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ENVIRONMENTAL MARKETING AFTER ASSOCIATION OF NATIONAL ADVERTISERS v. LUNGREN: STILL SEARCHING FOR AN IMPROVED REGULATORY FRAMEWORK

Brett B. Coffee*

INTRODUCTION

In the early 1990s, mainstream America discovered the environment.¹ Growing political and media attention situated environmental concerns in the spotlight as a national priority requiring domestic and global action. The heightened awareness also fostered a conservation ethic that each individual could help protect our planet by taking action at home, in school, or work. Consumers found that they could bring about an extensive shift in environmental practices by incorporating their concerns into their purchasing decisions.² Advertisers, manufacturers, and marketers quickly perceived the shift in attitudes toward greater environmental awareness and concern among the general public.³ No longer were hard-core "greens"⁴ the only segment of the population demanding environmentally benign products; mainstream consumers had joined in as well.⁵ A sizeable portion of

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1. See CALIFORNIA ATTORNEY GEN. ET AL., THE GREEN REPORT: FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ENVTL. ADVERTISING 4-6 (1990) [hereinafter GREEN REPORT]; Thomas C. Downs, Comment, "Environmentally Friendly" Product Advertising: Its Future Requires New Regulatory Authority, 42 AM. U. L. REV. 155, 156, 162-65 (1992) (noting a huge increase in environmental marketing in response to the rise in environmental consciousness among the general public); Joanna L. Watman, Note, *Whose Grass Is Greener? Green Marketing: Toward a Uniform Approach for Responsible Environmental Advertising*, 3 FORDHAM ENVTL. L. REP. 163, 164-67 (1992) (discussing the rise in consumer demand for environmentally responsible products and the evolution of the green marketing trend). The success surrounding Earth Day 1990 facilitated the growth of environmentalism as a mainstream issue. See, e.g., Casey Bukro, *Shopping for an Ideal: Consumers Hungry for 'Recyclable' or 'Biodegradable' are Finding Their Environmental Diet Heavy on Ambiguity*, CHI. TRIB., Nov. 17, 1991, (Ecology Special Report 1991), at 24 (finding that the growing popularity of Earth Day touched off a wave of environmental concerns in the marketplace).

2. Bukro, *supra* note 1.

3. GREEN REPORT, *supra* note 1, at 4-5.

4. "Of, pertaining to, or supporting environmentalism (esp. as a political issue); that belongs to or supports an ecological party; loosely, environmentalist, ecological." THE OXFORD ENGLISH DICTIONARY 811 (2d ed. 1989). The term has historically been used to describe members of the green political party and politically active environmentalists generally.

5. Cecilia Deck, *Business Response to Earthly Concerns is Expected to Grow*, DET. FREE PRESS, Jan. 29, 1990, at 1D; *Ecology Steering Shoppers*, NEW ORLEANS TIMES PICAYUNE, Sept. 13, 1991, at C1; John Holusha, *Companies Try to Woo Customers With Pro-Environment Image*, TIMES UNION, Mar. 12, 1991, at B12, available in WESTLAW, Papers File; Connie Koennen, *Many Putting Environment at the Top of Shopping List*, BUFF. NEWS, Mar. 25, 1990, at E1, available in WESTLAW, Papers

consumers demanded environmentally-friendly products, and were willing to pay more for these products.⁶

After noticing the consumer interest in purchasing "greener" products, manufacturers rushed to satisfy growing consumer demands.⁷ Many new products appeared at the marketplace touting environmentally-friendly qualities and claims to capture the growing market.⁸ In the rush to capture the public's attention, many businesses bypassed the lengthy process of creating new products by proclaiming the environmental benefits of their pre-existing products.⁹ Some companies also created products with environmentally-friendly characteristics.¹⁰ However, advertising claims for these products were often false or misleading.¹¹ For instance, many manufacturers claimed that their

File; Joyce Rosencrans, *Shops Add Food for the Environmentally Minded*, CIN. POST, Oct. 30, 1991, at 1C.

6. Bukro, *supra* note 1, at 24 (citing a J. Walter Thompson advertising survey in 1990, which found that "89[%] of consumers polled said they would choose a product marked environmentally safe, and that 82[%] of them would pay more for such products"); see also Robert A. Rankin, *EPA, Tampax at Odds Over Marketing Claim*, PHILA. INQUIRER, Aug. 11, 1991, at D5 (finding that up to 91% of consumers want product labels to denote which items are environmentally benign); Terri Shaw, *The Selling of 'Green': Labels Use All the Buzz Words, But What Do They Mean?*, WASH. POST, Feb. 28, 1991, (Home), at 9 (surveying consumer misunderstanding over environmental terms used to promote products).

7. See GREEN REPORT, *supra* note 1, at 5.

8. *Id.* (noting that hundreds of products have been touted as environmentally friendly and even more are being developed).

9. See *id.* at 33 (noting that aerosol companies had claimed that products were free of chlorofluorocarbons (CFCs) even though they were banned by the federal government in 1978); Dick Rawe and Gary Rhodes, *Naturalists, Business Battle*, CIN. POST, July 23, 1991, at 1A (noting that manufacturers heavily publicized products which do not contain CFCs even though CFCs have largely been banned in the United States since 1978); see also Carol Jouzaitis, *Greenspeak Turns Out to be Hype With Some Products*, RECORD, Apr. 8, 1990, at B20, available in WESTLAW, Papers File (questioning green claims generally).

10. See Raj Bal, *Degradable Bags Help The Environment*, USA TODAY, Mar. 16, 1990, at 12A (praising the creation of degradable trash bags to relieve landfill concerns).

11. E.g., Shelby Gilje, *Biodegradable Diapers: Composting Isn't Available*, SEATTLE TIMES, Sept. 3, 1991, at F5 (discussing efforts by the Federal Trade Commission to crack down on manufacturers advertising diapers as degradable); Martha M. Hamilton, *Seven States Sue Mobil Over Degradable Trash Bag Claims*, WASH. POST, June 13, 1990, (Home), at B5 (reporting that seven state Attorneys General planned to file lawsuits against trash bag manufacturers for deceptively advertising trash bags as degradable). Manufacturers claimed that other products were recyclable. These products were actually very difficult to recycle and many recycling facilities were unable to handle the challenge. See generally *Juice-Box Makers Settle Dispute Over Recycling*, PHILA. INQUIRER, Aug. 29, 1991, at C13 (reporting that two juice-box manufacturers agreed to discontinue false claims that containers were easily recycled); Robert A. Rankin, *supra* note 6, (discussing claims that certain tampon applicators were more ecologically sound); Carole Sugarman, *Green Go the Grocers; A Sample of What's in Store*, WASH. POST, May 16, 1990, (Food), at 1; Stevenson Swanson, *White Castle Denied Recycling Label*, CHI. TRIB., Oct. 15, 1993, (Chicagoland), at 3 (reporting FTC crackdown on claims that White Castle hamburger containers are recyclable). See generally *FTC Gives the Red Light to Some 'Green' Claims*, NEW

plastic products broke down in landfills.¹² In fact, these products broke down only in ideal conditions over an inordinately long period of time, and in a condition not commonly found in most landfills.¹³ The barrage of environmental buzzwords and declarations led to tremendous consumer confusion regarding the meaning of the claims.¹⁴

A study of consumers' understanding of environmental terms revealed that consumers were unable to define many terms, nor could they grasp the nuances that differentiated similar terms.¹⁵ The study revealed that "[m]any current and proposed environmental labeling terms simply go whizzing by consumers."¹⁶ The study found that the most general terms were understandable, while more specific terms generated confusion.¹⁷ This study suggests that the problem of misleading environmental advertising lies at least partially with the consumers' unfamiliarity with more precise environmental definitions.¹⁸

ORLEANS TIMES PICAYUNE, Sept. 2, 1993, at E3 (discussing claims that certain cardboard containers are "environmentally friendly"); *Study: 'Biodegradable' Claim False*, NEW ORLEANS TIMES PICAYUNE, Mar. 6, 1991, at A2.

12. *Minnesota Challenges Mobil's 'Degradable' Bags*, CHI. TRIB., June 14, 1990, at 3 (manufacturers accused of deceptive advertising after claiming the products were degradable); Michael Parrish, *P&G Agrees to Modify Its Disposable Diaper Ads*, L.A. TIMES, Nov. 15, 1991, at D3 (manufacturers prevented from advertising diapers as degradable).

13. Gilje, *supra* note 11; Hamilton, *supra* note 11.

14. See Connie Koennen, *Consumer Is Left Holding the Bag in Controversy Over Biodegradability*, BUFF. NEWS, Feb. 11, 1990, at G13; Babette Morgan, *It Isn't Easy Being Green*, ST. LOUIS POST DISPATCH, July 8, 1991, (Business), at 1; *Plastics: Study Casts Doubt That 'Biodegradable' Products Decompose More Quickly*, ST. LOUIS POST DISPATCH, Mar. 12, 1991, at 6D; see also *Environmental Buyers Beware of 'Safe' Labels*, ROCKY MTN. NEWS, May 5, 1990, at 54 (giving examples of deficient definitions: "recyclable," "non-toxic," "environment-friendly," and "environmentally safe"); *A Short Course in Eco-Speak*, L.A. TIMES, Apr. 7, 1991, (Green Consumer Guide), at 4 (giving examples of phrases consumers should wary of, including: "degradable," "biodegradable," "photodegradable," "green," "natural," "nontoxic," "ozone-friendly," "recyclable," "recycled," "environmentally safe," and "safe for the environment").

15. *Do Consumers Understand Environmental Labeling Terminology?*, GREEN MARKETING REPORT, Jan. 1, 1992, available in WESTLAW, 1992 WL 2662927, Green Market Report File (page unavailable online). The scientific worth of the study has been questioned since only a limited group was polled. The study was conducted solely in Illinois among predominantly rural, middle-aged women. *Id.* The survey does not claim to be nationally projectable. In addition, the questions asked were open-ended. However, it is the only study to date conducted on consumers' understanding of these terms. See also Gary Levin, *Too Green For Their Own Good; Survey Indicates Many Consumers Having a Hard Time Coping*, ADVERTISING AGE, Apr. 12, 1993, at 29 (reporting a global survey which found a sense of helplessness in consumers from developed countries due to a lack of clarity in environmental claims).

16. *Do Consumers Understand Environmental Labeling Terminology?*, *supra* note 15.

17. See *id.* The report discussed consumers' high understanding of the term "recycled," but noted that consumers were not capable of correctly defining "re-usable" or "recyclable."

18. See *id.*

Consumers were not the only ones to take notice of the environmental marketing confusion.¹⁹ These claims quickly gained the attention of state²⁰ and federal²¹ regulators, resulting in a call for federal environmental marketing regulations.²²

The federal government, however, moved slowly in this area. Several congressional attempts failed to create federal environmental advertising rules,²³ and the Federal Trade Commission ("FTC") moved slowly toward creating guidelines that covered permissible and impermissible conduct in environmental marketing.²⁴ In response to the federal regulatory vacuum, various states stepped in with environmental marketing statutes of their own.²⁵

In 1992, a coalition of the Association of National Advertisers ("Association") and other commercial interest groups filed a suit against the California Attorney General, challenging California's statute regulating the use of various environmental terms in product advertising

19. "Environmental marketing" is also known as "green marketing." Environmental marketing is all marketing designed to sell a product on the basis of the products environmental characteristics. The author makes no differentiation, and uses "environmental marketing" solely for stylistic purposes.

20. See GREEN REPORT, *supra* note 1, at 5-11 (discussing how the situation came to attention of state regulators and their early attempts to control the fraud); Downs, *supra* note 1, at 174-76 (detailing the actions of state regulators); *Eleven States Warn Against False Ecological Claims*, S.F. CHRON., May 23, 1991, at B7 (discussing the plan of action by the Attorney General's Task Force to crack down on false advertising); Ingrid Sundstrum, 'Eco-Safe' Products? Humphrey Wary, STAR TRIB., Apr. 26, 1990, at 1D, available in WESTLAW, Papers File (reactions of Minnesota Attorney General Hubert Humphrey III to misleading and confusing green marketing claims); Brenda L. Wilson, *States' Prosecutors Take On Firms' 'Green' Claims; Group Seeks to End Misleading Labels*, S.F. EXAMINER, Feb. 17, 1991, at A4 (detailing Attorneys General task force objectives and actions).

21. GREEN REPORT, *supra* note 1, at 9; 'Biodegradable' Sell Faces FTC Scrutiny, BOSTON GLOBE, Mar. 17, 1990, (Business), at 16; Nancy Rivera Brooks, *FTC Investigating Claims of Products' Ecological Safety*, L.A. TIMES, Mar. 17, 1990, at 2D; *Federal Probe Aimed at False Claims*, ST. LOUIS POST DISPATCH, Mar. 18, 1990, at 4D; *Product's Environmental Claims to Be Probed*, CHI. TRIB., Mar. 17, 1990, at 1.

22. GREEN REPORT, *supra* note 1, at 15; CALIFORNIA ATT'Y GEN. ET AL., THE GREEN REPORT II: RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING 1-4 (1991) [hereinafter GREEN REPORT II]; 'Green' Ad Standards Sought; Report Urges Uniform Terms, CAP. TIMES, May 23, 1991, at 7A, available in WESTLAW, Papers File; Michael Parrish, *Federal 'Green' Ad Rules Proposed*, L.A. TIMES, Nov. 8, 1990, (Business), at 3.

23. E.g., Environmental Marketing Claims Act of 1990, S. 3218, 101st Cong., 2d Sess. (1990); Environmental Marketing Claims Act of 1991, H.R. 1408, 102d Cong., 1st Sess. (1991); Environmental Marketing Claims Act of 1991, S. 615, 102d Cong., 1st Sess. (1991); National Recycling Markets Act of 1991, H.R. 2746, 102d Cong., 1st Sess. (1991); National Recycling Markets Act of 1991, S. 2363, 102d Cong., 1st Sess. (1991); National Waste Reduction, Recycling and Management Act, H.R. 3865, 102d Cong., 1st Sess. (1991); Materials Recycling Enhancement Act of 1991, S. 1473, 102d Cong., 1st Sess. (1991). See also Downs, *supra* note 1, at 179-80.

24. FTC Guides For the Use of Environmental Marketing Claims, 16 C.F.R. § 260.1 (1994). The guidelines were announced in 1992. *Id.*

25. See *infra* parts IIA and IIIA.

and marketing.²⁶ That statute, section 17508.5 of the California Business and Professional Code ("Statute" or "section 17508.5"), regulates commercial environmental marketing by defining several environmental terms and prohibiting their use to represent product claims unless the statutory definition is met.²⁷ The interest groups claimed that section 17508.5 violated their members' commercial speech rights, a doctrine flowing from the First Amendment's guarantee of freedom of speech.²⁸ Both the District Court for the Northern District of California and the Ninth Circuit Court of Appeals upheld the statute.²⁹

*Association of National Advertisers, Inc. v. Lungren*³⁰ highlighted several difficulties inherent in state environmental marketing regulations. *National Advertisers* illustrated that the most obvious difficulty in regulating environmental marketing is the lack of uniform, national standards.³¹ The case also raised problems posed by state-created definitions for environmental marketing terms and the public perception of those definitions. Additionally, *National Advertisers* underscores the concern that green marketing regulation hamstrings commercial marketing without effectively advancing the state's environmental or consumer protection interests. Finally, *National Advertisers* highlighted the consumer confusion resulting from the statute specifically and environmental marketing in general.

This Note will analyze the California green marketing statute, briefly survey various regulations adopted by other jurisdictions, and propose an alternative solution to the current regulatory framework. Part I briefly reviews the downfall of environmental marketing. Part II discusses the California statute and its environmental consequences; an overview of the commercial speech doctrine; the application of this doctrine in *National Advertisers*; and the environmental consequences of the Ninth Circuit's decision. Part III surveys the various state and federal approaches to the regulation of environmental marketing. Part IV examines federal food labeling requirements. Finally, Part V extrapolates from the food labeling requirements promulgated by the

26. *Association of Nat'l Advertisers, Inc. v. Lungren*, 809 F. Supp. 747 (N.D. Cal. 1992), *aff'd*, 44 F.3d 726 (9th Cir. 1994), *reh'g denied*, No. 93-15644 (Feb. 23, 1995); Miranda Ewell, *Green Marketing Law in Court Top Story; A Group of Industries Challenges the State Environmental Advertising Rules*, SAN JOSE MERCURY NEWS, Sept. 18, 1992, at 3B, available in WESTLAW, Papers File. See also *infra* part II.

27. See *infra* notes 65-66.

28. See *infra* note 98 and accompanying discussion.

29. *National Advertisers*, 809 F. Supp. 747 (N.D. Cal. 1992), *aff'd*, 44 F.3d 726 (9th Cir. 1994), *reh'g denied*, No. 93-15644 (9th Cir. Feb. 23, 1995).

30. *Id.*

31. E.g., Howard Schlossberg, *Report Says Environmental Marketing Claims Level Off*, MARKETING NEWS, May 24, 1993, at 12, available in LEXIS, News Library (reporting that the EPA blamed the "chaotic nature" of environmental marketing regulations as a leading cause of declining environmental marketing claims).

Food and Drug Administration and proposes a similar framework for product labeling of environmental claims.

I. THE FALL OF ENVIRONMENTAL MARKETING

The barrage of environmental claims made by green marketers in the early 1990s ranged from "biodegradable diapers" to "recyclable hamburger containers."³² The rush to satisfy the growing demand for environmental products led to tremendous pressures on manufacturers to offer products touting environmental claims, whether accurate or not, to capture a segment of the consumer market.³³ As a result, regulatory authorities and environmental groups have often stepped in to correct glaring inaccuracies and misleading environmental advertising claims.³⁴

The first action was taken by a task force, comprised of ten state Attorneys General, who conducted public hearings on the problems of environmental marketing.³⁵ Specifically, the task force focused on the prevalence of misleading and deceptive environmental marketing practices³⁶ by studying the potential for abuse in environmental marketing.³⁷

The task force found many instances of environmental advertising irregularities. The task force published their findings in a document entitled the "Green Report," which detailed how environmental marketing had become an important factor in consumer purchases and the growing number of "trivial, confusing or even misleading" claims.³⁸ They determined that both environmental groups and businesses desired standard definitions for environmental claims, both to create a "level playing field" and to "reduce for both consumers and business the . . . confusion about the meaning of environmental claims."³⁹ The task force recommended the establishment of uniform definitions by

32. See *supra* note 11. But see ENVIRONMENTAL DEFENSE FUND AND McDONALD'S CORP., WASTE REDUCTION TASK FORCE FINAL REPORT (1991) (genuine attempts made through the joint efforts of McDonald's and the Environmental Defense Fund to reduce waste flow) [hereinafter EDF REPORT].

33. GREEN REPORT, *supra* note 1, at 11.

34. See *supra* note 11.

35. See Stephen Gardner, *How Green Were My Values: Regulation of Environmental Marketing Claims*, 23 U. TOL. L. REV. 31, 52-58 (1991); Michael Parrish, *Federal 'Green' Ad Rules Proposed Marketing*, L.A. TIMES, Nov. 8, 1990, at D3. The state Attorneys General represented California, Florida, Massachusetts, Minnesota, Missouri, New York, Texas, Utah, Washington, and Wisconsin. In May 1991, Tennessee joined the original ten states in a revision of the original Green Report. GREEN REPORT II, *supra* note 22.

36. See GREEN REPORT, *supra* note 1, at 5-7.

37. *Id.*

38. *Id.* at 1; see also *supra* notes 1-6, 8, 11.

39. GREEN REPORT, *supra* note 1, at 15.

the federal government,⁴⁰ and sought to increase the sharing of information between the offices of the state Attorneys General.⁴¹

Since the federal government was slow to enact environmental marketing regulations,⁴² regulations were enacted in various jurisdictions, sometimes in response to work of the task force's findings, with the aim of curbing incorrect and inaccurate environmental claims.⁴³ These regulations represented different approaches to the problem, and surpassed the laws concerning false and deceptive advertising.⁴⁴ Although states have successfully prosecuted several environmental claims generally,⁴⁵ they nevertheless sought to specifically regulate environmental advertising.⁴⁶ The various statutes that resulted presented a confusing array of regulations to businesses.⁴⁷

Finally, the FTC issued guidelines for environmental claims,⁴⁸ but did not issue binding regulations. A step that carries important impli-

40. *Id.* at 20-23; GREEN REPORT II, *supra* note 22, at 1.

