be easily misled.⁹ Finally, consumers have cognitive biases that affect their

likely to choose the environmentally friendly option. . . . [and] our survey shows that nearly half of them will pay at least five percent more for [it].").

³ Glenn Isreal, Comment, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims*, 20 B.C. ENVTL. AFF. L. REV. 303, 303 (1993). For instance, between 1989 and 1990, green marketing claims on labels more than doubled, and claims in TV and print advertising more than tripled. *Id.* (citing *Selling Green*, Consumer Reports, Oct. 1991, at 687).

⁴ TERRACHOICE ENVIRONMENTAL MARKETING INC., THE "SIX SINS OF GREENWASHING"TM: A STUDY OF ENVIRONMENTAL CLAIMS IN NORTH AMERICAN CONSUMER MARKETS 1 (2007).

⁵ *Id.* TerraChoice defines "greenwashing" as "the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service." *Id.*

⁶ *Id.* From the study, TerraChoice identified "six sins of greenwashing": (1) hidden trade-off, (2) no proof, (3) vagueness, (4) irrelevance, (5) fibbing, and (6) lesser of two evils. *Id.* Explanations and examples of each "sin" are included within the report. *See id.* at 1-4.

⁷ *Id.* at 2.

⁸ White, *supra* note 1, at 326.

⁹ Rebecca Tushnet's 43(B)log: False Advertising and More, <http://tushnet.blogspot.com/2009/03/hofstra-conference-on-energy-and.html> (Mar. 21, 2009, 14:34 EST) [hereinafter Tushnet Blog].

recognition of whether information is false or misleading. For instance, consumers often want to feel good about a product they have bought, so they may ignore the negative attributes about it.¹⁰ Another bias is that familiarity with any claim breeds trust in that claim, because memory of the source of the claim fades faster than the actual memory of the claim.¹¹ These are just some of the reasons why limited or distracting green claims work, and why manufacturers and marketers are tempted to use them.

By tainting the product information received, greenwashing confuses consumers and decreases consumer confidence.¹² It also destroys the legitimacy of consumers' market choice. In other words, greenwashing does damage to the notion of the consumer as "market voter," since consumers are denied the information with which to make an informed "market vote."¹³ Because of these harmful effects, the U.S. and states regulate false advertising and marketing claims, including greenwashing.¹⁴

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 526 (2004) ("In essence, individuals who are motivated to participate in public debates become subjected to a double bind, denied on the one hand an informational basis for seeking to incentivize changes through their market behavior, yet expected on the other hand to reveal their "vote" in favor of public goods while acting in that very capacity."); see also Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L.J. 377, 383 (1998) ("In other words, the value of any good is determined by estimating the amount of money with which people might be willing to part in order to satisfy their preference for it."). In addition to these effects on the consumer, regulation ensures a level field for manufacturers on which to compete. Cf. William Kovacic, Chairman of the Federal Trade Commission ("FTC"), Opening Remarks at the FTC Green Guides and Packaging Workshop 12 (Apr. 30, 2008) (transcript available at <http://www.ftc.gov/bcp/workshops/packaging/transcript.pdf>) (speaking about the FTC's input from the competition policy perspective) [hereinafter FTC Green Packaging Workshop].

¹⁴ Initially, one of the main goals of regulation was reducing consumer confusion. See J. Thomas Rosch, Comm'r, FTC, Responsible Green Marketing, Address at the American Conference Institute's Regulatory Summit for Advertisers and Marketers 5 (June 18, 2008), available at <http://www.ftc.gov/speeches/rosch/080618greenmarketing.pdf> ("Ultimately, the issuance of

III. U.S. Regulation of Greenwashing

Although the Federal Trade Commission (FTC) brought cases challenging deceptive environmental advertising claims pursuant to Section 5 of the Federal Trade Commission Act (FTCA) starting in the 1970s, it was the proliferation of greenwashing in the late 1980s that prompted increased regulatory action from federal, state and local authorities.¹⁵ By the 1990s, the result of this multi-level approach was clear: businesses were confused, states were still concerned about deceptive claims, and consumers were distrustful of environmental claims.¹⁶

Each of these groups shared an interest in gaining more information and ensuring more truthful claims to encourage the growth of green products.¹⁷ To secure this interest, they pressured the FTC to issue nationwide industry guidance.¹⁸ The FTC complied, working with the Environmental Protection Agency and state attorneys general to create the 1992 FTC Guides for the Use of Environmental Marketing Claims, commonly known as the "Green Guides."¹⁹

Section 5 of the FTCA and the Green Guides are the main regulatory mechanisms controlling greenwashing. Other responses include the federal Lanham Act,²⁰ state "mini-FTC"

national industry-wide guidance for environmental marketing claims was recognized as a way to promote truthful and substantiated advertising while providing certainty in the marketplace for both advertisers and consumers.) [hereinafter Rosch, Responsible Green Marketing Remarks]. However, regulators have now realized the potential for what scholars call the "market vote." See FTC Green Packaging Workshop, *supra* note 13, at 43 ("Perhaps though the most important trend concerns the consumer and the consumer understanding an expectation. . . . The consumer today wants to do something. There is an imperative. The consumer wants to make choices and believes that the purchasing choices can actually drive policy, make a significant or meaningful impact on the environment, and that is the expectation of the consumer.")

¹⁵ See Roscoe B. Starek, III, Comm'r, FTC, Remarks before the Alliance for Beverage Cartons and the Environmental Symposium (Dec. 4, 1996), *available at* <http://www.ftc.gov/speeches/starek/egstarek.shtm> [hereinafter Starek speech].

¹⁶ *See id.*

¹⁷ *See* Isreal, *supra* note 3, at 304.

¹⁸ *Id.*

¹⁹ *Id.* The Guides may be found at 16 C.F.R. § 260 (2010).

²⁰ 15 U.S.C. § 1125 (2010).

laws, industry self-regulation, and consumer oversight groups. These are discussed in turn below.

