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IS IT TOO EASY BEING GREEN? A BEHAVIORAL ECONOMICS APPROACH TO DETERMINING WHETHER TO REGULATE ENVIRONMENTAL MARKETING CLAIMS

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PART 1: INTRODUCTION

A recent stack of mail included a postcard advertising a line of laundry detergents called “greenworks” that uses “a plant-based cleaning system.” However, the ad did not explain what a “cleaning system” is or how a “plant-based” cleaning system is any more effective than any other cleaning system. By giving the line of detergents a “green” name and packaging the detergents with a green color scheme, the seller is likely leveraging consumers’ concern for the environment against its competition in the market to increase its detergents’ sales. The shelves of grocery stores and big-box retailers are replete with products bearing sellers’ environmental marketing claims. Environmental marketing firm TerraChoice notes that the rate of “green” advertising has “almost tripled since 2006.”¹ TerraChoice further noted that “[l]egitimate eco-labeling is nearly twice as common” in 2009 as it was in 2008.² The marketing claims range from a simple statement such as “100% Recycled” to more complex:

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². ENVIRONMENTAL CLAIMS SUMMARY REPORT, supra note 1, at i.
"35% Post-Consumer Waste." Consumers appear to have an insatiable appetite for environmentally friendly products, and producers appear eager to satisfy that demand. In his statement to the American Conference Institute’s Regulatory Summit for Advertisers and Marketers, J. Thomas Rosch, a commissioner to the Federal Trade Commission (FTC), noted that "by one count, manufacturers launched 328 ‘environmentally friendly’ products [in 2007], up from only 5 such products in 2002." Commissioner Rosch further noted that applications to the U.S. Patent and Trademark Office with the word “‘green’ more than doubled from 2006 to 2007,” while applications with the words ‘clean,’ ‘eco,’ ‘environment,’ ‘earth,’ ‘planet,’ and ‘organic’ also jumped.

As environmental products claims become more common, they are also becoming more exaggerated, vague, and ambiguous, and consequently, less truthful. Aware of this trend, critics have coined the term “greenwashing” to describe sellers’ efforts to cast their products as environmentally friendly when, in reality, the products have few or no environmentally helpful attributes. 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.”

The 2008 Shelton Group “Eco Pulse” survey found that 49% of those surveyed stated that a company’s environmental record “is important” to

3. Both claims were listed on the Second Nature legal pad the author used while taking notes for this Article.


6. ENVIRONMENTAL CLAIMS SUMMARY REPORT, supra note 1, at 3. The Sins of Greenwashing are:

1. Sin of the Hidden Trade-off: claiming a product is green based on a narrow set of product attributes that ignore more significant and environmentally harmful attributes;
2. Sin of No Proof: failing to substantiate a green claim with easily accessible supporting information;
3. Sin of Vagueness: claims that are so broad or poorly defined that consumers are not likely to understand the claims’ real meaning;
4. Sin of Irrelevance: environmental claims that are unimportant or unhelpful, such as “CFC-free”; the claim is irrelevant because CFCs are banned by law;
5. Sin of the Lesser of Two Evils: claims that may be true, such as “[o]rganic cigarettes” but distract the consumer from more significant environmental impacts of the class of product;
6. Sin of Fibbing: making false environmental claims; and
7. Sin of Worshiping False Labels: claims that give consumers the impression that a product has been endorsed by a third party, when no such endorsement exists.

Id. at 3, 5 exhibits 2 & 5.
their purchase decision, but only 21% stated that the company’s environmental record drove them to choose one product over another; only 7% could name the product they purchased based on environmental concerns. Moreover, a 2008 Price Waterhouse Coopers survey in the United Kingdom found that only 16% of those surveyed trusted manufacturers’ environmental claims about their products.

In a prepared statement delivered to the Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection of the United States House of Representatives, James A. Kohm, Associate Director of the Enforcement Division in the Bureau of Consumer Protection at the FTC, noted that “there has been a virtual tsunami of environmental marketing. Businesses in a diverse array of industry sectors are touting the ‘green’ attributes of their products and services, and several major retailers have launched their own green product lines.” In response to the “tsunami” of green advertising, the FTC, in 2007-08, sought public comment on the Commission’s Guides for the Use of Environmental Marketing Claims (Green Guides or Guides), which are a collection of general principles, definitions, and illustrations designed to guide sellers in making environmental claims that comply with Section 5 of the FTC Act. In its call for public comment, the FTC sought discussion regarding whether there is a continuing need for the Guides, the efficacy of the Guides, and whether the Guides should address recent marketers’ claims, such as “carbon neutral” and “sustainable.” The FTC also held a series of public workshops in 2008 that brought together individuals from industry, academia, government, environmental organizations, and consumer groups to explore the future of green marketing and the FTC’s role in regulating it. Kolm noted that the FTC plans to conduct its own research to evaluate consumer perception of environmental claims and to conduct an “Internet


11. Hearing, supra note 9, at 3-4.

12. Id. at 4.
surf” to get a better sense of claims currently in use.13 The FTC expects the research to shed light on whether it will revise its Green Guides, and if so, what those revisions might look like.14

Given this time of agency reflection on regulating producers’ environmental claims, this Article examines whether such regulation is necessary, and if so, what type of regulation is appropriate. To provide a sense of context and the FTC’s current regulatory structure, Part II of this Article summarizes the purpose, history, and evolution of the FTC’s Green Guides and the FTC’s use of those Guides in regulating producers’ environmental claims through its adjudicative process.

Scholars have approached the question of whether to regulate from many angles, often with conflicting responses.15 Part III of this Article consults the findings of behavioral law and economics to determine whether the regulation of environmental law claims is necessary by drawing upon the work of experts in the field such as Christine Jolls, Cass R. Sunstein, and Richard Thaler.

Employing Colin Camerer’s model of asymmetric paternalism, Part IV concludes that the regulation of environmental marketing claims is necessary because the benefit of such regulation to boundedly rational consumers exceeds the cost of the regulation to rational consumers, even when, as Jonathan Klick urges, discounting the benefit to boundedly rational consumers by any cognitive capital loss they might sustain by losing the opportunity to sharpen their own decision-making skills. Moreover, the Article asserts that although, as Alan Schwartz has argued, market competition may be capable of driving out low-quality contracts (here, products bearing false or misleading claims) when (1) a sufficient number of sophisticated consumers seek high-quality contracts (products bearing valid claims) and (2) naïve consumers have a low willingness to pay for their preferred contracts, such conditions are not characteristic of the market for environmentally friendly products. Thus, absent regulation,

13. Hearing, supra note 9, at 4-5 n.12.
14. Id. at 5.
15. Compare Christine Jolls, Cass R. Sunstein, & Richard Thaler, A Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471, 1475 (1998) (asserting that behavioral economics strengthens the “predictive and analytic power of law and economics” to address the question of whether to regulate market conduct), with Alan Schwartz, How Much Irrationality Does the Market Permit?, 37 J. LEGAL STUD. 131, 131 (2008) (arguing that market competition can cure consumer cognitive error, rendering government regulation of markets unnecessary and unwarranted), and John M. Church, A Market Solution to Green Marketing: Some Lessons from the Economics of Information, 79 MINN. L. REV. 245, 249 (1994) (contending that any increase in environmental product regulation is “unwise” because market forces alone can cure information deficits and “promote[] environmental goals”).
low-quality contracts, that is deceptive ads, are not likely to disappear. In light of the need for such regulation, Part V articulates a set of general attributes that describe appropriate environmental marketing legislation, and Part VI concludes.

**PART II: FEDERAL ENVIRONMENTAL MARKETING CLAIM REGULATION—THE GREEN GUIDES**

Commissioner Rosch noted that the FTC first published the Green Guides in 1992 in response to the FTC’s perception that there was "broad-based support for the view that truthful and reliable advertising had an important role to play in encouraging the development of more environmentally sound products and packages." Rosch further noted that "there was concern about the potential for the development of differing or inconsistent standards on a state-by-state basis" and stated that the Guides were "a way to promote truthful and substantiated advertising while providing certainty in the marketplace for advertisers and consumers."

The Guides "represent administrative interpretations of laws administered by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements." In its Environmental Assessment regarding the impact of the Guides, the FTC noted

\[\text{[T]he [G]uides are voluntary in nature, do not preempt inconsistent state laws, are based on the FTC's deception policy, and, when used in conjunction with the Commission's policy of case-by-case enforcement, are intended to aid compliance with Section 5(a) of the FTC Act as that Act applies to environmental marketing claims. Furthermore, the Guides are neither motivated by nor intended to influence environmental policy decisions.}\]

The FTC further added that "[c]onduct inconsistent with the positions articulated in these [G]uides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has

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17. Rosch, supra note 4, at 5. The widespread support for the Green Guides grew from a number of sources: in response to the proliferation of environmental marketing claims, states began enacting their own regulatory schemes, and in the late 1980s, industry leaders and the National Association of Attorneys General lobbied the FTC, seeking federal regulation of environmental marketing claims. David Gibson, Awash in Green: A Critical Perspective on Environmental Advertising, 22 TUL. ENVTL. L.J. 423, 429 (2009).
18. Rosch, supra note 4, at 5.
20. Id. § 260.8(a).
reason to believe that the behavior falls within the scope of conduct declared unlawful by the statute."\textsuperscript{21}

The Guides apply to a range of environmental claims, including:

labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means. The Guides apply to any claim about the environmental attributes of a product or package in connection with the sales, offering for sale, or marketing of such product or package for personal, family or household use, or for commercial, institutional or industrial use.\textsuperscript{22}

The FTC described the Guides as providing a set of "general principles" and "specific guidance" for marketers regarding their environmental claims.\textsuperscript{23} Both the general principles and specific guidance provisions list examples of claims that 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."\textsuperscript{24}

The FTC has revised the Guides twice since their initial publication in 1992. Following a notice and comment period, in 1996, the FTC noted that while the Guides had received widespread support from trade organizations, industry, and environmental and consumer groups, they were due for minor revisions.\textsuperscript{25} These revisions consist of additional examples that illustrate claims falling within the safe harbor and examples of deceptive conduct.\textsuperscript{26} The 1998 revisions clarified the terms "compostable" and "recyclable" and noted that the Guides "apply to all forms of marketing, including digital or electronic media, such as the Internet and electronic mail, and to the marketing of services, as well as products and packages."\textsuperscript{27} The FTC’s revisions reflect sensitivity to the comments it received as well as its desire to keep the Guides current and relevant. For example, its changes to the

\begin{itemize}
  \item \textsuperscript{21} FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.1 (2009).
  \item \textsuperscript{22} Id. § 260.2(a).
  \item \textsuperscript{23} Id. § 260.3.
  \item \textsuperscript{24} Id.
  \item \textsuperscript{25} FTC’s Revisions to Environmental Marketing Guides, 16 C.F.R. pt. 260, effective 10/4/96, \textit{reprinted in} 71 Antitrust & Trade Regulation Reporter (BNA) 345 (10/10/1996).
  \item \textsuperscript{26} Id.
\end{itemize}
Compostable Guide in 1998 were based, in part, on its perception that because there were only twenty municipal solid waste composting facilities in the United States, ‘few consumers are likely to know about and associate a compostable claim with municipal solid waste composting facilities.’

