

ARTICLES

RELATIONAL INTEGRITY REGULATION: NUDGING CONSUMERS TOWARD PRODUCTS BEARING VALID ENVIRONMENTAL MARKETING CLAIMS

BY

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Over the last two decades scholars have addressed attributes of effective environmental regulation and advocated a wide spectrum of regulatory approaches, from the traditional command-and-control model to a libertarian-paternalism approach. Some writers have used those approaches to advocate for modifications to the current federal regulation of environmental marketing claims. This Article joins that conversation and accomplishes two goals. First, it harmonizes existing environmental regulation scholarship, resulting in the creation of a new form of regulation that it terms “Relational Integrity” regulation. Second, in light of the Relational Integrity approach to regulation, the Article examines several public and private environmental claim regulatory schemes and suggests how those schemes could be more effective. The regulatory schemes include public schemes in the United States and the European Union and a private scheme issued by the non-governmental International Organization for Standardization (ISO). Among its observations, the Article notes that although the ISO standards are a product of an international non-governmental entity, the standards fare as well as if not better than existing and proposed governmental regulation in reaching the Relational Integrity standard.

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I. INTRODUCTION

Recently, I attended a law school function where clear plastic cups were provided for cold beverages. The cups prominently declared that they were made from corn and were 100% compostable. Intrigued by the cups' claims, I researched NatureWorks LLC, the cups' manufacturer, and learned that the cups are made from Ingeo fiber, which is derived from dextrose, or sugar, found in corn.¹ Nothing on the cup or its packaging indicated that the cup could not be composted in my backyard compost pile. However, the NatureWorks website states that the cups are only compostable in an industrial composting facility.² Unfortunately, the nearest industrial composting facility is located in Georgia, approximately four hundred seventy-five miles from where I used the cup.³ A conversation with the school's purchasing chef indicated that in a campus-wide effort to "go green," the chef is "encouraged" to purchase "green" products for the law school's cafeteria and café. When I informed the chef that the "green" cups were not compostable in Florida, the chef shook his head and questioned why he had paid extra for the cups. He noted that the NatureWorks cups cost \$0.10 each, but a comparable paper cup costs \$0.06.

Aware of the propensity for sellers to make self-declared environmental claims about their products, the Federal Trade Commission (FTC) has promulgated Guides for the Use of Environmental Marketing Claims (Green Guides or Guides).⁴ The Green Guides include principles, definitions, and illustrations⁵ that shed light on the kinds of claims that will not run afoul of Section 5 of the FTC Act.⁶ For example, the Guides offer the following regarding products claiming that they are "Compostable":

¹ NatureWorks LLC, Raw Materials, <http://www.natureworkslc.com/the-ingeo-journey/raw-materials.aspx> (last visited Nov. 21, 2010).

² NatureWorks LLC, Raw Materials, <http://www.natureworkslc.com/product-and-applications/fact%20or%20fiction.aspx> (last visited Nov. 21, 2010).

³ FindAComposter.com, Find a Composter: Facility Search, <http://www.findacomposter.com/search?mode=&forceSearch=1¬iceFlags=true&activeFlag=Yes&materialName=Compostable+serviceware&searchIn=facAgricultural&searchIn=facFood&searchIn=facOther&searchIn=facPaper&searchIn=st&searchIn=facWastewater&searchIn=facYard&materialClass=Paper+And+Compostable+Products&placeName=&locQuery=&maxDistance=,> tbl. (last visited Nov. 21, 2010).

⁴ Guides for the Use of Environmental Marketing Claims, 16 C.F.R. pt. 260 (2010).

⁵ See *id.* §§ 260.6–7.

⁶ Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2006).

(1) It is deceptive to misrepresent, directly or by implication, that a product or package is compostable. A claim that a product or package is compostable should be substantiated by competent and reliable scientific evidence that all the materials in the product or package will break down into, or otherwise become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device. Claims of compostability should be qualified to the extent necessary to avoid consumer deception. An unqualified claim may be deceptive if:

- (i) The package cannot be safely composted in a home compost pile or device; or
 - (ii) The claim misleads consumers about the environmental benefit provided when the product is disposed of in a landfill.
- (2) A claim that a product is compostable in a municipal or institutional composting facility may need to be qualified to the extent necessary to avoid deception about the limited availability of such composting facilities.⁷

Arguably, the “100% Compostable” claim on the NatureWorks cups is deceptive because the compostable claim is unqualified, yet the cups are only compostable in industrial composting facilities. The provisions of the Green Guides, however, are not law;⁸ instead, conduct inconsistent with the Guides “may result in corrective action” if FTC finds that the seller’s conduct is unlawful under Section 5 of the FTC Act.⁹ Section 5 directs FTC to prevent

⁷ 16 C.F.R. § 260.7(c) (2010).

⁸ *Id.* § 260.2(b) (stating that the Green Guides “are not themselves enforceable regulations, nor do they have the force and effect of law. The guides themselves do not preempt regulation of other federal agencies or of state and local bodies governing the use of environmental marketing claims”). The Guides are “administrative interpretations” of laws that the FTC administers. *Id.* § 260.1. As such, the guides are not subject to the administrative rulemaking provisions. *See* 5 U.S.C. § 553(b); *see also* 16 C.F.R. § 1.5 (2010) (stating that FTC industry guides are administrative interpretations). The decision to craft administrative guidelines for environmental marketing claims, as opposed to administrative rules, was in part a reflection of a climate of resistance against FTC rules in the late 1980s and early 1990s. *See* Paul H. Luehr, Comment, *Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising*, 10 UCLA J. ENVTL. L. & POL’Y 311, 328 (1992). Luehr noted that the President and Congress had become concerned about the FTC’s proliferation of rules, *id.*, and that state attorneys general had expressed an interest in retaining their own power to prosecute sellers making false environmental marketing claims. *Id.* In addition, Luehr noted that because sellers’ use of environmental marketing claims was growing rapidly, there was an interest in getting some form of federal regulatory scheme on the books quickly. *Id.* at 329 (citing *Steiger Suggests Quick Development of Environmental Claims Guidelines*, 61 Antitrust & Trade Reg. Rep. (BNA) 398 (Oct. 3, 1991)). With the passage of the Federal Trade Commission’s Improvement Act of 1980, the process of generating administrative rules was curbed, with the new Act requiring more extensive procedures. 15 U.S.C. § 57a (2006). Rules required years of working through the required process before promulgation. Luehr, *supra*, at 328–29. Administrative guidelines, on the other hand, could be promulgated much more quickly, in part, because no public comment on the rules was required. *Id.* at 329 (citing 16 C.F.R. § 1.6 (2010)). Though no public comment was required, Luehr noted that the FTC’s hearings regarding the rules “drew over forty witnesses and more than one hundred written submissions.” *Id.* at 330 n.111.

⁹ 16 C.F.R. § 260.1 (2010).

“persons, partnerships, or corporations” from engaging in “deceptive acts or practices in or affecting commerce.”¹⁰ Should it find that NatureWorks’s compostable claim is deceptive, FTC may issue a complaint against NatureWorks, which would trigger a notice and hearing procedure, and could result in a cease and desist order.¹¹ However, such cease and desist orders are few and far between,¹² and retail shelves are replete with products bearing false or arguably deceptive claims.¹³ Meanwhile, consumers are left to try to make sense of sellers’ claims. Some, such as the purchasing chef above, blindly reach out to products making environmental marketing claims, hoping that the claims are valid. Others attend to the claims, but because they distrust them, they use different product attributes, such as price to distinguish between products, and still others have grown completely indifferent to environmental marketing claims, to the point where such claims are largely ignored.¹⁴

Since the early 1990s, scholars have addressed whether the regulation of environmental marketing claims is necessary and if so what form that regulation should take.¹⁵ In recent years, authors have observed that the Green Guides’ approach has not been effective in controlling the proliferation of false environmental marketing claims,¹⁶ and they have proposed a variety of remedies, which generally include some form of

¹⁰ 15 U.S.C. § 45(a)(2) (2006).

¹¹ *Id.* § 45(b).

¹² Parker Allred, Comment, *From the BCS to the BS: Why “Championship” Must Be Removed from the Bowl Championship Series*, 2010 UTAH L. REV. 183, 188 (2010); see also Jeffrey J. Minneti, *Is It Too Easy Being Green? A Behavioral Economics Approach to Determining Whether to Regulate Environmental Marketing Claims*, 55 LOY. L. REV. 653, 666–67 (2009).

¹³ Minneti, *supra* note 12, at 654 (“For its 2009 report of firms’ environmental marketing claims, TerraChoice surveyed 2,219 products at twenty four big box stores in the United States and Canada and found that 98% of the products ‘committed at least one of the Sins of Greenwashing.’” (quoting TERRACHOICE GRP., INC., THE SEVEN SINS OF GREENWASHING, ENVIRONMENTAL CLAIMS IN CONSUMER MARKETS, SUMMARY REPORT: NORTH AMERICA 2–3 (2009), available at <http://sinsofgreenwashing.org/findings/greenwashing-report-2009> (click on “Greenwashing Report 2009”))).

¹⁴ See MY H. BUI, *Environmental Marketing: A Model of Consumer Behavior*, in PROCEEDINGS OF THE ANNUAL MEETING OF THE ASSOCIATION OF COLLEGIATE MARKETING EDUCATORS 20, 24–26 (2005), available at <http://www.sbaer.uca.edu/research/acme/2005/04.pdf>.

¹⁵ See, e.g., John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information*, 79 MINN. L. REV. 245, 249 (1994) (asserting that increased governmental regulation is “unwise and unnecessary” because the market is able to close information gaps on its own); Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. REG. 147, 150 (1993) (“[S]tringent and legally binding regulations are the only route to effective industry compliance.”); George Richards, Note, *Environmental Labeling of Consumer Products: The Need for International Harmonization of Standards Governing Third-Party Certification Programs*, 7 GEO. INT’L ENVTL. L. REV. 235, 236 (1994) (urging the United States to promote private third-party eco-labeling schemes and become more involved in international efforts to develop eco-label standards).

¹⁶ Maria Savasta-Kennedy, *The Newest Hybrid: Notes Toward Standardized Certification of Carbon Offsets*, 34 N.C. INT’L L. & COM. REG. 851, 870–71 (2009); Jennifer Woods, Student Article, *Of Selling the Environment—Buyer Beware? An Evaluation of the Proposed F.T.C. Green Guides Revisions*, 21 LOY. CONSUMER L. REV. 75, 81 (2008).

increased regulation.¹⁷ In an earlier article, I argued that, given consumers bounded rationality and self-interest and the high information costs associated with determining the validity of environmental marketing claims, government regulation of the claims was appropriate, even when considering the cognitive loss that consumers would experience by not having to make the determination for themselves.¹⁸

The question is no longer whether to regulate environmental marketing claims, but how to effectively do so. Over the last two decades scholars have addressed attributes of effective environmental regulation and advocated a wide spectrum of regulatory approaches, from the traditional command-and-control model to a libertarian-paternalism approach.¹⁹ Some writers have used those approaches to advocate for modifications to the Green Guides.²⁰ This Article joins that conversation and accomplishes two goals. First, it harmonizes environmental regulation scholarship, resulting in the creation of a new form of regulation that it terms “Relational Integrity” regulation. Second, in light of the Relational Integrity approach to regulation, the Article examines public and private environmental claim regulatory schemes and suggests how those schemes could be more effective.

More specifically, in Part II, the Article summarizes recent scholarship on models for environmental regulation, including reflexive law, preference-directed regulation, product- and process-based regulation, and personal norm activation. Part II synthesizes that scholarship, resulting in criteria for Relational Integrity regulation. In light of the Relational Integrity model, Part III assesses several environmental marketing claim regulatory schemes, including existing and proposed legislation in the United States, recently enacted eco-label regulation in the European Union (EU), and a set of environmental marketing claim standards promulgated by the non-governmental International Organization for Standardization (ISO) and suggests ways that each could be improved. Part IV discusses the implications of the Relational Integrity criteria assessment and observes that although the ISO standards are a product of an international non-governmental entity, the standards fare as well as, if not better than, existing and proposed governmental regulation in reaching the Relational Integrity standard.

¹⁷ See Minneti, *supra* note 12, at 664; Savasta-Kennedy, *supra* note 16, at 876, 882–83 (2009) (asserting that the government should regulate the carbon offset market by standardizing applicable terms and overseeing private third-party certification of entities making carbon offset claims); Woods, *supra* note 16, at 93 (2008) (arguing that more effective regulation of environmental marketing claims would occur if the Green Guides scripted standard claims with objective, technical requirements and if the Guides were coupled with an eco-label scheme); *id.* at 90 (arguing that one possible solution would be for the FTC to join forces with the EPA and create a comprehensive regulatory system).

¹⁸ Minneti, *supra* note 12, at 656–57.

¹⁹ Grodsky, *supra* note 15, at 167–68 (traditional command-and-control model); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1184–1201 (2003) (libertarian-paternalism approach).

²⁰ Savasta-Kennedy, *supra* note 16, at 869–71; see Woods, *supra* note 16, at 93.

II. BUILDING A FRAMEWORK FOR RELATIONAL INTEGRITY REGULATION

A. Recent Environmental Regulation Scholarship

In recent years, environmental marketing regulation scholarship has expressed multiple points of view. Some writers, concerned with the rapid proliferation of false environmental marketing claims, have argued that the federal government should enact command-and-control legislation that would prohibit firms from making false claims.²¹ Others assert that market forces are capable of weeding out false claims without government intervention or that price, as opposed to a product label, is the more effective vehicle to communicate a product's environmental value.²² Striking a balance between command-and-control and pure market-based approaches, reflexive law advocates point out that regulation that draws firms into the regulatory process, beyond the mere opportunity to offer comment, is more effective because the regulation is more in tune with the market and firms are incentivized to innovate as they craft the regulation and conform to it.²³ Aware of the propensity for regulation to drive firm practice, there is concern that environmental marketing regulations consider more than just the attributes of a product on a retailer's shelf. Instead, regulation should also contemplate the product's life cycle—the use of environmental resources in the making and disposal of the product.²⁴ Finally, because environmental marketing regulation, at its core, is concerned with consumer purchase decisions, scholarship has investigated the psychology of consumer behavior and whether and under what conditions a consumer is likely to purchase a product bearing an environmental label because of the product's label.²⁵

²¹ See Grodsky, *supra* note 15, at 167–68; see also E. Howard Barnett, *Green with Envy: The FTC, the EPA, the States, and the Regulation of Environmental Marketing*, 1 ENVTL. LAW. 491, 494–95 (1995) (“[O]nly through uniform, effective regulatory action can green marking regulation help to promote reuse, recycling and other environmental policies.”); Kimberly C. Cavanagh, Comment, *It's a Lorax Kind of Market! But Is It a Sneetches Kind of Solution?: A Critical Review of Current Laissez-Faire Environmental Marketing Regulation*, 9 VILL. ENVTL. L.J. 133, 185, 223–24 (1998) (proposing that Congress authorize the FTC and EPA to partner and promulgate environmental marketing rules that preempt state regulatory schemes, draw in the expertise of private third-party certifiers, and coordinate with international organizations). For additional information on schools of thought regarding environmental regulation beyond the realm of environmental marketing claims, see Cameron Holley, *Facilitating Monitoring, Subverting Self-Interest and Limiting Discretion: Learning from “New” Forms of Accountability in Practice*, 35 COLUM. J. ENVTL. L. 127, 136, 156–202 (2010), which examines the “practical application” of accountability mechanisms at work in Australian programs that feature new environmental governance approaches.

²² See Church, *supra* note 15, at 274; Peter S. Menell, *Structuring a Market-Oriented Federal Eco-Information Policy*, 54 MD. L. REV. 1435, 1451 (1995).

²³ See Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1262, 1311–12, 1333 (1995).

²⁴ Grodsky, *supra* note 15, at 218–26.

²⁵ See Church, *supra* note 15, at 251–54 (describing the willingness of consumers to consider the environmental impacts of their purchasing decisions).

Since the early 1990s, authors such as Jamie A. Grodsky have argued that “[s]hortcomings in the current legal and regulatory system have allowed manufacturers to make misleading and unsubstantiated claims with virtual impunity.”²⁶ Grodsky has asserted that “stringent and legally binding regulations are the only route to effective industry compliance.”²⁷ Specifically, Grodsky argued for a two-pronged approach. First, he called upon Congress to authorize the United States Environmental Protection Agency (EPA) to promulgate binding standards for the use of environmental marketing terms, and sanctions for noncompliance with the standards.²⁸ Second, he argued for the creation of a third-party certification program that would identify products that make authentic environmental marketing claims.²⁹ Grodsky envisioned a public-private certification scheme whereby the federal government would provide seed money and participate in the selection of a board of directors that would provide technical expertise to private certification firms, which would be responsible for establishing testing criteria and managing certification programs.³⁰

Professor John M. Church has countered a government-sponsored regulatory approach; he acknowledges that manufacturers “may have an incentive to inflate, or even lie about, the environmental attributes of their products,”³¹ but he argues that increased regulation “is both unwise and unnecessary”³² because, on its own, the market is capable of supplying consumers with the information they need to make rational product purchasing decisions, and the market itself “best promotes environmental goals.”³³ The market’s ability to supply accurate product information arises from the economics of information.³⁴ The provision of product information is costly to sellers; thus, sellers will not provide perfect or complete product information.³⁵ The interpretation and understanding of product information is costly to buyers; thus, buyers will likewise not seek out perfect or complete product information.³⁶ Therefore, uncertainty about product claims remains.³⁷ Professor Church argues that such consumer uncertainty does not signal market failure; it is merely a byproduct of the market for information.³⁸ Consumer mistrust of sellers’ claims incentivizes sellers to make valid claims, and if such mistrust persists, sellers will certify their claims through private third-party certification schemes.³⁹

²⁶ Grodsky, *supra* note 15, at 150; *see also* Barnett, *supra* note 21, at 494; Cavanagh, *supra* note 21, at 150; Holley, *supra* note 21, at 204.