A. Regulation by the Federal Government

Federal regulation of greenwashing is achieved in two main ways. First, the government regulates deceptive advertising through Section 5 of the FTCA. Regarding environmental marketing claims in particular, the FTC Green Guides provide guidance to companies. The second method of regulation is private lawsuits enforcing the Lanham Act. This allows competitors of products to bring suit to ensure fair marketing standards.

1. Section 5 of the Federal Trade Commission Act

The basic consumer protection statute enforced by the FTC is Section 5(a) of the FTCA, which declares unlawful “unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce” and gives the FTC enforcement authority over such acts.²¹ What is an “unfair” method of competition is determined by the particular environmental and marketing context of the practice at issue and the public interest at issue.²² The act or practice must cause or be likely to cause “substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”²³

The FTC enforces its consumer protection laws through both judicial and administrative means. Administratively, the FTC can choose to either make rules or to enforce existing statutes and rules. Rulemaking proceedings allow the FTC to prescribe and remedy unfair deceptive

²¹ 15 U.S.C. § 45.

²² *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532, 533 (1935); *Korber Hats, Inc. v. Fed. Trade Comm’n*, 311 F.2d 358, 360-61 (1st Cir. 1962).

²³ 15 U.S.C. § 45(n). Public policy considerations may be considered, but may not be the primary consideration. *Id.*

practices on an industry-wide basis.²⁴ In administrative enforcement, the FTC may file a complaint setting forth its charges if it determines that a particular company's practice is unlawful.²⁵ The respondent may sign a consent order or proceed to administrative trial.²⁶ After an administrative order is issued, the FTC may additionally seek civil penalties in district court for the harm at issue in the administrative proceeding that caused injury to consumers²⁷. To do so, it must prove that a reasonable man would have known the act was dishonest.²⁸

Alternatively, the FTC may seek civil remedies or consumer redress for violations of its cease and desist orders or trade regulations directly in district court under Section 13(b) of the FTCA, without first making an administrative determination.²⁹ Furthermore, the FTC may request a preliminary or permanent injunction for impending violations of the FTCA upon completion of the administrative proceeding.³⁰ A suit under Section 13(b) is often preferable to the adjudicatory process because the court may award both prohibitory and monetary equitable relief in one step and issue an injunction with immediate effect (as opposed to having to wait 60 days for a cease and desist order to take effect).³¹

2. FTC Green Guides

The FTC Green Guides provide industry guidance on all implied or express environmental marketing or advertising claims, including symbols, labeling, logos, depictions,

²⁴ Federal Trade Commission, A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority (July 2008) <http://www.ftc.gov/ogc/brfovrw.shtm> [hereinafter FTC Overview].

²⁵ See 15 U.S.C. § 45(b); see also FTC Overview, *supra* note 24.

²⁶ FTC Overview, *supra* note 24.

²⁷ *Id.*

²⁸ 15 U.S.C. § 57(b); FTC Overview, *supra* note 24. The FTC may also seek penalties from non-respondents if they had actual knowledge that the act was deceptive and unlawful. 15 U.S.C. § 45(m)(1)(B); FTC Overview, *supra* note 24.

²⁹ 15 U.S.C. § 53(b); FTC Overview, *supra* note 24.

³⁰ 15 U.S.C. § 53(b).

³¹ FTC Overview, *supra* note 24.

and brand names.³² They were created after industry pressure for more guidance on green marketing claims.³³ Authority for the Guides derives from the FTCA.³⁴ The Green Guides, like other industry guides, are administrative interpretations of the law and thus do not have the force and effect of law.³⁵ However, if the FTC determines that a business makes environmental marketing claims that are inconsistent with the Guides, it can take action under the FTCA.³⁶ The Guides do not preempt federal agencies or state bodies, but compliance with federal, state, or local laws does not preclude the FTC from taking action under Section 5 of the FTCA.³⁷

The substance of the Green Guides provides guidance on making certain environmental claims, with specific examples that provide safe harbors for companies.³⁸ The gravamen of the Green Guides is twofold: (1) the claim must be truthful, and (2) the company, at the time the claim is made, must possess a reasonable basis to substantiate the claim.³⁹ After laying out general principles concerning green marketing claims,⁴⁰ the Guides define, discuss, and

³² 16 C.F.R. § 260.2 (2010). The scope of the Guides is extremely broad—they apply to all claims for all products for all consumer uses. *See id.*

³³ *See* Starek speech, *supra* note 15.

³⁴ 15 U.S.C. §§ 41-58 (2010).

³⁵ 16 C.F.R. § 260.2; Rosch, Responsible Green Marketing Remarks, *supra* note 14, at 12 n.2.

³⁶ 16 C.F.R. § 260.1.

³⁷ 16 C.F.R. § 260.2.

³⁸ *See* 16 C.F.R. § 260.3.

³⁹ *See* 16 C.F.R. § 260.5. Further guidance on the reasonable basis standard is set forth in the Commission's 1983 Policy Statement on the Advertising Substantiation Doctrine, 49 Fed. Reg. 30999 (1984); *appended to Thompson Medical Co.*, 104 F.T.C. 648 (1984).

⁴⁰ 16 C.F.R. § 260.6. This section advises that qualifications and disclosures should be clear, prominent and understandable; that distinctions between a product, benefit and service must be clear; environmental attributes should not be overstated; and that comparative claims must be clear and substantiated. *Id.*

give examples of deceptive environmental claims for products that are biodegradable, compostable, recyclable, have recycled content, reduce waste, and are ozone friendly.⁴¹

The FTC evaluates claims through the eyes of the consumer.⁴² For example, the Green Guides prescribe that products cannot advertise that a product is “recyclable” if no recycling facilities or collection sites exist for that product within a certain area.⁴³ Statements such as “please recycle” or “please check for recycling programs in your area” would not be sufficient, because consumers think that a recycling program exists.⁴⁴ Instead, the product must qualify the claim by saying something like “recycling programs for this product may not exist in your area,” so that a consumer is not misled into thinking such a program actually exists.⁴⁵

Since the Guides were created in 1992, new environmental claims have flourished, especially with regard to products’ carbon impact and claims that a product is sustainable or renewable.⁴⁶ “Environmentally friendly” product launches have recently spiked, and patent applications involving “eco” or “green” claims have also jumped.⁴⁷ These general

⁴¹ 16 C.F.R. § 260.7.

