

GREENWASHING NO MORE: THE CASE FOR STRONGER REGULATION OF ENVIRONMENTAL MARKETING

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Fraudulent and deceptive environmental claims in marketing (sometimes called “greenwashing”) are a persistent problem in the United States, despite nearly thirty years of efforts by the Federal Trade Commission (FTC) to prevent it. This Essay focuses on a recent trend in greenwashing—fraudulent “organic” claims for nonagricultural products, such as home goods and personal care products. We offer three recommendations. First, we suggest ways that the FTC can strengthen its oversight of “organic” claims for nonagricultural products and improve coordination with the USDA. Second, we argue for inclusion of guidelines for “organic” claims in the next revision of the FTC’s Guidelines for the Use of Environmental Marketing Claims (often referred to as the “Green Guides”), which the FTC is scheduled to revise in 2022. Finally, we assert that the FTC should formalize the Green Guides as binding regulations, rather than their current form as nonbinding interpretive guidance, as the USDA has done for the National Organic Program (NOP) regulations. This Essay concludes that more robust regulatory oversight of “organic” claims, together with efforts by the FTC to prevent other forms of greenwashing, will ultimately bolster demand for sustainable products and incentivize manufacturers to innovate to meet this demand.

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INTRODUCTION

Many of today’s consumers, particularly Millennials and Gen Z-ers, seek to purchase “sustainable” products and services, and some have expressed a willingness to pay a higher price for “eco-friendly” options.¹ They should be encouraged to do so given the challenges of population growth, rising levels of consumption, heightened scarcity of some resources, and the compounding, deleterious effects of consumptive activities on environmental quality. Unsurprisingly, multinational, multibillion-dollar companies have promoted their sustainability initiatives in recent years. For example, in 2018, Starbucks promised to eliminate plastic straws from its cafés by 2020,² McDonalds pledged to cut greenhouse gas emissions by 36% by 2030,³ and Nestlé committed to making “100% of its packaging recyclable or reusable by 2025.”⁴

But can eco-consumers be sure they are getting what they pay for?

The trend toward “green” consumerism in the United States began in the 1970s and 1980s when many Americans developed a heightened awareness

1. Sonya Sachdeva et al., *Green Consumerism: Moral Motivations to a Sustainable Future*, 6 CURRENT OP. PSYCHOL. 60, 60, 62 (2015).

2. Christina Caron, *Starbucks to Stop Using Plastic Disposable Straws by 2020*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/business/starbucks-plastic-straws.html>.

3. Zlati Meyer, *McDonald’s Plans Dramatic Cut in Greenhouse Gases*, USA TODAY (Mar. 20, 2018, 4:00 AM), <https://www.usatoday.com/story/money/2018/03/20/mcdonalds-plans-cut-its-greenhouse-gas-emissions-36-2030/439755002/>.

4. Press Release, Nestlé, Nestlé Accelerates Action to Tackle Plastic Waste (Jan. 15, 2019), <https://www.nestle.com/media/pressreleases/allpressreleases/nestle-action-tackle-plastic-waste>.

of environmental issues.⁵ Manufacturers, and the marketing and advertising firms working for them, responded to this new consumer preference by touting the supposed environmental benefits of their products. False or misleading environmental claims became more common, with some producers changing their labels and ad campaigns—and nothing else.⁶ This practice is known as “greenwashing.”⁷

Unfortunately for consumers, fabricated environmental marketing claims can be more problematic than other forms of deceptive advertising because they are particularly difficult to substantiate.⁸ While consumers can determine, say, which brand of paper towels is more absorbent, they cannot readily verify whether the paper towels are organic or how long they will take to decompose in a landfill. Environmental marketing claims are also complex due to the interconnected nature of environmental issues—reducing one aspect of a company’s footprint does not mean that the totality of its operations are “green.”

Despite these challenges, “green” consumerism continues to gain momentum. “Green” goods have become a status symbol. A 2007 *New York Times* article reported that the number one reason for purchasing a Prius is that “it makes a statement about me” because “it shows the world that its owner cares.”⁹ In a similar vein, a 2010 study found that consumers are motivated to purchase “green” products when they believe it will elevate their social status.¹⁰ And among young adults between ages eighteen and thirty, a 2014 study showed emotion often motivates “green” purchasing decisions.¹¹

5. See David Gibson, Comment, *Awash in Green: A Critical Perspective on Environmental Advertising*, 22 TUL. ENVTL. L.J. 423, 426, 428–29 (2009); see also EPA, ASSESSING THE ENVIRONMENTAL CONSUMER MARKET 3–4 (1991) (reviewing surveys in the 1990s of Americans’ increased environmental awareness).

6. See Roger D. Wynne, Note, *Defining “Green”: Toward Regulation of Environmental Marketing Claims*, 24 U. MICH. J. L. REFORM 785, 787 (1991).

7. For a discussion on types of greenwashing and its potential consequences, see Nick Feinstein, Note, *Learning from Past Mistakes: Future Regulation to Prevent Greenwashing*, 40 B.C. ENVTL. AFFS. L. REV. 229, 233–34 (2013).

8. See Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG. 147, 150 (1993).

9. See Micheline Maynard, *Say ‘Hybrid’ and Many People Will Hear ‘Prius’*, N.Y. TIMES (July 4, 2007), <https://www.nytimes.com/2007/07/04/business/04hybrid.html> (comparing the hybrid-electric Prius vehicle to the rubber “issue bracelets” that show support for specific causes).

10. Vldas Griskevicius et al., *Going Green to be Seen: Status, Reputation, and Conspicuous Conservation*, 98 J. PERSONALITY & SOC. PSYCHOL. 392, 399 (2010).

11. See Maturros Kanchanapibul et al., *An Empirical Investigation of Green Purchase Behaviour Among the Young Generation*, 66 J. CLEANER PROD. 528, 528, 533 (2014).

This Essay argues that existing laws and regulations—facially and as-applied—do not fully prevent deceptive environmental claims in marketing. Part II examines the history of state and federal regulation of environmental marketing, focusing on the *Guidelines for the Use of Environmental Marketing Claims* (often referred to as the “Green Guides”) issued by the Federal Trade Commission (FTC or Commission). Part III focuses on the latest trend in greenwashing—fraudulent “organic” claims for nonagricultural products (such as home goods and personal care products). Part IV offers three recommendations: (1) increased FTC oversight and improved coordination with the USDA, (2) inclusion of guidelines for “organic” claims in the next revision of the Green Guides (slated for 2022), and (3) formalizing the Green Guides as binding legislative rules rather than an interpretive guidance document. This Essay concludes that more robust regulatory control over “organic” claims will not only prevent fraud but will also bolster consumer demand for sustainable goods and services generally, and incentivize manufacturers to innovate to meet this demand.

I. FEDERAL AND STATE REGULATION OF ENVIRONMENTAL MARKETING

This section reviews the history of regulating “green” marketing, beginning with the passage of the Federal Trade Commission Act (FTC Act) in 1914, which established the FTC’s broad mandate to prevent deceptive marketing; the development of disparate state regulations regarding environmental marketing in the 1970s and 1980s; issuance of the Green Guides by the FTC in 1992; and recent developments.¹² This section shows that, although the FTC’s oversight of environmental claims in marketing has strengthened over time, gaps remain, which are detrimental to manufacturers and consumers alike.

12. It should be noted that the Federal Trade Commission (FTC) has promulgated industry-specific rules and guidelines for environmental claims in the automotive, home appliance, and residential construction sectors; however, those rules are outside the scope of this paper. *See, e.g.*, FTC Guide Concerning Fuel Economy Advertising for New Automobiles, 16 C.F.R. § 259.2 (2019); FTC Energy Labeling Rule, 16 C.F.R. § 305.4(a) (2019); FTC Automotive Fuel Ratings, Certification & Posting Rule, 16 C.F.R. § 306.10 (2019); FTC Rule on Alternative Fuels and Alternative Fueled Vehicles, 16 C.F.R. § 309.2 (2019); FTC Recycled Oil Rule, 16 C.F.R. § 311.6 (2019); FTC Labeling and Advertising of Home Insulation Rule, 16 C.F.R. § 460.12 (2019).

