

Green Guide Gaps: Expanding FTC Authority over Low-Carbon Marketing Claims

Perrin Cooke*

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* J.D. Candidate, Columbia Law School, Class of 2014. The author would like to thank Professor Michael Gerrard for his guidance and thoughtful insight, as well as the *Journal* staff for their hard work to prepare this Note for publication.

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INTRODUCTION

Too often, environmentalists view American consumerism and corporate advertising as damaging forces necessarily at odds with conservation and sustainability.¹

With this in mind, many environmental activists have emphasized the basic rejection of consumerism as an essential step towards

1. See, e.g., Bradley A. Harsch, *Consumerism and Environmental Policy: Moving Past Consumer Culture*, 26 *ECOLOGY L.Q.* 543, 566 (1999) (“[A]dvertising too often detrimentally affects culture and creates unnecessary environmental harm. . . . [I]t deceives young and old alike into purchases that are inappropriate, unnecessary, or wasteful, feeding the frenzy of consumption that is responsible for civilization’s overshooting present carrying capacity.”) (internal quotation omitted).

sustainable consumption.² Importantly, however, this over-broad dichotomy often ignores the potentially powerful role that consumer culture can play in achieving environmental objectives. In fact, the early environmental movement also heralded an important shift in American consumerism. Just as leaders in Washington began to recognize growing public interest in the environment, companies across the nation sought to capitalize on consumers' newfound environmentalism.³ Since that time, environmental marketing has continued to draw on consumers' interest in sustainability and is today a familiar element of the American marketplace.

Unfortunately, vindicating concerns expressed by many environmental commentators, many companies have found it cheaper to exaggerate the environmental benefits of their products or obfuscate their environmental harms than to improve the environmental performance of their products. The Federal Trade Commission ("FTC" or "the Commission") has responded to exaggerated environmental performance claims by invoking its authority under § 5 of the Federal Trade Commission Act ("FTC Act" or "the Act")⁴ to pursue misleading or deceptive advertising. Unfortunately, the FTC's efforts in this field have not proven particularly successful. This Note examines the most recent development in this ongoing effort: the Commission's 2012 *Guides for the Use of Environmental Marketing Claims* ("2012 Green Guides").⁵ The 2012 *Green Guides* represent the FTC's first attempt to address claims related to two particularly important categories of environmental products: renewable energy and carbon offsets. This Note analyzes the new *Guides* for these products.

Part I provides a brief history of environmental marketing, connects such marketing to broader environmental goals, and

2. See, e.g., Erik Assadourian, *The Rise and Fall of Consumer Cultures*, in 2010 STATE OF THE WORLD: TRANSFORMING CULTURES, FROM CONSUMERISM TO SUSTAINABILITY 3 (2010), available at <http://blogs.worldwatch.org/transformingcultures/wp-content/uploads/2013/08/SOW10-final5.pdf> (advocating a cultural transformation that "would reject consumerism . . . as taboo and establish in its place a new cultural framework centered on sustainability.").

3. *Greenwashing: History*, GREENPEACE, <http://www.stopgreenwash.org/history> (last visited Jan. 20, 2014) (Environmental marketing "took root in the 1970s when the growth of the environmental movement brought awareness of ecological damage to the general public.").

4. 15 U.S.C. § 45 (2012).

5. *Guides for the Use of Environmental Marketing Claims*, 77 Fed. Reg. 62,122 (Oct. 11, 2012) [hereinafter "2012 Green Guides"].

discusses the causes and effects of “greenwashing,” the term for advertising that misstates the environmental attributes of products. Part II outlines state and federal efforts to combat deceptive environmental marketing, emphasizing the *Green Guides*. Part III analyzes the Commission’s first-ever guidance for renewable energy and carbon offset claims. Finally, Part IV identifies and discusses unresolved issues in the 2012 *Green Guides*’ treatment of these claims. Chief among these issues is the FTC’s reliance on consumer perceptions to identify deceptive environmental claims.

This Note concludes by arguing that the FTC should expand its basis for evaluating future renewable energy and carbon offset claims to rely more freely on its subjective analysis of the content of these claims. Should the Commission fail to do so, environmental and consumer advocates must work to ensure that consumers are better informed and equipped to evaluate marketers’ renewable energy and carbon offsets.

I. ENVIRONMENTAL MARKETING AND GREENWASHING

A. Environmental Marketing—Past to Present

Though often characterized as a novelty,⁶ environmental marketing—a marketing strategy that highlights the environmental attributes of a product or service—emerged in the early 1970s at the dawn of the environmental movement.⁷ Although the prevalence of environmental marketing has ebbed and flowed since that time, consumers continue to express a strong interest in the environmental attributes of the products they purchase.⁸

After an initial wave of interest in the early 1970s, environmental marketing experienced a marked decline late in the decade, which continued into the early 1980s.⁹ Although marketers renewed their

6. Courtney R. Szocs, *Green Marketing: Analysis and Classification*, 15 CHARM PROCEEDINGS 254, 254 (2011), available at <http://faculty.quinnipiac.edu/charm/CHARM%20proceedings/CHARM%20article%20archive%20pdf%20format/Volume%2015%202011/Green%20Marketing.pdf> (describing recent increased academic interest in environmental marketing).

7. DEBORAH BAKER BRANNAN ET AL., MADE WITH RENEWABLE ENERGY: HOW AND WHY COMPANIES ARE LABELING CONSUMER PRODUCTS 1 (2012), available at <http://www.nrel.gov/docs/fy12osti/53764.pdf> (National Renewable Energy Laboratory report summarizing expansion of environmental marketing and providing qualitative analysis of “made with renewable energy” claims).

8. See *infra* notes 9–11 and accompanying text.

9. Szocs, *supra* note 6, at 255.

interest in environmental claims during the early 1990s, they largely abandoned the strategy because “environmental claims in advertisements . . . were often met with criticism from competitors and consumer organizations, as well as regulatory resistance and sometimes even legal action.”¹⁰ Most recently, following another resurgence in the early 2000s, interest in environmental marketing and environmentally conscious products again waned during the Great Recession.¹¹

These peaks and valleys notwithstanding, consumers continue to express an interest in environmentally beneficial products, with studies indicating that many consumers are willing to pay a premium for such products. When surveyed, more than 70% of American consumers report that they at least “sometimes” consider the environmental impacts of the products they purchase.¹² Moreover, consumers report that they respond positively to claims regarding products’ environmental benefits. Taking just one example, in June 2011, Vestas—a major integrated wind energy company—commissioned a study of 31,000 consumers in twenty-six internationally significant markets.¹³ Fifty percent of respondents reported that they would pay extra for products manufactured using renewable energy.¹⁴ Similarly, according to a 2007 global consumer survey conducted by a prominent consulting firm, nearly two-thirds of respondents reported that they would be willing to pay an average premium of 11% for products and services that

10. Emma Rex & Henrikke Baumann, *Beyond Ecolabels: What Green Marketing Can Learn from Conventional Marketing*, 15 J. CLEANER PRODUCTION 567, 569 (2007) (footnotes omitted), available at http://publications.lib.chalmers.se/records/fulltext/local_24441.pdf (utilizing marketing analysis to assess environmental product labeling and identify alternate strategies to promote green products).

11. Stephanie Clifford & Andrew Martin, *As Consumers Cut Spending, ‘Green’ Products Lose Allure*, N.Y. TIMES, Apr. 21, 2011, http://www.nytimes.com/2011/04/22/business/energy-environment/22green.html?_r=0 (describing declining market share of green products reflecting consumers’ greater emphasis on cost following the 2008 recession).

12. CONE COMM’NS, CONSUMERS TAKE RESPONSIBILITY FOR “GREEN” ACTIONS BUT AREN’T FOLLOWING THROUGH, ACCORDING TO LATEST CONE COMMUNICATIONS RESEARCH 3 (2013), available at http://www.conecomm.com/stuff/contentmgr/files/0/a70891b83b6f1056074156e8b4646f42/files/2013_cone_communications_green_gap_trend_tracker_press_release_and_fact_sheet.pdf. Cone Communications is a public relations and marketing agency that has released an annual survey of consumer environmentalism since 2008.

13. VESTAS, GLOBAL CONSUMER WIND STUDY 2011 4 (2d ed. 2011), available at http://www.vestas.com/Files/Filer/EN/Press_releases/BloombergVestas_june_2011/Global_Consumer_Wind_Study_2011.pdf.

14. *Id.*

produce lower greenhouse gas emissions.¹⁵ According to a separate review of ninety-one consumer preference studies, the Network for Business Sustainability has estimated that consumers will pay an average premium of about 10% for products offering environmental benefits.¹⁶ This continued interest notwithstanding, some recent studies have suggested that consumers are becoming more skeptical of environmental marketing claims and less willing to pay a premium for more environmentally friendly products.¹⁷

B. Opportunities for Marketers and Environmentalists

Environmental marketing presents significant opportunities for both businesses and environmentalists. For example, companies that rely on renewable energy to power their operations can engage in environmental marketing to communicate their values to their customers.¹⁸ Marketers in the business-to-consumer sector also cited product differentiation as an important goal of environmental marketing, indicating a desire to appeal to environmentally conscious consumers.¹⁹

Accurate environmental marketing can also support the broader environmental movement. For example, marketers' emphasis on their use of renewable energy to manufacture consumer products fosters greater public awareness and interest in renewable energy.²⁰ Corporate efforts to promote the use of renewable energy help to educate consumers about the benefits of renewable energy and demonstrate the viability of renewable energy for large-scale

15. *Consumers Worldwide Would Switch to Energy Providers That Help Reduce Greenhouse Gas Emissions, Accenture Study Finds*, ACCENTURE (Oct. 17, 2007), http://newsroom.accenture.com/article_display.cfm?article_id=4601.

16. NETWORK FOR BUS. SUSTAINABILITY, *SOCIALLY CONSCIOUS CONSUMERISM 1* (2011), <http://www.nbs.net/wp-content/uploads/NBS-Consumerism-Primer1.pdf>.

17. Jack Neff, *As More Marketers Go Green, Fewer Consumers Willing to Pay For It*, ADVERTISING AGE, Sept. 24, 2012, available at <http://adage.com/article/news/marketers-green-fewer-consumers-pay/237377/> (describing a September 2012 study conducted by a leading marketing research organization).

18. BRANNAN ET AL., *supra* note 7, at 15 ("The primary motivation for developing products made with renewable energy is to directly and effectively communicate to the consumer about the company's commitment to renewable energy and, in doing so, enhance the image of the brand.").

19. *Id.* at 16. However, despite consumer survey data suggesting that products offering environmental advantages command a price premium, none of the marketers surveyed reported that products marketed as "made with renewable energy" earned such a premium. *Id.* at 17.

20. *Id.* at 3.

electricity generation.²¹ Likewise, consumer awareness of marketers' voluntary efforts to reduce their carbon emissions serves to educate the public on climate change, generally increasing the prospects for the implementation of effective climate change mitigation policies.²²

C. The "Seven Sins" of Greenwashing

As marketers have sought to capitalize on environmentalism, consumers have grown increasingly skeptical of environmental claims.²³ Commentators have argued that growing consumer skepticism regarding environmental claims is primarily due to marketers "over-hyping green products and making overly aggressive claims."²⁴ When marketers make unsubstantiated environmental claims, consumer advocates often accuse them of "greenwashing." Described as "whitewashing, but with a green brush,"²⁵ greenwashing is defined broadly as "the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service."²⁶

Greenwashing takes many forms, ranging from outright misrepresentation of a purported environmental benefit to more subtle claims that mislead consumers. Since 2007, TerraChoice, an environmental marketing and consulting firm, has compiled a series of reports designed to identify and track greenwashing in the

21. *Id.*

22. Mark C. Trexler & Laura H. Kosloff, *Selling Carbon Neutrality*, ENVTL. F., Mar./Apr. 2006, at 34, 37; *see also* MARK C. TREXLER ET AL., GOING CARBON NEUTRAL: HOW THE RETAIL CARBON OFFSETS MARKET CAN FURTHER GLOBAL WARMING MITIGATION GOALS 2 (2006), available at http://www.ecosystemmarketplace.com/media/pdf/em_going_carbon_neutral.pdf (arguing that "a better-educated public can influence long-term climate change policy at the national and international levels... [and] a modestly sized retail offsets market could... leverage larger policy outcomes."); Dhavan V. Shah et. al., *Political Consumerism: How Communication and Consumption Orientations Drive "Lifestyle Politics"*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 217, 221 (2007) ("[S]izeable body of research in the fields of political science, sociology, psychology, and marketing provides evidence of a direct association between environmental concern and environmentally friendly behavior...").

23. Neff, *supra* note 17.

24. *Id.*

25. *About Greenwashing*, GREENWASHING INDEX, <http://www.greenwashingindex.com/about-greenwashing/> (last visited Jan. 20, 2014).

26. UL LLC, THE SINS OF GREENWASHING: HOME & FAM. EDITION, <http://sinsofgreenwashing.org/index.html> (last visited Jan. 20, 2014).

North American marketplace.²⁷ Each TerraChoice report is based on the firm's "Seven Sins of Greenwashing"—a list of common categories of claims designed to capture the full spectrum of deceptive environmental marketing.²⁸ Though TerraChoice is not alone in identifying categories of misleading environmental claims,²⁹ commentators and the media generally view these reports as the most detailed, current, and comprehensive reflections of current trends in environmental marketing.³⁰ TerraChoice's seven "sins" include: (1) the "Sin of the Hidden Trade-Off"; (2) the "Sin of No Proof"; (3) the "Sin of Vagueness"; (4) the "Sin of Irrelevance"; (5) the "Sin of Lesser of Two Evils"; (6) the "Sin of Fibbing"; and (7) the "Sin of Worshipping False Labels."³¹

Issued in 2010, TerraChoice's most recent report reviewed 5,296 home and family products in the United States and Canada that made more than 12,061 separate environmental claims.³² Analyzing these products based on government guidelines and industry best practices, the report concluded that over 95% of these "greener" products committed one or more greenwashing "sins."³³ The most prevalent "sins" were the "Sin of No Proof," the "Sin of Vagueness," and the "Sin of Worshipping False Labels."³⁴ Despite these results, it is perhaps encouraging that the proportion of products demonstrating no greenwashing has consistently increased from only 1% in 2007 to nearly 4.5% in 2010.³⁵ Nonetheless, some evidence suggests that greenwashing is particularly prevalent in the American marketplace. A recent

27. UL LLC, *About Us*, THE SINS OF GREENWASHING: HOME & FAM. EDITION, <http://sinsofgreenwashing.org/about-us/index.html> (last visited Jan. 20, 2014).

