February 4, 2008

Office of the Secretary
Federal Trade Commission
Room H-135 (Annex B)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Green Guides Regulatory Review, 16 C.F.R. Part 260, Comment, Project No. P954501

To Whom It May Concern:

I am a student at Harvard Law School, and I appreciate the opportunity to comment on the Federal Trade Commission ("FTC")'s review of the Guides for the Use of Environmental Marketing Claims ("Green Guides"). The FTC review comes in "the midst of an environmental friendly frenzy" that has seen a significant number of companies "making new green claims, including those regarding renewable energy, carbon offsets, and sustainability."[1] The potential deception in these environmental claims has increased pressure for more extensive regulation.[2] In light of this pressure, it will be important for the FTC to consider Supreme Court precedent requiring that restrictions on advertising be no more extensive than necessary to accomplish the goal of reducing consumer deception.[3]

I make three recommendations. First, the FTC should conduct or commission an official empirical study on the types of environmental claims that are most likely to deceive consumers. Extant research is wholly insufficient as a basis for dramatic regulatory changes. Second, the FTC should decline to ban environmental claims entirely—an extreme regulation recently implemented in Norway.[4] Even less extensive but highly aggressive regulations are likely to violate the First Amendment. They might also have the collateral effect of reducing the incentives for companies to improve the environmental impact of their products. Finally, the FTC should consider a narrowly tailored restriction on vague claims—such as "Environmentally Friendly"—that are not empirically verifiable and provide no useful information to consumers. Apart from any changes to the Green Guides on which the FTC sought comment, the agency should also

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[1] *Q & A: FTC Review*, NEWSDAY (New York), Nov. 30, 2007, at A44; *see* Abigail Goldman, *"Green" Labels Come with a Shade of Doubt*, L.A. TIMES, Sept. 5, 2007 (documenting the increase in environmental claims).

[2] *See, e.g.*, Melinda Fulmer, *Eco-Labels on Food Called into Question*, L.A. TIMES, Aug. 26, 2001 ("The lack of regulation of this growing marketing niche probably has encouraged many unscrupulous companies to use unsubstantiated, vague slogans such as 'earth smart,' 'green' and 'nonpolluting,' analysts said.).

[3] Senator Arlen Specter raised this issue in his comments to the FTC in response to a review of its "Guides Concerning the Use of Endorsements and Testimonials in Advertising," Project No. P034520. His letter is available at http://www.ftc.gov/os/comments/endorsementguides/527492-00028.pdf (last visited Feb. 2, 2008) [hereinafter Specter letter]. The leading case—*Central Hudson*—is discussed *infra* at greater length. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

[4] *See* Alister Doyle, *Norway Says Cars Neither "Green" nor "Clean"*, REUTERS, Sept. 6, 2007, *available at* http://uk.reuters.com/article/environmentNews/idUKL0671323420070906.

increase its post-market enforcement of the current Green Guides. I address each of the recommendations in turn.

The Need for Empirical Research

Under Section 5 of the Federal Trade Commission Act, the FTC has the power and mandate to prevent unfair and deceptive trade practices.[5] In order to fulfill this mission, the FTC must identify those practices that are in fact deceptive. In this case, what types of environmental claims mislead consumers into believing something that is not true? When are they "greenwashed,"[6] and when do they simply disregard the claims as puffery? Do consumers even pay attention to "green" claims?[7] The FTC has conducted or commissioned studies detailing how consumers interpret advertisements before considering additional restrictions within an industry.[8] Such an effort is necessary here.

The recent push for additional regulation is due in part to studies that may themselves be—ironically enough—somewhat deceptive. For example, a 2007 study by TerraChoice Environmental Marketing examined more than 1,000 products in leading big box stores. The researchers concluded that "all but one made claims that are demonstrably false or that risk misleading intended audiences."[9] Yet, a claim could be deemed misleading if it simply failed to meet the "best practices" of environmental advertising based on the standards promulgated by the International Organization for Standardization, the FTC, and other government agencies. For example, a statement about the recycled content of copy paper was considered misleading because it did not also include information about how paper production affected "air emissions, water emissions, and global warming."[10]

The study's conclusion discusses its "bleak" findings and implies that this so-called "Sin of the Hidden Trade-Off" misleads consumers in a significant number of

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[5] *See* Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified at 15 U.S.C. § 45 (2000)).