A. *The Early Days*

Deceptive business practices and misleading marketing claims have existed for as long as there has been commercial activity. As such, the United States has had laws protecting consumers and regulating commerce since the 1700s. The U.S. Constitution grants Congress the power to “fix the Standard of Weights and Measures,” highlighting the early importance of protecting consumers from deceptive practices.¹³ As businesses and the U.S. economy evolved, so did the country’s needs for different types of consumer protection. In 1914, Congress passed the FTC Act.¹⁴ The FTC Act established the FTC and charged it with preventing anticompetitive, deceptive, or unfair business practices.¹⁵

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce” and serves as the principal federal law promoting truth in advertising and other marketing materials.¹⁶ The FTC deems actions to be “decept[ive]” if there is “a representation, omission or practice that [misleads] the consumer acting reasonably in the circumstances, to the consumer’s detriment.”¹⁷ Section 5 enumerates the various enforcement tools at the FTC’s disposal.¹⁸ The most commonly used remedy for unfair or deceptive marketing is a cease and desist order.¹⁹ The FTC may also pursue penalties or order corrective advertising.²⁰

13. U.S. CONST. art. I, § 8.

14. Act of Sept. 26, 1914, ch. 31, 38 Stat. 717 (codified as amended 15 U.S.C. §§ 41–58).

15. See 15 U.S.C. § 45(a)(2) (“The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”).

16. See *id.* § 45(a)(1) (declaring unlawful “unfair methods of competition”).

17. FTC, Policy Statement on Deception (Oct. 14, 1983), *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-103/ftc_volume_decision_103_january_-_june_1984pages_103-203.pdf. In 2015, the FTC issued an “Enforcement Policy Statement on Deceptively Formatted Advertisements.” The main purpose of the 2015 Policy Statement was to address deceptive formatting in advertising, and it reaffirmed the definition of “deceptive” first articulated in the 1983 Policy Statement. FTC, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS 1 (2015).

18. 15 U.S.C. § 45(b)–(m).

19. See DEE PRIDGEN ET AL., CONSUMER PROTECTION AND THE LAW § 12:1 (2019–2020 ed. 2019) (“The primary remedy of the FTC is the cease-and-desist orders. These orders constitute a staple ingredient of FTC enforcement. It is also the remedy that has been in existence for the longest period of time.”).

20. The FTC may order corrective advertising if the prohibition of future misrepresentations does not sufficiently dispel consumer misperceptions. See *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 761 (D.C. Cir. 1977).

With the rise of green consumerism in the 1970s, and the corresponding rise in greenwashing, the FTC began deploying its enforcement tools to address unsubstantiated and misleading environmental claims. Early efforts largely focused on claims of “biodegradable” products. For instance, in 1973, the FTC negotiated with the detergent industry to establish an industry-wide standard for marketing statements relating to biodegradability and phosphorus content of detergents.²¹ That same year, the FTC issued a cease and desist order against a milk carton company that had fraudulently claimed its cartons were “completely biodegradable.”²² In the 1980s, with concerns about the depleting ozone layer, the FTC issued cease and desist orders against marketers that had wrongfully claimed their products were “ozone friendly.”²³

Throughout the 1970s and 1980s, the Commission pursued enforcement actions against fraudulent environmental marketing claims based on its general authority under § 5 of the FTC Act. The FTC implemented these initial enforcement efforts piecemeal, under general policy, which led to a climate of frustration for both industry and consumers. At the same time, states were promulgating their own regulations to address the growing problem of fraudulent environmental claims in marketing, and state Attorneys General and consumer groups were enforcing these regulations in state courts. Ultimately, these fragmented efforts made it apparent that the FTC needed to issue nationwide guidance regarding environmental claims in marketing.

21. For a discussion of the “Voluntary Guideline Agreement” with the detergent industry, see 1974 FTC ANN. REP. 31, https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1974/ar1974_0.pdf; see also Roscoe B. Starek, III, Former Comm’r, FTC, Remarks at The Alliance for Beverage Cartons and the Environment Symposium (Dec. 4, 1996), <https://www.ftc.gov/public-statements/1996/12/federal-trade-commissions-green-guides-success-story>.

22. Ex-Cell-O Corp., 82 F.T.C. 36, 38 (1973), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-82/ftc_volume_decision_82_january_-_june_1973pages_1-53.pdf#page=36.

23. See, e.g., Tech Spray, Inc., 115 F.T.C. 433, 434–35 (1992), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-115/ftc_volume_decision_115_january_-_december_1992pages_433-559.pdf (finding that spray-on cleaning products marketed as “ozone friendly” in fact they contained ozone-depleting chemicals); Zipatone Inc., 114 F.T.C. 376, 377 (1991), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-114/ftc_volume_decision_114_january_-_december_1991pages_367-485.pdf (discovering spray-on cement product marketed as “ecologically safe” in reality contained an ozone-depleting substance).

B. *Calls for a National Standard*

In the absence of controlling federal rules, many states created their own green marketing laws by the early 1990s to address rampant misleading and unfounded environmental claims. While consumer groups applauded the laws, the nonuniformity of the laws caused frustration for manufacturers. States adopted different standards, which then interfered with interstate commerce.²⁴ In part, this was a question of stringency, with California leading the charge—as is often the case when it comes to environmental regulations. In Pennsylvania, a proposed bill allowed a product to be labeled “biodegradable” if it decomposed after any length of time,²⁵ whereas in California, the term could be used only if the product decomposed within one year.²⁶ Yet, other states banned use of terms entirely. For instance, Rhode Island prohibited “biodegradable” claims in product marketing,²⁷ complicating the nationwide marketing of biodegradable products.

In 1990, both the National Association of Attorneys General and the National Association of Consumer Agency Administrators were calling for nationwide regulation of “green marketing.”²⁸ Both groups adopted similar resolutions requesting that the FTC promulgate environmental marketing guidelines under federal law.²⁹ Similarly, a task force of ten state Attorneys General published reports in 1990 and 1991 calling for national environmental marketing standards.³⁰ Environmental groups also called for

24. See David F. Welsh, Comment, *Environmental Marketing and Federal Preemption of State Law: Eliminating the “Gray” Behind the “Green,”* 81 CALIF. L. REV. 991, 995, 1017–18 (1993).

25. S. 920, 175th Gen. Assemb., Reg. Sess. § 2 (Pa. 1991).

26. CAL. BUS. & PROF. CODE § 17,508.5 (West Supp. 1993) (repealed 1995).

27. See Welsh, *supra* note 24, at 1002 (describing R.I. GEN. LAWS § 23-18.14-3 (Supp. 1991), which banned the use of the term biodegradable). This law has since been repealed. See Act of July 13, 2000, ch. 282, § 2, 2000 R.I. Pub. Laws 1519–20.

28. See Petitions for Environmental Marketing and Advertising Guides; Public Hearings, 56 Fed. Reg. 24,968, 24,969 (May 31, 1991).

29. See *id.* at 24,968–69 (“By resolution adopted March 20, 1990 by the National Association of Attorneys General, the State Attorneys General requested that the FTC, in cooperation with the States and [Environmental Protection Agency (EPA)], develop uniform national guidelines. A similar resolution was adopted by the National Association of Consumer Agency Administrators.”); see also *NAAG Urges National Strategy on Energy Shortages, Environmental Marketing Claims*, 58 Antitrust & Trade Reg. Rep. (BNA) 424 (Mar. 22, 1990).

30. CAL. ATT’Y GEN. ET AL., *THE GREEN REPORT: FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ADVERTISING* 8–9 (1990); CAL. ATT’Y GEN. ET AL., *THE GREEN REPORT II: RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING* 1 (1991).

this type of regulation.³¹ Additionally, the Interagency Task Force on Environmental Marketing Claims was formed between the FTC, the Environmental Protection Agency (EPA), and the White House Office of Consumer Affairs (OCA) to facilitate coordination between federal agencies on this issue.³² It seemed that all interested parties—from consumers, to industry professionals, to environmental groups, to the regulators themselves—agreed that some form of a national standard was necessary.