41. GREEN REPORT, *supra* note 1, at 7, 15; see also Linda M. Harrington, *FTC Urged to Regulate 'Green' Ads*, CHI. TRIB., July 18, 1991, at 17.

42. See *supra* notes 21-23 and accompanying discussion.

43. See *infra* parts IIA and III; Peter J. Tarsney, *Regulation of Environmental Marketing: Reassessing the Supreme Court's Protection of Commercial Speech*, 69 NOTRE DAME L. REV. 533, 536-38 (1994). California and Indiana enacted similar laws after the Green Report findings were made public. See *infra* parts IIA and IIIA1. Rhode Island, Connecticut, and New Hampshire enacted environmental marketing laws before the Green Report, but during the early days of environmental marketing. See *infra* part III. The FTC finally issued guidelines in mid-1992. See *infra* note 356.

44. See, e.g., Glenn Israel, Comment, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims*, 20 B.C. ENVTL. AFF. L. REV. 303, 312-15 (1993).

45. Gardner, *supra* note 35, at 46-50 (eight actions against allegedly deceptive practices pursued by various states); Ciannat M. Howett, Note, *The "Green Labeling" Phenomenon: Problems and Trends in the Regulation of Environmental Product Claims*, 11 VA. ENVTL. L.J. 401 (1992) (examples of settlement agreements pursued by state Attorneys General); Israel, *supra* note 44, at 309-17 (brief overview of state and federal deceptive trade practice laws and civil Racketeer Influenced and Corrupt Organizations ("RICO") actions by citizen plaintiffs); Todd A. Rathe, Note, *The Gray Area of the Green Market: Is It Really Environmentally Friendly? Solutions to Confusion Caused By Environmental Advertising*, 17 J. CORP. L. 419, 434-39 (1992) (discussing case-by-case adjudication through general state deceptive advertising laws and disadvantages of this method). But see David F. Welsh, Comment, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green"*, 81 CAL. L. REV. 991, 999-1001 (1993) (arguing that state deceptive advertising statutes are not sufficient due to vague interpretations and low success rates).

46. Israel, *supra* note 44, at 320; Rathe, *supra* note 45, at 440-41; Welsh, *supra* note 45, at 1000.

47. See *infra* part III.

48. See *infra* note 356. There is some question whether the FTC, which regulates product claims, or the Environmental Protection Agency ("EPA"), which regulates environmental issues, should be regulating environmental marketing. The issue falls partially within the purview of both federal agencies, and yet neither has specific congressional authorization to regulate environmental marketing. For a discussion of the division of authority and expertise on the specific problems and possible solutions, see Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG. 147 (1993); Downs, *supra* note 1; Paul H. Luehr, Comment,

cations, because California enacted a safe harbor provision that encompassed any FTC regulations, but not FTC guidelines.⁴⁹ The FTC guidelines do not preempt the various state regulations governing environmental marketing.⁵⁰

Among the mosaic of regulations enacted by the states, by far the most stringent is California's.⁵¹ Then-Attorney General John Van de Kamp lobbied for the law,⁵² which set forth definitions for several environmental characteristics and regulated their use in describing any product.⁵³ The Statute dismayed various manufacturers, marketers, and advertisers ("marketers").⁵⁴ The marketers' grievance was not that the legislature had defined several environmental terms; the marketers themselves had already called for standard guidelines.⁵⁵ Rather, marketers opposed the statute because they believed it was antagonistic to national advertising campaigns.⁵⁶ In addition, they alleged that the definitions were capricious and harsh.⁵⁷ Facing the de-

Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising, 10 UCLA J. ENVTL. L. & POL'Y 311 (1992); Welsh, *supra* note 45.

49. See *infra* notes 69-70 and 324-25 and accompanying text.

50. FTC Guides For the Use of Environmental Marketing Claims, 16 C.F.R. § 260.1 (The guidelines "provide the basis for voluntary compliance . . . by members of industry."). However, some states have used the guidelines as a safe-harbor or as the basis for substantive law. See *infra* notes 323-24 and 356.

51. See Rathe, *supra* note 45, at 441-42; Tarsney, *supra* note 43, at 538.

52. Cf. Michael Parrish, *Environmental Claims Bill Goes to Governor*, L.A. TIMES, Aug. 23, 1990, at D2 ("outgrowth of a fact-finding meeting . . . by attorney generals [sic]").

53. See *infra* notes 65-66.

54. See, e.g., John Accola, *State Regs May Clip Businesses' Green Marketing*, ROCKY MTN. NEWS, Nov. 14, 1991, at 58 (citing criticism of California's and Rhode Island's regulations for being too harsh on environmental marketing claims and for creating inconsistencies between differing states in regulating environmental marketing).

55. Susan McKearney Bryan, *Industry Group Calls for Rules on 'Green' Ads*, ARIZ. REPUBLIC, Sept. 1, 1991, at F3, available in WESTLAW, Papers File; Ellen Carlson, *Nuggets*, ST. PAUL PIONEER PRESS DISPATCH, Mar. 6, 1991, at 4E, available in WESTLAW, Papers File; Michael Parrish, *Industry to Unveil Its Idea of 'Green' Marketing Rules*, L.A. TIMES, Feb. 14, 1991, Business Section, at 1; Cheryl Wetzstein, *FTC Urged to Set Guide Lines for Ecological Claims*, WASH. TIMES, Feb. 15, 1991, at C4, available in WESTLAW, Papers File. See also ANA Endorses International Environmental Claims Code, GREEN MARKETING REPORT, June 2, 1992, available in WESTLAW, GRMKTAL File.

56. See Watman, *supra* note 1, at 168; Rich Heidorn Jr., *It's Earth Friendly? Prove It: Labels Catch Eye of N.J. Agency*, PHILA. INQUIRER, Dec. 16, 1991, at B1; *Vocabulary of Environmental Terms Proposed*, PITT. PRESS, Feb. 14, 1991, at A7.

57. *Green Machine Stalls; Firms Face Backlash on Product Claims*, SUN SENTINEL, Dec. 31, 1990, (Weekly Business), at 4, available in WESTLAW, Papers File ("The major manufacturers have backpedaled because they are leery of getting caught in making claims that through no fault of their own they can't substantiate. . . .").

struction of many environmental claims, the marketers sought to enjoin enforcement of the statute.⁵⁸

With the marketers' and regulators' energy focused on attempting to shape the emerging regulatory framework, it seemed that the consumer was somewhat forgotten. Indeed, the consumers' exuberance for environmental marketing appears to have faded.⁵⁹ The recession of the early 1990s, premium prices, and advertiser confusion have been blamed for consumers' lack of enthusiasm over environmental marketing.⁶⁰ No one is certain if environmental marketing was merely a trend or has hit a snag.⁶¹ The decline in environmentally-driven purchases could be permanent or temporary. But one thing is for certain: in the current regulatory climate, whether due to the regulations, the recession, or lack of public concern,⁶² consumers have lost their enthusiasm for purchasing environmentally benign products.⁶³ And with the demise of environmental marketing, the public has lost a powerful tool for grass roots environmental action.

II. ASSOCIATION OF NATIONAL ADVERTISERS V. LUNGREN

A. California Business and Professional Code Section 17508.5

1. Statutory Provisions

At issue in *National Advertisers*⁶⁴ was section 17508.5 of the California Business and Professional Code.⁶⁵ The California statute regu-

58. *Association of Nat'l Advertisers, Inc. v. Lungren*, 809 F. Supp. 747 (N.D. Cal. 1992), *aff'd* 44 F.3d 726 (9th Cir. 1994), *reh'g denied*, No. 93-15644 (9th Cir. Feb. 23, 1993).

59. Bruce Horovitz, 'Green' Honeymoon is Over; Analysts Say Consumers Are Cooling to Environmental Products, L.A. TIMES, May 12, 1992, at D1; David E. Kalish, Marketers Put 'Green' Claims on Hold After Consumer Protest, CAP. TIMES, Jan. 1, 1991, at 6B, available in WESTLAW, Papers File; Carol Smith, Recession Has Only Slowed Green Growth, SEATTLE POST-INTELLIGENCER, May 29, 1992, at B8; Wendy Warren, Price, Not 'Green,' Sells in Midlands, STATE, Aug. 23, 1992, at 1H, available in WESTLAW, Papers File; cf. Michael Parrish, Just Call Him the Green Marketeer, L.A. TIMES, Sept. 18, 1993, at D1 (environmental marketeer believes that problem is price, not consumer commitment); Guy Webster, Going for the Green; Businesses Cast Environmental Net, ARIZ. REPUBLIC, Mar. 21, 1993, at F1 (businesses still marketing environmental claims).

60. See Israel, *supra* note 44, at 306-09; Schlossberg, *supra* note 31; Smith, *supra* note 59; Warren, *supra* note 59.

61. See *supra* note 59; see also *Green Machine Stalls; Firms Face Backlash on Product Claims*, *supra* note 57 (discussing how firms have become leery of making environmental claims).

62. See *supra* note 60.

63. See Horovitz, *supra* note 59; Warren, *supra* note 59.

64. *Association of Nat'l Advertisers, Inc. v. Lungren*, 809 F. Supp. 747 (N.D. Cal. 1992); *aff'd*, 44 F.3d 726 (9th Cir. 1994), *reh'g denied*, No. 93-15644 (9th Cir. Feb. 23, 1995).

65. CAL. BUS. & PROF. CODE § 17508.5 (West Ann. Supp. 1995). This section provides:

It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which con-

lates the commercial use of five environmental terms: "ozone friendly," "biodegradable," "photodegradable," "recycled," and "recyclable."⁶⁶ These terms may not be used to describe any consumer product unless the state's definition is met.⁶⁷ Advertisers run the risk of criminal prosecution for violating the terms of this section.⁶⁸

The statute does provide a safe harbor for advertisers: if the consumer product does not meet the definitions the state has set forth in section 17508.5, but instead conforms to the "definitions established in trade rules adopted by the Federal Trade Commission . . .,"⁶⁹ the representation will not run afoul of the statute.⁷⁰ While the safe harbor

notes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission.

66. *Id.* which states:

For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article's contents can be conveniently recycled, as defined in Section 40180 of the Public Resources Code; in every county in California with a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.4 of the Public Resources Code.

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, post-consumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer good" means any article which is used or bought for use primarily for personal, family, or household purposes.

(g) For the purposes of this section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

See also Parrish, *supra* note 52.

67. CAL. BUS. & PROF. CODE § 17508.5. See *supra* note 56.

68. CAL. BUS. & PROF. CODE § 17534 provides: "Any person, firm, corporation, partnership or association or any employee who violates this chapter is guilty of a misdemeanor." *Id.* See *id.* § 17508.5; *National Advertisers*, 44 F.3d at 737; Parrish, *Environmental Claims Bill Goes to Governor*, *supra* note 52. The criminal aspects of the statute are beyond the scope of this Note.

69. CAL. BUS. & PROF. CODE § 17508.5 (emphasis added).

70. However, the Federal Trade Commission has not established rules, but instead has established guides. See *infra* notes 324-25 and accompanying discussion.

provision allows for conformance with FTC "rules," the FTC has issued "guidelines" instead of "rules." The FTC guidelines therefore do not fall within the safe harbor provision.

There are potential problems with California's statute from the marketer's viewpoint, several of which were cogently set forth in a letter from then-Governor George Deukmajian.⁷¹ The governor's letter stated, in relevant part:

I am . . . concerned with the definition of "recyclable" which is defined as meaning the article can be conveniently recycled in every county in California with a population over 300,000. This term is impermissibly vague to be the basis of a criminal statute because it does not clearly state what is necessary to meet the test of convenience. Other definitions in the bill are too vague or overly strict.

Without specific definitions, manufacturers may be chilled from providing any labels, even where the packaging is more environmentally friendly than other packaging. This would be contrary to the goal that we all share to encourage packaging that is recyclable or environmentally sound.⁷²

Despite his reservations, the governor nonetheless signed the bill based on assurances by the Statute's drafter that "cleanup legislation" would be forthcoming within the next year.⁷³ The cleanup legislation, however, resulted in only minor changes.⁷⁴

2. California's Environmental Interest: A Lost Opportunity

The Statute fails to effectively promote California's interest.⁷⁵ In this regard, the Statute contains two primary defects. First, the Statute puts the burden of monitoring recycling facilities and their ability to handle different types of materials upon manufacturers.⁷⁶ Since the Statute requires that virtually every recycling facility in the state must be able to recycle the product, the state is requiring marketers to ensure that the state's facilities are up to date before marketing a product as recyclable. Second, the Statute prevents marketers from including clarifying or additional information in their product representations. By preventing the inclusion of such information, consumers receive minimal information. This reduces the quality of the consumer decision-making process. For instance, a label claiming that

71. CAL. BUS. & PROF. CODE § 17508.5 (Historical and Statutory Notes) (West Ann. Supp. 1995); see *infra* notes 75-77 and accompanying discussion. A preliminary difficulty is that the statute contains no provisions concerning goods already in the stream of commerce. *Id.* This problem has long ceased to be a concern since the statute is several years old.

72. *Id.*

73. *Id.*

74. See CAL. BUS. & PROF. CODE § 17508.5 (West Ann. Supp. 1995); Henry Weinstein, *Court Upholds Law Restricting 'Green' Labeling*, L.A. TIMES, Nov. 19, 1994, at 23.

75. But see *infra* notes 273-78.

76. See CAL. BUS. & PROF. CODE § 17508.5(d).

the product is "recyclable" may only be recyclable in a limited area. Additional information could be added to clarify the "recyclable" claim.⁷⁷ This would allow the marketer to gain the benefits of a limited environmental claim while preventing the deception that provided the impetus for promulgating section 17508.5. Consumers will have the pertinent information, while the state will not have to be concerned about its citizens being deceived.

These statutory defects lead to the conclusion that the California legislature's response to its recycling problem is flawed. Section 17508.5 does not effectively assist recycling efforts and places a heavy burden upon manufacturers. Ultimately, the state is responsible for waste collection.⁷⁸ Since recycling programs are of great assistance in reducing the state's problems of solid waste storage, the state is also responsible for recycling facilities.⁷⁹ Despite the commendable goal of waste reduction, which section 17508.5 is attempting to further, it fails to decrease the amount of waste dumped into landfills. This is because the statute does not allow for the inclusion of further information on products or advertisements that would assist consumers in their recycling efforts. This information would detail exactly how or where the product was recyclable. Without further explanation, consumer efforts are frustrated by the complexity of recycling programs or they may simply dump all products that they consider recyclable into their recycling bins. Many products are recyclable only in limited pilot programs or suffer from some other defect that renders the product non-recyclable for that area.⁸⁰

Further, the Statute does not pressure manufacturers to increase the recyclability of their products. Instead, the Statute frustrates corporate efforts to increase the feasibility of new recycling programs, since there is no feasible approach to create such a new and expensive technology without a smaller pilot program. Clarifying language should be sufficient to alert consumers that the manufacturer is actively creating the technology to recycle the product, but that this technology is not widely available.⁸¹

In enacting the environmental marketing regulations, the legislature was probably reacting to the problem of marketers who generally advertise their products as "recyclable" when they are actually recycl-

77. See *infra* note 84.

78. See CAL. HEALTH & SAFETY CODE § 4510.

79. See CAL. PUB. RES. CODE § 41300.

80. See GREEN REPORT, *supra* note 1, at 17-18.

81. Closing a large market such as California will decrease the number of products sold to consumers who support companies that are developing recycling technology, and will also decrease the number of units that can be recovered for use in pilot recycling programs. On a smaller scale, the statute diminishes the likelihood that a company within California will be able to promote a novel recycling program. Since consumers will not be aware of the new program, they will not be able to return used packaging or products to the pilot program. Such restrictions will needlessly increase the difficulty of developing recycling programs for specific products.

able only in experimental or pilot programs.⁸² These programs are usually in distant (often out-of-state) regions,⁸³ which poses a problem because consumers may purchase the product believing that the product is readily recyclable locally. To promote a product as "recyclable" when only one facility in the entire country can successfully recycle it, is, at the very least, somewhat misleading to consumers.

Consumers have other motivations in purchasing recyclable goods. The consumer may wish to patronize producers who are actively working toward improving the recyclability of their products or who take other steps to improve the environment. Manufacturers of products that are potentially recyclable or are more ecologically sound could provide clarifying language on their product labels to offer consumers such information.⁸⁴ Under the Statute, however, marketers would not be able to advertise their products as "recyclable" unless every county in California with a population of more than 300,000 conveniently recycles that item.⁸⁵ This applies even when clarifying language is used.⁸⁶ Thus, manufacturers are forced to abandon their recyclability campaigns unless every applicable county recycles that item.⁸⁷ This requirement therefore stifles efforts to promote environmentally sound products and denies consumers living in communities that can effectively recycle a product the information to do so.

Consequently, the Statute stunts the growth of recycling programs and denies consumers the clarifying language that could remove much

82. See GREEN REPORT, *supra* note 1, at 41-42.

83. Cf. James Mayer, *Recycling Symbol Misused, Groups Say*, OREGONIAN, Oct. 29, 1991, at C16, available in WESTLAW, Papers File (explaining how environmental groups criticized recycling program for advertising products as recyclable when recycling plant was not within Portland).

84. See *infra* notes 253 and 438 and accompanying discussion; see also *supra* note 11. For instance, a label could read "Package is recyclable in a limited area. To find out if this product is recyclable in your area, call 1-800-XXX-XXXX."

85. See CAL. BUS. & PROF. CODE § 17508.5(d).

86. *Id.*

87. Manufacturers should not be able to claim that a product is recyclable, for instance, if such a claim would be false, misleading, or confusing. Clarifying language should be required if a product is recyclable in only a limited manner or geographic area. However, preventing clarifying language will hinder the growth of new recycling programs by preventing consumers from receiving information about new programs. If consumers are not aware of the fledgling programs, they cannot support them through either their purchases or their voluntary participation in the pilot programs. In addition, consumers are prevented from receiving information about the program. Without this new information, consumers are not able to effect beneficial changes in their local recycling programs. See JOSEPH L. BLAST ET AL., *ECO-SANITY: A COMMON SENSE GUIDE TO ENVIRONMENTALISM* 195-96 (1994) (discussing how "information blackouts" lead to detrimental environmental decisions).

The statute does allow certain narrow claims to be made. See EDF REPORT, *supra* note 32, at 79-118. However, the statute eliminates the majority of environmental claims. The problem with the statute is not that it favors certain marketers over others, but rather that it eliminates terms consumers are familiar with while providing no more information, and often less, than is currently available.

of the confusion.⁸⁸ The effect of the Statute thus contravenes one of its major goals: to remove the consumers' confusion regarding recycling availability. This Statute does not effectively assist consumers, and instead frustrates their desire to recycle. Perhaps consumers will take out their frustrations that certain products "are not recyclable" by purchasing only recyclable products, as the Ninth Circuit suggested in *National Advertisers*.⁸⁹ Consumers may instead distance themselves from recycling in general, especially when only one brand meets the terms of the Statute.⁹⁰

The irony is that the marketers are being penalized for providing recyclable products, which is purportedly in the state's interest.⁹¹ This is not to say that the Statute is wholly ineffectual. It does help reduce glaring abuses by manufacturers making unfounded environmental claims about their products. However, the statutory failure in denying the use of clarifying language about claims on the label or in the advertisement of a product⁹² defeats the goal of providing increased consumer information.⁹³ While there is certainly a need to prevent claims from being "clarified" by misleading or confusing terms, the Statute bans manufacturers from providing helpful information. Simply permitting clarifying language would remove a major infirmity in the Statute.⁹⁴

These deficiencies, along with the confusion generated by differing state statutes, led the Association of National Advertisers to file suit in California. Businesses opposed the Statute because it prevented many firms from truthfully advertising their products as beneficial to the environment⁹⁵ and threw the regulatory requirements of national

88. The Attorney General argued that the district court should read the statute as allowing qualifying language. *National Advertisers*, 809 F. Supp. at 758 n.12. The district court did not reach the issue, but questioned the validity of such a reading. *Id.* The state abandoned the argument on appeal. *National Advertisers*, 44 F.3d at 740 (Noonan, J., dissenting). The argument would effectively rewrite the statute. *Id.*

89. *National Advertisers*, 44 F.3d at 733; see *supra* notes 44-46 and accompanying text.

