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Comments

***95 THINKING GREEN OR SCHEMING GREEN?: HOW AND WHY THE FTC GREEN GUIDE REVISIONS SHOULD ADDRESS CORPORATE CLAIMS OF ENVIRONMENTAL SUSTAINABILITY**

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I. Introduction

The Federal Trade Commission (FTC or Commission) is given the power to protect consumers from deceptive and unfair trade practices under Section 5 of the FTC Act. [FN1] The Act gives the FTC the power to bring law enforcement actions [FN2] against individuals or corporations [FN3] *96 employing false or misleading marketing claims, including environmental or “green” marketing claims. [FN4] In 1992, the FTC issued the Environmental Guides, often referred to as the Green Guides (Green Guides or Guides), to indicate how the Commission would apply Section 5 of the FTC Act to environmental marketing claims. [FN5] The Green Guides encompass sections 260.1-260.8 of Title 16 of the Code of Federal Regulations [FN6] and are similar to other industry guides issued by the FTC in that they are simply administrative interpretations of the law. This means the Green Guides are to be used by the public in conducting their affairs in conformity with legal requirements, but are not themselves independently enforceable. [FN7] The Green Guides look at all advertisements from the consumer's perspective and explain how consumers are likely to interpret environmental marketing claims so that marketers can avoid making false or misleading claims. [FN8] In doing so, the Guides give environmental claims the meaning that consumers give them. [FN9] Therefore, any express or implied claims that marketers make must be substantiated, meaning there must be “a reasonable basis for their claims.” [FN10]

Similar to other rules and guidelines proffered by the FTC, the Green Guides are periodically reviewed, through the regulatory review program, to ensure they are up to date, and to determine if they should be “retained, modified, or rescinded.” [FN11] In November 2007, the FTC announced it was reviewing the Green Guides a year earlier than originally planned. [FN12] The last time the Green Guides were revised was a decade ago, when in 1998 the FTC expanded the definition of “recyclable” and “recycled content.” [FN13] The FTC commenced this review early “[b]ecause of the proliferation of green claims in the *97 marketplace.” [FN14] As of the date of publication, the FTC has held three public workshops, as part of this review process, to address problematic green marketing issues that are not yet included in the Green Guides. The first workshop was held on January 8, 2008 and focused on the marketing of carbon offsets and renewable energy certificates (RECs). [FN15] The second workshop was held on April 30, 2008 and focused on developments in green packaging claims and the consumer perception of such claims. [FN16] Finally, the third workshop was held on July 15, 2008 and examined green claims relating to textiles, building products, and buildings. [FN17]

While the FTC should be commended for its proactive approach to updating the Green Guides, given the rise

of environmental advertising, it should also be cautious not to rush the process and focus solely on these three issues. Instead, the FTC should use this review as an opportunity to expand the reach of the Green Guides to cover a more diverse group of environmentally related marketing claims. By expanding the reach of the Green Guides, the FTC will be able to better protect consumers from false claims in the coming decades and provide an impetus for sweeping environmental changes. While these goals may seem lofty and out of reach for an administrative agency charged with so many other tasks, they can actually be achieved by simply reaching to the source of many environmental claims: corporations and other business entities. More and more corporations are touting themselves and their business practices as “environmentally friendly,” “socially responsible,” and “sustainable.” Therefore, since the Green Guides apply to all environmental marketing claims, [FN18] the FTC should use the *98 2008 revisions to expand the reach of the Guides to include and regulate corporate claims of environmental sustainability.

This comment will look at the FTC Green Guides, their structure, and the 2008 revision workshops. Furthermore, the comment will analyze: (1) the rise and prevalence of corporate claims of environmental sustainability; (2) possible changes to the Green Guides to address such claims and protect consumers; and (3) the benefits provided by such changes.

II. Background

A. The FTC's Regulation of Environmental Marketing Claims

1. General Overview

The FTC first began regulating environmental claims in the 1970s when it negotiated an industry-wide agreement on phosphate and degradability claims for detergents and brought cases challenging deceptive environmental advertising claims in a variety of other areas. [FN19] Then in the late 1980's, after a surge in environmental advertising claims, the FTC once again initiated several investigations resulting in consent orders whereby companies agreed to stop making “deceptive” claims and took other remedial actions. [FN20] Finally, in the early 1990's as a result of uncertainty by businesses and advertising agencies of what would be considered deceptive, and the various concerns of environmental groups and state enforcement agencies trying to prevent deceptive claims, the FTC issued the 1992 Guides for the Use of Environmental Marketing Claims. [FN21] The FTC's purpose when issuing the Guides was to ensure that marketers had the necessary tools available to ensure that any environmental claims they made were not deceptive and were adequately supported. [FN22] Furthermore, the FTC used the Green Guides to illustrate just what kind of evidence is required to support an environmental claim thereby encouraging genuine environmental *99 improvements, [FN23] especially since any and all environmental claims had to be substantiated.

While the Green Guides are not independently enforceable, they are enforced through Section 5 of the FTC Act. [FN24] Section 5 is very brief, only twenty-three words long, but it comprises the bulk of the FTC's law enforcement cases. [FN25] Section 5 states that “[u]nfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce are [. . .] unlawful.” [FN26] In relation to the Green Guides, the two most important phrases from Section 5 are “deceptive acts or practices” and “unfair acts or practices.” [FN27] Generally, the FTC's Deception Policy Statement holds an act or practice deceptive if it contains a presentation or an omission of information that would be material to consumers, would be important to con-

sumers' decision to buy or use the product, or would mislead consumers acting reasonably under the circumstances. [FN28] Similarly, under the FTC's Unfairness Policy Statement, an act or practice is held to be unfair if it is likely to cause a substantial consumer injury, either physical or economic, which is not reasonably avoidable by consumers. [FN29]

Generally, to avoid problems under Section 5 stemming from environmental claims, marketers need to remember four basic principles. First, the FTC looks at advertising claims from the viewpoint of a reasonable consumer, who does not have expertise in any technical fields. [FN30] Second, any claims, whether express or implied, must be substantiated. [FN31] Third, if a claim is only truthful under limited circumstances marketers must qualify that claim. [FN32] "Finally, if a disclosure is necessary to prevent an ad from being deceptive, it must be clear and conspicuous." [FN33] In order to help marketers comply with these principles, the FTC published an article entitled *Complying with the *100 Environmental Marketing Guides*, which provides various examples of deceptive and non-deceptive environmental marketing claims. [FN34] Additionally, in order to aid consumers in understanding the vast amount of environmental claims being thrown at them, and to help them decipher between appropriate and deceptive claims, the FTC published *Consumer Alert: Eco-Speak: A User's Guide to the Language of Recycling and FTC Facts for Consumers: Sorting Out "Green" Advertising Claims*. [FN35]

2. The Green Guides

The Green Guides are an administrative interpretation of the law illustrating how the FTC will apply Section 5 of the FTC Act to environmental advertising and marketing practices. [FN36] They are intended to promote voluntary compliance with the law, and conduct inconsistent with the position taken by the Guides may result in corrective action under Section 5 of the FTC Act. [FN37] The Guides are not themselves enforceable, nor do they preempt other regulations by federal agencies or state and local bodies. [FN38] Moreover, the guides apply to any environmental claim in all forms of marketing, whether express or implied. [FN39]

The Green Guides "are composed of general principles and specific guidance on the use of environmental claims." [FN40] Each principle is followed by examples addressing that specific "deception concern." [FN41] These examples are intended to provide marketers with a "safe harbor" so that they know how to qualify an environmental claim. [FN42] However, the examples are merely illustrative, not exhaustive, and as a result, *101 marketers should be wary about relying solely on the examples provided in the Guides. [FN43]