28. UL LLC, *The Seven Sins*, THE SINS OF GREENWASHING: HOME & FAM. EDITION, <http://sinsofgreenwashing.org/findings/the-seven-sins/index.html> (last visited Jan. 20, 2014).

29. See, e.g., RINA HORIUCHI ET AL., UNDERSTANDING AND PREVENTING GREENWASH: A BUSINESS GUIDE 7–8 (2009), available at http://www.bsr.org/reports/Understanding_Preventing_Greenwash.pdf.

30. See, e.g., Lauren M. Baum, *It's Not Easy Being Green . . . Or Is It? A Content Analysis of Environmental Claims in Magazine Advertisements from the United States and United Kingdom*, 6 ENVTL. COMM. 423, 425 (2012); see also Victoria Davis Lockard & Joshua L. Becker, *Green Is Good . . . Until "Eco-Friendly" Becomes "Eco-Fraud"*, FOR THE DEF., Feb. 2009, at 39, 40 (referencing media coverage of TerraChoice studies).

31. TERRACHOICE, THE SEVEN SINS OF GREENWASHING 3, 5 (2009), available at <http://sinsofgreenwashing.org/index3c24.pdf> [hereinafter TERRACHOICE, THE SEVEN SINS].

32. TERRACHOICE, THE SINS OF GREENWASHING: HOME AND FAMILY EDITION 15 (2010), available at <http://sinsofgreenwashing.org/index35c6.pdf>.

33. *Id.* at 16.

34. *Id.*

35. *Id.* at 6.

comparative study of magazine advertisements in the United States and United Kingdom indicated that 75% of environmental claims in U.S. magazines exhibited one or more of TerraChoice's "sins" of greenwashing.³⁶ By comparison, only 51% of such advertisements in magazines published in the United Kingdom were found to commit a greenwashing "sin."³⁷

D. The Effects of Greenwashing

Despite growing consumer scrutiny of environmental claims,³⁸ greenwashing remains pervasive in the North American marketplace.³⁹ Unfortunately, just as truthful environmental marketing presents opportunities for increased public awareness and interest in important environmental issues, greenwashing threatens to undermine broader environmental goals. Misleading environmental claims present a two-fold threat to the otherwise positive effects of environmental marketing.

First, in a competitive environment, deceptive environmental claims may divert market share from products that offer true environmental benefits and impede the ability for such products to penetrate existing markets.⁴⁰ This has the effect of minimizing the immediate benefits offered by such products and discouraging future investments in products offering similar benefits.⁴¹

Second, misleading claims may engender cynicism and doubt among consumers—particularly those most interested in supporting environmentally advantageous products—regarding all environmental claims.⁴² A familiar instance of this problem arises when individuals witness a custodian comingling the contents of a

36. Baum, *supra* note 30, at 432.

37. *Id.* (suggesting that the disparity between the United States and the United Kingdom may be primarily due to the relative absence of claims regarding "fuel-efficient" sport utility vehicles in the United Kingdom).

38. CONE COMM'NS, *supra* note 12, at 5 (indicating that 75% of consumers surveyed report that they will boycott a product if they discover that an environmental claim is misleading).

39. See *supra* notes 26–36, and accompanying text.

40. TERRACHOICE, THE SEVEN SINS, *supra* note 31, at 2.

41. Adrian Morrow, 'Greenwashing' Discourages Eco-friendly Behaviour: Study, THE GLOBE AND MAIL (June 2, 2010), <http://www.theglobeandmail.com/news/national/greenwashing-discourages-eco-friendly-behaviour-study/article1372086/> (describing a study conducted by the National Geographic Society suggesting that consumer cynicism, more than cost or inconvenience, prevents consumers from making more environmentally-friendly choices).

42. *Id.*

garbage can and a recycling bin, creating doubts about recycling. If these most-motivated consumers begin to ignore environmental claims, marketers may be less likely to devote resources to making and substantiating such claims.⁴³ Again, this has the effect of reducing investments in environmentally beneficial activities, while also discouraging honest environmental claims.

Thus, to the extent that consumer exposure to such claims advances broader environmental goals, greenwashing undermines this effect. In this way, greenwashing may perpetuate a vicious cycle that results in both fewer products offering environmental advantages and narrower public awareness of key environmental concerns.

II. CHECKS ON GREENWASHING: EXISTING FEDERAL AND STATE REGULATION OF DECEPTIVE ADVERTISING

Like other forms of deceptive advertising, state and federal consumer protection statutes prohibit greenwashing. This section provides an overview of the most significant of these laws, with a particular emphasis on the FTC's enforcement authority under § 5 of the FTC Act and the FTC *Green Guides*.

A. The FTC Act and "Unfair or Deceptive Acts or Practices"

Originally enacted to strengthen federal competition law, the FTC Act established the FTC and authorized the Commission to pursue unfair competitive practices.⁴⁴ In 1938, Congress broadened this prohibition to include "unfair or deceptive acts or practices," firmly establishing the Commission's consumer protection mandate.⁴⁵

1. FTC Rulemaking to Regulate Deceptive Marketing Claims

To prevent deceptive commercial activity, § 18 of the FTC Act authorizes the Commission to issue both legally binding rules ("trade regulation rules") and non-binding administrative guidance

43. HORIUCHI ET AL., *supra* note 29, at 3 (explaining that greenwashing makes consumers less likely to trust environmental claims and provokes regulatory scrutiny, thereby discouraging environmental claims generally).

44. William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 930 (2010).

45. See, e.g., *Pep Boys-Manny, Moe & Jack, Inc. v. Fed. Trade Comm'n*, 122 F.2d 158, 160–61 (3d Cir. 1941) (discussing the history of § 5).

(“industry guides”).⁴⁶ Trade regulation rules “define with specificity acts or practices which are unfair or deceptive.”⁴⁷ Because these rules carry the force of law, their violation alone constitutes an unfair or deceptive act in violation of § 5.⁴⁸ Concerned with the proliferation of trade regulation rules during the 1970s, Congress amended the FTC Act in 1980 to curb the Commission’s rulemaking authority.⁴⁹ As a result, trade regulation rules must now comply with a three-stage notification process in addition to general rulemaking requirements imposed by the Administrative Procedure Act.⁵⁰

As an alternative to trade regulation rules, the Commission may issue “interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices.”⁵¹ Generally termed “industry guides,” such informal guidance may cover broad categories of claims (e.g., comparative advertising claims⁵²) in addition to specific claims likely to deceive consumers (e.g., the use of the word “free”⁵³). Industry guides do not carry the force of law and are intended instead to allow for voluntary compliance by marketers.⁵⁴ However, because such guidance indicates the Commission’s interpretation of § 5, failure to comply with an FTC industry guide may result in corrective action by the Commission.⁵⁵

Though easier to promulgate than trade regulation rules, industry guides present additional enforcement challenges that the Commission must weigh. As intended, the additional procedural burdens associated with trade regulation rules have significantly delayed their promulgation, with some rules taking nearly a decade to complete.⁵⁶ By comparison, industry guides are not subject to administrative rulemaking requirements and do not require public

46. 15 U.S.C. § 57a(1) (2012).

47. 15 U.S.C. § 57a(1)(B) (2012).

48. 16 C.F.R. § 1.8(a) (2013).

49. Paul H. Luehr, *Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising*, 10 UCLA J. ENVTL. L. & POL’Y 311, 327–28 (1992).

50. 15 U.S.C. § 57a(b) (2012); 16 C.F.R. §§ 1.10–12 (2013); 5 U.S.C. § 553 (2012).

51. 15 U.S.C. § 57a(a)(1)(A) (2012).

52. 16 C.F.R. § 14.15 (2013).

53. 16 C.F.R. § 251.1(b) (2013).

54. 16 C.F.R. § 1.5 (2013).

55. *Id.*

56. Luehr, *supra* note 49, at 326–30 (comparing FTC authority to issue trade rules to its authority to issue industry guides and highlighting the nine-year process required to promulgate the FTC’s Credit Practices Rule).

input.⁵⁷ However, the FTC must meet the burden of proving that a violation of its guidance is in fact a violation of § 5 in every contested case.⁵⁸ This burden slows enforcement considerably and encourages companies to delay compliance by prolonging litigation.⁵⁹ Finally, although courts generally provide significant deference to agency interpretations promulgated through notice-and-comment rulemaking, voluntary guidelines generally carry less authority in court.⁶⁰

2. The FTC's General View of Deceptive Advertising

In addition to promulgating trade rules and industry guides addressing specific claims and industries, the Commission has long relied on its 1983 Deception Policy Statement to guide enforcement actions against deceptive marketing.⁶¹ Under this longstanding guidance, the Commission “will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”⁶² This general statement lays out a three-part test for identifying deceptive claims. First, “there must be a representation, omission, or practice that is likely to mislead the consumer.”⁶³ Second, the alleged deception is viewed from the “perspective of a consumer acting reasonably in the circumstances.”⁶⁴ Third, the representation, omission, or practice must be “material,” meaning that it is “likely to affect the consumer’s conduct or decision with regard to a product or service.”⁶⁵ Under this objective standard, advertisers are liable for

57. See 5 U.S.C. § 553(b)(3)(A) (2012) (exempting interpretative rules and general statements of policy from general rulemaking requirements); 16 C.F.R. § 1.5 (2013) (indicating that industry guides are interpretative rules).

58. Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG. 147, 167 (1993).

59. *Id.* at 167–68.

60. *Id.* at 168; see also *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001) (denying *Chevron* deference for agency interpretations promulgated outside of notice-and-comment rulemaking, while providing such interpretations with the less deferential *Skidmore* review).

61. *Cliffdale Assocs.*, 103 F.T.C. 110, 155 (1984) (FTC Policy Statement on Deception).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

materially misleading claims or omissions even if an advertiser makes such a claim inadvertently.⁶⁶

Importantly, because a misrepresentation is “an express or implied statement contrary to fact,” deceptive claims may be conveyed to consumers either directly or by implication.⁶⁷ In all cases, the Commission’s review is not limited to its own evaluation of the content and context of the claim. Instead, the Commission considers extrinsic evidence, including “expert opinion, consumer testimony (particularly in cases involving oral representations), copy tests, surveys, or any other reliable evidence of consumer interpretation.”⁶⁸ As described below, the Commission’s guidance regarding deceptive environmental marketing claims draws heavily on consumer perception research.

In general, marketers seeking to avoid § 5 liability must be prepared to substantiate all express and implied claims before disseminating advertising to consumers. This duty stems from the Commission’s requirement that “advertisers and ad agencies have a reasonable basis for advertising claims before they are disseminated.”⁶⁹ Thus, to avoid liability, marketers must identify all express and implied claims that the advertisement reasonably conveys and must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis.⁷⁰

B. Pursuing Deceptive Advertising—Federal, State, and Private Enforcement Regimes

The Commission may enforce its deceptive advertising regulations through either administrative or civil actions. First, under § 5(b) of the FTC Act, the Commission may issue a complaint when the Commission has “reason to believe” that the terms of § 5 have been violated.⁷¹ Should a party elect to challenge the Commission’s allegations, the complaint is adjudicated before a

66. Kraft, Inc., 114 F.T.C. 40, 71 n.33 (1991) (“Advertisers are liable for materially misleading claims or omissions that their advertisements convey to reasonable consumers, even if this is done inadvertently.”).

67. Cliffdale Assocs., 103 F.T.C. at 175 n.4.

68. *Id.* at 156 n.8.

69. Thompson Med. Co., 104 F.T.C. 839 (1984) (Appendix: FTC Policy Statement Regarding Advertising Substantiation).

70. *See id.* (explaining reasonable basis requirement).

71. 15 U.S.C. § 45(b) (2012).

Commission Administrative Law Judge (ALJ).⁷² Alternatively, under § 13(b), the Commission is authorized to file suit in U.S. District Court to enjoin an act or practice in violation of “any provision of law enforced by the Federal Trade Commission.”⁷³ Because § 13(b) authorizes federal courts to impose both injunctive and monetary relief, much of the Commission’s consumer protection litigation now begins in federal court instead of before an ALJ.⁷⁴ Likewise, § 43(a) of the Lanham Act provides a federal private right of action for damages resulting from false advertising or marketing.⁷⁵ Although some have proposed expanded use of private litigation under the Lanham Act to combat greenwashing, federal courts have approached consumer-initiated suits under § 43(a) cautiously.⁷⁶

The Commission has used its broad enforcement powers to win several impressive victories on deceptive marketing claims,⁷⁷ but it is hardly alone in enforcing advertising laws. Often referred to as “Little FTC Acts,” state consumer protection statutes were designed to supplement the FTC Act’s prohibition of unfair and deceptive trade practices.⁷⁸ In particular, because the FTC Act does not

72. Anne V. Maher & Lesley Fair, *The FTC’s Regulation of Advertising* 65 FOOD & DRUG L.J. 589, 593 (2010).

73. 15 U.S.C. § 53 (2012).

74. See Maher & Fair, *supra* note 72, at 594 (explaining that the FTC has successfully argued that the broad language of § 13(b) authorizes federal courts to impose a wide variety of equitable relief, including redress for consumers).

75. 15 U.S.C. § 1125 (2012) (“Any person who . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”).

