

The Federal Trade Commission's Regulation of Environmental Marketing Claims and Related Legal Issues

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Summary

During the last few decades, consumers in the United States have shown a significant interest in purchasing consumer products and packaging that appear to be beneficial—or at least not harmful—to the natural environment. In response to consumers' willingness to pay a premium for these products, manufacturers and others have increasingly touted the positive environmental attributes of their products in marketing materials, such as in advertising or on product labels. These environmental marketing claims may concern a single environmental attribute or relate to the environmental impacts of a product during all or part of its life cycle, such as the effect on the environment of the product's manufacture, distribution, use, or disposal.

Some commentators have suggested that certain environmental marketing messages have the potential to deceive consumers, and that the prevalence of such messages in the marketplace may discourage companies from competing to create more environmentally beneficial products. Currently, federal regulation of environmental marketing claims consists primarily of the Federal Trade Commission's (FTC's) case-by-case enforcement approach under Section 5 of the Federal Trade Commission Act (FTC Act), which prohibits unfair or deceptive acts or practices in commerce. The commission has issued nonbinding guidelines that explain how it might enforce Section 5 in the environmental marketing context. The FTC and other federal agencies also enforce federal laws and regulations that address specific types of environmental claims such as "dolphin-safe" or "organic" claims. Finally, in some cases, the federal government has required manufacturers to disclose certain information about the environmental attributes of their products. The EnergyGuide labeling program administered by the FTC and Department of Energy (DOE) serves as one example.

Federal regulation of environmental marketing claims raises certain legal issues including questions involving the First Amendment, international trade law, and federal preemption of state law. For example, legislation that regulates how manufacturers or sellers make certain claims about their products in advertisements or on labels may raise questions about the constitutional limits of regulating commercial speech. Requiring manufacturers to disclose certain information relating to the environmental characteristics of their products in advertisements and on labels may raise questions about the constitutionality of legislation that compels speech.

In addition, laws regulating environmental marketing claims that appear on product labels could potentially raise issues concerning the United States' obligations under international trade law. For example, such measures could potentially be subject to the World Trade Organization (WTO) Agreement on Technical Barriers to Trade (TBT Agreement), which generally requires WTO Members preparing, adopting, and applying a measure to adhere to obligations concerning nondiscrimination; trade-restrictiveness; transparency; and reliance on international standards as a basis for regulation. However, the extent to which the TBT Agreement applies to measures that regulate claims made on labels that address so-called "non-product-related processes and production methods" (e.g., the amount of carbon dioxide emitted during manufacture of a product) is unclear.

Another issue that might arise is the degree to which federal laws and regulations governing environmental marketing claims should expressly preempt state laws.

Contents

Introduction.....	1
General Enforcement, Rulemaking, and Investigative Powers of the FTC under the FTC Act	2
Rulemaking.....	3
Investigations.....	3
Enforcement	4
Administrative Actions.....	4
Lawsuits	4
International Enforcement Efforts	5
Cooperation with Foreign Countries	6
Extraterritorial Application of the FTC Act.....	7
The FTC's Role in Regulating Environmental Marketing Claims	8
Section 5 of the FTC Act and the Green Guides	9
Other Laws Enforced by the FTC.....	10
Enforcement Actions	11
Examples	12
Settlements	13
Federal Regulation of Environmental Marketing Claims: Select Legal Issues for Congress.....	14
First Amendment	15
Commercial Speech.....	15
World Trade Organization Agreement on Technical Barriers to Trade.....	19
Does the TBT Agreement Cover Environmental Labeling Measures for Consumer Products?.....	20
U.S. Obligations with Respect to Technical Regulations.....	24
Preemption of State Law	28
Conclusion	30

Contacts

Author Contact Information.....	31
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Introduction

During the last few decades, consumers in the United States have shown a significant interest in purchasing consumer products and packaging that appear to be beneficial—or at least not harmful—to the natural environment.¹ In response to consumers' willingness to pay a premium for these products, manufacturers and others have increasingly touted the positive environmental attributes of their products in marketing materials, such as in advertising or on product labels.² These environmental marketing claims may be self-declared by manufacturers or made by a government or third party through a certified “seal of approval” or “environmental label” awarded to products that meet certain environmental criteria.³

Some Members of Congress and commentators have argued that consumers may have difficulty verifying claims made about the environmental attributes of a particular product, and thus that environmental marketing messages have the potential to deceive consumers.⁴ According to these arguments, misleading claims may lead consumers to purchase products that lack the advertised environmental benefits or cause consumers to become indifferent to the claims.⁵ In addition, some commentators have argued that the prevalence of misleading claims in the marketplace could potentially discourage companies from competing to produce more environmentally beneficial products.⁶

This report examines the Federal Trade Commission's (FTC's) role in regulating environmental marketing claims under the Federal Trade Commission Act (FTC Act) and other federal laws. It begins with an overview of the FTC's enforcement powers under the FTC Act, including their potential extraterritorial application to unfair or deceptive claims made by foreign entities outside of the United States' territorial jurisdiction (e.g., labels on products that are imported into the United States). It then examines how the FTC has exercised its powers under the act and other laws in the environmental marketing context. The report concludes by considering legal issues

¹ E.g., Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 Yale J. on Reg. 147, 149 (1993).

² *It's Too Easy Being Green: Defining Fair Green Marketing Practices, Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 111th Cong. 1-22 (2009) (statement of Rep. Bobby L. Rush, Chairman, Subcomm. on Commerce, Trade, and Consumer Protection) [hereinafter *Hearing on Green Marketing Practices*]; Grodsky, *supra* note 1, at 150. These environmental marketing claims may relate to the environmental impacts of a product during all or part of its life cycle, such as the effect on the environment of the product's manufacture, distribution, use, or disposal. See International Organization for Standardization (ISO), *Environmental Labels and Declarations: How ISO Standards Help* 16 (2012), <http://www.iso.org/iso/environmental-labelling.pdf>.

³ *Id.* at 5.

⁴ *Hearing on Green Marketing Practices, supra* note 2, at 6 (statement of Rep. Kathy Castor) (“Consumers have a hard time telling the difference between companies that do the hard work to develop products and manufacturing processes that are more sustainable and environmentally friendly and those companies that simply start printing their labels in green with sustainable written on the label and then charge a green premium for the same old dirty products.”); Jack Neff, *Consumers Don't Believe Your Green Ad Claims, Survey Finds*, *Advertising Age* (September 16, 2013), <http://adage.com/article/news/consumers-green-ad-claims-survey-finds/244172/>; Grodsky, *supra* note 1, at 150. The deceptive use of environmental marketing claims is sometimes referred to as “greenwashing.”

⁵ *Hearing on Green Marketing Practices, supra* note 2, at 6 (statement of Rep. Kathy Castor).

⁶ See, e.g., *Advertising Trends and Consumer Protection: Hearing Before the Subcomm. on Consumer Protection, Product Safety, and Insurance of the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. 59 (2009) (statement of Sen. John D. Rockefeller IV) (“Fraud seriously hurts legitimate businesses trying to compete and does lasting damage to our economy.”).

potentially implicated by regulating environmental marketing claims, including questions involving the First Amendment, international trade law, and federal preemption of state law.

This report does not examine the role that other federal agencies may play in regulating or monitoring the use of environmental marketing claims.⁷ It also does not consider the possible use of the Lanham Act to bring a private cause of action against an entity that makes a false or deceptive environmental marketing claim.⁸ Finally, it does not address “private industry self-regulation” of claims by the National Advertising Division (NAD) administered by the Council of Better Business Bureaus, which issues nonbinding decisions in alternative dispute resolution proceedings regarding advertising claims.⁹

General Enforcement, Rulemaking, and Investigative Powers of the FTC under the FTC Act

The FTC derives its general consumer protection powers from Section 5 of the FTC Act.¹⁰ That section declares it unlawful for certain “persons, partnerships, or corporations” to engage in “unfair¹¹ or deceptive¹² acts or practices in or affecting commerce.”¹³ The FTC Act’s definition of “commerce” encompasses both domestic commerce among the states, U.S. territories, and the District of Columbia, as well as commerce with foreign nations.¹⁴ Under the FTC Act, the

⁷ For example, the Environmental Protection Agency (EPA) and Department of Energy (DOE) jointly administer Energy Star, which is a voluntary labeling program that seeks to encourage the purchase and manufacture of energy-efficient products. See 42 U.S.C. §6294a. Under the program, certain manufacturers who have entered into a voluntary partnership agreement with the EPA and DOE may affix an Energy Star label to qualified products in order to inform consumers that these products are among the most energy-efficient in a particular category but still perform at least as well as standard models. See *id.* As a further example, the U.S. Department of Agriculture’s (USDA’s) Agricultural Marketing Service oversees the National Organic Program, which provides standards governing claims that an agricultural product is “organic.” 7 C.F.R. Part 205; see also USDA, Food Standards and Labeling Policy Book (2005) (establishing the department’s policy regarding “natural” claims), http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf.

⁸ See 15 U.S.C. §1125(a).

⁹ For more information on NAD, see <http://www.bbb.org/council/the-national-partner-program/national-advertising-review-services/national-advertising-division/>.

¹⁰ 15 U.S.C. §45. All citations to the FTC Act in the footnotes are to the *U.S. Code* sections for the FTC Act sections in the main text.

¹¹ An “unfair act or practice” for purposes of Section 5 or Section 17 of the FTC Act is one that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” *Id.* §45(n). The FTC considers an act or practice to be unfair when it causes injury to a consumer that (1) is substantial; (2) is not “outweighed by any countervailing benefits to consumers or competition that the practice produces”; and (3) is not an injury that consumers could reasonably have avoided. *In re Int’l Harvester Co.*, 104 F.T.C. 949 (1984) (statement at end of agency order). The FTC may consider whether the unfair conduct violates a public policy that “has been established by statute, common law, industry practice, or otherwise.” *Id.*

¹² The FTC considers an act or practice to be deceptive when there is a “representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.” *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 171 (1984) (policy statement at end of agency order).

¹³ 15 U.S.C. §45(a). Section 12 of the FTC Act specifically prohibits certain entities from disseminating false advertisements related to “food, drugs, devices, services, or cosmetics.” *Id.* §52. However, for purposes of Section 12, the definition of “false advertisement” excludes product labels. *Id.* §55(a). The FTC Act contains definitions for “food,” “drug,” “device,” and “cosmetic.” *Id.* §55(b)-(e).

¹⁴ 15 U.S.C. §44. For more on the FTC’s attempts to enforce the FTC Act against foreign entities abroad that cause (continued...)

commission has authority to promulgate or issue trade regulation rules, interpretive rules, and policy statements,¹⁵ and to investigate certain trade practices.¹⁶ The FTC may enforce the act using administrative or judicial processes.¹⁷ There is no private right of action in the FTC Act. The commission's powers under the FTC Act are summarized below.

Rulemaking

Although a rule addressing a particular unfair or deceptive act or practice does not have to exist in order for the FTC to bring an enforcement action under Section 5 of the FTC Act, Section 18 of the act authorizes the commission to promulgate trade regulation rules, interpretive rules, and policy statements¹⁸ addressing unfair or deceptive acts or practices in or affecting commerce.¹⁹ When the commission promulgates a trade regulation rule under the FTC Act, the agency must follow the procedures outlined in the FTC Act and the Administrative Procedure Act (APA) (5 U.S.C. §553).²⁰ In addition, promulgation (and in certain cases, amendment) of trade regulation rules requires the commission to publish a regulatory analysis.²¹ Trade regulation rules are subject to judicial review, and entities may petition the FTC for exemptions from them.²²

Investigations

In addition to granting the FTC general rulemaking powers, the FTC Act authorizes the commission to investigate certain trade practices, including foreign practices.²³ The FTC may require persons to submit reports or answers to questions; make the submitted information publicly available (except for confidential or privileged information); and share the obtained information with federal, state, and foreign law enforcement agencies under certain conditions.²⁴

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injury to U.S. consumers, see “International Enforcement Efforts” below.

¹⁵ 15 U.S.C. §57a(b)-(c).

¹⁶ *E.g.*, 15 U.S.C. §46(a)-(b), (f), (h).

¹⁷ In some circumstances, the U.S. Attorney General may (or must) be involved in litigation under the FTC Act. *See* 15 U.S.C. §56(a), (c).