Included within the current Guides’ general principles section are statements regarding (1) the qualification and disclosure of claims; (2) the distinction between benefits of product, package, and service; (3) the overstatement of environmental attribute; and (4) comparative claims. Qualifications and disclosures must be “sufficiently clear, prominent and understandable to prevent deception.” Marketing claims that draw distinctions between the environmental benefits of the product itself, its package, and its service must be clear. For example, if a producer labeled a box of aluminum foil with the word “recyclable,” but failed to elaborate whether the claim refers to the foil or the box, “the claim is deceptive if any part of either the box or the foil, other than minor, incidental components, cannot be recycled.”

The general principles further provide that marketers should not present a claim “in a manner that overstates the environmental attribute or benefit, expressly or by implication.” Among the examples provided, the FTC notes that a paper grocery sack bearing the label “reusable” is not deceptively labeled because “reasonable consumers are unlikely to assume that a paper grocery sack is durable, [thus] the unqualified claim does not overstate the environmental benefit conveyed to consumers.”

Comparative product claims “should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception,” and “the advertiser should be able to substantiate the comparison.” For example, should an advertiser assert that its shampoo bottle contains “20% more recycled content,” the claim would be “ambiguous” because context could indicate that the claim was a “comparison either to the advertiser’s immediately preceding product or to a competitor’s product.” To avoid a finding of deceptive advertising, the advertiser must clarify the claim or “be prepared to substantiate whatever

30. Id. § 260.6(a).
31. Id. § 260.6(b).
32. Id.
33. Id. § 260.6(c).
34. Id.
35. FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.6(d) (2009).
36. Id.
comparison is conveyed to reasonable consumers."\textsuperscript{37}

The specific guidance provisions address claims regarding a product's

(a) General environmental benefit;

(b) Biodegradability;

(c) Compostability;

(d) Recyclability;

(e) Recycled content; and

(f) Source reduction.\textsuperscript{38}

For each of these product claims, the guidance provisions declare that when use of the claim is deceptive, the advertiser should offer general definitions of the claim, and provide examples of how the claim might be used.\textsuperscript{39} The Guides focus less on technical definitions of environmental terms and more on how consumers will interpret the terms.\textsuperscript{40} For instance, the provisions state that claims about a product's biodegradability are deceptive if the claim misrepresents "directly or by implication, that a product or package is degradable, biodegradable or photodegradable."\textsuperscript{41} Such claims should be "substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, \textit{i.e.}, decompose into elements found in nature within a reasonably short period of time after customary disposal."\textsuperscript{42} Among the examples, the Guides note that if a shampoo bottle was advertised as biodegradable, with no other qualification or disclosure, then the manufacturer's claim is not deceptive as long as the manufacturer has "competent and reliable evidence demonstrating that the [shampoo], which is customarily disposed of in sewage systems, will break down and decompose into elements found in nature in a short period of time."\textsuperscript{43}

Regarding claims of recyclability, the guidance provisions state that "[i]t is deceptive to misrepresent, directly or by implication, that a product

\begin{itemize}
\item \textsuperscript{37} FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.6(d) (2009).
\item \textsuperscript{38} Id. § 260.7.
\item \textsuperscript{39} \textit{See generally} id.
\item \textsuperscript{41} § 260.7(b).
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
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or package is recyclable.” 44 A marketer should only use such a claim when the product can be “collected, separated or otherwise recovered from the solid waste stream for reuse, or in the manufacture or assembly of another package or product, through an established recycling program.” 45 For example, if an advertiser markets a bottle nationwide with the unqualified claim that the bottle is “recyclable,” but collection sites for recycling the bottle are not available to “a substantial majority of consumers or communities,” the claim is deceptive “because, unless evidence shows otherwise, reasonable consumers living in communities not served by programs may conclude that recycling programs for material are available in their area.” 46

Claims regarding recycled content “may be made only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer).” 47 Manufacturers “must have substantiation” for their conclusion that the pre-consumer material would have “otherwise entered the solid waste stream.” 48 Thus, when a manufacturer claims that a legal pad is “100% Recycled,” the manufacturer must be able to substantiate its unqualified claim that 100% of the legal pad is manufactured from materials that have been recovered or diverted from the solid waste stream. 49

The Guides spring from the FTC’s statutory mandate to prevent “persons, partnerships, or corporations” from engaging in “deceptive acts or practices in or affecting commerce,” 50 as well as its authority to prescribe “general statements of policy with respect to . . . deceptive acts or practices in or affecting commerce.” 51 Although Congress declared such deceptive acts unlawful, 52 it did not define the phrase “deceptive acts or practices.” Upon review of its cases defining the phrase, in 1983, the FTC generated a Policy Statement on Deception, 53 the Guides refer to that Policy Statement

44. FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.7(d) (2009).
45. Id.
46. Id. ex. 4.
47. Id. § 260.7(e).
48. Id.
49. Id. § 260.7(e) ex. 7. The author notes that the “Second Nature” legal pad he used for note taking for this Article includes the “100% Recycled” claim.
52. Id. § 45(a)(1).
in determining whether an advertiser has made a deceptive environmental claim about a product.\textsuperscript{54}

The Policy Statement provides a three-part test to determine whether a deceptive act or practice has occurred. First, the FTC determines whether a representation, omission, or practice has occurred that is "likely to mislead the consumer."\textsuperscript{55} Second, the FTC examines the representation, omission, or practice "from the perspective of a consumer acting reasonably in the circumstances."\textsuperscript{56} Third, the FTC determines whether the representation, omission, or practice is "material."\textsuperscript{57} A representation, omission, or practice is material when it is "likely to affect the consumer's conduct or decision with regard to a product or service."\textsuperscript{58} In the Green Guides, the FTC adds that:

\begin{quote}
[A]ny party making an express or implied claim that presents an objective assertion about the environmental attribute of a product, package or service must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim. A reasonable basis consists of competent and reliable evidence. In the context of environmental marketing claims, such substantiation will often require
\end{quote}


\textsuperscript{54} 16 C.F.R. § 260.5 ("The Commission's criteria for determining whether an express or implied claim has been made are enunciated in the Commission's Policy Statement on Deception.").

\textsuperscript{55} Policy Statement on Deception, \textit{supra} note 53.

\textsuperscript{56} Id. Miller's use of the "reasonable consumer standard" was understood to invoke his rational choice theory background, because Miller expressly sought to eliminate liability for consumers' subjective understanding of sellers' claims. \textit{See Karns, supra} note 53, at 411-13.

\textsuperscript{57} Policy Statement on Deception, \textit{supra} note 53. Miller's definition of "material" sparked strong dissent because it was understood to equate "material" with actual injury, which had never been required under the previous deception definition. Budnitz, \textit{supra} note 53, at 399. Miller countered that those who read the definition to require actual injury had it "exactly backward." \textit{Id.} at 402 (citing Dingell, Miller Tangle Over New Enforcement Policy on Deception, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1137, at 664 (Oct. 27, 1983)).

\textsuperscript{58} Policy Statement on Deception, \textit{supra} note 53.
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competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.\(^59\)

Congress authorized the FTC to issue a complaint against any "person, partnership, or corporation" that uses a "deceptive act or practice in or affecting commerce" if it appears to the FTC that the complaint would "be to the interest of the public."\(^60\) If, following appropriate notice and hearing procedures, the FTC finds that an advertiser's conduct was unlawful, Congress has authorized the FTC to report its findings of fact in writing and issue an order to the offending party, directing it to "cease and desist" the unlawful deceptive act or practice.\(^61\) The FTC's findings of facts and order are reviewable in the United States Court of Appeals.\(^62\)

Upon the issuance of a cease and desist order, the FTC may commence a civil action against the offending entity in a United States District Court or a competent state court.\(^63\) Should the FTC satisfy the court that the deceptive act or practice was one that "a reasonable man would have known under the circumstances was dishonest or fraudulent,"\(^64\) the court may grant such relief as it finds "necessary to redress injury to consumers."\(^65\) The relief may include "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the . . . deceptive act or practice."\(^66\) Congress expressly prohibits the court from awarding "exemplary or punitive damages."\(^67\) Notably, the United States Court of Appeals has not reviewed any FTC decision concerning the Green Guides and the FTC has not commenced a civil action against an alleged Green

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63. Id. § 57b(a)(2).
64. Id.
65. Id. § 57b(b).
66. Id.
67. Id.
Guides violator in United States District Court.\(^{68}\)

Thus, the Guides' primary enforcement mechanism is the Commission's own adjudicative action. Prior to May 2009, however, the FTC had not issued any complaints for deceptive environmental marketing claims since 1996.\(^{69}\) Since the release of the Guides in 1992, all of the FTC's complaints have resulted in consent orders wherein the respondents refuse to admit that their claims were unlawful, but they agree to abide by the terms of the FTC's cease and desist orders.\(^{70}\)

On June 9, 2009, in a flurry of activity, the FTC issued a trio of complaints against three entities for allegedly deceptive and unsubstantiated claims about their products biodegradability.

The FTC's complaint against Kmart Corporation (Kmart) alleged that Kmart made a false or misleading representation and an unsubstantiated representation when it marketed American Fare brand paper plates by claiming that the plates were biodegradable.\(^{71}\) Noting that Kmart failed to define, describe, or qualify "biodegradable," the FTC alleged that the claim of biodegradability was false or misleading because the plates would not "completely break down and return to nature, i.e. decompose into elements found in nature, within a reasonably short period of time" under conditions common to most solid waste facilities.\(^{72}\) Furthermore, the FTC alleged that Kmart's biodegradability representation was unsubstantiated because Kmart

\(^{68}\) These conclusions are drawn from research on commercial electronic databases and the FTC's online materials.

\(^{69}\) See, e.g., RBR Prods., Inc., 122 F.T.C. 444 (1996) (consent order) (prohibiting respondent from making biodegradable, recyclable, and ozone friendly claims about its beauty salon products); Safe Brands Corp., 121 F.T.C. 379 (1996) (consent order) (prohibiting respondents' claims regarding the recyclability of engine cooling products and requiring respondents to support their other environmental claims with reliable scientific evidence).

\(^{70}\) See, e.g., RBR Prods., Inc., 122 F.T.C. 444 (1996) (consent order) (prohibiting respondent from making biodegradable, recyclable, and ozone friendly claims about its beauty salon products); Safe Brands Corp., 121 F.T.C. 379 (1996) (consent order) (prohibiting respondents' claims regarding the recyclability of engine cooling products and requiring respondents to support their other environmental claims with reliable scientific evidence). Paul H. Rubin opines that the lack of litigation in deception cases may be due to the "high reputation cost" to firms charged in deception actions. Paul H. Rubin, Regulation of Information and Advertising 5 (Emory Sch. of Law: Law & Econ. Research Paper Series, Paper No. 04-05), available at http://ssrn.com/abstract=498683. He further notes that firms that contest FTC losses "end up with greater capital losses than firms that agree to consent orders." Id.