The Green Guides require that any express or implied environmental marketing claim must be made upon a reasonable basis consisting of competent and reliable evidence. [FN44] Such evidence consists of "tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so using procedures generally accepted in the profession to yield accurate and reliable results." [FN45]

There are four general principles that apply to all environmental marketing claims: (1) qualification and disclosures, (2) distinction between benefits of the product, package and service, (3) overstatement of environmental attributes, and (4) comparative claims. [FN46] Generally, in order to not be deceptive, any qualifications or disclosures must be sufficiently clear, prominent, and understandable. [FN47] In determining the clarity of qualifications or disclosures, the Commission looks at the language used, size of the type, proximity to the claim, and absence of contrary claims. [FN48] Similarly, the Commission looks to ensure the claim is presented in a way that makes clear whether the environmental attribute being claimed refers to the product, its packaging, a

service, or “to a portion or component of the product, package or service.” [FN49] This is to ensure that consumers know exactly what the claim is referring to. Generally, “all but minor, incidental components of a product or package” need to be qualified. [FN50] However, if the incidental component significantly limits the applicability of the environmental claim, then it too must be disclosed. [FN51] Moreover, environmental claims cannot be presented in a way that “overstates the environmental attribute or benefit, [either] expressly or by implication.” [FN52] Finally, environmental marketing claims making a comparative statement have to be presented in a way that makes the basis for comparison sufficiently clear in order to avoid *102 deceiving consumers. [FN53] Specifically, this requires that any and all claims be substantiated. [FN54]

All of the requirements previously mentioned, while generally applicable to any and all environmental marketing claims, seem to be intended to augment Section 260.7 of the Green Guides, which deals with specific environmental marketing claims. [FN55] Section 260.7 is the heart of the Green Guides; it provides guidance about the use of specific environmental marketing claims and provides detailed examples of claims that would be both acceptable and deceptive. [FN56] Generally, it is deceptive to misrepresent, either directly or indirectly, that a product, package, or service offers a general environmental benefit. Therefore, every environmental claim must be substantiated, and if it cannot be substantiated then it should be qualified or avoided altogether. [FN57] Section 260.7 of the Green Guides specifically addresses the use of some of the most common environmental marketing terms and provides guidelines for using these terms as well as practical examples of how to use or not use these terms. [FN58] The terms that are currently addressed in the Green Guides are: degradable/biodegradable/photodegradable, [FN59] compostable, [FN60] recyclable, [FN61] recycled content, [FN62] source reduction, [FN63] refillable, [FN64] and ozone safe and ozone friendly. [FN65] These guidelines cover everything from *103 the requirements to claim a product is recyclable [FN66] to claims of reduced package size or weight. [FN67]

With the Green Guides, the FTC has provided a broad interpretation of how Section 5 of the FTC Act will be applied to environmental claims. In doing so, the FTC has proffered both general guidelines, applicable to any environmental claim, [FN68] as well as specific guidelines and examples for the most commonly used and exploited environmental claims. [FN69] Together, the guidelines and examples included in the Green Guides provide marketers and advertisers with an invaluable tool to ensure that any environmentally related claims they make, or plan to make, are lawful. This ensures that consumers are protected and cannot be taken advantage of via highly technical, diluted, or blatantly false claims about the environment. This protection is more important now than ever, as the concerns over climate change, the environment, energy independence, and sustainability will undoubtedly affect purchasing decisions. Thus, marketers will be tempted to make even more claims of an environmentally friendly nature in order to reach more consumers and make more sales.

B. The Green Marketing Explosion

The environmental marketing boom began nearly two decades ago; spurred by an increased public concern over environmental issues from 1985-1990, corporations began to engage in “green marketing” [FN70] *104 activities. [FN71] Today, because of the enormous environmental problems facing society, consumers are more concerned with buying green than ever before, and corporations and marketers are taking notice. [FN72] Since this “boom,” more and more environmental claims are being made about the products consumers buy every day, as corporations realize that environmental advertising can provide a competitive advantage. [FN73] Therefore, the volume of green advertising has increased dramatically as more businesses are informing consumers of the pro-environmental aspects of their products and services, while new products are being positioned solely on the

basis of environmental appeal. [FN74] These actions prove that large segments of socially responsible consumers exist and the market for socially responsible products and services is widening. [FN75] Therefore, now more than ever, corporations are looking for a way to identify themselves or their products as “green” so that they may capitalize on this green movement and not lose customers or market share.

While the increase in green marketing claims can be attributed to consumer preferences and the increased environmental issues facing our society today, one can see that this movement had its roots in the 1990s when various consumer research initiatives publicized the size and importance of the green market in the United States. In 1991, a consumer survey found that 50% of consumers claimed they would switch to a “greener” brand, and that 20% of the U.S. population was composed of active green consumers who were willing to pay, on average, 7% more for a green product. [FN76] Another survey in 1996 illustrated that 35% of North American consumers believed that companies should take more proactive steps to improve environmental issues, which was a 29% increase since 1993. [FN77] Furthermore, many consumers are convinced that businesses should play a major role in confronting environmental issues, and consider environmental issues second only to crime in terms of what issues businesses needed to *105 improve on. [FN78] Yet another 1990 study found that 34% of respondents remembered an advertisement that discussed a brand's environmental safety. [FN79] Additionally, a 1990 study commissioned by S.C. Johnson & Son found that 26% of U.S. consumers claimed to read product labels on a regular basis to see if the contents were environmentally safe, and another 36% did so occasionally. [FN80] Moreover, one 1992 study found that 75% of respondents stated that environmental marketing claims often influenced their purchasing decisions. [FN81] These statistics illustrate the power that environmental marketing claims had when environmental issues were just coming to the forefront and when the Green Guides were first issued.

The “green” trends that first gained popularity in the early 1990s are continuing today. A 2007 study found that consumers expected to double their spending on green products and services in 2008 to an estimated \$500 billion. [FN82] Moreover, eight out of ten Americans believe that a company's environmental record is an important factor in deciding whether or not to buy its products. [FN83] As environmental issues have continued to increase in importance to society and concerns over sustainability have increased, corporations have taken notice, which has led to a boom in the number of environmental marketing claims. [FN84]

C. Corporate Social Responsibility and its Relation to Environmental Marketing Claims

The consumer buying process is a two-stage process in which the consumer makes a decision at two levels. [FN85] At the first level, a decision between different products is made, while at the second level, a decision is made between different producers or companies. [FN86] At the first level, consumers select the product, or products, which are able to meet their *106 needs or have the highest expected utility. [FN87] At the second level, however, consumers decide which companies to reward with their purchases. [FN88] At this stage consumers will often reward companies whose policies are consistent with those they themselves value, be they attractive marketing practices or environmentally friendly processes. [FN89] This illustrates that consumers will try to purchase from and reward corporations whose practices and values resemble their own. Therefore, since green products and green marketing tend to give the impression that a corporation is green, [FN90] consumers who see environmental marketing claims often perceive the corporation making the claims as being environmentally friendly. These environmental concerns influence consumer attitudes towards the corporation and ultimately affect the consumer's intent to purchase from a specific corporation. [FN91] This basic tenet of consumer behavior serves to illustrate why corporations strive to be considered green. Ultimately, one way for a corpora-

tion to differentiate itself from its competitors is to commit to socially responsible practices. [FN92]