76. Elizabeth K. Coppolecchia, *The Greenwashing Deluge: Who Will Rise Above the Waters of Deceptive Advertising?*, 64 U. MIAMI L. REV. 1353, 1386–99 (2010) (providing a detailed analysis of the opportunities and challenges associated with private Lanham Act claims against deceptive environmental marketing).

77. See, e.g., Complaint, F.T.C. v. Your Baby Can, No. 12cv2114 (S.D. Cal. Aug 27, 2012) (Section 13(b) action alleging deceptive claims related to efficacy of early education products yielded a settlement barring defendants from further use of deceptive terms and imposing an \$185 million judgment); Complaint, F.T.C. v. Reebok Int’l, 1:11-cv-02046 (N.D. Ohio, Sept. 28, 2011) (Section 13(b) action alleging deceptive claims regarding improved muscle tone and strength associated with “EasyTone” footwear led to \$25 million in customer refunds).

78. Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 163, 173–76 (2011) (explaining that state consumer protection statutes responded to criticism of the FTC by providing “a private right of action, different remedies, and relaxed common law limitations on consumer protection actions when compared to FTC policy standards.”).

provide a private cause of action, many state statutes are designed to allow consumers to serve as private attorneys general.⁷⁹ However, most states continue to defer to FTC interpretations in implementing their consumer protection statutes.⁸⁰ Despite this purported deference to federal standards, increasing reliance on state consumer protection statutes has generated growing criticism.⁸¹ In particular, commentators and experts have argued that courts interpreting state consumer protection statutes have gone too far in aiding plaintiffs, potentially discouraging socially desirable business conduct.⁸²

Finally, marketers have employed self-regulation to counteract deceptive advertising. Of particular note, the National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB) is designed as a private forum to resolve advertising disputes involving member companies.⁸³ Although competitors initiate the majority of NAD cases, consumer groups and individual consumers may initiate review proceedings by filing a complaint with NAD.⁸⁴ As of 2008, environmental claims had “nearly overtaken superiority claims as the most scrutinized by the NAD.”⁸⁵ NAD uses alternative dispute resolution to determine whether national advertising claims have been substantiated.⁸⁶ NAD decisions are non-binding.⁸⁷ However, because NAD regularly refers resistant parties to the FTC, which is generally more likely to review a claim following a NAD decision, companies tend to comply with NAD decisions voluntarily.⁸⁸

79. *Id.* at 166.

80. *Id.* at 173 (noting that as of 2011, twenty-eight states reference the FTC in their respective consumer protection statutes).

81. *Id.* at 177–78.

82. *Id.* (summarizing critical analyses of state consumer protection statutes).

83. *Partnership and Subscription*, BETTER BUS. BUREAU, <http://alaskaoregonwesternwashington.bbb.org/NAD-Membership/> (last visited Jan. 20, 2014).

84. *About NAD*, BETTER BUS. BUREAU, <http://alaskaoregonwesternwashington.bbb.org/About-NAD/> (last visited Jan. 20, 2014).

85. *Environmental Marketing Claims*, AM. ADVERT. FED’N, <http://www.aaf.org/default.asp?id=867> (last updated Oct. 2008).

86. *About NAD*, BETTER BUS. BUREAU, <http://www.bbb.org/us/About-NAD/> (last visited Jan. 20, 2014).

87. Jason Reed Struble, *A Brief Guide to Comparative Advertising*, PRAC. LAW., June 2013, at 41, 46.

88. *Id.*; John E. Villafranco & Matthew D. Marcotte, *Unfair Competition in Advertising: Developments and Trends in Lanham Act Litigation*, ANTITRUST, Summer 2008, at 99 n.11.

Past efforts to combat deceptive environmental marketing demonstrate the often-complicated dynamic between NAD dispute resolution and FTC enforcement. For example, in 1998, a group of environmental organizations and wind power producers brought a successful NAD complaint against advertisements produced by the Nuclear Energy Institute (NEI) that described nuclear power as “environmentally clean” and capable of producing electricity “without polluting the environment.”⁸⁹ The NAD found that consumers could “reasonably interpret [these claims] to mean that electricity generated by nuclear power is produced without any negative impact on the environment.”⁹⁰ Citing a variety of environmental impacts, including traditional pollution created during the production of nuclear fuel and health threats associated with nuclear waste, the NAD concluded that the record did “not support this interpretation” and the claims were therefore “unsupportable.”⁹¹ Upon receiving the complaint from the NAD, the FTC agreed that the NEI claims were unsubstantiated, but it ultimately refrained from taking enforcement action.⁹² Because the advertisements were aimed at least in part at “opinion leaders,” the FTC concluded that the NEI was engaged in protected political speech, as opposed to purely commercial speech.⁹³ Nonetheless, the FTC strongly recommended that marketers “take to heart” the conclusions of the NAD, and the industry agreed to take the NAD’s concerns into consideration in future advertising campaigns.⁹⁴

C. FTC Regulation of Greenwashing—The *Green Guides*

The FTC has investigated and challenged environmental marketing claims since at least 1991, when the Commission obtained two consent agreements prohibiting deceptive “ozone safety” claims.⁹⁵ Recognizing that marketers were responding to

89. Matthew L. Wald, *Better Business Bureau Says Nuclear Group Ran False Ads*, N.Y. TIMES, (Dec. 10, 1998), <http://www.nytimes.com/1998/12/10/business/media-business-advertising-better-business-bureau-says-nuclear-group-ran-false.html?pagewanted=all&src=pm>.

90. *Id.*

91. *Id.*

92. Matthew L. Wald, *F.T.C. Decides Not to Ban Nuclear Ads*, N.Y. TIMES, (Dec. 22, 1998), <http://www.nytimes.com/1999/12/22/business/ftc-decides-not-to-ban-nuclear-ads.html>.

93. *Id.*

94. *Id.*; Wald, *supra* note 89.

95. FED. TRADE COMM’N, FTC 1991 ANNUAL REPORT 11 (1991), *available at* <http://www.ftc.gov/os/annualreports/ar1991.pdf>.

consumers' environmental concerns by using vague terms such as "biodegradable," "recyclable," and "environmentally friendly," the Commission began to consider national voluntary guidelines on environmental advertising.⁹⁶ The FTC consulted the public and formed a task force with a pair of interested federal agencies, the U.S. Environmental Protection Agency (EPA) and the U.S. Office of Consumer Affairs.⁹⁷ Finally, in response to a series of petitions from interested marketers and state attorneys general,⁹⁸ the Commission released the initial Guides for the Use of Environmental Marketing Claims (*Green Guides*) in 1992.⁹⁹

The following section provides a brief summary of the purpose and scope of the *Green Guides*, a description of their basic structure, and the basis for the Commission's guidance to environmental marketers.

1. The *Green Guides*—Purpose and Scope

The *Green Guides* have two objectives. First, the *Guides* are intended to "protect consumers and to bolster their confidence in environmental claims."¹⁰⁰ Second, the *Guides* are designed to facilitate compliance among marketers by reducing "manufacturers' uncertainty about which claims might lead to Commission law enforcement actions, thereby encouraging marketers to produce and promote products that are less harmful to the environment."¹⁰¹

The *Green Guides* set forth the Commission's "current views about environmental claims" in order to help "marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act."¹⁰² To do so, the *Guides* explain how reasonable consumers likely interpret environmental claims and

96. *Id.*

97. *Id.*

98. See Press Release, Fed. Trade Comm'n, FTC Chairman Steiger Announces National Guidelines to Prevent Misleading Environmental Marketing Claims (July 28, 1992), *available at* <http://legacy.library.ucsf.edu/documentStore/w/c/o/wco03c00/Swco03c00.pdf>.

99. Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (Aug. 13, 1992).

100. FED. TRADE COMM'N, 1992 ANNUAL REPORT 13 (1992), *available at* http://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1992/ar1992_0.pdf.

101. *Id.*

102. 16 C.F.R. § 260.1(a) (2013).

describe the basic elements necessary to substantiate such claims.¹⁰³ Where an unqualified claim would be misleading, the *Guides* present options for qualifying claims to avoid deception.¹⁰⁴ For example, an unqualified “made with renewable materials” claim may be qualified in various ways to avoid deception (e.g., by identifying the material used and explaining why the material is renewable).¹⁰⁵

The *Guides* apply broadly, both to business-to-consumer transactions and business-to-business transactions.¹⁰⁶ They also cover environmental claims in labeling, advertising, promotional materials, and all other forms of marketing in any medium.¹⁰⁷ As industry guides, the *Green Guides* are not themselves enforceable regulations and “do not have the force and effect of law.”¹⁰⁸ Still, failing to follow the guidance provided by the Commission exposes marketers to potential FTC enforcement action and liability under § 5 of the FTC Act.¹⁰⁹

2. The *Green Guides*—Basic Structure

The *Guides* apply four broad principles to all environmental marketing claims. First, to avoid deception, qualifications and disclosures related to environmental claims “should be clear, prominent, and understandable.”¹¹⁰ Qualifications and disclosure should also use “plain language and sufficiently large type,” and must be placed in “close proximity to [a] qualified claim.”¹¹¹ Second, unless it is clear, environmental claims should specify whether they refer to the product, the product’s package, a service, or only to a portion of the product, package, or service.¹¹² Third, environmental claims should not overstate, explicitly or implicitly,

103. FED. TRADE COMM’N, THE GREEN GUIDES: STATEMENT OF BASIS AND PURPOSE 1 (2012), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf> [hereinafter STATEMENT OF BASIS AND PURPOSE].

104. *Id.*

105. 16 C.F.R. § 260.16(c) (2013).

106. 16 C.F.R. § 260.1(c) (2013).

107. *Id.*

108. Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62,122 (Oct. 11, 2012); *supra* note 99 and accompanying text.

109. 16 C.F.R. § 260.1(a) (2013).

110. 16 C.F.R. § 260.3(a) (2013).

111. *Id.*

112. 16 C.F.R. § 260.3(b) (2013).

“an environmental attribute or benefit” of a product.¹¹³ Finally, claims comparing the environmental attributes of competing products must be clear and substantiated in order to avoid consumer confusion or deception.¹¹⁴ To supplement these overarching principles, the Commission provides specific guidance on the use of particular categories of environmental claims. For example, the current *Guides* describe the permissible use of “general” environmental benefit claims, such as a claim that a product is “eco-friendly” or that a product’s packaging is “greener” than previous packaging.¹¹⁵ In addition, the current *Guides* provide guidance for thirteen categories of claims, ranging from “non-toxic” and degradability claims to the use of certifications and seals of approval.¹¹⁶ As discussed in greater detail below, following the most recent revision of the *Guides*, the Commission now provides specific guidance regarding the use of claims about carbon offsets¹¹⁷ and renewable energy.¹¹⁸

Finally, the *Guides* provide illustrative examples to indicate how potentially deceptive claims may be qualified to avoid consumer confusion. These examples indicate the Commission’s views on how reasonable consumers would interpret individual claims.¹¹⁹ These examples do not illustrate all permissible claims or qualifications under § 5 of the FTC Act, however, and the Commission assesses individual claims on a case-by-case basis.¹²⁰

3. The *Green Guides*—Driven by Consumer Perceptions

Because the FTC has interpreted § 5 to prohibit claims that are likely to mislead reasonable consumers,¹²¹ the Commission has concluded that “consumer perception data provides the best evidence upon which to formulate guidance” related to

113. 16 C.F.R. § 260.3(c) (2013).

114. 16 C.F.R. § 260.3(d) (2013).

115. 16 C.F.R. § 260.4 (2013).

116. 16 C.F.R. §§ 260.5–260.17 (2013).

117. 16 C.F.R. § 260.5 (2013).

118. 16 C.F.R. § 260.15 (2013).

119. 16 C.F.R. § 260.1(d) (2013); *see, e.g.*, 16 C.F.R. § 260.13 (2013) (including a number of examples, such as explaining that packaging claiming to consist of “20% post-consumer recycled fiber,” that is actually composed of overrun newspaper stock never sold to customers, is deceptive).

120. 16 C.F.R. § 260.1(d) (2013).

121. *See supra* notes 62–66 and accompanying text.

environmental claims.¹²² Recognizing its limited authorization, the Commission also has expressed a general reluctance to set environmental policy.¹²³

Although the Commission has thus far relied exclusively on extrinsic consumer perception data to produce the *Green Guides*, the scope of the Commission's authority is not limited to the vindication of existing consumer perceptions. The Supreme Court has held that, when the possibility of deception is self-evident from the content of an individual claim, the Commission need not conduct a survey of the public before it may determine that the advertisement has the tendency to mislead.¹²⁴ In particular, although the Commission should generally rely on extrinsic evidence to assess marketers' implied claims, the Commission may instead utilize "common sense and administrative experience" where such claims are "conspicuous."¹²⁵

The Commission's reliance on general consumer perceptions to identify deceptive environmental claims has provoked criticism. In particular, some environmental advocates have argued that the Commission should place greater weight on the perceptions of so-called "green consumers," who are more influenced by environmental claims.¹²⁶ Because these consumers are more attuned to environmental claims and perhaps better informed regarding the content of such claims, guidance reflecting these consumers' perceptions may prevent deceptive or misleading claims not captured under the existing *Guides*.¹²⁷

More broadly, environmental advocates and certain trade associations argue that the Commission's sole reliance on consumer perception to identify deceptive environmental claims is misguided.¹²⁸ Under this view, the baseline of consumer perceptions regarding environmental claims may itself be skewed due to "media reports, advertising messages, or other forces that

122. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 25.

123. *Id.* at 17 ("The Commission publishes the Guides to prevent the dissemination of misleading claims, not to encourage or discourage particular environmental claims or consumer behavior based on environmental policy concerns.").

124. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 652–53 (1985) (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965)).

125. *Kraft, Inc. v. FTC*, 970 F.2d 311, 320–21 (7th Cir. 1992).

126. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 23–24 (noting that at least one environmental organization has made this recommendation).

127. *Id.*

128. *E.g., id.* at 24.

may or may not reflect reality.”¹²⁹ Because consumers may be unable to distinguish between factual and misleading environmental claims, enshrining existing perceptions in the *Green Guides* may lock-in existing consumer confusion.¹³⁰ With this in mind, some have suggested that the Commission balance consumer perception data against the Commission’s own review of the validity of environmental claims.¹³¹

Furthermore, although the EPA has generally supported the Commission’s use of consumer perception data, the agency has also noted the dynamic nature of consumer perceptions.¹³² Because these perceptions are subject to change as consumers learn more about specific claims and environmental concerns, the EPA has noted that more recent data may be necessary to substantiate individual claims.¹³³

D. The *Green Guides* in Action

Following the publication of the original *Green Guides* in 1992, the Commission initially pursued misleading environmental claims aggressively. In its 1993 Annual Report, the Commission indicated that its enforcement efforts yielded consent orders and proposed consent agreements involving a wide variety of environmental claims, including biodegradable claims for trash bags, ozone-friendly claims for electronic office equipment care products, and environmentally-friendly and environmentally-safe claims for aerosol products.¹³⁴ In addition to successful enforcement efforts, the Commission reported that its staff engaged frequently with stakeholders and marketers to promote voluntary compliance with the newly issued *Green Guides*.¹³⁵ Thereafter, the Commission consistently pursued enforcement actions under the *Green Guides*

129. Letter from Linda Brown, Exec. Vice President, Scientific Certification Sys., Inc., to Fed. Trade Comm’n. 1 (Dec. 10, 2010), *available at* http://www.ftc.gov/sites/default/files/documents/public_comments/guides-use-environmental-marketing-claims-project-no.p954501-00264%C2%A0/0026457042.pdf.

130. *Id.*

131. *E.g., id.*

132. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 23.

133. *Id.*

134. FED. TRADE COMM’N, 1993 ANNUAL REPORT 13 (1993), *available at* http://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1993/ar1993_0.pdf.

135. *Id.*

throughout the 1990s.¹³⁶ However, following this initial period of active enforcement, the Commission did not initiate an action under the *Green Guides* for more than nine years beginning in early 2000.¹³⁷

After nearly a decade of non-enforcement during the George W. Bush Administration, the Commission launched a “green initiative” in the spring of 2009 that included both a review of the *Green Guides* and a recommitment to enforcement.¹³⁸ This renewed commitment to enforcement quickly yielded success. In June 2009, the Commission won settlements with marketers that made unsubstantiated claims that their products, such as disposable plates, wipes, and towels, were “biodegradable.”¹³⁹ The Commission has successfully pursued other deceptive environmental marketing claims throughout recent years, even as the agency has begun to update and revise the *Green Guides*.¹⁴⁰

In addition to ongoing federal enforcement efforts, many states have pursued misleading environmental claims either by incorporating the *Green Guides* into existing consumer protection statutes or by enacting more stringent environmental marketing regulations.¹⁴¹ For example, in October 2011, the California Attorney General filed a first-of-its-kind state law claim against three companies that allegedly made false and misleading claims by

136. See Coppolecchia, *supra* note 76, at 1366 (describing FTC enforcement actions in the 1990s).

137. Traci Watson, *Ecofriendly Claims Go Unchecked*, USA TODAY, June 22, 2009, at 1A, available at http://usatoday30.usatoday.com/printedition/news/20090622/1agreen22_start.htm; Gabriel Nelson, *FTC Moves May Signal Start of ‘Greenwashing’ Crackdown*, N.Y. TIMES, Feb. 3, 2010, <http://www.nytimes.com/gwire/2010/02/03/03greenwire-ftc-moves-may-signal-start-of-greenwashing-cra-90834.html?pagewanted=all>.

138. *Advertising Trends and Consumer Protection: Statement Before the S. Comm. on Commerce, Sci. & Transp.*, 111th Cong. 12 (2009) (statement of David Vladeck, Dir., Fed. Trade Comm’n), available at <http://www.ftc.gov/os/testimony/090722advertisingtestimony.pdf>.

139. See Press Release, Fed. Trade Comm’n, FTC Announces Actions Against Kmart, Tender, and Dyna-E Alleging Deceptive ‘Biodegradable’ Claims (June. 9, 2009), available at <http://www.ftc.gov/opa/2009/06/kmart.shtm> (because customary methods of solid waste — e.g., landfills, incinerators, and recycling facilities—do not allow decomposition, the marketers’ claims that their products were “biodegradable” were alleged to be misleading).

140. See, e.g., Press Release, Fed. Trade Comm’n, Window Marketers Settle FTC Charges that They Made Deceptive Energy Efficiency and Cost Savings Claims (Feb. 22, 2012), available at <http://www.ftc.gov/opa/2012/02/windows.shtm> (announcing a recent settlement with replacement window manufacturers under which the manufacturers may no longer make exaggerated and unsupported claims regarding the energy efficiency of their products).

141. Lauren C. Avallone, *Green Marketing: The Urgent Need for Federal Regulation*, 14 PENN ST. ENVTL. L. REV. 685, 689 (2006).

marketing plastic water bottles as “100 percent biodegradable and recyclable.”¹⁴² The State’s complaint alleged that these claims violated both an explicit state-law prohibition on biodegradable claims related to plastic containers and the state’s general unfair and deceptive advertising statutes.¹⁴³ The complaint resulted in a settlement under which the defendant marketers agreed to modify their products to avoid future consumer confusion.¹⁴⁴ Nonetheless, although state environmental marketing statutes are generally intended to provide more stringent safeguards against deceptive environmental claims,¹⁴⁵ recent state law claims have seen limited success.¹⁴⁶

III. THE 2012 *GREEN GUIDES*—RENEWABLE ENERGY AND CARBON OFFSET CLAIMS

After first releasing the *Green Guides* in 1992, the FTC revised the *Guides* in 1996, and again in 1998.¹⁴⁷ Most recently, in November 2007, the Commission initiated a review of the 1998 *Guides* as a part of a systematic review of its rules and industry guidance.¹⁴⁸ In so doing, the Commission emphasized the emergence of new claims not covered under the 1998 *Guides*.¹⁴⁹ To determine whether a full revision of the *Guides* was warranted, the Commission sought public comment, held public workshops, and conducted research on consumer perception of environmental claims.¹⁵⁰

142. *Greenwashing*, STATE OF CAL. DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., <http://oag.ca.gov/environment/greenwashing> (last visited Jan. 22, 2014).

143. See Complaint at 11, California ex rel. Harris v. Enso Plastics, No. 30-2011-00518091-CU-MC-CJC (Cal. Super. Ct. filed Oct. 2011), available at http://ag.ca.gov/cms_attachments/press/pdfs/n2577_complaint.pdf.

144. *Greenwashing*, *supra* note 142.

145. *Id.*

146. Compare *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-00927 RMW, 2010 WL 94265 (N.D. Cal. Jan. 6, 2010) (class action under California consumer protection and unfair competition statutes), and *SC Johnson Settles Cases Involving Greenlist™ Labeling*, PR NEWswire, (July 8, 2011) (settling *Koh*), <http://www.prnewswire.com/news-releases/sc-johnson-settles-cases-involving-greenlist-labeling-125222089.html>, with *Hill v. Roll Int’l Corp.*, 128 Cal. Rptr. 3d 109 (Cal. Ct. App. 2011) (affirming dismissal of class action claim under state consumer protection and unfair competition statutes because allegedly deceptive environmental logo gave indication of environmental content).

147. 61 Fed. Reg. 53,311 (Oct. 11, 1996); 63 Fed. Reg. 24,240 (May 1, 1998).

148. 72 Fed. Reg. 66,091 (Nov. 27, 2007).

149. *Id.*

150. *Id.*

The following section summarizes the FTC's consideration of guidance regarding renewable energy and carbon offset claims. This summary draws primarily from the Commission's "Statement of Basis and Purpose," which accompanied the release of the final 2012 *Guides*.¹⁵¹ The Statement of Basis and Purpose describes the Commission's consideration of comments received from various stakeholders, including individual marketers, trade associations, environmental organizations, and federal agencies.¹⁵² The final 2012 *Guides* address a number of key issues related to renewable energy and carbon offset claims, reflecting the Commission's reliance on existing consumer perceptions as a touchstone for assessing potentially deceptive or misleading claims.¹⁵³ Unfortunately, the *Guides* leave open a number of concerns raised during the public notice and comment period. In Part IV, this Note discusses these unresolved issues in arguing that the FTC should reduce its reliance on consumer perceptions to identify deceptive environmental claims.

A. The Commission Emphasizes Renewable Energy and Carbon Offset Claims

Throughout its most recent revision of the *Guides*, the Commission focused particularly on claims related to renewable energy and carbon offsets. Noting the increasing prevalence of these claims, the Commission requested public comment regarding whether and how they should be included in the revised *Guides*.¹⁵⁴ Thereafter, the Commission conducted three public workshops to solicit additional input, with one workshop focused exclusively on renewable energy and carbon offset claims.¹⁵⁵ Finally, the FTC commissioned a consumer perception survey to test consumer responses to these and other claims.¹⁵⁶

Conducted in July and August 2009, the Commission's consumer perception survey presented 3,777 participants with questions calculated to determine how they understood selected

151. STATEMENT OF BASIS AND PURPOSE, *supra* note 103.

152. *Id.*; see also *id.* at i–vi.

153. See generally *supra* Part II.C.iii (discussing the importance of consumer perceptions in FTC assessments of deceptive advertising claims).

154. 72 Fed. Reg. 66,092 (Nov. 27, 2007).

155. 72 Fed. Reg. 66,094 (Nov. 27, 2007).

156. 75 Fed. Reg. 63,552 (Oct. 15, 2010) [hereinafter "PROPOSED 2012 GREEN GUIDES"].

environmental claims.¹⁵⁷ The Commission weighed and screened responses to provide a statistically representative sample of nationwide consumer perceptions.¹⁵⁸ The survey tested specific marketing claims, including “made with renewable energy,” against several non-environmental control claims.¹⁵⁹ The study also tested “carbon offset” and “carbon neutral” claims, gauging whether respondents understood these concepts by asking them to define the terms “carbon offset” and “carbon neutral.”¹⁶⁰ As a result of this research, the Commission included for the first time specific guidance regarding renewable energy and carbon offset claims in the proposed revised *Guides* issued in October 2010.¹⁶¹

B. Renewable Energy Claims—Key Issues

In contrast to nonrenewable fossil fuels, renewable energy resources—such as wind, the sun, and moving water—are readily replenished and do not diminish over time.¹⁶² Aiming to capitalize on increased public interest in renewable energy, many businesses have recently begun to communicate their renewable energy use directly to consumers.¹⁶³

Because electrons produced from fossil fuels and renewable sources are physically indistinguishable, companies that want to use renewable energy often purchase Renewable Energy Credits (RECs).¹⁶⁴ RECs represent the environmental and other non-power attributes of electricity generated from renewable sources.¹⁶⁵ Each REC represents the generation of one megawatt hour of electricity from an eligible source of renewable power and identifies the underlying generation source, the location of generation, and the year of generation.¹⁶⁶

157. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 3.

158. Agency Information Collection Activities; Submission for OMB Review; Comment Request, 74 Fed. Reg. 22,396, 22,397 (May 12, 2009).

159. PROPOSED 2012 GREEN GUIDES, *supra* note 156, at 63,554.

160. *Id.*

161. *Id.*

162. *Renewable Energy Basics*, NAT’L RENEWABLE ENERGY LAB., http://www.nrel.gov/learning/re_basics.html (last updated Oct. 30, 2012).

163. BRANNAN ET AL., *supra* note 7, at v.

164. U.S. ENVTL. PROT. AGENCY GREEN POWER P’SHIP, RENEWABLE ENERGY CERTIFICATES 1 (2008), available at http://www.epa.gov/greenpower/documents/gpp_basics-recs.pdf.

165. *Id.*

166. *Id.*

RECs are generally available in two parallel markets—the compliance market and the voluntary market.¹⁶⁷ The compliance market serves states that have adopted mandatory renewable energy targets for their public utilities through a Renewable Electricity Standard (RES) or Renewable Portfolio Standard (RPS).¹⁶⁸ At present, twenty-nine states and the District of Columbia have mandatory RES/RPS policies.¹⁶⁹ In these states, electricity generators must produce or obtain a sufficient quantity of RECs to meet renewable energy obligations.¹⁷⁰ In the voluntary market, individual energy users purchase RECs to meet self-imposed renewable energy goals.¹⁷¹ Voluntary purchasers often rely on independent certification programs to ensure that the RECs they purchase represent true renewable energy production.¹⁷²

Recognizing marketers' increasing use of "made with renewable energy" claims, the Commission tested consumer perceptions regarding such claims.¹⁷³ Although many consumers demonstrated a familiarity with renewable energy, the Commission's study indicated that a significant minority of consumers might be confused by renewable energy claims. In particular, many consumers believe that a "made with renewable energy" claim implies that the advertised product is instead made with renewable or recycled *materials*.¹⁷⁴ Due to this potential for confusion, the Commission concluded that specific guidance was required because "these claims may be misleading because consumers interpret them differently than marketers intend."¹⁷⁵

As a result, the Commission issued proposed guidance related to renewable energy claims in October 2010.¹⁷⁶ In response, the Commission received and responded to comments addressing five

167. ENVTL. TRAINING NETWORK OF N. AM., REC QUESTIONS & ANSWERS 4, *available at* <http://www.etnna.org/images/PDFs/ETNNA-REC-QandA.pdf> (last visited Jan. 22, 2014).

168. *Id.* at 4–5.

169. *Renewable Portfolio Standard Policies*, DATABASE OF STATE INCENTIVES FOR RENEWABLES AND EFFICIENCY, http://www.dsireusa.org/documents/summarymaps/RPS_map.pdf (last updated March 2013). Eight states currently maintain voluntary renewable energy targets.