\(^{71}\) Kmart Corp. Complaint, supra note 60, at ¶ 4-11. Interestingly, in 1994, the FTC issued Decisions and Orders in two similar cases against Keyes Fibre Company and AJM Packaging Corp. for, among other items, deceptive and unsubstantiated claims that their paper plates were biodegradable. Keyes Fibre Co., 118 F.T.C. 150 (1994); AJM Packaging Corp., 118 F.T.C. 56 (1994).

\(^{72}\) Kmart Corp. Complaint, supra note 60, at ¶¶ 4, 6-8.
failed to possess and rely on information that would substantiate its biodegradability claim.\textsuperscript{73}

Upon issuing the complaint against Kmart, the FTC also released an Agreement Containing Consent Order, in which Kmart agreed to waive "[a]ny further procedural steps; [t]he requirement that the [FTC generate] a statement of findings of fact and conclusions of law; and [a]ll rights to seek judicial review,"\textsuperscript{74} Kmart did not admit any liability or concede the veracity of any factual statement, other than those pertaining to jurisdiction. Pursuant to FTC rules, such consent orders are subject to a thirty day period of public comment, following which the FTC commissioners vote on whether to accept the Consent Order and issue a Decision and Order.\textsuperscript{75}

In July 2009, the FTC published its Decision and Order in the case, prohibiting Kmart from representing, "in any manner, expressly or by implication" that the product at issue was biodegradable or "offers any other environmental benefit," unless Kmart "possesses and relies on competent and reliable scientific evidence . . . that substantiates the representation."\textsuperscript{76} The Decision and Order further required that for five years Kmart must "maintain and upon request make available" any representation covered by the order, the materials relied upon in disseminating, and "[a]ll tests, reports, studies, demonstrations, or other evidence . . . that contradict, qualify, or call into question the representation, or the basis relied upon for the representation."\textsuperscript{77}

The FTC issued a similar complaint against Dyna-E International (Dyna-E) for its allegedly deceptive and unsubstantiated claims of biodegradability regarding its lightweight towels.\textsuperscript{78} Noting that the towels will not "decompose into elements found in nature, within a reasonably short period of time," and that Dyna-E neither possessed nor relied on information that would substantiate a contrary conclusion, the FTC declared Dyna-E's representations deceptive and in violation of the FTC Act.\textsuperscript{79} In early July 2009, the FTC entered an order withdrawing the action from adjudication pending the Commission's acceptance of a consent

\begin{itemize}
\item \textsuperscript{73} Kmart Corp. Complaint, \textit{supra} note 60, at ¶¶ 10-11.
\item \textsuperscript{74} Agreement Containing Consent Order at 1, Kmart Corp., No. C-4263 (F.T.C. June 9, 2009) [hereinafter Agreement Containing Consent Order], \textit{available at} http://www.ftc.gov/os/caselist/0823186/090609kmartagree.pdf.
\item \textsuperscript{75} Agreement Containing Consent Order, \textit{supra} note 74, at 1.
\item \textsuperscript{76} See 15 U.S.C. § 45(b) (2006).
\item \textsuperscript{77} Kmart Corp. Decision and Order, \textit{supra} note 61, at 2-3.
\item \textsuperscript{78} Id. at 3.
\item \textsuperscript{79} Complaint at ¶¶ 4-12, Dyna-E Int'l, Inc., No. 9336 (F.T.C. June 9, 2009), \textit{available at} http://www.ftc.gov/os/adjpro/d9336/090609adminemplt.pdf.
\item \textsuperscript{80} Id. at ¶¶ 8, 11, 13.
\end{itemize}
agreement.\textsuperscript{81}

The FTC’s complaint against Tender Corporation (Tender) included allegations similar to those against Kmart and Dyna-E.\textsuperscript{82} Tender allegedly represented that the packaging and wipes in its Fresh Bath Wipes product were biodegradable.\textsuperscript{83} The FTC alleged that Tender’s representations were false or misleading because the packaging and wipes would not “decompose into elements found in nature, within a reasonably short period of time,” and that Tender lacked any reasonable basis that would substantiate its representations.\textsuperscript{84} Like Kmart, Tender entered into a Consent Order with the FTC, agreeing, among other things, to stop making biodegradability claims about its product unless it has “competent and reliable evidence, which, when appropriate, must be competent and reliable scientific evidence that substantiates the representation.”\textsuperscript{85} The FTC Commissioners accepted the Consent Order in their Decision and Order in July 2009.\textsuperscript{86}

The preceding description of the Green Guides and recent FTC adjudications illustrate several facets of the federal regulation of environmental marketing claims. To its credit, the Guides are comprehensive, covering a variety of commonly used environmental claims. The FTC has made a consistent and diligent effort to keep the Guides current and relevant by regularly soliciting, receiving, and attending to feedback from trade associations, industry players, consumer and environmental groups, and individuals.\textsuperscript{87} While the Guides lack the force of law, the FTC can and has utilized its adjudicative process to enforce its Congressional mandate to prevent “persons, partnerships, or corporations” from engaging in “deceptive acts or practices in or affecting commerce.”\textsuperscript{88} However, given the relative paucity of FTC Green Guide adjudications, the fact that the adjudications that have occurred have settled in consent orders, and the fact that deceptive or misleading “green” marketing claims are sprouting up across the retail landscape, one wonders whether the Guides

\textsuperscript{82. See generally Complaint, Tender Corp., No. C-4261 (F.T.C. June 9, 2009), available at http://www.ftc.gov/os/caselist/0823188/090609tendercmpt.pdf.}
\textsuperscript{83. Id. at ¶ 4.}
\textsuperscript{84. Id. at ¶¶ 7-8, 10-11.}
\textsuperscript{87. See discussion supra notes 25-27 and accompanying text.}
\textsuperscript{88. 15 U.S.C. § 45(a)(2) (2006).}
are effectively protecting consumers' interests or if they are merely ignored by consumers and marketers alike.

In light of the questionable efficacy of the Green Guides and FTC adjudications that have addressed environmental marketing claims, this Article next considers whether such regulation is necessary given the market forces and consumer behaviors at work in the retail environment.

PART III: BEHAVIORAL ECONOMIC THEORY

Over the years, a number of scholars arguing from a variety of perspectives have weighed in on the issue of whether government regulation is necessary in a given field; some have targeted their arguments at the regulation of environmental marketing claims. Among the voices, behavioral economics is a relative newcomer to the regulation field, and it has not yet spoken on the issue of whether the regulation of environmental marketing claims is necessary. Because behavioral economics is rooted in the concept of a boundedly rational consumer, it is especially applicable to the environmental marketing field, where consumer confusion and mistrust about producers' claims often results in consumers' failure to make decisions in their own best interests. Behavioral economics is a synthesis of principles derived from law and economics and psychology. As such, an understanding of the theory must begin with an understanding of concepts fundamental to both fields.

A. LAW AND ECONOMICS THEORY

Law and economics stands upon the following postulate: human behavior is rational. That rationality is derived from three supporting claims:

First, people have well-defined preferences (or goals) and make decisions to maximize those preferences. Second, those preferences accurately reflect (to the best of the person's knowledge) the true costs and benefits of the available options. Third, in situations that involve uncertainty, people have well-formed beliefs about how uncertainty

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89. Matthew A. Edwards offers the following explanation of rationality:

When economists refer to a choice or behavior as "rational," they generally are referring not to the process that leads to the behavior, but rather to the substantive nature of the outcome of the behavior. To clarify the distinction, behavior is procedurally rational when it is the product of deliberative, conscious analysis. But behavior is substantively rational when it is appropriate for achieving particular goals, given conditions and constraints, regardless of how the behavior was actually chosen.

will resolve itself, and when new information becomes available, they update their beliefs using Bayes’ law—the presumed ability to update probabilistic assessments in light of new information.\(^9\)

Law and economics scholars strive to “determine the implications of such rational maximizing behavior in and out of markets, and its legal implications for markets and other institutions.”\(^9\)

Law and economics literature defines “rational behavior” in a number of ways.\(^9\) The four most prominent conceptions have been identified as: (1) Definitional, (2) Expected utility, (3) Self-interested, and (4) Wealth maximization.\(^9\)

### 1. DEFINITIONAL RATIONAL BEHAVIOR

Definitional rational behavior represents rational choice theory at its most basic level; it posits only that “‘man is a rational maximizer of his ends.’”\(^9\) It does not make any prediction about what form the rationalizations might take, and it offers no guidance on what the ends might be, leaving the theorist with the sense that as long as a man’s acts are justifiable, they are rational.\(^9\)

### 2. EXPECTED UTILITY THEORY

As viewed through the lens of expected utility, rationality becomes a study of the way people make decisions. Expected utility theory claims that in making a decision, a person engages in a cost-benefit analysis that compares competing choices and selects the choice that most advances the person’s goals or preferences.\(^9\) The selection process is governed by five conditions that characterize rational decision making:

1. **Commensurability:** actors should be able to compare the utility consequences of all alternatives to each other;

2. **Transitivity:** if an actor prefers choice A to choice B and choice B to choice C, he should then prefer choice A to choice C;

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93. *Id.* at 1061-66.
94. *Id.* at 1061 (quoting Richard A. Posner, *Are We One Self or Multiple Selves?: Implications for Law and Public Policy, 3 LEGAL THEORY 23, 24 (1997)).
95. *See id.*
(3) **Invariance:** the preference between two or more choices should not depend on how the choice is presented or structured, so long as the outcome possibilities are constant;

(4) **Cancellation:** a choice between options should not depend on features of the options that are identical; and

(5) **Dominance:** an actor should never choose an option in which every feature is only as good as the features of a competing option, and at least one feature is not as good.97

### 3. **Self-Interested Rationality**

The self-interested concept of rationality complements the expected utility model by predicting the outcome of a rational actor's decision: a rational actor will act in such a way as to further his or her own best interest.98

### 4. **Wealth Maximization Rationality**

Wealth maximization narrows rationality further, predicting that a rational decision-maker will select the choice that has the best chance of maximizing his or her financial well-being.99

Set in the context of environmental marketing claims, rational choice theory suggests that consumers and marketers participate in a market for product information.100 The provision of product information is a cost such that "'perfect' or complete information is neither attainable nor desirable."101 Instead, a rational consumer will seek out product information until the marginal cost of searching for the information equals the consumer's expected return.102 Each of the four definitions of rational choice theory finds application to the market for environmental products. Specifically, expected utility and self interested rationality suggest sellers will advertise product attributes until the cost of advertising equals or exceeds the profits that stream from the advertising.103

The market for product information has several cost levels: search, experience, and credence. Search costs are those that consumers can