90. If this brand is low in quality or high in cost, consumers will choose another product. Smith, *supra* note 59.

91. See *supra* note 78 and accompanying discussion.

92. See *infra* notes 253 and 438. "Clarifying language" is the language that makes a potentially misleading claim more reasonable. For instance, "This product is recyclable." The claim is correct, but may be misleading unless additional information is provided. For an example of the clarifying language that could be used in this instance, see *supra* note 84.

93. See *infra* notes 212-13 and accompanying text.

94. See *supra* note 56 and accompanying text. Allowing clarifying language would remove a major statutory infirmity. However, both the courts and the California legislature have resisted such a change. The proposed change would not remove all infirmities in the statute, but would allow section 17508.5 to pass the commercial speech test more easily. This does not mean that the reformulated statute would be the most effective manner of regulating environmental marketing. See *infra* part V.

95. See *supra* notes 49-51.

marketers into disorder and confusion.⁹⁶ In addition, businesses charged that the Statute is an onerous burden on their ability to effectively communicate with the public.⁹⁷

The Association alleged that the Statute violated the commercial speech doctrine of the First Amendment to the U.S. Constitution.⁹⁸ The Association also asserted that the regulation was unconstitutionally vague,⁹⁹ specifically the statutory definitions of "ozone friendly" and "recyclable."¹⁰⁰ The District Court agreed only that the definition of "recyclable" failed the test for vagueness.¹⁰¹ Since the Statute regulated the ability of manufacturers to make claims "concerning . . . commercial transactions,"¹⁰² the court tested the Statute under the commercial speech doctrine.¹⁰³

B. Commercial Speech Generally

Commercial speech is defined as speech that does "no more than propose a commercial transaction."¹⁰⁴ Essentially, this definition encompasses most product representations, either in advertising or on

96. *Id.*

97. This includes both consumers and non-purchasing members of the public. See *Association of National Advertisers v. Lungren*, 809 F. Supp. 747, 751-53 (N.D. Cal. 1992), *aff'd*, 44 F.3d 726 (9th Cir. 1994), *reh'g denied*, No. 93-15644 (9th Cir. Feb. 23, 1995).

98. The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The First Amendment applies to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1; *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697 (1931). The commercial speech doctrine is an outgrowth of the freedom of speech that in recent years has become an increasingly consequential issue. See generally LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-14, at 890-904 (2d ed. 1988); 4 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE*, §§ 20.26-.31, at 153-96 (2d ed. 1992). In 1976, the Court extended First Amendment protection of speech that merely proposes a commercial transaction. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). *Virginia Pharmacy* was the first case that acknowledged that commercial speech was protected by the First Amendment. However, the doctrine did not gain substance until *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). After *Central Hudson*, commercial speech became an important tool for marketers who challenged governmental actions that restricted any attempts to market products.

99. *National Advertisers*, 809 F. Supp. at 759-762.

100. See CAL. BUS. & PROF. CODE § 17508.5(a) & (d).

101. *National Advertisers*, 809 F. Supp. at 759.

102. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455 (1978), *reh'g denied*, 439 U.S. 883 (1978).

103. In upholding the district court, the court of appeals held that the speech at issue met the test for commercial speech set out in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). *National Advertisers*, 44 F.3d at 728 (9th Cir. 1994). The *Bolger* characteristics are: (1) advertising format; (2) reference to a specific product; and (3) the underlying economic motive of the speaker. *Id.*

104. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), *reh'g denied*, 414 U.S. 881 (1973); see also *Ohralik*, 436 U.S. at 455 ("Expression concerning purely commercial transactions . . ."); BLACK'S LAW DICTIONARY

labels. Until 1976, this type of speech was not considered to warrant First Amendment protection.¹⁰⁵ Thus, unlike other forms of protected speech, commercial speech traditionally has been subject to government regulation,¹⁰⁶ and has been provided lesser protection than other types of constitutionally guaranteed speech.¹⁰⁷ However, since 1980, this lesser protection has not meant that commercial speech is without value. As the Supreme Court has repeatedly stated in recent years:

[T]he particular consumer's interest in the free flow of consumer information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . [T]he free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system . . . [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered.¹⁰⁸

1. The Creation of the *Central Hudson* Test

The dominant commercial speech case is *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,¹⁰⁹ which considered New York State's prohibition on advertising by electric utilities promoting the use of electricity, to reduce energy demand during the energy crisis in the 1970s.¹¹⁰ Until shortly before the case arose, the Court consistently denied commercial speech any First Amendment protection,¹¹¹ but was slowly reconsidering granting protection to commercial speech in the 1970s.¹¹²

271 (6th ed. 1991) ("speech that advertises a product or service for profit or for business purpose").

105. *Bates v. State Bar*, 433 U.S. 350, 363-64 (1977), *reh'g denied*, 434 U.S. 881 (1977). See generally *TRIBE*, *supra* note 98; *NOVAK & ROTUNDA*, *supra* note 98.

106. See *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993).

107. *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989).

108. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-65 (1976); see also *Edenfield*, 113 S. Ct. at 1797-98; *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 646 (1985) (The "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.").

109. 447 U.S. 557 (1980). The Court first gave limited protection to commercial speech. *Virginia Pharmacy*, 425 U.S. 748; see *supra* note 79. Commercial speech analysis essentially did not move forward until the test announced in *Central Hudson*.

110. Three years later, after the national energy crisis had abated, the Commission extended the advertising ban. The ban divided advertising into two categories: promotional (defined as "advertising intended to stimulate the purchase of utility services") and institutional/informational (defined as "all advertising not clearly intended to promote sales."). *Central Hudson*, 447 U.S. at 559-60. All promotional advertising was banned. *Id.* While acknowledging the distinction was not ideal, the Commission elected to continue the restriction because it would likely further conservation. *Id.*

111. *E.g.*, *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

112. See *Virginia Pharmacy*, 425 U.S. at 758 ("There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected.").

The Supreme Court granted certiorari in *Central Hudson* to decide whether the government could place such a blanket restriction on utilities preventing them from advertising.¹¹³ Focusing on how much protection commercial speech warranted,¹¹⁴ the Court developed a four-part test to govern when and how commercial speech may be regulated.¹¹⁵

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹¹⁶

Hence, for a restriction on commercial speech to pass constitutional muster, the restriction must conform to all four prongs of the *Central Hudson* test.

In *Central Hudson*, there was no allegation that the affected speech was "either inaccurate or relate[d] to unlawful activity."¹¹⁷ New York offered two interests in supporting its ban on advertising by utilities.¹¹⁸ First, the state claimed there was a state and national interest in energy conservation. Second, the state alleged that promotional advertising would have "aggravate[d] inequities caused by the failure to base the utilities' rates on marginal cost."¹¹⁹ The Court found that both interests were substantial, and therefore the second prong was met.¹²⁰

The Court proceeded to the third prong, which considered whether the regulation directly advanced the state's interests.¹²¹ The Court held that the relationship between the advertising ban and the state's second interest was "tenuous" and "remote."¹²² However, the Court found that the state's interest in conserving energy was directly advanced by the advertising ban.¹²³

113. See *Central Hudson*, 447 U.S. at 558.

114. *Id.* at 563-64.

115. *Id.* at 566.

116. *Id.*

117. *Id.* The government clearly may impose regulations to prevent false, deceptive, or misleading commercial speech. *Id.* at 563-64 ("The government may ban forms of communication more likely to deceive the public than inform it . . ."); *Virginia Pharmacy*, 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

118. *Central Hudson*, 447 U.S. at 568. The Court found that commercial speech was protected by the First Amendment even in a monopoly market. *Id.* at 566-68.

119. *Id.* at 568.

120. *Id.* at 568-69.

121. *Id.* at 569.

122. *Id.*

123. *Id.*; see also *MD II Entertainment, Inc. v. City of Dallas, Tex.*, 28 F.3d 492 (5th Cir. 1994) (emphasizing substantial burden of *Central Hudson*'s fourth prong).

The Court invalidated the statute under the fourth prong,¹²⁴ which measures whether the restriction is not "more extensive than necessary to serve [the state interest]."¹²⁵ The Court held that the regulation's complete ban on advertising was too broad, since it suppressed information that would not have increased overall energy demand, and because the state was unable to demonstrate that a more limited regulation would be ineffective.¹²⁶

2. Clarifying the *Central Hudson* Test

a. *Illegal Activities and Misleading Speech*

At the outset of the *Central Hudson* test, the inquiry focuses on whether the speech "concern[s] lawful activity and [is] not misleading."¹²⁷

Commercial speech concerning unlawful activities does not enjoy any First Amendment protection.¹²⁸ The corollary to this principle is that advertising legal activities cannot be prohibited by the government.¹²⁹ However, the government may regulate such speech in certain instances.¹³⁰

The cases concerning speech that regulates or prohibits advertising relating to illegal activities are relatively straightforward. If an activity is legal, the government may not ban commercial speech relating to that activity unless it is misleading.¹³¹

124. *Central Hudson*, 447 U.S. at 570-71.

125. *Id.* at 566.

126. *Id.*

127. *Id.*

128. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) (ordinance requiring license to sell items designed to be used in conjunction with illegal drugs; speech is unprotected because it proposes an illegal activity and government may regulate or ban the activity altogether), *reh'g denied*, 456 U.S. 950 (1982); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) (newspaper advertisement violated ordinance prohibiting sex discrimination and therefore lost commercial speech protection), *reh'g denied*, 414 U.S. 881 (1973); *see also* *United States v. Walton*, 36 F.3d 32, 35 (7th Cir. 1994) (illegal relabeling of pacemaker caused defendant to lose commercial speech claim); *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829 (11th Cir. 1990) (holding video scrambling devices illegal and therefore they enjoyed no commercial speech protection).

129. *Bigelow v. Virginia*, 421 U.S. 809 (1975) (conviction overturned for newspaper publisher whose paper carried advertisement for firm that arranged for legal abortions); *see also* *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (Court struck down prohibition on advertising of contraceptives); *Virginia Pharmacy*, 425 U.S. 748 (1976) (statute prohibited advertisement of prescription drug prices, but Court holds this activity protected); *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n*, 701 F.2d 314 (5th Cir. 1983) (Fifth Circuit panel invalidated statutes and regulations on liquor advertising), *aff'd on reh'g*, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

130. *See, e.g., Virginia Pharmacy*, 425 U.S. at 770.

131. *But see* *Posadas v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). In *Posadas*, the Court upheld a statute which forbade casino advertising which was di-

Commercial speech is entitled to First Amendment protection only if the speech is not misleading.¹³² Misleading speech, however, presents a more difficult question. The Court has distinguished between speech that is "inherently" misleading and that which is "potentially" misleading.¹³³ States may regulate speech that is inherently misleading, and may even prohibit such speech altogether.¹³⁴ Speech that is potentially misleading may be regulated, but may not be

rected to the local population. *Id.* at 348. Advertising directed toward tourists was permitted. *Id.* at 335-36. The Court reasoned that "the greater power to completely ban [the activity] necessarily includes the lesser power to ban advertising." *Id.* at 345-46. While the statute was not a complete ban, the Court's language implies that, when the power exists to ban an activity, especially a vice activity, the government will have enormous leeway in later prongs of the *Central Hudson* test. See also *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (upheld statutory ban on cigarette advertising by any electronic medium that comes under control of FTC), *aff'd without opinion* *Capital Broadcasting Co. v. Acting Attorney Gen. Kleindienst*, 405 U.S. 1000 (1972).

It is unclear to what extent this "greater includes the lesser" standard applies. For instance, the power to ban gambling entirely does not include the power to ban discussions of the political merits of such an action. *But cf.* *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2704 (1993) (upholding federal statute which prevents radio stations in states that forbid lotteries from advertising lotteries of other states since "Congress might have . . . ban[ned] all radio or television lottery advertisements").

132. *Central Hudson*, 447 U.S. at 566.

133. *In re R.M.J.*, 455 U.S. 191, 203 (1982). *R.M.J.* involved a Missouri Supreme Court rule regulating advertising by lawyers. The rule restricted the content of any advertising to certain strictly defined categories. The Court found that the "potential for deception and confusion is particularly strong in the context of advertising professional services." *Id.*

The Court has dealt with professional advertising on numerous occasions. See *Ibanez v. Florida Dep't of Business and Professional Regulation, Bd. of Accountancy*, 114 S. Ct. 2084 (1994) (lawyer who was reprimanded for engaging in "false, deceptive, and misleading" advertising by truthfully referring to her credentials as Certified Public Accountant ("CPA") and Certified Financial Planner ("CFP") in advertising for law firm was engaged in protected activity); *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990) (Court overturned attorney reprimand for advertising as a specialist); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (Court overturned rule that CPAs could not solicit business in-person); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 488-91 (1988) (Court overturns state prohibitions against lawyers employing targeted, direct-mail advertising); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 676-77 (1985) (state may not ban lawyers from advertising in newspaper where advertisement contained legal advice); *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), *reh'g denied*, 439 U.S. 883 (1978) (state could regulate attorney who solicited accident victims where potential harm to public is great); *In re Primus*, 436 U.S. 412 (1978) (lawyer's letter which contained a solicitation for non-profit legal organization is protected by the commercial speech doctrine); *Bates v. State Bar*, 433 U.S. 350 (1977) (Court invalidates rule prohibiting attorney advertising).

134. *Id.* ("[W]hen the particular content or method of the advertising suggests that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely."); see *Friedman v. Rogers*, 440 U.S. 1, 12 (1978) (upholding complete ban on trade names in optometrist's advertisements since trade names lack intrinsic meaning).

banned completely unless the speech cannot be presented in a non-deceptive manner.¹³⁵

In *Peel v. Attorney Registration & Disciplinary Commission of Illinois*,¹³⁶ a lawyer was reprimanded for holding himself out as a "specialist." The lawyer had been certified by the National Board of Trial Advocacy, and stated this at the top of his letterhead.¹³⁷ An Illinois Code of Professional Responsibility provision prevented lawyers from using specialty designations except in the field of patent, trademark, or admiralty.¹³⁸

The case turned on the designation of his speech as either inherently or potentially misleading. The Court rejected the contention that the speech was inherently misleading.¹³⁹ The designation as a specialist was not only true, but also verifiable.¹⁴⁰ The Court also drew a distinction between "statements of opinion or quality and statements of objective facts that may support an inference of quality."¹⁴¹

The Court recognized that some consumers may assume that the fitness of a specialist exceeds that of other members of the bar, and that if the certifying organization failed to inquire into the lawyer's fitness, the statement could be misleading while factually correct.¹⁴² However, the Court found that the certifying qualifications were objectively clear, and thus, not misleading.¹⁴³ Finally, the Court rejected the finding of the Illinois Supreme Court that the placement of the designation of specialist in proximity to the identification of the states in which the lawyer was admitted conveyed the impression of an official state action.¹⁴⁴

The specialist designation was also alleged to be potentially misleading.¹⁴⁵ The Court acknowledged that the designation might "not be understood fully by some readers,"¹⁴⁶ but compared the situation to others in which the Court upheld the rights of attorneys to advertise.¹⁴⁷ The Court restated its position that "the particular state rule

135. *R.M.J.*, 455 U.S. at 203 ("[T]he States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive."); see also *Bates*, 433 U.S. at 374-75.

136. 496 U.S. 91 (1990).

137. *Id.* at 96.

138. *Id.* at 97 (citing Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility).

139. *Id.* at 100-01.

140. *Id.* at 100.

141. *Id.* at 101.

142. *Id.* at 102.

143. *Id.*

144. *Id.* at 103.

145. *Id.* at 106.

146. *Id.*

147. See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (targeted mailing); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (potential confusion

restricting lawyers' advertising is 'broader than necessary to prevent the perceived evil.'"¹⁴⁸

While the specific inquiry in *Peel* rejected the attempt of Illinois to restrict the designation of certification, states may in some instances regulate the designation of professionals as specialists.¹⁴⁹

The Court considered similar deceptive and misleading speech issues in *Ibanez v. Florida Department of Business & Professional Regulation*.¹⁵⁰ Sylvia Ibanez, an attorney, was also licensed as a certified public accountant ("CPA") and a certified financial planner ("CFP"). In advertisements for her law practice, she included these certifications and was reprimanded by the Florida Board of Accountancy ("Board") for practicing accountancy in an unlicensed firm¹⁵¹ and using a designation not recognized by the Board.¹⁵² Therefore, the issues are similar to *Peel* because the case involved whether a professional could hold herself out as a specialist to the general public. In this case, however, Ibanez was reprimanded for truthfully holding herself out as a licensed accountant when she practicing law, not accounting.

The Court rejected the arguments of the Board that the affected speech would confuse the public. "[A]s long as Ibanez holds an active CPA license from the Board we cannot imagine how consumers can be misled by her truthful representation to that effect."¹⁵³ The Board also argued that the term "certified" in CFP implied a state sanction.¹⁵⁴ The Court did not accept this position, citing *Peel*, which rejected the theory that a designation as a specialist indicated state sanction.¹⁵⁵ The Board finally attempted to argue that the speech was potentially misleading.¹⁵⁶ The Court noted that the mere use of the term "potentially misleading" will not "supplant the . . . burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'"¹⁵⁷ The Court noted that the Board could not point to "any harm that is potentially real,

from general legal advice in newspaper advertisement); *R.M.J.*, 455 U.S. 191 (1982) ("Practice before: The United States Supreme Court").

148. *Peel*, 496 U.S. at 107 (quoting *Shapero*, 486 U.S. at 472). The Court, in speaking of the breadth of the regulation compared to what state actions are minimally needed to combat the deception, is actually conducting a fourth prong analysis.

149. *Id.* at 110. The Court suggests that requiring a screening process or disclaimer would be more palatable. *Id.* The Court again emphasized that a state may not "completely ban statements that are not actually or inherently misleading." *Id.*

150. 114 S. Ct. 2084 (1994).

151. The Florida Board of Accountancy dropped this charge prior to the close of the initial proceedings. *Id.* at 2087.

152. *Id.*

153. *Id.* at 2089.

154. *Id.*

155. *Id.* at 2089-90; see also *Peel*, 496 U.S. at 106-07. But see *infra* note 182.

156. *Id.* at 2090.

157. *Id.* (quoting *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993)) (citations omitted).

not purely hypothetical," and rejected the Board's contentions.¹⁵⁸ Therefore, Ibanez's truthful speech was not considered misleading in this instance.

b. *Substantial Governmental Interest*

The second prong of the *Central Hudson* test inquires whether the asserted governmental interest is substantial.¹⁵⁹ Commercial speech regulations will only be upheld if there is a substantial governmental interest to justify the regulation. The Court has failed to establish a clear standard for determining when an interest is substantial for purposes of the *Central Hudson* test.¹⁶⁰ Despite the lack of a clear standard, a broad range of interests have been recognized as substantial.¹⁶¹

In *Bolger v. Youngs Drug Products Corp.*,¹⁶² the Court was faced with a federal statute that prohibited "the mailing of unsolicited advertisements for contraceptives."¹⁶³ Youngs attempted to send an unsolicited mass mailing of informational pamphlets through the mails.¹⁶⁴ The United States Post Office discovered the plan and informed the company that the proposed mailing would violate a federal statute.¹⁶⁵ Youngs filed for declaratory and injunctive relief.¹⁶⁶

There was no allegation that the mailings either concerned an illegal activity¹⁶⁷ or were misleading. The Court thus turned to the second prong: whether the governmental interest was substantial. The government claimed two interests in upholding the statute: (1) the statute "shield[ed] recipients . . . from materials that they [were] likely to find offensive," and (2) the statute assisted "parents' efforts to control the manner in which their children bec[ame] informed about sensitive and important subjects such as birth control."¹⁶⁸ The Court rejected the

158. *Ibanez* holds that for commercial speech to be potentially misleading the harm or confusion it may cause must be "potentially real, not purely hypothetical." *Id.* at 2090. The case constricts the Court's dicta in *Peel* that in some instances a state may restrict the truthful and non-misleading statements regarding designation as a specialist when the profession itself is regulated by the state. *See Peel*, 496 U.S. at 110.