170. WORLD RES. INST., THE BOTTOM LINE ON . . . RENEWABLE ENERGY CERTIFICATES 1 (2008), *available at* <http://valmarassociates.com/wp-content/uploads/2009/10/the-bottom-line-on-renewable-energy-certificates.pdf>.

171. *Id.*

172. *Id.*

173. PROPOSED 2012 GREEN GUIDES, *supra* note 156, at 63,554.

174. *Id.* at 63,562.

175. *Id.* at 63,553.

176. *Id.* at 63,589–93.

primary issues: (1) the meaning of “renewable energy”; (2) qualifying “made with renewable energy” claims; (3) renewable energy “hosting” claims; (4) claims about legally required renewable energy production; and (5) claims related to the geographic location of renewable energy production.¹⁷⁷ The following sections discuss the Commission’s final disposition on each of these issues.

1. Defining “Renewable Energy”

While the term “renewable energy” is easily defined in the abstract, there remains significant legal and policy uncertainty regarding whether many energy sources are properly considered “renewable.”¹⁷⁸ On one hand, existing state renewable energy mandates universally credit electricity generated using wind turbines, hydroelectric dams, and solar photovoltaic cells.¹⁷⁹ For less obviously environmentally-friendly sources, however, states often disagree. For example, only seventeen states recognize electricity generated from municipal waste incineration as “renewable” for purposes of mandatory or voluntary renewable energy targets.¹⁸⁰ Likewise, despite ongoing debate over whether geothermal heat pumps are properly considered a “renewable energy” technology, a small number of states allow utilities to meet their RPS requirements with geothermal heat pump systems.¹⁸¹

Reflecting this ongoing debate, the Commission received numerous comments advocating for either an explicit definition of “renewable energy” or for the explicit inclusion or exclusion of

177. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 201, 215.

178. Felicity Barringer, *With Billions at Stake, Trying to Expand the Meaning of ‘Renewable Energy’*, N.Y. TIMES, May 24, 2009, http://www.nytimes.com/2009/05/25/business/energy-environment/25renew.html?pagewanted=all&_r=0 (describing industry efforts to include various energy sources, including nuclear, municipal solid waste, and coal methane, in federal renewable energy legislation).

179. *RPS and AEPS Eligible Resource Details*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, <http://www.c2es.org/docUploads/State%20rps%20eligible%20resources.pdf> (last visited Jan. 22, 2014).

180. *Id.*

181. Chris Williams, *State-by-State Comparison of Geothermal Heat Pump and Renewable Thermal Legislation*, RENEWABLEENERGYWORLD.COM (Oct. 10, 2012), <http://www.renewableenergyworld.com/rea/blog/post/2012/10/state-by-state-comparison-of-geothermal-heat-pump-and-renewable-thermal-legislation>. See generally Robert J. Denicola, Note, *Harnessing the Power of the Ground Beneath Our Feet: Encouraging Greater Installation of Geothermal Heat Pumps in the Northeast United States*, 38 COLUM. J. ENVTL. L. 115 (2013) (proposing policies to facilitate the use of geothermal heat pumps in several states).

specified sources.¹⁸² Rejecting these requests, the Commission indicated that precise determinations regarding the renewable character of individual energy sources fall outside its authority and expertise.¹⁸³ However, the Commission's consumer perception study suggested that a significant minority of consumers understand renewable energy to exclude fossil fuels.¹⁸⁴ For this reason, the final revised *Guides* prohibit unqualified renewable energy claims related to products manufactured using fossil fuels, unless the marketer has matched such non-renewable energy use with RECs.¹⁸⁵

The Commission's decision to forgo an explicit list of eligible renewable energy sources contrasts sharply with similar guidance issued by the National Association of Attorneys General (NAAG) in 1999. Released in response to the trend of deregulation of the electric power industry, NAAG's Environmental Marketing Guidelines for Electricity apply to "any marketing claim about the attributes of electricity products or companies connected with the generation, distribution or sale of electricity."¹⁸⁶ Under the NAAG guidelines, renewable energy is defined broadly as "any energy source that is replenishable and replenished on some reasonable time scale."¹⁸⁷ The NAAG guides provide a non-exclusive list of eligible renewable sources, including "wind, sun, heat from the earth's interior, oceans and rivers, and eligible biomass."¹⁸⁸ However, "if a particular state's law provides for a different definition of 'renewable,' that definition would prevail in that state."¹⁸⁹

182. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 203 (referencing comments submitted by the Aluminum Association, the Biomass Accountability Project, and EnviroMedia Social Marketing).

183. *Id.* at 218 ("Under Section 5, a claim is deceptive if it likely misleads reasonable consumers. Therefore, the Guides are based on how consumers reasonably interpret claims, not on technical or scientific definitions.").

184. PROPOSED 2012 GREEN GUIDES, *supra* note 156, at 63,591.

185. 16 C.F.R. § 260.15(a) (2013).

186. NAT'L ASS'N OF ATTORNEYS GEN., ENVIRONMENTAL MARKETING GUIDELINES FOR ELECTRICITY 2-3 (1999), available at <http://www.atg.state.vt.us/assets/files/ENVIRONMENTAL%20MARKETING%20GUIDELINES.pdf>.

187. *Id.* at 16.

188. *Id.*

189. *Id.*

2. Qualifying Renewable Energy Claims

While the final *Guides* do not provide a specific list of qualifying renewable energy sources, the Commission did address three issues related to qualifying renewable energy claims: (1) whether and how to disclose the source of renewable energy used; (2) how to qualify claims regarding renewable energy use in manufacturing; and (3) whether to disclose the purchase of unbundled RECs.¹⁹⁰

First, the Commission considered comments suggesting that marketers should be advised to specify the renewable energy sources they use. These commenters generally argued that consumers have preferences among individual renewable energy sources and assume they are purchasing products made with renewable energy or RECs from these preferred sources.¹⁹¹ In response, several commenters—including the EPA—argued that a source disclosure requirement would overly burden marketers that buy RECs generated by a combination of renewable sources.¹⁹² Reviewing the available consumer perception data, the Commission observed that consumers tend to confuse “made with renewable energy” claims with claims related to renewable and recycled materials.¹⁹³ However, because the Commission did not expect this result, it did not test specific qualifying language designed to avoid such confusion.¹⁹⁴ As a result, the Commission acknowledged that it had insufficient information to draw clear boundaries between deceptive and non-deceptive claims.¹⁹⁵

With this difficulty in mind, the final *Guides* advise marketers to clearly and prominently qualify their renewable energy claims unless they can substantiate all their express and reasonably implied claims.¹⁹⁶ In particular, the final *Guides* note that marketers *may* identify renewable energy sources used to produce their products to reduce the potential for deception.¹⁹⁷ For marketers utilizing a mix of renewable sources, the final *Guides*

190. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 204.

191. *Id.* at 204–05 (noting comments submitted by a clean energy provider, major utilities, and environmental marketing agency).

192. *Id.* at 205.

193. *Id.* at 220.

194. *Id.*

195. *Id.*

196. 16 C.F.R. § 260.15(b) (2013).

197. *Id.*

further suggest that all sources may be disclosed.¹⁹⁸ Alternatively, a marketer may claim that a product is “made from a mix of renewable energy sources” and specify the source that makes up the greatest percentage, calculated on an annual basis.¹⁹⁹

Second, the Commission noted that a significant percentage of consumers perceive “made with renewable energy” claims to suggest that all, or virtually all, of a product’s manufacturing process is powered using renewable energy.²⁰⁰ Thus, the final *Guides* state that unqualified renewable energy claims are deceptive unless all, or virtually all, of a product is produced using renewable energy.²⁰¹ When this is not the case, claims should specify the percentage of renewable energy used in the manufacturing process.²⁰² Likewise, the Commission recognized marketers may make non-deceptive “made with renewable energy” claims regarding discrete parts of their products.²⁰³ For example, the final *Guides* suggest that a manufacturer that purchases RECs to offset the non-renewable energy used to produce a car’s seats may make the limited claim that the *seats* are made with renewable energy without deceiving consumers.²⁰⁴

Finally, the Commission considered whether the failure to disclose that a renewable energy claim is based on the purchase of unbundled RECs is deceptive.²⁰⁵ In an “unbundled” transaction, a marketer utilizes non-renewable electricity and separately purchases RECs from a third party.²⁰⁶ The net environmental effect of such a transaction is equivalent to that of a traditional “bundled” transaction, because each unit of electricity used is matched by a REC.²⁰⁷ Nonetheless, some commenters argued that an unqualified “made with renewable energy” claim would be deceptive if a product was in fact produced using non-renewable energy matched by separately acquired RECs.²⁰⁸ Because the Commission lacked

198. 16 C.F.R. § 260.15 (2013), Ex. 2.

199. *Id.*

200. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 222.

201. 16 C.F.R. § 260.15(c) (2013).

202. *Id.*

203. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 222.

204. 16 C.F.R. § 260.15, Ex. 4.

205. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 209–11.

206. WORLD RES. INST., *supra* note 170, at 2.

207. *Id.*

208. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 223. One commenter argued that consumers understand “made with renewable energy” claims to mean that renewable

evidence that consumers distinguish between bundled and unbundled transaction, the final *Guides* do not require additional disclosure in this area.²⁰⁹

3. Renewable Energy “Hosting” Claims

The Commission next considered comments from marketers seeking to promote their role in “hosting” renewable energy production.²¹⁰ Companies that “host” renewable energy generate energy from renewable sources but sell the RECs associated with that energy to others.²¹¹ For example, a pulp and paper mill that generates renewable biomass energy, but ultimately sells the corresponding RECs, has effectively sold the right to characterize the energy it uses as renewable. Nonetheless, these marketers argued that claims promoting their “hosting” of renewable energy generation would not deceive consumers.²¹² Because the Commission’s consumer perception survey demonstrated that using the term “host” implies that the marketer actually uses the renewable energy generated, unqualified “hosting” claims are deemed deceptive in the final *Guides*.²¹³ To avoid confusion, the Commission suggested that it would not be deceptive for a manufacturer to advertise, “We generate renewable energy, but sell all of it to others.”²¹⁴

4. Claims Regarding Legally Required Renewable Energy Production

A number of commenters suggested that consumers expect their renewable energy purchases to support net additional investments in renewable energy production.²¹⁵ As such, these commenters argued that renewable energy claims stemming from legally required renewable energy production (i.e., RECs generated under

energy was used in the manufacturing process. *Id.* Another broadly asserted that unbundled RECs do not convey the same environmental benefits as renewable energy production and use. *Id.*

209. *Id.*

210. *Id.* at 224.

211. *Id.*

212. *Id.*

213. 16 CFR § 260.15(d) (2013).

214. *Id.* at Ex. 5.

215. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 225.

a mandatory state market) are deceptive.²¹⁶ Though the Commission recognized that consumers may expect their purchases to support additional renewable energy production, the Commission failed to test this proposition in its consumer perception survey.²¹⁷ Thus, although the Commission indicated that it will continue to monitor the issue and would welcome additional consumer perception data, the final *Guides* do not address disclosure of legally mandated renewable energy generation.²¹⁸

5. Geographic Location of Renewable Energy Generation

Finally, the Commission also considered whether consumers infer local benefits from general renewable energy claims.²¹⁹ However, as with claims related to legally required renewable energy generation, the Commission did not test consumer perceptions regarding the geographic location of renewable energy production.²²⁰ With no consumer perception evidence, the Commission refrained from addressing these claims in the final *Guides*.²²¹

C. Carbon Offset Claims—Key Issues

In addition to “made with renewable energy” claims, the revised *Green Guides* address for the first time claims tied to marketers’ investments in carbon offsets.²²² As consumers have begun to recognize the dangers of greenhouse gas (GHG) emissions and global climate change, many marketers have sought to promote their commitment to reducing their GHG emissions.²²³ In most instances, even the most committed organizations cannot afford to avoid all activities that result in greenhouse gas emissions.²²⁴ As

216. *Id.*

217. *Id.* at 226.

218. *Id.*

219. *Id.* at 216.

220. *Id.* at 226.

221. *Id.* at 226–27.

222. PROPOSED 2012 GREEN GUIDES, *supra* note 156, at 63,554.

223. BUS. FOR SOC. RESPONSIBILITY, WHO’S GOING “CARBON NEUTRAL”? 1 (2007), available at http://www.bsr.org/reports/BSR_Carbon-Neutral-Chart.pdf.

224. *Carbon Offsets*, 3DEGREES, <http://www.3degreesinc.com/products/carbon-offsets> (last visited Jan. 23, 2014).

such, carbon offsets are an important means by which marketers achieve voluntary GHG emissions targets.²²⁵

A carbon offset represents a unit of carbon dioxide-equivalent (CO₂e) that is reduced, avoided, or sequestered to compensate for emissions occurring elsewhere.²²⁶ Businesses acquire carbon offsets to obtain net emissions reductions when the purchase of offsets is more cost-effective or technologically feasible than achieving equivalent reductions in the buyer's own operations.²²⁷ Common examples of offset projects include solar and wind power investments, forest preservation, and the collection of methane from landfills or farms.²²⁸ As of August 2008, more than six hundred organizations developed, marketed, or sold a diverse range of carbon offsets in the United States.²²⁹ In 2012, the total market value for carbon offsets grew by 11% to \$176 billion per year, with transaction volumes reaching 10.3 billion tons of carbon dioxide equivalent offsets.²³⁰

As previously described, the Commission undertook a significant review of carbon offset claims with its 2012 revision to the *Green Guides*.²³¹ In particular, the Commission's consumer perception survey explored consumers' understanding of the terms "carbon offset" and "carbon neutrality," as well as consumer exposure to advertisements and products referencing these terms.²³² The results of this survey indicate that many consumers demonstrate some understanding of carbon offsets.²³³ However, the survey

225. WORLD RES. INST., THE BOTTOM LINE ON... OFFSETS 1 (2008), *available at* http://www.wri.org/sites/default/files/pdf/bottom_line_offsets.pdf.