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98. *Id.*
99. *Id.* at 1066.
100. *See* Church, *supra* note 15, at 273.
101. *Id.*
102. *Id.*
103. *Id.*
research prior to the purchase of a product, such as the make and model of a car.\textsuperscript{104} Experience costs are those associated with the use of the product, such as how well a car handles in a variety of weather situations.\textsuperscript{105} Credence costs are a combination of search and experience costs that a consumer will only realize, if at all, after the consumer has purchased the product.\textsuperscript{106} Essentially, credence costs arise when "a buyer must pay search costs to determine what experience costs he has already suffered."\textsuperscript{107} For example, if a consumer purchased a car with stated miles per gallon fuel efficiency rating, the time and effort the consumer might spend verifying the efficiency rating would be credence costs because the consumer would expend search and experience costs to determine the actual value of information about the car. Because search costs are readily discernable prior to purchase, they rarely justify regulation.\textsuperscript{108} Likewise, experience costs for inexpensive products also do not generally justify regulation, since, having been deceived by a product once, a consumer is not likely to buy the product again.\textsuperscript{109} Conversely, because credence costs are more difficult to detect, they may justify regulation.\textsuperscript{110}

B. BEHAVIORAL ECONOMICS THEORY

The premise that humans behave rationally has provided a solid foundation for the development of the law and economics movement, perhaps owing to its simplicity, symmetry, and elegance. However, as the concept of rationality has evolved over time, it has become more susceptible to empirical testing. For example, as noted above, the expected-utility version of rationality predicts that people will make decisions by applying a cost-benefit analysis and selecting the option that best furthers their preferences or goals.\textsuperscript{111} To test this premise, researchers Daniel Kahneman and Amos Tversky designed thought questions such as the following and posed them to research subjects:

Which would you prefer?

\begin{itemize}
\item \textsuperscript{104} Rubin, \textit{supra} note 70, at 5.
\item \textsuperscript{105} \textit{Id}.
\item \textsuperscript{106} Mark R. Patterson, \textit{Product Definition, Product Information, and Market Power: Kodak in Perspective}, 73 N.C. L. REV. 185, 207 n.105 (1994) (noting that while his Article "discusses only search and experience information, \ldots a third category of product information" called credence characteristics "also has been proposed"); see also, Rubin, \textit{supra} note 70, at 5; Michael R. Darby & Edi Karni, \textit{Free Competition and the Optimal Amount of Fraud}, 16 J.L. & ECON. 67, 70 (1973).
\item \textsuperscript{107} Patterson, \textit{supra} note 106, at 207 n.105.
\item \textsuperscript{108} Rubin, \textit{supra} note 70, at 5.
\item \textsuperscript{109} \textit{Id}.
\item \textsuperscript{110} Rubin, \textit{supra} note 70, at 5.
\item \textsuperscript{111} Korobokin & Ulen, \textit{supra} note 92, at 1064.
\end{itemize}
100% chance to win $1500

or

50% chance to win $4000.\textsuperscript{112}

Rational choice theory would have the test subjects choose the option that, in the case of this question, generated the best financial gain.\textsuperscript{113} Researchers have found that in response to questions such as that above, most consumers would take the $1500, even though the expected value of the gamble, $2000, exceeds the value of the certain award.\textsuperscript{114} Such behavior illustrates risk aversion and is not surprising.\textsuperscript{115} What is interesting, however, is the result of asking the same set of consumers the following question:

Which would you prefer?

100% chance to lose $1500

or

50% chance to lose $4000.\textsuperscript{116}

Here the results are different: research suggests the majority of respondents would select the gamble, illustrating risk seeking behavior, even though in the previous example with the same expected values at stake, the respondents had been risk averse.\textsuperscript{117} Such asymmetry in consumer responses has led the researchers to conclude that expected utility could not fully explain actual consumer behavior.\textsuperscript{118} Instead, decision makers considered the context or framing of the question relative to a fixed reference point in addition to or instead of a pure cost-benefit analysis.\textsuperscript{119} Specifically, "[w]hen decision options are perceived as 'gains' relative to the reference point, individuals are risk adverse;" however, "when decision options are perceived as 'losses' relative to the reference point, the same individuals will be risk seeking."\textsuperscript{120} Such research suggests that the slogan


\textsuperscript{113} See Korobokin & Ulen, supra note 92, at 1066.

\textsuperscript{114} Id. at 1104.

\textsuperscript{115} Id.

\textsuperscript{116} See id. at 1102-03 (citing Tversky & Kahneman, supra note 112, at 453); see also Kahneman, supra note 112, at 1449.

\textsuperscript{117} Korobokin & Ulen, supra note 92, at 1105.

\textsuperscript{118} Id.

\textsuperscript{119} Id.

\textsuperscript{120} Id. at 1104.
"perception is reality" explains some consumer behavior. Consumers have a tendency to set aside expected mathematical values and probabilities and make decisions on perceived risks that arise from the way choices are posed.

Empirical testing such as the work of Kahneman and Tversky has revealed substantial cracks in the rationality foundation and has inspired others to critically and empirically evaluate rational choice theory assumptions and explanations.\textsuperscript{121} This body of research has become the field of behavioral economics. Herbert Simon has written that "behavioural [sic] economics is best characterized not as a single specific theory but as a commitment to empirical testing of the neoclassical assumptions of human behaviour [sic] and to modifying economic theory on the basis of what is found in the testing process."\textsuperscript{122} In contrast to the rational choice theory model, which operates as a device to predict an "objectively optimal response," behavioral economics serves to describe "the actual capacities of the human mind."\textsuperscript{123}

Such study has revealed that human behavior departs from the rational model in significant, but systematic ways that require a relaxing of the rigid assumptions of rational choice theory and characterize human behavior as "bounded" as opposed to fixed.\textsuperscript{124} The bounds of human behavior are described as bounded rationality, bounded self-interest, and bounded will power.\textsuperscript{125} Because bounded rationality and self-interest are most applicable to the study of environmental marketing claims, they will be discussed in some detail here.\textsuperscript{126}

Rather than making choices that would maximize their expected utility, researchers have found that people will "satisfice" themselves, meaning that people tend to select a choice that, while helpful, falls


\textsuperscript{122} HERBERT A. SIMON, 3 MODELS OF BOUNDED RATIONALITY: EMPIRICALLY GROUNDED ECONOMIC REASON 278 (1997).

\textsuperscript{123} Id. at 293.

\textsuperscript{124} Jolls, Sunstein & Thaler, supra note 15, at 1476.

\textsuperscript{125} Id.

\textsuperscript{126} For a discussion of the effect of individuals' bounded willpower in the context of climate change, see Andrew Green, Self Control, Individual Choice, and Climate Change, 26 VA. ENVT. L.J. 77, 81 (2008) (arguing that even if individuals had full information about climate change and were able to rationally understand it, their bounded willpower "may lead to individuals' unwillingness or incapacity to take action in their long-term interest").
somewhat short of optimal. One way consumers satisﬁce themselves is to consciously or unconsciously use heuristics, or mental shortcuts, to assist them when the choices they face are complex or ambiguous. Applicable heuristics here are lexicographic strategies, habit, availability, and anchoring and adjustment, each of which will be more fully described below. In addition to a decision’s potential complexity and ambiguity, as Kahneman has demonstrated, empirical evidence indicates that the context and framing of choices affect decision making more than rational choice theory would predict.

Given the cognitive limits of the human mind, it is no surprise that the complexity of a choice and ambiguity of alternatives will affect whether a consumer is tangibly able to maximize the expected utility of the decision. For example, consider a consumer who is standing in the aisle of a retailer, choosing between two products, one whose label indicates that it is “Composed of 45% Post-Consumer Waste” and the other whose label states nothing about its post consumer waste content. The prices of the goods are similar, though the arguably “environmentally friendly” product costs 2% more. Rational choice theorists would argue that the market for information would drive the consumer’s choice. To the extent that the consumer believes the increase in price provides a beneﬁt to him or advances his self interest, rational choice theorists would predict that the consumer will purchase the more expensive good. Rational choice theorists would allow the beneﬁt a consumer derives from his purchase to include a beneﬁt that does not inure to himself, such as purchasing the good for the beneﬁt of the environment.

However, the search costs involved in understanding what “Composed of 45% Post-Consumer Waste” means and the credence costs of determining whether the seller’s claim is accurate may exceed any beneﬁt the consumer might derive learning about the product, especially since the beneﬁt of purchasing the product would not accrue to the consumer directly. In fact, depending upon where the consumer ultimately disposed of the product and how her community deals with such consumer waste, her immediate community may see no beneﬁt from her purchase.

Further, uncertainty in the deﬁnition of “post consumer waste” also makes the consumers’ choice of alternatives ambiguous. Is 45% Post-Consumer Waste good enough for the environment to justify the increased cost? Such questions and concerns about the product’s attributes and the

127. See, e.g., SIMON, supra note 122, at 295-98; Korobkin & Ulen, supra note 92, at 1075; see also Jolls, Sunstein & Thaler, supra note 15, at 1477.
128. Korobkin & Ulen, supra note 92, at 1076.
129. Id. at 1077-84 (discussing complexity and ambiguity in the decision making process).
ambiguity of alternatives and purchase consequences quickly make a per se simple decision quite complex, and such complexity may well keep the consumer from making a rational choice.\textsuperscript{130}

Behaviorists have found that under such circumstances, consumers will likely employ a heuristic and make a satisficing decision.\textsuperscript{131} One such shortcut is a "lexicographic" strategy, which occurs when a consumer identifies a product attribute that is of greatest importance, and selects the product that has the best value on that attribute.\textsuperscript{132} In the foregoing example, the consumer might decide that as long as the products' price differential is lower than 5\% she will purchase the product with the most environmentally friendly marketing claim, even though the product may not actually yield its expected benefit.

A closely related tool is elimination by aspects.\textsuperscript{133} Consumers employ this heuristic when they base their product selection on the presence or absence of a key product attribute, such as its percentage of post consumer waste, and they select the product with the best percentage of post consumer waste eliminating alternatives.\textsuperscript{134} If two products share the same percentage, the consumer would select the next most important attribute, perhaps whether the product's content is recyclable, and apply the test in the same way.\textsuperscript{135}

Lexicographic and elimination by aspects run afoul of rational choice theory because they conflict with the principle of commensurability.\textsuperscript{136} As noted above, that principle requires that decision makers compare each of a product's attributes with each of the attributes of alternative products to make a decision that maximizes welfare,\textsuperscript{137} but when consumers employ the lexicographic strategies or elimination by aspects, the consumers key in on only one or two product attributes—they fail to consider the product as a whole.

Lexicographic and elimination by aspects strategies are related to another heuristic behavior: habit.\textsuperscript{138} A consumer may decide that rather than engage in a complex cost-benefit analysis with each product purchase,

\begin{itemize}
\item \textsuperscript{130} See Korobkin & Ulen, \textit{supra} note 92, at 1077-78.
\item \textsuperscript{131} \textit{Id.} at 1085.
\item \textsuperscript{132} \textit{Id.} at 1079 (citing James R. Bettman et al., \textit{Constructive Consumer Choice Processes}, 25 \textit{J. CONSUMER RES.} 187, 190 (1999)).
\item \textsuperscript{133} See \textit{id.}
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.} (citing Bettman et al., \textit{supra} note 132, at 190).
\item \textsuperscript{136} Korobkin & Ulen, \textit{supra} note 92, at 1079 (citing Bettman et al., \textit{supra} note 132, at 190).
\item \textsuperscript{137} See \textit{supra} text accompanying note 97.
\item \textsuperscript{138} Korobkin & Ulen, \textit{supra} note 92, at 1113-19.
\end{itemize}
he will always purchase the more environmentally friendly product, as long as it is no more expensive than alternative products. While such a decision may be rational because the consumer is limiting his information costs, such a strategy fails to achieve its expected utility when the consumer inadvertently purchases products whose environmental marketing claims are false or when he intentionally overlooks environmentally friendly products that do not make environmental marketing claims.