159. *Central Hudson*, 447 U.S. at 566.

160. *See Kansas v. United States*, 16 F.3d 436, 443 (D.C. Cir. 1994).

161. *See, e.g., Edenfield v. Fane*, 113 S. Ct. 1792, 1799 (1993) (consumer protection); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1511 (1993) (municipal interest in safety and aesthetics of streets); *Central Hudson*, 447 U.S. at 568 (energy conservation).

162. 463 U.S. 60 (1983).

163. *Id.* at 61.

164. *Id.* at 62-63.

165. *Id.*

166. *Id.*

167. The illegality of sending the pamphlets should not have been the focus. Rather, the first prong focuses on whether the underlying commercial transaction or activity is illegal. *See supra* note 131.

168. *Bolger*, 463 U.S. at 71. The Court noted that the government did not have to rely on the original justification in promulgating the statute during the last century.

first interest: "[W]e [have] stated that offensiveness was 'classically not [a justification] validating the suppression of expression protected by the First Amendment. . . . [W]e have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."¹⁶⁹

The Court found the second interest in aiding parents' control over their children's access to information regarding birth control to be substantial.¹⁷⁰ The Court did not spend time elaborating on this finding, but the point seems clear enough.¹⁷¹ Despite the Court's finding that the interest was substantial, the Court held that the statute failed the third and fourth prongs. The Court found that the statute provided only "limited incremental support for the interest asserted."¹⁷² Parents exercise substantial control over mail, and already cope with various external influences upon their children's beliefs.¹⁷³ The Court also found that the statute was far too broad in its scope.¹⁷⁴

In *Edenfield v. Fane*,¹⁷⁵ the Court held that the state must supply the "precise interests" they seek to advance,¹⁷⁶ and scrutinize those asserted "if it appears that the stated interests are not the actual interests served by the restriction."¹⁷⁷

c. Governmental Interest Directly Advanced

The third prong of the *Central Hudson* test examines whether the regulation at issue directly advances the governmental interest as-

Id. at 70. "[T]he insufficiency of the original motivation does not diminish other interests that the restriction may now serve." *Id.* (citing *Ohralik*, 436 U.S. at 460).

169. *Id.* (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 n.23 (1977)). There is no distinction between commercial and noncommercial speech which justifies such differential treatment. *Id.* (citing *Carey*, 431 U.S. at 701 n.28).

170. *Id.* at 73.

171. "[Parents] have an important 'guiding role' to play in the upbringing of their children . . . which presumptively includes counseling them on important decisions." *Id.* (quoting *H.L. v. Matheson*, 450 U.S. 398, 410 (1981)) (citations omitted).

172. *Id.*

173. *Id.* "Under these circumstances, a ban on unsolicited advertisements serves only to assist those parents who desire to keep their children from confronting such mailings, who are otherwise unable to do so, and whose children have remained relatively free from such [external] stimuli." *Id.*

174. *Id.* "This marginal degree of protection is achieved by purging all mailboxes of unsolicited material that is entirely suitable for adults." *Id.*

175. 113 S. Ct. 1792 (1993). See generally John C. Coots, *A Missed Opportunity to Definitively Apply the Central Hudson Test: Fane v. Edenfield*, 26 CREIGHTON L. REV. 1155 (1993) (criticizing the Eleventh Circuit's application of the *Central Hudson* test in *Edenfield*); Evan R. Levy, Note, *Edenfield v. Fane: In-person Solicitation by Professionals Revisited—What Makes Lawyers Different?*, 58 ALB. L. REV. 261 (1994) (arguing that Supreme Court's treatment of commercial speech in *Edenfield* is very close to full First Amendment protection).

176. *Edenfield*, 113 S. Ct. at 1798 (citing *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989)).

177. *Id.*

serted in the second prong.¹⁷⁸ This prong requires an "immediate connection" between the governmental interest and the restriction.¹⁷⁹ The Court recently emphasized the burden imposed upon the state: "the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'"¹⁸⁰

In *Edenfield*,¹⁸¹ the Court heard a Florida case challenging a state ban on in-person solicitations by certified public accountants.¹⁸² This restriction, like the restriction found in *Ibanez*, was promulgated by the Florida Board of Accountancy, which defended the prohibition as "necessary to preserve the independence of CPAs."¹⁸³

The controversy arose because the statute prevented the plaintiff from placing unsolicited telephone calls to business executives in order to attract business. The Board asserted that an accountant would be " beholden " to a client he had solicited, and that an accountant who solicits business is in need of clients and will therefore be more likely to break or bend the accountancy rules.¹⁸⁴

Since the commercial speech doctrine is "linked inextricably" with the underlying commercial arrangement,¹⁸⁵ if the state has an interest in regulating the underlying transaction the state may also gain a con-

178. *Central Hudson*, 447 U.S. at 566.

179. See *id.* at 569 ("[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."). See also *Edenfield*, 113 S. Ct. at 1800 ("[T]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.' . . . This burden is not satisfied by mere speculation or conjecture; rather, a governmental body . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." (citations omitted)).

180. *Ibanez*, 114 S. Ct. at 2089 (quoting *Zauderer*, 471 U.S. at 646).

181. 113 S. Ct. 1792 (1993).

182. *Id.* The Court previously examined a similar issue in the context of a lawyer's solicitation of clients. See *Edenfield*, 113 S. Ct. at 1796 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), *reh'g denied*, 439 U.S. 883 (1978), and *In re Primus*, 436 U.S. 412 (1978)); see also *supra* note 133. The Court in *Ohralik* held that lawyers could be banned from in-person solicitations in at least some instances; however, not all personal solicitation is without First Amendment protection. *Ohralik*, 436 U.S. at 449. But see *Edenfield*, at 1804 (O'Connor, J. dissenting). Justice O'Connor would hold that the states may prohibit commercial speech that "is inconsistent with the speaker's membership in a learned profession and therefore damaging to the profession and society at large." *Id.* See also *Ibanez*, 114 S. Ct. at 2093 (O'Connor, J., dissenting); *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 119 (1990) (O'Connor, J., dissenting); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 488-91 (1988) (O'Connor, J., dissenting); *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 676-77 (1985) (O'Connor, J., dissenting).

183. See *Edenfield*, 113 S. Ct. at 1797 (citing Affidavit of Louis Dooner, a former chairman of the Florida Board of Accountancy).

184. *Id.*

185. *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979), *reh'g denied*, 441 U.S. 917 (1979).

comitant interest in the expression itself.¹⁸⁶ The Board put forth two interests in upholding the ban: to protect consumers from fraud and to maintain the independence of individual CPAs and accounting firms.¹⁸⁷ The Court held that both interests were substantial.¹⁸⁸

Despite the substantial nature of the state's interests, the blanket ban failed to "directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."¹⁸⁹ The Court found that the Board could provide no support for the contention that the ban advanced its interests in any direct and material way.¹⁹⁰ The Court again stressed the burden upon the state to prove that a restriction should be upheld.¹⁹¹ "[A] governmental body seeking to sustain a restriction . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."¹⁹²

Despite the heavy burden placed on the states by the *Edenfield* and *Ibanez* decisions, the Court appeared to retreat from its tough stance in *United States v. Edge Broadcasting Company*.¹⁹³

186. See *Ohralik*, 436 U.S. at 456.

187. *Edenfield*, 113 S. Ct. at 1799. The Court noted that the state's interest encompassed both the prevention of fraud and the protection of privacy. *Id.* at 1799. As to fraud, the Court has consistently held that "[t]he First Amendment . . . does not prohibit the state from ensuring that the stream of commercial information flow cleanly as well as freely." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976). The state may completely ban without further justification commercial expression that is fraudulent or deceptive. *Edenfield*, 113 S. Ct. at 1799. What is not allowed is a blanket ban that will envelop truthful and non-misleading expression along with the fraudulent and deceptive, unless the state can demonstrate that the restriction reasonably accomplishes a substantial state interest. *Id.* The state's second justification relates to the audit and attest services that an accountant provides. "In the course of rendering these professional services, a CPA reviews financial statements and attests that they . . . present a fair and accurate picture of the firm's financial condition." *Id.* at 1799 (citation omitted).

188. *Edenfield*, 113 S. Ct. at 1799.

189. *Central Hudson*, 447 U.S. at 564.

190. The Court found the affidavit by Mr. Dooner to contain only conclusory statements with no basis in fact, and determined that the accounting profession's literature had come to the exact opposite conclusion as the Board. *Edenfield*, 113 S. Ct. at 1801. The Court also rejected the Board's contention that the regulation was a reasonable time, place, or manner restriction. *Id.* at 1801-02. See *infra*-note 229.

191. *Edenfield*, at 1800; see *supra* note 179 and accompanying text.

192. *Edenfield*, at 1800.

193. 113 S. Ct. 2696 (1993) (5-4 decision). See generally Tara L. Lavery, Note, *Commercial Speech Suffers a First Amendment Blow in United States v. Edge Broadcasting Co.*, 14 N. ILL. U. L. REV. 549 (1994) (*Edge* represents a set-back for First Amendment protection of commercial speech); *The Supreme Court, 1992 Term-Leading Cases*, 107 HARV. L. REV. 27, 224 (1993) (overview of commercial speech cases decided that term). The Court has recently granted certiorari in *Adolph Coors Co. v. Bentsen*, 2 F.3d 355 (10th Cir. 1993), *cert. granted*, 114 S. Ct. 2671 (1994), *aff'd sub nom.* *Rubin v. Coors Brewing Co.*, No. 93-1631, 1995 WL 227629 (U.S. Apr. 19, 1995). Coors Brewing Company challenged federal requirements which ban statements of alcohol content on malt beverage labels. Coors claims that such a restriction implicates their commercial speech rights under the First Amendment. The federal government claims that such labeling restrictions are necessary to prevent manufacturers

Edge owned and operated a radio station in Elizabeth City, North Carolina,¹⁹⁴ which wanted to accept advertising from the Virginia state lottery. North Carolina, however, prohibits lotteries.¹⁹⁵ In addition, federal law prohibits radio stations from advertising lotteries unless the broadcast occurs in a state that does not prohibit lotteries.¹⁹⁶ The radio station claimed that the federal law impermissibly burdened its commercial speech rights by prohibiting all lottery advertisements.¹⁹⁷

Since the Court easily dispensed with the first *Central Hudson* prong, the Court's discussion analyzed the second prong that requires the state to have a substantial interest in promulgating the regulation. The Court found that the "congressional policy of balancing the interests of lottery and non-lottery states" was a substantial governmental interest.¹⁹⁸ The Court explained how Congress could permissibly have banned the activity altogether since gambling is considered a "vice" activity.¹⁹⁹ Thus, the Court found that the government's interest was substantial.²⁰⁰

from entering into "strength wars" over alcoholic content with each other. See generally Denise D. Trumler, Note, *Perpetuating Confusion in the Commercial Speech Area*: *Adolph Coors Co. v. Brady*, 26 CREIGHTON L. REV. 1193 (1993).

As this Note was going to publication, the Court handed down its decision in *Coors. Rubin v. Coors Brewing Co.*, No. 93-1631, 1995 WL 227629 (U.S. Apr. 19, 1995); see also *Justices Allow Unsigned Political Fliers*, N.Y. TIMES, April 20, 1995, at A20. The Court unanimously upheld the Tenth Circuit and overturned the federal statute. The Court noted that the government could not point to any relationship between the government's ban and the prevention of strength wars. *Coors*, 1995 WL 227629 at *3. The Court noted both the "general thrust of federal alcohol policy [that] favor[s] greater disclosure" and the "overall irrationality of the Government's regulatory scheme," and held that both of these inconsistencies failed to advance the governmental interest under the third *Central Hudson* prong. *Id.* at *5-*7. The Court criticized the government for relying on anecdotal evidence to extend irrational and conflicting policies. *Id.* at *8. Justice Stevens wrote a concurring opinion that questioned the commercial speech doctrine's application since there was no misleading speech. *Id.* at *10. Justice Stevens would have extended full First Amendment protection to the speech in this instance. *Id.*

194. The radio station was operated from Moyock, North Carolina, which is approximately three miles from the Virginia-North Carolina border. *Edge*, 113 S. Ct. at 2702. Over 90% of the station's listeners, however, are Virginians, and 95% of the station's advertising revenue come from Virginia sources. *Id.*

195. *Id.* at 2701-02 (citing N.C. GEN. STAT. §§ 14-289, 14-291 (1986 & Supp. 1992)).

196. See *Edge*, 113 S. Ct. at 2701; Title 18 U.S.C. §§ 1304, 1307 (1988). The lower courts held that the statutes failed to directly advance the governmental interest supporting the statutes and were thus unconstitutional. *Edge*, 113 S. Ct. at 2702-03. The Court rejected the court of appeals' finding that because the listening residents of North Carolina were "inundated with Virginia's lottery advertisements," the prohibition "is ineffective in shielding North Carolina residents from lottery information." *Id.* at 2704.

197. *Edge*, 113 S. Ct. at 2704.

198. *Id.*

199. *Id.* at 2703.

200. *Id.*

The third prong, measuring whether the restriction directly advances the government's interest, was also met in this case. The Court found that the statute had to be analyzed as a general application to all radio broadcasters.²⁰¹ In analyzing the third prong, the Court found that the statute directly advanced the governmental interest. The Court explained how the state's interest was directly advanced because Congress could have permissibly taken even greater steps to restrict the activity.²⁰² This is in contrast to the test followed in *Central Hudson* and *Edenfield*, namely that "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."²⁰³ However, while one may argue that the statute provides direct support for the governmental interest,²⁰⁴ this was not the standard that the Court applied. The standard that the Court applied resembled the fourth *Central Hudson* prong, which requires that the regulation may not be broader than necessary.²⁰⁵ The Court did, however, find that the governmental interest was directly advanced by the statute.

The Court's analysis on the third prong in *Edge* was substantially weaker than in *Ibanez*. "We have no doubt that the statutes directly advanced the governmental interest at stake in this case."²⁰⁶ The difficulty in reconciling *Edenfield* and *Ibanez* with *Edge* reflects both a schism among the Justices in their treatment of commercial speech and the factual settings of the cases. The Court treated the regulation of "vice" activities more leniently than other types of commercial speech.²⁰⁷

Under *Central Hudson*'s fourth prong, the *Edge* Court examined the "fit" between the governmental interest behind the regulation and the restriction imposed. The Court held that the policy limiting lottery broadcasts prevented lottery states and non-lottery states from impinging on the policies of their neighbors.²⁰⁸ This was considered a

201. *Id.* at 2704. The Court ruled that the statute's application towards *Edge* specifically is measured under the fourth prong. *Id.*

202. *Id.*

203. *Central Hudson*, 447 U.S. at 564; *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993).

204. Since the statute did not prevent exposure to lottery advertisements from outside lottery states, it is questionable whether the statute provided anything more than remote or ineffective support for the government's arguments. *See Central Hudson*, 447 U.S. at 564. *But see Edge*, 113 S. Ct. at 2704.

205. *See Central Hudson*, 447 U.S. at 566. The *Edge* Court arrived at this test by applying the "fit" test announced in *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). This test properly belongs in the fourth prong analysis. *Id.*

206. *Edge*, 113 S. Ct. at 2704; *cf. id.* at 2705 ("We have no doubt that the fit in this case was a reasonable one.").

207. *See, e.g., Posadas De Puerto Rico Ass'n v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341.

208. "In other words, applying the restriction to a broadcaster such as *Edge* directly advances the governmental interest in enforcing the restriction in non-lottery states, while not interfering with the policy of lottery states like Virginia." *Id.* at 2705.

reasonable congressional policy and its goals fit within the policy means.²⁰⁹ Therefore, the statute was upheld.²¹⁰

d. *No More Extensive Than Necessary*

Central Hudson described the fourth prong as "whether [the regulation] is not more extensive than necessary."²¹¹ However, the Court altered this rule in *Board of Trustees of the State of New York v. Fox*.²¹²

Fox involved a statute prohibiting private commercial enterprises from conducting business on State University of New York property, including residential dormitories.²¹³ The District Court found that the "restrictions on speech were reasonable in light of the dormitories' [residential] purpose."²¹⁴ The Second Circuit Court of Appeals held that a regulation is "'not more extensive than necessary' only if it is the 'least-restrictive-measure' that could effectively protect the state's interests."²¹⁵ The circuit courts split over the interpretation of this phrase, noting that either an intermediate or strict scrutiny standard could be required.²¹⁶ The Supreme Court held that although commercial speech is important enough to justify distinguishing "the harmless from the harmful,"²¹⁷ the fit between the state's interest and its chosen

209. *Id.*

210. *Id.* at 2708.

211. *Central Hudson*, 447 U.S. at 566.

212. 492 U.S. 469 (1989).

213. The conflict arose when the University applied the regulation against "Tupperware parties" in dormitories. A "Tupperware party" consists of an in-home product demonstration where acquaintances are invited into a person's home, and where the host or hostess receives a benefit or award for holding the event. *See id.* at 472.

214. *Id.*

215. *Id.* at 476. The Court noted that if the term "necessary" is given strict interpretation, then the "least-restrictive-means" test would have been correctly applied by the court of appeals. *Id.* The Supreme Court had previously assumed a "least-restrictive-means" test. *Id.* However, the term "necessary" has sometimes been interpreted more loosely, and the Court noted that previous commercial speech cases supported a "flexible meaning for the *Central Hudson* test." *Id.* at 476-77. The Court explained that the confusion arose because none of the previous cases involved regulations that only marginally exceeded the state's interest. *Id.* at 479 (quoting *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988), *cert. denied*, 490 U.S. 1107 (1989)).

216. Several courts interpreted "not more extensive than necessary" to mean "least restrictive means." Compare *Fox v. Board of Trustees*, 841 F.2d 1207 (2d Cir. 1988), *rev'd*, 492 U.S. 469 (1989) (applying "least-restrictive-means" test) and *American Future Sys., Inc. v. Pennsylvania State Univ.*, 752 F.2d 854, 865 (3d Cir. 1984), *cert. denied sub nom. Johnson v. Pennsylvania State Univ.*, 473 U.S. 911 (1985) ("[W]e believe that this last prong of the *Central Hudson* test cannot be read as a 'least restrictive means' requirement."). The Court rejected this approach in favor of an intermediate test (*i.e.*, "'narrowly tailored' to serve a significant governmental interest"). *Fox*, 492 U.S. at 477-78.

217. *Shapero*, 486 U.S. at 478; *see also* *U.S. Healthcare, Inc. v. Blue Cross*, 898 F.2d 914, 931-35 (3d Cir. 1990), *cert. denied sub nom. Independence Blue Cross v. U.S. Healthcare, Inc.*, 498 U.S. 816 (1990) (discussing the lesser constitutional protection accorded to commercial speech generally).

means does not have to be flawless.²¹⁸ The Court explicitly rejected the notion that the "least-restrictive-means" standard was the correct standard for the fourth prong of the *Central Hudson* test.²¹⁹ Thus, the Court adopted an intermediate level of judicial scrutiny and significantly expanded the power of government to regulate commercial speech. The adoption of the intermediate test indicated that they should not second-guess state legislatures, and that courts could allow restrictions on commercial speech if the state could show a positive advancement of its interest.²²⁰

The intermediate standard announced in *Fox* does lower the scrutiny under which the fourth prong is to be analyzed. The effects of this shift, however, is mitigated by the Court's traditional preference for more speech rather than less.²²¹ Although this presumption can be overcome, the Court prefers additional speech.

In *City of Cincinnati v. Discovery Network, Inc.*,²²² the Court expanded upon the "fit" test announced in *Fox*. The City of Cincinnati

218. *Fox*, 492 U.S. at 480 ("What our decisions require is . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'") (citations omitted)).