¹⁸ Promulgation of interpretive rules and policy statements under Section 18(a)(1)(A) requires the commission to find that the unfair or deceptive act or practice is widespread. *Id.* §57a(b)(3).

¹⁹ 15 U.S.C. §57a(a). As noted below, other federal laws direct the FTC to promulgate rules pertaining to specific types of environmental marketing claims. *See* “Other Laws Enforced by the FTC” below.

²⁰ 15 U.S.C. §57a(b)-(d). Regulations governing the FTC's promulgation of rules under the FTC Act and other federal statutes are located at 16 C.F.R. Part 1, Subparts B-C.

²¹ 15 U.S.C. §57b-3.

²² *Id.* §57a(e), (g).

²³ *Id.* §46(a)-(b), (f), (h); *see also id.* §§49-50, 57b-1 (concerning civil investigative demands).

²⁴ *Id.* §46(a)-(b), (f), (h); *see also id.* §§49-50, 57b-1. A “foreign law enforcement agency” is defined as “(1) any agency or judicial authority of a foreign government, including a foreign state, a political subdivision of a foreign state, or a multinational organization constituted by and comprised of foreign states, that is vested with law enforcement or investigative authority in civil, criminal, or administrative matters; and (2) any multinational organization, to the extent that it is acting on behalf of an entity described in paragraph (1).” *Id.* §44.

Enforcement

This section discusses the general administrative and judicial processes that the FTC may use to enforce the FTC Act.

Administrative Actions

The commission may bring an administrative complaint against an entity subject to its jurisdiction when the agency has “reason to believe” that the entity has violated the act.²⁵ After notice and an opportunity for a hearing, the commission may issue an order instructing the entity to cease and desist from acts or practices that violate the act.²⁶ If the entity subsequently violates an order that is in effect after it has become final,²⁷ the United States may seek civil penalties (generally, up to \$16,000 per violation), injunctions, and other equitable relief in federal district court.²⁸ Often, however, respondents opt to settle with the FTC, and the parties enter into an agreement containing a consent order in which the respondent does not admit liability; waives judicial review of the order; and agrees not to engage in the allegedly unfair or deceptive acts or practices in the future.²⁹

Lawsuits

Depending on the circumstances, the FTC Act may provide one or more avenues for the FTC or Attorney General to seek judicial relief when an entity subject to FTC jurisdiction has violated, or is about to violate, the FTC Act. As described below, potential forms of relief include injunctive relief, civil penalties, and consumer redress (e.g., refunds). However, the FTC and defendants often settle these cases prior to trial.³⁰

Preliminary or Permanent Injunctive Relief

Section 13(b) of the FTC Act authorizes the commission to seek preliminary and permanent prohibitive injunctive relief in the proper federal district court in cases in which the commission has “reason to believe” that an entity subject to its jurisdiction is violating or is about to violate a provision of law enforced by the FTC, provided that such relief would be in the public interest.³¹

²⁵ 15 U.S.C. §45(b).

²⁶ *Id.* §45(b). Entities ordered to cease and desist from practices that violate the FTC Act may file a petition in a certain federal appeals court within 60 days of service of the FTC’s order that asks the court to set aside the order. 15 U.S.C. §45(c). The judgment and decree of the appeals court may be subject to review by the Supreme Court if it grants certiorari. *Id.* If the commission believes that a domestic or foreign entity has violated federal criminal law, it must refer the matter to the Attorney General for possible criminal prosecution. 15 U.S.C. §§46(k), 56(b).

²⁷ Provisions of the FTC Act governing the finality of an order are located at 15 U.S.C. §45(g)-(k).

²⁸ 15 U.S.C. §45(l). The size of the civil monetary penalty was last adjusted for inflation in 2009. 16 C.F.R. §1.98.

²⁹ *E.g.*, Am. Plastic Lumber, Inc., FTC File No. 132 3200 (July 24, 2014) (decision and order).

³⁰ *E.g.*, Stipulated Order for Permanent Injunction and Monetary Judgment at 3-14, FTC v. Green Foot Global, L.L.C., No. 2:13-cv-02064 (D. Nev. November 18, 2013).

³¹ 15 U.S.C. §53(b). The commission may seek a permanent injunction in “proper cases.” *Id.* The act provides somewhat similar authority to prevent dissemination of false advertisements in violation of Section 12 of the FTC Act, which pertains to “food, drugs, devices, services, or cosmetics,” with possible penalties. *Id.* §§53(a), 54. However, this authority does not apply to certain periodical publications, advertising agencies, and other media for the dissemination of advertising. *Id.* §§53(d), 54(b).

Several federal courts of appeals have held that Section 13(b)'s authorization of injunctive relief allows a federal court to exercise the full scope of its inherent equitable powers, permitting the court to order other equitable relief such as monetary consumer redress.³²

Civil Penalties for Violations of Trade Regulation Rules or Prior Cease and Desist Orders

The FTC may also bring a complaint in federal district court seeking imposition of a civil penalty (generally, up to \$16,000 per violation) against an entity that knowingly³³ violates a rule (not an interpretive rule) under the FTC Act respecting unfair³⁴ or deceptive³⁵ acts or practices.³⁶ Moreover, the commission may bring an action seeking a civil penalty against an entity subject to FTC jurisdiction under the FTC Act that engages in an unfair or deceptive act or practice that was the subject of a prior final cease and desist order (not a consent order), regardless of whether that entity was originally subject to the order and provided that the entity had actual knowledge that its conduct was unlawful under Section 5(a)(1) of the FTC Act.³⁷

Consumer Redress

Under Section 19 of the FTC Act, the commission may seek redress for consumers and others in state or federal court when an entity subject to its jurisdiction has violated (1) a trade regulation rule or (2) a final cease and desist order that applies to the entity, provided that a reasonable person would have known that the entity's violation was "dishonest or fraudulent."³⁸ Available relief under this section includes "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification" of the rule violation or unfair or deceptive act or practice, but Section 19(b) does not authorize "the imposition of any exemplary or punitive damages."³⁹

International Enforcement Efforts

The FTC frequently receives complaints from consumers about cross-border fraud, including allegations that a foreign business located outside of U.S. territory has engaged in unfair or deceptive acts or practices causing injury to consumers in the United States.⁴⁰ It is possible that a

³² E.g., *FTC v. Ross*, 743 F.3d 886, 890-92 (4th Cir. 2014). As noted below, Section 19 of the FTC Act explicitly authorizes the FTC to seek consumer redress in court in certain limited circumstances.

³³ The commission may bring a civil suit when the entity violates a rule "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule." 15 U.S.C. §45(m)(1)(A).

³⁴ *Supra* note 11.

³⁵ *Supra* note 12.

³⁶ 15 U.S.C. §45(m)(1)(A).

³⁷ *Id.* §45(m)(1)(B).

³⁸ *Id.* §57b.

³⁹ *Id.* §57b(b). There is a statute of limitations for consumer redress actions that varies depending on the circumstances of the violation. *Id.* §57b(d).

⁴⁰ FTC, Report to Congress, The U.S. SAFE WEB Act: The First Three Years 5 (2009), [http://www.ftc.gov/sites/default/files/documents/reports/u.s.safe-web-act-first-three-years-federal-trade-commission-report-congress/\(continued...\)](http://www.ftc.gov/sites/default/files/documents/reports/u.s.safe-web-act-first-three-years-federal-trade-commission-report-congress/(continued...))

foreign entity in a foreign country could make false or misleading environmental marketing claims that injure U.S. consumers. For example, a foreign manufacturer might affix deceptive labels to its products prior to their import into the United States.⁴¹ Partly in order to address cross-border fraud, Congress amended the FTC Act in 2006 to expand and clarify further the FTC's international enforcement authorities, allowing greater cooperation between the agency and foreign countries and specifically allowing extraterritorial application of the FTC Act by U.S. courts to certain conduct by foreign entities located in foreign countries.⁴²

However, despite these amendments, the FTC may face several procedural hurdles in litigating cases against a foreign defendant who lacks a legal presence in the United States, including the challenges involved in serving process on foreign defendants in a foreign country;⁴³ overcoming defendants' motions to dismiss for lack of personal jurisdiction⁴⁴ or *forum non conveniens*;⁴⁵ engaging in discovery abroad;⁴⁶ and obtaining recognition and enforcement of U.S. judgments by foreign courts.⁴⁷

Cooperation with Foreign Countries

In addition to the commission's general investigative powers described above,⁴⁸ the FTC may also assist certain foreign law enforcement agencies with investigations and enforcement actions involving potential violations of foreign consumer protection laws upon written request of the foreign agencies.⁴⁹ The FTC may, with State Department approval, negotiate and enter into international agreements with foreign law enforcement agencies in certain circumstances for the purposes of receiving information and enforcement assistance from the agencies.⁵⁰ Provisions of the FTC Act state that commission attorneys may assist the Attorney General in foreign litigation in which the FTC has an interest—and that the FTC may use appropriated funds to reimburse the Attorney General for retaining foreign counsel—with approval of the Attorney General.⁵¹

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⁴¹ This section does not address injury to foreign consumers by a U.S. entity.

⁴² 15 U.S.C. §45(a)(4).

⁴³ See generally Fed. R. Civ. P. 4(f); Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163, entered into force for the United States February 10, 1969, <http://www.hcch.net/upload/conventions/txt14en.pdf>.

⁴⁴ See generally Fed. R. Civ. P. 4(k); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

⁴⁵ See generally *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

⁴⁶ See generally Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, entered into force for the United States October 7, 1972, <http://www.hcch.net/upload/conventions/txt20en.pdf>.

⁴⁷ A full discussion of these procedural issues is beyond the scope of this report.

⁴⁸ 15 U.S.C. §46(a)-(b), (f), (h).

⁴⁹ *Id.* §46(j); see also *id.* §57b-2(b)(6), (f)(2); 16 C.F.R. §4.11(j). For a provision of the FTC Act pertaining to staff exchanges with foreign government agencies, see 15 U.S.C. §57c-1.

⁵⁰ *Id.* §46(j).

⁵¹ *Id.* §56(c). The FTC has also worked with foreign counsel to compel production of evidence for use in domestic proceedings. FTC, Report to Congress, The U.S. SAFE WEB Act: The First Three Years iii (2009), <http://www.ftc.gov/sites/default/files/documents/reports/u.s.safe-web-act-first-three-years-federal-trade-commission-report-congress/p035303safewebact2009.pdf>.

Extraterritorial Application of the FTC Act

Complaints about cross-border fraud committed by foreign companies in foreign countries that injures U.S. consumers in the United States have raised questions about the extraterritorial application of the FTC Act to this conduct by U.S. courts. As noted above, the FTC Act defines “commerce” to include trade between the United States and foreign nations.⁵² Although federal courts of appeals had previously disagreed about whether the FTC Act could apply to activity outside of the territorial boundaries of the United States,⁵³ Congress explicitly addressed the issue in legislation in 2006. Amendments to the FTC Act in the Undertaking Spam, Spyware, and Fraud Enforcement with Enforcers Beyond Borders Act of 2006 (U.S. SAFE WEB Act) provide that the FTC may use its enforcement powers to seek remedies for unfair or deceptive acts or practices that “(i) cause or are likely to cause reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring within the United States.”⁵⁴

This amendment appears to demonstrate Congress’s intent that the FTC Act apply to conduct by foreign companies that occurs outside of the United States but has (or is likely to have) certain effects on U.S. consumers, overcoming the statutory canon of construction applied by U.S. courts that there is a general presumption against extraterritoriality.⁵⁵ Even prior to the U.S. SAFE WEB Act amendments, the FTC had brought enforcement actions in federal district court against foreign defendants whose conduct in a foreign country allegedly caused injury to consumers in the United States.⁵⁶

⁵² 15 U.S.C. §44.

⁵³ See, e.g., *FTC v. Skybiz.com, Inc.*, 57 F. App’x 374, 377 (10th Cir. 2003); *Nieman v. Dryclean USA Franchise Co.*, 178 F.3d 1126, 1129–31 (11th Cir. 1999); *Branch v. FTC*, 141 F.2d 31, 35–36 (7th Cir. 1944); *FTC v. Commonwealth Mktg. Group, Inc.*, 72 F. Supp. 2d 530, 545 (W.D. Pa. 1999); Michael A. Rabkin, *When Consumer Fraud Crosses the International Line: The Basis for Extraterritorial Jurisdiction Under the FTC Act*, 101 Nw. U. L. Rev. 293, 296, 303, & n.74 (2007). Extraterritorial application of U.S. law is not prohibited by the U.S. Constitution.