Such a consumer may also employ the availability heuristic. In accurately making a prediction about the probability of a future event that will support a rational choice to purchase a product (such as whether a product purchase will affect the environment), a consumer must consider the chance of the future event occurring (establishing a base rate of occurrence) and accurately accommodate any new information about the probability into the base rate. Researchers have found that people frequently “underuse base rates when making probability predictions, or ignore them altogether,” resulting in decisions that depart from rational choice theory predictions. Empirical research has shown that people:

\[\text{depart from the predictions of [rational choice theory] in diametrically opposite directions. At times, when they view the world as stable or static, they place too much weight on past events in prediction; but when they perceive large structural changes taking place in the environment, they underestimate the significance of past experience for predicting the future.}\]

For instance, if the consumer in the previous example learned from the news media that some sellers’ claims about their products’ post consumer waste content are false, the salience of the media’s report relative to the consumer’s purchase decision may cause the consumer to select the product without the claim, even though the product’s claim may be accurate.

Related to the availability heuristic is the tendency for people to develop cognitive anchors about products’ attributes and fail to adjust those anchors when they receive additional or new product information. For example, a product’s packaging may give a consumer the impression that the product is environmentally friendly; the package might have a green and blue color scheme with trees, clear water, and wildlife. However, the product may also include fine print language, stating that the product offers

139. Korobkin & Ulen, supra note 92, at 1087-90.
140. Id. at 1085-86.
141. Id. at 1085.
142. SIMON, supra note 122, at 285.
143. Korobkin & Ulen, supra note 92, at 1100-02.
no environmental benefits. A consumer may purchase the product, having anchored his perception of the product to the packaging and failed to adjust that perception in light of the product's printed disclaimer.

Just as complexity and ambiguity in decision making have the potential to drive consumers to make, at best, boundedly rational decisions, the context or frame of the decision can also lead to less than rational consumer behavior. As noted above, Kahneman's work has established that the framing of a choice relative to a reference point has an effect on consumer choice, and rational choice theory cannot explain that effect. When given a set of options, rational choice theory's invariance principle demands that a consumer's preference between two products does not depend on how the choice is presented, as long as the product's outcomes are constant. However, research in this area illustrates that if a consumer is presented with two alternatives, variables beyond the alternatives' attributes themselves will likely factor into which alternative the consumer selects. Such variables may include the consumers' previous experiences with the alternatives, whether the consumer has previously invested resources into one of the alternatives, what the consumer's friends will think if he selects one alternative over another, and relevant to this discussion, whether one product's attributes are cast as more beneficial to the environment or less destructive than the other. In short, context matters—a lot.

In addition to having bounded rationality, behaviorists have found that people also exhibit bounded self-interest. Most of the research on bounded self interest has focused on the concept of fairness, and it has found that, in general, people "care, or act as if they care, about others, even strangers, in some circumstances." While rational choice theory has incorporated the concept of altruism in dealing with bequest decisions, a non-market setting, behaviorists' treatment of bounded self-interest has addressed decisions made in the context of negotiations and markets. Experiments have shown that people "are willing to sacrifice their own material wellbeing [sic] to help those who are being or have been kind," but they are also "willing to pay to punish someone who has been unfair."

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144. Korobkin & Ulen, supra note 92, at 1102-07.
145. See supra Part III.B.
146. Korobkin & Ulen, supra note 92, at 1064.
147. Id. at 1069.
149. Id.
150. Id.
151. Id. at 1494-95 (citing Matthew Rabin, Incorporating Fairness Into Game Theory and Economics, 83 AM. ECON. REV. 1281 (1993)).
Moreover, empirical data also supports the conclusion that “people do willingly and voluntarily contribute to the production of public goods.”\textsuperscript{152} In the context of environmental marketing claims, such research suggests that if a consumer perceives that a product purchase will benefit the environment, he may well purchase the product, even if it costs a little more. Conversely, if the same consumer perceives that a seller is mistreating the environment, the consumer may “punish” the seller by selecting a competitor’s goods.

**PART IV: APPLICATION OF ECONOMIC THEORY TO THE QUESTION OF WHETHER TO REGULATE ENVIRONMENTAL MARKETING CLAIMS**

Given the behavioral economics perspective on how consumers may respond to sellers’ environmental marketing claims, this Article next considers whether governmental regulation of such claims is appropriate. In light of consumers’ responses to complex decisions that are often less than optimal, Korobkin has noted, “If efficiency is the goal of the legal policy at issue, policymakers should at least consider whether government intervention in the market can be used to enhance the efficient allocation of social resources.”\textsuperscript{153} Given consumers’ reliance on context and framing of choices, Korobkin notes that there are two possible strategies for encouraging behavior.\textsuperscript{154} First, “the government can attempt to present actors with information framed in a way to encourage the desired behavior”; second, “to the extent that frames are difficult to manipulate and this difficulty may lead to undesirable behavior, government should consider removing choices from [consumers].”\textsuperscript{155}

\textsuperscript{152} Korobkin & Ulen, supra note 92, at 1139 (citing Richard Thaler, The Winner’s Curse 9-11 (1992)).

\textsuperscript{153} Id. at 1082-83. But see Darby & Karni, supra note 106, at 86 (concluding that because government agents are subject to the same market forces as private monitoring entities in the market, the government may be no more likely to have a positive effect on the market than private third party market monitors). Darby’s and Karni’s conclusion hinges on the presence of private consumer monitoring entities effectively exposing firms’ fraudulent conduct. See Darby & Karni, supra note 106, at 86. As noted above, in the environmental product market, however, the benefit of correcting sellers’ claims does not flow directly to the consumer and the majority of products bearing environmental claims are inexpensive; thus there is less incentive to engage in monitoring and no such widespread private monitoring of sellers’ claims exists. Absent such monitoring, sellers’ claims are left unchecked.

\textsuperscript{154} Korobkin & Ulen, supra note 92, at 1106.

\textsuperscript{155} Id. at 1106-07. But see Church, supra note 15, at 249 (arguing that government regulation of environmental marketing claims will deter sellers from touting the environmental attributes of their products). Church argues that absent such information, consumers will be less able to act on their desire to purchase environmentally friendly products. See id. at 249, 322-23. However, recent history may disprove Church’s point. While the Green Guides and FTC adjudicative actions may not be firm regulation of the market, they have provided, at least, guidance to sellers.
consumers comply with social norms, government may use its power to facilitate norm development through legislation, education, or both.\textsuperscript{156}

Jolls notes that laws are necessary because "[s]ome of the relevant actors will not be constrained by fairness norms in the absence of a law."\textsuperscript{157} Such language may give the impression that behavioral economics scholars favor a heavily paternalistic form of government; however, to the contrary, Jolls wisely notes that "bounded rationality pushes toward a sort of anti-antipaternalism—a skepticism about anti-paternalism, but not an affirmative defense of paternalism."\textsuperscript{158} Jolls cautions that before government gets involved in the business of regulating markets to correct the inefficiencies that arise from consumers’ bounded rationality, government should question whether it can do any better job than the market can on its own.\textsuperscript{159} Korobkin notes that great controversy surrounds the question of whether, and to what extent, the law should play a role in defining consumers’ harmful and beneficial habits.\textsuperscript{160} He suggests that policymakers must look beyond a pure cost-benefit analysis and examine the context and consumer characteristics to determine whether intervention would be efficacious.\textsuperscript{161}

Richard H. Thaler and Cass R. Sunstein recently argued that even small changes in the way the policy makers frame decisions for consumers can improve consumers’ welfare and preserve their freedom of choice.\textsuperscript{162} Michael A. Smith adds that choices can be framed to promote liberty—the ability to make an informed reflective choice and equality—parity among

\textsuperscript{156} Korobkin & Ulen, \textit{supra} note 92, at 1131-32.

\textsuperscript{157} Jolls, Sunstein & Thaler, \textit{supra} note 15, at 151.5.

\textsuperscript{158} \textit{Id.} at 1541 (citing Cass R. Sunstein, \textit{Behavioral Analysis of Law}, 64 U. CHI. L. REV. 1175, 1178 (1997)).

\textsuperscript{159} Jolls, Sunstein & Thaler, \textit{supra} note 15, at 1543-44.

\textsuperscript{160} Korobkin & Ulen, \textit{supra} note 92, at 1116.

\textsuperscript{161} \textit{Id.} at 1116.

A. ASYMMETRIC PATERNALISM

Aware of the findings of behaviorists and the paternalism debate, Camerer et al. (Camerer) proposed a model to determine the appropriateness of regulating a given market. They argue that when a regulation is asymmetrically paternalistic it strikes the proper balance between market efficiency and the boundedly rational consumer. A regulation is asymmetrically paternalistic when “it creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational.” An important assumption underlying Camerer’s model is that some consumers act rationally. While behavioral economics has demonstrated that people exhibit irrational tendencies, it does not postulate that all consumers act irrationally all of the time. In developing the model, Camerer was concerned about placing an undue burden on the rational consumer. Camerer observes that the key “challenge is figuring out what sorts of ‘idiotic’ behaviors are likely to arise routinely and how to prevent them, while imposing minimal restrictions on those who behave rationally.” In describing his model, Camerer begins with an equation that describes a beneficial paternalistic policy:

\[(p \times B) - [(1-p) \times C] - I + \Delta I > 0\]

164. Camerer et al., supra note 90, at 1212.
165. Id. In April 2007, the FTC held a conference on behavioral economics. JOSEPH P. MULHOLLAND, SUMMARY REPORT ON THE FTC BEHAVIORAL ECONOMICS CONFERENCE 1, available at http://www.ftc.gov/be/consumerbehavior/docs/070914mulhollandrpt.pdf (last visited Jan. 26, 2010). At the conference, Paul Pault of the FTC noted that the decision-making process underlying a number of FTC regulations incorporates the principles of asymmetric paternalism. Id. at 5. Like Camerer’s model, the FTC employs a cost-benefit analysis that justifies government intervention when “the benefits to the cognitively impaired will be greater than the cost to those who are cognitively aware.” Id.
166. Camerer et al., supra note 90, at 1212.
167. Id. at 1214.
168. Id.
169. Id.
170. Id. at 1218. At the FTC’s conference on behavioral economics, Camerer noted that consumer policy needs to do a better job of determining which consumers are cognitively challenged or inexperienced. MULHOLLAND, supra note 165, at 18. Camerer noted that consumer age may serve as an identifying factor: consumers who are young and old have the most cognitive issues. Id. at 18-19.
171. Camerer et al., supra note 90, at 1219.
Where:

p is the set of boundedly rational consumers
B is the benefit boundedly rational consumers receive from the policy
C is the cost of the policy to rational consumers
I is the implementation costs of the policy
$\Delta \pi$ is the change in firm profits as a result of the policy

A beneficial asymmetric paternalistic policy would provide a high B value and low C value and therefore, the left side of the equation exceeds zero. Camerer acknowledges that in the absence of the policy, some sellers would benefit from exploiting the boundedly rational consumer; thus, upon implementation of the policy, some sellers would show negative profits. However, he argues that, to the extent the policy provides benefit to the boundedly rational consumer, it creates a social benefit that is superior to the losses some individual firms may suffer. The social benefit arises from the alignment of the boundedly rational consumers' demand with the "true benefits they derive from consumption."