[6] "As more companies use offset programs to create an environmental halo over their products, the commission said it was growing increasingly concerned that some green marketing assertions were not substantiated. Environmentalists have a word for such misleading advertising: 'greenwashing.'" Louise Story, *F.T.C. Asks if Carbon-Offset Money Is Well-Spent*, N.Y. TIMES, Jan. 9, 2008, http://www.nytimes.com/2008/01/09/business/09offsets.html.

[7] *See, e.g.*, Posting of Mark Gongloff to Wall Street Journal Environmental Capital Blog, *Survey: Consumers More Skeptical of Going Green*, http://blogs.wsj.com/environmentalcapital/2007/09/24/survey-consumers-more-skeptical-of-going-green/ (Sept. 24, 2007, 12:29 EST); Neil Merrett & Katie Bird, *Sustainable Manufacturers Reaping Consumer Rewards* (Jan. 16, 2008), http://www.cosmeticsdesign.com/news/ng.asp?n=82594 (describing a new report revealing that despite increasing consumer attention to green claims, buyers are "often skeptical of such claims").

[8] For example, the FTC commissioned two studies as it considered additional restrictions on diet product testimonial advertising. *See* Manoj Hastak & Michael B. Mazis, *Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements* (report submitted to FTC, Sept. 22, 2004); Manoj Hastak & Michael B. Mazis, *The Effect of Consumer Testimonials and Disclosures of Ad Communication for a Dietary Supplement* (report submitted to FTC, Sept. 30, 2003). Both studies are available at http://www.ftc.gov/reports/endorsements/study1/materials/index.shtm.

[9] TERRACHOICE ENVIRONMENTAL MARKETING, INC., THE "SIX SINS OF GREENWASHING": A STUDY OF ENVIRONMENTAL CLAIMS IN NORTH AMERICAN CONSUMER MARKETS 1 (2007), *available at* http://www.terrachoice.com/files/6_sins.pdf [hereinafter SIX SINS OF GREENWASHING].

[10] *Id.* at 2.

cases.[11] There is no empirical evidence to support that implication. TerraChoice did not estimate the number of claims that would have *in fact* deceived a reasonable consumer. Other organizations have focused more specifically on the vague claims that are so general that they could convey no useful information to a consumer.[12] Yet, even those studies do not address whether vague claims are simply seen as puffery and largely disregarded by purchasers. TerraChoice provides important initial information, but knowing these details is critical for the FTC to stay within the bounds of its organic statute. If consumers are not deceived by non-disclosed tradeoffs or irrelevant claims, new restrictions might be overly broad and therefore unconstitutional.

Constitutional Limits and Policy Concerns

In 1980, in *Central Hudson*,[13] the Court devised a four-part balancing test to determine whether a government regulation unconstitutionally interferes with the exercise of commercial free speech under the First Amendment.[14] First, advertisers must show that the speech in question concerns lawful activity and is not "misleading."[15] Second, the government must provide evidence that it has a substantial interest in regulating such speech.[16] Assuming that both of these initial burdens are met, the Court then asked whether the proposed regulation "directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[17] In recent years, the Court has emphasized that "[t]he *Central Hudson* test is significantly stricter than the rational basis test."[18]

There is some debate over the meaning of "misleading" in the first prong of the test. In 1999, a panel of the D.C. Circuit Court of Appeals reasoned in *Pearson v. Shalala*[19] that there is a difference between "inherently misleading" advertisements, which the government has carte blanche to regulate, and "potentially misleading" advertisements, which the government may regulate only if it satisfies the *Central Hudson* test.[20] For example, the copy paper line describing its recycled paper content only has the potential to be misleading because of a hidden tradeoff. An unverifiable and vague claim such as "Eco-Friendly" might more properly be considered inherently