Corporate Social Responsibility (CSR) refers to the obligations of a corporation to its stakeholders. [FN93] These obligations go beyond legal requirements and are intended to minimize any harm and maximize the long-run beneficial impact the firm has on society. [FN94] CSR implies that corporations should behave in ways that do not just maximize profits, but also benefit society. [FN95] CSR [FN96] has been around since the 1930s [FN97] but has recently gained traction with many more businesses in the last fifteen years. [FN98] This enormous growth can be shown by the fact that CSR *107 initiatives like “social investing” have grown to over \$2.1 trillion, and the fact that academic programs, at both the undergraduate and MBA levels, are being assessed on their ability to provide business students with sustainability education. [FN99] Finally, cause-related marketing should also be considered as evidence of both consumer interest in CSR and a corporate belief that CSR is a source of competitive advantage. [FN100] Most analysts suggest that the increased focus on CSR is a result of a change in society's expectations, in that businesses are now expected to take responsibility for, and proactively address, social inequalities and environmental degradation. [FN101] This consumer pressure is illustrated by a 1994 Walker Research and Analysis survey which found that 88% of consumers indicated that they were much, or somewhat, more likely to buy from a company that is socially responsible, and 92% said they would be much, or somewhat, less likely to buy from corporations that were not socially responsible. [FN102] Therefore, corporations are realizing that their customers and stakeholders expect them to act in a socially responsible manner [FN103] and are changing their policies accordingly.

As a result of this change, businesses are also expecting instrumental benefits to accrue from adopting CSR policies. [FN104] Moreover, as goods become commoditized and consumers become more environmentally conscious, companies are using CSR to differentiate themselves, gain preference among consumers, and achieve significant sales and profit gains. [FN105] In fact, many businesses have adopted CSR policies because doing so is perceived as a way to increase profits. [FN106] Furthermore, 79% of global CEOs, and 82% of U.S. executives agree that operating responsibly benefits a business's bottom line. [FN107] By adopting CSR strategies businesses can become more competitive and *108 thus more profitable. [FN108] Moreover, a 2001 study found that businesses with CSR strategies were able to perform better than their peers as evidenced by market indices during the same five year period. [FN109]

The environmental aspect of CSR practices have come to the forefront as the public consensus has taken the view that individuals and businesses have an ethical obligation to conserve and protect the environment. [FN110] This has led many businesses to shift from simply including environmental practices in their CSR policies to focusing on environmental sustainability. By doing so, businesses are attempting to illustrate that they are committed to going beyond their legal obligations and are holding themselves to higher standards of responsibility. Thus, as we move forward, we can expect to see more businesses and corporations use various types of environmental sustainability claims to try to gain an advantage in the marketplace.

D. Greenwashing, the Inevitable and Unwanted Consequence

In order to properly illustrate the importance of the FTC's Green Guides, one must also realize the importance they play in preventing “greenwashing.” One of the most prevalent problems resulting from the increase in green marketing claims is that consumers sometimes feel that an advertised product, or corporation, is not really green. [FN111] This gives rise to claims of greenwashing. Greenwashing is defined as insincere, phony efforts to make a corporation, or product, appear more environmentally friendly than it truly is. [FN112] Over the years,

as environmental marketing claims have become more prevalent so too have claims of greenwashing. [FN113] Greenwashing has become so prevalent that academics have come together and created a website devoted to *109 greenwashing [FN114] in order to help draw attention to this issue. This website acts as an interactive forum for consumers to evaluate advertisements according to criteria established by academics and read various articles on greenwashing. [FN115] Clearly, the fact that academics have come together to form a website discussing greenwashing claims shows how prevalent the problem is and underscores the need for a comprehensive revision of the Green Guides so that claims like these will no longer be made.

III. Fast Forward: The 2008 Revision of the Green Guides

A. Bull's-eye: Focal Points of the 2008 Revisions

As part of the regulatory review process, the FTC held three workshops in 2008 to discuss some of the major issues facing the Green Guides. These workshops also solicited input from the public and industries that would be affected by any decisions to expand their reach. The first workshop was held on January 8, 2008 and focused on the marketing of carbon offsets and RECs. [FN116] The second workshop was held on April 30, 2008 and focused on developments in green packaging claims. [FN117] Finally, the third workshop was held on July 15, 2008 and examined green claims about textiles, building products, and buildings. [FN118] The exact outcomes of these workshops are outside the scope of this comment; however, it is useful to pause briefly to identify the issues examined and why they were addressed.

The first workshop was designed to address the increase in marketing of carbon offsets and RECs. [FN119] These issues are of particular importance because the number of alternative energy suppliers marketing these credits and offsets continues to increase. [FN120] Moreover, the markets for these products are also increasing. [FN121] The second workshop addressed green claims in relation to product packaging, which are not *110 presently addressed by the Green Guides. [FN122] These terms include “sustainable” and “renewable,” as well as claims that a product's packaging is easily and continuously recyclable. [FN123] The FTC addressed these and other issues relating to green packaging claims and consumer protection because consumers are having a difficult time perceiving differences in these claims and determining if these claims are in fact true, due to the lack of substantiation by marketers. [FN124] Finally, the third workshop focused on green building and textiles because of a significant increase in the use of environmental claims in textiles, building products, and construction. [FN125] Once again, the focus of this workshop was to discuss consumers' understanding of these claims and substantiation of the claims by marketers. [FN126]

It is clear that the FTC is proactively trying to address some of the major issues in environmental marketing today. The FTC has held workshops on issues that have become more prevalent in recent years to ensure that consumers understand the claims that are being made and are adequately protected from deceptive advertisements. However, despite these efforts, there are still issues that need to be addressed, such as corporate claims of environmental sustainability, which many consumers do not fully understand. Therefore, such issues must also be considered by the FTC in order to properly revise the Green Guides.

B. Off Target: The FTC's Failure to Address Corporate Claims of Environmental Sustainability and Responsibility

While the FTC has taken a proactive approach by holding workshops to discuss the current state of environmental advertisements in terms of carbon offsets and RECs, packaging, and building and textiles, there is still a great deal of work to be done. The FTC has yet to address one of the most blatant forms of environmental advertising: corporate claims of environmental sustainability. In the following section, I will illustrate how and why the FTC should address these issues and incorporate them into the latest revisions of the Green Guides.

***111** 1. Corporate Claims of “Environmental Sustainability”

One of the most important type of claims that the FTC still needs to address are claims made by corporations that say the corporations are “socially responsible” or “environmentally sustainable.” While the Green Guides cannot cover the plethora of issues and procedures that corporations refer to when they claim to be engaged in Corporate Social Responsibility (CSR), [FN127] they can be used to regulate both expressed and implied claims of an environmental nature. Many corporations that practice CSR claim (either expressly or impliedly) to be engaging in various environmental initiatives to either lessen their impact on the environment or provide “green” products to consumers. [FN128] As noted earlier, given the current importance of environmental issues to consumers, [FN129] the environmental stance of a company has a significant effect on a consumer's desire to purchase that company's products. [FN130] This has led corporations to use claims of environmental sustainability as a type of competitive advantage, and corporations have started marketing to consumers on this basis. [FN131] This is having, arguably, the same results that environmental claims in the packaging, building, and textile fields are having. This means consumers do not know how to perceive these claims and often the corporations are not providing any form of substantiation for these claims.