⁵⁴ 15 U.S.C. §45(a)(4); see also Restatement (Third) of the Foreign Relations Law of the United States §402 (1987) (“Subject to [certain exceptions,] a [country] has jurisdiction to prescribe law with respect to ... conduct outside its territory that has or is intended to have substantial effect within its territory.”). Section 403 of the Restatement states that the exercise of jurisdiction to prescribe should be reasonable.

⁵⁵ *Equal Employment Opportunity Comm’n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“It is a long-standing principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). It could be argued that a U.S. court should decline to apply the FTC Act extraterritorially to conduct occurring abroad that has substantial effects in the United States if such application would violate principles of international comity by prohibiting an entity from engaging in conduct required by the laws of the foreign country in which it is domiciled. *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 269 (2010); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993); Michael A. Rabkin, *When Consumer Fraud Crosses the International Line: The Basis for Extraterritorial Jurisdiction Under the FTC Act*, 101 Nw. U. L. Rev. 293, 324–26 (2007). However, one commentator has noted that such a prohibition would appear unlikely to result in the context of consumer protection laws because it seems unlikely that a foreign country’s laws would require an entity to engage in conduct prohibited by the FTC Act. *Id.* at 326; Restatement (Third) of the Foreign Relations Law of the United States §441 (1987) (“In general, a state may not require a person (a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or (b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.”).

⁵⁶ E.g., Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. Dr. Clark Research Ass’n*, Civ. No. 1:03CV0054 (N.D. Ohio January 8, 2003); Complaint for Injunctive and Other Equitable Relief at 2–3, *FTC v. TLD Network Ltd.*, No. 02C 1475 (N.D. Ill. February 28, 2002); Amended Complaint for Permanent Injunction and Other Equitable Relief at 3–4, *FTC v. 1492828 Ontario, Inc.*, No. 02C 7456 (N.D. Ill. December 30, 2002); see also Restatement (Third) of the Foreign Relations Law of the United States §421 (1987) (“In general, a state’s exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted ... the (continued...)”).

However, the FTC may face procedural challenges that make civil litigation in a U.S. court against foreign entities with no legal presence in the United States time-consuming, expensive, or impossible, including challenges involved in serving process on foreign defendants in a foreign country;⁵⁷ overcoming defendants' motions to dismiss for lack of personal jurisdiction⁵⁸ or *forum non conveniens*;⁵⁹ engaging in discovery abroad;⁶⁰ and obtaining recognition and enforcement of U.S. judgments by foreign courts.⁶¹

The FTC's Role in Regulating Environmental Marketing Claims

The FTC's enforcement of Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices in or affecting commerce, is central to the agency's role in regulating environmental marketing claims.⁶² To explain to businesses and the public how the FTC interprets Section 5 in determining which environmental marketing claims are unfair or deceptive, the agency has issued

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person, whether natural or juridical, has carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity."'). Regarding jurisdiction to enforce, the Restatement provides the following:

- (1) A state may employ judicial or nonjudicial measures to induce or compel compliance or punish noncompliance with its laws or regulations, provided it has jurisdiction to prescribe in accordance with §§ 402 and 403.
- (2) Enforcement measures must be reasonably related to the laws or regulations to which they are directed; punishment for noncompliance must be preceded by an appropriate determination of violation and must be proportional to the gravity of the violation.
- (3) A state may employ enforcement measures against a person located outside its territory
 - (a) if the person is given notice of the claims or charges against him that is reasonable in the circumstances;
 - (b) if the person is given an opportunity to be heard, ordinarily in advance of enforcement, whether in person or by counsel or other representative; and
 - (c) when enforcement is through the courts, if the state has jurisdiction to adjudicate.

Id. §431.

⁵⁷ See generally Fed. R. Civ. P. 4(f); Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163, entered into force for the United States February 10, 1969, <http://www.hcch.net/upload/conventions/txt14en.pdf>. Under the FTC Act, civil investigative demands may be served upon entities outside of the United States' territorial jurisdiction in accordance with the Federal Rules of Civil Procedure. 15 U.S.C. §57b-1(c)(7)(B). The FTC Act states that the U.S. District Court for the District of Columbia shall have authority to assert extraterritorial jurisdiction over persons in order to enforce their compliance with civil investigative demands, so long as jurisdiction is exercised consistent with due process. *Id.* §57b-1(c)(7)(C).

⁵⁸ See generally Fed. R. Civ. P. 4(k); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

⁵⁹ See generally *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

⁶⁰ See generally Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, entered into force for the United States October 7, 1972, <http://www.hcch.net/upload/conventions/txt20en.pdf>.

⁶¹ See generally Restatement (Third) of the Foreign Relations Law of the United States §481 (1987) (concerning U.S. courts' recognition of foreign judgments and awards). A full discussion of these procedural issues is beyond the scope of this report.

⁶² 15 U.S.C. §45.

nonbinding Guides for the Use of Environmental Marketing Claims.⁶³ Because these “Green Guides” are administrative interpretations of law, the FTC cannot bring an enforcement action alleging a violation of them *per se*, but must find that the practice at issue is unlawful under Section 5 of the FTC Act or other applicable law.⁶⁴

In addition to enforcement efforts directly under Section 5 of the FTC Act, the FTC also enforces various other laws passed by Congress aimed at assisting consumers in making meaningful comparisons regarding products’ environmental attributes.⁶⁵ Most of these laws state that violators are subject to FTC enforcement actions under Section 5 of the FTC Act.⁶⁶

Section 5 of the FTC Act and the Green Guides

As noted above, Section 5 of the FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce.⁶⁷ The FTC’s Guides for the Use of Environmental Marketing Claims seek to assist businesses and the public in making lawful environmental marketing claims.⁶⁸ The “Green Guides” explain how the FTC believes a consumer would interpret certain terms or symbols that appear in claims made about products, packaging, or services.⁶⁹ Building upon existing agency policy statements, such as those regarding deception and advertising substantiation, the guides provide general principles for environmental marketing regarding claim qualification; overstatement of environmental attributes or benefits; substantiation of comparisons between products;⁷⁰ and unqualified general environmental benefit claims.⁷¹ The guides frequently use examples to illustrate these principles.⁷²

The Green Guides also provide guidance to entities making specific environmental marketing claims.⁷³ New claims addressed by the guides in the 2012 revision include those pertaining to carbon offsets; certifications and seals of approval by independent third parties; “free-of” and

⁶³ 16 C.F.R. Part 260.

⁶⁴ 16 C.F.R. §260.1(a); Application of Guides in Preventing Unlawful Practices, 16 C.F.R. Part 17 (“Failure to comply with the guides may result in corrective action by the commission under applicable statutory provisions.”).

⁶⁵ See “Other Laws Enforced by the FTC” below.

⁶⁶ *E.g.*, Dolphin Protection Consumer Information Act of 1990 (DPCIA), 16 U.S.C. §1385(d). However, the FTC imposes civil penalties for certain violations of the FTC’s Appliance Labeling Rule under the Energy Policy and Conservation Act of 1975, 42 U.S.C. §6303. The FTC’s Appliance Labeling Rule is located at 16 C.F.R. Part 305. *See also* Penalties for Violation of Appliance Labeling Rules, 16 C.F.R. §§1.92-97.

⁶⁷ 15 U.S.C. §45.

⁶⁸ 16 C.F.R. Part 260.

⁶⁹ 16 C.F.R. §260.1(c)-(d) (“These guides apply to claims about the environmental attributes of a product, package, or service in connection with the marketing, offering for sale, or sale of such item or service to individuals. These guides also apply to business-to-business transactions. The guides apply to environmental claims in labeling, advertising, promotional materials, and all other forms of marketing in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names, or any other means.”). The FTC first issued its Green Guides in 1992, and most recently revised them in 2012. FTC, Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62122, 62122 (October 11, 2012).

⁷⁰ *See also* FTC, Statement of Policy Regarding Comparative Advertising (August 13, 1979), <http://www.ftc.gov/public-statements/1979/08/statement-policy-regarding-comparative-advertising>.

⁷¹ 16 C.F.R. §§260.3-4.

⁷² *E.g.*, *id.* §260.3.

⁷³ *See id.* §260.1(d).

“non-toxic” claims; and claims that a product is made with renewable energy or materials.⁷⁴ Other claims addressed in the guides include compostable claims; degradable claims; ozone-safe and ozone-friendly claims; recyclable claims; recycled content claims; refillable claims; and source reduction claims.⁷⁵ The guides do not include specific guidance for “organic,” “natural,” or “sustainable” claims.⁷⁶

The Green Guides are not legally binding FTC rules.⁷⁷ They appear to be administrative interpretations of law that inform businesses and the public of how the FTC interprets Section 5 of the FTC Act in the context of environmental marketing claims. Thus, the FTC cannot bring an enforcement action alleging a violation of the Green Guides *per se*, but must find that the practice at issue is unfair or deceptive under Section 5 of the FTC Act or other applicable law.⁷⁸ Furthermore, the Green Guides do not preempt state laws, and compliance with state laws is not a safe harbor from FTC enforcement action.⁷⁹

In addition to its general enforcement powers under Section 5, the FTC also enforces trade regulation rules it has promulgated under the FTC Act.⁸⁰ These include rules regarding the labeling and advertising of home insulation⁸¹ and advertising of fuel economy for new automobiles.⁸²

Other Laws Enforced by the FTC

In addition to its enforcement efforts under Section 5 of the FTC Act, the FTC also enforces various other laws passed by Congress aimed at assisting consumers in making meaningful comparisons of the environmental attributes of different products. These laws, which could be construed as regulating environmental marketing claims, include the following:

- The Energy Policy and Conservation Act of 1975 (EPCA), as amended, which directed the FTC to promulgate labeling rules concerning the energy and water use of certain covered consumer products in consultation with the Department of Energy (DOE).⁸³ EnergyGuide labels generally must show, among other things, the “estimated annual operating cost of such product,” as well as the “range of estimated annual operating costs for covered products [of the type] to which the

⁷⁴ FTC, Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62122, 62122 (October 11, 2012).

⁷⁵ See 16 C.F.R. Part 260.

⁷⁶ FTC, Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62122, 62124 (October 11, 2012).

⁷⁷ 16 C.F.R. §260.1(a).

⁷⁸ *Id.* §260.1(a); Application of Guides in Preventing Unlawful Practices, 16 C.F.R. Part 17 (“Failure to comply with the guides may result in corrective action by the commission under applicable statutory provisions.”).

⁷⁹ 16 C.F.R. §260.1(b).

⁸⁰ See 15 U.S.C. §57a(a)(1)(B).

⁸¹ 16 C.F.R. Part 460.

⁸² 16 C.F.R. Part 259.

⁸³ 42 U.S.C. §6294. The FTC’s Appliance Labeling Rule is located at 16 C.F.R. Part 305. See also Penalties for Violation of Appliance Labeling Rules, 16 C.F.R. §§1.92-97. EPCA establishes (or requires the DOE to establish) energy and water conservation standards for covered consumer products listed at 42 U.S.C. §6292. See 42 U.S.C. §6295.

rule applies.”⁸⁴ EPCA also directed the FTC to promulgate rules regarding the testing and labeling of recycled oil.⁸⁵

- The Dolphin Protection Consumer Information Act of 1990 (DPCIA), which, among other things, makes it a violation of Section 5 of the FTC Act for any producer, importer, exporter, distributor, or seller of any “tuna product” that is “exported from or offered for sale in the United States” to misrepresent that the product is “dolphin safe” or otherwise falsely suggest that the tuna in the product “were harvested using a method of fishing that is not harmful to dolphins” if the tuna were harvested in a certain manner outlined in the statute.⁸⁶
- The Energy Policy Act of 1992, which directed the FTC, in consultation with other federal agencies, to establish “uniform labeling requirements” that provide the costs and benefits of alternative fuels and alternative-fueled vehicles to assist consumers in their purchasing decisions.⁸⁷
- The Petroleum Marketing Practices Act (PMPA), as amended by the Energy Policy Act of 1992, which, among other things, regulates the determination, certification, disclosure, and display by various parties in the fuel supply chain of the “automotive fuel rating” (e.g., “octane rating”) of motor vehicle fuels, and requires manufacturers to represent properly the automotive fuel rating requirements of new motor vehicles.⁸⁸
- The Energy Independence and Security Act of 2007, which includes provisions regarding the labeling of retail diesel fuel pumps with, in general, “the percent of biomass-based diesel or biodiesel that is contained in the biomass-based diesel blend or biodiesel blend that is offered for sale.”⁸⁹

Enforcement Actions

To enforce Section 5 of the FTC Act and trade regulation rules promulgated thereunder in the environmental marketing context, the FTC (or Attorney General) has brought administrative or

⁸⁴ *Id.* §6294(c); *see also* 16 C.F.R. §305.4.