219. *Id.* But see Albert P. Mauro, Jr., Comment, *Commercial Speech After Posadas and Fox: A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931 (1992) (asserting that the modified *Central Hudson* test is merely a rational basis test). Commentators have noted a decline in the protection afforded commercial speech beginning with *Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), with *Fox* representing a serious blow to the stature of First Amendment protection for commercial speech. See Mauro, at 1951-54 (analyzing "Supreme Court's Drift"); Douglas Kmiec, *Of Newsracks and the First Amendment: The Constitutional Protection of Commercial Speech*, Oct. 30, 1992, available in WESTLAW, SCT-Preview file. But see Floyd Abrams, *A Growing Marketplace of Ideas*, LEGAL TIMES, July 26, 1993, at S28-29 (arguing that recent Supreme Court commercial speech jurisprudence encompasses both significant First Amendment accomplishments and setbacks).

220. *Fox*, 492 U.S. at 480-81.

221. *E.g.*, *Peel*, 496 U.S. at 108 ("principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information"); *Bates v. State Bar*, 433 U.S. 350, 374 (1977) ("[I]t seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision."); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) ("There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than close them.").

222. 113 S. Ct. 1505 (1993). See generally Robert T. Cahill, Jr., Note, *City of Cincinnati v. Discovery Network, Inc.: Towards Heightened Scrutiny for Truthful Commercial Speech?*, 28 U. RICH. L. REV. 225 (1994) (arguing that the *Discovery* decision was a reevaluation of the Court's treatment of commercial speech); Survey & Essay, *City's Selective and Categorical Ban on the Distribution of "Commercial Handbills" is Violative of the First Amendment*, 3 SETON HALL CONST. L.J. 651 (1993) (noting increased protection of commercial speech after *Discovery*); Scott S. Servilla, Note, *First Amendment Prohibits Laws That Favor Newsracks Containing Noncommercial*

passed an ordinance aimed at improving the safety and aesthetic appearance of its streets and sidewalks by prohibiting commercial handbill dispensers.²²³ Cincinnati's primary argument was that "a categorical prohibition on the use of newsracks [that] disseminate commercial messages did not burden any more speech than necessary to further its interest in limiting the number of newsracks [on city streets]."²²⁴

There was no allegation that the affected speech was deceptive or concerned illegal activity, and there was no challenge to the substantiality of the government's interest in the safety and aesthetic appearance of city streets.²²⁵ Therefore, the Court tested whether the statute established a fit between the governmental interest and the means of achieving that interest.²²⁶

The majority opinion rejected a bright-line rule that would "cabin commercial speech in a distinct category,"²²⁷ and instead reached a narrow holding that the city did not establish the required "fit" between its goals and [the] chosen means.²²⁸ The Court further held that the city's "bare assertion that the 'low value' of commercial speech is a sufficient justification for its selective and categorical ban,"

Publications Over Dispensing Devices Containing Commercial Publications, 24 SETON HALL L. REV. 1089 (1993) (arguing that *Discovery* presages full First Amendment protection for commercial speech).

223. The regulation prohibited the dispensing of a "commercial handbill" that "(a) . . . advertises for sale any merchandise, product, commodity or thing; or [](b) which directs attention to any business . . . for the purpose of directly promoting thereof by sales; or [](c) which . . . advertises any meeting, theatrical performance, exhibition or event . . . for which an admission . . . fee is charged . . ." *Discovery*, 113 S. Ct. at 1508 (citing CINCINNATI, OHIO MUNICIPAL CODE § 714-1-C (1992)). Admittedly, the definition of commercial handbill embraces traditional "newspapers," although separate provisions authorize the public distribution of newspapers. *Id.* at 1511. *But see* Gold Coast Publications, Inc. v. Corrigan, 42 F.3d 1336, 1344 (11th Cir. 1994) (upholding restrictions on all newsracks as valid time, place, or manner restriction).

224. *Discovery*, 113 S. Ct. at 1511. The Court accepted the City's proposition that decreasing the number of newsracks would be an aesthetic improvement, but rejected the notion that the discrimination in and of itself was a reasonable fit between the stated means and ends. *Id.* The Court criticized the City's reliance on the distinction between commercial and noncommercial speech. *Id.* If the Court were to accept the City's argument that since the speech was commercial in nature and that it could therefore be regulated, commercial speech would lose all constitutional protection and the *Central Hudson* test would be devoid of its value. *Id.*

225. *Id.* at 1509-10.

226. *Id.* at 1510.

227. *Id.* at 1511. However, some commentators have questioned whether the distinction between commercial speech and other constitutionally protected speech is fully supported by constitutional analysis. See Kozinski & Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 651 (1990). The Court sidestepped the issue in *Discovery*, 113 S. Ct. at 1511-14.

228. *Discovery*, 113 S. Ct. at 1516. The lower courts did find the effects of the statute "paltry" and "minute." *Id.* at 1510. The Court agreed with this evaluation. *Id.* Therefore, the Court implicitly applied the test's third prong of a direct advancement of the regulation's goals, and found that the city's restriction did not advance the city's goals except in the most minimal manner.

failed to establish the requisite fit.²²⁹ Thus, the distinction between commercial speech and fully protected speech cannot itself justify all regulatory control.

Interpreting the *Central Hudson* test, the Supreme Court has essentially expanded its inherent flexibility. The intermediate level standard, lesser deference to "vice" activities, and fact-based decisions have injected flexibility into a test that covers the breadth of the commercial speech doctrine. Unfortunately, this flexibility has "left both sides of the debate with their own well of precedent from which to draw,"²³⁰ a situation that can cause great confusion.

C. *Association of National Advertisers v. Lungren*

In *National Advertisers*,²³¹ the plaintiff filed suit to enjoin enforcement of section 17508.5 of the California Business and Professional Code, claiming that it impinged on their commercial speech rights.²³² When the district court handed down its judgment in 1992, the four most recent Supreme Court commercial speech cases had not yet been decided.²³³ Since these cases were instrumental in refining the *Central Hudson* test, the district court could not rely on the clarification the Supreme Court has since provided.

1. Decision of the District Court of the Northern District of California

The Association initially contended that the Statute brought within its purview not only commercial speech, but noncommercial speech as well.²³⁴ Plaintiffs claimed that "they are unable to express their policy views or publish editorial or informational advertisements aimed at inducing public activism."²³⁵ The district court decided that the inclu-

229. *Id.* Compare *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1169 (4th Cir. 1991) (upholding official's discretion in deciding if speech is commercial or non-commercial), *cert. denied*, 112 S. Ct. 1997 (1992) with *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 556-57 (2d Cir. 1990) (holding that content discrimination of signs acts as an impermissible commercial versus non-commercial distinction), *cert. denied*, 498 U.S. 852 (1990). The Court also analyzed the statute under the time, place, and manner doctrine, which posits that restrictions on the time, place, or manner of the speech are allowable if they do not impinge on the content of the speech. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), *reh'g denied*, 492 U.S. 937 (1989); see also *Gold Coast*, 42 F.3d at 1344. For an exhaustive discussion of the doctrine, see *TRIBE*, *supra* note 98, at 941 n.83, 977-86; *NOWAK & ROTUNDA*, *supra* note 98, § 16.47, at 1087-88.

230. *Abrams*, *supra* note 219, at §28.

231. 809 F. Supp. 747 (N.D. Cal. 1992), *aff'd*, 44 F.3d 726 (9th Cir. 1994), *reh'g denied*, No. 93-15644 (9th Cir. Feb. 23, 1995).

232. See *supra* note 26.

233. *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084 (1994); *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993); *Discovery*, 113 S. Ct. 1505 (1993).

234. *National Advertisers*, 809 F. Supp. at 751-54.

235. *Id.* at 751.

sion of protected speech will not render commercial speech fully protected.²³⁶

The district court classified the speech at issue as commercial speech.²³⁷ The court relied on *Bolger v. Youngs Drug Products Corp.*,²³⁸ where the Supreme Court classified the speech at issue as commercial because it: (1) took the form of advertisements; (2) referred to a specific product; and (3) contained the presence of an economic motive.²³⁹ While the presence of any of these factors is not dispositive, the presence of all of them strongly supports the conclusion that the speech is commercial in nature.²⁴⁰ As in *Bolger*, the district court found all three characteristics in the proposed speech, and thus concluded that the speech was commercial.²⁴¹

The district court held that the environmental marketing claims affected by the Statute are at least potentially misleading under the first prong of *Central Hudson*.²⁴² By characterizing the claims in this manner, the court acknowledged that they may have value in certain contexts.²⁴³ From both logical and environmental perspectives, speech that is potentially confusing in some contexts will be perfectly clear in

236. *Id.* at 752-53.

237. *Id.* at 754. In most instances, CAL. BUS. & PROF. CODE § 17508.5 will reach only commercial speech. However, it would not be difficult to imagine a manufacturer creating a public service-oriented advertisement that, by way of example, illustrates the manufacturer's record. The plaintiffs provided several examples to the district court. *Id.* at 752 n.6. In *Fox*, however, the Supreme Court ruled that the mere inclusion of non-commercial speech elements does not convert commercial speech into fully protected speech any more than "opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." *Board of Trustees v. Fox*, 492 U.S. 469, 475 (1989). *But see* *Riley v. National Fed'n of Blind, Inc.*, 487 U.S. 781 (1988) (holding that commercial speech is inextricably intertwined with non-commercial speech during solicitations for charitable organizations). The district court likewise rejected the argument that commercial advertisements and policy statements were inseparable. *National Advertisers*, 809 F. Supp. at 752.

238. 463 U.S. 60 (1983).

239. *Id.* at 66-67.

240. *Id.* at 67.

241. *National Advertisers*, 809 F. Supp. at 754.

242. *Id.* at 755. If the statements are inherently deceptive, the speech will not enjoy any First Amendment protection. If the statements are potentially misleading, the *Central Hudson* analysis will continue. Compare *In re R.M.J.*, 455 U.S. 191, 203 (1982) (holding that "states may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive") with *Joe Conte Toyota, Inc. v. Louisiana Motor Vehicle Comm'n*, 24 F.3d 754 (5th Cir. 1994) (holding that statements are misleading when inherently likely to deceive).

243. Not all claims will be misleading in all instances, for example, some recycling claims may not be true in one region but true in another. Depending on the availability or proximity of facilities, the lack of information may hinder the very environmental activity which the statute is attempting to promote. *But see National Advertisers*, 44 F.3d at 731.

others.²⁴⁴ Under the *Central Hudson* analysis, this potentially deceptive speech may be regulated but not banned entirely.²⁴⁵

Since the parties agreed that California had a substantial consumer protection interest in the Statute, the court dispensed with analysis of the second prong.²⁴⁶ The court proceeded to the third prong, which requires the regulation to directly advance the state's interest.²⁴⁷

The court found that California's consumer protection interest was advanced by the Statute.²⁴⁸ The court reasoned that since consumers have "difficulty determining the veracity of the environmental claims advertisers make concerning [products]" the state's requirement of standard definitions will ensure that all marketers are on a level playing field.²⁴⁹ The court held that the Statute would "decrease[] the chance that consumers will be misled by the use of undefined environmental terms," and found reasonable the legislature's belief that "uniform standards for frequently used environmental advertising terms would promote the state's consumer protection goals"²⁵⁰ Therefore, the court held that the Statute directly advanced the state's interest.²⁵¹

Under the fourth *Central Hudson* prong, the regulation must reasonably fit the governmental interest.²⁵² Preliminarily, the court noted that the Statute prohibited the use of various terms when they do not meet the established definition, even where clarifying language is added.²⁵³ Next, the court pointed out that the commercial speech doctrine does not protect all factually accurate claims.²⁵⁴

244. If a product is recyclable in San Diego County, but is not recyclable in every county with a population over 300,000, the product representation is still perfectly clear to those persons in San Diego County. Nor would such a representation hinder recycling efforts because such a claim would advance recycling efforts in the locality in the product is sold in.

245. See *supra* note 135 and accompanying text. In striking down all confusing speech, helpful speech is also banned. See *supra* notes 78-79 and accompanying text.

246. *National Advertisers*, 809 F. Supp. at 756. The district court did not find that the state had an environmental interest in the promulgation of the statute. However, the fact that the state did indeed have such an interest is undeniable. This fact was recognized, although without discussion, in the circuit court's opinion. *National Advertisers*, 44 F.3d at 732-33.

247. *Central Hudson*, 447 U.S. at 566. The district court drew a parallel between the case at bar and *Central Hudson* because "there is an immediate connection in this case between environmental advertising and sales." *National Advertisers*, 809 F. Supp. at 756-57.

248. *National Advertisers*, 809 F. Supp. at 757.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Fox*, 492 U.S. at 477-80.

253. *National Advertisers*, 809 F. Supp. at 758. The California Attorney General urged the court to construe the statute narrowly, i.e., only when qualifying language is absent. *Id.* at 758 n.12. The court did not reach the issue. *Id.*

254. *Id.* at 758.

The court held that since the state has an interest in "encouraging recycling and reducing solid waste,"²⁵⁵ it was reasonable to restrict products designated as recyclable only if every county with a population of 300,000 or more could conveniently recycle that product.²⁵⁶ The court rejected the argument that allowances for clarifying language would remove this obstacle because some claims might still be misleading.²⁵⁷ The court analyzed the term "biodegradability" in a similar manner, and was thus unconvinced that less restrictive means of accomplishing the state's goals existed.²⁵⁸ The court also rejected the argument that the state could merely have enforced the general deceptive advertising laws more aggressively to crack down on misleading environmental marketing.²⁵⁹

The court then turned to the Association's challenge that the Statute was impermissibly vague.²⁶⁰ The district court found definition of "recyclable" impermissibly vague and severed the definition from the Statute.²⁶¹

Since the Statute satisfied the *Central Hudson* test, the court upheld its validity, with the exception of the definition of "recyclable." The Association then appealed the ruling to the Ninth Circuit Court of Appeals.

2. The Decision of the Ninth Circuit Court of Appeals

While the Association appealed the district court's ruling on the commercial speech issue to the Ninth Circuit, California elected not to appeal the district court's severance of the term "recyclability."

The Ninth Circuit preliminarily upheld the district court's ruling that the speech at issue was commercial, and therefore an intermediate level of judicial scrutiny applied under *Central Hudson*.²⁶² The Ninth Circuit also upheld the district court's ruling that the commercial and non-commercial speech were not inextricably intertwined, which would have raised the level of judicial scrutiny.²⁶³ The analysis then turned to the *Central Hudson* test.

In response to the first prong, the Ninth Circuit set out, but did not apply, four factors which determine whether commercial speech enjoys First Amendment protection: (1) "whether the speech restricted is devoid of intrinsic meaning;" (2) the "possibilities for deception;"

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* (citing *Board of Trustees v. Fox*, 492 U.S. 469, 479 (1989)).

259. *Id.* at 758 ("[N]othing prevents a legislative body from adopting a specific law simply because a more general law already exists.")

260. *Id.* at 759-62. Discussion of the vagueness claim is beyond the scope of this Note.

261. *Id.* at 762.

262. *National Advertisers*, 44 F.3d at 728.

263. *Id.* at 730.

(3) "whether experience has proved that in fact such advertising is subject to abuse;" and (4) the "ability of the intended audience to evaluate the claims made."²⁶⁴ The Ninth Circuit determined that whether the statements are misleading depends upon what type of recycling facilities are available in the area.²⁶⁵ Therefore, the Ninth Circuit upheld the district court's ruling that some environmental marketing claims are "potentially misleading" since some items may not actually be recyclable in a given area.²⁶⁶ Since California's interests in environmental and consumer protection were undisputed, the Ninth Circuit moved on to the third prong of the *Central Hudson* test.

The Ninth Circuit found that California's interest was directly promoted by the statute.²⁶⁷ The majority opinion held that, "California seeks to guard against a direct, predictable and ongoing result of green marketing—increased sales of goods as a result of potentially specious claims or ecological puffery about products with minimal environmental attributes."²⁶⁸

Both the consumer and environmental protection interests were advanced by the Statute. The Ninth Circuit took these in turn. "Section 17508.5 increases certainty in the market both on the demand side and the supply side. The statute increases consumer knowledge and awareness and discourages exploitation and deception"²⁶⁹ The Ninth Circuit was confident that the Statute would provide the monitoring functions a consumer cannot adequately perform.²⁷⁰ The court held that while performing these functions, the Statute did not operate in the paternalistic manner condemned by the Court in *Peel*.²⁷¹ The majority also believed that section 17508.5 would benefit scrupulous manufacturers by rewarding those that met the minimum standards²⁷² and suggested that firms may also benefit from lower insurance premiums and legal costs.²⁷³

264. *Id.* at 731 (citations omitted).

265. *Id.*

266. *Id.*

267. *Id.* at 732.

268. *Id.*

269. *Id.* at 733. It is unclear how the statute increases consumer knowledge or awareness. Since less, or at least no more, information is provided by the statute, it is difficult to see how consumers will glean additional knowledge or awareness. On the other hand, one could make the argument that consumers gain confidence in the claims that are allowable under the statute because they may know the product must meet a statutory minimum. The court held that "these provisions give all consumers information permitting them to make rational product comparisons and tradeoffs in price versus 'greenness.'" *Id.* This claim is patently false. Nowhere in the statute are consumers given information except the term itself. And there is no provision for information in a manner which would allow for easy comparison amongst brands or explanation of terms.

270. *Id.* at 734.

271. 496 U.S. 91, 105 (1990).

272. See *National Advertisers*, 44 F.3d at 734.

273. *Id.*

The Ninth Circuit held that California's interest was advanced by consumers' increased certainty of environmental claims in the market.²⁷⁴ The court found that the Statute enabled consumers to avoid products with minimal environmental attributes, prevented unscrupulous advertising, and gave consumers more information upon which to base their purchasing decisions.²⁷⁵ This ensured the "flow and purity of [the] information [stream] in the marketplace."²⁷⁶ The court, in analyzing whether California's interest was advanced by the Statute, seemed to be making an analysis of the type of "mere speculation or conjecture" that the Supreme Court rejected in *Edenfield*.²⁷⁷

The Ninth Circuit held that California's environmental interest was met by setting minimum, although modest, targets as an incentive to reduce the waste stream.²⁷⁸ This "directly furthers California's substantial interest in promoting resource conservation and reducing the burden on its brimming landfills."²⁷⁹ Therefore, section 17508.5 meets the third prong of the *Central Hudson* test.

The Association argued that section 17508.5 violated the fourth *Central Hudson* prong by sweeping within its ambit "so far beyond what could possibly be deemed false and deceptive that it cannot possibly provide a reasonable fit with the state's interests."²⁸⁰ The plaintiffs raised the identical alternatives in the district court hearing.²⁸¹ As the court stated, "the thresholds drawn do not appear unduly prohibitive and leave considerable room for both more privileged editorial

274. *Id.* at 733-34.

275. *Id.* at 733.

276. *Id.*

277. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993); *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2088 n.7, 2090-92 (1994).

278. *National Advertisers*, 44 F.3d at 735.

279. *Id.*

280. *Id.* The plaintiffs attacked the statute for prohibiting the use of the terms even in the presence of qualifying language. Even though the statute precludes such language, the court held that the statute was narrowly tailored. *National Advertisers*, 809 F. Supp. at 758 n.12. However, the court also conceded that section 17508.5 would facially prevent a manufacturer from making a claim using the prohibited language combined with limiting language. *Id.* See generally Dick Rawe, *Recycling Battle Begins Beyond Good Will: Labels Pit States Against Firms*, CIN. POST, Jan. 28, 1991, at 7B. The district court gave great weight to the California Legislature's finding that allowing manufacturers to define the terms themselves "would not promote the state's consumer and environmental goals." *National Advertisers*, 809 F. Supp. at 758. Despite the fact that the statute prohibited additional statements in advertising that were entirely correct, the district court held it to be drawn sufficiently narrow under *Central Hudson* and its progeny. *National Advertisers*, 809 F. Supp. at 759. See *supra* notes 55-57.