²⁷ Grodsky, *supra* note 15, at 150; *see also id.* at 167–72.

²⁸ *Id.* at 163.

²⁹ *Id.* at 193.

³⁰ *Id.* at 208.

³¹ Church, *supra* note 15, at 246.

³² *Id.* at 249.

³³ *Id.*

³⁴ *Id.* at 271–73.

³⁵ *Id.* at 273.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 294.

³⁹ *Id.* at 287.

Professor Church argues that sophisticated consumers will emerge to enforce truthful labeling practices.⁴⁰

Professor Church acknowledges that some regulation is needed—to the extent that federal regulation prohibits deceptive advertising, it is appropriate because the regulation sets a legal threshold for all marketers, thereby increasing the efficiency of the market.⁴¹ Additional regulation, through fixed definitions for environmental claims, eco-labels, and individual state regulation, merely advances the regulators' environmental agenda and manipulates the information market, resulting in greater inefficiencies.⁴²

Also advancing a market approach to environmental marketing claims, Professor Peter S. Menell argues that the price system informs consumers about the environmental impact of their purchasing decisions better than an eco-labeling scheme.⁴³ Professor Menell notes that regulation of environmental marketing claims serves two objectives: regulation compels firms to internalize the environmental impact of their products, and regulation informs consumers about firms' misleading product information.⁴⁴ In evaluating whether the price system or an eco-labeling program best fits these regulatory needs, Professor Menell established the following criteria:

- (1) comprehensibility—whether the information is understandable and easy to apply in making decisions;
- (2) universality—whether the information enables consumers to compare a broad range of choices in a comparative perspective;
- and (3) prioritization—whether the information enables consumers to make judgments about the importance of choosing one option relative to others.⁴⁵

⁴⁰ *Id.* at 293 (“A well functioning market will emerge when a critical mass of sophisticated consumers develops to force the firm . . . to supply products with desired environmental attributes and make truthful green claims about their products.” (internal footnote omitted)).

⁴¹ *See id.* at 320–21.

⁴² *Id.* at 320–23. On a related point, but not writing specifically about environmental marketing claims, Professor Richard L. Revesz has argued that environmental regulation ought to be decentralized because different regions of the country have different preferences for environmental regulation, the benefits of environmental regulation will vary across the country, and the costs of the regulation will vary from region to region, if not state to state. Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 536–38 (1997). Revesz further wrote that decentralization of environmental regulation would not result in a race to the bottom such that each state's laws were as lax as possible to accommodate business interests because when states compete with one another through environmental standards, the states are essentially competing for a good—the right to have a firm locate within the state. *Id.* at 538. As such, Revesz argues that the competition maximizes, not diminishes, social welfare. *Id.* In addition, game theory-type interactions among the states could lead to overregulation, a problem not dealt with by federal minimum standards. *Id.* at 539. Finally, even if federal regulation was promulgated, the states would find some other regulatory dimension on which to compete. *Id.* at 540.

⁴³ Menell, *supra* note 22, at 1462 (“Ecolabeling provides consumers with a detailed (and imperfect) view of but a few trees, but obscures the larger forest of options. By contrast, the price system offers consumers a simple, flexible, and readily available guide to the broad range of choices. While imperfect, it provides the better organizing framework for structuring eco-information policy.”).

⁴⁴ *Id.* at 1444–45, 1462.

⁴⁵ *Id.* at 1446.

Professor Menell argues that price is more comprehensible than an eco-label because price reflects many factors that affect the manufacture of a product, whereas an eco-label may oversimplify a product's environmental benefit, especially when the labeled product competes against other similar products that the labeling scheme has not evaluated.⁴⁶ Price is more universal, Professor Menell asserts, because the price impact of a good is readily available to consumers.⁴⁷ When a consumer purchases a washing machine, for example, the consumer is aware of the price of the washing machine and can track the cost of using the washing machine through repair costs and his or her monthly utility bills.⁴⁸ An eco-label, however, is far more restrictive because the labels generally reflect narrow product attributes and do not contemplate important factors such as variances in the consumer's manner of use.⁴⁹ Regarding prioritization, Professor Menell concludes that price is superior to an eco-label because the difference in price between products is obvious to consumers, allowing them to make strategic purchase decisions.⁵⁰ An eco-label, however, is often drawn from arbitrary product attributes and provides "no indication of the relative environmental importance of consumer choices."⁵¹ Professor Menell's price system hinges on two elements: 1) the government's ability to compel firms to internalize the environmental impact of their products so that price reflects actual costs of production and 2) the government's ability to educate consumers about the eco-information market and the downstream effects of their product purchases.⁵²

Looking away from command-and-control and market-based regulatory schemes, Professor Eric W. Orts argued that a reflexive approach to environmental regulation would be more responsive to environmental issues because it would draw upon the self-reflections of social institutions, such as businesses, to develop environmental management programs.⁵³ Professor Orts noted that command-and-control legislation has been characterized as heavy handed, blunt, and on occasion, "irrational."⁵⁴ Moreover, because environmental command-and-control law often depends on administrative

⁴⁶ *Id.* at 1454–55.

⁴⁷ *Id.* at 1456.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1455–56.

⁵⁰ *Id.* at 1457.

⁵¹ *Id.* at 1456.

⁵² *Id.* at 1442–45, 1462.

⁵³ Orts, *supra* note 23, at 1252–55. For a brief discussion of the German roots of reflexive law and a discussion about whether reflexive law may assist in the development of the legal tools needed to promote sustainable development, see Sanford E. Gaines, *Reflexive Law as a Legal Paradigm for Sustainable Development*, 10 BUFF. ENVTL. L.J. 1, 4–9 (2003); see also John C. Dernbach, *Navigating the U.S. Transition to Sustainability: Matching National Governance Challenges with Appropriate Legal Tools*, 44 TULSA L. REV. 93, 102–04 (2008), which discusses appropriate legal structures for sustainable development and describing reflexive law as one such tool; and Delcianna J. Winders, Note, *Combining Reflexive Law and False Advertising Law to Standardize "Cruelty-Free" Labeling of Cosmetics*, 81 N.Y.U. L. REV. 454, 476–86 (2006), which applies reflexive law to standardize "Cruelty-Free" marketing claims.

⁵⁴ Orts, *supra* note 23, at 1236 (citations omitted).

agencies for enforcement, its effect is limited by the enthusiasm, competence, and agenda of individual administrators, as well as their vulnerability to industry capture.⁵⁵ Professor Orts observed that market-based regulation also has shortcomings.⁵⁶ Frequently, such regulation requires the government to assist with the valuation of internalized property rights through the setting of tax rates, fees, or pollution levels and with the registration and oversight of rights through licensing and permitting procedures.⁵⁷ These actions necessarily entangle the government in a scheme that is designed to be free of the government's fingerprints.⁵⁸

In considering the stakeholders on environmental issues, reflexive law scholars emphasize that businesses do not exist on paper alone.⁵⁹ Instead, they express the collective will of a group of individuals, each of whom has a socially and politically motivated value system that may extend well beyond the bottom line.⁶⁰ Reflexive law aims to facilitate the alignment of firms' norms and value systems with environmentally responsible value systems without defining the specific norms or values to which firms must adhere.⁶¹ Instead, it provides firms with the information and processes they need to develop their own environmentally responsible management systems.⁶²

Thus, reflexive law differs from command-and-control legislation, because, unlike command-and-control legislation, which scripts out rules in ever-expanding and complex detail, reflexive law limits legislation to empowering social institutions to decide the best course of environmental management for themselves.⁶³ Reflexive law differs from market-based approaches because while market-based approaches draw upon the government to oversee the internalization of externalities through the private valuation and exchange of property rights, reflexive law limits government involvement to setting processes on the front end so that firms can use the process to self-regulate.⁶⁴ As such, reflexive law is "characteristically unpredictable," because once social institutions are empowered to give flesh to a predetermined process, regulators lose some control of the outcome.⁶⁵ A significant benefit of reflexive law is that it can relieve regulatory gridlock by siphoning pressure off government as the sole regulator through the enlistment of actual stakeholders in the regulatory process.⁶⁶ In commenting on eco-label schemes, Orts wrote that to the extent the schemes "generate internal self-reflective processes within businesses,

⁵⁵ *Id.* at 1236.

⁵⁶ *Id.* at 1243–47, 1251–52.

⁵⁷ *Id.* at 1244–45.

⁵⁸ *Id.* at 1245.

⁵⁹ Richard B. Stewart, *A New Generation of Environmental Regulation*, 29 CAP. U. L. REV. 21, 128 (2001).

⁶⁰ *Id.*

⁶¹ *Id.* at 128–29.

⁶² *Id.* at 128.

⁶³ Orts, *supra* note 23, at 1262.

⁶⁴ *Id.* at 1253–54; Stewart, *supra* note 59, at 127.

⁶⁵ Orts, *supra* note 23, at 1267.

⁶⁶ *Id.* at 1264.

as well as expand[] social communication about environmental products among consumers, environmental labels qualify as strongly reflexive.”⁶⁷ Orts proposed an environmental regulatory structure analogous to the European Eco-Management and Audit Scheme.⁶⁸ Essentially, the scheme would encourage businesses to “adopt systematic ways of thinking and operating in an environmentally responsible manner.”⁶⁹

Scholars continue to explore regulatory approaches beyond the traditional command-and-control and market-based schemes. Michael A. Livermore advocated focusing on a “libertarian paternalist”⁷⁰ approach to regulation that is “preference-directed.”⁷¹ Such regulation seeks to shape consumer purchasing behavior by providing information to consumers and creating or strengthening consumer norms.⁷² The regulatory scheme is grounded on revealed preferences, those that consumers actually exhibit in the marketplace as evidenced by empirically collected data.⁷³ By providing consumers with additional information, externalized costs of consumer purchases become clear, prompting consumers to select products and processes that minimize externalities and incentivizing firms to supply products and processes that are consistent with consumer demand.⁷⁴ Norm creation and strengthening occur when consumers internalize values—adherence to the values becomes auto-enforcing—and no external, government imposed enforcement is needed.⁷⁵ For example, information campaigns such as those concerning recycling have created and strengthened the societal norm to recycle.⁷⁶ Livermore asserts that preference-directed regulation would not only have a significant positive impact on consumer behavior,⁷⁷ but it may also break up the regulatory

⁶⁷ *Id.* at 1272.

⁶⁸ *Id.* at 1316. *See generally id.* at 1287–1313 (discussing the European Eco-Management and Audit Scheme).

⁶⁹ *Id.* at 1339.

⁷⁰ Sunstein & Thaler, *supra* note 19, at 1161. In their work, Professors Sunstein and Thaler promote an approach to regulation that is sensitive to the fact that consumers’ revealed preferences, as expressed through choices they make, may not reflect their actual preferences, if the consumers had perfect information. *Id.* In addition, the authors assert that the way information is communicated to consumers has an effect on the choices the consumers make. *Id.* Thus, as government seeks to inform consumers, inevitably its provision of information will have some paternalistic effect. *Id.* at 1166. The authors suggest that government should be aware of that effect and intentionally inform consumers in a way that will maximize consumer welfare. *Id.* Their approach is libertarian to the extent that it respects consumers’ freedom to choose. *Id.* at 1166–67. It is paternalistic to the extent that it suggests government should thoughtfully consider the default rules, anchors, and framing in the information government supplies to consumers. *Id.* at 1166, 1174–80.

⁷¹ Michael A. Livermore, *Reviving Environmental Protection: Preference-directed Regulation and Regulatory Ossification*, 25 VA. ENVTL. L.J. 311 (2007).

⁷² *Id.* at 327.

⁷³ *Id.* at 326.

⁷⁴ *Id.* at 330–31.

⁷⁵ *Id.* at 332–33.

⁷⁶ *Id.* at 333.

⁷⁷ *Id.* at 327 (stating that the “maximization of revealed preferences [is] welfare maximizing”).

ossification that has kept administrative agencies from acting in the environmental area.⁷⁸ Livermore argues that agency ossification is a product of the “stable political coalitions that form around existing regimes.”⁷⁹ Preference-directed regulation that provides information about the environmental impact of products and processes not only affects consumers’ purchasing decisions, it also affects consumers’ voting decisions to the extent the choices between candidates and proposals align themselves with consumers’ environmental goals.⁸⁰ In addition, preference-directed regulation makes the subject of the regulation more salient and available to consumers.⁸¹ As a result, “if a particular environmental issue is on the minds of consumers, it will likely also be on the minds of voters.”⁸² Because voters are more attuned to an environmental issue, they are more inclined to insist that their elected representatives act on environmental issues.⁸³ Further, to the extent that preference-directed regulation results in consensus on goals related to an issue, government actors are more likely to agree on solutions to the issue and act.⁸⁴ Legislative action, in turn, breaks up stagnation among the bureaucracy and can provide administrative agencies space to explore innovative and risk-taking efforts to accomplish legislative goals.⁸⁵

Preference-directed regulation and reflexive law are expressions of the same regulatory species. Essentially, preference-directed regulation is reflexive in nature because like reflexive law, it is rooted in preserving, protecting, and shaping choice, rather than removing, forcing or directing it.⁸⁶ The two approaches, however, emphasize different points. Where reflexive law is more concerned with facilitating the development of environmental management systems (EMSs) on the market’s supply-side, preference-directed law is oriented at the market’s demand side.⁸⁷ When the two forms are combined, a powerful regulatory scheme results: reflexive law facilitates a firm’s environmentally responsible manufacture of goods; preference-directed legislation provides consumers with accurate, valid, and trustworthy information about products’ environmental performance, resulting in greater demand for the firm’s products.

By explicitly informing consumers about the mean and aggregate effects of consumers’ consumption habits on the environment, Professor Michael P. Vandenbergh argues that regulation can “induce us to act because we believe we should, rather than because we fear legal or social

⁷⁸ *Id.* at 357.

⁷⁹ *Id.*

⁸⁰ *Id.* at 358.

⁸¹ *Id.*

⁸² *Id.* at 359.

⁸³ *Id.* at 360–61.

⁸⁴ *Id.* at 363.

⁸⁵ *Id.* at 365.

⁸⁶ See Stewart, *supra* note 59, at 128 (“[G]overnment should not act solely or even primarily as a policeman dictating what organizations must do or not do and punishing violators. It should create other incentives and support for organizations and their personnel to internalize environmental goals as goals of the organization.”).

⁸⁷ Livermore, *supra* note 71, at 326, 331, 374.

sanctions,⁸⁸ thereby creating a more effective preference-directed scheme.⁸⁹ Personal norm activation occurs when an individual is aware of the consequences of an act and the individual takes personal responsibility for those consequences.⁹⁰ Personal norm activation results in a sense of personal duty to act.⁹¹ The sense of duty or obligation to act induces action in conformity with the norm, as long as external costs such as financial burdens, physical effort, or social costs do not exceed the value of the action and the individual perceives that others are doing their fair share to alleviate the problem.⁹² Regulation can activate personal norms to the extent it creates awareness that the mean individual's action or aggregate individuals' actions create an environmental problem and a change in the behavior of the

⁸⁸ Michael P. Vandenbergh, *Order Without Social Norms: How Personal Norm Activation Can Protect the Environment*, 99 NW. U. L. REV. 1101, 1102 (2005).

⁸⁹ *Id.* at 1163–64. *But see* Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117, 152–55 (2009) (discussing the emergence of environmental norms and obstacles that may impede formation of the norms, including: 1) norms may not be “sufficiently robust or widely enough held” to give rise to responsible environmental behavior; 2) ambiguously formed norms may give rise to a lessened form of self guilt, which is the primary enforcement mechanism for personal norms; 3) if one observes others practicing irresponsible environmental behavior, bad environmental norms may take hold; and 4) norm creation and maintenance depends upon a positive sense of self-regard; individuals must connect a sense of pride with their responsible environmental behavior—absent such a sense of pride, personal norms may not hold). Professor Babcock notes that “norms are not easy to activate and enforce and even harder to create or change.” *Id.* at 155. She states that while government may have a role to play in “shaping the social meaning that forms the basis of a norm,” non-governmental actors, such as individuals that have the power of public persuasion, *id.* at 143–44, should play the primary role in norm creation and activation. *Id.* at 155; *cf.* Stephen M. Johnson, *Is Religion the Environment's Last Best Hope? Targeting Change in Individual Behavior Through Personal Norm Activation*, 24 J. ENVTL. L. & LITIG. 119, 121 (2009) (recommending that regulators consider involving religious organizations in the process of disclosing environmental information to consumer). *See generally* Victor B. Flatt, *Act Locally, Affect Globally: How Changing Social Norms to Influence the Private Sector Shows a Path to Using Local Government to Control Environmental Harms*, 35 B.C. ENVTL. AFF. L. REV. 455, 463–65; 473–78 (2008) (discussing the power of social norms and how local government can partner with public-private partnerships to create social norms that influence private behavior); Andrew Green, *Self Control, Individual Choice, and Climate Change*, 26 VA. ENVTL. L.J. 77 (2008) (examining “how bounded willpower may lead to individuals’ unwillingness or incapacity to take action that is in their long-term best interests” in the context of environmental regulation); Michael P. Vandenbergh, *Climate Change: The China Problem*, 81 S.C. L. REV. 905, 934–41 (2008) (discussing how private supply-chain contracts between firms in developed countries and China can be utilized to reduce carbon footprints).

⁹⁰ Vandenbergh, *supra* note 88, at 1120.

⁹¹ *Id.* at 1121.