⁸⁵ 42 U.S.C. §6363; 16 C.F.R. Part 311.

⁸⁶ 16 U.S.C. §1385. Department of Commerce regulations implementing the DPCIA are located at 50 C.F.R. Part 216, Subpart H. In 2008, various WTO Members requested consultations with the United States with respect to the DPCIA, its implementing regulations, and a related federal court of appeals decision. For the current status of the WTO dispute settlement case challenging aspects of these measures as inconsistent with the WTO agreements, see http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm.

⁸⁷ 42 U.S.C. §13232. The FTC’s labeling requirements under this provision are located at 16 C.F.R. Part 309.

⁸⁸ 15 U.S.C. §§2821-2824. The FTC’s Posting Rule is located at 16 C.F.R. Part 306. Failure to comply with the Posting Rule is deemed a violation of Section 5 of the FTC Act. 16 C.F.R. §306.1. A few courts have addressed the question of whether the PMPA and the FTC’s Posting Rule preempt state law claims that would effectively impose disclosure and labeling requirements for retailers and other parties with regard to automotive fuel ratings. *E.g.*, *Alvarez v. Chevron Corp.*, 656 F.3d 925, 928, 934-35 (9th Cir. 2011) (finding express preemption of a state law false advertising claim that would effectively require retailers to make disclosures in addition to those required under federal law); *VP Racing Fuels, Inc. v. General Petroleum Corp.*, 673 F. Supp. 2d 1073, 1076-83 (E.D. Cal. 2009) (finding no express or implied preemption when the state law false advertising claim would effectively require distributors to make accurate and truthful disclosures); *see also* 15 U.S.C. §2824.

⁸⁹ 42 U.S.C. §17021. Regulations implementing this provision are located in the FTC’s Posting Rule at 16 C.F.R. Part 306. Violation of the rule is considered to be a violation of Section 5 of the FTC Act. 16 C.F.R. §306.1.

judicial complaints against entities subject to its jurisdiction. These complaints generally allege that the entity has violated the act, a regulation, or a prior commission order by engaging in unfair or deceptive environmental marketing practices. As described below, such allegations include that an entity, in connection with advertising or selling a product, has made express or implied misrepresentations; failed to substantiate claims; or made deceptive omissions of material fact.

Examples

Examples of environmental marketing claims alleged to violate Section 5 of the FTC Act include claims that a product or its packaging is made of or contains post-consumer recycled content;⁹⁰ recyclable by “a substantial majority of consumers or communities where the item is sold”;⁹¹ degradable, biodegradable, or photodegradable;⁹² free of volatile organic compounds or chemicals;⁹³ certified by an independent third party as environmentally beneficial according to objective standards;⁹⁴ manufactured using an environmentally friendly process;⁹⁵ likely to result in a certain amount of energy savings;⁹⁶ generally beneficial to the environment;⁹⁷ free of chlorofluorocarbons;⁹⁸ or “ozone friendly.”⁹⁹ The commission has also brought enforcement actions in which it has alleged a violation of Section 5 more specifically tied to a particular product. These include allegations that an entity has misrepresented the light output and lifetime of LED lamps;¹⁰⁰ that fuel or motor oil additives will increase fuel economy and lower toxic emissions;¹⁰¹ that pesticides are “practically nontoxic”;¹⁰² or that coffee filters are manufactured without chlorine.¹⁰³

In some cases, the FTC or Attorney General has alleged that respondents violated trade regulation rules enforced by the commission. For example, it has been alleged that respondents violated the Textile Fiber Products Identification Act¹⁰⁴ and its implementing regulations¹⁰⁵ by misrepresenting that its textile products contain “bamboo”;¹⁰⁶ or the rule concerning the Labeling

⁹⁰ *E.g.*, Am. Plastic Lumber Inc., FTC File No. 132 3200 (June 24, 2014) (complaint).

⁹¹ *E.g.*, N.E.W. Plastics Corp., FTC File No. 132 3126 (April 3, 2014) (complaint).

⁹² *E.g.*, Complaint for Permanent Injunction, Civil Penalties, and Other Relief at 5-7, *FTC v. AJM Packaging Corp.*, No. 1:13-cv-1510 (D.D.C. September 30, 2013).

⁹³ *E.g.*, Essentia Natural Memory Foam Co., Inc., FTC File No. 122 3130 (November 8, 2013) (complaint).

⁹⁴ *E.g.*, Ecobaby Organics, Inc., FTC File No. 122 3129 (November 8, 2013); *see also* Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255.

⁹⁵ Pure Bamboo, LLC, FTC File No. 082 3193 (December 15, 2009) (complaint).

⁹⁶ Gorell Enters., Inc., FTC File No. 112 3053 (May 16, 2012) (complaint).

⁹⁷ *E.g.*, Safe Brands Corp., 121 F.T.C. 379, 385 (March 26, 1996) (complaint).

⁹⁸ Mattel, Inc., 119 F.T.C. 969, 970 (June 23, 1995) (complaint).

⁹⁹ PerfectData Corp., 116 F.T.C. 769, 770 (August 2, 1993) (complaint).

¹⁰⁰ Amended Complaint for Permanent Injunctive and Other Relief at 27-28, *FTC v. Lights of America, Inc.*, No. SACV10-01333 (C.D. Cal. February 4, 2011).

¹⁰¹ Complaint for Permanent Injunction and Other Equitable Relief at 8-9, *FTC v. Green Foot Global, L.L.C.*, No. 2:13-cv-02064 (D. Nev. November 7, 2013); *Blue Coral Inc.*, 124 F.T.C. 568, 571 (July 12, 1996) (complaint).

¹⁰² Orkin Exterminating Co., Inc., 117 F.T.C. 747, 748 (May 25, 1994) (complaint).

¹⁰³ Mr. Coffee, Inc., 117 F.T.C. 156, 157-58 (March 25, 1994) (complaint).

¹⁰⁴ 15 U.S.C. §§70 *et seq.*

¹⁰⁵ 16 C.F.R. Part 303. These regulations were promulgated under the authority of the Textile Fiber Products Identification Act rather than the FTC Act. *Id.*

¹⁰⁶ *E.g.*, Complaint for Civil Penalties, Injunctive, and Other Relief at 7-10, *United States v. Macy's, Inc.*, No. 1:13-cv- (continued...)

and Advertising of Home Insulation (“R-value Rule”)¹⁰⁷ by misrepresenting home insulation’s resistance to heat flow.¹⁰⁸

Settlements

In many cases, an entity and the FTC have agreed voluntarily to a consent order or stipulated court order settling a case. These settlements typically require an entity to refrain from making (or providing others with the means of making) future express or implied misrepresentations that a product or its packaging provides a specific or general environmental benefit, at least not without proper qualification.¹⁰⁹ The entity must also generally rely on “competent and reliable evidence” in order to substantiate any representations that it makes.¹¹⁰ The orders typically contain language stating that the respondent does not admit liability but will comply with certain record-keeping requirements; disseminate the order to current and future personnel; notify the commission when major events affecting the entity (e.g. the dissolution of a corporation) might affect its compliance obligations; and submit a compliance report.¹¹¹ A consent order may contain language providing that it will terminate on a future date.¹¹²

(...continued)

00004 (D.D.C. January 3, 2013).

¹⁰⁷ 16 C.F.R. Part 460.

¹⁰⁸ *E.g.*, Complaint for Civil Penalties, Injunction, and Other Relief at 8-10, *United States v. Enviromate, LLC*, No. CV-09-S-0386-NE (N.D. Ala. February 26, 2009); *United States v. Sumpolec*, 811 F. Supp. 2d 1349 (M.D. Fla. 2011) (order granting plaintiff’s motion for summary judgment).

¹⁰⁹ *E.g.*, *N.E.W. Plastics Corp.*, FTC File No. 132 3126 (April 3, 2014) (decision and order); Stipulated Order for Permanent Injunction and Monetary Judgment at 3-14, *FTC v. Green Foot Global, L.L.C.*, No. 2:13-cv-02064 (D. Nev. November 18, 2013). Occasionally, a case has gone to trial. *E.g.*, Final Judgment and Order for Injunctive and Other Relief, *FTC v. Lights of America, Inc.*, No. SACV10-01333 (C.D. Cal. January 15, 2014). In the past, some FTC consent orders have stated that they do not prevent the respondent from disseminating representations contained on labels or in other materials approved under other federal law. *E.g.*, *Orkin Exterminating Co.*, 117 F.T.C. 747, 755 (May 25, 1994) (decision and order) (“Provided however, that nothing in this order shall prohibit respondent from disseminating ... any pesticide label approved by the United States Environmental Protection Agency ...”).

¹¹⁰ *E.g.*, *Am. Plastic Lumber Inc.*, FTC File No. 132 3200 (July 24, 2014) (decision and order); Stipulated Order for Permanent Injunction and Monetary Judgment at 3-14, *FTC v. Green Foot Global, L.L.C.*, No. 2:13-cv-02064 (D. Nev. November 18, 2013). If, in general, “experts in the relevant scientific fields would conclude it is necessary, such evidence must be competent and reliable scientific evidence.” *E.g.*, *Am. Plastic Lumber Inc.*, FTC File No. 132 3200 (July 24, 2014) (decision and order). Consent orders typically define “competent and reliable scientific evidence” as “tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true.” *Id.*; see also FTC Policy Statement Regarding Advertising Substantiation, <http://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-advertising-substantiation>.

¹¹¹ *E.g.*, *Am. Plastic Lumber Inc.*, FTC File No. 132 3200 (July 24, 2014) (decision and order); Stipulated Order for Permanent Injunction and Monetary Judgment at 3-14, *FTC v. Green Foot Global, L.L.C.*, No. 2:13-cv-02064 (D. Nev. November 18, 2013).

¹¹² *E.g.*, *Am. Plastic Lumber Inc.*, FTC File No. 132 3200 (July 24, 2014) (decision and order).

Federal Regulation of Environmental Marketing Claims: Select Legal Issues for Congress

Some commentators have suggested that certain environmental marketing messages have the potential to deceive consumers, and that the prevalence of such messages in the marketplace may discourage companies from competing to create more environmentally beneficial products.¹¹³ Environmental marketing claims may be self-declared by manufacturers in advertising or on product labels, or made by a government or third party through a certified “seal of approval” or “environmental label” awarded to a product that meets certain environmental criteria.¹¹⁴ These claims may concern a single environmental attribute or relate to the environmental impacts of a product during all or part of its life cycle, such as the effect on the environment of the product’s manufacture, distribution, use, or disposal.¹¹⁵

Currently, federal regulation of environmental marketing claims consists primarily of the FTC’s case-by-case enforcement approach under Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices in commerce.¹¹⁶ Through the Green Guides, the commission has provided nonbinding guidelines explaining how it might enforce Section 5 in the environmental marketing context.¹¹⁷ The FTC and other federal agencies also enforce federal laws and regulations that address specific types of environmental claims such as “dolphin-safe” or “organic” claims.¹¹⁸ The federal government has also established voluntary labeling programs such as Energy Star that allow manufacturers to affix a label to a product if a third party certifies that the product has met environmental criteria set by federal agencies.¹¹⁹ Finally, in some contexts, the federal government has required manufacturers to disclose certain information about their products in marketing materials, including on labels.¹²⁰

While the FTC’s Green Guides and private voluntary standards, such as the International Organization for Standardization (ISO) 14020 series of standards for environmental labels and declarations, to protect consumers currently shape many environmental marketing claims,¹²¹ environmental marketing claims may also be regulated¹²² by, among other things: (1) enacting a

¹¹³ *Supra* notes 4-5, 6.