226. *Id.*

227. BUS. FOR SOC. RESPONSIBILITY, GETTING CARBON OFFSETS RIGHT: A BUSINESS BRIEF ON ENGAGING OFFSET PROVIDERS 1 (2007), *available at* http://www.bsr.org/reports/BSR_GettingCarbon-Offsets-Right.pdf.

228. *Buying Carbon Offsets: What You Need to Know*, NATURAL RES. DEF. COUNCIL, <http://www.nrdc.org/globalwarming/offsets.asp> (last updated Jan. 15, 2014).

229. U.S. GOV'T ACCOUNTABILITY OFFICE, CARBON OFFSETS: THE U.S. VOLUNTARY MARKET IS GROWING, BUT QUALITY ASSURANCE POSES CHALLENGES FOR MARKET PARTICIPANTS 7 (2008), *available at* <http://www.gao.gov/new.items/d081048.pdf>.

230. ALEXANDRE KOSSOY & PIERRE GUIGON, CARBON FIN. AT THE WORLD BANK, STATE AND TRENDS OF THE CARBON MARKET 9 (2012), *available at* http://siteresources.worldbank.org/INTCARBONFINANCE/Resources/State_and_Trends_2012_Web_Optimized_19035_CVI&Txt_LR.pdf.

231. *Supra* Part III.A.

232. PROPOSED 2012 GREEN GUIDES, *supra* note 156, at 63,555.

233. *Id.* at 63,596. (noting that 41% of respondents identified a carbon offset as "a way of reducing carbon dioxide and other greenhouse gases" from a closed list of options, while only 18% provided an answer that communicated a general understanding of the term in

further indicated that a significant percentage of consumers might be misled by carbon offset claims when emissions reductions do not occur for several years.²³⁴

Following the release of its initial proposed guidance, the Commission sought further comment on five topics: (1) defining the terms “carbon offset” and “carbon neutral”; (2) tracking carbon offsets; (3) timing of emissions reductions; (4) additionality of carbon offsets; and (5) the use of RECs to substantiate carbon offset claims.²³⁵ The following sections discuss the Commission’s final guidance on each of these issues.

1. Defining “Carbon Offset” and “Carbon Neutral”

Though several commenters recommended more comprehensive guidance regarding the definition of “carbon offset” and “carbon neutral,” the final *Guides* do not provide specific definitions for these terms.²³⁶ The Commission found that available consumer perception data did not identify a pattern of confusion among consumers regarding the use of these terms.²³⁷ Absent such evidence, the Commission noted that “more detailed guidance would place the FTC in the inappropriate role of setting environmental policy” and reiterated that its “mandate is to combat deceptive and unfair practices, not to create definitions or standards for environmental terms.”²³⁸ Further, the Commission noted that any detailed guidance “could quickly become obsolete given the rapidly changing nature of this market.”²³⁹

2. Tracking Carbon Offsets

As with RECs, carbon offsets are primarily available in two markets: the regulatory market and the voluntary market.²⁴⁰ In regulatory markets, like the Regional Greenhouse Gas Initiative in

response to an open-ended question. Consumer responses regarding the term “carbon neutral” followed a similar pattern).

234. *Id.* (noting that 43% of respondents disagreed with a marketer’s statement that it had offset its emissions where offsetting emissions reductions would not occur “for several years.”).

235. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 59.

236. *Id.* at 70.

237. *Id.*

238. *Id.*

239. *Id.*

240. WORLD RES. INST., *supra* note 225, at 2.

the Northeast, state agencies are responsible for establishing standards to determine which offsets may be used to comply with mandatory emissions reduction targets.²⁴¹ However, in the larger voluntary market, there is currently no common standard for offset measurement and verification.²⁴² According to the Government Accountability Office, the lack of uniform standards and quality control assurances creates significant difficulties for purchasers seeking to ensure the credibility of offsets.²⁴³

In light of these difficulties, some commenters recommended that the Commission provide detailed guidance regarding the “offset criteria, recordkeeping requirements, verification procedures, or particular qualifications” marketers must use to substantiate their carbon offset claims.²⁴⁴ However, because the Commission identified no evidence that any particular substantiation method is necessary to prevent consumer deception, the final *Guides* advise only that marketers employ “competent and reliable scientific and accounting methods” to substantiate offset claims.²⁴⁵

3. Timing of Emissions Reductions

The Commission next considered whether marketers must disclose the timing of emissions reductions associated with carbon offset claims.²⁴⁶ As described above, the Commission’s consumer perception survey demonstrated that a significant percentage of consumers understand carbon offset claims to reflect investments yielding near-term emissions reductions.²⁴⁷ In response, the Commission’s proposed guidance required disclosure where a marketer’s carbon offset claim represents emission reductions that will not occur within two years.²⁴⁸

The Commission received conflicting comments in response to its proposed guidance.²⁴⁹ While most commenters agreed that carbon offset claims should be substantiated by emissions

241. *Id.*

242. *Id.*

243. GOV’T ACCOUNTABILITY OFFICE, *supra* note 229, at 8–9.

244. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 71.

245. 16 C.F.R. § 260.5(a) (2013).

246. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 64–68.

247. PROPOSED 2012 GREEN GUIDES, *supra* note 156, at 63,596.

248. *Id.* at 63,601.

249. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 64–65.

reductions that have already occurred or will occur in the near future, some commenters argued that the Commission's proposed disclosure requirement would unfairly discourage long-term offsets projects.²⁵⁰ Ultimately, the Commission retained the two-year disclosure threshold, citing consumer perceptions regarding the timing of unqualified carbon offset claims.²⁵¹

4. Additionality of Carbon Offsets

Because offsets are used to compensate for continued or increased GHG emissions elsewhere, if they do not represent a deviation from business-as-usual activity, their use allows a net increase in GHG emissions.²⁵² This basic requirement that offsets represent *additional* carbon reductions beyond those that would have occurred without incentives provided by a carbon offset market is termed "additionality."²⁵³ Ultimately, however, the question of whether an individual project represents additional emissions reductions beyond business-as-usual generally has no definite answer.²⁵⁴ Additionality calculations can vary widely, depending on assumptions regarding the conditions under which a project is developed.²⁵⁵ For example, a project's net carbon impact may be influenced by a variety of factors, including access to financing, legal and regulatory barriers or incentives, and local resistance or lack of technical capacity to undertake the project.²⁵⁶ These inherent difficulties result in conflicting standards used to assess the additionality of purported offsets.²⁵⁷

Due to the unresolved technical and environmental policy issues that these conflicting additionality tests raise, the Commission

250. *Id.* at 65.

251. 16 C.F.R. § 260.5(b) (2013).

252. WORLD RES. INST., *supra* note 225, at 1.

253. *Id.*

254. *See* TREXLER ET AL., *supra* note 22, at 7.

255. *Id.*

256. Stockholm Env't Inst. & Greenhouse Gas Mgmt. Inst., *Additionality*, CO2OFFSETRRESEARCH.ORG (2011), <http://www.co2offsetresearch.org/consumer/Additionality.html>.

257. *See id.* (describing commonly used additionality tests, including the "Legal and Regulatory Additionality Test," the "Financial Test," etc.); *see also* Thomas P. Healy, *Clearing the Air: Pursuing a Course to Define the Federal Government's Role in the Voluntary Carbon Offset Market*, 61 ADMIN. L. REV. 871, 877-79 (2009) (describing lack of consensus among market participants and regulators as to the proper standards for evaluating offsets); Laurie A. Ristino, *It's Not Easy Being Green: Reflections on the American Carbon Offset Market*, 8 SUSTAINABLE DEV. L. & POL'Y 34, 34 (2008) (describing additionality as a "deceptively simple concept").

refrained from endorsing a detailed, comprehensive test for substantiating carbon offset claims.²⁵⁸ However, the Commission did recognize consumer perception data indicating that consumers expect carbon offset claims to represent activities that generate emissions reductions that would not have occurred otherwise.²⁵⁹ As a result, the final revised *Guides* advise that it is deceptive to claim that a carbon offset “represents an emission reduction if the reduction, or the activity that caused the reduction, was required by law.”²⁶⁰

5. Using RECs to Substantiate Carbon Offset Claims

Finally, the Commission considered whether unqualified carbon offset claims tied to a marketer’s investment in renewable energy production are deceptive.²⁶¹ As described above, RECs represent the environmental benefit of electricity generated using renewable resources.²⁶² Because electricity generated using renewable sources generally displaces electricity produced from fossil fuels, some argue that carbon offsets may be based on the purchase of RECs.²⁶³ Under this view, federal agencies may use RECs to comply with agency GHG reduction targets.²⁶⁴ On the contrary, many in the environmental community maintain that RECs are not properly viewed as carbon offsets.²⁶⁵ Reflecting this division, the Commission received conflicting recommendations regarding the use of RECs to substantiate carbon offset claims.²⁶⁶

258. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 73.

259. *Id.* at 74.

260. 16 C.F.R. § 260.5(c) (2013).

261. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 69–70.

262. *See supra* note 165 and accompanying text.

263. *See* Jeremy Elton Jacquot, *Shining a Light on the RECs vs. Carbon Offsets Controversy*, TREEHUGGER (Jan. 24, 2008), <http://www.treehugger.com/corporate-responsibility/shining-a-light-on-the-recs-vs-carbon-offsets-controversy.html> (noting that a coalition of U.S. and international energy firms lobbied for RECs to count as carbon offsets).

264. U.S. DEP’T OF ENERGY, FEDERAL ENERGY MANAGEMENT PROGRAM 1–2 (2011), *available at* <http://www.nrel.gov/docs/fy11osti/52105.pdf>.

265. *See, e.g.*, WORLD RES. INST., *supra* note 170, at 1 (“RECs and carbon offsets are different mechanisms that accomplish different goals.”); CIR. FOR RES. SOLUTIONS, RENEWABLE ENERGY CERTIFICATES, CARBON OFFSETS, AND CARBON CLAIMS 3 (2012), *available at* http://www.resource-solutions.org/pub_pdfs/RECs&OffsetsQ&A.pdf (“It is inappropriate for projects or marketers to sell RECs as offsets . . . that can address non-electricity-related . . . emissions, since the facility and emissions reductions associated with that MWh of generation have not necessarily been proven to meet offset standards, specifically additionality.”).

266. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 69–70.

However, in the absence of compelling evidence of consumer perceptions related to REC-backed offset claims, the Commission provided no definitive guidance with respect to such claims.²⁶⁷ As described below, this reliance on existing consumer perceptions ultimately weakens the *Guides*, and demonstrates the need for the Commission to take a more active role in reviewing particularly misleading claims.²⁶⁸ Nonetheless, recognizing the evolving nature of the field and the complexity of the interaction between RECs and carbon offsets, the Commission recommended that marketers rely on competent and reliable scientific evidence to substantiate their claims and ensure that emission reductions are not double-counted.²⁶⁹

IV. THE 2012 *GREEN GUIDES*: LIKELY IMPACTS AND OUTSTANDING ISSUES

The 2012 *Green Guides* mark an important first step towards ensuring that renewable energy and carbon offset claims do not deceive environmentally conscious consumers. The Commission's guidance provides a basic framework for assessing these claims, and it establishes guidelines to ensure that claims conform to consumer expectations and environmental preferences. Nonetheless, because the Commission relies exclusively on existing consumer perceptions, the resulting guidance may result in both under- and over-enforcement from an environmental perspective. This concern is particularly apparent in the Commission's initial guidance regarding renewable energy and carbon offset claims. In light of continued uncertainty, even among well-informed observers, regarding the validity of these claims, the Commission should expand its analysis beyond existing consumer perceptions and incorporate the Commission's subjective assessment of the validity of marketers' renewable energy and carbon offset claims. This recommendation is addressed in greater detail below.

267. *Id.* at 74–75.

268. *See infra* Part IV.B.

269. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 75.

A. Applying the Revised *Green Guides* to Existing Renewable Energy and Carbon Offset Claims

Although Commission staff identified widespread use of key terms related to renewable energy production and carbon offsets, the final revised *Green Guides* provide limited additional guidance on these topics. Prior to issuing the Commission's most recent proposed *Guides*, Commission staff reviewed over 1,000 websites which each contained at least one environmental marketing claim.²⁷⁰ The purpose of this "Internet Surf" was to provide a snapshot of the content of online environmental marketing claims and to inform the Commission's proposed guidance regarding such claims.²⁷¹ Of the websites reviewed, 387 included claims related to renewable energy production—45.9% of these claims used the term "renewable energy," and 36.7% used the term "renewable resource."²⁷²

However, despite recognizing the inconsistent use of these terms, the Commission expressly refused to provide extensive guidance regarding their content in the final revised *Green Guides*.²⁷³ As a result, the revised *Green Guides* likely will have relatively little impact on these claims. At most, online marketers may begin to specify the source of renewable energy used to produce their products in order to avoid consumer confusion. Such disclosure is not required, but suggested as a means to minimize the risk of deception.²⁷⁴

Similarly, the final *Guides* likely will have limited impact on carbon offset claims identified in the Commission's Internet Surf. Of the webpages reviewed by Commission staff, 332 included claims related to marketers' carbon emissions.²⁷⁵ Of these, 60.2% of invoked the term "carbon footprint," while 15.7% referenced "carbon neutrality" or being "carbon neutral."²⁷⁶ Again, although the Commission recognized the absence of a uniform definition of

270. DIV. OF ENFORCEMENT, U.S. FED. TRADE COMM'N, GREEN MARKETING: INTERNET SURF 3 (2010) (reviewing a variety of claims, including carbon neutrality, renewability, sustainability, and general environmental claims) (on file with author).

271. *Id.*

272. *Id.* at 11.

273. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 200–14.

274. 16 C.F.R. § 260.15(b) (2013).