⁴² Laura DeMartino, Assistant Director, Enforcement Division of FTC, Remarks at the Hofstra Law School Energy and the Environment Conference Panel Discussion: A Threat to Consumer Empowerment: Greenwashing, (Mar. 20, 2009), webcast *available at* http://www.livestream.com/hofstralaw/video?clipId=flv_864476af-27be-44b5-8dfc-c290196b9965 [hereinafter, DeMartino Remarks].

⁴³ *See* 16 C.F.R. § 260.7(d).

⁴⁴ DeMartino Remarks, *supra* note 42.

⁴⁵ *See* 16 C.F.R. § 260.7(d) ex. 4.

⁴⁶ DeMartino Remarks, *supra* note 42; Rosch, Responsible Green Marketing Remarks, *supra* note 14, at 11. Some of the questions that companies are struggling with can be found at Jonathan Martel & Clara Vondrich, *Climate Change and Greenhouse Gas Regulation*, 2008 *Emerging Issues* 65 (2008).

⁴⁷ CBS Evening News reported that manufacturers launched 328 “environmentally friendly” products in 2007, up from only 5 such products in 2002. CBS Evening News, *A Closer Look at ‘Green’ Products*, May 18, 2008, *available at* www.cbsnews.com/stories/2008/05/18/eveningnews/main4105507.shtml. The U.S. Patent and

environmental claims are likely to be unsubstantiated; as such, the Green Guides recommend avoiding their use.⁴⁸ These trends are also an indication that greenwashing is not being abated by the Green Guides, but instead is growing.

To keep up to date with these changes in marketplace terminology, the FTC is revising its Green Guides.⁴⁹ Currently, the comment process has ended and the FTC is reviewing and summarizing the 150 comments it received.⁵⁰ It is also considering feedback from three workshops it held in 2008 on various green marketing topics.⁵¹ These workshops included "Green Building and Textiles," "Green Packaging Claims," and "Carbon Offsets and Renewable Energy Certificates."⁵² Some of the themes raised by the comments received include: whether life cycle analysis for claims involving carbon footprints should be used, whether the current guides provide enough guidance, how claims of "biodegradability" and "recyclability" can be improved, and whether "sustainable" is too vague or if it is definable.⁵³ As discussed in this paper, before issuing its revised Green Guides, the FTC should consider using its rulemaking authority to promulgate regulations setting out national standards implementing International Standards Office (ISO) definitions for such claims.

Trademark Office received twice as many applications with the word "green" in 2007 than in 2006, and applications with the words "clean," "eco," "environment," "earth," "planet," and "organic" also jumped. GreenBiz Staff, *Eco Trademarks Made Big Gains in 2007*, Apr. 28, 2008, www.greenbiz.com/news/2008/04/28/eco-trademarks-made-big-gains-2007.

⁴⁸ See 16 C.F.R. § 260.7(a) (using the terms "environmentally safe" and "environmentally preferable" as examples).

⁴⁹ Federal Trade Commission, *Eco in the Market: Green Guide Review*, http://www.ftc.gov/bcp/edu/microsites/energy/about_guides.shtml (last visited Apr. 6, 2010).

⁵⁰ Rosch, *Responsible Green Marketing Remarks*, *supra* note 14, at 8-9. Comments are accessible on the FTC website at http://www.ftc.gov/bcp/edu/microsites/energy/about_guides.

⁵¹ Federal Trade Commission, *Eco in the Market: Green Guide Review*, http://www.ftc.gov/bcp/edu/microsites/energy/about_guides.shtml.

⁵² *Id.*

⁵³ Rosch, *Responsible Green Marketing Remarks*, *supra* note 14, at 9-12.

3. FTC Enforcement of Green Marketing Claims

FTC Enforcement of green marketing claims has been minimal. From 1999 to 2000, the FTC brought 37 administrative enforcement actions challenging environmental marketing claims.⁵⁴ From 2000 to 2009, the FTC filed no such claims; however, since 2009, it has filed seven claims.⁵⁵ Recent enforcement actions indicate that the FTC attacks certain types of environmental marketing claims at a time. For instance, three of the 2009 cases involved companies that made misleading claims of biodegradability.⁵⁶ The four other 2009 cases challenged companies making claims regarding bamboo fabric.⁵⁷ Besides bringing these cases, the FTC issued 78 letters to companies warning them to stop labeling rayon fabrics as

⁵⁴ Federal Trade Commission, Energy and Environment, <http://www.ftc.gov/energy/> (last visited Apr. 6, 2010) (follow "Environment" hyperlink; then follow "Enforcement" hyperlink); Rosch, Responsible Green Marketing Remarks, *supra* note 14, at 14.

⁵⁵ *Id.* Notably, the 2000 to 2009 enforcement void corresponds to the years of the Bush administration.

⁵⁶ See *Tender Corp.*, C-4261 (July 13, 2009) (challenging biodegradable claims for moist wipes); *Kmart Corp.*, C-4263 (July 15, 2009) (challenging biodegradable claims for disposable plates); *Dyna-E International, Inc., et al.*, D-9336 (Dec. 15, 2009) (challenging biodegradable claims for compressed dry towels); see also Press Release, Federal Trade Commission, FTC Announces Actions Against Kmart, Tender and Dyna-E Alleging Deceptive "Biodegradable" Claims (June 9, 2009), available at <http://ftc.gov/opa/2009/06/kmart.shtm>.