While some may see the regulation of corporate claims of environmental sustainability as being outside the scope of the Green Guides and not worth the FTC's time, that is simply not the case. Given the limited data regarding the size of the market that green consumers *112 control [FN132] and how their purchasing decisions are often affected not just by what a product's label says, but also by their image of what the company is and what it stands for, [FN133] corporate claims of environmental sustainability are very much within the scope of the Green Guides and something the FTC must be concerned with. These claims, if false or unsubstantiated, affect both consumers and competitors. First, when consumers purchase a product, or even stock in a company, they are being deceived about the true impact that they, and the company, are having on the environment. In doing so, corporations are taking advantage of consumer beliefs to the detriment of both consumers and the environment. Furthermore, corporations making false and deceptive statements are gaining unfair advantages over their competition and are reaching new markets and consumers without actually expending the necessary funds to truly reduce their environmental impact. Essentially, these corporations are unjustly enriching themselves at the expense of consumers and honest competitors.

The effects caused by false and deceptive claims of environmental sustainability are not just occurring at the retail level. These claims are also having a direct effect on investors. Often individuals will invest in companies they are familiar with, which often have similar values as the investor themselves. [FN134] Conversely, some individuals will invest in a corporation based on performance, however, others chose to invest in corporations that are doing something positive for society. [FN135] In any case, corporations that claim to be engaging in environmental sustainability, and are not, are once again gaining an unfair advantage in the marketplace. In the first instance, socially conscious investors are not likely to invest in a corporation unless they know it is committed to a socially responsible policy, such as environmental sustainability. By claiming to be sustainable, corporations can attract more investors. Therefore, the demand for their stock increases, thus increasing the stock price, which results in a distinct financial advantage to these corporations. Also, by claiming to be engaged in environ-

mentally friendly practices and offering “green” products, corporations can increase sales by tapping the large market of “green” consumers that was noted earlier. [FN136] In doing so, a corporation's revenues rise, thus making *113 its stock seem more attractive, this results in an increased demand for its stock. Therefore, if the corporations are not truly engaged in “green” initiatives, or their initiatives do not have the actual impact they claim, the corporations are in essence supplying false information to the market in an effort to inflate their stock price. [FN137] Thus, under the language of SEC Rule 10b-5, these corporations are committing securities fraud. [FN138]

Clearly, given the abuse of environmental claims by corporations and marketers, the FTC must act to expand the scope of the Green Guides to cover corporate claims of environmental sustainability, including those being masked as part of a corporation's CSR initiatives. By expanding the scope of the Green Guides, the FTC can ensure that consumers will be able to tell a difference between corporations that are truly committed to bettering the environment and reducing their impact from those that are just trying to make more money. By encompassing corporate claims of environmental sustainability in the Green Guides the FTC can also help reduce the incidents of greenwashing and restore consumer confidence. Expanding the scope of the Green Guides in this way may seem like a daunting task, but it could be accomplished quite easily, without much effort or expenditure on the part of the FTC.

Ideally, the FTC could require corporations that claim to be environmentally friendly, or engaged in environmental sustainability, or similarly characterized environmental initiatives, to have their claims certified by independent, third party organizations. [FN139] For instance, there *114 are a number of private certification programs available that are industry specific [FN140] as well as a number of general environmental certification programs for products and corporations. [FN141] Nowadays, consumers are often being directed to the websites of these independent organizations in order to find products that are truly “green” [FN142] because the claims on a product's packaging can no longer be trusted. [FN143] Thus, independent certification would not only benefit consumers by ensuring that corporations are truly engaging in environmentally sustainable and friendly practices, but would also benefit corporations since the corporations would then be listed on the websites of these organizations and would essentially be gaining an additional advertising route. This allows the corporations to reach more consumers and publicize their commitment to environmental stewardship. This would also be particularly useful because it would allow certified corporations to directly reach those sought-after “green” consumers that frequent such sites. One of the major certifications available to corporations that wish to show such a commitment to environmental stewardship is the ISO 14000 certification. [FN144] This certification could go a long way in proving a commitment to environmental stewardship for a corporation wishing to leverage its sustainable practices into a competitive advantage. While requiring independent third party certifications for corporations wishing to make claims of environmental sustainability will impart costs on the *115 corporations, [FN145] the benefits provided would be far more substantial. First, it would reduce the number of false and deceptive messages being pushed on consumers, thus protecting them and restoring consumer confidence in both the marketplace and in advertisements. Second, it would actually provide an impetus for, and ensure that, corporations making these claims are actually engaging in practices and activities that positively affect the environment. Arguably, these long-lasting benefits would be more significant than the minimal costs imposed on the corporations to get certified. [FN146]

2. Changes in the Substantive Enforcement Provisions of the Green Guides

The FTC also cannot assume that by simply expanding the scope of the Green Guides to cover RECs, green packaging, building and textile claims, and, as proposed here, corporate claims of environmental sustainability,

that marketers and corporations will reduce the number of environmental advertisements used and alter their conduct. [FN147] Simply expanding the scope of the Green Guides will do nothing to curb these claims if they are not enforced. However, by expanding their scope the FTC would succeed in making its enforcement job that much harder. Therefore, the FTC should also consider asking Congress to either amend the FTC Act, or pass similar legislation, allowing, in certain limited circumstances such as this, concurrent jurisdiction to enforce Section 5 of the FTC Act as it relates to environmental claims. In this case, concurrent enforcement power would allow the Green Guides to be more strictly enforced, and would ensure that the FTC is not overburdened and can adequately focus on its other duties. While this seems like a daunting task, it could be done quite easily by simply *116 sharing enforcement power with states and the U.S. Securities and Exchange Commission (SEC). [FN148]

First, in order to provide more “manpower” in enforcing the Green Guides, the FTC should allow state Attorneys General to sue as “*parens patriae*,” similar to what is done under the antitrust laws. [FN149] This would allow state Attorneys General to bring suits against corporations that are not complying with the Guides; thus ensuring that there is a greater chance that deceptive environmental claims are stopped before consumers are exploited. In these instances, the state Attorneys General should be allowed to bring suits for both cease and desist orders as well as for fines in instances where the orders are not complied with, just like the FTC does now. [FN150] This enforcement scheme would also allow for geographically targeted enforcement. Under this structure, the state Attorneys General could effectively identify and stop false or deceptive environmental claims and advertisements that are being proffered by local and regional corporations and businesses, which may have been overlooked by the FTC since the FTC has national jurisdiction and often deals with the largest and most prevalent environmental marketing claims. This would ensure that all companies, regardless of size, were on the same “playing field” so to speak and that consumers would not be deceived and exploited by small local businesses and advertisements. Such a structure would also help lessen the burden placed on the FTC *117 without sacrificing its ability to adequately enforce the Green Guides and protect consumers.