C. *The Green Guides*

By May 1991, the FTC had received four petitions for rulemaking,³³ in addition to other informal requests,³⁴ asking that it promulgate a uniform national standard for environmental claims in marketing. From these petitions and requests, the FTC began the rulemaking process. The FTC held a two-day public hearing in July 1991, along with an extended comment period lasting 120 days.³⁵ In the Federal Register notice soliciting public comment, the Commission asked for comments on “what form” the environmental marketing standards should take—ranging from increased enforcement of § 5 of the FTC Act on a case-by-case basis, to interpretative guidance, to binding regulations.³⁶

The FTC ultimately settled on an interpretative guidance approach. In 1992, the Commission, acting pursuant to its authority under § 5, issued the

31. See Petitions for Environmental Marketing and Advertising Guides; Public Hearings, 56 Fed. Reg. at 24,969 (“In addition, environmental groups have called for guidance on environmental marketing claims . . . [e.g. Environmental Action Foundation Press Release, ‘Solid Waste Expert Urges State Action Against Bogus “Green Market” Products’ (March 14, 1990)].”).

32. *Id.* at 24,968.

33. *Id.* at 24,969–70. The petitions were filed by: Mobil Chemical Co. in September 1990; First Brands Corp. on February 5, 1991; the National Food Processors Association and ten other trade associations on February 14, 1991; and the Cosmetic, Toiletry, and Fragrance Association with the Nonprescription Drug Manufacturers Association on April 12, 1991. *Id.*

34. *Id.* at 24,968–69; see also *Manufacturers, Retailers Petition FTC to Adopt Uniform Labeling Guidelines*, 60 Antitrust & Trade Reg. Rep. (BNA) 279 (Feb. 21, 1991).

35. Petitions for Environmental Marketing and Advertising Guides, 56 Fed. Reg. 37,026, 37,026 (Aug. 2, 1991).

36. Petitions for Environmental Marketing and Advertising Guides; Public Hearings, 56 Fed. Reg. at 24,968. The FTC notes that the three possible forms of guidance in this case include: “(1) Increased enforcement of Section 5 on a case-by-case basis and enhanced dissemination of the decisions in such cases; (2) issuance of a trade regulation rule, a binding regulation; and/or (3) issuance of interpretive guides, or guidelines as they sometimes are called.” *Id.*

Guides for the Use of Environmental Marketing Claims, frequently referred to as the “Green Guides.”³⁷ The Green Guides are the FTC’s interpretation of the FTC Act as it applies to environmental claims in marketing.³⁸ They were subsequently revised in 1996, 1998, and 2012.³⁹

The Green Guides are interpretive guidelines that advise marketers on how to properly make environmental claims. They set forth general principles that apply to environmental claims about products, packaging, or services, when the claims are made in the marketing or sale of an item or service to the public.⁴⁰ These principles direct marketers to:

1. Use appropriate qualifications and disclosures regarding environmental claims. Disclosures should be “clear and prominent,” in “plain language and sufficiently large type,” located in “close proximity to the qualified claim.” Marketers should “avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosure.”⁴¹
2. Make clear whether their claim pertains to the entirety of a product, just one component of the product, or just the packaging. The Green Guides provide the following example:

A plastic package containing a new shower curtain is labeled “recyclable” without further elaboration. Because the context of the claim does not make clear whether it refers to the plastic package or the shower curtain, the claim is deceptive if any part of either the package or the curtain, other than minor, incidental components, cannot be recycled.⁴²

3. Avoid overstating environmental attributes or benefits. The Green Guides provide the following example: “An area rug is labeled ‘50% more recycled content than before.’ The manufacturer increased the recycled content of its rug from 2% recycled fiber to 3%. Although the claim is technically true, it likely conveys the false impression that the manufacturer has increased significantly the use of recycled fiber.”⁴³

37. See *Guides for the Use of Environmental Marketing Claims*, 57 Fed. Reg. 36,363, 36,363 (Aug. 13, 1992). The Green Guides are currently codified at 16 C.F.R. pt. 260 (2019).

38. *Guides for the Use of Environmental Marketing Claims*, 75 Fed. Reg. 63,552, 63,553 (Oct. 15, 2010).

39. See 61 Fed. Reg. 53,311 (Oct. 11, 1996); 63 Fed. Reg. 24,240 (May 1, 1998); 77 Fed. Reg. 62,122 (Oct. 11, 2012).

40. 16 C.F.R. § 260.1(c).

41. *Id.* § 260.3(a).

42. *Id.* § 260.3(b).

43. *Id.* § 260.3(c).

4. Ensure that comparative claims are clear and substantiated. The Green Guides provide the following example:

An advertiser notes that its glass bathroom tiles contain “20% more recycled content.” Depending on the context, the claim could be a comparison either to the advertiser’s immediately preceding product or to its competitors’ products. The advertiser should have substantiation for both interpretations. Otherwise, the advertiser should make the basis for comparison clear, for example, by saying “20% more recycled content than our previous bathroom tiles.”⁴⁴

Marketers must adhere to these principles, regardless of whether the environmental claims are “asserted directly or by implication.”⁴⁵

In addition to setting forth general environmental marketing principles, the Green Guides consider how consumers are likely to interpret particular claims and how, in turn, marketers can appropriately substantiate or qualify their claims to avoid deceiving consumers. The Green Guides state that environmental claims must be supported by a “reasonable basis.”⁴⁶ They explain that meeting the reasonable basis standard often requires scientific evidence in the context of environmental claims.⁴⁷

The Green Guides, by their own terms, are not binding regulations.⁴⁸ Rather, they “help marketers avoid making environmental marketing claims that are unfair or deceptive under § 5 of the FTC Act”⁴⁹ by providing “a ‘safe harbor’ for marketers who want certainty about how to make environmental claims.”⁵⁰

To put this in context, the FTC’s rulemaking power under § 18 of the FTC Act provides that the Commission may promulgate two different kinds of rules—interpretive rules and legislative rules.⁵¹ The FTC categorizes the Green Guides as interpretive rules, meaning that they are “general statements of policy with respect to unfair or deceptive acts or practices in or

44. *Id.* § 260.3(d).

45. *Id.* § 260.1(c).

46. *See id.* § 260.2 (“Marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims.”).

47. *Id.*

48. *See id.* § 260.1(a) (“The guides . . . do not confer any rights on any person and do not operate to bind the FTC or the public.”).

49. *Id.*

50. Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363, 36,364 (Aug. 13, 1992).

51. *See* 15 U.S.C. § 57a(a)(1) (“[T]he Commission may prescribe-- (A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce . . . and (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.”).

affecting commerce.”⁵² Legislative rules, by contrast, “define with specificity acts or practices which are unfair or deceptive . . . in or affecting commerce.”⁵³ A full analysis of the differences between interpretative and legislative rules, and the scholarship surrounding this topic, is beyond the scope of this paper; however, it is appropriate to briefly consider the significance of interpretative and legislative rules in the FTC context.

Legislative rules are subject to the requirements of the Administrative Procedure Act,⁵⁴ as well as additional procedural requirements prescribed in § 18(b)(1) of the FTC Act and in the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (FTC Improvement Act), which was passed in 1975.⁵⁵ Congress passed the FTC Improvement Act in the wake of several controversial FTC rulemakings. These additional procedural hurdles are intended to, and generally do, slow the FTC rulemaking process.⁵⁶ Since the passage of the FTC Improvement Act, the FTC has issued fewer binding rules,⁵⁷ and instead has increasingly relied on interpretive rules or industry guides, such as the Green Guides, to avoid the

52. *Id.* § 57a(a)(1)(A); *see also* Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63,552, 63,553 (Oct. 15, 2010) (“Industry guides, such as these, are administrative interpretations of the law. Therefore, they do not have the force and effect of law and are not independently enforceable.”).

53. 15 U.S.C. § 57a(a)(1)(B).

54. 5 U.S.C. §§ 551–559, 561–570a, 701–706.

55. Magnuson-Moss Warranty Federal Trade Commission (FTC) Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. § 57a). The FTC must begin the rulemaking process by publishing an Advance Notice of Proposed Rulemaking (ANPRM) in the Federal Register that contains certain information and invites comments and alternative suggestions. The FTC must also submit this ANPRM to certain Senate and House committees. In addition, before the FTC can issue a Notice of Proposed Rulemaking, the agency must “make a determination that unfair or deceptive acts or practices are prevalent,” which it is permitted to do only if “it has issued cease and desist orders regarding such acts or practices,” or “any other information available to the [FTC] indicates a widespread pattern of unfair or deceptive acts or practices.” 15 U.S.C. § 57a(b); *see also* TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW (2017), <https://crsreports.congress.gov/product/pdf/R/R41546>.