⁹² *Id.* at 1121–22, 1124. Professor Babcock previously hypothesized that by providing consumers with public education, relevant sanctions, and market-based incentives, consumers would develop an energy conservation norm and express it. Babcock, *supra* note 89, at 155. However, in studying how to encourage consumers to purchase compact fluorescent lights (CFLs) to replace incandescent bulbs, Professor Babcock found, that problems associated with the CFLs, including their price, mercury content, unattractiveness and inconvenience, stood as barriers that kept consumers from purchasing the lights, in spite of their superior environmental performance. Hope M. Babcock, *Responsible Environmental Behavior, Energy Conservation, and Compact Fluorescent Bulbs*, 37 HOFSTRA L. REV. 943, 972 (2009).

mean individual or aggregate individuals will resolve the environmental problem.⁹³ Professor Vandenberg acknowledges that an individual's propensity to free-ride on others' efforts to solve environmental problems may limit regulation's ability to induce behavioral changes.⁹⁴ He cites a recent study however, that suggests that providing consumers with information about the aggregate effects of individual behavior may convince individuals to act cooperatively and not attempt to free-ride.⁹⁵ In assessing the kind of information regulations should provide to consumers, Professor Vandenberg discusses the results of studies that have examined the effect of eco-labels on consumer behavior.⁹⁶ He notes that those studies reveal that eco-labels have "little effect" on consumers' product choices.⁹⁷ Only when all or most of the products' factors are equal do consumers appear to discriminate between products based on eco-labels.⁹⁸ Professor Vandenberg argues that eco-labels fail because they are not capable of reporting the mean or aggregate effects of the product purchase on the environmental problem that the label targets, which is the very information needed to activate consumers' personal norms.⁹⁹ He advocates for the provision of more detailed information to consumers through vehicles such as the "Individual Toxic Release Inventory," which would inform consumers about the mean and aggregate effects of using household goods that release toxins into the environment, such as chemicals and lawn and garden equipment, thereby activating consumers' personal norms to reduce their release of the toxins.¹⁰⁰

Professor Douglas Kysar's article on consumer choice regulation identifies four trends that have emerged on the economic and regulatory landscape: 1) consumer spending has become closely associated with civic duty, 2) market-derived standards have displaced politically determined regulatory practices, 3) consumer product markets have become globalized, and 4) government, industry, and consumers are struggling for control over information describing the process by which products are manufactured; Professor Kysar's piece focuses on the fourth trend.¹⁰¹ He notes that government and industry are eager to have consumers consider only product-based distinctions because consumers are not sophisticated enough to appreciate process-based distinctions.¹⁰² Product-based attributes are those that are present in the end product, such as a plastic cup's propensity to be composted.¹⁰³ Process-based attributes are those that describe

⁹³ Vandenberg, *supra* note 88, at 1123–24.

⁹⁴ *See id.* at 1128.

⁹⁵ *Id.* at 1129.

⁹⁶ *Id.* at 1134.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1138.

¹⁰⁰ *Id.* at 1146, 1149.

¹⁰¹ Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 533 (2004).

¹⁰² *See id.* at 539.

¹⁰³ *See id.* at 536.

manufacturing conditions or methods.¹⁰⁴ For example, life-cycle analysis of a cup's manufacturing method describes the cup's process-based attributes because it considers the environmental impact of the raw materials and manufacturing process that produce the cup, not just the cup itself.¹⁰⁵ The idea is that when a consumer purchases a product, she not only purchases the end product, she also purchases the inputs and outputs associated with the product's manufacturing process. Professor Kysar argues that consumers can and do make purchasing decisions based on both product- and process-based characteristics.¹⁰⁶ To the extent regulatory schemes contemplate only product-based disclosures, the schemes do consumers a disservice because they may spotlight an end-product attribute even though the product's environmentally detrimental manufacturing process results in a net loss to the environment.¹⁰⁷

Acknowledging that environmental policy "critically depends" on the acquisition of data and its analysis, Professor Daniel C. Esty has argued that, with the advent of the Information Age, "important opportunities for improved environmental results are emerging."¹⁰⁸ Professor Esty writes that "as information gaps become less pervasive, institutional design options for addressing environmental problems will expand and we will be able to rethink our regulatory choices."¹⁰⁹ Professor Esty notes that recent scholarship on environmental economics has dealt with information gaps "only in passing."¹¹⁰ He highlights the role information technology can play in increasing the quality and quantity of information available to consumers, industry, and government.¹¹¹ For example, advances in nanotechnology and small-scale sensors have enhanced the detection and quantification of pollutants to the extent that soon, "virtually all emissions will be susceptible to tagging, tracking, and measurement at relatively low cost."¹¹² Professor Esty concedes that

while the complexity of the environmental realm will not diminish, our ability to make sense of what is going on and to tailor policy responses to particularized circumstances appears likely to increase rapidly, improving our capacity to fill information gaps in problem identification, casual specification, impact evaluation, and policy intervention.¹¹³

On the issue of environmental search costs, Professor Esty notes that the internet has markedly reduced search costs for industry and consumers

¹⁰⁴ See *id.* at 529.

¹⁰⁵ See *id.*

¹⁰⁶ *Id.* at 591.

¹⁰⁷ See *id.* at 536–38.

¹⁰⁸ Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 119 (2004).

¹⁰⁹ *Id.* at 119–20.

¹¹⁰ *Id.* at 128.

¹¹¹ See *id.* at 120–21.

¹¹² *Id.* at 157.

¹¹³ *Id.* at 160.

alike, resulting in opportunities for more efficient exchanges among industry players and more sophisticated decision-making for consumers.¹¹⁴ Professor Esty notes that a market-driven approach to regulation depends upon the assignment of property rights in the market, which in turn requires the ability to value and strategically exchange those rights.¹¹⁵ He argues that greater emphasis on “data-driven decisionmaking” will facilitate “better risk assessments and more sophisticated cost-benefit analysis.”¹¹⁶ In the context of command-and-control regulation, Professor Esty argues that information technologies will mitigate regulatory failures such as technical and administrative inefficiencies.¹¹⁷ Given the capacity of environmental information technology advances, Professor Esty asserts that “more policy emphasis should be given to driving data and analysis into the environmental rights marketplace, the regulatory process, and the hands of consumers.”¹¹⁸

B. The Genesis of Relational Integrity Regulation

The scholarship above suggests that efficiencies abound when regulators respect the role consumer choice plays in the effectiveness of environmental marketing regulation and invite the participation of relevant social institutions and stakeholders, such as industry, environmental, and consumer groups, into the regulatory process. But regulators must also recognize that consumer perception is malleable and that empirical evidence of consumers’ revealed preferences indicates that the way a choice is framed, the context of the choice, and the information provided to consumers about the choice each manipulate consumers’ preferences. Further, if regulators seek to change consumer behavior, their best course is to ignite consumers’ preferences by providing concrete information to consumers about the mean and aggregate effects of their choices. Moreover, to be most effective, the information should focus on attributes of the product and the process that created it. Given recent advances in information technology discussed above, accumulating, analyzing, and communicating relevant information to consumers should become more efficient.¹¹⁹

To effect real changes in consumer behavior, regulation of environmental marketing claims should be 1) reflexive, 2) preference-directed, 3) focused on both the production process and the product itself, and 4) aimed at activating consumers’ personal norms. When harmonized, these principles create a system of “Relational Integrity” regulation. The system is relational because it draws upon the synergies that exist when collaborative relationships exist between industry, consumers, government, the market, and the environment. The system has integrity because it is a product of the relevant stakeholders, it is grounded upon empirical studies

¹¹⁴ *Id.* at 175–76.

¹¹⁵ *Id.* at 178.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 182.

¹¹⁸ *Id.* at 197.

¹¹⁹ *See supra* text accompanying notes 109–18.

of consumers' revealed preferences, and it ignites and strengthens consumers' preferences for environmentally responsible products.

Because it accounts for market forces, Relational Integrity regulation overcomes the obstacles that Professor Church and Professor Menell discuss. Professor Church was concerned that any extra-market regulation would advance a government regulator's agenda over industry's and consumers' interests.¹²⁰ Professor Menell asserted that price was the most effective way to guide consumer choice because other regulatory schemes captured only arbitrary attributes of products and failed to provide enough consistent valid information to be trusted.¹²¹ Appropriate Relational Integrity regulation of environmental marketing claims must consider the characteristics of the market for products bearing such claims. Environmental marketing claims tend to fall into two groups: self-declared claims and third-party certified claims. Self-declared claims are those that a seller makes about its own products.¹²² Third-party certified claims are those that have been subjected to a third party's scrutiny and are generally reflected in some form of eco-label or seal.¹²³ One option for the Relational Integrity regulation would be to focus on the latter form—third-party certified claims. The premise of such a scheme would be that if the regulation could nudge consumers toward certified product claims and away from self-declared claims, the self-declared claims would eventually leave the market.¹²⁴

A second option for the Relational Integrity regulatory scheme would provide a reflexive certification process to shape consumer preferences, but it would also provide standards for self-declared claims and a process for removing false claims from the market. While a purely reflexive and preference-directed scheme may be preferred—because the environmental

¹²⁰ See Church, *supra* note 15, at 254–55, 320.

¹²¹ See Menell, *supra* note 22, at 1456–57.

¹²² See, e.g., Anne Pender, Louise Dunne & Frank J. Convery, ENVTL. PROT. AGENCY IR., THE USE AND REGULATION OF ENVIRONMENTAL CLAIMS AS A MEANS FOR PROMOTING SUSTAINABLE CONSUMPTION IN IRELAND 2004-SD-DS-12-M2: FINAL REPORT 2 (2007), available at <http://www.epa.ie/downloads/pubs/research/econ/pender%20report%20for%20web.pdf> (“[S]elf-declared product-related environmental claims—those made by manufacturers/retailers for their products but not subject to independent certification or verification.”).

¹²³ See, e.g., FED. TRADE COMM’N, COMPLYING WITH THE ENVIRONMENTAL MARKETING GUIDES 6 (2000), <http://business.ftc.gov/documents/bus42-complying-environmental-marketing-guides> (last visited Nov. 21, 2010) (“Environmental seals-of-approval, eco-seals and certifications from third-party organizations imply that a product is environmentally superior to other products. . . . If the seal-of-approval implies that a third party has certified the product, the certifying party must be truly independent from the advertiser and must have professional expertise in the area that is being certified.”).

¹²⁴ See generally Margaret Sova McCabe, *Loco Labels and Marketing Madness: Improving How Consumers Interpret Information in the American Food Economy*, 17 J. L. & POL’Y 493, 517–18 (2009) (noting that the purchase of third-party certified organic foods signals demand for organic products); Livermore, *supra* note 71, at 328–29 (discussing the effectiveness of the Energy Star labeling program at drawing consumers toward more energy efficient products). The inference in each source (and the text) is that as consumers are drawn toward certified products, they are drawn away from uncertified products and hence demand for the uncertified products decreases.

claim certification process is likely to be time intensive—self-declared claims will not depart the market quickly. The certification process is likely to be time intensive because it requires the establishment of certification entities, the determination of product categories, the examination of product production cycles, the development of certification criteria, the implementation of the certification process, and consumer education about the process. Thus, until the certification process captures a sufficient portion of the product market, a hybrid scheme would most effectively regulate the claims.

The Article next examines several current schemes that seek to regulate environmental marketing claims and tests the schemes against the four-part Relational Integrity criteria established above.

III. PUBLIC AND PRIVATE ENVIRONMENTAL MARKETING CLAIM REGULATORY SCHEMES

A. Assessment of the United States' Regulation of Environmental Marketing Claims

1. Regulation of Self-Declared Claims: The Green Guides

As noted above, federal law has directed FTC to prevent firms from engaging in deceptive acts or practices affecting commerce.¹²⁵ Acting on this mandate, FTC has promulgated the Green Guides, which provide guidance to firms and consumers about self-declared environmental marketing claims.¹²⁶ The Guides include general principles for environmental claims and specific definitions for several claims.¹²⁷ The general principles provide criteria for non-deceptive claims, including the criterion that, in the eyes of a consumer acting reasonably under the relevant circumstances, claims must be clear, prominently displayed, accurate, and precise.¹²⁸ In addition, firms making the claims must be able to substantiate the claims with competent and reliable evidence.¹²⁹ The Guides define commonly used self-declared claims such as “biodegradable,” “recyclable,” and “compostable,” and provide examples and negative examples of how those claims can be made.¹³⁰ Neither the general principles nor the definitions in the Guides are legal rules—they are safe harbors.¹³¹ As long as a firm makes a product claim

¹²⁵ 15 U.S.C. § 45(a)(2) (2006).

¹²⁶ Guides for the Use of Environmental Marketing Claims, 16 C.F.R. pt. 260 (2010). For a more thorough summary of the Guides, see Minneti, *supra* note 12, at 657–67.

¹²⁷ 16 C.F.R. §§ 260.6–.7 (2010).

¹²⁸ *Id.* § 260.6.

¹²⁹ *Id.* § 260.5.

¹³⁰ *Id.* § 260.7.

¹³¹ *Id.* § 260.3 (“These operations are intended to provide a “safe harbor” for marketers who want certainty about how to make environmental claims. They do not represent the only permissible approaches to qualifying a claim. The examples do not illustrate all possible acceptable claims or disclosures that would be permissible under Section 5.”).

that is consistent with the Guides' principles and definitions, the firm's claim will not be found deceptive.¹³² A claim that is inconsistent with the Guides "may result in corrective action" if FTC finds that the claim is deceptive under section 5 of the FTC Act.¹³³ In evaluating whether a claim is deceptive, FTC employs its Deception Policy, which provides that a claim is deceptive if the claim is likely to mislead a consumer acting reasonably under the circumstances, to the consumer's detriment.¹³⁴

In compliance with the National Environmental Policy Act,¹³⁵ FTC evaluated whether promulgation of the Green Guides required an environmental impact statement.¹³⁶ FTC concluded that no such statement was required because

the [G]uides would have no quantifiable environmental impact because the [G]uides are voluntary in nature, do not preempt inconsistent state laws, are based on the FTC's deception policy, and, when used in conjunction with the [FTC's] policy of case-by-case enforcement, are intended to aid compliance with section 5(a) of the FTC Act.¹³⁷

The Guides are subject to periodic review.¹³⁸ In 2007 and 2008, FTC sought public comment on the Guides; specifically, FTC asked for feedback on whether the Guides were still needed, whether the Guides were an efficient way to regulate claims, and whether any other definitions of more recent claims, such as carbon neutral or sustainable, ought to appear in the Guides.¹³⁹

2. *Eco-labels: Energy Guide and Energy Star*

The "Energy Guide" and "Energy Star" programs are eco-labeling schemes that identify and promote energy-efficient consumer products and buildings.¹⁴⁰ The schemes provide a set of federal energy standards for

¹³² See *id.* § 260.3. But see *id.* § 260.2(b) (noting that the Guides "do not preempt regulation of other federal agencies or of state and local bodies governing the use of environmental marketing claims").

¹³³ *Id.* § 260.1.

¹³⁴ *Id.* § 260.5 (noting that FTC employs this policy to determine if a claim is deceptive); Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to Hon. John D. Dingell, Chairman, Comm. on Energy and Commerce (Oct. 14, 1983), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

¹³⁵ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

¹³⁶ 16 C.F.R. § 260.8 (2010).

¹³⁷ *Id.*

¹³⁸ *Id.* § 260.4 (noting that FTC reviews the Guides as part of its general program to review all industry guides on an ongoing basis).

¹³⁹ *It's Too Easy Being Green: Defining Fair Green Marketing Principles Before the Subcomm. on Commerce, Trade, and Consumer Prot., H. Comm. on Energy and Commerce*, 111th Cong. 3–4 (2009) [hereinafter *Hearing*] (statement of James A. Kohm, Assoc. Dir., Enforcement Div., Bureau of Consumer Prot., Fed. Trade Comm'n), available at <http://www.ftc.gov/os/2009/06/P954501greenmarketing.pdf>.

¹⁴⁰ 42 U.S.C. § 6294a(a) (2006) (explaining the purpose of the "Energy Star" program); *id.* § 6294(c) (listing the Energy Guide label requirements); see Energy Star, Learn More About

covered products,¹⁴¹ an informational label (the Energy Guide),¹⁴² and for products that perform 10%–25% above the federal standard,¹⁴³ it provides a seal (the Energy Star).¹⁴⁴ Congress, FTC, EPA, and the Department Of Energy (DOE) share responsibilities in the programs.¹⁴⁵ Building upon work Congress began, EPA and DOE are charged with developing product categories and standard criteria; FTC is charged with generating rules regarding the eco-labels.¹⁴⁶ To date there are over sixty residential and commercial product categories, ranging from appliances to heating and cooling products, to roofs, windows, doors, and skylights.¹⁴⁷ The program requires the labeling of covered products,¹⁴⁸ unless the product is intended for export.¹⁴⁹ Generally, the Energy Guide label must state information such as the product's estimated annual operating cost, annual energy

Energy Guide, http://www.energystar.gov/index.cfm?c=appliances.pr_energy_guide (last visited Oct. 1, 2010) (noting that Energy Guide labels contain the information referenced in 42 U.S.C. § 6294(c)). Eco-label schemes have been promoted in other areas. *See, e.g.*, Matthew Connolly, *Thinking Globally, Acting Locally: Cleaning Up Global Aquaculture through Eco-Labeling in the United States*, 26 PUB. LAND & RESOURCES L. REV. 121 (2005) (proposing an eco-labeling scheme for aquaculture that would create a federally coordinated program that would inform consumers about whether aquatic farming products, such as fish, mollusks, or aquatic plants, have met minimum environmental production standards); Tracy Cooper, *Picture This: Promoting Sustainable Fisheries Through Eco-Labeling and Product Certification*, 10 OCEAN & COASTAL L.J. 1, 17–23 (2005) (discussing the utility of eco-labeling and product certification to promote marine fisheries sustainability); Misty L. Archambault, Note, *Making the Brand: Using Brand Management to Encourage Market Acceptance of Forestry Certification*, 81 N.Y.U. L. REV. 1400 (2006) (asserting that forestry certification schemes should treat their certification label as a brand and should “better distill” the information that the brand communicates and express more clearly to consumers the benefits of purchasing a branded product).