Second, the SEC should also be given the power to bring suits under Section 5 of the FTC Act in instances where corporations claim to be engaging in environmentally friendly practices or environmental sustainability in their annual reports, prospectus, press releases, or other documentation provided to, or available to, investors. The SEC is in the best position to help enforce the Green Guides, since it regulates the securities markets and, clearly, environmental claims have an effect on stock price and investor decisions. [FN151] As noted earlier, when such statements have an effect on a corporation's stock price and are fraudulent or unsubstantiated, the corporations are committing securities fraud by providing investors with false information that materially affects the price of the corporation's stock. [FN152] Moreover, if the investors or consumers rely upon this information in making their decision regarding which corporation's stock to purchase, [FN153] such information is clearly material to these investors and, if false and unsubstantiated, would violate SEC Rule 10b-5. [FN154]

Theoretically, the SEC, and even individual investors, could sue any corporation making false or unsubstantiated claims under 10b-5 in a suit that is similar to a common law tort action for deceit and misrepresentation, [FN155] provided that the corporation has not truly engaged *118 in the environmentally friendly or sustainable practices that it claims, or has not carried out these practices to the extent they claim. The basic elements for such suits include: (1) a material misrepresentation, (2) scienter, i.e. a wrongful state of mind, (3) a connection to the purchase or sale of a security, (4) reliance on the misrepresentation, (5) economic loss, and (6) loss causation, i.e. a casual connection between the material misrepresentation and the loss. [FN156] Therefore, in instances where corporations make false environmental statements in an effort to reach “green” consumers and the market that they command, elements one and two would be met since they are intentionally misrepresenting

their position in order to reach these consumers. Once a “green” consumer or investor [FN157] purchases the company's stock because of the corporation's environmental policy, elements three and four are met. Thus, only elements five and six would need to be satisfied. Therefore, in instances where investors purchased a corporation's stock because of its environmental claims and it is later found that the corporation's claims were false and the stock price falls, those investors would have a claim. [FN158] However, the Supreme Court has explicitly stated that the simple inflation of stock price resulting from a material misstatement is not enough to justify a 10b-5 suit. [FN159] Thus, investors who simply purchase stock in a corporation they believe to be “green” would not, under the current law, be able to file suit if it was later found that the corporation was not “green” and there was no adverse effect on the stock price. Given the requirements imposed for a 10b-5 suit and their connection with false corporate claims of environmental sustainability, it is clear that the SEC should have concurrent enforcement power over the Green Guides. Also, by simply allowing this concurrent jurisdiction, it could provide redress for those investors who purchased stock in what they were led to believe was a “green” company, regardless of the economic effects, because this would now be considered an unfair and deceptive trade practice.

Allowing the SEC to also enforce the Green Guides would ensure that corporations do not make fraudulent or unsubstantiated claims of environmental sustainability in their annual reports, prospectus, press releases, or other documents provided to investors or potential investors. Instead, corporations wishing to reach socially conscious investors would *119 truly invest in, and engage in, environmentally sustainable practices and procedures which would have a positive, far reaching, effect on our environment and planet. Moreover, both investors and the corporations would be better protected. First, investors' confidence in the market would be restored, [FN160] and as a result investors would not be as wary or skeptical as they are now. Second, while corporations would be subject to SEC, or citizen, suits if they made material misstatements, this is not much different than it is today. What would be different is that SEC oversight would prevent these environmental misstatements, which would drastically cut down on the number of possible suits filed by investors who believe an environmental statement filed by a corporation was false and had an adverse effect on the stock price. Thus, the corporations would, over time, save a substantial amount of money, in terms of the potential litigation costs associated with these potential claims that would be saved.

While changing or expanding the enforcement procedures under Section 5 of the FTC Act would be substantially more difficult than simply reviewing and amending the Green Guides, it is necessary. By providing for concurrent jurisdiction over claims arising under the Green Guides Congress can ensure that the FTC's intent in promulgating the Guides, to protect consumers, is met without overburdening the FTC.

IV. Conclusion

The Green Guides, like the environmental marketing claims they regulate, have evolved over time. Now, as the FTC prepares to revise the Guides once again, it should take note of both explicit claims, such as product packaging and building claims, and implicit claims, such as claims of environmental sustainability and stewardship made by corporations in association with their CSR policies, which have begun to plague our society. In doing so, the FTC can adequately revise and expand the Green Guides to allow for the regulation of such claims in order to properly protect consumers. Therefore, the FTC should expand the coverage of the Green Guides and require substantiation and independent certification of corporate claims of environmental sustainability. In doing so, it would both protect and inform consumers while providing a much needed impetus for businesses and corporations to engage in practices which truly are beneficial to the environment. Moreover, by expanding

the enforcement provisions of the Green Guides, to include state Attorneys General and the SEC, it would allow for the identification and correction of more false and deceptive *120 marketing claims than would be possible if only the FTC were enforcing them. Furthermore, under this framework, it could all be done without straining the limited resources of a single agency like the FTC.

Given the rapid increase in environmental marketing claims and current socio-political atmosphere, it is safe to assume environmental marketing claims will continue to increase at a rapid rate. Aside from the fact that they are in vogue, corporations are beginning to see the economic benefits that can be achieved by pursuing various “green” advertising strategies. Therefore, the FTC should not be satisfied that only three workshops will give it the insight needed to adequately revise the Green Guides. Instead, the FTC should use this opportunity to completely overhaul the Green Guides so that consumers may be adequately protected from all forms of deceptive environmental advertising used by corporations and businesses today.

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[FN1]. See Federal Trade Commission Act § 5, 15 U.S.C. §45(a)(1) (2008) (stating “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”); see also Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(2) (2008) (stating “The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations [...] from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”).

[FN2]. Generally, the FTC can issue cease and desist orders requiring the unfair or deceptive trade practices to stop. See Federal Trade Commission Act § 5, 15 U.S.C. §45(b) (2008). Moreover, when these orders are disregarded the FTC can then pursue civil actions seeking injunctions and equitable relief, including fines of up to \$10,000 per violation. See Federal Trade Commission Act § 5, 15 U.S.C. § 45(l) (2008); see also Office of the General Counsel, 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](http://www.ftc.gov/ogc/brfovrw.shtm).

[FN3]. For purposes of this comment I will use the term corporations, but one should remember the Green Guides and any proposed revisions would also affect sole proprietorships and partnerships as well, as they too can make similar claims of environmental sustainability.

[FN4]. Federal Trade Commission, *Complying with the Environmental Marketing Guides 1* (2000), available at [http:// www.ftc.gov/bcp/edu/pubs/business/energy/bus42.pdf](http://www.ftc.gov/bcp/edu/pubs/business/energy/bus42.pdf).

[FN5]. *Id.*

[FN6]. See *Guides for the use of Environmental Marketing Claims*, 16 C.F.R. §§ 260.1-.8 (2008).

[FN7]. Federal Trade Commission, *supra* note 4 at 1.

[FN8]. *Id.* at 3.

[FN9]. *Id.*

[FN10]. *Id.* (emphasis in original).

[FN11]. Federal Trade Commission, Reporter Resources: The FTC's Green Guides P 2, available at <http://www.ftc.gov/opa/reporter/greengds.shtm>. See also Guides for the use of Environmental Marketing Claims, 16 C.F.R. §§ 260.4 (2008) (describing the review procedure).

[FN12]. Federal Trade Commission, *supra* note 11 at P 2.

[FN13]. Arnall Golden & Gregory, FTC Expands “Recyclable” and “Recycled” Definitions, 10 Ga. Envtl. Law Letter Issue 1, (July 1998).

[FN14]. Federal Trade Commission, *supra* note 11 at P 2.

[FN15]. *Id.* at P 3.

[FN16]. *Id.* at P 4. (stating “[w]orkshop participants discussed: 1) trends in packaging and the resulting environmental packaging claims; 2) whether consumer perception of the specific packaging terms currently covered by the Green Guides has changed over the past decade; 3) new green packaging terms not currently addressed in the Green Guides; 4) consumer perception of claims based on third-party certification; 5) the impact of scientific and technological changes, including the use of new packaging materials and their impact on the environment; 6) the current state of substantiation for green packaging claims; and 7) the need for new or updated FTC guidance in these areas.”).

[FN17]. *Id.* at P 5 (stating “[w]orkshop participants discussed, among other things, consumer perception of green claims about these products; substantiation for the claims; third party certifications or seals for green textiles, building products, or buildings; and the need for new or updated FTC guidance in this area.”).