⁵⁷ See *The M Group, Inc., et al.*, D-9340 (Aug. 11, 2009) (challenging claims that company's textile fiber products, including clothing for infants, are made of bamboo fiber, retain the natural antimicrobial properties of the bamboo plant, and are biodegradable); *CSE, Inc., et al.*, C-4276 (Dec. 15, 2009) (challenging claims that company's textile fiber products are made of bamboo fiber, are manufactured using an environmentally-friendly process, and retain the natural antimicrobial properties of the bamboo plant); *Pure Bamboo, LLC, et al.*, C-4274 (Dec. 15, 2009) (challenging claims that company's textile fiber products, including clothing, are made of bamboo fiber, are manufactured using an environmentally-friendly process, retain the natural antimicrobial properties of the bamboo plant, and are biodegradable); *Sami Designs, LLC, et al.*, C-4275 (Dec. 15, 2009) (challenging claims that company's textile fiber products, including clothing, are made of bamboo fiber, are manufactured using an environmentally-friendly process, and retain the natural antimicrobial properties of the bamboo plant). The FTC challenged these claims of biodegradability and environmental friendliness because the fabric production used toxic chemicals that resulted in hazardous air emissions and produced rayon instead of bamboo fabric. Press Release, Federal Trade Commission, How to Avoid Bamboozling Your Customers, (Aug. 2009), available at <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt172.shtm>.

bamboo.⁵⁸ Since 2000, the FTC has also filed several actions regarding claims relating to energy efficiency.⁵⁹

In addition, there are two cases currently in litigation regarding "green" claims.⁶⁰ One involves the marketer of a coating that advertised that if a consumer painted with it, the coating would have insulation properties with energy savings of 40-60%.⁶¹ Another involves a business that advertised that its device could turn any car into a hybrid car which would have 50-100% greater fuel efficiency.⁶² In both of these cases, the FTC alleges that the companies have no evidence to back up their claims.⁶³ The limited number and subject of FTC enforcement actions, especially compared with the growing incidence of greenwashing,⁶⁴ reveal that the FTC is not sufficiently enforcing claims. Such limited enforcement is due to its budget constraints, which force it to pursue major deceptive claims.⁶⁵ As discussed in this paper, the enactment of a citizen suit provision within the FTCA would alleviate the FTC's burden in bringing these suits and reallocate it to the public.

⁵⁸ Press Release, Federal Trade Commission, FTC Warns 78 Retailers, Including Wal-Mart, Target, and Kmart, to Stop Labeling and Advertising Rayon Textile Products as "Bamboo" (Feb. 3, 2010), available at <http://ftc.gov/opa/2010/02/bamboo.shtm>.

⁵⁹ See, e.g., *U.S. v. Northwestern Ohio Foam Packaging, Inc.*, Civil Action No. 3:06-cv-02407 (filed Oct. 5, 2006) (alleging that an insulation made exaggerated R-value claims for its insulation product); *F.T.C. v. Intl. Research and Dev. Corp. of Nevada, et al.*, Case No.: 04C 6901 (filed Oct. 7, 2004) (alleging deceptive claims about an "automatic fuel saver" device); *In the Matter of Kryton Coatings Intl., Inc.*, Docket No. C-4052, File No. 012 3060 (decision issued June 14, 2002) (alleging unsubstantiated performance and R-value claims for building coatings).

⁶⁰ DeMartino Remarks, *supra* note 42.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See *supra* note 47.

⁶⁵ See Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK L. REV. 283, 317 (2007).

B. Regulation by States and Private Citizens: Mini-FTCs

Many states have enacted trade practice statutes modeled after the FTCA.⁶⁶ These statutes provide for injunctions and civil and criminal penalties for misleading advertising.⁶⁷ In the mid-1990s, states engaged in cooperative, multi-state efforts to combat greenwashing.⁶⁸ Most of the cases ended in settlement.⁶⁹ The cooperative approach these states took was necessary because of the national scope of the problem. For instance, most green marketing campaigns are launched nationally because state-by-state prosecution of such huge marketers is inefficient, given the vast resources these companies expend on advertising nationally.⁷⁰ In addition to inefficiencies, state-by-state litigation may also result in disparities that “ultimately confuse rather than clarify,” so that manufacturers are required to simply comply with the highest state standard.⁷¹ For example, at least two states require advertisers to maintain documentation concerning the validity of environmental claims.⁷² This is the reason why a comprehensive federal approach is necessary.⁷³

⁶⁶ See, e.g., Cal. Bus. & Prof. Code § 17500-09 (West 2010); Mass. Gen. Laws ch. 93A, § 2 (2010); N.Y. Exec. Law § 63(12) (McKinney Supp. 2010); N.Y. Gen. Bus. Law § 349-50 (McKinney 2009 & Supp. 2010); Tex. Bus. & Com. Code Ann. § 17.41-17.826 (West 2009 & Supp. 2010).

⁶⁷ *Id.*

⁶⁸ Isreal, *supra* note 3, at 313 (1993).

⁶⁹ *Id.*

⁷⁰ *Id.* at 314.

⁷¹ Delcianna J. Winders, *Combining Reflexive Law and False Advertising Law to Standardize “Cruelty-Free” Labeling of Cosmetics*, 81 N.Y.U. L. REV. 454, 473 n.91 (2006).

⁷² Christopher P. McCormack, *The FTC’s “Green Guides” and the Challenges of Environmental Marketing*, 41 Trends (A.B.A. Sec. of Env’t, Energy, and Resources Newsl. 9 (2010) (citing FLA. STAT. § 403.7193(1) (2010); CAL. BUS. & PROF. CODE § 17580(a) (2010)).

⁷³ See *id.* at 313-14.

Some of these state statutes allow for citizen suits to enforce the provisions of the statutes.⁷⁴ Such citizen suit provisions help bring down the cost of enforcement by allowing private citizens to enforce the statute.⁷⁵ If attorneys' fees are provided within the statute, these suits have the added benefit of shifting the cost of enforcement to the industry that benefits from such deceptive practices. However, state citizen suit provisions are inefficient for the same reasons that state-by-state enforcement by attorneys general is inefficient. Therefore, a federal citizen suit provision is preferable.