¹⁴¹ *See* 42 U.S.C. § 6294a(1) (2006).

¹⁴² *See id.* § 6294a(c).

¹⁴³ Energy Star, Product Specifications: Program Requirements, http://www.energystar.gov/index.cfm?c=product_specs.pt_product_specs (last visited Nov. 21, 2010).

¹⁴⁴ *See* 42 U.S.C. § 6294a(a), (c)(2) (2006) (noting that the Energy Star program seeks to “identify and promote” efficient products and referring to the Energy Star label as the way in which those identified products will be identified and promoted).

¹⁴⁵ *See id.* § 6294(g) (noting FTC authority with respect to the Energy Star program); *id.* § 6294a(b) (noting that EPA and DOE share certain responsibilities in the program); *id.* § 6295(b)(1) (showing that Congress is involved in the process by way of setting energy standards). EPA and DOE are exploring ways to highlight top performing products through a “Top Tier” program; the agencies are studying the marketplace, consumer preferences, and the best ways to communicate product information to consumers. *See* Energy Star, Proposal For COMMENT ADVANCING THE MARKET FOR TOP TIER ENERGY STAR QUALIFIED PRODUCTS, *available at* http://www.energystar.gov/ia/partners/downloads/Top_Tier_Stakeholder_Proposal.pdf.

¹⁴⁶ 42 U.S.C. § 6294(a)(1)–(2) (2006) (noting that FTC is to prescribe labeling rules); *id.* § 6294a(c)(4)–(5) (noting that EPA and DOE are responsible for establishing and updating product criteria and categories).

¹⁴⁷ U.S. DEPT. OF ENERGY, SELLING ENERGY EFFICIENT PRODUCTS TO THE FEDERAL GOVERNMENT 14–15 (2008), *available at* http://www1.eere.energy.gov/femp/pdfs/selling_eeproducts_to_gov.pdf; *see also* Energy Star, Product Specifications: Program Requirements, http://www.energystar.gov/index.cfm?c=product_specs.pt_product_specs (last visited Nov. 21, 2010).

¹⁴⁸ 42 U.S.C. § 6302(a)(1) (2006) (noting that it is illegal to distribute a covered Energy Star product unless the product is properly labeled).

¹⁴⁹ *Id.* § 6300.

consumption, and energy efficiency rating.¹⁵⁰ The label must further provide comparative information, such as ranges of annual operating costs and energy efficiency ratings for similar products, and the label must indicate where the labeled product stands along the ranges.¹⁵¹ To earn the Energy Star seal, EPA authorizes third parties to test the products to see that they sufficiently exceed federal standards, and EPA verifies the product testing.¹⁵² In setting and reviewing its standards, the Energy Star program considers the following brand principles and product attributes:

[p]rovide simple ways for consumers to find and select energy-saving products and practices; [d]eliver real energy savings to the consumer; [a]re fully commercialized and use proven technologies; [w]ill be cost effective, offering a payback in a reasonable period of time if there is a higher initial cost for the product; [w]ill provide the same, if not better, performance compared to the typical alternative; [p]rovide technology-neutral performance requirements across competing technologies.¹⁵³

Annually, the Energy Star program surveys the public to gauge their perceptions of the program.¹⁵⁴ The 2009 survey results indicated that 77% of households recognized the Energy Star seal, 81% demonstrated a “high” or “general” understanding of the seal’s purpose, and 80% of the households that recognized the seal and understood what it meant stated that the seal influenced their purchase decision “very much” or “somewhat.”¹⁵⁵

¹⁵⁰ *Id.* § 6294(c)(1)(A) (noting that each product that bears an Energy Star label must disclose the estimated annual operating cost of the product); 16 C.F.R. § 305.5 (2010) (noting that for covered products, there are procedures for determining the estimated annual energy consumption, the estimated annual operating costs, the energy efficiency ratings, and the efficacy factors); *see also id.* § 305.11(f)(8) (noting that labels for many products, such as refrigerators, must contain the estimated annual energy consumption, whereas for air conditioners, energy efficiency ratings must be included).

¹⁵¹ 42 U.S.C. § 6294(c)(1)(B) (2006) (noting that the label must contain “the range of estimated annual operating costs for covered products to which the rule applies”); *see* 16 C.F.R. § 305.10(a) (2010) (noting that energy efficiency ratings for all covered products are organized into an appendix that allows for comparison); *id.* § 305.11(a)(5)(iii)(D)(1) (noting that for a central air conditioner, for example, the Energy Star label must contain energy efficiency ratios for all cooling only central air conditioners); *id.* § 305.11(f)(6) (noting that the labels must have ranges of comparability).

¹⁵² *See* U.S. ENVTL. PROT. AGENCY, MAINTAINING THE VALUE OF ENERGY STAR: 2007 REPORT 28, 33, 38 (2007), *available at* http://www.energystar.gov/ia/partners/downloads/Integrity_Report_2007.pdf.

¹⁵³ *Id.* at 53.

¹⁵⁴ *Id.* at 47.

¹⁵⁵ OFFICE OF AIR & RADIATION, U.S. ENVTL. PROT. AGENCY, NATIONAL AWARENESS OF ENERGY STAR FOR 2009: ANALYSIS OF CEE HOUSEHOLD SURVEY, at ES1–ES2 (2010), *available at* http://www.cee1.org/eval/2009_ES_survey.pdf.

3. Proposed Eco-Label for Other Environmental Product Attributes

In 2008, U.S. Senator Diane Feinstein circulated a discussion draft of a bill entitled Eco-Labeling Act of 2008 (the Bill).¹⁵⁶ The Bill's stated purpose is "to establish a voluntary eco-label award program . . . to promote products that have the potential to reduce negative environmental impacts; and . . . to provide to consumers accurate, nondeceptive, and scientifically-based information and guidance on the environmental impact of products."¹⁵⁷ The Bill directs the EPA Administrator to appoint a thirteen member board composed of representatives from EPA, DOE, Office of the Federal Environmental Executive, labor unions, manufacturers, purchasers, environmental community, consumer groups, and scientific community.¹⁵⁸ The Board is charged with identifying eligible products and product groups, awarding eco-label distribution to product certification centers, monitoring the product certification centers, and certifying the product certification centers.¹⁵⁹

Eligible products are those that, at least once during the product's life cycle, have a significant environmental impact and present "significant potential to effect environmental improvements through consumer choice."¹⁶⁰ The Bill expressly excludes any "food, drug, or device" defined as such under the Federal Food, Drug, and Cosmetic Act,¹⁶¹ toxic substances, and substances that are likely to significantly harm the environment or consumers.¹⁶² An eligible product group is at least two types of eligible products that satisfy three criteria: they serve similar consumer purposes; they represent a significant volume of United States sales; and a significant portion of the sales volume is sold for final consumption.¹⁶³

A product certification center is a nongovernmental entity that has the knowledge and capability needed to distribute the eco-label, has no fiduciary or financial interest in the product the entity seeks to certify, and has been certified by the Board to act as a product certification center.¹⁶⁴ The product

¹⁵⁶ Eco-Labeling Act of 2008, S., 110th Cong. (2008), *available at* http://standards.nsf.org/apps/group_public/download.php/2802/Eco-Label%20bill%207-22-08.pdf. There are interesting parallels between labeling products that are environmentally responsible and labeling foods that are organically produced. For a discussion of the federal government's organic labeling program, see e.g., Margaret Sova McCabe, *Loco Labels and Marketing Madness: Improving How Consumers Interpret Information in the American Food Economy*, 17 J.L. & POL'Y 493, 501 (2009) which discusses the "struggle to find the proper balance between government regulation, reliable science, and consumers' demand for information" in food labeling programs; and Savasta-Kennedy, *supra* note 16, at 857, 871–76 which proposes a blend of government initiated standards and private certification entities to regulate the carbon offset market and drawing upon the lessons learned from the evolution of the regulation of the organic products market.

¹⁵⁷ Eco-Labeling Act of 2008 § 2.

¹⁵⁸ *Id.* §§ 3(1), 5(b)(1)–(10).

¹⁵⁹ *Id.* § 4(c).

¹⁶⁰ *Id.* § 3(4)(A).

¹⁶¹ *Id.* § 3(4)(B).

¹⁶² *Id.*

¹⁶³ *Id.* § 3(5).

¹⁶⁴ *Id.* § 3(11)(A).

certification centers are charged with tasks such as establishing “eco-label criteria and transparency, assessment, and verification requirements;” evaluating eligible products and product groups for compliance with eco-label requirements; submitting a budget; and recommending changes to the eco-label program.¹⁶⁵ The eco-label criteria that product certification centers establish must require only those adaptations that are “technically and economically feasible within a reasonable period of time” and the criteria must maximize the potential for environmental improvement over the lifecycle of the product.¹⁶⁶ The criteria must include a clear statement of the criteria’s valid time period, the “transparency, assessment, and verification requirements” for each eligible product group, specifications for the eligible product group’s environmental information and the presentation of that information on a website, and the “public comment period for draft eco-label criteria and requirements.”¹⁶⁷

In setting an eligible product or product group’s environmental requirements, the product certification center must use the criteria it has set to evaluate the products’ comparative environmental effects across various lifecycle stages; identify the categories of environmental impact that would have the most significant effect; consider, to the maximum extent technically feasible, the products’ preproduction lifecycle stage; and ensure that “not more than 35 percent of the types of eligible products in an eligible product group meet the requirements as of the date on which development of the environmental requirements begins.”¹⁶⁸ The product certification centers are also required to update the requirements on a periodic basis or if “more than 80 percent of the products in the eligible product group qualif[y] for the eco-label.”¹⁶⁹

Those seeking the eco-label for their products must pay a fee and apply for the eco-label through a fee structure and application process that the Board has designed.¹⁷⁰ Upon receipt of an application, the Board must refer the application to a product certification center capable of certifying the subject product.¹⁷¹ The product certification center has discretion to award the eco-label, upon verification that the product complies with the center’s eco-label criteria and environmental requirements and the application conforms to the center’s transparency, assessment, and verification requirements.¹⁷² If a center approves an application, the applicant must contract with the center, agreeing that use of the eco-label may be withdrawn, the eco-label criteria may be revised, and the applicant’s participation in the eco-label program is “without prejudice” to other U.S. environmental or regulatory requirements applicable to the product or its

¹⁶⁵ *Id.* § 6(b).

¹⁶⁶ *Id.* § 7(b)(1)(A).

¹⁶⁷ *Id.* § 7(b)(2).

¹⁶⁸ *Id.* § 8(b).

¹⁶⁹ *Id.* § 8(c).

¹⁷⁰ *Id.* § 9(a)(1).

¹⁷¹ *Id.* § 9(a)(4).

¹⁷² *Id.* § 9(b).

lifecycle.¹⁷³ The applicant must also pay an annual fee to cover the eco-label program's administration and promotion.¹⁷⁴

The Board must determine the eco-label's form; the Bill specifies that the eco-label have a clear, recognizable symbol and a reference number that connects the labeled product group with environmental information about that group.¹⁷⁵ The Bill requires that the Board consult with consumer associations about the eco-label's effectiveness and, in light of that consultation, propose modifications to the eco-label's form.¹⁷⁶

*B. Application of Relational Integrity Regulation Criteria to the U.S.
Environmental Regulatory Scheme*

Assessment of the U.S. regulatory scheme against the Relational Integrity regulation criteria set out in Part II will first examine two regulations currently in force, the Green Guides and the Energy Eco-Label program, and will then extend the analysis to Senator Feinstein's proposed eco-label bill.

1. Reflexive

To the extent that the Green Guides are voluntary in nature—they offer guidance to firms seeking to self-declare the environmental attributes of their products and inform consumers about how environmental claims ought to be used—they are reflexive.¹⁷⁷ The focus of the Guides is not on facilitating the development of processes and procedures in firms to ensure the production of environmentally responsible products; instead, the Guides focus on the claims firms make about their products.¹⁷⁸ The review, notice, and comment features of the Green Guides give regulated entities an opportunity to participate in the Green Guides' construction,¹⁷⁹ but FTC ultimately directs and promulgates the Guides.¹⁸⁰

The Energy Eco-Label program is less reflexive than the Green Guides because it requires that covered products bear the Energy Guide label,¹⁸¹ and EPA and DOE generate criteria for standards.¹⁸² While firms can voluntarily apply to have their products bear the Energy Star seal, the firms themselves play no role in determining the standards,¹⁸³ and nothing in the Energy Eco-Label program facilitates firms' EMSs. Both programs could be strengthened by requiring firms that choose to make environmental marketing claims to

¹⁷³ *Id.* § 11(a).

¹⁷⁴ *Id.* § 13(a).

¹⁷⁵ *Id.* § 10(a)–(b).

¹⁷⁶ *Id.* § 10(c).

¹⁷⁷ See *supra* text accompanying notes 60–67.

¹⁷⁸ See 16 C.F.R. §§ 260.2–.3 (2009).

¹⁷⁹ See 15 U.S.C. § 57a(b) (2006); 16 C.F.R. § 260.4 (2009).

¹⁸⁰ 15 U.S.C. § 57a(b) (2006).

¹⁸¹ See 42 U.S.C. § 6302(a)(5) (2006).

¹⁸² *Id.* § 6294a(a)–(c).

¹⁸³ See *id.* § 6294a(a).

also provide evidence of an EMS that guides the production of their products. Such an EMS may take the form of the widely used ISO 14001.¹⁸⁴

2. Preference-Directed

Because the Green Guides and Energy Eco-Label programs seek to guide consumer choice, rather than direct it, they are good examples of preference-directed legislation.¹⁸⁵ The Green Guides shape consumer purchasing behavior and environmental norms by providing definitions to a set of environmental claims that firms can safely make about their products.¹⁸⁶ The mere appearance of the claims on the products can give rise to or support consumers' beliefs about the importance of purchasing environmentally responsible products.¹⁸⁷ To the extent consumers understand and believe the product claims, the Guides assist in lowering the consumers' information costs as they seek out the highest performing products.¹⁸⁸ Additionally, as the Green Guides take behavioral economic principles such as consumers' bounded rationality and self-interest into account when selecting claims to define, the Guides will continue to have an effect on consumer purchase decisions.

The Energy Eco-Label program is even more preference-directed, because the scheme does more than merely offer a definition of a marketing claim—it lowers consumers' information costs by detailing critical product energy use information and comparing that information across other products.¹⁸⁹ The Energy Star seal offers additional information about a product's environmental attributes and assists in guiding consumers to the most energy efficient product.¹⁹⁰ The Energy Star's 2009 survey results suggest that the program is, in fact, shaping consumer behavior, since 80% of the surveyed households that recognized the seal and understood what it means stated that the seal influenced their purchase decisions.¹⁹¹

Together the Energy Eco-Label programs strengthen environmental norms by making an issue of products' environmental performance and giving consumers the information they need to distinguish between products based on environmental performance. As EPA selects new product categories and reconsiders the design, aesthetics, and content of product labels, it too must consider the malleable nature of consumers'

¹⁸⁴ See *infra* text accompanying notes 304–32 for further discussion of ISO 14001.

¹⁸⁵ See Livermore, *supra* note 71, at 314 (describing preference-directed legislation).

¹⁸⁶ See 16 C.F.R. § 260.3 (2010).

¹⁸⁷ See Barnett, *supra* note 21, at 493–94 (describing the impact of environmental market claims on consumer behavior).

¹⁸⁸ See Glenn Israel, Comment, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims*, 20 B.C. ENVTL. AFF. L. REV. 303, 304 (1993) (discussing how environmentally sound purchasing decisions result from accessible information).

¹⁸⁹ See 42 U.S.C. § 6294(c)(1) (2006) (stating the information requirements of the program).

¹⁹⁰ FED. TRADE COMM'N, FTC FACTS FOR CONSUMERS: ENERGY GUIDANCE (2008), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/real14.pdf> (providing an overview of the components of Energy Star seals).

¹⁹¹ OFFICE OF AIR & RADIATION, *supra* note 155, at 6.

bounded rationality and self-interest to ensure that EPA maximizes the program's effectiveness.

3. *Product- and Process-Based*

The Green Guides and Energy Eco-Label program are exclusively product-based regulatory schemes. The Green Guides focus on claims made about the environmental attributes of products;¹⁹² likewise, the Energy Eco-Label scheme focuses only on the products' energy consumption under normal use conditions.¹⁹³ Neither program examines the products in a holistic manner because neither considers the products' use of raw materials and energy in production, the waste produced during production, and the waste generated from the product during and after its useful life.¹⁹⁴ While some Green Guide definitions touch on post-consumer use concepts such as recyclability and compostability,¹⁹⁵ nowhere do the Guides provide direction for producers wishing to make holistic or life-cycle claims about their products. The Energy Eco-Label scheme focuses exclusively on energy consumption during normal product use;¹⁹⁶ as such it is merely a snapshot of one environmental attribute of labeled products. Like the Green Guides, the scheme does not facilitate or guide firms toward environmentally responsible product production and management; instead, the scheme merely focuses on the end-product that firms produce.¹⁹⁷

While life-cycle analysis is a time-consuming and expensive process, many firms choose to invest in the process because they believe it provides a more accurate picture of their products' environmental impacts.¹⁹⁸ By not including this process-based analysis in the Green Guides or Energy Eco-label program, the government has missed an opportunity to incentivize firms to perform the analysis and inform consumers about the fruit of firms' efforts.

4. *Personal Norm Activation*

Even at their highest and best use, the Green Guides do nothing to activate consumers' personal norms. The Guides provide safe harbors for marketers making a variety of environmental claims about their products, but without more information about the mean and aggregate effect of the claims on the environment, consumers are unlikely to internalize the value of purchasing products bearing even valid product claims. As noted above,

¹⁹² See 16 C.F.R. §§ 260.6–.7 (2010).