56. In the wake of these new requirements, “it soon became clear that the Magnuson-Moss rulemaking process was too slow to be of much use.” PRIDGEN ET AL., *supra* note 19, §§ 12:12–14 (discussing procedural burdens imposed pursuant to the FTC Improvement Act). It should be noted that there is an exception to this lengthier process; however, the FTC is subject only to Administrative Procedure Act (APA) rulemaking procedures if Congress expressly directs the FTC to promulgate the rule in question. *See id.*

57. *Id.* at § 12:8.

cumbersome FTC Improvement Act requirements.⁵⁸ These industry guidelines occupy a middle ground between being truly voluntary and legally binding.

The FTC's decision to tackle deceptive and fraudulent "green" marketing using an industry guide, rather than a binding regulation, enabled the FTC to more quickly address the problem at a time when it was under pressure by various stakeholders to do so. While the expedited action was a significant advantage, this approach caused other challenges.

First, voluntary federal guidelines do not preempt disparate state regulations. The Green Guides expressly state that they "do not preempt federal, state, or local laws."⁵⁹ Although some state laws now adopt by reference the Green Guides in some manner,⁶⁰ the issue of disparate state regulations still is not entirely resolved.⁶¹

Second, despite that the Green Guides expressly state that they are not binding regulations, they read like binding regulations and the FTC has sometimes treated them like binding regulations. The Green Guides classify certain practices as "deceptive" and describe what marketers "should" and "should not" do when making environmental claims in order to comply with § 5 of the FTC Act. These specific directions are arguably inconsistent with a "general statement[] of policy,"⁶² as an interpretive rule is supposed to be, and instead "define with specificity [unfair] acts or practices,"⁶³ as legislative rules do. To this end, former FTC Commissioner Mary L. Azcuenaga issued a statement of dissent upon the release of the Green Guides in 1992, questioning whether the Green Guides were legislative rules masquerading as interpretative guidance.⁶⁴

58. Grodsky, *supra* note 8, at 171. The FTC's rulemaking history is discussed in detail in PRIDGEN ET AL., *supra* note 19, § 12:12. See also Cooper J. Spinelli, Note, *Far from Fair, Farther from Efficient: The FTC and the Hyper-Formalization of Informal Rulemaking*, 6 LEGIS. & POL'Y BRIEF 129, 133–34 (2014).

59. 16 C.F.R. § 260.1(b) (2019).

60. For example, Maine, Rhode Island, and Michigan have all incorporated by reference the Green Guides into state law in some manner. In Maine and Rhode Island, a violation of the Green Guides constitutes a violation of state law (even though, ironically, it does not constitute a violation of federal law). ME. REV. STAT. ANN. tit. 38, § 2142 (2019); MICH. COMP. LAWS ANN. § 445.903 (West 2018); 6 R.I. GEN. LAWS ANN. § 6-13.3-1 (West 2014); (codifying into state law many of the Green Guides requirements).

61. See Feinstein, *supra* note 7, at 255.

62. 15 U.S.C. § 57a(a)(1)(A).

63. *Id.* § 57a(a)(1)(B).

64. See Dissenting Statement of Commissioner Mary L. Azcuenaga Concerning Issuance of Commission Guides on Environmental Marketing Claims, 57 Fed. Reg. 36,363, 36,368–69

A third problem with the interpretive guidance approach is the difficulty with enforcement. The FTC Act is the sole piece of legislation that grants the Commission statutory powers of enforcement over deceptive advertising and other forms of marketing. Because the Green Guides are nonbinding, they “are not independently enforceable.”⁶⁵ Therefore, a violation of the Green Guides is not a violation of a legally binding rule pursuant to the FTC Act, and the FTC is burdened with proving that each Green Guides violation also violates § 5 of the FTC Act. A related issue is that voluntary guidelines typically are not viewed as final agency actions, which both complicates judicial review and reduces judicial deference to the FTC’s determination that a marketer has violated § 5.⁶⁶

In sum, the Green Guides were intended to curb the growing problem of deceptive and fraudulent “green” marketing in the United States, and they have succeeded in doing so in many respects. Companies marketing products or services have a clearer roadmap for compliance with § 5 of the FTC Act, and American consumers can be more confident that they are not being “greenwashed.” This confidence, in turn, leads to higher demand for sustainable products and can reduce the negative impacts of consumption on environmental quality.

The form of the Green Guides as an interpretive guidance document, rather than a binding regulation, leads to several challenges in compliance and enforcement. The substantive purview of the Green Guides is also a factor. While the Green Guides respond to some of the most significant environmental marketing deceptions of the past—such as claims of being “ozone-layer friendly”—they are silent on one of the issues that matters most to today’s consumers: “organic” claims. The next section of this Essay discusses the rise of fraud in organic claims, particularly for nonagricultural products.

(Aug. 13, 1992) (“Even in the presence of express language disavowing agency intent to bind either itself or the public, courts in this circuit have considered whether allegedly interpretive rules are sufficiently mandatory and definitive to render them legislative in nature.”).

65. See *Guides for the Use of Environmental Marketing Claims*, 75 Fed. Reg. 63,552, 63,553 (Oct. 15, 2010) (“The Commission, however, can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the Guides. In any such enforcement action, the Commission must prove that the challenged act or practice is unfair or deceptive.”).

66. See *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (holding that agency actions are final only if they (1) constitute the “consummation” of the agency’s decision making process” and (2) impose “rights or obligations” . . . from which “legal consequences will flow”). See generally Stephen Hylas, Note, *Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. REV. 1644 (2017) (discussing the challenges in implementing the *Bennett* test).

II. DECEPTION AND FRAUD REGARDING “ORGANIC” CLAIMS

The FTC has jurisdiction over most claims made in interstate commerce,⁶⁷ and this broad mandate encompasses claims regarding the environmental attributes of products or services. As a practical matter, however, the FTC has historically deferred to the USDA regarding “organic” claims. Because the USDA focuses on agricultural products, this has led to a regulatory gap in oversight of “organic” claims for nonagricultural products, such as manufactured goods.⁶⁸ This section discusses the potential for fraud in these types of claims and recent FTC enforcement action that begins to address it.

A. Gaps in Oversight and Enforcement

An Interagency Memorandum of Understanding among the FTC, USDA, and the U.S. Department of Justice, executed in 1999, defines the agencies’ joint approach to oversight of competitive conditions in the agricultural marketplace.⁶⁹ Despite this effort at coordination, the agencies’ concurrent jurisdiction has led to confusion and gaps in enforcement regarding deceptive or fraudulent marketing.

The USDA’s Agricultural Marketing Service administers the National Organic Program (NOP), which in pertinent part sets binding regulations for the marketing of domestic agricultural products (in contrast to the purportedly nonbinding Green Guides).⁷⁰ The NOP regulations define “organic” and provide for certification of agricultural ingredients produced

67. See 15 U.S.C. § 45(a)(2) (stating the Commission may prevent persons, partnerships, or corporations except for some banks, savings, and loan institutions from using unfair methods of competition or unfair or deceptive acts).

68. Agricultural and nonagricultural products are discussed at length in this Essay. 7 U.S.C. § 6503(a) prescribes that the “[t]he Secretary [of USDA] shall establish an organic certification program for producers and handlers of agricultural products that have been produced using organic methods as provided for in this chapter.” An agricultural product is defined as “[a]ny agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock, that is marketed in the United States for human or livestock consumption.” 7 C.F.R. § 205.2 (2019).

69. Memorandum of Understanding between the Antitrust Div., Dep’t of Just. & the FTC & the USDA on Cooperation with Respect to Monitoring Competitive Conditions in the Agric. Marketplace (Sept. 16, 1999), https://www.ftc.gov/system/files/documents/cooperation_agreements/ftcdojdoa-mou.pdf.