[FN18]. See Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.2 (2008) (stating “[t]hese guides apply to environmental claims included in labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means, including marketing through digital or electronic means, such as the Internet or electronic mail. The guides apply to any claim about the environmental attributes of a product, package or service, in connection with the sale, offering for sale, or marketing of such product, package, or service for personal, family or household use, or for commercial, institutional or industrial use.”).

[FN19]. Roscoe B. Starek, III, Commissioner, Federal Trade Commission, The Federal Trade Commission's Green Guides: A Success Story, at the Alliance for Beverage Cartons and the Environment Symposium P 4 (Dec. 4, 1996), available at <http://www.ftc.gov/speeches/starek/egstarek.shtm>.

[FN20]. *Id.* at P 5.

[FN21]. *Id.* at PP 7-8.

[FN22]. *Id.* at P 10.

[FN23]. *Id.* at P 9.

[FN24]. See Federal Trade Commission, *supra* note 4 at 1.

[FN25]. Lesley Fair, Division of Consumer and Business Education, FTC, Introduction to Advertising Law at the Carbon Offsets & Renewable Energy Certificates Workshop 19-20 (Jan. 8, 2008), available at http://www.ftc.gov/bcp/workshops/carbonoffsets/transcript/intro_adlaw.pdf. Ms. Fair is an attorney in the Bureau of Consumer Protection working in the Division of Consumer and Business Education, and her statements do not necessarily reflect the official position of the Federal Trade Commission. *Id.* at 18.

[FN26]. Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (2008).

[FN27]. Fair, *supra* note 25 at 20.

[FN28]. See *id.* at 20-21; see also *In re Cliffdale Assocs.*, 103 FTC 110, 170 (1984) (appending FTC's deception policy statement).

[FN29]. Fair, *supra* note 25.

[FN30]. *Id.* at 22.

[FN31]. *Id.*

[FN32]. *Id.* at 23.

[FN33]. *Id.*

[FN34]. See generally Federal Trade Commission, *supra* note 4.

[FN35]. See Federal Trade Commission, Eco-Speak: A User's Guide to the Language of Recycling (1998), available at <http://www.ftc.gov/bcp/edu/pubsconsumer/alerts/alt049.pdf> (explaining recycling language and claims on product packaging); see also Federal Trade Commission, FTC Facts for Consumers: Sorting Out "Green" Advertising Claims (1999), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen02.pdf> (describing environmental marketing claims).

[FN36]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.1 (2008).

[FN37]. *Id.*

[FN38]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.2(b) (2008).

[FN39]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.2(a) (2008).

[FN40]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.3 (2008).

[FN41]. *Id.*

[FN42]. *Id.*

[FN43]. See *id.*

[FN44]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.5 (2008).

[FN45]. *Id.*

[FN46]. See Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.6 (2008).

[FN47]. *Id.*

[FN48]. *Id.*

[FN49]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.6(b) (2008).

[FN50]. *Id.*

[FN51]. *Id.*

[FN52]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.6(c) (2008).

[FN53]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.6(d) (2008).

[FN54]. *Id.*

[FN55]. See generally Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.7 (2008).

[FN56]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.7 (2008).

[FN57]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.7(a) (2008).

[FN58]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.7(b-h) (2008).

[FN59]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.7(b) (2008).

[FN60]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.7(c) (2008).

[FN61]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.7(d) (2008).

[FN62]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.7(e) (2008).

[FN63]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.7(f) (2008).

[FN64]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.7(g) (2008).

[FN65]. Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.7(h) (2008).

[FN66]. See *supra* note 61 (stating “A product or package should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the solid waste stream for reuse, or in the manufacture or assembly of another package or product through an established recycling program.”).

[FN67]. See *supra* note 63 (stating “It is deceptive to misrepresent, directly or by implication, that a product or

package has been reduced or is lower in weight, volume or toxicity. [Such] claims should be qualified to the extent necessary to avoid consumer deception....”).

[FN68]. See generally Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.6 (2008); see also Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.7(a) (2008).

[FN69]. See generally Guides for the use of Environmental Marketing Claims, 16 C.F.R. § 260.7(b-h) (2008).

[FN70]. “[T]he American Marketing Association defines green marketing as: ‘the marketing of products that are presumed to be environmentally safe [(retailing definition)], the development and marketing of products designed to minimize negative effects on the physical environment or to improve its quality [(social marketing definition)], and the efforts by organizations to produce, promote, package and reclaim products in a manner that is sensitive or responsive to ecological concerns.’” Worawan Yim Ongkrutraksa, Green Marketing and Advertising, in *The Debate Over Corporate Social Responsibility* 365, 366 (Steve May, George Cheney, and Juliet Roper eds., 2007).

[FN71]. Ongkrutraksa, *supra* note 70, at 365-66.

[FN72]. See *id.* at 365.

[FN73]. See *id.* at 366.

[FN74]. *Id.* at 368.

[FN75]. See N. Craig Smith, Changes in Corporate Practices in Response to Public Interest Advocacy and Actions: The Role of Consumer Boycotts and Socially Responsible Consumption in Promoting Corporate Social Responsibility, in *Handbook of Marketing and Society* 140, 151 (Paul N. Bloom & Gregory T. Gundlach eds. 2001).

[FN76]. Ongkrutraksa, *supra* note 70, at 367. See also Robert N. Mayer, Linda A. Lewis, & Debra L. Scammon, The Effectiveness of Environmental Marketing Claims: The Roles of Consumers, Competitors, and Policy Makers, in *Handbook of Marketing and Society* 399, 401 (Paul N. Bloom & Gregory T. Gundlach eds. 2001).

[FN77]. Ongkrutraksa, *supra* note 70, at 365.

[FN78]. *Id.* at 365.

[FN79]. Mayer et al., *supra* note 76, at 410.

[FN80]. *Id.*

[FN81]. *Id.* at 411.

[FN82]. Penn, Schoen & Berland Associates, Press Release: Consumers will Double Spending on Green, (Sept. 27, 2007) available at [http:// www.psbresearch.com/press_media_sept28-2007.htm](http://www.psbresearch.com/press_media_sept28-2007.htm).

[FN83]. Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Opening Remarks: Carbon Offset Workshop 1 (Jan. 8, 2008) available at [http:// www.ftc.gov/speeches/majoras/080108carbonow.pdf](http://www.ftc.gov/speeches/majoras/080108carbonow.pdf) (quoting Patrick O'Driscoll and Elizabeth Weise, “Green Living Takes Root, But Habits Die Hard,” USA Today, Apr. 19, 2007,

at A1).

[FN84]. See Ongkrutraksa, *supra* note 70, at 365-66.

[FN85]. Heiner Imkamp, *Do Better Companies Provide Better Products?*, in *Consumers, Policy and the Environment: A Tribute to Folke Ölander* 217, 229 (Klausa G. Grunert & John Thógerson eds., 2005).

[FN86]. *Id.* (emphasis omitted).

[FN87]. *Id.*

[FN88]. *Id.*

[FN89]. See *id.*

[FN90]. Ongkrutraksa, *supra* note 70, at 371.

[FN91]. See *id.*

[FN92]. Corporations engaged in such practices are considered to be engaging in Corporate Social Responsibility.

[FN93]. Smith, *supra* note 75, at 142. Stakeholders are defined as those individuals affected by corporate policies and practices. *Id.*

[FN94]. *Id.*

[FN95]. S. Tamer Cavusgil, Gary Knight & John R. Riesenberger, *Int'l Bus.: Strategy, Mgmt. and the New Realities* 181 (2008).