¹⁹³ See 42 U.S.C. § 6294(c)(1) (2006); 16 C.F.R. § 305.11 (2010) (stating labeling requirements).

¹⁹⁴ See 42 U.S.C. § 6291 (2006) (defining energy use as including only that energy that is directly consumed at the point of use by consumers).

¹⁹⁵ See 16 C.F.R. § 260.7(b)–(c) (2010).

¹⁹⁶ See 42 U.S.C. § 6294(a)(2)(C)(i) (2006); 16 C.F.R. § 305.11 (2010).

¹⁹⁷ See 42 U.S.C. § 6291(4) (2006).

¹⁹⁸ SCIENTIFIC APPLICATIONS INT'L CORP., LIFE CYCLE ASSESSMENT: PRINCIPLES AND PRACTICE 1–5 (2006), available at <http://www.epa.gov/nrmrl/lcaccess/pdfs/600r06060.pdf>.

studies suggest that a mere claim of recyclability, for example, is unlikely to convince a consumer to purchase the product because consumers do not know what the claim means and the consumers may not trust the claim.¹⁹⁹ Thus, the consumers are unlikely to intentionally and systematically find and purchase products bearing Green Guide-approved claims. Instead, price and other product attributes will drive their decisions.²⁰⁰ Because the Energy Eco-Labels, specifically the Energy Guide label, provides information on average annual energy costs, cost savings, and energy efficiency ratings that is comparable across covered products,²⁰¹ the Energy Guide label has the potential to activate consumers' personal norms.

Consumers can infer from the information provided that purchasing a product with low energy costs and high efficiency ratings will reduce his energy bill, and he can extrapolate the effect of the energy savings to the benefits that would flow to the environment. However, the program's own survey demonstrates that the presence of an Energy Star seal on a product is only somewhat or very much likely to influence consumer purchase decisions.²⁰² Perhaps if the seal or label provided additional information about the product's mean and aggregate effect on the environment, such as how much less oil would have to be imported or how much less fossil fuel would have to be burned if a mean and aggregate number of people purchased similarly rated products, the consumer would be more likely to purchase the product. In addition, the Energy Star seal gives no indication how much more superior Energy Star rated products are than non-sealed products.²⁰³ Consumers may be shocked to learn that the difference is no more than 10%–25% better than the federal standard, thus rendering the seal less meaningful.

*C. Application of Relational Integrity Regulation Criteria to the Discussion
Draft of the Eco-Labeling Act of 2008*

1. Reflexive

The Eco-Labeling Act (the Bill) expresses the same spirit of reflexive legislation as that of the Green Guides and Energy Eco-Label programs because like those programs, the Bill is voluntary and it seeks to guide rather than direct consumer product choices.²⁰⁴ Moreover, the composition of the eco-label board brings together representatives from industry, trade, environmental groups, consumer groups, and government.²⁰⁵ The Bill empowers the Board to essentially design and implement the eco-label

¹⁹⁹ See *supra* text accompanying notes 88–100.

²⁰⁰ Vandenbergh, *supra* note 88, at 1134–35.

²⁰¹ See 42 U.S.C. § 6294(c)(1) (2006); 16 C.F.R. § 305.11(f)(5), (6), (8) (2010).

²⁰² OFFICE OF AIR & RADIATION, *supra* note 155, at 19.

²⁰³ FED. TRADE COMM'N, *supra* note 190 (illustrating what information Energy Star labels include).

²⁰⁴ Eco-Labeling Act of 2008, S., 110th Cong. § 2(1)–(2) (2008).

²⁰⁵ See *id.* §§ 3(1), 5(b).

program.²⁰⁶ The Board-approved certification centers further the Bill's reflexive nature because the centers are non-governmental entities that have the authority to generate product categories and label criteria and the ability to award the label to qualified products.²⁰⁷ By allowing non-governmental entities to make these decisions and permitting competition among the certification centers, the Bill brings the regulation of environmental marketing claims into the marketplace where market efficiencies can fuel progress under the Board's oversight, ensuring that the centers' decisions are a product of a reflective, environmentally responsible process.

By extending the certification centers' review of a firm's label application beyond the product and its production process to the firm itself, the Bill may be able to ignite even more environmentally responsible firm behavior. As with the product label provisions, the Bill need not mandate a specific code of firm environmental conduct, but requiring firms to generate an EMS may inspire them to take steps to align firm-wide environmental goals with society's environmental goals. Doing so would empower firms to perceive themselves as not just producers of environmentally sound products but also as participants in a national effort to act in an environmentally responsible manner.

2. Preference-Directed

The Bill is a strong example of preference-directed legislation because like existing environmental marketing legislation, it too seeks to guide consumers to purchase products bearing valid environmental marketing claims, without compelling them to do so.²⁰⁸ The Bill is superior to the Green Guides because while it is voluntary in nature, it requires firms that seek to use the label to obtain third-party certification of product claims.²⁰⁹ Such a process instills trust in the minds of consumers that the product claiming to have earned the label has in fact earned the label.

Another significant attribute of the Bill is that it permits the label to be awarded to only top performing environmental products.²¹⁰ Unlike the Energy Star seal which represents performance only 10%–25% better than the federal standards, the eco-label would only go to those products whose environmental performance is in the top 35% of products within the product category.²¹¹ Such a requirement incentivizes firms to innovate so that their products can obtain and maintain labeled status, and it ensures that the labeled products consumers see on retail shelves are the highest performing products.

²⁰⁶ See *id.* § 4(c)(1)–(4).

²⁰⁷ *Id.* §§ 3(11)(A), 6(b).

²⁰⁸ *Id.* § 2.

²⁰⁹ See *id.* §§ 2, 9.

²¹⁰ See *id.* § 3(4)(A).

²¹¹ *Id.* § 8(b)(4); Energy Star, Product Specifications: Program Requirements, http://www.energystar.gov/index.cfm?c=product_specs.pt_product_specs (last visited Nov. 21, 2010).

3. Product- and Process-Based

Unlike existing U.S. environmental marketing legislation, the Bill is expressly product- and process-based. The Bill is product-based because it applies a label to the end product.²¹² The Bill is process-based because to earn the label, firms must demonstrate that at least once during their products' life cycle, the products have "significant environmental impact."²¹³ When setting criteria to award the eco-label to a product category, the Board must consider the environmental effect of the product category across its life-cycle stages and determine which of those stages have the most significant environmental impact.²¹⁴ It is upon those stages that the criteria are built.²¹⁵ Consequently, the scheme is focused not only on the end product, but also on the process of creating and disposing of the product.

4. Personal Norm Activation

The Bill has the potential to activate personal norms, but no provisions ensure that such activation will occur. The Bill contemplates labeling a product with a symbol and a reference number, but it leaves decisions about the symbol's form and other label information to the Board.²¹⁶ Unless the label communicates in specific terms how the consumer's product purchase will benefit the environment, consumers are unlikely to discriminate between products based on the label.²¹⁷ Information costs of determining the label's precise meaning and significance would likely be too high, leaving the consumer to discriminate between products based on price. With advances in technology and a dose of creativity, a labeling scheme that provides consumers with concrete and specific information about a product's environmental benefits (or the hazards of purchasing lower performing products) could be developed and implemented.²¹⁸ Given the costs associated with implementing an eco-label scheme and what we know about consumer purchasing behavior, failing to include such information on the product label would appear to be a waste of resources.

²¹² See Eco-Labeling Act of 2008, S., 110th Cong. § 2 (2008).

²¹³ *Id.* § 3(4)(A).

²¹⁴ *Id.* § 8(b)(1)–(2).

²¹⁵ See *id.* § 8(a)–(b).

²¹⁶ *Id.* § 10(a)–(b).

²¹⁷ See Vandenberg, *supra* note 88, at 1132, 1138.

²¹⁸ See Esty, *supra* note 108, at 156; *supra* text accompanying notes 101–18.

D. Assessment of the European Union's Regulation of Environmental Marketing Claims

1. The European Union's Eco-Label Scheme

Since 1992, the EU has had a voluntary eco-label scheme in place.²¹⁹ Article 20 of Regulation No. 1980/2000 compelled the European Commission (EC) to review the eco-label scheme and propose appropriate amendments.²²⁰ That process began in 2002, culminating with the 2008 publication of an Impact Assessment, which reported the EC's findings.²²¹ The Impact Assessment concluded that the scheme constructed under Regulation 1980/2000, was "unable to achieve its objectives [because] it suffers from low awareness of the label and low uptake by industry resulting amongst others from excessively bureaucratic processes and management."²²²

Faced with the choice of continuing the current scheme, phasing out the scheme, or revising the scheme, the EC chose to revise the scheme.²²³ In deciding to revise the scheme, the EC noted that an eco-label tends to increase the demand for products with strong environmental performance and it incentivizes firms to innovate their product design and production process to earn the eco-label award.²²⁴ The EC also cited a 2004 study, reporting the direct and indirect benefit of an eco-label on the environment based on the percent of industry eco-label uptake.²²⁵ The study reported the following direct savings:²²⁶

²¹⁹ *Accompanying Document to the Revision of Regulation (EC) No. 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a Revised Community Eco-Label Award Scheme: Impact Assessment*, at 4, SEC (2008) XXX final (2008) [hereinafter *Impact Assessment*].

²²⁰ Regulation of the European Parliament and of the Council 1980/2000, art. 20, 2000 O.J. (L 237) 1 (EC).

²²¹ *Impact Assessment*, *supra* note 219, at 4.

²²² *Id.* The Commission noted that "48% of Europeans do not know what the logo means while only 11% correctly said that it is a label for ecological products and services." *Id.* at 14. Since its inception, 470 companies have used the eco-label; by comparison, Germany's Blue Angel has attracted 560 companies and the Nordic Swan has captured 680. *Id.* at 15. In a presentation at the Global Ecolabelling Network 2009 Annual Meeting, a representative from the EC noted that the EU label has 26 product groups, and has granted 958 licenses, covering 20,000 products and generating over 4.5 billion in sales per year. Rugile Balzekaite, *The New EU Ecolabel Regulation at Global Ecolabelling Network 2009 Annual Meeting* (Nov. 19, 2009) (unpublished powerpoint presentation), available at http://www.globalecolabelling.net/pdf/09kobejapan_revision_of_ecolabel_presentation_final.pdf. The EC notes that the Blue Angel has 80 product groups and the Nordic Swan 60. *Impact Assessment*, *supra* note 219, at 16. The previous regulatory scheme made it possible to produce only one or two product groups per year; even simple revisions to label criteria took years to complete due to the bureaucratic and political process required. *Id.*

²²³ *Impact Assessment*, *supra* note 219, at 4.

²²⁴ *Id.* at 28.

²²⁵ *Id.* at 29.

²²⁶ *Id.* (citing AEA TECH, *THE DIRECT AND INDIRECT BENEFITS OF THE EUROPEAN ECOLABEL – FINAL REPORT* (2004), available at http://ec.europa.eu/environment/ecolabel/about_ecolabel/reports/benefitsfinalreport_1104.pdf).

Resource Saved	5% Uptake	20% Uptake	50% Uptake
Electricity (GWh)	14,700	59,000	147,600
CO2 Produced from Energy Use (tonnes)	9,318,000	37,270,000	93,175,000
Water Use (megalitres)	12,285,000	49,138,000	122,846,000
Reduced Hazardous Substance Use (tonnes)	13,800	55,400	138,400
Material Savings (tonnes)	530,700	2,122,700	5,306,700
Reduced Discharges to Water (tonnes)	30,400	121,700	304,200
Reduced Air Pollution (tonnes)	17,500	70,100	175,300

The EC noted that the strongest economic benefit arising from an eco-labeling scheme is the “promotion of innovation in both process design and production techniques” that arises when consumers demand green products.²²⁷ To the extent consumers are aware of and trust the eco-label, they are likely to demand products bearing it.²²⁸ Thus, revisions to the eco-label scheme include measures to increase both the supply and the demand of the eco-label.²²⁹ Specifically, the measures include: increasing the label’s scope and the number of product groups, encouraging harmonization of the scheme with other national and regional eco-labeling schemes, speeding up the criteria development process, simplifying assessment and verification schemes, abolishing the annual fee assessed against label users, and increasing eco-label marketing efforts.²³⁰

²²⁷ *Id.* at 32.

²²⁸ *Id.*

²²⁹ *See id.* at 4–5.

²³⁰ *See id.* The annual fee was a percentage of sales; firms were also required to pay testing and verification costs, which amounted to as much as 10,000. *Id.* at 16. The EU’s revisions to its eco-labeling scheme are instructive, especially as the United States considers its next steps in environmental marketing claim regulation. The EU recognizes the economic and environmental benefit of an eco-labeling scheme, but it has also noted that it must reduce the barriers that keep sellers from using the scheme and build consumer trust and awareness in the label. *See id.* at 4–5, 28–32. To reduce barriers, the revised Regulation lowers the fixed costs and transaction costs associated with the scheme. *See id.* at 26, 46. By abolishing the annual fee and maintaining only an application fee, the Regulation invites more marketers. *Id.* at 17, 18, 42 (stating that removing cost as a major application deterrent will encourage applications and increase the number of companies available for marketing). The revised Regulation lowers transaction costs for firms and consumers in several ways. By allowing industry stakeholders to play a larger role in criteria development, the label will reflect market forces and industry expertise, resulting in more technologically and scientifically feasible criteria. *See id.* at 24–25. Acceptance of criteria developed under ISO principles and procedures and the rapid adoption of other Member State label criteria will allow the EC to build on the sound work of others, instead of repeating it. *See id.* at 39–41. Streamlining the criteria development and adoption process through collapsing the

a. Eco-Label Scope

Council Regulation No 66/2010 (the Regulation)²³¹ implements the EC's measures and replaces the previous legislation.²³² The Regulation increases the scope of the eco-label because it applies to goods, including food and feed, and services, regardless of whether the goods or services are acquired for payment or free of charge and excludes only medicinal products for human or veterinary use and medical devices.²³³

b. Eco-Label Actors

By streamlining the bureaucratic process, the Regulation should lead to increased product groups and quicker criteria development. The Regulation directs each Member State to designate at least one "Competent Body" that arises from within the state's government or as a nongovernmental entity and ensure that the Competent Body is operational.²³⁴ A Competent Body must be independent of the organization or product it assesses, it must have the necessary technical expertise, experience, and means to perform its duties, and the remuneration of the Body's top management and assessment personnel must "not depend upon the number of assessments completed or the results of those assessments."²³⁵ The Competent Body is charged with receiving applications and fees from those who wish to use the eco-label, collecting supporting documentation, assessing conformity with the eco-label criteria, awarding the eco-label, contracting with the eco-label user, and monitoring the eco-label users' ongoing compliance with the relevant eco-label

decision-making bureaucracy will reduce costs by making the process more efficient. *See id.* at 42. The revised Regulation continues to require third-party certification and verification of products, which adds a layer of transaction costs to the labeling process. *Id.* However, for many constituencies—especially consumer and environmental groups—third party certification is the cornerstone of label credibility because it ensures that the label user has, in fact, conformed his product and process to the label's criteria. *See id.* Although label users may dislike the notion of on-the-spot inspections, such independent verification of ongoing product and process conformity to label criteria is essential to building trust in the label. For consumers, the Regulation lowers transaction costs by lowering the information costs consumers expend in selecting high performing environmental products. *See id.* at 12, 37. The revised Regulation lowers information costs by increasing the eco-label's visibility through educational and promotional efforts, providing more information on the label itself, including the opportunity to identify three key environmental attributes of the product, and providing a registry of labeled products on the EU website. *See* Council Regulation 66/2010 on the EU Ecolabel, art. 12, 2010 O.J. (L 27) 1, 7 (EC). In addition to lowering information costs for consumers, these measures will also increase consumer awareness of the label over time, and build consumer trust in the label and labeled products.

²³¹ Council Regulation 66/2010 on the EU Ecolabel, *supra* note 230.

²³² *Id.* ¶ 19.

²³³ *Compare id.* (describing the scope of the regulation as applying to "any goods or services which are supplied for distribution, consumption, or use on the Community market), *with* Regulation of the European Parliament and of the Council 1980/2000, O.J. (L 237) 3 (excluding all food, drink, and pharmaceuticals from the scope of the regulation).

²³⁴ Council Regulation 66/2010 on the EU Ecolabel, *supra* note 230, art. 4.

²³⁵ *Id.* at annex V.

criteria.²³⁶ In addition, Competent Bodies must, at least twice annually, participate in a working group to exchange information and experiences regarding the process of awarding eco-labels and monitoring their use.²³⁷

The Regulation requires the EC to establish an eco-labeling board (EUEB), made up of representatives of Competent Bodies from all Member States.²³⁸ The EC must ensure that the EUEB observes a balanced participation of interested parties, including representatives from industry and environmental and consumer groups.²³⁹ The EUEB serves in a consultative role on the development and revision of the eco-label criteria and the promotion of the eco-label.²⁴⁰

c. Development of Eco-Label Criteria

The EC, Member States, Competent Bodies, and other stakeholders, upon consultation with the EUEB, may initiate and lead eco-label criteria development and revision.²⁴¹ The previous regulation permitted only the EC or the EUEB to initiate and lead criteria development.²⁴² By allowing other stakeholders to play a lead role in the development of criteria, the Regulation incentivizes industry, consumer, and environmental groups to play a larger role in the process. The procedure for developing and revising eco-label criteria includes a standard procedure, a shortened procedure for eco-label schemes developed consistent with ISO 14024, and a shortened procedure for non-substantial criteria revisions.²⁴³

The standard procedure requires submission to the EC and EUEB of preliminary, technical, and final reports, draft criteria, and manuals for eco-label users and authorities that award public contracts.²⁴⁴ The public procurement manuals are an important part of the revised eco-label regulation because they provide governments with the product specifications they need to make informed purchasing decisions.²⁴⁵ The preliminary report must address, among other topics, discussion of the product group's environmental benefits, and based on assessment of its life cycle, the product group's environmental impacts; potential trade issues; other laws and eco-label criteria applicable to the product group; and assessment of the product group's current and future market penetration.²⁴⁶ The preliminary report must be posted on the EC's eco-label website for comment and reference while the criteria is developed.²⁴⁷

²³⁶ *Id.* arts. 9–10.