C. Regulation by Competitors: The Lanham Act

Section 43 of the Lanham Act deals with trademark issues and false advertising, including greenwashing.⁷⁶ It has been used increasingly to combat deceptive claims.⁷⁷ However, for many reasons, the Lanham Act suffers from shortfalls that counsel against its use as a principal mechanism to combat greenwashing.

The Lanham Act creates a private cause of action for false advertising.⁷⁸ However, whereas the FTCA is enforceable only by the FTC, the Lanham Act is generally enforceable by competitors of a person or company making false advertisements.⁷⁹ Consumers are regularly denied standing under the Lanham Act.⁸⁰

⁷⁴ See, e.g., MASS. GEN. LAWS ch. 93A, § 9 (2010); N.Y. GEN. BUS. LAWS § 350(e) (McKinney Supp. 2010); TEX. BUS. & COM. CODE § 17.49 (West 2010).

⁷⁵ See Lemley, *supra* note 65, at 319-20.

⁷⁶ See 15 U.S.C.A. § 1125(a) (2010).

⁷⁷ See Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 844 (1999).

⁷⁸ See 15 U.S.C.A. § 1125(a).

⁷⁹ White, *supra* note 1, at 329-30. Both acts prohibit "misrepresentation" and "deceptiveness." Compare 15 U.S.C. § 45(a)(1) ("[U]nfair or deceptive acts or practices in or affecting commerce . . . are hereby declared unlawful."), with *id.* § 1125(a)(1) ("Any person who . . . misrepresents the natures, characteristics, [or] qualities . . . of . . . goods . . . shall be liable . . .").

⁸⁰ See, e.g., *Made in the USA Found. v. Phillips Food, Inc.*, 365 F.3d 278 (4th Cir. 2004) ("At least half of the circuits hold (and none of the others disagree) that . . . § 45, or 15 U.S.C. § 1127,

In addition to this limited enforcement capacity, the Lanham Act provides little guidance and is wrought with conflicting case law. In fact, because of its “layers upon layers of ambiguous wording, congressional inattention, judicial glosses, a statutory revision, and significant scholarly developments in related areas,” it has been described as an “onion of complexity.”⁸¹ Although the statutory language “nearly mirrors” that of the FTCA, it relies on vague notions of “misrepresentation” without guidance such as that provided by the FTC Green Guides.⁸² The Green Guides do not provide guidance to the Lanham Act on what environmental claims are deceptive.⁸³

The Lanham Act has also been criticized for not sufficiently protecting consumers.⁸⁴ Despite the cost and uncertainty of litigation under the Lanham Act,⁸⁵ false advertising claims brought pursuant to the Act are on the rise.⁸⁶ However, this does not necessarily correspond to an increase in consumer welfare. To the contrary, these claims tend to be about highly technical

bars a consumer from suing under the [Lanham] Act.”); *Barrus v. Sylvania*, 55 F.3d 468 (9th Cir. 1995); *Serbin v. Ziebart Int’l Corp.*, 11 F.3d 1163 (3d Cir. 1993); *Dovenmuehle v. Gildorn Mortgage Midwest Corp.*, 871 F.2d 697 (7th Cir. 1989); *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686 (2d Cir. 1971); see also Joseph A. Larson, Note, *Taming the Wild West: An Examination of Private Student Loan Consolidation Companies’ Violations of § 43(a) of the Lanham Act by Using Trade Names and Logos That Closely Resemble Those Used by the United States Department of Education*, 41 CREIGHTON L. REV. 515, 524 (2008) (“Thus far, five circuit courts have stated that consumers do not have standing to sue under § 43(a) for false advertising.”); White, *supra* note 76, at 330.

⁸¹ Burns, *supra* note 76, at 835.

⁸² White, *supra* note 1, at 330.

⁸³ *Id.* at 330 n.46.

⁸⁴ Burns, *supra* note 76, at 844.

⁸⁵ Mindy P. Fox, *Does It Really Suck?: The Impact of Cutting-Edge Marketing Tactics on Internet Trademark Law and Gripe Site Domain Name Disputes*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 225, 236 (2009).

⁸⁶ Burns, *supra* note 76, at 843.

issues that do little to protect the consumer.⁸⁷ These suits do, however, presumably pass litigation costs on to the consumer.⁸⁸

Finally, the Lanham Act may be of limited assistance in dealing with complicated green claims. Several cases brought under the Lanham Act have held that terms consumers have limited information about cannot be false because they do not communicate information that is specific enough.⁸⁹ In other words, if a company advertises with a technical term, that term has no meaning to the customer and is therefore not false to the customer.⁹⁰ For example, in one recent case, the court rejected a challenge to Mitsubishi's advertisement of a 1080p television set because the phrase "1080p" does not convey a specific claim that is recognizable to the targeted customer, rather, it simply indicated a technologically sophisticated TV set.⁹¹

D. Self-Regulation

Some companies regulate themselves through professional organizations, or by complying with certification and labeling schemes.

1. National Advertising Division

The main example of this self-regulation is the National Advertising Division (NAD) of the Better Business Bureau, which covers the self-regulation of advertising companies. NAD reviews national advertising claims on its own initiative, or upon complaint by other advertisers or consumers.⁹² NAD has a staff of seven attorneys that handle about 150 cases

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Tushnet Blog, *supra* note 9.

⁹⁰ *Id.*

⁹¹ *Id.* (citing *Date v. Sony Electronics Inc.*, 2009 WL 435289 (E.D. Mich.)).