70. See 7 C.F.R. § 205 (outlining the National Organic Program (NOP)); see also *Guidance and Instructions for Accredited Certifying Agents and Certified Operations*, USDA, <https://www.ams.usda.gov/rules-regulations/organic/handbook> (last visited Aug. 12, 2020) (containing more information about organic standards and certification).

under conditions that meet the definition. The NOP regulations also include labeling standards based on the percentage of organic ingredients in a product.⁷¹ Under the NOP, the USDA can suspend or revoke organic certifications and impose civil penalties for noncompliance.⁷² Although the NOP sets national standards for “organic” agricultural products, many types of products and services that are marketed as “organic” are not covered by the NOP—for example, home goods (e.g., mattresses, pillows), personal care products (e.g., soaps, shampoos, skin creams), and dry cleaning services.⁷³

During the latest revision of the Green Guides, which began in 2007 and was completed in 2012, the FTC considered adding guidance for “organic” claims.⁷⁴ It ultimately decided not to do so for two reasons. First, the FTC determined that “organic” claims for agricultural products were sufficiently covered by the NOP. The FTC explained that it “want[ed] to avoid providing advice that is duplicative or inconsistent with the USDA’s [NOP], which provides a comprehensive regulatory framework governing organic claims for agricultural products.”⁷⁵ Second, the FTC decided that there was insufficient evidence of the potential for consumer deception: “For organic claims outside the NOP’s jurisdiction, and for sustainable and natural claims,

71. 7 C.F.R. § 205.300–.311.

72. *Id.* § 205.662(g)(1).

73. Readers may be wondering about the role of the FDA with regard to “organic” products. In brief, the FDA does not regulate use of the term “organic” on food labels, cosmetics, or other products under its jurisdiction. While the FDA regulates other aspects of these products pursuant to the Federal Food, Drug, and Cosmetic Act and the Fair Packaging and Labeling Act, it defers to the USDA NOP on use of the term “organic.” See “*Organic*” Cosmetics, FDA (Mar. 8, 2010), <https://www.fda.gov/cosmetics/cosmetics-labeling-claims/organic-cosmetics>.

74. See Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63,552, 63,581 (Oct. 15, 2010) (“The Commission asked commenters to discuss whether and how the Guides should be modified to address the use of environmental marketing claims that either are new or were not common during the last Guides review. Commenters discussed five types of claims: (1) sustainable; (2) organic/natural; (3) made with renewable materials; (4) made with renewable energy; and (5) carbon offsets.”); see also Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62,122, 62,122 (Oct. 11, 2012) (describing how the agency’s final rule was changed as a result of the comments received); Press Release, FTC, FTC Issues Revised “Green Guides” (Oct. 1, 2012) [hereinafter Green Guides Press Release], <https://www.ftc.gov/news-events/press-releases/2012/10/ftc-issues-revised-green-guides> (explaining that the FTC declined to address use of the term “organic” in the Guides because the agency wanted to avoid issuing a guidance that contradicts USDA).

75. Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. at 62,124; see also Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. at 63,585–86.

the Commission lacks sufficient evidence on which to base general guidance.”⁷⁶

The purported “lack of evidence” regarding fraud and deception in “organic” marketing of nonagricultural products prompted the FTC and USDA to co-fund a study aimed at better understanding consumer perception of such claims. The Joint Staff Report summarizing the study stated that “FTC staff initiated the study to determine whether to recommend updates to the FTC’s Guides for the Use of Environmental Marketing Claims.”⁷⁷ The Report noted that “[a]lthough NOP regulates organic claims for agricultural products, products either partially or entirely consisting of non-agricultural components do not generally fall within the core of the USDA’s program, and the FTC’s Guides currently do not provide guidance regarding organic claims for such products.”⁷⁸

The Report, an internet-based study, surveyed over 8,000 individuals.⁷⁹ The study tested consumer perception of what an “organic” claim implies about the content of a nonagricultural product.⁸⁰ It also tested consumer beliefs regarding the regulation of “organic” claims.⁸¹

In pertinent part, the study found that a “significant proportion” of consumers surveyed believe that if a nonagricultural product contains even trace amounts of man-made chemicals, then an unqualified “organic” claim for that product is misleading.⁸² Also noteworthy were the study’s findings regarding perceptions of government regulation. Approximately “30% of [respondents] believe[d]”—incorrectly—“that ‘organic’ claims for []

76. Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. at 62,124; *see also* Press Release, FTC, *supra* note 74 (“[E]ither because the FTC lacks a sufficient basis to provide meaningful guidance or wants to avoid proposing guidance that duplicates or contradicts rules or guidance of other agencies, the Guides do not address use of the terms ‘sustainable,’ ‘natural,’ and ‘organic.’”); Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. at 63,586 (stating that the Commission cannot prohibit marketers from using the term “natural” in the absence of evidence that demonstrates use of the term is always deceptive).

77. BUREAU OF ECON. & BUREAU OF CONSUMER PROT., FTC, CONSUMER PERCEPTION OF “RECYCLED CONTENT” AND “ORGANIC” CLAIMS 1 (2016), https://www.ftc.gov/system/files/documents/reports/consumer-perception-recycled-content-organic-claims-joint-staff-report-federal-trade-commission/consumer_perception_of_recycled_content_and_organic_2016-08-10.pdf.

78. *Id.*

79. *Id.* at 5, 7.

80. *Id.* at 10–12, 14.

81. *Id.* at 10–12.

82. *Id.* at 31.

shampoo[s] [and] mattresses are certified by the USDA.”⁸³ The Joint Staff Report concluded the study results were “sufficiently robust to consider these organic issues further.”⁸⁴

To this end, the Report announced that “the FTC and USDA [would] hold a public roundtable . . . to explore organic claims for non-food products, and how we can work together to reduce deceptive organic claims.”⁸⁵ The roundtable took place in October 2016 with industry members, environmental groups, government agencies, and academics in attendance. Participants emphasized the importance of maintaining the integrity of “organic” claims not only for consumer protection but also to maintain fair competition in the market.⁸⁶ For example, Scott Faber, Vice President for Government Affairs for Environmental Working Group, explained that many consumers misunderstand “organic” claims when they are made in reference to nonagricultural products.⁸⁷ Additionally, Angela Jagiello, Associate Director of Conference and Product Development at the Organic Trade Association (OTA), noted that in an OTA survey, 60% of participants strongly agreed that “a certification process such as the USDA uses to oversee and enforce the labeling of organic foods should also be used to oversee and enforce the labeling of organic non-food, and products and services.”⁸⁸ At the same time that the FTC was conducting the consumer study and public roundtable, it was also preparing to bring its first enforcement actions for deceptive “organic” claims, as described in the following section.

83. *Id.* at 38. Approximately 36–40% of respondents did not believe these products were regulated by the USDA, and the remainder of respondents reported being unsure. *Id.*

84. *Id.* at 4. The study also surveyed consumer perception of “recycled content” claims, and ultimately determined that further FTC guidance on that subject was not necessary. *Id.*

85. *Id.*

86. See *Consumer Perceptions of “Organic” Claims Roundtable*, FTC (Oct. 20, 2016), <https://www.ftc.gov/news-events/events-calendar/2016/10/consumer-perceptions-organic-claims-ftc-usda-roundtable>; see also Transcript for FTC Organic Claims Roundtable, Segment 1, FTC (Oct. 20, 2016) [hereinafter *FTC Roundtable Transcript Part 1*], https://www.ftc.gov/system/files/documents/videos/consumer-perceptions-organic-claims-roundtable-part-1/ftc_organic_claims_roundtable_-_transcript_segment_1.pdf; Transcript for FTC Organic Claims Roundtable, Segment 2, FTC (Oct. 20, 2016), https://www.ftc.gov/system/files/documents/videos/consumer-perceptions-organic-claims-roundtable-part-2/ftc_organic_claims_roundtable_-_transcript_segment_2.pdf.

87. *FTC Roundtable Transcript Part 1*, *supra* note 86.

88. *Id.*

B. *In the Matter of Moonlight Slumber, LLC and FTC v. Truly Organic Inc.*

The potential for consumer confusion or deception surrounding “organic” claims for nonagricultural products, as documented by the FTC/USDA study and roundtable, proved to be well-founded. In 2017, the FTC brought its first enforcement action for fraudulent “organic” claims in *In the Matter of Moonlight Slumber, LLC*.⁸⁹ Two years later, the FTC brought its second enforcement action for fraudulent “organic” claims in *FTC v. Truly Organic Inc.*,⁹⁰ and recovered over \$1.75 million in penalties.⁹¹

To be clear, the FTC has been actively combating other forms of greenwashing for years, and those cases inform the FTC’s current approach towards fraudulent “organic” claims. For example, in 2013, the court ordered marketers of a fuel additive to pay \$800,000 in consumer redress due to unsubstantiated claims that their Enviro Tabs would increase fuel efficiency and reduce air emissions.⁹² In 2014, the FTC settled charges against a diaper manufacturer that had falsely claimed its products were “100% biodegradable,” “‘certified’ biodegradable,” and “compostable.”⁹³ That same year, the FTC entered a Consent Order with a manufacturer of plastic lumber that had “misled consumers and distributors about the recycled content, post-consumer recycled content, and recyclability of its

89. 164 F.T.C. 869 (2017) (Complaint), https://www.ftc.gov/system/files/documents/commission_decision_volumes/volume-164/vol164complete.pdf.

90. Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. Truly Organic Inc.*, No. 1:19-cv-23832 (S.D. Fla. Sept. 13, 2019).

91. Stipulated Order for Permanent Injunction and Monetary Judgment; Order Closing Case at 3, *FTC v. Truly Organic Inc.*, No. 1:19-cv-23832 (S.D. Fla. Sept. 18, 2019).

92. Stipulated Order for Permanent Injunction and Monetary Judgment Against Green Foot Global, LLC, William C. Hyman, and Mary Ann P. Hyman at 3, 4–6, *FTC v. Green Foot Glob., LLC*, No. 2:13-cv-02064 (D. Nev. Nov. 19, 2013); *see also* Press Release, FTC, FTC Sends Refunds to Consumers Duped by Marketers Who Claimed Fuel Additive Could Drastically Increase Fuel Economy and Reduce Emissions (Apr. 30, 2014), <https://www.ftc.gov/news-events/press-releases/2014/04/ftc-sends-refunds-consumers-duped-marketers-who-claimed-fuel>.

93. Down to Earth Designs, Inc., 157 F.T.C. 476, 510–13 (2014), https://www.ftc.gov/system/files/documents/commission_decision_volumes/volume-157/ftc_volume_decision_157_jan_-_jun_2014pages_462-630.pdf; *see also* Press Release, FTC, FTC Approves Final Order Settling Charges that Down to Earth Designs, Inc. Made Deceptive Environmental Claims for its Diapers and Related Products (Mar. 19, 2014), <https://www.ftc.gov/news-events/press-releases/2014/03/ftc-approves-final-order-settling-charges-down-earth-designs-inc>.

products.”⁹⁴ Another case of note, from 2016, involved an FTC cease and desist order against a sunscreen manufacturer that had falsely claimed its product was “100% natural.”⁹⁵ And finally, in 2018, the FTC entered a Consent Order in *In the Matter of Benjamin Moore & Co., Inc.*⁹⁶ The paint company falsely claimed that its products would not emit volatile organic compounds (VOCs) or other harmful chemicals and marketed its products using self-awarded environmental seals.⁹⁷

What sets *Moonlight Slumber* and *Truly Organic* apart is that they were the first enforcement actions by the FTC to tackle the burgeoning problem of false or deceptive “organic claims.” In 2017, the FTC issued a four-count complaint against Moonlight Slumber, LLC (Moonlight Slumber), an Illinois corporation that manufactures baby mattresses and maternity pillows at its factory near Chicago, and sells them throughout the United States.⁹⁸ The complaint was based on the FTC’s authority to prevent deceptive claims in marketing under § 5(a) of the FTC Act.⁹⁹ The claims alleged included:

1. Moonlight Slumber had falsely advertised its baby mattresses as “organic,” “natural,” and “plant-based.”¹⁰⁰

94. N.E.W. Plastics Corp., 157 F.T.C. 900, 922 (2014); *see also* Press Release, FTC, FTC Approves Final Order Settling Charges That N.E.W. Plastics’ Claims for Its Plastic Lumber Products Were Misleading (Apr. 7, 2014), <https://www.ftc.gov/news-events/press-releases/2014/04/ftc-approves-final-order-settling-charges-new-plastics>.

95. Cal. Naturel, Inc., 162 F.T.C. 1066, 1070–71 (2016), https://www.ftc.gov/system/files/documents/commission_decision_volumes/volume-162/vol162complete.pdf; *see also* Press Release, FTC, FTC Rules California Naturel, Inc. Mised Consumers, Violated the FTC Act (Dec. 12, 2016), <https://www.ftc.gov/news-events/press-releases/2016/12/ftc-rules-california-naturel-inc-mised-consumers-violated-ftc>.

96. 165 F.T.C. 731 (2018), https://www.ftc.gov/system/files/documents/commission_decision_volumes/volume-165/ftc_volume_decision_165_jan_-_jun_2018pages_725-969.pdf.

97. *Id.* at 750–52, 761; *see also* Press Release, FTC, FTC Approves Final Consent Orders Settling Charges That Four Paint Companies Mised Consumers Through Claims Their Products Are Emission- and VOC-Free (Apr. 27, 2018), <https://www.ftc.gov/news-events/press-releases/2018/04/ftc-approves-final-consent-orders-settling-charges-four-paint>.

98. Moonlight Slumber, LLC, 164 F.T.C. 869 (2017) (Complaint), https://www.ftc.gov/system/files/documents/commission_decision_volumes/volume-164/vol164complete.pdf. Moonlight Slumber, LLC is now doing business as “Moonlight.”

99. *Id.* at 874.

100. *Id.* at 870, ¶ 4(a)–(e). The FTC alleged that, in reality, “[t]he substantial majority of content in Respondent’s Starlight Simplicity and Little Star mattresses is non-organic Only the mattress ribbon, a minor component of the mattresses, is purely organic.” *Id.* at 871, ¶ 6. It continued: “Most of Respondent’s mattresses contain cores made wholly or substantially of polyurethane, a non-natural material made almost entirely from

2. Moonlight Slumber had falsely claimed that testing had proven its mattresses do not emit VOCs, when in fact there was no testing to substantiate that claim.¹⁰¹
3. Moonlight Slumber had represented that its mattresses were certified by Green Safety Shield, but “failed to disclose . . . adequately that the Green Safety Shield is its own designation” and not a certification from an independent third party.¹⁰²

On October 4, 2017, the FTC published a Federal Register notice seeking public comment regarding the draft Consent Agreement and Consent Order.¹⁰³ During the thirty-day comment period, the FTC received only one comment, which was from the OTA.¹⁰⁴ The OTA expressed support for the proposed Consent Agreement, remarking that “[c]onsumer demand for organic products continues to show double-digit growth with no signs of slowing,” and that this “provides great incentive for marketers to take advantage of the term ‘organic’ and apply it to products that may contain little to no ‘organic’ material.”¹⁰⁵ In its comment, the OTA suggested that the FTC develop a draft policy statement regarding “organic” claims for nonagricultural and partially nonagricultural products, noting that these products are outside the scope of the USDA’s jurisdiction under the NOP,¹⁰⁶ leaving a “largely undefined and unregulated space.”¹⁰⁷

isocyanates and polyols derived from petrochemicals.” *Id.* ¶ 7. In addition, the FTC asserted that “the latex used in the core for the Little Star mattress is not a natural material, but is synthetic.” *Id.* Further, “[t]he foams used in Respondent’s Starlight Supreme, Starlight Sleepwell, Starlight Dream, Little Star, Little Dreamer, Little Dreamer Deluxe, and Little Angel mattresses contain little or no plant-based material.” *Id.* ¶ 8.

101. *See id.* at 873 (“Respondent has represented . . . that [its] mattresses will not emit any substance, including volatile organic compounds. In fact, Respondent did not possess and rely upon a reasonable basis to substantiate that its mattresses will not emit any substance, including volatile organic compounds.”).

102. *Id.* at 874.

103. Moonlight Slumber, LLC; Analysis to Aid Public Comment, 82 Fed. Reg. 46,243, 46,243 (Oct. 4, 2017).

104. Press Release, FTC, FTC Approves Final Consent Order in Moonlight Slumber, LLC, Advertising Case (Dec. 12, 2017), <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-approves-final-consent-order-moonlight-slumber-llc>.

105. Letter from Gwendolyn Wyard, Vice President, Organic Trade Ass’n, to Off. of the Sec’y, FTC 1, 4 (Oct. 27, 2017), www.ftc.gov/system/files/documents/public_comments/2017/10/00002-141568.pdf (commenting on FTC’s proposed consent agreement to settle charges).