[FN96]. For purposes of this comment CSR and sustainability will be used interchangeably since “[t]oday, many of the CSR and sustainability business associations and organizing bodies make little effort to distinguish [between] CSR and sustainable business.” Theodore E. Zorn & Eva Collins, *Is Sustainability Sustainable?: Corporate Social Responsibility, Sustainable Business, and Management Fashion*, in *The Debate Over Corporate Social Responsibility* 405, 407 (Steve May, George Cheney, and Juliet Roper eds., 2007).

[FN97]. *Id.* at 406.

[FN98]. *Id.* During the past few decades the idea of CSR has been legitimized and has moved beyond just “simply defining responsibility as upholding the law.” Michael Stohl, Cynthia Stohl, & Kikki C. Townsley, *A New Generation of Global Corporate Social Responsibility*, in *The Debate Over Corporate Social Responsibility* 30, 42 (Steve May, George Cheney, and Juliet Roper eds., 2007).

[FN99]. Zorn et al., *supra* note 96, at 408. Further proof of this growth is the fact that “CSR has become big business, including executive programs in CSR, business school chairs in CSR, professional CSR organizations,... [and] [c]onstituencies [which] have sprung up to advise companies on how to do CSR and how to let it be known that they are doing it. Most multinationals now have a senior executive explicitly charged with developing and coordinating the CSR function.” Stohl et al., *supra* note 98, at 37.

[FN100]. Smith, *supra* note 75, at 153.

[FN101]. Zorn et al., *supra* note 96, at 407.

[FN102]. Smith, *supra* note 75, at 155.

[FN103]. Cavusgil et al., *supra* note 95, at 539.

[FN104]. Zorn et al., *supra* note 96, at 407.

[FN105]. Philip Kotler & Kevin Lane Keller, *Marketing Management* 27 (13th ed. 2008).

[FN106]. Zorn et al., *supra* note 96, at 407.

[FN107]. *Id.* at 407-08.

[FN108]. Malcolm McIntosh, *Progressing from Corporate Social Responsibility to Brand Integrity*, in *The Debate Over Corporate Social Responsibility* 45, 47 (Steve May, George Cheney, and Juliet Roper eds., 2007).

[FN109]. *Id.* (citing a study published by Michael King in the *Journal of Corporate Citizenship* in 2001).

[FN110]. Matthew W. Seeger & Steven J. Hipfel, *Legal Versus Ethical Arguments: Contexts for Corporate Social Responsibility*, in *The Debate Over Corporate Social Responsibility* 155, 161 (Steve May, George Cheney, and Juliet Roper eds., 2007).

[FN111]. Kotler et al., *supra* note 105, at 83.

[FN112]. *Id.* at 636.

[FN113]. See Susan Salisbury, *Some Products' "Green" Claims Misleading, False*, *Palm Beach Post*, Nov. 3, 2008, available at http://www.palmbeachpost.com/business/content/business/epaper/2008/11/03/a9f_greenwashing_1103.html. Products claiming to be "green" seem to be everywhere. *Id.* But, along with the rise in the number of "green" claims has come an increase in "greenwashing." *Id.* A 2007 Terra Choice Environmental Marketing, Inc. survey of 1,018 consumer products found 1,753 environmental marketing claims, and all but one of the claims were either false or misleading. *Id.*

[FN114]. See *The EnviroMedia Greenwashing Index*, <http://www.greenwashingindex.com> (last visited Nov. 20, 2008).

[FN115]. *Id.*

[FN116]. Federal Trade Commission, *supra* note 11, at P 3.

[FN117]. Federal Trade Commission, *supra* note 16.

[FN118]. Federal Trade Commission, *supra* note 17.

[FN119]. Federal Trade Commission, *supra* note 11, at P 3.

[FN120]. See generally *Transcript of Session 1: Market Overview--Current Practices for Carbon Offsets and*

RECs, available at [http:// www.ftc.gov/bcp/workshops/carbonoffsets/transcript/session1.pdf](http://www.ftc.gov/bcp/workshops/carbonoffsets/transcript/session1.pdf).

[FN121]. Id.

[FN122]. Federal Trade Commission, Announcement of Public Workshop: The Green Guides and Packaging 7, available at [http:// www.ftc.gov/os/2008/02/P084200emarketing.pdf](http://www.ftc.gov/os/2008/02/P084200emarketing.pdf).

[FN123]. See id.

[FN124]. See id.

[FN125]. Federal Trade Commission, Announcement of Public Workshop: Green Building and Textiles 7, available at [http:// www.ftc.gov/os/2008/06/P084203ggfrn.pdf](http://www.ftc.gov/os/2008/06/P084203ggfrn.pdf).

[FN126]. Id. at 8.

[FN127]. For example, human rights initiatives, community service projects, and employee welfare; which are all accepted practices and aspects of CSR, would be outside the scope of the Green Guides. Therefore, when the term CSR is used in this comment it is used to specifically refer to corporate claims of environmental sustainability and those environmentally related aspects of a corporation's CSR initiatives.

[FN128]. See generally Wal-Mart, 2008 Annual Report (2008) available at <http://walmartstores.com/download/2713.pdf> (claiming they are more environmentally responsible because of their “Sustainability 360” approach among other things); see also Samsung Elecs. Corp., 2007 Annual Report (2007), available at http://www.samsung.com/us/aboutsamsung/ir/financialinformation/annualreport/downloads/2007/00_SEC_07AR_E_Full.pdf (describing the environmentally friendly nature of their products, and environmental initiatives); Samsung Elecs. Corp., 2008 Sustainability Report (2007), available at http://www.samsung.com/us/aboutsamsung/citizenship/download/2008_SustainabilityReport_Eng.pdf (speaking solely to their sustainability efforts including various environmental claims).

[FN129]. Majoras, *supra* note 83.

[FN130]. Imkamp, *supra* note 85.

[FN131]. Ongkrutraksa, *supra* note 70, at 366.

[FN132]. Penn, Schoen & Berland Associates, *supra* note 82 (estimating spending in 2008 on green products and services to be \$500 billion).

[FN133]. See Ongkrutraksa, *supra* note 70, at 371.

[FN134]. See generally Zorn et al., *supra* note 96 (in this case rewarding the corporations by purchasing their stock).

[FN135]. See generally Zorn et al., *supra* note 99 (referencing the growth of “social investing”).

[FN136]. Penn, Schoen & Berland Associates, *supra* note 82 (estimating spending in 2008 on green products and services to be \$500 billion).

[FN137]. This is similar to, although less severe than, what was done by Enron, WorldCom, and AIG. While those cases involved blatant securities fraud, and illegal dealings, the basic premise is the same. That is, corporations claim to have done, or be doing, something in their annual reports and press releases; when, in reality, they are not truly doing anything or they are not doing it to the extent that they claim. This ultimately results in an increase in their stock price, to the corporations benefit and ultimately to detriment of shareholders.

[FN138]. SEC Rule 10b-5 says it is unlawful to: (a) employ any device, scheme, or artifice to defraud, (b) make any untrue statement of material fact or (c) engage in any act, practice, or course of business which would operate fraud or deceit upon a person. SEC Rule 10b-5, [17 C.F.R. § 240.10b-5 \(2008\)](#). Arguably, by misstating their CSR and environmental efforts public corporations could be violating sections a-c, since these misstatements have a material effect their stock price because of the environmental focus of our society today. See generally Zorn et al., *supra* note 134.