⁹² Kathrin Farrara, Attorney, Better Business Bureau, National Advertising Division, Remarks at the Hofstra Law School Energy and the Environment Conference Panel Discussion: A Threat to Consumer Empowerment: Greenwashing, (Mar. 20, 2009), webcast *available at* http://www.livestream.com/hofstralaw/video?clipId=flv_864476af-27be-44b5-8dfc-

per year.⁹³ Once NAD makes a determination about a particular company's advertisement, the company has an opportunity to appeal.⁹⁴ If it fails to comply or loses the appeal, NAD turns the company in to the FTC, which usually results in a negative determination.⁹⁵

Although NAD is an effective alternative to federal litigation, it also has several shortfalls.⁹⁶ First, since it has no enforcement authority, it relies on self-regulation by advertisers or the FTC to regulate.⁹⁷ This creates a dependence on a financially-strapped agency. Second, it does not offer monetary relief to consumers.⁹⁸ Finally, it does not allow for public notice of companies engaging in deceptive practice. This is because its proceedings are confidential, and thus prohibit publicity.⁹⁹

2. Certification and Labeling Schemes

Some businesses also engage in voluntary certification and labeling. According to EcoLabeling.org, an organization that inventories eco-labels, there are currently 325 separate eco-labels worldwide.¹⁰⁰ The most widely known examples are GreenSeal and EnergyStar.¹⁰¹ These labels work differently, but they typically require payment of a fee and testing.¹⁰² The

c290196b9965.; National Advertising Division, About NAD, <http://www.nadreview.org/AboutNAD.aspx> (last visited Apr. 21, 2010) [hereinafter Farrara Remarks].

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ NAD has a compliance rate of 95% and has been praised by the FTC as a "model of self-regulation." Winders, *supra* note 71, at 475. It produces results "that often results in a quicker, cheaper, easier and more professional decision." *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ EcoLabeling.org, http://ecolabelling.org/search/apachesolr_search/?filters=type:ecolabel (last visited Apr. 15, 2010).

¹⁰¹ U.S. ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL LABELING, ISSUES, POLICIES, AND PRACTICES WORLDWIDE, EPA 742-R-98-009, B133, B153 (1998).

¹⁰² *Id.* at 21-22.

stringent testing sometimes involved or high fees can discourage smaller companies from certifying new products.¹⁰³ Other criticisms involve potential World Trade Organization violations, effectiveness concerns, and concerns that such labels hurt production in third world countries.¹⁰⁴ Finally, while eco-labeling is generally positive, too many labels can confuse consumers and decrease the value of the label.¹⁰⁵

E. Oversight by the Public

The public also plays a role in regulating green marketing claims and discouraging greenwashing. Numerous environmental groups and consumer watchdog groups promulgate online websites, forums, blogs and resources to help consumers gain knowledge about environmental claims and identify greenwashing. One of the most prominent examples is the Greenwashing Index, run through the University of Oregon.¹⁰⁶ The Index allows the public to upload, rate, and comment on advertisements making dubious environmental claims. Such a novel form of media is changing the way companies gain information about consumer knowledge and opinion and allowing unprecedented public participation in the green marketing dialogue.¹⁰⁷ Other groups include mainstream environmental groups such as Greenpeace, Friends of the Earth, Co-op America, and consumer watchdog groups such as CorpWatch and GreenBiz.¹⁰⁸

¹⁰³ *Id.*

¹⁰⁴ For a full explanation of these critiques, see Stacy R. O'Neill, *Consuming for the Environment: A Proposal for Carbon Labels in the United States*, 39 CAL. W. INT'L L.J. 393, 408-413 (2009).

¹⁰⁵ *Id.* at 65.

¹⁰⁶ Greenwashing Index, available at <http://www.greenwashingindex.com/>.

¹⁰⁷ Farrara Remarks, *supra* note 91.

¹⁰⁸ Robert Lamb, *How Greenwashing Works*, HowStuffWorks.com, available at <http://money.howstuffworks.com/greenwashing3.htm> (last visited Apr. 6, 2010).

IV. Reducing Greenwashing Through International Standards and Federal Citizen Suits

Two simple changes could help reduce greenwashing. First, the FTC should take the opportunity in updating its Green Guides to adopt international standards for environmental labeling and declarations. Second, Congress should amend the FTCA to provide standing for private citizens to enforce the statute. Imposing international standards will not only help bring about a consensus on what constitutes deceptive environmental marketing claims, it will also help consumers trust the claims they are receiving and businesses to compete better internationally. Amending the FTCA to allow for citizen suits will help stretch the FTC enforcement budget and allow for more democratic participation in the regulation of deceptive companies. Together, these two actions will help fight greenwashing and improve consumer confidence in environmentally-friendly products.

A. Adopting International Standards for Environmental Labeling and Declarations into the FTC Green Guides

The updating of the Green Guides provides the perfect opportunity for the FTC to provide more guidance, certainty, and uniformity to companies making environmental claims by adopting international standards, as set out by the International Standards Office (ISO) in the ISO 14000 series environmental labeling and declaration guidelines (ISO 14020-25).

The ISO is a specialized international non-governmental agency whose members consist of national standards bodies of 159 countries.¹⁰⁹ ISO develops voluntary standards in almost all industries with the input of government, industry, and other interested parties to ensure

¹⁰⁹ International Standards Office, ISO Members, http://www.iso.org/iso/about/iso_members.htm (last visited Apr. 20, 2010).

materials, products, processes, and services are fit for their purpose and to facilitate international trade by increasing the reliability and effectiveness of goods and services.¹¹⁰

The ISO 14000 series deals with environmental management systems, and ISO 1420-25 deals specifically with environmental labeling and declaration standards.¹¹¹ ISO 14021 would be the most relevant standard to incorporate into the Green Guides, as it covers self-declared environmental claims (or Type II labeling), as opposed to third party eco-labeling programs like EnergyStar (Type I labeling in ISO 14024) or third party lifecycle assessment certifications (Type III declarations in ISO 14025). The ISO 14021 standard provides consensus descriptions and guidance for common terminology such as “reduced water consumption,” “extended life product,” and numerous other terms, whereas the FTC Green Guides only provide guidance for seven environmental claims.¹¹² The ISO 14021 standard also offers clarification of verification standards for environmental claims.¹¹³ During the FTC’s Green Packaging Workshop, industry brought up both of these issues—terminology and verification standards—as areas the FTC needed to address.¹¹⁴ Finally, the ISO standard provides eighteen different requirements that are similar to the “general principles” section of the Green Guides.¹¹⁵ Thus, the standard is similar to the current Green Guides, but provides expanded terminology, verification standards, and guidelines for companies to avoid making false or misleading environmental claims.