Applying Camerer’s model to the question of whether to regulate seller’s environmental marketing claims requires articulation of a policy that regulates sellers’ environmental claims and, in light of the policy, consideration of the variables discussed above. For the purposes of this discussion, assume that the FTC promulgated a rule that prohibited deceptive environmental marketing claims and provided a standardized set of definitions that indicate when a seller’s claims are deceptive. Further, assume that the FTC implemented a public and private civil enforcement scheme to enforce the rule.

Without question the market would contain boundedly rational and boundedly self-interested consumers because high information costs, the presence of social norms, and fairness concerns would cause at least some, and depending on the product, perhaps many, consumers to act in a less than rational manner when selecting products. Consumers encounter

172. Camerer et al., supra note 90, at 1219.
173. Id.
174. Id. at 1220.
175. Id. at 1220-21.
176. Id. at 1221.
177. But see Church, supra note 15, at 271 (arguing that “consumer confusion is rational”). Applying an economics of information model, Church argues that consumer confusion will prompt consumers to expend search costs to determine whether a seller's claims are valid. Id. at 271-72. When high search costs preclude consumer investigation, such confusion will also
high information costs when confronted with a seller’s environmental marketing claims because, as noted above, the claims are often complex, the alternatives are ambiguous, and the context may mislead consumers. The information costs will likely include experience and credence costs, those costs that consumers may not realize until after product purchase.

For example, a consumer may purchase a product with a label touting its recyclability, but later learn that such products are not recyclable in her area or that in the course of making the product, the manufacturer used a process that is more destructible to the environment than any benefit to be gained from recycling the product. To reduce their information costs, consumers are likely to employ heuristics, such as lexicographic strategies, availability, anchoring, and habit. Such short cuts frequently result in less than optimal behavior. Further, because environmentally friendly product purchases are often driven by social norms and not genuine product attributes, consumer purchases may not maximize their utility. And finally, since consumers may purchase or not purchase a product because of fairness issues, the consumers may not optimize their purchasing power.

The benefits that boundedly rational consumers would realize from the implementation of the policy described above are significant, but due to the nature of this market, they flow indirectly to the consumer. Because the policy would, at least in theory, ensure that sellers’ environmental marketing claims are truthful and their products offer legitimate value to the environment, the primary beneficiary of the policy would be the prompt third-party certifiers to enter the market. Id. at 287-89. The certifiers will direct consumers to the goods that make valid claims. Id. In effect, through third party certifiers, the market would police itself against false or misleading claims. Id. The difficulty with this theory is that because the benefits of environmentally friendly products flows directly to the environment and only indirectly to the consumer, there is less incentive for third party certifiers to enter the market. Moreover, should such certifiers enter the market and begin to compete, consumers may well be inundated with additional product information, uncertain about which certifier to believe, if any, adding yet another layer of complexity and ambiguity to consumers’ purchase decisions. Jamie A. Grodsky cautions that market forces may “undermine the quality of environmental certification” because third-party certification requires high start-up and monitoring costs, which may lead some certifiers to relax their standards to cover costs. Jamie A. Grodsky, Certified Green: The Law and Future of Environmental Labeling, 10 YALE J. ON REG. 147, 209 (1993). Should certifiers emerge in the market, Grodsky recommends government oversight of certifiers’ practices and finances. Id. at 211-13.

178. But see Church, supra note 15, at 274 (contending that “[m]any environmental attributes, however, are not credence qualities, but search qualities,” especially when consumers are aware of their communities’ environmental programs). One difficulty with the information market is that one consumer’s credence cost is another’s search cost. An advantage to regulation is that it gives every consumer an opportunity to make a rational product purchase. Moreover, behavioral law and economics contemplates moving from theory to empiricism—consumer perception surveys would go a long way to determine exactly how high information costs are in the environmental advertising market.
environment. To the extent the consumer values environmental protection, he would see a benefit from the policy because the policy would protect him from making a host of errors as he makes product purchase decisions. Such errors include:

(1) being misled by sellers' deceptive product claims and purchasing products that appear to help the environment but in reality offer no benefit or hurt the environment;

(2) being confused about the meaning or significance sellers' environmental claims and consequently selecting a less environmentally friendly product;

(3) being aware of the propensity for sellers to make false environmental claims about their products, resulting in mistrust of sellers' claims, and refusing to purchase products that bear valid environmental marketing claims and would actually help the environment;

(4) paying more for a product the seller claims is a environmentally friendly product but that actually offers little to no environmental benefit.

The costs the policy would impose on rational consumers are minimal. The consumer who functions rationally in the absence of the policy by validating sellers' claims on his own and making optimal product purchases would arguably be even more efficient under the policy because his information costs would be significantly reduced. Depending on the level of standardization in the policy, it is possible that some sellers whose product claims are valid but do not satisfy the policy standards would be driven from the market, resulting in fewer alternative products for the rational consumer to purchase, and thus a potential minor loss to the rational consumer.

The costs to implement the policy are not clear, but given the exhaustive process the FTC must employ to make rules, and the costs associated with meaningful enforcement, they would likely be significant.\footnote{179} Fortunately, the FTC has a well-defined infrastructure, the authority to make rules that prohibit deceptive environmental marketing claims, experience in working with environmental marketing claims through the Green Guides, and a history of enforcement actions.\footnote{180}

Sellers whose environmental marketing claims are false or fail to satisfy policy standards would be forced from the market, resulting in losses. However, the policy may also generate consumer trust in sellers'
claims, increasing the pool of buyers and consequently increasing sellers’ profits.

Returning to Camerer’s equation:

\[(p * B) - [(1-p) * C] - I + \Delta n > 0\]

Given the disparity between the significant benefits (B) the policy would provide to boundedly rational consumers and the minimal costs (C) to rational consumers, the policy would be asymmetrically paternalistic as Camerer has defined it. As such, it is arguably appropriate for the government to regulate sellers’ environmental marketing claims.

**B. RATIONAL CHOICE THEORY**

1. **PURE MARKET APPROACH**

Rational choice theorist Alan Schwartz has questioned whether the market is capable of dealing with consumer irrationality without paternalistic legislative intervention.\(^{182}\) Like the behavioral economics scholars, Schwartz acknowledges that the consumer demand pool includes consumers who are “difficult to fool” and those who are “more easily misled.”\(^{183}\) Schwartz further divides the “more easily misled” consumers into two additional groups: those that know they are easily misled and those that have no clue.\(^{184}\) Schwartz labels the clueless consumers as “naïve,” noting that they are prone to make cognitive errors because they are “more optimistic, more confident, more present-oriented, more swayed by anecdotal evidence than [they] should be.”\(^{185}\) Other consumers, those who are “difficult to fool” and those who are “more easily misled,” but aware of their shortcomings, are labeled as “sophisticated.”\(^{186}\)

Schwartz observes that the demand pool as he has described it creates a dilemma for sellers: sellers would like to profit from the unsophisticated consumers by offering them products on less favorable terms than the sophisticated consumers would accept.\(^{187}\) The difficulty, of course, is that firms cannot easily tell the difference between consumers until they make a purchase decision.\(^{188}\) Clearly, however, “the market is more likely to offer

\(^{181}\) Camerer et al., *supra* note 90, at 1219.
\(^{183}\) Id. at 133.
\(^{184}\) Id. at 134.
\(^{185}\) Id. at 135.
\(^{186}\) Id. at 138.
\(^{187}\) Id. at 134.
\(^{188}\) Schwartz, *supra* note 15, at 134.
'naïve contracts' to consumers who are unaware of their penchant to err."

Thus, like the two types of consumers—sophisticated and naïve—Schwartz also envisions two types of products: high quality and low quality. Ideally, firms would price the products such that sophisticated buyers would purchase high-quality products and naïve buyers would purchase low-quality products. Schwartz then considers whether market competition alone can correct for the naïve consumers' cognitive error. To address the question, Schwartz constructs a "search equilibrium model of competition" for the market that addresses two issues: the effect of competition on the price for low quality goods and how competition affects the mix of high and low quality goods on the market.

The modeling reveals that (1) market competition will produce some low-quality products, but they are unlikely to be sold at "supracompetitive prices"; (2) some sellers will offer high quality products; (3) the likelihood that a market will be effective in dealing with low-quality products increases to the extent: (a) the number of sophisticated consumers increases; (b) sophisticated and naïve consumers search for the products they prefer; (c) sophisticated consumers have a willingness to pay for high-quality products; and (d) the fixed costs associated with high-quality goods are lower than the fixed costs associated with low-quality goods; and (4) market competition will also be more effective when naïve consumers have a low willingness to pay for low-quality products and a high willingness to pay for high-quality goods.

Schwartz concludes that as long as there is a sufficient number of sophisticated consumers purchasing high-quality products and the naïve consumers have a low willingness to pay for their preferred low-quality products, the quantity of low quality products will decline and "may actually vanish," leaving only the high quality products available for purchase. Thus, market competition, without intervention, may drive out low-quality products.

Applying Schwartz's conclusion to the market for environmentally friendly products, sophisticated consumers would be the consumers who

190. Id. at 136.
191. Id. at 134.
192. Id. at 136.
193. Id. at 137.
194. Id. at 151-52.
196. Id. at 131.
197. See id. at 151-52.
make product choices based on valid and accurate information about the product. If they are uncertain about a seller’s claim, the sophisticated consumer would check it out and not make an uninformed choice. A naïve consumer would not know whether the seller’s claims were valid; he would make a product choice without investigation. High products would be those that make valid environmental claims; low products would be those that make deceptive or misleading claims.

Schwartz would argue that products with false or misleading product claims will decline in quantity and may vanish from the market as long as: (1) the market contains a sufficient number of consumers who can identify sellers’ deceptive claims and/or check into sellers’ claims and make informed purchase decisions; (2) such consumers have a high willingness to pay for products that advertise valid and accurate environmental claims; (3) all consumers search for their preferred products (4) the fixed price of products bearing valid claims is low relative to the fixed price of products with false claims; and (5) the uninformed consumers have a low willingness to pay for products that make false or misleading product claims and a correspondingly high willingness to pay for products that make valid and accurate environmental claims.

In sum, Schwartz’s model hinges on two events: (1) the presence of a “sufficient” number of discerning consumers who will not be misled by sellers’ false or misleading claims and who will seek out products bearing valid claims and (2) uninformed consumers’ low willingness to pay for products with weak or bogus claims and a high willingness to pay for products with accurate claims.