[FN139]. Requiring third party certification under the Green Guides is not a novel idea; it has been advocated before, most recently by a student from the University of Chicago School of Law. See Jennifer Woods, Student Article, [Of Selling the Environment--Buyer Beware? An Evaluation of the Proposed F.T.C. Green Guides Revisions](#), *21 Loy. Consumer L. Rev.* 75, 91-94 (2008) (suggesting Eco-labeling be embraced). While I agree with this principle I would suggest that we go one step further and not just require the certification of individual products, but require certification of both processes and companies that wish to make corporate claims of environmental sustainability. I believe such requirements would result in even greater environmental benefits than the certification of individual products alone.

[FN140]. One example of an industry specific environmental certification would be the Forest Stewardship Council Certification. This certifies forests for proper forest management techniques and tracking of forest products back to their original source. Forest Stewardship Council: What is "certification?," http://www.fscus.org/faqs/what_is_certification.php (last visited Dec. 30, 2008).

[FN141]. Two examples of general industry certification programs would be the EcoLogo and Green Seal programs which certify a variety of products in a number of different industries. See EcoLogo, <http://www.ecologo.org/en/> (last visited Dec. 30, 2008); see also Green Seal, <http://www.greenseal.org/> (last visited Dec. 30, 2008).

[FN142]. See Salisbury, *supra* note 113 (advising consumers look for products certified by qualified independent third parties such as EcoLogo or Green Seal). See also Robert Bieselin, Sometimes, 'Green' Doesn't Mean a Thing, *San Jose Mercury News*, Nov. 8, 2008, 2008 WLNR 21498391 (suggesting consumers use trusted organizations like the Global Ecolabeling Network or Green Seal to identify "green" items).

[FN143]. See *id.* For example a 2007 survey of 1,018 consumer products found some egregious violations such as: "[a] dishwasher detergent boast[ing] '100 percent recycled paper' packaging, and yet the container is plastic [and] [a] caulking product claim[ing] to be 'Energy Star' certified, but Energy Star doesn't certify such products." *Id.*

[FN144]. See International Organization for Standardization: ISO 14000 Essentials, http://www.iso.org/iso/iso_catalogue/management_standards/iso_9000_iso_14000/iso_14000_essentials.htm (last visited Dec. 30, 2008) (describing ISO 14000 as providing for generic guidelines for environmental management programs); see also Paula C. Murray, [Inching toward Environmental Regulatory Reform--ISO 14000: Much Ado about Nothing or a Reinvention Tool](#), *37 Am. Bus. L.J.* 35 (1999) (analyzing ISO 14000 and its role in environ-

mental law).

[FN145]. However, these costs are quite minimal given the revenue that corporations earn annually. For example, to have a product certified by EcoLogo the initial audits usually cost between \$1,500-\$5,000, with subsequent certifications for additional products usually costing between \$250-\$2,000. See EcoLogo: EcoLogo Program Certification Process, [http:// www.ecologo.org/en/certified/cost/](http://www.ecologo.org/en/certified/cost/) (last visited Jan. 5, 2009).

[FN146]. See supra note 145 (illustrating how relatively inexpensive this would be).

[FN147]. This also brings up another interesting fact which, again, is outside the scope of this comment, but is worth mentioning briefly, and that is the extremely lax penalties provided for by Section 5 of the FTC Act. See generally Federal Trade Commission Act §5, 15 U.S.C. § 45 (2008). Given the vast amount of corporate wealth, and inflation over the years, the penalties provided for by the FTC Act are no longer sufficient to deter such conduct. Thus, I would argue Congress needs to re-examine and modernize the FTC Act so as to raise the amount of fines in order for the Act to effectively serve its purpose and deter such conduct.

[FN148]. It has also been suggested that the EPA should have concurrent enforcement power over the Green Guides. See Woods, supra note 139 at 89-91 (suggesting the FTC and EPA act in concert to create a comprehensive environmental regulatory system); see also Lauren C. Avallone, Comment, *Green Marketing: The Urgent Need for Federal Regulation*, 14 Penn St. Envtl. L. Rev. 685, 692-700 (2006) (suggesting the EPA is best equipped and should take the lead role in promulgating and enforcing environmental regulations like the Green Guides, and also suggesting that the states should be able to enforce the Green Guides). While the EPA could be a great asset in enforcing the Green Guides, it is not the best solution to curb corporate claims of environmental sustainability. I believe the SEC is in fact the best agency to share enforcement power over the Green Guides with the FTC. This is because the SEC can go directly to the source of environmental claims, corporations, and regulate them at the most fundamental level. That is, since corporations are often making such claims to increase their revenue and thus raise stock price, by having the SEC enforce the Guides they can stop these claims before they start, since corporations would be more wary of making unsubstantiated claims. Moreover, by adding yet another set of environmental regulations that need to be enforced to the EPA's plate would, quite possibly, overburden this agency given all of the other duties they have. Furthermore, while I tend to agree with Ms. Avallone that the states should share enforcement powers with the FTC, I think this idea should be expanded upon. Ideally, state Attorneys General should be allowed to bring suits as *parens patriae* as discussed earlier. In my opinion, it is best to give concurrent enforcement power over the Green Guides to the SEC and state Attorneys General since they would be able to better protect consumers and restore consumer confidence in the marketplace than an agency like the EPA could.

[FN149]. Clayton Act § 4, 15 U.S.C. § 15c (2008).

[FN150]. See supra note 2.

[FN151]. See generally Imkamp, supra note 85 (suggesting consumers reward corporations with similar values by purchasing from them); Zorn et al., supra note 99 (referencing the growth of “social investing”).

[FN152]. See generally *In re Sonus Networks, Inc. Sec. Litig.*, 2006 U.S. Dist. LEXIS 28272 (Mass. Dist. Ct. 2006) (Defendant's motion to dismiss was not granted for 10b-5 claims where Plaintiff alleged Defendant deceived the investing public through use of materially false and misleading statements which artificially inflated the company's stock price); see also *In re LDK Solar Sec. Litig.*, 584 F. Supp. 2d 1230 (N.D. Cal. 2008)

(Defendant's motion to dismiss denied because company knowingly released a prospectus which contained a material overstatement prior to an initial public offering and subsequently once the irregularities were noticed the stock price plummeted to the detriment of investors who relied upon the prospectus).

[FN153]. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005) (referencing *Basic, Inc. v. Levinson*, 485 U.S. 224, 248-49 (1988) (nonconclusively presuming the price of a publicly traded stock reflects a material misrepresentation and that investors have relied upon that misrepresentation as long as they would not have bought the [stock] in its absence)); see also *In re Van Der Moolen Holding N.V. Sec. Litig.*, 405 F. Supp. 2d 388, 402 (S.D.N.Y. 2005) (stating Defendant knew, or should have known, that the investing public would rely upon certain misstatements in their prospectus and press releases; therefore, Plaintiff's claims should not be dismissed). Moreover, these misrepresentations do not need to be directly communicated to investors by the company. *Id.* (citing *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998)); see generally supra note 151.

[FN154]. See SEC Rule 10b-5, 17 C.F.R. §240.10b-5 (2008).

[FN155]. *Dura Pharms.*, 544 U.S. at 341.

[FN156]. *Id.* at 341-42.

[FN157]. See generally supra note 151.

[FN158]. See *Dura Pharms.*, 544 U.S. at 342-47.

[FN159]. *Id.* at 342 (stating the Ninth Circuit's theory of an inflated stock price at the time of purchase is not sufficient because logically at the moment the transaction takes place the investor has suffered no loss, instead the inflated purchase price is offset at that moment because the purchased shares actually have an equivalent value).

[FN160]. *Dura Pharms.*, 544 U.S. at 345 (stating securities statutes seek to maintain public confidence in the marketplace).

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