¹¹⁰ TOM TIBOR & IRA FELDMAN, IMPLEMENTING ISO 14000, 15-16 (McGraw Hill 1997).

¹¹¹ *Id.* at 438.

¹¹² *Id.* at 441.

¹¹³ *Id.*

¹¹⁴ FTC Green Guides and Packaging Workshop 192 (Apr. 30, 2008).

¹¹⁵ See 16 C.F.R. § 260.6; see also KUN-MO LEE & HARUO UEHARA, BEST PRACTICES OF ISO 14021: SELF-DECLARED ENVIRONMENTAL CLAIMS 33 (2003). For example, the requirements state that a claim shall be accurate and not misleading, substantiated and verifiable, relevant to that particular product, etc.

1. The Need for Adoption of International Standards

Adopting the ISO standards into the FTC Green Guides has several implications that would benefit businesses, the government, and consumers. One benefit would be regulatory advantages. For instance, the FTC could offer reduced penalties to companies that become ISO-certified, or consider ISO compliance a safe harbor in any FTC enforcement action.¹¹⁶ In fact, the FTC already recognizes industry self-regulation as an important factor in prosecuting claims.¹¹⁷ The U.S. Environmental Protection Agency (EPA) has used a similar approach.¹¹⁸ In addition, companies might gain competitive trading advantages if governments or other customers used ISO-certified companies as preferred suppliers.¹¹⁹

In fact, regulated industry has indicated that it would welcome the push for internationally-based national standards. In the recent FTC Green Packaging Workshop, the issue of adopting international standards, namely ISO standards, came up frequently.¹²⁰ All of the members who brought up the subject were in favor of the Green Guides adopting the ISO standards.¹²¹ The main reasons cited were certainty, economic advantages, and the stimulation of environmental improvements.¹²² The same concerns were echoed in the initial push for the Green Guides and in comments for the current revisions of the Green Guides.¹²³

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 439.

¹¹⁸ Jason Hart, ISO 14000: QUESTIONS AND ANSWERS 29 (2001).

¹¹⁹ *Id.*

¹²⁰ FTC Green Guides Packaging Workshop, *supra* note 13, at 30, 46, 49, 52, 58, 82, 92 (Apr. 30, 2008).

¹²¹ The only caveat was that, to ensure flexibility and continued improvement of environmental responsibility, the Green Guides and standards would need to be updated more regularly. *Id.* at 52.

¹²² *Id.* at 30, 46, 58, 92.

¹²³ See, e.g., FTC Green Guide Comments, <http://www.ftc.gov/os/comments/greengudesregreview/533431-00060.htm> (requesting guidance with more specific information on green marketing claims).

Other advantages of adopting international standards include the enhanced ability to efficiently produce and market a product, and to boost sales by increasing consumer confidence.¹²⁴

FTC adoption of ISO 14020-25 into its Green Guides has not only been proposed by industry; it has also been proposed by the U.S. government. The U.S. sub-Technical Advisory Group of the ISO requested that the FTC consider "harmonizing" the FTC environmental marketing guides with the ISO 14020-25 environmental labeling guidelines.¹²⁵ It was also the subject of a congressional hearing entitled "The Increasing Importance of International Standards to the U.S. Industrial Community and the Impact of ISO 14000," which touted adoption of the standards as a way to introduce flexibility and cost-savings.¹²⁶

Consumers would also benefit from these international standards. This is because implementation would expand the guidance currently in the Green Guides and increase uniformity in environmental claims from advertisers. Consumers would benefit from this because they typically trust a standard that they know.¹²⁷ As Professor Tushnet notes, this is one reason why nutrition labels work so well and inspire such consumer confidence.¹²⁸ An international standard would create confidence in several ways. First, it would ensure the

¹²⁴ Stephen R. Sides, Vice President, National Paint and Coatings Association, Inc., FTC Workshop Session, Shades of Green: Overview of Green Claims for Building Products, A Paint Industry Perspective on "Green Product Claims" 12 (July 18, 2008), *available at* <http://www.ftc.gov/bcp/workshops/buildingandtextiles/presentations/3ssides.pdf>.

¹²⁵ *Id.* at 439.

¹²⁶ *Hearing Before the Subcommittee on Technology on the Committee on Science*, 104th Cong. 103 (1996).

¹²⁷ Rebecca Tushnet, Professor of Law, Georgetown University, Remarks at the Hofstra Law School Energy and the Environment Conference Panel Discussion: A Threat to Consumer Empowerment: Greenwashing, (Mar. 20, 2009), webcast *available at* http://www.livestream.com/hofstralaw/video?clipId=flv_864476af-27be-44b5-8dfc-c290196b9965 (arguing for a federal greenwashing baseline because consumers are more willing to trust a standard that they know).