106. *Id.* at 2–3.

107. *Id.* at 1.

The Consent Order, entered on December 11, 2017, prohibits Moonlight Slumber from continuing to engage in deceptive environmental marketing practices.¹⁰⁸ It also provides that Moonlight Slumber may be liable for civil penalties for future violations of the Consent Order.¹⁰⁹

Truly Organic involves similar issues. The USDA started the *Truly Organic* investigation, with later involvement by the FTC. Truly Organic Inc. (Truly Organic), a Florida corporation, packages and labels personal care products (e.g., body wash, baby lotion, and personal lubricant) and homeware products (e.g., cleaning spray), and markets them to consumers in the United States.¹¹⁰ Truly Organic manufactures some of these products itself; it also purchases some finished products from wholesalers and packages them for retail sale.¹¹¹ Truly Organic sells these products on its website as well as on third-party websites.¹¹²

On September 13, 2019, the FTC filed a complaint against Truly Organic, invoking § 5(a) of the FTC Act.¹¹³ The complaint alleged that, from 2015 to 2019, Truly Organic falsely advertised its products as “certified organic,” “USDA organic,” “USDA certified organic,” and containing “100% organic ingredients”—when, in fact, none of Truly Organic’s products had ever been certified as organic by the USDA NOP, and some do not contain any organic ingredients at all.¹¹⁴ It further alleged that, in addition to directly making these false claims, Truly Organic had distributed press kits to third parties (e.g., social media influencers) containing the false claims, which the third parties then disseminated on social media channels.¹¹⁵

The complaint further claimed that in 2016, the USDA had issued a Notice of Warning to Truly Organic and its Chief Executive Officer, Maxx

108. Moonlight Slumber, LLC, 164 F.T.C. 869, 901–04 (2017).

109. *Id.*

110. Complaint for Permanent Injunction & Other Equitable Relief ¶¶ 6,9, FTC v. Truly Organic Inc., No. 1:19-cv-23832, (S.D. Fla. Sept. 13, 2019).

111. *See id.* (noting Truly Organic’s “products fall into two categories: (1) products that they ‘make’ by purchasing wholesale bath, beauty, and home products online, adding ingredients to increase visual appeal, and repackaging; and (2) ‘bath bombs’ and soaps that they purchase as finished products from online wholesalers and resell at a substantial markup”).

112. *See id.* ¶ 10 (pointing out websites such as “ulta.com, urbanoutfitters.com, nordstrom.com, and aerie.com”).

113. *See id.* at ¶ 28 (“Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits ‘unfair or deceptive acts or practices in or affecting commerce.’”).

114. *Id.* at ¶ 31. The Complaint also alleges false “vegan” claims.

115. *See id.* at ¶¶ 16, 33–34 (“Defendants have distributed the promotional materials . . . to third parties for use in the marketing and sale of Defendants’ products. In so doing, Defendants have provided the means and instrumentalities to these third parties for the commission of deceptive acts or practices.”).

Harley Appelman, stating that Truly Organic was not “a certified organic operation” and, therefore, was prohibited from advertising its products as “USDA organic” or “certified organic.”¹¹⁶ The complaint alleged that, despite the Notice of Warning, Truly Organic continued its deceptive “organic” marketing campaign until May 2019, when the FTC informed the company that it had begun an investigation.¹¹⁷

On September 18, 2019, five days after the FTC filed the complaint, the United States District Court for the Southern District of Florida issued a Stipulated Order for Permanent Injunction and Monetary Judgment and Order Closing Case.¹¹⁸ The Order prohibited Truly Organic and Appelman from making false or unsubstantiated “organic,” “vegan,” or other health or environmental claims regarding their products in the future and from providing third parties the means and instrumentalities to do so.¹¹⁹ The Order imposed a monetary penalty of \$1.76 million—the FTC’s first penalty collected for false “organic” claims.¹²⁰ The Commission voted 5-0 to approve the filing of the complaint and proposed Stipulated Final Order. Commissioner Rohit Chopra issued a separate statement emphasizing that Truly Organic’s conduct had “distorted competition for organic products, inflicting harm on honest producers” as well as consumers.¹²¹

As shown by the history of FTC enforcement actions involving environmental marketing, there has never been a lack of unscrupulous marketers that are willing to deceive consumers to gain an unfair advantage over competitors. While *Moonlight Slumber* and *Truly Organic* may be extreme examples of deceptive “organic” claims in marketing made at the expense of vulnerable populations, such as babies and pregnant women, it is unrealistic to assume that they are isolated cases. More likely, they are emblematic of the latest trend in greenwashing—the misuse of buzzwords like “organic” and “vegan”—which the FTC must take further action to address.

116. See *id.* at ¶ 18 (“On June 16, 2016, the USDA issued a Notice of Warning to Defendants confirming that Truly Organic is not a certified organic operation, but represented its products as such on product labels and company website.”).

117. See *id.* at ¶ 23 (“Until the FTC contacted Defendants in May 2019, Truly Organic’s website incorporated the statement ‘100% Organic Ingredients—Truly Organic’ in its metadata.”).

118. Stipulated Order for Permanent Injunction and Monetary Judgment; Order Closing Case, FTC v. Truly Organic Inc., No. 1:19-cv-23832 (S.D. Fla. Sept. 18, 2019).

119. *Id.* at 2–3.

120. *Id.* at 3.

121. Press Release, Rohit Chopra, Commissioner, Statement on In re Truly Organic (Sept. 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544655/commis_ioner_rohit_chopra_statement_on_truly_organic_sept_19_2019.pdf.

III. RECOMMENDATIONS

Greenwashing hurts business competitors, consumers, and the environment. It is well documented that even isolated instances of greenwashing can make consumers skeptical of all products marketed as “green,” and can lead consumers to question not only the supposed eco-attributes of those products, but all claims about those products made in marketing materials.¹²² Purchasers of “green” products are not the only ones who are affected; exposure to fraudulent “green” marketing materials can leave broad swathes of consumers confused, dissatisfied, and disloyal.¹²³ If allowed to continue, greenwashing can ultimately lead consumers to avoid products that are marketed as “green.”¹²⁴ Frankly, this is a shame given the magnitude of environmental challenges and the importance and urgency of reducing the environmental impact of consumptive activities.

Because greenwashing can have far-reaching impacts on consumer purchasing, the problem of fraudulent or deceptive “organic” claims regarding nonagricultural products affects more than the businesses and consumers operating in that sector. Many businesses and numerous consumers are impacted due to the effect on consumer decisionmaking that can then artificially affect competition and opportunity.

This section of the Essay offers three recommendations for reducing unfounded and deceptive “organic” claims in the marketing of nonagricultural products. First, the FTC should take immediate steps to tighten its investigation and enforcement oversight regarding “organic” claims and to improve coordination with the USDA NOP. Second, the FTC should add provisions regarding “organic” claims to its next revision of the Green Guides, which is slated for revision in 2022. Finally, in the longer term, the FTC should consider making the Green Guides into legislative rules, similar to the NOP regulations.

A. *Enhanced FTC Oversight of “Organic” Claims and Improved Coordination with USDA NOP*

The gap in regulatory oversight of “organic” claims for nonagricultural products exposed by *Moonlight Slumber* and *Truly Organic* needs to be closed. As those cases showed, the FTC’s historical approach of deferring to the USDA NOP on all things “organic” left the door open for fraudulent and

122. Hendy Mustiko Aji & Bayu Sutikno, *The Extended Consequence of Greenwashing: Perceived Consumer Skepticism*, 10 INT’L J. BUS. & INFO. 433, 461, 463 (2015).

123. Marta Pagán Martínez et. al, *Fuzzy Inference System to Study the Behavior of the Green Consumer Facing the Perception of Greenwashing*, 242 J. CLEANER PROD., Aug. 31, 2019, at 20.

124. *Id.*

deceptive claims. The FTC and USDA should continue to work towards improved coordination in their oversight of “organic” products. To this end, the agencies should more clearly delineate what constitutes an “agricultural product” within the scope of the NOP and what does not. Although the NOP regulations define “agricultural product,”¹²⁵ the *Moonlight Slumber* and *Truly Organic* cases reveal a gray area in which neither the FTC nor the USDA has been proactively addressing fraudulent or deceptive claims.