²³⁷ *Id.* art. 13.

²³⁸ *Id.* art. 5.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* art. 7.

²⁴² *Impact Assessment*, *supra* note 219, at 11.

²⁴³ Council Regulation 66/2010 on the EU Ecolabel, *supra* note 230, annex I.

²⁴⁴ *Id.* art. 7.

²⁴⁵ *Impact Assessment*, *supra* note 219, at 41.

²⁴⁶ Council Regulation 66/2010 on the EU Ecolabel, *supra* note 230, annex I.

²⁴⁷ *Id.*

Draft criteria must be based on indicators such as the environmental performance of the best products available; the product's most significant environmental impacts; and the product's life cycle; and the criteria must guarantee harmonization with existing legislation.²⁴⁸ The technical report must include, among other elements, a scientific explanation for the criteria; a comparison between the aggregate environmental performance of products satisfying the criteria and products not conforming to the criteria; and relevant test methods for satisfying the criteria.²⁴⁹ The criteria and technical report must be posted on the EC's eco-label website for public comment.²⁵⁰ At least two working group meetings must be held so interested parties have an opportunity to offer comments on the criteria.²⁵¹ The final report must include "[c]lear responses to all comments and proposals," a list of interested parties, an executive summary of the criteria, and the three key environmental characteristics for the product group, among other elements.²⁵²

In an effort to harmonize criteria with industry standards, the Regulation provides a shortened procedure for a product group that is subject to criteria developed by an ISO 14024 type I eco-labeling scheme.²⁵³ The shortened procedure permits any Member State to submit a single report, which demonstrates that the Regulation's criteria development procedures have been followed.²⁵⁴ If the EC is satisfied with the report, it posts the report on the EC's eco-label website for public comment.²⁵⁵ Responses must be provided to each comment.²⁵⁶ No working group meeting is required on the criteria, unless a Member State requests it.²⁵⁷

In a further effort to harmonize the EU scheme with existing eco-label programs, the Regulation provides that once the EC has adopted criteria for a product group, an officially recognized national or regional ISO 14024 type I labeling scheme that has not yet covered the product group may extend its scheme to the product group, but the national or regional scheme's criteria must be at least as strict as the EU criteria.²⁵⁸

To speed up the evolutionary process of criteria development, an additional shortened procedure is in place; when criteria undergo a non-substantial revision, the EC prepares a single report that explains why the revision is not substantial.²⁵⁹ The report must include the revised criteria,

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* art. 7, annex I; see INT'L ORG. FOR STANDARDIZATION, REFERENCE NO. ISO 14024:1999(E), ENVIRONMENTAL LABELS AND DECLARATIONS—TYPE I ENVIRONMENTAL LABELING—PRINCIPLES AND PROCEDURES 3.1 (1999).

²⁵⁴ Council Regulation 66/2010 on the EU Ecolabel, *supra* note 230, annex I.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* art. 11.

²⁵⁹ *Id.* annex I.

updates to the product group's market data, current technical data, and a quantitative estimate of the effect the criteria will have on the product group's environmental performance compared to the environmental performance of average products on the market.²⁶⁰

d. Adoption of Eco-Label Criteria

After consulting with the EUEB, the EC adopts eco-label criteria, which are then published in the Official Journal of the European Union.²⁶¹ In addition to adopting criteria, the EC must also establish assessment requirements for specific products, specify three key environmental characteristics, which may be displayed on the eco-label, specify criteria validity periods for each product group, and indicate the degree of product variability permitted during the criteria validity period.²⁶² The criteria must consider the whole life cycle of products, including: 1) the most significant environmental impacts, 2) using alternative materials or designs to substitute hazardous substances with safer substances, and 3) criteria established for other eco-labels, particularly officially recognized ISO 14024 type I labels.²⁶³

The Regulation provides for a number of reporting and study deadlines to ensure that Member States and the EC comply with the Regulation's provisions. By February 19, 2011, the EUEB and EC are required to have a working plan in place that includes a non-exhaustive list of product groups and a strategy for developing criteria.²⁶⁴ By December 31, 2011, the EC must undertake a study of the feasibility of developing reliable environmental performance criteria for food and feed products.²⁶⁵ By February 19, 2015, the EC must report to the European Parliament on the implementation of the Regulation.²⁶⁶

The EC has no direct enforcement mechanism to ensure that parties charged with responsibilities under the Regulation, such as Member States and Competent Bodies, conform their actions to the Regulation.²⁶⁷ It cannot inspect, monitor, or sue facilities within Member States.²⁶⁸ Further, citizens cannot bring suit against non-compliant regulated entities and can only bring suit against governing bodies in limited circumstances.²⁶⁹ Thus,

²⁶⁰ *Id.*

²⁶¹ *Id.* art. 8.

²⁶² *Id.*

²⁶³ *Id.* art. 6.

²⁶⁴ *Id.* art. 7.

²⁶⁵ *Id.* art. 6.

²⁶⁶ *Id.* art. 14.

²⁶⁷ See Christoph Demmke, *Implementation of Environmental Policy and Law in the United States and the European Union*, in GREEN GIANTS?: ENVIRONMENTAL POLICIES OF THE UNITED STATES AND THE EUROPEAN UNION 135, 139 (Norman J. Vig & Michael G. Faure eds., 2004).

²⁶⁸ *Id.* at 140.

²⁶⁹ *Id.* at 143; see also Clifford Rechtshaffen, *Shining the Spotlight on European Union Environmental Compliance*, PACE ENVTL. L. REV. 161, 165 (2007) (stating that citizen enforcement of EU directives is possible only in highly circumscribed situations).

implementation of the Regulation essentially depends upon cooperation among Member States, Competent Bodies, and other interested parties.

Interestingly, the EC considered whether to include, as part of the eco-label scheme, standards for those making self-declared environmental claims about their products.²⁷⁰ Those in favor of the standards argued that such standards would decrease consumer confusion and increase consumer reliance on such claims.²⁷¹ In addition, the standards would create a level playing field among industry players who make such claims, and the standards would offer a clear benchmark for green products.²⁷² Opponents countered that the standards would be limited to product groups for which standard criteria had been developed and that such standards may keep some firms from participating in the eco-label scheme because they may value the ability to make their own, unregulated, self-declared claims.²⁷³ The EC rejected extending the eco-label scheme to self-declared claims, noting that doing so would considerably change the voluntary nature of the Regulation.²⁷⁴

The conclusion of the EC's eco-label Impact Assessment stresses that the success of the eco-label scheme will depend, in part, on how integrated the scheme is with broader sustainability policy initiatives.²⁷⁵ Because the eco-label scheme will provide good quality life-cycle based product information, it has the potential to serve as the backbone of such policies.²⁷⁶ The EC urged the EU to use the eco-label scheme and related instruments "in a coherent and co-ordinated way to maximize their effect as a whole."²⁷⁷

2. Application of the Relational Integrity Regulation Criteria to the European Union's Environmental Marketing Claim Regulation

a. Reflexive

The EU's Regulation of environmental marketing claims is far more reflexive than existing U.S. regulation. While both the Green Guides and the EU regulation are voluntary, the EU regulation expressly permits private stakeholders, such as businesses, to take the lead in developing product groups and criteria for the eco-label. Although the periodic review and notice and comment procedures give private industry a voice in the construction of the Green Guides and the Energy Guide program, FTC is ultimately charged with deriving standards and enforcing them.²⁷⁸ In stark contrast, the EU Regulation invites private industry or other interested stakeholders, such as consumer and environmental groups, to set appropriate

²⁷⁰ *Impact Assessment*, *supra* note 219, at 40.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 50.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 51.

²⁷⁸ See 15 U.S.C. § 57a(a)–(b) (2006); 16 C.F.R. § 260.4 (2010).

standards.²⁷⁹ Enforcement of the EU regulation is left to the cooperative efforts of member states, competent bodies, and consumers through their product purchase decisions.²⁸⁰ In addition, the EU regulation empowers independent entities to conduct product testing, award the eco-label, and monitor producers' compliance.²⁸¹ By allowing non-governmental entities to implement the eco-label program, the EU regulation distances the scheme from the paralysis that can accompany a bureaucracy and moves the scheme closer to the market, where dynamic market forces ensure that the entities function efficiently. Thus, in keeping with the nature of reflexive law, the EU regulation incentivizes industry to act in an environmentally responsible manner by giving it the tools and authority to regulate itself.

The EU's regulation shares many of the reflexive traits of the proposed U.S. Eco-Label Act of 2008, which is perhaps not surprising given that both pieces of legislation were crafted at roughly the same time.²⁸² Both schemes focus on setting processes and procedures in place rather than legislating specific standards for firms to obey.²⁸³ Both schemes invite stakeholder participation in selecting product groups and setting criteria, and they offer the stakeholders more than a mere forum to share comments—they empower them to shape the regulation.²⁸⁴ To the extent member states' competent bodies are governmental agencies, the EU scheme may be less reflexive because the governmental competent bodies are less accountable to the market. Also, the EU scheme injects an additional layer of governmental oversight in the form of the EC. The EC must approve EUEB decisions and the actions of competent bodies.²⁸⁵ The U.S. proposed Eco-Label Act has no such layer of oversight.²⁸⁶

To its credit, the EU regulation seeks to harmonize its provisions with the labeling schemes of individual member states, industry, and countries outside the EU, by providing a shortened approval process for criteria consistent across the schemes.²⁸⁷ The emphasis on harmonization is unique to the EU scheme and suggests another dimension of its reflexive character. By encouraging harmonization, the regulation is more reflexive because it contemplates aligning with industry and member states schemes rather than attacking and preempting them. The resulting product categories and criteria development are likely to be less a product of a single government actor's agenda and more likely to be a product of stakeholders' interests and needs.

²⁷⁹ *Impact Assessment*, *supra* note 219, at 7.

²⁸⁰ See Council Regulation 66/2010 on the EU Ecolabel, *supra* note 230, arts. 1, 4.

²⁸¹ See *id.* arts. 4, 10.

²⁸² Compare *id.*, with Eco-Labeling Act of 2008, S., 110th Cong. (2008).

²⁸³ See Council Regulation 66/2010 on the EU Ecolabel, *supra* note 230, art. 7; Eco-Labeling Act of 2008 § 7(a).

²⁸⁴ See Council Regulation 66/2010 on the EU Ecolabel, *supra* note 230, art. 7; Eco-Labeling Act of 2008 § 7(a), (c).

²⁸⁵ See Council Regulation 66/2010 on the EU Ecolabel, *supra* note 230, art. 8.

²⁸⁶ See Eco-Labeling Act of 2008 § 5(a).

²⁸⁷ Council Regulation 66/2010 on the EU Ecolabel, *supra* note 230, art. 7.

b. Preference-directed

Like the existing and proposed U.S. legislation, the EU regulation is preference-directed because it focuses on shaping consumer behavior, not compelling or directing it. The Regulation is analogous to the United States' Energy Eco-Label program because, like the Energy Star seal, the EU label lowers consumers' information costs by spotlighting products with strong environmental performance, and the mere presence of the label on a product reminds consumers of the need to consider environmental performance of products in their purchase decisions. To the extent the EU eco-label provides specific information about a product's three key environmental attributes, the label offers consumers even more information about high performing products and thus lowers information costs further.²⁸⁸ Moreover, the EU Regulation requires that competent bodies base criteria, at least in part, on an assessment of the product group's current and future market penetration.²⁸⁹ Such an assessment necessarily requires that the criteria contemplate consumers' revealed preferences for labeled products. To the extent the label draws upon consumers' actual preferences it is likely to be more effective in shaping consumer behavior. Like the proposed U.S. eco-label program, the EU scheme utilizes independent third-party certifiers to ensure that products that bear the label have legitimately earned the right to do so.²⁹⁰ Having such a check in place builds consumer trust in the label, resulting in further shaping of consumer behavior.

c. Product- and Process-Based

The EU Regulation contemplates product and process environmental attributes in establishing label criteria. Product category criteria development requires competent bodies to qualify and quantify environmental attributes of the best performing products and to determine the product categories' most significant environmental impacts over the course of the products' life cycle.²⁹¹ Seeking out the best products available incentivizes firm innovation of products' environmental attributes. Emphasis on a products' life cycle ensures that the process employed in manufacturing the products is environmentally responsible.²⁹² Focusing the life cycle analysis on the most significant aspects of the products' life cycle may not be as thorough of an analysis as studying each aspect of a products' life cycle, but the approach is more economically feasible.

d. Personal Norm Activation

Like the existing and proposed U.S. legislation, the EU's Regulation has the potential to activate personal norms, but nothing in the Regulation

²⁸⁸ *Id.* art. 8.

²⁸⁹ *Id.* annex I.

²⁹⁰ *Id.* annex V.

²⁹¹ *Id.* annex I.

²⁹² *Id.*

ensures that such activation will occur. As noted above, the mere presence of a label on a product does little to activate personal norms, instead, norm activation requires additional information about the products' mean and aggregate environmental impacts.²⁹³ The Regulation permits the eco-label to list up to three key environmental characteristics of the labeled product.²⁹⁴ To the extent the characteristics featured on the label focus on the products' mean and aggregate effects on the environment, they may activate consumers' personal norms, thereby increasing the demand for labeled products and resulting in more environmentally responsible products on retailers' shelves.

*E. Assessment of the International Organization for Standardization's
Eco-label Efforts*

*1. Description of the International Organization for Standardization's
Environmental Standards*

The International Organization for Standardization (ISO) is a non-governmental world-wide network of national standards institutes that work together to produce international standards.²⁹⁵ Its membership is composed of one representative standards institute per country.²⁹⁶ Some standards institutes are rooted in private industry, others in government.²⁹⁷ Consequently, ISO perceives itself as an organization that bridges industry and government interests.²⁹⁸ For example, the American National Standards Institute (ANSI) is the United States ISO member.²⁹⁹ ANSI membership numbers 125,000 companies, ranging from organizations dedicated to standard setting and conformity assessments, to trade associations, labor unions, consumer groups, academics, and government organizations.³⁰⁰

ISO Technical Committees (TC) develop new ISO standards.³⁰¹ The TCs are made up of representatives from the business, industry, and technical organizations that have requested the development of the standard and that will ultimately use the standard.³⁰² In addition, each ISO member may have a representative serve on a given TC.³⁰³ The TCs generate

²⁹³ Vandenberg, *supra* note 88, at 1138; *see supra* text accompanying notes 71–84.

²⁹⁴ Council Regulation 66/2010 on the EU Ecolabel, *supra* note 230, art. 8.

²⁹⁵ Int'l Org. for Standardization, About ISO, <http://www.iso.org/iso/about.htm> (last visited Nov. 21, 2010).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ Int'l Org. for Standardization, ISO Members – USA (ANSI), http://www.iso.org/iso/about/iso_members/iso_member_body.htm?member_id=2188 (last visited Nov. 20, 2010).

³⁰⁰ *Id.*

³⁰¹ Int'l Org. for Standardization, How ISO Develops Standards, http://www.iso.org/iso/about/how_iso_develops_standards.htm (last visited Nov. 20, 2010).

³⁰² *Id.*

³⁰³ *Id.*

a draft standard, which must achieve consensus among the group, where consensus is defined as

“general agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments.” The definition notes, “Consensus need not imply unanimity.”³⁰⁴

Once consensus is reached in a TC, the standard goes before the ISO membership, where two-thirds of the members that participated in its development must vote in favor of it, and one-quarter of those who vote on it may not disapprove of it.³⁰⁵ ISO standards are purely voluntary; there is no enforcement mechanism; they are not binding under international law.³⁰⁶

TC 207 is tasked with generating standards dealing with EMS and tools that support sustainable development.³⁰⁷ In 1996, TC 207 developed the first of the ISO environmental standards, which provides requirements for EMS.³⁰⁸ Rather than providing a set of predetermined environmental markers, ISO 14001 is a process-oriented standard that guides an organization along a path toward developing an environmental policy and managing its environmental issues.³⁰⁹ A significant benefit of the EMS approach is its breadth and depth; in principle, an organization that commits to an ISO 14001 EMS engages in a review of environmental issues that goes from the shop floor to top-level management and considers the entire production process.³¹⁰ While an organization’s EMS provides internal guidance and is distinct from government regulatory requirements, a properly crafted EMS would compel an organization to satisfy government requirements.³¹¹

Upon its release, ISO 14001 received mixed reviews among legal scholars. Professor Paula C. Murray wrote that the standard was “a perfect tool to foster evolutionary environmental policy reform.”³¹² Since the standard was private and voluntary, Professor Murray added that market forces will lead to its national and international adoption.³¹³ Professor Murray opined that a significant attribute of ISO 14001 was that it would

³⁰⁴ *Id.* (quoting INT’L ORG. FOR STANDARDIZATION, ISO/IEC GUIDE 2 (2004)).

³⁰⁵ Int’l Org. for Standardization, *supra* note 301.

³⁰⁶ David A. Wirth, *The International Organization for Standardization: Private Voluntary Standards as Swords and Shields*, 36 B.C. ENVTL. AFF. L. REV. 79, 81, 88 (2009).

³⁰⁷ Int’l Org. for Standardization, TC 207, http://www.iso.org/iso/standards_development/technical_committees/list_of_iso_technical_committees/iso_technical_committee.htm?commid=54808 (last visited Nov. 21, 2010).