¹¹⁴ See International Organization for Standardization, *Environmental Labels and Declarations: How ISO Standards Help 1* (2012), <http://www.iso.org/iso/environmental-labelling.pdf>.

¹¹⁵ See *id.* at 16.

¹¹⁶ See “Enforcement Actions” above.

¹¹⁷ See “Section 5 of the FTC Act and the Green Guides” above.

¹¹⁸ See “Other Laws Enforced by the FTC” and “Introduction” above.

¹¹⁹ See, e.g., 42 U.S.C. §6294a.

¹²⁰ E.g., *id.* §6294 (EnergyGuide label).

¹²¹ Cf. 15 U.S.C. §2056(b)(1) (stating that the Consumer Product Safety Commission should rely on voluntary standards issued by other bodies “whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards.”). For more on the ISO 14020 series of standards, see International Organization for Standardization, *Environmental Labels and Declarations: How ISO Standards Help* (2012), <http://www.iso.org/iso/environmental-labelling.pdf>.

¹²² For simplicity, this report assumes that Congress would directly enact (or refrain from enacting) a law governing environmental marketing claims, and does not consider the possibility that Congress would delegate this authority to a federal administrative agency.

government standard to set a floor for regulation and allowing private voluntary standards to provide stricter requirements¹²³ or (2) codifying a private voluntary labeling and marketing standard into law or using such a standard as a basis for a law.¹²⁴ For instance, Congress could compel manufacturers to disclose certain environmental attributes of a product or its packaging, as it has done with the EnergyGuide label.¹²⁵ In addition, an existing voluntary environmental labeling program, such as the Energy Star program, could be expanded to cover more product categories and attributes. Under the Energy Star program, the federal government sets specifications that products must meet to qualify for a government-owned label; licenses third parties that determine whether products conform with these specifications; and monitors use of the label to ensure it remains meaningful to consumers.¹²⁶

This section examines legal issues potentially implicated by these various approaches to federal regulation of environmental marketing claims, including issues involving the First Amendment, international trade law, and preemption of state law.

First Amendment

Challenges related to the First Amendment right to free speech may arise from environmental marketing standards. The First Amendment restricts the government's ability to constrain speech; however, some types of speech may be restricted to a greater extent than others. This section discusses the tests a reviewing court may apply in a First Amendment challenge to different hypothetical legislative schemes regulating environmental claims in advertisements and on product labels. Such legislation could regulate how manufacturers or sellers make certain claims about their products in advertisements or on labels. For example, standards governing the use of terms such as "recyclable" or "biodegradable" may raise questions about the constitutional limits of regulating commercial speech. Requiring manufacturers to disclose certain information relating to the environmental characteristics of their products in advertisements and labels may raise questions about the constitutionality of legislation that compels speech.

Commercial Speech

The Supreme Court has held that the Constitution affords less protection to commercial speech than other constitutionally safeguarded forms of expression.¹²⁷ Commercial speech is "speech that proposes a commercial transaction."¹²⁸ The Court has further noted that the combination of speech in an advertising format, that references a specific product, and for which the speaker has

¹²³ See American National Standards Institute, Workshop Report, *Toward Product Standards for Sustainability* (2009), <http://publicaa.ansi.org/sites/apdl/Documents/Meetings%20and%20Events/ANSI%20Workshop%20Toward%20Product%20Standards%20for%20Sustainability/Workshop%20report%20FINAL.pdf>. The federal government may participate in the development of private voluntary standards. See OMB Circular A-119, http://www.whitehouse.gov/omb/circulars_a119_a119fr.

¹²⁴ Cf. 15 U.S.C. §2056b (codifying most of the voluntary toy safety standard by ASTM International (formerly known as the American Society for Testing and Materials (ASTM)) into U.S. law).

¹²⁵ Cf. 42 U.S.C. §6294; 21 U.S.C. §343(q) (requiring nutrition labeling for food).

¹²⁶ See 42 U.S.C. §6294a.

¹²⁷ *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 418 (1993).

¹²⁸ *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 482 (1989).

an underlying economic motivation is “strong support” for characterizing such speech as commercial speech.¹²⁹

Commercial speech is subject to a more relaxed level of scrutiny, often described as intermediate scrutiny, than other forms of protected speech. *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York* provides the four-part test used to analyze whether a regulation of commercial speech is permissible under the First Amendment.¹³⁰ The first prong of the test examines whether the speech at issue is protected. For commercial speech to be protected, it must at least concern a lawful activity and not be misleading.¹³¹ The government has authority to ban commercial messages which are “more likely to deceive the public than to inform it” without running afoul of the First Amendment.¹³² Second, there must be a substantial government interest behind the regulation.¹³³ Third, the regulation must “directly advance” that substantial interest.¹³⁴ The Court has noted that “in the commercial context, the speech-restrictive means chosen [must] provide more than ‘ineffective or remote support’ for a legitimate governmental policy goal.”¹³⁵ Finally, the restriction must be no more extensive than necessary to further the government interest.¹³⁶ This fourth prong was further clarified by the Court in a case decided nine years after *Central Hudson*.¹³⁷ The Court explained in *Board of Trustees of the State University of New York v. Fox* that the fourth prong did not amount to a least restrictive means requirement, but rather necessitated a less rigorous test.¹³⁸ The fit between the regulation and the interest need not be perfect, but simply reasonable.¹³⁹ While restrictions on commercial speech are subject to intermediate scrutiny, if a restriction applies where commercial and noncommercial speech are inseparable, strict scrutiny analysis is required.¹⁴⁰

How is this commercial speech test applied in the context of restrictions on speech relating to environmental marketing? A 1994 decision from the U.S. Court of Appeals for the Ninth Circuit provides a sample case for a First Amendment challenge to environmental marketing restrictions imposed at the state level.¹⁴¹ In 1990, California adopted a law prohibiting a manufacturer or distributor of consumer goods from representing their products as “ozone friendly,” “biodegradable,” “photodegradable,” “recyclable,” or “recycled” unless the products satisfied the statutory definition of each term.¹⁴² The law was enacted following the efforts of an interstate task force, which found that there were disparities in the way these terms were used, and was concerned that the resulting confusion “creat[ed] a fertile ground for abusive business

¹²⁹ *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983).

¹³⁰ *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

¹³¹ *Id.* at 564-65.

¹³² *Id.* at 563-64.

¹³³ *Id.* at 564.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 569-70.

¹³⁷ *Bd. of Trustees of the State University of N.Y. v. Fox*, 492 U.S. 469 (1989).

¹³⁸ *Id.* at 480.

¹³⁹ *Id.*

¹⁴⁰ *Fox*, 492 U.S. at 477.

¹⁴¹ *Assoc. of Nat’l Advertisers v. Lungren*, 44 F.3d 726 (9th Cir. 1994).

¹⁴² Cal. Bus. Code §17508.5, *repealed by* Stats. 1995 ch. 642 §2 (SB 426).

practices.”¹⁴³ In *Association of National Advertisers, et al. v. Lungren*, several trade associations challenged the law as impermissibly restricting commercial and noncommercial speech.¹⁴⁴

The court began by addressing the plaintiffs’ claim that the law regulated not just commercial speech but also noncommercial speech. The court rejected this argument, concluding that by the statute’s own terms, the only speech being restricted were claims about specific consumer goods in advertisements and product labels. Therefore, the speech met the three criteria used by the Supreme Court to find evidence of commercial speech: it was in an advertising format, it referenced a specific product, and the speaker had an underlying economic motive.¹⁴⁵ Additionally, the plaintiffs failed to provide any examples in which “political, editorial, or otherwise non-commercial representation[s]” would fall within the scope of the statute’s restrictions.¹⁴⁶

Since the court determined that the restriction applied to commercial speech, it was appropriate to analyze its constitutionality under the intermediate scrutiny test articulated in *Central Hudson*. First, the court determined that the speech at issue should be afforded First Amendment protection because it concerned a lawful activity and was not outright misleading. Instead, the court concluded that the use of terms like “recyclable” and “biodegradable” was only *potentially* misleading because whether a specific product bought by a specific consumer could be recycled or would biodegrade depends on factors such as access to recycling facilities and composting techniques in local landfills.¹⁴⁷ The parties agreed that California satisfied the second prong of the *Central Hudson* test since it had a substantial interest in “ensuring truthful environmental advertising and encouraging recycling.”¹⁴⁸ Moving to the third prong of the *Central Hudson* test, the court determined that the statute directly advanced California’s interests. The case’s record had “abundant support” for the idea that environmental marketing increased consumer demand for environmentally friendly products.¹⁴⁹ Without standardized terms, such marketing could present “potentially specious claims or ecological puffery[,]” leading to an increase in sales of “products with minimal environmental attributes.”¹⁵⁰ Therefore, it was reasonable to believe that uniform standards for environmental marketing terms would promote the state’s interest in truthful advertising and consumer protection.¹⁵¹ Finally, the court addressed the fourth prong, which is described as “a more deferential ‘far-less-restrictive means test’ for commercial speech.”¹⁵² The court determined that there were no less restrictive and more precise alternatives available that achieved California’s stated interests.¹⁵³ The two alternatives offered by the plaintiffs were rejected because they were less precise than the existing statute, and required more

¹⁴³ *Lungren*, 44 F.3d at 727 (internal citations omitted).

¹⁴⁴ *Id.* at 728. The plaintiffs also challenged the statute on the grounds that it was unconstitutionally vague. *Id.*

¹⁴⁵ *Id.* at 728 (citing *Bolger*, 463 U.S. at 67).

¹⁴⁶ *Id.* at 729. The court also determined that the statute “does not embrace non-commercial messages inextricably linked with commercial speech.” *Id.* at 730.

¹⁴⁷ *Id.* at 731-32.

¹⁴⁸ *Lungren*, 44 F.3d at 732.

¹⁴⁹ *Id.* at 733.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 735.

¹⁵³ *Lungren*, 44 F.3d at 735-36.

speech by forcing manufacturers to qualify or explain their use of nonconforming terms, respectively.¹⁵⁴

Restrictions on commercial speech must withstand *Central Hudson*'s intermediate scrutiny in order to be upheld when faced with a First Amendment challenge. In accordance with this test, regulation of environmental marketing claims in advertisements and labels must be consistent with the government's interest in regulating such commercial speech, and must directly advance that interest.

Compelled Speech

Legislation that compels commercial speech, such as requiring the disclosure of environmental characteristics on product advertisements and labels, may be subject to a different standard of review based on how a reviewing court interprets the nature of the compelled speech. In general, the required disclosure of "accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests."¹⁵⁵ Therefore, compelled commercial speech will be subject to a more relaxed level of scrutiny than the *Central Hudson* test if it satisfies the criteria established in a 1985 Supreme Court case, *Zauderer v. Office of Disciplinary Counsel*.¹⁵⁶ First, the compelled disclosure must concern "purely factual and uncontroversial information."¹⁵⁷ Second, the disclosure must be "reasonably related" to a legitimate government interest.¹⁵⁸ While *Zauderer* addressed a disclosure requirement that was aimed at preventing deception to customers, later circuit courts have applied its reasoning to other governmental interests.¹⁵⁹ Lastly, the disclosure

¹⁵⁴ *Id.* This holding has been criticized by the D.C. Circuit. *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999). The court disagreed with the Ninth Circuit's conclusion that *Fox* "mandates a more deferential review of government regulations on potentially misleading commercial speech." *Id.* at 657. It continued to note that, in its opinion, "when government chooses a policy of suppression over disclosure—at least where there is no showing that disclosure would not suffice to cure misleadingness—government disregards a 'far less restrictive' means." *Id.* at 658. Additionally, the *Pearson* court noted that a subsequent Supreme Court case, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, undermined the *Lungren* court's statement that "a court should not second guess a legislative decision to restrict speech rather than to require speech." *Id.* (noting that the "Supreme Court expressly disapproved of that aspect of *Posadas* [*de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328] in *44 Liquormart*.")

¹⁵⁵ *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-114 (2d Cir. 2001).

¹⁵⁶ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (stating that "[an advertiser's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal ... We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.").