[11] *Id.* at 8.
[12] *See, e.g.*, CONSUMERS INTERNATIONAL, GREEN CLAIMS: ENVIRONMENTAL CLAIMS ON PRODUCTS AND PACKAGING IN THE SHOPS: AN INTERNATIONAL STUDY (1999), *available at* http://www.consumersinternational.org/shared_asp_files/uploadedfiles/05462598-E4AA-465E-8A14-9853E07E2093_GreenClaims(1999).pdf [hereinafter GREEN CLAIMS].
[13] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).
[14] *Id.* at 566.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002).
[19] Pearson v. Shalala, 164 F.3d 650 (D.C. Cir. 1999), *reh'g denied*, 172 F.3d 72 (1999) (striking down regulations that would permit advertisers of dietary supplements to make only claims that were backed by "significant scientific agreement").
[20] *See id.* at 655. The distinction might be easier to illustrate outside of the environmental claim context. For example, a product called "Texas Chili" manufactured in Florida would be potentially misleading. The government might require a "Made in Florida" disclaimer on the packaging. On the other hand, a Florida product labeled "Made in Texas" would be inherently misleading and be subject to more aggressive regulation.

misleading. The essential difference turns on whether the consumer is "bound to be misled" by a particular type of claim.[21]

The second prong of the *Central Hudson* test requires the government to justify a new regulation on commercial speech by advancing a substantial state interest.[22] Protecting consumers from deceptive advertising likely qualifies as such an interest. The FTC would have a stronger case for additional restrictions if it can produce evidence that a significant number of consumers are in fact being deceived by advertisements that are not currently addressed or are otherwise considered proper under the current Green Guides. Yet, even if the FTC can demonstrate consumer deception, some courts may not find that a substantial state interest is at stake. In a 2002 case, for example, a federal court struck down an FTC regulation, declaring that "[a]t worst, any deception resulting from Plaintiffs' health claim will result in consumers spending money on a product that they might not otherwise have purchased. This type of injury, while obviously not insignificant, cannot compare to the harm resulting from the unlawful suppression of speech."[23] A court like the ones that decided *Pearson* and *Whitaker* is unlikely to be convinced that the government has a substantial interest in the context of environmental claims without more than the agency's assumptions about consumer behavior.[24] This only emphasizes that importance of commissioning and relying on additional empirical studies.

The third prong of *Central Hudson* requires that any new regulation directly advance the substantial state interest.[25] As explained above, broad bans are likely to be found unconstitutional if the speech in question is not inherently misleading. Even if extensive regulations were found to be constitutional, however, we should consider whether those regulations would take two steps backward to take one step forward. Consumers might be subjected to fewer deceptive ads, but companies would have one less reason to focus their efforts on producing more environmentally friendly products. Although environmental protection is not part of the FTC's mission, it should as a matter of policy avoid increasing speech regulations that might have harmful environmental effects if there is insufficient empirical evidence that the regulations will reduce consumer deception. An appropriate balance might be found in further regulating broad, vague environmental claims without changing the requirements for other types of claims. In other words, the government should address what TerraChoice described as the "Sin of Vagueness" without further restricting other potentially misleading "sins" described in that study. We should encourage a diverse market with *more* information—a market in which producers have an incentive to improve their environmental impact and a consumer can accurately assess their environmental claims.

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[21] *Id.*
[22] *Central Hudson*, 447 U.S. at 566.
[23] *Whitaker v. Thompson*, 248 F. Supp. 2d. 1, 16 (D.D.C. 2002).
[24] The substantial government interest requirement is the Court's interpretation of the First Amendment, not of an organic statute. As a result, the FTC could not argue for deference under *Chevron U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[25] *Central Hudson*, 447 U.S. at 566.