³⁰⁸ Paulette L. Stenzel, *Can the ISO 14000 Series Environmental Management Standards Provide a Viable Alternative to Government Regulation?*, 37 AM. BUS. L.J. 237, 259–60 (2000). For a summary of the development of the ISO 14000 series, see *id.* at 243–55.

³⁰⁹ Wirth, *supra* note 306, at 82.

³¹⁰ *Id.* at 84.

³¹¹ *Id.*

³¹² Paula C. Murray, *Inching Toward Environmental Regulatory Reform—ISO 14000: Much Ado About Nothing or a Reinvention Tool?*, 37 AM. BUS. L.J. 35, 38 (1999).

³¹³ *Id.* at 39.

induce businesses, especially small- to medium-sized entities, to engage in environmental management practices on their own terms, rather than acting out of fear of a heavy-handed command and control regulation.³¹⁴ Professor Paulette L. Stenzel agreed and further noted that ISO 14001 would foster the harmonization of national and international private and public environmental management standards³¹⁵ because they represent consensus of interests.³¹⁶

Professor Murray acknowledged that the way ISO 14001 was developed led to some shortcomings in the standard—specifically, she cited that the standard sets no environmental performance level; allows companies to gravitate to the lowest levels of compliance, which are generally levels set by local or national governing bodies; creates no incentive to set ambitious goals; and permits self-certification.³¹⁷ Professor Stenzel adds that, because the standard is a product of a non-governmental entity dominated by business interests,³¹⁸ the standard lacks democratic participation,³¹⁹ is not subject to judicial interpretation,³²⁰ allows self-certification and self-enforcement,³²¹ permits variance in audit quality,³²² and is more concerned with process and procedure than outcomes and actual standards.³²³

Professor Murray asserted that the tendency for firms to gravitate to local and national regulatory schemes is not a significant problem because regulatory standards in the United States are “sufficiently strict that even modest improvement is laudable.”³²⁴ As to the lack of any requirement for third-party certification, Professor Murray argues that market forces may generate demand for third-party certification, though firms that fear the release of confidential information to certifiers and ultimately government entities may be inclined to self-certify.³²⁵ However, the standards are a more holistic approach to international regulation than treaties, which tend to be piecemeal.³²⁶ Professor Stenzel concluded that in light of the standard’s limits, the standard “provide[s] a useful supplement to environmental regulation yet should not be viewed as an alternative to regulation.”³²⁷

³¹⁴ *Id.* at 40; see Stenzel, *supra* note 308, at 238 (“Business managers view ISO 14000 as a market-driven approach to environmental protection that provides an alternative to ‘command and control’ regulation by the government.”).

³¹⁵ Stenzel, *supra* note 308, at 252–54.

³¹⁶ See *id.* at 255.

³¹⁷ Murray, *supra* note 312, at 49–50.

³¹⁸ Stenzel, *supra* note 308, at 283.

³¹⁹ *Id.* at 284.

³²⁰ *Id.* at 290.

³²¹ *Id.* at 284–85.

³²² *Id.* at 285.

³²³ *Id.* at 284.

³²⁴ Murray, *supra* note 312, at 50.

³²⁵ *Id.* at 53.

³²⁶ Stenzel, *supra* note 308, at 289.

³²⁷ *Id.* at 239.

Over 100 countries, 27 of which are developing countries, currently participate in TC 207.³²⁸ Leadership of the TC is “twinned” between a developing country and a developed country; currently Brazil and Canada lead the committee.³²⁹ In 2006, ISO claimed that ISO 14001 has been the model for 111,000 EMSs in 138 countries, and it estimated that 20 million people work for ISO 14001 certified organizations.³³⁰ Entities claiming certification range from Credit Suisse and the offices of IBM to the public tourism sector at the beaches of Cadiz, Spain.³³¹ In the United States, ISO 14001 has had a significant impact on the public sector: public buildings frequently require an EMS, and the Clinton administration issued an executive order, requiring federal agencies and facilities to implement an EMS by the end of 2005.³³²

Since 1999, TC 207 has developed a series of standards that address environmental marketing claims: ISO 14020 provides general principles for environmental labels and product claims;³³³ ISO 14021 sets out standards for self-declared environmental claims;³³⁴ ISO 14024 prescribes principles and procedures for environmental labeling schemes;³³⁵ and ISO 14025 provides principles and procedures for life cycle-based environmental product claims.³³⁶ As with ISO 14001, the standards are voluntary; however, a number of national standards agencies from countries other than the United States indicated that upon final issuance, they would incorporate the standards into their national law.³³⁷

The goal of the ISO environmental marketing claim standards is to provide “verifiable and accurate information, that is not misleading, on environmental aspects of products and services, to encourage the demand for and supply of those products and services that cause less stress on the environment, thereby stimulating the potential for market-driven continuous environmental improvement.”³³⁸ Among the general principles provided in

³²⁸ INT’L ORG. FOR STANDARDIZATION, ENVIRONMENTAL MANAGEMENT: THE ISO 14000 FAMILY OF INTERNATIONAL STANDARDS 4 (2009), *available at* http://www.iso.org/iso/theiso14000family_2009.pdf.

³²⁹ *Id.*

³³⁰ Reinhard Peglau & Martin Baxter, *A Decade of ISO 14001*, ISO MGMT. SYS., May–June 2007, at 13, *available at* http://www.iso.org/iso/14001_decade_ims3_07.pdf.

³³¹ *Id.* at 15, 17.

³³² Wirth, *supra* note 306, at 86.

³³³ INT’L ORG. FOR STANDARDIZATION, REFERENCE NO. ISO 14020:2000(E), ENVIRONMENTAL LABELS AND DECLARATIONS—GENERAL PRINCIPLES § 1 (2000).

³³⁴ INT’L ORG. FOR STANDARDIZATION, REFERENCE NO. ISO 14021:1999(E), ENVIRONMENTAL LABELS AND DECLARATIONS—SELF-DECLARED ENVIRONMENTAL CLAIMS (TYPE II ENVIRONMENTAL LABELLING) § 1 (1999).

³³⁵ INT’L ORG. FOR STANDARDIZATION, *supra* note 253, § 1.

³³⁶ INT’L ORG. FOR STANDARDIZATION, REFERENCE NO. ISO 14025:2006(E), ENVIRONMENTAL LABELS AND DECLARATIONS—TYPE III ENVIRONMENTAL DECLARATIONS—PRINCIPLES AND PROCEDURES § 1 (2006).

³³⁷ SAMUEL A. BLEICHER, AM. LAW INST., ISO ENVIRONMENTAL LABELING STANDARDS: SWORD AND SHIELD IN GLOBAL TRADE § 3.1.1 (2000), *available at* Westlaw SF25 ALI-ABA 309. Professor Bleicher further noted that other countries that already have environmental marketing laws in place can use the standards to add depth to their regulatory scheme. *Id.* § 3.1.2.

³³⁸ INT’L ORG. FOR STANDARDIZATION, *supra* note 333, § 3.

ISO 14020 appear the following: environmental labels and claims shall be “accurate, verifiable, relevant and not misleading”; they shall not create “unnecessary obstacles to international trade”; they “shall be based on scientific methodology that is sufficiently thorough and comprehensive”; information about the label’s or claim’s “procedure, methodology, and any criteria” must be provided to all interested parties upon request; labels and claims shall consider “all relevant aspects of the life cycle of the product”; they “shall not inhibit innovation”; their development process shall include “open, participatory consultation with interested parties”; and the entity making the environmental claim or label must make information about the environmental aspects of the product to consumers.³³⁹

ISO 14021 prescribes standards for self-declared environmental marketing claims.³⁴⁰ Self-declared claims are those that entities such as manufacturers, distributors, and retailers make about products’ environmental aspects without providing independent third-party certification of the claims.³⁴¹ The standard applies to a variety of environmental claims, including statements, symbols, and graphics about both goods and services.³⁴² ISO 14021’s goal is to “harmonize the use of self-declared environmental claims,” resulting in the following benefits:

³³⁹ *Id.* § 4. The “open participatory consultation” language and reference to consensus building were controversial during the development of the standard. BLEICHER, *supra* note 337 § 2.1.2. Entities that were granting seals of approval worried that consultation and consensus efforts would undermine their goal of establishing high standards. *Id.* Writing in 1995, just as ISO was getting started on standards for environmental marketing claims, Professor Naomi Roht-Arriaza cautioned that ISO TCs would be dominated by corporate interests and generate standards that are watered down in an effort to appeal to as many major participants as possible. Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 *ECOLOGY L.Q.* 479, 522–31 (1995). Citing the potential for reduced public costs of generating and enforcing ISO standards, the standards’ relative ease of revision, and the level of compliance achieved, Professor Roht-Arriaza suggests that while ISO standards should not replace public regulation, “a move to producer- and product-based regulation may enhance environmental protection.” *Id.* at 531–32, 539.

³⁴⁰ INT’L ORG. FOR STANDARDIZATION, *supra* note 334, § 1. Professor Bleicher stated that the United States representatives on TC 207 used FTC’s Green Guides as a starting point for ISO discussions on self-declared claims. BLEICHER, *supra* note 337, § 4.1.

³⁴¹ See INT’L ORG. FOR STANDARDIZATION, *supra* note 334, § 3.1.13.

³⁴² *Id.* §§ 1, 3.1.11. Professor Bleicher notes that one symbol in particular, the Mobius Loop (the “chasing arrows” symbol) was the “single most controversial issue” in crafting the standard. BLEICHER, *supra* note 337, § 2.2.2. ISO 14021 declares that the Mobius Loop indicates that the product is recyclable, or if it appears with a percentage, it indicates the amount of the product’s recycled content. INT’L ORG. FOR STANDARDIZATION, *supra* note 334, § 5.10.2.3–4. The ISO definition conflicts with FTC’s Green Guides, which provide that the Mobius Loop appearing alone indicates that the product is both recyclable and made entirely from recycled materials. Thus, a Mobius Loop appearing alone on a product communicates two different messages; its meaning depends upon the scheme the firm operated under when it affixed the symbol to its product. ISO 14021 and the Green Guides also define recyclable differently. BLEICHER, *supra* note 337, § 4.1.1. The ISO standard is arguably stricter; it requires qualification of the term when recycling collection or facilities are not “conveniently available to a reasonable proportion of purchasers.” INT’L ORG. FOR STANDARDIZATION, *supra* note 334, § 7.7.2. In contrast, the Green Guides require qualification of the term when recycling collection or facilities are “not available to a substantial majority of consumers.” 16 C.F.R. § 260.7(c)–(d)

- a) accurate and verifiable environmental claims that are not misleading;
- b) increased potential for market forces to stimulate environmental improvements in production, processes, and products;
- c) prevention or minimization of unwarranted claims;
- d) reduction in marketplace confusion;
- e) facilitation of international trade; and
- f) increased opportunity for purchasers, potential purchasers and users of the product to make more informed choices.³⁴³

The standard notes that it “does not preclude, override, or in any way change . . . any . . . applicable legal requirement.”³⁴⁴ But the standard does proscribe and prescribe specific claims. For example, it precludes firms from making vague or non-specific claims, such as “environmentally friendly,” “green,” or “nature’s friend”³⁴⁵ and undefined claims such as “sustainable.”³⁴⁶ It lists eighteen specific requirements for claims; among them, claims must be accurate, substantiated, verified, specific, precise, unlikely to mislead, and true as to the product and the product’s lifecycle.³⁴⁷ The claims may not imply that an independent third-party has certified the product when it has not, and the claims must be reassessed and updated as needed to protect the claims’ accuracy.³⁴⁸

The standard provides more specific definitions and qualifications for commonly used environmental marketing claims, such as “compostable,” “degradable,” “designed for disassembly,” “extended life,” “recyclable,” “recycled content,” and “waste reduction.”³⁴⁹ For example, the standard defines “compostable” as a product’s ability to “biodegrade [into a] . . . humus-like substance.”³⁵⁰ The standard qualifies “compostable” as follows: the term may not be used if the product negatively affects the value of the compost, releases harmful substances into the environment as it degrades, or significantly reduces the composting rate of other composted items.³⁵¹ If the product is only compostable in an industrial composting facility, the claim must not only state that the product is compostable, it must also clearly explain that the product’s compostability is limited to such facilities.³⁵² If industrial composting facilities are not available to a reasonable proportion of purchasers, the compostable claim must also include an explanatory statement indicating the limited availability of appropriate composting facilities.³⁵³ For claims such as “recovered energy”

(2010). The conflicts noted above are especially relevant to international firms that seek to make claims about their products’ recyclability in the United States.

³⁴³ INT’L ORG. FOR STANDARDIZATION, *supra* note 334, § 4.

³⁴⁴ *Id.* § 1.

³⁴⁵ *Id.* § 5.3.

³⁴⁶ *Id.* § 5.5.

³⁴⁷ *Id.* § 5.7.

³⁴⁸ *Id.*

³⁴⁹ *Id.* § 7.1.2.

³⁵⁰ *Id.* § 7.2.1.

³⁵¹ *Id.* § 7.2.2.1.

³⁵² *Id.* § 7.2.2.2(a).

³⁵³ *Id.* § 7.2.2.4.

and “recycled content,” the standard provides specific mathematical formulas to determine the precise value of the claims.³⁵⁴

ISO 14021 part 6 provides requirements for the evaluation and verification of claims.³⁵⁵ Specifically, the standard requires that prior to making a claim, a firm must employ an evaluation measure that will provide reliable and reproducible results that verify the claim.³⁵⁶ Methods of evaluation and verification must draw upon the following standards in order of preference: ISO standards, internationally recognized standards, or industry or trade methods that are subject to peer review.³⁵⁷ Should the firm make a comparative claim, it must use a published standard or recognized test method to test its product against a comparable product that contemporaneously serves a similar function in the same marketplace.³⁵⁸ Verification must not require access to confidential business information; while a firm may voluntarily release its verification information, it must do so upon any person’s request.³⁵⁹ The standard requires that firms, at a minimum, document and retain the materials related to evaluation and verification such as test methods and results.³⁶⁰

ISO 14024 describes policies and procedures for public and private eco-labeling schemes.³⁶¹ In addition to setting out principles regarding eco-labels, the standard describes procedures for developing label criteria and addresses certification and compliance with the criteria.³⁶² Its principles require that eco-labels must be voluntary, comply with relevant legislation, consider product life cycle stages, and be based on measurable differences in environmental impact.³⁶³ In addition, the development of the label criteria must provide a process of “formal open participation among interested parties” for the selection of product categories and establishment of criteria, be verifiable, be transparent, be free of undue influence, and respect confidential information.³⁶⁴

The procedures for generating an eco-label include: consulting with interested parties, such that the parties participate throughout the process and those who comment on the process receive proper consideration of and response to their comments; selecting product categories based on a feasibility study that contemplates the product’s environmental impact and market forces; and developing product criteria through a process that demonstrates that the selected criteria “will not lead to the transfer of

³⁵⁴ *Id.* §§ 7.6.2–3, 7.8.4.

³⁵⁵ *Id.* § 6.

³⁵⁶ *Id.* § 6.2.1.

³⁵⁷ *Id.* § 6.4.

³⁵⁸ *Id.* § 6.3.1.

³⁵⁹ *Id.* § 6.5.

³⁶⁰ *Id.* § 6.5.3.

³⁶¹ INT’L ORG. FOR STANDARDIZATION, *supra* note 253, at iv.

³⁶² *Id.* at ii.

³⁶³ *Id.* § 5. That the standard provides that the label criteria need only consider life-cycle analysis reflects controversy that occurred among the committee about the role that life-cycle analysis should play in eco-labeling. BLEICHER, *supra* note 337, § 2.3.2.

³⁶⁴ INT’L ORG. FOR STANDARDIZATION, *supra* note 253, § 5.9–11, 5.15, 5.17.

impacts from one stage of the life cycle to another . . . without a net gain of environmental benefit” and will focus on the areas “most relevant for reduction of environmental impact.”³⁶⁵

The standard prescribes requirements for third-party certification of labeling schemes and monitoring compliance with the schemes.³⁶⁶ The standard requires that certifying entities publish rules that govern the award and use of the label; maintain a list of products that have received the label; document the methodology for determining whether a product satisfies the label’s criteria; establish a plan of supervision and control over the verification of the label; require the label user to comply with relevant legislation; and obtain documentary evidence of the label user’s conformity with the label criteria.³⁶⁷ The label user must ensure that compliance with the scheme is maintained and must take corrective action if nonconformity with label criteria occurs.³⁶⁸

ISO 14025 sets out principles and procedures for environmental marketing claims that provide quantified life-cycle information.³⁶⁹ The standard is primarily for use in business-to-business product communication, but it does not preclude business-to-consumer use.³⁷⁰ The standard is intended to facilitate comparison of environmental products based on life-cycle information.³⁷¹ Thus the transparency of procedures, data collection and analysis, and verification procedures is essential.³⁷² Life-cycle basis requires consideration of “all relevant environmental aspects of [a] product throughout its life cycle.”³⁷³ In general, such consideration translates to assessment of the inputs and outputs associated with the product’s raw materials acquisition, production, use, and end of life.³⁷⁴ Any life-cycle aspect not considered relevant must be stated and justified.³⁷⁵ The development of a life-cycle claim requires the definition of a product category and the collection or production of a life-cycle assessment (LCA) of the product category, which in turn gives rise to product category rules (PCR) that describe parameters of the product category, the LCA, other environmental information, and requirements for reporting.³⁷⁶ The standard encourages those who develop PCRs and LCAs for the same product category to collaborate so that costs are minimized and comparisons are meaningful.³⁷⁷

³⁶⁵ *Id.* § 6.

³⁶⁶ *Id.* § 7.

³⁶⁷ *Id.*

³⁶⁸ *Id.* § 7.5.

³⁶⁹ INT’L ORG. FOR STANDARDIZATION, *supra* note 336, at v.