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See, e.g., Am. Meat Inst. v. Dep't of Ag.*, 760 F.3d 18, 22 (D.C. Cir. 2014) ("The language with which *Zauderer* justified its approach, however, sweeps far more broadly than the interest in remedying deception. After recounting the elements of *Central Hudson*, *Zauderer* rejected that test as unnecessary in light of the 'material differences between disclosure requirements and outright prohibitions on speech.' Later in the opinion, the Court observed that 'the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.' All told, *Zauderer*'s characterization of the speaker's interest in opposing forced disclosure of such information as 'minimal' seems inherently applicable beyond the problem of deception, as other circuits have found.") (internal citations omitted); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009) (subjecting a disclosure requirement intended to "(1) reduce consumer confusion and deception; and (2) to promote informed consumer decision-making so as to reduce obesity and the diseases associated with it" to the *Zauderer* standard); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (subjecting a disclosure (continued...))

requirement must not be “unjustified or unduly burdensome” such that it chills protected commercial speech.¹⁶⁰

Consequently, environmental marketing requirements mandating the disclosure of purely factual and uncontroversial information would be governed by the “reasonable relationship” standard articulated in *Zauderer*. However, a heightened standard of scrutiny is likely to apply to laws that require manufacturers to espouse a particular opinion; perform ideological speech; or disclose nonpurely factual statements, which may for instance be designed to evoke a particular emotional response.¹⁶¹

World Trade Organization Agreement on Technical Barriers to Trade

Laws regulating environmental marketing claims made on product labels could potentially raise issues concerning the United States’ trade obligations under the World Trade Organization agreements, specifically the General Agreement on Tariffs and Trade 1994 (GATT) and the Agreement on Technical Barriers to Trade (TBT Agreement).¹⁶² The GATT generally prohibits WTO Members from enacting measures that discriminate against imported products in favor of like domestic products or like products from other countries unless an exception applies.¹⁶³ However, WTO jurisprudence concerning labeling measures has focused on the TBT Agreement, which seeks to ensure that standards-related measures, including labeling requirements or standards, do not create unnecessary obstacles to international trade while at the same time allowing WTO Members to take actions necessary, for example, to protect human health and the environment.¹⁶⁴

(...continued)

requirement related to “Maine’s interest in preventing deception of consumers and increasing public access to prescription drugs” to the *Zauderer* standard); *Sorrell*, 272 F.3d at 115 (subjecting a disclosure requirement intended “to better inform consumers about the products they purchase” and “protect[] human health and the environment from mercury poisoning” to the *Zauderer* standard).

¹⁶⁰ *Zauderer*, 471 U.S. at 651.

¹⁶¹ See, e.g., *Zauderer*, 471 U.S. at 650-51; *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216-17 (D.C. Cir. 2012) (subjecting a federal law that required certain statements and nonpurely factual and uncontroversial images to appear on cigarette packages to *Central Hudson* intermediate scrutiny); *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006) (subjecting a law requiring an “18” sticker to be placed on certain video games, which “communicate[d] a subjective and highly controversial message—that the game’s content is sexually explicit,” to strict scrutiny).

¹⁶² This section does not analyze potential implications that may arise under other WTO agreements or other international agreements to which the United States is a party.

¹⁶³ GATT Article I:1, which sets forth a most-favored-nation treatment obligation, requires that “any advantage, favour, privilege or immunity granted by any [WTO Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [WTO Members].” Article I:1 applies to customs duties and import charges, as well as to all rules and formalities in connection with importation and exportation. GATT Article III:4, which sets forth a national treatment obligation for WTO Members’ internal regulations, requires that a WTO Member provide no less favorable competitive conditions for imported products as compared to like domestic products. GATT Article XX contains possible exceptions to these obligations.

¹⁶⁴ TBT Agreement, Preamble. The disciplines of the TBT Agreement do not apply to sanitary and phytosanitary measures or purchasing specifications prepared by governmental bodies addressed in the Agreement on Government Procurement. TBT Agreement, Art. 1.4-.5.

As a WTO Member, the United States has an obligation to comply with the disciplines of the TBT Agreement.¹⁶⁵ If a WTO Member believes that an environmental labeling measure promulgated by the United States, one of its state or local governments, or a nongovernmental body within U.S. territory is not in compliance with the disciplines of the TBT Agreement, the Member may challenge the measure using procedures in the WTO agreements.¹⁶⁶ Consultations and dispute settlement under the TBT Agreement are governed by the dispute settlement rules of the GATT and the Dispute Settlement Understanding.¹⁶⁷

WTO Members have challenged one of the environmental marketing laws enforced by the FTC as inconsistent with U.S. obligations under the WTO agreements. As noted above,¹⁶⁸ the Dolphin Protection Consumer Information Act of 1990 (DPCIA) regulates representations that a tuna product exported from, or offered for sale in, the United States is harvested in a manner that does not harm dolphins.¹⁶⁹ In 2008, various WTO Members requested consultations with the United States with respect to the DPCIA, its implementing regulations, and a related federal court of appeals decision. In 2012, the Appellate Body found that the U.S. “dolphin-safe” labeling measure violated the TBT Agreement by discriminating against tuna products imported from Mexico.¹⁷⁰ Subsequently, the United States modified its regulations implementing the DPCIA in an effort to bring them into conformity with the Appellate Body’s ruling.¹⁷¹ However, in November 2013, Mexico requested the establishment of a compliance panel to determine whether the United States’ changes to its regulations brought them into conformity with the United States’ WTO obligations. According to the WTO’s website, a compliance panel has been established but has not yet issued its final report to the parties.¹⁷²

This section examines the United States’ trade obligations under the TBT Agreement potentially implicated by a law or standard governing environmental marketing claims made on product labels. It analyzes when such a law would fall within the coverage of the TBT Agreement, and discusses potentially relevant trade obligations under the agreement pertaining to the preparation, adoption, and application of an environmental labeling measure that qualifies as a “technical regulation.”

Does the TBT Agreement Cover Environmental Labeling Measures for Consumer Products?

If a WTO Member challenged a U.S. environmental labeling measure for consumer products as inconsistent with the TBT Agreement, an initial question that might arise is whether the labeling

¹⁶⁵ TBT Agreement, Art. 2 & Annex 1.

¹⁶⁶ See TBT Agreement, Arts. 2-10, 14 & Annex 1.

¹⁶⁷ TBT Agreement, Art. 14; Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 3.

¹⁶⁸ See “Other Laws Enforced by the FTC” above.

¹⁶⁹ 16 U.S.C. §1385. Department of Commerce regulations implementing the DPCIA are located at 50 C.F.R. Part 216, Subpart H.

¹⁷⁰ Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, ¶ 407 (May 16, 2012).

¹⁷¹ Department of Commerce, Final Rule, Enhanced Document Requirements To Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40997 (July 9, 2013).

¹⁷² A summary of the ongoing dispute settlement case and its current status is located at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm.

measure is a “technical regulation”¹⁷³ or “standard”¹⁷⁴ covered by the TBT Agreement.¹⁷⁵ If a WTO panel were to find that a measure promulgated by the United States federal government meets one of these definitions, then the United States would have to comply with several trade obligations with respect to that measure, including obligations concerning nondiscrimination; trade-restrictiveness; transparency; and reliance on international standards as a basis for regulation.¹⁷⁶ In addition, if a private standardizing body or state or local government within United States territory were to promulgate a labeling measure that qualified as a “standard,” the United States would generally have to take reasonable measures to ensure that this entity complied with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 of the TBT Agreement.¹⁷⁷ Because WTO jurisprudence under the TBT Agreement has focused almost exclusively on obligations related to “technical regulations,” this section examines when an environmental labeling measure would potentially qualify as a “technical regulation,” and discusses the obligations that the United States would have with respect to such a measure under the TBT Agreement.

Environmental Labeling Measures as “Technical Regulations”

Criteria for marking or labeling products may fall within the definition of a “technical regulation” under Annex 1.1 to the TBT Agreement.¹⁷⁸ According to the Appellate Body’s interpretation of Annex 1.1, a technical regulation is a measure (1) that is applicable to an identifiable product or group of products, although the measure does not have to identify these products expressly; (2) that lays down product characteristics, including packaging, marking, or labeling requirements, in either positive or negative form “or their related processes and production methods”; and (3) with which compliance is mandatory.¹⁷⁹

An environmental labeling measure seems likely to satisfy factor (1) because it would arguably apply to a group of products that share a particular characteristic regulated by the measure, such as “consumer products that claim to be biodegradable.”¹⁸⁰ Under factors (2) and (3), a measure

¹⁷³ The agreement defines “technical regulation” as a document “which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.” TBT Agreement, Annex 1.1.

¹⁷⁴ The agreement defines “standard” as a document “approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.” TBT Agreement, Annex 1.2.

¹⁷⁵ This section does not analyze whether marketing claims not appearing on a product’s label are covered by the TBT Agreement.

¹⁷⁶ See “U.S. Obligations with Respect to Technical Regulations” below. If the panel were to find that the measure was a “standard,” the United States would have to comply with obligations provided in the Code of Good Practice for the Preparation, Adoption and Application of Standards. TBT Agreement, Art. 4.1 & Annex 3.

¹⁷⁷ TBT Agreement, Art. 4.1. This obligation also applies with respect to “regional standardizing bodies of which [WTO Members] or one or more bodies within their territories are members.” *Id.*

¹⁷⁸ TBT Agreement, Annex 1.1.

¹⁷⁹ Appellate Body Report, *European Communities—Trade Description of Sardines*, WT/DS231/AB/R, ¶ 176 (Sept. 26, 2002); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, paras. 67-70 (March 12, 2001).

¹⁸⁰ See Committee on Technical Barriers to Trade, Notification by the United States, Guides for the Use of Environmental Marketing Claims, G/TBT/N/USA/595 (November 18, 2010) (stating that the FTC’s nonbinding guidelines apply to “consumer products”).

stating that products must be labeled with certain information would appear to lay down mandatory product characteristics within the meaning of the TBT Agreement. In addition, WTO case law suggests that a measure permitting a product to carry a certain label only if the product possesses certain characteristics is a “technical regulation” that lays down mandatory product characteristics.¹⁸¹ In *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, the Appellate Body held that a U.S. law, the Dolphin Protection Consumer Information Act (DPCIA), laid down product characteristics when the law provided that an entity would violate Section 5 of the FTC Act if the entity voluntarily labeled a tuna product as “dolphin-safe” when the product’s harvesting methods failed to meet certain dolphin safety criteria.¹⁸² The Appellate Body emphasized that the DPCIA provided penalties for the voluntary use of the government-designed “dolphin-safe” label, as well as any other “dolphin safety” label or statement on a product when the product’s harvesting methods did not meet certain criteria.¹⁸³ Thus, when a measure subjects a company to government enforcement proceedings or penalties for voluntarily using a label on a product that possesses or lacks certain characteristics, the labeling measure could potentially constitute a “technical regulation” under the TBT Agreement.

Labels Pertaining to Processes and Production Methods

Some environmental labeling measures might regulate claims made on labels concerning product characteristics that are not physical characteristics. For example, some labeling measures might regulate claims addressing the environmental impacts of a product during all or part of its life cycle, such as the effect on the environment of the product’s manufacture, distribution, use, or disposal.¹⁸⁴ These characteristics of a product may be considered non-product-related processes and production methods (NPR PPMs). NPR PPMs are those processes and production methods that do not leave a trace in the final product. An example of an environmental labeling measure based on NPR PPMs is a law stating that a piece of furniture may carry a certain label only if it is made with “sustainably managed wood.”¹⁸⁵

It remains unclear whether the TBT Agreement applies to a measure that requires a product label to provide information regarding the product’s NPR PPMs, or permits a product to carry a label concerning NPR PPMs only if the product’s PPMs meet certain criteria.¹⁸⁶ In a recent case not

¹⁸¹ Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, paras. 193-195 (May 16, 2012); Appellate Body Report, *European Communities—Trade Description of Sardines*, WT/DS231/AB/R, ¶ 190 (Sept. 26, 2002); Panel Report, *European Communities—Trade Description of Sardines*, WT/DS231/R, ¶ 7.27 (May 29, 2002).

¹⁸² Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, paras. 193-195 (May 16, 2012).