281. The plaintiffs argued that the California Legislature could have chosen to require disclaimers or qualifying language, but the district court ruled that this would not further the state's interests. *National Advertisers*, 809 F. Supp. at 759. The plaintiffs also argued that California could have been more stringent in enforcing the provisions of the Business and Professional Code relating to deceptive and false advertising. *Id.* at 758-59. The district court noted that nothing prevents a legislature from enacting a specific law when a general law already exists. *Id.*

commentary and . . . alternative expressions conveying . . . information about the modest environmental attributes of products not measuring up under [the Statute] (e.g., 'this product contains x% (reused/recaptured) materials'²⁸²

In short, the Ninth Circuit's opinion evaluated section 17508.5 without significant analysis. For instance, discussion and application of the recent Supreme Court decisions was noticeably absent from the Ninth Circuit's discussion. The Ninth Circuit's deferential stance towards section 17508.5 also ignored the recent pronouncements on the application of *Fox's* intermediate review standard. In deciding the case, the majority did not seem to fully understand, or even discuss, the changes in the *Central Hudson* test since *Fox*. The Ninth Circuit also ignored less-restrictive alternatives to the California Statute.²⁸³

Judge Noonan dissented vigorously from the decision. However, the dissenting opinion, like the majority opinion, skated over the *Central Hudson* test without concrete analysis.²⁸⁴ While conceding that the Statute concerned commercial speech and that the government could regulate "untrue or deceptive advertising," Judge Noonan described the Statute as "a zealous and unconstitutional intrusion by a state government into an area where technologies are developing, the free play of ideas is important, and the free speech of everyone . . . is essential to the development of a healthy environment. Tested by our Bill of Rights, the statute is defective."²⁸⁵

The dissent first attacked the vagueness of the definitions enunciated in section 17508.5, that impose criminal penalties for using the terms in violation of the Statute.²⁸⁶ The dissent argued that the terms "nature," "unnatural," "biodegradable," and "photodegradable" are

282. *National Advertisers*, 44 F.3d at 736-37. However, the terms that are defined in section 17508.5 are used by marketers because they are the terms with which consumers are more familiar and comfortable. On the other hand, "reused" brings to mind thrift shops, and "recaptured" has little meaning to the average consumer; "recyclable" is the term that American consumers use to mean something that can be gathered and used again. See *supra* note 15. In addition, the terms provided by the court are no more inherently clear than the terms in section 17508.5. *National Advertisers*, 44 F.3d at 736-37.

283. The court of appeals failed to analyze section 17508.5 in terms of the *Discovery*, *Edenfield*, or *Edge* decisions. The district court's opinion did not discuss these cases because they had not been handed down at the time. The court of appeals in *National Advertisers* applied a rational basis review to section 17508.5 despite its dicta to the contrary. See *National Advertisers*, 44 F.3d at 735-36. The Supreme Court rejected such an approach in *Discovery*. See *supra* note 220 and accompanying text.

284. See *supra* notes 264 and 283 and accompanying text.

285. *National Advertisers*, 44 F.3d at 737 (Noonan, J., dissenting).

286. *Id.* at 738 (Noonan, J., dissenting). Judge Noonan argued that the terms "nature," "unnatural," "biodegradable," and "photodegradable," as well as the distinction between "recyclable" and "recycled" are not defined with sufficient clarity by the Statute. *Id.*

inherently confusing.²⁸⁷ The Statute forces the manufacturer "to determine at the peril of criminal penalties that the product advertised does not have [these] elusive metaphysical qualit[ies]."²⁸⁸

The dissent criticized the lack of common sense used in defining the terms "recycled" and "recyclable."²⁸⁹ Judge Noonan further argued that the terms are incomprehensible to manufacturers.²⁹⁰ The terms may be comprehensible to manufacturers, but they are, at best, unwieldy for consumers. The definitions potentially could lead to decreased consumer knowledge about the products and could dampen consumer ability to pressure manufacturers to change products through their purchasing decisions. At the very least, the Statute has not sufficiently decreased confusion.

Finally, the dissent noted that the term "recycled" was not fully defined within section 17508.5,²⁹¹ and that the fit between the statutory goal and the definition itself was unreasonable.²⁹² For instance, while the Statute treats all recycled materials equally, Judge Noonan noted that the Environmental Protection Agency has found no basis for such equal treatment.²⁹³ The various products contain different materials, and these materials have differing recycling requirements and technologies.²⁹⁴ He wrote, "[a]t best it is a speculation that there is any connection between protection of the environment, encouragement of environmentally sensitive advertisers, and protection of environmentally conscious consumers and [the Statute]."²⁹⁵ The dissent also ar-

287. "What is unnatural deterioration of the Ozone?" *Id.* After posing this rhetorical query, Judge Noonan questioned what state of ozone is considered the natural state. *Id.*

288. *Id.* The dissent employed the same argument to complain about "biodegradable" and "photodegradable." *Id.* The statute defines biodegradable as capable of decomposing through natural biological processes. See CAL. BUS. & PROF. CODE § 17508.5(b). Again the dissent questioned what minimal level of human activity is allowed or denied in determining if the definition is met, and also applied a similar argument for the term "photodegradable." *National Advertisers*, 44 F.3d at 738 (Noonan, J., dissenting).

289. "[W]hat is recyclable should eventually be recycled. . . . The statute, however, adopts one definition of 'recyclable' and another of 'recycled', so that what is 'recyclable' will not necessarily be 'recycled' when re-use is made." *Id.* But cf. *National Advertisers*, 809 F. Supp. at 759-62 (invalidating term "recyclable" on vagueness grounds).

290. *Id.*

291. *Id.*; see CAL. BUS. & PROF. CODE § 17508.5(e); see also CAL. PUB. CONT. CODE § 12200(b). The term "recycled" is defined by cross-reference to PUB. CONT. CODE § 12200(b). CAL. BUS. & PROF. CODE § 17508.5(e).

292. *National Advertisers*, 44 F.3d at 740 (Noonan, J., dissenting). See *supra* note 191 and accompanying discussion.

293. *National Advertisers*, 44 F.3d at 738; see EPA Request for Comments[:] Guidance for Use of the Term 'Recycled' and 'Recyclable' and the Recycling Emblem in Environmental Marketing Claims, 56 Fed. Reg. 49,992, 49,996 (1991).

294. *National Advertisers*, 44 F.3d at 738 (Noonan, J., dissenting).

295. *Id.*

gued that the Statute involved impermissible restrictions on viewpoint.²⁹⁶

Judge Noonan criticized the district court for finding the Statute's definitions to be "potentially misleading" and thus within the purview of the *Central Hudson* test.²⁹⁷ The dissent criticized the paucity of evidence supporting this point, much of which was compiled from arguments made by parties who assisted in passing the legislation.²⁹⁸ The dissent emphasized that even if this finding were based on facts, the term potentially misleading could be applied to many terms used by advertisers, such as the words "antique," "bargain," "economical," "environmentally sound," and "naturally good."²⁹⁹ The dissent stated:

A paternalistic government might decide to protect consumers by criminalizing all advertising containing these words if the product advertised failed to conform with the state's own definition. That the terms defined were capable of misleading use would be incontestable. That a criminal law of this character would violate the First Amendment would be equally incontestable. Potential misuse "does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information."³⁰⁰

The dissent concluded that the Statute "cannot survive the test of rationality, let alone strict scrutiny."³⁰¹

Since the Ninth Circuit denied plaintiff's Petition for Rehearing,³⁰² the Supreme Court is the Association's only possible remaining hope for judicial reprieve. However, to this point, no court has seriously examined the effect on environmentalism that the California green marketing statute wields.

D. *National Advertisers and California's Environmental Goals*

The decision in *National Advertisers* ignores the Statute's actual effects upon the environment and green advertising. The actual effects

296. This argument was briefed to the court, but the majority opinion did not discuss it. *Id.* at 739-40 (Noonan, J., dissenting) (citing Brief of Plaintiffs-Appellants at 31 n.13). Discrimination on the basis of an individual viewpoint raises the level of judicial scrutiny used by courts considering the constitutionality of a regulation on speech. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992).

297. *National Advertisers*, 44 F.3d at 738-39 (Noonan, J., dissenting).

298. *Id.* The dissent noted that the letters entered into evidence on this point were one from the Attorney General's office that merely opined, and another letter from the sponsor of the Statute that only managed to cite one example of questionable environmental advertising. *Id.* at 739. *Contra supra* notes 9-12 and accompanying text. Judge Noonan concluded that the evidence relied upon by the state is the type of evidence condemned in *Edenfield* and *Ibanez*. See *supra* note 179.

299. *National Advertisers*, 44 F.3d at 739.

300. *Id.* at 739 (Noonan, J., dissenting) (quoting *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 109 (1990)).

301. *Id.* at 740 (Noonan, J., dissenting).

302. *National Advertisers*, No. 93-15644 (9th Cir. Feb. 23, 1995) (order denying petition for rehearing).

of California's Statute on environmentalism defeat many of the state's goals and violate the theme of flexibility inherent in the *Central Hudson* test.³⁰³ Therefore, the state has not established the fit required between the third and fourth *Central Hudson* prongs.

The most egregious problem is the Statute's failure to accommodate qualifying language, which explains the meaning of the environmental attributes or recyclability of products.³⁰⁴ The conclusion of the Ninth Circuit ignored the fact that, in many instances, not only will consumer information be curtailed, but by the very terms of the Statute, the environmental product information will cease.³⁰⁵ The state's interests in consumer protection and environmental standards are not likely to benefit from a suppression of environmental information.³⁰⁶

Ironically, this portion of the decision is potentially the most damaging from an environmental perspective. The district court opinion gave an example regarding the term "recyclable," which pointed out a damaging aspect of the Statute.³⁰⁷ The Statute defines a recyclable product as one which can be "conveniently recycled . . . in every county in California with a population over 300,000 persons."³⁰⁸ However, a carton of milk which claims on its label that it "is recyclable in San Diego County," would violate the Statute despite its complete accuracy. Unless California has provided convenient recycling facilities in every county containing 300,000 persons that can handle this type of milk carton, the residents of San Diego county will be denied the necessary recycling information. Therefore, this statutory construction will be detrimental to, not supportive of, California's interest in reducing the waste stream.³⁰⁹ Manufacturers of products that

303. See, e.g., *supra* note 220 and accompanying text.

304. See *Bates v. State Bar*, 433 U.S. 350, 374 (1977) ("[I]t seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision.") *reh'g denied*, 434 U.S. 881 (1977); *New York State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 841 (2d Cir. 1994) (holding "fundamental failure to distinguish between truthful, non-misleading solicitation and blockbusting" in residential property sales failed to achieve desired fit), *cert. denied*, 115 S. Ct. 511 (1994); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 611 (9th Cir. 1993) (approving substitution clauses of non-commercial messages in outdoor sign regulation); *Abramson v. Gonzalez*, 949 F.2d 1567, 1577 (11th Cir. 1992) ("Yet when the First Amendment is at issue, the preferred remedy is more disclosure, rather than less.") (quoting *Bates* at 375); *Project 80s, Inc. v. City of Pocatello*, 942 F.2d 635 (9th Cir. 1991) ("The government's imposition of affirmative obligations on the residents' First Amendment rights to receive speech is not permissible.").

305. *But see supra* notes 249-51 and accompanying text.

306. The state certainly has an interest in ensuring that the qualifying language is clear and readable. However, a complete ban violates the third and fourth prongs of the *Central Hudson* analysis.

307. *National Advertisers*, 809 F. Supp. at 758.

308. CAL. BUS. & PROF. CODE § 17508.5(d).

309. *But see GREEN REPORT, supra* note 1, at 38-42; *GREEN REPORT II, supra* note 22, at 18-27 (stating the belief that banning misleading information is more beneficial than allowing clarifying language).

can be recycled in some regions cannot encourage recycling if the population is not large enough or if there is no facility that can handle it in the immediate area. In turn, the decreased supply of recyclable goods will hurt recycling facilities by denying them materials. Indeed, there would also be less of an incentive from a corporate perspective to create products with environmentally friendly attributes.

In addition, setting a statutory minimum for recycling will result in a standard that will remain static, thereby inhibiting environmental progress. Such minimum standards will remove any incentive for manufacturers to improve the positive environmental attributes of their products. A more flexible regulation would improve the state's ability to meet its environmental goals and could lead to market competition over improving environmental attributes. While the choice of a statutory approach does not violate the *Central Hudson* analysis, California does have an interest in providing flexible environmental marketing regulation that can adapt as it evolves.

In analyzing California's interest in environmental protection, the Ninth Circuit held that the Statute creates an "incentive for manufacturers . . . to enhance the environmental attributes of their goods in order to capture the benefits of green labeling."³¹⁰ Again, this argument presumes that the manufacturers will not stagnate after reaching the statutory standards.³¹¹ The argument further presumes that pressure from the state is a more effective agent for progress than pressure from the marketplace. However, if there is a sizable consumer market to protect, market forces will in turn promote the desired changes.³¹² So long as advertising is not misleading or deceptive, state interference in the marketplace is unnecessary and undesirable.³¹³

The California environmental marketing statute has many undesirable effects. Allowances for qualifying language and a functioning safe-harbor rule would eliminate many, but not all, of these problems.³¹⁴ At the very least, these two steps would remove all doubt as to whether the Statute is broader than necessary to meet the state's interests. Other states have enacted statutes designed to combat the same environmental marketing problems and have avoided some of the pitfalls created by the California Statute.³¹⁵ These states have taken approaches that might illuminate some of the defects in California's environmental marketing statute.³¹⁶

310. *National Advertisers*, 44 F.3d at 735.

311. See *infra* note 351 and accompanying text.

312. See BOLD, ET AL., *supra* note 87, at 181-99 (discussing the benefits and superiority of market-based solutions).

313. *Id.*

314. If these allowances were made, a provision could be added to prevent the additional language from being confusing or misleading.

315. See *infra* part III.

316. *Id.*

III. ENVIRONMENTAL MARKETING STATUTES

1. Definitional Statutes

Both before and after the publication of the Green Report,³¹⁷ several other states enacted legislation regulating environmental marketing claims.³¹⁸ These statutes vary both in scope and austerity. In particular, Maine's unique approach to environmental regulation is separately analyzed with the federal guidelines since they are closely allied. Of the remaining state statutes, only those enacted by Indiana and Rhode Island may be classified as definitional in nature. New York, New Hampshire, and Connecticut have enacted statutes that promote the use of logos to publicize environmental attributes of products.

The Indiana environmental marketing statute is substantially similar to California's, since it was based upon it.³¹⁹ The terms "biodegradable," "ozone friendly," "photodegradable," and "recycled" as defined in the Indiana statute are substantially the same as those used by California.³²⁰ In addition, the Indiana statute defines the terms "compostable," "consumer goods," and "package."³²¹ The only term that is defined in a substantially different manner is "recyclable."³²² Indiana's definition eliminates the requirement that the article can be "conveniently recycled in every county . . . over 300,000 persons."³²³

Two substantive differences set the Indiana statute apart from the California statute. First, the safe-harbor provision allowing qualifying language in the Indiana statute is broader.³²⁴ Whereas California exempts only representations conforming to the FTC rules, the Indiana statute exempts marketing practices that conform to either rules or guidelines set by the FTC.³²⁵

317. See *infra* note 43 and accompanying text.

318. However, most states still rely on their general deceptive advertising statutes. Israel, *supra* note 44, at 320; Rathe, *supra* note 45, at 434-36.

319. See Rathe, *supra* note 45, at n.204.

320. Compare IND. CODE ANN. §§ 24-5-17-3, -6, -8-10 (Burns Supp. 1994) with CAL. BUS. & PROF. CODE § 17508.5.

321. IND. CODE §§ 24-5-17-4 to 5, 7.

322. IND. CODE §§ 24-5-17-9. "Recyclable" is defined as:

a material or product [that] can be redeemed or returned at an identifiable recycling location for the purpose of returning the material to the economic mainstream in the form of raw material for new, reused, or reconstituted materials which meet quality standards necessary to be used in the marketplace.

Id.

323. *Contra* CAL. BUS. & PROF. CODE § 17508.5(d).

324. IND. CODE § 24-5-17-2(b). "It is a violation . . . unless that consumer good or its package meets the definitions contained in this chapter or meets definitions established in trade regulations or guides adopted by the Federal Trade Commission or in enforceable regulations adopted by another federal agency . . ." *Id.*

325. IND. CODE § 24-5-17-2(b). This point is vitally important. The marketers supported standardized guidelines. See *supra* note 55 and accompanying text. However,

The second divergence from the California statute is that the Indiana statute provides for a private cause of action for anyone who suffers actual damages.³²⁶ In most instances, the harm caused by the representation will be measured only by the price of the product, which is ordinarily low. However, the potential for class-action litigation will serve as a powerful deterrent.

Clearly, the most important difference is that the safe harbor encompasses not only FTC rules, but also the recently enacted guidelines. This provision eliminates the trade-disrupting aspect of conflicting state laws from a manufacturer's perspective and reduces the inflexibility of environmental marketing regulation.³²⁷ Marketers will confidently be able to place goods claiming environmental attributes in the Indiana market if they conform to the FTC guidelines.³²⁸

Rhode Island enacted a statute in 1990,³²⁹ which sought to regulate the terms used to advertise "degradable" plastics and packaging.³³⁰ The statute very simply forbids the use of the terms "degradable," "biodegradable," "photodegradable," or "environmentally safe" on plastic products or packaging.³³¹ However, Rhode Island has not enacted a law generally regulating environmental marketing.

Rhode Island enacted the statute in response to a specific problem regarding degradable plastic products.³³² The Rhode Island legisla-

since the FTC has issued only guidelines, and not rules, the California statute effectively has no safe zone. *See supra* notes 69-70 and accompanying text.

326. IND. CODE § 24-5-17-14(b), states that: "[a] person who suffers actual damages from a violation of this act may bring an action to recover the actual damage plus attorney's fees." *Id.* The effectiveness of this provision is highly dubious, since the basic problem with environmental claims is that damages are too difficult for consumers to substantiate.

327. *See supra* note 40 and accompanying text.

328. *Id.*

329. R.I. GEN. LAWS § 23-18.17 (Supp. 1994).

330. The statute was enacted the year before the Attorney General conference. The Rhode Island Attorney General did not participate in the conference. *See supra* note 23; *see also* Tom Arrandale, *Greens Earn Seal of Approval*, ROCKY MTN. NEWS, Sept. 19, 1991, at 64.

331. R.I. GEN. LAWS § 23-18.14-3 (Supp. 1994). The statute defines the following terms:

"Degradable plastic" shall mean any thermoplastic synthetic polymeric material, commonly known as plastic, which has been modified in any way for the purposes of weakening in the presence of ultraviolet radiation or microorganisms.

"Photodegradable plastic" shall mean any thermoplastic synthetic polymeric material, commonly known as plastic, into which has been incorporated light-sensitive chemical additives or copolymers for the purposes of weakening the bonds of the polymer in the presence of ultraviolet radiation.

"Biodegradable plastic" shall mean any thermoplastic synthetic polymeric material, commonly known as plastic, into which cornstarch or other additives have been incorporated into the formulation for the purposes of weakening the material in the presence of micro-organisms.

R.I. GEN. LAWS § 23-18.14-2.

332. *See supra* note 11.

ture determined that the sale of these products was harming the state's attempts to "extend the life of landfills," and harming the state's recycling efforts by introducing contaminants into the recycling stream.³³³ Therefore, the use of these terms was simply banned.³³⁴ This action came at the same time many degradable plastic claims were exposed as false and misleading.³³⁵

2. State Logos

Another approach that several states have implemented is the establishment of a state "recycling logo."³³⁶ New York, Connecticut, and New Hampshire are among the states that have followed this path. This method entails the creation or adoption of a logo to denote recyclable or environmentally-friendly products. The use of such logos has often been introduced through consumer education programs.³³⁷

New York was one of the first states to create a recycling logo program.³³⁸ Like other state statutes, New York's statute defines the

333. R.I. GEN. LAWS § 23-18.14-1.

334. *Id.* At first blush, this outright ban would seem to violate the commercial speech doctrine. However, the state interest extends only to plastics as opposed to all products. There is doubt that any truthful scientific claim could be made that supports these statements. See *supra* note 11 and accompanying text.