³⁷⁰ *Id.*

³⁷¹ *Id.* § 5.6.

³⁷² *Id.* §§ 5.6–9, 7.2.1.

³⁷³ *Id.* § 5.3.

³⁷⁴ *Id.* fig.B.1.

³⁷⁵ *Id.* § 5.3.

³⁷⁶ *Id.* fig.1.

³⁷⁷ *Id.* at v, 6.

In addition to describing the product and the PCR, life-cycle claims must also identify the program operator making the claim, supply data from the LCA, explain which life-cycle stages are not covered, indicate that other claims for similar product categories may not be comparable, and indicate where additional explanatory information may be obtained.³⁷⁸ The standard prescribes procedures for review and independent verification of claims, noting that the verification can be internal or external; third-party verification is not required.³⁷⁹ Verifications must confirm that the product conforms with the PCR, the ISO 14040 series of standards addressing LCA in further detail, and ISO 14025, and must further confirm that the information supporting the claim is of sufficient quality, and is plausible and accurate.³⁸⁰ When making business to consumer life cycle claims, the standard requires the same claim components listed above, except that when information on specific life cycle stages is not available or cannot be modeled or the stages may “reasonably be expected to be environmentally insignificant,” the information need not be provided to consumers.³⁸¹ The consumer claim information must be available at the point of purchase, and the organization making the claim must provide, upon request, extra explanatory information that may assist consumers’ understanding of the claim.³⁸² Further, business-to-consumer life cycle claims must be verified by competent third parties.³⁸³

2. Application of Relational Integrity Criteria to the International Organization for Standardization’s Environmental Marketing Claim Standards

a. Reflexive

Because the standards are the result of collaboration between industry, trade, consumer and environmental groups, and governments, the ISO standards are the most reflexive of any regulation discussed thus far. Professor Samuel A. Bleicher noted that participation on TC 207, the subcommittee that promulgated the ISO 14000 series, was not well balanced and varied by country of origin.³⁸⁴ Governmental standards and trade regulation agencies dominated the EU delegation, whereas private industry played a stronger role in U.S. and Japanese delegations.³⁸⁵ Professor Bleicher further observed that some environmental and consumer groups had a noticeable impact on the standards.³⁸⁶ However, few U.S. nonprofit environmental organizations have made significant commitments to the ISO process, because the process is still perceived to be dominated by industry, and because it is time consuming, complicated, and expensive for

³⁷⁸ *Id.* § 7.2.1.

³⁷⁹ *Id.* § 8.1.1.

³⁸⁰ *Id.* § 8.1.3.

³⁸¹ *Id.* § 9.2.1.

³⁸² *Id.* § 9.2.2–.3.

³⁸³ *Id.* § 9.4.

³⁸⁴ *See* BLEICHER, *supra* note 337, § 1.1.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

nonprofit organizations.³⁸⁷ Notwithstanding the imbalanced participation on the TC 207 subcommittee, the fact that the 14000 series arose from an international consortium of public and private interests and not from any single governmental entity distinguishes the series from regulations in the United States and the EU.³⁸⁸ The series reflects the goals of reflexive law: the voluntary alignment of firms' environmental values with those of society at large.

The reflexive nature of the standards is also reflected in their content. With the exception of ISO 14021, which provides for specific definitions of several self-declared claims,³⁸⁹ the emphasis of the ISO standards is on providing guidance principles and setting appropriate processes and procedures in place, not on compelling firms to act in a given manner. As such, the scheme is able to be employed across product groups, political boundaries, and in a variety of marketplaces. In addition, ISO 14024 requires that eco-labeling bodies facilitate full participation of interested parties and attempt to achieve consensus with the interested parties throughout the eco-label process.³⁹⁰ Interested parties include "any party affected" by an eco-label scheme.³⁹¹ Drawing upon the collective interests and resources of interested parties further renders the scheme reflexive.

b. Preference-Directed

Like the existing and proposed environmental marketing regulations in the United States and the EU, the ISO 14000 series is highly preference-directed. ISO 14021, which focuses on self-declared claims, and 14024, which centers on third-party claims, both seek to standardize the environmental claims firms make about their products so that consumers will be better informed about the products, trust the claims firms make, and thus be more likely to purchase the products bearing environmental claims.³⁹² The emphasis of ISO 14021 on firms' evaluation and verification of their self-declared claims and the requirement that firms make their evaluation and verification information available to the public upon request ensures that firms conforming to the standard do not make false claims about their products.³⁹³ Similarly, the eco-label scheme provided in ISO 14024 gives firms the principles and procedures they need to have their products independently certified.³⁹⁴ Among the procedures is the requirement that when selecting product categories for labels, a certifier must conduct a feasibility study, which assesses the market for the product and the

³⁸⁷ Wirth, *supra* note 306, at 87.

³⁸⁸ *Id.* at 88.

³⁸⁹ INT'L ORG. FOR STANDARDIZATION, *supra* note 334, § 7.

³⁹⁰ INT'L ORG. FOR STANDARDIZATION, *supra* note 253, § 6.2.

³⁹¹ *Id.* § 3.8.

³⁹² INT'L ORG. FOR STANDARDIZATION, *supra* note 334, § 4; INT'L ORG. FOR STANDARDIZATION, *supra* note 253, § 4.

³⁹³ See INT'L ORG. FOR STANDARDIZATION, *supra* note 334, § 6.1–2.

³⁹⁴ INT'L ORG. FOR STANDARDIZATION, *supra* note 253, § 4.

characteristics of the market suppliers.³⁹⁵ Such a requirement necessitates consideration of consumers' actual preferences in the market. Thus consumer preference itself plays a role in whether a product receives a label. Further, by internationally standardizing the process for certifying environmental marketing claims, ISO 14024 lowers the transaction costs firms incur when they seek to label their products.³⁹⁶ Lowering such costs increases supply of labeled products, which in turn creates or strengthens environmental norms. Noting that there was much speculation about whether the standards would have any effect on industry or consumer behavior, Professor Bleicher asserted that the "practical reality is that [the standards] facilitate demands up and down the product manufacturing and distribution chain for products that can be labeled favorably."³⁹⁷

c. Product- and Process-Based

Like the United States' proposed Eco-Label Act of 2008 and the EU's Regulation, the ISO 14000 series is product- and process-based. Since it focuses on self-declared product claims, ISO 14021 is primarily concerned with claims that appear on the end product. However, the standard encourages firms who make end product claims to consider all relevant aspects of the product life cycle to determine whether the end product claim has the potential to increase a harmful environmental impact in the process of decreasing another environmental impact.³⁹⁸ ISO 14024 requires that product criteria "be based on indicators arising from life cycle considerations."³⁹⁹ ISO 14025 and the 14040 series are focused exclusively on assisting firms make life-cycle claims about their products. Those standards go further than any existing governmental regulation. Professor Bleicher noted that ISO 14025 represents ISO's efforts to pioneer definitions and rules that do not exist, instead of its regular practice of drawing upon and harmonizing industry practice among the nations.⁴⁰⁰ Professor Bleicher characterizes such efforts as "codification" and "law making," and he notes that ISO's efforts here are something of a test case for similar efforts on other standards.⁴⁰¹

d. Personal Norm Activation

Although the ISO 14000 series is more reflexive and process-based than the U.S. and EU schemes and at least as equally preference-directed, it does no more to activate personal norms than any governmental scheme

³⁹⁵ *Id.* § 6.3.1.

³⁹⁶ See Stenzel, *supra* note 308, at 253–54 (stating that national certification programs increase costs for companies that operate in more than one county by forcing those companies to use varying standards and processes).

³⁹⁷ BLEICHER, *supra* note 337, § 1.2.4.

³⁹⁸ INT'L ORG. FOR STANDARDIZATION, *supra* note 334, § 5.7(h).

³⁹⁹ INT'L ORG. FOR STANDARDIZATION, *supra* note 253, § 5.6.1.

⁴⁰⁰ BLEICHER, *supra* note 337, § 1.2.5.

⁴⁰¹ *Id.*

described above. While ISO 14021 and 14024 do not mandate specific content for self declarations and third party certified eco-labels, nothing in the ISO 14000 series directs firms to provide consumers with the kind of information they need to change their purchase decisions.⁴⁰² Given ISO 14020's goal to encourage demand for products that cause less stress on the environment,⁴⁰³ it would behoove ISO to consider requiring the provision of personal norm activation information into the self declared and third party certified marketing claims.

IV. IMPLICATIONS OF THE APPLICATION OF RELATIONAL INTEGRITY CRITERIA TO THE U.S., EU, AND ISO ENVIRONMENTAL MARKETING CLAIM REGULATORY SCHEMES

Several conclusions can be drawn from the application of the Relational Integrity Regulation criteria to the U.S., EU, and ISO environmental marketing claim regulatory schemes. First, no scheme has effectively found a way to systematically activate personal norms. The Energy Guide comes closest because it provides specific information about a product's energy cost savings, which may incentivize consumers to purchase more environmentally responsible products. But the scheme contemplates only one aspect of a single product; it does not offer information about the aggregate savings that could be achieved through widespread product purchase; it does not offer information about mean or aggregate environmental impact of the product purchase; and it does not consider process concerns, such as the product's life-cycle to determine whether the net environmental impact of the product's manufacture, use, and disposal are positive. While the EU eco-label allows for up to three key product attributes to appear on the label with the seal, nothing in the EU's regulation directs competent bodies to provide the kind of information needed to activate personal norms. Given the results of empirical studies on consumer purchase decisions cited above, any entity attempting to regulate environmental marketing claims should carefully consider how to deliver information about the product's mean and aggregate environmental impacts to consumers. With advances in technology, assessing such impacts would appear to be within our grasp. When the advances are combined with a dose of creativity, firms could craft a way to use environmental marketing claims to activate and strengthen personal norms.

Second, taken as a whole, the existing U.S. legislation lags far behind that of the EU and ISO. While the Energy Guide program may be closer to activating personal norms than other schemes, the U.S. legislation is less reflexive, less preference-directed, and less product- and process-based than the schemes the EU and ISO have produced. With each passing day, U.S. consumers, eager to purchase products that are environmentally responsible, blindly pass by products on retailers' shelves, the purchase of

⁴⁰² See INT'L ORG. FOR STANDARDIZATION, *supra* note 334, § 5; INT'L ORG. FOR STANDARDIZATION, *supra* note 253, § 5.

⁴⁰³ INT'L ORG. FOR STANDARDIZATION, *supra* note 334, § 4; INT'L ORG. FOR STANDARDIZATION, *supra* note 253, § 4.

which could result in less stress on the environment. Sellers, lacking incentives to create environmentally responsible products, fail to explore how even minor product and process changes can result in dramatic environmental impacts. With no incentive to innovate, those firms producing environmentally responsible products fail to enhance and perfect their products' environmental performance. As the eco-label schemes in the EU and EU member states illustrate, eco-labels can be effective, especially when the regulation that creates them have Relational Integrity. The proposed Eco-Label Act of 2008 is a step in the right direction because adding personal norm activation information to the label scheme would enhance the scheme's Relational Integrity and render the Bill a strong step in the right direction.

Third, given that the ISO 14000 standards are a product of a diverse, largely non-governmental, and perhaps industry-centered body, the standards have a surprising degree of Relational Integrity. The nature of the organization that produced them renders them highly reflexive; the organization is technologically and scientifically savvy enough to recognize that the standards must consider product and process attributes, and while the focus of the standards is on the supply side, the standards acknowledge their role in directing consumer preferences by seeking to increase consumer demand for environmentally responsible products and basing product label criteria on market survey information that reflects consumers' revealed preferences. Scholars are quick to criticize ISO standards because they are not a product of a publicly elected body, and they are not subject to judicial interpretation.⁴⁰⁴ Others worry that the international character of the standards may propel them from non-governmental instruments to "standards with international legal significance."⁴⁰⁵ And there is concern that ISO's consensus requirement and business oriented nature may yield standards that seek out the lowest common denominator in environmental regulation, in typical race to the bottom fashion.⁴⁰⁶ However, when compared against the schemes that the U.S. and EU regulatory machines have produced, the ISO 14000 series is no less detailed, still seeks out widespread involvement in the regulatory process from interested parties, and provides a set of self-declared claim standards that are no less rigorous.

Interestingly, when the ISO 14021 standard on compostability is applied to the corn cup described in Part I, the application reaches the same result as the U.S. Green Guides—absent an explanatory statement indicating that the cup's compostability is limited to industrial composting facilities and that the availability of such facilities is limited—the cup's claim violates an

⁴⁰⁴ Stenzel, *supra* note 308, at 283–84, 290.

⁴⁰⁵ Wirth, *supra* note 306, at 94–96. Wirth notes that the World Trade Organization's Technical Barriers to Trade Agreement (TBT Agreement) recognizes standards such as those ISO has produced and requires use of the standards in crafting government regulatory requirements. *Id.* at 94–95. The TBT Agreement provides a rebuttable presumption of validity to government regulations that adopt ISO standards. *Id.* at 95. Governments that seek to depart from international standards must justify the departure. *Id.* As a result, Wirth argues, the standards "are transformed into an outer limit of rigor—a ceiling—for public regulation." *Id.* at 96.

⁴⁰⁶ Murray, *supra* note 312, at 49; Roht-Arriaza, *supra* note 339, at 529.

ISO standard.⁴⁰⁷ On the surface, a key difference between the schemes would appear to be enforcement: FTC can utilize its Deception Policy and power under Section 5 of the FTC Act to order the firm to retract its claim or add explanatory language.⁴⁰⁸ The ISO standards, however, are purely voluntary—there is no enforcement mechanism anywhere in ISO 14021.⁴⁰⁹ In practice, however, FTC's regulatory scheme for self-declared environmental claims is difficult to enforce.⁴¹⁰ Although Section 5 gives FTC a powerful stick to ward off deceptive claims, FTC has found that stick cumbersome and heavy, because use of Section 5 is a time-intensive and expensive process for an agency with limited resources.⁴¹¹ There are simply too many firms making too many arguably deceptive claims.⁴¹² Thus, the net enforcement effect of FTC's regulatory scheme is not all that different from that of ISO. Although FTC has effectively used the media to spotlight offenders and essentially shame them into compliance, through environmental and consumer watchdog groups such as TerraChoice, ISO standards have the same power. Thus, in the end, FTC's scheme for regulating self-declared marketing claims and that of ISO are not all that different.

The answer to the enforcement question may lie in an eco-label scheme with Relational Integrity. Such a scheme, as noted above in Part II, would nudge consumers toward labeled products and shift their demand away from products with self-declared claims, which would in turn incentivize suppliers to produce environmentally responsible products that achieve eco-labeled status. In time, products bearing the eco-label would replace those making self-declared claims, rendering the need for enforcement of self-declared claim regulation less necessary.

ISO's proficiency in crafting standards that function like regulation raises several questions. Is government the only entity capable of crafting meaningful regulation? Can industry effectively self-regulate? Given that the United States' process of producing regulation is only indirectly democratic and shaped by nongovernmental influences such as lobbyists and special interest groups, is the process really all that different from that of entities such as ISO? In light of the increasingly complex and technical nature of industry, and the information costs associated with understanding the industry well enough to regulate it, is it more efficient for non-governmental

⁴⁰⁷ See INT'L ORG. FOR STANDARDIZATION, *supra* note 334, § 7.2.2.2, .4; *supra* Part I.

⁴⁰⁸ See Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.5 (2010); *see also* Letter from James C. Miller III, *supra* note 134.

⁴⁰⁹ See *generally* INT'L ORG. FOR STANDARDIZATION, *supra* note 334 (containing no provision for enforcement of the standards).

⁴¹⁰ See *generally* Minneti, *supra* note 12 (describing the history of the FTC Green Guides and analyzing its enforcement methods in light of economic theories).

⁴¹¹ See *id.* at 662–64, 695 (discussing how the FTC's only enforcement method against sellers making misleading claims is to pursue an adjudicative action against the seller in civil court).

⁴¹² See *id.* at 695 (“As noted above, if the FTC suspects that a seller has made a deceptive or misleading claim, the FTC must bring an adjudicative action against the seller that requires an administrative law judge to rule on whether a violation has occurred. Such an enforcement mechanism is impotent, as illustrated by the proliferation of false environmental claims and the few actions brought since the Guides were released.”).

industry experts such as ISO to play a lead role in regulation? In our increasingly globalized economy, are international organizations such as ISO in a better position to offer regulatory schemes that concern commercial interests? Finally, should government reassess its role in regulation and transform its role so that it becomes an agent that empowers industry groups to establish their own Relational Integrity regulation?

The answers to these questions are beyond the scope of this Article, but they suggest a direction for additional scholarship. For the moment, suffice it to say that under the guiding principles of Relational Integrity regulation, when the appropriate incentives are in place, such as keeping government agents and auditors off the manufacturing floor and out of the manufacturing process, and transaction costs are not prohibitive, the market appears capable of regulating itself. When viewed in this light, ISO's success appears to be yet another confirmation of the validity of the Coase Theorem.⁴¹³

V. CONCLUSION

This Article has articulated the contours of a new form of environmental marketing regulation—Relational Integrity regulation, which arises from the collective wisdom of two decades of environmental regulation scholarship. And the Article has weighed several public and private environmental marketing claim regulatory schemes against Relational Integrity principles, finding that the private scheme fares as well as or better than the public schemes. Finally, the Article has discussed the consequences of the assessment of the public and private schemes and posed a set of questions for further consideration. The world of scarce resources we share requires that we thoughtfully consider the issues raised here, and in the short term, the hope is that we can craft Relational Integrity regulation that will nudge consumers toward environmentally responsible purchasing decisions.

⁴¹³ See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 6–8 (1960) (noting that in a costless transaction that is subject to government regulation, parties will allocate resources in an efficient manner, regardless of which party the regulation favors; the market will adjust the initial allocation so that externalities are minimized).