¹⁸³ *Id.* The Appellate Body found that the U.S. dolphin tuna labeling measure required mandatory compliance, even though use of the label was voluntary because “[i]n effect, the measure at issue establishes a single definition of ‘dolphin-safe’ and treats any statement on a tuna product regarding ‘dolphin-safety’ that does not meet the conditions of the measure as a deceptive practice or act.” *Id.* at ¶ 195. A WTO panel evaluating whether a measure is mandatory might also seek to determine whether the affected industry has complied with the labeling requirement as if it were binding. Panel Report, *United States—Certain Country of Origin Labeling (COOL) Requirements*, WT/DS/384/R, paras. 7.192-194 (November 18, 2011).

¹⁸⁴ See International Organization for Standardization, *Environmental Labels and Declarations: How ISO Standards Help* 16 (2012), <http://www.iso.org/iso/environmental-labelling.pdf>.

¹⁸⁵ WTO, *Environment: Issues, Labelling*, http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm.

¹⁸⁶ See TBT Agreement, Annex 1.1.

involving a labeling measure, the Appellate Body confirmed that the TBT Agreement may cover *product-related* PPMs, but declined to address the extent of the relationship that the PPM must have with the product in order for the TBT Agreement to apply.¹⁸⁷ Commentators have noted that because of lingering ambiguity in the text of the TBT Agreement, it is unclear whether the agreement covers labeling of NPR PPMs.¹⁸⁸

If outside the scope of the TBT Agreement, a U.S. labeling measure might be subject to the GATT, including Article I:1, which sets forth most-favored nation treatment obligations, or Article III:4, which contains national treatment obligations pertaining to a WTO Member's internal regulations, if there is sufficient government involvement in its formulation, adoption, or application.¹⁸⁹ However, it is unclear whether these GATT provisions allow a WTO Member to treat an imported product less favorably than a domestic product (or product from another country) solely because the imported product's NPR PPMs differ from those of the domestic product in a way that the regulating Member deems undesirable.¹⁹⁰ If a WTO panel were to determine that a labeling measure was inconsistent with the GATT, then the United States might raise defenses under one or more of the exceptions in GATT Article XX pertaining to protection of "human, animal, or plant life or health" or "conservation of exhaustible natural resources."¹⁹¹ It

¹⁸⁷ Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, ¶ 5.69 (May 22, 2014) ("In these circumstances, we do not consider it appropriate to complete the legal analysis by ruling on whether the EU Seal Regime lays down 'related processes and production methods' within the meaning of Annex 1.1 to the TBT Agreement.").

¹⁸⁸ See, e.g., TBT Agreement, Annex 1.1 (defining a "technical regulation" as a document "which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.") (emphasis added); Erik P. Bartenhagen, Note, The Intersection of Trade and the Environment: An Examination of the Impact of the TBT Agreement on Ecolabeling Programs, 17 Va. Env'tl. L.J. 51, 74 (1997).

¹⁸⁹ The GATT could potentially apply to a measure covered by the TBT Agreement if relevant provisions in the two agreements were not in conflict. See Marrakesh Agreement Establishing the World Trade Organization, General Interpretive Note to Annex 1A, April 15, 1994. This report does not analyze whether an environmental labeling measure might give rise to a "non-violation" claim under GATT Article XXIII:1(b). This GATT article states that a WTO Member may challenge a measure when "the application by another [WTO Member] of [the] measure, whether or not it conflicts with the provisions of this Agreement[,] nullifies or impairs a "benefit accruing to it directly or indirectly under [the GATT]" or impedes "the attainment of any objective of the [GATT]." GATT Art. XXIII. The Appellate Body has stated that "the remedy in Article XXIII:1(b) 'should be approached with caution and should remain an exceptional remedy.'" Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, ¶ 186 (March 12, 2001) (quoting Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, ¶ 10.37 (April 22, 1998)).

¹⁹⁰ See generally GATT Panel Report, *United States—Restrictions on Imports of Tuna*, GATT Doc. DS21/R, GATT BISD 39S/155, ¶ 5.15 (September 3, 1991) (unadopted) ("Article III:4 [of the GATT] therefore obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels."); Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, paras. 230, 298-99 (May 16, 2012) (implicitly raising the possibility that the TBT Agreement may apply to labeling of NPR PPMs); Marie Wilke & Hannes Schloemann, International Centre for Trade and Sustainable Development, Not-so-voluntary Labelling in the WTO Tuna-dolphin Dispute (2011), <http://www.ictsd.org/bridges-news/biores/news/not-so-voluntary-labelling-in-the-wto-tuna-dolphin-dispute>. Health and environmental concerns associated with each product could potentially be relevant to a panel's analysis of whether they are "like products" to which the GATT's nondiscrimination obligations apply. See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, paras. 116, 122, 126, 128, 131-32 (March 12, 2001); Center for International Environmental Law, Eco-labeling Standards, Green Procurement and the WTO: Significance for World Bank Borrowers 41-42 (2005), http://www.ciel.org/Publications/Ecolabeling_WTO_Mar05.pdf.

¹⁹¹ E.g., GATT Art. XX(b) (measures "necessary to protect human, animal or plant life or health"), XX(g) (measures (continued...))

is important to note, however, that it is unclear to what extent the United States may assert these exceptions when the measure at issue seeks to protect solely those persons or resources outside of U.S. territory.¹⁹²

U.S. Obligations with Respect to Technical Regulations

If a WTO panel were to find that an environmental labeling measure was a “technical regulation” under the TBT Agreement, the United States would have WTO obligations pertaining to the preparation, adoption, and application of the measure, including obligations concerning nondiscrimination; trade-restrictiveness; transparency; and reliance on international standards as a basis for regulation.

Nondiscrimination

Under TBT Agreement Article 2.1, the United States has an obligation to ensure that a labeling measure that is a “technical regulation” does not treat imported products less favorably than like domestic products or like products imported from other countries.¹⁹³ To decide whether products are “like,” a panel generally seeks to determine whether a competitive relationship exists between the products by considering several factors.¹⁹⁴ In the past, the Appellate Body has suggested that a product which presents greater *health* concerns might not be “like” a substitute safer product, at least insofar as these concerns “have an impact on the competitive relationship between and

(...continued)

“relating to the conservation of exhaustible natural resources”). If a measure is provisionally justified under Article XX(b) or (g), it must also satisfy the Article XX chapeau. Appellate Body Report, *U.S.—Standards for Reformulated and Conventional Gasoline*, 22-23, WT/DS2/AB/R (April 29, 1996). The chapeau states that a measure covered by Article XX must be neither “a disguised restriction on international trade” nor “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.” GATT Art. XX.

¹⁹² See generally GATT Panel Report, *United States—Restrictions on Imports of Tuna*, GATT Doc. DS21/R, GATT BISD 39S/155, ¶ 6.2 (September 3, 1991) (unadopted) (stating that “a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own”); GATT Panel Report, *United States—Restrictions on Imports of Tuna*, DS/29/R, ¶ 5.20 (June 16, 1994) (unadopted) (“[T]he Panel could see no valid reason supporting the conclusion that the provisions of Article XX(g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision.”); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ 121 (October 12, 1998) (“It appears to us, however, that conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.”).

¹⁹³ TBT Agreement, Art. 2.1. These national treatment and most-favored-nation obligations are basic WTO principles articulated in the GATT. See GATT Arts. I, III.

¹⁹⁴ Among other things, a panel may consider “(i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.” Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, paras. 7.235-240 (September 15, 2011). When a measure such as a labeling requirement would itself affect the competitive conditions between products, the likeness analysis should “determine the nature and the extent of the competitive relationship for the purpose of determining likeness in isolation from the measure at issue to the extent that the latter informs the physical characteristics of the products and/or consumers’ preferences.” Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, ¶ 111 (April 4, 2012).

among the products” at issue.¹⁹⁵ It is possible that a panel would extend this reasoning to imported products that present greater *environmental* concerns.¹⁹⁶ Thus, it is possible that a U.S. environmental labeling measure could treat an imported WTO Member product less favorably than a domestic product or product from another country based on the fact that the domestic product (or product of another country) was better for the environment or health when compared to the imported WTO Member product that possessed the same physical characteristics.

If a measure applies to “like products,” then a panel would probably next consider whether the measure discriminates against the imported products by granting these products less favorable treatment than the like domestic products or products of another country.¹⁹⁷ The Appellate Body has held that a measure grants an imported product less favorable treatment when it (1) modifies the conditions of competition to the detriment of the imported product as compared to the like domestic product or like product of another WTO Member; and (2) this detrimental impact “reflects discrimination” against the imported product.¹⁹⁸

Because access to an environmental label may provide an advantage to a product in the marketplace, a WTO panel might determine that the *de jure* or *de facto* denial of access to the label for like imported products treats these products less favorably.¹⁹⁹ For a complainant to establish a violation, it must demonstrate a genuine relationship between the labeling measure and the detrimental impact on competitive opportunities for the imported products.²⁰⁰ Such a relationship may exist, for example, when the government creates “incentives for market participants to behave in certain ways, and thereby treat[s] imported products less favorably.”²⁰¹ For instance, less favorable treatment may result from a labeling measure that “entails higher costs” for handling imported products than domestic products.²⁰²

A measure that is discriminatory may be consistent with the TBT if the discrimination stems from a legitimate regulatory distinction.²⁰³ To stem from such a distinction and avoid violating TBT Agreement Article 2.1, a labeling measure that appears to discriminate *de facto* against like imported products must be “even-handed.”²⁰⁴ One example of a lack of evenhandedness is when “informational requirements imposed on upstream producers under [a measure] are

¹⁹⁵ *Id.* at ¶ 119; Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, paras. 116, 122, 126, 128, 131-32 (March 12, 2001) (addressing this issue in a case involving a comparison between chrysotile asbestos fibers and substitute fibers).

¹⁹⁶ See Center for International Environmental Law, *supra* note 190, at 41-42.

¹⁹⁷ TBT Agreement, Art. 2.1.

¹⁹⁸ Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, ¶ 231 (May 16, 2012).

¹⁹⁹ *Id.* at paras. 233, 299.

²⁰⁰ *Id.* at paras. 236-40.

²⁰¹ Appellate Body Report, *United States—Certain Country of Origin Labeling (COOL) Requirements*, WT/DS/384/AB/R, ¶ 270 (June 29, 2012).

²⁰² Panel Report, *United States—Certain Country of Origin Labeling (COOL) Requirements*, WT/DS/384/R, paras. 7.302, .372, .374, .376, .378 (November 18, 2011).

²⁰³ Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, paras. 297-99 (May 16, 2012).

²⁰⁴ *Id.* at ¶ 298.

disproportionate as compared to the level of information communicated to consumers through mandatory retail labels.”²⁰⁵

Use of Relevant International Standards as a Basis for Domestic Regulations

Under Article 2.4 of the TBT Agreement, a WTO Member must use relevant international standards or parts thereof as a basis for their technical regulations except when the standards would not effectively or appropriately assist the Member in fulfilling its legitimate objectives.²⁰⁶ One international standard that could potentially serve as the basis for an environmental labeling measure is the International Organization for Standardization (ISO) 14020 series of standards for environmental labels and declarations.²⁰⁷ This standard would appear to meet the definition of “standard” in Annex 1.2 of the TBT Agreement,²⁰⁸ and the ISO would appear to qualify as an “international body” under Annex 1.4.²⁰⁹

For the United States to have an obligation to use a standard as a basis for regulation, the standard must be “relevant,” which means that it deals with the same product as the domestic regulation and covers similar characteristics of that product,²¹⁰ or at least regulates the same subject matter.²¹¹ Thus, a WTO panel’s determination of relevance would likely involve a comparison between the U.S. labeling measure and the potentially relevant international standard. For an international standard to be “used as a basis” for a U.S. labeling measure, the measure need not conform to the standard in all respects; rather, the standard or its relevant parts must serve as the “principal constituent or fundamental principle” of the measure.²¹² In addition, the measure and standard cannot be contradictory.²¹³ Notably, the United States would not have to use a relevant international standard as a basis for a labeling measure when that standard would not effectively or appropriately assist it in fulfilling the United States’ legitimate objectives.²¹⁴ WTO panels have suggested that an international standard may be ineffective or inappropriate at fulfilling the

²⁰⁵ Appellate Body Report, *United States—Certain Country of Origin Labeling (COOL) Requirements*, WT/DS/384/AB/R, ¶ 347 (June 29, 2012).

²⁰⁶ TBT Agreement, Art. 2.4.