As noted above, environmental product claims tend to be complex and are frequently vague or ambiguous; consequently, most would probably agree that the market for environmentally friendly goods has plenty of uninformed consumers. The question is whether the market contains a “sufficient” number of discerning consumers to create the demand for products that include valid environmental claims so that competition can function properly.

198. See Schwartz, supra note 15, at 136. For such a situation to occur, the uninformed consumers must have a willingness to pay that arises from some product attribute other than the validity of the product’s claim, since by virtue of being uninformed they would not know which product claims are valid. Such attributes might include product packaging, labeling, or other marketing efforts. For example, if the high-quality product uses an impressive looking “seal of approval” from a third-party certifier, a naïve consumer may set aside low-quality products and purchase the high-quality product, not because its claims are valid, but because the consumer is impressed with the seal.

199. See id.
What's clear is that the market is flooded with products that make environmental claims. If the data from TerraChoice and the Shelton Group are even remotely accurate,²⁰⁰ it appears that many sellers make false product claims. In Schwartz's terms, arguably, there are many more low-quality products on the market than high.²⁰¹ If the supply of low-quality products is an indicator of demand, it appears that there are few discerning consumers on the market seeking out high-quality products—those with valid environmental claims. Moreover, since the market appears replete with uninformed consumers who cannot discern whether a marketer's claim is valid, the uninformed consumers likely do not have a low willingness to pay for products with bogus claims; instead, they appear willing to pay for any product bearing an environmental claim—valid or not. Thus, market forces alone are not likely to drive the low-quality products from the shelves.

Schwartz asserts that banning low-quality products "is problematic," because decision makers cannot readily discern which consumers might purchase low-quality products and low-quality products might be a rational choice if they are competitively priced and better products are monopolistically priced.²⁰² He notes, however, that when identical products trade at widely different prices, "an insufficient number of consumers comparison shop."²⁰³ Under such circumstances, Schwartz advocates casting common product attributes in common, readable terms so that competition increases and consumers are more inclined to comparison shop.²⁰⁴ Finally, Schwartz notes that policy makers can respond directly to consumer bias by educating consumers, thereby increasing the supply of sophisticated consumers.²⁰⁵ Under the equilibrium model, an increase in sophisticated consumers would enhance market performance because the sophisticated consumers would drive down the price of low-quality products.

²⁰⁰ See supra text accompanying notes 2, 8.
²⁰¹ Church argues that because many products bearing environmental marketing claims appear in the mass consumer transaction market, sellers rely on consumers’ repeat purchases to stay in business. Church, supra note 15, at 293. The need for repeat sales creates an incentive for sellers to make valid product claims. Id. However, as noted above, given the complexity and ambiguity of sellers’ claims and the ensuing high information costs of researching them, consumers may never know if sellers’ claims are valid and may make repeat purchases based on a perception of environmentally friendliness, even though that perception is inaccurate.
²⁰² Schwartz, supra note 15, at 153-54. Church would add that "increased regulation deters manufacturers from touting environmental attributes of their products, which has the effect of limiting the interchange of information between manufacturers and consumers.” Church, supra note 15, at 249.
²⁰³ Schwartz, supra note 15, at 154.
²⁰⁴ Id. at 154.
²⁰⁵ See id.
Thus, here Schwartz would argue against banning products that make false or misleading claims. Instead, he would advocate the standardization of product terms to increase comparison shopping if prices vary widely, and educating consumers about sellers’ claims to increase the demand for products with valid and accurate environmental claims.

Interestingly, both Camerer and Schwartz acknowledge that the demand pool is mixed. Camerer argues that regulation is appropriate when the regulation provides more benefit to boundedly rational consumers than cost to rational consumers, which the regulation of environmental marketing claims arguably would do. Given the state of the market, Schwartz may have to concede market competition will not “ameliorate” consumers’ cognitive errors and that government might appropriately act to educate consumers about sellers’ claims.

2. REGULATION’S RISK OF MORAL AND COGNITIVE HAZARDS

Before concluding that regulation of environmental marketing claims is appropriate, the risk that the regulation’s moral and cognitive hazards to consumers would exceed the regulation’s benefits should be evaluated. Jonathan Klick has argued that legislation designed to “correct inefficiencies associated with systematic psychological biases in the formation of beliefs and expression of preferences” may inhibit “the development of the regulated parties’ decision-making skills.” In light of the way people learn, their motivation to learn, and the fact that people “differ in their propensity to act rationally,” Klick argues that “debiasing interventions, or no intervention at all,” may be more efficient than a paternalistic intervention. He further asserts that a paternalistic intervention will create a moral hazard because it will reduce consumers’ “motivation to act deliberately and carefully,” noting that when people are motivated to act with deliberation and care they are less likely to act on psychological biases. Cognitive hazards arise because paternalistic
regulations deprive consumers of the opportunity to engage in the kind of “information searches, educational investments, and feedback” that would empower consumers to develop “effective decision-making skills and strategies.”

In place of paternalistic regulations, Klick points to a behaviorist model of self-regulation that suggests consumers will improve their decision making skills when they make decisions and attend to and accommodate for the feedback and outcomes of those decisions. Attending to the feedback and outcomes of decisions leads to changes in consumers’ psychological states, such that later psychological states have more reliable information about how to obtain the most desired and valued results, and therefore, later psychological states move the consumer toward more rational behavior. For example, in the context of product purchases, a consumer may purchase a specific product over other similar products because the product makes an environmental claim, such as “recyclable,” only to discover later that the product is not recyclable in her geographic area. Armed with feedback about the product’s recyclability, the consumer will, on her own, select an alternative product that is recyclable or at the very least, have a low willingness to pay for the product that is not recyclable in her area. By obtaining information about products’ recyclability and using that information to guide her future product purchases, the consumer exhibits changes in her psychological state. These changes are profound and long-lasting because the consumer herself takes ownership of the product purchase decision. Such changes would never have occurred had regulation removed non-recyclable products from the shelves. Implicit in the self-regulation model is the notion of incentives. The incentive to make a more rational decision motivates consumers to learn from previous decisions, especially when “irrational behavior occurs due to lack of attention or interest.”

Paternalistic regulations, Klick argues, interrupt the self-regulation

213. Klick & Mitchell, supra note 209, at 1626. Church agrees, noting that even if a consumer purchases a product with an attribute that does not satisfy a regulation, the “consumer still benefits from purchasing that attribute.” Church, supra note 15, at 270. He adds that “the information conveyed by advertising may foster discussion and may even promote grassroots environmentalism.” Id. Church would “trust consumers to recognize and account for the inevitable environmental tradeoffs,” and he contends that “[f]or grassroots environmentalism to develop and have a positive effect, however, it should be based upon truth, and truth is not promoted by providing uniform definitions when there is no consensus concerning the underlying policy.” Id.


215. Id.

216. Id. at 1633-34.

217. Id. at 1634.
model by revoking consumers' power to engage in decision making and robbing them of incentives to modify their own psychological states. Consequently, one cost of paternalistic regulations is that they may worsen or prolong consumer biases. Klick further notes that a paternalist culture is likely to beget more paternalism, creating additional drag on the market as paternalistic policy makers chase exploitive firms and interfere with pure competition. He concludes, "[T]o the extent economic efficiency is the primary goal, improving competition rather than protecting individuals from their inefficient irrational tendencies is likely the better long term strategy."

In the context of ex ante regulations, such as the regulating of environmental marketing claims, Klick notes that he "might favor" regulation when the expected benefit of the regulation exceeds the consumers' "expected outcome of the search model net of search costs." He states that such a "condition will hold if the policy maker is almost as likely to choose correctly as the individual is, where the allowable gap in likelihoods is determined by the cost of search effort relative to the utility gap between the correct and incorrect outcomes." He cautions that as consumer preferences become more diverse, the likelihood of policy makers to make accurate choices for consumers decreases, resulting in less overall utility for the policy. Returning to the question of regulating sellers' environmental marketing claims, regulation would be appropriate if the benefit of the regulation would exceed the cost to consumers, where that cost includes the possible loss in "cognitive capital" that would result from constraining consumers' ability to make their own choice.

C. REVISIGN THE ASYMMETRIC PATERNALISM MODEL TO ACCOUNT FOR MORAL AND COGNITIVE HAZARDS

Synthesizing Klick's moral and cognitive hazard analysis with Camerer's model for asymmetric paternalism results in the addition of a value, c, to the asymmetric paternalism model; c is the cost boundedly rational consumers suffer by not being able to engage in a decision making process that would, over time, drive down their irrational preferences and bias and move them toward irrationality. Thus the equation becomes:

218. Klick & Mitchell, supra note 209, at 1635.
219. Id. at 1637.
220. Id. at 1639.
221. Id. at 1640-41.
222. Id. at 1645.
223. Id.
225. Id. at 1646-47.
The benefit of regulating sellers’ environmental product claims has been discussed above and all other variables remain the same. Thus the question becomes: to what extent does such regulation keep consumers from engaging in a decision-making process that would move them naturally toward rationality? Rephrasing, we can compare the benefits consumers accrue from the decision making process in the unconstrained market to the absence of those benefits in the constrained market. Absent regulation, if a consumer purchases a product that makes a false or misleading claim and the consumer learns of the deceptive claim, he can choose not to purchase the product in the future. Learning whether the seller’s claim is deceptive is challenging in this market, however, because the search, experience, and credence costs are high, as sellers’ claims are often complex and ambiguous.

For example, if a consumer was to decide whether to purchase a package of paper plates that includes the claim that the plates are biodegradable or a package that makes no such claim, the consumer would have to know what biodegradable means, whether the plates are in fact biodegradable, and whether the plates are biodegradable in the waste disposal system his community uses, which would require an awareness of how his community processes paper product waste. Moreover, given the sheer volume of consumer product purchases and the fact that most product purchases are relatively inexpensive, the incentive to engage in search for each product with an environmental claim is not likely to be strong. Thus, a consumer will likely never know whether he is making a rational decision when he purchases a product with an environmental marketing claim. Absent such knowledge, no change in psychological state can occur; biases and preferences will remain unchanged, and the benefit consumers realize from being able to learn from their decisions in an unconstrained market will be small. Further limiting consumers’ learning benefit is the fact that, as noted above, any benefit the consumer derives from learning about a deceptive product claims is indirect. The primary beneficiary is the environment—the individual’s welfare is changed only to the extent he values the environmental impact of his purchase.

Because the benefit of “cognitive capital” in this market is arguably minimal, the cost of losing that benefit with the implementation of regulation is correspondingly minimal. Thus, as long as the regulation of environmental marketing claims provides meaningful benefit, under Klick’s model, regulation may be appropriate. Further, under the modified

\[ p \times (B-c) - [(1-p) \times C] - I + \Delta I > 0 \]

See Camerer et al., supra note 90, at 1219.
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asymmetric paternalism equation:

\[ [p \times (B-c)] - [(1-p) \times C] - I + \Delta I > 0, \]

since the value for \( c \) is small, arguably that model also endorses regulation in this area.