¹²⁸ *Id.*

mass dissemination of a uniform standard, thus creating familiarity.¹²⁹ Consumers view such claims as having been vetted and trustworthy.¹³⁰ Second, use of the same standard or format increases credibility (e.g., nutrition labels).¹³¹ Finally, it would decrease inconsistency, which signals ulterior motives and heightens skepticism in consumers.¹³²

One organization that is able to take on such a task, together with the FTC, is the American National Standards Institute (ANSI), the main American non-governmental organization that engages in world-wide standard-setting and testing. ANSI could provide a wealth of experience and expertise in helping implement such international standards into national definitions.¹³³

2. Potential Problems with International Standards

Although several potential problems exist with imposing international environmental marketing standards, these are easily dismissed.

a. Congressional Authority

Congress has clear authority to delegate rulemaking authority to promulgate national environmental marketing definitions conforming to international standards through the Commerce Clause. The FTC, in turn, has clear authority to impose these standards through its authority under Section 5 of the FTC Act. Although certain practical considerations such as flexibility to encourage new environmental products swayed the

¹²⁹ Tushnet Blog, *supra* note 9.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ House Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection Hearing; It's Too Easy Being Green: Defining Fair Green Marketing Practices; Testimony by Scott Cooper, Vice President, Government Relations, American National Standards Institute Congressional Documents and Publications (June 9, 2009) (urging Congress to adopt uniform green standards).

FTC in adopting only industry guidelines, the prevailing interest in trustworthy environmental marketing standards is sufficiently strong to counter that concern. A 2008 Price Waterhouse Cooper survey found that only sixteen percent of consumers trust environmental claims from manufacturers.¹³⁴ Such sagging consumer confidence is the very reason the FTCA was put into place. It is time for the FTC to step up its rulemaking authority and act by imposing international environmental marketing standards.

b. First Amendment Protection

While the debate on First Amendment protection of commercial speech is ongoing,¹³⁵ deceptive claims have no such claim to constitutional protection. False claims have never held the right to First Amendment protection precisely because it has no value in the democracy of ideas.¹³⁶ By regulating against deceptive practices, the FTC is not in danger of any First Amendment constitutional violations.¹³⁷

¹³⁴ HomeIntel.org, Best Practices in Green Marketing: FTC, ISO, and More, <http://homeintelblog.com/2009/04/best-practices-in-green-marketing-ftc-iso-and-more/>.

¹³⁵ See generally David Hoch & Robert Franz, *Legal Developments: Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALB. L. REV. 441 (1994) (summarizing case law on commercial speech and discussing the developments of the *Association of National Advertisers, Inc. v. Lundgren*).

¹³⁶ See, e.g., *Bolger v. Youngs Drugs Prod. Corp.*, 463 U.S. 60, 64-65 (1983) (noting constitutional protection of commercial speech does not extend to confusing or deceptive messages); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (noting that boundaries of commercial speech protection end at untruthful and misleading statements); *Garey v. Population Servs. Int'l*, 431 U.S. 678, 700 (1977) (stressing that first amendment will not protect false advertising or advertising that proposes illegal transactions); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976) (indicating that Constitution does not protect false, deceptive, or misleading commercial speech).

¹³⁷ Requiring environmental labels, however, would have First Amendment implications. See Kysar, *supra* note 13, at 569.

c. Preemption of State Statutes

As discussed above, the FTC does not preempt state statutes. In fact, states provide an often helpful supplementary role in enforcing the FTCA through their anti-FTC statutes.¹³⁸ Such a cooperative system of governance would be further helped by standardized national definitions, which would provide more guidance to states in challenging deceptive environmental marketing claims.¹³⁹

B. Federal Citizen Suits

Over the years, the FTC's enforcement authority has been greatly expanded.¹⁴⁰ While Congress has provided the FTC with increased funds,¹⁴¹ the Commission is still not bringing many enforcement actions.¹⁴² To remedy this problem, Congress should follow the approach of many state anti-FTC statutes and amend the FTCA to allow citizen suits to recover actual damages for deceptive advertising practices. Such an approach will increase enforcement while keeping FTC's costs at a minimum, thereby challenging deceptive marketing claims and increasing consumer confidence.

Citizen suits have a long history in aiding the government in law enforcement.¹⁴³ They are currently used in many environmental statutes, including the Clean Water Act, which is the model for many other citizen suit provisions. Citizen suits proliferate because

¹³⁸ See discussion in Section III.B, *supra*.

¹³⁹ See White, *supra* note 1, at 327.

¹⁴⁰ Statement of the FTC Before the U.S. Senate Committee on Commerce, Science, and Transportation 7 (Apr. 8, 2008).

¹⁴¹ *Id.*

¹⁴² See *supra* note 45.

¹⁴³ One noted scholar states that they have been used since the Middle Ages. See Erwin Chemerinsky, *Controlling Fraud Against the Government: The Need for Decentralized Enforcement*, 58 NOTRE DAME L. REV. 995, 1013 (1983). In the article, Chemerinsky outlines the historic use of citizen suits, especially to combat fraud and corruption.

governments are often not able or willing to properly enforce laws for a variety of reasons, including bureaucratic, political, financial, or logistical constraints.¹⁴⁴ Citizen suits not only increase enforcement by supplementing the government's role and allowing suits by private attorneys general, they also can encourage government enforcement by highlighting certain claims, products or firms that require more enforcement.¹⁴⁵ Furthermore, they provide greater deterrence by allowing more people, including consumers of "green" products, to bring suit against advertisers making false environmental claims.

V. Conclusion

As shown by the legislative history leading to the FTC Green Guides, a strong national approach is needed to combat deceptive environmental marketing claims, or greenwashing. While several federal and state schemes exist to combat the problem, one of the main avenues for enforcement, FTC enforcement through Section 5 of the FTCA, could be improved by implementing certain changes. These changes should include provision within the FTCA for citizen suits and for adopting ISO standards into the FTC Green Guides. By implementing these changes, lagging consumer confidence in green marketing claims could be improved. With improved consumer confidence, companies will be more likely to produce more environmentally-friendly products and consumers will be more willing to buy them. With more environmentally-friendly products being bought and sold, the consumer is better able to do his or her part in fighting climate change.

¹⁴⁴ See Maria E. Chang, *Citizen Suits: Toward a Workable Solution to Help Created Wetlands Succeed*, 6 Univ. FLA. J.L. & PUB. POL'Y 77, 85 (1993).

¹⁴⁵ *Id.*