²⁰⁷ For more on the ISO 14020 series of standards, see International Organization for Standardization, *Environmental Labels and Declarations: How ISO Standards Help* (2012), <http://www.iso.org/iso/environmental-labelling.pdf>.

²⁰⁸ Annex 1.2 defines “standard” as a “document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.” TBT Agreement, Annex 1.2. This report does not address a potential interaction between aspects of the ISO standard addressing NPR PPMs and WTO rules.

²⁰⁹ Annex 1.4 defines international body as a “body ... whose membership is open to the relevant bodies of at least all Members.” TBT Agreement, Annex 1.4; Panel Report, *EC—Trade Description of Sardines*, WT/DS231/R, ¶ 7.63 (May 29, 2002).

²¹⁰ Panel Report, *EC—Trade Description of Sardines*, WT/DS231/R, ¶ 7.69 (May 29, 2002).

²¹¹ Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, ¶ 7.701 (September 15, 2011).

²¹² Panel Report, *EC—Trade Description of Sardines*, WT/DS231/R, ¶ 7.110 (May 29, 2002).

²¹³ Appellate Body Report, *EC—Trade Description of Sardines*, WT/DS231/AB/R, ¶ 248 (September 26, 2002).

²¹⁴ TBT Agreement, Art. 2.4.

objective of providing consumers with information when the standard does not allow the Member to convey to consumers all of the critical information that the Member wants to provide.²¹⁵

Measure Not “More Trade Restrictive Than Necessary ...”

In order to ensure that technical regulations do not create unnecessary obstacles to international trade, Article 2.2 of the TBT Agreement states that technical regulations must not be “more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.”²¹⁶ Objectives identified in the TBT Agreement or by the Appellate Body as “legitimate” that could be cited in support of an environmental labeling measure include “providing accurate and reliable information [to] protect consumers from being misled or misinformed,”²¹⁷ as well as the “protection of human health or safety, animal or plant life or health, or the environment.”²¹⁸ A panel evaluating whether a labeling measure is more trade-restrictive than necessary to fulfill such an objective would likely engage in a fact-specific examination of, among several other things, the degree to which the technical regulation as written and applied “actually contributes to the legitimate objective pursued by the Member.”²¹⁹ The Appellate Body has indicated that a measure may satisfy Article 2.2 even if it does not completely fulfill its legitimate objective.²²⁰

Transparency

The TBT Agreement also contains provisions intended to increase the transparency of central government bodies’ promulgation of mandatory technical regulations. If Congress (or a federal

²¹⁵ Panel Report, *United States—Certain Country of Origin Labeling (COOL) Requirements*, WT/DS/384/R, paras. 7.734-735 (November 18, 2011); Panel Report, *EC—Trade Description of Sardines*, WT/DS231/R, ¶ 7.123 (May 29, 2002).

²¹⁶ TBT Agreement, Art. 2.2. A WTO panel has noted that this test involves a two-step inquiry: (1) whether a technical regulation pursues a legitimate objective; and (2) whether the technical regulation is more trade-restrictive than necessary to fulfill that legitimate objective, taking into account the risks nonfulfillment would create. Panel Report, *US—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, paras. 7.382-387 (September 15, 2011).

²¹⁷ Appellate Body Report, *United States—Certain Country of Origin Labeling (COOL) Requirements*, WT/DS/384/AB/R, paras. 451, 453 (June 29, 2012).

²¹⁸ TBT Agreement, Art. 2.2.

²¹⁹ Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, ¶ 317 (May 16, 2012). In this case, the Appellate Body wrote that

In sum, we consider that an assessment of whether a technical regulation is “more trade-restrictive than necessary” within the meaning of Article 2.2 of the *TBT Agreement* involves an evaluation of a number of factors. A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.

Id. at ¶ 322 (citation omitted).

²²⁰ Appellate Body Report, *United States—Certain Country of Origin Labeling (COOL) Requirements*, WT/DS/384/AB/R, ¶ 468 (June 29, 2012).

agency like the FTC) proposes a technical regulation that may have a significant effect on the trade of other Members in the absence of, or in deviation from, a relevant international standard, the agreement obligates the United States to notify interested parties in other Member countries and allow them to comment on the proposal.²²¹ WTO Members must make adopted technical regulations available to interested parties in other Member countries.²²²

Other Obligations

The TBT Agreement contains several additional obligations with respect to the preparation, adoption, and application of technical regulations by central government bodies. For example, Members have an ongoing obligation to reassess their technical regulations to ensure that circumstances or objectives still require them and that they are the least trade-restrictive means of addressing such circumstances or objectives.²²³ The agreement also states that Members should specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics wherever appropriate.²²⁴ The agreement contains rules governing procedures for the assessment of conformity with standards and technical regulations by central government, local government, and nongovernmental bodies.²²⁵ It also addresses the provision of technical assistance and special and differential treatment to developing country WTO Members.²²⁶

Preemption of State Law

The degree to which federal laws and regulations governing environmental marketing claims should expressly preempt state laws is unclear.²²⁷ Some states have laws that specifically regulate environmental marketing claims.²²⁸ For example, California requires any person who makes an

²²¹ TBT Agreement, Art. 2.9. The agreement contains an exception to some of these requirements for “urgent problems of safety, health, environmental protection or national security.” TBT Agreement, Art. 2.10.

²²² TBT Agreement, Art. 2.11.

²²³ TBT Agreement, Art. 2.3; Panel Report, *European Communities—Trade Description of Sardines*, WT/DS231/R, paras. 7.80–81 (May 29, 2002).

²²⁴ TBT Agreement, Art. 2.8.

²²⁵ TBT Agreement, Arts. 5–9. The agreement defines “conformity assessment procedures” as procedures “used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.” TBT Agreement, Annex 1.3.

²²⁶ TBT Agreement, Arts. 11–12.

²²⁷ Several bills in the 102nd Congress would have established a regulatory framework for environmental marketing claims. Some bills would have provided a minimum floor of requirements for certain claims, and would not have preempted stricter state standards. *E.g.*, Environmental Marketing Claims Act of 1991 §13, H.R. 1408; Resource Conservation and Recovery Act Amendments of 1991 §307, S. 976 (as reported). Other bills contained stronger preemption language. *E.g.*, National Waste Reduction, Recycling, and Management Act §403, H.R. 3865 (as reported).

²²⁸ *E.g.*, Cal. Bus. & Prof. Code §17580(a). Even if a state does not have a law specific to environmental marketing claims, all 50 states and the District of Columbia have some form of consumer protection law prohibiting fraudulent or deceptive acts. Alan S. Brown & Larry E. Hepler, Comparison of Consumer Fraud Statutes Across the Fifty States, 55 Fed’n Def. & Corp. Couns. Q. 263, 263–65 (2005), available at <http://www.thefederation.org/documents/Vol55No3.pdf>. These “little FTC Acts” may prohibit unfair or deceptive environmental marketing claims, and many of the acts do not require a showing of all of the elements of a common law cause of action for fraud or breach of contract. In addition, unlike the FTC Act, many of these laws contain a private right of action for consumers. *Id.* Other state statutory and common law remedies could potentially be available to a consumer injured by an unfair or deceptive claim.

environmental marketing claim in advertising, on a product's label, or on a product's container to maintain written records supporting the claim.²²⁹ The entity making the claim must furnish this information to the public upon request.²³⁰ California's law provides that conformance with the FTC's Green Guides may be used as a safe harbor from liability in a lawsuit or complaint.²³¹ Other laws, such as Indiana's, provide a statutory list of definitions for terms such as "biodegradable" that are to be used in conjunction with the definitions found in the Green Guides.²³²

Scholars disagree about the extent to which a binding federal law on environmental marketing claims should preempt state laws. On the one hand, commentators argue, federal preemption could bring uniformity to varying state standards, making it less costly for manufacturers to market their products throughout the United States and making it easier for consumers to evaluate environmental claims.²³³ Such preemption could take various forms including federal preemption that allows states to retain "an active role in defining and enforcing" federal law on environmental marketing;²³⁴ permits states to make laws that exceed federally created minimum standards;²³⁵ or allows a federal agency to grant states waivers from preemption on a case-by-case basis.²³⁶

On the other hand, commentators note that courts have traditionally considered consumer protection to fall within the states' police powers.²³⁷ States could arguably tailor environmental marketing regulations to fit local conditions and concerns.²³⁸ In addition, without the assistance of states, the federal government may lack sufficient resources for vigorous enforcement efforts against entities making deceptive environmental marketing claims.²³⁹ State laws could supplement federal enforcement efforts.²⁴⁰

²²⁹ Cal. Bus. & Prof. Code §17580(a).

²³⁰ *Id.* §17580(b).

²³¹ *Id.* §§17580(a)(5), 17580.5. Maine has a law that states, "A person who labels, advertises or promotes a product in violation of [the Green Guides] commits a violation of the Maine Unfair Trade Practices Act." Me. Rev. Stat. tit. 38, §2142; *see also* Mich. Comp. Laws §445.903(dd)(i); Minn. Stat. §325E.41; R.I. Gen. Laws §6-13.3-1.

²³² Ind. Code Ann. §§24-5-17-2(b) *et seq.*

²³³ *E.g.*, David F. Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green,"* 81 Cal. L. Rev. 991, 991, 996-97, 1003-04 (1993).

²³⁴ *Id.* at 991.

²³⁵ *E.g.*, Environmental Marketing Claims Act of 1991 §13, H.R. 1408.

²³⁶ *See, e.g.*, 42 U.S.C. §6297(d).

²³⁷ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992); Welsh, *supra* note 233, at 998.

²³⁸ Welsh, *supra* note 227, at 1019; Glenn Israel, Comment, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims*, 20 B.C. Env'tl. Aff. L. Rev. 303, 326 (1993).

²³⁹ Thomas C. Downs, Comment, "Environmentally Friendly" Product Advertising: *Its Future Requires a New Regulatory Authority*, 42 Am. U.L. Rev. 155, 194 (1992).

²⁴⁰ *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996).

Conclusion

Some commentators have suggested that certain environmental marketing messages have the potential to deceive consumers, and that the prevalence of such messages in the marketplace may discourage companies from competing to create more environmentally beneficial products.²⁴¹ Currently, federal regulation of environmental marketing claims consists primarily of the FTC's case-by-case enforcement approach under Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices in commerce.²⁴² The commission has provided nonbinding guidelines explaining how it might enforce Section 5 in the environmental marketing context.²⁴³

Federal regulation of environmental marketing claims potentially raises legal issues involving the First Amendment, international trade law, and preemption of state law. Legislation that regulates how manufacturers or sellers make certain claims about their products in advertisements or on labels may raise questions about the constitutional limits of regulating commercial speech. Requiring manufacturers to disclose certain information relating to the environmental characteristics of their products in advertisements and on labels may raise questions about the constitutionality of legislation that compels speech.

In addition, a law regulating environmental marketing claims that appear on product labels could potentially raise issues concerning the United States' obligations under international trade law.²⁴⁴ For example, such measures could potentially be subject to the WTO TBT Agreement, which generally requires WTO Members preparing, adopting, and applying a measure to adhere to obligations concerning nondiscrimination; trade-restrictiveness; transparency; and reliance on international standards as a basis for regulation. However, the extent to which the TBT Agreement applies to measures that regulate claims made on labels that address so-called "non-product-related processes and production methods" (e.g., the amount of carbon dioxide emitted during manufacture of a product) is unclear.

Another issue is the degree to which federal laws and regulations governing environmental marketing claims should expressly preempt state laws.²⁴⁵ On the one hand, commentators argue, federal preemption could bring uniformity to varying state standards, making it less costly for manufacturers to market their products throughout the United States and making it easier for consumers to evaluate environmental marketing claims. On the other hand, commentators note that courts have traditionally considered consumer protection to fall within the states' police powers. States could arguably tailor environmental marketing regulations to fit local conditions and concerns, and state laws could potentially supplement federal enforcement efforts.

²⁴¹ *Supra* notes 4-5, 6.

²⁴² See "Enforcement Actions" above.

²⁴³ See "Section 5 of the FTC Act and the Green Guides" above.

²⁴⁴ This paragraph summarizes in part the section above titled "World Trade Organization Agreement on Technical Barriers to Trade."

²⁴⁵ This paragraph summarizes in part the section above titled "Preemption of State Law."

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