Like Schwartz, Klick recognizes the value of paternalist education as a tool to empower consumers to act more rationally, but he cautions that if the government provides education for consumers, it robs some consumers of their desire to educate themselves and may discourage those consumers from seeking education.\(^{227}\)

Given the wide range of products that bear environmental claims and the diversity of those claims, education alone is not likely to generate a sufficient number of sophisticated consumers to drive deceptive or misleading claims from the market. However, education, coupled with the standardization of environmental marketing terms and effective enforcement mechanisms, would likely have a significant positive impact on the market—it is to this topic the Article now turns.

**PART V: ATTRIBUTES OF EFFECTIVE REGULATION**

Having argued that the regulation of environmental marketing terms is necessary, the Article now considers what form of regulation is appropriate. The focus of such regulation must be to enable consumers to make rational decisions when faced with products bearing environmental marketing claims. To facilitate rational decision making, regulation must compel sellers to provide accurate information about their products' attributes and the products' effects on the environment. Moreover, the products' environmental claims must be written in a way the average consumer can understand. Finally, for sellers to conform their claims to the standardized vocabulary and definitions, the regulation must have an effective enforcement mechanism. Thus the regulation should have three components: standardization, education, and enforcement.

**A. STANDARDIZATION**

The regulation must articulate a set of environmental marketing claims, a standard definition for each claim,\(^{228}\) and a legal standard for


\(^{228}\) Church argues that standard definitions require a mix of advertising and environmental policy decisions. Church, *supra* note 15, at 322. He asserts that when there is no consensus on environmental policy, imposing standard definitions is “foolhardy at best.” *Id.* However, in the years since the Green Guides were first released in 1992, the FTC has exposed them to three rounds of notice and comment. With each review, the definitions have become more solid. With
deceptive claims. Ideally, each claim and its definition would conform to international standards such as those promulgated by the International Standards Organization. Through its work in creating the Green Guides, the FTC has demonstrated that it can articulate a set of environmental marketing claims and it has taken strides to define each claim. However, the Guides’ “safe harbor” approach leaves too much uncertainty regarding the nature of each claim. Moreover, global sellers wishing to comply with the Guides must adapt their claims to the American market because the Guides do not contemplate international standards. In addition, since the guides do not preempt state law, several states have developed their own standards, further crowding the field of applicable standards and making it difficult for national and international sellers to offer products with valid environmental attributes.

Since the promulgation of the Green Guides in 1992, authors have called upon the FTC to work with the EPA in drafting environmental marketing standards; however, no such collaboration has occurred, perhaps owing to the highly politicized climate at the EPA and the FTC’s status as an independent agency. The FTC has also refused to enact its own set of environmental marketing rules, arguing that doing so would require the articulation of environmental policy and it lacks statutory authority to appropriate guidance from the Environmental Protection Agency and the notice and comment process required for rulemaking, such a consensus will likely develop and support firm claim definitions.

229. Although written in the context of the FTC’s work with unfairness claims, Matthew A. Edwards makes an important point about the FTC’s receptiveness to behavioral economics theory. See Matthew A. Edwards, The FTC and New Paternalism, 60 ADMIN. L. REV. 323, 351 (2008). He notes that since the 1980s the FTC has seen its role as one of “umpire, not the star player” and that the FTC is tasked not only with enforcing the law, but also studying the market, and working with industry generate effective solutions to marketplace problems. Id. at 351 (quoting former FTC Chairman Timothy J. Muris). Given its focus on consumer sovereignty, Edwards predicts that the FTC is not likely to radically embrace behavioral economics as expressed through the promulgation of paternalistic regulations; instead, he concludes that the FTC will likely defer to Congress’s ability incorporate behavioral economics theory in its policymaking. Id. at 370. As noted above, in April 2007 the FTC held a conference on behavioral economics, indicating a willingness to explore the theory and its implications for FTC policy. See generally MULHOLLAND, supra note 165. In her presentation on FTC Decision-making, FTC staffer Pauline Ippolito noted that the FTC’s deception policy permits it to incorporate an understanding of consumers’ behavior problems when evaluating whether an ad is deceptive. See id. at 10-11. Currently consumer testing with controlled copy tests is “relatively standard at the FTC.” Id. at 11. During the copy tests, consumers review suspect ads in context and report any claims they find. Id. The consumers’ report of a misleading claim provides the basis for a case. Id.


make such policy. However, the FTC has considerable expertise in attending to and responding to the dynamics of the market and has recently expressed a willingness to consider the policy implications of a boundedly rational consumer as a market participant. Consequently, the FTC is in the best position to promulgate rules standardizing environmental marketing claims. The policy direction has already been set in the Green Guides, which have been generally well received. All that remains is providing strength and standardization to the guides by transforming them into rules.

The FTC’s definition of deception is embedded in a deception policy, which the Commission approved in 1983. The policy standard hinges upon whether the seller’s representation is likely to mislead a reasonable consumer. Use of the “reasonable consumer” standard is a reflection of the FTC’s effort to conduct a cost-benefit analysis prior to bringing an action. Rather than bringing an action for every perceived claim of deception, the FTC screens the claims to determine which would offend a reasonable consumer. As noted above, behavioral economic scholars and rational choice theorists recognize that the consumer demand pool is a mixture of rational and boundedly rational consumers. Use of the “reasonable consumer” standard is likely to leave some boundedly rational consumer claims untouched. However, the cost of implementing a regulation that addressed every claim would likely render the regulation impractical. Instead, through empirical research into the kind of misperceptions consumers commonly make, regulators can prosecute those claims that consumers are likely to misperceive and devise a program of systematic education that enables all consumers to make more rational purchases. Thus, the FTC’s current deception policy is sufficient to support environmental marketing rules.

B. Education

Having set appropriate standards, the regulation’s next objective should be one of education. As empirical research sheds light on consumer misperception, policymakers can fashion educational materials that teach consumers how the products they purchase affect the environment, what


233. Policy Statement on Deception, supra note 53.

234. Id.

235. Note that in screening claims, the FTC can make one of two errors: it may prohibit a claim that is true, and it may permit a claim that is false. See Rubin, supra note 70, at 7. If it targets its propensity to permit false claims, it necessarily will prohibit more claims that are true. Id.

236. See Bar-Gill, supra note 121, at 755 (noting the persistence of consumer misperception even upon seller correction and suggesting that empirical research demonstrate consumer misperception).
sellers' environmental claims mean, and whether the product attributes that give rise to sellers' claims will have a meaningful impact on the environment. No such education component to federal regulation currently exists. Although, as noted above, the Green Guides have articulated a set of environmental marketing claims and have provided some sense of what those claims mean, few consumers are aware the Guides exist; nothing in the Guides compels the FTC to educate the public about their existence. The FTC has engaged in consumer perception studies of environmental marketing claims in the past, most recently during 2009. By focusing its study on debiasing consumers' opinions and developing an educational message that will align consumers' preferences with valid environmental marketing claims, the FTC will more effectively protect consumers' interest in the environment and environmentally friendly products.

In discussing asymmetric paternalism regulations, Camerer notes that one of the expressed purposes of the Federal Truth in Lending Act (FTLA) was to provide meaningful disclosure of consumer credit costs. The disclosure enables consumers to make informed decisions about credit offers and protects consumers against "inaccurate and unfair credit" practices. Camerer writes that FTLA's aims "reflect the kind of asymmetric paternalism that we are seeking to promote," because the act provides "potentially substantial" benefits to boundedly rational consumers at "minimal cost" to rational consumers. Similarly, as noted above, the regulation of environmental marketing claims proposed here would benefit unsophisticated or boundedly rational consumers by enabling them to make informed product purchases and it would protect consumers against sellers' false or misleading claims, at minimal cost to informed consumers.

237. The FTC has provided a Facts for Consumers webpage entitled "Sorting out Green Advertising Claims"; the page describes several commonly used marketing claims and symbols, but it offers little definitive information because the FTC's Green Guides are themselves only marketing guides, not rules. FTC, Sorting Out 'Green' Advertising Claims, http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen02.shtm (last visited Jan. 26, 2010).

238. Citing previous studies, Michael P. Vandenbergh argues that eco-labels "have little effect on consumer behavior." Michael P. Vandenbergh, Order Without Social Norms: How Personal Norm Activation Can Protect the Environment, 99 NW U. L. REV. 1101, 1134 (2005). He asserts that the labels fail because they do not convey the right kind of information. Id. at 1137. He contends that individuals will not change their purchasing practices until their "personal norms" are activated. Id. at 1106. In the context of product labels, personal norms are likely activated when the labels convey "information about the mean, aggregate or relative environmental effects of product purchases." Id. at 1138.


240. Camerer et al., supra note 90, at 1232.

241. Id. at 1233.

242. Id.
C. ENFORCEMENT

The third prong of the regulation of environmental marketing claims is enforcement. Once the claims are standardized and defined, a seller's use of the claims without substantiation must give rise to a legal violation that empowers the FTC to enjoin the seller's marketing practice and seek damages. The Green Guides are simply industry Guides; as such, they lack the force of law.\(^{243}\) As noted above, if the FTC suspects 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.\(^{244}\) 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. Consider, for example, the FTC's recent action against Kmart for selling paper plates labeled with a deceptive claim of biodegradability.\(^{245}\) The FTC brought virtually the same action against two other sellers during the 1990s.\(^{246}\) Clearly, the current enforcement scheme does not have the incentives necessary to motivate sellers to desist from making deceptive environmental marketing claims.

An environmental marketing regulation that provides standardization, education, and enforcement would drive deceptive and misleading claims from the market and enable consumers to make more rational purchases, which would in turn make the environmental product market more efficient and provide greater benefit to the environment. While FTC rulemaking is time consuming and expensive, the value that effective enforceable regulations would provide to consumers and the environment is worth the cost.

PART VI: CONCLUSION

Is it too easy being green? Perhaps. Given the proliferation of false environmental claims in recent years, arguably, it is too easy to claim being green in today's marketplace. This Article has argued that, in light of empirical research into consumer decision making, the regulation of environmental marketing claims is necessary because regulation's benefit to boundedly rational consumers far exceeds any cost of the regulation to the rational consumers, even when factoring in the loss of cognitive capital that such regulation might cause. Moreover, the Article has established that because of the high information costs associated with the market for

\(^{244}\) Id. § 45(b).
\(^{245}\) Kmart Corp. Complaint, supra note 60, at ¶¶ 4-11.
\(^{246}\) See Keyes Fibre Co., 118 F.T.C. 150 (1994); AJM Packaging Corp., 118 F.T.C. 56 (1994).
environmentally friendly products and the relative paucity of sophisticated consumers acting in the market, market competition alone will not drive out sellers who make deceptive product claims. Finally, the Article has provided a general framework for the regulation of environmental marketing claims. The time is right for such regulation because consumers have a genuine interest in making green purchases but significant distrust in sellers’ claims. Regulation such as that outlined above would weed out sellers’ deceptive product claims. Moreover, regulation would incentivize sellers to generate and market authentic environmentally friendly products that would ultimately benefit the environment.