335. See *supra* note 11.

336. *But cf.* Mayer, *supra* note 83 (reporting confusion from private placement of recycling logos). Several private companies have created logo programs as well. These businesses independently test products; if the product meets the certification program's criteria, an emblem is placed upon the product. There are currently at least two such certification programs in the United States: Green Cross and Green Seal. Grant Ferrier, *Two Groups Seek to Keep the Record Straight*, BALT. EVENING SUN, Oct. 9, 1990, at E1; *Picking Environmentally Safe Products Just Became More Confusing*, ORLANDO SENTINEL, Aug. 8, 1991, at C1. The two programs employ different methods to judge products. Green Cross certifies products that meet a higher static standard, whereas Green Seal certifies products that harm the environment less than other products in the product category. Doug Fruehling, *Products To Get Green Light*, PITT. PRESS, July 6, 1990, at C8. Similar programs, albeit under government sponsorship, have been employed in Germany, Canada, and Japan. Daniel P. Jones, *Green Seal's Label Plan Gets Down to Earth*, SUN SENTINEL, June 23, 1990, at 7D; Andrew Maykuth, *New Label to Tag 'Environmentally Friendly' Products*, PHILA. INQUIRER, June 15, 1990; see also ANA Endorses International Environmental Claims Code, *supra* note 55. *But see* Casey Bukro, *Watchdogs Seeing Red Over 'Green' Labeling*, CHI. TRIB., Oct. 29, 1991, at 1 (environmental watchdogs criticize environmental labels); Jamie Beckett, *Behind the Zeal for Seals as the Marketing Appeal of Seals of Approval Rises, There Is Confusion Over What They Mean*, S.F. CHRON., Aug. 6, 1990, at C1 (consumers confused over what private labels endorse). See generally GREEN REPORT II, *supra* note 22, at 13-17; Downs, *supra* note 1, at 172-74; Grodsky, *supra* note 48, at 192-203, 208-18; Howett, *supra* note 45, at 448-55; Israel, *supra* note 44, at 321-23; *Do Seals Sell? The Market Impact of Product Certification*, GREEN MARKETALERT, Feb. 1, 1992, available in WESTLAW, GRMKTAL File (page unavailable online).

337. See, e.g., N.Y. ENVTL. CONSERV. LAW § 27-0401(2)(a) (McKinney 1984 & Supp. 1995).

338. See N.Y. ENVTL. CONSERV. LAW § 27-0401.

terms "recycled" and "recyclable" for the purposes of the logo program.³³⁹ The statute sets forth the "international chasing arrows symbol" as the official state recycling logo.³⁴⁰ Directly beneath the symbol, words denoting the terms "recycled," "recyclable," or "re-used" are placed on a product's packaging.³⁴¹

The New York statute defines standards for products that voluntarily elect to carry the logo. The "recycled" symbol sets standards for various materials that the products must contain to qualify for the logo.³⁴² The "recyclable" symbol will be granted only to products or packages that "can be used in [their] entirety . . . as a feedstock at the beginning of [the] manufacturing process."³⁴³

Connecticut was also an early leader in state-sponsored logos denoting recycled and recyclable material. As early as 1988, Connecticut created a state logo and delegated responsibility for the implementation of the environmental logo plan.³⁴⁴ The law itself required the

339. N.Y. COMP. CODES R. & REGS. tit. 9, § 368.2 (1990) provides the following definitions of recycled and recyclable:

(k) Recyclable means a material for which any of the following standards are met:

(1) access to community recyclable recovery programs for that material is available to no less than 75 percent of the population of the state; or

(2) a statewide recycling rate of 50 percent has been achieved within the material category; or

(3) a manufacturer, distributor, or retailer achieves a statewide recycling rate of 50 percent for the product or package sold within the state; or

(4) a product or package may be recyclable within the jurisdiction of a municipality where an ongoing source separation and recycling program provides the opportunity for recycling of the product or package.

(l) Recycled means a package or product containing a specified minimum percentage by weight of secondary material content and minimum percentage by weight of post-consumer material as described in subdivision 368.4(a) of this Part. The percentage of secondary material content shall be that portion of a package or product weight that is composed of secondary material as demonstrated by an annual mass balance of all feedstocks and outputs of the manufacturing process. The weight of secondary material use in any month shall be no less than 80 percent of the average secondary material usage during the corresponding calendar year.

340. See *id.* § 368.4. For a history of this familiar symbol see *Recycling Symbol is Recycled From Contest Entry*, STAR TRIB., Jan. 18, 1994, at 7E, available in WESTLAW, Papers File.

341. N.Y. COMP. CODES R. & REGS. tit. 9, § 368.4. The logo also notes that it is a trademark of the New York State Department of Environmental Conservation. *Id.*

342. *Id.* § 368.4(a); see also Cailin Brown, *The Truth Behind 'Green' Products*, TIMES UNION, Apr. 21, 1991, at D1, available in WESTLAW, Papers File; Phil Brown, *Recyclable Products to Get State Labels Next Year*, TIMES UNION, Sept. 29, 1990, at B5, available in WESTLAW, Papers File.

343. N.Y. COMP. CODES R. & REGS. tit. 9, § 368.4(b).

344. CONN. GEN. STAT. ANN. § 22a-255c (1994). The statute in pertinent part provides:

The commissioner of environmental protection shall . . . adopt (1) official symbols that may be placed on packages indicating recyclability or recycled

state Commissioner of Environmental Protection to create an official state recycling logo and to promulgate procedures for its use.³⁴⁵

Similarly, in 1989, the New Hampshire legislature adopted the "international 3 arrow recycling emblem," coupled with a designation that the product is either recycled or recyclable, as the official logo.³⁴⁶ The statute enacting the use of environmental logos grants authority to the New Hampshire Department of Environmental Services to define which materials are "recyclable material"³⁴⁷ and to adopt standards for the qualifications of various products.³⁴⁸ The statute defines "recycled material" as containing "at least 50 percent post-consumer material."³⁴⁹ The use of the logo in contravention of the Department of Environmental Services rules constitutes a per se unfair and deceptive trade practice.³⁵⁰

The logo system adopted by these various states has many advantages over regulatory schemes like California's. Logo statutes allow greater flexibility in the administration of the program and do not re-

material content and (2) procedures for the use of such symbols. . . . Such regulations shall not be inconsistent with symbols adopted or proposed by the Northeast Recycling Council established by the eastern regional conference of the council of state governments.

The law was to go into effect when the other members of the Northeast Recycling Council, a regional organization comprising the states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont, enacted similar statutes. However, the state revised Section 22a-255c in 1989 to proceed alone in the establishment of a recycling logo. CONN. GEN. STAT. ANN. § 22a-255c (Historical and Statutory Notes).

345. *Id.*

346. N.H. REV. STAT. ANN. § 149-N:1 (1990). The statute provides:

The department of environmental services shall establish the international 3 arrow recycling emblem with a designation of whether the item on which it is placed is recycled or recyclable material. This emblem shall be the exclusive symbol for use on material which is authorized to be so labeled under this chapter.

347. N.H. REV. STAT. ANN. § 149-N:2.I (1990). The section provides:

"Recyclable material" means any material which is identified as recyclable material by the department of environmental services in accordance with rules adopted by the commissioner of environmental services. It shall include, but not be limited to, glass, food and beverage containers, plastic milk containers, plastic soft drink containers, newspaper, tin coated steel cans and steel cans, aluminum, corrugated cardboard, and mixed office paper.

The section further provides that: "Recycled material" means any material which is produced of material with at least 50 percent post-consumer material. *Id.* § 149-N:2.II.

"Post-consumer material" means only those products generated by either a commercial entity or consumer which have served their intended end uses and which have been separated or diverted from solid waste for the purposes of collection, recycling, and disposition.

Id. § 149-N:2.III.

348. N.H. REV. STAT. ANN. § 149-N:4.

349. *Id.* § 149-N:2.II. *But see supra* note 66.

350. N.H. REV. STAT. ANN. § 149-N:3. Finally, the statute provides for a civil penalty of \$2,500 per day for violations. *Id.* § 149-N:6.

quire legislative redrafting.³⁵¹ A sticker with the logo may be placed on products, thus decreasing the chance that conflicting standards will necessitate changes in the labeling or marketing of a product on a national or regional level.³⁵² A logo system further allows states to set their own local goals. In addition, because the state will be able to continually improve the standards, the logo program provides local consumers with the confidence that the product is less harmful to the environment and meets their needs.

A disadvantage, however, is that a logo denotes only products that have reached a certain level.³⁵³ Furthermore, a logo does not allow comparison between products.³⁵⁴ Moreover, because states may have different logos, a product crossing state borders would require another logo, thereby adding costs to businesses. The costs and hassle of meeting different state standards could pose a serious obstacle to environmental marketing.³⁵⁵ Administrators of the various logo programs would have to be careful in eliminating marketing confusion by clearly specifying exactly what the state endorses.

B. Federal Trade Commission Guidelines

The final approach to regulating environmental marketing was undertaken by the FTC.³⁵⁶ As noted earlier, California and Indiana enacted safe harbors for products that met the standards promulgated by the FTC in either rules, or guidelines in Indiana's case.³⁵⁷ Maine passed a law that incorporates the FTC guidelines by reference. Prod-

351. See, e.g., N.Y. COMP. CODES. R. & REGS. tit. 9, § 368.

352. Although the sticker itself is an addition to the waste stream, its effect is negligible and would produce less waste than changing the packaging of a nationally marketed product.

353. See *supra* note 351 and accompanying discussion.

354. E.g., the difference between a product that contains 50% recycled material will not be directly comparable to a product containing 75% recycled material.

355. See *supra* notes 56-63 and accompanying text.

356. FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260 (1994); see also Downs, *supra* note 1, at 176-79; Carl F. Patka, *Of Diapers, Lawnbags, and Landfills: The Federal Trade Commission Cracks Down on False Advertising in the Environmental Marketplace*, 5 LOY. CONSUMER L. REP. 43 (1993); *After the FTC Guides, What?*, GREEN MARKETALERT, Dec. 1, 1992, available in WESTLAW, GRMKTAL File; *Businesses Get Long-Awaited 'Green' Rules*, S.F. CHRON., July 29, 1992, at A4; *Federal Agency Applies Limits to Companies' 'Green' Claims*, ROCKY MTN. NEWS, July 30, 1992, at 48; *FTC Issues 'Green' Label Guidelines*, ATLANTA CONST., July 30, 1992, at C4; *The FTC Issues Its Voluntary Labeling Guidelines: A New Era Begins*, GREEN MARKETALERT, Aug. 1, 1992, available in WESTLAW, GRMKTAL File; *FTC Wants Environmental Truth in Ads*, ST. LOUIS POST DISPATCH, July 29, 1992, at 7A; Michael Parrish, *FTC Issues Guidelines for Green Marketing*, L.A. TIMES, July 29, 1992, at D1; Alex Pham, *It's Not Easy Being Green: FTC Issues Some Guidelines; Agency Clarifies Use of Environmental Terms for Products*, WASH. POST, July 29, 1992, (Financial), at 3; *US FTC Issues Guidelines for Green Marketing Claims*, BUS. & ENV'T, Aug. 1, 1992, available in WESTLAW, BUSENV File.

357. See *supra* notes 48-49 and 323-24 and accompanying text.

ucts that violate the guidelines are also in violation of the Maine Unfair Trade Practices Act.³⁵⁸

The federal guidelines are not legally enforceable, since they are not codified as rules or a statute.³⁵⁹ They were compiled as "administrative interpretations of laws administered by the [FTC] for the guidance of the public in conducting its affairs in conformity with legal requirements."³⁶⁰ Actually, the guidelines are based predominantly on consent decrees.³⁶¹ And since many states will use these guidelines as a reference point, if not by law but by incorporation (as in Maine),³⁶² the importance of the guidelines is great indeed.³⁶³

There has been a general call for federal regulation of environmental marketing.³⁶⁴ In fact, the Attorneys General Task Force explicitly called for federal regulation that does not preempt state law in the area.³⁶⁵ Furthermore, several bills have been introduced in Congress in recent years.³⁶⁶ Despite the desire for national standards, the FTC Guidelines are the only successful attempt in regulating environmental marketing at the federal level. The FTC commissioners scheduled review of their success for three years after adoption.³⁶⁷ It is possible that the FTC will enact binding administrative regulations at that time. Therefore, the likelihood that the FTC will adopt regulations before the three-year review is completed is minimal.

The guidelines provide explanation for the process by which environmental claims are judged by the FTC.³⁶⁸ They set forth various

358. ME. REV. STAT. ANN. tit. 38, § 2142 (West Supp. 1993); see also Maine Unfair Trade Practices Act, ME. REV. STAT. ANN. tit. 5, §§ 205-A to 214 (West 1989 & Supp. 1993).

359. 16 C.F.R. § 260.2 ("Because the guides are not legislative rules under section 18 of the FTC Act, they are not themselves enforceable regulations, nor do they have the force and effect of law."). But see *supra* notes 11 and 32-36 and accompanying text (discussing unenforceable guidelines and the weight many companies give to such guides).

360. 16 C.F.R. § 260.1. But see *supra* notes 11 and 54-58 and accompanying text (noting the stability such compilations provide).

361. Israel, *supra* note 44, at 317. "A judgment entered by consent of the parties whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing. Agreement by defendant to cease activities asserted as illegal by government (e.g., deceptive advertising practices as alleged by F.T.C.)." BLACK'S LAW DICTIONARY 410 (6th ed. 1991).

362. See *supra* note 358 and accompanying text.

363. Compare *After the FTC Guides, What?*, *supra* note 356 (expressing the view that the guidelines will not solve all the environmental marketing difficulties) with *The FTC Issues Its Voluntary Labeling Guidelines: A New Era Begins*, *supra* note 356 (expressing the view that the guidelines will eliminate the substantial environmental problems). See also Israel, *supra* note 44, at 317.

364. See *supra* notes 22 and 55. For a critique of the structural problems associated with federal environmental marketing regulation, see Downs, *supra* note 1.

365. See *supra* notes 22 and 55.

366. See *supra* note 23.

367. 16 C.F.R. § 260.4; see also *US FTC Issue Guidelines for Green Marketing Claims*, *supra* note 356.

368. 16 C.F.R. § 260.5 states:

general principles,³⁶⁹ and address specific environmental marketing issues by providing examples of appropriate and inappropriate claims.³⁷⁰

The FTC guidelines are certainly a helpful addition for manufacturers and advertisers.³⁷¹ They clarify the interpretation of federal laws and regulations and may provide guidance on approaches taken by

Section 5 of the FTC Act makes unlawful deceptive acts and practices in or affecting commerce. The Commission's criteria for determining whether an express or implied claim has been made are enunciated in the Commission's Policy Statement on Deception. In addition, any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product or package must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim. These guides, therefore, attempt to preview Commission policy in a relatively new context—that of environmental claims.

Id. (citations omitted).

369. 16 C.F.R. § 260.6. The section provides the following general guide:

Overstatement of Environmental Attribute. An environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication. Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible.

Id. § 260.6(c). The sub-section continues:

Example 1: A package is labeled, "50% more recycled content than before." The manufacturer increased the recycled content of its package from 2 percent [sic] recycled material to 3 percent [sic] recycled material. Although the claim is technically true, it is likely to convey the false impression that the advertiser has increased significantly the use of recycled material.

Id.

370. 16 C.F.R. § 260.7. The examples take various factual situations and interpret the situations in light of the guidelines. *Id.* This allows manufacturers a chance to see how the guidelines operate in a substantive situation. For example:

(a) General Environmental Benefit Claims. It is deceptive to misrepresent, directly or by implication, that a product or package offers a general environmental benefit. Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product or package has specific and far-reaching environmental benefits. As explained in the Commission's Ad Substantiation Statement, every express and material, implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product must be substantiated. Unless this substantiation duty can be met, broad environmental claims should either be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.

Id. § 260.7. The following example relates to the general guide stated above:

Example 1: A brand name like "Eco-Safe" would be deceptive if, in the context of the product so named, it leads consumers to believe that the product has environmental benefits which cannot be substantiated by the manufacturer. The claim would not be deceptive if "Eco-Safe" were followed by clear and prominent qualifying language limiting the safety representation to a particular product attribute for which it could be substantiated, and provided that no other deceptive implications were created by the context.

371. See *supra* note 359.

different states.³⁷² Most importantly, the guidelines are national in scope.³⁷³

However, the guidelines have left several questions about green marketing unanswered. Conflict between the guidelines and state law is one major problem, since the guidelines do not preempt state law.³⁷⁴ Perhaps more importantly, the FTC does not have the expertise in interpreting and substantiating environmental claims. This is an area where the Environmental Protection Agency clearly has more experience and qualifications.³⁷⁵ Since the expertise of each agency is needed in tracking environmental marketing, some sort of joint approach would seem necessary for adoption of extensive federal regulations.³⁷⁶ A third problem with the federal approach is that the command and control methods of the federal regulatory agencies may not allow for local solutions to their specific problems (e.g., landfills in the *National Advertisers* situation).³⁷⁷

IV. FOOD LABELING REQUIREMENTS

The problems associated with environmental marketing are not entirely unique, since disseminating information is not an exact science.³⁷⁸ The difficulties resulting from the ambiguity of marketing terms are common to all forms of advertising. Indeed, there is an inherent tension between the consumers' desire for accurate and understandable information,³⁷⁹ and the marketers' attempt to appeal to a mass market.

Recently, new marketing regulations were enacted affecting the American food industry and the type of information that consumers are given.³⁸⁰ The new regulations were mandated by the Nutritional

372. E.g., the guidelines have given a reference point and a safe harbor for Maine and Indiana respectively, but has had little effect upon California. See *supra* notes 48-49 and 324-325 and accompanying text. Some states and state agencies may also use the FTC Guidelines as a guide to interpreting state law, or as a presumption under state law.

373. *Businesses Get Long-Awaited 'Green' Rules*, *supra* note 356; *The FTC Issues Its Voluntary Labeling Guidelines: A New Era Begins*, *supra* note 356.

374. See 16 C.F.R. § 260.2; Israel, *supra* note 44, at 327.

375. See *supra* note 48.

376. *Id.*

377. Cf. Kathleen McClain, *Steel Cans Added to Recycling Program*, CHARLOTTE OBSERVER, July 3, 1992, at 1C, available in WESTLAW, Papers File (discussing local steel can recycling program added due to local initiative).

378. See *National Advertisers*, 44 F.3d 726, 739 (9th Cir. 1994) (Noonan, J., dissenting), *reh'g denied*, No. 93-15644 (9th Cir. Feb. 23, 1995).

379. These divergent goals sometimes themselves present a tension.

380. John Schwartz, *Read It and (Maybe) Eat; FDA Promotes New Food Label Format as Major 'Health Opportunity'*, WASH. POST, May 3, 1994, at A8; Carole Sugarman, *How Do You Label a Kumquat?*, WASH. POST, Mar. 14, 1990, (Food), at 1; Carole Sugarman, *Lord of the Label; Commissioner Kessler Launches His New Idea*, WASH. POST, May 4, 1994, (Food), at 1; *Truth in Eating; New Labeling Will Be A Start*

Labeling and Education Act of 1990,³⁸¹ and were issued by the Food and Drug Administration ("FDA") in 1993.³⁸² The new labeling requirements had two main goals: to require additional information and to ensure that it would be easily comprehended by consumers.³⁸³

The FDA nutritional labeling regulations are the most far-reaching attempt to regulate the labels of commercial products. For this reason, it may be helpful to analyze the FDA Regulations, and use them as a model to work from when approaching the question of environmental marketing labeling requirements.³⁸⁴ A label could help eradicate many of the problems associated with environmental marketing.³⁸⁵ The specific problems of environmental labeling requirements will be addressed in Part V.

The FDA food labeling regulations are complex, comprising 152 pages.³⁸⁶ The reason for the length of the regulations is that there are different requirements for the labeling of every type of claim that may be made or content that may be added. In addition, the regulations cover the entire range of food products.³⁸⁷ Fortunately, the information relevant to environmental advertising comprises fewer categories, and these do not vary drastically from product to product.³⁸⁸ The regulations may be viewed as tracking both stylistic advertising and the content of claims.

A. Stylistic Requirements

The FDA Regulations begin by mandating the location of the information panel "immediately contiguous and to the right of the principal display panel as observed by an individual facing the principal display panel"³⁸⁹ The regulation does create exceptions for pack-

On Avoiding Health Risks, SAN JOSE MERCURY NEWS, Dec. 4, 1992, at 10B, available in WESTLAW, Papers File.

381. 21 U.S.C. § 343 (West Supp. 1994) [hereinafter 1990 Act].

382. 21 C.F.R. § 101 (1994) [hereinafter Regulations or FDA Regulations].