Apart from coordination with the USDA, there are some steps that the FTC could—if it has sufficient desire and resources to do so—implement on its own to help curb fraudulent “organic” and other “green” claims. If budgetary conditions allow, the FTC could focus its hiring efforts on additional technical staff with expertise in environmental sustainability who could review environmental claims in marketing and analyze their potential environmental impact. Also, the FTC could launch a task force to tackle deceptive environmental claims, as it has done recently for other areas of concern, such as anticompetitive behaviors in the technology industry.¹²⁶ At a minimum, in the short term, the FTC could develop a webpage that offers the public a portal for submitting complaints and viewing investigation and enforcement reports, similar to the USDA NOP website.¹²⁷

B. *Revising the Green Guides to Address “Organic” Claims*

According to the regulatory review schedule published in the Federal Register in May 2019, the FTC plans to initiate the next revision of the Green Guides in 2022.¹²⁸ The foundation is well laid for the addition of a section on “organic” claims. As explained in Section III above, the FTC considered adding a section on “organic” claims in the 2012 revision of the Green Guides, but ultimately decided not to on grounds that it had insufficient evidence that consumers were being deceived by “organic”

125. As noted above, 7 C.F.R. § 205.2 (2019) provides that an “agricultural product” is an “agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock, that is marketed in the United States for human or livestock consumption.”

126. Press Release, FTC, FTC’s Bureau of Competition Launches Task Force to Monitor Technology Markets (Feb. 26, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology>.

127. See *National Organic Program*, USDA, <https://www.ams.usda.gov/about-ams/programs-offices/national-organic-program> (last visited Aug. 12, 2020).

128. Regulatory Review Schedule, 84 Fed. Reg. 18,746, 18,747 (May 2, 2019).

claims.¹²⁹ The findings of the subsequent FTC/USDA co-funded study and public roundtable, together with the fraud exposed in the *Moonlight Slumber* and *Truly Organic* cases, strongly support the FTC including guidance on “organic” claims in the next revision of the Green Guides. In so doing, the FTC could consider developing an accreditation and certification program for manufacturers of “organic” nonagricultural products similar to the certification of “organic” growers by accredited certifiers under the NOP, which has largely been successful in maintaining the integrity of “organic” claims for agricultural products.¹³⁰

The FTC has, in fact, already begun revising its industry-specific interpretive guidance documents to include “organic” claims. In 2018, the FTC revised its Guides for the Jewelry, Precious Metals, and Pewter Industries (Jewelry Guides) to include a new section on “organic” pearls. The Jewelry Guides, like the Green Guides, is an interpretive guidance document that advises marketers without being a binding regulation.¹³¹ The Jewelry Guides now state that “it is unfair or deceptive to use the term ‘organic’ to describe, identify, or refer to an imitation pearl, unless the term is qualified in such a way as to make clear that the product is not a natural or cultured pearl.”¹³² By updating the Jewelry Guides to address “organic” pearls, the FTC has taken an initial step towards reducing fraudulent and deceptive claims for nonagricultural products.

Importantly, the FTC has shown an intention to keep abreast of changing conditions in the marketplace. In fall 2018 and spring 2019, the FTC held Hearings on Competition and Consumer Protection in the 21st Century (CCP Hearings). These hearings primarily focused on the FTC’s role in the face of rapidly-changing technology, with many topics centering on antitrust law and consumer privacy and protection.¹³³ Although the CCP Hearings did not specifically address environmental marketing or “organic” claims, they indicate that the FTC wants to keep pace with changing consumer preferences and to be mindful of the accompanying new opportunities for fraud.

129. Green Guides Press Release, *supra* note 74 (stating that it lacked a sufficient basis, including consumer perception evidence, upon which to provide guidance on certain organic claims); see also BUREAU OF ECON. & BUREAU OF CONSUMER PROT., *supra* note 77, at 5.

130. See 7 C.F.R. § 205.400 (2019).

131. 16 C.F.R. § 23.0(d) (2019).

132. 16 C.F.R. § 23.21(e).

133. See *Hearings on Competition and Consumer Protection in the 21st Century*, FTC, www.ftc.gov/policy/hearings-competition-consumer-protection (last visited Aug. 11, 2020) (“The Federal Trade Commission held a series of public hearings during the fall 2018–spring 2019 examining whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy.”).

C. *Formalizing the Green Guides as Legislative Rules*

Looking further forward, the FTC should consider formalizing the Green Guides as legislative rules. The FTC's decision in the early 1990s to tackle rampant fraud and deception in "green" marketing through an industry guide, rather than a binding regulation, made sense because it allowed the FTC to begin addressing the problem more quickly. But for the past thirty years, the Green Guides have remained in an ill-defined, hybrid status as de facto rules that do not actually have the force of law. As discussed above, this has led to problems regarding preemption, enforcement, and judicial review.

Now is the time to give the Green Guides more teeth—not only to help prevent fraudulent "organic" claims, but to curb whatever yet-unseen greenwashing tactics lay around the corner. The FTC's limited investigation, enforcement, and legal resources could be deployed more effectively if the Green Guides were legally binding and independently enforceable, without requiring a separate showing by the FTC that each Green Guides violation is also a violation of § 5 of the FTC Act. The NOP, which has been largely successful at preventing fraudulent and deceptive claims regarding organic agricultural products, is implemented pursuant to binding USDA regulations. Many scholars agree that formalizing the Green Guides as binding regulations would provide a variety of benefits for both the marketplace and consumers.¹³⁴

As discussed in Section II, the rulemaking process prescribed by the FTC Improvement Act is lengthy, involving advanced notice of the proposed rulemaking and the potential for extensive written and oral testimony.¹³⁵ To this end, the most efficient option for the Green Guides to become legislative rules is through a congressional mandate. If Congress passes a statute directing the FTC to promulgate a specific regulation, then the FTC is exempt from many rulemaking procedural requirements. At present, there does not appear to be any activity in Congress regarding such a bill. In the absence of a congressional mandate, the FTC would be required to follow the FTC Improvement Act rulemaking process when making the Green

134. See Lauren C. Avallone, Comment, *Green Marketing: The Urgent Need for Federal Regulation*, 14 PENN ST. ENVTL. L. REV. 685, 697–98 (2006); Jessica Fliegelman, Note, *The Next Generation of Greenwash: Diminishing Consumer Confusion Through a National Eco-Labeling Program*, 37 FORDHAM URB. L.J. 1001, 1037 (2010); Gibson, *supra* note 5, at 434.

135. For reference, it took the FTC nine years to promulgate the Credit Practices Rule pursuant to this process—by which point, elements of it were already outdated. See Paul H. Luehr, Comment, *Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising*, 10 UCLAJ. ENVTL. L. & POL'Y 311, 329 (1992).

Guides into legislative rules. Although it is unlikely that the FTC will take action to formalize the Green Guides in the current deregulatory political climate,¹³⁶ the upcoming elections makes this a space to watch.

CONCLUSION

This Essay argues that more robust oversight by the FTC is needed to address the persistent problem of fraudulent and deceptive environmental claims in marketing. Because even isolated instances of greenwashing can make consumers skeptical of all products that are marketed as “green,” it is critical—from the standpoints of consumer protection, business competition, and environmental sustainability—to curb these abuses.

This Essay offers three recommendations. First, it calls for improved coordination between the FTC and USDA regarding “organic” claims for nonagricultural products. Second, it makes a strong case for including guidelines for “organic” claims in the 2022 revision of the Green Guides. Finally, it argues that the FTC should work to formalize the Green Guides as binding regulations, rather than nonbinding interpretive guidance, as the USDA has done for the NOP regulations.

If implemented, these recommendations may have far-reaching, positive impacts on consumer practices. More robust regulatory oversight of environmental marketing will prevent fraud, bolster consumer demand for sustainable goods and services, and incentivize manufacturers to innovate in order to meet this demand, all at a time when the stakes could not be higher.

136. See *President Donald J. Trump's Deregulatory Actions are Benefitting American Families, Workers, and Businesses*, WHITE HOUSE (June 28, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-historic-deregulatory-actions-are-benefitting-american-families-workers-and-businesses>. Although the FTC is an independent agency within the Executive Branch, the President has a degree of influence over its Commissioners and agenda. *Id.*