Proposed Amendments to the Green Guidelines

It is difficult to articulate new, narrowly-tailored standards that would adequately address most of the sins listed in the TerraChoice report referenced above—even if we assume that empirical evidence will show that those sins are in fact misleading consumers. For example, how extensive would regulations need to be to eliminate the "Sin of the Hidden Trade-off"?[26] How many trade-offs would have to be addressed to inform a consumer that a ream of paper has 30 percent recycled content? At some point, the laundry list of disclaimers—like the fine print in a credit card contract—could eliminate most of the informational benefit.[27] Existing guidelines on substantiation[28] fully cover the "Sin of No Proof" and the "Sin of Fibbing." Yet, the existing guidelines may not sufficiently address the "Sin of Vagueness."

If we accept for the moment the conclusions of the TerraChoice study, approximately 10 percent of surveyed products make environmental claims that are vague and provide essentially no useful information to the consumer.[29] I propose that the FTC primarily target these claims in its revisions of the Green Guidelines. First, some of the claims may be inherently misleading and therefore properly subject to significant restriction. For example, we might imagine an advertisement for an "environmentally friendly" bathroom cleaner. If anything, the cleaner is probably environmentally-neutral rather than environmentally-friendly. Second, such a claim provides no useful information to the consumer. There is no standard definition for what constitutes an "environmentally friendly" product.

The FTC might address this problem of vagueness in two different ways. It might consider providing a set of requirements for using terms like "environmentally friendly," "eco-safe," "chemical free," or "all natural." For example, to use an "environmentally friendly" label, a company might need to provide evidence that a product had less than a threshold impact on air, water, and soil quality during its lifecycle. The problem with this approach is the sheer number of vague phrases that may appear in advertising. So, the FTC might alternatively prohibit vague claims that are not able to be empirically verified. This would not reduce the incentives to focus on improving a product's environmental impact. A company would still be able to say that its water bottle "was produced with 100 percent wind power," even if it could not say "energy efficient." The existing guidelines suggest that vague claims are *already* subject to FTC enforcement,[30] but the revisions might strengthen that indication.

Greater enforcement efforts would also be appropriate. The "Sin of Fibbing"—making unsubstantiated claims—is already addressed by the Green Guides. It makes little sense to enhance a restriction because it is not being followed. A parallel of that logic

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[26] This refers to the potential deception when an advertisement refers to one environmental improvement (e.g., 30 percent recycled content) without focusing on other environmental impacts (e.g., contribution to air pollution).

[27] This is especially true if consumers are not as familiar with environmental data as they are with, for example, nutritional facts. If that is the case, additional disclaimers in themselves could be misleading.

[28] *E.g.*, 16 C.F.R. § 260.5.

[29] SIX SINS OF GREENWASHING, *supra* note 9, at 3-4.

[30] *See* 16 C.F.R. § 260.7(a), ex. 2 ("Since consumers are likely to interpret the 'Environmentally Friendly' claim, in combination with the textual explanation, to mean that no significant harmful substances are currently released to the environment, the 'Environmentally Friendly' claim would be deceptive.").

would call for lower campaign donation limits because contributors were disobeying the current limits. Instead, the FTC should enforce the existing substantiation requirements. It should also refocus its efforts on enforcing existing requirements on comparative[31] and overstated claims.[32]

Conclusion

As one U.S. Senator has written to the FTC, "[c]onsumers deserve to be protected from deceptive advertisements, but overly broad restrictions would do a disservice to consumers and truthful advertisers alike."[33] As the FTC evaluates the need for change, it should gather more empirical evidence and focus any strengthening of the Green Guides primarily on problematic vague claims. It should also increase its efforts to enforce existing guidelines. By taking these steps, the agency will improve the quality of information in the marketplace, keep incentives for environmental progress in place, and comply with constitutional requirements.

Sincerely,

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[31] *See* 16 C.F.R. § 260.6(c).
[32] *See* 16 C.F.R. § 260.6(b).
[33] Specter letter, *supra* note 3.