383. See Colman McCarthy, *Junk Food and Label Literacy*, WASH. POST, May 17, 1994, at C10.

384. Ken Miller, 'Green' Label Buying Still a Multiple Choice, Hous. POST, Nov. 28, 1993, at A30.

385. A label can provide more information to consumers, allow manufacturers to tout their products' attributes, and decrease the amount of time enforcement agencies spend on tracking down misleading and deceptive claims. See *infra* part V; see also *supra* part III.B.

386. 21 C.F.R. § 101.

387. Sugarman, *Lord of the Label*, *supra* note 380.

388. For instance, a claim that a product contains recycled material could easily pertain to a glass bottle or an aluminum can. However, foods as varied as vegetable juice, raw fruits, and spices obviously have different labelling requirements. See 21 C.F.R. §§ 101.22, 101.30, 101.42. But see 6 N.Y.C.R.R. § 368.2(d) (setting forth recyclability requirements for various products).

389. 21 C.F.R. § 101.2. The regulation defines the principal display panel in part as: "the part of a label that is most likely to be displayed, presented, shown, or examined under customary conditions of display for retail sale." *Id.* § 101.1.

aging that cannot meet these requirements if there is insufficient space or no space exists at all for the label.³⁹⁰

The regulations set forth the size and type of lettering for the label: "[A]ll information appearing on the . . . informational panel . . . shall appear prominently and conspicuously, but in no case may the letters and/or numbers be less than one-sixteenth inch in height" ³⁹¹ To ensure maximum legibility, the FDA has developed a guide to "graphic enhancements," suggesting the typeface and point size to be used in the label.³⁹² The guide also suggests the color that should be used for the label, even though the color may vary according to the product.³⁹³

The regulations then mandate the type of information required on each label. First, the regulations require that the "identity of the commodity" be clearly specified.³⁹⁴ The identity of the commodity must be either: (a) in any name required by Federal law;³⁹⁵ (b) by "[t]he common or usual name of the food;"³⁹⁶ or (c) in the absence of any common or usual name, by "[a]n appropriately descriptive term" or a name commonly used by the public.³⁹⁷ Secondly, the regulations require that the ingredients found in the food be listed by predominance of weight in descending order.³⁹⁸ The regulations require that the name of the manufacturer, packer, or distributor be placed on the label.³⁹⁹

B. Content Requirements

The regulations require food labels to provide specific nutrition information in various categories.⁴⁰⁰ In each category, the respective percentages of that quality must be stated on the label.⁴⁰¹ The regula-

390. 21 C.F.R. § 101.1(a)(1)-(3). Cf. Susan Warner, *New Food Labeling Law Boon to Lancaster Lab; Companies Must Make Clear What You Are Putting Into Your Stomach*, PHILA. INQUIRER, Oct. 10, 1993, at G1 (describing increased costs to manufacturers).

391. 21 C.F.R. § 101.2(c). Again, exceptions are available depending on the type of product or packaging. See 21 C.F.R. § 101.1(c)-(f).

392. 21 C.F.R. § 101 app. B.

393. *Id.*

394. 21 C.F.R. § 101.3(a).

395. *Id.* § 101.3(b)(1).

396. *Id.* § 101.3(b)(2).

397. *Id.* § 101.3(b)(3).

398. *Id.* § 101.4(a) (1)-(2). Ingredients below a certain threshold (two percent or less, but the specific threshold under two percent is determinable by the company) may be listed together, but as a separate category. *Id.*

399. *Id.* § 101.5.

400. *Id.* § 101.9(a). The categories include calories, calories from fat, total fat, saturated fat, cholesterol, sodium, total carbohydrates, dietary fiber, sugars, protein, and various vitamins and minerals. *Id.* § 101.9(c). The percentages of each are also listed. *Id.*

401. *Id.* § 101.3(f).

tions supply categories that may be voluntarily provided on the label.⁴⁰²

The regulations also require more stringent labeling or disclosure of information for certain products⁴⁰³ or ingredients.⁴⁰⁴ Importantly, the regulations distinguish between general requirements for virtually all products and specific requirements for those products that require more detailed descriptions. In addition, the regulations define the use of terms such as "good source," "high," "more," "fortified," and "light."⁴⁰⁵ These terms parallel terms used in environmental marketing such as "environmentally-friendly," "safe for the environment," or "better for the environment."⁴⁰⁶

The most dramatic change in the recent food labeling requirements has to do with the new label design. "The [new food label is] the first major change in nutrition labels since their introduction two decades ago, the new format . . . features large type and offers simple guides to . . . nutritional components."⁴⁰⁷ This new label design was accompanied by some simple rules designed to increase the legibility and comprehensibility of the labels. Some of these include a "single easy-to-read type style,"⁴⁰⁸ sufficient space between the lines of text⁴⁰⁹ and between letters,⁴¹⁰ various required headings,⁴¹¹ and minimum type

402. The categories include calories from saturated fat, polyunsaturated fat, monosaturated fat, potassium, soluble fiber, insoluble fiber, sugar alcohol, and other carbohydrates. *Id.*

403. These specific labeling requirements are beyond the scope of this Note. For detailed analysis of the Nutrition Labeling and Education Act of 1990, see Edward Dunkelberger & Sarah E. Taylor, *The NLEA, Health Claims, and the First Amendment*, 48 FOOD & DRUG L.J. 631 (1993); Eric F. Greenberg, *The Changing Food Label: The Nutrition Labeling and Education Act of 1990*, 3 LOY. CONSUMER L. REP. 10 (1990); Geoffrey M. Levitt, *FDA Enforcement Under the Nutrition Labeling and Education Act*, 48 FOOD & DRUG L.J. 119 (1993); Jean Lyons & Martha Rumore, *Food Labeling—Then and Now*, 2 J. PHARMACY & L. 171 (1994); John McCutcheon, *Nutrition Labeling Initiative*, 49 FOOD & DRUG L.J. 409 (1994); James M. Serafino, *Developing Standards for Health Claims—The FDA and the FTC*, 47 FOOD & DRUG L.J. 335 (1992); Fred R. Shank, *The Nutrition Labeling and Education Act of 1990*, 47 FOOD & DRUG L.J. 247 (1992); Roseann B. Termini, *The Prevention of Misbranded Food Labeling: The Nutrition Labeling and Education Act of 1990 and Alternative Enforcement Mechanisms*, 18 OHIO N.U. L. REV. 77 (1991); John M. Blim, Comment, *Free Speech and Health Claims Under The Nutrition Labeling and Education Act of 1990: Applying a Rehabilitated Central Hudson Test for Commercial Speech*, 88 NW. U. L. REV. 733 (1994).

404. *Id.*

405. 21 C.F.R. §§ 101.54-101.56; see also Carole Sugarman, *Truth in Labeling, But What About Advertising?*; *Controversy Over FTC's Plans to Keep Product Claims Consistent With FDA's New Labels*, WASH. POST, May 31, 1994, at Z16.

406. Miller, *supra* note 384.

407. Schwartz, *supra* note 380.

408. 21 C.F.R. § 101.9(d)(1)(ii)(A).

409. *Id.* § 101.9(d)(1)(ii)(C).

410. *Id.* § 101.9(d)(1)(ii)(D).

411. *Id.* § 101.9(d)(1)(iv).

sizes.⁴¹² These requirements ensure the legibility and clarity of the information provided.⁴¹³ Other sections of the regulations continue to provide the stylistic requirements of the new label.⁴¹⁴ In addition, various sections regulate the misbranding of labels, mandating the truthfulness of the information provided on the labels.⁴¹⁵ Since not all ingredients are useful to human health, the regulations update labeling requirements for saccharin⁴¹⁶ and regulate nutrient content claims,⁴¹⁷ health claims,⁴¹⁸ and warning and notice statements found on food labels.⁴¹⁹

Since consumer data evaluating the new labels will not be available until 1999,⁴²⁰ the effect of the new regulations will not be known for some time. However, this does not mean the regulations are a failure. Although only time will tell, the regulations seem to be working better than the old label requirements.

V. SOLUTION⁴²¹

In creating a regulatory framework for green marketing, three interested groups should be taken into account: consumers, marketers, and the various government agencies that regulate deceptive advertising.⁴²² The framework should strive to meet numerous goals: achieving truthful and accurate environmental marketing; creating an atmosphere that provides a continuing incentive for companies to improve the environmental characteristics of their products; securing consumer confidence in environmental marketing claims; ensuring consumers' ability to easily understand environmental marketing claims and discern between competing products; providing consumer access to the environmental characteristics of products; increasing the consumers' ability to recycle products or packaging and their access to related information; promoting products that are less harmful to the environment; and, easing the strain of regulatory and prosecutorial

412. *Id.* § 101.9(d)(1)(iii).

413. *See* McCarthy, *supra* note 383.

414. 21 C.F.R. § 101.9(d). Various sample labels are diagrammed *id.* §§ 101.9(d)(11)(iii), (d)(12), (d)(13)(i), (e)(5), (j)(13)(1)-(2).

415. *See, e.g., id.* § 101.9(g)(4), (k).

416. *Id.* § 101.11.

417. *Id.* § 101.13.

418. *Id.* § 101.14.

419. *Id.* § 101.17.

420. *See* McCarthy, *supra* note 383 (noting that the FDA would reevaluate the regulations five years after enactment).

421. Various non-regulatory solutions to the environmental marketing crisis have been proposed. *See* John J. Fried, *The 'Green' Label Becomes a Coveted Endorsement*, PHILA. INQUIRER, Feb. 28, 1993, at C1 (discussing EPA's Energy Star program); Jesus Sanchez, *Group Will Target the Environmental Claims of Products*, L.A. TIMES, Apr. 13, 1990, (Business), at 1 (discussing "Environmental Hall of Shame").

422. *Cf.* Welsh, *supra* note 45, at 999-1013 (examining deficiencies in environmental marketing regulation).

agencies.⁴²³ These goals should be tempered with a respect for a cleaner environment and the implementation of environmental goals.

One possible solution is the creation of an "Environmental Facts" label similar to the "Nutrition Facts" label mandated by the FDA Regulations.⁴²⁴ This solution has two attractive features: first, the structure and design of the label have already been created and their user-friendliness has already been tested;⁴²⁵ and second, the approach is capable of meeting the goals enunciated above.⁴²⁶

The question of who should regulate this new label immediately arises. The state governments cannot effectively regulate this, since varying state requirements are at the heart of the current troubles.⁴²⁷ Regulatory authority by the federal government would certainly be within the power of Congress under the Commerce Clause, although the political will does not seem to be present.⁴²⁸

Perhaps the best alternative is to allow industry to set the initial guidelines, so long as they create a fair and understandable guide.⁴²⁹ Congress could grant trade associations or industry groups authority over this matter.⁴³⁰ In any event, the federal government would retain

423. See also Grodsky, *supra* note 48, at 163-92; Welsh, *supra* note 45, at 995-98.

424. See *supra* part IV.

425. For the sake of argument, it is assumed that the design of the "Nutrition Facts" label actually increases the ability of consumers to discern nutrition values.

426. See *supra* part IIIA2. The allure of labeling lies in the simplicity and flexibility of the approach. The amount of information can be easily increased or decreased, and a standard format will drastically cut down the need for enforcement, while allowing companies to advance their message.

427. See Heidorn, *supra* note 56 ("There are some product categories where the rules are conflicting between California and Rhode Island and you'll have to pick which state you'll market in . . ."); *Vocabulary of Environmental Terms Proposed*, *supra* note 56 ("If they have different label laws in every state, and even some localities, it means basically that we can't tell consumers about the environmental features of our products . . .").

428. See generally TRIBE, *supra* note 98, at 479-81, 497-501; NOWAK & ROTUNDA, *supra* note 98, §§ 9.1-4, at 311-15. Given the time constraints of enacting federal regulations and the difficulties when federal agencies attempt to create regulations, regulations by the federal government should be seen as a last resort. See John Schwartz, *A Healthy Amount of Verbiage to Define What's Good for You*, WASH. POST, May 5, 1994, at A24. See also *supra* note 23 (noting federal bills introduced to control environmental marketing that have not passed).

429. See Barbara A. Boczar, *Toward a Viable Environmental Regulatory Framework: From Corporate Environmental Management to Regulatory Consensus*, 6 DEPAUL BUS. L.J. 291, 295 (1994).

430. See Howett, *supra* note 45, at 444-48 (discussing industry regulation and "potential antitrust concerns in industry self-regulation"); Boczar, *supra* note 429, at 295 (discussing environmental self-regulating approaches). This approach is not novel. The securities industry, attorneys, and trade associations all enjoy the privileges of self-regulation to a greater or lesser degree. See, e.g., Allen Blumenthal, *Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession*, 3 KA. J.L. & PUB. POL'Y 6 (1994) (discussing attorney disciplinary system); Deborah Masucci & Robert S. Clemente, *Securities Arbitration at Self-Regulatory Organizations: New York Stock Exchange, Inc., and National Association of Securities Dealers, Inc.—Administration and Procedure*, PRACTICING LAW INSTITUTE CORPORATE LAW

ultimate authority.⁴³¹ Faced with the threat of federal intervention, the groups would have a powerful incentive to create a fair guide to environmental attributes. Furthermore, the federal government could act as a watchdog over any abuse of power by the industry groups.

Another less formal approach would entail the industry groups developing the label on their own initiative. In conjunction with this step, the trade associations or industry groups responsible would initiate a dialogue with the FTC and the National Association of Attorneys General. The trade associations or industry groups would then attempt to secure an agreement not to prosecute against claims in the label format.⁴³²

The challenge is to create a framework that satisfies these groups and goals. While not an easy task, as the dizzying number and styles of regulations attest to, the challenge nonetheless needs to be undertaken before consumers are completely mistrustful of environmental advertising and manufacturers are unwilling to promote environmental characteristics.⁴³³ This distrust would be harmful for everyone.

The nature of the information contained in the label would obviously have to change. The heading, similar to the "Nutrition Facts" label, could be termed "Environmental Facts." Instead of serving sizes, as is logical for food information, the label should provide the environmental characteristics of the entire package. This would allow consumers to compare packaging between similar products. In addition, a consumer would see not only the cost benefits of buying a larger package, but the environmental benefits as well. Since many consumers report their willingness to pay more for a product with better environmental credentials,⁴³⁴ this would be an especially important breakthrough and would allow comparison of different products on both their cost and environmental qualifications.

The specific categories to be included in the label are a contentious issue. Environmental attributes are not as universal as nutrition at-

AND PRACTICE COURSE HANDBOOK SERIES, July-Oct., 1994, PLI No. B4-7072 (discusses arbitration within self-regulating securities organizations); Butler D. Shaffer, *In Restraint of Trade: Trade Associations and the Emergence of "Self Regulation"*, 20 Sw. U. L. REV. 289 (1991) (discussing self-regulation pressures in trade associations).

431. *Id.*

432. Note that the prosecutors and regulators would not be barred from attacking the veracity of the claim (e.g., a claim that a product contains "50% post-consumer recycled material" when it contains only 25% of such material), but would be prevented from attacking a claim because it does not meet the form the applicable statute envisioned (e.g., "Recycled material—seven percent.") See *supra* notes 280-82 and accompanying text. This latter statement would be banned under the California statute. See *supra* note 253. California's legislature feared that an exemption for clarifying language would easily manipulate the purpose of the statute. *Id.* However, so long as the claim was in the label form, the threat of manipulation is minimal.

433. This is already happening. Despite being called the advertising *wunderkind* of the 1990s, environmental advertising has caused less excitement in recent years. See *supra* notes 59-63.

434. See *supra* note 6 and accompanying text.

tributes.⁴³⁵ A voluntary scheme allowing manufacturers to pick and choose which terms to include could be easily abused. Companies would be able to include those terms favorable to their particular situation while excluding less favorable terms. Therefore, rules must be drawn up ensuring that if a product contains a certain material or is of a certain type, then specific categories must be included in the product's label.⁴³⁶

In formulating a list of environmental categories to be included in the label program, a distinction should be made between categories that necessarily require explanations and those that do not. The former category would include "degradable," "biodegradable," "photodegradable," "source reduction,"⁴³⁷ and "ozone-safe/friendly." When these terms are applicable, an explanatory note should be added in proximity to the claim and in the same size lettering.⁴³⁸ By its nature, it may also be necessary to include the term "recyclable" in this category.⁴³⁹ The terms "refillable" and "compostable" are similar in nature to "recyclable" and should be treated in the same manner.

There are two terms that should be treated differently from the preceding terms: "recycled content"⁴⁴⁰ and "percentage packaging." Since these terms are expressed in percentages, they may be listed plainly on the label with their corresponding values.⁴⁴¹ Another term that could be added where applicable is "organic—pesticide free." This term could be placed on all applicable products, and a star placed across from the term if the product meets the definition. These terms

435. *E.g.*, whereas virtually every food contains calories, not every product is either "ozone-safe" or "ozone-damaging." For many products, either term would be nonsensical and thus confusing. On the other hand, one term which should be included in every label is "Packaging as a Percentage of Product."

436. *E.g.*, a product which was packaged in cardboard would have to include both the "recycled" and "recyclable" categories in its label.

437. See 16 C.F.R. § 260.7(f) ("a product or package has been reduced or is lower in weight, volume or toxicity").

438. The FTC guidelines also require explanatory notes when these terms are used. See 16 C.F.R. § 260.7.

439. This is because differing parts of the product may or may not be recycled, and in many cases additional information will be required informing consumers about the recycling requirements. This can easily be done by designating an information hotline that is denoted on the label.

440. Many commentators have been critical of companies that have used pre-consumer waste in their calculations of recycled content. See, *e.g.*, GREEN REPORT, *supra* note 1, at 36. While it is confusing to combine these terms, consumers are still interested in the information. Consumers are also interested in the recycling practices of the company during the manufacturing process as well. After all, if the waste were not utilized during the manufacturing process, it would still end up in the waste stream. In turn, the term "recycled" should be broken down into two sub-terms: "manufacturing by-products" and "post-consumer." Consumers' confusion would easily be cleared up if these two terms were listed side by side.

441. This is similar to the "% Daily Value" terms found in the FDA Regulations. See *supra* note 402.

would provide an easy reference point for consumers and would be applicable to an enormous number of products.

To facilitate the verifiability of these claims, the companies that claim that a product has certain attributes must keep a record of the data that supports the claim. The regulations are already in place for the FDA nutritional claims,⁴⁴² and similar regulations should not be difficult to duplicate.

To reduce the waste that labels themselves will require, alternatives should be considered to placing the label on the package itself. Many labels are already crowded with a variety of information⁴⁴³ required by various laws.⁴⁴⁴ Companies will be adverse to a plan that takes up the space for their purposes, such as package advertising and name placement. The obvious solution is to require a label to be prominently placed on the shelf in front of the product. This display could be similar to those currently used for providing price information in most grocery stores and supermarkets.

The use of labels will establish environmental marketing as a powerful consumer tool. The flexibility and simplicity of the concept allows a label to achieve goals that are difficult to achieve with regulatory approaches. The current approaches have not met the challenge, and a new approach needs to be taken to resuscitate environmental consumerism from its recent languor.

CONCLUSION

Environmental marketing is an important, consumer-driven source of progress in today's marketplace. In their attempts to eliminate fraud, both the state and the federal governments have used blunt tools to manage a delicate topic. Their approaches have failed to meet the diverse goals of consumers who purchase the products, businesses that market the products, and state regulators who keep watch over the marketplace. The current state statutes create difficulties for business and give no information to the consumer. California's Statute is especially egregious because it fails to permit qualifying language and does not contain a functioning safe-harbor provision. These defects render the Statute too broad to meet California's environmental goals and, therefore, it fails the *Central Hudson* test as well. Consequently, there is a great risk that consumers will lose their zeal to buy environmentally safe products, if they have not done so already. These conflicting statutes are probably strong contributors to the decline of environmental marketing over the past few years.

In contrast, a label program would meet the various goals of these interested parties. The program could furnish consumers with the in-

442. 21 C.F.R. § 101.

443. See Warner, *supra* note 388.

444. *Id.*

formation needed to make a rational choice, and would greatly ease the burden on manufacturers endeavoring to provide purchasers with pertinent and responsible attributes of their products. A label program is the most effective approach for meeting these goals and should be created based on the FDA "Nutrition Facts" labeling regulations to provide flexible and efficient management of environmental marketing.