275. DIV. OF ENFORCEMENT, *supra* note 270, at 10.

276. *Id.*

these terms,²⁷⁷ the revised *Green Guides* largely eschew definitive guidance regarding their content.²⁷⁸

B. Outstanding Issues

1. General Concerns Regarding the *Green Guides*

With marketers continuing to engage in extensive greenwashing,²⁷⁹ commentators have questioned whether the *Green Guides* provide adequate protection against deceptive environmental marketing claims. In particular, many observers note that the *Green Guides* are not enforceable regulations and do not carry the force of law.²⁸⁰ This forces the Commission to pursue backward-looking enforcement actions to ensure compliance, straining agency resources and limiting the *Green Guides*' impact.²⁸¹ To enhance compliance, some have proposed granting the states and the U.S. Securities and Exchange Commission concurrent jurisdiction to enforce the *Green Guides*.²⁸²

In addition to enforcement concerns, commentators have criticized the content of the *Green Guides*. For example, some have warned that the Commission's emphasis on specific categories of environmental claims allows marketers to develop new environmental terminology to avoid § 5 liability.²⁸³ Along similar lines, and emphasizing the Commission's limited technical expertise, some have proposed a more robust role for the EPA in defining common marketing terms and setting national standards for environmental claims.²⁸⁴

With these broad criticisms of the *Green Guides* in mind, the Commission's newly issued guidance regarding renewable energy and carbon offset claims raises particularly pressing concerns. Most notably, the Commission's continued emphasis on consumer

277. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 60 n.201.

278. *See supra* notes 236–39 and accompanying text.

279. *See supra* notes 25–37 and accompanying text.

280. *See, e.g.,* Avallone, *supra* note 141, at 685–86.

281. *Id.*

282. Joseph J. Swartz, *Thinking Green or Scheming Green?: How and Why the FTC Green Guide Revisions Should Address Corporate Claims of Environmental Sustainability*, 18 PENN ST. ENVTL. L. REV. 95, 118 (2009).

283. Coppolecchia, *supra* note 76, at 1400 (suggesting that future Guides should exclude specific categories of claims and instead focus on the creation of broad principles for environmental marketing claims).

284. Avallone, *supra* note 141, at 699–700.

perceptions to identify deceptive environmental claims results in guidance that stands at odds with important environmental objectives.

2. Potential Confusion Regarding Renewable Energy Claims

Turning first to renewable energy claims, the Commission's inability to settle on a firm definition of "renewable" energy sources leaves considerable ambiguities about the environmental effects of the guidance. As described above, differing state policies define different sources of electricity generation as "renewable."²⁸⁵ However, the revised *Green Guides* do not provide precise criteria to determine which sources may be considered "renewable" for purposes of identifying deceptive environmental marketing claims.²⁸⁶ Therefore, the FTC cannot distinguish among more or less environmentally sound marketing claims because of the different proclivities of the respective states that define the meaning of "renewable."

First, although the *Green Guides* categorically prohibit renewable energy claims based on electricity generation relying on fossil fuels, at least one state credits certain fossil fuel generation sources under its RES.²⁸⁷ Because the Commission has concluded that consumers generally understand "renewable" energy sources to exclude fossil fuels,²⁸⁸ the Commission is unlikely to look favorably on renewable energy claims based on fossil fuel electricity generation.

The potential environmental difficulties posed by the lack of uniformity among state definitions of renewable energy are exemplified by marketing claims based on electricity generated using woody biomass. Woody biomass counts as the nation's second largest source of renewable electricity generation, behind only hydropower.²⁸⁹ Further, the Department of Energy's Energy Information Administration projects that biomass electricity

285. See *supra* notes 178–81 and accompanying text.

286. See *supra* notes 182–85 and accompanying text.

287. *Pennsylvania: Incentives/Policies for Renewables & Efficiency*, DATABASE OF STATE INCENTIVES FOR RENEWABLES AND EFFICIENCY, http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=PA06R (last updated Aug. 9, 2012) (explaining that integrated gasification combined cycle (IGCC) coal technology is included among "Tier II" sources, which must account for 10% of the electricity generation by 2021).

288. See *supra* note 184 and accompanying text.

289. *Short-Term Energy Outlook: Renewables and CO2 Emissions*, U.S. ENERGY INFO. ADMIN. (Jan. 7, 2014), http://www.eia.gov/forecasts/steo/report/renew_co2.cfm.

generation will increase four-fold throughout the next twenty-five years, driven primarily by state and federal renewable energy policies.²⁹⁰

Nonetheless, while every state that has enacted an RES/RPS includes woody biomass among eligible sources of renewable energy, the states' definitions of woody biomass differ significantly.²⁹¹ Most notably, though most states define woody biomass to include whole trees, six states at least limit (and some explicitly prohibit) the use of whole trees as eligible biomass.²⁹² This distinction is particularly important from an environmental perspective. While studies suggest that the use of waste sources (e.g., scraps from lumber operations and tree trimmings) of woody biomass reduces GHG emissions in a relatively short timeframe, using whole trees for electricity production offers far less certain carbon savings.²⁹³ For this reason, some argue that burning whole trees to generate electricity is more damaging from a carbon emissions perspective than burning non-renewable coal.²⁹⁴

With this in mind, the Commission's decision to forgo specific guidance that more clearly indicates which sources of woody biomass qualify as "renewable" for purposes of the *Green Guides* weakens their environmental efficacy. Under the final 2012 *Green Guides*, marketers seeking to claim that their products are manufactured using renewable energy have no incentive to ensure that the RECs they purchase are derived from waste-only woody biomass or other high-quality renewable energy sources. Clearly there is an environmental difference between a REC generated using wind power and a REC generated by burning tires. However, a number of state legislatures have recently proposed offering

290. *EIA Projects U.S. Non-Hydro Renewable Power Generation Increases, Led by Wind and Biomass*, U.S. ENERGY INFO. ADMIN. (Feb. 28, 2012), <http://www.eia.gov/todayinenergy/detail.cfm?id=5170>.

291. Christine Elizabeth Zeller-Powell, *Defining Biomass As a Source of Renewable Energy: The Life Cycle Carbon Emissions of Biomass Energy and a Survey and Analysis of Biomass Definitions in States' Renewable Portfolio Standards, Federal Law, and Proposed Legislation*, 26 J. ENVTL. L. & LITIG. 367, 401 (2011).

292. *Id.* at 420–21.

293. *Id.* at 395.

294. MARY S. BOOTH WITH RICHARD WILES, ENVTL. WORKING GRP., *CLEARCUT DISASTER: CARBON LOOPHOLE THREATENS U.S. FORESTS* 18 (2010), available at <http://static.ewg.org/pdf/EWG-clearcut-disaster.pdf> (arguing that "[b]ecause wood and other biomass materials have a very low energy density, and because biomass power plants are significantly less efficient than gas and even coal plants, carbon dioxide emissions from biomass per unit of energy generated are about 1.5 times higher than from coal.").

RECs for tire incinerators and coal waste facilities.²⁹⁵ Due to the Commission's general deference to states in defining "renewable energy," a significant portion of activities giving rise to acceptable renewable energy claims may offer only limited environmental advantages. As described in greater detail below, the Commission should address this issue by engaging in a subjective review of the content of marketers' renewable energy claims.²⁹⁶

3. Misleading "Clean Energy" Claims Left Unaddressed

Growing interest among policymakers and marketers in promoting investments in a broader universe of "clean energy" sources poses similar challenges. In his 2011 State of the Union address, President Barack Obama challenged Congress to adopt a new national goal to provide 80% of the nation's electricity from "clean energy sources" by 2035.²⁹⁷ Although the President did not explicitly define "clean energy," he clearly suggested that the term embraces not only traditional renewable sources (e.g., wind and solar), but also "nuclear, clean coal, and natural gas."²⁹⁸ Think tanks and other policy advocates have since proposed a national Clean Energy Standard (CES) to meet this goal,²⁹⁹ and in March 2012 then-Senate Energy and Natural Resources Committee Chairman Jeff Bingaman introduced legislation to establish such a program.³⁰⁰ Under the Clean Energy Standard Act of 2012, "clean energy" sources would include new nuclear power generation, while new natural gas and coal facilities would receive partial credit relative to their carbon-intensity.³⁰¹

This increased interest in an expanded universe of clean energy sources has not been lost on marketers. While the terms "clean

295. Michael Hawthorne, *Bill Would Define Tire Burning as Renewable Energy*, CHI. TRIB., Mar. 21, 2010, available at http://articles.chicagotribune.com/2010-03-21/health/ct-met-tire-burning-20100320_1_renewable-energy-incinerator-bill-energy-credits.

296. *Infra* Part IV.C.i.

297. Barack H. Obama, U.S. President, 2011 State of the Union Address (Jan. 25, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>).

298. *Id.*

299. See, e.g., RICHARD W. CAPERTON ET AL., CTR. FOR AM. PROGRESS, HELPING AMERICA WIN THE CLEAN ENERGY RACE (2011), available at http://www.americanprogress.org/wp-content/uploads/issues/2011/02/pdf/ces_brief.pdf.

300. The Clean Energy Standard Act of 2012, S. 2146, 112th Cong. (2012).

301. *Analysis of the Clean Energy Standard Act of 2012*, U.S. ENERGY INFO. ADMIN. (MAY 2, 2012), <http://www.eia.gov/analysis/requests/bces12/>.

energy” and “renewable energy” have been used interchangeably to some degree, many marketers now promote their investments in “clean” energy that are less readily understood as “renewable.”³⁰² Particularly troubling among these claims are those related to so-called “clean coal” technologies. The American Coalition for Clean Coal Electricity (ACCCE), an industry advocacy group, defines “clean coal” as the “entire suite of technologies—both pre- and post-combustion—that can reduce the environmental footprint of coal-based electricity plants. These technologies include devices that increase the operational efficiency of a power plant, as well as those technologies that reduce emissions.”³⁰³

Notwithstanding this optimistic description, environmental organizations often argue that the term “clean coal” is inherently misleading.³⁰⁴ In addition to the human health and environmental impacts of coal production, burning coal results in the release of significant amounts of conventional air pollutants and GHG emissions.³⁰⁵ On one hand, modern pollution control technologies (in addition to hypothesized carbon capture and sequestration technologies) serve to reduce the total amount of air emissions that reach the atmosphere.³⁰⁶ On the other hand, “clean coal” claims arguably commit at least the TerraChoice “Sin of Lesser of Two Evils” by minimizing the significant, unavoidable environmental

302. See, e.g., *About Natural Gas*, CLEAN ENERGY FUELS, <http://www.cleanenergyfuels.com/why/aboutng.html> (promoting natural gas as a transportation fuel) (last visited Jan. 23, 2014); *Clean Energy Solutions*, PAC. GAS & ELEC. CORP., <http://www.pge.com/en/about/environment/pge/cleanenergy/index.page> (describing PG&E’s investments in “Clean Energy Solutions,” including “cleaner” fossil fuel electricity generation facilities) (last visited Jan. 23, 2014); NUCLEAR ENERGY INST., <http://www.nei.org/> (Nuclear Energy Institute homepage describes nuclear power as “Clean Air Energy”) (last visited Jan. 23, 2014).

303. *Clean Coal Technology Now*, AMERICASPOWER.ORG, <http://m.americaspower.org/cct-glossary-terms> (last visited Jan. 23, 2014). AmericasPower.org is sponsored by the American Coalition for Clean Coal Electricity, “a partnership of the industries involved in producing electricity from coal.” See *Who We Are*, AMERICASPOWER.ORG, <http://m.americaspower.org/who-we-are> (Jan. 23, 2014).

304. See, e.g., NATURAL RES. DEF. COUNCIL, THERE IS NO SUCH THING AS “CLEAN COAL” 2 (2008), available at <http://www.nrdc.org/globalwarming/files/coalmining.pdf> (describing the environmental impacts of coal mining, in addition to emissions of traditional air pollutants, heavy metals, etc. from coal-fired power plants).

305. *Id.*

306. *Clean Coal Technology & the Clean Coal Power Initiative*, U.S. DEP’T. OF ENERGY, <http://energy.gov/fe/science-innovation/clean-coal-research/major-demonstrations/clean-coal-technology-and-clean-coal> (last updated Oct. 23, 2012).

impacts of coal-fired electricity generation.³⁰⁷ With this in mind, a number of environmental organizations recommended that the FTC clarify that nuclear, biomass, and “clean coal” energy are not “renewable” in the most recent *Guides*.³⁰⁸

Because the *Green Guides* do not provide specific guidance regarding “clean” energy claims, these claims are unlikely to trigger enforcement action in the short-term. This leaves a gap in enforcement, potentially allowing both electricity generators deploying “clean” energy technologies and manufacturers utilizing such technologies to mislead consumers. Moreover, where trade associations seeking to advance “clean” energy technologies market directly to consumers,³⁰⁹ these claims may confuse consumers who would otherwise support renewable energy policies.³¹⁰

By relying exclusively on existing consumer perceptions, the Commission allows marketers making novel claims to shape the audience that evaluates those claims. As with all environmental claims, clean energy claims that overstate environmental benefits are presumptively deceptive under the *Green Guides*.³¹¹ However, the Commission’s reliance on consumer perceptions as the touchstone for deception provides limited avenues for future challenges to these claims. Where consumers have less exposure to a novel claim—for example, a claim related to “clean coal” technologies—marketers have greater freedom to shape consumer perceptions without running afoul of the *Green Guides*. Thus, notwithstanding the serious environmental concerns presented by many purportedly “clean” energy technologies, claims related to these technologies are deceptive only to the extent that consumers understand and recognize their true environmental impacts.

4. Continued Uncertainty Regarding Carbon Offset Claims

As with renewable energy claims, the Commission’s limited guidance regarding marketers’ substantiation of carbon offset claims may ultimately threaten important environmental goals. As

307. TERRA CHOICE, THE ‘SIX SINS OF GREENWASHING’ 4 (2007), *available at* <http://sinsofgreenwashing.org/index6b90.pdf> (A greenwashing claim that commits the “Sin of Lesser of Two Evils” may be true within the product category, but . . . risks distracting the consumer from the greater environmental impacts of the category as a whole.”).

308. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 203.

309. *See, e.g., supra* note 163, and accompanying text.

310. *See* Morrow, *supra* note 41.

311. 16 C.F.R. § 260.3(c) (2013).

described above, significant uncertainty remains regarding how best to track and validate carbon offsets to ensure that claimed emissions reductions are real, additional, and permanent.³¹² Even offsets generated in international compliance markets, which are ostensibly subject to stringent accounting standards,³¹³ are not immune to criticism regarding the validity of purported emissions savings.³¹⁴ This continued uncertainty is best captured by one observer's description of carbon offsets as "an imaginary commodity created by deducting what you hope happens from what you guess would have happened."³¹⁵ Moreover, strong critics of global carbon markets argue that carbon offsets are in fact counterproductive, as they distract from the necessity for developed nations to reduce their reliance on fossil fuels.³¹⁶ With these criticisms in mind, some suggest that the term "offset" is essentially misleading and should be discarded altogether.³¹⁷

The revised *Green Guides* do not prohibit carbon offset claims, and instead require only that marketers "employ competent and reliable scientific and accounting methods to properly quantify claimed emissions reductions."³¹⁸ Thus, to the extent that carbon offsets generally cannot be persuasively demonstrated to represent true emissions reductions even under the most stringent

312. See *supra* notes 252–57 and accompanying text.

313. See MICHAEL GILLENWATER & STEPHEN SERES, THE CLEAN DEVELOPMENT MECHANISM: A REVIEW OF THE FIRST INTERNATIONAL OFFSET PROGRAM 8–9 (2011), available at <http://www.c2es.org/docUploads/clean-development-mechanism-review-of-first-international-offset-program.pdf> (describing the process by which offset projects are approved under the United Nations Framework Convention on Climate Change, including review by outside experts and independent auditors).

314. DAVID J. HAYES, CTR. FOR AM. PROGRESS, GETTING CREDIT FOR GOING GREEN: MAKING SENSE OF CARBON "OFFSETS" IN A CARBON-CONSTRAINED WORLD 10 (2008), available at http://www.americanprogress.org/wp-content/uploads/issues/2008/03/pdf/carbon_offsets.pdf.

315. Nick Davies, *The Inconvenient Truth About The Carbon Offset Industry*, THE GUARDIAN (June 15, 2007), <http://www.theguardian.com/environment/2007/jun/16/climatechange.climatechange> (quoting journalist Dan Welch, who investigated carbon offset practices in 2007).

316. STEFFEN BÖHM & SIDDHARTHA DABHI, UPSETTING THE OFFSET: THE POLITICAL ECONOMY OF CARBON MARKETS 9, 10 (Steffen Böhm & Siddhartha Dabhi eds., 2009), available at <http://steffenboehm.net/sites/default/files/9781906948078upsettingtheoffset.pdf>.

317. HAYES, *supra* note 314, at 3 ("[W]e should retire the ambiguous and misleading term 'offsets' because it has been used so loosely as to have virtually no meaning.").

318. 16 C.F.R. § 260.5(a) (2013).

international standards, the revised *Green Guides* do little to ensure that carbon offset claims do not deceive consumers.

Moreover, even assuming that most carbon offsets available in voluntary markets represent true and permanent emissions reductions, the Commission's limited guidance does little to ensure that marketers' claims are substantiated with high-quality offsets. Because marketers seeking to reduce their contribution to climate change often lack the expertise and inclination to judge the quality of offsets they purchase, there is a natural pressure to select lower priced—and often lower quality—offsets.³¹⁹ Because the revised *Green Guides* do not require marketers to ensure that their offsets comply with specific criteria to substantiate their claims, the potential for lower quality offsets to prevail is self-evident. Although marketers are required to utilize “competent and reliable scientific and accounting methods” to substantiate their claims, such substantiation is necessarily subjective.³²⁰ Thus, in absence of clear guidance from the Commission, unscrupulous marketers may continue to rely on low-quality offsets that manage to meet at least one measure of validity and additionality.

5. Discouraging Important Carbon Offset Projects

Finally, while the *Green Guides* do little to ensure that carbon offset claims are substantiated with high-quality offsets, they may in fact discourage investments in important long-term carbon offset projects. The final revised *Green Guides* require additional disclosure for carbon offset projects that achieve reductions outside of two years.³²¹ Thus, to the extent that additional disclosure requirements discourage marketers from investing in offset projects that necessitate a longer time horizon, the Commission's final guidance may have the unintended consequence of limiting important carbon reduction strategies.

This potential effect of the Commission's final guidance is most apparent when one considers offsets tied to forest and other land management projects. International deforestation plays a significant role in the increase in global GHG emissions, with the

319. Trexler & Kosloff, *supra* note 22, at 39 (“Consumers have no way to judge the quality of the offset commodity and will be inclined to select lower priced and often lower quality offsets.”).

320. BÖHM & DABHI, *supra* note 316.

321. 16 C.F.R. § 260.5(b) (2013).

loss of forests across the globe contributing nearly 20% of global GHG emissions annually.³²² However, despite this significant contribution to climate change, offsets stemming from avoided deforestation and other land management practices are often controversial.³²³ Proponents of such projects emphasize the significance of global deforestation as a driver of climate change, and often stress the environmental co-benefits offered by forestry offset projects.³²⁴ On the other hand, some environmentalists insist that forestry projects are particularly susceptible to difficulties in ensuring additionality and express concern regarding emissions “leakage” that results when avoided deforestation in one region merely shifts land clearing activities to other regions.³²⁵

Though the Commission did not consider this broader debate in the context of carbon offset claims, additional disclosure requirements included in the final *Green Guides* may effectively discourage investments in forestry offsets. Critics of the Commission’s final guidance argued that long-term offset claims are not deceptive where such claims are substantiated by projects offering a reasonable expectation of carbon savings.³²⁶ However, again relying on consumer perception data, the Commission concluded that consumers understand carbon offset claims to entail immediate or short-term carbon reductions.³²⁷ Again, because the Commission’s guidance relies on lay consumer perceptions, the true environmental impact of forestry and other long-term offset projects has limited impact on the final *Guides*. In this instance, because consumers may underestimate the environmental value of forestry projects, the final *Guides* may discourage investments in important environmental initiatives.

322. *About REDD+*, UN-REDD PROGRAM, <http://www.un-redd.org/AboutREDD/tabid/102614/Default.aspx> (last visited Nov. 18, 2013). To give a sense for the scale of this impact, GHG emissions resulting from deforestation exceed total emissions generated by the global transportation sector. *Id.*

323. HAYES, *supra* note 314, at 12.

324. *Id.* at 9.

325. *Id.* at 5–6.

326. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 66.

327. *Id.*

C. Recommendations

1. Subjective Analysis of Implied Environmental Claims

Although the Commission has properly refrained from advancing new federal environmental policy under its existing authority, this limited authority does not prevent the Commission from prohibiting clearly misleading environmental claims. To a degree, the Commission correctly suggests that the purpose of the *Green Guides* “is to prevent the dissemination of misleading claims, not to encourage or discourage particular environmental claims or consumer behavior based on environmental policy concerns.”³²⁸ For this reason, some have proposed expanding the Commission’s legal authority to work with the EPA to promulgate binding standards for environmental marketing that would give precise definitions to commonly used terms.³²⁹

However, the courts have consistently affirmed the Commission’s existing authority to identify misleading environmental claims without relying on consumer perception data.³³⁰ Likewise, the Commission itself has recognized marketers must “ensure that all reasonable interpretations of their claims are . . . supported by a reasonable basis before they make the claims.”³³¹ For environmental claims, such a reasonable basis often entails objective and reliable “tests, analyses, research, or studies” that the Commission will consider in light of the “entire body of relevant and reliable scientific evidence.”³³² The Commission itself has recognized that its reliance on consumer perception allows for inconsistency between scientific standards and Commission guidance regarding environmental claims.³³³ For this reason, the Commission must refine its criteria for evaluating future renewable energy and carbon offset claims.

328. PROPOSED 2012 GREEN GUIDES, *supra* note 156, at 63,558.

329. Nick Feinstein, Note, *Learning from Past Mistakes: Future Regulation to Prevent Greenwashing*, 40 B.C. ENVTL. AFF. L. REV. 229, 255–57 (2013) (arguing that the Commission’s existing authority must be expanded to prevent future greenwashing); *see also* Avallone, *supra* note 141, at 692–93.

330. *See supra* notes 124–25 and accompanying text.

331. 16 C.F.R. § 260.2 (2013) (citing Thompson Med. Co., 104 F.T.C. 839 (1984) (Appendix: FTC Policy Statement Regarding Advertising Substantiation)).

332. *Id.*

333. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 25 n.91.

In some instances, significant uncertainty within the scientific community regarding the environmental import of these claims may require the Commission to rely more heavily on consumer perceptions. For example, due to continued disagreement even between experts regarding the environmental impact of carbon offsets,³³⁴ the Commission appropriately refrained from issuing more definitive guidance regarding substantiation of related marketing claims. In this instance, it is conceivable that a marketer looking to promote its use of offsets with disputed environmental benefits would be able to substantiate such a claim with legitimate scientific evidence.

However, where there is a general scientific consensus regarding the environmental impacts of activities underlying a specific category of claims, the Commission should rely more freely on its subjective analysis of the content of these claims. For example, in light of the undeniable environmental impacts of “clean coal” electricity generation,³³⁵ the Commission is on surer footing in concluding that claims that do not acknowledge these significant environmental harms are likely to mislead consumers. Similarly, for claims related to patently non-renewable resources included in state renewable energy policies, the Commission can rightly assume that marketers will not be able to produce scientific evidence demonstrating that these resources are in fact renewable.

Unlike with more specific guidance regarding carbon offset claims, reviewing these claims without relying exclusively on existing consumer perceptions does not pose a significant risk of enshrining particular environmental policy determinations. Instead, more stringent guidance explicitly proscribing these claims would merely recognize the existing scientific consensus and the claims’ inherently misleading nature.

2. Private Action to Expand Consumer Awareness

Finally, so long as the Commission limits its enforcement activities to claims that do not meet existing consumer perceptions, broader public awareness efforts are essential to ensure that well-informed consumers are prepared to demand more environmentally sensitive products. As such, environmental

334. *See supra* notes 151–53 and accompanying text.

335. *See supra* notes 305–09 and accompanying text.

stakeholders should recognize that the key to more closely aligning environmental marketing claims with sound science and policy is a better-informed consumer. Given the Commission's refusal to incorporate independent environmental standards to assess marketers' renewable energy and carbon offset claims, it is essential to expand consumer awareness in these areas.

In some cases, consumers may already have a sophisticated understanding of difficult environmental issues. For example, consumers may in fact recognize that long-term carbon offset projects offer important environmental benefits. In these instances, additional consumer perception data may demonstrate that the current *Green Guides* do not reflect consumer concerns. The Commission has indicated that existing consumer survey data may not capture all relevant consumer perceptions, presenting an opportunity for additional third-party research.³³⁶ Similarly, even in absence of additional consumer perception data, environmental stakeholders should consider pursuing complaints before the CBBB National Advertising Division to combat patently misleading claims. Although such claims do not always result in tangible enforcement actions by the FTC, past complaints have led marketers to voluntarily alter their advertisements to better reflect demonstrable environmental harms.³³⁷

In other cases, additional public outreach and education may be necessary to ensure that consumers understand the environmental consequences of their purchases. For instance, although there appears to be a growing consensus among policymakers that certain non-renewable energy sources are properly described as "clean energy," consumers may not yet perceive a difference between these "clean energy" sources and traditional "renewable energy" sources. To the extent that environmentally conscious consumers would prefer to purchase products manufactured utilizing traditional renewable energy sources, it is essential for interested environmental and consumer protection organizations to work together to expand public awareness of this distinction.

336. STATEMENT OF BASIS AND PURPOSE, *supra* note 103, at 226 (noting the Commission's concern that consumers may expect renewable energy claims to represent investments beyond legal requirements and welcoming consumer perception information from the public to support this proposition); *see also supra* notes 132–33 and accompanying text (noting that the EPA has also suggested additional data would be helpful).

337. *See supra* note 94 and accompanying text.

V. CONCLUSION

Environmental marketing is here to stay, and environmental activists should work to harness consumers' demonstrated interest in the sustainability. Just as the early environmental movement harnessed growing public concern for the environment to achieve lasting legislative gains, consumer interest in environmentally-sensitive products presents a new opportunity to achieve a more sustainable American economy. In particular, growing public support for American energy security and global climate stability will continue to encourage marketers to promote their efforts to invest in low-carbon energy. Where these claims reflect good-faith environmental stewardship, environmental marketing can help to encourage the deployment of lower-carbon technologies that will enable the country to achieve important environmental aims. Unfortunately, when these claims are deceptive or misleading, greenwashing poses significant barriers to the broader adoption of low-carbon energy sources and ultimately undermines efforts to combat climate change.

The *Green Guides* are an essential tool in the effort to ensure that environmentally-conscious consumers can rely on marketers' low-carbon claims. The Federal Trade Commission should be commended for recognizing the growing significance of these claims through the inclusion of renewable energy and carbon offset claims in the most recent *Guides*. Unfortunately, because the Commission relied exclusively on existing consumer perceptions to craft its present guidance, the existing *Guides* carry a number of important gaps. To better harmonize low-carbon claims with true environmental impacts, the Commission should more aggressively pursue clearly misleading claims to minimize continued consumer confusion. Ultimately, however, future efforts to harmonize environmental marketing with environmental goals will depend primarily on well-informed consumers. As such, environmental and consumer advocates must work to ensure that consumers are better informed and equipped to evaluate marketers' low-carbon claims.